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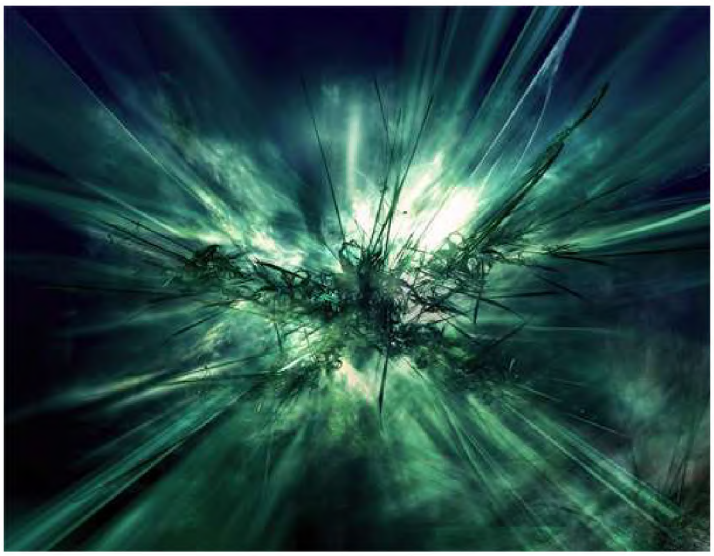

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials

By: Lyndon Maither, CFE, B.Comm

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Canadian Bankruptcy/Insolvency, Companies' Creditors Arrangement Act Law: Provisions, Precedents and Materials
(a.k.a. "Lyndon goes into bankruptcy...")

Foreword

This compilation of materials came as result of my long-standing interest in bankruptcy and the Canadian mechanics of the law related thereto.

I first was introduced to the topic through a Concordia University class *"Creditors Rights",* in 1992, by David Franklin Ad E., BCL, of the firm Franklin and Franklin. He, as one aspect of his legal career, had become extremely knowledgeable on this environment since that was one of the fields he chose to discipline his practice to. Upon initially reviewing the Acts I quickly noticed that there had been considerable evolution in the statutes however the relative structure remained the same: various cases had happened since 1992, various government initiatives and refinements...

The area of bankruptcy and insolvency has become more complex in Canada in the intervening decades since then due to the nature of legal obligations, financial instruments and structuring a company can enter into with its creditors. And the statute law has tried to keep up.

This compilation consists of the relevant Acts:

The Bankruptcy and Insolvency Act (w select case)
The Bankruptcy and Insolvency Rules
The Companies' Creditors Arrangement Act (w select case)
The Orderly Payment of Debts Regulations[1]
The Ontario Fraudulent Conveyances Act (w/ select case).

and the latest **Parliamentary Review of our insolvency laws**

I wanted to compile a relevant "internet book" on this subject and here is where this project split from others out there: I purposefully used **CANLII.org's** database of cases from across the country to, what I call, do a ranking search: I sought to replicate here only those cases that *have consider jurisprudential value as indicated as a result of a key-word search in the CANLII.org database*. I did this since I suspected that these are the cases that form the back-bone of the application of the Acts/key-words involved and by doing so *I would ignore those "exceptions to the rule" and reproduce only those instances where courts have considerably cited case authority for what they have decided (the database allows rank by "most cited").* These are the cases I used so you should understand that *these are not all the cases on the topic*, but, at 205, I think they represent fairly accurately the foundation issues in the environment today. *I did, however, limit my search to only those cases available through CANLII.org.*

I also based this compilation on case in effort to acclimatize you to researching case yourself. I could have condensed them down to digests and placed them as mere foot-notes to the provisions they deal with but I wanted you to develop the ability, and patience, to read case yourself. *Obviously, I believe that anyone can read case, with practice, to get the most out of it and have refused to paraphrase in my words the important aspects of the cases for purposes of brevity.* I'd like you to note that all these cases are in

1 I apologize for not also including the *Winding Up and Restructuring Act* as well as a provincial *Fraudulent Conveyance Act* or *Personal Property Security Act* which are also somewhat relevant to the environment however I wanted to cover, in this first edition, as much meaningful content as possible and the WURA/FCA/PPSA shall be processed in a later edition.

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CANLII.org's database and I have merely taken those that rank at the top of their issues but you are certainly encouraged to research yourself.

The key-words I used were:
"bankruptcy and insolvency'
"CCAA"
"secured creditor" "bankruptcy and insolvency"
"proposal" "bankruptcy and insolvency"
"trustee" "bankruptcy and insolvency"
"official receiver" "bankruptcy and insolvency"
"consumer proposal"

I have also reproduced the Superintendent's *Directives* ("SB Directive") for more refinement of focus and for your convenience. As well, I have included Canada Revenue Agency *Internal Operations manuals ("CRA Internal Operations Manuals")* on the subjects of: *bankruptcy, proposals, receiverships and CCAA* proceedings, available for public consultation in any CRA TSO, to allow you to be aware of some ancillary aspects which affect the environment. *PLEASE NOTE IN RESPECT OF THESE TWO REGARDS THAT I AM NOT AFFILIATED WITH ANY GOVERNMENT OF CANADA OFFICE.*

This is a rather lengthy reproduction of the Acts, the relevant Regs, the Superintendent's Directives, and these first 205 cases; it measures 2900 pages plus. Each case follows the provision in the relevant Act that it considers. Using server speed of the internet it should be quickly accessible. I have assumed that you have a minimal ability to read the provisions in the relevant law yourself - the provisions are the law and you should read acutely to gain its full benefit.

At the beginning of each Division of the relevant Act I have also tried to formulate my own shorter commentary about what the Division is about - paraphrased: you are certainly encouraged to read the relevant provisions within the Division itself to determine finer more pertinent insight. (I will be also adding more as time goes by.)

I must apologize, also, for the "superficiality" of this project. It's basically just a compilation of case coupled with the relevant Acts, in one source though it should give you a foundation upon which to further your own interest through the avenues you choose, which should include purchase of other tomes on the subject.

This project came about as a desire that I had to fill a vacuum I feel exists on the net: the Acts are easily accessible on Justice Canada's web-site, the Superintendent's Directives are easily accessible on that Office's web-site (along with a breadth of other material which I definitely encourage you to extensively refer to), and the case can be easily reviewed on CANLII.org's site, however, by coupling them together I think, hope, I have added some ease for you to learn the topic, my sole objective.

This "nominal" "work" is in recognition of David Franklin Ad. E BCL of the firm Franklin and Franklin who I met at Concordia University as a *Business Law* professor as well as in *Creditors' Rights* in my final semester in obtaining my Bachelor of Commerce in Accountancy. David epitomizes the publicly minded lawyer who, I think, through his on-going commitment in giving creditors his best insight, has one of the biggest hearts of an individual I have ever met, given I think, his disdain for, substantively, debtors who have chosen routes to disenfranchise the sincere sentiment granted to them by their creditors. He has written several in-depth books on creditor realization, available through Carswell. He has contributed to his community for more years than anyone can probably count, formally as a lawyer and informally as an

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outstanding citizen, also to Concordia U. for 45 plus years through his teaching where he has forever encouraged his students to be their best by wittily posing aspects of questions, (preparing them the best he can - *which is a lot* - for their careers), that in my history, some didn't grasp as they provided answers.

Properly, through David Franklin's practice of law, he obtained his Ad. E. for excellence in the continuous practice, and, continues to teach. If you want to learn creditor law in Canada (with international aspects as well), contact David Franklin, Ad. E. BCL.

I'd also like to thank my extended family.

And of course, law enforcement in Canada/USA who will simply be doing their job attending to a former "client-continent" of mine whose whole "disgusting spectacle" of a life from 1993 to present consisted of succeeding in breaking as many laws as possible: *"a career con-guy".*

Hope you like.

Lyndon Maither

With every sale of this a donation will be made to one of the below Cdn./US charities that the compiler highly values. You are equally certainly welcome to recommend one yourself as to where you'd like a donation to go to.

Federation CJA (Montreal)
United Way
Covenant House (Vancouver)
Centraide (Montreal)
Breakfast Club of Canada
Sierra Club of Canada
SPCA (Montreal-Toronto-Vancouver).
If you're buying from within the USA:
Shamayim V'Aretz

And always remember, meat/eggs is a status-symbol luxury that you have no idea the TONS of liabilities of. According to Cowspiracy.com

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Bankruptcy and Insolvency Act
R.S.C., 1985, c. B-3

An Act respecting bankruptcy and insolvency

SHORT TITLE
Short title - Sec. 1
1. This Act may be cited as the Bankruptcy and Insolvency Act.
R.S., 1985, c. B-3, s. 1;
1992, c. 27, s. 2.

INTERPRETATION

Definitions - Sec. 2
2. In this Act,

"affidavit"
« affidavit »
"affidavit" includes statutory declaration and solemn affirmation;

"aircraft objects"
"aircraft objects"[Repealed, 2012, c. 31, s. 414]

"application"
Version anglaise seulement
"application", with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion;

"assignment"
« cession »
"assignment" means an assignment filed with the official receiver;

"bank"
« banque »
"bank" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the Bank Act,
(b) every other member of the Canadian Payments Association established by the Canadian Payments Act, and
(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

"bankrupt"
« failli »

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"bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person;

"bankruptcy"
« faillite »
"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt;

"bargaining agent"
« agent négociateur »
"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a person;

"child"
"child"[Repealed, 2000, c. 12, s. 8]

"claim provable in bankruptcy", "provable claim" or "claim provable"
« réclamation prouvable en matière de faillite » ou « réclamation prouvable »
"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

Bankruptcy of Park City Products Ltd., 2001 MBQB 200 (CanLII) - Mistakes at Law and Property of Bankrupt to whom Others Have Entitlements

Date:	2001-07-27
Docket:	BK 00-01-58529
Parallel citations:	27 CBR (4th) 314; 159 Man R (2d) 168
URL:	http://canlii.ca/t/1r8zx
Citation:	Bankruptcy of Park City Products Ltd., 2001 MBQB 200 (CanLII), <http://canlii.ca/t/1r8zx> retrieved on 2013-09-10
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Date: 20010727
Docket: BK 00-01-58529
Indexed as: Bankruptcy of Park City Products Ltd.
Cited as: 2001 MBQB 200ci 00-01-
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA
IN BANKRUPTCY

IN THE MATTER OF:
THE BANKRUPTCY OF: PARK CITY PRODUCTS LTD.

) Appearances:
)
) Douglas G. Ward, Q.C.
) and Dayna S. Anderson
) (for TaxSave Consultants Ltd.)
)
) Ted E. Bock
) (for Canada Safeway Ltd.)
)
) D. Wayne Leslie
) (for BDO Dunwoody Ltd.)
)
) Decision delivered:
) July 27, 2001

SENIOR REGISTRAR GOLDBERG

[1] Counsel for Park City Products Ltd.'s trustee in bankruptcy is in possession of a substantial tax refund which is being held in trust pending the disposition of the claims of Canada Safeway Ltd. and TaxSave Consultants Ltd. Both have appealed from the trustee's disallowances of their claims.

Background

[2] Park City Products Ltd. (Park City) manufactured pet food. One of its customers was Canada Safeway Ltd. (Safeway).

[3] Prior to May 1, 1987 *The Excise Tax Act* provided that manufacturers were liable for payment of federal sales tax (FST). *The Excise Tax Act* was amended in that after May 1, 1987, the liability for payment of FST moved from the manufacturer, in this case, Park City, to its customers as deemed manufacturers, in this case, Safeway. A manufacturer could continue to be obligated to remit FST under a new Alternative Tax Accounting Method for Retailers/Wholesalers, if an agreement to use this alternate method was made.

[4] Between May 1, 1989 and December 31, 1990 Park City charged Safeway FST on its invoices; and Safeway paid $112,827.10 as a result. Park City remitted that amount to Revenue Canada.

[5] Park City retained TaxSave Consultants Ltd. (TaxSave) to obtain a refund of the tax paid. TaxSave is a business which identifies ways for clients to recover, among other types of taxes, federal sales taxes. Once retained by a client by way of contingency agreement, TaxSave will consult with the relevant taxing authority in an attempt to recover the taxes. If the consultations are unsuccessful, Tax Save may retain counsel to litigate the matter. If TaxSave is unsuccessful in obtaining a refund of tax then the client is not charged for the services provided by TaxSave. However, if TaxSave is successful, then a fee based on a percentage of the amount recovered is payable to TaxSave by the client pursuant to the contingency agreement.

[6] Park City entered into contingency agreements with TaxSave (in 1987 and 1991) to investigate and pursue a refund of FST from the Government of Canada. Under the agreements with TaxSave, Park City agreed to pay TaxSave a fee of fifty percent of any amounts recovered. Funded by TaxSave, Park City applied for a refund of the FST it had paid, claiming that its pet food was exempt from tax pursuant to paragraph 50(5)(k) of *The Excise Tax Act*. The Minister of National Revenue disallowed the application on the ground that Park City's customers had elected to use the Alternative Tax Accounting Method which would require the seller to remit taxes collected on otherwise exempt sales. Park City

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appealed. In September, 1993 the Canadian International Trade Tribunal (CITT) allowed the appeal, finding that Park City was entitled to a refund of the FST paid. The tribunal held that there was insufficient evidence to justify the Minister of National Revenue's conclusion that at the time at which the tax in issue had been remitted to Revenue Canada, there was an agreement between Park City and the purchasers of its food to use the Alternative Tax Accounting Method. The Government of Canada appealed this decision.

[7] In April 1999 Park City, by its then receiver, BDO Dunwoody Ltd. made an assignment in bankruptcy.

[8] In November, 1999 the Government of Canada discontinued it appeal of the CITT decision.

[9] In March, 2000, the Government of Canada paid $285,942.49, being the refund, plus interest, to counsel for Park City's trustee in bankruptcy to be held in trust pending the claims made by TaxSave and Canada Safeway regarding the tax refund. These claims were the subject of four motions heard together:

1. a motion by TaxSave appealing the trustee's disallowance of its claim;
2. a motion by Safeway appealing the trustee's disallowance of its claim based on trust;
3. a motion by Safeway extending the time to file an appeal of the trustee's disallowance of its debt claim;
4. a motion by Safeway appealing the trustee's disallowance of its debt claim.

TaxSave's Appeal

[10] TaxSave's employees and consultants spent time and money to pursue the tax refund. TaxSave also retained counsel to represent Park City before the CITT, at a cost to TaxSave of over $42,000.00. As a result of the services provided and paid for by TaxSave, the tax, plus interest, was refunded. TaxSave's claim to fifty percent of the amount refunded was disputed by the trustee. This motion is the appeal from the trustee's decision.

[11] TaxSave claims entitlement to fifty percent of the refund on the basis of the principle in *Re Condon, Ex parte James* (1974), 9 Ch. App. 609 (C.A.). In that case money obtained by an execution creditor prior to the bankruptcy was paid to the trustee under a mistake of law, following threats by the solicitors for the trustee of proceeding against the creditor if the money was not so paid. The court held that the general rule that relief could not be given for a mistake of law should not be pressed too far, and ordered the money to be repaid by the trustee to the execution creditor. James, L.J. stated at p. 614:

I am of the opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion, the Court of Bankruptcy ought to be as honest as other people.

[12] The principle in *Ex parte James* is not limited in its application to cases of money paid under mistakes of law. The principle has been applied to give relief in the following cases cited by TaxSave:

1. *Re Tyler* [1904-07] All E.R. Rep. 181 (C.A.): The court applied *Ex Part James* to reimburse a bankrupt's widow who had paid the bankrupt's life insurance premiums before and after bankruptcy. The trustee had knowledge that the wife had been paying the premiums during the bankruptcy until the bankrupt's death. The court would not allow its officer, the trustee, "to do a thing which from a moral point of view would be dishonest" (at p. 183), that is, to retain the proceeds of the insurance without reimbursing the widow for the amounts paid by her for premiums.
2. *Re Hardy; Price Waterhouse Limited v A.E. LePage Real Estate Services Limited* (1984), 51 C.B.R. 21 (N.S.S.C.): The court applied *Ex parte James* to require a trustee to pay a real estate agent his commission where the agent had, prior to bankruptcy, developed the interest of a prospective purchaser for a property which formed part of the bankrupt's estate. A binding agreement had not been made prior to the bankruptcy. After the bankruptcy the trustee negotiated a sale directly with the purchaser and did not notify the agent of the sale or pay a commission. The court stated that the trustee acted without regard to the efforts and services provided by the agent, and ordered the trustee to pay the agent's commission.
3. *Re Giorgio Galleria Ltd.* [1995] B.C.J. No. 239 (B.C.S.C.): *Ex parte James* was applied to protect a bailiff's claim for fees. The bailiff had delivered distrained goods to the trustee, but was unable to come within s. 73(4) of *The Bankruptcy and Insolvency Act (B.I.A.)*, which otherwise would have protected his claim for fees, because the goods had been the subject of security under the *Bank Act* (Canada). The court held that since the plaintiff's efforts had enriched the estate by preserving the assets for the trustee, the trustee should pay the bailiff's costs. Humphries, J. stated at p. 5:

A trustee in bankruptcy is an officer of the court and has imposed upon him an obligation to act fairly and justly, and to do what is morally right and honest.

4. *Re Stormont Chemicals Ltd.* reflex, (1993), 20 C.B.R. (3d) 188 (Ont.G.D.): The court applied *Ex parte James* to protect a former debtor of the bankrupt business. That debtor had paid the money it owed to the bankrupt company, but, in error, had also paid the same amount of money pursuant to a garnishment order. The trustee disallowed the claim for repayment of the money paid pursuant to the garnishee. The court applied the rule in *Ex parte James*, stating that to

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permit the trustee to retain the funds paid pursuant to the garnishee would mean that the bankrupt company would have been paid twice for the same debt, and that there was an element of unfairness in the trustee insisting on retaining those funds.

5. *Re Sefel Geophysical Ltd.* (1998) 70 C.B.R. 97 (Alta Q.B.): *Ex parte James* was applied to protect the interests of U.S. creditors of a Canadian company. The Canadian company, in financial difficulty, had proposed a plan of arrangement under the *Companies Creditor Arrangement Act* (CCAA). It had obtained a stay of proceedings from Canadian creditors and applied for a stay in the U.S. The U.S. court granted a stay against U.S. creditors who had preferred status in the U.S. This was done in the mistaken belief that the U.S. creditors would have similar standing in the Canadian proceedings. The CCAA arrangement failed and the Canadian company was adjudged bankrupt. The court applied *Ex parte Jame*s to give preferred status to the U.S. creditors, because the majority of the assets available for distribution originated in the U.S. and had only become available to the Canadian trustee as a result of the U.S. court's stay, which had been made on the understanding that the U.S. creditors would have preferred status.

[13] TaxSave argues that but for the efforts of TaxSave and the significant costs it incurred in pursuing the FST refund, no refund would have been issued to Park City; and therefore, the estate has been enriched at the expense of TaxSave. It says that by refusing to pay the compensation owed to TaxSave pursuant to the contingency agreements, the trustee is taking advantage of the services provided by TaxSave without paying any compensation whatsoever to TaxSave. As such, it argues, the trustee is acting unfairly, unjustly or immorally in the administration of Park City's estate, contrary to the rule in *Ex parte James*.

[14] In considering TaxSave's appeal, I begin by agreeing with the trustee that TaxSave does not have any right or remedy in the refund itself. TaxSave is an unsecured creditor. There is nothing in the contingency agreements which purports to assign fifty percent of the refund to TaxSave. The agreements provide that the fee payable by Park City to TaxSave becomes payable "when the refund has been received (by Park City) by way of cheque, credit from suppliers or reduction of accrued taxes or other amounts". This supports the argument that Park City's obligation to TaxSave was that the fee would become payable when a refund or equivalent credit was obtained. The agreements gave TaxSave no security interest in any refund.

[15] In any event, a Crown debt such as a tax refund is not assignable: *The Financial Administration Act (Canada)* sec. 67.

[16] TaxSave is an unsecured creditor of Park City. TaxSave is entitled to file a proof of claim in the estate for $142,971.24, an amount equal to fifty percent of the refund recovered. The trustee's evidence is that if it does so (and assuming that Safeway is not entitled to recover any moneys therefrom) TaxSave would receive a dividend of approximately $100,000.00. TaxSave's assertion that the trustee wants to provide no compensation to TaxSave whatsoever is inaccurate. The trustee has recognized TaxSave's right to claim as an unsecured creditor, and there is potential for substantial recovery on that basis.

[17] That factor alone distinguishes TaxSave's position from the cases cited by TaxSave in support of its position. In *Re Clark* [1975] 1 All ER 453, Walton, J. held that in order for the rule in *Ex parte James* to apply, in most cases the bankrupt must not be in a position to file a proof of claim in a bankruptcy. The reason is that if the claimant can file a proof of claim, the application of the rule in *Ex parte James* would conflict with the mandatory *pari passu* division of the bankrupt estate among the creditors as required by the bankruptcy legislation.

[18] The cases referred to by TaxSave in support of its appeal are further distinguishable from the case before me in that, in each of the cases relied on by TaxSave, there were factors other than the existence of specific assets preserved or contributed by the claimant. In *Re Tyler* and *Re Hardy*, the court found an element of unfairness in the actions of the trustee. In *Re Giorgio*, the assets were protected by the bailiff on the eve of bankruptcy. In *Stormont,* the mistake made in paying the bankrupt's estate twice provided a substantive basis for a constructive trust with regard to the funds. In *Sefel*, the claimant's situation had been prejudiced by the actions of the U.S. Bankruptcy Court.

[19] None of these factors exist in the case before me. The fact that the bankrupt estate was enriched as a result of TaxSave's effort and at TaxSave's expense is not enough to justify the application of the rule in *Ex parte James*. If it were, any supplier of inventory would have protection under that rule. TaxSave cannot use the rule in *Ex parte James* to elevate an unsecured claim into a secured claim.

[20] For these reasons, I find that the rule in *Ex parte James* is not applicable. TaxSave's appeal is dismissed.

Canada Safeway's motion to extend the time allowed for the filing of the appeal

[21] The trustee mailed the notice of disallowance of Safeway's proof of claim dated April 30, 1999 to Bruce Taylor, counsel for Safeway, on April 20, 2000. Mr. Taylor received it on April 27, 2000. Safeway's motion to appeal the disallowance was filed on May 26, 2000.

[22] Sec. 135(4) of *The B.I.A.* provides:

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A ..... disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

[23] The trustee's position is that the notice of appeal was not filed within the requisite thirty day period. The trustee argues that:

1) neither the *B.I.A.* nor the rules thereunder provide when service made by mail on April 20, 2000 was effective;
2) therefore, pursuant to Rule 3 of the *B.I.A.* Rules, reference must be made to Manitoba's rules of civil procedure;
3) Manitoba's Queen's Bench Rule 16.06(2) provides that service of a document by mail is effective on the fifth day after the document is mailed;
4) the service of the notice of disallowance on Safeway was therefore effective on April 25, 2000.

Accordingly, the appeal was not filed within the prescribed thirty day period.

[24] Safeway moved for an order extending the time allowed for filing of an appeal of the trustee's disallowance. I find that this motion is not necessary. Rule 113 of the *B.I.A.* Rules is the specific service rule relating to notices of disallowance. It provides that these documents are to be served, or sent by registered mail or courier, methods which result in an ascertainable and verifiable date of service. It is not necessary to look to either the *B.I.A.* Rules or to provincial civil procedure rules to determine a deemed or effective date of service when the actual date of the service can be readily determined. Queen's Bench Rule 16.06(2) is therefore not relevant.

[25] The evidence that Mr. Taylor received the notice of disallowance on April 27, 2000 is not disputed. The date of service was April 27, 2000; and the appeal was filed within thirty days thereof.

Safeway's Appeal (Trust Claim)

[26] Safeway asserts that when it paid Park City for pet food between May, 1989 and December, 1990, the remittances for FST were paid to Park City in trust for Revenue Canada, in order to discharge Safeway's liability for the FST. Safeway argues that as a result of the CITT decision and the resulting refund, the purpose or object of the trust failed, giving rise to a resulting trust in Safeway's favour.

[27] A prerequisite to the creation of a trust, whether express or implied, is certainty of intention to create a trust. In this case, the intention to create a trust cannot be discovered from the alleged settlor's oral or written words. Safeway did not place any express trust conditions on the payment of the FST. Safeway asks the court to infer the settlor's intention from Safeway's conduct, and from the context.

[28] Bruce Bowman gave evidence on behalf of Safeway. He has held the position of vice-president, secretary and general counsel of Safeway since May, 1994. In his affidavit, sworn September 25, 2000 Mr. Bowman states:

During the time period of May, 1989 to September, 1990 it was never the intention of Safeway that Park City be the beneficiary of the FST moneys and Park City was merely acting as the trustee of same for payment to Revenue Canada.

This is the extent of Safeway's direct evidence on the issue of intention.

[29] On cross-examination, Mr. Bowman acknowledged that at some time prior to the first invoice (issued in March and paid in May, 1999) it was agreed between Park City and Safeway that tax would be shown and charged on each invoice at the relevant rate in accordance with *The Excise Tax Act.* Safeway was aware that it could have paid the FST directly to the Government, but was relying on an agreement with Park City that the Alternative Tax Accounting Method would be used.

[30] Upon paying the aggregate sum of $112,827.10 to Park City on account of FST as expressly invoiced, Safeway was of the view that it had discharged its liability for FST; and did not follow up or inquire whether the moneys were in fact paid by Park City to the Government of Canada. The moneys paid by Safeway on account of FST were not segregated in any way. Typically, there would not be a covering letter when the payments were forwarded.

[31] The question for the court is whether this evidence is sufficient to meet Safeway's onus of establishing the requisite certainty of intention to create a trust. My conclusion is that the evidence is consistent with the creation of a contract between Safeway and Park City regarding the payment of FST, but does not meet the onus of establishing an intention to create a trust. Safeway admits that it was relying on an agreement between Safeway and Park City pursuant to the Alternative Tax Accounting Method. The fact that the CITT, in 1993, after the fact, did not find sufficient evidence to support the Minister's position that there was an Alternative Tax Accounting Method in place obligating Park City to the Government of Canada does not go to support Safeway's position regarding its intention to create a trust. Safeway did not give evidence and did not have any input at the CITT hearing.

[32] Looking at Safeway's conduct in the context of the relevant period, i.e. between May, 1989 and December, 1990, I cannot find the requisite certainty of intention to create a trust. I therefore dismiss Safeway's appeal of its property claim.

Safeway's Appeal (Debt Claim)

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[33] Safeway's alternative position is that it is entitled to status as a creditor on the basis of a claim for damages. In the statement of claim which Safeway filed in 1995 under CI 95-01-89826, it claims damages on the basis that it was deprived of the use and benefit of the money paid as FST. When the motion was argued, Safeway's counsel argued that Safeway's claim is based upon an implied agreement between Safeway and Park City that any tax refunded to Park City would be remitted to Safeway.

[34] Neither theory of recovery can succeed because Safeway has suffered no loss. Safeway was obligated to pay FST under *The Excise Tax Act*. Safeway entered into a contract with Park City whereby Safeway would discharge its liability by payment of the FST through the payment to Park City. It does not follow that because Park City secured a refund, that Safeway suffered a loss. The Government of Canada has made no demand to Safeway for payment of FST; and any claim against Safeway that the Government may have had is now statute barred. Safeway has no exposure to liability at this point. Further, Mr. Bowman's evidence is that Safeway took a markup on its sales of the pet food beyond the aggregate of the purchase price and FST. Safeway did not establish that its sales volumes were affected by the FST component of the price it charged its customers.

[35] For these reasons, I am dismissing Safeway's appeal filed May 26, 2000.

Costs

[36] If counsel cannot agree, the issue of costs may be spoken to.

_____

M.E. Goldberg, Q.C.
Senior Registrar

Lacroix v. Valois, [1990] 2 SCR 1259 - Whether Discharge Of Bankrupt Husband Bar To Claim For Compensatory Allowance -- Whether Allowance "Provable Claim" Within Meaning Of Bankruptcy Act

Date:	1990-10-18
Docket:	19134
Parallel citations:	1990 CanLII 46 (SCC); 74 DLR (4th) 61; 4 CBR (3d) 113; 29 RFL (3d) 337
URL:	http://canlii.ca/t/1fsrr
Citation:	Lacroix v. Valois, 1990 CanLII 46 (SCC), [1990] 2 SCR 1259, <http://canlii.ca/t/1fsrr> retrieved on 2013-08-12
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Lacroix *v.* Valois,[1990] 2 S.C.R. 1259

Louise Lacroix *Appellant*

v.

Normand Valois *Respondent*

indexed as: lacroix *v.* valois

File No.: 19134.

1990: April 26; 1990: October 18.

Present: Lamer C.J.* and La Forest, Gonthier, Cory and McLachlin JJ.

on appeal from the court of appeal for quebec

Family law -- Compensatory allowance -- Divorce -- Bankruptcy -- Bankrupt husband discharged prior to claim for compensatory allowance -- Whether discharge of bankrupt husband bar to claim for compensatory allowance -- Whether allowance "provable claim" within meaning of Bankruptcy Act -- Whether bankruptcy at end of cohabitation irrefutable evidence of lack of enrichment -- Civil Code of Quebec, art. 559 -- Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 2, 148.

Family law -- Compensatory allowance -- Divorce -- Criteria for obtaining compensatory allowance -- Continuing enrichment -- Time at which enrichment of patrimony to be evaluated -- Civil Code of Quebec, art. 559.

Divorce -- Lump sum -- Waiver -- Order granting lump sum set aside by Court of Appeal -- Minutes of trial indicating that wife waived "any claim for an alimentary pension, limiting herself to an allowance" of $55,000 -- Whether wife waived any claim of an alimentary nature -- Divorce Act, R.S.C. 1970, c. D-8, s. 11.

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Appeal -- Divorce -- Supreme Court of Canada -- Application for leave to appeal filed within time limit set by Court but granted after time expired -- Whether leave to appeal granted out of time -- Divorce Act, R.S.C. 1970, c. D-8, s. 18(2).

Appeal -- Divorce -- Supreme Court of Canada -- Leave to appeal -- Whether s. 41 of Supreme Court Act and s. 18(1) of Divorce Act can both be relied on in same case to obtain leave to appeal -- Supreme Court Act, R.S.C. 1970, c. S-19, s. 41(1) -- Divorce Act, R.S.C. 1970, c. D-8, s. 18(1).

Appeal -- Divorce -- Court of Appeal -- Applicable rules -- Divorce decree granting compensatory allowance and lump sum -- Notice of appeal filed pursuant to provisions of Divorce Act, not provisions of Code of Civil Procedure -- Whether filing of appeal inscription pursuant to Divorce Act valid with respect to compensatory allowance -- Divorce Act, R.S.C. 1970, c. D-8, s. 17(3) -- Code of Civil Procedure, R.S.Q., c. C-25, art. 495 -- Civil Code of Quebec, art. 559.

The parties were married in 1969 under the regime of separation of property and ceased all cohabitation in 1977. In the course of the marriage respondent went into business with his wife, who at the time had substantial liquid capital, but all their business ventures failed. After the cohabitation ceased appellant became completely destitute, while respondent, after making an assignment of his property in January 1978 and being discharged in 1979, became a shareholder and the prime mover of a transportation company and co-owner of a residence. In June 1981 appellant filed a divorce petition and asked the Superior Court to order respondent to pay her the sum of $55,000 and the sum of $250 a week as alimony. At the hearing of the petition appellant waived "any claim for an alimentary pension, limiting herself to an allowance" of $55,000. When the decree absolute was granted, the Superior Court ordered respondent to pay appellant the sum of $40,000 both as a compensatory allowance and as a lump sum indemnity for re-establishment and maintenance. The Court of Appeal set aside the trial judgment with respect to the corollary relief. This appeal is to determine whether the Court of Appeal erred in finding that the sum awarded by the Superior Court was not justified under art. 559 *C.C.Q.* and s. 11 of the *Divorce Act*. However, before answering the main issue, the Court must dispose of certain preliminary issues of a procedural nature which could have an effect on the jurisdiction of the Court of Appeal and on that of this Court.

Held: The appeal should be allowed.

(1) *Supreme Court of Canada's jurisdiction*

Although leave to appeal was granted after the time limit set by this Court had expired, the order granting leave to appeal under s. 18(2) of the *Divorce Act* was not out of time since the notice of application for leave to appeal was filed within the time limit set. Like most court orders which are reserved, the order granting leave to appeal is retroactive to the date of the application. Section 18(2), which refers to leave to appeal, in fact refers to the date on which the notice of application was filed, being the date on which the leave order is deemed to have been made.

As long as there is no conflict in their application, s. 41(1) of the *Supreme Court Act* and s. 18(1) of the *Divorce Act* can confer jurisdiction on this Court and both provisions can be relied on in the same case in order to obtain leave to appeal. Since in this case the leave order makes no distinction between the question of the lump sum and that of the compensatory allowance, this Court is thus free to consider that it duly has before it these two aspects of the appeal under its enabling legislation, and so to examine any issue of mixed law and fact which may have to be disposed of in resolving the dispute.

(2) *Court of Appeal's jurisdiction*

The filing of the appeal inscription in accordance with the procedure specified in the *Divorce Act* is valid for all questions disposed of in a divorce decree, including the award of a compensatory allowance. The possibility of incorporating the claim for a compensatory allowance into the divorce proceedings at the trial level is well recognized: the language of art. 559 *C.C.Q.* cannot be circumvented in this regard. It is entirely natural for the same to be true of the procedure applicable to appeals. It is clearly not appropriate to create a mandatory procedural distinction at the appeal level in dealing with questions which are closely related at trial.

(3) *Compensatory allowance and lump sum*

In order to be awarded a compensatory allowance a party must establish (1) his or her contribution; (2) the enrichment of his or her spouse's patrimony; (3) the causal link between the two; and (4) the proportion in which the contribution made possible the enrichment. Each of these elements must be evaluated with great flexibility. Further, the enrichment must subsist and must be evaluated at the time of the divorce. Determining the existence and value of the enrichment at the time of the divorce will very much depend on the circumstances. There is no indication in the present case that as a question of fact the trial judge did not find an enrichment that still existed at the time of the divorce. There was evidence in the record on the basis of which the trial judge could conclude there had been a contribution by appellant which resulted in an enrichment of respondent, despite the intervening bankruptcy which occurred in the interval, and the Court of Appeal was wrong to intervene on the question of the compensatory allowance. The court made an initial error in finding that the trial judge had mistakenly applied s. 148(1) of the *Bankruptcy Act*. The latter referred to s. 148 as a whole. Subsection (2) provides that the legal effect of a discharge order extends only to claims provable in bankruptcy. The trial judge thus correctly held that the order discharging respondent was not a bar to the awarding of a compensatory allowance. A "claim" arising out of art. 559 *C.C.Q.* is not a claim provable in a proceeding brought pursuant to the *Bankruptcy Act*. The Court of Appeal made a second error in stating that

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respondent's bankruptcy and discharge constituted an estoppel ("*fin de non-recevoir*") to the claim for a compensatory allowance. The term "estoppel" has a well defined legal meaning which cannot be taken to describe the effect produced by the bankruptcy of a defendant spouse on the rights of the other spouse to a compensatory allowance. The court probably regarded respondent's bankruptcy as absolute and irrefutable evidence that no enrichment was still in existence from the matrimonial relationship. A bankruptcy occurring before the action for an allowance is not irrefutable evidence either of the lack of enrichment at the time of the divorce or of the lack of correlation between the contribution prior to the bankruptcy and the assets subsequently found in the defendant's patrimony.

The Court of Appeal was also wrong to intervene on the question of the lump sum. The court concluded that the trial judge had no claim of an alimentary nature before him and quashed the order awarding a lump sum solely on the basis of a waiver alleged by respondent, an allegation based on the ambiguous wording of the minutes of trial. First, the language used in the minutes indicates that appellant waived "any claim for an alimentary pension, limiting herself to an allowance" of $55,000. Clearly, a person does not waive a claim for a lump sum by waiving a claim for an alimentary pension. The word "allowance" must be given its ordinary meaning here and may include a lump sum or a compensatory allowance. With the benefit of the record as a whole, the trial judge considered that he had before him a claim of an alimentary nature. The Court of Appeal, which did not have transcripts available to it and was not in a position to analyse the minutes in light of the record as a whole, should not have intervened.

Cases Cited

Applied: *Pelech v. Pelech*, 1987 CanLII 57 (SCC), [1987] 1 S.C.R. 801; *Droit de la famille--203*, reflex, [1985] C.A. 339; **referred to**: *Air-Care Ltd. v. United Steel Workers of America*, 1974 CanLII 200 (SCC), [1976] 1 S.C.R. 2; *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, 1976 CanLII 4 (SCC), [1977] 2 S.C.R. 67; *Gingras v. Gagnon*, 1975 CanLII 186 (SCC), [1977] 1 S.C.R. 217; *Beausel v. Langevin*, [1975] C.A. 223; *Caisse populaire de Sacré-Coeur, Saguenay v. Dufour*, C.A. Québec, No. 200-09-000060-779, March 4, 1981; *Droit de la famille--67*, reflex, [1985] C.A. 135; *Sabourin v. Charlebois*, [1982] C.A. 361; Cass. civ. 1st Ch., January 9, 1979, *Bull. civ.* I, No. 11, p. 8 (*R. v. L.*); Cass. civ. 1st Ch., May 30, 1979, *Bull. civ.* I, No. 161, p. 130 (*D. v. L.*); Cass. civ. 1st Ch., October 26, 1982, *Bull. civ.* I, No. 302, p. 257 (*Perrin v. Chevrier*); *M.D. v. P.-H.D.*, 1988 CanLII 233 (QC CA), [1988] R.L. 139; *Droit de la famille--649*, [1989] R.D.F. 325; *Droit de la famille--688*, [1989] R.D.F. 532; *Banque canadienne nationale v. St-Germain*, [1942] Que. K.B. 496; *Droit de la famille--271*, [1986] R.D.F. 49; *Droit de la famille--594*, 1989 CanLII 304 (QC CA), [1989] R.J.Q. 271; *Droit de la famille--1097*, [1987] R.D.F. 222.

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Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 2, "claim provable in bankruptcy", 148.
Civil Code of Quebec, arts. 462.1 *et seq.* [ad. 1989, c. 55, s. 8], 559 [rep. *idem*, s. 23].
Code of Civil Procedure, R.S.Q., c. C-25, art. 495.
Divorce Act, R.S.C. 1970, c. D-8, ss. 11, 12, 18.
Supreme Court Act, R.S.C. 1970, c. S-19, ss. 41(1) [rep.& sub. 1974-75-76, c. 18, s. 5], 52 [*idem*, s. 7].

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Cossette, André. "Le régime de la séparation de biens est-il disparu avec la naissance de la prestation compensatoire?" (1985), 87 *R. du N.* 456.
Goré, François. *L'enrichissement aux dépens d'autrui*. Paris: Dalloz, 1949.

APPEAL from a judgment of the Quebec Court of Appeal, [1985] C.A. 5 (*sub nom. Droit de la famille--176*), varying a judgment of the Superior Court[1]. Appeal allowed.

Gérard Dugré, for the appellant.

Pierrette Rayle and *Suzanne Anfousse*, for the respondent.

//Gonthier J.//

English version of the judgment of the Court delivered by

GONTHIER J. -- This appeal is brought pursuant to s. 41 of the *Supreme Court Act*, R.S.C. 1970, c. S-19 (now R.S.C., 1985, c. S-26, s. 40(1)), and s. 18 of the *Divorce Act*, R.S.C. 1970, c. D-8. It raises certain questions as to the rules governing a compensatory allowance, in particular in the event of a bankruptcy and a discharge order prior to any claim for an allowance and the requirement that the enrichment must subsist when proceedings are brought.

The appeal also raises questions regarding the assessment of the facts by the trial judge and the legitimacy of the Court of Appeal's intervention. Because these questions arise in the specific circumstances of this case, before proceeding any further

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I should point out that the Court is not called upon to deal with the principal aspects of the ongoing debate regarding the principles that should govern the granting of compensatory allowances, even though this is the first appeal it has heard in the field.

1. Facts and Proceedings

The parties were married in 1969 under the regime of separation of property. After a brief separation followed by a reconciliation in 1971, they finally ceased all cohabitation in 1977. At the time of the marriage the respondent held employment in a local paper mill at a gross salary of $140 a week. In 1972 the respondent gave up his job to go into business with his wife, who at the time had substantial liquid capital, having received $140,000 following the accidental death of her first husband, with whom she had had two children. The appellant had also received $47,000 as a particular legatee of her father, who died in 1973. All the businesses operated by the parties failed. According to the trial judge the appellant is now completely destitute while the respondent, after making an assignment of his property in January 1978 and being discharged in 1979, became the "brain trust" of a successful moving equipment transportation company, and is the co-owner of a residence which is "far from modest though mortgaged".

By a divorce petition dated June 2, 1981 the appellant asked the Superior Court to order her husband to pay her the sum of $55,000 in non-exclusive overall settlement of her alimentary pension, and the sum of $250 a week as alimony. At the hearing of the petition the appellant said that she was abandoning any claim for an "alimentary pension", and was simply asking for an "allowance" of $55,000.

The decree nisi was granted on June 17, 1983. On the following October 7, Laroche J. granted a decree absolute and ordered the respondent to pay the appellant the sum of $40,000, both as repayment of money and as a compensatory allowance and lump sum indemnity for re-establishment and maintenance, the whole without interest. The amount was to be payable in annual instalments of $5,000 commencing on November 1, 1983 with a final instalment of $10,000 on November 1, 1989.

On October 12, 1983 the respondent filed an appeal and subsequently obtained an order staying the provisional execution of the judgment with respect to the corollary relief, except for the obligation connected with the first instalment. No joint record was prepared for the Court of Appeal, which set aside the trial judgment with respect to the corollary relief without having the benefit of consulting the record as a whole.

2. Applicable Legislation

The awarding of a compensatory allowance and a lump sum was based on the following legislation:

-- article 559 of the *Civil Code of Quebec*:

> **559.** The court, in granting a divorce, may order either spouse to pay to the other, as consideration for the latter's contribution, in goods or services, to the enrichment of the patrimony of the former, an allowance payable immediately or by instalments, taking into account, in particular, the advantages of the matrimonial regime and marriage contract.
>
> The compensatory allowance may be paid, wholly or in part, by the granting of a right of ownership, use or habitation in accordance with articles 458 to 462.

-- sections 11 and 12 of the *Divorce Act*:

> **11.** (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:
>
> (*a*)an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
>
> (i)the wife,
>
> (ii)the children of the marriage, or
>
> (iii)the wife and the children of the marriage;
>
> (*b*)an order requiring the wife to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of
>
> (i)the husband,
>
> (ii)the children of the marriage, or
>
> (iii)the husband and the children of the marriage; and
>
> (*c*)an order providing for the custody, care and upbringing of the children of the marriage.
>
> (2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.
>
> **12.** Where a court makes an order pursuant to section 10 or 11, it may

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(*a*)direct that any alimony, alimentary pension or maintenance be paid either to the husband or wife, as the case may be, or to a trustee or administrator approved by the court; and

(*b*)impose such terms, conditions or restrictions as the court thinks fit and just.

3. Judgments Below

Superior Court

Laroche J. did not consider it necessary to discuss in detail in his reasons the various aspects of the two parties' financial venture. From the considerable evidence presented during six days of hearing, he selected and mentioned two points: the state of the respondent's patrimony as indicated by the accounting documents filed and the appellant's right to the money she had to pay as endorser after the respondent's bankruptcy. In the opinion of Laroche J., this is a [TRANSLATION] "financial contribution" which presents no problems in terms of evidence. According to the evidence adduced this financial contribution amounts, with interest, to a total of $32,640.48, which the judge then increased to $40,000 as an allowance for support and re-establishment. Laroche J. explained the purpose of his order as follows:

> [TRANSLATION] The awarding of this sum will be such as to allow [the appellant] to achieve financial independence and to finally terminate relations between the parties, after a "common adventure", both emotional and financial, which is unique of its kind.

As regards the effect of the respondent's bankruptcy and discharge on the appellant's rights, the trial judge explained:

> [TRANSLATION] In law, needless to say, the order discharging the respondent's bankruptcy is not a bar to the awarding of such an amount and the performance of obligations of this kind between the parties, as a consequence of s. 148 of the Bankruptcy Act.

The respondent was accordingly ordered to pay the appellant the sum of $40,000, on the terms I described in the summary of facts.

Court of Appeal, [1985] C.A. 5

Turgeon J.A. -- reasons concurred in by Tyndale J.A.

After reproducing most of the trial judgment in his reasons, Turgeon J.A. noted the reference by the trial judge to s. 148 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. This section provides *inter alia* that a discharge order does not release the bankrupt from any debt or liability under a maintenance order. The trial judge concluded from this that he could make an award in this case despite the respondent's bankruptcy and discharge. In the opinion of Turgeon J.A., the compensatory allowance is not alimentary in nature as art. 559 *C.C.Q.* is found in Subsection 1, dealing with the "Settlement of the financial interests of the spouses" and not in Subsection 2, dealing with the "Effects of divorce as to support". The respondent's discharge was thus possible having regard to his potential obligations under art. 559 *C.C.Q.*

Turgeon J.A. then mentioned what in his opinion must be proven by the plaintiff to obtain a compensatory allowance, at pp. 7-8:

[TRANSLATION]

(1) his or her contribution;
(2) the enrichment of his or her spouse's patrimony;
(3) the causal link between the two;
(4) the proportion in which the contribution made possible the enrichment.

He added, and this passage is important:

> [TRANSLATION] These four conditions must coexist and these four things must exist, or at least subsist, at the time the court grants the divorce. [Emphasis added.

The judge noted that in this case the enrichment no longer existed at the time of the divorce, since the respondent had made an assignment of his property. He concluded, at p. 8:

> [TRANSLATION] In my opinion [the respondent's] bankruptcy and discharge are an estoppel to [the appellant's] claim for a compensatory allowance. The amounts paid by [the appellant] as endorser of certain debts contracted by her husband are a bar to her claim for a compensatory allowance.
>
> Article 559 *C.C.Q.* does not alter the rules of suretyship. It does not have the effect of imposing on [the respondent] an obligation from which he has been discharged under the *Bankruptcy Act*.

With respect, I am of the view that the trial judge made an error of law.

There was accordingly no basis for the compensatory allowance order. In the view of Turgeon J.A., the amount awarded in this regard was $32,640.48, the balance having been awarded as a lump sum (although the entire amount was combined in the conclusions of the trial judgment, this breakdown is indicated in the trial judge's reasons). Turgeon J.A. considered that as the appellant had abandoned her alimentary claim, this second part of the order was therefore also without foundation: the judge's award went beyond what had been sought.

Turgeon J.A. accordingly allowed the appeal and struck out the financial order in the divorce decree, but reserved the appellant's right to claim alimentary support under the law.

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McCarthy J.A. -- concurring opinion

I shall simply reproduce the short reasons of McCarthy J.A. (at pp. 8-9):

[TRANSLATION] I have had the advantage of reading the opinion of my colleague Turgeon J.A.

Article 559 *C.C.Q.* gives the judge granting the divorce discretion, provided there is a "contribution . . . to the enrichment of the patrimony" of the spouse. Since what is involved is "compensation" (not indemnification) for this contribution, I am of the view that the enrichment must subsist at the time of the divorce.

In the present case the enrichment of the husband's patrimony as a result of his wife's contribution was not still in existence when the divorce decree was granted. The judge consequently did not have any discretion under art. 559.

With respect to the lump sum awarded by the judge beyond the provisions of art. 559, I would emphasize that he had no claim of an alimentary nature before him.

Like my colleague I would allow the appeal, with each party paying their own costs.

4. Issues

The appellant submitted the following issues to the Court:

1.Did the Court of Appeal err in finding that the award of the sum of $40,000 was not justified under art. 559 *C.C.Q.*?

2.Did the Court of Appeal err in finding that the award of the sum of $40,000 was not justified under s. 11 of the *Divorce Act*?

5. Analysis

Before moving on to the main issues, which I shall deal with in the order suggested by the appellant, I must dispose of certain preliminary issues of a procedural nature which both sides argued could have an effect on the jurisdiction of the Court of Appeal and on that of this Court in the case at bar.

A. *Preliminary Issues*

(a) Jurisdiction of This Court

The respondent maintains that the order granting leave to appeal to this Court under the *Divorce Act* was made out of time. The relevant provision reads as follows:

18. . . .

(2) Leave to appeal under this section may be granted within thirty days from the pronouncing of the judgment or order being appealed from or within such extended time as the Supreme Court of Canada or a judge thereof may, before the expiration of those thirty days, fix or allow.

In the present case the judgment appealed from was pronounced on November 9, 1984 and the appellant filed a notice of motion for an extension of time on December 6, 1984. This motion was granted the following day and the time was extended to January 21, 1985. The appellant filed her notice of application for leave to appeal on December 27, 1984 and the order of this Court granting leave to appeal was made on January 31 following. As the respondent indicated, the notice of application for leave to appeal was filed within the time limit set by the order extending the time, but leave to appeal was in fact granted after the time fixed by that order had expired. The provision cited above refers quite clearly to the leave to appeal rather than the application to obtain it. The respondent argued that leave must in fact be granted within the time mentioned, which was not the case here.

The result of adopting this interpretation offends common sense. On this reading the time limit at issue would be imposed on this Court, and its length fixed by its own order in cases of an extension. The parties' rights would subsist or be extinguished, depending on whether the leave order was made before or after the time limit fixed, regardless of the diligence exercised by the respective parties. Such a result seems to me to be both unfair and absurd. It will suffice to recall here the remarks made by Dickson J. in *Air-Care Ltd. v. United Steel Workers of America*, 1974 CanLII 200 (SCC), [1976] 1 S.C.R. 2, at p. 8, regarding the parties' rights in relation to the excessive length of time which an administrative tribunal had allowed to elapse before making its decision:

The right of a party should not be lost or in any way prejudiced as the result of dilatory conduct on the part of a Board over which it has little or no control.

The length of this Court's deliberations in a case depends on a host of factors connected with its internal operation and it is inconceivable that a litigant could be prejudiced by the effect of the law.

The answer to the respondent's questions lies in the retroactivity of an order granting leave to appeal. Like most court orders which are reserved, the order granting leave to appeal is retroactive to the date of the application. It is in this respect similar to an order made from the bench following an oral application, and in the absence of any indication to the contrary it similarly produces its legal effects from the time the application is duly submitted.

I am therefore of the view that the time limits mentioned in the provision refer in fact to the date on which the notice of application was filed, being the date on which the leave order is deemed to have been made. In the case at bar the notice of application for leave to appeal was filed on December 27, 1984, that is nearly a month before the time limit set by this Court expired.

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The respondent also drew the Court's attention to s. 18(1) of the *Divorce Act*, which states that an appeal to this Court with leave lies on a question of law:

18. (1) An appeal lies on a question of law to the Supreme Court of Canada with leave of that court from a decision of the court of appeal under section 17.

An appeal authorized under the *Supreme Court Act* may concern issues of mixed law and fact. Section 41(1) read as follows at that time:

41. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from such judgment is accordingly granted by the Supreme Court.

In the case at bar the application for leave to appeal was based on both Acts and the leave order was granted without specifying the Act, as requested in the application. In the respondent's submission the appeal relating to the application of the *Divorce Act* must necessarily have been authorized under that Act and, consequently, with respect to the lump sum this Court has jurisdiction only over questions of law raised by the award made.

In my opinion *Pelech v. Pelech*, 1987 CanLII 57 (SCC), [1987] 1 S.C.R. 801, disposes of this question in the appellant's favour. It was argued in that case that the right to rely on the *Divorce Act*, which is more specific, in order to seek leave to appeal, precluded the application of the *Supreme Court Act*, which is more general in its application. This Court rejected the argument and held that both statutes could confer jurisdiction on it as long as there was no conflict in their application (p. 825).

The functional test for the existence of a conflict which appears to have been adopted allows the maximum area of overlap and responds to this Court's concern that the procedural avenues of access to the Court should be kept open. The criteria used to guide this Court in exercising its discretion under each of the provisions are not identical and it is in the interests of justice to see that both avenues can be used. In my view, it should be possible for them both to be relied on in the same case in order to obtain leave to appeal.

In the case at bar, the leave order makes no distinction between the question of the lump sum and that of the compensatory allowance. This Court is thus free to consider that it duly has before it these two aspects of the appeal under its enabling legislation, and so to examine any issue of mixed law and fact which may have to be disposed of in resolving the dispute.

(b) Court of Appeal's Jurisdiction

In this Court the appellant argues that the Court of Appeal never had before it an appeal regarding the conclusions of the trial judgment on the compensatory allowance. The respondent appealed the trial judgment by filing a notice in the office of the Court of Appeal, in accordance with the requirements of the *Divorce Act*, but no notice of inscription was served on or filed with the office of the Superior Court as required by art. 495 of the *Code of Civil Procedure*, R.S.Q., c. C-25. In the appellant's submission, the Court of Appeal went beyond the limits of its jurisdiction to the extent of its intervention regarding the compensatory allowance. The question is therefore whether the filing of the inscription in appeal pursuant to the *Divorce Act* is valid with respect to the compensatory allowance.

The respondent refers to a dispute in the Court of Appeal concerning the proper procedure in the case of an appeal from a Superior Court judgment disposing both of matters governed by the *Divorce Act* and matters governed by the *Civil Codes*. After a period of uncertainty (see *Beausel v. Langevin*, [1975] C.A. 223; *Caisse populaire de Sacré-Coeur, Saguenay v. Dufour*, C.A. Québec, No. 200-09-000060-779, March 4, 1981; *Droit de la famille--67*, reflex, [1985] C.A. 135), the Court of Appeal disposed of this issue in a leading judgment rendered in *Droit de la famille--203*, reflex, [1985] C.A. 339. Stressing that the compensatory allowance takes the form of corollary relief when it is ordered in a divorce decree, LeBel J.A. held that the procedure set out in the federal Act was applicable to all incidental matters covered in divorce proceedings.

I agree that the filing of the appeal inscription in accordance with the procedure specified in the *Divorce Act* is valid for all questions disposed of in a divorce decree, including the award of a compensatory allowance. The possibility of incorporating the claim for a compensatory allowance into the divorce proceedings at the trial level is well recognized: the language of art. 559 *C.C.Q.* cannot be circumvented in this regard. It seems entirely natural for the same to be true of the procedure applicable to appeals. It is clearly not appropriate to create a mandatory procedural distinction at the appeal level in dealing with questions which are closely related at trial.

On the preliminary questions, it can be said that the Court of Appeal and this Court have both been validly presented with the appeal relating to the compensatory allowance as well as to the lump sum ordered under the *Divorce Act*. For all aspects of the appeal this Court may rule on issues of mixed law and fact, deriving the necessary jurisdiction from its enabling Act.

B. *Main Issues*

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The awarding of a compensatory allowance or lump sum rests upon a decision that depends to a large extent on the trial judge's ability to assess the facts. In performing this difficult judicial exercise, there are many factors which the trial judge may legitimately consider as, in relation to both compensatory allowances and lump sums, the legislator has recognized the need for broad discretion by adopting enabling provisions which have an essentially open texture. In such a context, the function of an appellate court is to correct errors of law made at trial in exercising the discretion conferred by law. It goes without saying that assessing the facts is the prerogative of the trial judge and that, unless it can identify such an egregious error in this regard that it indicates an error of legal principle, the Court of Appeal is not justified in intervening.

In this appeal the appellant is essentially challenging the legitimacy of the Court of Appeal's intervention, first on the question of the compensatory allowance and second on that of the lump sum. In view of the considerable volume of evidence adduced at trial and the fact that no joint record was submitted to the Court of Appeal, I think it is advisable to consider the questions raised in the manner proposed by the appellant.

(a) The Compensatory Allowance

Quebec law has long recognized the freedom of matrimonial agreements and the right of spouses to opt for the regime of separation of property. It is well known that a great many flagrant injustices have resulted from this regime: one of the spouses, usually the wife, was often left destitute by a divorce while the other spouse had capitalized throughout the marriage on contributions of money and unpaid labour. From time to time other regimes also produced certain injustices requiring redress. The courts were certainly aware of these injustices, but generally refused to intervene in the absence of legislative authority.

First, the Court of Appeal refused its concurrence to the orders of a compensatory nature made at the time of the divorce as part of the lump sum, because their effect was to retroactively extinguish the effects of a freely made and executed contract. After all, the lump sum is alimentary in nature. From the same concern that agreements freely concluded for the separation of property should be respected, the courts also seldom recognized that a tacit partnership could exist between spouses. The person affected found it hard to establish the existence of a tacit partnership contract existing alongside a written marriage contract, duly concluded before a notary, the terms of which hardly lent themselves to such a possibility. Finally, it was felt that generally the doctrine of unjust enrichment could not be used to mitigate this type of injustice, as the cause of the enrichment was the matrimonial regime or association: *Sabourin v. Charlebois*, [1982] C.A. 361. It will be noted that the decisions of the Quebec courts have diverged in this respect from the position taken by French courts: Cass. civ. 1st Ch., January 9, 1979, *Bull. civ.* I, No. 11, p. 8 (*R. v. L.*); Cass. civ. 1st Ch., May 30, 1979, *Bull. civ.* I, No. 161, p. 130 (*D. v. L.*); Cass. civ. 1st Ch., October 26, 1982, *Bull. civ.* I, No. 302, p. 257 (*Perrin v. Chevrier*).

This is the context in which the remedy by way of a compensatory allowance was introduced on December 1, 1982. There has in general been little consideration of the general objectives of this legislative innovation. It is clearly intended to mitigate the injustices produced by the implementation of a freely adopted matrimonial regime, by making it possible to compensate a spouse who has enriched the patrimony of the other spouse by his or her contribution of goods or services (see Roger Comtois, "La prestation compensatoire: une mesure d'équité" (1983), 85 *R. du N.* 367).

The problems arise when it comes to determining how far the discretion conferred on the judge extends. The wording of the article is very broad and in practice it allows the judge to extinguish completely the regime of separation of property chosen by the spouses (see André Cossette, "Le régime de la séparation de biens est-il disparu avec la naissance de la prestation compensatoire?" (1985), 87 *R. du N.* 456). The legislature has, however, elected to preserve freedom of choice in matrimonial agreements. For this reason, the courts could hardly create *a posteriori* an obligatory and retroactive judicial partnership of acquests by adopting an overly broad interpretation of the discretion conferred on them. On the other hand, limiting the ordinary meaning of the provision by an excessive deference to freedom of matrimonial agreements would be to ignore the purpose sought by the legislature. Moreover, the latter has recently chosen to limit this freedom considerably by creating a mandatory family patrimony: *Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*, S.Q. 1989, c. 55; *Civil Code of Quebec*, arts. 462.1 *et seq.*

The courts must therefore seek to correct injustices in accordance with the purpose of the law, without in so doing extinguishing the spouses' freedom of choice in so far as the legislature has chosen to preserve it. It is not an easy exercise and the judgments of the Court of Appeal show that the problems to be encountered are many. The Court of Appeal held in the case at bar that the awarding of a compensatory allowance by the trial judge was vitiated by error.

The elements which a party must establish in order to be awarded an allowance are stated by the Court of Appeal as follows, at pp. 7-8:

(1)his or her contribution;
(2)the enrichment of his or her spouse's patrimony;
(3)the causal link between the two;
(4)the proportion in which the contribution made possible the enrichment.

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This statement results from the wording of art. 559 and the natural incorporation of the remedy introduced by it into the general principles of civil law. I do not think there is any need to alter this statement, except to note that there must be great flexibility in evaluating the items it contains.

It seems particularly clear that too much rigidity in applying the burden of proof imposed on the plaintiff with respect to each of these items would result in denying the beneficial effects of the remedy. The Court of Appeal has quite properly pointed out many times in subsequent cases that these items must be viewed as a whole, by an assessment free of calculations made to the nearest dollar (see, for example, *M.D. v. P.-H.D.*, 1988 CanLII 233 (QC CA), [1988] R.L. 139; *Droit de la famille--649*, [1989] R.D.F. 325; *Droit de la famille--688*, [1989] R.D.F. 532). The matrimonial context is special in that the keeping of precise, penny-pinching accounts which could eventually be used as evidence in a court is hard to reconcile with the idea generally held of marriage as being a peaceful union. I note that the legislature has recently recognized the special nature of this context in expressly and unequivocally relaxing the rules governing the means of proof in this area: art. 462.15 *C.C.Q.* immediately follows the new article on the compensatory allowance and states that the co-operating spouse may adduce evidence by any means to prove his contribution to the enrichment of his spouse.

In general, therefore, analysis of the factual and legal aspects of a compensatory allowance situation calls for special flexibility. I think it is quite understandable that it should differ somewhat from that applicable to other areas such as civil liability, where the requirement of a causal link, for example, is relatively strict. It is worth noting in this regard that the traditional concept of causality is not applied in cases of unjust enrichment: *Banque canadienne nationale v. St-Germain*, [1942] Que. K.B. 496. The plaintiff must certainly show a cause-and-effect relationship between the impoverishing act or the impoverishment on the one hand and the enrichment on the other, but the requirement of this relationship is much less strict than the standards evoked by the notions of *causa causans*, *causa sine qua non* or *causa proxima*: Jean-Louis Baudouin, *Les Obligations* (3rd ed. 1989), No. 553, at p. 332. In *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, 1976 CanLII 4 (SCC), [1977] 2 S.C.R. 67, stating the conditions on which the *de in rem verso* action is available, this Court laid down the requirement for a simple "correlation" between the impoverishment and the enrichment. Flexibility is essential and the analysis highly empirical. The very close relationship between the action for unjust enrichment and the action for a compensatory allowance does not have to be restated, and I think that on this point the approach taken for the first generation should apply for the second.

In the case at bar the Court of Appeal suggested that the enrichment did not exist at the time of the divorce. The Court of Appeal's intervention is based first on an alleged error of law concerning the legal effect of a bankruptcy on the possibility of obtaining an allowance. The second error the Court of Appeal claimed to find concerns the continued existence of the enrichment at the time of the divorce.

(i) *Effect of the Bankruptcy*

The Court of Appeal's treatment of the question of how the bankruptcy affects the rights of the parties in my opinion demonstrates a regrettable confusion which is unfortunately reflected in the arguments of the parties. In fact, the question seems to me to be quite straightforward.

At trial Laroche J. simply said the following about the bankruptcy:

> [TRANSLATION] In law, needless to say, the order discharging the respondent's bankruptcy is not a bar to the awarding of such an amount or to the performance of obligations of this kind between the parties, as a consequence of s. 148 of the Bankruptcy Act.

Section 148 reads as follows:

148. (1) An order of discharge does not release the bankrupt from

(*a*) any fine or penalty imposed by a court or any debt arising out of a recognizance or bail bond;

(*b*) any debt or liability for alimony;

(*c*) any debt or liability under a maintenance or affiliation order or under an agreement for maintenance and support of a spouse or child living apart from the bankrupt;

(*d*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;

(*e*) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation;

(*f*) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless such creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim; or

(*g*) any debt or liability for goods supplied as necessaries of life and the court may make such order for payment thereof as it deems just or expedient.

(2) An order of discharge releases the bankrupt from all other claims provable in bankruptcy. [Emphasis added.]

Like the parties, the Court of Appeal assumed that Laroche J. was referring exclusively to one of the items mentioned in s. 148(1). In the case of the lump sum, which is unquestionably alimentary in nature, Laroche J. could very well have been

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referring to para. (*b*) or (*c*), which unequivocally dispose of the question of bankruptcy; but as regards the compensatory allowance, I find it hard to understand the decision rendered on appeal.

In the opinion of the Court of Appeal, the trial judge was exclusively and necessarily referring to para. (*b*) or (*c*), which it found to be an error, correctly pointing out that the compensatory allowance is not alimentary in nature. The appellant then argued in this Court that the judge could easily have been referring instead to para. (*d*) or (*e*), as fraud by the respondent was alleged at trial. In my opinion the premises of this debate are mistaken.

Without having to consider what Laroche J. actually had in mind regarding the effect of the bankruptcy on the awarding of a compensatory allowance, it could be said that his reference primarily concerned the rule governing the effect of a discharge contained in subs. (2), rather than any exception or qualification contained in subs. (1), as an error in a judgment is not to be presumed and the fact is that in the case at bar the appellant never had a claim provable in bankruptcy from which the respondent could have been discharged under subs. (2). Under the latter subsection, the sole effect of the discharge of a bankrupt is to block his creditors' claims which were "provable in bankruptcy" at the time of the assignment of property. These claims are defined in s. 2 of the Act as follows:

"claim provable in bankruptcy" or "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a preferred, secured or unsecured creditor;

The appellant's position as the respondent's wife at the time of the bankruptcy cannot be likened to that of a creditor who can prove his claim in bankruptcy. First, I do not think that a "claim" arising out of art. 559 *C.C.Q.* can be provable in a proceeding brought pursuant to the *Bankruptcy Act*. Under art. 559 *C.C.Q.*, the compensatory allowance is awarded at the time of the divorce, which probably excludes the possibility of claiming it in a bankruptcy proceeding. Second, because of the important part played by discretion in the judicial exercise leading to the award of a compensatory allowance, I do not think that considered in the abstract the existence of a contribution by a spouse which caused enrichment of the other spouse confers any right that could be described as a "claim" within the meaning of the *Bankruptcy Act*. The judgment awarding a compensatory allowance creates the right. Further, I note that in the case at bar the discharge of the bankrupt was ordered several years before art. 559 *C.C.Q.* came into effect: I do not see how such a discharge could have any legal effect on the appellant's position with respect to the application of this provision.

The Court of Appeal thus made an error of law in finding that Laroche J. had mistakenly applied s. 148(1) of the *Bankruptcy Act*. Laroche J. referred to s. 148 as a whole. Subsection (2) provides that the legal effect of a discharge order extends only to claims provable in bankruptcy. It may be said that Laroche J. correctly applied s. 148 in disposing of the parties' arguments, as at no relevant time did the appellant have a claim from which the respondent could be discharged under that section.

The Court of Appeal further stated that the bankruptcy and discharge of the respondent constituted an estoppel ("*fin de non-recevoir*") to the claim for a compensatory allowance. This is a clear error of law probably resulting from an imprecise use of language. The term "estoppel" has a well defined legal meaning which cannot be taken to describe the effect produced by the bankruptcy of a defendant spouse on the rights of the other spouse to a compensatory allowance. As the respondent suggested at the hearing, the Court of Appeal probably considered the bankruptcy which occurred at the end of the period of cohabitation as irrefutable evidence of insolvency indicating either an absence of enrichment or a breach of the necessary connection between the earlier contributions and the state of the patrimony at the time of the divorce, since the Court of Appeal was of the view that the enrichment must still be in existence at the time of the divorce if an allowance is to be awarded: this is a point that should now be considered.

(ii) *Continued Existence of the Enrichment*

The appellant first properly noted that the concept of enrichment refers to that of patrimony. Article 559 indeed speaks of "enrichment of the patrimony". The concept of patrimony as a container has a particular identity independent of its content: Louis Baudouin, *Le droit civil de la Province de Québec* (1953), at p. 354. Patrimony seen as a container is unchanging and its existence is not subject to the fluctuations of any particular thing it may contain at any time as a result of its holder's dealings. In this regard the appellant suggests that the one-time increase in the calculable value of an individual's rights and obligations as the result of a contribution made from outside produces an enrichment which attaches to the patrimony as a container, and this enrichment thereby also becomes unchanging. The enrichment would thus be treated as independent of subsequent fluctuations affecting what is contained in the patrimony, and there would accordingly be no need to speak of the enrichment subsisting at the time of the divorce.

In my view, precisely because of this unchanging and intangible nature of the patrimony which is traditionally regarded as a container, the notion of enrichment must necessarily relate to the content of the patrimony, that is, the calculable value of what it contains. The opposite conclusion would have the unfortunate effect of detaching the analysis of the contribution and the enrichment from factual reality, at the cost of distorting the action for a compensatory allowance by a misunderstanding of its central objective of fairness. Accordingly, it seems perfectly possible to envisage a requirement that the enrichment should still be in existence. The question that really arises is as to the time at which the enrichment must be evaluated.

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At first sight, the purpose of the compensatory allowance is to restore the equilibrium between two patrimonies which has been unfairly disrupted by developments in the matrimonial relationship. If one of the spouses has been enriched at the conclusion of the matrimonial relationship by the contribution of the other spouse, the judge will order compensation to the extent that the enrichment was due to the contribution. However, if no residue of the contribution remains in the defendant's patrimony when the matrimonial relationship comes to an end, there is no basis for compensation as the alleged contribution has ultimately produced no enrichment. It thus seems quite natural for the enrichment to be evaluated at the time of the divorce.

The traditionally accepted rules governing the doctrine of unjust enrichment are instructive in this regard. The *de in rem verso* action has always been limited to the measure of the actual enrichment, and the courts have determined the time of evaluation to be that of the bringing of the action. If the defendant's enrichment no longer exists when the action is brought, the latter must be dismissed without further consideration (see Jean-Louis Baudouin, op. cit., at pp. 323 *et seq.*) François Goré explains this condition as follows in *L'enrichissement aux dépens d'autrui* (1949), at p. 64:

> [TRANSLATION] The enrichment which must be considered is that enjoyed by an individual when the action is brought. The function of the theory of unjust enrichment is to restore the equilibrium between two patrimonies which has been unfairly disrupted. For this function to be performed, the disequilibrium must exist at the time the action is brought.

Like the doctrine of unjust enrichment, the compensatory allowance is imbued with a concern for fairness which must be borne in mind in applying it. The idea of an action based on unjust enrichment is meaningless in terms of fairness if the party enriched no longer enjoys the proceeds of the contribution at the time the action is brought. In such a case, it is the order itself which might have the effect of creating an injustice.

Accordingly, in this context the idea of enrichment must include that of a minimum possibility of enjoyment in respect of the proceeds of the contribution. For example, one could at first sight contemplate the existence of an enrichment in respect of a patrimony the absolute calculable value of which is negative at the time of the action; but ordering a compensatory allowance in such a case could have the undesirable consequence of aggravating the defendant's indebtedness when he is not enjoying the proceeds of the contribution in any way. It is for this reason that one cannot speak of enrichment at the time of the action if the defendant does not enjoy the product of the contribution. Determining the existence and value of the enrichment at the time of the action is a delicate matter and will very much depend on the circumstances.

If we take the example of *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, *supra*, in which the enrichment consisted in the obtaining by Cie Immobilière Viger Ltée of land developed as it wished for the cost of a vacant lot, I think that the subsequent annihilation of the product of the development work by a fortuitous event would have deprived Lauréat Giguère Inc. of any remedy. The enrichment was clearly identifiable because it was directly connected with a material asset in the patrimony. If a contribution in services or money directly increases the value of an identifiable asset, that contribution must be treated as part of the asset in question. The party making the contribution then assumes the risks of deterioration and benefits from any increase in value in respect of the asset in question, to the extent of his contribution. In the case of a compensatory allowance, the classic example is that of a spouse who helps pay for the family residence of which the other spouse is the sole owner: the courts have recognized that the spouse making the contribution will have an action for the additional value of the residence to the extent of the contribution made (see, for example, *Droit de la famille--67*, *supra*; *Droit de la famille--271*, [1986] R.D.F. 49 (C.A.); *Droit de la famille--594*, 1989 CanLII 304 (QC CA), [1989] R.J.Q. 271 (C.A.)).

A purely economic contribution, on the other hand, will often be difficult to trace and it may prove to be impossible to show that whatever is in the patrimony at the time of the action results from the alleged contribution. This is where the necessary flexibility in analysing the causal connection becomes especially important, as the plaintiff cannot be required to identify each dollar resulting from the contribution in the spouse's patrimony. Demonstration of a simple correlation between the contribution and the state of the patrimony must suffice. If, for example, there has been a negative enrichment, resulting from a loss or expense that was avoided by the making of the contribution, it is apparent that the plaintiff will have difficulty relating his contribution to any identifiable part of the patrimony. The general value of the patrimony, which the defendant enjoys, should then suffice as a basis for a ruling in the plaintiff's favour.

Subject to these qualifications, therefore, I agree with the Court of Appeal in saying that the enrichment must subsist. It must be evaluated at the time of the divorce. It appears, however, that the trial judge never said otherwise. The question therefore remains as to whether the Court of Appeal had grounds for intervening in the determination of the facts on the question of enrichment.

As I mentioned, the Court of Appeal probably regarded the respondent's bankruptcy as absolute and irrefutable evidence that no enrichment was still in existence from the matrimonial relationship. The assignment of property took place after cohabitation had ceased. This is why the Court of Appeal assumed that Laroche J. had not required that the enrichment subsist at the time of the divorce. On the basis of this assumption, the Court of Appeal concluded there had been an error of law in the trial judgment.

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With all due respect, in my opinion this was an error by the Court of Appeal as the fact of a bankruptcy occurring before the action for an allowance is not irrefutable evidence either of the lack of enrichment at the time of the divorce or of the lack of correlation between the contribution prior to the bankruptcy and the assets subsequently found in the defendant's patrimony. Although the fact of a bankruptcy occurring at such a time generally tends to suggest the absence of an enrichment or correlation, it could not be regarded as irrefutable evidence thereof as, first, the creditors' meeting still controls the realization of the assets in the patrimony, some items of which it may for various reasons abandon, and second, the possibly fraudulent dealings of the bankrupt may have the effect of indirectly bringing back into his patrimony certain items that were there before.

There is no indication in the case at bar that as a question of fact Laroche J. did not find an enrichment that still existed at the time of the divorce despite the respondent's bankruptcy. The trial judge noted the enrichment of the respondent in his reasons; without tracing its origins, he referred to the body of evidence which it was his function to weigh, evidence which the Court of Appeal did not have the benefit of consulting as there was no joint record.

I note, first, that [TRANSLATION] "fraud" and "subterfuge" by the respondent are alleged in the divorce petition dated June 2, 1981. It is clear that the trial judge must consider the presence of enrichment in awarding a compensatory allowance even if that enrichment results from actions that could be taken as fraudulent in light of the *Bankruptcy Act*, compliance with which is not his concern.

The record prepared for this Court indicates that in 1975 the respondent obtained trucks with the aid of loans for which the appellant was jointly and severally liable with the respondent. On November 30, 1978, after the assignment of the respondent's property, the trucks were part of the capital stock of a moving company of which the respondent was a shareholder and the prime mover ("brain trust"), while the appellant was still indebted for the balance of the loans, amounting to some $2,500. There is therefore, in my opinion, evidence in the record on the basis of which the trial judge could conclude there had been a contribution by the appellant which resulted in an enrichment of the respondent, despite the intervening bankruptcy. The Court of Appeal apparently did not consider these points, which probably were not brought to its attention.

The Court of Appeal suggests that the compensatory allowance can in no way alter the usual rules governing the obligations arising out of a loan of money. This proposition is correct to the extent that the appellant continued to be civilly bound by her initial undertaking to the lender; but in so far as there is evidence of a present enrichment resulting from a contribution by one spouse, an order for a compensatory allowance can certainly be made whatever the rules resulting from the law of obligations may be. This remedy was created in part to circumvent the judicial requirement regarding the absence of cause in the *de in rem verso* action; the fact of using a contract, which is governed by the law of obligations, to make a contribution cannot affect the distinct analysis necessary for this remedy. For the parties, the situation is the same as if the appellant had obtained a loan and given the proceeds of that loan to the respondent: this contribution may be regarded as the trucks themselves, of which the respondent now has the enjoyment, and the value of which is still part of his patrimony through the capital stock of the company.

It was therefore possible for the trial judge to conclude, in exercising his power of weighing the facts, that the elements needed to award a compensatory allowance existed. The mention of this factor as part of the justification for the order of $40,000 in the conclusions of the trial judgment was accordingly justified and the Court of Appeal was wrong to intervene.

The other amounts mentioned by the trial judge as a contribution that might require compensation need not be discussed for a very simple reason. The trial judge clearly set the appellant's needs at $40,000 for purposes of awarding the lump sum, and the respondent's means are not at issue. Since part of the needs had already been met by the awarding of a compensatory allowance, the judge set the lump sum at the amount necessary to make up the difference between the amount of the allowance and that of the needs. It follows that these amounts, explained by the trial judge as a compensatory allowance, may in any case be justified under the heading of the lump sum up to an amount of $40,000, so that in any event the conclusions of the judgment would not be altered. In my opinion, the Court of Appeal also wrongly intervened on the question of the lump sum, which must now be considered.

Before moving on to that, I should point out that I am not in any way approving of the procedure used by the trial judge, consisting of making a general order the various bases of which are not dealt with separately in the conclusions. This may create considerable difficulties on appeal, as the awarding of a compensatory allowance and the granting of a lump sum are governed by rules which differ fundamentally in several respects, although the setting of the amount of the former will considerably influence the amount of the latter (see comments by LeBel J.A. in *Droit de la famille--1097*, [1987] R.D.F. 222 (C.A.)). It thus seems specially desirable that the various types of orders should be dealt with separately, both in the conclusions and in the reasons of a trial judgment.

(b) The Lump Sum

As I just mentioned, the respondent's ability to pay was not questioned any more than were the appellant's needs. The Court of Appeal quashed the order awarding a lump sum solely on the basis of a discontinuance alleged by the respondent. The Court accordingly concluded that Laroche J. had no claim of an alimentary nature before him.

The divorce petition dated June 2, 1981 contains the following conclusions as to corollary relief:

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[TRANSLATION] TO ORDER the respondent to pay me the sum of fifty-five thousand dollars ($55,000) by way of non-exclusive lump sum settlement of the alimentary pension, for the reasons stated above;

TO ORDER the respondent to pay me an alimentary pension of two hundred and fifty dollars ($250) a week, payable in advance on Friday of each week at my residence at 10, rue Chapleau, Cap-de-la-Madeleine;

I note that art. 559 *C.C.Q.* was not yet in effect at this time; it became applicable to the case at bar by a provision stipulating that it would be applicable to cases pending: *An Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39, s. 70. The lump sum settlement requested at that time thus necessarily refers to the lump sum specified by the *Divorce Act*. At the hearing the appellant waived part of the conclusions of her petition, as is reported in the minutes of trial for June 15, 1983 as follows:

[TRANSLATION] Proof as to a compensatory allowance requested.

The petitioner stating that she waives any claim for an alimentary pension, limiting herself to an allowance of $55,000 and performance of the gifts made to her under the marriage contract.

The Court of Appeal probably relied on this transcript in arriving at its conclusion that the appellant had waived her "claim of an alimentary nature" (p. 9). Assuming the minutes to be authentic, though they were signed neither by counsel nor by the judge, I do not feel I am able to give them the meaning suggested by the respondent and endorsed by the Court of Appeal.

First, the language used indicates a waiver of "any claim for an alimentary pension"; the respondent is trying to make it say that there was a waiver of "any claim of an alimentary nature", which would include the lump sum. Clearly, a person does not waive a claim for a lump sum by waiving a claim for an alimentary pension. As regards the wording "limiting herself to an allowance of $55,000", I do not think it fair to attribute to the parties an intent to refer exclusively to the compensatory allowance. Article 559 had only been in effect for a few months and there was still some confusion as to the nature of a compensatory allowance as opposed to a lump sum, as is indeed indicated by the judgment of the Court of Appeal in the case at bar. I would accordingly tend to give the word "allowance", as used there, its ordinary meaning, which may include either of the two types of order. In any event, no one will dispute the rather ambiguous nature of the minutes, and a waiver must be strictly interpreted in the event of doubt as to its scope: *Gingras v. Gagnon*, 1975 CanLII 186 (SCC), [1977] 1 S.C.R. 217, at p. 222.

I would also note that the content of the petition relating to corollary relief, the awarding of which was adjourned on consent until the time the decree absolute was granted, was clarified in testimony by the appellant on September 14, 1983. The transcript indicates the following exchange between Laroche J. and the appellant:

[TRANSLATION]

BY THE COURT:

Q.Is the fifty-five thousand ($55,000) you just mentioned included in or excluded from the other three earlier amounts?

A.The three amounts are included in that amount.

Q.Are you also including interest in that?

A.Yes, your Honour.

Q.Then your maximum claim is for the whole?

A.Yes.

Q.On any basis?

A.Yes.

Q.It is limited exclusively and totally to fifty-five thousand dollars ($55,000)?

A.Yes, your Honour. [Emphasis added.]

The respondent did not in any way raise the alleged waiver of June 15 as an objection to this, and the parties and the judge considered that there was no objection, until the respondent raised this argument at the appellate level, relying on the unfortunately ambiguous language of the minutes. This document bears no signature that can authenticate it and it therefore certainly cannot be taken as proof of its contents. The record as a whole then becomes particularly relevant in determining the scope of the waiver. With the benefit of the record as a whole, the trial judge considered that he had before him a claim of an alimentary nature, while the Court of Appeal did not have transcripts available to it and was not in a position to analyse the minutes in light of the record as a whole.

For these reasons, I am of the view that the Court of Appeal erred in intervening on the question of the lump sum.

C. *The question of Interest*

There is no need to dwell at length on the question of the interest claimed in this Court in or on that of the additional indemnity. In October 1983 Laroche J. ordered that the sum of $40,000 be paid in periodic instalments without interest over a six-year period. The penalty specified for failure to pay was that the entire amount would automatically become due. Execution of the judgment in respect of the corollary relief was stayed by the Court of Appeal, except as regards the initial instalment of $5,000.

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Under s. 52 of the *Supreme Court Act* (now s. 50), the appellant is entitled to interest at the legal rate on each of the unpaid instalments indicated in the conclusions of the trial judgment, from the time when they respectively became due. An order to the contrary would not seem to me to be appropriate.

I note that the additional indemnity was not claimed at trial. Taking into account the very special circumstances of this case as a whole, I do not feel it is proper to increase the amount otherwise due by adding such an indemnity.

6. Conclusions

For all these reasons, I must necessarily conclude that the Court of Appeal's intervention in the case at bar was unwarranted. There was no error in the Superior Court's judgment that could affect the validity of its conclusions and so justify a reversal on appeal.

The appeal is accordingly allowed. There will be no award as to costs.

Appeal allowed.

Solicitors for the appellant: Byers Casgrain, Montréal.

Solicitors for the respondent: Martineau Walker, Montréal.

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* Chief Justice at the time of judgment.

[1] Sup. Ct. Trois-Rivières, No. 400-12-003513-818, October 7, 1983.

Re Dyrland, 2008 ABQB 356 (CanLII) - Does a Province's Limitations Act make all pre-bankruptcy claims in which Statements of Claim have not been filed vulnerable to a limitations defence?

Date:	2008-08-07
Docket:	BK03 95643
Parallel citations:	459 AR 118; [2009] 1 WWR 153; 47 CBR (5th) 243; [2009] 1 CTC 48; 96 Alta LR (4th) 27
URL:	http://canlii.ca/t/2077r
Citation:	Re Dyrland, 2008 ABQB 356 (CanLII), <http://canlii.ca/t/2077r> retrieved on 2013-09-24
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Court of Queen's Bench of Alberta

Citation: Re Dyrland, 2008 ABQB 356

Date: 20080807
Docket: BK03 95643
Registry: Edmonton

In the Matter of the Bankruptcy
of
Ricky Steven Dyrland

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] In Alberta, approximately 20% of bankrupts remain undischarged after their Trustee has been discharged; that percentage has increased markedly in recent years. When a Trustee is subsequently re-appointed, or a new Trustee appointed, to complete the administration of the bankruptcy, one problem that must be addressed is the status of unsecured creditor claimants who have not anchored their claims for limitations purposes by commencing legal proceedings. Specifically, does the passage of more than two years from the discharge of a first Trustee to the re-appointment of that Trustee or the appointment of a new Trustee, coupled with the provisions of Alberta's Limitations Act which imposes a two year limitation period on claims, make all pre-bankruptcy claims in which Statements of Claim have

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not been filed vulnerable to a limitations defence? To put it another way, since a Trustee must act in the best interests of all valid claimants, must a Trustee contest all claims to which a two year "gap" period applies on the basis of a limitations defence?

[2] The basic issue naturally raises many subsidiary or collateral issues such as, does the mere reciting by the bankrupt of a claim in a statement of affairs constitute an "acknowledgment" of a debt for limitations purposes, and does a Trustee's preliminary distribution to creditors constitute a "part payment" which extends the limitations period and, if so, does the limitations period resume from the date of the payment or from the date when the original Trustee is discharged?

[3] Ricky Dyrland made an assignment into bankruptcy on March 26, 2002. Fenniak & Associates was appointed to be his Trustee. The following unsecured creditors filed proofs of claim in the bankruptcy: Canada Revenue Agency, CRA, in the approximate amount of $140,255.00; Alberta Treasury Branches, ATB, in the approximate amount of $115,059.00; Leduc Motors in the approximate amount of $2,515.00, and Canadian Tire Acceptance in the approximate amount of $575.00. In addition, Alberta Justice - Maintenance Enforcement, filed a claim as a preferred creditor in the approximate amount of $3,555.00. On July 22, 2002, Canada Revenue Agency filed a Notice of Objection to Mr. Dyrland's discharge. On August 7, 2002, Mr. Dyrland's application for discharge was adjourned sine die by Registrar Funduk. Small dividends were paid by the Trustee to unsecured creditors on April 30, 2003, prior to Alberta Justice filing its claim on November 17, 2003. Fenniak was discharged on January 27, 2004.

[4] More than two years after Fenniak's discharge, on March 29, 2006, a new Trustee, Browning Crocker Inc., was appointed to complete the administration of the Dyrland bankruptcy and realize and distribute the property.

[5] In this motion, Mr. Dyrland's current Trustee asks the court for advice and directions concerning the application of Alberta's limitations legislation on bankruptcy claims, ATB asks for a direction to Browning Crocker Inc. that it continue to deal with ATB as a proven creditor with a valid and outstanding claim against the bankrupt's estate, and CRA asks for a declaration that, pursuant to the provisions of s. 222 of the Income Tax Act, its claim against the bankrupt is not statute-barred.

[6] In Alberta, once a Trustee is discharged, if the bankrupt remains undischarged, the statutory stay of proceedings against the bankrupt is lifted. This is the necessary result of: the clear wording of the legislation, legislative history, and policy relating to an uncooperative bankrupt.

[7] The lifting of the statutory stay of proceedings against a bankrupt following the discharge of the Trustee results in the continuation or resumption of the limitations period. That is merely another manifestation of the same policy which results in the lifting of the statutory stay; like the lifting of the statutory stay, the continuation of the limitations periods returns a bankrupt's creditors to the position they were in immediately prior to the imposition of the bankruptcy regime. There is no operational conflict between provincial laws relating to debt obligations and federal bankruptcy law: provincial limitations statutes do not hinder the application of the BIA and do not interfere with the latter's priorities' regime. The continuation or resumption of statutory provincial limitation periods interferes with neither the operation of the bankruptcy law or with the legislative objectives of the BIA, which include the fair and equal treatment of creditors.

[8] The inclusion of a debt in a bankrupt's statement of affairs is not an acknowledgment for limitations purposes: at that stage of proceedings, the bankrupt no longer has the power to "admit" the debt. Indeed, the debtor's Trustee has explicit authority to disallow a claim listed in the statement of affairs.

[9] The receipt of a dividend in a bankruptcy proceeding is a part payment of a debt for limitations purposes. Such a payment restarts the limitation period as of the date on which the trustee is discharged.

[10] Here:

- the claim of the Director of Maintenance Enforcement survives the bankruptcy;
- the claims of ATB are vulnerable to the Trustee's invocation of Alberta's Limitations Act. ATB failed to obtain a "Remedial Order" within the meaning of the provincial limitations legislation in order to keep its claim alive after the discharge of the original Trustee; that claim is therefore statute-barred under provincial law;
- the claims of the creditors who were given notice of this application but did not appear are similarly vulnerable to the Trustee's pleading of the limitations period as a defence to their claims;
- the claim by CRA for income tax debts is not statute-barred: Alberta's Limitations Act does not override s. 222 of the Income Tax Act.

Cases and authorities cited

[11] By the Trustee: Limitations Act ss. 3(l)(a), 3(1)(b), 8(2), 9(1), 9(3), 9(4), 9(4)(c);
BIA ss. 2.1, 69, 69.1, 69.2, 69.3, 136, 141, 148(1), 158(d); Canada (Attorney General) v. Ramjag, 1995 CanLII 9107 (AB QB), [1995] 8 W.W.R 94 (Alta. Q.B.); Re Fraser 1996 CanLII 5111 (SK QB), (1996), 41 C.B.R. (3d) 33 (Sask. Q.B.); Re Morgan reflex, (1999), 12 C.B.R. (4th) 48 (Man. Q.B.); Canada (Attorney General) v. Fekete 1999 ABQB 262 (CanLII), (1999), 10 C.B.R (4th) 102 (Alta. Master); Amex Bank of Canada v. Johnson, 2007 ABPC 130 (CanLII), 2007 ABPC 130 at paras. 45, 46, 50; Maintenance Enforcement Act, s. 38 R.S.A. 2000, M-l; ss. 222(4) and 222(8) Income Tax Act, R.S.C.

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1985, c. 1 (5th Supp); Gibson v. Canada, 2005 FCA 180 (CanLII), 2005 FCA 180 at para. 11; AEVO Co. v. D & A Macleod Co. reflex, (1991),7 C.B.R. (3d) 33 (Ont. Gen Div.) at para. 22; Houlden, Morawetz, and Sarra, The 2008 Annotated Bankruptcy and Insolvency Act, A§4; Re Canadian Tabulating Card Co. (1972), 17 C.B.R (N.S.) 248 (Ont S.C.) at para. 15; Mercure v. A. Marquette & Fils Inc., 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547; British Columbia v. Henfrey Samson Belair Ltd., 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24 at paras. 10, 14; Royal Bank of Canada v. Larue, [1928] A.C. 187 (P.C.); Husky Oil Operations Ltd. v. Minister of National Revenue 1995 CanLII 69 (SCC), (1993), 35 C.B.R (3d) 1(S.C.C.) at para. 87; Re Drummie, 2004 Carswell NB 17 (N.B.Q.B.) at para 20.

[12] By Alberta Treasury Branches: Limitations Act, RSA 2000 c. L-12; Deloitte Haskins & Sells Ltd. v. Alberta (Workers Compensation Board), [1985] 55 C.B.R. (NS) 241; Re Smith reflex, (1993),17 C.B.R. (3d) 119 (Ont. Gen. Div.); Re Bouvier Co., [1933] 14 C.B.R. 446; Re Cassidy (1922), 2 C.B.R. 459; Abramyk v. Abramyk 2000 SKQB 473 (CanLII), (2000), 24 C.B.R. (4th)163 (Sask. Q.B.).

[13] By the Minister of National Revenue: Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), as amended, section 222; Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), as amended, section 224; Markevich v. Canada, 2003 SCC 9 (CanLII), [2003] 1 S.C.R. 94; Gibson v. R., 2005 D.T.C. 5252, 2005 FCA 180 (CanLII), 2005 FCA 180, leave to appeal to S.C.C. refused, 31034 (May 13, 2005); Collins v. R., 2005 D.T.C. 5679, 2005 FC 1431 (CanLII), 2005 FC 1431.

[14] By the court: On whether the discharge of the trustee when the associated bankrupt is not discharged lifts the statutory stay: Canada (Agence des Douanes et du Revenu c. Fortin [2005] J.Q. no. 1008 (C.A.) at para. 4; Re Sherazee [2006] O.J. No. 2747 (Sup. Ct. J.), at para. 7;
Thiessen v Antifaev [2003] B.C.J. No. 519 (Sup. Ct.) at paras. 70, 71

[15] On whether the mere listing of a debt in a statement of affairs acts as an acknowledgment of a claim for limitations purposes: Ackerman v Concorde Investment Corp. 2000 SKQB 556 (CanLII), 2000 SKQB 556, [2000] S.J. No. 793; Ryan v Moore 2005 SCC 38 (CanLII), 2005 SCC 38, [2005] S.C.J. No. 38; Bradford & Bingley plc v Rashid [2006] 1 W.L.R. 2066 (H.L.), [2006] UKHL 37, at paras 21 and 58

Appendix A: Decision of the Registrar
Appendix B: Alberta Limitations Act, ss. 3,8,9
Appendix C: Institute of Law Research and Reform, Limitations, Report for Discussion No. 4, pp. 175-177
Appendix D: Bankruptcy and Insolvency Act, ss. 69, 69.1, 69.2, 69.3
Appendix E: Income Tax Act, s. 222

1. Background

a) Factual

[16] Ricky Dyrland made an assignment into bankruptcy on March 26, 2002 and Fenniak & Associates was appointed his Trustee.

[17] The following claimants filed Proofs of Claim in the Bankruptcy:

- Her Majesty the Queen in the Right of Canada as represented by the Minister of National Revenue, claims dated March 26, 2002, October 7, 2002, and October 16, 2006 in the total amount of $140,255.23;
- Alberta Treasury Branches claim dated April 9, 2002, and Alberta Treasury Branches Mastercard claim dated April 12, 2002 in the amounts of $113,871.01 and $1,188.55 respectively;
- Canadian Tire Acceptance Limited claim dated April 8, 2002 in the amount of $574.77;
- Alberta Justice Maintenance Enforcement Program claim in the amount of $3,554.77;

and

- 487244 Alberta Ltd. operating as Leduc Motors / Auto World claim in the amount of $2,515.27.

[18] **On July 22, 2002, Canada Revenue Agency filed a Notice of Objection to Mr. Dyrland's discharge.** On August 7, 2002, **Mr. Dyrland's application for discharge was adjourned sine die by Registrar Funduk.** Fenniak made dividend payments to the unsecured creditors on April 30, 2003. Fenniak was discharged as Trustee on January 27, 2004. More than two years later, on March 29, 2006, a new Trustee, Browning Crocker Inc.. was appointed to complete the administration of the Dyrland bankruptcy and realize and distribute the property.

[19] The Claim of the Maintenance Enforcement Program survives the bankruptcy.

[20] The evidence establishes that, according to searches at the Alberta Law Courts, none of the Proofs of Claim filed by the claimants were the subject of a judgment, or even of civil proceedings.

[21] No proceedings were ever taken by any of the claimants to lift the stay in the Bankruptcy.

[22] However, CRA took its own enforcement steps against the bankrupt between March 2004 and January 2006. Although all the Claimants have been given notice of these proceedings, only CRA and ATB have chosen to participate in this application. CRA has filed an affidavit, and ATB has not. No requests for cross-examination on Affidavits were made by the Trustee, CRA or ATB.

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[23] The applicants obtained a decision on the motion for advice and directions from the Registrar: Appendix A. While the applicants do not disagree with the Registrar's specific direction concerning the parties to this application, they seek advice, to the extent possible, on the effect of provincial limitations provisions on the "gap" period - i.e. the period between the discharge of one Trustee and the re-appointment of the same Trustee or the appointment of a new Trustee in the same bankruptcy.

[24] Evidence obtained from the Superintendent of Bankruptcy establishes that, in the period from 1900 to the present, the percentage of bankrupts not discharged although their trustee was discharged is 9%. However, in 2006, relative to the discharge of their Trustees, 12.1% of Alberta associated bankrupts were not yet discharged, and in 2007, that percentage increased to 15% and in 2008 to 19.1%.

b) Provincial Limitations Act

[25] For ease of reference, the sections of the statute to which reference is made are set out in Appendix B hereto.

[26] The Alberta Limitations Act establishes a general limitation period of two years from when the claimant knew, or ought to have known, that the injury for which the claimant seeks a remedial order has occurred, that it is attributable to the defendant, and that it warrants bringing a court proceeding: s. 3(1)(a).

[27] The Act also establishes a "sunset clause" of 10 years from the date on which the claim arose, regardless of knowledge on the part of the plaintiff: s. 3(1)(b).

[28] The expiry of the limitations period under the Act is not an automatic bar to proceedings; rather the defendant must raise it as a bar: s. 3(1)(b).

[29] If a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of that claim before the expiry of the limitation period, the limitation period begins again at the time of the acknowledgment or part payment: s. 8(2).

[30] To be effective, an acknowledgment must be in writing and signed by the debtor: s. 9(1).

[31] The acknowledgement or part payment can be made by or to an agent and it will have the same effect as if it had been made by or to the principal: s. 9(3).

[32] A person has the benefit of an acknowledgment or part payment only if it is made with or to the person, or, with or to a person through whom the person derives a claim, or, "in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy and Insolvency Act": s. 9(4).

[33] ALRI's Report on Limitations does not explicitly mention federal bankruptcy legislation. It does, however, emphasize its intention that Alberta limitations legislation should - insofar as it is able - regulate all actions which are commenced in Alberta: see Appendix B. Section 2(3) of the existing statute reflects the recommendations made in s. 2(1) of the Annotated Model Limitations Act found in ALRI's Report No. 55 on Limitations.

[34] In its March 6, 1996 edition, Alberta Hansard reports the discussion in the Legislature concerning Bill 205, the proposed new Limitations Act, which was in fact brought forward as a private Member's bill. I have been unable to find any specific reference in the discussion to section 9(4) of Bill 205, the reference to bankruptcy legislation. On the contrary, in the comments from Mr. Dickson, the hon. Member for Calgary-Buffalo, there is the following:

Similarly section 9, section 10. There hasn't been a substantive change to the law in terms of part payment or acknowledgements, but I think it's brought forward in a way that's more intelligible to Albertans, to members of the public who may be reading this.

[35] The applicant has also brought to the court's attention that the recommendations of the Uniform Limitations Act Working Group, of the Civil Section of the Uniform Law Conference of Canada, as discussed at the Group's meeting in St. John's in August 2005, while generally basing its work on the work of the Alberta Law Reform Institute and the new limitations statute in Alberta, has developed a different form of reference to acknowledgments than that found in the current Alberta statute. The Group's proposed Act deals with acknowledgments in s. 11, which reads in part as follows:

11. (1) If a person acknowledges liability in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, the limitation periods begin anew.

(2) An acknowledgment of liability in respect of a claim for interst is an acknowledgment of liability in respect of a claim for the principal and for interest falling due after the acknowledgment is made.

. . .

(10) This section does not apply unless the acknowlegment is made to the person with the claim, the person's agent or an official receiver or trustee acting under the Bankruptcy and Insolvency Act (Canada) before the expiry of the limitation period applicable to the claim.

c) Federal bankruptcy legislation

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[36] A statutory stay of proceedings against an insolvent person is instituted automatically upon the filing of a notice of intention by an insolvent person, the filing of a proposal or consumer proposal, or upon bankruptcy: ss 69, 69.1, 69.2, 69.3. For ease of reference, these sections are set out in Appendix D hereto.

[37] The BIA does not specifically address the impact of the re-appointment of a trustee or the appointment of a new trustee, after the initial trustee has been discharged.

[38] So far as I am aware, federal legislation does not require the Trustee, on being discharged when the bankrupt is not discharged, to tell creditors that the stay of proceedings will be lifted upon the discharge and that the creditors are free to pursue their claims against the bankrupt. However, the applicant here - Browning Crocker Inc. - makes it a practice to include such a statement in the footnote to the Statement of Receipts and Disbursements which is files in connection with its application for discharge. However, Browning Crocker was not Mr. Dyrland's first Trustee and no statement concerning the stay of proceedings is found in the first Trustee's Final Statement of Receipts and Disbursements.

2. General principles relating to the relationship between provincial limitations provisions and the federal bankruptcy law

[39] For the purposes of this application, the parties agree, and I agree with them, that the following general principles apply:

- each of the BIA and the Limitations Act is valid legislation within the federal and provincial spheres respectively;
- if a provincial statute - the Limitations Act - comes into conflict with a federal statute - the BIA - then the federal statute prevails over the provincial statute and takes effect according to its tenor: Larue. Any statutory conflict must be analyzed to determine if there is an operational conflict between the federal and provincial legislation. If provincial and federal laws are in operational conflict, and if the federal law is in an area of exclusive federal jurisdiction, the provincial legislation is ultra vires to the extent of the conflict. If the conflict arises in an area of concurrent or overlapping jurisdiction, the provincial legislation remains intra vires, but is inoperative to the extent of the conflict: Husky Oil Operations Ltd.;
- the constitutional authority given to Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables Parliament to determine, by legislation, the relative priorities of creditors under a bankruptcy or an authorized assignment: Larue;
- provinces cannot create priorities under the BIA by their own legislation: Henfrey Samson Belair Ltd.;
- one of the purposes of the BIA is to provide for the fair distribution of the bankrupt's property amongst the bankrupt's creditors on a pari passu basis: Aevo Co.; and,
- where there is an interpretation of the facts and the law which furthers the basic concept of equality of creditors, as opposed to favouring a particular group of ordinary creditors, the court should lean in the direction of the interpretation which leads to equality of ranking: Re Canadian Tabulating Card Co.

[40] In addition, it is settled law that the stay of proceedings in a bankruptcy has the effect of suspending the operation of a limitation period.

3. In Alberta, once a trustee is discharged, does the statutory stay of proceedings against the bankrupt contained in the BIA come to an end even though the bankrupt is undischarged?

[41] The short answer to the question is: Yes.

[42] Although it is apparently not the law in Manitoba (Morgan), in Alberta, it has been decided that once the trustee in bankruptcy is discharged, but the bankrupt is undischarged, there is no longer a stay under section 69.3(1): Ramjag. A similar result was reached in Saskatchewan (Re Fraser), in Ontario (Re Sherazee), in British Columbia (Thiessen) and by the Quebec Court of Appeal (Fortin).

[43] With respect, I agree with the Registrar's decision in Ramjag, and similar case law including that from the Quebec Court of Appeal, to the effect that the combination of the clear wording of s. 69.3, together with the legislative change that was effected in that section from the previous wording of the predecessor section (which change removed the words requiring leave of the court), together with the policy implications of an uncooperative bankrupt maintaining the benefit of a stay, result in the conclusion that when a trustee has been discharged, if the bankrupt is not discharged, there is no longer any statutory stay of proceedings against the bankrupt.

4. Does the lifting of the stay of proceedings against a bankrupt following the discharge of a trustee result in the resumption or continuation of the limitation period?

[44] The short answer to the question is: Yes.

[45] The objective of limitations legislation is to force timely litigation of disputes. Such legislation protects both debtors and creditors, for example, by allowing a reasonable period of time for the non-litigation resolution of disputes before the admittedly expensive litigation route is engaged. Acknowledgments and part payments, which in some jurisdictions are collectively termed "confirmation", extend the time during which non-litigation routes may be explored.

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[46] In Alberta, when federal bankruptcy legislation is not involved, a creditor is not relieved from the obligation of commencing litigation within a limitation period just because the debtor has acknowledged his debt or made a part payment on the debt. In Alberta, a plaintiff/creditor who is faced with a limitations defence cannot successfully claim that merely because the defendant/debtor has acknowledged the debt, the limitations legislation no longer applies: on its face, the legislation only extends the limitation period when an acknowledgment or part payment is made.

[47] I pause to note that, in relation to this application, had Mr. Dyrland not gone into bankruptcy, the mere acknowledgment by Mr. Dyrland of his debt to ATB, or even a part payment by Mr. Dyrland on his debt to ATB, would not have relieved ATB from complying with the Alberta Limitations Act if Mr. Dyrland had subsequently failed to pay off all his debt.

[48] Should this state of the law change because the debtor goes into bankruptcy? No. In order to be fair and predictable, bankruptcy legislation requires Trustees to treat all creditors of a debtor alike by requiring Trustees to ascertain the legitimacy of a bankrupt's purported obligations. Part of that legitimacy is compliance with the applicable limitations legislation.

[49] It is relatively clear that limitations legislation must be taken into account when a bankrupt first invokes the protection of bankruptcy legislation. On an initial bankruptcy proceeding, the bankrupt's Trustee will embark on an assessment of the bankrupt's alleged debts in which the Trustee will, presumably, deny all claims to which limitations defences apply. It would be unfair, for example, for a Trustee to recognize a bankrupt's claim that she owes a piano teacher for lessons which terminated 10 years ago and to treat that claim on an equal footing with the claim of the guitar retailer who sold the debtor a Fender guitar last month.

[50] In the situation here, if ATB had not, within the two years preceding the appointment of the original Trustee, either received an acknowledgment by Mr. Dyrland of his debt or received a part payment from him on his debt, or commenced an action in debt against Mr. Dyrland, ATB would expect that its claim in the Dyrland bankruptcy would be rejected by Mr. Dyrland's Trustee.

[51] Is there a different outcome in the situation where the original Trustee is discharged? No. As has been discussed above, the statutory stay of proceedings against a bankrupt is lifted when the bankrupt's Trustee has been discharged, even though the bankrupt has not been discharged. The statutory stay on litigation, and its collateral suspension of provincial limitations provisions, is at the core of bankruptcy policy: it helps the bankrupt by ensuring that the satisfaction of obligations can be accomplished in a fair manner that will allow the bankrupt's rehabilitation, and it helps the bankrupt's unsecured creditors by ensuring that they will be treated fairly by means of collective action against all of the bankrupt's property. However, when a Trustee is discharged but the bankrupt is not discharged, the statutory stay is lifted. The effect of the lifting of the stay is that each of the creditors is then entitled to take whatever permissible individual action it sees fit to undertake, even though that action may hinder the bankrupt's eventual rehabilitation and even though by that action it may appropriate to itself all or most of the bankrupt's scarce assets, leaving the other unsecured creditors with fewer, or no, assets against which their claims may be enforced. In the situation here, for example, after the statutory stay was lifted, CRA proceeded to undertake collection activity against Mr. Dyrland which resulted in approximately $50,000.00 of Mr. Dyrland's assets going to CRA and not being shared by all creditors.

[52] It is not unfair that the lifting of the stay requires the creditors to resume their limitations vulnerability: they are in no worse position than they were in prior to the recourse to the bankruptcy regime.

[53] ATB argues that because the BIA does not require that a proven creditor "reprove" its claim every 2 years, a "proven creditor" need not seek a Remedial Order under provincial legislation to maintain its claim in the bankruptcy. With respect, I disagree. While it is true that the BIA does not require creditors to re-file their claims when there has been a gap between the discharge of the original Trustee and the re-appointment of that Trustee or the appointment of a new Trustee, it is also true that the BIA does not anticipate or require stasis during the "gap" period. The most obvious example of that legislative intention is, of course, the lifting of the statutory stay. In the Dyrland bankruptcy, for example, between the date when the original Trustee was discharged and the current Trustee appointed, the assets available for distribution to creditors has diminished by approximately $50,000.00 which, in the circumstances here, could be a very material reduction in the bankrupt's estate. Re Drummie, which in my view correctly states that the BIA does not prevent a Trustee from re-assessing claims as the administration of a bankruptcy goes forward, points the way to a correct purposive interpretation of the BIA. When action is taken by a Trustee pursuant to the Act, the Trustee recognizes those claimants who have a currently valid claim under provincial legislation and applies those claims to the assets which currently form part of the bankrupt's estate. There is therefore no operational conflict between the BIA and the provincial limitations statute. Here, the original Trustee made partial payments on claims which had not yet been statute barred from assets which were then available. Similarly, when the current Trustee takes any action in the bankruptcy, he must assure himself that the claims remain valid and he can only distribute the assets which remain. In this way, the legislative authority of both the Legislature and Parliament are respected.

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[54] In this context, ATB further argues that an admission (and also presumably a part payment) by a Trustee is "akin to and bears the hallmarks of a court judgment". With respect, I disagree. A debtor's admission of a debt, or part payment of a debt is not "akin to a court judgment": it is merely an admission or a part payment which extends the time to start legal proceedings. The actions of a Trustee are, with respect to acknowledgment and part payment not akin to the actions of a court but akin to the actions of the original debtor: just as the original debtor could have acknowledged the debt, and even repaid some of it, so can the Trustee acknowledge and pay; where the Trustee acknowledges and pays, he is merely doing so as the official who steps into the shoes of the debtor. There is no indication in the BIA that Parliament intended to create a new debt or civil claims regime; clearly, it intended only to make the adjustments to existing provincial civil claims law as were necessary to accomplish the policy objectives of bankruptcy legislation. The bankruptcy legislation can fulfill Parliament's aims and objectives by interfering with provincial civil law only to the extent governed by the statutory stay and collateral suspension of the limitations regime; when the stay is lifted, the limitations regime re-engages. Indeed, since legal proceedings objectively determine whether there is a debt, bringing oneself within the legal regime is an important marker in bankruptcy proceedings where the objective is to have a fair and orderly distribution of the bankrupt's assets amongst creditors.

[55] It is true, of course, that within the bankruptcy regime, provincial limitations periods are suspended, and that the Trustee can decide to allow a claim or, subject to court review, deny a claim. That model would have applied to Mr. Dyrland, and the ATB, had Mr. Dyrland's original Trustee not been discharged. [Of course, as the Abramyk decision makes clear, the bankruptcy regime has no necessary application to s. 178(1) claims, such as the s. 178(1)(c) claim here by the Director of Maintenance Enforcement: the Director can file a proof of claim in this bankruptcy and can benefit from a partial distribution, but can pursue the balance of the support claim after Mr. Dyrland is discharged from bankruptcy. However, because the ATB claim does not benefit from the provisions found in s. 178 of the BIA, the principles in the Abramyk decision do not assist the ATB here.] As the legislative lifting of the stay upon the discharge of the original Trustee demonstrates, the discharge of the original Trustee acts as a partial suspension of the bankruptcy regime. Once the original Trustee is discharged, neither the bankrupt's assets nor the status of the claims against those assets is protected.

[56] The ATB also argues that a resumption of a provincial limitations regime where a bankrupt's Trustee has been discharged but where the bankrupt himself has not been discharged would encourage bankrupts to be uncooperative with their Trustees in an effort to have the Trustees discharged. With respect, I disagree. The effect of the bankrupt's original Trustee being discharged is harmful to the bankrupt and could, indeed, be seen as a punishment to the bankrupt for being uncooperative: the bankrupts assets can be seized and liquidated, and new actions can be started against the bankrupt. However, the discharge of the bankrupt's Trustee does not disadvantage the bankrupts' creditors: if the creditor's claim has been rejected by the Trustee, the creditor has the right to have the denial reviewed by a court. If the creditor's claim has been admitted by the Trustee, or if the Trustee has made a part payment on the claim, or both, the creditor is protected by the provincial limitations legislation by the extension of the time for starting legal action to prove the claim and is further benefited by the bankruptcy legislation which suspends the provincial limitations periods until the discharge of the Trustee, so that the creditor benefits from yet a further extension of the time in which to commence legal proceedings. In the ATB example here, ATB's limitation period was extended for a further two years by the original Trustee's part payment on April 30, 2003 but since the limitation period is suspended while the Trustee was still in office, and since the original Trustee was discharged only on January 27, 2004, ATB had two years from that date to commence legal proceedings. In summary, the debtor cannot "take advantage" of the gap to allow their obligations, or some of them, to evaporate during the "gap" period; on the contrary, during the gap period, the bankrupt loses the protection of the bankruptcy legislation and is again at the mercy of all his creditors.

[57] Nor is it unfair that a trustee in the process of being discharged does not have to advise, or warn, the debtor's unsecured creditors that provincial limitations legislation is resuming. There is no obligation on a Trustee to give any kind of advice to a putative claimant with a view to improving their claim. The claimants are, however, advised by the Trustee of any impending discharge; that is sufficient to put the creditors on notice that the full provincial civil law regime is back in operation.

[58] In summary with respect to ATB's arguments against the resumption of the limitations periods, there is no operational conflict between provincial limitations law and federal bankruptcy law. On the contrary, the two systems are well able to work in concert.

[59] The conclusion that the provincial statutory limitations period continues following the discharge of the trustee if the bankrupt has not been discharged raises consideration of two policy issues which also must be considered.

(a) Given the purpose of the BIA to ensure fair and equal treatment of creditors, should a provincial statute such as the Limitations Act be permitted to operate prior to the discharge of the bankrupt, where to do so favours the recovery of certain unsecured creditors over others?

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[60] The short answer to the question is: because the Limitations Act treats all unsecured creditors alike and requires all of them to comply with its requirements, that Act promotes the same objective as does the BIA, i.e. the fair and equal treatment of creditors and is not in policy conflict with the bankruptcy legislation.

[61] Indeed, if a creditor who chose not to incur the cost of commencing an action to meet provincial limitations legislation could obtain all of the same advantages as the creditor who did go to that expense, the BIA would not be treating all creditors alike.

(b) Should the Limitations Act be held to be inapplicable to situations where its operation would alter the priorities contemplated by the BIA?

[62] The short answer to the question is: since the Limitations Act does not alter any priorities contemplated by the BIA, it should continue to be applied.

[63] There is nothing in the BIA to suggest that the validity of claims against a bankrupt should be assessed by any standard other than the standard imposed by provincial civil law. So long as that law is applied consistently, there is no alteration of the priorities established by Parliament in the BIA.

5. Does the inclusion of a debt in a bankrupt's statement of affairs constitute an acknowledgement for the purposes of a limitation period?

[64] The short answer to the question is: No.

[65] Browning Crocker Inc. submits, and I accept, that the listing of a claim in the statement of affairs does not act as an acknowledgment of the debt for the purposes of the Limitations Act.

[66] Indeed, a decision to that effect had been made under the previous statute: Fekete.

[67] The only Alberta case to which I have been referred which considers whether the new provisions as found in s. 9(4) of the Limitations Act change the previous interpretation is Johnson. I agree with the conclusion of O'Ferrall Prov. Ct. J. in that case that "a part payment made n the course of bankruptcy proceedings has the same effect as a part payment made directly by the person liable in respect of the claim". The Johnson court did not have to consider when the limitation period restarts as a result of a part payment in a bankruptcy setting. Although the situation of part payment does not arise on the facts of this case, in my view, where there has been a part payment, the limitation period re-starts when the trustee is discharged; I agree with the applicant's contention that the implicit finding in the Fekete decision is that the limitation period resumes once the trustee has been discharged.

[68] The conclusion in Johnson about the effect of an acknowledgment of a claim in the statement of affairs is, however, just as much a statement of obiter as is my view that a part payment operates to restart the limitation period once the trustee has been discharged. With respect, for the reasons which follow, I disagree with the conclusions concerning the validity of the acknowledgment in a statement of affairs.

[69] My analysis of the status of an acknowledgement of a debt or claim in a statement of affairs must begin with the Ackerman decision where the Saskatchewan Court of Queen's Bench held that although a listing in the statement of affairs satisfied the requirement that an acknowledgment must be in writing and signed by the maker or his agent, in the circumstances there, the acknowledgment had not satisfied the statutory requirement that the acknowledgment be given to a person entitled to receive the same. Section 9(4) of Alberta's Limitation Act removes the requirement that the acknowledgment be made to the creditor or his/her agent in situations where the acknowledgment is made in the course of proceedings under the BIA. For that reason, the Ackerman decision might be thought of as authority for holding that the statement of affairs would constitute an effective acknowledgment for limitations purposes in Alberta.

[70] However, as the Supreme Court of Canada held in Ryan, an "acknowledgment" requires an admission, or acknowledgment of liability; it requires more than acknowledgment of the mere fact that someone has asserted a claim. The Supreme Court relies, in part, on an older English decision, Surrendra, which appears to continue to be good law, having recently been referred to with approval by the English House of Lords in Bradford & Bingley. Indeed, the very proposition that an acknowledgment must be an admission is reflected in s. 8(3) of Alberta's Limitations Act, i.e. that a "claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid". (Emphasis added).

[71] The uniqueness of the bankruptcy situation in this context is that the bankrupt is no longer the "person liable in respect of it": once an assignment in bankruptcy is made, the bankrupt gives up their ability to acknowledge liability since all the bankrupt's property becomes vested in the trustee. Indeed, the law is clear that a trustee is able to disallow a claim that has been listed by a bankrupt in his/her statement of affairs.

[72] In summary, a listing of a claim in a statement of affairs is not an acknowledgment of a claim for the purposes of limitations.

6. With respect to claims that survive a bankruptcy, does the receipt of a dividend in a bankruptcy proceeding constitute a part payment for the purposes of a limitation period?

[73] The short answer to the question is: Yes.

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[74] In Alberta, s. 8(2) of the Limitations Act provides that "if a person liable in respect of a claim . . . makes a part payment in respect of the claim before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the . . . part payment".

(i) Does the payment of a dividend in a bankruptcy proceeding restart the limitation period on the trustee's discharge or on the payment of the dividend?

[75] The short answer to the question is: From the date of the trustee's discharge.

[76] Browning Crocker Inc. argues, and I accept, that the limitation period begins or resumes only upon the discharge of the trustee, not upon the part payment. This result, which is consistent with the implicit finding in the Fekete decision, is required because the part payment does not affect the automatic stay of proceedings which itself suspends the operation of the provincial limitations period. That suspension remains in effect until the Trustee's discharge.

7. What is the status of the ATB claim?

[77] For the purposes of this application, ATB concedes that two years had passed since it knew that an injury for which ATB could have sought a remedial order had occurred, that the injury was attributable to the bankrupt Dyrland, and that the injury warranted bringing a proceeding.

[78] However, ATB argues that it was not required, pursuant to the provisions of Alberta's Limitations Act, to crystallize, perfect or maintain its claim. For ease of reference, the provisions of that Act relating to remedial orders and the usual and the final provincial limitation periods are reproduced here:

1 In this Act,

. . .

(i) "Remedial Order" means a judgment or an Order made by a Court in a civil proceeding requiring a Defendant to comply with a duty or to pay damages for the violation of a right, but excludes

(i) a declaration of rights and duties, legal relations or personal status,

(ii) the enforcement of a Remedial Order,

(iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute or regulation, or

(iv) a Writ of Habeas Corpus.

. . .

3(1) Subject to section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[79] ATB argues that nothing in the BIA requires a proven creditor to further maintain its claim: for example, the Act does not require a creditor to reprove its claim every two years or to reprove its claim upon the reappointment of a previously discharged trustee. I agree. However, that analysis applies only to a matter that remains within the bankruptcy framework; the crux of the situation here is that the discharge of the trustee removes ATB's claim from the bankruptcy framework and places it back within the provincial framework of the collection of debts in which limitation rules apply. In the circumstances here, ATB received a part payment from the original trustee. That part payment restarted the limitation period for ATB. As indicated above, the limitation legislation was, however, suspended while there was a statutory stay applied pursuant to the bankruptcy legislation. However, as soon as the statutory stay was lifted, i.e. when the original trustee was discharged on January 27, 2004, the limitations period started again. Since, as it acknowledged, ATB knew that it could obtain a remedial order but did not do so, its claim is vulnerable to being contested by the debtor's current Trustee based on a limitations defence.

[80] ATB alleges that to invoke provincial legislation in the specific context here creates an operational conflict between provincial and federal legislation, in which case the federal legislation prevails. With respect, I disagree. Bankruptcy legislation does not create a priorities regime amongst unsecured creditors based upon mere filing of a claim. Rather, since bankruptcy legislation does not create a parallel civil claims universe, it presupposes that unsecured claims filed in the bankruptcy will be assessed as to validity according to provincial law. For example, Trustee who was faced with a money claim for discrimination would presumably deny the claim based on Canadian law which establishes that discrimination comes within the exclusive jurisdiction of human rights commissions. A Trustee must assess every claim

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made against the bankrupt's estate in light of the law that applies to that claim. Provincial limitations law is part of the law that applies to each claim. A Trustee can re-assess its position relative to a claim as new circumstances arise: a claim for a Fender guitar may appear perfectly valid until the Trustee uncovers a receipt for the purchase price signed and sealed by the vendor. Similarly, a claim which initially is valid, including compliance with limitations legislation, can become invalid if it fails to maintain validity through compliance with provincial law.

8. What is the status of the CRA claim?

[81] In addition to the information set out in the Background section above, the following facts should be noted in connection with CRA's claim:

- based on Alberta case law, including discussed above, after Mr. Dyrland's original Trustee was discharged, CRA concluded that the statutory stay on collection action was lifted, and commenced action to collect Mr. Dyrland's tax debt;
- CRA's collection action included various T1 transfers, 22 wage garnishments and one garnishment of $23,000.00 held on behalf of Mr. Dyrland by a law firm;
- in total, CRA collected a little over $50,000.00 through these various collection techniques;
- the final collection action undertaken by CRA occurred on January 31, 2006;
- Mr. Dyrland did not, prior to March 4, 2004, obtain a declaration that his tax debts were "statute barred".

[82] The limitations period covering CRA is contained in s. 222 of the Income Tax Act; the limitations contained in Alberta's Limitations Act cannot over-ride the federal Act: Markevich.

[83] Pursuant to s. 222, CRA can enforce tax debts that were prescribed prior to March 4, 2004: Gibson, Collins.

[84] In the result, CRA's claim is not statute barred. The limitations period on the CRA claim would normally expire on January 30, 2016, but will be extended by the number of days that Mr. Dyrland remains in bankruptcy and will be further extended if CRA is able to take collection action again either because the trustee has been discharged again or if CRA obtains leave under s. 69.4 of the BIA to initiate such action.

9. Costs

[85] In light of the novelty of the arguments raised on this motion, the court makes no award of costs.

Heard on the 13th day of June, 2008.

Dated at the City of Edmonton, Alberta this 6th day of August, 2008.

J.B. Veit
J.C.Q.B.A.

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Appearances:
Bryan P. Maruyama, Parlee McLaws LLP
for Browning Crocker Inc., Trustee in the
Estate of Ricky Steven Dyrland
Geoffrey N. Edgar, Miller Thomson LLP
for Alberta Treasury Branches
Daniel G. Segal, and
Maria Teeling, Department of Justice
for Canada Revenue Agency

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Appendix A
April 23, 2008
I wish to thank counsel for their excellent briefs and their candid argument in relation to this matter. Having reviewed the authorities and considered the argument presented, it is plain to me that the Limitations Act, R.S.A. 2000, c. L-12 does not have any application given the facts and circumstances of this bankruptcy. I agree with counsel representing Canada Revenue Agency that the limitations applicable to their claim arise under the Income Tax Act and therefore also have no application.
Accordingly, the Trustee may distribute funds in accordance with the provisions of the Bankruptcy and Insolvency Act except that the creditors Alberta Treasury Branches and Canada Revenue Agency shall each be entitled to $1,000.00 in costs to be paid in priority to the claims of the general creditors.

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Appendix B
Limitations Act, R.S.A. c. L-12
ss. 3, 8, 9
Limitation periods
3(1) Subject to section 11, if a claimant does not seek a remedial order within
(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
(i) that the injury for which the claimant seeks a remedial order had occurred,
(ii) that the injury was attributable to conduct of the defendant, and
(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
or
(b) 10 years after the claim arose,
whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.
(2) The limitation period provided by subsection (1)(a) begins
(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a),
(b) against a principal when either
(i) the principal first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), or
(ii) an agent with a duty to communicate the knowledge prescribed in subsection (1)(a) to the principal, first actually acquired that knowledge,
and
(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:
(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), if the deceased owner acquired the knowledge more than 2 years before the deceased owner's death;
(ii) when the representative was appointed, if the representative had the knowledge prescribed in subsection (1)(a) at that time;
(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a), if the representative acquired the knowledge after being appointed.
(3) For the purposes of subsection (1)(b),
(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;
(b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;
(c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;
(d) a claim in respect of a proceeding under the Fatal Accidents Act arises when the conduct that causes the death, on which the claim is based, occurs;
(e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever first occurs;
(f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.
(4) The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 69 of the Law of Property Act.
(5) Under this section,
(a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a), and

(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b).
(6) The re-entry of a claimant to real property in order to recover possession of that real property is effective only if it occurs prior to the end of the 10-year limitation period provided by subsection (1)(b).
(7) If a person in possession of real property has given to the person entitled to possession of the real property an acknowledgment in writing of that person's title to the real property prior to the expiry of the 10-year limitation period provided by subsection (1)(b),

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(a) possession of the real property by the person who has given the acknowledgment is deemed, for the purposes of this Act, to have been possession by the person to whom the acknowledgment was given, and
(b) the right of the person to whom the acknowledgment was given, or of a successor in title to that person, to take proceedings to recover possession of the real property is deemed to have arisen at the time at which the acknowledgment, or the last of the acknowledgments if there was more than one, was given.
(8) If the right to recover possession of real property first accrued to a predecessor in title of the claimant from whom the claimant acquired the title as a donee, proceedings to recover possession of the real property may not be taken by the claimant except within 10 years after the right accrued to that predecessor.
RSA 2000 cL-12 s3;2007 c22 s1
Acknowledgment and part payment
8(1) In this section, "claim" means a claim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income and a share of estate property, and interest on any of them.
(2) Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the acknowledgment or part payment.
(3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid, but an acknowledgment is effective
(a) whether or not a promise to pay can be implied from it, and
(b) whether or not it is accompanied with a refusal to pay.
(4) When a claim is for the recovery of both a primary sum and interest on it, an acknowledgment of either obligation, or a part payment in respect of either obligation, is an acknowledgment of, or a part payment in respect of, the other obligation.
1996 cL-15.1 s8
Persons affected by exceptions for agreement, acknowledgment and part payment
9(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected.
(2) An agreement made by or with an agent has the same effect as if made by or with the principal.
(3) An acknowledgment or a part payment made by or to an agent has the same effect as if it were made by or to the principal.
(4) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made
(a) with or to the person,
(b) with or to a person through whom the person derives a claim, or
(c) in the course of proceedings or a transaction purporting to be pursuant to the Bankruptcy and Insolvency Act (Canada).
(5) A person is bound by an agreement, an acknowledgment or a part payment only if
(a) the person is a maker of it, or
(b) the person is liable in respect of a claim
(i) as a successor of a maker, or
(ii) through the acquisition of an interest in property from or through a maker
who was liable in respect of the claim.
1996, c. L-15.1, s.9

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Appendix C

Extracts from Alberta Institute of Law Research and Reform, Limitations, Report for Discussion No. 4, at pp. 175-177

(a) Federal law

3.10 In Canada, by way of example, actions for divorce, actions with respect to patents, copyrights and trade marks, and maritime law actions arise under substantive federal law. Some areas of law are subject to exclusive federal jurisdiction. Although Parliament can subject claims in these areas to applicable provincial limitations law, the extent to which it has done this is sometimes uncertain. In other areas of law there may be dual legislative jurisdiction, with federal jurisdiction paramount. Federal legislation on a subject would preempt that subject area. However, the extent to which federal legislation on a subject actually occupies an entire subject area, and hence preempts provincial legislation, is sometimes uncertain.

3.11 We want to make it certain that any claim which arose under substantive federal law, and which is brought before an Alberta court, is subject to the new Alberta Act to the extent that the Act can be made applicable to it. Our reason is that we want to insure that a claim which is not in fact subject to limitation provisions under federal law is not left in a limitations hiatus because Alberta failed to assert a legislative power which it had.

3.12 It may be that a provision applying the new Alberta Act to a claim not otherwise excluded "to the extent that the claim is subject to the legislative jurisdiction of the Province" would be sufficient. Literally, such a provision would include a claim arising under substantive federal law. We think, however, that an express inclusive reference to any claim arising under federal law is preferable.

(b) Federal courts

3.13 Similarly, we want to make it certain that any claim which arose within Alberta, and which is brought before a federal court, is subject to the new Alberta Act to the extent that the Act can be made applicable to it. For this purpose the crucial point is that the claim arose in Alberta; it makes no difference whether the claim arose under federal substantive law or Alberta substantive law, or whether the claim is brought before a federal court in Alberta or somewhere else in Canada. Again, we want to insure that a claim which arose in Alberta and which is brought before a federal court will not be in a limitations void because neither jurisdiction applied limitation provisions to it.

3.14 It seems clear that Parliament has granted a province legislative power to apply its limitations law to a claim in this situation, for subsection 38(1) of the Federal Court Act provides:

38.(1) Except as expressly provided by any other Act, the law relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in such province. . . .

It may be that this subsection does apply Alberta limitations law to the claims we are considering, and that no express application provision in the new Alberta Act is needed. However, this is a technical field of law, and a court might hold that Alberta limitations law applies in this situation only if Alberta legislation makes it applicable. We prefer to avoid any possible uncertainty on this issue.

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Appendix D
Bankruptcy and Insolvency Act, S.C. 1992, c. 1 and S.C. 1992, c. 27, as amended
ss. 69, 69.1, 69.2, 69.3
Stay of proceedings — notice of intention
69. (1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the filing of a notice of intention under section 50.4 by an insolvent person,
(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on
(i) the insolvent person's insolvency,
(ii) the default by the insolvent person of an obligation under the security agreement, or
(iii) the filing by the insolvent person of a notice of intention under section 50.4,
the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,
(c) Her Majesty in right of Canada may not exercise Her rights under
(i) subsection 224(1.2) of the Income Tax Act, or
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that
(A) refers to subsection 224(1.2) of the Income Tax Act, and
(B) provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and
(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the Income Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,
until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.
Limitation
(2) The stays provided by subsection (1) do not apply
(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;
(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;
(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or
(d) to prevent a creditor who holds security on aircraft objects . . .
Limitation
(3) A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if
(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the notice of intention and could be subject to a demand under

(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or

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(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or
(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under
(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.
R.S., 1985, c. B-3, s. 69; 1992, c. 27, s. 36; 1997, c. 12, s. 62; 2000, c. 30, s. 145; 2005, c. 3, s. 12.
Stay of proceedings — Division I proposals
69.1 (1) Subject to subsections (2) to (6) and sections 69.4 and 69.5, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,
(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;
(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on
(i) the insolvent person's insolvency,
(ii) the default by the insolvent person of an obligation under the security agreement, or
(iii) the filing of a notice of intention under section 50.4 or of a proposal under subsection 62(1) in respect of the insolvent person,
the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as the insolvent person would otherwise have, has any force or effect until the trustee has been discharged or the insolvent person becomes bankrupt;
(c) Her Majesty in right of Canada may not exercise Her rights under subsection 224(1.2) of the Income Tax Act or any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, until
(i) the trustee has been discharged,
(ii) six months have elapsed following court approval of the proposal, or
(iii) the insolvent person becomes bankrupt; and
(d) Her Majesty in right of a province may not exercise Her rights under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

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(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,
in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation, until
(iii) the trustee has been discharged,
(iv) six months have elapsed following court approval of the proposal, or
(v) the insolvent person becomes bankrupt.
Limitation
(2) The stays provided by subsection (1) do not apply
(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the proposal was filed from dealing with those assets;
(b) unless the secured creditor otherwise agrees, to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before
(i) a notice of intention was filed in respect of the insolvent person under section 50.4, or
(ii) the proposal was filed, if no notice of intention under section 50.4 was filed
from enforcing that security;
(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or
(d) to prevent a creditor who holds security on aircraft objects . . .
Limitation
(3) A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if
(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the proposal and could be subject to a demand under
(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or
(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under
(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.
Limitation
(4) If, by virtue of subsection 69(3), the stay provided by paragraph 69(1)(c) or (d) does not apply or terminates, the stay provided by paragraph (1)(c) or (d) of this section does not apply.

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Secured creditors to whom proposal not made
(5) Subject to sections 79 and 127 to 135 and subsection 248(1), the filing of a proposal under subsection 62(1) does not prevent a secured creditor to whom the proposal has not been made in respect of a particular security from realizing or otherwise dealing with that security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.
Where secured creditors vote against proposal
(6) Subject to sections 79 and 127 to 135 and subsection 248(1), where secured creditors holding a particular class of secured claim vote for the refusal of a proposal, a secured creditor holding a secured claim of that class may henceforth realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.
1992, c. 27, s. 36; 1994, c. 26, s. 8(E); 1997, c. 12, s. 63; 2000, c. 30, s. 146; 2005, c. 3, s. 13.
Stay of proceedings — consumer proposals
69.2 (1) Subject to subsections (2) to (4) and sections 69.4 and 69.5, on the filing of a consumer proposal under subsection 66.13(2) or of an amendment to a consumer proposal under subsection 66.37(1) in respect of a consumer **debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action,** execution or other proceedings, for the recovery of a claim provable in bankruptcy until
(a) the consumer proposal or the amended consumer proposal, as the case may be, has been withdrawn, refused, annulled or deemed annulled; or
(b) the administrator has been discharged.
Exception
(2) Subsection (1) does not apply where the consumer proposal, other than an amendment to a consumer proposal referred to in section 66.37, is filed within six months after the filing of a previous consumer proposal in respect of the same debtor.
Idem
3) Subsection (1) does not apply where an amendment to a consumer proposal is filed within six months after the filing of a previous amendment to the same consumer proposal.
Secured creditors
(4) Subject to sections 79 and 127 to 135 and subsection 248(1), the filing of a consumer proposal under subsection 66.13(2) does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his security, except as follows:
(a) in the case of a security for a debt that is due at the date of the approval or deemed approval of the consumer proposal or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and
(b) in the case of a security for a debt that does not become due until more than six months after the date of the approval or deemed approval of the consumer proposal, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or act, or law, creating the security.
Exception
(5) No order may be made under subsection (4) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.
1992, c. 27, s. 36; 1997, c. 12, s. 64; 2004, c. 25, s. 43(E); 2007, c. 29, s. 95.
Stay of proceedings — bankruptcy
69.3 (1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has **any remedy against the debtor or the debtor's property, or may commence or continue any action, execution or other** proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.
Secured creditors
(2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his security, except as follows:

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(a) in the case of a security for a debt that is due at the date the bankrupt became bankrupt or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and
(b) in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.
Exception
(2.1) No order may be made under subsection (2) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.
Secured creditors — aircraft objects
(3) The bankruptcy of a debtor does not prevent a creditor who holds security on aircraft objects . . .
1992, c. 27, s. 36; 2005, c. 3, s. 14; 2007, c. 29, s. 96.

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Appendix E
Income Tax Act, R.S.C. 1985 (5th Supp.) c. 1, as amended
s. 222
222 (1) Definitions
The following definitions apply in this section.
"action" means an action to collect a tax debt of a taxpayer and includes a proceeding in a court and anything done by the Minister under subsection 129(2), 131(3), 132(2) or 164(2), section 203 or any provision of this Part.
"tax debt" means any amount payable by a taxpayer under this Act.
222 (2) Debts to Her Majesty
A tax debt is a debt due to Her Majesty and is recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.
222 (3) No actions after limitation period
The Minister may not commence an action to collect a tax debt after the end of the limitation period for the collection of the tax debt.
222 (4) Limitation period
The limitation period for the collection of a tax debt of a taxpayer
(a) begins
(i) if a notice of assessment, or a notice referred to in subsection 226(1), in respect of the tax debt is mailed to or served on the taxpayer, after March 3, 2004, on the day that is 90 days after the day on which the last one of those notices is mailed or served, and
(ii) if subparagraph (i) does not apply and the tax debt was payable on March 4, 2004, or would have been payable on that date but for a limitation period that otherwise applied to the collection of the tax debt, on March 4, 2004; and
(b) ends, subject to subsection (8), on the day that is 10 years after the day on which it begins.

222 (5) Limitation period restarted
The limitation period described in subsection (4) for the collection of a tax debt of a taxpayer restarts (and ends, subject to subsection (8), on the day that is 10 years after the day on which it restarts) on any day, before it would otherwise end, on which
(a) the taxpayer acknowledges the tax debt in accordance with subsection (6);
(b) the Minister commences an action to collect the tax debt; or
(c) the Minister, under subsection 159(3) or 160(2) or paragraph 227(10)(a), assesses any person in respect of the tax debt.
222 (6) Acknowledgment of tax debts
A taxpayer acknowledges a tax debt if the taxpayer
(a) promises, in writing, to pay the tax debt;
(b) makes a written acknowledgement of the tax debt, whether or not a promise to pay can be inferred from the acknowledgement and whether or not it contains a refusal to pay; or
(c) makes a payment, including a purported payment by way of a negotiable instrument that is dishonoured, on account of the tax debt.
222 (7) Agent or legal representative
For the purposes of this section, an acknowledgement made by a taxpayer's agent or legal representative has the same effect as if it were made by the taxpayer.
222 (8) Extension of limitation period
In computing the day on which a limitation period ends, there shall be added the number of days on which one or more of the following is the case:
(a) the Minister may not, because of any of subsections 225.1(2) to (5), take any of the actions described in subsection 225.1(1) in respect of the tax debt;
(b) the Minister has accepted and holds security in lieu of payment of the tax debt;
(c) if the taxpayer was resident in Canada on the applicable date described in paragraph (4)(a) in respect of the tax debt, the taxpayer is non-resident; or
(d) an action that the Minister may otherwise take in respect of the tax debt is restricted or not permitted under any provision of the Bankruptcy and Insolvency Act, of the Companies' Creditors Arrangement Act or of the Farm Debt Mediation Act.
222 (9) Bar to claims

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Notwithstanding any law of Canada or a province, Her Majesty is not liable for any claim that arises because the Minister collected a tax debt after the end of any limitation period that applied to the collection of the tax debt and before March 4, 2004.

222 (10) Orders after March 3, 2004 and before effect

Notwithstanding any order or judgment made after March 3, 2004 that declares a tax debt not to be payable by a taxpayer, or that orders the Minister to reimburse to a taxpayer a tax debt collected by the Minister, because a limitation period that applied to the collection of the tax debt ended before royal assent to any measure giving effect to this section, the tax debt is deemed to have become payable on March 4, 2004.

Newfoundland and Labrador *v.* AbitibiBowater Inc., 2012 SCC 67, [2012] 3 S.C.R. 443 - Environment Orders as a Form of Claim

Her Majesty The Queen in Right of the Province of Newfoundland and Labrador *Appellant*

v.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders) *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty The Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada *Interveners*

Indexed as: Newfoundland and Labrador *v.* AbitibiBowater Inc. 2012 SCC 67

File No.: 33797.

2011: November 16; 2012: December 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and Insolvency — Provable claims — Contingent claims — Corporation filing for insolvency protection — Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order — Whether environmental protection orders are monetary claims that can be compromised in corporate restructuring under CCAA — Whether CCAA is ultra vires or constitutionally inapplicable by permitting court to determine whether environmental order is a monetary claim.

A was involved in industrial activity in Newfoundland and Labrador (the "Province"). In a period of general financial distress, it ended its last operation there, filed for insolvency protection in the United States and obtained a stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Province subsequently issued five orders under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, requiring A to submit remediation action plans for five industrial sites it had occupied, three of which had been expropriated by the Province, and to complete the remediation actions. The Province also brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to A's proposed reorganization did not bar the Province from enforcing the environmental protection orders. The Province argued that the environmental protection orders were not "claims" under the *CCAA* and therefore could not be stayed and subject to a claims procedure order. It further argued that Parliament lacked the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that were validly made in the exercise of a provincial power. A contested the motion, arguing that the orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order. The *CCAA* court dismissed the Province's motion. The Court of Appeal denied the Province leave to appeal.

Held (McLachlin C.J. and LeBel J. dissenting): The appeal should be dismissed.

Per Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: Not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceedings. In the environmental context, the *CCAA* court

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must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims or orders on the basis of form alone. If the order is not framed in monetary terms, the *CCAA* court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process in a case such as the one at bar. First, there must be a debt, a liability or an obligation to a creditor. In this case, the first criterion was met because the Province had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred as of a specific time. This requirement was also met since the environmental damage had occurred before the time of the *CCAA* proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. The present case turns on this third requirement, and the question is whether orders that are not expressed in monetary terms can be translated into such terms.

A claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In the context of an environmental protection order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim. If there is sufficient certainty in this regard, the court will conclude that the order can be subject to the insolvency process.

Certain indicators can guide the *CCAA* court in this assessment, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. The analysis is grounded in the facts of each case. In this case, the *CCAA* court's assessment of the facts, particularly its finding that the orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

Subjecting such orders to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay a debt. It merely ensures that the Province's claim will be paid in accordance with insolvency legislation. Full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors and replace the polluter-pay principle with a "third-party-pay" principle. Moreover, to subject environmental protection orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities. Reorganization made necessary by insolvency is hardly ever a deliberate choice, and when the risks corporations engage in materialize, the dire costs are borne by almost all stakeholders.

Because the provisions on the assessment of claims in insolvency matters relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. The interjurisdictional immunity doctrine is also inapplicable, because a finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities; its claim is simply subject to the insolvency process.

Per McLachlin C.J. (dissenting): Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They may only be reduced to monetary claims which can be compromised under *CCAA* proceedings in narrow circumstances where a province has done the remediation work, or where it is "sufficiently certain" that it will do the work. This last situation is regulated by the provisions of the *CCAA* for contingent or future claims. The test is whether there is a likelihood approaching certainty that the province will do the work. "Likelihood approaching certainty" recognizes that the government's decision is discretionary and may be influenced by competing political and social considerations, which are not normally subject to judicial consideration. Insofar as this determination touches on the division of powers, I am in substantial agreement with Deschamps J.

Apart from the orders related to the work done or tendered for on the Buchans property, the orders for remediation in this case are not claims that can be compromised. The *CCAA* maintains the fundamental distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy. The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. His failure to consider that question requires this Court to answer it in his stead. There is nothing on the record to support the view that the Province will move to remediate the properties. It has not been shown that the contamination poses immediate health risks which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not

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been shown that the Province has set aside or even contemplated setting aside money for this work. The Province retained a number of options, including leaving the sites contaminated, or calling on Abitibi to remediate following its emergence from restructuring. There is nothing in the record that makes it more probable, much less establishes "sufficient certainty", that the Province will opt to do the work itself.

Per LeBel J. (dissenting): The test proposed by the Chief Justice according to which the evidence must show that there is a "likelihood approaching certainty" that the Province would remediate the contamination itself is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J. best reflects how both the common law and the civil law view and deal with contingent claims. Applying that test, the appeal should be allowed on the basis that there is no evidence that the Province intends to perform the remedial work itself.

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By Deschamps J.

Distinguished: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45; **referred to:** *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624.

By McLachlin C.J. (dissenting)

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 81 Alta. L.R. (2d) 45; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley (Re)* (1995), 129 D.L.R. (4th) 105; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52; *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385; *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138; *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75; *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

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APPEAL from a judgment of the Quebec Court of Appeal (Chamberland J.A.), 2010 QCCA 965, 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, [2010] Q.J. No. 4579 (QL), 2010 CarswellQue 4782, dismissing the appellant's motion for leave to appeal a decision of Gascon J., 2010 QCCS 1261, 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, [2010] Q.J. No. 4006 (QL), 2010 CarswellQue 2812. Appeal dismissed, McLachlin C.J. and LeBel J. dissenting.

David R. Wingfield, *Paul D. Guy* and *Philip Osborne*, for the appellant.

Sean F. Dunphy, *Nicholas McHaffie*, *Joseph Reynaud* and *Marc B. Barbeau*, for the respondents.

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Christopher Rupar and *Marianne Zoric*, for the intervener the Attorney General of Canada.

Josh Hunter, *Robin K. Basu*, *Leonard Marsello* and *Mario Faieta*, for the intervener the Attorney General of Ontario.

R. Richard M. Butler, for the intervener the Attorney General of British Columbia.

Roderick Wiltshire, for the intervener the Attorney General of Alberta.

Elizabeth J. Rowbotham, for the intervener Her Majesty The Queen in Right of British Columbia.

Robert I. Thornton, *John T. Porter* and *Rachelle F. Moncur*, for the intervener Ernst & Young Inc., as Monitor.

William A. Amos, *Anastasia M. Lintner*, *Hugh S. Wilkins* and *R. Graham Phoenix*, for the intervener the Friends of the Earth Canada.

The judgment of Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

[1] DESCHAMPS J. — The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[2] Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim.

[3] In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

[4] The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contaminated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1, at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

I. Facts and Procedural History

[5] For over 100 years, AbitibiBowater Inc. and its affiliated or predecessor companies (together, "Abitibi") were involved in industrial activity in Newfoundland and Labrador. In 2008, Abitibi announced the closure of a mill that was its last operation in that province.

[6] Within two weeks of the announcement, the Province passed the *Abitibi-Consolidated Rights and Assets Act*, S.N.L. 2008, c. A-1.01 ("*Abitibi Act*"), which immediately transferred most of Abitibi's property in Newfoundland and Labrador to the Province and denied Abitibi any legal remedy for this expropriation.

[7] The closure of its mill in Newfoundland and Labrador was one of many decisions Abitibi made in a period of general financial distress affecting its activities both in the United States and in Canada. It filed for insolvency protection in the United States on April 16, 2009. It also sought a stay of proceedings under the *CCAA* in the Superior Court of Quebec, as its Canadian head office was located in Montréal. The *CCAA* stay was ordered on April 17, 2009.

[8] In the same month, Abitibi also filed a notice of intent to submit a claim to arbitration under NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2) for losses resulting from the *Abitibi Act*, which, according to Abitibi, exceeded $300 million.

[9] On November 12, 2009, the Province's Minister of Environment and Conservation ("Minister") issued five orders (the "*EPA* Orders") under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). The *EPA* Orders required Abitibi to submit remediation action plans to the Minister for five industrial sites, three of which had been

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expropriated, and to complete the approved remediation actions. The *CCAA* judge estimated the cost of implementing these plans to be from "the mid-to-high eight figures" to "several times higher" (para. 81).

[10] On the day it issued the *EPA* Orders, the Province brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to Abitibi's proposed reorganization did not bar the Province from enforcing the *EPA* Orders. The Province argued — and still argues — that non-monetary statutory obligations are not "claims" under the *CCAA* and hence cannot be stayed and be subject to a claims procedure order. It further submits that Parliament lacks the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that are validly made in the exercise of a provincial power.

[11] Abitibi contested the motion and sought a declaration that the *EPA* Orders were stayed and that they were subject to the claims procedure order. It argued that the *EPA* Orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order.

[12] Gascon J. of the Quebec Superior Court, sitting as a *CCAA* court, dismissed the Province's motion. He found that he had the authority to characterize the orders as "claims" if the underlying regulatory obligations "remain[ed], in a particular fact pattern, truly financial and monetary in nature" (para. 148). He declared that the *EPA* Orders were stayed by the initial stay order and were not subject to the exception found in that order. He also declared that the filing by the Province of any claim based on the *EPA* Orders was subject to the claims procedure order, and reserved to the Province the right to request an extension of time to assert a claim under the claims procedure order and to Abitibi the right to contest such a request.

[13] In the Court of Appeal, Chamberland J.A. denied the Province leave to appeal (2010 QCCA 965, 68 C.B.R. (5th) 57). In his view, the appeal had no reasonable chance of success, because Gascon J. had found as a fact that the *EPA* Orders were financial or monetary in nature. Chamberland J.A. also found that no constitutional issue arose, given that the Superior Court judge had merely characterized the orders in the context of the restructuring process; the judgment did not "'immunise' Abitibi from compliance with the EPA Orders" (para. 33). Finally, he noted that Gascon J. had reserved the Province's right to request an extension of time to file a claim in the *CCAA* process.

II. Positions of the Parties

[14] The Province argues that the *CCAA* court erred in interpreting the relevant *CCAA* provisions in a way that nullified the *EPA*, and that the interpretation is inconsistent with both the ancillary powers doctrine and the doctrine of interjurisdictional immunity. The Province further submits that, in any event, the *EPA* Orders are not "claims" within the meaning of the *CCAA*. It takes the position that "any plan of compromise and arrangement that Abitibi might submit for court approval must make provision for compliance with the *EPA* Orders" (A.F., at para. 32).

[15] Abitibi contends that the factual record does not provide a basis for applying the constitutional doctrines. It relies on the *CCAA* court's findings of fact, particularly the finding that the Province's intent was to establish the basis for a monetary claim. Abitibi submits that the true issue is whether a province that has a monetary claim against an insolvent company can obtain a preference against other unsecured creditors by exercising its regulatory power.

III. Constitutional Questions

[16] At the Province's request, the Chief Justice stated the following constitutional questions:

1. Is the definition of "claim" in s. 2(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this definition includes statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

2. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to bar or extinguish statutory duties to which the debtor is subject pursuant to s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

3. Is s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, *ultra vires* the Parliament of Canada or constitutionally inapplicable to the extent this section gives courts jurisdiction to review the exercise of ministerial discretion under s. 99 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2?

[17] I note that the question whether a *CCAA* court has constitutional jurisdiction to stay a provincial order that is *not* a monetary claim does not arise here, because the stay order in this case did not affect non-monetary orders. However, the question may arise in other cases. In 2007, Parliament expressly gave *CCAA* courts the power to stay regulatory orders that are not monetary claims by amending the *CCAA* to include the current version of s. 11.1(3) (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, s. 65) (the "2007 amendments"). Thus, future cases may give courts the opportunity to consider the question raised by the Province in an appropriate factual

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context. The only constitutional question that needs to be answered in this case concerns the jurisdiction of a *CCAA* court to determine whether an environmental order that is not framed in monetary terms is in fact a monetary claim.

[18] Processing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation, which falls under a head of power attributed to Parliament. Rules concerning the assessment of creditors' claims, such as the determination of whether a creditor has a monetary claim, relate directly to the equitable and orderly treatment of creditors in an insolvency process. There is no need to perform a detailed analysis of the pith and substance of the provisions on the assessment of claims in insolvency matters to conclude that the federal legislation governing the characterization of an order as a monetary claim is valid. Because the provisions relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process.

[19] What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province's choice of order should not be scrutinized to determine whether the form chosen is consistent with the order's true purpose as revealed by the Province's own actions. If the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process. Environmental claims do not have a higher priority than is provided for in the *CCAA*. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453). Environmental claims are given a specific, and limited, priority under the *CCAA*. To exempt orders which are in fact monetary claims from the *CCAA* proceedings would amount to conferring upon provinces a priority higher than the one provided for in the *CCAA*.

IV. Claims Under the *CCAA*

[20] Several provisions of the *CCAA* have been amended since Abitibi filed for insolvency protection. Except where otherwise indicated, the provisions I refer to are those that were in force when the stay was ordered.

[21] One of the central features of the *CCAA* scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims against the debtor's assets in order to maintain the *status quo* during negotiations with the creditors. When such negotiations are successful, the creditors typically accept less than the full amounts of their claims. Claims have not necessarily accrued or been liquidated at the outset of the insolvency proceeding, and they sometimes have to be assessed in order to determine the monetary value that will be subject to compromise.

[22] Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

> **12.** (1) [Definition of "claim"] For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.
>
> (2) [Determination of amount of claim] For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (*a*) the amount of an unsecured claim shall be the amount
>
> . . .
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; . . .

[23] Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

> "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

[24] This definition is completed by s. 121(1) of the *BIA*:

> **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[25] Sections 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

> **121.** . . .

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(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135. . . .

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

[27] The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

[28] The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

11.8 . . .

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

[29] The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases, the damage continues to be sustained after the reorganization has been completed.

[30] With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

[31] However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update" (1998), 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

[32] Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Evidence of the Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

[33] If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) of the *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

[34] Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil*

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Code of Québec, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

[35] The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

[36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[37] The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

[38] Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

[39] Having highlighted three requirements for finding a claim to be provable in a *CCAA* process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

[40] These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24. This objection demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third-party-pay" principle in place of the polluter-pay principle.

[41] Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colourful analogy of two American scholars, "Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199, at p. 1200).

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[42] Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities.

[43] And the power to determine whether an order is a provable claim does not mean that the court will necessarily conclude that the order before it will be subject to the *CCAA* process. In fact, the *CCAA* court in the case at bar recognized that orders relating to the environment may or may not be considered provable claims. It stayed only those orders that were monetary in nature.

[44] The Province also argues that courts have in the past held that environmental orders cannot be interpreted as claims when the regulatory body has not yet exercised its power to assert a claim framed in monetary terms. The Province relies in particular on *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.), and its progeny. In *Panamericana*, the Alberta Court of Appeal held that a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings. The court found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim.

[45] The first answer to the Province's argument is that courts have never shied away from putting substance ahead of form. They can determine whether the order is in substance monetary.

[46] The second answer is that the provisions relating to the assessment of claims, particularly those governing contingent claims, contemplate instances in which the quantum is not yet established when the claims are filed. Whether, in the regulatory context, an obligation always entails the existence of a correlative right has been discussed by a number of scholars. Various theories of rights have been put forward (see W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (new ed. 2001); D. N. MacCormick, "Rights in Legislation", in P. M. S. Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (1977), 189). However, because the Province issued the orders in this case, it would be recognized as a creditor in respect of a right no matter which of these theories was applied. As interesting as the discussion may be, therefore, I do not need to consider which theory should prevail. The real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged. Rather, the question is whether it is sufficiently certain that the regulatory body will perform the remediation work and, as a result, have a monetary claim.

[47] The third answer to the Province's argument is that insolvency legislation has evolved considerably over the two decades since *Panamericana*. At the time of *Panamericana*, none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in *Panamericana* (*An Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27, s. 9, amending s. 14 of the *BIA*). The 1997 amendments provided additional protection to trustees and monitors (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12). The 2007 amendments made it clear that a *CCAA* court has the power to determine that a regulatory order may be a claim and also provided criteria for staying regulatory orders (s. 65, amending the *CCAA* to include the current version of s. 11.1). The purpose of these amendments was to balance the creditor's need for fairness against the debtor's need to make a fresh start.

[48] Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

V. Application

[49] I now turn to the application of the principles discussed above to the case at bar. This case does not turn on whether the Province is the creditor of an obligation or whether damage had occurred as of the relevant date. Those requirements are easily satisfied, since the Province had identified itself as a creditor by resorting to *EPA* enforcement mechanisms and since the damage had occurred before the time of the *CCAA* proceedings. Rather, the issue centres on the third requirement: that the orders meet the criterion for admission as a pecuniary claim. The claim was contingent to the extent that the Province had not yet formally exercised its power to ask for the payment of money. The question is whether it was sufficiently certain that the orders would eventually result in a monetary claim. To the *CCAA* judge, there was no doubt that the answer was yes.

[50] The Province's exercise of its legislative powers in enacting the *Abitibi Act* created a unique set of facts that led to the orders being issued. The seizure of Abitibi's assets by the Province, the cancellation of all outstanding water and hydroelectric contracts between Abitibi and the Province, the cancellation of pending legal proceedings by

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Abitibi in which it sought the reimbursement of several hundreds of thousands of dollars, and the denial of any compensation for the seized assets and of legal redress are inescapable background facts in the judge's review of the *EPA* Orders.

[51] The *CCAA* judge did not elaborate on whether it was sufficiently certain that the Minister would perform the remediation work and therefore make a monetary claim. However, most of his findings clearly rest on a positive answer to this question. For example, his finding that "[i]n all likelihood, the pith and substance of the EPA Orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAFTA claims for compensation" (para. 178), is necessarily based on the premise that the Province would most likely perform the remediation work. Indeed, since monetary claims must, both at common law and in civil law, be mutual for set-off or compensation to operate, the Province had to have incurred costs in doing the work in order to have a claim that could be set off against Abitibi's claims.

[52] That the judge relied on an implicit finding that the Province would most likely perform the work and make a claim to offset its costs is also shown by the confirmation he found in the declaration by the Premier that the Province was attempting to assess the cost of doing remediation work Abitibi had allegedly left undone and that in the Province's assessment, "at this point in time, there would not be a net payment to Abitibi" (para. 181).

[53] The *CCAA* judge's reasons not only rest on an implicit finding that the Province would most likely perform the work, but refer explicitly to facts that support this finding. To reach his conclusion that the *EPA* Orders were monetary in nature, the *CCAA* judge relied on the fact that Abitibi's operations were funded through debtor-in-possession financing and its access to funds was limited to ongoing operations. Given that the *EPA* Orders targeted sites that were, for the most part, no longer in Abitibi's possession, this meant that Abitibi had no means to perform the remediation work during the reorganization process.

[54] In addition, because Abitibi lacked funds and no longer controlled the properties, the timetable set by the Province in the *EPA* Orders suggested that the Province never truly intended that Abitibi was to perform the remediation work required by the orders. The timetable was also unrealistic. For example, the orders were issued on November 12, 2009 and set a deadline of January 15, 2010 to perform a particular act, but the evidence revealed that compliance with this requirement would have taken close to a year.

[55] Furthermore, the judge relied on the fact that Abitibi was not simply designated a "person responsible" under the *EPA*, but was intentionally targeted by the Province. The finding that the Province had targeted Abitibi was drawn not only from the timing of the *EPA* Orders, but also from the fact that Abitibi was the only person designated in them, whereas others also appeared to be responsible — in some cases, primarily responsible — for the contamination. For example, Abitibi was ordered to do remediation work on a site it had surrendered more than 50 years before the orders were issued; the expert report upon which the orders were based made no distinction between Abitibi's activities on the property, on which its source of power had been horse power, and subsequent activities by others who had used fuel-powered vehicles there. In the judge's opinion, this finding of fact went to the Province's intent to establish a basis for performing the work itself and asserting a claim against Abitibi.

[56] These reasons — and others — led the *CCAA* judge to conclude that the Province had not expected Abitibi to perform the remediation work and that the "intended, practical and realistic effect of the EPA Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (para. 211). He found that the Province appeared to have in fact taken some steps to liquidate the claims arising out of the *EPA* Orders.

[57] In the end, the judge found that there was definitely a claim that "might" be filed, and that it was not left to "the subjective choice of the creditor to hold the claim in its pocket for tactical reasons" (para. 227). In his words, the situation did not involve a "detached regulator or public enforcer issuing [an] order for the public good" (para. 175), and it was "the hat of a creditor that best fi[t] the Province, not that of a disinterested regulator" (para. 176).

[58] In sum, although the analytical framework used by Gascon J. was driven by the facts of the case, he reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. He did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. Earmarking money may be a strong indicator that a province will perform remediation work, and actually commencing the work is the first step towards the creation of a debt, but these are not the only considerations that can lead to a finding that a creditor has a monetary claim. The *CCAA* judge's assessment of the facts, particularly his finding that the *EPA* Orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

VI. Conclusion

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[59] In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge's findings of fact.

[60] With respect to the law, the Chief Justice would craft a standard specific to the context of environmental orders by requiring a "likelihood approaching certainty" that the regulatory body will perform the remediation work. She finds that this threshold is justified because "remediation may cost a great deal of money" (para. 86). I acknowledge that remediating pollution is often costly, but I am of the view that Parliament has borne this consideration in mind in enacting provisions specific to environmental claims. Moreover, I recall that in this case, the Premier announced that the remediation work would be performed at no net cost to the Province. It was clear to him that the *Abitibi Act* would make it possible to offset all the related costs.

[61] Thus, I prefer to take the approach generally taken for all contingent claims. In my view, the *CCAA* court is entitled to take all relevant facts into consideration in making the relevant determination. Under this approach, the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

[62] Finally, the Chief Justice would review the *CCAA* court's findings of fact. I would instead defer to them. On those findings, applying any legal standard, be it the one proposed by the Chief Justice or the one I propose, the Province's claim is monetary in nature and its motion for a declaration exempting the *EPA* Orders from the claims procedure order was properly dismissed.

[63] For these reasons, I would dismiss the appeal with costs.

The following are the reasons delivered by

THE CHIEF JUSTICE (DISSENTING) —

1. Overview

[64] The issue in this case is whether orders made under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"), by the Newfoundland and Labrador Minister of Environment and Conservation ("Minister") requiring a polluter to clean up sites (the "*EPA* Orders") are monetary claims that can be compromised in corporate restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). If they are not claims that can be compromised in restructuring, the Abitibi respondents ("Abitibi") will still have a legal obligation to clean up the sites following their emergence from restructuring. If they are such claims, Abitibi will have emerged from restructuring free of the obligation, able to recommence business without remediating the properties it polluted, the cost of which will fall on the Newfoundland and Labrador public.

[65] Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They are not monetary claims. In narrow circumstances, specified by the *CCAA*, these ongoing regulatory obligations may be reduced to monetary claims, which can be compromised under *CCAA* proceedings. This occurs where a province has done the work, or where it is "sufficiently certain" that it will do the work. In these circumstances, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the *CCAA* proceedings. Otherwise, the regulatory obligation survives the restructuring.

[66] In my view, the orders for remediation in this case, with a minor exception, are not claims that can be compromised in restructuring. On one of the properties, the Minister did emergency remedial work and put other work out to tender. These costs can be claimed in the *CCAA* proceedings. However, with respect to the other properties, on the evidence before us, the Minister has neither done the clean-up work, nor is it sufficiently certain that he or she will do so. The Province of Newfoundland and Labrador ("Province") retained a number of options, including requiring Abitibi to perform the remediation if it successfully emerged from the *CCAA* restructuring.

[67] I would therefore allow the appeal and grant the Province the declaration it seeks that Abitibi is still subject to its obligations under the *EPA* following its emergence from restructuring, except for work done or tendered for on the Buchans site.

2. The Proceedings Below

[68] The *CCAA* judge took the view that the Province issued the *EPA* Orders, not in order to make Abitibi remediate, but as part of a money grab. He therefore concluded that the orders were monetary and financial in nature and should be considered claims that could be compromised under the *CCAA* (2010 QCCS 1261, 68 C.B.R. (5th) 1). The Quebec Court of Appeal denied leave to appeal on the ground that this "factual" conclusion could not be disturbed (2010 QCCA 965, 68 C.B.R. (5th) 57).

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[69] The *CCAA* judge's stark view that an *EPA* obligation can be considered a monetary claim capable of being compromised simply because (as he saw it) the Province's motive was money, is no longer pressed. Whether an *EPA* order is a claim under the *CCAA* depends on whether it meets the requirements for a claim under that statute. That is the only issue to be resolved. Insofar as this determination touches on the division of powers, I am in substantial agreement with my colleague Deschamps J., at paras. 18-19.

3. The Distinction Between Regulatory Obligations and Claims Under the *CCAA*

[70] Orders to clean up polluted property under provincial environmental protection legislation are regulatory orders. They remain in effect until the property has been cleaned up or the matter otherwise resolved.

[71] It is not unusual for corporations seeking to restructure under the *CCAA* to be subject to a variety of ongoing regulatory orders arising from statutory schemes governing matters like employment, energy conservation and the environment. The corporation remains subject to these obligations as it continues to carry on business during the restructuring period, and remains subject to them when it emerges from restructuring unless they have been compromised or liquidated.

[72] The *CCAA*, like the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised.

[73] This distinction is also recognized in the jurisprudence, which has held that regulatory duties owed to the public are not "claims" under the *BIA*, nor, by extension, under the *CCAA*. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements. Writing for the court, Laycraft C.J.A. said the question was whether the *Bankruptcy Act* "requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety . . . as a charge to the public" (para. 29). He answered the question in the negative:

> The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed. [Emphasis added; para. 33.]

[74] The distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law. It has been repeatedly acknowledged: *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534 (B.C.S.C.); *Shirley (Re)* (1995), 129 D.L.R. (4th) 105 (Ont. Ct. (Gen. Div.)), at p. 109; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 146, *per* Iacobucci J. (dissenting). As Farley J. succinctly put it in *Air Canada, Re [Regulators' motions]* (2003), 28 C.B.R. (5th) 52 (Ont. S.C.J.), at para. 18: "Once [the company] emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved [regulatory] matter."

[75] Recent amendments to the *CCAA* confirm this distinction. Section 11.1(2) now explicitly provides that, except to the extent a regulator is enforcing a payment obligation, a general stay does not affect a regulatory body's authority in relation to a corporation going through restructuring. The *CCAA* court may only stay specific actions or suits brought by a regulatory body, and only if such action is necessary for a viable compromise to be reached and it would not be contrary to the public interest to make such an order (s. 11.1(3)).

[76] Abitibi argues that another amendment to the *CCAA*, s. 11.8(9), treats ongoing regulatory duties owed to the public as claims, and erases the distinction between the two types of obligation: see *General Chemical Canada Ltd., Re*, 2007 ONCA 600, 228 O.A.C. 385, *per* Goudge J.A., relying on s. 14.06(8) of the *BIA* (the equivalent of s. 11.8(9) of the *CCAA*). With respect, this reads too much into the provision. Section 11.8(9) of the *CCAA* refers only to the situation where a government has performed remediation, and provides that the *costs of the remediation* become a claim in the restructuring process even where the environmental damage arose after *CCAA* proceedings have begun. As stated in *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 ABQB 559, 47 Alta. L.R. (4th) 138, *per* Burrows J., the section "does not convert a statutorily imposed obligation owed to the public at large into a liability owed to the public body charged with enforcing it" (para. 42).

4. When Does a Regulatory Obligation Become a Claim Under the *CCAA*?

[77] This brings us to the heart of the question before us: When does a regulatory obligation imposed on a corporation under environmental protection legislation become a "claim" provable and compromisable under the *CCAA*?

[78] Regulatory obligations are, as a general proposition, not compromisable claims. Only financial or monetary claims provable by a "creditor" fall within the definition of "claim" under the *CCAA*. A "creditor" is defined as "a

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person having a claim": s. 2, *BIA*. Thus, the identification of a "creditor" hangs on the existence of a "claim". Section 12(1) of the *CCAA* defines "claim" as "any indebtedness, liability or obligation . . . that . . . would be a debt provable in bankruptcy", which is accepted as confined to obligations of a financial or monetary nature.

[79] The *CCAA* does not depart from the proposition that a claim must be financial or monetary. However, it contains a scheme to deal with disputes over whether an obligation is a monetary obligation as opposed to some other kind of obligation.

[80] Such a dispute may arise with respect to environmental obligations of the corporation. The *CCAA* recognizes three situations that may arise when a corporation enters restructuring.

[81] The first situation is where the remedial work has not been done (and there is no "sufficient certainty" that the work will be done, unlike the third situation described below). In this situation, the government cannot claim the cost of remediation: see s. 102(3) of the *EPA*. The obligation of compliance falls in principle on the monitor who takes over the corporation's assets and operations. If the monitor remediates the property, he can claim the costs as costs of administration. If he does not wish to do so, he may obtain a court order staying the remediation obligation or abandon the property: s. 11.8(5) *CCAA* (in which case costs of remediation shall not rank as costs of administration: s. 11.8(7)). In this situation, the obligation cannot be compromised.

[82] The second situation is where the government that has issued the environmental protection order moves to clean up the pollution, as the legislation entitles it to do. In this situation, the government has a claim for the cost of remediation that is compromisable in the *CCAA* proceedings. This is because the government, by moving to clean up the pollution, has changed the outstanding regulatory obligation owed to the public into a financial or monetary obligation owed by the corporation to the government. Section 11.8(9), already discussed, makes it clear that this applies to damage after the *CCAA* proceedings commenced, which might otherwise not be claimable as a matter of timing.

[83] A third situation may arise: the government has not yet performed the remediation at the time of restructuring, but there is "sufficient certainty" that it will do so. This situation is regulated by the provisions of the *CCAA* for contingent or future claims. Under the *CCAA*, a debt or liability that is contingent on a future event may be compromised.

[84] It is clear that a mere possibility that work will be done does not suffice to make a regulatory obligation a contingent claim under the *CCAA*. Rather, there must be "sufficient certainty" that the obligation will be converted into a financial or monetary claim to permit this. The impact of the obligation on the insolvency process is irrelevant to the analysis of contingency. The future liabilities must not be "so remote and speculative in nature that they could not properly be considered contingent claims": *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75, at para. 4.

[85] Where environmental obligations are concerned, courts to date have relied on a high degree of probability verging on certainty that the government will in fact step in and remediate the property. In *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), Farley J. concluded that a contingent claim was established where the money had already been earmarked in the budget for the remediation project. He observed that "there appears to be every likelihood to a certainty that every dollar in the budget for the year ending March 31, 2002 earmarked for reclamation will be spent" (para. 15 (emphasis added)). Similarly, in *Shirley (Re)*, Kennedy J. relied on the fact that the Ontario Minister of the Environment had already entered the property at issue and commenced remediation activities to conclude that "[a]ny doubt about the resolve of the [Ministry's] intent to realize upon its authority ended when it began to incur expense from operations" (p. 110).

[86] There is good reason why "sufficient certainty" should be interpreted as requiring "likelihood approaching certainty" when the issue is whether ongoing environmental obligations owed to the public should be converted to contingent claims that can be expunged or compromised in the restructuring process. Courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a corporation has caused. To begin with, the government's decision is discretionary and may be influenced by any number of competing political and social considerations. Furthermore, remediation may cost a great deal of money. For example, in this case, the *CCAA* court found that at a minimum the remediation would cost in the "mid-to-high eight figures", and could indeed cost several times that (para. 81). In concrete terms, the remediation at issue in this case may be expected to meet or exceed the entire budget of the Minister ($65 million) for 2009. Not only would this be a massive expenditure, but it would also likely require the specific approval of the legislature and thereby be subject to political uncertainties. To assess these factors and determine whether all this will occur would embroil the *CCAA* judge in social, economic and political considerations — matters which are not normally subject to judicial consideration: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 74. It is small wonder, then, that courts assessing whether it is "sufficiently certain" that a government will clean up pollution created by a corporation have insisted on proof of likelihood approaching certainty.

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[87] In this case, as will be seen, apart from the Buchans property, the record is devoid of any evidence capable of establishing that it is "sufficiently certain" that the Province will itself remediate the properties. Even on a more relaxed standard than the one adopted in similar cases to date, the evidence in this case would fail to establish that remediation is "sufficiently certain".

5. The Result in This Case

[88] Five different sites are at issue in this case. The question in each case is whether the Minister has already remediated the property (making it to that extent an actual claim), or if not, whether it is "sufficiently certain" that he or she will remediate the property, permitting it to be considered a contingent claim.

[89] The Buchans site posed immediate risks to human health as a consequence of high levels of lead and other contaminants in the soil, groundwater, surface water and sediment. There was a risk that the wind would disperse the contamination, posing a threat to the surrounding population. Lead has been found in residential areas of Buchans and adults tested in the town had elevated levels of lead in their blood. In addition, a structurally unsound dam at the Buchans site raised the risk of contaminating silt entering the Exploits and Buchans rivers.

[90] The Minister quickly moved to address the immediate concern of the unsound dam and put out a request for tenders for other measures that required immediate action at the Buchans site. Money expended is clearly a claim under the *CCAA*. I am also of the view that the work for which the request for tenders was put out meets the "sufficiently certain" standard and constitutes a contingent claim.

[91] Beyond this, it has not been shown that it is "sufficiently certain" that the Province will do the remediation work to permit Abitibi's ongoing regulatory obligations under the *EPA* Orders to be considered contingent debts. The same applies to the other properties, on which no work has been done and no requests for tender to do the work initiated.

[92] Far from being "sufficiently certain", there is simply nothing on the record to support the view that the Province will move to remediate the remaining properties. It has not been shown that the contamination poses immediate health risks, which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. Abitibi relies on a statement by the then-Premier in discussing the possibility that the Province would be obliged to compensate Abitibi for expropriation of some of the properties, to the effect that "there would not be a net payment to Abitibi": R.F., at para. 12. Apart from the fact that the Premier was not purporting to state government policy, the statement simply does not say that the Province would do the remediation. The Premier may have simply been suggesting that outstanding environmental liabilities made the properties worth little or nothing, obviating any net payment to Abitibi.

[93] My colleague Deschamps J. concludes that the findings of the *CCAA* court establish that it was "sufficiently certain" that the Province would remediate the land, converting Abitibi's regulatory obligations under the *EPA* Orders to contingent claims that can be compromised under the *CCAA*. With respect, I find myself unable to agree.

[94] The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. Essentially, he proceeded on the basis that the *EPA* Orders had not been put forward in a sincere effort to obtain remediation, but were simply a money grab. The *CCAA* judge buttressed his view that the Province's regulatory orders were not sincere by opining that the orders were unenforceable (which if true would not prevent new *EPA* orders) and by suggesting that the Province did not want to assert a contingent claim, since this might attract a counterclaim by Abitibi for the expropriation of the properties (something that may be impossible due to Abitibi's decision to take the expropriation issue to NAFTA (the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2), excluding Canadian courts). In any event, it is clear that the *CCAA* judge, on the reasoning he adopted, never considered the question of whether it was "sufficiently certain" that the Province would remediate the properties. It follows that the *CCAA* judge's conclusions cannot support the view that the outstanding obligations are contingent claims under the *CCAA*.

[95] My colleague concludes:

> [The *CCAA* judge] did at times rely on indicators that are unique and that do not appear in the analytical framework I propose above, but he did so because of the exceptional facts of this case. Yet, had he formulated the question in the same way as I have, his conclusion, based on his objective findings of fact, would have been the same. . . . The *CCAA* judge's assessment of the facts . . . leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim. [Emphasis added; para. 58.]

[96] I must respectfully confess to a less sanguine view. First, I find myself unable to decide the case on what I think the *CCAA* judge would have done had he gotten the law right and considered the central question. In my

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view, his failure to consider that question requires this Court to answer it in his stead on the record before us: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 35. But more to the point, I see no objective facts that support, much less compel, the conclusion that it is "sufficiently certain" that the Province will move to itself remediate any or all of the pollution Abitibi caused. The mood of the regulator in issuing remediation orders, be it disinterested or otherwise, has no bearing on the likelihood that the Province will undertake such a massive project itself. The Province has options. It could, to be sure, opt to do the work. Or it could await the result of Abitibi's restructuring and call on it to remediate once it resumed operations. It could even choose to leave the sites contaminated. There is nothing in the record that makes the first option more probable than the others, much less establishes "sufficient certainty" that the Province will itself clean up the pollution, converting it to a debt.

[97] I would allow the appeal and issue a declaration that Abitibi's remediation obligations under the *EPA* Orders do not constitute claims compromisable under the *CCAA*, except for work done or tendered for on the Buchans site.

THE FOLLOWING ARE THE REASONS DELIVERED BY

[98] LEBEL J. (dissenting) — I have read the reasons of the Chief Justice and Deschamps J. They agree that a court overseeing a proposed arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), cannot relieve debtors of their regulatory obligations. The only regulatory orders that can be subject to compromise are those which are monetary in nature. My colleagues also accept that contingent environmental claims can be liquidated and compromised if it is established that the regulatory body would remediate the environmental contamination itself, and hence turn the regulatory order into a monetary claim.

[99] At this point, my colleagues disagree on the proper evidentiary test with respect to whether the government would remediate the contamination. In the Chief Justice's opinion, the evidence must show that there is a "likelihood approaching certainty" that the province would remediate the contamination itself (para. 86). In my respectful opinion, this is not the established test for determining where and how a contingent claim can be liquidated in bankruptcy and insolvency law. The test of "sufficient certainty" described by Deschamps J., which does not look very different from the general civil standard of probability, better reflects how both the common law and the civil law view and deal with contingent claims. On the basis of the test Deschamps J. proposes, I must agree with the Chief Justice and would allow the appeal.

[100] First, no matter how I read the *CCAA* court's judgment (2010 QCCS 1261, 68 C.B.R. (5th) 1), I find no support for a conclusion that it is consistent with the principle that the *CCAA* does not apply to purely regulatory obligations, or that the court had evidence that would satisfy the test of "sufficient certainty" that the province of Newfoundland and Labrador ("Province") would perform the remedial work itself.

[101] In my view, the *CCAA* court was concerned that the arrangement would fail if the Abitibi respondents ("Abitibi") were not released from their regulatory obligations in respect of pollution. The *CCAA* court wanted to eliminate the uncertainty that would have clouded the reorganized corporations' future. Moreover, its decision appears to have been driven by an opinion that the Province had acted in bad faith in its dealings with Abitibi both during and after the termination of its operations in the Province. I agree with the Chief Justice that there is no evidence that the Province intends to perform the remedial work itself. In the absence of any other evidence, an offhand comment made in the legislature by a member of the government hardly satisfies the "sufficient certainty" test. Even if the evidentiary test proposed by my colleague Deschamps J. is applied, this Court can legitimately disregard the *CCAA* court's finding as the Chief Justice proposes, since it did not rest on a sufficient factual foundation.

[102] For these reasons, I would concur with the disposition proposed by the Chief Justice.

Appeal dismissed with costs, MCLACHLIN C.J. *and* LEBEL J. *dissenting.*

Solicitors for the appellant: WeirFoulds, Toronto; Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the respondents AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.: Stikeman Elliott, Toronto.

Solicitors for the respondent the Ad Hoc Committee of Bondholders: Goodmans, Toronto.

Solicitors for the respondents the Ad Hoc Committee of Senior Secured Noteholders and the U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders): Borden Ladner Gervais, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the interveners the Attorney General of British Columbia and Her Majesty The Queen in Right of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener Ernst& Young Inc., as Monitor: Thornton Grout Finnigan, Toronto.

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Solicitors for the intervener the Friends of the Earth Canada: Ecojustice, University of Ottawa, Ottawa; Fasken Martineau DuMoulin, Toronto.

Produits de Caoutchouc Marquis Inc. v. Trottier, [1962] SCR 676 - Preferred landlord on Liable Rent but Also Repairs?

Date:	1962-06-11
Parallel citations:	1962 CanLII 79 (SCC)
URL:	http://canlii.ca/t/22vwh
Citation:	Produits de Caoutchouc Marquis Inc. v. Trottier, 1962 CanLII 79 (SCC), [1962] SCR 676, <http://canlii.ca/t/22vwh> retrieved on 2013-08-29
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Supreme Court of Canada
Produits de Caoutchouc Marquis Inc. v. Trottier, [1962] S.C.R. 676
Date: 1962-06-11

In The Bankruptcy of Gingras Automobile Ltée.
Les Produits de Caoutchouc Marquis Inc. (*Petitioner*) *Appellant;*
and
André Trottier (*Trustee*) *Respondent.*
1962: February 22; 1962: June 11.
Present: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.
ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Bankruptcy—Landlord and tenant—Claim for arrears of rent and for costs of repairs—Whether landlord a secured creditor—Whether both claims preferred—The Bankruptcy Act, R.S.C. 1952, c. 14, ss. 95, 100, 105—Civil Code, arts. 1619, 1624, 1628, 1994, 2005.

The petitioner, as landlord of the premises occupied by the bankrupt, filed with the trustee a preferred claim in respect of three months arrears of rent due by the bankrupt and also in respect of costs of certain repairs for which the bankrupt was liable under the terms of the lease. The trustee allowed the amount claimed for arrears of rent as a preferred claim, but refused to consider the claim for repairs as a preferred claim. The trial judge held that the petitioner was entitled to rank by preference for both claims. That judgment was reversed by the Court of Queen's Bench and the decision of the trustee was restored. The petitioner obtained leave to appeal to this Court. The petitioner contended that s. 95 of *The Bankruptcy Act* dealt merely with the order in which a landlord was entitled to be collocated by preference, and that the extent of that preference under the provincial law was preserved by s. 105.

Held: Only the claim for arrears of rent was entitled to priority.

Subject to priority of ranking under s. 95 of *The Bankruptcy Act,* by virtue of s. 105 the nature and extent of the landlord's claim for rent or damages and any other rights he may have arising out of the contract of lease are determined by the law of the province in which the leased premises are situated. However, in the event of bankruptcy; the right of the landlord to be collocated and paid by preference, and the extent of that preference, are clearly provided for in s. 95. That preference ranks sixth in order of priority and is limited as provided for by s. 95. Furthermore, by the combined effect of ss. 95, 100 and 105, the landlord is entitled to rank only as an unsecured creditor for any balance to which he may be entitled under provincial law.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec1, reversing a judgment of Mitchell J. Appeal dismissed.

A. Denis, Q.C., for the petitioner, appellant.
J. P. Bergeron, Q.C., and *P. E. Blain,* for the trustee, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant is a creditor of Gingras Automobile Ltée, a bankrupt, and respondent is the trustee of the estate of the said bankrupt. At the date of the receiving order a valid lease existed between the debtor and appellant covering premises occupied by the debtor and with respect to which three months' arrears of rent amounting to $1,800 were

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outstanding. In addition, appellant was entitled to claim from the debtor a sum of $1,398.22 representing the cost of certain repairs for which the debtor was liable under the terms of its lease. Appellant's total claim against the debtor amounted therefore to $3,198.22, for which it filed a claim with respondent, alleging that it was entitled to be paid its entire claim by preference.

It is conceded that at the date of the receiving order sufficient moveable property was located upon the leased premises to secure payment of the full amount claimed.

The trustee allowed the amount claimed for arrears of rent as a preferred claim but disallowed the balance. On appeal to the Superior Court that decision was reversed and appellant held entitled to rank by preference for the whole amount of its claim. On appeal to the Court of Queen's Bench2, that judgment was reversed and the decision of the trustee restored. The present appeal, by leave, is from that judgment.

The facts are not in dispute and the sole questions in issue on this appeal are ones of law. Under the provincial law, appellant was entitled to be paid a sum of $3,198.22 and payment of that claim was secured by privilege on the moveable property located on the leased premises: arts. 1619 *et seq.* and 2005 of the *Civil Code.* That privilege consisted in the right to seize and sell such moveable property and to be paid by preference out of the proceeds: Faribault, Traité de Droit civil, t. 2, p. 112. In the event of competing claims, under the law of Quebec the landlord's privilege ranks eighth in order of preference: art. 1994 of the *Civil Code.*

The legal question in issue here is, to what extent if any the provincial law has been abrogated by the provisions of the *Bankruptcy Act,* R.S.C. 1952, c. 14.

In 1949 all existing bankruptcy legislation was repealed and a new *Bankruptcy Act* enacted, 13 Geo. VI, c. 7, now R.S.C. 1952, c. 14. The previously existing statute was completely re-cast and many important changes made including changes in the preferential right of the landlord.

The present Act, like its predecessor acts, provides that subject to the Act all debts proved in bankruptcy shall be paid *pari passu.* To that rule of absolute equality, certain exceptions are made including those provided for by s. 95. The exclusive authority given to Parliament by s. 91(21) of the *British North America Act* to deal with all matters arising within the domain of bankruptcy and insolvency, enables Parliament to determine the relative priorities of creditors under a bankruptcy: *Royal Bank v. Larue*3. To the extent that such priorities may be in conflict with provincial law, the federal statute must prevail. In his argument before us Mr. Denis did not of course challenge that proposition. He contended, however, that s. 95 of the Act dealt merely with the order in which a landlord was entitled to be collocated by preference, and that the extent of that preference under the provincial law was preserved by s. 105. With deference I am unable to agree with that submission. The relevant portions of s. 95 and s. 105 are as follows:

> 95. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt Shall be applied in priority of payment as follows: ...
>
> (*f*) the landlord for arrears of rent for a period of three months next preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto Under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent:...
>
> (3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due to him.
>
> 105. Except as to priority of ranking as provided by section ninety-five, and subject to the provisions of subsection four of section forty-two, the rights of landlords shall be determined according to the laws of the province in which the leased premises are situate.

"Secured creditor" is defined by s. 2(*r*) as follows:

> "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable; ...

The interpretation and effect of these sections were considered by the Court of Appeal of Saskatchewan in *Canadian Credit Men's Trust Association Ltd. v. Carman Block Ltd.*4.

In my respectful opinion, Gordon J.A. accurately stated the law when he said at p. 162:

> With every deference I do not think a landlord with a claim for arrears of rent falls within the definition of a "secured creditor". He has no lien on the property seized but must give it up to the trustee and file his claim in the usual way. He has no security to value within the provisions of ss. 87-92 of *The Bankruptcy Act.* Further, I do not think that any such inference should be drawn in the face of the explicit directions contained in s. 95 of the Act. So far as I can

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see the Act deprives the landlord of his right of lien and merely uses the value of the property seized as a gauge to fix the amount for which he is allowed a preferred claim but does not make him a "secured creditor".

Subject to priority of ranking under s. 95 (and to s. 42(4) which has no relevance here) in virtue of s. 105 the nature and extent of the landlord's claim for rent or damages and any other, rights he may have arising out of the contract of lease are determined by the law of the province in which the leased premises are situated.

In my opinion however, in the event of bankruptcy, the right of the landlord to be collocated and paid by preference, and the extent of that preference, are clearly provided for in s. 95. Shortly stated, such preference ranks sixth in order of priority. It is limited to three months' arrears of rent prior to the bankruptcy and to accelerated rent for a period not exceeding three months following the bankruptcy. Any amount payable by preference is limited to the amount realized from property on the lease premises, and any payment on account of accelerated rent must be credited against any amount due by the Trustee for occupation rent.

I am further of opinion that by the combined effect of ss. 95, 100 and 105 of the Act the landlord is entitled to rank only as an unsecured creditor for any balance to which he may be entitled under provincial law.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorney for the petitioner, appellant: A. Denis, Sherbrooke.

Attorneys for the trustee, respondent: Blain, Piché, Bergeron, Godbout & Emery, Montreal.

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1 [1961] Que. Q.B. 827, (1962), 3 C.B.R. (N.S.) 55

2 [1961] Que. Q.B. 827, (1962), 3 C.B.R. (N.S.) 55.

3 reflex, [1928] A.C. 187, 8 C.B.R. 579, 1 W.W.R. 534.

4 reflex, (1957), 36 C.B.R. 158, 8 D.L.R. (2d) 647, 22 W.W.R 180.

SB Directive: Proofs of Claims, Proxies, Quorums and Voting at Meetings of Creditors (see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 22R

PROOFS OF CLAIM, PROXIES, QUORUMS AND VOTING AT MEETINGS OF CREDITORS

PREUVES DE RÉCLAMATION, PROCURATIONS, QUORUM ET DROIT DE VOTE AUX ASSEMBLÉES DES CRÉANCIERS

Issued: MAY 07 2010

(Due to a printing error, this version of Directive No. 22R supersedes Directive No. 22R Issued on April 19, 2010, on the same topic)

Date d'émission : 07 MAI 2010

(En raison d'une erreur d'impression, la présente version de l'instruction n° 22R remplace et annule l'instruction n° 22R sur le même sujet émise le 19 avril 2010)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*.

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Authority and Purpose

2. This Directive is issued pursuant to paragraphs 5(4)(*b*), (*c*) and (*e*) of the Act.

3. The purpose of this Directive is to clarify the position of the Superintendent with regard to proofs of claim, proxies, quorums and voting at meetings of creditors.

Policy

4. The trustee shall supply to all creditors a proof of claim and a proxy in the prescribed form.

Information sheet to complete proofs of claim and a proxy form

5. Creditors may experience difficulty when completing a proof of claim and/or a proxy form. Where appropriate, instructions should be provided with each proof of claim form that explain in detail how to complete the proof of claim. A suggested format for the instructions is attached as Appendix A.

Acceptability of proof of claim

6. In order for a proof of claim to be acceptable, it must be completed in the prescribed form and include all information required by sections 124–128 of the Act. Related jurisprudence on the matter should

Autorité et objet

2. La présente instruction est émise en vertu des alinéas 5(4)*b*), *c*) et *e*) de la Loi.

3. La présente instruction a pour objet de préciser la position du surintendant à l'égard des preuves de réclamation, des procurations, du quorum et du droit de vote lors des assemblées des créanciers.

Politique

4. Le syndic doit fournir à tous les créanciers une preuve de réclamation et une procuration en la forme prescrite.

Feuille de renseignements pour preuve de réclamation et procuration

5. Les créanciers peuvent avoir de la difficulté à remplir une preuve de réclamation ou un formulaire de procuration. Le cas échéant, des consignes expliquant clairement comment remplir le document devraient être fournies avec chaque formulaire de preuve de réclamation. Une liste de consignes suggérées est jointe à l'annexe A.

Recevabilité des preuves de réclamation

6. Afin qu'une preuve de réclamation soit recevable, elle doit avoir été remplie en la forme prescrite et contenir toute l'information exigée aux articles 124 à 128 de la Loi. Il faut également tenir compte de la jurisprudence

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also be considered when dealing with the acceptability of a proof of claim.

Review of proofs of claim

7. The chair, at the first meeting of creditors, has the power to admit or reject a proof of claim for the purpose of voting. Prior to the time appointed for the meeting, the trustee shall review all proofs of claim and advise the chair if they are acceptable for the purpose of voting at a meeting of creditors. Often, proofs of claim are filed just prior to the time appointed for the meeting. In this circumstance, it is recommended that the chair open the meeting and then adjourn it for a brief time for the purpose of reviewing the proofs of claim. A person who has filed a proof of claim after the time appointed for the meeting shall not be permitted to vote at that meeting.

Establishing a quorum at the first meeting of creditors

8. (1) The establishment of the quorum is governed by section 106 of the Act. When applying this section, the term "creditor" does not refer to the number of creditors appearing on the Statement of Affairs. The quorum is established by considering the number of creditors who are present in person or represented by a proxyholder (or by voting letter in a proposal) and have filed and proven their claim in proper form with the trustee before the time appointed for the meeting.

pour déterminer la recevabilité des preuves de réclamation.

Examen des preuves de réclamation

7. À la première assemblée des créanciers, le président est habilité, aux fins du vote, à admettre ou à rejeter une preuve de réclamation. Avant le moment fixé pour l'assemblée, le syndic doit examiner les preuves de réclamation et indiquer au président si elles sont recevables pour les fins du vote à l'assemblée des créanciers. Les preuves de réclamation sont souvent déposées immédiatement avant le moment fixé pour l'assemblée. En l'occurrence, il est recommandé que le président appelle l'assemblée à l'ordre et l'ajourne pour quelque temps pour permettre l'examen des preuves de réclamation alors reçues. Toute personne qui dépose une preuve de réclamation après le moment fixé pour l'assemblée n'aura pas le droit de voter à cette assemblée.

Établissement du quorum à la première assemblée des créanciers

8.(1) La constitution d'un quorum est régie par l'article 106 de la Loi. Pour les fins d'application de cet article, le mot « créancier » ne fait pas référence au nombre de créanciers figurant sur le bilan. Le quorum est fixé en fonction du nombre de créanciers qui sont présents en personne ou représentés par un fondé de pouvoir (ou par formulaire de votation dans une proposition) et qui ont déposé et prouvé leur réclamation en règle auprès du syndic, avant le moment fixé pour l'assemblée.

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(2) Where a voting letter is filed in a proposal, supported by a proven claim, the letter is to be considered as if the creditor were present and is to be voted in accordance with the direction contained therein. A quorum under section 106 of the Act can be established in this manner.

(2) Lorsqu'un formulaire de votation est déposé dans une proposition, avec une réclamation prouvée en bonne et due forme, le formulaire doit être considéré au même titre que si le créancier était présent et être utilisé aux fins qui y sont prescrites. Le quorum prévu à l'article 106 de la Loi peut être constitué de cette façon

Accepting proofs of claim to establish a quorum, to table motions and to vote

Recevabilité des preuves de réclamation, quorum, motions et droit de vote à l'assemblée

9. Providing that the proof of claim is in proper form and is filed with the trustee prior to the time appointed for the meeting, the types of claims presented in Appendix B will be dealt with in the manner shown as to whether or not they are to be considered for:

9. Pourvu que la preuve de réclamation soit en règle et qu'elle soit dûment déposée auprès du syndic avant le moment fixé pour l'assemblée, les réclamations mentionnées à l'annexe B seront traitées de la façon indiquée pour déterminer si elles seront admissibles pour :

(a) establishing a quorum at a first meeting of creditors;

a) établir le quorum à la première assemblée des créanciers;

(b) tabling motions before the meeting;

b) déposer une motion à l'assemblée;

(c) voting on an ordinary resolution;

c) voter sur une résolution ordinaire;

(d) voting on a proposal; and

d) voter sur une proposition; et

(e) voting on a special resolution.

e) voter sur une résolution spéciale.

Proxy

Procuration

10. (1) It is not necessary that a proxy be filed with the trustee before the time fixed for the meeting as section 109 of the Act only applies to proofs of claim.

10. (1) Il n'est pas nécessaire qu'une procuration soit déposée auprès du syndic avant le moment fixé pour l'assemblée puisque l'article 109 de la Loi ne s'applique qu'aux preuves de réclamation.

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(2) A proxy may be filed in the form of a letter or any form of telecommunication at any time prior to a vote.

(2) Une procuration peut être déposée sous forme de lettre ou par tout moyen de télécommunication en tout temps avant le vote.

(3) The proxy does not have to be under the seal of the company unless the incorporating act or the bylaws of the company require it.

(3) Dans le cas d'une personne morale, il n'est pas nécessaire que la procuration soit marquée du sceau de la société, à moins que les statuts constitutifs ou les règlements administratifs de la personne morale ne l'exigent.

(4) The person designated in a proxy cannot be substituted unless the proxy provides for a power of substitution.

(4) La personne désignée sur la procuration ne peut être substituée, à moins que la procuration ne prévoie un pouvoir de substitution.

11. If a proxy is signed in blank and sent to the trustee, there is a tacit authority for the trustee to vote with the said proxy.

11. Si un formulaire de procuration est envoyé au syndic, signé en blanc, il y a autorisation tacite pour que le syndic puisse voter avec ladite procuration.

Objection to the proof of claim

Contestation de preuve de réclamation

12. (1) For the purpose of a quorum or voting, when ruling on the admissibility of a proof of claim, or any part thereof, the chair must ensure that the documents are in their prescribed form and available at that time.

12.(1) Pour décider si une preuve de réclamation, ou une partie de celle-ci, est recevable aux fins du quorum ou du vote, le président doit s'assurer que les documents sont en leur forme prescrite et disponibles à ce moment-là.

(2) Pursuant to subsection 108(3) of the Act, the proof of claim should only be marked as "objected to" when the chair is in doubt as to whether or not a proof of claim should be admitted or rejected. If a proof of claim is marked as "objected to," the creditor shall be allowed to vote subject to the vote being

(2) Aux fins du paragraphe 108(3) de la Loi, c'est seulement lorsque le président doute de l'admissibilité d'une preuve de réclamation qu'il doit noter la preuve de réclamation comme « contestée ». Lorsqu'une preuve de réclamation est notée comme « contestée », le créancier a le droit de voter, sous réserve

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declared invalid in the event of the objection being sustained.

Failure to establish a quorum at the first meeting of creditors

13. Subsection 106(2) of the Act establishes the procedure to be followed where there is no quorum at the first meeting of creditors. In this circumstance, the appointment of the trustee is deemed confirmed and the chair can either adjourn the meeting to a new time or place or may adjourn the meeting without fixing a time or place for a future meeting.

14. In a Division I Proposal, subsection 54(2.2) of the Act provides that where there is no quorum of secured creditors in respect of a particular class, that class shall be deemed to have voted for the refusal of the proposal.

15. In a Division II Proposal, subsection 66.18(2) of the Act provides that where there is no quorum at a meeting of creditors, the consumer proposal shall be deemed to be accepted by the creditors.

16. It would be considered proper for the trustee to contact creditors to encourage their participation or presence at any meeting of creditors.

d'invalidation du vote au cas où la contestation serait maintenue.

Absence de quorum à la première assemblée des créanciers

13. Le paragraphe 106(2) de la Loi énonce la procédure à suivre en cas de défaut de quorum à la première assemblée des créanciers. En l'occurrence, le syndic est réputé être confirmé dans ses fonctions et le président peut ajourner l'assemblée soit à une date ultérieure, soit à une date indéterminée.

14. Pour les fins d'une proposition déposée aux termes de la section I, le paragraphe 54(2.2) de la Loi énonce qu'en cas de défaut de quorum des créanciers garantis dans le cas d'une des catégories de créances garanties, cette catégorie est réputée avoir voté en faveur du rejet de la proposition.

15. Pour les fins d'une proposition déposée aux termes de la section II, le paragraphe 66.18(2) de la Loi énonce qu'en cas de défaut de quorum à l'assemblée des créanciers, la proposition de consommateur est réputée avoir été acceptée par les créanciers.

16. Il est acceptable pour le syndic de communiquer avec les créanciers afin de les encourager à participer ou à être présents aux assemblées des créanciers.

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Coming into Force

17. Directive 22R comes into force on May 10, 2010.

Entrée en vigueur

17. L'instruction n° 22R entre en vigueur le 10 mai 2010.

Enquiries

18. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

18. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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APPENDIX A

CHECKLIST FOR PROOF OF CLAIM

This checklist is provided to assist you in preparing the proof of claim form and, if appropriate, the proxy form in a complete and accurate manner. Please check each requirement.

GENERAL

- The signature of a witness is required.
- The document must be signed by the individual completing the declaration.
- Provide the complete address where all notices or correspondence are to be forwarded along with your phone number, fax number and email address where appropriate.

Notes:

- It is permissible to file a proof of claim by fax.
- A creditor may vote either in person or by proxy at any meeting of creditors if the proof of claim is filed with the trustee prior to the time appointed for the meeting.
- A quorum at any meeting of creditors is at least one creditor with a valid proof of claim in attendance in person or by proxy.
- A corporation may vote by an authorized agent or mandatary at meetings of creditors.
- In order for a duly authorized person to have a right to vote, they must be a creditor or be the holder of a properly executed proxy. The name of the creditor must appear in the proxy.
- A creditor who is participating in any distribution from an estate must have filed a proof of claim prior to the distribution being declared.
- In the case of an individual bankrupt, by checking the appropriate box or boxes at the bottom of the proof of claim form, you may request that the trustee advise you of any material change in the financial situation of the bankrupt or the amount the bankrupt is required to pay into the bankruptcy, and a copy of the trustee's report on the discharge of the bankrupt.

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PARAGRAPH 1

- Creditor must state full and complete legal name of the individual, company or firm.

- If the individual completing the proof of claim is a representative of the creditor, the individual's position or title must be identified.

PARAGRAPH 3

- The amount owing must be set out in paragraph 3.

- A detailed statement of account must be attached to the proof of claim and marked "Schedule A" and must show the date, number and amount of all invoices or charges, together with the date, number and amount of all credits or payments. The amount on the statement of account must correspond to the amount indicated on the proof of claim.

PARAGRAPH 4

Notes:

- Paragraph A applies to *ordinary unsecured claims*. In addition to recording the amount of the claim, please indicate whether the claim has a priority pursuant to section 136 of the Act.

- Paragraph B applies to *lessor claims* in a commercial proposal. Please ensure that the claim applies to a commercial proposal and, if so, include the full particulars of the claim.

- Paragraph C applies to *secured claims*. Please indicate the dollar value of the security and attach copies of the security document. In addition, please attach copies of the security registration documents, where appropriate.

- Paragraph D applies to *inventory claims of farmers, fishermen and aquaculturists* Please note that such claims apply only to inventory supplied from farmers, fishermen and aquaculturists within 15 (fifteen) days of the date of bankruptcy. In addition, please attach copies of any applicable sales agreements and delivery slips.

- Paragraph E applies to *claims by wage earners*. Please note that such claims apply only for unpaid wages owed upon the bankruptcy of an employer or when the employer becomes subject to a receivership.

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- Paragraph F applies to *claims by employees for unpaid amounts regarding pension plans*. Please note that such claims apply only to unremitted pension contributions outstanding when the sponsoring employer becomes bankrupt or is subject to a receivership.

- Paragraph G applies to *claims against directors*. Please note that such claims apply only to directors of corporations that have filed a commercial proposal to creditors that includes a compromise of statutory claims against directors.

- Paragraph H applies to *claims of customers of a bankrupt securities firm*. Please ensure that the claim of the customer is for net equity and, if so, include the full particulars of the claim, including the calculations upon which the claim is based.

PARAGRAPH 5

- All claimants must indicate whether or not they are related to the debtor, as defined in section 4 of the Act, or dealt with the debtor in a non-arm's-length manner.

PARAGRAPH 6

- All claimants must attach a detailed list of all payments or credits received or granted, as follows:

  (a) within the three (3) months preceding the initial bankruptcy event (including the bankruptcy or the proposal);

  (b) within the twelve (12) months preceding the initial bankruptcy event (including the bankruptcy or the proposal) in the case where the claimant and the debtor were not dealing at arm's length.

- PROXYHOLDER -

NOTE

The Act permits a proof of claim to be made by a duly authorized representative of a creditor but, in the absence of a properly executed proxy, does not give such an individual the power to vote at the first meeting of creditors nor to act as the proxyholder of the creditors.

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GENERAL

- In order for duly authorized persons to have a right to vote, they must themselves be creditors or be the holders of a properly executed proxy. The name of the creditor must appear in the proxy.

Notes:

- A creditor may vote either in person or by proxyholder.
- A proxy may be filed at any time prior to a vote at a meeting of creditors.
- A proxy can be filed with the trustee in person, by mail or by any form of telecommunication.
- A proxy does not have to be under the seal of a corporation unless required by its incorporating documents or its bylaws.
- The individual designated in a proxy cannot be substituted unless the proxy provides for a power of substitution.
- Bankrupts/debtors may not be appointed as proxyholders to vote at any meeting of their creditors.
- The trustee may be appointed as a proxyholder for any creditor.
- A corporation cannot be designated as a proxyholder.

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ANNEXE A

LISTE DE CONTRÔLE POUR LES PREUVES DE RÉCLAMATION

La présente liste de contrôle vous aidera à remplir correctement la preuve de réclamation et, s'il y lieu, la procuration. Veuillez vérifier chacun des points mentionnés.

GÉNÉRALITÉS

- La signature d'un témoin est nécessaire.
- Le document doit être signé par la personne qui le remplit.
- Indiquez l'adresse complète à laquelle tous les avis ou toutes les lettres devront être envoyés (avec le numéro de téléphone, le numéro de télécopieur et, s'il y a lieu, l'adresse électronique).

Remarques :

- Une preuve de réclamation peut être déposée par télécopieur.
- Un créancier peut voter personnellement ou au moyen d'une procuration aux assemblées des créanciers, pourvu que la preuve de réclamation ait été dûment remise au syndic avant le moment fixé pour l'assemblée.
- Le quorum à une assemblée des créanciers est constitué lorsqu'un seul créancier ayant une réclamation prouvée est présent en personne ou par procuration.
- Une personne morale peut voter par un mandataire autorisé aux assemblées des créanciers.
- Pour qu'une personne dûment autorisée ait le droit de voter, elle doit elle-même être créancier ou détenir une procuration en règle. Le nom du créancier doit figurer sur le formulaire de procuration.
- Un créancier a le droit de partage dans la distribution d'un actif pourvu que la preuve de réclamation ait été déposée avant la déclaration de la distribution
- Dans le cas de la faillite d'un particulier, en cochant la case ou les cases appropriée(s) à la fin du formulaire de la preuve de réclamation, vous pouvez demander au syndic de vous aviser de

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tout changement important quant à la situation financière du failli ou de toute modification au montant que le failli doit verser à l'actif de la faillite, ou demander une copie du rapport rempli par le syndic quant à la demande de libération du failli.

PARAGRAPHE 1

- Le créancier doit fournir le nom légal au complet du particulier, de la société ou de l'entreprise.

- Si la preuve de réclamation est faite par une personne autorisée à agir au nom du créancier, cette personne doit déclarer sa position ou son titre.

PARAGRAPHE 3

- Le montant à inscrire à titre de dette doit figurer au paragraphe 3.

- Un état de compte détaillé doit être joint à la preuve de réclamation et indiquer la date, le numéro et le montant de toutes les factures ou de tous les comptes ainsi que la date, le numéro et le montant de tous les crédits ou paiements. Le montant inscrit à l'état de compte doit correspondre au montant inscrit sur la preuve de réclamation.

PARAGRAPHE 4

Remarques :

- L'alinéa *a*) s'applique aux *réclamations non garanties*. En plus d'inscrire le montant de la réclamation, veuillez indiquer si la réclamation a un rang prioritaire en vertu de l'article 136 de la Loi.

- L'alinéa *b*) s'applique aux *réclamations des locateurs* dans le cadre d'une proposition commerciale. Veuillez vous assurer que la réclamation se rapporte à une proposition commerciale et, si tel est le cas, veuillez donner tous les détails de la réclamation.

- L'alinéa *c*) s'applique aux *réclamations garanties*. Veuillez indiquer la valeur attribuable à la garantie et joindre une copie des documents relatifs à la garantie. De plus, veuillez annexer une copie des documents relatifs à l'enregistrement de la garantie.

- L'alinéa *d*) s'applique aux *réclamations des agriculteurs, des pêcheurs ou des aquiculteurs*. Veuillez noter que la garantie n'est valable que si les produits d'un agriculteur, d'un pêcheur ou d'un aquiculteur ont été livrés dans les quinze (15) jours précédant la date de la faillite. Veuillez annexer, le cas échéant, une copie de la convention de vente et du bordereau de livraison.

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- L'alinéa *e)* s'applique aux *réclamations des salariés*. Veuillez noter que de telles réclamations sont possibles uniquement en cas de faillite ou de mise sous séquestre de l'employeur, au bénéfice des employés pour le paiement des salaires non payés.

- L'alinéa *f)* s'applique aux *réclamations des employés relatives au régime de pension*. Veuillez noter que de telles réclamations concernent les cotisations au fonds de retraite non versées qui demeurent en souffrance au moment de la faillite ou d'une mise sous séquestre de l'employeur.

- L'alinéa *g)* s'applique aux *réclamations contre les administrateurs*. Veuillez noter que de telles réclamations sont possibles uniquement lorsqu'une proposition commerciale est déposée et qu'elle comporte, au profit des créanciers, des dispositions relatives à une transaction sur les réclamations contre les administrateurs.

- L'alinéa *h)* s'applique aux *réclamations des clients d'un courtier en valeurs mobilières failli*. Veuillez vous assurer que la réclamation se rapporte à une réclamation de client pour des capitaux nets et, si tel est le cas, veuillez donner tous les détails de la réclamation, y compris les calculs s'y rapportant.

PARAGRAPHE 5

- En vertu de la définition de l'article 4 de la Loi, tous les demandeurs doivent indiquer s'ils sont liés ou non liés avec le débiteur, ou s'ils ont un lien de dépendance avec ce dernier.

PARAGRAPHE 6

- Tous les demandeurs doivent joindre une liste détaillée de tous les paiements ou crédits reçus ou consentis :

  a) dans les trois (3) mois précédant l'ouverture de la faillite ou la proposition;

  b) dans les douze (12) mois précédant l'ouverture de la faillite ou la proposition, si le débiteur et le créancier ont un lien de dépendance.

– PROCURATION –

REMARQUE

La Loi autorise qu'une preuve de réclamation soit préparée par le représentant dûment autorisé du créancier. Toutefois, en l'absence d'une procuration dûment remplie, cette personne n'a pas

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le droit de vote à la première assemblée des créanciers ni le droit d'agir à titre de fondé de pouvoir des créanciers.

GÉNÉRALITÉS

- Pour qu'une personne dûment autorisée ait le droit de voter, elle doit elle-même être créancier ou détenir une procuration en règle. Le nom du créancier doit figurer sur la procuration.

Remarques :

- Un créancier peut voter en personne ou par procuration.
- La procuration peut être déposée en tout temps avant le moment fixé pour le vote à l'assemblée des créanciers.
- Une procuration peut être déposée auprès du syndic, en personne, par courrier ou par tout moyen de télécommunication.
- Dans le cas d'une personne morale, il n'est pas nécessaire que la procuration soit marquée du sceau de la société, à moins que les statuts constitutifs ou les règlements administratifs de la personne morale ne l'exigent.
- La personne désignée sur la procuration ne peut être substituée, à moins que la procuration ne prévoie un pouvoir de substitution.
- Un failli ou un débiteur ne peut voter par procuration à aucune assemblée de ses créanciers.
- Le syndic peut être nommé fondé de pouvoir de tout créancier.
- Une personne morale ne peut être nommée fondé de pouvoir.

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APPENDIX B

Type of Creditor	Quorum	Motion	Ordinary Vote	Proposal Vote	Special Resolution	Comments
Fully or partly secured creditor (secured balance)	Y[1]	N[2]	N	Y	N	In a proposal, can only vote and be included in the quorum in its class. In a bankruptcy, cannot vote and cannot be included in the quorum.
Unsecured creditor	Y	Y	Y	Y	Y	Includes the unsecured portion of a partly secured claim.
Creditor with an undischargeable debt (section 178 of the Act)	Y	Y	Y	Y	Y	

[1] Y = yes

[2] N = no

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Type of Creditor	Quorum	Motion	Ordinary Vote	Proposal Vote	Special Resolution	Comments
Creditor with a contingent claim	N	N	N	N	N	Does not have a provable claim until it has been valued by the trustee (subsection 135(1.1) of the Act).
Creditor with an objected claim	Y	Y	Y	Y	Y	A creditor with an objected claim can vote subject to the vote being declared invalid by the Court (subsection 108(3) of the Act).
Creditor with a disallowed claim	N	N	N	N	N	
Creditor voting by voting letter in a proposal	Y	N	N	Y	N	

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Type of Creditor	Quorum	Motion	Ordinary Vote	Proposal Vote	Special Resolution	Comments
Claim of related party	Y	Y	Y	Y*	Y	* May vote against but not for a proposal (subsection 54(3) of the Act). Cannot vote for the appointment of trustee but with Court permission can vote for the appointment of inspectors (subsection 113(3) of the Act).
Claim of employees and directors	Y	Y	Y	Y	Y	Cannot vote for the appointment of trustee or inspectors (subsection 113(3) of the Act).

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Type of Creditor	Quorum	Motion	Ordinary Vote	Proposal Vote	Special Resolution	Comments
Trustee holding a proxy for a creditor	Y	Y	Y	Y	Y	Cannot vote on remuneration or conduct (subsection 113(2) of the Act).
Creditor not dealing at arm's length in the year prior to the initial bankruptcy event	Y	Y	Y	Y	Y	Permitted to vote, but if vote is determinative of outcome, chair redetermines outcome by excluding that vote. Redetermined outcome is the outcome unless an application is made and court determines another outcome (subsection 109(6) of the Act).

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Type of Creditor	Quorum	Motion	Ordinary Vote	Proposal Vote	Special Resolution	Comments
Claims acquired after bankruptcy	Y	Y	Y	Y	Y	Can vote only if the entire claim is acquired (subsection 110(1) of the Act).
Creditor secured by bill or note	Y	Y	Y	Y	Y	Can vote on the amount owing after deducting amounts recoverable from antecedent makers (section 111 of the Act)[3].
Creditor with a proof of claim (property)	N	N	N	N	N	Not a creditor (section 81 of the Act).

[3] If a creditor has a claim secured by a bill of exchange or promissory note, that creditor must deduct from the claim for voting purposes the amount(s) recoverable from all prior makers of the note. This has no application where a promissory note is joint and several.

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ANNEXE B

Genre de créancier	Quorum	Motion	Résolution ordinaire Vote	Proposition Vote	Résolution spéciale	Commentaires
Créancier entièrement ou partiellement garanti (solde garanti)	O[1]	N[2]	N	O	N	Dans le cas d'une proposition, il vote par catégorie et ce vote est compté pour les fins du quorum de cette catégorie. Dans le cas d'une faillite, ce créancier n'a pas le droit de vote.
Créancier non garanti	O	O	O	O	O	Inclut le montant non garanti d'une créance partiellement garantie

[1] O = oui

[2] N = non

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Genre de créancier	Quorum	Motion	Résolution ordinaire Vote	Proposition Vote	Résolution spéciale	Commentaires
Créancier ayant une réclamation pour dette non libérable (article 178 de la Loi)	O	O	O	O	O	
Créancier ayant une réclamation éventuelle	N	N	N	N	N	Cette réclamation n'est pas une réclamation prouvable avant que le syndic l'évalue (paragraphe 135 [1.1] de la Loi).
Créancier ayant une réclamation contestée	O	O	O	O	O	Un créancier ayant une réclamation contestée peut voter, sous réserve d'invalidation du vote par le tribunal (paragraphe 108[3] de la Loi).
Créancier ayant une créance rejetée	N	N	N	N	N	

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Genre de créancier	Quorum	Motion	Résolution ordinaire Vote	Proposition Vote	Résolution spéciale	Commentaires
Créancier votant par formulaire de votation	O	N	N	O	N	
Réclamation d'un créancier lié	O	O	O	O*	O	* Le créancier lié peut voter contre, mais non pour l'acceptation de la proposition (paragraphe 54[3] de la Loi). Le créancier lié n'a pas le droit de voter pour la nomination d'un syndic mais, avec l'autorisation du tribunal, a le droit de voter pour la nomination d'inspecteurs (paragraphe 113 [3] de la Loi).

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Genre de créancier	Quorum	Motion	Résolution ordinaire Vote	Proposition Vote	Résolution spéciale	Commentaires
Réclamation d'un employé ou d'un administrateur	O	O	O	O	O	L'employé ou l'administrateur n'a pas le droit de voter pour la nomination d'un syndic ou d'inspecteurs (paragraphe 113[3] de la Loi).
Syndic agissant à titre de fondé de pouvoir d'un créancier	O	O	O	O	O	Le syndic agissant à titre de fondé de pouvoir d'un créancier ne peut voter pour sa rémunération ou sa conduite (paragraphe 113 [2] de la Loi).

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Genre de créancier	Quorum	Motion	Résolution ordinaire Vote	Proposition Vote	Résolution spéciale	Commentaires
Créancier ayant un lien de dépendance au cours de l'année précédant l'ouverture de la faillite	O	O	O	O	O	Ce créancier peut voter, mais si le vote a influé sur le résultat du vote, le président établit un nouveau résultat en excluant ce vote. Le nouveau résultat est définitif à moins que le tribunal ne détermine un autre résultat (paragraphe 109[6] de la Loi).
Créance obtenue après la faillite	O	O	O	O	O	Ce créancier peut voter seulement si la réclamation a été acquise en entier (paragraphe 110[1] de la Loi).

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Genre de créancier	Quorum	Motion	Résolution ordinaire Vote	Proposition Vote	Résolution spéciale	Commentaires
Créancier garanti par lettre de change ou billet	O	O	O	O	O	Le créancier peut voter pour le montant qui lui est dû, déduction faite des montants reçus antérieurement (article 111 de la Loi)[3].
Personne réclamant des biens ou un intérêt dans des biens en possession d'un failli	N	N	N	N	N	Cette personne n'est pas un créancier (article 81 de la Loi).

[3] Si un créancier possède une réclamation garantie par une lettre de change connaître ou un billet à ordre, ce créancier doit, pour les fins de la votation, évaluer sa garantie et déduire tous montants reçus antérieurement. Cette disposition ne s'applique pas si le billet à ordre est conjoint et individuel.

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"collective agreement"
« convention collective »
"collective agreement", in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent;

"common-law partner"
« conjoint de fait »
"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

"common-law partnership"
« union de fait »
"common-law partnership" means the relationship between two persons who are common-law partners of each other;

"corporation"
« personne morale »
"corporation" means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, insurance companies, trust companies, loan companies or railway companies;

"court"
« tribunal »
"court", except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act;

"creditor"
« créancier »
"creditor" means a person having a claim provable as a claim under this Act;

"current assets"
« actif à court terme »
"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets;

"date of the bankruptcy"
« date de la faillite »
"date of the bankruptcy", in respect of a person, means the date of
(a) the granting of a bankruptcy order against the person,
(b) the filing of an assignment in respect of the person, or

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(c) the event that causes an assignment by the person to be deemed;

"date of the initial bankruptcy event"
« ouverture de la faillite »
"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,
(b) a proposal by or in respect of the person,
(c) a notice of intention by the person,
(d) the first application for a bankruptcy order against the person, in any case
(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or
(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,
(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d), or
(f) proceedings under the Companies' Creditors Arrangement Act;

"debtor"
« débiteur »
"debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt;

"director"
« administrateur »
"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called;

"eligible financial contract"
« contrat financier admissible »
"eligible financial contract" means an agreement of a prescribed kind;

"equity claim"
« réclamation relative à des capitaux propres »
"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,
(b) a return of capital,
(c) a redemption or retraction obligation,
(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

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"equity interest"
« intérêt relatif à des capitaux propres »
"equity interest" means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

"executing officer"
« huissier- exécutant »
"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor;

"financial collateral"
« garantie financière »
"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

"General Rules"
« Règles générales »
"General Rules" means the General Rules referred to in section 209;

"income trust"
« fiducie de revenu »
"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event;

"insolvent person"
« personne insolvable »
"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

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(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

Royal Bank of Canada v. Cal Glass Ltd., 1979 CanLII 570 (BC SC) - An Example of Ceasing to Pay Debts as They Come Due (Insolvent)

Date:	1979-12-10
Docket:	C785210
Parallel citations:	18 BCLR 55
URL:	http://canlii.ca/t/23pfd
Citation:	Royal Bank of Canada v. Cal Glass Ltd., 1979 CanLII 570 (BC SC), <http://canlii.ca/t/23pfd> retrieved on 2013-08-18
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Reflex Record	Related decisions, legislation cited and decisions cited

Supreme Court of British Columbia
Royal Bank of Canada v. Cal Glass Ltd.
Date: 1979-12-10
J. B. Molson and R. R. C. Twining, for plaintiff.
R. F. Hungerford, for defendant Cal Glass Ltd.
D. P. Baron, for defendant by counterclaim, Coopers & Lybrand Limited.
(Vancouver No. C785210)

[1] 10th December 1979. FAWCUS J.:— This is an action for a declaration that a debenture held by the plaintiff with respect to the assets of the defendant Cal Glass Ltd. ("Cal Glass") is valid and for the usual order for, inter alia, an accounting as to the amount due and owing from Cal Glass to the plaintiff.

[2] Cal Glass pleads that the debenture is invalid and that, in any event, the appointment by the plaintiff of a receiver-manager (the defendant by counterclaim, Coopers & Lybrand Limited), purportedly pursuant to the terms of the debenture, is also invalid. Cal Glass seeks by way of counterclaim damages against both the plaintiff and the receiver-manager.

[3] Cal Glass carried on the business of a boat builder in the municipality of Richmond, British Columbia, for a number of years, initially under the name "California Fibreglass Ltd.". It changed its name to "Cal Glass" in 1977.

[4] At all material times, the plaintiff was Cal Glass' banker. In 1977 Cal Glass established an operating line of credit with the plaintiff of $375,000. By way of security for this line of credit, the plaintiff obtained the usual s. 88 [of the Bank Act, R.S.C. 1970, c. B-1] bank security on Cal Glass' inventory, a general assignment of book accounts and personal guarantees from a Mr. Piccolo, Cal Glass' president, and from Mr. Piccolo's wife.

[5] Early in 1978 Mr. Piccolo, on behalf of Cal Glass, discussed with a Mr. Tommasini, the plaintiff's Richmond branch manager, the question of increasing the line of credit by $50,000 to $425,000. Mr. Tommasini approved this additional line of credit provided that Cal Glass would execute a debenture covering its assets, in favour of the plaintiff. Mr. Piccolo agreed to this, and the debenture was eventually executed in April 1978. During the discussions with Mr. Tommasini, Mr. Piccolo indicated to him that Cal Glass would reduce its indebtedness to the plaintiff to $100,000 by July or August 1978. Although shortly after the execution of the debenture the indebtedness was reduced to $300,000, during the summer it was back to the limit of $425,000. This caused Mr. Tommasini some concern, and that fact, together with several other factors with respect to the business of Cal Glass to which I shall refer later, resulted in his decision to recommend to the plaintiff that a receiver-manager be appointed. On 23rd August 1978 Mr. Tommasini, on behalf of the plaintiff, attended at Cal Glass' business premises in Richmond and gave to Mr. Piccolo a written demand for payment of all moneys due to the plaintiff. The moneys were not paid. Shortly thereafter a Mr. Linsley, a partner of Coopers & Lybrand Limited, arrived with his staff and took over the management of Cal Glass' business.

[6] The attack by Cal Glass on the debenture and on the appointment of the receiver-manager is made on the following grounds:

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1. The debenture is void for lack of consideration in that all funds advanced to Cal Glass by the plaintiff were advanced prior to the execution of the debenture.
2. There was a collateral oral agreement between Cal Glass and the plaintiff that, if Cal Glass executed the debenture, then the plaintiff would not make any demand for payment so long as Cal Glass made the required monthly interest payments. Cal Glass says it did make such payments and that by demanding payment the plaintiff has breached a fundamental term of the collateral oral agreement.
3. It was a further term of the collateral oral agreement that, if Cal Glass executed the debenture, then the plaintiff would, on request, allow Cal Glass to grant a debenture on certain of its assets to the Federal Business Development Bank (the "F.B.D.B."), which would rank in priority over the plaintiff's debenture. Cal Glass says it did arrange financing with the F.B.D.B. in an amount of $100,000; that it then requested the priority agreement from the plaintiff, but the plaintiff refused to give it. Cal Glass says this also is a fundamental breach of the oral agreement.
4. The purported appointment of the receiver-manager was made prior to any demand for payment by the plaintiff and the appointment is therefore invalid.
5. By the express terms of the debenture, Cal Glass was not required to repay the loan, despite any demand for payment, until the debenture had been presented to it. Cal Glass says the debenture was never presented to it and that therefore the demand for payment is invalid.
6. It was an implied term of the debenture that, following a demand by the plaintiff for payment, Cal Glass would have a reasonable period of time within which to make such payment and that the plaintiff did not give Cal Glass reasonable time to make payment. Therefore, says Cal Glass, the plaintiff has not made a demand pursuant to the terms of the debenture and Cal Glass is therefore not in default.

[7] By its amended statement of claim the plaintiff alleges that, aside from the failure of Cal Glass to make payment following the demand for payment by the plaintiff, Cal Glass committed various other acts of default under the terms of the debenture and that the moneys secured thereby have therefore become immediately payable and the security constituted by the debenture enforceable as at 23rd August 1978. Among other acts of default, the plaintiff alleges that Cal Glass was insolvent as at 23rd August 1978.

1. Was the debenture void for lack of consideration?

[8] Mr. Hungerford, counsel for Cal Glass, submits that there was no consideration for the debenture because, although the plaintiff increased the authorized line of credit from $375,000 to $425,000, the additional sum of $50,000 had already been loaned by the plaintiff to Cal Glass, in the sense that Cal Glass was in an overdraft position to at least that amount. But to me it is clear from Mr. Tommasini's evidence that the plaintiff was not prepared to permit Cal Glass to continue with a $50,000 overdraft position or perhaps any overdraft position over and above the authorized line of credit of $375,000 unless Cal Glass agreed to execute a debenture. Refusal by Cal Glass to agree would have meant, according to Mr. Tommasini, whose evidence I accept, that cheques drawn on Cal Glass' account which would result in an overdraft position would not be honoured. I therefore agree with the submission of Mr. Molson, counsel for the plaintiff, that the increase in the authorized line of credit was valid consideration for the debenture.

2. Did the plaintiff agree not to "call the loan" provided that Cal Glass maintained the required monthly interest payments?

[9] The evidence establishes that the required monthly interest payments were made by Cal Glass. Deciding whether there was an agreement that if this was done, then the plaintiff would not demand payment of the loan secured by the debenture, necessitates, unfortunately, an expression of preference of the evidence of either Mr. Tommasini or Mr. Piccolo. That is to say, they are in direct conflict on this issue. Mr. Tommasini denies that any such agreement was made by the plaintiff, either through him or otherwise.

[10] At trial, Mr. Piccolo said that Mr. Tommasini had agreed that the loan would not be called if the interest payments were made. He confirmed this on cross-examination. However, on further cross-examination a portion of his examination for discovery was put to him, namely:

> "Q. In any event, to get back to the question, was there ever a time when Mr. Tommasini said, as long as you make the monthly interest payments as required by clause 2 of the debenture, the Royal Bank will not make demand for payment under the debenture? He never said anything to that effect, did he? A. I don't believe it was the interest in there but he just told me on numerous occasions that he would not call my note."

This answer was also confirmed later in his cross-examination at trial, wherein Mr. Piccolo said the following: "The evidence [I am giving at trial] is true. He [Mr. Tommasini] definitely said he would not call the note". It will be noted that again in this answer Mr. Piccolo did not include any reference to an agreement as to interest.

[11] Because of the conflicting evidence of Mr. Piccolo as given at trial and at his examination for discovery, and because his final answer on cross-examination at trial did not include any reference to interest, I find his evidence quite unsatisfactory. I therefore reject his evidence on this point and I accept Mr. Tommasini's evidence. I find that there was no

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such agreement made by the plaintiff, either through Mr. Tommasini or otherwise, that the loan would not be called provided that Cal Glass maintained the monthly interest payments.

3. Did the plaintiff agree to permit a debenture in the amount of $100,000 to F.B.D.B. to rank in priority over its debenture, and if so, is the plaintiff in breach of this agreement?

[12] The evidence of Mr. Tommasini clearly establishes that he informed Mr. Piccolo in early 1978 that the plaintiff would give priority to the F.B.D.B. for a debenture in the amount of $100,000 on certain fixed assets. Mr. Tommasini said he also confirmed this with Mr. Piccolo in April 1978 when Mr. Piccolo signed the debenture. However, Mr. Tommasini also testified that he told Mr. Piccolo at that time that "... if things are the way they are, based on your financial position, that if the F.B.D.B. was to request facilities we will give you priority". Mr. Tommasini said that, during the following several months and up to a meeting between Mr. Tommasini and Mr. Piccolo on 18th August 1978, he was generally satisfied with Cal Glass' operations. In August, however, he said some cheques were returned "N.S.F." and also that in the month of July third-party notices had been issued by the federal excise branch. As to the latter, he said he spoke to Mr. Piccolo, who said that he would take care of them.

[13] On 18th August 1978 Mr. Piccolo, together with his general manager, Mr. Van Ess, met with Mr. Tommasini. Mr. Tommasini testified, and I accept his evidence, that Mr. Piccolo said Cal Glass needed an additional $100,000 from the plaintiff as well as $100,000 from the F.B.D.B. and that he, Piccolo, intended to contribute $50,000. Mr. Tommasini said he told Mr. Piccolo there was no possibility that the plaintiff could assist Cal Glass further and pointed out to him that Cal Glass was already overdrawn. Mr. Tommasini said that, on mentioning the third-party notices, Mr. Piccolo said that Cal Glass was invoicing boats through Farrell Boats, another operation of Cal Glass', in order to avoid third-party demands. This obviously caused Mr. Tommasini great concern.

[14] Although they did discuss what additional security Mr. Piccolo might be able to provide, nothing came of this and in the result Mr. Tommasini told Mr. Piccolo, in effect, that because of the changed circumstances the plaintiff would not now agree to any priority for any debenture to the F.B.D.B.

[15] Mr. Hungerford says this refusal to give the priority was a breach of the oral agreement made earlier in the year with Mr. Tommasini. He submits that the debenture in favour of the plaintiff would not have been executed by Cal Glass but for the plaintiff's agreement to give such priority. It is, of course, implicit in this submission that Mr. Tommasini, on behalf of the plaintiff, agreed to give such priority at any time in the future regardless of the then existing circumstances and that, in effect, any change for the worse in the financial position of Cal Glass was irrelevant.

[16] Mr. Molson submits that, while it is true that the plaintiff agreed to give such priority to the F.B.D.B., such agreement was based on the then existing financial position of the defendant, that is, in early 1978. He says that position had obviously changed for the worse by the time of the meeting on 18th August 1978 and that Mr. Tommasini's worst fears were confirmed at that meeting. He submits that there was clearly an implied term that if Cal Glass' financial position did not improve, or certainly if it worsened, then the plaintiff would not be bound to give any priority to a debenture executed in favour of the F.B.D.B.

[17] I am quite satisfied from Mr. Tommasini's evidence on this point, which I accept and to which I have already referred, that he told Mr. Piccolo early in 1978, in effect, that if Cal Glass' financial position remained the same, then the priority agreement would be given any time in the future. There was, therefore, an implied term of the agreement, in my view, that if Cal Glass' financial position worsened, then the plaintiff would no longer be under any obligation to give such priority. I find as a fact that Cal Glass' financial position had worsened, as evidenced by the third-party demands issued during the summer of 1978, and as further evidenced by Mr. Piccolo stating at his meeting with Mr. Tommasini on 18th August that he was invoicing boats to a "third party" in order to avoid these demands. I therefore find that, as at 18th August 1978, the plaintiff was under no obligation to grant any priority agreement with respect to a debenture to the F.B.D.B.

4. Was the receiver-manager appointed prior to a demand for payment being made and, if so, does this invalidate the appointment?

[18] On 23rd August Mr. Tommasini, after consulting with the plaintiff's solicitors, obtained from them a duly executed form of appointment of Coopers & Lybrand Limited as receiver-manager and a letter addressed to Cal Glass, demanding payment of the loan. He then attended at Mr. Linsley's office, gave to him a copy of the executed appointment and arranged that he, Tommasini, would go to Cal Glass' business premises and serve the demand and Mr. Linsley would then follow.

[19] Mr. Tommasini then attended at Cal Glass' premises and handed the demand for payment to Mr. Piccolo. No payment was made. A short time later, Mr. Linsley and his assistants arrived and took over Cal Glass' operation as receiver-manager.

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[20] Mr. Tommasini did agree on cross-examination that the appointment of the receiver-manager was not delivered to Mr. Linsley subject to any conditions, but he added that he was under the impression that the appointment did not take effect until it was delivered by Mr. Linsley to Cal Glass.

[21] Mr. Linsley testified that his instructions were to follow Mr. Tommasini to the defendant's premises and that, if the loan had not been paid, then he and his staff would take over as receiver-manager. He said he attended at the premises, met with Mr. Piccolo and, on confirming that payment had not been made, he then exercised his purported authority as receiver-manager and took over the business.

[22] This evidence makes it clear to me that the intention of the plaintiff, through Mr. Tommasini, was that Mr. Linsley would not take over as receiver-manager unless the loan remained unpaid following the demand. Does the fact that the executed appointment of the receiver-manager preceded the presentation of the demand for payment and failure to pay invalidate the appointment? I think not. In my view, there is nothing to prevent such an appointment being prepared, dated, executed and left until it is required — that is, until a demand for payment of the loan has been made and not met: vide *Cripps (R.A.) & Son v. Wickenden; Cripps (Pharmaceuticals) v. Wickenden,* [1973] 2 All E.R. 606.

5. Should the debenture have been presented to Cal Glass at the time demand for payment of the loan was made?

[23] At the time Mr. Tommasini made demand for payment, the debenture was not presented. That is to say, neither the original nor a copy of the debenture was handed to him. Obviously, on the evidence, Mr. Tommasini had not thought of this.

[24] The relevant paragraph of the debenture reads as follows:

> "1. CAL GLASS LTD., A British Columbia Company having its registered office at 2480 Shell Road, Richmond, British Columbia (hereinafter called the 'Company') will ON DEMAND pay to THE ROYAL BANK OF CANADA (hereinafter called the 'Bank') on presentation of this Debenture the sum of FOUR HUNDRED TWENTY-FIVE THOUSAND ($425,000) DOLLARS in lawful money of Canada."

As I follow Mr. Molson's submission, he says that presentation is unnecessary in spite of the express wording of the debenture and, even if it is necessary, such presentation can be made validly at the time payment of the loan is made.

[25] Mr. Hungerford submits that the debenture clearly calls for a presentment of the debenture at the time the demand is made. I agree. That is to say, in my view the plaintiff has agreed, in effect, that payment need not be made until presentment of the debenture is first made, together with the demand. The words of Lord Blanesburgh in *Hunter* v. *Hunter,* [1936] A.C. 222 at 253 (H.L.), are, I think, apposite:

> "The condition in this instance [to demand payment] was a very small protection to the appellant. So much the stricter was the Bank's duty to fulfil it. Here, however, on the part of the Bank's officials the duty was either neglected or forgotten."

[26] I therefore find that the plaintiff failed to follow the express procedure stipulated in para. 1 of the debenture with the result that the demand, as made under that paragraph is, in my view, invalid.

6. Was the plaintiff nevertheless entitled under the terms of the debenture to appoint a receiver-manager?

[27] The plaintiff submits that Cal Glass was, in any event, in breach of several of the conditions referred to in the debenture and that the plaintiff was therefore entitled to appoint a receiver-manager under the debenture. Inter alia, the plaintiff alleges that Cal Glass was insolvent at the time of the appointment. In this respect, the relevant parts of the debenture read as follows:

> **"CONDITIONS REFERRED TO IN THE WITHIN DEBENTURE**
>
> **"5. The principal, interest and other monies hereby secured shall become immediately payable and the security hereby constituted shall become enforceable in each and every of the following events: ...**
>
> **"(c) if the Company becomes insolvent ...".**

[28] Mr. Linsley was called by the plaintiff on this point. He is a chartered accountant of extensive experience and has eminent qualifications. He is a licensed trustee in bankruptcy and has been a partner of Coopers & Lybrand Limited for approximately 20 years. His written reports were filed as part of Ex. 35. Exhibit 35, tab 5, is Mr. Linsley's first written report. In it he expresses the view, which he confirmed at the trial, that the following definitions adequately define a condition of insolvency as it is generally viewed in Canada today, namely:

> **"The Bankruptcy Act [R.S.C. 1970, c. B-3, s. 2] defines an insolvent person as:—**
>
> **" '... a person who is not bankrupt and who resides or carries on business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and**
>
> **" '(*a*) who is for any reason unable to meet his obligations as they generally become due, or**
>
> **" '(*b*) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or**

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" '(*c*) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due".

"The Proposed Bankruptcy Act 1978 (Bill S-11) offers a comparable definition as follows:—

" 'A person is insolvent where:

" '(*a*) the property of the person, if it were realized at a fair value, would be insufficient to pay all his certain and liquidated debts whether or not the debts are due; or

" '(*b*) the person has ceased to pay his certain and liquidated debts generally as they become due.

"In my opinion the aforementioned definitions adequately define a condition of insolvency as it is generally viewed in Canada to-day."

[29] Mr. Linsley then goes on to say in his report that Cal Glass had ceased paying its current obligations in the ordinary course of business as they generally became due prior to the date of the appointment of the receiver-manager, namely, 23rd August 1978, and that more specifically Cal Glass did or failed to do the following:

"Cal Glass Ltd. ceased paying current obligations in the ordinary course of business as they generally became due prior to August 23, 1978 and more specifically the company:—

"(a) did not remit portions of Federal Sales Tax owing for the months of March and April 1978 and all of the amounts owing for Federal Sales Tax for May and June 1978. The total Federal Sales Tax owing as at August 23, 1978 was determined to be approximately $135,000.

"(b) did not remit payroll Income Tax, Unemployment Insurance and Canada Pension Plan deductions and contributions for the months of June and July 1978. The total of such amounts owing as at August 23, 1978 was approximately $45,000.

"(c) did not remit portions of Social Services Tax for the period January 1, 1975 to August 23, 1978 as required by the Social Services Tax Act. The total amount of Social Services Tax owing as at August 23, 1978 was approximately $17,000.

"(d) exceeded its $425,000 level of credit with its bankers.

"(e) failed to make payment to the majority of its trade suppliers as required by the terms of credit extended by the suppliers."

[30] Mr. Linsley's opinion was not given lightly. That is to say, among other things, he caused thorough financial statements for Cal Glass to be prepared. Insofar as he was concerned, the inability of Cal Glass to meet its current obligations in the ordinary course of business was due to a serious lack of working capital. Other evidence called by the plaintiff supported Mr. Linsley's opinion as to the difficulties which Cal Glass was encountering in attempting to meet its current obligations and, in particular, the evidence supported his opinions as expressed in paras, (a) to (e) inclusive above. I need only refer to the evidence of Mr. Van Ess, which I accept, that from the months of May to August 1978 Cal Glass had trouble paying its bills and that the situation was critical by August 1978.

[31] Mr. E. G. Robinson, a chartered accountant, was called on behalf of Cal Glass. Although he does not have Mr. Linsley's extensive experience, he has been a chartered accountant for some seven years and is a licensed trustee. He has some experience in the insolvency field and in receivership work. I thought Mr. Robinson gave his evidence in a very straightforward manner. However, the difficulty, if I may say so, which he faced was in having to rely on Mr. Piccolo's statements and information in preparing his financial statements for Cal Glass and as a basis for his opinion that Cal Glass was not insolvent as at 23rd August 1978. In this respect, I quote from his written report, Ex. 35, tab 1:

"II Ceasing to Pay Current Obligations

"I am informed of the following by Mr. Piccolo:

"(i) That Cal Glass Ltd. had arrangements with the majority of its general creditors that their accounts would generally be paid beyond the time technically specified as the net term applying to invoices from such creditors.

"(ii) That said arrangements were the practice generally applied by the company from time to time in dealing with its creditors and were accepted by such creditors.

"(iii) That during the months of July and August 1978 (up to August 23, 1978) there had been no significant change in the company's practice of dealing generally with its creditors and it was continuing to pay its general creditors in accordance with its past practice.

"(iv) That the company normally operated with liabilities to trade creditors in the range of $400,000 to $600,000; that in March 1978 these liabilities amounted to approximately $525,000 and that as at August 23, 1978 the liabilities to trade creditors had been reduced to approximately $375,000.

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"(v) That Cal Glass Ltd. was in the final stages of negotiation for the provision of $100,000 in term financing from the Federal Business Development Bank to be utilized to make payment on the accounts of the current creditors and to allow the company to replenish its inventories of raw materials and supplies.

"Based on the foregoing information it is my opinion that Cal Glass Ltd. had not ceased to pay its current obligations as they generally came due in the ordinary course of business."

[32] Mr. Piccolo, in his evidence, also expressed the view that Cal Glass was not insolvent because, among other reasons, it had arrangements with its creditors and with the federal excise branch. However, Mr. Piccolo's evidence with respect to the arrangements allegedly made with the federal excise branch with respect to its third-party demands was refuted by a Mr. Reiter, who is the head of collections for that branch. Mr. Reiter testified that such demands were outstanding in July and August 1978. He said that Mr. Piccolo met with the regional director and himself on 15th August in order to discuss the situation. He said an agreement was reached that the demands would be withdrawn provided that a payment of $20,000 was made by Cal Glass in the following few days. However, neither this amount nor any amount was paid, and Mr. Reiter said that the demands were therefore not withdrawn.

[33] With respect to the alleged arrangements with Cal Glass' creditors; in my view, it is clear from Ex. 40, which is an analysis of Cal Glass' accounts payable as at 31st March 1978 and 23rd August 1978, that the situation was seriously worsening with respect to payments, late or otherwise, to the various trade creditors. In his second report, Ex. 35, tab 6, Mr. Linsley, in commenting on the report and analysis done by Mr. Robinson, had the following to say with respect to the alleged arrangements with the creditors:

"It has been suggested that arrangements with creditors for payment beyond their normal terms would cure a condition of insolvency caused by failure to pay current obligations as they generally became due in the ordinary course of business. I disagree since I do not believe that payment arrangements thrust on creditors can be regarded as paying current obligations as they generally become due. Indeed such arrangements, if they existed, might be considered to be further evidence of insolvency."

[34] With respect to the working capital position of Cal Glass; as I have said, Mr. Linsley found it seriously deficient. In his view, a cash injection of some $500,000 was required. Mr. Robinson disagreed with this opinion, but on cross-examination eventually agreed that a sum of approximately $250,000 was required.

[35] I have no hesitation whatsoever in accepting Mr. Linsley's opinion that Cal Glass was insolvent as at 23rd August 1978, in that it had ceased to meet its current obligations in the ordinary course of business as they generally became due.

[36] I might also mention that Mr. Linsley was also of the opinion that Cal Glass was insolvent under the second head, that is, that the aggregate property of Cal Glass "at a fair valuation, ... or, if disposed of at a fairly conducted sale under legal process" was less than book value. Put in another way, in his opinion the fair value of Cal Glass' assets was less than its liabilities. Again, in my view, Mr. Linsley's opinion was based on what I would term a careful preparation, by the employees of Coopers & Lybrand Limited under the direction of Mr. Linsley, of financial statements for Cal Glass, the contents of which were based in part on an examination of the assets of Cal Glass, including a full inventory count and valuation thereof by reference to the company's records.

[37] Again there was a substantial difference of opinion between Mr. Robinson and Mr. Linsley under this head. Based on a review of the financial statements prepared by Coopers & Lybrand Limited and based on information provided to him by Mr. Piccolo, it was Mr. Robinson's opinion that Cal Glass' assets "at a fair and realizable value on a going-concern basis exceeded its liabilities due or accruing due". Mr. Robinson in his report in this respect, Ex. 35, tab 1, was careful to point out that the financial statements of Cal Glass "have not been audited or verified to the books and records of the company". Neither Mr. Robinson nor anyone under his direction examined the records of Cal Glass or conducted any inventory check or valuation by reference to the company's records. As I have said, in this repect he relied on Mr. Piccolo.

[38] Again, I reject Mr. Piccolo's evidence where it conflicts with that of the evidence of the employees of Coopers & Lybrand Limited who, under Mr. Linsley's direction, valued the company's assets and ascertained its liabilities. I therefore accept Mr. Linsley's opinion that Cal Glass was insolvent as at 23rd August 1978, as well as under the second head, namely, for the reason that the fair value of its assets was less than its liabilities.

7. Was the plaintiff required to give Cal Glass reasonable time to pay the loan and, if so, was a reasonable time given?

[39] Mr. Molson submitted that, where a breach of condition 5(c) occurs, then no demand for payment need be made by the plaintiff and therefore that no time, reasonable or otherwise, need be given. However, I agree with the submission of Mr. Hungerford that regardless of the nature of the breach, a demand for payment must always be made. That being so, in my view, a reasonable time must then be given to the borrower to meet the demand: *Ronald Elwyn Lister Ltd.* v. *Dunlop Can. Ltd.* (1978), 19 O.R. (2d) 380, 4 B.L.R. 1, 85 D.L.R. (3d) 321, amended 25 O.R. (2d) 155, which

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was reversed 8 B.L.R. 133, 32 C.B.R. (N.S.) 4 (C.A.); I should note here that the question of the presentation of the debenture does not arise with respect to the breach with which I am now dealing under condition 5(c).

[40] Mr. Hungerford submits that the plaintiff did not give Cal Glass reasonable time to meet the demand for payment and that the demand is therefore invalid and that the appointment of the receiver-manager is likewise invalid. He points to the evidence that a substantial sum of money, namely, $425,000, was the subject of the demand; that Mr. Tommasini arrived after banking hours, namely, at or shortly after 4:00 p.m.; and that only a nominal time, namely, approximately 30 minutes, was given to Cal Glass to meet the demand before the arrival of the receiver-manager. Mr. Hungerford cited *Mister Broadloom Corpn. (1968) Ltd.* v. *Bank of Montreal* (1979), 32 C.B.R. (N.S.) 241, 7 B.L.R. 222 (Ont. S.C.). In dealing with the question of reasonable time, Linden J. stated, and I agree, that the following factors should be considered [C.B.R. p. 253]:

> "Thus a reasonable time must always be allowed, but, in assessing what length of time is reasonable in a particular fact situation various factors must be analyzed: (1) the amount of the loan; (2) the risk to the creditor of losing his money or the security; (3) the length of the relationship between the debtor and the creditor; (4) the character and reputation of the debtor; (5) the potential ability to raise the money required in a short period; (6) the circumstances surrounding the demand for payment; and (7) any other relevant factors."

I therefore apply these factors to the circumstances in the case at bar. In this respect, the grounds for the concern of Mr. Tommasini with respect to Cal Glass' business operation must be considered. I accept his evidence that, at the meeting with Mr. Piccolo on 18th August, not only did Mr. Piccolo inform him that boats were being invoiced to Farrell Boats in order to avoid third-party demands but Mr. Piccolo also stated that if Mr. Tommasini did not accede to the request for further financing and the priority agreement with F.B.D.B. then, in Mr. Piccolo's words, the plaintiff "owned a boat company". Furthermore, the evidence of Mr. Tommasini and Mr. Van Ess, which I accept, is that immediately prior to 23rd August, namely, on the weekend following the meeting of 18th August, Mr. Piccolo had made preparations to remove certain assets of Cal Glass from its premises. Although I accept Mr. Piccolo's evidence that these assets were not of substantial value, nevertheless, the concern from Mr. Tommasini's point of view was understandably real. I must also consider the evidence, and I so find, that Mr. Piccolo did not ask either Mr. Tommasini or Mr. Linsley or any of Mr. Linsley's representatives for time to meet the demand, nor did he indicate that he would be able to raise the money, that is, to re-finance. In fact, according to Mr. Linsley, whose evidence I accept, Mr. Piccolo told him that he had no source of funds. I appreciate that it would be more difficult for a company to re-finance after a receiver-manager has taken over (and Mr. Linsley agreed with this proposition), but nevertheless, in view of the then financial position of Cal Glass, the ability or potential ability of Cal Glass to re-finance to the extent of paying out the plaintiff was improbable, to say the least.

[41] Applying the factors referred to above, and after considering all of the circumstances in the case at bar, I am of the view that the plaintiff acted reasonably and that, in particular, under the circumstances, it was reasonable for the plaintiff to give Cal Glass only a nominal amount of time to meet the demand.

[42] The plaintiff's action is therefore allowed with costs and the counterclaim is dismissed with costs.

[43] I shall leave it to counsel to settle the terms of the order. If there is any difficulty in this respect, the matter may be spoken to further.

[44] Judgment accordingly.

Order accordingly.

“legal counsel”
« conseiller juridique »
“legal counsel” means any person qualified, in accordance with the laws of a province, to give legal advice;

“locality of a debtor”
« localité »
“locality of a debtor” means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

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(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

Sam Lévy & Associés Inc. *v.* Azco Mining Inc., [2001] 3 S.C.R. 978, 2001 SCC 92 - Jurisdiction of Court to Transfer Proceedings to Other Province

Azco Mining Inc. *Appellant*

v.

Sam Lévy & Associés Inc. *Respondent*

Indexed as: Sam Lévy & Associés Inc. *v.* Azco Mining Inc.

Neutral citation: 2001 SCC 92.

File No.: 27876.

2001: May 15; 2001: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for quebec

Bankruptcy and insolvency -- Courts -- Jurisdiction -- Trustee presenting petition to Quebec Superior Court sitting in bankruptcy seeking to "recuperate" assets held by company with office in British Columbia -- Company bringing motion to transfer petition to British Columbia -- Whether Superior Court lacked subject matter jurisdiction over petition -- Whether Superior Court erred in exercising discretion against making transfer order -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-1, s. 187(7).

The appellant is a company incorporated under the laws of Delaware, offering venture capital services from its office in British Columbia. In 1996, a deal involving the financing of an African gold mine was struck between the appellant and Eagle, a company with offices in Quebec. The parties reduced their agreement to a series of documents, each of which contained a clause stating that the agreement was to be governed by the laws of British Columbia. In September 1997, Eagle was adjudged bankrupt by the Quebec Superior Court sitting in bankruptcy and the respondent firm was appointed trustee in bankruptcy. In January 1999, the respondent trustee presented a petition seeking to "recuperate" the assets of Eagle, including the monetary value of numerous shares held or controlled by the appellant. The appellant then brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". The appellant's motion was dismissed. The Court of Appeal unanimously upheld that decision.

Held: The appeal should be dismissed.

The bankruptcy petition was properly filed in the Quebec Superior Court sitting in bankruptcy. A creditor is required to file a bankruptcy petition in the court having jurisdiction in the judicial district of the locality of the debtor. Eagle carried on business in Quebec and its only connection to British Columbia was that the agreements between itself and the appellant referred to the law of that province. Nothing in the evidence suggested that the bankruptcy court in Quebec lacked subject matter jurisdiction over the petition or personal jurisdiction over Eagle when it made the receiving order. The bankruptcy court thereby acquired jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia. The *Bankruptcy and Insolvency Act* establishes a nationwide scheme for the adjudication of bankruptcy claims. Section 188(1) ensures that orders made by the bankruptcy court sitting in one province can and will be enforced across the country.

The bankruptcy court does not lack subject matter jurisdiction over the dispute because it is a contract case. While a trustee's claim in relation to a "stranger to the bankruptcy" or lacking the "complexion of a matter in bankruptcy" should be brought in the ordinary civil courts, if the contractual dispute properly relates to the subject matter of the bankruptcy proceedings, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction. Here, far from being a "stranger" to the bankruptcy, the appellant is potentially the most significant player in the role of either creditor or debtor, as the case may be. Further, while the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases, the trustee's claim is not properly characterized as a claim in damages but as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant.

The *Bankruptcy and Insolvency Act prima facie* establishes one command centre or "single control" for all proceedings related to the bankruptcy. "Single control" is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" under s. 187(7) to send the trustee scurrying to multiple jurisdictions. The motions judge was entitled to conclude that the facts of this case do not show "sufficient cause" to require the transfer to British Columbia.

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The relevant agreements to which the appellant and Eagle were parties contained choice of law, not choice of forum provisions, and the Quebec courts are perfectly able to apply the law of British Columbia. Furthermore, arts. 3148 and 3135 of the *Civil Code of Québec* would only apply in bankruptcy court "[i]n cases not provided for in the Act or . . . Rules". Since s. 187(7) of the Act specifically provides that a transfer will not be ordered unless there is satisfactory proof that a proceeding will be "more economically administered" in another division or district or "for other sufficient cause", these particular provisions of the Code can have no application. Where, unlike in this case, a defendant has the benefit of a choice of forum clause, such a clause ought to be taken into careful consideration by a motions judge under s. 187(7) but it is not binding.

Cases Cited

Followed: *Stewart v. LePage* (1916), 53 S.C.R. 337; *In re Ireland* (1962), 5 C.B.R. (N.S.) 91; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; **distinguished:** *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; **referred to:** *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87; *Boily v. McNulty*, [1928] S.C.R. 182; *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240; *Associated Freezers of Canada Inc. (Trustee of) v. Retail, Wholesale Canada, Local 1015* (1996), 39 C.B.R. (3d) 311; *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380; *In re Morris Lofsky* (1947), 28 C.B.R. 164; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75; *Re Holley* (1986), 54 O.R. (2d) 225; *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336; *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31; *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31; *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83; *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19; *In re Martin* (1953), 33 C.B.R. 163; *In re Reynolds* (1928), 10 C.B.R. 127; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143; *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246; *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; *Excavations Sanoduc inc. v. Morency*, [1991] R.D.J. 423; *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226; *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23; *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171; *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256; *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040; *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143, leave to appeal refused [1997] 2 S.C.R. xiv; *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235, aff'd (1992), 9 O.R. (3d) 755, leave to appeal refused [1992] 3 S.C.R. v; *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471; *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (1960); *In re Treco*, 239 B.R. 36 (1999), aff'd 240 F.3d 148 (2001); *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109; *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (1987); *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (1989).

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2(1) [am. 1997, c. 12, s. 1], 17(1), 30(1)(*d*), 43(5) [rep. & sub. 1992, c. 27, s. 15], 72(1), 183(1)(*b*), (*c*), 187(7), 188(1), (2).

Bankruptcy and Insolvency General Rules, C.R.C., c. 368 [am. SOR/98-240], s. 3.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 3135, 3148.

Code of Civil Procedure, R.S.Q., c. C-25.

Constitution Act, 1867, ss. 91(21), 92(13).

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APPEAL from a judgment of the Quebec Court of Appeal, [2000] R.J.Q. 392, [2000] Q.J. No. 417 (QL), dismissing the appellant's appeal from a judgment of the Superior Court, [1999] R.J.Q. 1497. Appeal dismissed.

Yves Martineau, for the appellant.

Jean-Philippe Gervais, for the respondent.

The judgment of the Court was delivered by

1 BINNIE J. -- The long arm of the Quebec Superior Court sitting in Bankruptcy reached out to the appellant in Vancouver, British Columbia, in respect of a claim for shares and warrants and other debts allegedly due to the bankrupt which the trustee in bankruptcy values in excess of $4.5 million. The appellant protested that the dispute, which involves the financing of an African gold mine, has nothing to do with Quebec. It argues that the claim of the

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respondent trustee in bankruptcy is an ordinary civil claim that rests entirely on agreements that are to be interpreted according to the laws of British Columbia. For this and other reasons of convenience and efficiency, the appellant says, the claim ought to proceed in British Columbia. The bankruptcy court and the Quebec Court of Appeal rejected these submissions and, in my view, the further appeal to this Court ought also to be dismissed.

I. Facts

2 The appellant Azco Mining Inc. ("Azco"), a company incorporated under the laws of Delaware, offered venture capital services from its office in Vancouver, British Columbia. In 1996 it was introduced to Eagle River International Limited and Eagle River Exchange and Financial Services Inc. (hereinafter collectively referred to as "Eagle"), with offices in Gatineau, Quebec. Eagle was in the process of trying to develop promising gold mining properties in a 500 square mile area of Mali, West Africa. A deal was struck whereby Eagle would continue to use its expertise to bring the mines to production through subsidiary companies in Mali, and Azco would provide the financing. The parties reduced their agreement to a series of documents, each of which contained what the appellant contends is a choice of forum clause and the respondent argues is no more than a choice of law clause, as follows:

> June 7, 1996 financing agreement
>
> 28. The agreement shall be governed by the law of British Columbia.
>
> June 12, 1996 management services agreement
>
> 13. **Arbitration**: The Parties hereto agree that all questions or matters in dispute with respect to this Agreement shall be submitted to arbitration pursuant to the terms hereof.
>
> . . .
>
> 20. **Applicable Law**: The situs of this Agreement is Vancouver, British Columbia, and, for all purposes this Agreement, will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia.

3 In addition, Azco relies on the terms of the debenture entered into by Azco with Eagle's subsidiary company in Mali (called West African Gold & Exploration S.A.), as follows:

> West African Gold & Exploration S.A. Debenture dated August 9, 1996
>
> 17. [The] situs of this Debenture is Vancouver, British Columbia, and for all purposes this Debenture will be governed exclusively by and construed and enforced in accordance with the laws prevailing in the Province of British Columbia. In addition, the Company hereby expressly acknowledges and agrees to forthwith execute any and all documentation which may be necessary in order to ensure both the enforceability of this Debenture and the valid registration thereof as against the Mortgaged Property under the laws prevailing in each of the Province of British Columbia and the Republic of Mali and, in addition, and without limiting the generality of the foregoing, to attorn, if required, to any courts of competent jurisdiction in the Province of British Columbia in order to either administer or interpret this Debenture in accordance with the laws prevailing in the Province of British Columbia.

4 It was envisaged that if the project were successful Azco would ultimately own a majority interest in what the trustee describes as a joint venture holding company, Sanou Mining Corporation ("Sanou"). Eagle was to be a minority partner.

5 During the period of May 16, 1996 and May 1, 1997, Azco paid Eagle a total of US$3,844,858. For each payment, Eagle executed a promissory note, undertaking to repay Azco if it failed to fulfill its contractual obligations.

6 On September 12, 1997, Eagle was adjudged bankrupt. The respondent firm was appointed trustee in bankruptcy. Despite Eagle's bankruptcy, the Mali project proceeded and, according to Azco, it is still underway. The trustee says that the appellant now controls the holding company Sanou and continues to withhold, wrongfully, the 3.5 million shares and 4 million warrants to which Eagle was (and is) entitled.

7 On January 18, 1999, the respondent trustee presented a petition to the Quebec Superior Court sitting in Bankruptcy ("the bankruptcy court") seeking to "recuperate the assets" of Eagle, including the monetary value of what it considers the wrongfully withheld property of the debtor, namely 125,000 shares of Azco itself and 3.5 million shares and 4 million warrants of Sanou. The respondent trustee values the Azco shares at CAN$337,500 and the Sanou interest at US$1,875,000. In addition the trustee advances some monetary claims for a variety of alleged debts.

8 On February 24, 1999, the appellant brought a motion to transfer the petition "to the Supreme Court of British Columbia, Bankruptcy Division of Vancouver". In support of its motion, the appellant stated that "it is a certainty that Azco will file a counterclaim for an amount in excess of $5,000,000 Cdn., based principally" on the financing agreements to recover about US$3.85 million in the payments to Eagle mentioned above which, as stated, were secured by promissory notes. The contractual arrangement, says Azco, was that if certain conditions in the agreements were not met, the advances would be treated as a demand loan. Azco says the conditions were not met and that it is entitled to

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immediate repayment of all advances. Azco submitted that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco". Its position, as stated, was that the file should be transferred to the Bankruptcy Division of Vancouver.

9 Azco's Vice-President of Finance, Ryan Modesto, who lives in the United States, testified in support of the motion that Azco is a creditor in the bankruptcy:

Q. So is it Azco Mining's position that it is the creditor in that bankruptcy of Eagle River?
A. Yes, it is.
Q. For what amount?
A. For three million eight hundred forty-four thousand eight hundred and fifty-eight dollars ($3,844,858) plus accrued interest.
Q. That's U.S. currency?
A. That is U.S. currency.
Q. And you refer to interest. Are you referring to the interest referred to in the promissory note?
A. Exactly.

10 Azco's motion was dismissed by Isabelle J. of the Quebec Superior Court on May 6, 1999. That decision was upheld by the Quebec Court of Appeal on February 21, 2000.

II. Judicial History

A. *Quebec Superior Court*, [1999] R.J.Q. 1497

11 Isabelle J. held that the Quebec Superior Court sitting in Bankruptcy had jurisdiction to deal with the respondent's petition. The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), were clear and there was no need to refer to the *Civil Code of Québec*, S.Q. 1991, c. 64, or the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25.

12 Azco had not argued that the bankrupt's affairs could be more efficiently administered in British Columbia but rather that there were other "sufficient" reasons for transferring the proceeding to that province, including, in particular, certain clauses in the agreement (reproduced above) that Azco said required the dispute to be tried in British Columbia. Isabelle J. ruled that these clauses had to do with choice of law rather than choice of forum and in any event lacked an "imperative" character.

13 Isabelle J. accepted that he could transfer the proceeding to the Vancouver division of the Supreme Court of British Columbia sitting in Bankruptcy under s. 187(7) of the Act. There was no need to turn to the specific rules governing *forum non conveniens* set out in art. 3135 of the *Civil Code of Québec*. Having regard to all the circumstances, however, Isabelle J. did not think a transfer of proceedings would be justified. The legislator bestowed on the trustee the power to manage the affairs of the bankrupt in the most practical and economical manner possible. Vancouver may be convenient for the appellant, but the interests of all the creditors prevailed over the convenience of only one creditor. Accordingly, the appellant's motion was dismissed.

B. *Quebec Court of Appeal*, [2000] R.J.Q. 392

14 A unanimous Court of Appeal dismissed Azco's appeal. Robert J.A., concurred in by Proulx and Rousseau-Houle JJ.A., agreed that the Quebec Superior Court had jurisdiction over Eagle's bankruptcy, noting that the company was carrying on business in Quebec when the bankruptcy proceedings were initiated. The petition against Azco was authorized by s. 30(1)(*d*) of the Act which empowers a trustee to bring legal proceedings relating to the property of the bankrupt with the permission of the inspectors.

15 Robert J.A. agreed with the motions judge that it would be most efficient and equitable to have a single court oversee the administration of the bankrupt estate despite the fact that a centralized bankruptcy might present certain difficulties and inconveniences for parties residing in provinces far from the bankruptcy forum. However, like Isabelle J., he noted that the courts retain some discretion under s. 187(7) to transfer a case to another division where there is proof that the bankrupt's estate would be administered more economically or where some other sufficient reason exists. In the present case, Robert J.A. found that Azco had not demonstrated it would be more economical to proceed before the bankruptcy court in British Columbia. As to other circumstances, Robert J.A. ruled that the contractual terms that Azco characterized as choice of forum clauses did not bind the trustee in bankruptcy, who represented and acted for the benefit of all creditors. The clauses in question were not exclusive jurisdiction clauses but even if they were, the Act is a law of public order and its provisions must be rigorously applied given the consequences for the rights of both debtors and creditors.

III. Relevant Statutory Provisions

16 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

2. (1) In this Act,

. . .

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"locality of a debtor" means the principal place

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

. . .

(*d*) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

43. . . .

(5) The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

. . .

(*b*) in the Province of Quebec, the Superior Court;

(*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

187. . . .

(7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

188. (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368 (am. SOR/98-240)

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Civil Code of Québec, S.Q. 1991, c. 64

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

. . .

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

. . .

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

IV. Analysis

17 Parliament has conferred on the bankruptcy court the capacity and authority to exercise "original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act" (s. 183(1)). On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's

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jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.

18 While the appellant's motion simply asked that the dispute be transferred to the Vancouver Division of the Supreme Court of British Columbia sitting in Bankruptcy (thereby appearing to concede that the dispute is properly dealt with as a bankruptcy matter), its motion also contended that the trustee's claims are "exclusively contractual" (para. 6) and that the "Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). Moreover, much of its oral argument suggested that the dispute ought to be tried in the ordinary civil courts. In addition the appellant takes the position that Quebec is not the convenient forum to deal with this dispute, and that the Quebec Superior Court sitting in Bankruptcy lacks a sufficiently long arm to require Azco to take its witnesses east to litigate. The proper forum, it says, is British Columbia because there is no substantial connection at all between this case and the Province of Quebec.

19 It is convenient to address the legal issues raised by the appellant in the following order:

1. Was the bankruptcy petition properly filed in the Hull Division of the Quebec Superior Court sitting in Bankruptcy?
2. If so, did that court thereby acquire jurisdiction to deal with matters affecting the bankrupt estate arising in British Columbia?
3. If so, are contract claims nevertheless excluded from federal bankruptcy jurisdiction?
4. If not, does this particular contract claim come within the bankruptcy court's jurisdiction?
5. Even if fully clothed with jurisdiction to hear this case, should the bankruptcy court in Hull nevertheless have transferred the file to the court exercising counterpart bankruptcy jurisdiction in Vancouver?

1. Was the Bankruptcy Petition Properly Filed in the Hull Division of the Quebec Superior Court Sitting in Bankruptcy?

20 Parliament decided to utilize the superior courts of the provinces and territories to exercise bankruptcy jurisdiction (s. 183). It has long been established that, with respect to matters coming within the enumerated heads of s. 91 of the *Constitution Act, 1867*, "the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent": *Attorney-General for Alberta v. Atlas Lumber Co.*, [1941] S.C.R. 87, *per* Rinfret J., at p. 100. The courts mentioned in s. 183 retain their character as superior courts of inherent jurisdiction, but will be referred to here, perhaps with some imprecision of language, as the bankruptcy courts.

21 A creditor who wishes to obtain a receiving order against a debtor is required to file a bankruptcy petition "in the court having jurisdiction in the judicial district of the locality of the debtor" (s. 43(5)).

22 The "locality of the debtor" is defined under s. 2(1) as the "principal place"

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated;

23 Section 43(5) expresses a rule of jurisdiction that apportions among the courts named in s. 183(1) judicial power over the adjudication of bankruptcy petitions. The evidence was that Eagle carried on business in Quebec even though it had not obtained a licence to do so. The agreements between Azco and Eagle (and the promissory notes on which Azco's counterclaim is based) recite that Eagle has an office at 212 Labrosse Boulevard, Gatineau, Quebec. The same address appears on its corporate letterhead. Azco's Vice-President of Finance testified that his meetings with respect to the financing were held at that office. There is no suggestion that Eagle vacated the premises prior to its bankruptcy, or that it had any other offices in Canada.

24 It appears that Eagle's only connection to British Columbia is that the agreements mentioned above refer to the law of that province. It is clear that s. 43(5) would not have permitted the filing of the bankruptcy petition in British Columbia on such a ground. Nothing in the evidence, in my view, suggests that the bankruptcy court in Hull lacked subject matter jurisdiction over the petition and personal jurisdiction over Eagle when it made the receiving order on September 12, 1997.

2. *Did the Bankruptcy Court Thereby Acquire Jurisdiction to Deal With Matters Affecting the Bankrupt Estate Arising in British Columbia?*

25 The Act establishes a nationwide scheme for the adjudication of bankruptcy claims. As Rinfret J. pointed out in *Boily v. McNulty*, [1928] S.C.R. 182, at p. 186: [TRANSLATION] "This is a federal statute that concerns the whole country, and it considers territory from that point of view". The national implementation of bankruptcy decisions rendered by a court within a particular province is achieved through the cooperative network of superior courts of the provinces and territories under s. 188: *In re Mount Royal Lumber & Flooring Co.* (1926), 8 C.B.R. 240 (Que. C.A.), *per* Rivard J.A., at p. 246, [TRANSLATION] "The *Bankruptcy Act* is federal and the orders of the Quebec Superior Court sitting as a bankruptcy court under that Act are enforceable in Ontario". See also: *Associated Freezers of Canada Inc.*

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(Trustee of) v. Retail, Wholesale Canada, Local 1015 (1996), 39 C.B.R. (3d) 311 (N.S.C.A.), at p. 314, and *Kansa General International Insurance Co. (Liquidation de)*, [1998] R.J.Q. 1380 (C.A.), at p. 1389.

26 The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation". *Stewart* dealt with the winding up of a federally incorporated trust company in British Columbia. As a result of the winding up, a client in Prince Edward Island instituted a proceeding in the superior court of that province for a declaration that certain moneys held by the bankrupt trust company were held in trust and that the bankrupt trust company should be removed as trustee. This Court held that the dispute, despite its strong connection to Prince Edward Island, could not be brought before the court of that province without leave of the Supreme Court of British Columbia. Anglin J. commented at p. 349:

> No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

27 *Stewart* was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse. Section 188(1) ensures that orders made by a bankruptcy court sitting in one province can and will be enforced across the country.

28 I have concluded that the jurisdiction of the Quebec Superior Court sitting in Bankruptcy was properly invoked by the petitioning creditors in this case but counsel for the appellant company says that his client, with its office in British Columbia, is not within its reach. The argument, in part, is that whatever the power of Parliament to confer national jurisdiction on a provincial superior court, that court is nevertheless provincially constituted, and for service of process its long arm statute must be complied with. The factual record does not show precisely how service of the trustee's petition was effected on the appellant, but if the appellant had any concerns regarding the proprieties of service of the petition to initiate proceedings against it, such concerns were waived when Azco did not raise them in its motion brought in Hull. A good deal of time was occupied on the appeal with arguments about how a Quebec court could acquire *in personam* jurisdiction over a corporation resident in British Columbia, and whether the Quebec rules for service *ex juris* applied. The argument that the Quebec Superior Court sitting in Bankruptcy cannot exercise *in personam* jurisdiction over creditors in another province under the Act is rejected for the reasons of national jurisdiction already mentioned. Any objections regarding service of process are answered by the fact that Azco not only appeared in Quebec but invoked the jurisdiction of the Quebec Superior Court sitting in Bankruptcy to transfer the proceedings pursuant to s. 187(7) of the Act to the bankruptcy court sitting in Vancouver. Any remaining issue with respect to *in personam* jurisdiction was thereby waived.

29 Azco did not, of course, waive its objection to jurisdiction over the subject matter of this particular dispute. That was a major point in its motion. I turn now to that issue.

3. *Are Contract Claims Nevertheless Excluded From Federal Bankruptcy Jurisdiction?*

30 The appellant's motion, as stated, argued that the trustee's claims against it are "exclusively contractual in nature" (para. 6) and that "[t]he Superior Court of the Bankruptcy Division of Hull does not have jurisdiction to hear this contractual claim against Azco" (para. 20). The theory underlying these contentions seems to be that contract claims relate to "Property and Civil Rights" within the meaning of s. 92(13) of the *Constitution Act, 1867* and on that account lie outside the jurisdiction of the bankruptcy court. At para. 42 of its factum, for example, the appellant argues:

> [TRANSLATION] Contrary to what the Court of Appeal affirms, the trustee's claim is therefore purely contractual in nature, under the civil law. It is not a remedy specifically provided for under the BIA such as the application to have preferential payments declared void (see sections 91 to 100 BIA). The mere fact that the plaintiff is a trustee does not alter the nature of the claim and does not turn it into a bankruptcy dispute.

31 Most bankruptcy issues, of course, present a property and civil rights aspect. It is true, however, that some of the decided cases which deny jurisdiction to the bankruptcy court do so on grounds that have a constitutional flavour, e.g., *In re Morris Lofsky* (1947), 28 C.B.R. 164 (Ont. C.A.), *per* Roach J.A., at p. 167; *Sigurdson v. Fidelity Insurance Co.* (1980), 35 C.B.R. (N.S.) 75 (B.C.C.A.), at p. 102; *Re Holley* (1986), 54 O.R. (2d) 225 (C.A.); *In re Ireland* (1962), 5 C.B.R. (N.S.) 91 (Que. Sup. Ct.), *per* Bernier J., at p. 94, and *Falvo Enterprises Ltd. v. Price Waterhouse Ltd.* (1981), 34 O.R. (2d) 336 (H.C.).

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32 It is therefore necessary to come to an understanding of what is included in the subject matter of "Bankruptcy" within the meaning of s. 91(21) of the *Constitution Act, 1867*.

33 In *In re The Moratorium Act (Sask.)*, [1956] S.C.R. 31, it was stated by Rand J., at p. 46, that:

> Bankruptcy is a well understood procedure by which an insolvent debtor's property is coercively brought under a judicial administration in the interests primarily of the creditors.

34 The core concept of coercive administration appeared early in our bankruptcy jurisprudence. In *Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31, Lord Selborne, speaking at p. 36 of general laws governing bankruptcy and insolvency, said: "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation".

35 More helpful still was Lord Selborne L.C.'s description of bankruptcy in the context of the English Act in *Ellis v. Silber* (1872), L.R. 8 Ch. App. 83, at p. 86:

> That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority. [Emphasis added.]

36 Despite the fact that England is a unitary state without the constitutional limitations imposed by our division of powers, the courts in Canada have generally hewn ever since 1874 to the basic dividing line between disputes related to the administration of the bankrupt estate and disputes with "strangers to the bankruptcy". The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or if the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Re Ireland*, *supra*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée (Trustees of) v. Caisse Populaire de Black-Lake* (1987), 66 C.B.R. (N.S.) 19 (Que. C.A.); *In re Martin* (1953), 33 C.B.R. 163 (Ont. S.C.), at p. 169; *In re Reynolds* (1928), 10 C.B.R. 127 (Ont. S.C.), at p. 131; *Re Galaxy Interiors Ltd.* (1971), 15 C.B.R. (N.S.) 143 (Ont. S.C.); *Mancini (Trustee of) v. Falconi* (1987), 65 C.B.R. 246 (Ont. S.C.), and *Re Morris Lofsky*, *supra*, at p. 169.

37 The Quebec Court of Appeal has perhaps led the argument for a more expansive interpretation of what disputes properly come under the bankruptcy umbrella and can therefore properly be litigated in the bankruptcy court: *Geoffrion v. Barnett*, [1970] C.A. 273; *Arctic Gardens inc. (Syndic de)*, [1990] R.J.Q. 6; and *Excavations Sanoduc inc. v. Morency*, [1991] R.D.J. 423. See also the dissenting judgment of LeBel J.A., as he then was, in *Cry-O-Beef Ltd./Cri-O-Bœuf Ltée*, *supra*, and *In re Atlas Lumber Co. v. Grier and Sons Ltd.* (1922), 3 C.B.R. 226 (Que. Sup. Ct.); but the push is not confined to Quebec: *In re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (N.S.S.C.); *Re Westam Developments Ltd.* (1967), 10 C.B.R. (N.S.) 61 (B.C.C.A.), at p. 65; *Re M. B. Greer & Co.* (1953), 33 C.B.R. 69 (Ont. S.C.), at p. 70; *Re M.P. Industrial Mills Ltd.* (1972), 17 C.B.R. 226 (Man. Q.B.).

38 It seems to me that the decided cases recognize that the word "Bankruptcy" in s. 91(21) of the *Constitution Act, 1867* must be given a broad scope if it is to accomplish its purpose. Anything less would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs. Creation of a national jurisdiction in bankruptcy would be of little utility if its exercise were continually frustrated by a pinched and narrow construction of the constitutional head of power. The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction.

39 There are limits, of course. If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Re Reynolds*, *supra*, at p. 129) or lacks the "complexion of a matter in bankruptcy" (*Re Morris Lofsky*, *supra*, at p. 169) it should be brought in the ordinary civil courts and not the bankruptcy court. However, claims for specific property may clearly be advanced in the bankruptcy courts (*Re Galaxy Interiors*, *supra*, and *Sigurdson*, *supra*), as can claims for relief specifically granted by the Act (*Re Ireland*, *supra*, and *Re Atlas*

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Lumber, *supra*). That said, it is sometimes difficult to discern the particular "golden thread" running through the cases. L. W. Houlden and G. B. Morawetz observe:

> There has been a great deal of litigation on this issue, and the cases are not always easy to reconcile. The difficulty flows from the division of constitutional powers in Canada, bankruptcy and insolvency being a federal power, and property and civil rights and the administration of justice being provincial powers.
> (*Bankruptcy and Insolvency Law of Canada* (3rd ed. (looseleaf)), at I§4)

40 The short answer to the "property and civil rights" argument, however, is that the appellant poses the wrong question. The issue is whether the contractual dispute between it and the respondent trustee properly relates to the bankruptcy. If so, the fact it also has a property and civil rights aspect does not in any way impair the bankruptcy court's jurisdiction.

4. *Does This Particular Contract Claim Come Within the Bankruptcy Court's Jurisdiction?*

41 In this case, the respondent trustee, with the permission of the inspectors, is instituting a "legal proceeding" in the bankruptcy court under s. 30(1)(*d*) "relating to the property of the bankrupt". In addition to the Azco and Sanou shares, the trustee says the definition of "property" in s. 2 includes "things in action" which, it is argued, includes the trustee's monetary claims.

42 As to the shares and warrants, the trustee alleges in para. 108 of its petition that Azco is "acknowledged to be the nominal owner of 100% of Sanou Mining Corporation" which owns West African Gold & Exploration S.A., which in turn runs the mining concessions in Mali. The allegation, in effect, is that Azco holds the Sanou shares and warrants that rightfully belong to the bankrupt estate and is in a position to transfer them to the trustee if required to do so by the bankruptcy court.

43 As discussed above, it cannot plausibly be argued that the bankruptcy court lacks subject matter jurisdiction over the dispute because it is a contract case. The objection, more narrowly defined, is whether the bankruptcy court lacks jurisdiction because (i) the appellant is properly considered a "stranger to the bankruptcy", or (ii) the bankruptcy court cannot award the remedy which the trustee seeks.

(i) Is the Appellant a "Stranger to the Bankruptcy"?

44 If a potential defendant is a "stranger" to the bankruptcy, the bankruptcy court may have no subject matter jurisdiction over the dispute (because it is not part of the bankruptcy) even though the "stranger" resides within the territorial jurisdiction of the court.

45 At the time of the trustee's petition, the appellant had filed no proof of claim in the bankruptcy. It seems to have adopted a "come and get me approach", that is to say, it would file a claim only if claimed against by the trustee. Eventually the trustee *did* claim against it by way of the January 18, 1999 petition and the appellant *did* give notice of its counterclaim in its February 24, 1999 motion, including the fact it held promissory notes for US$3,844,858 signed by the bankrupt, payable on demand, constituting potential obligations now inherited by the trustee.

46 In a decision released concurrently, *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, we uphold a decision of the Federal Court of Canada to dispose of the claims of maritime lienholders against a ship whose owner was adjudged bankrupt after the ship was arrested but before the *in rem* action had proceeded to judgment. We concluded that the Federal Court did not lose subject matter jurisdiction by virtue of the subsequent bankruptcy of the shipowner. We held that the Federal Court *could* have stayed its proceedings in deference to the bankruptcy court but was not, in the circumstances, obliged to do so.

47 The issue here is somewhat different. The appellant is resisting a claim by the trustee in bankruptcy and threatening to bring a counterclaim against the bankrupt estate based on the same set of commercial agreements. The appellant sought only to have the proceedings transferred to a different division of the bankruptcy court within Canada.

48 In *Re Morris Lofsky*, *supra*, the Ontario Court of Appeal dealt with a case where the trustee sought a declaration that the transfer of an automobile from the bankrupt to his wife was fraudulent and void as against the trustee and that it formed part of the property of the bankrupt. The wife resisted the claim on the ground that the automobile never belonged to the bankrupt (even though it was registered in his name). Roach J.A., at p. 169, found the wife was a stranger to the bankruptcy:

> In my opinion, it must be concluded that the issue between the trustee and the appellant is not a matter in bankruptcy and that it is purely a matter of property and civil rights. It has none of the elements that would bring it within the former. No question as between debtor and creditor here arises in the distribution of a bankrupt estate. The appellant does not claim title to the automobile through the bankrupt. Indeed she says that the bankrupt never had title and that she was always the owner. I cannot think of any aspect of the issue that gives it the complexion of a matter in bankruptcy unless perhaps this, that the bankrupt pending the bankruptcy caused the new motor vehicle permit to be issued in her name. That does not

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make the issue one in bankruptcy when the sole question is who, as between the bankrupt and the appellant, was always the true owner.

See also *Re Reynolds*, *supra*, at p. 131.

49 On the record before us, however, the appellant takes the position that it is the largest creditor of the bankrupt estate and that it will "with certainty" counterclaim in answer to the trustee's petition. The trustee, for its part, regards the appellant as the biggest debtor of the bankrupt estate. Far from being a "stranger" to the bankruptcy, Azco is potentially the most significant player in the role of either creditor or debtor, as the case may be.

(ii) Does the Bankruptcy Court Have Jurisdiction to Grant the Remedy Sought by the Trustee?

50 It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act. In *Sigurdson*, *supra*, the trustee in bankruptcy sued two former directors of the bankrupt for fraud in the Supreme Court of British Columbia. During the course of its reasons on another point, the Court of Appeal remarked that if the trustee had sued in the bankruptcy court "he would have been in the wrong court" as "[h]e must use the ordinary civil courts to sue for damages" (p. 102). See also *Re Ireland*, *supra*.

51 In my view, however, the trustee's claim here is not properly characterized as a simple claim in damages, even though the trustee has attempted to place a monetary value on the shares which it says belong to the bankrupt estate but which the appellant, it says, wrongfully withholds. I do not think the bankruptcy court is precluded from considering an order that substitutes money for the claimed property in circumstances where the claimed property cannot be delivered up. The bulk of the trustee's claim, it will be recalled, is for 125,000 shares of Azco itself, plus 3.5 million shares of Sanou and 4 million warrants of Sanou, which the trustee says is wholly controlled by the appellant. The trustee's petition states in para. 65:

> The Debtor/Company is also entitled to receive 3,500,000 shares of Sanou and 4,000,000 warrants of said Sanou, as per the terms of the Agreement, the whole as it has been acknowledged by the Respondent itself in their annual report to United States Securities and Exchange commission for the fiscal year ending June 30, 1997, filed as Exhibit R-24;

52 As to the Azco shares, the trustee states in para. 101 of its petition that it claims "125,000 shares of Azco Mining Corporation which had a value at 2.70$ Cdn dollars per share".

53 Equally significantly, the appellant acknowledges that the gist of the action against it is the delivery up of the shares. It says at para. 25 of its factum:

> [TRANSLATION] It seems that the trustee's claim is a real action rather than a personal one since the trustee is primarily seeking the rights to 125,000 shares of Azco and 3,500,000 shares and 4,000,000 warrants of Sanou (see in particular paragraphs 95, 98, 99 and 102 of the trustee's petition).

54 The parties therefore seem to agree, despite some obfuscating language in the trustee's petition, that the bulk of the trustee's claim is properly characterized as a claim to specific property of the bankrupt which is being wrongfully withheld by the appellant. As such, the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(*d*)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act. See *Re Galaxy Interiors*, *supra*, *per* Houlden J., at p. 144; *Mancini*, *supra*, *per* Catzman J., at pp. 250-51; *Re Atlas Lumber*, *supra*, *per* Rinfret J., at p. 234.

55 It will be for the bankruptcy court in Hull to scrutinize the petition when the facts are known and the parties' positions on the issues are clarified to determine whether any particular element of the trustee's multiple claims falls outside its jurisdiction. For present purposes, it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed. On the present state of the record (this being a preliminary motion), we can go no further.

5. *Even if Fully Clothed with Jurisdiction to Hear This Case, Should the Bankruptcy Court in Hull Nevertheless Have Transferred the File to the Court Exercising Counterpart Bankruptcy Jurisdiction in Vancouver?*

56 If persuaded that the affairs of the bankrupt could be (i) more economically administered in another bankruptcy district or division or (ii) for "other sufficient cause", the bankruptcy court is authorized to transfer "any proceedings" pending before it to the other bankruptcy district or division (s. 187(7)).

57 Section 187(7) provides a method for transferring proceedings between the various bankruptcy courts in Canada. As discussed below, it raises different issues than the specific international situation dealt with in *Holt Cargo Systems*, *supra*, released concurrently.

58 The motions judge exercised his discretion against making a transfer order in this case. The appellant must therefore show an error of law or principle or failure to take into consideration a major element in the determination of the case: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 588. The scope of this discretion in

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bankruptcy cases was recognized in *Re Lions D'Or Ltée* (1965), 8 C.B.R. (N.S.) 171 (Que. Sup. Ct.), and *Re M. Pollack Ltée* (1979), 30 C.B.R. (N.S.) 256 (Que. Sup. Ct.).

59 The appellant says the courts below erred in both law and principle. They erred in law, it argues, because art. 3148 of the *Civil Code of Québec* required the bankruptcy court to decline jurisdiction in light of the "choice of forum" clauses, and they erred in principle because there is no substantial connection between the dispute and the Province of Quebec. In this regard, it relies on *Bourque Consumer Electronics Inc. (Syndic de)*, J.E. 91-1040 (Sup. Ct.), and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

(i) Choice of Forum Clause

60 The appellant's point is that the applicable rules are found in the *Civil Code of Québec*, and in particular art. 3148 which provides in part that:

> . . . a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

61 The choice of forum objection fails, with respect, both on the facts and on the law. In terms of facts, the only relevant agreements are those to which Eagle was a party. Clause 28 in the June 7, 1996 financing agreement and clause 20 of the management services agreement are both no more than choice of law provisions. The Quebec courts are perfectly able to apply the law of British Columbia. The import of clause 17 of the West African Gold& Exploration S.A. debenture of August 9, 1996 is more obscure, but as Azco is not a party to the debenture and therefore cannot be sued upon it, its terms are irrelevant.

62 As to the legal issue, the question is whether arts. 3148 or 3135 of the *Civil Code of Québec* have any application to this proceeding at all. These provisions will only apply in bankruptcy court "[i]n cases not provided for in the Act or these Rules" (*Bankruptcy and Insolvency General Rules*, s. 3). The fact is that s. 187(7) specifically provides that a transfer will be ordered only where there is satisfactory proof that a proceeding will be "more economically administered" in another division or district, which the appellant did not allege, or "for other sufficient cause". The appellant argues that such general words need to be "supplemented" by the more specific provisions of the *Civil Code of Québec*. But this is incorrect. Resort is to be had to the provincial rules only "[i]n cases not provided for". Here, provision has been made. The door is therefore not open to these particular provisions of the *Civil Code of Québec*. This interpretation of s. 3 is not only inevitable, it is desirable. The *Civil Code of Québec* applies across a vast range of subjects. When s. 187(7) speaks of "sufficient cause", it does so in the specific context of bankruptcy.

63 Leaving aside, then, the inapplicable directives of the *Civil Code of Québec*, the question is whether a choice of forum clause would amount to "sufficient cause" for the purpose of s. 187(7) to the extent that it would be an error of law for the motions judge to have declined to give it effect in the circumstances of this case. In my view a choice of forum clause (where there really is one) ought to be taken into careful consideration by a motions judge but it is not binding: J.-G. Castel, *Canadian Conflict of Laws* (4th ed. 1997), at pp. 262-63. See *Sarabia v. "Oceanic Mindoro" (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.), *per* Huddart J.A., at p. 153 (leave to appeal refused, [1997] 2 S.C.R. xiv); *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.*, [1986] 1 W.W.R. 380 (Alta. C.A.), *per* Kerans J.A., at p. 381; *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Gen. Div.), aff'd (1992), 9 O.R. (3d) 755 (C.A.) (leave to appeal refused, [1992] 3 S.C.R. v); *Maritime Telegraph and Telephone Co. v. Pre Print Inc.* (1996), 131 D.L.R. (4th) 471 (N.S.C.A.).

(ii) Public Policy Considerations

64 It could be argued that the public policy favouring a "single control" of bankruptcy proceedings and opposition to their fragmentation demands that a choice of forum clause receive lesser effect in bankruptcy than in the context of ordinary commercial litigation: *Industrial Packaging Products Co. v. Fort Pitt Packaging International, Inc.*, 161 A.2d 19 (Pa. 1960); *In re Treco*, 239 B.R. 36 (S.D.N.Y. 1999), aff'd 240 F.3d 148 (2d Cir. 2001).

65 In *Re Moratorium Act*, *supra*, Rand J. discussed important "public policy" objectives of bankruptcy legislation, at p. 46:

> To this proceeding not only a personal stigma may attach but restrictions on freedom in future business activity may result. The relief to the debtor consists in the cancellation of debts which, otherwise, might effectually prevent him from rehabilitating himself economically and socially.

See also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, at p. 120.

66 In his treatise on bankruptcy, Professor Albert Bohémier states on the purpose of the Act:

> [TRANSLATION] The purpose of the *Bankruptcy Act* is to protect the debtor, his or her creditors and the public interest. These objectives have always been present but to varying degrees. It can be stated with certainty that the more a society promotes credit and therefore debt, the more the legislation will tend to give priority to alleviating the lot of honest and hapless debtors. A scheme based on debt must include a

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> self-regulating system so that defaulting debtors may eventually be reintegrated into the system and become productive elements once again.
> (*Faillite et insolvabilité* (1992), vol. 1, at p. 48)

67 The implementation of these public policies might be expected to take priority over private "choice of forum" agreements where the two come into conflict, as indeed Robert J.A. concluded in the Quebec Court of Appeal. A similar position is expressed in I. F. Fletcher, *Insolvency in Private International Law* (1999), at p. 47, fn. 73:

> [P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.

In the United States, however, there is a competing body of judicial opinion that a trustee in bankruptcy who sues on an agreement containing a forum selection clause should, as a general rule, be bound by that clause to the same extent as the parties thereto: see *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), and *Hays and Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir. 1989).

68 In my view, for the reasons previously mentioned, the choice of forum clause would be a significant factor under s. 187(7) but not, in the context of the public policies expressed in the Act, a controlling factor.

69 In light of my conclusion that the appellant does not have the benefit of a "choice of forum" clause, I need not undertake the exercise of considering whether in this case there is any conflict between private choice and public interest, and if so, how "choice of forum" considerations should be balanced in this case against *Amchem*, *supra*, and public interest factors within the framework of s. 187(7) of the Act.

70 The bottom line is that the appellant is unable to show that the motions judge committed any error of law in declining to transfer the proceeding to Vancouver.

(iii) Error of Principle

71 The appellant, relying on *Amchem*, *supra*, argues that this dispute has its most real and substantial connection to British Columbia, and that the motions judge erred in principle in ignoring relevant factors in coming to the opposite conclusion.

72 Again, with respect, I do not think this position is sustainable on the law or the facts.

73 In the first place, as stated, the *Amchem* approach has to be applied here with full regard to the context of Canadian bankruptcy legislation. This appeal involves the allocation of a particular bankruptcy matter within a single national bankruptcy scheme created by the Act. As shown in *Holt Cargo Systems*, *supra*, consideration of the allocation of a matter having different aspects (e.g. maritime law and bankruptcy law), as between Canadian courts and foreign courts operating under quite different legislative or other schemes, may raise different problems.

74 Secondly, *Amchem* and its progeny involved private litigation. Here, as explained in *Holt Cargo Systems*, *supra*, there is the important public interest aspect mentioned above. The Court looks not only at the *Amchem* factors, but must strive to give effect to Parliament's intent to create an economical and efficient national system for the administration of bankrupt estates, as evidenced in the Act.

75 It is in the public interest to facilitate the speedy resolution of the fallout from a financial collapse. This, as noted in *Holt Cargo Systems* was not present in the *Amchem* fact situation. In fact, there are stronger policy considerations here than in *Holt Cargo Systems*. That case dealt with a choice between a maritime law action in Halifax for the determination of claims of *secured* creditors that had already proceeded to default judgment and, as an alternative, the exercise of jurisdiction by the Quebec Superior Court sitting in Bankruptcy acting at the behest of the bankruptcy court in Belgium in a matter that was still in its early stages of organization. In those circumstances the Federal Court of Canada declined to stay the maritime law action, and its exercise of discretion was upheld by the Federal Court of Appeal and by this Court.

76 In the present case, we are confronted with a federal statute that *prima facie* establishes one command centre or "single control" (*Stewart*, *supra*, at p. 349) for all proceedings related to the bankruptcy (s. 183(1)). Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple jurisdictions. Parliament was of the view that a substantial connection sufficient to ground bankruptcy proceedings in a particular district or division is provided by proof of facts within the statutory definition of "locality of a debtor" in s. 2(1). The trustee in that locality is mandated to "recuperate" the assets, and related proceedings are to be controlled by the bankruptcy court of that jurisdiction. The Act is concerned with the economy of winding up the bankrupt estate, even at the price of inflicting additional cost on its creditors and debtors.

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77 The "balancing test" advocated by the appellant based on the *Amchem* factors and general principles of private international law fails to take these important public policies into account. The Quebec Superior Court sitting in Bankruptcy is, in a very real sense, sitting as a national court.

78 Finally, in point of fact, even if the principles of private international law did apply without modification for the bankruptcy context, it is difficult to discern any connection at all between the dispute and Vancouver except that Eagle signed some agreements with a choice of law clause directed to the laws of that jurisdiction. The links between the appellant and Vancouver are not particularly strong. It has, amongst other offices, a Vancouver address, but the bulk of the activities at issue here occurred outside British Columbia. Its key employee, Mr. Ryan Modesto, resides in the United States. The management services agreement of June 12, 1996 recites that Azco's corporate office is in Arizona. Azco's press release of September 17, 1996, announcing this project to the world, was issued in Arizona. Moreover there is no juridical advantage to the appellant in proceeding under the same bankruptcy regime in Vancouver as in Hull. In either case, the law of British Columbia may be applied. Vancouver may be marginally more convenient for the appellant and some of its witnesses, but that is all that can be said for it. The trustee, for its part, complains that if the appeal succeeds, it would, on the same reasoning, be required to bring other actions (unrelated to Azco) in Chicoutimi, Toronto, Halifax, Winnipeg, Charlottetown and Calgary. The trial judge has much factual support for his decision to retain the case in Hull.

79 I do not wish to be taken, however, as squeezing the life out of s. 187(7). While the facts in this case do not show "sufficient cause" to make the transfer to British Columbia, other cases may arise of course where the transfer is justifiable. Even in *Stewart*, *supra*, which established the "single control" paradigm, Anglin J. went out of his way to say that the case probably should have been heard in P.E.I. The claimants' problem in that case is that they failed to seek leave from the court in British Columbia before launching their case in P.E.I. Just before the "single control" passage previously cited, Anglin J. says (at p. 349):

> I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island -- as from what is now before us would seem to be the case -- an order of transfer will not be made, preceded or accompanied by the necessary leave under section 22.

And Brodeur J. said this (at p. 352):

> In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

80 The point is that it was up to Azco to demonstrate "sufficient cause" on the facts of *this* case, and it failed to do so.

V. Conclusion

81 I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman Elliott, Montréal.

Solicitors for the respondent: Gervais & Gervais, Montréal.

Langret Investments S.A. v. McDonnell, 1996 CanLII 1433 (BC CA) - Locality of Bankrupt

Date:	1996-03-18
Docket:	CA020285
Parallel citations:	40 CBR (3d) 44; 21 BCLR (3d) 145
URL:	http://canlii.ca/t/1f0m3
Citation:	Langret Investments S.A. v. McDonnell, 1996 CanLII 1433 (BC CA), <http://canlii.ca/t/1f0m3> retrieved on 2013-08-24
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Court of Appeal for British Columbia

BETWEEN:

LANGRET INVESTMENTS S.A. and
THE BANK OF NOVA SCOTIA
PETITIONERS
(APPELLANTS)

AND:

JOHN JOSEPH McDONNELL
RESPONDENT
(RESPONDENT)

Before: The Honourable Mr. Justice Macfarlane
The Honourable Madam Justice Rowles
The Honourable Madam Justice Ryan

John G. Mendes Counsel for the Appellants
Heather M.B. Ferris Counsel for the Respondent
Place and Date of Hearing: Vancouver, British Columbia
February 2, 1996
Place and Date of Judgment: Vancouver, British Columbia
March 18, 1996

Written Reasons by:
The Honourable Madam Justice Rowles
Concurred in by:
The Honourable Mr. Justice Macfarlane
The Honourable Madam Justice Ryan

CA020285
Vancouver Registry

Court of Appeal for British Columbia

LANGRET INVESTMENTS S.A. and
THE BANK OF NOVA SCOTIA
v.
JOHN JOSEPH McDONNELL

REASONS FOR JUDGMENT OF MADAM JUSTICE ROWLES:

1 This is an appeal from an order dated 11 April 1995, dismissing an application to amend a Petition for a Receiving Order, brought under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

2 The application to amend, which was brought before the Petition was set for hearing, sought to add two further allegations regarding the "locality of a debtor", as that term is defined in s. 2 of the *BIA*.

3 The central issue is whether, by reason of Rule 4 of the ***Bankruptcy Rules***, the practice of the court in civil actions applies to the Appellants' motion to amend their Petition.

Background

4 The Appellants are the Bank of Nova Scotia (the "Bank") and Langret Investments S.A. ("Langret"). The Bank obtained a judgment against the Respondent, John Joseph McDonnell ("McDonnell"), for $83,727.98 on 31 July 1992. On 16 May 1994, Langret obtained a judgment against McDonnell and Irefra Investments Ltd. ("Irefra") for $2,390,409.67. The judgments have not been paid.

5 A petition was filed by the Appellants on 28 October 1994, seeking an order that McDonnell and Irefra be adjudged bankrupt and that a receiving order be made in respect of their property.

6 Section 43 of the ***BIA*** allows a creditor to bring a petition for a receiving order against the property of a debtor:

43. (1) Subject to this section, one or more creditors may file in court a petition for a receiving order against a debtor if, and if it is alleged in the petition that,

(a)the debt or debts owing to the petitioning creditor or creditors amount to one thousand dollars; and

(b)the debtor has committed an act of bankruptcy within six months next preceding the filing of the petition.

* * *

(3) The petition shall be verified by affidavit of the petitioner or by someone duly authorized on his behalf having personal knowledge of the facts alleged in the petition.

* * *

(5) <u>The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.</u>

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(6) At the hearing of the petition, the court shall require proof of the facts alleged in the petition and of the service of the petition, and, if satisfied with the proof, may make a receiving order.

(7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

* * *

(10) Where the debtor appears at the hearing of the petition and denies the truth of the facts alleged in the petition, the court may, instead of dismissing the petition, stay all proceedings on the petition on such terms as it may see fit to impose on the petitioner as to costs or on the debtor to prevent alienation of his property and for such time as may be required for trial of the issue relating to the disputed facts.

(Underlining added.)

7 By s. 2 of the ***BIA***, "locality of a debtor" means the principal place:

(*a*) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(*b*) where the debtor has resided during the year immediately preceding his bankruptcy, or

(*c*) in cases not coming within paragraph (*a*) or (*b*), where the greater portion of the property of the debtor is situated.

8 Paragraph 1 of the Petition alleged:

1. That the said John Joseph McDonnell has principally resided at 1677 Somerset Crescent, Vancouver, British Columbia, V6M 1S3, in the year immediately preceding the filing of the Petition and is within the jurisdiction of this Court."

9 The Respondent filed a Notice of Dispute on 12 December 1994, which reads, in part:

TAKE NOTICE that John Joseph McDonnell ("McDonnell") intends to dispute the Petition for a Receiving Order herein, on the following grounds:

1. With respect to paragraph 1 of the Petition, McDonnell does not principally reside in Vancouver, British Columbia. McDonnell's family residence is Wellfield House, Oughterard, County Galway, Ireland. McDonnell holds an Irish passport.

10 The Appellants filed an application on 3 March 1995, seeking to amend the Petition to add the following allegations after the first paragraph:

2. That the Judicial District of Vancouver is the principal place in which [McDonnell] has carried on business during the year immediately preceding his bankruptcy.
3. In the alternative, that the Judicial District of Vancouver is the principal place where the greater part of the property of [McDonnell] is situated.

11 Before the chambers judge the Appellants argued that their application to amend the Petition to add further allegations as to the locality of the debtor was not a matter provided for in the ***BIA*** or the ***Bankruptcy Rules*** and therefore, by reason of Rule 4, the practice of the court in civil actions must be applied.

12 Rule 4 provides:

4. The practice of the court in civil actions or matters, including the practice in chambers, shall, in cases not provided for by the Act or these Rules, and so far as it is applicable and not inconsistent with the Act or these Rules, apply to all proceedings under the Act or these Rules.

13 The Respondent argued that the penal nature of the ***BIA*** requires that creditors who seek to take advantage of the legislation must strictly comply with it and consequently matters of substance in a bankruptcy petition cannot be amended.

14 The learned chambers judge decided that the question of whether the amendments should be allowed fell "to be determined on the basis of the jurisprudence relating to bankruptcy and the statutory provisions of the Act and Rules". The chambers judge concluded that in bankruptcy proceedings, a strict test should be applied to determine if an amendment should be allowed because of the penal nature of the ***BIA***, and held that an amendment should not be allowed if it relates to substance rather than form, or if it potentially prejudices the respondent.

Grounds of Appeal

15 The grounds of appeal are these:

1. The Learned Chambers Judge erred in refusing to allow the amendments sought by the Appellants on the grounds that the *Bankruptcy & Insolvency Act* is penal in nature.
2. The Learned Chambers Judge erred in refusing to allow the said amendments on the grounds that s. 187(9) of the *Bankruptcy & Insolvency Act* does not allow substantive amendments, and the amendments sought by the Appellants are substantive in nature.

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3. The Learned Chambers Judge erred in refusing to allow the said amendments on the grounds that they would potentially prejudice the Respondent.

Ground One

16 On the first ground, the Appellants argue that the procedural strictness that once applied to bankruptcy proceedings because of their penal nature is now outdated, and referred to the decision of this Court in ***Markovina v. Coopers & Lybrand Ltd.*** 1991 CanLII 2027 (BC CA), (1991), 57 B.C.L.R. (2d) 192 (C.A.).

17 In that case, which appears not to have been drawn to the attention of the chambers judge, the debtor claimed that he was entitled, as of right, to succeed in his application to set aside a receiving order made under the ***BIA*** because of two admitted defects in the material that supported the grant of the order. One of the defects was the absence of part of the date in the jurat of the affidavit of service. The chambers judge refused to accede to the debtor's argument that he was entitled to have the receiving order set aside as of right and instead directed that an inquiry be held. The debtor's appeal was unsuccessful.

18 As to the debtor's submissions regarding the defect in the affidavit of service entitling him to have the order set aside as of right, Hutcheon J.A. said at pp. 196-197:

> A number of cases were relied upon by Mr. Prince for the proposition that a bankruptcy proceeding is in the nature of a criminal matter and accordingly there must be strict compliance. For example, in Ex parte Coates; Re. Skeleton (1877), 5 Ch.D. 979 (C.A.), Chief Justice Bacon stated at p. 980:
>
> > It is the very gist and essence of the *Bankruptcy Act* that creditors who claim the benefit of these severe and almost criminal provisions of the law cannot have that benefit unless they strictly comply with the terms of the Act.
>
> Much has changed in the practice of criminal law since 1877 when the slightest defect made an indictment a nullity. The words of Mr. Justice Dickson in R. v. Sault Ste. Marie (City), 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299 at 1307 ... are most apt:
>
> > That age has passed. Parliament has made it abundantly clear in those sections of the *Criminal Code* having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.
>
> If that is so in criminal matters I would not expect that to be less so in "almost criminal" matters....

19 The present provisions of the ***Criminal Code*** amply demonstrate that a strict approach to amendments is no longer required in criminal proceedings. Section 601 of the ***Criminal Code*** confers a broad power to amend an indictment, including one which is defective in substance. When such broad powers of amendment are permitted in true criminal matters, I would not expect the bankruptcy statute, although still considered "penal in nature", to require a more restrictive approach to amendments than the ***Criminal Code***.

20 In light of the observations made by Hutcheon J.A. in ***Markovina***, *supra*, with which I respectfully agree, I have concluded that the penal nature of the bankruptcy legislation is not determinative of whether amendments to a petition for a receiving order may be granted.

21 I would add that there are cases which lend direct support to the proposition that a bankruptcy petition may be amended on a substantive matter. In ***Re Barton Realty Company Limited*** (1963), 5 C.B.R. (N.S.) 109 (Ont. S.C.), the petitioner was allowed to amend a petition to add additional alleged acts of bankruptcy. In that case it appears that the amendments were sought before the petition was heard.

22 In ***Re F.G. Wright& Co.*** (1937), 19 C.B.R. 49 (Man. K.B.), a debtor company brought a motion to set aside a receiving order made by the Registrar. The alleged act of bankruptcy was that the debtor company exhibited to a meeting of its creditors a statement which showed that it was insolvent. On appeal from the Registrar's order, Taylor J. held that the statement, which had not been submitted to or approved by the company, should not have been used as a foundation for the petition. There was also evidence given of another act of bankruptcy but it had not been alleged in the petition. The order made by the Registrar was set aside but leave was given to the creditor, upon payment of the costs, to amend his petition and to proceed again through the regular channels before the Registrar.

Ground Two

23 On the second ground, the Appellants submit that the chambers judge erred in refusing to allow the amendments sought on the ground that s. 187(9) of the ***BIA*** does not allow substantive amendments.

24 Section 187(9) of the ***BIA*** provides:

> **187(9)** No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

25 In regard to s. 187(9) the chambers judge held:

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Section 187(9) of the Act ... permits the Court to excuse "formal defects" and "irregularities" but it does not empower the Court to grant relief where a matter of substance is involved: ***Re Roosenboom*** (1973), 18 C.B.R. (N.S.) 180 at 181 (Ont. S.C.). The distinction between allegations of substance, i.e., those necessary to establish the bankruptcy, and those which are a matter of form, must be decided on the circumstances arising in each case: ***Re Little*** (1924), 5 C.B.R. 244 at 247 (Ont.S.C.).

26 Counsel were in agreement that proof of the "locality of the debtor" is fundamental to the jurisdiction of the court to grant a receiving order but they differed on whether the court was able to allow amendments to a petition going to the question of jurisdiction.

27 The Respondent's position is that s. 187(9) empowers the court to make amendments to a bankruptcy petition, but only to the extent of curing formal defects and irregularities where matters of substance are not involved. The arguments put forward to support that position largely mirror the Respondent's submissions on the first ground that the penal nature of the ***BIA*** would exclude amendments of a substantive nature.

28 The Appellants' contend that the chambers judge used s. 187(9) to defeat the motion to amend, whereas the section was intended to cure problems, not defeat them. While Appellants' counsel doubted that s. 187(9) of the ***BIA*** enables the court to make amendments, he argued that if it did, the section would be inapplicable in any event where the application is brought to amend a petition before the petition is heard. In support of that submission, counsel pointed out that s. 187(9) provides that "[n]o proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity". There is no possibility, he argued, that a "proceeding in bankruptcy" would be "invalidated" at an application to amend a bankruptcy petition.

29 I agree that there is nothing in the wording of s. 187(9) to suggest that it would apply to an application to amend a petition brought before the petition is heard.

Rule 4 of the *Bankruptcy Rules*

30 The Appellants' main argument is that Rule 4 of the ***Bankruptcy Rules***, which directs the court to follow the provincial civil practice in certain circumstances, governs the practice to be followed on the Appellants' application to amend their Petition.

31 Under Rule 4, the court is required to follow the civil practice of the court in cases not provided for under the ***BIA*** or the ***Bankruptcy Rules*** where there is an applicable practice of the court in civil matters, including the practice in chambers, and the applicable civil practice is not inconsistent with the ***BIA*** or the ***Bankruptcy Rules***.

32 The ***BIA*** and ***Bankruptcy Rules*** are silent on the procedure to be followed if an amendment to a petition is sought prior to the hearing of the petition. I have already concluded that s. 187(9) is inapplicable and the same holds true for Rule 110, as Respondent's counsel conceded.

33 Rule 4 does not require that the applicable civil practice be consistent with the ***BIA*** or the ***Bankruptcy Rules***; it requires that the civil practice be "not inconsistent" with the bankruptcy legislation. In other words, a civil practice need not further or promote the objectives of the bankruptcy legislation to apply and the civil practice will apply provided it does not undermine those objectives.

34 Rule 24(1) of the ***Rules of Court*** in British Columbia allows a party to amend an originating process or pleading. Amendments are allowed unless prejudice can be demonstrated by the opposite party or the amendment will be useless. The rationale for allowing amendments is to enable the real issues to be determined. The practice followed in civil matters when amendments are sought fulfils the fundamental objective of the civil rules which is to ensure the just, speedy and inexpensive determination of every proceeding on the merits. See McLachlin and Taylor, *British Columbia Practice* (2nd Ed.) pp. 24-1 to 24-2-10, and the decision of this Court in ***Chavez*** v. ***Sundance Cruises Corp.*** (1993), 15 C.P.C. (3d) 305, 309-10.

35 The principles embodied in the civil practice of the court which allows for amendments of originating process and pleadings are "not inconsistent" with the objectives of the bankruptcy legislation and, in my view, that is so regardless of the fact that the legislation is viewed as penal in nature.

36 Two provisions of the bankruptcy legislation were referred to in argument and require comment.

37 Rule 67(3) of the ***Bankruptcy Rules*** provides:

Rule 67(3) Every petition shall be clearly written and, after a petition has been issued by the court, no alteration, interlineation or erasure shall be made therein without leave of the court.

To the extent that Rule 24 of the ***Rules of Court*** permits amendments without leave of the court, the Rule would be inapplicable because of Rule 67(3) of the ***Bankruptcy Rules***.

38 Section 43(3) of the ***BIA*** provides that the petition shall be verified by affidavit of the petitioner or someone duly authorized on his behalf having personal knowledge of the facts alleged in the petition. If an application to amend a petition is brought, the allegations sought to be added would have to be verified by affidavit in order to comply with the

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requirement of s. 43(3) of the ***BIA***. The fact that the ***BIA*** has such a requirement does not make the civil practice inapplicable.

39 ***Goertz (Trustee of)*** v. ***Goertz***, 1994 CanLII 4872 (SK QB), [1994] 8 W.W.R. 250, 26 C.B.R. (3d) 222 (Sask. Q.B.), rev'd. in part on other grounds (11 Dec. 1995), 1911 (Sask. C.A.), supports the conclusion that when applications to amend a petition for a receiving order are not dealt with in the bankruptcy legislation or its rules, the civil practice of the court applies, as provided in Rule 4.

Prejudice to the Respondent

40 The third ground of appeal concerns the question of prejudice to the Respondent if the amendments to the Petition were allowed. The Appellants contend that the chambers judge erred in refusing to allow the amendments on the ground that the amendments would "potentially" prejudice the Respondent. In her reasons, the chambers judge observed that the proposed amendments "potentially prejudice" McDonnell and that prejudice "could arise" if the application were allowed.

41 The Appellants' argument on this ground follows, in part, from their earlier submissions, which I have accepted, that the penal nature of the bankruptcy legislation does not exclude amendments being made, even on matters of substance, before the petition is set for hearing.

42 The Appellants argue that under the civil practice of the court, "potential" prejudice will not suffice to defeat a motion to amend. In the Appellants' submission, unless a respondent to an application to amend pleadings can demonstrate that the amendment would give rise to prejudice that cannot be compensated by costs, an amendment will not be refused.

43 I agree with Appellants' counsel that to refuse an amendment because it is "potentially" prejudicial is unduly onerous and does not accord with the civil practice. If "potential prejudice" were the test applied on an application to amend an originating process or pleadings, an application could be defeated on technical grounds without regard to the effect it might have on the ultimate determination of the proceedings. Almost any amendment can be regarded as being "potentially" prejudicial to a respondent.

44 The civil practice was recently followed in bankruptcy proceedings when an amendment was sought in ***Re RCL Operators Ltd.*** reflex, (1993), 18 C.B.R. (3d) 222, (N.B.Q.B.), aff'd. (28 Sept. 1994), No. 181/93 CA, No. 182/93 CA, No. 186/93 CA (N.B.C.A.). After referring to Rule 4 of the Rules, Jones J. said, at p. 227:

> I take it from this that in specific matters of practice not enumerated in the *Bankruptcy Act* or Rules one may have regard to general Rules of practice and in this connection take notice of the decision of the New Brunswick Court of Appeal ... adopting the statement of Lord Esher from *Steward v. North Metropolitan Tramways Co.* (1886), 16 Q.B.D. 556 (C.A.) as to the general rule to amendments as follows:
>
> "The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made."

45 In ***Re RCL Operators***, *supra*, Jones J. decided that amendments to a bankruptcy petition ought to be refused if the amendments would put the respondent in a position where he or she "must be injured".

46 In the case at bar, the Respondent presented no evidence of actual prejudice and from an examination of the material there does not appear to be any basis for drawing an inference that there was prejudice to the Respondent which could not be compensated by costs. The only argument put forward by the Respondent on appeal was that prejudice should be presumed.

47 The Appellants filed affidavit material with their application to amend to show that there was evidence to support, at least by inference, the additional allegations they wished to make as to the locality of the debtor, as that term is defined in the ***BIA***. The affidavits filed were adequate to comply with the requirement found in s. 43(3) of the ***BIA,*** set out above, that there be verification by affidavit of the facts alleged.

48 The chambers judge made reference to the additional allegations the Appellants' wished to add to their Petition in the following way:

> Unlike pleadings in a statement of claim in a civil action, the allegations in a petition for a receiving order must be specific and supported. Section 43(3) of the Act requires the petition to be verified by the "affidavit of the petitioner or by someone duly authorized on his behalf having personal knowledge of the facts alleged in the petition." While the petitioners filed some material in support of the alternative allegations that McDonnell's principal place of business was Vancouver at the material time and that most of his property is here, it appears that they wish to allege all three bases of locality because they are not sufficiently confident to rely upon any single one of them.

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49 Section 43(6) of the ***BIA*** provides that at the hearing of the petition, the court shall require proof of the facts alleged in the petition. Whether the evidence before the court proves the facts alleged in the petition has to be determined, not at the time the application for an amendment is heard, but at the time the petition is heard.

50 The application to amend cannot be defeated on the basis that the Appellants wished to allege more than one "locality of the debtor", as defined in s. 2 of the ***BIA***. One allegation, if proved, does not exclude another also being proved.

51 Whether an allegation respecting the locality of the debtor is established by the evidence is a matter to be determined by the judge hearing the petition, not the chambers judge hearing a motion to amend.

52 As to the reason the proposed amendments could potentially prejudice the Respondent, the chambers judge said:

> Further, the proposed amendments potentially prejudice McDonnell. The date of the filing of the petition sets the date of the bankruptcy. Important issues, including those relating to priorities, arise from the date of the bankruptcy. Substantial prejudice could arise if that date preceded the amendment fixing the locality of the debtor which is one of the essential elements in the petition.
>
> (Underlining added.)

53 With deference, granting the amendments sought could not have the effect of altering the date of the bankruptcy. Allegations of the "locality of the debtor", as that term is defined under the ***BIA,*** relate to the point in time the Petition is filed. The Appellants are not seeking to add new allegations as to the "locality of the debtor" that were non-existent at the date the Petition was issued.

54 In my opinion, the application to amend should have been dealt with on the basis of the civil practice of the court, as provided by Rule 4 of the ***Bankruptcy Rules***, and the amendments sought by the Appellants should have been granted.

Conclusion

55 For the reasons stated, I would allow the appeal, set aside the order dismissing the application, and substitute an order allowing the amendments sought by the Appellants.

"THE HONOURABLE MADAM JUSTICE ROWLES"

I AGREE: "THE HONOURABLE MR. JUSTICE MACFARLANE"

I AGREE: "THE HONOURABLE MADAM JUSTICE RYAN"

“Minister”
« ministre »
“Minister” means the Minister of Industry;

“net termination value”
« valeurs nettes dues à la date de résiliation »
“net termination value” means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions;

“official receiver”
« séquestre officiel »
“official receiver” means an officer appointed under subsection 12(2);

“person”
« personne »
“person” includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;

“prescribed”
« prescrit »

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"prescribed"

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

"property"
« bien »
"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

"proposal"
« proposition concordataire » ou « proposition »
"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement;

"public utility"
« entreprise de service public »
"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services;

"resolution" or "ordinary resolution"
« résolution » ou « résolution ordinaire »
"resolution" or "ordinary resolution" means a resolution carried in the manner provided by section 115;

"secured creditor"
« créancier garanti »
"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the Civil Code of Québec or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

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(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the Civil Code of Québec entitled Prior Claims and Hypothecs that deal with the exercise of hypothecary rights;

Toronto-Dominion Bank v. Usarco Ltd., 2001 CanLII 24004 (ON CA) - Rank of Municipal Taxes vis-à-vis Secured Creditors

Date:	2001-02-28
Docket:	C29472
Parallel citations:	196 DLR (4th) 448; 24 CBR (4th) 303; 142 OAC 70
URL:	http://canlii.ca/t/1fbns
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DATE: 20010228
DOCKET: C29472
COURT OF APPEAL FOR ONTARIO

AUSTIN, LASKIN and SIMMONS JJ.A.

BETWEEN:	)	
	)	
THE TORONTO-DOMINION BANK	)	**John A. Campion,**
	)	**Michael J. MacNaughton and**
Moving Party/Respondent	)	**Carole J. Hunter**
(Appellant)	)	**for the appellant**
	)	**Toronto Dominion Bank**
- and -	)	
	)	
USARCO LIMITED AND	)	
FRANK LEVY	)	**Neil C. Saxe**
	)	**for the respondent**

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Defendants	)	**Coopers & Lybrand Limited**
	)	
- and -	)	
	)	
THE CORPORATION OF THE CITY OF HAMILTON	)	**F. Paul Morrison and David E. Leonard for the respondent Corporation of the City of Hamilton**
	)	
Moving Party/Respondent (Respondent in Appeal)	)	
	)	
- and -	)	
	)	
COOPERS & LYBRAND LIMITED	)	
	)	
Moving Party/Respondent (Respondent in appeal)	)	
	)	
- and -	)	
	)	
THE MINISTRY OF LABOUR	)	
	)	
Respondent (Respondent in appeal)	)	**Heard: October 11 and 12, 2000**

On appeal from the judgment of Justice Alvin Rosenberg dated June 2, 1997.

AUSTIN J.A.:

[1] The Toronto-Dominion Bank ("the Bank") appeals from the decision of Rosenberg J. made June 2, 1997, that Coopers & Lybrand Limited (the "Receiver") should have paid to the Corporation of the City of Hamilton (the "City") the municipal taxes on the property of Usarco Limited ("Usarco") and Frank Levy ("Levy") in receivership as they accrued due.

[2] From the Bank's perspective, the issue is whether the claim of a fully secured creditor ranks ahead of a municipality's claim for realty taxes on a receivership. The City's position is that it had priority and that the Receiver was wrong in not paying the taxes as they accrued due. Rosenberg J. agreed with the City's position and ordered the Bank to refund the money received during the receivership to the Receiver. The Receiver was also ordered to pay to the City all the money it had realized with the exception of its fees and disbursements, including all the money refunded to it by the Bank. Rosenberg J.'s reasons are reported at 1997 CanLII 12417 (ON SC), (1997), 50 C.B.R. (3d) 127 and at 40 M.P.L.R. (2d) 293 (Ont. Gen. Div). I agree with his reasons and his conclusion. My reasons follow.

[3] The matters in issue involve the duty of a court-appointed receiver and the interpretation of certain sections of the *Municipal Act* R.S.O. 1990 c. M.45 (the "Act"), insofar as they bear on the issue of priority. The facts are set out fully in the reasons of Rosenberg J. A summary will suffice for the purposes of the appeal.

[4] Levy was a principal of Usarco. Usarco was a scrap metal dealer and processor for over 40 years. It operated on five properties in Hamilton, Ontario, some registered in its name and others in the name of Levy. All or some of these lands were believed to be highly contaminated because of the operations carried out on them.

[5] Levy and Usarco had been dealing with the Bank for about 40 years. In 1989, Usarco's business was failing and Usarco owed the Bank about $18,000,000. As security for Usarco's obligations the Bank held, among other security, a registered general security agreement dated December 22, 1987, charging all of Usarco's property, a registered $3,000,000 demand debenture charging all of Usarco's property, a registered general assignment of book debts, mortgages on 371 Wellington Street North and 735 Strathearne Avenue and guarantees of Usarco's debts to the Bank provided by Levy, secured by mortgages upon 363 Wellington Street, 675 Strathearne Avenue and 725 Strathearne Avenue, all in Hamilton.

[6] The Receiver was appointed by the order of Borins J. on October 11, 1990. The Receiver was not to go into possession or to manage or continue the business because of the contamination. The Receiver's function was "to sell, lease, transfer or otherwise dispose of" the assets. Those assets consisted of the five properties and the buildings, contents and equipment on them. The Receiver was granted the power and authority but not the obligation to make

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payments to persons having prior mortgages, charges or encumbrances upon the assets and to pay any debts, charges or expenses of Usarco and Levy considered "necessary and desirable for the purposes of carrying out this Order." Usarco and Levy remained the owners of the assets. Any tenants were to pay rents and arrears to the Receiver, but the Receiver was not obligated to fulfil any of the obligations of Usarco or Levy as landlords. No proceedings were to be taken or continued against the Receiver without leave of the court.

[7] The Receiver actively carried on the receivership from the date of the order until 1996. By that time some of the property had been sold to Archibald Leach ("Leach") and the receivership had been discontinued with respect to the balance of the assets in light of the fact that they were unsaleable. The Receiver and the Bank were in the process of winding up the receivership when the City brought a motion seeking to recover municipal realty taxes.

[8] During the receivership the Receiver dealt with the Ministry of Labour respecting claims of former employees, the Ministry of the Environment respecting contamination of the premises and the City with respect to the removal of chemicals from the lands in question into the city at large. The Receiver also dealt with Dofasco with respect to a part of the premises leased to Dofasco.

[9] During the receivership, the Receiver recorded receipts of $3,606,611.48 and disbursements of $2,561,238.30. Among the receipts was a payment by Dofasco of $115,245.23 in February 1993, for the years 1990, 1991 and 1992 in accordance with a lease requirement that the tenant's share of the municipal realty taxes be paid to the landlord.

[10] Included in the disbursements made by the Receiver were the following:

Security	$267,638.39
Utilities	$120,687.06
Legal Fees	$110,756.34
Telephone	$ 4,408.66
Receiver's Fees	$467,374.52
Ministry of Labour	$509,557.14

The $115,245.23 paid by Dofasco to the Receiver on account of taxes was not paid over to the City.

[11] As is the custom, the Receiver's activities were periodically reported to the court. These reports, some lengthy and detailed, were dated March 13 and July 14, 1992, November 15 and December 3, 1993, February 11 and August 10, 1994, September 28, 1995, and March 15 and October 30, 1996. They were presented to the court on or about their respective dates, each accompanied by a notice of motion requesting a particular order or orders, as for instance for the approval of a sale.

[12] Although Dofasco's payment to the Receiver on account of taxes was made in February 1993, it does not appear in the lists of disbursements in the reports until October 1996. Presumably it was included under "Rental of Premises" in the earlier reports. No explanation for this accounting was provided. There is no reference to the payment of municipal realty taxes in any of the lists of disbursements in the reports.

[13] As of October 11, 1990, $186,002.93 was owing on account of such taxes. Nothing was paid on that account by the Receiver. As a consequence, by January 15, 1997, $2,588,159 was owing for taxes, penalties and interest. No issue was raised with respect to the amounts of these debts.

[14] The evidence before the court does not indicate when it was decided not to pay these taxes nor by whom or why. Borden & Elliot were the Receiver's solicitors. In June, 1992 they provided the Receiver with an opinion letter as to the Bank's priority over all other claims. "Unregistered Rights and Liens" were expressly excluded from that opinion. The letter dealt with municipal realty taxes at length. They were described as constituting a "special lien against the land in priority to all other claims except claims by the Crown". It was pointed out that notice of the lien did not require registration. As to s. 384 of the Act, which deals with leases, the letter stated that "[t]his provision takes effect upon the tenant receiving written notice from the "collector" or the treasurer of the municipality" and would not apply otherwise.

[15] The only reflection of this opinion letter in the reports to the court is in the Report dated July 14, 1992, paragraph 8 of which states that:

> The Receiver has obtained an opinion from Messrs. Borden & Elliot that, subject to certain qualifications, the Security held by the Bank charges the Proceeds in priority to the claims of third parties.

[16] That Report proposed that from its excess receipts, the Receiver should pay to the Bank $900,000 subject to agreement by the Bank to refund to the Receiver as much as might later be revealed to be required to satisfy the costs of the Receivership or a claim ranking in priority to the security held by the Bank. There was no indication in that Report that substantial municipal taxes were owing and were not being paid. Nor is there any indication that any consideration was given to the propriety or otherwise of non-payment of municipal taxes or to the question whether the court should be advised of such non-payment and direction sought.

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[17] In the first Report dated March 13, 1992, it was noted that a cash offer of $525,000 which had been made for the land and equipment "was withdrawn upon the offeror learning of the property taxes payable in respect of the Wellington Street property".

[18] In the same Report, there is a reference to the Receiver being required to pay the Minister of Labour a sum in excess of $500,000 on account of wages, vacation pay, termination pay and severance pay of former employees. An order to this effect was made by Farley J. on August 2, 1991.

[19] The Receiver's statement of receipts and disbursements to September 30, 1993, includes the following disbursements:

Pension Plan	$509,557.14
Receiver's Fees	$387,965.95
Security Charges	$253,201.10
Utilities	$120,687.06

There is no mention of municipal taxes.

[20] The Report of November 15, 1993, indicated that under the agreement with Leach the purchaser would be responsible for the settlement of all property taxes and that, based on information supplied by the City, the property tax arrears were approximately $260,000. The same report indicated a net excess of receipts over disbursements of $1,322,988.64, $900,000 of which had already been remitted to the Bank.

[21] In dealing with the sale to Leach, the Report of December 3, 1993, states that the agreement is "conditional upon Leach making an arrangement with the City of Hamilton with respect to outstanding tax arrears".

[22] The motion which accompanied the Report of December 3, 1993, was made on notice to the City. This was the first notice the City had of the receivership or of any of the proceedings before the court. The City was not given notice because of tax arrears owing to the City, but because the City claimed the Receiver was responsible for certain costs incurred when chemicals from the property were spread within the City and a "state of emergency" was declared. The Receiver's response was to send the City a copy of the original receiving order referring:

> in particular to paragraphs 1 and 2 of that Order which directs the Receiver not to and deems the Receiver not to have possession, management or control of Usarco's property
> . . . .

[23] The Receiver's next Report was dated February 11, 1994. It noted that the Receiver's motion in respect of the partial termination of the receivership had been adjourned in December 1993, as a consequence of concerns raised by the Ministry of the Environment. These concerns were resolved through the sale by the Receiver of certain of Usarco's equipment for $25,000 and the application of that sum to environmental assessment of the Wellington Street property. In paragraphs 8 and 13 of this Report the Receiver refers to the Bank as "the only secured creditor of Usarco". The result of the Receiver's motion for approval of the Report of February 11, 1994, was an order of Farley J. dated February 18, 1994, reducing the receivership by deleting the unsold properties from it. The receivership was continued with respect to the lands still in the process of being sold to Leach.

[24] The Report of March 15, 1996, advised that the sale to Leach had been completed. The Receiver's statement of receipts and disbursements showed that it expected a net receipt of $375,000 from the sale to Leach after commissions and expenses. Leach was responsible for and had assumed the tax arrears on the property purchased. He had not paid the taxes as of the date of the hearing before Rosenberg J. Leach provided a limited indemnity to the Receiver and the Bank in respect of any claims that might be brought against them in regard to realty taxes.

[25] The Bank's position is that there was a contest as to entitlement from the outset and that the Receiver's duty in the circumstances was to recognize this, to refrain from paying the municipal taxes and to wait until the court determined priorities, if necessary. The Bank argues that this approach is supported by the original order of October 11, 1990, which authorizes and empowers the Receiver to pay bills, including encumbrances, but does not order the Receiver to do so. The City's position is that the Receiver should have paid the municipal taxes as they became due. Had the Receiver done so, the total amount paid to the City would have been approximately $1,260,000, leaving about $600,000 available for distribution to the Bank.

[26] In his decision, after setting out the facts, Rosenberg J. dealt with the issues as follows:

> Without criticizing the Receiver or Mr. MacNaughton as counsel for the Bank and sometimes counsel for the Receiver, the receivership has been conducted as if it were a private receivership by the Receiver for the Bank rather than a court appointed receiver. Even the indemnity from Leach with regard to the realty taxes is given both to the Receiver and the Bank. Mr. MacNaughton on behalf of the Bank argued that the position is analogous to a second mortgagee serving notice on tenants to attorn the rents to the

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> second mortgagee. The funds that the second mortgagee thus realizes can be applied on account of the second mortgage until such time as the first mortgagee takes steps to protect its position. This analogy does not apply to the present situation. The City is prevented from taking any steps because of the order of this court. Even more significant is the duty owed by the Receiver to represent all of the creditors (at para 31).

[27] After reference to the law, Rosenberg J., at paras 33, 36-40, continued as follows:

> At the time of the appointment of the Receiver the total tax arrears were approximately $186,000. Those tax arrears have increased and the latest statement shows the total tax arrears to be $2,588,000. In my view the Receiver would not be acting in a meticulously correct manner if during the term of receivership the Receiver realized some $1,900,000 while paying nothing on account of taxes and allowing tax arrears to accumulate and increase in the amount of some $2,500,000. The Receiver has not even paid on account of realty taxes the amount paid to the Receiver under the leases as contribution to realty taxes.
>
> ...
>
> One other factor that makes this application unusual but reflects on the equities between the parties is the concern about the environment. The Bank and the Receiver were careful to make certain that the order of Borins J. did not make either the Bank or the Receiver subject to the strict requirements that might be ordered by the Ministry of the Environment with regard to cleaning up any pollution of the property. These requirements can be most onerous. It was prudent of the Bank and the Receiver to have the appointment in the nature of a liquidator and not as an occupier or owner. However if the City attempted to sell and if a purchaser were unable to be found the city would become the owner and subject to those onerous requirements. This is particularly relevant in the present case since it is already known from the Receiver's reports that there are no purchasers that have been located and likely none that can be located for the properties in question. It is also known that there maybe serious environmental problems with the properties.
>
> The *Municipal Act* R.S.O. 1990, c.M.45, section 400 gives the City recourse to chattels owned by the taxpayer and similarly other sections of the Act allow the City to collect rentals.
>
> It is not necessary for the Receiver to proceed under these sections of the *Municipal Act* on behalf of the City because the Court has already given the Receiver all rights to dispose of the chattels and to collect the rents. Accordingly it is not appropriate to deprive the City of the rights to proceeds of the sale of the chattels or the collection of rents on the ground that it could have taken steps to collect them and has not.
>
> For all of the foregoing reasons and in the peculiar circumstances of this case, it is appropriate that the net proceeds realized by the Receiver (especially in this case since they are less than the taxes that accrued during the receivership) should be paid to the City. Accordingly the Bank will pay back to the Receiver the sum of $900,000 paid to it together with interest at the prime bank rate from the time of receipt to the time of repayment to the Receiver and all of the net funds realized by the Receiver shall be paid to the City on account of taxes. The City shall also be entitled to its costs of these proceedings against the Bank after assessment thereof on a party and party basis.
>
> I wish to make it abundantly clear that in so deciding I am not criticising the actions of the Receiver or Mr. MacNaughton. The situation is an unusual one and neither the Receiver nor Mr. MacNaughton could be expected to predict that the City was entitled to priority for all monies realized.

[28] I turn now to consider the law. As I do so, it is useful to repeat what was said at the outset of these reasons, namely that from the perspective of the appellant Bank, the issue in this appeal is whether the claim of a secured creditor on a receivership ranks ahead of a claim for municipal realty taxes. From the perspective of the respondent City, on the other hand, the issue is whether, during a receivership, the receiver is bound to pay such taxes as they become due.

[29] A useful place to start (as Rosenberg J. did) is with the statement of Laycraft C.J.A. in *Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd.* 1991 ABCA 336 (CanLII), (1991), 81 D.L.R. (4th) 280 at 292, 293 and 294; Supplementary Reasons at 86 D.L.R. (4th) 567 leave to appeal refused 86 D.L.R. (4th) viii. (Alta. C.A.):

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> A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances. The receiver may be liable for failure to exercise an appropriate standard of care.
>
> . . .
>
> A further factor affecting the obligation of a court-appointed receiver is the receiver's status as an officer of the court; the standard required because of that status is one of meticulous correctness. In *Alta. Treasury Branches v. Invictus Fin. Corp.* 1986 CanLII 1601 (AB QB), (1986), 42 Alta. L.R. (2d) 181, 68 A.R. 207 (Q.B.) Stratton J. (as he then was) said that the Receiver's obligations "reach further than merely acting honestly". He quoted with approval the statement of Wilson J. in *Fotti v. 777 Management Inc.* reflex, (1981), 2 P.P.S.A.C. 32 at p. 37, [1981] 5 W.W.R. 48, 9 Man. R. (2d) 142 (Q.B.):
>
> > ... the receiver is an officer of the Court and in his discharge of that office he may not, in the name of the Court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this Court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed. [Emphasis added.]
>
> The same concern for proper conduct by the court's appointed officer may be seen in the judgment of the Saskatchewan Court of Appeal in *Canadian Commercial Bank v. Simmons Drilling Ltd.* reflex, (1989), 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241, 35 C.L.R. 126 ... per Sherstobitoff J.A. at pp. 250-51:
>
> > The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.
> >
> > . . .
> >
> > The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, *for he is an officer of the court*. The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default. [Italics in the original; underlining added.]

[30] Reference may usefully be made to *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999), at 180-181 (footnotes omitted):

> A court-appointed receiver represents neither the security holder nor the debtor. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court including disclosing not only facts favourable to pending applications, but also facts that are unfavourable.
> . . .

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> In setting the standard of care, the court-appointed receiver must act with meticulous correctness, but not to a standard of perfection. As a fiduciary, the receiver **owes a duty to make full disclosure of information to all interested persons**. ... **The court**-appointed receiver owes no duty to any individual creditor who may attempt to interfere in the receivership. [Emphasis added.]

[31] Perhaps of limited significance here is the duty of a court-appointed receiver to the debtor and its shareholders. It would normally be a matter of some concern to a debtor and shareholders if the conduct of a receiver included the non-payment of taxes and the incurring of penalties and interest, thereby reducing the recovery or the chance of recovery of the owner. Barring extraordinary circumstances, such events should be fully disclosed to the court and the advice and instruction of the court sought.

[32] The priority of a municipality with respect to municipal taxes is set out in the Act., Section 382 deals with realty, s. 384 deals with tenants and s. 400 with personalty. The relevant parts of those sections read as follows:

> **382.** The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor and from **any subsequent owner of the whole or any part thereof, saving that person's recourse** against any other person, and are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or of any agent, or officer, or by want of registration. [Emphasis added.]
>
> **384.** (1) Where taxes are due upon any land occupied by a tenant, the collector or, after the roll has been returned, the treasurer, may give the tenant notice in writing requiring the tenant to pay such collector or treasurer the rent of the premises as it becomes due from time to time to the amount of the taxes due and unpaid and costs, and the collector or treasurer has the same authority as the landlord of the premises would have to collect the rent by distress or otherwise to the amount of the unpaid taxes and costs.
>
> (2) Nothing in this section prevents or impairs any other remedy for the recovery of the taxes or any portion thereof from the tenant or from any other person liable therefor.
>
> **400.** (1) Subject to section 399, if taxes that are a lien on land remain unpaid for twenty-one days after demand or notice made or given under section 392, 395 or 399 or, where a longer period has been authorized under subsection 399(6) such taxes remain unpaid at the expiry of that period, the collector or, where there is no collector, the treasurer may alone or by an agent, subject to the exemptions and provisos mentioned in this section, levy them with costs by distress,
>
> (a) upon the goods and chattels, wherever found within the county in which the municipality lies, belonging to or in the possession of the **owner or tenant of the land whose name appears upon the collector's roll (the owner or the tenant in this section is called "the person taxed")**;
>
> (b) upon the interest of the person taxed in any goods on the land, including an interest in any goods to the possession of which the person is entitled under a contract for purchase or a contract by which the person may or is to become the owner thereof upon performance of any condition;
>
> (c) upon the goods and chattels of the owner of the land found thereon, **though the owner's name does not appear upon the roll**;
>
> (d) upon any goods and chattels on the land, where title to such goods and chattel is claimed,
>
> (i) by virtue of an execution against the person taxed or against **the owner, though the person's name does not appear on the** roll,
>
> (ii) by purchase, gift, transfer or assignment from the person taxed, or from such owner, whether absolute or in trust, or by way of mortgage, or otherwise,
>
> (iii) by the spouse, daughter, son, daughter-in-law or son-in-law of the person taxed, or of such owner, or by any of his or her

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> relatives, in case such relative lives on the land as a member of the family, or
>
> (iv) by virtue of any assignment or transfer made for the purpose of defeating distress,
>
> provided that, where the person taxed or such owner is not in possession, goods and chattels on the land not belonging to the person taxed or to such owner are not subject to seizure, and the possession by the tenant of such goods and chattels on the premises is sufficient proof, in the absence of evidence to the contrary, that they belong to the tenant; provided also that no distress shall be made upon the goods and chattels of a tenant for any taxes not originally assessed against him, her or it as tenant; provided also that in cities and towns no distress for taxes in respect of vacant land shall be made upon goods and chattels of the owner except upon the land.
>
> . . .
>
> (11) Where personal property liable to seizure for taxes as hereinbefore provided is under seizure or attachment or has been seized by the sheriff or by a bailiff of any court or is claimed by or in possession of any assignee for the benefit of creditors or any liquidator, trustee or authorized trustee in bankruptcy or where such property has been converted into cash and is undistributed, it is sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy shall pay the amount to the collector in preference and priority to any other and all other fees, charges, liens or claims.

[33] Courts have long recognized the importance of taxation to society. In *Re Decker's Delicatessen* (1924), 56 O.L.R. 140 (S.C.), Fisher J., in the course of interpreting the predecessor to s. 382 of the Act, made the following observation at 142:

> Governments and municipalities must secure revenue, otherwise they could not function; money must be secured, and taxation is the method adopted to secure it; and transactions between individuals must, therefore, unless excepted by statute, be subordinated to that of the Government or municipality.

[34] Also on the subject of priority, he said at the same page:

> It also seems to me that banks, loan companies, and persons engaged in the lending of money must have in mind, when valuing the security upon which they make a loan, to provide for taxes due to Dominion and Provincial Governments, or to a municipality, as being a prior charge or encumbrance in the event of insolvency.

[35] More recently, MacPherson J. in *Royal Bank of Canada v. Lawton Development Inc.* (1994), 19 M.P.L.R. (2d) 170 (Ont. Gen. Div.) noted at 176 that s. 382 of the Act and its related provisions deserved of broad construction. As he explained:

> In recent years, Canadian courts have recognized that taxes serve important social purposes and are, therefore, entitled to judicial respect provided they are imposed in a clear fashion by a proper legislative body.

MacPherson J. also commented on the importance of property taxes at p. 175:

> It seems obvious that if a taxpayer owes a $1,000 municipal tax on January 1, 1994, and does not pay it, then the municipality is deprived of the use of that money. It will not have the money, to which it is legally entitled and on which it has counted, available to support the education, recreation, housing, social support and other programmes which it is required to provide. . . .

[36] Inherent in the Bank's appeal is the proposition that the Receiver had no duty to keep current and to pay the arrears of property taxes owed by Usarco and Levy out of the proceeds of the receivership. In my view, this proposition is wrong. It fails to recognize the principles enunciated in *Re Decker's Delicatessen, supra*. Further, it has been specifically rejected in numerous cases.

[37] In *Royal Bank v. Lawton Development Inc., supra*, a court-appointed receiver sought the court's advice regarding the payment of certain moneys owed to the municipality. While the receiver did not question that it had an obligation to pay the accrued property taxes, it did question its obligation to pay, *inter alia*, the penalties, interest and costs assessed by the municipality. MacPherson J. specifically endorsed the receiver's recognition of its obligation to pay the accrued property taxes at p. 173 as follows:

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> The Royal Bank does not challenge the priority of the municipal tax over its security, almost certainly because of the clear language of s. 382 of the *Municipal Act. . .*

MacPherson J. continued at pp. 174-175:

> ... the status and recovery of [a municipal] tax are governed by s. 382 ... [The provisions of s. 382] make it clear that a tax due upon land ... has priority over all other forms of security, except security held by the Crown. This conclusion has been reached by several judges of the Ontario courts in cases raising the relationship between a variety of municipal taxes and many different encumbrances held by private parties ... It follows that the security held by the Royal Bank in the instant case does not take priority over the money owed to the City of Toronto . . .

In the end, MacPherson J. had little difficulty deciding that the priority granted to the City of Toronto under s. 382 of the Act extended to interest, penalties and certain costs.

[38] In *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 28 M.P.L.R. (2d) 59 (Ont. Gen. Div.) Blair J. observed that the receiver had not made tax payments to the municipality on an ongoing basis, nor had it made any arrangements specifically providing for such payment. In contrast, however, the receiver had made other payments, including legal fees, receivership fees and utilities. When the municipality proposed selling the property pursuant to its powers under the *Municipal Tax Sales Act,* R.S.O. 1990, c. M.60, it appeared there would be insufficient proceeds to pay both the property tax arrears and the receiver's own fees and disbursements. In denying the receiver priority over the municipality, Blair J. noted at p. 63:

> It is the failure [by the receiver] to keep taxes current that has led to the present predicament.

Blair J. also stated at pp. 72-73:

> Accordingly, I am of the opinion that the statutory scheme enacted through the *Municipal Act* and the *Municipal Tax Sales Act* for the imposition and collection of municipal property taxes precludes an order granting a receiver and manager priority over the Municipality for the receiver and manager's fees and disbursements, regardless of whether those fees and disbursements were incurred for the necessary preservation or improvement and realization of the property on behalf of all creditors.
>
> While this approach denies a receiver and manager a "super priority" with respect to municipal property taxes, it does not, in my view, alter what has traditionally been the case – and the understanding in the industry – concerning the payment of such taxes. Such taxes have traditionally been considered to be part of the "necessary costs of preservation" to be paid by a receiver and manager.

[39] The City's claim with respect to realty is quite straightforward. Section 382 puts the City's claim ahead of all others except the Crown. As stated by Sherstobitoff J.A. in *Canadian Commercial Bank, supra* at p. 251, "the Court will not permit or approve any action on the part of its officer [the receiver] which has the effect of changing the rights of competing creditors . . . " This is precisely what the City says has happened. I agree with Sherstobitoff J.A. that the court will not permit such conduct. The same result is dictated by consideration for other interested parties. Levy and Ursaco should not be prejudiced by the City's claim increasing because of the accretion of penalties and interest.

[40] Usarco leased part of the lands in question to Dofasco. This arrangement was continued following the Receiver's appointment. Under the lease Dofasco was responsible for taxes on that land. Dofasco paid $115,245.23 in taxes for the years 1990, 1991 and 1992 to the Receiver on or about February 15, 1993. Counsel for the Bank conceded during oral argument that this amount should have been paid over to the City on account of taxes. No similar concession was made by counsel for the Receiver.

[41] In my respectful view, that amount should have been paid to the City on account of taxes in February 1993. It is my understanding that Dofasco remained liable for the taxes on the "leased lands" which were subsequently sold to Leach. To the extent that Dofasco has paid further amounts to the Receiver on account of taxes, such amounts should have been and must now be paid over to the City.

[42] Personalty is dealt with under s. 400 of the Act. The Bank advances many reasons why the City has no entitlement to personalty or its proceeds. First, the Bank argues in its factum that the "goods and chattels" the City was entitled to pursuant to s. 400(1) did not include such items as Usarco's receivables, rent and like matters. I understood this argument respecting receivables was withdrawn during oral argument.

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[43] The Bank then argued that the City was further limited to applying the proceeds of the sale of personalty on a particular lot to the realty taxes on that lot. It was then argued that the City's lien respecting chattels did not arise until after distraint, and since the City never distrained any personalty, it had no lien in that regard and therefore no priority. Finally, in dealing with s. 400(11), which applies where personal property liable to seizure for taxes is in the hands of certain named persons, it was argued that as the Receiver was not one of such named persons, no relief was available to the City under s. 400(11).

[44] The City's position is that s. 400(1)(a) accords the City the right to distrain against the goods and chattels of Usarco and Levy situated anywhere in the county and that s. 400(1)(d) gives the City the right to distrain against any goods and chattels situated on the subject property, i.e. on the property on which municipal taxes remain unpaid.

[45] The City also argues that "chattels" is one of the widest words known in law in its relation to personal property (*Re Goverde,* [1972] 2 O.R. 506 (H.C.J.)), therefore it encompasses all personal property including:

> . . . choses in action such as money in a bank account, stocks, bonds, the right to receive money under a contract (e.g. rents under release) and debts (e.g. accounts receivable).

[46] As a result, the City submits that in the instant case the meaning of "chattels" in s. 400(1) includes all of the assets realized upon by the Receiver and the proceeds thereof. Having regard to the concession by counsel for the Bank in the course of oral argument and his choosing not to argue further as to the meaning of "chattels", no specific ruling is required in this regard.

[47] In view of the fact that s. 400(1)(a) refers to goods and chattels situated anywhere in the county and s. 400(1)(d) refers to any goods and chattels on the particular land on which taxes are unpaid, it does not seem to me that the City is limited by any geographic argument.

[48] The real argument with respect to personalty is whether s. 400(11) applies to the Receiver in this case. The relevant language of that section is set out earlier in these reasons. The Bank argues that the section has no application because a court-appointed receiver or a receiver of any kind is not included in the list of persons to whom the subsection applies. Only asheriff, bailiff of any court, assignee, liquidator, trustee or authorized trustee in bankruptcy are listed in s. 400(11). The City's position is that the Receiver is a "trustee" within the meaning of s. 400(11).

[49] In my view, the purpose of s. 400(11) is to provide a municipality clear and simple means to assert its priority in circumstances where personalty otherwise available to be seized for taxes, has come under the control of some other person and has been or is in the process of being realized for the purpose of paying a debt or debts owed to that other person or his or her principal. In my opinion a receiver in these circumstances has no personal interest in the fund, apart from its fees and is therefore a trustee as well as a receiver. As such the Receiver comes within the ambit of the s. 400(11).

[50] The jurisprudence on this point is mixed. In *Royal Bank of Canada v. 238842 Alberta Ltd.* (1985), 57 C.B.R. (N.S.) 242 (Sask. C.A.) the contest was between a debenture holder and a municipality claiming for business taxes and water and electric charges. The receiver, whose appointment by the debenture holder had been affirmed by the court, was directed to pay into court the proceeds of his sales of the debtor's assets. Section 384 of the *Saskatchewan Urban Municipality Act,* R.S.S. 978, c. U-10 was identical to our s. 400(11) for the purposes of these proceedings. At 247 and 248 Wakeling J.A. speaking for the majority said:

> The section [s. 384] certainly seems to be applicable in this instance as personal property was under seizure or attachment, the property was liable to seizure for taxes (s. 379), it had been converted into cash, was held by a trustee and was undistributed when the required notice was given by the city. In such circumstances, the priority provisions underlined above are to be applied and were so applied by Noble J. in the judgment from which this appeal is taken.
>
> The result is supported by the Ontario decision of *Re Decker's Delicatessen* ... in which an almost identical section was interpreted to give priority to Ontario Hydro for electric rates which were acknowledged to be the equivalent of a municipal tax, rate or assessment.

[51] The reasons of the court do not reveal any discussion apart from the foregoing as to whether the receiver in that case was a "trustee" within the meaning of s. 384.

[52] In *Alberta Treasury Branches v. Invictus Financial Corporation Ltd.* 1986 CanLII 1601 (AB QB), (1986), 42 Alta. L.R. (2d) 181, aff'd 1986 ABCA 178 (CanLII), (1986), 47 Alta. L.R. (2d) 94 (C.A.) a court appointed receiver-manager sought direction as to the priority of claims as amongst a Workers' Compensation Board claim for employer contributions, claims of two municipalities for business taxes incurred both before and after the appointment of the receiver and the claim of a debenture holder under its debenture. Stratton J. of the Court of Queen's Bench decided that the Workers' Compensation Board ranked first because of the language of its legislation. One of the claiming municipalities was

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Lloydminster, which is partly in Alberta and partly in Saskatchewan, and as a consequence is governed by a charter. Section 330 of the charter is for our purposes identical to Ontario s. 400(11). At 189 and 190 Stratton J. said:

> Upon deciding that the *Decker's Delicatessen and Mowbrey Stout* [*Royal Bank v. 238842 Alberta Ltd.*] cases apply to the case at bar, it must then be determined whether, in the present case, the receiver-manager falls within any of the categories listed in s. 330 of the charter. "Receiver" is not expressly mentioned in that section.
>
> I am of the view that a court-appointed receiver-manager would fit within the term of "trustee." A court-appointed receiver-manager is a fiduciary. His obligations reach further than merely acting honestly and in good faith. Wilson J. of the Manitoba Court of Queen's bench indicated in *Fotti v. 777 Mgmt. Inc.* ... that a receiver-manager appointed under a court order is:
>
> > ... an officer of the court and in his discharge of that office he may not, in the name of the court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed.
>
> The scope of the priority created by s. 330 of the charter is clearly limited to personal property and to the proceeds of personal property. [Emphasis added.]

[53] Thus *Royal Bank v. 238842 Alberta Ltd., supra*, *Alberta Treasury Branches v. Invictus Financial, supra,* and *Fotti v. 777 Mgmt. Inc., supra,* all equate a receiver with a trustee for the purposes of s. 400 (11). *Bennett on Receiverships, supra,* cites the *Alberta Treasury Branches v. Invictus Financial, supra,* as authority for the statement that "[a] court-appointed receiver is a trustee and fiduciary" (at p. 180, footnote 93).

[54] *Royal Bank of Canada v. Sherkston Beaches Ltd.* (1988), 70 C.B.R. (N.S.) 197 (Ont. Sup. Ct.) stands for the contrary position. This case involved a claim by a municipality for business taxes assessed against Sherkston Beaches Limited. Sherkston Beaches Limited owned and operated a recreational park and camping facility within the limits of the municipality. Royal Bank was its major creditor and on its application a receiver was appointed by the court. The operation was sold to another company but the proceeds were not sufficient to pay both the business taxes assessed and the amount owing to the bank. With respect to the application or otherwise of s. 400(11) O'Driscoll J. at 202 and 205-207, said the following:

> V. ISSUES
>
> A. *Is the court-appointed receiver a "trustee or authorized trustee in bankruptcy" under the provisions of s. 387(11)* [now s. 400 (11)] *of the Municipal Act?*
>
> *Re P.W. Ellis Co.* (1929), 36 O.W.N. 202,10 C.B.R. 491 at 493-94 (S.C.; Official Referee):
>
> > Secondly, Mr. Herapath contends that if the proceeds are to be regarded as I think they must be, as being in the possession of Mr. Clarkson *qua* receiver on behalf of the bondholders, then the words in the subsection "or of any trustee" include a receiver such as Mr. Clarkson is and the section applies.
> >
> > I disagree with this contention also. The whole phrase must be read together, "or of any trustee or authorized trustee in bankruptcy," both referring, I think to a case of bankruptcy; and I cannot bring myself to believe, what Mr. Herapath's argument implies, that a trustee for a mortgagee claiming or being in possession of chattel property, is in a worse position than the mortgagee himself would have been had he taken possession of the mortgaged property.
>
> *Conclusion*
>
> My answer to the question posed in "A" is: "No".
>
> ...
>
> VI. SUBMISSION OF COUNSEL FOR THE CITY OF PORT COLBORNE
>
> 1. The receiver is a "trustee" under the provisions of s. 387(11) of the *Municipal Act*.
> 2. In the case at bar, "property has been converted into cash and is undistributed." (s. 387(11) of the *Municipal Act*).
> 3. Notice of the amount due was given to the "trustee".

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4. The "trustee" is obliged to pay the city the arrears of business tax under s. 387(11) of the *Municipal Act*.

5. The following decisions support the city's position:

(a) *Royal Bank v. 238842 Alta. Ltd.; Saskatchewan v. Mowbrey Stout Ltd.*, 57 C.B.R. (N.S.) 2422, reflex, [1985] 5 W.W.R. 373 , 20 D.L.R.(4th) 450, 40 Sask.R. 177 (C.A.)

(b) *Re Decker's Delicatessen*, O.L.R. 140, 5 C.B.R. 208, [1925] 1 D.L.R. 652 (S.C.)

My conclusions

1. The following quotations are found in the majority judgment in the Saskatchewan Court of Appeal in *Royal Bank v. 238842 Alta., Ltd., supra*:

Page 246:

> The section then goes on to indicate that the only interest which is protected from the city's remedy by distress is that of a vendor with a subsisting lien for the purchase price (s. 379(2)).

Pages 247-48:

> In the result, the provisions of s. 379 set up a different but very extensive system of priorities which are sweeping in nature, covering by specific mention the right to distrain against property other than that of the taxpayer and exempting only the claim of an unpaid vendor...
>
> The section certainly seems to be applicable in this instance as personal property was under seizure or attachment, the property was liable to seizure for taxes (s. 379), it had been converted into cash, was held by a trustee and was undistributed when the required notice was given by the city. In such circumstances, the priority provisions underlined above are to be applied and were so applied by Noble J. in the judgment from which this appeal is taken.
>
> The result is supported by the Ontario decision of *Re Decker's Delicatessen* [*supra*] in which an almost identical section was interpreted to give priority to Ontario Hydro for electric rates which were acknowledged to be the equivalent of a municipal tax, rate or assessment.

2. It will be observed that:

(a) The Saskatchewan Court of Appeal in *Royal Bank v. 238842, supra*, did not consider the question: Was the personal property "liable to seizure for taxes"?

(b) The Saskatchewan Court of Appeal did not deal with the question whether a court-appointed receiver falls within the phrase "trustee" in the legislation comparable to s. 387(11) of the *Municipal Act*.

(c) In *Re Decker's Delicatessen*, *supra*, Fisher J. was sitting as a *bankruptcy judge* and had to decide whether the priorities set out in s. 387(11) of the *Municipal Act* of Ontario should take precedence or whether a priority in the *Landlord and Tenant Act* of Ontario should take precedence.

Fisher J. held (headnote [O.L.R.]):

... [that] the trustee of the bankrupt estate is bound to pay, out of the proceeds of the personal property of the debtor liable to seizure for taxes and rent, rates payable by the debtor to Hydro-Electric Power Commission, in priority to the claim of the landlord for rent.

(d) The case before me does not involve a bankrupt estate nor does it involve two competing statutes each setting out a priority.

(e) In my view, *Re Decker's* is not analogous to the case before me.

(f) The Saskatchewan Court of Appeal in *Royal Bank v. 238842 Alta. Ltd., supra*, dealt with a statute which gave wide powers to municipalities regarding distress for arrears of business taxes – powers much wider that the Ontario statute.

If and insofar as the decision of the Saskatchewan Court of Appeal is in conflict with the Ontario decisions, I decline to follow it.

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[55] I am not certain what weight should be given to *Royal Bank of Canada v. Sherkston Beaches Limited et al*. First, it deals with business taxes rather than realty taxes and the powers of a municipality with respect to collecting realty taxes and business taxes are not co-extensive. In addition, the motions judge found that the goods in question were not "liable to seizure" because the bank's secured claim exceeded the value of the goods and accordingly Sherkston Beaches Ltd.had no interest or equity in the goods. As well, the decision of the Alberta Court of Appeal in *Alberta Treasury Branches v. Invictus Financial, supra,* does not appear to have been drawn to the attention of the motions judge.

[56] If the motions judge's conclusion was based upon the Official Referee's opinion, then with respect, I would draw a distinction between the example referred to by the Official Referee, namely a person not appointed by the court, and the situation in the instant case. That same distinction was drawn by Sherstobitoff J.A. in *Canadian Commercial Bank, supra*, when he pointed out the difference between a "private debtor" and an "officer of the court". It may well be that, in the instant case, had the Bank itself taken and sold the personalty, it would have been in a stronger position than the Receiver. The Receiver was bound, by its appointment, to act on behalf of all interested parties, including Usarco, Levy and the City. Had the Bank taken possession, by itself or by a private receiver it could have looked to its own interests alone. I disagree with what appears to have been the opinion of the Official Referee in this regard.

[57] In *Royal Bank of Canada v. Niagara Falls (City)* reflex, (1992), 7 O.R. (3d) 147 (Gen. Div.) Steele J. dealt with the lawfulness of a seizure for business taxes. After deciding the case in favour of the municipality, Steele J. said at 151:

> I do not think that s. 400(11) has any application. The private receiver appointed by the bank is not one of those persons referred to therein. In this regard, I agree with the conclusion in *Royal Bank of Canada v. Sherkston Beaches Ltd.* reflex, (1988), 64 O.R. (2d) 126, 49 D.L.R. (4th) 460 (H.C.J.), at p. 130 O.R., p. 464 D.L.R. I would distinguish the decision in the *Sherkston Beaches* case from the present one in that, in that case, no seizure had taken place. [Emphasis added.]

[58] I agree with Steele J. that s. 400(11) had no application to the circumstances of that case. His remarks with respect to the decision in *Royal Bank of Canada v. Sherkston Beaches Ltd. et al, supra,* were accordingly *obiter*. It does not appear from the reasons of Steele J. that the decision in *Alberta Treasury Branches v. Invictus Financial, supra,* was drawn to his attention.

[59] Having regard to the purpose of s. 400(11) as set out earlier and to the circumstances under which the court-appointed Receiver dealt with the properties in question, including both realty and personalty, I conclude that the Receiver in the instant case was a "trustee" within the meaning of s. 400(11). It is conceded that the requirement for notice in s. 400(11) was met. Accordingly the Bank's arguments with respect to priority with respect to the proceeds from the sale of personalty must be rejected.

[60] I should note that in reaching this conclusion, in addition to the authorities discussed above, I have considered the following:

> *The Assessment Amendment Act*, S.O. 1917 c.45, s.10 (the original of what is now s. 400(11) of the *Municipal Act* R.S.O. 1990, c.M-45).
> *In re West and Company* (1921), 2 C.B.R. 3.
> *In re Cecilian Company Limited* (1922), 2 C.B.R. 330.
> *The Suburban Area Development Act,* S.O. 1922, c.77, s.24 (which amended the *Assessment Act* by adding the words "or trustee or authorized trustee in bankruptcy").
> *In re P.W. Ellis Company Limited* (1929), 10 C.B.R. 491.
> *In re General Fireproofing Company of Canada Limited* (1937), 18 C.B.R. 159 (S.C.C.).
> *In re Blind River Pine Company Limited* (1937), 19 C.B.R. 41.
> *Merrell v. A. Sung Holdings Ltd.* (1992), 11 M.P.L.R. (2d) 62 (Ont. Gen. Div.) aff'd. 1995 CanLII 715 (ON CA), (1995), 22 O.R. (3d) 44 (C.A.).
> *808757 Ontario Inc. (Receiver of) (Re.)* 1994 CanLII 7466 (ON SC), (1994), 26 C.B.R. (3d) 75 (Ont. Gen. Div.).
> *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* 1996 CanLII 1437 (BC CA), (1996), 41 C.B.R. (3d) 251 (B.C. C.A.)

[61] The Bank has an alternative or additional argument. It submits that the Bank is entitled to any and all of the money recovered by virtue of its security, while the City is more limited in that it can only apply the money recovered by the disposition of realty and personalty owned by Usarco to the taxes owing by Usarco. Simply put, the money recovered from the sale of Levy's property cannot be applied to tax arrears on Usarco's property.

[62] This submission was not made by the Bank at the hearing below nor does it appear in its factum. Counsel for the Bank first advised counsel for the City of the argument at 8:30 a.m. on October 11, 2000, the day the appeal was to be argued. The court was advised of this submission when the case was called for argument, at which time counsel for the

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Bank sought to introduce a chart to illustrate this point. The City's position was that the court should not hear the argument because it was not raised before and notice was not given until that day. As the court anticipated that the hearing might run over into the following day, it decided to accept the chart and hear the argument without any commitment on the court's part to deal with the argument. Counsel for the City would be at liberty, if so advised, to file written submissions on the matter. He did so the following day.

[63] The first two paragraphs of those submissions are as follows:

> 1. The Bank now raises, for the first time in these proceedings, the distinction between assets and property owned by the two Defendants, Usarco Limited ("Usarco") and Usarco's President, Director and majority shareholder Frank Levy ("Levy"). The Bank says that the assets of Usarco cannot be used to pay the realty tax arrears of Levy, and vice versa, and as a result, at most the City is entitled to recover $645,823.01 in respect of Usarco realty tax arrears and $276,980.32 in respect of Levy realty tax arrears.
>
> 2. This is wrong, it is submitted, in three ways:
>
> (a) it ignores the treatment of the Usarco and Levy properties and assets as one by the Receiver during the course of the receivership, as set out in more detail below and as evidenced in the attached documents from the Appeal Books;
>
> (b) it ignores the strong evidence that Usarco was a tenant on the Levy properties; and
>
> (c) even if the Appellant is correct in its submission, it fails to allocate to the Levy realty tax arrears the $541,800.00 the Receiver realized in respect of Usarco's inventory which was situated on Levy property (363 Wellington St. N.) and the $729,802.43 the Receiver realized in respect of Usarco's Accounts Receivable which were situated at Usarco's head office on Levy property (363 Wellington St. N.), as it should pursuant to s. 400(1)(d)(ii) of the *Municipal Act*.

[64] I agree with those submissions. Arguments (a) and (b) run together. All the properties were used by Usarco or for Usarco's purposes. There was no indication that Levy's involvement in or ownership of the properties was personal. The Receiver treated the properties as a single pool of Usarco assets and the only reference to Levy was to identify which parcels were being talked about. Usarco assets were used for the benefit of "Levy" lands. When lands were sold, there was no apportionment of the price between the part in Levy's name and the part in Usarco's name.

[65] Whether in retrospect the Receiver acted properly in treating this as a single receivership rather than as two, the fact remains that it did. To achieve the allocation now asserted by the Bank would require, at the least, consideration of a reaccounting to reflect separate ownerships. In my view it is neither timely nor appropriate to consider such a suggestion. The allocation argument must therefore be rejected.

[66] In paragraph 25, I set out the position taken by counsel for the Bank on the appeal. This position was that the issue between the Bank and the City was a question of priorities and that the Receiver was correct in not paying any taxes during the receivership. Instead, the proper position was to protect, preserve and realize the assets and leave priorities to be worked out at the end. The Bank claimed that nothing had been lost and no one had been injured by the Receiver following such a course.

[67] In my respectful view, that position is quite wrong and totally untenable. It overlooks the Receiver's normal duty to pay the taxes as part of preserving the property. The deliberate accretion of penalties and interest discriminated amongst interested parties, favouring the Bank at the expense of all others, including the City and the owners. There may well be receiverships where an uneven hand is appropriate. Such a position, however, should not be adopted unilaterally or at the suggestion or request of the petitioning creditors, but only upon direction from the court upon complete disclosure and on notice to parties who may be affected.

[68] The appeal of the Bank must therefore be dismissed with costs. The Receiver submitted its rights to the court and took no significant part in the argument. Its costs may be addressed by letter if so advised.

RELEASED: February 28, 2001

"Austin J.A."
"I agree J. I. Laskin J.A."
"I agree J. Simmons J.A."

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Dartmouth (City) v. Barclay's Bank of Canada, 1996 CanLII 5620 (NS CA) - Rank Recognition of Municipal Taxes vis-à-vis Secured Creditor

Date:	1996-05-21
Docket:	C.A. No. 116299
Parallel citations:	151 NSR (2d) 264; 40 CBR (3d) 1
URL:	http://canlii.ca/t/1mpw5
Citation:	Dartmouth (City) v. Barclay's Bank of Canada, 1996 CanLII 5620 (NS CA), <http://canlii.ca/t/1mpw5> retrieved on 2013-09-05
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C.A. No. 116299

NOVA SCOTIA COURT OF APPEAL
Hallett, Matthews and Chipman, JJ.A.
BETWEEN:
CITY OF DARTMOUTH
Appellant
- and -
BARCLAYS BANK OF CANADA and DELOITTE & TOUCHE, a body corporate
Respondent
Peter D. Darling
for the Appellant
Roy F. Redgrave and
Lloyd MacNeil
for the Respondent
Appeal Heard: April 10, 1996
Judgment Delivered: May 21, 1996
THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Matthews and Chipman, JJ.A. concurring.

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HALLETT, J.A.:

This is an appeal from a decision of Saunders J. in which he dismissed the City of Dartmouth's application under **Civil Procedure Rule** 25 for an order for judgment against Barclays Bank for outstanding taxes owing to the City of Dartmouth by CNC Machining Limited (CNC) in the amount of $25,498.89. Barclays Bank held mortgage security on the machinery and equipment of CNC. On default the Bank went into possession of CNC's assets. Shortly after Barclays Bank went into possession CNC made an assignment in bankruptcy pursuant to the provisions of the **Bankruptcy Act,** R.S.C. 1985, c. B-3, as amended. The City of Dartmouth sued Barclays Bank for payment of CNC's outstanding taxes which had been levied on the machinery and equipment. The action was based on the provisions of s. 118 of the **Assessment Act,** R.S.N.S. 1989, c. 23 as amended, which provides:

> "118 (1) No personal property shall be taken possession of by the holder of any bill of sale, chattel mortgage, instalment payment contract, hire purchase agreement, transfer or mortgage thereof, or any lien thereon, nor except as provided in this Act, shall the same be seized or levied upon, under or by virtue of any warrant, execution or attachment, or other process, nor shall the same be distrained for rent, nor shall the same be sold under any order of any court, until the holder or the person, at whose instance or suit the warrant, execution, attachment or other process issued or order of sale was granted, pays all rates and taxes rated and levied against the owner or person in possession thereof.
>
> (2) Any sheriff, constable, bailiff or other officer having process to levy upon such property shall, before selling the same, pay to the treasurer such rates and taxes and the amount paid to any municipality for rates or taxes may be added to the amount claimed under such process.
>
> (3) The assignee, mortgagee or person holding a lien on such property, or the sheriff, constable, bailiff or officer who takes possession thereof, shall be personally liable to the municipality for the amount of the rates and taxes rated and levied against the owner or person in possession thereof for the then current taxation year, and may be sued therefor by the municipality as for an ordinary debt.
>
> (4) Such property shall be liable to be levied upon, seized, taken and sold under warrant to pay such rates and taxes, together with costs, charges and expenses."

Saunders J. Found that s. 118 of the Assessment Act was rendered inoperative upon the bankruptcy of CNC by reason of the provisions of the Bankruptcy Act which, in his opinion, altered the scheme of distribution provided for in s. 136(1) of the Bankruptcy Act. He concluded that once the voluntary assignment in bankruptcy had been made the Bankruptcy Act exclusively determined the status, priority and ranking of creditors. Pursuant to s. 136(1) of the Bankruptcy Act the municipal taxes would rank fifth in priority among preferred creditors and after payment of the secured creditors. Therefore, he found that the City could not claim against Barclays Bank (as mortgagee in possession of CNC's assets) pursuant to s. 118 of the Assessment Act. He was of the opinion that these provisions of the Assessment Act were not within the sphere of legislative competency of a province.

As required by **Rule** 25, the matter went before Justice Saunders upon an agreed statement of facts. I will summarize the relevant facts in a chronological order:

(i) CNC carried on business in Dartmouth from and prior to January 1st, 1991 until February 11th, 1992;

(ii) Barclays Bank held a fixed and floating charge debenture charging the machinery and equipment of CNC;

(iii) on February 11th, 1992, CNC was in default. Pursuant to the terms of the debenture, Barclays Bank appointed Deloitte & Touche Inc. receiver and manager of the property and assets of CNC;

(iv) on the instructions of Barclays Bank, Deloitte & Touche took possession of the assets and undertaking of CNC;

(v) at the time Deloitte & Touche took possession of the assets, CNC owed rates and taxes to the City of Dartmouth for the current year in the amount of $25,498.89. This tax was with respect to the ownership of the machinery and equipment mortgaged to Barclays Bank and which Deloitte & Touche took possession of on February 11th, 1992;

(vi) on February 12th, 1992, Deloitte & Touche wrote the City of Dartmouth seeking particulars as to the amount of taxes outstanding. These particulars were provided to Deloitte & Touche;

(vii) Deloitte & Touche, as receiver and manager, advertised the assets of CNC for sale by tender. Five tenders were submitted by the closing date but none were acceptable to Barclays Bank;

(viii) on April 28th, 1992, CNC made a voluntary assignment in bankruptcy pursuant to the provisions of the **Bankruptcy Act.** Deloitte & Touche was named the trustee in bankruptcy. Its appointment was subsequently confirmed at the first meeting of creditors of the estate of CNC in bankruptcy;

(ix) between the months of April and July, 1992, discussions were held between M&M Manufacturing Limited, a business enterprise in Dartmouth, Deloitte & Touche and Barclays Bank, concerning the sale of the

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assets of CNC. M&M Manufacturing was willing to purchase the assets but required financing in the form of a long term lease option. Barclays Bank, on the other hand, wanted to sell the machinery and equipment outright. In order to conclude the transaction Barclays contacted Kes Pacific Leasing Inc., an equipment financing company. Kes Pacific agreed with Barclays Bank to purchase the assets of CNC, including those in respect of which CNC was rated for machinery and equipment tax. The agreed purchase price was $400,000. It had been arranged that Kes Pacific would lease the equipment to M&M;

(x) on the 26th of May, 1992, the City of Dartmouth commenced an action against Barclays Bank and Deloitte& Touche claiming that Deloitte & Touche as agent, and at the instigation of Barclays Bank took possession of the assets and undertaking of CNC and sold the assets. The City of Dartmouth claimed that Deloitte & Touche and/or Barclays thereby became personally responsible to the City of Dartmouth for CNC taxes pursuant to the provisions of s. 118 of the **Assessment Act**;

(xi) on the 9th day of June, 1992, the defendants filed a defence stating that Barclays Bank was a secured creditor of CNC, as defined in s. 2 of the **Bankruptcy Act,** and pleaded the provisions of the **Bankruptcy Act** as a full defence to the City of Dartmouth's claim;

(xii) on August 4th, 1992, Deloitte & Touche as trustee in bankruptcy of CNC executed a bill of sale transferring the assets of CNC, including those in respect of which CNC was rated for machinery and equipment tax transferring said assets to Kes Pacific for the nominal consideration of $1.00;

(xiii) on the same date Barclays Bank gave a letter to Kes Pacific acknowledging the receipt of $399,500 from Kes Pacific representing the amount required to release its security interest in CNC's machinery and equipment. Barclays Bank also confirmed that $500 was paid by Kes Pacific to Deloitte & Touche, trustee in bankruptcy for the estate of CNC;

(xiv) on the 13th day of January, 1995, the City of Dartmouth applied to the Supreme Court for an order pursuant to **Civil Procedure Rule** 25 for an order for judgment in favour of the City of Dartmouth against both Barclays Bank and Deloitte & Touche for the amount claimed in the statement of claim;

(xv) the application was heard by Justice Saunders in special Chambers on March 7th, 1995, and by a decision released on March 27th, 1995, Justice Saunders dismissed the application of the City of Dartmouth and awarded costs to the defendants;

(xvi) by notice of appeal filed on the 25th of April, 1995, the City of Dartmouth asserts that the learned Chambers judge erred in law in finding that s. 118 of the **Assessment Act** was rendered inoperative by the **Bankruptcy Act** and the assignment in bankruptcy of CNC made pursuant to the said **Act**. The City of Dartmouth asked this Court to award judgment in favour of the City of Dartmouth against Barclays Bank and Deloitte & Touche or one of them in the amount of $25,670.30 plus pre-judgment interest and costs;

(xvii) on the hearing of the appeal counsel agreed: (a) that the amount owing to the City of Dartmouth for the current year was $25,498.89 and this was the amount being claimed by the City of Dartmouth; (b) that should judgment be awarded to the City of Dartmouth that the pre-judgment interest would be at the rate of 7% and run from February 11th, 1992; and, (c) that the machinery and equipment that was mortgaged to Barclays Bank and subsequently sold to Kes Pacific were all the assets of CNC.

Section 136 of the **Bankruptcy Act** is relevant; it provides:

> "136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payments as follows:
>
> . . . . .
>
> (e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding his bankruptcy, that do not constitute a preferential lien or charge against the real property of the bankrupt, but not exceeding the value of the interest of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;
>
> . . . . .
>
> (j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary."

The appellant's counsel characterizes the issue raised on this appeal as follows:

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> "Is the personal liability of Barclays, as imposed upon it by s. 118 of the *Assessment Act,* R.S.N.S. 1989, c. 23, rendered inapplicable by the *Bankruptcy Act,* R.S.C. 1985, c. B-3 (now the *Bankruptcy and Insolvency Act*), and the assignment into bankruptcy of CNC Machining Limited made thereunder?"

Before deciding whether s. 118 is rendered inapplicable, it is necessary to determine what it means. The Section has been recognized in several decisions of the courts of this Province as being difficult to interpret (**FBDB v. Halifax (City of)** (1982), 56 N.S.R. (2d) 139 at p. 144; **Matheson v. Calkin, et al.** (1931), 3 M.P.R. 9).

Mellish J., writing for the Supreme Court en banc, in **Matheson v. Calkin,** decided that it was not necessary for the bailiff who sold personal property distrained on by the landlord for arrears of rent to have paid the taxes owing to the town prior to selling the personal property distrained upon. Mellish J. directed his attention to the object of the legislation. He stated at p. 14:

> "The object of the legislation is primarily to secure the payment of taxes and with that end in view to empower the town, if so advised, to sell any goods for taxes in the hands of any person exercising by possession any claim thereto, to make such person liable for the current year's taxes, and in the event of such person selling the same to make taxes a first charge on the proceeds. The provisions of the Act are not very clearly expressed, but they do not in my opinion make such a sale as has taken place here, void or illegal as between the landlord and tenant."

Paton, J. concurred in the disposition of the appeal in that case and stated at p. 14:

> ""The proper interpretation of the sections of the statute quoted in the judgment of my brother Mellish is very difficult. This is due in some cases to the indefiniteness of the words and expressions used, and in other cases to the use of the same words and expressions with apparently different and inconsistent meanings. A logical analysis of the meaning of the Act in its application to this action is impossible. On the whole, I think we should give the Act an interpretation which brings about the result arrived at by Mellish, J."

Mellish, J. concluded that the section should not receive a technical interpretation.

In my opinion s. 118(1) of the **Assessment Act** clearly describes four events that give rise to a requirement that a person, other than the owner of the personal property, pay the rates and taxes rated and levied against the owner or person in possession of the personal property in question. The first of these events is when a mortgagee takes possession of personal property of the taxpayer. When this happens the mortgagee is required, pursuant to s. 118(1), to pay the taxes on the said personal property that is taken possession of pursuant to the terms of the mortgage.

By reason of the provisions of s. 118(3), the mortgagee, who takes possession, is personally liable to the municipality for the taxes owing for the current year and may be sued therefore by the municipality as for an ordinary debt.

It was on the basis of the provisions in s. 118(1) and (3) that the City of Dartmouth sued Barclays Bank. Barclays Bank had taken possession of the machinery and equipment of CNC by the appointment of Deloitte & Touche as receiver and the requirement to pay was, therefore, triggered on February 11, 1992, when Deloitte & Touche, on behalf of Barclays Bank, went into possession.

I see the issue in the case as being whether or not those provisions of the **Assessment Act** are rendered inapplicable or inoperative by reason of the subsequent assignment in bankruptcy of CNC. The answer to this question turns on the objects of the federal/provincial legislation and, in particular, the interpretation of s. 136(1) of the **Bankruptcy Act** which provides for a scheme of distribution of the proceeds realized from the sale of the bankrupt's property and what effect applying s. 118 of the **Assessment Act** has on the scheme of distribution.

The Trial Judge's Decision

After reviewing the facts the learned Chambers judge stated the issue before him as follows:

> "Is Barclays and/or Deloitte required to pay the taxes owed by CNC to Dartmouth for the 1991/1992 taxation year? The analysis of that issue necessitates an inquiry whether s. 118 of the **Assessment Act** directly or indirectly overrides the scheme of distribution set out in the **Bankruptcy Act**."

Justice Saunders accepted the argument of counsel for Barclays Bank which he reproduced in his judgment as follows:

> "Under the **Bankruptcy Act**, the secured creditor is entitled to sell all assets over which it has security and there are two alternative positions with respect to the proceeds of the sale:
>
> first, the proceeds can be less than the amount owed to the secured creditor, in which case the secured creditor retains all proceeds of sale and files as an unsecured creditor with the trustee in bankruptcy for the deficiency;
>
> secondly, the proceeds of distribution totally retire the secured creditors debt and costs of realization, in which case the surplus is remitted to the trustee in bankruptcy for *the*

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> *general benefit of all creditors and to be distributed in accordance with the terms and provisions of the Bankruptcy Act, notably Section 136(1).*
>
> If, however, the position advanced by the City of Dartmouth is adopted the following results: the proceeds of realization by Barclays Bank of Canada would, in effect, be used first to retire the debt of the bankrupt to the City of Dartmouth for machinery and equipment and business occupancy taxes and second to be applied to reduce the debt of the bankrupt to Barclays Bank. In the situation where there is a surplus, the City of Dartmouth would not have to file a proof of claim with the Trustee, since their debt was the first to be retrieved.
>
> If, as the Plaintiff claims, Section 118 of the *Assessment Act* applies in the event of a bankruptcy, then the province will be viewed as a secured creditor and its position will be elevated from the rank of tenth (j) or fifth (e) to the rank of first in the scheme of distribution. The Defendant submits that such an interpretation is ultra vires the province since it attempts to usurp the Federal scheme."

The learned Chambers judge considered four decisions of the Supreme Court of Canada on the subject of provincial legislation that appears to be in conflict with the Federal bankruptcy legislation which have become known as the "quartet". He concluded his decision as follows:

> "I can come to no other conclusion but that the application of s. 118 of the Nova Scotia **Assessment Act** in these circumstances is to alter the scheme of distribution under the **Bankruptcy Act.** Although the **Assessment Act** may determine priorities prior to bankruptcy, once CNC made a voluntary assignment into bankruptcy, the **Bankruptcy Act** exclusively determined the status, priority and ranking of creditors. To permit the plaintiff's application would be to subvert the scheme of distribution under the **Bankruptcy Act.** That is not within the sphere of legislative competence of a province.
>
> In the result, s. 118 of the **Assessment Act** was rendered inoperative, upon the bankruptcy of CNC, by the provisions of the **Bankruptcy Act**.
>
> The plaintiff's application is dismissed with costs to the defendants."

Review of the Relevant Law

Subsequent to the trial judge's decision which was rendered on March 27th, 1995, the Supreme Court of Canada on October 19th, 1995, filed its decision in **Workers' Compensation Board v. Husky Oil Operations Limited** indexed as **Husky Oil Operations Limited v. M.N.R.**, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453; 128 D.L.R. (4th) 1 (S.C.C.). The issue before the Supreme Court of Canada involved consideration of the applicability of provincial workers' compensation legislation to s. 136(1)(h) of the **Bankruptcy Act**. In that case Husky Oil contracted with Metal Fabricating and Construction Limited respecting the construction of a heavy oil upgrader owned by Husky Oil in Saskatchewan. The contractor had not paid the required contributions to the Workers' Compensation Fund. On March 2nd, 1992, the Workers' Compensation Board advised the contractor that $208,850.50 was due and payable. Soon thereafter the Bank of Montreal obtained an assignment of book debts from the contractor. On March 16th the Board was advised that the contractor had ceased operations. The Board then sought payment from Husky Oil, the principal of the defaulting contractor, pursuant to s. 133(1) of the of the **Workers' Compensation Act** which, in such circumstances, allows the Board to obtain the required contributions from the principal. Pursuant to s. 133(3) of the **Act** the principal could set off the amount paid to the Board from what it owed to the contractor. At that time Husky Oil owed the contractor approximately $800,000. On March 19, 1992, subsequent to the Board having sought payment from Husky Oil, the contractor made an assignment in bankruptcy (Iacobucci J., paragraph 95).

Under s. 136(1)(h) of the **Bankruptcy Act,** a claim by the Workers' Compensation Board would rank 8th in priority to payment from the proceeds of realization by the trustee on the sale of the bankrupt's assets after the claims of secured creditors were paid.

Husky Oil applied to the trial judge to determine whether it should make the payments required by s. 133(1) to the Compensation Board. The trial judge held that the Provincial legislation was inapplicable as, if applied, it would alter the scheme of distribution in the federal bankruptcy legislation. The Saskatchewan Court of Appeal dismissed the appeal on the basis that s. 133(1) and (3) of the Workers' Compensation Act were *ultra vires* as they applied to bankruptcy. On appeal to the Supreme Court of Canada, the Court split five to four. The majority dismissed the appeal.

Gonthier, J., writing for the majority, found that the debt deemed against Husky Oil by s. 133(1) of the Workers' Compensation Act working in tandem with the set-off allowed the principal against the bankrupt contractor under s. 133(3) of the Act, diminished the bankrupt's estate. The net effect of this is that the contractor's liability is discharged out of its own property and not from the property of the principal. The effect of this was also to secure the claim of the Board against the assets of the bankrupt contractor and allow recovery by the Board ahead of the priority assigned to such an

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entity by Parliament under s. 136(1)(h) of the **Bankruptcy Act**. The majority was of the opinion that there was a clear conflict between the provincial and federal legislation because the provisions of the Workers' Compensation Act re-ordered federal priorities for claims by third parties such as the Compensation Board against the bankrupt even though the federal bankruptcy legislation allows for the operation of the law of set-off as between Husky Oil and the contractor. The majority concluded that s. 133 should be read down as inapplicable to the exclusive federal sphere of bankruptcy even though it was legislation of general application that had not been enacted with the intention to interfere with the **Bankruptcy Act.**

Iacobucci J., writing for the minority, held that s. 133(1) of the Workers' Compensation Act did not affect the property of the bankrupt; it simply allows the Compensation Board to recover from Husky Oil, a non-bankrupt third party. The minority held that the provisions were not enacted for the purpose of improving the ranking of the Compensation Board in bankruptcy proceedings and that the section was not in operational conflict with federal bankruptcy law. The minority were of the opinion that s. 133(1) could stand independent from s. 133(3). Although s.133(3) allowed Husky Oil to take from the bankrupt's property by asserting a set-off, the operation of the law of set-off has been preserved by s. 97(3) of the **Bankruptcy Act.** The minority held that any interference with the bankruptcy scheme does not result in the clear conflict required to trigger the paramountcy doctrine; a mere effect on a federal sphere of legislative power is not sufficient to invalidate legislation.

Gonthier J., writing for the majority, did a thorough review of the purposes of the federal bankruptcy legislation and a review of the decisions of the Supreme Court in **Re Bourgault** reflex, (1979), 105 D.L.R. (3d) 270, [1980] 1 S.C.R. 35 *sub nom. Deputy Minister of Revenue v. Rainville;* **Deloitte Haskins& Sells Ltd. v. Alberta (Workers' Compensation Board)** 1985 CanLII 82 (SCC), (1985), 19 D.L.R. (4th) 577, [1985] 1 S.C.R. 785; **Federal Business Development Bank v. Québec (Commission de la Santé et de la Sécurité du Travail** 1988 CanLII 105 (SCC), (1988), 50 D.L.R. (4th) 577, [1988] 1 S.C.R. 1061; and **British Columbia v. Henfrey Samson Belair Limited** 1989 CanLII 43 (SCC), (1989), 59 D.L.R. (4th) 726, [1989] 2 S.C.R. 24 (the so-called "quartet").

At 120 D.L.R. p. 18 Gonthier J. then summarized his review of the quartet as follows:

> ".....my overview of the quartet hopefully indicated, the goal of maintaining a nationally homogeneous system of bankruptcy priorities has properly been a constant concern of this court. Were the situation otherwise, "Canada [would] have a balkanized bankruptcy regime which [would] diminish the significance of the exclusivity of federal jurisdiction over bankruptcy and insolvency. ... Otherwise there could be a different scheme in every jurisdiction; ten different bankruptcy regimes would make ordinary commercial affairs extremely complex, unwieldy and costly, not only for Canadians but also for our international trading partners" (Roman and Sweatman, *supra*, at pp. 80, 104). This is a prospect which this court has been acutely mindful of in the past, and its vigilance has ensured the continuing vitality of our nation's bankruptcy legislation. In my view, its past vigilance commends itself to the present and, barring an amendment to s. 91(21) of the *Constitution Act, 1867,* also to the future.
>
> In this regard, I agree with Iacobucci J., at para. 147, that a bankruptcy priority is a category, and also that provincial law may result in the content of such categories being different from province to province. However, provincial law does not and cannot define the content of bankruptcy priorities or categories without limitation. Indeed, crucial limitation is imposed by the order of priorities in the *Bankruptcy Act* itself. Thus, while individual provinces can define and rank categories such as "secured creditor" and "trust" as they each have their own purposes, those provincial laws which enter into conflict with the provisions of the *Bankruptcy Act* are simply without application in bankruptcy. Such, indeed, was this court's unequivocal holding in *Re Bourgault, Deloitte Haskins, and F.B.D.B.* with respect to "secured creditors" and in *Henfrey Samson* with respect to "trusts":'

The essence of the majority's decision in **Husky Oil** is contained in paragraph 49 where Justice Gonthier stated:

> "Furthermore, when s. 133(1) and (3) operate in tandem as intended by this legislation, the principal's right to withhold and be indemnified from moneys owing to the contractor in the event that the principal is deemed responsible *for the contractor's liability* means that the principal will ultimately *not* be responsible for that liability. Instead, the debt to the Board is effectively discharged with property of the contractor when the principal exercises its right of set-off. Differently put, when s. 133(1) and (3) operate together, the principal is no worse off after having acted as the contractor's surety. The principal's estate or, to use civil law terminology, its patrimony remains entirely unaffected even after discharging its "personal" liability to the Board. As a result of the principal's right of set-off against moneys owing to the contractor, it is the contractor's estate or patrimony which is diminished to the extent of the assessments owing to the

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> Board. The reality of this scheme, then, is that the contractor discharges its own liability to the Board, mediated through the legally compelled agency of the principal."

Justice Gonthier concluded that the combined effect of ss. 133(1) and (3) was to secure the claim of the Compensation Board against the assets of the contractor. In short, the bankrupt's estate, available for distribution to preferred creditors pursuant to s. 136(1) of the **Bankruptcy Act,** (after the claims of secured creditors are satisfied) is diminished by the application of ss. 133(1) and 133(3) of the Saskatchewan Workers' Compensation Act. The effect of the provincial legislation is to secure the Board's claim against the bankrupt estate ahead of its priority ranking under s. 136 of the **Bankruptcy Act.** In paragraph 68 Gonthier J. stated:

> "We have consistently held that the deference to provincial law in the *Bankruptcy Act* does not extend to the reordering of claims against the estate. At that point, provincial law simply ceases to apply for intruding into an exclusive federal sphere. Such, then, must also be the fate of the impugned legislation in this appeal."

Of significance to the issue before us are the comments of Justice Gonthier at paragraph 77 of his opinion where he stated:

> "At this point, I should perhaps stress that nothing I have said detracts from a province's authority to impose liability on a third party for a bankrupt's debt. What a province cannot do, however, is create a statutory security device which has the effect of reordering the priorities of distribution of the assets in the bankrupt's estate. In such a case, what is otherwise valid provincial legislation is simply without application upon the occurrence of bankruptcy."

He went on in paragraph 79 to again emphasize that his decision rested on the operation in tandem of the provisions of s. 133(1) and 133(3) of the Workers' Compensation Act. He stated:

> "In the foregoing, I have proceeded on the basis that s. 133(1) operates in tandem with s. 133(3), that is, that the principal has moneys owing to the contractor which it can use as a basis for set-off when the Board deems it liable for the contractor's assessment. Where a principal has such moneys owing, it was clearly the legislature's intention that such a right to set-off be exercised in order that the contractor ultimately be responsible for its own assessment. In this sense, where both s. 133(1) and (3) potentially apply on the facts of a given case, it was clearly the legislature's intention that the right to set-off be exercised. As a result, in such a case s. 133 is inapplicable *in toto* against the bankruptcy."

Counsel for the City of Dartmouth puts considerable reliance on the statement made by Justice Gonthier in paragraph 80 to support his argument that s. 118 of the **Assessment Act** should be allowed to operate in the case we have under appeal. Justice Gonthier stated:

> "(80) However, there may be instances where the principal does not hold or retain any moneys owing to the contractor. While the court did not have the benefit of extensive submissions on this point, I believe it is quite plausible to conclude that the principal can then claim from the estate as a preferred creditor under s. 136(1)(h), since its claim is comprehended with "indebtedness of the bankrupt under any Workmen's Compensation Act". This would appear to be permissible because on its plain wording s. 136(1)(h) specifies only the nature of the claim and not the identity of the claimant. As a result, if only s. 133(1) applies, the Board has not secured its claim against the estate but recovers only from the principal. The scheme of distribution of assets in the estate is thereby unaffected. In such a case, there is no constitutional reason why full effect should not be given to provincial law within its legitimate sphere of operation. I would therefore only read down s. 133 to the extent that in application it enters into conflict with the scheme of distribution in the *Bankruptcy Act.* Where s. 133(1) alone is engaged in a given case, the Board's claim against the principal continues to be fully applicable." (Emphasis added)

I will return to the considerations raised by the foregoing statement.

In paragraph 87 Gonthier J. felt it appropriate to summarize his view on the proper constitutional analysis where federal and provincial legislation potentially conflict. He stated:

> "In view of Iacobucci J. 's statement that "[provincial] [l]egislation that is *intra vires* is permitted to have an incidental and ancillary effect on a federal sphere" [at para. 162], I think it appropriate in concluding to summarize my view as to the proper constitutional analysis where federal and provincial legislation potentially conflict. One must first determine whether the laws are respectively valid federal or provincial legislation. If so, the actual operation of the laws must be examined to determine whether they are in operational conflict, that is, inconsistent or incapable of being fully complied with in a given situation. If they are in operational conflict, the federal legislation prevails and the provincial legislation is without

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> effect to the extent of this conflict. If the operational conflict is in a field of exclusive federal jurisdiction, the provincial legislation will be inapplicable as being *ultra vires* to that extent. If the conflict is in an area of concurrent or overlapping jurisdictions, the provincial legislation will remain *intra vires* but be inoperative. To the extent that there is operational conflict, there is no room for an incidental or ancillary effect of provincial legislation. If, on the other hand, there is no operational conflict, then both laws continue to operate and both continue to have effect to the extent that operational conflict does not arise. Short of operational conflict, provincial law may validly have an effect on bankruptcy, as I have indeed acknowledged in observing that there is no bankruptcy "bottom line" without provincial law (at para. 30). In the present case, I have found clear operational conflict in that s. 133(1) and (3) in their operation together entail a reordering or subverting of the federal order of priorities under the *Bankruptcy Act.* Such an intrusion into an exclusive federal sphere necessarily goes far beyond an incidental and ancillary effect. I believe this proposition runs thorough my reasons."

What emerges from Gonthier J.'s analysis of the quartet is the recognition by the Supreme Court of Canada of six propositions or principles to be considered by a court when dealing with potential conflicts between provincial and federal legislation where s. 136(1) of the **Bankruptcy Act** is engaged (**Husky Oil,** paras. 39 and 40).

Those principles are as follows:

> "(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;
>
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;
>
> (3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; and
>
> (4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act.
>
> (5) in determining the relationship between provincial legislation and the *Bankruptcy Act,* the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
>
> (6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so."

Appellant's Submission

The appellant submits that the *ratio decidendi* of the majority decision of the Supreme Court of Canada in **Husky Oil** is the rejection of what was labelled the "bottom line approach" in that case (See paragraphs 29 and 30). I disagree. I would refer to Gonthier J.'s statement in paragraph 31:

> "However, even rejecting the simplistic "bottom line" approach, I do not agree that the quartet stands for the sole proposition that the provinces cannot "jump the queue". In my opinion, the quartet embodies a consistent and general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements. That philosophy cannot be captured in the pithy but limited proposition that the provinces cannot "jump the queue".

Counsel for the City of Dartmouth argues that the learned trial judge applied the "bottom line approach" which was described by Gonthier J. in paragraph 29 as being an approach which posits that "any time provincial law affects the final result of a bankruptcy, the province is improperly attempting to alter the priorities of distribution".

The essence of the appellant's submission is that one must look to the facts of the particular case and if the effect of applying s. 118 of the **Assessment Act** on the facts of the case does not diminish the estate of the bankrupt then s. 118 does no more than impose a liability on a secured creditor as a cost of realization of its security. He argues s. 118 makes no attempt to affect the property of the bankrupt nor does it attempt to give a secured creditor, Barclays Bank, recovery rights with respect to the bankrupt property whether through setoff or otherwise.

I will deal with these submissions in setting out the reasons why I am of the opinion that this appeal ought to be dismissed.

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Analysis of Issues raised on this Appeal

The provincial legislation in issue in three of the so-called quartet cases was different in a fundamental aspect from the facts of the case we have before us. In these cases the issue of s. 136(1) priorities affected by the conflicting provincial legislation related to provincial legislation securing a claim (of the nature identified in s. 136(1)) against the bankrupt's property thus giving that claimant security and, thus, priority against the property that otherwise would be available for distribution pursuant to the order of priority established in s. 136(1) of the **Bankruptcy Act**. In **British Columbia v. Henfrey Samson Belair Ltd.** 1989 CanLII 43 (SCC), (1989), 59 D.L.R. (4th) 726, [1989] 2 S.C.R. 24, 75 C.B.R. (N.S.) 1, the provincial legislature created a deemed statutory trust with respect to monies held by the bankrupt that had been collected as provincial sales tax. The majority of the Court held that it was not a valid trust. McLachlin J., writing for the majority, concluded that the reality of the property interest created by the provincial legislation ought to govern over the form, and as a result the province's claim failed.

In **Husky Oil** the provincial legislation did not directly create a charge on the bankrupt's property; it made a third party personally liable. That is the situation that exists in the case before us. Furthermore, in **Husky Oil** and in the case we have under consideration the personal liability of the third parties had been triggered before the assignment in bankruptcy. There is no clear indication in **Husky Oil** if there were surplus funds from realization of the bankrupt property after payment of the secured claims. However, in paragraph 96 there is an indication that there would not have been any funds available to the Board as a preferred creditor if s. 133 of the **Workers' Compensation Act** was inapplicable. Therefore, on the facts of **Husky Oil,** as in the case we have under consideration, there would not have been any money for the preferred creditor in question unless effect were given to the provincial legislation in issue.

In **Husky Oil**, if effect were given to s. 131(1) and (3) of the **Workers' Compensation Act** the property of the bankrupt available for distribution to the other preferred creditors would have been diminished and, therefore, the order of priorities under s. 136(1) altered.

In each of the cases on which the Supreme Court of Canada ruled, it was held that if the provincial legislation were given effect it would diminish the amounts realized from the bankrupt's property and, thus, diminish the amounts available for payment of preferred and unsecured creditors. However, the provincial legislation under which the City of Dartmouth claims Barclays Bank is liable for CNC's taxes does not expressly involve a priority claim to the bankrupt's property that but for the priority would have been available for the preferred or unsecured creditors but a personal claim against a mortgagee who went into possession.

The question arises as to whether or not the provincial legislation we have under consideration can be given effect without affecting the scheme of distribution under s. 136(1) of the **Bankruptcy Act**. If the City's claim against Barclays Bank is enforceable there would not appear to be a diminishment of the bankrupt's property available for distribution to the preferred creditors pursuant to s. 136(1) of the **Act** as on the facts of this case there is nothing to distribute after payment of the secured creditor Barclays Bank.

"The quartet" and **Husky Oil** decisions all involved situations where the application of the provincial legislation would clearly have had the effect of diminishing the proceeds from the realization of the bankrupt's property and thus effect the distribution envisaged under. 136(1) of the **Bankruptcy Act**. The majority decision in **Husky Oil** in paragraph 80 concedes that provincial legislation designed to secure payment of money owing to a provincial entity may be allowed to operate if the application of the provincial legislation does not effect the scheme of distribution provided for in s. 136(1) of the **Bankruptcy Act**.

The minority in **Husky Oil** would have allowed s. 133(1) and (3) of the Workers' Compensation Act to operate despite the bankruptcy of the contractor. The minority concluded at p. 71:

> "In terms of constitutional analysis, the simple fact that a provincial undertaking may have an effect upon a bankruptcy does not necessarily mean that such an undertaking is to be nullified under paramountcy analysis. Further, the fact that the Board might be able to recover more money as a result of s. 133 does not mean that this provision is in operational conflict with the *Bankruptcy Act.* Operational conflict means that compliance with the provincial statute means offending the federal one. But the two pieces of legislation involved here are complementary."

With respect to the proper approach to questions of paramountcy between federal and provincial legislation, Iacobucci J. stated at paragraph 122:

> "In the case at bar, the courts below did not demonstrate the appropriate level of judicial restraint in their application of paramountcy doctrine. In my view, courts should carefully look for co-existence, not strive to find conflict."

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After reviewing the so-called quartet decisions Justice Iacobucci directed his attention to the consequences of these decisions and made further comments on the proper approach when dealing with potential conflicting general provincial legislation and federal legislation respecting bankruptcy; he stated at paragraph 141:

> " ....The quartet stands for the position that only those provincial laws which directly improve the priority of a claim upon the actual property of the bankrupt over that accorded by the *Bankruptcy Act* are inoperative. This accords with the facts of the cases in the quartet. In each case, the provincial governments endeavoured to change the priorities of preferred creditors in s. 136(1) by elevating a lower ranked claim to a higher rank. In *Re Bourgault* and *Belair,* the province attempted to "queue jump" claims of the Crown ranked last by s. 136(1)(j) by declaring such debts to be "privileges" (*Re Bourgault*) or deeming them to be "trust money" and hence outside the distribution scheme (*Belair*). In *Deloitte*, the province attempted to elevate its claim through a proposed security interest and, finally, in *F.B.D.B.,* the province once again endeavoured to use the mechanism of a privilege/lien." {Emphasis added}

And further at paragraph 149:

> "I conclude that within the context of the bankruptcy process judicial authority and common sense militate in favour of a guarded approach to invalidation under the paramountcy doctrine. When this analysis is applied to the case at bar, it obliges the respondents, in order to prevail, to demonstrate that s. 133 of the impugned provincial Act actually reorders the federally established priority scheme with regard to the property of the bankrupt Metal Fab by directly creating interests therein. I now turn to this issue." {Emphasis added}

Most significantly for the matters we have under consideration, he stated at paragraph 161:

> "In sum, s. 136(1)(h) encompasses a claim against the property of the bankrupt. The Board's claim under s. 133(1) targets a solvent principal. The two provisions are co-extensive, not mutually exclusive. Use of s. 133(1) does not displace s. 136(1)(h); it complements it."

If one were to apply the persuasive reasoning of the minority decision, the City of Dartmouth's claim would prevail on the facts of this case as s. 118 of the **Assessment Act** is valid provincial legislation enacted pursuant to s. 92(13) of the **Constitution Act, 1867** and does not directly create an interest in the bankrupt's property in favour of the City of Dartmouth. As such, it should be given effect if it is not in operational conflict with federal bankruptcy legislation which would be paramount pursuant to the provisions of s. 91(21) of the **Constitution Act, 1867.** By applying s. 118(1) and (3) of the **Assessment Act** so as to require Barclays Bank to pay the City of Dartmouth $25,498.89, does not diminish the proceeds from the realization on the bankrupt's property by the trustee that would be available for distribution to the preferred creditors pursuant to s.136(1) of the **Bankruptcy Act** as there was nothing left to be diminished; the assets having sold for an amount that is only sufficient, if that, to pay the secured claim of Barclays Bank and something towards the trustee's fees.

On such an analysis the liability of the mortgagee, Barclays Bank, in relation to obligations created by the provincial legislation ought not to be extinguished by the mere fact that subsequent to the liability being created (when the mortgagee went into possession on February 11th, 1992) the mortgagor made an assignment in bankruptcy. The mortgagee is still subject to the laws of the province that may affect the mortgagee's remedies when realizing on the security for the loan. So long as the operational effect of this provincial law does not diminish the bankrupt's property available for distribution pursuant to s. 136(1) of the **Act**, the provincial legislation ought to be allowed to operate. Whether s. 118 of the **Assessment Act** can be invoked by a municipality in any given bankruptcy would on this analysis turn on the facts of the particular case.

Such a conclusion would be consistent with the views expressed by Gonthier J. in paragraph 80 of the **Husky Oil** decision and would certainly accord with the views of the minority.

However, I should state that in a different factual situation than that before us, s. 118(1) and (3) of the **Assessment Act** could not be given operational effect as this would offend the principles enunciated in **Husky Oil**. For example, in a bankruptcy in which there was a secured debt of $400,000 and the assets of the bankrupt realized $450,000, giving effect to s. 118(1) and (3) of the **Assessment Act** would require the mortgagee, who had gone into possession as Barclays Bank had, in this case, to pay a current year's taxes owing by the bankrupt to the municipality in which it did business. Pursuant to the standard form of debenture (as was provided for in Barclays debenture form) the mortgagee could add this sum (say $25,000) to its secured claim. The trustee in bankruptcy would have paid out $425,000 leaving only $25,000 available for the other creditors pursuant to s. 136(1) of the **Bankruptcy Act** rather than $50,000 had s. 118(1) of the **Assessment Act** not been applied. Under such circumstances the pool of money available to s. 136 creditors would be reduced from $50,000 to $25,000. Such a situation would clearly fall within the principles developed by the majority

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decision in **Husky Oil** in that the proceeds of realization of the bankrupt property would be diminished by the application of s. 118 of the **Assessment Act** and would have the effect of reordering the priorities provided for in s. 136(1) of the **Bankruptcy Act** as the municipal taxes would be paid out of the bankrupt's property prior to payments to the preferred creditors with a superior ranking under s. 136(1) of the **Bankruptcy Act**. Under such circumstances s. 118 could not be applied as it would be in operational conflict with s. 136 of the **Bankruptcy Act**. Therefore, under such circumstances a municipality could not rank as a creditor of the bankrupt other than as provided for in s. 136(1) of **the Bankruptcy Act**.

Conclusion

I will briefly review the relevant facts:

(i) Barclays Bank went into possession of CNC's property as mortgagee following a default in payment of a mortgage on CNC's personal property;

(ii) there was a subsequent bankruptcy of CNC;

(iii) Section 136(1) of the **Bankruptcy Act** provides for a scheme of distribution from the proceeds of realization of the bankrupt's property subject to the rights of secured creditors;

(iv) the City of Dartmouth does not claim a security interest in any of the bankrupt's property and is not a secured creditor within the meaning of that term in the **Bankruptcy Act**;

(v) there was no evidence in the agreed statement of facts as to the exact amount that was owing to Barclays Bank by CNC on the date the receiver went into possession - February 11th, 1992. However, the trustee, who has a duty to all the creditors, was apparently satisfied that at least $399,500 was owing to Barclays Bank under the Debenture as that amount was paid for the release of its security;

(vi) we know that the trustee was paid $500.00 and that it is reasonable to infer that his fees would be more that this amount. We also know that the trustee's fees are the second priority for payment under s. 136(1) of the **Bankruptcy Act;**

(vii) if Barclays Bank is held personally liable to pay to the City CNC's outstanding taxes on personal property by the application of s. 118(1) and (3) of the **Assessment Act**, it can pursuant to Clause 3.5(b) of the Debenture add the amount paid to the debt secured by the Debenture and thus bring the indebtedness back up to $399,500;

(viii) there are no funds available for preferred creditors from the sale of the bankrupt's property other than the $500 generated from the sale of the assets of CNC to Kes Pacific.

The fundamental difference between the majority and minority decisions in **Husky Oil** is that Gonthier J.'s decision is rooted in what he correctly perceives as a constant theme of the Supreme Court of Canada to have a consistent application of bankruptcy law from province to province and that any provincial legislation that creates a "statutory security device" which has the effect of re-ordering the priorities of creditors specifically mentioned in s. 136(1) of the **Bankruptcy Act** has no application once a debtor has gone into bankruptcy. And in assessing whether the legislation has the effect of creating a "statutory security device", substance must govern over form. The court must look to the effect of the provincial legislation on the scheme of distribution of a bankrupt property as provided in the **Bankruptcy Act.**

The minority's opinion is founded on an approach that requires the courts, when dealing with these problems, to attempt to reach a resolution that would allow the provincial legislation to operate rather than to strive to find conflict. Inherent in the minority view is that if the provincial legislation does not directly create an interest in the bankrupt's property because the legislation creates a claim against a third party, the provincial legislation does not diminish the bankrupt's property and can therefore co-exist with the **Bankruptcy Act.** In such circumstances the legislation should be given operational effect as it will not interfere with the order of priorities for distribution of the proceeds of the realization on the property of the bankrupt as provided for in s. 136(1) of the **Bankruptcy Act**.

In concluding that the appeal ought to be dismissed I have obviously been guided by the six propositions or principles adopted by the majority in **Husky Oil.** But I would note that in paragraph 80 Gonthier J. seems to concur with the minority that if the preferred creditors' claim is not secured against the bankrupt's property but recoverable from a third party the scheme of distribution of assets of the bankrupt is unaffected and full effect should be given to the provincial legislation. It is this aspect of the majority decision that forms the foundation of the appellant's argument before us and creates the dilemma in resolving this appeal.

In **Husky Oil**, the Bank of Montreal, as the principal secured creditor, was in a similar, although not identical position, to that of Barclays Bank. Both would lose their secured position to the extent of the preferred creditors' claims if the provincial legislation were given operative effect.

One of the prime purposes of the **Bankruptcy Act** is to provided a regime whereby the creditors of the bankrupt will pursue their claims by collective action through the trustee so that the assets of the bankrupt can be realized and distributed on an equitable basis subject to the priorities of preferred creditors and the rights of secured creditors. The

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Bankruptcy Act allows secured creditors to realize on their security as if there was not a bankruptcy (**Husky Oil,** paragraph 9).
Creditors holding security, such as a mortgage on real or personal property, are subject to a variety of provincial laws that have the effect of diminishing the amount realized on a sale of the secured property. One such device is s. 118 of the **Assessment Act** which provides that if a taxpayer has outstanding taxes owing to the Municipality on personal property and the mortgagee goes into possession, the mortgagee is liable to pay those taxes. Should the mere fact that the debtor has gone into bankruptcy make that provincial law inapplicable? The majority decision in **Husky Oil** seems to answer yes to that question.
Although there seems to be a mixed message created by paragraph 80 of the majority decision, I would note that the comments of Gonthier J. in that paragraph were clearly *obiter dicta* and seem to run contrary to the general theme of the judgment.
Iacobucci J. stated that he found the concepts developed in the majority judgment with respect to tests to be applied in resolving conflicts between provincial legislation that infringe upon the federal bankruptcy field to be "somewhat confusing".
The situations in **Husky Oil** and in this appeal are significantly similar in three respects: (i) the provincial legislation in issue does not in its form create a charge against property of the bankrupt; (ii) the personal liability of the third parties arose before the bankruptcy; and (iii) giving operational effect to the provincial legislation on the facts would not have diminished the funds available for the preferred creditors under s. 136(1) of the **Bankruptcy Act** as there would not have been a surplus after payment of the secured creditors.

In addition to the similarity of the facts, what is persuasive in resolving the issues in the appeal we have under consideration is that the majority decision in **Husky Oil** reaffirms the principles upon which the decisions in the quartet were founded. We must be guided by the majority decision in **Husky Oil** and, in particular, the six propositions spelled out in that decision as representing the current law relating to the issue before us.
With these propositions in mind one is driven to the conclusion that s. 118 of the **Assessment Act** has the combined effect of diminishing the security of the mortgagee and re-ordering the priorities of preferred creditors to payment as established by s. 136(1) of the **Bankruptcy Act.** This is so because Barclays Bank as mortgagee holds the first fixed charge against the machinery and equipment of the bankrupt. Under s. 136(1) of the **Bankruptcy Act** the right of a municipality to have outstanding taxes on personal property of the bankrupt paid by the trustee in bankruptcy is subject to both the rights of the secured creditors and to those preferred creditors ranking ahead of the municipality under s. 136(1). The majority decision in **Husky Oil** makes it clear that in considering such statutory security devices substance must govern over form. Although the liability of Barclays Bank under s. 118(1) is personal the substantive effect of applying s. 118(1) is to give the City of Dartmouth what amounts to a secured claim against the machinery and equipment ranking ahead of, not only other higher ranked preferred creditors under s. 136(1), but also ahead of Barclays Bank, a secured creditor. This is so because, in effect, the City of Dartmouth's claim will be paid out of the realization of the sale of the bankrupt's property that secured the claim of Barclays Bank. Gonthier J.'s use of the term "statutory security device" must be considered in combination with his statement that the substance of the legislation in question governs over its form. Therefore the term includes, not only statutory provisions which create a lien against property of the bankrupt, but also provisions that have such an effect. Section 118(1) is such a statutory security device as the personal liability of the mortgagee who goes into possession will, in effect, be covered by the proceeds of the realization of the bankrupt property by the mortgagee. Furthermore, the effect of applying s. 118 of the **Assessment Act** is to re-order the priorities of preferred creditors to realize from the sale of the bankrupt property as provided for in s. 136(1) of the **Bankruptcy Act**. Based on the majority decision in **Husky Oil,** the fact that there would not be any funds available for the preferred creditors in any event does not appear to be a relevant consideration in determining the applicability of the provincial legislation following a bankruptcy. Therefore, applying the majority decision in **Husky Oil** and the propositions therein recognized, s. 118 of the **Assessment Act** is inapplicable following the assignment in bankruptcy by CNC as it is in conflict with the federal bankruptcy legislation. If s. 118 of the **Assessment Act** were to be applied by this court in these circumstances the decision would be contrary to each of the six propositions recognized by the majority decision in **Husky Oil**.
The fact that a secured creditor can improve his position by causing a debtor to be put into bankruptcy is a price that was acceptable to the Supreme Court of Canada in **FBDB v. Quebec** to accomplish the end of having uniform bankruptcy laws from coast to coast in Canada. In that case Lamer J. stated:

> " Once the bankruptcy has occurred, the federal statute applies to all creditors of the debtor.
> It is true that such a solution may encourage secured creditors to bring about the bankruptcy of their debtor in order to improve their title. On the other hand, this solution has obvious advantages. As soon as

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> a the bankruptcy occurs the **Bankruptcy Act** will be applied: the mere fact that a creditor is mentioned in s. 107 of the **Bankruptcy Act** suffices for such creditor to be ranked as a preferred creditor and in the position indicated in that provision. As provincial statutes cannot affect the priorities created by the federal statute, consistency in the order of priority in bankruptcy situations is ensured from one province to another."

Accordingly, I would dismiss the appeal and order the City of Dartmouth to pay to Barclays Bank the costs with respect to the hearing before Justice Saunders and the appeal to this Court in the total amount of $4,000 plus disbursements to be taxed.

Hallett, J.A.

Concurred in:

Matthews, J.A.

Chipman, J.A.

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1992 **S.H. No. 92-82333**

IN THE SUPREME COURT OF NOVA SCOTIA
BETWEEN:
CITY OF DARTMOUTH
PLAINTIFF
and
BARCLAYS BANK OF CANADA and DELOITTE & TOUCHE INC.,
bodies corporate
DEFENDANTS

HEARD: before the Honourable Justice Jamie W. S. Saunders, Supreme Court of Nova Scotia, Halifax, Nova Scotia
March 7, 1995 (in Chambers)

DECISION: March 27, 1995

COUNSEL: Peter D. Darling for the plaintiff
Roy F. Redgrave for the defendants

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C.A. No. 116299

NOVA SCOTIA COURT OF APPEAL
BETWEEN:
CITY OF DARTMOUTH
Appellant
- and -
BARCLAYS BANK OF CANADA and
DELOITTE& TOUCHE INC.
Respondent
REASONS FOR
JUDGMENT BY
HALLETT, J.A.

Everingham Brothers Ltd. (In Bankruptcy) (Re), 2000 CanLII 5709 (ON CA) - Determination of Priority of Secured Creditors

Date:	2000-04-03
Docket:	C29850; C30139
Parallel citations:	48 OR (3d) 108; 185 DLR (4th) 278; 16 CBR (4th) 41; 131 OAC 52
URL:	http://canlii.ca/t/1cwwm
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DATE: 20000403
DOCKETS: C29850
C30139

COURT OF APPEAL FOR ONTARIO

CHARRON, ROSENBERG and MacPHERSON JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF
EVERINGHAM BROTHERS LIMITED
OF THE CITY OF BRAMPTON
IN THE PROVINCE OF ONTARIO

and

IN THE MATTER OF THE BANKRUPTCY OF
764388 ONTARIO LIMITED
OF THE CITY OF BRAMPTON
IN THE PROVINCE OF ONTARIO

C29850

B E T W E E N :)
) **Harvin D. Pitch,**
NICHOLAS BULUT) **for the appellant**
)
Appellant)

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) Peter L. Biro and
- and -) Jonathan N. Eades,
) for the respondent,
CORPORATION OF THE CITY OF) Sun Life Assurance Company
BRAMPTON, EMCO LIMITED,) of Canada
EVERINGHAM BROTHERS LIMITED,)
SUN LIFE ASSURANCE COMPANY)
OF CANADA)
)
Respondents) Heard: September 17, 1999
)
On appeal from the order of MacKenzie J. dated May 14, 1998
C30139
B E T W E E N :)
) Harvin D. Pitch,
1238157 ONTARIO INC.) for the appellant
)
Appellant)
) Peter L. Biro and
- and -) Jonathan N. Eades,
) for the respondent,
CORPORATION OF THE CITY OF) Sun Life Assurance Company
BRAMPTON, EVERINGHAM) of Canada
BROTHERS LIMITED, SUN LIFE)
ASSURANCE COMPANY OF CANADA)
P. D. MERRELL BAILIFF INC.)
)
Respondents) Heard: September 17, 1999
)
On appeal from the order of MacKenzie J. dated June 3, 1998
ROSENBERG J.A. (dissenting):
[1] This is an appeal from the order of MacKenzie J. in which he determined the priorities among certain secured creditors of two bankrupt companies. MacKenzie J. declared that the respondent, the mortgagee in possession of certain premises, had priority over two creditors with perfected security interests on the assets of the companies. For the reasons that follow, I would dismiss the appeal of the appellant Nicholas Bulut and allow the appeal of the appellant 1238157 Ontario Inc.

THE FACTS

The parties

[2] This appeal arises out of the bankruptcy of two companies, Everingham Brothers Limited and 764388 Ontario Limited. 764388 Ontario Limited operated as Royal Spas and I will refer to it as Royal Spas in these reasons. Everingham owned commercial premises at 5 Tilbury Court in Brampton. Everingham was a manufacturer of stainless steel cookware and therefore it had various presses and dies as well as inventory on the premises. Royal Spas leased space in the Tilbury property where it carried on the manufacture and distribution of hot tubs and whirlpool spas. It too had equipment and inventory on the premises. Everingham and Royal Spas were controlled by Nicholas Bulut and his family. Nicholas Bulut was the president of both companies.

[3] The respondent Sun Life Assurance Company of Canada holds

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the first mortgage granted by Everingham on the Tilbury property. The original loan secured by the mortgage was $2,250,000 and the mortgage was registered against the Tilbury property in January 1992.

[4] Nicholas Bulut became a secured creditor of Everingham under the following circumstances. In 1991, Everingham granted a security interest to the Royal Bank to secure a loan for $568,000. The financing statement was registered in accordance with the Personal Property Security Act, R.S.O. 1990, c. P. 10 in November 1991. Bulut purchased the Royal Bank interest in the security on November 25, 1996 and the Bank assigned the security to Bulut. On November 26, 1996, a financing change statement was registered under the PPSA. On June 30, 1995, Everingham granted a security interest to Bulut to secure a revolving line of credit to be advanced by Bulut. This security was registered on April 2, 1997. At that time the line of credit stood at approximately $100,000. There is no suggestion that Bulut did not advance the funds for which the security interests were granted in either case. Thus, by April 1997 Bulut was a secured creditor of Everingham in the amount of approximately $650,000.

[5] The other appellant in this case is 1238157 Ontario Inc. ("123. Inc."). It became a secured creditor of Royal Spas under the following circumstances. In April 1995, Royal Spas granted a security interest to Nicholas Bulut to secure a $2,000,000 revolving line of credit. In April 1997, that line of credit stood at just under $1,300,000. On May 14, 1997, Bulut registered his security interest in accordance with the PPSA. On May 23, 1997, Bulut assigned his security interest to 123 Inc. and a financing change statement was registered a year later on March 24, 1998. 123 Inc. is controlled by the Bulut family and Nicholas Bulut's son is a director of that company. On June 26, 1995, Royal Spas granted a general security agreement to National Bank of Canada to secure a $250,000 loan. A financing statement was registered in accordance with the PPSA. On May 16, 1997, 123 Inc. purchased the National Bank's interest and the general security agreement was assigned to it. A financing change statement was registered on May 20, 1997. Thus, by May 1997, 123 Inc. was a secured creditor of Royal Spas for approximately $1,500,000.

The court proceedings

[6] In January 1996, Everingham went into default under the mortgage to Sun Life. On April 2, 1997, Dyson J. granted possession of the Tilbury property and leave to issue a writ of possession to Sun Life. Sun Life took possession on April 25, 1997 and changed the locks. At this point, Sun Life did not have any security interest in the personal property of the bankrupts. The core of the dispute in this appeal centres on the attempts by Everingham and Royal Spas to recover possession of their chattels in the Tilbury property. To further complicate matters, on May 2, 1997, a bailiff acting on behalf of the City of Brampton levied distraint upon Everingham's personal property for arrears in the payment of business taxes of approximately $80,000.

[7] Shortly after Sun Life took possession, Everingham and Royal Spas brought a motion for an order for recovery of their personal property. On May 9, 1997, Thomas J. made an order that on or

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before May 15, 1997, Everingham and Royal Spas pay $35,000 into court on account of occupation costs, costs of security guards and utilities. In the meantime, they were to have access to the premises from 6:00 a.m. to 9:00 p.m. Monday to Friday of each week. They were also entitled to use the packaging machines. Everingham and Royal Spas were to be responsible for the cost of security guards, utilities and occupation costs in an amount to be determined by Thomas J. The $35,000 was paid in accordance with this order.

[8] From this time on, there was a continuing dispute between Sun Life and Everingham and Royal Spas about access to the property. One difficulty was that the City of Brampton claimed to have a secured interest in the personal property of Everingham and it and another creditor, Aristech Chemical International Limited, obtained court orders enjoining Everingham and Royal Spas from in any way dealing with Everingham's personal property. Further, it appears relatively clear that Everingham and Royal Spas were not particularly interested in vacating the premises. Rather, Everingham hoped to reach a settlement with Sun Life. Several agreements were reached but never carried out by Everingham.

[9] A critical order in the appeal is the order made by MacKenzie J. on June 4, 1997, in response to a further motion by Everingham and Royal Spas for an order to permit recovery of their personal property. Nicholas Bulut swore an affidavit in support of this motion. In effect, Everingham and Royal Spas sought an extension of time to realize on their inventory and remove their personal property. The order of June 4, 1997 included the following provisions:

1. The occupancy costs (consisting of rent and security services) was fixed at $1,305 per day from and including April 25, 1997.
2. The $35,000 paid into court was to be paid out to Sun Life on account of the occupancy costs.
3. The shortfall of $17,200 as of June 4, 1997 was to be paid by June 16, 1997. Thereafter, the occupancy costs were to be paid on a weekly basis.
4. Everingham and Royal Spas were to have to August 1, 1997 to remove their equipment, inventory and trade chattels subject to the following:

(a) any sale that may take place by Aristech pursuant to MacKenzie J.'s order of the same date;

(b) provided that Everingham an Royal Spas make the payments referred to in para. (3.).

[10] The fifth paragraph of the order is the most important. It purported to create a charging order and was in the following terms:

5. THIS COURT ORDERS that if the Plaintiffs [Everingham and Royal Spas] fail to make the payment referred to in paragraph 3 of the Order the Defendant [Sun Life] shall be at liberty to exercise its right under the writ of possession herein and that any arrears in payment of occupancy costs shall be a charge on the said equipment, inventory and trade chattels in the same manner and to the same extent as a

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landlord's distress subject to any rulings as to the entitlement and priorities of the parties on the motion contemplated under paragraph 9 of my Order of even date in Court File No. 87-CV-428-CM, with liability for the occupancy costs on the proceeds of sale by Aristech only from June 4, 1997 to the date of vacant possession. [Emphasis added.]

[11] While Everingham and Royal Spas paid the shortfall of $17,200 they did not pay any of the occupancy costs thereafter. They were also not able to remove their equipment and inventory from the premises.

[12] On September 17, 1997, Everingham filed a Notice of Intention to file a proposal with the official receiver pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B.-3. On October 3, 1997, on motion by Sun Life, MacKenzie J. lifted the stay of proceedings under the BIA to allow Sun Life to sell Everingham's assets if the occupancy costs were not paid by Everingham by October 17, 1997. MacKenzie J.'s order contains the following:

THIS COURT ORDERS AND DECLARES that Sun Life has a charge on the assets of Everingham in the possession of Sun Life on the Premises (the "Assets") and that Sun Life shall be entitled to distrain against the Assets in accordance with the terms of the Occupation Order for the amounts payable to it as occupancy costs accruing at the rate of $1,305.00 per day from June 4, 1997 to the date when Sun Life receives vacant possession of the Property and to, subject to the provisions of this Order, proceed to sell such portion of the Assets as described hereinafter. [Emphasis added.]

[13] Everingham failed to file a proposal and therefore became bankrupt on October 17, 1997 (effective September 17, 1997).

[14] On October 23, 1997, Bulut, as security holder of Everingham, and 123 Inc., as security holder of Royal Spas, served notice on Sun Life that they intended to exercise their security interest over the collateral and chattels of Everingham and Royal Spas in accordance with the PPSA. Sun Life served its own notice refusing to recognize these security interests and objected to Bulut and 123 Inc. (the appellants) realizing on their security. Ultimately, the assets of Everingham and Royal Spas were sold by an interim receiver and the proceeds now stand in court to the credit of these proceedings.

[15] Royal Spas made a voluntary assignment in bankruptcy on March 31, 1998.

[16] On April 8, 1998, Bulut and 123 Inc. brought a motion for a declaration that their security interests had priority over the occupancy costs payable to Sun Life in accordance with the charging order of June 4, 1997. MacKenzie J. heard the motion and issued orders on May 14, 1998 in respect of Everingham and June 3, 1998 in respect of Royal Spas. It is these orders that are subject to this appeal.

The orders under appeal

[17] The orders made by MacKenzie J. may be summarized as follows:

i. Sun Life is a "secured creditor" within the meaning of the BIA.

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ii. The charge on the assets of Everingham and Royal Spas respecting the occupancy costs created by the order of June 4, 1997 constitutes a "lien" within the meaning of the PPSA, which lien is enforceable "in the same manner and to the same extent as a landlord's distress".
iii. Sun Life, as a secured creditor and lien holder, is outside the priorities regimes stipulated under the BIA and the PPSA.
iv. Sun Life has the right to enforce its lien rights for its occupancy costs in priority to the security interests of Bulut and 123 Co. in the assets of Everingham and Royal Spas respectively.
v. The sale of the assets of Everingham and Royal Spas was to proceed forthwith.

[18] MacKenzie J. gave the following reasons for these orders. In his reasons in relation to Everingham he held that the charge created by the June 4, 1997 order made Sun Life a secured creditor, applying Re Sara (1985), 56 C.B.R. 283 (Ont. H.C.J.). He held that the charging order also gave Sun Life a lien "by operation of law". (Since the parties are agreed that the Personal Property Security Act does not apply to determine the priorities, I need not decide whether this is a correct characterization of the charging order.) Further, by reason of the order of October 3, 1997, Sun Life "in enforcing its rights has the status of a landlord distraining, either actually or constructively". As to the question of priorities among the secured creditors, MacKenzie J. held as follows:
Since Sun Life is outside the ambit of both the BIA and the PPSA regimes in terms of priorities, Sun Life has priority over Bulut in satisfying the charge or lien in its favour with respect to occupancy costs.

[19] MacKenzie J. held, however, that there were no grounds for piercing the corporate veil "to impose personal liability on Bulut".
[20] In supplementary reasons on May 28, 1998, MacKenzie J. held that,
[t]he charge and lien created under the June 4th, 1997 order for occupancy costs refers to a landlord's distress right only for purposes of describing the means of enforcement; it does not state nor could it reasonably imply that the charge or lien created could only apply to the costs of the means of enforcement...

[21] In his reasons on June 3, 1998 in relation to Royal Spas, MacKenzie J. dealt with other arguments from the appellants concerning the question of priorities. He rejected the argument that the first-in-time rule should apply to the secured creditors, relying upon the decision of this court in Leavere v. Port Colborne (City) 1995 CanLII 715 (ON CA), (1995), 22 O.R. (3d) 44. He reasoned that Sun Life was "in possession" of the chattels of Royal Spas and the order of June 4, 1997 authorized Sun Life to "enforce its lien by means analogous to a landlord's right of distress upon chattels".
[22] MacKenzie J. also held in the June 3, 1998 reasons that, even if Sun Life did not have priority, he would have granted it

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an order that the appellants could only realize on their security interests upon paying all of the occupancy costs outstanding under the June 4, 1997 order. He reasoned as follows:

> The basis for such alternative relief is that it would be just and equitable for 123 Co. and N. Bulut to pay such costs since the evidence establishes a continuing and concerted course of action between and among Mr. N. Bulut, Mr. S. Bulut and their respective corporations, including 123 Co. herein, in delaying the payment of occupancy costs relating to personal property of Royal Spas and Everingham in respect of which Messrs. Bulut and their respective corporations now claim an interest as secured parties, and which personal property Sun Life has effectively warehoused for one year at a cost of $1,305.00 per day. In my view, it would be a just, in the sense of fair or equitable, term that the said Messrs. Bulut and their respective corporations in their capacities as secured parties of Everingham and Royal Spas should pay to Sun Life the occupancy costs for this collateral prior to their having any rights in and to the same vis-€-vis any security interest holders or claimants other than Sun Life.

THE POSITIONS OF THE PARTIES

[23] For the purposes of this appeal, the appellants concede that Sun Life is a secured creditor and that accordingly the priorities are to be determined outside the scheme of the BIA.1 Similarly, as indicated, the parties conceded that the PPSA does not apply. They also concede that it is possible for a judge to make a charging order giving the person a priority over other secured creditors.2 However, they submit that the charging order of June 4, 1997 did not give Sun Life such a priority and that accordingly the normal rule of priorities of secured creditors applies. That rule is simply that priorities are based on the "first in time" and the security interests of Bulut and 123 Inc. were prior in time to the June 4, 1997 charging order. Finally, in the absence of a finding of fraud or some other reason to pierce the corporate veil, the appellants submit that there were no grounds in equity for giving the respondent priority over the appellants.

[24] The respondent supports the motion judge's order principally on the basis of equity. It submits that the motions judge had an inherent equitable jurisdiction to do justice between the parties. Sun Life had been thrust into the position of unwilling creditor, required to warehouse and protect the goods of the bankrupts for the benefit of the creditors. It suggests that there is an analogy to a solicitor's lien, which can take priority in some circumstances over the claims of secured creditors. In support of its position, counsel for the respondent carefully reviewed the facts to demonstrate that Mr. Bulut, as the directing mind of the bankrupts, had no real intention of causing the bankrupts to remove their property from the premises. Rather, he was attempting to force Sun Life into an improvident settlement of its claim on the mortgage.

ANALYSIS

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[25] The reasons of the motions judge raise two issues. First, did the charging order of June 4, 1997 give Sun Life a priority at law over secured creditors? Second, if not, did the motions judge have an equitable jurisdiction to, in effect, give Sun Life a priority over the claims of the secured creditors that were related to the bankrupts? The phrase "related to" is mine, but as I understand his reasons the motions judge would have denied a priority to the appellants because of the conduct of Mr. Bulut and his son in causing the bankrupts not to pay the occupancy costs.

Issue One: The position at law

[26] In his reasons of May 14, 1998, the motions judge held that:

> Since Sun Life is outside the ambit of both the BIA and the PPSA regimes in terms of priorities, Sun Life has priority over Bulut in satisfying the charge or lien in its favour with respect to occupancy costs.

[27] The motions judge did not otherwise explain why the respondent's charge should take priority over the claims of other secured creditors. In his reasons of June 3, 1998, the motions judge expanded on his initial reasons. He rejected the applicability of the first-in-time rule and relied upon this court's reasons in Leavere v. Port Colborne (City). In my view, Leavere does not support the motions judge's holding. The issue in that case was whether a municipality distraining on a taxpayer's chattels for arrears of business taxes is entitled to those chattels as against a creditor of the taxpayer with a registered perfected security interest in those chattels. Galligan J.A., writing for the court, held that the PPSA did not apply because of s. 4 of that Act, which provides that the Act does not apply to a lien given by statute or rule of law. He then noted at pp. 48-9 that at common law priorities are determined in accordance with the chronological order of the encumbrances. The creditors in Leavere relied upon this rule since their security interests were registered before the exercise of the right of distress by the municipality created the lien upon the taxpayer's chattels. Galligan J.A. adopted the following statement of the common-law rule from Spence on Equitable Jurisdiction of the Court of Chancery (1850), vol. 2, at p. 727:

> It has already been stated that the general rule, though not without exceptions as will presently appear, is, that statutes, judgments and recognizances, at law and in equity, and equitable charges of every kind, in equity, all rank according to their dates: therefore, in the absence of particular circumstances, the successive periods of their execution or attainment constitute the order in which they will be directed to be satisfied.

[28] However, Galligan J.A. held at p. 52 that it has always been recognized that this common-law rule could be displaced by the provisions of a statute and this was the effect of s. 400(2)(c)(ii) of the Municipal Act, R.S.O. 1990, c. M.45. That provision gave the municipality the right to levy unpaid taxes by distress upon any goods and chattels in the possession of the taxpayer where title to the goods and chattels is claimed, "by

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way of mortgage or otherwise". The security interests claimed by the creditors in that case were so similar to mortgages that they could be included in the word "otherwise". Galligan J.A. found that the legislature had clearly intended that the municipalities were entitled to levy by distress upon chattels in the possession of a person taxed although the chattels were subject to security agreements. At p. 53, he held that it would "amount to an absurdity if the statute authorized distress upon chattels covered by security agreements but did not intend as well that the lien created by the exercise of the right of distress was to have priority over the security agreement".

[29] In my view, the decision in Leavere supports the position of the appellants in this case with respect to the effect only of the June 4th order. There is no statutory exception to prevent the ordinary rule from applying – that secured interests of all kinds rank according to their dates. In this case, the appellants' perfected security interests all preceded the charging order of June 4, 1997.

[30] The motions judge, however, relied upon Leavere by analogy. He referred to the following excerpt from the reasons at p. 53 and held that by substituting "rule of law" [being the June 4th charging order] for "statute" or "statutory", the same result could be achieved. The passage referred to by the motions judge is as follows:

> The municipalities' liens arose when the municipalities took possession of the chattels in exercise of their statutory power to distrain. Because the statute authorizes distress upon chattels subject to security agreements I am constrained to conclude that the lien which arises upon the exercise of that right must take priority over the security agreements. It would, in my view, amount to an absurdity if the statute authorized distress upon chattels covered by security agreements but did not intend as well that the lien created by the exercise of the right of distress was to have priority over the security agreement. The power to distrain upon chattels subject to security agreements would be rendered nugatory if the security agreements were not required to rank behind the liens which had arisen by rule of law.

[31] The difficulty with the analogy is that, while the legislature by express language clearly intended that the municipality have the right to distrain upon chattels subject to security agreements, the wording of the June 4th order does not expressly give that right. For convenience, I repeat the relevant part of the charging order:

> ... any arrears in payment of occupancy costs shall be a charge on the said equipment, inventory and trade chattels in the same manner and to the same extent as a landlord's distress ...

[32] While the order makes the arrears a charge on the assets of the [now] bankrupts and provides as means for realizing on the charge, "in the same manner and to the same extent as a landlord's distress", it did not expressly give the order priority over the secured interests of the appellants who, it

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should be pointed out, were not parties to the June 4, 1997 proceedings. My interpretation of the order is bolstered by the supplementary reasons of the motions judge on May 28, 1998 where he held:

The charge and lien created under the June 4th, 1997 order for occupancy costs refers to a landlord's distress right only for purposes of describing the means of enforcement; it does not state nor could it reasonably imply that the charge or lien created could only apply to the costs of the means of enforcement...

[33] Even if the use of the phrase, "in the same manner and to the same extent as a landlord's distress" was intended to describe the priority of the charging order, it cannot give the respondent a priority over the perfected security interests of the appellants. In Commercial Credit Corp. Ltd. v. Harry D. Shields Ltd. et al. (1981), 32 O.R. (2d) 703 (C.A.) affirming (1980), 29 O.R. (2d) 106 (Ont. H.C.J.), this court held that through the combined operation of the common law and s. 31(2) of the Landlord and Tenant Act, R.S.O. 1970, c. 236 [now Commercial Tenancies Act R.S.O. 1990, c. L.7, s. 31(2)] a landlord could levy distress on goods found on the demised premises including goods subject to a chattel mortgage. However, this priority arises not simply because the landlord has a right of distress, but depends upon the landlord taking possession of the chattels pursuant to its right of distress.

[34] However, on October 3, 1997, after Everingham filed its Notice of Intention to file a proposal with the official receiver pursuant to the Bankruptcy and Insolvency Act, MacKenzie J. made a further order lifting the automatic stay of proceedings in favour of Sun Life. This order included the paragraph set out above which I repeat for convenience:

THIS COURT ORDERS AND DECLARES that Sun Life has a charge on the assets of Everingham in the possession of Sun Life on the Premises (the "Assets") and that Sun Life shall be entitled to distrain against the Assets in accordance with the terms of the Occupation Order for the amounts payable to it as occupancy costs accruing at the rate of $1,305.00 per day from June 4, 1997 to the date when Sun Life receives vacant possession of the Property and to, subject to the provisions of this Order, proceed to sell such portion of the Assets as described hereinafter. [Emphasis added.]

[35] In my view, the only reasonable interpretation of this order is that Sun Life was deemed to have taken possession of the assets of Everingham pursuant to its right of distress. Everingham appealed this order but the appeal was dismissed by the Registrar of this court for failure to perfect.3 The order of October 3rd therefore stands and whether or not it was based on a correct interpretation of the June 4th order, it gave Sun Life priority over Bulut. I would therefore dismiss Bulut's appeal.

[36] The appeal of 123 Inc. stands in a different position. It was not affected by the order of October 3rd, which related only to the assets of Everingham. 123 Inc.'s security was on the

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assets of Royal Spas.

Issue Two: The position in equity

[37] In view of my conclusion on the first issue, this part of the analysis only directly concerns the dispute between 123 Inc. as secured creditor of Royal Spas and Sun Life's claim to a charge on the assets of Royal Spas. In his reasons of May 14, 1998, dealing only with Everingham, the motions judge held that there were not sufficient grounds to pierce the corporate veil to impose personal liability on Bulut. In his reasons of June 3, 1998, dealing with Royal Spas, the motions judge did not make any such comment in respect of Mr. Bulut or his son as regards 123 Inc. On the other hand, there is nothing to distinguish the two cases. I did not understand the respondent to argue that the order of June 3, 1998 could be upheld on the basis that the motions judge had pierced the corporate veil to, in effect, make 123 Inc. or its principals responsible for the debts incurred by Royal Spas under the charging order.

[38] The issue then is whether the order of June 3rd can be supported on the basis of an equitable jurisdiction. MacKenzie J. held that Bulut and 123 Inc. could not realize on their security interests until they had paid the occupancy costs under the June 4, 1997 charging order. For convenience, I repeat his reasons for that disposition:

> The basis for such alternative relief is that it would be just and equitable for 123 Co. and N. Bulut to pay such costs since the evidence establishes a continuing and concerted course of action between and among Mr. N. Bulut, Mr. S. Bulut and their respective corporations, including 123 Co. herein, in delaying the payment of occupancy costs relating to personal property of Royal Spas and Everingham in respect of which Messrs. Bulut and their respective corporations now claim an interest as secured parties, and which personal property Sun Life has effectively warehoused for one year at a cost of $1,305.00 per day. In my view, it would be a just, in the sense of fair or equitable, term that the said Messrs. Bulut and their respective corporations in their capacities as secured parties of Everingham and Royal Spas should pay to Sun Life the occupancy costs for this collateral prior to their having any rights in and to the same vis-€-vis any security interest holders or claimants other than Sun Life. [Emphasis added.]

[39] The financial affairs of Everingham and Royal Spas were complex. In addition to the security interests of the appellants, various other creditors sought to establish that they had secured interests. In particular, the City of Brampton claimed that it was a secured creditor after it exercised its right of distress on the goods of Everingham for business taxes. That dispute did not involve Royal Spas, so far as I can tell. However, it seems to have been a factor that prevented Sun Life from exercising its rights under the charging order. On September 24, 1997, MacKenzie J. held that Brampton was not a secured creditor. Brampton appealed that decision to this court and the appeal was dismissed in reasons reported at (1999), 43

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O.R. (3d) 594.
[40] With respect to Royal Spas, on July 2, 1997, Manton J. made an order prohibiting Bulut and related persons from entering the premises for any purpose or from obstructing any liquidation or sale of the machinery and equipment of Royal Spas.
[41] Thus, because of various legal proceedings and court orders, Sun Life, which was simply seeking vacant possession of the premises, became the custodian of the appellants' property. The motions judge considered it fair and equitable that 123 Inc. and Bulut, rather than any of the other parties, bear the burden of Sun Life's costs for preserving the appellants' property. If the motions judge had the jurisdiction to make that determination, he is entitled to deference from this court: Regina v. City of Barrie et al., Ex parte Bernick, [1970] 1 O.R. 200 (C.A.) at 206.
[42] In I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23 at p. 51, the author described the inherent jurisdiction of the court as that reserve or fund of powers, "which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them".4 Aside from such general statements about a court of equity's right to do justice between the parties, we were referred to no case that would justify the order made by the judge in this case.
[43] Counsel for Sun Life sought to analogize its position to that of a solicitor who is entitled to an order charging funds that have been recovered or preserved by the action of the solicitors. In Budinsky v. The Breakers East Inc. (1993), 15 O.R. (3d) 198 (Ont. Ct. (Gen. Div.)) at 206-9, Ground J. held that the charging order should rank ahead of the other secured creditor, although the latter's security preceded the charging order of the solicitors. Ground J. fully reviewed the authorities, including the decision of Romer J. in Scholey v. Peck, [1893] 1 Ch. 709 where at p. 711 he explained the rationale for giving the solicitor priority over the secured creditor:

> Here undoubtedly the property was preserved by the action brought by these solicitors on behalf of the Plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security. In my judgment the case is governed by the principle of Greer v. Young [(1883), 24 Ch. D. 545]. I hold, therefore, that the solicitors are entitled to the charge for which they ask, not only against the Plaintiff, but also against the mortgagee, who is taking the benefit of the action, over whose mortgage they must have priority. [Emphasis added.]

[44] In my view, this is not an apt analogy. This is not a case where, but for the actions of Sun Life, 123 Inc. would have lost its security. As mortgagee in possession of the realty, Sun Life had certain rights. On April 2, 1997, Dyson J. granted Sun Life possession of the Tilbury property and leave to issue a writ of possession. The writ was issued and Sun Life took possession and changed the locks.
[45] In any event, on May 9, 1997 the first of two orders was

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made requiring Everingham and Royal Spas to pay occupancy costs. In the second order, of June 4, 1997, MacKenzie J. ordered Everingham and Royal Spas to pay $1,305 per day in occupancy costs "to and including the date of vacant possession". These costs were to be paid on a weekly basis. They were also required to pay the arrears to that date. Those arrears were paid on June 19, 1997.

[46] The order also provided that Everingham and Royal Spas had until August 1, 1997 to remove their equipment, inventory and trade chattels from the premises. However, pursuant to the order if Everingham and Royal Spas failed to make the arrears payment or the weekly payments, Sun Life was "at liberty to exercise its right under the writ of possession". Finally, the order provided that the occupancy costs were a charge on the equipment, inventory and trade chattels in the same manner and to the same extent "as a landlord's distress". None of the weekly payments were made and Sun Life could therefore have taken steps to obtain vacant possession or, at the very least, exercise its right of distress and sell the goods, presumably in accordance with s. 53 of the Commercial Tenancies Act. It did not do so. Instead, it entered into negotiations with the mortgagor in an attempt to reach some solution. This was its choice. It seems to me that the problem with Sun Life's position is captured in an excerpt from its counsel's affidavit where he says:

Sun Life never wished the occupancy costs claim to keep escalating; however, it could not, without giving up possession of the assets, and therefore, giving up its security without payment, cap the amount owing pursuant to the June 4 and October 3 Orders.

[47] At least under the June 4th order, Sun Life had the right to attempt to collect the occupancy charges by exercising its rights under the writ of possession. That would have capped the occupancy charges and it could have done so a week after June 19, 1997, when Everingham and Royal Spas failed to pay that week's costs. Alternatively, it could stand by and let the occupancy costs accrue knowing that the occupancy costs were a charge on the assets. The risk it ran in pursuing that course of action was that, if there was not sufficient value in the assets to cover both the secured claims and the occupancy charges, under the first-in-time rule, it would not recover the occupancy charges. This was a matter within Sun Life's control. The matter is different from the case where a solicitor is given a charging order over property that would not have otherwise been available. The solicitors are given priority because, without their action, the property would not be available to the creditors. Sun Life has not preserved assets that would not have been available. The assets were available.

[48] My concern with the motions judge's equitable remedy is that it is based on nothing more than his assessment that "it would be a just, in the sense of fair or equitable" result. No doubt, in cases where parties are in a relationship of, or akin to, trust, a certain degree of generality or uncertainty is necessary and is tolerable. See Soulos v. Korkontzilas, 1997 CanLII 346 (SCC), [1997] 2 S.C.R. 217 at 236-37. Sun Life, Everingham and Royal Spas were not in such a

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relationship, nor was Sun Life in a vulnerable position. In my view, this degree of uncertainty is not to be encouraged in matters associated with bankruptcy and insolvency.

[49] The result reached by the motions judge resembles the doctrine of equitable subordination. In Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 1992 CanLII 49 (SCC), [1992] 3 S.C.R. 558 at 609, Iacobucci J. left open the question of whether such a doctrine should be recognized in Canada. This court has similarly left the matter open in Olympia & York Developments Ltd. v. Royal Trust Co. reflex, (1993), 14 O.R. (3d) 1.

[50] In Canada Deposit Insurance Corp., Iacobucci J. held that assuming Canadian courts have the power in insolvency matters to subordinate otherwise valid claims to those of other creditors on equitable grounds relating to the conduct of these creditors inter se, there were insufficient grounds to justify the exercise of the power in that case. He referred to the requirements for a successful claim of equitable subordination as developed in the United States as follows at p. 609:

> the claimant must have engaged in some type of inequitable conduct;
> the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and
> equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

[51] It should be borne in mind that the motions judge did not "pierce the corporate veil", nor did he find that the security interest held by 123 Inc. was not bona fide. Thus, the "claimant" for the purposes of the doctrine is 123 Inc. It did not engage in any kind of inequitable conduct, nor did its conduct result in injury to Sun Life.

[52] In P. V. Baker & P. St. J. Langan, Snell's Equity, 29th ed. (1990), at p. 57 the authors describe the circumstances in which persons may lose a prima facie claim to which they would otherwise be entitled under the first-in-time rule:

> A person with a prima facie claim to priority for his interest may lose it through his own misconduct. The owner of a legal interest may be postponed to a subsequent equitable interest owing to his fraud, or by estoppel, or through his gross negligence; and the owner of a prior equitable interest may be postponed if his conduct is inequitable. [Emphasis added.]

[53] The motions judge made no finding of fraud against 123 Inc., nor was there any evidence of estoppel or gross negligence that would disentitle 123 Inc. from asserting its prior secured interest.

DISPOSITION

[54] Accordingly, I would dismiss Mr. Bulut's appeal. I would allow the appeal by 1238157 Ontario Inc., set aside paragraph 4 of the order of MacKenzie J. dated June 3, 1998 and in its place provide that the rights of Sun Life are subject to the security interest of 1238157 Ontario Inc. The appellants were represented by the same counsel in this court. Accordingly, I would make no

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order for costs in this court. 1238157 Ontario Inc. is entitled to its costs before MacKenzie J.

(signed) "M. Rosenberg J.A."

MACPHERSON J.A.:

[55] I have had the benefit of reading the reasons prepared by Rosenberg J.A. I agree with his summary of the facts and the positions of the parties and with his statement of the issues.

[56] Rosenberg J.A. would dismiss Nicholas Bulut's appeal, essentially on grounds of res judicata. I agree with his proposed disposition but would dismiss Mr. Bulut's appeal on the merits.

[57] Rosenberg J.A. would allow 1238157 Ontario Inc.'s appeal. With respect, I disagree.

[58] I will attempt to set out, in brief fashion, my reasons for the above conclusions. Essentially, I agree with the reasons and conclusions of MacKenzie J. in the two decisions which are the subject of these appeals.

ANALYSIS

[59] There is a good deal in the legal analysis in my colleague Rosenberg J.A.'s judgment with which I agree. In order to move quickly to the crucial point of difference, I will record in summary form the points on which I agree with Rosenberg J.A.'s analysis.

[60] First, the appellant Nicholas Bulut ("Bulut") is a secured creditor of Everingham Brothers Ltd. ("Everingham"). Bulut registered his security under the Personal Property Security Act ("PPSA") on April 2, 1997.

[61] Second, the appellant 1238157 Ontario Inc. ("123 Co.") is a secured creditor of 764388 Ontario Ltd. carrying on business as Royal Spas ("Royal Spas"). Through a variety of transactions with Bulut and the National Bank of Canada, 123 Co. held a registered security interest in Royal Spas by May 23, 1997.

[62] Third, there is nothing to suggest that Bulut's and 123 Co.'s security interests in Everingham and Royal Spas are not legitimate.

[63] Fourth, Bulut and his family controlled Everingham, Royal Spas and 123 Co. at all times relevant to this appeal. Royal Spas leased space at Everingham's premises in Brampton.

[64] Fifth, the respondent Sun Life Assurance Company of Canada ("Sun Life") held a first mortgage on Everingham's property at 5 Tilbury Court in Brampton. The mortgage was registered in January 1992 and secured an original loan of $2,250,000. Everingham defaulted on the mortgage in January 1996. Sun Life took possession on April 25, 1997 and changed the locks. At this juncture, Sun Life had no security interest in the personal property at Everingham's premises.

[65] Sixth, as expressed by Rosenberg J.A., "a critical order in the appeal is the order made by MacKenzie J. on June 4, 1997." Moreover, "the fifth paragraph of the Order is the most important" because it purported to create a charging order over personal property in favour of Sun Life and against both Everingham and Royal Spas. The relevant portion of paragraph 5 of the Order is:

5. THIS COURT ORDERS ... that any arrears in payment of occupancy costs shall be a charge on the said equipment,

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inventory and trade chattels in the same manner and to the same extent as a landlord's distress...

[66] Seventh, as can be seen from the relevant dates set out above, Bulut's and 123 Co.'s security interests under the PPSA arose before Sun Life's security interest created by court order (April 20 and May 23 versus June 4, 1997).
[67] Eighth, for reasons explained by Rosenberg J.A. and MacKenzie J., neither the Bankruptcy and Insolvency Act ("BIA") nor the PPSA resolves the question of whose security interests have priority.
[68] I turn now to where my analysis diverges from that of Rosenberg J.A.
[69] After MacKenzie J. made his order on June 4, 1997, the financial situations at Everingham and Royal Spas became increasingly gloomy. Everingham became bankrupt on October 17, 1997. Royal Spas followed suit on March 31, 1998.
[70] The question then arose: which security interest had priority, Sun Life's or Bulut's and 123 Co.'s ? On April 1, 1998, Bulut and 123 Co. brought a motion for a declaration that their security interests had priority over Sun Life's. On April 2, 1998, Sun Life brought a 'mirror' motion seeking a declaration in its favour.
[71] MacKenzie J. heard the motions and decided in favour of Sun Life. His reasons on the Sun Life-Bulut priority question (May 14, 1998) were sparse: "Since Sun Life is outside the ambit of both the BIA and the PPSA regimes in terms of priorities, Sun Life has priority over Bulut in satisfying the charge or lien in its favour with respect to occupancy costs."
[72] However, the motions judge provided more elaborate reasons when he analyzed the Sun Life-123 Co. priority question (June 3, 1998). In these reasons, he found in favour of Sun Life on two bases – first, reasoning by analogy from this court's decision in Leavere v. City of Port Colborne 1995 CanLII 715 (ON CA), (1995), 22 O.R. (3d) 44; second, applying equitable principles to require 123 Co. (and, by parity of reasoning, Bulut) to pay occupancy costs before collecting under its (their) security interest(s). In broad terms, and acknowledging that there is an overlap between the two reasons, I would describe the motions judge's first reason as dealing with how Sun Life could be given priority, and his second reason as explaining why Sun Life should be given priority.
[73] On the question of 'how', the starting point, as the motions judge recognized, was that the priorities regimes in the BIA and PPSA did not apply. Accordingly, the priorities issue had to be resolved by the application of common law principles.
[74] Prima facie, the common law principle that applies to priorities between secured interests is the 'first in time' rule: see McLaren, Secured Transactions in Personal Property in Canada, 2nd ed., looseleaf (Scarborough: Carswell, 1989) at p. 5-202.
[75] However, the 'first in time' rule is not an absolute rule. It can be overridden by statute: see McLaren, Secured Transactions in Personal Property in Canada, at p. 5-202. An example is s. 400 (2)(c)(ii) of the Municipal Act, R.S.O. 1990, c. M. 45, which allows municipalities to distrain upon the chattels of persons who have not paid municipal taxes even though

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the chattels are subject to security interests which arose before the tax liability: see Leavere v. Port Colborne (City), supra.

[76] A second line of exception to the 'first in time' rule is provided by equity. In Spence on the Equitable Jurisdiction of the Courts of Chancery, the author identified the 'first in time' rule as "the general rule"(Vol. II, at p. 727). However, he stated that the rule was qualified by the notion of 'the better equity' and that "the circumstance of priority of time alone does not give a better equity" (Vol. II, at p. 737).

[77] In Snell's Principles of Equity, 29th ed. by P.V. Baker and P. St. J. Langan (London: Sweet & Maxwell, 1990) the authors explain (at p. 57) the circumstances in which the holder of a prima facie priority can lose it:

> A person with a prima facie claim to priority for his interest may lose it through his own misconduct. The owner of a legal interest may be postponed to a subsequent equitable interest owing to his fraud, or by estoppel, or through gross negligence; and the owner of a prior equitable interest may be postponed if his conduct is inequitable.

[78] The motions judge recognized the 'first in time' rule. However, he determined that Sun Life had a better equity. The mechanism he chose to give effect to this determination was reasoning by analogy from this court's decision in Leavere v. Port Colborne (City). He said that what the statute did in Leavere he could do by "rule of law" – i.e. by judicial application of common law and equitable principles – in this litigation. Since the priority issue had to be determined outside the framework of the BIA and the PPSA, I can find no fault in the motions judge's approach.

[79] Turning to the question of 'why' Sun Life's interest was entitled to be given priority over Bulut's and 123's interests, the motions judge provided a clear reason:

> [T]he evidence establishes a continuing and concerted course of action between and among Mr. N. Bulut, Mr. S. Bulut and their respective corporations, including 123 Co. herein, in delaying the payment of occupancy costs relating to personal property of Royal Spas and Everingham in respect of which Messrs. Bulut and their respective corporations now claim an interest as second parties, and which personal property Sun Life has effectively warehoused for one year at a cost of $1,305.00 per day.

[80] In my view, the motions judge's reasons for applying equitable principles to give Sun Life priority over Bulut and 123 Co. are sound. The record before the motions judge amply supports his analysis and conclusion. I will mention just a few of the factors that, in my view, suggest that the motions judge was correct.

[81] First, the Bulut family were the principals and directing minds of Everingham, Royal Spas and 123 Co. One does not need to pierce corporate veils to agree with the motions judge's description of "Mr. N. Bulut, Mr. S. Bulut and their respective corporations."

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[82] Second, Everingham had a huge mortgage from Sun Life. It defaulted on this mortgage in January 1996. Bulut acquired the major part of his security interest in Everingham (approximately $550,000 of a total interest of $650,000) after Everingham's default on the mortgage. Similarly, 123 Co. acquired its security interest in Royal Spas (approximately $1,500,000) in May 1997. Royal Spas was a tenant of Everingham. It is obvious that Bulut and 123 Co. acquired their security interests with full knowledge that Everingham and Royal Spas were in serious financial trouble, especially vis-€-vis Sun Life.

[83] Third, Sun Life's security interest in the personal property at Everingham's premises was obtained in a court proceeding launched by Everingham and Royal Spas in which they sought to obtain their personal property (i.e. equipment and inventory) from Everingham's premises. On May 1, 1997, Nicholas Bulut, the President of both Everingham and Royal Spas, swore an affidavit in support of the motion. At the time Bulut was a secured creditor of both Everingham and Royal Spas. In his affidavit, Bulut spoke on behalf of Everingham and Royal Spas. However, importantly, he also spoke explicitly in his capacity as holder of security interests in the personal property of Everingham and Royal Spas. Bulut stated:

15. ... The items of personal property are owned by Everingham and Royal Spas and Everingham and Royal Spas are lawfully entitled to possession of such property. The items of personal property belonging to these corporations are themselves secured under a General Security Agreement. I, Nicholas Bulut, hold the security interest in these items of personal property belonging to Everingham and Royal Spas. I am content, Royal Spas is content and Everingham5 is content if the items of personal property simply are released to all three of us and we can sort out our respective interests in the personal property.

[84] In other words, Bulut was openly representing not only Everingham and Royal Spas, but also himself in his capacity as holder of security interests in the personal property of Everingham and Royal Spas. He was seeking relief from the court in both of these capacities.

[85] Fourth, the motions judge provided Everingham, Royal Spas and Bulut with the relief they sought, provided Everingham and Royal Spas paid occupancy costs of $1,305 per day from April 25, 1997 to the date on which the personal property was removed. This order was not appealed. Yet, almost immediately, the companies stopped making occupancy cost payments. Further, the companies made no serious efforts to remove their personal property. In short, the companies and Bulut (explicitly) and 123 Co. (by strong and fair inference) sought relief from the court, obtained it, did not appeal the court order – and then promptly ignored it.

[86] For these reasons, I agree with the motions judge that Bulut's and 123 Co.'s conduct disentitles them to obtain a priority over Sun Life. In the language of Snell's Principles of Equity, supra, their misconduct estops them from claiming a

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priority.

[87] I conclude with a final observation. It is true, as Rosenberg J.A. notes, that the motions judge's orders resemble the doctrine of equitable subordination and that the Supreme Court of Canada and this court have expressly left open the question of whether this doctrine should be introduced into Canadian law: see Canadian Deposit Insurance Corp. v. Canadian Commercial Bank, 1992 CanLII 49 (SCC), [1992] 3 S.C.R. 558; and Olympia & York Developments Ltd. v. Royal Trust Co. reflex, (1993), 14 O.R. (3d) 1 (C.A.).

[88] There is a crucial difference between those cases and this appeal. In those cases, the issue before the courts was whether the doctrine of equitable subordination should be introduced into statutory regimes for determining priorities between creditors. There is, as the courts recognized, a serious issue as to whether courts should modify explicit priorities created by statute, even if the modification arose through the application of equitable principles.

[89] The situation in the present appeal is entirely different. No statutory regime, including the BIA and the PPSA, determines the priority issue as between Sun Life and Bulut and 123 Co. That issue must be determined under common law principles. In that context, there is nothing wrong with a motions judge doing what common law judges have done for centuries, namely considering common law and equitable principles together in an attempt to reach a fair result. That is what the motions judge did on these motions.

DISPOSITION

[90] For the above reasons, I would dismiss the appeals. I would award the respondent its costs of the appeal.

(signed) "J. C. MacPherson J.A."

(signed) "I agree Louise Charron J.A."

Released: April 3, 2000

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1 In addition to Re Sara, see J.J. H. McLean Company, Limited v. Newton, In re Kaplan Estate (1926), 8 C.B.R. 61 (Man. C.A.)

2 See Birch (in trust) v. Lacasse Enterprises Inc. (1991), 2 O.R. (3d) 465 (Gen. Div.).

3 With the consent of the trustee, Bulut brought an application for an extension of time to perfect the appeal. That application was dismissed.

4 In MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725 at para. 29, Lamer C.J.C. described this as the "seminal article on the core or inherent jurisdiction of superior courts".

5 123 Co. is not mentioned in this paragraph. That is because on May 1, 1997, when Bulut swore his affidavit, Bulut held the security interest in the personal property of both Everingham and Royal Spas. On May 23, he assigned his security interest in Royal Spas to 123 Co., another family company. In my view, it is no stretch to infer that what Bulut said qua secured creditor on May 1 could be imputed to 123 Co. three weeks later.

"settlement"

"settlement"[Repealed, 2005, c. 47, s. 2]

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"shareholder"
« actionnaire »
"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies;

"sheriff"
"sheriff"[Repealed, 2004, c. 25, s. 7]

"special resolution"
« résolution spéciale »
"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution;

"Superintendent"
« surintendant »
"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1);

"Superintendent of Financial Institutions"
« surintendant des institutions financières »
"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the Office of the Superintendent of Financial Institutions Act;

"time of the bankruptcy"
« moment de la faillite »
"time of the bankruptcy", in respect of a person, means the time of
(a) the granting of a bankruptcy order against the person,
(b) the filing of an assignment by or in respect of the person, or
(c) the event that causes an assignment by the person to be deemed;

"title transfer credit support agreement"
« accord de transfert de titres pour obtention de crédit »
"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract;

"transfer at undervalue"
« opération sous-évaluée »
"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

"trustee" or "licensed trustee"
« syndic » ou « syndic autorisé »
"trustee" or "licensed trustee" means a person who is licensed or appointed under this Act.

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R.S., 1985, c. B-3, s. 2;
R.S., 1985, c. 31 (1st Supp.), s. 69;
1992, c. 1, s. 145(F), c. 27, s. 3;
1995, c. 1, s. 62;
1997, c. 12, s. 1;
1999, c. 28, s. 146, c. 31, s. 17;
2000, c. 12, s. 8;
2001, c. 4, s. 25, c. 9, s. 572;
2004, c. 25, s. 7;
2005, c. 3, s. 11, c. 47, s. 2;
2007, c. 29, s. 91, c. 36, s. 1;
2012, c. 31, s. 414.

SB Directive: General Transitional Directive (2005 Legislative Reform)
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
Bureau du surintendant des faillites Canada

An Agency of Industry Canada
Un organisme d'Industrie Canada

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Date: **August 14, 2009**

To: **OSB Staff, Trustees and Registrars**

Subject: ***General Transitional Directive***

The Office of the Superintendent of Bankruptcy (OSB) has amended several Directives as a result of two initiatives. The first initiative is a comprehensive legislative and regulatory reform package that requires corresponding amendments to Directives in order to be consistent with the enabling legislation and regulation. The second initiative is the modernizing of the Superintendent's Directives.

Legislative Reform

In 2005, a comprehensive insolvency reform package was introduced in Parliament to modernize the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA), as well as to create the legislative framework for the Wage Earner Protection Program (WEPP). The Bill received Royal Assent on November 25, 2005, thereby becoming Chapter 47 of the Statutes of Canada, 2005 (Chapter 47). Certain technical amendments were made to Chapter 47 before it could be brought into force. These technical amendments were contained in Bill C-62, *Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection*

Date : **Le 14 août 2009**

À : **Employés du BSF, syndics et registraires**

Objet : ***Instruction générale de transition***

Le Bureau du surintendant des faillites (BSF) a effectué des changements à plusieurs instructions suite à deux initiatives. La première concerne un programme complet de réformes législatives et réglementaires qui nécessite des modifications correspondantes aux instructions afin de s'assurer qu'elles sont conformes à la législation habilitante et au règlement connexe. La seconde se rapporte à la modernisation des instructions du surintendant.

Réforme législative

En 2005, une refonte complète des règles sur l'insolvabilité a été présentée au Parlement en vue de moderniser la *Loi sur la faillite et l'insolvabilité* (LFI) et la *Loi sur les arrangements avec les créanciers des compagnies* (LACC), ainsi que de créer un cadre législatif pour le Programme de protection des salariés (PPS). Le projet de loi a reçu la sanction royale le 25 novembre 2005, devenant ainsi le chapitre 47 des *Lois du Canada (2005)* (« chapitre 47 »). Certaines modifications de forme devaient être apportées au chapitre 47 avant qu'il n'entre en vigueur. Ces modifications de forme sont prévues par le projet de loi C-62, *Loi modifiant la Loi sur la faillite et*

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Program Act and chapter 47 of the Statutes of Canada, 2005. On June 12, 2007, Bill C-62 was introduced in the House of Commons and passed all three readings in the House of Commons on June 13 and 14, 2007, receiving first reading in the Senate on June 14, 2007. However, Parliament was prorogued in September 2007 and this bill died on the order paper. The amendments were reintroduced in the next session of Parliament as Bill C-12 on Thursday, October 25, 2007, on a motion that was approved by all parties. The Bill passed all three readings in the House of Commons on October 29, 2007, and received Royal Assent on December 14, 2007, thereby becoming Chapter 36 of the Statutes of Canada, 2007. As a result of the legislative reform, the *Bankruptcy and Insolvency General Rules* (Rules) were amended and new Rules were also created.

l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés, et le chapitre 47 des Lois du Canada (2005). Le projet de loi C-62 a été déposé à la Chambre des communes le 12 juin 2007, et il a franchi les étapes des trois lectures à la Chambre des communes les 13 et 14 juin 2007 et celle de la première lecture au Sénat le 14 juin 2007. En raison de la prorogation du Parlement en septembre 2007, ce projet de loi est mort au *Feuilleton*. Les documents de réforme de la faillite ont été déposés de nouveau au cours de la séance suivante du Parlement à titre de projet de loi C-12 le jeudi 25 octobre 2007, dans le cadre d'une motion approuvée par tous les partis. Le projet de loi a franchi les étapes des trois lectures à la Chambre des communes le 29 octobre 2007, puis a reçu la sanction royale le 14 décembre 2007, devenant ainsi le chapitre 36 des *Lois du Canada (2007)*. Suite à la réforme législative, les *Règles générales sur la faillite et l'insolvabilité* (« les Règles ») ont été modifiées et certaines ont été créées.

Therefore, in order to give effect to the new provisions in the BIA and to the Rules, several Directives have been amended or revoked to ensure that they are consistent with the enabling legislation and regulation.

Ainsi, afin de donner effet aux nouvelles dispositions de la LFI et aux Règles, plusieurs instructions ont été modifiées ou révoquées afin de s'assurer qu'elles sont conformes à la législation habilitante et au règlement connexe.

Modernization of the Directives

Several Directives were amended in order to streamline some of the administrative steps in an insolvency file with a view to eliminating unnecessary administrative requirements and information obligations, while maintaining the integrity of the insolvency system. In fact, the OSB has made a number of amendments to Directives issued before November 30, 1992, and reissued on July 23, 1993, pursuant to the authority of paragraph 5(4)*(c)* of the BIA. These modifications modernize the Directives.

Modernisation des instructions

Plusieurs instructions ont été modifiées pour rationaliser quelques étapes administratives dans les dossiers d'insolvabilité, afin d'éliminer les exigences administratives et les obligations inutiles en matière d'information tout en assurant l'intégrité du système d'insolvabilité. En effet, le BSF a apporté des modifications à plusieurs instructions émises avant le 30 novembre 1992 et émises de nouveau le 23 juillet 1993 conformément à l'autorité conférée en vertu de l'alinéa 5(4)c)

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correct references to sections of the BIA, and ensure a certain standardization, coherency and uniformity throughout. These Directives were also renumbered in order to avoid any source of confusion when referring to Directives issued prior to 1992 and after 1992. In this manner, the amendments to these Directives will enhance their practical application.

Please note that no amendments were made to Directive No. 12R *Administrative Agreements with Trustees and Receivers*, and Directive No. 16R *Preparation of the Statement of Affairs* as they will be revised in their entirety at a later date. These Directives have not been renumbered and are not being reissued at this point.

Please find attached a copy of the *General Transitional Directive*. Appendix A lists the Directives that are hereby being reissued along with their new reference number. Appendix B lists the Directives that are hereby revoked.

Coming into Force

The *General Transitional Directive* comes into force on September 18, 2009.

Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

de la LFI. Ces modifications ont modernisé ces instructions et corrigé les renvois à la LFI, en plus d'assurer une certaine uniformité, homogénéité et cohérence. Une renumérotation de ces instructions a également été effectuée afin d'éviter toute confusion dans les renvois aux instructions émises avant 1992 et à celles émises après 1992. Ainsi, les modifications apportées à ces instructions amélioreront leur application quotidienne.

Veuillez noter qu'aucune modification n'a été apportée à l'instruction nº 12R, *Ententes administratives avec les syndics et séquestres*, et à l'instruction nº 16R, *Préparation du bilan statutaire*, puisqu'elles seront révisées en entier à une date ultérieure. Ces instructions n'ont pas été renumérotées et elles ne sont pas émises de nouveau en ce moment.

Veuillez trouver ci-joint une copie de *l'Instruction générale de transition*. L'annexe A énumère les instructions qui sont émises de nouveau ainsi que leur nouveau numéro de référence. L'annexe B énumère les instructions qui sont révoquées par la présente.

Entrée en vigueur

L'*Instruction générale de transition* entre en vigueur le 18 septembre 2009.

Demande de renseignements

Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

p. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

GENERAL TRANSITIONAL DIRECTIVE

Issued: August 14, 2009

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to paragraph 5(4)(*c*) of the Act.

3. The purpose of this General Transitional Directive is to reissue and renumber certain Directives that have been amended and to revoke certain Directives that are no longer required. These amendments stem from two initiatives: (1) the comprehensive legislative and regulatory amendments to the *Bankruptcy*

INSTRUCTION GÉNÉRALE DE TRANSITION

Date d'émission : le 14 août 2009

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » désigne la *Loi sur la faillite et l'insolvabilité* (LFI);

« Règles » désigne les *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'alinéa 5(4)*c*) de la Loi.

3. L'instruction générale de transition a pour objet d'émettre de nouveau et de renuméroter certaines instructions qui ont été modifiées et de révoquer certaines instructions qui ne sont plus nécessaires. Ces modifications découlent de deux initiatives : les modifications exhaustives apportées à la Loi et aux Règles

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and Insolvency Act (BIA) and Rules brought about by Chapter 47 of the Statutes of Canada, 2005, and Chapter 36 of the Statutes of Canada, 2007; and (2) the modernization of the Superintendent's Directives.

Policy

4. The Directives set out in Appendix A are hereby reissued. The Directives set out in Appendix B are hereby revoked.

Coming into Force

5. The *General Transitional Directive* comes into force on September 18, 2009.

Enquiries

6. If you have any questions pertaining to this Directive, please contact your local OSB office.

par l'entremise du chapitre 47 des *Lois du Canada* (2005) et du chapitre 36 des *Lois du Canada* (2007); et la modernisation des instructions du surintendant.

Politique

4. Les instructions à l'annexe A sont émises de nouveau. Les instructions à l'annexe B sont révoquées par le présent document.

Entrée en vigueur

5. L'*Instruction générale de transition* entre en vigueur le 18 septembre 2009.

Demandes de renseignements

6. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Appendix A

DIRECTIVES THAT ARE BEING REISSUED AND THEIR NEW REFERENCE NUMBER

Directive Number	Title	New Directive Number	New Title
Pre-1992			
3R	Use of Related Persons to Perform Services for Bankruptcy Estates and Costs Chargeable to the Estate	14	Use of Related Persons to Perform Services for Bankruptcy Estates and Costs Chargeable to the Estate
4	Trustee Consultation Fees in Non-Business Bankruptcies	15	Trustee Consultation Fees in Bankruptcies and Proposals
5R	Third-Party Deposits and Guarantees	16	Third-Party Deposits and Guarantees
7	Retention of Documents by the Trustee	17	Retention of Documents by the Trustee
8	Unclaimed Dividends and Undistributed Funds	18	Unclaimed Dividends and Undistributed Funds
10	Reporting of Receipts Resulting from the Realization of Assets in Summary Administrations	19	Reporting of Receipts Resulting from the Realization of Certain Assets in Summary Administrations
11	Bankruptcy Assistance Program	20	Bankruptcy Assistance Program
13	Estate Bonding	21	Estate Security

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Directive Number	Title	New Directive Number	New Title
14R	Proofs of Claim, Proxies and Quorums at the First Meeting of Creditors	22	Proofs of Claim, Proxies, Quorums and Voting at Meetings of Creditors
19R	Publication in Local Newspaper	23	Publication in Local Newspaper
20	Information to be Provided to Creditors in Commercial Proposals	24	Information to be Provided to Creditors in Commercial Proposals
22	Realization of Estate Assets	25	Realization of Estate Assets
23	Notice to Bankrupts and Officers of a Bankrupt Corporation with Regard to their Duties and Status	26	Notice to Bankrupts and Officers of a Bankrupt Corporation with Regard to their Duties and Status
24	Withdrawal of Advances on Trustee Remuneration in Ordinary Bankruptcy Administration	27	Advances of Trustee's Remuneration for Bankruptcies under Ordinary Administration
29	Non-Resident Office	28	Non-Resident Office
30R	Advertising by Trustees	29	Advertising by Trustees
32	Trustee's Report to the Creditors on Preliminary Administration	30	Trustee's Report to the Creditors on Preliminary Administration
Post-1992			
1R2	Counselling in Insolvency Matters	1R3	Counselling in Insolvency Matters
3	Duties of the Bankrupt to Deliver Credit Cards to the Trustee	3R	Duties of the Bankrupt to Deliver Credit Cards to the Trustee
4	Delegation of Tasks	4R	Delegation of Tasks

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Directive Number	Title	New Directive Number	New Title
5R2	Estate Funds and Banking	5R3	Estate Funds and Banking
6R	Assessment of an Individual Debtor	6R2	Assessment of an Individual Debtor
13R	Trustee Licensing	13R2	Trustee Licensing
Circular			
2	Summary Administration Estates with Realizable Assets Exceeding $10,000	2R	Summary Administration Estates with Realizable Assets Exceeding $15,000

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Annexe A

INSTRUCTIONS ÉMISES DE NOUVEAU ET NOUVEAU NUMÉRO DE RÉFÉRENCE

Numéro de l'instruction	Titre	Nouveau numéro de l'instruction	Nouveau titre
Instructions émises avant 1992			
3R	Emploi de personnes liées pour effectuer du travail pour le compte de l'actif et frais imputables à l'actif	14	Emploi de personnes liées pour effectuer du travail pour le compte de l'actif et frais imputables à l'actif
4	Honoraires de consultation du syndic dans les faillites non commerciales	15	Honoraires de consultation du syndic dans les faillites et les propositions
5R	Dépôts et garanties de tierces personnes	16	Dépôts et garanties de tierces personnes
7	Rétention de documents par le syndic	17	Conservation des documents par le syndic
8	Dividendes non réclamés et fonds non distribués	18	Dividendes non réclamés et fonds non distribués
10	Déclaration des recettes résultant de la réalisation des biens en cas d'administration sommaire	19	Déclaration des recettes résultant de la réalisation des biens en cas d'administration sommaire
11	Programme d'accès à la faillite	20	Programme d'accès à la faillite
13	Cautionnement de l'actif	21	Garantie de l'actif

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Numéro de l'instruction	Titre	Nouveau numéro de l'instruction	Nouveau titre
14R	Preuves de réclamation, procurations et quorum à la première assemblée	22	Preuves de réclamation, procurations, quorum et droit de vote aux assemblées des créanciers
19R	Publication dans un journal local	23	Publication dans un journal local
20	Renseignements à être fournis aux créanciers dans les propositions commerciales	24	Renseignements à être fournis aux créanciers dans les propositions commerciales
22	Réalisation des biens de l'actif	25	Réalisation des biens de l'actif
23	Avis aux faillis et officiers d'une corporation en faillite relativement à leurs devoirs et obligations	26	Avis aux faillis et officiers d'une personne morale en faillite relativement à leurs devoirs et obligations
24	Retrait d'avances de rémunération de syndic dans les administrations de faillites ordinaires	27	Avances de rémunération du syndic dans les faillites d'administration ordinaire
29	Les bureaux secondaires de syndics	28	Bureaux secondaires de syndics
30R	Publicité par les syndics	29	Publicité par les syndics
32	Rapport du syndic aux créanciers sur l'administration préliminaire	30	Rapport du syndic aux créanciers sur l'administration préliminaire

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Appendix B

REVOKED DIRECTIVES

Directive Number	Title
Pre-1992	
6	Criminal Investigations
15R	Costs and Disclosure Associated with the Realization by the Trustee of Secured Creditors' Assets
18	Informing Creditors of the Result of the Bankrupt's Application for Discharge
Post-1992	
12	Terms of Discharge

Directive Instruction ____ Page

General Transitional Directive Instruction générale de transition 9

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Annexe B

INSTRUCTIONS RÉVOQUÉES

Numéro de l'instruction	Titre
Instructions émises avant 1992	
6	Enquêtes criminelles
15R	Coûts et divulgation relatifs à la réalisation d'actifs pour le compte d'un créancier garanti
18	Renseigner les créanciers du résultat de la demande de libération du failli
Instruction émise après 1992	
12	Conditions de libération

Designation of beneficiary - Sec. 2.1

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2.1 A change in the designation of a beneficiary in an insurance contract is deemed to be a disposition of property for the purpose of this Act.
1997, c. 12, s. 2;
2004, c. 25, s. 8;
2005, c. 47, s. 3.

Superintendent's division office - Sec. 2.2
2.2 Any notification, document or other information that is required by this Act to be given, forwarded, mailed, sent or otherwise provided to the Superintendent, other than an application for a licence under subsection 13(1), shall be given, forwarded, mailed, sent or otherwise provided to the Superintendent at the Superintendent's division office as specified in directives of the Superintendent.
1997, c. 12, s. 2.

3. [Repealed, 2005, c. 47, s. 4]

Definitions - Sec. 4
4. (1) In this section,

"entity"
« entité »
"entity" means a person other than an individual;

"related group"
« groupe lié »
"related group" means a group of persons each member of which is related to every other member of the group;

"unrelated group"
« groupe non lié »
"unrelated group" means a group of persons that is not a related group.

Definition of "related persons" - Sec. 4(2)
(2) For the purposes of this Act, persons are related to each other and are "related persons" if they are

- **(a) individuals connected by blood relationship, marriage, common-law partnership or adoption;**
- **(b) an entity and**
  - **(i) a person who controls the entity, if it is controlled by one person,**
  - **(ii) a person who is a member of a related group that controls the entity, or**
  - **(iii) any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or**
- **(c) two entities**
  - **(i) both controlled by the same person or group of persons,**
  - **(ii) each of which is controlled by one person and the person who controls one of the entities is related to the person who controls the other entity,**

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(iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity,
(iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other entity,
(v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or
(vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

Relationships - Sec. 4(3)
(3) For the purposes of this section,
(a) if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;
(b) if a related group is in a position to control an entity, it is deemed to be a related group that controls the entity whether or not it is part of a larger group by whom the entity is in fact controlled;
(c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests;
(d) if a person has ownership interests in two or more entities, the person is, as holder of any ownership interest in one of the entities, deemed to be related to himself or herself as holder of any ownership interest in each of the other entities;
(e) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;
(f) persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship or adoption to the other;
(f.1) persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and
(g) persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or sister, to the other.

Question of fact - Sec. 4(4)
(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

Presumptions - Sec. 4(5)
(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.
R.S., 1985, c. B-3, s. 4;
2000, c. 12, s. 9;

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2004, c. 25, s. 9(F);
2005, c. 47, s. 5;
2007, c. 36, s. 2.

HER MAJESTY
Binding on Her Majesty - Sec. 4.1
4.1 This Act is binding on Her Majesty in right of Canada or a province.
1992, c. 27, s. 4.

PART I
ADMINISTRATIVE OFFICIALS
SUPERINTENDENT

Appointment - Sec. 5
5. (1) The Governor in Council shall appoint a Superintendent of Bankruptcy to hold office during good behaviour for a term of not more than five years, but the Superintendent may be removed from office by the Governor in Council for cause. The Superintendent's term may be renewed for one or more further terms.

Salary - Sec. 5(1.1)
(1.1) The Superintendent shall be paid the salary that the Governor in Council may fix.

Extent of supervision - Sec. 5(2)
(2) The Superintendent shall supervise the administration of all estates and matters to which this Act applies.

Duties - Sec. 5(3)
(3) The Superintendent shall, without limiting the authority conferred by subsection (2),

(a) receive applications for licences to act as trustees under this Act and issue licences to persons whose applications have been approved;

(b) monitor the conditions that led to a trustee being issued a licence to determine whether those conditions continue to exist after the licence has been issued and take the appropriate action if he or she determines that the conditions no longer exist;

(c) where not otherwise provided for, require the deposit of one or more continuing guaranty bonds or continuing suretyships as security for the due accounting of all property received by trustees and for the due and faithful performance by them of their duties in the administration of estates to which they are appointed, in any amount that the Superintendent may determine, which amount may be increased or decreased as the Superintendent may deem expedient, and the security shall be in a form satisfactory to the Superintendent and may be enforced by the Superintendent for the benefit of the creditors;

(d) [Repealed, 1992, c. 27, s. 5]

(e) from time to time, make or cause to be made any inquiry or investigation of estates or other matters to which this Act applies, including the conduct of a trustee or a trustee acting as a receiver, within the meaning of subsection 243(2), or as an interim receiver, that the Superintendent considers appropriate, and for the purpose of the inquiry or investigation the Superintendent or any person appointed by the Superintendent for the purpose shall have

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access to and the right to examine and make copies of all books, records, data, including data in electronic form, documents and papers, that are relevant to an inquiry or investigation pertaining or relating to any estate or other matter to which this Act applies;
(f) receive and keep a record of all complaints from any creditor or other person interested in any estate and make such specific investigations with regard to such complaints as the Superintendent may determine; and
(g) examine trustees' accounts of receipts and disbursements and final statements.

Powers of Superintendent - Sec. 5(4)
(4) The Superintendent may
(a) intervene in any matter or proceeding in court, where the Superintendent considers it expedient to do so, as if the Superintendent were a party thereto;
(b) issue, to official receivers, trustees, administrators of consumer proposals made under Division II of Part III and persons who provide counselling pursuant to this Act, directives with respect to the administration of this Act and, without restricting the generality of the foregoing, directives requiring them
(i) to keep such records as the Superintendent may require, and
(ii) to provide the Superintendent with such information as the Superintendent may require;
(c) issue such directives as may be necessary to give effect to any decision made by the Superintendent pursuant to this Act or to facilitate the carrying out of the purposes and provisions of this Act and the General Rules, including, without limiting the generality of the foregoing, directives relating to the powers, duties and functions of trustees, of receivers and of administrators as defined in section 66.11;
(d) issue directives governing the criteria to be applied by the Superintendent in determining whether a trustee licence is to be issued to a person and governing the qualifications and activities of trustees;
(d.1) issue directives respecting the rules governing hearings for the purposes of section 14.02; and
(e) issue directives prescribing the form of any document that is by this Act to be prescribed and the information to be given therein.

Compliance with directives - Sec. 5(5)
(5) Every person to whom a directive is issued by the Superintendent under paragraph (4)(b) or (c) shall comply with the directive in the manner and within the time specified therein.

Directives - Sec. 5(6)
(6) A directive issued by the Superintendent under this section shall be deemed not to be a statutory instrument within the meaning and for the purposes of the Statutory Instruments Act.
R.S., 1985, c. B-3, s. 5;
1992, c. 27, s. 5;
1997, c. 12, s. 4;
2001, c. 4, s. 26(E);
2005, c. 47, s. 6.

Outside investigations - Sec. 6

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6. (1) The Superintendent may engage any persons that the Superintendent considers advisable to conduct any inquiry or investigation or to take any other necessary action outside of the office of the Superintendent, and the cost and expenses of those persons shall, when certified by the Superintendent, be payable out of the appropriation for the office of the Superintendent.

Superintendent may examine bank account - Sec. 6(2)
(2) The Superintendent, or any one duly authorized by him in writing on his behalf, is entitled to have access to and to examine and make copies of the banking accounts of a trustee in which estate funds may have been deposited, and, when required, all deposit slips, cancelled cheques or other documents relating thereto in the custody of the bank or the trustee shall be produced for examination.

SB Directive: 5R4, Estate Funds and Banking
(see below image pages)

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Bureau du surintendant des faillites Canada

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Date: MAR 18 2010

To: **OSB Staff, Trustees and Registrars**

Subject: **Directive No. 5R4, *Estate Funds and Banking***

The Office of the Superintendent of Bankruptcy (OSB) has amended Directive No. 5R3, *Estate Funds and Banking*.

The Annual Banking Report (ABR) has been amended to correct discrepancies in the data capture of the information presented. Schedule 2, Electronic Fund Transfer (EFT) — Authorization Agreement, is now Schedule 3. Schedule 3, Annual Banking Report, is now Schedule 2. Finally, paragraph 6(3) of the Directive now provides additional details on pre-filing deposits from debtors.

Coming into Force
This Directive comes into force on March 31, 2010.

Enquiries
If you require further information, please do not hesitate to contact the OSB office nearest you.

Date : 18 MARS 2010

À : **Employés du BSF, syndics et registraires**

Objet : Instruction n° 5R4, *Les fonds de l'actif et procédures bancaires*

Le Bureau du surintendant des faillites (BSF) a effectué des changements à l'instruction n° 5R3, *Les fonds de l'actif et procédures bancaires*.

Le rapport bancaire annuel (RBA) a été modifié afin de corriger certaines erreurs de compilation des données. L'annexe 2, « Convention d'autorisation concernant le transfert électronique de fonds », est devenue l'annexe 3 de l'instruction. L'annexe 3, « Rapport bancaire annuel » est devenue l'annexe 2. Enfin, le paragraphe 6(3) de l'instruction précise davantage la procédure à suivre en ce qui concerne les fonds déposés par le débiteur avant l'institution de procédures.

Entrée en vigueur
La présente instruction entre en vigueur le 31 mars 2010.

Renseignements
Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 5R4

ESTATE FUNDS AND BANKING

Issued: MAR 18 2010

(Supersedes Directive No. 5R3 issued on August 14, 2009, on the same topic)

This Directive applies to individual and corporate trustees licensed pursuant to section 13 of the *Bankruptcy and Insolvency Act* (the Act) and to administrators of consumer proposals as defined in section 66.11 of the Act. For ease of reading, the term "trustee" in this Directive is to be read as including an administrator.

Interpretation

1. (1) In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"bank" means a bank as defined in section 2 of the Act;

"consolidated trust account" means a bank account operated pursuant to paragraph 155(g) or subsection 66.26(2) of the Act;

LES FONDS DE L'ACTIF ET PROCÉDURES BANCAIRES

Date d'émission : 18 MARS 2010

(La présente instruction remplace et annule l'instruction n° 5R3 sur le même sujet émise le 14 août 2009.)

La présente instruction s'applique aux syndics (particuliers et corporatifs) titulaires de licence en vertu de l'article 13 de la *Loi sur la faillite et l'insolvabilité* (la Loi) et aux administrateurs de propositions de consommateur tels que définis à l'article 66.11 de la Loi. Dans le but de simplifier la lecture de la présente instruction, le terme «syndic» désigne également un administrateur.

Interprétation

1. (1) Les définitions qui suivent s'appliquent à la présente instruction :

« actif » Une faillite, une proposition déposée aux termes de la section I ou de la section II de la partie III de la Loi, un avis d'intention ou la nomination d'un séquestre intérimaire en vertu de l'article 46 ou de l'article 47.1 de la Loi;

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"control ledger" means a record maintained by the trustee that reports the balance of funds held in an estate trust account. In the case of a consolidated account, such record will show the control ledger balance as the sum of all sub-ledger balances;

"electronic payment" means the payment of dividends or disbursements from an estate trust fund to another party by means of an approved system as described in paragraph 16 of this Directive;

"estate" means a bankruptcy, a proposal filed under Division I or Division II of Part III of the Act, a notice of intention, or an interim receivership under section 46 or section 47.1 of the Act;

"estate trust funds" means funds received by a trustee that belong to an estate, including any moneys advanced in payment of fees for services not yet rendered or money advanced in payment of disbursements to be made that are not subject to a third-party agreement;

"Rules" means the *Bankruptcy and Insolvency General Rules* made pursuant to subsection 209(1) of the Act;

"sub-ledger balance" means the balance of funds for each estate that comprises a consolidated bank account;

"transaction posting report" means an accounting record maintained by the trustee showing all banking transactions (credits and debits) posted to an estate account during a specific time period, and the account balance;

"transfer account" means an approved bank account with a banking institution other

« banque » Les banques définies à l'article 2 de la Loi;

« compte consolidé en fiducie » Le compte bancaire administré conformément à l'alinéa 155g) ou au paragraphe 66.26(2) de la Loi. Dans le but de simplifier la lecture de la présente instruction, l'expression « compte consolidé en fiducie » désigne également le compte consolidé en fidéicommis;

« compte de transit » Un compte bancaire approuvé ouvert dans une institution bancaire autre que la banque où le syndic a ouvert un compte consolidé en fiducie;

« compte en fiducie » Le compte bancaire dans lequel les fonds d'un actif sont déposés et détenus en fiducie par un syndic. Dans le but de simplifier la lecture de la présente instruction, l'expression « compte en fiducie » désigne également le compte en fidéicommis;

« fonds en fiducie de l'actif » Les fonds reçus par un syndic qui font partie de l'actif, y compris les avances d'honoraires pour services non encore rendus ou les avances relatives au débours qui devront être faits et qui ne sont pas l'objet d'une entente avec une tierce personne. Dans le but de simplifier la lecture de la présente instruction, l'expression « fonds en fiducie de l'actif » désigne également les fonds en fidéicommis de l'actif;

« Loi » La *Loi sur la faillite et l'insolvabilité* (LFI).

« paiement électronique » Le paiement de dividendes ou de débours tiré d'un compte en fiducie à une autre partie au moyen d'un

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than the bank having custody of a trustee's consolidated trust account:

"trust account" means an account with a bank into which estate funds are deposited and held in trust by a trustee.

(2) The coming into force date for that part of the definition of "*estate*" in paragraph 1(1) that refers to a "proposal filed under Division I" and a "notice of intention" shall be held in abeyance until further notice.

Purpose

2. This Directive, issued pursuant to paragraphs 5(4)(*b*) and (*c*) of the Act, imposes upon a trustee the minimum standards for the accounting for and the proper custody of estate trust funds. The main applicable sections of the Act are

système approuvé aux termes de l'article 16 de la présente instruction;

« rapport d'enregistrement des transactions » Un document comptable tenu par le syndic, dans lequel celui-ci indique toutes les transactions bancaires (crédits et débits) enregistrées à un actif pendant une période spécifique ainsi que le solde du compte;

« registre de contrôle » Le registre que le syndic tient sur le solde des fonds détenus dans le compte en fiducie de l'actif. Dans le cas d'un compte consolidé, le solde figurant au registre de contrôle correspond au total des soldes de tous les livres auxiliaires;

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité* établies en vertu du paragraphe 209(1) de la Loi;

« solde des livres auxiliaires » Le solde des fonds pour chaque actif faisant partie d'un compte bancaire consolidé.

(2) La date d'entrée en vigueur de la définition du terme « actif » au paragraphe 1(1) faisant référence à la « proposition déposée aux termes de la section I » et à « l'avis d'intention » est reportée à une date indéterminée jusqu'à nouvel ordre.

Objet

2. La présente instruction est émise en vertu des alinéas 5(4)*b*) et *c*) de la Loi et elle impose au syndic des normes minimales pour la comptabilité et la protection adéquate des fonds en fiducie de l'actif. Les principales dispositions de la

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subsections 6(2), (3) and (4), sections 25, 26, 27 and 66.26, paragraphs 155(g) and 14.01(1)(*f*), and Rules 65, 67, 101, 103, 128 and 129.

Loi qui s'appliquent sont les paragraphes 6(2), (3) et (4), les articles 25, 26, 27 et 66.26, les alinéas 155g) et 14.01(1)e) et les règles 65, 67, 101, 103, 128 et 129 de la Loi.

Principles

3. Section 25 of the Act imposes a duty on a trustee to deposit forthwith in a trust account all moneys received for an estate. The trust account shall be held at a bank, provided that federal or provincial law guarantees deposits of that institution, and that such law protects depositors from the loss of money on deposit with that institution.[1]

Principes

3. En vertu de l'article 25 de la Loi, un syndic est tenu de déposer sans délai dans un compte en fiducie tous les fonds reçus pour le compte d'un actif. Le compte en fiducie est ouvert dans une banque, pourvu qu'une loi fédérale ou provinciale garantisse les dépôts effectués dans cette institution et protège les déposants contre la perte de leurs dépôts dans cette institution[1].

Subsection 25(1.3) of the Act also dictates that, except for paying dividends and charges incidental to administering the estate, a trustee shall not withdraw any funds from the trust account of an estate without the permission, in writing, of the inspectors or, on application, the Court.

Le paragraphe 25(1.3) de la Loi prescrit également qu'un syndic ne peut effectuer aucun retrait sur le compte en fiducie d'un actif sans la permission écrite des inspecteurs ou, sur demande, du tribunal, sauf en cas de paiement de dividendes ou de frais se rapportant à l'administration de l'actif.

When withdrawing funds from the trust account of an estate, the trustee must comply with the rules governing fees and disbursements drawn in summary administration bankruptcies and consumer proposals.

En effectuant un retrait sur le compte en fiducie d'un actif, le syndic doit se conformer aux règles régissant les honoraires et débours perçus dans les faillites d'administration sommaire ou les propositions de consommateur.

[1] To be eligible for deposit insurance protection, deposits must be payable in Canada, in Canadian currency. If estate funds are situated abroad, a trustee, with the Superintendent's permission, may deposit such funds in a financial institution, which is similar to a bank, in that country, as per subsection 25(1.2) of the Act.

[1] Pour être couverts par l'assurance-dépôts, les dépôts doivent être payables au Canada en fonds canadiens. Si les fonds de l'actif se trouvent à l'étranger, un syndic, sur autorisation du surintendant, peut, en vertu du paragraphe 25(1.2) de la Loi, déposer de tels fonds dans une institution semblable à une banque dans ce pays.

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Trust account funds are to be kept intact and not commingled with non-estate funds and in the case of consolidated trust accounts, not commingled with estates of administration types other than that type for which the account was approved.

Les fonds de compte en fiducie doivent être conservés de façon distincte et ne doivent pas être confondus avec des fonds qui ne sont pas des fonds de l'actif; dans le cas d'un compte consolidé en fiducie, ils ne doivent pas être confondus avec des fonds d'actif faisant l'objet d'un autre genre d'administration que celui pour lequel le compte a été approuvé.

Banking and Accounting Records

4. (1) A trustee has a fiduciary relationship with an estate under its administration. As such, a trustee has a duty to control and account for the funds under his or her administration in accordance with the Act.

Registres bancaires et comptables

4. (1) Une relation de fiduciaire existe entre un syndic et un actif. Ainsi, un syndic a le devoir de contrôler les fonds sous son administration et d'en rendre compte conformément à la Loi.

(2) For each estate trust account under a trustee's administration, the trustee shall maintain, at a minimum, up-to-date books and records, including the control ledger, of estate funds showing:

(2) Pour chaque compte en fiducie d'un actif qu'il administre, un syndic conserve, au minimum, des livres et des registres à jour, y compris un registre de contrôle des fonds de l'actif indiquant ou comprenant :

(a) all receipts and disbursements of estate trust funds, including the name of the payer or payee, the date, nature of payment and the amount;

a) toutes les recettes et tous les débours de fonds en fiducie de l'actif, y compris le nom du payeur ou du bénéficiaire, la date, la nature du paiement et le montant;

(b) duplicate deposit slips, duplicate receipts for cash deposits, cancelled cheques, bank statements, passbooks, and all other documents of deposit; and

b) des copies des bordereaux de dépôt, des copies des reçus des dépôts en espèces, les chèques payés, les relevés bancaires, les livres bancaires et tout autre document relatif aux dépôts; et

(c) for consolidated trust accounts, a calculation of the balance within the consolidated account, which we refer to as the control ledger, produced on the same day as the bank statement.

c) pour les comptes consolidés en fiducie, le calcul du solde du compte bancaire consolidé, auquel nous nous référons comme registre de contrôle, en date du même jour que le relevé bancaire.

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(3) The trustee shall complete and sign the reconciliation of all trust accounts, monthly, within forty-five (45) days of the bank statement date.

(3) Chaque mois, le syndic doit concilier tous les comptes en fiducie et apposer sa signature sur le rapport de conciliation dans les quarante-cinq (45) jours de la date du relevé bancaire.

(4) The trustee shall advise the Designated Senior Bankruptcy Analyst, in writing, of all outstanding errors that have not been corrected within seventy-five (75) days of the bank statement date.

(4) Le syndic doit aviser l'analyste principal des faillites désigné, par écrit, de toute erreur qui n'a pas été corrigée dans les soixante-quinze (75) jours de la date du relevé bancaire.

(5) Each monthly trust account reconciliation must be supported by:

(5) Chaque conciliation mensuelle d'un compte en fiducie doit être appuyée par :

(a) an original detailed monthly bank statement for each trust account, supported by cancelled cheques and deposit receipts;

a) l'original d'un relevé bancaire mensuel détaillé pour chaque compte en fiducie accompagné des chèques payés et des reçus de dépôts

(b) the trustee's transaction posting report for the month;

b) le rapport d'enregistrement des transactions du syndic pour le mois;

(c) a complete listing of all outstanding cheques, including the cheque number, payee, amount and date of issue, an explanation regarding any cheques outstanding for longer than six (6) months, and a complete listing of outstanding deposits;

c) une liste de tous les chèques en circulation, y compris le numéro du chèque, le bénéficiaire, le montant et la date d'émission, une explication si des chèques sont en circulation depuis plus de six (6) mois, et une liste complète des dépôts en transit;

(d) a complete and detailed listing of all other reconciling items;

d) une liste détaillée de toutes les autres questions dont il est fait état dans la conciliation;

(e) the name and signature of the individual preparing the bank reconciliation;

e) le nom et la signature de la personne qui a préparé la conciliation bancaire;

(f) the name and signature of the trustee approving the bank reconciliation, and the date of that approval.

f) le nom et la signature du syndic qui a approuvé la conciliation ainsi que la date de l'approbation.

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(6) In addition to the supporting evidence listed in paragraphs 4(5)(a) to (f), reconciliation of all consolidated trust accounts must include the control ledger, which in turn is comprised of a listing of the component sub-ledger balances. Outstanding cheques or deposits that are reconciling items in a consolidated account must be identified by sub-ledger in order to ensure sub-ledger balances are accurate.

(6) En plus des pièces justificatives visées aux alinéas 4(5)*a*) à *f*) ci-dessus, la conciliation des comptes consolidés en fiducie doit comprendre un registre de contrôle renfermant la liste des soldes de chaque livre auxiliaire du compte consolidé. Les chèques en circulation et les dépôts en transit dont il est fait état dans la conciliation d'un compte consolidé doivent être identifiés dans le livre auxiliaire afin d'assurer l'exactitude du solde de chaque livre auxiliaire.

(7) (a) The monthly trust account reconciliation must be accompanied by a report of any estate trust funds invested pursuant to paragraph 6(2) of this Directive. The report will indicate the trust account to which the investment belongs and the monetary value of the investment.

(b) Investment instruments must bear the name of the trust account to which they belong, and must be held in the same bank where the related estate trust account resides.

(7) *a*) La conciliation mensuelle du compte en fiducie doit être accompagnée d'un rapport sur les fonds de l'actif investis conformément au paragraphe 6(2) de la présente instruction. Le rapport devra indiquer à quel compte en fiducie appartient l'investissement, ainsi que la valeur monétaire de l'investissement.

b) La documentation concernant l'investissement doit porter le nom du compte en fiducie auquel appartient l'investissement et être déposée dans la même banque que celle où le compte en fiducie de l'actif est ouvert.

Electronic Banking and Accounting Records

5 (1) A trustee may keep banking and accounting records in electronic media format subject to paragraph 5(2) of this Directive.

Registres bancaires et comptables électroniques

5. (1) Sous réserve du paragraphe 5(2) de la présente instruction, un syndic peut tenir des registres bancaires et comptables électroniques.

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Computer Records for Books of Original Entry

(2) A trustee who maintains banking and accounting records for trust accounts in an electronic format shall ensure that the system used:

(a) is capable of producing on demand a hard copy of the records of original entry at any given date;

(b) shows, at a minimum, details required by paragraph 4(5) of this Directive;

(c) provides a complete audit trail of transactions.

(3) For greater clarity, the period of retention for electronic banking and accounting records shall be the same as required for "hard copy" records.

Computer Bank Reconciliation

(4) A trustee who keeps trust records in an electronic format shall produce and keep a printed copy of the bank reconciliations referred to in paragraphs 4(2), (5) and (6).

Backup Copy

(5) A trustee who keeps trust records in an electronic format shall maintain a backup copy of the electronic records that shall be updated each business day, and stored in a secure manner at an off-site location on a weekly basis.

Livres de données initiales sous forme de registres informatisés

(2) Un syndic qui tient des registres bancaires sous forme électronique pour des comptes en fiducie doit s'assurer que le système utilisé :

a) est capable de produire, sur demande, un imprimé des enregistrements d'écritures initiales à une date donnée;

b) indique, au minimum, les détails requis par le paragraphe 4(5) de la présente instruction;

c) offre une piste de vérification complète des transactions.

(3) La période de rétention des registres bancaires et comptables électroniques est la même que celle prescrite pour les registres sur support papier.

Conciliation bancaire informatisée

(4) Un syndic qui tient des registres de comptes en fiducie sous forme électronique doit imprimer les conciliations bancaires visées aux paragraphes 4(2), (5) et (6) et conserver les documents.

Copie de sauvegarde

(5) Un syndic qui tient des registres de comptes en fiducie sous forme électronique doit conserver une copie de sauvegarde des registres électroniques, qui doit être mise à jour, chaque jour ouvrable, et gardée, sur une base hebdomadaire, dans un endroit sûr, ailleurs qu'au bureau du syndic.

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(g) ensure that all cheques drawn on a trust account are signed by at least one authorized trustee;

g) doit s'assurer que tous les cheques tirés sur un compte en fiducie sont signés par au moins un syndic autorisé;

(h) not pay any of his or her personal or general office expenses from a trust account;

h) ne doit pas se servir d'un compte en fiducie pour payer ses dépenses personnelles ou les dépenses générales de bureau;

(i) make reasonable efforts to obtain a competitive rate of interest on all trust accounts;

i) doit déployer des efforts raisonnables pour obtenir un taux d'intérêt concurrentiel sur tous les comptes en fiducie;

(j) ensure that all interest earned on summary administration estate funds, whether held in a trust account or other investment certificate referred to in paragraph 6(2), which has not been offset by reasonable bank service charges, forms part of the assets of the estate, and is allocated monthly;

j) doit s'assurer que tous les intérêts générés à même les fonds de l'actif d'une administration sommaire — que les fonds soient déposés dans un compte en fiducie ou dans un certificat d'investissement visé au paragraphe 6(2) — qui n'ont pas été annulés par des frais de services bancaires raisonnables, font partie des biens de l'actif et sont attribués mensuellement;

(k) not permit an estate trust account to be overdrawn, and immediately correct any transactions that inadvertently place the account into an overdraft position;

k) doit s'assurer que le compte en fiducie de l'actif n'est pas à découvert et corriger immédiatement toute transaction qui met par inadvertance un compte à découvert;

(l) disclose on the statement of receipts and disbursements the total amount of interest earned for each estate;

l) doit indiquer sur l'état des recettes et des débours le montant total d'intérêts générés pour chaque actif;

(m) in the event that the trustee's general account is charged a transaction fee by the bank for a non-sufficient fund cheque, be permitted to recover this transaction fee from the person responsible and deposit it to the estate

m) peut, si des frais de transaction bancaire pour un chèque sans provision sont débités du compte général du syndic, recouvrer les frais de transaction de l'auteur du chèque et les déposer dans le compte en

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trust account, in which circumstance the trustee is permitted to reimburse the general account from the consolidated bank account for the amount of the transaction fee;

(n) inform the Designated Senior Bankruptcy Analyst promptly of any change to the type of banking or accounting system used for trust accounts;

(o) inform the Designated Senior Bankruptcy Analyst, within five (5) business days, of any change in the name and address of a bank where estate trust funds are held;

(p) be permitted to offset reasonable bank fees (other than non-sufficient fund charges) against interest earned by a summary administration or a Division II Proposal trust account provided the amounts are clearly disclosed on the monthly bank reconciliation, and be permitted to offset bank fees related to investment certificates against interest earned on those certificates provided this is also clearly disclosed;

(q) not be permitted to offset bank fees described in paragraph 6(1)(p) beyond the generated interest.

fiducie de l'actif. Dans un tel cas, le syndic peut rembourser le montant des frais de transaction du compte consolidé au compte général;

n) doit informer sans délai l'analyste principal des faillites désigné de toute modification au type de système bancaire ou comptable utilisé pour les comptes en fiducie;

o) doit informer l'analyste principal des faillites désigné de toute modification du nom et de l'adresse de la banque où les fonds en fiducie de l'actif sont déposés, dans les cinq (5) jours ouvrables de la modification;

p) est autorisé à déduire des frais de services bancaires raisonnables (autres que les frais de chèques sans provision) des intérêts générés à même le compte en fiducie d'une administration sommaire ou d'une proposition déposée aux termes de la section II, pourvu que les montants soient clairement indiqués dans la conciliation bancaire mensuelle, et peut déduire les frais de services bancaires liés aux certificats d'investissement des intérêts générés par ces certificats, pourvu que cette information soit elle aussi clairement indiquée;

q) ne doit pas déduire les frais de services bancaires décrits à l'alinéa 6(1)*p*) au-delà des intérêts générés.

(2) A trustee may invest estate moneys in appropriate investment certificates where

(2) Un syndic peut investir les fonds d'un actif dans des certificats d'investissement

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such funds are not immediately needed for distribution of dividends to creditors, or for the day-to-day administration of the estate. Such investment certificates must be guaranteed against losses and should not be used in cases where service charges and related costs exceed the interest that would accrue had the funds remained in an estate trust account. Investment certificates are to be held at the same branch of the financial institution where the related trust account is held.

appropriés lorsque les fonds ne sont pas requis immédiatement pour une distribution de dividendes ou l'administration courante de l'actif. De tels certificats doivent être garantis contre les pertes et ne doivent pas être utilisés dans les cas où les frais de service et les coûts afférents excèdent les intérêts qui auraient été générés si les fonds étaient restés dans le compte en fiducie d'un actif. Les certificats d'investissement doivent être émis par la succursale de l'établissement financier où les comptes en fiducie de l'actif sont administrés.

(3) Pre-filing deposits from debtors are not considered to be estate trust funds until a bankruptcy has been accepted or a proposal or notice of intention has been filed. Such deposits are to be held separately by the trustee in a trust account, clearly identified for that purpose only or in a separate trust account containing the aggregate of all these funds held, provided the accounting records in respect of the account fully document deposits and withdrawals. Such deposits are not to be held in a consolidated estate trust account or individual estate trust account, until such time as a proceeding under the Act has been registered.

(3) Les fonds déposés par le débiteur avant l'institution de procédures ne sont pas considérés constituer des fonds en fiducie de l'actif jusqu'à ce qu'une faillite soit acceptée ou qu'une proposition ou un avis d'intention soit déposé. Le syndic dépose ces fonds dans un compte en fiducie distinct clairement identifié à ces fins seulement ou dans un compte en fiducie distinct comprenant l'ensemble de ces fonds, pourvu que le système comptable pour ce compte documente tous les dépôts et retraits. Les fonds déposés ne doivent pas être détenus dans un compte consolidé en fiducie ou dans un compte en fiducie de l'actif individuel avant qu'une procédure en vertu de la Loi ne soit inscrite.

(4) The coming into force date for that part of paragraph 6(3) that alludes to a "proposal filed under Division I" and a "notice of intention" shall be held in abeyance until further notice.

4) La date d'entrée en vigueur de la section du paragraphe 6(3) faisant référence à la « proposition déposée aux termes de la section I » et à « l'avis d'intention » est reportée à une date indéterminée jusqu'à nouvel ordre.

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Electronic Banking

(5) (a) A trustee may move funds (such as fees) electronically from an estate trust account to another of the trustee's accounts (such as a general account).[3]

(b) No transfer of funds as described in paragraph 5(a) shall be permitted unless the electronic transfer system used by the trustee produces a confirmation from the financial institution that shall contain:

(i) the number of the trust account from which the money is drawn;

(ii) the name, branch and address of the financial institution from which the money is drawn;

(iii) the number of the account to which the money is transferred;

(iv) the name, branch and address of the financial institution to which the money is transferred; and

(v) the time, date and details of the transfer.

[3] For greater clarity, electronic fund transfers of dividends and disbursements to another party are subject to the provisions of paragraph 16 of this Directive

Transactions bancaires par voie électronique

(5) *a*) Un syndic peut transférer des fonds (tels des honoraires) par voie électronique d'un compte en fiducie de l'actif à un autre de ses comptes (tel un compte général) [3].

b) Aucun transfert de fonds, tel que décrit à l'alinéa 5*a*), ne sera autorisé à moins que le système de virements électroniques utilisé par le syndic produise une confirmation de l'établissement financier qui doit contenir :

(i) le numéro du compte en fiducie duquel les fonds ont été tirés;

(ii) le nom, la succursale et l'adresse de l'établissement financier duquel les fonds ont été tirés;

(iii) le numéro du compte dans lequel les fonds ont été virés;

(iv) le nom, la succursale et l'adresse de l'établissement financier dans lequel les fonds ont été virés; et

(v) l'heure, la date et les détails du virement.

[3] Aux fins de précision, les transferts par voie électronique de dividendes et de débours à une tierce personne sont régis par les dispositions de l'article 16 de la présente instruction

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Consolidated Trust Account

7 (1) An individual trustee may, with the approval of the Designated Assistant Superintendent, operate only one consolidated trust account for summary administrations, pursuant to paragraph 155(g) of the Act, and only one consolidated trust account for consumer proposals, pursuant to subsection 66.26(2) of the Act, provided that the trustee:

(a) submits a request in writing with the information required in paragraph 8 and obtains prior written approval of the Designated Assistant Superintendent in the locality of the trustee; and

(b) maintains, in good order, a bank account and accounting system providing for, and disclosing, equitable monthly distribution to each of the individual estate accounts of all the interest earned by the consolidated trust account.

(2) Consolidated trust accounts are to be used exclusively for their intended purpose. Sub-accounts or separate accounts, including clearing accounts, dividend accounts, expense accounts, etc., are not permitted.

(3) Where the trustee does not comply with the requirements of this Directive, the Designated Assistant Superintendent may revoke approval to operate a consolidated trust account.

(4) A trustee may reapply to the Designated Assistant Superintendent for approval to

Compte consolidé en fiducie

7. (1) Un syndic individuel peut, sur autorisation du surintendant adjoint désigné, gérer un seul compte consolidé en fiducie pour les administrations sommaires, conformément à l'alinéa 155g) de la Loi, et un seul compte consolidé en fiducie pour les propositions de consommateur conformément au paragraphe 66.26(2) de la Loi, pourvu que le syndic :

a) soumette une demande écrite contenant les renseignements requis à l'article 8 et obtienne au préalable l'approbation écrite du surintendant adjoint désigné du bureau principal du syndic; et

b) maintienne en bon ordre un compte bancaire et un système comptable prévoyant une répartition mensuelle équitable, pour chacun des comptes de l'actif, de tous les intérêts générés à même le compte consolidé en fiducie.

(2) Les comptes consolidés en fiducie doivent être utilisés exclusivement aux fins pour lesquelles ils ont été créés. Les comptes auxiliaires et les comptes individuels, tels les comptes de compensation, les comptes de dividendes et les comptes de dépenses, ne sont pas permis.

(3) Lorsque le syndic ne se conforme pas aux exigences de la présente instruction, le surintendant adjoint désigné peut révoquer l'autorisation de gérer un compte consolidé en fiducie.

(4) Un syndic dont l'autorisation de gérer un compte consolidé en fiducie a été

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operate a consolidated trust account after a revocation under paragraph 7(3) has occurred.

révoquée en vertu du paragraphe 7(3) peut présenter une autre demande d'autorisation au surintendant adjoint désigné.

Operating a Consolidated Trust Account

8. (1) An individual trustee shall submit the following along with the written request to the Designated Assistant Superintendent to operate a consolidated trust account:

(a) a complete description of the accounting and banking systems and procedures, whether manual or electronic;

(b) a complete description of the backup procedures, manual or electronic, to allow for the recovery of accounting records in the event of destruction of same;

(c) the name and address of the branch of the bank where the consolidated trust account will operate;

(d) a description of the type of bank accounts to be operated;

(e) a copy of the current banking agreement;

(f) a description of the method by which the bank calculates the rate of interest payable on a consolidated trust account;

(g) a description of the method by which interest is to be calculated and attributed monthly to individual estate accounts; and

Gestion d'un compte consolidé en fiducie

8. (1) À la demande écrite d'autorisation de gérer un compte consolidé en fiducie qu'il adresse au surintendant adjoint désigné, le syndic individuel doit joindre :

a) une description détaillée des systèmes et des procédures comptables et bancaires, qu'ils soient manuels ou électroniques;

b) une description détaillée des procédures de sauvegarde pour le système électronique et du système alternatif de soutien pour le système manuel qui permettent de récupérer les registres comptables en cas de destruction;

c) le nom et l'adresse de la succursale bancaire où le compte consolidé en fiducie sera ouvert;

d) la description du genre de compte bancaire qui sera utilisé;

e) une copie de la convention bancaire en vigueur;

f) une description de la méthode selon laquelle la banque détermine les intérêts payables sur le compte consolidé en fiducie;

g) une description de la méthode selon laquelle les intérêts sont calculés et attribués mensuellement à chaque compte d'actif;

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(h) the details of bank charges applicable to the consolidated trust account and the method by which said charges will be disposed of.

h) les détails des frais applicables au compte consolidé en fiducie et la méthode selon laquelle ces frais seront acquittés.

(2) A trustee shall keep a copy of the original approval for a consolidated account and copies of any subsequent revisions or approvals.

(2) Un syndic doit conserver une copie de l'autorisation originale de gérer un compte consolidé, ainsi que des copies de toutes les révisions et autorisations subséquentes.

Corporate Trustee

9. (1) For corporate trustees, paragraphs 7 and 8 of this Directive shall apply to each individual trustee, except in those cases where a corporate trustee operates a consolidated account as described in paragraph 9(2).

Syndic corporatif

9. (1) Dans le cas d'un syndic corporatif, les articles 7 et 8 de la présente instruction doivent s'appliquer à chaque syndic individuellement, sauf dans les cas où un syndic corporatif gère un compte consolidé de la façon décrite au paragraphe 9(2).

(2) A corporate trustee may, upon written request and with the written permission of the Designated Assistant Superintendent, operate one consolidated bank account for summary estates, and/or one consolidated bank account for consumer proposals, for all or some of its trustees. In any such arrangement, however, individual trustees will be linked to said account as being responsible for specific estates contained therein. A named trustee will be designated by the corporate trustee as the principal contact for the purposes of banking questions. This in no way relieves a corporate trustee of its responsibilities.

(2) Un syndic corporatif peut, sur demande écrite suivie de l'autorisation écrite du surintendant adjoint désigné, gérer un compte consolidé pour les administrations sommaires ou un compte consolidé pour les propositions de consommateur, pour tous ou certains de ses syndics. Lorsque de telles dispositions sont prises, les syndics individuels sont liés aux comptes comme étant les syndics responsables des actifs dont les fonds sont déposés dans les comptes bancaires consolidés. Le syndic corporatif désignera le syndic qui sera la personne-ressource responsable pour les questions bancaires. Ceci ne libère en aucune façon le syndic corporatif de ses obligations.

(3) Where a corporate trustee operates an approved consolidated account as described in paragraph 9(2), paragraphs 7, 8 and 10 apply to the corporate trustee.

(3) Les articles 7, 8 et 10 s'appliquent au syndic corporatif qui gère un compte consolidé ayant été autorisé de la façon visée au paragraphe 9(2).

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(4) For greater clarity, an individual trustee who is linked to a multi-user corporate account as described in paragraph 9(2) shall not be permitted to also operate consolidated accounts pursuant to paragraph 7(1) of this Directive.

(4) Il est entendu qu'un syndic individuel qui est lié à un compte bancaire à utilisateurs multiples tel que décrit au paragraphe 9(2) n'est pas autorisé à gérer simultanément un compte consolidé conformément au paragraphe 7(1) de la présente instruction.

Annual Banking Report

10. (1) A trustee must complete and deliver to the Designated Senior Bankruptcy Analyst **on or before May 31 of each year** a report that shall contain:

(a) for the benefit of each bank holding trust accounts as at April 30 of that year, a signed request for a bank confirmation as set out in Schedule 1 of this Directive;

(b) a master control list of all trust accounts open as at April 30 of that year showing the account number, name and address of the banking institution, the name and the Superintendent's estate number of each estate, and balances on deposit at April 30; and

(c) the information required pursuant to paragraph 10(1)(a) presented in conformity with the form found in Schedule 2 of this Directive.

Rapport bancaire annuel

10. (1) Chaque année, **au plus tard le 31 mai**, le syndic doit préparer et remettre à l'analyste principal des faillites désigné un rapport qui doit contenir :

a) au bénéfice de chaque institution bancaire détenant des comptes en fiducie au 30 avril précédent, un formulaire signé de demande de confirmation bancaire tel que figurant à l'annexe 1 de la présente instruction.

b) une liste de contrôle maîtresse de tous les comptes en fiducie ouverts au 30 avril précédent; cette liste doit renfermer le numéro de compte, le nom et l'adresse de l'institution bancaire, le nom de chacun des actifs, le numéro que le surintendant lui a donné et les soldes des montants déposés en date du 30 avril;

c) les renseignements requis en vertu de l'alinéa 10(1)*a*) doivent être présentés conformément au formulaire qui se trouve à l'annexe 2 de la présente instruction.

(2) A trustee shall include, along with the first annual banking report submitted pursuant to this Directive, a description of

(2) Avec le premier rapport bancaire annuel qui doit être soumis en vertu de la présente instruction, le syndic doit inclure une

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the software programs (either commercially available or proprietary) used to administer estate trust funds. Thereafter, the trustee shall promptly inform the Designated Senior Bankruptcy Analyst of any changes to the type of software used for this purpose as required by paragraph 6(1)(n).

description des logiciels (de marque déposée ou personnelle) utilisés pour l'administration des fonds en fiducie de l'actif. De plus, le syndic doit informer sans délai l'analyste principal des faillites désigné de toute modification au type de logiciel utilisé à cette fin et ce, tel que prévu à l'alinéa 6(1)*n*) de la présente instruction.

Maintaining a Transfer Account

11. (1) Notwithstanding paragraph 6(1)(c) of this Directive, exceptional circumstances may arise where a trustee is unable to deposit funds immediately into the estate's trust account as the Act requires. (For instance, a trustee may have an establishment in a town that does not have a branch of his or her bank.)

Gestion d'un compte de transit

11. (1) Nonobstant l'alinéa 6(1)c) de la présente instruction, il peut exister des circonstances exceptionnelles faisant qu'un syndic est incapable de déposer immédiatement des fonds dans le compte en fiducie de l'actif, comme la Loi le prescrit. (Par exemple, un syndic peut avoir un bureau dans une ville qui ne compte aucune succursale de sa banque.)

(2) A trustee may, with prior written approval of the Designated Assistant Superintendent, operate a transfer account subject to such terms and conditions as the Designated Assistant Superintendent may impose.

(2) Un syndic peut, sur autorisation préalable écrite du surintendant adjoint désigné, gérer un compte de transit, à la condition de respecter les modalités qui peuvent être établies par le surintendant adjoint désigné.

Undistributed Interest

12. (1) Any amount of monthly interest earned on a consolidated trust account that is too small to be rateably apportioned to the individual estates may be carried forward to the following month, where it will form part of the next month's interest allocation. Such amounts of unallocatable interest shall be clearly identified on the monthly reconciliation.

Intérêts non distribués

12. (1) Si le montant des intérêts générés sur un compte consolidé durant une période d'un mois est infime et ne peut être distribué au prorata dans les comptes d'actifs individuels, le montant en question peut être reporté au mois suivant, où il fera partie de l'allocation d'intérêt du mois en question. Le montant des intérêts non alloués doit être clairement indiqué dans les conciliations mensuelles.

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(2) Any amount of interest earned on a non-consolidated trust account that cannot be allocated to that account shall be remitted to the Superintendent as an undistributed asset as provided for in Directive No. 18. *Unclaimed Dividends and Undistributed Funds.*

(2) Le montant des intérêts générés sur un compte non consolidé en fiducie et qui ne peut être attribué à ce compte doit être remis au surintendant à titre d'actifs non distribués, tel que prévu dans l'instruction n°18. *Dividendes non réclamés et fonds non distribués.*

Deposit Insurance

13. A trustee shall take necessary steps to ensure that estate funds are insured under the *Canada Deposit Insurance Corporation Act* (CDIC) or equivalent provincial deposit insurance legislation.

Assurance-dépôts

13. Un syndic doit prendre les mesures nécessaires pour que les fonds des actifs soient assurés en vertu de la *Loi sur la Société d'assurance-dépôts du Canada* ou d'une loi provinciale équivalente sur l'assurance-dépôts

Change of Status of Estate from Summary to Ordinary Administration

14. Where an estate is converted from a summary to an ordinary administration and the estate funds therein were previously held in a consolidated trust account, a trustee shall immediately open a separate trust bank account into which he or she shall transfer all of the estate funds.

Modification du statut d'administration sommaire à ordinaire

14. Lorsqu'un actif passe d'une administration sommaire à une administration ordinaire et que les fonds de l'actif sont détenus dans un compte consolidé en fiducie, un syndic doit immédiatement ouvrir un compte en fiducie individuel et y effectuer le virement et le dépôt de tous les fonds de l'actif.

Foreign Moneys

15. Subject to subsection 25(1.2) of the Act, the provisions of this Directive also apply to moneys in foreign countries, with such modifications as the circumstances require.

Fonds à l'étranger

15. Sous réserve du paragraphe 25(1.2) de la Loi, les dispositions de la présente instruction s'appliquent, avec les adaptations nécessaires, aux fonds détenus à l'étranger.

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Electronic Payments and Related Records

16. (1) A trustee may make application, in writing, for approval to make payments electronically from a trust account rather than by signed printed cheque. Such application shall:

(a) be made to the Designated Senior Bankruptcy Analyst;

(b) include an acknowledgement of the Superintendent's power to receive bank confirmations or other pertinent bank information regarding electronic transactions upon request;

(c) describe, to a degree of detail acceptable to the Designated Senior Bankruptcy Analyst, how the proposed electronic payment system and internal controls meet or exceed the requirements specified in this Directive; and

(d) include a contingency plan outlining how the trustee will deal with payment system service interruptions or malfunctions in order to continue to make required payments and maintain proper books and records.

(2) (a) Where the Designated Assistant Superintendent approves a trustee's application to utilize electronic payments, that approval shall be in writing.

Paiements électroniques et registres afférents

16. (1) Un syndic peut demander par écrit d'être autorisé à faire des paiements électroniques d'un compte en fiducie plutôt que de signer des chèques imprimés. Une telle demande :

a) doit être présentée à l'analyste principal des faillites désigné;

b) doit comporter une reconnaissance du pouvoir du surintendant de recevoir, sur demande, des confirmations de la banque ou d'autres renseignements bancaires pertinents sur les transactions électroniques;

c) doit décrire, avec un degré de précision acceptable pour l'analyste principal des faillites désigné, comment le système de paiements électroniques proposé et les contrôles internes satisferont aux exigences précisées dans la présente instruction ou les excéderont; et

d) doit comprendre une méthode alternative, dans l'éventualité où le syndic ferait face à des interruptions de service ou à des défaillances du système de paiements, afin d'être en mesure de continuer à faire les paiements requis et à tenir les registres et les livres appropriés.

(2) *a*) Lorsque le surintendant adjoint désigné approuve la demande du syndic d'utiliser les paiements électroniques, il le fait par écrit.

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(b) Where the trustee does not comply with the requirements of this Directive, the Designated Assistant Superintendent may revoke approval to utilize an electronic payment system.

b) Lorsque le syndic ne se conforme pas aux exigences de la présente instruction, le surintendant adjoint désigné peut révoquer l'autorisation d'utiliser un système de paiements électroniques.

(3) The trustee is well advised to retain on file a copy of the application referred to in paragraph 16(1) and the written approval referred to in paragraph 16(2) while the electronic payment system is being used.

(3) Tant que le système de paiements électroniques est utilisé, il est conseillé au syndic de conserver au dossier une copie de la demande visée au paragraphe 16(1) et de l'autorisation écrite visée au paragraphe 16(2).

(4) For the purposes of making electronic payments, a trustee must utilize the services of a bank as defined under section 2 of the Act.

(4) Pour les fins des paiements électroniques, un syndic doit utiliser les services d'une banque telle que définie à l'article 2 de la Loi

(5) An acceptable electronic payment system shall, as a minimum:

(5) Un système de paiements électroniques acceptable doit, au minimum :

(a) send an electronic payment together with remittance information relating to that payment, including the estate name and estate number to which the payment relates, the account number from which the payment was drawn and a description of the nature of the payment;

a) envoyer un paiement électronique avec l'information sur l'envoi des fonds relatifs à ce paiement, y compris le nom de l'actif, le numéro de l'actif auquel se rapporte le paiement, le numéro du compte duquel le paiement a été tiré et une description de la nature du paiement;

(b) transmit payment and remittance information together directly from the trustee to the bank, with the bank confirming payment details directly to the creditor/recipient. The payment system may send the remittance details by email, facsimile or other electronic formats;

b) transmettre en même temps l'information sur le paiement et l'information sur l'envoi des fonds directement du syndic à la banque qui doit, par la suite, confirmer les détails du paiement directement au créancier ou au bénéficiaire. Le système de paiements électroniques peut envoyer les détails de l'envoi d'argent par courriel, télécopieur ou sous une autre forme électronique;

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(c) use consecutively numbered payment trace numbers as generated by the trustee's accounting system to clearly identify each payment as to amount, payee, estate name and number, date of payment and nature of payment (i.e. dividend, other type of disbursement);

c) utiliser les numéros repères de paiement consécutifs produits par le système comptable du syndic pour identifier clairement chaque paiement ainsi que son montant et son bénéficiaire, le nom et le numéro de l'actif, la date et la nature du paiement (c'est-à-dire dividende ou autre genre de débours);

(d) provide for secure transmission of payment and remittance information;

d) transmettre en toute sécurité l'information sur le paiement et l'envoi des fonds;

(e) satisfy the requirements set out in paragraph 4(2) of this Directive relating to proper books and records, with such allowances for electronic equivalents of paper-based records as are reasonable;

e) satisfaire aux exigences du paragraphe 4(2) de la présente instruction en ce qui concerne les livres et les registres appropriés, des registres électroniques pouvant, dans la mesure du raisonnable, remplacer les registres sur support papier;

(f) ensure that the account reconciliation requirements set out in paragraphs 4(5) and 4(6) of this Directive can be satisfied;

f) faire en sorte que les exigences relatives à la conciliation des comptes énoncées aux paragraphes 4(5) et (6) de la présente instruction puissent être satisfaites;

(g) ensure that requirements for handling trust moneys as set out in paragraph 6(1) of this Directive can be satisfied. In particular, trustees must indicate how they intend to ensure that payments made via the electronic payment system can only be approved by a licensed trustee in accordance with the requirements of paragraph 6(d) of Directive No. 4. *Delegation of Tasks*;

g) faire en sorte que les exigences relatives à la gestion des fonds en fiducie énoncées au paragraphe 6(1) de la présente instruction puissent être satisfaites. En particulier, les syndics doivent indiquer comment ils ont l'intention de s'assurer que les paiements effectués par l'intermédiaire du système de paiements électroniques peuvent être approuvés exclusivement par un syndic titulaire de licence, conformément aux exigences de l'alinéa 6*d*) de l'instruction n° 4, *Délégation des tâches*;

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(h) not compromise the trustee's ability to comply with any other requirement of the Act, Rules or directives;

h) ne pas compromettre la capacité du syndic à respecter les autres exigences de la Loi, des Règles ou des instructions;

(i) not permit the alteration of information relating to statements or reports of transactions (i.e. not permit banking records to be overwritten);

i) ne pas permettre la modification de l'information relative aux relevés ou aux rapports de transactions (c'est-à-dire ne pas permettre que les registres bancaires soient réécrits);

(j) allow printing of electronic statements or reports regarding payment transactions;

j) permettre l'impression de relevés électroniques ou de rapports concernant les transactions de paiement;

(k) provide the trustee with prompt notification of unsuccessfully completed electronic payments;

k) aviser promptement le syndic dans les cas où les paiements électroniques ne sont pas complétés;

(l) use unique identifiers for each individual with access to the electronic payment system;

l) utiliser un identificateur unique pour chaque personne ayant accès au système de paiements électroniques;

(m) keep records showing which trustee(s) initiated each electronic payment.

m) tenir des registres indiquant quel syndic a effectué quel paiement électronique.

(6) Where the trustee receives notification of an unsuccessfully completed electronic payment, measures shall be taken within five (5) business days to deal with the problem.

(6) Dans les cinq (5) jours ouvrables suivant celui où il est avisé qu'un paiement électronique n'a pas été complété, le syndic doit prendre les mesures adéquates pour corriger le problème.

(7) The trustee shall obtain the consent of a creditor/recipient to receive payments electronically;

(7) Le syndic doit obtenir le consentement d'un créancier ou d'un bénéficiaire à recevoir des paiements électroniques;

(a) such consent shall be provided to the trustee in the form set out in Schedule 3;

a) un tel consentement doit être fourni au syndic par l'intermédiaire du formulaire présenté à l'annexe 3;

(b) the trustee shall keep all consent documents in a separate file designated

b) le syndic doit conserver tous les formulaires de consentement dans un

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for this purpose for the period of time prescribed by the Rules for retention of estate documents or for the duration of the consent period, whichever is longer;

dossier distinct prévu à cette fin durant la période prescrite par les Règles pour la retention des documents de l'actif ou pour la durée du consentement, la période la plus longue étant retenue;

(c) the trustee shall take steps to ensure that consent documents are kept in a safe and secure manner;

c) le syndic doit prendre des mesures pour s'assurer que les formulaires de consentement sont conservés dans un endroit sûr et sécuritaire.

(d) a creditor may revoke consent to receive electronic payments by sending written notification to the trustee.

d) un créancier peut révoquer son consentement à recevoir des paiements électroniques en envoyant un avis écrit au syndic

Coming into Force

17. This Directive comes into force on March 31, 2010.

Entrée en vigueur

17. La présente instruction entre en vigueur le 31 mars 2010.

Enquiries

18. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

18. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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Office of the Superintendent of Bankruptcy Canada / Bureau du surintendant des faillites Canada
An Agency of Industry Canada / Un organisme d'Industrie Canada

Schedule I — Annual Banking Report
Request for Bank Confirmation

Part 1 — Acknowledgement: To be completed by trustee

I, the undersigned, do hereby submit this request in accordance with the Superintendent's Directive No. 5R4, *Estate Funds and Banking*. Paragraph 10(1)(b) that Directive requires that trustees annually complete and deliver such a request to the Designated Senior Bankruptcy Analyst for each bank branch holding trust accounts administered by the

I understand that a representative of the Superintendent of Bankruptcy may present this request to the bank at any time during the year where it is determined that a bank confirmation is required. Costs associated with processing such a request are to be borne by the undersigned.

TRUSTEE (Legal name)	Signature of Trustee (Authorized Signing Officer)	Date: mm/dd/yyyy

Part 2 — Financial Institution Identification: To be completed by trustee

This Request for Bank Confirmation pertains to the following FINANCIAL INSTITUTION	(Name, branch, and full mailing address)

Part 3 — Notice to Financial Institution: To be completed by a representative of the Superintendent of Bankruptcy

The aforementioned Trustee in Bankruptcy has reported that, as at April 30, trust accounts were held in your institution.

The Superintendent of Bankruptcy has a duty under the *Bankruptcy and Insolvency Act* to "from time to time make or cause to be made such inspection or investigation of estates or other matters to which this Act applies, including the conduct of a trustee or a trustee acting as a receiver or interim receiver, as the Superintendent may deem expedient..." [Par. 5(3)(e)]

Pursuant to subsection 6(2) of the *Bankruptcy and Insolvency Act*, the "Superintendent or anyone duly authorized by him in writing on his behalf is entitled to have access to, to examine and to make copies of the banking accounts of a trustee in which estate funds may have been deposited, and, when required, all deposit slips, cancelled cheques or other documents relating thereto in the custody of the bank or the trustee shall be produced for examination."

I, as a duly authorized representative of the Superintendent, do hereby require confirmation of the bank accounts of the aforementioned trustee which are open as at:		Date: mm/dd/yyyy
Details regarding the information requested are found in Part 4 of this document.	Address:	
Please provide this information to the undersigned at the following address:	Industry Canada Office of the Superintendent of Bankruptcy	
(Name of OSB representative)		
Email address:		
Telephone:		
Fax:		
Signature of Representative		

Part 4 — Information Requested from Financial Institution: To be completed by financial institution

1. **SPECIFIC BANK ACCOUNTS**

Name of Account	Account Number	Amount of Related Term Deposits (if applicable)	Terms and Conditions of Related Term Deposits (if applicable)	Account Balance (parentheses if overdrawn)

A.	Are all of the above-listed accounts designated as "Trust Accounts"?	☐Yes	☐No
B.	Have any of the above-listed accounts been pledged as collateral for loans or other credit instruments?	☐Yes	☐No
C.	For the above-listed accounts, is the withdrawal or transfer of funds allowed by cheque only?	☐Yes	☐No
D.	Are there any arrangements in place allowing the trustee to overdraw the trust accounts? If yes, please provide details.	☐Yes	☐No
E.	Are you aware of any other trust accounts in the name of this trustee? If yes, please provide details as above.	☐Yes	☐No

2. **Comments**
Please provide on a separate sheet any comments or additional information, if applicable.

3. **Trust Account Agreement**
Please provide a copy of the most recent Trust Account Agreement between the trustee and the financial institution.

4. **Signing Authority**
Please provide below, or on a separate sheet, a list of individuals with signing authority on all trust accounts.

Statement of Procedures Performed by Financial Institution
The above information was completed in accordance with our records.

Authorized Signing Officer — Financial Institution	BRANCH CONTACT — Name and telephone number

Canada

OSB-BSI Protecting the Integrity of the Insolvency System / Protéger l'intégrité du système d'insolvabilité

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Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Annexe I – Rapport bancaire annuel – Demande de confirmation bancaire

Partie 1 – Attestation : Cette partie doit être remplie par le syndic.

Je, soussigné, soumets la présente demande en accord avec l'instruction n° 5R4, *Les fonds de l'actif et procédures bancaires*, du Bureau du surintendant des faillites. Aux termes de l'alinéa 1(2)(j) de ladite instruction, le syndic remplit chaque année une demande en ce sens pour chaque succursale bancaire détenant des comptes en fiducie qu'il administrait au 30 avril précédent, et la transmet à l'analyste principal des faillites désigné.

Il est entendu qu'un représentant du surintendant des faillites peut présenter cette demande à la banque à tout moment au cours de l'année s'il est déterminé qu'une confirmation de la banque est requise. Le coût du traitement d'une telle demande est à la charge du soussigné.

SYNDIC (dénomination sociale)	Signature du syndic (Fondé de pouvoir)	Date : jj/mm/aaaa

Partie 2 – Institution financière visée : Cette partie doit être remplie par le syndic.

La présente demande de confirmation bancaire vise l'institution financière suivante :	(Dénomination sociale, succursale et adresse postale complète)

Partie 3 – Notification de l'institution financière : Cette partie doit être remplie par un représentant du surintendant des faillites.

Selon le syndic de faillite susmentionné, votre institution détenait des comptes en fiducie au 30 avril.

En vertu de l'alinéa 5(3)e) de la *Loi sur la faillite et l'insolvabilité*, le surintendant des faillites « effectue ou fait effectuer les investigations ou les enquêtes, au sujet des actifs et autres affaires régies par la présente loi, et notamment la conduite des syndics agissant à ce titre ou comme séquestres ou séquestres intérimaires, qu'il peut juger opportunes ».

En outre, le paragraphe 6(2) de ladite loi stipule que « [le] surintendant, ou toute personne qu'il a dûment autorisée par écrit à agir en son nom, a droit d'accès aux comptes de banque d'un syndic où les fonds de l'actif ont été déposés, de les examiner et d'en prendre copie, et, lorsque la chose est requise, tous les bordereaux de dépôt, chèques annulés ou autres documents s'y rattachant, placés sous la garde de la banque ou du syndic, doivent être produits pour examen. »

En qualité de représentant dûment autorisé du surintendant, je vous demande par les présentes de confirmer l'existence des comptes de banque du syndic susmentionné ouverts en date du :	Date : jj/mm/aaaa

Le détail des renseignements demandés figure à la partie 4 des présentes. Veuillez faire parvenir les renseignements demandés au soussigné à l'adresse suivante :	Adresse : Industrie Canada, Bureau du surintendant des faillites
(Nom du représentant du BSF)	
Adresse de courriel :	
Téléphone :	
Télécopieur :	
Signature du représentant	

Partie 4 – Informations demandées de l'institution financière : Cette partie doit être remplie par l'institution financière.

1. **Comptes bancaires spécifiques**

Nom du compte	Numéro du compte	Montant de dépôts à terme relié (s'il y a lieu)	Conditions (taux, date d'échéance) du dépôt à terme (s'il y a lieu)	Solde (parenthèses dans le cas d'un découvert)

A.	Est-ce que les comptes susmentionnés sont désignés comme étant « en fiducie »?	☐ Oui	☐ Non
B.	Est-ce que les comptes susmentionnés ont déjà été ou sont donnés en garantie comme dépôts collatéraux pour des prêts ou autre facilités de crédit?	☐ Oui	☐ Non
C.	Pour les comptes susmentionnés, est-ce qu'il y a possibilité d'effectuer des retraits ou des transferts de fonds par chèque seulement?	☐ Oui	☐ Non
D.	Est-ce qu'il existe des arrangements permettant au syndic de mettre les comptes en fiducie à découvert? Si oui, veuillez en fournir les détails.	☐ Oui	☐ Non
E.	Savez-vous si le syndic possède d'autres comptes en fiducie à son nom? Si oui, veuillez en fournir les détails.	☐ Oui	☐ Non

2. **Commentaires**
Veuillez nous fournir sur une page séparée vos commentaires ou informations additionnelles, s'il y a lieu.

3. **Entente bancaire**
Veuillez nous fournir une copie de la plus récente convention ou entente signée entre le syndic et l'institution financière.

4. **Signataires autorisés**
Veuillez nous fournir la liste des signataires autorisés sur les comptes en fiducie.

Déclaration concernant les procédés mis en œuvre par l'institution financière
Les renseignements ci-dessus ont été établis en conformité avec nos registres.

Signataire autorisé de l'institution financière	Personne à contacter à la succursale (nom et numéro de téléphone)

Canada

Protéger l'intégrité du système d'insolvabilité / Protecting the Integrity of the Insolvency System

BSF - OSB

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Schedule 2 - Annual Banking Report

Part 1. Acknowledgement to be Completed by the Trustee

I, the undersigned, do hereby submit this report in accordance with the Superintendent's Directive No. 5R4, *Estate Funds and Banking*. Paragraph 10(1)(a) of that Directive requires that trustees annually complete and deliver such a report to the Designated Senior Bankruptcy Analyst for all trust accounts open as at April 30 of that year. The undersigned Trustee in Bankruptcy reports that as at April 30, the following trust accounts were maintained by the undersigned at the bank(s) and branch(es) noted below and that the following information is true and complete in all material respects.

TRUSTEE (legal Name under which the estates are filed) TRUSTEE LICENSE Number:	Signature of Trustee(s) (authorized signing officer(s) on trust account) Print Trustee Name(s):	Date (mm/dd/yyyy)	Trustee licence numbers that have estates in the Annual Banking Report:

Part 2. Insolvency Software Details (see below)

The trustee shall include, in the first Annual Banking Report (ABR) submitted to the (OSB), a description of the software programs (either commercially available or proprietary) used to administer estate trust funds. ***Thereafter, the trustee shall promptly inform the Assistant Superintendent of any changes to the type of software used for this purpose as required by paragraph 6(1)(n) of Directive No. 5R4, Estate Funds and Banking.***

Description of software used:

Part 3. Financial Institution Identification

Consolidated Bank Account Information (attach listing if required) **List Attached** □

Deposit Type	**Bank Institution No**	**Bank Branch Address**	**Bank Branch Transit No.**	**Bank Account No.**	**Account Balance as at April 30**	**Term Deposit Certificate No.**	**Term Deposit Balance as at April 30**	**Bank and Branch where Term Deposit Located**
Summary Administration								
Division II Proposal								
Third-Party Deposit/Guarantee								
Pre-Filing Deposits								
Other (provide details)								

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Part 4. Consolidated Bank Account - Detailed Estate Master List Information

Summary Administration Estates (a copy of the sub-ledger report, i.e., Summary of Estate Balances may be attached) **List Attached** ☐

Superintendent's Estate No. (complete for all estates held in CBA)	Estate Name	Bank Account No.	Estate Balance ($) in CBA as at April 30

Part 5. Consolidated Bank Account - Detailed Estate Master List Information

Division II Proposal Estates (a copy of the sub-ledger report, i.e., Summary of Estate Balances may be attached) **List Attached** ☐

Superintendent's Estate No. (complete for all estates held in CBA)	Estate Name	Bank Account No.	Estate Balance ($) in CBA as at April 30

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Part 6. Consolidated Bank Account - Detailed Estate Master List Information

Other Trust Account Information (for use with consolidated bank accounts identified under Part 3 as "Other") **List Attached** □

Superintendent's Estate No. (if applicable)	Estate Name or Depositor's Name	Deposit Type	Bank Account No.	Trust Account Balance as at April 30
		□ Summary □ Ordinary □ Division I Proposal □ Division II Proposal □ Third-Party Deposit/Guarantee □ Pre-Filing Deposits □ Receivership □ Other (provide details):		
		□ Summary □ Ordinary □ Division I Proposal □ Division II Proposal □ Third-Party Deposit/Guarantee □ Pre-Filing Deposits □ Receivership □ Other (provide details):		
		□ Summary □ Ordinary □ Division I Proposal □ Division II Proposal □ Third-Party Deposit/Guarantee □ Pre-Filing Deposits □ Receivership □ Other (provide details):		

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Annexe 2 – Rapport bancaire annuel

Partie 1. Déclaration du syndic

Je, soussigné(e), syndic de faillite, soumets le présent rapport en conformité avec l'instruction n° 5R4 du surintendant intitulée *Les fonds de l'actif et procédures bancaires*. En vertu de l'alinéa 10(1)*a*) de cette instruction, les syndics doivent présenter et remettre à l'analyste principal des faillites désigné un rapport pour tous les comptes en fiducie ouverts au 30 avril précédent. Je déclare avoir maintenu en date du 30avril les comptes en fiducie suivants dans les banques et succursales indiquées ci-après et j'affirme que les renseignements suivants sont exacts et complets à tous égards importants.

SYNDIC (nom sous lequel les dossiers ont été déposés) NUMÉRO DE LICENCE DE SYNDIC :	Signature du ou des syndic(s) signataire(s) autorisé(s) pour le compte en fiducie Nom du ou des syndic(s) en caractères d'imprimerie :	Date (jj/mm/aaaa)	Numéro de licence des syndics ayant un ou plusieurs dossiers dans le Rapport bancaire annuel :

Partie 2. Détails sur le logiciel en matière d'insolvabilité

Le syndic doit inclure, dans son premier rapport bancaire annuel présenté au BSF, une description des programmes logiciels utilisés (disponibles au niveau commercial ou propriétaire) pour administrer les fonds d'actifs en fiducie. ***Par la suite, le syndic doit informer dans les plus brefs délais le surintendant adjoint de tout changement quant au logiciel utilisé dans l'administration des fonds d'actifs en fiducie, tel qu'exigé par l'alinéa 6(1)n) de l'instruction n° 5R4.*** Les fonds de l'actif et procédures bancaires.

Description du logiciel utilisé :

Partie 3. Identification de l'institution financière

Renseignements sur les comptes bancaires consolidés en fiducie (On peut joindre une liste au besoin.) **Liste jointe** ☐

Type de dépôt	N° de l'institution bancaire	Adresse de la succursale bancaire	N° de transit de la succursale	N° du compte bancaire	Solde du compte bancaire au 30 avril	N° du certificat de dépôt à terme	Solde du dépôt à terme au 30 avril	Banque et succursale où le certificat de dépôt à terme a été émis
Administration sommaire								
Proposition de consommateur								
Dépôts et garanties de tiers								
Fonds déposés avant l'institution de procédures								
Autre (préciser)								

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Partie 4. Compte bancaire consolidé en fiducie – Renseignements détaillés sur la liste de contrôle maîtresse des dossiers
Dossiers d'administration sommaire (On peut joindre une copie du rapport sur les livres auxiliaires – par exemple, un résumé du solde des comptes.)

Liste jointe ☐

N° de dossier du surintendant (à remplir pour tous les actifs détenus dans le compte bancaire consolidé)	**Nom du dossier**	**Type de dossier**	**N° du compte bancaire**	**Solde du compte bancaire consolidé en fiducie au 30 avril**

Partie 5. Compte bancaire consolidé en fiducie – Renseignements détaillés sur la liste de contrôle maîtresse des dossiers
Propositions de consommateur (On peut joindre une copie du rapport sur les livres auxiliaires – par exemple, un résumé du solde des comptes.)

Liste jointe ☐

N° de dossier du surintendant (à remplir pour tous les actifs détenus dans le compte bancaire consolidé en fiducie)	**Nom du dossier**	**Type de dossier**	**N° du compte bancaire**	**Solde du compte bancaire consolidé au 30 avril**

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Partie 6. Compte bancaire consolidé en fiducie – Renseignements détaillés sur la liste de contrôle maîtresse des dossiers
Autres renseignements concernant les comptes en fiducie (pour les comptes bancaires consolidés dans la catégorie « Autre » à la partie 3) — **Liste jointe** ☐

N° de dossier du surintendant (s'il y a lieu)	Nom du dossier ou nom du déposant	Type de dépôt	N° du compte bancaire	Solde du compte en fiducie au 30 avril
		☐ Administration sommaire ☐ Administration ordinaire ☐ Proposition – section I ☐ Proposition – section II ☐ Dépôts et garanties de tiers ☐ Fonds déposés avant l'institution de procédures ☐ Mise sous séquestre ☐ Autre (préciser)		
		☐ Administration sommaire ☐ Administration ordinaire ☐ Proposition – section I ☐ Proposition – section II ☐ Dépôts et garanties de tiers ☐ Fonds déposés avant l'institution de procédures ☐ Mise sous séquestre ☐ Autre (préciser)		
		☐ Administration sommaire ☐ Administration ordinaire ☐ Proposition – section I ☐ Proposition – section II ☐ Dépôts et garanties de tiers ☐ Fonds déposés avant l'institution de procédures ☐ Mise sous séquestre ☐ Autre (préciser)		

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Partie 7. Renseignements détaillés sur les différents comptes bancaires de dossiers d'actifs individuels

(On peut joindre une copie du rapport sur les livres auxiliaires – par exemple, un résumé du solde des comptes.) **Liste jointe** ☐

N° de dossier du surintendant	Nom du dossier	Type de dépôt	N° de l'institution bancaire	Adresse de la succursale bancaire	N° de transit de la succursale	N° du compte bancaire	Solde du compte bancaire au 30 avril	N° du certificat de dépôt à terme	Solde du dépôt à terme au 30 avril	Banque et succursale où le certificat de dépôt à terme a été émis
		☐ Administration sommaire ☐ Administration ordinaire ☐ Proposition – section I ☐ Proposition – section II ☐ Dépôts et garanties de tiers ☐ Fonds déposés avant l'institution de procédures ☐ Mise sous séquestre ☐ Autre (préciser)								
		☐ Administration sommaire ☐ Administration ordinaire ☐ Proposition – section I ☐ Proposition – section II ☐ Dépôts et garanties de tiers ☐ Fonds déposés avant l'institution de procédures ☐ Mise sous séquestre ☐ Autre (préciser)								
		☐ Administration sommaire ☐ Administration ordinaire ☐ Proposition – section I ☐ Proposition – section II ☐ Dépôts et garanties de tiers ☐ Fonds déposés avant l'institution de procédures ☐ Mise sous séquestre ☐ Autre (préciser)								

Partie 8. Renseignements détaillés sur les comptes de transit

N° de l'institution bancaire	N° de transit de la succursale	N° du compte bancaire de transit	Solde du compte bancaire de transit au 30 avril	N° de l'institution bancaire destinataire	N° de transit de la succursale destinataire	N° de compte à l'institution bancaire destinataire

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Part 7. Individual Estate Bank Account Detailed Information

(A copy of the sub-ledger report, i.e.: Summary of Estate Balances may be attached) List Attached □

Superintendent's Estate No.	Estate Name	Deposit Type	Bank Institution No.	Bank Branch Address	Branch Transit No.	Bank Account No.	Bank Account Balance as at April 30	Term Deposit Certificate No.	Term Deposit Balance as at April 30	Bank & Branch Where Term Deposit Located
		□ Summary □ Ordinary □ Division I Proposal □ Division II Proposal □ Third-Party Deposit/Guarantee □ Pre-Filing Deposits □ Receivership □ Other (provide details):								
		□ Summary □ Ordinary □ Division I Proposal □ Division II Proposal □ Third-Party Deposit/Guarantee □ Pre-Filing Deposits □ Receivership □ Other (provide details):								
		□ Summary □ Ordinary □ Division I Proposal □ Division II Proposal □ Third-Party Deposit/Guarantee □ Pre-Filing Deposits □ Receivership □ Other (provide details):								

Part 8. Transfer Account Detailed Information

Bank Institution No.	Branch Transit No.	Transit Bank Account #	Transit Bank Account Balance as at April 30	Receiving Bank Institution No.	Receiving Branch Transit No.	Receiving Bank Account(s) No (s).

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Schedule 3 — ELECTRONIC FUND TRANSFER (EFT) — AUTHORIZATION AGREEMENT

Section 1: TO BE COMPLETED BY TRUSTEE
NAME AND ADDRESS OF TRUSTEE

Section 2: IDENTIFICATION OF ELECTRONIC PAYMENT RECIPIENT *(PRINT OR TYPE)*	
LAST NAME _____ or BUSINESS NAME_____	FIRST NAME _____
MAILING ADDRESS	
PHONE NUMBER (_ _ _) _ _ _ - _ _ _ _	
DESIGNATED CONTACT PERSON	PHONE NUMBER (_ _ _) _ _ _ - _ _ _ _

Section 3: ACCOUNT INFORMATION FOR ELECTRONIC PAYMENT		
The undersigned confirms the following account information for the purposes of receiving payments by electronic transfer of funds. Any existing account previously set up by the creditor with the trustee is to be replaced by this account information.		
BANK NAME		
BANK ADDRESS		
TRANSIT NUMBER	INSTITUTION NUMBER	ACCOUNT NUMBER
TYPE OF ACCOUNT Chequing Savings Other (Explain) _____ PLEASE ATTACH A COPY OF A VOIDED CHEQUE OR DEPOSIT SLIP FOR VALIDATION OF INFORMATION		

Section 4: DECLARATION CONSENT AND AUTHORIZATION		
The undersigned hereby certifies that the foregoing information delivered to the bankruptcy trustee is true in all material respects and consents to receive all payments electronically. The undersigned hereby authorizes the trustee to initiate credit entries, electronically, to his or her account. The undersigned further acknowledges that it is his or her responsibility to ensure that the account stays current and available for electronic payments of dividends payable as those dividends become due. The undersigned may revoke or cancel this agreement at any time by delivering a notice of such revocation or cancellation to the trustee.The undersigned agrees to retain the signed original of this document for the duration of this agreement if sending a facsimile copy to the trustee.		
_____ *(Signature of authorized signatory)* Direct phone number (_ _ _) _ _ _ - _ _ _ _	_____ *(Print name of signatory)* _____ *(Title)*	_____ Date (mm/dd/yyyy)

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Annexe 3 : TRANSFERT ÉLECTRONIQUE DE FONDS – CONVENTION D'AUTORISATION

Section 1 : SECTION DEVANT ÊTRE REMPLIE PAR LE SYNDIC

NOM ET ADRESSE DU SYNDIC :

Section 2 : RENSEIGNEMENTS SUR LE BÉNÉFICIAIRE DES TRANSFERTS ÉLECTRONIQUES *(ÉCRIRE EN CARACTÈRES D'IMPRIMERIE OU DACTYLOGRAPHIER)* :

NOM DE FAMILLE _____ ou RAISON SOCIALE _____	PRÉNOM _____
ADRESSE POSTALE :	
NUMÉRO DE TÉLÉPHONE : (_ _ _) _ _ _ - _ _ _ _	
PERSONNE-RESSOURCE DÉSIGNÉE	NUMÉRO DE TÉLÉPHONE : ( ) -

Section 3 : RENSEIGNEMENTS SUR LE COMPTE DE DÉPÔT DES TRANSFERTS ÉLECTRONIQUES

Le soussigné confirme l'exactitude des renseignements ci-dessous sur le compte aux fins de la réception de paiements par voie de transfert électronique de fonds. Tout autre compte établi antérieurement par le créancier avec le syndic doit être remplacé par le compte ci-dessous.

NOM DE L'INSTITUTION FINANCIÈRE :

ADRESSE DE L'INSTITUTION FINANCIÈRE :

NUMÉRO DE TRANSIT :	NUMÉRO D'INSTITUTION :	NUMÉRO DE COMPTE :

TYPE DE COMPTE
Chèques Épargne Autre (préciser) _____

ANNEXER UN SPÉCIMEN DE CHÈQUE OU UN BORDEREAU DE DÉPÔT AUX FINS DE LA VÉRIFICATION DES RENSEIGNEMENTS.

Section 4 : DÉCLARATION DE CONSENTEMENT ET AUTORISATION

Par la présente, le soussigné confirme que les renseignements ci-dessus fournis au syndic de faillite sont exacts à tous égards importants et consent à recevoir tous les paiements par voie électronique. Le soussigné, par la présente, autorise le syndic à comptabiliser, par voie électronique, des écritures de crédit dans ce compte. Le soussigné reconnaît également qu'il lui incombe de veiller à la bonne marche et à la disponibilité du compte pour le versement électronique des dividendes à payer au moment où ils sont exigibles. Le soussigné peut révoquer ou annuler la présente convention en tout temps en envoyant un avis à cet effet au syndic. Le soussigné accepte de conserver l'original signé du présent document pour toute la durée de l'entente si la copie remise au syndic est transmise par télécopieur.

_____ *(Signature du signataire autorisé)* Numéro de téléphone direct : _ _ _ - _ _ _ - _ _ _ _	_____ *(Nom du signataire en caractères d'imprimerie)* _____ *(Titre)*	_____ Date (jj/mm/aaaa)

Superintendent may examine records and documents - Sec. 6(3)

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(3) The Superintendent, or anyone duly authorized in writing by or on behalf of the Superintendent, may with the leave of the court granted on an ex parte application examine the books, records, documents and deposit accounts of a trustee or any other person designated in the order granting that leave for the purpose of tracing or discovering the property or funds of an estate when there are reasonable grounds to believe or suspect that the property or funds of an estate have not been properly disclosed or dealt with and for that purpose may under a warrant from the court enter on and search any premises.

Court order re payments from accounts - Sec. 6(4)
(4) Where the Superintendent, on ex parte application, satisfies the court that it is necessary and in the public interest to do so, the court may issue an order directing a deposit-taking institution that holds a deposit account of a trustee or such other person as is designated in the order not to make payments out of the account until such time as the court otherwise directs.
R.S., 1985, c. B-3, s. 6;
1997, c. 12, s. 5;
2005, c. 47, s. 7(E).

7. and 8. [Repealed, 1992, c. 27, s. 6]

Appointment of employees - Sec. 9
9. Such employees as are required to assist the Superintendent to perform his functions under this Act shall be appointed in accordance with the Public Service Employment Act.
R.S., c. B-3, s. 5.

Investigations or inquiries by Superintendent - Sec. 10
10. (1) If, on information supplied by an official receiver, trustee or other person, the Superintendent suspects, on reasonable grounds, that a person has, in connection with any estate or matter to which this Act applies, committed an offence under this or any other Act of Parliament, the Superintendent may, if it appears to the Superintendent that the alleged offence might not otherwise be investigated, make or cause to be made any inquiries or investigations that the Superintendent considers appropriate.

Pfeiffer v. Canada (Superintendent of Bankruptcy), [1996] 3 FC 584 - Charter and Bill of Rights Challenge to Superintendent's Power to Investigate Trustee

Date:	1996-05-02
Docket:	T-2127-95; T-2130-95
Parallel citations:	1996 CanLII 4059 (FC); 42 CBR (3d) 245; 116 FTR 173
URL:	http://canlii.ca/t/4gcg
Citation:	Pfeiffer v. Canada (Superintendent of Bankruptcy), 1996 CanLII 4059 (FC), [1996] 3 FC 584, <http://canlii.ca/t/4gcg> retrieved on 2013-08-16
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T-2127-95
Sydney H. Pfeiffer (*Applicant*)
v.

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Georges F. Redling, Marc Mayrand, Marc Lamarre, Brian P. Doyle, Uwe Manski and **Attorney General of Canada** (*Respondents*)
and
T-2130-95
Pfeiffer & Pfeiffer (*Applicant*)
v.
Georges F. Redling, Marc Mayrand, Marc Lamarre, Brian P. Doyle, Uwe Manski and **Attorney General of Canada** (*Respondents*)
and
Guylaine House (*Intervenor*)
Indexed as: Pfeifferv. Canada (Superintendent of Bankruptcy) (T.D.)
Trial Division, Tremblay-Lamer J."Montréal, March 20; Ottawa, May 2, 1996.
Bankruptcy " Delegation of powers under Bankruptcy and Insolvency Act, s. 14.01(2) to investigate conduct of trustee " No jurisdiction in delegate tribunal to deal with Charter and Bill of Rights challenges to validity of Act, ss. 14.01 and 14.02.
Constitutional law " Charter of Rights " Enforcement " Delegation of powers under Bankruptcy and Insolvency Act, s. 14.01(2) to investigate conduct of trustee " Delegate tribunal lacking jurisdiction under Charter, s. 24, Constitution Act, s. 52 to deal with challenges to validity of Act, ss. 14.01 and 14.02 " Review of case law on powers of administrative tribunals to consider Charter issues " No jurisdiction in delegate tribunal to deal with questions of law.
Bill of Rights " Delegation of powers under Bankruptcy and Insolvency Act, s. 14.01(2) to investigate conduct of trustee " No jurisdiction in delegate tribunal to deal with questions of law " Corporate applicant, trustee in bankruptcy, cannot invoke Bill of Rights, s. 2(e) as latter protecting rights whereas, for corporation applicant, trustee licence privilege.
In 1993, following an audit of the applicants' operations, the Superintendent of Bankruptcy delegated to a three-member tribunal his powers under subsection 14.02 of the *Bankruptcy and Insolvency Act* to investigate into the applicants' conduct and determine whether their licence as a trustee in bankruptcy should be cancelled. The tribunal's mandate was to examine the report, hear the applicants, establish the rules of procedure that would apply, hold a hearing and cause the proceedings to be recorded, examine the evidence and arguments, give written reasons for its decision and, if need be, appoint another or other trustees to deal with the estates that had been under the applicants' administration. The applicants moved that the tribunal declare that it lacked jurisdiction to proceed under sections 14.01 and 14.02 on the grounds that those sections were unconstitutional as in violation of section 7 of the Charter; that those sections were of no force or effect as inconsistent with paragraph 2(*e*) of the Bill of Rights; that the investigation process provided for in sections 14.01 and 14.02 was in violation of the natural justice requirement of impartiality. The tribunal held that it lacked jurisdiction to determine the constitutional validity of those sections. These were applications to review that decision. The respondents presented a motion to strike the declarations as premature.
The issues were: (1) whether the applications were premature, the tribunal's decision being interlocutory; (2) whether the tribunal erred in concluding that it lacked jurisdiction to declare sections 14.01 and 14.02 unconstitutional; (3) whether the sections were of no force and effect as inconsistent with paragraph 2(*e*) of the Bill of Rights.
Held, the applications should be dismissed.
(1) Since the application was directed against the very existence of the tribunal, there was a special reason justifying judicial review at this stage of the proceedings: this was a final decision disposing of a fundamental question before the tribunal: *Mahabir v. Canada (Minister of Citizenship and Immigration)*.
(2) It was not a matter of the application of the Charter but of section 52 of the *Constitution Act, 1982*. In the Supreme Court of Canada decision in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, La Forest J. declared that an administrative tribunal does not have to meet the definition of court of competent jurisdiction in order to have the necessary authority to subject its enabling statute to Charter scrutiny. The issue is whether in the enabling statute, Parliament expressly or impliedly conferred on the tribunal the obligation to examine questions of law. An examination of the statutory provisions herein leads to the conclusion that the tribunal, through the Superintendent or his delegates, did not have the power to dispose of legal questions. Instead, Parliament provided for an informal hearing process in which the Superintendent is not bound by the rules of evidence. Matters are to be dealt with as the circumstances and a consideration of fairness permit. Nothing in these provisions indicates an intention to give the panel responsibility to decide questions of law. Furthermore, Parliament did not deem it advisable to grant the panel certain powers of investigation under the *Inquiries Act*.
(3) Since only the corporate applicant applied for declaratory relief and served the notice of constitutional questions required by section 57 of the *Federal Court Act*, the alleged violation of paragraph 2(*e*) of the Bill of Rights was examined only in so far as it was concerned.

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Even though the corporate applicant was a "person" within the meaning of paragraph 2(*e*), since a trustee licence, for a corporate applicant, is a privilege and not a right, and since paragraph 2(*e*) protects rights and not privileges, the corporate applicant could not rely on that paragraph.

statutes and regulations judicially considered

Bankruptcy and Insolvency Act (formerly *Bankruptcy Act*), R.S.C., 1985, c. B-3 (as am. by S.C. 1992, c. 27, s. 2), ss. 14.01 (as enacted *idem*, s. 9), 14.02 (as enacted *idem*), 25 (as am. *idem*, s. 10).

Canadian Bill of Rights, R.S.C., 1985, Appendix III, s. 2(*e*).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 24.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 23.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 52.

Federal Court Act, R.S.C., 1985, c. F-7 , ss. 5 (as am. by S.C. 1992, c. 49, s. 127), 18(3) (as am. by S.C. 1990, c. 8, s. 4), 57 (as am. *idem*, s. 19).

Federal Court Rules, C.R.C., c. 663, R. 5.

Immigration Act, 1976, S.C. 1976-77, c. 52.

Inquiries Act, R.S.C., 1985, c. I-11.

cases judicially considered

applied:

Mahabir v. Canada (Minister of Employment and Immigration), reflex, [1992] 1 F.C. 133; (1991), 85 D.L.R. (4th) 110; 15 Imm. L.R. (2d) 303; 137 N.R. 377 (C.A.); *Cyanamid Agricultural de Puerto Rico, Inc. v. Canada (Commissioner of Patents)*, [1983] F.C.J. No. 429 (T.D.) (QL); *Anti-dumping Act (In re) and in re Danmor Shoe Co. Ltd.*, [1974] 1 F.C. 22; (1974), 1 N.R. 422 (C.A.); *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570; (1990), 77 D.L.R. (4th) 94; [1991] 1 W.W.R. 643; 52 B.C.L.R. (2d) 68; 91 CLLC 17,002; 118 N.R. 340; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22; (1991), 81 D.L.R. (4th) 358; 50 Admin. L.R. 1; 36 C.C.E.L. 117; 91 CLLC 14,023; 4 C.R.R. (2d) 12; 126 N.R. 1; *Canada (Attorney General) v. Gill*, reflex, [1992] 3 F.C. 3; (1992), 16 Admin. L.R. (2d) 215; 52 F.T.R. 81 (T.D.); *Canada (Attorney General) v. Racette-Villeneuve*, [1995] A.C.F. No. 581 (T.D.) (QL); *Joys v. M.N.R.*, 1995 CanLII 3537 (FCA), [1996] 1 F.C. 149; (1995), 128 D.L.R. (4th) 385; 189 N.R. 175 (C.A.); *MacBain v. Lederman*, reflex, [1985] 1 F.C. 856; (1985), 22 D.L.R. (4th) 119; 16 Admin. L.R. 109; 6 C.H.R.R. D/3064; 85 CLLC 17,023; 18 C.R.R. 165; 62 N.R. 117 (C.A.); *New Brunswick Broadcasting Co., Limited v. Canadian Radio-television and Telecommunication Commission*, reflex, [1984] 2 F.C. 410; (1984), 13 D.L.R. (4th) 77; 2 C.P.R. (3d) 433; 12 C.R.R. 249; 55 N.R. 143 (C.A.); *National Anti-Poverty Organization v. Canada (Attorney General)*, reflex, [1989] 1 F.C. 208; (1988), 32 Admin. L.R. 1; 21 C.P.R. (3d) 305; 21 F.T.R. 33 (T.D.).

distinguished:

Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5; (1991), 81 D.L.R. (4th) 121; 91 CLLC 14,024; 122 N.R. 361; [1991] OLRB Rep 790; *Laflamme v. Canada (Superintendent of Bankruptcy)*, 1995 CanLII 3596 (FC), [1995] 3 F.C. 174; (1995), 35 C.P.R. (3d) 230; 96 F.T.R. 200 (T.D.); *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75; *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929; (1995), 125 D.L.R. (4th) 583; 30 Admin. L.R. (2d) 1; 12 C.C.E.L. (2d) 1; 24 C.C.L.T. (2d) 217; 95 CLLC 210-027; 30 C.R.R. (2d) 1; 183 N.R. 241; 82 O.A.C. 321.

considered:

Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; (1989), 58 D.L.R. (4th) 577; 25 C.P.R. (3d) 417; 94 N.R. 167; *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, 1990 CanLII 140 (SCC), [1990] 1 S.C.R. 705; (1990), 97 N.S.R. (2d) 181; 68 D.L.R. (4th) 147; 258 A.P.R. 181; 40 C.L.R. 1; 41 C.P.C. (2d) 18; 46 C.R.R. 259; 106 N.R. 11.

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Szczecka v. Canada (Minister of Employment and Immigration) reflex, (1993), 116 D.L.R. (4th) 333; 25 Imm. L.R. (2d) 70; 170 N.R. 58 (F.C.A.); *Santé c. Québec (Procureur général)* (26 novembre 1993), Montréal 500-05-010002-937, J.E. 94-70 (C.S.); *Granville Shipping Co. v. Pegasus Lines Ltd. et al.* reflex, (1994), 86 F.T.R. 77 (F.C.T.D.); *Salinas v. Canada (Minister of Employment and Immigration)*, reflex, [1992] 3 F.C. 221; (1992), 52 F.T.R. 7 (T.D.); *Canada (Attorney General) v. Public Service Staff Relations Board*, reflex, [1990] 1 F.C. 297; (1989), 31 F.T.R. 107 (T.D.); *Bova v. Public Service Commission Appeal Board (Can.)* (1990), 120 N.R. 186 (F.C.A.); *Singh et al. v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177; (1985), 17 D.L.R. (4th) 422; 12 Admin. L.R. 137; 14 C.R.R. 13; 58 N.R. 1; *Wilson v. British Columbia (Medical Services Commission)* 1988 CanLII 177 (BC CA), (1988), 53 D.L.R. (4th) 171; [1989] 2 W.W.R. 1; 30 B.C.L.R. (2d) 1; 34 Admin. L.R. 235; 41 C.R.R. 276 (C.A.); *Howard v. Architectural Institute (B.C.)* reflex, (1989), 39 Admin. L.R. 277; 47 C.R.R. 328 (B.C.S.C.); *Richardson v. Assn. of Pro. Engineers*, reflex, [1990]

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1 W.W.R. 709; (1989), 41 B.C.L.R. (2d) 130 (S.C.); *Harvey v. Law Society of Newfoundland* 1992 CanLII 2774 (NL SCTD), (1992), 93 Nfld. & P.E.I.R. 339; 88 D.L.R. (4th) 487; 292 A.P.R. 339; 2 Admin. L.R. (2d) 306 (Nfld. S.C.); *Ptack c. Comité de l'Ordre des dentistes du Québec*, 1992 CanLII 3303 (QC CA), [1993] R.L. 305 (Que. C.A.); *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863; (1986), 29 D.L.R. (4th) 161; 26 C.C.C. (3d) 481; 52 C.R. (3d) 1; 21 C.R.R. 76; 67 N.R. 241; 16 O.A.C. 81.

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APPLICATIONS for judicial review of the decision of three delegates of the powers of investigation and hearing vested in the Superintendent of Bankruptcy under the *Bankruptcy and Insolvency Act* holding that they did not have jurisdiction to find sections 14.01 and 14.02 of the Act to be unconstitutional, or jurisdiction to declare those sections to be inoperative and contrary to the *Canadian Bill of Rights*. Applications dismissed.

counsel:

Gérald R. Tremblay and *Louis Brousseau* for applicants.

Claude Joyal and *Marcel Gauvreau* for respondents.

Bernard Boucher for intervenor.

solicitors:

McCarthy Tétrault, Montréal, for applicants.

Deputy Attorney General of Canada for respondents.

Bélanger, Sauvé, Montréal, for intervenor.

The following is the English version of the reasons for order rendered by

Tremblay-Lamer J.: There are two applications for judicial review before the Court in which the applicants are seeking to have set aside the decision of Marc Lamarre, Brian Doyle and Uwe Manski, in their capacity as delegates of the powers of investigation and hearing vested in the Superintendent of Bankruptcy under the *Bankruptcy and Insolvency Act*[1] (the Act), holding that they did not have jurisdiction to find sections 14.01 [as enacted by S.C. 1992, c. 27, s. 9] and 14.02 [as enacted *idem*] of the Act to be unconstitutional, or jurisdiction to declare those sections to be inoperative and contrary to the *Canadian Bill of Rights*[2] (the Bill of Rights).

THE FACTS

Pfeiffer & Pfeiffer has held a licence as a trustee in bankruptcy since 1980. The applicant Sydney Pfeiffer has also held such a licence since 1974. He is the president of the firm Pfeiffer & Pfeiffer, which administers more than 1600 estates and whose personnel consists of two trustees and eighty employees. The intervenor Guylaine Houle, who also holds a licence as a trustee in bankruptcy, is a shareholder and director of Pfeiffer & Pfeiffer.

During December 1991 and January 1992, the Superintendent of Bankruptcy, with the assistance of the personnel under his direction and control, conducted an audit of the activities of the applicants, and in April 1992 the applicants received a report prepared by Andy J. Blitzer, C.A.

On December 11, 1992, Mr. Pfeiffer received a letter from Marc Mayrand, Deputy Superintendent of Bankruptcy (Operations), to which was attached a draft report recommending that the Superintendent cancel the applicants' trustee licence. The report noted flaws in the administration of some estates which violated the Act, the regulations, the guidelines and the policies. More specifically, the report pointed to the following anomalies:

(a) investing consolidated estate funds in trust companies and treasury bills;

(b) registering certificates of deposit of consolidated funds not in trust for estates;

(c) under-allocating interest to estate files;

(d) withdrawing final fees without recognizing the interim draw already taken;

(e) withdrawing fees in excess of the fees taxed;

(f) delegating signing authority on checks [*sic*] to an unauthorized person.

On April 28, 1993, the solicitor for Pfeiffer & Pfeiffer wrote a letter to the office of the Superintendent of Bankruptcy setting out a list of reasons why Pfeiffer & Pfeiffer should retain its trustee licence.

On June 16, 1993, Marc Mayrand signed a report similar to the draft that had been submitted to the parties earlier, recommending nonetheless that the Superintendent of Bankruptcy, George F. Redling, cancel the applicants' trustee licence.

On December 31, 1993, the Superintendent of Bankruptcy informed the parties that under subsection 14.01(2) of the Act, he had delegated his powers and functions as Superintendent to a panel composed of Marc Lamarre, a retired judge, as

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Chairman of the panel, and Brian Doyle and Uwe Manski, both trustees in bankruptcy. Accordingly, the Superintendent issued a delegation instrument authorizing the panel to act in accordance with the powers conferred by the Act. The panel's specific mandate is described in the delegation instrument as follows:

1. considering the report in respect of the trustee received by the Superintendent from the Deputy;
2. affording the trustee the opportunity to be heard required by subsection 14.02(1) of the BIA in respect of the Deputy's report and notice of intention to exercise the powers set out in paragraphs 14.01(1)(*a*) to (*c*) of the BIA in relation to the trustee's licence;
3. determining, in conformity with the provisions of paragraphs 14.02(2)(*b*) and (*c*) and in consultation with the trustee and the Deputy or their respective counsel, the procedural rules that shall apply in the course of affording the trustee the opportunity to be heard;
4. conducting, under the presidency of the chairman, the hearing at which the trustee is given the opportunity to be heard;
5. causing, for the purposes of paragraph 14.02(2)(*d*) of the BIA, a stenographic, electronic or other record to be taken of the proceedings at which the trustee is given the opportunity to be heard;
6. considering the evidence and submissions of the trustee and the Deputy;
7. deciding whether, on the balance of the evidence before the panel, the recommendation of the Deputy in respect of the license of the trustee should be accepted, varied or rejected, and, in accordance with subsection 14.02(4) of the BIA, to give the decision and the reasons for the decision of the panel in writing to the trustee and to the Deputy within ninety days after the conclusion of the hearing; and,
8. where the panel accepts or varies the recommendation of the Deputy and decides to exercise the power to suspend or cancel the license of the trustee, directing, after hearing representations from the trustee and the Deputy, another or other trustees to deal, in the manner directed by the panel, with the property in the estates that were, immediately prior to the cancellation or suspension of the licence, under the administration of the trustee.

On June 3, 1994, the applicants filed a "Motion for declaration of lack of jurisdiction" with the panel. They were arguing, primarily, that:

" sections 14.01 and 14.02 of the Act are unconstitutional, in that they violate section 7 of the *Canadian Charter of Rights and Freedoms* .[3]

" sections 14.01 and 14.02 of the Act are inoperative because they are inconsistent with paragraph 2(*e*) of the Bill of Rights.

" the process of investigation and hearing established by sections 14.01 and 14.02 of the Act violate the impartiality requirements imposed by the principles of natural justice.

Accordingly, they asked the panel to declare that it was not competent to proceed, having regard to the invalidity of sections 14.01 and 14.02 of the Act.

On September 1, 1995, the panel rendered its decision in which it concluded that it did not have jurisdiction to determine the constitutionality of the sections in question. It concluded as follows:

The tribunal and/or the Superintendent does not have and has never had the power in its enabling statute to review the constitutionality of its duties and the powers conferred on it by the *Bankruptcy and Insolvency Act*. No such power, whether express or implied, is found anywhere in the Act.

We have no jurisdiction to determine constitutional questions, or to made declarations that only the superior courts may make, or to determine the constitutional validity of the enabling statute under which our mandate was given to us.

For the foregoing reasons, the two motions by the applicants Sydney H. Pfeiffer and Pfeiffer & Pfeiffer Inc. are denied. [*sic*]

That decision is the subject of this judicial review. However, on November 9, 1995, the respondents filed a motion to strike out the two originating notices of motion. On the consent of the parties, Mr. Justice Teitelbaum ordered that the motion be heard at the hearing on the merits. At the time of the hearing before me, the respondents chose not to argue that motion at any length, although it remains in the record. I shall therefore deal with it first.

THE ISSUES

1. Are these originating notices of motion premature, in that the decision of the panel is interlocutory, and should they accordingly be struck out?
2. Did the panel err in concluding that it did not have jurisdiction to declare that sections 14.01 and 14.02 of the Act are unconstitutional and inoperative?
3. Are sections 14.01 and 14.02 inoperative in that they are inconsistent with paragraph 2(*e*) of the Bill of Rights?

THE LEGISLATION

Sections 14.01 and 14.02 of the Act provide:

14.01 (1) The Superintendent, after making or causing to be made an investigation into the conduct of a trustee, may, where it is in the public interest to do so,

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(*a*) cancel the licence of a trustee;
(*b*) suspend the licence of a trustee; or
(*c*) place such conditions or limitations on the licence of a trustee as the Superintendent considers appropriate.
(2) The Superintendent may delegate by written instrument, on such terms and conditions as are therein specified, any or all of the Superintendent's powers, duties and functions under paragraphs 1(*a*) to (*c*) or section 14.01 or 14.03.
(3) Where the Superintendent delegates in accordance with subsection (2), the Superintendent or the delegate shall
(*a*) where there is a delegation in relation to trustees generally, give written notice of the delegation to all trustees; and
(*b*) whether or not paragraph (*a*) applies, give written notice of the delegation of a power to any trustee who may be affected by the exercise of that power, either before the power is exercised or at the time the power is exercised.
14.02 (1) Where the Superintendent intends to exercise any of the powers set out in paragraphs 14.01(1)(*a*) to (*c*), the Superintendent shall send the trustee written notice of the powers that the Superintendent intends to exercise and the reasons therefor and afford the trustee a reasonable opportunity for a hearing.
(2) At a hearing referred to in subsection (1), the Superintendent
(*a*) has the power to administer oaths;
(*b*) is not bound by any legal or technical rules of evidence in conducting the hearing;
(*c*) shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit; and
(*d*) shall cause a summary of any oral evidence to be made in writing.
(3) The notice referred to in subsection (1) and, where applicable, the summary of oral evidence referred to paragraph 2(*d*), together with such documentary evidence as the Superintendent receives in evidence, form the record of the hearing.
(4) The decision of the Superintendent after a hearing referred to in subsection (1), together with the reasons therefor, shall be given in writing to the trustee not later than ninety days after the conclusion of the hearing and may, where the Superintendent considers it in the public interest to do so, be made public after the decision has been given to the trustee.
(5) A decision of the Superintendent given pursuant to subsection (4) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside pursuant to the *Federal Court Act*.

ANALYSIS

1. Preliminary motion to strike out the originating notices of motion

The Attorney General submitted that the application for judicial review brought by the applicants from the decision of the panel is premature because that decision was in fact an interlocutory decision. The respondent relied on the decision of the Federal Court of Appeal in *Szczecka v. Canada (Minister of Employment and Immigration)*,[4] in which Mr. Justice Létourneau held that as a general rule, time should not be spent on reviewing interlocutory decisions, except in special circumstances. According to the respondent, the Court has jurisdiction to dismiss the originating notices of motion under its general power, as governed by section 5 of the *Federal Court Act*.[5]

The applicants argued, for their part, that it was not premature to raise the issue of bias before the panel. It is settled law that bias on the part of a tribunal must be raised without delay. For example, in *Santé c. Québec (Procureur général)*,[6] the Court held that failure to raise the issue of bias at the first opportunity amounted to waiver of that ground for challenging the jurisdiction of the tribunal.

In my opinion, there is an initial procedural problem, since the *Federal Court Rules* [C.R.C., c. 663] make no provision for dismissing a motion.[7] Although the Attorney General cited section 5, it is used only in exceptional cases. In the instant case, the decision relates to the jurisdiction of the administrative tribunal to determine constitutional questions or make declaratory judgments. The tribunal held that it did not have jurisdiction to determine such a question. The same situation arose in *Laflamme v. Canada (Superintendent of Bankruptcy)*,[8] and the Court decided the issue immediately on an application for judicial review.

In *Cyanamid Agricultural de Puerto Rico, Inc. v. Canada (Commissioner of Patents)*,[9] Mr. Justice Mahoney held that under Rule 5, judicial review could be permitted in interlocutory cases on the question of jurisdiction, at page 4 (QL):

. . . where the motion itself is apt to be time consuming and where there is, as here, a clear question of jurisdiction which may determine the entire matter, common sense dictates, and Rule 5 permits, that the Court deal with the preliminary objection in advance.

As well, it appears that judicial review of a decision of a tribunal relating to a question of jurisdiction may avoid the costs of a hearing on the merits. In *Anti-dumping Act (In re) and in re Danmor Shoe Co. Ltd.*,[10] the Federal Court of Appeal held:

In my view, the object of sections 18 and 28 of the *Federal Court Act* is to provide a speedy and effective judicial supervision of the work of federal boards, commissions and other tribunals with a minimum of interference with the work of those tribunals. Applying section 11 of the *Interpretation Act*, with that object in mind, to the question raised by these section 28 applications, it must be recognized that the lack of a right to have the Court review the position taken by a

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tribunal as to its jurisdiction or as to some procedural matter, at an early stage in a hearing, may well result, in some cases, in expensive hearings being abortive. On the other hand, a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such party to frustrate the work of the tribunal. [Emphasis mine.]

In my opinion, since this issue involves an attack on the very existence of the tribunal, there is a special reason permitting judicial review at this stage of the proceedings.[11] As the Court held in *Mahabir v. Canada (Minister of Employment and Immigration)*,[12] "it is a final decision that disposes of a substantive question before the tribunal".

Accordingly, the motion to strike is dismissed.

2. Power of the tribunal to examine questions relating to the Charter and the Bill of Rights

The applicants and the intervenor submitted that the role played by the Minister's delegates is comparable to that played by an administrative tribunal in that they exercise judicial or quasi-judicial power.[13] The guiding principles that apply in this area are set out in three decisions of the Supreme Court of Canada: *Douglas/Kwantlen Faculty Assn. v. Douglas College*;[14] *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board);*[15] and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*.[16] These decisions hold that an administrative tribunal may have jurisdiction to determine constitutionality, either by virtue of the power conferred by subsection 24(1) of the Charter or by virtue of a tribunal's duty to apply the Constitution in carrying out the mandate assigned to it by statute and under section 52 of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. In the instant case, the applicants suggested that in the absence of specific enabling provisions in the Act itself, the Minister's delegates very probably do not have the powers set out in section 24 of the Charter. However, it has been recognized that the power to apply the Constitution under section 52 of the *Constitutional Act, 1982* may devolve to a tribunal, either expressly or by implication. In the case at bar, it is clear that the Minister's delegates must apply and interpret at least the Act in order to determine whether the applicants have violated its provisions. *Inter alia*, since it is alleged that the applicants acted improperly in the management of their trust accounts, the Minister's delegates will surely have to determine how section 25 [as am. by S.C. 1992, c. 27, s. 10] of the Act is to be interpreted.

For his part, the Attorney General submitted that the Superintendent is neither a tribunal nor a court of competent jurisdiction for the purpose of determining the constitutionality of sections 14.01 and 14.02 of the Act under section 24 of the Charter and section 52 of the *Constitution Act, 1982* and in accordance with the decisions of the Supreme Court of Canada.[17] The respondents argued that the question was settled by the decision in *Laflamme*[18] and there was nothing substantially different in the situation now before the Court.

In short, we must examine the trilogy of decisions of the Supreme Court of Canada in *Douglas College, Cuddy Chicks* and *Tétreault-Gadoury* with respect to the jurisdiction of administrative tribunals to determine Charter questions. The issue in the case at bar is not the application of subsection 24(1) of the Charter, which allows a court of competent jurisdiction to grant a remedy. Rather, we shall have to consider the application of section 52 of the *Constitution Act, 1982*, which provides:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

With respect to the application of this section by an administrative tribunal, the principle set out in *Douglas College* is that an administrative tribunal which is given the power to interpret any statute also has the power to determine whether the statute is constitutional. The decision in *Cuddy Chicks* established that a tribunal whose task it is to determine questions of law may also apply the Charter.

Mr. Justice La Forest summarized the situation as follows in *Cuddy Chicks*, at pages 14-15:

An administrative tribunal need not meet the definition of a court of competent jurisdiction in s. 24(1) of the *Charter* in order to have the necessary authority to subject its enabling statute to *Charter* scrutiny. In the present case, the relevant inquiry is not whether the tribunal is a "court" [within the meaning of subsection 24(1) of the Charter] but whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter* .

. . .

The legislature expressly, and without reservation, conferred authority on the Board to decide points of law. In addition, the Act confers powers on the Board to determine questions of law and fact relating to its own jurisdiction. Section 124, for example, gives it authority to decide if a matter is arbitrable. The issue, then, is whether this authority with respect to questions of law can encompass the question of whether a law violates the *Charter*. It is clear to me that a *Charter* issue must constitute a question of law; indeed, the *Charter* is part of the supreme law of Canada. This comports with the view expressed in *Douglas College* that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to interpret the *Charter* .

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In *Tétreault-Gadoury*,[19] the Supreme Court of Canada held that the powers of an administrative tribunal to determine questions of law and to interpret any law could derive not only from an express power but also from an implied power. This statement of the law was reiterated in *Canada (Attorney General) v. Gill*,[20] in which the Court stated, at page 20:

Recent Supreme Court of Canada decisions have confirmed that where an administrative tribunal has an express authority to interpret and apply statutes[21] or where it has been expressly authorized to determine questions of law[22] it may apply the Charter to determine the validity of laws it is applying. In *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*[23] the Court also held that such power may be implied even though not expressly granted.

In *Laflamme*,[24] the provisions of the Act were similar to those with which we are concerned in the case at bar. Mr. Justice Noël was of the opinion that the legislative grant of authority must give the tribunal not only the power to interpret its enabling legislation, but also jurisdiction over the subject-matter resulting from reliance on the Charter and the remedy sought. In that case, the Court held that those powers must be found in the enabling statute and be among the powers that Parliament intended to confer on it.

While I have reached the same conclusion as Mr. Justice Noël, I shall not follow the same route as my colleague did. In my view, this is the approach that must be taken when the issue is whether the tribunal in question is a court of competent jurisdiction within the meaning of subsection 24(1) of the Charter. This analysis is not required when the issue is the power of an administrative tribunal to examine the constitutionality of its enabling statute under section 52 of the *Constitution Act, 1982*.

In *Weber v. Ontario Hydro*,[25] and more recently in *Mooring v. Canada (National Parole Board)*,[26] the Supreme Court applied the "three-pronged test" required by subsection 24(1), that is, that a tribunal will be a court of competent jurisdiction only if it has jurisdiction over the parties, the subject-matter of the proceedings and the remedy sought. These tests had long since been established, in *Mills v. The Queen* ,[27] for the purpose of determining whether a tribunal is a court of competent jurisdiction.

In addition, in *Cuddy Chicks*, Mr. Justice La Forest himself acknowledged that this analytical framework, that is, that there must be jurisdiction over the whole of the matter before the tribunal, reflects the prerequisites for a tribunal to be a court of competent jurisdiction within the meaning of subsection 24(1) of the Charter, but that an administrative tribunal need not meet the definition of a court of competent jurisdiction in order to have the necessary authority to subject its enabling statute to Charter scrutiny.[28]

Despite what he said in *Cuddy Chicks* and his intention of analysing the case from the standpoint of section 52, Mr. Justice La Forest continued his analysis by applying the three-pronged test, as if the issue was whether it was a court of competent jurisdiction under subsection 24(1). This is the same type of analysis as was done by Mr. Justice Noël in *Laflamme*.[29]

In the instant case, I do not believe that it is necessary to analyze the question from this standpoint, since, as Mr. Justice La Forest stated, the tribunal need not meet the definition of a court of competent jurisdiction. In the case at bar, no remedy is sought. Rather, the parties are seeking a declaration that certain provisions of the Act are inoperative since they are contrary to the Charter.[30] In *Mahabir v. Canada (Minister of Employment and Immigration)*,[31] the Federal Court of Appeal held:

Rather subsection 24(1) gives a remedial power, and subsection 52(1) a declaratory power, to be exercised in disposing of matters properly before the Court.

In my opinion, we must determine whether Parliament gave the tribunal, in its enabling statute, expressly or by implication, a duty to examine questions of law. This is the approach taken by the Trial Division in *Canada (Attorney General) v. Gill*,[32] and by me in *Canada (Attorney General) v. Racette-Villeneuve*.[33]

What are the powers of the Superintendent or his delegates? The Superintendent has the power to suspend or cancel the licence of a trustee or place such conditions on the licence as he considers appropriate where it is in the public interest to do so, after affording the trustee an opportunity for a hearing.

Of course, in order to do that, he must apply his enabling statute. In my opinion, however, that is not sufficient for us to conclude that he has the power to determine questions of law. As Mr. Justice Noël stated in *Laflamme*,[34] all administrative tribunals may apply their enabling statute. We must analyse the statutory provision, the object of the provision and the general scheme of the Act in order to determine whether Parliament intended to give the tribunal the power to decide questions of law.

In the case at bar, after examining the statutory provisions, I conclude that the panel, through the Superintendent or his delegates, did not have the power to determine questions of law.

Quite the contrary; Parliament has provided an informal process for hearings, and specified that the Superintendent is not bound by the rules of evidence. Matters must be dealt with as the circumstances and a consideration of fairness permit. There is nothing in these provisions to indicate any intention to give the panel responsibility for determining questions of law. In addition, Parliament did not deem it advisable to grant the panel certain powers of investigation under the *Inquiries*

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Act,[35] which powers the Trial Division took into account in *Canada (Attorney General) v. Gill*[36] in concluding that the tribunal had declaratory power.

In *Racette-Villeneuve*,[37] in which I held that the Entitlement Board had jurisdiction to determine Charter questions, several statutory provisions in the enabling legislation implicitly gave the Entitlement Board the power to rule on questions of law. For example, the enabling statute provided that the Board had to provide the applicant with a summary of the law applicable to the applicant's case and the Board's interpretation thereof, to hold hearings *in camera* if it considered that this would not be contrary to the public interest (such a finding necessarily involves points of law) and to determine the legal duty to maintain. In addition, the act granted it certain powers under the *Inquiries Act*.[38]

I was compelled to conclude from that analysis that the panel could determine questions of law. This is not the case here. I have been unable to find any provision that indicates that Parliament intended to assign any such responsibility to it. The panel therefore did not err in determining that it did not have the power to decide the constitutional questions submitted.

The applicant Sydney Pfeiffer did not apply for a declaration, as he could have under subsection 18(3) [as am. by S.C. 1990, c. 8, s. 4] of the *Federal Court Act*.[39] He therefore did not serve the notice of constitutional question required by section 57 [as am. *idem*, s. 19] of the *Federal Court Act*. Accordingly, this Court cannot consider the question of whether the statutory provisions violate his rights under section 7 of the Charter and paragraph 2(*e*) of the Bill of Rights. It has been settled since *Tétreault-Gadoury*[40] that in a judicial review the Court is limited to "overseeing and controlling the legality"[41] of administrative decisions and has no "jurisdiction to make a final determination of the constitutional question"[42] where the administrative tribunal does not itself have jurisdiction over constitutional questions.

The applicant Pfeiffer & Pfeiffer has asked for a declaration that sections 14.01 and 14.02 of the Act are inoperative and contrary to the Bill of Rights. Accordingly, the corporate applicant served the constitutional notice required by section 57 of the *Federal Court Act*.[43] The Bill of Rights will be examined only in so far as that application was made by the corporate applicant.

Of course, Pfeiffer & Pfeiffer could not have argued that the provisions of the Act violate its rights under section 7 of the Charter. The wording of section 7 provides that "everyone" has the right to protection of life, liberty and security of the person. In *Irwin Toy Ltd. v. Quebec (Attorney General)* ,[44] the Supreme Court of Canada held that the expression "everyone" excluded corporations and included only human beings. As well, in *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.* ,[45] the Court again held that a corporation could not be deprived of the right to life, liberty or security of the person, and accordingly that it could not rely on section 7 of the Charter.

3. Are the provisions of the Act inoperative in that they are contrary to paragraph 2(*e*) of the *Canadian Bill of Rights*?

Pfeiffer & Pfeiffer contended that the provisions of the Act are inoperative as contrary to paragraph 2(*e*) of the *Canadian Bill of Rights*.

Paragraph 2(*e*) of the Bill of Rights provides:

2. [Construction of law] Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

. . .

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

The first issue here is the scope of the expression "person" which is found in paragraph 2(*e*). In *New Brunswick Broadcasting Co., Limited v. Canadian Radio-television and Telecommunications Commission*,[46] the Federal Court of Appeal, commenting on paragraph 2(*e*), stated:

In this section the word "person" is used in contexts which suggest that it is concerned with natural persons but I see no compelling reason why the word should not be interpreted as referring as well to corporations wherever the subject-matter of a provision in which it is found can have application to corporations. Paragraph 2(*e*) is, in my view, such a provision.

It is therefore possible, in the case at bar, for the corporation to rely on paragraph 2(*e*). Accordingly, we must consider whether, in the instant case, the Act deprives the corporation of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of its rights and obligations.

In *MacBain v. Lederman*,[47] the Federal Court of Appeal set out the tests that must be met before it can be found that paragraph 2(*e*) of the Bill of Rights has been violated, at pages 877-878:

. . . Firstly, it must be shown that a party's "rights and obligations" fall to be determined by a federal tribunal; and, secondly , it must be established that the party concerned was not afforded a "fair hearing in accordance with the principles of fundamental justice".

The decision in *Singh et al. v. Minister of Employment and Immigration*[48] gave renewed scope to the *Canadian Bill of Rights*. Madam Justice Wilson acknowledged that the dichotomy between privileges and rights had played a role in

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narrowing the scope of the Bill of Rights, and that the analysis that derived from that dichotomy could not apply in relation to the Charter. She therefore turned to the Charter for her analysis of the issue in *Singh*.

However, Mr. Justice Beetz chose to interpret the *Immigration Act, 1976* [S.C. 1976-77, c. 52] having regard to the Bill of Rights. With respect to the first criterion to be met, in relation to the definition of "rights and obligations", he stated, at page 228:

Be that as it may, it seems clear to me that the ambit of s. 2(*e*) is broader than the list of rights enumerated in s. 1 which are designated as "human rights and fundamental freedoms" whereas in s. 2(*e*), what is protected by the right to a fair hearing is the determination of one's "rights and obligations", whatever they are and whenever the determination process is one which comes under the legislative authority of the Parliament of Canada. It is true that the first part of s. 2 refers to "the rights or freedoms herein recognized and declared", but s. 2(*e*) does protect a right which is fundamental, namely "the right to a fair hearing in accordance with the principles of fundamental justice" for the determination of one's rights and obligations, fundamental or not. It is my view that . . . the right guaranteed by s. 2(*e*) is in no way qualified by the "due process" concept mentioned in s. 1(*a*).

Mr. Justice Beetz concluded that the process of determining refugee claims involved the determination of rights and obligations. However, he added:

It follows also that this case is distinguishable from cases where a mere privilege was refused or revoked, such as *Prata v. Minister of Manpower and Immigration*, 1975 CanLII 7 (SCC), [1976] 1 S.C.R. 376, and *Mitchell v. The Queen*, 1975 CanLII 167 (SCC), [1976] 2 S.C.R. 570.[49]

Most importantly, Mr. Justice Beetz concluded that the "rights" referred to in paragraph 2(*e*) of the Bill of Rights included rights that went beyond the fundamental rights usually recognized under the concept of "natural justice" or "procedural fairness". However, a case must nonetheless involve the determination of a person's "rights", and a mere privilege will not be protected by paragraph 2(*e*).

The question is therefore whether the revocation of a licence to carry on one's business meets the definition of the determination of a right.

There is a body of case law that recognizes that the practice of a profession may constitute a right, and that this right may be protected by either section 7 of the Charter[50] or section 23 of the Quebec Charter [*Charter of Human Rights and Freedoms*, R.S.Q., c. C-12].[51] It could be argued that this characterization is appropriate, by analogy, in the context of our analysis of paragraph 2(*e*) of the Bill of Rights. I do not believe so. As we saw earlier, Pfeiffer & Pfeiffer alone has brought an application under paragraph 2(*e*). A corporation, unlike an individual, cannot claim to be practising a profession. The interests of the corporation in the case at bar are purely economic, and accordingly obtaining a licence can result in nothing more, in my opinion, than a privilege.

A "licence" is defined in the *Petit Larousse illustré* , 1985 as follows:

[translation] Permission granted by the public authorities to practise certain professions, and to import or export various products; authorization to exploit a patent.

Stroud's Judicial Dictionary of Words and Phrases[52] defines a licence as follows:

When one finds the word "licence" used in a statute the presumption is that it is intended to designate a purely personal privilege.

It is quite common for it to be necessary to obtain a licence in order to operate a business. For example, the individual in question in *Joys v. M.N.R.*[53] had a commercial fishing licence. The Federal Court of Appeal held that the issuance of a licence was a function of the Minister's discretion, and added, at page 164:

It is clear law that a fishing licence is a privilege granted by the Minister and in the renewal of which the licence holder has no vested right.

In *New Brunswick Broadcasting Co., Limited v. Canadian Radio-television and Telecommunications Commission*,[54] the CRTC had limited the renewal of broadcasting licences to the company in question. The Court of Appeal acknowledged that the broadcasting company had a licence at the time a direction concerning renewal was issued, and held, with respect to the application of paragraph 2(*e*) of the Bill of Rights, at page 429:

The appellant had, however, no vested or other property right to have its licences renewed or to have the authority of the Commission maintained either until the disposition of its application or for the future.

Having regard to these decisions, it would be difficult for me to conclude that the revocation of the applicants' licence meets the definition of a "right". In the circumstances, since this was merely a privilege, Pfeiffer & Pfeiffer does not satisfy the first element of the test developed in *MacBain* and accordingly cannot rely on paragraph 2(*e*) of the Bill of Rights.

For these reasons, the applications for judicial review are dismissed.

[1] R.S.C., 1985, c. B-3, as am. by S.C. 1992, c. 27, s. 2.

[2] S.C. 1960, c. 44, reproduced in R.S.C., 1985, Appendix III.

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[3] Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].
[4] reflex, (1993), 116 D.L.R. (4th) 333 (F.C.A.).
[5] R.S.C., 1985, c. F-7 , s. 5 [as am. by S.C. 1992, c. 49, s. 127].
[6] (November 26, 1993), Montréal 500-05-010002-937, JE 94-70 (S.C.).
[7] *Granville Shipping Co. v. Pegasus Lines Ltd. et al.* reflex, (1994), 86 F.T.R. 77 (F.C.T.D.).
[8] 1995 CanLII 3596 (FC), [1995] 3 F.C. 174 (T.D.).
[9] (May 31, 1983), T-153-83, [[1983] F.C.J. No. 429 (T.D.) (QL).
[10] [1974] 1 F.C. 22 (C.A.), at p. 34.
[11] Cases in which the Court has intervened in interlocutory decisions: *Salinas v. Canada (Minister of Employment and Immigration)*, reflex, [1992] 3 F.C. 221 (T.D.); *Canada (Attorney General) v. Public Service Staff Relations Board*, reflex, [1990] 1 F.C. 297 (T.D.); *Bova v. Public Service Commission Appeal Board (Can.)* (1990), 120 N.R. 186 (F.C.A.).
[12] reflex, [1992] 1 F.C. 133 (C.A.), at p. 140.
[13] R. Dussault and L. Borgeat, *Administrative Law: A Treatise*, Vol. 1, 2nd ed., Toronto: Carswell, 1985, at pp. 122-127; P. Garant, *Précis de droit des administrations publiques*, Cowansville: Yvon Blais, 1987, at pp. 65-66, 76-77; P. Garant, *Droit administratif*, Vol. 1, 3rd ed. Cowansville: Yvon Blais, 1991, at pp. 159-163.
[14] 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570.
[15] 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5.
[16] 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22.
[17] *Douglas College, Cuddy Chicks, Tétreault-Gadoury, supra* notes 14, 15 and 16; *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75.
[18] *Supra*, note 8.
[19] *Supra*, note 16, at p. 32.
[20] reflex, [1992] 3 F.C. 3 (T.D.).
[21] *Douglas College, supra*, note 14.
[22] *Cuddy Chicks, supra*, note 15.
[23] *Tétreault-Gadoury*, *supra*, note 16, at pp. 37-38.
[24] *Supra*, note 8.
[25] 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929.
[26] *Supra*, note 17.
[27] 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863.
[28] *Supra*, note 15, at p. 14.
[29] *Supra*, note 8.
[30] *Mahabir v. Canada (Minister of Employment and Immigration), supra*, note 12.
[31] *Ibid.*, at p. 138.
[32] *Supra*, note 20.
[33] (April 13, 1995), T-1259-94 [[1995] A.C.F. No. 581 (T.D.) (QL).
[34] *Supra*, note 8.
[35] R.S.C., 1985, c. I-11.
[36] *Supra*, note 20.
[37] *Supra*, note 33.
[38] *Supra*, note 35.
[39] *Supra*, note 5.
[40] *Supra*, note 16.
[41] *Ibid.*, at p. 37.
[42] *Ibid.*, at pp. 37-38.
[43] *Supra*, note 5.
[44] 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927.
[45] 1990 CanLII 140 (SCC), [1990] 1 S.C.R. 705.
[46] ;*New Brunswick Broadcasting Co., Limited v. Canadian Radio-television and Telecommunications Commission*, [1984] 2 F.C. 410 (C.A.), at p. 428; the same conclusions are found in *National Anti-Poverty Organization v. Canada (Attorney General)*, reflex, [1989] 1 F.C. 208 (T.D.), at p. 236.
[47] reflex, [1985] 1 F.C. 856 (C.A.).
[48] 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177.
[49] *Ibid.*, at p. 228.

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[50] *Wilson v. British Columbia (Medical Services Commission)* 1988 CanLII 177 (BC CA), (1988), 53 D.L.R. (4th) 171 (B.C.C.A.), at p. 195; *Howard v. Architectural Institute (B.C.)* reflex, (1989), 39 Admin. L.R. 277 (B.C.S.C.), at pp. 283-286; *Richardson v. Assn. of Pro. Engineers*, reflex, [1990] 1 W.W.R. 709 (B.C.S.C.), at pp. 716-717; *Harvey v. Law Society of Newfoundland* 1992 CanLII 2774 (NL SCTD), (1992), 93 Nfld. & P.E.I.R. 339 (S.C.), at pp. 349-351, 352-353.
[51] *Ptack c. Comité de l'Ordre des dentistes du Québec*, 1992 CanLII 3303 (QC CA), [1993] R.L. 305 (Que. C.A.), at pp. 310-311.
[52] 5th ed., 1986.
[53] 1995 CanLII 3537 (FCA), [1996] 1 F.C. 149 (C.A.).
[54] *Supra*, note 46.

Groupe G. Tremblay Syndics Inc. v. Canada (Superintendent of Bankruptcy), [1997] 2 FC 719 - Venue to Challenge Superintendent's Actions

Date:	1997-03-12
Docket:	T-1918-95; T-1952-95
Parallel citations:	1997 CanLII 6334 (FC); 147 DLR (4th) 739; 19 CBR (4th) 199; 128 FTR 81
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T-1918-95
Groupe G. Tremblay Syndics Inc. and **Louis Drolet, Trustee** (*Applicants*)
v.
Superintendent of Bankruptcy, Georges R. Redling and **Deputy Superintendent, Policy, Programs and Standards, Marc Mayrand** (*Respondents*)
and
Attorney General of Canada and **François A. Gouin, Trustee** (*Mis-en-cause*)
T-1952-95
Gilles M. Tremblay, Trustee (*Applicant*)
v.
Superintendent of Bankruptcy, Georges R. Redling and **Deputy Superintendent, Policy, Programs and Standards, Marc Mayrand** and **Pierre Lecavalier in his capacity as Deputy Administrator of the Office of the Superintendent of Bankruptcy** and **Attorney General of Canada** (*Respondents*)
Indexed as: Groupe G. Tremblay Syndics Inc. v. Canada (Superintendent of Bankruptcy) (T.D.)
Trial Division, Tremblay-Lamer J."Montréal, January 20; Ottawa, March 12, 1997.
Federal Court jurisdiction " Trial Division " Judicial review of Deputy Superintendent of Bankruptcy's decision to seize records administered by applicants, entrust them to guardian until completion of investigation, disciplinary hearing " "Decision" within Federal Court Act, s. 18.1 " Having final effect on applicants' rights as seized records not likely to be returned until end of disciplinary process " Administration of seized records probably complete by end of that process.
Administrative law " Judicial review " Deputy Superintendent of Bankruptcy seizing records administered by applicants, entrusting them to guardian until completion of investigation, disciplinary hearing " Not exercising discretion for improper purposes, in bad faith, or in arbitrary, unfair, unreasonable manner " Bankruptcy and Insolvency Act, s. 14.03 authorizing conservatory measures to protect public interest " Duty to act quickly to protect estates " Applicants not taking any of numerous opportunities to provide explanations of misconduct " Federal Court Act, s. 18.1(4) authorizing review of findings of fact not supported by evidence or that assessment of evidence as whole show to be unreasonable " In light of evidence of serious misconduct in administration, decision to take conservatory measures reasonable.
Bankruptcy " Judicial review of Deputy Superintendent of Bankruptcy's decision under Bankruptcy and Insolvency Act, s. 14.03 to seize records administered by applicants, entrust them to guardian until completion of investigation, disciplinary hearing " Auditor's report disclosing serious misconduct " RCMP also investigating applicants' conduct " Given seriousness of alleged irregularities, seizure intended to preserve estate records " Once relationship of trust disintegrated, Deputy Superintendent compelled to seize all records given fiduciary relationship between trustees, clients " Power to

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"preserve" estates in s. 14.03 not used to "recover" estate records " Conservatory measures taken to prevent further misconduct.

Constitutional law " Charter of Rights " Life, liberty and security " Judicial review of Deputy Superintendent of Bankruptcy's decision pursuant to Bankruptcy and Insolvency Act, s. 14.03, to seize records administered by applicants, entrust them to guardian until completion of investigation, disciplinary hearing " Right to liberty including right to practice profession " Not at issue herein as conservatory measures not affecting existence, validity of trustee licence " S. 14.03 not affecting right to practice profession " Doctrine of vagueness inapplicable as circumstances, purpose of conservatory measures specified, sufficient guidance for legal debate provided.

Constitutional law " Charter of Rights " Criminal process "Judicial review of Deputy Superintendent of Bankruptcy's decision, pursuant to Bankruptcy and Insolvency Act, s. 14.03, to take possession of records administered by applicants, entrust them to guardian until completion of investigation, disciplinary hearing " Taking of possession constituting seizure " As applicant not consenting freely, voluntarily to seizure, not waiving s. 8 guarantee " Purpose of ss. 14.01, 14.02, 14.03 supervision of trustees' administrative conduct " Documents administered by trustees public " Expectation of privacy lower than that associated with private, personal documents " Not requiring strict application of criteria established by S.C.C. in Hunter et al. v. Southam Inc. for determining whether seizure reasonable " Necessary to balance reasonable expectation of privacy, seriousness of intrusion " Since search of private premises, not part of regulatory inspection, degree of intrusion greater " Must be reasonable grounds to believe conservatory measures involving search, seizure will make it possible to "preserve" records of estates " To extent authorizing conservatory measures in nature of seizure where no reasonable grounds to believe measures enabling preservation of records, s. 14.03(1)(b) infringing Charter, s. 8 " Reasonable grounds herein to believe conservatory measures enabling preservation of records of estates.

Construction of statutes " Bankruptcy and Insolvency Act, s. 14.03(1)(b) found to have infringed Charter, s. 8 to extent authorizing conservatory measures in nature of seizure where no reasonable grounds to believe measures enabling preservation of records " S. 14.03(1)(b) "read down" so that conservatory measures in nature of "seizure" not authorized unless Superintendent of Bankruptcy or delegate having reasonable grounds to believe measures enabling preservation of records of estates.

This was an application for judicial review of the Deputy Superintendent of Bankruptcy's decision to seize records administered by the applicants and entrust them to a guardian until the completion of the investigation and disciplinary hearing into the applicants' conduct and administration. Louis Drolet was a trustee in bankruptcy against whom the Office of the Superintendent of Bankruptcy in Québec had received numerous complaints of professional misconduct. While an investigation and disciplinary proceedings were pending, Drolet proposed the creation of a new corporate trustee, Groupe G. Tremblay Syndics Inc., with Mr. Tremblay. He agreed that his licence would be suspended for one year. The proposal was accepted, but was not yet approved by the Superintendent when records were transferred to Groupe G. Tremblay. A subsequent audit revealed deficiencies in the manner in which some of the records had been handled, but these were not disclosed to Mr. Daviault, the Superintendent's delegate to decide the fate of Drolet's trustee licence, who subsequently ratified the 1994 agreement. On April 6, 1995 a disciplinary committee was formed to investigate Groupe G. Tremblay's administration and activities. As well, the RCMP began investigating the administration and activities of Mr. Drolet, Mr. Tremblay and Groupe G. Tremblay. On August 31 search warrants issued authorizing the seizure of 18 of Groupe G. Tremblay's records. The same day the applicants received a letter informing them of the Deputy Superintendent's decision to issue a direction to protect all the estates administered by Groupe G. Tremblay until the completion of the investigation and to entrust the estate records to a guardian. The direction was issued under paragraphs 14.03(1)(*b*) and (2)(*b*) which provide that where there is an investigation pursuant to paragraph 5(3)(*e*), the Superintendent may direct any person to take the necessary steps to preserve the records of estates.

The issues were: (1) whether the Deputy Superintendent's decision was a decision within *Federal Court Act*, section 18.1; (2) whether he had gone beyond the inherent limitations of the discretion conferred on him by section 14.03; (3) whether he had exercised that discretion for improper purposes, in bad faith or in an arbitrary, unfair or unreasonable manner; (4) whether he was required to comply with the rules of natural justice; (5) whether the seizure infringed the applicants' Charter, section 7 rights by depriving them of their liberty in a manner not in accordance with the principles of fundamental justice; (6) whether section 14.03 was contrary to Charter, section 7 because it was too vague; (7) whether the taking of possession was a seizure within Charter, section 8; (8) whether section 14.03 contravened the Charter, section 8 right to be secure against unreasonable search and seizure and, if so, whether this infringement was saved by section 1; and (9) what was the appropriate remedy.

Held, the applications should be allowed in part. *Bankruptcy and Insolvency Act*, paragraph 14.03(1)(*b*) is declared of no force or effect to the extent that it authorizes the taking of conservatory measures in the nature of a "seizure" where there are no reasonable grounds to believe that the measures will make it possible to "preserve" the records of estates. They were, in the instant case, reasonable grounds for the conservatory measures taken.

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(1) The Deputy Superintendent's decision was a decision within the meaning of *Federal Court Act*, section 18.1. It had a final effect on the applicants' rights, because the seized records were administered by a representative of the Superintendent and could not, in all likelihood, be returned to them until the end of the disciplinary process. Moreover in most instances the administration of the seized records would probably be complete by the time the disciplinary process ended.
(2) The Deputy Superintendent did not exceed his jurisdiction in exercising his discretion. Given the seriousness of the alleged irregularities, the seizure was intended to ensure that debtors and creditors did not suffer any harm pending completion of the investigation. The sole purpose of the conservatory measures was to preserve estate records. Because of their fiduciary role, trustees must be as transparent as possible in administering the records entrusted to them. They manage the property of others for the benefit of all creditors. Once the relationship of trust had disintegrated, the Deputy Superintendent had no choice but to take possession of all the records. It was impossible to select certain records that the applicants could have continued to handle without jeopardizing the administration of property belonging to others. Such a decision was not unreasonable.
The power to "preserve" estates set out in section 14.03 was not used to "recover" estate records. The alleged actions endangered estates under the administration and control of the trustees, and conservatory measures were taken to prevent the occurrence of further misconduct.
The conservatory measures direction did not rescind Mr. Daviault's decision. While Mr. Daviault's decision concerned Mr. Drolet's conduct the seizure was necessitated by the misconduct of Mr. Tremblay and the corporate trustee that he headed. The events on which the two decisions were based occurred at two different times.
(3) The applicants will have an opportunity for a hearing as part of the disciplinary proceedings and they can raise all their defences during that hearing. In the meantime it was the Superintendent's duty to act quickly to protect estates. The applicants were given numerous opportunities to provide explanations of the misconduct alleged against them, but neglected to do so. They had only their own carelessness to blame.
(4) *Federal Court Act*, subsection 18.1(4) authorizes the Court to review findings of fact that are not supported by the evidence or that an assessment of the evidence as a whole shows to be unreasonable. The evidence showed that the Deputy Superintendent had evidence of serious misconduct in their administration. In light of this evidence and the seriousness of the misconduct noted in various reports, the Deputy Superintendent's decision to take conservatory measures to protect the estates administered by the applicants was reasonable.
(5) Charter, section 7 guarantees the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. Only the right to liberty could have been at issue herein. While the right to liberty includes the right to practice a profession, the issue did not arise herein because the conservatory measures ordered by the Superintendent did not affect the existence or validity of the applicants' trustee licence.
(6) The doctrine of vagueness is applicable under Charter, section 7 only if the sanction provided for in the provision may deprive someone of life, liberty or security of the person. The measures provided for in section 14.03 do not affect the right to practice a profession. In any event, paragraph 5(3)(*e*) and section 14.03 provide "sufficient guidance for legal debate". Although the Superintendent has the discretion to decide what conservatory measures are needed in each situation, the circumstances in which such measures may be taken and the goal to be achieved, namely preserving the records of estates, are specified. The doctrine of vagueness was inapplicable.
(7) Charter, section 8 provides that everyone has the right to be secure against unreasonable search or seizure. The essence of a seizure under section 8 is the taking of a thing from a person by a public authority without that person's consent. The taking of possession on September 1, 1995 was a "seizure" within the meaning given to that term in section 8. For a true waiver, the person purporting to consent must be possessed of the requisite informational foundation. The applicant Tremblay felt that he had no choice; he simply submitted to the requirements of the representatives of the Office of the Superintendent who appeared at his place of business accompanied by bailiffs. Moreover, they had been preceded that day by RCMP officers, who had search warrants issued by a justice of the peace. As Mr. Tremblay saw it, the search conducted by the representatives of the Office of the Superintendent came within the scope of the police operation of the same morning. He did not consent freely and voluntarily to the seizure thereby waiving the guarantee conferred on the applicants by section 8.
(8) The purpose of the set of provisions including sections 14.01, 14.02 and 14.03 is the supervision of trustees' administration and conduct. Parliament's primary aim was to protect third parties, whether debtors or creditors. Such rules were necessary because trustees act as fiduciaries and as such are responsible for administering property owned by others. The documents administered by trustees are, according to law, public documents. The expectation of privacy associated with documents produced in the course of operating a regulated business, is lower than the expectation of privacy associated with documents that are strictly personal and private. The balance to be struck between society's interests and the applicants' expectation of privacy, which in the circumstances was low, did not require a strict application

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of the criteria established by the Supreme Court of Canada in *Hunter et al. v. Southam Inc.* to determine whether a search and seizure was reasonable. It is necessary to strike a balance between the reasonable expectation of privacy and the seriousness of the intrusion resulting from the search or seizure. The reasonable grounds requirement will not be applicable when the case involves checks and inspections that a person in a regulated activity must expect or when it would be unjustified given the low degree of intrusion. Since this case involved a search of private premises that was not conducted as part of a regulatory inspection, the degree of intrusion was greater than it would be in a case involving a request for the production of documents. When conservatory measures involve a search or seizure within the meaning of Charter section 8, those measures cannot be taken unless there are reasonable grounds to believe that they will make it possible to "preserve" the records of estates. In so far as it authorizes conservatory measures in the nature of a "seizure" where there are no reasonable grounds to believe that the measures will make it possible to "preserve" the records of an estate, paragraph 14.03(1)(*b*) infringes the guarantee set out in Charter, section 8. That infringement was not saved by section 1, no evidence having been adduced in this regard.

(9) The appropriate remedy was to "read down" paragraph 14.03(1)(*b*) so that the conservatory measures in the nature of a "seizure" are not authorized unless the Superintendent or his delegate has reasonable grounds to believe that they will make it possible to "preserve" the records of estates. Reading down satisfied Parliament's legitimate concerns for effective law enforcement without offending the reasonable seizure requirement under Charter, section 8. Judicial review was available after the fact to verify the existence of reasonable grounds and that provides an adequate guarantee against an abuse of the statutory power. In the case at bar, the Deputy Superintendent had reasonable grounds to believe that the conservatory measures would make it possible to "preserve" the records of estates. There was evidence of very serious misconduct which called for effective and prompt action to protect the estates of third parties.

statutes and regulations judicially considered

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 (as am. by S.C. 1992, c. 27, s. 2), ss. 5(3)(*a*) (as am. *idem*, s. 5), (*c*),(*e*), 10 (as am. *idem*, s. 7), 14.01 (as enacted *idem*, s. 9), 14.02 (as enacted *idem*), 14.03 (as enacted *idem*).

Canadian Bill of Rights, R.S.C., 1985, Appendix III.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 7, 8, 12.

Federal Court Act, R.S.C., 1985, c. F-7 , s. 18 (as am. by S.C. 1990, c. 8, s. 4).

Tobacco Tax Act, R.S.O. 1980, c. 502, s. 15.

cases judicially considered

applied:

Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; (1989), 59 D.L.R. (4th) 416; 26 C.C.E.L. 85; 89 CLLC 14,031; 40 C.R.R. 100; 93 N.R. 183; *Homex Realty and Development Co. Ltd. v. Corporation of the Village of Wyoming*, 1980 CanLII 55 (SCC), [1980] 2 S.C.R. 1011; (1980), 116 D.L.R. (3d) 1; 13 M.P.L.R. 234; 33 N.R. 475; *Bunn v. Law Society of Manitoba* reflex, (1990), 63 Man.R. (2d) 210 (Q.B.); *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2; (1982), 137 D.L.R. (3d) 558; 44 N.R. 354; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; (1985), 24 D.L.R. (4th) 536; [1986] 1 W.W.R. 481; 69 B.C.L.R. 145; 23 C.C.C. (3d) 289; 48 C.R. (3d) 289; 18 C.R.R. 30; 36 M.V.R. 240; 63 N.R. 266; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606; (1992), 114 N.S.R. (2d) 91; 93 D.L.R. (4th) 36; 313 A.P.R. 91; 74 C.C.C. (3d) 289; 43 C.P.R. (3d) 1; 15 C.R. (4th) 1; 10 C.R.R. (2d) 34; 139 N.R. 241; *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031; (1995), 125 D.L.R. (4th) 385; 99 C.C.C. (3d) 97; 17 C.E.L.R. (N.S.) 129; 41 C.R. (4th) 147; 30 C.R.R. (2d) 252; 183 N.R. 325; 82 O.A.C. 243; *R. v. Borden*, 1994 CanLII 63 (SCC), [1994] 3 S.C.R. 145; (1994), 92 C.C.C. (3d) 404; 33 C.R. (4th) 147; 24 C.R.R. (2d) 51; 171 N.R. 1; *R. v. Nielsen*, 1988 CanLII 213 (SK CA), [1988] 6 W.W.R. 1; (1988), 66 Sask. R. 293; 43 C.C.C. (3d) 548; 39 C.R.R. 147 (C.A.); *R. v. Fitzpatrick*, 1995 CanLII 44 (SCC), [1995] 4 S.C.R. 154; (1995), 129 D.L.R. (4th) 129; 65 B.C.A.C. 1; 102 C.C.C. (3d) 144; 18 C.E.L.R. (N.S.) 237; 43 C.R. (4th) 343; 32 C.R.R. (2d) 234; 188 N.R. 248; 106 W.A.C. 1; *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679; (1992), 93 D.L.R. (4th) 1; 92 CLLC 14,036; 10 C.R.R. (2d) 1; 139 N.R. 1; *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417; (1988), 73 Nfld. & P.E.I.R. 13; 55 D.L.R. (4th) 503; 229 A.P.R. 13; 45 C.C.C. (3d) 244; 66 C.R. (3d) 348; 38 C.R.R. 301; 10 M.V.R. (2d) 1; 89 N.R. 249; *Johnson v. Ontario (Minister of Revenue)* reflex, (1990), 75 O.R. (2d) 558; 73 D.L.R. (4th) 661; 1 C.R.R. (2d) 293; 25 M.V.R. (2d) 78; 41 O.A.C. 129; 3 T.C.T. 5289 (C.A.).

distinguished:

Szczecka v. Canada (Minister of Employment and Immigration) reflex, (1993), 116 D.L.R. (4th) 333; 25 Imm. L.R. (2d) 70; 170 N.R. 58 (F.C.A.).

considered:

R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30; (1988), 44 D.L.R. (4th) 385; 37 C.C.C. (3d) 449; 62 C.R. (3d) 1; 31 C.R.R. 1; 82 N.R. 1; 26 O.A.C. 1; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990

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CanLII 105 (SCC), [1990] 1 S.C.R. 1123; [1990] 4 W.W.R. 481; (1990), 68 Man.R. (2d) 1; 56 C.C.C. (3d) 65; 77 C.R. (3d) 1; 48 C.R.R. 1; 109 N.R. 81; *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145; (1984), 55 A.R. 291; 11 D.L.R. (4th) 641; [1984] 6 W.W.R. 577; 33 Alta. L.R. (2d) 193; 27 B.L.R. 297; 14 C.C.C. (3d) 97; 2 C.P.R. (3d) 1; 41 C.R. (3d) 97; 9 C.R.R. 355; 84 DTC 6467; 55 N.R. 241; *Korponay v. Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41; (1982), 132 D.L.R. (3d) 354; 65 C.C.C. (2d) 65; 26 C.R. (3d) 343; 44 N.R. 103; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425; (1990), 65 D.L.R. (4th) 161; 54 C.C.C. (3d) 417; 29 C.P.R. (3d) 97; 76 C.R. (3d) 129; 47 C.R.R. 1; 106 N.R. 161; 39 O.A.C. 161.

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APPLICATIONS for judicial review of the Deputy Superintendent of Bankruptcy's decision to seize records administered by the applicants and entrust them to a guardian until completion of an investigation and disciplinary hearing. Applications allowed only in so far as *Bankruptcy and Insolvency Act*, paragraph 14.03(1)(*b*) was declared of no force and effect to the extent that it authorizes the taking of conservatory measures in the nature of a "seizure" where there are no reasonable grounds to believe that the measures will make it possible to "preserve" the records of estates.

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Daniel Des Aulniers, Raymond Gagnon and *Jean-Philippe Gervais* for applicants.

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DeBlois & Associés, Québec, and *Deputy Attorney General of Canada* for respondents and *mis-en-cause*.

The following is the English version of the reasons for judgment rendered by

Tremblay-Lamer J.:

INTRODUCTION

This case raises the issue of whether section 14.03 of the *Bankruptcy and Insolvency Act*[1] (BIA) is constitutional. That section authorizes the Superintendent, in certain expressly stated circumstances, to take the necessary steps to preserve the records of estates.

In the fall of 1995, in the exercise of that power, the Deputy Superintendent took possession of records administered by the applicants and entrusted them to a guardian until the completion of the investigation and disciplinary hearing into the applicants' conduct and administration.

These applications for judicial review relate to that taking of possession.

THE FACTS

Louis Drolet is one of the applicants in application for judicial review No. T-1918-95. He began working as a trustee with Gingsberg, Gingras & Associés, a corporate trustee, on February 2, 1990. From 1991 to 1993, numerous complaints were made against him, primarily to the Office of the Superintendent of Bankruptcy in Québec. He was alleged to have committed improper acts in administering estate records, which is what led to the end of his association with Gingsberg, Gingras & Associés.

At that time, Ginette Trahan was the Official Receiver and Assistant Superintendent for the district of Québec. After receiving the complaints about Mr. Drolet's activities, she informed Marc Mayrand, the Deputy Superintendent (Policy,

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Programs and Standards). In view of the seriousness of the improper acts alleged against Mr. Drolet, the Deputy Superintendent announced that a disciplinary committee would be formed.

While the committee was considering his case, Mr. Drolet contacted the Deputy Superintendent to tell him of a plan to create a new corporate trustee. He submitted the proposal in order to settle the dispute associated with his disciplinary case. Mr. Drolet and Mr. Tremblay planned to work together for Groupe G. Tremblay Syndics Inc. (Groupe G. Tremblay). Mr. Drolet agreed to transfer all the records he had handled while working for Gingsberg, Gingras & Associés to the newly formed corporate trustee. Mr. Tremblay was to do the same with his own records. Mr. Drolet further agreed that his licence as a trustee in bankruptcy would be suspended for a period of one year, from September 1, 1994 to September 1, 1995.

In September 1994, the proposal was finally accepted. An agreement was entered into with respect thereto by Mr. Drolet, Mr. Tremblay, the Deputy Superintendent and Gingsberg, Gingras & Associés. Although Mr. Tremblay had been audited in 1992, the Deputy Superintendent said he was satisfied that Mr. Tremblay was competent. To be fully executory, however, the agreement had to be approved by the Superintendent of Bankruptcy, Georges Redling (the Superintendent). To this end, the Deputy Superintendent filed a report with the Office of the Superintendent recommending that the agreement be ratified. On receiving the report and the recommendation, the Superintendent, under sections 14.01 [as enacted *idem*] and 14.02 [as enacted *idem*] of the BIA, delegated his powers, duties and functions in dealing with the matter to François Daviault, who was to hear the parties and render a decision on the trustee licence of the applicant Mr. Drolet.

Although, to become executory, the agreement had to be ratified subsequently by the Superintendent, or in this case his delegate, it was nevertheless applied as soon as it was concluded. Thus, records began to be transferred to Groupe G. Tremblay in the fall of 1994. From that time on, the records administered by Groupe G. Tremblay were as follows: (1) records on which Mr. Drolet had worked while with Gingsberg, Gingras & Associés; (2) new records of Groupe G. Tremblay; (3) Québec records handled pursuant to Mr. Tremblay's personal licence; and (4) Montréal records handled pursuant to Mr. Tremblay's personal licence.

In October 1994, the Assistant Superintendent for the district of Québec, Ms. Trahan, decided to audit the Québec records handled pursuant to Mr. Tremblay's personal licence. Laurent Lachance, an auditor, was assigned to do the work. In spite of the deficiencies reported by the auditor, the Assistant Superintendent and the Deputy Superintendent decided not to say anything to Mr. Daviault, the delegate, before he rendered his decision.

By mid-March 1995, the new Assistant Superintendent for the district of Québec, Denis Gilbert, had already informed the Deputy Superintendent that numerous complaints had been filed against the corporate trustee Groupe G. Tremblay. The complaints referred not only to administrative deficiencies, such as slowness in issuing certificates of discharge, but also to much more serious misconduct.

On March 27, 1995, Mr. Daviault rendered his decision, at the end of which he ratified the September 1994 agreement.

On April 6, 1995, the Deputy Superintendent called a special meeting, at which, relying on paragraph 5(3)(*e*) of the BIA, he announced the formation of a committee to investigate Mr. Tremblay's administration of estates. The committee was also given the more general mandate to investigate Groupe G. Tremblay's administration and activities. It was in that context that the Office of the Superintendent first contacted François A. Gouin, a trustee. Subsequently, in May 1995, at a conference of the Canadian Insolvency Association, the Deputy Superintendent approached Mr. Gouin personally to discuss the same mandate.

As well, in the weeks following the decision of the delegate, Mr. Daviault, the Royal Canadian Mounted Police (RCMP) began a number of investigations into the administration and activities of Mr. Drolet, Mr. Tremblay and Groupe G. Tremblay. Some of those investigations were initiated after the issuance of investigation mandates by the Office of the Superintendent.[2] The rest were begun at the initiative of the RCMP itself, which was acting in response to complaints it had received from debtors and creditors involved in the records managed by the applicants.

Throughout August 1995, the auditor, Mr. Lachance, audited Groupe G. Tremblay's records. The investigation corroborated the information that had already been gathered, which showed that serious offences had been committed.

On August 28, 1995, the auditor submitted his report on Groupe G. Tremblay's administration to his superiors. The report recounted all the disturbing facts that he had noted in the audit, namely: misappropriation of funds, estates that had not been realized or had been realized at a very low price, misrepresentations to the courts and the Official Receiver and the preparation of false statutory documents.

On August 31, 1995, RCMP officers submitted a number of informations to Judge Choquette of the Court of Quebec, Penal Division, in order to obtain search warrants. Judge Choquette issued the warrants the same day. He authorized the officers to seize eighteen (18) of Groupe G. Tremblay's records.[3] The search took place the next morning.

The same day, the applicants received a letter prepared by the Deputy Superintendent informing them of the decision he had made, based on a progress report (by the auditor, Mr. Lachance), to issue a direction to protect all the estates

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administered by Groupe G. Tremblay until the completion of the investigation under way. Notices that conservatory measures had been directed were sent the same day to, *inter alia*, trustees in bankruptcy in the Québec region, financial institutions with which Groupe G. Tremblay did business, Bell Canada and Canada Post. The recipients of the notices were told that the estate records formerly administered by Groupe G. Tremblay would now be administered by François A. Gouin, trustee.

The direction for conservatory measures was issued by Deputy Superintendent Mayrand under paragraphs 14.03(1)(*b*) and 14.03(2)(*b*) of the BIA, which provide that where an investigation is being made pursuant to paragraph 5(3)(*e*) of the BIA, the Superintendent may direct any person to take the necessary steps to preserve the records of estates.

The Deputy Superintendent has admitted that he thought the BIA did not require him to obtain judicial authorization before taking possession of the records. Given the seriousness of the alleged misconduct and the search conducted that morning by the RCMP officers, he considered it reasonable to take possession of all of Groupe G. Tremblay's records.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions for the purposes of the case at bar are all found in the BIA. They are as follows:

5. . . .

(3) The Superintendent shall, without limiting the authority conferred by subsection (2),

(*a*) receive applications for licences to act as trustees under this Act and issue licences to persons whose applications have been approved;

. . .

(*c*) where not otherwise provided for, require the deposit of one or more continuing guaranty bonds as security for the due accounting of all property received by trustees and for the due and faithful performance by them of their duties in the administration of estates to which they are appointed, in such amount as the Superintendent may determine, which amount may be increased or decreased as he may deem expedient, and the security shall be in a form satisfactory to the Superintendent and may be enforced by the Superintendent for the benefit of the creditors;

. . .

(*e*) from time to time make or cause to be made such inspection or investigation of estates as he may deem expedient and for the purpose of the inspection or investigation the Superintendent or any person appointed by him for the purpose shall have access to and the right to examine all books, records, documents and papers pertaining or relating to any estate;

(*f*) receive and keep a record of all complaints from any creditor or other person interested in any estate and make such specific investigations with regard to such complaints as the Superintendent may determine; and

(*g*) examine trustees' accounts of receipts and disbursements and final statements.

. . .

14.01 (1) The Superintendent, after making or causing to be made an investigation into the conduct of a trustee, may, where it is in the public interest to do so,

(*a*) cancel the licence of a trustee;

(*b*) suspend the licence of a trustee; or

(*c*) place such conditions or limitations on the licence of a trustee as the Superintendent considers appropriate.

(2) The Superintendent may delegate by written instrument, on such terms and conditions as are therein specified, any or all of the Superintendent's powers, duties and functions under paragraphs (1)(*a*) to (*c*) or section 14.02 or 14.03.

(3) Where the Superintendent delegates in accordance with subsection (2), the Superintendent or the delegate shall

(*a*) where there is a delegation in relation to trustees generally, give written notice of the delegation to all trustees; and

(*b*) whether or not paragraph (*a*) applies, give written notice of the delegation of a power to any trustee who may be affected by the exercise of that power, either before the power is exercised or at the time the power is exercised.

14.02 (1) Where the Superintendent intends to exercise any of the powers set out in paragraphs 14.01(1)(*a*) to (*c*), the Superintendent shall send the trustee written notice of the powers that the Superintendent intends to exercise and the reasons therefor and afford the trustee a reasonable opportunity for a hearing.

(2) At a hearing referred to in subsection (1), the Superintendent

(*a*) has the power to administer oaths;

(*b*) is not bound by any legal or technical rules of evidence in conducting the hearing;

(*c*) shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit; and

(*d*) shall cause a summary of any oral evidence to be made in writing.

(3) The notice referred to in subsection (1) and, where applicable, the summary of oral evidence referred to in paragraph (2)(*d*), together with such documentary evidence as the Superintendent receives in evidence, form the record of the hearing.

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(4) The decision of the Superintendent after a hearing referred to in subsection (1), together with the reasons therefor, shall be given in writing to the trustee not later than ninety days after the conclusion of the hearing and may, where the Superintendent considers it in the public interest to do so, be made public after the decision has been given to the trustee.
(5) A decision of the Superintendent given pursuant to subsection (4) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside pursuant to the *Federal Court Act*.
14.03 (1) The Superintendent may, for the protection of an estate in the circumstances referred to in subsection (2),
(*a*) direct any person to deal with the property of the estate described in the direction in accordance with the terms of the direction;
(*b*) direct any person to take such steps as the Superintendent may deem necessary to preserve the records of the estate; and
(*c*) direct a bank or other depository not to pay out funds on deposit to the credit of the estate except in accordance with the direction.
(2) The circumstances in which the Superintendent is authorized to exercise the powers set out in subsection (1) are where
(*a*) an estate is left without a trustee by the death, removal or incapacity of the trustee;
(*b*) the Superintendent makes or causes to be made any investigation pursuant to paragraph 5(3)(*e*);
(*c*) the Superintendent exercises any of the powers set out in section 14.01; or
(*d*) the fees referred to in subsection 13.2(2) have not been paid in respect of the trustee's licence.
(3) A direction given pursuant to subsection (1)
(*a*) shall state the statutory authority pursuant to which the direction is given;
(*b*) is binding on the person to whom it is given; and
(*c*) is, in favour of the person to whom it is given, conclusive proof of the facts set out therein.
(4) A person who complies with a direction given pursuant to subsection (1) is not liable for any act done by the person only to comply with the direction.
ISSUES
Administrative law issues:
1. Did the Deputy Superintendent exceed his jurisdiction by going beyond the inherent limitations of the discretion conferred on him by section 14.03 of the BIA?
2. Did he exercise that discretion for improper purposes, in bad faith or in an arbitrary, unfair or unreasonable manner?
3. Was he required to comply with the rules of natural justice?
Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] issues:
1. Did the taking of possession on September 1, 1995 infringe section 7 of the *Canadian Charter of Rights and Freedoms* by depriving the applicants Drolet and Tremblay of their liberty in a manner not in accordance with the principles of fundamental justice?
2. Is section 14.03 of the BIA contrary to section 7 of the *Canadian Charter of Rights and Freedoms* because it is too vague?
3. Was the taking of possession on September 1, 1995 a search or seizure within the meaning of section 8 of the *Canadian Charter of Rights and Freedoms*?
4. Was the taking of possession on September 1, 1995 an unreasonable seizure and hence constitutionally prohibited by section 8 of the *Canadian Charter of Rights and Freedoms*?
5. Is section 14.03 of the BIA contrary to the guarantee set out in section 8 of the *Canadian Charter of Rights and Freedoms*? If so, is this infringement saved by section 1?
ANALYSIS
A. PRELIMINARY ISSUE
The respondents began by arguing that the "direction for conservatory measures" issued by the Deputy Superintendent on September 1, 1995 was not a decision within the meaning given to that term in section 18 of the *Federal Court Act* .[4] In the respondents' submission, it was not a measure that had a final effect on the applicants' rights and was binding on the parties.
The rule being relied on in this regard was formulated by the Federal Court of Appeal in *Szczecka v. Canada (Minister of Employment and Immigration)*.[5] In that case, the Court, *per* Létourneau J.A., held that unless there are special circumstances, there should not be any immediate judicial review of an interlocutory decision. The decisions in respect of which judicial review is available are those that make a final ruling on the merits of a case.
In my view, the Deputy Superintendent's decision was not an interlocutory decision within the meaning that the courts have given that term. It was not a decision made in the course of an action by an administrative tribunal. It was a decision

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that had a final effect on the applicants' rights, because the seized records were administered by a representative of the Superintendent and could not, in all likelihood, be returned to them until the end of the disciplinary process. Moreover, in most instances, the administration of the seized records will probably be complete by the time the disciplinary process ends. For these reasons, it seems to me that the *Szczecka*[6] rule is not applicable to this case.

B. ADMINISTRATIVE LAW ISSUES

1. Excess of jurisdiction

The applicants submitted that the decision to initiate an investigation into a trustee's administration (paragraph 5(3)(*e*) BIA) and the decision to issue a direction for conservatory measures (paragraphs 14.03(1)(*b*) and 14.03(2)(*b*) BIA) are decisions that fall within the Superintendent's discretion. The courts have consistently held that a discretion is never absolute. In the case at bar, the Deputy Superintendent's decision to issue a direction for conservatory measures was contrary to the three legal limitations on any discretion.

According to the applicants, the Deputy Superintendent exercised his discretion for improper purposes, because his decision was intended not to preserve estate records but rather to permanently and irrevocably prevent the applicant Mr. Drolet from working as a trustee. If the Superintendent's objective was really to preserve estate records, why did he take possession of all the records administered by Groupe G. Tremblay, without exception?

The applicants further submitted that a direction for conservatory measures can be issued only to preserve future estate records. The "preservation power" set out in section 14.03 of the BIA can, by definition, be exercised only to prevent an imminent, future threat to an estate. In so far as an act has already been done, it is no longer a question of "preserving" estate records, but rather of "recovering" estates because of past actions or misconduct.

Moreover, the applicants argued that his decision was made in bad faith. Not only did the Deputy Superintendent, without reason, deem it appropriate to take greater exceptional measures than had even been taken before, but he applied those measures in an excessive manner.

Finally, the applicants submitted that the Superintendent's decision was unfair, arbitrary and discriminatory. While he claimed to have made it on the basis of the "progress" report prepared by the auditor, Mr. Lachance, the evidence showed that his actions had in fact been planned for a long time.

As for the respondents, they argued that since the Deputy Superintendent simply applied the principles found in paragraph 5(3)(*e*) and section 14.03 of the BIA, he in no way exceeded his jurisdiction. The Deputy Superintendent exercised his discretion in an appropriate manner, that is, within the limits set out in the BIA.

I agree with the applicants that the statutory discretion exercised by the Superintendent is not absolute. The courts have held on numerous occasions that every discretion is subject to certain general legal limitations.[7] For example, it is established that a discretion cannot be used for improper purposes that are contrary to the applicable legislation. Furthermore, a discretion cannot be exercised in bad faith or in an arbitrary, unfair or unreasonable manner.

As noted by Lamer J. (as he then was) in *Slaight Communications*:[8]

Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred. This is a long-established principle. H. W. R. Wade, in his text titled *Administrative Law* (4th ed. 1977), says the following at pp. 336-37:

For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious. (Emphasis added.)

What is the situation in the case at bar? Did the Deputy Superintendent disregard the general legal limitations to which he was subject in exercising his discretion? I do not think so.

Section 14.03 authorizes the Superintendent to take conservatory measures for the protection of bankruptcy estates. Given the seriousness of the irregularities alleged against the applicants, the taking of possession was intended to ensure that debtors and creditors did not suffer any harm pending the completion of the investigation under way.

In these circumstances, I cannot conclude that the conservatory measures ordered by the Deputy Superintendent had any purpose other than preserving estate records.

As for the argument that he should not have taken possession of all the records, when the situation had become urgent, I have difficulty seeing how he could have sorted through them and decided which records he could have left to be administered by the applicants. It must be recalled that what was at issue was their ability to fulfil their responsibilities as trustees with integrity. Because of their fiduciary role, trustees must be as transparent as possible in administering the records entrusted to them. They manage the property of others for the benefit of all creditors, and this is true for each record of a bankruptcy. Once the relationship of trust had broken down, the Deputy Superintendent had no choice but to take possession of all the records. Given the seriousness of the alleged misconduct, it seemed impossible to him to select

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certain records that the applicants could have continued to handle without jeopardizing the administration of property belonging to others. I cannot conclude that such a decision was unreasonable.

As for the conservatory measures involving Bell Canada and Canada Post, since they were cancelled a few days after they were taken, this Court no longer has to consider their validity and thus determine whether taking them was consistent with the power conferred by the BIA.

Moreover, I do not accept the argument that the power "to preserve" estates set out in section 14.03 was used in this case to "recover" estate records. The alleged actions endangered estates under the administration and control of the trustees, and it was precisely to prevent the occurrence of further misconduct that the conservatory measures were taken.

The applicants also submitted that, for all practical purposes, the direction for conservatory measures of September 1, 1995 rescinded the decision of the delegate, Mr. Daviault. According to the applicants, by ordering that possession be taken of all of Groupe G. Tremblay's records, the Deputy Superintendent made it impossible to implement Mr. Daviault's decision. By taking possession of the records, the Deputy Superintendent prevented the applicant Mr. Drolet from resuming his activities as a trustee in bankruptcy as planned. It should be recalled that the suspension of Mr. Drolet's licence was to end on September 1, 1995. The decision of the delegate, Mr. Daviault, was binding on Deputy Superintendent Mayrand. The applicants argued that because the Deputy Superintendent disregarded that decision, his exercise of the power to issue a direction for conservatory measures was unlawful.

In my view, this argument carries no weight. The decision of the delegate, Mr. Daviault, and that made by the Deputy Superintendent on September 1, 1995 related to two different matters. While Mr. Daviault's decision concerned Mr. Drolet's conduct when he worked for Gingsberg, Gingras & Associés, the taking of possession on September 1, 1995 was made necessary by the misconduct of Mr. Tremblay and the corporate trustee that he headed, namely Groupe G. Tremblay. The events on which these two decisions were based occurred at two different times.

2. The principles of natural justice

The applicants criticized the Deputy Superintendent for not giving them any notice before ordering the conservatory measures. They were never able to learn what misconduct the auditor was alleging they had committed, nor were they aware of the possible consequences thereof. They had no meaningful opportunity to respond to the auditor's allegations.

The respondents argued that the principles of natural justice are flexible and that, in the case at bar, those principles did not require that the applicants be given advance notice of the possible consequences. The applicants will have a hearing as part of the disciplinary proceedings and can raise their defences at that time.

I want to begin by noting that the Office of the Superintendent gave these trustees a number of opportunities to explain the shortcomings in their administration.[9] They neglected to respond, and they have only themselves to blame if they feel that they were not heard.

The courts have long recognized that the rules of natural justice and the duty of fairness are variable standards. As Sopinka J. has said, their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided.[10]

In the case at bar, the applicable statutory provisions authorize the taking of conservatory measures to protect the public interest involved. It was imperative in such circumstances for the Superintendent to act quickly.

In this regard, I consider it appropriate to refer to the following passage from the Supreme Court of Canada's decision in *Homex Realty and Devel-opment Co. Ltd. v. Corporation of the Village of Wyoming*:[11]

There are instances where the omission of the prerequisite notice is not supplied by the courts, as, for example, where the statute in question, by its very nature and by the legislative framework there adopted by the Legislature, must be read as precluding the requirement of prior notice. The Ontario Court of Appeal, for example, in *Bishop v. Ontario Securities Commission* ([1964] 1 O.R. 17), so construed s. 19 of *The Securities Act*, R.S.O. 1960, c. 363. Roach J.A., in speaking for the Court, stated:

The whole purpose of the Act might be defeated if the chairman could make an order or ruling under that section only on notice to the person or company affected and after a hearing. Many days might elapse between the giving of the notice to the persons or company sought to be affected and the conclusion of the hearing during which time those persons or that company if dishonest and disreputable could continue to prey upon the public and plunder and fleece many people. For that reason it was essential to the purpose of the Act that the chairman should be empowered to act promptly and without notice to the person or company sought to be affected. The chairman's first duty is to the public and in empowering him to discharge that duty the Legislature has by appropriate legislation at the same time protected the person or company affected by the order by giving to him on [*sic*] it at their election the right to have the order reviewed by the Commission. (at p. 23) [Emphasis added.]

Similarly, in *Bunn*,[12] the Court held that the public interest involved was pressing and required that the Law Society act promptly. The Court ruled that the object of the provisions in issue would be frustrated if it were impossible to take action until after notice had been given and a full hearing held. Hanssen J. stated the following:[13]

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The legislation seeks to strike a balance between the rights of an individual member and the public interest. However, it recognizes, on the question of whether to suspend or not, the interest of the individual lawyer must be subordinate to the public interest. The object of s. 50(1)(a) is to protect the public interest. In many cases, that object would be frustrated if the action contemplated in that section could only take place after notice and a hearing.

In the instant case, the applicants will have an opportunity for a hearing as part of the disciplinary proceedings, and they can raise all their defences during that hearing. In the meantime, it was the Superintendent's duty to act quickly to protect estates.

Finally, as noted above, the evidence shows that the applicants were given numerous opportunities to provide explanations of the misconduct alleged against them. They neglected to do so. They have nothing to complain of now but their own carelessness.

3. Erroneous finding of fact made in a perverse or capricious manner

Subsection 18.1(4) of the *Federal Court Act*[14] authorizes the Court to review findings of fact that are not supported by the evidence or that an assessment of the evidence as a whole shows to be unreasonable.

The evidence shows that Mr. Mayrand had evidence of serious misconduct in their administration. That evidence was from a number of sources, and more specifically:

[translation] (i) the first report of the auditor, Laurent Lachance, dated May 13, 1995, concerning the records administered by the applicant Gilles M. Tremblay;

(ii) the report of the Official Receiver, Sylvie Laperrière, dated June 14, 1995;

(iii) the second report of the auditor, Laurent Lachance, dated August 28, 1995;

(iv) the reports on the RCMP investigations;

(v) the judgments of the Superior Court"Bankruptcy Division, which were sent to him by the judges and other interested persons;

(vi) the informations prepared by the RCMP, which led to the issuance of search warrants on August 31, 1995;

(vii) the many complaints that were constantly being filed at the Superintendent's offices in Québec, Montréal and Ottawa;

" transcript, examination of Marc Mayrand, January 31, 1996, p. 145 *et seq*.

The reports submitted were subjected to a strict internal verification process to determine their accuracy. The alleged acts raised serious doubts about the trustees' integrity. Contrary to what the applicants argued, the reports submitted were not interpreted in a discretionary or arbitrary manner.

In light of this evidence and the seriousness of the misconduct noted in the reports, Mr. Mayrand's decision to take effective conservatory measures to protect the estates administered by the applicants was reasonable.

In conclusion, I have found no reason to intervene as far as the administrative law issues are concerned. Although I imagine that the Deputy Superintendent could have taken less drastic conservatory measures, it is a clearly established rule that a superior court should not interfere with the exercise of a discretion by an administrative agency merely because the court might not have reached the same decision. This rule of curial deference has been stated many times by the Supreme Court, *inter alia* in *Maple Lodge Farms Ltd.*,[15] in which McIntyre J. summarized the principle as follows:

Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

That is the case here. It is therefore not appropriate to vary the Deputy Superintendent's decision.

C. CHARTER ISSUES

1. Section 7 of the Charter

(a) The right to liberty and the principles of fundamental justice

Section 7 of the *Canadian Charter of Rights and Freedoms* reads as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Since *Re B.C. Motor Vehicle Act*,[16] it has been accepted that section 7 does not guarantee the right to life, liberty and security *per se*. Section 7 guarantees that subjects of law to whom the section is applicable will not be deprived of their life, liberty or security except in accordance with the principles of fundamental justice. Thus, in determining the scope of section 7, it is necessary to define both the right to life, liberty and security and the principles of fundamental justice.

For the purposes of these proceedings, attention should be focused specifically on the right to liberty.

The applicants argued that the right to liberty includes the right to practice a profession and that the cancellation of a professional licence must be seen as infringing the right to liberty. Canadian courts seem to be divided on this subject at the present time. A number of decisions have found that the right to liberty includes the right to practice a profession.[17]

In my opinion, this issue does not arise in the case at bar, because the conservatory measures ordered by the Superintendent did not affect the existence or validity of the applicants' trustee licence. The issue can still be raised on

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judicial review of any disciplinary proceeding that cancels their licence without giving them an opportunity to assert their rights.

(b) The doctrine of vagueness

It was in *R. v. Morgentaler*[18] that the Supreme Court of Canada first associated the defect of vagueness with the principles of fundamental justice.[19] In that case, Dickson C.J. held that the impugned legislative provision violated the principles of fundamental justice because of its "failure to provide an adequate standard for therapeutic abortion committees".[20] Subsequently, in the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*,[21] Lamer J. (as he then was), with whom a majority of judges concurred, expressed his views in terms similar to those used by Dickson C.J. in *Morgentaler*.[22]

It is clear that the doctrine of vagueness does not require Parliament and the provincial legislatures to enact legislation that provides absolute certainty. The courts are responsible for interpreting legislation. A legislative provision establishing a sanction that may deprive a person of life, liberty or security must not be unacceptably vague. The test to be applied was established by the Supreme Court of Canada in *R. v. Nova Scotia Pharmaceutical Society*.[23] A legislative provision becomes unac-ceptably vague when it "does not provide an adequate basis for legal debate".[24]

The applicants argued that paragraph 5(3)(*e*) and section 14.03 of the BIA are so vague as to infringe section 7 of the *Canadian Charter of Rights and Freedoms* (the Charter). An investigation under paragraph 5(3)(*e*) is all that is required for the seizure power set out in section 14.03 to be exercised. Under section 14.03, the Superintendent may direct any person to take such steps as the Superintendent may deem necessary to preserve the records of estates. In the applicants' submission, these are vague terms that confer an unlimited discretion on the Superintendent. The wording of paragraph 5(3)(*e*) and section 14.03 is so vague that it becomes impossible for a court to interpret it as limiting the Superintendent's discretion in any way. Nor do these provisions give individuals any reasonable notice of the circumstances in which the legislation applies or the types of consequences that result from violating it.

The respondents argued only that, in light of the context of section 14.03 of the BIA, the issue of its vagueness simply does not arise because what is involved is perfectly clear. The Superintendent is made responsible for supervising trustees' administration. The wording of paragraph 5(3)(*e*) and section 14.03 is not so vague as to justify a finding by me that they cannot provide guidance for legal debate.

It is important to recall that the doctrine of vagueness is applicable under section 7 only if the sanction provided for in the provision in question may deprive someone of life, liberty or security of the person.

In the case at bar, however, as noted above, the measures provided for in section 14.03 do not affect the right to practice a profession"here the profession of trustee"a right which, according to some cases, may make section 7 of the Charter applicable. In any event, I am of the view that paragraph 5(3)(*e*) and section 14.03 provide "sufficient guidance for legal debate".[25] The applicable test is a very strict one. As noted by Gonthier J. in *Ontario v. Canadian Pacific Ltd.*,[26] at page 1071:

In particular, a deferential approach should be taken in relation to legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives.

In the instant case, although it is true that the Superintendent has the discretion to decide what conservatory measures are needed in each situation, the circumstances in which such measures may be taken and the goal to be achieved, namely preserving the records of estates, are specified. The doctrine of vagueness is inapplicable in the circumstances.

2. Section 8 of the Charter

The applicants argued essentially that the conservatory measures taken in this case were in the nature of a seizure. Since that seizure was carried out without the prior authorization of a neutral and impartial arbiter, it was unreasonable within the meaning of section 8 of the Charter. They also argued that paragraph 5(3)(*e*) and section 14.03 of the BIA are constitutionally invalid.

It was in *Hunter et al. v. Southam Inc.*[27] that the Supreme Court of Canada first ruled on the scope of section 8 of the Charter, which reads as follows:

8. Everyone has the right to be secure against unreasonable search or seizure.

In dealing with the basis for this constitutional guarantee, Dickson J. (as he then was) wrote the following:[28]

This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

In defining the terms "search" and "seizure" in section 8, reference must be made to the Supreme Court of Canada's decision in *R. v. Dyment* .[29] In that case, the Court held that the essence of a seizure under section 8 is the taking of a thing from a person by a public authority without that person's consent.

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In the instant case, the respondents argued that there was no seizure because the applicants do not own the estate records entrusted to them. In the alternative, they argued that the applicants consented to the seizure.

I do not share this view. Since *Plant*,[30] it has been accepted that ownership of the seized items is not a relevant consideration. Because section 8 is essentially concerned with the expectation of privacy, its focus is above all on individuals, not property. The taking of possession on September 1, 1995 was undoubtedly a "seizure" within the meaning given to that term in section 8 of the Charter.

Before examining the nature and scope of the guarantee provided by section 8 of the Charter, I should consider whether the guarantee can be waived by a person to whom it applies.

In criminal cases, the Supreme Court of Canada applied the following test for waiver before the advent of the Charter:

. . . [it must be] clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.[31]

In *R. v. Borden*,[32] the Supreme Court made a definitive ruling on the question of what conditions must be met for a waiver of the section 8 guarantee to be valid. It confirmed the approach put forward by the Saskatchewan Court of Appeal in *R. v. Nielsen*,[33] namely that the waiver of the section 8 right must, at a minimum, be subject to the conditions applicable to the waiver of a statutory procedural right like that in issue in *Korponay*.[34]

For a true waiver, the person purporting to consent must be possessed of the requisite informational foundation. In *Borden*,[35] Iacobucci J., writing for the majority, stated the following:

. . . the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful. This is equally true whether the individual is choosing to forego consultation with counsel or choosing to relinquish to the police something which they otherwise have no right to take.

In the case at bar, rather than risk having physical force used against him or proceedings brought against him for hindering government representatives in the performance of their duties, the applicant Mr. Tremblay preferred to act prudently and complied with their demand, on the assumption that the "direction for conservatory measures" pursuant to which they were acting was lawful. The applicant Mr. Tremblay felt that he had no choice; he simply submitted to the requirements of the representatives from the Office of the Superintendent, who, it should be noted, showed up at his place of business accompanied by bailiffs.

Moreover, I consider it important to point out that the representatives of the Office of the Superintendent were preceded that day by RCMP officers, who had search warrants issued by a justice of the peace, namely Judge Choquette of the Court of Québec, Criminal and Penal Division. As Mr. Tremblay saw it, the search conducted by the representatives of the Office of the Superintendent came within the scope of the police operation of the same morning. In these circumstances, I cannot conclude that he consented freely and voluntarily to the seizure and thus waived the guarantee conferred on the applicants by section 8 of the Charter.

Applicability of the *Hunter* criteria in a regulatory context

To determine whether a statute that authorizes a search or seizure is unreasonable, it is first necessary to ascertain whether the criteria formulated by Dickson J. (as he then was) in *Hunter* are applicable. Those criteria were summarized as follows by Wilson J. in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*:[36]

(a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;

(b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established upon oath, to believe that an offence has been committed;

(c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and

(d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

However, in *Thomson Newspapers Ltd.*[37] and *R. v. McKinlay Transport Ltd.*,[38] the Supreme Court stated that the development of less stringent criteria for administrative or regulatory searches and seizures may be consistent with the spirit of section 8.

The standard of review must be reasonable and take account of the regulatory nature of the legislation and the scheme enacted.[39] For example, prior authorization is not required for a search or seizure that is aimed not at detecting criminal activities but rather at ensuring compliance with regulatory provisions adopted to protect the public interest.[40] It is thus necessary to balance a group of factors.

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What is the purpose of the legislation? What is the degree of intrusion? What expectation of privacy should exist in light of the purpose of the legislation? What is the nature of the seized documents? These are a few of the questions that must be asked.[41]

Sections 14.01, 14.02 and 14.03 of the BIA are part of a set of provisions whose essential purpose is the supervision of trustees' administration and conduct. In authorizing such supervision by the Superintendent, Parliament's primary aim is to protect third parties, whether they be debtors or creditors. The nature of the role played by trustees makes the existence of such rules necessary. Trustees act as fiduciaries and as such, as we have seen, they are responsible for administering property owned by others. For this reason, the duties and obligations of trustees in bankruptcy are highly regulated. Such trustees are subject to constant audits, by means of which the Superintendent assures himself of their integrity.

Moreover, the documents administered by trustees are, according to law, public documents. It has been found that the expectation of privacy associated with such documents, that is, documents produced in the course of operating a regulated business, is lower than the expectation of privacy associated with documents that are strictly personal and private.

As noted by La Forest J. in *R. v. Fitzpatrick*:[42]

In my view a similar standard should be applied to the use in a regulatory prosecution of records that are statutorily compelled as a condition of participation in the regulatory area. Little expectation of privacy can attach to these documents, since they are produced precisely to be read and relied upon by state officials. [Emphasis added.]

In light of these various factors, I do not think that the balance to be struck between society's interests and the applicants' expectation of privacy, which in the circumstances is low, requires a strict application of the *Hunter* criteria.

Our courts have recently developed less stringent criteria for cases in which the *Hunter* criteria are inapplicable. In this regard, I consider the Ontario Court of Appeal's decision in *Johnson v. Ontario (Minister of Revenue)*[43] to be relevant. In that case, the Court had to determine whether subsections 15(3) and (4) of the *Tobacco Tax Act*[44] were constitutional. Those subsections authorized the seizure of motor vehicles used in the tobacco trade and the contents thereof.

Since the measures authorized by subsections 15(3) and (4) of the *Tobacco Tax Act* were administrative or regulatory in nature, the parties acknowledged that the strict criteria formulated in *Hunter* were inapplicable. It was in that context that Arbour J.A. wrote the following:[45]

However, the fact that legislation is merely regulatory rather than criminal in nature does not in itself determine what standard of reasonableness will be required. This depends largely on the second step in the analysis which consists of identifying the privacy interest which is at stake under the search and seizure provision and the severity of the intrusion on that privacy interest.

It is therefore necessary to strike a balance between the reasonable expectation of privacy and the seriousness of the intrusion resulting from the search or seizure. She concluded as follows:[46]

Against this limited privacy claim, the intrusion permitted by s. 15 is serious . . . . The section contains no requirement of reasonable and probable grounds or even of reasonable suspicion. It allows a person authorized by the Minister of Revenue to stop and detain for any purpose related to the administration or enforcement of the *Tobacco Tax Act*, any commercial vehicle, to search the contents thereof, to seize documents that may afford evidence of a contravention of the Act and to seize cargo if it consists of more than 10,000 cigarettes.

She noted, however, that persons engaged in a regulated activity, such as the tobacco trade, must expect that the authorities will make certain inspections and checks. In other words, persons involved in a regulated activity must expect a certain amount of intrusion by administrative authorities. However, the measures authorized by subsections 15(3) and (4) went much further than what such persons were obliged to expect. Such measures would not be consistent with the section 8 guarantee unless the reasonable grounds test were met. She stated the following:[47]

A requirement of reasonable and probable grounds to believe that a commercial vehicle contains evidence of a contravention of the *Tobacco Tax Act* will, in my opinion, reduce the scope of the search sufficiently to recognize the privacy interest at stake. While not unduly impairing the enforcement of the Act, such a requirement would also satisfy the s. 8 *Charter* standard required for regulatory type searches.

The *Johnson*[48] test must, however, be applied only in cases in which the significance and severity of the intrusion so require. The reasonable grounds requirement will not be applicable when the case involves monitoring-type measures such as those discussed by Arbour J.A., namely checks and inspections that a person engaged in a regulated activity must reasonably expect. Likewise, the test will not be applied when doing so would be unjustified given the low degree of "intrusion".

In my view, since this case involves a search of private premises that was not conducted as part of a regulatory inspection, the degree of intrusion is greater than it would be, for example, in a case involving a request for the production of documents. For this reason, I feel that when conservatory measures involve a search or seizure within the meaning

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given to those terms in section 8 of the Charter, the measures cannot be taken unless there are reasonable grounds to believe that they will make it possible to "preserve" the records of estates.

Thus, in so far as it authorizes conservatory measures in the nature of a "seizure" where there are no reasonable grounds to believe that the measures will make it possible to "preserve" the records of an estate, paragraph 14.03(1)(*b*) of the BIA infringes the guarantee set out in section 8 of the Charter. That infringement is not saved by section 1, no evidence having been adduced in this regard by the Attorney General of Canada.

In so far as it infringes section 8 of the Charter, paragraph 14.03(1)(*b*) of the BIA is of no force or effect. I must therefore consider what remedy would be appropriate. In *Schachter v. Canada*,[49] Lamer C.J. set out the range of remedies and the principles applicable to selecting the appropriate one:

A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. . . . In choosing how to apply s. 52 . . . a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.[50]

For the following reasons, I am satisfied that the appropriate remedy in the circumstances is to "read down" paragraph 14.03(1)(*b*) of the BIA so that conservatory measures in the nature of a "seizure" are not authorized unless the Superintendent or his delegate has reasonable grounds to believe that they will make it possible to "preserve" the records of estates. This was the type of remedy chosen by the Supreme Court of Canada in a similar context in *R. v. Grant* .[51]

The advantage of such a remedy is that it means that a mechanism that is absolutely essential for the protection of third parties can be maintained. In my view, the reading down involved here satisfies Parliament's legitimate concerns for effective law enforcement without offending the reasonable seizure requirement under section 8 of the Charter.

The existence of reasonable grounds can be verified by this Court through judicial review after the fact. In *Thomson Newspapers Ltd.*,[52] La Forest J. noted the importance of such judicial review where the requirement of prior judicial authorization is found to be inapplicable:

The opportunity to challenge, by way of judicial review, the relevancy of any particular use of s. 17 to matters in respect of which the Director or Commission can conduct inquiries, provides adequate guarantee against potential abuse of the power s. 17 confers. No evidence of any such abuse is apparent in the case before this Court.

I now turn to the question of whether, in the case at bar, the Deputy Superintendent had reasonable grounds to believe that the conservatory measures would make it possible to "preserve" the records of estates. In my view, an affirmative answer must be given to this question. As I noted above, the evidence in the record refers to very serious misconduct, which called for effective and prompt action to protect the estates of third parties.

As for the applicants' argument with respect to section 12 of the Charter, I need only say that the conservatory measures taken in the case at bar do not amount to "cruel and unusual treatment". Section 12 is therefore inapplicable.

I also reject the arguments based on the *Canadian Bill of Rights* [R.S.C., 1985, Appendix III] on the basis that they are without merit.

CONCLUSION

For these reasons, the applications for judicial review are allowed in part. Paragraph 14.03(1)(*b*) of the BIA is of no force or effect in so far as it authorizes the taking of conservatory measures in the nature of a "seizure" where there are no reasonable grounds to believe that the measures will make it possible to "preserve" the records of estates.

The applicants' conclusions seeking to reserve their right to claim damages are dismissed.

[1] R.S.C., 1985, c. B-3 (as am. by S.C. 1992, c. 27, s. 2).

[2] It is s. 10(1) [as am. *idem*, s. 7] of the BIA that authorizes the Superintendent to issue investigation mandates.

[3] See the respondents' application record, Vol. I., at pp. 268 *et seq*.

[4] R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 4).

[5] reflex, (1993), 116 D.L.R. (4th) 333 (F.C.A.).

[6] *Ibid*.

[7] In this regard, see *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038.

[8] *Id*., at p. 1076.

[9] Audit progress report, May 1995, letter of May 11, 1995; letter of the Assistant Superintendent dated June 19, 1995; letter of June 22, 1995.

[10] *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879, at p. 896.

[11] 1980 CanLII 55 (SCC), [1980] 2 S.C.R. 1011, at pp. 1024-1025.

[12] *Bunn v. Law Society of Manitoba* reflex, (1990), 63 Man.R. (2d) 210 (Q.B.), at p. 213.

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[13] *Id.*, at p. 213.
[14] *Supra*, note 4.
[15] *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2, at pp. 7-8.
[16] 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486.
[17] *Wilson v. British Columbia (Medical Services Commission)* 1988 CanLII 177 (BC CA), (1988), 53 D.L.R. (4th) 171 (B.C.C.A.), at p. 195; *Howard v. Architectural Inst. of B.C.* reflex, (1989), 40 B.C.L.R. (2d) 315 (S.C.), at pp. 320-323; *Richardson v. Ass. of Prof. Engineers*, reflex, [1990] 1 W.W.R. 709 (B.C.S.C.), at pp. 716-717; and *Harvey v. Law Society of Newfoundland* 1992 CanLII 2774 (NL SCTD), (1992), 93 Nfld. & P.E.I.R. 339 (S.C.), at pp. 349-351 and 353.
[18] 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30.
[19] Patrice Garant, *Droit administratif*, 3rd ed., Les Éditions Yvon Blais Inc., Cowansville, 1991, Vol. III, at pp. 416-417.
[20] *R. v. Morgentaler, supra*, note 18, at p 68. A majority of judges concurred with him on this point.
[21] 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123.
[22] *Supra*, note 18.
[23] 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606.
[24] *Id.*, at p. 639.
[25] *Id.*, at p. 643.
[26] 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031.
[27] [1984] 2 S.C.R. 145.
[28] *Id.*, at pp. 159-160.
[29] 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417.
[30] *R. v. Plant*, 1993 CanLII 70 (SCC), [1993] 3 S.C.R. 281.
[31] *Korponay v. Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41, at p. 49.
[32] 1994 CanLII 63 (SCC), [1994] 3 S.C.R. 145.
[33] 1988 CanLII 213 (SK CA), [1988] 6 W.W.R. 1 (Sask. C.A.).
[34] *Supra*, note 31.
[35] *Supra*, note 32, at p. 162.
[36] 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425, at p. 449.
[37] *Ibid.*
[38] 1990 CanLII 137 (SCC), [1990] 1 S.C.R. 627.
[39] *Ibid.*
[40] *Belgoma Transportation Ltd. and Director of Employment Standards Re* reflex, (1985), 51 O.R. (2d) 509 (C.A.).
[41] *R. v. Ezzeddine (M.)*, (1996), 183 A.R. 37 (Q.B.).
[42] 1995 CanLII 44 (SCC), [1995] 4 S.C.R. 154, at pp. 181-182.
[43] reflex, (1990), 75 O.R. (2d) 558 (C.A.).
[44] R.S.O. 1980, c. 502, s. 15.
[45] *Supra*, note 43, at p. 567.
[46] *Supra*, note 43, at pp. 568-569.
[47] *Supra*, note 43, at p. 574.
[48] *Supra*, note 43.
[49] 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679.
[50] *Id.*, at pp. 695-696.
[51] 1993 CanLII 68 (SCC), [1993] 3 S.C.R. 223.
[52] *Supra*, note 36, at p. 535.

Sheriff v. Canada (Attorney General), 2005 FC 305 (CanLII) - Judicial review of Superintendent's Disciplinary Measures

Date:	2005-02-25
Docket:	T-1687-02
Parallel citations:	10 CBR (5th) 70; 131 CRR (2d) 83; 27 Admin LR (4th) 54
URL:	http://canlii.ca/t/1jwxf
Citation:	Sheriff v. Canada (Attorney General), 2005 FC 305 (CanLII), <http://canlii.ca/t/1jwxf> retrieved on 2013-09-13

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Noteup: Search for decisions citing this decision
Reflex Record Related decisions, legislation cited and decisions cited
Date: 20050225
Docket: T-1687-02
Citation: 2005 FC 305
BETWEEN:

TODD Y. SHERIFF, holder of a trustee license
and SEGAL & PARTNERS INC.,
holder of a corporate trustee license

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

MacKAY D.J.:

[1] These reasons concern my decision to dismiss the application by the applicant trustees for judicial review of three interrelated decisions of the Superintendent of Bankruptcy acting under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, ("the *BIA"* or "the *Act*").

[2] The decisions in question were made in proceedings concerning review of the conduct of the trustees following an investigation and a report by a senior disciplinary analyst ("SDA") concerning allegations of unprofessional conduct in the administration of two estates. The first decision concerned alleged misconduct by the trustees, a decision made September 3, 2002, following hearings conducted in the preceding May and June. By the second decision, made on February 12, 2003, the Superintendent dismissed a motion by the trustees for a stay of the proceedings or a rehearing, a motion based on the ground that there were alleged failures by the SDA to disclose material evidence in advance of the hearings in May and June 2002. The third decision, made June 23, 2003, concerned penalties imposed for failure of the trustees to meet professional standards expected of them.

[3] Under Rule 302 of the *Federal Court Rules, 1998*, SOR/98-106, unless the Court orders otherwise, an application for judicial review concerns a single decision of a federal board, tribunal or agency in respect of which relief is sought. The circumstances of this case warrant an Order, as the terms of the Order now issued confirm, that this proceeding relates to three interrelated and interdependent decisions made concerning the merits, a stay application and applicable penalties in the course of proceedings arising from investigation and hearings about alleged failure of the trustees to meet professional standards in the management of certain estates in bankruptcy.

[4] Proceedings in this application were extended following the hearing until January 2005 by written submissions, initiated by the applicants with responses by the Attorney-General, filed with leave of the Court. Those concern "fresh evidence" or information which it is urged has significance for this matter. After reviewing the background and the decisions in issue, these reasons then review developments after June 23, 2003 when the penalty decision was rendered, and the significance of those developments. Finally, these reasons deal with the merits of the issues raised in this application.

[5] The reasons proceed under the following headings:

A. The background and the decisions in issue.
B. Developments after June 23, 2003.
C. Significance of post-June 2003 developments.
D. The issues raised in judicial review.
   1. The standard of review
   2. The applicability of the *Charter of Rights and Freedoms*, sections 7 and 11
   3. The applicability of the *Canadian Bill of Rights*
   4. The appropriate standard of fairness
   5. Specific errors alleged in law
   6. Reasonableness of the decisions of the Superintendent
E. Conclusion
F. Costs

A. The background and the decisions in issue

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[6] The applicant, Todd Y. Sheriff, is a licensed trustee under the *BIA* and he is the principal shareholder and an employee of the corporate applicant, Segal and Partners, Inc. which holds a corporate trustee licence under the *Act*. As a result of complaints about the administration by the trustees of two estates in bankruptcy, a Senior Disciplinary Analyst ("SDA"), exercising certain responsibilities of the Superintendent of Bankruptcy under the *BIA*, was directed to initiate an investigation of the work of the two trustees.

[7] Under the *Act* the Superintendent is responsible for licencing and supervision of trustees in their administration of estates as a fiduciary for the benefit of creditors. In the exercise of that responsibility the Superintendent receives complaints and he or his delegate may undertake an investigation or inspection of any matter to which the *Act* applies, including the conduct of a trustee.

[8] While the investigation of the SDA was underway, in March 2001 the corporate trustee reported concerns about alleged dishonesty of one of its staff who had been involved in the administration of the estates of interest to the SDA. That staff member (here called "A") was subsequently terminated in her employment. The investigation by the SDA led to two reports, the first on June 29, 2001, concerning alleged failures by the trustees to meet professional standards in administration of the two estates of concern. A second, supplementary report was completed October 25, 2001. Copies of both were provided to the trustees and preparations were made for a hearing by the Superintendent about the deficiencies, or the wrongdoing, reported by the SDA.

[9] Arrangements were made for hearings by the Superintendent with appropriate notice from the SDA's reports of the matters of concern, pursuant to section 14.02 of the *BIA*. Upon objection by the trustees to the form and content of the SDA's second report as inconsistent with directed requirements under the *BIA*, the Superintendent declined to deal with the second report, but commenced the hearing in relation to the first report. Prior to that hearing, the applicant trustees sought full disclosure of documents in possession of the SDA that were relevant to the anticipated hearing. The hearing was held May 27-30 and June 3, 2002, when decision was reserved. Subsequently on September 3, 2002, the Superintendent's decision found significant deficiencies in the administration by the trustees of the estates in question.

[10] Following the September 3, 2002 decision, the first of those here in question, the trustees raised objections to the admission, at the hearing, of the evidence of one, Mr. Webster. Since the Superintendent expressly stated by his decision that this evidence would be ignored, and it was not otherwise referred to in the decision, and it is not now said by the trustees that it was relied upon by the Superintendent, that objection has no merit. The second objection concerns alleged failure by the SDA to disclose in advance of or at the hearing, correspondence with another trustee, a third party, alleging dishonesty by A, the former employee of the applicant corporation, who had been employed by that third party after employment with the applicant trustee was terminated. That correspondence the applicants learned about only in November, 2002 when it was disclosed by the SDA as a document possibly relevant for the second report, which as we have noted, was completed October 25, 2002.

[11] The two objections of the trustees led them to apply to the Superintendent for a stay of proceedings or for a new hearing on the ground that the SDA had failed to disclose material evidence, i.e. the letter from a second corporate trustee concerning the alleged wrongdoing of A. They urged that had they known of that alleged wrongdoing by A, they might have called her as a witness and evidence of A's conduct could reasonably have resulted in a different decision concerning the applicants.

[12] That application by the trustees was heard on November 12, 2002 and was dealt with by decision of the Superintendent, dated February 12, 2003, the second decision here in question. No reason was found to order a new hearing or to stay proceedings. In his decision the Superintendent noted that a statement by A, included in the SDA's material evidence disclosed before the May-June 2002 hearing, a matter disputed by the trustees at the hearing, had specifically been excluded from his consideration, as stated in his decision. A had not been called as a witness at the hearing either by the SDA or by the trustees, though nothing precluded that.

[13] As for the failure to disclose the correspondence from the second corporate trustee, the Superintendent's decision found that the SDA had failed to meet appropriate standards for disclosing information that could have been relevant and of interest to the applicant trustees. Nevertheless, that "information would not itself have produced any different result, and in the circumstances of the case, on a balance of probabilities there was no reasonable possibility that the trustees were denied the opportunity to present a full answer and defence or that their right to a fair hearing was violated as a result of the failure to disclose the other trustee firm's report."

[14] Thereafter, submissions were made by the applicants and by the SDA to the Superintendent with respect to appropriate penalties. The decision, to impose penalties, was released on June 23, 2003. This is the third decision in issue in this application for judicial review. I return to the issues raised in this application after dealing with issues arising after the penalty decision in June 2003. The penalties then decided were not imposed, pending the outcome of this application.

B. Developments after June 23, 2003

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[15] While the parties prepared for the hearing of this matter they were simultaneously involved in preparations for a hearing by a delegate of the Superintendent in regard to the second report of the SDA, which had originated on the basis of an audit of the applicant trustees' affairs following their report in 2001 of alleged wrongdoing by A, their former employee. In the course of preparations for that hearing concerning the second report the trustees continued to seek disclosure of information from the SDA. Further disclosure was made, in March and April 2004 when working papers of the SDA, excluding some claimed to be privileged, and a regulatory circular concerning management of third party accounts were produced by the SDA.

[16] That late disclosure led to a motion by the trustees to the Superintendent's delegate, that proceedings with regard to the second report be stayed. The motion was denied and preparations for the hearing on that matter continued with a view to commencing in the fall of 2004.

[17] The late disclosure with other concerns about the SDA's alleged failure to disclose relevant information was also a ground for argument in the hearing of this application concerning the decisions of the Superintendent. That ground I return to discuss, after first disposing of a second request by the trustees that this proceeding be stayed and the decisions here in question be set aside. That request was based upon "fresh evidence", said to have become available after the hearing of this application. That evidence is constituted by further disclosure of the SDA on November 2, 2004, of e-mail correspondence recently examined and perceived to be possibly relevant in relation to the hearing in regard to the second report. Submissions in respect of the significance of that fresh evidence were made in writing to this Court in December 2004, following a request in November by the applicants for leave to file a supplementary record.

[18] The disclosure made November 2, 2004, also became the basis for a second motion by the trustees to the Superintendent's delegate for a stay of proceedings in relation to the second report of the SDA. That motion, heard by the Honourable Fred Kaufman, the Superintendent's delegate, led to a decision dated January 6, 2005. That was sent to me by the trustees with a request for leave to file it in this matter, with additional submissions emphasizing the trustees' view that the reasoning of that decision has significance for this proceeding, and further supports their submission that this proceeding in relation to the first report be stayed or be ordered to be reheard by the Superintendent. That request the respondent Attorney General opposed by written submissions dated January 25, 2005.

[19] By his decision the Honourable Fred Kaufman, acknowledging that he was dealing with a different case than this, found that delayed disclosure, and some uncertainty whether all relevant information had been disclosed, put in question the integrity of the process in regard to the second report and so too the right and ability of the trustees to make full answer and defence in regard to that report. He found the wording of the *Bankruptcy and Insolvency Act* authorized him to grant a stay, and he stayed "the proceedings initiated against [the trustees'] by the Senior Discipline Analyst".

[20] By the Order now issued I confirm that the written submissions of the trustee, including the decision of January 6, 2005 by the Honourable Fred Kaufman, and the response by letter of the Attorney General, are filed in this proceeding. I do so in order to complete the record of submissions made before, at, and following the hearing of this application for judicial review.

C. Significance of post-June 2003 developments

[21] Having ordered the written submissions presented following the hearing of this matter to be filed, I am not persuaded that the fresh evidence revealed by the disclosure of information on November 2, 2004, or the decision of the Honourable Fred Kaufman have any significance for my decision. The November disclosure and the delegate's subsequent decision following the hearing of this application, and the earlier disclosures of March and April 2004, occurred long after the decisions of the Superintendent here in question. I note the trustees are concerned about alleged failure of the SDA to make timely disclosure of evidence or information in her possession at the time of the first report and also of the second report, and that both reports concern the same trustees and SDA, the same time period and some similar underlying facts.

[22] Nevertheless what is urged to be fresh evidence by disclosure in November 2004, as in March and April, 2004, mainly concerns conduct by A, the former employee of the trustees, contemplation of possible prosecution of A, and guidelines for managing third party accounts, matters which are not relevant for review of the decisions of the Superintendent here in question. Again, I note that any evidence of A was expressly excluded from consideration by the Superintendent when A was not called by the trustees or by the SDA at the hearing on the first report. Matters relating to third party accounts, possibly apart from the two estates of concern for the first report, are not relevant for review in this proceeding, and in any event the guidelines were not "fresh evidence" since they had been published for trustees some years ago.

[23] No substantive argument concerning the Superintendent's decision here in question is raised by the trustees on the basis of the "fresh evidence". They seek to support their claim for relief by relying on late disclosure, after the

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hearing, to bolster their similar argument made at the hearing of this application. They claim to have lost confidence in the fairness of the process followed by the SDA. That is unfortunate but their measure of the standard for fairness is not in itself persuasive.

[24] Finally, I am not persuaded that the decision of the Honourable Fred Kaufman, in relation to proceedings in preparation for the hearing on matters raised in the second report has significance for judicial review of the decisions made by the Superintendent in 2002 and 2003 in respect of matters raised in the first report. With respect for his decision, I note that it concerns different circumstances, although they involve the same trustees and SDA and the same general time period. It is a case different from this, as the delegate himself acknowledged. Each case concerns a different report, the first concerning perceived failure to meet professional standards, the second concerning perceived wrongdoing against the interests of beneficiaries of bankrupt estates.

D. The issues raised in judicial review

[25] I turn to the issues raised in the application records and the submissions made at the hearing of this judicial review of the decisions by the Superintendent in regard to the first report.

D.1. The standard of review

[26] The applicants urge that the standard of review in this application is correctness. While that may be the appropriate standard in relation to some or all of specific errors of law they urge were made by the Superintendent, I am not persuaded that standard is appropriate in assessing the decision of September 3, 2002 on the merits of the first report, and the penalty decision of June 23, 2003, when those are each considered as a whole.

[27] Under the *BIA* the Superintendent is responsible for supervision of the administration of all estates, with broad power to oversee the regime for management of bankruptcy and insolvency situations for the benefit of debtors, creditors and others interested in the estates. A primary means of supervision is through trustee licensing and regulation of the work of trustees. Under section 5 of the *Act* the Superintendent's supervisory responsibilities include:

5(3) The Superintendent shall, without limiting the authority conferred by subsection (2),

[...]

(e) from time to time make or cause to be made such inspection or investigation of estates or other matters to which this Act applies, including the conduct of a trustee or a trustee acting as a receiver or interim receiver, as the Superintendent may deem expedient and for the purpose of the inspection or investigation the Superintendent or any person appointed by the Superintendent for the purpose shall have access to and the right to examine and make copies of all books, records, data, including data in electronic form, documents and papers pertaining or relating to any estate or other matter to which this Act applies;

(f) receive and keep a record of all complaints from any creditor or other person interested in any estate and make such specific investigations with regard to such complaints as the Superintendent may determine; and

[...]

5(4) The Superintendent may

[...]

(b) issue, to official receivers, trustees, administrators of consumer proposals made under Division II of Part III and persons who provide counselling pursuant to this Act, directives with respect to the administration of

5(3) Le surintendant, sans que soit limitée l'autorité que lui confère le paragraphe (2) :

[...]

e) effectue ou fait effectuer les investigations ou les enquêtes, au sujet des actifs et autres affaires régies par la présente loi, et notamment la conduite des syndics agissant à ce titre ou comme séquestres ou séquestres intérimaires, qu'il peut juger opportunes et, aux fins de celles-ci, lui-même ou la personne qu'il nomme à cet effet a accès, outre aux données sur support électronique ou autre, à tous livres, registres, documents ou papiers se rattachant ou se rapportant à un actif ou à toute autre affaire régie par la présente loi, et a droit de les examiner et d'en tirer des copies ;

f) reçoit et note toutes les plaintes émanant d'un créancier ou d'une autre personne intéressée dans un actif, et effectue, au sujet de ces plaintes, les investigations précises qu'il peut déterminer ;

[...]

5(4) Le surintendant peut :

[...]

b) donner aux séquestres officiels, aux syndics, aux administrateurs au sens de la section II de la partie III et aux personnes chargées de donner des consultations au titre de la présente loi des instructions relatives à l'exercice de leurs fonctions, et notamment leur

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this Act and, without restricting the generality of the foregoing, directives requiring them

(i) to keep such records as the Superintendent may require, and

(ii) to provide the Superintendent with such information as the Superintendent may require;

(c) issue such directives as may be necessary to give effect to any decision made by the Superintendent pursuant to this Act or to facilitate the carrying out of the purposes and provisions of this Act and the General Rules, including, without limiting the generality of the foregoing, directives relating to the powers, duties and functions of trustees, of receivers and of administrators as defined in section 66.11;

(d) issue directives governing the criteria to be applied by the Superintendent in determining whether a trustee licence is to be issued to a person and governing the qualifications and activities of trustees; and

[...]

enjoindre de conserver certains dossiers et de lui fournir certains renseignements;

c) donner les instructions nécessaires à l'exécution de toute décision qu'il prend en vertu de la présente loi ou susceptibles de faciliter l'application de la présente loi et des Règles générales, et notamment en ce qui touche les attributions des syndics et des séquestres et celles des administrateurs au sens de l'article 66.11;

d) donner des instructions régissant les critères relatifs à la délivrance des licences de syndic, les qualités requises pour agir à titre de syndic et les activités des syndics;

[...]

[28] Subsection 5(6) of the *BIA* provides:

5(6) A directive issued by the Superintendent under this section shall be deemed not to be a statutory instrument within the meaning and for the purposes of the Statutory Instruments Act.

5(6) Les instructions données par le surintendant ne sont pas des textes réglementaires au sens de la Loi sur les textes réglementaires.

[29] The *Act* also includes provisions concerning investigations by the Superintendent, as follows:

14.01 (1) Where, after making or causing to be made an investigation into the conduct of a trustee, it appears to the Superintendent that

(a) a trustee has not properly performed the duties of a trustee or has been guilty of any improper management of an estate,

(b) a trustee has not fully complied with this Act, the General Rules, directives of the Superintendent or any law with regard to the proper administration of any estate, or

(c) it is in the public interest to do so,

(2) The Superintendent may delegate by written instrument, on such terms and conditions as are therein specified, any or all of the Superintendent's powers, duties and functions under subsection (1), subsection 13.2(5), (6) or (7) or section 14.02 or 14.03.

14.02 (1) Where the Superintendent intends to exercise any of the powers referred to in subsection 14.01(1), the Superintendent shall send the trustee written notice of the powers that the Superintendent intends to exercise and the reasons therefor and afford the trustee a

14.01 (1) Après avoir tenu ou fait tenir une enquête sur la conduite du syndic, le surintendant peut prendre l'une ou plusieurs des mesures énumérées ci-après, soit lorsque le syndic ne remplit pas adéquatement ses fonctions ou a été reconnu coupable de mauvaise administration de l'actif, soit lorsqu'il n'a pas observé la présente loi, les Règles générales, les instructions du surintendant ou toute autre règle de droit relative à la bonne administration de l'actif, soit lorsqu'il est dans l'intérêt public de le faire :

a) annuler ou suspendre la licence du syndic;

b) soumettre sa licence aux conditions ou restrictions qu'il estime indiquées, et notamment l'obligation de se soumettre à des examens et de les réussir ou de suivre des cours de formation;

c) ordonner au syndic de rembourser à l'actif toute somme qui y a été soustraite en raison de sa conduite.

(2) Le surintendant peut, par écrit et aux

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reasonable opportunity for a hearing.

conditions qu'il précise dans cet écrit, déléguer tout ou partie des attributions que lui confèrent respectivement le paragraphe (1), les paragraphes 13.2(5), (6) et (7) et les articles 14.02 et 14.03.

14.02 (1) Lorsqu'il se propose de prendre l'une des mesures visées au paragraphe 14.01(1), le surintendant envoie au syndic un avis écrit et motivé de la mesure qu'il entend prendre et lui donne la possibilité de se faire entendre.

[30] In the context of the pragmatic and functional approach to the standard of review as confirmed by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247 at paras. 20, 26-27 and in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226 at paras. 21-22, the decisions on the merits of the report and on any penalties are both decisions for which the standard of review is reasonableness. That standard rests on my assessment of the comparative expertise of the Superintendent relative to the Court in the supervision of trustees and of estates, of the purpose of the *Act* in general, and of sections 14.01 and 14.02 in particular, to ensure an appropriate exercise of fiduciary responsibilities in administration of estates, and of the nature of the ultimate issues for each decision, which are mixed questions of law and fact.

[31] In review of those decisions the Court owes deference to the conclusions reached by the Superintendent. Unless they are clearly unreasonable in light of the evidence considered by the Superintendent, the Court will not disturb his decisions on the merits and on penalties. That is particularly the case where in the course of a hearing the Superintendent "is not bound by any legal or technical rules of evidence" (the *Act*, subsection 14.02(2)(b)).

[32] Other decisions of the Superintendent, first in regard to the applicant's motion to stay proceedings based on alleged unfairness arising from failure of the SDA to provide full disclosure in advance of the hearing, and second in regard to alleged unfairness from the statute's vesting of various functions in the Superintendent, and third concerning specific errors of law claimed by the applicants, relate to the process followed by the Superintendent. For the first two mixed questions of fact and law, the standard of review applicable is also reasonableness. In assessing specific errors of law alleged, the standard is correctness.

[33] I turn to apply these standards to the decisions in issue after considering the applicants' claims in relation to the *Canadian Charter of Rights and Freedoms, Constitution Act*, 1982, Schedule B, Part I, and the *Canadian Bill of Rights*, S.C. 1960, c. 44.

D.2. The applicability of the *Charter of Rights and Freedoms*, sections 7 and 11

[34] In written submissions in the applicants' record it is urged that the application of sections 14.01 and 14.02 as applied in this case violate their rights assured by sections 7 and 11 of the *Charter of Rights and Freedoms*. It is urged those constitutional rights are engaged by reason of procedural guidelines issued by the Superintendent which provide that one objective of the process for decisions affecting a trustee's licence is to ensure compliance with the legal obligations provided for under the *BIA*, the general rules and directives applicable, and the *Charter of Rights* and rules of administrative law.

[35] Enunciation of that objective does not in itself engage sections 7 and 11 of he *Charter of Rights*. The guidelines are directives issued by the Superintendent and do not constitute law in the normal sense (*Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557 at 591). The *Charter* is applicable in accord with its terms and relevant jurisprudence. Proceedings like those before the Superintendent are administrative in nature, controlling the practice of licenced trustees. At most they may affect economic interests and the privilege of practising as a licenced trustee. They do not affect rights to life, liberty and security of the person within the meaning of section 7 of the *Charter* (see *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 S.C.R. 429; *Charles v. Canada (Attorney General)*, 1995 Carswell Ont. 1037 (Gen. Div.) aff'd 1998 Carswell Ont. 1297 (C.A.) at para. 47). Moreover subsection 11(d) of the *Charter*, referred to by the trustees, has no application to professional conduct proceedings under the *BIA* which proceedings are not penal in nature (*R. v. Wigglesworth*, 1987 CanLII 41 (SCC), [1987] 2 S.C.R. 541; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307 at para. 88). Finally, it is well settled that the *Charter* rights here referred to do not protect the interests of the corporate trustee in any case.

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[36] In my opinion, sections 7 and 11 of the *Charter* are not engaged by the proceedings conducted by the Superintendent under sections 14.01 and 14.02 of the *BIA* either directly, or indirectly as the trustees suggest by reason the objective stated for the process, or by reason of alleged failure of the SDA to disclose relevant information in advance of the hearing in May and June 2002.

D.3. The applicability of the *Bill of Rights*

[37] The trustees submit that in addition to their *Charter* rights their rights under the *Canadian Bill of Rights* are infringed by the proceedings, in particular those rights assured by subsection 1(a) which declares "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law", and by subsection 2(e) which provides "... no law of Canada shall be construed and applied so as to ...(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations".

[38] It is well settled that subsections 1(a) and 2(e) of the *Bill of Rights* are concerned with rights of natural persons, not with claimed rights of corporations. *Canada (Attorney General) v. Central Cartage*, reflex, (1990) 2 F.C. 641 (C.A.); *Pfeiffer v. Redling*, (1995) Carswell Nat 1570 (F.C.T.D.). Further, the *Bill of Rights* does not apply with regard to a claim for a privilege or for licenced authority (*Pfeiffer, supra*; *Re Joys and Minister of Natural Revenue*, 1995 CanLII 3537 (FCA), [1995] 128 D.L.R. (4th) 385 (F.C.T.D.). I agree with submissions of the respondent that under the *BIA*, a trustee is licensed and regulated by the Superintendent; he has no right to a license and no vested interest in the license he may hold as a trustee.

[39] Further, as will be evident when I next consider the trustees' claims concerning the combination of functions under authority of the *BIA* and concerning failures of disclosure, claims relating to fairness of the process, I am not persuaded that they were not afforded a fair hearing in accord with the principles of fundamental justice. Thus, their claims do not establish a violation of rights ensured under the *Canadian Bill of Rights* in the process here followed by the Superintendent.

D.4. The appropriate standard of fairness

[40] The trustees raise two preliminary objections to the process which in my view concern the fairness of the proceedings. These concern the combination of functions authorized for the Superintendent, and the delay and failures in disclosure by the SDA.

[41] It is the case that under the *BIA* the Superintendent is responsible for investigation, reporting and adjudicating, including the imposition of penalties whenever concerns arise about the conduct and practice of a licensed trustee. Those functions may be delegated by the Superintendent, as the investigation and reporting were to the SDA in this case. In other cases the Superintendent may delegate to another the responsibility for a hearing and determinations of inadequacy or of penalties, as was done in regard to the second report completed with respect to the trustees concerned in this case.

[42] In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 (CanLII), [2001] 2 S.C.R. 781 at para. 40, Madame Justice McLachlin wrote:

The mere fact that senior inspectors functioned both as investigators and decision makers does not automatically establish a reasonable apprehension of bias. [...]

In *Bell Canada v. C.T.E.A.*, 2003 SCC 36 (CanLII), [2003] 1 S.C.R. 884 at para. 40, Chief Justice McLachlin and Bastarache J. commented, following the reasoning in *Ocean Port*:

The overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for [an administrative agency] to effectively perform its intended role.

[43] In this case the Superintendent delegated his investigatory and reporting role to the SDA. The report became the basis for the hearing conducted by the Superintendent who, on the evidence presented by the SDA's report and the testimony and evidence of the trustees, reached decisions on the merits and ultimately on appropriate penalties. The Superintendent participated in one phase only and the various roles for which the office was responsible were not improperly confused. There was no inherent bias in the process. Moreover, the process was not criminal in nature and it did not lead to deprivation of basic rights or liberty. It was concerned with assessing and regulating the practices of licensed trustees. In my opinion, the structural framework established by the statute, as it was applied in this case did not constitute a breach of the appropriate standard of fairness.

[44] No basis is established concerning alleged violation of the *Charter*, or of the *Canadian Bill of Rights*, or of basic principles of fairness in process, that would warrant a finding that the statutory provisions, sections 14.01 to 14.03 are inoperative in the circumstances of this case.

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[45] As earlier noted, the time this application was heard, in September 2004, and in subsequent written submissions to the Court, the trustees emphasized their concern about a lack of fairness in the process followed by reason of the lack of, and often belated, disclosure by the SDA both before and after the hearing by the Superintendent, a concern already noted and dealt with in part. I have declined to stay this proceeding, or the proceedings of the Superintendent, or to set those aside on the basis of the trustees' concerns about alleged failure of disclosure.

[46] Their concerns are based on principles concerning disclosure that have evolved in criminal law, now established by the decision in *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326 and the jurisprudence flowing from that. The proceedings here do not result in criminal penalties, they did not result in deprivation of the professional standing of a licensed trustee though the terms of their licenses were varied. I am not persuaded that in these disciplinary proceedings, to review the practices of licenses, criminal law standards for disclosure are necessary or appropriate.

[47] Rather, aside from exceptional circumstances not present in this case, in an administrative process for assessing and directing practices of licensed trustees, it is sufficient if disclosure extends to information upon which the report of the SDA is based, and the report itself, so that the person affected knows the case he is expected to meet and has a fair opportunity to answer that case.

[48] That basic standard of fairness of the process was met in this case, in my opinion. The case the applicant trustees had to meet was known to them in advance of the hearing, from the first report of the SDA and the documentary evidence produced before the Superintendent's hearing in May and June 2002 (*D. & B. Co. of Canada Ltd. v. Canada (Director of Investigations and Research)* 1994 Carswell Nat 1849 (F.C.A.); *Re CIBA-Geigy Canada Ltd.* 1994 Carswell Nat 1796). They had opportunity to provide evidence, to call witnesses and to make submissions before the Superintendent's decisions were made in September 2002 and in June 2003.

D.5. Specific errors alleged in law

[49] The trustees urged specific errors were made in failing to consider the significance of evidence revealed by belated disclosure. The first concerned failure to disclose, until after the first decision, information that became the basis for the trustees' motion to stay proceedings and for the Superintendent's second decision in February 2003, a matter I deal with in review of that decision. The second concerned an exculpatory statement by an employee of the Superintendent, which it is said might have had a significant bearing on results of the hearing. But the evidence of that employee, as in the case of the evidence of A, the trustees' former employee, was specifically excluded from consideration by the Superintendent, and the evidence in question was essentially a matter of opinion. In these circumstances, I am not persuaded that the information disclosed after the hearing would have had any bearing on the result had it been earlier available, and I note the trustees make no submissions except to speculate that the outcome might have been affected.

[50] Reference by the Superintendent in recitals of the penalty decision to a loan arranged by the trustees, when it is urged that loan was not established in the Superintendent's findings on the merits in the first report, is said to have been made without opportunity for the trustees to explain. That reference appears to me as a descriptive form of a recital, not as a factor relied upon in establishing the penalties imposed.

[51] The Superintendent is also said to have erred by failing to take into consideration in the penalty decision the trustees cooperation with the investigation and possible oppressive effects upon the trustees of undue emphasis on deterrence as a factor of the penalties imposed. This Court, however, defers to the Superintendent's assessment of appropriate penalties where no case is made that those are unreasonable in light of the evidence before him.

[52] In summary, the specific errors in law alleged by the trustees are not established, in my opinion and those submissions provide no basis for the Court to intervene to quash the decisions on the merits and on penalties.

D.6. Reasonableness of the decisions of the Superintendent

[53] By the decision of September 3, 2002 on the merits of the first report of the SDA the Superintendent found a number of specific errors in practice by the trustees in the management of the two estates that were subject to the investigation.

[54] Aside from concerns about the SDA's delay or failure in disclosing information in advance of the hearing, no sound argument is made by the trustees that the findings of the Superintendent were unreasonable. In written submissions they urge the appropriate standard of review of that decision is correctness, but as I have indicated the application of the pragmatic and functional test leads me to conclude that the standard is reasonableness. On the evidence before the Superintendent, from the report of the SDA with supporting documents and the evidence adduced by the trustees the findings of the Superintendent in relation to the merits of the first report were open to him and were reasonable.

[55] By the decision of February 12, 2003, the Superintendent dismissed the trustees' motion to stay proceedings or to order a new hearing because of the failure of the SDA to disclose correspondence from another corporate trustee

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about the conduct of A, a former employee of the trustees at the time of when the estates in question were administered by the trustees. In my opinion, the Superintendent did not err in law, nor did he reach an unreasonable decision, despite acknowledging failure by the SDA to meet her obligation to disclose the correspondence. No evidence from A, collected by the SDA and made available to the trustees and to the Superintendent, was considered by the latter; rather in his decision he expressly excluded it. A might have been called as a witness by the trustees but they did not do so. The correspondence from other corporate trustees, belatedly disclosed, dealt with A's conduct when employed by those other trustees after employment by the trustees had terminated.

[56] In the circumstances the Superintendent, who by statute has discretion to determine what is evidence and how it shall be weighed, did not err in law, and his decision was entirely reasonable. If the correspondence had been disclosed that would not have affected his determination of failures by the trustees to meet appropriate professional standards.

[57] By the penalty decision of June 23, 2003, the Superintendent ordered that the license of the corporate trustee be restricted for one month, that the license of the applicant Sheriff be suspended for six months and that he be restricted to administration of corporate estates for 18 months. As earlier noted, objections to the penalty decision raised by the trustees include specific allegations of errors in law by the Superintendent. Their objections also include the Superintendent's failure to refer in his decision to the applicants' cooperation with the SDA's investigation, or to the fact that some of the transgressions found prior to the hearing were readily addressed even before the hearing.

[58] In my view, none of these claims raises a serious issue about the penalty decision. Even if A's conduct had played a major role in the administration of the estates in question, an inference the Court is invited to draw, there is no evidence, and none was considered by the Superintendent to provide a basis for intervention by the Court. The conduct of the trustees in the course of the investigation is no more than would be expected of a licensed trustee. There is simply no basis for finding the penalty decision, made within the exercise of statutory discretion vested in the Superintendent, was unreasonable.

E. Conclusions

[59] In addition to incidental orders confirming procedural determinations on issues raised by the applicants by written submissions following the hearing of this matter, the Order now issued dismisses the trustees' application for judicial review, concerning the three interrelated decisions of the Superintendent in bankruptcy, in its entirety.

[60] For greater certainty I dismiss the applicants' requests for an Order:

a) declaring the discipline provisions (sections 14.01 to 14.03 of the *BIA*) inoperative pursuant to sections 7 and 11 of the *Charter of Rights and Freedoms*, and subsections 1(a) and 2(e) of the *Canadian Bill of Rights*;

b) quashing and setting aside the decisions of the Superintendent dated September 3, 2002, February 12, 2003 and June 23, 2003 and staying the proceedings; or

c) quashing and setting aside the three decisions here questioned and an Order staying the proceedings.

F. Costs

[61] Each of the parties seeks costs. As in the normal course, costs will follow the outcome. The respondent shall have costs as the parties may agree upon or, failing agreement within 45 days, as may be assessed by a taxing officer in accord with the mid-range of costs set by column III of the Court's tariff.

"W. Andrew MacKay"

D.J.F.C.

Ottawa, Ontario
February 25, 2005

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1687-02

STYLE OF CAUSE: Todd Y. Sheriff, holder of a trustee license and Segal & Partners Inc., holder of a coporate trustee license
and
Superintendent of Brankruptcy

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 27 and 28, 2004

REASONS FOR ORDER
AND ORDER OF The Honourable Mr. Justice W. Andrew MacKay

DATED: February 25, 2005

APPEARANCES:

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Roy v. Poitras, 2006 FC 1386 (CanLII) - Judicial Review of Delegate's Measures

Date:	2006-11-17
Docket:	T-360-05
Parallel citations:	36 CBR (5th) 1; 306 FTR 83
URL:	http://canlii.ca/t/1st82
Citation:	Roy v. Poitras, 2006 FC 1386 (CanLII), <http://canlii.ca/t/1st82> retrieved on 2013-09-15
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Reflex Record	Related decisions, legislation cited and decisions cited

Date: 20061117
Docket: T-360-05
Citation: 2006 FC 1386
Ottawa, Ontario, the 17th day of November 2006
Present: The Honourable Mr. Justice Simon Noël
BETWEEN:
JACQUES ROY
Applicant
and
LAWRENCE A. POITRAS
Respondent
and
SYLVIE LAPERRIÈRE
Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made by Jacques Roy, trustee in bankruptcy ("the trustee"), with regard to complementary and ongoing disciplinary decisions dated December 3, 2004 (concerning the merits of disciplinary offences, or lack thereof) and January 31, 2005 (determination of the sanction) by Lawrence A. Poitras, in his capacity as delegate of the Superintendent of Bankruptcy (the "delegate" or "delegate Poitras") under section 14.01 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the Act"). In addition, another application for judicial review of the delegate's decision dated December 3, 2004 involving some of the same parties was initiated by the Attorney General of Canada (see *A.G. Canada v. Jacques Roy, in his capacity of trustee* – T-402-05).

[2] In his decisions, the delegate ruled that the trustee had committed four (4) of the fifteen (15) disciplinary offences with which he was charged, including those which were withdrawn during the hearing. Moreover, the delegate concluded that

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seven (7) other breaches of discipline were unfounded. Accordingly, a suspension of the trustee's licence for one (1) week was appropriate. For the purposes of this decision, instead of using the word "offence", I will use the term "breach", which is more appropriate, considering the facts in this case.

[3] In his application for judicial review, the trustee is challenging the merits of the determination made concerning each of the four (4) breaches of discipline, as well as the determination made concerning the sanction applied.

I. Facts

[4] Since 1986, the trustee has held a trustee's licence issued under the Act and has no disciplinary record.

[5] In connection with the administration of the assets in the bankruptcy of Distribution Sunliner (1985) Inc. ("Sunliner bankruptcy"), one of the company's shareholders, Mr. Paris, wrote a letter to the Office of the Superintendent of Bankruptcy ("OSB") on December 7, 1995, requesting an investigation [TRANSLATION] "into the conduct of the trustee in bankruptcy Jacques Roy".

[6] Josée Plourde ("Ms. Plourde") from the OSB was assigned to follow up on the request for an investigation, and she prepared a report explaining certain factual situations connected with specific work performed in the Sunliner bankruptcy. In a letter sent to the trustee on May 9, 1997, Ms. Plourde issued the following opinion:

> [TRANSLATION]
>
> - In general, the administration of this file seems to be in compliance with the provisions of the *Bankruptcy and Insolvency Act*, the *Bankruptcy Rules* and the directives issued by the Superintendent.
> - ... the bill of costs was approved by the inspectors and assessed by the Court. As far as the trustee's fees and disbursements are concerned, we leave everything to the Court, which will award you fair and reasonable compensation according to the circumstances.
>
> (Parties' joint record, volume XI, tab B-15, letter from Josée Plourde to Jacques Roy dated May 9, 1997).

[7] On July 23, 1997, the Deputy Registrar signed a judgment discharging the trustee from the administration of the Sunliner bankruptcy. A final statement of receipts and disbursements, signed by the trustee on November 19, 1996, was included in the documents enclosed with the application for discharge.

[8] On June 8, 1999, Ms. Plourde attended a new meeting with Mr. Paris, Mr. Gallant, and a representative of the Royal Canadian Mounted Police. During this meeting, they discussed the administration of the Sunliner bankruptcy, the involvement of Yves Lemaire ("Mr. Lemaire") in the administration of the bankruptcy, the monies received by the National Bank, and the cashing of cheques issued by a company named BCL, some of which had been cashed by Mr. Lemaire.

[9] On June 10, 1999, in light of these new facts, the OSB assigned this case to Mr. Nolet of the audit section. He signed a report on October 21, 1999.

[10] On March 2, 2000, Ms. L. MacDonald, Acting National Director, Compliance and Investigation, recommended to the OSB, Quebec City District, that the trustee face a disciplinary committee further to the complaints made by Mr. Paris, based on the [TRANSLATION] "new facts" revealed at the June 8, 1999 meeting, the trustee's reply, and Mr. Nolet's audit report.

[11] On November 24, 1999, in the bankruptcy file of Pierre-André Jacob ("Jacob bankruptcy"), a complaint was filed against the trustee by a creditor involved in the bankruptcy. The issues raised in this case concerned a trustee substitution and due diligence. The facts will be discussed in the analysis.

[12] On March 23, 2000, the OSB assigned Sylvie Laperrière, a senior analyst of professional conduct ("analyst Laperrière"), to investigate the trustee's professional conduct in the Jacob and Sunliner bankruptcies.

[13] Ms. Laperrière signed her report on April 17, 2001. It was amended on November 2, 2001. In her report, Ms. Laperrière concluded that the trustee's conduct in the administration of the Jacob and Sunliner bankruptcies gave rise to fifteen (15) alleged breaches of the Act and/or the *Bankruptcy and Insolvency Rules*, C.R.C., 1978, c. 368 (the "Rules") and of the directives issued by the Superintendent of Bankruptcy. This report was submitted to the Superintendent for a hearing under sections 14.01 and 14.02 of the Act. The Superintendent had delegated his authority under sections 14.01, 14.02 and 14.03 of the Act to delegate Poitras (the Superintendent's first choice as delegate had died, and delegate Poitras was subsequently chosen), in accordance with subsection 14.01(2).

[14] In the fall of 2004, the delegate chaired a disciplinary hearing for the fifteen (15) breaches complained of, some of which were withdrawn, and accepted only four (4), which read as follows:

> Pierre-André Jacob file
>
> [TRANSLATION]
>
> (2) The trustee did not perform his duties in a timely manner and did not carry out his functions with due care by not accepting the application for substitution by representatives of Trans-Canada Credit and by delaying the preparation of minutes of the creditors' meeting of November 18, 1999, thereby contravening section 13.5 of the Act and Rule 36.

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Distribution Sunliner (1985) Inc. file

[TRANSLATION]

(1) The trustee failed to obtain a statement from an officer of Distribution Sunliner (1985) Inc., from which it would have been possible to confirm the accuracy at the time of the bankruptcy of the inventory dated March 8, 1994, thereby contravening subsection 5(5) of the Act and paragraphs 6 and 7 of Directive No. 31 on taking inventory of the bankrupt's property, issued by the Superintendant of Bankruptcy on August 18, 1989.

(5) The trustee did not document his file:

- on the reconveyance to the trustee by Isomur of the Bay Distributors' account receivable of $6,031.43;
- on the results obtained regarding collection of the said account receivable by the trustee and the balance of $9,000 payable by Isomur;
- and on the decision to postpone *sine die* proceedings for recovery against Messrs. Georges Rivard and Jean-Yves Genest, of the amount owed under the judgment of January 4, 1995,

thereby contravening subsection 5(5) of the Act and paragraph 5 of Directive No. 22 on the realization of the estate's assets, issued by the Superintendent of Bankruptcy on December 22, 1988.

(7) The trustee did not carry out his functions with due care:

- by not documenting his file on the instructions given by the trustee to Yves Lemaire of Gérance Mauricie, to follow up on the trustee's behalf on the recovery of money from BCL, and by not documenting his file on the change in status of Mr. Lemer (*sic*), who according to the trustee was acting for the National Bank of Canada in the collection of these amounts;
- by not informing BCL that it should send cheques to Yves Lemaire of Gérance Mauricie after learning of the instructions obtained from the National Bank of Canada by the latter;
- and by authorizing the said Yves Lemaire of Gérance Mauricie to open the trustee's mail,

thereby contravening section 13.5 and subsection 5(5) of the Act and paragraph 5 of Directive No. 22 on the realization of estate assets, issued by the Superintendent of Bankruptcy on December 22, 1988, as well as Rules 36 and 52.

It should be noted that the numbering of the breaches follows the numbering used by the delegate in his decision dated December 3, 2004.

[15] The trustee challenges these determinations of the delegate, as well as the sanction ordering a one-week suspension of his trustee's licence.

II. Issues

[16] Considering the foregoing, the issues to be dealt with are as follows:

1) What is the standard of review applicable to each of the issues?
2) Should the breaches concerning the Sunliner bankruptcy be dismissed because Ms. Plourde of the OSB was satisfied with the conduct of the trustee in bankruptcy in that case?
3) Did the delegate err in concluding that the trustee did not perform his duties in a timely manner and with due care in the Jacob bankruptcy, contrary to Rule 36?
4) Did the delegate err in concluding that in the Sunliner bankruptcy the trustee infringed Directive 31 of the Superintendent of Bankruptcy, which requires that a statement confirming the accuracy of the inventory of assets of the bankrupt be filed?
5) Did the delegate make a mistake of fact in concluding that in the Sunliner bankruptcy the trustee infringed paragraph 5 of Directive 22 of the Superintendent of Bankruptcy, which requires that the trustee document his files?
6) Did the delegate err in concluding that the trustee did not perform his duties with due care in the Sunliner bankruptcy case?
7) Was the delegate's decision to suspend the trustee's licence for one week legal and proper in the circumstances of the case?

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III. Analysis

1) What is the standard of review applicable to each of the issues?

[17] The Superintendent has a statutory duty to supervise and administer estates in bankruptcy in Canada. To this end, the Act grants the Superintendent numerous powers to oversee the administration of estates in bankruptcy in the interest of creditors, debtors, bankrupts, and any other interested parties. One of the control mechanisms used is the licensing of trustees, as well as the supervision of their activities, taking into consideration the Act, Regulations and obligations under the directives issued by the Superintendent. For the purposes of this issue, I will reproduce some relevant sections from the legislation:

5. (3) The Superintendent shall, without limiting the authority conferred by subsection (2),	**5.** (3) Le surintendant, sans que soit limitée l'autorité que lui confère le paragraphe (2) :
[…]	[…]
(*e*) from time to time make or cause to be made such inspection or investigation of estates or other matters to which this Act applies, including the conduct of a trustee or a trustee acting as a receiver or interim receiver, as the Superintendent may deem expedient and for the purpose of the inspection or investigation the Superintendent or any person appointed by the Superintendent for the purpose shall have access to and the right to examine and make copies of all books, records, data, including data in electronic form, documents and papers pertaining or relating to any estate or other matter to which this Act applies;	*e*) effectue ou fait effectuer les investigations ou les enquêtes, au sujet des actifs et autres affaires régies par la présente loi, et notamment la conduite des syndics agissant à ce titre ou comme séquestres ou séquestres intérimaires, qu'il peut juger opportunes et, aux fins de celles-ci, lui-même ou la personne qu'il nomme à cet effet a accès, outre aux données sur support électronique ou autre, à tous livres, registres, documents ou papiers se rattachant ou se rapportant à un actif ou à toute autre affaire régie par la présente loi, et a droit de les examiner et d'en tirer des copies;
(*f*) receive and keep a record of all complaints from any creditor or other person interested in any estate and make such specific investigations with regard to such complaints as the Superintendent may determine; and	*f*) reçoit et note toutes les plaintes émanant d'un créancier ou d'une autre personne intéressée dans un actif, et effectue, au sujet de ces plaintes, les investigations précises qu'il peut déterminer;
[…]	[…]
5. (4) The Superintendent may	**5.** (4) Le surintendant peut :
[…]	[…]
(*b*) issue, to official receivers, trustees, administrators of consumer proposals made under Division II of Part III and persons who provide counselling pursuant to this Act, directives with respect to the administration of this Act and, without restricting the generality of the foregoing, directives requiring them (i) to keep such records as the Superintendent may require, and (ii) to provide the Superintendent with such information as the Superintendent may require;	*b*) donner aux séquestres officiels, aux syndics, aux administrateurs au sens de la section II de la partie III et aux personnes chargées de donner des consultations au titre de la présente loi des instructions relatives à l'exercice de leurs fonctions, et notamment leur enjoindre de conserver certains dossiers et de lui fournir certains renseignements;
(*c*) issue such directives as may be necessary to give effect to any decision made by the Superintendent pursuant to this Act or to facilitate the carrying out of the purposes and	*c*) donner les instructions nécessaires à l'exécution de toute décision qu'il prend en vertu de la présente loi ou susceptibles de faciliter l'application de la présente loi et des Règles

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provisions of this Act and the General Rules, including, without limiting the generality of the foregoing, directives relating to the powers, duties and functions of trustees, of receivers and of administrators as defined in section 66.11;

(*d*) issue directives governing the criteria to be applied by the Superintendent in determining whether a trustee licence is to be issued to a person and governing the qualifications and activities of trustees; and
[...]

5. (6) A directive issued by the Superintendent under this section shall be deemed not to be a statutory instrument within the meaning and for the purposes of the *Statutory Instruments Act*.

générales, et notamment en ce qui touche les attributions des syndics et des séquestres et celles des administrateurs au sens de l'article 66.11;

d) donner des instructions régissant les critères relatifs à la délivrance des licences de syndic, les qualités requises pour agir à titre de syndic et les activités des syndics;
[...]

5. (6) Les instructions données par le surintendant ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*.

[18] The relevant provisions of sections 14.01 and 14.02 of the Act which interest the Court read as follows:

14.01 (1) Where, after making or causing to be made an investigation into the conduct of a trustee, it appears to the Superintendent that

(*a*) a trustee has not properly performed the duties of a trustee or has been guilty of any improper management of an estate,

(*b*) a trustee has not fully complied with this Act, the General Rules, directives of the Superintendent or any law with regard to the proper administration of any estate, or

(*c*) it is in the public interest to do so,

the Superintendent may do one or more of the following:

(*d*) cancel or suspend the licence of the trustee;

(*e*) place such conditions or limitations on the licence as the Superintendent considers appropriate including a requirement that the trustee successfully take an exam or enrol in a

14.01 (1) Après avoir tenu ou fait tenir une enquête sur la conduite du syndic, le surintendant peut prendre l'une ou plusieurs des mesures énumérées ci-après, soit lorsque le syndic ne remplit pas adéquatement ses fonctions ou a été reconnu coupable de mauvaise administration de l'actif, soit lorsqu'il n'a pas observé la présente loi, les Règles générales, les instructions du surintendant ou toute autre règle de droit relative à la bonne administration de l'actif, soit lorsqu'il est dans l'intérêt public de le faire :

a) annuler ou suspendre la licence du syndic;

b) soumettre sa licence aux conditions ou restrictions qu'il estime indiquées, et notamment l'obligation de se soumettre à des examens et de les réussir ou de suivre des cours de formation;

c) ordonner au syndic de rembourser à l'actif toute somme qui y a été soustraite en raison de sa conduite.

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proficiency course, and

(*f*) require the trustee to make restitution to the estate of such amount of money as the estate has been deprived of as a result of the trustee's conduct.

(2) The Superintendent may delegate by written instrument, on such terms and conditions as are therein specified, any or all of the Superintendent's powers, duties and functions under subsection (1), subsection 13.2(5), (6) or (7) or section 14.02 or 14.03.

(2) Le surintendant peut, par écrit et aux conditions qu'il précise dans cet écrit, déléguer tout ou partie des attributions que lui confèrent respectivement le paragraphe (1), les paragraphes 13.2(5), (6) et (7) et les articles 14.02 et 14.03.

14.02 (1) Where the Superintendent intends to exercise any of the powers referred to in subsection 14.01(1), the Superintendent shall send the trustee written notice of the powers that the Superintendent intends to exercise and the reasons therefor and afford the trustee a reasonable opportunity for a hearing.

14.02 (1) Lorsqu'il se propose de prendre l'une des mesures visées au paragraphe 14.01(1), le surintendant envoie au syndic un avis écrit et motivé de la mesure qu'il entend prendre et lui donne la possibilité de se faire entendre.

[19] Bankruptcy law is a specialized field that has its own administration through structures created by the Act: the Superintendent, the Official Receiver, the trustee, and the Quebec Superior Court (Bankruptcy Division) (on this point, see *Sam Lévy & Associés Inc. v. Mayrand,* 2005 FC 702 (CanLII), 2005 FC 702 at paragraph 135).

[20] Because of this specialization, persons who are called upon to assume responsibilities must rely on their training and experience to develop an in-depth knowledge of this field, its practices, and its customs. Accordingly, ethical standards, established by legislation and the directives, are part of the daily work in this field.

[21] According to the pragmatic and functional approach advanced in *Dr. Q. v. College of Physicians and Surgeons*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226 at paragraphs 21 and 22 (the absence of a privative clause or a right of appeal; the expertise of the decision-maker relative to that of the reviewing court; the purposes of the legislation and the provision in particular; and the nature of the question – law, fact, or mixed fact and law), it seems to me that the Superintendent has the necessary qualifications to be recognized as an expert in such matters. The Act does not include a privative clause and does not grant any right of appeal (see subsection 14.02(5) of the Act), except for specific recognition of a power to review and set aside decisions as specified in the *Federal Courts Act*, R.S.C. 1985, c. F-7. On the basis of the purpose of the Act and the content of sections 14.01 *et seq.*, it seems to me that the standard of review applicable to a disciplinary report and to the decision concerning the sanction is that of reasonableness *simpliciter*. The reviewing court must show a degree of deference. On this point, I note that Mr. Justice MacKay in *Sheriff v. Canada (Superintendent of Bankruptcy)*, 2005 FC 305 (CanLII), 2005 FC 305, at paragraphs 30 and 31, came to the same conclusion:

> 30. In the context of the pragmatic and functional approach to the standard of review as confirmed by the Supreme Court of Canada in Law *Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247 at paras. 20, 26-27 and in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226 at paras. 21-22, the decisions on the merits of the report and on any penalties are both decisions for which the standard of review is reasonableness. That standard rests on my assessment of the comparative expertise of the Superintendent relative to the Court in the supervision of trustees and of estates, of the purpose of the Act in general, and of sections 14.01 and 14.02 in particular, to ensure an appropriate exercise of fiduciary responsibilities in administration of estates, and of the nature of the ultimate issues for each decision, which are mixed questions of law and fact.
>
> 31 In review of those decisions the Court owes deference to the conclusions reached by the Superintendent. Unless they are clearly unreasonable in light of the evidence considered by the Superintendent, the Court will not disturb his decisions on the merits and on penalties. That is particularly the case where in the course of a hearing the Superintendent "is not bound by any legal or technical rules of evidence" (the Act, subsection 14.02(2)(*b*)).

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For the purposes of this decision, I will refer to the reasons stated by MacKay J. concerning the applicable standard of review, but I will add additional reasons here and there in the paragraphs that follow.

[22] Having said this, I note that one of the issues, the one concerning whether the trustee performed his duties in a timely manner and with due care in the Jacob bankruptcy (issue No. 3), raises questions of fact in connection with the evidence submitted. Here, the applicable standard of review is that of patent unreasonableness (see *Marchand Syndics Inc. v. Laperrière*, 2004 FC 1584 (CanLII), 2004 FC 1584, at paragraph 60).

[23] To sum up, for the purposes of this case, I intend to use the standard of reasonableness *simpliciter* for questions of mixed law and fact and that of patent unreasonableness for questions of fact. When analyzing each individual issue in dispute, I will begin by stating the applicable standard of review for greater precision and to allow for a better understanding of the decision.

[24] Before concluding on this first issue, counsel for the trustee argued that delegate Poitras should not receive the same degree of deference as the Superintendent, since he does not have the same expertise as Superintendent Marc Mayrand. The objective of such an argument is to ensure that the standard applied is that of correctness. No affidavit offering any evidence on this point was submitted. It is public knowledge that the chosen delegate was a judge and Chief Justice of the Quebec Superior Court, and in this capacity he has heard numerous and varied proceedings, including Bankruptcy Division cases. In his capacity as delegate, he was called upon to apply the Act, regulations and the directives to the facts submitted in evidence, render a decision, and ultimately decide on a sanction. He has done this for a large part of his life. I do not see how I could apply a standard of review other than those already mentioned above. Considering the circumstances in this case, such an argument must fail.

2) Should the breaches concerning the Sunliner bankruptcy be dismissed because Ms. Plourde of the OSB was satisfied with the conduct of the trustee in bankruptcy in that case?

[25] I would stress that this argument was not developed in any significant manner in the memorandum of the trustee. Having said this, counsel for the trustee claimed that Ms. Plourde's investigation, which began in 1995 and ended in 1997 in the Sunliner bankruptcy, concluded that the administration of the Sunliner estate in bankruptcy was in compliance with the Act, the regulations and the directives; accordingly, this determination by Ms. Plourde should be taken into consideration for the purposes of the disciplinary investigation to such an extent that the breaches in question should be dismissed.

[26] Counsel did not cite any authors or submit any case law in support of this argument. He merely argued that the investigation conducted by Ms. Plourde of the OSB and the decision to discharge the trustee were in themselves sufficient to show that no other conclusion could be reached concerning the disciplinary breaches.

[27] In answer to this argument, I underline that the evidence showed that new facts were adduced from the complaints made by Mr. Paris in the summer of 1999 (including, but not limited to, the role played by Yves Lemaire with the National Bank, the cashing of two (2) cheques from BCL by him, and the follow-up to a decision rendered against the company Isomur and two other defendants). These new facts explain the intervention of the OSB starting in the summer of 1999. These were slightly different from the facts which were the subject of Ms. Plourde's investigation up to 1997.

[28] With regard to the argument that all legal procedures in the Sunliner case were followed up to the discharge of the trustee, that at no time was any negative comment made about the administration of the estate and that, accordingly, the alleged breaches should be dismissed, there is a distinction to be made between the supervision of the estate by a Superintendent as specified under the Act and a disciplinary investigation. One is not necessarily done to the exclusion of the other. On this point, Mr. Justice Martineau made the following comment in *Sam Lévy & Associés et al.*, *supra*:

> [195] Although subsection 48(1) of the Act discharges the trustee as to any act or default in the administration of the bankrupt's property and as to his conduct as trustee, the provision does not address all the Superintendent's supervisory powers under sections 14.01 *et seq.* of the Act. It is the Superintendent who has the exclusive power of issuing trustee licences and making the obtaining of such licences subject to certain conditions.
>
> [196] Additionally, a discharge order made by the Bankruptcy Court only affects the trustee's conduct in respect of third parties and any person who has an interest in the bankruptcy. In this regard, the discharge procedure is not a proceeding for examining the professional conduct of a trustee, at the conclusion of which a trustee may be subject to a disciplinary penalty. Any other conclusion would essentially amount to giving the Bankruptcy Court the power to place bankruptcy trustees beyond the reach of any disciplinary penalty, which would be to usurp the exclusive jurisdiction of the Superintendent
>
> . . . .
>
> 197] Further, I consider that subsection 41(8.1) of the Act clearly reflects the situation that existed before it was adopted. That provision only confirmed the state of the law, by expressly laying down a rule which had already emerged from the general scheme of the Act. Consequently, despite the fact that subsection 41(8.1) of the Act might not be applicable here, since it is not retroactive in application, I

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> consider that the discharge order made by the Bankruptcy Court is not a legal bar to the prosecution of disciplinary proceedings brought against the applicant Roy.

I entirely agree with these reasons.

[29] I note that this argument does not in any way affect the Jacob bankruptcy case.

3) Did the delegate err in concluding that the trustee did not perform his duties in a timely manner and with due care in the Jacob bankruptcy, contrary to Rule 36?

[30] The standard of review applicable to this issue is that of patent unreasonableness. This concerned a request by the trustee for a determination as to whether the delegate [TRANSLATION] "correctly interpreted the evidence adduced at the hearing ", thus raising a question of fact.

[31] The delegate concluded as follows:

> [T]he trustee did not perform his duties in a timely manner and did not carry out his functions with due care, by not accepting the application for substitution by the representatives of Trans-Canada Credit at the time of the meeting, namely November 18, 1999, and by delaying the preparation and forwarding of the minutes of the creditors' meeting of November 18, 1999, contrary to section 13.5 of the Act and Rule 36.
> (Joint record, volume I, tab 2, Decision of the delegate dated December 3, 2004, at page 19).

[32] The delegate's conclusion had two parts. First of all, the trustee did not accept the application for the substitution of the trustee at the meeting held on November 18, 1999, and secondly, he took too long to prepare and submit the minutes of the meeting of November 18, 1999.

[33] Rule 36 provides as follows:

36. Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care. [Emphasis added]	**36.** Le syndic s'acquitte de ses obligations dans les meilleurs délais et exerce ses fonctions avec compétence, honnêteté, intégrité, prudence et diligence. [Je souligne]

[34] The delegate determined that the starting point of the application for the substitution of the trustee by the creditor was November 18, 1999. The trustee argued that on this date he had to contact Mr. Sévigny, the creditor's titular head, to discuss the reasons at the root of the application for substitution. At this meeting, no instructions to substitute the trustee were given, so the trustee claims.

[35] In addition, the trustee added that it was only in mid December 1999 that he concluded there actually was a substitution of trustee, following the receipt of a letter from the Official Receiver advising that the creditor had made a complaint and following a telephone conversation with Mr. Sévigny. The minutes of the November 18, 1999 meeting, which mentioned the substitution of the trustee, were submitted on December 28, 1999. Therefore, according to him, he had acted with due care, because he took action as soon as he received the letter from the Official Receiver.

[36] As mentioned in the preceding, the delegate determined that the starting point for the trustee to act on the application for substitution was November 18, not mid-December 1999. The delegate assessed the evidence as submitted. The evidence of the analyst on this point (testimonies of Mr. Sévigny, Mr. Pitt and his affidavit, etc.) allowed the delegate to conclude as he did.

[37] Under Rule 36, the trustee must perform his duties in a "timely manner" and with "due care". More than 39 days had gone by before the trustee acted. This is not acting in a "timely manner" or with "due care", even if we take into account that it was the holiday season. There is no need to consider the legal interpretation of the duty to act in a "timely manner" and with "due care", as the time elapsed speaks for itself, and there is no reason to conclude that this is a patently unreasonable decision.

4) Did the delegate err in concluding that in the Sunliner bankruptcy the trustee infringed Directive 31 of the Superintendent of Bankruptcy, which requires that a statement confirming the accuracy of the inventory of assets of the bankrupt be filed?

[38] The standard of review applicable to this issue is that of reasonableness *simpliciter*, as it raises a question of mixed law and fact.

[39] The delegate concluded as follows:

> We conclude that the trustee failed to obtain a statement from an officer, of Distribution Sunliner (1985) Inc. from which it would have been possible to confirm the accuracy at the time of the bankruptcy of the inventory dated March 8, 1994, thereby contravening section 5(5) of the Act and paragraphs 6 and 7 of Directive No. 31 on taking inventory of the bankrupt's property, issued by the Superintendent of Bankruptcy on August 18, 1989.
> (Joint record, volume I, tab 2, Decision of the delegate dated December 3, 2004, at page 19).

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[40] Subsection 16(3) of the Act provides as follows:

16(3) The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory, and for the purpose of making an inventory the trustee is entitled to enter, subject to subsection (3.1), on any premises on which the deeds, books, records, documents or property of the bankrupt may be, even if they are in the possession of an executing officer, a secured creditor or other claimant to them.
[Emphasis added]

16(3) Le plus tôt possible, le syndic prend possession des titres , livres , dossiers et documents, ainsi que de tous les biens du failli, et dresse un inventaire; pour lui permettre de préparer un inventaire, il a le droit, sous réserve du paragraphe (3.1), de pénétrer en tout lieu où peuvent se trouver les titres, livres, dossiers, documents ou biens du failli, quoiqu'ils puissent être en la possession d'un huissier-exécutant, d'un créancier garanti ou d'une autre personne qui les réclame.
[Je souligne]

[41] Under paragraphs 5(4)(*c*)(*d*) and (*e*) of the Act, the Superintendent is authorized to issue directives to facilitate the application of the Act and Rules. Subsection 5(5)of the Act adds the following:

5(5) Every person to whom a directive is issued by the Superintendent under paragraph (4)(*b*) or (*c*) shall comply with the directive in the manner and within the time specified therein.
[Emphasis added]

5(5) Les personnes visées par les instructions du surintendant sont tenues de s'y conformer.
[Je souligne]

[42] Directive 31, which has now been replaced by Directive 7, specifies the content of the inventory (see paragraph 4 of Directive 31 and its subparagraphs) and requires that the bankrupt or the bankrupt's representative sign a statement (see the Appendix of the Directive) certifying:

> . . . that to the best of my knowledge and belief this final inventory listing . . . represents the quantities, descriptions (and valuation, if applicable) of all estate property, goods and assets . . . .

If such a statement has not been obtained, the trustee must note its absence (see paragraph 7 of Directive 31).

[43] The trustee has admitted that the statement required under Directive 31 was not obtained, and the delegate noted this in his decision.

[44] The trustee argued that the statement was not compulsory, because the bankruptcy balance sheet had been filed with a sworn statement. He argued that this was sufficient to certify the accuracy of the inventory made a few days before the bankruptcy and that, accordingly, the objective of paragraphs 158(*d*) and (*e*) of the Act had been respected.

[45] A simple reading of the bankruptcy balance sheet shows that it does not contain the information required under paragraph 4 of Directive 31. All that was mentioned under the inventory of the bankruptcy balance sheet was an amount of $120,000 at item "c" and a reference to a list under the heading "inventory", where we find a book value of $442,914 and an estimated realizable value of $120,000. There is no list of property.

[46] The report of the inventory taken a few days before the bankruptcy does not contain the statement required under paragraph 7 of Directive 31. Only the signature of the person who took the inventory appears in the report.

[47] In addition, counsel for the trustee argued that the delegate had erred in law by not rendering a decision on the importance of the requirements of subsection 5(5) of the Act and paragraphs 6 and 7 of Directive 31, because the interrelationship between the duly sworn bankruptcy balance sheet and the inventory taken a few days before the bankruptcy allowed the trustee to argue that he:

> [TRANSLATION]
> . . . complied with all the requirements of the Act, and any criticism on this point is based on a strictly legalistic and technical reading of the Act and/or Directive 31.
> (Applicant's memorandum, at page 10, paragraph 39)

[48] The trustee was of the opinion that the objective of Directive 31 had been met, as was shown by the evidence submitted. The delegate made another finding, specifically that the evidence on record did not show non-compliance with the Directive in not filing the statement in support of the inventory.

[49] Without delving into the details of paragraphs 158(*d*) and (*e*) of the Act and of Directive 31, it seems to me that there is a marked difference between a bankruptcy balance sheet and an inventory of estate assets. One document cannot be substituted for the other, and vice versa. The balance sheet of a bankruptcy does not necessarily have an inventory of assets as required under paragraph 4 of Directive 31. The sworn statement of the balance sheet of a bankruptcy does not confirm the content of the inventory. Accordingly, the delegate did not have to be concerned with the requirements of subsection 5(5) and

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paragraphs 6 and 7 of Directive 31, because the trustee's evidence was insufficient to counteract the requirements of Directive 31.

[50] With these findings, I come to the same conclusion as the delegate did in his decision, that is, that the requirement under Directive 31 concerning the statement of the bankrupt or of the bankrupt's representative was not respected. Consequently, the delegate's decision is reasonable and in no way warrants intervention by this Court.

5) Did the delegate make a mistake of fact in concluding that in the Sunliner bankruptcy the trustee infringed paragraph 5 of Directive 22 of the Superintendent of Bankruptcy, which requires that the trustee document his files?

[51] Because this is a question of mixed law and fact the standard of review is that of reasonableness *simpliciter*.

[52] The delegate concluded that the trustee's files were not properly documented in the following situations:

- Isomur's reassignment to the trustee of the account receivable in the amount of $6,031.43 from Bay Distributors;
- the results obtained in connection with the collection of the said account receivable by the trustee and of the balance of $9,000 owed by Isomur;
- the decision to postpone *sine die* the actions to be taken by the trustee in order to recover from Georges Rivard and Jean-Yves Genest the amount of money owing pursuant to a judgment dated January 4, 1995.

[53] The delegate stated the following:

> This directive [paragraph 5 of Directive 22] confirms that the trustee has a duty to realize on all the assets of the estate. It is up to him to prove that he was unable to document everything that took place in his office regarding the receipts, disbursements and actions taken. The trustee's response that [TRANSLATION] "this would create a mountain of paper" is clearly inadequate.
> (Joint record, volume I, tab 2, Delegate's decision dated December 3, 2004, at page 19).

[54] The Court underlines the fact that, under subsection 5(5) of the Act, trustees have the obligation to abide by the directives issued by the Superintendent.

[55] Paragraph 5 of Directive 22 reads as follows:

5. As it is a statutory obligation on the part of a trustee to realize on all assets for the benefit of the estate, it is therefore expected that a trustee will document his files as much as possible in support of the receipts, disbursements and actions taken on all the transactions. The Official Receiver may, at his discretion, request from the trustee a copy of that documentation. [Emphasis added]	**5.** Étant donné que le syndic a l'obligation statutaire de réaliser tous les biens de l'actif pour le bénéfice des créanciers, il importe donc que le syndic justifie, autant que possible, toutes ses transactions quand (sic) aux recettes, déboursés et actions prises. Le séquestre officiel, lorsqu'il le juge à propos, peut demander au syndic de lui fournir une copie de ces documents. [Je souligne]

[56] In addition to the argument to the effect that the delegate did not give reasons for determination because he did not specifically mention the documents which should have been on record, counsel for the trustee submitted the following:

> [TRANSLATION]
> [T]he applicant was found liable not because of his incompetence or negligence, but because he reported details to the representatives of the Superintendent of Bankruptcy orally rather than placing written memos in his files.

[57] The evidence shows that the trustee's files did not contain documents explaining the following situations in a summary manner or otherwise:

- further to the sale of the accounts receivable to Isomur, the undertaking made by certain debtors to pay $9,000 to the trustee rather than $15,000;
- the trustee's responsibility to recover an amount of $6,031;
- the fact that the amount of $9,000 mentioned above was not recovered and a decision was made not to continue recovery proceedings because of the insolvency of the persons and corporations involved.

[58] It was only later, in August 1999, further to questions from auditor Nolet of the OSB that the trustee and the lawyer involved in the bankruptcy gave any explanations (see the Joint record, volume X, tab 49, letter from the trustee to Industry Canada, dated August 20, 1999, and Joint record, volume X, tab 49-D, letter from counsel for the trustee to the trustee, dated August 18, 1999). It is obvious that the explanations given in these letters were not documented in the trustee's files at the time of the events in question.

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[59] A simple reading paragraph 5 of Directive 22 shows that it does not refer to verbal explanations, but rather to documents concerning all transactions in connection with the receipts, disbursements and actions taken. In such circumstances, it is up to the trustee to explain why it was not possible to document all relevant transactions. The trustee's defence to the effect that he subsequently gave oral and written explanations does not meet the requirements of paragraph 5 of Directive 22. This paragraph requires that trustees document their administration, not subsequently explain it. The trustee's answer to the effect that [TRANSLATION] "it will create a mountain of paper" is unjustified.

[60] With regard to the argument that the delegate did not give sufficient reasons for his decision insofar as he did not specifically mention the documents which should have been in the files, I can only note that the evidence was to the effect that there were no documents directly or indirectly explaining the follow-up on the $15,000 judgment in the trustee's favour, the defendants' undertaking to pay $9,000, the not-sufficient-funds cheque, the decision not to continue recovery from the defendants, or the trustee's agreement to recover $6,031.43 from another debtor. Accordingly, criticizing the delegate for not having specified the documents which should have been in his files seems to me to be a moot point, because, *a priori*, letters of explanation sent after the events would have been sufficient, or *a fortiori*, an ongoing correspondence as the case progressed would also have been sufficient. There was no obligation to give any more details. The delegate's decision concerning the fourth issue is reasonable, considering the case as a whole, the evidence and the applicable law.

6) Did the delegate err in concluding that the trustee did not perform his duties with due care in the Sunliner bankruptcy case?

[61] I intend to apply the same standard of review as that applied to the fourth issue, that is, reasonableness *simpliciter*.

[62] The delegate concluded that the trustee did not perform his duties with due care:

- by not documenting his files to report the mandate he gave to Yves Lemaire of Gérance Mauricie to follow up on the recovery of money from BCL, and by not documenting the change in status of Mr. Lemaire, who according to the trustee was acting for the National Bank of Canada in the collection of these amounts;
- by not advising BCL to forward cheques to Yves Lemaire after having learned about the mandate Mr. Lemaire obtained from the National Bank of Canada; and
- by authorizing Yves Lemaire to open the trustee's mail,

contrary to subsection 5(5) and section 13.5 of the Act, Rules 36 and 53 of the regulations, and paragraph 5 of Directive 22.

[63] The Court has already cited subsection 5(5) of the Act concerning the obligation of a trustee to comply with the Superintendent's directives, as well as the obligation to document files as required under paragraph 5 of Directive 22 and Rule 36, which obliges trustees to perform their duties in a timely manner and with due care.

[64] For the purposes of this issue, section 13.5 of the Act specifies the following:

13.5 A trustee shall comply with such code of ethics respecting the conduct of trustees as may be prescribed.	**13.5** Les syndics sont tenus de se conformer aux codes de déontologie régissant leur conduite qui peuvent être prescrits.

Furthermore, Rule 52 states the following:

52. Trustees, in the course of their professional engagements, shall apply due care to ensure that the actions carried out by their agents, employees or any persons hired by the trustees on a contract basis are carried out in accordance with the same professional standards that those trustees themselves are required to follow in relation to that professional engagement.	**52.** Dans toute activité professionnelle, le syndic veille avec prudence et diligence à ce que les actes accomplis par ses mandataires, ses employés ou toute personne engagée par lui à contrat respectent les mêmes normes professionnelles qu'il aurait lui-même à appliquer relativement à cette activité.

[65] The evidence shows that Mr. Lemaire's involvement in the Sunliner bankruptcy was not documented so as to show his role in the recovery of money from BCL, the new role he played in recovering this money for the National Bank, and the role Mr. Lemaire played in opening the trustee's mail.

[66] The fact that Mr. Lemaire's role was not documented in the Sunliner bankruptcy was explained some time later by the trustee. When conducting his audit, Mr. Nolet, an auditor from the Office of the Superintendent of Bankruptcy, in a letter following a meeting on July 23, 1999, obtained information concerning the role played by Mr. Lemaire in connection with the trustee. The trustee answered by giving explanations in his letters dated August 20 and November 19, 1999, including a letter from Mr. Lemaire dated August 10, 1999 regarding his role and the accounts receivable involving BCL. Moreover, his explanations were complemented by the testimony he gave at the hearing before the delegate.

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[67] The evidence shows that in 1997, Mr. Lemaire, who had access to the trustee's mail at his other office in Trois-Rivières, cashed two (2) BCL cheques for the National Bank, as per his mandate. These cheques were payable to the order of the trustee. A third cheque from BCL was cashed by the trustee in 2000, after he had been discharged from the administration of the Sunliner bankruptcy on July 23, 1997.

[68] In conducting the analysis of the preceding issues, I have already mentioned the trustee's obligation to document the bankruptcy files in compliance with paragraph 5 of Directive 22. The evidence is clearly to the effect that this had not been done in the Sunliner bankruptcy with regard to the role played by Mr. Lemaire and the undocumented mandate he was given. It would have been prudent to document the role played by Mr. Lemaire, but this was not done.

[69] Having studied the evidence in relation to the ethical standards established by legislation and the Directives, and after having studied the reasons and the conclusion which the delegate reached, I conclude that his decision is reasonable.

7) Was the delegate's decision to suspend the trustee's licence for one week legal and proper in the circumstances of the case?

[70] This issue raises two questions of law, that is, the interpretation to be given to a statutory provision such as subsection 14.01(1) of the Act concerning the possible choices of sanctions to be considered and the question as to whether the delegate's decision provided sufficient reasons. The standard of review applicable to such matters is that of correctness. However, assuming that the delegate's decision reflects the choice of sanctions specified in subsection 14.01(1) and is supported with adequate reasons, I am asked to assess it by taking into consideration the evidence and the sanction of a suspension of one (1) week. In such a case, the standard of review applicable is that of reasonableness *simpliciter* (see paragraph 21 of this decision and the *Sherriff* decision, *supra,* at paragraph 30).

[71] For the purposes of this analysis, it is important to once again reproduce in full subsection 14.01(1) of the Act:

14.01 (1) Where, after making or causing to be made an investigation into the conduct of a trustee, it appears to the Superintendent that	**14.01** (1) Après avoir tenu ou fait tenir une enquête sur la conduite du syndic, le surintendant peut prendre l'une ou plusieurs des mesures énumérées ci-après, soit lorsque le syndic ne remplit pas adéquatement ses fonctions ou a été reconnu coupable de mauvaise administration de l'actif, soit lorsqu'il n'a pas observé la présente loi, les Règles générales, les instructions du surintendant ou toute autre règle de droit relative à la bonne administration de l'actif, soit lorsqu'il est dans l'intérêt public de le faire :
(*a*) a trustee has not properly performed the duties of a trustee or has been guilty of any improper management of an estate,	*a*) annuler ou suspendre la licence du syndic;
(*b*) a trustee has not fully complied with this Act, the General Rules, directives of the Superintendent or any law with regard to the proper administration of any estate, or	*b*) soumettre sa licence aux conditions ou restrictions qu'il estime indiquées, et notamment l'obligation de se soumettre à des examens et de les réussir ou de suivre des cours de formation;
(*c*) it is in the public interest to do so,	*c*) ordonner au syndic de rembourser à l'actif toute somme qui y a été soustraite en raison de sa conduite.
the Superintendent may do one or more of the following:	
(*d*) cancel or suspend the licence of the trustee;	
(*e*) place such conditions or limitations on the licence as the Superintendent considers appropriate including a requirement that the trustee successfully take an exam or enrol in a	

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proficiency course, and

(*f*) require the trustee to make restitution to the estate of such amount of money as the estate has been deprived of as a result of the trustee's conduct.

[72] In his decision on the sanction dated January 31, 2005, after having eliminated option C, which is not relevant in this case, the delegate wrote the following concerning subsection 14.01(1) of the Act:

> Having practised as a trustee over a period of some 25 years and having been a member of the Board of Directors then vice-president of the Association québécoise des professionnels en restructuration et en insolvabilité (*the Quebec association of professionals in debt restructuring and insolvency*), there is no need to either require him to successfully undergo any examinations or proficiency courses. We are thus left with the option of cancelling or suspending his license as trustee.
> [Emphasis added]
> (Joint record, volume I, tab 2, Delegate's decision dated January 31, 2005, at page 36).

[73] With all due respect to delegate Poitras, I do not think that after having eliminated certain options—that of reimbursing the estate, which is inapplicable to this case, and that of taking proficiency courses— there were only two left, namely, either cancelling or suspending the trustee's licence.

[74] My reading of subsection 14.01(1) of the Act shows that Parliament used the verb "may do one of the following" ("*peut*" in French) and not the verb "must" ("*doit*" in French). Accordingly, Parliament gave the Superintendent or his delegate the additional discretionary option of not applying any sanction if the circumstances of the case warrant it. Such an interpretation of the word "may" is clearly stated in section 11 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which reads as follows:

11. The expression "shall" is to be construed as imperative and the expression "may" as permissive. [Emphasis added]	**11.** L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions. [Je souligne]

In addition, in *Khadr v. Canada (Attorney General)*, 2006 FC 727 (CanLII), 2006 FC 727, at paragraphs 107 and 108, Mr. Justice Phelan effectively summarized the case law bearing on the interpretation to be given to the word "may":

> **107** Characterizing "may" as permissive implies that it imports discretion upon the person it grants the permissive authority. Although this implication of discretion arises, it is not in itself conclusive. In *R. v. S. (S.)*, 1990 CanLII 65 (SCC), [1990] 2 S.C.R. 254 at 273-274, Dickson C.J. indicates that, although "may" implies discretion, it does not preclude obligation. In *R. v. S. (S.)*, Dickson C.J. refers to the judgment of Lord Cairns in the House of Lords case of *Julius v. Lord Bishop of* Oxford (1880), 5 App. Cas. 214 where a distinction was drawn between a power coupled with a duty and a complete discretion. The relevant portion of this judgment is as follows:
>
> > [The words "shall be lawful"] confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.
> >
> > . . .
> >
> > [W]here a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.

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> **108**. The Nova Scotia Court of Appeal, in *Brown v. Metropolitan Authority* 1996 CanLII 5608 (NS CA), (1996), 150 N.S.R. (2d) 43 (C.A.), fully adopted the reasoning in *Julius*, holding that once the conditions were met (conditions as set out in a particular statute imposing a duty on the Metropolitan Authority to pay compensation for damages that arose out of its actions), a duty arose to exercise this power in spite of the fact that the words empowering the Authority were "may pay".

[75] In my opinion, taking into consideration the *Interpretation Act*, the Act and case law, it is a mistake to construe the verb "may" within the meaning of the Act as implying an obligation to impose a sanction of cancellation or suspension of the licence. I do not find anywhere in the words used by Parliament an obligation to do anything on the basis of the verb "may" ("*peut prendre*", "may do one or more of the following") as used in subsection 14.01(1) of the Act.

[76] Counsel for analyst Laperrière suggested that the delegate's decision is to the effect that the verb "may" must be understood as meaning all the discretion that is granted to him, which would include the option of taking all the evidence into consideration and not imposing a specific sanction.

[77] On reading the decision of January 31, 2005, it is impossible for me to agree with such an interpretation and find in it an implied understanding. The delegate clearly and specifically stated, "We are thus left with the option of cancelling or suspending his licence as trustee" (Joint record, volume I, tab 2, Delegate's decision dated January 31, 2005, at page 36). It is difficult to see an implicit understanding of discretionary power when the delegate demonstrates an explicit understanding of his power.

[78] My reading of the whole decision does not allow me to attenuate the delegate's explicit understanding. In fact, the text of the decision follows the line of reasoning resulting from the delegate's understanding of subsection 14.01(1) of the Act.

[79] At the hearing, particularly during the oral arguments, I asked if the delegate had expressed verbally his understanding of subsection 14.01(1) of the Act and the options he had, including that of not imposing any sanction, taking the complete record into consideration. I was told that he had not said anything on this point.

[80] The delegate's understanding of subsection 14.01(1) of the Act is an error in law which calls into question the entire decision rendered on January 31, 2005. He needed to bear in mind an understanding that included all the options to be considered and needed a clear understanding that it was a discretionary power that had been granted to him. This seems to me to be vital for a disciplinary decision-maker when he or she must assess the appropriateness of a sanction on the basis of the evidence on record.

[81] Having concluded that the decision of January 31, 2005 contained an error for the above-mentioned reason, the case must be returned to the delegate so that he may take the appropriate measures for a new decision to be rendered on the sanction, taking into consideration the discretionary power and all options available under subsection 14.01(1) of the Act. Therefore, it will not be necessary to deal with the trustee's two (2) other arguments, that is to say, the lack of reasons for the decision concerning the sanction and the merit of the decision suspending the trustee's licence for a period of one (1) week.

IV. Costs

[82] Costs were discussed at the hearing of the application for judicial review. Considering the result in this case and in accordance with the discretionary power granted to me under section 400 of the *Federal Courts Rules*, SOR/98-106, and its subsections, costs are awarded to the trustee.

JUDGMENT

THE COURT ORDERS that:

- The application for judicial review be allowed in part, the decision of January 31, 2005, is set aside, and the case is returned to the delegate for redetermination of the sanction;
- Costs to the trustee.

"Simon Noël"

Judge

Certified true translation
Michael Palles
FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-360-05
STYLE OF CAUSE:	JACQUES ROY v. LAWRENCE POITRAS ET AL.
PLACE OF HEARING:	MONTREAL
DATE OF HEARING:	September 26 and 27, 2006
REASONS FOR ORDER BY:	The Honourable Mr. Justice Simon Noël

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DATED: November 17, 2006
APPEARANCES:

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Bernard Letarte Vincent Veilleux	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Laperrière v. D. & A. MacLeod Company Ltd., 2010 FCA 84 (CanLII) - Attempted Stay of Disciplinary Proceedings

Date:	2010-03-24
Docket:	A-66-10
URL:	http://canlii.ca/t/28vmd
Citation:	Laperrière v. D. & A. MacLeod Company Ltd., 2010 FCA 84 (CanLII), <http://canlii.ca/t/28vmd> retrieved on 2013-09-07
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Federal Court of Appeal		Cour d'appel fédérale

Date: 20100324
Docket: A-66-10
Citation: 2010 FCA 84

Present:
STRATAS J.A.

BETWEEN:
SYLVIE LAPERRIÈRE, in her capacity as Senior Analyst – Professional Conduct - of the Office of the Superintendent of Bankruptcy

Appellant

and
ALLEN W. MACLEOD

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and
D. & A. MACLEOD COMPANY LTD.
Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 24, 2010.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal		Cour d'appel fédérale

Date: 20100324
Docket: A-66-10
Citation: 2010 FCA 84

Present:
STRATAS J.A.

BETWEEN:
SYLVIE LAPERRIÈRE, in her capacity as Senior Analyst –
Professional Conduct - of the Office of the Superintendent of Bankruptcy

Appellant

and
ALLEN W. MACLEOD
and
D. & A. MACLEOD COMPANY LTD.
Respondents

REASONS FOR ORDER
STRATAS J.A.

A. Introduction

[1] The appellant moves for a stay or suspension of an administrative adjudicator's hearing while an appeal is pending in this Court. For the reasons set out below, I shall dismiss the motion.

B. The facts giving rise to the motion

The parties

[2] The appellant is a senior analyst / professional conduct official in the Office of the Superintendent of Bankruptcy. The respondents are trustees who have administered various estates.

The legislative regime

[3] The Office of the Superintendent of Bankruptcy licenses trustees in bankruptcy. Under section 14.01 of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3, the Office can inquire into the conduct of a trustee. Sanctions can be imposed where, among other things, the trustee has contravened the Act, the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, or directives of the Superintendent of Bankruptcy made under section 5 of the Act.

The allegations

[4] After an investigation, the Office alleged that the respondents, while administering various estates, had committed a number of contraventions. It identified 12 categories of contraventions. The Office instituted disciplinary proceedings under section 14.01 of the Act against the respondents.

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The disciplinary proceeding

[5] A delegate of the Superintendent of Bankruptcy tried the allegations. He found the respondents not guilty of misconduct under six of the twelve categories.

[6] In one category, the delegate found a contravention arising from the respondents' delays in administering two estates. The respondents had no defence to this and were guilty of misconduct. The delegate held a sanction hearing on this and imposed a reprimand.

[7] In the remaining five categories, the delegate found contraventions, but ruled that the respondents had established the defence of due diligence. Therefore, in these five categories, the delegate decided that the respondents were not guilty of misconduct. The appellant applied for judicial review to the Federal Court from that decision.

The Federal Court's decision: the case becomes bifurcated

[8] The Federal Court granted the application for judicial review in part: 2010 FC 97 (CanLII), 2010 FC 97. The Federal Court's decision led to bifurcation: of the five categories of contraventions placed before the Federal Court, a group of three are now in this Court and a group of two are now before the delegate for determination of sanction. Here is how that happened:

- *The group of three now in this Court.* On judicial review, the Federal Court agreed with the delegate that the due diligence defence was established in three categories of contraventions. The appellant appealed this portion of the Federal Court's decision to this Court.

- *The group of two now before the delegate.* On judicial review, the Federal Court found, contrary to the delegate, that the due diligence defence was not established in two categories of contraventions and so the respondents were guilty of misconduct. The Federal Court remitted these back to the delegate for determination of sanction. The respondents did not appeal.

[9] The delegate now intends to begin a hearing concerning the sanction that should be applied for the findings of misconduct in the group of two. The delegate's sanction hearing will likely take place and conclude before this Court deals with the appeal concerning the group of three. The appellant asks this Court to stay this sanction hearing until it determines the appeal concerning the group of three.

C. Analysis

[10] The test for a stay is set out in the well-known Supreme Court of Canada cases of *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110, *RJR-Macdonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, *143471 Canada Inc. v. Quebec (Attorney General)*, 1994 CanLII 89 (SCC), [1994] 2 S.C.R. 339 and *Harper v. Canada (Attorney General)*, 2000 SCC 57 (CanLII), [2000] 2 S.C.R. 764, 2000 SCC 57.

[11] On the first branch of the threefold test for a stay, the appellant must establish a serious question to be tried on appeal. The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald*, *supra* at page 337; *143471 Canada Inc.*, *supra* at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). An applicant need only show that the matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR-Macdonald*, *supra* at page 337. Based on the record in this case, I cannot say now that this matter is destined to fail.

[12] The appellant's request for a stay turns on the outcome of the remaining two parts of the test. The appellant must show that irreparable harm will be caused if the stay is not granted and the balance of convenience lies in favour of granting a stay. Where the stay seeks to stop persons acting under a statute from carrying out their duties, a "very important" public interest "weigh[s] heavily" in favour of allowing those acting under statutes to carry out their mandates: *143471 Canada Inc.*, *supra* at page 383, Cory J. (for the majority); *Harper*, *supra* at paragraph 9.

[13] Before applying for a stay from this Court, the appellant asked the delegate to adjourn until the appeal to this Court was determined. The delegate declined. If this Court grants the stay requested by the appellant in this motion, this Court essentially would be quashing an interlocutory, fact-based, discretionary scheduling decision made by the delegate, an

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administrative actor who is statutorily empowered to conduct his own proceedings. Seen in that light, the appellant's stay would be just like a successful interlocutory judicial review of the delegate's decision. But interlocutory judicial reviews are not available, absent exceptional circumstances: *President of the Canada Border Services Agency v. C.B. Powell Limited*, 2010 FCA 61 (CanLII), 2010 FCA 61. This underscores the exceptional nature of the relief sought by the appellant in the circumstances of this case. For this sort of exceptional relief, the appellant must file evidence that is credible, detailed and strong.

[14] The evidence offered by the appellant on the issue of irreparable harm falls short of the mark.

[15] The appellant submitted that if this Court grants her appeal and remits instances of misconduct from the group of three back to the delegate for determination of sanction, the delegate would have to hold a second separate hearing on sanction. Consequences giving rise to irreparable harm follow from this, says the appellant. The first hearing on sanction would become moot because the delegate would have to conduct a new, compendious assessment of sanction: the delegate would have to consider all of the instances of misconduct from the original category of five. Thus, "[a]ll of the time, energy and money spent" on the first sanction hearing would be wasted. The appellant also points to a savings of costs arising from holding one compendious sanction hearing, rather than two.

[16] This scenario of irreparable harm offered by the appellant suffers from at least four flaws. The appellant has fallen well short of proving the sort of irreparable harm necessary to obtain a stay.

[17] First, the appellant's scenario presupposes that her appeal will succeed. It may not succeed, with the effect that a second sanction hearing will not be held and the harms alleged by the appellant will not arise. The harms alleged by the appellant are speculative, hypothetical, or only arguable at best and do not qualify as irreparable harm: *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25 (CanLII), 2001 FCA 25, 268 N.R. 328 at paragraph 12.

[18] Second, the appellant has asserted, without evidence, that the first sanction hearing will be rendered moot by the second sanction hearing. In considering the issue of irreparable harm, the Court cannot accept bare assertions without evidence: *Bathurst Machine Shop Ltd. v. Canada*, 2006 FCA 59 (CanLII), 2006 FCA 59, [2006] 2 C.T.C. 276 at paragraph 24 (F.C.A.). It may be possible for the delegate to hold two sanction hearings dealing with the two groups of contraventions without reference to each other. It all depends on the circumstances.

[19] In this regard, the appellant offered no evidence to show an interconnection among the various matters such that there would have to be one compendious sanction hearing. Had the appellant filed that evidence, she might have been able to raise a tenable issue regarding whether irreparable harm would arise if the sanction hearing were held now. The available evidence, however, suggests no such interconnection. The delegate, in declining to adjourn the sanction hearing, obviously concluded that he could proceed with the sanction hearing and, if necessary, hold a second sanction hearing later. Further, the delegate has already proceeded in this way: he held a hearing and imposed the sanction of reprimand for one of the instances of misconduct even though several other matters were before the Federal Court and might come back to him later for a determination of sanction (see paragraph 6, above).

[20] Third, even if "time, energy and money" would be wasted, the appellant has failed to particularize adequately the nature and amount of waste. Indeed, as best as can be determined from the affidavit offered in support of the stay – and the affidavit is unclear on this point – perhaps only a few days of work might be wasted. This smacks of mere administrative inconvenience and is too trifling to justify the unusual remedy of a stay against a public decision-maker who wants to exercise his jurisdiction. Mere administrative inconvenience, without more, does not qualify as irreparable harm: *Falkiner v. Director, Income Maintenance Branch* 2000 CanLII 15904 (ON CA), (2000), 189 D.L.R. (4th) 377 at paragraph 9 (Ont. C.A.).

[21] Finally, the sort of bifurcation caused by the Federal Court's decision in this case often happens. Bifurcation and its unwelcome effects – greater inconvenience, increased complexity and mounting costs – are part of the normal vicissitudes of litigation. If the Court granted a stay on the basis of the evidentiary record in this motion, it would have to grant a stay in every case where bifurcation has happened. The appellant did not offer evidence that the bifurcation in this case caused abnormal, harsh consequences beyond the norm. Bifurcation, without more, is not a golden ticket to a stay.

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[22] Therefore, the appellant has failed to show irreparable harm. This conclusion is sufficient to dismiss the appellant's motion for a stay of the delegate's sanction hearing. However, for completeness, I would add that the balance of convenience is strongly against the granting of this relief.

[23] The respondents filed an affidavit attesting to the impact that the allegations have had against them, their family and their business, including legal fees, enormous expenditures of management time, loss of staff and significant reputational, financial and emotional harm. Understandably, the respondents want the sanction hearing to finish as soon as possible. Depending on the outcome of the appeal in this Court, it may be the last hearing before the delegate in this matter and the end of what the respondents feel is an intolerable ordeal.

[24] Some of the respondents' evidence lacks sufficient particularity to be given full weight. However, it easily outweighs the appellant's evidence, summarized earlier in these reasons.

[25] This conclusion is buttressed by the public interest considerations that the Court must factor into the balancing: see paragraph 12, above. The delegate is discharging responsibilities under a statutory regime that protects the public by identifying and sanctioning instances of professional misconduct. Parliament has instructed the delegate to act as expeditiously as the circumstances and fairness permit: Act, subsection 14.02(2). The delegate now intends, with the respondents' support, to act expeditiously and determine the sanction that the respondents deserve for their misconduct in what I have called the group of two. Public interest considerations weigh against the granting of a stay.

[26] I conclude that the delegate may proceed with the sanction hearing without interference from this Court at this time. I decline to grant the stay requested by the appellant.

D. Conclusion

[27] Therefore, I shall dismiss the appellant's motion for a stay, with costs to the respondents.

"David Stratas"

J.A.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-66-09
STYLE OF CAUSE:	**Sylvie Laperrière, in her capacity as Senior Analyst – Professional Conduct - of the Office of the Superintendent of Bankruptcy v. Allen W. MacLeod and D. & A. MacLeod Company Ltd.**

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	March 24, 2010

WRITTEN REPRESENTATIONS BY:

Bernard Letarte Benoît de Champlain	FOR THE APPELLANT
Julia J. Martin J. Alden Christian	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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Julia J. Martin Barrister and Solicitor Ottawa, Ontario Doucet McBride LLP Ottawa, Ontario	FOR THE RESPONDENTS

Office of the Superintendent of Bankruptcy v. MacLeod, 2011 FCA 4 (CanLII) - An Appeal of Due Diligence Established?

Date:	2011-01-13
Docket:	A-66-10
URL:	http://canlii.ca/t/2fdlv
Citation:	Office of the Superintendent of Bankruptcy v. MacLeod, 2011 FCA 4 (CanLII), <http://canlii.ca/t/2fdlv> retrieved on 2013-09-24
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Related decisions
Federal Court of Appeal
Office of the Superintendent of Bankruptcy v. MacLeod, 2010 FCA 97 (CanLII) - 2010-04-13
Laperrière v. D. & A. MacLeod Company Ltd., 2010 FCA 84 (CanLII) - 2010-03-24
Federal Court of Canada
Office of the Superintendent of Bankruptcy v. MacLeod, 2010 FC 97 (CanLII) - 2010-01-28
Office of the Superintendent of Bankruptcy v. MacLeod, 2010 FC 96 (CanLII) - 2010-01-28
Legislation cited (available on CanLII)
Bankruptcy and Insolvency Act, RSC 1985, c B-3 — 14.01; 14.01(1); 61(2); 64(2); 151; 152; 154
Decisions cited
Canada (Attorney General) v. Roy, 2007 FCA 410 (CanLII)
Canada (Director of Investigation and Research) v. Southam Inc., 1997 CanLII 385 (SCC)
Canada Revenue Agency v. Telfer, 2009 FCA 23 (CanLII)
Carruthers v. College of Nurses of Ontario, reflex
Cata International Inc. v. Canada (Minister of National Revenue), 2004 FC 663 (CanLII)
Chauvin c. Beaucage, 2008 QCCA 922 (CanLII)
Chauvin c. Sheehan, 2010 QCCQ 1512 (CanLII)
Corporation de l'École Polytechnique v. Canada, 2004 FCA 127 (CanLII)
Davies v. Canada (Attorney General), 2005 FCA 41 (CanLII)
Democracy Watch v. Campbell, 2009 FCA 79 (CanLII)
Dr. Q. v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19 (CanLII)
Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII)
Housen v. Nikolaisen, 2002 SCC 33 (CanLII)
Latulippe c. Médecins, 1998 QCTP 1687 (CanLII)
Millette c. Assoc. des Courtiers d'Assurances de la province de Québec, 2004 CanLII 7074 (QC CQ)
Millette c. Comité de surveillance de l'Association des courtiers d'assurances de la province de Québec, 2006 QCCA 711 (CanLII)
Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40 (CanLII)
Public Service Alliance of Canada v. Canada Post Corporation, 2010 FCA 56 (CanLII)
R. v. Alexander, 1999 CanLII 18928 (NL CA)
R. v. Cooke, reflex
R. v. Emil K. Fishing, 2008 BCCA 490 (CanLII)
R. v. Kurtzman, reflex
R. v. Raham, 2010 ONCA 206 (CanLII)
R. v. Rio Algom Ltd., reflex
R. v. Sault Ste. Marie, 1978 CanLII 11 (SCC)
Roy v. Poitras, 2006 FC 1386 (CanLII)
Samson v. Canada (National Revenue), 2007 FC 975 (CanLII)
Sheriff v. Canada (Attorney General), 2005 FC 305 (CanLII)
Shneidman v. Canada (Attorney General), 2007 FCA 192 (CanLII)
Stuart v. British Columbia College of Teachers, 2005 BCSC 645 (CanLII)
Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 (CanLII)

Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20110113
Docket: A-66-10

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Citation: 2011 FCA 4
CORAM: BLAIS C.J.
NOËL J.A.
NADON J.A.
BETWEEN:
Sylvie Laperrière, in her capacity as Senior Analyst –
Professional Conduct – of the Office of the Superintendent of Bankruptcy
Appellant
and
Allen W. MacLeod
and
D.& A. MacLeod Company Ltd.
Respondents
Heard at Ottawa, Ontario, on November 23, 2010.
Judgment delivered at Ottawa, Ontario, on January 13, 2011.
REASONS FOR JUDGMENT BY: BLAIS C.J.
CONCURRED IN BY: NADON J.A.
CONCURRING REASONS BY: NOËL J.A.

Federal Court of Appeal

Cour d'appel fédérale

CANADA

Date: 20110113
Docket: A-66-10
Citation: 2011 FCA 4
CORAM: BLAIS C.J.
NOËL J.A.
NADON J.A.
BETWEEN:
Sylvie Laperrière, in her capacity as Senior Analyst –
Professional Conduct – of the Office of the Superintendent of Bankruptcy
Appellant
and
Allen W. MacLeod
and
D.& A. MacLeod Company Ltd.
Respondents
REASONS FOR JUDGMENT
BLAIS C.J.

[1] This is an appeal from the decision of Justice Mainville (Judge), as he then was, of the Federal Court, dated January 28, 2010 (Decision), which allowed, in part only, the appellant's application for judicial review of related decisions made by the Honourable James B. Chadwick in his capacity as Delegate of the Superintendent of Bankruptcy (Delegate). **More specifically, this appeal is concerned with the Delegate's finding that the respondents had established a defence of due diligence with respect to certain violations of professional conduct provisions set out in the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (BIA), the Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368 (Rules) and the Directives of the Superintendent (Directives).**

I. Background

[2] The respondents carry on activities as trustees in bankruptcy under licences issued by the Superintendent of Bankruptcy (Superintendent) pursuant to the BIA.

[3] In 2005, the appellant, in her capacity as a Senior Analyst (Professional Conduct) with the Office of the Superintendent of Bankruptcy (OSB), was mandated to conduct an investigation of the respondents' professional conduct

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in the administration of bankruptcy estates. This investigation culminated in a report dated February 27, 2007 (Report), which identified over forty breaches of professional conduct provisions set out in the BIA, the Rules and the Directives.

[4] Following the receipt of the appellant's report, the Superintendent appointed the Delegate to conduct a hearing in order to determine whether the respondents had committed the alleged contraventions and whether any disciplinary measures set out in subsection 14.01(1) of the BIA were warranted.

[5] The Delegate described the alleged contraventions under the following 12 headings:

A. Bank balances of estate and insolvency files deposited in an "Interest Account".
B. Applications for trustee discharge while having a bank balance in the estate account.
C. Surplus from the consolidated trust account for summary administrations deposited in an "Interest Account".
D. Monies withdrawn for various uses from an "Interest Account".
E. Statements of Receipts and Disbursements.
F. Unauthorized fee withdrawal in a consumer proposal.
G. "Clearing Account" used to post estate transactions.
H. Co-mingling of funds in consolidated trust accounts.
I. Disbursement claimed for services performed by a related person.
J. "Third Party Account" used to post estate transactions.
K. Monies not deposited forthwith.
L. Delay in the administration of estates.

[6] In his decision dated December 1, 2008, the Delegate first dismissed a motion for a stay of proceedings filed by the respondents on grounds of delay, bias and other improprieties with respect to the conduct of the appellant's investigation. Concerning the nature of the allegations, the Delegate found that the alleged contraventions were strict liability offences which, as per the Supreme Court of Canada's decision in R. v. Sault Ste. Marie (City), 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299, allowed for a defence of due diligence.

[7] The Delegate rejected the allegations falling under headings A and D on the basis that the "Interest Account" operated by the respondents had been authorized by the OSB and had subsequently been closed when the OSB requested such a closure. The allegations under headings C, F, G and I were rejected on the basis that no contraventions of the BIA, the Rules or the Directives had occurred.

[8] With respect to headings B, E, H, J and K, the Delegate found that the respondents had failed to fully comply with the relevant statutory and regulatory provisions. However, having accepted the respondents' submissions that the estates at issue represented only a small fraction of their overall business and that the infractions were the result of administrative errors which had caused no prejudice to the estates or the creditors, the Delegate found that a defence of due diligence had been established. The Delegate ultimately found that the respondents were liable only with respect to the contraventions falling under heading L, in respect of which he concluded in a separate decision dated February 5, 2009, that the appropriate disciplinary measure was a reprimand.

[9] The appellant brought an application for judicial review challenging the Delegate's decision with respect to headings A, B, D, E, H, J and K, as well as the sanctions decision.

II. Decision of the Federal Court

[10] The Judge carried out the standard of review analysis established in Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), 2008 SCC 9, and characterized the issues before the Delegate as principally involving questions of fact or mixed fact and law for which the appropriate standard of review was reasonableness. (Decision, at paragraphs 52-59) However, the Judge identified two questions of law arising from the Delegate's decision, namely whether the allegations under headings B, E, H, J and K could be characterized as strict liability offences and whether a reprimand was an available form of sanction under subsection 14.01(1) of the BIA, to which he applied the correctness standard. (Decision, at paragraph 60)

[11] The Judge identified the first issue in the application as whether the Delegate had committed a reviewable error in finding, as a matter of fact, that the operations of the Interest Account under Headings A and D had been authorized by the OSB. The Judge stated that the record contained ample evidence to support the Delegate's finding on this issue, which was largely based on an assessment of the credibility of various witnesses. (Decision, at paragraphs 70-82)

[12] The Judge identified the second issue in the application as whether the Delegate had erred in law in finding that the allegations under headings B, E, H, J and K were subject to a defence of due diligence. Relying on Gordon Capital Corp. v. Ontario (Securities Commission), [1991] O.J. No. 934, 50 O.A.C. 258 (Div. Ct.), Carruthers v. College of Nurses of Ontario reflex, (1996), 31 O.R. (3d) 377 (Div. Ct.) and Canada (Attorney General) v. Roy, 2007 FCA 410 (CanLII), 2007 FCA 410, the Judge indicated that a contextual or sui generis approach was appropriate to determine whether allegations of professional misconduct were subject to a defence of due diligence: "If the legislative or regulatory provision at issue shows that an element of reasonable care is involved, then the defence of due diligence will generally

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be available (...)." (Decision, at paragraph 91) The Judge found that the provisions of the BIA and the Rules surrounding the allegations under headings B, E, H, J and K, when read together, disclose wording such as "due care" or "reasonably ought to know" and concluded that the Delegate was correct in finding that a defence of due diligence was available to the respondents. (Decision, at paragraphs 83-106)

[13] The Judge identified the third issue as whether the Delegate had erred in finding that the respondents had established a defence of due diligence to counter the allegations under headings B, E, H, J and K, which he described as a question of mixed fact and law reviewable on a standard of reasonableness. (Decision, at paragraph 107)

[14] Of particular importance for this appeal are the Judge's findings with respect to headings B, E and H. The Judge noted that the Delegate had accepted the respondents' evidence that the irregularities (i) represented a small segment of their overall business, (ii) had been unintentional, (iii) were the result of minor administrative errors on the part of their staff, (iv) had caused no prejudice to the estates or the creditors and (v) had not resulted in any benefits to the respondents. The Judge indicated that the Delegate must have inferred from these findings that the respondents had successfully established a defence of due diligence. (Decision, at paragraphs 111, 114 and 117) The Judge refused to interfere with the Delegate's conclusions, stating that they fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." (Decision, at paragraph 113) However, the Judge reached a different conclusion with respect to allegations J and K, remarking on "the absence of any evidence tendered by the respondents in regard to a due diligence defence to these allegations, and the absence of explanations by the Delegate (...) as to why a due diligence defence was held to have been made out (...)." (Decision, at paragraph 121)

[15] The Judge identified the fourth issue in the application as whether the Delegate had erred in law at the disciplinary stage of the proceedings in imposing a reprimand on the respondents with respect to the infractions under heading L. The Judge stated that while the Delegate's determination of the appropriate remedy fell within his expertise and was therefore reviewable on the reasonableness standard, the determination of the spectrum of available remedies was a question of law subject to the correctness standard. (Decision, at paragraph 129) The Judge noted that while a "reprimand" was not an available form of sanction under subsection 14.01(1) of the BIA, the decision to impose or not to impose a sanction fell within the Delegate's discretion (Jacques Roy v. Sylvie Lapperière, 2006 FC 1386 (CanLII), 2006 FC 1386 at paragraphs 75-80). The Judge interpreted the Delegate's decision to impose a reprimand on the respondents as a decision that no specific measure or sanction contemplated by subsection 14.01(1) was warranted and held that this decision was reasonable in the circumstances. (Decision, at paragraphs 122-131)

[16] The Judge allowed the application in part and remitted the matter to the Delegate in order for him to determine the appropriate disciplinary measure, if any, to be imposed on the respondents with respect to headings J, K and L.

III. Issues and Analysis

[17] This appeal raises only one issue, namely whether the Judge erred in upholding the Delegate's finding that the respondents had established a defence of due diligence with respect to headings B, E and H.

A. Positions of the Parties

[18] The appellant argues that, in the context of a strict liability regime, due diligence is established by showing on a balance of probabilities that the accused took all reasonable care to avoid committing the illegal act or that he reasonably believed in a mistaken set of facts which, if true, would render the act innocent. (Sault Ste. Marie, above at pages 1325-1326; Corp. de l'École Polytechnique v. Canada, 2004 FCA 127 (CanLII), 2004 FCA 127 at paragraph 28) The appellant submits that the Federal Court has set a high threshold for proving the defence of due diligence (Cata International Inc. v. Canada (M.N.R.), 2004 FC 663 (CanLII), 2004 FC 663 at paragraph 22; Samson v. Canada (M.N.R.), 2007 FC 975 (CanLII), 2007 FC 975 at paragraph 35) and that the following principles have been established in the relevant case law: (i) errors made in good faith are not tantamount to due diligence as this defence requires affirmative proof that all reasonable care was exercised to ensure that errors were not made; (ii) proof of reasonable care must be established in relation to the particular contravention at issue and general compliance with a statutory regime is not sufficient; (iii) an employer must show that a system was in place to prevent the prohibited act from occurring and that reasonable steps had been taken to ensure the effective operation of that system; and, (iv) the fact that the contraventions did not cause prejudice to third parties is not relevant in assessing whether due diligence was exercised.

[19] The appellant submits that the Delegate erred in law in finding that the respondents had successfully established a defence of due diligence with respect to the allegations contained in headings B, E and H by showing, inter alia, that the infractions were the result of administrative errors, had caused no prejudice to the estates or the creditors and represented a small fraction of the overall volume of their business. Further, the appellant argues that the Judge erred in law in upholding a decision reached on the basis of an unacceptably low standard for the defence of due diligence.

[20] The respondents argue that this appeal should be rejected on the basis that the appellant is asking this Court to reweigh evidence pertaining to their defence of due diligence. The respondents submit that the issue of whether a defence of due diligence had been established was properly characterized by the Judge as a question of mixed law and

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fact which should be reviewed on the reasonableness standard. Alternatively, the respondents submit that, as per Dunsmuir, above at paragraph 70, even if an extricable question of law could be identified, the Delegate's decision should nevertheless be reviewed on the reasonableness standard on the basis that it has no significance to the legal system in general and was within the Delegate's expertise in matters of professional discipline.

[21] The respondents reiterate their position that the infractions set out in the Report did not result in any benefit to them or in any prejudice to the concerned estates or creditors, and evidence that the concerned estates and transactions represented a very small fraction of their overall business demonstrates that an adequate system of oversight was applied and, therefore, that "all reasonable care" had been exercised to prevent these infractions. In the alternative, the respondents argue that, as per Sault Ste. Marie, above, a defence of due diligence has also been established on the basis that the infractions resulted from a reasonable belief on a mistaken set of facts.

B. Standard of Review

[22] The role of this Court is to determine whether the Judge selected and correctly applied the appropriate standard of review to the Delegate's decision: Telfer v. Canada (Revenue Agency), 2009 FCA 23 (CanLII), 2009 FCA 23 at paragraph 18; Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40 (CanLII), 2005 SCC 40 at paragraph 35; Dr. Q v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19 (CanLII), 2003 SCC 19 at paragraph 43. The Judge's selection of the appropriate standard of review is a question of law subject to review on the standard of correctness: Shneidman v. Canada (Customs and Revenue Agency), 2007 FCA 192 (CanLII), 2007 FCA 192 at paragraph 17; Davies v. Canada (Attorney General), 2005 FCA 41 (CanLII), 2005 FCA 41 at paragraph 8; Housen v. Nikolaisen, 2002 SCC 33 (CanLII), 2002 SCC 33 at paragraph 8. If the correct standard of review was selected, the Judge's application of that standard constitutes a question of mixed fact and law reviewable on a "palpable and overriding error" standard, unless an extricable error of law can be identified in his reasons: Housen, above at paragraphs 26, 37.

C. Analysis

[23] As stated above, this Court must determine whether the Judge erred in finding that it was reasonable for the Delegate to conclude that the respondents had met their burden of proving a defence of due diligence with regard to the infractions listed under headings B, E and H. The answer to this question requires this Court to first determine whether the Judge selected the appropriate standard of review: Telfer, above at paragraph 18; Mugesera, above at paragraph 35; Dr. Q, above at paragraph 43. The Judge stated his position on this issue as follows:

107 Since the defence of due diligence was open to the Respondents under headings B, E, H, J and K, the Applicant submits that the Delegate made reviewable errors in finding that such a defence had been properly made out by the Respondents to counter all these allegations under these headings. This raises issues of mixed law and fact which are to be reviewed on a standard of reasonableness.

[24] The Judge correctly characterized the issue as to whether the respondents had established the defence of due diligence as a question of mixed fact and law, as it required the Delegate to apply a legal standard to a set of facts: Democracy Watch v. Campbell, 2009 FCA 79 (CanLII), 2009 FCA 79 at paragraph 21; Housen, above at paragraph 26; Canada (Director of Investigation and Research) v. Southam Inc., 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748 at paragraph 35. Further, the Judge correctly concluded that such questions, in an application for judicial review, are generally subject to the reasonableness standard: Dunsmuir, above at paragraph 53; Housen, above at paragraph 37.

[25] However, the judicial review of questions of mixed fact and law presents an additional challenge for reviewing judges. If an extricable question of law can be identified in the question of mixed fact and law put before the decision-maker, this question must be reviewed on the appropriate basis. If the extricable question of law is of "central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", it must be reviewed on the standard of correctness: Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 (CanLII), 2003 SCC 63 at paragraph 62; Dunsmuir, above at paragraph 55. Conversely, if the extricable question of law involves the decision-maker's interpretation of a statute "with which [he] will have particular familiarity", it will generally attract the application of the reasonableness standard: Dunsmuir, above at paragraph 54.

[26] The question as to whether the respondents have successfully established a defence of due diligence with respect to headings B, E and H clearly presents an extricable question of law, namely the legal standard upon which such a defence must be established. Further, I disagree with the respondents' submission that the Delegate's interpretation of this standard should be reviewed on the standard of reasonableness because, in what I interpret to be a reference to the Supreme Court's above-cited comments in CUPE and Dunsmuir, "it has no significance to the legal system in general". (Respondents' Memorandum, at paragraph 77) The Supreme Court of Canada's affirmation in Sault Ste. Marie that the defence of due diligence was available in the context of "strict liability" infractions has impacted our legal system across many fronts, from quasi-criminal proceedings involving breaches of work safety or environmental regulations (R. v. Rio Algom Ltd. reflex, (1988), 66 O.R. (2d) 674 (C.A.); R. v. Imperial Oil Ltd., 200 BCCA 553) to the context of professional discipline (Re Ghilzon and Royal College of Dental Surgeons of Ontario (1979), 22 O.R. (2d) 756 (H.C.J.); Stuart v. British

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Columbia College of Teachers, 2005 BCSC 645 (CanLII), 2005 BCSC 645). In addition, a plain reading of the case law shows that developments in the interpretation of "due diligence" in one context will influence the application of this standard in another. The Delegate's interpretation of the criteria required to establish a defence of due diligence and, by extension, the Federal Court's treatment of this issue in an application for judicial review, transcends the interests of the parties and holds significance to the Canadian legal system as a whole. Further, while courts have considered the relative expertise of the Superintendent and his delegates in the supervision of trustees to justify the application of the reasonableness standard to liability and sanctions decisions under section 14.01 of the BIA (Roy v. Poitras, 2006 FC 1386 (CanLII), 2006 FC 1386 at paragraphs 19-21; Sheriff v. Canada (Attorney General), 2005 FC 305 (CanLII), 2005 FC 305 at paragraphs 30-31), the Delegate does not possess any comparative expertise on the standards required to establish a defence of due diligence. The Judge was therefore required to apply the standard of correctness to this aspect of the Delegate's decision: CUPE, above at paragraph 62; Dunsmuir, above at paragraph 55.

[27] Although the Judge's standard of review analysis identified two questions of law raised in the Delegate's decision for which he applied the correctness standard (Decision, at paragraph 60), his review of the Delegate's decision with respect to headings B, E and H failed to distinguish between the merits of the Delegate's findings and the legal standard against which these findings were made. The Judge simply qualified the issue of whether a defence of due diligence had been established by the respondents as a question of mixed fact and law and felt it appropriate to generally show deference to the Delegate's findings on this point. (Decision, at paragraphs 107, 112) The Judge's failure to separately examine the Delegate's interpretation of the standard required to establish a defence of due diligence under the correctness standard was an error of law: Democracy Watch, above at paragraph 26.

[28] Further, a review of the Delegate's decision pertaining to headings B, E and H shows that he misunderstood the burden falling upon the respondents with respect to the establishment of a due diligence defence.

[29] With regard to allegation B, the Delegate noted that the respondents admitted to having failed to comply with section 154 of the BIA and section 64(2) of the Rules [now section 61(2)] by applying for a discharge before forwarding all unclaimed dividends and undistributed funds to the Superintendent. Section 154 provides, inter alia, that before proceeding to a discharge, a trustee shall forward to the Superintendent, for deposit with the Receiver General for Canada, unclaimed dividends and undistributed funds. Completing section 154, section 64(2) states, inter alia, that at the time of discharge a trustee shall certify to the Court that he has forwarded all undistributed funds to the Superintendent. The Delegate accepted the respondents' submissions that the infractions (i) were the result of administrative errors, (ii) had not resulted in any prejudice to the creditors or benefit to them and (iii) that the amounts in issue represented a small fraction of their overall business. The Delegate concluded his analysis with the following statement: "Technically, there may be a breach of [the Act] and Rules. However, it was certainly unintentional." (Appeal Book, Vol. I, Tab 4, "Liability Decision", pages 103-104). For his part, the Judge indicated that "[t]he Delegate obviously inferred from this evidence that the Respondents has thus established a successful due diligence defence (...)." (Decision, at paragraph 111)

[30] The Delegate's findings with regard to headings E and H reflect a similar decision-making process. The respondents admitted to having submitted inaccurate Statements of Receipts and Disbursements (SRD) in contravention of sections 151 and 152 of the BIA. Section 151 of the BIA imposes a duty on trustees to prepare a SRD once all the property of a bankrupt has been realized while section 152 indicates the mandatory information contained in a SRD. The Delegate accepted the respondents' submission that these infractions were the result of administrative errors and had not resulted in any benefit to them or prejudice to the creditors. The Delegate adopted the same approach with respect to allegation H, which concerned the respondents' failure to maintain separate trust accounts for estates converted from a summary to an ordinary administration in contravention of section 13 of Directive No. 5. Again, the Delegate accepted the respondents' submissions that the amounts at issue represented a small fraction of their overall business and that the infractions were the result of administrative errors which did not prejudice the creditors. (Appeal Book, Vol. I, Tab 4, "Liability Decision", pages 110-111) The Judge's comments on the Delegate's findings also reflect the general deference he showed to this aspect of the Delegate's decision: "[T]he findings of fact and the inferences drawn by the Delegate from the evidence (...) are reasonable since they fall within an acceptable range of possible outcomes." (Decision, at paragraph 117)

[31] A plain reading of the Delegate's decision reveals that the following factors were considered as supporting the respondents' defence of due diligence: (i) the lack of intentional wrongdoing on the part of the respondents; (ii) the lack of any resulting prejudice to the creditors of benefit to the respondents; and (iii) the fact that the infractions related to a small portion of the respondents' overall business. In my opinion, these were not relevant considerations to the establishment of a defence of due diligence as articulated in Sault Ste. Marie and subsequently developed in the jurisprudence.

[32] The defence of due diligence was articulated in Sault Ste. Marie, at pages 1325-26 as follows:

The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

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[33] While the Delegate regarded the respondents' diligence in the overall conduct of their business as a relevant factor in assessing whether due diligence had been established with respect to headings B, E and H, the jurisprudence is well-settled that, as per Sault Ste. Marie, evidence presented to support this defence must relate to the specific offence at issue. This principle has notably been adopted by the Ontario Court of Appeal (R. v. Raham, 2010 ONCA 206 (CanLII), 2010 ONCA 206 at paragraph 48; R. v. Kurtzman reflex, (1991), 4 O.R. (3d) 417 at paragraph 37; Rio Algom Ltd., above at paragraph 31), the British Columbia Court of Appeal (R. v. Emil K. Fishing Corp., 2008 BCCA 490 (CanLII), 2008 BCCA 490 at paragraphs 13, 19; Imperial Oil, above at paragraphs 23, 28) and the Newfoundland and Labrador Court of Appeal (R. v. Alexander 1999 CanLII 18928 (NL CA), (1999), 171 Nfld. & P.E.I.R. 74 at paragraph 18 (C.A.)). The Ontario Court of Appeal recently made the following comments on this particular aspect of the due diligence defence in Raham, above at paragraph 48:

The due diligence defence relates to the doing of the prohibited act with which the defendant is charged and not to the defendant's conduct in a larger sense. The defendant must show he took reasonable steps to avoid committing the offence charged, not that he or she was acting lawfully in a broader sense.

[34] Similarly, with respect to heading B, the Delegate accepted the respondents' submission that the breach of the BIA and the Rules was "unintentional". (Appeal Book, Vol. I, Tab 4, "Liability Decision", page 104). However, the lack of intentional wrong-doing will not support a defence of due diligence in the context of strict liability offences which, as stated in Sault Ste. Marie, have as their defining characteristic the absence of any need for the prosecution to prove the existence of a mens rea. In Pillar Oilfield Projects Ltd. v. Canada, [1993] T.C.J. No. 764 at paragraph 27, the Tax Court indicated that "innocent good faith in the making of unintentional errors is not tantamount to due diligence." More recently in Samson, above at paragraph 35, the Federal Court stated that "[i]t is not sufficient to plead forgetfulness or an error made in good faith."

[35] The fact that the infractions may have resulted from "administrative errors" on the part of the respondents' staff was also taken into consideration by the Delegate. However, with respect to headings B and E, subsection 7(f) of Directive No. 4R (Delegation of Tasks) specifically barred the respondents from delegating their responsibility to ensure both the accuracy of SRDs (Heading E) and that an application for discharge was not filed prior to forwarding all unclaimed dividends and undistributed funds to the Superintendent (Heading B). Further, as stated in Sault Ste. Marie at page 1331, en employer will not escape "strict liability" on the sole basis that the alleged infraction was committed by a staff member:

Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating willful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

[36] Finally, while the Delegate accepted the respondents' submissions that the infractions had not resulted in any prejudice to the concerned creditors, there is no reference in the case law pointing to the relevance of such considerations in a due diligence analysis. The appellant refers this Court to the comments of the Court of Quebec (Civil Division) in Millette c. Le Comité de surveillance de l'Association des courtiers, [2004] J.Q. no 8844 at paragraph 44 (Civ. Div.), aff'd 2006 QCCA 711 (CanLII), 2006 QCCA 711, to the effect that liability under a regime of professional conduct does not depend on whether a prejudice was caused to third parties. On this issue, the Court was referred to S. Poirier, La discipline professionnelle au Québec (Cowansville: Yvon Blais, 1998) at 39:

Contrairement à la faute civile, la faute disciplinaire est sans égard aux conséquences de l'acte posé. La conclusion recherchée en matière disciplinaire sera la sanction de l'infraction et non la réparation du préjudice causé.

[37] In light of these observations, it is clear that the Delegate determined that a defence of due diligence had successfully been established by the respondents on the basis of irrelevant criteria. The Delegate failed to hold the respondents to the correct burden of proof, namely to demonstrate on a balance of probabilities that they took all reasonable steps to avoid committing the specific infractions listed under headings B, E and H. Further, even if the Delegate had applied the appropriate criteria for assessing the respondents' due diligence, there is no evidence in the record which can support the finding that all reasonable care was exercised to prevent these specific infractions from occurring. Admittedly, the interpretation of the defence of due diligence in the jurisprudence sets a heavy burden on the respondents: Samson, above at paragraph 35; Cata International, above at paragraph 22. The Ontario Court of Appeal has notably commented on the "nebulous" nature of the notion of due diligence: R. v. Wholesale Travel Group Inc., [1989] O.J. No. 1971 at paragraph 70 (C.A.).

[38] The respondents rightfully submit that, as per Sault Ste. Marie, a defence of due diligence will also be established if the accused "reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent." However, while the respondents invoke this alternative mode of defence, they have failed to identify a precise "set of facts" which was reasonably relied on to believe that their actions were lawful. Rather, the respondents' argument

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on this point seems to relate to a reasonable belief that existing control measures were adequate to prevent the infractions from occurring. In my opinion, on the evidence before us, that argument cannot form the basis of a due diligence defence.

IV. Disposition

[39] I would allow the appeal, set aside the Judge's decision pertaining to the contraventions listed under headings B, E and H and allow the application for judicial review with respect to these contraventions. The Delegate's decisions pertaining to headings B, E and H, in addition to his decision pertaining to the remedial measure under heading L, are thereby set aside. Given this disposition, the matter is remitted to the Delegate in order to determine the appropriate disciplinary measure, if any, under subsection 14.01(1) of the BIA with regard to the contravention under heading L in addition to the contraventions identified by the Judge (J and K) and on appeal (headings B, E and H) as a whole. However, in light of the appellant's failure to obtain a stay of the Judge's decision, and in the event the Delegate has already rendered a new decision with respect to disciplinary measures under headings J, K and L, I would remit the matter to the Delegate only with respect to headings B, E and H.

[40] The Federal Court awarded no costs and I would not disturb that finding. I would award the appellant its costs in this appeal.

"Pierre Blais"

Chief Justice

"I agree.

M. Nadon J.A."

NOËL J.A. (Concurring Reasons)

[41] I have had the benefit of reading the reasons of the Chief Justice. Like him I would allow the appeal. However, I reach that conclusion through a different route.

[42] The role of this Court sitting on an appeal from a decision rendered by the Federal Court further to an application for judicial review is to identify the correct standard of review and determine whether the Judge applied this standard correctly (Public Service Alliance of Canada v. Canada Post Corporation, 2010 FCA 56 (CanLII), 2010 FCA 56 at paragraph 84). In this case, the Delegate's decision gave rise to an extricable question of law which, by its nature, stood to be reviewed on a standard of correctness, i.e. what are the legal parameters of the defence of due diligence?

[43] Had the Judge assessed this question against the appropriate standard, he would have been bound to allow the application for judicial review with respect to the contraventions described under headings B, E and H because none of the grounds identified by the Delegate in exculpating the respondents from these contraventions come within the ambit of the defence of due diligence.

[44] Specifically, with respect to the contravention under heading B, the Delegate wrote at paragraph 68 of his reasons:

I accept Mr. MacLeod's evidence that the irregularities as set fourth in these allegations were as a result of administrative errors, and that there was no prejudice to the estates or the creditors, nor any benefit to trustees. Technically, there may be a breach of the Bankruptcy Act and Rules, it was certainly unintentional.

[45] As for the contravention under heading E, the Delegate wrote at paragraph 75 of his reasons:

The explanation given by Mr. MacLeod was that allegation 46 and 47 was an error made by his staff, for which he takes responsibility... At the time of signing the SRD he thought they were correct and accurate. The trustees did not benefit from any of these administrative errors...As has been pointed out, the trustees have not financially benefited from any of these mistakes. They may have used some creative accounting techniques to adjust the estates, but it would also appear that no creditor or debtor has suffered.

[46] With respect to the allegation under heading H, the Delegate noted at paragraph 84 that:

Mr. MacLeod's response to this allegation was that it represented a very small portion of the estates, which were administered by [the respondents].

[47] Finally, the Delegate at paragraph 87 added that:

[Mr. McLeod] points out that the effect of opening these estates in the consolidated bank account was an administrative error but did no prejudice or compromise the administration [of] the estate nor did it prejudice the consolidated bank account for consumer proposals.

[48] In short, the Delegate found that the defence of due diligence had been made out because the contraventions were the result of administrative errors, the creditors were not prejudiced, the respondents did not benefit and the amounts involved represented a very small fraction of the total value of the estates under the respondents' administration.

[49] However, the case law establishes that errors made in good faith are not tantamount to due diligence (Cata International Inc. v. Canada (Minister of National Revenue, Customs, Excise and Taxation – M.N.R.), 2004 FC 663 (CanLII), 2004 FC 663 at paragraph 22; Jean-Pierre Samson and the Minister of National Revenue, 2007 FC 975

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(CanLII), 2007 FC 975; Pillar Oilfield Projects Ltd. v. Canada, [1993] T.C.J. no 764 at paragraphs 24 and 27); that proof of reasonable care in the general conduct of one's affairs is not sufficient to escape liability (R. v. Alexander, 1999 CanLII 18928 (NL CA), (1999) 171 Nfld & P.E.I.R. 74 (C.A.); R. v. Imperial Oil Ltd., (2000) 144 B.C.A.C. 118; R. v. Kurtzman, reflex, (1991) 4 O.R. (3d) 417, 429 (C.A.); R. v. Emonts, [2007] O.J. no 1206; R. v. Pilen Construction of Canada Ltd., [1999] O.J. No 5650; R. v. Cooke, reflex, (1989) 78 Sask. R. 141); that it is incumbent upon the person claiming due diligence to show that a system was in place to prevent the prohibited act (R. v. Sault-Ste-Marie, 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299 at page 1331; Chauvin c. Beaucage, 2008 QCCA 922 (CanLII), 2008 QCCA 922 at paragraphs 88-91) and that the fact that the contraventions did not cause prejudice to third parties is irrelevant (Millette c. Assoc. des Courtiers d'Assurances de la Province de Québec, 2004 CanLII 7074 (QC CQ), 2004 CanLII 7074 (CQ) at paragraphs 42-46; conf. at 2006 QCCA 711 (CanLII), 2006 QCCA 711 (CanLII) at paragraph 59; Chauvin c. Sheehan, 2010 QCCQ 1512 (CanLII), 2010 QCCQ, 1512 (CanLII); Latulippe c. Médecins, 1998 QCTP 1687 (CanLII), 1998 QCTP 1687 (CanLII); Poirier, S., La Discipline Professionnelle au Québec, Cowansville, Les Éditions Yvon Blais inc., 1998 at pages 38-39).

[50] Giving effect to the defence of due diligence as defined by the case law, it is apparent that none of the factors relied upon by the Delegate were capable of establishing such a defence.

[51] In response to questions from the Court during the hearing, counsel for the respondents (Mr. Christian) did not challenge the state of the law as I have described it. However, he took the position that this line of cases does not apply in assessing a due diligence defence in the context of this case.

[52] In particular, counsel noted that there are two branches to the due diligence defence as it was articulated in Sault Ste Marie (at pages 1325 and 1326):

... The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular act. ...

[53] Insisting on the first branch of this test counsel argued that the strict due diligence standard which has been developed by the case law is appropriate with respect to infractions under certain statutes which are based on self-compliance such as the Income Tax Act. However, it is inappropriate in the case of the BIA.

[54] I can see no merit in this submission. First, although broken down into two elements, the Supreme Court in the above quote from Sault Ste Marie provides for a single test inasmuch as an accused who fails to take all reasonable steps to avoid the commission of an infraction will not be able to invoke the first element (i.e. reliance on others) in order to escape liability (Sault Ste Marie at p. 1331).

[55] Second, there is no basis for the suggestion that the BIA calls for a more relaxed approach. Trustees are expected to act in conformity with their statutory obligations. Investigations are undertaken under the BIA from time to time in order to ensure compliance just as they are under the Income Tax Act. This does not detract from the fact that trustees are expected to comply on their own volition as most do. The system could not function otherwise.

[56] I can see no basis for altering the standard of due diligence as it has been established by the case law when dealing with contraventions under the BIA. Applying this standard, it was not open to the Delegate to hold, on the record before him, that the due diligence defence had been made out. It follows that the Judge was bound to intervene and that he erred in failing to do so.

[57] I would allow the appeal on the terms proposed by the Chief Justice.

"Marc Noël"

J.A.

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FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD
DOCKET: A-66-10
Appeal from a decision of Justice Mainville, as he then was, of the Federal Court, dated January 28, 2010.
STYLE OF CAUSE: Sylvie Laperrière, in her capacity as Senior Analyst – Professional Conduct – of the Office of the Superintendent of Bankruptcy and Allen W. MacLeod and D. & A. MacLeod Company Ltd.
PLACE OF HEARING: Ottawa, Ontario
DATE OF HEARING: November 23, 2010
REASONS FOR JUDGMENT BY: BLAIS C.J.
CONCURRED IN BY: NADON J.A.
CONCURRING REASONS BY: NOËL J.A.
DATED: January 13, 2011
APPEARANCES:

Bernard Letarte Benoît de Champlain	FOR THE APPELLANT
J. Alden Christian Julia J. Martin	FOR THE RESPONDENTS

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(2) [Repealed, 1992, c. 27, s. 7]

Examination - Sec. 10(3)
(3) If, on the application of the Superintendent or the Superintendent's authorized representative, a subpoena has been issued by the court, the Superintendent may, for the purpose of an inquiry or investigation under subsection (1), examine or cause to be examined under oath before the registrar of the court or other authorized person, the trustee, the debtor, any person who the Superintendent suspects, on reasonable grounds, has knowledge of the affairs of the debtor, or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the debtor or the trustee, with respect to the conduct, dealings and transactions of the debtor, the causes of the bankruptcy or insolvency of the debtor, the disposition of the debtor's property or the administration of the estate, and may order any person liable to be so examined to produce any books, records, data, including data in electronic form, documents or papers in the person's possession or under the person's control.

Questions - Sec. 10(4)
(4) A person being examined pursuant to this section is bound to answer all questions relating to the conduct, dealings and transactions of the debtor, the causes of the debtor's bankruptcy or insolvency and the disposition of the debtor's property.

Privilege of witness - Sec. 10(5)

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(5) Where a person being examined pursuant to this section objects to answering any question on the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person and if, but for this section or section 5 of the Canada Evidence Act, he would have been excused from answering that question, the answer so given shall not be used or admitted in evidence against him in any proceeding, civil or criminal, thereafter taking place other than a prosecution for perjury in the giving of that evidence.

Compliance - Sec. 10(6)
(6) No person shall hinder, molest or interfere with any person doing anything that he is authorized by or pursuant to this section to do, or prevent or attempt to prevent any person doing any such thing, and, notwithstanding any other Act or law, every person shall, unless he is unable to do so, do everything he is required by or pursuant to this section to do.

Copies - Sec. 10(7)
(7) Where any book, record, paper or other document is examined or produced in accordance with this section, the person by whom it is examined or to whom it is produced or the Superintendent may make or cause to be made one or more copies thereof, and a document purporting to be certified by the Superintendent or a person thereunto authorized by him to be a copy made pursuant to this section is admissible in evidence and has the same probative force as the original document would have if it were proven in the ordinary way.
R.S., 1985, c. B-3, s. 10;
1992, c. 27, s. 7;
2004, c. 25, s. 10;
2005, c. 47, s. 8.

Reporting offence to provincial authority - Sec. 11
11. (1) Where after an investigation pursuant to section 10 or otherwise the Superintendent has obtained evidence of an offence having been committed in connection with an estate or matter to which this Act applies, the Superintendent shall report the alleged offence to the deputy attorney general of the province concerned or to such person as is duly designated by that deputy attorney general for that purpose.

Costs and expenses - Sec. 11(2)
(2) Notwithstanding section 136, a recovery made as the result of any inquiries or investigation made or caused to be made pursuant to section 10 shall be applied to the reimbursement of any costs and expenses incurred by the Superintendent thereon, not being ordinary costs or expenses of the office of the Superintendent, and the balance thereafter remaining in respect of the recovery shall be made available for the benefit of the creditors of the debtor.
R.S., 1985, c. B-3, s. 11;
1992, c. 27, s. 8;
2004, c. 25, s. 11(F).

PUBLIC RECORDS

Public records - Sec. 11.1

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11.1 (1) The Superintendent shall keep, or cause to be kept, in such form as the Superintendent deems appropriate and for the prescribed period, a public record of

(a) proposals,

(b) bankruptcies,

(c) licences issued to trustees by the Superintendent, and appointments or designations of administrators made by the Superintendent, and

(d) notices sent to the Superintendent by receivers pursuant to subsection 245(1)

and, on request therefor and on payment of such fee as may be prescribed, shall provide, or cause to be provided, any information contained in that public record.

Other records - Sec. 11.1(2)

(2) The Superintendent shall keep, or cause to be kept, in such form as the Superintendent deems appropriate and for the prescribed period, such other records relating to the administration of this Act as the Superintendent deems advisable.

Agreement to provide compilation - Sec. 11.1(3)

(3) The Superintendent may enter into an agreement to provide a compilation of all or part of the information that is contained in the public record.

1992, c. 27, s. 8;

2007, c. 36, s. 3.

OFFICIAL RECEIVERS

Bankruptcy districts and divisions - Sec. 12

12. (1) Each of the provinces constitutes one bankruptcy district for the purposes of this Act but the Governor in Council may divide any bankruptcy district into two or more bankruptcy divisions and name or number them.

Official receivers - Sec. 12(2)

(2) The Governor in Council shall appoint one or more official receivers in each bankruptcy division who shall be deemed to be officers of the court and shall have and perform the duties and responsibilities specified by this Act and the General Rules.

Report to Superintendent - Sec. 12(3)

(3) The official receiver shall make a report to the Superintendent, in the prescribed form, of every bankruptcy originating in his division, and he shall also notify the Superintendent of any subsequent increase or decrease in the security filed by the trustee.

Registrar to act for official receiver - Sec. 12(4)

(4) In the absence or illness of the official receiver or pending the appointment of a successor when the office is vacant, the registrar of the court shall perform the duties of the official receiver.

R.S., c. B-3, s. 8.

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TRUSTEES

Licensing of Trustees
Application for licence - Sec. 13
13. (1) A person who wishes to obtain a licence to act as a trustee shall file with the Superintendent an application for a licence in the prescribed form.

SB Directive: 8R9, "Application" for Trustee Licence
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
Bureau du surintendant des faillites Canada

An Agency of Industry Canada
Un organisme d'Industrie Canada

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4th Floor
Ottawa, Ontario
K1A 0H5
http://osb-bsf.ic.gc.ca

Place Héritage
155, rue Queen
4e étage
Ottawa (Ontario)
K1A 0H5
http://osb-bsf.ic.gc.ca

Date: April 30, 2010

To: OSB Staff, Trustees and Registrars

Subject: Directive No. 8R9, *Bankruptcy and Insolvency Act* Forms

The Office of the Superintendent of Bankruptcy (OSB) has amended several forms to correct technical inconsistencies and to address minor discrepancies. The amendments reflect no substantive changes to the forms.

Summary of Changes

1. Form 2, *Application for Trustee Licence (Individual)* — English version
The OSB has corrected a reference to a directive. Under "Specific Qualifications," the last sentence of the text in parentheses has been replaced by the following: "Please refer to sections 36 to 39 of Directive No. 13R2 (Trustee Licensing)."

2. Form 3, *Application for Trustee Licence (Corporation)* — English version
The OSB has corrected a reference to a section of a directive. In footnote 1, the beginning of the last sentence has been replaced by the following: "Section 25 of Directive 13R2 (Trustee Licensing) reads as follows:

Date : Le 30 avril 2010

À : Employés du BSF, syndics et registraires

Objet : Instruction n° 8R9, *Formulaires de la Loi sur la faillite et l'insolvabilité*

Le Bureau du surintendant des faillites (BSF) a apporté des modifications à quelques formulaires de manière à corriger des incohérences et de légères divergences de texte. Aucune modifications de fond n'a toutefois été apportée aux formulaires.

Résumé des modifications

1. Formulaire 2 – *Demande de licence de syndic (particulier)* – Version anglaise
Le BSF a corrigé un renvoi à une directive. Sous la rubrique « Specific Qualifications », la dernière phrase du texte entre parenthèses a été remplacée par ce qui suit «Please refer to sections 36 to 39 of Directive No. 13R2 (Trustee Licensing) ».

2. Formulaire 3 – *Demande de licence desyndic (personne morale)* – Version anglaise
Le BSF a corrigé un renvoi à une section d'une instruction. Dans la note de bas de page, le début de la dernière phrase a été remplacé par ce qui suit : « Section 25 of Directive

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Montant mensuel que le failli a convenu de payer (même montant qu'à la ligne (12) du formulaire 65). . . . . $ (2)"

The amendments to these forms are of a technical nature to correct minor inconsistencies and do not reflect substantive changes to the forms.

Coming into Force
Directive No. 8R9, The *Bankruptcy and Insolvency Act* Forms, comes into force on September 20, 2010.

Enquiries
If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

Montant mensuel que le failli a convenu de payer (même montant qu'à la ligne (12) du formulaire 65). . . . . $ (2) »

Ainsi, toutes les modifications apportées sont de nature technique. Elles servent à corriger des incohérences et n'entraînent aucun changement de fond aux formulaires en question.

Entrée en vigueur
L'instruction n°8R9, *Formulaires de la Loi sur la faillite et l'insolvabilité*, entre en vigueur le 20 septembre 2010.

Demande de renseignements
Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

p. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 8R9

THE *BANKRUPTCY AND INSOLVENCY ACT* FORMS

Issued: April 30, 2010

(This Directive amends Directive No. 8R8 issued on November 19, 2009.)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"Forms" means forms under the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*c*) and (*e*) of the Act for the purpose of prescribing amendments to:

FORMULAIRES DE LA *LOI SUR LA FAILLITE ET L'INSOLVABILITÉ*

Émise : Le 30 avril 2010

(La présente instruction modifie l'instruction n° 8R8 émise le 9 novembre 2009.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Formulaires » renvoie aux formulaires émis en vertu de la *Loi sur la faillite et l'insolvabilité*;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction, qui est émise en vertu de l'autorité conférée par les alinéas

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Coming into Force

4. Revised Forms 2, 3, 12, 13, 14, 52 and 82 will come into force on September 20, 2010.

Entrée en vigueur

4. Les formulaires 2, 3, 12, 13,14, 52 et 82, révisés entreront en vigueur le 20 septembre 2010.

Enquiries

5. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

5. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Cation
Superintendent of Bankruptcy / Surintendant des faillites

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FORM 2

Application for Trustee Licence (Individual)
(Subsection 13(1) of the Act)

GENERAL INFORMATION

Family Name _____ Given Name(s) _____ Date of Birth ____/____/____ year month day

Other Previous Legal Names or Aliases
_____

Business Address
_____
_____
_____
Telephone No.: _____
Fax No.: _____
Email address: _____

Home Address
_____
_____
_____
Telephone No.: _____
Fax No.: _____

Current Employer
_____

Employment Began ____/____/____ year month day

Professional organization(s) of which I am currently a member (if any)
_____
_____
_____

Bankruptcy district(s) for which licence is requested: _____

PREREQUISITE QUALIFICATIONS

Formal education (degrees, professional designations, year of conferment, post-secondary institutions) and relevant work experience. Please provide a curriculum vitae.
_____
_____
_____
_____

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FORM 2 -- *Continued*

DECLARATION REGARDING PREREQUISITE QUALIFICATIONS

I hereby declare that:

(a) I have not, at any time within 5 years preceding the date of this application, personally been in a *state of insolvency*[1];
(b) I have successfully completed the *Bankruptcy and Insolvency Act* (BIA) Insolvency Counsellor's Qualification Course;
(c) I have successfully completed the National Insolvency Qualification Program; and
(d) As a member or former member of a professional organization, I am in good standing with and am not subject to any current disciplinary action by that organization.

SPECIFIC QUALIFICATIONS

If you are a member of a professional organization, do you intend to retain your membership in that organization when you begin to practise as a trustee?

☐ Yes ☐ No

*(If yes, and if such membership entitles you to practise a profession that is an incompatible occupation,[2] you are required to satisfy the Superintendent that you will be a non-practising member of the organization. Please refer to sections 36 to 39 of Directive No. 13R2 (*Trustee Licensing*))*

DECLARATION RELATING TO THE APPLICANT'S REPUTATION

I hereby declare that:

(a) I have no criminal record;
(b) I have never been a bankrupt;
(c) I have never been a principal shareholder, a director or an officer of a bankrupt corporation; and
(d) As a member or former member of a professional organization, I have not previously been found guilty of professional misconduct of an ethical, commercial or economic nature;

except as indicated hereinafter (please provide documentation):_____

_____

---

1 "State of insolvency" means being bankrupt, having filed a notice of intention or a proposal under the BIA, or being subject to any similar proceedings under federal, provincial or foreign legislation.

2 "Incompatible occupation" includes, notably, a collection agent, a bailiff, a trade association representative, an employee of the Office of the Superintendent of Bankruptcy (OSB), a lawyer or a notary in the Province of Quebec, as well as any other occupation, business or profession that may be in conflict with the duties and responsibilities of a trustee.

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FORM 2 – *Continued*

UNDERTAKING OF APPLICANT REGARDING CONDITIONS IMPOSED ON NEW LICENCES

If a trustee licence is granted by the Superintendent of Bankruptcy, I accept that it be subject to the following conditions:

(a) that I will, for a period of twenty-four (24) months, practise with, and in the same physical location as, an active established trustee who is acceptable to the Superintendent; and

(b) that where, at any time during those twenty-four (24) months, I do not meet the requirement set forth in paragraph (a), I will be authorized to act only in the following cases:

(i) consumer proposals;

(ii) estates under the summary administration provisions of the Act;

(iii) estates, known as ordinary administration estates, for which the unsecured liabilities, as per the Statement of Affairs, do not exceed $500,000 and for which the realizable assets as per the Statement of Affairs, after deducting the value of all security interests, do not exceed $15,000; and

(iv) all other cases (notice of intention, Division I Proposal, Interim Receiver, estates not covered by case (iii) above, etc.), subject to the approval of the Designated Assistant Superintendent and on such terms as the Designated Assistant Superintendent shall determine, considering my performance.

These conditions will not necessarily restrict me to any specific employer and any transfer or change of employment assuring similar or better circumstances would be acceptable. I will inform the OSB in advance of any such change.

I also accept that these conditions may, upon written request, be reviewed after the period of twenty-four (24) months. They will thus either be removed, modified or maintained.

If other conditions are to apply, I will be so notified by the Superintendent, prior to the granting of the licence, for my approval.

AUTHORIZATION

I understand that my application for a trustee licence is subject to an investigation, and that a verification by the Royal Canadian Mounted Police (RCMP) will be conducted with regard to criminal records, ongoing or completed investigations and arrest warrants, as well as with regard to my background. I hereby authorize and give consent to the RCMP or other police forces to release personal information and make full disclosure to the Office of the Superintendent of Bankruptcy, as provided by the *Privacy Act*.

DECLARATION AND SIGNATURE

I, the undersigned, do solemnly declare that I am the applicant named in this application and that the information set out in this application and in the attached documents is, to the best of my knowledge and belief, true, correct and complete in all respects, and that I agree to respect the conditions contained in this form, if the Superintendent issues me a licence.

Dated at _____, this _____ day of _____.

Applicant's name in block letters

Signature of applicant

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FORM 2 – *Continued*

APPLICATION FOR A TRUSTEE LICENCE —
BREAKDOWN OF AREA OF EXPERIENCE IN INSOLVENCY MATTERS

Name of Applicant: _____ Firm: _____

The applicant for a trustee licence should estimate the amount of time worked, during the periods indicated, in each of the fields listed. The breakdown is to be shown as a percentage (%) of the overall time during the year.

	Consumer Bankruptcies	Consumer Proposals	Commercial Bankruptcies	Commercial Proposals	Interim Receiverships	Receiverships, Agency, Look-see, Secured Creditors, *Companies' Creditors Arrangement Act*	Other work not directly related to insolvency work (audit, tax, accounting, forensic)
Previous Year							
During _____ (*year*)							
During _____ (*year*)							
During _____ (*year*)							

I, the undersigned applicant for a trustee licence, hereby attest that the above information faithfully reflects my experience in insolvency and other fields during the periods shown above.

_____
Signature of applicant

Date: _____

I, the undersigned, a trustee of the firm where the applicant is presently employed or associated, hereby attest that the information provided by the applicant, for the period of time with this firm, faithfully reflects the extent of his/her experience in insolvency and other fields.

_____
Signature of trustee

_____
Trustee's name in block letters

Date: _____

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FORM 2 -- *Concluded*

THE FOLLOWING MUST ALSO BE PROVIDED WITH THIS APPLICATION

Please fill out this page and return it to the Office of the Superintendent of Bankruptcy with your application. If any items are not checked off, please indicate the reason for the information being excluded and the date when it will be provided to the Office of the Superintendent of Bankruptcy.

☐ 1 A copy of the applicant's certificate of completion of the Insolvency Counsellor's Qualification Course.

☐ 2 A curriculum vitae containing the applicant's academic background and a list of employment positions held during the last ten (10) years with a brief description of duties.

☐ 3 A detailed description of experience in bankruptcy administration (see attached table).

☐ 4 A recent photograph of the applicant (approximately 5 cm X 3.5 cm).

☐ 5 A cheque for $300 payable to the Receiver General of Canada.

Where the applicant intends to practise either with a trustee firm (i.e. partnership or corporate licence) or as an employee of another trustee:

☐ 6 A supporting letter in which the employer or a partner undertakes to provide the necessary resources (work facilities, equipment and personnel) that will be required by the applicant for the execution of his/her duties as a trustee, as well as insurance coverage (professional liability insurance and employee dishonesty (fidelity) insurance).

In all other cases (in order to obtain authorization to begin accepting professional engagements)

☐ 7 A personal balance sheet.

☐ 8 Details of necessary resources (work facilities, equipment and personnel) that will be at the applicant's disposal during the execution of his/her duties as a trustee, and of banking arrangements.

☐ 9 Evidence of insurance coverage for the applicant (professional liability insurance and employee dishonesty (fidelity) insurance).

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FORM 3

Application for Trustee Licence (Corporation)
(Subsection 13(1) of the Act)

GENERAL INFORMATION

Name of corporation (pre-approved by the Superintendent)
_____

Address of head office
_____
_____
_____
Telephone No.: _____
Fax No.: _____
Email address: _____

Incorporated:
☐ Under federal law
☐ Under provincial law (*Which province(s)?*) _____
Other province(s) in which the corporation is registered: _____

Date of incorporation: _____ /_____ /_____
year month day

Bankruptcy district(s) for which licence is requested: _____

DECLARATION

I, the undersigned, do solemnly declare that I am authorized to submit the present application on behalf of the corporation named herein and that the information set out in this application and in the attached documents is, to the best of my knowledge and belief, true, correct and complete in all respects.

Dated at _____, this _____day of

_____
Signature of applicant, on behalf of the corporation

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FORM 3 -- *Concluded*

THE FOLLOWING MUST ALSO BE PROVIDED WITH THIS APPLICATION

Please fill out this page and return it with your application. If any items are not checked off, please indicate the reason for the information being excluded and the date when it will be provided.

☐ 1 The original or a certified true copy of the constituting documents (letters patent, certificate of incorporation, memorandum or articles of association and other pertinent documentation).

☐ 2 The address of the head office and of every other office or place of business from which the corporate trustee intends to provide bankruptcy services.

☐ 3 The personal balance sheet of the firm's managing trustee (as of the date of the application).

☐ 4 The name, residential address and occupation of each shareholder and each person having a direct or indirect proprietary interest in the corporation (including the beneficial owner, where applicable).

☐ 5 The number of shares (or proportion of total shares) and classes of shares held by each shareholder in the corporation.

☐ 6 A list indicating every trustee who is simultaneously a shareholder (or financial backer) of this corporation and of any other corporate trustee[1] and all relevant details (i.e. names of those corporate trustees and the district(s) in which they operate).

☐ 7 The name, residential address and occupation of each director and of each officer of the corporation.

☐ 8 The name and business address of every licensed trustee who will practice in an office or place of business of the corporate trustee.

☐ 9 Evidence of insurance coverage (professional liability insurance and employee dishonesty (fidelity) insurance).

☐ 10 A cheque for $300 payable to the Receiver General of Canada.

A copy of the following information must also be sent to your local Designated Assistant Superintendent:

☐ 11 Details of necessary resources (work facilities, equipment and personnel) available for each office at which the corporate trustee intends to provide bankruptcy services, as well as details of banking arrangements.

☐ 12 Where the trustee responsible for the administration of estates is being replaced, a letter indicating which trustee is assuming responsibility for these estates, and the signature of that trustee confirming his/her acceptance of the transfer.

---

1 Section 24 of Directive 11R2 (Trustee Licensing) reads as follows: "A trustee may, with the pre-approval of the Superintendent, be a shareholder or a financial backer of more than one corporate trustee provided that:
(a) the corporate trustees do not operate in the same district,
(b) the trustee satisfies the Superintendent that there is no conflict of interest; and
(c) the trustee respects any other conditions and limitations that the Superintendent considers appropriate."
Section 25 of Directive 11R2 (Trustee Licensing) reads as follows: "Notwithstanding section 24, a trustee may, with the pre-approval of the Superintendent, be a shareholder or a financial backer of more than one corporate trustee in the same district, for a limited period of time, in order to retire from practice as a trustee."

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FORM 12

Statement of Receipts and Disbursements
(Other than Summary Administration and Consumer Proposals)
(Section 152 of the Act)

(*Title Form 1*)

TRUSTEE'S STATEMENT OF RECEIPTS AND DISBURSEMENTS

RECEIPTS

1. Cash in hand and in bank ..... $_____

2. Realization of assets: Book debts and bills of exchange ..... $_____

3. Realization of assets: Stock, fixtures, machinery and furniture ..... $_____

4. Realization of assets: Real property or immovable ..... $_____

5. Received from:
   (a) Interim receiver as taxed ..... $_____
   (b) Former trustee as taxed ..... $_____ ..... $_____

6. Operating receipts ..... $_____
   less: (a) purchases ..... $_____
   (b) operating expenses ..... $_____ ..... $_____
   (*Attach statement detailing purchases and expenses*)
   Net profit (*net loss to be shown in miscellaneous disbursements, 19(a)*) ..... $_____

7. Miscellaneous:
   (a) Bank interest, etc. (*specify*) ..... $_____
   (b) Funds received from guarantor (*if applicable*) ..... $_____

TOTAL RECEIPTS ..... $_____

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FORM 12 -- *Continued*

DISBURSEMENTS

8. Fees paid:
   (a) To official receiver ..... $_____
   (b) To Court ..... $_____ ..... $_____

9. Notice of first meeting:
   (a) Local paper ..... $_____
   (b) To (*number*) _____ creditors ..... $_____
   (c) Postage ..... $_____ ..... $_____

10. Other advertising ..... $_____

11. Stock-taking and possession (*actual expenses only*) ..... $_____

12. Premiums:
   (a) Bond or suretyship ..... $_____
   (b) Insurance ..... $_____ ..... $_____

13. Notice of bankrupt's application for discharge:
   (a) To (*number*) _____ creditors ..... $_____
   (b) Postage ..... $_____ ..... $_____

14. Auctioneer:
   (a) Commission ..... $
   (b) Expenses ..... $_____ ..... $_____

15. Notice of final dividend and trustee's application for discharge:
   (a) To (*number*) _____ creditors ..... $_____
   (b) Postage ..... $_____ ..... $_____

16. Other notices and reports:
   (a) To (*number*) _____ creditors ..... $_____
   (b) Postage ..... $_____ ..... $_____

17. Postage on general correspondence ..... $_____

18. Inspector:
   (a) Fees (*provide details*) ..... $_____
   (b) Expenses ..... $_____ ..... $_____

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FORM 12 -- *Continued*

19. Miscellaneous:
(a) Loss on operations ..... $ _____
(b) Cost of former trustee as taxed ..... $ _____
(c) Other (*provide details*) ..... $ _____ $ _____

20. Trustee's remuneration ..... $ _____

21. Legal fees and legal services costs (*taxed*):
(a) Legal counsel on application or assignment ..... $ _____
(b) Legal counsel to estate ..... $ _____
(c) Court fees awarded against trustee ..... $ _____
(d) Costs awarded to opposing creditor (pursuant to subsection 197(6.1)) ..... $ _____ $ _____

22. Taxes (*federal and provincial*) ..... $ _____

23. Counselling fees ..... $ _____

24. Trust claim (*Crown*) ..... $ _____

TOTAL DISBURSEMENTS ..... $ _____

Note: Total disbursements paid for services provided by persons related to the trustee: $ _____

(a) Amount: $ _____
(b) Name of person related to the trustee: _____
(c) Relationship to the trustee (e.g. spouse, parent): _____

25. Amount available for distribution ..... $ _____

26. Levy payable under section 147 of the Act ..... $ _____

27. Secured creditors:

Dividend $ _____ less levy ..... $ _____ $ _____

28. Preferred creditors:

Dividend $ less levy ..... $ _____ $ _____

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FORM 12 -- *Concluded*

29. Unsecured creditors:

Proved claims of ..... $

Interim dividend ___% $ _____ less levy ..... $ _____ $

Final dividend __.% $ _____ less levy ..... $ _____ $ _____

30. Amount refunded to debtor ..... $ _____

31. Undistributed assets ..... $ _____

32. Status of Bankrupt's Discharge (if an individual) / Status of Proposal

☐ Absolute discharge	☐ Automatic	☐ Conditional	☐ Deceased
☐ Discharge suspended	☐ Hearing set	☐ Refused	☐ *Sine die*
☐ Annulled by Court	☐ Court approval refused	☐ Creditor acceptance rejected	
☐ Deemed annulled	☐ Full performance	☐ Withdrawn	☐ Ongoing

Status date: ____-____-____

_____ _____

(Provide a description and value of all property of the bankrupt (whether or not secured) as shown in the Statement of Affairs, or otherwise known and not accounted for in the receipts, stating why the property has not been sold or realized and stating the disposition made)

_____ _____
Date Trustee

Approved by the following inspectors: _____
_____
_____

Taxed at the sum of $_____ on _____ ____, 2____

_____
Registrar

NOTE If a copy of this Form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

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FORM 13

Trustee's Statement of Receipts and Disbursements
(Summary Administration)
(Sections 152 and 155 of the Act; Rule 62)

(*Title Form 1*)

RECEIPTS
(*Itemize receipts*)

Total receipts ..... $ _____
Less payments made to secured creditors ..... $ _____
Less necessary disbursements relating directly to realization
(*Identify separately costs pertaining to all assets*)..... $ _____ ..... $ _____

NET RECEIPTS AVAILABLE TO ESTATE ..... $ _____

DISBURSEMENTS
1. Counselling fees..... ..... $ _____

2. Fees paid:
(a) To official receiver ... . $ _____
(b) To Court (*where applicable*) ..... $ _____ ..... $ _____

3. Other disbursements ..... $ _____

4. Administrative disbursement ..... $ _____

5. Trustee's fees:
100% of $_____ ... . $_____
35% of $_____ ... . $_____
50% of $_____ ..... $_____

Total fees ..... $_____ ..... $_____

6. Applicable taxes ..... $_____

TOTAL DISBURSEMENTS ..... $_____

Note: Total disbursements paid for services provided by persons related to the trustee: $_____

(a) Amount: $_____
(b) Name of person related to the trustee: _____
(c) Relationship to the trustee (e.g. spouse, parent): _____

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FORM 13 – *Concluded*

Amount available for distribution . . . . . $_____

Amount refunded to debtor . . . . . $_____

Undistributed assets . . . . . $_____

Proved claims . . . . . $_____

Dividend . . . . . $_____

Superintendent's levy . . . . . $_____

Total dividend and levy . . . . . $_____

Status of Bankrupt's Discharge

☐ Absolute discharge ☐ Automatic ☐ Conditional ☐ Annulled
☐ Deceased ☐ Discharge suspended ☐ Hearing set ☐ Refused ☐ *Sine die*

Status date: _____

_____

(Provide a description and value of all property of the bankrupt (whether or not secured) as shown in the Statement of Affairs, or otherwise known and not accounted for in the receipts, stating why the property has not been sold or realized and stating the disposition made)

_____ _____
Date Trustee

Approved by the following inspectors: _____
_____

Where there is no approval by inspectors, disclose the reason(s) for non-approval:

_____
_____

NOTE: If a copy of this Form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

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FORM 14

Administrator's Statement of Receipts and Disbursements
(Consumer Proposal)
(Rule 98)

(*Title Form 1*)

RECEIPTS
(*Itemize receipts*)

Total receipts ..... $ _____
Less trust claims ..... $ _____

RECEIPTS AVAILABLE TO PROPOSAL ..... $ _____

DISBURSEMENTS
1. Counselling fees ..... $ _____

2. Fees paid:
(a) To official receiver ..... $ _____
(b) To Court (*where applicable*) ..... $ _____ ..... $ _____

3. Administrator's fees:
(a) On filing proposal with official receiver ..$
(b) On approval or deemed
approval by the Court ....$ _____
(c) 20% of moneys distributed ..... $ _____

Total fees ..... $ _____ ..... $ _____

4. Applicable taxes ..... $ _____

TOTAL DISBURSEMENTS ..... $

Note: Total disbursements paid for services provided
by persons related to the trustee: $_____

(a) Amount: $_____
(b) Name of person related to the trustee: _____
(c) Relationship to the trustee (e.g. spouse, parent): _____

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FORM 14 -- *Concluded*

Amount available for distribution ..... $ _____

Amount refunded to debtor ..... $ _____

Undistributed assets ..... $

Proved claims ..... $ _____

Dividend ..... $ _____

Superintendent's levy ..... $ _____

Total dividend and levy ..... $_____ $_____

Status of Proposal

☐ Annulled by Court ☐ Court approval refused ☐ Creditor acceptance rejected
☐ Deemed annulled ☐ Full performance ☐ Withdrawn ☐ Ongoing

Status date:

_____ .....
Date Administrator of consumer proposal

Approved by the following inspectors:

_____
_____
_____
_____
_____

NOTE: If a copy of this Form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

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FORM 52

Notice of Status of Consumer Proposal
(Section 66.27 of the Act)

(Title Form 1)

Take notice that the consumer proposal of _____, a consumer debtor, made on the _____ day of _____, a copy of which was filed with the official receiver on the _____ day of _____, has been:

(Check appropriate description.)

- ☐ refused by the creditors of the consumer debtor on the _____ day of _____.
- ☐ refused by the _____ Court of _____ (province) in Bankruptcy on the _____ day of _____.
- ☐ withdrawn by the consumer debtor on the day of _____.

Dated at _____, this _____ day of _____.

_____
Administrator of
Consumer Proposal

NOTE: If a copy of this Notice is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

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FORMULAIRE 12

État des recettes et des débours
(autrement que pour l'administration sommaire et les propositions de consommateur)
(article 152 de la Loi)

(*Intitulé Formulaire 1*)

ÉTAT DES RECETTES ET DES DÉBOURS DU SYNDIC

RECETTES :

1. Espèces en caisse et en banque ..... _____ $

2. Réalisation de l'actif : Créances et effets à recevoir ..... _____ $

3. Réalisation de l'actif : Inventaire, aménagements, machines, ameublement ..... _____ $

4. Réalisation de l'actif : Immeubles et biens réels ..... _____ $
....

5. Reçu
a) Du séquestre intérimaire tel que taxé ..... _____ $
b) De l'ancien syndic tel que taxé ..... _____ $ ..... _____ $

6. Recettes d'exploitation ..... _____ $
Moins : a) achats ..... _____ $
b) dépenses d'exploitation ..... _____ $ ..... _____ $
(*annexez un état indiquant les achats et dépenses*)
Profit net (*indiquez toute perte nette comme débours divers, à la ligne 19a)*) ..... _____ $

7. Divers
a) Intérêts bancaires, etc. (*préciser*) ..... _____ $
b) Montants reçus d'une caution (*le cas échéant*) ..... _____ $

TOTAL DES RECETTES ..... _____ $

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FORMULAIRE 12 (*suite*)

DÉBOURS :

8. Frais payés
   a) Au séquestre officiel ..... _____ $
   b) Au tribunal ..... _____ $ ... _____ $

9. Avis de la première assemblée
   a) Journal local ..... _____ $
   b) À (*nombre*) créanciers ..... _____ $
   c) Timbres-poste ..... _____ $ .. _____ $

10. Autres annonces .... _____ $

11. Prise de possession et inventaire (*débours réels uniquement*) ..... _ $

12. Primes
   a) Sûreté ou cautionnement ..... _____ $
   b) Assurance ..... _____ $ ... _____ $

13. Avis de demande de libération du failli
   a) À (*nombre*) _____ créanciers ..... _____ $
   b) Timbres-poste ..... ___ $ ... ___ $

14. Encanteur
   a) Commission ..... _____ $
   b) Frais ..... _____ $. _____ $

15. Avis de dividende définitif et de demande de libération du syndic
   a) À (*nombre*) _____ créanciers ..... $
   b) Timbres-poste ..... $ ... _____ $

16. Autres avis et rapports
   a) À (*nombre*) créanciers ..... _____ $
   b) Timbres-poste ..... _____ $ ... _____ $

17. Timbres-poste pour correspondance générale .... _____ $

18. Inspecteurs
   a) Honoraires (*donnez les détails*) ..... _____ $
   b) Frais ..... _____ $ ... _____ $

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FORMULAIRE 12 (*suite*)

19. Divers
- a) Déficit sur les opérations ..... _____ $
- b) Honoraires de l'ancien syndic, tels que taxés ..... _____ $
- c) Autres (*donnez les détails*) ..... _____ $ ... _____ $

20. Rémunération du syndic ..... _____ $

21. Frais judiciaires et frais de services juridiques (taxés)
- a) Conseiller juridique pour requête ou cession ..... $
- b) Conseiller juridique de l'actif ..... _____ $
- c) Frais judiciaires adjugés contre le syndic ..... _____ $
- d) Frais adjugés aux créanciers opposants (en vertu du paragraphe 197(6.1)) ..... _____ $ ... _____ $

22. Taxes (fédérale et provinciale) ..... _____ $

23. Frais de consultation ..... _____ $

24. Réclamation de biens en fiducie (Couronne) ..... _____ $

TOTAL DES DÉBOURS ..... _____ $

Remarque : Total des débours payés pour des services fournis par des personnes liées au syndic _____ $

a) Montant : _____ $
b) Nom de la personne liée au syndic : _____
c) Lien avec le syndic (p. ex., conjoint, parent) : _____

25. Montant disponible pour répartition ..... $

26. Prélèvement payable en vertu de l'article 147 de la Loi ..... _____ $

27. Créanciers garantis

Dividende $ moins prélèvement ..... _____ $ _____ $

28. Créanciers privilégiés

Dividende _____ $ moins prélèvement ..... _____ $ _____ $

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FORMULAIRE 12 (*suite*)

29. Créanciers non garantis

Réclamations prouvées ..... _____ $

Dividende intérimaire __%_____ $ moins prélèvement . . . . _____ $ __ $

Dividende définitif __%_____ $ moins prélèvement _____ $ __ $

30. Montant remboursé au débiteur . . . . . __ $

31. Actifs non distribués . . . . _____ $

32. Statut de la libération du failli (s'il s'agit d'une personne physique) / Statut de la proposition

☐ libération absolue	☐ libération d'office	☐ libération conditionnelle	☐ failli décédé
☐ libération suspendue	☐ audition fixée	☐ libération refusée	☐ audition remise
☐ annulée par le tribunal	☐ refusée par le tribunal	☐ refusée par les créanciers	☐ annulation présumée
☐ exécution intégrale	☐ retirée avant approbation	☐ en cours	

Date du statut : _____

_____

(Donnez tous les détails, la description et la valeur de tous les biens du failli [qu'ils soient grevés d'une sûreté ou non], tels qu'indiqués dans son bilan ou autrement connus, et dont il n'est pas tenu compte dans les recettes, en énonçant les raisons qui en ont empêché la vente ou la réalisation et en indiquant la disposition qui en a été faite.)

_____ _____
Date Syndic

Approuvé par les inspecteurs suivants : _____
_____
_____

Taxé à la somme de _____.$, ce __ 20 __.

_____
Registraire

REMARQUE : Lorsqu'une copie du présent formulaire est envoyée par voie électronique, par des moyens tels que le courriel, le nom et les coordonnées de l'expéditeur, tels qu'indiqués sur le formulaire 1.1, doivent figurer à la fin du document.

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FORMULAIRE 13

État des recettes et des débours du syndic
(administration sommaire)
(articles 152 et 155 de la Loi et Règle 62)

(*Intitulé Formulaire 1*)

RECETTES :

(*Donnez le détail des recettes*)

Total des recettes ..... _____ $
Moins paiements aux créanciers garantis _____ $
Moins déboursés nécessaires directement
liés à la réalisation (*indiquez séparément les coûts afférents à tous les biens*) _____ $ ..... _____ $

RECETTES NETTES DISPONIBLES DE L'ACTIF : ..... _____ $

DÉBOURS :
1. Frais de consultation ..... _____ $

2. Frais payés
a) Au séquestre officiel ..... $
b) Au tribunal (*le cas échéant*) ..... _____ $ ..... _____ $

3. Autres débours ..... $

4. Débours administratifs ..... _____ $

5. Honoraires du syndic
100 % de _____ $ ..... _____ $
35 % de _____ $ ..... _____ $
50 % de _____ $ ..... _____ $

Total des honoraires ..... _____ $ ..... _____ $

6. Taxes applicables ..... _____ $

TOTAL DES DÉBOURS : ..... _____ $

Remarque : Total des débours payés pour des services fournis par des personnes liées au syndic _____$

a) Montant : _____ $
b) Nom de la personne liée au syndic : _____
c) Lien avec le syndic (p. ex., conjoint, parent) : _____

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FORMULAIRE 13 (*suite*)

Montant disponible pour distribution . . . . . _____ $

Montant remboursé au débiteur . . . . . _____ $

Biens non distribués . . . . . _____ $

Réclamations prouvées de . . . . . _____ $

Dividende . . . . . _____ $

Prélèvement du surintendant . . . . . _____ $

Total du dividende et du prélèvement . . . . . $ . . . . . _____ $

Statut de la libération du failli :

☐ libération absolue ☐ libération d'office ☐ libération conditionnelle ☐ libération annulée
☐ failli décédé ☐ libération suspendue ☐ audition fixée ☐ libération refusée
☐ audition remise

Date du statut : _____

_____

(*Donnez tous les détails, la description et la valeur de tous les biens du failli [qu'ils soient grevés d'une sûreté ou non], tels qu'indiqués dans son bilan ou autrement connus, et dont il n'est pas tenu compte dans les recettes, en énonçant les raisons qui en ont empêché la vente ou la réalisation et en indiquant la disposition qui en a été faite.*)

_____ _____
Date Syndic

Approuvé par les inspecteurs suivants : _____
_____

Dans le cas où les inspecteurs n'approuvent pas, donnez les raisons de la désapprobation :

_____
_____

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FORMULAIRE 14

État des recettes et des débours de l'administrateur
(proposition de consommateur)
(Règle 98)

(*Intitulé Formulaire 1*)

RECETTES :

(*Donnez les détails des recettes*)

Total des recettes ..... ____$

Moins réclamations de biens en fiducie ..... _____ $

RECETTES NETTES DISPONIBLES AUX FINS DE LA PROPOSITION ..... _____$

DÉBOURS :

1. Frais de consultation ..... _____ $

2. Frais payés
   a) Au séquestre officiel ..... _____ $
   b) Au tribunal (*le cas échéant*) ..... $ ..... _____ $

3. Honoraires de l'administrateur
   a) Lors du dépôt auprès du séquestre officiel . _____ $
   b) Lors de l'approbation, effective ou présumée, par le tribunal ..... _____ $
   c) 20 % des sommes distribuées ..... _____ $

   Total des honoraires ..... _____ $ ..... _____ $

4. Taxes applicables ..... _____ $

TOTAL DES DÉBOURS : ..... _____$

Remarque : Total des débours payés pour des services fournis par des personnes liées au syndic_____$

a) Montant : _____$
b) Nom de la personne liée au syndic : _____
c) Lien avec le syndic (p. ex., conjoint, parent) : _____

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FORMULAIRE 14 (*suite*)

Montant disponible pour distribution . . . . . _____ $

Montant remboursé au débiteur . . . . . _____ $

Actifs non distribués . . . . . _____ $

Réclamations prouvées . . . . . _____ $

Dividende . . . . . _____ $

Prélèvement du surintendant . . . . . _____ $

Total du dividende et du prélèvement . . . . . _____ $ . . . . . _____ $

STATUT DE LA PROPOSITION :

☐ annulée par le tribunal ☐ refusée par le tribunal ☐ refusée par les créanciers ☐ annulation présumée
☐ exécution intégrale ☐ retirée avant approbation ☐ en cours

Date du statut : _____

_____ _____
Date

_____
Administrateur de la proposition de consommateur

Approuvé par les inspecteurs suivants : _____
_____
_____

REMARQUE : Lorsqu'une copie du présent formulaire est envoyée par voie électronique, par des moyens tels que le courriel, le nom et les coordonnées de l'expéditeur, tels qu'indiqués sur le formulaire 1.1, doivent figurer à la fin du document.

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FORMULAIRE 52

Avis de l'état de la proposition de consommateur
(article 66.27 de la Loi)

(Intitulé Formulaire 1)

Avis est donné que la proposition de consommateur de _____, débiteur consommateur, faite le _____, dont une copie a été déposée auprès du séquestre officiel le _____ :

(Cochez ce qui s'applique.)

☐ a été rejetée par les créanciers du débiteur consommateur le _____.

☐ a été rejetée par la Cour _____ de _____ (province) en matière de faillite le

☐ a été retirée par le débiteur consommateur le

Daté le _____, à _____

_____
Administrateur de la
proposition de consommateur

REMARQUE : Lorsqu'une copie du présent avis est envoyée par voie électronique, par des moyens tels que le courriel, le nom et les coordonnées de l'expéditeur, tel que prescrit Formulaire 1.1, doivent être indiqués à la fin du document.

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FORMULAIRE 82

Rapport du syndic sur la demande de libération du failli (paragraphe 170(1) de la Loi)

(Intitulé Formulaire 1)

Date de la faillite :		Date d'ouverture de la faillite :	
État civil :			
Genre d'emploi :	Nombre de personnes dans l'unité familiale, incluant le failli :		
PASSIF			
	Dette garantie	Dette privilégiée	Dette non garantie
Dette déclarée	$	$	$
Dette prouvée	$	$	$
ACTIF			
Description	Valeur d'après le bilan	Montant réalisé	Évaluation des actifs à réaliser
	$	$	$
TOTAL			
TAUX DE DIVIDENDES ANTICIPÉS			
Créanciers privilégiés :		Créanciers non garantis :	

A. CAUSES DE LA FAILLITE

1. Donnez les détails sur les causes de la faillite.

_____

_____

_____

B. INFORMATION CONCERNANT LA SITUATION FINANCIÈRE *(La même méthode de calcul doit être utilisée pour les fins du calcul du revenu mensuel disponible du failli et de l'unité familiale à la date de la faillite et à la date du présent rapport. Expliquez tout changement important.)*

2. a) Revenu mensuel disponible du failli en date de la faillite
(même montant qu'à la ligne (7) du formulaire 65) : ..... _____ $

b) Revenu mensuel disponible du failli en date du présent rapport : ..... _____ $

3. a) Revenu mensuel disponible de l'unité familiale en date de la faillite
(même montant qu'à la ligne (8) du formulaire 65) : ..... _____ $

b) Revenu mensuel disponible de l'unité familiale en date du présent rapport ..... _____ $

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FORMULAIRE 82 (*suite*)

C. CONDUITE DU FAILLI

6. a) Le failli devait-il verser à l'actif de la faillite un montant conformément à l'instruction n° 1R2, *Revenu excédentaire? (Si oui, veuillez joindre l'annexe A.)* ☐ Oui ☐ Non

   b) Le failli aurait-il pu soumettre une proposition viable au lieu de déclarer faillite? *(Si oui, veuillez joindre l'annexe A.)* ☐ Oui ☐ Non

5. Le failli avait-il des dettes élevées au titre de l'impôt sur le revenu en vertu de l'article 172.1 de la Loi? ☐ Oui ☐ Non

6. a) Le failli a-t-il manqué à ses obligations imposées sous l'autorité de la Loi? *(Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

   b) Est-ce que le failli peut être tenu responsable d'avoir commis un des faits énumérés à l'article 173 de la Loi? *(Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

   c) Le failli a-t-il commis une infraction ayant rapport au processus de faillite? *(Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

7. a) Le failli a-t-il déjà fait une proposition en vertu de la *Loi sur la faillite et l'insolvabilité? (Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

   b) Le failli a-t-il déjà été en faillite au Canada ou ailleurs? *(Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

8. Des inspecteurs ont-ils été nommés pour surveiller l'actif de la faillite? *(Veuillez préciser si le syndic a des motifs raisonnables de croire que les inspecteurs n'approuveront pas le présent rapport. Veuillez joindre une copie de la résolution.)* ☐ Oui ☐ Non

D. LIBÉRATION DU FAILLI

9. a) Le syndic a-t-il l'intention de s'opposer à la libération du failli? *(Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

   b) Le syndic a-t-il des motifs raisonnables de croire qu'un créancier ou le surintendant s'opposera à la libération du failli, pour une raison autre que les raisons énoncées aux alinéas 173(1)*m*) ou *n*) de la Loi? *(Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

10. Le failli a-t-il refusé ou omis de recevoir des consultations en vertu de l'instruction n° 1R3, *Consultations en matière d'insolvabilité? (Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

11. Y a-t-il d'autres faits, incidents ou circonstances qui justifieraient que le tribunal refuse une ordonnance de libération absolue? *(Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

12. Y a-t-il d'autres faits pertinents *(p. ex., circonstances personnelles exceptionnelles ou paiements préférentiels)? (Si oui, veuillez donner des détails.)* ☐ Oui ☐ Non

Détails additionnels requis

Numéro	Informations additionnelles

Daté le_____, à_____.

_____
Syndic

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FORMULAIRE 82 (*suite*)

ANNEXE A

A. MONTANT À ÊTRE PAYÉ MENSUELLEMENT PAR LE FAILLI

Montant mensuel requis par l'instruction n° 11R2, *Revenu excédentaire*
(même montant qu'à la ligne (15) du formulaire 65) ..... _____ $ (1)
Montant mensuel que le failli a convenu de payer *(même montant qu'à la ligne (12) du formulaire 65)* _____ $ (2)
Différence entre les montants aux lignes (1) et (2) ..... _____ $
Montant que le failli a convenu de verser chaque mois pour racheter des éléments d'actif
(même montant qu'à la ligne (13) du formulaire 65. Veuillez donner des détails.) ..... _____ $ (3)
Paiement total anticipé, lignes (2) + (3) ..... _____ $

B. REVENU EXCÉDENTAIRE

1. Le failli a-t-il fait tous les paiements requis en vertu de l'article 68 de la Loi?
(Si non, veuillez donner des détails.) ☐ Oui ☐ Non

2. Le montant à payer correspond-il à l'instruction n° 11R2, *Revenu excédentaire*?
(Si non, veuillez donner les détails de toute circonstance atténuante qui affecterait le montant à être payé tel que fixé par l'instruction.) ☐ Oui ☐ Non

3. Le failli a-t-il été informé de la possibilité de recourir à la médiation? ☐ Oui ☐ Non

4. Y a-t-il eu des modifications ou des changements importants pendant la faillite?
(Si oui, veuillez donner des détails.) ☐ Oui ☐ Non

5. Une médiation a-t-elle été nécessaire en vertu du paragraphe 68(6) ou 68(7) de la Loi afin de déterminer le montant que doit payer le failli? ☐ Oui ☐ Non

Daté le_____, à_____.

_____
Syndic

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SB Directive: 13R4, Trustee Licensing
(see below image pages)

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Industry Canada
Office of the Superintendent of Bankruptcy Canada

Industrie Canada
Bureau du surintendant des faillites Canada

Directive / Instruction

N° 13R4

TRUSTEE LICENSING

Issued: DEC 19 2012

(Supersedes Directive No. 13R3 issued on December 8, 2011, on the same topic.)

Interpretation

1. In this Directive,

["Act" « *Loi* »] "Act" means the *Bankruptcy and Insolvency Act*;

["applicant" « *demandeur* »] "applicant" means a person who applies for a trustee licence under the Act;

["CAIRP" « *ACPIR* »] "CAIRP" means the Canadian Association of Insolvency and Restructuring Professionals;

["licence" « *licence* »] "licence" means a licence issued by the Superintendent of Bankruptcy pursuant to the Act;

["MOU" « *PE* »] "MOU" means the Memorandum of Understanding between CAIRP and the OSB signed on October 8, 2009, or any further MOU as may be entered into

DÉLIVRANCE DES LICENCES DE SYNDIC

Date d'émission : 19 DEC. 2012

(La présente instruction remplace et annule l'instruction n° 13R3 sur le même sujet émise le 8 décembre 2011.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction.

[« ACPIR » *"CAIRP"*] « ACPIR » L'Association canadienne des professionnels de l'insolvabilité et de la réorganisation;

[« activité professionnelle » *"professional engagement"*] « activité professionnelle » Toute affaire de faillite ou d'insolvabilité dans laquelle le syndic est nommé ou désigné pour exercer ses fonctions dans le cadre de la Loi;

[« BSF » *"OSB"*] « BSF » Le Bureau du surintendant des faillites;

[« bureau principal » *"resident office"*] « bureau principal » Le principal établissement d'où le syndic exerce normalement ses activités;

[« demandeur » *"applicant"*] « demandeur »

Canada

OSB • BSF Protecting the Integrity of the Insolvency System / Protéger l'intégrité du système d'insolvabilité

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between the parties thereafter. The MOU sets out the roles, responsibilities and interests of the parties with respect to the delivery of a professional qualification program for insolvency and restructuring professionals seeking a licence to act as a trustee in bankruptcy;

["OSB" *« BSF »*] "OSB" means the Office of the Superintendent of Bankruptcy;

["professional engagement" *« activité professionnelle »*] "professional engagement" means any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the Act;

["resident office" *« bureau principal »*] "resident office" means the principal place of business from which the trustee normally practises;

["Rules" *« Règles »*] "Rules" means the *Bankruptcy and Insolvency General Rules*;

["state of insolvency" *« état d'insolvabilité »*] "state of insolvency" means being bankrupt, having filed a notice of intention or a proposal under the Act or being subject to any similar proceedings under federal, provincial or foreign legislation.

Authority and Purpose

2. This Directive is issued pursuant to paragraph 5(4)(*d*) of the Act for the purpose of specifying

Personne qui demande une licence de syndic en vertu de la Loi;

[« état d'insolvabilité » *"state of insolvency"*] « état d'insolvabilité » État d'une personne qui est en faillite, qui a déposé un avis d'intention ou une proposition sous le régime de la Loi, ou qui est assujettie à des procédures similaires au titre d'une loi fédérale, provinciale ou étrangère;

[« licence » *"licence"*] « licence » Licence que délivre le surintendant des faillites en vertu de la Loi;

[« Loi » *"Act"*] « Loi » La *Loi sur la faillite et l'insolvabilité*;

[« PE » *"MOU"*] « PE » Le protocole d'entente conclu entre l'ACPIR et le BSF le 8 octobre 2009 ou tout autre PE conclu entre les parties par la suite. Le PE décrit les rôles, responsabilités et intérêts des parties relativement à la prestation d'un programme de qualification à l'intention des professionnels de l'insolvabilité et de la réorganisation qui souhaitent obtenir une licence les autorisant à agir en qualité de syndic de faillite;

[« Règles » *"Rules"*] « Règles » Les *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'alinéa 5(4)*d*) de la Loi et précise les qualités

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the criteria and qualifications required to obtain and maintain a trustee licence.

requises et les critères relatifs à l'obtention et au maintien d'une licence de syndic.

PART I

PARTIE I

CRITERIA TO OBTAIN A TRUSTEE LICENCE

CRITÈRES RÉGISSANT L'OBTENTION D'UNE LICENCE DE SYNDIC

A. TRUSTEE LICENCE — INDIVIDUAL

A. LICENCE DE SYNDIC — PARTICULIER

Application

3. Application by an individual for a trustee licence shall be made using Form 2, *Application for Trustee Licence (Individual)*.

Demande

3. Tout particulier qui désire obtenir une licence de syndic en fait la demande à l'aide du formulaire 2, *Demande de licence de syndic (particulier)*.

Prerequisite Qualifications

4. An individual is eligible to obtain a licence if the individual meets the following prerequisites:

(a) the individual is not an insolvent person and has not been in a state of insolvency within five (5) years preceding the date of the application;

(b) the individual has successfully completed:

(i) the Chartered Insolvency and Restructuring Professional (CIRP) Qualification Program (CQP), unless otherwise exempted;

(ii) the CIRP National Insolvency Examination (CNIE); and

(iii) the Insolvency Counsellor's

Exigences préalables

4. Le particulier qui satisfait aux exigences préalables suivantes est admissible à obtenir une licence :

a) il ne doit pas être une personne insolvable et ne doit pas avoir été en état d'insolvabilité au cours des cinq (5) années précédant la date de la demande;

b) il a réussi :

(i) le Programme de qualification (PQC) des professionnels agréés de l'insolvabilité et de la réorganisation (PAIR), à moins d'en avoir été exempté;

(ii) l'Examen national sur l'insolvabilité du PQC (ENIC);

(iii) le Cours de qualification pour

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Qualification Course (ICQC),

all of which are administered and governed by CAIRP in accordance with the MOU; and

(c) the individual is in good standing with and is not subject to any current disciplinary action by any professional organization of which the applicant is or was a member.

Personal Suitability

5. An applicant who meets the prerequisite qualifications must also satisfy the reputation and suitability requirements described below.

(i) Reputation

6. The applicant shall

(a) be of good character and reputation; and

(b) satisfy the Superintendent that the issuance of a licence will not impair public confidence in the bankruptcy and insolvency system.

7. An applicant who has been found guilty of an indictable offence for which a pardon has not been granted must satisfy the Superintendent that such finding is not of a nature that would impair the trustee's capacity to perform his or her fiduciary duties nor impair public confidence in the bankruptcy and insolvency system.

8. An applicant who has been found guilty of professional misconduct by any professional organization of which the applicant is or was a member shall satisfy the Superintendent that such finding is not of a nature that would impair the trustee's capacity to perform his or her

conseiller en insolvabilité (CQCI),

lesquels sont administrés et régis par l'ACPIR conformément au PE;

c) il doit être en règle avec tout organisme professionnel dont il est ou a été membre et ne pas faire l'objet, à ce titre, de mesures disciplinaires.

Qualités personnelles

5. Le demandeur qui satisfait aux exigences préalables doit également remplir les exigences énoncées ci-après en ce qui a trait à la réputation et à la compétence.

***(i)* Réputation**

6. Le demandeur doit respecter les deux conditions suivantes :

a) il doit jouir d'une bonne réputation;

b) il doit démontrer au surintendant que la délivrance d'une licence ne compromettra pas la confiance du public à l'égard du système de faillite et d'insolvabilité.

7. Le demandeur qui a été déclaré coupable d'un acte criminel pour lequel il n'a pas obtenu le pardon doit démontrer au surintendant qu'une telle déclaration n'est pas de nature à compromettre la capacité du syndic à remplir ses fonctions de nature fiduciaire ni la confiance du public à l'égard du système de faillite et d'insolvabilité.

8. Le demandeur qui a été reconnu coupable d'une inconduite professionnelle par un organisme professionnel dont il est ou a été membre doit démontrer au surintendant que celle-ci n'est pas de nature à compromettre la capacité du syndic de remplir ses fonctions de

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fiduciary duties nor impair public confidence in the bankruptcy and insolvency system.

(ii) Suitability

9. The suitability of an applicant to become a trustee is evaluated during an oral examination before a Board of Examination that will assess the skills of the applicant.

10. After three unsuccessful attempts before the Board of Examination or after five (5) years following successful completion of the CNIE, whichever comes first, the onus is on the applicant to submit a request to the Superintendent for additional time or attempts to pass the oral examination and shall provide justification for such a request. This applies to all applicants who wrote the CNIE on or after October 8, 2009, the date the MOU was entered into.

Conditions

11. An individual licence is issued subject to the following conditions:

(a) the trustee continues to meet the requirements of this Directive at all times;

(b) the trustee complies with the Act, Rules and Directives; and

(c) the trustee complies with any other condition or limitation that the Superintendent considers appropriate.

Limitations

12. A licence may be limited to

(a) corporate bankruptcies and corporate proposals; or

nature fiduciaire ni la confiance du public à l'égard du système de faillite et d'insolvabilité.

(ii) Compétence

9. La compétence est évaluée au cours d'un examen oral par un jury d'examen qui examine les aptitudes du demandeur à agir en qualité de syndic.

10. Après s'être présenté trois (3) fois devant le jury d'examen sans succès ou cinq (5) ans après avoir réussi l'ENIC, selon la première éventualité, le demandeur doit présenter au surintendant une demande pour obtenir plus de temps ou pouvoir tenter à nouveau de réussir l'examen oral et doit fournir une justification pour présenter une telle demande. L'exigence s'applique à tous les demandeurs qui ont passé l'ENIC le ou après le 8 octobre 2009, date de signature du PE.

Conditions

11. La délivrance d'une licence pour particulier est assujettie aux conditions suivantes :

a) le respect en tout temps par le syndic des exigences énoncées dans la présente instruction;

b) le respect par le syndic des dispositions de la Loi, des Règles et des instructions;

c) le respect par le syndic de toute autre condition ou restriction que le surintendant estime indiquée.

Restrictions

12. Une licence peut être restreinte :

a) soit aux faillites et propositions de personne morale;

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(b) consumer bankruptcies and consumer proposals;

or be subject to any other limitation that the Superintendent considers appropriate taking into account the Board of Examination's evaluation and the professional environment in which the applicant will operate.

13. For the purposes of this Directive only, where a trustee licence is limited to consumer bankruptcies and consumer proposals pursuant to paragraph 12(b) of this Directive, a "consumer bankruptcy" means a bankruptcy in which an individual has, directly or indirectly, no business liabilities.

14. Where a bankruptcy does not constitute a "consumer bankruptcy" as defined in paragraph 13 of this Directive and is not a corporate bankruptcy, such an estate may only be administered by a trustee holding a licence without limitations.

b) soit aux faillites et propositions de consommateur;

ou être assujettie à toute autre restriction que le surintendant estime indiquée, compte tenu de l'évaluation du jury d'examen et de l'environnement professionnel dans lequel le demandeur évoluera.

13. Pour les fins de la présente instruction seulement, lorsque la licence d'un syndic est restreinte aux faillites de consommateur et aux propositions de consommateur, en vertu du paragraphe 12*b*) de l'instruction, une « faillite de consommateur » signifie la faillite d'un particulier qui ne comporte, directement ou indirectement, aucune dette d'affaires.

14. Lorsqu'une faillite ne constitue ni une « faillite de consommateur », telle que définie à l'article 13 de la présente instruction, ni une faillite de personne morale, celle-ci peut être seulement administrée par un syndic dont la licence n'est assujettie à aucune restriction.

B. TRUSTEE LICENCE — CORPORATE

Application

15. Application for a corporate trustee licence shall be made using Form 3, *Application for Trustee Licence (Corporation)*.

Pre-approval of Name

16. A person who wishes to apply for a corporate trustee licence must

(a) first obtain pre-approval from the

B. LICENCE DE SYNDIC — PERSONNE MORALE

Demande

15. La demande de licence de syndic pour une personne morale est faite à l'aide du formulaire 3, *Demande de licence de syndic (personne morale)*.

Approbation préalable de la raison sociale

16. La personne qui désire demander une licence de syndic pour une personne morale doit :

a) tout d'abord, obtenir l'approbation

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Superintendent for the proposed corporate trustee name; and

(b) then obtain the approval of the appropriate federal or provincial regulatory body regarding the proposed corporate name.

préalable du surintendant à l'égard de la raison sociale proposée pour la personne morale;

b) par après, obtenir l'approbation de l'organisme de réglementation fédéral ou provincial concerné quant à la raison sociale proposée.

Corporate Requirements

17. (1) Subject to paragraphs 17(2), 18 and 19 of this Directive, the name of a corporate trustee shall only be composed of the names of one or more trustees or accountants that are practising or have actively practised either as trustees or accountants.

Exigences applicables aux personnes morales

17. (1) Sous réserve du paragraphe 17(2) et des articles 18 et 19 de la présente instruction, la raison sociale d'une personne morale agissant en qualité de syndic ne doit se composer que du nom d'un ou de plusieurs des syndics ou comptables qui y exercent ou qui y ont exercé activement leur profession de syndic ou de comptable.

(2) The name of a corporate trustee may consist of the name of a monitor appointed in *Companies' Creditors Arrangement Act* (CCAA) proceedings commenced after September 30, 1997, and before the day on which subsection 1(1) of Chapter 36 of the *Statutes of Canada*, 2007, came into force.

(2) La raison sociale d'une personne morale agissant en qualité de syndic peut se composer du nom d'un contrôleur nommé dans le cadre des procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (LACC) ayant débuté après le 30 septembre 1997 et avant la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007).

(3) The corporate trustee must be a corporation incorporated under an Act of Parliament or of the legislature of a province.

(3) La personne morale agissant en qualité de syndic doit être une société constituée par une loi fédérale ou provinciale.

18. A corporate trustee may continue to use a name approved by the Superintendent prior to the date of coming into force of this Directive.

18. La personne morale agissant en qualité de syndic peut continuer d'utiliser la raison sociale approuvée par le surintendant avant la date d'entrée en vigueur de la présente instruction.

19. The requirements of paragraph 17(1) of this Directive may be waived or varied in circumstances where the Superintendent is satisfied it is appropriate.

19. Les exigences prévues au paragraphe 17(1) de la présente instruction peuvent être levées ou modifiées dans des circonstances jugées appropriées par le surintendant.

20. The corporate trustee shall restrict its

20. La personne morale agissant en qualité de

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business to the duties and responsibilities of a trustee licensed pursuant to the Act and to other related functions, such as those of liquidator, receiver, interim receiver, receiver/manager, agent for a secured creditor or consultant in insolvency matters.

21. A majority of the directors and a majority of the officers of a corporate trustee shall be licensed trustees.

22. A corporate trustee shall be a private or closed company as defined in the applicable legislation.

23. A trustee may, with pre-approval from the Superintendent, be a shareholder or a financial backer of more than one corporate trustee provided that

(a) the corporate trustees do not operate in the same district;

(b) the trustee satisfies the Superintendent that there is no conflict of interest; and

(c) the trustee respects any other conditions and limitations that the Superintendent considers appropriate.

24. Notwithstanding paragraph 23 of this Directive, a trustee may, with pre-approval from the Superintendent, be a shareholder or a financial backer of more than one corporate trustee in the same district, for a limited period of time, in order to wind up the trustee's practice.

Issuance of Licence

25. A corporate licence is issued subject to the

syndic limite ses activités aux fonctions et responsabilités d'un syndic autorisé en vertu de la Loi et à d'autres fonctions connexes, comme celles de liquidateur, de séquestre, de séquestre intérimaire, de séquestre-gérant, de mandataire d'un créancier garanti ou de conseiller en matière d'insolvabilité.

21. Une majorité des administrateurs et une majorité des dirigeants de la personne morale agissant en qualité de syndic sont des syndics titulaires d'une licence.

22. La personne morale agissant en qualité de syndic est une société fermée au sens de la loi applicable.

23. Un syndic peut, avec l'approbation préalable du surintendant, être actionnaire ou bailleur de fonds de plusieurs personnes morales agissant en qualité de syndic, pourvu que :

a) les personnes morales en question ne fassent pas affaire dans le même district;

b) le syndic démontre au surintendant qu'il n'y a aucun conflit d'intérêts;

c) le syndic se conforme à toute autre condition ou restriction que le surintendant estime indiquée.

24. Nonobstant l'article 23 de la présente instruction, un syndic peut, moyennant l'approbation préalable du surintendant, être actionnaire ou bailleur de fonds de plusieurs personnes morales agissant en qualité de syndic dans le même district, pour un temps limité, dans le but de mettre fin à ses opérations comme syndic.

Délivrance des licences

25. La licence d'une personne morale est

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Corporate Representation

27. Subject to paragraph 28 of this Directive, a corporate trustee must, at all times and in each district for which it holds a licence, operate through an individual trustee.

28. In extraordinary circumstances, where the corporate trustee is left with no individual trustee in a given district due to an unforeseen event, such as death, sickness or resignation of an individual trustee, the corporate trustee shall submit a written request to the Superintendent for authorization to maintain the corporate trustee's operation in the given district for a specified period of time.

Designated Trustee

29. A corporate trustee shall, for each professional engagement, designate an individual trustee with a licence to practise in the applicable district who shall accept responsibility for the administration of that engagement.

30. The designation of an individual trustee shall not relieve the corporate trustee of its ethical responsibility under any professional engagement it has accepted.

31. An individual trustee designated pursuant to paragraph 29 of this Directive shall not accept professional engagements under the individual trustee's personal name.

32. Where the individual trustee designated by the corporate trustee is to be replaced, the corporate trustee shall forthwith notify the Designated Senior Bankruptcy Analyst of the reason for such replacement and of the name of

Représentation corporative

27. Sous réserve de l'article 28 de la présente instruction, la personne morale agissant en qualité de syndic doit, en tout temps et dans chaque district visé par une licence qu'elle détient, agir par l'entremise d'un syndic particulier.

28. Dans les cas exceptionnels où la personne morale agissant en qualité de syndic ne compte plus aucun syndic particulier dans un district donné en raison d'un événement imprévu, notamment un décès, une maladie ou la démission d'un syndic, la personne morale agissant en qualité de syndic doit demander par écrit au surintendant l'autorisation de poursuivre ses activités dans le district en question pendant une période déterminée.

Syndic désigné

29. La personne morale agissant en qualité de syndic doit, pour chaque activité professionnelle, désigner un syndic particulier qui est titulaire d'une licence l'autorisant à pratiquer dans le district visé et qui accepte d'être responsable de l'administration de l'activité.

30. La désignation d'un syndic particulier ne libère pas la personne morale agissant en qualité de syndic de sa responsabilité déontologique relative aux activités professionnelles qu'elle a acceptées.

31. Le syndic particulier désigné en vertu de l'article 29 de la présente instruction ne peut accepter d'activités professionnelles en son nom personnel.

32. Dans le cas du remplacement du syndic particulier que la personne morale a désigné, celle-ci avise sans délai l'analyste principal des faillites désigné de la raison de ce remplacement et du nom du nouveau syndic désigné.

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the newly designated trustee.

Incompatible Occupation

33. An individual trustee shall not act as a trustee if that trustee practises an incompatible occupation.

34. "Incompatible occupation" includes a collection agent, a bailiff, a trade association representative, an employee of the OSB, a lawyer, or a notary in the Province of Quebec, as well as any other occupation, business or profession that may be in conflict with the duties and responsibilities of a trustee.

35. Notwithstanding paragraph 34 of this Directive, an employee of the OSB acting pursuant to sections 14.03 or 29 of the Act may act as a trustee.

36. The trustee who is a member of a professional body regulating an incompatible occupation must satisfy the Superintendent that he or she does not practise that occupation or profession.

Geographical Jurisdiction

37. A licence is issued for the bankruptcy district or part thereof in which the trustee maintains a resident office.

38. The Superintendent may, upon written request, transfer the licence of an individual trustee to another district or part thereof, provided the trustee satisfies the Superintendent that he or she has sufficient knowledge of the relevant legislation that applies in that district.

39. The Superintendent may, upon written request, extend the licence of an individual trustee to another district, or part thereof,

Occupation incompatible

33. Un syndic particulier ne peut agir en qualité de syndic s'il exerce une occupation incompatible.

34. Une « occupation incompatible » désigne notamment le travail d'agent de recouvrement, de huissier, de représentant d'une association commerciale, d'employé du BSF, d'avocat (ou de notaire dans la province de Québec), ainsi que de toute autre occupation, entreprise ou profession dont l'exercice peut donner lieu à un conflit avec les fonctions et responsabilités du syndic.

35. Nonobstant l'article 34 de la présente instruction, un employé du BSF qui agit conformément aux articles 14.03 ou 29 de la Loi peut agir en qualité de syndic.

36. Le syndic qui est membre d'un organisme professionnel réglementant une occupation incompatible doit démontrer au surintendant qu'il n'exerce pas cette occupation ou cette profession.

Territoire géographique

37. La licence est délivrée à l'égard du district de faillite ou de la partie de celui-ci où le syndic possède un bureau principal.

38. Le surintendant peut, sur demande écrite, transférer la licence d'un syndic particulier à un autre district ou à une partie de celui-ci, pourvu que le syndic démontre au surintendant qu'il connaît suffisamment la législation pertinente qui s'applique dans ce district.

39. Le surintendant peut, sur demande écrite, étendre la portée de la licence d'un syndic particulier à un autre district ou à une partie de

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provided the trustee satisfies the Superintendent that

(a) he or she has sufficient knowledge of the relevant legislation that applies in that district; and

(b) this extension will not adversely affect the performance of professional engagements.

40. Where an individual trustee has made a request to the Superintendent to transfer or extend his or her licence to one or more districts, the Superintendent may require that the trustee appear before a Board of Examination.

41. Notwithstanding paragraph 40 of this Directive, an individual trustee who requests that his or her licence be transferred or extended from a common law province to a civil law province, or vice versa, will be required to appear before a Board of Examination.

42. Appendix B, *Policy on Multi-Jurisdictional Licences*, sets out the various elements considered by the Superintendent in reviewing a trustee's request to extend and/or transfer his or her licence to a province in which he or she does not maintain a resident office, as well as the procedures to follow in dealing with such a request.

celui-ci, pourvu que le syndic lui démontre :

a) qu'il connait suffisamment la législation pertinente qui s'applique dans ce district;

b) que cette extension ne nuira pas à l'exercice de ses activités professionnelles.

40. Lorsqu'un syndic particulier demande au surintendant de transférer sa licence ou d'en étendre la portée à d'autres districts, le surintendant peut exiger que le syndic se présente devant un jury d'examen.

41. Nonobstant le paragraphe 40 de la présente instruction, le syndic particulier qui demande que sa licence soit transférée ou étendue d'une province de common law à une province de droit civil, ou vice versa, devra se présenter devant un jury d'examen.

42. L'annexe B, *Politique sur les licences multi-juridictionnelles*, énonce les divers éléments que le surintendant doit prendre en compte dans l'examen de la demande d'un syndic d'étendre la portée de sa licence ou de la transférer dans une province où il ne possède pas de bureau principal, de même que la procédure à suivre pour traiter une telle demande.

PART III

MAINTENANCE OF A TRUSTEE LICENCE

Notification of Changes

43. The trustee shall submit a written request to the Superintendent and receive prior approval before any of the following changes to the

PARTIE III

MAINTIEN EN VIGUEUR D'UNE LICENCE DE SYNDIC

Avis de changement

43. Le syndic doit présenter au surintendant une demande écrite et obtenir son autorisation préalable avant d'apporter l'un des changements

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trustee's licence can be effected:

(a) a change of district or of the resident office of the trustee;

(b) a change of firm for which the individual trustee practises;

(c) a change in the corporate structure or trustee name;

(d) reactivation or reinstatement of a trustee licence; and

(e) a merger or purchase agreement between two or more corporate trustees.

44. Any other change in the information supplied by the trustee under this Directive shall be communicated to the Superintendent, in writing, within five (5) days of such a change.

Corporate Name

45. A corporate trustee shall operate and do business only under the name under which it is licensed.

46. Any change to the corporate name shall be pre-approved by the Superintendent before the approval of the appropriate federal or provincial regulatory body is requested.

suivants à la licence de syndic :

a) le changement de district ou de bureau principal du syndic;

b) le changement de firme auprès de laquelle le syndic particulier pratique;

c) le changement de la structure de la firme ou du nom ou de la raison sociale du syndic;

d) la réactivation ou le rétablissement d'une licence de syndic;

e) la fusion ou l'achat entre deux ou plusieurs personnes morales agissant à titre de syndic.

44. Tout autre changement relatif aux renseignements qu'un syndic fournit conformément à la présente instruction est communiqué par écrit au surintendant dans les cinq (5) jours qui suivent.

Raison sociale de la personne morale

45. La personne morale agissant en qualité de syndic poursuit ses activités uniquement sous la raison sociale approuvée.

46. Tout changement relatif au nom de la personne morale agissant en qualité de syndic est assujetti à l'approbation préalable du surintendant, avant de pouvoir recevoir l'approbation de l'organisme de réglementation fédéral ou provincial concerné.

PART IV

TRUSTEE STATUS

47. An individual trustee may be active or inactive.

PARTIE IV

STATUT DU SYNDIC

47. Un syndic particulier peut être actif ou inactif.

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Applicable Factors

48. The following factors are taken into consideration in determining whether a trustee is active or inactive:

(a) activity in the day-to-day administration of professional engagements;

(b) a supervisory role or control in an insolvency practice;

(c) the length of time of inactivity, if any;

(d) the inventory of open estates in the trustee's personal name or in the trustee's name on behalf of a corporate trustee; and

(e) the intent to file new bankruptcy and insolvency proceedings.

Active Trustee

49. An active trustee is a trustee who may accept professional engagements either in the trustee's personal name or for a corporate trustee. The trustee is responsible for the administration of these professional engagements.

50. The trustee must obtain pre-approval from the Superintendent before that trustee can begin accepting professional engagements.

Inactive Trustee

51. An inactive trustee is a trustee who does not carry out the functions of a trustee and who does not perform any duties in relation to supervision, receivership or liquidation work, look-see, consultation or research in insolvency matters; for example, a trustee who has gone back to school for a period of time or left the profession.

Critères d'applicabilité

48. Les facteurs suivants sont pris en considération pour déterminer si un syndic est actif ou inactif :

a) l'administration courante des activités professionnelles;

b) la supervision ou le contrôle dans une pratique dans le domaine de l'insolvabilité;

c) la période d'inactivité, le cas échéant;

d) l'inventaire des dossiers ouverts qui sont à son nom personnel ou à son nom pour le compte d'une personne morale;

e) l'intention d'entreprendre de nouvelles procédures de faillite et d'insolvabilité.

Syndic actif

49. Le syndic actif est celui qui peut accepter des activités professionnelles, soit en son nom personnel, soit pour le compte d'une personne morale. Il est responsable de l'administration de ces activités professionnelles.

50. Le syndic doit obtenir l'autorisation préalable du surintendant avant de pouvoir accepter des activités professionnelles.

Syndic inactif

51. Un syndic inactif est celui qui n'exerce pas ses fonctions de syndic et qui ne remplit aucune responsabilité de supervision, de séquestre, de liquidateur, d'évaluation, de consultation ou de recherche en matière d'insolvabilité. Il peut s'agir, par exemple, d'un syndic qui est retourné aux études pendant un certain temps ou qui a quitté la profession.

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52. Upon being formally notified by the Superintendent that he or she is inactive, the trustee shall not accept any professional engagements, nor shall that trustee carry out any functions that are exclusively reserved for a trustee appointed under a professional engagement.

52. Dès que le surintendant l'avise formellement qu'il est inactif, le syndic ne peut accepter aucune activité professionnelle; il ne peut non plus exercer de fonction exclusivement réservée à un syndic qui a accepté une activité professionnelle.

53. An inactive trustee must pay the prescribed annual fees.

53. Le syndic inactif doit payer les droits annuels prescrits.

54. In order to reactivate a licence, an inactive trustee must satisfy the Superintendent that the technical knowledge and skills required to act as a trustee have been maintained.

54. Lorsqu'un syndic inactif désire réactiver sa licence, il doit démontrer au surintendant qu'il a conservé ses connaissances techniques et ses aptitudes à agir en qualité de syndic.

55. Where the trustee has been inactive for more than five (5) years and wishes to reactivate his or her licence, he or she will be required to appear before a Board of Examination.

55. Lorsqu'un syndic inactif depuis plus de cinq (5) ans souhaite réactiver sa licence, il doit se présenter devant un jury d'examen.

Honorary Trustee

Syndic honoraire

56. The Superintendent may issue an honorary trustee licence to an individual trustee, acknowledging past service, where the trustee meets the following criteria:

56. Le surintendant peut délivrer à un syndic particulier une licence de syndic honoraire reconnaissant ses services antérieurs, pourvu qu'il respecte les critères suivants :

(a) the trustee has been active for a minimum of thirty (30) years;

a) il a été syndic actif pendant au moins trente (30) ans;

(b) the trustee has retired from active insolvency practise;

b) il s'est retiré de la pratique active dans le domaine de l'insolvabilité;

(c) the trustee is not responsible for any professional engagements;

c) il n'est responsable d'aucune activité professionnelle;

and, at the discretion of the Superintendent,

et, selon l'appréciation du surintendant,

(d) the trustee is generally recognized by peers as having made a significant contribution to the insolvency community.

d) il est généralement considéré par ses pairs comme une personne ayant fourni un apport important au milieu de l'insolvabilité.

57. An honorary trustee shall not accept any

57. Le syndic honoraire ne peut accepter

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professional engagements and will not be subject to any fees.

d'activités professionnelles et n'est pas tenu de verser des droits.

PART V

REINSTATING A TRUSTEE LICENCE

PARTIE V

RÉACTIVATION DE LA LICENCE DE SYNDIC

58. In order to reinstate a licence that has ceased to be valid, in accordance with subsection 13.2(3) of the Act, the trustee must satisfy the Superintendent that reinstatement of the licence will not impair public confidence in the bankruptcy and insolvency system.

59. Appendix C, *Policy on Reinstating a Licence that has Ceased to be Valid by Reason of the Trustee Becoming Bankrupt*, sets out the factors the Superintendent may consider when deciding whether to reinstate the licence of a trustee pursuant to paragraph 13.2(4)*(b)* of the Act.

58. Pour rétablir une licence qui a été annulée, conformément au paragraphe 13.2(3) de la Loi, le syndic doit démontrer au surintendant que la réactivation ne compromet pas la confiance du public à l'endroit du système de faillite et d'insolvabilité.

59. L'annexe C, *Politique sur la réactivation d'une licence qui a été annulée en raison de la faillite du syndic*, énonce les facteurs dont le surintendant peut tenir compte pour décider s'il doit réactiver la licence du syndic en vertu de l'alinéa 13.2(4)*b)* de la Loi.

PART VI

GENERAL PROVISIONS

PARTIE VI

DISPOSITIONS GÉNÉRALES

Temporary Absence

60. In the event of a temporary absence (i.e., illness, maternity leave, vacation) during which the trustee is unable to perform normal trustee duties, arrangements may be made with the Designated Senior Bankruptcy Analyst to allow another trustee to carry out the required duties.

Absence temporaire

60. En cas d'absence temporaire (notamment pour cause de maladie, de congé de maternité ou de vacances) au cours de laquelle il ne peut exercer ses fonctions normales, le syndic peut conclure une entente avec l'analyste principal des faillites désigné pour permettre à un autre syndic d'exercer les fonctions nécessaires.

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Compliance and Enforcement

61. Failure to comply with any provision of this Directive may constitute an offence under the Act and, in accordance with subsection 13.2(5) of the Act, may, among other things, result in cancellation or suspension of a licence as well as application of a disciplinary process and conservatory measures, including a direction to the official receiver not to appoint the trustee to any new estates.

Coming Into Force

62. This Directive comes into force on the date it is signed.

Enquiries

63. For any questions pertaining to this Directive, please contact Sheila Westerink Robin, National Manager, Policy and Regulatory Affairs, at the OSB.

Conformité et exécution

61. Le défaut de se conformer à la présente instruction peut constituer une infraction à la Loi et peut entraîner, notamment, l'annulation ou la suspension d'une licence en vertu du paragraphe 13.2(5) de la Loi, de même que l'application d'une mesure disciplinaire et de mesures conservatoires, y compris des instructions au séquestre officiel de ne plus nommer le syndic en cause pour administrer de nouveaux actifs.

Entrée en vigueur

62. La présente instruction entre en vigueur à la date de sa signature.

Demandes de renseignements

63. Pour toute question concernant la présente instruction, veuillez communiquer avec Sheila Westerink Robin, Gestionnaire national, Politiques et affaires réglementaires au BSF.

Bill James
Superintendent of Bankruptcy / Surintendant des faillites

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APPENDIX A

LICENSING PROCESS

This appendix provides detailed information on the licensing process and is an integral part of Directive No. 13R4, *Trustee Licensing* (the Directive).

A. PROCESS REGARDING ISSUANCE OF AN INDIVIDUAL TRUSTEE LICENCE

Application

1. After having successfully passed the CNIE and ICQC, an individual may apply for a trustee licence using Form 2, *Application for Trustee Licence (Individual)*.

2. Subject to paragraph 10 of the Directive, individuals who have passed the CNIE will receive an invitation from the Superintendent to appear before a Board of Examination for the oral examination. The invitation letter will include a copy of Form 2, *Application for Trustee Licence (Individual)*, which must be completed by the applicant and filed with the Superintendent.

Investigation

3. Once Form 2, *Application for Trustee Licence (Individual)* is filed, the Superintendent verifies that the applicant meets the prerequisite qualifications and other requirements set out in the Directive.

4. The Superintendent may require an applicant to provide any additional information and sign any authorization for information as the Superintendent deems appropriate, including, but not limited to, an authorization to communicate with a professional organization in order to verify the applicant's status.

ANNEXE A

PROCESSUS DE DÉLIVRANCE DES LICENCES

La présente annexe renferme des précisions sur le processus de délivrance des licences et fait partie intégrante de l'instruction n° 13R4, *Délivrance des licences de syndic* (l'instruction).

A. PROCESSUS DE DÉLIVRANCE DES LICENCES DE SYNDIC INDIVIDUEL

Demande

1. Après avoir réussi l'ENIC et le CQCL, tout particulier peut présenter une demande de licence de syndic à l'aide du formulaire 2, *Demande de licence de syndic (particulier)*.

2. Sous réserve de l'article 10 de l'instruction, les demandeurs qui ont réussi l'ENIC seront invités par le surintendant à se présenter devant un jury d'examen oral. L'invitation comprend une copie du formulaire 2, *Demande de licence de syndic (particulier)*, que le demandeur remplira et déposera auprès du surintendant.

Enquête

3. Dès que le formulaire 2, *Demande de licence de syndic (particulier)*, est déposé, le surintendant s'assure que le demandeur respecte les exigences préalables et les autres exigences énoncées dans l'instruction.

4. Le surintendant peut exiger que le demandeur fournisse des renseignements supplémentaires et signe les autorisations qu'il juge indiquées, notamment une autorisation de communiquer avec un organisme professionnel afin de vérifier le statut du demandeur.

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5. The applicant will provide any consent and authorization that may be necessary where the Superintendent requests an investigation by the Royal Canadian Mounted Police to determine whether the applicant has a criminal record. The Superintendent may also take any other investigative measures that are deemed necessary, including but not limited to:

(a) a bankruptcy search and credit verification;

(b) a financial evaluation; and

(c) verification of the applicant's employment history and references.

Board of Examination

6. The Superintendent shall strike a Board of Examination that may consist of a trustee, a lawyer, a person designated by the Regional Director to act as Assistant Superintendent and a representative of the Superintendent.

7. The members of the Board may vary from district to district. The Superintendent selects both the lawyer examiner and the trustee examiner. The trustee examiner is selected after seeking input from CAIRP. The members of the Board are selected upon consideration of the following factors:

(a) that these examiners have a minimum of five (5) years' relevant practical experience in the insolvency field;

(b) the opinion of the Regional Director regarding the competence of these examiners; and

(c) that there is no relationship between the examiner and the applicants that would call into question the impartiality or the fairness of the oral examination process.

8. The members of each Board shall make a

5. Le demandeur doit donner son consentement et son autorisation s'ils sont nécessaires lorsque le surintendant demande à la Gendarmerie royale du Canada de mener une enquête pour déterminer si le demandeur a un casier judiciaire. Le surintendant peut également mener toute autre enquête qu'il juge nécessaire, notamment :

a) une recherche en matière de faillite et une vérification de la solvabilité;

b) une évaluation financière;

c) une vérification des emplois antérieurs et des références du demandeur.

Jury d'examen

6. Le surintendant établit un jury d'examen qui peut être composé d'un syndic, d'un avocat, d'une personne désignée par le directeur régional pour agir à titre de surintendant adjoint et d'un représentant du surintendant.

7. Les membres du jury peuvent varier d'un district à l'autre. Le surintendant choisit l'avocat membre du jury et le syndic membre du jury. Il nomme le syndic après avoir demandé l'avis de l'ACPIR. Les membres du jury sont choisis en tenant compte des facteurs suivants :

a) le fait que ces membres du jury comptent un minimum de cinq (5) ans d'expérience pratique pertinente dans le domaine de l'insolvabilité;

b) l'avis du directeur régional au sujet de la compétence de ces membres du jury;

c) l'absence, entre le membre du jury et les demandeurs, de lien pouvant mettre en cause l'impartialité ou l'équité du processus d'examen oral.

8. Les membres de chaque jury font une

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recommendation to the Superintendent.

Superintendent's Decision Regarding Application for a Trustee Licence

9. The Superintendent's decision shall be sent to all applicants.

10. An applicant may ask for feedback on their performance, as indicated in the comments of the Board members.

Review of the Superintendent's Decision Regarding Application for a Trustee Licence

11. An applicant may ask for a review of the Superintendent's decision provided that a written request stating the grounds therefor is made to the Superintendent within thirty (30) days of receiving the decision.

Licence

A. Licence Subject to Probationary Conditions

12. The following conditions apply to a new licence:

(a) the newly licensed trustee agrees, for a period of twenty-four (24) months, to practise with, and in the same physical location as, an active established trustee who is acceptable to the Superintendent;

(b) where, at any time during those twenty-four (24) months, the newly licensed trustee does not satisfy the requirement set forth in paragraph 12(a) above, the newly licensed trustee is authorized to act only in the following cases, subject to any other limitations imposed upon the licence:

(i) consumer proposals;

recommandation au surintendant.

Décision du surintendant concernant la demande de licence de syndic

9. La décision du surintendant est envoyée à tous les demandeurs.

10. Le demandeur peut demander une rétroaction sur son rendement, tel qu'il appert des commentaires des membres du jury.

Révision de la décision du surintendant concernant la demande de licence de syndic

11. Le demandeur peut demander une révision de la décision du surintendant, pourvu qu'il lui présente une demande écrite et motivée dans les trente (30) jours suivant la réception de la décision.

Licence

A. Licence assujettie à des conditions de probation

12. Les conditions suivantes s'appliquent à toute nouvelle licence :

a) le nouveau titulaire de licence s'engage, pendant une période de vingt-quatre (24) mois, à exercer ses activités au même endroit et avec un syndic actif établi qui convient au surintendant;

b) lorsque, en tout temps au cours de cette période de vingt-quatre (24) mois, le nouveau titulaire de licence ne respecte pas l'exigence du paragraphe 12*a*), celui-ci sera autorisé à agir uniquement dans les cas suivants, sous réserve de toute autre restriction imposée à la licence :

(i) les propositions de consommateur;

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(ii) summary administration estates;

(iii) estates, known as ordinary administration estates, for which unsecured liabilities, as per the Statement of Affairs, do not exceed $500,000 and for which the realizable assets, as per the Statement of Affairs, after deducting the value of all security interests, do not exceed $15,000; and

(iv) all other cases (notice of intention, Division I Proposal, receivership, CCAA filing and estates not covered by (iii) above), subject to the approval of the Designated Assistant Superintendent and on any terms that the Designated Assistant Superintendent shall determine, considering the performance of the newly licensed trustee.

13. In granting the newly licensed trustee approval to act in the cases described in sub-paragraph 12(b)(iv) of this Appendix, the Designated Assistant Superintendent may require that the newly licensed trustee appoint a sponsor who will provide supervision in the administration of such estates.

14. The Superintendent may also require that the trustee practise under the direct supervision of an established trustee.

15. After the period of time for which the conditions attached to a new licence are imposed, the trustee must, in order to have them removed, request in writing that the Superintendent lift these conditions.

16. Trustees requesting the lifting of the conditions attached to a new licence shall:

(a) have worked in the field of insolvency during the 24-month probationary period;

(b) provide details substantiating that significant work experience has been obtained during the 24-

(ii) les dossiers d'administration sommaire;

(iii) les dossiers dits d'administration ordinaire dont les dettes non garanties, telles qu'indiquées au bilan, ne dépassent pas 500 000 $ et dont les avoirs réalisables indiqués au bilan ne dépassent pas 15 000 $, déduction faite de la valeur des garanties;

(iv) tous les autres cas (avis d'intention, proposition en vertu de la section I, mise sous séquestre, dépôt en vertu de la LACC et actifs en dehors des critères du sous-alinéa (iii) ci-dessus), sous réserve de l'approbation du surintendant adjoint désigné et selon les modalités qu'il détermine, compte tenu du rendement du nouveau titulaire de licence.

13. Lorsque le nouveau titulaire de licence est autorisé à agir dans les dossiers énumérés au sous-alinéa 12*b*)(iv) de la présente annexe, le surintendant adjoint désigné peut exiger que ce nouveau titulaire de licence s'adjoigne un parrain qui exercera un rôle de surveillance dans l'administration de ces dossiers.

14. Le surintendant peut aussi exiger que le syndic pratique sous la supervision directe d'un syndic établi.

15. Après la période pour laquelle les conditions se rattachant à une nouvelle licence sont imposées, le syndic doit, pour les faire enlever, demander par écrit au surintendant de lever ces conditions.

16. Le syndic qui demande que soient levées les conditions se rattachant à une nouvelle licence doit :

a) avoir travaillé dans le domaine de l'insolvabilité pendant la période de probation de vingt-quatre (24) mois;

b) fournir des détails montrant qu'une expérience de travail significative a été obtenue pendant la

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month period; and

(c) undergo a review of their practice conducted by the OSB, as required.

17. The Superintendent may lift, modify or maintain the conditions depending on the recommendation of the Designated Assistant Superintendent as to the performance of the trustee.

B. Licence Subject to Limitations

18. Where the Superintendent offers a licence with limitations pursuant to paragraph 12 of the Directive, the applicant has thirty (30) days to accept the offer.

B. PROCESS REGARDING ISSUANCE OF A CORPORATE TRUSTEE LICENCE

Application

19. Form 3, *Application for Trustee Licence (Corporation)*, is filed after the Superintendent has approved the proposed name of the corporate trustee.

20. The requirements as set out in paragraphs 17 and 22 of the Directive shall be contained in the constituting documents of the corporation.

C. PROCESS REGARDING CONDITIONS OF PRACTISE

Inquiry

21. The Superintendent may, from time to time, conduct an inquiry in order to verify that a trustee continues to meet all requirements set out in the Directive.

22. Within such an inquiry, the Superintendent

période de vingt-quatre (24) mois;

c) se soumettre à un examen de sa pratique mené par le BSF, au besoin.

17. Le surintendant peut lever, modifier ou maintenir ces conditions, suivant la recommandation du surintendant adjoint désigné quant au rendement du syndic.

B. Licence assujettie à des restrictions

18. Lorsque le surintendant offre une licence assujettie à des restrictions en application de l'article 12 de l'instruction, le demandeur dispose d'un délai de trente (30) jours pour accepter l'offre.

B. PROCESSUS DE DÉLIVRANCE DE LICENCES DE SYNDIC AUX PERSONNES MORALES

Demande

19. Le formulaire 3, *Demande de licence de syndic (personne morale)*, est déposé une fois que le surintendant a approuvé la raison sociale proposée de la personne morale.

20. Les exigences énoncées aux articles 17 et 22 de l'instruction sont comprises dans les documents constitutifs de la personne morale.

C. PROCESSUS À L'ÉGARD DES CONDITIONS D'EXERCISE

Enquête

21. Le surintendant peut, à l'occasion, mener une enquête pour s'assurer qu'un syndic continue de respecter les exigences énoncées dans l'instruction.

22. Dans le cadre d'une telle enquête, le

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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may require that the trustee provide additional information and documentation, such as the trustee's financial statements. The Superintendent may also conduct any other form of investigation deemed necessary.

Geographical Jurisdiction

23. A trustee may offer services from a location other than the resident office. All locations other than the resident office must be authorized by the Designated Senior Bankruptcy Analyst in accordance with the provisions of Directive No. 28, *Non-Resident Office*.

surintendant peut exiger que le syndic lui fournisse des renseignements et des documents supplémentaires, tels que ses états financiers. Le surintendant peut également mener toute autre forme d'enquête qu'il juge nécessaire.

Territoire géographique

23. Un syndic peut offrir des services d'un endroit autre que son bureau principal. L'exploitation de bureaux secondaires est autorisée par l'analyste principal des faillites désigné, suivant l'instruction n° 28, *Les bureaux secondaires de syndics*.

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APPENDIX B

POLICY ON MULTI-JURISDICTIONAL LICENCES

A. Purpose

This policy sets out the various elements to be considered in reviewing a trustee's application to extend his or her licence to a province in which he or she does not maintain a resident office, as well as the procedures to follow in dealing with such an application. The policy is intended to ensure consistency in the application of the rules for extending licences to other districts.

B. General Principles

In reviewing a trustee's application, the Superintendent will consider the various elements set out below. He may then grant the extension without conditions, require that certain conditions be met before the extension is granted, or refuse the extension.

If the extension is granted, it will remain at all times conditional on the trustee complying with the requirements set out at the time of the extension.

The extension privilege may be revoked if the trustee fails to meet his or her obligations, or if the trustee's performance or the quality of the trustee's administration is no longer satisfactory, either with respect to files opened in the district for which the extension was given or in the district for which the licence was initially issued.

C. Factors to be Considered

The Superintendent will consider factors related to the trustee's knowledge of relevant legislation and

ANNEXE B

POLITIQUE SUR LES LICENCES MULTI-JURIDICTIONNELLES

A. Objet

La présente politique énonce les divers éléments qui doivent être pris en compte dans l'examen de la demande d'un syndic d'étendre la portée de sa licence à une province dans laquelle il ne possède pas de bureau principal, de même que la procédure à suivre pour traiter une telle demande. Elle vise à assurer une application uniforme des règles relatives à l'extension d'une licence à un autre district.

B. Principes généraux

Dans le cadre de l'examen de la demande du syndic, le surintendant doit tenir compte des éléments énumérés ci-après. Il peut ensuite accorder l'extension sans conditions, exiger que certaines conditions soient remplies avant d'accorder l'extension demandée, ou refuser la demande d'extension.

Dans les cas où l'extension est accordée, elle demeurera en tout temps conditionnelle au respect par le syndic des exigences établies au moment où l'extension a été accordée.

Le privilège de l'extension peut être révoqué si le syndic ne s'acquitte pas de ses obligations ou si son rendement ou la qualité de son administration ne sont plus satisfaisants, soit à l'égard des dossiers ouverts dans le district pour lequel l'extension a été accordée, soit dans le district où la licence a été initialement délivrée.

C. Facteurs à considérer

Le surintendant considère des facteurs ayant trait à la connaissance de la législation pertinente et à

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performance of professional engagements.

1. Knowledge of relevant legislation (paragraph 39(a) of Directive 13R4, *Trustee Licensing*)

a) Provincial Legislation

The trustee must have sufficient knowledge of provincial legislation pertaining to insolvency. While not necessarily exhaustive, the list in Part F below identifies various areas in which the trustee must be very familiar.

b) Board of Examination

A trustee who requests that his or her licence be extended from a common law province to a civil law province, or vice versa, will be required to appear before a Board of Examination. The Superintendent may also require that the trustee appear before a Board of Examination where the trustee does not have sufficient knowledge of the applicable legislation in the new province.

2. The requested extension must not adversely affect the performance of the trustee's professional engagements (paragraph 39(b) of Directive 13R4, *Trustee Licensing*). Review of an extension request will include consideration of the following factors:

a) Trustee compliance and performance, particularly with regard to:

- the *Bankruptcy and Insolvency Act*, and the *Bankruptcy and Insolvency General Rules*;
- the Superintendent's Directives;
- the closing of files, the number of open files, and the age of open files;
- the number and type of complaints against the trustee.

l'exercice des activités professionnelles du syndic.

1. Connaissance de la législation pertinente (paragraphe 39*a*) de l'instruction n° 13R4, *Délivrance des licences de syndic*)

***a)* Législation provinciale**

Le syndic doit posséder une connaissance suffisante de la législation provinciale en matière d'insolvabilité. Bien qu'elle ne soit pas nécessairement exhaustive, la liste figurant à la partie F ci-dessous fait état des divers domaines que le syndic doit bien connaître.

***b)* Jury d'examen**

Si un syndic demande que sa licence soit étendue d'une province de common law à une province de droit civil, ou vice versa, il doit se présenter devant un jury d'examen. Le surintendant peut également exiger que le syndic se présente devant un jury d'examen s'il ne connaît pas suffisamment la législation qui s'applique dans la nouvelle province.

2. L'extension demandée ne doit pas nuire à l'exercice des activités professionnelles du syndic (paragraphe 39(b) de l'instruction n° 13R4, *Délivrance des licences de syndic*). L'examen d 'une demande d'extension tiendra compte des facteurs suivants :

***a)* La conformité et le rendement du syndic, notamment quant :**

- à la *Loi sur la faillite et l'insolvabilité* et aux *Règles générales sur la faillite et l'insolvabilité*;
- aux instructions du surintendant;
- à la fermeture des dossiers, au nombre de dossiers ouverts et à l'âge de ces dossiers;
- au nombre et au type de plaintes déposées contre le syndic.

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b) Quality of service provided by the trustee, including:

- the trustee's facilities and office;
- access to files;
- access to the trustee, e.g., assessment in person;
- access to the trustee's personnel, on-site or not, permanently or occasionally.

***b)* La qualité du service offert par le syndic, notamment :**

- les installations et le bureau du syndic;
- l'accès aux dossiers;
- l'accès au syndic, p. ex., évaluation en personne;
- l'accès au personnel du syndic, sur place ou non, en permanence ou à l'occasion.

c) Cost of services

Trustee fees and disbursements claimed against the estate should not be higher by reason of distance from the resident office.

***c)* Le coût des services**

Les frais et débours que le syndic réclame contre l'actif ne devraient pas être plus élevés en raison de l'éloignement du bureau principal.

d) Continuity in the administration of files

The trustee must conclude a succession agreement in case of death, incapacity or other factors that could prevent the trustee from performing engagements. He or she must ensure at all times that there is a successor for the files being administered. This criterion is mandatory in view of the risks inherent in leaving estate files without a trustee.

With the exception of the succession agreement, no one criteria set out above will be determinant. Each case will be considered on its merits based on the entire set of circumstances.

***d)* La continuité dans l'administration des dossiers**

Le syndic doit conclure une entente de succession en cas de décès, d'incapacité ou d'autres causes qui pourraient l'empêcher d'exécuter ses activités. Il doit veiller en tout temps à ce qu'il y ait un successeur pour les dossiers qu'il administre. Ce critère est obligatoire en raison du risque que représentent les dossiers d'actifs laissés sans syndic.

À l'exception des ententes de succession, aucun des facteurs susmentionnés n'est déterminant. Chaque cas est examiné au mérite et selon l'ensemble des circonstances.

D. Conditions for Issuing an Extension

Before being granted an extension, the trustee must commit in writing:

1. to maintain satisfactory performance and the same level of service as that which was represented to the Superintendent when he or she applied for the licence extension;

2. to submit to the Superintendent for prior approval

D. Conditions d'obtention d'une extension

Avant de se voir accorder une extension, le syndic doit s'engager par écrit :

1. à maintenir un rendement satisfaisant et le même niveau de service que celui qu'il a présenté au surintendant au moment où il a demandé l'extension de sa licence;

2. à soumettre au surintendant pour approbation préalable :

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a) any significant change in the level of service that he or she represented to the Superintendent;
b) any significant change in the succession agreement.

a) tout changement important dans le niveau de service qu'il a présenté au surintendant;
b) tout changement important dans l'entente de succession.

E. Process

- The trustee makes an application in writing demonstrating that he or she meets the requirements of this policy.
- A copy of the succession agreement(s) for the files he or she administers is attached to the application.
- The entire application is reviewed by the Assistant Superintendent (Licensing) in consultation with the Designated Assistant Superintendent (DAS).
- The Assistant Superintendent (Licensing) makes a recommendation and forwards it to the Superintendent of Bankruptcy for a decision.
- This recommendation is not binding on the Superintendent.

E. Processus

- Le syndic fait une demande écrite dans laquelle il démontre comment il satisfait aux exigences de la présente politique.
- Il joint à sa demande une copie de l'entente ou des ententes de succession relatives aux dossiers qu'il administre.
- Le surintendant adjoint (Licences) examine l'ensemble de l'entente, en consultation avec le surintendant adjoint désigné (SAD).
- Le surintendant adjoint (Licences) formule une recommandation et l'achemine au surintendant des faillites, qui prendra la décision.
- La recommandation ne lie pas le surintendant.

F. Relevant Provincial Legislation

The trustee should have general knowledge as to the application of relevant provincial legislation in a bankruptcy situation. Generally, the trustee should be very familiar with the following areas of provincial legislation:

- Bulk Sales
- Business corporation
- Conditional Sales
- Construction Lien
- Credit Reporting
- Employment Standards
- Execution (or Exemptions)
- Family Law
- Fraudulent Conveyances
- Landlord and Tenant
- Mortgages
- Partition

F. Législation provinciale pertinente

Le syndic devrait posséder une connaissance générale de l'application de la législation provinciale pertinente en matière de faillite. De façon générale, le syndic devrait bien connaître les domaines suivants de la législation provinciale :

- Administration du bien d'autrui
- Bail
- Cession de créance
- Donations, préférences et dispositions frauduleuses
- Dossier de crédit
- Droit des biens, notamment l'indivision et la copropriété
- Droit des compagnies et sociétés
- Droit de la famille
- Droit de rétention

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- Partnership
- Pension Benefit
- Personal Property Security
- Provincial Taxes
- Repair and Storage Liens
- Sale of Goods
- Workers' Compensation

- Droit du travail, notamment les normes du travail et l'organisme responsable de la sécurité au travail
- Exécution forcée et insaisissabilité
- Financement de l'entreprise, notamment le crédit bail
- Hypothèques et sûretés
- Régimes de retraite, rente et assurance
- Taxes provinciales
- Vente, notamment la vente d'entreprise et la vente à tempérament

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APPENDIX C

POLICY ON REINSTATING A LICENCE THAT HAS CEASED TO BE VALID BY REASON OF THE TRUSTEE BECOMING BANKRUPT

A. Purpose

This policy sets out the factors the Superintendent may consider when deciding whether to reinstate the licence of a trustee pursuant to paragraph 13.2(4)*(b)* of the Act.

B. Sources and General Principles

As a general rule, the Superintendent may reinstate the licence of a trustee whose licence has ceased to be valid by reason of the trustee becoming bankrupt (hereinafter "the applicant") only after the discharge of the trustee who administered the applicant's bankruptcy (hereinafter "the administering trustee").

The Superintendent will handle reinstatement applications under paragraph 13.2(4)*(b)* of the Act on a case-by-case basis having regard to the factors set out in Part D.

If the applicant's bankruptcy was the result of fraudulent activities or other willful misconduct, the Superintendent will generally refuse reinstatement of the licence in the interest of protecting the integrity of the bankruptcy and insolvency system.

C. Application Process

A trustee whose licence has ceased to be valid by reason of the trustee becoming bankrupt may apply

ANNEXE C

POLITIQUE SUR LA RÉACTIVATION D'UNE LICENCE QUI A ÉTÉ ANNULÉE EN RAISON DE LA FAILLITE DU SYNDIC

A. Objet

La présente politique énonce les facteurs dont le surintendant peut tenir compte pour décider s'il doit réactiver la licence d'un syndic en vertu de l'alinéa 13.2(4)*b*) de la Loi.

B. Sources et principes généraux

En règle générale, le surintendant peut réactiver une licence qui a été annulée en raison de la faillite d'un syndic (ci-après appelé « le demandeur ») seulement après la libération du syndic qui a administré la faillite du demandeur (ci-après appelé « le syndic administrateur »).

Le surintendant traitera les demandes de réactivation fondées sur l'alinéa 13.2(4)*b*) de la Loi au cas par cas, après avoir pris en compte les facteurs énoncés dans la partie D.

Si la faillite du demandeur est attribuable à des activités frauduleuses ou à toute autre inconduite délibérée, le surintendant refusera généralement la réactivation de la licence afin de protéger l'intégrité du système de faillite et d'insolvabilité.

C. Processus de présentation de la demande

Le syndic dont la licence a été annulée en raison de sa faillite peut demander la réactivation de sa

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for reinstatement of his or her licence by submitting written representations to that effect to the Superintendent.

An applicant must provide an attestation of professional competence showing that he or she has kept up-to-date with developments in the insolvency field, and provide an attestation of good character showing that there have been no breaches, investigations or sanctions against the applicant that may impair public confidence in the bankruptcy and insolvency system.

D. Factors to be Considered

Upon receipt of an application for reinstatement under paragraph 13.2(4)*(b)* of the Act, the Superintendent will consider various factors, which may include, but are not limited to, the following:

a) Factors relating to the period prior to the bankruptcy:

- Causes of the bankruptcy.
- Whether the applicant breached his/her fiduciary obligations.
- Whether the applicant willfully neglected his/her creditors, was financially irresponsible, or whether his/her personal extravagance contributed to the bankruptcy.
- Number, nature and quantum of the applicant's creditors.
- Nature of the applicant's practice (number and type of files).
- History of the applicant's licence and the firm at which the applicant worked.
- Whether the applicant committed any act that is, by its nature, fraudulent or subject to sanction as criminal by a court of competent

licence en présentant au surintendant une demande écrite en ce sens.

Le demandeur doit fournir une attestation de compétence professionnelle démontrant qu'il s'est tenu à jour en ce qui a trait aux développements dans le domaine de l'insolvabilité et fournir une attestation de bonne réputation démontrant qu'il n'a commis aucune contravention, n'a fait l'objet d'aucune enquête ni sanction pouvant compromettre la confiance du public à l'égard du système de faillite et d'insolvabilité.

D. Facteurs à considérer

Sur réception d'une demande de réactivation fondée sur l'alinéa 13.2(4)*b*) de la Loi, le surintendant tiendra compte de divers facteurs, notamment :

***a)* Facteurs relatifs à la période précédant la faillite :**

- causes de la faillite;
- manquement du demandeur à ses obligations fiduciaires;
- négligence délibérée de ses créanciers, irresponsabilité financière et extravagances personnelles ayant contribué à la faillite;
- nombre, nature et montant des créances du demandeur;
- nature de la pratique du demandeur (nombre et type de dossiers);
- antécédents de la licence du demandeur et de la firme auprès de laquelle il a travaillé;
- actes commis par le demandeur qui sont de nature frauduleuse ou pouvant être passibles d'une sanction criminelle par un tribunal

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jurisdiction.

b) Factors relating to the period of bankruptcy:

- Amount of time between the date of bankruptcy and the discharge of the administering trustee.
- Applicant's discharge and any conditions of discharge.
- Whether the administering trustee has been discharged.
- Relative percentage and amount of dividends recovered by creditors.

c) Factors relating to the period following the bankruptcy:

- Whether the applicant will be working with other trustees and will, therefore, be subject to internal control processes and procedures.
- The applicant's financial situation, including cash reserves to enable the applicant to operate the business, if applicable, over a period of time.
- The applicant's controls and reporting over trust accounts.
- Whether the Superintendent believes the applicant is:
  - competent to carry on the practice of a trustee;
  - capable of performing the essential duties associated with his/her employment; and
  - capable of carrying out any business or practice in which the applicant is engaged.
- Other factors, such as references to be submitted by the applicant, and the time period between the discharge of the applicant and the application for reinstatement.

compétent.

***b)* Facteurs relatifs à la période de la faillite :**

- période entre la date de la faillite et la libération du syndic administrateur;
- libération du demandeur et conditions de libération;
- libération ou non du syndic administrateur;
- pourcentage relatif et montant des dividendes recouvrés par les créanciers.

***c)* Facteurs relatifs à la période suivant la faillite :**

- la question de savoir si le demandeur travaillera avec d'autres syndics et sera donc assujetti à des processus et procédures de contrôle interne;
- la situation financière du demandeur, notamment l'encaisse nécessaire à l'exploitation de ses activités, le cas échéant, au cours d'une période donnée;
- les mesures de contrôle et de rapport du demandeur à l'égard des comptes en fiducie;
- la question de savoir si le surintendant croit que le demandeur est :
  - apte à exercer la profession de syndic;
  - capable de remplir les fonctions essentielles liées à son emploi;
  - capable de diriger des activités ou une pratique à laquelle il prend part;
- tout autre facteur, notamment les références présentées par le demandeur et la période écoulée entre la libération du demandeur et la demande de réactivation.

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While the above factors are intended to clarify the basis upon which the Superintendent may decide to reinstate a licence of a trustee whose licence has ceased to be valid by reason of bankruptcy, the Superintendent maintains the ultimate discretion in the matter.

Bien que les facteurs susmentionnés visent à préciser le fondement sur lequel le surintendant peut décider de réactiver la licence d'un syndic qui a été annulée en raison de la faillite de celui-ci, il revient en définitive au surintendant de trancher la question.

The Superintendent may reinstate a licence with or without conditions or limitations, or may refuse the reinstatement application. The applicant will be notified accordingly.

Le surintendant peut réactiver la licence avec ou sans conditions ou restrictions, ou encore peut rejeter la demande de réactivation. Le demandeur sera avisé en conséquence.

Conditions of eligibility - Sec. 13(2)

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(2) The Superintendent, after such investigation concerning an applicant for a licence to act as a trustee as the Superintendent considers necessary, may issue the licence if the Superintendent is satisfied, having regard to the criteria referred to in paragraph 5(4)(d), that the applicant is qualified to obtain the licence.

Non-eligibility - Sec. 13(3)
(3) The Superintendent may refuse to issue a licence to an applicant who is insolvent or has been found guilty of an indictable offence that, in the Superintendent's opinion, is of a character that would impair the trustee's capacity to perform his or her fiduciary duties.
R.S., 1985, c. B-3, s. 13;
1992, c. 27, s. 9;
1997, c. 12, s. 6;
2005, c. 47, s. 9.

Form of licence - Sec. 13.1
13.1 A licence shall
(a) be in the prescribed form;
(b) specify the bankruptcy district or part thereof in which the trustee is entitled to act; and
(c) be subject to such conditions and limitations as the Superintendent considers appropriate and may specify therein.
1992, c. 27, s. 9;
1997, c. 12, s. 7.

Fees payable - Sec. 13.2
13.2 (1) Prior to the issue of a licence, the applicant shall pay such fees as may be prescribed.

Idem - Sec. 13.2(2)
(2) On the December 31 following the day on which a licence is issued, and on December 31 in each year thereafter, the trustee shall pay such fees as may be prescribed.

When licence invalid - Sec. 13.2(3)
(3) A licence ceases to be valid on the failure of the trustee to pay a fee in accordance with subsection (2) or if the trustee becomes bankrupt.

Superintendent may reinstate licence - Sec. 13.2(4)
(4) Where a licence has ceased to be valid by reason of
(a) failure to pay fees, the Superintendent may reinstate it where the trustee pays the outstanding fees together with a prescribed penalty amount and provides a reasonable written explanation of the failure to pay them in accordance with subsection (2); or
(b) the trustee becoming bankrupt, the Superintendent may, on written representations made by the trustee, reinstate the licence subject to such conditions and limitations as the Superintendent considers appropriate and may specify therein.

Suspension or cancellation - Sec. 13.2(5)
(5) A licence may be suspended or cancelled by the Superintendent

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(a) if the trustee has been found guilty of an indictable offence that, in the Superintendent's opinion, is of a character that would impair the trustee's capacity to perform his or her fiduciary duties;
(b) if the trustee has failed to comply with any of the conditions or limitations to which the licence is subject;
(c) if the trustee has ceased to act as a trustee; or
(d) at the request of the trustee.

Notice of intended decision - Sec. 13.2(6)
(6) Notice of an intended decision under subsection (5) shall be in writing setting out the Superintendent's reasons therefor and shall be sent to the trustee at least ten days before the decision takes effect.

Conditions - Sec. 13.2(7)
(7) If a licence ceases to be valid by virtue of subsection (3) or is suspended or cancelled under subsection (5), the Superintendent may impose on the trustee any requirements that the Superintendent considers appropriate, including a requirement that the trustee provide security for the protection of an estate.

Non-application of procedure - Sec. 13.2(8)
(8) For greater certainty, section 14.02 does not apply in respect of a suspension or cancellation of a licence under subsection (5).
1992, c. 27, s. 9;
1997, c. 12, s. 8;
2004, c. 25, s. 12;
2005, c. 47, s. 10.

Conduct of Trustees
Where trustee is not qualified to act - Sec. 13.3
13.3 (1) Except with the permission of the court and on such conditions as the court may impose, no trustee shall act as trustee in relation to the estate of a debtor
(a) where the trustee is, or at any time during the two preceding years was,
(i) a director or officer of the debtor,
(ii) an employer or employee of the debtor or of a director or officer of the debtor,
(iii) related to the debtor or to any director or officer of the debtor, or
(iv) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the debtor; or
(b) where the trustee is
(i) the trustee under a trust indenture issued by the debtor or any person related to the debtor, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the Civil Code of Québec that is granted by the debtor or any person related to the debtor, or
(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Copy of application to Superintendent - Sec. 13.3(1.1)

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(1.1) A trustee who applies for the permission of the court for the purposes of subsection (1) shall without delay send a copy of the application to the Superintendent.

Where disclosure required - Sec. 13.3(2)
(2) No trustee shall act as a trustee in relation to the estate of a debtor where the trustee is already

(a) the trustee in the bankruptcy of, or in a proposal concerning, any person related to the debtor, or

(b) the receiver, within the meaning of subsection 243(2), or the liquidator of the property of any person related to the debtor,

without making, at the time of being appointed as trustee in relation to the estate of the debtor and at the first meeting of creditors, full disclosure of that fact and of the potential conflict of interest.

1992, c. 27, s. 9;
1997, c. 12, s. 9(F);
2004, c. 25, s. 13;
2005, c. 47, s. 11;
2007, c. 36, s. 4(F).

SB Directive: 29R2, Advertising by Trustees
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada
Heritage Place
155 Queen Street
4th Floor
Ottawa, Ontario
K1A 0H5
http://osb-bsf.ic.gc.ca

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada
Place Héritage
155, rue Queen
4e étage
Ottawa (Ontario)
K1A 0H5
http://osb-bsf.ic.gc.ca

Date: APR 30 2010

To: **OSB Staff, Trustees and Registrars**

Subject: **Directive No. 29R2, *Advertising by Trustees***

The Office of the Superintendent of Bankruptcy (OSB) has amended paragraph 6(b) of Directive No. 29, *Advertising by Trustees*, to replace the word "resident" with the word "non-resident." When the Directive was re-numbered and re-issued on August 14, 2009, part of the "non" in "non-resident" was inadvertently dropped in paragraph 6(b) of the English version of Directive. The omission of the word "non" is clearly an oversight since it appeared in paragraph 6 of Directive No. 30R issued on July 23, 1993, on the same topic. This error is also present in the French version of the Directive since the translator used the word "resident" to translate the document.

The omission has been corrected and the first portion of paragraph 6(b) has been replaced by the following: "(b) the advertising of a non-resident trustee office must always include the address of the principal place of business [...]."

Date : 30 AVR. 2010

À : **Employés du BSF, syndics et registraires**

Objet : **Instruction n° 29R2, *Publicité par les syndics***

Le Bureau du surintendant des faillites (BSF) a apporté une modification au paragraphe *6b)* de l'instruction n° 29, *Publicité par les syndics*, afin de remplacer le mot "principal" par le mot "secondaire". Lorsque l'instruction a été numérotée et émise de nouveau le 14 août 2009, la partie « non » du terme « non-resident » a été omise par erreur au paragraphe *6b)* de la version anglaise de l'instruction. L'omission de la partie « non » du terme est clairement une méprise, car elle figure au paragraphe 6 de l'instruction n° 30R émise le 23 juillet 1993 et qui porte sur le même sujet. Cette erreur s'est répercutée dans la version française, car le traducteur a utilisé le terme « principal » dans sa traduction du document.

Cet oubli a été corrigé et la première partie de la phrase au paragraphe *6b)* a été remplacée par ce qui suit : "b) la publicité d'un bureau secondaire de syndics doit inclure l'adresse du lieu d'affaires principal [...]".

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Coming into Force
The Directive No.29R2, *Advertising by Trustees* comes into force on April 30, 2010.

Enquiries
If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

Entrée en vigueur
L'instruction n° 29R2, *Publicité par les syndics* entre en vigueur le 30 avril 2010.

Demande de renseignements
Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

p. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 29R2

ADVERTISING BY TRUSTEES

Issued: APR 30 2010

(Supersedes Directive No. 29 issued on August 14, 2009, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this Directive is to outline the position of the Superintendent concerning advertising by trustees in general.

PUBLICITÉ PAR LES SYNDICS

Date d'émission : 30 AVR. 2010

(La présente instruction remplace et annule l'instruction n° 29 sur le même sujet émise le 14 août 2009)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*;

Autorité et objet

2. La présente instruction est émise en vertu des alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction vise à préciser la politique du surintendant quant à la publicité par les syndics en général.

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Policy

4. When advertising their services, trustees shall always identify themselves as Trustee in Bankruptcy.

5. A trustee shall not advertise, directly or indirectly, in a manner that:

(a) is false or misleading;

(b) contravenes professional good taste or fails to uphold professional courtesy;

(c) reflects unfavourably on the competence or integrity of any trustee;

(d) refers to the trustee as a specialist in a particular industry or area of insolvency, or

(e) involves a statement, the content of which the trustee cannot substantiate.

6. The following guidelines apply in all advertising by trustees:

(a) trustees may advertise their services anywhere in Canada provided that their advertising indicates in which province and/or territory they are licensed, if the advertisement is outside the province and/or territory in which they are licensed;

(b) the advertising of a non-resident trustee office must always include the

Politique

4. Lorsqu'ils annoncent leurs services, les syndics doivent toujours s'identifier en tant que syndic de faillite.

5. Un syndic ne doit pas annoncer ses services, directement ou indirectement, d'une façon qui :

a) soit fausse ou trompeuse;

b) va à l'encontre du bon goût professionnel ou n'observe pas la courtoisie professionnelle de rigueur;

c) peut être perçue comme portant atteinte à la réputation d'un autre syndic;

d) mentionne que le syndic possède une spécialité dans un secteur d'activité ou un domaine particulier de l'insolvabilité; ou

e) énonce une affirmation que le syndic ne peut justifier.

6. Les lignes directrices suivantes s'appliquent à toute publicité par les syndics :

a) Les syndics peuvent annoncer leurs services n'importe où au Canada, mais la publicité doit préciser la province ou le territoire pour lequel ils détiennent une licence lorsque la publicité est fait hors de leur province ou territoire;

b) la publicité d'un bureau secondaire de syndics doit inclure l'adresse du lieu

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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address of the principal place of business from which an individual trustee normally practises and this address must be prevalent in the advertisement;

(c) the advertising of a non-resident office must be done in a manner which will not convey to the public the impression that there is a resident individual trustee in that office;

(d) in advertising, the name of trustees and full-time employees may appear and their status must be identified accordingly (i.e., trustee, estate administrator); and

(e) it is permissible for trustees to use a logo to identify their firm.

7. Asset realization, contributions to the estate by the debtor as well as trustee's fees and expenses are governed by the Act, Rules, individual circumstances and orders of the Court. As these amounts are not predictable, it is difficult to conceive that this type of publicity would not be misleading. In any event, if charges and/or expenses are advertised, it must be done in conformity with the provisions of this Directive and with the standards described in Appendix A.

8. Subject to Directive No. 15, *Trustee Consultation Fees in Bankruptcies and Proposals*, it is acceptable for a trustee to advertise his or her fees in respect of a preliminary or initial consultation prior to bankruptcy.

d'affaires principal où un syndic particulier exerce normalement ses fonctions et cette adresse doit prédominer dans la publicité;

c) la publicité d'un bureau secondaire ne doit pas donner l'impression au public qu'un syndic résidant y travaille à temps plein;

d) le nom des syndics et de leurs employés à temps plein peut paraître dans la publicité, mais leurs fonctions doivent être précisées (p. ex., syndic, administrateur); et

e) les syndics peuvent se servir d'un « logo » pour identifier leur bureau.

7. La réalisation des biens, les contributions à l'actif par le débiteur ainsi que les honoraires et débours du syndic sont régis par la Loi, les Règles, les circonstances individuelles et les ordonnances du tribunal. Comme ces montants ne peuvent être déterminés à l'avance, il serait difficile de concevoir une telle publicité qui ne serait pas trompeuse. Quoi qu'il en soit, si une publicité devait porter sur les charges ou déboursés, elle devra respecter les dispositions de la présente instruction et les normes de pratiques énoncées à l'annexe A.

8. Sous réserve de l'instruction n° 15, *Honoraires de consultation du syndic dans les faillites et les propositions*, il est acceptable pour un syndic d'annoncer le montant de ses honoraires pour une rencontre ou une consultation initiale avant la faillite.

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9. The issuance of this Directive does not affect trustees registered under the Bankruptcy Assistance Program who participate in the said program by reason of a previously granted exemption.

Coming into Force

10. This Directive comes into force on April 30, 2010.

Enquiries

11. For any questions pertaining to this Directive, please contact your local OSB office.

9. L'émission de la présente instruction n'affecte pas les syndics inscrits au Programme d'accès à la faillite qui participent à ce programme en raison d'une exemption obtenue antérieurement.

Entrée en vigueur

10. La présente instruction entre en vigueur le 30 avril 2010.

Demandes de renseignements

11. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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APPENDIX A

Canadian Association of Insolvency & Restructuring Professionals' (CAIRP) Bulletin on Compliance in Advertising (October 2000)

(Issued by the Professional Conduct Committee (PCC) in order to put all members and trustees on notice that several practices do not conform to the Directives and CAIRP's Rules)

1. **False Names:** It is the opinion of the PCC that placing an extra "A" in front of a firm's name contravenes paragraphs 5(a) and 5(b) of the Superintendent's Policy Statement 30R - Advertising by Trustees *(now subsection 5(a) and (b) of Directive No. 29)* and violates CAIRP's Rules as it is false advertising. Similarly, a standalone alphabetical listing under a name different from the firm's licensed name is unacceptable; *i.e.*, "Bankruptcy Boutique".

2. **Principal Office:** Another common fault that the PCC has found with advertising is that the principal place of business is not indicated where a firm lists several addresses but does not have a resident trustee at each of the locations listed in the ad. It would be acceptable to say "by appointment only" where the address is for a satellite or non-resident office. The wording of Directive No. 30R, paragraph 6 (c) *(now subsection 6(c) of Directive No. 29)* provides the best guidance as to what is intended by the Directive, "It should not convey to the public the impression that there is a resident individual trustee in that office."

One member has dealt with this very clearly by showing "Mr. CIRP trustee in bankruptcy" at his address and "Ms. EA, estate administrator" at his non-resident office address.

3. **Exclusive Headings:** The Superintendent's Directive requires that trustees must identify themselves as "trustee in bankruptcy" in their advertising. Several members have said that this is redundant when they are listing themselves under a Yellow Pages or a newspaper heading such as "bankruptcies - trustees", which is reserved only for trustees. On the other hand, trustees have complained to CAIRP that non-trustees have been allowed to place ads in these sections. As a result, the PCC has come to the conclusion that the requirement to use "trustee in bankruptcy", as required by Directive No. 30R *(now Directive No. 29)* should remain in this Directive. At the same time, it will be writing to the Yellow Pages Publishers to ask them to refuse any ads for this section unless the advertiser is identified as "trustee in bankruptcy". This will make it much easier to prevent non-trustees from advertising in these sections. Until now, the ads have been removed after the fact.

4. **Estate Administrators:** In keeping with the principle that the "bankruptcies- trustees" section is exclusively for trustees, the PCC asks that you remove any individual listings for estate administrators.

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5. Photos: Photos of office staff or models without using names are acceptable. When names are used in the ad, the status and full name of the employee must be included. Most trustees take appointments under their corporate licence. When they put in their photo and feature their name prominently in a display ad, the name of their firm must be included.

6. Internet Listings: Internet listings constitute advertising and the content must comply with advertising standards.

7. Practical Experience: When ads refer to years of experience, the number of years should refer to the number of years the trustee has held his or her licence.

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ANNEXE A

Bulletin de l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation (ACPIR) sur la conformité en matière de publicité (octobre 2000)

(Présenté par le Comité de la conduite professionnelle [CCP] afin d'informer tous les membres et syndics de l'existence de plusieurs pratiques qui ne respectent pas les directives ou instructions et les Règles de l'ACPIR.)

1. **Faux noms :** Le CCP estime que l'ajout d'un « A » supplémentaire devant le nom d'un cabinet va à l'encontre des alinéas 5a) et b) de l'énoncé de politique 30R du surintendant - Publicité des syndics *(maintenant les paragraphes 5 a) et b) de l'instruction n° 29)*, ainsi que des règles de l'ACPIR/CAIRP, car il s'agit de fausse publicité. De la même façon, une inscription alphabétique isolée sous un nom différent de celui pour lequel le cabinet détient une licence, p. ex. « Bankruptcy Boutique » est inacceptable.

2. **Bureau principal :** Il arrive souvent qu'un cabinet énumère plusieurs adresses dans son annonce sans donner celle de son principal établissement alors qu'il ne compte pas parmi ses membres un syndic résidant à chacun des endroits énumérés, ce qui constitue une faute. Lorsque l'adresse concerne un bureau satellite ou secondaire, l'ajout des mots « sur nomination seulement » serait acceptable. Il convient à cet égard de se reporter à l'alinéa 6c) de la Directive 30R *(maintenant paragraphe 6 c)de l'instruction n° 29)*, qui indique le mieux l'intention sous-jacente à la politique : « Elle ne doit pas donner l'impression au public qu'un syndic résidant y travaille à temps plein. »

Un membre a été très clair dans sa publicité en utilisant les mots « M. CIRP, syndic de faillite » pour l'endroit où il réside et les mots « M™ AE, administratrice d'actifs » pour son bureau secondaire.

3. **Rubriques exclusives :** Selon la Directive du surintendant, les syndics sont tenus de se désigner à titre de « syndic de faillite » dans leur publicité. Plusieurs membres ont souligné que cette façon de procéder est redondante lorsqu'ils s'inscrivent sous une rubrique des Pages Jaunes ou d'un journal comme « Faillites - syndics », qui est réservée uniquement à l'usage des syndics. Par ailleurs, certains syndics se sont plaints à l'ACPIR/CAIRP du fait que des personnes qui ne sont pas syndics ont été autorisées à publier des annonces sous ces rubriques. Le CCP en est donc arrivé à la conclusion que l'obligation d'utiliser la désignation « syndic de faillite » conformément à la Directive 30R *(maintenant l'instruction n°29)*devrait demeurer en vigueur. Au même moment, il écrira aux éditeurs des Pages Jaunes pour leur demander de refuser de publier toute annonce sous cette rubrique, à moins que l'annonceur ne soit désigné par les mots « syndic de faillite ». Si cette façon de procéder est utilisée, il sera beaucoup plus facile d'empêcher les personnes qui ne sont pas syndics de s'annoncer sous ces rubriques. Jusqu'à maintenant, les annonces ont été retirées après coup.

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4. Administrateurs d'actifs : Compte tenu du principe selon lequel la section « Faillites - syndics » est réservée exclusivement à l'usage des syndics, le CCP vous demande de retirer toute inscription individuelle qui concerne les administrateurs d'actifs.

5. Photographies : Il est permis de publier des photographies du personnel de bureau ou de mannequins sans utiliser les noms. Lorsque les noms figurent dans l'annonce, le poste et le nom au complet de l'employé doivent être indiqués. La plupart des syndics acceptent des mandats en application de leur licence de syndic constitué en société. Lorsqu'ils publient leur photographie et placent leur nom en évidence dans une annonce, le nom de leur cabinet doit également figurer dans celle-ci.

6. Inscriptions dans une page ou un site web : Les inscriptions figurant dans une page ou un site web constituent une forme de publicité et le contenu doit respecter les normes relatives à la publicité.

7. Expérience pratique : Lorsque le nombre d'années d'expérience est indiqué dans les annonces, ce nombre devrait correspondre au nombre d'années au cours desquelles le syndic a détenu sa licence.

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SB Directive: 28, Non-resident (trustee) Offices
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 28

NON-RESIDENT OFFICE

Issued: August 14, 2009

(Supersedes Directive No. 29 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"non-resident office" means an office that is in operation and where there is no individual trustee on the premises on a full-time basis;

"OSB" means the Office of the Superintendent of Bankruptcy;

"resident office" means the principle place of business from which the trustee normally practises.

LES BUREAUX SECONDAIRES DE SYNDICS

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 29 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« bureau principal » signifie le principal établissement d'où le syndic exerce normalement ses activités;

« bureau secondaire » désigne un bureau exploité sans qu'il y ait un syndic particulier dans le bureau sur une base permanente;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*.

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Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this Directive is to outline the position of the Superintendent regarding the use and operation of a non-resident office by trustees.

Policy

4. If a trustee wishes to operate out of a location other than his or her resident office, he or she must apply for the registration of the non-resident office.

5. This application is made, in writing, to the designated Senior Bankruptcy Analyst responsible for the area in which the non-resident office will be located.

6. This application shall meet the requirements of Directive No. 13R2, *Trustee Licensing*, relating to individuals or corporations.

7. The responsibility for authorizing the registration of a non-resident office rests with the designated Senior Bankruptcy Analyst.

8. To authorize the operation of a non-resident office where the trustee does not maintain any staff but provides professional services on a regular basis, the designated Senior Bankruptcy Analyst must be satisfied that:

(a) the trustee has adequate facilities to receive the public,

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction vise à exposer la position du surintendant en ce qui concerne l'exploitation d'un bureau secondaire par les syndics.

Politique

4. Lorsqu'un syndic désire faire affaire dans un bureau autre que son bureau principal, il doit faire une demande d'enregistrement de ce bureau secondaire.

5. La demande doit être faite par écrit à l'analyste principal des faillites désigné responsable de la région dans laquelle le bureau secondaire sera situé.

6. Une telle demande doit satisfaire aux exigences de l'instruction n° 13R2, *Délivrance des licences de syndic*, applicable aux particuliers ou aux corporations.

7. La responsabilité d'autoriser l'enregistrement d'un bureau secondaire incombe à l'analyste principal des faillites désigné.

8. Pour autoriser un syndic à exploiter un bureau secondaire où le syndic n'a pas d'employés mais où il fournit des services professionnels de façon régulière, l'analyste principal des faillites désigné doit être convaincu :

a) que le syndic dispose d'installations satisfaisantes

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to conduct interviews and to hold meetings of creditors; and

(b) all files are kept in the trustee's resident office.

9. To authorize the operation of a non-resident office where the trustee maintains his or her own staff, the designated Senior Bankruptcy Analyst must be satisfied that:

(a) the trustee has adequate facilities to receive the public, to conduct interviews and to hold meetings of creditors;

(b) there are proper internal controls over the operation of the non-resident office;

(c) if there is more than one licensed trustee in the resident office, one specific trustee is identified as the trustee responsible for the non-resident office;

(d) there is proper supervision of estates and the books, records and documents relating to the administration of estates by the trustee in charge of the non-resident office;

(e) a trustee will personally attend the non-resident office on a periodic basis;

pour recevoir le public, mener des entrevues et tenir des assemblées de créanciers; et

b) que tous les dossiers sont conservés au bureau principal du syndic

9. Pour autoriser l'exploitation d'un bureau secondaire où le syndic a en place son propre personnel, l'analyste principal des faillites désigné doit être convaincu :

a) que le syndic dispose d'installations satisfaisantes pour recevoir le public, mener des entrevues et tenir des assemblées de créanciers;

b) que l'exploitation du bureau secondaire fera l'objet de contrôles internes adéquats;

c) lorsque le bureau principal compte plus d'un syndic titulaire d'une licence, qu'un syndic particulier sera désigné comme syndic responsable du bureau secondaire;

d) que le syndic responsable du bureau secondaire exercera une surveillance adéquate des actifs ainsi que des livres, registres et documents concernant l'administration de l'actif;

e) qu'un syndic se rendra personnellement au bureau secondaire sur une base périodique;

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(f) the maintenance of the files in the non-resident office will not adversely affect the administration of estates; and

f) que le maintien des dossiers dans le bureau secondaire ne nuira pas à l'administration des actifs; et

(g) the administration of an estate from the non-resident office does not cause additional costs for an estate.

g) que l'administration de l'actif à partir du bureau secondaire n'entraînera pas de frais supplémentaires pour l'actif.

10. A trustee may advertise the existence of the non-resident locations but this advertisement must be in accordance with the provisions of Directive No. 29, *Advertising by Trustees*.

10. Un syndic peut annoncer l'existence d'un bureau secondaire. Cependant, une telle publicité doit être conforme aux exigences de l'instruction n° 29, *Publicité par les syndics*.

11. Before registering a non-resident office pursuant to paragraphs 8 or 9 of this Directive, the designated Senior Bankruptcy Analyst will consider the overall performance of a trustee in the administration of his or her estates.

11. Avant d'enregistrer un bureau secondaire conformément aux paragraphes 8 ou 9 de la présente instruction, l'analyste principal des faillites désigné tiendra compte du rendement général du syndic dans l'administration des actifs.

12. If the designated Assistant Superintendent is not satisfied with the trustee's overall performance in the administration of his or her estates, he or she may refuse the application for the registration of a non-resident office.

12. Si le surintendant adjoint désigné n'est pas satisfait du rendement général d'un syndic en ce qui concerne l'administration des actifs, il peut refuser la demande d'enregistrement d'un bureau secondaire.

13. If the designated Assistant Superintendent is not satisfied with the trustee's professional services provided in a non-resident office, he or she may cancel the registration of an existing non-resident office.

13. Lorsque le surintendant adjoint désigné n'est pas satisfait des services professionnels qu'un syndic offre dans un bureau secondaire, il peut annuler l'enregistrement d'un bureau secondaire déjà établi.

14. If the designated Assistant Superintendent takes any measure under paragraphs 12 or 13 of this Directive, a trustee affected by such measure may make representations to the Superintendent.

14. Lorsqu'un surintendant adjoint désigné prend une mesure énoncée aux paragraphes 12 ou 13 de la présente instruction, le syndic visé peut faire des représentations auprès du surintendant.

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Coming into Force

15. This Directive comes into force on September 18, 2009.

Entrée en vigueur

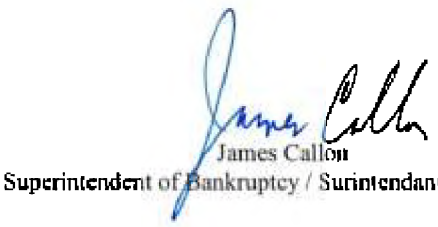
15. La présente instruction entre en vigueur le 18 septembre 2009.

Enquiries

16. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

16. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.



James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Trustee may act for secured creditor s13.4

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13.4 (1) No trustee may, while acting as the trustee of an estate, act for or assist a secured creditor to assert a claim against the estate or to realize or otherwise deal with a security that the secured creditor holds, unless the trustee has obtained a written opinion from independent legal counsel that the security is valid and enforceable against the estate.

Notification by trustee - Sec. 13.4(1.1)
(1.1) Forthwith on commencing to act for or assist a secured creditor of the estate in the manner set out in subsection (1), a trustee shall notify the Superintendent and the creditors or the inspectors

(a) that the trustee is acting for the secured creditor;
(b) of the basis of any remuneration from the secured creditor; and
(c) of the opinion referred to in subsection (1).

Trustee to provide opinion - Sec. 13.4(2)
(2) Within two days after receiving a request therefor, a trustee shall provide the Superintendent with a copy of the opinion referred to in subsection (1) and shall also provide a copy to each creditor who has made a request therefor.
1992, c. 27, s. 9;
1997, c. 12, s. 10;
2004, c. 25, s. 14(E);
2005, c. 47, s. 12;
2007, c. 36, s. 5.

Code of Ethics - Sec. 13.5
13.5 A trustee shall comply with the prescribed Code of Ethics.
1992, c. 27, s. 9;
2005, c. 47, s. 13.

Moses v. Weninger, 2006 ABCA 52 (CanLII) - A Case of Trustee Negligence?

Date:	2006-02-15
Docket:	0501-0219-AC
Parallel citations:	380 AR 230; 55 Alta LR (4th) 37
URL:	http://canlii.ca/t/1mkw7
Citation:	Moses v. Weninger, 2006 ABCA 52 (CanLII), <http://canlii.ca/t/1mkw7> retrieved on 2013-08-27
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Reflex Record	Related decisions, legislation cited and decisions cited

In the Court of Appeal of Alberta
Citation: Moses v. Weninger, 2006 ABCA 52

Date: 20060215
Docket: 0501-0219-AC
Registry: Calgary

Between:
Terry Moses

Appellant

- and -

William Weninger, Richard E. Edwards, ATB Financial (formerly known as Alberta Treasury Branches), Bill Wigley carrying on business as Bill Wigley Auction Services, and BDO Dunwoody Limited

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Respondents

Reasons for Decision of
The Honourable Madam Justice Constance Hunt

Application for Leave to Appeal under Rule 505(6)

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Reasons for Decision of
The Honourable Madam Justice Constance Hunt

[1] The Appellant, Terry Moses ("Moses"), seeks leave pursuant to Rule 505(6) to appeal my November 1, 2005 order ("Order") to a three-member panel. The application is dismissed.

Background

[2] In his Statement of Claim, Moses claimed damages of $700,000, representing his alleged loss of shareholders' equity in a company (which operated as Mr. Tux) of which he was the sole owner and director. He claimed further damages of $300,000 representing the value of his lost opportunity to build on the share value of Mr. Tux. Moses's allegations against the BDO defendants (BDO Dunwoody Limited and its employees Weninger and Edwards) included negligence, breach of contract and professional malpractice in failing to advise him of the commercial proposal provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as amended) (the "*BIA*") and thereafter in their conduct during the ensuing bankruptcy proceedings. He also claimed negligence against all the defendants in the disposal of Mr. Tux's inventory.

[3] Briefly, these claims arose after Moses assigned Mr. Tux into bankruptcy and BDO was appointed trustee. BDO was also appointed receiver by ATB Financial, a creditor of Mr. Tux. BDO contracted with Bill Wigley to liquidate Mr. Tux's inventory.

[4] Moses' Statement of Claim was struck. Neither the Master (who allowed the initial application under Rule 129) nor the Queen's Bench chambers judge who heard the application *de novo* (and ordered the Statement of Claim struck pursuant to Rule 129 and summarily dismissed the action in favour of the defendant pursuant to Rule 159) gave written reasons. Nor was I provided with transcripts of their oral reasons. The respondents suggested that the primary reason for the success of their application was that Moses had no cause of action against them in his personal capacity. Moses appealed the striking of his claim.

[5] Moses applied to stay the enforcement of the costs orders granted below, and the respondents applied for security for costs of the appeal. My Order denied the stay application and awarded security for costs of $10,000 each to the three sets of respondents (Bill Wigley, ATB Financial, and the BDO defendants).

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Leave to Appeal a Single Justice of Appeal's Order

[6] Rule 505(6) of the Alberta Rules of Court provides:

> No judgment given or order made by one justice of appeal shall be subject to any appeal, except by leave of the justice giving the judgment or making the order.

In two cases a judge recused himself from hearing a leave application concerning his own decisions: ***Prefontaine v. Minister of National Revenue*** 2001 ABCA 288 (CanLII), (2001), 293 A.R. 369 (C.A.), 2001 ABCA 288; ***Liu v. Tangirala*** 2005 ABCA 243 (CanLII), (2005), 371 A.R. 71 (C.A.), 2005 ABCA 243. In ***Liu***, he clarified that in ***Prefontaine*** he had not done so on a constitutional basis, but rather because of concerns about an apprehension of bias.

[7] In ***Vysek v. Nova Gas International Ltd.***, 2002 ABCA 112 (CanLII), 2002 ABCA 112, (2002), 303 A.R. 209 (C.A.), another judge observed at para. 17:

> Rule 505(6) imposes a mild form of gate keeping, designed to deploy judicial resources when they are needed to address serious issues and end the costly appeal motion cycle when they are not. This is achieved most efficiently by having the judge who heard the appeal motion consider the leave application, "because of that judge's familiarity with the evidence, the issues and the need for further review": ***Pugh v. Schepanovich*** 1993 CanLII 7292 (AB QB), (1993), 159 A.R. 397 at 400 (Q.B.). Judges have the necessary skills to determine whether a matter they have considered raises an important issue that merits scrutiny by three other judges.

[8] Although additional materials put before the Court by Moses during oral argument make passing reference to ***Prefontaine***, the issue of whether Rule 505(6) gives rise to an apprehension of bias was not seriously pursued. Moses did not ask that I recuse myself. I see no reason to do so.

The Test for Leave to Appeal Under Rule 505(6)

[9] In ***Standards of Review Employed by Appellant Courts***, (Edmonton: Juriliber, 1994), former Justice R. P. Kerans states at pp.70-72:

> The very existence of [a requirement for leave to appeal] indicates that only appeals meeting some standard of worthiness should receive permission to proceed. This standard may be "a matter of general public importance" or it may be "a strong likelihood of success" or any other standard the leave court chooses.
>
> The Ontario Court of Appeal has adopted a fairly explicit leave policy for those cases where leave is required. It has indicated leave will be granted if an "arguable question" arises involving one of these issues:
>
> (a) the interpretation of a statute or Regulation of Canada or Ontario including its constitutionality;
> (b) the interpretation, clarification or propounding of some general rule or principle of law;
> (c) the interpretation of a municipal by-law where the point in issue is a question of public importance;
> (d) the interpretation of an agreement where the point in issue involves a question of public importance.
>
> The Court will of course consider also cases where special circumstances would make the matter sought to be brought before the Court a matter of public importance or would appear to require that in the interest of justice leave should be granted - such as the introduction of new evidence, obvious misapprehension of the Divisional Court of the relevant facts or a clear departure from the established principles of law resulting in a miscarriage of justice.
>
> The outlining of the foregoing criteria is not to say that in cases in which there is clearly an error in a judgment or order of the Divisional Court, it is not the duty of the Court of Appeal to grant leave so that it might correct the error. However, the possibility that there may be error in the judgment or order will not generally be a ground in itself for granting leave.
>
> It would seem that in the second category, more than merely an "arguable" case must be put to the leave judge. The British Columbia Court of Appeal similarly requires, in the case of an interlocutory order "an obvious error."
>
> On the other hand, the leave policy may leave the entire question to the ad hoc judgment of the leave judge, who might even grant open-ended leave, permitting appeal on any issue. With respect, that largely undermines the idea of leave.

[10] The annotation to Rule 505(6) in Stevenson & Côté's ***Alberta Civil Procedures Handbook 2006*** (Juriliber: Edmonton 2006) states that the applicable test to be used in determining whether to grant leave includes "whether there is an issue of law, whether discretion is involved, and whether there is an arguable ground": ***Vysek v. Nova Gas International Ltd.*** 2002 ABCA 136 (CanLII), (2002), 303 A.R. 221 (C.A.), 2002 ABCA 136, at para. 16. In ***R. v. Knight*** 2003 ABCA 114 (CanLII), (2003), 57 W.C.B.

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(2d) 196 (Alta. C.A.), 2003 ABCA 114, Côté J.A. refused to grant leave under R. 505(6) on the ground that "Knight had failed to provide any valid reason for granting leave to appeal. He did not argue any error of law, and there was no important issue raised.".

[11] The Court of Appeal of British Columbia has held that when a panel reviews a decision of a single appeal judge, it should ask "was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts": ***Haldorson v. Coquitlam (City)***, 2000 BCCA 672 (CanLII), 2000 BCCA 672 at para. 7. That Court has also said that a panel should interfere only if "satisfied that the Chambers Judge was wrong in the legal sense and not merely that he exercised a discretion incorrectly": ***Frew v. Roberts***, [1990] B.C.J. No. 2175, (1990), 29 B.C.L.R. (3d) 34 (B.C.C.A) at para. 36. Although these cases deal with the standard of review of the chambers judge by a panel, they inform the question of what test should be applied on a leave application under Rule 505(6).

[12] It is also worthwhile to consider the nature of the decision in regard to which leave is sought. Stays and security for costs orders are both exercises of discretion. Absent an error of law, reasonableness is the applicable standard in reviewing an exercise of discretion: ***Decock v. Alberta*** 2000 ABCA 122 (CanLII), (2000), 255 A.R. 234 (C.A.), 2000 ABCA 122 at para. 13.

[13] Absent a question of general public importance, it is my view that the test governing an application under Rule 505(6) is whether

(i) there is a possible error of law;
(ii) a discretion has been unreasonably exercised; or
(iii) the chambers judge misapprehended important facts.

Parties' Positions

[14] Moses submits that if I do not grant leave he will be denied natural justice. In effect, he says, this will end his appeal. Presumably natural justice will be denied because if he does not have the resources to post security for costs, his main appeal will be dismissed. He also argues that he is prejudiced because "the respondents are aggressively pursuing collection of their trial costs", but adduces no evidence to support this claim. In oral argument he stated that it would be unfair if a lack of resources prevented a person from pursuing an appeal.

[15] His second argument is that in the security for costs application, the respondents did not discharge their burden of proving "special circumstances" because they did not prove he had no assets. On this point, the respondents point to the evidence that no real property registered in Moses's name was found in their search of Alberta Land Titles.

[16] The respondents' position is that there are no grounds for granting leave. They say I applied the correct tests properly. They submit that Moses is not denied natural justice. They question his allegation that impecunious appellants are prevented from having their appeals heard. The safety net, they say, is that if the appellant discharges the burden of proving that the appeal has a reasonable prospect of success, security for costs may not be ordered. It is only absent a reasonable prospect of success of the appeal that an appellant's impecuniosity becomes critical.

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Analysis

A. Stay of Enforcement of Bill of Costs

[17] In determining whether to grant the stay of enforcement, I applied the tri-partite test (***RJR-MacDonald Inc. v. Canada (A.G.)***, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311), which requires the applicant to show:

1. Serious question - Preliminary and tentative assessment of the merits of the case: is it a serious question as opposed to a frivolous and vexatious one?
2. Irreparable harm - Would the applicant suffer irreparable harm (harm that is difficult to compensate in damages) if the stay is refused?
3. Balance of convenience - If the stay is refused, will the applicant suffer greater harm than the respondent would suffer if the stay were granted?

[18] Although my reasons were not explicit on the "serious question" part of the test, I did not conclude that Moses failed on this part of the test. Rather, I concluded that he had not shown irreparable harm.

[19] Irreparable harm refers to the nature, not the magnitude, of the harm. Harm that is unquantifiable in monetary terms is irreparable. Harm is irreparable where damages cannot be collected. Impecuniosity is a relevant factor to consider but is not determinative: ***RJR-MacDonald Inc. v. Canada (A.G.)***.

[20] There can be irreparable harm if refusal to grant the stay renders the appeal nugatory: ***Triple Five Corp. v. United Western Communications*** reflex, (1994), 19 Alta. L.R. (3d) 153 at 155, [1994] A.J. No. 278 at para. 6 (C.A.), motion for a stay of execution dismissed: [1994] S.C.C.A. No. 226.

[21] Having to pay money alone is not irreparable harm: ***Kassian v. Hill*** 2002 ABCA 140 (CanLII), (2002), 303 A.R. 391, 2002 ABCA 140. Proof of irreparable harm may be shown where the amount of the judgment exceeds the ability of the ordinary citizen to repay: ***Edmonton (City) v. Westinghouse Canada Inc.*** (1996), 187 A.R. 153 (C.A.); see also ***Re Evans (Bankrupt)*** (1992), 135 A.R. 46 (C.A.), and ***Costello v. Calgary (City)*** (1995), 178 A.R. 81 (C.A.).

[22] I determined that Moses had failed to provide evidence of irreparable harm. The unpaid taxed costs were in the sums of $13,053 (BDO defendants) and $12,541 (ATB Financial). Presumably Wigley's as-yet untaxed costs would be similar. There is no evidence that if Moses paid these amounts, he would be unable to recover them if he succeeded on his substantive appeal. BDO and ATB are major corporations who would easily be able to repay. There is no evidence that the respondent, Wigley, could not repay the costs if required to do so.

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[23] The only possible argument is that Moses's impecuniosity means that a refusal of his stay application will determine his substantive appeal. As I noted in my reasons at para. 5, no evidence was adduced by Moses in this respect. Even in the most current application he only refers to the "possibility" of his inability to pay. That is not evidence of irreparable harm.

[24] I am satisfied that I properly applied the correct legal test and came to a reasonable conclusion. The test for granting leave is not met in regard to my refusal to grant a stay of the costs order.

B. Security for Costs

[25] In ***Gusky v. Rosedale Clay Products***, [1917] 34 D.L.R. 727 at 728 (Alta. C.A.) it was held that:

> The successful litigant should be entitled to an order for security upon proof of the appellant's poverty unless the appellant satisfies the judge or court to whom the application is made that the case is one in which an appeal may properly be taken with some reasonable prospect of success.

This decision has been cited with approval many times.

[26] The following principles guide the Court in determining whether to grant security for costs: ***Freyberg v. Fletcher Challenge Oil and Gas Inc.*** 2003 ABCA 208 (CanLII), (2003), 330 A.R. 130, 2003 ABCA 208:

- security will not be ordered unless there are special circumstances;
- special circumstances are required for good reason: appellate costs are a small portion of litigation costs and the appellant must pay the bulk of these costs in providing the appeal books;
- there must be some proof that costs may not be recovered or recovered only with great difficulty;
- where there is a reasonable prospect of success on appeal, the application will fail.

[31] One of the factors that may show special circumstances is that a portion of the trial costs remain outstanding: ***Ellis v. Friedland*** 2001 ABCA 45 (CanLII), (2001), 277 A.R. 126 (C.A.), 2001 ABCA 45 at para. 16. If there are special circumstances, the onus shifts to the appellant to establish a reasonable prospect of success on the appeal: ***Ellis v. Friedland***, at para. 16. Ordering a poor appellant to pay security for costs where there is no reasonable prospect of success is not tantamount to a summary dismissal of the appeal: ***Vysek v. Nova Gas International Ltd.*** 2002 ABCA 136 (CanLII), (2002), 303 A.R. 221, 2002 ABCA 136 at para. 20, refusing leave to appeal from 2002 ABCA 5 (CanLII), (2002), 303 A.R. 33, 2002 ABCA 5. There is little prospect of success when the decision under appeal is discretionary, there is no obvious error in the judgment below, and the appellant has twice argued her case and twice lost: ***Sorochan v. St. Albert Protestant Separate School District No. 6***, 2002 ABCA 260 (CanLII), 2002 ABCA 260 at para.9.

[32] A three-member panel of this Court, hearing an appeal of a single judge's security for costs order disagreed that, by upholding the order, "we thus turn our faces away from justice … we do not equate agreeing with [the appellant] with fulfilling our oaths to do justice": ***Sunlife Trust Co. v. Gramaglia*** (1996), 187 A.R. 31 (C.A.) at para. 6, leave to appeal to S.C.C. denied at [1996] S.C.C.A. No. 360.

[33] The respondents' evidence showed that Moses was impecunious. Moses failed to rebut that. He provided no evidence that would lead to a different conclusion, either on November 1, 2005 or on this application. His Notice of Motion in this application simply states that there is the "possibility" that he would be unable to post costs. Given this, the onus of proving a reasonable prospect of success on appeal shifts to Moses.

[34] I have carefully reconsidered whether there is a possible legal error or an unreasonable exercise of my discretion in concluding that he does not have a reasonable chance of success on his appeal, or whether there are other grounds upon which I should grant leave. During the hearing of this application, I specifically asked Moses to explain the merit in his appeal. Nothing he said in reply shed any light on this subject, including that he would have a "fairer chance" in front of three judges. I remain of the view that his prospects for success are dim, because this is not the kind of case where he has a personal action against the respondents.

Conclusion

[35] The application for leave is dismissed. As I indicated during the oral hearing, pursuant to my Order the respondents must apply by notice of motion to have the appeal struck if Moses does not pay the ordered security for costs.

[36] I direct counsel for ATB to prepare the necessary order arising from these Reasons. Rule 323 is waived.

Application heard on February 6, 2006
Reasons filed at Calgary, Alberta
this 15th day of February, 2006

_____

Hunt J.A.

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Appearances:
Terry Moses
for the Appellant
Sean E. Fairhurst
for the Respondent BDO Dunwoody Limited, and
agent for counsel for William Weninger, Richard E. Edwards and Bill Wigley
Douglas S. Nishimura
for the Respondent ATB Financial

Persons disqualified from working for trustee - Sec. 13.6
13.6 A trustee shall not engage the services of a person
(a) whose trustee licence has been cancelled under paragraph 13.2(5)(a) or subsection 14.01(1); or
(b) who is the subject of a direction made by the Superintendent under paragraph 14.03(1)(d).
1997, c. 12, s. 11;
2005, c. 47, s. 13.

SB Directive: 4R, Delegation of Tasks
(see below image pages)

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Directive / Instruction

N° 4R

DELEGATION OF TASKS

Issued: August 14, 2009

(Supersedes Directive No. 4 issued on November 17, 1994, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"administrator" means an administrator of consumer proposals as defined in section 66.11 of the Act;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*;

"trustee" means a trustee as defined in section 2 of the Act.

DÉLÉGATION DES TÂCHES

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 4 sur le même sujet émise le 17 novembre 1994.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« administrateur » s'entend d'un administrateur de propositions de consommateur, tel que défini à l'article 66.11 de la Loi;

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » désigne la *Loi sur la faillite et l'insolvabilité* (LFI);

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité*;

« syndic » s'entend d'un syndic tel que défini à l'article 2 de la Loi.

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Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraph 5(4)(*b*) of the Act.

3. The purpose of this Directive is to set out the circumstances under which trustees and administrators may delegate certain tasks in the administration of an estate to other individuals. It also lists those tasks that shall be performed by an individual trustee or an administrator.

Policy

4. In delegating tasks, trustees or administrators remain responsible for ensuring that the administration is conducted in a professional and timely manner.

5. Trustees and administrators are required to establish adequate controls in carrying out their statutory duties.

Delegation

6. The following criteria shall be considered in determining which tasks may be delegated, and to which individual:

(a) the internal control system in the offices of trustees or administrators;

(b) the length of training and the accreditation of the individual; and

(c) the personal knowledge that trustees or administrators have of the

Autorité et objet

2 La présente instruction est émise en vertu de l'autorité conférée par l'alinéa 5(4)*b*) de la Loi.

3. La présente instruction vise à établir les circonstances dans lesquelles les syndics et les administrateurs peuvent déléguer certaines tâches à d'autres individus dans le cadre de l'administration d'actifs. Elle dresse aussi la liste des fonctions qui doivent être exécutées par un syndic ou un administrateur.

Politique

4. En déléguant les tâches, les syndics et les administrateurs doivent s'assurer que l'administration est menée de façon professionnelle et dans les délais fixés.

5. Les syndics et les administrateurs sont tenus d'établir des mesures de contrôle appropriées dans l'exercice de leurs devoirs statutaires.

Délégation

6. Les critères suivants doivent être considérés pour établir les tâches qui peuvent être déléguées et désigner la personne à qui elles peuvent l'être :

a) le système de contrôle interne des bureaux des syndics et des administrateurs;

b) la durée de formation et l'accréditation de la personne;

c) la connaissance personnelle que le syndic ou l'administrateur possède

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individual's experience, capabilities and aptitudes relevant to the tasks in question.

7 The following tasks shall be performed by individual trustees, or administrators where applicable, and cannot be delegated:

(a) accepting an appointment;

(b) chairing meetings of creditors for

i) a Division I proposal;
ii) an ordinary administration bankruptcy; or
iii) a summary administration bankruptcy and Division II proposal where a proven creditor, or the Official Receiver, requests the trustee to chair the meeting;

(c) chairing a meeting of inspectors upon the request of an inspector;

(d) reviewing and signing all cheques drawn on estate accounts;

(e) ensuring that the internal control system is adequate and operational;

(f) reviewing and signing the forms and documents listed in Schedule A; and

(g) other tasks specified by the Act, the Rules or Directives.

sur l'expérience, les compétences et les aptitudes de la personne et ce, par rapport aux tâches en question.

7. Les tâches suivantes doivent être accomplies par un syndic individuel ou, le cas échéant, par un administrateur et elles ne peuvent pas être déléguées :

a) accepter une nomination;

b) présider une assemblée des créanciers pour :
(i) une proposition de la section I;
(ii) une faillite d'administration ordinaire; ou
(iii) une faillite d'administration sommaire et une proposition de la section II lorsqu'un créancier ayant une réclamation prouvable ou le séquestre officiel demande que le syndic préside l'assemblée des créanciers;

c) présider une assemblée d'inspecteurs à la demande de l'un de ces derniers;

d) passer en revue et signer tous les chèques tirés sur des comptes d'actifs;

e) vérifier le système de contrôle interne afin de s'assurer qu'il demeure satisfaisant et opérationnel;

f) passer en revue et signer les formulaires et les documents énumérés à l'annexe A;

g) toute autre tâche précisée par la Loi, les Règles ou les instructions.

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8. Special arrangements may be made with the designated senior bankruptcy analyst regarding the application of this Directive to accommodate unusual circumstances.

Coming into Force

9. This Directive comes into force on September 18, 2009.

Enquiries

10. For any questions pertaining to this Directive, please contact your local OSB office.

8. Des mesures spéciales peuvent être prises par l'analyste principal des faillites désigné afin d'appliquer la présente instruction de façon à répondre aux circonstances inhabituelles.

Entrée en vigueur

9. La présente instruction entre en vigueur le 18 septembre 2009.

Demandes de renseignements

10. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon

Superintendent of Bankruptcy / Surintendant des faillites

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Schedule A

Forms	BIA Sections / Rules	Form Title
7	Subsection 36(1); Rule 56	Application of Former Trustee to Pass Accounts
9	Rule 56	Notice of Former Trustee's Application to Pass Accounts
10	Rule 61	Application of Trustee for Discharge
12, 13, 14	Sections 152 and 155; Rules 62 and 98	Statement of Receipts and Disbursements
16	Rules 65(1)(*c*)(iii) and 101(1)(*d*)	Certificate of Compliance and Deemed Discharge of Trustee or Administrator
29	Paragraphs 50(6)(*b*) and 50.4(2)(*b*)	Trustee's Report on Cash-flow Statement
34	Paragraph 50.4(8)(*b*)	Report of Trustee on Non-filing of Cash-flow Statement or Proposal
38	Paragraph 57(*b*)	Report of Trustee on Refusal by Creditors to Approve Proposal
40	Section 59(1) and paragraph 58(*d*)	Report of Trustee on Proposal
43.1	Subsection 63(6)	Report of Trustee on Annulment of Proposal
46	Sections 65.3 and 66.38	Certificate of Full Performance of Proposal
48	Section 66.14	Report of Administrator on Consumer Proposal
51	Paragraph 66.23(*c*)	Report of Administrator on Consumer Proposal and Conduct of Consumer Debtor
53	Section 66.3(4)	Notice to Creditors and Report to Official Receiver on Annulment of Consumer Proposal of a Consumer Debtor who was not a Bankrupt

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54	Paragraph 66.3(5)(*c*)	Report to Official Receiver on Annulment of the Consumer Proposal of a Consumer Debtor who was a Bankrupt
54.2	Paragraph 66.31(4)(*c*)	Report to Official Receiver on Deemed Annulment of Consumer Proposal of a Consumer Debtor who was a Bankupt
77	Subsection 135(3)	Notice of Disallowance of Claim, Right to Priority or Security or Notice of Valuation of Claim
82	Subsection 170(1)	Report of Trustee on Bankrupt's Application for Discharge
83	Subsections 171(1) and (2)	Report of Trustee under Subsections 171(1) and (2)
84	Subsection 168.1(6) and Paragraph 170.1(4)(*a*)	Certificate of Discharge

Documents (BIA sections)	Description of Document
Subsection 34(2)	Notice of Hearing of Trustee's Report to Court after Three Years
Subsection 50(5)	Report on the Financial Situation of the Debtor and the Cause of the Debtor's Financial Difficulties
Subparagraph 50(10)(*a*)(i)	Report on the State of the Insolvent Person's Business and Financial Affairs when any Material Adverse Change
Paragraph 50(10)(*b*)	Report on the State of the Insolvent Person's Business and Financial Affairs
Paragraph 50.4(1)(*b*)	Consent by the Trustee to Act as Trustee under the Proposal
Subparagraphs 50.4(7)(*b*) (i) and (ii)	Report to the Superintendent and to the Court on the State of the Insolvent Person's Business and Financial Affairs when any Material Adverse Change

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Annexe A

Formulaire	Article ou Règle de la LFI	Nom du formulaire
7	Paragraphe 36(1); Règle 56	Demande d'approbation des comptes par l'ancien syndic
9	Règle 56	Avis de l'ancien syndic d'une demande d'approbation des comptes
10	Règle 61	Demande de libération du syndic
12, 13, 14	Articles 152 et 155; Règles 62 et 98	État des recettes et des débours
16	Règles 65(1)*c*)(iii) et 101(1)*d*)	Certificat de conformité et libération présumée du syndic ou de l'administrateur
29	Alinéas 50(6)*b*) et 50.4(2)*b*)	Rapport du syndic sur l'état de l'évolution de l'encaisse
34	Alinéa 50.4(8)*b*)	Rapport du syndic sur le non-dépôt d'un état de l'évolution de l'encaisse ou d'une proposition
38	Alinéa 57*b*)	Rapport du syndic sur le refus des créanciers d'accepter une proposition
40	Paragraphe 59(1) et alinéa 58*d*)	Rapport du syndic concernant la proposition
43.1	Paragraphe 63(6)	Rapport du syndic concernant l'annulation de la proposition
46	Articles 65.3 et 66.38	Certificat d'exécution intégrale d'une proposition
48	Article 66.14	Rapport de l'administrateur concernant la proposition de consommateur

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51	Alinéa 66.23*c*)	Rapport de l'administrateur concernant la proposition de consommateur et la conduite du débiteur consommateur
53	Paragraphe 66.3(4)	Avis aux créanciers et rapport au séquestre officiel concernant l'annulation de la proposition de consommateur d'un débiteur consommateur qui n'est pas un failli
54	Alinéa 66.3(5)*c*)	Rapport au séquestre officiel concernant l'annulation de la proposition de consommateur d'un débiteur consommateur qui est un failli
54.2	Alinéa 66.31(4)*c*)	Rapport au séquestre officiel concernant l'annulation présumée de la proposition de consommateur d'un débiteur consommateur qui est un failli
77	Paragraphe 135(3)	Avis de rejet d'une réclamation, du droit à un rang prioritaire ou d'une garantie ou avis d'évaluation d'une réclamation
82	Paragraphe 170(1)	Rapport du syndic sur la demande de libération du failli
83	Paragraphes 171(1) et (2)	Rapport du syndic en vertu des paragraphes 171(1) et (2)
84	Paragraphe 168.1(6) et alinéa 170.1(4)*a*)	Certificat de libération

Référence à la LFI	**Description du document**
Paragraphe 34(2)	Avis d'audition et rapport du syndic au tribunal après trois ans
Paragraphe 50(5)	Rapport sur la situation financière du débiteur et sur la cause de ses difficultés financières
Sous-alinéa 50(10)*a*)(i)	Rapport portant sur l'état des affaires et des finances de la personne insolvable lorsqu'il y a un changement négatif important
Alinéa 50(10)*b*)	Rapport portant sur l'état des affaires et des finances de la personne insolvable
Alinéa 50.4(1)*b*)	Acceptation par le syndic d'exercer les fonctions de syndic dans le cadre de la proposition

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Sous-alinéas 50.4(7)*b*)(i) et (ii)	Rapport au surintendant et au tribunal portant sur l'état des affaires et des finances de la personne insolvable lorsqu'il y a un changement négatif important

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SB Directive: 14, Use of Related Persons to Perform Services For Bankruptcy Estates and costs Chargeable to the Estate
(see below image pages)

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Directive / Instruction

N° 14

USE OF RELATED PERSONS TO PERFORM SERVICES FOR BANKRUPTCY ESTATES AND COSTS CHARGEABLE TO THE ESTATE

Issued: August 14, 2009

(Supersedes Directive No. 3R issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"related persons" mean those defined in section 4 of the Act, as well as employees, employers or associates of the trustee and firms in which the above individuals or the trustee may have an interest;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

EMPLOI DE PERSONNES LIÉES POUR EFFECTUER DU TRAVAIL POUR LE COMPTE DE L'ACTIF ET FRAIS IMPUTABLES À L'ACTIF

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 3R sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« personnes liées » désigne les personnes définies à l'article 4 de la Loi, y compris les employés, employeurs ou associés du syndic et des bureaux de syndics dans lesquels les personnes susmentionnées ou le syndic ont un intérêt.

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité*.

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Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

3 The purpose of this Directive is to outline the position of the Superintendent of Bankruptcy concerning the use of related persons to perform services in the administration of the estates and the costs chargeable to the estate.

Policy

4. (a) All charges incidental to the administration of the estates are subject to the provisions of subsection 26(1) of the Act and shall be included as part of the trustee's remuneration in the Statement of Receipts and Disbursements.

(b) All moneys disbursed by the trustee for services provided by related persons shall be claimed as a disbursement and shall be shown as a separate item in the final Statement of Receipts and Disbursements.

5. The reporting of expenses as disbursements and the payment from estate funds for services by related persons without previously obtaining permission from the court contravenes Rule 58(1).

Costs chargeable to the Estate as Disbursements

6. The trustee is entitled to claim as a disbursement, the actual cost incurred in the administration of an estate.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction vise à établir la position du surintendant en ce qui concerne l'emploi de personnes liées pour effectuer du travail dans l'administration de l'actif et les frais imputables à l'actif.

Politique

4. *a*) Tous les frais se rapportant à l'administration de l'actif sont assujettis aux dispositions du paragraphe 26(1) de la Loi et doivent être mclus comme rémunération du syndic dans l'état des recettes et des débours.

b) Les sommes que le syndic a versées à des personnes liées pour la prestation de services doivent être réclamées comme débours et figurer séparément dans l'état définitif des recettes et des débours.

5. La divulgation de dépenses comme débours et le paiement à même les fonds de l'actif pour des services rendus par une personne liée sans l'approbation préalable du tribunal vont à l'encontre du paragraphe 58(1) des Règles.

Coûts imputables à l'actif comme débours

6. Le syndic est en droit de réclamer des débours pour ses dépenses réelles encourues dans le cadre de l'administration d'un actif.

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7. Possible disbursements may include:

(a) travel expenses:
   i) if public transportation is used, the actual cost, and

   ii) if the trustee or the trustee's employees use their private vehicle, reimbursement at a reasonable rate (rate usually paid by employer);

(b) hotel and meal allowances;

(c) long distance telephone calls, including facsimile, at the actual amount charged;

(d) charges for notices and documents to creditors, at an amount not exceeding 50 cents per page;

(e) photocopies, other than those claimed in the preceding paragraph, at an amount not exceeding 50 cents each;

(f) bank service charges; and

(g) storage costs for items other than those referred to under subsection 68(1) of the Rules and in special circumstances where the quantity of the records has resulted in unusually high costs.

8. If the costs in subsections 7 (a) and (b) above relate to more than one estate, the total cost must be divided equally amongst all of the related estates.

9. The trustee may claim as a disbursement the actual costs paid for:

7. Ces débours peuvent inclure :

a) les frais de déplacement :
   (i) lorsque les services publics sont utilisés, le montant réel déboursé, et

   (ii) lorsque le syndic ou ses employés font usage de leur propre véhicule, le remboursement selon un barème raisonnable (le taux habituellement payé par l'employeur);

b) les repas et frais de séjour;

c) le coût réel pour les frais d'appels interurbains, incluant les télécopies;

d) les frais pour avis et documents aux créanciers, à un taux n'excédant pas 50 cents par page;

e) les photocopies autres que celles réclamées au paragraphe précédent à un montant n'excédant pas 50 cents par page;

f) les frais de services bancaires;

g) les frais d'entreposage pour articles autres que ceux dont il est question au paragraphe 68(1) des Règles et dans des cas spéciaux lorsque la quantité de documents amène des coûts plus élevés que la normale.

8. Lorsque les coûts mentionnés aux alinéas 7 *a*) et *b*) ci-dessus se rapportent à plus d'un dossier, ils doivent être répartis également entre tous les dossiers visés.

9. Le syndic peut réclamer le coût réel payé pour les services suivants lorsque le montant a été payé à une personne traitant à distance :

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(a) taking possession,
(b) inspecting assets;
(c) delivering assets;
(d) stock-taking;
(e) investigatory audit;
(f) updating of accounting books and records; and
(g) other similar expenses

a) la prise de possession d'actifs;
b) l'inspection des actifs;
c) la livraison des actifs;
d) la prise d'inventaire;
e) les enquêtes comptables,
f) la mise à jour des livres et registres comptables; et
g) d'autres dépenses similaires.

if the amount paid was made to a person dealing at arm's length.

10. The list of expenses appearing under sections 7 and 9 is not exhaustive, these being the principal expenses requiring clarification.

10. La liste des dépenses figurant aux articles 7 et 9 n'est pas exhaustive, elle fait état uniquement des principales dépenses nécessitant des clarifications.

11. If the work was performed by a related person, the cost must be claimed as a disbursement.

11. Lorsqu'un travail a été effectué par une personne liée, le coût doit être réclamé comme débours.

Costs not chargeable to the Estate as Disbursements

Coûts ne pouvant être imputés à l'actif comme débours

12. If the work was performed by the trustee, the cost must be included in the remuneration of the trustee and not claimed as a disbursement.

12. Lorsqu'un travail a été effectué par le syndic, le coût doit être compris dans la rémunération du syndic et ne pas être reclamé comme débours

13. The following costs may not be claimed as disbursements by the estate and/or in the Statement of Receipts and Disbursements as these are overhead costs or costs for "the facilities of the trustee" as defined in Rule 58(3):

13. Les dépenses suivantes ne peuvent pas faire l'objet d'une charge au dossier de l'actif ou à l'état des recettes et des débours car il s'agit de frais généraux ou de dépenses pour « les équipements du syndic » aux termes du paragraphe 58(3) des Règles :

(a) office equipment and furniture;

a) l'équipement et ameublement de bureau;

(b) telephone system, including special features;

b) le système téléphonique, y compris les options particulières;

(c) cellular telephones;

c) les téléphones cellulaires;

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(d) use of office computer equipment, software programs, Internet and other electronic means;

(e) general costs of administration for the office (i.e. rent, insurance, electricity, etc.);

(f) stationery and office supplies;

(g) the cost to the trustee's office to finance the cost of work-in-progress or estate administration; and

(h) storage cost for books, records and documents relating to the administration of the estate as defined under subsection 68(1) of the Rules.

14. There shall be no charges in the Final Statement of Receipts and Disbursements for unforeseen costs or provisions for future costs unless they are shown under specific charges.

Coming into force

15. This Directive comes into force on the day on September 18, 2009.

Enquiries

16. For any questions pertaining to this Directive, please contact your local OSB office.

d) l'usage du matériel informatique de bureau, de logiciels, d'Internet et d'autres moyens électroniques;

e) les frais généraux de l'administration du bureau (p. ex., loyer, assurances, électricité);

f) la papeterie et les fournitures de bureau;

g) les coûts de financement, par le bureau du syndic, des travaux en cours ou des dépenses d'administration au dossier;

h) les frais d'entreposage des livres, registres et documents relatifs à l'administration de l'actif tels que définis au paragraphe 68(1) des Règles.

14. Il ne doit pas y avoir de frais à l'état définitif des recettes et des débours pour imprévus ou provisions pour dépenses futures, à moins que ces frais ne soient imputés aux postes spécifiques.

Entrée en vigueur

15. La présente instruction entre en vigueur le 18 septembre 2009.

Demandes de renseignements

16. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Appointment and Substitution of Trustees

Appointment of trustee by creditors - Sec. 14

14. The creditors may, at any meeting by special resolution, appoint or substitute another licensed trustee for the trustee named in an assignment, a bankruptcy order or a proposal, or otherwise appointed or substituted.
R.S., 1985, c. B-3, s. 14;
1992, c. 27, s. 9;
2004, c. 25, s. 15.

Confederation Treasury Services Ltd., Re, 1995 CanLII 7386 (ON SC) - Court Decision in Instance of Dispute over Identity of Trustee(s) When CCAA Fails

Date:	1995-12-12
Docket:	31-205220
Parallel citations:	37 CBR (3d) 237
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Ontario Supreme Court
Confederation Treasury Services Ltd., Re
Date: 1995-12-12

Re bankruptcy of Confederation Treasury Services Limited
Ontario Court of Justice (General Division) [In Bankruptcy] Farley J.
Heard - December 8, 1995.
Judgment - December 12, 1995.

Lyndon A.J. Barnes, Gordon Marantz and Tristram Mallett, for UBS Limited and Arm's Length Creditors Committee of Confederation Treasury Services Limited.
Harry Fogul, for Province of Ontario.
Ronald N. Robertson, Q.C., and Edmond Lamek for UBS Limited.
William G. Horton and Daniel V. Macdonald, for U.S. rehabilitator of Confederation Life Insurance Company.
Benjamin Zarnett and Gale Rubenstein, for Peat Marwick Thorne Inc., agent to Superintendent of Financial Institutions, provisional liquidator of Confederation Life Insurance Company.
Bruce Leonard and John R. Sandrelli for National Organization of Life and Health Insurance Guaranty Associations.
Charles F. Scott and Ulli Streit for Compcorp.
L.A. Wittlin, for Deloitte & Touche Inc., monitor of Confederation Life Ins. Co. pursuant to Companies' Creditors Arrangement Act.

(Doc. 31-205220)

December 12, 1995. FARLEY J.: –
UBS Limited–"UBS"
Arm's Length Creditors Committee–"ALC Committee"
Confederation Treasury Services Limited–"Treasury"
Province of Ontario–"Ontario"
U.S. Rehabilitator of Confederation Life Insurance Company–"Rehabilitator"
National Organization of Life and Health Insurance Guaranty Associations–"NOLA"

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Confederation Life Insurance Company–"**CLIC**"
Peat Marwick Thorne Inc. Agent to the Superintendent of Financial Institutions, Provisional Liquidator of CLIC–"**Liquidator**"
Deloitte & Touche Inc.–"**Deloitte**"
Richter & Partners Inc.–"**Richter**"
BDO Dunwoody Ltd.–"**Dunwoody**"
Doane Raymond Ltd.–"**Doane**"

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended–"**BIA**"
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36–"CCAA"

[1] Houlden J.A. is supervising the Treasury CCAA proceedings; he lifted the stay for the purpose of my hearing this motion regarding a replacement nominee for the trustee. It is expected that he will lift the stay generally on Dec. 15, 1995 or shortly thereafter once all pressing matters regarding the CCAA proceedings have been dealt with by him. It would then appear that everyone's expectation and desire is that Treasury immediately thereafter be placed in bankruptcy.
[2] UBS (the replacement petitioning creditor in the bankruptcy proceedings) moved to amend the petition to nominate Richter as trustee in bankruptcy in place of Deloitte. It also sought a receiving order against Treasury (appointing Richter as trustee) effective immediately following the termination of the CCAA proceedings. As regards the latter motion, it would seem to me that this should be more appropriately dealt with once the CCAA proceedings have terminated. Mr. Barnes argued on behalf of UBS and the ALC Committee; he was supported by Mr. Robertson also acting for UBS and by Mr. Fogul on behalf of Ontario. Deloitte took no part of the argument; it had previously indicated that it was not willing to stand for appointment as trustee (either as sole trustee or in some joint or shared responsibility capacity) unless it had the endorsement of all three major stakeholders - the ALC Committee, Rehabilitator and Liquidator. The ALC Committee was opposed to Deloitte having a role as trustee. Instead it wished to have Richter, a firm which had done extensive forensic investigation on its behalf in the CCAA proceedings, the investigation being essentially of document review but no interviews or examinations. The substitution of Richter as the trustee nominee was opposed by the remaining participants - Mr. Horton for the Rehabilitator, Mr. Zarnett for the Liquidator, Mr. Leonard for NOLA and Mr. Scott for Compcorp; they preferred that Dunwoody or Doane be the substitute since they submitted that Richter was not impartial in the bankruptcy proceedings given its involvement for the ALC Committee in the CCAA proceedings.
[3] The Rehabilitator has tabled a motion which obstensively was to be heard at the same time as this motion for an order:

> 1. Declaring that the bankruptcy of [Treasury] shall proceed in accordance with the provisions of the Protocol which is attached as Appendix A [to that motion record].
> 2. In the alternative, declaring that section 69.3(1) of [BIA] does not operate with respect to the [Rehabilitator's] claims against [Treasury] as set forth in the draft Statement of Claim attached as Appendix "B" [to that motion record] (the "Ontario Proceedings").
> 3. In the further alternative granting the [Rehabilitator] leave to issue and proceed in the Ontario Proceedings; and
> 4. such further and other relief as to this Honourable Court seems just.

This motion was certainly premature since the stay had not been lifted for that purpose and it presupposed that the trustee in bankruptcy (once Treasury were declared bankrupt) would be preempted from this motion. I found this quite puzzling, especially since this matter had been previously informally canvassed and the same concerns expressed. This motion was adjourned to a more appropriate time once all interested parties had been canvassed. This overall battle amongst the stakeholders has been fought since the beginning of the CCAA proceedings some sixteen months ago. Despite this intimate, intensive and extensive involvement it was candidly volunteered by the Rehabilitator that the matter was complicated beyond any comprehension and that it could not be even described after all this time. Thus in the Michigan material there were claims advanced by the Rehabilitator on the basis of eleven separate (and distinct) grounds. It would not seem that the Rehabilitator is estopped from pleading in the alternative: see (*Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of)* reflex, (1991), 3 O.R. (3d) 129 (Gen. Div.) at pp. 140-1), at least at this stage of the proceedings.
[4] I would also note that the estate is of the magnitude of some $630 million dollars, all of which except approximately $30 million dollars (plus or minus a very wide allowance) is in the form of "cash". Thus while the major percentage of the estate has been liquidated, it is clear that there is a sizeable absolute amount of the number of various types of assets to be gathered in, subject to of course assorted disputes. If this latter role were hived off, it would comprise a major bankruptcy estate by itself.
[5] It would appear that Richter, Dunwoody and Doane are willing to be considered as nominees. Deloitte has removed itself from the running, based upon its unfulfilled condition. Other firms are conflicted out.
[6] Perhaps it is the fact that
(a) the major stakeholders have been warring in a very negative sense for over a year.

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(b) the potential losses for each are quite sizeable, in the hundreds of millions, when each with moral legitimacy looks upon their own "ultimate" situation as an innocent who has been mugged,
(c) there is a great deal of money ($630 million dollars odd) which may be recovered out of the estate.
(d) under certain scenarios it is conceivable that a stakeholder could obtain a benefit before the others and under other scenarios the stakeholder might be shut out from that estate.
(e) tactics may appear at first glance to give more relief (or inflict a negative relief upon the others) than strategies,
(f) stakeholders may be unsure of their comparative positions and interests despite ample opportunity to reflect upon same,
(g) some undisclosed factor(s) or
(h) a combination of some or all of the foregoing,
which has resulted in all concerned attempting to introduce a lot of colour and atmosphere plus premature arguments into these proceedings. I would not think that helpful in the long run, neither for these proceedings in general nor for the interest of the stakeholders so advancing this tinged view of things and trying to set the stage for future battles. However on reflection I trust that counsel and their clients will appreciate that this is unproductive.
[7] The ALC Committee and specifically UBS appear to represent creditors of Treasury who loaned funds to Treasury in a commercial situation, taking the benefits of that loan together with its commercial risk. The other side may to some degree or other have claims against the $630 million dollars which may be in the nature of property or trust claim (or something similar) which I will hereafter describe as a proprietary claim which would take some or all of the $630 million dollars out of the estate (and thus away from the potential dividend to be shared amongst the creditors). There also seems to be the possibility of a claim which although a "creditor claim" within the estate is advanced on the basis that it should enjoy a priority and be paid out before the "ordinary" creditor claims, this priority not being of a temporal nature but rather of a preference nature. I think it fair to observe that the rights and entitlements advanced are not so clear cut that, at least at this stage, it would be inappropriate for any trustee to acquiesce and hand over the funds. Unless there is some compromise achieved, it is painfully obvious that there will be litigation. This litigation may be as to a dispute between the trustee and someone claiming that it has a proprietary right which takes assets out of the estate (see the comments of Goodman J.A. in *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol* 1995 CanLII 1371 (ON CA), (1995), 30 C.B.R. (3d) 90 (Ont. C.A.) at p. 94 or it may be a dispute amongst creditors within the estate (see the views of Ferguson J.A. in *Re Orzy* (1923), 3 C.B.R. 737 (Ont. C.A.) at p. 741 and of Hodgins J.A. at p. 738) or a combination thereof. While the trustee would have an active role in the proprietary claim dispute, it would seem to me on a casual observation of the trustee's role in a dispute between creditors in the estate would primarily be that of a true stakeholder (i.e. in its "original" sense of someone who merely holds the stakes being wagered or fought over as opposed to the "modern" additional sense used by the participants here of someone who claims to have a stake in the outcome of these proceedings) and, as may possibly be required, ensure that the participants observe the rules of the game, even if only on a report basis to the court or by asking for advice and directions.
[8] In this regard and regard and generally the trustee is an officer of the court. As stated in *Houlden and Morawetz, Bankruptcy Law in Canada* (3rd ed. 1995) at pp. 1-61/2:

> The trustee is an officer of the court and should impartially represent the interests of creditors: *Re Roy* (1963), 4 C.B.R. (N.S.) 275 (Que. S.C.). He should act equitably and, as far as possible, hold an even hand between competing interests of various classes of creditors: *Re Reed* (1980), 34 C.B.R. (N.S.) 83, reversing 32 C.B.R. (N.S.) 203 (Ont. C.A.). In bringing proceedings, such as an application to set aside a fraudulent preference, he should not adopt an adversarial or hostile role: *Touche Ross Ltd. v. Weldwood of Canada Sales Ltd.* (1983), 48 C.B.R. (N.S.) 83, additional reasons at 49 C.B.R. (N.S.) 284 (Ont. S.C.). Rather, he should present the relevant facts to the court in a dispassionate, non-adversarial manner, and leave the matter to the court for decision.
>
> ...
>
> The trustee's obligation is to act for the benefit of the general body of creditors, not just the benefit of unsecured creditors. He must not, therefore, act in a manner which is prejudicial and unfair to the interests of secured creditors: *Re Bell's Ltd.: Bank of Montreal v. Touche Ross Ltd.,* 60 C.B.R. (N.S.) 224, reflex, [1986] 4 W.W.R. 211, 48 Sask. R. 241 (Sask. Q.B.).
>
> A trustee in bankruptcy does not function as an agent of the creditors in the ordinary sense, but as an administrative official required by law to gather in and realize on the assets of the bankrupt, and then to divide the proceeds among those entitled thereto in accordance with the scheme set out in the Bankruptcy Act: *Clarkson Co. v. Muir* (1982), 43 C.B.R. (N.S.) 259, 53 N.S.R. (2d) 609, 109 A.P.R. 609 (C.A.).

[9] Mr. Barnes submitted that there were two issues before me – firstly that there was no legal impediment against Richter acting as trustee since there was nothing to prevent a person from becoming such merely because of an association of a nature such as here, where Richter has been acting as a forensic investigator for the ALC Committee (which includes

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representation of UBS) and secondly that Richter is an appropriate person to nominate (and appoint) in the circumstances.

[10] I would observe that Richter does not appear on the material before me to have a problem of possible disqualification pursuant to s. 13.3. of BIA. If there were any potential conflict of interest as set forth in that section, it should disclosed at the time of appointment and at the first meeting of creditors if it falls within s. 13.3(2).

[11] S. 43(9) BIA provides that:

> On a receiving order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court deems just, to the wishes of the creditors.

S. 102(5) BIA states:

> The purpose of the first meeting of creditors shall be to consider the affairs of the bankrupt, to affirm the appointment of the trustee or substitute another in place thereof, to appoint inspectors and to give such directions to the trustee as the creditors may see fit with reference to the administration of the estate.

See also s. 14 and s. 14.04 of BIA. I did not find it helpful for Mr. Fogul to point out that Ontario could lead a move to appoint Richter as trustee at the first meeting of creditors if it were not so appointed as trustee upon the receiving order being made since such action would be, to my mind, quite inappropriate if I were to determine in this motion that Richter were for some reason "disqualified" in the circumstances.

[12] In *Re Quinte Nurseries Ltd.* (1982), 41 C.B.R. (N.S.) 156 (Ont. S.C.) at p. 160 Saunders J. observed:

> The choice of trustee is for the creditors and, in my opinion, the nominee of the petitioning creditor should be appointed pending the first meeting of creditors when the final determination will be made.

I would be of the view that Registrar Ferron's opening words in *Re Batteries Included, Inc.* (1987), 67 C.B.R. (N.S.) 123 (Ont. S.C.) at p. 123:

> The court is not bound to appoint a trustee named in the petition by the petitioning creditor, nor is the official receiver required to
> appoint a trustee named by the debtor as the assignee in an assignment.

must be taken in context. In that case he went on to examine the various reasons why he appointed another trustee than the one nominated by the petitioning creditor (recognizing this was an interim appointment until the first meeting of creditors). He observed at p. 124:

> I chose to appoint Yale, Kline, Geary Limited as the trustee in place of Collins Barrow Limited, named in the petition for several reasons, none of which have anything to do with competency and integrity.
>
> In my opinion, in this instance Yale, with whom the debtor filed its assignment, is in a better position to administer the estate. That firm has already been involved in a watching brief for a secured creditor, and has a fairly extensive knowledge of the debtor company.
>
> In addition Yale has identified the company's assets and liabilities, and has in fact prepared a preliminary statement of affairs which accompanied the assignment. That work will not now have to be duplicated.
>
> Further, four creditors of the debtor have expressed a preference for Yale, I suppose because of the above factors, and their wishes should at least be given some standing in the matter.
>
> Finally, there is a suggestion that the debt owing to petitioning creditor is disputed. It seems to me that it would not be appropriate in these circumstances to appoint Collins Barrow Limited as trustee because of the potential for conflict.

This fits within the philosophy of *Re Drash* (1930) 38 O.W.N. 295 (C.A.) at p. 296. See also *I. Caron Ltd. v. Robin Hood Mills Ltd.* (1935), 17 C.B.R. 101 (Que. S.C.) at p. 102.

[13] Houlden J.A. for the court in *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.) said at p. 86:

> ...Unless this inquiry is carried out, the credit union may be dealt with unfairly. A trustee in bankruptcy should act equitably and so far as possible hold an even hand between the competing interests of various classes of creditors. As James L.J. said in *Re Condon; Ex parte James* (1874), 9 Ch. App. 609 at 614 (L.JJ.):
>
> "I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors."

See also my view in *Re Rizzo Shoes (1989) Ltd.* 1995 CanLII 7361 (ON SC), (1995), 29 C.B.R. (3d) 270 (Ont. Gen. Div. [Commercial List]) at pp. 277-8 including my observation:

I think it also fair to observe that in deciding whether or not the trustee has acted properly the court must be careful to judge the trustee's conduct in light of the circumstances as they existed at the time the trustee performed the act or made the decision: see *Cocks v. Chapman,* [1896] 2 Ch. 763 at 777 (C.A.).

[14] A trustee may be removed for cause: see *Houlden and Morawetz, supra,* at p. 1-52 where the authors observe:

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"Cause" means misconduct, fraud, dishonesty, becoming bankrupt or otherwise incapable of acting as a trustee: *Re Herman* (1930), 11 C.B.R. 239 at 246. Cause is not, however, restricted to dishonest conduct; misconduct short of dishonesty is sufficient: *Re Bryant Isard* (1923), 4 C.B.R. 41, 24 O.W.N. 597 (S.C.).

Cause exists: (a) if there is conduct showing that it is no longer fit that a person should continue as trustee; (b) if there is a danger to the estate property; (c) if there is a want of reasonable fidelity; (d) if circumstances prevent the creditors from working in harmony with the trustee; (e) if the trustee cannot act impartially; (f) if there has been an excess of power by the trustee; (g) if there has been a lack of *bona fides* by the trustee; or (h) if there has been unreasonable conduct by the trustee in relation to the bankrupt estate. The main principle upon which the jurisdiction of the court is exercised in ordering the removal of the trustee, is the welfare of the creditors and of the bankrupt estate. The trustee must not undertake a duty and put himself in a position that is in conflict with his duty as trustee, or act in a manner that is inconsistent with that duty. If the trustee has placed himself in a position of conflict, he cannot continue as trustee; he must resign or be removed by the court; *Re Commonwealth Investors Syndicate Ltd.* (1986), 61 C.B.R. (N.S.) 147, 69 B.C.L.R. 346 (S.C.)', additional reasons at (1986), 62 C.B.R. (N.S.) 308 (B.C.S.C.). In the *Commonwealth* case, the trustee was removed because he had improperly delayed the winding up of the bankrupt estate for several years.

...

Even if a trustee is not dishonest, the court, if it is of the opinion that he has not acted in the best interests of creditors and that he cannot act in concord with the inspectors, may remove him and appoint a new trustee: *Re Gauthier Lumber Ltd.; Vanasse Tire Ltd. v. Tardif* (1960), 1 C.B.R. (N.S.) 127 (Que. S.C.).

Where a trustee wishes to be relieved of its duties as trustee in bankruptcy, the court can appoint a substitute under s. 14.04. "Cause", in s. 14.04, embraces a trustee who is incapable of acting for any reason: *Re Philip's Manufacturing Ltd.* 1992 CanLII 458 (BC SC), (1992), 16 C.B.R. (3d) 127 (B.C.S.C.). Where it would be difficult for a trustee to act impartially and impossible for it to sue itself, a substitute trustee will be appointed: *Re Philip's Manufacturing Ltd.,* supra.

In *Re Bryant, Isard & Co., supra,* Fisher J. was quite caustic with his comments about the actions of the trustee, he said at p. 52 [C.B.R.]:

I find the trustee guilty of misconduct and abuse of his office in making these payments and retaining the cheques.

...

The trustee who is an officer of the Court, has no right to make free with creditors' moneys committed to his charge.

However he did not remove the trustee, although he sanctioned the trustee with making the estate good on the inappropriate payment and indicated that his order was without prejudice to the creditors removing the trustee. Fisher J. in doing so observed at p. 53:

The Court, on an application to remove a trustee for cause, exercises a judicial discretion. The sole question for me to determine in this case is whether there is in the evidence submitted, sufficient cause shewn that the trustee, J.L. Thorne, is unfit to be continued as trustee in the administration of this estate. The estate is a large one, with many important and complicated business problems to solve before the estate can be finally wound up, and while it is the duty of the Court to vindicate the law but in doing so to abstain if possible from injury to those who are vitally, and beneficially interested, to inflict a needless injury on them and vindicate some legal principle should be avoided. Here to transfer the administration of the estate would involve the necessity of a large additional expense, and delay. Therefore, notwithstanding my findings, I will not adopt the extreme course of removing the trustee from office for the following reasons:

(1) It would add to the great expense already incurred in this estate.

(2) The trustee is conversant with the estate, and is in a much better position than a new trustee would be in assisting the Crown authorities in the pending criminal proceedings against N.P. Bryant, and also in the civil actions awaiting trial; and

(3) The creditors at the meeting of December 4, 1922, and the inspectors at the meeting in May, 1923, were not in favour of removing the trustee, and counsel representing Ottawa, Toronto and Montreal creditors urged before me that it the wish of their clients that the trustee should not be removed, but if what has come to light on this application should lead the creditors to change their opinions they have power to do so under the Act. An authorized trustee, as I have pointed out, is an officer of the Court and must administer the estate in his charge in accordance with *The Bankruptcy Act.*

So to in appointing a trustee the Court is exercising a judicial discretion. No one should take too lightly the burdens and responsibility of securing such an appointment. The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate. Miquelon J. in *Re Gauthier*

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Lumber Ltd. (1960), 1 C.B.R. (N.S.) 127 (Que. S.C.) said at pp. 135-6:

> On ne peut certes pas affirmer que l'intimé a été malhonnête. Par ailleurs, la Cour ne peut non plus dire qu'il a été un gérant impartial, chargé qu'il était par la loi, de protéger les intérêts de tous les créanciers. Les créanciers garantis sont généralement en état de se protéger et leurs intérêts sont assez souvent contraires à ceux des créanciers ordinaires. Ce sont ceux-ci que le syndic représénte d'abord et ils ont droit à ce que la conduite d'un syndic solt au-dessus de tout soupçon.

[15] McQuaid J. in *Prince Edward Island v. Bank of Nova Scotia* (1988), 70 C.B.R. (N.S.) 209 (P.E.I. T.D.) reversed on other grounds (1989), 77 C.B.R. (N.S.) 113 (P.E.I. C.A.) had concerns about the propriety of appointing a former privately appointed receiver-manager as trustee. His concerns would appear to be expressed as part of his decision in an obiter fashion when he said at p. 220:

> It is clear that, immediately upon his appointment, the trustee in bankruptcy is in full, complete and exclusive control of the bankrupt business and all of the assets thereof, to the total exclusion of the owner, operator or manager of the business. I think it may be said that those erstwhile functionaries, whatever their capacity might have been, become functus upon that appointment. This would clearly include any receiver-manager who might have been in place at the time of the bankruptcy.
>
> It is the duty of the trustee, who is an officer of the court, to represent impartially the interests of all creditors; he is obligated to hold an even hand as between competing classes of creditors; he must act for the benefit of the general body of creditors; he is not an agent of the creditors, but an administrative official required by law to gather in and realize on the assets of the bankrupt and to divide the proceeds in accordance with the scheme of the *Bankruptcy Act* among those entitled. And perhaps most importantly, he must conduct himself in such a manner as to avoid any conflict, real or perceived, between his interest and his duty.
>
> *While it may not be incompatible with the scheme of the Bankruptcy Act, or, indeed, with the role of the trustee in bankruptcy, the propriety of appointing the former receiver-manager as trustee is a matter of serious import. The two functions are certainly incompatible, if not in actual conflict.*
>
> As in this instance, the receiver-manager is, in fact, the nominee of the major creditor, put into place as the watchdog on behalf of that creditor, essentially to preserve and hopefully to realize upon the assets of the business for the benefit of that creditor albeit as the agent of the company. That is normal, prudent business practice, not to be criticized, and something which happens regularly in the world of commerce.
>
> On the other hand, the trustee, who is in actuality an officer of the court, rather than a single creditor's nominee, must represent all creditors, and ensure that conflicting interests are resolved equitably. He must not only act without interest or bias, but must be clearly perceived to be acting without interest or bias.
>
> That perception may be difficult to maintain when he who yesterday was the man of a single creditor must today act, and be seen to act, as the man of all creditors. (Emphasis added).

As seen by the emphasized words he recognizes that such an appointment may not be incompitable with the BIA or the role of a trustee. It would appear on a reading of the case that McQuaid J. was concerned about there were aspects in which as a receiver-manager representing the interests of a secured creditor the firm in question was not recognizing various aspects which it should have as trustee. For instance he states at pp. 221-2:

> ...It is inconceivable to me that Doane Raymond would not know that Doane Raymond was sitting on a cash deposit representing the assets of the firm whose bankruptcy it was administering.
>
> I find it equally difficult to believe that "the funds realized from the sale by the Receiver [i.e., the corporate entity of Doane Raymond] of the assets of Island Jewellers were paid to the Bank without the participation or consent of the Trustee in Bankruptcy [i.e., the corporate entity of Doane Raymond]". Is the local office that large that the right hand does not know what the left hand is doing?

[16] In *Federal Trust Co. v. Frisina* (1976), 20 O.R. (2d) 32 (S.C.) Galligan J. raised the question of perception or appearances as to a court appointed receiver-manager (i.e. one which was appointed by the court and not privately) when he observed at p. 35:

> Whatever may be required of a person whom a Court will appoint as receiver-manager of a property I think that such a person must be reasonably competent to perform the duties entrusted to him and must be disinterested and impartial so as to be able to deal with the rights of all persons with an interest in the property in a fair and even-handed manner. It ought to be remembered that a receiver-manager appointed by the Court under s. 19 of the *Judicature Act,* becomes an officer of the Court and is therefore very different from a person appointed manager by a mortgagee in possession. That person is simply the agent of the mortgagee.
>
> I think it follows that not only must the receiver-manager appointed by the Court be impartial, disinterested and able to deal with the rights of all interested parties in a fair and even-handed manner, but he ought to appear to have those qualities.

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> A good part of the argument on the motion was taken up with a discussion of the relative competence of Geisel and Lousbury. If all else were equal, it would seem to me to be sensible to appoint that person whom the Court thought to be the more competent. In this case, it seems that both have sufficient competency to perform the duties of a receiver-manager, but because of the view I take of the case it is unnecessary for me to weigh the relative competence of them.
>
> The evidence discloses two facts that in my opinion seriously mar the appearance of impartiality and disinterestedness which I think Geisel ought to have if he is to be appointed the receiver-manager. I do not intend to cast aspersions upon him by suggesting that, in fact, he would not act impartially and be disinterested, but I do not think he ought to be appointed if circumstances exist which would raise in the mind of a reasonable and intelligent man a real apprehension that he lacked impartiality and disinterestedness.

However it is important to appreciate that the test here is of a reasonable and intelligent man, i.e. one who is objective and who has been informed of all material facts. However in that case it was determined that the receiver-manager in question, as an officer of the court would not pass muster on such an objective test since he had a close and direct business relationship with the second mortgagee applicant as he owed that trust company five million dollars and further that he owned a building which would be in direct competition for tenants with the building which was the subject of the receivership.

[17] Thus there would appear to be healthy objective reasons for scepticism about the impartiality appearances in both *Federal Trust* and *Prince Edward Island, supra,* based on actual financial competition and *Federal Trust* and the incapatibility of simultaneously being involved in several roles in *Prince Edward Island.*

[18] I think it instructive to read *Tannis Trading Inc. v. Camco Food Services Ltd. (Trustee of)* (1988), 67 C.B.R. (N.S.) 1 (Ont. S.C.) in conjunction with Dr. Morawetz's annotation found at pp. 2-3 of that report. In that case CCL was an audit client of the trustee's organization, which was found to be "an important and valued relationship" (p. 6). At that same page it was determined that "the claims [of the estate] against CCL... are crucial to the administration of the estate". Saunders J. went on to say at pp. 6-7:

> It appears that the trustee and the inspectors feel that the trustee has acted impartially and will continue to do so. It is likely that such will be the case. That, however, is not the test. In a situation such as this, the court must consider from an objective point of view whether it would be difficult for the trustee to act with impartiality: see *Re Shaw Co.,* 16 Sask. L.R. 275, 3 C.B.R. 198, reflex, [1922] 3 W.W.R. 119, 68 D.L.R. 616 (K.B.). In my opinion, the answer in this particular case is clearly in the affirmative. The trustee is, in effect, suing its
> own client. On the particular facts, I am of the opinion that there is a potential for a conflict of interest and, perhaps more importantly, there is an appearance of conflict. An unsecured creditor seeks the removal of the trustee. There is no suggestion that the request is not bona fide. In my opinion, in the special circumstances of this case, the trustee ought to stand aside or be replaced.

Dr. Morawetz observed at pp. 2-3:

> In ordering that the trustee should be removed, the court relied on the judgment of the Saskatchewan Court of King's Bench in the case of *Re Shaw Co.,* 16 Sask. L.R. 275, 3 C.B.R. 198, reflex, [1922] 3 W.W.R. 119, 68 D.L.R. 616, which in turn, relied on the English case *of Re Lamb,* [1894] 2 Q.B. 805, 64 L.J.Q.B. 71 at 74 (C.A.), and held that the court must consider from an objective point of view whether it would be difficult for the trustee to act with impartiality. The court was of the opinion, that there was a potential for a conflict of interest and, perhaps more importantly, there was an appearance of conflict.
>
> The judgment in the *Shaw Co.* case is very short, and no reference was made to one of the leading Ontario cases, *Re Bryant, Isard & Co.; Ex parte Higginson* (1923), 24 O.W.N. 597, 4 C.B.R. 41 (S.C.). In that case the court considered the removal of a trustee from office to be an extreme course and refused to remove the trustee because: it would add to the great expense already incurred in the estate; a new trustee would not be as conversant with the estate as the present trustee; and neither the inspectors nor the creditors were in favour of removing the trustee. Although in the *Bryant, Isard* case the court did not remove the trustee, the order was made without prejudice to the rights of the creditors to remove the trustee and appoint another in its place if so advised.

See also *Re Ethier* reflex, (1991), 7 C.B.R. (3d) 268 (Ont. Bktcy.) at p. 273.

[19] In *Shaw, supra,* it should be noted at p. 199 that the trustee had as some (material) shareholders (and a director) persons who were making large claims in the estate of the bankrupt company. As for *Lamb, supra,* the trustee was a creditor of two estates which were in competition with each other as to ownership of the only asset of value as A.L. Smith L.J. said at pp. 820-1:

> Now, what is the salient point in this case? If a man has a pecuniary interest in the success of one estate which is the creditor of another estate, and he has no pecuniary interest in the success of the other estate, and he is called upon to act for both, it seems to me that a prima facie case is made out that he is placed in a difficulty as regards

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> acting with impartiality between the two. It is obvious–everybody knows it who has any knowledge of life–that when a man has a pecuniary interest, his mind is naturally warped in favour of his own interest. It is human nature, and no one can doubt it. Beyond all question Mr. Gregson has a pecuniary interest as a creditor to the amount of 3,000*l.* in the success of Emerson's estate. As regards Lamb's estate he as a creditor has a pecuniary interest of only 400*l.*, and it is said that Emerson's estate is a creditor of Lamb's estate. Standing in this position between the two estates, can it be said with truth that Mr. Gregson's connection with Emerson's estate is not such as to make it difficult for him to act with impartiality towards Lamb's creditors? This is the real question, and that question my brother Vaughan Williams did not put to himself. If he had done so, I think he would have answered it in the same way as I am now doing. We are not suggesting that Mr. Gregson is not a gentleman of probity - not a word has been said about that - but the question is, whether upon the facts of the case the objection of the Board of Trade to his appointment as trustee of Lamb's estate was a valid objection. In my judgment it was.

[20] I think it instructive to recall what Cave J. said in *Re Martin* (1888), 21 Q.B.D. 29 at p. 33:

> The objection which is taken here is the third of those objections, namely, that the connection of this trustee with, or his relation to, the bankrupt or his estate makes it difficult for him to act with impartiality in the interests of the creditors generally. It is not easy to lay down any general rule, and indeed it is a question of fact with regard to which it is, to my mind, impossible to lay down any accurate general rule. Every case must depend more or less upon its circumstances, and, having regard to the expressions in the Act, one must see whether the facts are such as to lead to the conclusion that the trustee's connection with or relation to the bankrupt or his estate makes it difficult for him to act with impartiality.

[21] Is there such a problem for Richter in these circumstances? I think not if one looks at the situation well informed and objectively. As Tysoe J. in *Re Western Canada Beverage Corp.* reflex, (1993), 22 C.B.R. (3d) 10 (B.C. S.C.) stated at p. 18:

> ...It has become fashionable to allege conflicts of interest but the Court will not act out of fashion.

It should almost go without saying (and would not be said but for the unfortunate wrangling history of this case) that once Richter were appointed trustee it bears allegiance to the creditors of the estate as an officer of the Court. It is not beholden to any of the creditors on an individual (or segregated) basis and certainly not to UBS, Ontario or the ALC Committee. Its loyalty is to the creditors as they are found–be it UBS, Ontario, other creditors represented by the ALC Committee, the Rehabilitator or Liquidator–as a collective group. So long as it does so then it will not have a problem with impartiality or conflict of interest.

[22] NOLA submitted in its factum that it recommends the appointment of an independent, impartial trustee, citing at p. 6 thereof:

> See 11 U.S.C. s 101(14) (E). *In re Micro-Time Management Systems Inc.,* 102 B.R. 602 (Bankr. E.D.Mich. 1989) (Bankruptcy trustee held disqualified because of professional relationship with and consultant work for a major creditor of estate); *In re Envirodyne Industries Inc.* 150 B.R. 1008, 1019 (Bankr. N.D. Ill. 1993) ("The key issue is whether the [allegedly disinterested] firm's interest in maintaining the client relationship with Salomon, the substantial party-in-interest, could impair the firm's ability to act with impartiality, even unconscious impartiality.")

This was responded to by American counsel (Chaim Fortgang) for the ALC Committee who faxed a submission as follows:

> In ¶17 of the factum of [NOLA], counsel cites two U.S. Cases for the proposition that under U.S. Law, representation of a creditors' Committee would be a basis to disqualify a professional from acting as trustee or as a professional for a trustee. The cases cited do not so hold at all. They stand for the proposition that prior representation of a *target* in a potential litigation against the target would disqualify a professional from acting on behalf of the estate, because he could not be expected to vigorously pursue a former client. The law in the U.S. clearly permits counsel for a creditors' committee to become counsel to a Trustee after the creditors' committee has been disbanded.
>
> In a case remarkably similar to the instant situation a contested secured claimant objected to counsel for the creditors' committee functioning as counsel for the trustee. It was alleged inter alia, by the contested secured creditor, that counsel for the creditors' committee advised against a settlement of litigation involving subordinating the claim of the secured creditor proposed by the secured creditor and thus was not disinterested.
>
> The court noted that disqualification motions are often used for purely tactical reasons and the impending conflict between the secured creditor and counsel was not a basis for disqualifying counsel for the trustee.
>
> The objecting party argued that the bankruptcy Code intended to disqualify any person who in the slightest degree had some interest or relationship that would color the independent and impartial attitude required by the Code. Thus counsel should be disqualified. The court disagreed and said "It is *clear* that a law firm's prior representation

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> of a Creditors' committee does not disqualify it from representing a trustee in bankruptcy." In a REA Holding Corporation 4 BCD 1249 (Bkptcy S.D.N.Y. 1979). In re W.T. Grant 4 B.R. (53 Bkptcy S.D.N.Y. 1980).
>
> The Court further observed "Indeed, their previous familiarity with this case through their preparations on behalf of the creditors' committee will station this firm in a position where further delay and expense should be eliminated which might otherwise have been incurred if another law firm were brought into this case by the trustee to investigate the underlying events and transactions."
>
> Counsel to NOLA apparently does not appreciate the distinction between having represented an individual creditor with an adverse interest which may be a basis for disqualification and having represented a creditors' committee (which *is* the estate) which *can not* be a basis for disqualification.

[23] I have a number of varying observations concerning these submissions. While I appreciate that there are foreign elements in this matter, including American elements, what we have here is the nomination and appointment of a trustee for a bankrupt estate in Canada pursuant to BIA. That process if governed by Canadian law and a Canadian statute. That is not to say that judges of our court are chauvinistic or xenophobic. To the contrary, we will consider foreign jurisprudence in context and specifically where there appears to be a gap in our jurisprudence. As I said however in another case: *Re Cadillac Fairview,* unreported, released Feb. 9, 1995 at p. 7 for somewhat different purposes:

> Recognizing that this is a *CCAA* proceeding which will be governed by Canadian law, perhaps it would be highly desirable for Canadian counsel for all stakeholders to ensure that their clients (and their non-Canadian counsel) appreciate some of the differences between our reorganization law and procedures and that with which they may be more familiar.

When I speak of taking foreign cases in context, one of the most obvious aspects is to consider whether foreign statute law is substantially different in essential elements. However it may be appropriate, keeping in mind that the U.S. legislation has a detailed overwhelming impact on these American cases to review how that jurisdiction views potential conflict situations.

[24] Further I would observe that it is unfortunate that it was left up to this court to determine that *REA, supra,* had been ruled upon by the U.S. District Court (S.D.N.Y.) on January 14, 1980 (2 B.R. 733) and the case remanded back to the Bankruptcy Court for reconsideration (as to which see Bankr. L.Rep. (CCH) P67 483, 22 Collier Bankr. Cas. (MB) 1051 (Bankr. S.D.N.Y. 1980)). However it appears to me that this appellate decision was based upon a question of failure to disclose potential conflict of interest and not upon the fact of co-counsel's prior involvement with the creditors' committee in superseded chapter XI proceedings which had been found by the Bankruptcy Court not to conflict with its present role in the bankruptcy proceedings. The prior involvement with that creditors' committee did not appear to trouble the appellate court. As Galgay J. (the bankruptcy judge) said at p. 1253:

> The law firm served as counsel to the Official Creditors' Committee during the REA Chapter XI proceeding but at no point in the REA
>
> proceeding did Whitman & Ransom represent any particular railroad or airline. The role of counsel to an official creditors' committee is not adverse to or in conflict with the role of counsel to a bankruptcy trustee if liquidation should subsequently ensue.

[25] In *Grant, supra,* decided a month after the release of the appellate decision in *REA,* Galgay J. said at pp. 82-3:

> ...It is also asserted that WGM's role as co-counsel to the Chapter XI Creditors' Committee constitutes a disqualification factor.
>
> [34] This Court recently had the opportunity to review the factors to be considered in entertaining a motion to disqualify attorneys for a trustee in In re REA Holding Corp., 4 Bankr.Ct.Dec. 1249 (S.D.N.Y. 1979). The disqualification of both a trustee and his co-counsel was sought upon alleged conflicts of interest which prevented them from adequately representing the interests of the bankrupt estate. Among the alleged conflicts cited was the fact that the counsel for the trustee had represented the Creditors' Committee during the Chapter XI case that preceded an adjudication in bankruptcy and the retention of such counsel by the trustee. In considering that motion I was guided by the teachings of Ernie Industries, Inc. V. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). Ernie admonishes courts to recognize their "responsibility to preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility." 4 Bankr.Ct.Dec. at 1253 (citation omitted). Additionally, I noted the difficulties involved in evaluating the claims asserted in the perspective of the guidelines provided by United States v. Standard Oil Company, 136 F.Supp. 345, 367 (S.D.N.Y. 1955), which states:
>
> When dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts of precise application of precedent.

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> I concluded and reaffirm that "(t)he role of counsel to an official creditors' committee is not adverse to or in conflict with the role of counsel to a bankruptcy trustee if liquidation should subsequently ensue." 4 Bankr.Ct.Dec. at 1253.

In the appeal decision *of Re W.T. Grant Co. 1*, 699 F.2d 599 (2d. Cir. N.Y. 1983) Friendly J. in dismissing the appeal said at p. 613:

> We see no reason to disagree with Judge Galgay's reaffirmation, 4 B.R. at 83, of his conclusion in *In re REA Holding Corp.,* 4 Bankr.Ct.Dec. 1249, 1253 (Bankr.S.D.N.Y. 1979), vacated and remanded on other grounds, 2 B.R. 733 (S.D.N.Y. 1980), that "[t]he role of counsel to an official creditors' committee is not adverse to or in conflict with the role of counsel to a bankruptcy trustee if liquidation should subsequently ensue." WGM's previous representation of one or more of the banks or their subsidiaries in unrelated matters is scarcely a ground for disqualification. There is no contention that WGM regularly served any of the banks in bankruptcy cases, and their having done so in one or more unrelated cases would not prevent a vigorous assertion of the claims of the subordinated debentureholders against the banks. On an issue of this sort particular weight should be given to the conclusion of the Bankruptcy Judge, who had abundant opportunities to observe the activities of WGM over many months and concluded "that the Trustee's attorneys have served him and the creditors of the bankrupt estate with vigor, objectivity and independence."

[26] I think it appropriate to take a look at the fact situations in *Micro-Time* and *Envirodyne, supra*. In both there would appear to be a problem with ongoing relationships of significance with creditors who may be adverse in interest to the bankrupt estate. In *Envirodyne* at pp. 1018-9 Schwartz C.J. said:

> ...Judge Schmetterer based the American Printers decision, in part, on the reasoning in In re Amdura Corp., 121 B.R. 862 (Bankr.D.Colo. 1990). In Amdura, a firm seeking to be employed as debtor's counsel represented the debtor's primary secured lender on an ongoing basis in matters unrelated to the bankruptcy case. The debtor commenced the bankruptcy case as result of its inability to reach an accommodation with the lender. A partner of the firm testified that other counsel would have to be employed to investigate and prosecute a potential suit against the lender because the firm would not "bite the hand that feeds it." In re Amdura, 121 B.R. at 867. During the February 10 hearing, Mr. Millstein argued that the facts in this case do not justify disqualifying Cleary, Gottlieb because, unlike the creditor in Amdura, Salomon is not the primary secured creditor in this case. Mr. Millstein apparently believes that the relative size of the creditor's claim vis-a-vis the estate's total debt is necessarily relevant to whether Debtors' counsel may continue to maintain a relationship with that creditor without violating the tests of Sec. 327(a).
>
> Counsel's argument is not persuasive. The key issue is whether the firm's interest in maintaining the client relationship with Salomon, a substantial party-in-interest, could impair the firm's ability to act with impartiality, even unconscious impartiality. The Amdura opinion correctly focuses on the law firm's ability to act impartially as the debtor's representative in all matters. The court in Amdura does not consider the relative size of the creditor's claim in a vacuum, but in conjunction with the creditor's status as a major client of the firm. Amdura, 121. B.R. at 869.
>
> The court must remain cognizant of the fact that Salomon is an insider, a 64% owner, and a substantial creditor of the Debtor Envirodyne. The negotiation of a plan of reorganization likely will necessitate negotiation with Salomon, a "substantial client" of
>
> Cleary, Gottlieb. Given these facts in this case, the Debtors' interests and the interests of the creditor body as a whole are not best represented at a negotiation table by a lawyer who faces a substantial client on the other side. (FN 14)

[27] In *Micro-Time* Rhodes J. stated at pp. 607-8:

> [4] The facts in this case are essentially the same as those in In re Gray, 64 B.R. 505 (Bankr.E.D.Mich.1986). Although the trustee and the accountants for the trustee are not prepetition creditors of the estate, Bohl's work for Comerica does present a potential, if not an actual, conflict of interest. Comerica was a major creditor of Micro-Time. The amount of its debt was very strongly disputed and there had been an adverse relationship between the principal of the debtor (Kirkland) and Comerica. When the trustee was appointed, it was clear that a successful resolution of Micro-Time's dispute with Comerica would be a necessary prerequisite to any successful chapter 11 reorganization of Micro-Time. Any hint of any prior or ongoing relationship between Comerica and Bohl would create at least the appearance of impropriety. This is sufficient under the case law and section 101(13) to disqualify John C. Bohl, Jr. as trustee and Parker, Bohl & Associates as accountants for the trustee.
>
> Like the accounting firm in Gray, Bohl did not disclose his potentially disqualifying relationship with Comerica in either the trustee's declaration of disinterest or in the affidavit he submitted when he applied for approval to appoint Parker, Bohl & Associates as accountants for the trustee. Instead, Bohl swore in his affidavit that "To the best of my knowledge neither our firm nor any member thereof... holds any interest adverse to the matters upon which we are

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to be engaged. Neither I nor any member of my firm has any relationship or interest in the above named debtor or any other parties of interest therein." These statements were false; Bohl had an ongoing relationship with Comerica.

Micro-Time and *Envirodyne* illustrate quite different concerns than the situation prevailing here. There is no suggestion of an ongoing relationship with the ALC Committee side which would possibly influence Richter from its neutral, impartial role as trustee, acting in the best interests of the estate.

[28] Thus given that Richter is the preference of the petitioning creditor (and of the ALC Committee which appears to represent apparently unchallenged major creditors); it has the advantage of being quite familiar with and knowledgeable of the situation from its prior involvement as forensic investigator; the proprietary claims have been acknowledged as complex and difficult to describe; those advancing proprietary claims have had the advantage of advice from their own forensic investigators; it does not appear on the material before me that Richter has any ongoing relationship with any creditor and particularly not with any creditor or claimant which may have an adverse position to the estate, it would not seem to me appropriate to disqualify Richter as the nominee for trustee in place of Deloitte in the petition by UBS, but rather it would seem that Richter was adequately qualified to act as trustee. This result would avoid the estate taking a significant period of time to catch up with potential slippage exposure if the litigation heats up quickly and a duplication of expense for another firm to come to the same position as Richter now is on the learning curve. On a practical basis, given what is at stake in relation to the funds already expended as as to Richter's investigation, I do not see this duplication as a major factor but certainly it is a reasonable factor to consider. To their credit the Rehabilitator and the Liquidator have acknowledged that they in essence expect a fair fight in the proprietary claim situation against a trustee which is adequately and well prepared; they were not opposing Richter on the basis of knocking out a worthy opponent. The Liquidator had no concern about Richter being hired as a consultant by any trustee; I understand the Rehabilitator's attitude to have been the same. They were concerned, I take it, that Richter was beholden to the ALC Committee and the creditors it represented. As discussed, that relationship is at an end and Richter must be indifferent to all creditors, whomsoever they may be. Certainly this aspect of neutrality must be demonstrated throughout the trusteeship, including any s. 163 examinations.

[29] In the result I see no impediment to Richter replacing Deloitte as the nominee for trustee in the UBS petition order accordingly.

[30] As a postscript I would observe that my secretary and the manager of the Commercial List/Bankruptcy Office were bombarded with calls yesterday and today as to when my decision was going to be released and why it had not been then released. Counsel have advised that they had not done so. It may be that these enquiries were made by persons who were trading in or arbitraging claims. Such behaviour is not only inappropriate, but also counterproductive (looking at their self interest of having the decision as early as possible).

Motion granted.

Decision affecting licence - Sec. 14.01

14.01 (1) If, after making or causing to be made an inquiry or investigation into the conduct of a trustee, it appears to the Superintendent that

(a) a trustee has not properly performed the duties of a trustee or has been guilty of any improper management of an estate,

(b) a trustee has not fully complied with this Act, the General Rules, directives of the Superintendent or any law with regard to the proper administration of any estate, or

(c) it is in the public interest to do so,

the Superintendent may do one or more of the following:

(d) cancel or suspend the licence of the trustee;

(e) place such conditions or limitations on the licence as the Superintendent considers appropriate including a requirement that the trustee successfully take an exam or enrol in a proficiency course;

(f) require the trustee to make restitution to the estate of such amount of money as the estate has been deprived of as a result of the trustee's conduct; and

(g) require the trustee to do anything that the Superintendent considers appropriate and that the trustee has agreed to.

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Application to former trustees - Sec. 14.01(1.1)
(1.1) This section and section 14.02 apply, in so far as they are applicable, in respect of former trustees, with such modifications as the circumstances require.

Delegation - Sec. 14.01(2)
(2) The Superintendent may delegate by written instrument, on such terms and conditions as are therein specified, any or all of the Superintendent's powers, duties and functions under subsection (1), subsection 13.2(5), (6) or (7) or section 14.02 or 14.03.

Notification to trustees - Sec. 14.01(3)
(3) Where the Superintendent delegates in accordance with subsection (2), the Superintendent or the delegate shall

> **(a) where there is a delegation in relation to trustees generally, give written notice of the delegation to all trustees; and**
> **(b) whether or not paragraph (a) applies, give written notice of the delegation of a power to any trustee who may be affected by the exercise of that power, either before the power is exercised or at the time the power is exercised.**

1992, c. 27, s. 9;
1997, c. 12, s. 12;
2005, c. 47, s. 14;
2007, c. 36, s. 6.

Notice to trustee - Sec. 14.02
14.02 (1) Before deciding whether to exercise any of the powers referred to in subsection 14.01(1), the Superintendent shall send the trustee written notice of the powers that the Superintendent may exercise and the reasons why they may be exercised and afford the trustee a reasonable opportunity for a hearing.

Summons - Sec. 14.02(1.1)
(1.1) The Superintendent may, for the purpose of the hearing, issue a summons requiring and commanding any person named in it

> **(a) to appear at the time and place mentioned in it;**
> **(b) to testify to all matters within their knowledge relative to the subject matter of the inquiry or investigation into the conduct of the trustee; and**
> **(c) to bring and produce any books, records, data, documents or papers — including those in electronic form — in their possession or under their control relative to the subject matter of the inquiry or investigation.**

Effect throughout Canada - Sec. 14.02(1.2)
(1.2) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (1.1).

Fees and allowances - Sec. 14.02(1.3)
(1.3) Any person summoned under subsection (1.1) is entitled to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

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Procedure at hearing - Sec. 14.02(2)
(2) At a hearing referred to in subsection (1), the Superintendent

(a) has the power to administer oaths;
(b) is not bound by any legal or technical rules of evidence in conducting the hearing;
(c) shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit; and
(d) shall cause a summary of any oral evidence to be made in writing.

Record - Sec. 14.02(3)
(3) The notice referred to in subsection (1) and, where applicable, the summary of oral evidence referred to in paragraph (2)(d), together with such documentary evidence as the Superintendent receives in evidence, form the record of the hearing and the record and the hearing are public, unless the Superintendent is satisfied that personal or other matters that may be disclosed are of such a nature that the desirability of avoiding public disclosure of those matters, in the interest of a third party or in the public interest, outweighs the desirability of the access by the public to information about those matters.

Decision - Sec. 14.02(4)
(4) The decision of the Superintendent after a hearing referred to in subsection (1), together with the reasons therefor, shall be given in writing to the trustee not later than three months after the conclusion of the hearing, and is public.

Review by Federal Court - Sec. 14.02(5)
(5) A decision of the Superintendent given pursuant to subsection (4) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside pursuant to the Federal Courts Act.
1992, c. 27, s. 9;
1997, c. 12, s. 13;
2002, c. 8, s. 182;
2005, c. 47, s. 15;
2007, c. 36, s. 7.

Conservatory measures - Sec. 14.03
14.03 (1) Subject to subsection (2), the Superintendent may, for the protection of an estate, the rights of the creditors or the debtor,

(a) direct a person to deal with property of the estate described in the direction in such manner as may be indicated in the direction, including the continuation of the administration of the estate;
(b) direct any person to take such steps as the Superintendent considers necessary to preserve the books, records, data, including data in electronic form, and documents of the estate;
(c) direct a bank or other depository not to pay out funds held to the credit of the estate except in accordance with the direction; and
(d) direct the official receiver not to appoint the trustee in respect of any new estates until a decision is made under subsection 13.2(5) or 14.01(1).

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Marchand syndics nc. v. Laperrière, 2006 FCA 368 (CanLII) - Standing to Action Conservatory Measures

Date:	2006-11-10
Docket:	A-658-04
Parallel citations:	28 CBR (5th) 5
URL:	http://canlii.ca/t/1q68f
Citation:	Marchand syndics nc. v. Laperrière, 2006 FCA 368 (CanLII), <http://canlii.ca/t/1q68f> retrieved on 2013-09-13
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Date: 20061110
Docket: A-658-04
Citation: 2006 FCA 368
CORAM: LÉTOURNEAU J.A.
NOËL J.A.
PELLETIER J.A.
BETWEEN:
MARCHAND SYNDICS INC., trustee
GEORGES E. MARCHAND, trustee
BRUNO MARCHAND, trustee
Appellants
and
SYLVIE LAPERRIÈRE
Respondent
Hearing held at Ottawa, Ontario, on October 18, 2006.
Judgment delivered at Ottawa, Ontario, on November 10, 2006.
REASONS FOR JUDGMENT: LÉTOURNEAU J.A.
CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

Date: 20061110
Docket: A-658-04
Citation: 2006 FCA 368
CORAM: LÉTOURNEAU J.A.
NOËL J.A.
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BETWEEN:
MARCHAND SYNDICS INC., trustee
GEORGES E. MARCHAND, trustee
BRUNO MARCHAND, trustee
Appellants
and
SYLVIE LAPERRIÈRE
Respondent

REASONS FOR JUDGMENT
LÉTOURNEAU J.A.
ISSUES

[1] The appellants are challenging a decision by Madam Justice Tremblay-Lamer of the Federal Court (judge) dated November 10, 2004. They raised three grounds for appeal including one regarding the judge's refusal to hear a motion for her disqualification. They wisely withdrew this ground of appeal at the hearing.

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[2] At the hearing, the two issues that we accepted and regarding which we invited counsel to submit their arguments, are the following:

(a) Did the appellants have the right to be heard before conservatory measures were taken with respect to the estate managed by the appellants pursuant to section 14.03 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 (Act), such that there was a breach of procedural fairness?

(b) Was there a rational connection between the facts giving rise to the decision to use conservatory measures and the conservatory measure directing the official receiver not to appoint the appellants to administer any new ordinary administration estates until further notice or until a decision had been made under section 14.01 of the Act?

[Emphasis added.]

[3] The appellants state that, in the absence of a rational connection, the measure was legally unfounded and is therefore void because it breaches section 14.03 of the Act and paragraphs 18.1(3)(*b*) and 4(*a*), (*c*) and (*f*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[4] I refer to the provisions of the Act as well as the directions on conservatory measures relevant to the resolution of the dispute:

PART I **ADMINISTRATIVE OFFICIALS** *Superintendent* **5.** . . . *Extent of supervision* (2) The Superintendent shall supervise the administration of all estates and matters to which this Act applies. . . . *Powers of Superintendent* (4) The Superintendent may (*a*) intervene in any matter or proceeding in court, where the Superintendent considers it expedient to do so, as if the Superintendent were a party thereto; (*b*) issue, to official receivers, trustees, administrators of consumer proposals made under Division II of Part III and persons who provide counselling pursuant to this Act, directives with respect to the administration of this Act and, without restricting the generality of the foregoing, directives requiring them (i) to keep such records as the Superintendent may require, and (ii) to provide the Superintendent with such information as the Superintendent may require; (*c*) issue such directives as may be necessary to give effect to any decision made by the Superintendent pursuant to this Act or to facilitate the carrying out	PARTIE I **FONCTIONNAIRES ADMINISTRATIFS** *Surintendant* **5.** ... *Surveillance* (2) Le surintendant contrôle l'administration des actifs et des affaires régis par la présente loi. ... *Pouvoirs du surintendant* (4) Le surintendant peut : *a*) intervenir dans toute affaire ou dans toute procédure devant le tribunal, lorsqu'il le juge à propos, comme s'il y était partie; *b*) donner aux séquestres officiels, aux syndics, aux administrateurs au sens de la section II de la partie III et aux personnes chargées de donner des consultations au titre de la présente loi des instructions relatives à l'exercice de leurs fonctions, et notamment leur enjoindre de conserver certains dossiers et de lui fournir certains renseignements; *c*) donner les instructions nécessaires à l'exécution de toute décision qu'il prend en vertu de la présente loi ou susceptibles de faciliter l'application de la présente loi et des Règles générales, et notamment en ce qui touche les attributions des syndics et des séquestres et celles des administrateurs au sens de l'article 66.11;

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of the purposes and provisions of this Act and the General Rules, including, without limiting the generality of the foregoing, directives relating to the powers, duties and functions of trustees, of receivers and of administrators as defined in section 66.11;

(*d*) issue directives governing the criteria to be applied by the Superintendent in determining whether a trustee licence is to be issued to a person and governing the qualifications and activities of trustees; and

(*e*) issue directives prescribing the form of any document that is by this Act to be prescribed and the information to be given therein.

13.2

. . .

Suspension or cancellation

(5) A licence may be suspended or cancelled by the Superintendent

(*a*) if the trustee is convicted of an indictable offence;

(*b*) if the trustee has failed to comply with any of the conditions or limitations to which the licence is subject;

(*c*) if the trustee has ceased to act as a trustee; or

(*d*) at the request of the trustee.

Code of ethics

13.5 A trustee shall comply with such code of ethics respecting the conduct of trustees as may be prescribed.

Decision affecting licence

14.01 (1) Where, after making or causing to be made an investigation into the conduct of a trustee, it appears to the Superintendent that

(*a*) a trustee has not properly performed the duties of a trustee or has been guilty of any improper management of an estate,

(*b*) a trustee has not fully complied with this Act, the General Rules, directives of the Superintendent or any law with regard to the proper administration of any estate, or

(*c*) it is in the public interest to do

d) donner des instructions régissant les critères relatifs à la délivrance des licences de syndic, les qualités requises pour agir à titre de syndic et les activités des syndics;

e) prescrire, par instruction, la forme de documents requis pour l'application de la présente loi, ainsi que les renseignements à y porter.

13.2

…

Suspension ou annulation

(5) Une licence peut être suspendue ou annulée par le surintendant :

a) si le syndic a été reconnu coupable d'un acte criminel;

b) si le syndic n'a pas observé l'une des conditions ou restrictions de sa licence;

c) si le syndic a cessé d'agir à ce titre;

d) à la demande du syndic.

Codes de déontologie

13.5 Les syndics sont tenus de se conformer aux codes de déontologie régissant leur conduite qui peuvent être prescrits.

Décision relative à la licence

14.01 (1) Après avoir tenu ou fait tenir une enquête sur la conduite du syndic, le surintendant peut prendre l'une ou plusieurs des mesures énumérées ci-après, soit lorsque le syndic ne remplit pas adéquatement ses fonctions ou a été reconnu coupable de mauvaise administration de l'actif, soit lorsqu'il n'a pas observé la présente loi, les Règles générales, les instructions du surintendant ou toute autre règle de droit relative à la bonne administration de l'actif, soit lorsqu'il est dans l'intérêt public de le faire :

a) annuler ou suspendre la licence du syndic;

b) soumettre sa licence aux conditions ou restrictions qu'il estime indiquées, et notamment l'obligation de se soumettre à des examens et de les réussir ou de suivre des cours de formation;

c) ordonner au syndic de

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so,
the Superintendent may do one or more of the following:
(*d*) cancel or suspend the licence of the trustee;
(*e*) place such conditions or limitations on the licence as the Superintendent considers appropriate including a requirement that the trustee successfully take an exam or enrol in a proficiency course, and
(*f*) require the trustee to make restitution to the estate of such amount of money as the estate has been deprived of as a result of the trustee's conduct.
Application to former trustees
(1.1) This section and section 14.02 apply, in so far as they are applicable, in respect of former trustees, with such modifications as the circumstances require.
Delegation
(2) The Superintendent may delegate by written instrument, on such terms and conditions as are therein specified, any or all of the Superintendent's powers, duties and functions under subsection (1), subsection 13.2(5), (6) or (7) or section 14.02 or 14.03.
Notification to trustees
(3) Where the Superintendent delegates in accordance with subsection (2), the Superintendent or the delegate shall
(*a*) where there is a delegation in relation to trustees generally, give written notice of the delegation to all trustees; and
(*b*) whether or not paragraph (*a*) applies, give written notice of the delegation of a power to any trustee who may be affected by the exercise of that power, either before the power is exercised or at the time the power is exercised.

Notice of proposed decision to trustee

14.02 (1) Where the Superintendent intends to exercise any of the powers referred to in subsection 14.01(1), the Superintendent shall send the

rembourser à l'actif toute somme qui y a été soustraite en raison de sa conduite.
Application aux anciens syndics
(1.1) Dans la mesure où ils sont applicables, le présent article et l'article 14.02 s'appliquent aux anciens syndics avec les adaptations nécessaires.
Délégation
(2) Le surintendant peut, par écrit et aux conditions qu'il précise dans cet écrit, déléguer tout ou partie des attributions que lui confèrent respectivement le paragraphe (1), les paragraphes 13.2(5), (6) et (7) et les articles 14.02 et 14.03.
Notification
(3) En cas de délégation aux termes du paragraphe (2), le surintendant ou le délégué doit :
a) dans la mesure où la délégation vise les syndics en général, en aviser tous les syndics par écrit;
b) en tout état de cause, aviser par écrit, avant l'exercice du pouvoir qui fait l'objet de la délégation ou lors de son exercice, tout syndic qui pourrait être touché par l'exercice de ce pouvoir.

Avis au syndic

14.02 (1) Lorsqu'il se propose de prendre l'une des mesures visées au paragraphe 14.01(1), le surintendant envoie au syndic un avis écrit et motivé de la mesure qu'il entend prendre et lui donne la possibilité de se faire entendre.
Procédure de l'audition
(2) Lors de l'audition, le surintendant :
a) peut faire prêter serment;
b) n'est lié par aucune règle juridique ou procédurale en matière de preuve;
c) règle les questions exposées dans l'avis d'audition avec célérité et sans formalisme, eu égard aux circonstances et à l'équité;
d) fait établir un résumé écrit de toute preuve orale.
Dossier et audition
(3) L'audition et le dossier de l'audition sont publics à moins que le surintendant ne juge que la

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trustee written notice of the powers that the Superintendent intends to exercise and the reasons therefor and afford the trustee a reasonable opportunity for a hearing.

Procedure at hearing

(2) At a hearing referred to in subsection (1), the Superintendent

(*a*) has the power to administer oaths;

(*b*) is not bound by any legal or technical rules of evidence in conducting the hearing;

(*c*) shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit; and

(d) shall cause a summary of any oral evidence to be made in writing.

Record

(3) The notice referred to in subsection (1) and, where applicable, the summary of oral evidence referred to in paragraph (2)(*d*), together with such documentary evidence as the Superintendent receives in evidence, form the record of the hearing and the record and the hearing are public, unless the Superintendent is satisfied that personal or other matters that may be disclosed are of such a nature that the desirability of avoiding public disclosure of those matters, in the interest of a third party or in the public interest, outweighs the desirability of the access by the public to information about those matters.

Decision

(4) The decision of the Superintendent after a hearing referred to in subsection (1), together with the reasons therefor, shall be given in writing to the trustee not later than three months after the conclusion of the hearing, and is public.

Review by Federal Court

(5) A decision of the Superintendent given pursuant to

nature des révélations possibles sur des questions personnelles ou autres est telle que, en l'espèce, l'intérêt d'un tiers ou l'intérêt public l'emporte sur le droit du public à l'information. Le dossier de l'audition comprend l'avis prévu au paragraphe (1), le résumé de la preuve orale visé à l'alinéa (2)d) et la preuve documentaire reçue par le surintendant.

Décision

(4) La décision du surintendant est rendue par écrit, motivée et remise au syndic dans les trois mois suivant la clôture de l'audition, et elle est publique.

Examen de la Cour fédérale

(5) La décision du surintendant, rendue et remise conformément au paragraphe (4), est assimilée à celle d'un office fédéral et comme telle est soumise au pouvoir d'examen et d'annulation prévu à la Loi sur les Cours fédérales.

Mesures conservatoires

14.03 (1) Pour assurer la sauvegarde d'un actif dans les circonstances visées au paragraphe (2), le surintendant peut :

a) donner instruction à quiconque de s'occuper des biens de l'actif visé dans les instructions conformément aux modalités qui y sont indiquées, notamment d'en continuer l'administration;

b) donner instruction à quiconque de prendre les mesures qu'il estime nécessaires à la sauvegarde des livres, registres, données sur support électronique ou autre, et documents de l'actif;

c) donner instruction à une banque ou autre dépositaire de ne faire aucun paiement sur les fonds détenus au crédit de cet actif, si ce n'est conformément à l'instruction;

d) donner instruction au séquestre officiel de ne plus nommer le syndic en cause pour administrer de nouveaux actifs tant qu'une décision n'est pas rendue au titre des paragraphes 13.2(5) ou 14.01(1).

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subsection (4) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside pursuant to the Federal Courts Act.

Conservatory measures

14.03 (1) The Superintendent may, for the protection of an estate in the circumstances referred to in subsection (2),

(*a*) direct a person to deal with property of the estate described in the direction in such manner as may be indicated in the direction, including the continuation of the administration of the estate;

(*b*) direct any person to take such steps as the Superintendent considers necessary to preserve the books, records, data, including data in electronic form, and documents of the estate;

(*c*) direct a bank or other depository not to pay out funds held to the credit of the estate except in accordance with the direction; and

(*d*) direct the official receiver not to appoint the trustee in respect of any new estates until a decision is made under subsection 13.2(5) or 14.01(1).

Circumstances

(2) The circumstances in which the Superintendent is authorized to exercise the powers set out in subsection (1) are where

(*a*) an estate is left without a trustee by the death, removal or incapacity of the trustee;

(*b*) the Superintendent makes or causes to be made any investigation pursuant to paragraph 5(3)(*e*);

(*c*) the Superintendent exercises any of the powers set out in section 14.01;

(*d*) the fees referred to in subsection 13.2(2) have not been paid in respect of the trustee's licence;

(*e*) a trustee becomes insolvent;

(*f*) a trustee is convicted of an indictable offence or has failed to

Circonstances

(2) Le surintendant peut exercer les pouvoirs visés au paragraphe (1) dans les circonstances suivantes :

a) le décès, la destitution ou l'empêchement du syndic responsable de l'actif;

b) la tenue par lui de l'enquête prévue à l'alinéa 5(3)*e*);

c) l'exercice par lui des pouvoirs visés à l'article 14.01;

d) le défaut de paiement de droits prévus au paragraphe 13.2(2) à l'égard de la licence du syndic;

e) l'insolvabilité du syndic;

f) le syndic a été reconnu coupable d'un acte criminel ou n'a pas observé l'une des conditions ou restrictions de sa licence;

g) le fait qu'il envisage d'annuler la licence du syndic au titre des alinéas 13.2(5)*c*) ou *d*).

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comply with any of the conditions or limitations to which the trustee's licence is subject; or

(*g*) a circumstance referred to in paragraph 13.2(5)(*c*) or (*d*) exists and the Superintendent is considering cancelling the licence under subsection 13.2(5).

CANADA

In the matter of: **Bruno Marchand**
Georges E. Marchand

Marchand Syndics Inc.

Directions for Conservatory Measures

(section 14.03 of the *Bankruptcy and Insolvency Act*)

WHEREAS the *Bankruptcy and Insolvency Act* (the Act) provides the Superintendent of Bankruptcy with the general power to supervise the administration of all estates and matters to which the Act applies;

WHEREAS the exercise of the powers of the Superintendent of Bankruptcy set out in paragraph 5(3)e) of the Act revealed that the trustees have an abnormally high number of files that have been open more than three years;

WHEREAS the trustees are also the subject of an investigation under the provisions of section 14.01 of the Act;

WHEREAS on August 5, 2003 a letter was sent to the trustees giving them 15 business days in which to submit an acceptable closing plan intended, among other things, to reduce to 10% of their inventory the percentage of summary administration files open for more than 36 months and to 40% of their inventory the number of ordinary administration files open for more than 36 months, or to provide the Superintendent of Bankruptcy with a satisfactory explanation as to why the number of files older than three years exceeds these levels;

WHEREAS despite repeated requests, the trustees did not submit, within the prescribed time, a detailed closing plan in compliance with the requirements of the Superintendent of Bankruptcy;

WHEREAS the trustees effectively refused to submit a detailed closing plan, submitting only a plan that does not accord any priority to the oldest files, nor to those with large bank balances, and which plan does not even set time lines for the various stages of closing, the trustees in question instead chose to challenge the authority of the Office of the Superintendent to require such a closing plan;

WHEREAS moreover the trustees did not even respect their own closing plan, which had not, for the reasons set out above, been accepted by the Office of the Superintendent;

WHEREAS the trustees lacked diligence in closing their files, of which the number of ordinary administration estate files open for more than three years, as of February 3, 2004, was 69 administered by the corporate trustee and Bruno Marchand (99% of his total inventory of ordinary administration files), and 133 by the corporate trustee and Georges E. Marchand, 35 of which were under the personal licence of Georges E. Marchand (98% of his total inventory of ordinary administration files);

WHEREAS some of these estates contain large sums of money which the trustees are not distributing to the creditors;

WHEREAS the trustees' conduct is prejudicial to the creditors, who are being subjected to undue delays in the payment of their dividends;

WHEREAS the trustees refuse or neglect to complete the administration of these files, and in so doing, are not rendering their accounts as required by the Act;

WHEREAS it is not permissible for a fiduciary, such as a bankruptcy trustee, to refuse or neglect to account for his administration;

WHEREAS the Superintendent of Bankruptcy has reasonable grounds to believe that the estate files require protection and that the administration of these files should be completed as soon as possible;

WHEREAS the Superintendent of Bankruptcy may, in order to protect estates, exercise the powers set out in subsection 14.03(1) of the Act, under the circumstances anticipated in subsection 14.03(2) of the Act;

WHEREAS the Superintendent of Bankruptcy has delegated to the undersigned, in accordance with subsection 14.01(2) of the Act, in certain situations mentioned in subsection 14.03(2), the Superintendent's powers as specified

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at subsection 14.03 (1) of the Act, copies of which delegation are attached, along with copies of subsections 14.01(2) and 14.03(1) to (4) of the Act;

WHEREAS subsections 14.03(1)a) and b) and (2)b) of the *Bankruptcy and Insolvency Act* apply;

I, the undersigned, Sylvie Laperrière, in my capacity as Senior Analyst, Professional Conduct, direct:

The Official Receiver to not appoint Bruno Marchand, Georges E. Marchand and Marchand Syndics Inc. to administer any new ordinary administration estates;

These directions take effect immediately and will stay in place until further notice or until a decision is rendered under section 14.01 of the Act.

In accordance with subsection 14.03(3) of the Act, these directions bind their addressees, who must comply with them;

In accordance with subsection 14.03(4) of the Act, a person who complies with these directions is not liable for any act done by the person only to comply with them.

SIGNED, in the City of Sainte-Foy, Quebec

February 10, 2004

Sylvie Laperrière

Senior Analyst, Professional Conduct

[Emphasis added.]

[5] I have not referred to the provisions relied on from the *Federal Courts Act* because they are not necessary to the resolution of the dispute.

[6] Some background is required regarding the issuance of this conservatory measure, which was not the only one. Others were issued, withdrawing the appellants' administration of 48 files and entrusting them to the official receiver to ensure their conservation, and then to an agent of the Office of the Superintendent for Bankruptcy, for their administration and settlement: see the appeal book, volumes 5 and 6, pages 969 to 972 and 997 to 1,000.

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THE FACTS AND THE PROCEDURE

[7] The judge properly summarized the factual background of this case and the circumstances leading ultimately to the issuance of the conservatory measures. We need not review all of them even though they are very informative and enlightening in regard to the appellants' conduct. I will simply refer to paragraphs 2 to 5, 7 to 23 and 28 to 31 of her decision.

> [2] The applicants were the subject of a number of reports of the Office of the Superintendent of Bankruptcy (OSB) for more than a decade because their administration displayed some chronic deficiencies in the time taken to close files. An audit report in January 1992 indicated, for example, that a file opened in February 1973 had never been closed. In February 2004, this file was still open and the monies had still not been distributed to the creditors, when the balance of the trust account in this case amounted to $575,505.30.
>
> [3] That may represent the most extreme case, but other supervision and audit reports, in October 2000 and March 2003, indicate the same problems.
>
> [4] Seven agreements in relation to closure plans were developed during the period from 1993 to 2001 by the OSB in collaboration with the applicants under which they would proceed to close their files that were more than three years old. Only one of these seven plans (the 1996 one) was implemented by the applicants.
>
> [5] Moreover, during this period, many creditors complained about the slowness with which the applicants were completing the administration of their file and a number of judgments of the Superior Court of Quebec denounced their negligence.
>
> . . .
>
> [7] In July 2003, the OSB began the Initiative for the Orderly and Timely Administration of Insolvency Estates (IAPO) throughout the country. Pursuant to paragraph 5(3)(*e*) of the Act, the OSB conducted a general investigation to identify all the trustees in Canada who had not managed to close their files in less than three years at an acceptable level. To be identified by this program, the ordinary administration files dating back more than three years had to make up more than 60% of the trustee's inventory, and summary administration files had to make up more than 15%.
>
> [8] The goal of the IAPO was to lower these levels to less than 40% and 10% respectively. Ninety-nine trustees were identified in this investigation, and the applicants were included in this group.
>
> [9] On August 5, 2003, Ms. Lorraine Provost, the OSB representative, wrote to the 99 trustees who had been identified urging them to provide, within 15 business days, a closure plan acceptable to the OSB and to demonstrate regular progress throughout the year. The monthly reports were to list, at minimum, the files closed in the preceding month and the files that would be closed in the current month, as well as provide any further information concerning the status of the other files that were to be closed under the plan. She explained that the OSB considered a file to be closed only when the trustee obtained his or her discharge, and not earlier.
>
> [10] In the letter she sent to the applicants, she noted that 94.29% of the ordinary files and 57.76% of the summary files of Georges Marchand, and 97.70% of the ordinary files and 62.63% of the summary files of Bruno Marchand had been open for more than three years.
>
> [11] The applicants and all the other trustees identified in the IAPO program were also informed that failure to produce the documents or comply with the requests for a closure plan acceptable to the OSB within the time allotted would expose them to conservatory measures under section 14.03 of the Act.
>
> [12] On August 26, 2003, the applicants submitted to the OSB a table in which they indicated the number of files they planned to close for each of the following four quarters commencing September 1, 2003.
>
> [13] The exchange of correspondence between the parties during this period is crucial, since it is at the heart of the litigation. It is important, therefore, to relate its content in some detail.

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[14] On September 4, 2003, Mr. Georges Marchand sent a letter to Mr. François Leblanc of the OSB in which he stated that he had understood that the closure plan was to be more detailed, and further details were provided on September 8, 2003.

[15] In a letter sent on the same date, Ms. Provost explained that the suggested plan was not acceptable. To be acceptable, the plan had to indicate:

- the number of summary administration files of more than three years for which receipts and disbursements returns would be produced;

- the number of summary administration files of more than three years for which the trustee's discharge would be obtained;

- the number of ordinary administration files of more than three years for which receipts and disbursements returns would be produced;

- the number of ordinary administration files of more than three years for which the trustee's discharge would be obtained.

[16] The OSB also asked that the applicants supply a detailed list of the files that were to be closed within the next quarter.

[17] In a letter dated September 10, 2003, the applicants asked the OSB for clarifications as to all of the comments exchanged in the letter of August 5, 2003, and more particularly the reference to section 14.03 of the Act. The applicants further explained that in their opinion the decision of the Superior Court in *Abderrazik (Syndic de),* [2002] J.Q. No. 2241 (S.C.) (QL), the OSB did not have authority to demand a detailed list of the files to be closed.

[18] On September 19, 2003, in reply to this letter, Ms. Provost informed the applicants that the plan submitted was not accepted by the OSB. She explained that the expression [translation] "the files closed" meant that the OSB would receive, before the deadline, a document showing that the trustee had been discharged, i.e. the certificate of compliance or order of discharge.

[19] On September 25, 2003, the applicants' counsel wrote a further letter to Ms. Provost. He repeated that the plan submitted was acceptable and that the request for a detailed list went beyond the OSB's administrative authority. He suggested a meeting within 90 days, should that prove necessary, to discuss this matter.

[20] In a letter dated October 24, 2003, the OSB counsel again notified the applicants that the plan submitted was not acceptable and requested a written undertaking to close on a priority basis files dating back ten years or more with a bank balance of $25,000 or more, that is, a total of 17 ordinary administration files, a list of which was provided to them.

[21] On October 31, 2003, the applicant's counsel replied to the letter of October 24, 2003, providing some figures in respect of the closure of files and objectives to be achieved within the period in question. He suggested a meeting in early January 2004 to describe and review the efforts made for that purpose over a represented period of several months.

[22] On November 7, 2003, the OSB counsel stated that the case was very serious. He said that the OSB request in relation to the file closure plan remained unchanged.

[23] That same day, the applicant's counsel renewed his request for a meeting in early January 2004 and asked once again what statutory authority the OSB had to demand a sequential order of closure of the files.

...

[28] He also mentioned that the process of closing a bankruptcy file is subject to some delays over which the trustee has no control. That is why the IAPO program normally gives the trustees 12 months in which to present their evidence. It was not fair that the respondent was suggesting the imposition of conservatory measures after only six months. The applicants were available to discuss the actual and meaningful progress in the closure process and thereby to avoid conservatory measures being taken.

[29] It was at that point, in view of the repeated refusal of the applicants to comply with the OSB requirements, that the respondent's decision to impose two series of conservatory

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> measures directions crystallized. These measures were taken only in regard to the 48 files with large bank balances ($10,000 or more) since those are the files that are likely to produce a dividend for the creditor.
>
> [30] The first series, which took effect on February 10, 2004, provided:
>
> - that 48 active ordinary administration files opened for several years would be withdrawn from the applicants until the official receiver wound up their administration or a custodial trustee was appointed for that purpose; and
>
> - that the applicants could not be assigned any new ordinary administration files by the official receiver.
>
> [31] The second series, issued on February 24, 2004, resulted in the firm of H.H. Davis& Associés Inc. being instructed to wind up the administration of the 48 files withdrawn from the applicants.

[8] As the judge states, the Office of the Superintendent did not take the conservatory measures capriciously. They were taken following a history of inexcusable delays sanctioned by the Court: see *Société Chapichou Inc., Georges Marchand et Procureur général du Canada*, S.C. No. 500-11-002944-862, March 16, 1995, where the judge determined that there was no valid excuse for the trustee's failure to finalize the matter and that the trustee was solely responsible for the delays described as unacceptable; *Dubois (Re)*, [1995] A.Q. No. 1684, where the judge stated that it seemed difficult to justify prolonging the management of a small estate for eight years; *Benchaya et Marchand Syndics Inc. et Surintendant des Faillites*, S.C. No. 500-11-006335-976, January 17, 2000; *Benchaya et Marchand Syndics Inc.*, S.C. No. 500-11-006335-976, July 6, 2000, where the trustee, in the same matter, was fined $1,000 for contempt of court because he refused to obey an order of the Superior Court directing him to pay the debtor the amount of $5,157.92; *Blais et Marchand Syndics Inc. et Surintendant des Faillites*, S.C. No. 405-11-000158-897, January 15, 2003, where Sénécal J. determined that there was no justification for the matter to have dragged on for 10 years.

[9] The appellants challenged the validity of these measures before both the Superior Court of Québec and the Federal Court on practically the same basis, however without elaborating the argument of unconstitutionality based on paragraph 2(*e*) of the *Canadian Bill of Rights* in their written memorandum before us. They were successful in the Superior Court: see *Marchand Syndics Inc. v. Procureur général du Canada et H.H. Davis et associés Inc.*, 2005 CanLII 27120 (QC CS), [2005] R.J.Q. 2094. The Superior Court declared that paragraphs 14.03(1)(*a*) and (*d*) of the Act were inoperative because they were inconsistent with paragraphs 1(*a*) and 2(*e*) of the *Canadian Bill of Rights*. The respondents appealed and the matter is now pending before the Court of Appeal of Québec.

[10] By contrast, the Federal Court dismissed the appellants' arguments accepted by the Superior Court of Québec. Hence the appeal before us by Marchand Syndics Inc. as well as the trustees Georges and Bruno Marchand.

[11] On appeal before us, I must say that the appellants were in no rush to move their case forward. On July 15, 2005, the Court awarded them an extension of time to file a reply to a motion to dismiss their appeal for failing to proceed diligently, without costs: see docket A-658-04, order dated July 15, 2005. In a decision dated August 25, 2005, the Court observed that more than eight months had elapsed since the motion had been filed and that the appellant had not taken any steps to advance the matter. The Court nevertheless dismissed the motion to dismiss the appeal, but ordered the appellants to pay $1,000 in costs, payable immediately: see docket A-658-04, order dated August 25, 2005.

[12] Finally, on July 18, 2006, the Court dismissed an unfounded application by the appellants to suspend the hearing of this appeal. It ordered them to pay $1,500 in costs, payable immediately regardless of the outcome of the litigation. The Court also ordered the judicial administrator to schedule the hearing of this appeal, which had already dragged on enough, as soon as possible. Accordingly, it was heard on October 18, 2006, i.e. three months after the order: see docket A-658-04, order dated July 18, 2006.

ANALYSIS OF THE APPELLANTS' SUBMISSIONS AND OF THE DECISION BY THE JUDGE OF THE FEDERAL COURT

The alleged breach of procedural fairness

[13] The appellants submit that the directions for conservatory measures were issued in breach of the rules of procedural fairness and fundamental justice. Three grounds were raised at the hearing in support of this argument. First, the appellants contend that they had the right to be heard, in an oral hearing, on the advisability of issuing conservatory measures. Second, the measures are measures of indefinite duration and they seriously compromise their right to practice. Third, the measures were issued by a person who was both judge and a party, thereby breaching the rule of *Nemo judex in causa sua*: no one can be a judge in their own case.

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[14] I will examine each of these arguments, beginning with the right to be heard. I must point out though, as with the unconstitutionality argument based on the *Canadian Bill of Rights*, this procedural fairness argument, as pleaded at the hearing, does not appear in the notice of appeal as a ground of appeal or in the appellant's written memorandum. The only breach of procedural fairness that they raised is the one relating to the refusal to receive the motion to disqualify the judge. And that is a ground for appeal that they withdrew. The appellants' counsel simply referred us to paragraph 20 of their written memorandum, where it states that their memorandum of fact and law filed at first instance supplements the arguments set out therein. Yet, there was no such argument. Nevertheless, section 337 indeed provides that the notice of appeal must set out a complete and concise statement of the grounds intended to be argued. These are the grounds normally elaborated in the memorandum of fact and law. The appellants' notice of appeal is twenty (20) pages long and reflects everything but the complete, concise, and precise grounds of appeal. It is in fact a veiled, deficient memorandum of fact and law.

The right to be heard before conservatory measures are directed under section 14.03 of the Act

[15] At the hearing, the appellants claimed that they were entitled to an oral hearing on the conservatory measures, presumably before a third party, probably a judge, to decide whether such measures should be issued. It is difficult to know the appellants' exact position because, as I said, their memorandum of fact and law did not refer to this issue, much less the issue of the right to be heard by a third party. The respondent's counsel, in relying on this same procedural fairness that the appellants so ardently claimed, objected to a new ground of appeal being raised for the first time on appeal, at the hearing, when it did not appear in the written memorandum or in the notice of appeal. The oral arguments of the appellants' counsel were not much more enlightening on the issue, as they simply stated that the hearing could not take place before the same person, nothing more.

[16] In fact, the appellants challenge our Court's decision in *Tremblay v. Canada (Superintendent of Bankruptcy)*, 2001 FCA 46 (CanLII), 2001 FCA 46, where our Court dismissed a similar claim to a right to an oral hearing when resorting to conservatory measures. At paragraphs 4 to 6, the Court writes:

> [4] In such circumstances, it is hardly surprising that the Superintendent thought it necessary to take conservatory measures to protect the assets which, objectively, on the evidence before him, seemed to be at risk at the time.
>
> [5] We consider that there is no merit in the appellants' argument that the Superintendent failed to observe the rules of natural justice in dealing with them. The appellants were aware of the audits taking place in their offices. They knew that a number of complaints had been filed against them and they knew the nature of the complaints. As the motions judge properly pointed out, they had several opportunities to be heard and to provide explanations about the alleged deficiencies, but chose to ignore them. They are hardly in any position to complain now.
>
> [6] Finally, the appellants argued that the Superintendent taking control of the estate records was a disguised revocation of their trustee licence without their having an opportunity to be heard as required in s. 14.02 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("the Act"). This argument is without basis in the case at bar and is founded on a misapprehension, not to say distortion, of the action taken by the Superintendent. The taking control of the estate records, which was made necessary by the appellants' conduct, was a measure taken to protect a third party's property involved in an administrative and disciplinary inquiry. This inquiry is now concluded, disciplinary proceedings have been initiated and the appellants may exercise the rights conferred on them by s. 14.02, if that has not already been done.
>
> [Emphasis added.]

[17] In this case, as in *Tremblay*, the appellants had many opportunities to express their point of view regarding the requests by the Office of the Superintendent. They were well aware of the allegations against them. They provided explanations in that regard on more than one occasion. They knew they had been asked to provide a detailed plan for the closing of files that had been long drawn out to the detriment of the creditors, failing which they would face conservatory measures. They refused to do so on the grounds that in their opinion, the Office of the Superintendent did not have the authority to demand such a plan from them.

[18] In passing, the appellants' counsel argued at the hearing that the judge improperly determined that their clients had not provided the detailed plan that they had been asked to provide. They referred us to letters containing statistical projections on file closings (e.g. 90 files by November 30, 2003, 170 by February 28, 2004, etc.): see appeal book, volume II, page 359. Clearly, without further details and specifications, these letters did not amount to a valid closing plan addressing the concerns expressed by the Office of the Superintendent about the backlog of files and the value of the estates at issue. In short, it was impossible for the Office of the Superintendent to know whether the emphasis had truly been placed on the backlog of files,

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where significant amounts lay stagnant to the detriment of the creditors (see, for example, the case of a matter dating back to 1973 with $575,505.30 held in trust and which, in 2004, had still not been settled: judge's decision, paragraph 2; see also the matters of *Vide et Traitement Canada Inc.* dating back to 1992; *Les Remorques Bédard Inc.*, dating back to 1990; and *Matériaux de Plomberie et Chauffage du Coteau Inc.*, dating back to 1991, with respective estates of $414,986.93, $272,008.19 and $146,990.09). In fact, the appellants' counsel was unable to point out any evidence in the appeal record establishing that the detailed plan requested had in fact been provided.

[19] I share the opinion of the judge that in this case there was no breach of procedural fairness and that the appellants were heard and given the opportunity to raise their arguments. I refer to paragraphs 82 to 86 of her decision which accurately summarizes this opinion:

> [82] In this case, I must take into consideration the efforts made by the OSB with its decision to begin the IAPO across the country, which led to a more specific investigation into the cases of administration of the applicants' active files. I note that once this process began between the OSB and the Syndics Marchand, the OSB informed the applicants that the failure to provide an acceptable closure plan could trigger some conservatory measures.
>
> [83] The abundant correspondence exchanged between the applicants and the OSB indicates that the rules of natural justice were complied with since the applicants were informed on many occasions of the OSB's requirements and the consequences they were risking should they refuse to comply with those requirements.
>
> [84] The applicants also think they had some legitimate expectations that a certain procedure would be followed. They state that the process contemplated by the IAPO program extended over a 12-month period, but that in their case the conservatory measures had been issued after only six months. I note, however, that the IAPO program required that a closure plan meeting the OSB's requirements be accepted at the outset. That did not happen in this case. The respondent did not contravene the procedure laid down by the IAPO program, therefore, since the applicants never provided an acceptable closure plan.
>
> [85] In the circumstances, given the statutory framework, the OSB had no need to grant the applicants a hearing or to meet with them one last time, since all the previous attempts had proved unproductive. As I said in Groupe G. Tremblay, supra, a hearing is not necessary before taking conservatory steps since when they prove necessary it is imperative that the OSB act swiftly.
>
> [86] I am satisfied, therefore, that the rules of natural justice were complied with in regard to the applicants and that the decision to issue conservatory measures directions does not contravene paragraph 2(*e*) of the *Canadian Bill of Rights*, *supra*.
>
> .

[20] The appellants acknowledge that they were heard on many points but not, they say, on the nature and choice of conservatory measures taken against them. In my opinion, our Court's decision in *Tremblay*, *supra*, is determinative. The appellants have not persuaded me that there are grounds to derogate from it. The fact that paragraph (*d*) of section 14.03 was added to the Act after the decision by this Court does not change the fact that we have before us conservatory measures which, as we shall discuss later on, are a means of protecting and administering property belonging to third parties, dictated by imperatives of safety, emergency or the need to carry out the objectives of the Act.

[21] I would add the following for purely pragmatic and functional purposes. Can we conceive that a measure taken to preserve evidence – an inspector's order to shut down a workplace in accordance with section 186 of *An Act respecting Occupational Health and Safety*, R.S.Q., c. S-2.1 to ensure the safety of the workers or an order to garnish from a third party pursuant to subsection 224(1) of the *Income Tax Act* – be subject to a notice of preliminary hearing? The question is asked and answered. Indeed, the Superior Court of Québec did not hesitate to answer in these terms in regard to section 15 of *An Act respecting the Ministère du Revenu du Québec*, a provision that is analogous with subsection 224(1) of the federal statute, in *Sioui v. Sous-ministre du Revenu du Québec*, [1995] R.J.Q. 2,492, at page 2,496:

> [TRANSLATION]
>
> The Court is of the opinion that the right to be heard, enshrined by section 23 of the Charter, does not apply to the seizure under section 15… This seizure does not determine the party's right; it is a provisional measure intended to ensure income tax is paid until there has been a definitive decision in the dispute.

[22] In this case, as we shall see later on, the conservatory measure was itself an interim measure and therefore of limited duration. Beyond that fact, the appellants were not without recourse. They could seek a judicial review of the decision made: in fact, they did seek two reviews before two different courts where they were heard on the constitutionality of the

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existence of a power to direct such measures as well as the lawfulness of the power that was exercised in their case. They could also have been heard at the hearing regarding their licence: section 14.02 expressly provides that it and the resulting decision is subject to judicial review and then to a subsequent appeal.

The nature of the conservatory measures under section 14.03 of the Act

[23] As this Court pointed out in *Tremblay*, *supra*, the conservatory measures under section 14.03 of the Act are measures taken to protect the property of third parties in the course of an administrative and disciplinary inquiry. They are dictated by a necessity to act quickly in order to ensure estates are preserved in the circumstances provided in subsection 14.03(2). "Preserve" in this case means not only protection against the loss or destruction of the estates in question, but also protection against improper or lacking management of the administration of an estate, to the detriment of creditors and the public interest. This is indeed suggested by the circumstances established by the Act whereby the Superintendent may resort to those measures.

[24] In fact, the Superintendent may resort to these protective measures when carrying out an inquiry or investigation pursuant to the powers conferred to him under paragraph 5(3)(*e*) of the Act, when pursuant to subsection 14.01(1) measures have been taken in regard to a trustee's licence for failing to properly fulfil the duties of a trustee, for improper management of the estate or for failing to comply with the Superintendent's directions (subsection 14.01(1), when it is in the public interest to do so (*ibidem*) or when a trustee fails to comply with one of the conditions of the licence, including the code of ethics respecting the conduct of trustees (section 13.5) [Emphasis added].

[25] It is clear that the use of conservatory measures is not, as the appellants ultimately claim, limited only to cases of estates compromised as a result of fraud, misappropriation or embezzlement. It is there so that the objectives of the Act are attained, which certainly includes the objectives of properly and efficiently administering estates as well as the objective of trustees respecting the terms and conditions of their licences.

[26] It would be false to claim, as the appellants do, that the conservatory measures apply indefinitely, particularly in this case.

[27] First, the Act itself clearly provides a time limit on the restriction in regard to the administration of new assets. Paragraph 14.03(1)(*d*) stipulates that it remains in effect until there has been a decision regarding the suspension or cancellation of the licence. The conservatory measures at issue are measures that are purely accessory to the principal litigation, which is disciplinary in terms of the appellants' ability to practice their profession: they are born of the litigation and extinguish with it.

[28] Second, the conservatory measure which is in dispute here has an additional limit: the order may be lifted when the Superintendent is satisfied with the guarantees offered regarding the proper and diligent administration of the estates to the creditors' benefit rather than to their detriment. In the words of the direction itself, "[t]hese directions take effect immediately and will stay in place until further notice".

[29] The appellants were certainly affected by this measure dated February 10, 2004, temporarily limiting their access to new estates. But we must not exaggerate. Beyond the time limit, the direction also contained a material limit: it applied only to new ordinary administration estates. It is closely connected and adapted to the problem alleged against the appellants: i.e. negligence in the administration of ordinary administration estates. As stated by Mr. Justice Chamberland of the Court of Appeal of Québec – from whom the appellants requested the interim execution of a judgment in their favour, declaring inoperative paragraphs (*a*) and (*d*) of section 14.03 and, accordingly, quashing the directions for conservatory measures – the appellants were certainly impeded in their professional activities, but they were not prevented from acting as trustees in summary administration estates, in certain ordinary administration estates or in proposals: see *Procureur général du Canada et al. v. Marchand Syndics Inc. et al. et H.H. Davis et Ass. Inc. et Banque canadienne impériale de commerce*, C.A.Q., No. 500-09-015869-050, November 8, 2005.

[30] In support of dismissing the appellants' motion, Mr. Justice Chamberland writes:

> [TRANSLATION]
> The evidence of irreparable harm is not very persuasive. There is no doubt that the measures imposed on the petitioners since February 2004 impede their professional activities. The evidence establishes however that this does not prevent them from continuing to act as trustees, i.e. continuing to administer certain ordinary administration bankruptcies, namely by administering summary administration estates and proposals. The situation is perhaps difficult – since they cannot be appointed as trustees in ordinary administration bankruptcies – but it is not critical, and is not an irreparable prejudice.

[31] I would add as complementary information that the appellants had informed the Office of the Superintendent that in any event they wanted to significantly reduce the influx of new ordinary administration estates. They reiterated this information before us, adding that the appellants were planning to retire.

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[32] I turn now to the appellants' complaint in support of their allegation of a breach of procedural fairness, namely that the person who directed the conservatory measures was at once judge and a party. It would not usually be necessary to address this issue since it is another issue that the appellants failed to raise or elaborate in their memorandum of fact and law. But the appellants insisted that it be decided in order to avoid the undertaking of a new challenge.

[33] The allegation is unfounded for the reasons that I have already stated relating to the very nature of a conservatory measure. It is also unfounded because the appellants based their claim on a narrow and incorrect interpretation of *Sheriff et al. v. Attorney General of Canada*, 2006 FCA 139 (CanLII), 2006 FCA 139, decided by our Court.

[34] In that matter, our Court simply reiterated the principle that a person cannot initiate and judge an action. That goes without saying. But here the conservatory measures are not an action. As I already stated, they are incidental and accessory to a disciplinary proceeding brought against the appellants. The hearing of this proceeding, pending decisions on the various recourse brought by the appellants challenging the Superintendent's powers, was entrusted to Mr. Greenberg, an independent adjudicator who will hear the appellants in accordance with section 14.02. I believe it would be superfluous to say more.

[35] The appellants also relied on *Authorson v. Canada (Attorney General)*, 2003 SCC 39 (CanLII), [2003] 2 S.C.R. 40 and *Air Canada v. Procureure générale du Canada et le Commissaire de la concurrence*, 2003 CanLII 32929 (QC CA), [2003] R.J.Q. 322 (C.A.Q.) in support of their argument.

[36] *Authorson* is of no help to the appellants. At paragraph 42 of this decision, Mr. Justice Major states that paragraph 1(*a*) of the *Canadian Bill of Rights* guarantees notice and some opportunity to contest a governmental deprivation of property rights only in the context of an adjudication of that person's rights and obligations before a court or tribunal. [Emphasis added.]. While it is obvious that the conservatory measure has an impact on the appellants' business, it is accepted that they do not have property rights over the estates of third parties, which they are responsible for administering in accordance with the Act and the conditions of their licence. They are only trustees and, under subsections 5(2) and (4) of the Act, the Superintendent has the ultimate control of the estates and can give trustees directives regarding the performance of their duties. Moreover, the respondent's decision, like that of an inspector, is an administrative decision authorized by the Act.

[37] At paragraph 59, Mr. Justice Major lists the guarantees of fundamental Justice conferred by paragraph 2(*e*) of the *Canadian Bill of Rights*. He adds and I quote:

> All of these protections are legal rights applicable in the context of, or prior to, a hearing before a court or tribunal.
>
> . . .
>
> Its protections are operative only in the application of law to individual circumstances in a proceeding before a court, tribunal or similar body.

The proceeding referred to by Major J. is the disciplinary proceeding where the appellants will be heard in accordance with section 14.02 of the Act before a disciplinary tribunal. Resorting to conservatory measures is not a proceeding before such a forum: the respondent is not a court or a tribunal or a similar body.

[38] With regard to *Air Canada*, *supra*, we did not have the benefit of any such arguments in the respondent's written memorandum since the appellants' ground for appeal was new and did not appear, as I already mentioned, in their notice of appeal or in their memorandum of fact and law (the only reference to this case by the appellants in their memorandum is found in three lines at paragraph 44; it was made in relation to the ground for appeal involving the judge's disqualification and was withdrawn at the hearing). But that aside, the decision of the Court of Appeal of Québec in that matter is entirely different from the one at issue in this case.

[39] In *Air Canada*, the Commissioner of Competition (Commissioner) issued an interim order for an injunction against Air Canada prohibiting it from offering to sell or selling, directly or indirectly, particular fares on a given number of routes. The Court of Appeal of Québec determined that the Commissioner, while continuing the inquiry against Air Canada, had become a judge for the purposes of issuing an injunctive order. This is not at all the case with respect to the respondent under the Act and section 14.03. Indeed, in *Métivier v. Mayrand*, [2003] J.Q. No. 15389 (C.A.Q.), the Court of Appeal of Québec distinguished the Superintendent's situation from the Commissioner's in terms of the guarantees of the Superintendent of Bankruptcy's independence and impartiality under paragraph 2(*e*) of the *Canadian Bill of Rights*. It determined that the legislative scheme resulting from 14.01 and 14.02 of the Act was not contrary to the *Canadian Bill of Rights* and therefore was not invalid or inoperative.

[40] Moreover, the decision made by the respondent to resort to conservatory measures was not an injunctive measure like the one taken by the Commissioner. It did not prohibit the appellants from carry on their activities as trustees. It only removed certain files whose administration was jeopardized as a result of their inability to close them and their failure or refusal to cooperate with a procedure that would likely have enabled them to keep them.

[41] It is true that the appellants have been temporarily deprived of the opportunity to receive new ordinary administration estates. But that fact does not change the conservatory nature of the measure taken pursuant to paragraph (*d*)

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of section 14.03, as long as there is a rational connection between that measure and the facts underlying the decision to resort to conservatory measures. I will now address that issue.

Was there a rational connection between the facts underlying the decision to resort to conservatory measures and the decision made under paragraph (*d*) of section 14.03 of the Act?

[42] The judge determined that the appellants were repeatedly asked, to no avail, to provide a specific closing plan which, under the circumstances, would have provided that the most problematic files be given priority. This finding of fact is amply supported by the evidence.

[43] Following the series of refusals and the notices that conservatory measures could be taken, the judge also determined at paragraph 70 of her decision that "it was not patently unreasonable to consider that the administration of the estates in the oldest files was compromised and that it was necessary to protect them by resorting to conservatory measures so that the administration of the files could be diligently wound up and the sums obtained would be paid to the creditors at the earliest opportunity". Whether in this case we apply the standard of patent unreasonableness or that of simple unreasonableness, the situation in my opinion warranted that these measures be taken in the interest of the creditors, in the public interest and in the interest of properly and efficiently administering third party property as the appellants were bound to do under the Act.

[44] In a situation where there was undeniable and certain negligence in the management of ordinary administration estates and a refusal to cooperate to accelerate their settlement, it was not unreasonable to avoid aggravating the existing problem by not allowing similar estates of that type to be added to those the appellants continued to administer, thereby potentially compromising the proper administration of both those and the new estates. Only 48 of the most drastic ordinary administration estates were removed from them through the conservatory measures, in accordance with the ordered and timely administration of insolvency cases across the country. The others – 144 in all – remained under their administration.

CONCLUSION

[45] In my opinion, in analyzing the arguments submitted by the appellants and in applying the law to the facts of the matter, the judge did not make any error that would justify our intervention. The temporary conservatory measures taken were necessary to ensure the proper administration of ordinary administration estates which were compromised by the appellants' negligence and refusal to cooperate. The measures were taken in keeping with the Act and the rights that it confers on the appellants. They were complaining about measures that were brought about by their own wrongdoing.

[46] For these reasons, I would dismiss the appeal with costs. Under the circumstances, given the state of the proceedings in the appeal book as well as the nature of the challenge which was derived in large part from it's first time around, I would order that costs be payable immediately and that they be assessed in accordance with column V of Tariff B.

"Gilles Létourneau"

J.A.

"I concur

Marc Noël J.A."

"I concur

J.D. Denis Pelletier J.A."

Certified true translation

Kelley A. Harvey, BCL, LLB

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FEDERAL COURT OF APPEAL
SOLICITORS OF RECORD
DOCKET: A-658-04
APPEAL FROM AN ORDER BY THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER DATED NOVEMBER 10, 2004,
IN DOCKET T-1116-04.
STYLE OF CAUSE: MARCHAND SYNDIC INC., trustee et al. v. SYLVIE LAPERRIÈRE
PLACE OF HEARING: Ottawa, Ontario
DATE OF HEARING: October 18, 2006
REASONS FOR JUDGMENT: LÉTOURNEAU J.A.
CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.
DATE OF REASONS: November 10, 2006
APPEARANCES:

Michel Décary Jean-Philippe Gervais	FOR THE APPELLANTS
Bernard Letarte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT

Date: 20061110
Docket: A-658-04
Ottawa, Ontario, November 10, 2006
CORAM: LÉTOURNEAU J.A.
NOËL J.A.
PELLETIER J.A.
BETWEEN:
MARCHAND SYNDICS INC., trustee
GEORGES E. MARCHAND, trustee
BRUNO MARCHAND, trustee
Appellants
and
SYLVIE LAPERRIÈRE
Respondent
JUDGMENT

The appeal is dismissed with costs payable immediately and assessed under column V of Tariff B.

"Gilles Létourneau"

J.A.
Certified true translation
Kelley A. Harvey, BCL, LLB

Circumstances - Sec. 14.03(2)

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(2) The circumstances in which the Superintendent is authorized to exercise the powers set out in subsection (1) are where

(a) an estate is left without a trustee by the death, removal or incapacity of the trustee;

(b) the Superintendent makes or causes to be made any inquiry or investigation under paragraph 5(3)(e);

(c) the Superintendent exercises any of the powers set out in section 14.01;

(d) the fees referred to in subsection 13.2(2) have not been paid in respect of the trustee's licence;

(e) a trustee becomes insolvent;

(f) a trustee has been found guilty of an indictable offence that, in the Superintendent's opinion, is of a character that would impair the trustee's capacity to perform the trustee's fiduciary duties, or has failed to comply with any of the conditions or limitations to which the trustee's licence is subject; or

(g) a circumstance referred to in paragraph 13.2(5)(c) or (d) exists and the Superintendent is considering cancelling the licence under subsection 13.2(5).

Contents and effect of direction - Sec. 14.03(3)

(3) A direction given pursuant to subsection (1)

(a) shall state the statutory authority pursuant to which the direction is given;

(b) is binding on the person to whom it is given; and

(c) is, in favour of the person to whom it is given, conclusive proof of the facts set out therein.

Liability ceases on compliance - Sec. 14.03(4)

(4) A person who complies with a direction given pursuant to subsection (1) is not liable for any act done by the person only to comply with the direction.

1992, c. 27, s. 9;
1997, c. 12, s. 14;
1999, c. 31, s. 18(E);
2005, c. 47, s. 16;
2007, c. 36, s. 8(F).

Removal and appointment - Sec. 14.04

14.04 The court, on the application of any interested person, may for cause remove a trustee and appoint another licensed trustee in the trustee's place.

1992, c. 27, s. 9.

Royal Bank of Canada v. United Used Auto & Truck Parts Ltd. et al., 2006 BCSC 1192 (CanLII) - Alteration in Trustee

Date:	2006-08-03
Docket:	H990076
Parallel citations:	24 CBR (5th) 102
URL:	http://canlii.ca/t/1p294
Citation:	Royal Bank of Canada v. United Used Auto & Truck Parts Ltd. et al., 2006 BCSC 1192 (CanLII), <http://canlii.ca/t/1p294> retrieved on 2013-08-21
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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Royal Bank of Canada v. United Used Auto & Truck Parts Ltd. et al.,***
2006 BCSC 1192

Date: 20060803

Docket: H990076
Registry: Vancouver
Between:
Royal Bank of Canada
Petitioner
And
United Used Auto & Truck Parts Ltd. and Others
Respondents

Docket: H990085
Registry: Vancouver
Between:
Century Services Inc.
Petitioner
And
VECW Industries Ltd. and Others
Respondents

Before: The Honourable Mr. Justice Rice
Reasons for Judgment

Counsel for Applicant, Mr. Mott:	W.A. Pearce, QC
Counsel for PricewaterhouseCoopers Inc.	K. Jackson D. Westgeest, Articled Student
Date and Place of Hearing:	June 5 – 8, 2006 Vancouver, B.C.

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INTRODUCTION

[1] This is an application for an order pursuant to s. 14.04 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 (the "***BIA***"), removing PricewaterhouseCoopers ("PWC") as trustee in bankruptcy for United Used Auto & Truck Parts Ltd., Seiler Holdings Ltd., and VECW Industries Ltd., and United Used Auto Parts (Storage Div.) Ltd. (together "United"), and appointing George Abakhan, licensed trustee, in its place.

[2] The applicant is Ian Mott, an officer, director, major shareholder, and creditor of one or more of the United companies. The sole purpose of the application is to provide creditors of United with a trustee that has the capacity to sue PWC for alleged breaches of fiduciary duty as trustee of the bankrupt estate and court-appointed receiver of the assets of the estate.

[3] The application arises from the court-approved sales of certain lands owned by United in Surrey, B.C. (the "United Lands"). In particular, it concerns a sale in 2001 to the Pacific National Exhibition (the "PNE") of lots 3 to 6 and 8 to 20 of the United Lands (the "PNE Lands").

[4] It is alleged that PWC, as United's trustee and receiver, failed in a fiduciary duty owed to United's creditors to maintain and enhance the value of the United Lands and to obtain a fair price on the sales. PWC denies these allegations and contends in any event that any legal action commenced now on those claims is *res judicata* and so barred either because the claims have been adjudicated in this Court before or because Mr. Mott should have but failed to raise them in earlier court proceedings.

[5] The parties sought and obtained directions from Mr. Justice Tysoe on April 12, 2006. His Lordship directed that PWC was at liberty to raise the issue of *res judicata* on this application in advance of determining whether to replace PWC as United's trustee.

BACKGROUND

[6] For many years, United operated a used auto parts business in Surrey, B.C. near the Patullo Bridge. It managed at the same time to assemble about 150 acres of land, some of which it used in its auto parts business, and some it kept vacant for redevelopment. This activity all took place under the direction of Mr. Mott.

[7] As far back as 1994, United was under pressure of foreclosure of the United Lands from the Royal Bank. In May of that year, to forestall foreclosure, United entered into a forbearance agreement whereby the bank agreed to forbear from foreclosing until May of 1997. The agreement was extended a number of times through to 1998.

[8] Beginning in about June 1997, the PNE and United had discussions on and off about the sale to PNE of the PNE Lands.

[9] In March 1998, United entered into another forbearance agreement with another charge holder on the United Lands, R.A. Aziz. By that agreement, United was required to put the United Lands on the market for sale and undertake an aggressive sales and marketing program. United entered into a one-year listing agreement with Colliers.

[10] Meanwhile, in about January 1998, United had made an informal proposal to the secured creditors whereby United would sell $25 million worth of the United Lands by September 1998. In that time, however, there were no sales.

[11] In September 1998, three years of taxes were unpaid on the United Lands, and United obtained financing through another charge holder, Century Services. With that, United owed the Royal Bank about $6 million, Century Services about $5 million, Aziz about $6 million, and there were also other charges over the United Lands.

[12] The Royal Bank and Century commenced foreclosure proceedings in January 1999. They obtained orders nisi on February, 4 1999.

[13] United resisted applications for conduct of sale by the mortgagees in early 1999. It entered into another forbearance agreement with Aziz. The agreement included a repayment plan that required United to achieve various sales targets or a refinancing of the property by July 1999. United failed to meet the targets and sold none of the properties. In about July 1999, United consented to an order granting joint conduct of sale of the United Lands to the Royal Bank, Century, and Aziz.

[14] On August 16, 1999, Century and the Royal Bank obtained an appraisal from Burgess, Austin, Cawler & Associates valuing the United Lands at $44.4 million based on industrial-salvage zoning. The appraisal was updated on September 23, 1999, valuing the lands at $23 million to $25 million if sold en bloc and $30.5 million if sold in individual lots. Century and the Royal Bank then agreed to list the United Lands for $32 million en bloc. Accordingly, on October 12, 1999, they entered into a listing agreement putting the asking prices at $49.6 million in total based on selling the lots individually and $32 million on an en bloc basis.

[15] On November 8, 1999, United commenced proceedings under the ***Companies' Creditors Arrangements Act***, R.S.C. 1985, c. C-36 (the "***CCAA***"). Ernst & Young was appointed as a monitor and was granted conduct of sale of the United Lands.

[16] On February 23, 2000, in the CCAA proceeding, the court approved a sale of the United Lands to Cape Developments, Oxford Properties, and GE Capital for $30 million. That sale was subject to two conditions: first, that Cape

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could rezone the property, and second, that Cape could be satisfied of the environmental condition of the property. Cape never cleared its conditions, and although an extension was negotiated, Cape failed to increase the deposit in accordance with the extension agreement. In the result, that transaction collapsed.

[17] Meanwhile, on April 27, 2000, CB Richard Ellis provided a report for Mr. Mott valuing part of the United Lands, consisting of lots 22 through 32 (the "Group Five Lands"), at $28,400,000 based on highway-commercial zoning. A letter from Mr. Ellis to Mr. Mott on May 23, 2000, stated that the total United Lands excluding the Group Five Lands were worth $750,000 to $800,000 per acre.

[18] In May 2000, Ernst & Young issued its ninth monitor's report. It was negative about United's conduct and ability to organize. The report stated that the prospects for restructuring appeared to be significantly poorer than when the Cape offer had been accepted earlier in the year.

[19] The monitor remained of the view that United's operations could be financially viable in due course under competent management. However, the monitor accused Mr. Mott of improperly dealing with funds generated from the sale of its "P.M.S.I." inventory, which should have been held strictly in trust. The report stated:

It is common ground that the management of United lacks the skills to achieve the restructuring without significant professional assistance. However, even that professional assistance is without effect if management is not prepared to accept and execute professional advice it received in a prompt and efficient manner.

The report also alleged that United had filed a false affidavit and had breached a court order not to give further security.

[20] In June 2000, Mr. Justice Tysoe granted the Royal Bank and Century conduct of sale of the United Lands, and they entered into a further listing agreement with Colliers to list the lands en bloc for $32 million as well as on an individual lot basis. The CCAA proceedings were terminated the next month. United was declared bankrupt, and PWC was appointed as the trustee in bankruptcy. United appealed, but the appeal was dismissed on August 8, 2000. PWC was later replaced as the trustee for United Used Auto Parts (Storage Div.) Ltd., but remained in that position for the rest of the United companies.

[21] By this time, the administrative charges on the United Lands had risen to approximately $850,000. The interest costs on the mortgages were running at about $300,000 per month. In August 2000, Mr. Justice Tysoe approved the sale of lot 1 of the United Lands for $2.4 million, and on September 1, 2000, he appointed PWC as the receiver of the assets and undertaking of United with conduct of sale of all but lots 1, 7, and the Group Five Lands. Conduct of sale of lot 1 and the Group Five Lands remained with the Royal Bank and Century. Lot 7 was the subject of a separate foreclosure proceeding and was sold on November 27, 2000, to a numbered company owned by Advance Lumber for $2,525,000.

[22] On February 6, 2001, PWC, acting as the receiver, filed applications under the Royal Bank and Century foreclosure actions for an order for sale of the PNE Lands and the right to purchase lot 2 for $12,572,600. The purchaser was a numbered company controlled by the PNE. PWC also applied for an order that lot 21 be sold to a numbered company related to Ralph's Auto Supply for $1,250,000.

[23] Mr. Ritchie Clark appeared as counsel for Mr. Mott and for United itself on the sale applications. Although he brought no counter-application on behalf of United, Mr. Clark objected to the sale on several grounds, including alleged failures by PWC to adequately inform the other parties as to who were the purchaser's backers, to provide information on the negotiation history, to properly market the property, and to obtain a price at fair market value. Mr. Clark applied for an adjournment, which was refused, and Mr. Justice Shaw approved the sales on February 9, 2001. Later that month, Mr. Justice Tysoe granted PWC conduct of sale of the Group Five Lands.

[24] On March 9, 2001, Mr. Mott sought leave to appeal the orders for sale granted by Mr. Justice Shaw. The application was dismissed.

[25] The original sale of the PNE Lands to the PNE failed to close because the PNE wished to also acquire lot 7, which had been sold to Advance Lumber in a separate foreclosure proceeding. However, on May 11, 2001, PWC brought another application based on a renewed agreement with the PNE. It was for an order that the PNE Lands and the right to purchase lot 2 be sold to the PNE for $12,572,600 and that lots 27 to 32 (the "Replacement Lands"), which formed part of the Group Five Lands, be sold to a company related to Advance Lumber for $2,146,000. On May 15, 2001, after a hearing May 11 and 14, 2001, Mr. Justice Thackray approved these sales.

[26] Mr. Mott and his son, Howard Mott, appeared at the hearing before Mr. Justice Thackray without counsel and made submissions opposing the sale. They requested an order directing a trial on the issue of constructive expropriation, but made no formal application to support the order. Mr. Justice Thackray dismissed their request, saying that such an application was not technically before him. Mr. Justice Thackray found further that the Motts had failed to establish a foundation for their allegations of conspiracy and fraud.

[27] Mr. Mott sought leave to appeal Mr. Justice Thackray's ruling, but his application was dismissed on May 18, 2001. A further application by Mr. Mott to vary the Court of Appeal's order of May 18, 2001, and to stay Mr. Justice Thackray's orders approving the sales was similarly dismissed by the Court of Appeal on May 20, 2001.

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[28] After completion of the sale of the PNE Lands, the court made further orders granting Aziz conduct of sale of the remainder of the Group Five Lands, being lots 22 to 26. In about August 2002, the court made a vesting order in the foreclosure actions, approving the sale of lot 24 to Ralph's Auto Supply for $1,130,000. On October 3, 2003, Mr. Justice Tysoe granted a vesting order approving the sale of the remaining lots 22, 23, 25, and 26 to R & R Trading Co. Ltd. for $2,644,800.

THE FIRST MOTT ACTION

[29] On May 31, 2000, Mr. Mott, on behalf of himself and Moe-Villa Investments Ltd., a fourth mortgagee of the United Lands, commenced B.C. Supreme Court Action No. S013035 (the "First Mott Action") against the PNE, PWC, and Advance Lumber. Concurrently, he filed certificates of pending litigation against 24 lots within the United Lands. His claim was for damages for breach of trust, deceit, and conspiracy. He alleged that the court-approved sales were not made in good faith for valuable consideration and that the defendant purchasers were not *bona fide* purchasers for value.

[30] The endorsement on the writ provided:

Moe-Villa Investments Ltd. claim a mortgage over the lands... and claim its security interest in the land which is being compromised by the tortuous [*sic*] and deceitful conduct of the Defendants in this action and in Supreme Court of B.C. action numbers H99076 and H99085. Ian Mott claims damages and title of the lands is being wrongfully [*sic*] transferred away by errors of the court and the parties to the action participated and wrongfully dealt in ways to deprive the Plaintiffs of their interest in the lands as set out in the attached schedules... These lands are being taken without proper compensation to the Plaintiffs. Fair market value was not paid by the purchasers presently on title... The Plaintiffs claim against the Defendants, and each of them, for damages [*sic*] and loss resulting from, breach of trust, deceit, and conspiring to transfer to the Defendant purchasers P.N.E...., 617548 B.C. LTD., ADVANCE LUMBER LTD. and 606703 B.C. LTD. the aforesaid interests in parcels of land unlawfully for less than fair market value, and contrary to the *Bankruptcy and Insolvency Act, R.S.C.* and the *Company Act, R.S.B.C.* The Defendants conspired to depress the market value of the lands and the Defendant purchasers obtained the lands the lands [*sic*] and interests in the lands owned by the Plaintiffs for less than true market value. The said purchases of lands were not made in good faith for valuable consideration and the Defendant purchasers are not bona fide purchasers for value.

[31] PWC applied to dismiss that action as an abuse of process, and the application was heard before Madam Justice Allan on August 23, 2001. Madam Justice Allan, upon reading the materials and hearing argument, ruled that all the issues in the new action had either been raised or should have been raised in the previous sale approval proceeding before Mr. Justice Thackray, who had dismissed the allegations of conspiracy as groundless.

[32] Included in her findings of fact and law were the following:

[para. 8]... Mr. Mott's son made extensive submissions on that application, alleging serious improprieties by the Receiver and the P.N.E. Specifically, Mr. Mott alleged a conspiracy between the Receiver and the P.N.E., to have the P.N.E. obtain land at price advantageous to the P.N.E., and disadvantageous to Mr. Mott.

[para. 22]... In essence, the plaintiffs seek the return of the lands, and damages to compensate them for the Receiver selling those lands to the P.N.E. for less than fair market value, and deceitfully.

[para. 25]... the plaintiffs filed additional affidavits asserting that Colliers did not permit prospective purchasers of the lands to make offers because Colliers was reserving certain parcels for purchase by the P.N.E.

[para. 26]... The plaintiffs suggest that numerous matters were not before Mr. Justice Thackray, and that with respect to some issues, he was confused and did not understand them.

[para. 31]... Mr. Mott seeks to pursue the claim that the defendants acted wrongfully and deprived the plaintiffs of their lands without proper compensation. He alleges the lands were "wrongfully transferred away by errors of the courts."

[para. 33] Both plaintiffs claim for damages as a result of the defendants' breach of trust, deceit, and conspiracy to depress the market values of the lands. Mr. Mott alleges a wrongful sale of the lands, and seeks to have those transactions reversed.

[para. 34] These issues have all been raised in previous proceedings and litigated. There are no new parties to the litigation. There is no "fresh evidence" that was not or could not have been discovered in previous litigation. The proposed evidence of Mr. Seilor and Mr. Lutor who were apparently unsuccessful in making offers to purchase portions of the lands does not raise a new issue.

[para. 35] Mr. Justice Thackray devoted 18 paragraphs of his careful and lengthy reasons for judgment to the alleged conspiracy alleged by Mr. Mott, and dismissed it as groundless.

[para. 37] The PNE has been judicially determined to be a bona fide purchase for value. Allegations against Advance Lumber co-operating with PNE and Colliers, the realtor acting as agent for PWC, were canvassed before Thackray J. and have no merit.

[para. 38] I conclude that the plaintiff's application is an abuse of process and should be dismissed pursuant to Rule 19(24)(d).

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[para. 45]... So, pursuant to Rule 19(24), there will be two orders of special costs.

THE SECOND MOTT ACTION

[33] On June 13, 2001, Mr. Mott commenced another action, B.C. Supreme Court Action No. S013957 (the "Second Mott Action"), against the existing and additional defendants. He filed certificates of pending litigation against the Group Five Lands. A similar application was made to strike the action under Rule 19(24) as an abuse of process. It was heard on September 26, 2002, before Mr. Justice Davies, who found that the endorsement in the Second Mott Action was "virtually identical" to the endorsement on the First Mott Action. Mr. Justice Davies held that because the Second Mott Action was "in all material respects identical to an action which has already been struck by this court as an abuse of process, it must be dismissed on the basis of *res judicata*."

THE PROPOSED STATEMENT OF CLAIM

[34] In the proposed action underlying the application before me, the claims against PWC are detailed in a draft statement of claim submitted on behalf of Mr. Mott. As a pleading it is overloaded with redundancies, evidence, and conjecture, but it also manifests a number of allegations, which may be excerpted as follows:

PROPOSED STATEMENT OF CLAIM

Statement of Claim Para. No.	**Allegation:**
4 - 5	PWC accepted appointment as Trustee and failed to disclose to the court and United's creditors its conflict in dealing with the PNE sale when PWC was also the auditor for PNE. PWC should never have accepted an appointment as Receiver because of the conflict that existed between the interests of the secured creditors and unsecured creditors.
6 – 7, 18	PWC failed to exercise its duty to take reasonable care, supervision and control of the debtor's property, specifically by failing to preserve the values of the property and enhance those values where it would have been prudent and feasible, and by failing to market the properties in a manner which would achieve the best possible price. PWC failed to appear at a public hearing in Surrey, July 31, 2000, to oppose a down zoning to remove salvage use from land zoned "Industrial Salvage" ("I.S."). PWC could have opposed the down zoning successfully on the basis that the down zoning constituted contravention of an agreement between the United and the City of Surrey in 1985. PWC knew or ought to have known that the proposed down zoning was part of a plan by Surrey to upgrade the use of the area where the United Lands were situate for commercial use, and it knew that commercially zoned lands were much more valuable than lands zoned for salvage or lands zoned for industrial use.
8 - 9	PWC failed to take reasonable steps to enhance the value of the subject lands before placing them on the market for sale by applying for a rezoning of the subject lands for commercial use or by not requesting Surrey counsel on July 31, 2000 to postpone the final passage of the down zoning to give it an opportunity to prepare rezoning applications.
10, 18	PWC locked the doors of the twelve business operations of United and proceeded to liquidate the assets without any prior notice to United, knowing that closing the businesses would put into jeopardy the non- conforming use of the United Lands and the premium value associated with that use, and knowing that United was revitalizing its business and the CCAA monitor's forecast income from operations would amount to approximately $866,000. PWC caused United to lose profits from the time of business closure to the present and in the future.
11	PWC listed the properties of United for sale without first taking advantage of the material change in Surrey's planning objectives to upgrade the area for commercial use and when it set an en bloc listing price of $32 million dollars which was an unconscionably low price having regard to the fair market value of the properties if sold as individual lots.
12	PWC failed to list the properties on MLS in a timely fashion and discouraged offers from potential purchasers who were interested in acquiring individual lots, with a view to accommodating the wishes of PWC's client, the PNE, which needed a large assembly of land to stay in place while it was in the process of deciding on its own site

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	relocation. PWC failed to obtain a fair and reasonable return for the sale of the United Lands over reasonable period of time on a program that would give the properties as broad exposure as possible and encourage sales of individual lots but at the same time allowing consideration of en bloc offers that included premiums for the value of large blocks of land.
13	PWC failed to secure access as to the individual lots or to commence proceedings to enforce contractual rights claiming damages,, with the result that the lots bordering on the perimeter road were sold for substantially less than fair market value.
17	PWC sold the PNE Lands to the PNE for $12,572,600 based on a price of $185,000 per acre, which was substantially less than fair market value, knowing at the time that the PNE had secured the necessary commitment from the City of Surrey to rezone the subject lands for commercial purposes, and that if the lands were rezoned, their value would more than triple the price that was agreed upon. PWC further failed to take into account the following: (a) the earlier expressions by the PNE of its willingness to pay full market value; (b) the scarcity of large blocks of land that would suit the needs of the PNE, and the fact that the PNE Lands were the PNE's first choice of all potential sites it had reviewed over a number of years; (c) the fact that the PNE was under a time constraint to acquire lands for a new site because of the expiry of an existing lease; (d) the fact that the Province of British Columbia, which owned the PNE, had the financial ability to pay not only full market value but a premium as well.
20	PWC entered into a tri-partite agreement with PNE and Advance Lumber whereby PWC sold six lots (the "Replacement Lands") from the Group Five area to Advance Lumber, and Advance sold lot 7 of the United Lands to the PNE, and failed to advise the court of the following: (a) its conflict of interest in dealing with the PNE, an important client of PWC; (b) information regarding the commitment that Surrey had made to rezone the lands to permit commercial use, including a casino; (c) the sale price of Lot 7, which would have provided the court with a good indicator of the value of the PNE Lands; (d) information about PWC's failure to take appropriate steps to preserve and enhance property values and to market the properties in a manner to achieve the best possible price; (e) information as to its complete failure to drive a hard bargain with the PNE.
21	PWC also breached its fiduciary duty by: (a) misinforming the court of the proper status for the zoning of the Replacement Lands and misinforming the court that salvage use on the subject lands would not likely be permitted by Surrey when PWC knew the opposite to be true; (b) discouraging the court from placing any value on an offer for one of the lots in the Replacement Lands which reflected a premium value based on the intended salvage use; (c) misinforming the court that United's inventory had been sold off; (d) misinforming the court that the sale price for the Replacement Lands was approximately $10,000 below market value when in fact a fair price for the Replacement Lands may well had been in excess of $2 million above the actual sale price; (e) misinforming the court that the Group Five Lands had been actively marketed for a long time before the agreement and purchase of sale to Advance was entered into.
22	PWC failed to make the PNE accountable for the difference between the fair market

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	value of the Replacement Lands and the actual sale price of the same.
23	PWC failed to obtain the best possible price for the remaining lots by setting a low benchmark in the sale of the Replacement Lands, in causing those lots bordered on the perimeter road to lack access, and failing to secure commercial zoning or to commence salvage operations to preserve the nonconforming salvage premium.

THE DOCTRINE OF *RES JUDICATA*

[35] In British Columbia, applications to have actions dismissed on the basis of *res judicata* are brought under Rule 19(24), which enables the court to dismiss an action if it is "unnecessary, scandalous, frivolous, or vexatious", or is "otherwise an abuse of the process of the court."

[36] The doctrine of *res judicata* and the related rules against abuse of process and collateral attack are designed to ensure that once a cause of action or the issues within it have been finally determined by the courts, they cannot be brought forward again. The goal is to bring litigation between two parties to a definitive end and to prevent one party from pursuing the other in the courts more than once over the same cause or the same issues: ***Fenerty v. The City of Halifax*** (1920), 53 N.S.R. 457, 50 D.L.R. 435 (S.C.). Other policy reasons underlying the doctrine are to prohibit duplicative litigation and avoid potentially inconsistent results, undue costs, and inconclusive proceedings: ***Danyluk v. Ainsworth Technologies Inc.***, 2001 SCC 44 (CanLII), [2001] 2 S.C.R. 460, 2001 SCC 44.

[37] In ***Angle v. Minister of National Revenue***, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544 at p. 555, Dickson J. explained the operation of the doctrine of *res judicata* and its two main branches: cause of action estoppel and issue estoppel. He wrote:

In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem judicatam*. This form of estoppel, as Diplock L.J. said in *Thoday v. Thoday* [[1964] P. 181.], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. ... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* [(1921), 29 C.L.R. 537.], at p. 561:

I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

(a) Cause of Action Estoppel

[38] Cause of action estoppel applies to bar proceedings that allege the same cause of action between the same parties if that cause has already been determined by the courts. However, despite its name, it is not so strictly limited. Cause of action estoppel also applies to bar subsequent proceedings covering the same subject matter and arising out of the same relationship between the parties, even though the second litigation may be based on a different legal description or conception of the cause: ***Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.*** 1980 CanLII 393 (BC CA), (1980), 19 B.C.L.R. 59 at pp. 64-65, 109 D.L.R. (3d) 729 (C.A.), cited with approval in ***Chapman v. Canada*** 2003 BCCA 665 (CanLII), (2003) 21 B.C.L.R. (4th) 272, 2003 BCCA 665 at para. 17.

[39] This broader definition of cause of action estoppel recognizes that parties to an action have a duty to bring their whole case to the court's attention and not to reserve some aspect of the matter against the possibility of a decision in the opponent's favour as a means of preserving a way to come at the opponent again. As Wigram V.C. explained in ***Henderson v. Henderson*** (1843), 3 Hare 100 at 114-15, 67 E.R. 313 at 319:

In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, in which the parties exercising reasonable diligence, might have brought forward at the time.

[40] This description of the doctrine was quoted with approval by our Court of Appeal in ***Lehndorff Management***, *supra,* where Carrothers J.A. gave the following further explanation of the doctrine's scope:

The maxim *res judicata* does not apply to distinct causes of action (*Hall v. Hall and Hall's Feed & Grain Ltd.* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.)), but it does apply where the second action arises out of the same relationship, and the same

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subject matter, as the adjudicated action, although based upon a different legal conception of the relationship between the parties (*Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.)). It also applies not only to points on which the court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time (*Winter v. Dewar*, 41 B.C.R. 336, reflex, [1929] 2 W.W.R. 518, [1929] 4 D.L.R. 389 (C.A.)).

[41] Where a party seeks to pursue a second action against the same foe, the court must be satisfied that the new cause of action alleged is truly separate and distinct from the old, and not merely a new portrayal of the same subject matter, such as tort rather than contract. Litigants may not simply characterize the facts of the first action in a different way to avoid the application of *res judicata.*

[42] PWC cites ***M.R.S. Trust Co. v. 374961 B.C. Ltd.*** reflex, (1997), 31 B.C.L.R. (3d) 247, [1997] B.C.J. No. 13 (QL)(S.C.), for its similarities to the case at bar. M.R.S. brought foreclosure proceedings on a mortgage in default against Giovanni Zen, a covenantor under the mortgage. Zen was represented at the hearing for an order nisi and conduct of sale of the property. The court ordered personal judgment against Zen at that time.

[43] Zen subsequently commenced an action claiming breach of contract, breach of trust, and breach of a duty of care arising from M.R.S.'s conduct during the foreclosure proceedings. Zen claimed that following the hearing, he had ceased to be a party to the foreclosure proceedings and was unable to protect his interest in seeing that the highest price possible was obtained for the property. M.R.S., in turn, sought a declaration that Zen's action was estopped by the doctrine of *res judicata.*

[44] The court held that Zen did not cease to be a party to the foreclosure proceedings. As a party with a vital interest at stake, he had standing to seek the court's assistance in obtaining the maximum sale price. Because the same parties were involved, the doctrine of *res judicata* could apply. The facts upon which Zen based his claims were all known before the order approving the sale was granted. Additionally, the issue that Zen sought to raise, that is, M.R.S.'s alleged failure to ensure the maximum possible price, was before the court at the earlier hearing. The court found that secondary issues relating to the sale price, such as waste, vandalism, and security issues, were relevant to the issues to be decided in the foreclosure and should have been raised at that time. The court stated at para. 37:

To Zen's contention that his claim is in tort and is therefore a distinct cause of action from the issues on the foreclosure the short answer is that the subject matter, the sale of the property, and the duties of M.R.S. (if such they were) were all matters within the competence and purview of the Court in the foreclosure. Recasting these issues in positive terms as a "duty" on the part of M.R.S. does not create a fundamentally different cause which could be separately litigated.

(b) Issue Estoppel

[45] The second branch of the doctrine of *res judicata* prevents litigants from attempting to re-litigate the same point or issue against the same party even though the overall cause of action now being pursued may be different. Where a material fact or issue in a proceeding has already been determined by a court of competent jurisdiction, that fact or issue may not be attacked or thrown into dispute in subsequent proceedings among the same parties: ***Danyluk****, supra,* at para. 54.

[46] In ***Danyluk*** and ***Angle***, *supra*, and the Supreme Court of Canada adopted the three-part test for issue estoppel first framed by Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935:

(1) that the same question has been decided;
(2) that the judicial decision which is said to create the estoppel was final; and
(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[47] Issue estoppel applies to any issue of fact, law, and mixed fact and law that is necessarily bound up with the determination of that issue in a prior proceeding: ***Danyluk***, *supra,* at para. 54. However, it acts to bar further proceedings on such issues only in circumstances where it is clear from the facts that the question has already been decided: ***R. v. Van Rassel***, 1990 CanLII 124 (SCC), [1990] 1 S.C.R. 225**,** 53 C.C.C. (3d) 353 at para. 32.

ABUSE OF PROCESS

[48] As Madam Justice Allan did in the First Mott Action, the court may, in the alternative to applying the doctrine of *res judicata*, apply the doctrine of abuse of process, which was recently restated by the Supreme Court of Canada in ***Toronto (City) v. Canadian Union of Public Employees***, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, 2003 SCC 63 at para. 35:

Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, 1989

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CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007:

... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

[49] The doctrine of abuse of process is more flexible than *res judicata* and is typically invoked where the requirements of issue estoppel are not strictly met, yet it is apparent that the applicant is attempting to re-litigate a matter or to otherwise undermine the consistency and finality of judicial decision-making.

COLLATERAL ATTACK

[50] Another closely related doctrine to that of *res judicata* or abuse of process is the rule against collateral attack on final judgments. In ***R v. Wilson***, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, the Supreme Court of Canada stated the rule as follows:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[51] In ***Roeder v. Lang Michener Lawrence & Shaw***, 2005 BCSC 1784 (CanLII), 2005 BCSC 1784, [2005] B.C.J. No. 2830 (QL) at para. 23, Rogers J. stated:

A proceeding is a collateral attack when it asserts facts inconsistent with a previous factual determination by a court that had jurisdiction to make it, or when the proceeding seeks relief that is inconsistent with a previous disposition by a similarly competent court. To be a collateral attack it is not necessary that the proceeding bluntly assert that the previous order should be set aside.

[52] Thus, if the present proceedings are found to be a collateral attack on the orders of Justices Shaw, Tysoe, Thackray, Allan, or Davies, or on any of the orders of the Court of Appeal refusing Mr. Mott leave to appeal, the proposed action may be struck as an abuse of the court's process.

DISCRETION FOR SPECIAL CIRCUMSTANCES

[53] The application of an estoppel to bar future litigation is not automatic, nor is it guaranteed. As Finch J.A. (as he then was) explained in ***British Columbia (Minister of Forests) v. Bugbusters Pest Management*** 1998 CanLII 6467 (BC CA), (1998), 50 B.C.L.R. (3d) 1, 159 D.L.R. (4th) 50 (C.A.) at para. 32:

It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of judicial discretion to achieve fairness according to the circumstances of each case.

[54] The same principle applies to cause of action estoppel and the doctrines of *res judicata,* abuse of process, and collateral attack in general. A court must retain a residual discretion to refuse to apply any form of estoppel when do to so would be contrary to the requirements of justice. As the Supreme Court of Canada explained in ***Danyluk***, *supra,* at para. 33: "The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."

POSITION OF UNITED

[55] United argues that the breaches of fiduciary duty alleged against PWC have not been raised before now and so constitute a new cause or causes of action that must be brought before the court for resolution.

[56] According to United, the only issue before Mr. Justice Thackray during the applications for approval of sales of the United Lands was whether or not a fair price had been secured in all of the circumstances. It says that the court was not asked to consider what duty of care the receiver had with respect to preserving the goodwill of the business and the property, nor was the court asked to consider the nature of the duty of the receiver to achieve the best possible price, a duty that United says was owed to all interested parties, including the bankrupt and the shareholders of the bankrupt. The court was not called upon to make a ruling whether the receiver had breached its fiduciary duty to preserve the property and to achieve the highest price for the property. Therefore, a person appearing at the applications for approval could not possibly succeed on a request for a trial so that such allegations could be judicially determined, and neither of the parties could have reasonably expected that that the outcome of the sale approval would bar a future action for breach of fiduciary duty. United relies on the comments of Finch J.A. (as he then was) in ***Bugbusters***, *supra*, to argue that a reasonable expectation of that kind is required before a party can be estopped from pursuing further action.

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[57] Referring to ***Bennett on Receiverships***, 2nd ed, (Toronto: Carswell, 1999) at p. 182-83 and p. 247, United says that the courts will generally follow the recommendation of a receiver and leave it to the receiver to assess offers to purchase a debtor's assets, accepting that the price put forward by the receiver is the best possible price obtainable. It is uncertain whether United means to imply that the court did not apply itself to the independent duty that it has to ensure a fair price during the sale approval proceedings. Certainly the implication seems to be that the court did not seriously consider the issues related to PWC's wrongful conduct, which Mr. Mott raised during the sale approval hearings.

[58] United contends that due to the summary nature of the proceedings, which does not permit oral or documentary discoveries or interrogatories, Mr. Justice Thackray was not in a position to judge the sufficiency of the evidence relating to these allegations of wrongdoing. It is on this basis that United distinguishes the case of ***Toronto Dominion Bank v. Preston Springs Gardens Inc.***, [2006] O.J. No. 1834 (QL) (Ont. Sup. Ct. J.), in which *res judicata* was found to apply to claims of breach of duty and negligence against a receiver that had been the subject of detailed evidence and full argument in an earlier proceeding.

[59] United argues that it never had the opportunity to bring forward its claims of breach of fiduciary duty. Even if Mr. Justice Thackray had directed a trial as Mr. Mott had requested, the issue of breach of fiduciary duty could not have been tried at that time as it had no relationship whatever to constructive expropriation, which was the basis advanced for the deceit and conspiracy claims.

[60] Moreover, United says that although Mr. Justice Thackray was entitled to refuse to order a trial of the issue, the reasons that he provided with respect to allegations of conspiracy and fraud had no judicial weight because he had already determined that the issue was not properly before him. United says that Madam Justice Allan was therefore wrong in her view that Mr. Justice Thackray had considered all of the issues, that it was wrong for Mr. Justice Davies to concur, and that it would be wrong for this court to make a similar finding with respect to the allegations and issues in the proposed statement of claim.

[61] United argues that both Madam Justice Allan and Mr. Justice Davies should have recognized that the evidence required to succeed in the claim of constructive expropriation would not be sufficient to support a claim of conspiracy, which necessitated a new action against PWC. United claims that this was confirmed by Mr. Justice Thackray when he expressed his view that the matter was not before him. According to United, a tort of conspiracy requires collusion and an agreement of the parties acting together to injure an individual. That is distinct from what is required to prove a constructive expropriation, on the grounds advanced before Mr. Justice Thackray, and it is different again from what is required to prove a breach of fiduciary duty, on the grounds alleged in this action.

[62] United cites ***Re Caswan Environmental Services Inc.***, 2001 ABQB 240 (CanLII), (2001), 287 A.R. 11, 2001 ABQB 240 at p. 197, as support for its contention that the courts have recognized the impracticality, for the sake of justice, of forcing certain actions to be tried together:

The principle of avoiding litigation by installment [*sic*] must be tempered by practical considerations. The plaintiff's original application for declaratory relief would have bogged down the judicial process if it were coupled with an action for resultant damages. Common sense dictates that a determination as to the validity of the competing security interests should have been made before a damage claim was advanced. ... It is unlikely that any court would have granted leave to sue an interim receiver for damages until a declaration as to the entitlement of the goods was made. In practical terms there was no way in which a damage claim could have proceeded contemporaneously with the declaratory relief sought.

[63] United also says that Madam Justice Allan should have realized that she could dispose of the First Mott Action on the basis of lack of jurisdiction, and had she done so, *res judicata* would not arise to bar the proposed claims. According to United, because it was bankrupt, the ***BIA*** dictates what proceedings could be brought to set aside a sale, and leave was required, but not obtained, to begin the First Mott Action. As the ***BIA*** provides a complete code on the subject, United says Madam Justice Allan could, and should, have concluded that there was no jurisdiction to hear the action. The same argument appears to be made against the decision of Mr. Justice Davies in the Second Mott Action.

[64] On the question of mutuality of parties, United argues that the proposed action involves different parties in that Mr. Abakhan, as the new trustee for United, would bring the action against PWC itself for acts and omissions committed when acting as both receiver and trustee. United says that the previous actions involved PWC only as a representative of United. Moreover, on the application for a trial of the issue of constructive expropriation, Mr. Mott represented himself personally, and United was not represented at the hearings, thus according to United, the parties to the various proceedings are not the same and no estoppel may bar the proposed action.

[65] Finally, United asserts that the proposed action is based on new evidence that could not have been discovered with reasonable diligence at or before the earlier proceedings. Alternatively, United argues that this new evidence constitutes a "special circumstance" sufficient to permit the court to refuse to apply an estoppel should grounds for one be made out. United describes the new evidence as follows:

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(a) information that prior to entering into the agreement of purchase and sale with the PNE, Surrey had made a commitment to the Province to re-zone the lands to permit commercial use of the PNE Lands including a casino;
(b) information about the sale price of lot 7 from Advance Lumber to the PNE, which would have provided the court with a good indicator of value;
(c) information showing the lack of any offers and counter-offers leading up to the agreement of purchase and sale with respect to the PNE which is evidence from which an inference can be drawn that PWC failed in its duty to aggressively seek the best possible price; and
(d) evidence which demonstrates the ease with which PWC was able to commence a salvage parts operation on lot 24 to maintain salvage zoning for that lot and evience from which the court can infer the court was misled by PWC as to the non-salvage use of the Replacement Lands.

POSITION OF PWC

[66] PWC says that the complaints in the proposed statement of claim are essentially the same as those that were raised in the sale approval proceedings and also in both the First and Second Mott Actions. The Mott Actions were not confined to allegations of conspiracy. They included claims of breach of trust and deceit. PWC prepared a list of passages from the affidavits and submissions filed in the sale approval application before Mr. Justice Thackray and in the First Mott Action before Madam Justice Allan, as well as quotations from the learned justices' judgments, which demonstrate that the issues now raised were all before the court in those earlier proceedings. These passages are as follows:

(a) "the receiver... is seemingly beholden to making a transaction with the P.N.E. to the detriment of the interest of the United Group creditors." (May 10, 2001, affidavit of Ian Mott, para. 49)
(b) "the Trustee seems only to be interested in serving only the interests of the secured creditors, the Royal Bank and Century Services and includes Aziz in this group. (May 10, 2001, affidavit of Ian Mott, para. 56; May 14, 2001, submissions of H. Mott, page 26, lines 2-5)
(c) "The Trustee's actions, taken individually and as a whole unreasonably favor the interests of the PNE and are a betrayal of his duty to the interests of the ordinary creditors. The Trustee as appointed auditor of the PNE is favoring the interests of the PNE and as Trustee in Bankruptcy of the United Group defrauding the ordinary and other creditors." (May 10, 2001, affidavit of Ian Mott, para. 61; May 14, 2001, submissions of H. Mott, page 27, lines 32-39)
(d) "... United's interests and those of the secured and unsecured creditors who will not be paid by the sale to the P.N.E. are not being properly served by the trustee who ought to be acting in good faith and without any appearance of conflict. The fact is that the trustee PricewaterhouseCoopers (P.W.C.) is both a trustee of the United Group of Companies in bankruptcy as well as the appointed auditors of the P.N.E." (May 10, 2001, affidavit of Ian Mott, para. 64; May 14, 2001, submissions of H. Mott, page 28, lines 29-37)
(e) "... we don't think the trustee is acting on behalf of the best interests of all the creditors. We feel he's acting only in the interest of the major secured creditors." (May 14, 2001, submissions of H. Mott, page 16, lines 19-23)
(f) "... it's not clear to me that the trustee is representing the unsecured creditors at all." (May 14, 2001, submissions of H. Mott, page 49, lines 25-27)
(g) "... the trustee and receiver, for any bankruptcy, never mind one as big as this, and as complex as this, should never be in conflict. They should be totally independent parties..." (May 14, 2001, submissions of I. Mott, page 49, lines 36-40)
(h) "the Motts questioned the propriety of the PricewaterhouseCoopers being both the receiver and the trustee." (May 15, 2001, reasons for judgment of Thackray J., para. 7)
(i) "[Mr. Mott's] submission was grounded upon assertions of improprieties. The Court on several occasions informed Mr. Mott that to establish the improprieties, that went so far as to allege fraud, it was necessary for him to produce evidence." (May 15, 2001, reasons for judgment of Thackray J., para. 50)
(j) "Mr. Mott then deposed as to the 'inappropriate actions' of the trustee and concluded that 'the trustee was intent on raising quick liquid cash to finance his receivership and sought the easy route of disposing of the inventory and chattels of the businesses for a value 'well below its actual market value.' He added:

61. The Trustee's actions, taken individually and as a whole unreasonably favour the interests of the PNE and are a betrayal of his duty to the interests of the ordinary creditors. The Trustee as appointed auditor of the PNE is favouring the interest of the PNE and as Trustee in Bankruptcy of the United Group defrauding the ordinary and other creditors.

I asked Mr. Mott if I was correct in reading this to mean that Mr. Mott was alleging fraud on the part of the trustee. He said that I was." (May 15, 2001, reasons for judgment of Thackray J., paras. 65 and 66)
(k) "... in recommending this sale at what we now realize was a grossly inadequate sum, the Receiver had a duty to the Court to disclose its own conflict of interest. Unknown to Mr. Clark and his client and not disclosed to the Court was the fact that the Receiver was and remains this purchaser's auditors." (May 2001, Outline of I. Mott, page 6, par. 2(aa))

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(l) "The Plaintiffs claim against the Defendants, and each of them, for damages and loss resulting from breach of trust, deceit, and conspiring to transfer to the Defendant purchasers... the aforesaid interests in parcels of land unlawfully for less than fair market value... The Defendants conspired to depress the maket [*sic*] of the lands and the Defendant purchasers obtained the lands the lands [*sic*] and intersts [*sic*] in the lands owned by the Plaintiffs for less than true market value." (Endorsement to Amended Writ of Summons dated August 15, 2001, in the First Mott Action)

(m) "The relief which the Plaintiffs seek in the present action is the return of the subject lands to the United Group... and for additional damages, including the loss of profits suffered by the Plaintiffs which resulted from wrongful interference with contractual arrangements, misrepresentations, deceit, breach of trust and other illegal actions on the part of the Defendants..." (August 18, 2001, affidavit of Ian Mott sworn in the First Mott Action, para. 6)

(n) "... the PNE, Colliers International, the Receiver/Trustee (PricewaterhouseCoopers Inc.), the City of Surrey, the Province of B.C., Golders Associates, and others have worked in concert to frustrate and prevent fair value marketing of the subject lands by delaying the public listing of the individual lots until December 200, by discouraging prospective purchasers from making offers, and by refusing to process offers on the subject lands from prospective purchasers." (August 18, 2001, affidavit of Ian Mott sworn in the First Mott Action, para. 14)

(o) "[Mr. Mott is] claiming damages, once the land's returned, for the improper conduct. He's alleging for the first time breach of trust, deceit. The word "conspiring" or "conspiracy" has come up in his mind and from his mouth before without him even knowing the meaning of that. The – what he's saying is that, according to his affidavit evidence, is that the Royal Bank, Century Services, the receiver, Advance Lumber, the Aziz group and the PNE in particular, have worked together to transfer the lands to the PNE, and of course to Advance in this case, for amounts that clearly are not anywhere near the fair market value, and they've done so deceitfully, and that is dishonestly." (August 22, 2001, submissions of P. Formby, counsel for Mr. Mott, in the First Mott Action, page 51, lines15-29)

(p) "And that history, I'd like to be very clear, I don't think it's ever been properly presented before the court. And – and to do it properly, It would take a trial, and the simply cases with respect to what there – what happened thereafter with the – I would say the powerful players as opposed to those that didn't have any power with respect to the conduct of the receiver in an application, what will be alleged obviously, you know, is that there's grave misgivings with respect to the duty, the fiduciary duty of the receiver being breached, where there's an application I believe where the Royal Bank to have this particular receiver appointed, PricewaterhouseCoopers. And this is a court appointed receiver that should know of its particular duty with respect to all interested parties, not just to secured creditors." (August 22, 2001, submissions of P. Formby in the First Mott Action, page 66, lines 32-45)

(q) "Both plaintiffs claim for damages as a result of the defendants' breach of trust, deceit, and conspiracy to depress the market values of the lands. Mr. Mott alleges a wrongful sale of the lands, and seeks to have those transactions reversed." (August 23, 2001, reasons for judgment of Allan, J., para. 33)

(r) "[PWC] had a duty to pursue... the contract that [the United Group] had with the City of Surrey." (September 26, 2002, submissions of I. Mott in the Second Mott Action, pages 32-33)

[67] PWC submits that Mr. Mott should not be permitted to continue to litigate these same claims simply by recasting his grievance as a breach of fiduciary duty owed by PWC, or even by introducing some new fact. PWC argues that this amounts to litigating by instalment, and the court ought not to permit it or force PWC to bear the hardship resulting from having to defend further litigation: ***Melcor Developments Ltd. v. Edmonton (City)*** 1982 CanLII 1139 (AB QB), (1982), 37 A.R. 532, 136 D.L.R. (3d) 695 (Q.B.)

[68] In response to Mr. Mott's argument before Madam Justice Allan that some of the allegations were never "properly framed in any type of claim other than in opposition to the sale of the lands" and so no cause of action was ever advanced against PWC in the prior proceedings, PWC argues that any of the issues now raised are issues that either were raised or should have been raised in any event because they formed part of the same subject matter of the earlier litigation: See ***Henderson*** and ***Chapman,*** *supra.*

[69] PWC contends that each of the allegations of misconduct on the part of PWC as trustee and receiver were raised in affidavits and argument during the sale approval proceeding and that these allegations were fundamental to Mr. Justice Thackray's decision in that he could not have approved the sale if he found that any of these allegations had merit. As the sale was approved, the issues must be deemed to have been finally determined: ***Toronto Dominion Bank***, *supra*, citing ***Bank of America Canada v. Willann Investments Ltd.*** reflex, (1993), 23 C.B.R. (3d) 98, [1993] O.J. No. 3039 (QL) (Gen. Div.)

[70] On the issue of mutuality of the parties, PWC says, firstly, that mutuality is not lost by replacing PWC with Mr. Abakhan as the trustee in bankruptcy for United. Regardless of what individual or company is acting as trustee, the trustee was a party to the foreclosure actions and certainly had the opportunity to appear on the relevant hearings. Whether or not it chose to do so is, according to PWC, irrelevant; a party is bound by a decision in which they could have

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participated: ***Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.*** 1988 CanLII 2941 (BC SC), (1988), 22 B.C.L.R. (2d) 89, 47 D.L.R. (4th) 431 at 438 (S.C.).

[71] PWC also argues that there is no loss of privity because of the fact that Mr. Mott purported to appear on his own behalf as a creditor and shareholder of United in some of the proceedings and on behalf of United itself in others. PWC argued that according to the judgment of Mr. Justice Tysoe in ***Lang Michener LLP v. American Bullion Minerals Ltd.***, 2006 BCSC 504 (CanLII), 2006 BCSC 504, [2006] B.C.J. No. 685 (QL), there is a residual power in the directors of a company to oppose the enforcement of security on behalf of a company, and this is clearly what Mr. Mott was doing. In doing so, Mr. Mott raised any and all arguments that could have been made on behalf of the trustee and the estates of the bankrupt companies.

[72] Accordingly, PWC argues that the parties to the proposed action are the same as were parties to the previous proceedings, and mutuality is not lost. PWC relies on Sopinka, Lederman, and Bryant, ***The Law of Evidence in Canada***, 2nd ed. (Toronto: Butterworths, 1999) at p.1088, where the learned editors note that: "it is impossible to be categorical about the degree of interest which will create privity." Mutuality will arise where there is "a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party."

[73] As regards any special circumstances, PWC cautions that the courts have treated the discretion to refuse to apply *res judicata* as a very limited one, and "the fact that harsh results follow the application of the doctrine has not deterred its application by the courts": ***General Motors of Canada Ltd. v. Naken,*** 1983 CanLII 19 (SCC), [1983] 1 S.C.R. 72 at p. 101, 144 D.L.R. (3d) 385; ***Manolescu v. Manolescu,*** 2003 BCSC 1094 (CanLII), (2003) 47 C.B.R. (4th) 77, 2003 BCSC 1094 at para. 10.

ANALYSIS

[74] For all the details provided in the proposed Statement of Claim as to the wrongdoing of PWC, I agree with the submission of PWC that, essentially, the claims sought to be advanced boil down to the following:

(a) PWC as receiver failed to obtain the best possible price for the sale of the United Lands, which were worth more than the amount for which they were sold;

(b) the PNE was the audit client of PWC, and, as a result of that relationship, PWC was in a conflict of interest and participated in a conspiracy with the PNE and the City of Surrey (among others) to sell the United Lands to the PNE at less than fair market value;

(c) PWC failed to preserve the industrial-salvage zoning of some of the lots in the United Lands, resulting in a reduction of the value of those lots;

(d) PWC failed to apply for rezoning of some of the United Lands to highway-commercial, such that the potential value of the United Lands was not realized; and

(e) PWC failed to market the United Lands properly.

[75] In my view, the cause of action proposed in the draft statement of claim, and the issues sought to be advanced, arise from the same relationship and the same subject matter as was adjudicated in the proceedings before Mr. Justice Thackray, Madam Justice Allan, and Mr. Justice Davies. The facts and issues now raised were squarely before the court in the sale approval proceeding and in both Mott Actions.

[76] Mr. Mott admits that he had the opportunity to be heard, and was heard, as an interested party during the sale approval applications before Mr. Justice Thackray. Mr. Mott argued strenuously that the sale ought not to be approved. In his submissions and affidavit evidence, he put before the court each of the allegations regarding PWC's conduct that are set out above as being the issues to be determined in the proposed action, including specifically the alleged conflict of interest, conspiracy to sell at less than fair market value, and each failure to perform those actions that would have resulted in obtaining the best possible price for the United Lands. I cannot accede to United's contention that it had no opportunity to make these claims.

[77] As Madam Justice Allan noted, Mr. Justice Thackray issued lengthy and carefully considered reasons for his decision to approve the sale. Leave to appeal was sought and dismissed. These same arguments were again brought before Madam Justice Allan and then again before Mr. Justice Davies. Both found that the issues had been litigated and determined such that it would be an abuse of the court's process to review them once again. No appeal was taken of either of these decisions.

[78] Mr. Mott now advances a few items of evidence that apparently did not come into his hands until after the two Mott Actions were concluded. I find that some of this evidence was discoverable with reasonable diligence prior to the sale approval proceedings and certainly prior to the Mott Actions. The rest I do not weigh as critical. Although it may not have been discoverable prior to the sale approval proceeding, it does not bring to light any new issue or cause of action formerly unknown or unpursued by Mr. Mott, nor is it likely that this evidence would have substantially altered the outcome of the previous proceedings.

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[79] While it is correct to say that breach of fiduciary duty, constructive expropriation, and conspiracy are each distinguishable as causes of action, the record shows that the evidence and argument offered to oppose the sale in the hearing before Mr. Justice Thackray included all of the allegations that Mr. Mott would now seek to prove in the case at bar. The same is true for both the Mott Actions, in which the claim alleged was not conspiracy alone but also breach of trust and deceit, which require much the same evidence as against PWC as the breaches of fiduciary duty now alleged. Any minor differences in the facts and issues raised in the proposed action belonged, in every case, to the subject matter of the earlier litigation. Mr. Mott has simply changed the legal description of his claim to facilitate re-litigation of the same issues.

[80] I also accept PWC's argument that the requirements of issue estoppel are met for each issue now raised in the proposed statement of claim. There is sufficient connection to create privity. The appointment of a new trustee will not undermine the mutuality of parties required for the application of issue estoppel to the issues in the proposed action. The parties involved in all the previous proceedings include PWC, United, and Mr. Mott as either named parties or interested parties. The fact that Mr. Mott appeared variously in his capacity as shareholder, creditor, or director of United does not, in my view, seriously affect the mutuality requirement in this case. As Mr. Mott concedes that the previous decisions were final, and as I have found that the same issues were litigated, the proposed action is barred in its entirety by the doctrine of issue estoppel.

[81] However, even if the requirements of issue estoppel were not strictly met, I would dismiss the proposed action as an abuse of process and impermissible collateral attack on the judgments of Mr. Justice Thackray, Madam Justice Allan, and Mr. Justice Davies. Many of United's arguments are directed at challenging various aspects of Madam Justice Allan and Mr. Justice Davies' reasons for judgment. Yet Mr. Mott does not appear to have attempted an appeal of either decision. He has chosen instead to recast his claim yet again to avoid the outcome of those judgments.

[82] Mr. Mott raises an interesting argument that the summary nature of an application for sale ought to be considered a "special circumstance" leading the court to refuse to apply an estoppel that would bar a trial of an action where the evidence may be much more thoroughly tested. The record shows, however, that this same argument was presented to Mr. Justice Thackray and Madam Justice Allan and was not accepted by either of them. The court, by its own account, carefully addressed the issues arising between these parties, even though the issues were brought forward in a summary proceeding.

[83] As regards the argument that Madam Justice Allan should have disposed of the action on the basis of lack of jurisdiction, clearly that is an issue that should have been put before Madam Justice Allan with resort to the Court of Appeal if necessary. It is not an issue for this court to resolve in the case at bar.

[84] Similarly, as to the statements in Mr. Justice Thackray's reasons for judgment with respect to the allegations of fraud and conspiracy and his refusal to direct a trial on the issue of constructive expropriation, Mr. Mott was entitled to seek leave to appeal that decision and did so. The Court of Appeal dismissed his leave application. Mr. Mott then applied further to stay the decision and vary the order of the Court of Appeal. Again, his application was dismissed. It is not for this court to sit in further judgment of the sufficiency and accuracy of those reasons or the orders they support.

[85] Nothing advanced in the current proceeding or sought to be advanced in the proposed action alters the fact that all the material facts and issues underlying the breaches of duty now alleged were raised, considered, and rejected either explicitly or implicitly in the finding that the sales of the United Lands were made for fair market value through an appropriate process approved by the court.

[86] Two judges of this court have declared that to adjudicate further on the matters brought before the court in the First and Second Mott Actions would be an abuse of process. Nothing arises in the present proceedings to change that view. I can find no special circumstances sufficient to militate against the application of the doctrines of *res judicata*, abuse of process, and collateral attack. Mr. Mott has had the opportunity to have his objections to the sale and his allegations of misconduct by PWC heard. This is a strong case for bringing finality to the litigation. To allow the trustee to commence the proposed action would be inconsistent with three previous orders of this court, and I can find no compelling reason for taking such a course.

CONCLUSION

[87] Mr. Mott's overriding contention has been that the United Lands were sold at less than fair market value for wrongful reasons. The court rejected that contention expressly in the sale approval application before Mr. Justice Thackray. Two other judges have declined to permit that claim and its related issues to be re-litigated. In my view, the claims sought to be pursued are *res judicata* and an abuse of process.

[88] The sole reason for the application to remove PWC as trustee was to provide United with a trustee that had the capacity to sue PWC so that these same issues could be re-opened. As there is no reason to re-open the claims, there is no reason to remove PWC as trustee at this time. The application is dismissed with costs as scale 3.

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"E. Rice, J."
The Honourable Mr. Justice E. Rice
August 16, 2006 – ***Revised Judgment***
On the front page of the Reasons for Judgment, Counsel for PricewaterhouseCoopers Inc. should read:
"K. Jackson and D. Westgeest, Articled Student"
and that "J.F. Grieve" should be removed.

Where there is no licensed trustee, etc. - Sec. 14.05
14.05 Where a debtor resides or carries on business in a locality in which there is no licensed trustee, and no licensed trustee can be found who is willing to act as trustee, the court or the official receiver may appoint a responsible person residing in the locality of the debtor to administer the estate of the debtor, and that person, for that purpose, has all the powers of a licensed trustee under this Act, and the provisions of this Act apply to that person as if a licence had been issued to that person under paragraph 5(3)(a).
1992, c. 27, s. 9.

No trustee is bound to act - Sec. 14.06
14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

Application - Sec. 14.06(1.1)
(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes
(a) an interim receiver;
(b) a receiver within the meaning of subsection 243(2); and
(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

No personal liability in respect of matters before appointment - Sec. 14.06(1.2)
(1.2) Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,
(a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and
(b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

Status of liability - Sec. 14.06(1.3)
(1.3) A liability referred to in subsection (1.2) is not to rank as costs of administration.

Liability of other successor employers - Sec. 14.06(1.4)
(1.4) Subsection (1.2) does not affect the liability of a successor employer other than the trustee.

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Coopers & Lybrand Ltd. v. Retail, Wholesale Canada, Local 1015, 1995 CanLII 4412 (NS SC) Successor Employer Interprovincial Recognition?

Date:	1995-10-12
Docket:	B No. 18948
Parallel citations:	149 NSR (2d) 385; 36 CBR (3d) 36
URL:	http://canlii.ca/t/1mt97
Citation:	Coopers & Lybrand Ltd. v. Retail, Wholesale Canada, Local 1015, 1995 CanLII 4412 (NS SC), <http://canlii.ca/t/1mt97> retrieved on 2013-08-18
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1995 **Bankruptcy # 18948**

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY
IN THE MATTER OF: **The Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3**
- and-
IN THE MATTER OF: **The Bankruptcy of Associated Freezers of Canada Inc.**
- and-
IN THE MATTER OF: **An Application pursuant to Section 69 and Section 215 of the Bankruptcy and Insolvency Act for a Declaration of a Stay of Proceedings**

BETWEEN:

COOPERS & LYBRAND LIMITED, in its capacity as Trustee in Bankruptcy of the Estate of Associated Freezers of Canada Inc. APPLICANT
-and-
RETAIL, WHOLESALE CANADA, LOCAL 1015 (Division of U.S.W.A.) RESPONDENT

CHAMBERS DECISION
Heard Before: **Justice J. Michael MacDonald in Chambers on October 3, 1995, at Halifax, Nova Scotia**
Decision: **(Orally) October 12, 1995**
Written Release of Decision: **October 25, 1995**
Counsel: **John MacPherson and Richard Rafuse, Q.C. for the Applicant**
Ronald Pink, Q.C., for the Respondent
Ann Barrett for Mr. Pink (Decision)

In April of this year Associated Freezers of Canada Inc. (together with affiliated companies) was petitioned into bankruptcy by order of Mr. Justice Spence of the Ontario Court, General Division. Coopers& Lybrand Limited, the applicant herein, was the named trustee.

Prior to bankruptcy, **Associated** carried on operations at Dartmouth, Nova Scotia, with certain of its employees represented by the respondent. The respondent was a party to a collective agreement with **Associated**. This agreement was in force at the time of the bankruptcy.

Since the bankruptcy the trustee continues to operate out of the Dartmouth facilities, employing all members of the respondent union who previously worked for **Associated**. Before taking over the Dartmouth operations the trustee had each employee sign an employment contract acknowledging that the trustee was not a successor employer (Tab F of the **Pettit** affidavit).

The respondent not being a party to these contracts applied in June of this year to the Nova Scotia Labour Relations Board seeking a declaration that the trustee is a successor employer by virtue of Section 31 of the *Trade Union Act*, R.S.N.S.(1989) as amended.

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The trustee has applied to this Court for an order declaring the application before the Labour Relations Board stayed.

The parties have agreed upon the following issues:

(1) Is the respondent's application to the Labour Relations Board stayed by the operation of Section 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA")?

(2) Is the respondent's application to the Labour Relations Board stayed by the operation of Section 69.3 of the BIA?

(3) Is the Supreme Court of Nova Scotia (in Bankruptcy) the proper forum to hear an application pursuant to Section 215 or Section 69.3 of the BIA?

(4) Can the trustee be deemed to be a successor employer?

Is the respondent's application to the Labour Relations Board stayed by the operation of Section 215 of the BIA?

Section 215 of the BIA provides:

> **"215 Except by leave of the Court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act."**

By virtue of Section 215, the trustee is protected from actions or other proceedings except by leave of the court. **Re: Wilanour Resources Limited** (1982), 43 C.B.R. (N.S.) 153 Ontario Supreme Court (in Bankruptcy).

The respondent in failing to seek leave maintains that Section 215 has no application to the case at bar. It submits that the trustee is automatically a successor by virtue of Section 31 of the Nova Scotia *Trade Union Act.*

Section 31 reads in part:

> **"31(1) Where an employer sells, leases or transfers or agrees to sell, lease or transfer his business or the operations thereof or any part of either of them and either**
>
> > **(a) the employer or the purchaser, lessee or transferee or any of them is a party to or is bound by a collective agreement with a bargaining agent on behalf of any employees affected by the sale, lease or transfer or contract...**
>
> **unless the Board otherwise directs, the collective agreement, certification, application, notice or entitlement to give notice continues in force and is binding upon the purchaser, lessee or transferee."**

The respondent therefore submits that the trustee has failed to acknowledge the provisions of the *Trade Union Act* by not recognizing the respondent's statutory successor rights and the existing collective agreement. This failure it maintains is therefore not "an action" of the trustee "taken pursuant to the BIA."

The respondent is correct in that leave is not required if the trustee fails to take action otherwise required by law, *A. Marquette & Fils Inc. v. Mercure* (1975), 10 N.R. 239 (Supreme Court of Canada). However, in the case at bar I am asked to assume that the trustee is *automatically* a successor employer, and therefore bound by the collective agreement. This is clearly not the case. Clause 8 of the order of Mr. Justice Spence states just the opposite:

> **"8. THIS COURT ORDERS that the Receiver...shall not...be or be deemed to be a successor employer within the meaning of any legislation, federal, provincial or otherwise, which may have application in any jurisdiction in which any of the Business and Assets are situate or pursuant to any agreement with any union or employee."**

This is a valid order of the Ontario Court with jurisdiction over this issue.

Furthermore, I find that upon bankruptcy all employment with the bankrupt terminated. Mr. Justice Austin of the Ontario Court of Appeal in **Re: Rizzo and Rizzo Shoes Limited** (1995) 30 C.B.R. (3d), at page 13 noted:

> **I conclude that while the Ministry had the status to make these claims on behalf of the former employees of Rizzo, no liability arose with respect to termination, severance, or vacation pay, because the employment was ended by the order of bankruptcy and not by the act of the employer.**

The fact that the court in **Rizzo** was dealing with a non-union situation is not material to the issue before me. With no employment there can be no collective agreement.

I agree with Justice Abella in **Re: St. Mary's Paper** (1994), 26 C.B.R. (3d) 27: (Ont. C.A.) where at page 291 she states:

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> **Contracts of employment with employees, including collective agreements, terminate with a bankruptcy.**

In the case at Bar the trustee did not omit to take action as envisaged by the Supreme Court of Canada in **Marquette**. It acted under the authority of the BIA b3 entering into new contracts of employment with the workers. The trustee is therefore protected by **Section 215**. The respondent must secure leave before applying to the Labour Relations Board.

Alternatively, I have been asked by the respondent to grant leave **nunc pro tunc**.

In appropriate circumstances this court may grant leave to proceed **nunc pro tunc**. This was confirmed by Chief Justice Glube of the Nova Scotia Supreme Court Trial Division in **MacCulloch (Bankrupt)** 1992 CanLII 2796 (NS SC), (1992), 115 N.S.R. (2d) 131.

In light of the clear wording of clause 8 of the **Spence** order and in light of my finding that the trustee is not bound by the collective agreement it would be inappropriate for this Court to grant leave.

By virtue of Section 188(1) of the BIA, I declare the respondent's application to the Labour Relations Board stayed.

My consideration of the remaining issues is therefore no longer necessary. These issues are, nonetheless, worthy of comment:

Is the Respondent's Application to the Labour Relations Board stayed by the operation of Section 69.3 of the BIA?

Section 69.3 of the BIA provides in part:

> **"693(1)...no creditor..shall commence...any...other proceedings, for the recovery of a claim provable in bankruptcy until the trustee has been discharged."**

The trustee submits that the respondent's **Section 31** application is a proceeding for a claim provable in bankruptcy as defined by Section 121 of BIA:

Section 121 (1):

> **"All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act."**

The respondent submits that its application relates only to the activities of the trustee since bankruptcy as employer of the members of the respondent union. Yet, the respondent makes no such qualification in its **Form 12** application (exhibit G of the **Pettit** affidavit).

Furthermore, one cannot consider successor rights in isolation. For example, vacation rights under the collective agreement are dictated by pre-bankruptcy activities, thereby making Section 69.3 of the BIA applicable. The respondent's application is therefore stayed also by virtue of Section 69.3 of the BIA.

Is the Supreme Court of Nova Scotia (in Bankruptcy) the proper forum to hear an application pursuant to Section 215 or Section 69.3 of the BIA?

The trustee is correct when it submits that, in effect, the respondent is asking the Labour Relations Board to vary clause 8 of the **Spence** order. Any such application should be brought before the Ontario Court under Section 187(5) of the BIA which reads:

> **"Every court may review, rescind or vary an order made by it under its bankruptcy legislation."**

While this Court can enforce Justice Spence's order by virtue of Section 188 of the BIA it cannot, and should not, vary the terms of the Ontario order. The fact that the respondent received no notice of the Ontario hearing is a matter for that court to consider on an application to vary.

Can the trustee be deemed to be a successor employer?

I have already answered this question in the negative but I will elaborate further on a point raised by counsel for the respondent.

There is case law to support the fact that collective agreements do not terminate upon the appointment of a court appointed receiver **Re: Ontario Labour Relations Act: Maritime Life Assurance Co. v. Chateau Gardens (Hanover) Inc.** et al. reflex, (1983), 2 D.L.R. (4th) 553, Ontario High Court. This makes sense. Court appointed receivers are appointed to manage an existing enterprise.

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In bankruptcy however the bankrupt by law ceases operation. For this reason employment terminates. With no employment there can be no collective agreement. Therefore, while trustees and receivers may perform similar functions their mandates are quite distinct.

In the case at Bar the trustee could have opted to close the plant down entirely putting all employees permanently out of work. Instead it decided to operate the plant. It did so on the strength of Justice Spence's order declaring successor rights inapplicable. It would be improper for this court to change the proverbial "rules of the game" at this stage. The trustees application is therefore granted.

If counsel cannot agree on costs, I invite written submissions within two weeks.

J.

588871 Ontario Ltd., Re, 1995 CanLII 7375 (ON SC) - Setting Aside of Successor Employer Status

Date:	1995-05-25
Docket:	31-205284-T; 31-205285-T; 31-205286-T
Parallel citations:	33 CBR (3d) 28
URL:	http://canlii.ca/t/1wbb3
Citation:	588871 Ontario Ltd., Re, 1995 CanLII 7375 (ON SC), <http://canlii.ca/t/1wbb3> retrieved on 2013-08-16
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Ontario Supreme Court
588871 Ontario Ltd., Re
Date: 1995-03-25

Re BANKRUPTCY OF 588871 ONTARIO LIMITED;
Re BANKRUPTCY OF 542212 ONTARIO LIMITED;
Re BANKRUPTCY OF GROSVENOR HEALTH CARE PARTNERSHIP (NO. 2)

Ontario Court of Justice (General Division) [In Bankruptcy] Spence J.
Heard – March 15, 1995.
Judgment – May 25, 1995.

(Docs. 31-205284-T, 31-205285-T, 31-205286-T)

May 25, 1995. Endorsement.

[1] SPENCE J.: – The United Food & Commercial Workers Union, Local 175 (the "union") seeks leave nunc pro tunc to continue certain proceedings which it has initiated against Peat Marwick Thorne Inc. ("PMTI") under the *Labour Relations Act* (the "UOLRA") and the *Hospital Labour Disputes Arbitration Act* (the "HLDAA".). By a court order dated December 14, 1994, PMTI was appointed the trustee in bankruptcy of three companies, 588871 Ontario Limited, 542212 Ontario Limited and Grosvenor Health Care Partnership (No. 2). These companies have carried on or held an interest in the business of the Quinte Beach Nursing Home (the "home"). The union has been the certified bargaining agent for certain of the employees employed at the home, under a collective agreement dated September 29, 1991.

[2] PMTI, as trustee, seeks an order that the proceedings brought by the union under the OLRA are stayed by operation of the *Bankruptcy and Insolvency Act* (the "BIA").

[3] The proceedings brought by the union against PMTI are as follows:

(i) an application dated January 31, 1995, under s. 64 of the OLRA, to have PMTI declared a successor employer;

(ii) an application dated January 31, 1995, under s. 91 of the OLRA alleging violation of ss. 65, 67, 69 and 81(1) of the OLRA;

(iii) requests dated January 31, 1995 and February 28, 1995, for the appointment of an arbitrator pursuant to s. 46 of the OLRA; and

(iv) an interest arbitration proceeding under the HLDAA.

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[4] Whether the proceedings mentioned in items (ii) through (iv) may properly be brought against PMTI appear to depend in part on a determination being made in the proceeding referred to in item (i) to the effect that PMTI is a successor employer under the OLRA.

Background

[5] On or about November 30, 1994, PMTI took over the day-today operations of the home in its capacity as the interim receiver of the home pursuant to an order of appointment granted by Houlden J. dated that day. Subsequently, on December 14, 1994, Houlden J. made an order appointing PMTI as trustee in bankruptcy of the home. No notice was given to the union of that proceeding.

[6] On December 14, 1994, Houlden J. also made an order (the "supplemental order") [unreported], which contains the following provisions:

> THIS COURT ORDERS that the employment of the Nursing Home employees be and is hereby terminated by reason of the bankruptcy of 588871, 542212 or Grosvenor, that the Trustee be and is hereby authorized to offer new employment to all the employees of the Nursing Home on a temporary basis, and that the Trustee shall not be, nor be deemed to be, a successor employer with respect to the employees engaged by the Trustee or any former employees of the Nursing Home, under the *Labour Relations Act* (Ontario), the *Employment Standards Act* (Ontario), any collective agreement or other contracting between the Nursing Home or 588871, 542212, or Grosvenor and any of the employees, or under any other provincial or federal legislation pertaining to employees or otherwise.
>
> THIS COURT ORDERS that provided that the Trustee does not make any contributions to any pension plans in which the Nursing Home or 588871, 542212 or Grosvenor are participants, the trustee shall not be nor be deemed to by an "employer" under section 1 of the *Pension Benefits Act* (Ontario).
>
> THIS COURT ORDERS that the Trustee is authorized but not obligated to carry on the Nursing Home business until the first meeting of creditors of the estates of 588871, 542212 and Grosvenor.

[7] It appears that subsequent to that time PMTI has carried on the business of the home and actions have been taken in the course of that activity that have prompted the union to seek the relief which is now in issue. The reason given for carrying on the business is the need to provide care to the remaining occupants. There is no evidence before me as to whether the trustee has carried on the business of the home subsequent to the first meeting of creditors mentioned in para. 5 of the supplemental order.

Legal Issues

[8] Section 215 of the BIA provides that, except by leave of the court, no action lies against a trustee in bankruptcy with respect to any action taken pursuant to the Act.

[9] The union submits that in an application for leave under s. 215, it is only necessary to allege facts which could form the basis of an action against the trustee, it is not the duty of the court to determine the merits of the action before granting leave: *LeBlond c. Tremblay* (1985), 54 C.B.R. (N.S.) 199 (C.A. Qué.).

[10] The trustee argues that it cannot properly be held liable under the collective agreement. The trustee contends:

1. A trustee can have no liability under a collective agreement because, as an executory contract, the collective agreement terminate on bankruptcy.

2. The trustee could be determined to be a "successor employer" under the OLRA and therefore subject to liability on the basis asserted by the union only if there has been a sale of the employer's business and there is a continuation of that business and neither of these is the case here. In particular the mandate of the trustee to carry on the business is only incidental to its responsibility to take possession of the bankrupt's assets and to realize them for the benefit of the bankrupt's estate, which is not consistent with the notion of a continuing business.

3. The supplementary order of December 14, 1994 expressly states that the trustee is not a "successor employer".

[11] The union states that the supplementary order was obtained without notice to the union. It appears this is not disputed but no contention is advanced that there was any legal requirement that notice of the motion for that order was to be given to the union.

[12] The union asserts that the Ontario Labour Relations Board (the "board") has discretion under s. 64(12) of the OLRA to determine whether a business has been sold by one employer to another. For this purpose, "sale" includes "any other disposition". The decision of the board is final and conclusive for the purposes of that Act. If a sale is determined to have occurred to a successor employer, then, under s. 64(2) of the OLRA, if the predecessor employer was bound by a collective agreement the successor employer is bound by it as if the successor employer were the predecessor employer, until the board declares otherwise. On this basis it would appear that if proceedings were taken against the trustee under the OLRA, the board would have the jurisdiction to determine whether there has been a sale of the business to the trustee as a successor employer and if it were to determine that there had been, the trustee would be liable with respect to the collective agreement as a successor employer under the Act.

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[13] A determination to that effect would be apparently inconsistent with the rule in bankruptcy law that the collective agreement terminates on the occurrence of the bankruptcy: *Re St Marys Paper Inc.* 1994 CanLII 1232 (ON CA), (1994), 26 C.B.R. (3d) 273 (Ont. C.A.), at p. 291 per Abella J.A.: "Contracts of employment with employees, including collective agreements, terminate with a bankruptcy." Such a determination would also be apparently inconsistent with the provision in the order of Mr. Justice Houlden of December 14, 1994 which provides that the trustee is not to be, and is not to be deemed to be a successor employer under the OLRA.
[14] Those two prospective inconsistent results seem to me to be central to the proper disposition of the present motion. This court is being asked in effect to grant leave under the BIA for proceedings to be taken against the trustee which could result in liability on the part of the trustee if but only if determinations are made under the OLRA which are inconsistent with the bankruptcy law and to an order of this court made under the BIA. The first of these potential inconsistencies seems to me to involve something akin to a constitutional issue concerning paramountcy. However, no submissions were made by counsel as to constitutional considerations. The second potential inconsistency raises the question whether it is appropriate for this court to grant leave where the relief to be sought would conflict with a decision already taken by this court in the same matter.
[15] The union argues that s. 110 of the OLRA gives the board exclusive jurisdiction with respect to the successor employer questions and accordingly that the supplementary order is "problematic" in this regard. Section 110 appears to support the union's position on this point, but their submission may not give adequate weight to the underlying principle of bankruptcy law that the collective agreement terminates with the bankruptcy.
[16] PMTI says that the relief sought by the union involves claims relating to matters which arose before the bankruptcy and which by s. 69.3 of the BIA may not be asserted until the trustee has been discharged. PMTI argues that the court should not exercise its discretion under s. 69.4 to lift the stay against such claims, because it is equitable that those claims should be dealt with in the same manner as all other claims against the bankrupt.
[17] It appears that certain claims, pertaining to the remission of health and welfare contributions and pension contributions, relate to the period prior to bankruptcy and would therefore constitute provable claims in bankruptcy. In the absence of any reason to grant an order under s. 69.4, the s. 69.3 prohibition against any proceedings in respect of these claims must remain in effect, quite apart from the disposition of the request for leave.
[18] PMTI also contended that this motion involves an important policy question. If, in circumstances such as those in the present case, a trustee in bankruptcy who is given authority to carry on the business is to be exposed to the risk of being considered a successor employer and the attendant liabilities of the status, no trustee would ever undertake to carry on that business and that could thwart the proper operation of the BIA. I think this concern may properly be taken into account.
[19] With respect to the request for leave, I think a delicate balancing of the relevant considerations is required. The board clearly has jurisdiction under the OLRA to make a determination that there has been a sale of a business and that PMTI is a successor employer. The considerations which have been raised here concerning the apparent inconsistencies between a positive determination to that effect and bankruptcy principles and the order of December 14, 1994 could presumably be considered in those proceedings to the extent germane and in any other proceedings that may be taken in this matter. The courts should ordinarily defer to the board on a matter clearly within its statutory jurisdiction. On the other hand, if a decision were taken by the board against the trustee, it would involve the inconsistencies mentioned above. It would be incompatible with the termination of the collective agreement as a result of the bankruptcy and the limited role of a trustee in bankruptcy in carrying on a business. It seems to me that such matters are properly to be addressed by this court on this application for leave under the BIA and not to be deferred for decision to a tribunal which is not charged with responsibility in respect of the bankruptcy law. The stay of proceedings imposed by s. 215 of the BIA is one part of the machinery of the Act which functions to ensure that the purposes of the Act can be carried out properly without the undue intervention of other proceedings. The stay imposed under s. 215 has a proper effect in this case, for the reasons mentioned above. Accordingly, the request for leave nunc pro tunc should not granted.
[20] The parties may make submissions about costs.
Application dismissed.

GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc., 2006 SCC 35, [2006] 2 SCR 123 - SCC on Interim Receiver as Successor Employer

Date: 2006-07-27

Docket: 30391

Parallel citations: 2006 SCC 35 (CanLII); 271 DLR (4th) 193; 51 CCEL (3d) 1; 22 CBR (5th) 163; 215

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SUPREME COURT OF CANADA

Citation: GMAC Commercial Credit Corporation – Canada v. T.C.T. Logistics Inc., [2006] 2 S.C.R. 123, 2006 SCC 35
Date: 20060727
Docket: 30391

Between:
Industrial Wood & Allied Workers of Canada, Local 700
Appellant / Respondent on cross-appeal
and
GMAC Commercial Credit Corporation – Canada
Respondent / Appellant on cross-appeal
and
T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., the Interim Receiver and Trustee in Bankruptcy of T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (a successor to Tri-Line Expressways Ltd. and TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express &Distribution Inc., 606965 British Columbia Ltd. and 606966 British Columbia Ltd.
Respondents
Official English Translation: Reasons of Deschamps J.
Coram: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

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Reasons for Judgment: (paras. 1 to 84)	Abella J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Fish and Charron JJ. concurring)
Dissenting Reasons on Appeal: (paras. 85 to 167)	Deschamps J.

* Major J. took no part in the judgment.

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GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc., [2006] 2 S.C.R. 123, 2006 SCC 35

Industrial Wood & Allied Workers of Canada, Local 700 — Appellant/Respondent on cross-appeal

v.

GMAC Commercial Credit Corporation — Canada — Respondent/Appellant on cross-appeal

and

T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., the Interim Receiver and Trustee in Bankruptcy of T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc., and TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (a successor to Tri-Line Expressways Ltd. and TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. and 606966 British Columbia Ltd. — Respondents

Indexed as: GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.

Neutral citation: 2006 SCC 35.

File No.: 30391.

2005: November 16; 2006: July 27.

Present: McLachlin C.J. and Major,* Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for ontario

Bankruptcy and insolvency — Bankruptcy court — Jurisdiction — Whether bankruptcy judge lacks jurisdiction to determine whether interim receiver is successor employer under provincial labour relations legislation — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 47, 72(1).

Bankruptcy and insolvency — Procedure — Action against interim receiver — Bankruptcy legislation precluding proceedings against interim receiver without leave of court – Union seeking leave to bring "successor employer" application against interim receiver — Whether Mancini test applicable — Whether test different when dispute relates to receiver's obligations to debtors' employees represented by union — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 215.

The company TCT became insolvent and its largest secured creditor applied for an order appointing an interim receiver. The order appointing KPMG states that the receiver's employment-related actions could not be considered those of a "successor employer", and prohibits proceedings being taken against the interim receiver unless the court grants leave. After TCT was assigned in bankruptcy, KPMG sold most of the assets of the warehousing business to a new company. All unionized employees at the Toronto warehouse were terminated by KPMG, but some of them were later hired by the new company. Except for a change in location, the only major difference between TCT's operations and those of the new company was the absence of the union as representative of TCT's former employees.

The union applied to the Ontario Labour Relations Board seeking, in particular, a declaration that, as a successor employer to TCT or KPMG, the new company was bound by the collective agreement pursuant to s. 69 of the Labour Relations Act, 1995 ("LRA"). After a stay was granted on the basis that s. 215 of the Bankruptcy and Insolvency Act ("BIA") precludes proceedings against an interim receiver or trustee without leave of the court, the union sought the necessary court approval. The bankruptcy judge amended the paragraph relating to the "successor employer" protection in the order appointing the interim receiver, but denied leave. The Court of Appeal unanimously concluded that only the labour board had jurisdiction to determine who was a successor employer, but divided over the test under s. 215 for granting leave to bring successor employer applications. The majority was of the view that the traditional Mancini test represented too low a threshold when the proposed proceedings were successor employer applications, and that other factors should be considered to take account to a greater extent of the impact of such litigation on the bankruptcy process. Accordingly, the majority set aside the bankruptcy judge's refusal to grant leave and remitted the leave

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application back to him for reconsideration based on the enhanced enumerated factors. The union appealed the Court of Appeal's order denying leave, and the secured creditor cross-appealed on the issue of the bankruptcy judge's jurisdiction. Held (Deschamps J. dissenting on the appeal): The appeal should be allowed and the cross-appeal dismissed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.: The bankruptcy court does not have jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the LRA. The powers given to the bankruptcy court under s. 47(2) BIA are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes. Further, s. 72(1) BIA declares that unless there is a conflict, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the Act. The right to seek a successor employer declaration pursuant to the LRA does not conflict with the bankruptcy court's authority under s. 47(2). If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all rights. Explicit language would be required before such a sweeping power could be attached to s. 47. [4] [43-51]

The bankruptcy judge erred in not granting leave to the union to bring a successor employer application against the interim receiver. Under the Mancini test, the threshold for granting leave under s. 215 BIA is not a high one. The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. If the evidence discloses a prima facie case, leave should be granted. The focus of the inquiry is not a determination of the merits. The threshold of the Mancini test strikes the appropriate balance between the protection of trustees and receivers from frivolous suits, while preserving to the maximum extent possible the rights of creditors and others as against a trustee or receiver. As a result, Mancini is consistent with the requirement that there be explicit statutory language before the BIA is interpreted so as to deprive persons of rights conferred under provincial law. Where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly. In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers. There is no reason to create a more stringent test to be applied only to claims by employees represented by unions. To impose a higher s. 215 threshold in a case involving a labour board issue is to read into the BIA a lower tolerance for the rights of employees represented by unions than for other creditors. Nothing in the Act suggests this dichotomy. Finally, the Mancini test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. In this case, since it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed. [7] [55-61] [67-72] [80]
Per Deschamps J. (dissenting on the appeal): A judge who must decide whether to grant leave to bring proceedings against a trustee under s. 215 BIA must determine the actual scope of the remedy being sought, identify potential conflicts and tailor the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the BIA. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law and the judge must therefore deny leave to bring them. [154]

The decision to continue operating the business is central to the trustee's role under the BIA and, in principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. The provisions of the BIA that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by the BIA. The successor employer declaration is not free of pitfalls when it applies to a trustee. The effect of such a declaration is that the trustee becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. Although it is common ground that the LRA confers the exclusive power to decide who is a "successor employer" on the Ontario Labour Relations Board, the LRA cannot frustrate the purpose of the BIA. It is therefore important to strike a balance between the trustee's duties and immunities under the BIA and the employees' rights under the LRA. In the event of conflict, the parties must refer to constitutional principles. Courts that hear disputes relating to the difficulty of applying federal and provincial statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government. Where conflict is unavoidable, however, the federal statute is paramount to the provincial statute. Hence the importance of the screening mechanism of s. 215 BIA, which serves the purpose of ensuring that provincial and federal statutes do not conflict with each other. Since the bankruptcy of a business affects the interests of all the creditors, not just of the

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employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts. [91] [101] [103] [111-112] [116-117] [123] [127-128]

Although the criteria established in Mancini for applying s. 215 are easy to apply to a simple action in damages based on wrongdoing by the trustee, they must, in other cases, be tailored to the specific nature of each application for leave. The judge must assess the nature and scope of the proceeding in light of the evidence. This review does not have the effect of giving special or different treatment to successor employer declarations. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and make provision for conflicts. By ensuring that the conclusions being sought do not impair the application of the BIA and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits the federal statute and provincial legislation to be applied simultaneously. A judge who denies leave to bring proceedings merely avoids a conflict by relying on the paramountcy doctrine in a preventive manner. However, the bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits. **The judge's first task is to enquire into the actual effect of the application**, not a vaguely defined effect on the administration of the bankruptcy. The judge will be justified in limiting the scope of proceedings or denying leave to bring **them only if the proceedings would genuinely hinder the trustee's work**. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 BIA, which makes express provision for the application of provincial legislation that is compatible with the federal statute. [124] [135] [143-153]
In the instant case, the unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the BIA. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court **to engage in the review that is the Superior Court's responsibility**. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. [162] [166]

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Feldman, MacPherson and Cronk JJ.A.) 2004 CanLII 11415 (ON CA), (2004), 71 O.R. (3d) 54, 238 D.L.R. (4th) 677, 185 O.A.C. 138, 48 C.B.R. (4th) 256, [2004] O.J. No. 1353 (QL), setting aside a decision of Ground J. 2003 CanLII 64272 (ON SC), (2003), 42 C.B.R. (4th) 221, [2003] O.J. No. 1603 (QL). Appeal allowed, Deschamps J. dissenting. Cross-appeal dismissed.
Stephen Wahl and Andrew J. Hatnay, for the appellant/respondent on cross-appeal.
Orestes Pasparakis and Susan E. Rothfels, for the respondent/appellant on cross-appeal.
Benjamin Zarnett and Frederick L. Myers, for the respondent KPMG Inc.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ. was delivered by

1 Abella J. — Bankruptcy suspends the economic independence of an enterprise or individual. No longer can operational choices be made by the owner of a business. These become instead the responsibility of the receiver or trustee appointed by the court to salvage as much of the business's financial remains as possible for the benefit of creditors.

2 Those creditors include unionized employees. The issue in this appeal is the extent to which the rights of those employees must yield to the overall objective in a bankruptcy of maximizing the ability of creditors to minimize their losses. In particular, the issue is whether those employees are entitled to the same access to a remedy as other stakeholders who attempt to impugn a receiver's or trustee's conduct.

3 The analysis engages both the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, and the Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A.

4 Three provisions of the Bankruptcy and Insolvency Act are engaged by the circumstances of this case. The first is s. 47, authorizing a judge to appoint and supervise an interim receiver to take possession and control of, or otherwise deal with the debtor's property. The second is s. 215, which immunizes the conduct of receivers and trustees from lawsuits unless prior judicial authorization is obtained. The third is s. 72(1), declaring that unless there is a conflict with the Act, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the federal Bankruptcy and Insolvency Act.

5 The relevant provisions of the Labour Relations Act, 1995 are ss. 69(2), 69(12), 114(1) and 116, the combined effect of which is to give to the Ontario Labour Relations Board exclusive and final authority to determine whether a financial transaction constitutes a sale of a business, thereby triggering the obligation, as a "successor employer", to honour any collective agreements of the acquired business.

6 The issue which animates the interpretive interplay between these provisions is whether to endorse the current judicial approach set out in Mancini (Bankrupt) v. Falconi reflex, (1993), 61 O.A.C. 332 (C.A.), to determinations under s. 215 of the Bankruptcy and Insolvency Act granting or withholding permission to sue a receiver or trustee.

7 For over a decade, the reigning test for mediating between the protection from litigation for those administering a bankrupt estate, and the right to sue them for this very administration, has been the one set out in Mancini. In essence, the three principles summarized in Mancini preclude frivolous, vexatious or manifestly unmeritorious claims from proceeding. For the reasons that follow, unlike the majority in the Court of Appeal, I see no reason to dethrone it and create a higher test to be applied only to claims by employees represented by unions.

I. Background

8 The bankrupt, T.C.T. Logistics Inc., was one of a number of related companies (collectively "TCT") operating a trucking, freight brokerage and warehousing business of high-tech goods in Canada and the United States. TCT operated its warehouse business from several sites, one of which was in Toronto.

9 Forty-two employees at the Toronto warehouse were represented by the Industrial Wood & Allied Workers of Canada, Local 700 ("Union"). On their behalf, the Union entered into a collective agreement with TCT. The term of the agreement was from May 1, 2000 until April 30, 2004.

10 During the course of the collective agreement, TCT became insolvent. GMAC Commercial Credit Corporation — Canada ("GMAC"), TCT's largest secured creditor, applied under s. 47 of the Bankruptcy and Insolvency Act for an order appointing KPMG Inc. ("KPMG") as interim receiver. The Union was not given notice of this application.

11 The order was made on January 24, 2002. It provides for the termination of all employees "effective immediately", but it also gives KPMG authority to hire or fire any of TCT's employees.

12 The order explicitly states that KPMG's employment-related actions could not be considered those of a "successor employer". The order also prohibits proceedings being taken against the interim receiver unless the court grants leave, and then only if KPMG's solicitor/client costs in such proceedings are secured by court order.

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13 The provision at the heart of this litigation is para. 15 of the order, the central provision insulating KPMG from a successor employer designation and more elaborately protecting it from employment obligations arising under either provincial or federal legislation. It states:

EMPLOYEES

. . .

15. THIS COURT ORDERS that the employment of employees of the Debtors, including employees on maternity leave, disability leave and all other forms of approved absence is hereby terminated effective immediately prior to the appointment of the Receiver. Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the Receiver is not and shall not be deemed or considered to be a successor employer, related employer, sponsor or payer with respect to any of the employees of any of the Debtors or any former employees within the meaning of the Labour Relations Act (Ontario), the Employment Standards Act (Ontario), the Pension Benefits Act (Ontario), Canada Labour Code, Pension Benefits Standards Act (Canada) or any other provincial, federal, or municipal legislation or common law governing employment or labour standards, (the "Labour Laws") or any other statue [sic], regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between any of the Debtors and any of their present or former employees, or otherwise. In particular, the Receiver shall not be liable to any of the employees of any of the Debtors for any wages (as "wages" are defined in the Employment Standards Act (Ontario)), including severance pay, termination pay and vacation pay, except for such wages as the Receiver may specifically agree to pay. The Receiver shall not be liable for an [sic] contribution or other payment to any pension or benefit fund.

14 Paragraph 14 of the order is also relevant:

THIS COURT ORDERS AND DECLARES that nothing in this Order shall constitute the Receiver as the employer of the employees of any of the Debtors and further orders and declares that the appointment of the Receiver will not constitute a sale of the business of any of the Debtors.

15 Pursuant to a further order, KPMG was directed to file an assignment in bankruptcy on behalf of TCT and the related companies. The assignment was filed on February 25, 2002. KPMG was appointed trustee in bankruptcy.

16 KPMG did not give notice to TCT's employees before it had obtained the January 24 order permitting it to terminate their employment. The Union, upon learning about the order, wrote to TCT and KPMG on February 1, 2002 advising them that, in its view, any collective bargaining rights under the Ontario Labour Relations Act, 1995 remained "operative and in full force and effect".

17 KPMG met with the employees on February 25, advising them that the business would be continuing in order to evaluate potential sales of the warehousing business. KPMG asked the employees for their loyalty and support "to allow us to maximize the enterprise value for all stakeholders".

18 Subsequently, because of the rapid deterioration of the warehousing business, KPMG sought to sell it as a going concern as quickly as possible. On April 12, KPMG agreed to sell most of the assets of the warehousing business to Spectrum Supply Chain Solutions Inc., a newly formed company.

19 On April 16, KPMG informed the employees about the Spectrum deal and of its intention to seek court approval two days later. An order approving the transaction was obtained on April 18. The closing was scheduled to take place on April 19, 2002.

20 The leasehold interest in the Toronto warehouse was not one of the assets Spectrum purchased. As a result, KPMG decided to wind down its operations and disclaim the lease. It asked Spectrum to manage this process from April 19 until May 23, the date by which KPMG was obliged to vacate the Toronto premises. The resulting management agreement between Spectrum and KPMG entitled Spectrum to any revenues earned during that period in exchange for incurring the costs of winding down the Toronto operation.

21 All unionized employees at the Toronto warehouse were terminated by KPMG on May 9. Some of them were later hired by Spectrum. These hirings were not in accordance with the Union's seniority list.

22 As a result, the Union applied to the Ontario Labour Relations Board on May 13, seeking the following relief under the Ontario Labour Relations Act, 1995:

- a declaration that Spectrum was the successor employer to TCT and/or KPMG, and, accordingly, bound by the Union's collective agreement with TCT (under s. 69 of the Act);
- a declaration that TCT and Spectrum were a single employer for labour relations purposes (under s. 1(4) of the Act);

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- a declaration of unfair labour practices against TCT and/or KPMG and Spectrum for entering into an agreement discriminating against unionized employees and eliminating the Union in Spectrum's workforce (under s. 96 of the Act); and
- an order certifying the Union as the exclusive bargaining agent for Spectrum's employees.

23 The underlying premise of the Union's application to the Ontario Labour Relations Board was that Spectrum was incorporated for the sole purpose of acquiring TCT's warehousing business and had colluded with KPMG to operate TCT's business at a different location under substantially the same management. Except for the new location, the only major difference between TCT's operations and those of Spectrum was the absence of the Union. The president of Spectrum had been the vice-president, Warehousing and Logistics, of TCT; several of the warehousing managers of TCT became managers of Spectrum; and Spectrum set up the warehousing operations in its new Toronto location with essentially the same customers as TCT.

24 Relying primarily on s. 215 of the Bankruptcy and Insolvency Act which prevents proceedings against an interim receiver or trustee in bankruptcy without leave of the court, KPMG obtained a stay of the Union's application from the Ontario Labour Relations Board.

25 The Union accordingly sought the necessary court approval. In its motion to the bankruptcy judge, it asked for the deletion of those portions of the January 24 order which had declared KPMG's conduct incapable of scrutiny under federal or provincial labour and employment legislation. It also sought to strike the security for costs provision.

26 The bankruptcy judge agreed that the costs requirement was unduly onerous and deleted it (2003 CanLII 64272 (ON SC), (2003), 42 C.B.R. (4th) 221). He declined, however, to delete that part of the order declaring that the interim receiver could not be found to be a "successor employer" under the Labour Relations Act, 1995.

27 In the course of his analysis, the bankruptcy judge made a number of observations. Since interim receivership orders are designed to enhance the value of the bankrupt estate as much as possible, and since this objective may sometimes best be realized by continuing the operation of a debtor's business pending a sale, the court was entitled to consider the policy implications of exposing interim receivers or trustees to the risk of being successor employers. Moreover, eliminating the risk of an obligation that might otherwise accrue from continuing a business as a going concern offers employees the possibility of employment with a subsequent purchaser.

28 The bankruptcy judge concluded that it would be unduly burdensome on an interim receiver, and incompatible with its duties, to impose the requirements flowing from a successor employer designation on a receiver engaged in such temporary and limited employment relationships.

29 However, applying the "ancillary" or "necessarily incidental" doctrine crafted by Dickson C.J. in General Motors of Canada Ltd. v. City National Leasing, 1989 CanLII 133 (SCC), [1989] 1 S.C.R. 641 (refined by Iacobucci J. in Global Securities Corp. v. British Columbia (Securities Commission), 2000 SCC 21 (CanLII), [2000] 1 S.C.R. 494, 2000 SCC 21, and by LeBel J. in Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31 (CanLII), [2002] 2 S.C.R. 146, 2002 SCC 31), the bankruptcy judge concluded that the "successor employer provisions" of the order were only "sufficiently integrated" with the legislative scheme of the Bankruptcy and Insolvency Act if the interim receiver was carrying on the bankrupt's business for the purpose of an orderly liquidation of the bankrupt's assets or of effecting a sale of the bankrupt's business as a going concern. He relied on Farley J.'s distinction in Royal Crest Lifecare Group, Re 2003 CanLII 11504 (ON SC), (2003), 40 C.B.R. (4th) 146 (Ont. S.C.J.), between a receiver (or trustee) acting "qua realizer" of the assets and acting "qua employer". When acting "qua realizer", the receiver was entitled to immunity from successor employer provisions.

30 The bankruptcy judge accordingly amended para. 15 of the order by adding language clarifying that the "successor employer" protection was only valid if KPMG was acting "qua realizer" and its conduct was for the purpose of preserving, protecting or liquidating the debtor's assets. The specific language added to the second sentence of para. 15 was:

for the purpose of preserving, protecting and realizing upon the assets of the Debtors by effecting a sale or sales of the assets or of the business of the Debtors as a going concern or otherwise or for the purpose of effecting an orderly liquidation of the assets of the Debtors.

Since in his view KPMG was carrying on the business as a going concern for these very purposes and acting "qua realizer", it was therefore entitled to the protection stipulated in the January 24 order.

31 Turning to s. 215 of the Bankruptcy and Insolvency Act, the bankruptcy judge denied the Union leave to bring proceedings against KPMG at the Ontario Labour Relations Board. Since he had concluded that the provisions of the order in relation to KPMG's status as a successor employer were valid as amended, he saw no basis on which leave should be granted to bring a proceeding seeking relief contrary to the terms of the order.

32 On appeal by the Union to the Court of Appeal, there were two issues:

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- Did the bankruptcy judge have jurisdiction under s. 47(2) of the Bankruptcy and Insolvency Act to make declarations about successorship?
- Did he err in the exercise of his discretion by denying leave under s. 215 of the Act?

33 The Court of Appeal unanimously concluded that only the labour board had jurisdiction to determine who was a successor employer (2004 CanLII 11415 (ON CA), (2004), 71 O.R. (3d) 54). Section 47(2) of the Bankruptcy and Insolvency Act did not confer on the bankruptcy judge the jurisdiction to make declarations on this issue or to otherwise immunize KPMG from such potential declarations by the labour board. Writing for the court on this issue, Feldman J.A. observed that the federal Bankruptcy and Insolvency Act itself explicitly states in s. 72(1) that only provincial laws which conflict with the Bankruptcy and Insolvency Act can be abrogated. She did not find in s. 47(2) the authority to declare whether actions taken by KPMG make it a successor employer. Accordingly, she saw no conflict between the authority given to the bankruptcy court under s. 47(2) to supervise an interim receiver, and the successor rights provisions in s. 69(12) of the Labour Relations Act, 1995, making a paramountcy analysis unnecessary. As a result, in her view the provincial laws conferring this exclusive jurisdiction on the labour board were unaffected by the Bankruptcy and Insolvency Act.

34 Since the bankruptcy judge had no jurisdiction to make any determination relating to successor employer status, the distinction he drew in para. 15 of his January 24 order protecting the interim receiver only when it was acting "qua realizer" and not "qua employer" of the assets was immaterial.

35 On this basis, the Court of Appeal further amended para. 15 deleting the bankruptcy judge's "qua realizer" addition, and adding the following two passages:

. . . unless and until an order is made by the OLRB, upon leave of this court under s. 215 of the BIA, declaring the interim receiver a successor employer to the debtors, and subject to the specific terms of any such order, the interim receiver is not obliged to make any payment as a successor employer . . . . For clarification, the parties have agreed that if any such amounts become payable by the interim receiver as a successor employer, in no event is the interim receiver to be liable for any amount that either became due or accrued prior to the date of its appointment.

36 The court divided, however, on the bankruptcy judge's approach to and resolution of the Union's application for leave to bring labour board proceedings. The disagreement was over the test under s. 215 of the Bankruptcy and Insolvency Act for granting leave to bring successor employer applications. Feldman J.A., whose analysis was endorsed in separate concurring reasons by Cronk J.A., was of the view that the traditional Mancini test represented too low a threshold when the proposed proceedings were successor employer applications. In her view, an approach was required that took more account of the impact of such litigation on the bankruptcy process.

37 The revised test proposed by Feldman J.A. added factors such as the complexity of the receivership; the availability of suitable purchasers; the potential duration of the receiver's operation of the business pending a sale; any arrangements the receiver has made with the Union to accommodate the employees; the likelihood that a subsequent purchaser will be declared a successor employer bound by the obligations under the collective agreement; and the timeliness of the labour board hearing relative to the receiver's temporary operation and ultimate sale of the business.

38 Feldman J.A. concluded that the bankruptcy judge was obliged not to determine the issue itself, but to determine whether a prima facie case of successor employer status had been made out, and, based on the factors she enumerated, to decide whether to grant leave. She accordingly set aside his refusal to grant leave and remitted the leave application back to him for reconsideration based on her enumerated factors.

39 In dissent, MacPherson J.A. saw no basis for erecting a higher threshold for granting leave when the application was for successor employer applications. Other creditors' applications for leave to bring proceedings under s. 215 are usually determined in accordance with the Mancini test, the applicability of which had been consistently upheld by the Ontario Court of Appeal, most recently in Royal Crest Lifecare Group Inc., Re 2004 CanLII 19809 (ON CA), (2004), 46 C.B.R. (4th) 126. In his view, by formulating what he characterized as a "more vague and more elaborate" (para. 111) test uniquely for successor employer leave applications, the majority was inviting a bankruptcy court to do indirectly through s. 215 what it had decided, correctly in his view, could not be done under s. 47(2), namely, insulate the receiver from successor employer determinations.

40 Applying the test in Mancini, MacPherson J.A. concluded that the bankruptcy judge had erred in refusing to grant leave to the Union to bring successor employer and unfair labour practice proceedings against KPMG. His remedy, accordingly, would have been to grant leave to the Union to proceed with its application before the labour board.

41 The Union appealed the Court of Appeal's order denying leave to bring its successorship proceedings before the labour board, and disputed the majority's conclusion that the Mancini test set too low a bar for granting leave to bring proceedings before the labour board. The Union also sought to have the Court of Appeal's

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amended version of para. 15 set aside to the extent that it continues to make declarations with respect to successorship rights.

42 GMAC cross-appealed the Court of Appeal's amendments to para. 15, taking issue with the court's unanimous conclusion that a bankruptcy judge lacks jurisdiction to declare whether a receiver is a successor employer under the Labour Relations Act, 1995.

II. Analysis

A. Can a Bankruptcy Court Judge Determine Successor Rights Issues?

43 The first issue decided by the Court of Appeal, and raised in the cross-appeal, relates to whether the bankruptcy court has jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the Labour Relations Act, 1995. The unanimous conclusion of the Court of Appeal was that it had no such jurisdiction. I agree.

44 The bankruptcy court's authority to supervise the interim receiver is found in s. 47(2) of the Bankruptcy and Insolvency Act, which states:

47. . . .

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;

(b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and

(c) take such other action as the court considers advisable.

45 These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

46 Any doubt about whether s. 47(2) was intended to dispense such jurisdictional largesse vanishes when it is read in conjunction with s. 72(1) of the Bankruptcy and Insolvency Act, which states:

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

47 The effect of s. 72(1) is that the Bankruptcy and Insolvency Act is not intended to extinguish legally protected rights unless those rights are in conflict with the Bankruptcy and Insolvency Act. The right in issue here is the right found in s. 69 of the Ontario Labour Relations Act, 1995 to seek a declaration that a subsequent employer is bound by the employment obligations found in the collective agreements of its predecessor. I agree with Feldman J.A. who concluded:

. . . the first half of [s. 72] clearly states that the BIA will not abrogate or supercede any provincial law unless that law is in conflict with the BIA. The language of s. 47(2) of the BIA does not conflict with the successor employer sections of the LRA and therefore does not abrogate or supercede that Act. [para. 30]

48 Section 114(1) of the Labour Relations Act, 1995 states:

114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

49 This means the labour board has exclusive jurisdiction to make a successor employer determination. It is difficult to see how the right to seek such a declaration conflicts in any way with the bankruptcy court's authority under s. 47(2) to direct and supervise the interim receiver's effective management of the debtor's assets.

50 Trustees, receivers and the specialized courts by which they are supervised, are entitled to a measure of deference consistent with their undisputed expertise in the effective management of a bankruptcy. Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.

51 If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(c). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72. As Major J. stated in Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:

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. . . explicit statutory language is required to divest persons of rights they otherwise enjoy at law. . . . [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

The language of s. 47(2) falls well short of this standard. The bankruptcy court can undoubtedly mandate employment-related conduct by the receiver, but as s. 47(2) of the Bankruptcy and Insolvency Act is presently worded, the court cannot, on its own, abrogate the right to seek relief at the labour board.

52 Accordingly, the Court of Appeal was correct to conclude that the bankruptcy judge had no jurisdiction to make a declaration about or immunize the receiver from successor employer liability. To the extent that any provision of the order does so, including the amendments added by the Court of Appeal, they should be set aside.

B. Is a Unique Test Required Under Section 215 for Leave to Bring Successor Rights Applications?

53 Having concluded that the bankruptcy judge has no jurisdiction either to make a determination as to the receiver's status as a successor employer, or to immunize it from such a determination by the labour board, the remaining issue is whether to set aside the bankruptcy judge's refusal to permit the Union remedial access to the Ontario Labour Relations Board.

54 The debate between the parties is over the extent of the bankruptcy court's discretion when leave is sought by a union to bring a successor employer application against the receiver or trustee. This shifts the focus to s. 215 of the Bankruptcy and Insolvency Act, which states:

215. Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

55 For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact. As L. W. Houlden, G. B. Morawetz and J. Sarra stated in Bankruptcy and Insolvency Law of Canada (3rd ed. (loose-leaf)), vol. 3, at p. 7-118.2:

The court will not refuse leave unless there is no foundation for the claim or the claim is frivolous and vexatious . . . .

56 Essentially, unless the claim is without merit, the gate to a litigated determination has usually been opened under s. 215 and its statutory predecessors: see Randfield v. Randfield (1861), 3 De G. F. & J. 766, 45 E.R. 1075, at p. 1077, per Turner L.J. (". . . it is not, as I apprehend, according to the course of the Court, to refuse liberty to try a right which is claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim"); In re Diehl v. Carritt (1907), 15 O.L.R. 202 (H.C.J.), at p. 204; Danny's Cabaret Ltd. v. Horner, [1980] B.C.J. No. 1293 (QL) (C.A.); Virden Credit Union Ltd. v. Dunwoody Ltd. (1982), 45 C.B.R. (N.S.) 84 (Man. Q.B.), at p. 90; Re New Alger Mines Ltd. (1986), 59 C.B.R. (N.S.) 113 (Ont. C.A.); RoyNat Inc. v. Allan 1988 CanLII 3499 (AB QB), (1988), 61 Alta. L.R. (2d) 165 (Q.B.); B.N.R. Holdings Ltd. v. Royal Bank 1992 CanLII 410 (BC SC), (1992), 14 C.B.R. (3d) 233 (B.C.S.C.); Toronto Dominion Bank v. Alex L. Clark Ltd. reflex, (1993), 22 C.B.R. (3d) 6 (Ont. Ct. (Gen. Div.)), at para. 7; Nicholas v. Anderson 1996 CanLII 8256 (ON SC), (1996), 40 C.B.R. (3d) 32 (Ont. Ct. (Gen. Div.)), at paras. 13-15; Burton v. Kideckel 1999 CanLII 15010 (ON SC), (1999), 13 C.B.R. (4th) 9 (Ont. S.C.J.), at para. 13; Society of Composers, Authors and Music Publishers of Canada v. Armitage 2000 CanLII 16921 (ON CA), (2000), 50 O.R. (3d) 688 (C.A.), at para. 2; Vanderwoude v. Scott and Pichelli Ltd. 2001 CanLII 6622 (ON CA), (2001), 143 O.A.C. 195, at para. 22; Bennett on Bankruptcy (8th ed. 2005), at pp. 416-17; Bennett on Receiverships (2nd ed. 1999), at p. 223; and Houlden, Morawetz and Sarra, at p. 7-118.2.

57 In the leading case of Mancini, the Court of Appeal summarized the accepted principles as being the following:

1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.

2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.

3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

58 The court in Mancini explained that the duty of the trustee is to protect both the creditors and the public interest in the proper administration of the bankrupt estate. The gatekeeping purpose of the leave requirement, therefore, in light of this duty, is to prevent the trustee or receiver "from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action" (para. 17) so that the bankruptcy process is not made unworkable. On the other hand, it ensures that legitimate claims can be advanced.

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59 The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. As Blair J. observed in Nicholas:

The question . . . is whether, in the circumstances of this case, the facts in support of the proposed claim have been disclosed by sufficient affidavit evidence to ensure the claim's proper factual foundation, having regard to the policy of requiring leave in order to protect a trustee from claims which have no basis in fact. [para. 16]

In other words, the evidence must disclose a prima facie case.

60 Although the Mancini test calls for an investigation into whether the proposed litigation discloses a cause of action, the focus of that inquiry is not a determination of the merits. This is a particularly important observation in circumstances where exclusive jurisdiction to decide the legal questions raised in the proceedings resides elsewhere. As the court said in Mancini, at para. 16 "[o]n a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under [the predecessor of s. 215] must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action." See also Society of Composers, Authors and Music Publishers of Canada, at para. 2.

61 This threshold strikes the appropriate balance between the protection of trustees and receivers from the distraction and delay inherent in frivolous or merely tactical suits, and the preservation to the maximum extent possible of the rights of creditors and others as against a trustee or receiver. In this way, Mancini is consistent with Crystalline's requirement that there be "explicit statutory language" (para. 43) before the Bankruptcy and Insolvency Act is interpreted so as to deprive persons of rights conferred under provincial law.

62 The approach proposed by the majority in the Court of Appeal would require that courts consider the effect of the proposed proceeding on, among other considerations, the potential for interference with the maximization of stakeholder value. With respect, the result of the application of this higher threshold would necessarily bar some meritorious cases on the basis that other stakeholders would be better off. To allow bankruptcy courts to use the leave requirement in s. 215 to pick and choose between stakeholders' claims on the basis of a standard which, as MacPherson J.A. noted, at para. 111, is both "more vague and more elaborate" than that set out in Mancini, would be a profound departure from the principles in Crystalline. The integrity and efficiency of the bankruptcy process are sufficiently advanced by directing bankruptcy courts to deny leave to frivolous and merely tactical suits.

63 A more interventionist approach is premised on the "single control" theory of bankruptcy litigation. In Sam Lévy & Associés Inc. v. Azco Mining Inc., 2001 SCC 92 (CanLII), [2001] 3 S.C.R. 978, 2001 SCC 92, a case dealing with the enforceability of bankruptcy court orders across Canada, Binnie J. described the goal of a single court controlling all aspects of a bankruptcy, including litigation, as being "the expeditious, efficient and economical clean-up of the aftermath of a financial collapse" (para. 27). The benefits of avoiding multiple proceedings in multiple provinces underlay the decision. But, as Binnie J. also observed, "[s]ingle control is not necessarily inconsistent with transferring particular disputes elsewhere" (para. 76).

64 "[T]ransferring particular disputes elsewhere" is all that is done when leave under s. 215 is granted. Moreover, I note that the "transfer" in the instant case consists only of permitting the tribunal vested with exclusive jurisdiction over the matter to ultimately decide it. It is one thing to avoid permitting provincial enforcement schemes to defeat legitimate bankruptcy orders, as was held in Sam Lévy, it is another to use the bankruptcy process to defeat legitimate assertions of provincially granted rights, including labour and employment rights over which the bankruptcy court has no jurisdiction. The Mancini test is not, in short, inconsistent with "single control".

65 Ultimately, the appropriate test under s. 215 of the Bankruptcy and Insolvency Act remains a question of statutory interpretation, and the Act itself provides important context for the resolution of that question. I think it is instructive that s. 37 of the Bankruptcy and Insolvency Act provides that when the bankrupt, any creditor, or any other person is aggrieved by an act or decision of a trustee or receiver in the administration of the bankrupt estate, he or she may apply to the bankruptcy court. The court may then reverse, modify or confirm the act or decision complained of, making such order as it thinks just. No leave is required under s. 37.

66 Sections 37 and 215 have been called alternative means of proceeding against a trustee or receiver: see Virden Credit Union, at pp. 89-90. The difference, of course, is that under s. 215, permission can be sought to seek a remedy elsewhere than in the bankruptcy court, and certain claims will be beyond the jurisdiction of the bankruptcy court under s. 37. Nevertheless, many actions that may be brought with leave under s. 215 may also be heard in the bankruptcy court on a s. 37 application. What is instructive about s. 37, however, is that it demonstrates that Parliament did not consider it appropriate to immunize court-appointed officers from litigation.

67 On the other hand, where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly, as in s. 14.06(1.2) (trustee immune from certain liabilities arising from continuing the debtor's business or the employment of the debtor's employees); s. 14.06(4) (trustee immune in certain circumstances from environmental liabilities); s. 41(8) (discharge of liability of trustee upon discharge of trustee); ss. 50(9) and 50.4(5)

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(trustee not liable for detrimental reliance on cash-flow statements if the trustee reviews the statements reasonably and in good faith); s. 80 (trustee not liable for losses resulting from seizure of property); s. 148(3) (no action for a dividend lies against a trustee); s. 171(6) (trustee not liable for reasonable and good faith statement of opinion as to the probable cause of the bankruptcy); s. 197(3) (trustee not liable for costs of a proceeding); s. 251 (no action against a receiver for loss resulting from notice of the receiver's appointment); and s. 252 (no action against a receiver for failure to comply with the Act where the receiver reasonably believed the debtor was not insolvent).

68 In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers.

69 The issue then becomes whether there is some reason why the long-standing principles governing the granting of leave should be different when the dispute relates to the receiver's obligations to the debtors' employees represented by a union.

70 The argument for a higher, more elaborate threshold advanced by the majority in the Court of Appeal is to enhance the receiver's ability to decide how and when to sell the assets, free from the fear of subsequent scrutiny for labour relations violations. The Mancini test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. If the argument is that the receiver should be protected from the threat of litigation by the Union because of its inevitable cost, delay and inconvenience, then no creditor should ever be granted leave to sue. No litigation is without delay, cost and inconvenience. But Parliament has nonetheless decided, through s. 215, that the bankruptcy court should, in its discretion, permit litigation against court-appointed officers. It has made no distinction between unions and other creditors in granting this discretionary authority and none should be imputed.

71 To impose a higher s. 215 threshold when it is a labour board issue is to read into the Bankruptcy and Insolvency Act a lower tolerance for the rights of employees represented by unions than for other creditors. I see nothing in the Act that suggests this dichotomy.

72 A hierarchical approach to s. 215 which makes it significantly more difficult for a successorship case to obtain leave would unduly give trustees and receivers more protection from being answerable to the court for possible misconduct related to potential breaches of labour relations, and offers unique and enhanced protection for trustees who violate labour rights. It is, moreover, an approach that undermines the protection of rights endorsed by this Court in Crystalline. As Borins J.A. of the Ontario Court of Appeal observed in Royal Crest:

While the important role performed by bankruptcy trustees is deserving of protection, the rights of labour unions to pursue legitimate issues on behalf of their members must also be respected. [para. 70]

73 The Court of Appeal unanimously — and correctly — reached the conclusion that the bankruptcy court cannot make declarations about, or immunize court-appointed officers from accountability for contraventions of applicable labour relations laws. Yet, the majority's proposed threshold for leave under s. 215 would not only upset the balance in the Act between the gate-keeper function of the bankruptcy court and protected property and civil rights, it would create a real risk that s. 215 would become a de facto means by which the bankruptcy court could make such declarations, and, contrary to Mancini, effectively decide the issue on its merits. That is what happened at first instance in this case. As MacPherson J.A. observed in his dissent:

In short, and with respect, my colleague introduces through the side door of s. 215 (a leave provision, not a provision conferring authority on the receiver) precisely what she correctly does not permit the receiver to do through the front door of s. 47(2). [para. 115]

74 Section 215 is not designed to protect the trustee from well-founded litigation. It is designed to afford protection from claims for which there is no factual foundation. All major stakeholders, on a plain reading of the statute, have been given similar access for remedying alleged grievances against the trustee under ss. 37 and 215. Absent a statutory intention to the contrary, this symmetry should continue, whatever the identity of the stakeholder. There is no reason to depart from it when what is sought is relief from the labour board rather than from a bankruptcy judge.

75 That brings us to the proposed action in this case, namely a successor rights application before the labour board. Various provincial statutes provide that the successor employer is bound by the collective agreement and required to recognize the exclusive representation of the employees by their union. The statutes declare that the collective agreement is binding if the business has been sold or otherwise transferred to the successor until the tribunal otherwise declares.

76 In Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, 1990 CanLII 22 (SCC), [1990] 3 S.C.R. 644, Wilson J., in her dissenting reasons, explained that the purpose of the "successor rights" provisions in labour legislation is "to prevent the loss of union protection by employees whose company's business is sold or transferred" (p. 652). A successor employer is defined in

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s. 69(2) of the Ontario Labour Relations Act, 1995 as someone who acquires a business by sale or transfer from an employer and is bound by any existing collective agreements until the Ontario Labour Relations Board rules otherwise.

77 To be found to be a successor employer, as McLachlin J. noted for the majority in Lester, a labour board must first determine whether a discernable part of the business was disposed of. This requires an examination of "the nature of the predecessor business, and the nature of the successor business" (p. 676) to determine whether the business of the predecessor is being performed by the successor. Relevant factors include the work covered by the terms of the collective agreement, the type of assets transferred, whether employees are transferred, and whether there is continuity of management or of the work performed. In each case, as McLachlin J. pointed out, the labour relations board must determine "if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor" (p. 677).

78 KPMG and GMAC make a number of arguments directed specifically at the obstacles to the Union's successorship claim, including a constitutional paramountcy argument relating to the effect of a successor employer declaration on the priority scheme in the Bankruptcy and Insolvency Act. These are matters for the labour board's consideration. They are not germane to whether leave should be granted. And I appreciate the majority of the Court of Appeal's concern that the possibility of subsequent labour relations scrutiny may have an impact on a receiver's decision about how best to maximize stakeholder value. But again, this goes not to whether leave should be granted, but is a consideration in deciding the merits of the successor rights application. Issues of successorship are within the exclusive jurisdiction of the labour relations board. The labour board has been given exclusive responsibility for deciding these issues because the provincial legislature has confidence in its ability to do so in the public interest, based not only on the expectations of employees, but on those of employers as well.

79 In this case, the Union sought to argue before the Ontario Labour Relations Board that the interim receiver became the employer of the employees after its appointment when it decided to employ them in order to continue operating the warehouse. As an employer, it would be obliged to abide by the collective agreement and applicable labour and employment statutes. The Union alleged it failed to do so by, among other acts, manipulating the sale agreement so that the Union was ousted from the purchaser's workforce.

80 It is by no means clear how the Board will deal with a particular successorship issue, since the outcome will be determined by the facts. But where, as here, it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed.

81 A postscript: No notice of the motion appointing an interim receiver was given to the Union, the exclusive bargaining agent of the employees. I appreciate that what happened in this case is not uncommon: receivers routinely seek an ex parte order from the bankruptcy judge with a draft order agreed upon by the debtor corporation and major creditors. Unions, as in this case, receive no notice, thereby losing the opportunity at the earliest possible stage to participate in the formulation of the plan for dealing with the debtor's assets. Notice is no guarantee either of cooperation or resolution, but, arguably, a union shut out of the process early will eventually, like any major creditor, likely seek to protect its interests. As Iacobucci J. observed in Wallace v. United Grain Growers Ltd., 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701:

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result . . . . [para. 95]

82 While advance negotiations with unions on important decisions may not eliminate a subsequent claim for successor employer liability, they could potentially yield a greater possibility for resolution than ignoring them would. Optimally, advance discussions about the impact on employees if the business is continued will lead to compromise rather than litigation.

83 This would have resulted, in this case, in the immediate integration of a significantly affected party into the development and supervision of the orderly, fair and effective management of the insolvency process. It would not, of course, necessarily have avoided a multiplicity of proceedings. Nor would it have guaranteed the Union's blessing of the proposed methodology for preserving and realizing the assets. But it would have, at the very least, ensured that its legitimate concerns were factored into the planning at an early enough stage, thereby possibly avoiding later proceedings such as those which arose in this case.

III. Disposition

84 I would allow the appeal with costs throughout, grant leave to the Union to bring its proceeding before the labour board, and set aside those parts of the order that make a declaration about, or immunize the receiver from, successor employer liability. I would dismiss the cross-appeal with costs.

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85 Deschamps J. (dissenting on the appeal) — What factors guide a bankruptcy judge when hearing an application for leave to bring proceedings against a trustee? That is the main issue in this case. To resolve it, however, the Court must consider the limits on the application of provincial law in bankruptcy matters. For the reasons that follow, I am of the view that a judge who decides an application under s. 215 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"), must do so in a manner consistent with federal and provincial heads of power so as to avoid any constitutional conflicts. I would therefore affirm the Court of Appeal's judgment (2004 CanLII 11415 (ON CA), (2004), 71 O.R. (3d) 54) remitting the case to the Superior Court of Justice for reconsideration in light of the principles set out below.

86 I have read the reasons of Abella J. She concludes (at para. 78) that it is the Ontario Labour Relations Board ("OLRB") that must decide the constitutional question. In my view, the BIA provides for a step that is specifically designed to avoid any constitutional conflicts, and the administrative tribunal should not be allowed to make an unconstitutional declaration. Thus, we disagree as to the forum that should hear and determine the conflict issue. A superior court judge presiding over a bankruptcy case acts as a specialized tribunal. He or she is very familiar with the duties and responsibilities of trustees and serves as the initial jurisdiction to which someone wanting to bring proceedings against a trustee must apply. I propose that the application for leave to bring proceedings pursuant to s. 215 BIA be analysed based on the actual effect of the proceedings on the duties and responsibilities of the trustee as set out in the BIA. Such an analysis is the only way to guarantee compliance with the principles of constitutional law.

87 In order to assess the areas of conflict between the BIA and the provisions of the Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A ("LRA"), concerning successor employers, it will be helpful to begin by briefly reviewing the trustee's role in the context of the 1992 reform of the bankruptcy scheme. I will then discuss the effect of successor employer declarations made by the OLRB before turning to the constitutional principles applicable in the event of conflict. I will conclude by identifying the specific criteria for avoiding conflicts and then making a few comments on the case before the Court.

1. Powers and Responsibilities of the Trustee

1.1 Role of the Trustee

88 Viewed generally, the administration of a bankruptcy is straightforward. The trustee receives the assets in one hand, then settles any claims with the other using the proceeds of realization of the assets. In concrete terms, the trustee, in performing these functions, plays an active role in the liquidation of the bankrupt's estate. The trustee's duties and responsibilities are explicitly governed by the BIA. The bankrupt's property vests in the trustee (s. 71). The trustee's powers with respect to the property are set out in the BIA (ss. 30 and 31). Subject to the rights of secured creditors and certain other exceptions, the remedies of all the creditors are stayed (s. 69.1). The BIA also governs the nature of provable claims and the claims procedure (s. 121). A trustee who carries on the bankrupt's business or continues the employment of the bankrupt's employees is not personally liable for any claims arising before the bankruptcy (s. 14.06(1.2)). However, trustees are authorized to settle such claims out of the assets vested in them (s. 67) by distributing the proceeds of realization of the assets in accordance with the BIA, based on the priority of payment for which that Act provides (ss. 136 to 147).

89 The trustee is, first and foremost, an officer of the court:

. . . and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors.

(Ex parte James, In re Condon (1874), L.R. 9 Ch. App. 609, at p. 614)

90 The basis for the trustee's long-recognized role as an officer of the court is found in s. 16(4) BIA; under the BIA, the trustee has the same status as the interim receiver: Parsons v. Sovereign Bank of Canada, [1913] A.C. 160 (H.L.), at p. 167; L. W. Houlden, G. B. Morawetz and J. Sarra, Bankruptcy and Insolvency Law of Canada (3rd ed. (loose-leaf)), vol. 1, at C§10 and C§44. This status obliges the trustee to act equitably and prudently, to cooperate with the court and, in a more general manner, to contribute to the proper administration of justice (L'Heureux (Syndic de), 1999 CanLII 13791 (QC CA), [1999] R.J.Q. 945 (C.A.), at p. 949; Caisse populaire de Pontbriand v. Domaine St-Martin Ltée, [1992] R.D.I. 417 (C.A.); Azco Mining Inc. v. Sam Lévy & Associés Inc., 2000 CanLII 9546 (QC CA), [2000] R.J.Q. 392 (C.A.); Re Reed (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.); J. Auger and A. Bohémier, "The Status of the Trustee in Bankruptcy" (2003), 37 R.J.T. 57, at pp. 99-100).

91 The BIA protects trustees while they are acting as officers of the court and exercising the powers conferred upon them by law. A trustee is not personally bound by the bankrupt's obligations. In addition to being protected by the provisions that confer immunity upon them (ss. 14.06(1.2), (2) and (4), 50(9) and 50.4(5)), trustees benefit from the screening of the proceedings provided for in s. 215, which is central to the litigation in the case at bar. The provisions that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by the BIA.

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92 It is also interesting to note that similar protections exist for monitors appointed under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11.7(4) and 11.8(1), (3) and (5), and liquidators acting pursuant to the Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, ss. 35.1 and 76(2).

1.2 1992 Reform

93 The rules governing bankruptcy changed considerably with the coming into force of the 1992 reform. The most striking change was the priority given to the reorganization of companies, as opposed to the interruption of business. D. C. A. Tay comments as follows on the significance of the BIA's new thrust:

The main impact of the BIA is to change the thrust of Canada's bankruptcy legislation from liquidation to rehabilitation. Whereas the old Act dealt primarily with who gets what from the remains of the bankrupt's estate, the BIA tries to provide more ways for an insolvent debtor to stay alive and to restructure and reorganize its affairs.

(Implications of the New Bankruptcy and Insolvency Act (1993), article VI, "The Bankruptcy and Insolvency Act: Striking a Balance Between the Rights of the Debtor and its Creditors", at p. 2)

94 This change is fundamental, and it unquestionably constitutes one of the main objectives behind the reform. Its effect, in concrete terms, in the case at bar is that the trustee was obliged to facilitate the sale of a going concern rather than to cease operations and liquidate the assets. The objective of continuing operations is a factor that must be incorporated into the constitutional analysis when considering whether a provincial statute frustrates the purpose of the BIA.

95 The trustee's duties and responsibilities as a public officer permeate these new functions. The trustee has been transformed from a mere liquidator into an agent of financial restructuring. If trustees are responsible for ensuring that businesses survive and that jobs are preserved, then it follows that they must manage the businesses until purchasers can be found. The trustee's management role is essentially a temporary one. Although the length of the trustee's administration may vary depending on the nature of the business and the economic conditions at the time, the trustee serves essentially as a bridge in maintaining or reorganizing the business before handing it over to a purchaser.

96 It is clear from this crucial role of the trustee that bankruptcy inevitably has consequences for labour relations, which is why it is important to review the interrelationship of the rules of bankruptcy and those of labour relations, more specifically those applicable to the successor employer declaration.

2. Purpose and Effect of the Successor Employer Declaration

2.1 Purpose of the Declaration

97 Every Canadian legislature has enacted a provision pursuant to which employees' union protection remains in effect should the business they work for be transferred. The Ontario provision that is relevant to the instant case reads as follows:

69. . . .

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

98 Without this protection, employees could, although still working at the same jobs, albeit for a new employer, be stripped of the rights their union had negotiated on their behalf.

99 In Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, 1990 CanLII 22 (SCC), [1990] 3 S.C.R. 644, McLachlin J., as she then was, explained the purpose of the successor employer declaration as follows:

The basic aim of such provisions is to prevent employees from losing union protection when a business is sold or transferred or when changes are made to the corporate structure of a business. . . . [p. 671]

100 Numerous factors are taken into consideration when establishing whether the purchaser of a business has succeeded to the vendor as employer. To determine whether the business has been transferred, the usual practice is to ask whether sufficient significant elements of its assets have been sold to the purchaser and assess the degree of continuity in the business's operations. Each case turns on its own facts, and no single factor is determinative. The decision maker may compare both the human aspects (employee know-how, management system, licences, patents, goodwill) and physical aspects (tangible assets of the business, equipment, land, location) of the assigned business with those of the new one to decide whether there has been a sale. The decision maker also determines whether the constituent parts of the business have been transferred as a whole that is sufficiently coherent for the transfer to be equivalent to the sale of the business as a "functional economic vehicle" and for the survival of the rights arising out of

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collective bargaining to be justified (Lester, at p. 676; Metropolitan Parking Inc., [1980] 1 Can. L.R.B.R. 197 (Ont.), at p. 208; Lincoln Hydro Electric Commission, [1999] O.L.R.B. Rep. May/June 397, at pp. 415-16; G. W. Adams, Canadian Labour Law (2nd ed. (looseleaf)), at pp. 8-4 to 8-23).

2.2 Effect of the Declaration

101 The effect of a declaration by the OLRB that an entity has succeeded to another as an employer is that the entity in respect of which the declaration is made becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. The new employer becomes personally liable for the predecessor employer's debts, as well as for any violations of the collective agreement occurring before the sale. For example, the successor may be bound by an arbitration award against the predecessor and be forced to assume responsibility for unfair labour practices. Generally speaking, the successor is personally liable to perform the predecessor's obligations (Adam v. Daniel Roy Ltée, 1983 CanLII 147 (SCC), [1983] 1 S.C.R. 683, at pp. 694-95; Man of Aran (1974), 6 L.A.C. (2d) 238 (Ont.); Woodbridge Hotel (1976), 13 L.A.C. (2d) 96 (Ont.); Uncle Ben's Industries, [1979] 2 Can. L.R.B.R. 126 (B.C.); Re United Brotherhood of Carpenters& Joiners of America, Local 3054 and Cassin-Remco Ltd. reflex, (1979), 105 D.L.R. (3d) 138 (Ont. H.C.J.); Radio CJYQ-930 Ltd. (1978), 34 di 617; Adams, at pp. 8-38.2 to 8-39; D. D. Carter, G. England, B. Etherington and G. Trudeau, Labour Law in Canada (5th ed. 2002), at pp. 280-81).

102 Although protecting employees upon the sale of a business is straightforward in the context of the transfer of obligations to the purchaser, a number of questions are raised when the issue arises in a situation involving a trustee. The difficulties faced by trustees are exacerbated by a lack of uniformity both in labour relations legislation across Canada and in the case law relating to that legislation (Adams, at pp. 8-4 et seq. and 8-39 et seq.).

103 It is common ground that the LRA confers the exclusive power to decide who is a "successor employer" on the OLRB. However, since the Ontario statute cannot frustrate the purpose of the BIA, it is necessary to determine to what extent a declaration that a trustee is a successor employer is compatible with the BIA.

3. Conflicts Between the BIA and the LRA

104 I have already discussed the effect of a successor employer declaration made under the LRA. Section 69(2) LRA provides that the purchaser of the business is bound by the obligations of the employer-vendor who signed the collective agreement as if the purchaser had been a party to that agreement. I also mentioned above that a declaration that a trustee is an employer within the meaning of the LRA would raise a number of questions. Even a cursory review brings a number of conflicts to light.

105 The most obvious conflict results from claims for unpaid wages. The effect of a successor employer declaration is that the person to whom it applies is liable for the obligations of the employer who signed the collective agreement. The new "employer", the trustee in the case at bar, would be liable for all wages left unpaid by the bankrupt. This obligation is in direct conflict with two provisions of the BIA.

106 The first is s. 14.06(1.2), which explicitly provides as follows:

(1.2) Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.

As the declaration binds the trustee to perform all the obligations of the employer who signed the collective agreement, its effect is to impose on this officer of the court a personal liability from which he or she is explicitly exempted by s. 14.06(1.2).

107 The second incompatible provision is s. 136(1)(d), which gives priority to claims of the bankrupt's employees for up to six months' back pay, to a maximum of $2,000 per employee. Any claims in excess of this amount are treated as ordinary claims and paid rateably (s. 141). If the trustee is considered to be an employer, he or she must pay the employees' claims in full, which is inconsistent with the BIA. This is another situation in which there is a direct conflict because it is impossible to comply with both the BIA and the LRA. Although not all bankrupt employers accumulate debts for back pay in excess of the limits provided for in the BIA, when one does, the bankruptcy court cannot unconditionally allow a union to request that the trustee be declared the bankrupt's successor.

108 Another conflict may arise in situations similar to the one in Adam v. Daniel Roy Ltée. In that case, the new employer was ordered to reinstate and indemnify an employee who had been dismissed by the predecessor employer because of her union activities. Such a decision, if applied to a trustee, would require the trustee to reinstate an employee even though the bankruptcy had, in principle, terminated his or her employment (Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27).

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109 Other conflict situations are more subtle. One example is where a trustee must continue operating a business with only a few remaining employees. Procedures relating to lay-offs or to relocation may impose constraints that are incompatible with reorganization for bankruptcy purposes.

110 A final conflict results from the fact that the successor employer declaration is not time-limited. In the case of an actual purchaser, this poses no problems. In principle, the transfer of the business, like the declaration, is final. The same is not true in the case of a trustee, since the trustee, as an officer of the court, is entitled to be discharged once the administration of the assets has been completed (s. 41(2) BIA). An unconditional declaration would make the trustee an employer even though the reorganization has been completed and the trustee has been discharged by the bankruptcy court.

111 The above examples clearly illustrate that the successor employer declaration is not free of pitfalls when it applies to a trustee who must discharge his or her duties in accordance with the BIA. If in my first example it is clearly impossible to apply the two statutes concurrently, a situation in which the trustee could be held personally liable for debts of the bankrupt connected with the collective agreement would just as obviously frustrate the purpose of the BIA. As Feldman J.A. stated in the instant case:

These bankruptcy considerations are critically important where an interim receiver could be declared a successor employer of the debtor if it carries on the debtor's business in order to sell it as a going concern. Whether to carry on the business is one of the most significant decisions that the receiver must make. That decision affects the entire direction of the bankruptcy and its outcome and, importantly, the ability of the receiver to maximize the value of the bankrupt's estate for the benefit of the affected stakeholders. [para. 53]

112 The decision to continue operating the business is central to the trustee's role under the BIA. This role cannot be disregarded. The parties must strike a balance between the trustee's duties and immunities under the BIA and the employees' rights under the LRA. In the event of conflict, the parties must refer to constitutional principles. A brief review of the relevant doctrines is therefore in order.

4. Double Aspect and Paramountcy Doctrines

113 Conflicts of legislative powers are not tolerated in constitutional law. A number of doctrines have been developed to ensure that federal and provincial powers are respected. Two of them are relevant here: double aspect and paramountcy. The doctrine of paramountcy has been considered in a number of this Court's decisions dealing specifically with bankruptcy, and it would be helpful to summarize those decisions.

4.1 Double Aspect Doctrine

114 Provincial legislatures have jurisdiction over property and civil rights under s. 92(13) of the Constitution Act, 1867 (the "Constitution"). The regulation of conditions of employment falls under this head of power. No one is questioning the constitutionality either of the LRA as a whole or of s. 69(2). As for Parliament, it has jurisdiction over bankruptcy and insolvency under s. 91(21) of the Constitution, and neither its jurisdiction nor the provisions granting powers and immunities to trustees are being contested. Thus, each of these statutes, in its own field, is within the jurisdiction of the level of government that enacted it.

115 When effect is given to federal and provincial statutes, they can often be applied concurrently. The Privy Council recognized this possibility at a very early stage:

. . . subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

(Hodge v. The Queen (1883), 9 App. Cas. 117, at p. 130)

Thus, when trustees manage businesses while searching for a buyer, they derive their powers from the BIA, which is within federal jurisdiction. However, they are not exempt from the application of all provincial legislation. The BIA even makes express provision for the application of compatible provincial legislation relating to property and civil rights. Section 72(1) reaffirms the applicability of laws that are not in conflict with the BIA:

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

A trustee who operates a business must satisfy a large number of requirements. For example, he or she may neither fail to collect source deductions from employees' pay nor violate minimum labour standards.

116 As a result, because of the division of legislative powers between the levels of government, trustees are subject to a large number of provincial statutes. Courts that hear disputes relating to the difficulty of applying federal and provincial statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government: Reference re Employment Insurance Act (Can.), ss. 22 and

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23, 2005 SCC 56 (CanLII), [2005] 2 S.C.R. 669, 2005 SCC 56. Where conflict is unavoidable, another doctrine may apply, namely, paramountcy.

4.2 Paramountcy Doctrine

117 The paramountcy of federal laws over provincial laws in the event of conflict is a doctrine that was established long ago: W. R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 McGill L.J. 185. Conflicts that will trigger recourse to this doctrine may occur where it is impossible to apply a federal statute and a provincial statute simultaneously (Multiple Access Ltd. v. McCutcheon, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, at p. 191), but may also occur where the application of a provincial statute frustrates the legislative purpose of a federal one: Law Society of British Columbia v. Mangat, 2001 SCC 67 (CanLII), [2001] 3 S.C.R. 113, 2001 SCC 67, and Rothmans, Benson& Hedges Inc. v. Saskatchewan, 2005 SCC 13 (CanLII), [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 12.

118 While this principle is easily stated, it is not always easy to apply, as can be seen from the numerous cases on this subject.

4.3 Specific Context of Bankruptcy

119 The BIA and the LRA are not necessarily incompatible. While it is important to acknowledge potential conflicts, it is just as important to ensure that the paramountcy doctrine is not interpreted in a way that makes it impossible to apply provincial provisions in respect of aspects that are compatible with the federal statute. The double aspect doctrine is as important as the doctrine of paramountcy. Courts must ensure that the balance struck by the Constitution is respected and that each level of government can exercise its jurisdiction fully when this can be done without impeding action by the other level.

120 In several important judgments on the subject of bankruptcy, this Court has considered the relationship between bankruptcy legislation and various aspects of provincial property law: Deputy Minister of Revenue v. Rainville, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35; Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785; Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061; British Columbia v. Henfrey Samson Belair Ltd., 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24; Husky Oil Operations Ltd. v. Minister of National Revenue, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453, and D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General), 2005 SCC 52 (CanLII), [2005] 2 S.C.R. 564, 2005 SCC 52.

121 In Husky Oil, Gonthier J., writing for the majority, summarized the principles that can serve as a basis for a "consistent and general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements" (para. 31). He not only noted that provinces may not directly affect priorities under the Bankruptcy Act, but also stated propositions that permit the paramountcy doctrine to be applied where provincial legislation indirectly conflicts with the BIA (paras. 32 (quoting A. J. Roman and M. J. Sweatman, "The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992), 71 Can. Bar Rev. 77, at pp. 78-79) and 39):

(1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;

(2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;

(3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; . . .

(4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act[;]

. . .

(5) in determining the relationship between provincial legislation and the Bankruptcy Act, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;

(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the Bankruptcy Act in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so. [Emphasis in original.]

122 Although the propositions enunciated in Husky Oil relate more specifically to conflicts between provincial statutes and the scheme of distribution established in the BIA, they have a scope that extends beyond that specific context, and they demonstrate how the paramountcy doctrine applies in the context of bankruptcy.

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123 In principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. However, all the conflicts to which I have alluded will not occur every time the OLRB makes a successor employer declaration. On the one hand, it may be that in the particular circumstances of a case, the trustee's conduct is inconsistent with the role entrusted to him or her by the BIA; on the other hand, the OLRB may make a partial declaration if the union does not require the transfer of all the former employer's obligations. The case at bar is a good example of the latter situation. The union argues that it is not seeking a declaration of liability for debts owed before the appointment of the receiver. While this clarification is helpful, it does not avert every potential conflict.

124 The Superior Court plays a decisive role in identifying potential conflicts and must not authorize proceedings that could give rise to a conflict. A judge who denies leave to bring proceedings does not declare the provincial provision to be of no force or effect; he or she merely avoids the conflict by relying on the paramountcy doctrine in a preventive manner, hence the importance of the screening mechanism of s. 215 BIA.

5. Section 215 BIA

5.1 Purpose of Section 215 BIA

125 As I mentioned earlier, Parliament's intent to give trustees flexibility in administering bankruptcies is evident in the immunities provided for in the BIA. Section 215 plays an important role in protecting trustees, because a superior court must, in applying it, screen proceedings that could be brought against them. It reads as follows:

215. Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

126 My colleague Abella J. objects to incorporating factors related to the special nature of a declaration that a trustee is an employer into the criteria for applying s. 215 BIA. To do so would in her view be to create a special and exceptional test for such a declaration. I myself see it as an incorporation of constitutional principles and an adjustment to new dimensions of the remedies that may be authorized against trustees.

127 Like Feldman and Cronk JJ.A., I am of the opinion that s. 215 acts as a screening mechanism for the purpose of ensuring that provincial and federal statutes do not conflict with each other. The bankruptcy judge acts as a specialized tribunal. Not only is the bankruptcy judge responsible for applying the federal statute, which must take precedence over provincial legislation in the event of conflict, but he or she is also the first person before whom the issue of the potential conflict is raised and the only one in a position to assess all the interests at stake. It is the bankruptcy judge who must decide all issues relating to the application of the BIA.

128 In Tranchemontagne v. Ontario (Director, Disability Support Program), 2006 SCC 14 (CanLII), [2006] 1 S.C.R. 513, 2006 SCC 14, the Court recognized the central role of the first court or tribunal to which a claimant applies. That case required a decision as to which of two administrative tribunals should decide an issue relating to human rights. In the case at bar, the choice is between the Superior Court and an administrative tribunal, the OLRB, and, what is more, it involves a constitutional question. In light of the Superior Court's expertise in bankruptcy matters and in matters relating to the Constitution, there is all the more reason to choose the Superior Court instead of the administrative tribunal. The bankruptcy court must be permitted to play its central role in full before the tribunal external to the bankruptcy considers the application against the trustee: Sam Lévy & Associés Inc. v. Azco Mining Inc., 2001 SCC 92 (CanLII), [2001] 3 S.C.R. 978, 2001 SCC 92. In contrast, the OLRB specializes in labour relations, and its mission is to apply the LRA and, more specifically in the case at bar, s. 69(2), the purpose of which is to protect employees. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts.

129 I agree with my colleague Abella J. that the trustee is not immunized by the BIA. There are two sections that provide for supervision of the trustee's activities: ss. 37 and 215. Section 37 allows any interested person to apply to the bankruptcy court to have it confirm, reverse or modify an act or decision of a trustee that is the subject of a complaint. This remedy is not conditional on first obtaining leave and it sometimes constitutes an alternative remedy to s. 215 BIA. What distinguishes s. 37 from s. 215 is that the latter allows proceedings to be brought in a court or tribunal other than the bankruptcy court and that it requires leave. Leave is required here because Parliament intended that the bankruptcy court have control over the proceedings. The other court or tribunal is not one that specializes in bankruptcy matters.

130 The vast majority of the decisions based on s. 215 are from cases involving alleged wrongdoing by a trustee: Alamo Linen Rentals Ltd. v. Spicer Macgillivry Inc. (1986), 63 C.B.R. (N.S.) 38 (Ont. Prov. Ct.); Beatty Limited Partnership (Re) reflex, (1991), 1 O.R. (3d) 636 (Gen. Div.); Chastan Ventures Ltd., Re 1993 CanLII 745 (BC SC), (1993), 23 C.B.R. (3d) 115 (B.C.S.C.); Willows Golf Corp. (Bankrupt), Re 1994 CanLII 4714 (SK QB), (1994), 119 Sask. R. 208 (Q.B.); McKyes, Re, 1996 CarswellQue 2575 (Sup. Ct.); Nicholas v. Anderson 1998 CanLII 7186 (ON CA), (1998), 5 C.B.R. (4th) 256 (Ont. C.A.); Gallo v. Beber 1998 CanLII 907 (ON CA), (1998), 7 C.B.R. (4th) 170 (Ont. C.A.); Kearney v. Feldman, [1998] O.J. No. 5109 (QL) (Gen. Div.); Burton v. Kideckel 1999 CanLII 15010 (ON SC), (1999), 13 C.B.R.

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(4th) 9 (Ont. S.C.J.); Society of Composers, Authors& Music Publishers of Canada v. Armitage 2000 CanLII 16921 (ON CA), (2000), 20 C.B.R. (4th) 160 (Ont. C.A.); Mann v. KPMG Inc. 2000 SKQB 460 (CanLII), (2000), 197 Sask. R. 181, 2000 SKQB 460; Vanderwoude v. Scott & Pichelli Ltd. 2001 CanLII 6622 (ON CA), (2001), 25 C.B.R. (4th) 127 (Ont. C.A.); Caswan Environmental Services Inc., Re 2001 ABQB 240 (CanLII), (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; K.D.N. Distribution & Warehousing Ltd., Re 2002 CanLII 49583 (ON SC), (2002), 33 C.B.R. (4th) 77 (Ont. S.C.J.); Canada 3000 Inc. (Re), [2002] O.J. No. 3266 (QL) (S.C.J.); MacLean v. Morash 2003 NSSC 219 (CanLII), (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; Down, Re 2003 BCSC 1286 (CanLII), (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; Jiwani v. Devgan, [2005] O.J. No. 2868 (QL) (S.C.J.); 105497 Ontario Inc. v. Schwartz Levinsky Feldman Inc. 2005 CanLII 21108 (ON SC), (2005), 12 C.B.R. (5th) 122 (Ont. S.C.J.); and 477470 Alberta Ltd., Re 2005 ABQB 430 (CanLII), (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430.

131 The courts have hesitated to grant leave to bring proceedings against a trustee for the purpose of obtaining a declaration that the trustee is a successor employer. The instant case exemplifies this, but the Court of Appeal is not alone in this respect: 588871 Ontario Ltd., Re 1995 CanLII 7375 (ON SC), (1995), 33 C.B.R. (3d) 28 (Ont. Ct. (Gen. Div.)).

132 With the evolution of administrative law and the growing number of specialized tribunals, s. 215 is now used for a much wider variety of purposes than before. I agree with what Feldman J.A. said on this subject:

In cases to date dealing with leave under s. 215 of the BIA, such as Mancini, where the issue has been trustee wrongdoing, factors relating to the bankruptcy court's control over the process have not arisen. In such cases, if leave is granted, the trustee will hire a lawyer to defend it in court, and the trustee will proceed to carry out its duties conducting the receivership or bankruptcy. [para. 54]

133 Applications for leave based on grounds other than negligence or refusal by the trustee to discharge his or her duties are thus a fairly recent occurrence. It is quite clear from the few reported cases that bankruptcy judges are desirous of preserving the trustee's flexibility and that they ensure that proceedings brought before the other court or tribunal do not impede action by the trustee. For instance, in Royal Crest Lifecare Group, Re 2003 CanLII 11504 (ON SC), (2003), 40 C.B.R. (4th) 146, the Ontario Superior Court dismissed a union's motion for leave to apply to the OLRB on the following basis:

There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E&Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities. [para. 29]

On an appeal from that judgment (2004 CanLII 19809 (ON CA), (2004), 46 C.B.R. (4th) 126, at para. 27), the Ontario Court of Appeal explicitly approved the Superior Court's approach, although it noted the constraints inherent in the bankruptcy context:

A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose substantial sums of money. Employees of the bankrupt company instantly lose their jobs. The bankruptcy judge is thrown into the middle of the disaster. The judge will need to make important decisions that will affect the future of the company, creditors and employees. The qualities of a good bankruptcy judge are therefore expertise, sensitivity and speed.

. . .

The trustee has many responsibilities — to the estate it is managing, to creditors and to the court. Where, as here, a trustee in bankruptcy seeks to hire former employees of the bankrupt company, the trustee also has a responsibility to those employees. The trustee's decision to bring a motion on the first day of its trusteeship seeking a declaration that it not be deemed a successor employer "for any purpose whatsoever" was, in the bankruptcy judge's view, premature. Accordingly, he dismissed the motion. The trustee does not appeal this component of his decision.

Equally, the appellants' cross-motion, understandable perhaps because of the trustee's motion, was also, arguably, misconceived. The first day of a bankruptcy is hardly "business as usual" for anyone, including the employees. The relationship between the trustee and the employees of the bankrupt company cannot be resolved instantly. Care, sensitivity, negotiation and at least some time will be necessary before an appropriate relationship can be set in place. The bankruptcy judge regarded the union's cross-motion as premature as well. Accordingly, he dismissed it, but without foreclosing the possibility that such a motion could succeed once the parties, at a minimum, had explored the establishment of an appropriate employment relationship. Again, I see no basis for interfering with the bankruptcy judge's exercise of discretion in this regard. [paras. 21, 22, 31 and 32]

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134 Thus, the purpose of ss. 37 and 215 is not to immunize the trustee against legitimate proceedings, but to permit the trustee's administration to be supervised without impeding it. Facilitating a form of supervision by the bankruptcy court supports the trustee's role. The BIA establishes a scheme under which the effectiveness of the trustee's administration can be taken into account without shielding the trustee from the courts' power of supervision. Section 215 does not indicate what criteria must be met. The flexibility afforded by Parliament permits the bankruptcy court to adapt to new realities, including successor employer declarations.

5.2 Criteria for Granting Leave

135 Mancini (Bankrupt) v. Falconi reflex, (1993), 61 O.A.C. 332 (C.A.), is often cited as the source of the analysis that the judge must conduct. Although the criteria established in that case are easy to apply to a simple claim against a trustee for breach of his or her duties, they must be tailored to the specific nature of each application for leave.

5.2.1 Mancini and the Sufficiency of the Evidence

136 There is a need to demystify the analysis developed in Mancini. In that case, the moving parties applied for leave to commence an action by way of counterclaim for damages against a trustee. They alleged that the trustee's proceeding constituted an abuse of process and that the trustee had organized a criminal prosecution. The moving parties thus accused the trustee of wrongdoing and asked for an award of damages against the trustee personally. This was not a proceeding likely to impair the application of the BIA. The judge did not need to consider the effect the proceeding might have in this regard. However, the Court of Appeal clearly differentiated between two matters a judge must consider on an application for leave under s. 215: the seriousness of the cause of action and the sufficiency of the evidence. On the seriousness of the cause of action, the Court of Appeal in Mancini did not set out the applicable analysis, but simply summarized the case law.

137 In my view, the most interesting aspect of that case was the court's discussion about the standard of proof. Moreover, that was the main issue in the case. The Court of Appeal wrote the following:

In considering whether leave should be granted under s. 186 [now s. 215] of the Bankruptcy Act to commence an action against the trustee, the motions court judge was required to consider the evidence, very generally reviewed above, in the context of the counterclaim sought to be made against the trustee. The issue is not whether the evidence on the s. 186 motion discloses the existence of a cause of action against the trustee, but rather whether the evidence provides the required support for the cause of action sought to be asserted by way of the appellants' counterclaim. Thus, it is necessary to examine the claims that the appellants sought to make against the trustee.

. . .

The appellants submit that the motions court judge erred in holding that the evidence filed in support of their motion under s. 186 of the Bankruptcy Act must be sufficient to establish a factual foundation for the claim that the appellants propose to make against the trustee. The appellants submit that the test under s. 186 requires no more than some evidence providing a factual foundation for the claim they seek to assert. In my opinion, the motions court judge was correct in reaching the conclusion he did on this issue. On a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under s. 186 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.

The sufficiency of the evidence must be measured in the context of the purpose of s. 186 which, as stated earlier, is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action. As I have previously noted, the evidence on a motion under s. 186 does not have to be sufficient to enable the motions court judge to make a final assessment of the merits of the claim sought to be made, but it must be sufficient to address the issues that I have identified, having in mind the objectives of s. 186. [Emphasis added; paras. 12, 16 and 17.]

138 In saying this, the Court of Appeal was affirming the decision of the trial judge ((1989), 76 C.B.R. (N.S.) 90), who had adopted a clear formulation of what evidence would be sufficient for leave to be granted to bring proceedings against a trustee:

Because the decision requires an exercise of discretion, the Court must make a more thorough enquiry than when considering whether or not a claim, as a matter of law, discloses a cause of action. In considering whether a claim discloses a cause of action, the Court presumes the allegations in the claim to be true to determine whether those allegations can provide the basis for a remedy. On a section 186 application, the Court must consider whether there is evidence of a factual basis for the proposed claim. The policy of section 186 is to protect the Trustee from claims which have no basis in fact. Ensuring a proper factual foundation for a proposed claim requires that the alleged facts must be disclosed by sufficient affidavit evidence. Facts are not allegations merely to be accepted at face value. [pp. 93-94]

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139 If Mancini can be considered to have laid down a threshold or test of some sort, I would say that the test relates to the standard of proof required for the bankruptcy court to grant leave to bring proceedings.

140 With regard to the sufficiency of the evidence, Mancini thus makes it clear that the judge to whom an application for leave is made under s. 215 cannot accept vague allegations. The allegations must be supported by the evidence. The judge does not have to be convinced that the action is well founded, since he or she is not the trier of fact. However, the judge must ensure that there is sufficient factual evidence, whether in the form of affidavits or exhibits, to support the allegations. To do this, the judge must review the evidence. In ordinary usage, the standard of proof in civil proceedings is often characterized as requiring either proof on the balance of probabilities or prima facie evidence. The threshold under s. 215 is not the trial judge's threshold of proof on the balance of probabilities, but prima facie evidence.

141 Unlike in Mancini, what is in issue in the case at bar is not the question of fact of the sufficiency of the evidence, but the question of law that is considered at the stage of the review of the seriousness of the cause of action.

5.2.2 Seriousness of the Cause of Action

142 The review of the seriousness of the cause of action must be adapted to the nature of the proceedings the applicant intends to bring. If, as in Mancini and the majority of the cases submitted to the courts until quite recently, a monetary award is all that is sought, the proceedings do not prevent the trustee from carrying out his or her duties or impose a burden on the trustee that is incompatible with the BIA.

143 However, bankruptcy judges clearly cannot grant leave to bring proceedings that are incompatible with the BIA. Thus, a bankruptcy judge could not authorize proceedings aimed at holding a trustee liable where the BIA immunizes trustees against the liability in question, as in the case of environmental damage. Since a full defence is available to the trustee pursuant to s. 14.06(2) and (4), such proceedings could not be characterized as serious or, in the words used in Mancini, "not frivolous". When a proceeding is not a simple action in damages based on wrongdoing by the trustee, the judge must therefore assess the nature and scope of the proceeding in light of the evidence.

144 Thus, in proceedings in which the OLRB is asked to declare that a trustee has succeeded to the bankrupt as employer, the review by the bankruptcy judge enables the judge to identify the union's actual objective in making this request. This makes it possible for the bankruptcy judge to reconcile the employees' interests with those of anyone else who has interests in the bankruptcy.

145 The judge's review does not have the effect of giving special or different treatment to successor employer declarations. Regardless of the reason the judge gives for granting leave to bring proceedings, the general context of the bankruptcy remains relevant. The judge must play an active role, anticipate the consequences of the proceedings, and limit their scope if need be. Screening the proceedings in this way is in fact what the trial judge did when he amended the order appointing the receiver so as to limit the protection of the receiver to acts it carried out in the context of the liquidation of the property. This limitation should be qualified if, for example, the issue concerns the rate of wages paid by the trustee. The process engaged in by the trial judge is nevertheless an example of what bankruptcy judges can be required to do on a regular basis in the course of their interactions with the parties. They can tailor the leave they grant to the specific needs of each case. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and must deal with conflicts that could impair the application of the BIA.

146 In the case at bar, Feldman J.A. concluded that an operational conflict results each time a bankruptcy judge denies leave to bring proceedings under s. 69(2) LRA:

Because the denial of leave under s. 215 of the BIA can be used by the bankruptcy court in appropriate circumstances to preclude the OLRB from exercising its exclusive jurisdiction to declare a person a successor employer, it is in operational conflict with s. 69 of LRA when such leave is denied. When that occurs, s. 72(1) of the BIA is engaged, with the result that s. 69(12) of the LRA is superceded by s. 215 of the BIA. [para. 69]

147 I myself would present this idea from a positive perspective. Judges who exercise their jurisdiction under s. 215 are in a position to avoid operational conflicts. By ensuring that the conclusions being sought do not impair the application of the BIA and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits the federal statute and provincial legislation to be applied simultaneously.

148 If the union seeks only to maintain wage rates, the proceedings can be limited to that purpose. Similarly, the problem of the period during which the declaration will be effective can be resolved by specifying that the trustee's liability will terminate when the business is transferred to the purchaser.

149 Some cases, such as those involving seniority, may be difficult to evaluate. The issues in such cases will turn on the specific facts of each bankruptcy situation and will sometimes require an assessment of the overall impact of the proceedings.

150 Feldman J.A. mentioned the following factors:

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The factors that the bankruptcy court applies on a s. 215 application will relate to both procedural and substantive aspects of the process. Some important factors will include: the timing of the application, the complexity of the receivership and the demands on the receiver as it carries out its obligations, the potential duration of the period that the receiver intends to operate the business before it can be sold (normally as brief as possible), the availability of potential purchasers and their financial strength, and the likelihood that a purchaser will be declared a successor employer and assume all of the obligations under the collective agreement. This latter factor may be particularly important because it will give practical assurance to the union that all of the terms of the collective agreement will be honoured and the employees protected. Another key factor is the practicality of proceeding before the OLRB and the timeliness of a hearing before that tribunal in the context of the proposed temporary operation of the business and its sale. [para. 58]

These factors could be applied incorrectly. They inevitably overlap with those that will determine the decision on the merits. The bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits.

151 Using the factors proposed by Feldman J.A. entails a second risk. These factors do not expressly mention the employees' rights. The trustee represents the interests of all the creditors, including the employees. The proposed factors must therefore be resituated in the context of the exercise of a remedy that necessarily implies constraints relating to the rights of all the creditors. They cannot serve to allow the trustee to evade the application of a statute that, although it may create a constraint, does not hinder the trustee's work. Judges must therefore bear in mind that they will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. The judge's first task is therefore to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy.

152 Employees' wage rates are one example of a constraint related to the application of the collective agreement that does not ordinarily hinder the trustee's work. Trustees who retain employees' services do not necessarily have the right to reduce their wages. Consequently, if a union seeks a declaration that a trustee is the bankrupt's successor for the sole purpose of maintaining wage rates, and if the interests of the parties cannot be reconciled at the hearing before the bankruptcy court, then leave should normally be granted. An order that a monitor pay recalled employees in accordance with the terms of the collective agreement has been made in the context of the Companies' Creditors Arrangement Act. Such an order does not generally lead to conflict with the duties of a liquidator or a trustee: Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc., [2003] Q.J. No. 264 (QL) (C.A.).

153 Moreover, the review before the bankruptcy judge of the consequences of a declaration is likely to make the parties aware of their respective interests and create an atmosphere conducive to the respect of everyone's rights. When considering the application, the judge must therefore bear in mind all the interests at stake and accept that every constraint does not necessarily hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 BIA.

154 To sum up, a judge who must decide whether to grant leave to bring proceedings against a trustee must determine the actual scope of the remedy being sought, identify potential conflicts and tailor the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the BIA. Determining the scope of the remedy is part of the review of the cause of action. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law. The judge must tailor the leave. If the conflict cannot be avoided in this way, then leave to bring the proceedings must be denied.

6. Application to the Case at Bar

155 My colleague Abella J. concludes that leave to bring proceedings should be granted. I myself believe that the case should be reconsidered by the Superior Court. The union has not stated its objective other than to say that the proceedings do not concern debts incurred prior to the trustee's appointment, but this is insufficient to eliminate every potential conflict of jurisdiction, and it is also insufficient for us to substitute our assessment for that of the trial judge.

156 To appreciate the nature of the analysis the bankruptcy judge must carry out, it will be helpful to set out the facts of the case.

157 On January 18, 2002, the respondent GMAC Commercial Credit Corporation — Canada ("GMAC"), the principal creditor of the respondents T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc. ("T.C.T."), was informed that T.C.T. had artificially inflated its accounts receivable and had obtained advances from GMAC that exceeded the value of its security by $21 million. On January 24, 2002, at GMAC's request, the Ontario Superior Court appointed KPMG Inc. as interim receiver of T.C.T.'s property. The appointment order provided that no proceedings could be commenced against KPMG without leave of the Superior Court. The order also stated that KPMG would not be considered to have succeeded to T.C.T. as employer. On February 25, 2002, T.C.T. made an assignment in bankruptcy. KPMG was appointed trustee in bankruptcy. As of the date of the bankruptcy, T.C.T. was operating a brokerage,

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logistics, trucking and warehousing business in Canada and the United States. The sale of the business was considered urgent (refusal by GMAC to advance additional funds, trucks located across Canada and the U.S., perishable goods still in transit or in warehouses, storage of property at risk, etc.).

158 T.C.T. had 1,357 employees across Canada, including unionized employees represented by 13 different unions. There were 225 employees in the warehousing division, which included warehouses located in Edmonton, Calgary and Toronto. The operation of these warehouses was subject to collective agreements covering 78 employees, including the 42 employees in the Toronto warehouse, who were represented by the appellant, Industrial Wood & Allied Workers of Canada, Local 700 (the "union"). On April 12, 2002, KPMG reached an agreement with Spectrum Supply Chain Solutions Inc. ("Spectrum") under which Spectrum would buy certain specified assets of T.C.T.'s warehouses. The letter of intent initially signed by Spectrum and KPMG provided that Spectrum would operate the warehouses and continue to employ most of the employees. After evaluating the assets, however, Spectrum decided that two of the warehouses were of no interest to it, including the one in Toronto, which was considered to be in disrepair. The final agreement provided that the employees would be terminated and that the lease of the Toronto warehouse would not be assigned to Spectrum. On April 16, 2002, the Toronto employees were informed of the agreement with Spectrum and were also informed that KPMG would be applying to the Superior Court for approval of the agreement on April 18, 2002. The Toronto warehouse was closed on May 23, 2002.

159 On May 13, 2002, the union filed two applications with the OLRB in which KPMG was named as a responding party. The purpose of the first was to have Spectrum declared to be the successor employer to T.C.T. and KPMG under s. 69(2) LRA. The second was a complaint of unfair labour practices. KPMG contested the applications, submitting that all proceedings were stayed pursuant to the appointment order and the BIA and that the union had not applied to the Superior Court for leave, as required by the appointment order and by s. 215 BIA. On August 27, 2002, the OLRB ruled in the trustee's favour and stayed the hearing of the applications.

160 The proceedings in the Superior Court concerned only KPMG. The union's application to have Spectrum recognized as the successor to T.C.T. with respect to its obligations as an employer was not in issue.

161 The reasons given by Ground J. of the Superior Court on the merits of the remedy the union sought to exercise were clear (2003 CanLII 64272 (ON SC), (2003), 42 C.B.R. (4th) 221). Ground J. concluded that the trustee had merely acted as a liquidator and should not, as such, be declared the bankrupt's successor. He did not consider the actual objective being pursued by the union or the possibility of limiting the scope of the proceedings that could be brought before the OLRB. Moreover, it is impossible to determine whether he considered these proceedings to be frivolous or to have no chance of succeeding or whether he felt that the evidence did not prima facie support the union's cause of action. In any event, the judge analysed the merits of the case as if he himself was the trier of fact.

162 One observation is necessary here. The unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the BIA. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The union and GMAC do not agree on the scope of the successor employer declaration sought by the union in the instant case. The union does not seek to place a time limit on the declaration that the receiver and trustee is a successor employer. Nor has it stated if it is seeking a monetary award or the reinstatement of all unionized employees in the context of the unfair labour practices complaint. Does the dispute concern only wages or does it also relate to transfers and terminations of staff? Other issues could be raised by the parties, who are familiar with all aspects of the case. Not only is it necessary to assess the sufficiency of the evidence, but the uncertainty surrounding the scope of the proceedings and the union's actual objective prevents the Court, incontrovertibly in my view, from granting the union the leave it seeks and that was denied by the judge of the Superior Court.

7. Conclusion

163 The analytical approaches of the Court of Appeal and the Superior Court had the effect of avoiding a constitutional conflict, but they could block legitimate actions. Even in their role as liquidators, trustees are often required to conform to obligations imposed on them by provincial legislation. Not every constraint inherent in a proceeding for a successor employer declaration is liable to hinder the administration of the bankruptcy. The criteria proposed by the Superior Court and the Court of Appeal are therefore too demanding.

164 I propose instead to incorporate into s. 215 a review designed to prevent constitutional conflicts. Under this approach, the paramountcy doctrine would apply only where the third party's proposed action would hinder the application of the BIA.

165 Furthermore, I believe that this Court should not supplant the Superior Court to assess the cause of action and the sufficiency of the evidence. In the review required by s. 215, the trier of fact has an active role to play. It is the trier of fact who must conduct the review.

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166 The Court of Appeal ordered that the case be remitted to the Superior Court. That was a sound decision. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. The Superior Court did not conduct this more complete review. The Court of Appeal's disposition should accordingly be confirmed.

167 For these reasons, I would dismiss the appeal and the cross-appeal.

Appeal allowed with costs, Deschamps J. dissenting. Cross-appeal dismissed with costs.

Solicitors for the appellant/respondent on cross-appeal: Koskie Minsky, Toronto.

Solicitors for the respondent/appellant on cross-appeal: Ogilvy Renault, Toronto.

Solicitors for the respondent KPMG Inc.: Goodmans, Toronto.

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* Major J. took no part in the judgment.

Liability in respect of environmental matters - Sec. 14.06(2)

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 2000 ABQB 440 (CanLII) - Trustee Liability for Environmental Costs though Under *Winding Up Act*

Date:	2000-06-23
Docket:	8503-23319
Parallel citations:	269 AR 49; [2000] 9 WWR 472; 82 Alta LR (3d) 382
URL:	http://canlii.ca/t/5n3x
Citation:	Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 2000 ABQB 440 (CanLII), <http://canlii.ca/t/5n3x> retrieved on 2013-08-20
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Canada Deposit Insurance Corporation v. Canadian Commercial Bank, 2000 ABQB 440

Date: 20000623
Action No. 8503-23319

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON
IN THE MATTER OF THE WINDING-UP ACT,
R.S.C. 1970, c. W-10 as amended;
AND IN THE MATTER OF THE WINDING-UP OF
CANADIAN COMMERCIAL BANK

BETWEEN:
CANADIAN DEPOSIT INSURANCE CORPORATION

Petitioner

- and -

CANADIAN COMMERCIAL BANK

Respondent

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[Note: An Erratum was filed on June 30, 2000; the correction has been made to the text and the Erratum is appended to this Judgment.]

MEMORANDUM OF DECISION
of the
HONOURABLE ALLAN H. WACHOWICH
ASSOCIATE CHIEF JUSTICE

APPEARANCES:
Charles P. Russell & Kevin Ozubko
for PricewaterhouseCoopers Inc.
Robert M. Curtis, Q.C.
for Bank of Canada
Kirk N. Lambrecht, Q.C.
for Government of Canada
Barbara C. Howell
for Canada Deposit Insurance Company

James Rout, Q.C.
for Alberta Justice
Brad Crawford, Q.C.
for Bank Support Group

1. Introduction

[1] This is an application by PricewaterhouseCoopers (PWC) for advice and direction in the liquidation of the estate of the Canadian Commercial Bank (CCB). After argument on the issue, counsel for PWC, the liquidator, submitted an amended Notice of Motion in which it requested a declaration. The particulars of the amended Notice of Motion are reproduced below. Also, the present application deals only with the U.S. properties that were realized during the course of the liquidation. The question before me has to do with the liability of the liquidator for environmental claims in respect of those properties.

[2] The Court of Queen's Bench of Alberta ordered that CCB be wound up on September 3, 1985. Price Waterhouse Limited, Now PWC, was appointed liquidator of the estate and effects of CCB. Since that time, there has been a great deal of change in environmental law. Legislation has been passed throughout North America that imposes liability for actions that damage the environment. The liquidator canvassed some of this legislation in its July 1999 Report to the Court. I do not propose to review that information. However, in light of this legislation, the liquidator has raised legitimate concerns as to its potential liability for environmental claims. The liquidator now turns to this Court for advice and direction on the following questions as stated in its Amended Notice of Motion:

> (i) do PWC as liquidator of CCB and the Estate of CCB itself, have responsibility for potential environmental liability claims which may hereafter be asserted in connection with PWC's administration of the affairs of CCB in the United States and the affairs of its U.S. affiliates CCB Business Credit, Inc., CRC Development Corporation, Westlands Diversified Bancorp, Inc. and CCB Bancorp, Inc. (which amalgamated and continued as CCB Bancorp, Inc.), Automated Processing & Development Corp., Commercial Center Bank and CCB Realty, Inc. or does such responsibility rest solely with Bank of Canada as a secured creditor of CCB by virtue of all the monetary benefit derived from such administration flowing to Bank of Canada rather than to the Estate of CCB?
>
> (ii) does the answer to (i) depend in part on the determination of whether Bank of Canada stood outside of the liquidation of CCB in the enforcement of its security, or came into the liquidation to value and retain its security utilizing the procedures outlined in sections 78-84 of the ***Winding-up Act***, and if so does that impact of the question of liability?
>
> (iii) if the answer to the first part of (ii) is yes, did Bank of Canada stand outside of or come into the liquidation of CCB for the purposes of realizing on its security?
>
> (iv) does the fact that no monetary recoveries flowed directly to Bank of Canada from PWC's administration of the affairs of CCB Bancorp, Inc.'s subsidiary Commercial Center Bank impact on the answer to (i), or is it sufficient that Bank of Canada obtained all benefit from the Consolidation Accounting Decision rendered by this Court on January 14, 1994 (upheld by the Court of Appeal of Alberta, leave to appeal to the Supreme Court of Canada

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refused) and all benefit from the trust created by this Court by Order dated December 22, 1994, thereby indirectly benefiting from the administration undertaken by PWC of such entity?

(v) does the fact that the Estate of CCB benefited from realization upon:

(1) CCB's loans to its employees in the United States;

(2) CCB's U.S. dollar denominated mortgage loans recorded on Item 13 of CCB's Schedule J Returns filed with the Office of the Inspector General of Banks prior to the commencement of the liquidation; and

(3) the shares held by CCB in a U.S. entity known as El Camino Bancorp; impact upon the answer to (i)?

(vi) if the answer to (i) is that a liquidator of CCB and the Estate itself have no responsibility for any such potential environmental claim, and such responsibility rests solely with Bank of Canada as a secured creditor of CCB, should PWC apply to convert some portion of the Advance Payment Plan to final dividends?

(vii) if PWC is to make an application as contemplated in (vi) above, should such application await further clarification of potential exposure in Canada to environmental claims against the Estate of CCB or PWC as liquidator of CCB and if so should PWC undertake a process similar to that process set out in Schedule "3" of the Liquidator's Report dated July 26, 1999 or should some other process be adopted, and if so what?

(viii) if PWC is to make an application as contemplated in (vi) above, what is the impact of Bank of Canada retaining "excess security" over and above its proven debt, to satisfy environmental or other claims which may hereafter be asserted against it in its capacity as a secured creditor, and how is that excess security to be dealt with in converting Advance Payments to final dividends?

[3] In the amended notice of motion, PWC added the following request for relief:

In the alternative, a declaration that Bank of Canada has responsibility for potential environmental liability claims which may hereafter be asserted in connection with PWC's administration of the affairs of CCB in the United States and the affairs of its U.S. affiliates.

I will canvass the issues and the law and then return and answer the questions the liquidator posed in its Amended Notice of Motion.

2. Jurisdiction of the Court to issue a declaration

[4] The Bank of Canada submitted that this Court does not have the jurisdiction to give advice and direction and to issue a declaration because there is no actual claim. The Court should not attempt to answer questions that are entirely hypothetical. In ***Smith* v. *Attorney General of Ontario***, 1924 CanLII 3 (SCC), [1924] S.C.R. 331 at 336, Duff J. cited ***Glasgow Navigation Co.* v. *Iron Ore Co.***, [1910] A.C. 293:

> It is not the function of a court of justice to advise parties as to their rights under a hypothetical state of facts.

[5] Further, Bank of Canada submitted that because there is no actual claim at present, it is premature for this Court to make an order. It is impossible to ascertain the actual liabilities of the parties before the specific facts of an actual claim are reviewed.

[6] There is merit to this argument. It is difficult to ascertain the liabilities of parties when there are no specific facts available. Nevertheless, it is also clear that this Court's jurisdiction to issue a declaratory judgment is very broad. Section 11 of the ***Judicature Act***, R.S.A. 1980, c. J-1, states:

> 11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

[7] In ***Re Henning and City of Calgary*** (1974), 51 D.L.R. (3d) 762, the Alberta Supreme Court, Appellate Division discussed the breadth of the courts' power to issue a delaration. McDermid J.A. stated at 764:

> In ***Kent Coal Co. ltd. et al* v. *Northwestern Utilities***, [1936] 4 D.L.R. 337 at p. 354,... McGillivray, J.A., giving the judgment of the majority of this Division, reviewed the authorities as to the jurisdiction of the Court to grant a declaratory judgment and quoted the remark of Lord Sterndale in ***Hanseon* v. *Radcliffe Urban District Council***, [1922] 2 Ch. 490, where he stated:
>
> > In my opinion, under Order XXV., r.5, the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me the discretion is very wide.

[8] In ***Newfoundland* v. *Quebec (Commission Hydro Electrique)***, 1982 CanLII 28 (SCC), [1982] 2 S.C.R. 79, the Supreme Court of Canada considered what type of interest was necessary for a party to be entitled to a declaration from the Court. Beetz J. stated at 106:

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> Further, it is not necessary for *Churchill Falls* to have already refused to perform the *Power Contract* in order for the Superior Court to rule on the rights of the parties to the contract. The value of the new declaratory action which *Hydro-Quebec* is seeking to use lies precisely in the fact that it allows the litigant to protect a threatened right. As the Commissioners observed, "the interest required to institute proceedings may flow from a right which itself would only be eventual". What matters is that the interest in obtaining a solution to a genuine problem is real. I consider that *Hydro-Quebec* does really possess such an interest.

[9] This jurisprudence does not directly address whether a Court may grant a declaration when this request is submitted in an amended Notice of Motion after argument has been heard. Before I review the authority on that issue, I note that the declaration sought by PWC was a direct extension of the argument heard on the original Notice of Motion. This Court's response differs very little as a result of the requested amendment.

[10] Amendments to Notices of Motion are made pursuant to Rules 132 and 133 of the Alberta Rules of Court:

> 132. The court may at any stage of the proceedings allow any party to alter or amend his pleadings or other proceedings in such manner and on such terms as may be necessary for the purpose of determining the real question in issue between the parties.
>
> 133. The court may at any time, on terms as to costs or otherwise, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

[11] In ***Hoffman* v. *Ohlson Ranch Ltd.***1995 ABCA 57 (CanLII), (1995), 165 A.R. 68, the Alberta Court of Appeal allowed an amendment to the Notice of Motion. This was pursuant to Rule 518 which governs amendments on appeal. The power given to the Court of Queen's Bench pursuant to Rules 132 and 133 appears to be equally broad. In the ***Alberta Civil Procedure Handbook 2000*** (Edmonton: Juriliber, 2000) at 101-102, W.A. Stevenson and J.E. Côté state that the general rule to amend a pleadings is in fact very broad. There are only four exceptions to the rule. First, an exception exists when the amendment would cause serious prejudice that cannot be repaired by a payment of costs. Second, an amendment will not be allowed when it would be hopeless; an amendment that would have been struck out had it been in the pleadings originally will not be allowed. Third, the Court will disallow the amendment where it would add a new cause of action or a new party outside the limitation period. Fourth, the amendment will be disallowed when it, or the failure to plead it earlier, is indicative of bad faith.

[12] The circumstances of the case at bar do not fall within any of the exceptions. This Court accordingly has the authority to allow the amendment to the Notice of Motion. In ***Hoffman,*** *supra*, the Court of Appeal further held that it would allow the amendment where it would not take any of the parties by surprise. It is unclear whether that qualification applies to Rules 132 and 133. In light of the commentary in Stevenson and Côté, I am of the view that it does not. Nevertheless, even if it did, as I indicated earlier, this amendment changed very little in the ultimate result. Furthermore, in light of the oral argument, this amendment could not have taken any of the parties by surprise. The issues which arise from the request for a declaration were clearly addressed in argument. Therefore, I hold that this Court has the jurisdiction to provide advice and direction and to issue a declaration.

3. Legislative Protection

[13] The paramount issue in this application is the scope of the protection offered by s. 76(2) of the ***Winding-up and Restructuring Act***, R.S.C. 1985, c. W-11 (***WURA***):

> *Distribution of assets*
>
> 76.(1) After the notices required by sections 74 and 75 have been given, the respective times specified in the notices have expired and all claims of which proof has been required by due notice in writing by the liquidator in that behalf have been allowed or disallowed by the court in whole or in part, the liquidator may distribute the assets of the company or any part of those assets among the persons entitled to them and without reference to any claim against the company, or, in the case of an authorized foreign bank in respect of its business in Canada, that has not been sent to the liquidator.
>
> *Claims not sent in*
>
> (2) The liquidator is not liable to any person whose claim has not been sent in at the time of distributing the assets or part thereof under subsection (1) for the assets or part thereof so distributed.

[14] PWC submitted that s. 76(2) protects it from environmental claims that arose against the Estate prior to the liquidation. Section 76(2) does not protect the liquidator from any claims that arose during the liquidation or post-liquidation. The Bank Support Group, an unsecured creditor, suggested an interpretation of s. 76(2) that is far broader in scope. He submitted that the section protects the liquidator from all claims, whether prior to, during, or after the liquidation.

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[15] PWC suggests that its restrictive interpretation of s. 76(2) is buttressed by the fact that the ***WURA*** does not contain a section, akin to those found in other insolvency legislation, which specifically protects the representative of creditors from environmental claims which arise from the discharge of its duties. For example, the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 (***BIA***), contains the following sections:

> *Liability in respect of environmental matters*
>
> 14.06(2) Notwithstanding anything in federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred
>
> (a) before the trustee's appointment: or
>
> (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct.
>
> *Non-liability re certain orders*
>
> 14.06(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order...
>
> (a) if... the trustee
>
> (i) complies with the order, or
>
> (ii) ... abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage...
>
> *Claim for clean up costs*
>
> 14.06(8) Notwithstanding subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.
>
> *Effect of discharge of trustee*
>
> 41.(8) The discharge of a trustee discharges him from all liability
>
> (a) in respect of any act done or default made by him in the administration of the property of the bankrupt, and
>
> (b) in relation to his conduct as trustee,
>
> but any discharge may be revoked by the court on proof that it was obtained by fraud or by suppression or concealment of any material fact.

[16] Likewise, the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 (***CCAA***) has a specific section which provides protection to a representative of creditors within the discharge of its function:

> 11.8(8) Any claim ... for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge
>
> (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and
>
> (b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

[17] Courts often look at related statutes when interpreting a provision. In ***Dreidger on the Construction of Statutes***, 3rd ed. (Toronto: Butterworths, 1994) at 285, Ruth Sullivan explains:

> The context of a legislative provision includes not only the immediate context and the rest of the Act in which the provision appears but also any other legislation that may cast light on the meaning or effect of the words. Traditionally, the category of related legislation is said to consist of statutes *in pari materia*, that is, statutes enacted by the same legislature and relating to the same subject.

[18] And later, she explains the governing principle at 285, 286:

> Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principle was stated by Lord Mansfield in ***R. v. Loxdale***:
>
> Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.

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> In effect, the several statutes are construed together as if they constituted a single Act and the presumptions of coherence and consistent expression apply to these statutes as if they were part of a single Act.

[19] Therefore, it is clear that this Court may look at the ***BIA***, *supra*, and the ***CCAA,*** *supra* for guidance in determining the scope of s. 76(2) . The sections reproduced above expressly protect the representative of creditors from environmental claims against it. There is no such section in the ***WURA***, *supra*. The issue for this Court to decide is what is to be made of this absence. The rules of statutory interpretation are clear in this regard when comparing two provisions within the same Act. If an idea is specifically expressed in a provision, and no mention is made of it in another, it is assumed that Parliament intended the idea to apply only where it is specifically mentioned. Section 15 of the ***Interpretation Act***, R.S.C. 1985, c. I-21 states:

> 15.(1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.
>
> (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> (a) as being applicable only if a contrary intention does not appear; and
>
> (b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

[20] Therefore, I should not assume that Parliament intended the ***WURA*** to be interpreted as including sections that were not expressly included. The Court also cannot give existing sections, such as s. 76(2), such a wide scope as to write in sections that Parliament did not include. This is so even though related statutes expressly include such sections. In fact, the absence of such protection only speaks louder in light of the fact that Parliament turned its mind to including such protection in related statutes. I cannot impute an intention to Parliament to include protection in the ***WURA*** which it simply did not include.

[21] Clearly, the lack of express legislative protection against environmental liability is a legitimate source of concern for the liquidator. The Bank Support Group suggested that the correct interpretation of s. 76(2) of the ***WURA*** is one which is broad enough to incorporate such protection. Unfortunately, there is an extreme dearth of jurisprudence on the interpretation of that section. Only one case, which is quite dated, has come before me. In ***City of Toronto and Toronto Hydro-Electric Commission*** **v.** ***Wade***, [1932] O.R. 500, the Ontario Court of Appeal interpreted the predecessor of the provision which now concerns us. In that case, the Court considered wether the liquidator could be held personally liable for municipal taxes and utility bills which arose against the estate, but which had not been claimed at the time that the liquidator had been discharged. The Court held that, according to the ***Dominion Winding-up Act***, there was no recourse against the liquidator personally once it had been discharged and the assets of the estate distributed. The Court sated at 502:

> Now in these circumstances the plaintiffs' right to recover the amounts claimed must be based upon some personal liability of the defendant, either for moneys due the plaintiffs by himself or for damages for some negligence on his part while occupying the office of liquidator. In view of his discharge from all such liability, I cannot see how any action against him as liquidator can lie, and it seems doubtful if, in the circumstances any personal action could lie based upon tort except possibly for fraud in the performance of his duties.

[22] This case, while not authoritative, does indicate that an earlier view of this issue was that, except in cases of malfeasance or negligence, a liquidator is not liable for any claims once discharged. PWC argued that this case can be distinguished on its facts. In ***Wade***, the claims arose before the liquidation began. Therefore, even if it were followed, PWC submitted, it would be of no value because the potential claims in this case will have arisen during the course of the liquidation. I am of the view that the statement of liquidator liability in ***Wade*** is broader than that insofar as it absolves the liquidator of liability for all claims that are identified after it is discharged, with the exception of those which are due to its negligence or malfeasance. Nothing in the ***Wade*** decision states that the liquidator's liability is limited to claims that arose against the Estate prior to the commencement of liquidation.

[23] Unfortunately, the term "claim" is not defined in the current ***WURA***. Nonetheless, the way the word is used in other sections may shed light on its scope. For example, s. 71 states:

> 71(1) When the business of a company is being wound up under this Act, all debts and all other claims against the company in existence at the commencement of the winding-up, certain or contingent, matured or not, and liquidated or unliquidated, are admissible to proof against the company...
>
> (2) In case of any claim subject to any contingency or for unliquidated damages or which for any other reason does not bear a certain value, the court shall determine the value of the claim and the amount for which it shall rank.

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[24] These sections do not aid in clarifying whether the term "claim" is used solely in reference to claims that arose against the insolvent company before liquidation began or whether they may include claims against the liquidator. No other section of the ***WURA*** is any more helpful.

[25] As discussed above, the Courts may look at related enactments to see the definition given to the word "claim". The word "claim" is defined in s. 121 of the ***BIA***, *supra*:

> 121.(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[26] In ***Re Bomasuit***, [1951] O.J. No. 196 (Ont. H.C.J.) (QL) the Court interpreted s. 83(1) of the old ***Bankruptcy Act***, which was identically worded, and held at para. 12:

> Section 83(1) . . . appears to make it clear that only debts, etc. to which the debtor is liable at the date of the bankruptcy or those to which he may become subject at his discharge by reason of an obligation incurred before the bankruptcy would share in the assets of the new business which are now vested in the trustee. Subsequent creditors would have to wait.

[27] Accordingly, a claim under the ***BIA*** only includes claims which arose before the bankruptcy. This is supportive of PWC's position that claims under the ***WURA*** only include those that arose against the Estate.

[28] Absent any other authority for an alternative interpretation, I am of the view that the word "claim" in the ***WURA*** only includes claims against the Estate. Accordingly, the only interpretation which Parliament could have intended for s. 76(2) is one which excludes protection for the liquidator against environmental claims arising during the liquidation.

4. Agency

[29] PWC has also asked for direction as to whether it can be indemnified for any environmental claims arising in relation to properties which it managed not in its capacity as liquidator, but rather in its role as agent for Bank of Canada. Before I deal directly with the indemnification issue, it is necessary to answer the objection raised by the Bank of Canada as to whether the winding-up Court has the jurisdiction to decide an agency matter, relating to the liquidation, between the liquidator and a secured creditor. Essentially, the question is whether this agency falls within the liquidation such that this Court has jurisdiction, or whether it is a contractual matter between two private parties.

a. Jurisdiction of the Court

[30] PWC submitted that this Court has jurisdiction for three reasons. First, the Bank of Canada has come into the liquidation and therefore has attorned to the jurisdiction of the winding-up Court. Second, PWC submitted that the scope of the jurisdiction of the winding-up Court pursunt to the ***WURA***, *supra,* is sufficiently broad to allow it to decide this matter. Third, s. 11 of the ***Judicature Act***, *supra,* gives this Court the authority to decide this matter.

[31] First, has the Bank of Canada come into the liquidation? A secured creditor has three options in a liquidation. It can stay outside the liquidation and value its security through other legal avenues. In doing so, it foregoes any unsecured claim for deficiencies. Secondly, it can come into the liquidation and value and retain its security. It may then prove for any deficiency as an unsecured creditor according to the procedure outlined in the ***WURA***. Thirdly, it may release its security to the liquidator and prove its claim as an unsecured creditor: H. Sutherland, et al, ***Company Law of Canada,*** 6th ed. (Carswell: Scarborough, 1993) at 903, ***WURA***, R.S.C. 1985, c. W-11; ***Deacon* v. *Driffil*** (1879), 4 O.A.R. 335 at 338 (C.A.).

[32] It is clear that the Bank of Canada has come into the liquidation. Bank of Canada brought an application in 1988 to allow it to sue Price Waterhouse (now PWC) outside the liquidation, in order to enforce its security. That motion was withdrawn in 1990. Then, in 1990 PWC applied to this Court for authority to permit Bank of Canada to retain its collateral. That order was sought pursuant to s. 84 of the ***WURA***. All parties wishing to participate in the application for the retention of Bank of Canada's security had to file Notices of Appearance. In Bank of Canada's Notice of Appearance, the Bank stated:

> Bank of Canada seeks an Order declaring that the Hypothecation and Assignment Agreements [...] are valid security and that the Bank of Canada has priority with respect to the Collateral covered thereby.

[33] It is evident that Bank of Canada was not seeking a declaration by this court that they had remained outside the liquidation. Rather, the Bank sought a declaration that it had priority. The retention order that was granted states, on page 3, that there is a reservation of Bank of Canada's right to rank in the liquidation for any deficiency claim, pursuant to s. 80 of the ***WURA***.

[34] It is apparent that Bank of Canada opted to pursue the second option. Namely, it came into the liquidation and it valued and retained its security. Further, as indicated by the Retention Order, it retained its right to prove for any deficiency as an unsecured creditor as directed by the ***WURA***.

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[35] I am not convinced that it is relevant to my jurisdiction whether the Bank of Canada has come into the liquidation or not. The winding-up Court, through the liquidator, is given very broad authority to deal with matters pertaining to the liquidation. This power is conferred by s. 35(1)(h) of the ***WURA***:

> 35(1) A liquidator may, with the approval of the court, and on such previous notice to the creditors, contributories, shareholders or members of the company as the court orders,
>
> ...(h) do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets...

[36] The express wording of this section indicates that it was Parliament's intention to give the liquidator, and accordingly the Court through whose authority the liquidator acts, a very wide breadth within which to complete the liquidation process quickly and efficiently. In ***Kansa General International Insurance Company (liquidator of)* v. *Maska U.S. Inc.***, [1998] Q.J. No. 1410 (C.A.) (QL) the Court held that s. 35(1)(h) gives the liquidator wide powers and that those powers should not be interpreted as being merely technical or administrative.

[37] In light of the wording of the section, I find that it confers the authority upon the liquidator, and therefore the winding-up Court, to take any reasonable action to complete the liquidation. This authority must include the jurisdiction of the winding-up Court to determine the obligations of two parties, both involved in the liquidation in some capacity, pursuant to a contract which, although peripheral to the actual liquidation, pertains directly to it.

[38] Third, PWC submits that s. 11 of the ***Judicature Act*** gives this Court the authority to decide this issue. I do not see how that section has any bearing on this issue. Clearly, as indicated above, that section gives the Court wide powers to issue declaratory judgments. That does not mean that a winding-up Court can issue declaratory judgments on issues that are peripheral to the liquidation. Section 11 gives the Court authority to issue declarations, but that authority must be intended to fall within spheres over which the Court already has jurisdiction.

[39] Based on the foregoing, I am of the view that regardless of whether the Bank has stepped into the liquidation or not, I have the jurisdiction to deal with the issue of its indemnification of PWC within the context of the agency relationship between those two parties.

b. Indemnification

[40] Bank of Canada engaged PWC as its agent in order to realize its collateral. PWC therefore acted simultaneously as liquidator in respect of the assets of the Estate and as agent for the Bank of Canada. Through the various agreements between the parties it is possible to distinguish which properties PWC dealt with as agent and which properties it dealt with as liquidator. However, since no specific environmental claims have yet been put forth, it is unnecessary to determine those relationships at this point. What the liquidator seeks now is a declaration giving it some certainty that it has a right to indemnification from its principal, Bank of Canada, should a claim arise after PWC has been discharged. Should a claim come forward, clearly the liquidator will have to prove that the property to which the claim related was one administered pursuant to the agency agreement.

[41] Bank of Canada appointed PWC as its agent through a general agency agreement contained in a letter dated September 1, 1985. The agreement states:

> Bank of Canada is a major secured creditor of Canadian Commercial Bank and we refer you to the Hypothecation and Assignment Agreements between us and Canadian Commercial Bank executed March 25, 1985 and April 16, 1985. To minimize costs and realization losses due to the difficulty of integrating the realization by the liquidator and the realizations under our security, we request that if you are appointed liquidator of Canadian Commercial Bank you also act on our behalf in realization of our security. In this regard you would not be required to obtain specific releases of our security in the liquidation of the assets subject thereto, but would account separately for the proceeds of realization of such assets.

[42] This is clearly a general agency agreement. However, when an agent is retained by its principal, the scope of the agent's authority to act on behalf of the principal is not limited only to the express agreement between the two. Rather, the agent also has implied authority to do all acts which are necessary for it to accomplish the objective of the agency relationship. G.H.L. Fridman, in ***The Law of Agency*** (Toronto: Butterworths, 1996) explains this implied authority at 68:

> It is possible, indeed in some instances necessary, to read into the agent's express authority a certain implied authority. This may be because what has been expressly stated when the agency relationship was created does not cover the acts performed or required to be performed by the agent. It may be because the only way of construing the document which contains the agent's express authority is by inferring the necessary implications. Moreover, if there is no statement which clarifies exactly what the agent's authority is, then the only way of knowing what authority can properly be attributed to the agent is by inferring a certain implied authority. This is part of an agent's actual authority, which the principal has consented, by implication, that the agent should have. If the principal has not consented to his agent's

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> having this implied authority, and has taken the necessary steps to make the outside world aware of his lack of consent, then the agent will not have such authority. Failing such lack of consent together with notice thereof to third parties, the agent's implied authority is part of the authority which the parties have agreed upon shall be exercised by the agent on the principal's behalf.

[43] Therefore, PWC had implied authority to carry out the acts necessary to accomplish the realization of the Bank of Canada's security, despite the fact that this very general agreement does not explicitly outline the scope of PWC's authority as agent.

[44] The question which this Court must answer, therefore, is whether PWC may be indemnified for any necessary actions it took as agent for the Bank of Canada, if environmental claims later arise from those actions. Clearly, a principal must indemnify its agent for any losses or liabilities that arise from the agent discharging its duties express or implied. For instance, Fridman, *supra*, states at 201:

> The principal's duty to indemnify his agent against losses, liabilities and expenses incurred in the performance of the undertaking may be expressly stated in the contract of agency. But it is more usually implied.

[45] The agent is not entitled to indemnification where it acted negligently or outside its scope of authority (at 202):

> Thus, the agent in order to make his principle liable to indemnify him in this way, must have acted within its express, implied, or usual authority. ...
>
> However, there is no duty to indemnify an agent who has acted unlawfully, or in breach of his duty, or negligently.

[46] Also, in ***Vic Priestly Landscaping Contracting Ltd.* v. *Elder*** (1978), 19 O.R.(2d) 591 at 599, Ferguson, Co.Ct.J. held:

> However, while the Elders may not be able to rely upon the fact of their agency as a defence vis-à-vis the plaintiff, their capacity as agents does entitle them to claim indemnification for any liability from their principals. In ***McMillan* v. *Barton et al*** (1890), 19 O.A.R. 602 at 613; affirmed 20 S.C.R. 404, the Court held:
>
> > Every agent is entitled to be indemnified by his principal against loss arising out of the service rendered. The law implies that obligation in the absence of express agreement.
>
> See also 1 C.E.D. (Ont. 3rd) "Agency", para. 14. This principle applies so long as the agent has acted within his authority and the loss does not result from the agent's own neglect or default.

[47] The law on this issue is clear. However, because there is no actual claim before this Court it is impossible to state whether or not the Bank of Canada will have to indemnify PWC for a specific loss. It is possible to state that, in relation to the properties that are subject to the agency agreement, insofar as PWC acted within its authority, express or implied, and did not do so negligently, in breach of its duty, or illegally, it will be entitled to indemnification from its principal, the Bank of Canada for any losses or liabilities that may arise.

5. Equitable Benefit

[48] PWC also submits that it is entitled to indemnification from the Bank of Canada based on the equitable principle that he who receives the profit should bear the burden. Essentially, the argument is that in relation to the properties which resulted in a benefit to the Bank of Canada, the Bank should be responsible for any loss or liability.

[49] Counsel was unable to provide the Court with any equitable benefit case law in a liquidation context. Rather, PWC asked this Court to draw an analogy from related contexts such as bankruptcy, receivership and mortgage foreclosure. Further, these cases all relate to costs: ***Carter Oil & Gas Ltd. (Trustee of)* v. *Carter*** (1998), 217 A.R. 135 (Q.B.), aff'd (1998), 228 A.R. 1 (C.A.); ***Re Joly-Sac.*** 1991 CanLII 3362 (QC CA), (1991), 12 C.B.R. (3d) 182 (Que. C.A.); ***MacPherson* v. *Ritz Management Inc.***, [1992] O.J. No. 506 (Gen. Div.) (QL); ***Ford* v. *The Earl of Chesterfield*** (1856), 52 E.R. 924 (C.A.); ***Wright* v. *Kirby*** (1857), 53 E.R. 182 (C.A.).

[50] It is only equitable, in my view, that Bank of Canada be liable to bear any loss in relation to the properties from which it received a benefit. A loss includes an environmental claim that arises from the management of the properties during liquidation. I see no reason not to extend the equitable principle evident in the above noted cases to the liquidation context. However, this principle should only extend insofar as PWC acted reasonably in its management of the properties. Nor do I see why the fact that Bank of Canada benefited indirectly rather than directly should have any bearing. However, the proportion of responsibility for any loss is only equal to that of the benefit received. Where parties shared the benefit arising from a property, they should likewise share the loss.

6. Proposed Investigations

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[51] Two proposals were made both in the written briefs and oral argument. First, the Bank Support Group proposed that the liquidator should advertise for any environmental claims pursuant to ss. 75 and 76 of the ***WURA***. That proposal was not well-received by the parties to the application. I am of the view that that is not a wise course of action. The liquidator has already advertised for claims as is its duty and to do so again would be redundant. The interests of all the parties involved will be best served by an efficient end to this liquidation.

[52] That brings me to the second proposal. As indicated earlier, this application dealt only with the U.S. realizations. Accordingly, the liquidator has proposed a scheme whereby it would review its files on the Canadian properties in order to ascertain the degree of risk of a potential environmental claim. In light of my decision in this application, I do not feel that this is a worthwhile endeavour. Again, it is in everyone's best interests that this liquidation be finalized as quickly as possible.

7. Conclusion

[53] The liquidator has its advice and directions to the extent set out above. In light of the Court's inability to resolve the issue of liability for particular environmental claims, actual or potential of which PWC has no notice, the application for advice regarding the excess security is premature.

[54] If the parties cannot agree as to the costs of this application, they may speak to me within 30 days of the date this decision was rendered.

DATED at Edmonton, Alberta this 23rd day of June, 2000.

_____

A.C.J.C.Q.B.A.

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ERRATA OF THE MEMORANDUM OF DECISION
of the
HONOURABLE ALLAN H. WACHOWICH
ASSOCIATE CHIEF JUSTICE

In paragraph number [54] of the above judgment, the word "aplication" has been changed to read "application".

Reports, etc., still required - Sec. 14.06(3)
(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders - Sec. 14.06(4)
(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

Stay may be granted - Sec. 14.06(5)
(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

Costs for remedying not costs of administration - Sec. 14.06(6)

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(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims - Sec. 14.06(7)
(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs - Sec. 14.06(8)
(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.
1992, c. 27, s. 9;
1997, c. 12, s. 15;
2004, c. 25, s. 16;
2005, c. 47, s. 17;
2007, c. 36, s. 9.

Effect of defect or irregularity in appointment
14.07 No defect or irregularity in the appointment of a trustee vitiates any act done by the trustee in good faith.
1992, c. 27, s. 9.

Corporations as Trustees
Majority of officers and directors must hold licences - Sec. 14.08
14.08 A body corporate may hold a licence as a trustee only if a majority of its directors and a majority of its officers hold licences as trustees.
1992, c. 27, s. 9.

Acts of body corporate - Sec. 14.09
14.09 A body corporate that holds a licence as a trustee may perform the duties and exercise the powers of a trustee only through a director or officer of the body corporate who holds a licence as a trustee.
1992, c. 27, s. 9.

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Not carrying on business of trust company - Sec. 14.1
14.1 Every body corporate that is incorporated by or under an Act of Parliament and that holds a licence as a trustee may carry on the business of a trustee anywhere in Canada and shall not, in respect of its operations as a trustee, be construed to be carrying on the business of a trust company.
1992, c. 27, s. 9.

Official Name
Official name in bankruptcy and proposal proceedings - Sec. 15
15. The official name of a trustee acting in bankruptcy proceedings is "The Trustee of the Estate of (insert name of the bankrupt), a bankrupt", and the official name of a trustee acting with respect to a proposal by an insolvent person is "The Trustee acting in re the proposal of (insert the name of the debtor)".
R.S., c. B-3, s. 11.

Status of Trustee

Declaration - Sec. 15.1
15.1 A trustee is deemed to be a trustee for the purposes of the definition "trustee" in section 2 of the Criminal Code.
1997, c. 12, s. 16;
2004, c. 25, s. 17(F).

Duties and Powers of Trustees

Security to be given by trustee - Sec. 16
16. (1) Every trustee duly appointed shall, as soon as they are appointed, give security in cash or by bond or suretyship of a guaranty company satisfactory to the official receiver for the due accounting for, the payment and the transfer of all property received by the trustee as trustee and for the due and faithful performance of the trustee's duties.

Security to be given by trustee - Sec. 16(2)
(2) The security required to be given under subsection (1) shall be given to the official receiver in favour of the creditors generally and may be enforced by any succeeding trustee or by any one of the creditors on behalf of all by direction of the court, and may be increased or reduced by the official receiver.

Trustee to take possession and make inventory - Sec. 16(3)
(3) The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory, and for the purpose of making an inventory the trustee is entitled to enter, subject to subsection (3.1), on any premises on which the deeds, books, records, documents or property of the bankrupt may be, even if they are in the possession of an executing officer, a secured creditor or other claimant to them.

Warrant required to enter - Sec. 16(3.1)

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(3.1) Where the premises referred to in subsection (3) are occupied by a person other than the bankrupt, the trustee may not enter the premises without the consent of that other person except under the authority of a warrant issued under section 189.

Trustee to be receiver - Sec. 16(4)
(4) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the court, and the court may on his application enforce the acquisition or retention accordingly.

Right of trustee to books of account, etc. - Sec. 16(5)
(5) No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents, including material in electronic form, relating to the accounts or to any trade dealings of the bankrupt or to set up any lien or right of retention thereon.
R.S., 1985, c. B-3, s. 16;
R.S., 1985, c. 31 (1st Supp.), s. 3;
1994, c. 26, s. 7;
1997, c. 12, s. 17;
2004, c. 25, s. 18.

Impact Tool & Mould Inc. (Re), 2006 CanLII 7498 (ON CA) - Access to Trustee's Records by Inspectors/Creditors for Collateral Purposes

Date:	2006-03-15
Docket:	C42042
Parallel citations:	79 OR (3d) 241; 266 DLR (4th) 192; 20 CBR (5th) 220; 208 OAC 133
URL:	http://canlii.ca/t/1msxr
Citation:	Impact Tool & Mould Inc. (Re), 2006 CanLII 7498 (ON CA), <http://canlii.ca/t/1msxr> retrieved on 2013-08-18
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DATE: 20060315
DOCKET: C42042
COURT OF APPEAL FOR ONTARIO

SIMMONS, BLAIR and ROULEAU J.J.A.
IN THE MATTER OF THE BANKRUPTCY OF IMPACT TOOL& MOULD INC., OF THE CITY OF WINDSOR

B E T W E E N :	)	
	)	
BDO DUNWOODY LIMITED, TRUSTEE OF THE ESTATE OF IMPACT TOOL & MOULD INC., A BANKRUPT	))	**Frank Bennett, for the appellant**
	)	
	)	
	)	
Appellant	)	

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- and -	)	
DOYLE SALEWSKI INC., in its capacity as Court-Appointed Interim Receiver of IMPACT TOOL & MOULD INC., IMPACT TOOL & MOULD (WINDSOR) INC. and THE SUPERINTENDENT OF BANKRUPTCY	))	**Ronald G. Slaght and Dena Varah, for the respondent Impact Tool & Mould (Windsor) Inc.**
	)	**No one appearing for Doyle Salewski Inc. or for the Superintendent of Bankruptcy**
Respondents	))	
	)	**Heard: November 9, 2005**

On appeal from the order of Justice S. Rogin of the Superior Court of Justice, dated March 29, 2004, affirming the order of Deputy Registrar in Bankruptcy R. Stevens dated October 10, 2003.

R.A. BLAIR J.A.:

Background

[1] The issue on this appeal is whether, and if so to what extent, the court may restrict the ability of a trustee in bankruptcy to provide the inspectors and creditors of the bankrupt estate with access to, or information from, the books, records and other documents of the bankrupt where there is a concern that the inspectors or creditors may use the information they obtain for purposes collateral to the administration of the bankrupt estate.

[2] Underlying the appeal is the following commercial dynamic. The bankrupt, Impact Tool & Mould Inc., and its largest unsecured creditor, Unique Tool & Gauge Inc., were rivals. Each engaged in the highly competitive business of manufacturing plastic injection moulds in the Windsor area. The purchaser of Impact Tool's assets and undertaking, Impact Tool & Mould (Windsor) Inc. – a company owned and controlled by the same three principals who owned and controlled Impact Tool – continues to carry on its same business out of the same premises and in the same fashion.[1]

[3] Unique obtained a judgment against Impact Tool, which with interest and costs, now stands at over $600,000. Impact Tool became insolvent as a result of the judgment and other financial difficulties that it was experiencing. Faced with this situation, two of the company's shareholders (who were also secured creditors) arranged for a court-appointed interim receiver to be put in place and approximately a month later the company's assets were sold, again with court approval, to Impact Tool & Mould (Windsor). Immediately after the asset sale was completed, the interim receiver assigned Impact Tool into bankruptcy.

[4] Four inspectors were appointed in the bankruptcy proceedings. Kevin O'Brien, a representative of Unique, was one of them. Impact Tool (Windsor), and the three former principals of Impact Tool, demonstrated a marked reluctance to cooperate with the Trustee in bankruptcy in providing access to and producing the books, records and other documents of the bankrupt ("the Documents")[2]. The interim receiver, in whose possession many of the Documents remained, adopted their position. This reluctance was based upon the concern of the purchaser – founded on an earlier incident in the interim receiver proceedings – that Mr. O'Brien and Unique would use the information they obtained in Mr. O'Brien's capacity as inspector for their own competitive purposes rather than for purposes of the administration of the bankrupt estate. As the purchaser of the assets and undertaking of the bankrupt, Impact Tool (Windsor) was obviously anxious to protect its investment and the confidential competitive information of Impact Tool underlying that investment.

[5] As a result of these difficulties, the Trustee applied to the Deputy Registrar for an order requiring the interim receiver and Impact Tool (Windsor) to produce the Documents. The Trustee also sought an order permitting it to share with, disclose and distribute to the inspectors the information that it acquired in its review of those materials, and that it be at liberty to report to the creditors in the normal course, without any restrictions in relation to the knowledge it acquired in its review of the Documents.

[6] The Deputy Registrar made an order that the Documents be produced to the Trustee, but he restricted the Trustee from providing them to the inspectors and creditors of the bankrupt estate without further order of the court on notice to Impact Tool (Windsor). Justice Rogin, the appeal judge, upheld the decision of the Deputy Registrar, concluding that the order was reasonable and that it properly balanced all the competing interests and addressed the privacy issues at play.

[7] The Trustee appeals the restrictive nature of the orders below.

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[8] In my view, the appeal must be allowed. Respectfully, the Deputy Registrar and the appeal judge erred in principle in precluding the inspectors and creditors from having access to the Documents in the circumstances of this case. In brief, the Deputy Registrar and the appeal judge confused two important concepts, namely, *access* by the inspectors and Trustee to the Documents of the bankrupt – which they require in order to carry out their essential functions that lie at the heart of the regulatory scheme under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended (" the *BIA*") – and *the use* to which the inspectors and creditors may put the information they acquire. It is permissible to restrain the latter. Generally, however – and except in the rarest of cases – inspectors, in particular, and the creditors they represent, should not be barred from access to the bankrupt's documents. Other controls, such as orders restraining the use to which the documents may be put or, in proper circumstances, removing the offending inspector, will normally suffice to protect other interests that need protection.

[9] My reasons for this view follow.

Facts

[10] Impact Tool operated as a tool and mould shop, manufacturing plastic injection moulding in the Windsor area. Its directors, officers and shareholders were Jeff Andrews, Roberto Santarossa and John Sabelli.

[11] In 2002, Impact Tool was experiencing financial difficulties. In January of that year, Unique obtained its judgment. An appeal was unsuccessful. In the meantime, judgment debtor proceedings occurred, and in the course of those proceedings Impact Tool refused to release certain financial information and trade-related reports to Unique. It did so on the ground that the information would provide Unique with a competitive advantage. Unique moved for production, and in January 2003, Brockenshire J. ordered the documents to be produced unless Impact Tool deposited sufficient funds to pay an independent expert to examine them and to report to Unique's counsel "but bearing in mind the continuing interest of [Impact Tool] in protecting proprietary information not directly relevant to the issues on a judgment debtor examination". Impact Tool deposited the funds.

[12] In March 2003, however, Andrews and Santarossa – as secured creditors of Impact Tool – requested the court to appoint the respondent, Doyle Salewski Inc., as interim receiver of the company. Patterson J. granted the order, effective March 10. The interim Receiver took possession of the property, assets and undertaking of Impact Tool, and continued to operate it as a going concern. As part of this process, the interim receiver took possession of the Documents.

[13] On April 23, 2003, Brockenshire J. granted an order approving the sale of Impact Tool's undertaking and assets to Impact Tool (Windsor) for a purchase price of approximately $4.8 million. As noted earlier, Andrews, Santarossa and Sabelli are also the shareholders, directors and officers of Impact Tool (Windsor). The sale transaction was completed on May 15, 2003.

[14] On May 20, 2003, the interim receiver assigned Impact Tool into bankruptcy – a move clearly contemplated in advance as part of the process of reorganizing the Impact Tool business. The appellant, BDO Dunwoody Limited (which had been advising Unique in the receivership process), was appointed the Trustee in bankruptcy. By all accounts Unique is funding the bankruptcy.

[15] At the first meeting of creditors, four inspectors were appointed. One of those inspectors, Mr. O'Brien, is a representative of Unique.

[16] When the Trustee sought production of the bankrupt's Documents, the competition/confidentiality issue resurfaced. Driven by the concerns of the purchaser and its principals that Unique, through its representative O'Brien, would misuse information that O'Brien would obtain in his capacity as inspector, both the interim receiver and Impact Tool (Windsor) resisted production. There is extensive correspondence on the record about this. Before the closing of the sale transaction, Unique's solicitors wrote to the interim receiver requesting that it protect the Documents of Impact Tool for review by the Trustee, once appointed. The interim receiver took the position that the Trustee would only be provided with the information requested if it gave an undertaking not to disclose anything except the books records and documents relating to Impact Tool's accounting and bookkeeping. Eventually, the Trustee provided such an assurance, without prejudice to its right to move before the court for directions.

[17] In due course, the Trustee did bring its motion and, as indicated at the outset of these reasons, the Deputy Registrar made the order directing that the Documents be produced to the Trustee, but prohibiting the Trustee from disclosing them to the inspectors or creditors without further court order.

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Analysis

[18] The central issue on this appeal is the extent to which, if at all, restrictions may be placed on the ability of a trustee in bankruptcy to provide inspectors and, to a lesser extent, creditors with access to the books, records and documents of a bankrupt. The case does not involve the production of documents that belong to third parties (such as the purchaser here, or the solicitors or auditors of the bankrupt).

[19] The Deputy Registrar's decision to prohibit such access was premised upon the concerns of the pre-bankruptcy purchaser of the bankrupt's assets and undertaking. The concerns were that the inspector, Mr. O'Brien, had previously used Impact Tool-related customer information obtained from the interim receiver's first report in an attempt to dissuade customers from doing business with Impact Tool prior to the asset sale, and therefore – presumably, it seems – that he would abuse his position as inspector in the bankruptcy to make collateral use of information again for purposes extraneous to the administration of the bankruptcy. This would enable his company – the creditor and competitor, Unique – to steal a competitive advantage on the new purchaser's business. In this case, the asset purchase was not at arms length, but it was nonetheless sanctioned by a court order from which no appeal has been taken. The principles at play are equally applicable, it seems to me, to a situation where the insolvent company's assets have been acquired by a third-party purchaser for value.

[20] There was some evidence to support the conclusion that during the interim receivership, after receiving a copy of the interim receiver's first report, Mr. O'Brien had contacted at least two of Impact Tool's suppliers, disparaging Impact Tool, encouraging the suppliers to put the company on a C.O.D. basis, and expressing disappointment that they continued to do business with it. Mr. Santarossa and Mr. Doyle (representing the interim receiver) certainly took from this intelligence that Mr. O'Brien and Unique were using information obtained through the interim receivership in order to gain a competitive advantage in the market place. There is no direct evidence linking Mr. O'Brien's alleged contacts with the suppliers to his access to the interim receiver's report, but even if the allegations are true, it is not proof that he would necessarily flout his fiduciary duties to the general body of creditors and his statutory obligations as an inspector of the bankrupt estate, once those responsibilities were explained to him.[3]

[21] I have a more substantial difficulty with the order of the Deputy Registrar and the affirming order of the appeal judge, however. Respectfully, they are founded on an error in principle.

[22] As a general rule the inspectors and creditors of a bankrupt estate are entitled to access to the books, records and documents of the bankrupt because they require that access to be able to carry out their important functions under the bankruptcy legislation. The use to which they may put the information obtained through that access is restricted to matters relating to the administration of the bankrupt estate. In focusing on whether the inspectors and creditors should be denied *access* to the Documents, rather than on whether the problem he faced could have been resolved by restraining the *use* to which the inspectors and creditors could put the information they obtained, the Deputy Registrar lost sight of this guiding principle. He was wrong in doing so.

[23] I have come to this conclusion for the reasons that follow. In analyzing the proper approach to be taken to the type of problem the Deputy Registrar faced, there may be some distinction between the position of inspectors and that of the creditors, however. I shall therefore deal with the case of inspectors and creditors separately.

Inspectors

[24] Because of the scheme of the bankruptcy regime, and the distinct role and responsibilities of inspectors in it, considerations governing the production of the bankrupt's documents to them differ from the normal considerations concerning the production of private and confidential documents, and the protection of third party interests, in a lawsuit. I would not say there can never be situations where an order prohibiting access to inspectors might be appropriate, but such circumstances will, of necessity, be rare. Here, there was no suggestion that the Documents sought by the Trustee were not relevant to the inspectors' duties.

[25] In my opinion, the proper approach to the conflict facing the Deputy Registrar was to recognize the general rule outlined above and to ask, not whether the inspectors should be deprived of access to the bankrupt's documents, but whether the circumstances require them to be restrained in the use to which they may put them (or, if appropriate, to consider whether they should be removed as inspectors). That was not the approach followed in this case, however.

[26] A brief examination of the role and responsibilities of inspectors in the bankruptcy scheme underscores the reason for the different approach in principle that I favour.

[27] Apart from its rehabilitative goals with respect to personal bankrupts, the purpose of a bankruptcy is to gather in and realize upon the assets of the bankrupt and to distribute those assets amongst the creditors on an equitable basis, subject to their priorities. In that sense, bankruptcy is a creditor-driven process, with the creditors pursuing their claims by collective action through the trustee in bankruptcy: see *Dartmouth (City) v. Barclays Bank of Canada* 1996 CanLII 5620

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(NS CA), (1996), 40 C.B.R. (3d) 1 (N.S.C.A.). The inspectors – appointed by the creditors under s. 116 of the *BIA* – are the creditors' representatives in this exercise.

[28] The inspectors' role is integral to the operation of the bankruptcy regime. As the creditors' representatives in the administration of the bankrupt estate, they owe a fiduciary duty to the general body of creditors, collectively: *Re Bryant, Isard and Co; Ex parte Higginson* (1923), 4 C.B.R. 41 (Ont. S.C.). While the trustee in bankruptcy is vested with the assets of the bankrupt and is responsible for the day-to-day administration, it is the inspectors who have the primary supervisory role in the administration of the bankrupt estate. They have an obligation to be proactive and to keep watch on the trustee to ensure that assets are realized to the best advantage of the estate: *Taylor v. Davies*, (1919), 51 D.L.R. 75 (P.C.); *Re Paul-Emile Roy Inc.* (1968), 13 C.B.R. (N.S.) 244 (Que. S.C.). In *Re Fishman* (1985), 56 C.B.R. (N.S.) 316 (Ont. S.C. in Bankruptcy) at 317, Henry J. said:

> The inspectors are the supervisors of the trustee and it is their function to instruct the trustee to take whatever steps they consider appropriate in order to protect the estate and the creditors.

[29] Earlier, in *Re Hess* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C. in Bankruptcy), Henry J. had outlined the role of the inspectors in more detail. At p. 217 he said:

> [The general duty of the trustee] is to get in and administer the estate for the benefit of the creditors. Many of the duties he performs under statutory authority alone. *In matters of judgment*, where the interests of the estate and creditors may be adversely affected, *he is required to obtain the permission of the inspectors*, as for example in the matters set out in s. 14 of the Act,[4] which is not exhaustive.
>
> The inspectors of the estate are also statutory officials appointed under s. 94 of the Act.[5] They represent the interests of the creditors. They must be and must act independently of the trustee in the sense that they are not in a conflict of interest with the affairs of the estate, especially as to the matters set out in s. 94. They are required to supervise the trustee's administration of the estate generally and in matters specified in s. 14 of the Act and elsewhere. The inspectors are themselves subject to control and direction by the creditors by virtue of s. 94(9). *The fundamental concept is that the creditors are the final supervising authority in the administration of the estate, the inspectors represent their interest, the trustee's conduct is supervised by both*; the overall administration of the estate is subject to the supervision of the superintendent by s. 5; in cases of dispute or doubt the court is resorted to for adjudication or direction for the purpose of the proper application of the law [emphasis added].

[30] Although there is no specific provision in the bankruptcy legislation giving inspectors the general supervisory powers referred to above, the propositions arise from the scheme of the legislation and from the many and varied powers and supervisory duties invested in the inspectors throughout the *BIA*. The general nature of the inspectors' pivotal supervisory role is well-embedded in the jurisprudence. In addition to the foregoing authorities, Masten J.A. put the position very succinctly in *Re Feldman* (1932), 13 C.B.R. 313 (Ont. S.C., App. Div.), at 314:

> In other words the whole scope and foundation of *The Bankruptcy Act* is that in the practical administration of the estate of the bankrupt the governing authority shall be the inspectors and not the Court, the inspectors being practical men named by the creditors, and unless it is shown they are acting fraudulently or in some way not in good faith for the benefit of the estate, the administration of the affairs of the estate is to be governed according to their directions. [underlining added]

This passage was approved by this court in *Re Rizzo & Rizzo Shoes Limited* 1998 CanLII 2673 (ON CA), (1998), 38 O.R. (3d) 280 (C.A.), per Charron J.A. at 287. See also *Re Melnitzer* reflex, (1991), 9 C.B.R. (3d) 30 (Gen. Div. in Bankruptcy).

[31] A review of the *BIA* reveals a wide variety of inspector powers and responsibilities that underpin this overarching supervisory role. For instance, s. 30 gives the trustee a broad list of powers that are essential to the administration of the bankrupt estate, but which can only be exercised with the permission of the inspectors. These powers include the power to sell, lease, carry on the bankrupt's business as a going concern, institute or defend litigation, and settle debts owing to the bankrupt or any claims made by or against the estate. Proposals in bankruptcy must be approved by the inspectors: s. 50(3). The trustee in bankruptcy must call a meeting of creditors if requested to do so by a majority of inspectors and if the trustee fails to do so a majority of the inspectors may convene such a meeting themselves: s. 103. Section 119 mandates that the trustee "shall have regard to any directions that may be given by resolution of the creditors at any general meeting or by the inspectors"[6].

[32] The duties imposed upon inspectors by subsections 120(3) and (4) of the *BIA* bear citing in full:

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> 120(3) The inspectors shall from time to time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.
>
> (4) Before approving the final statement of receipts and disbursements of the trustee, the inspectors shall satisfy themselves that all the property has been accounted for and that the administration of the estate has been completed as far as can reasonably be done and shall determine whether or not the disbursements and expenses incurred are proper and have been duly authorized, and the fees and remuneration just and reasonable in the circumstances [underlining added].

[33] How can inspectors carry out their overall supervisory role in the administration of the estate, and the specific duties assigned to them, without access to the bankrupt's books, records and documents? How, in particular, can they "satisfy themselves that all the property has been accounted for and that the administration of the estate has been completed as far as can reasonably be done"? The answer is that they cannot. That is why, in my respectful view, the broad limit to access imposed by the order of the Deputy Registrar and the order of the appeal judge upholding it cannot stand.

[34] At the same time, the jurisprudence is clear that inspectors have a fiduciary duty to the body of creditors generally, as well as the statutory duties imposed under the legislation. Inspectors must perform their duties impartially and in the interests of the creditors who appoint them: *Re Bryant, Issard & Co.; ex parte Higginson*, *supra*. They may not use their position as inspector for purposes extraneous to the administration of the bankruptcy. It follows that access to the books, records and documents of the bankrupt must not be used for any such extraneous purposes. See *Re Taylor Ventures Ltd.* 1999 CanLII 5475 (BC SC), (1999), 9 C.B.R. (4th) 136 (B.C.S.C.); *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.* 2002 CanLII 35019 (ON SC), (2002), 37 C.B.R. (4th) 267 (Ont. Sup. Ct., Comm. List).

[35] The respondents rely heavily upon *Taylor Ventures* and *GMAC* in support of the Deputy Registrar's order. Neither case stands for the proposition that the bankrupt's books, records and documents may be withheld from the *inspectors*, however. In addition, both are distinguishable on the basis that each involved the production of third party documents and not the books, records and documents of the bankrupt itself[7].

[36] In *Taylor Ventures*, Burnyeat J. applied what in my view is the proper approach to addressing a problem of the type confronting the Deputy Registrar here. He granted the Trustee *and the inspectors* "complete and unrestricted access" to all of the Taylor files received from the former solicitors of the bankrupt (to which privilege did not attach), but ordered that "they may use those files and the information contained [in them] only in relation to the affairs of the Bankrupt" (para. 34).

[37] Farley J. did not apply *Taylor Ventures* to preclude *inspectors* from having access to the documents of the third party auditors in *GMAC*. In fact, he said he agreed with Burnyeat J.'s analysis. He ordered that the documents be produced to the trustee, but limited the trustee's right to provide access to the *creditors* in that case. I shall return to *GMAC* in relation to creditors in a moment.

[38] The respondents rely upon two additional authorities – *Re Hickman Equipment (1985) Ltd.*, 2003 NLSCTD 108 (CanLII), (2003), 44 C.B.R. (4th) 82 (Nfld. Sup Ct – TD in Bankruptcy), and *Re St. Anne-Nackawic Pulp Co.*, reflex, (2005), 8 C.B.R. (5th) 142 (N.B.Q.B. in Bankruptcy). Like *Taylor Ventures* and *GMAC*, however, these cases do not relate to access to the documents of the bankrupt, but rather to auditors' files and papers. I need not deal with them further. Suffice it to say that, to the extent they suggest that inspectors and creditors may be denied access to the bankrupt's documents rather than being subject to restrictions of the use to be made of such documents, I prefer the approach articulated here.

[39] The Deputy Registrar alluded to the possibility – asserted by counsel – that once the information has been released to the inspectors the phrase "let the cat out of the bag" may have application, in terms of inappropriate extraneous use that may be made of the information. I am satisfied, however, that the imposition of a restraining order on the use that may be made of information obtained is an adequate remedy in most cases. First, I am not prepared to assume as a default position, that individual inspectors will readily ignore their statutory and fiduciary obligations to use the information they receive only for purposes of administration of the estate or, when faced with a direct restriction compelling them to do so, they will be unable or unwilling to abide by it. Secondly, injunctive orders are commonly employed to prevent and control the misuse of confidential proprietary information in commercial competition cases. They are binding not only on the parties, but also on those who have knowledge of the order. They are effective and they may be enforced by the court's contempt powers.

[40] Moreover, there is an additional remedy available. Section 116(5) of the *BIA* provides for the removal and replacement of inspectors, at the instance of the trustee or a creditor. It is true that in this particular case Impact Tool

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(Windsor) is not a creditor of the bankrupt and therefore could not resort to s. 116(5). However, I note that both Messrs. Andrews and Santarossa are. Nonetheless, a party in the position of Impact Tool (Windsor) is not without a remedy in such circumstances. It can request the trustee to bring such an application and, if the trustee refuses, attack the trustee's decision under s. 37, which enables the bankrupt, a creditor, or "any other person" aggrieved by a decision of the trustee to appeal to the court.

[41] In summary, then, it is generally an error to preclude the inspectors in a bankruptcy from having access to the books, records and other documents of the bankrupt. To do so is to undermine their ability to carry out their functions under the bankruptcy scheme and legislation. Inspectors owe a fiduciary duty to the general body of creditors, and as a result – amongst other things – they may only use their access to the books, records and documents for purposes relating to the administration of the estate. They may be restrained from improperly using the information they obtain for collateral purposes, or they may be removed as inspectors, in appropriate cases. I am satisfied that these latter remedies provide adequate protection from the misuse of such information in most cases, without undercutting the inspectors' ability to perform their statutory functions.

Creditors

[42] Creditors stand on a somewhat different footing, which may justify a more flexible approach, in some circumstances, to the general rule in favour of access.

[43] For instance, in *GMAC* Farley J. restricted the trustee's right to provide access to the documents in question to creditors. The facts were different from those of the present case, though. In *GMAC* the creditors had made it clear that they wished to have access to the auditor's working papers in order to determine whether they (as opposed to the bankrupt company) might be able to advance a claim for auditors' negligence outside of the bankruptcy. Thus, their motive was clear. They were not seeking access in order to exercise their duties under the *BIA*. The thrust of Farley J's decision is found in the following comment, at para 13:

> In my view it would be inappropriate to allow these creditors here in their individual persona capacities to piggyback upon the Trustee's s. 164 examination to get a leg up in non-bankruptcy litigation.

[44] I agree. In such circumstances, I do not see anything wrong with limiting the access of creditors to the documents as long as the ability of their representatives, the inspectors, to carry out their functions in relation to the administration of the estate is not hampered.

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[45] While the bankruptcy process is creditor-driven, and while the creditors ultimately give directions to, and control, the trustee and the inspectors, creditors have more rights than duties under the bankruptcy scheme. They do not owe fiduciary duties to anyone in relation to the bankrupt estate and they do not have the same sort of statutory obligations with respect to the administration of the estate that the trustee and their representatives in the administration of the estate, the inspectors, have. This makes their position somewhat different than that of the inspectors in terms of needing access to the bankrupt's documents in order to carry out their functions in the Act. Creditors are undoubtedly precluded from using, for purposes extraneous to the administration of the bankruptcy, any information they receive in their capacity as "the final supervising authority in the administration of the estate"[8]. That restriction may be founded more on an implied obligation not use the information they receive in that fashion – similar to the implied obligation that arises respecting production in civil proceedings – than on a statutory or fiduciary obligation, however.

[46] For purposes of this appeal, I need not decide the rationale for the creditors' restriction on the use of information or the issue of the extent to which creditors may be excepted from the general rule in favour of permitting access to the books, records and documents of a bankrupt. I note that, although the order of the Deputy Registrar deprived Impact Tool's creditors of access to the Documents, the Trustee had not specifically requested an order allowing them access. It sought an order permitting it to report to the creditors in the normal course, without restrictions based upon what it learned in its review of the Documents. I am satisfied that the record before the Deputy Registrar in this case did not justify denying the Trustee the right to report to the creditors in that fashion.

Standard of Review

[47] Before the appeal judge the parties agreed that the standard of review of the Deputy Registrar's decision was reasonableness. The appeal judge concluded that the decision was reasonable because there was evidence upon which the Deputy Registrar could have made his decision and because he addressed the issues of privacy and balanced all competing interests. The respondent argues this standard continues to apply.

[48] I disagree. "Reasonableness" in this sense is a standard that is applied in the administrative law context. The Deputy Registrar in bankruptcy is not an administrative tribunal. Although not a judge, he or she exercises a judicial function in deciding issues such as those arising in this case. Applying the patently unreasonable/reasonable/correct spectrum that constitutes the standard of review in administrative law matters to the decisions of a deputy registrar in bankruptcy is not helpful. As Lane J. noted in *Re Golden Mile Bowl Inc.* 2005 CanLII 31583 (ON SC), (2005), 14 C.B.R. (5th) 187 (Ont. S.C.), at para. 13:

> An appeal of the registrar's order will be allowed where it is demonstrated that the registrar erred in principle or in law or failed to take into account a proper factor or took into account an improper factor, which led to a wrong conclusion.

See also *Re Barukory Investments Limited* (1979), 32 C.B.R. (N.S.) 185 (Ont. H.C.), at p. 186; *Re Barrington and Vokey Limited* 1996 CanLII 5193 (NS SC), (1996), 48 C.B.R. (3d) 270 (N.S.S.C.) at para. 18; *Re Mengistu* 2003 SKQB 319 (CanLII), (2003), 45 C.B.R. (4th) 277 (Sask. Q.B.) at para. 4.

[49] An appeal to this court under s. 193 of the *BIA* from an order of the nature in question here, should be determined on the same criteria.

[50] The Deputy Registrar's decision must be set aside. For the reasons outlined above, he erred in principle and thereby arrived at a wrong conclusion. In fairness to the Deputy Registrar, he felt that he was bound by the decision of Farley J. in *GMAC*, but, as I have explained, *GMAC* did not address the issue of depriving the inspectors of access to the bankrupt's books, records and documents. Similarly, the decision of the appeal judge must be set aside, founded as it was upon the application of an erroneous standard of review (albeit at the urging of the parties) and upholding a decision based upon an error in principle.

Disposition

[51] For the foregoing reasons, then, I would allow the appeal, set aside the order of the appeal judge, and vary the order of the Deputy Registrar by deleting paragraph 3 thereof and substituting the following:

> 3. THIS COURT ORDERS that BDO Dunwoody Limited, in its capacity as Trustee of the Estate of Impact Tool & Mould Inc., is at liberty to share, disclose and distribute to the Inspectors of the Estate of Impact Tool & Mould Inc., any and all information which the Trustee now has or hereafter acquires in its review of the books, records and other documents relating to the Estate of Impact Tool & Mould Inc.

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3A. THIS COURT ORDERS that BDO Dunwoody Limited, in its capacity as Trustee of the Estate of Impact Tool & Mould Inc., is at liberty to report to the creditors of the Estate of Impact Tool & Mould Inc., in the normal course, without restriction or reservation, of the knowledge the Trustee now has or hereafter acquires in its review of the books, records and other documents relating to the Estate of Impact Tool & Mould Inc.

3B. THIS COURT ORDERS that the Inspectors and the Creditors of Impact Tool & Mould Inc. are hereby restrained from using the books, records and documents of Impact Tool & Mould Inc. to which they may be provided access, and any information obtained from in relation to such books, records and documents, for purposes other than those relating to the administration of the bankrupt estate and the affairs of the Bankrupt.

[52] The appellant is entitled to its costs of the appeal and of the application for leave to appeal, payable by the respondent Impact Tool & Mould (Windsor) Inc. I would fix costs in the amount of $3,500 in relation to the application for leave to appeal, and in the amount of $10,000 in relation to the appeal, all inclusive of fees, disbursements and GST.

"R.A. Blair J.A."

"I agree J.M. Simmons J.A."

"I agree Paul S. Rouleau J.A."

RELEASED: March 15, 2006

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[1] From this point on I shall refer to Impact Tool & Mould Inc., Impact Tool & Mould (Windsor) Inc. and Unique Tool & Gauge Inc., respectively as "Impact Tool" (or, "the Bankrupt"), "Impact Tool (Windsor)", and "Unique".

[2] Although there may be some question whether all of the documents in question here are documents of the Bankrupt, the parties have approached these proceedings of the basis that they are. I have therefore considered this appeal on the same basis.

[3] Trustees normally should make the inspectors familiar with the duties imposed upon them at their first meeting: see Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3d ed., vol. 2 (Toronto: Carswell, 1992) at 5-27.

[4] Now s. 30 of the *BIA*.

[5] Now s. 116 and following of the *BIA*.

[6] In keeping with the legislative regime outlined by Henry J. in *Re Hess*, *supra*, s. 119 provides that, in cases of conflict, any directions given by creditors trump those given by inspectors, and that inspectors' decisions are subject to court review.

[7] In *Taylor Ventures* the documents were from the files of the bankrupt's solicitors. In *GMAC* they were the files of the bankrupt's accountants, including their working papers.

[8] *Re Hess, supra*, at para. 4.

Property to be delivered to trustee - Sec. 17

17. (1) Where a person has in his possession or power any property of the bankrupt that he is not by law entitled to retain as against the bankrupt or the trustee, that person shall deliver the property to the trustee.

Power to act anywhere - Sec. 17(2)

(2) For the purpose of obtaining possession of and realizing on the property of the bankrupt, a trustee has power to act as such anywhere.

R.S., c. B-3, s. 12.

Conservatory measures - Sec. 18

18. The trustee may when necessary in the interests of the estate of the bankrupt

(a) take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value; and

(b) carry on the business of the bankrupt until the date fixed for the first meeting of creditors.

R.S., c. B-3, s. 12.

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Legal advice or action before first meeting - Sec. 19
19. (1) The trustee may prior to the first meeting of creditors obtain such legal advice and take such court proceedings as he may consider necessary for the recovery or protection of the property of the bankrupt.

In case of emergency - Sec. 19(2)
(2) In the case of an emergency where the necessary authority cannot be obtained from the inspectors in time to take appropriate action, the trustee may obtain such legal advice and institute such legal proceedings and take such action as he may deem necessary in the interests of the estate of the bankrupt.

(3) [Repealed, 2005, c. 47, s. 18]
R.S., 1985, c. B-3, s. 19;
2004, c. 25, s. 19(F);
2005, c. 47, s. 18.

Divesting property by trustee - Sec. 20
20. (1) The trustee may, with the permission of the inspectors, divest all or any part of the trustee's right, title or interest in any real property or immovable of the bankrupt by a notice of quit claim or renunciation by the trustee, and the official in charge of the land titles or registry office, as the case may be, where title to the real property or immovable is registered shall accept and register in the land register the notice when tendered for registration.

Registration of notice - Sec. 20(2)
(2) Registration of a notice under subsection (1) operates as a discharge or release of any documents previously registered in the land register by or on behalf of the trustee with respect to the property referred to in the notice.
R.S., 1985, c. B-3, s. 20;
1997, c. 12, s. 18;
2004, c. 25, s. 20.

Verifying bankrupt's statement of affairs - Sec. 21
21. The trustee shall verify the bankrupt's statement of affairs referred to in paragraph 158(d).
R.S., 1985, c. B-3, s. 21;
2005, c. 47, s. 19.

SB Directive: 16R, Preparation of the Statement of Affairs
(see below image pages)

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Directives

Consommation et Corporations Canada | Consumer and Corporate Affairs Canada

Surintendant des faillites | Superintendent of Bankruptcy

No. 16R

PRÉPARATION DU BILAN STATUTAIRE

Émise: le 15 décembre 1988

Émise de nouveau: le 10 janvier 1991

OBJET

Cette directive révise et remplace la directive #16 émise le 22 décembre 1986 ainsi que toute autre politique émise antérieurement sur ce sujet.

GÉNÉRALITÉS

1. Le bilan statutaire est l'un des documents les plus importants pour l'administration de l'actif et sert à l'ensemble des participants nommément la cour, le syndic, les créanciers, les inspecteurs et le séquestre officiel, dans leur prise de décisions.

2. Bien que le bilan statutaire soit celui du débiteur, c'est généralement le syndic qui le prépare à même les renseignements fournis par le débiteur. Compte tenu de cette pratique, il est normal et acceptable que le temps consacré par le syndic à la préparation du bilan statutaire soit un coût imputable à l'actif.

3. Alors que les états financiers rédigés par un comptable professionnel sont préparés selon des principes comptables généralement reconnus, tel n'est pas le cas pour le bilan statutaire puisqu'aucune ligne directrice n'existe. Très souvent, en raison des diverses méthodes utilisées, les bilans suscitent le doute ou l'équivoque.

PREPARATION OF THE STATEMENT OF AFFAIRS

Issued: December 15, 1988

Reissued: January 10, 1991

PURPOSE

This Directive revises and replaces Directive #15 issued December 22, 1986 as well as any previously issued policies on this matter.

BACKGROUND

1. The Statement of Affairs is one of the most important documents for the administration of the estate and one on which a variety of users, the Court, the trustee, the creditors, the inspectors and the Official Receiver, base their decisions.

2. Although the Statement of Affairs is the debtor's statement, the trustee often assists in its preparation on the basis of the information provided by the debtor. As the preparation of the Statement of Affairs is normally done by the trustee, the time spent is a normal and acceptable charge to the estate.

3. Whereas financial statements prepared by professional accountants will normally be prepared in accordance with generally accepted accounting principles, such is not the case for a Statement of Affairs where there are no guidelines. There are concerns that the manner in which it is prepared in numerous instances leads to confusion and misunderstanding.

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4. La variété dans la présentation des actifs et du passif lors de la préparation du bilan statutaire transmet souvent une image incorrecte de la situation véritable du débiteur, laissant les créanciers, le syndic et le séquestre officiel sans critères fiables pour leur prise de décisions.

LIGNES DIRECTRICES

5. Tout en aidant le débiteur dans la préparation de son bilan les syndics doivent, selon leur expérience et expertise, faire un effort pour promouvoir le plus possible la divulgation complète des renseignements nécessaires et aider le débiteur à fournir des renseignements qui sont des plus précis et appropriés, compte tenu des circonstances, des exemptions et des législations provinciales.

6. Le formulaire 74A - Le bilan d'un failli non-commerçant doit être utilisé pour tous les débiteurs-consommateurs et les faillites de non-commerçants, que le dossier soit administré selon les dispositions de l'administration sommaire ou non. Le formulaire 74 - Le bilan commercial doit être utilisé pour les autres administrations.

7. Lorsqu'il s'agit de la faillite d'une société en nom collectif, un bilan doit être préparé pour l'entreprise ainsi que pour chacun des associés qui fait cession de ses biens.

8. Aux fins de la présente directive,

a) un débiteur-consommateur est un particulier:

- qui n'a pas d'actif d'affaires; et
- qui n'exploite pas présentement une entreprise; (les vendeurs à commission ou autres personnes dans une situation semblable doivent être considérés comme des consommateurs)

b) l'endettement résultant de garanties ou d'endossements d'emprunts d'une compagnie ou d'une tierce personne en affaires, ne constitue pas un endettement découlant de l'exploitation d'une entreprise.

4. The multiplicity of ways in which assets and liabilities have been treated for the purpose of the preparation of the Statement of Affairs have often led to a distorted picture of the actual situation of the debtor leading to unreliable criteria on which decisions by the creditors, the Official Receiver and the trustee are made.

GUIDELINES

5. While assisting a debtor in preparing his Statement of Affairs, trustees are expected to make an effort by using their experience and skill to improve the full disclosure of all the necessary information and help the debtor to provide information which is proper and as accurate as possible, having regard to the circumstances and to the provincial exemptions and legislations.

6 Form 74A - Statement of Affairs of a Non-Business Bankrupt is to be used for all consumer debtors and non-business bankruptcies whether the estate is administered under the summary administration provisions or under the regular provisions of the Act. Form 74 - Statement of Affairs is to be used for all other proceedings.

7. Where a partnership is involved, a Statement of Affairs must be prepared for the business as well as for each of the partners making an assignment.

8. For the purpose of this Directive,

a) a consumer debtor is defined as an individual:

- who has no business assets; and
- who is not currently active in business; (commissioned salespersons or individuals in similar occupations should be classified as consumer debtors)

b) indebtedness resulting from guarantees or endorsements of a corporation or a third party operating a business does not constitute a debt arising out of the operation of a business.

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9. Nonobstant le paragraphe 6, lorsqu'il semble plus à propos, dans certains cas, d'utiliser une formule plutôt que l'autre, le syndic devra consulter le séquestre officiel quant à la possibilité de le faire

10. Lors de la préparation du bilan d'un failli non-commerçant comme d'un commerçant:

a) le nom et l'adresse complète de chaque créancier doivent apparaître, les créanciers additionnels qui n'apparaissent pas sur la liste doivent être inscrits sur une liste séparée;

b) lorsque le montant exact ou approximatif de la dette ou d'un bien de l'actif n'est pas connu, le "meilleur montant estimé" devrait être indiqué et le débiteur doit s'abstenir d'utiliser un point d'interrogation dans les colonnes "valeur estimée des actifs" ou "montant de la dette" du formulaire 74A ou dans les colonnes "actif" ou "passif" du formulaire 74;

c) lorsqu'il n'est pas possible de déterminer un montant en raison de sa nature éventuelle, une explication doit être donnée quant à la raison pour laquelle le montant ne peut être établi (e.g remboursement d'impôt non connu, jugement non rendu);

d) lorsqu'un bien est détenu conjointement ou partiellement, il faut en tenir compte, en démontrant au bilan la part du débiteur dans l'actif, la part des créances garanties dont il est directement responsable ainsi que toutes réclamations éventuelles vu qu'il est conjointement et solidairement responsable, avec le(s) autres copropriétaire(s), de la totalité des créances à l'encontre du bien;

e) lorsque le débiteur ne peut déterminer si un montant est ou serait dû à un créancier mais veut toutefois l'aviser. Le créancier devrait être démontré comme créancier supplémentaire au bilan statutaire sans qu'un point d'interrogation ou un montant n'apparaisse dans la colonne des dollars;

f) les annexes "A" et "B" montrent comment les éléments particuliers d'actif et de passif doivent être traités ou présentés au bilan statutaire;

9. Notwithstanding paragraph 6, in those cases where the use of the alternate form could be more appropriate, the trustee shall consult the Official Receiver as to the acceptability of using the alternate form.

10 In completing the Statement of Affairs or the Statement of Affairs of a Non-Business Bankrupt:

a) the full name and complete address of each creditor is to be shown, additional creditors not shown on the list should be shown as a separate list;

b) where the exact or approximate amount owed or where the value of the asset is not known, the "best estimate" of the amount involved is to be included and the debtor is to refrain from using a question mark in the "estimated dollar value of assets" or the "amount of debt" columns of Form 74A or in the "assets" or "liabilities" columns of Form 74;

c) in those cases where it is not possible to determine an amount because of its contingent nature, an explanation is to be provided as to why an amount cannot be indicated (i.e. - tax refund unknown, judgment not yet rendered);

d) where a property is jointly or partially owned, the situation is to be reflected in the Statement of Affairs with the debtor's share of the property, the share of the secured encumbrances that he is directly responsible for as well as any possible contingent claims as he is, with the other co-owner(s), jointly and severely responsible for all of the encumbrances against the property;

e) where the debtor cannot ascertain if an amount is or could be owed to a creditor, but wants to include the said creditor. The creditor should be shown on the Statement of Affairs as a supplementary creditor without any amount or question mark in the dollar amount column.

f) appendices "A" and "B" indicate how individual elements of assets and liabilities are to be dealt with or presented on the Statement of Affairs;

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g) les annexes au bilan statutaire doivent être entièrement complétées dans les moindres détails afin de justifier les montants apparaissant à la page frontispice du bilan statutaire; et

h) la page frontispice du bilan statutaire (formulaire 74) devrait être envoyée à tous les créanciers avec l'avis de la première assemblée des créanciers et la liste des créanciers. Dans le cas d'un Bilan d'un failli non-commerçant (formulaire 74A), le bilan et les annexes doivent être envoyés aux créanciers.

g) the appendices attached to the Statement of Affairs are to be fully completed to provide all the details to substantiate the amounts appearing on the front page of the Statement of Affairs; and

h) the front page of a business Statement of Affairs (Form 74) should be sent to creditors with the notice to creditors of the first meeting and the list of creditors. In the case of a Non-business Statement of Affairs (form 74A), the Statement of Affairs and all the appendices are to be sent to the creditors.

Le surintendant des faillites

The Superintendent of Bankruptcy

W. Clare

Veuillez noter que les modifications au texte sont identifiées par ce caractère spécial d'imprimerie.
Please note that amendments to the text are identified by this special printing font.

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Annexe "A"

L'actif et le passif du débiteur doivent apparaître de la manière prescrite sous chacune des rubriques:

BILAN D'UN FAILLI NON-COMMERÇANT
(Formulaire 74A)

A C T I F

1. **Espèces en mains**: Indiquer les sommes que le débiteur a remises au syndic au moment de la cession (espèces en main ou en banque).

2. **Ameublement**: Si une exemption provinciale est prévue, le montant de l'exemption devrait figurer sous la rubrique "description". Tout intérêt partiel du débiteur dans le bien doit être indiqué. La valeur estimée par le débiteur des biens réalisables doit figurer dans la colonne des dollars.

3. **Effets personnels**: (peut comprendre bijoux, collections, objets d'art, manteaux de fourrure, appareils photographiques ou autres objets). Si une exemption provinciale est prévue, le montant de l'exemption devrait figurer sous la rubrique "description". Tout intérêt partiel du débiteur dans le bien doit être indiqué. La valeur estimée par le débiteur des biens réalisables doit figurer dans la colonne des dollars.

4. **Valeur de rachat de l'assurance-vie**: Les polices d'assurance-vie devraient faire l'objet d'un examen. La valeur de rachat doit indiquer "exemption" s'il y a un bénéficiaire privilégié ou si l'actif n'est pas le bénéficiaire.

5. **Valeur de bourse**: (y compris les obligations d'épargne du Canada payées en entier ou souscrites) Le syndic doit saisir tous les titres et effets de commerce négociables, même s'ils sont considérés comme étant sans valeur. Il faut mentionner la valeur nette réalisable des diverses actions et en faire une description appropriée.

6. **Immeubles**: Fournir l'adresse municipale de l'immeuble, préciser si le débiteur est propriétaire individuel ou en copropriétaire et indiquer si l'immeuble est totalement ou partiellement grevé. Dans le cas d'un terrain, une brève description légale peut remplacer l'adresse municipale. La valeur à indiquer correspond à la valeur réalisable de la propriété.

   Même si les biens-fonds ou toute autre propriété font l'objet d'un litige, il faut les inscrire dans la colonne de l'actif et porter les charges dont ils sont grevées dans la colonne du passif, peu importe l'intérêt ou l'équité détenu par le débiteur, pourvu qu'il en soit toujours le propriétaire enregistré. Si les procédures sont terminées et que ni le débiteur ni le syndic n'ont de recours pour reprendre possession du bien, la propriété ne doit pas faire partie de l'actif, pas plus que la sûreté réelle qui s'y rattache. Il faut indiquer, s'il y a lieu, seulement le déficit anticipé lors de la réalisation du bien. Si une exemption provinciale est prévue, le montant de l'exemption devrait figurer sous la rubrique "description".

7. **Véhicules**: Indiquer l'année, le modèle et numéro de série du véhicule et préciser s'il est partiellement ou totalement grevé. Pour déterminer la valeur des automobiles, il serait acceptable de consulter un livre reconnu (livre noir) qui fait mention de la valeur des véhicules. La valeur à indiquer correspond à la valeur réalisable estimée.

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8. **Équipements de loisir** (y compris camionnettes de camping, caravanes, bateaux, équipement de chasse ou autre) Faire une description complète des équipements et en indiquer l'année, le modèle et le numéro de série. La valeur à inscrire correspond à la valeur réalisable estimée

9. **Remboursement d'impôt prévu.** Correspond au remboursement que le débiteur n'avait pas encore touché à la date de la cession mais qu'il devait recevoir selon la déclaration d'impôt de l'année précédente. Si une évaluation raisonnable du remboursement d'impôt préfaillite a été faite, il est possible de l'inclure au bilan à condition de mentionner qu'il s'agit d'un montant approximatif.

10. **Autres actifs:** Comprend tous les autres actifs non visés par les rubriques ci-dessus notamment les comptes à recevoir, les REER, les sommes à recevoir à la suite d'un litige, les nues-propriétés et les autres droits en vertu de testaments ou d'une succession ainsi que les intérêts du débiteur dans toute transaction. La valeur à indiquer correspond à la valeur réalisable estimée.

P A S S I F

1. **Créanciers non garantis:** Inscrire toutes les dettes non garanties et, dans le cas de créanciers privilégiés ou garantis, la partie non garantie des sommes qui leur sont dues.

2. **Créanciers garantis:** Seule la partie garantie des dettes doit figurer dans cette colonne. Lorsque la valeur de la propriété grevée par une sûreté réelle est inférieure au passif total, l'excédent de la dette doit être déclaré comme non garanti. La description détaillée de la garantie sur le bien grevé doit paraître au bas de l'annexe "A".

3. **Créanciers privilégiés** La partie privilégiée des dettes doit figurer sous cette rubrique. Lorsque le débiteur ne peut déterminer si une somme est ou pourrait être due à un créancier et qu'il veut inscrire ce dernier (p. ex. Revenu Canada) sur la liste des créanciers privilégiés, aucun montant ne doit être indiqué. Lorsqu'il y a possibilité d'une fiducie présumée, le montant pouvant être réclamé contre l'actif devrait apparaître sous cette rubrique.

4. **Dettes éventuelles ou autres dettes non liquidées:** Expliquer la nature et fournir le montant de la réclamation ainsi que la dette pouvant être réclamée contre l'actif pour fin de dividende. Faire la même chose pour les garanties. Si le débiteur a consenti une garantie ou un endossement envers un tiers, la nature de cette garantie ou de l'endossement doit être indiquée.

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Annexe "B"

BILAN STATUTAIRE - ENTREPRISE
(formulaire 74)

A C T I F

a) **Fonds de commerce:** Indiquer la juste valeur marchande sur le bilan. La juste valeur marchande est l'estimation la plus exacte que le débiteur a pu faire de la valeur des actifs dans une vente forcée. Indiquer si le bien est totalement ou partiellement grevé.

b) **Aménagement:** Voir le paragraphe a) ci-dessus. Si ces éléments d'actif sont immeubles par destination et qu'ils n'ont aucune valeur réalisable, il faut en faire mention à l'annexe appropriée ou à la première page du bilan.

c) **Créances:** Indiquer le montant total des sommes à recevoir et à réaliser d'après les estimations les plus exactes du débiteur. Il faudra apporter une attention particulière à tout droit de compensation de manière à ne pas lausser le montant réalisable.

d) **Lettres de change:** Fournir les détails pertinents sur l'annexe jointe au bilan. Inscrire le montant estimatif à réaliser.

e) **Espèces en banque:** Solde des comptes de banque que le débiteur a cédé au syndic.

f) **Espèces en caisse:** Montant que le débiteur a remis au syndic (e.i. argent comptant, feuillets de cartes de crédit, chèques non déposés).

g) **Bétail:** Voir le paragraphe a) ci-dessus.

h) **Machine, outillage et installation.** Voir le paragraphe a) ci-dessus, et le paragraphe l) au sujet des charges.

i) **Immeubles:** La valeur à indiquer correspond à la valeur estimée réalisable. Indiquer également si le failli est propriétaire individuel ou copropriétaire et préciser si l'immeuble est totalement ou partiellement grevé. A l'annexe appropriée, indiquer l'adresse municipale (dans le cas d'un terrain, une brève description légale pourrait également suffire) et les autres détails requis.

> Même si les bien-fonds ou toute autre propriété font l'objet d'un litige, il faut les inscrire dans la colonne de l'actif et porter les charges dans la colonne du passif, peu importe l'intérêt ou l'équité détenu par le débiteur, pourvu qu'il en soit encore propriétaire. Si les procédures sont terminées et que ni le débiteur ni le syndic n'ont de recours pour reprendre possession du bien, la propriété ne doit pas faire partie de l'actif. Il faut indiquer, s'il y a lieu, seulement le déficit anticipé lors de la réalisation du bien

j) **Valeur réalisable estimative des garanties entre les mains des créanciers garantis:** Dans une annexe du bilan, il faut faire une description complète des garanties et indiquer où elles se trouvent.

k) **Ameublement:** Voir le paragraphe a) ci-dessus. Si le débiteur est un particulier et si une exemption provinciale est prévue, le total de l'exemption doit figurer sur l'annexe appropriée. Il faut également préciser si le débiteur ne détient qu'un intérêt partiel dans l'ameublement. *La valeur réalisable estimée par le débiteur doit figurer dans la colonne des dollars.*

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials
Compiled by Lyndon Maither, B.Comm

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l) **Polices d'assurance-vie**: Indiquer la valeur de rachat réalisable. Si l'actif n'est pas le bénéficiaire, en faire mention et indiquer une valeur réalisable "nulle"

m) **Nues-propriétés ou autres intérêts en vertu d'un testament ou d'une succession**: S'il s'agit d'un bénéficiaire ou d'un héritier présomptif, indiquer le nom du défunt. S'il est impossible de déterminer le montant à recevoir, inscrire "indéterminé". S'il est possible d'établir la valeur estimative du montant, inscrire ledit montant.

n) **Autres biens:** Peut comprendre des actifs comme des véhicules automobiles, des REER, des brevets, des marques de commerce, des titres de copropriété. Inscrire la valeur estimative réalisable. Pour en connaître davantage sur chacun des biens, consulter le paragraphe pertinent du bilan d'un failli non-commerçant

PASSIF

1. **Créanciers non garantis**: Inscrire toutes les dettes non garanties et, dans le cas de créanciers privilégiés ou garantis, la partie non garantie des sommes qui leur sont dues.

2. **Créanciers garantis** Seule la partie garantie des dettes doit figurer dans cette colonne. Lorsque la valeur de la propriété grevée d'une sûreté réelle est inférieure au passif total, l'excédent de la dette doit être déclaré comme non garanti.*

3. **Passif des effets ou billets endossés**: Indiquer le montant devant porter dividende.*

4. **Créanciers privilégiés**: La partie privilégiée des dettes doit figurer sous cette rubrique. Lorsque le débiteur ne peut déterminer si une somme est ou pourrait être due au créancier et qu'il veut inscrire ce dernier (p. ex. Revenu Canada) sur la liste des créanciers privilégiés,aucun montant ne doit être indiqué. Lorsqu'il y a possibilité d'une fiducie présumée, le montant pouvant être réclamé contre l'actif devrait apparaître sous cette rubrique.

5. **Dettes éventuelles ou non liquidées**: Expliquer la nature et fournir le montant de la dette réclamée ainsi que la dette pouvant être réclamée contre l'actif pour fin de dividende. Faire la même chose pour les garanties. Si le débiteur a consenti une garantie ou un endossement en faveur d'un tiers, la nature de cette garantie ou de l'endossement doit être indiquée.*

* Les détails et la nature des dettes doivent apparaître sur les annexes appropriées.

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Appendix "A"

Assets and liabilities of the debtor are to be shown in the manner indicated under the individual captions:

STATEMENT OF AFFAIRS OF A NON-BUSINESS BANKRUPT
(Form 74A)

A S S E T S

1. **Cash on hand**: Moneys turned over to the trustee by the debtor at the time of the assignment is to be shown (on hand or in the bank).

2. **Furniture**. Where there is a provincial exemption, the amount of such exemption should be shown under "description". Any part-interest of the debtor in the property should be indicated. The debtor's estimated realizable dollar value of the asset is to be shown in the dollar column.

3. **Personal effects** (may include jewellery, collections, works of art, fur coats, cameras, etc...): Where there is a provincial exemption, the amount of such exemption should be shown under "description". Any part-interest of the debtor in the property should be indicated. The debtor's estimated realizable dollar value of the asset is to be shown in the dollar column.

4. **C.S.V. of insurance policies**: The life insurance policies should be examined. The C.S.V. should be shown with "exemption" if preferential beneficiary or where the estate is not the beneficiary.

5. **Stocks, bonds**: (also includes fully paid or subscribed CSB): All securities and negotiable instruments, even if deemed to be without any value, should be seized by trustee. The net realizable value of the various stocks is to be shown with an appropriate description

6. **Real estate**: Indicate the municipal address; if sole owner, part-owner or joint tenant, and if partly or fully encumbered. For land, a short legal description instead of the municipal address could suffice. The value to be shown is the realizable value of the property.

   Should the real property or other property be under litigation it is still to be shown as an asset with the off-setting encumbrance on the liability side, regardless of the interest or equity of the debtor where the debtor is still the registered owner. Where the proceedings are entirely executed and neither the debtor nor the trustee have any recourse to retake possession of the asset, the property is not to be shown as an asset. As to the related lien, only the eventual shortfall on the disposal, if applicable, is to be shown. Where there is a provincial exemption, the amount of such exemption should be shown under "description".

7. **Motorized vehicles**: Indicate the year, model and serial number and if partly or fully encumbered. Reference to a recognized value publication (black book) to determine the value of automobiles would be acceptable. The value to be shown is the estimated realizable value.

8. **Recreational equipment**: (includes campers, trailers, boats, hunting equipment, etc...) Indicate the full description, year, model and serial number. The value to be shown is the estimated realizable value.

9. **Estimated tax refund** Refers to the refund receivable as a result of the previous year's tax return for which the refund has not yet been received as of the date of the assignment. Where a reasonable estimate has been made of the pre-bankruptcy tax refund, it can also be included but must be so identified.

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10. **Other assets**: Includes all other assets not shown above such as accounts receivable, R.R.S.P., amounts receivable as a result of litigation, reversionary or other interests under wills, or interest of the debtor in any transaction. The value to be shown is the estimated realizable value.

LIABILITIES

1. **Unsecured**: All unsecured debts, including the unsecured portion of debts owing to preferred and secured creditors.

2. **Secured creditors**. Only the secured portion of the debts is to be shown in this column. Where the value of the property under lien is less than the total liability, the excess portion of the debt is to be shown as unsecured. The particulars of the security on the encumbered assets is also to be shown at the bottom of appendix A.

3. **Preferred creditors**: Preferred portion of debts are to be shown in this column. Where the debtor cannot ascertain if an amount is or could be owed to the creditor but wants to include the said creditor (i.e. Revenue Canada), no dollar amount is to be shown. Where a deemed trust liability may exist, the amount expected to rank against the estate is to be shown therein.

4. **Contingent and Unliquidated**: An explanation of the nature and amount of the claim with the amount of proven claims estimated to rank for a dividend is to be provided. Similar treatment is to be given to guarantees. Where the debtor has given a third party guarantee or endorsement, the nature of the guarantee or endorsement is to be explained.

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials
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Appendix "B"

STATEMENT OF AFFAIRS - BUSINESS
(Form 74)

ASSETS

(a) **Stock-in-trade**: Indicate the fair market value. Fair market value on the Statement of Affairs is interpreted as the best estimate by the debtor of the forced sale value of the merchandise. Any encumbrances should be disclosed.

(b) **Trade fixtures**: Same as (a) above. Where these assets are immovable by location and there is no realizable value, a notation to this effect should appear on the pertinent schedule or on the front page of the Statement of Affairs.

(c) **Book debts**: The total amount of receivables and the amount to produce according to the best estimate of the debtor is to be shown. Particular attention is also to be given to any right of set-off so as not to distort the amount to be realized

(d) **Bill of exchange**: Provide the detail thereof on the schedule attached to the Statement of Affairs. The estimated amount expected to be realized is to be shown.

e) **Cash in bank**: Amount of money in the bank account(s) of the debtor to be turned over to the trustee

(f) **Cash on hand**. Amount of money remitted by the debtor to the trustee in the form of a deposit (i.e. cash, credit cards slips, undeposited cheques).

(g) **Livestock**: Same as (a) above.

(h) **Machinery, equipment and plant**: Same as (a) above. See also item (l) immediately below regarding encumbrances

(i) **Real estate**: The value to be shown is the estimated realizable value. Also indicate if sole owner, part-owner or joint tenant, and if partly or fully encumbered. On the pertinent schedule, indicate the municipal address; (for land, a short legal form description instead of the municipal address will also suffice) and all required details

Should the real property or other property be under litigation, it is still to be shown as an asset with the off-setting encumbrance on the liability side, regardless of the interest or equity of the debtor where the debtor is still the owner. Where the proceedings are entirely executed and neither the debtor nor the trustee have any recourse to retake possession of the asset, the property is not to be shown as an asset. As to the related lien, only the eventual shortfall on the disposal, if applicable, is to be shown.

(j) **Estimated realizable value of securities in hand of secured creditors**: A full description and location of the securities is to be provided on an appendix to the Statement of Affairs

(k) **Furniture**: Same as (a) above. Where the debtor is an individual and there is a provincial exemption, the amount of such exemption will be shown on the pertinent schedule. Where the debtor has only a part-interest in the property, it should be indicated. The realizable dollar value estimated by the debtor is to be shown in the dollar column.

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(l) **Life insurance policies:** The cash surrender value is to be shown. Where the estate is not the beneficiary, it should be indicated and a realizable value of "nil" is to be shown.

(m) **Reversionary or other interests under wills.** Where beneficiary or remainder-man of a deceased person, indicate the name of the deceased. If the amount to be received cannot be determined, indicate "indeterminate". If an amount can be estimated, indicate the approximate amount involved.

(n) **Other property:** Could include assets such as motor vehicles, R.R.S.P., patents, trade marks, joint interest in property. The estimated realizable value is to be shown. For details as to individual elements, also refer to the Statement of Affairs of a Non-Business Bankrupt where applicable.

LIABILITIES

1. **Unsecured:** All unsecured debts, including the unsecured portion of debts owing to preferred and secured creditors.

2 **Secured creditors:** Secured portion of debts to be shown in this category. Where the value of the property under lien is less than the total liability, the excess portion of the debt is to be shown as unsecured. The particulars of the security on the encumbered assets is also to be shown.*

3 **Liabilities on bills or notes endorsed...:** The amount expected to rank for dividend is to be shown.*

4 **Preferred creditors:** Preferred portion of debts are to be shown in this category.* Where the debtor cannot ascertain if an amount is or could be owed to the creditor but wants to include the said creditor (i.e. Revenue Canada), no dollar amount is to be shown. Where a deemed trust liability may exist, the amount expected to rank against the estate is to be shown therein.

5 **Contingent and Unliquidated:** An explanation of the nature and amount of the claim with the amount of proven claims estimated to rank for a dividend is to be provided. Similar treatment is to be given to guarantees. Where the debtor has given a third party guarantee or endorsement, the nature of the guarantee or endorsement is to be explained.

* The details and the nature of the debts are to be shown on the pertinent schedules.

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SB Directive: 8R8, Form 79, Statement of Affairs (Non-Business Bankruptcy/Proposal)
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
Bureau du surintendant des faillites Canada

An Agency of Industry Canada
Un organisme d'Industrie Canada

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155 Queen Street
4th Floor
Ottawa, Ontario
K1A 0H5
http://osb.ic.gc.ca

Place Hériage
155, rue Queen
4e étage
Ottawa (Ontario)
K1A 0H5
http://bsf.ic.gc.ca

Date: November 19, 2009

To: OSB Staff, Trustees and Registrars

Subject: The *Bankruptcy and Insolvency Act* Forms - Form 79, *Statement of Affairs (Non-Business Bankruptcy/Proposal)*, and Estate Information Summary

The Office of the Superintendent of Bankruptcy (OSB) has amended Form 79, *Statement of Affairs (Non-Business Bankruptcy/Proposal)*, which came into force on September 18, 2009. The OSB has removed the requirement to indicate the highest level of education completed by the bankrupt/debtor from Part A of the form under the section titled "Information Relating to the Affairs of the Bankrupt/Debtor."

The OSB has amended the *Estate Information Summary* (EIS) form to include under Part 1 (for statistical purposes only) a question regarding the bankrupt/debtor's highest level of education.

Coming into Force

The revised Form 79 and EIS form come into force on November 19, 2009, and apply to persons to which the September 18, 2009, amendments apply.

Date : Le 19 novembre 2009

À : Employés du BSF, syndics et registraires

Objet : Formulaires de la *Loi sur la faillite et l'insolvabilité* – Formulaire 79, *Bilan (Faillite ou proposition non commerciale)*, et Fiche de renseignement sur l'actif

Le Bureau du surintendant des faillites (BSF) a modifié le Formulaire 79, *Bilan (Faillite ou proposition non commerciale)*, entré en vigueur le 18 septembre 2009. Le BSF a supprimé l'obligation d'indiquer le niveau d'études le plus élevé terminé par le failli ou le débiteur, qui se trouvait à la partie A de la section intitulée « Renseignements relatifs aux affaires du failli ou du débiteur ».

Le BSF a modifié le formulaire «Fiche de renseignement sur l'actif» (FRA) en ajoutant à la partie I (à des fins statistiques seulement) une question concernant le niveau d'études le plus élevé terminé par le failli ou le débiteur.

Entrée en vigueur

La version modifiée du formulaire 79 et de la FRA entrent en vigueur le 19 novembre 2009 et s'appliquent aux personnes visées par les modifications entrées en vigueur le 18 septembre 2009.

Canada

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Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

Demandes de renseignements

Pour obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

p.j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 8R8

THE *BANKRUPTCY AND INSOLVENCY ACT* FORMS

Issued: November 19, 2009

(This Directive amends Directive No. 8R7 issued on September 15, 2009)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"Forms" means forms under the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4) *(c)* and *(e)* of the Act for the purpose of prescribing amendments to Form 79, *Statement of Affairs (Non-Business Bankruptcy/Proposal)*.

FORMULAIRES DE LA *LOI SUR LA FAILLITE ET L'INSOLVABILITÉ*

Émis : Le 19 novembre 2009

(La présente instruction modifie l'instruction n° 8R7 émise le 15 septembre 2009)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Formulaires » s'entend des formulaires émis en vertu de la *Loi sur la faillite et l'insolvabilité*;

« Loi » désigne la *Loi sur la faillite et l'insolvabilité*;

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction, qui est émise en vertu de l'autorité conférée par les alinéas 5(4)*c*) et *e*) de la Loi, a pour objet de prescrire des modifications au formulaire 79, *Bilan (Faillite ou proposition non commerciale)*.

Canada

OSB • BSF Protecting the integrity of the insolvency system / Protéger l'intégrité du système d'insolvabilité

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Summary

3. This Directive amends Form 79 and removes the requirement to indicate the highest level of education completed by the bankrupt/debtor from Part A of the form under the section titled "Information Relating to the Affairs of the Bankrupt/Debtor."

Coming into Force

4. The revised Form 79 comes into force on November 19, 2009 and applies to persons to which the September 18, 2009, amendments apply.

Enquiries

5. For any questions pertaining to this Directive, please contact your local OSB office.

Résumé

3 La présente instruction modifie le formulaire 79 et supprime l'obligation d'indiquer le niveau d'études le plus élevé terminé par le failli ou le débiteur, qui se trouvait à la partie A de la section intitulée « Renseignements relatifs aux affaires du failli ou du débiteur ».

Entrée en vigueur

4. Le formulaire 79 révisé entre en vigueur le 19 novembre 2009 et s'applique aux personnes visées par les modifications entrées en vigueur le 18 septembre 2009.

Demandes de renseignements

5. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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FORM 79

Statement of Affairs (Non-Business Bankruptcy Proposal)
(Subsection 49(2) and Paragraph 158(d) of the Act Subsections 50(2) and 62(1) and Paragraph 66.13(2)(d) of the Act)

(Title Form 1)

☐ Original ☐ Amended

ASSETS							
Type of Asset		Description *(provide details)*	Estimated Dollar Value	Exempt Property		Secured Amount / Liens	Estimated Net Realizable Dollar Value*
				Yes	No		
1. Cash on hand							
2. Furniture							
3. Personal effects							
4. Cash-surrender value of life insurance policies, RRSPs, etc.							
5. Securities							
6. Real property or immovables	House						
	Cottage						
	Land						
7. Motor vehicle	Automobile						
	Motorcycle						
	Snowmobile						
	Other						
8. Recreational equipment							
9. Estimated tax refund							
10. Other assets							
TOTAL							

Date

Bankrupt Debtor

* For a summary administration, indicate value net of the direct realization costs referred to in Rule 128(1) of the *Bankruptcy and Insolvency General Rules*

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FORM 79 -- *Continued*

LIABILITIES						
			Liabilities type code (LTC) 1 Real property or immovable mortgage or hypothec 2 Bank loans (except real property mortgage) 3 Finance company loans 4 Credit cards - bank/trust company issuers 5 Credit cards - other issuers 6 Taxes - federal/provincial/municipal 7 Student loans 8 Loans from individuals 9 Other			
Creditor	Address *(including postal code)*	Account No.	Amount of Debt			Enter LTC
			Unsecured	Secured	Preferred	
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						
20						
Pledged Assets: *(provide details)*	TOTAL	Unsecured				
	TOTAL	Secured				
	TOTAL	Preferred				
					TOTAL	

Date

Bankrupt/Debtor

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FORM 79 -- *Continued*

INFORMATION RELATING TO THE AFFAIRS OF THE BANKRUPT/DEBTOR				
A. PERSONAL DATA				
1. Family name:	Given names: Gender: F ☐ M ☐		Date of birth: ____/____/____ MM/DD/YYYY	
2. Also known as:				
3. Complete address, including postal code:				
4. Marital status: *(specify month and year of event if it occurred in the last five years)*	____ ____ Married		____ ____ Single	
	____ ____ Widowed		____ ____ Separated	
	____ ____ Divorced		____ ____ Common-law partner	
5. Full name of spouse or common-law partner:				
6. Name of present employer:			Occupation (bankrupt/debtor):	
7A. Number of persons in household family unit, including bankrupt/debtor:				
7B. Number of persons 17 years of age or younger:				
8. Have you operated a business within the last five years?	Yes	No	(If *yes*) Name, type and period of operation:	
B. WITHIN THE 12 MONTHS PRIOR TO THE DATE OF THE INITIAL BANKRUPTCY EVENT, HAVE YOU, EITHER IN CANADA OR ELSEWHERE:				
9A. Sold or disposed of any of your property?			Yes	No
9B. Made payments in excess of the regular payments to creditors?			Yes	No
9C. Had any property seized by a creditor?			Yes	No
C. WITHIN THE FIVE YEARS PRIOR TO THE DATE OF THE INITIAL BANKRUPTCY EVENT, WHILE YOU KNEW YOURSELF TO BE INSOLVENT, HAVE YOU, EITHER IN CANADA OR ELSEWHERE:				
10A. Sold or disposed of any property?			Yes	No
10B. Made any gifts to relatives or others in excess of $500?			Yes	No

Date

Bankrupt Debtor

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FORM 79 -- *Concluded*

D. BUDGET INFORMATION: *Attach Form 65 to this form*
11A. Have you ever made a proposal under the *Bankruptcy and Insolvency Act*? Yes ___ No ___
11B. Have you been bankrupt before in Canada? Yes ___ No ___
If you answered *yes*, provide the following details for all insolvency proceedings: (a) filing date and location of the proceedings; (b) name of trustee or administrator; (c) if applicable, whether the proposal was successful; (d) date on which Certificate of Full Performance or Discharge was obtained.
12. Do you expect to receive any sums of money that are not related to your normal income, or any other property within the next 12 months? Yes ___ No ___
13. If you answered *yes* to any of questions 9, 10 or 12, provide details:
14. Give reasons for your financial difficulties:

I, ____ *(name)* ____ of *(city, town or village)*, in the Province of _____, do swear (*or* solemnly declare) that this statement is, to the best of my knowledge, a full, true and complete statement of my affairs on *(date)* and fully discloses all property and transactions of every description that is or was in my possession or that may devolve on me in accordance with the *Bankruptcy and Insolvency Act*.

SWORN (*or* SOLEMNLY DECLARED)
before me at *(city, town or village)*,
in the Province of _____,
on *(date)*

_____ _____
Commissioner of Oaths Bankrupt Debtor
for the Province of _____

NOTE If a copy of this form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 11, must be added at the end of the document.

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FORMULAIRE 79

Bilan (Faillite ou proposition non commerciale)
(paragraphe 49(2) et alinéa 158*d*) ou paragraphes 50(2) et 62(1) et alinéa 66.13(2)*b*) de la Loi)

(*Intitulé Formulaire 1*)

☐ Original ☐ Modifié

ACTIFS						
Genre d'actif	Description *(veuillez donner des détails)*	Valeur estimée en dollars	Biens exemptés		Montant garanti / privilège	Valeur estimée nette en dollars*
			Oui	Non		
1. Espèces en main						
2. Ameublement						
3. Effets personnels						
4. Valeur de rachat de la police d'assurance-vie, des REER, etc.						
5. Valeurs mobilières						
6. Immeubles et biens réels — Maison						
Chalet						
Terrain						
7. Véhicules à moteur — Automobile						
Motocyclette						
Motoneige						
Autre						
8. Équipement de loisirs						
9. Remboursement d'impôt estimé						
10. Autres éléments d'actif						
TOTAL						

_____
Date

_____
Failli ou débiteur

* Pour une administration sommaire, veuillez indiquer la valeur nette après déduction des coûts directement liés à la réalisation prévus à la règle 128(1) des *Règles générales en matière de faillite et d'insolvabilité*.

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FORMULAIRE 79 -- *Suite*

PASSIF						
			Code du genre de passif (CGP) 1 Hypothèques sur les biens immeubles 2 Prêts bancaires (excepté hypothèques sur les biens immeubles) 3 Prêts des sociétés de crédit 4 Cartes de crédit émises par les banques et les sociétés de fiducie 5 Autres émetteurs de cartes de crédit 6 Impôts fédéral/provincial; taxes municipales 7 Prêts étudiants 8 Prêts de particuliers 9 Autre			
Créancier	Adresse *(incluant le code postal)*	N° de compte	Montant de la dette			Entrer le CGP
			Non garantie	Garantie	Privilégiée	
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						
20						
Éléments d'actif en gage : *(veuillez donner des détails)*	TOTAL	Non garantie				
	TOTAL	Garantie				
	TOTAL	Privilégiée				
					TOTAL	

Date

Failli ou débiteur

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FORMULAIRE 79 -- *Suite*

RENSEIGNEMENTS RELATIFS AUX AFFAIRES DU FAILLI OU DU DÉBITEUR				
A. RENSEIGNEMENTS PERSONNELS :				
1. Nom de famille :	Prénom(s) : Sexe : F ☐ H ☐		Né(e) le : ___/___/___ JJ/MM/AAAA	
2. Pseudonyme(s) :				
3. Adresse complète, y compris le code postal :				
4. État civil : *(précisez le mois et l'année si l'événement est survenu dans les cinq dernières années)*	____ ____ Marié(e)		____ ____ Célibataire	
	____ ____ Veuf (veuve)		____ ____ Séparé(e)	
	____ ____ Divorcé(e)		____ ____ Conjoint(e) de fait	
5. Nom complet de l'époux(se) ou du conjoint(e) de fait :				
6. Nom du présent employeur :			Occupation (failli ou débiteur) :	
7A. Nombre de personnes dans l'unité familiale, incluant le failli ou le débiteur :				
7B. Nombre de personnes âgées de 17 ans et moins :				
8. Avez-vous exploité une entreprise au cours des cinq dernières années?	Oui	Non	(Si *oui*) Nom, type d'entreprise et période d'exploitation :	
B. AU COURS DES 12 MOIS PRÉCÉDANT L'OUVERTURE DE LA FAILLITE, AVEZ-VOUS, AU CANADA OU AILLEURS :				
9A. Vendu ou disposé de quelques-uns de vos biens?			Oui	Non
9B. Fait des paiements en plus des remises ordinaires à vos créanciers?			Oui	Non
9C. Subi des saisies de biens par vos créanciers?			Oui	Non
C. AU COURS DES CINQ ANNÉES PRÉCÉDANT L'OUVERTURE DE LA FAILLITE ET PENDANT QUE VOUS VOUS SAVIEZ INSOLVABLE, AVEZ-VOUS, AU CANADA OU AILLEURS :				
10A. Vendu ou disposé de quelques-uns de vos biens?			Oui	Non
10B. Fait des dons de plus de 500 $ à des parents ou à d'autres personnes?			Oui	Non

_____
Date

_____
Failli ou débiteur

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FORMULAIRE 79 – *Fin*

D. RENSEIGNEMENTS BUDGÉTAIRES : *Veuillez joindre le Formulaire 65 au présent formulaire*.
11A. Avez-vous déjà fait une proposition en vertu de la *Loi sur la faillite et l'insolvabilité*? Oui_____ Non_____
11B. Avez-vous déjà été en faillite au Canada? Oui_____ Non_____
Si vous avez répondu par l'affirmative, veuillez fournir les détails suivants pour toute procédure d'insolvabilité : a) date et lieu du dépôt des procédures; b) nom du syndic ou de l'administrateur; c) si applicable, indiquer si la proposition a été exécutée intégralement; d) date à laquelle le débiteur a obtenu le Certificat d'exécution intégrale ou date de sa libération. _____ _____ _____
12. Vous attendez-vous à recevoir des sommes d'argent en dehors du cours normal des affaires ou d'autres biens au cours des 12 prochains mois? Oui_____ Non_____
13. Si vous avez répondu par l'affirmative aux questions 9, 10 ou 12, veuillez donner des détails : _____ _____ _____
14. Donnez les raisons de vos difficultés financières : _____ _____ _____

Je, _____*(nom)*_____, de _____*(ville ou village)*_____, dans la province de _____, étant dûment assermenté(e) (ou ayant déclaré solennellement), déclare que le bilan est, au meilleur de ma connaissance, un relevé complet, véridique et entier de mes affaires en ce _____*(date)*_____, et indique au complet tous mes biens et transactions de quelque nature qu'ils soient, en ma possession et dévolus, tels que définis par la *Loi sur la faillite et l'insolvabilité*.

ASSERMENTÉ (ou DÉCLARÉ SOLENNELLEMENT)
devant moi à _____*(ville ou village)*_____
dans la province de _____
ce _____*(date)*_____.

_____
Commissaire à l'assermentation
pour la province de _____

_____
Failli ou débiteur

REMARQUE : Lorsque cette copie du présent formulaire est envoyée par voie électronique, par des moyens tels que le courriel, le numéro et les coordonnées de l'expéditeur, tel que prévu au formulaire 1, doivent être inscrits à la fin du document.

SB Directive: 16, Third Party Deposits and Guarantees

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An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 16

THIRD-PARTY DEPOSITS AND GUARANTEES

Issued: August 14, 2009

(Supersedes Directive No. 5R issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this Directive is to codify the basic minimum standards of practice for

DÉPÔTS ET GARANTIES DE TIERCES PERSONNES

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 5R sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction vise à codifier les normes minimales de pratique des syndics

Canada

OSB • BSF Protecting the integrity of the insolvency system / Protéger l'intégrité du système d'insolvabilité

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trustees in the treatment of third-party deposits and guarantees.

4. This Directive does not apply to those situations involving the trustee acting in a proposal under Part III of the Act and/or as interim receiver pursuant to section 47 of the Act.

Disclosure

5. Third-party deposits and guarantees shall be fully disclosed in writing

(a) to give the creditors, the inspectors, the Superintendent and the taxing officers a complete financial picture of the entire insolvency proceedings and to conform with the requirements of subsection 152(1) of the Act;

(b) to maintain intact the principle that the trustee is paid from the estate and ensure the trustee's independence and integrity;

(c) to reinforce the principles of openness, reliability and control, which are essential foundations of a properly functioning bankruptcy process; and

(d) to ensure that advances on remuneration, in any form, continue to be subjected to the discipline and control mechanisms embodied in the Act.

relativement au traitement des dépôts et garanties de tierces personnes.

4. La présente instruction ne s'applique pas lorsque le syndic agit dans une proposition en vertu de la partie III de la Loi ou comme séquestre intérimaire au terme de l'article 47 de la Loi.

Divulgation

5. Les dépôts et garanties de tierces personnes doivent faire l'objet d'une divulgation écrite complète afin :

a) de donner aux créanciers, aux inspecteurs, au surintendant et aux officiers taxateurs un tableau financier complet et fidèle de l'administration entière et de satisfaire aux exigences du paragraphe 152(1) de la Loi;

b) de préserver le principe selon lequel le syndic est payé à même l'actif et d'assurer l'intégrité et l'indépendance du syndic;

c) de renforcer les concepts de divulgation, de fiabilité et de contrôle, qui sont les fondements d'un système de faillite efficace; et

d) d'assurer que les avances sur rémunération de syndic demeurent dans tous les cas assujetties aux mécanismes de discipline et de contrôle prévus par la Loi.

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6. Subject to section 7, trustees shall disclose, in reporting at the first meeting of creditors and in the Estate Information Summary (EIS), the existence of and the name of the depositor or guarantor regarding any direct or indirect deposit or guarantee of fees by a third party.

7. In unusual or exceptional circumstances where the disclosure of the name of the depositor or guarantor provides undue hardship, embarrassment or would otherwise result in the third-party deposit or guarantee not being given, the trustee may withhold disclosure at the first meeting of creditors of the name, but shall not withhold this disclosure from the Superintendent.

8. The full disclosure and the proper treatment of these deposits or guarantees is consistent with the principles embodied in section 61 of the Rules and subsection 152(1) of the Act attesting that there were no other direct or indirect considerations paid or payable to the trustee with regard to the administration of the estate.

9. (1) Third-party deposits and guarantees are not estate funds.

(2) If third-party deposits are received in an estate, the trustee's file shall contain satisfactory written evidence of third party deposits, whether direct or indirect.

(3) If no such written evidence exists in the trustee's file, these deposits will be considered, by the Superintendent, to be estate funds like any other deposits and will be treated accordingly.

10. Subject to section 11, the disposition of

6. Sous réserve de l'article 7, les syndics doivent divulguer dans leur rapport lors de la première assemblée des créanciers et dans la fiche de renseignements sur l'actif (FRA), l'existence et le nom du déposant ou du garant de tout dépôt ou garantie pour les frais de l'administration par une tierce personne.

7. Dans les circonstances exceptionnelles où la divulgation du nom du déposant ou du garant pourrait engendrer des difficultés excessives, susciter de l'embarras ou empêcher le versement du dépôt ou de la garantie, le syndic peut s'abstenir de divulguer le nom à la première assemblée des créanciers mais ne peut refuser de le divulguer au surintendant.

8. L'entière divulgation et le traitement approprié de ces dépôts et garanties vont de pair avec les principes de l'article 61 des Règles et du paragraphe 152(1) de la Loi attestant qu'il n'y a aucune autre considération directe ou indirecte payée ou payable au syndic relativement à l'administration de l'actif.

9. (1) Les dépôts et garanties de tierces personnes ne sont pas des biens de l'actif.

(2) Lorsque des dépôts de tierces personnes sont versés à l'actif, le syndic doit avoir au dossier une preuve écrite concluante de ces dépôts, qu'ils soient directs ou indirects.

(3) Lorsqu'il n'y a aucune preuve écrite au dossier du syndic, ces dépôts seront considérés par le surintendant comme des biens de l'actif, à l'instar de tout autre dépôt, et seront traités en conséquence.

10. Sous réserve de l'article 11, la disposition

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the deposit or guarantee in a summary or ordinary administration shall also be shown in the Statement of Receipts and Disbursements as follows:

(a) as a receipt to the extent of the amount required to satisfy the trustee's taxed or deemed taxed fees and costs; and

(b) as a footnote, in the case where a deposit or a guarantee has not been called upon and is not expected to be called upon

11. The trustee may, where the Court requires or accepts, show third-party deposits received as a footnote in the Statement of Receipts and Disbursements instead of as a receipt in the said Statement.

Written Agreement - Depositor

12. The agreement in writing with the depositor shall include, as a minimum:

(a) the amount or the method of calculation of remuneration;

(b) a declaration by the depositor that the funds involved in the deposit are truly third-party funds and do not directly or indirectly, in whole or in part, come from assets that would otherwise be estate assets;

(c) a declaration that the deposit is

éventuelle du dépôt ou de la garantie dans une administration sommaire ou ordinaire doit être inscrite comme suit à l'état des recettes et des débours :

a) comme recette, jusqu'à concurrence du montant nécessaire pour combler les honoraires et dépenses du syndic dûment taxés ou réputés taxés; et

b) comme annotation à l'état des recettes et des débours, lorsque le dépôt ou la garantie n'a pas été et ne sera pas nécessaire.

11. Le syndic peut, lorsque le tribunal le demande ou le permet, inscrire les dépôts de tierces personnes reçus comme annotation à l'état des recettes et des débours au lieu de les inscrire comme recettes

Entente écrite avec le déposant

12. L'entente écrite avec le déposant doit inclure comme minimum les renseignements ci-après :

a) le montant ou le mode de calcul de la rémunération garantie;

b) une déclaration du déposant selon laquelle les fonds en question sont véritablement des fonds provenant de tierces personnes et ne proviennent pas directement ou indirectement, en partie ou en totalité, d'actifs qui autrement seraient des biens du failli;

c) une déclaration selon laquelle le

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Written Agreement - Guarantor

14. An arrangement for a third-party guarantee shall indicate in writing that its purpose is to indemnify the trustee for the trustee's fees and disbursements in a voluntary assignment or application for a bankruptcy order.

15. The written agreement with the guarantor referred to above shall include, as a minimum:

(a) the existence of the guarantee;

(b) a declaration that the guarantee is given to indemnify the costs of the trustee's administration; and

(c) the name and address of the guarantor.

16. Appendix B or a form to a like effect will satisfy the requirements concerning guarantees.

Banking and Accounting Arrangements

17. Funds received as indemnification shall be held:

(a) in a separate trust account clearly identified for that purpose only, or

(b) in a separate trust account containing the aggregate of all these funds held, provided the accounting records in respect of the account clearly allocate the

Entente écrite avec le garant

14. Les ententes relatives aux garanties de tierces personnes doivent être faites par écrit et indiquer qu'il s'agit d'une indemnisation du syndic pour ses honoraires et débours dans une cession volontaire ou une requête en vue d'une ordonnance de faillite.

15. L'entente écrite avec le garant en question doit inclure comme minimum les renseignements ci-après :

a) une déclaration relative à l'existence de la garantie;

b) une déclaration selon laquelle la garantie est donnée afin d'indemniser le syndic pour ses coûts d'administration; et

c) le nom et l'adresse du garant.

16. L'annexe B ou une formule de même effet satisfait aux exigences relativement aux garanties.

Arrangements bancaires et comptables

17. Les fonds reçus à titre d'indemnisation doivent être déposés dans :

a) un compte en fidéicommis (ou en fiducie) clairement identifié à ces fins seulement; ou

b) un compte en fidéicommis (ou en fiducie) comprenant l'ensemble de ces fonds, pourvu que le système comptable pour ce compte précise l'appartenance de

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appropriate funds to each estate and fully document deposits and withdrawals. The individual estate files shall also contain references to any funds deposited in that account to facilitate audit by the Superintendent.

Disposition of Deposits Received

18. Funds received under a third-party deposit or a guarantee agreement shall be disposed of, in whole or in part, as follows:

(a) to the estate trust account, including the interest earned, in those cases where the funds are required to cover the taxed costs of administration, including those cases where the trustee wishes to apply for an advance on the trustee's remuneration;

(b) to the third-party depositor, including interest or as may otherwise be stipulated in the agreement, where the funds are not required to cover the taxed costs of administration; or

(c) where (a) or (b) above are not fully complied with, the details of such arrangements shall be explained by way of a footnote on the Statement of Receipts and Disbursements.

Coming into Force

19. This Directive comes into force on September 18, 2009.

ces fonds. Le dossier de l'actif devra également contenir les renseignements indiquant que les fonds sont déposés au compte spécial pour en faciliter la vérification par le surintendant.

Disposition des dépôts reçus

18. Les montants reçus selon une entente de dépôt ou de garantie de tierces personnes doivent être traités, en partie ou en totalité, de la manière suivante :

a) versés au compte de l'actif, y compris les intérêts gagnés, lorsque les fonds sont nécessaires pour couvrir les coûts taxés d'administration et lorsqu'il y a demande par le syndic d'une avance sur sa rémunération;

b) versés au déposant, y compris les intérêts ou selon l'entente si autrement convenu, lorsque les fonds ne sont pas nécessaires pour couvrir les coûts taxés d'administration; ou

c) lorsque *a)* ou *b)* ci-dessus n'est pas entièrement observé, le détail de tels arrangements doit être expliqué au moyen d'une annotation à l'état des recettes et des débours.

Entrée en vigueur

19. La présente instruction entre en vigueur le 18 septembre 2009.

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Enquiries

20. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

20. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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APPENDIX A

THIRD PARTY DEPOSIT AGREEMENT

In the matter of the bankruptcy of _____ .

This agreement is made between

_____, hereafter referred to as the depositor, and

_____ _____, trustee to the above estate.

1. In consideration of the trustee's acceptance to act as trustee in the above estate, the depositor deposits with the said trustee an amount of $_____ to be held in trust.

2. The amount deposited is to guarantee the costs of administration of the trustee to a maximum of the taxed costs should the realization from other sources be less than the taxed costs or any qualification that may be explained on the Statement of Receipts and Disbursements by way of a footnote

3. The amount hereby remitted is third-party funds and did not, directly or indirectly, in whole or in part, come from assets that would otherwise be estate assets.

4. The trustee will provide the depositor with a copy of the Statement of Receipts and Disbursements, when submitted to the Superintendent for comments, and then with a notice of the proposed taxation. If the depositor does not attend at the taxation, the trustee will provide the depositor with a taxed copy of the Statement of Receipts and Disbursements when available.

5. The trustee undertakes to deposit and maintain these funds in a separate bank trust account for this purpose or in the estate bank account

6. Withdrawal of these funds by the trustee, prior to the completion of the administration, will be limited to the amounts authorized by the *Bankruptcy and Insolvency Act*.

7. Upon completing the full administration of the estate, any balance of the deposit not required to pay the trustee's fees and disbursements will be immediately returned to the depositor.

8. The primary responsibility for the payment of the trustee's fees and disbursements lies with the estate and the deposit is only an accessory covering any unpaid portion of the primary obligation

9.Other conditions:_____

_____	_____	_____
Depositor	Trustee	Date
_____		_____
Address of Depositor		Telephone Number
_____		_____
Fax Number		Email Address

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ANNEXE A

ENTENTE DE DÉPÔT DE TIERCES PERSONNES

Dans l'affaire de la faillite de : _____

La présente entente intervient entre :
_____, ci-après appelé le déposant, et
_____, syndic au dossier.

1. En raison de l'engagement du syndic d'agir dans le dossier susmentionné, le déposant remet au syndic un montant de _____$ à être détenu par lui en fidéicommis.

2. Ce dépôt servira à garantir les frais d'administration du syndic, jusqu'à concurrence des frais d'administration taxés advenant que le produit de la réalisation des actifs du failli soit inférieur aux frais d'administration taxés ou selon l'annotation à l'état des recettes et des débours.

3. Les fonds remis sont véritablement des fonds provenant de tierces personnes et ne provenant pas, directement ou indirectement, en partie ou en totalité, d'actifs qui autrement seraient des biens de l'actif.

4. Le syndic fournira au déposant une copie de l'état des recettes et des débours, lorsque soumis au surintendant pour commentaires, et l'avisera ensuite de la date et de l'heure fixées pour la taxation. Lorsque le déposant ne se présente pas au moment de la taxation, le syndic lui fournira, en temps opportun, une copie taxée de l'état des recettes et des débours.

5. Le syndic s'engage à déposer et à conserver ces sommes d'argent dans un compte de banque distinct désigné à ces fins ou dans le compte de la faillite.

6. Le retrait de ces sommes d'argent par le syndic, avant la fin de l'administration, sera limité aux montants autorisés par la *Loi sur la faillite et l'insolvabilité*.

7. Lorsque l'administration du dossier sera entièrement terminée, le solde du dépôt non requis pour payer les honoraires et débours du syndic sera immédiatement retourné au déposant.

8. L'obligation de payer les honoraires et débours du syndic relève en premier lieu de l'actif de la faillite; le dépôt n'est qu'accessoire et ne couvre que la partie laissée impayée par l'actif.

9. Autres conditions : _____

_____	_____	_____
Déposant	Syndic	Date
_____		_____
Adresse du déposant		Numéro de téléphone
_____		_____
Numéro de télécopieur		Adresse électronique

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APPENDIX B

THIRD-PARTY GUARANTEE AGREEMENT

In the matter of the bankruptcy of _____ -

_____ , hereafter referred to as the guarantor, and

_____ ,
trustee,

hereby declare:

1. That in consideration for the trustee's acceptance to act in the above estate, the guarantor has agreed to guarantee the costs of administration of the trustee.

2. That the funds to support the guarantee will not, directly or indirectly, in whole or in part, come from assets that would otherwise be estate assets.

_____ _____ _____
Guarantor Trustee Date

_____ _____
Address of Guarantor Telephone Number

_____
Fax Number

_____
Email Address

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ANNEXE B

ENTENTE DE GARANTIE DE TIERCES PERSONNES

Dans l'affaire de la faillite de : _____ _____

_____, ci-après appelé le garant, et

_____, syndic au dossier,

déclarent par la présente :

1. qu'en retour de l'engagement du syndic d'agir dans le dossier susmentionné, le garant accepte de garantir les coûts d'administration du syndic;

2. que les fonds à l'appui de la garantie ne proviennent pas, directement ou indirectement, en partie ou en totalité, d'actifs qui autrement seraient des biens de l'actif.

_____	_____	_____
Garant	Syndic	Date
_____		_____
Adresse du garant		Numéro de téléphone
		_____
		Numéro de télécopieur
		_____
		Adresse électronique

Duties regarding returns - Sec. 22

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22. The trustee is not liable to make any return that the bankrupt was required to make more than one year prior to the commencement of the calendar year, or the fiscal year of the bankrupt where that is different from the calendar year, in which he became a bankrupt.
R.S., c. B-3, s. 12.

Trustee to permit inspection of records - Sec. 23
23. The trustee shall at all reasonable times permit any authorized person to inspect the books and papers of the bankrupt in order to prepare or verify returns that the bankrupt is by statute required to file.
R.S., c. B-3, s. 12.

Insuring property - Sec. 24
24. (1) The trustee shall forthwith temporarily insure and keep insured in his official name all the insurable property of the bankrupt, for such amount and against such hazards as he may deem advisable until the inspectors are appointed, whereupon the inspectors shall determine the amount for which and the hazards against which the bankrupt's property shall be insured by the trustee.

Losses payable to trustee - Sec. 24(2)
(2) All insurance covering property of the bankrupt in force at the date of the bankruptcy shall in the event of loss suffered, without any notice to the insurer or other action on the part of the trustee and notwithstanding any statute or rule of law or contract or provision to a contrary effect, become payable immediately to the trustee as if the name of the trustee were written in the policy or contract of insurance as that of the insured or as if no change of title or ownership had come about and the trustee were the insured.
R.S., c. B-3, s. 13.

Trust account - Sec. 25
25. (1) When acting under the authority of this Act, a trustee shall, without delay, deposit in a bank all funds received for an estate in a separate trust account for each estate.

Other deposit-taking institutions must be insured - Sec. 25(1.1)
(1.1) The trustee may deposit the funds in a deposit-taking institution, other than a bank as defined in section 2, only if deposits held by that institution are insured or guaranteed under a provincial or federal enactment that provides depositors with protection against the loss of funds on deposit with that institution.

Foreign funds - Sec. 25(1.2)
(1.2) If the funds are situated in a country other than Canada, the trustee may, if authorized by the Superintendent, deposit them in a financial institution in that country that is similar to a bank.

Permission needed for certain acts - Sec. 25(1.3)
(1.3) The trustee shall not withdraw any funds from the trust account of an estate without the permission in writing of the inspectors or, on application, the court, except for the payment of dividends and charges incidental to the administration of the estate.

Payment by cheque - Sec. 25(2)

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(2) All payments made by a trustee under subsection (1) shall be made by cheque drawn on the estate account or in such manner as is specified in directives of the Superintendent.

Not in private account - Sec. 25(3)
(3) The trustee shall not deposit any funds received by the trustee when acting under the authority of this Act in any banking account kept by the trustee for the trustee's personal use.
R.S., 1985, c. B-3, s. 25;
1992, c. 27, s. 10;
1997, c. 12, s. 19;
2005, c. 47, s. 20.

Books to be kept by trustee - Sec. 26
26. (1) The trustee shall keep proper books and records of the administration of each estate to which he is appointed, in which shall be entered a record of all moneys received or disbursed by him, a list of all creditors filing claims, the amount and disposition of those claims, a copy of all notices sent out, the original signed copy of all minutes, proceedings had, and resolutions passed at any meeting of creditors or inspectors, court orders and all such other matters or proceedings as may be necessary to give a complete account of his administration of the estate.

SB Directive: 17, Retention of Documents by the Trustee
(see below image pages)

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Bureau du surintendant des faillites Canada
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Directive / Instruction

N° 17

RETENTION OF DOCUMENTS BY THE TRUSTEE

Issued: August 14, 2009

(Supersedes Directive No. 7 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this directive is to specify (without limiting) the types of documents to

CONSERVATION DES DOCUMENTS PAR LE SYNDIC

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 7 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction a pour objet de préciser (sans toutefois limiter) les documents

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retain and the period of retention as provided in the Act and the Rules.

Types of Documents to Retain

Documents of the bankrupt

4. (1) The deeds, books, records and documents of the bankrupt referred to in subsection 16(3) of the Act are the documents generated by and attesting to the commercial and legal activities and operations of the debtor prior to the bankruptcy.

(2) If the bankruptcy involves a business concern, these documents will generally include, but are not limited to:

(a) salary records;
(b) accounting records;
(c) sale and purchase invoices;
(d) correspondence;
(e) banking records;
(f) contracts;
(g) letters patent;
(h) shareholders' register; and
(i) book of minutes of a corporation.

Documents relating to the administration of the estate

5. (1) The books, records and documents relating to the administration of the estate referred to in subsection 26(2) of the Act are the documents generated for or by the trustee reflecting the trustee's decisions and actions in the administration.

(2) These documents will generally include,

à conserver et la durée de cette conservation selon les dispositions de la Loi et des Règles.

Documents à conserver

Documents du failli

4. (1) Les titres, livres, dossiers et documents du failli mentionnés au paragraphe 16(3) de la Loi sont les pièces qui proviennent et témoignent des activités et opérations commerciales ou à caractère juridique du débiteur avant la faillite.

(2) Lorsque la faillite est de nature commerciale, ces documents incluront généralement, sans toutefois s'y limiter :

a) les relevés et livres de salaires;
b) les registres comptables;
c) les factures d'achats et de ventes;
d) la correspondance;
e) les effets bancaires;
f) les contrats;
g) les lettres patentes;
h) le registre des actionnaires et des transferts; et
i) le livre des procès-verbaux de la compagnie.

Documents concernant l'administration d'un actif

5. (1) Les livres, registres et documents concernant l'administration d'un actif mentionnés au paragraphe 26(2) de la Loi sont les documents produits pour ou par le syndic durant sa propre administration pour justifier ses décisions et démarches.

(2) Ces documents incluront généralement,

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but are not limited to:

(a) proofs of claim;
(b) various notices to creditors;
(c) reports to creditors, the Court and the Superintendent;
(d) correspondence;
(e) time sheets;
(f) applications and court orders;
(g) all minutes of meetings;
(h) the banking records and accounting records showing receipts and disbursements of funds; and
(i) supporting documents for various disbursements.

6. In view of section 22 of the Act, which limits the obligation to make any return that the bankrupt was required to make to one year prior to the commencement of the calendar year, the trustee could limit the taking of possession of documents to the period necessary to prepare these reports. In practical terms, this could involve a period of approximately two years depending on the date of the bankruptcy except for those records that, in the opinion of the trustee, would not be required.

Retention of Documents

7. (1) Subject to other statutes, section 68 of the Rules requires that a trustee retain, for a period of four (4) years after the trustee's discharge, the books, records and documents that relate to the administration of the estate.

(2) A trustee should extend the retention period of documents where other statutes

sans toutefois s'y limiter :

a) les preuves de réclamation;
b) les avis divers aux créanciers;
c) les multiples rapports aux créanciers, au tribunal et au surintendant;
d) la correspondance;
e) les feuilles de temps;
f) les requêtes et les ordonnances;
g) tous les procès-verbaux d'assemblées;
h) les effets bancaires et les relevés comptables démontrant les entrées et dispositions de fonds; et
i) les pièces justificatives pour les divers débours.

6. Puisque l'article 22 de la Loi limite l'obligation de produire une déclaration que le failli était tenu de faire, à un an avant le début de l'année civile au cours de laquelle il a fait faillite, le syndic pourrait restreindre sa prise de possession à la période nécessaire à la préparation des rapports qu'il peut devoir préparer. En termes pratiques, cette période devrait couvrir environ deux ans avant la date de la cession sauf pour les documents qui, de l'avis du syndic, ne seraient pas nécessaires.

Conservation des documents

7. (1) Sous réserve d'autres lois, l'article 68 des Règles prévoit que le syndic conservera pendant une période de quatre (4) ans après sa libération, les livres, registres et documents qui portent sur l'administration de l'actif.

(2) Le syndic devrait prolonger la période de conservation des documents lorsque d'autres

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require documents to be kept for a longer time period (e.g., the *Income Tax Act* (R.S.C. 1985, c.1 (5th Supp.)) requires the retention of documents for a period of six (6) years)

lois exigent que les documents soient gardés pendant une plus longue période de temps (par exemple, la *Loi de l'impôt sur le revenu* (L.R.C. (1985), ch. 1 (5e suppl.)), exige la conservation de documents pendant une période de six (6) ans).

8. The trustee is not required to retain deeds or documents if a copy of these documents was filed with the Court or is held by the provincial registry office.

8. Le syndic n'est pas tenu de garder des titres ou documents dont une copie a été déposée ou est disponible auprès du tribunal ou du bureau d'enregistrement de la province.

9. If the trustee has a waiver of notification (Appendix A), the trustee may dispose of the documents relating to the commercial and legal activities prior to the bankruptcy immediately after the discharge of the trustee.

9. Si le syndic détient une renonciation (annexe A), il peut disposer des documents portant sur les activités et opérations antérieures à la faillite, immédiatement après sa libération.

10. Where the administration will be prolonged as a result of specific litigation, and:

10. Lorsque l'administration se prolongera en raison d'un litige particulier, et que :

(a) all of the assets have generally been realized;

a) tous les actifs ont généralement été réalisés,

(b) the trustee has received a waiver of notification from the bankrupt; and

b) le syndic possède une renonciation de la part du failli, et

(c) the trustee has allowed a reasonable delay for any government agency to make a routine audit,

c) un délai raisonnable est accordé pour permettre aux organismes gouvernementaux de faire les vérifications d'usage,

the trustee may dispose of the secondary documents as if the administration had been completed while retaining the documents relating to the litigation.

le syndic peut disposer des documents secondaires comme si l'administration de l'actif était terminée tout en retenant les documents liés au litige.

11. Despite sections 9 and 10 above, in a commercial bankruptcy the trustee should retain for a period of four (4) years with the administration file the documentation

11. Nonobstant les articles 9 et 10 ci-dessus, dans une faillite commerciale, le syndic doit conserver pour une période de quatre (4) ans avec son propre dossier tout ce qui touche les

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pertaining to wages, the letters patent, the shareholder's register and the minutes of the corporation.

12. The trustee shall not dispose of documents that should be available because of investigation or possible litigation.

Coming into Force

13. This Directive comes into force on the day on September 18, 2009.

Enquiries

14. For any questions pertaining to this Directive, please contact your local OSB office.

salaires de l'entreprise, les lettres patentes et les registres de transferts et de procès-verbaux de corporations.

12. Le syndic ne disposera pas des documents qui devraient être disponibles en cas d'enquêtes, de litiges ou de contestations.

Entrée en vigueur

13. La présente instruction entre en vigueur le 18 septembre 2009.

Demandes de renseignements

14. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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APPENDIX A

DISPOSAL OF BOOKS, RECORDS AND DOCUMENTS

In the matter of the bankruptcy of	Estate No.
Trustee to the estate	Court No.

AUTHORIZATION OF BANKRUPT TO TRUSTEE PURSUANT TO SUBSECTION 68(2) OF THE *BANKRUPTCY AND INSOLVENCY GENERAL RULES*

I, the undersigned, the bankrupt debtor (*or* an officer of the bankrupt corporation), hereby waive delivery by the trustee of the books, records and documents covered by subsection 68(2) of the Rules and authorize the said trustee to dispose of such books, records and documents after the trustee has been discharged.

Bankrupt or an officer of the bankrupt corporation	Date

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ANNEXE A

DESTRUCTION DES LIVRES, REGISTRES ET DOCUMENTS

Dans l'affaire de la faillite de	N° de l'actif
Syndic de l'actif	N° de la Cour

AUTORISATION DU FAILLI AU SYNDIC EN VERTU DU PARAGRAPHE 68(2) DES *RÈGLES GÉNÉRALES SUR LA FAILLITE ET L'INSOLVABILITÉ*

Je, soussigné, débiteur failli (*ou* dirigeant de la personne morale en faillite), renonce à la remise par le syndic des livres, registres et documents visés par le paragraphe 68(2) des Règles et autorise ledit syndic à disposer desdits livres, registres et documents après qu'il aura obtenu sa libération.

Failli ou dirigeant de la personne morale en faillite	Date

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SB Directive: 32, Trustee Electronic Recordkeeping
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Office of the Superintendent of Bankruptcy Canada / Bureau du surintendant des faillites Canada

Directive / Instruction

N° 32

TRUSTEE ELECTRONIC RECORDKEEPING

Issued: MAR 19 2013

Interpretation

1. In this Directive,

["Act" « *Loi* »] "Act" means the *Bankruptcy and Insolvency Act*;

["conversion" « *conversion* »] "conversion" means the process of changing a record from one medium to another or from one form to another;

["digitization" « *numérisation* »] "digitization" means the conversion of information that exists in print or paper form to digital or electronic form, resulting in the content being made available electronically;

["electronic estate record" « dossier électronique de l'actif »] "electronic estate record" means an estate record originally created or subsequently generated in digital or electronic form, resulting in the content being made available electronically;

["electronic recordkeeping system" « *système de tenue de documents électroniques* »] "electronic recordkeeping system" means a system used to generate, collect, classify, store,

LA TENUE DES DOCUMENTS ÉLECTRONIQUES PAR LE SYNDIC

Date d'émission : 19 MAR 2013

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

[« assurance de la qualité » "*quality assurance*"] « assurance de la qualité » s'entend d'un processus ou d'un programme de surveillance et d'évaluation systématiques des divers aspects d'un projet, d'un service ou d'un équipement pour en assurer la conformité et veiller à ce qu'il satisfasse aux normes de qualité;

[« BSF » "*OSB*"] « BSF » s'entend du Bureau du surintendant des faillites;

[« conversion » "*conversion*"] « conversion » désigne l'action de transférer des documents d'un support à un autre, ou d'une forme à une autre;

[« dossier de l'actif sur papier » "*paper-source estate record*"] « dossier de l'actif sur papier » s'entend d'un dossier de l'actif initialement créé ou ultérieurement généré sous forme imprimée ou sur papier;

[« dossiers de l'actif » "*estate records*"]

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retain and otherwise process electronic estate records;

["electronically readable format" « *format électronique intelligible* »] "electronically readable format" means information supported by a system capable of producing an accessible and useable copy;

["estate records" « *dossiers de l'actif* »] "estate records" means the books, records and documents as referenced in subsection 26(1) of the Act, regardless of format;

["OSB" « *BSF* »] "OSB" means the Office of the Superintendent of Bankruptcy;

["paper-source estate record" « *dossier de l'actif sur papier* »] "paper-source estate record" means an estate record originally created or subsequently generated in print or paper form;

["quality assurance" « *assurance de la qualité* »] "quality assurance" means a process or program for the systematic monitoring and evaluation of the various aspects of a project, service or facility to ensure compliance and that the standards of quality are being met; and

["Rules" « *Règles* »] "Rules" means the *Bankruptcy and Insolvency General Rules*.

« dossiers de l'actif » s'entend des livres, registres et documents mentionnés au paragraphe 26(1) de la Loi, indépendamment du format;

[« dossier électronique de l'actif » "*electronic estate record*"] « dossier électronique de l'actif » s'entend d'un dossier de l'actif initialement ou ultérieurement généré sous forme numérique ou électronique pour que le contenu soit disponible par voie électronique;

[« format électronique intelligible » "*electronically readable format*"] « format électronique intelligible » signifie que les renseignements sont soutenus par un système qui permet de produire une copie accessible et utilisable;

[« Loi » "*Act*"] « Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

[« numérisation » "*digitization*"] « numérisation » désigne la conversion de l'information qui existe en version imprimée ou papier vers une version numérique ou électronique pour que le contenu soit disponible par voie électronique;

[« Règles » "*Rules*"] « Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*;

[« système de tenue de documents électroniques » "*electronic recordkeeping system*"] « système de tenue de documents électroniques » désigne un système utilisé pour générer, recueillir, classifier, mettre en mémoire, conserver et autrement traiter les dossiers électroniques de l'actif.

Authority

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*), (*c*) and (*e*) of the Act.

Autorité

2. La présente instruction est émise en vertu des alinéas 5(4)*b*), *c*) et *e*) de la Loi.

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Purpose and Scope

3. This Directive specifies the conditions, principles and minimum requirements for electronic recordkeeping by trustees to assist them in complying with their administrative and legal requirements to keep estate records under the Act, without dictating the types of technology required.

4. This Directive applies to trustees and administrators, as defined in section 66.11 of the Act, who are required to keep estate records under the Act. For ease of reading, the term "trustee" in this Directive is to be read as including an administrator.

5. This Directive shall be read in conjunction with Directive 17, *Retention of Documents by the Trustee*, and Directive 5R4, *Estate Funds and Banking*.

6. This Directive shall be applied in conjunction with the requirements imposed by other statutes, whether federal, provincial/territorial or municipal, to maintain adequate books and records and to satisfy evidentiary requirements.

Retention Principles for Estate Records

7. A trustee shall keep estate records in a manner that will ensure the accessibility, authenticity, integrity, reliability, readability and perennity of the information recorded therein. The integrity of a document is ensured if it is possible to verify that the information it contains has not been altered and has been maintained in its entirety, and that the medium used provides stability and the required

Objet et portée

3. La présente instruction précise les conditions, les principes et les exigences minimales applicables à la tenue des documents électroniques par les syndics pour aider ceux-ci à se conformer aux exigences administratives et juridiques liées à la tenue des dossiers de l'actif en vertu de la Loi, sans dicter les types de technologie requis.

4. La présente instruction s'applique aux syndics et aux administrateurs au sens de l'article 66.11 de la Loi, qui doivent tenir les dossiers de l'actif en vertu de la Loi. Pour faciliter la lecture, dans la présente instruction, le terme « syndic » vise également les administrateurs.

5. La présente instruction doit être lue en conjonction avec l'instruction n° 17, *Conservation des documents par le syndic*, et l'instruction n° 5R4, *Les fonds de l'actif et procédures bancaires*.

6. La présente instruction s'applique conjointement avec les exigences imposées par d'autres lois et règlements, qu'ils soient fédéraux, provinciaux, territoriaux ou municipaux, sur la tenue appropriée de livres et de registres et le respect des obligations en matière de preuve.

Principes de conservation des dossiers de l'actif

7. Le syndic conserve les dossiers de l'actif de manière à assurer l'accessibilité, l'authenticité, l'intégrité, la fiabilité, la lisibilité et la pérennité de l'information qui y est consignée. L'intégrité d'un document est assurée lorsqu'il est possible de vérifier que l'information n'en est pas altérée et qu'elle est maintenue dans son intégralité, et que le support qui porte cette information lui procure la stabilité et la pérennité voulue.

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perennity to the information.

8. Estate records may be destroyed after the appropriate retention period has expired pursuant to Rule 68(1).

9. Subject to the allowable fees and disbursements under the Act and Rules, the costs associated with the retention of estate records shall not be charged to the estate.

Retention Principles for Electronic Estate Records

10. A trustee who digitizes a paper-source estate record shall ensure that the resulting electronic estate record is an intelligible, electronically readable reproduction of that document. The conversion must not result in the loss, destruction or alteration of information and data relevant to the estate record.

11. Without limiting paragraph 10 of this Directive, a trustee who keeps estate records electronically shall ensure:

(a) the electronic estate records are retained in a format that does not change the information contained in the electronic estate records that was originally made, sent or received;

(b) the information in the electronic estate records is readable and perceivable by any person who is entitled to access or require the production of electronic estate records; and

(c) if electronic records are sent or received, any information that identifies the origin and destination of the electronic estate record, and the date and time when it was sent or received, is also retained.

8. On peut détruire les dossiers de l'actif une fois que la période de conservation appropriée a pris fin conformément à la Règle 68(1).

9. Sous réserve des honoraires et débours prévus par la Loi et les Règles, le coût de la conservation des dossiers de l'actif n'est pas imputé à l'actif.

Principes de conservation des dossiers électroniques de l'actif

10. Le syndic qui numérise un dossier de l'actif sur papier s'assure que le dossier électronique de l'actif qui en résulte est une reproduction électronique intelligible et lisible du document. La conversion ne doit pas entraîner la perte, la destruction ou la modification des données et des renseignements figurant au dossier de l'actif.

11. Sans limiter le paragraphe 10, le syndic qui assure la tenue électronique des dossiers de l'actif s'assure que :

a) les dossiers électroniques de l'actif sont conservés sous une forme qui ne modifie en rien l'information contenue dans les dossiers électroniques de l'actif faits, envoyés ou reçus à l'origine;

b) l'information contenue dans les dossiers électroniques de l'actif est lisible ou perceptible par quiconque a accès aux dossiers électroniques de l'actif ou est autorisé à exiger la production de ceux-ci; et

c) si les dossiers électroniques sont envoyés ou reçus, l'information qui permet de déterminer l'origine et la destination du dossier électronique de l'actif, ainsi que la date et l'heure d'envoi ou de réception, est elle aussi conservée.

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12. The trustee shall ensure electronic estate records are accessible and intelligible at all times and shall produce electronic estate records for inspection when required under the Act, regardless of where the electronic estate records are located and how they are stored, classified or indexed.

Electronic Recordkeeping System Requirements

13. A trustee shall store electronic estate records in a secure electronic recordkeeping system that includes adequate controls to safeguard the accessibility, authenticity, integrity, reliability, readability and perennity of the electronic estate records processed and kept in that system, including, at a minimum, the following features:

(a) user authentication and permission controls;
(b) firewall and virus protection;
(c) disaster recovery and business continuity;
(d) audit trail capability to detail alterations; and
(e) system backups.

14. Without limiting paragraph 13(d) of this Directive, audit trails shall contain sufficient information to provide evidence of the authenticity of stored electronic estate records, including information about changes to the electronic estate records stored in the system.

15. Without limiting paragraph 13(e) of this Directive, a trustee shall ensure that procedures are in place to back up electronic estate records on a daily basis and shall ensure that backed-up

12. Le syndic veille à ce que les dossiers électroniques de l'actif soient accessibles et intelligibles en tout temps, et produit ces dossiers aux fins d'inspection comme l'exige la Loi, peu importe l'endroit où ils se trouvent et la manière dont ils sont stockés, classifiés ou indexés.

Exigences associées au système de tenue de documents électroniques

13. Le syndic conserve les dossiers électroniques de l'actif dans un système de tenue de documents électroniques sécurisé qui comprend des mécanismes de contrôle permettant de préserver l'accessibilité, l'authenticité, l'intégrité, la fiabilité, la lisibilité et la pérennité des dossiers électroniques de l'actif traités et conservés dans ce système, y compris, à tout le moins, les fonctions suivantes :

a) authentification des utilisateurs et contrôle des permissions;
b) pare-feu et protection antivirus;
c) reprise après sinistre et continuité des opérations;
d) capacité de conserver des pistes de vérification afin de repérer les modifications;
e) copies de sauvegarde du système.

14. Sans limiter l'alinéa 13*d*) de la présente instruction, les pistes de vérification contiennent suffisamment d'information pour prouver l'authenticité des dossiers électroniques conservés de l'actif, dont des renseignements sur les modifications apportées aux dossiers électroniques de l'actif conservés dans le système.

15. Sans limiter l'alinéa 13*e*) de la présente instruction, le syndic veille à ce que des procédures soient en place pour faire une sauvegarde quotidienne des dossiers

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copies of electronic estate records are stored in a secure off-site location.

16. A trustee shall put in place a quality assurance process or program to ensure the electronic recordkeeping system remains compliant with this Directive.

Destruction of Digitized Paper-Source Estate Records

17. Subject to paragraphs 18 to 20 of this Directive, a trustee may destroy a paper-source estate record that has been digitized and stored in a secure electronic recordkeeping system in accordance with this Directive.

18. Prior to destroying any paper-source estate record that has been digitized, the trustee shall submit to the Designated Assistant Superintendent an attestation and declaration regarding his or her electronic recordkeeping system, as provided in Appendix A of this Directive. One attestation may be submitted for one or more individual trustees who work in the same firm and/or office, which shall be specified therein.

19. A trustee shall not destroy a paper-source estate record after digitization until satisfied that no system failure will result in the loss of the digitized document.

20. Pursuant to subsection 26(1) of the Act, regardless of digitization, a trustee shall not destroy the original signed copies of any minutes, proceedings had or resolutions passed at any meeting of creditors or inspectors until the appropriate retention period has expired pursuant to Rule 68(1).

électroniques de l'actif et à ce que des copies de sauvegarde des dossiers électroniques de l'actif soient conservées hors site en lieu sûr.

16. Le syndic met en place un processus ou un programme d'assurance de la qualité de manière que le système de tenue de documents électroniques demeure conforme à la présente instruction.

Destruction des dossiers de l'actif sur papier et numérisés

17. Sous réserve des paragraphes 18 à 20 de la présente instruction, le syndic peut détruire un dossier de l'actif sur papier qui a été numérisé et conservé dans un système de tenue de documents électroniques sécurisé conformément à la présente instruction.

18. Avant de disposer des dossiers de l'actif sur papier qui ont été numérisés, le syndic soumet au surintendant adjoint désigné une attestation et une déclaration relatives à son système de tenue de documents électroniques, ainsi que le prévoit l'annexe A de la présente instruction. Une attestation peut être soumise pour un ou plusieurs syndics individuels qui travaillent dans un même cabinet ou bureau, auquel cas il faut le préciser dans l'attestation.

19. Le syndic ne peut disposer des dossiers de l'actif sur papier qui ont été numérisés que s'il est satisfait qu'aucune panne du système n'entraînera la perte du document numérisé.

20. Conformément au paragraphe 26(1) de la Loi, le syndic ne peut détruire le texte original et signé de tout procès-verbal, procédure entamée ou résolution adoptée à une assemblée de créanciers ou d'inspecteurs, même si ces documents ont été numérisés, avant l'expiration de la période de conservation requise conformément à la Règle 68(1).

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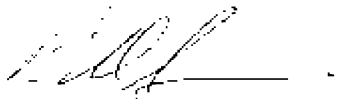
External Service Providers

21. A trustee is not relieved of his or her responsibilities under this Directive because of the use of an external service provider to carry out all or part of the functions of its electronic recordkeeping system.

Fournisseurs de services externes

21. Le syndic n'est pas dispensé de ses responsabilités en vertu de la présente instruction parce qu'il fait appel à un fournisseur de services externe pour exécuter tout ou partie des fonctions du système de tenue de documents électroniques.



Bill James
Superintendent of Bankruptcy / Surintendant des faillites

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Appendix A

TRUSTEE ELECTRONIC RECORDKEEPING ATTESTATION AND DECLARATION

☐ Original ☐ Subsequent

General Information

Name of individual trustee(s):[1]

Name of firm (where applicable):

Business address:

Attestation

1. I attest that the electronic recordkeeping system for which this attestation is being submitted is in compliance with Directive No. 32, *Trustee Electronic Recordkeeping*.

2. I attest that the electronic recordkeeping system for which this attestation is being submitted includes, at a minimum, the following features:

☐ User authentication and permission controls

☐ Firewall and virus protection

☐ Disaster recovery and business continuity

☐ Audit trail capability to detail alterations

☐ System backups

3. I attest that the electronic recordkeeping system for which this attestation is being submitted has been verified and approved by an information technology (IT) specialist:[2]

Name: [*insert name of IT specialist or software provider*]
Contact information:

---

[1] If you are submitting this document for more that one individual trustee, please include the names of all individual trustees as well as the firm and district in which each individual trustee practices.

[2] An "IT specialist" means a professional recognized in the industry as someone who has the appropriate qualifications, experience and competencies to do the work herein specified

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Declaration and Signature

I, the undersigned, do solemnly declare that I am the individual trustee named in this attestation or that I am authorized to submit the present attestation on behalf of the individual trustees named herein, and that the information set out in this attestation is correct and complete in all respects.

Signature of individual trustee or authorized representative:

_____

Dated at _____, this __ day of ____, 20__

****

Date of receipt of the attestation and declaration by the Office of the Superintendent of Bankruptcy

Dated at _____, this __ day of ____, 20__

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Annexe A

ATTESTATION ET DÉCLARATION RELATIVE À LA TENUE DES DOCUMENTS ÉLECTRONIQUES PAR LE SYNDIC

☐ Original ☐ Subséquent

Renseignements généraux

Nom du ou des syndics individuels :[1]

Bureau de syndics (le cas échéant) :

Adresse commerciale :

Attestation

1. J'atteste que le système de tenue de documents électroniques à l'égard duquel la présente attestation est soumise est conforme à l'instruction n° 32, *La tenue des documents électroniques par le syndic*.

2. J'atteste que le système de tenue de documents électroniques à l'égard duquel la présente attestation est soumise comprend à tout le moins les fonctions suivantes :

☐ authentification des utilisateurs et contrôle des permissions

☐ pare-feu et protection antivirus

☐ reprise après sinistre et continuité des opérations

☐ capacité de conserver des pistes de vérification afin de repérer les modifications

☐ copies de sauvegarde du système

3. J'atteste que le système de tenue de documents électroniques à l'égard duquel la présente attestation est soumise a été vérifié et approuvé par un expert en technologie de l'information (TI)[2] :

---

[1] Si vous soumettez le présent document pour plus d'un syndic individuel, veuillez inscrire le nom de tous les syndics ainsi que le bureau et le district au sein desquels chaque syndic exerce ses activités.

[2] L'« expert en TI » désigne le professionnel reconnu au sein de l'industrie comme étant une personne qui possède les qualifications, l'expérience et les compétences requises pour effectuer le travail mentionné dans le présent document

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Nom : [*inscrire le nom de l'expert en TI ou du fournisseur du logiciel*]
Coordonnées de la personne-ressource :

Déclaration et signature

Je, soussigné, déclare solennellement que je suis le syndic individuel nommé dans la présente attestation ou que je suis autorisé à soumettre celle-ci pour le compte des syndics individuels nommément désignés dans le présente document, et que les renseignements qui y figurent sont des renseignements exacts et exhaustifs à tous égards.

Signature du syndic individuel ou du représentant autorisé

_____

Fait à _____, le __ jour de ____ 20__.

****

Date de réception de l'attestation et de la déclaration par le Bureau du surintendant des faillites :

Fait à _____, le __ jour de ____ 20__.

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Trustee's records to be property of estate - Sec. 26(2)
(2) The estate books, records and documents relating to the administration of an estate are deemed to be the property of the estate, and, in the event of any change of trustee, shall forthwith be delivered to the substituted trustee.

Records may be inspected - Sec. 26(3)
(3) The trustee shall permit the books, records and documents referred to in subsection (2) to be inspected and copies of them made by the Superintendent, the bankrupt or any creditor or their representative at any reasonable time.
R.S., 1985, c. B-3, s. 26;
1997, c. 12, s. 20;
2004, c. 25, s. 21.

Taylor Ventures Ltd. (Re), 1999 CanLII 5475 (BC SC) - Can Trustee Allow Access to Records to Creditors

Date:	1999-01-08
Docket:	185695/VA98; 185403/VA98
Parallel citations:	9 CBR (4th) 136; 60 BCLR (3d) 348
URL:	http://canlii.ca/t/1d0wj
Citation:	Taylor Ventures Ltd. (Re), 1999 CanLII 5475 (BC SC), <http://canlii.ca/t/1d0wj> retrieved on 2013-08-29
Share:	
Print:	PDF Format
Noteup:	Search for decisions citing this decision
Reflex Record	Related decisions, legislation cited and decisions cited

Date: 19990108
Docket: 185695/VA98
185403/VA98
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE BANKRUPTCIES OF
TAYLOR VENTURES LTD.
402847 B.C. LTD.
387325 B.C. LTD.
512046 B.C. LTD.
512048 B.C. LTD.
REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE BURNYEAT

Counsel for
Oliver, Drabik, Carruthers & Chalcraft: J. Webster
Counsel for the Trustee
in Bankruptcy, Pricewaterhouse Coopers Inc.: M.J. Peerson
Counsel for 4 of the 5
Inspectors of Bankruptcy: H.M.B. Ferris
Place and Date of Hearing: Vancouver, B.C.
November 12, 1998

[1] Oral reasons on this matter were given on November 12, 1998. These written reasons supplement the decision provided on that date. The Trustee in Bankruptcy applies pursuant to s.34(1) of the ***Bankruptcy and Insolvency Act*** which allows the Trustee to apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt**. In particular, the Trustee seeks directions as to whether it is at liberty to provide to all of the Inspectors of the Bankrupt**

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"complete and unrestricted access to all Taylor Ventures Ltd. and related files which the Trustee has received from ... the former solicitors for the Bankrupt." The counsel for the former solicitors submits that, in the unique circumstances of this bankruptcy, complete and unrestricted access to the records should not be available to the Inspectors.

BACKGROUND

[2] Taylor Ventures Ltd. was incorporated in 1979 and had raised approximately $36 million from in excess of 400 investors. Taylor then used that money to purchase and develop various real estate projects in British Columbia. Pursuant to its own petition, an order was made on January 22, 1998 that Coopers & Lybrand Ltd. be appointed as the Receiver-Manager of all of the undertaking of Taylor. By order made February 18, 1998, five individuals were appointed as a Steering Committee to represent the interests of all investor creditors. After extensive negotiations, a May 8, 1998 order relieved Coopers of much of its duties and responsibilities as Receiver- Manager. Its responsibilities were assumed by the Steering Committee so that the Committee could undertake many of the tasks which would ordinarily be the responsibility of the Receiver-Manager and so that the cost of the Receiver-Manager undertaking mailings to the investor creditors and of undertaking a forensic audit of the affairs of Taylor could be avoided.

[3] The Receiver-Manager was provided with the authority to assign Taylor into bankruptcy. That was done and a receiving order was made on September 2, 1998 with Pricewaterhouse Coopers Inc. appointed as the Trustee. At a meeting of creditors held on October 22, 1998, five Inspectors were appointed: Gary Bateman, Peter Elms, David Mosher, Laurie Giles and Michael Sturby. Mr. Mosher represents a judgment creditor of Taylor and the other Inspectors were investor creditors who advanced monies to Taylor. Four of the five Inspectors had served as a members of the Steering Committee. Michael Sturby is a member of the Steering Committee and is an Inspector. Mr. Sturby had been retained by Coopers to conduct research and analysis in relation to Taylor and its related numbered companies and had undertaken much of the forensic auditing tasks which would ordinarily have been undertaken by the Receiver-Manager.

[4] In the Statement of Affairs of Taylor, unsecured creditors are listed as $33,285,810.99, secured creditors are listed at $13,556,802.00 and total assets are listed at $18,155,385.00.

CONCERNS RAISED ON BEHALF OF THE FORMER LAW FIRM OF TAYLOR

[5] The concerns raised by the solicitor for the former lawyers can best be summarized in his October 16, 1998 letter to the solicitors for the Trustee:

> ... one of the investors who is anticipated to be starting a lawsuit by using Heather Ferris and David Roberts at Campney & Murphy is also an inspector in the bankruptcy and that you anticipate that he may wish to examine the files in question under the context of the bankruptcy. Firstly, I think it is plain that the trustee's possession of the files and access to those files must only be exercised for legitimate and proper purposes of the bankruptcy. It would be completely inappropriate and wrong, in my view, for an investor who is also an inspector to go through all of our client's files so as to get information and documentation for the purposes of a personal lawsuit which is anticipated to be commenced. First of all, it subverts the concept of implied confidentiality of documents from one litigation matter to another. Secondly, it subverts the disclosure of documents issues of relevance and privilege which flow within each individual lawsuit.
>
> In strikes me that the trustee is under an obligation to respect the confidentiality of documents produced within the bankruptcy in the same manner as a litigant is under a duty to respect the confidentiality of all documents produced by the discovery process.
>
> It strikes me that if indeed there are inspectors who are also actual or prospective litigants against our client or others arising out of matters touched upon in the Taylor Ventures Ltd. bankruptcy that those inspectors are in conflict of interest and should either resign or steps should be taken by the trustee to deal with the issue in some other manner so as to prevent the use of documents used in the bankruptcy from being used for other personal purposes or for other litigation.

The concerns are therefore twofold: (a) the Inspectors will use the knowledge they obtain from the files to either promote their own personal lawsuit against the former solicitors or to provide information to one of the Investors who has threatened a lawsuit against the former solicitors arising out of the alleged representation of both Taylor and that Investor by the former law firm; (b) information which will be confidential to the Investors and their solicitor, Ms. Ferris, will be made known to Mr. Roberts, the partner of Ms. Ferris, in his capacity as the solicitor likely to be commencing an action on behalf of one of the Investors against the former law firm of Taylor arising out of the alleged fiduciary duty owed by the former law firm to the Investors and/or out of the alleged representation of both an Investor and Taylor on a particular transaction or transactions.

POSITION TAKEN BY THE SOLICITORS FOR THE INSPECTORS

[6] The position of the Inspectors is best outlined in the November 4, 1998 letter to the solicitor for the former law firm:

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The Trustee in Bankruptcy of Taylor Ventures Ltd. stands in the shoes of the bankrupt. The files of Taylor Ventures Ltd. which are in the possession of Mr. Oliver, belong to Taylor Ventures Ltd., the bankrupt. Communications between Taylor Ventures Ltd. and Mr. Oliver are privileged and the files may not be disclosed to others by Mr. Oliver without the permission of Taylor Ventures Ltd. However, the client, now the Trustee in Bankruptcy, may waive that privilege if he chooses. The confidentiality is the Trustee's and the Trustee may disclose what he chooses because the files belong to the Trustee, as does the privilege.

APPLICABLE PROVISIONS: *BANKRUPTCY AND INSOLVENCY ACT* AND RULES

S.16(5)No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents relating to the accounts or to any trade dealings of the bankrupt or to set up any lien thereon.

S.16(2)No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceedings by or against the estate of the bankrupt.

S.120(1)No inspector is, directly or indirectly, capable of purchasing or acquiring for himself or for another any of the property of the estate for which he is an inspector, except with the prior approval of the court.

S.163(1)The trustee ... may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt ... respecting the bankrupt, his dealings or property and may order the person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

S.164(1)Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.

R.65(5)Documents that are subject to the lien of a solicitor shall be returned to the solicitor upon completion of the estate to which the documents relate.

WHAT IS PRIVILEGED

[7] It is clear that there is a distinction between the "facts" which may be in a solicitor's file and "confidential communications." It is clear that, as to matters of fact, no privilege attaches to documents and that they are not confidential. Similarly, a solicitor must answer questions regarding the movement of funds in and out of a trust account: see, for instance, ***Re Lauzier*** (1996), 43 C.B.R. (2d) 207 (Ont.Ct.of Justice-Gen.Div.). In ***Descoteaux et al v. Mierzwinski and A./G. Que. et al*** 1982 CanLII 22 (SCC), (1982), 141 D.L.R. (3d) 590 (S.C.C.), where Lamer J. delivered the judgment of the court, there is this description of the scope of privilege:

The following statement by Wigmore (8 Wigmore, *Evidence* para.2292, p.554 (McNaughton Rev.1961), of the rule of evidence is a good summary, in my view, of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived. (at p.603)

CAN A TRUSTEE IN BANKRUPTCY WAIVE THE PRIVILEGE

[8] The 1965 decision of McDermott J. in ***Re Cirone***, (1965) 8 C.B.R. 237, stood for the proposition that the Trustee stepped into the shoes of the client and was in a position to waive the privilege in order to require the former solicitor for a bankrupt to be examined. In dealing with the power to examine the former solicitor, McDermott J. stated:

Counsel for the trustee cited numerous cases in support of his contention that the privilege of the solicitor is actually that of the client, and that the client can release the solicitor from refusing to answer on a question of privilege, or from divulging information that came to him from his client, and further submits that when the client has become bankrupt the trustee steps into the shoes of the client and has the right to relieve from or waive the solicitor's privilege (or actually the client's privilege) of not answering questions leading to information obtained by the solicitor for the bankrupt before the bankrupt assumed that status. See 2 Halsbury, 3rd ed., p.408, para.820: "The solicitor of a person who afterwards becomes bankrupt cannot set up as against the trustee in the bankruptcy any privilege which is the client's"; and the reference there to Cordery on Solicitors, 4th ed., p.298. (at p.239)

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[9] The motion before the court had been made in an action commenced by the Trustee against the former solicitor. The question was whether the former solicitor should re-attend at his examination for discovery to answer the questions that he previously refused to answer. In deciding that the former solicitor should attend to answer the questions, McDermott J. concluded:

> The trustee in bankruptcy under the Bankruptcy Act should be permitted much wider scope in the course of his examinations in cases where he is obliged to take an action in court on behalf of the creditors to try to recover funds, and where it is his duty to make all possible investigation in his work as a trustee to carry out fully the administration of the estate for the benefit of the creditors. (at p.243)

[10] In ***Re Abacus Cities Ltd.*** (1981), 40 C.B.R. (N.S.) 172 (Alta.Q.B.), MacDonald J. dealt with the question of whether or not a Trustee was in a position to waive privilege in connection with communications between the previous solicitors for the bankrupt and the bankrupt in order that the communications might be introduced in evidence at preliminary hearings in Ontario relating to fraud charges against the principal of the Abacus. MacDonald J. commented:

> Were Abacus Cities Ltd. not in bankruptcy, decisions of and for the company would be made by the Board of Directors. Being in bankruptcy, the Trustee replaces the Board of Directors, at least in all matters concerning the property of the bankrupt. (at p.173)

[11] After citing the decision in ***Re Cirone***, *supra*, MacDonald J. concluded:

> It would be improper to claim the privilege of the company for the purpose of protecting an employee who enjoys no solicitor-client privilege in a prosecution for a breach of a statute.
>
> If the trustee with the advice of the inspectors in bankruptcy knows of any reason why, in the interests of the bankrupt, privilege should be claimed and certainly he can do so. The trustee as an officer appointed by the court is under an obligation to balance the public interests in any decision he makes.
>
> I do not consider that an order should go directing the trustee to waive privilege as there may be circumstances of which this court has no knowledge, but an order will go authorizing the trustee to waive privilege and suggesting he do so if he has no reason to believe that such a waiver would be to the prejudice of the interests that he represents.
>
> (at pp.176-7)

[12] In ***Re Dilawri*** (1983), 47 C.B.R. (N.S.) 93 (Ont.S.C.), Ewaschuk J. dealt with the question of whether the former solicitor of the bankrupt should re-attend and answer questions relating to property presently or formerly forming part of the estate of the bankrupt. Ewaschuk J. concluded as follows:

> My initial impression was that the trustee in bankruptcy, though vested with the bankrupt's property and charged with a duty to act in the best interests of the bankrupt's creditors, possess no right to waive solicitor-client privilege with respect to the bankrupt's property. That was so on the basis that the solicitor-client privilege was such a fundamental right in our legal system that this right should not be lightly derogated from. And it was also based on the assumption that the creditors' rights to the bankrupt's property could be adequately protected by inquiry into the acquisition, location and disposition of property, which attract no privilege, being objective acts and transactions and not confidential communications: see *Ont. Securities Comm. v. Greymac Credit Corp.* (Ont. Div. Ct., 30th March 1983, not yet reported). In other words, by compelling the bankrupt and solicitor to disclose the flow of the bankrupt's property, the rights of the creditors would be adequately protected without requiring disclosure of the client's instructions, and thus disclosure of the purpose for which the property was acquired or disposed of.
>
> However, I find that my impressions are not valid in law. It appears clear that a trustee in bankruptcy does indeed possess the legal right to waive the bankrupt's solicitor-client privilege with respect to the bankrupt's former property: *Re Cirone*; *Reisman v. Laker* (1965), 8 C.B.R. (N.S.) 237 (Ont. H.C.) and implicity reaffirmed in *Ont. Securities Comm. v. Greymac Credit Corp.*, *supra*. Thus, the law's interest in protecting confidential legal communications must yield to the seemingly greater interest in protecting the creditors' rights in the easily disposed of bankrupt's property.
>
> I would hope that the trustee in bankruptcy would not lightly waive a solicitor-client privilege unless the bankrupt's property cannot be determined and reached in any other way. Now that the act/transaction as opposed to communication distinction has been developed and recently clarified, I would hope it would be the rare case where the trustees would waive the privilege. (at pp.95-6)

[13] In the ***Re Ontario Securities Comm. v. Greymac Credit Corp.*** decision referred to (reported at reflex, (1983), 146 D.L.R. (3d) 73 (Ont.H.C.-Div.Ct.)), the court dealt with the ability of a Receiver appointed under the ***Loan and Trust Corporation Act*** to waive solicitor and client privilege on behalf of a company. The court concluded that the Receiver had the power to waive solicitor-client privilege but that the power had to be used only for the purposes for which the Receiver was ordered to take control of the company:

> Section 159 of the *Loan and Trust Corporations Act* expressly provides that the registrar has his powers "for such purposes". The result of the Orders in Council is that the registrar has all the powers of the boards of directors of Greymac Trust and Crown Trust, which would include the power to waive a solicitor-and-client privilege of either of those corporations, but

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> those powers are expressly conferred for the purposes for which the registrar was ordered to take control. It is no part of those purposes, in my judgment, to render assistance to the Morrison Commission in its inquiry into the affairs of Greymac Trust and Crown Trust and other corporations. That being so, the registrar, in my judgment, has no right to waive the solicitor-and-client privilege of Greymac Trust or Crown Trust so that their solicitors or former solicitors may be free to disclose confidential information to the commission. (at p.81)

[14] The decision in ***Re Cirone***, *supra*, was described by the court in ***Greymac*** as not being "determinative of the issue" because of the differences between the purposes for which a Trustee in Bankruptcy is appointed and the purposes for which a statutory Receiver was ordered to take possession and control. The court said that the Trustee was appointed to liquidate the assets of the bankrupt and distribute the proceeds amongst the creditors whereas the statutory Receiver was appointed to take possession and control of the two trust companies and conduct their businesses and to take " ... such steps as in his opinion should be taken towards their rehabilitation or continued operation." (at p.81)

[15] The court in ***Greymac*** also dealt with the question of what would and would not be privileged:

> Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of accounts and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged, and the solicitor may be compelled to answer the questions and produce the material.
>
> It may be helpful to ask in such a case whether the client himself if he were the witness, could refuse on the ground of the solicitor-and-client privilege to disclose particulars of a transaction directed by him through his solicitor's trust account. The fact that a client has paid to, received from, or left with his solicitor a sum of money involved in a transaction is not a matter as to which the client himself could claim the privilege, because it is not a communication at all. It is an act. The solicitor-and-client privilege does not enable a client to retain anonymity in transactions in which the identity of the participants has become relevant in properly constituted proceedings. (at p.83)

[16] The trial decision of Ewaschuk J. and the decision in ***Greymac*** were reviewed by the Ontario Court of Appeal in ***Re Dilawri*** (1984), 53 C.B.R. (N.S.) 251. The judgment of the court was delivered by Lacourciére J.A. The court dismissed the appeal but also ruled that: "... the appellant may refuse to answer any and all questions in respect of instructions which he has received or professional advice which he gave to the debtor in respect of the bankrupt's property." (at p.256)

[17] The court had the following comments about the judgment of Ewaschuk J.:

> We respectfully disagree, however, with the proposition accepted by the learned motions court judge that a trustee in bankruptcy possesses the legal right to waive the privilege with respect to legal advice given to the bankrupt respecting his former property. He relied on *Re Cirone*; *Reisman v. Laker* (1965), 8 C.B.R. (N.S.) 237 (Ont.S.C.); in our respectful view, the case is based on a broad proposition stated in 2 Hals. (3d) 408, para.820, which does not appear to be consistent with the rationale for the privilege. *Cirone* involved the proposed examination of a solicitor against whom there were allegations of fraudulent preference with respect to his fees for services to the bankrupt. (at p.254)
>
> Mr. Justice Houlden in his article "Discovery in Criminal Prosecutions in Bankruptcy Matters" (1972), Can.Bar Rev. 486 at 488, states that it is a difficult question whether or not the *Cirone* case should be extended beyond its particular facts. We think that it should be limited to its own facts, and that the proposition in Halsbury is too broad having regard to the authority upon which it is based. (at p.254)
>
> In our view, the appellant can be compelled to disclose all information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc., which do not require the disclosure of communications made to the appellant for the purpose of giving legal advice. These communications with respect to property are not privileged. All questions contained in Sched.A to the order of Ewaschuk J. can be read as falling in this category of non-privileged information and to that extent they should be answered by the appellant. In that respect, there is no privilege to be waived by the client or by the trustee. (at p.255)
>
> The privilege attaches, however, to all information requested by the client for the purpose of obtaining professional advice and assistance and given for that purpose. (at p.255)
>
> It is also unnecessary to say definitely whether there may be circumstances in which the trustee may properly waive the bankrupt's privilege. We do not think, however, that the protection of creditor's rights, standing alone, is sufficient to overcome the solicitor/client privilege. (at p.255)

[18] Subsequent decisions have not been consistent in dealing with the Ontario Court of Appeal decision in ***Re Dilawri***. In ***Re Amonson*** (1985), 57 C.B.R. (N.S.) 314 (Alta.Q.B.), Chrumka J. dealt with whether the bankrupt's former solicitor should present himself for examination by the Trustee pursuant to ss.133 and 134 of the ***Act***. Chrumka J. stated:

> There are matters which deal with the preparation of documents and dispensing of funds, with respect to which there is no solicitor-client privilege. There are other areas of communications between solicitor and client where there clearly is a privilege in the client. (at p.316)

[19] Chrumka J. then cited the trial decision but not the appeal decision in ***Re Dilawri*** before concluding:

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> ... a trustee in bankruptcy may waive the solicitor-client privilege, but that it should not be waived unless the bankrupt's property cannot be determined in any other way ...
>
> However, questions should not be asked which are concerned with the giving of legal advice by Mr. Milne [the lawyer] and which attempt to elicit the nature of the legal advice given. No privilege, of course, attaches where a communication is made in furtherance of a criminal purpose.
>
> In an examination of this type, it seems to me that it is generally unnecessary to breach the confidentiality respecting the legal advice sought or given. There is nothing improper or irregular in asking Mr. Milne questions which deal with the assets, disposition of the assets, tracing of them, the flow of funds and similar matters. But care should be taken with respect to the solicitor-client privilege concerning the giving of the legal advice unless this advice was in furtherance of a criminal purpose. (at pp.316-17)

While Chrumka J. does not refer to the Ontario Court of Appeal decision, he concludes as they did that much which is in the possession of the former solicitor is not privileged.

[20] Registrar Quinn in ***Wolch's Guaranteed Foods Ltd.*** 1994 CanLII 8935 (AB QB), (1994), 24 C.B.R. (3d) 268 (Alta.Q.B.) dealt with an application by a Trustee for a declaration that certain correspondence, memoranda and documents in the possession of a former solicitor were producible and not subject to any solicitor-client privilege. The documentation requested related to legal and accounting advice received prior to a "rather elaborate series of transactions "including a resolution declaring a dividend." Registrar Quinn concluded:

> Counsel for the Trustee submits that any privilege there may have been has in any event been waived by the Trustee, and that the Trustee is entitled to receive all of the documentation, even if it includes communications between the Bankrupt and its lawyer for the purpose of obtaining professional legal advice. Having regard to what was said in the ***Chilcott*** [***Dilawri***] case, I conclude there is no authority for holding a Trustee can waive the Bankrupt's privilege. (at p.273).
>
> Turning to the present case, I do not purport to decide whether or not a waiver by a Trustee of a Bankrupt's privilege is possible. It is not necessary for me to do so, because I am of the opinion that even if such a waiver is possible, circumstances that would warrant it have not been shown by the Trustee. (at p.275).

Registrar Quinn concluded that the lawyer and accountant should produce at their examinations under s.163(1) of the ***Act***, any books, documents, correspondence or papers in their possession or power respecting the bankrupt, its dealings or its property, except those which were privileged.

[21] In ***Shepherd (Trustee of) v. Shepherd*** 1997 CanLII 12416 (ON SC), (1997), 50 C.B.R. (3d) 115 (Ont.Ct.of Justice-Gen.Div.), Greer J. cited with approval the Court of Appeal decision in ***Dilawri*** although he found that the documents requested did not fall within the category of privileged documents.

[22] Since the decision of the Ontario Court of Appeal in ***Dilawri***, it is possible to summarize the position of the Trustee regarding privileged information as follows:

(a) Solicitors or former solicitors can be compelled to disclose to the Trustee all information regarding the property and affairs and transactions of the bankrupt which do not require the disclosure of communications made for the purpose of giving legal advice. Specifically, questions which deal with assets, the disposition of assets, the tracing of assets or sale proceeds or the flow of funds in and out of trust or otherwise are matters which are not subject to solicitor-client privilege.

(b) Communications made for the purposes of giving legal advice are not privileged where the purpose of the communication was made to further a criminal purpose. All other communications for the purpose of giving legal advice are privileged and must not be disclosed to the Trustee or others and this privilege cannot be waived by the Trustee on behalf of the bankrupt.

(c) The Trustee can, pursuant to ss.16(5), 163(1) and 165(1) of the ***Act***, require the examination of a former solicitor and the delivery of documents in the possession of the former solicitor providing those documents and that examination does not relate to matters which are privileged.

[23] In this case, all documents and information in the possession of the former solicitors must be delivered up to the Trustee except that the former solicitors are not obligated to disclose communications between Taylor and themselves which were made for the purpose of providing legal advice to Taylor. It is then necessary to review the question of whether the documents and information that come into the possession of a Trustee and the Inspectors may then be provided by the Trustee and the Inspectors to third parties or may be used by the Inspectors or provided to others by the Inspectors for purposes other than for purposes of the bankruptcy.

CAN DOCUMENTS WHICH ARE NOT PRIVILEGED BE PROVIDED TO THIRD PARTIES

[24] In ***Re Nadon Paving Ltd.*** (1967), 10 C.B.R. 57 (Alta.C.A.), the court dealt with the question of whether documentation in the hands of a consultant should be produced or not. The consultant had been retained by the bankrupt to review the workmanship of the bankrupt company but a copy of the report prepared by the consultant was not available to the Trustee. The Trustee sought a copy of the report from the consultant so that the Trustee could proceed with an action against the owner who refused to pay for

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work done by the bankrupt company. The court concluded that the documents should be made available. As to the argument of whether or not what is now s.163(1) of the ***Act*** should be used as a "dress rehearsal" for ongoing litigation, the court concluded:

> *Re Franks; Ex parte Gittins* [1892] Q.B. 646, was referred to and it was argued that because of that decision an examination that had for its purpose the improving of the trustee's position in civil litigation should not be made. In that case Vaughan Williams J., acting under the equivalent English section, postponed an examination of a party against whom the trustee intended to assert a claim because, he said at p.647, that he wished "to avoid permitting the trustee to have anything like a dress rehearsal of the cross-examination in the action." The rule that he was applying was stated by Cave J. in *Re Easton; Ex parte Davies* (1891), 8 Morr. 168 at 171:
>
> I admit that when the person seeking to interrogate is the official receiver or the trustee it is no answer to say that an action is pending by the official receiver or trustee against the witness he proposes to examine. But it is the duty of the registrar to see that the questions are put *bona fide* for the benefit of the creditors, and not for any indirect purpose.
>
> The contemplated litigation in this case is not against the appellant but against John Laing & Sons Ltd. There is therefore no question of any preliminary examination for discovery as far as that action is concerned. (at p.60)

[25] Houlden J. in ***Re Tompkinson*** (1971) 14 C.B.R. (N.S.) 245 (Ont.S.C.) dealt with a situation where actions had previously been commenced by the Bank of Nova Scotia against the sister of the bankrupt claiming a fraudulent conveyance and where the same counsel was acting for the Bank of Nova Scotia and for the Trustee on a proposed examination under s.163(1) of the ***Act***. Houlden J. commented:

> I suggested to counsel for the Trustee that, if the Trustee was *bona fide* in bringing this application, the Trustee should have no objection to the Court ordering that the examinations not be used in the proceedings brought by the Bank of Nova Scotia. Counsel has consented to my imposing this restriction on the examinations. I do not know what the Bank of Nova Scotia intends to do with its pending actions, but where the trustee appears to have a *prima facie* right to attack the two transactions in question for the benefit of the bankrupt's estate, I believe the Trustee should be permitted to conduct a s.121 [now s.163] examination. If the Trustee had no interest in the transactions, and merely wished to assist the Bank of Nova Scotia, the decisions of *Re Desportes* (1893), 10 Morr. 40, 68 L.T. 233 and *Re Easton; Ex parte Davies* (1891), 8 Morr. 168, 64 L.T. 798 would be relevant and I would stay the holding of the examination. But in this case, there is good reason for the Trustee to examine into the transactions and, in my view, the Trustee should be permitted to conduct it. (at p.248)

[26] In dealing with this general question, Cory J. (as he then was) in ***Re Long*** (1978), 29 C.B.R. (N.S.) 225 (Ont.S.C.) allowed an examination and concluded:

> There may be many instances where it is essential for the benefit of the creditors of the bankrupt that the trustee obtain as much information as possible before he determines whether or not to proceed with an action or undertake an action on behalf of the bankrupt's estate. The principle thus given is of great important and ought not, in my opinion, to be unduly fettered or restricted. It would seem that in many situations the trustee can proceed with an examination which is, in effect, a discovery, without there being payment of security costs for the protection of the other parties. That right is prone to abuse, and no doubt in some instances, if it were exercised without restraint by a trustee, it would become so abusive that the court would take steps to restrict the practice. (at p.227)

[27] In ***Re Catalina Products Inc.*** (1982), 43 C.B.R. (N.S.) 94 (B.C.S.C.), Skipp L.J.S.C. (as he then was) dealt with the question of whether a person could be represented by counsel at a s.163(1) examination even though that counsel also represented a creditor of the estate. After concluding that the person could be represented by counsel, Skipp L.J.S.C. stated:

> I conclude that the nature of the examination under s.133(1) [now s.163(1)] is a bar to the admission of the creditors to the proceedings. The examination under s.133 is not the proper forum for the creditors to inform themselves with respect to the assets of the bankrupt or the dealings of the estate, there being alternatives open to them.
>
> Since counsel here represents not only Mr. Evans, the person being examined, but a creditor as well, a restriction should be placed on counsel that as a condition of his being allowed to attend he should give an undertaking not to divulge information obtained at the examination to the creditor. (at p.169)

[28] While ***Re Greymac***, *supra*, deals with the question of the powers available to a statutory Receiver, it is clear from the judgment of the court that the court was of the view that the powers available should only be exercised for the purposes for which they were provided.

[29] In dealing with questions arising under ss.163(1) and 164(1) of the ***Act***, the court has limited the scope of the examination or the delivery of documents to matters relating to the bankrupt, his dealings or property. For instance, in ***Re Sun Squeeze Juices Inc.*** 1994 CanLII 7467 (ON SC), (1994), 27 C.B.R. (3d) 98 (Ont.Ct.of Justice-Gen.Div.) Farley, J. dealt with the right of inspection of documents in the possession of an accounting firm. Regarding s.164, Farley J. noted that it was:

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> ... wide enough to include a right of inspection of documents even though they are the property of another person. Naturally the production of such must be of documents "relating in whole or in part to the Bankrupt, his dealings or property". (at p.99)

[30] It is clear that the Trustee is appointed for the purposes set out under the ***Act*** and Regulations. Under s.16(3) of the ***Act***, the Trustee is required to take possession of the deeds, books, records and documents and all property of the bankrupt and may enter onto premises for the purpose of making an inventory of that property. Under s.30 of the ***Act***, the Trustee may do a number of things with the permission of the Inspectors: (a) sell the property of the bankrupt including the goodwill of any business and any book debts owing; (b) lease any real properties; (c) carry on the business of the bankrupt; (d) "bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt"; (e) incur obligations, borrow money and give security on any property of the bankrupt; (f) comprise and settle any debts owing to the bankrupt; (g) comprise any claim made by or against the estate of the bankrupt; etc. The activities of the Trustee must be limited to the legitimate interests of the creditors and of the affairs of the bankrupt.

[31] The powers available to the Trustee do not include the ability to review the books and records of the bankrupt to obtain, not information which is pertinent to the affairs of the bankrupt, but information which would be of use to third parties. The efforts of the Trustee and the Inspectors must be spent for the benefit of the creditors only as the interest of those creditors relate to the property, dealings and affairs of the bankrupt. It is clear that the Inspectors and the Trustee stand in a fiduciary relation to the general body of creditors. As a result, the Inspectors and the Trustee must not use their access to the books and records of the bankrupt for their own purposes, the purposes of creditors who may have separate actions against third parties who had dealings with the bankrupt or in a way which would conflict with the Trustee's obligation to pursue all legitimate claims against third parties that may be available to the Trustee and the bankrupt.

[32] The duties owed by the Inspectors have been variously described:

(a) ***Re Bryant, Isard & Co.*** (1923), 4 C.B.R. 41 (Ont. S.C.) - Inspectors stand in a fiduciary relation to the general body of creditors and should perform their duties impartially and in the interests of the creditors who appoint them. (at p.48);

(b) ***Re Fentiman*** (1926), 7 C.B.R. 355 (Ont. S.C.) - Inspectors must not allow their duty as Inspectors to conflict with some other interest.;

(c) ***Re Shannon & Co.*** (1931), 13 C.B.R. 291 (Alta. S.C.) - An Inspector must not act for his or her own personal advantage and must make a full and complete disclosure to the Trustee of the matters much might reasonably create suggestion of conflict.;

(d) ***Re Promedia Inc.*** (1984), 51 C.B.R. (N.S.) 132 (Que. S.C.) - An Inspector will be removed if there is a conflict of interest and the fact that the Inspector could be of assistance in administering the estate is not sufficient reason to justify his continuance as an Inspector.

[33] The Inspectors were not appointed in order that they might review the materials available to them to see whether they or others might have causes of action available against parties who had dealings with the Bankrupt. Plaintiffs having causes of action against parties such as the former solicitors will have all of the rights of discovery allowed by the Supreme Court Rules. It is inappropriate to allow the Inspectors to use their present access to materials to allow them or others to have early access to materials which will be available on discovery or to have access to materials which would not be available on discovery.

[34] In the circumstances of this case, the access which both the Trustee and the Inspectors and their solicitors will have to the documents and records obtained from the former solicitors will be limited to using those documents in relation only to the "affairs of the Bankrupt", its "account", its "trade dealings", or its "dealings or property" and not in relation to any other purposes. Accordingly, it is appropriate to impose upon the Trustee and the Inspectors and their respective solicitors that, while the Trustee and the Inspectors will have complete and unrestricted access to all Taylor and related files which the Trustee has received from the former solicitors of the Bankrupt, they may use those files and the information contained only in relation to the affairs of the Bankrupt. At the same time, the solicitor for the Inspectors will provide an undertaking that she and those in her office who are assisting her in her representation of the Inspectors will not provide any of the information or documents they obtain in that capacity to any other members of their firm.

"G.D. Burnyeat, J."

_____

Mr. Justice Burnyeat

Reports by trustee - Sec. 27

27. (1) The trustee shall from time to time report,

(a) when required by the inspectors, to every creditor,

(b) when required by any specific creditor, to the creditor, and

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(c) when required by the Superintendent, to the Superintendent or the creditors,
showing the condition of the bankrupt's estate, the moneys on hand, if any, and particulars of any property remaining unsold.

Disbursements - Sec. 27(2)
(2) The trustee is entitled to charge against the estate of the bankrupt, for the preparation and delivery of any report referred to in subsection (1), only his actual disbursements.
R.S., c. B-3, s. 13.

Documents to be forwarded to Superintendent - Sec. 28
28. (1) The trustee shall, without delay after their receipt or preparation, send to the Superintendent, in the prescribed manner, true copies of the documents referred to in section 155 and a true copy of
(a) the notice referred to in section 102,
(b) the statement referred to in paragraph 158(d),
(c) the trustee's final statement of receipts and disbursements and the dividend sheet, and
(d) every order made by the court on the application for discharge of a bankrupt or annulling any bankruptcy,
and file a copy of the documents referred to in paragraphs (b) and (c) in the court.

Notices, etc., to be forwarded to Superintendent - Sec. 28(2)
(2) The trustee shall forward promptly to the Superintendent copies of all notices, reports and statements sent by him to the creditors and, when required, copies of such other documents as the Superintendent may specify.
R.S., 1985, c. B-3, s. 28;
1992, c. 1, s. 12, c. 27, s. 11;
2005, c. 47, s. 21.

Duty of trustee on expiration of licence or removal - Sec. 29
29. (1) Where
(a) the licence of a trustee has been cancelled or suspended, or has ceased to be valid by reason of failure to pay fees,
(b) a trustee has been removed from continuing the administration of an estate, or
(c) a trustee dies or becomes incapacitated,
the trustee or the legal representative of the trustee shall, within such time as is fixed by the Superintendent, prepare and forward to the Superintendent a detailed financial statement of the receipts and disbursements together with a list of and report on the unadministered property of every estate under the trustee's administration for which the trustee has not been discharged, and shall forward to such other trustee as may be appointed in the trustee's stead or, pending the appointment of the other trustee, to the official receiver all the remaining property of every estate under the trustee's administration together with all the books, records and documents relating thereto.

(2) [Repealed, 2005, c. 47, s. 22]
R.S., 1985, c. B-3, s. 29;
1997, c. 12, s. 21;
2005, c. 47, s. 22.

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Powers exercisable by trustee with permission of inspectors - Sec. 30

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

(a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

(b) lease any real property or immovable;

(c) carry on the business of the bankrupt, in so far as may be necessary for the beneficial administration of the estate of the bankrupt;

(d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

(e) employ a barrister or solicitor or, in the Province of Quebec, an advocate, or employ any other representative, to take any proceedings or do any business that may be sanctioned by the inspectors;

(f) accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the inspectors think fit;

(g) incur obligations, borrow money and give security on any property of the bankrupt by mortgage, hypothec, charge, lien, assignment, pledge or otherwise, such obligations and money borrowed to be discharged or repaid with interest out of the property of the bankrupt in priority to the claims of the creditors;

(h) compromise and settle any debts owing to the bankrupt;

(i) compromise any claim made by or against the estate;

(j) divide in its existing form among the creditors, according to its estimated value, any property that from its peculiar nature or other special circumstances cannot be readily or advantageously sold;

(k) elect to retain for the whole part of its unexpired term, or to assign, surrender, disclaim or resiliate any lease of, or other temporary interest or right in, any property of the bankrupt; and

(l) appoint the bankrupt to aid in administering the estate of the bankrupt in such manner and on such terms as the inspectors may direct.

Tinant v. Tinant, 2003 ABCA 211 (CanLII) - Can a Bankrupt's Action be Assigned by the Trustee?

Date:	2003-07-02
Docket:	0203-0005-A
Parallel citations:	330 AR 148; 46 CBR (4th) 150; 15 Alta LR (4th) 225
URL:	http://canlii.ca/t/57v0
Citation:	Tinant v. Tinant, 2003 ABCA 211 (CanLII), <http://canlii.ca/t/57v0> retrieved on 2013-08-31
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Tinant v. Tinant, 2003 ABCA 211

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Date: 20030702
Docket: 0203-0005-A

IN THE COURT OF APPEAL OF ALBERTA

REASONS FOR DECISION OF
THE HONOURABLE MR. JUSTICE RITTER

BETWEEN:

ROGER FELIX TINANT

Applicant

- and -

CONSTANCE MINERVA TINANT

Respondent

APPLICATION FOR RESTORATION OF THE APPEAL TO THE LIST

R.F. TINANT
The Applicant in Person

COUNSEL:

L.M.E. ARES, Q.C.
For the Respondent

REASONS FOR DECISION OF
THE HONOURABLE MR. JUSTICE RITTER

---

[1] The applicant applies for an order to have his appeal restored to the general appeal list. It was struck because, after the appeal books were filed, no steps were taken to prosecute the appeal between April 2002 and December 2002.

[2] The applicant has filed a short affidavit in support of his motion which does no more than state that his appeal was struck and that he wants it restored to the list. Fortunately the affidavit filed by the respondent is more informative. This affidavit, along with another affidavit that the applicant filed in previous proceedings, provide sufficient information to enable me to deal with this application on a substantive basis.

Background

[3] This application involves an appeal filed by the applicant from a decision made in Court of Queen's Bench following a matrimonial property trial which was heard from September 24 to September 28, 2001. Written reasons for judgment were issued on October 18, 2001. The formal judgment was entered on December 20, 2001. Minor amendments to the formal judgment were filed on February 12, 2002. The appeal was filed on January 4, 2002 and the appeal books were filed on April 19, 2002.

[4] The applicant filed for personal bankruptcy on October 2, 2002. The trustee in bankruptcy did not wish to pursue the appeal and took no steps to further it. In consequence the appeal was struck from the general list in accordance with the usual practice of this Court.

[5] There is nothing before me to indicate why no steps were taken by the applicant or his counsel to prepare the applicant's factum between April 19, 2002 and October 2, 2002. However the applicant did produce a letter dated early June 2003, by which his trustee purported to assign the bankruptcy estate's interest in this appeal to the applicant. No consideration for that assignment was expressed in the letter. Even though the letter was not filed, I propose to treat it as if it were part of the material properly before me.

Analysis

[6] In ***707739 Alberta Ltd. v. Phillips*** 2001 ABCA 219 (CanLII), (2001), 286 A.R. 367, at paragraph 13 Hunt J.A. reviewed the factors to consider in the restoration of an appeal:

> If the appellants could bring themselves within the six-month time period in Rule 515.1(9), their application would be to restore an appeal under Rule 515.1(7). An order to restore an appeal struck from the list under Rule 515.1(7) is discretionary and, in exercising that discretion, a judge must consider all relevant matters: Brown v. Royal Bank of Canada 2001 ABCA 73 (CanLII), (2001), 277 A.R. 241; 242

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> W.A.C. 241 (C.A.), at 242. A mere slip or inadvertence to appear on the part of counsel will generally not prevent the restoration of the appeal to the list: ibid.; Bishop v. Bishop (1990), 113 A.R. 280 (C.A.). On the other hand, panels of this court have refused applications to restore struck appeals on a number of grounds: an appeal appears to lack merit: Kowalchuk v. Kowalchuk, [1999] A.R. Uned. 538; [1999] A.J. No. 1585, (C.A.), online: QL (AJ); an appellant shows no intention of proceeding with an appeal and has not taken any steps to prosecute his appeal with diligence: Sammut v. Landau Estate , [1989] A.J. No. 128 (C.A.), online: QL (AJ); the delay is so great that prejudice to the respondents is evident: Clay v. Board of Reference and Board of Education of Calgary reflex, (1990), 106 A.R. 24 (C.A.); and an appellant can offer no reasonable explanation for a lengthy delay in taking steps to restore an appeal: Kalin v. Cline, [1992] A.J. No. 973 (C.A.), online: QL (AJ).

[7] The applicant has not shown that he has prosecuted his appeal with diligence. Indeed the opposite has occurred. Rule 538(1)(a) of the Alberta Rules of Court required the applicant to file his factum within 60 days of filing the appeal books. The gap between April 19, 2002 and October 2, 2002 is much greater than 60 days. None of the applicant's materials explain why the factum was not filed in accordance with this requirement. Further the applicant's appeal was struck from the list in December 2002 but he did not file this motion until May 16, 2003. Again no explanation is proffered to account for this delay.

[8] Delay and prejudice go hand in hand. It is now almost 2 years since the trial. Successful parties should not have the fruits of their success revisited long after trial. Appellants must be aware that with the right of appeal there is a corresponding obligation to prosecute the appeal with reasonable diligence or the right will be lost. Where there is a deadline in the rules for a step, there should be some explanation for the failure to meet that deadline before an appeal will be restored to the list.

[9] There is a second reason why this appeal should not be restored to the list. The applicant has no right to prosecute it as the right to pursue this appeal is within the exclusive capacity of the trustee in bankruptcy and that right cannot be assigned to the applicant.

[10] The *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, ("*BIA*") touches on this issue in the following sections:

> **s. 30(1) The trustee may with the permission of the inspectors, do all or any of the following things:**
>
> > **(a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;**
> >
> > **...**
> >
> > **(d) bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt;**
> >
> > **...**
> >
> > **(l) appoint the bankrupt to aid in the administering of the estate in such manner, and on such terms as the inspectors may direct.**
> >
> > **...**
>
> **s. 40(1) With the permission of the inspectors, any property of a bankrupt found incapable of realization shall be returned to the bankrupt prior to the trustee's application for discharge**
>
> **(2) Where a trustee is unable to dispose of any property as provided in this section, the court may make such order as it may consider necessary.**

[11] There are good reasons why the capacity to act is vested in the trustee. First, the assets of the bankrupt are in the control of the trustee. If the proceeding is unsuccessful it is likely that there will be a costs consequence. A costs order against the bankrupt will generally be meaningless. Further if any of the property of the bankrupt is available to satisfy the costs award then it is likely that the property should have been turned over to the trustee. Also, if the bankrupt has legitimate means to raise costs, those means would generally be better spent on contribution to his or her creditors.

[12] Second, one of the purposes of cost awards is to ensure that parties will carefully consider whether there is any merit to a proceeding. When a party is bankrupt that careful consideration is easily set aside as the party is insulated from costs consequences as he or she has already lost all his or her assets to the trustee. Also the party against whom costs

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consequences have some meaning, the trustee, has already assessed the risks and has determined that the potential benefits of the proceeding are outweighed by the risks of a costs award.

[13] The applicant argues that different considerations apply where there is an assignment by the trustee of the right to appeal. In my view they do not. It would be a hollow benefit to persons being sued by bankrupts to be assured that the bankrupt and the trustee could avoid all consequences of cost awards by the simple mechanism of an assignment of the right to commence or continue an action, particularly where that assignment is granted for nominal or, as is the case here, no consideration. I conclude that Esson J.A. was correct in *Bolton v. Amborq Developments Ltd.* 1987 CanLII 2586 (BC CA), (1987), 15 B.C.L.R. (2d) 20, 66 C.B.R. (NS) 310 (C.A.) when he determined that the use of an assignment in this type of situation is at odds with the spirit of the *BIA*.

[14] I turn to the issue of whether matrimonial property litigation enjoys a special exemption which permits a bankrupt to commence or carry on with litigation in his or her own name. This issue needs to be addressed because two decisions issued by judges of the Alberta Court of Queen's Bench, ***Deloitte, Haskins & Sells Ltd. v. Graham*** 1983 CanLII 1044 (AB QB), (1983), 42 A.R. 76, 144 D.L.R. (3d) 539 (Q.B.) ("***Deloitte***") and ***Dinapoli v. Yeung,*** 2002 ABQB 714 (CanLII), [2003] 3 W.W.R. 714, 2002 ABQB 714, came to this conclusion.

[15] It is clear that capacity to institute or continue proceedings does not vest in the trustee in every case. Section 30(1)(d) of the *BIA* only applies to proceedings which relate to the property of the bankrupt. Therefore proceedings which do not relate to property remain within the purview of the bankrupt subject always to the rights of opposing parties to move for security for costs.

[16] Also the *BIA* specifically preserves to the bankrupt the right to pursue wages and other employment entitlements: see *s. 68 of the Bankruptcy and Insolvency Act*, R.S.C. 1985,
c. B-3, as amended by S.C. 1997, c-12. The Supreme Court has interpreted this provision as permitting a bankrupt to commence or continue proceedings for wrongful dismissal which it concluded is "akin to wages": see ***Wallace v. United Grain Growers,*** 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1.

[17] In ***Deloitte***, *supra*, McDonald J. (as he then was) concluded that the definition of property in the *BIA*, while broad, does not include a claim under the Alberta Matrimonial Property Act, R.S.A. 1980, c. M-9, now R.S.A. 2000, c. M-8 ("*MPA*"). In my view the reasoning used to support this decision does not stand up under scrutiny. The basis for this conclusion is that the rights granted under the *MPA* do not relate to property but rather to the right to ask the court for an order in its discretion.

[18] I do not agree. The *MPA* is about matrimonial property. The entire purpose of the *MPA* is to achieve an equitable distribution of married people's property after a marriage breakdown has occurred. It is true that the court enjoys a discretion as to how it distributes the property, but courts often enjoy discretions relating to remedy, especially where equitable principles are factors to be applied. That does not mean, however, that wherever equitable principles come into play that which is being sought or granted no longer relates to property but to an equitable order. Also the *MPA* makes it clear that while judges may take equitable principles into account, once they have done so, they are required to make an order distributing the total property belonging to the married parties.

[19] There is no good reason why matrimonial property should enjoy a different status than does other property. In fact there is a good reason why it should not. It is not unusual for bankrupts to attempt to place their property beyond the reach of their creditors and the trustee. One possible way of achieving this objective would be to have one's spouse commence a matrimonial property application and then agree to a generous order. If such orders do not relate to property, then neither the trustee or any creditor would have a say in the matter.

[20] Finally, when one is dealing with the party who has a legal interest in the bulk of the matrimonial property, as is the situation involving this applicant, what is being sought is not an order but a limitation or diminution of the property to be taken from that party. The applicant is not seeking a matrimonial property order, he is asking the court to reduce the one that has been granted to the respondent. In other words he wants to preserve his property and is asking this Court to permit him to do so. This proposed form of proceeding has to be one "relating to the property of the bankrupt".

[21] I conclude that pursuit or defence of an order, even though discretionary, which relates to property, is a legal proceeding relating to property and is, by virtue of s. 30(1)(d) of the *BIA*, within the exclusive capacity of the trustee. In consequence this application is dismissed.

APPEAL HEARD on JUNE 17, 2003
DECISION FILED at EDMONTON, Alberta,
this 2nd day of JULY, 2003

RITTER J.A.

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Hall-Chem Inc. v. Vulcan Packaging Inc., 1994 CanLII 1384 (ON CA) - Bankrupt's Claim Against Debtor A Bar to Pursuing Claim - Reliance on BIA By Debtor

Date:	1994-11-25
Docket:	m13741; C18618
Parallel citations:	21 OR (3d) 89; 120 DLR (4th) 552; 28 CBR (3d) 161; 75 OAC 74
URL:	http://canlii.ca/t/6k9m
Citation:	Hall-Chem Inc. v. Vulcan Packaging Inc., 1994 CanLII 1384 (ON CA), <http://canlii.ca/t/6k9m> retrieved on 2013-08-29
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C18618
M13741

COURT OF APPEAL FOR ONTARIO
FINLAYSON, DOHERTY and AUSTIN JJ.A.

B E T W E E N :

HALL-CHEM INC.

Plaintiff

- and -

VULCAN PACKAGING INC.,
VULCAN, EMBALLAGES INC.
carrying on business under the firm name and style of VULSAY INDUSTRIES

Defendants

A N D B E T W E E N :

VULCAN PACKAGING INC.,
VULCAN, EMBALLAGES INC.
carrying on business under the firm name and style of VULSAY INDUSTRIES

Plaintiffs by Counterclaim (Respondent)

- and -

HALL-CHEM INC., MICHEL BELEC, LAWRENCE DEAKINS, QUALILAB MARKETING INC., and QUALILAB INDUSTRIES INC.

John T. Zuber for the appellant
Michel Belec

Kirk M. Baert for the respondent
Vulcan Packaging Inc.

Robert A. Klotz for Deloitte & Touche, Trustee for the Estate of Joseph Paul Emile Belec

Heard: November 2 and 8, 1994

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Defendants by Counterclaim)
(Appellant))

FINLAYSON J.A.:

This is a motion by the appellant, Michel Belec, under s.7(5) of the *Courts of Justice Act*, R.S.O 1990, Chap. C.43, to set aside or vary a decision of Madam Justice Weiler dated May 27, 1994, in which, *inter alia*, she ordered the appellant, Belec, one of the defendants by counterclaim, to give security within fourteen days in the amount of $150,000 to abide the outcome of the appeal. Belec had filed a notice of appeal from the judgment of Spence J. in which Belec was ordered to pay Vulcan Packaging Inc. $338,000. This motion was returnable on November 2, 1994, but on that date, counsel for the moving party did not appear despite being advised that counsel for the responding party, Vulcan Packaging Inc., would be appearing and was ready to proceed. Prior to the opening of the court, members of the panel were provided with correspondence to which I will refer in some detail.

On October 26, 1994, Deloitte & Touche wrote to the Ontario Court (General Division) advising that Michel Joseph Paul Emile Belec had filed an assignment in bankruptcy on October 5, 1994 and that it had been appointed Trustee. A copy of this letter was sent to the Court of Appeal for Ontario. The author referred to s.69(1) of the *"Bankruptcy Act"* and stated that "the above action [referring to the appeal pending] should be discontinued forthwith". Counsel for the responding party replied on October 31, 1994, taking issue with the content of the Trustee's letter. On the same date, he wrote to the Registrar of this court enclosing copies of the above correspondence.

On November 1, 1994, Robert A. Klotz wrote to counsel for the moving and responding parties and to the Registrar of this court. I set out the letter in full:

> Deloitte& Touche, Trustee in Bankruptcy of the Estate of Mr. Belec, has requested that we intervene to clarify the flurry of correspondence in this matter.
>
> Mr. Belec is now bankrupt. The proceeding against Mr. Belec is therefore stayed by the operation of s.69.3 of the Bankruptcy and Insolvency Act. The trustee quite properly advised the Court of Appeal of these facts, by letter of October 26, 1994. The appeal is a step in the proceeding; the proceeding itself is stayed; therefore the appeal is stayed. Rule 11 of the Rules of Civil Procedure similarly provides for a stay. The trustee authorized Mr. Zuber to attend to advise the Court of Appeal of the bankruptcy and the consequent stay of proceedings. **However, it is immaterial to the trustee whether it is Mr. Zuber, or Mr. Baert, or indeed the trustee's letter itself, which informs the Court of Appeal that Mr. Belec is bankrupt and the proceeding is stayed.**
>
> **I would request that Registrar Kromkamp advise Mr. Baert that the appeal is not proceeding tomorrow. In the event that it does proceed, we would consider it a nullity. We call on both counsel to respect the stay provided for in s. 69.3 and Rule 11, and to refrain from inappropriately threatening the trustee with a cost sanction.**

On November 1, counsel for the moving party, wrote to all concerned, including the Registrar of this court, stating that relying upon the information that the motion was "stayed by operation of the *Bankruptcy and Insolvency Act*", he would "not be attending tomorow's motion at the Court of Appeal".

This motion was adjourned on November 2, because of the absence of counsel for the moving party. The Registrar was instructed to contact counsel for the moving party and Robert A. Klotz and require their attendance on November 8, 1994. Mr. Klotz did appear on November 8. He stated that he was representing the Trustee and persisted in his submission that all proceedings in this court were stayed by virtue of s.69.3(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "*BIA*"). The section reads as follows:

> **69.3** (1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no ***creditor*** has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged. [Emphasis added.]

Subsection (1) clearly makes reference to a creditor, not a debtor such as the appellant Belec. Depite this language, which would not appear to have any application to an appeal by a bankrupt against a judgment creditor, counsel for the Trustee stated that Vulcan, as a creditor, was continuing its action against Belec, the debtor, by resisting Belec's appeal against Vulcan's judgment. This submission makes no sense to me. In my view, the applicable section of the *BIA* is 71(2):

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> 71. (2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

The definition of "property" in s.2 of the *BIA* is very broad and includes "things in action". Belec had a counterclaim against Vulcan. By virtue of s.71(2), that cause of action was vested in his Trustee and the carriage of the appeal by Belec was firmly in the hands of the Trustee. It appears to me that the obligation of the Trustee was therefore to contact counsel for the moving party and instruct him as to whether the Trustee intended to proceed with the appeal and with this motion, which arose out of the appeal. If time was required to investigate the merits of the appeal, the Trustee should have instructed counsel to arrange for an adjournment of the motion, either on consent, or failing consent, on application to the court. Counsel, in turn, should have notified this court of the Trustee's position pursuant to rule 11 of the Rules of Civil Procedure which I will refer to in more detail below.

Far from assuming this responsibility and doing something positive, the Trustee, as counsel frankly conceded, was only concerned with avoiding costs to itself and the bankrupt estate. This was a legitimate concern, but the way in which the Trustee dealt with it was quite inappropriate. Correspondence filed with the court on November 8 is most revealing. In a letter to counsel for the moving party dated October 31, 1994, the Trustee, specifying that it was acting as Trustee and not in its personal capacity, purported to authorize counsel to attend on the motion on behalf of Belec "in order that you do the court the courtesy of completing your file, in light of Mr. Belec's bankruptcy". The author of the letter made it clear that counsel was not acting for the Trustee and that the Trustee would "not be responsible for costs of any nature, either for yourselves or for the opposing party with respect to this motion".

The Trustee appeared to be operating on the faulty premise that any proceedings that were outstanding prior to the bankruptcy were irrelevant, and the Trustee, to use its words, could treat them as a nullity. However, absent any language in the *BIA* which governs proceedings in this court, our Rules of Civil Procedure still apply and the Trustee has a duty to comply with them. It is not the *BIA* which stays these proceedings, it is the rules of court. Rule 11 of the Rules of Civil Procedure provides:

> 11.01 Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed until an order to continue the proceeding by or against the other person has been obtained.
>
> 11.02 (1) Where a transfer or transmission of the interest or liability of a party takes place while a proceeding is pending, any interested person may, on filing an affidavit verifying the transfer or transmission of interest or liability, obtain on requisition from the registrar an order to continue (Form 11A), without notice to any other party.
>
> (2) An order to continue shall be served forthwith on every other party.
>
> 11.03 Where a transfer or transmission of the interest of a plaintiff takes place while an action is pending and no order to continue is obtained within a reasonable time, a defendant may move to have the action dismissed for delay, and rules 24.02 to 24.05 apply, with necessary modifications.

Counsel, having instituted proceedings in the Ontario Court (General Division), was obliged to comply with the rules of court. Rule 11 clearly covers an appeal in a proceeding commenced in the General Division. Rule 11.02 provides that either party may obtain an *ex parte* order continuing the proceeding in the name of the Trustee. The Trustee should have determined whether it wished to proceed with the motion and advised counsel for the respondent so that the appropriate steps required under rule 11.02 could be taken.

Counsel for the moving party had a clear duty to the court and other counsel involved to seek instructions from the Trustee to obtain an order to proceed with the appeal or to abandon it. He was not entitled to wash his hands of the proceedings. So far as the pending motion in the appeal is concerned, if counsel could not arrrange for its orderly disposition, he should have asked for the court's intervention. In the circumstances of this case, the Trustee had no business writing to the court at all. If it wished to become a party to the proceedings, it could have taken them over from counsel for Belec and then adopted any position it considered appropriate. Both the moving party and the Trustee have ignored the rights of the responding party by attempting to leave the appeal in limbo.

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It is unfortunate that this matter got out of hand and was allowed to carry on as long as it has. We now know that the Trustee never did have any intention of taking over the carriage of the appeal. Instead of issuing declarations, the Trustee could have arranged for the abandonment of the appeal with a few telephone calls. If any problems arose relating to costs of an abandoned appeal, they could have been resolved by this court. The conduct of counsel for the moving party and the Trustee towards this court was wrong and has resulted in a considerable waste of court time. Since both counsel have apologized to the court for their discourtesy, there is no reason to say anything further on that score.

With respect to the motion under s.7(5) of the *Courts of Justice Act,* since there is no intention of proceeding with it, there is no further purpose in maintaining the stay in so far as it interferes with the court's ability to deal with this motion. The motion should be dismissed. In my view, counsel for the responding party is entitled to his costs of the day from the Trustee in bankruptcy personally for the attendance November 1, 1994, which I fix at $1,000. I would make no other order as to costs.

Permission limited to particular thing or class - Sec. 30(2)
(2) The permission given for the purposes of subsection (1) is not a general permission to do all or any of the things mentioned in that subsection, but is only a permission to do the particular thing or things or class of thing or things that the permission specifies.

If no inspectors - Sec. 30(3)
(3) If no inspectors are appointed, the trustee may do all or any of the things referred to in subsection (1).

Sale or disposal to related persons - Sec. 30(4)
(4) The trustee may sell or otherwise dispose of any of the bankrupt's property to a person who is related to the bankrupt only with the court's authorization.

Related persons - Sec. 30(5)
(5) For the purpose of subsection (4), in the case of a bankrupt other than an individual, a person who is related to the bankrupt includes

(a) a director or officer of the bankrupt;
(b) a person who has or has had, directly or indirectly, control in fact of the bankrupt; and
(c) a person who is related to a person described in paragraph (a) or (b).

Factors to be considered - Sec. 30(6)
(6) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition of the property was reasonable in the circumstances;
(b) the extent to which the creditors were consulted;
(c) the effects of the proposed sale or disposition on creditors and other interested parties;
(d) whether the consideration to be received for the property is reasonable and fair, taking into account the market value of the property;
(e) whether good faith efforts were made to sell or otherwise dispose of the property to persons who are not related to the bankrupt; and
(f) whether the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition of the property.

R.S., 1985, c. B-3, s. 30;
1997, c. 12, s. 22(F);

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2004, c. 25, s. 22;
2005, c. 47, s. 23;
2007, c. 36, s. 10.

Borrowing powers with permission of court - Sec. 31
31. (1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

Security under Bank Act - Sec. 31(2)
(2) For the purpose of giving security under section 427 of the Bank Act, the interim receiver, receiver or trustee, when carrying on the business of the bankrupt, is deemed to be a person engaged in the class of business previously carried on by the bankrupt.

Limit of obligations and carrying on of business - Sec. 31(3)
(3) The creditors or inspectors may by resolution limit the amount of the obligations that may be incurred, the advances that may be made or moneys that may be borrowed by the trustee and may limit the period of time during which the business of the bankrupt may be carried on by the trustee.

Debts deemed to be debts of estate - Sec. 31(4)
(4) All debts incurred and credit received in carrying on the business of a bankrupt are deemed to be debts incurred and credit received by the estate of the bankrupt.
R.S., 1985, c. B-3, s. 31;
1991, c. 46, s. 584;
2005, c. 47, s. 24.

Trustee not obliged to carry on business - Sec. 32
32. The trustee is not under obligation to carry on the business of the bankrupt where in his opinion the realizable value of the property of the bankrupt is insufficient to protect him fully against possible loss occasioned by so doing and the creditors or inspectors, on demand made by the trustee, neglect or refuse to secure him against such possible loss.
R.S., c. B-3, s. 15.

Reimbursement only of trustee's disbursement advances - Sec. 33
33. The court may make an order providing for the sale of any or all of the assets of the estate of the bankrupt, either by tender, private sale or public auction, setting out the terms and conditions of the sale and directing that the proceeds from the sale are to be used for the purpose of reimbursing the trustee in respect of any costs that may be owing to the trustee or of any moneys the trustee may have advanced as disbursements for the benefit of the estate.
R.S., 1985, c. B-3, s. 33;
2005, c. 47, s. 25.

Trustee may apply to court for directions - Sec. 34

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34. (1) A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

Slattery (Trustee of) v. Slattery, [1993] 3 SCR 430 - Can Federal Income Tax Act Confidentiality Provisions be Set-Aside for Trustee Realization Purposes?

Date:	1993-09-30
Docket:	22618
Parallel citations:	1993 CanLII 73 (SCC); 139 NBR (2d) 246; 106 DLR (4th) 212; 21 CBR (3d) 161; 47 DTC 5443; [1993] 2 CTC 243
URL:	http://canlii.ca/t/1fs12
Citation:	Slattery (Trustee of) v. Slattery, 1993 CanLII 73 (SCC), [1993] 3 SCR 430, <http://canlii.ca/t/1fs12> retrieved on 2013-08-24
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Slattery (Trustee of) *v.* Slattery, [1993] 3 S.C.R. 430

Marguerite Slattery *Appellant*

v.

Doane Raymond Limited, Trustee of the Estate of Raymond P. Slattery, a Bankrupt *Respondent*

Indexed as: Slattery (Trustee of) *v.* Slattery

File No.: 22618.

1993: March 29; 1993: September 30.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the new brunswick court of appeal

Income tax -- Enforcement -- Confidentiality -- Evidence gained from Income Tax Act investigations protected unless required in proceedings relating to administration or enforcement of the Act -- Taxpayer petitioned into bankruptcy by Revenue Canada -- Trustee in bankruptcy seeking declaration that assets held by taxpayer's wife rightfully assets of bankrupt's estate -- Testimony of Revenue Canada officials from income tax investigation admitted into evidence -- Whether a civil action commenced by the trustee for a declaration that certain property belongs to the bankrupt's estate is a proceeding relating to the enforcement of the Income Tax Act -- Income Tax Act, S.C. 1970-71-72, c. 63, s. 241(1)(a), (b), (c), (2)(a), (b), (3), (4)(c).

A taxpayer unable to pay his taxes owing was petitioned into bankruptcy by Revenue Canada. The respondent trustee in bankruptcy commenced an action against the appellant (the bankrupt's wife) seeking a declaration that certain assets registered in her name were the property of the bankrupt's estate or were held in trust for that estate.

At trial, the trustee sought to introduce testimony from two Revenue Canada officials who had participated in the investigation into the bankrupt's affairs. Appellant argued that that testimony was barred because s. 241 of the *Income Tax Act* prohibits Revenue Canada officials from disclosing information obtained from a taxpayer for the purposes of that Act. The trial judge ruled that this testimony fell within the exception in s. 241(3) which provides that the prohibition does not apply in respect of proceedings relating to the administration or enforcement of the Act. Both officials testified, and the court granted the declaration in part. The New Brunswick Court of Appeal agreed with the trial judge's interpretation of s. 241 and dismissed the appeal. At issue here was whether a civil action commenced by the trustee for a declaration that certain property is property of the bankrupt's estate is a proceeding "relating to the . . . enforcement of" the *Income Tax Act* within the meaning of s. 241(3) of the Act.

Held (L'Heureux-Dubé, Sopinka and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and La Forest, Gonthier, Cory, Iacobucci and Major JJ.: Section 241 involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and

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enforcement of the *Income Tax Act* and other federal statutes referred to in s. 241(4). Only in exceptional or prescribed situations does the privacy interest give way to the interest of the state. By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. Parliament, however, has also recognized that the possession of personal information is useless if it cannot be used to assist in tax collection, when required, including tax collection by way of judicial enforcement.

Section 241(3) contemplates not only administrative and enforcement proceedings brought under the *Income Tax Act* itself but also other proceedings. Both the text and the context of s. 241 buttress this conclusion. The connecting phrases used by Parliament in s. 241(3) ("in respect of" and "relating to") are of the widest possible scope and suggest that a wide rather than narrow view should be taken when considering whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*. This breadth of meaning is confirmed by the French version of the section.

Section 222 clearly states that the Minister may resort generally to the courts to institute civil proceedings to collect taxes as debts in addition to the procedures specified in the *Income Tax Act*. In order to take full advantage of this power, the Minister must be able to disclose in court otherwise confidential information in order to prove the cause of action in debt. Absent the ability to disclose as required to prove a debt, s. 222 would be deprived of part of its meaning.

Glover v. Glover (No. 1) must be read to mean that the confidentiality provisions apply to any legal proceeding of a civil character which is not covered by the exception provided in s. 241(3). Sections 241(1) and (2) apply to civil proceedings not related to the administration or enforcement of the *Income Tax Act*. *Glover* does not inform the issue already set out: the essential question is whether or not the bankruptcy proceedings taken herein are related to the administration or enforcement of the *Income Tax Act*.

The proceedings taken here were related to the administration or enforcement of the *Income Tax Act* even though they were taken by the trustee in bankruptcy. A contrary interpretation is not supported by the wording of s. 241(3) and is somewhat inconsistent with the power given to creditors in s. 38(1) of the *Bankruptcy Act*. At the policy level, the Minister should not be inhibited from recourse to the bankruptcy process in light of the advantages and protection that this process can entail. If the Minister cannot disclose confidential information in bankruptcy to prove a claim asserted, the bankruptcy procedure will in many cases not be available for income tax enforcement.

The difference in nature between bankruptcy proceedings and proceedings under s. 160, where disclosure was admitted to be available by appellant, was not relevant. The important point was that disclosure made during bankruptcy proceedings was made in respect of proceedings relating to the administration or enforcement of the Act within the meaning of s. 241(3). The fact that the Minister chose to collect taxes by petitioning the taxpayer into bankruptcy did not disentitle Revenue Canada from disclosing the confidential information.

Arguments raising the possibility of difficult questions as to competence and compellability were not persuasive.

Per L'Heureux-Dubé, Sopinka and McLachlin JJ. (dissenting): The s. 241(3) exemption applies only in the case of proceedings specifically provided for in the *Income Tax Act*. These proceedings are, for the most part, set out in Part XV of the Act which establishes "Administration and Enforcement" provisions. A trial to determine title between an individual and a trustee in bankruptcy is not a proceeding provided for in Part XV, or elsewhere in the Act. Accordingly, Revenue Canada officials should have been barred from disclosing information obtained in the course of their investigation of the bankrupt's affairs.

This Court gave the phrase "in respect of" a wide interpretation in the circumstances of the *Indian Act* as it related to taxation of personal property. The wide interpretation given the phrase in that context is not determinative of its application in s. 241(3). The context of s. 241(3), and jurisprudence of this Court treating the section, suggest that the phrase should be construed narrowly, not broadly.

The proceedings at issue on this appeal are not proceedings so connected to the administration of the Act that they fall within the contemplation of the exemption in s. 241(3). Part XV of the Act provides the Minister of Revenue with a system of debt collection proceedings that mirrors ordinary creditors' remedies. It does not, however, deal with bankruptcy, except to the extent of providing the Minister with the power to collect money owed to a secured creditor by a trustee in bankruptcy, notwithstanding the *Bankruptcy Act*. This legislative silence is significant. Bankruptcy is a particular process which has specific and salutary aims and which involves all of the creditors of a particular debtor. Concern for the confidentiality of information that is not public is very much at issue.

The proceeding at issue here is not an action under s. 222. The action is brought by a trustee in bankruptcy and not by the Crown as the section appears to contemplate. Under s. 69 of the *Bankruptcy Act,* all collection proceedings are stayed when the debtor is declared bankrupt. Until that point the Minister arguably may prove its debt by disclosure of information obtained for the purposes of the Act. But once a debtor is declared bankrupt, and a trustee in bankruptcy has been put in place to pursue the bankruptcy, the proceeding is no longer capable of being accurately characterized as a proceeding relating to the administration of the Act. The stay operates until the trustee in bankruptcy is discharged. The

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practical effect of the proceedings permitting the Minister to realize upon an outstanding debt does not operate to make the proceeding one relating to the administration of the Act.

Part XV of the Act makes no specific provision for disclosure in the context of bankruptcy. When the Minister has recourse to this procedure, its actions are governed by the *Bankruptcy Act* and no longer by the *Income Tax Act*. In so proceeding the Minister loses the capacity to deploy the special information gathering techniques, which accrue only by virtue of the *Income Tax Act*, either to its own advantage, or to those of its fellow creditors.

The Minister was not permitted to disclose confidential information in the case at bar even though a superior court judge is a person, as provided in s. 241(4)(*c*), "legally entitled" to the information. A party should not be able to avail itself of the s. 241(4)(*c*) exemption if it cannot bring the proceeding within the terms of s. 241(3).

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By Iacobucci J.

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By McLachlin J. (dissenting)

Nowegijick v. The Queen, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29; *R. v. McKinlay Transport Ltd.*, 1990 CanLII 137 (SCC), [1990] 1 S.C.R. 627; *Glover v. Minister of National Revenue*, 1981 CanLII 64 (SCC), [1981] 2 S.C.R. 561, aff'g (1980), 29 O.R. (2d) 392.

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APPEAL from a judgment of the New Brunswick Court of Appeal 1991 CanLII 4083 (NB CA), (1991), 120 N.B.R. (2d) 4, 84 D.L.R. (4th) 360, 7 C.B.R. (3d) 157, dismissing an appeal from a judgment of Jones J. Appeal dismissed, L'Heureux-Dubé, Sopinka and McLachlin JJ. dissenting.

B. A. Crane, *Q.C.*, and *Randall J. Hofley*, for the appellant.

John R. Power, *Q.C.*, and *Michael Donovan*, for the respondent.

The judgment of Lamer C.J. and La Forest, Gonthier, Cory and Major JJ. was delivered by

IACOBUCCI J. -- This appeal concerns the interpretation to be given to s. 241(3) of the *Income Tax Act*, S.C. 1970-71-72, c. 63 (the *Income Tax Act*), which permits in certain circumstances the disclosure of otherwise confidential information obtained from a taxpayer by officials of the Department of National Revenue. More specifically, the appeal concerns an action by a trustee in bankruptcy under the *Bankruptcy Act*, R.S.C., 1985, c. B-3, for a declaration that certain property is the property

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of a taxpayer bankrupt's estate. The issue is whether such an action is a proceeding "relating to the administration or enforcement of" the *Income Tax Act*.

I.Facts

Raymond Slattery, who is not a party to this action, fell into arrears in paying income tax, resulting in a lengthy investigation by Revenue Canada. Unable to collect the taxes owing, Revenue Canada petitioned Slattery into bankruptcy. The respondent, Doane Raymond Limited (the Trustee), was appointed as trustee in bankruptcy of the Raymond Slattery estate. In the bankruptcy, Revenue Canada proved a claim of just over $1 million and other creditors proved claims of over $3 million; however, since Revenue Canada is the only preferred creditor, it appears that the assets of the estate will not be sufficient to satisfy the claims of any other creditors.

The trustee commenced an action against the appellant, Marguerite Slattery, who is the wife of the bankrupt Slattery. The action sought a declaration that certain assets registered in Marguerite Slattery's name were, in fact, the property of the bankrupt's estate or were held in trust for that estate.

At trial, the trustee sought to introduce testimony from two Revenue Canada officials who had participated in the investigation into Raymond Slattery's affairs. Counsel for Marguerite Slattery objected on the ground that such testimony was barred by s. 241 of the *Income Tax Act*, which prohibits Revenue Canada officials from disclosing information which has been obtained from a taxpayer for the purposes of the *Income Tax Act*. The trial judge ruled that the testimony was not barred by s. 241 because it fell within the exception contained in s. 241(3), which exception provides that the prohibition does not apply "in respect of proceedings relating to the administration or enforcement of" the *Income Tax Act*. Both officials testified, and the New Brunswick Court of Queen's Bench granted the declaration sought in part.

Marguerite Slattery appealed. She argued that the trial judge had erred in permitting the Revenue Canada officials to testify. The New Brunswick Court of Appeal agreed with the trial judge's interpretation of s. 241 of the *Income Tax Act*, and dismissed the appeal.

II.Relevant Statutory Provisions

Income Tax Act, S.C. 1970-71-72, c. 63, s. 241:

241. (1) Except as authorized by this section, no official or authorized person shall

(*a*) knowingly communicate or knowingly allow to be communicated to any person any information obtained by or on behalf of the Minister for the purposes of this Act or the *Petroleum and Gas Revenue Tax Act*,

(*b*) knowingly allow any person to inspect or to have access to any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act or the *Petroleum and Gas Revenue Tax Act*, or

(*c*) knowingly use, other than in the course of his duties in connection with the administration or enforcement of this Act or the *Petroleum and Gas Revenue Tax Act*, any information obtained by or on behalf of the Minister for the purposes of this Act or the *Petroleum and Gas Revenue Tax Act*.

(2) Notwithstanding any other Act or law, no official or authorized person shall be required, in connection with any legal proceedings,

(*a*) to give evidence relating to any information obtained by or on behalf of the Minister for the purposes of this Act or the *Petroleum and Gas Revenue Tax Act*, or

(*b*) to produce any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act or the *Petroleum and Gas Revenue Tax Act*.

(3) Subsections (1) and (2) do not apply in respect of criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information, under an Act of the Parliament of Canada, or in respect of proceedings relating to the administration or enforcement of this Act or the *Petroleum and Gas Revenue Tax Act.*

(4) An official or authorized person may ...

(*c*) communicate or allow to be communicated information obtained under this Act or the *Petroleum and Gas Revenue Tax Act*, or allow inspection of or access to any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act or the *Petroleum and Gas Revenue Tax Act*, to or by any person otherwise legally entitled thereto.

III.Judgments Below

1.*New Brunswick Court of Queen's Bench* (Jones J.)

The judgment of the New Brunswick Court of Queen's Bench consists of an oral ruling during the trial on the admissibility of testimony from the Revenue Canada officials. Jones J. held that the proceedings in the case at bar fell within the exception in s. 241(3) of the *Income Tax Act*. In interpreting the phrase "in respect of proceedings relating to the... enforcement of this Act", the trial judge commented upon two possible approaches, namely, the one set out in *Glover v. Minister of National Revenue*, 1981 CanLII 64 (SCC), [1981] 2 S.C.R. 561, in which the exception in s. 241(3) was held not to

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apply in any legal proceedings of a civil character, and a second approach taken in *Canadian Pacific Tobacco Co. v. Stapleton* (1952), 86 C.L.R. 1 (Aust. H.C.), which was more supportive of the trustee's position.

The trial judge held that "relating to" in s. 241(3) has a broad meaning. He suggested that, although s. 241(3) does not apply to civil proceedings unrelated to the *Income Tax Act*, some civil proceedings nonetheless fall within the exemption. He concluded that the action by the Trustee was of this latter kind, stating:

> Now I know there can be civil legal proceedings strictly under the Income Tax Act, nevertheless, it is my finding that on the interpretation that I make of the words "relating to the enforcement of the Act" that -- and bearing in mind the circumstances in this case, the fact that it is -- this is a civil action by trustee in bankruptcy, major -- while the primary creditor is Revenue Canada, and the purpose for which -- came out in evidence before me yesterday morning, this action is pursued, I would find that it comes within the meaning of s. 241.3 and I would, therefore allow the plaintiff to continue with questions along that -- along the line which he was pursuing, or at least I would say that Sections 241.1 and 241.2 would not apply in this proceeding.

Accordingly, the trial judge permitted the Revenue Canada officials to testify.

2.*New Brunswick Court of Appeal* 1991 CanLII 4083 (NB CA), (1991), 120 N.B.R. (2d) 4 (Hoyt, Ayles and Ryan JJ.A.)

The reasons of the court were delivered by Hoyt J.A. (as he then was). During a brief review of the facts, Hoyt J.A. noted the importance of the testimony given by the Revenue Canada officials to the decision reached by the trial judge. He also noted that the purpose of the trustee's action was to ensure that the assets of the estate were collected, so that the bankrupt's creditors, including Revenue Canada, could be paid. In determining whether such proceedings were "proceedings relating to the administration or enforcement of this Act", Hoyt J.A. held at pp. 11-12:

> A taxpayer who, like Mr. Slattery, circumvents tax collection procedures found in the *Act* is not thereby immune from other proceedings that the Minister may take to collect unpaid taxes and thus enforce the *Act*. Although Mr. Slattery is not a defendant in this proceeding, the trial judge has found, correctly in my view, that this situation arose because Mr. Slattery attempted to avoid paying outstanding taxes owed to Revenue Canada by implicating Mrs. Slattery with, it must be noted, her acquiescence.

Hoyt J.A. held at p. 12 that to "accept the appellant's submission could prevent the Minister from enforcing the *Income Tax Act* in proceedings other than those brought specifically under that *Act*". He distinguished *Glover*, *supra*, by stating that the present action could not be characterized as a non-*Income Tax Act* legal proceeding. Although this proceeding was not instituted under the *Income Tax Act*, he found it to be related to the enforcement of that Act.

As a result, the Court of Appeal held that the Revenue Canada officials had properly been permitted to testify and the appeal was dismissed.

IV.Issue

The question raised by this appeal is whether a civil action commenced by the trustee for a declaration that certain property is property of the bankrupt's estate is a proceeding "relating to the ... enforcement of" the *Income Tax Act* within the meaning of s. 241(3) of that Act. If it is, the prohibitions contained in s. 241 of the *Income Tax Act* against Revenue Canada officials' communicating or giving evidence of information obtained from the taxpayer do not apply. The respondent trustee in its factum also argues that the disclosure could be permitted by the exception contained in s. 241(4)(*c*), by suggesting that a bankruptcy judge is a "person otherwise legally entitled" to such information. As a result of my conclusion, I need not discuss this argument further.

An analysis of the history of s. 241, its underlying purposes and policy, its text and context, applicable judicial authority, and the nature of the proceedings involved herein, leads me to conclude that the courts below were correct in their holdings and that this appeal should be dismissed.

V.Analysis

1. *History of s. 241*

At the outset, it is worth noting that the taxation of income in Canada has been and is based on a self assessment and self reporting system. Confidentiality of taxpayer information has been an important part of our income tax collection system.

Legislated confidentiality of information obtained from taxpayers has moved through two distinct stages in Canada. The first stage began with s. 11 of the *Income War Tax Act, 1917*, S.C. 1917, c. 28. That section was a simple prohibition against disclosure by a person employed in the service of the Crown to a person, not legally entitled thereto, of any information obtained under the Act. Section 11 read as follows:

> **11.** No person employed in the service of His Majesty shall communicate or allow to be communicated to any person not legally entitled thereto, any information obtained under the provisions of this Act, or allow such person to inspect or have access to any written statement furnished under the provisions of this Act. Any person violating any of the provisions of this section shall be liable on summary conviction to a penalty not exceeding two hundred dollars.

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Section 11 was re-enacted as s. 81 of the 1927 *Income War Tax Act*, R.S.C. 1927, c. 97, with the only modification being that the section was divided into two subsections, with the penalty portion becoming s. 81(2). In 1948, s. 81 became s. 121 of *The Income Tax Act*, slight changes in wording took place, and the subsections reverted to a consolidated form once more (S.C. 1948, c. 52). In 1952, the last change of the first stage occurred, and s. 121 became s. 133 in the *Income Tax Act*, R.S.C. 1952, c. 148. Viewed as a whole, this stage of legislative history is distinguishable because the extent of confidentiality protection afforded to taxpayers by the plain language of the statute had two features. First, the prohibition against disclosure was directed only at persons in the service of the Crown. Second, the success of that prohibition depended almost entirely upon the meaning ascribed to the statutory phrase "a person, not legally entitled thereto", which phrase offered the only exception to the otherwise blanket statutory prohibition.

The second legislative stage began in 1966 when the confidentiality section was entirely modified by two amendments (S.C. 1966-67, c. 47, s. 17, and S.C. 1966-67, c. 91, s. 22). These amendments extended the general rule of non-disclosure to everyone, and at the same time spelled out specific exceptions for prescribed situations. (See Stephen J. Toope and Alison L. Young, "The Confidentiality of Tax Returns Under Canadian Law" (1982), 27 *McGill L.J.* 479.) The following is a succint summary of the 1966 amendments at p. 489:

> The general effect of these provisions is to make the section easier to apply. There is now a general prohibition against release of tax information to anyone. The subsections which follow the general prohibition set up exceptions to the rule, and the circumstances in which ministerial discretion may operate seem to be clear. The organization of the section is, in this respect, more amenable to application by common law courts as it resembles a set of rules rather than an abstract principle.

As will be noted again below, the 1966 amendments were described by the Ontario Court of Appeal as "a comprehensive code designed to protect the confidentiality of all information given to the Minister for the purposes of the *Income Tax Act*" -- *Glover v. Glover (No. 1)* (1980), 29 O.R. (2d) 392, at p. 396. The amendments were initially embodied in s. 133, but in 1970, s. 133 became s. 241 of the *Income Tax Act*, as it remains today. Since then, the section has been only slightly modified.

2. *Purposes and Policy Underlying s. 241*

In my view, s. 241 involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the *Income Tax Act* and other federal statutes referred to in s. 241(4).

Section 241 reflects the importance of ensuring respect for a taxpayer's privacy interests, particularly as that interest relates to a taxpayer's finances. Therefore, access to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in those exceptional situations does the privacy interest give way to the interest of the state.

As alluded to already, Parliament recognized that to maintain the confidentiality of income tax returns and other obtained information is to encourage the voluntary tax reporting upon which our tax system is based. Taxpayers are responsible for reporting their incomes and expenses and for calculating the tax owed to Revenue Canada. By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. The opposite is also true: if taxpayers lack this confidence, they may be reluctant to disclose voluntarily all of the required information (Edwin C. Harris, *Canadian Income Taxation* (4th ed. 1986), at pp. 26-27).

Parliament has also recognized, however, that if personal information obtained cannot be used to assist in tax collection when required, including tax collection by way of judicial enforcement, the possession of such information will be useless. Disclosure of information obtained through tax returns or collected in the course of tax investigations may be necessary during litigation in order to ensure that all relevant information is before the court, and thereby to assist in the correct disposition of litigation. But this necessity is sanctioned by Parliament in a very limited number of situations. Disclosure is authorized in criminal proceedings and other proceedings as set out in s. 241(3). Certain other situations are specified in s. 241(4), which have been described by the Ontario Court of Appeal as being "largely of an administrative nature" (*Glover v. Glover (No. 1)*, *supra*, at p. 397).

3. *The Text and Context of s. 241(3)*

As already noted, s. 241(3) provides, *inter alia*, that the confidentiality provisions in s. 241(1) and (2) do not apply "in respect of proceedings relating to the administration or enforcement of" the *Income Tax Act*. The appellant argues that the only proceedings covered by this exception are those which are expressly provided for in Part XV of the Act, entitled "Administration and Enforcement". The appellant's argument would require the words in s. 241(3) to be read as meaning that the confidentiality provisions do not apply "in respect of proceedings taken pursuant to the administration or enforcement provisions" of the *Income Tax Act*. Neither the text nor context of s. 241 supports this argument.

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The connecting phrases used by Parliament in s. 241(3) are very broad. The confidentiality provisions are stated not to apply in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*.

The phrase "in respect of" was considered by this Court in *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, at p. 39:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]

In my view, these comments are equally applicable to the phrase "relating to". *The Pocket Oxford Dictionary* (1984) defines the word "relation" as follows:

> ... what one person or thing has to do with another, way in which one stands or is related to another, kind of connection or correspondence or contrast or feeling that prevails between persons or things;...

So, both the connecting phrases of s. 241(3) suggest that a wide rather than narrow view should be taken when considering whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*.

This breadth of meaning is confirmed when one examines the French version of the section. The French version of s. 241(3) reads as follows:

241. ...

> (3) Les paragraphes (1) et (2) ne s'appliquent ni aux poursuites au criminel, sur acte d'accusation ou sur déclaration sommaire de culpabilité, engagées par le dépot d'une dénonciation, en vertu d'une loi fédérale, ni aux poursuites ayant trait à l'application ou à l'exécution de la présente loi... [Emphasis added.]

The phrase "ayant trait à" is defined in the Larousse dictionary *Dictionnaire de la langue française* (1989) as: "Avoir trait à : avoir un rapport avec". The dictionary *Le Robert Méthodique* (1988) defines the phrase as: "Avoir trait à: Se rapporter à... V. Rapport". And the same dictionary defines the word "rapport" as meaning "Lien, relation". Consequently, the French version of s. 241(3) is as broad as the English version.

The next question to ask considers what type of administration or enforcement proceedings are contemplated by s. 241(3): only proceedings brought under the *Income Tax Act* itself, or both such proceedings and others? To answer this question, one must look first to the wording of s. 241(3). That provision contains no language which confines the concept of proceedings relating to administration or enforcement to the boundaries of the *Income Tax Act*. This conclusion is buttressed when one considers the context of s. 241.

Section 241 is found in Part XV of the *Income Tax Act*, which deals with administration and enforcement as previously noted. It is obvious, but the fact must nonetheless be highlighted, that the collection of money owing to Revenue Canada is an important part of the Act's enforcement. This proposition is confirmed by s. 222 of the Act which reads as follow:

> **222.** All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court of Canada or any other court of competent jurisdiction or in any other manner provided by this Act. [Emphasis added.]

Section 222 is a clear statement that, in addition to the procedures specified in the *Income Tax Act*, the Minister may resort generally to the courts to institute civil proceedings to collect taxes as debts. But, in order to take full advantage of this power, the Minister must be able to disclose in court otherwise confidential information in order to prove the cause of action in debt. It must therefore be possible to disclose such information to establish the amount owed and to prove related matters. Absent the ability to disclose as required to prove a debt, s. 222 would be deprived of part of its meaning. The absurdity of such a result strongly suggests that the collection proceedings specified in s. 222 are proceedings "relating to the... enforcement" of the *Income Tax Act* within the meaning of s. 241(3).

This legislative interpretation accords with the necessary balancing of privacy and state interests which takes place in s. 241. Confidentiality of tax information is necessary in order to promote the privacy interests of taxpayers and the success of voluntary tax reporting. But the success of the voluntary tax reporting system will be of no import if Revenue Canada cannot effectively collect taxes owed by taxpayers. In order to collect taxes owed, Revenue Canada should be able to resort to various procedures and proceedings to pursue the amounts owed and in doing so should also be able to disclose in court the information necessary to prove a cause of action in debt. As Décary J.A. said in *Diversified Holdings Ltd v. Canada*, reflex, [1991] 1 F.C. 595 (C.A.), at p. 599:

> In the instant case, the documents are part of a process, the collection proceedings, which is in itself in the public domain and which involves by its very nature the publication of information that would otherwise have remained confidential. One cannot seize a property pursuant to a certificate which has the force and effect of a judgment (see subsection 223(2) of the Act) without revealing to some extent information given to the Minister.

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4. *Judicial Interpretation of s. 241*

I do not find it necessary to discuss all the cases which were decided under s. 241's predecessor sections or which deal with actions related to those predecessor sections. However, both the appellant and respondent cited, in support of their respective positions, the decision of the Ontario Court of Appeal in *Glover v. Glover (No. 1)*, *supra*, which was affirmed by this Court in a short judgment (*Glover v. Minister of National Revenue*, *supra*). Accordingly, some comment on this case is required.

In *Glover*, a trial judge ordered Revenue Canada to disclose the address of a taxpayer who had abducted his children in violation of a court order which granted custody to the children's mother. The question was whether the judge who ordered disclosure of the information was a person "legally entitled thereto". That phrase had been carried over from s. 241's predecessor provision and was restated in s. 241(4)(*c*) as an enumerated exception. The Ontario Court of Appeal set aside the trial judge's order, holding that the judge did not come within the s. 241(4)(*c*) exception.

In the course of his reasons, MacKinnon A.C.J.O. on behalf of a unanimous court made some general comments on the interpretation of s. 241. He stated at p. 396 that "[s]ection 241, in my view, is a comprehensive code designed to protect the confidentiality of all information given to the Minister for the purposes of the *Income Tax Act*". In his opinion, at p. 397, s. 241(3) was:

... a clear statement of parliamentary policy that no information obtained for the purpose of the Act shall be communicated and no official or authorized person shall be required to give evidence relating to such information in any non-*Income Tax Act* civil legal proceedings.

The mother appealed the decision of the Ontario Court of Appeal to this Court, which dismissed the appeal with brief reasons in which Laskin C.J. said at p. 562:

Sympathetic though one is inclined to be to the appellant's plight, the statutory provisions above-mentioned for non-disclosure, in connection with any legal proceedings of a civil character, do not give any power to a court to qualify them, nor do the exceptions set out in s. 241(4)(*c*) assist the appellant.

I agree with the respondent that, in *Glover*, the proceedings in question had no connection whatsoever with the administration or enforcement of the *Income Tax Act*. As a result, this Court's decision must be read to mean that the confidentiality provisions apply to any legal proceeding of a civil character which is not covered by the exception provided in s. 241(3). In other words, ss. 241(1) and (2) apply to civil proceedings which are not related to the administration or enforcement of the *Income Tax Act*. In my view, *Glover* does not inform the issue already set out: the essential question is whether or not the bankruptcy proceedings taken herein are related to the administration or enforcement of the *Income Tax Act*. As I will now discuss, I think they are.

V. *Are the Present Proceedings Covered by s. 241(3)*?

In determining whether the present bankruptcy proceedings are covered by the exception in s. 241(3) of the *Income Tax Act*, I think it worthwhile to note briefly some of the features of the bankruptcy process.

It has been stated that among the purposes of the *Bankruptcy Act* are a desire to permit an effective and fair distribution of the assets of a bankrupt person, and a desire to protect creditors of insolvent persons. See Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. 1993), at pp. 1-3, 1-4; see also Marc Chabot, *Faillite et Insolvabilité* (1987), at p. 8. Indeed, it has been asserted that not only are the interests of debtors and creditors protected under the *Bankruptcy Act*, but so is the public interest. See Professor Albert Bohémier, *Faillite et Insolvabilité*, vol. 1, (1992), at pp. 48-56. Thus, there are many who would advocate resort to bankruptcy proceedings as an effective and fair means of debt collection. I need not join the debate as to whether or to what extent these assertions are true. I will simply note that the bankruptcy process is aimed at the proper protection of debtor, creditor and public interests.

In the case on appeal, the Minister of National Revenue petitioned Raymond Slattery into bankruptcy. Mr. Slattery filed a statement of affairs stating that he had virtually no assets. The trustee then commenced the present action in the Court of Queen's Bench of New Brunswick seeking a declaration that certain assets held in the name of the appellant, Marguerite Slattery, were in reality property of the bankrupt's estate.

The appellant admits that, if the Minister through Revenue Canada had instituted proceedings under the *Income Tax Act*, such proceedings would be enforcement proceedings covered by the exception in s. 241(3). However, the appellant argues that because the proceedings herein were taken by the trustee, they cannot qualify as such. In my view, this argument fails for several reasons.

First, the appellant's argument is not supported by the wording of s. 241(3). As mentioned earlier, in my opinion the exception authorizing Revenue Canada to disclose tax related information in proceedings is very broad; that is, it operates in respect of proceedings relating to the enforcement of the *Income Tax Act*. The practical purpose and result of the present proceedings will be to increase the estate of the bankrupt taxpayer, Raymond Slattery. The ultimate purpose and result of these same proceedings will be the payment of taxes owed, inasmuch as Revenue Canada is a preferred beneficiary under the scheme of distribution established by s. 136 of the *Bankruptcy Act*. I find it quite clear that, under the terms of s. 241(3),

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such a proceeding has a "relation" or "connection" with the enforcement of the *Income Tax Act*. Neither the fact that the bankruptcy proceedings involve other creditors of the bankrupt, nor the fact that the proceedings were commenced by the trustee, detracts from the "relation" or "connection" between the proceedings and the enforcement of the *Income Tax Act*.

Second, the appellant's argument is also somewhat inconsistent with the power given to creditors in s. 38(1) of the *Bankruptcy Act*. Section 38(1) provides for the following:

> **38.** (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk....

If we accept the appellant's proposition, a potential contradiction obviously results. That is, if a trustee initiated proceedings, confidential information obtained by Revenue Canada could not be disclosed in order to prove the fraudulent scheme, whereas if the trustee refused to act and Revenue Canada took the same proceedings, the information could arguably be disclosed. This result makes no sense since, in either case, the proceedings would be under the *Bankruptcy Act* and would be taken in furtherance of enforcing the *Income Tax Act*. The intervention of the trustee does not change the character of the bankruptcy proceedings, in so far as that character relates to the enforcement of the *Income Tax Act*.

Third, at the level of policy, I see no valid reason why the Minister should be inhibited from recourse to the bankruptcy process in light of the advantages and protection that this process can entail. If the Minister cannot disclose confidential information in bankruptcy to prove a claim asserted, the bankruptcy procedure will in many cases not be available for income tax enforcement. Again, the sense of this result is not apparent.

Without wishing to rule in any way on the matter, it is alleged that Revenue Canada had and still has at its disposal some *Income Tax Act* remedies against the appellant, which are unaffected by the stay of proceedings provided for by s. 69 of the *Bankruptcy Act*, which reads as follows:

> **69.** (1) On the filing of a proposal made by an insolvent person or on the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.

(See D. Scott Brown, "Bankruptcy and Income Tax: A Revenue Canada Perspective" in *1990 Conference Report: Report of Proceedings of the Forty-Second Tax Conference*, at p. 18:11).

One of these allegedly unaffected remedies is found in s. 160 of the *Income Tax Act* which provides:

> **160.** (1) Where a person has, on or after the 1st day of May, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> (*a*) his spouse or a person who has since become his spouse,
>
> ...
>
> the following rules apply:
>
> ...
>
> (*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
>
> (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
>
> (ii) the aggregate of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year.

D. Scott Brown, in the article cited above, comments on the scope of s. 160 as follows (at p. 18:13):

> The provisions of section 160 enable the minister to assess a transferee in respect of a transfer of property that, but for that provision, would require recourse under the settlement provisions of sections 91, 92, or 93 of the Bankruptcy Act, or alternatively under a provincial fraudulent conveyance statute. Generally, section 160 provides a very effective remedy against this type of transfer. In fact, the result of any direct or indirect transfer to a spouse... will be that the transferee and the transferor will be held jointly and severally liable under section 160 to pay the lesser of (1) the difference between the fair market value of the property and the amount paid for the property, and (2) the amount of the tax due by the transferor in the year of the transfer or any prior year.

It was apparently acknowledged by the appellant that the Minister could have used s. 160 in an attempt to recover some of the taxes owed by Raymond Slattery, but did not do so. The appellant agrees that, in the context of s. 160, the Minister could have disclosed the confidential tax information, but the appellant argues that the bankruptcy proceedings are different in nature. However, whether or not they are different in nature is beside the point. The important point is whether or not the disclosure within the bankruptcy proceedings occurred "in respect of proceedings relating to the administration or enforcement of" the *Income Tax Act*. The possible existence of an alternative enforcement procedure which would clearly

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permit disclosure is further support for the respondent's position. Although the Minister chose to collect taxes by petitioning the taxpayer into bankruptcy, in my view, this did not disentitle Revenue Canada from disclosing the confidential information. The disclosure occurred in respect of proceedings which can be clearly characterized as relating to the enforcement of the *Income Tax Act* within the meaning of s. 241(3) of that Act.

Finally, counsel for the appellant argued that to characterize the bankruptcy proceedings as "proceedings relating to the... enforcement of" the *Income Tax Act* would open up difficult questions relating to competence and compellability as those issues might affect Revenue Canada in a variety of possible actions. I find this argument unpersuasive, particularly in light of the circumstances of this case. Those circumstances include Revenue Canada's act of petitioning the taxpayer into bankruptcy, the active involvement of Revenue Canada in the bankruptcy proceedings, the collaboration between officials and the trustee, and the reality that Revenue Canada was entitled to volunteer and did, in fact, volunteer to disclose the otherwise confidential information in order to enforce the *Income Tax Act*.

VI.Conclusion

For the foregoing reasons, I conclude that the proceedings taken by the trustee are "proceedings relating to the administration or enforcement" of the *Income Tax Act* as set out in s. 241(3). Accordingly, I would dismiss the appeal with costs.

The reasons of L'Heureux-Dubé, Sopinka and McLachlin JJ. were delivered by

MCLACHLIN J. (dissenting) -- I have had the benefit of reading the reasons of my colleague, Justice Iacobucci. I respectfully disagree with his conclusion regarding the scope of the s. 241(3) exemption from non-disclosure of information obtained by the Minister of Revenue for the purposes of the *Income Tax Act*, S.C. 1970-71-72, c. 63.

Section 241(3) provides that the general prohibition on disclosure of such information, as set out in ss. 241(1) and (2), does not apply, *inter alia*, "in respect of proceedings relating to the administration or enforcement of this Act ...." The sole question on this appeal is whether the proceedings at issue are of this type.

These proceedings should be carefully described. Raymond Slattery fell into arrears paying income taxes. Revenue Canada conducted a lengthy investigation into his affairs. They petitioned Mr. Slattery into bankruptcy. In bankruptcy proceedings Revenue Canada proved a claim against Mr. Slattery of over $1,000,000. At a subsequent trial to determine title between the appellant and the bankrupt's estate, the trustee in bankruptcy sought to introduce testimony from two Revenue Canada officials who had participated in the earlier investigation of Mr. Slattery's affairs. This testimony was admitted on the ground that the trial was a proceeding relating to the administration or enforcement of the *Income Tax Act*. The ruling was upheld on appeal.

My colleague Iacobucci J. would uphold these decisions. Focusing in part on the fact that the trial would ultimately result in the collection of unpaid taxes, he finds that the trial was a proceeding "relating to" the administration or enforcement of the Act.

In my view, the s. 241(3) exemption applies only in the case of proceedings specifically provided for in the *Income Tax Act*. These proceedings are, for the most part, set out in Part XV of the Act which, as the title of the Part indicates, establishes "Administration and Enforcement" provisions. A trial to determine title between an individual and a trustee in bankruptcy is not a proceeding provided for in Part XV, or elsewhere in the Act. Accordingly, in my view, Revenue Canada officials should have been barred from disclosing information obtained in the course of their investigation of the bankrupt's affairs.

The Scope of s. 241

Iacobucci J. has discussed the character of the provisions which govern the disclosure of information obtained for the purposes of the Act. He notes, at p. 444, that "[o]nly in those exceptional situations does the privacy interest [of citizens] give way to the interest of the state." These words, as my colleague notes, reflect the balance which Parliament has established between the competing interests at play: the interest in ensuring voluntary disclosure to the Minister of Revenue, which is served by the general rule of confidentiality, and the state's interest the collection of tax debts.

But having noted the primacy of privacy concerns under the *Income Tax Act*, Iacobucci J. goes on to interpret the disclosure clause of s. 241 broadly. He finds that the connecting phrases used in s. 241(3) are "very broad". Relying on *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, he interprets these connecting phrases to encompass proceedings which have any connection with the administration of the Act.

I do not share the view that *Nowegijick* informs the issue. That case does not concern s. 241 or any of its predecessor sections. Rather, *Nowegijick* discusses the phrase "in respect of" as it is employed in s. 87 of the *Indian Act,* R.S.C. 1970, c. I-6, in relation to taxation of personal property. Giving the phrase the "widest possible scope" in that context is not determinative of its application in s. 241(3). Instead, the context of s. 241(3), and jurisprudence of this Court treating the section, suggests that the phrase should be construed narrowly, not broadly. As Wilson J. noted in *R. v. McKinlay Transport Ltd.*, 1990 CanLII 137 (SCC), [1990] 1 S.C.R. 627, at p. 650:

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... the taxpayer's privacy interest is protected as much as possible since s. 241 of the Act protects the taxpayer from disclosure of his records or the information contained therein to other persons or agencies. [Emphasis added.]

See also *Glover v. Minister of National Revenue*, 1981 CanLII 64 (SCC), [1981] 2 S.C.R. 561, at p. 562, *per* Laskin C.J.

The structure of s. 241 subsequent to its 1966 amendment (S.C. 1966-67, c. 47, s. 17 and S.C. 1966-67, c. 91, s. 22) bears out the interpretation given the section by Wilson J. Prior to 1966, the Minister of Revenue was barred from disclosing information obtained under the Act to persons "not legally entitled thereto ...." This phrase did not constitute a serious hurdle to disclosure. As noted by Stephen J. Toope and Alison L. Young, in "The Confidentiality of Tax Returns Under Canadian Law" (1982), 27 *McGill L.J.* 479, at p. 487, "the [former] section created a *carte blanche* for the Minister to consider almost anyone to be `legally entitled' to the information as long as they could show some vague need." After 1966, the prohibition was extended to "any person", unless a specific exemption had been provided. The exemptions are few, and are set out in ss. 241(3) and (4). Disclosure is permitted in specific criminal proceedings, in proceedings relating to the administration or enforcement of the Act, and, by virtue of s. 241(4), as might be required to facilitate specific government programs and the internal working of the Ministry of specific features of the Act. In s. 241(4)(*c*), disclosure to persons "otherwise legally entitled thereto" is again permitted, but the phrase is no longer the animating concern of the section. Rather, it must be understood as one element in a group of narrow and particular exemptions largely administrative in nature: see *Glover v. Glover (No. 1)* (1980), 29 O.R. (2d) 392, at p. 398.

The appellant submits that the proceedings at issue on this appeal are not proceedings relating to the administration of the Act in which the Minister can disclose information obtained for the purposes of the Act since they are not specifically provided for in Part XV of the Act. I agree with the substance of this submission. We are not here concerned with the capacity of the Ministry to undertake, or to involve itself in, proceedings which may bear some connection to the enforcement of the Act. The concern is whether these are the sort of proceedings which are so connected to the administration of the Act that they fall within the contemplation of the exemption in s. 241(3) and thereby allow the Ministry to disclose information which it has only by virtue of special investigative powers provided for in the Act (see ss. 231.1 to 231.5).

Part XV of the Act provides the Minister of Revenue with a system of debt collection proceedings that mirrors ordinary creditors' remedies. Taxes owing may be recovered by registering the amount in court and enforcing it as a judgment (s. 223(3)), registering the amount as a charge on land (s. 223(5)), garnishing sums destined to the tax debtor from third parties (s. 224(1)), deducting the amount from or setting it off against other sums payable by the Crown to the tax debtor (s. 224.1), seizing and selling the debtor's chattels (s. 225(1)) and prosecuting the tax debtor for offences under the Act and obtaining compliance orders (ss. 238 and 239). But Part XV does not deal with bankruptcy, except to the extent of providing the Minister the power to collect money owed to a secured creditor by a trustee in bankruptcy, notwithstanding the *Bankruptcy Act*, R.S.C., 1985, c. B-3: see *Income Tax Act*, s. 224 (1.2) (added by S.C. 1987, c. 46, s. 66).

In the context of Part XV this legislative silence is significant. Bankruptcy is a particular process with specific and salutary aims. Above all, however, bankruptcy is a process that involves all of the creditors of a particular debtor. Concern for the confidentiality of information that is not public is very much at issue.

My colleague is of the view that the bankruptcy process is available to the Minister by virtue of s. 222 of the Act, which provides that the Minister may resort to a court of competent jurisdiction to collect tax debts. I concur in this interpretation of the plain wording of s. 222, but I am not persuaded that the proceeding that is at issue here is an action under s. 222.

In the first place, the action is not brought by Her Majesty, as the section appears to contemplate. It is brought by a trustee in bankruptcy. Iacobucci J. is of the view that this does not take the proceedings out the s. 241(3) exemption. I disagree. Under s. 69 of the *Bankruptcy Act,* all collection proceedings are stayed once the debtor is declared bankrupt. Until that point the Minister arguably may prove its debt by disclosure of information obtained for the purposes of the Act. But once a debtor is declared bankrupt, and a trustee in bankruptcy has been put in place to pursue the bankruptcy, the proceeding is no longer capable of being accurately characterized as a proceeding relating to the administration of the Act. The stay operates until the trustee in bankruptcy is discharged. The trustee has a statutory duty to take possession of the bankrupt's property. It has a statutory power to institute legal proceedings. Persons in possession of a bankrupt's property have a statutory duty to deliver it to the trustee. (See *Bankruptcy Act*, ss. 16(3), (4), 19(1), (2), and 17(1).) The trustee is a fiduciary of the estate of the bankrupt and institutes an action to the benefit of the state as a whole. The trustee does not act a mere agent of the creditors, or as an agent of particular creditors. In such a legal context, I do not think that it can be said that the fact that the practical effect of the proceedings will permit the Minister to realize on an outstanding debt suffices to make the proceeding one that relates to the administration of the Act.

The fact that Part XV of the Act makes no specific provision for disclosure in the context of bankruptcy suggests that when the Minister has recourse to this procedure, its actions are governed by the *Bankruptcy Act* and no longer by the *Income Tax Act*. In so proceeding the Minister loses the capacity to deploy the special information gathering techniques, which accrue only by virtue of the *Income Tax Act*, either to its own advantage, or to those of its fellow creditors. The broad

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powers to compel appearance and disclosure which are exercisable by the trustee in bankruptcy under the *Bankruptcy Act* (see ss. 163 through 167) should be interpreted in light of this fact. Information available from public sources is not unavailable in such proceedings simply because it has passed through the hands of Revenue Canada. But information that issues from the Minister, by virtue of any special investigative powers, must remain confidential.

Section 241(4)(*c*)

The respondent also argues that the Minister was permitted to disclose confidential information in the case at bar since a superior court judge is a person, as provided in s. 241(4)(*c*), "legally entitled" to the information. In my view the decisions of this Court and of the Ontario Court of Appeal in *Glover*, *supra*, dispense with this argument. The issue in those cases was whether the judge in child custody proceedings was a "person ... legally entitled" to the information. The Ontario Court of Appeal, in a decision that was affirmed in this Court, held (at p. 397) that the s. 241(4) exemptions were administrative in nature, and that if a court could at any time by its own order entitle itself to receive otherwise confidential taxpayer information "it would emasculate the effect of s. 241(2) and render s. 241(3) unnecessary". The point of these judgments is that a party should not be able to avail itself of the s. 241(4)(*c*) exemption if it cannot bring the proceeding within the terms of s. 241(3). I have found above that this respondent cannot.

Disposition

The Court of Appeal found that the trial judge's findings in declaring some of the property of the appellant to be the property of the bankrupt's estate depended largely upon the testimony and evidence of the Revenue Canada officials. This information was gathered in the course of an investigation undertaken according to special investigatory powers available to Revenue Canada under the Act. Section 241 forbad its disclosure in the bankruptcy proceedings. I would allow the appeal and set aside the judgments below. I would grant costs to the appellant.

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Appeal dismissed, L'HEUREUX-DUBÉ, SOPINKA *and* MCLACHLIN JJ. *dissenting.*
Solicitors for the appellant: Mockler, Allen & Dixon, Fredericton.
Solicitors for the respondent: Palmer, O'Connell, Leger, Roderick & Glennie, Saint John.

3004876 Nova Scotia Ltd v. Laserworks Computer Services Inc., 1998 CanLII 2550 (NS CA) - Can Ct. Object When Abuse of Process in BIA

Date:	1998-02-13
Docket:	CA141313
Parallel citations:	165 NSR (2d) 296; 37 BLR (2d) 226; 6 CBR (4th) 69
URL:	http://canlii.ca/t/1gmr2
Citation:	3004876 Nova Scotia Ltd v. Laserworks Computer Services Inc., 1998 CanLII 2550 (NS CA), <http://canlii.ca/t/1gmr2> retrieved on 2013-08-29
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Date: 19980213 Docket: CA 141313

NOVA SCOTIA COURT OF APPEAL
Freeman, Pugsley and Cromwell, JJ.A.

BETWEEN:

3004876 Nova Scotia Limited
Appellant
-and-
LASERWORKS COMPUTER SERVICES INC.
Respondent

James A. Musgrave for the Appellant
Roy F. Redgrave for the Respondent
D. Bruce Clarke and Pamela J. Clarke-Priddle for the Respondent - Trustee

Appeal Heard: December 9, 1997
Judgment Delivered: February 13, 1998

THE COURT: The appeal is dismissed, per reasons for judgment of Freeman, J.A.; Pugsley and Cromwell, JJ.A., concurring.

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FREEMAN, J.A.:

The respondent LaserWorks Computer Services Inc., a dealer in supplies for laser printers, made a proposal to its creditors under the provisions of the **Bankruptcy and Insolvency Act,** R.S.C. 1985, c. B-3 (the **BIA**).

A competitor, Datarite, operating through the appellant 3004876 Nova Scotia Limited, acquired the claims of eighteen creditors and voted them over the objections of LaserWorks at the meeting of creditors, defeating the proposal. Only two of the remaining sixteen creditors opposed the proposal.

Acceptance required votes representing a majority in number and two-thirds in value of the class of unsecured creditors present in person or by proxy. The Registrar of Bankruptcy of the Supreme Court of Nova Scotia in Bankruptcy, Tim Hill, found:

> Upon the vote being taken, fourteen creditors with a total claim value of $206,531.65 voted in favour of the proposal. Twenty creditors with a total claim of $140, 370.00 voted against the proposal. Thus 41% of creditors representing 59% of the claims voted pro, and 59% of the creditors with 40.5% of the claims voted con. The proposal was defeated, subject to the resolution of the objections before the court today.

At the hearing into the objections the Registrar, after hearing evidence from the appellant's solicitor Victor Goldberg, who was not counsel on the appeal, disallowed the appellant's votes. He found the proposal had been accepted by the votes of the other creditors. His decision was upheld by Justice Stewart on an appeal to the Supreme Court of Nova Scotia in Bankruptcy.

Issues and Standard of Review

The overriding issue is whether the court's inherent supervisory jurisdiction should be invoked to interfere in a proposal to creditors under the BIA when it appears the statutory process is being used for purposes not contemplated by Parliament.

The appellant submits it was a true appeal before Justice Stewart, and not a hearing *de novo*, on the authority of **Re McCulloch Estate** 1992 CanLII 2799 (NS SC), (1992), 13 C.B.R. (3d) 201 Tr. Div.) and **Cockfield Brown Inc. (Trustee of) v. Reseau de Television TVA Inc.** (1988), 70 C.B.R. (N.S.) 59 (Que. C.A.) On further appeal to this court the grounds are whether Justice Stewart erred in:

1. Failing to reverse the Registrar's finding that 18 creditors of LaserWorks assigned their rights to the appellant;
2. Sustaining the Registrar's finding that Datarite engaged in an improper purpose in acquiring and voting the claims of the 18 creditors;
3. Sustaining the Registrar's finding that the Appellant's purpose in acquiring and voting the claims was relevant; and

4. Concluding that there was an abuse on a minority of a class of unsecured creditors and that a duty in this respect was owed by the appellant.

An appeal lies to this court under s. 193 of the **BIA** which reads in part:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
> (a) if the point at issue involves future rights;
> ...
> (e) in any other case by leave of a judge of the court of appeal.

The appellants assert future rights are involved and no leave is necessary. The respondents take no issue with this. Neither is issue taken with the jurisdiction of the Registrar and Justice Stewart to deal with the matters in question pursuant to the **BIA**. The issue is whether they erred.

The appellant's submission with respect to the standard of review is that:

> . . . the Registrar's discretion will not be disturbed on appeal unless he failed to consider or misconstrued a material fact or violated a principle of law. If the Registrar did not appreciate the nature of the evidence before him, it was open to the Supreme Court to substitute its discretion for that of the Registrar. There is also authority that the Registrar's decision should not be disturbed unless it was clearly wrong: **Re Achilles** reflex, (1993), 23 C.B.R. (3d) 20 B.S.S.C.).

It cites **Industrial Acceptance Corp. v. Lalonde**, 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109 p. 120; **Re Gilmartin (a bankrupt),** [1989] 2 All E.R. 835 (Ch. D.) p. 838; and **Re Barrick** (1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.) p. 290. In **Industrial Acceptance** Estey J., writing for the Supreme Court of Canada, held at page 120 that:

> A judgment rendered in the exercise of a judicial discretion under s. 142 ought not to be disturbed by an appellate court, unless the learned judge, in arriving at his conclusion, has omitted the consideration of or misconstrued some fact, or violated some principle of law.

The respondent LaserWorks urges that this court should only substitute its own discretion when the Registrar is clearly wrong. Apparent failure by the Registrar to appreciate the nature of the evidence before him is too low a threshold:

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The court in **Re Barrick** ((1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.)) substituted its discretion for that of the trial judge only after ruling that he misapplied a legal test. Justice Taggert, at page 290, gives three reasons the Court of Appeal should substitute its discretion for that of the trial judge:

> In these circumstances, it would seem to me that the learned judge has not applied the correct test, has not given the effect that ought to be given to the trustee's report and has not appreciated the nature of the evidence which was before him. In these circumstances, I think we are justified for substituting our discretion for that of the trial judge.

On that basis the respondent submits the first three grounds of appeal fail.

The Trustee under the Proposal submits that "the Appellant has not satisfied the onus upon it in this appeal to overturn the decision of the Honourable Justice Stewart to decline to substitute her discretion for that of the Registrar."

The respondent also referred to the principles stated by McLachlin, J., in **Toneguzzo-Norvel (Guardian Ad Litem of) v. Savein and Burnaby Hospital** 1994 CanLII 106 (SCC), (1994), 1 S.C.R. 114 at page 121, which this court has followed consistently:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see P. (D.) v. S. (C.), 1993 CanLII 35 (SCC), [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux-Dube J.), and all cases cited therein, as well as **Geffen v. Goodman Estate,** 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and **Stein v. The Ship "Kathy K",** 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

These principles apply in bankruptcy matters, and provide guidance when, as here, the Registrar's findings have been upheld by a judge of the Supreme Court.

The Registrar's Decision

The Registrar based his decision on the following findings:

> Before turning to deal with these submissions, it is essential that I make some findings of fact. In large part the facts are uncontested. No affidavits were filed, but counsel agree that I may rely on the minutes of the meeting of creditors, the testimony by Mr. Goldberg upon the section 163(2) examination, and the list provided by Mr. Goldberg in compliance with his undertaking on the examination.
>
> I find that Datarite through its solicitor approached some but not all of the creditors of Laserworks with the intention of obtaining an assignment of those creditors' claims and consequently rights to vote on the proposal. The claims were obtained and the votes utilized to defeat the proposal. This would have the effect under section 57(a) of the BIA of placing LaserWorks into bankruptcy by virtue of a deemed assignment.
>
> I can only conclude that the purpose of Datarite was to effect the bankruptcy of LaserWorks. It is a reasonable supposition that the purpose was to remove a competitor from the marketplace. I find that it was the intention of Datarite to put LaserWorks in bankruptcy.
>
> I further find that the motive was to lessen competition.
>
> In my view, Datarite was engaged throughout in an improper purpose not contemplated by the BIA, the purpose of which is far removed from the use to which Datarite put it.

It is apparent that the Registrar, in speaking of "purpose", included both motive or intent and the steps taken to give effect to that motive or intent. While the record is somewhat sparse, as counsel have remarked, there was evidence in support of these findings. I am not satisfied that the Registrar failed to appreciate the nature of the evidence before him or that he was clearly wrong, or alternatively that he omitted the consideration of or misconstrued some fact, or violated some principle of law. The questions before this court relate to the effect of these findings.

The Registrar disallowed the votes of the eighteen creditors represented by the appellant because he considered they had been cast for an improper purpose. In the absence of authority specific to proposals to creditors, he applied jurisprudence related to bankruptcy petitions, stating:

> It has long been held that the court will not grant a petition in bankruptcy where the petition is filed for an improper purpose: **Re E. De La Hooke** (1934), 15 C.B.R. 485 (Ont. S.C.); **Re Pappy's Good Eats**

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Limited (1985), 56 C.B.R. (N.S.) 304 (Ont. S.C.); **Dimples Diapers Inc. v. Paperboard Industries Corporation** reflex, (1992), 15 C.B.R. (3d) 204 (Ont. G.D.); **Re Shepard** reflex, (1996), 40 C.B.R. (3d) 145 (Man. Q.B.).

In **Hooke** the petitioner obtained an assignment of a judgment against the debtor for the sole purpose of filing a petition in bankruptcy and of removing the debtor as a business competitor. In that case, as is the situation in this case, there was no evidence that the debtor had any business dealings with the party seeking to place the debtor in bankruptcy. The petition was dismissed.

In **Hooke** the court made extensive reference to the decision of the House of Lords in **King v. Henderson**, [1898] A.C. 720. The comments of James, L.J., at p. 732 are particularly germane here:

> After what Lord Justice Cotton has said, in which I entirely agree, people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings.

Lord Justice Cotton had commented that the proceedings in bankruptcy were not taken to obtain payment of the debt, but rather the debt was purchased for the purpose of taking the proceedings. I would simply add that in tight of the decision I make here persons should certainly think twice before they purchase debts in order to defeat a proposal.

It is my opinion that the eighteen creditors are tainted with the improper motive of Datarite. In **Pappy's Good Eats** the petition was filed by a creditor with a genuine claim. The creditor entered into an agreement with three franchisees of the debtor. This agreement provided that the creditor would prosecute the bankruptcy proceedings while the franchisees financed the proceeding in exchange for a share of the dividends. The motive of the franchisees was to bring about a bankruptcy so as to terminate the franchise agreements between them and the debtor.

The court found that there had been an improper use of the bankruptcy legislation. The effect of the agreement was to embroil the creditor in the improper objectives of the franchisees who were intermeddling in the proceeding. This tainted the whole proceeding. Clearly where the object of the intermeddling party is to bring about the bankruptcy of the debtor an improper purpose is present. The court will act to prevent such an abuse of the legislation.

The other cases I have referred to, **Dimples Diapers Inc.** and **Shepard** also deal with bankruptcy petitions instigated for an improper collateral purpose. In **Dimples** that purpose was to recover a trademark and a business opportunity. In **Shepard** that purpose was to obtain control of certain shares.

While this case does not involve a bankruptcy petition, it does involve the placing of Laserworks into bankruptcy. In my view, it would be wrong to allow Datarite to do in the proposal process what it cannot do by petition. Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose. The court will not allow to be done by the back door what cannot be done by the front.

By entering into this arrangement with the numbered company the eighteen creditors have tainted themselves and become embroiled in the improper purpose of Datarite. Their votes cannot stand. If Laserworks has the right to be free of this type of interference the Court must be able to fashion a remedy. This court does have the inherent jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where that conduct constitutes an abuse of the provisions of the BIA. While creditors can certainly vote in their own best interest, they may not collude with a third party to place a debtor in bankruptcy for an improper purpose. Such activity lacks commercial morality and offends the integrity of the bankruptcy process.

While Datarite was not permitted to vote the claims it had acquired, they remained debts of the insolvent debtor.

Justice Stewart

The first ground of appeal to this court, the issue of whether the claims of 18 creditors were actually assigned to Datarite, does not appear to have been a ground of appeal before Justice Stewart.

On the next two grounds of appeal, whether the Registrar failed to appreciate the evidence before him in concluding that Datarite's purpose in acquiring and voting the 18 claims was an improper one, and whether such purpose was a relevant consideration, Justice Stewart, in upholding the Registrar, took a different route to arrive at the same conclusion. She stated:

> Although stated in the context of voting by debenture holders when the majority had votes to modify the rights of the debenture holders in a clause, the statements of principle by Viscount Haldane of the Judicial

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Committee of the Privy Council in **British America Nickel Corporation v. M. J. O'Brien,** [1927] A.C. 369 at p. 371 are, no less, here applicable:

> To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the **English Companies Act** of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities, namely, that the power given must be exercised for the purpose of benefitting the class as a whole, and not merely individual members only.

And later at p. 373, noting this to be a principle which does not depend on misappropriation or fraud, stated:

> . . . but their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member.

The court, applying the principle stated by Viscount Haldane, should not sanction a scheme if it appears that the majority have not voted *bona fide* in the interests of the class as a whole.

Justice Quilliam in an unreported decision of the High Court of New Zealand, **Re: Farmers' Co-Operative Organization Society of New Zealand Limited** (M 12/97, 4 August 1987) in addressing the very issue of a company whose proposal had been defeated by the votes cast by some of its direct competitors, in circumstances where the majority had the right to bind the minority by statute relied on the principle enunciated in **British American Nickel Corp. Inc. v. O'Brien,** supra, during the objection to votes application before him. He concluded the votes should be discounted as their votes were cast out of self-interest and not in the interest of the class of creditors as a whole, or of the company. Unlike the present case, he did not determine there was specific activity of an improper purpose other than recognizing the votes were cast by creditors in direct commercial competition with the company.

The Registrar, on his finding of facts, was not faced with a preexisting creditor voting as it wished for whatever reason. He was faced with a unique set of circumstances where he found the appellant shelf company and Datarite, a competitor of Laserworks, involved a selective, secret arrangement with creditors against Laserworks, an arrangement that would hurt some creditors and favour other creditors, although as competitors rather than as creditors, given its purpose of removing Laserworks from the market place and diverting from it, its asset, the market share, so it could be available to Datarite, all of which would result in the balance of the creditors receiving little, if anything, and Laserworks having been deemed a bankrupt.

Justice Stewart found that Datarite was not entitled to use its votes for motives unrelated to the best interest of the creditor group and only pursuant to its own self interest in removing a potential competitor from the market place without regard to the interests of the other members of its class, the other voting creditors. She concluded:

> The Appellant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

On the fourth ground she found that while there had been no collusion by the eighteen creditors sufficient to deprive them of the right to vote, the Registrar was justified in determining that in the circumstances Datarite controlled the way the claims were voted. She upheld the Registrar's decision and declined to interfere with it.

Assignment--The First Ground

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The appellant submits that the judge erred when she declined to address and reverse the Registrar's finding that 18 unsecured creditors of LaserWorks assigned their rights to the appellant. On a proper appreciation of the evidence, it submits, no assignment took place. It states in its factum:

> The appellant did not take issue with the Registrar's finding that four of the 18 creditors received payment for them prior to the vote .... Each of the four creditors provided executed assignments and proxies to Mr. Goldberg, and each assignment was completed by payment. The 14 remaining creditors did not receive payment for their claims prior to the vote, and the appellant submits that the teamed Registrar failed to appreciate the evidence in this regard when he concluded that the claims of these 14 creditors had been assigned to the appellant before the vote was taken.

LaserWorks submits that the Registrar did not decide whether or not the claims voted by Datarite were assigned:

> The conclusion of the Registrar with respect to the assignment issue is:
>
> > Given my findings with respect to the intent and motive of Datarite, I find it unnecessary to consider whether Datarite should have exercised 1 vote or 18.
>
> The reference to 1 vote or 18 relates to the assignment of claims. If the 18 claims had been assigned to the Appellant, the authorities establish that only one vote could be cast on the proposal. The Registrar found it "unnecessary to consider" this issue. We submit that the Registrar would need to consider the issue before making a decision.

It seems reasonable that the Registrar did not intend to decide whether the claims were assigned because it would not determine the question before him. Even if the appellant were restricted to voting as one creditor, leaving a majority of creditors in favor of the proposal, the value of the claims voted by the appellant was sufficient to defeat the proposal and thus achieve the appellant's objective.

If the claims had been assigned to the appellant, the voting rights would have been merged and the appellant could only cast one vote for the value of the claims it had acquired. If the creditors retained their own claims, the appellant could have voted once for each creditor for whom it held a proxy. There is authority for this proposition and the parties seem in agreement with it. The rationale is clear. Each creditor has a vote, to be exercised in person or by proxy. If the claim is assigned, the assignor ceases to be a creditor. It loses its right to vote in person or to control the vote of the proxy. The assignor becomes a creditor and is able to vote its claim, no matter the amount of the claim. If it acquires the claims of other creditors the amount of its claim increases, but it does not pluralize itself. It remains one creditor, entitled to one vote.

The appellant referred to **Toia v. Cie de Cautionnement Alta Inc.** (1989), 77 C.B.R. (ICS.) 264 (Que. S.C.). The respondent insurance company paid out 19 claims against a bankrupt under a performance bond; each claimant signed a release and subrogated its claims to the respondent, which filed 19 proofs of claim. The Official Receiver permitted 19 votes but the Quebec Supreme Court reversed this, allowing only one vote. The appellant purports to distinguish **Toia** because "there the respondent completed the assignments by payment prior to the vote."

In my view it is of small importance whether the appellant bought for cash or on credit. The situation seems clear when creditors authorize votes on their behalf by proxy: each creditor is entitled to its vote and the proxy may cast votes for several creditors. It is equally clear when a creditor assigns its claim to another creditor: the assignee creditor has only one vote. This was the case with the four creditors whose assigned claims were accepted and paid for by the appellant. It is less clear with respect to the remaining fourteen creditors who had executed assignments to the appellant. The appellant says they had not yet been accepted, pending proof of the claims. However they had to be proven before they could be voted, and their values were proved for the purpose of calculating their percentage of the total of the unsecured claims. Any condition on the assignment would appear to have been met.

The intention of the parties must be determined: did the appellant vote those claims on its own behalf, or as an agent exercising the rights of the original creditors by proxy? If it had been necessary for the Registrar to decide this question, there was evidence before him that the original creditors had given control over their claims to the appellant by entering into enforceable contracts to assign them. That is, while the appellant voted the claim in the form of proxies, in fact it had acquired sufficient interest in the claims to vote them in its own right, as assignee, as though the assignments had been fully executed. It is clearly an improper practice for an assignee to purport to vote as the proxy of a creditor which has assigned its claim, thereby ceasing to be a creditor. If Datarite was otherwise entitled to vote at the creditor's meeting, it had one vote for the full value of the claims it had acquired. It was not justified in voting by proxy.

I would dismiss this ground of appeal.

Evidence of Datarite's purpose--the second ground

Mr. Goldberg testified as follows to Datarite's purpose in buying claims and voting against the proposal:

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> Q. Can you tell me the benefit the numbered company will get in the bankruptcy of LaserWorks?
> A. Well, the purpose of the numbered company hopefully in buying the claims is that it'll buy the claims at a reduced price and get full payment one day.

The appellant states that Mr. Goldberg's evidence was uncontradicted, and submits:

> It is respectfully submitted that the Registrar was clearly wrong in his appreciation of the evidence. The learned Judge concluded that the Registrar made a finding of credibility with respect to Victor Goldberg's evidence on this issue. However, the Registrar's decision does not indicate that Mr. Goldberg's evidence on this key issue was even considered. The Registrar simply failed to address Mr. Goldberg's evidence on this issue at all. It is therefore open to this Honourable Court to substitute its discretion for that of the Registrar. It is submitted that the Registrar could only find an improper purpose on the record by overlooking the only piece of direct evidence before him on Datarite's intentions.

Mr. Goldberg was obviously only stating his client's ostensible intentions, not its true ones. The Registrar in fact had commented on Mr. Goldberg's evidence after quoting a passage from the minutes indicating how he had responded to certain questions. He said:

> It is not unfair to say that Mr. Goldberg was obtuse to a very great degree. While this does not necessarily confirm suspicion as to the motives of his client, it does explain the concern expressed by the principals of LaserWorks.

The evidence before the Registrar included the proposal itself, which shows total liabilities of $585,459 of which $247,651 was unsecured, $334, 838 secured and $2,970 preferred. Assets totaled $306,158 including book debts of $170,000, leased vehicles $ 95,958, stock in trade $18,500, cash in the bank (which was the principal secured creditor) $8,000 plus fixtures, furnishings and equipment. Virtually all of the assets would be subject to security. The overall deficiency is shown as $279,301. It is difficult to see a basis for Mr. Goldberg's client's optimism that it might get full payment for the claims it bought at reduced value, or indeed, to see any significant source of dividends for unsecured creditors, on a bankruptcy.

Datarite had not been a creditor of LaserWorks before the proposal. There was evidence, however, that it had been a competitor. The Registrar was entitled to consider the evidence as a whole in making findings of fact and drawing inferences that led him to the conclusion that:

> ... Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose...

In my view the Registrar did not fail to appreciate the evidence nor otherwise err in arriving at this conclusion. Neither did Justice Stewart err in upholding him. I would dismiss this ground of appeal.

Is Purpose Relevant? The Third Ground.

(i) The Statute

The appellant submits that the trial judge erred in upholding the Registrar's decision that Datarite engaged in an improper purpose in acquiring and voting the claims of the 18 creditors, and that its purpose was relevant. In view of the conclusion on the second ground that the Registrar did not err in finding improper purpose, the appellant is left with the relevancy argument. It argues that the authority relied on by the Registrar, **De La Hooke, Pappy's Good Eats, Dimples Diapers** and **Shepard,** arises under s. 43(7) of the **BIA** which deals only with bankruptcy petitions:

> 43(7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for *other sufficient cause* no order ought to be made, it shall dismiss the petition. (emphasis added.)

It cites the discussion of the discretion thus created in Houlden & Morawetz, **Bankruptcy and Insolvency Law of Canada** (3d) at p. 2-50:

> Section 43(7) permits the court to dismiss a petition if it concludes "that for any other sufficient cause no order ought to be made". Section 43(7) confers a discretion; the exercise of that discretion must be founded on sound judicial reasoning based on credible evidence and must be exercised judicially according to common sense and justice in a manner which does not occasion a miscarriage of justice.

Section 43(7) clearly does not create the supervisory jurisdiction of the court over the bankruptcy regime; it is simply a concrete application of a discretionary power inherent in the scheme of the BIA. Each step in the bankruptcy process, whether initiated by a creditor's petition for a receiving order or a debtor's assignment for the benefit of creditors, is supervised by court officials or the court itself. For example s. 108 in Part V, the Administration of Estates, relates to "any meeting of creditors". At the meeting which gave rise to this appeal the chairman applied s. 108(3):

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> 108(3) Where the chairman is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

Section 187(9) provides a broad directive:

> 187(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

The short answer to the question raised by this ground of appeal is that motive or purpose is relevant to a court authorized to remedy substantial injustice.

The appellant takes the narrow position that proposals are outside the discretionary supervisory jurisdiction of the court because they are not specifically included in s. 43(7) or some equivalent provision. This submission cannot be sustained.

There is a similarity between a creditor's petition for a receiving order under s. 43 and refusal of a proposal. In either case it is something done by a creditor or creditors that places the debtor in bankruptcy, likely against its will. But a proposal is also similar to an assignment: the debtor has itself resorted to protection under the **BIA** and its proposal will be deemed to be an assignment unless it succeeds in persuading its creditors to accept it in their own best interests.

The appellant submits that s. 54 is the provision in the proposals Part of the **BIA** which corresponds with s. 43(7). S. 54 provides:

> 54(1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

While s. 43(7) provides an occasion for the exercise of the court's supervisory jurisdiction, an examination focused on the merits of the petition itself, s. 54(1) does not. Such an examination of a proposal is not necessary at that stage. The validity of the claims voted at the creditor's meeting at which the proposal is accepted or refused is subject to the court's scrutiny under s. 108(3). If the proposal is refused by a regular vote of creditors it vanishes and further examination is unnecessary; the debtor is deemed under s. 57(a) to have made an assignment in bankruptcy and the matter proceeds as on an actual assignment. If the creditors approve the proposal, it is then examined on its merits under s. 59, which provides:

> 59. (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Proposals are therefore just as much a part of the bankruptcy regime, and just as subject to the supervision of the court exercising an equitable jurisdiction under the statute, as petitions and assignments. In **Whiteman v. UDC Finance Ltd.,** [1992] 3 NZLR 684, Hardie Boys J., writing for the New Zealand Court of Appeal with respect to the New Zealand **Insolvency Act,** which varies in detail but not in principle from our own, said at p. 691 that proposals are merely

> . . . the other side of the coin to a petition for adjudication.

The only distinction between petitions and proposals in the exercise of the court's supervisory jurisdiction is that under the scheme of the **BIA** occasions for judicial scrutiny occur at different stages of the process. In the present appeal, court intervention was occasioned by objections to proofs of claims affecting the right to vote at the creditors' meeting considering the proposal. The correct procedure was followed, and the objections were considered by the Registrar who had jurisdiction under s.187(9) to remedy substantial injustice.

Motive or purpose is not relevant to objections to proofs of claim based on statutory exceptions under the **BIA**. These are established in several sections, including s.109(1), persons who had not duly proved and lodged a claim; s.54(3), a relative of the debtor (who may vote against but not for a proposal); 109(4), the debtor as proxy for a creditor; s.109(6), a creditor who did not deal with the debtor at arm's length (with exceptions); s.110(1), a person with a claim acquired after the bankruptcy unless the entire claim is acquired; s.111, a creditor with a claim on or secured by a current bill of exchange (subject to conditions); s.112, a creditor holding security (subject to conditions); and s. 113(2), a trustee as proxy (subject to restrictions). See also s. 109, the trustee as creditor.

(It will be noted that many of these exceptions arise from circumstances that could give rise to conflict of interest. This will be considered further under the fourth ground of appeal.)

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However the statutory exceptions are not a code exhausting the forms in which substantial injustice may manifest itself. Objections will be sustained under s. 108(3) if they result from a crime or a tort against the debtor or a crteditor. In the present appeal, and in the authorities cited by the Registrar, the substantial injustice assumes the guise of tortious behavior, to which motive is relevant. In the s. 108(3) context the commonest torts, or instances of substantial injustice arising from tortious behavior, relate to abuse of process and fraud. However conspiracy to harm was also found in **Dimples Diapers.**

Tortious or tort-tike behavior falling short of a fully developed tort susceptible of formal proof or definition can nevertheless result in substantial injustice, particularly for persons at a point so vulnerable they must resort to insolvency protection. (See **Shepard**.) In my view that is why Parliament chose the language it did in s.187(9): to create a discretionary jurisdiction in courts that is not fettered, for example, by the high standards required for establishing such torts as abuse of process in other contexts. What remains to be considered is the threshold level of the substantial injustice which will result in remedial action by the court.

(ii)The Authorities

The four cases cited by the Registrar establish that the threshold is crossed when the **BIA** is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament.

Farley J. held in **Dimples Diapers** that:

> . . . the **Bankruptcy Act**, R.S.C. 1985, c. B-3 has as its purpose the provision of "the orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis". (L.W.Houlden and C.H.Morawetz, Bankruptcy Law of **Canada**, 3rd ed. (looseleaf) (Toronto: Carswell, 1989) at p. 1-3 [A&4]....

In the cases cited the improper purpose takes the form of abuse of process or tortious behavior closely analogous to abuse of process. In each case the court reacted to what could be seen as substantial injustice. The remedy of choice arising under s. 43(7) is refusal of the petition. The appropriate remedy in the present case is rejection of the tainted votes.

In a vigorous judgment in **Dimples Diapers** Farley J. dismissed the bankruptcy petition because it was brought for an improper purpose, to recover the diaper trademark and business opportunity, and awarded damages for abuse of process and conspiracy against three creditors. He held at p. 219:

> ...The tort of abuse of process consists in the misuse of a legal process for any purpose other than that which it was designed to serve. It is immaterial in establishing abuse of process that the process was properly commenced or founded by the defendants and it does not matter that the process be concluded in the instigator's favour. The improper purpose is the gravamen of liability. See **Unterreiner v. Wilson** reflex, (1982), 40 O.R. (2d) 197, 24 C.C.L.T. 54, 142 D.L.R. (3d) 588 (H.C.), at p. 203 [O.R.], appeal dismissed reflex, (1983), 41 O.R. (2d) 472, 146 D.L.R. (3d) 322 (C.A.), and J.G.Fleming, **The Law of Torts**, 7th ed. (Sydney: Law Book, 1987) at pp. 591-592.
>
> Potts J. In **R. v. Cholkan & Co. v. Brinker** reflex, (1990), 71 O.R. (2d) 381, 1 C.C.L.T. (2d) 291, 40 C.P.C. (2d) 6 (H.C). at p. 8 [C.P.C.] said:
>
> > Most recently, Montgomery J. writing for the divisional Court in **Bentham v. Rothbart** reflex, (1989), 36 O.A.C. 13 (Div. Ct.), stated:
> >
> > The constituent elements of the tort of abuse of process are: (a) a collateral improper purpose such as extortion; and (b) a definitive act or threat in furtherance or a purpose not legitimate in the use of the process.

Montgomery J. was clearly using "extortion" as an example only. Any crime or tort would be an improper purpose.

In **de la Hooke** the petition was dismissed when petitioning creditors, who had had no business dealings with the debtor, obtained an assignment of a judgment debt he owed for the sole purpose of filing a petition in bankruptcy to remove him as a business competitor who was using a similar trade name. Registrar Cook cited a number of leading English cases relevant to the circumstances of the present appeal. These included **King v. Henderson**, [1898] A.C. 720 at p. 731 which considered abuse of process or fraud on the court; **Ex Partre Griffin; in re Adams** (1879), 12 Ch. Div. 480 in which a worthless debt was purchased to take proceedings in bankruptcy to force the debtor to give up a just debt, causing Brett L.J. to remark, "a viler fraud I have never heard of"; **Ex parte Harper; In re Pooley** (1882), 20 Ch. D. 585 at p. 692 in which buying a debt to force a bankruptcy in order to get rid of a trustee was found "a gross abuse of the bankruptcy laws;" and **In re a Debtor** [1928] 1 Ch. 199 at p. 211 in which the bankruptcy laws were used for the collateral purpose of extortion.

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In **Pappy's Good Eats** a petition was denied when three franchisees of the debtor, who were not creditors, contracted with the petitioning landlord , who had a $65,000 unsatisfied judgment against the debtor, to pay the landlord's costs to petition the debtor into bankruptcy so they would be relieved of obligations under their franchise agreements. Henry J. held the effect of the agreement was to "embroil the petitioning creditor in the improper objective of the purchasers who as non-creditors have no status in these proceedings and are intermeddling in it. The whole proceeding is inescapably tainted; the petition must be dismissed." He found that "the abuse occurred when the parties agreed or arranged improperly to use the facility of the Act to advance the objectives of the franchisees to cause injury to the debtor."
In **Shepard** it was found that the purpose of the petitioner was to gain control over certain shares of the debtor, an important business advantage. "It is not appropriate or indeed, correct in law, to have the courts facilitate such an objective when the objective is very clearly the main purpose of the application." This finding is consistent with a finding of substantial injustice resulting from abuse of process.

(iii) The Present Case

It is most significant that the appellant was not a creditor of LaserWorks prior to the proposal. Intermeddling by strangers to the pre-existing debtor creditor relationship for an improper purpose was a determinative factor in **Pappy's Good Eats.** The practice of buying dubious claims against an insolvent for purposes foreign to the bankruptcy process was denounced in the English cases cited in **de la Hooke.** The Registrar in the present case understandably looked askance at it. Few legitimate reasons come to mind for buying into a bankrupt estate. When somebody does so, it is a matter of common sense to assume, subject to correction, they intend to use the bankruptcy process for some purpose it was not meant for. In the present case it was readily apparent that mischief was afoot.

The "orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis" was not the purpose behind the acts of the appellant. The appellant made separate approaches to each of the eighteen creditors whose claims it succeeded in acquiring. It negotiated a separate deal with each for varying considerations presumably seen to be more advantageous to the creditor than reliance on the proposal. From most of them it obtained an agreement, an executed assignment and a proxy. It purported to vote the proxies of former creditors whose claims had been assigned to it. Its purpose was not an orderly recovery of debts from the debtors assets but to limit competition by the debtor in its own marketplace by rejecting the debtor's proposal and forcing it into bankruptcy.
The appellant was acting on its own making sharp use of the provisions of the **BIA** for its own advantage. There was no evidence that the co-operating creditors were part of a conspiracy with the appellant to injure the debtor. Otherwise the tort of conspiracy to injure could be found where the predominant purpose of the appellant's conduct is to cause injury to the plaintiff, whether the means used by the defendants are lawful or unlawful: **Canada Cement LaFarge Ltd, v. British Columbia Lightweight Aggregate Ltd.,** [1983] 1 S.C.C. 452.
It is undeniable that the appellant caused injury to the debtor not negligently but deliberately. The debtor made its proposal to avoid bankruptcy; bankruptcy therefore must have been seen by Laserworks as a more injurious alternative than acceptance of the proposal by the creditors. Laserworks had the heavy burden of persuading its creditors that their best interests lay in approving the proposal; it did not have the impossible burden of dissuading a financially stronger competitor bent on using the provisions of the **BIA** to destroy it as a competitor. The appellant derailed the proposal procedure to force the debtor into bankruptcy. Using bankruptcy to cause injury, thereby eliminating the debtor as an entity capable of competing in the marketplace, is abusive of the purpose of the BIA. It does not qualify as "the orderly and fair distribution of (its) property." Annihilation of an individual business or a company may be an unfortunate consequence of a bankruptcy, an unavoidable side-effect, but it is not the purpose of the **BIA**. Use of the **Act** to accomplish such an objective is in my view so abusive of the purpose of the legislation as to engage the supervisory jurisdiction of the courts under s. 187(9). It is a substantial injustice to be remedied.
No distinction in principle is possible between the present case and the four cited by the Registrar. He identified the problem and he applied the remedy. He was upheld on appeal in the Supreme Court. I would dismiss this ground of appeal.

Class voting--The Fourth Ground

In upholding the Registrar Justice Stewart added a string to his bow by introducing the class voting analysis of Viscount Haldane in **British American Nickel**. In light of the holdings respecting the second and third grounds of appeal, it is not necessary to the outcome to decide this ground.
The appellant submits that the trial judge was wrong in concluding there was an abuse on a minority of a class of unsecured creditors and that a duty in this respect was owed by the appellant:

> . . . There was no abuse on a minority of the unsecured creditors and no duty was imposed on the Appellant to cause votes to be cast in the best interest of the class. Without such a duty the learned

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> Judge was without authority to consider Datarite's motives and the votes in question should have been allowed.

In **British America Nickel** Viscount Haldane stated that where a power is conferred on a special class, a majority in exercising a power to modify the rights of a minority must exercise that power in the interests of the class as a whole.

> . . . But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member...

In the present case the minority creditors saw their alternative of furthering their best interests by voting in favour of the proposal disappear when the votes amassed by the appellant were exercised, not in the interest of making the most favourable recovery from a combination of a distribution of the assets of LaserWorks and its continuance in business as a customer or potential customer, but in the interests of removing a competitor of Datarite. Justice Stewart was concerned that the other creditors, as well as the debtor, suffered from the abusive use of the provisions of the **BIA**. Of the sixteen creditors who did not assign their claims to Datarite, fourteen voted in favour of the proposal.

The rationale for Viscount Haldane's conclusion in **British America Nickel** was carefully reviewed by Hardie Boys J. in **Whiteman v. UDC Finance Ltd.** The court found it should not intervene in the refusal of a proposal by creditors including several who were being sued by the debtor, and who therefore had a collateral interest in seeing him out of business.

Hardie Boys J. cited the same passage quoted above by Justice Stewart from Vicount Haldane's judgment. It concludes that there is a restriction on powers conferred on a majority of a special class in order to enable that majority to bind a minority:

> ...They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.

Hardie Boys J. considered **Re Farmers' Co-operative,** which was also cited by Justice Stewart, in which votes of several creditors who were competitors of the debtor were disallowed .

> ...In a later development of the same matter, but not now involving the Court's sanction under s. 205, Gallen J. accepted that the Court has an overriding control, not limited to the approval stage under s. 205, and may restrict a right to vote where the equities of a particular situation require it: see [1992] 1 NZLR 348. It is unnecessary for present purposes to decide whether these cases were correctly decided, for even if they were, the principle is not of unlimited application, and does not apply to the exercise of voting rights generally. This is clear from what Viscount Haldane said in the **British America Nickel** case.
>
> Immediately after the passage already quoted, his Lordship said
>
> > Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share.
>
> Thus in **Pender v. Lushington** (1877) 6 Ch. D. 70, 75-76 Jessel MR said there is:
>
> > . . . no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.
>
> While the voting rights conferred by Part XV of the **Insolvency Act** are not akin to a "right of property attaching to a share", they are rights conferred without reservation. There is no requirement for class voting; there is instead a general right conferred equally on all creditors. The rationale of the principle does not apply. It is well settled that the motive (short of fraud) of a petitioning creditor, no matter how reprehensible, is irrelevant to his right to obtain an order of adjudication: **King v. Henderson** [1898] AC 720, **Re King, ex parte Commercial Bank of Australia Ltd.** (No. 2) [1920] VLR 490. The motive of a creditor voting on a proposal, really the other side of the coin to a petition for adjudication, can be no different. That is not to say that there may be no remedy in an extreme case, such as fraud or mistake. But certainly where, as here, there are perfectly legitimate reasons for opposing the proposal, a creditor is not to be denied that right because he may have some other motive as well...

If the exception made for fraud is broadened to "substantial injustice" I would take Hardie Boys J.'s conclusions to be a fair statement of the law in Canada as well, as applied by Canadian courts in the cases cited by the Registrar. The New

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Zealand court included mistake as well as fraud as an exception. A creditor is not to be deprived of the right to vote for wrongful motives alone; motive must be coupled with a tortious act to support a finding of improper purpose.

A Canadian case supporting a broad interpretation of the right of creditors to vote on proposals is **Re Bedard Louis Inc.** 1991 CanLII 3533 (QC CA), (1991) 22 C.B.R. (3d) 218. The debtor sued three creditors who had sought to seize his goods before judgment for amounts far exceeding their claims against him. One creditor petitioned for a receiving order, and the Quebec Superior Court rejected the debtor's argument that the petitioner was not a creditor because of the large undecided actions. The debtor was declared bankrupt and later filed a proposal. The trustee refused to let the three creditors vote at a creditors' meeting considering the proposal because of a possible conflict of interest. The Superior Court allowed an appeal against the trustee's decision, and the Quebec Court of Appeal upheld the Superior Court, holding (headnote) that:

> No provision of the Act authorizes the trustee to exclude a creditor whom he considers to have a conflict of interest. The debtor's action for damages against the creditors, which constituted a debt not yet payable, did not strip the creditors of their status of ordinary creditors. By the proposal, the debtor presented the creditors with terms of payment which were different from those provided legally by contract.
>
> The Act was intended to allow the voting of all duly acknowledged creditors. Exceptions to that rule were properly specified in the Act and none of them pertained to a creditor against whom a debtor had filed legal proceedings.

The Proposals Part of the **BIA** recognizes only two classes of creditors, secured creditors who are presumably protected by the security they hold, and unsecured creditors, all the others. This does not appear to meet Viscount Haldane's criterion of a special class bound to exercise its voting rights for the benefit of the class as a whole. That concept seems surplus to and difficult to reconcile with the scheme of the **BIA** where, as the Quebec Court of Appeal found in **Bedard,** all duly acknowledged creditors are entitled to vote as they please, subject to exceptions set out in the **Act** (and the exception for tortious or criminal behavior.)

As remarked above, those exceptions reflect the manner in which Parliament dealt with conflicts of interest which might arise in the context of voting on proposals. Parliament has obviously legislated on the subject and cannot be assumed to have created by implication an exception for general, unspecified, conflicts of interest. The mere fact that a creditor is also a competitor of the debtor or otherwise in a conflict of interest with the debtor does not give rise to a statutory exception. The scheme for protecting minority creditors adopted under the BIA was not a class voting concept but rather a system of specific exceptions coupled with a discretionary power in the courts to remedy substantial injustice.

It is not necessary to make a final determination on this point. The rational of Justice Stewart's decision is found in her adoption of the Registrar's conclusions as to improper purpose in the following passage:

> The applicant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

That is, while the Registrar's decision was consistent with considerations of class voting, he was upheld on his findings of improper purpose.

I would dismiss the fourth ground of appeal.

Conclusion

The appellant attempted to abuse the provisions of the **BIA** by using them to intermeddle for an improper purpose with the proposal of a debtor to its creditors, giving rise to a substantial injustice. This affected not only the debtor but the remaining creditors who supported the proposal. The Registrar made no error in discerning this from the evidence and in exercising the court's discretionary jurisdiction to remedy substantial injustice. He was upheld on appeal to the Supreme Court. The appellant's actions are not to be condoned. I would dismiss the appeal with costs which I would fix costs at $3,000 plus disbursements to the Respondent and $3,000 plus disbursements to the Trustee.

Freeman, J. A.

Concurred in:

Pugsley, J.A.

Cromwell. J.A.

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1997 B19853

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY

IN THE MATTER OF the Proposal of Laserworks Computer Services Inc.
-and-
IN THE MATTER OF Section 194(2) of *Bankruptcy and Insolvency Act*, &S.C. 1985, c.B-3
- and -
IN THE MATTER OF an appeal by 3004876 Nova Scotia Limited

DECISION

HEARD: at Halifax, Nova Scotia, before the Honourable Justice Margaret J. Stewart on June 24, 1997
DECISION: August 13, 1997
COUNSEL: Michael, S. Ryan, Q.C.
Counsel for the Appellant, 3004876 Nova Scotia Limited
Roy F. Redgrave
Counsel for the Laserworks Computer Services Limited
D. Bruce Clarke
Counsel for McCuaig & Company Inc., Trustee under Proposal

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C.A. No. 141313

NOVA SCOTIA COURT OF APPEAL
BETWEEN:
3004876 NOVA SCOTIA LIMITED
Appellant
-and-
LASERWORKS COMPUTER SERVICES INC.
Respondent
REASONS FOR
JUDGMENT BY: Freeman, J.A.

Bre-X Minerals Ltd. (Trustee of) v. Verchere, 2001 ABCA 255 (CanLII) - Trustee's Ability to Waive Solicitor-Client Privilege

Date:	2001-10-05
Docket:	98-18077
Parallel citations:	293 AR 73; 206 DLR (4th) 280; [2002] 2 WWR 71; 29 CBR (4th) 1; 97 Alta LR (3d) 1
URL:	http://canlii.ca/t/50bq
Citation:	Bre-X Minerals Ltd. (Trustee of) v. Verchere, 2001 ABCA 255 (CanLII), <http://canlii.ca/t/50bq> retrieved on 2013-08-16
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Reflex Record	Related decisions, legislation cited and decisions cited

Bre-X Minerals Ltd. (Trustee of) v. Bennett Jones Verchere 2001 ABCA 255

Date: 20011005
Docket: #98-18077

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE JUSTICE WITTMANN
THE HONOURABLE JUSTICE LoVECCHIO

IN THE MATTER OF THE BANKRUPTCY OF
BRE-X MINERALS LTD.

BETWEEN:

DELOITTE& TOUCHE INC. TRUSTEE IN BANKRUPTCY
OF BRE-X MINERALS LTD.

APPELLANTS

- and -

BENNETT JONES VERCHERE

RESPONDENT

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE R.M. CAIRNS
MADE NOVEMBER 24, 1998

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE CONRAD
CONCURRED IN BY THE HONOURABLE MR. JUSTICE WITTMANN

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REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE LoVECCHIO
DISSENTING IN PART

COUNSEL:

W.L. SEVERSON
For the APPELLANTS

R.A. McLENNAN, Q.C. and
K. FITZ
For the RESPONDENT

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REASONS FOR JUDGMENT OF THE HONOURABLE
MADAM JUSTICE CONRAD

[1] After a spectacular run in the market, the shares of Bre-X Minerals Ltd. ("Bre-X") took an equally dramatic fall, resulting in bankruptcy. The Trustee in Bankruptcy for Bre-X (the "Trustee") appealed an order refusing to declare that the Trustee has the authority and power to waive solicitor-client privilege on behalf of Bre-X.

Issues and Conclusions

[2] Principally, the issues in this appeal are:

1. Does a trustee have the right to documents protected by solicitor-client privilege and does it have the power to waive solicitor-client privilege for a bankrupt?
2. If not, is this an occasion which justifies an exception to the privilege?

[3] Solicitor-client privilege is the privilege of the bankrupt. It is a personal right and a protection which must be zealously protected. The privilege does not vest in a trustee upon bankruptcy, nor does the trustee have the authority to waive this privilege. Once privilege attaches to a document it need not be produced unless a governing statute says that it is subject to production whether or not privilege applies. While solicitor-client privilege is not an absolute right and exceptions apply, the Trustee in the within action has failed to demonstrate any basis for a court-sanctioned exception to the privilege. I would dismiss the appeal.

Background

[4] Bre-X made an assignment in bankruptcy on November 7, 1997. Prior to the assignment, Bennett Jones Verchere ("BJV") acted as corporate and securities counsel to Bre-X providing advice and information to Bre-X, its officers and directors. Bre-X remains a subsisting corporate entity but, at present, has no directors or officers. BJV has not acted for Bre-X since May of 1997.

[5] In August of 1998, the Trustee filed a notice of motion seeking a declaration that it had the power and authority to waive the solicitor-client privilege of Bre-X. The notice of motion references affidavit materials as well as ss. 34, 67(1), 71(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA" and the rules thereunder. Specifically, the Trustee sought a declaration that would confirm its power and authority to waive "any applicable solicitor-client privilege of Bre-X with respect to advice, information, opinions given to Bre-X by Bennett Jones Verchere ..." BJV has conceded that its documents, records, files and solicitors are producible in respect of Bre-X's affairs and property, but it submits that professional advice, opinions and assistance provided to Bre-X are privileged and not compellable. For the purposes of the application, the parties agreed that the advice and information at issue constitute privileged communications between solicitor and client.

[6] The Trustee argues, *inter alia*, that the information subject to solicitor-client privilege is critical to the proper administration of the bankrupt's estate. During argument, counsel conceded that a trustee may not automatically have the right to waive privilege. The Trustee, however, argues that in this case, a court sanctioned exception should be allowed because the information is critical to the administration of the bankrupt's estate and because Bre-X no longer has any officers or directors who could direct such a waiver and demand production.

[7] The evidence in support of the application is minimal, and consists of the following allegations set out in the supporting affidavit of R. Ross Nelson, licensed Trustee:

> 7. In the course of its administration of the bankruptcy estate of Bre-X, and for use in the attempted realization by the Trustee of assets of Bre-X and to potentially realize upon claims against other parties, the Trustee is desirous of obtaining and using some information that may have been provided by Bennett Jones Verchere to Bre-X.
>
> 8. The Trustee views the receipt of such information as being a very important element to the administration of the Estate and to the realization of Bre-X property and to claims made against other parties.
>
> 9. Bennett Jones Verchere have taken the position that such information is the subject of Bre-X solicitor-client privilege with Bennett Jones Verchere, and that Bennett Jones Verchere cannot divulge that information without a waiver and consent by Bre-X or some authorized party on behalf of Bre-X.
>
> 10. Although Bre-X exists as a corporate entity, it has no officers or directors, and has no one to make corporate decisions for Bre-X, and has no one to exercise a will or directing mind on behalf of Bre-X.
>
> 11. In the current circumstances, it appears that if the Trustee is unable to waive such privilege on behalf of Bre-X, and if there is no other person who has the ability to waive such privilege on behalf of Bre-X, then in that case the Trustee's ability to administer the bankrupt estate, and the Trustee's ability to put forward its best case to realize upon property of Bre-X and/or prosecute claims against third parties, will be severely prejudiced, if not entirely negated.

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12. If the Trustee has the ability and authority to waive solicitor-client privilege on behalf of Bre-X, the Trustee would propose to assess the merits of waiving that privilege and make a decision accordingly.

[8] The application is a very general one. The affidavit evidence does not specify any particular information which the Trustee expects to obtain from BJV, nor does it identify any specific action or potential actions which turn on the information sought. As well, the evidence does not demonstrate how any interest (neither the creditors' nor Bre-X's) may be affected by the disclosure or non-disclosure of privileged communications between Bre-X and BJV. Overall, the Trustee seeks a blanket exemption to solicitor-client privilege based on general evidence that such information would benefit the administration of the estate. The parties have agreed for the purposes of this application that solicitor-client privilege exists. The only issues are whether a Trustee has the right to waive this privilege for Bre-X and, if not, whether a court is justified in permitting an exception to the privilege.

Decision of the Chambers Judge

[9] Relying upon ***Re Chilcott and Clarkson Co. Ltd.*** reflex, (1984), 48 O.R. (2d) 545 (C.A.), the learned Chambers Judge, in a well-reasoned judgment, refused to grant the declaration sought by the Trustee. In ***Re Chilcott***, the trustee in bankruptcy sought to compel a solicitor to disclose privileged communications that might reveal the whereabouts of some of the bankrupt's property. The bankrupt did not waive his privilege and, at the time, was facing criminal charges for fraud allegedly associated with the bankruptcy.

[10] The Ontario Court of Appeal varied the lower court's decision to compel evidence from the solicitor to avoid disclosure of any privileged communications. Specifically, the court confirmed that the privilege could not be waived by the trustee, as the privilege resides with the bankrupt. The Ontario Court of Appeal also limited the earlier decision of ***Re Cirone*** (1965), 8 C.B.R. (N.S.) 237 (Ont. S.C.) to its particular facts. In ***Re Cirone***, the Ontario Supreme Court permitted a waiver of solicitor-client privilege by a trustee in circumstances where allegations of fraudulent preference had been made against the solicitor who refused to disclose certain communications. The Chambers Judge in the within action wholly adopted the reasoning of the Ontario Court of Appeal in ***Re Chilcott***.

[11] In addition, the Chambers Judge rejected the Trustee's analogies between this case and wills cases in which waiver of privilege by a third party may be permitted. Although he accepted the established nature of the exception in wills cases and acknowledged a superficial attraction in the analogy, he distinguished the estates cases. Namely, estates cases focus on the ascertainment of a deceased's intentions by disclosure of information protected by solicitor-client privilege. Waiver, in this situation, does not offend the rationale for this privilege.

[12] The Chambers Judge denied the application and held that the Trustee does not have the legal right, power or authority to waive Bre-X's solicitor-client privilege. He confirmed that BJV could be compelled to produce its solicitors and their files, documents and records respecting the assets, affairs and transactions of Bre-X for examination, to the extent that solicitor-client privilege would not be compromised.

[13] The Trustee's submissions in support of waiver of privilege may be distilled into two main categories. First, the Trustee submits that the case law, but for ***Re Chilcott,*** supports a waiver of privilege in this appeal. Second, the Trustee submits that exceptions to solicitor-client privilege exist and that the circumstances of the within appeal (e.g., the absence of directors to effect a waiver) justify an exception.

[14] For the reasons that follow, I am of the view that the powers conferred on a trustee in bankruptcy do not include the general power to waive solicitor-client privilege and documents subject to that privilege need not be produced. There are no facts that justify an exception to the privilege here.

Analysis

1. Does a trustee have the power to waive solicitor-client privilege for a bankrupt?

a) Solicitor-Client Privilege

[15] A basic understanding of the history and role of solicitor-client privilege is critical to the determination of both issues in this appeal. The case law specifically considering a trustee's power and authority to waive solicitor-client privilege is not extensive and is somewhat inconsistent. A broader appreciation, however, of the nature of solicitor-client privilege and its role in our legal system readily reveals the almost absolute protection afforded by this privilege.

[16] Solicitor-client privilege, one of the oldest forms of common law privilege, protects the sanctity of the confidence between client and lawyer. The current rationale for solicitor-client privilege has remained unchanged for some time. The basis for this privilege was articulated aptly in ***Greenough* v. *Gaskell*** (1833), 1 My. & K. 98 at 103, 39 E.R. 618 at 620-21:

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to

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> afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

[17] The Supreme Court has consistently commented that solicitor-client privilege is an important cornerstone to the effective representation of clients by counsel. That court has gone as far as to characterize solicitor-client privilege as a "fundamental civil and legal right...": ***Solosky* v. *The Queen***, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 at 839.

[18] It should be emphasized that solicitor-client privilege is not merely a rule of evidence but a substantive rule, which protects the client's **fundamental right** to confidentiality. The Supreme Court stated in ***Descôteaux* v. *Mierzwinski*,** 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860 at 875:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

At 871, the court further noted:

> There is no denying that a person has a right to communicate with a legal adviser in all confidence, a right that is "founded upon the unique relationship of solicitor and client" (*Solosky, supra*). It is a **personal** and extra-patrimonial right which follows a citizen throughout his dealings with others.
>
> (Emphasis added.)

Thus, this privilege casts a wide protective net over communications between solicitors and their clients and is protected zealously by the courts.

[19] Due to its critical function in our legal system, solicitor-client privilege is distinct from other forms of evidentiary privilege. Solicitor-client privilege has attained the status of a class privilege, and is not assessed on a case-by-case basis like other forms of relational privilege. A consideration of other forms of relational privilege (e.g., priest/penitent, therapist/patient and so on) that are decided on a case-by-case basis is, however, useful. In particular, the Wigmore criteria, used to assess claims of privilege on a case-by-case basis, reveal the basic rationale for relational privilege and demonstrate why solicitor-client privilege constitutes an entrenched class of privilege.

[20] The Wigmore criteria were quoted, perhaps most notably, by the Supreme Court in ***Slavutych* v. *Baker*,** 1975 CanLII 5 (SCC), [1976] 1 S.C.R. 254. In ***Slavutych***, the Supreme Court considered whether any privilege attached to a professor's comments about a colleague who was being considered for tenure. The professor was told by his superior that his comments and the evaluation form were part of a confidential review process. The professor's comments on the form were subsequently used in dismissal proceedings against him. When considering whether the professor's comments were privileged, the Supreme Court adopted the Wigmore criteria as the test for privilege at 260:

(1) The communications must originate in a *confidence* that they will not be disclosed.
(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
(3) The *relation* must be one which in the opinion of the community ought to be *sedulously fostered*.
(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

When assessing claims of relational privilege on a case-by-case basis, these four fundamental conditions must be met before privilege will be held to arise. These stringent conditions limit the circumstances in which privilege may be claimed.

[21] Solicitor-client privilege is presumed to meet all four criteria. As noted in ***R.* v. *Gruenke***, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263 at 289: "[t]he *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system." Thus, it is essential that clients enjoy confidentiality in their pursuit of legal advice, otherwise clients might avoid

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seeking assistance from lawyers or might not disclose all necessary information to their lawyers when attempting to get advice. There is no question that this confidential relationship ought to be "sedulously fostered", as effective representation is a cornerstone of our legal system. The injury that would result from an erosion of solicitor-client privilege is great, including the collapse of effective legal representation.

[22] Once solicitor-client privilege is established (i.e., the communication was in fact confidential, in the context of a professional relationship and in the course of seeking advice), the categorical circumstances in which disclosure of privileged information by a person other than the client will be permitted are very limited. Communications which are criminal or which seek to facilitate criminal activities are exempted: ***Solosky***. Similarly, privilege may be set aside when the safety of the public is at risk from non-disclosure of the communications: ***Smith* v. *Jones***, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455. In addition, the continued existence of solicitor-client privilege is not required where the client no longer has an interest to protect and where non-disclosure would compromise the ability of an accused to defend himself: ***Smith***. Finally, while the duty of confidentiality survives the death of the client, the privilege enures to the client's successor in title (e.g., heirs) and may be waived by a successor in interest to the client: ***Geffen* v. *Goodman Estate***, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353 at 384. The within appeal does not fall within any of these categories nor is the Trustee's situation analogous to any of these exceptional circumstances.

[23] The Trustee strongly urges an analogy between this action and estates cases in which disclosure is permitted. Disclosure in estates cases has been allowed to promote the deceased client's wishes and true testamentary intentions through disclosure of privileged communications. The interests that solicitor-client privilege seeks to protect are not compromised where the waiver will disclose the testator's intentions: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1990) at 753-54. The rationale for disclosure is not only that disclosure is consistent with what the testator would have wanted, but also that the client's communication is presumed to have been intended to remain a secret only during the testator's lifetime: Wigmore, *Evidence in Trials at Common Law*, vol. 8, 4th ed. (Boston: Little, Brown & Co., 1961) at para. 2314; ***Geffen*** at 385. Thus, the exception in ***Geffen*** allows the testator's intention to be carried out but should not be misinterpreted as authority for a widespread, case-by-case assessment of requests for waiver of privilege by third parties. The presumption described by Wigmore does not apply in the circumstances of this appeal.

b) The Powers of a Trustee in Bankruptcy

[24] Solicitor-client privilege is the privilege of the client - in this case, Bre-X. Subject to an exception, the only basis upon which a trustee could claim the right or power to waive the bankrupt's solicitor-client privilege and demand disclosure would be statutory. It is important to understand the powers of a trustee when resolving the question of privilege. A trustee has no inherent authority over the bankrupt's affairs. Rather, the trustee's rights are statutory and it is empowered to assume conduct of the bankrupt's affairs and take possession of his property pursuant to authority granted by the BIA which provides, in part:

> 16. (3) The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory, and for the purpose of making an inventory the trustee is entitled to enter, subject to subsection (3.1), on any premises on which the deeds, books, records, and documents or property of the bankrupt may be, notwithstanding that they may be in the possession of a sheriff, a secured creditor or other claimant thereto.
>
> ...
>
> (5) No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents, including material in electronic form, relating to the accounts or to any trade dealings of the bankrupt or to set up any lien or right of retention thereon.
>
> 18. The trustee may when necessary in the interests of the estate of the bankrupt
>
> (a) take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value; and
>
> (b) carry on the business of the bankrupt until the date fixed for the first meeting of creditors.
>
> 20. (1) The trustee may, with the permission of the inspectors, divest all or any part of the trustee's right, title or interest in any real property of the bankrupt...
>
> 21. The trustee may initiate such criminal proceedings as may be authorized by the creditors, the inspectors or the court against any person believed to have committed an offence under this Act.
>
> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person,
>
> (b) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

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but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

71. (2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee, the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

163. (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

164. (1) Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.

167. Any person being examined is bound to answer all questions relating to the business or property or the bankrupt, to the causes of his bankruptcy and the disposition of his property.

There are many other provisions which confer broad powers upon the trustee, but notably absent is the delegation of any power to waive privilege, such as contained in the British legislation. While these sections allow for the examination of a solicitor and disclosure of information relating to the bankrupt's transactions, the sections omit any reference to privileged communications.

[25] British insolvency legislation (the *Insolvency Act*, 1986, c. 45 (U.K.)) explicitly refers to privileged communications:

311(1). The trustee shall take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (including any which would be privileged from disclosure in any proceedings).

[26] This provision expressly permits the production of privileged documents, unlike the Canadian statute where neither production of privileged documents nor waiver of privilege is mentioned. A cursory review of *Halsbury's Laws of England*, vol. 3(1), 4th ed. (London: Butterworths, 1980) and vol. 3(2), 4th ed. (London: Butterworths, 1980), and British case authorities reveals that even where the privileged document is expressly producible notwithstanding the privilege, the provision merely entitles the trustee to take possession. The protection afforded by solicitor-client privilege, however, is not displaced and the section does not confer any authority to waive the privilege upon the trustee.

[27] The British legislation may be contrasted with comparable American provisions. The *Bankruptcy Code*, 11 U.S.C. §§ 542(e) provides:

Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records and papers relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

The American legislation recognizes that the privilege protects communications from disclosure and cannot be waived by the trustee.

[28] The Canadian legislation is silent regarding solicitor-client privilege, and thus it is necessary to determine whether the documents must be produced notwithstanding the privilege. Keeping in mind the importance and purpose of the privilege, it is my view that, absent specific language such as that contained in the British statute, once the privilege attaches disclosure of the communication cannot be compelled. That is the essence of the privilege. The purpose of the privilege is a recognition of the importance of confidentiality to the judicial system generally. If the document must be disclosed to a trustee in bankruptcy, then confidentiality and the judicial system it supports is undermined. And it is not corrected by saying that the trustee cannot use the information. Indeed, if the trustee cannot use the information then there is no purpose in the disclosure. If it can, then the foundation for the privilege is damaged.

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[29] There may be occasions where the trustee inadvertently comes into possession of privileged information. Even then, a trustee cannot waive the privilege and make use of the documents unless they fall within an exception.

[30] Parliament did not include a clause making privileged communications producible. In addition to excluding any reference to solicitor-client privilege, Parliament does not confer all the bankrupt's property and personal rights in the trustee. Section 2(1) of the BIA defines "property" to include:

> money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

The "property" that vests in the trustee includes almost "every conceivable type of asset": ***Chetty* v. *Burlingham Associates Inc.*** 1995 CanLII 3939 (SK CA), (1995), 121 D.L.R. (4th) 297 at 300 (Sask. C.A.). Some types of property, however, are specifically excluded (e.g., property held in trust for another person, pursuant to s. 67(1)) or do not fall within the confines of the definition.

[31] Notably, personal property and personal rights are very different and the cases interpreting the BIA distinguish the two. For example, "things in action", such as a cause of action for custody or divorce, are matters personal to the bankrupt and are not captured by s. 2(1) of the BIA: ***Gano* v. *Alberta Motor Association Insurance Co.*** (1997), 202 A.R. 118 (Q.B.). Tax refunds for the support of disabled person are the "property of the bankrupt": ***Re Neufeld (Bankrupt)*** (1993), 144 A.R. 182 (Q.B.). Nor does a cause of action for damage to the reputation of a bankrupt vest in a trustee: ***Egan* v. *Grayson*** (1956), 8 D.L.R. (2d) 125 (Alta. S.C.); ***Rahall* v. *McLennan*** (1996), 190 A.R. 183 (Q.B.). In my view, solicitor-client privilege is a personal right, at least as fundamental and individual as damages to reputation, which falls into a category of interests which are not transferred to or conferred upon a trustee by the BIA. As noted by Yoine Goldstein in "Bankruptcy as it Affects Third Parties: Some Aspects", [1985] Meredith Mem. Lect. 198 at 227: "I can think of nothing more attached to the person and nothing less pecuniary, than a communication to a person bound by professional secrecy ..."

[32] The distinction between property rights and personal rights, such as privilege, however, is far from absolute. For example, the BIA dictates that trustees take possession of all property of the bankrupt, including books, records and documents. The trustee argues that if a privileged communication has been reduced to writing (for example, in the form of an opinion letter) the tangible letter is property that must be produced. But the very essence of the solicitor-client privilege (the personal right of the bankrupt) protects the privileged communication from being communicated. The BIA does not diminish the personal right of privilege enjoyed by the bankrupt in respect of that communication. Once privilege attaches to the communication, I am of the view that it need not be produced unless the statute specifically provides. Moreover, in cases where production of privileged material occurs inadvertently, the privilege remains extant and the bankrupt's right to privilege with respect to that document is maintained.

[33] Section 16 of the BIA and other related provisions are neither sufficiently broad nor explicit enough to empower the trustee to take possession of and use privileged communications, advice or opinions which may fall under the BIA's definition of "property". Certainly a privileged communication is not property divisible amongst creditors such as that contemplated in s. 67. In short, while there may be a physical record or document which records the communication, the essence of the document is still the privileged communication, a personal right and not property contemplated or falling under the BIA. The personal right of privilege attaches to the document and, in my view, that personal right, retained by the bankrupt, precludes disclosure of the communication to the trustee whatever form the communication takes. If disclosure of the physical document was permitted, the personal privilege right would be totally defeated. Had a transfer of solicitor-client privilege, or production of privileged communications (whatever their form) been intended, Parliament would have so provided in the BIA. This was not done.

[34] In the case of a company, the privilege is solely the right of the company. There may also be situations where questions of privilege will arise with respect to individuals such as directors, officers and managers of the corporation who seek advice from the corporate solicitor as to their own obligations, which may become intertwined with corporate opinions. This variant on the issues that may arise out a trustee's attempt to disclose privileged information is not before us and I need not address the issue.

[35] In my view, there is no attempt in the legislation to displace the common law confidentiality rights enjoyed by a bankrupt with respect to its communications with solicitors. The privilege itself is not property under the BIA. Nor is the right to waive a power attaching to property divisible amongst creditors under s. 67. The essence of the privilege, whatever its form, is the confidential communication to which privilege attaches. An explicit delegation would be required in order for trustees to have a categorical right to waive privilege for bankrupts and even for trustees to have an enhanced ability to seek the authority to waive from the courts on a case-by-case basis. Thus, the personal right of privilege is not altered by the BIA.

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c) Jurisprudence

[36] The Trustee submits that diverging and inconsistent views regarding the ability of a trustee to waive a bankrupt's privilege exist among courts in Canada. It suggests that, notwithstanding ***Re Chilcott***, the continuing rule in the jurisprudence is that a bankruptcy trustee can waive a bankrupt's solicitor-client privilege. It is true that there is a dearth of authority on this issue and that some of the earlier authorities are inconsistent with ***Re Chilcott.*** In my view, however, the approach of the court in ***Re Chilcott*** is compelling.

[37] As noted earlier, in that case, a solicitor acted on behalf of the bankrupt prior to the bankruptcy and advised the bankrupt on financial and other corporate matters. The trustee sought to examine the solicitor regarding privileged communications with the bankrupt. Although the court accepted that the solicitor could be compelled to disclose information about the bankrupt's property, affairs and transactions, the court held that information on any topic necessarily involving disclosure of communications made between the solicitor and the bankrupt for the purpose of giving legal advice could not be disclosed. Ultimately, the court refused to speculate on circumstances in which a trustee might properly waive a bankrupt's privilege, but it concluded that the goal of protecting creditors' rights, standing alone, could not defeat solicitor-client privilege.

[38] In my view, ***Re Chilcott*** correctly balances the importance of solicitor-client privilege against creditors' rights and is relevant and applicable to the case at bar. The fact that the bankrupt was an individual in ***Re Chilcott***, as compared to the corporate bankrupt involved in the within action, is not a relevant distinguishing factor. If anything, the bankrupt's refusal to waive privilege and the specific fraud allegations advanced against him in ***Re Chilcott*** resulted in a stronger case for disclosure than the Trustee has put before this Court.

[39] In support of its submissions, the Trustee relies on the Alberta case of ***Re Abacus Cities Ltd.*** (1981), 40 C.B.R. (N.S.) 172 (Alta. Q.B.). In ***Abacus Cities***, a trustee sought the court's advice and direction regarding his authority over privilege applicable to communications between a bankrupt corporation and the bankrupt's solicitors where an officer of the bankrupt had been charged with fraud. The trustee's query arose when the Attorney General of Ontario, during a preliminary hearing into the fraud charges, asked the trustee to waive the bankrupt's solicitor-client privilege regarding certain communications relevant to the fraud charges. As the matter arose out of a bankruptcy action commenced in Ontario, the Alberta court declined to make a decision regarding the admissibility of evidence in Ontario proceedings and the existence of solicitor-client privilege. The judge did, however, comment upon the trustee's ability to waive privilege. Following ***Re Cirone***, he accepted that the privilege belonged to the bankrupt, but held that the trustee could step into the shoes of the bankrupt to waive the privilege. In particular, the court specified that the trustee was authorized to waive the bankrupt's privilege after considering issues of public interest and if such a waiver would not be prejudicial to the interests that the trustee represented.

[40] With respect, I do not accept that a trustee steps into the shoes of the bankrupt for all purposes, including the purpose of waiving solicitor-client privilege. A trustee's powers are prescribed by statute. The BIA does not confer any authority over privilege and does not provide that the trustee steps into the shoes of the bankrupt for all purposes. Moreover, a proper consideration of the public interest must include a careful examination of the rationale for solicitor-client privilege, including the overriding need to guard this privilege in order to ensure the integrity of our legal process and a client's right to effective representation by counsel. In addition, I note that ***Re Abacus*** relied heavily upon ***Re Cirone,*** but was decided before ***Re Cirone*** was limited to its facts by the Ontario Court of Appeal in ***Re Chilcott***. Finally, in both ***Re Abacus*** and ***Re Cirone***, fraudulent behaviour was involved (fraud being a potential exception to the privilege) and that these cases may, on that basis alone, be distinguished from the within appeal.

[41] The Trustee also refers to ***Re Amonson*** (1985), 57 C.B.R. (N.S.) 314 (Alta. Q.B.). In my view, this case does not assist the Trustee. In that case the court followed the reasoning of the Ontario Supreme Court in ***Re Chilcott***, without reference to the Ontario Court of Appeal's decision in that case. In ***Re Amonson***, the court again considered whether a solicitor was a compellable witness in bankruptcy proceedings and whether the trustee could waive solicitor-client privilege. Although the court agreed with the decision at first instance in ***Re Chilcott***, the court in ***Re Amonson*** did not eventually permit a blanket waiver. Ultimately, the court remained reticent about waiver of a bankrupt's privilege and concluded at 317 that "care should be taken with respect to the solicitor-client privilege concerning the giving of the legal advice unless this advice was in furtherance of a criminal purpose."

[42] Similarly, ***Wolch's Guaranteed Foods Ltd. (Trustee of)*** **v.** ***Wolch*** 1994 CanLII 8935 (AB QB), (1994), 24 C.B.R. (3d) 268 (Alta. Q.B.) does not support the Trustee's position in the within action. In this case, the Registrar considered, *inter alia*, whether a trustee could waive the solicitor-client privilege of a bankrupt, but ultimately concluded that the case did not require him to generally determine whether a trustee was entitled to waive a bankrupt's privilege. On the specific facts before him, the Registrar held that waiver was not warranted, in part, because wide disclosure about the bankrupt's property had already been made. Thus, there was no true necessity for the waiver.

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[43] The Trustee appears to argue that ***Wolch*** contemplates the possibility of trustees being able to waive a bankrupt's privilege because the Registrar declined to make a final determination on the issue. In my view, the ultimate result of ***Wolch*** supports the respondent's position that privilege should not be waived and the case indicates a preference for the Ontario Court of Appeal's reasoning in ***Re Chilcott***. Namely, at 273, the Registrar stated: "...there is no authority for holding a trustee can waive the bankrupt's privilege."

[44] Finally, while not referred to by counsel in argument, this Court discussed release of information by a solicitor to a trustee in bankruptcy in the case of ***Clark* v. *Law Society of Alberta***, 2000 ABCA 242 (CanLII), [2000] 11 W.W.R. 520 (Alta. C.A.). In that case, a lawyer disclosed information about assets of the bankrupt to a trustee and the Law Society took disciplinary action. This Court granted relief to the lawyer. During the course of its reasons, this Court noted that the BIA conferred broad powers on a trustee to demand information about property, but held that the scope of these powers was not at issue because the lawyer had properly disclosed information (not privileged), as is clearly required by the BIA. The Court specifically declined to rule on the question of solicitor-client privilege, noting only that had privileged information been divulged, other problems might have arisen.

[45] In my view, the state of the law regarding a trustee's ability to waive a bankrupt's privilege is not as ambiguous as the Trustee submits, nor is it evolving towards an exception favouring trustees generally. If anything, the common law is evolving in the contrary direction. While a small number of the cases put before us permitted disclosure, many of them predate ***Re Chilcott***. Moreover, some deal with accepted exceptions, namely, criminal behaviour, which distinguishes them factually from the within appeal. Overwhelmingly, jurisprudence reiterates that solicitor-client privilege must be guarded zealously and there are no common law developments which support an erosion of that privilege in favour of trustees in bankruptcy.

2. Is this an occasion which justifies an exception to the privilege?

[46] Finally, it is necessary to address the Trustee's submissions relating to the existing exceptions at common law which might permit disclosure of Bre-X's privileged information by this Court. The bases for solicitor-client privilege must be weighed against the potential benefits to be derived from an exception displacing the privilege of bankrupts.

[47] In my view, the fact that disclosure is sought in a bankruptcy context, where creditors' financial recovery might be enhanced by disclosure, is insignificant compared to the benefits derived from protection of a bankrupt's solicitor-client privilege. Insolvent entities and persons in financial difficulty frequently need legal advice, perhaps even more so than those who enjoy financial stability. The ability of these individuals or corporations to obtain fully informed and reliable legal advice should not be compromised by threat of disclosure in the possible event of a bankruptcy. In my view, creditors may benefit more from the provision of good legal advice to persons on the brink of insolvency than they would from disclosure of solicitor-client communications between these debtors and their lawyers.

[48] It is not helpful to simply say that in the public's interest trustees obtain all information that will help maximize asset recovery without also recognizing the public interest in solicitor-client privilege. Frequently, contrary public interests may compete with the public interest in solicitor-client privilege, but most often, the public interest in and the rationale for solicitor-client privilege prevail. As noted in ***A. (L.L.)* v. *B. (A.)***, 1995 CanLII 52 (SCC), [1995] 4 S.C.R. 536 at 562, a class privilege such as solicitor-client privilege is not easily displaced:

> A class privilege entails a *prima facie* presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an **overriding** interest commands disclosure.
>
> (Emphasis added.)

The potential benefits that may result from trustees generally being able to waive privilege for bankrupt persons simply cannot be viewed as "overriding" when compared to the interests protected and enhanced by solicitor-client privilege.

[49] This begs the question - what interests will override solicitor-client privilege? In short, very, very few interests are more important than those protected by this privilege. The almost absolute nature of solicitor-client privilege was reiterated in the recent case of ***R.* v. *McClure*** 2001 SCC 14 (CanLII), (2001), 195 D.L.R. (4th) 513 (S.C.C.). In that case, an accused was charged with sexual offences. The Supreme Court considered whether to waive solicitor-client privilege over the litigation file of the lawyer representing the alleged victim in a related civil suit in order to allow the accused to explore and confirm potential defences in the criminal prosecution.

[50] The Supreme Court noted that the occasions when this privilege will yield to other interests are rare and stated at 524 "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis." Ultimately, the court held that the file ought not to be produced, principally because the accused had not demonstrated that any useful information was in the litigation file and the necessity for disclosure was questionable.

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[51] In my view, the Supreme Court's recent decision in ***McClure*** narrows the exceptions to solicitor-client privilege significantly, particularly given that court's criticism of case-by-case assessment of requests to set aside privilege. The Trustee, however, argues that exceptions may arise on a case-by-case basis where a principled basis for waiver exists. Even if principled exceptions were permissible on a case-by-case basis, the Trustee has not demonstrated that the facts of this case merit any exception. The rationale for rejecting a categorical right by trustees to waive the solicitor-client privilege of bankrupts applies equally to the Trustee's request in this appeal for a principled exception.

[52] In short, no overriding rationale for disclosure exists in the within action. There is simply no pressing objective that, in principle, surpasses in importance the interests protected by solicitor-client privilege, and thus no principled exception is justified. The factors that militate against disclosure and which reinforce the rationale for continued privilege include: the absence of any identity of interest between the bankrupt and the Trustee, the inability to displace any of the Wigmore justifications for continued privilege, the minimal importance of the creditors' likely financial recovery relative to the interests protected by solicitor-client privilege, and the absence of a demonstrated need for the waiver sought.

a) Identity of Interest

[53] Because the evidence does not directly demonstrate what benefits the bankrupt or its estate will reap from disclosure, the materials before us invite a rather hypothetical debate about the potential identity and conflicts of interest between the Trustee and Bre-X (and trustees and bankrupts more generally). During oral submissions, the appellant and respondent took opposite positions on this point. The Trustee submits that the bankrupt could only benefit from proper administration of its estate. Conversely, the respondent suggested that a trustee in bankruptcy and the bankrupt likely never enjoy a unity of interest since a trustee's principal obligation is to the creditors.

[54] The potential unity of interest that may hypothetically exist between a bankrupt and its trustee provides an interesting topic for debate and discussion, but this much is clear. The Trustee has not proven, with sufficient affidavit evidence, that disclosure of Bre-X's privileged communications with BJV will further the interests and intentions of the bankrupt. The trustee has simply asserted that a fishing expedition is something he is "desirous" of.

[55] Furthermore, there is no obvious analogy between the Trustee's objectives in this case and the desire to determine a deceased person's intentions in estates cases. For example, in ***Geffen***, the Supreme Court considered whether disclosure of privileged information (in order to obtain evidence from a solicitor regarding advice given to a client pertaining to the creation of a trust of which the client was a settlor) was justified. The action arose after the settlor/client's death, when her executor brought an action seeking to set aside the trust for undue influence. At trial, the solicitor, who advised the settlor prior to the creation of the trust, was permitted to give evidence regarding privileged communications with his client.

[56] The Supreme Court considered the disclosure of privileged information permitted by the trial judge. The primary basis upon which the evidence was initially allowed was the accepted exception in wills cases. Namely, solicitors may be permitted to give evidence in wills cases to determine the validity of the will or intent of a testator. The Supreme Court accepted this exception and further elaborated upon the bases for the exception.

[57] Traditionally, the exception for wills cases was rationalized on the grounds that the testator intended to disclose his intentions through the will and that communications with the solicitor were only intended to remain secret during his lifetime. The Supreme Court also appeared to justify the exception on the basis that the interests of the client and the claimants in wills cases were the same. In other words, both client and claimants wished to ensure the full expression of the client's intentions. Ultimately, the court permitted the disclosure of the privileged communications in ***Geffen*** because, as stated at 387:

> [T]he considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were. And the principle of extending the privilege to the heirs or successors in title of the deceased is promoted by focussing the inquiry on who those heirs or successors properly are.

[58] The court's decision in ***Geffen*** is based largely upon the obvious analogy between the disclosure of the settlor's intention and confirmation of a testator's intention in estates cases. Namely, both in estates cases and in ***Geffen***, solicitor-client privilege was not violated by disclosure because of the identity of interest between the claimant and client and, to a lesser degree, because of the deceased's presumed wish to have his intentions disclosed to his beneficiaries and other claimants.

[59] No similar identity of interest can be assumed to exist between a trustee in bankruptcy and a bankrupt. While such a commonality may occasionally arise, any presumption that bankrupts and their trustees enjoy an identity of interest

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is obviously unwarranted. A trustee acts in the interests of the creditors, which are not identical to, and frequently conflict with, the interests of the bankrupt person. While a trustee is afforded broad powers to deal with a bankrupt's assets, the bankrupt still exists, whether as a person or a corporation. The interests of the two are not the same. Moreover, if they are identical, the bankrupt might well agree to waive the privilege.

[60] Further, as noted earlier, in estates cases, the deceased person is presumed to have intended necessary disclosure of his intention after his death. No similar presumption may be advanced in this case. No one would suggest that a bankrupt anticipates or intends that privileged communications with his solicitor will be disclosed in the event of his insolvency and bankruptcy. Certainly, the directors of Bre-X did not waive the company's privilege prior to resigning. In the absence of any contrary evidence, we may assume that Bre-X intended to engage in fully confidential communications with its solicitor, without any intention to disclose such communications. Disclosure may compromise Bre-X's legitimate expectation of and entitlement to confidentiality. In addition, no identity of interest between the Trustee, who desires waiver, and Bre-X has been proven.

b) Creditors' Interests

[61] Any decision about an exception invites a closer look at the interests of the estate and creditors which the trustee seeks to protect and enhance. Namely, how important are creditors' rights in the broader context of solicitor-client privilege? As noted earlier, it is obvious that a bankrupt's creditors might occasionally benefit from disclosure of privileged communications between the bankrupt and his solicitors. The mere fact that there might be a benefit is not a compelling reason to disclose information that is otherwise privileged.

[62] By way of illustration, the disclosure of privileged discussions between the accused and his counsel in criminal cases might frequently promote convictions where evidence regarding the offence would be revealed by disclosure of privileged communications. There is a public interest in prosecuting criminals, yet the accused's solicitor-client privilege may prevent disclosure of material evidence and will be protected notwithstanding the possibility that a guilty party may not be convicted. The benefits of disclosure alone, whether in a civil or criminal context, are always outweighed compared to the societal benefit resulting from a legal system in which clients may freely seek advice from solicitors.

[63] As noted earlier, there is simply no competition between creditors' rights and the collective benefits derived from effective legal representation within our legal system. Confidentiality is essential to the solicitor-client relationship and, using Wigmore's language, ought clearly to be sedulously fostered. Potentially insolvent corporations must not be discouraged from seeking legal advice due to the possibility of disclosure of their solicitor-client communications. Particularly during periods of financial instability, corporations and their creditors benefit from appropriate and complete legal advice that may assist the corporation (and by extension, its creditors). One expects that persons in financial difficulty would be reluctant to avail themselves of legal advice where a real possibility of disclosure existed. Thus, disclosure would compromise the effective provision of legal advice to clients experiencing financial difficulty. A great injury to individuals and corporations in financial difficulty, as well as the shareholders and other creditors of such persons, would result from an erosion of solicitor-client privilege. This injury to the legal system and its ability to provide legal advice to persons in dire financial straits vastly outweighs the occasional benefits that might flow to the estate of the bankrupt.

c) No Necessity for Waiver by the Trustee

[64] Finally, I must deal with the argument that disclosure of Bre-X's privileged communications with BJV is required because of Bre-X's alleged inability to waive its own privilege. The Supreme Court emphasized in ***McClure*** that solicitor-client privilege will not be set aside except in cases of dire need. When commenting on whether the accused's stated desire to review his alleged sexual assault victim's civil litigation file constituted a case of dire need, the court firmly stated at 527: "Before the test [for waiver of privilege] is even considered, the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way." While this case was decided after this appeal was heard, it merely confirms my decision and in particular reiterates that waiver will only be permitted if there is no other way to obtain the information sought and if the information itself is demonstrably important and necessary.

[65] The Trustee submits that an exception is necessary because all Bre-X's officers and directors resigned in 1997. That argument is difficult to entertain when one realizes that privilege continues even after death (with some exceptions): ***Bullivant* v. *A.-G. for Victoria***, [1901] A.C. 196 at 206 (H.L.); ***Langworthy* v. *McVicar*** (1913), 25 O.W.R. 297 at 298 (M.C.); ***Stewart* v. *Walker*** (1903), 6 O.L.R. 495 at 497 (C.A.). If privilege continues after death, surely the privilege of a corporation survives the mere resignation of its officers and directors. Moreover, the argument that there is no one to waive privilege is not persuasive because there are still Bre-X shareholders and a meeting could be called to deal with the issue of privilege, whether by the election of directors or otherwise. In the end, Bre-X retains the capacity in law to waive

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privilege, and no appropriate steps have been taken to perfect that capacity. This capacity for waiver seriously undermines the Trustee's request for an exception to Bre-X's privilege.

[66] Furthermore, the BIA provides the Trustee with broad powers to take possession of property and obtain information regarding the bankrupt. For example, the Trustee has the discretion to examine witnesses, including BJV. Section 163(1) of the BIA provides:

> The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

While privilege may arise in respect of certain communications, the Trustee is still entitled to examine BJV and any former employee, officer or director of Bre-X. That option has not been exhausted in this case.

[67] Thus, we know that the Trustee is equipped with a broad range of powers to obtain information from and about the bankrupt. Yet, there is no unequivocal evidence which demonstrates that the Trustee cannot obtain the information he seeks without setting aside solicitor-client privilege. There is no evidence that all available options have been exhausted. Thus, even if a case-by-case review is available, until the Trustee adduces evidence on these points, this Court cannot conclude that the disclosure sought is necessary.

[68] Finally, I do not accept that the information sought will demonstrably assist the administration of the estate. Even if the lack of a directing mind to grant the waiver were a valid reason for an exception and the information could not be obtained without disclosure of privilege communications, this Court has not been advised, with any degree of precision, what information the Trustee seeks. There are no specific questions which BJV has thus far refused to answer. In the absence of specifics, this Court is not in a position to decide whether the information will truly be beneficial to the creditors and to the Trustee's administration of the estate. The information will not be disclosed so that the Trustee can go on a fishing expedition. A benefit must be anticipated and the likelihood of that benefit must be more than speculative.

Conclusion

[69] In summary, the jurisprudence regarding solicitor-client privilege creates an extremely high threshold for disclosure of these communications. The Supreme Court has repeatedly reiterated the fundamental role which solicitor-client privilege plays in the trial process and the importance of the confidentiality right enjoyed by clients seeking advice from counsel. Accordingly, the privilege will only be displaced in exceptional circumstances, which overcome the important goals protected by solicitor-client privilege. In this case, the pecuniary interests of creditors of the bankrupt do not trump the interests protected by solicitor-client privilege.

[70] Overall, no authority at common law, nor any provisions in insolvency legislation, nor any principle underlying solicitor-client privilege relax the application of solicitor-client privilege in the bankruptcy context. The BIA does not contain provisions forcing production of information notwithstanding solicitor-client privilege. There is no demonstrated identity of interest between the bankrupt and the Trustee. Furthermore, the evidence in this case, at best, expresses a hope that creditors might benefit from the disclosure of certain privileged communications, but the evidence does not specify what benefits are anticipated. Moreover, the mere resignation of the directors of the bankrupt does not, by itself, prove that the disclosure is necessary as other means to obtain the information may exist. Ultimately, the privilege cloaking communications between a bankrupt and his solicitor constitutes a personal and fundamental right over which a trustee in bankruptcy has no authority and may only be displaced in the most exceptional circumstances.

[71] In the end, the relief sought by the Trustee would involve a significant relaxation of the rules of solicitor-client privilege. Given the somewhat common circumstances of this bankruptcy, in order to permit the Trustee to waive Bre-X's privilege, this Court would necessarily have to recognize a wide range of circumstances in which trustees in bankruptcy were entitled to waive bankrupts' solicitor-client privilege. I am not prepared to permit, nor has the Trustee advanced any reasonable basis for, such a massive erosion of solicitor-client privilege.

[72] The appeal is dismissed.

APPEAL HEARD on October 10, 2000
REASONS FILED at CALGARY, Alberta,
this 5th day of October, 2001

_____

CONRAD J.A.

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I concur: _____
WITTMANN J.A.

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE LoVECCHIO DISSENTING IN PART

[73] I have had the benefit of reading the reasons of my colleague, Madam Justice Conrad. Although I agree with her conclusion, my road to that conclusion follows a slightly different path.

BACKGROUND:

[74] While the Bre-X story has been the subject matter of several books and lawsuits, the background facts for the application heard by the Chambers Judge are relatively simple. Prior to November 7, 1997, Bre-X retained Bennett Jones Verchere as corporate and securities counsel. Pursuant to this retainer, Bennett Jones Verchere provided advice and information to Bre-X. As a result of this solicitor-client relationship, some of these communications became privileged.

[75] On November 7, 1997, Bre-X made an assignment in bankruptcy.

[76] Bennett Jones Verchere argues that the professional advice and opinions are subject to solicitor-client privilege, and are not compellable. The trustee filed a Notice of Motion, seeking a declaration that it has the right to all files, documents, and records of Bennett Jones Verchere concerning the assets and affairs of Bre-X and that it has the right to waive Bre-X's solicitor-client privilege.

[77] On November 23, 1998, the Chambers Judge ordered that Bennett Jones Verchere are compellable witnesses together with their *non-privileged* files, documents, and records respecting the assets, business affairs, and transactions of Bre-X. Further, the Chambers Judge ordered that the Trustee did not have the right or power to waive the solicitor-client privilege of Bre-X.

[78] The Notice of Motion for Leave to Appeal only mentioned the order of the Chambers Judge with respect to waiver of solicitor-client privilege. While no mention is made in the Notice of Motion for Leave to Appeal respecting the denial by the Chambers Judge of the Trustees request for the production of privileged documents, in my view, a consideration of that decision is a necessary part of the analysis of this appeal.

ISSUES:

[79] The issues in this appeal are as follows:

1. Does a trustee have the right to obtain from the bankrupt's solicitor possession of all of the files, documents, and records respecting the assets, business affairs, and transactions of the bankrupt, including those that are subject to solicitor-client privilege?
2. Does a trustee have the inherent power or right to waive the solicitor-client privilege of the bankrupt?
3. If the trustee does not have the inherent power or right to waive the bankrupt's privilege, should the court exercise its overriding jurisdiction and grant this right or power to the trustee?

DECISION ISSUE 1:

[80] For the reasons outlined below, Bennett Jones Verchere may not object to the transfer of their entire files, documents, and records of Bre-X respecting the assets, business affairs, and transactions of Bre-X to the trustee, including those that are subject to solicitor-client privilege. However, in view of my decision respecting Issues 2 and 3, proper safeguards would have to be established respecting the transfer of possession to the trustee of materials on the Bre-X file that are privileged.

ANALYSIS:

[81] In the administration of the bankrupt's estate, the trustee is given very wide powers. The sections of the ***Bankruptcy and Insolvency Act***[1] that are relevant to this appeal are as follows:

> 16(3) The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt...
>
> 163(1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce

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any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

164(1) Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.

167 Any person being examined is bound to answer all questions relating to the business or property or the bankrupt, to the causes of his bankruptcy and the disposition of his property.

[82] These sections quite clearly allow for the examination of a solicitor. A solicitor may be compelled to disclose all information relating to the transactions of the bankrupt and the location of the bankrupt's property. Further, these sections allow for the trustee to obtain possession of all of the property of the bankrupt.

[83] However, there is an omission in these sections: no reference is made to the delivery of privileged communications. This omission raises a question. Does the omission mean that privileged documents need not be delivered to the trustee? That is clearly the effect of the ruling of the Chambers Judge.

[84] With respect to the examinations of solicitors, Holden & Morawetz in *Bankruptcy and Insolvency Law in Canada*[2] note:

> In the examination, the solicitor can be compelled to disclose all information regarding the bankrupt's affairs, transactions, whereabouts of his property, etc., which do not require the disclosure of communications made to the solicitor for the purpose of receiving legal advice or assistance[3]

Such an examination is limited to the goal of assisting the trustee in the administration of the estate by realizing property of the bankrupt and distributing the proceeds of this property to the bankrupt's creditors.[4] However, privileged communications are subject to solicitor-client privilege, and unless this privilege is waived by the bankrupt, this information may not be disclosed. This is a reference to communications. Such communications could be oral or written and in the case of written, the analysis is more complicated. It is axiomatic that a solicitor would have on their client's file a copy of any written opinions or advice given to a client.

[85] Under s. 164 of the **BIA**, the solicitor may be compelled to provide the trustee with all "property" of the bankrupt and documents relating to the bankrupt's property. I believe it is settled law that a solicitor's file is really the property of the client and the definition of property in the BIA is so broad, it must be seen as encompassing the solicitor's file.

[86] As a result, a potential problem exists if a solicitor could be compelled to deliver privileged communications (by this I mean the file copy of written communications which by any test are privileged) to the trustee and the trustee did not have the power to waive the privilege associated with the document just received. The problem is ensuring the confidentiality of the privileged communications when the documents are in the hands of the trustee, particularly when one concludes (as the Chambers Judge did and as will be noted below, I do) that the trustee does not have the power to waive the privilege. The Chambers Judge sidestepped the problem by only ordering the delivery to the trustee of the non-privileged materials.

[87] British insolvency legislation explicitly refers to materials of the bankrupt that are privileged:

> 311(1) The trustee shall take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (including any which would be privileged from disclosure in any proceedings).[5]

[88] This legislation highlights that we are really dealing with two different issues: the trustee obtaining physical possession of the file and waiver. I do not accept that merely because the trustee may obtain possession of the solicitors file, this alone would give the trustee the power to waive the privilege. That is a different issue. I also note that the obtaining of possession relates only to materials of the bankrupt and would not extend to materials associated with advice given solely to the directors or officers of Bre-X as opposed to the company itself.

[89] In addition, even though the trustee is entitled to possession of these privileged documents, their use would be limited to the affairs and property of the bankrupt.[6] The trustee must not use these documents to aid third parties in any action against Bre-X or any other party.

[90] Put simply, the focus of the trustee in examining the solicitor's files, privileged and non-privileged, must be the property and affairs of the bankrupt. Further, the trustee, as an officer of the court, must strictly ensure the sanctity of the solicitor-client privilege of Bre-X. In other words, the trustee must not disclose the contents of these privileged communications to any third party. The trustee must take the greatest of care in its use of these important documents.

[91] Given my decision below, rather than not order the production of the privileged, I would have ordered the delivery of all materials, both privileged and non-privileged, as they are property of the bankrupt. However, I would have

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ordered that Bennett Jones Verchere separate the privileged materials from the non-privileged materials and deliver these privileged materials separately and I would have ordered them sealed.

DECISION ISSUE 2:

[92] For the reasons that follow, a trustee does not have the inherent right or power to waive the solicitor-client privilege of a bankrupt.

ANALYSIS:

[93] This appeal deals solely with the question of whether the trustee has the power to waive the solicitor-client privilege of the bankrupt. Consequently, questions of whether a trustee *should* or *would* exercise such a power are not relevant to this appeal. That is a decision the trustee would make were the Court to find that the trustee was entitled to make such a decision.

[94] The starting point for this analysis includes an examination of the bankrupt and its status and capacity. Notwithstanding its status as a bankrupt, it is clear that Bre-X continues to exist as a corporate entity. Stated another way, although all of the assets of Bre-X passed to the trustee through operation of the **BIA**, this does not destroy the corporate entity or totally restrict its ability to function as a corporation.[7]

[95] As Bre-X continues to exist as a corporation, it continues to possess the power to waive its solicitor-client privilege.[8] Bre-X has not waived the privilege because of its particular situation. Bre-X, like most bankrupts, has no officers or directors at present. Because of this fact, Bre-X has no present corporate means to authorize such a waiver. This obstacle could be removed by holding a shareholders' meeting and electing directors. I recognize for practical purposes that it is unlikely this would be done.

[96] As a result of this situation, the trustee wishes to waive the solicitor-client privilege of Bre-X.

[97] Subject to the third issue, the only basis upon which a trustee could claim the right or power to waive the bankrupt's solicitor-client privilege would be statutory. This may explicitly appear in the **BIA**. Alternatively, the trustee may obtain this privilege, and therefore the right to waive it, under s. 71(2) of the **BIA**.

a. Explicit Provision

[98] It may be argued by the trustee that the fact alone that it will receive possession of privileged documents from the solicitor through the operation of s. 164 is sufficient to waive privilege. However, for the reasons that follow, this argument must fail.

[99] The trustee may come into possession of privileged documents through the operation of the **BIA,** as discussed in detail above. This mandated possession alone is not sufficient to allow the trustee to waive the privilege of the bankrupt. An analogous situation occurs in the context of medical reports:

> So where a statute requires disclosure, e.g., of a report, no voluntariness is said to be present and no implied waiver occurs. For example, where a medical report is disclosed pursuant to the Ontario *Evidence Act*, the attendant communications (e.g., surveillance films used to produce the report) remain privileged as there has been voluntariness in the disclosure of the report and no implied waiver of the attendant materials.[9]

Similarly, under the **BIA**, the transfer of possession of some privileged communications of the bankrupt and third persons, such as the solicitor, may be compelled. Such a transfer is likewise involuntary and therefore, cannot constitute waiver of the solicitor-client privilege.

[100] The **BIA** is silent on the ability of the trustee to waive the solicitor-client privilege of the bankrupt. There is nothing in the **BIA** which gives the trustee the right or power to waive this privilege. The issue is simply not addressed in the **BIA**.

[101] The rules of statutory interpretation shed light upon this omission in the **BIA**. The doctrine of "implied exclusion" or *expressio unius est exclusio alterius* provides:

> An implied exclusion argument lies whenever there is a reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there was no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.[10]

This rule of statutory interpretation has been applied by the Supreme Court of Canada in ***Canada (Director of Investigation and Research under the Combines Investigation Act)* v. *Newfoundland Telephone Co.***.[11]

[102] If Parliament had meant to exclude solicitor-client privilege, it would have referred to this expressly. The fact that privilege is not mentioned in the **BIA** leads to the implication that this omission was deliberate. Therefore, it is reasonable

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to conclude that Parliament intended that the ability to waive solicitor-client privilege remain with the bankrupt under the **BIA**.

b. Section 71(2)

[103] In the absence of an express entitlement to waive Bre-X's privilege, the trustee suggested that s. 71(2) of the **BIA** indirectly provides this right:

> 71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

[104] Section 71(2) provides that the "property" of Bre-X vested in the trustee upon bankruptcy. If solicitor-client privilege constitutes "property" under the **BIA**, then the trustee is vested with this privilege and consequently, has the power to waive it.

[105] Section 2(1) of the **BIA** defines "property" very broadly:

> 2(1) "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

[106] *Prima facie*, the "property" that vests in the trustee includes almost "every conceivable type of asset."[12] Some property is then excluded from sale and division among the creditors.[13] For example, s. 67(1) of the **BIA** excludes property held in trust for another person or property that is exempt according to provincial legislation.

[107] In ***Gano* v. *Alberta Motor Association Insurance Co.***, Master Funduk notes that there is a third category of property that is not available for distribution: matters very personal to the bankrupt.[14] These "personal rights" are not "property" under the **BIA,** based upon the purpose of the **BIA**:

> ***Husky Oil Operations Ltd.* v. *Minister of National Revenue et al.***, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453; 188 N.R. 1; 137 Sask. R. 81; 107 W.A.C. 81, says that there are two fundamental purposes underlying the **B.I.A.** One is to ensure the equitable distribution of a bankrupt's assets among his creditors and the second is the financial rehabilitation of the bankrupt. Given those purposes it becomes quickly apparent that certain "things in action" simply do not fit into the objectives of the **B.I.A.** even though in law they are "things in action". For example, a bankrupt has a cause of action for divorce. It would be stupid to suggest that that cause of action is "property" of the bankrupt available for distribution among his creditors. A bankrupt has a cause of action for voiding his marriage because his wife was still married to someone else at the time of the marriage to the bankrupt. A bankrupt has a cause of action for custody of his children. None of these would be "things in action" within the scope of the **B.I.A.** *They are all matters very personal to the bankrupt.*[15]

[108] Various other authorities reveal that such "personal rights" are not "property" under the **BIA**. In ***Neufeld (Bankrupt), Re***, the Court concluded that tax refunds received by the bankrupt for the support of a disabled person are not the "property" of the bankrupt and therefore, do not vest in the trustee.[16] A right of action for injury to character and reputation remains vested in the bankrupt.[17] Punitive damages are not "property" of the bankrupt.[18] All of these relate to matters very personal to the bankrupt and as such, are not included as "property" under the **BIA**.

[109] The right of privileged communications with a solicitor must be equally personal. In fact, one author noted that "I can think of nothing more attached to the person and nothing less pecuniary, than a communication to a person bound by professional secrecy".[19]

[110] There is ample case authority to support this proposition that the solicitor-client privilege constitutes a "personal right".[20] The Supreme Court of Canada noted that:

> There is no denying that a person has a right to communicate with a legal adviser in all confidence, a right that it "founded upon the unique relationship of solicitor and client" (***Solosky,*** *supra*). *It is a personal and extra-patrimonial right which follows a citizen throughout his dealings with others.*[21]

[111] In my view, matters that are very personal in nature are not included within the definition of "property" in the **BIA**. This conclusion is based upon the fundamental purpose of the **BIA**, as set out by the Supreme Court of Canada in ***Husky Oil Operations Ltd.* v. *Minister of National Revenue et al.***. Further, the right of solicitor-client privilege has been affirmed by the Supreme Court and other authorities as a "personal" right. As a result, one must conclude that the solicitor-client privilege is a personal right and as such, is not "property" that vests in the trustee. The solicitor-client privilege remains with the bankrupt. Therefore, the trustee has no power to waive the solicitor-client privilege.

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[112] Many authorities support this result.[22] Further, ***Laprairie Shopping Centre Ltd., Re***[23] and ***Stikeman, Elliott* c. *164461 Canada Inc. (syndic)***[24] support the above analysis. However, because of their roots in the civil law, these two cases should be viewed with caution in this common law jurisdiction.

DECISION ISSUE 3:

[113] The Court should not exercise its overriding jurisdiction and grant the right or power in the circumstances of this case.

ANALYSIS:

[114] Although the trustee has no right to waive the bankrupt's privilege, the court may, in appropriate circumstances, apply its inherent jurisdiction to grant this right to the trustee.

[115] In a recent judgment of the Supreme Court of Canada, the Court reinforced the importance of solicitor-client privilege:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interest to be fully represented.[25]

[116] As noted by Madam Justice Conrad in her reasons for judgment, solicitor-client privilege "protects the sanctity of the confidence between client and lawyer." Without such privilege, there could not be effective representation of clients by counsel. The Supreme Court of Canada in ***Solosky* v. *The Queen*** has gone so far as to classify solicitor-client privilege as a "fundamental civil and legal right".[26]

[117] Given the sanctity of solicitor-client privilege, it will not be disregarded lightly. Very few interests will prove important enough to override solicitor-client privilege. The Supreme Court in ***R.* v. *McClure*** has recently further narrowed the exceptions to solicitor-client privilege. The Court noted that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances and does not involve a balancing of interest on a case-by-case basis."[27] Unless there are extremely pressing considerations, solicitor-client privilege will not be ignored.

[118] No reason exists for making an exception in this action as no evidence was presented on the basis of which any of the exceptions set out in ***R.* v. *McClure*** could be applied.

Conclusion

[119] As the trustee has not appealed the part of the Order which in effect declined to order the delivery of the privileged documents to the trustee, even on my analysis, the appeal should be dismissed and the order of the Chambers Judge confirmed.

APPEAL HEARD on October 10, 2000
REASONS FILED at CALGARY, Alberta,
this 5th day of October, 2001

_____
LoVECCHIO J.

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[1] R.S.C. 1985, c. B-3.

[2] Houlden & Morawetz, *Bankruptcy and Insolvency Law in Canada*, Vol. 2, 3rd ed. (Toronto: Carswell, 1998).

[3] *Ibid.* at 6-16.

[4] *Ibid.* at 6-15.

[5] ***Insolvency Act***, 1986, c. 45 (U.K.).

[6] ***Taylor Ventures Ltd., Re*** 1999 CanLII 5475 (BC SC), (1999), 60 B.C.L.R. (3d) 348 at 363-64 (S.C.). See also Houlden & Morawetz, *supra* at 6-18.15 - 6-18.16.

[7] ***Ciriello* v. *R.*** 2000 CanLII 470 (TCC), (2000), 21 C.B.R. (4th) 9 at 17 (T.C.C.), citing with approval ***National Trust Co.* v. *Ebro Irrigation & Power Co.***, [1954] 3 D.L.R. 326 (Ont. H.C.).

[8] ***Shepherd (Trustee of)* v. *Shepherd*** 1997 CanLII 12416 (ON SC), (1997), 50 C.B.R. (3d) 115 (Ont. Gen. Div.).

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[9] R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law*, (Markham, Butterworths, 1993) at 191 [footnotes omitted]. See also ***Cameron et al.* v. *Campbell et al.*** (1987), 29 C.P.C. (2d) 41 (Ont. H.C.).

[10] R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Markham: Butterworths, 1994) at 168. See also P. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Les Éditions Yvon Blais Inc., 1992) at 282.

[11] 1987 CanLII 34 (SCC), [1987] 2 S.C.R. 466 at 483-84.

[12] ***Chetty* v. *Burlingham Associates Inc.*** 1995 CanLII 3939 (SK CA), (1995), 121 D.L.R. (4th) 297 at 300 (Sask. C.A.).

[13] ***Chetty* v. *Burlingham Associates Inc.***, *supra* at 300.

[14] (1997), 202 A.R. 118 at para. 33 (Q.B.).

[15] ***Gano* v. *Alberta Motor Association Insurance Co.***, *supra* at 125.

[16] (1993), 144 A.R. 182 at 184 (Q.B.).

[17] ***Egan* v. *Grayson*** (1956), 8 D.L.R. (2d) 125 (Alta. S.C.); ***Rahall et al.* v. *McLennan et al.*** (1996), 190 A.R. 183 (Q.B.).

[18] ***Gano* v. *Alberta Motor Association Insurance Co.***, *supra* at 133.

[19] Y. Goldstein, "Bankruptcy as it Affects Third Parties: Some Aspects" (1985) Meredith Mem. Lect. 198 at 227.

[20] ***Taberner Investments Ltd.* v. *Price Waterhouse***, [2000] O.J. No. 2595 (Ont. Sup. Ct.) at para. 18, online: QL (OJ); ***Descôteaux* v. *Mierzwinski***, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860 at 871; ***Festing* v. *Canada (Attorney General)***, 2000 BCSC 439 (CanLII), [2000] 5 W.W.R. 413 at 433-34 (B.C.S.C.).

[21] ***Descôteaux* v. *Mierzwinski***, *supra* at 871, cited with approval in ***Festing* v. *Canada (Attorney General)***, *supra* at 433-34.

[22] ***Taberner Investments Ltd.* v. *Price Waterhouse***, *supra*; ***Re Chilcott and Clarkson Co. Ltd.,*** *supra*; ***Canbook Distribution Corp.* v. *Borins*** 1999 CanLII 14842 (ON SC), (1999), 7 C.B.R. (4th) 121 (Ont. Gen. Div.). See also R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* (Markham: Butterworths, 1993) at 68-69.

[23] [1998] R.J.Q. 488 (C.A. Qué.).

[24] [1996] A.Q. No. 4203 (C.S. Qué.), online: QL (AQ).

[25] ***R.* v. *McClure*** 2001 SCC 14 (CanLII), (2001), 195 D.L.R. (4th) 513 at 517 (S.C.C.).

[26] 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 at 839.

[27] ***R.* v. *McClure***, *supra* at 524.

To report to court after three years - Sec. 34(2)
(2) Where an estate has not been fully administered within three years after the bankruptcy, the trustee shall, if requested to do so by the Superintendent, report that fact to the court as soon as practicable thereafter, and the court shall make such order as it considers fit to expedite the administration.

Notice to Superintendent's division office - Sec. 34(3)
(3) The trustee must send notice to the Superintendent's division office of the day and time when any application for directions made under subsection (1) is to be heard and of the day and time when the trustee intends to report to the court as required by the Superintendent under subsection (2).
R.S., 1985, c. B-3, s. 34;
1992, c. 27, s. 12;
2005, c. 47, s. 26.

Redirection of mail - Sec. 35
35. (1) Subject to subsection (2), the trustee may, by sending to the Canada Post Corporation
(a) a notice in the prescribed form, and
(b) a copy of the trustee's certificate of appointment,
request that any mail addressed to a bankrupt that is directed to any place referred to in the notice be redirected or sent by the Canada Post Corporation to the trustee or to such other person as the

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trustee may designate and when Canada Post Corporation receives those documents, it shall so redirect or send that mail.

Permission for residence - Sec. 35(2)
(2) A notice referred to in subsection (1) may refer to a bankrupt's residence only where the trustee has, on application, obtained permission from the court.

Time limitation - Sec. 35(3)
(3) If a bankrupt is an individual, a notice referred to in subsection (1) is operative only during the three-month period immediately after the date of the bankruptcy unless the court, on application, extends that period on any terms that it considers fit.
R.S., 1985, c. B-3, s. 35;
1992, c. 27, s. 13;
1997, c. 12, s. 23;
2005, c. 47, s. 27.

Duty of former trustee on substitution - Sec. 36
36. (1) On the appointment of a substituted trustee, the former trustee shall without delay pass his or her accounts before the court and deliver to the substituted trustee all the property of the estate, together with all books, records and documents of the bankrupt and of the administration of the estate, as well as a statement of receipts and disbursements that contains a complete account of all moneys received by the trustee out of the property of the bankrupt or otherwise, the amount of interest received by the trustee, all moneys disbursed and expenses incurred and the remuneration claimed by the trustee, together with full particulars, description and value of all the bankrupt's property that has not been sold or realized, setting out the reason why the property has not been sold or realized and the disposition made of the property.

Duty of substituted trustee - Sec. 36(2)
(2) A substituted trustee shall

- **(a) [Repealed, 1992, c. 27, s. 14]**
- **(b) if appointed by the creditors, file with the court a copy of the minutes of the meeting signed by the chair;**
- **(c) notify the Superintendent of his appointment;**
- **(d) if required by the inspectors, register a notice of the appointment in the land register of any land titles or registry office where the assignment or bankruptcy order has been registered; and**
- **(e) as soon as funds are available, pay to the former trustee his remuneration and disbursements as approved by the court.**

R.S., 1985, c. B-3, s. 36;
1992, c. 27, s. 14;
1997, c. 12, s. 24;
2004, c. 25, s. 23;
2005, c. 47, ss. 28, 123(E);
2007, c. 36, s. 11(F).

Appeal to court against trustee - Sec. 37

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37. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.
R.S., c. B-3, s. 19.

Hoque, Re, 1996 CanLII 5578 (NS CA) - Right of Action by Bankrupt Against Secured Property of Estate?

Date:	1996-02-05
Docket:	C.A. No. 119873; No. 119215
Parallel citations:	148 NSR (2d) 142; 38 CBR (3d) 133
URL:	http://canlii.ca/t/1mptq
Citation:	Hoque, Re, 1996 CanLII 5578 (NS CA), <http://canlii.ca/t/1mptq> retrieved on 2013-08-29
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B 17401
CANADA
PROVINCE OF NOVA SCOTIA
IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY
IN THE MATTER OF:
THE BANKRUPTCY OF
DR. KHANDKER SHAMSUL HOQUE
IN THE MATTER OF:
AN APPLICATION BY
MONTREAL TRUST COMPANY OF CANADA
BEFORE: **The Honourable Justice Michael MacDonald, in Chambers, at Halifax, Nova Scotia, on July 12, 1995**
SUPPLEMENTARY DECISION: **August 18, 1995**
COUNSEL: **Alan V. Parish, Esq., and Peter Doig, Esq., for Applicant Montreal Trust**
D. Bruce Clarke, Esq., for Dr. K. S. Hoque
Paul Thompson, Esq., for Estate of Dr. Hoque

C.A. No. 119873
C.A. No. 119215
NOVA SCOTIA COURT OF APPEAL
Hallett, Jones and Roscoe, JJ.A.
BETWEEN:
MONTREAL TRUST COMPANY OF CANADA
Appellant
- and -
COOPERS& LYBRAND LIMITED, trustee in bankruptcy of the estate of DR. KHANDKER SHAMSUL HOQUE
Respondent
Alan V. Parish for the Appellant
Victor J. Goldberg for the Respondent
D. Bruce Clarke for Dr. Khandker S. Hoque

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Appeal Heard: January 17, 1996
Judgment Delivered: February 5, 1996
THE COURT: Appeal dismissed other than requiring that the solicitor and client costs awarded to the trustee be taxed per reasons for judgment of Hallett, J.A.; Jones and Roscoe, JJ.A. concurring.
HALLETT, J.A.:

This is an appeal by Montreal Trust Company of Canada from a decision of Justice Michael MacDonald dismissing Montreal Trust's application under s. 37 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 for an order that a right of action of Dr. Hoque, the bankrupt, against his secured creditors remained in his estate in bankruptcy and had not been transferred to him by Coopers & Lybrand Limited, the trustee in bankruptcy of the estate of Dr. Hoque. Alternatively, Montreal Trust sought an order that if the right of action had been transferred that the conveyance and assignment ought to be declared null and void and of no force and effect.

Section 37 of the **Bankruptcy and Insolvency Act** provides:

> "Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just."

In short, Montreal Trust asserts that the trustee acted unreasonably by failing to offer to Montreal Trust an opportunity to either settle the claim Dr. Hoque proposed to make against Montreal Trust or offer to assign the cause of action to Montreal Trust for a price.

The facts disclose that the trustee agreed to assign the cause of action to Dr. Hoque without considering that Montreal Trust might have been a potential purchaser. Montreal Trust asserts that the trustee accordingly failed to perform the duties required of a trustee to realize on the assets in a way that would be most beneficial to the general body of creditors. Justice MacDonald found that the trustee, with the approval of the inspectors, acted reasonably in disposing of the cause of action by agreeing to transfer it to Dr. Hoque for valuable consideration.

There were several issues raised on the application to Justice MacDonald but this appeal has been narrowed to one issue and that is whether the trustee acted reasonably in failing to contact Montreal Trust as a potential purchaser of the cause of action.

The Facts

Dr. Hoque had very substantial real estate holdings. A number of buildings owned by his companies were mortgaged to Montreal Trust. Through one of his companies he became involved in the development of a condominium project which caused a considerable drain on his cash resources. There were problems with the construction and the condominiums were not selling due to a general down turn in the economy and in the real estate market in particular. Dr. Hoque had been a guarantor of loans made by Montreal Trust to his various companies. The mortgages went in arrears. Over a period of time Dr. Hoque attempted to refinance properties but eventually all avenues of refinancing seemed to be closed and in early 1993 he made an assignment in bankruptcy. Montreal Trust commenced foreclosure proceedings.

It is clear from the extensive affidavit evidence that was filed before Justice MacDonald that by November 1993 the trustee was preparing his formal Report to the Registrar in Bankruptcy in connection with Dr. Hoque's application for discharge. The trustee, with the approval of the inspectors, was recommending to the Registrar of Bankruptcy that Dr. Hoque only be discharged on the condition that, if he were to be successful in his lawsuits, particularly the one contemplated against Montreal Trust, he would be required to pay the lesser of 20% of his net recovery or $200,000 to the trustee for the benefit of the creditors. Dr. Hoque supported this recommendation. It is clear from the evidence that earlier in the year the trustee and the inspectors had given consideration to either defending the foreclosure proceedings that had been commenced by Montreal Trust or commencing a separate proceeding against Montreal Trust based on the allegations made by Dr. Hoque that Montreal Trust's manner of dealing with his mortgages was the cause of the collapse of his real estate ventures. The trustee and inspectors had taken advice from counsel; he advised them that the costs of pursuing the matter would be in the order of $200,000 to $250,000. There were no funds in the estate. None of the major creditors were prepared to fund the lawsuit and the decision was made that the best way to recover anything for the creditors would be to assign the causes of action to Dr. Hoque and to make the recommendation that was eventually made by the trustee to the Registrar.

On November 9th, 1993, the Registrar in Bankruptcy heard the application for discharge. It was opposed by Montreal Trust on the ground that there were missing funds which the police were investigating and, accordingly, Dr. Hoque should not be discharged. Alternatively, if he were to be discharged, Montreal Trust took the position that it should be conditional upon his being required to pay the lesser of 60% of recovery on potential lawsuits or $600,000.

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The Registrar in Bankruptcy did not agree with the recommendation of either the trustee or Montreal Trust. He ordered that Dr. Hoque would be granted an absolute discharge provided he consented to judgment in the amount of $68,000 which was to be paid over a period of five years. Dr. Hoque agreed and on December 15, 1993, an absolute order of discharge was signed by the Registrar.

On March 29th, 1994, Mr. Bruce Clarke, the solicitor acting for Dr. Hoque with respect to the dealings with the trustee, wrote the trustee advising that if the trustee transferred the causes of action to Dr. Hoque be would agree to pay out the consent judgment as soon as he received funds from the litigation. Subsequent to this the trustee contacted the inspectors who authorized the trustee to agree to the assignment to Dr. Hoque. As a result the trustee requested from Mr. Clarke that he be provided with a letter signed by Dr. Hoque confirming his agreement that if he received funds from the litigation he would pay out the consent judgment prior to the expiry of the five year period.

In September of 1994, another solicitor acting for Dr. Hoque commenced an action on his behalf against Montreal Trust. Dr. Hoque had not provided the requested letter to the trustee and, accordingly, the formal assignment of the causes of action had not been executed.

On or about December 20th, 1994, Mr. Clarke advised the trustee that Dr. Hoque intended to bring an application under s. 172(3) of the **Act** for a modification of the discharge Order.

On February 9th, 1995, the trustee was asked by counsel for Montreal Trust to advise them of the status of the purported transfer to Dr. Hoque of the causes of action. The trustee advised counsel for Montreal Trust that, although a resolution had been passed authorizing the assignment to Dr. Hoque, the assignment documents had not been executed.

On March 1st, 1995, counsel for Montreal Trust requested the trustee to revoke what counsel referred to as the offer to assign the causes of action to Dr. Hoque. The letter also advised the trustee that Montreal Trust was prepared to pay an amount (to be negotiated) for any rights of action which were vested in the estate.

The trustee and the inspectors met and discussed the contents of this letter with the solicitor for the bankrupt estate. The solicitor was instructed to write Montreal Trust advising that the estate did not wish to become embroiled in a dispute between Montreal Trust and Dr. Hoque.

On March 7th Montreal Trust applied to the Registrar in Bankruptcy for an order declaring that the assignment and conveyance from the trustee to Dr. Hoque of certain causes of action was of no force and effect and requested that Dr. Hoque's application for variation of the order for discharge be moved to the Supreme Court of Nova Scotia. The Registrar refused to transfer the matter to the Supreme Court.

On March 8th the trustee received the letter from Dr. Hoque confirming his agreement with respect to the immediate payment of the net proceeds from the lawsuit.

On March 21st, Justice Bateman, then of the Supreme Court, refused Montreal Trust's application to determine the status and ownership of the causes of action and refused to grant an order that the variation hearing with respect to the earlier discharge Order be heard in the Supreme Court and refused to stay the application before the Registrar for a variation. The application by Dr. Hoque to vary the terms of the discharge Order was heard by the Registrar. Montreal Trust and the trustee successfully opposed the variation.

Montreal Trust continued to pursue its application in the Supreme Court to determine the status and ownership of the causes of action and the matter was set down for hearing.

On July 12th, 1995, Justice MacDonald heard the application. Extensive affidavit evidence was filed, in particular, the affidavits of the trustee representative, Mr. Mark Rosen, who was the chartered accountant administering the estate; the affidavits of counsel and associate counsel for Montreal Trust which set out relevant facts that were not in dispute; the affidavit of Dr. Hoque and the affidavit of Herb A. MacIntosh setting out that as of July 5th, 1995, Montreal Trust was owed $3,905,126 as a creditor of the estate in bankruptcy of Dr. Hoque. *Viva voce* evidence of Mr. Rosen and Dr. Hoque was heard by Justice MacDonald.

The Decision Appealed From

Justice MacDonald directed his mind to the issue raised by Montreal Trust that the trustee breached its duty to the creditors of the bankrupt estate by failing to contact Montreal Trust with respect to either settling the potential lawsuit or paying for an assignment of it before agreeing to assign the cause of action to Dr. Hoque. On the application, counsel for Montreal Trust argued that it was unreasonable for the trustee to have so acted. Justice MacDonald concluded that the decision of the trustee (with the approval of the inspectors) to assign the cause of action to Dr. Hoque was a legitimate business decision; that the trustee and the inspectors acted reasonably and that the sale was not contrary to the interests of the creditors generally. He dismissed the application and ordered that Montreal Trust pay to Dr. Hoque party and party costs which he fixed in the amount of $1,500 plus disbursements of $294.05 and that Montreal Trust pay the trustee's solicitor/client costs of $3,400 plus disbursements of $38. He did not agree that Montreal Trust should pay the trustee's fees of $3,043.08 but directed that they be paid from the estate.

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The Position of the Appellant on the Appeal

On this appeal Montreal Trust asserts that Justice MacDonald erred in finding that the trustee had acted reasonably in the disposition of the cause of action to Dr. Hoque and erred in law when he found that the disposition was not contrary to the interests of the creditors generally. The notice of appeal further asserts that Justice MacDonald erred by failing to order that the trustee liquidate the cause of action and consider Montreal Trust as a potential purchaser when liquidating that asset. It is further asserted in the notice of appeal that Justice MacDonald erred in mixed law and fact in finding that the trustee and/or the inspectors took into account business considerations in reaching their decision when the evidence disclosed that the cause of action was not offered to Montreal Trust because the trustee found such a proposition to be morally repugnant. Finally and alternatively, the notice of appeal asserts that Justice MacDonald erred in law in finding that the principles set out in **Re Katz** (1991), 6 **C.B.R.** (2d) 311 (Ont. Ct. Gen. Div.) do not apply to the circumstances of the case.

Montreal Trust requests that the judgment of MacDonald J. be reversed and that this Court find that the causes of action which lay against the secured creditors of Dr. Hoque remain vested in Dr. Hoque's estate in bankruptcy and that the trustee conduct a sale of the cause of action against Montreal Trust and that each of Dr. Hoque and Montreal Trust shall be entitled to purchase the asset from the estate and further that the trustee have its costs paid out of the estate and Montreal Trust have its costs against Dr. Hoque.

Montreal Trust also appeals the manner in which Justice MacDonald decided the cost issues asserting that he erred in law in ordering Montreal Trust to pay the costs of the estate's solicitor on a solicitor/client basis and erred in law in awarding a fixed sum for solicitor/client costs rather than requiring the taxation of the account. Montreal Trust requests that this aspect of the judgment be reversed and that the Court order that the cost of the estate solicitor be paid out of the estate or, alternatively, that Montreal Trust pay the costs of the estate solicitor on a party and party basis in an amount to be fixed by taxation or otherwise agreed to by the parties.

In summary, counsel for Montreal Trust argues that the trustee ought to have realized that Montreal Trust might be interested in either settling the potential action or be prepared to pay for an assignment of it simply to avoid the cost of having to defend and, therefore, the trustee did not give careful consideration to the disposition of the cause of action. With respect to the award of costs, counsel argues that there was no basis for Justice MacDonald departing from the general principle that party and party costs be awarded as Montreal Trust had raised a legitimate issue that needed to be resolved.

The Position of the Respondent Trustee

Counsel for the trustee argues that Justice MacDonald gave careful consideration to the evidence and the law in finding that the trustee acted reasonably in disposing of the cause of action. Counsel asserts it was a legitimate business decision and considering all the circumstances there was no reason for the trustee to believe that Montreal Trust might be interested in paying for an assignment of the cause of action not having exhibited any interest in doing so until March 1st, 1995. He asserts that this Court should not interfere with the findings of the trial judge (**Stein v. The Ship "Kathy K"**, 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802). He also asserts that costs are in the discretion of the trial court and the exercise of that discretion should be left alone by an appeal court.

The Position of Dr. Hoque

On behalf of Dr. Hoque it is argued that this was a reasonable business decision and that the law dictates that a court, reviewing a decision made by a trustee in bankruptcy with the approval of the inspectors, should show deference to the business acumen of the trustees and the inspectors who are familiar with the practicalities of administering the bankrupt estate.

Disposition of the Appeal

As early as January 1993 Montreal Trust, as a result of having received correspondence from Dr. Hoque's Toronto solicitor, was well aware of the potential lawsuit against it by Dr. Hoque.

It is clear from the evidence that the trustee did not think of Montreal Trust as a potential purchaser of the lawsuit when, later in 1993, the trustee worked out the agreement with Dr. Hoque whereby the latter would obtain an assignment of the cause of action and would support the trustee's recommendation to the Registrar that he be discharged from bankruptcy on the condition that 20% of the proceeds of the litigation or $200,000, whichever was the lesser, would, if recovered by Dr. Hoque, be paid to the trustee.

There is no evidence that, at the time the decision was made to make a deal with Dr. Hoque, the trustee was influenced by his subsequently stated opinion that the sale of lawsuits to defendants was morally repugnant.

As noted in the recitation of the facts, Montreal Trust opposed the discharge but, as an alternate position, supported the concept that Dr. Hoque would be able to proceed with any potential lawsuits provided he pay 60% of any

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net recovery or $600,000 whichever was the lesser, to the trustee. Montreal Trust did not indicate any interest in acquiring the lawsuit at that time yet it was well aware of the intention of the trustee to assign the cause of action to Dr. Hoque.

The decision of the Registrar in Bankruptcy in December of 1993 impacted on the agreement between the trustee and Dr. Hoque. In March 1994 Dr. Hoque's solicitor wrote the trustee putting forward a proposition for earlier payment of the $68,000 provided the lawsuits were assigned to Dr. Hoque. This offer was eventually accepted by the trustee, with the authorization of the inspectors, in the latter part of the summer of 1994. After that, there only remained a matter of formalizing the agreement which required that Dr. Hoque provide the letter requested, evidencing his obligation, and upon receipt of that letter the trustee would execute the formal assignment. The trustee had not imposed a deadline on Dr. Hoque for delivery of the requested letter. It was not until the letter of March 1st, 1995, that Montreal Trust indicated any interest in purchasing the cause of action. When asked by Montreal Trust in this letter to revoke the offer to Dr. Hoque, an agreement had already been made, and the trustee was in no position to resile from that agreement. It must be remembered that Dr. Hoque supported the trustee's recommendation on the discharge hearing on the understanding the cause of action against Montreal Trust would be assigned to him. And that in 1993 the trustee had made a decision, in consultation with the inspectors and the solicitor, not to pursue the cause of action against Montreal Trust but to assign it to Dr. Hoque. While it is correct that once Dr. Hoque consented to the judgment in the amount of $68,000 the subsequently agreed upon consideration for the assignment (the possible acceleration of payment of the judgment) was not substantial. However, Dr. Hoque would not likely have consented to the judgment had he not the reasonable expectation that the trustee would assign the cause of action.

One must look at all of the foregoing in assessing the reasonableness or lack of the same of the decision of the trustee to conclude an agreement with Dr. Hoque in the summer of 1994.

There seemed to be an issue before Justice MacDonald as to whether the duties of a trustee in bankruptcy were as set out in **Katz** (supra) or those set out in **Re Keppock Developments Limited** reflex, (1992), 15 C.B.R. (3d) 228 (N.S.S.C.). It is my opinion this ought to have been a non-issue. The tests to be applied by a court reviewing the decision of a trustee appointed under the **Bankruptcy and Insolvency Act** or a receiver appointed by the court respecting the sale of an asset are substantially the same. Both a trustee under the **Bankruptcy and Insolvency Act** and a receiver appointed by the court must act in a reasonable and competent manner in the performance of their duties to the creditors. A difference between a trustee acting under the provisions of the **Bankruptcy and Insolvency Act** and a receiver appointed pursuant to a court Order, is that the trustee is governed by the **Act** and the receiver by the common law and the terms of the court Order. In addition, the trustee has the benefit of a group of experienced creditors' representatives acting as inspectors who can bring their experience to bear on proposed dispositions of assets by the trustee. These differences do not alter the requirement that both trustees and receivers respectively act with integrity in a competent and reasonable manner.

When it comes to making business decisions relating to the sale of the bankrupt's assets, a trustee, with the authorization of the inspectors, must exercise reasonable business judgment. The trustee must provide advice to the inspectors equivalent to the advice one would expect from a reasonably competent trustee in the circumstances. Both the trustee and the inspectors are entitled to rely on legal advice from counsel for the estate. And, of course, a trustee must act with honesty and integrity. Finally, the courts should show deference to business decisions made by those entrusted by the creditors and authorized by the **Act** to make such decisions.

I agree with counsel for Montreal Trust that it had no obligation to indicate to the trustee it was interested in either paying a sum of money to acquire the causes of action or settling it. However, the fact that Montreal Trust was well aware of the intent of Dr. Hoque to commence action against it, yet it never exhibited any interest in acquiring the cause of action until March 1st, 1995, is a relevant consideration in reviewing the reasonableness of the trustee's action in failing to offer the cause of action to Montreal Trust prior to concluding that it would be in the best interest of the creditors to assign the cause of action to Dr. Hoque and hopefully derive a benefit for the estate if he were to succeed in his potential action. Absent evidence that it is common place for the trustees to peddle potential lawsuits that a bankrupt may have to the defendants in those potential lawsuits, it is difficult to conclude that the failure of the trustee to consider Montreal Trust as a potential purchaser of the asset (particularly where the trustee considered it to be of nebulous value and Montreal Trust had shown no interest) was a failure to act reasonably in the circumstances.

It cannot be disputed that a defendant might be prepared to pay a sum of money to avoid even a lawsuit that the defendant is satisfied is without merit simply to save the costs of defending which would not likely be recovered from a discharged bankrupt if the trustee transferred the cause of action to the bankrupt or caused the right of action to be returned to the bankrupt as an unrealized asset. This would be particularly so where the costs of defending would be high.

The lawsuit which Dr. Hoque commenced against Montreal Trust in September of 1994, which blames Montreal Trust for the collapse of his real estate ventures is complex and will be expensive to defend. That trustees do sell lawsuits

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to the defendants in those suits is clear from **Re Katz** (supra). How prevalent this somewhat unseemly method of realizing on an asset of nebulous value is not disclosed in the evidence. Although a bare assignment of a right of action was at one time illegal, an assignment of a bare right of action by a trustee in bankruptcy was not **(Halsbury's Laws of England,** volume 9, (4th) at para. 401).

An advertisement by a trustee, for either a public auction or a call for the submission of tenders to purchase a potential claim against one of the bankrupt's creditors, while lawful, would be unusual in the absence of a situation such as confronted the trustee in **Re Katz** (supra) where the trustee had an expression of interest from more than one party. The nature of the asset does not lend itself to these traditional methods of realization by a trustee. The issue, however, is whether the trustee ought to have invited a bid from Montreal Trust. Even in hindsight it is not known whether Montreal Trust would have been prepared to pay anything for the lawsuit had an offer been made to Montreal Trust in 1993 or 1994.

Mr. Rosen did not think of this method of disposing of this so-called asset; apparently it did not occur to him that he could more or less intimidate Montreal Trust into paying a substantial sum for what the trustee considered to be a lawsuit of questionable value. Had Montreal Trust ever indicated an interest before the agreement was made with Dr. Hoque, the trustee would have been in a very different situation.

I agree with the comments of Mcfarlane J. in **Re Groves-Raffin Construction Ltd. (No. 2)**, reflex, [1978] 4 W.W.R. 451, 28 C.B.R. (N.S.) 104 (B.C. S.C.) where he stated at (C.B.R.) 112:

> "In considering the conduct of a trustee it is well to keep in mind that the scheme of the Act is to allow the trustee to administer the estate under the supervision of the inspectors without interference unless there has been an excess of power, fraud, a lack of bona fides, or unless the actions of the trustee and the inspectors are unreasonable from the standpoint of the good of the estate."

Justice MacDonald had before him all the affidavit evidence that is before us. In addition, he heard the *viva voce* testimony of the trustee and Dr. Hoque. Justice MacDonald clearly understood the issue and made a judgment call that the trustee, in the circumstances, acted reasonably and in the interest of the creditors generally, despite the trustee having failed to consider a sale of the cause of action to Montreal Trust.

The trial judge did not apply an incorrect test in assessing the conduct of the trustee and his decision is justified on the evidence. I would not interfere with his finding. In fact, I agree with his conclusion. (**Stein v. The Ship "Kathy K"** (supra)).

I would make one further point, although it was not raised in argument. Having made an agreement with Dr. Hoque to assign the cause of action to him, the trustee's hands were tied when he received the March 1st, 1995, letter from counsel for Montreal Trust. A Court would be hard pressed to conclude that it ought to set aside the agreement made with Dr. Hoque on the ground that the trustee ought to have also offered to sell the lawsuit to Montreal Trust. Dr. Hoque was entitled to insist on the agreement being completed by the exchange of the documents contemplated. Section 37 of the **Bankruptcy Act**, while it gives the Court broad power to confirm, reverse or modify a decision complained of and make such order as it thinks just, ought not to lightly set aside an agreement that the other party (in this case Dr. Hoque) was entitled to have performed. The only ground asserted in requesting this Court to declare the agreements null and void is that the trustee ought to have disposed of the asset in a different manner. While s. 37 of the **Act** gives the Supreme Court in Bankruptcy power to set aside the trustee's decision, it would only be in exceptional circumstances that the Court would set aside a valid and enforceable agreement. There is no evidence of what amount Montreal Trust was prepared to pay for the assignment of the cause of action. To set aside an agreement made by the trustee in good faith would, in the eyes of those persons acquiring assets from time to time from trustees, impinge on the integrity of the bankruptcy process.

In an article entitled **"Sale of Assets by a Trustee; The Fundamental Pragmatics"** by Al Lando, C.A., Senior Vice-President of Price Waterhouse Limited, Toronto published in (1991), C.B.R. (3d) 179, the author draws a distinction between what might be a sharp but acceptable practice by businessmen to enhance their "bottom line" with the standard of conduct expected of a trustee in bankruptcy in realizing on assets of the bankrupt. The author states at p. 181:

> "The trustee in bankruptcy, however, is governed by standards that go beyond those which determine the business behaviour of the entrepreneur. As an officer of the Court, the trustee must always be concerned about the integrity of the insolvency process. There are times when 'reasonable' business principles are not easy to reconcile with the determinants for standards of behaviour that govern an officer of the Court. The businessman is playing in his own game, and must do what is fair and reasonable, no less, but not necessarily more. The stakes are greater for the trustee; his actions are measured against a higher test, a test of not only being right and fair but that of appearing to be right

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> and fair. The dilemma arises when doing what is right, when conducting an administration from the 'highest moral ground', does not necessarily produce the best commercial result.
>
> All of that said, the insolvency process (the *Bankruptcy Act,* the Courts, the office of the superintendent in bankruptcy, members of the Bar who specialize in bankruptcy law, and trustees) manages, for the most part, to satisfy its intended purposes in a practical sense. This paper will talk about basic principles, focusing on the practical considerations that influence the manner in which a trustee wheels and deals with the assets of a bankrupt."

The author then condemns the practice of trustees "wheeling and dealing" in assets to maximize recovery. He concludes his article by stating that there are certain assets that are difficult to deal with but the trustee should be governed by the same fundamental principles that govern the treatment of all assets and principles that will always enhance and never offend the integrity of the process. He concludes stating:

> "What are these principles? Among those described or alluded to are: fairness, equity, good faith, order (as opposed to 'chaos' referred to in the last case cited), honesty, integrity, due care, and sound commercial practice. Of equal importance, the trustee's actions must be perceived to be governed by these standards. That the process functions effectively, is a manifestation of the symbiosis between the practices and procedures as they are articulated in the Act, superintendent directives, and the case law, on the one hand, and their practical application in the business world, on the other hand."

A trustee in bankruptcy has a broader range of duties than simply getting the best possible price at any cost.

In **Re Pachal's Beverages Ltd.** (1969), 13 C.B.R. (N.S.) 160 the Saskatchewan Court of Appeal had to deal with the provisions of s. 15 of the **Bankruptcy Act,** R.S.C. 1952, c. 14. That section is essentially the same as the present s. 37 of the **Bankruptcy and Insolvency Act**. The Court stated at p. 163:

> "While s. 15 gives to the court a wide discretionary power: *Imperial Bank of Canada v. Barber* (1921), 50 O.L.R. 380, 1 C.B.R. 485, 59 D.L.R. 523; and *Re Hancock; Ex parte Spraggett,* [1952] O.R. 121, 32 C.B.R. 96, [1952] 1 D.L.R. 785; that power must be judicially exercised. To obtain relief under this section, the onus rests upon the applicant to show that it has been aggrieved by the decision of the trustee, or has suffered damage or prejudice as a result of the trustee's action: *Re Gareau (English and Scotch Woollen Company); Ex parte Joseph Brothers Limited* (1922), 3 C.B.R. 76."

The only affidavit filed by Montreal Trust was that of Mr. Macintosh setting out the amount owing to Montreal Trust. There is nothing stated to show that Montreal Trust has been aggrieved by the decision of the trustee to assign the lawsuit to Dr. Hoque other than the argument by counsel that an action has been started and that Montreal Trust will incur costs to defend the action. Possibly it goes without saying that they are aggrieved and to that extent have or will suffer damages.

The decision in **Pachal's Beverages** (supra) is relevant as it makes clear that the burden of proof is on the applicant to show that the trustee's decision was unreasonable and not on the trustee to show that it was right. In the absence of evidence to prove that, as a general practice, trustees in bankruptcy offer to sell causes of action which the bankrupt may have to the potential defendants in those lawsuits who also happen to be creditors of the bankrupt, it is difficult to conclude that the trustee's conduct in this instance was a failure to meet the acceptable standards for a trustee in realizing on assets of the bankrupt.

In summary, on the principal issue, I would dismiss the appeal on two grounds. The trial judge did not err in concluding on the facts that the trustee acted reasonably, and in the interests of the creditors generally, notwithstanding the failure to ask Montreal Trust if it would like to bid to acquire the lawsuit; and, secondly, it would be unjust in the circumstances to grant the relief sought by Montreal Trust as Dr. Hoque was entitled to have the agreement he made with the trustee finalized; in short, it would not be a judicial exercise of the power given the court by s. 37 of the **Act**. To grant the relief sought, even if it were concluded that the trustee acted unreasonably, would also offend the integrity of the bankruptcy process.

The Costs Issue

We were advised at the hearing of this appeal that the estate in bankruptcy has no assets. I assume counsel meant no assets other than judgment against Dr. Hoque, the value of which is very dependent on Dr. Hoque succeeding in his action against Montreal Trust.

With one exception, I would not interfere with Justice MacDonald's decision on costs. I agree with counsel for Montreal Trust that the application was not frivolous; there were issues to be resolved and s. 37 is in the **Act** to allow decisions of the trustee to be reviewed by the Court. However, on the facts, Justice MacDonald, even if he had found that the trustee had not acted reasonably in failing to offer the lawsuit to Montreal Trust, would not likely have granted the relief sought by Montreal Trust. As already noted, it would not be just to declare the agreement with Dr. Hoque null and void.

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There is no allegation of fraud nor any reason to warrant depriving Dr. Hoque of the benefit, if any, of the agreement he made with the trustee to have the lawsuit assigned to him.

Under the circumstances, Justice MacDonald did not err in awarding solicitor and client costs to the trustee to be paid by Montreal Trust notwithstanding that an award of solicitor and client costs is only made in exceptional circumstances as is an order that such costs be paid other than out of the estate.

An award of solicitor and client costs should not be limited as was held in **Stiles v. British Columbia (Workers Compensation Board)** (1989), 39 C.P.C. (2d) 74 to situations where the party ordered to pay the costs was guilty of reprehensible conduct. In this instance, the conduct of Montreal Trust could not be categorized as reprehensible.

Solicitor and client costs were awarded against the s. 37 applicant in **Re Groves-Raffin Construction Limited (No. 2)** (supra) where on the cost issue the Court concluded:

> "There is no reason, in my opinion, why the trustee or the estate should bear any part of the costs of an application brought solely for the benefit of one creditor. The costs of the trustee are therefore awarded against Fred Welsh Ltd. on a solicitor and client basis. Different considerations apply with respect to Fidelity. In essence, this has been a dispute not between Fred Welsh Ltd. and the trustee, but with Fidelity. The latter will have its costs on a party and party basis against Fred Welsh Ltd."

The application of Montreal Trust is essentially for its sole benefit. There appears to be case law that the words of s. 37 are broad enough to permit the court to set aside a sale even if the sale has been completed (See **Houlden and Morawetz Bankruptcy and Insolvency Law of Canada**, 3rd Edition, Volume 1, p. 1-87. The authority cited for that statement is **Re H. Packar and Sons Ltd. Hopmeyer v. Lamarre (1936)**, 17 C.B.R. 208 (Que. S.C.). A review of that case shows a very different fact situation than we have under consideration. In **Re H. Packar** (supra) one of the inspectors of the estate was the president of a company which purchased the estate assets without the prior approval of the Court to the sale. The Court declared the sale null and void; the prior approval of the Court being necessary in such a case under s. 103(6) of the **Bankruptcy Act** that was in force at the time. The Court stated at p. 208:

> "...There are now concerns [businesses] who make a business of buying bankrupt assets, and to allow insiders to take advantage of their knowledge to put in a bid at a few dollars more than the highest bidder is an unfair practice, which, if allowed to prevail, would discourage bidding by outsiders and militate against obtaining the best possible price, and, therefore, should not be countenanced:"

The same reasoning dictates that on the facts we have under consideration the sale to Dr. Hoque should not be set aside; it would be unfair to do so in the circumstances of this case.

Costs are in the discretion of the Supreme Court in Bankruptcy. I would not interfere with the exercise by Justice MacDonald of his discretion to award solicitor and client costs but I am of the opinion that under the circumstances he ought to have ordered that the solicitor and client costs of the trustee be taxed so as to enable Montreal Trust to make representations as to the amount of the account.

Montreal Trust has not appealed the award of costs to Dr. Hoque.

On this appeal the trustee, by notice of contention, argues that Justice MacDonald ought to have ordered Montreal Trust to pay the trustee for its time in preparing for the application. I disagree. The time spent by the trustee in these circumstances was exactly the same as the time spent by any litigant who is unfortunately involved in legal proceedings. There is no legal basis for requiring the losing party to a lawsuit or legal proceeding to pay a sum of money to the other side to compensate the winning party for time spent in preparing for and attending the proceedings.

In summary, Montreal Trust's appeal ought to be dismissed other than requiring that the solicitor and client costs awarded to the trustee be taxed.

The trustee and Dr. Hoque shall each have costs of this appeal against Montreal Trust which I would fix at $1,000 each plus disbursements.

Hallett, J.A.

Concurred in:
Jones, J.A.
Roscoe, J.A.

C.A.. No. 119873
C.A. No. 119215
NOVA SCOTIA COURT OF APPEAL
BETWEEN:
MONTREAL TRUST COMPANY
OF CANADA

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Appellant
- and -
COOPERS& LYBRAND LIMITED,
trustee in bankruptcy of the estate
of DR. KHANDKER SHAMSUL HOQUE
Respondent
REASONS FOR JUDGMENT BY: HALLETT, J.A.

Proceeding by creditor when trustee refuses to act - Sec. 38
38. (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

Formula Atlantic Financial Corp. v. Canada (Attorney General), 1994 CanLII 1135 (BC CA) - Standing on Right To Address a s. 38 Empowerment

Date:	1994-11-18
Docket:	CA019333; CA019334
Parallel citations:	34 CBR (3d) 50; 10 BCLR (3d) 52
URL:	http://canlii.ca/t/1dcqc
Citation:	Formula Atlantic Financial Corp. v. Canada (Attorney General), 1994 CanLII 1135 (BC CA), <http://canlii.ca/t/1dcqc> retrieved on 2013-08-31
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CA019333/CA019334
Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:
FORMULA ATLANTIC FINANCIAL CORP.
APPELLANT

AND:
ATTORNEY GENERAL OF CANADA
RESPONDENT

BETWEEN:
ATTORNEY GENERAL OF CANADA
PLAINTIFF
(RESPONDENT)
AND:
COROBAN PLASTICS LTD., A BANKRUPT AND
FORMULA ATLANTIC FINANCIAL CORP.
APPELLANT

Robert A. Millar	Counsel for the Appellants
Donald F. Gurney	Counsel for the Respondent
Place and Date of Hearing	Vancouver, British Columbia October 4, 1994

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Place and Date of Judgment Vancouver, British Columbia
November 18, 1994

Written Reasons by:
The Honourable Mr. Justice Taylor (In Chambers)

Court of Appeal for British Columbia

Formula Atlantic Financial Corp.
- v. -
Attorney General of Canada
- and -
Attorney General of Canada
- v. -
Coroban Plastics Ltd., a Bankrupt and Formula Atlantic Financial Corp.
Reasons for Judgment of the Honourable Mr. Justice Taylor ((In Chambers)

1 **These are applications for leave to appeal and for a stay of proceedings brought both in the bankruptcy of Coroban Plastics Ltd., in which an order has been made permitting the federal Crown to commence proceedings to set aside certain transfers of assets alleged to be fraudulent conveyances, and also in the action commenced by the Crown pursuant to that order against the bankrupt company and the applicant, Formula Atlantic Financial Corp., the alleged transferee of the assets concerned.**

2 The applicant seeks leave in both proceedings to appeal a decision of Mr. Justice Cohen holding that it has no status in either proceeding to challenge the order of the Master under s. 38 of the ***Bankruptcy and Insolvency Act*** authorizing the Attorney General, on behalf of Revenue Canada, to bring the fraudulent conveyance action. The applicant also seeks an order in the fraudulent conveyance action staying that proceeding pending the outcome of the proposed appeal. The ground on which it sought to have the s. 38 order set aside by Mr. Justice Cohen was that the material on which the order was obtained did not establish a *prima facie* case on the fraudulent conveyance claim. **Mr. Justice Cohen did not embark on a consideration of the sufficiency of the material, but decided only that the applicant lacked status to bring the application to set aside the s. 38 order.**

3 Mr. Millar, for the applicant, accepts that his client had no right to be given notice of the application for the s. 38 order. But he says it does not follow that the applicant therefore had no status to challenge the order once made.

4 Section 38 of the ***Bankruptcy and Insolvency Act*** (which was s. 20 of the former ***Bankruptcy Act***) provides:

38(1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

(2) On an order under subsection (1) being made the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject matter of the proceeding, including any document in support thereof.

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

(4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

There are two decisions of this court dealing with that provision in the present context: ***Bank of B.C. v. McCracken et al*** 1986 CanLII 1093 (BC CA), (1986), 4 B.C.L.R. (2d) 35 and ***Re Salloum*** (1990), 51 B.C.L.R. 336.

5 In the ***Bank of B.C.*** case the court was concerned with an order under the then s. 20 authorizing the principals of a bankrupt company, as creditors of the company, to bring an action against the bank which was petitioner in the bankruptcy proceeding. The bank had not been served with the application for the s. 20 order. It applied to have the order set aside but failed in the trial court and succeeded in this court only to the extent that the order provided that costs of the application which led to the s. 20 order being made would be in the discretion of the court hearing the action authorized by it. Giving judgment for the Court, Mr. Justice Hutcheon said (at pp. 36-37):

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Section 20 of the ***Bankruptcy Act***, in my view, clearly shows that the issue on the application is between the creditor making the application and the trustee.

I agree that there is nothing in s. 20 that requires notice of the application for that order to be served upon the intended defendant, or in the case of a continuing action, upon the defendant named in the action. The authorities supporting that view include the case of ***Re Swerdlow*** (1985), 57 C.B.R. (N.S.) 180. Mr. Justice Trainor of the Ontario Supreme Court, at p. 184, said:

In the present circumstances, where the trustee has not been discharged, but where he has decided against prosecuting the action. I can find no requirement or necessity to serve the proposed defendants with notice. Section 20 contemplates two parties, the moving creditor and the trustee.

Rule 13 mandates service on parties affected by the motion. The proposed defendants are not parties. The creditor or creditors, upon an order being granted, stand in the shoes of the trustee. In the facts of this case, I can see no cogent reason to require the creditors to give notice to the defendants, any more than I could find reason to require the trustee to serve notice if he brought the action. The trustee must be served because, by the bankruptcy, any property of the bankrupt is vested in him as is the cause of action against the bankrupt.

As I have said, where the order is made under s. 20 and when the issue is whether the trustee or creditor will take proceedings, then I agree that the intended defendant need not be served.

Mr. Justice Hutcheon went on to say that the intended defendant would have standing if the order dealt with other matters than the commencement of proceedings against it. He said:

Suppose the order under s. 20 purported to impose on the intended defendant certain obligations in the conduct of the litigation or to direct the defendant to take certain steps in that litigation. The appropriate court to hear that complaint, in my view, would be the court that made the order, that is to say, the Bankruptcy Court.

In the present case, however, there is no suggestion that the order does anything more than authorize commencement of action.

6 In ***Re Salloum*** a bank had been granted an order under the then s. 20, after the bankrupt had been discharged. The order permitted it to bring proceedings to impeach as fraudulent conveyances certain dispositions made by the bankrupt. The bankrupt sought to appeal the order to this court, his counsel asserting that the bankrupt was entitled to notice of the application for the order by reason of the fact that he had been discharged from bankruptcy. Counsel contended that the order had been granted without the bank having established that it had a *prima facie* case that the transfers were fraudulent, and also that the order was inequitable in the circumstances. Mr. Justice Wallace, giving judgment of this court dismissing the appeal, said (at p. 339-40):

The order granted by the chambers judge on the application is in the standard form. It authorized the Royal Bank to commence and prosecute proceedings in its own name and at its own expense and risk for the purpose of setting aside the dispositions of the lots and the boat. In other words, it authorized the Royal Bank to do that which the trustee could and presumably would have done, had he had sufficient funds.

The order did not contain any provisions that affected the status of the discharged bankrupt in any way that he would not have been affected had the trustee had the funds to pursue the intended action and decided to initiate the same. The intended defendant Mr. Salloum will, of course, be served with the proceedings in the intended action and have full opportunity to raise such defences as he considers appropriate.

And later (at p. 340):

The trustee's obligation to realize and distribute the estate of the bankrupt which is vested, or which may become vested, in him continues until the trustee is discharged, regardless of the prior discharge of the bankrupt. It is this obligation that the bank seeks to pursue with respect to the specific properties described in the application. The trustee, because it does not have the required funds, agrees that the bank may do so. There is no logical or legal reason why a discharged or an undischarged bankrupt, or any other intended defendant, should have notice of such a s. 20 application.

Mr. Justice Wallace held that since the bankrupt, discharged or undischarged, is not a necessary party to s. 20 proceeding, he could have no standing to appeal the order made.

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7 Counsel for the applicant in the present proceedings does not seek to have those decisions reconsidered. He says instead that they do not decide the question he seeks to raise.

8 I do not understand how such an argument could succeed. **These decisions, taken together, seem to me to establish clearly that on a s. 38 application, such as that which resulted in the present order, neither the bankrupt nor any other proposed defendant in the intended action has a right either to notice or to be heard on the application, and that neither the bankrupt nor any other proposed defendant will have standing to appeal any order made on such an application, provided that it goes no further than to authorize action to be brought--this being for the reason that their rights will not be affected by a s. 38 order so long as it goes no further than that. The effect of the order is to transfer from trustee to creditor whatever right of action may exist--much, no doubt, as a chose in action may be contractually transferred from one party to another, without adversely affecting the debtor. The order in this case imposes no liability on the appellant which did not previously exist, and leaves it free to assert in the action every defence it ever had.**

9 The applicant may, of course, move as defendant in the action for summary dismissal of the claim if the plaintiff is unable to make out a *prima facie* case.

10 After hearing the application I invited the assistance of counsel with respect to two decision, ***Wilson v. The Queen***, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, and ***Caisse Populaire Vanier Ltée v. Bales*** reflex, (1991), 2 O.R. (3d) 456 (Gen. Div.), which were not referred to in argument. I am obliged to them for their written responses to this request. ***Wilson v. The Queen*** sets out the principle that, absent fraud or new evidence, it is not possible to attack an order in proceedings other than those whose specific purpose is the reversal, variation or nullification of that order. In ***Caisse Populaire Vanier Ltée v. Bales*** it was held that challenging the validity of a s. 38 order in the proceeding commenced pursuant to the order would amount to such a collateral attack, and is therefore impermissible.

11 While in that case the defendant company's application to dismiss an action commenced pursuant to a s. 38 order brought in the action itself was held to be an improper attack on the validity of the s. 38 order, the matter was then heard as an application for review under s. 187(5) of the then ***Bankruptcy Act***. The present applicant's counsel says in his written argument that if the validity of the order cannot be challenged collaterally, the matter should be dealt with as in the ***Bales*** case. The former s. 187(5) (still s. 187(5) in the present ***Act***) was not pleaded but counsel suggests this is merely a procedural defect. The subsection permits a court to "review, rescind or vary any order made by it under its bankruptcy jurisdiction". I am, however, of the view that such a provision cannot invoke any wider test for standing than would otherwise apply. In the ***Bales*** case the issue of standing does not appear to have been raised, and the decisions of this court mentioned above are not cited.

12 On the basis of those previous decisions of this court it seems to me clear that the present applicant has no status to challenge the order under s. 38 in the bankruptcy action, and nothing said by counsel suggests to me that the validity of the order could properly be subject to collateral challenge--that is to say in the action commenced pursuant to the order.

13 I would note that the proposition that a *prima facie* case must be established on a s. 38 application was not supported by any authority referred to before me. Assuming for the present purpose that an applicant for such an order has that burden, I would not assume, as counsel contends, that the purpose of the requirement must necessarily be to protect the intended defendant. It seems to me that the requirement could be intended to serve other purposes, including that of showing that the action which the creditor seeks to bring is capable of succeeding, so that other creditors may make an informed decision whether or not to join in it. I would note, finally, that counsel for the applicant says that if the intended defendant has no status to seek to have such an order set aside then an order obtained by fraud could not be impeached. But, of course, the court will always act to prevent its process being used so as to perpetrate a fraud. There can, in my view, be no basis for the assertion that it follows from this that a court will grant status to impeach an order on grounds other than fraud.

14 I am of the view that the applicant has not shown that it has any reasonable prospect of persuading a panel of this court that the order appealed from is in error. If there is merit in the suggestion that the Crown has no *prima facie* case, that is something which can be promptly dealt with in the action itself, under the ordinary rules governing summary disposition of unmeritorious proceedings. It seems to me that the proposed appeal could only delay resolution of the litigation on its merits.

15 The applications are therefore dismissed.

"The Honourable Mr. Justice Taylor"

Penfold v. Provenzano, 1996 CanLII 8035 (ON SC) - Fixing a s. 38 Action

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Ontario Supreme Court
Penfold v. Provenzano,
Date: 1996-08-09

Penfold et al.
and
Provenzano et al.

Ontario Court (General Division), Whalen J. August 9, 1996
Michael S. O'Neill, for plaintiffs.
James T. Melville, for defendants.

WHALEN J.:—

I. *Introduction*

[1] This is a motion by the defendants to dismiss the plaintiffs' claim as a nullity. For the reasons that follow the motion will be dismissed and an order will issue regularizing the plaintiffs' action *nunc pro tunc,*

II. *The Facts*

[2] The plaintiffs and defendant Antonio Provenzano (hereafter "Provenzano") were partners in a business financed in part through funds borrowed from a commercial lender. In applying for that loan, the parties were required to provide personal financial statements. In the case of Provenzano, one of the assets listed was a home, which he represented as being registered in his sole name with equity value of $140,000. About the same time the business failed, Provenzano divested his interest in the home to his wife. Eventually he made an assignment in bankruptcy, leaving his two partners to bear the partnership's liabilities, including to the commercial lender and judgments which inevitably followed from other creditors. Provenzano's trustee declined action to recover the bankrupt's transferred interest in the home. This was communicated to plaintiffs' counsel by letter of December 2, 1994.

[3] Accordingly, on December 8, 1994, the plaintiffs obtained an order pursuant to s. 38 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (hereafter the "Act"), permitting them to commence an action against Provenzano and his wife to set aside the transfer. Apart from the issue which is the subject of this motion, there was no suggestion the order was improper. Section 38 of the Act provides as follows:

> 38(1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> (2) On an order under subsection (1) being made the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject matter of the proceeding, including any document in support thereof
>
> (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.
>
> (4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

[4] The order was in the usual form and followed the wording of s. 38, including that:

> ...the trustee shall within four days of service of this order upon him, execute an assignment assigning all his right, title and interest in the subject matter of the proceedings... and that such assignment shall vest in James Penfold

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and Nick Di Tommaso and such other creditors, if any, as shall join in the proceedings, all the right the trustee has in the said claim by virtue of this office as trustee.

[5] The plaintiffs instituted their action on March 27, 1995. The claim and order were served on the trustee by ordinary mail on March 29, 1995 and the trustee executed an acknowledgement card on April 4, 1995.

[6] For reasons unknown, the trustee did not execute and deliver an assignment of his right, title and interest in the action as directed by the order. The defendants pleaded this rendered the claim a nullity and repeated their position at discovery on February 22, 1996. The plaintiffs therefore pressed the trustee and obtained the assignment on March 22, 1996.

III. *The Issue*

[7] The narrow issue in this motion is whether the plaintiffs' failure to obtain the executed assignment *before* issuing the claim renders the action a nullity. Although the point has not previously been directly considered, various courts have envisioned conflicting solutions.

A. *The Applicant / Defendant's Position*

[8] In support of their position, the defendants relied on *B.N.R. Holdings Ltd. v. Royal Bank* 1992 CanLII 1093 (BC CA), (1992), 16 C.B.R. (3d) 72, 74 B.C.L.R. (2d) 332 (C.A.). In that case, the plaintiff corporation (a restaurant) defaulted on loans to the defendant bank, which then forced the plaintiff into bankruptcy. The bankruptcy proceedings were commenced in 1982 and completed in the same year with the discharge of the trustee. The plaintiff corporation was dissolved in 1985 under provincial companies law for failure to file annual reports. In late 1985, the principals of the corporation commenced an action against the defendant bank in their own names and in the name of the corporation, although the action was maintainable by the corporation only. Before issuing the claim, they failed to seek an order pursuant to s. 38 of the *Bankruptcy Act,* R.S.C. 1985, c. B-3 (the same section of the Act now under consideration). The plaintiffs dallied in the pursuit of the action, resulting in motions to dismiss for want of prosecution. Eventually, in 1992, the court issued orders *nunc pro tunc* re-appointing the trustee in bankruptcy so he could refuse to pursue the claim, and granting leave under s. 38 to continue the claim after notifying creditors and restoring the corporation to the register. The bank successfully appealed.

[9] Writing for the majority of the British Columbia Court of Appeal, Seaton J.A. acknowledged the narrow issue was whether an action commenced without prior s. 38 authorization was a nullity or an irregularity. He concluded it was a nullity, but at pp. 81 and 82 commented further:

> Section 38 offers an avenue by which a creditor can present a claim of the bankrupt and thereby recover its own claim against the bankrupt. The steps to be taken are clear:
>
> (1) The creditor must request the trustee to take proceedings,
>
> (2) The trustee must refuse or neglect to take the proceedings,
>
> (3) The creditor must apply to the court for an order authorizing it to take proceedings in its own name,
>
> (4) Notice of the contemplated proceedings must be given to the creditors,
>
> (5) The trustee must assign and transfer the claim to the creditor.
>
> These are not just procedural steps. The assignment is essential—it is the foundation for the action. Clearly each of the other steps must precede the assignment.
>
> In the cases that granted leave nunc pro tunc that have been brought to our attention, it could be said that there was a cause of action when the proceedings were commenced. In those cases, suing a trustee (ss. 37 and 215) or a bankrupt (s. 69), the plaintiff has a claim that it cannot present without leave. In cases under s. 38, on the other hand, the plaintiff has no claim to present. Until the trustee assigns the claim the plaintiff has no status to start the action. That is not a mere technical error. The plaintiff has no cause of action absent the assignment. It can only receive the assignment after complying with the statute.

[10] The defendants therefore urged that the assignment was the "essential" step by which the plaintiffs acquired status to proceed with their claim. It was "not procedural", but rather a precondition for the commencement of the action. The defendants further urged that but for s. 38 of the Act, the plaintiffs would have no remedy, and in order to avail themselves of it they must comply strictly with the prescribed requirements. Because the steps described by the British Columbia Court of Appeal were essential preconditions to the institution of a claim, the defendants submitted that non-compliance was not simply a failure in form (an irregularity) that could be repaired by order *nunc pro tunc.* It was a failure of such fundamental importance as to render the offending action null and void *ab initio,* and as such could not be repaired by court order.

B. *The Respondent / Plaintiffs' Position*

[11] On the other hand, the plaintiffs relied on Miller J.'s observations in *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.* 1993 CanLII 7074 (AB QB), (1993), 20 C.B.R. (3d) 102, 10 Alta. L.R. (3d) 127 (Q.B.). There, the plaintiffs had issued a claim against a number of corporate defendants whom they alleged owed money to the bankrupt automobile

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warranty corporation. The trustee had previously refused to pursue the claim himself but indicated willingness to assign the estate's interest pursuant to a s. 38 order. On the final day of the time limitation for the particular cause of action, the plaintiffs obtained authorization pursuant to s. 38, including permission to issue the claim without first giving notice to other creditors (because time would not allow). To further complicate matters, no inspectors had been appointed as at the date of the s. 38 order. So the trustee's refusal to pursue the claim himself and his assignment of the action to the plaintiffs on the same date the order was granted were not considered and approved by the inspectors on behalf of the creditors. The defendants moved to strike the claim on the basis it was a nullity. They argued the court was without jurisdiction to authorize an action *prior* to notice being given to creditors. They questioned the propriety of the trustee's actions and the assignment of the action absent *prior* approval by the inspectors. They urged a narrow and strict interpretation of s. 38, based on the decision in *B.N.R. Holdings Ltd.* They argued that the essential steps or conditions precedent had not been taken and therefore the action was a nullity

[12] The court rejected the reasoning in *B.N.R. Holdings Ltd.,* distinguishing it on the fact that the claim had issued without a prior s. 38 order and indeed after the bankruptcy proceedings had been completed, whereas in the *Toyota* case the bankruptcy proceedings were still extant and the plaintiffs had sought a s. 38 order before commencing the action. Secondly, the court observed that the application for authority under s. 38 was between the creditor and trustee. There was no need to serve others with prior notice of the application: *Imprimerie Canadienne Gazette v. Turcotte* (1991), 50 Q.A.C. 152; *Roles v. Smith Roles Ltd. (Trustee of)* (unreported), Sask. C.A., April 21, 1992; *Re Parallels Restaurant Ltd.* (1988), 68 C.B.R. (N.S.) 266, 26 C.B.R. (2d) 385 (B.C.S.C.). Thirdly, there was no need to notify other creditors prior to the issuance of the claim, so long as they were subsequently given reasonable opportunity to participate. In other words, the sequence of the steps mandated by s. 38 was not fixed. Fourthly, the court held the section should not be given a narrow, legalistic interpretation, but rather a broader and more liberal one in keeping with its purpose of protecting creditors' rights and business relations: *A. Marquette & Fils Inc. v. Mercure,* 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547 at p. 556, 10 N.R. 239; *Re Andrew Motherwell Ltd. of Canada* (1924), 55 O.L.R. 294, 5 C.B.R. 107 (S.C.). Fifthly, it was held that in an application under s. 38, the applicant creditor need only show the trustee has refused or neglected to bring the action the creditor sought to initiate. It was that simple failure that made the remedy available. The reason for the refusal (including failure to hold a first creditors' meeting or to appoint inspectors) was not determinative. Finally, the court observed at p. 118:

> Section 38(2) states that the Trustee shall assign to the creditor all its rights, title, and interest in the chose in action of the proceeding. Houlden and Morawetz state at p. 1-129 that the right to take proceedings under s. 38 is conferred on the creditor not by the assignment but by law, and the creditor is not an assignee of the rights of the trustee. The assignment is not a condition of the creditor's acquired right to take the action, but merely a consequence of it. Therefore if there is a defect in the assignment, it will not frustrate the creditor's ability to commence the action. It is merely a procedural step.

[13] Miller J. therefore concluded the court had not overstepped its jurisdiction, nor undermined the purpose of s. 38, nor prejudiced the rights of other creditors or the bankrupt. Any error or non-compliance was an irregularity and repairable by order *nunc pro tunc.*

IV. *Analysis*

[14] Although the observations made in the *B.N.R. Holdings Ltd.* case in respect of the essential nature of the trustee's assignment were forcefully articulated by a senior appeal court, they were clearly *obiter,* as Seaton J.A. acknowledged at p. 74 of his reasons. Therefore, they are not binding on me. Also, as counsel in the instant case both observed, the *B.N.R. Holdings Ltd.* and *Toyota* cases are factually distinguishable from each other and the present one. Nevertheless, I am convinced that the approach and analysis in the *Toyota* case is the correct one.

[15] To begin with, I agree the interpretation of s. 38 should be large and liberal, in favour of its intended purposes and beneficiaries. Section 12 of the *Interpretation Act,* R.S.C. 1985, c. 1-21, provides:

> 12. Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[16] Houlden and Morawetz have succinctly summarized the purpose of the Act (with authorities) at pp. 2-3 of *The 1996 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1996):

> 1. To permit the honest but unfortunate debtor to secure a discharge from his/her debts upon reasonable conditions, so he/she can be financially rehabilitated and can make a fresh start as a useful citizen or business person in the community;
> 2. To provide for the orderly and fair distribution of the bankrupt's property among his/her creditors;
> 3. TO permit an investigation to be made of the affairs of the bankrupt;
> 4. To permit the setting aside of preferences, settlements and other fraudulent transactions so all ordinary creditors may share equally in the administration of the bankrupt's estate.

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[17] Section 38 is clearly aimed at protecting and advancing the interests of creditors where the trustee has failed or refused to do so. By this mechanism, the creditors' interests may be independently investigated and adjudicated upon, without risk or cost to the trustee. The honest but unfortunate debtor's discharge and rehabilitation is not undermined in the process. The result either way supports a full and fair distribution of the debtor's property amongst the creditors. In situations such as those alleged in the present case, there may be an avoidance of preferential or fraudulent transactions. If the creditors seeking the benefit of s. 38 fail, then they do so at their own risk, without consequence to the trustee or bankrupt. Therefore, a liberal interpretation of s. 38 accommodates the purposes intended and without prejudice to the bankrupt (in this case, the defendants). The contrasting narrow, legalistic approach proposed in the *B.N.R. Holdings Ltd.* case is interpretively inconsistent with these purposes.

[18] In analyzing s. 38, the *B.N.R. Holdings Ltd.* court did not seem to have had the opportunity to consider the Supreme Court of Canada's reasons in *Re Garage Causapscal Ltée,* 1960 CanLII 80 (SCC), [1961] S.C.R. 83, 26 D.L.R. (2d) 384. In that case a debtor made payment to a creditor ten days before making an assignment in bankruptcy and at a time when both were aware the debtor was insolvent. The trustee failed to attempt recovery of the payment pursuant to s. 64 of the *Bankruptcy Act,* R.S.C. 1952, c. 14 (substantially the same as s. 95 of the present Act). Section 64 presumed a preference where an assignment in bankruptcy occurred within three months after the payment having been made. The plaintiff creditor (Traders Finance) therefore obtained authorization to commence an action to recover the amount of the payment from the alleged preferred creditor pursuant to s. 16 of the *Bankruptcy Act* (now s. 38). The order authorizing the action and the action itself were commenced within a year of the plaintiff creditor's learning of the payment, but several years after the appointment of the trustee and the payment itself. The defendant creditor attacked the claim on the basis of a provision in the Quebec *Civil Code* which required it to be instituted within a year of coming to the creditor's knowledge, or where the suit was brought "by assignees or other representatives of the creditors collectively", within a year of their appointment. The defendants argued that because the action was commenced pursuant to a s. 16 (now s. 38) authorization resulting in the trustee assigning his right, title and interest in the subject-matter of the claim to the plaintiffs, the plaintiffs were caught by the time limitation applicable to trustees and their assignees. When the appeal reached the Supreme Court of Canada, the court considered the nature and effect of the assignment contemplated by the section. Speaking for the majority, Fauteux J. stated at pp. 389-90:

> In a bankruptcy or assignment, when the Trustee refuses to take proceedings for the benefit of, but at the risk and expense of, the estate, s. 16 grants the prompt creditor who wishes to sue in his own name and at his own risk and expense exclusive preference to the extent of his claim and expenses. It is this preferential right which the respondent is asserting in his proceedings. This right is conferred on him by the law and not by the Trustee. It differs, moreover, essentially from that which the Trustee, acting for the creditors as a whole, could have asserted for the benefit of the estate. The fact that, in support of the proceeding he could take in this case, the Trustee would have invoked, as the respondent has done in his action, the fraudulent character of the payment, makes it possible to say that both had common grounds, but not an identical right and remedy.
>
> Never having had the right or the remedy of the respondent, the Trustee could not assign it to him.
>
> Under the old *Bankruptcy Act,* R.S.C. 1927, c. 11, this same preferential right was granted to the creditor by s. 69; but the Trustee asserted it in his name for the benefit of the creditor who provided security to indemnify him for his expenses. Section 16 of the new Act upholds this preferential right, but provides that the action to assert it must be taken by the creditor personally and not by the Trustee. It is for this reason that Parliament, by s. 16, has obliged the latter to assign and hand over to the creditor all his right, title and interest in the chose in action or subject-matter of the proceedings, including any document in support thereof, upon the order authorizing the creditor to sue being given. This obligation is a consequence and not a condition of the preferential right and of the right to sue to assert it.

[19] In *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.,* 1976 CanLII 142 (SCC), [1978] 1 S.C.R. 230 at p. 232, 75 D.L.R. (3d) 63 at p. 65, the Supreme Court of Canada referred briefly with approval to *Re Garage Causapscal Ltée,* noting that an action under s. 16 (now s. 38) was personal and conferred by the Act. This expression of the law has not been altered legislatively or by further pronouncement of the Supreme Court of Canada. The reasons in the *Toyota* case are consistent with the law stated by the Supreme Court of Canada.

[20] Therefore, an assignment executed pursuant to s. 38 of the Act is neither the foundation of the action nor the manner by which the claimant acquires his right and status. These are personal to the creditor and are founded upon or accorded by the section itself, not the assignment. Although the Supreme Court of Canada did not discuss the reason for requiring the assignment, the purpose is apparent. By assigning his right and interest in the subject-matter of the claim, the trustee exhausts his residuary interest in the matter, thereby avoiding the possibility of a multiplicity of actions, and releasing the trustee and estate of any further responsibility or liability in that regard. Thus the "common ground" shared with the claimant creditor, but which is a separate right and remedy of the trustee or estate, is extinguished.

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[21] Accepting this analysis and law (as I must), I also accept that a s. 38 assignment by the trustee is not a condition precedent to the remedy extended by the section. Rather, it is a consequence. The language of s. 38(2) also seems to indicate the consequential nature of the assignment, namely, that the trustee execute an assignment "on an order under subsection (1) being made".

[22] Upon a reading of s. 38, it would also appear there are only two conditions precedent to the creditor/claimant's commencement of an action, namely: (1) the trustee's refusal or neglect to initiate it; and (2) the court's authorization in the form of an order pursuant to s. 38. The same view was held by the Quebec Court of Appeal in *Re Imprimerie Canadienne Gazette,* [1991] A.Q. No. 2055 at p. 9.

[23] Furthermore, the provision is directory of the *trustee, not* the creditor/claimant. The order issued by the court in the instant case is similarly directory. A failure to assign would amount to non-compliance by the *trustee, not* the creditor/claimant. It is difficult to imagine the creditor/claimant being denied the right to institute action by the trustee's failure to deliver. If this were so, the creditor would be back in the position he was when the trustee refused or neglected to take action, and the remedy contemplated by s. 38(1) would be frustrated. Others may be interested in the assignment being executed (for example, the defendants in this case), and they may seek the assistance of the creditor/claimant, or the further intervention of the court to assure compliance. However, it is difficult to imagine a trustee's non-compliance resulting in the creditor being penalized, especially to the extent of denying or voiding the right to commence a claim.

[24] If non-compliance is the result (for example) of a *trustee's* wilful refusal, his complete disappearance or perhaps his disinterest or neglect, what justice flows from the *creditor* being sanctioned in the face of an otherwise authorized action; and why should that action (and therefore the broader purposes underlying s. 38) be delayed? The obvious solution is to seek further order of the court dispensing with the assignment and vesting the trustee's right, title and interest in the claimant. Who applies for such order will depend on the circumstances. The point is that the *trustee's* failure to assign (for whatever reason) cannot be permitted to frustrate the remedy intended to benefit *creditors.*

[25] Therefore, assignment by the trustee cannot be regarded as a pre-condition to the creditor/claimant's commencement of the action. If the claim issues without the trustee having refused or neglected to commence or continue it; and/or if it issues without the authorization of the court, then it may be fundamentally flawed. This was the situation in the *B.N.R. Holdings Ltd.* case. In the instant case, both conditions precedent were satisfied before the action was commenced.

[26] Finally, when is non-compliance with a statutory or procedural requirement an irregularity which can be rectified by order *nunc pro tunc,* and when will such non-compliance be so fundamental as to render the action a nullity that cannot be repaired? These questions occupied much judicial attention during the last half of the nineteenth century and the first half of the twentieth, unfortunately producing a labyrinth of conflicting decisions often difficult to understand or reconcile. Nevertheless, whether in connection with statutory provisions or rules of civil procedure, certain principles have emerged.

[27] At p. 497 of *The Law of Civil Procedure,* vol. 1 (Toronto: Butterworths, 1970), Williston and Rolls offered the following general analysis:

> There are fundamental differences between a proceeding which is irregular and a proceeding which is a nullity. An irregularity is an error in the manner of taking a proceeding prescribed by the rules, or is a proceeding not in strict accordance with the prescribed form: a nullity is a proceeding which is altogether unwarranted and different from that which ought to have been taken, and affects a matter of substance. A nullity is an error in litigation which is incurable, and the person affected by it is entitled to have the proceeding set aside *ex dubito justitiae* without terms or conditions... If a proceeding is irregular, it may be set aside or amended or otherwise dealt with upon such terms as the court sees fit.

[28] In *Judicial Review of Administrative Action,* 4th ed. (London: Stevens & Sons, 1980) S.A. de Smith made the following comment at pp. 142-43:

> When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provisions that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act". In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular

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circumstances of the case in hand. Although "nullification is the natural and usual consequence of disobedience", breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.

[29] At p. 465 of *King v. Kokot* reflex, (1980), 31 O.R. (2d) 461, 119 D.L.R. (3d) 154 (H.C.J.), Steele J. cited with approval a statement of principle, articulated by Noble J. in *Raspier v. Robertson* (1977), 4 C.P.C. 103 (Sask. Q.B.) at p. 105:

> The line between what constitutes a nullity or an irregularity is sometimes difficult to distinguish. It seems to me that unless the Rule of practice imports a prohibition which the litigant has disregarded then it would not amount to a nullity. One general test would be whether or not the Court would, as a result of the failure to observe the Rule, lose jurisdiction over the proceedings. Another test discussed in the case law is whether or not the failure to observe the Rule strictly, has prejudiced the other parties' legal position. In my view, the more recent trend of our court is to put a liberal interpretation on the Rules of procedure with a view to facilitating, as opposed to hampering, the cause of litigation.

[30] Section 187(9) of the Act provides as follows:

> 187(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[31] This raises the question of whether an action already authorized and commenced pursuant to s. 38 of the Act is a "proceeding in bankruptcy", or whether it is governed by the Rules of Civil Procedure. If it is the latter, Rule 2.01(1) of the Ontario rules provides:

> 2.01(1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (*a*) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
>
> (*b*) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.
>
> (2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.

[32] This rule, instituted in 1984 during the last major reform of the Ontario rules, virtually abolished the old debate as to irregularity and nullity. As the editors of Holmested and Watson on *Ontario Civil Procedure* observed in vol. 2 at pp. 2-6 and 2-7:

> The purpose of rule 2.01 is, quite simply, to abolish the concept of a nullity in the Rules and to provide as much relief as possible from procedural defects. The courts are not to engage in the sterile exercise of deciding first, on the authorities, whether a failure to comply with the Rules is a nullity or an irregularity, and then, if the defect is characterized as an irregularity, whether the court will permit an amendment. *All* defects are characterized by rule 2.01 as irregularities. The first step for the court is to determine how to cure the defect, by amendments or other relief (including dispensing with compliance with a rule; see rule 2.03) the presumption being that all defects are curable on appropriate terms.

[33] Because the defendants are questioning the viability of the action resulting from the s. 38 order and not the order itself, I am inclined to think the non-compliance alleged here is governed by the Rules of Civil Procedure, not the Act. If that is so, there will be no question of nullity, the issue being how to repair the failure complained of. The matter seems to have repaired itself by the delivery of the assignment before this motion was brought and before the action itself was ready for trial.

[34] However, lest I am mistaken in this view, I would still hold the failure to deliver the assignment within the time specified in the order and before the commencement of the action to be an irregularity repairable by order *nunc pro tunc.* Based on s. 187(9) of the Act and the principles stated in the passages just quoted, my reasons are as follows:

> 1. The defect in the assignment is a consequence of the order of December 8, 1994, not a condition, and as such is simply a formal procedural matter rather than an essential or fundamental one.
>
> 2. Being a defect of form rather than fundamental substance, the proceeding is not altogether unwarranted and different from that which ought to have been taken.
>
> 3. Although the assignment was delayed and therefore failed to comply with the time specified in the order of December 8, 1994, there was otherwise substantial compliance and the deviation went only to a procedural aspect which did not result in a miscarriage of justice that could not be corrected by an order.

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4. The defect did not undermine the policy purpose of the section or the Act. Indeed, a refusal to cure the defect would frustrate the remedy intended.
5. The trustee and the defendants are not prejudiced in so far as the legal issues which are the subject-matter of the action are concerned. At most, the trustee and bankrupt have been delayed in the taking of the step (i.e., the assignment) which would assure a release of further responsibility in the alleged cause and the possibility of a multiplicity of actions. At worst, the delay has caused mild inconvenience which was the fault of the trustee (not the plaintiffs) to whom the direction to assign was made.
6. The failure to comply has not caused public inconvenience.
7. The defect has not resulted in the court losing jurisdiction. And
8. A liberal interpretation regarding the remedial nature of s. 38 of the Act, as discussed earlier in these reasons, requires an approach that facilitates the course of litigation rather than hampers it.

V. *Conclusion*

[35] For all these reasons the defendants' motion is dismissed and an order will issue *nunc pro tunc* declaring the late execution and delivery of the assignment by the trustee an irregularity which has been rectified by the delivery of the assignment on the date ultimately achieved. If the parties are unable to agree they may make an appointment to speak to the issue of costs.

Order accordingly.

Transfer to creditor - Sec. 38(2)

(2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

Toyota Canada Inc. v. Imperial Richmond Holdings Ltd., 1993 CanLII 7074 (AB QB) - Can Latent Creditors Overturn a Court Santioned Creditor Action upon Trustee Assignment?

Date:	1993-05-14
Docket:	32725; 9203-23858
Parallel citations:	[1993] 6 WWR 492; 20 CBR (3d) 102; 10 Alta LR (3d) 127
URL:	http://canlii.ca/t/28nxs
Citation:	Toyota Canada Inc. v. Imperial Richmond Holdings Ltd., 1993 CanLII 7074 (AB QB), <http://canlii.ca/t/28nxs> retrieved on 2013-08-27
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Alberta Court of Queen's Bench
Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.
Date: 1993-05-14

V.L. Lirette, for plaintiffs Toyota Canada Inc. and Hyundai Auto Canada Inc.
M. McCabe, for defendants Lloyds Bank of Canada, now known as Hongkong Bank of Canada, and Hongkong Bank of Canada.
Rostyk Sadownik, for defendants 351224 Alberta Ltd., now known as 488638 Alberta Ltd., Edwin E. Bean, Alfred Milke and Terry A. Bean.
Michelle Simpson, for defendant Toronto Dominion Bank.
Barry Young, for defendants Imperial Richmond Holdings Ltd., 322680 Alberta Ltd., now known as Sharpewood Holdings Ltd., Ronald L. Funnell, Garry A. Levang and Robert Farquhar.
(Docs. Edmonton 32725, 9203-23858)
May 14, 1993.

[1] MILLER J.:– The issue in this application is whether an order I granted to the Plaintiffs on November 23, 1992 under s. 38(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (hereinafter referred to as "the Act"),

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authorizing them to commence an action against the named Defendants is a valid order. If it is not, can the Statement of Claim issued pursuant to the order still stand?

[2] The background facts are not in dispute but, as the sequence of events may be critical to the decision, I propose to briefly outline the key events.

[3] International Warranty Company Limited (hereinafter referred to as "International") was an Alberta company that marketed extended warranty automobile policies across Canada. It experienced severe financial difficulties in 1987 and a Receiver was appointed by this Court to protect the creditors. The named Plaintiffs in this action, Toyota Canada Inc. and Hyundai Auto Canada Inc., were two of the many creditors of International. I have been the principal judge of the Court of Queen's Bench who has handled the many applications surrounding the winding down of International's affairs and was very aware of the background of the matter. **For some time prior to November 23, 1992 the Plaintiffs, through their respective counsels, have advised the Court that they were contemplating bringing an action against the Defendants to try and recover certain monies which they allege were unlawfully taken from International to the detriment of its creditors.**

[4] On the 9th day of November, 1992 an order was obtained under the *Bankruptcy Act* appointing W.W. McCulloch and Associates Inc. as the Trustee of International. No inspectors, provided under the Act, were ever named as a formal creditors' meeting, where they would normally be elected, was not convened by the Trustee prior to November 23, 1992. **At that point in time, the tangible assets of International were negligible. The Plaintiffs wrote a letter to the Trustee asking it to commence an action on behalf of the creditors against the Defendants for the recovery of monies or, alternatively, to assign the right of action to them pursuant to s. 38 of the Act. The Trustee responded by stating that there were no funds available to it to pursue the claims but it had no objection to the Plaintiffs commencing an action and was prepared to assign the rights to carry the action to the Plaintiffs. It is common ground that before responding, the Trustee did not consult with any inspectors, as none were appointed, nor did it call any meeting of creditors before it decided not to sue and to assign its rights to sue to the Plaintiffs.**

[5] The 23rd of November 1992 was the last day under the *Limitation of Actions Act* that a Statement of Claim could be filed against the Defendants. There simply was no time left to serve any s. 38 notice upon International's creditors and, if an action was not commenced on that day, all chances of pursuing a potential substantial claim would have been lost forever. Counsel for the Plaintiffs appeared before me on the 23rd of November and sought an order permitting them to file their Statement of Claim later that day. I granted the order but made it a term of the order that the following provision be included:

> Subject to paragraph 12, all benefits to be derived from the proceedings authorized by this order together with the costs of same shall belong exclusively to the Applicants and to such other creditors of the bankrupt who may within sixty (60) days of service upon them of the notice of the granting of this order agree to contribute pro rata according to the amount of their respective claims to the expense and risk of such proceedings, and who within the like time in writing directed to the law firm of Reynolds, Mirth, Richards and Farmer, solicitors for the Applicants, signify their agreement pursuant to the form of agreement attached as Schedule "B" to this order. The Applicants shall also within 60 days of this order provide security in the amount of 5% of their claims, less all costs and fees incurred by them in accordance with paragraph 14 hereof.

[6] On the same day, after the order had been granted, the Trustee assigned to the Plaintiffs any right, title or interest to the course of action which it had as Trustee. Pursuant to the order and the assignment, the Statement of Claim was filed that day and a notice of the granting of the order was served upon all known creditors of International. They were given 60 days after service to decide if they wished to become involved in the action. If they elected not to, nothing more was required of them. If they wished to share pro rata in any proceeds, they had to agree to share the costs of the action pro rata and to deposit with the Plaintiffs' solicitor a sum equal to 5% of their claims as security for costs. Five of the creditors served did, in fact, elect to become involved in the action with the Plaintiffs and signed a written agreement to this effect.

[7] Several of named Defendants now seek to set aside the order which I granted and to ask the Court to strike out the Statement of Claim filed. None of the creditors served have objected to the order, except for the Hong Kong Bank which is both a creditor and a named Defendant.

[8] The major issues raised by the Defendants in this application are the following:

1. Did the court have jurisdiction to grant the order which permitted the Plaintiffs to commence the action immediately, without first giving the other creditors notice?

2. Are other creditors effectively precluded from joining the action as the statement of claim has been issued and the limitation period has expired, thus defeating the intention of the legislation?

3. Is the Assignment of the claim by the Trustee in Bankruptcy to the Plaintiffs valid?

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4. Must the Trustee obtain permission from the Inspectors or creditors to refuse or neglect to take proceedings before consenting to the application under section 38?

5. Is this a derivative action?

6. Do the Defendants have standing to challenge the order made under section 38?

[9] Section 38 of the Act reads as follows:

> 38.(1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> (2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.
>
> (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

[10] The Defendants who challenge the order take the position that the general scheme of the Act only permits a trustee to take proceedings on behalf of the bankrupt estate. The bankrupt loses his or its right to sue in its own name. Section 38 of the Act constitutes an exception to the general scheme for it permits a creditor, in its own name, to sue on behalf of the bankrupt estate under certain conditions specifically spelled out within that section. Before taking proceedings the creditor must obtain a Court order. Before obtaining the order and commencing the proceedings the Defendants maintain that three things must occur.

[11] These three steps, they argue, are mandatory and are the following:

(a) The Trustee must obtain directions from the inspectors or the creditors before coming to a decision whether to refuse or neglect to take proceedings,

(b) The Plaintiffs must give notice to the other creditors before the action was commenced giving them the option of participating in the action,

(c) The assignment given by the Trustee must be to all the creditors who have indicated, before the action was commenced, that they intended to share in the costs and the proceeds.

[12] The Defendants argue that the failure to comply with any or all of these three steps leaves the Court unable to grant the order given. In support of this assertion the Defendants rely heavily upon the 1992 decision of the British Columbia Court of Appeal in *B.N.R. Holdings Ltd.* (unreported) [reported *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 1992 CanLII 1093 (BC CA), [1993] 2 W.W.R. 471] and *Re Andrew Motherwell of Canada Ltd.* (1924), 55 O.L.R. 294 (C.A.). In addition, the Defendants cite a passage from an article on the 1970 version of the *Bankruptcy Act* by one Michael B. Rotsztain entitled "Creditors Taking Proceeding in Bankruptcy" referring to s. 20 (which is roughly equivalent to the present s. 38) that states at p. 39:

> 6. The Proceedings
>
> After the completion of all matters described above, notice, assignment, agreement to share and contributed, pro rata, retainer it shall then be possible to actually commence the proceedings in question against the particular defendant. The participating section 20 creditors shall be the named applicants, plaintiffs or petitioners, as the case may be.

[13] All of the arguments raised by the Defendants revolve around how the Court should interpret s. 38 of the Act, i.e., should the Court take a narrow legalistic approach or a broader and more liberal one? There are some earlier decisions which give an indication of the favoured approach. One of these is a Supreme Court of Canada decision in *A. Marquette& fils Inc. v. Mercure*, 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547, where at p. 556 de Grandpre J. said:

> Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it. It seems to me that appellant is urging the Court to so interpret it.

Another statement of the general approach is found in a decision from the Supreme Court of Ontario in *Re Andrew Motherwell of Canada Ltd.* (1924), 55 O.L.R. 294. Fisher J. said at p. 298:

> In *Caughell v. Brower* (1897), 17 P.R. 438, it was held that an appeal from an order setting aside an award was a proceeding in Court. Any interpretation to be given to the meaning and scope of sec. 35 should be a liberal one, and not a construction that would debar a creditor, if he is prepared to undertake the risk, of the right to proceed for his own benefit.

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[14] In addition to the general approach outlined above, I thing it is also important to try to understand the general meaning and intent of s. 38 of the Act.

[15] In my view, s. 38 is designed to allow the creditors of a bankrupt estate to carry an action in their own name, when the action by law belongs to the Trustee in Bankruptcy, in circumstances where the Trustee refuses or neglects to proceed with the action.

[16] The practical significance of this is as follows:

(a) The creditor applying for an order under s. 38 steps into the shoes of the Trustee.

(b) The action involved remains in substance a single action which continues to be carried on for the benefit of the estate. The recovery from the action will not be affected by the number of creditors that agree to support the action as the action remains essentially the same since it is the Trustee's rights which are being asserted,. That is very clear when reference is made to s. 38(3), which provides that the surplus realized through such action, if any, belongs to the estate.

(c) The requirement for notice to creditors is part of a mechanism with respect to how the proceeds of the action will be divided, with creditors who agree to share in the costs of prosecuting such an action and the risks involved obtaining a preference as to distribution of the proceeds of the action. The section does not affect the liability of the Defendants in any respect.

(d) Until 1949, the action authorized by s. 38 or its predecessors was brought in the name of the assignee or Trustee of the bankrupt, with a provision for security to be posted in favour of the assignee or Trustee to protect the assignee or Trustee with respect to costs. This was seen as unduly restrictive and a cause of difficulty. As a result, the section was altered to provide that the action would be brought in the name of the creditor obtaining an order under s. 38, thereby obviating the need for security to be posted in favour of the Trustee. However, this change did not alter the fundamental nature of the proceedings which are authorized by the order.

[17] In order to carry out the basic intent of s. 38, previously expressed, is it mandatory that a specific sequence of events take place? Do the decisions in *B.N.R. Holdings v. Royal Bank* (supra) and *Re Andrew Motherwell of Canada Ltd.* (supra) support this proposition?

[18] The *B.N.R.* case dealt with a very unusual fact situation. Mr. and Mrs. Bishop were the principals of B.N.R. Holdings Ltd. which operated a restaurant in 1981. The Royal Bank provided financing to the business and the loan was personally guaranteed by the Bishops. The business failed and a Trustee in Bankruptcy was appointed. The bankrupt company had extensive liabilities and no assets. The Trustee completed its duties and was discharged in September of 1982. The company was struck off the register of companies in 1985. The bank sued the Bishops on their guarantees. In November of 1985 the Bishops sued the bank in the name of the company and their own names. The bank took the position that the Bishops had no right to advance a claim on behalf of the bankrupt company in their own names and applied to strike out the action. The chambers judge [reported 1992 CanLII 410 (BC SC), (1992), 14 C.B.R. (3d) 233] upheld the bank's position, struck out the Statement of Claim but granted leave to the Bishops to start a new action. He ordered that the discharged Trustee be re-appointed so that it could refuse to take proceedings and then ordered that under s. 12 the Bishops would have leave to recommence the action in their own names after they had taken steps to restore the company on the register and sending notice to creditors. In effect, the chambers judge granted a Nunc Pro Tunc Order. The B.C. Court of Appeal ruled that this unusual procedure was in error and reversed the decision.

[19] In the course of the Reasons for Judgment, Seaton J.A. speaking for the court, after outlining the steps which the creditor is directed to take in s. 38, said at p. 12 [p. 479]:

> These are not just procedural steps. The assignment [from the Trustee] is essential - it is the foundation for the action. Clearly each of the other steps must precede the assignment.

And again at p. 13 [p. 479], Seaton J.A. states:

> Until the trustee assigns the claim the plaintiff has no status to start the action. This is not a mere technical error. The plaintiff has no cause of action absent the assignment. It can only receive the assignment after complying with the statute.

In determining whether the ratio of this decision governs the facts in the case at bar I observe that the real root issue in the *B.N.R.* case was whether an action commenced without an order under s. 38 can be saved through the issuance of an order under s. 38 nunc pro tunc. It is noted that the B.C. decision relies on the fact that the Trustee had already been discharged and, in effect, the bankruptcy proceedings had been concluded. Seaton J.A. cites with approval the B.C. Supreme Court decision of Meredith J. in *Sangara v. Lawson* 1984 CanLII 827 (BC SC), (1984), 52 B.C.L.R. 300, where he says at p. 301:

> In my view, s. 20 [a predecessor section to the present s. 38] contemplates that the continuance of a proceeding such as this must be taken in the bankruptcy proceedings, not afterwards.

[20] In the case at bar the bankruptcy proceedings were still extant when the assignment was given.

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[21] This brings me to a consideration of whether the *B.N.R.* case stands for the proposition that s. 38 should be interpreted as allowing the procedure contemplated by that section to go ahead, not only if a number of events occur but also, that these events occur in a specific sequence. While I believe that the *B.N.R* case mandates that the events do occur I am not convinced that it stands for the proposition that only one specific sequence can give the procedure validity.

[22] The Defendants state that the only way s. 38 can be validated is if:

(a) the creditors are notified before the Statement of Claim is issued and

(b) the inspectors or creditors are consulted before the Trustee decides not to take actions in its own name.

[23] Addressing the argument regarding the s. 38 requirement that notice be given to all creditors, I would break this down to two points of time. Firstly, before the order is sought and, secondly, after the order is obtained but before the Statement of Claim is issued. There is ample authority to support the proposition that the s. 38 application is one between the Trustee and the Creditor applying for the order so that only the Trustee need be served with notice of that application.

[24] See: *Imprimerie canadienne Gazette v. Turcotte* (unreported) Quebec Court of Appeal, issued November 27, 1991; *Roles v. Smith Roles Ltd.* (*Trustee of*) (unreported), Saskatchewan Court of Appeal, April 21, 1992; *Re Parallels Restaurant Ltd.* (1988), 68 C.B.R. (N.S.) 266 (B.C.S.C.).

[25] It is also noted that the precedent form of a s. 38 order contained in Houlden and Morawetz, *Bankruptcy Law in Canada* (3rd ,ed.), makes it abundantly clear that only the Trustee receives notice of the application. The following reasons for such a conclusion are logical:

(a) There is simply no need for prior notice to be given. Creditors by the terms of such an order are given the full opportunity to share in the fruits (provided they agree to share in the costs) of the litigation involved.

(b) A creditor who does not join still retains a residual interest in the litigation as any surplus recovered must be paid to the estate.

(c) All the creditors are not always known at the stage where such an order is obtained, as in this case. There is no sound reason to require that the application await until such creditors are known.

(d) The section does not state that notice must be given of the application itself.

[26] I conclude that it is not necessary under s. 38 to notify the creditors in advance of the application for the order.

[27] Is it an absolute requirement to notify the creditors prior to the issuance of the Statement of Claim? To answer this one must again refer to the intent of s. 38. As I understand it, the general intent is to give those creditors who wish to assume the cost and risks of carrying an action, that would usually be conducted by the Trustee, an opportunity to do so. In exchange for assuming the risk, those creditors who participate gain a preference in any recoveries over creditors who eschew the risk. However, any surpluses left after the sponsoring creditors have recovered still belong to the bankrupt estate so that, in theory, creditors who do nothing may still recover some or all of their claims. The key element, in my opinion, is that all of the creditors be given a reasonable opportunity to decide whether or not to participate and risk further loss in exchange for a preferred position should a recovery be made as a result of the action. The order granted in this matter accorded all known creditors exactly that choice, the only difference being that they got to make the choice after the Statement of Claim was issued instead of before. In point of fact, five additional creditors elected to sign a document agreeing to take the risk and were required to put money up front toward their share of the legal costs. I cannot see how any of the creditors has been adversely affected by the sequence that was followed in this case because of the severe time limitation restraints. It is clear that, if the method set out in the order had not been granted, all of the creditors would have lost forever any opportunity to realize upon their claims. No creditor, with the exception of the Hong Kong Bank who is also a named Defendant, have come forward to challenge the sequence of events.

[28] Is it then just and equitable that one or more of the Defendants should be able to receive an advantage because of the sequence of events permitted by the order? As I observed earlier, s. 38 is designed to protect the rights of creditors to sue if the Trustee refuses or neglects to do so. It is, in my view, not designed to protect potential debtors of the bankrupt estate. If there had been funds available in the estate, it is quite possible that the Trustee would have carried the action and the Defendants would have been in jeopardy. If it was practical to notify the creditors before the Statement of Claim was issued and still avoid the limitation period, the Defendants would have been in jeopardy. I cannot see how the sequence of events as to when the creditors were notified, which is solely for their benefit, can be the basis upon which a court concerned with equity should relieve the Defendants of being placed in jeopardy and, in effect, frustrate the intent of s. 38.

[29] In my view the *B.N.R.* decision is restricted to the unique facts of that case and the general comments of the court regarding the necessity for strict compliance with that court's interpretation of s. 38 is not persuasive in relation to the facts of the case at bar.

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[30] Does the fact that the Trustee decided not to pursue the claim without first consulting with inspectors or creditors invalidate the order?

[31] When the Court heard the application on November 23, 1992, the affidavit material filed before the Court established the following:

(a) There was some urgency with respect to the application, and it was highly advisable for the proceedings to be commenced immediately.

(b) The Trustee had not yet been able to gather a list of the creditors of the estate, let alone call the first meeting of creditors for purposes of electing the inspectors of the estate. It was impossible for the Trustee to consult with inspectors of the estate, or creditors, in a timely fashion with respect to the proceedings being proposed.

(c) The trustee confirmed that it was declining to commence proceedings due to lack of funds in the estate.

[32] In my view, in an application for an order under s. 38, the applicant creditor need only show that the Trustee has refused or neglected to bring the action the creditor wants to bring. It is not a requirement or condition precedent that the Trustee have consulted with the inspectors, nor is it a requirement or a condition precedent that the Trustee have called a meeting of the creditors with respect to the matter.

[33] The reasons given by the Quebec Court of Appeal in the 1991 decision of *Imprimerie canadienne Gazette v. Turcotte* (unreported) as yet should be especially noted as to why this is the better view. I paraphrase them as follows:

(a) The predecessor to s. 38 did require the inspector's permission. Parliament deleted that requirement. The Courts should not read back into a provision that which Parliament has deleted.

(b) Section 38(4) refers to the inspector's permission being required, as does s. 30. Section 38(1) does not, and the clear inference is that same is unnecessary for an application under s. 38(1).

(c) The section refers to cases where the Trustee not only refuses to bring an action, but also "neglects" to do so. If permission of the inspectors is required, that logically requires the Court to read the section as requiring the inspectors to authorize the Trustee to "neglect" to bring the action. That is illogical and incongruous.

[34] Houlden and Morawetz state at p. 1-90 [p. 1-66], with respect to s. 30(1)(*d*), that a defendant to an action brought by the trustee cannot set up the fact that the trustee did not obtain the permission of the inspectors for bringing the action. The permission of the inspectors is not required to give capacity to the trustee, but merely to protect the bankrupt estate with respect to costs: *Re Tremblay* (1922), 3 C.B.R. 488 (Que. S.C.). In view of this reasoning, the trustee has capacity to refuse to take proceedings without the permission of the inspectors. It is the applying creditors who will be taking on the risk and responsibility for costs, the estate of the bankrupt is not at risk or involved.

[35] Therefore, the trustee does not need to obtain the consent of the inspectors to refuse or neglect to take proceedings. Since there was a request from the Plaintiffs to the Trustee to act and a subsequent refusal to do so, the Plaintiffs came within the requirements of s. 38.

[36] With regard to the Trustee consulting with creditors before deciding, the Saskatchewan Court of Appeal in *Roles v. Smith Roles Ltd.* (*Trustee of*) (supra) stated:

> It was not necessary for the Applicant to establish the basis for the Trustee's refusal or neglect, which is to say whether the Trustee had or had not obtained the consent of the creditors to its course of action.

I conclude that it is not a mandatory requirement of s. 38 for a Trustee to consult with creditors before making his decision.

[37] The next issue raised is whether the order and the mechanics used in this case effectively precludes other creditors from joining in the action after the Statement of Claim has been issued.

[38] The defendants are essentially arguing that the creditors who wish to join the action cannot do so now as they were not given notice before the action was commenced as required by s. 38. Since the limitation has expired, they argue that the creditors are not precluded from joining.

[39] The defendants agree that cases decided since 1949 have not stated that a creditor had to be a named plaintiff to enjoy the benefit of action; however, they argue that these cases have all been in error.

[40] The defendants base their arguments on the wording of s. 38(3) and its predecessors and an article written by Michael Rotsztain. They argue that since s. 38(3) states:

> (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

Therefore, if you are not a named plaintiff then you will not share in the proceeds. If notice is not given to the other creditors to allow them to join and effectively add their name to the action before it is initiated, then the purpose of the act is frustrated. Rotsztain's article also states that the participating s. 20 (now s. 38) creditors will be the named applicants, plaintiffs or petitioners, as the case may be.

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[41] One cannot look at the words of s. 38(3) alone without looking at the bigger picture. Once a Trustee is appointed for the estate it is to act for the benefit of the estate and its creditors without partiality to any party. Section 38 is an exception to the normal course of events because it is triggered when the Trustee refuses or neglects to take legal proceedings, for whatever reasons, and therefore assigns its rights in the action to any creditor who is willing to take the action over himself. The section allows other creditors or all the creditors to join in the proceeding if they so wish. It would make sense that only those creditors who wished to take the risk of the action on would benefit from any fruits the action may bring. Therefore s. 38(3) clarifies this point exactly. Instead of the benefits of the action accruing to the estate of the bankrupt, the benefits will first accrue to those creditors who chose to take the risk.

[42] Section 38(3) is not intended to exclude "joining" creditors from enjoying the benefits of the action. Section 38(3) does not specifically exclude "joining" creditors. I believe that "creditor instituting the proceeding" can be interpreted as including those creditors who join, after being given notice. There is no need for all creditors to be named plaintiffs. Only those creditors who obtain the s. 38 order must be named as plaintiffs. They are given the right, statutorily, under s. 38 to take the action. The order in this case also provides that other creditors may join by agreement. In fact, as the Defendants have said, historically only the creditors who obtained the order have been named plaintiffs. This did not affect the agreement with the other joining creditors who elected to join after receiving notice. The agreement still provided for a pro rata sharing. The nature of the action is not affected by who is named as plaintiff. The action was a right that was vested in the bankrupt, then the Trustee and now may be pursued by a creditor.

[43] *Waffle's Electric Ltd. v. Davis* (1988), 70 C.B.R. (N.S.) 316 (Ont. H.C.), supports the contention that not all joining creditors must be named plaintiffs. In that case an order was obtained under s. 20 (now s. 38) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, allowing one creditor to maintain an action. Two other creditors joined by agreement with the creditor pursuant to the order. The defendants, due to a concern about security for costs, sought to have both of the joining creditors added as party plaintiffs. Justice Carruthers held: "I do not think that the scheme provided by the Bankruptcy Act envisages that creditors who ask to join the action be made party plaintiffs." He therefore declined to order that the creditors be made party plaintiffs.

[44] In *Re Carex Distributors Inc.* (1981), 43 C.B.R. (N.S.) 209 (Ont. C.A.), a creditor, who was also a defendant, applied to the Court to be permitted to join in an action pursuant to s. 20 of the *Bankruptcy Act* initiated by another creditor. The Court of Appeal held that a defendant who is also a creditor is permitted to participate in the proceedings. The Court further ordered that the action shall be taken in the name of the initiating creditor in its own name, as provided by the order. This case clearly implies that a joining creditor need not be named as a plaintiff to share in the costs and benefits of the action. *Imprimerie canadienne Gazette v. Turcotte* (supra) referred to *Re Carex*, stating that the defendant who was permitted to join in the proceedings, however, did not become a plaintiff. The creditor who applied for the order was ordered to take the proceedings in his name.

[45] In fact in the precedent form of order, found in Houlden and Morawetz, the order states that "the applicant (of the s. 38 order) may and it is hereby authorized to commence and prosecute proceedings in its own name **and at its own expense ..." [vol. 2, p. 12-9]**. Furthermore it stated that [vol. 2, p. 12-9]:

> ... **all benefits to be derived from the proceedings authorized by this order together with the costs of same, shall** belong exclusively to the applicant, and to such other creditors of the said bankrupt who may within seven days of the service upon them of the notice of the granting of this order as hereinafter provided, agree to contribute *pro rata* according to the amount of their respective claims to the expense and risk of such proceedings, and who within the like time in writing directed to E.F., solicitors for the applicant herein, signify their agreement.

This form implies that the creditors who obtain the order are permitted to commence the action in their name; however, other creditors who wish to join may do so by agreement. The order in the case at bar has similar provisions.

[46] The Petitioners cite *Re Bernard Motors Ltd.* (1958), 18 D.L.R. (2d) 528 (N.B.C.A.), and *Re B. Donovan Interiors Ltd.* reflex, (1990), 3 C.B.R. (3d) 196 (N.S.T.D.), which both refer to orders that contain the provisions mentioned above. The order authorizes the commencing of the action in the name of the creditor applying for the order. The order further provides for the sharing of the costs and the benefits between all creditors who choose to join by agreement in writing.

[47] I find that in order for a creditor to join in the proceedings initiated by another creditor pursuant to s. 38, he does not have to become a party plaintiff. The point is that it does not matter who is named as plaintiff. As long as there is a creditor who can be made liable for costs, it is not necessary to name all creditors. The joining creditor contributes to the costs and enjoys the potential benefits as provided in the order and the agreement signed between the creditors. The nature of the action does not change if all or one creditor is named as plaintiff. As stated in *Re Parallels Restaurant Ltd.* (1988), 68 C.B.R. (N.S.) 266 (B.C.S.C.), by Justice Campbell, "The s. 20 order does not affect the substance or rights of the party against whom the order is directed. The issue on an application for such an order is

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between the trustee and the creditor applying for the order" (p. 268). Hence the fact that notice was given to the creditors after the action was commenced will not preclude them from joining the action. They are not prejudiced.

[48] The intention of s. 38, stated by all parties, is to preclude any opportunity for preference of one creditor over others, thereby requiring notice to all other creditors of the action. This was done in the case at bar. Five creditors have agreed to participate and will join in sharing the costs and the potential benefits. They are not precluded from joining even if the notice was given after the action was commenced and after the limitation period has expired. The cause of action is affected by the limitation period. The cause of action has not been altered, nor have any parties been added to the cause of action that would cause difficulties. They are not prejudiced by lack of notice before the statement of claim was issued. The policy objective of s. 38, to preclude an opportunity for preference of one creditor over others, is not frustrated. It must be noted that if the Plaintiffs had failed to commence the action immediately then the other creditors would have been prejudiced. All creditors would have lost the opportunity to bring the action forever. As stated, the nature of the action is the same and the creditors are not "plaintiffs" in the true sense that they were the "harmed" ones. The s. 38 order has merely transferred the bankrupt's rights to the chose in action over to the creditors. The requirements of s. 38 have been met.

[49] The next issue to consider is whether the assignment from the Trustee to the Plaintiffs complies with the requirements of s. 38.

[50] Section 38(2) states that the Trustee shall assign to the creditor all its rights, title, and interest in the chose in action of the proceeding. Houlden and Morawetz state at p. 1-129 that the right to take proceedings under s. 38 is conferred on the creditor not by the assignment but by law, and the creditor is not an assignee of the rights of the trustee. The assignment is not a condition of the creditor's acquired right to take the action, but merely a consequence of it. Therefore if there is a defect in the assignment, it will not frustrate the creditor's ability to commence the action. It is merely a procedural step.

[51] The standard precedent in Houlden and Morawetz, vol. 2, at pp. 12-9 - 12-10 states:

> ... **the trustee shall within four days of service of this order upon him, execute an assignment assigning all his right, title and interest in the subject matter of the proceedings and ... such assignment shall vest in A.B.** and such other **creditors as may join in these proceedings** ...

[52] The section implies that the assignment will be made immediately to the creditors applying for the order under s. 38. Therefore the assignment will be made before it is known who the other joining creditors will be. This is evident in the section in the precedent, that gives the other creditors 7 days notice to respond to indicate their willingness to participate. The applicants of the s. 38 order are assigned the right to bring the action almost immediately upon receiving the order, as evident by the form of orders. In the case at bar, the assignment is made within 4 days of service of the order and the other creditors have 60 days to indicate their willingness to participate. There is nothing unusual in these provisions.

[53] A fifth issue is whether the action commenced by Toyota and Hyundai can be classed as a "derivative action" and, if so, must it comply with the provisions of the *Canada Business Corporations Act*, which the Defendants allege did not occur. The first question to examine is whether the action is, indeed, a derivative one for, if it isn't, there is no need to see if it complies with the *Canada Business Corporations Act*.

[54] The defendants argue that the claims advanced by the plaintiffs are claims that can only be advanced by International Warranty Company Ltd. and therefore the plaintiffs would have to commence a derivative action. Further, that if this is a derivative action, the conditions precedent must be complied with as set out in the *Canada Business Corporations Act*, which they have not been.

[55] The Defendants are right in one sense, this is an action that the bankrupt, International, could have brought. It was a right, an asset, a chose-in-action vested in International. However, since International has gone bankrupt, all of its assets and liabilities have since been vested in the Trustee. A right to bring a legal action is an asset. Through s. 38, the Trustee can transfer his right to take this action to a creditor. Hence the creditor gains the right to take this action pursuant to the *Bankruptcy Act*. The creditors are not taking this action on the basis of being "an interested party" affected by a harm done to International Warranty. They are taking the action as if they stood in the shoes of International (or the Trustee, once they went bankrupt). This is not a derivative action. It is allowed by the *Bankruptcy Act* and not pursuant to the *Canada Business Corporations Act*.

[56] The Plaintiffs have raised the issue of whether these Defendants have the status to challenge the s. 38 order on the basis of any alleged procedural irregularities.

[57] I think the correct view of this issue was well stated by Paris J. in the B.C.S.C. decision of *A & B Construction Co. v. Reid* (1985), 56 C.B.R. (N.S.) 232, at pp. 234-35 where he said:

> The applicants on this motion are defendants in the action and their rights are, of course, directly affected. It seems to me that if the commencement of the proceedings in which their interests are affected is permitted by a statutory

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scheme only under certain conditions, namely, an order of the court authorizing it, then they should be permitted to inquire into whether those conditions have been complied with. Furthermore, if they could demonstrate that the order authorizing the proceedings was a nullity as having been made without jurisdiction, then that would surely dispose of the proceedings and they should be permitted to raise that issue in those proceedings.

[58] In the end result, I have concluded that the order granted does directly affect the Defendants and they, therefore, have status to question the validity of the order.

[59] The application to strike down the order is hereby refused. The Statement of claim issued pursuant to the order will stand.

[60] Counsel did address specifically the question of the costs of this application. As I have largely upheld the Plaintiffs' position, I think they are entitled to their costs of defending this application. If counsel cannot agree how these should be calculated they are welcome to come back to me for directions.

Application dismissed.

Toyota Canada Inc. v. Toronto-Dominion Bank, 1994 ABCA 261 (CanLII)

Date:	1994-07-04
Docket:	9303-0395-AC; 9303-0397-AC; 9303-0400-AC; 9303-0404-AC
Parallel citations:	[1994] 9 WWR 380; 27 CBR (3d) 1; 21 Alta LR (3d) 336
URL:	http://canlii.ca/t/1p6kr
Citation:	Toyota Canada Inc. v. Toronto-Dominion Bank, 1994 ABCA 261 (CanLII), <http://canlii.ca/t/1p6kr> retrieved on 2013-08-27
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In the Court of Appeal of Alberta
Citation: Toyota Canada Inc. v. Toronto-Dominion Bank, 1994 ABCA 261
Date: 19940704
Docket: 9303-0395-AC,
9303-0397-AC,
9303-0400-AC
and 9303-0404-AC
Registry: Edmonton
Between:
Toyota Canada Inc. and Hyundai Auto Canada Inc.
Respondents
(Plaintiffs)
- and -
The Toronto-Dominion Bank, HongKong Bank of Canada, 351224 Alberta ltd., now known as 488638 Alberta Ltd., Edwin E. Bean, Terry A. Bean, Alfred Milke, 288314 Alberta Ltd., 322680 Alberta Ltd., now known as Sharpewood Holdings Ltd., Ronald L. Funnell, Garry A. Levang, Ralph Meyers, and Robert Farquhar
Appellants (Defendants)
- and -
Imperial Richmond Holdings Ltd., 321149 Alberta Ltd., 288314 Alberta Ltd., 351224 Alberta Ltd., now known as 488638 Alberta Ltd., 322680 Alberta Ltd., now known as Sharpewood Holdings Ltd., 349189 Alberta Inc., Lloyds Bank Canada, now known as Hongkong Bank of Canada, HongKong Bank of Canada, The Toronto-Dominion Bank, Edwin E. Bean, Ronald L. Funnell, Alfred Milke, Terry A. Bean, James Wilkins, Richard Heyman, Dale Mather, Del Manary, Robert Nelson, Henry A. Smith, Garry A. Levang, Ralph Meyers, Robert Farquhar, Jim Patterson, Alan N.

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Parkinson, B.A.B. Newell, Ron F. King, Arthur Odamura, D. Cameron, Rodney L.J. Child, Gerry Peterson, and Robert Blades
Defendants

The Court:
The Honourable Mr. Justice Lieberman
The Honourable Mr. Justice Belzil
The Honourable Madam Justice Conrad

Reasons for Judgment of The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice Lieberman
Concurred in by The Honourable Mr. Justice Belzil

APPEAL FROM THE WHOLE OF THE JUDGMENT OF THE HONOURABLE MR. JUSTICE T.H. MILLER, FILED THE 18TH DAY OF MAY, 1993

COUNSEL:
V.L. Lirette, for the respondents
M.M. Simpson, for the appellant, Toronto-Dominion Bank
M.J. McCabe, for the appellant, HongKong Bank of Canada
R. Sadownik, for the appellants, 351224 Alberta Ltd., now known as 488638 Alberta Ltd., Edwin E. Bean, Terry A. Bean, Alfred Milke

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE CONRAD

[1] The question of law in this appeal is whether a statement of claim issued pursuant to s. 38 of the **Bankruptcy Act**, R.S.C. 1985, c. B-3 (now known as the **Bankruptcy and Insolvency Act,** S.C. 1992, c. 27, s. 2) ('the **Bankruptcy Act**"), without prior notice to other creditors, is a nullity. I am of the view it is not, and would dismiss the appeal.

The Facts

[2] The respondents, Toyota Canada Inc. ("Toyota") and Hyundai Auto Canada Limited ("Hyundai") are two of the main creditors of International Warranty Company Limited ("International") who went into receivership by court order, December 31, 1987. On November 9, 1992, an order was obtained under the **Bankruptcy Act** appointing a trustee in bankruptcy. Toyota and Hyundai forwarded a letter, on November 10, 1992, to the trustee requesting him to commence the proceeding which is the subject-matter of this appeal. The trustee, by letter dated November 18, 1992, communicated that he had made a decision not to pursue the litigation because the estate did not have the required funds. He proceeded without consultation with the inspectors, as it was not possible to prepare a proper list of creditors, or have a first meeting of creditors, in time to avoid the limitation risk that existed with respect to the action.

[3] November 23rd was the last day under the **Limitation of Actions Act**, R.S.A. 1980, c. L-15 for filing the statement of claim. On that date, Toyota and Hyundai, on notice to the trustee of International, made application for an order under s.38 of the **Bankruptcy Act**, authorizing them to take proceedings in this action. It is common ground that the cause of action in this suit is that of the bankrupt, and it is only by virtue of s. 38 that Toyota and Hyundai have the right to sue. While notice of that application was given to parties other than the trustee (including the appellant Lloyds Bank Canada), generally the creditors were not served.

[4] The Chambers Judge granted the application of Toyota and Hyundai, authorizing them to commence proceedings. That order included the following paragraph:

> Subject to paragraph 12, all benefits to be derived from the proceedings authorized by this Order together with the costs of same shall belong exclusively to the applicants and to such other creditors of the bankrupt who may within sixty (60) days of service upon them of the notice of the granting of this Order agree to contribute pro rata according to the amount of their respective claims to the expense and risk of such proceedings, and who within the like time in writing directed to the law firm of Reynolds, Mirth, Richards & Farmer, solicitors for the applicants, signify their agreement pursuant to the form of agreement attached as Schedule "B" to this Order. The applicants shall also within 60 days of this Order provide security in the amount of 5% of their claims, less all costs and fees incurred by them in accordance with paragraph 14 hereof.

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On November 23rd, the trustee assigned to Toyota and Hyundai its interest in this cause of action. Pursuant to the order and the assignment, the statement of claim was issued that day, and thereafter notice to creditors was served on all known creditors. Of the creditors served, five elected to become involved in the action with the plaintiffs, and signed a written agreement.

[5] Several of the named defendants sought to set aside the order of the Chambers Judge and strike the statement of claim as being a nullity. At the time of that application, the limitation period for commencing this action had expired. The judge dismissed the application, and the appellants now appeal from that order. Although many issues were raised before the Chambers Judge, the hearing of this appeal revolved around the failure to give notice to creditors prior to issuance of the statement of claim.

Analysis

[6] Section 38 of the **Bankruptcy Act** provides the mechanism for creditors to proceed with an action of the bankrupt where the trustee refuses or fails to act, without which Hyundai and Toyota would have no cause of action against the defendants. Since the right of a creditor to bring an action under s. 38 is purely statutory, a creditor must bring itself strictly within the provisions of the section in order to exercise the powers provided by it (see *In re Andrew Motherwell* (1924), 4 C.B.R. 484 (Ont.S.C.) at 486; *Re Points of Call Airlines Ltd.* (1990), 80 C.B.R. 157 (B.C.S.C.) at 164).

[7] Section 38 of the **Bankruptcy Act** reads as follows:

> (1) Where a creditor requests the trustee to take any proceedings that in his opinion would be for the benefit of the estate of the bankrupt and the trustee refuses or neglects to take the proceedings, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> (2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.
>
> (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

[8] The appellants rely on the decision in *B.N.R. Holdings Ltd. v. Royal Bank of Canada,* 1992 CanLII 1093 (BC CA), [1993] 2 W.W.R. 471 (B.C.C.A.) for the proposition that notice is a condition precedent to the validity of the action. In *B.N.R. Holdings Ltd., supra,* Seaton, J.A. comments on the distinction between s. 38 applications and those brought under s. 69 to allow continuation of a creditor's action, when he states at p. 479:

> In the cases that granted leave nunc pro tunc that have been brought to our attention, it could be said that there was a cause of action when the proceedings were commenced. In those cases, suing a trustee (ss. 37 and 215) or a bankrupt (s. 69), the plaintiff has a claim that it cannot present without leave. In cases under s. 38, on the other hand, the plaintiff has no claim to present. Until the trustee assigns the claim the plaintiff has no status to start the action. That is not a mere technical error. The plaintiff has no cause of action absent the assignment. It can only receive the assignment after complying with the statute.

He also sets out what he considers to be the five conditions to obtaining a s. 38 order:

> (1) The creditor must request the trustee to take proceedings,
> (2) The trustee must refuse or neglect to take proceedings,
> (3) The creditor must apply to the court for an order authorizing it to take proceedings in its own name,
> (4) Notice of the contemplated proceedings must be given to the other creditors,
> (5) The trustee must assign and transfer the claim to the creditor.

With respect to those five conditions, Seaton, J.A. commented at p. 479:

> These are not just procedural steps. The assignment is essential - it is the foundation for the action. Clearly each of the other steps must precede the assignment.

[9] This reasoning differs from that in *Imprimerie* Canadienne Gazette v. Turcotte (1991), 50 Q.A.C. 152 (Que.CA), where the Quebec Court of Appeal approves its earlier decisions requiring that the pursuing creditor must satisfy two conditions precedent: first, to ask the trustee to take proceedings, and second, if the trustee refuses, to obtain the Court's authorization. Fish, J.A. states at p. 156-7:

> Case law also favours the position that the permission of the inspectors is not required under s. 38(1). As mentioned earlier, this court has set out two conditions precedent for an action under s. 38: failure or refusal of the trustee to take an action when requested to do so, and permission of the court. There is no mention, as a further

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requirement, that the inspectors authorize the proceeding: see **Bank of Montreal v. Elliott** and **Manifattura Lane Gaetano Marzotto**, supra.

[10] I approach this issue in two stages: firstly, does the section require that the notice be given before the action is commenced; and, secondly, if it does, is it a condition precedent or merely a procedural irregularity which can be cured?

[11] The Chambers Judge did not deal squarely with the jurisdictional issue of notice, but certainly took a purposive approach to interpretation of the section. He found that the intention of s. 38 in requiring notice, was to preclude any opportunity for preference of one creditor over others, which he satisfied by the terms of his order. Following the application to vary his order, the Chambers Judge stated:

> Five creditors have agreed to participate and will join in sharing the costs and potential benefits. They are not precluded from joining even if the notice was given after the action was commenced and after the limitation period has expired. The cause of action is affected by the limitation period. The cause of action has not been altered, nor have any parties been added to the cause of action that would cause difficulties. They are not prejudiced by lack of notice before the statement of claim was issued. The policy objective of section 38, to preclude an opportunity for preference of one creditor over others, is not frustrated. It must be noted that if the Plaintiffs had failed to commence the action immediately then the other creditors would have been prejudiced. All creditors would have lost the opportunity to bring the action forever.
>
> (A.B. 91)

[12] The general rule of interpretation of the **Bankruptcy Act** has been commented on specifically by the Supreme Court of Canada in *Mercure v. Marquette & Fils Inc.,* 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547, at p. 556 where it is stated:

> Before going on to another point it is perhaps not inappropriate to recall that the **Bankruptcy Act,** while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it. It seems to me that appellant is urging the Court to so interpret it.

[13] Similarly, in *Re Andrew Motherwell of Canada Ltd.* (1924), 55 O.L.R. 294 (Ont.S.C.) the Court commented on the interpretation of the predecessor to the present s. 38, and stated at p. 298:

> Any interpretation to be given to the meaning and scope of sec. 35 should be a liberal one, and not a construction that would debar a creditor, if he is prepared to undertake the risk, of the right to proceed for his own benefit.

[14] What then is the purpose of section 38? In my view, its primary purpose is to ensure that the bankrupt's assets are preserved for the benefit of the creditors. It provides the mechanism for creditors to proceed with an action when the trustee refuses or fails to act; thereby ensuring that assets of the bankrupt (which may otherwise go unrecovered) are available to creditors willing to finance the litigation.

[15] The secondary purpose, relating to notice, is to make sure the section operates fairly. While it is fair that those parties willing to accept the risks and costs of litigation receive a preference in terms of recovering their losses, the right to that preference must be shared with all creditors. To ensure that no creditor receives an unfair advantage over another, the section requires that notice be given to all other creditors. The interpretation of the requirement of notice should be approached with this distinction, and purpose, in mind.

[16] It is necessary to address the meaning of the words "...the creditor may obtain an order...on notice being given the other creditors of the contemplated proceeding..." in s. 38(1). There appear to be three alternative interpretations:

(1) "contemplated proceeding" refers to the application for a s. 38 order, and therefore notice to the creditors of that application is required before the application for a s. 38 order is made;

(2) "contemplated proceeding" refers to the statement of claim, and "on notice" should be read to mean "after notice". This means that notice is required before the statement of claim has been issued;

(3) "contemplated proceeding" refers to that proceeding contemplated by the order (in this case the statement of claim), and while notice must be given, the timing of that notice is flexible. The reason for the phrase "contemplated proceeding" is because at the time the order is made the proceeding is only "contemplated". This interpretation would mean that the order may be obtained, but there will be a condition in the order to give notice and to do such other things as the court directs.

[17] At first blush, the first alternative appears to technically fit best with subsections 38(2) and (3). Section 38(2) provides that "...on the order being made...the trustee shall assign and transfer to the creditor..." all his interest in the action. Section 38(3) then provides that the creditor is entitled to the benefit of the proceeding to the extent of its claim and costs. Since the duty to assign occurs immediately on the making of the order, a strict reading would require that it is

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only the creditor that receives the assignment who would have an opportunity to participate. If that were true, notice would be required before the application so that those creditors who were interested in participating could be assignees.

[18] There is, however, authority to support the position that the application stage only requires notice to the trustee. Fish, J.A. in *Imprimerie Canadienne Gazette, supra,* dealt with this issue at p. 157, where he says:

> In **Re Parallels Restaurant Ltd.** (1988), 68 C.B.R. (N.S.) 266 (B.C.S.C), it was held that the issue under s. 20 (now s. 38), at least initially, is between the trustee and the pursuing creditor. Notice therefore does not have to be given to the defendant or to the other creditors until after the court order is made; nor is the trustee obliged to call a meeting of the creditors before deciding not to proceed with the action. See also: **Re Swerdlow** (1985), 57 C.B.R. (N.S.) 180 (Ont. S.C.); **Re Wagon Stop Inc.** (1979), 30 C.B.R. (N.S.) 63 (Ont. S.C.)

[19] In fact, the position taken by the appellants is the second alternative interpretation, namely, that notice is required before the statement of claim has been issued. As a matter of statutory interpretation, they argue the words "on notice being given" must be read "after notice being given", and cite *R. v. Arkwright,* 12 Adol.& E., N.S., 960, 966 as authority for the proposition.

[20] The respondents opt for the third interpretation, and say that the timing of the notice is not mandated by the section, and the requirements of the section are met by the judge providing for notice to the creditors, along with any other terms and conditions he sees fit, so that the objects of the Act can be met. In any event, they say the obligation is directory only, and not substantive, and can be cured.

[21] The Alberta Court of Appeal commented on the issue of notice in *Transamerica Commercial Financial Corp., Canada v. Computer Corp. Systems Inc.* 1993 ABCA 215 (CanLII), (1993), 10 Alta.L.R. (3d) 337, where the Court said at p. 340:

> ...no notice was given to the other creditors. To this day, it is not clear they know that the judge transferred away from them at least some of the fruit of the litigation. They were entitled to notice. It is no answer to say it was a better deal than any other offer. They should decide, or at least have a chance to be heard on the point. That is why s. 38 requires notice to the creditors. It is at least equally vital that they know of a proposed assignment to a shareholder.

While this quote is helpful on the importance of notice, I do not read it as demanding that notice occur prior to commencement of proceedings as long as creditors' rights are preserved.

[22] On a strict interpretation, I acknowledge that both alternatives (2) and (3) present difficulties because s. 38(2) and (3) appear to suggest that only the creditor who receives the assignment would obtain the benefit. In my view, that is far too narrow an approach. The judge can, as he did in this case, provide for one creditor to receive the assignment on terms and conditions that allow others to join in and participate. Requiring notice before the statement of claim can lead to unreasonable, if not absurd, results. The definition of creditor under the **Bankruptcy Act** is a broad one and a bankruptcy may occur near the end of a limitation period, when ascertainment of an exhaustive list of creditors would not be possible. It is also easy to imagine a lawsuit proceeding, past its prescription date, and suddenly a "new creditor" appears. Would the section intend the action to be a nullity? I think not. It goes against the primary object of the Act to suggest that a failure of notice to creditors should defeat the cause of action. Notice is unrelated to the main purpose.

[23] I accept that the proper approach to interpretation is a purposive one, and the third interpretation best meets the purpose. It meets the objectives of preserving the bankrupt's assets, while still providing fairness to creditors.

[24] The defendants to the action have no interest in what creditors participate and share in the proceeds of the action. If the bankrupt has an asset in the nature of a cause of action, the defendants cannot be heard to complain if the suit is pursued on behalf of the bankrupt's estate, if done within the limitation period. They are not prejudiced because the cause of action exists, albeit in another person. The words "on notice being given to the other creditors of the contemplated proceeding" simply means that the other creditors must be given notice of the proceedings contemplated by the order. It must be a condition contained within the order. A judge can address, having regard to all the circumstances of the application, the timing of the notice and the means of participation in both the lawsuit and the proceeds. I agree with the trial judge's comments, quoted earlier, with respect to the ability of creditors to apply to participate subsequent to the commencement of the action.

[25] In the event I am wrong on the interpretation of and the timing of notice under s. 38, I would find that notice is not a condition precedent and could be cured if necessary. I recognize this appears to be contrary to the decision in *B.N.R. Holdings Limited v. Royal Bank of Canada, supra.* However, in that case the Court was dealing with a fact situation where the action was commenced without an order under s. 38, and the Court ruled on whether the action could be saved by the issuance of an order under s. 38 *nunc pro tunc.* Any discussion on the issue of notice to the creditor is *obiter dicta.* The case was not dealing with the interpretation of the notice provision or the timing of notice, Thus a provision in the order for notice would suffice, if my interpretation is correct. In any event, I prefer the reasoning in

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Imprimerie Canadienne Gazette that there are only two conditions precedent to the commencement of proceedings. Firstly, failure or refusal of the trustee to act, and secondly, the court order under s. 38.

[26] Moreover, this is more consistent with the holding of the Supreme Court of Canada in *Traders Finance Corporation Ltd. v. Emilien Levesque,* 1960 CanLII 80 (SCC), [1961] S.C.R. 83, dealing with a similar provision. The Supreme Court, at page 87, said: "Cette obligation est une conséquence et non une condition du droit préférence et du droit de poursuivre pour l'exercer." The assignment of the action to the creditor is not a condition precedent to the action being brought, but a consequence of the order under s. 38. Thus, the creditor's right to carry on the action does not flow from the assignment by the trustee, but is a function of law upon the granting of the s. 38 order. Nor does it flow directly from notice. Notice is required to deal with the results of the order.

[27] In my view, if notice is required, it is merely procedural, and any irregularity can be cured. Section 187 of the **Bankruptcy Act** allows that procedural irregularities may be cured. Section 187(9) reads:

> (9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[28] No substantial injustice has been caused by the failure to give notice before the statement of claim was issued. The defendants are not prejudiced. If the action against them has merit, they are liable, and not entitled to any benefit directed solely for the protection of the creditors. The action was brought against the defendants in time and they suffer no substantial injustice. In addition, no creditor can be said to have been harmed. The judge has jurisdiction to impose whatever conditions may be necessary to do justice. In this case all creditors were given notice of the proceedings after the statement of claim was issued. No creditor has been precluded from joining the action in terms of contributing to the costs and sharing in the proceeds. The creditors could have suffered harm if the statement of claim had not been issued when it was, as the limitation period was about to expire. Any substantial injustice that may have occurred would, in any event, be curable by order under s. 187(11) of the **Bankruptcy Act** which allows the court "...to extend the time either before or after the expiration date..." for doing any act or thing for which the time is limited. Therefore the court could permit service of notice on the creditors after the statement of claim has been issued. But as all the creditors have already been notified in the proceeding, this step is unnecessary.

[29] In summary, the notice required by s. 38(1) need not be served prior to the commencement of the proceeding, and is most properly dealt with by the court when granting the order, to ensure that all creditors are provided with ample opportunity to participate in the action in such manner as the court directs. There is ample jurisdiction in section 38 for a judge to deal with all the issues required to do justice between creditors. Even if notice was required prior to issuance, it is not a substantive condition nullifying the statement of claim.

[30] The appeal is dismissed.

JUDGMENT DATED at EDMONTON, Alberta,
this 4th day Of July
A.D. 1994

Benefits belong to creditor - Sec. 38(3)

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

Trustee may institute proceeding - Sec. 38(4)

(4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.
R.S., 1985, c. B-3, s. 38;
2004, c. 25, s. 24(F).

Remuneration of Trustee

To be voted by creditors - Sec. 39

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39. (1) The remuneration of the trustee shall be such as is voted to the trustee by ordinary resolution at any meeting of creditors.

Not to exceed 7½ per cent - Sec. 39(2)
(2) Where the remuneration of the trustee has not been fixed under subsection (1), the trustee may insert in his final statement and retain as his remuneration, subject to increase or reduction as hereinafter provided, a sum not exceeding seven and one-half per cent of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid or satisfied.

Wasserman, Arsenault Limited v. Sone, 2002 CanLII 41494 (ON CA) - Questionable Excessive Trustee fees and Ability to Have Ct. Approve

Date:	2002-04-08
Docket:	C35525; C35555
Parallel citations:	33 CBR (4th) 145; 157 OAC 183
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DOCKETS: C35525 and C35555
COURT OF APPEAL FOR ONTARIO
WEILER, ABELLA and GOUDGE JJ.A.
B E T W E E N:

WASSERMAN, ARSENAULT LIMITED and THE SUPERINTENDENT OF BANKRUPTCY Applicants (Respondents) **- and -**	George Glezos and Juliane Park for the appellant Rumanek & Cooper Ltd. Graham F. Alloway and Calvin J. Ho for the appellant Canadian Imperial Bank of Commerce
MARSHALL BRYAN SONE; MARSHALL SONE RECEIVER & TRUSTEE LTD.; ANNE LYNN SONE; RUMANEK & COOPER LTD.; CANADIAN IMPERIAL BANK OF COMMERCE; THE ATTORNEY GENERAL OF CANADA; ROSENBERG, SONE; GEARY AND COMPANY LIMITED, TRUSTEE OF THE ESTATE OF ALLAN S. ROSENBERG, A BANKRUPT; OSLER, HOSKIN & HARCOURT; WARREN SHELLY SONE, MARSHALL BRYAN SONE and PAMELA NANCY SCHWARTZBERG AS EXECUTORS AND TRUSTEES OF THE ESTATE OF ABRAHAM SONE; WARREN SHELLY SONE,	Daniel R. Dowdall, Alex A. Ilchenko and James Tumbridge for the respondent the Guardian, Wasserman Arsenault Ltd. William J. Burden and John N. Birch for the respondent the Superintendent of Bankruptcy

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MARSHALL BRYAN SONE and PAMELA NANCY SCHWARTZBERG AS EXECUTORS AND TRUSTEES OF THE ESTATE OF DOROTHY SONE and CITADEL GENERAL INSURANCE COMPANY	)	
Respondents (Appellants)	)	
	)	1. Heard: February 7 and 8, 2002

On appeal from the order of Justice James M. Farley of the Superior Court of Justice dated December 15, 2000, reported at (2000) C.B.R. (4th) 153.

WEILER J.A.:

INTRODUCTION

[1] These appeals raise the issue of whether a trustee in bankruptcy may claim fees in excess of the tariff allowed for the summary administration of the estate of a bankrupt, and raise issues of priority amongst those claiming a fee for the administration of a bankrupt's estate.

BACKGROUND

[2] Farley J. determined five questions of law on a Rule 21 motion and these same questions form the basis of this appeal. While there are many factual issues between the parties, for purposes of the motion, an agreed statement of facts, as well as a compendium of materials, were provided for the assistance of the court. In order to provide context for the issues I will be discussing, it will be helpful to give a brief outline of some of the facts.

[3] In 1992 and 1993, the Office of the Superintendent of Bankruptcy ("Superintendent") found that Marshall Sone and Marshall Sone Receiver and Trustee Ltd. ("Sone") had made unauthorized withdrawals from the trust accounts of some of the bankruptcy estates under its administration resulting in shortfalls in those accounts. The Superintendent believed that Sone had converted those funds to his own use, and required that Sone cease further draws from the consolidated trust account ("CTA") with respect to the estates under summary administration. (The CTA is a trust account in which the funds from the summary administration of estates are pooled in one account. In ordinary administration estates, the trustee is required to open a separate bank account for each estate.) The Superintendent and Sone agreed that Sone would surrender his trustee's licence in November 1994 and, in the interim, would seek another trustee to work with him to supervise and complete the administration of the bankruptcy estates. The professional fees generated from work on the estates were to be applied to offset the shortfalls in the trust accounts. It was recognized, however, that the ongoing operations of Sone required funding to ensure the practice would not shut down and the estates would be administered. Consequently, the Superintendent permitted Sone to withdraw money from the CTA to cover overhead expenses.

[4] In May 1994, Rumanek and Cooper ("Rumanek") agreed to act as joint trustee of the estates being administered by Sone ("the Sone estates") in exchange for a portion of Sone's fees, and this agreement was approved by the Superintendent. When Sone did not complete administration of the estates within the time envisaged, Rumanek began paying the office and overhead expenses of Sone's staff who were engaged in administering the estates. Rumanek was appointed sole trustee by court order of Houlden J. in December 1995. At the time, Houlden J. allowed Rumanek to make a withdrawal on account of disbursements and expenses for administering the Sone estates in the amount of $120,000 from the ordinary trust accounts and the CTA. There is an issue as to whether this interim withdrawal by Rumanek and the permitted withdrawals of Sone are to be deducted from any fees due as trustee.

[5] While acting as sole trustee, Rumanek encountered numerous difficulties that caused it to spend a great deal of time on the Sone estates. The trustee's fees for the summary administration of estates are governed by a tariff which has a ceiling. This is not the case with ordinary estates. The fees of ordinary estates are subject to approval by the inspectors appointed at the first meeting of creditors and taxation by the court. In 1996, Rumanek obtained an order from the Master allowing it to convert 545 summary administration estates to ordinary estates. The effect of converting the estates was to potentially allow Rumanek to charge a higher fee.

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Once the administration of an estate is complete, the trustee submits for review by the Official Receiver a draft Statement of Receipts and Disbursements that includes the fee to be charged. The Official Receiver then issues a "letter of comment" upon the draft Statement. Unless the Official Receiver indicates that taxation is necessary, once any other issues in the letter of comment are completed, the trustee proceeds to discharge. Upon discharge, the trustee is allowed to draw from its CTA an amount equal to the balance of the fees provided in the approved Statement of Receipts and Disbursements. Rumanek was of the opinion it was not receiving timely letters of comment from the Official Receiver. Rumanek sought and obtained an order from the Master that the requirement of "comment" by the Official Receiver on the trustee's accounts with respect to 20 estates be waived.

[6] The orders converting the 545 estates from summary to ordinary administration, and the order waiving the requirement of the Official Receiver's approval of its fees on the 20 estates, were set aside on appeal in May 1999.

[7] Rumanek was losing money badly on the administration of the estates. Consequently, it asked to be discharged for cause as trustee pursuant to s. 41(2) of the *Bankruptcy and Insolvency Act* (BIA), and this discharge was granted in May 1997. The Superintendent took control of the estates and, after a period of interim guardianship, Howard Wasserman was appointed guardian of the estates in February 1998. The firm Wasserman, Arsenault ("Wasserman") was appointed guardian in August 1998. Wasserman made an agreement with the Superintendent of Bankruptcy that the Superintendent would pay it a specified amount. The Superintendent is subrogated to Wasserman's claim for its fees on the estates under its administration.

[8] In July 1998, fourteen months after obtaining a discharge as trustee, Rumanek brought a motion seeking a declaration that it is entitled to payment of extraordinary expenses and increased fees totalling in excess of $1 million in administering the Sone estates. Rumanek also asserts that it is entitled to a first charge against the funds and any other assets in the Sone estates. In addition, Rumanek sued the Superintendent in Bankruptcy alleging damages for fraud and, in the alternative, claimed declaratory relief, namely fees and expenses, for work allegedly performed at the request of the Superintendent. Rumanek then sought court approval to bring the action *nunc pro tunc*. In May 1999, Blair J. dismissed Rumanek's motion insofar as the allegations of fraud were concerned against the Superintendent without prejudice to the motion being revived on proper affidavit evidence by Mr. Rumanek. Subsequently, Blair J. imposed a time limit of November 15, 1999 to bring the motion for leave to sue the Superintendent for fraud. Rumanek did not pursue the matter. Blair J. allowed the claim for fees and expenses against the Superintendent to proceed and it is still outstanding.

[9] In addition to Rumanek's claim for fees against the estates, the Guardian's administration was further complicated by certain third party claims to the CTA which ultimately came to an end as a result of a claims barring process. This is a process whereby the Guardian advertises for any claims to the CTA and, if no such claims are made by a certain date, the court issues an order barring any subsequent claims against the CTA or the Guardian. No new claims emerged. As a result, the only claims to the CTA are those of the Guardian, Rumanek and Sone as well as Sone's banker, CIBC. A brief explanation respecting the claim of CIBC is necessary at this point.

[10] At the same time as Houlden J. dealt with Rumanek's motion to withdraw funds from the CTA, he had before him a motion by Sone's banker, CIBC, to withdraw $71,000 from the CTA. CIBC's position is that it was not informed of the conservatory measures instigated by the Superintendent and continued to finance Sone's operating expenses to the extent of over $71,000. In December 1995, CIBC brought an application before Houlden J. to draw $71,000 in compensation for the expenses it had incurred in allowing the continued administration of the Sone estates. This application was heard at the same time as Rumanek's. Houlden J. ordered that CIBC be entitled to draw $71,000 as reimbursement for the expenses it had incurred, but later ordered that the money be returned, holding that CIBC could renew its application for payment upon proving the expenses. CIBC reapplied and this application was heard in September 1999 by Blair J.

[11] CIBC took the position before Blair J. that the effect of the orders of Houlden J. was to determine its entitlement to the $71,000 on the merits, subject to the production of vouchers to satisfy an accounting. Counsel for the Superintendent, the Guardian, and Rumanek took the position that all CIBC could do was renew its application on the merits at which time all issues "including the issues of priority regarding other claimants" would be open for determination, and that Blair J. could not interpret the order of another judge. In his endorsement, Blair J. stated: "Highly experienced judge that he [Houlden J.] was in this area (and many others) I am satisfied that if he had meant to expose CIBC to the priority contests he would have said so. He did not." In his order Blair J. allowed CIBC to apply for payment of the $71,000 on production of vouchers, but stated that "[t]he issue of priority, however, is not open for determination." The Superintendent appealed the order of Blair J. This court

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was not persuaded that Blair J. was in error, and dismissed that appeal on June 6, 2000. On the appeal before us, there is an issue as to the interpretation of the order of Blair J.

[12] To resolve some of the outstanding legal issues expeditiously, Rumanek and CIBC brought a Rule 21 motion before Farley J. based on an agreed statement of facts. He dealt with five questions, each of which is the subject of appeal. I will deal with these questions in the course of addressing the issues raised by the appellants.

THE FIVE QUESTIONS OF LAW AND THE ANSWERS OF FARLEY J.

[13] The five questions of law and the answers of Farley J. with respect to each of them are as follows:

Q.1. Does the Court have jurisdiction upon the taxation of a summary administration bankruptcy to allow an amount for fees which exceeds the tariff of fees for summary administration estates stipulated under the Bankruptcy and Insolvency Act ("BIA") and Bankruptcy and Insolvency Rules (the "Rules"). If so, what are the principles which must be applied in allowing such excess?

A.1. The court does not have jurisdiction to allow fees in summary administration bankruptcy estates which exceed the tariff.

Q.2. Is there any jurisdiction for the Bankruptcy Court, the Superintendent of Bankruptcy (the "Superintendent") or a Trustee to withdraw or authorize the withdrawal of amounts from the estate funds held with respect to a summary administration estate for the payment of any amount other than a trustee's proper taxed fees and disbursements related to administration of the estate in question. Specifically, must the withdrawals made by Rumanek & Cooper Ltd. ("R&C") from the consolidated trust account ("CTA") maintained with respect to the summary administration bankruptcy estates formerly administered by Sone with the approval of the Superintendent and/or the Court after the commencement of R&C's involvement in this matter be credited against amounts which may be found on taxation to be due to R&C or Sone for outstanding fees and disbursements related to the administration of such estates? If such withdrawals are allowed what are the principles which govern such withdrawals and how are they to be accounted for? Should the amount of $71,000 ordered by the Court to be paid to CIBC, if proven, be treated in any manner different from other withdrawals from the CTA?

A.2. The Court and the Superintendent do not have the jurisdiction to authorize the payment of funds from summary administration bankruptcy estates to cover items other than tariff fees and disbursements; there can be no extra compensation for overhead or other costs of a trustee. Specifically, the withdrawals by R&C from the CTA with the approval of the Superintendent or the court must be credited against the amounts which may be found on taxation to be due to R&C.

Q.3. Can any party claim payment out of the CTA for fees and disbursements payable to a Trustee other than those fees and disbursements directly related to administrating the Summary Administration Estates? Specifically, can any party claim payment out of the CTA for fees and disbursements arising out of matters such as the administration of the ordinary administration bankruptcy estates, or for the cost of dealing with ordinary or extraordinary administrative requests by the Superintendent or others? If such payments are allowed, what are the principles which govern the making of these payments and how are the payments to be allocated among the bankruptcy estates?

A.3. A trustee in bankruptcy cannot claim payment out of the CTA for fees and disbursements other than those related to such summary administration estates.

Q.4. Do the fees and disbursements of the Guardian with respect to its administration of the Summary Administration Estates which are under its administration have priority over the claims of other fee claimants against the CTA by reason of s. 136(1)(b)(i) of the BIA or on some other basis? If so, to what extent do the Guardian's fees and disbursements have priority? If not, what are the principles which should guide the Registrar in determining priority of payment among the competing fee claimants?

A.4. The claims of the Guardian have priority over the fee claims of R&C in the open bankruptcy estates pursuant to the BIA; this is not a retroactive application of the Act since fees and disbursements are only determined at the time that an estate is closed.

Q.5. If the amount in the CTA is insufficient to pay both the proper fees and disbursements payable out of the CTA fund and also the proper dividends that ought to be paid to creditors in the Summary Administration Estates which are not fully administered, how should the shortfall be allocated as between the fee claimants and the creditors?

A.5. Sone and then R&C must bear the burden of any shortfall in the CTA caused by excessive draws for fees and disbursements. With respect to the CIBC issue, it takes through Sone. The $71,000 payable to the CIBC cannot reduce the amount to which creditors in the estates are entitled to receive. It was never before Blair J. and the Court of Appeal that they were dealing with a shortfall situation.

[14] For the reasons that follow, I would uphold the decision of Farley J. and dismiss these appeals, with one clarification. In question five, Farley J. was asked to decide how any shortfall should be divided between fee claimants and creditors. I agree that the fee claimants must bear the loss. I also agree that the Guardian has

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priority over the fee claimants, including the C.I.B.C. Farley J. was not asked to decide how any shortfall should be further divided. To the extent that his reasons appear to do so, they should be considered *obiter*.

SUBMISSIONS AND ANALYSIS

The Rumanek Appeal

Issue #1: Did Farley J. err in holding that the Superior Court of Justice in Bankruptcy does not have the inherent jurisdiction to allow an amount for fees of a trustee in bankruptcy such as Rumanek which exceeds the tariff of fees for summary administration estates contemplated by s. 156 of the BIA and Rule 128 of the BIA General Rules?

[15] Section 156 of the BIA and Rule 128 are as follows:

156. Fees and disbursements of trustee – The trustee shall receive such fees and disbursements as may be prescribed.

128. (1) The fees of the trustee for services performed in a summary administration are calculated on the total receipts remaining after deducting necessary disbursements relating directly to the realization of the property of the bankrupt, and the payments to secured creditors, according to the following percentages:

(a) 100 per cent on the first $975 or less of receipts;
(b) 35 per cent on the portion of the receipts exceeding $975 but not exceeding $2,000; and
(c) 50 per cent on the portion of the receipts exceeding $2,000.

(2) A trustee in a summary administration may claim, in addition to the amount set out in subsection (1),

(a) the costs of counselling referred to in subsection 131(2);
(b) the fee for filing an assignment referred to in paragraph 132(a);
(c) the fee payable to the registrar under paragraph 1(a) of Part II of the schedule;
(d) the amount of applicable federal and provincial taxes for goods and services; and
(e) a lump sum of $100 in respect of administrative disbursements.

(3) A trustee in a summary administration may withdraw from the bank account used in administering the estate of the bankrupt, as an advance on the amount set out in subsection (1),

(a) $250, at the time of the mailing of the notice of bankruptcy;
(b) an additional $250, thirty days after the date of the bankruptcy; and
(c) an additional $250, four months after the date of the bankruptcy.

(4) Subsections (1) to (3) apply to bankruptcies in respect of which proceedings are commenced on or after September 30, 1997 and the accounts are taxed on or after April 30, 1998.

[16] Rumanek submits that Farley J. erred in holding that the Superior Court of Justice in Bankruptcy does not have the inherent jurisdiction to allow an amount for fees of a trustee in a bankruptcy in excess of this tariff schedule.

[17] Section 183(1) of the BIA gives the Superior Court "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings" authorized by the Act. Rumanek submits that, as a court of equity, the Bankruptcy Court possesses inherent jurisdiction to grant the equitable relief to create a charge in favor of Rumanek for fees and expenses incurred in the administration of the trust assets that are in excess of the tariff. In support of its submission, Rumanek relies in particular on *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* reflex, (1993), 106 D.L.R. (4th) 132 (Ont. C.A.). In that case, a receiver and substitute trustee appointed by the Registrar of Mortgage Brokers was granted a charge on the trust assets that had benefited from the work of the receiver, notwithstanding the questionable statutory authority for the receiver's appointment. Had the charge not been granted, the receiver could have been left without any means of reimbursement for its work. The instant case is thus distinguishable on several points, including the important fact that, unlike the receiver in *Matrix*, Rumanek's reimbursement is governed by the statutory scheme for a trustee in bankruptcy as set out pursuant to the BIA and the BIA General Rules.

[18] In *Re Aue; Re Beckles; Re Blandsford; Re Borst* (1984), 50 C.B.R. (NS) 186 (Ont. S.C.), in an appeal from the registrar's order disallowing a trustee's claim for fees in excess of the tariff for "extraordinary services" in a summary administration estate, the court held that the trustee's fees and disbursements must be limited in accordance with the *Bankruptcy Act* to those prescribed in the Bankruptcy Rules applicable to such estates. At p. 188 Catzman J. held that submissions in support of allowing fees and disbursements for the trustee in excess of the tariff fail to "address the fundamental question of the court's lack of jurisdiction to accomplish that objective which can, in my view, only properly be achieved through amendment of the present tariff provisions, not through their disregard by court officers who are charged with the responsibility to superintend their observance." In my opinion the decision of Catzman J. is dispositive of the issue.

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[19] Rumanek submits, however, that because the court has a discretion to reduce the trustee's fees below the tariff, it must have a discretion to increase them above the tariff. In *Re Vanderbank* reflex, (1995), 42 C.B.R. (3d) 112, (Que. S.C.), the parties agreed that the Registrar and the court kept their discretion in equity to reduce the fees prescribed by the tariff. In that case, the court followed the decision of Henry J. in *Re Frustaglio* (1985), 56 C.B.R. (NS) 158 (Ont. H.C.J.), where he reduced the fees of a trustee who had deliberately delayed submitting his account in order to take advantage of the higher tariff in the new rules. Following the principle in *Frustaglio*, the court in *Vanderbank* held that it is only after a trustee has fulfilled all of the objectives under the BIA of liquidation, distribution and rehabilitation of the bankrupt that he is entitled to look to the tariff for compensation. Because the trustee had not administered the estate in accordance with the Act and his duties, his compensation was reduced.

[20] I would reject the submission that there is a discretion to increase the fees above the tariff because there is discretion to reduce them. Section 156 states that the trustee "shall receive" prescribed fees. The mandatory use of the word "shall" is indicative of the intention of the BIA that the tariff is the maximum that can be allowed. As pointed out by Farley J., although the Superior Court of Justice in Bankruptcy does possess equitable jurisdiction, "that does not confer on this Court the ability, capacity, or jurisdiction to do something not allowed by the BIA." By allowing only prescribed fees, s. 156 excludes any fees not prescribed by regulation. No fees other than the tariff in Rule 128 are prescribed. Former Bankruptcy Rule 117 specifically provided that amounts in excess of the tariff could be awarded if there were extraordinary services. Rule 117 has been repealed. This supports the interpretation that the tariff establishes the maximum fee that can be allowed.

[21] Also supportive of this interpretation is the Policy Statement of the Superintendent of Bankruptcy's Programs, effective April 1, 1994. It states that the duties of the Office of the Superintendent have been expanded with the passage of the amendments to the BIA. It specifies that, if the statutory duties of the trustee are not fulfilled within the time limits contemplated under the Act, or at all, the fees that the trustee charges should be reduced, and letters of comment to that effect would be issued. No reference is made to increasing fees.

[22] The trustee's fees are based on and limited by the receipts of each estate under summary administration; they cannot exceed those receipts no matter how much extra work has been done. There is a need for a cap on the fees a trustee can charge because the summary administration of estates is a low value, high volume business. On the other hand, the compensation awarded to a trustee under the tariff is for fulfilling the requirements of the work to be done in administering the bankrupt's estate. If the work has not been done, the Official Receiver can require in its letter of comment, upon the statement of receipts and disbursements submitted by the trustee, that the trustee tax its fee claim. There is no mechanism provided to allow a trustee to have a taxation on a summary administration of a bankrupt's estate in order to increase fees. This structure further reinforces the conclusion that the tariff amount may be reduced but not increased.

[23] The determination of this issue effectively determines the answers to issues 2, 3, and 4 raised by Rumanek on appeal. I will, however, briefly address each of these issues.

Issue # 2: Did Farley J. err in holding that the Superior Court of Justice in Bankruptcy and the Superintendent do not have the inherent jurisdiction to authorize the payment of amounts from the estate funds held with respect to a summary administration estate for the payment of any amount other than a trustee's fees and disbursements related to the administration of the estate in question?

[24] Section 25(1.3) of the BIA enables a trustee to withdraw money from the trust account on application to the court. By way of exception, the trustee may withdraw money for the payment of dividends and charges incidental to the administration of the estate without court approval and without the permission in writing of the inspectors.

[25] This section contemplates the payment of money from summary administration estate funds for amounts other than a trustee's fees and disbursements. What the section does not say is whether amounts withdrawn for the trustee's expenses must be deducted from the compensation to which the trustee is entitled. Rumanek submits that the amounts that Sone and Rumanek were permitted to withdraw from the CTA for overhead by the Superintendent and by Houlden J. should not be deducted from the fees that may be found to be due to Rumanek.

[26] I have already held that there is no jurisdiction to award fees for the administration of summary estates in excess of the tariff. To allow overhead and operating expenses in addition to a trustee's fees would enable the trustee to do indirectly what it cannot do directly. A person who receives payment for services performed does not receive payment, in addition, for the overhead and operating expenses incurred in earning those fees. In a similar vein, Rumanek is not entitled to charge as a disbursement, the services of Sone's employees for clerical

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work such as bookkeeping, rendering accounts and collection of estate moneys. See *Re Bryant Isard* (1923), 4 C.B.R. 41 (Ont. S.C.).

[27] The "draws" from the CTA authorized by the Superintendent and by Houlden J. meant that the freeze imposed by the Superintendent against the withdrawal of amounts on account of fees from the CTA was temporarily lifted to allow certain specific draws to be made. The order made by Houlden J. and the authorization of the Superintendent did not, however, change the character of the money drawn out so as to make it additional compensation.

Issue # 3: Did Farley J. err in finding that the requests for services emanating from the Superintendent which were directed at Rumanek did not constitute mandatory directives pursuant to s. 5(5) of the BIA?

[28] Section 5 of the BIA sets out the duties and powers of the Superintendent of Bankruptcy. Paragraph 5 of that section obliges every person to whom a directive is issued by the Superintendent under para. 4(b) or (c) to comply with the directive. Paragraph 4(b) requires a trustee to keep such records and to provide the Superintendent with such information as the Superintendent may require. Paragraph 4(c) enables the Superintendent to give directives in relation to the powers, duties and functions of trustees. While acknowledging that the Superintendent may have made requests of Rumanek for information, Farley J. held that these requests were not mandatory directives. In any event, to the extent that the requests related to the ordinary administration of the estates, the requests for information were covered by the tariff. To the extent that the requests were extraordinary, they did not relate to the regular administration of the estates and Rumanek could look to its lawsuit against the Superintendent. In my opinion, Farley J. did not err in holding that the requests for information were not mandatory directives.

Issue # 4: Did Farley J. err in finding that a trustee in bankruptcy such as Rumanek cannot claim payment out of a consolidated trust account in respect of the costs of extraordinary services performed pursuant to requests by the Superintendent?

[29] The Guardian's position is that Rumanek is in effect asking to be appointed receiver *nunc pro tunc*. It was not a receiver. It was a trustee. Farley J. recognized this and stressed in his reasons that Rumanek was a trustee. If Rumanek was performing services not ordinarily performed by a trustee at the request of the Superintendent in Bankruptcy, Rumanek should have sought a further appointment other than trustee. Alternatively Rumanek has its action against the Superintendent.

Issue # 5: Did Farley J. err in finding that the doctrine of laches applied to Rumanek's claim for fees in addition to the summary administration tariff, and to its claim against the CTA for fees and disbursements for extraordinary services performed in response to directives by the Superintendent?

[30] The doctrine of laches is an equitable doctrine. Two circumstances relevant to whether or not it should be applied are the length of the delay, including any explanation for the delay, and whether there would be any prejudice if the relief requested were now to be granted: *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 at 239-40; *K.M. v. H.M.,* 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6 at para. 96.

[31] At the time that Rumanek sought to be discharged as trustee for cause, Rumanek did not apply to be treated differently than an ordinary trustee. During the delay of 14 months before it came forward, the Guardian closed many files. There appears to be no explanation for the delay. If the claim of Rumanek is allowed then the creditors in the estates whose files are not closed will have to bear a greater burden than those in the estates that have been closed. In argument this was described as the "cross-collateralization issue". Rumanek cannot take money out of the CTA for estates whose funds are not in the trust account but which have all been paid out.

[32] Instead of claiming all of its extra fees against the estate files that are not closed, Rumanek proposes to claim a proportionate amount. This would still place the creditors in the estates that have not been closed in a worse position than the creditors in the estates that have been closed. Rumanek has not offered any rational reason that would justify this result. Rumanek knew the extent of the work it had done at the time it was discharged. It is too late now for Rumanek to effectively recharacterize its position as other than trustee in bankruptcy. Even if there were discretion in the court to award fees in excess of the tariff, it would be inequitable to award them now.

Issue # 6: Did Farley J. err in finding that Wasserman is entitled to priority over the funds in the CTA as a person acting under a direction made under section 14.03(1)(a) of the BIA as provided for in s. 136(1)(b)(i) of the BIA? In particular, did Farley J. err in applying the newly amended section 136(1)(b)(i) of the BIA to this case, notwithstanding the argument that the application of that section amounted to a retrospective application of legislation which defeated Rumanek's vested right to priority?

[33] Section 136(1)(b) subordinates claims for fees and expenses of a trustee to those of a person acting under a direction made by the Superintendent under section 14.03(1)(a). These sections provide, in part:

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14.03 (1) The Superintendent may, for the protection of an estate in the circumstances referred to in subsection (2),
(*a*) direct a person to deal with property of the estate described in the direction in such manner as may be indicated in the direction, including the continuation of the administration of the estate;
...
136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
...
(*b*) the costs of administration, in the following order,
(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(*a*),
(ii) the expenses and fees of the trustee, ...

[34] The appellant submits that Farley J. erred in applying s. 136(1)(b) for two reasons which I will deal with summarily. The first reason is that Wasserman has not incurred fees and expenses because its fees and expenses are being paid by the Superintendent. The fact that the Guardian has an agreement to be paid by the Superintendent does not diminish its right to claim fees under s. 136(1)(b). The agreement of the Guardian with **the Superintendent for the payment of fees, while subrogating the Superintendent to the Guardian's recovery of fees and disbursements out of the bankrupts' estates, is a financing device to allow the administration of the** estates to move forward.

[35] The appellant alleges, secondly, that Farley J. applied s. 136(1)(b) retroactively. Section 136(1)(b), which gives priority to the fees of a person acting under the direction of the Superintendent over the trustee, came into force on September 30, 1997. Prior to this amendment the expenses of a trustee had first priority. Rumanek submits that on a number of files its work was substantially completed, with only certain procedural or administrative steps remaining, and that it had a vested right to payment for these files prior to the coming into force of s. 136(1)(b). Accordingly, Rumanek submits that it is entitled to payment on these files in priority to the Guardian, and that Farley J. erred in not recognizing this.

[36] The commentary in *Dreidger on the Construction of Statutes*, 3rd ed. (1994) at p. 517 is helpful in dealing with this submission. It states:

Legislation clearly is retroactive if it applies to facts all of which have ended before it comes into force. Legislation clearly is prospective if it applies to facts all of which began after its coming into force. But what of on-going facts, facts in progress? These are either continuing facts, begun but not ended when the legislation comes into force, or successive facts, some occurring before and some after commencement. The application of legislation to on-going facts is not retroactive because, to use the language of Dickson J. in [*Gustavson Drilling (1964) Ltd. v. M.N.R.* 1975 CanLII 4 (SCC), [1977] 1 S.C.R. 271], there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date. The application is prospective only to facts in existence at the present time. Such an application may affect existing rights and interests, but is not retroactive.

Legislation that applies to on-**going facts is said to have "immediate effect". Its application is both immediate and general: "immediate" in the sense that the new rule operates from the moment of commencement displacing whatever rule was** formerly applicable to the relevant facts, **and "general" in the sense that the new rule applies to all relevant facts,** on-going as well as new.

[37] I agree with Farley J. that these files should be viewed as a continuing fact situation. Rumanek ceased its work prior to the enactment of s. 136(1)(b), but the files were not complete by that date. They were on-going in varying degrees. The Guardian was appointed to complete the administration of these files. Certificates of completion had not been filed. Strictly speaking, there is no entitlement to compensation and hence no vested right to payment until a certificate of completion has been filed. It is at the time of payment that priority is determined and, hence, the application of s. 136(1)(b) does not have retrospective effect. Rumanek does not have a vested right to any fees or disbursements arising from the completion of the Sone estates by the Guardian. Farley J. did not err in his appreciation of s. 136(1)(b).

Issue # 7: Did Farley J. err in finding that Rumanek should bear the burden of any further shortfall in the CTA after any shortfall is borne by Sone?

[38] A shortfall in the CTA could only happen because a fee claimant received estate funds to which it was not entitled. If there was only one trustee, Sone, it would be clear that the loss must be borne by Sone. The creditors would be entitled to receive the dividends they would otherwise have received if Sone had not made unauthorized withdrawals.

[39] As between the creditors and the Guardian, the Superintendent has instructed the Guardian that, should the CTA be insufficient to pay both the dividends and the proper fees of the Guardian, the Guardian should adjust

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its fee claim to the extent necessary to allow creditors to receive the dividends that they would otherwise have received but for the shortfall.

[40] Farley J. held that as between the creditors and Rumanek, Rumanek should bear the shortfall.

[41] Rumanek alleges that it was not advised by either Sone or the Superintendent of the extent of the problems with the estates, including the extent of the shortfalls in the trust accounts, the concerns regarding Sone's integrity, and the agreement with Sone that he surrender his trustee licenses. Rumanek submits that its involvement as sole trustee was continued at the request of the Superintendent.

[42] Rumanek's claim that it did not know of the seriousness of the irregularities in the bankruptcy estates is an issue between Rumanek and the Superintendent that will be determined in the action instituted by Rumanek. The issue of a shortfall is an issue between Rumanek and the creditors in the bankruptcy estates. Rumanek was not compelled to take on the administration of the estates. This was a business decision on its part. The Superintendent did not oblige Rumanek to continue as trustee. If Rumanek had applied for directions or its discharge at the point when it recognized the serious nature of the irregularity in the CTA, the terms on which Rumanek could have finished the work might have been resolved. As between the creditors and Rumanek, the creditors should not be disadvantaged. Farley J. did not err in holding that the burden of any further shortfall in the CTA, after Sone, must fall secondly upon Rumanek.

[43] Conclusion for the Rumanek Appeal

[44] For the reasons given, I would dismiss Rumanek's appeal.

The CIBC Appeal

[45] The CIBC appeal raises two issues:

- *Did Farley J. err in finding that CIBC takes only through Sone and in finding that priority to the $71,000 granted by orders of Justice Houlden December 15, 1995, and of Justice Blair September 24, 1999, as affirmed by the Court of Appeal June 6, 2000 is only as to those involved in the fees and disbursements remuneration for the Sone bankruptcy estates?*
- *Did Farley J. err in finding that a shortfall situation was never before Blair J. and the Court of Appeal when they rendered their decisions September 24, 1999 and June 6, 2000?*

[46] CIBC argues that the payment of $71,000 was a payment to a third party in order to carry on the practice to administer the Sone estates. If successful, CIBC would then be a creditor and have priority over all the fee claimants including the Guardian. Farley J. held that any payments from the CTA were an advance on the trustees' fees. I would agree with him. CIBC is not a creditor.

[47] Blair J. determined that the CIBC claim was not to be subject to priority contests with the other fee claimants as of May 1997. This is not the same issue as who should bear the loss as between creditors and the fee claimants in the event of a shortfall. The latter issue is not an issue of priority and was not before Blair J. nor dealt with on appeal. Farley J. had the equitable jurisdiction to determine that, as between the unsecured creditors and those entitled to fees, CIBC was not a creditor but a fee claimant and, as such, should share in any shortfall. This decision is not inconsistent with that of Blair J. as to priorities and therefore the issues of *res judicata*, *stare decisis* and *issue estoppel* raised by CIBC are simply inapplicable in the circumstances.

[48] Other than confirming the Guardian's priority of payment under s. 136(1)(b) of the BIA, Farley J. was not asked to rank the fee claimants in terms of priority. The comment in his endorsement that CIBC takes through Sone is clearly *obiter*. It is trite law that an appeal is from the judgement of the court and not its reasons.

Conclusion for the CIBC Appeal

[49] The appeal of the CIBC is dismissed.

Released: APR 08 2002
KMW
Signed: "Karen M. Weiler J.A."
"I agree R.S. Abella J.A."
"I agree S.T. Goudge J.A."

Papick (Re), 2007 BCSC 818 (CanLII) - Contested Fees on Poorly Administered Proposal

Date: 2007-06-11
Docket: 07/0939
Parallel citations: 33 CBR (5th) 249
URL: http://canlii.ca/t/1rrpb

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Citation: Papick (Re), 2007 BCSC 818 (CanLII), <http://canlii.ca/t/1rrpb> retrieved on 2013-09-13
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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Papick (Re),*** 2007 BCSC 818

Date: 20070611

Docket: 07/0939
Registry: Victoria

In the Consumer Proposal
of
Sharon Marie Papick

Before: Registrar Bouck

Reasons for Decision

Appearing for Abakhan & Associates Inc., Administrators of the Consumer Proposal	R. Robinson
Appearing for the Office of the Superintendent of Bankruptcy (the "OSB", also referred to as the official receiver)	L. Vogt
Date and Place of Hearing:	May 3, 2007 Victoria, B.C.

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[1] At the request of the official receiver, the administrator applies for a taxation of its fees. The disbursements claimed are not in issue.

[2] The taxation is one of a series heard on this day, all initiated by a negative comment letter from the OSB. The OSB alleges that this and all other proposals were poorly administered. As a result, the administrator should not be entitled to any fees.

[3] In *Carr (Re)*, 2007 BCSC 816 (CanLII), 2007 BCSC 816, I discuss the general scheme for initiating and completing a Division II consumer proposal under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "*BIA*"). I will not repeat those comments except to observe that a proposal may be structured creatively, so long as it meets the requirements under s. 66 of the *BIA*.

[4] The proposal must be in a prescribed form but its content is deemed accepted unless modified at either a meeting of creditors or upon review of the court. The official receiver may direct such a meeting or review. Any creditor dissatisfied with the proposal's terms may also ask the administrator to convene a meeting.

[5] The proposal in this case was filed on January 28, 2004. The terms of the proposal include the following:

> 4. That the following payments be made to Abakhan & Associates Inc., the administrator of the consumer proposal, for the benefit of the unsecured creditors:
>
> That beginning on the date of the filing of the Proposal the debtor shall pay to the administrator an amount of $250.00 per month for twenty-six (26) months or such amount so that a total of $6,500.00 will be paid to the administrator within 26 months. [my emphasis]
>
> 5. That the administrator of the consumer proposal shall distribute the moneys received to the unsecured creditors in accordance with the following schedule:
>
> That one month after each anniversary date of this proposal the administrator shall pay to the unsecured creditors who have filed a valid proof of claim the appropriate dividends as regulated under the Bankruptcy and Insolvency Act of Canada.

And

> 7. That the proposal may include the following additional terms:
>
> (a) the creditors may appoint up to three inspectors responsible for the consumer proposal of the consumer debtor. The inspectors may have, in addition to any powers of inspectors under the Act, the power to:
>
> (i) receive any notice of default in the performance of a provision of the consumer proposal and waive any such default; and
>
> (ii) approve any amendment to the consumer proposal without calling a meeting of creditors, if the amendment would alter the schedule for and the amount of the payments to be made by the consumer debtor, but would not change the total amount to be paid.
>
> (b) such other terms as may be proposed.

[6] At the time of filing, the administrator opined that a proposal was more advantageous to the creditors as they would recover $.26 on the dollar while only $.05 on the dollar would be recovered in a bankruptcy.

[7] **The proposal was deemed accepted without the court's review of its terms.** Neither the official receiver nor any creditors raised concerns with respect to those terms.

[8] The proposal was to be completed by March 28, 2006.

[9] **According to the administrator's records, Ms. Papick made payments totalling $1,650 in 2004.** Three of these payments were for $250; others ranged from $100 to $500 each. In 2005, Ms. Papick made only one payment of $300. Thus, the total amount paid by the debtor was $1,950.00.

[10] If there is default under the proposal, the administrator may either apply to the court for an order annulling the proposal or issue a notice of deemed annulment. That notice is sent to both the creditors and the official receiver: s. 66.31 of the *BIA*. In this case, the administrator issued two such notices.

[11] The first notice was issued on September 23, 2005. **It states that the debtor was in "in default to the extent of at least three months of the following payments" and lists the months of January 2004 to August 2005 indicating whether** a payment was made or not. The notice states that the proposal was annulled effective September 23, 2005.

[12] A second notice was issued on July 5, 2006. In that notice, the administrator states that default occurred when payments were missed in March, April and May 2006. The notice states that the proposal was annulled effective July 5, 2006.

[13] According to the information before me, no payments were made by the debtor after February 2005.

[14] The administrator and the OSB share responsibility for the issuance of two notices.

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[15] In 2003, the administrator obtained a legal opinion in another matter which addressed the interpretation and application of a similarly worded payment clause. According to the opinion letter, no default could occur under the proposal unless or until the debtor failed to pay the total sum of $ 6,500 by the end of the twenty-six months. Ms. Papick could pay either the $250 or "such other amount", including $0, each month.

[16] The administrator provided the OSB with a copy of a legal opinion sometime before the first notice of deemed annulment was issued in this matter. The OSB disputed the notice. It took the position that in issuing the first notice, the administrator was not following its own "position or legal opinion". In a letter to the administrator issued February 16, 2007, the OSB says that it is not acceptable to rely on the legal opinion in some instances but to "disregard it" in others.

[17] The administrator obviously accepted the OSB's rejection of the first notice and carried on with the proposal.

[18] There is no information of what impact, if any, the two notices had on the creditors.

[19] The issue for me to determine is what impact the administrator's actions (or inaction) should have on its fees.

[20] Pursuant to Rule 129(1) of the *Bankruptcy and Insolvency General Rules* the proposal must provide for certain fees and expenses. Those fees include $750 payable to the administrator on the filing of the proposal and a second $750 payable on the approval or deemed approval of the proposal by the court.

[21] Under Rule 129(1) (c), the administrator is also entitled to 20% of moneys distributed to creditors under the proposal, payable on the distribution of those moneys. Thus, there would seem to be some incentive to the administrator to ensure the debtor's compliance with the proposal's terms.

[22] In this case, the administrator claims the "preparatory fees" of $1,500 plus 20% of $63.77 for a total remuneration of $1,512. 75. After accounting for taxes, statutory fees and disbursements, the creditors share proportionately in a dividend of just over $50.00.

[23] The OSB submits that fees should be reduced (or disallowed entirely) for several reasons: first, the proposal should never have been recommended; second, the administrator should have advised the creditors of missed payments and included a provision for such notice in the proposal; and third, the proposal should have been annulled well before September 2005.

[24] On this first point, I have some doubt as to whether, on taxation, the registrar should be revisiting the trustee's recommendation to accept the proposal. It may be a relevant consideration if there were some element of bad faith on the part of the administrator or certain information about the debtor's circumstances was missed. That is not the case here. I am reluctant to fault the administrator for a recommendation that was effectively accepted by both the official receiver and the creditors.

[25] Similarly, with respect to the inclusion of mandatory language requiring notice to creditors of missed payments, this could have been addressed by the official receiver upon the filing of the proposal. The *BIA* does not require such mandatory language in a proposal.

[26] On the third point, the OSB submits that the administrator should have made application to the court to annul the proposal. When the first notice of deemed annulment was issued, payments under the proposal were 14 months "in arrears". It makes this submission despite previously contesting the validity of the first notice of deemed annulment.

[27] Both the administrator and the OSB are guilty of taking inconsistent positions during the administration of the proposal. It is difficult to be critical of the administrator when the OSB agreed that there had been no missed payments by September 2005.

[28] The administrator is, however, deserved of some criticism. Regardless of its interpretation of the payment clause, the administrator failed in its duties under s. 66.251 of the *BIA*. The administrator in a proposal such as this one is required to give notice to the creditors and the official receiver if the debtor has suffered a change of circumstances which puts the proposal in jeopardy. The provision does not, however, require the administrator to apply to the court to have the proposal annulled.

[29] There is nothing in the material before me which explains the administrator's investigations or consultations with the debtor after the filing of the proposal. Absent some explanation, it appears that the administrator made little or no effort to monitor the debtor's performance of the proposal for the first 12 to 15 months.

[30] At the very least, the debtor's failure to make any payments over a four month period in 2004 should have alerted the administrator to a possible change in the debtor's circumstances. An investigation should have been conducted and, if appropriate, notice given to the creditors and the official receiver that the proposal might be in jeopardy.

[31] When the particular administrator (not Mr. Robinson) did review the debtor's payments, the first notice of deemed annulment was issued.

[32] The issuance of the first notice of deemed annulment might have been sufficient for the purposes of s. 66.251. However, that notice was withdrawn as a result of the OSB's position. The administrator does not appear to have considered whether a separate form of notice under s. 66.251 should have been issued.

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[33] The OSB must accept some responsibility for the muddled administration of this proposal. It was alerted to the missed payments in September 2005 but essentially told the administrator to carry on with the proposal.

[34] This does not absolve the administrator of its responsibilities. It still failed to investigate a possible changes of circumstances even before the first notice of deemed annulment was issued. It failed to adequately monitor the proposal after September 2005. This maladministration invites the registrar to consider a reduction in the fees claimed: *Nelson (Re)* [2006] O.J. No. 2812 (S.C.).

[35] In determining whether, and to what extent, a reduction is warranted, I must consider the objectives of this taxation: see *Re Hess* [1977] O.J. No. 1642 (H.C.J.).

[36] One objective is to ensure that the administrator receives fair compensation for its services.

[37] A second is to prevent unjustifiable payments for fees to the detriment of the creditors.

[38] A third objective is to encourage, rather than to discourage, efficient, conscientious administration of the proposal for the creditors' benefit and, so far as the public is concerned, in the interests of the proper carrying out of the principles and objectives of the *BIA*.

[39] Even if there is no evidence of specific prejudice to the creditors, the errors or omissions in the proposal's administration can justify a reduction in fees: see *Nelson (Re), supra*, and *Wright (Re),* 2005 BCSC 1618 (CanLII), 2005 BCSC 1618.

[40] Where there is no measurable loss to the creditors, the reduction should reflect the gravity and nature of the administrator's conduct.

[41] In this case, I have found that the OSB is partly to blame for the administrator's impugned actions. Regardless, the administration was not carried out in a conscientious manner. Although there is no measurable loss to the creditors, it would seem unfair for the administrator to receive all of its fees while the creditors share in such a nominal sum.

[42] In all of these circumstances, I find that the administrator is entitled a fee of $1,300 plus GST. As noted, the disbursements claimed are not in issue.

_____

Registrar C. P. Bouck

SB Directive: 15, Trustee Consultation Fees in Bankruptcies and Proposals (see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 15

TRUSTEE CONSULTATION FEES IN BANKRUPTCIES AND PROPOSALS

Issued: August 14, 2009

(Supersedes Directive No. 4 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"consultation" means to assist and educate bankrupts and/or relatives of bankrupts, or consumer debtors, on good financial management, including prudent use of consumer credit and budgeting principles; in developing successful strategies for achieving financial goals and overcoming financial setbacks; and at any time, where appropriate, making referrals to deal with non-budgetary causes of insolvency (e.g., gambling, addiction, marital and family problems, etc.);

"consultation fees" include any fees for services that a trustee may be called upon to perform with regard to an administration;

HONORAIRES DE CONSULTATION DU SYNDIC DANS LES FAILLITES ET LES PROPOSITIONS

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 4 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« consultation » s'entend de l'aide et de l'éducation données à un failli, à une personne liée au failli ou à un débiteur consommateur sur la saine gestion financière, y compris la sage utilisation du crédit à la consommation et les principes applicables à la tenue d'un budget; l'élaboration de stratégies visant à réaliser des objectifs financiers et à surmonter les échecs; et, en tout temps, diriger vers des services spécialisés lorsque l'insolvabilité est attribuable à une cause non budgétaire (p. ex., jeu, dépendance, problèmes conjugaux ou familiaux);

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"OSB" means the Office of the Superintendent of Bankruptcy;

"related persons" are those defined in section 4 of the Act, as well as employees, employers or associates of the trustee and firms in which the above individuals or the trustee may have an interest;

"Rules" means the *Bankruptcy and Insolvency General Rules*;

"trustee" means a trustee licensed under section 13.1 of the Act and an administrator of consumer proposals as defined in section 66.11 of the Act.

« honoraires de consultation » vise tous les services qu'un syndic peut être appelé à rendre en regard de l'administration de l'actif;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« personnes liées » désigne les personnes définies à l'article 4 de la Loi, y compris les employés, employeurs ou associés du syndic et des bureaux de syndics dans lesquels les personnes susmentionnées ou le syndic ont un intérêt;

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité*;

« syndic » désigne un syndic titulaire d'une licence émise en vertu de l'article 13.1 de la Loi et un administrateur de propositions de consommateur tel que défini à l'article 66.11 de la Loi.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this Directive is to provide guidelines to trustees in regard to consultation fees. Specifically, it addresses whether a payment made to the trustee prior to the filing of an assignment in bankruptcy or proposal constitutes a consultation fee outside the purview of the bankruptcy or proposal process, or whether it forms part of the continuing process leading up to the actual bankruptcy or proposal.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction vise à fournir certains paramètres aux syndics en ce qui a trait aux honoraires de consultation. Elle porte plus précisément sur la question de savoir si un montant versé au syndic avant le dépôt d'une cession (faillite) ou d'une proposition de consommateur équivaut à des honoraires de consultation payés à l'extérieur du processus de faillite ou de proposition ou s'il fait partie du processus menant au dépôt de la cession ou de la proposition.

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Policy

Services of a trustee

4. It is legitimate and acceptable for a trustee to expect financial compensation from a debtor for consulting services provided, where the individual does not file an assignment in bankruptcy or a proposal with the trustee, the consultation being for the purpose of an appraisal of the individual's situation and of the solutions available.

5. Where a debtor files an assignment in bankruptcy or a proposal with the trustee after paying a consultation fee to the trustee or to a related party, the amount paid, if received within sixty (60) days prior to the date of bankruptcy or the earlier of the filing of the notice of intention under subsection 50.4(1) of the Act or a proposal, shall be:

(a) considered as part of the continuing process leading up to the actual bankruptcy or the proposal;

(b) deposited in the estate trust account; and

(c) declared as an asset in the debtor's Statement of Affairs.

6. The preliminary consultation work already done is an acceptable time charge to the estate in accordance with section 131 of the Rules.

7. Where the amount paid was received from a third party and was so treated at the time of receipt, it will be treated pursuant to the

Politique

Services d'un syndic

4. Dans le cadre d'une consultation, il est légitime et approprié pour le syndic de s'attendre à une compensation financière de la part d'un débiteur lorsque celui-ci ne fait pas cession de ses biens ou ne dépose pas une proposition auprès du syndic, la consultation visant seulement à obtenir une évaluation de sa situation et des possibilités qui s'offrent à lui.

5. Lorsque le débiteur dépose une cession de ses biens ou une proposition auprès du syndic suite à la consultation et que des honoraires de consultation ont été payés au syndic ou à une personne liée, le montant payé, s'il a été reçu dans les soixante (60) jours précédant la date de la faillite ou du dépôt d'un avis d'intention aux termes du paragraphe 50.4(1) de la Loi ou d'une proposition devra être :

a) considéré comme faisant partie du processus menant au dépôt de la cession ou de la proposition;

b) déposé dans le compte en fidéicommis (ou compte en fiducie) de l'actif; et

c) déclaré comme actif au bilan du débiteur.

6. Le travail préliminaire de consultation déjà effectué par le syndic constitue une charge de temps normal pour ce dernier, conformément à l'article 131 des Règles.

7. Lorsque le montant reçu est un dépôt d'une tierce personne et a été ainsi traité lors de sa perception, il est assujetti aux dispositions de

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requirements of the Directive No. 16, *Third-Party Deposits and Guarantees*.

Coming into Force

8. This Directive comes into force on the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force. This Directive applies only to a person who, on or after the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force, is described in one of (a) – (f) listed below:

(a) the person becomes bankrupt;

(b) the person files a notice of intention;

(c) the person files a proposal without having filed a notice of intention;

(d) a proposal is made in respect of the person without the person having filed a notice of intention;

(e) an interim receiver is appointed in respect of the person's property and all

l'instruction n° 16, *Dépots et garanties de tierces personnes*.

Entrée en vigueur

8. La présente instruction entre en vigueur à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)*. La présente instruction ne s'applique qu'à l'égard des personnes suivantes :

a) celles qui deviennent failli à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

b) celles qui déposent un avis d'intention, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite,

c) celles qui déposent une proposition, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

d) celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

e) celles dont la totalité ou une partie des biens est mise en la possession ou sous

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or part of the person's property comes into the possession or under the control of the interim receiver; or

(f) all or part of the person's property comes into the possession or under the control of a receiver.

As such, in order to determine whether Directive No. 15 applies to a particular insolvency file, the question that needs to be asked is whether one of the "triggering events" described in (a) (f) occurred on or after the coming into force date.

Enquiries

9. For any questions pertaining to this Directive, please contact your local OSB office.

la responsabilité d'un séquestre intérimaire, nommé à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

f) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite.

Par conséquent, pour déterminer si l'instruction nº 15 s'applique à un dossier d'insolvabilité en particulier, la question qui doit être posée est de savoir si l'un des « événements déclencheurs » décrits aux alinéas *a)* à *f)*, est survenu à la date d'entrée en vigueur ou par la suite.

Demandes de renseignements

9. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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SB Directive: 27R, Advances of Trustee's Remuneration under Ordinary Administration

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(see below image pages)

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Date: FEB 10 2010

To: **OSB Staff, Trustees and Registrars**

Subject: **Directive No. 27R, *Advances of Trustee's Remuneration for Bankruptcies Under Ordinary Administration***

Date : 10 FEV. 2010

À : **Employés du BSF, syndics et registraires**

Objet : Instruction n° 27R. *Avances de rémunération du syndic dans les faillites d'administration ordinaire*

The Office of the Superintendent of Bankruptcy (OSB) received a number of questions from various stakeholders regarding Directive No. 27, *Advances of Trustee's Remuneration for Bankruptcies Under Ordinary Administration*, which was issued on August 14, 2009.

There was uncertainty in terms of the trustees' reporting obligations under paragraph 7 of the Directive. Specifically, subparagraph 7(1)*(e)* of Directive No. 27 referred to only one of the three ways in which a trustee can obtain proper authorization to withdraw an advance on his or her remuneration and the term "unless otherwise required" in subparagraph 7(2) of the Directive was too vague and created unnecessary reporting obligations.

Le Bureau du surintendant des faillites (BSF) a reçu un certain nombre de questions de la part de divers intervenants au sujet de l'instruction n° 27, *Avances de rémunération du syndic dans les faillites d'administration ordinaire*, qui a été émise le 14 août 2009.

Il y avait une incertitude concernant les obligations de production de rapports des syndics aux termes du paragraphe 7 de l'instruction. Plus particulièrement, l'alinéa 7(1)*e)* de l'instruction n° 27 ne mentionnait qu'un seul des trois moyens par lesquels un syndic peut obtenir la permission requise afin de retirer une avance de rémunération, et l'expression « sauf avis contraire », à l'alinéa 7(2) de l'instruction, était trop vague et entrainait des obligations inutiles en matière de production de rapports.

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Directive No. 27 has been amended as follows.

(1) Subparagraph 7(1)*(e)* now reflects the three ways in which an advance on a trustee's remuneration may be approved (as provided for in paragraph 4 of the Directive):

> (1) by a resolution of a duly constituted meeting of creditors;
>
> (2) by a majority of the inspectors; or
>
> (3) by a Court Order approving payment of the advance.

(2) Subparagraph 7(2) of the Directive now requires trustees to remit a copy of the documents referred to in subparagraph 7(1) to the OSB at the time of filing the Final Statement of Receipts and Disbursements and to the registrar or taxing officer if and when there is a taxation hearing. Trustees must only remit a copy of the documents referred to in subparagraph 7(1) to the creditors upon request.

Coming into Force

Directive 27R comes into force on February 12, 2010.

L'instruction nº 27 a été modifiée comme suit :

(1) L'alinéa 7(1)*e)* mentionne dorénavant les trois moyens par lesquels peut être approuvée une avance de rémunération du syndic (tel qu'il est indiqué au paragraphe 4 de l'instruction) :

> (1) par résolution adoptée à l'assemblée des créanciers;
>
> (2) par résolution adoptée par la majorité des inspecteurs;
>
> (3) par ordonnance du tribunal autorisant le paiement de l'avance.

(2) L'alinéa 7(2) de l'instruction exige maintenant que les syndics remettent une copie des documents mentionnés à l'alinéa 7(1) au BSF au moment de déposer l'État définitif des recettes et des débours, ainsi qu'au registraire ou au fonctionnaire taxateur au moment de l'audition de la taxation, si une telle audition a lieu. Les syndics doivent remettre une copie des documents mentionnés à l'alinéa 7(1) aux créanciers seulement si on le leur demande.

Entrée en vigueur

L'instruction nº 27R entre en vigueur le 12 février 2010.

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Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Demandes de renseignements

Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

Att.

p. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Directive / Instruction

N° 27R

ADVANCES OF TRUSTEE'S REMUNERATION FOR BANKRUPTCIES UNDER ORDINARY ADMINISTRATION

Issued: FEB 1 0 2010

(Supersedes Directive No. 27 issued on August 14, 2009, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

AVANCES DE RÉMUNÉRATION DU SYNDIC DANS LES FAILLITES D'ADMINISTRATION ORDINAIRE

Date d'émission : FEB 1 0 2010

(La présente instruction remplace et annule l'instruction n° 27 sur le même sujet émise le 14 août 2009)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

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3. The purpose of this Directive is to set out the proper procedure the trustee must follow when making an interim withdrawal or withdrawing an advance on his or her remuneration for an ordinary administration bankruptcy.

3. La présente instruction a pour objet d'établir la procédure à suivre par un syndic qui désire effectuer un paiement intérimaire ou retirer une avance de rémunération dans une faillite d'administration ordinaire.

Procedure

Modalités

4. To withdraw an advance on his or her remuneration, the trustee must obtain proper authorization in the form of a resolution of a duly constituted meeting of creditors or of a majority of the inspectors or make application to the Court for an order approving payment of the advance.

4. Afin de retirer une avance de rémunération, le syndic doit obtenir la permission requise, soit par résolution adoptée à l'assemblée des créanciers ou par résolution adoptée par la majorité des inspecteurs, ou obtenir du tribunal une ordonnance autorisant le paiement de l'avance.

5. The trustee must ensure that sufficient funds remain in the trust account to cover the disbursements and fees necessary to complete the administration of estates.

5. Le syndic doit s'assurer qu'il y a dans le compte en fidéicommis suffisamment de fonds pour couvrir les frais et honoraires nécessaires afin de mener à bien l'administration des dossiers.

6. The request of the trustee for an advance shall stipulate the specific dollar amount, which should also be reflected in the minutes of the meeting of creditors or inspectors and/or in the Court Order.

6. La demande d'avance de rémunération du syndic doit indiquer le montant précis. Ce montant doit également être indiqué dans le procès-verbal de l'assemblée des créanciers ou des inspecteurs ou figurer sur l'ordonnance du tribunal.

7.(1) Trustees shall have in their file the following information for each authorized advance on the remuneration:

(a) number of hours worked;
(b) tasks performed;

7.(1) Les syndics doivent détenir dans leur dossier les informations suivantes pour chaque avance de rémunération autorisée :

a) le nombre d'heures travaillées;
b) les tâches accomplies;

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(c) hourly rates;
(d) other factors for consideration in the calculation of fees; and
(e) resolution of a duly constituted meeting of creditors, resolution of a majority of the inspectors, or Court Order approving payment of the advance, whatever the case may be.

c) les taux horaires;
d) les autres éléments à prendre en compte dans le calcul de la demande d'avance de rémunération; et
e) selon le cas, la résolution adoptée à l'assemblée des créanciers, la résolution adoptée par la majorité des inspecteurs, ou l'ordonnance du tribunal autorisant le paiement de l'avance.

(2) Trustees shall remit a copy of the documents referred to in subparagraph 7(1) to the OSB at the time of filing the Final Statement of Receipts and Disbursements and to the registrar or taxing officer if and when there is a taxation hearing. Trustees must only remit a copy of the documents referred to in subparagraph 7(1) to the creditors upon request.

(2) Les syndics doivent remettre une copie des documents mentionnés à l'alinéa 7(1) au BSF au moment de déposer l'État définitif des recettes et des débours et au registraire ou à l'officier taxateur s'il y a audition de la taxation. Les syndics doivent remettre une copie des documents mentionnés à l'alinéa 7(1) aux créanciers seulement si on le leur demande.

8.(1) When a registrar or taxing officer taxes the remuneration of the trustee to an amount that is less than the advance withdrawn by the trustee, this excess shall be repaid to the estate without delay.

8.(1) Lorsqu'un registraire ou un officier taxateur taxe la rémunération du syndic pour un montant moindre que l'avance déjà prise par le syndic, le surplus doit être immédiatement remboursé à l'actif de la faillite.

(2) The trustee must notify the official receiver in writing of the repayment or other changes due to the taxation.

(2) Le syndic doit immédiatement informer par écrit le séquestre officiel du remboursement ou d'autres modifications suite à la taxation.

9. The registrar or taxing officer is not bound by this Directive and can exercise his or her discretion in relation to the taxation of the trustee's accounts.

9. Le registraire ou l'officier taxateur ne sont pas liés par la présente instruction et exerceront leur discrétion quant à la taxation des comptes du syndic.

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Coming into Force

10. This Directive comes into force on February 12, 2010.

Entrée en vigueur

10. La présente instruction entre en vigueur le 12 février 2010.

Enquiries

11. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

11. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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For carrying on debtor's business or in case of a proposal - Sec. 39(3)

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(3) Where the business of the debtor has been carried on by the trustee or under his supervision, he may be allowed such special remuneration for such services as the creditors or the inspectors may by resolution authorize, and, in the case of a proposal, such special remuneration as may be agreed to by the debtor, or in the absence of agreement with the debtor such amount as may be approved by the court.

Successive trustees - Sec. 39(4)
(4) In the case of two or more trustees acting in succession, the remuneration shall be apportioned between the trustees in accordance with the services rendered by each, and in the absence of agreement between the trustees the court shall determine the amount payable to each.

Court may increase or reduce - Sec. 39(5)
(5) On application by the trustee, a creditor or the debtor and on notice to such parties as the court may direct, the court may make an order increasing or reducing the remuneration.
R.S., c. B-3, s. 21.

Discharge of Trustee

Disposal of unrealizable property - Sec. 40
40. (1) Any property of a bankrupt that is listed in the statement of affairs referred to in paragraph 158(d) or otherwise disclosed to the trustee before the bankrupt's discharge and that is found incapable of realization must be returned to the bankrupt before the trustee's application for discharge, but if inspectors have been appointed, the trustee may do so only with their permission.

Final disposition of property - Sec. 40(1)
(2) Where a trustee is unable to dispose of any property as provided in this section, the court may make such order as it may consider necessary.
R.S., 1985, c. B-3, s. 40;
2005, c. 47, s. 29.

Application to court - Sec. 41
41. (1) When a trustee has completed the duties required of him with respect to the administration of the property of a bankrupt, he shall apply to the court for a discharge.

Discharge of trustee - Sec. 41(2)
(2) The court may discharge a trustee with respect to any estate on full administration thereof or, for sufficient cause, before full administration.

When another trustee has been appointed - Sec. 41(3)
(3) A trustee when replaced by another trustee is entitled to be discharged if he has accounted to the satisfaction of the inspectors and the court for all property that came to his hands, and a period of three months has elapsed after the date of the replacement without any undisposed of claim or objection having been made by the bankrupt or any creditor.

When estate deemed fully administered - Sec. 41(4)

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(4) When a trustee's accounts have been approved by the inspectors and taxed by the court and all objections, applications, oppositions, motions and appeals have been settled or disposed of and all dividends have been paid, the estate is deemed to have been fully administered.

Objections to be filed with court and trustee - Sec. 41(5)
(5) Any interested person desiring to object to the discharge of a trustee shall, at least five days prior to the date of the hearing, file notice of objection with the registrar of the court setting out the reasons for the objection and serve a copy of the notice on the trustee.

Court may grant discharge - Sec. 41(6)
(6) The court shall consider the objection filed under subsection (5) and may grant or withhold a discharge accordingly or give such directions as it may deem proper in the circumstances.

Fraud or breach of trust - Sec. 41(7)
(7) Nothing in or done under authority of this section relieves or discharges or shall be deemed to relieve or discharge a trustee from the results of any fraud.

Effect of discharge of trustee - Sec. 41(8)
(8) The discharge of a trustee discharges him from all liability

> **(a) in respect of any act done or default made by him in the administration of the property of the bankrupt, and**
> **(b) in relation to his conduct as trustee,**

but any discharge may be revoked by the court on proof that it was obtained by fraud or by suppression or concealment of any material fact.

Investigation not precluded - Sec. 41(8.1)
(8.1) Nothing in subsection (8) is to be construed as preventing an inquiry, investigation or proceeding in respect of a trustee under subsection 14.01(1).

Security released - Sec. 41(9)
(9) The discharge of a trustee under this section operates as a release of the security provided pursuant to subsection 16(1).

Trustee remains - Sec. 41(10)
(10) Notwithstanding his discharge, the trustee remains the trustee of the estate for the performance of such duties as may be incidental to the full administration of the estate.

Appointment of trustee by court to complete administration - Sec. 41(11)
(11) The court, on being satisfied that there are assets that have not been realized or distributed, may, on the application of any interested person, appoint a trustee to complete the administration of the estate of the bankrupt, and the trustee shall be governed by the provisions of this Act, in so far as they are applicable.
R.S., 1985, c. B-3, s. 41;
1997, c. 12, s. 25;
2004, c. 25, s. 25;
2007, c. 36, s. 12.

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SB Directive: 8R12, Form 10, Application of Trustee for Discharge, Form 31, Proof of Claim, Form 37, Voting Letter (Division I Proposal), Form 37.1 (Consumer Proposal), Form 49, Notice to Creditors of Consumer Proposal, Form 87, Notice and statement of the Receiver
(see below image pages)

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Date: [illegible]

To: **OSB Staff, Trustees and Registrars**

Subject: **The *Bankruptcy and Insolvency Act* Forms — Form 10, *Application of Trustee for Discharge*; Form 31, *Proof of Claim*; Form 37, *Voting Letter (Division I Proposal)*; Form 37.1, *Voting Letter (Consumer Proposal)*; Form 49, *Notice to Creditors of Consumer Proposal* and Form 87, *Notice and Statement of the Receiver***

The Office of the Superintendent of Bankruptcy (OSB) has amended Form 10, *Application of Trustee for Discharge*; Form 31, *Proof of Claim*; Form 37, *Voting Letter (Division I Proposal)*; Form 49, *Notice to Creditors of Consumer Proposal* and Form 87, *Notice and Statement of the Receiver*. In addition, the OSB has created Form 37.1, *Voting Letter (Consumer Proposal)*, which is only applicable to consumer proposals.

Date : [illegible]

À : **Employés du BSF, syndics et registraires**

Objet : **Formulaires de la *Loi sur la faillite et l'insolvabilité* – formulaire 10, *Demande de libération du syndic*; formulaire 31, *Preuve de réclamation*; formulaire 37, *Formulaire de votation (proposition déposée en vertu de la section I)*; formulaire 37.1, *Formulaire de votation (proposition déposée en vertu de la section I)*; formulaire 49, *Avis aux créanciers de la proposition de consommateur*; et formulaire 87, *Avis et déclaration du séquestre.***

Le Bureau du surintendant des faillites (BSF) a modifié le formulaire 10, *Demande de libération du syndic*; le formulaire 31, *Preuve de réclamation*; le formulaire 37, *Formulaire de votation (proposition déposée en vertu de la section I)*; le formulaire 49, *Avis aux créanciers de la proposition de consommateur*; et le formulaire 87, *Avis et déclaration du séquestre*. De plus, le BSF a créé le formulaire 37.1, *Formulaire de votation (proposition de consommateur)*, qui est propre aux propositions de consommateur.

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Form 10, *Application of Trustee for Discharge*

Form 10, *Application of Trustee for Discharge*, has been amended to clarify that in both bankruptcies and proposals submitted pursuant to Division I of the *Bankruptcy and Insolvency Act* (BIA), trustees are entitled to apply to the court for an order of discharge.

Formulaire 10, *Demande de libération du syndic*

Le formulaire 10, *Demande de libération du syndic*, a été modifié afin de préciser que, tout comme en matière de faillite, les syndics peuvent demander au tribunal une ordonnance de libération relativement à l'administration d'une proposition déposée en vertu de la section I de la *Loi sur la faillite et l'insolvabilité* (LFI).

Form 31, *Proof of Claim*

The first two check boxes in paragraph 7 on Form 31, *Proof of Claim*, have been replaced by one check box. Whenever the trustee reviews the financial situation of a bankrupt to determine whether there have been changes to the bankrupt's obligation to make payments under section 68 of the BIA, the creditor may request to be informed, pursuant to paragraph 68(4) of the BIA, of the new fixed amount or of the fact that there is no longer surplus income and that the bankrupt's obligation to make payments under section 68 of the BIA no longer exists.

Formulaire 31, *Preuve de réclamation*

Les deux premières cases à cocher au paragraphe 7 du formulaire 31, *Preuve de réclamation*, ont été remplacées par une case à cocher. Lorsque le syndic doit examiner la situation financière du failli pour déterminer s'il y a eu des changements à l'obligation du failli de verser les paiements prévus à l'article 68 de la LFI, le créancier peut demander d'être avisé, conformément au paragraphe 68(4) de la Loi, du nouveau montant que le failli est tenu de verser à l'actif de la faillite ou du fait que le failli n'a plus de revenu excédentaire et qu'il n'est plus tenu de verser les paiements prévus à l'article 68 de la LFI.

Form 37, *Voting Letter (Division I Proposal)*

Minor changes have been made to Form 37, *Voting Letter (Division I Proposal)*, so that it is specific to proposals filed pursuant to Division I of the BIA.

Formulaire 37, *Formulaire de votation (proposition déposée en vertu de la section I)*

Des modifications mineures ont été apportées au formulaire 37, *Formulaire de votation (proposition déposée en vertu de la section I)*, afin qu'il soit spécifique aux propositions déposées en vertu de la section I de la LFI.

Form 37.1, *Voting Letter (Consumer Proposal)*

Form 37.1, *Voting Letter (Consumer Proposal)*, has been created to take into account specific provisions applicable to consumer proposals following the amendment

Formulaire 37.1, *Formulaire de votation (proposition de consommateur)*

Le formulaire 37.1, *Formulaire de votation (proposition de consommateur)*, a été créé pour tenir compte des particularités applicables aux propositions de

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to subsection 66.17(2) of the BIA by Chapter 47 of the *Statutes of Canada* (2005) and by Chapter 36 of the *Statutes of Canada* (2007). The amendment to subsection 66.17(2) simplified the process by eliminating the need to hold a meeting of creditors in cases where a dissent from the consumer proposal is received by the administrator. Thus, if the administrator is not required to call a meeting of creditors, the consumer proposal is deemed to have been accepted regardless of any dissent that may have been received.

To make creditors aware of the consequences of this amendment, the OSB created a new voting letter specific to consumer proposals enabling creditors to assent to or dissent from the proposal and to request that a meeting of creditors be held.

Form 49, *Notice to Creditors of Consumer Proposal*

Paragraph 3 of Form 49, *Notice to Creditors of Consumer Proposal*, has been changed to inform creditors that they may use Form 37.1, *Voting Letter (Consumer Proposal)*, to assent to or dissent from the consumer proposal and to request that a meeting of creditors be held.

Form 87, *Notice and Statement of the Receiver*

A reference to subsection 246(1) of the BIA has been added to the French title of Form 87, *Notice and Statement of the Receiver*. This subsection was not referenced in the title of

consommateur et ce, suite à la modification apportée au paragraphe 66.17(2) de la LFI par le chapitre 47 des *Lois du Canada* (2005) et le chapitre 36 des *Lois du Canada* (2007). La modification au paragraphe 66.17(2) a simplifié le processus en éliminant l'obligation de tenir une assemblée des créanciers dans les cas où une désapprobation de la proposition de consommateur est reçue par l'administrateur. Ainsi, si l'administrateur n'est pas tenu de convoquer une assemblée des créanciers, la proposition de consommateur est réputée avoir été acceptée, sans égard à toute désapprobation qui aurait été reçue.

Afin de porter à l'attention des créanciers les conséquences de ce changement, le BSF a créé un nouveau formulaire de votation spécifique aux propositions de consommateur, permettant ainsi aux créanciers d'approuver ou de désapprouver la proposition en plus de demander qu'une assemblée des créanciers soit convoquée.

Formulaire 49, *Avis aux créanciers de la proposition de consommateur*

Le paragraphe 3 du formulaire 49, *Avis aux créanciers de la proposition de consommateur*, a été modifié afin d'indiquer aux créanciers qu'ils peuvent utiliser le formulaire 37.1, *Formulaire de votation (proposition de consommateur)*, pour approuver ou désapprouver la proposition de consommateur ainsi que pour demander qu'une assemblée des créanciers soit convoquée.

Formulaire 87, *Avis et déclaration du séquestre*

Une référence au paragraphe 246(1) de la LFI a été ajoutée au titre de la version française du formulaire 87, *Avis et déclaration du séquestre*. Ce paragraphe n'a pas été cité en

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the French version of the form; yet, it appeared in the English version. Therefore, this amendment corrects an omission in the French title and ensures consistency between the French and English versions of Form 87.

référence dans le titre de la version française du formulaire alors qu'il figure dans la version anglaise. Ainsi, cette modification corrige une omission à la version française et améliore la cohérence entre les versions française et anglaise du formulaire 87

Coming into Force

Amended Forms 10, 31, 37, 49 and 87 and new Form 37.1 come into force on September 23, 2011, and apply to persons to which the September 18, 2009, amendments apply.

Entrée en vigueur

La version modifiée des formulaires 10, 31, 37, 49 et 87 ainsi que le nouveau formulaire 37.1 entrent en vigueur le 23 septembre 2011, et s'applique aux personnes visées par les modifications entrées en vigueur le 18 septembre 2009.

Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Demandes de renseignements

Si vous souhaitez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche

Att.

P. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Directive / Instruction

N° 8R12

The *BANKRUPTCY AND INSOLVENCY ACT* FORMS

Issued: MAR 5 2011

(This Directive amends Directive No. 8R11 issued on November 9, 2010, on the same topic.)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"Forms" means the forms under the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*c*) and (*e*) of the Act for the purpose of prescribing

FORMULAIRES DE LA *LOI SUR LA FAILLITE ET L'INSOLVABILITÉ*

Émise : MAR 5 2011

(La présente instruction modifie l'instruction n° 8R11 émise le 9 novembre 2010 sur le même sujet.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » Le Bureau du surintendant des faillites;

« Formulaires » Les formulaires émis en vertu de la *Loi sur la faillite et l'insolvabilité*;

« Loi » La *Loi sur la faillite et l'insolvabilité*;

« Règles » Les *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction, émise en vertu de l'autorité conférée par les alinéas 5(4)*c*) et *e*) de la Loi, a pour objet de prescrire des

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amendments to Form 10, *Application of Trustee for Discharge*; Form 31, *Proof of Claim*; Form 37, *Voting Letter (Division I Proposal)*; Form 49, *Notice to Creditors of Consumer Proposal* and Form 87, *Notice and Statement of the Receiver*. This Directive also prescribes a new form, Form 37.1, *Voting Letter (Consumer Proposal)*.

modifications au formulaire 10, *Demande de libération du syndic*, au formulaire 31, *Preuve de réclamation*; au formulaire 37, *Formulaire de votation (proposition déposée en vertu de la section I)*; au formulaire 49, *Avis aux créanciers de la proposition de consommateur*; et au formulaire 87, *Avis et déclaration du séquestre*. La présente instruction prescrit aussi un nouveau formulaire, le formulaire 37.1, *Formulaire de votation (proposition de consommateur)*.

Summary

3. Form 10, *Application of Trustee for Discharge*, has been amended to clarify that in both bankruptcies and proposals submitted pursuant to Division I of the *Bankruptcy and Insolvency Act* (BIA), trustees are entitled to apply to the court for an order of discharge.

4. The first two check boxes in paragraph 7 on Form 31, *Proof of Claim*, have been replaced by one check box. Whenever the trustee reviews the financial situation of a bankrupt to determine whether there have been changes to the bankrupt's obligation to make payments under section 68 of the BIA, the creditor may request to be informed, pursuant to paragraph 68(4) of the BIA, of the new fixed amount or of the fact that there is no longer surplus income and that the bankrupt's obligation to make payments under section 68 of the BIA no longer exists.

Résumé

3. Le formulaire 10, *Demande de libération du syndic*, a été modifié afin de préciser que, tout comme en matière de faillite, les syndics peuvent demander au tribunal une ordonnance de libération relativement à l'administration d'une proposition déposée en vertu de la section I de la *Loi sur la faillite et l'insolvabilité* (LFI).

4. Les deux premières cases à cocher au paragraphe 7 du formulaire 31, *Preuve de réclamation*, ont été remplacées par une case à cocher. Lorsque le syndic doit examiner la situation financière du failli pour déterminer s'il y a eu des changements à l'obligation du failli de verser les paiements prévus à l'article 68 de la LFI, le créancier peut demander d'être avisé, conformément au paragraphe 68(4) de la Loi, du nouveau montant que le failli est tenu de verser à l'actif de la faillite ou du fait que le failli n'a plus de revenu excédentaire et qu'il n'est plus tenu de verser les paiements prévus à l'article 68 de la LFI.

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5 Form 37.1, *Voting Letter (Consumer Proposal)*, has been created to take into account specific provisions applicable to consumer proposals. This voting letter, which is specific to consumer proposals, enables creditors to assent to or dissent from the proposal, as well as to request that a meeting of creditors be held. Consequently, minor changes have been made to Form 37, *Voting Letter (Division I Proposal)*, so that it is specific to proposals submitted pursuant to Division I of the BIA.

5. Le formulaire 37.1, *Formulaire de votation (proposition de consommateur)*, a été créé pour tenir compte des particularités applicables aux propositions de consommateur. Ce formulaire de votation, qui est spécifique aux propositions de consommateur, permet aux créanciers d'approuver ou de désapprouver la proposition en plus de demander qu'une assemblée des créanciers soit convoquée. Par conséquent, des modifications mineures ont été apportées au formulaire 37, *Formulaire de votation (proposition déposée en vertu de la section I)*, afin qu'il soit spécifique aux propositions déposées en vertu de la section I de la LFI.

6. Paragraph 3 of Form 49, *Notice to Creditors of Consumer Proposal*, has been changed to inform creditors that they may use Form 37.1, *Voting Letter (Consumer Proposal)*, to assent to or dissent from the consumer proposal and to request that a meeting of creditors be held.

6. Le paragraphe 3 du formulaire 49, *Avis aux créanciers de la proposition de consommateur*, a été modifié afin d'indiquer aux créanciers qu'ils peuvent utiliser le formulaire 37.1, *Formulaire de votation (proposition de consommateur)*, pour approuver ou désapprouver la proposition de consommateur ainsi que pour demander qu'une assemblée des créanciers soit convoquée.

7 A reference to subsection 246(1) of the BIA has been added to the French title of Form 87, *Notice and Statement of the Receiver*. This subsection was not referenced in the title of the French version of the form; yet, it appeared in the English version. Therefore, this amendment corrects an omission in the French title and ensures consistency between the French and English versions of Form 87.

7 Une référence au paragraphe 246(1) de la Loi a été ajoutée au titre de la version française du formulaire 87, *Avis et déclaration du séquestre*. Ce paragraphe n'a pas été cité en référence dans le titre de la version française du formulaire alors qu'il figure dans la version anglaise. Ainsi, cette modification corrige une omission à la version française et améliore la cohérence entre les versions française et anglaise du formulaire 87.

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Coming into Force

8. Amended Forms 10, 31, 37, 49 and 87 and new Form 37.1 come into force on September 23, 2011, and apply to persons to which the September 18, 2009, amendments apply.

Entrée en vigueur

8. La version modifiée des formulaires 10, 31, 37, 49 et 87 ainsi que le nouveau formulaire 37.1 entrent en vigueur le 23 septembre 2011, et s'applique aux personnes visées par les modifications entrées en vigueur le 18 septembre 2009.

Enquiries

9. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

9 Si vous souhaitez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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FORM 10

Application of Trustee for Discharge
(Rule 61 and subsection 66(1) of the Act)

(Title Form 1)

I, , the trustee of the estate or acting in the proposal of , a bankrupt/debtor, hereby apply to the court for an order of discharge with respect to the above-mentioned estate or proposal and, consequently, for a release of the security that I have provided pursuant to subsection 66(1) of the Act.

I certify that I have observed the applicable terms set out in the *Bankruptcy and Insolvency General Rules*.

Dated at , this day of .

Trustee

NOTE: If a file is made electronically by trustee with AT sheet, this box must contain information as to the method prescribed in Rule [illegible] which was used in the case of this document.

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FORMULAIRE 10

Demande de libération du syndic
(Règle 61 et paragraphe 66(1) de la Loi)

(Intitulé Formulaire 1)

Je, . syndic de l'actif ou agissant relativement à la proposition de , failli ou débiteur, demande au tribunal une ordonnance de libération relativement à l'actif ou à la proposition susmentionnée(e) et, conséquemment, la mainlevée de la garantie que j'ai fournie en conformité avec le paragraphe 16(1) de la *Loi*.

Je certifie que je me suis conformé aux exigences des *Règles générales sur la faillite et l'insolvabilité*.

Daté le , à

Syndic

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FORM 31

Proof of Claim
(Sections 50.1, 81.5, 81.6, Subsections 65.2(4), 81.2(1), 81.3(8), 81.4(8), 102(2), 124(2), 128(1), and Paragraphs 51(1)(c) and 66.14(*b*) of the Act)

All notices or correspondence regarding this claim must be forwarded to the following address:

_____ _____

_____ _____

In the matter of the bankruptcy (*or* the proposal *or* the receivership) of _____ (*name of debtor*) of _____ (*city and province*) and the claim of _____, creditor.

I, _____ (*name of creditor or representative of the creditor*), of _____ (*city and province*), do hereby certify:

1. That I am a creditor of the above-named debtor (*or* that I am _____ (*state position or title*) of _____ (*name of creditor or representative of the creditor*)).

2. That I have knowledge of all of the circumstances connected with the claim referred to below.

3. That the debtor was, at the date of bankruptcy (*or* the date of the receivership *or, in the case of a proposal*, the date of the notice of intention *or* of the proposal, *if no notice of intention was filed*), namely the _____ day of _____, _____, and still is, indebted to the creditor in the sum of $_____, as specified in the statement of account (*or* affidavit) attached and marked Schedule "A," after deducting any counterclaims to which the debtor is entitled. (*The attached statement of account or affidavit must specify the vouchers or other evidence in support of the claim.*)

4. *Check and complete appropriate category.*

A. UNSECURED CLAIM OF $__

(Other than as a customer contemplated by Section 262 of the Act)

That in respect of this debt, I do not hold any assets of the debtor as security and

(Check appropriate description)

Regarding the amount of $ _____, I claim a right to a priority under section 136 of the Act.

Regarding the amount of $ _____, I do not claim a right to a priority.

(Set out on an attached sheet details to support priority claim)

B. CLAIM OF LESSOR FOR DISCLAIMER OF A LEASE $ __ _____.

That I hereby make a claim under subsection 65.2(4) of the Act, particulars of which are as follows:

(Give full particulars of the claim, including the calculations upon which the claim is based)

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FORM 31 -- *Continued*

C. SECURED CLAIM OF $_____ .

That in respect of this debt, I hold assets of the debtor valued at $ as security, particulars of which are as follows:

(Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents)

D. CLAIM BY FARMER, FISHERMAN OR AQUACULTURIST OF $

That I hereby make a claim under subsection 81.2(1) of the Act for the unpaid amount of $

(Attach a copy of sales agreement and delivery receipts)

E. CLAIM BY WAGE EARNER OF $ __

That I hereby make a claim under subsection 81.3(8) of the Act in the amount of $ ___
That I hereby make a claim under subsection 81.4(8) of the Act in the amount of $ ___

F. CLAIM BY EMPLOYEE FOR UNPAID AMOUNT REGARDING PENSION PLAN OF $ _____

That I hereby make a claim under subsection 81.5 of the Act in the amount of $
That I hereby make a claim under subsection 81.6 of the Act in the amount of $ _____

G. CLAIM AGAINST DIRECTOR $ _ _____

(To be completed when a proposal provides for the compromise of claims against directors)

That I hereby make a claim under subsection 50(13) of the Act particulars of which are as follows

(Give full particulars of the claim, including the calculations upon which the claim is based)

H. CLAIM OF A CUSTOMER OF A BANKRUPT SECURITIES FIRM $ _____

That I hereby make a claim as a customer for net equity as contemplated by section 262 of the Act, particulars of which are as follows:

(Give full particulars of the claim, including the calculations upon which the claim is based)

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FORM 31 -- *Concluded*

5. That, to the best of my knowledge, I am (*or* the above-named creditor is) (*or* am not *or* is not) related to the debtor within the meaning of section 4 of the Act, and have (*or* has) (*or* have not *or* has not) dealt with the debtor in a non-arm's-length manner.

6. That the following are the payments that I have received from, the credits that I have allowed to, and the transfers at undervalue within the meaning of subsection 2(1) of the Act that I have been privy to or a party to with the debtor within the three months (*or, if the creditor and the debtor are related within the meaning of section 4 of the Act or were not dealing with each other at arm's length,* within the 12 months) immediately before the date of the initial bankruptcy event within the meaning of subsection 2(1) of the Act: (*provide details of payments, credits and transfers at undervalue*)

7. (*Applicable only in the case of the bankruptcy of an individual*)

Whenever the trustee reviews the financial situation of a bankrupt to redetermine whether or not the bankrupt is required to make payments under section 68 of the Act, I request to be informed, pursuant to paragraph 68(4) of the Act, of the new fixed amount or of the fact that there is no longer surplus income.

I request that a copy of the report filed by the trustee regarding the bankrupt's application for discharge pursuant to subsection 170(1) of the Act be sent to the above address.

Dated at _____, this _____day of _____.

_____
Witness

_____
Creditor

Telephone No.: ___ .
Fax No.: _____ _____ .
E-mail address.

NOTE: If applicable, a duplicate of this proof of claim must be completed before a person qualified to take affidavits.

WARNING: A trustee who, pursuant to subsection 128(3) of the Act, redeems a security or pays money to the secured creditor out of the estate of the bankrupt for the security as assessed, or a proof of security, by the secured creditor

Subsection 201(1) of the Act provides for severe penalties for making any false statement, report or balance sheet or any statement or account that is misleading

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FORMULAIRE 31

Preuve de réclamation
(articles 50.1, 81.5 et 81.6, paragraphes 65.2(4), 81.2(1), 81.3(8), 81.4(8), 102(2), 124(2) et 128(1) et alinéas 511(3)e) et 66.14b) de la Loi)

Expédier tout avis ou toute correspondance concernant la présente réclamation à l'adresse suivante :

_____ — — —
_____ — —. _____

Dans l'affaire de la faillite (*ou* de la proposition *ou* de la mise sous séquestre) de _____ (*nom du débiteur*) de __ , _ (*ville et province*) et de la réclamation de _____, créancier

Je soussigné, ___ _____(*nom du créancier ou du représentant du créancier*), de _____(*ville et province*), certifie ce qui suit :

1. Je suis le créancier du débiteur susnommé (*ou* je suis _____ [*préciser le poste ou la fonction*] de _____ [*nom du créancier ou de son représentant*]).

2. Je suis au courant de toutes les circonstances entourant la réclamation visée par le présent formulaire.

3. Le débiteur était, à la date de la faillite (*ou* à la date de la mise sous séquestre *ou*, *s'il s'agit d'une proposition*, à la date du dépôt de l'avis d'intention *ou*, *à défaut*, à la date du dépôt de la proposition), soit le _____, endetté envers le créancier et l'est toujours, pour la somme de _____ $, comme l'indique l'état de compte (*ou* l'affidavit) ci-annexé et désigné comme l'annexe A, après déduction du montant de toute créance compensatoire à laquelle le débiteur a droit. (*L'état de compte ou l'affidavit annexés doivent faire mention des pièces justificatives ou de toute autre preuve à l'appui de la réclamation.*)

4. (*Cochez la catégorie qui s'applique et remplissez les parties requises.*)

A. RÉCLAMATION NON GARANTIE AU MONTANT DE $

(*autre qu'une réclamation d'un client visée par l'article 262 de la Loi*)

En ce qui concerne cette créance, je ne détiens aucun avoir du débiteur à titre de garantie et

(*Cochez ce qui s'applique.*)

pour le montant de $, je ne revendique aucun droit à un rang prioritaire

pour le montant de __ $, je revendique le droit à un rang prioritaire en vertu de l'article 136 de la Loi.

(*Indiquez sur une feuille annexée les renseignements à l'appui de la réclamation prioritaire.*)

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FORMULAIRE 31 (*suite*)

B. RÉCLAMATION DU LOCATEUR SUITE À LA RÉSILIATION D'UN BAIL AU MONTANT DE _____$

J'ai une réclamation en vertu du paragraphe 65.2(4) de la Loi, dont les détails sont mentionnés ci-après :

(*Donnez tous les détails de la réclamation, y compris les calculs s'y rapportant.*)

C. RÉCLAMATION GARANTIE AU MONTANT DE ____ $

En ce qui concerne la créance susmentionnée, je détiens des avoirs du débiteur à titre de garantie, dont la valeur estimative s'élève à _____ $ et dont les détails sont mentionnés ci-après :

(*Donnez des renseignements complets au sujet de la garantie, y compris la date à laquelle elle a été donnée et la valeur que vous lui attribuez, et annexez une copie des documents relatifs à la garantie.*)

D. RÉCLAMATION D'UN AGRICULTEUR, D'UN PÊCHEUR OU D'UN AQUICULTEUR AU MONTANT DE _____ $

J'ai une réclamation en vertu du paragraphe 81.2(1) de la Loi pour la somme impayée de _____ $.

(*Veuillez joindre une copie de l'acte de vente et des reçus de livraison.*)

F. RÉCLAMATION D'UN SALARIÉ AU MONTANT DE _____$

J'ai une réclamation en vertu du paragraphe 81.3(8) de la Loi au montant de _____ $.
J'ai une réclamation en vertu du paragraphe 81.4(8) de la Loi au montant de ____ $.

F. RÉCLAMATION D'UN EMPLOYÉ RELATIVE AU RÉGIME DE PENSION AU MONTANT DE: _____$

J'ai une réclamation en vertu du paragraphe 8.1.5 de la Loi au montant de _____ $
J'ai une réclamation en vertu du paragraphe 8.1.6 de la Loi au montant de ____ . __ $

G. RÉCLAMATION CONTRE LES ADMINISTRATEURS AU MONTANT DE _____ $

(*À remplir lorsque la proposition vise une transaction quant à une réclamation contre les administrateurs.*)

J'ai une réclamation en vertu du paragraphe 50(13) de la Loi, dont les détails sont mentionnés ci-après :

(*Donnez tous les détails de la réclamation, y compris les calculs s'y rapportant.*)

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FORMULAIRE 31

Preuve de réclamation
(articles 50.1, 81.5 et 81.6, paragraphes 65.2(4), 81.2(1), 81.3(8), 81.4(8), 102(2), 124(2) et 128(1) et alinéas 51(1)e) et 66.14b) de la Loi)

Expédier tout avis ou toute correspondance concernant la présente réclamation à l'adresse suivante :

_____

_____ _____

Dans l'affaire de la faillite (*ou* de la proposition *ou* de la mise sous séquestre) de _____ (*nom du débiteur*) de _____ (*ville et province*) et de la réclamation de _____, créancier.

Je soussigné, _____ (*nom du créancier ou du représentant du créancier*), de _____ (*ville et province*), certifie ce qui suit :

1. Je suis le créancier du débiteur susnommé (*ou* je suis _____ [*préciser le poste ou la fonction*] de _____ [*nom du créancier ou de son représentant*]).

2. Je suis au courant de toutes les circonstances entourant la réclamation visée par le présent formulaire.

3. Le débiteur était, à la date de la faillite (*ou* à la date de la mise sous séquestre *ou, s'il s'agit d'une proposition*, à la date du dépôt de l'avis d'intention *ou, à défaut*, à la date du dépôt de la proposition), soit le _____, endetté envers le créancier et l'est toujours, pour la somme de _____ $, comme l'indique l'état de compte (*ou* l'affidavit) ci-annexé et désigné comme l'annexe A, après déduction du montant de toute créance compensatoire à laquelle le débiteur a droit. (*L'état de compte ou l'affidavit annexés doivent faire mention des pièces justificatives ou de toute autre preuve à l'appui de la réclamation.*)

4. (*Cochez la catégorie qui s'applique et remplissez les parties requises.*)

A. RÉCLAMATION NON GARANTIE, AU MONTANT DE _____ $

autre qu'une réclamation d'un client visée par l'article 262 de la Loi

En ce qui concerne cette créance, je ne détiens aucun avoir du débiteur à titre de garantie et

(*Cochez ce qui s'applique.*)

pour le montant de _____ $, je ne revendique aucun droit à un rang prioritaire.

pour le montant de _____ $, je revendique le droit à un rang prioritaire en vertu de l'article 136 de la Loi.

(*Indiquez sur une feuille annexée les renseignements à l'appui de la réclamation prioritaire.*)

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FORMULAIRE 31 (*suite*)

B. RÉCLAMATION DU LOCATEUR SUITE À LA RESILIATION D'UN BAIL, AU MONTANT DE $

J'ai une réclamation en vertu du paragraphe 65.2(4) de la Loi, dont les détails sont mentionnés ci-après

(*Donnez tous les détails de la réclamation, y compris les calculs s'y rapportant.*)

C. RÉCLAMATION GARANTIE AU MONTANT DE _____$

En ce qui concerne la créance susmentionnée, je détiens des avoirs du débiteur à titre de garantie, dont la valeur estimative s'élève à _____ $ et dont les détails sont mentionnés ci-après :

(*Donnez des renseignements complets au sujet de la garantie, y compris la date à laquelle elle a été donnée et la valeur que vous lui attribuez, et annexez une copie des documents relatifs à la garantie.*)

D. RÉCLAMATION D'UN AGRICULTEUR, D'UN PÊCHEUR OU D'UN AQUICULTEUR AU MONTANT DE _____$

J'ai une réclamation en vertu du paragraphe 81.2(1) de la Loi pour la somme impayée de $

(*Veuillez joindre une copie de l'acte de vente et des reçus de livraison.*)

E. RÉCLAMATION D'UN SALARIÉ AU MONTANT DE $

J'ai une réclamation en vertu du paragraphe 81.3(8) de la Loi au montant de _____ $.
J'ai une réclamation en vertu du paragraphe 81.4(8) de la Loi au montant de _____ $

F. RÉCLAMATION D'UN EMPLOYÉ RELATIVE AU RÉGIME DE PENSION AU MONTANT DE _____$

J'ai une réclamation en vertu du paragraphe 81.5 de la Loi au montant de $.
J'ai une réclamation en vertu du paragraphe 81.6 de la Loi au montant de $.

G. RÉCLAMATION CONTRE LES ADMINISTRATEURS AU MONTANT DE ___ ___ .$

(*À compléter lorsque la proposition vise une transaction quant à une réclamation contre les administrateurs.*)

J'ai une réclamation en vertu du paragraphe 50(13) de la Loi, dont les détails sont mentionnés ci-après :

(*Donnez tous les détails de la réclamation, y compris les calculs s'y rapportant.*)

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FORMULAIRE 31 (*suite*)

II. RÉCLAMATION D'UN CLIENT D'UN COURTIER EN VALEURS MOBILIÈRES FAILLI AU MONTANT DE $

J'ai une réclamation en tant que client en conformité avec l'article 262 de la Loi pour des capitaux nets, dont les détails sont mentionnés ci-après

(*Donnez tous les détails de la réclamation, y compris les calculs y rapportant.*)

5. Au meilleur de ma connaissance, je suis lié (*ou* le créancier susnommé est lié) (*ou* je ne suis pas lié *ou* le créancier susnommé n'est pas lié) au débiteur selon l'article 4 de la Loi, et j'ai (*ou* le créancier susnommé a) (*ou* je n'ai pas *ou* le créancier susnommé n'a pas) un lien de dépendance avec le débiteur

6. Les montants suivants constituent les paiements que j'ai reçus du débiteur, les crédits que j'ai attribués à celui-ci et les opérations sous-évaluées selon le paragraphe 2(1) de la Loi auxquelles j'ai contribué ou été partie intéressée au cours des trois mois (*ou si le créancier et le débiteur sont des « personnes liées » au sens du paragraphe 4 de la Loi ou ont un lien de dépendance*, au cours des 12 mois) précédant immédiatement l'ouverture de la faillite, telle que définie au paragraphe 2(1) de la Loi.

(*Donnez les détails des paiements, des crédits et des opérations sous-évaluées.*)

7. (*Applicable seulement dans le cas de la faillite d'une personne physique*)

Lorsque le syndic doit réexaminer la situation financière du failli pour déterminer si celui-ci est tenu de verser les paiements prévus à l'article 68 de la LFI, je demande que l'on m'avise, conformément au paragraphe 68(4) de la Loi, du nouveau montant que le failli est tenu de verser à l'actif de la faillite ou du fait que le failli n'a plus de revenu excédentaire.

Je demande qu'une copie du rapport dûment rempli par le syndic quant à la demande de libération du failli, en conformité avec le paragraphe 170(1) de la Loi, me soit expédiée à l'adresse susmentionnée

Date le , à .

Témoin

_____ _____ .
Créancier

Numéro de téléphone : _____
Numéro de télécopieur : _____
Adresse électronique : _____

REMARQUE : Si la réclamation est soumise au présent formulaire, il doit être fait devant une personne autorisée à recevoir des affidavits.

AVERTISSEMENTS : Le syndic, peut, en vertu du paragraphe 128(3) de la Loi, racheter une garantie ou paiement au créancier garanti de la créance ou de la valeur de la garantie telle qu'elle a été fixée par le créancier garanti dans l'preuve de garantie.

Le paragraphe 204(1) de la Loi prévoit l'imposition de peines sévères en cas de présentation de réclamations, de preuves ou déclarations ou d'états de comptes qui sont faux.

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FORM 37

Voting Letter (Division I Proposal)
(Paragraph 51(1)(*f*) of the Act)

In the matter of the proposal of _____

I, _____, creditor (*or* I, _____, representative of _____, creditor), of _____ (*name of city*), a creditor in the above matter for the sum of $_____, hereby request the trustee acting with respect to the proposal of _____ to record my vote _____ (for *or* against) the acceptance of the proposal as made on the _____ day of _____ _____.

Dated at _____, this _____ day of _____, _____.

_____ _____
Witness Individual Creditor

_____
Name of Corporate Creditor

_____ Per _____
Witness Name and Title of Signing Officer

Note: If a copy of this form is sent electronically, please ensure the name and contact information of the sender, presented in Form 1, is also added at the end of this message.

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FORMULAIRE 37

Formulaire de votation (proposition déposée en vertu de la section I)
(alinéa 51(1)*f*) de la Loi)

Dans l'affaire de la proposition de _____ _____

Je, _____ . créancier (*ou* Je, _____ , représentant de _____ . créancier), de _____ . _____ (*nom de la ville*), créancier dans l'affaire susmentionnée à l'égard de la somme de _____ $, demande au syndic agissant relativement à la proposition de _____ _____. de consigner mon vote _ _____. (en faveur de *ou* contre) l'acceptation de la proposition), faite le _____

Daté le _____ . à _____

_____ _____
Témoin Créancier (personne physique)

_____
Créancier (personne morale)

_____ _____ Par _____
Témoin Nom et titre du signataire autorisé

Remarque : Lorsque le vote est exprimé par voie électronique par des moyens tels que le courriel, le nom et les coordonnées de l'expéditeur, tel que prévu au Formulaire 101, doivent être indiqués à la fin du document.

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FORM 37.1

Voting Letter (Consumer Proposal)
(Paragraph 66.15(3)(c) of the Act)

In the matter of the consumer proposal of _____

I, _____, creditor (or _____, representative of _____, creditor), of _____ (*name of city*), a creditor in the above matter for the sum of $ _____, hereby understand that:

(a) as a creditor who has a proven claim, I may indicate assent to or dissent from the consumer proposal at or prior to a meeting of creditors, or prior to the expiration of the 45-day period following the filing of the consumer proposal;

(b) a vote **AGAINST** the consumer proposal is not a deemed request for a meeting of creditors for the purpose of paragraph 66.15(2)(*b*) of the Act, and will not be counted in a vote on the consumer proposal unless a meeting of creditors is called;

(c) the administrator of the consumer proposal will be required to call a meeting of creditors only if, pursuant to section 66.15 of the Act:

- he/she is directed to do so by the official receiver within the 45-day period after the filing of the consumer proposal; or

- at the expiration of the 45-day period after the filing of the consumer proposal, creditors having in the aggregate at least 25 percent of the value of proven claims have so requested;

(d) if no meeting of creditors is called, the consumer proposal shall, by virtue of subsection 66.18(1) of the Act, be deemed to have been accepted by the creditors, regardless of any dissent(s) the administrator of the consumer proposal may have received

2. I hereby request:

(Check and complete appropriate section)

☐ the administrator acting with respect to the consumer proposal to record my vote **FOR** the acceptance of the consumer proposal as made on the _____ day of _____, _____.

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FORM 37.1 - *Concluded*

- the administrator acting with respect to the consumer proposal to record my vote **AGAINST** the acceptance of the consumer proposal as made on the _____ day of _____ _____.

- the administrator acting with respect to the consumer proposal to record my vote **AGAINST** the acceptance of the consumer proposal as made on the _____ day of _____ _____ and **REQUEST THAT A MEETING OF CREDITORS BE HELD.**

Dated at _____, this _____ day of _____ _____

_____ _____

Witness Creditor or Representative of Creditor

NOTE: If a copy of this Form is sent electronically by means such as email, the name and contact information at the bottom, printed or typed, must be added at the end of the document.

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FORMULAIRE 37.1

Formulaire de votation (proposition de consommateur)
(alinéa 66.15(3)*c*) de la Loi)

Dans l'affaire de la proposition de consommateur de _____

1 Je, _____, créancier (*ou* Je, _____, représentant de _____, créancier), de _____ (*nom de la ville*), créancier dans l'affaire susmentionnée à l'égard de la somme de _____ $, déclare comprendre ce qui suit :

a) En tant que créancier ayant prouvé une réclamation, je peux, lors de l'assemblée des créanciers ou avant la tenue de celle-ci, ou encore avant l'expiration des 45 jours suivant le dépôt de la proposition, indiquer si j'approuve ou je désapprouve la proposition de consommateur.

b) Un vote **CONTRE** l'acceptation de la proposition de consommateur n'est pas une demande de convocation d'une assemblée des créanciers pour l'application de l'alinéa 66.15(2)*b*) de la Loi et ne sera pas calculé dans le cadre d'un vote portant sur la proposition de consommateur, à moins qu'une assemblée des créanciers soit convoquée.

c) L'administrateur de la proposition de consommateur sera tenu de convoquer une assemblée des créanciers dans la mesure où, selon le cas, en vertu de l'article 66.15 de la Loi :

- dans les 45 jours suivant le dépôt de la proposition de consommateur, le séquestre officiel l'enjoint de convoquer une telle assemblée, ou

- des créanciers représentant en valeur au moins 25 p. 100 des réclamations prouvées en font la demande avant l'expiration des 45 jours suivant le dépôt de la proposition de consommateur.

d) Si une assemblée des créanciers n'est pas convoquée, la proposition de consommateur est réputée, en vertu du paragraphe 66.18(1) de la Loi, avoir été acceptée par les créanciers, sans égard à toute désapprobation reçue par l'administrateur de la proposition de consommateur.

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FORMULAIRE 37.1 *(suite)*

2 Je demande

(Cochez et remplissez la section pertinente.)

☐ à l'administrateur de la proposition de consommateur de consigner mon vote **EN FAVEUR** de l'acceptation de la proposition de consommateur faite le ____.

☐ à l'administrateur de la proposition de consommateur de consigner mon vote **CONTRE** l'acceptation de la proposition de consommateur faite le ____.

à l'administrateur de la proposition de consommateur de consigner mon vote **CONTRE** l'acceptation de la proposition de consommateur faite le _____ et **JE DEMANDE QU'UNE ASSEMBLÉE DES CRÉANCIERS SOIT CONVOQUÉE.**

Daté le _____, à _____.

_____ _____

Témoin Créancier ou représentant du créancier

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FORM 37

Voting Letter (Division I Proposal)
(Paragraph 51(1)(f) of the Act)

In the matter of the proposal of _____

I, _____, creditor (or I, _____, representative of _____, creditor), of _____ (*name of city*), a creditor in the above matter for the sum of $_____, hereby request the trustee acting with respect to the proposal of _____ to record my vote _____ (for *or* against) the acceptance of the proposal as made on the _____ day of _____

Dated at _____, this _____ day of

_____ _____
Witness Individual Creditor

_____
Name of Corporate Creditor

_____ Per _____
Witness Name and Title of Signing Officer

NOTE: If a copy of this Form is sent electronically by Fax or E-mail, the name and address of the creditor, as shown on the last line, must be typed at the end of the document.

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FORM 49

Notice to Creditors of Consumer Proposal
(Paragraph 66.14(*b*) of the Act)

(*Title Form 1*)

Take notice that:

1. _____ _____, _____, a consumer debtor, made a consumer proposal under section 66.13 of the Act on the _____ day of _____ _____ and a copy of it and the prescribed statement of affairs was filed with the official receiver by me, _____, the administrator of the consumer proposal on the day of _____, ____.

2. Attached to this notice are the following documents:

(a) a copy of the consumer proposal;

(b) a copy of my report on the consumer proposal, which was filed with the official receiver on the day of _____ ____;

(c) a copy of the statement of affairs referred to in paragraph 66.13(2)(*a*) of the Act; and

(d) a proof of claim.

3. Any creditor who has proved a claim may indicate assent to or dissent from the consumer proposal at or prior to a meeting of creditors, or prior to the expiration of the 45-day period following the filing of the consumer proposal. (Note: Form 37.1, *Voting Letter (Consumer Proposal)*, may be used by the creditor to indicate assent to or dissent from the consumer proposal and to request that a meeting of creditors be held.)

4. Any dissent I receive, however, is not a request for a meeting of creditors for the purpose of paragraph 66.15(2)(*b*) of the Act, and will not be counted in a vote on the consumer proposal unless I am required to call a meeting of creditors pursuant to section 66.15 of the Act.

5. I will be required to call a meeting of creditors only if, pursuant to section 66.15 of the Act:

(a) I am directed to do so by the official receiver within the 45-day period after the filing of the consumer proposal; or

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FORM 49 - *Concluded*

(b) at the expiration of the 45-day period after the filing of the consumer proposal, creditors having in the aggregate at least 25 percent of the value of proven claims have so requested.

6. If, within the 45-day period mentioned at paragraph 5, I am not required to call a meeting of creditors, the consumer proposal shall, by virtue of subsection 66.18(1) of the Act, be deemed to have been accepted by the creditors, regardless of any dissent(s) I may have received.

7. In the event that the consumer proposal has been accepted or is deemed to have been accepted by the creditors, I will apply to the court to review the consumer proposal only if, pursuant to section 66.22 of the Act, I am requested to do so by the official receiver or any other interested party within 15 days after the day of acceptance or deemed acceptance of the consumer proposal.

8. If, within that 15-day period mentioned at paragraph 7, I am not requested to apply to the court to review the consumer proposal, the consumer proposal is deemed to be approved by the court.

Dated at _____, this __ day of _____ _____.

_____
Administrator of
Consumer Proposal

NOTE: If a copy of this form is sent electronically, it must be sent as either the name and mandant information, if the method prescribed is Form 1, Court of Appeal, or the seal of the division.

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FORMULAIRE 49

Avis aux créanciers de la
proposition de consommateur
(alinéa 66.14*b)* de la Loi)

(Intitulé Formulaire 1)

Avis est donné que :

1. _____ _____ , débiteur consommateur, a fait une proposition de consommateur en vertu de l'article 66.13 de la Loi le _____, et une copie de la proposition et du bilan prescrit de ce dernier a été déposée auprès du séquestre officiel par _____, administrateur de la proposition de consommateur, le _____.

2. Sont annexés au présent avis les documents suivants :

a) une copie de la proposition de consommateur,

b) une copie du rapport de l'administrateur concernant la proposition de consommateur qui a été déposée auprès du séquestre officiel le ;

c) une copie du bilan visé à l'alinéa 66.13(2*a*)(i); et

d) un formulaire de preuve de réclamation.

3. Tout créancier qui a prouvé une réclamation peut, lors de l'assemblée des créanciers ou avant la tenue de celle-ci, ou encore avant l'expiration des 45 jours suivant le dépôt de la proposition, indiquer s'il approuve ou désapprouve la proposition. (Veuillez noter que le formulaire 37.1, *Formulaire de votation (proposition de consommateur)*, peut être utilisé par le créancier afin d'indiquer s'il approuve ou désapprouve la proposition ainsi que pour demander qu'une assemblée des créanciers soit convoquée.)

4. Cependant, toute désapprobation que je reçois n'est pas une demande en vue de la convocation d'une assemblée des créanciers pour l'application de l'alinéa 66.15(2)*b)* et ne sera pas calculée dans le cadre d'un vote portant sur la proposition de consommateur, à moins que je ne sois tenu de convoquer une assemblée des créanciers en vertu de l'article 66.15 de la Loi.

5. Je suis tenu de convoquer une assemblée des créanciers dans la mesure où, selon le cas, en vertu de l'article 66.15 de la Loi :

a) dans les 45 jours suivant le dépôt de la proposition de consommateur, le séquestre officiel m'enjoint de convoquer une telle assemblée; ou

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FORMULAIRE 49 *(suite)*

b) des créanciers représentant en valeur au moins 25 p. 100 des réclamations prouvées en font la demande avant l'expiration des 45 jours suivant le dépôt de la proposition de consommateur.

6. Si, au cours de la période de 45 jours mentionnée au paragraphe 5, je ne suis pas tenu de convoquer une assemblée des créanciers, la proposition de consommateur est réputée, en vertu du paragraphe 66.18(1) de la Loi, avoir été acceptée par les créanciers, sans égard à toute désapprobation que j'aurai reçue.

7. En cas d'acceptation effective ou présumée de la proposition de consommateur par les créanciers, je présenterai une demande de révision judiciaire de la proposition par le tribunal seulement si, en vertu de l'article 66.22 de la Loi, le séquestre officiel ou toute autre partie intéressée m'en fait la demande dans les 15 jours suivant l'acceptation effective ou présumée – de la proposition de consommateur.

8. Si, au cours du délai de 15 jours mentionné au paragraphe 7, je ne reçois aucune demande de révision de la proposition de consommateur par le tribunal, la proposition de consommateur sera réputée avoir été approuvée par le tribunal.

Daté le . à _____.

_____
Administrateur de la
proposition de consommateur

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FORMULAIRE 87

Avis et déclaration du séquestre
(paragraphes 245(1) et 246(1) de la Loi)

Le séquestre donne avis de ce qui suit et déclare que :

1. Le _____ (*date*), je, _____ _____ suis devenu séquestre à l'égard des biens suivants de _____, personne insolvable (*ou* failli), tel que décrit ci-dessous :

(*Donnez une description suffisante des biens incluant leur valeur comptable et en les répartissant selon les catégories suivantes : stock, comptes recevables et autres biens.*)

2. Je suis devenu séquestre des biens susmentionnés du fait de ma prise de possession ou de ma prise de contrôle desdits biens (*ou* de ma nomination en cette qualité par _____ (*nom de la personne ou du tribunal ayant nommé le séquestre*) aux termes de _____ (*Donnez les détails du contrat de garantie ou de l'ordonnance du tribunal prévoyant la nomination.*)

3. Le soussigné a pris la possession ou le contrôle des biens susmentionnés le _____.

4. Les renseignements suivants se rapportent à la mise sous séquestre :
a) Adresse de la personne insolvable (*ou* du failli) :
b) Activité principale de l'entreprise :
c) Adresse de l'établissement (*ou* des établissements)
d) Montant dû par la personne insolvable (*ou* le failli) à chaque créancier qui détient une garantie sur les biens susmentionnés : _____ $
e) La liste des autres créanciers de la personne insolvable (*ou* du failli) incluant le montant qui est dû à chacun d'eux et le montant total dû à l'ensemble des créanciers est la suivante :
f) Le plan d'action que le séquestre entend suivre pendant la durée de son mandat, s'il a établi un tel plan, est le suivant :
g) Personne-ressource du séquestre :
(*Donnez le nom et les numéros de téléphone et de télécopieur, et, le cas échéant, l'adresse électronique.*)

Daté le _____, à _____

_____
Nom du séquestre

_____
Nom et titre du signataire autorisé

[illegible]

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PART II

BANKRUPTCY ORDERS AND ASSIGNMENTS

Summary: Bankruptcy Petitions, Orders and Assignments and Basic Issues - Sections 42 to 49

Section 42 details the statutory list that upon which the BIA is founded, being "acts of bankruptcy" that allow petitioning and coverage by the Act. Amongst others the most common acts that the bankrupt will perpetrate that draw the application are:

- **if in Canada or elsewhere he makes an assignment of his property to a trustee for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;**
- **if in Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it;**
- **if in Canada or elsewhere the debtor makes any transfer of the debtor's property or any part of it, or creates any charge on it, that would under this Act be void or, in the Province of Quebec, null as a fraudulent preference;**
- if, with intent to defeat or delay his creditors, he departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling-house or otherwise absents himself;
- **if the debtor permits any execution or other process issued against the debtor under which any of the debtor's property is seized, levied on or taken in execution to remain unsatisfied until within five days after the time fixed by the executing officer for the sale of the property or for fifteen days after the seizure, levy or taking in execution, or if any of the debtor's property has been sold by the executing officer, or if the execution or other process has been held by the executing officer for a period of fifteen days after written**
- **demand for payment without seizure, levy or taking in execution or satisfaction by payment, or if it is returned endorsed to the effect that the executing officer can find no property on which to levy or to seize or take, but if interpleader or opposition proceedings have been instituted with respect to the property seized, the time elapsing between the date at which the proceedings were instituted and the date at which the proceedings are finally disposed of, settled or abandoned shall not be taken into account in calculating the period of fifteen days;**
- **if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;**
- **if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;**
- **if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;**

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- **if he defaults in any proposal made under this Act; and**
- **if he ceases to meet his liabilities generally as they become due.**

Subs. (2) deems any above assignment to be null and void.

Section 43 is, what I call, the "charging" provision whereby a creditor can make application to court for a bankruptcy order to have the Act apply. The two conditions to allow such are:

- **If there has been an act of bankruptcy as detailed above, and,**
- **The debt that exists with respect to that creditor, or group of creditors, amounts to more than $1,000.**

Subs. (2) allows a secured creditor to give up stated value of his security to be given standing to make a petition though only up to the amount of his residual unsecured.
Subs. (3) requires that the application be supported with an affidavit from someone personally knowledgeable of the facts attested to while subs. (4) allows the court to join the proceedings in the case of two or more bankrupts if it sees fit.
Subs. (5) requires that the petition be filed with the court in the locality of the bankrupt.
Subs. (6) provides that the court may, in its discretion, grant the bankruptcy order upon proof of application and of the facts therein. Note that civil damages may result against the petitioner if the judge finds otherwise and the debtor suffers harm because of it. So, make sure the situation is exactly as provided in the affidavits and the BIA should be called in to apply. Subs. (7) allows the court to dismiss the application if it is not satisfied with regards to the proof or that the debtor can make its payments as they come due.
Subs. (9) provides that once the bankruptcy judge is satisfied that the BIA should apply, she shall appoint a trustee the identity of which is per the desires of the petitioner(s). This allows the petitioner the ability to choose a trustee that she has total confidence in to act for her interest: it also allows the petitioner to have "first stab" at having their interests represented best since, while there are mechanics for the substitution of a trustee once the process operates, it is the basically the petitioner who chooses the initial trustee. The court will however, consider all the creditors in appointing a trustee.
Subs. (10) allows the debtor to contest the petition whereby the court will set out a stay of the proceedings to a date whereby the issue can be determined in trial: this allows a debtor to prove that they are not bankrupt or have perpetrated an above act, and that the BIA should not apply while the court will impose any conditions on alienation of the debtor's property until the next proceeding. Subs. (11) allows the court to also stay the proceedings for other reasons it feels just.
(Subs. (12) requires non-resident petitioners to extend costs with the court, before hand, for the proceeding to continue.)
Subs. (13) allows the court to substitute creditors in the stayed proceedings have not been pursed with due diligence by the primary petitioner(s).
Subs. (14) very importantly disallows a petition from being withdrawn once it has been entered into court: this is critical since the BIA cannot be used illegitimately to cause harm and the faith placed by the court in its discretion to apply the BIA should not be used capriciously by a creditor seeking to obtain advantage, other than through the BIA.

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(Subs. (15) allows a petition to be acceptable against any of the partners in a partnership without having to name them all - allowing a petition to be valid if all the partners are not known by the petitioner, while subs. (16) allows consolidation of proceedings when and if other proceedings have been commenced against the same partnership in fact.)
Subs. (17) allows a bankruptcy proceeding to continue notwithstanding the debtor dies - this allows the proceedings to continue to then operate against the debtor's estate. Sections 44 and 45 then provide specific rules with regard to petitions against estates of bankrupts.

Section 46 provides for the appointment of an interim receiver, who must be a trustee, to protect the debtor's property until the petition has been dealt with. It allows the interim receiver to take immediate control of the debtor's property and allows the court to make any order it sees fit to interfere with any of the debtor's rights though on an undertaking being imposed on the applicant. This allows the petitioning creditor to protect any legal or, under BIA, interest it has in the debtor's property and its conservation. Subs. (2) states the conservatory measures that the interim receiver can take with respect to the debtor's property including control of the debtor's business, however, said control shall not operate to interfere with the business. Note that it is the conservatory measures are effectively determined by the court.
Section 47 deals with instances where secured creditors are about to or have sent possessory notices to the debtor with respect to their security. It prompts for the court to appoint an interim receiver to take control over any or all of the debtor's property until the earliest of:

- the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
- the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

In such a case, per subs. (2) the interim receiver shall exercise similar conservatory steps as above noted, at the discretion of the court, while per subs. (3) the appointment shall be made only if it acts to protect the debtor's estate, generally, AND the interests of the secured creditor sending the notice to enforce.

Section 47.1 attends to instances where the debtor is about or who has made a proposal within the Part III chapter on proposals and allows the court to, at any time, appoint a trustee to take control of the debtor's property. Subs. (1.1) attends to when that appointment will expire while subs. (2) deals with actions that authority can take with respect to the estate of the debtor. NOTE that pursuant to subs. (3) the appointment of the receiver shall occur only if it is in the best interests of the debtors generally or to preserve the debtor's estate. Section 47.2 allows the court to charge the debtor's property, AHEAD of any secured creditors, for the payment of the interim receiver's fees and costs.

Section 48 allows for exemption from the s 43 to 46 statutory target of application those instances where the party is a wage earner with earnings less than $2,500/year and who does not carry on her own business, carries on the tillage of soil, is a farmer or is a fisherman.

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Section 49 allows an assignment of an insolvent person to her creditors to a official receiver in respect of it. Subs. (1) through (4) prompt for the filing of the assignment by the official receiver while also finding a trustee to act on the desires of the dictated creditors while if the receiver cannot find a trustee to act, the assignment fails. Subs. (6) prompts for the trigger of the summary administration provisions in the BIA to apply if, in the case when the debtor isn't a corporation, upon opinion by the receiver, if the net realizable assets of the corporation, after secured claims, is less than $5,000. Subs. (8) allows the summary administration provisions to cease to apply if the realizable value of the debtor's estate exceeds $5,000 or the costs of realization are high relative to the value.

ACTS OF BANKRUPTCY

Acts of bankruptcy - Sec. 42

42. (1) A debtor commits an act of bankruptcy in each of the following cases:

(a) if in Canada or elsewhere he makes an assignment of his property to a trustee for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;

(b) if in Canada or elsewhere the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it;

(c) if in Canada or elsewhere the debtor makes any transfer of the debtor's property or any part of it, or creates any charge on it, that would under this Act be void or, in the Province of Quebec, null as a fraudulent preference;

(d) if, with intent to defeat or delay his creditors, he departs out of Canada, or, being out of Canada, remains out of Canada, or departs from his dwelling-house or otherwise absents himself;

(e) if the debtor permits any execution or other process issued against the debtor under which any of the debtor's property is seized, levied on or taken in execution to remain unsatisfied until within five days after the time fixed by the executing officer for the sale of the property or for fifteen days after the seizure, levy or taking in execution, or if any of the debtor's property has been sold by the executing officer, or if the execution or other process has been held by the executing officer for a period of fifteen days after written demand for payment without seizure, levy or taking in execution or satisfaction by payment, or if it is returned endorsed to the effect that the executing officer can find no property on which to levy or to seize or take, but if interpleader or opposition proceedings have been instituted with respect to the property seized, the time elapsing between the date at which the proceedings were instituted and the date at which the proceedings are finally disposed of, settled or abandoned shall not be taken into account in calculating the period of fifteen days;

(f) if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

(g) if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;

(h) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;

(i) if he defaults in any proposal made under this Act; and

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(j) if he ceases to meet his liabilities generally as they become due.

Unauthorized assignments are void or null - Sec. 42(2)
(2) Every assignment of an insolvent debtor's property other than an assignment authorized by this Act, made by an insolvent debtor for the general benefit of their creditors, is void or, in the Province of Quebec, null.
R.S., 1985, c. B-3, s. 42;
1997, c. 12, s. 26;
2004, c. 25, s. 27.

APPLICATION FOR BANKRUPTCY ORDER

Bankruptcy application - Sec. 43
43. (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

If applicant creditor is a secured creditor - Sec. 43(2)
(2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

Affidavit - Sec. 43(3)
(3) The application shall be verified by affidavit of the applicant or by someone duly authorized on their behalf having personal knowledge of the facts alleged in the application.

Consolidation of applications - Sec. 43(4)
(4) If two or more applications are filed against the same debtor or against joint debtors, the court may consolidate the proceedings or any of them on any terms that the court thinks fit.

Place of filing - Sec. 43(5)
(5) The application shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

Proof of facts, etc. - Sec. 43(6)
(6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.

Dismissal of application - Sec. 43(7)

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(7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

Dismissal with respect to some respondents only - Sec. 43(8)
(8) If there are more respondents than one to an application, the court may dismiss the application with respect to one or more of them, without prejudice to the effect of the application as against the other or others of them.

Appointment of trustee - Sec. 43(9)
(9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.

Stay of proceedings if facts denied - Sec. 43(10)
(10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's property and for any period of time that may be required for trial of the issue relating to the disputed facts.

Stay of proceedings for other reasons - Sec. 43(11)
(11) The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

Olympia & York Developments Ltd., Re, 1995 CanLII 7380 (ON SC) - Objection to BIA Mechanics being Improperly Followed

Date:	1995-09-01
Docket:	31-204546T; 31-204573T; 31-204574T
Parallel citations:	34 CBR (3d) 93
URL:	http://canlii.ca/t/1wbtf
Citation:	Olympia & York Developments Ltd., Re, 1995 CanLII 7380 (ON SC), <http://canlii.ca/t/1wbtf> retrieved on 2013-08-29
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Ontario Supreme Court
Olympia & York Developments Ltd., Re
Date: 1995-09-01

Re bankruptcy of Olympia & York Developments Limited
Ontario Court of Justice (General Division) [Commercial List] Farley J.
Heard – April 18, 1995.
Judgment – September 1, 1995.

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Patricia D.S. Jackson, for moving party, Bank of Nova Scotia.
Arnie Herschorn, for Institute for Advanced Talmudic Study.
Garth Low, for Martin Orbach, Lewis Gestetner, and HRF Fund Holdings Inc.
Theodore Kerzner, Q.C., for Yeshivah Yesodei Hatora.
David Stamp, for Credit Lyonnais.
William V. Sasso, for Olympia & York Creditors' Monitoring Committee.
Geoffrey B. Morawetz and Craig J. Hill, for Coopers & Lybrand OYDL Inc. (Administrator) and Coopers & Lybrand Limited (Trustee in Bankruptcy of Olympia & York Developments Limited).

(Docs. 31-204546T, 31-204573T and 31-204574T)

[1] September 1, 1995. FARLEY J.: – The Bank of Nova Scotia ("BNS") moved for an order pursuant to s. 181 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), annulling the bankruptcy of Olympia & York Developments Limited ("OYDL") created by a receiving order dated December 20, 1994 ("receiving order") in combination with two other orders of the same date (conjunctively the "December orders"), or, in the alternative, an order pursuant to s. 187(5) of BIA reviewing and rescinding the December orders. BNS was supported in this regard by various other parties (Martin Orbach, Lewis Gestetner, and HRF Fund Holdings Inc.; the Institute for Advanced Talmudic Study; and Yeshiva Yesodei Hatora), which, subsequent to the hearing but prior to the release of my decision, have entered into settlement agreements with the respondents Coopers & Lybrand OYDL Inc., the administrator ("administrator") pursuant to the OYDL *Companies Creditors' Arrangement Act* (R.S.C. 1985, c. C-36 – "CCAA") plan, and Coopers & Lybrand Limited, the trustee in bankruptcy of OYDL ("trustee"), pursuant to the receiving order. The OYDL Creditors' Monitoring Committee supported the position of the administrator and trustee.

[2] On May 20, 1992, petitions in bankruptcy were issued against OYDL by 976910 Ontario Inc., Credit Lyonnais, and the HongKong and Shanghai Banking Corporation Limited. The subject receiving order made against OYDL was advanced by the petitioners in accordance with the procedure set out in s. 10.7 of the OYDL CCAA plan, which was approved by the creditors of OYDL under the CCAA and sanctioned by the court on February 5, 1993. I granted the receiving order on December 20, 1994, together with two other orders, administrative in nature, which are individually referred to as the BIA admin order and the CCAA admin order.

[3] BNS submits that the December orders are contrary to BIA in that they:

(a) create a partial and entirely voidable bankruptcy of OYDL,
for the apparent purpose of avoiding significant adverse tax consequences associated with a "proper" bankruptcy of OYDL;
(b) vest only a portion of the assets of OYDL which BIA requires to be vested in the trustee;
(c) limit the powers and duties which BIA requires of a trustee in bankruptcy such as the trustee;
(d) require the administrator to act contrary to BIA; and
(e) allow for the use of certain sections of BIA in respect of certain preferences and settlements while at the same time limiting the trustee's power to review and challenge other potential preferences, settlements, and reviewable transactions which the trustee would examine under a "proper" bankruptcy of OYDL, but all in contemplation that the December orders would be annulled in the future (and hence, in the language of BIA, "ought never to have been made") when the utility of those portions of BIA sought to be relied on has been exhausted. BNS also complains that the December orders were made on an ex parte basis without the participation of those, such as BNS, whose rights would be affected by them. The administrator and trustee countered by saying that BNS is attempting to use this motion to obtain relief which would have the effect of shielding itself from an action being continued by the trustee to set aside certain alleged preferential transactions which were for the benefit of BNS, to the prejudice of the other unsecured creditors of OYDL.

[4] The two sections of BIA which were specified by BNS were:

> **181.** (1) Where, in the opinion of the court, a receiving order ought not to have been made... the court may by order annul the bankruptcy.
>
> 187(5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

[5] In the proceedings under CCAA, the creditors of OYDL negotiated and voted on the OYDL CCAA Plan; 27 of 35 classes of creditors voted in favour, the remaining 8 voted against the plan. The claims of BNS with respect to the swap transactions (defined infra) were included in Class 33A, which class voted against the plan. The February 5, 1993, sanction order appointed the administrator as the administrator of OYDL; in s. 16(b) the order provided that, in exercising its power and authority pursuant to the plan, the administrator was the agent of OYDL and not the agent of the creditors of OYDL.

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[6] On June 10, 1993, the administrator commenced an action ("preference action") which sought to set aside and declare void certain transactions between OYDL, Olympia & York CC Limited ("OYCC"), Baden Real Estate Corp., and BNS ("swap transactions") on the basis that:

(a) the swap transactions were entered into with the intention and effect of giving BNS an improper preference over the other creditors of OYDL and of defeating, hindering, delaying, prejudicing, or defrauding OYDL's creditors contrary to the Ontario *Fraudulent Conveyances Act*, the Ontario *Assignments and Preferences Act*, and BIA;

(b) they constituted settlements pursuant to BIA; and

(c) they were oppressive, unfairly prejudicial to, or unfairly disregarded the interests of OYDL, OYCC, and the security holders and creditors thereof, contrary to s. 248 of the Ontario *Business Corporations Act.*

In its statement of defence, BNS stated:

(a) Class 33A was specifically excluded from those classes of creditors which approved the plan and, accordingly, none of the terms of the plan apply to BNS in its capacity as a creditor in respect of the swap transaction; and

(b) the administrator, which was appointed by the sanction order and which derives all its authority from the sanction order in the plan, therefore has no standing to assert any of the claims set forth in the statement of claim in the preference action.

BNS then moved to dismiss the preference action on the foregoing basis.

[7] On December 20, 1994, counsel for the administrator representing OYDL and for each of the petitioning creditors attended upon me regarding the December orders. There had been some discussions two weeks earlier between counsel for the administrator and for BNS concerning the possibility of the receiving order motion and on December 19, 1994, counsel for the administrator advised counsel for BNS that the administrator intended to proceed within the next day with the bankruptcy of OYDL as contemplated in s. 10.7 of the plan. In the affidavit of Paul Currie, an employee of the administrator, it was set out that one of the principal reasons for seeking the December orders was the pending BNS motion. Another factor considered was the position of the federal and provincial Crowns under the CCAA plan.

The Ontario Court of Appeal in *Fine's Flowers Ltd. v. Fine's Flowers Ltd. (Creditors of)* 1993 CanLII 967 (ON CA), (1993), 22 C.B.R. (3d) 1, has now ruled subsequent to the approval of the subject plan that the Crown is not bound by CCAA proceedings. Further, Mr. Currie indicated that "[a] bankruptcy under section 10.7 will enable the Administrator to effectively deal with the remaining assets of OYDL, creditors who are affected by the Plan and creditors who are not affected by the Plan." The receiving order was issued in the general form of Form 28 of Schedule 111 of BIA.

[8] The administrator was appointed in the CCAA proceedings and is charged with the responsibility of implementing the plan. In pursuing the BIA proceedings the administrator is required to follow the provisions of s. 10.7 of the CCAA plan. The provisions of the plan and of the December orders do not restrict the court from utilizing its discretion at the hearing of any motion to annul the receiving order.

[9] The administrator points out that, in addition to having claims under Class 33A (swap transactions), BNS is a substantial creditor of OYDL in the Class 28 unsecured creditors as to $540 million of unsecured claims. While creditors of Class 28 voted in favour of the plan and are bound by it, they are only bound by it, in my view, qua their condition of being a Class 28 creditor – and not in their condition, if such were the case, under a class which did not vote in favour of the plan.

[10] In accordance with the receiving order the provisions of BIA and s. 10.7 of the plan, it is the position of the administrator and trustee that the preference action was vested in the trustee. On January 30, 1995, the administrator issued its annual report to the creditors of OYDL; it stated, at pp. 17-8, that:

> A fundamental objective in making the [bankruptcy] filing was to ensure that OYDL and the Administrator could utilize the sections of the Plan available to continue the preference action. As you will recall the Plan provided for a section 10.7 "limited bankruptcy" of OYDL if defendants to preference actions sought to have preference actions dismissed on jurisdictional grounds. Certain creditors have sought this remedy and after considering the consequences of such action the Administrator decided to utilize section 10.7 of the Plan.
>
> **Effect of 10.7(L) Bankruptcy**
>
> Counsel has advised that the effect of 10.7(L) is as follows:
>
> * OYDL is in bankruptcy;
> * the vesting of assets to the Trustee is limited to the preference action; and
> * the Plan continues to be binding on OYDL.

[11] BNS asserts that the fact that the bankruptcy was so limited was not clear from the December orders or from the affidavit of Mr. Currie since the receiving order merely appoints Coopers& Lybrand Limited as the trustee in bankruptcy of the estate of OYDL (not a portion of the estate) and there is nothing contained therein to suggest that the apparent objective of this "limited" vesting of assets in the trustee was an attempt to avoid the potential negative tax consequences associated with the possible change in control of all of the assets of OYDL being vested in the trustee.

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[12] Section 10.7(L) of the plan provides:

> (L) Notwithstanding the granting of a receiving order pursuant to this Section 10.7, the Plan as sanctioned shall continue to be binding upon all Creditors and shall be binding upon the trustee in bankruptcy of the Relevant Applicant and the Relevant Applicant. Such receiving order shall, accordingly, vest all Preference Claims in the trustee but shall not vest any other assets nor require any administration save as contemplated hereby or ordered by the Court. Without limiting the foregoing, the powers of the Administrator with respect to OYDL and its property shall not be diminished or modified by the terms of this Section 10.7 or any deemed vesting of title in a trustee in bankruptcy of OYDL. When all Recourses [proceedings taken to enforce Preference Claims] in respect of a Relevant Applicant have been completed, whether by withdrawal of the Recourses, settlement thereof, final judgment in respect thereof or otherwise, and any required administration of the bankrupt estate completed, *the Relevant Applicant shall, in the case of OYDL*, and may, in the case of the other Relevant Applicants, *apply for the annulment of the receiving order pursuant to Section 181 and Subsection 187(5) of the Bankruptcy Act, and the Administrator and the Creditors of the Relevant Applicant shall not oppose such annulment* unless it adversely affects the exercise of a Recourse, any judgment rendered in respect of a Recourse or any settlement made between a Moving Party and a Respondent. (Emphasis added.)

[13] Section 10.7(M) of the plan provides:

> (M) The application for annulment provided for in Section 10.7(L) may be made earlier than therein contemplated with the consent of the relevant Moving Party and the trustee in bankruptcy of the Relevant Applicant on such terms as the relevant Moving Party may, in its discretion, agree to accept.

[14] It appears to me that the issue in this motion is whether the court should either annul the receiving order or rescind the December orders either because there was no jurisdiction in the court to have granted these orders on December 20, 1994, or that BNS, as supported by the other parties, has shown additional information as to why this court's discretion should be so exercised.

[15] If BIA does not allow for such a receiving order in the sense that the legislation does not permit a receiving order of the nature granted, then clearly I cannot impose my views of what is an appropriate regime to operate under regarding bankruptcy matters and disregard what is the express will of Parliament: see *R. v. McIntosh*, [1995] S.C.J. No. 16, at pp. 39-40. This, of course, should be contrasted with the aspect of the inherent jurisdiction of this court to deal with the vacuum which is required to be filled so as to give purpose and meaning to the legislation or to supplement what is permitted by the legislation so that there is a firm foundation on which to build, as opposed to a partial base of sand. In this regard see the views of Chadwick J. in his unreported decision *Re J.P. Capital Corp.*, released February 28, 1995 [reported at reflex, (1995), 31 C.B.R. (3d) 102 (Ont. Bktcy.)] (especially at p. 4 [p. 104 C.B.R.] where he comments on *Re A. & F. Baillargeon Express Inc.* reflex, (1993), 27 C.B.R. (3d) 36 (Que. S.C.); *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Inc.* (1971), 21 D.L.R. (3d) 75 (Man. Q.B.); in *Re Tlustie* (1923), 3 C.B.R. 654 (Ont. S.C.); *Re Loxtave Buildings of Canada Ltd.* (1943), 25 C.B.R. 22 (Sask. K.B.); *Re Cheerio Toys & Games Ltd.* (1971), 15 C.B.R. (N.S.) 77 (Ont. S.C.), affirmed [1972] 2 O.R. 845 (C.A.); *Re Westar Mining Ltd.* 1992 CanLII 1863 (BC SC), (1992), 14 C.B.R. (3d) 88 (B.C. S.C.); *Re Woodward's Ltd.* reflex, (1993), 17 C.B.R. (3d) 236 (B.C. S.C.); *Re Lehndorff General Partner Ltd.* reflex, (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.). It should, however, be recognized that in the present situation there is no such general enabling language present, as was the case in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* 1994 CanLII 7468 (ON SC), (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div.) [Commercial List], where "takes such other action as the court [deems] advisable" was in place. As Chadwick J. said at p. 143 of *Re N.T.W. Management Group Ltd.* reflex, (1994), 29 C.B.R. (3d) 139 (Ont. Bktcy.):

> Courts have recognized in dealing with the bankruptcy and insolvency legislation a technical or stringent interpretation should not be applied. The Act has to be flexible to deal with the numerous situations and variations which arise from time to time. To take a technical approach to the Act would in my view defeat the whole purpose of the legislation.

Clearly, it would be undesirable for the general working of the bankruptcy and insolvency regime (be it pursuant to BIA or CCAA or a combination thereof since there must be a meshing of these two pieces of legislation) for some party to escape the scrutiny (and if found wanting, the rectification) of a preference review merely through a technical device. However, it must be acknowledged that the prevailing legislation may not always be perfect so as to preclude such a result; it may be that a party may be able to take advantage of such an imperfection until such is cured by amendment.

[16] BNS submits that the December orders create a partial and entirely voidable bankruptcy in which only certain preference claims of OYDL and no other assets vest in the trustee, which limited vesting of assets would be contrary to s. 71(2) of BIA, which provides:

> 71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights

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of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

"Property" for the purpose of BIA has been broadly defined in s. 2 as:

2. In this Act,

...."property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent in, arising out of or incident to property...

BNS then submits that s. 67(1) of BIA reinforces the aspect that a bankruptcy must involve *all* the bankrupt's property (but implicitly this must mean *all* property of *value* since it would be inappropriate to distribute "excess" liabilities).

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

but it shall comprise

(*c*) *all property* wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit. (Emphasis added.)

It must be recognized that one of the fundamental purposes of the bankruptcy legislation is the appropriate distribution of the bankrupt's property amongst its creditors. See L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3d ed., looseleaf (Scarborough, Ont.: Carswell, 1995). It would seem to me that "shall" should be read in the imperative sense and that "all property" cannot be modified to provide that it should be part of the property: see *Cheerios*, supra, at p. 81. That s. 46 of BIA provides for the appointment of an interim receiver over "any part" of the property of a debtor does not seem to me to imply that BIA also provides by implication that a trustee can be appointed over "part" of the bankrupt's estate. However, of course, it should be noted that the property does not include all assets which are legally but not beneficially held by the bankrupt. In this regard it would seem to me that where the bankrupt has entered into bona fide contractual arrangements as to certain of its assets, then these assets would by implication not form part of the property of the bankrupt in the Frankian jurisprudential sense that certain of the bundle of rights (and reciprocal obligations) of those assets which have been dealt with have been alienated; however, that would not thereby "disqualify" those remaining rights (and obligations) from forming part of the bankrupt's property. It would seem that it is clear that the preference action is an asset which is appropriately property capable of devolving upon the trustee; similarly, if the preference action is successful, then the security which the BNS claims in relation to the swap transactions will be void and thus there is the appropriate devolution to the trustee of this (inchoate) right to the property forming the security for the BNS swap transaction as of the receiving order.

[17] It seems to me that the receiving order would have the effect of having all property of the bankrupt devolve upon the trustee. However, as discussed immediately above, this would not include any aspect of assets which have been otherwise alienated in a bona fide fashion. It would appear that the concern of BNS as to whether or not all (appropriate) property has so devolved upon the trustee lies as to para. 4 of the BIA admin order of December 20, 1994, which states:

> This Court Orders that, notwithstanding the granting of the Receiving Order pursuant to section 10.7 of the Plan, the Plan as sanction shall continue to be binding on the trustee in bankruptcy OYDL and OYDL.

Section 66(2) of BIA provides that "Nothing in this Act [BIA] shall be deemed to affect the operation of [CCAA]." It would seem to me that the sanctioned plan can be taken into account in the situation of determining what property is to devolve unto the trustee. As Blair J. said in his reasons in sanctioning the plan on February 5, 1993 (over two years ago) [reported as *Olympia & York Developments Ltd. v. Royal Trust Co.* reflex, (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.), at p. 19]:

> From this perspective it could be said that the parties are merely
> being held to – or allowed to follow – their contractual arrangement. There is, indeed, authority to suggest that a Plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a Plan that could be lawfully incorporated into any contract: see *Re Canadian Vinyl Industries Inc.* (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.), at p. 18; L.W. Houlden & C.H. Morawetz, *Bankruptcy Law of Canada*, vol. 1 (Toronto: Carswell, 1984) pp. E-6 and E-7.

[18] Thus, if one takes into account the sanctioned plan (which, by implication, Blair J. determined was a bona fide contract), then it appears that the only property which was not burdened by the contractual relations of the plan was the preference action and the related asset to it. If there were other assets not so dealt with in the plan, then they would also

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have to be dealt with in the sense that they would devolve unto the trustee. If there are in fact other assets not so dealt with but which would have to be in accordance with this perspective, it may be entirely possible that the administrator and trustee may wish to revisit the question, especially if there would be severe adverse tax consequences. I note that CCAA need not be employed to revitalize a corporation but can also involve a liquidation scenario: See *Lehndorff*, supra, at p. 284 [B.L.R.], relying on *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.), at p. 318, reversed on other grounds (1988), 71 C.B.R. (N.S.) 71 (C.A.), and *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.), at pp. 187-188 (C.B.R.). In this regard I believe it fair and reasonable to categorize the Olympia & York CCAA plan as being more of the liquidation scenario as opposed to the revitalization one; those classes which did not vote in favour of the plan were allowed, in effect, to exercise and realize upon their security with the attendant "disappearance" of those assets from the scene. No one has appealed the sanction order of February 5, 1993, which approved the plan which contains s. 10.7(L) and (M). Section 6(*b*) of CCAA provides that a court sanctioned plan under CCAA is binding upon a trustee in bankruptcy already in existence; a fortiori, it would seem that the rights and obligations of a subsequently appointed trustee would be subject to a pre-existing sanctioned CCAA plan.

[19] I do not see this type of situation, namely, an open bona fide arrangement which has been approved in accordance with the provisions of CCAA, as being contrary to public policy, as was the concern in *Re Knechtel Furniture Ltd.* (1985), 56 C.B.R. (N.S.) 258 (Ont. S.C.), where the "private" arrangement was designed to keep certain assets out of the hands of creditors (with no quid pro quo). Similarly, there does not appear to be any material risk of abuse, as would be the case where an undischarged bankrupt tried to deal with his property despite having no status (see *McNamara v. Pagecorp Inc.* (1989), 76 C.B.R. (N.S.) 97 (Ont. C.A.)), since in the present case the administrator appointed pursuant to the plan sanctioned by the court would be dealing with matters in accordance with that plan and would always be under the general supervisory jurisdiction of the court.

[20] It would seem to me that implicit in s. 16(3) of BIA requiring the trustee to take "possession of... all property of the bankrupt" is the concept, as discussed above, that if the property which is capable of devolving upon the trustee in that it has not otherwise been appropriately alienated. The same philosophy would also deal with the concerns of BNS as to s. 158(*a*). It would also appear contrary to the general philosophy of the bankruptcy legislation to require an actual taking of possession of certain assets when that action would subject the trustee in the estate to greater liability than there would be value in the asset (e.g., the possession of leased premises with attendant exposure to occupation rent or the possession of hazardous property with the exposure to environmental liability). It would also appear that the plan which was sanctioned has otherwise dealt with the other potential preference settlements and related matters.

[21] It does not seem to me that BNS has made out a case that the obtaining of the December orders was an abusive process if the preference action is truly the only asset which comprises the property of OYDL when one looks at what is capable of devolving upon the trustee. It is not, of course, improper to use BIA for specific purposes aside from the division of the bankrupt's assets amongst creditors, including being able to employ remedies which would not be available outside the bankruptcy: see *Re Maple City Ford Sales (1986) Ltd.* reflex, (1992), 14 C.B.R. (3d) 188 (Ont. Bktcy.); *Re Four Twenty-Seven Investments Ltd.; Re 495487 Ontario Ltd.* (1985), 55 C.B.R. (N.S.) 183 (Ont. S.C.), affirmed (1985), 58 C.B.R. (N.S.) 266 (Ont. C.A.); *Re 676915 Ontario Ltd.* (1989), 76 C.B.R. (N.S.) 164 (Ont. S.C.); *Gasthof Schnitzel House Ltd. v. Sanderson* (1978), 27 C.B.R. (N.S.) 75 (B.C. S.C.).

[22] I would observe that I do not feel that s. 30(1) of BIA advances the cause of the administrator and trustee since that section clearly contemplates that a trustee in bankruptcy would have had devolved onto him the rights of the bankrupt tenant vis-à-vis the lease. That section only allows the trustee to otherwise deal with that property. It would seem to me that *Stead Lumber Company v. Lewis (No. 2)* (1957), 37 C.B.R. 24 (Nfld. T.D.); *Re Erin Features #1 Ltd.* 1991 CanLII 1814 (BC SC), (1991), 8 C.B.R. (3d) 205 (B.C. S.C.); *Re Bakermaster Foods Ltd.* (1985), 56 C.B.R. (N.S.) 314 (Ont. S.C.), should be viewed in the same light vis-à-vis the trustee's ability to disclaim or abandon "improvident contracts."

[23] I would also note as to the status of BNS to bring this motion

that the obiter views of Houlden J. in *Re Develox Industries Ltd.* (1970), 14 C.B.R. (N.S.) 132 (Ont. S.C.), at p. 133, were not exhaustive when he said:

> In view of the disposition which I propose to make of this application, I do not have to give a definite answer to this question. However, it would seem to me that the application to rescind or annul a receiving order should be by the debtor, the petitioning creditor or the trustee. In my view, to permit any creditor to bring such an application would be an abuse to the process of the court. For the purpose of this application I will assume that the landlord has the necessary status to ask that the receiving order be annulled or rescinded.

It would not seem that he was attempting to be definitive in all circumstances, but rather that he was giving rather valuable guidance as to the question in a general sense. Thus, it would appear that where there are unusual circumstances this general rule would not and should not be applied rigidly and unthinkingly. It would seem to me that a lack of jurisdiction proposal by a creditor would be an unusual circumstance worthy of giving that creditor status. However, I would also be of

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the view that motions of this nature would be truly infrequent and that if creditors were to inappropriately bring such a motion, they should be made an example for others by severe costs awards or other suitable sanction.
[24] The motion of BNS is dismissed. BNS is to pay the administrator and trustee jointly $10,000 costs. This is not a severe costs award.
Motion dismissed.

Security for costs - Sec. 43(12)
(12) Applicants who are resident out of Canada may be ordered to give security for costs to the debtor, and proceedings under the application may be stayed until the security is furnished.

Bankruptcy order on another application - Sec. 43(13)
(13) If proceedings on an application have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is considered just, substitute or add as applicant any other creditor to whom the debtor may be indebted in the amount required by this Act and make a bankruptcy order on the application of the other creditor, and shall, immediately after making the order, dismiss on any terms that it may consider just the application in the stayed or non-prosecuted proceedings.

Withdrawing application - Sec. 43(14)
(14) An application shall not be withdrawn without the leave of the court.

Application against one partner - Sec. 43(15)
(15) Any creditor whose claim against a partnership is sufficient to entitle the creditor to present a bankruptcy application may present an application against any one or more partners of the firm without including the others.

Court may consolidate proceedings - Sec. 43(16)
(16) If a bankruptcy order has been made against one member of a partnership, any other application against a member of the same partnership shall be filed in or transferred to the same court, and the court may give any directions for consolidating the proceedings under the applications that it thinks just.

Continuance of proceedings on death of debtor - Sec. 43(17)
(17) If a debtor against whom an application has been filed dies, the proceedings shall, unless the court otherwise orders, be continued as if the debtor were alive.
R.S., 1985, c. B-3, s. 43;
1992, c. 27, s. 15;
2004, c. 25, s. 28.

Application against estate or succession - Sec. 44
44. (1) Subject to section 43, an application for a bankruptcy order may be filed against the estate or succession of a deceased debtor.

Personal liability - Sec. 44(2)
(2) After service of an application for a bankruptcy order on the executor or administrator of the estate of a deceased debtor, or liquidator of the succession of a deceased debtor, the person on whom the order was served shall not make payment of any moneys or transfer any property of the

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deceased debtor, except as required for payment of the proper funeral and testamentary expenses, until the application is disposed of; otherwise, in addition to any penalties to which the person may be subject, the person is personally liable for the payment or transfer.

Act done in good faith - Sec. 44(3)
(3) Nothing in this section invalidates any payment or transfer of property made or any act or thing done, in good faith, by the executor, administrator of the estate or liquidator of the succession before the service of an application referred to in subsection (2).
R.S., 1985, c. B-3, s. 44;
2004, c. 25, s. 28.

Costs of application - Sec. 45
45. (1) If a bankruptcy order is made, the costs of the applicant shall be taxed and be payable out of the estate, unless the court otherwise orders.

Insufficient proceeds - Sec. 45(2)
(2) If the proceeds of the estate are not sufficient for the payment of any costs incurred by the trustee, the court may order the costs to be paid by the applicant.
R.S., 1985, c. B-3, s. 45;
1992, c. 1, s. 14;
2004, c. 25, s. 28.

INTERIM RECEIVER

Appointment of interim receiver - Sec. 46
46. (1) The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of the property of the debtor and direct the interim receiver to take immediate possession of the property or any part of it on an undertaking being given by the applicant that the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the application being dismissed.

Powers of interim receiver - Sec. 46(2)
(2) The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for conservatory purposes or to comply with the order of the court.

Place of filing - Sec. 46(3)
(3) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.
R.S., 1985, c. B-3, s. 46;
1997, c. 12, s. 27(F);

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2004, c. 25, s. 29;
2007, c. 36, s. 13.

Appointment of interim receiver - Sec. 47
47. (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

1231640 Ontario Inc. (Re), 2007 ONCA 810 (CanLII) - Exactly Mutually Secured Creditors and Shifting Perfections, a Fight over the Bankrupt's Tax Refund and the Role of the Receiver

Date:	2007-11-26
Docket:	C45883
Parallel citations:	289 DLR (4th) 684; 37 CBR (5th) 185
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CITATION: 1231640 Ontario Inc. (Re) , 2007 ONCA 810
DATE: 20071126
DOCKET: C45883
COURT OF APPEAL FOR ONTARIO
WEILER, FELDMAN and LAFORME JJ.A.
IN THE MATTER OF THE BANKRUPTCY OF 1231640 ONTARIO INC. (formerly known as The State Group Limited) OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO
BETWEEN:
THE ROYAL BANK OF CANADA, in its capacity as administrative agent for certain lenders
Appellant
and
PRICEWATERHOUSECOOPERS LLP, TRUSTEE OF THE ESTATE OF 1231640 ONTARIO INC., A BANKRUPT and ST. PAUL GUARANTEE INSURANCE COMPANY
Respondents
Peter H. Griffin and Matthew Sammon for the appellant, Royal Bank of Canada in its capacity as Administrative Agent for Certain Lenders
John D. Marshall for the respondent, St. Paul Guarantee Insurance Company
Alex MacFarlane for the respondent, PricewaterhouseCoopers Inc., in its capacity as Trustee in Bankruptcy of 1231640 Ontario Inc. (formerly known as The State Group Limited)
Heard: May 10, 2007
On appeal from the order of Justice John D. Ground of the Superior Court of Justice dated July 7, 2006, with reasons reported at [2006] O.J. No. 2850.
WEILER J.A. (Dissenting in part):

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Introduction

[1] This appeal concerns a priority dispute between two creditors of an insolvent company, The State Group Limited (now 1231640 Ontario Inc. but referred to here as "State"), over funds totalling approximately $5.5 million. The majority of the disputed amount resulted from an income tax refund to State of approximately $4.5 million.

[2] The priority dispute requires a consideration of the role of a receiver appointed by the court pursuant to s. 47 of the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). It also requires the court to interpret the phrase "a person who represents the creditors of the debtor" in s. 20(1)(b) and the phrase "rights of a person....in respect of the collateral" in s. 20(2)(b) of the provincial *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*").

[3] On one side of the priority dispute is the appellant, the Royal Bank of Canada ("the Bank"), which acted as the administrative agent for a syndicate of lenders to State. **The loan was secured by a general security agreement. All parties agree that the terms of the general security agreement between the Bank and State cover all the assets of State, including the tax refund. On the other side of the dispute is the respondent, St. Paul Guaranty Insurance Company ("St. Paul"). St. Paul also holds a general security agreement over all of the assets of State, which would include the tax refund. In the middle is PricewaterhouseCoopers Inc. ("PWC"), who acted as both the s. 47 *BIA* receiver and as the trustee in bankruptcy.**

[4] At this juncture, it may be helpful to provide a brief overview of the priority regime established by the *PPSA*. The *PPSA* creates a regime that enables creditors to record written agreements giving them a security interest in a debtor's property, known as "collateral".[1] A security interest is not enforceable against a third party unless the requirements of the *PPSA* are met.[2] Because multiple secured creditors can acquire security interests in the same collateral, the concept of "perfection" is used to order the priorities among them. The basic rule is that perfected security interests have priority over those that are unperfected. One method of perfection is for the creditor to take actual possession of the collateral.[3] The most common method of perfection, however, is by registration of a financing statement in the Ontario Personal Property Security Registry ("PPSR"). **Generally, the first person to register has a first priority secured interest that is effective against third parties, including other secured parties.[4] Perfection may last as long as the period chosen for registration lasts, generally some time longer than the length of the security agreement, or until there is a change affecting the collateral.**

[5] In this case, the Bank had a first priority secured interest. St. Paul's security interest was registered after the Bank's and thus was subordinate to that of the Bank.

[6] On November 14, 2001, the Bank obtained a court order appointing PWC as an interim receiver pursuant to s. 47 of the *BIA* ("Appointment Order").[5]

[7] A s. 47 *BIA* receiver is appointed by the court when a debtor is insolvent and a creditor gives notice that it intends to enforce its security pursuant to s. 244 of the *BIA*. The applicant creditor must satisfy the court that the appointment of the receiver is necessary to protect the debtor's estate or the interest of the creditor who sent the s. 244 notice. **Thus, the receiving order is not made in the context of an application for a bankruptcy order or in a situation where the debtor seeks to avoid bankruptcy by making a proposal to its creditors. The appointment is for "such term as the court may determine" and allows the receiver to take possession of the debtor's property that is subject to the security interest, to exercise control over it, and to take such action as the appointment order provides. The appointment order usually provides, as this order does, that third parties are prevented from taking or continuing any legal proceedings against the debtor without leave of the court.**

[8] Pursuant to the Appointment Order allowing it to do so, PWC sold State's name on November 14, 2001. The next day, the name of the debtor company was changed to 1231640 Ontario Inc. Section 48(3) of the *PPSA* provides that if the secured creditor learns that the debtor has changed its name, the secured creditor's interest in the collateral becomes unperfected unless the secured creditor takes possession of the collateral[6] or files a financing change statement giving the new name of the debtor within thirty days.[7] If the secured creditor fails to file a financing change statement within thirty days, it can reperfect its interest by filing a fresh financing statement. [8]

[9] The Bank conceded that it would have been aware of State's name change at least by the time PWC made a second sale of State's assets on December 6, 2001. **The Bank did not file, or seek leave of the court to file, a financing change statement within thirty days of becoming aware of the name change, nor did it file a fresh financing statement after that date. St. Paul also filed nothing. The proceeds of the December 6, 2001 sale and a further sale on December 24, 2001 are not in dispute on this appeal.**

[10] The Appointment Order permitted PWC to assign State into bankruptcy, which it did on January 31, 2002. By this date, the previously perfected security interests of both creditors had become unperfected.

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[11] Following the assignment into bankruptcy, PWC received the income tax refund owing to State in the amount of approximately $4.5 million. The Bank claimed that it was entitled to the proceeds because when PWC was appointed a receiver on November 14, 2001, it had a properly perfected first security interest. St. Paul contended that the relevant date for determining priorities was the date that PWC was appointed trustee in bankruptcy, *i.e.*, January 31, 2002, and that as of this date, the Bank had lost its priority because it had failed to file a financing change statement as required by s. 48(3) and had also failed to file a fresh financing statement thereafter. PWC sought the direction of the court on the priority issue.

[12] Before the motion judge, the Bank argued that it was implicitly exempted from having to file a financing change statement as required by s. 48(3) of the *PPSA* in light of the terms of the Appointment Order. In the alternative, the Bank argued that because its security interest was perfected at the time of PWC's appointment as receiver, it did not lose its priority because a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. Since s. 20(2)(b) provides that "[t]he rights of a person... under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect", the relevant date for determining the priority dispute is the date of the receiver's appointment. At that date, the Bank's security interest was perfected and the Bank's failure to make a further filing when PWC sold State's name did not result in a loss of its priority.[9]

[13] The motion judge rejected both of the Bank's arguments. He concluded that the November 14, 2001 court order appointing PWC as interim receiver did not have the effect of exempting the Bank from having to comply with s. 48(3) of the *PPSA* by filing a financing change statement within thirty days of learning that PWC had sold State's name.

[14] With respect to the Bank's alternative argument, the motion judge held that PWC, as a receiver under s. 47 of the *BIA*, was not "a person who represents the creditors of the debtor" under s. 20(1)(b) of the *PPSA*, but rather was appointed for the protection of the Bank's interests. He observed that the assets of the debtor did not vest in PWC, nor did the liabilities of the debtor become PWC's liabilities, as is the case with a trustee in bankruptcy. He further held that PWC did not have the authority to settle or compromise liabilities owed to the creditors of the debtor. The motion judge reasoned that the application of the *ejusdem generis* principle of statutory interpretation applied to the interpretation of s. 20(1)(b). He held that "a person who represents the creditors of the debtor" must be of like kind or class as a trustee in bankruptcy or an assignee for the benefit of creditors. Given the distinctions he had observed between a receiver and the representatives specified in s. 20(1)(b), he held that a s. 47 *BIA* receiver is not "a person who represents the creditors of the debtor."

[15] Accordingly, the motion judge concluded that pursuant to s. 20(2)(b), the effective date of the appointment of a person with representative status, and the date that the representative's rights in respect of the collateral are to be determined, is the date PWC was appointed as trustee in bankruptcy, namely January 31, 2002. At that time, both St. Paul and the Bank were unperfected secured creditors. Pursuant to the priorities under the *BIA*, as unperfected secured creditors, the Bank and St. Paul were entitled to share rateably in the income tax refund. Since the Bank's claim was for $29 million and St. Paul's was for some $88 million, the result of the motion judge's decision is that St. Paul would be entitled to the bulk of the refund.

The Issues

[16] This appeal requires me to consider two issues:

1. Did the Appointment Order implicitly give the Bank an exemption from complying with s. 48(3) of the *PPSA*?
2. Did the Bank's failure to file a financing change statement or fresh financing statement result in a loss of its priority as a secured creditor?

[17] On the first issue, like the motion judge, I conclude that the obligation to make filings under the *PPSA* continued and that the Appointment Order did not exempt the Bank from complying with s. 48(3) of the *PPSA*. My colleagues agree.

[18] My colleagues and I disagree on the answer to the second question, whether the Bank lost its priority as a secured creditor. The answer depends on the date chosen for the determination of priorities. If, as I conclude, a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, then in light of the combined operation of ss. 20(1)(b) and 20(2)(b), the relevant date for determining the Bank's priority status is the date of the appointment of PWC as interim receiver. On that date, the Bank's security interest was perfected and had priority over that of St. Paul.

[19] In answering the second question, it is also necessary to address an alternative argument put forward by PWC. According to PWC, the Bank's priority status had to be determined all over again as of the date PWC was appointed trustee in bankruptcy on January 31, 2002. PWC argues that the s. 47 *BIA* receivership ended when it was appointed trustee in bankruptcy and that the s. 47 *BIA* receiver had no proprietary interest in the disputed assets. I reject PWC's

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position and conclude that the s. 47 *BIA* receivership did not end with PWC's appointment as trustee and that the Bank retained its priority over the tax refund following State's assignment into bankruptcy by PWC.

Analysis

1. Did the Appointment Order implicitly give the Bank an exemption from compliance with s. 48(3) of the *PPSA*?

[20] The Bank submits that to require it to comply with s. 48(3) of the *PPSA* by filing a financing change statement after it learned PWC sold State's name is inconsistent with the spirit of the Appointment Order, which had the effect of maintaining the existing priorities among creditors. The Bank also submits that exempting it from compliance with s. 48(3) does no injustice to the policy underlying the *PPSA*. The registration regime established by the *PPSA* is intended to provide a means of giving notice to interested parties of existing security interests in the debtor's property so that they can govern their dealings with the debtor accordingly. Interested parties can search the PPSR against the debtor's name for existing registrations against that debtor and its collateral. Although the *PPSA* requires that the debtor's name must appear correctly on a registration in order for that registration to be effective, the policy reason for requiring a secured creditor to maintain the perfection of its security interest disappears on a s. 47 *BIA* receivership. Under that type of receivership, the secured creditor is in the process of enforcing its security and the debtor is deprived of possession of its property and is not in a position to grant further security interests.

[21] The Bank further argues that to require it to comply with s. 48(3) would effectively require it to act in a manner that is contrary to the wording of the Appointment Order. The Bank relies on s. 7 of the order appointing PWC, which stays any "legal proceeding, enforcement process, extra-judicial proceeding or other proceeding against or in respect of the Debtor or the Property". Similarly, s. 8 of the Order restrains the enforcement or exercise of certain rights, including registration, against the debtor or the property. The Bank argues that these provisions prevented it from registering a financing change statement.

[22] The motion judge rejected the Bank's submissions. He held that even if the Bank was correct that the policy considerations requiring registration were no longer applicable in the circumstances, the court could not override the provisions of the legislation unless there was a legislative gap, which he concluded there was not. Insofar as the Appointment Order was concerned, he held that even if the filing of a financing change statement was a "proceeding" that was stayed under s. 7 or restrained under s. 8, the Bank could have applied to lift the stay and the court would likely have allowed the application. Thus, the terms of the Order did not preclude the Bank from filing the required financing change statement to maintain its perfected status prior to the assignment in bankruptcy.

[23] The motion judge's approach was intended to protect the integrity of the registration requirements of the *PPSA*. I agree that nothing in the Appointment Order or in the *PPSA* exempts the Bank from having to comply with the filing requirements of the *PPSA*. As indicated by the motion judge, if the filing of a financing statement was a "proceeding" that was stayed by the Appointment Order, an application to lift the stay would likely have been successful since no other creditor would be prejudiced. The reason that an application to lift the stay would likely be successful even after the expiry of the thirty day period for filing a financing change statement is reinforced by the existence of s. 30(6) of the *PPSA*. That subsection permits re-registration of a security interest that has become unperfected. [10] See *Re PSINet Ltd.*, [2002] O.J. No. 271 (S.C.J.).

[24] Alternatively, instead of bringing an application to lift the stay for the limited purpose of allowing it to either maintain or to reperfect its security interest, s. 31 of the Appointment Order provides that any interested party may apply to vary or amend the order on seven days notice. The Bank could thus have applied to the court to amend the initial Appointment Order so as to enable the Bank to obtain the receiver's consent to lifting the stay or to filing the requisite *PPSA* registration.

[25] I note that the *Standard Template Receivership Order* ("the Model Order") prepared by a subcommittee of the Commercial List Users Committee in conjunction with the Canadian Bar Association Insolvency section contains standard language ordering that all rights and remedies against the debtor, the receiver, or affecting the property are stayed except with leave of the court or "except with the written consent of the Receiver" and further that nothing shall "prevent the filing of any registration to preserve or perfect a security interest." The wording of the Model Order provides further support for my conclusion that the motion judge was correct in holding that the Appointment Order did not give the Bank an implied exemption from complying with the requirement to file a financing change statement as required by s. 48(3) upon learning that PWC had sold State's name.

2. Did the Bank's failure to file a financing change statement result in a loss of its priority as a secured creditor?

[26] The resolution of this issue requires me to determine whether a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*, as well as to interpret the meaning of the words "rights of a person" in s. 20(2).

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[27] For ease of reference, the relevant portions of s. 20 are as follows:

> 20 (1) Except as provided in subsection (3),[11] until perfected, a security interest,
>
> ...
>
> (b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;
>
> ...
>
> (2) The rights of a person,
>
> ...
>
> (b) under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

[28] The Bank submits that the motion judge erred in holding that an interim receiver appointed by the court under s. 47 of the *BIA* is not "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. If the receiver is a "person" within the meaning of s. 20(1)(b), then the date for determining the parties' priorities is the date that PWC was appointed as a s. 47 *BIA* receiver. On that date, the Bank had a properly perfected security interest.

[29] St. Paul's position is that the motion judge was correct in holding that an interim receiver is not a "person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The trustee in bankruptcy, not the s. 47 *BIA* receiver, is the representative of the creditors and the date for determining priorities is the date of the trustee's appointment. On that date the Bank did not have a properly perfected security interest. In the alternative, St. Paul agrees with the position of PWC.

[30] PWC agrees with the Bank that an interim receiver is a representative of the creditors for the purposes of s. 20(1)(b). However, PWC submits that even if the Bank's security interest was effective as against the interim receiver, once the estate funds vested in the trustee in bankruptcy, the interim receivership ended. The relevant date for determining the effectiveness of the Bank's security interest then became January 31, 2002, when its status as trustee in bankruptcy took effect. As of January 31, 2002, the Bank's security interest was no longer perfected. The Bank responds that the receivership and the bankruptcy are not two separate processes, but one continuous process and that the date for determining priorities did not change when the trustee in bankruptcy was appointed.

[31] I first confront the issue of whether a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). In my view, the motion judge erred in concluding that an interim receiver is not such a person. In reaching this conclusion, I am guided by the following considerations:

(a) the relevant principles of statutory interpretation;
(b) the history of the legislative provision and the view of commentators on the meaning of s. 20(1)(b);
(c) the fiduciary role and the powers of the s. 47 *BIA* receiver;
(d) the word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession;
(e) the overall scheme of the *PPSA*, including s. 20 as a whole and s. 30(6); and
(f) the purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed.

[32] I now discuss each of these considerations supporting my conclusion that a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). I will then go on to address PWC's alternative argument.

(a) The relevant principles of statutory interpretation

[33] Section 20(1)(b) renders any security interest in the debtor's collateral ineffective against "a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy" until that security interest is perfected. All provinces have legislation governing priorities between and among secured and unsecured creditors.[12] However, no other province uses the general words, "a person who represents the creditors of the debtor" as found in s. 20(1)(b) of the Ontario legislation. The *PPSA* does not define "a person who represents the creditors of the debtor". Consequently, resort must be had to ordinary principles of statutory interpretation to determine the meaning of this phrase.

[34] The prevailing approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at p. 1; *R. v. Bell ExpressVu Limited Partnership*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559 at para. 26. In order to maintain harmony within the scheme of the Act, the same word must consistently be given the same meaning throughout a statute. See Sullivan, *supra*, at p. 163; *Thomson v. Canada (Minister of Agriculture)*, 1992 CanLII

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121 (SCC), [1992] 1 S.C.R. 385. The principle is also one of the Drafting Conventions adopted by the Uniform Law Commission of Canada in s. 21(5) and s. 34(2). See Sullivan, *supra,* Appendix I at pp. 619, 623. The ordinary meaning of legislation is "the natural meaning which appears when the provision is simply read through". See Sullivan, *supra*, at p. 21; *Canadian Pacific Air Lines v. Canadian Air Line Pilots Assn.*, 1993 CanLII 31 (SCC), [1993] 3 S.C.R. 724 at 735.

[35] Words take their meaning from the context in which they are found. Thus, in interpreting a statutory provision, among the considerations to which the court will have regard are the immediate context of the words in the section, any adjacent and closely related provisions, the Act as a whole, the history of the legislation and other external sources. See Sullivan, *supra*, at pp. 261-62.

(b) Having regard to the history of the legislative provision, a s. 47 *BIA* receiver is not excluded from being "a person who represents the creditors of the debtor"

[36] The predecessor version of the *PPSA* included a receiver in the list of persons who represent the creditors of the debtor. Section 22 of the *Personal Property Security Act*, R.S.O. 1980, c. 375, stated:

22 (1) Except as provided in subsection (3),[13] an unperfected security interest is subordinate to,

(a) the interests of a person,

...

(iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...

...

(2) The rights of a person under subclause (1)(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the security interest.

The question is, therefore, whether the removal of the word "receiver" from the current version of the Act, and the substitution of the word "includes" for the word "as" indicates that the legislature intended to exclude an interim receiver from the category of persons referred to in the section.

[37] In my opinion, the removal of the word "receiver" is not indicative of any legislative intention to exclude receivers appointed under s. 47 of the *BIA* from the category of persons included under s. 20(1)(b). I say this for four reasons.

[38] First, the earlier version of the *PPSA* was limitative, not expansive. The use of the word "as" in the phrase "a person who represents the creditors of the debtor *as* assignee ... trustee in bankruptcy, or receiver" meant that only the three categories of persons mentioned were included: see R. McLaren, *Secured Transactions and Personal Property in Canada*, 2nd ed., looseleaf (Toronto: Carswell, 1989) at pp. 5-160 to 5-161.

[39] What the legislature intended to do and did do in amending s. 20(1)(b) was to expand the category of persons representing the creditors of the debtor. The word "including" in the current legislation is a term of extension. See Sullivan, *supra*, at p. 181; see also *National Bank of Greece (Canada) v. Katsiknouris,* 1990 CanLII 92 (SCC), [1990] 2 S.C.R. 1029 at 1041, where LaForest J. wrote that the word "including" is normally "designed to enlarge the meaning of preceding words, and not to limit them." Accordingly, the examples that follow the word "including", namely, an assignee for the benefit of creditors and a trustee in bankruptcy, are not meant to be exhaustive. Further, an interpretation of legislation that narrows the scope of general words so that there is nothing but the enumerated items to which they can apply must be rejected. See Sullivan, *supra*, at p. 179. Limiting the meaning of s. 20(1)(b) to an assignee for the benefit of the creditors and a trustee in bankruptcy would leave no other persons to whom the general words, "a person who represents the creditors of the debtor" could apply.

[40] Second, there is a presumption against implicit alteration of law. The legislature is presumed not to change existing law or to depart from established practices beyond that which is expressly stated. Failing to explicitly alter the law results in the law remaining undisturbed. See Sullivan, *supra*, at pp. 395-96. The legislature would have had to use more precise language to exclude all receivers from the category of persons "who represent the creditors of the debtor" if it wished to have done so.

[41] Third, the commentary of Mr. Fred M. Catzman, Q.C., the former chair of the Attorney General's advisory committee on the *PPSA*, lends some insight into why the term "receiver" was removed from the current legislation. In reference to the previous legislation, he stated that the term "receiver" is a generic term and, in his opinion, whether the receiver represented the interests of the creditors depended on whether the receiver was appointed by court order. If appointed by private agreement, the receiver represented only the interests of the creditor appointing it. See F. M. Catzman *et al.*, *Personal Property Security Law In Ontario* (Toronto: Carswell, 1976) at p. 114. Where, as here, legislative change is preceded by a report of a person or body that has investigated a condition and made a recommendation, the courts are entitled to take judicial notice of it. While the commentary cannot be used as direct evidence of legislative intent, the court may use it to draw inferences about the meaning of particular provisions. See Sullivan, *supra*, at pp. 484-85. Removing the word "receiver" was intended to exclude a privately-appointed receiver, whose role is to protect the interests of a single secured creditor, from the class of persons contemplated by s. 20(1)(b).

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[42] Fourth, the interpretation of legal scholars with expertise in the particular statute under consideration has become an authoritative source for consideration by courts. See Sullivan, *supra*, at p. 502. The unanimous opinion of academics and other commentators respecting s. 20(1)(b) is that the phrase "a person who represents the creditors of the debtor" is not limited to assignees or trustees in bankruptcy. In *The Ontario PPSA Commentary and Analysis* (Markham, Ont.: Butterworths, 2000) at p. 163, under the heading "Trustee in bankruptcy and other representative creditors", Jacob S. Ziegel and David L. Denomme write in reference to s. 20(1)(b):

It is clear from the structure of clause (b) that it is not meant to be confined to an assignee for the benefit of creditors and a trustee in bankruptcy but also covers other creditors' representatives.

[43] Frank Bennett states in *Bennett on the PPSA (Ontario)*, 3rd ed. (Markham, Ont.: Butterworths, 2006) at p. 53:

.... even though there is no reference to a receiver in s. 20(1), it is clear that a court-appointed receiver comes within the subsection... The court-appointed receiver is an officer of the court with fiduciary duties to *all* creditors and the debtor although its appointment was initiated by the secured party. [Emphasis added.]

Richard McLaren writes in *Secured Transactions and Personal Property in Canada*, *supra*, at p. 5-162:

A receiver is not listed in the revised Act [R.S.O. 1990, c. P.10] as a type of creditor's representative, but it is likely that court-appointed receivers will still qualify as a representative of creditors. Receiver is a generic term describing a person having the attributes characteristic of a receiver in chancery: one must be an officer judicially appointed and responsible to the court with the object of preserving property pending litigation to decide the rights of the parties. Once appointed by the court, the receiver is answerable to the court and to all interested parties. Given the cited case law decisions on the characteristics of a receiver, a liquidator under the *Winding-Up and Restructuring Act*, the *Business Corporations Act* or the *Bank Act* would qualify as a receiver.

Given that privately-appointed receivers only represent one or some of the creditors and that they are not judicially appointed, it has been held that they do not come within the ambit of s. 20(1)(b). [Citations omitted.][14]

[44] I am not aware of any scholarly opinion to the contrary. The unanimous opinion of scholars appears to be that the phrase used in s. 20(1)(b), "a person who represents the creditors of the debtor", is not limited to an assignee or trustee in bankruptcy. Further, in the opinion of two of the authors cited above, the phrase includes a court-appointed receiver.

(c) The fiduciary role and powers of the s. 47 *BIA* receiver

[45] The motion judge concluded that a receiver appointed by the court under s. 47 of the *BIA* is effectively the representative of the Bank alone. In my opinion, his conclusion on this issue is in error. A s. 47 *BIA* receiver owes a duty to all of the creditors of the debtor.[15] For example, a s. 47 *BIA* receiver was described by Cumming J. in *Ravelston Corp.,* [2007] O.J. No. 414 (S.C.J.), aff'd 2007 ONCA 135 (CanLII), (2007), 85 O.R. (3d) 175 (C.A.), as an officer of the court, who owes a duty not only to the court, but also to all persons interested in the debtor's assets, property and undertakings. These duties must be carried out honestly and in good faith. The receiver's role, like that of a trustee in bankruptcy, is "that of a fiduciary to all interested stakeholders." He concluded at para. 67:

A court-appointed receiver under the *BIA* or *[Courts of Justice Act]*, as with a trustee in bankruptcy under the *BIA*, has a duty to impartially represent the interests of all creditors, the obligation to act even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty. *[Citations omitted.]*

[46] In addition to the fiduciary relationship to all creditors, the s. 47 receiver typically has vast powers over the property of the debtor and performs functions similar to those of a trustee in bankruptcy, albeit without relying on a change in the locus of title. The powers of the s. 47 receiver were discussed by Farley J. in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc,* [1994] O.J. No. 953 (Gen. Div.). At para. 3, Farley J. noted how amendments to the *BIA* in 1992 had affected the rights of secured creditors by the requirement in s. 244 to give notice to the debtor of an intention to enforce its security and to refrain from taking action for ten days, but providing for the remedy of a s. 47 receiver.

[47] After quoting the provisions of s. 47, and noting that the interim receivership in *Curragh* had continued for much longer than ten days, Farley J. observed that the object of the s. 47 receivership process appeared to be to maintain the mining property in question, while marketing it with a view to selling it, and that the s. 47 receivership would likely continue until the mine was sold. He concluded that "it would seem that in many practical aspects in these circumstances that the [interim receiver] is functioning as a quasi-receiver and manager/trustee in bankruptcy." He pointed out that the 1992 amendments to the *BIA* dealt more extensively with insolvency as contrasted with bankruptcy and that pre-amendment cases dealing with the powers of the interim receiver had to be analyzed with care.[16] Farley J. concluded that the regime providing for the appointment of a s. 47 *BIA* receiver was flexible and that the court could allow the interim receiver to exercise control over the business in question as opposed to limiting its powers for narrow purposes such as the sale of perishable goods. In addition, he observed at para. 6 that because s. 47(2)(c) allows the interim receiver to apply to the

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court for directions, "it would appear that these directions should be tailored to meet the practical demands of the situation which are being encountered in any given case."

[48] In deciding whether the s. 47 receiver falls within s. 20(1)(b), it is also relevant to consider that such a receiver has exclusive control over the assets and affairs of the company and, in this regard, the receiver displaces the board of directors and the company's managers: *Toronto Dominion Bank v. Fortin et al.* (1978), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.); *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* 2005 SKQB 294 (CanLII), (2005), 11 C.B.R. (5th) 75 (Sask. Q.B.). Further, the s. 47 receiver has the power to settle liabilities and can be a successor employer, that is, it can stand in the shoes of the owner towards the employees of the company: *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII), [2006] 2 S.C.R. 123. In addition, s. 47(2)(c) of the *BIA* empowers the interim receiver to "take such other action as the court considers advisable."

[49] Frank Bennett, in *Bennett on Bankruptcy*, *supra*, at p. 119-20, contrasts the appointment of a s. 47 interim receiver with that of receivers appointed in the context of an application for a bankruptcy order under s. 46 or pending the proposal process under s. 47.1 of the *BIA* as follows:

There does not appear to be any limitation on this appointment. There is no defined end of the interim receivership and the word "interim" is clearly a misnomer of the receiver's powers and duties that are more akin to a court-appointed receiver and manager under provincial legislation.

[50] As these cases illustrate, the role played by the s. 47 *BIA* receiver is akin to that of a trustee in bankruptcy in the sense that the s. 47 *BIA* receiver owes a fiduciary duty to all of the creditors and typically has vast powers over the property of the debtor. Furthermore, as in a bankruptcy, the exercise of the s. 47 *BIA* receiver's powers and duties is overseen by the court to ensure that the creditors of the debtor are not prejudiced.

[51] My colleague Feldman J.A. cites the case of *Re TRG Service Inc.*, [2006] O.J. No. 4521 (S.C.J.), in which it was held that a monitor under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, is not a representative of creditors within the meaning of s. 20(1)(b) of the *PPSA*. The role of a court-appointed s. 47 *BIA* receiver stands in sharp contrast to that of a court-appointed monitor. A monitor's powers are limited and a court-appointed monitor does not stand in the shoes of the company nor owe fiduciary duties to creditors. See *Re Ivaco* 2006 CanLII 34551 (ON CA), (2006), 83 O.R. (3d) 108 (C.A.) at paras. 49-50, leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 490.

(d) The word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession

[52] A person "who represents the creditors of the debtor" under s. 20(1)(b) must be a person exercising rights, because s. 20(2) refers to the time when "[t]he rights of a person... in respect of the collateral under clause 1(b)" are to be determined. The *PPSA* does not define the word "rights" or the phrase "rights of a person...in respect of the collateral". In my opinion, the word "rights" in the *PPSA* is used more broadly than referring to title alone.

[53] The motion judge was of the opinion that the rights referred to in s. 20(2) are proprietary rights akin to those exercised by a trustee in bankruptcy. He concluded that a receiver is not the type of representative of creditors included in s. 20(1)(b) because, unlike with the trustee in bankruptcy, title to the debtor's assets does not vest in a s. 47 *BIA* receiver. In my opinion, the motion judge erred in interpreting the word "rights" in s. 20(2) as meaning proprietary rights limited to the traditional concepts of title and ownership.

[54] The motion judge's conclusion ignores the fact that the *PPSA* is not about title to property or rights against the debtor, but is about notice to and priorities between creditors. In *Re Giffen*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91 at para. 28, Iacobucci J. was critical of the British Columbia Court of Appeal's approach to a priority dispute under the B.C. *Personal Property Security Act* because that court "did not look past the traditional concepts of title and ownership." He held that the dispute could not be resolved through the determination of who had title because the dispute was one of priority to the collateral and not ownership in it.

[55] As noted by Tamara M. Buckwold and Ronald C.C. Cuming in their article, cited with approval in *Giffen, supra* at para. 26, "The Personal Property Security Act and the Bankruptcy and Insolvency Act: Two Solitudes or Complementary Systems?" (1997) 12 B.F.L.R. 476 at 470:

The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the [Personal Property Security] Act itself.

[56] Other legal scholars have made similar comments. In *2006 Ontario PPSA & Commentary*, (Markham, Ont.: Butterworths, 2006) at p. 3, editors Jennifer G. Legge and Daphne J. MacKenzie explain that "neither the application [of the Act] nor priority contests among creditors with an interest in personal property collateral are governed by title." In his *2008 Annotated Ontario Personal Property Security Act, supra* at p. 247, Richard McLaren states in regard to the general priority rules that are to be applied if no other provision of the Act is applicable: "The general priority scheme set up in s. 30(1) disregards the pre-Act law and its reverence for legal title in collateral."[17] By focusing on where title was held in interpreting s. 20(1)(b), the motion judge ignored the overall context of the *PPSA*.

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[57] I am of the opinion that the phrase "rights of a person" in s. 20(2) refers to the entitlement of the person under s. 20(1)(b) to exercise its powers, such as the power to take possession of the debtor's assets. In *Re Giffen, supra*, Iacobucci J. held at para. 34 that the right to possession is a right to property or a proprietary right under the *BIA*. He stated: "In my opinion, the bankrupt's right to use and possession of the car constitutes 'property' for the purposes of the *BIA*..."[18]

[58] This interpretation of "rights of a person" in s. 20(2) is also in harmony with the use of the phrase "rights" in other sections of the *PPSA*, as well as scholarly comment on the word "rights" as used in the *PPSA* context.

[59] Although title to a debtor's property does not vest in a receiver, s. 60(1) of the *PPSA* states:

60. (1) Nothing in this Act prevents,

(a) the parties to a security agreement from agreeing that the secured party may appoint a receiver or receiver and manager and, except as provided by this Act, determining the *rights* and duties of the receiver and manager by agreement [Emphasis added.]

As the word "rights" is specifically used in relation to receivers in s. 60(1), the argument that "person" in s. 20(2) must have proprietary rights akin to those of a trustee in bankruptcy cannot succeed.

[60] Zeigel and Denomme also discuss the word "rights" in relation to one of the prerequisites for attachment under s. 11 of the *PPSA*: that the debtor have "rights" in the collateral. See *The Ontario PPSA Commentary and Analysis*, *supra*, at pp. 124-27. They begin by saying that the section merely states the obvious, namely, that if the debtor has no "rights" in the collateral, the debtor has nothing to give as security to the creditor. One subheading asks the question: "Is it sufficient that the debtor only has a 'power' to transfer rights in the collateral?" The authors conclude that the power to vest a good title in the goods of a third party is a sufficient right to create a security interest. They also ask the question whether anything turns on the distinction between "power" and "rights" and conclude at p. 127 that nothing turns on the distinction: "Rights" is used elliptically in paragraph [11(2)(c)] to describe collateral to which the secured party's security interest is capable of attaching, and is not concerned with the purity of the debtor's title.

[61] In addition, under s. 1 of the *PPSA*, a "debtor" is defined as: "a person who ... owns or has rights in the collateral, including a transferee of or a successor to a debtor's interest in collateral." The construction of this definition makes it clear that the word rights has a broader meaning than ownership.

[62] I would adopt the same approach to interpreting the word "rights" in s. 20(2). In my opinion, the phrase "a person who represents the creditors of the debtor" is not limited to persons with the same proprietary rights in the collateral as an assignee for the benefit of creditors and a trustee in bankruptcy, but includes a receiver appointed by the court pursuant to s. 47 of the *BIA* who has the right to take possession of the collateral and the right to sell it. If "rights" in s. 20(2) were read as only referring to ownership rights, then the phrase "including" in s. 20(1)(b) would have no significance because only the named representatives hold title in the debtor's collateral. My interpretation of the word "rights" in s. 20(2) as referring to the receiver's rights to possess and sell the debtor's collateral gives effect to the phrase "including" in s. 20(1)(b).

(e) The overall scheme of the *PPSA* including s. 20 as a whole and s. 30(6)

[63] In *The Ontario PPSA Commentary and Analysis, supra*, at pp. 170-71, Ziegel and Denomme consider what happens when a properly perfected security interest becomes unperfected, or in other words, when it lapses. After noting that the current s. 20 does not deal with the question of what happens to a lapsed registration, the authors say that the question would have been resolved in favour of the secured party whose perfected interest had lapsed, for a number of reasons. One reason is that under the pre-PPSA statutes, the lapsed registration did not affect the validity of pre-lapse interests. The underlying reason was that priority between competing consensual interests was determined on the basis of a reliance theory. The authors then consider what the approach to priorities would be under the current s. 20(1)(b). They note that one of the arguments in favour of not giving any effect to the lapsed interest is to protect the integrity of the registration system. In opposition to this position, they note that in ss. 20(1)(c) and (d),[19] the general rule that a security interest is not effective until perfected only applies where there is a transferee for value who does not know of the security interest at the time of the transfer.

[64] The authors conclude that the argument in favour of subordinating lapsed interests in determining priorities so as to protect the integrity of the registration system is further undermined by s. 30(6) of the *PPSA*.[20] Under that section, a secured creditor may reperfect a security interest in the debtor's collateral that was perfected but has become unperfected. The effect of reperfecting is to restore the secured creditor to the position it had prior to becoming unperfected, subject only to the rights of a person acquired during the period of unperfection. There is no time limit for reperfecting in s. 30(6) and Ziegel and Denomme consider the reperfection requirement to be little more than a formality that "might as well be dispensed with." These provisions show that when a previously perfected security interest lapses, the integrity of the registration system is not the ultimate value to be protected.

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[65] As mentioned, s. 30(6) of the *PPSA* also contains an exception. The exception is "...that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period." Use of the generic word "person" encompasses legal entities other than a secured or unsecured creditor. See Ziegel and Denomme, *supra*, at p. 259. Since the word "rights" in the *PPSA* has a broader meaning than proprietary rights and is to be given a consistent meaning throughout the *PPSA*, the reference to "rights in all or part of the collateral during the period when the security interest was unperfected" includes the rights in the collateral acquired by the s. 47 *BIA* receiver to take possession of a debtor's property and to sell it. On my interpretation of s. 30(6), if St. Paul had attempted to reperfect its security interest by registering a fresh financing statement after the appointment of PWC as a s. 47 *BIA* receiver, the exception would apply because the s. 47 *BIA* receiver acquired rights in the collateral, namely the right to possession of all present and future money and the right to sell the debtor's assets on behalf of all creditors and distribute the proceeds. Thus, my interpretation of s. 20(1)(b) is consistent with the interpretation of rights in the collateral under other sections of the *PPSA*.

(f) The purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed

[66] The purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the creditors at the time "a person who represents the creditors of the debtor" is appointed. This conclusion flows from the Supreme Court's rulings on the relationship between provincial security interest legislation and federal bankruptcy legislation.

[67] One of the clearest and most trenchant explanations of s. 20(1)(b) and its relationship to the *BIA* is found in Anthony Duggan and Jacob Ziegel's commentary on the decision of Iacobucci J. in *Re Giffen*, *supra*. See "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007) 57 U.T.L.J. 227 at 231-34. In that case, Telecom Leasing Canada Ltd. ("TLC") leased a car to B.C. Tel, who leased it to its employee, Carol Giffen. Leases of more than one year are subject to the B.C. *PPSA* irrespective of who has title and even though the lease does not secure payment or performance of an obligation. Neither TLC nor B.C. Tel filed a financing statement. Giffen went bankrupt. Even though Giffen did not have title to the car, the Supreme Court held that pursuant to the B.C. *PPSA*, title to the car vested in the trustee in bankruptcy.

[68] Commenting on this decision, Duggan and Ziegel state:

The *PPSA* registration requirements serve a publicity function. "Public disclosure of the security interest is required to prevent innocent third parties from granting credit to the debtor or otherwise acquiring an interest in the collateral." From this perspective, s. 20(b)(1) of the *PPSA* presents a puzzle: the trustee in bankruptcy is not in the position of an innocent third party, he does not rely on the register for the purpose of any dealings with the debtor, and so he is not prejudiced by a secured party's failure to perfect a security interest. Therefore, why should an unperfected security interest be ineffective against him? According to *Re Giffen,* 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, the answer relates to the rights of execution creditors and the like. *PPSA* s. 20(a) provides that an unperfected security interest is subordinate to execution creditors. An execution creditor may be prejudiced by an unperfected security interest, and *PPSA* s. 20(a), provides a remedy by giving the execution creditor priority over the secured party. If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70. In effect, "the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings." *PPSA* s. 20(b)(i) is a kind of *quid pro quo.* It compensates unsecured creditors for the loss of their priority rights under s. 20(a) by giving the corresponding priority to the trustee in the trustee's capacity as the creditors' representative. *In summary, the purpose of the PPSA s. 20 (b)(i) is "to permit the unsecured creditors to maintain, through the person of the trustee, the same status vis-à-vis secured creditors who have not perfected their security interests which they enjoyed prior to the bankruptcy of the debtor."*

....

In *Re Giffen*, Justice Iacobucci put the case for *PPSA*, s. 20(b)(i) in fairness terms: when the debtor becomes bankrupt the execution creditor loses the priority it previously had over unperfected security interests but this is offset by giving priority to the trustee instead. However, the justification can by expressed in economic terms. The thinking goes like this: Bankruptcy creates a common pool problem, which bankruptcy law addresses by substituting a mandatory system of collective debt collection for the individual first-come, first -served debt collection system that operates outside bankruptcy. *Creditors' relative entitlements should be the same inside bankruptcy as they are outside bankruptcy because otherwise there will be incentives for individual creditors to use the bankruptcy laws opportunistically.* [Citations omitted; emphasis added.]

[69] The rationale given by Duggan and Ziegel in relation to bankruptcy applies equally whenever "a person who represents the creditors of the debtor" is appointed. When the s. 47 *BIA* receiver was appointed in this case, it was because the Bank was about to enforce its security. At that time, the Bank had a properly perfected security interest. An execution creditor would not have had any priority vis-à-vis the Bank. Because the Appointment Order stayed any

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actions, the execution creditor would have lost any priority it had over unperfected security interests as of the commencement of the receivership, subject to the stay being lifted by the court. Whether the *BIA* stay is imposed automatically under s. 69.3 or by court order under s. 47, the effects of the stay and the considerations it engages are similar. To prevent insolvency as well as bankruptcy laws from being used opportunistically, creditors' relative entitlements should be the same as they were immediately prior to the time "a person who represents the creditors of the debtor" was appointed.

[70] Duggan and Ziegel then address the second question raised in *Re Giffen,* namely, whether s. 20(1)(b) of the *PPSA* is in conflict with the *BIA* because of the principle of bankruptcy law that a trustee has no greater claim to property than the debtor herself had. Iacobucci J. held that the principle is not an inflexible one and that the provinces are competent to modify it as long as the modifications are not in conflict with the provisions of the *BIA*.

[71] In *Re Giffen*, Iacobucci J. did not directly address the issue of whether a conflict exists between then s. 20(b)(i) of the B.C. *PPSA* and bankruptcy policy that a trustee has no greater claim to property than the debtor had. However, he provided a clue to his thinking at para. 52 of his reasons where he approved a statement from *Donaghy v. CNS Vehicle Leasing,* 1992 CanLII 6150 (AB QB), [1992] 6 W.W.R. 70 (Alta. Q.B.), to the effect that the issue is not ownership of the property but priority to it. Duggan and Ziegel state:

From a bankruptcy perspective, what matters is not the rights a creditor may have had against the debtor herself to the disputed asset but, rather, the creditor's rights against other creditors at the moment of bankruptcy: "it is a question of priority, not property." In other words, the flaw in TLC's argument was that it focused on the wrong attribute of the property right its security interest gave it. The question is not whether TLC could have enforced its security interest against Giffen just before she went bankrupt but, rather, whether TLC would have had a priority over an execution creditor at the same point. Section 20(1)(a) of the *PPSA* determines the answer to the second question, and *bankruptcy policy dictates that bankruptcy law should preserve the parties' relative entitlements.* If this is the real meaning of the principle at stake, there is no conflict between *PPSA* s. 20(1)(b), and the bankruptcy laws. On the contrary, the provision reinforces bankruptcy policy. [Emphasis added.]

[72] I take Duggan and Ziegel's reference to bankruptcy policy and bankruptcy law to be a reference to insolvency policy and law as well. Inasmuch as the purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the parties at the time "a person who represents the debtors of the creditor" is appointed, the Bank's priority status falls to be determined at the time PWC was appointed as receiver under s. 47 of the *BIA*.

[73] The purpose of s. 20 of the *PPSA* is to permit a person who takes over control of the assets or business of the debtor to distribute those assets in an orderly fashion in accordance with the existing priorities. It is for this reason that s. 20(2) determines the rights of the representative as of the date from which her status takes effect. Determining priorities at the commencement of the distribution process when the receiver assumes control over the debtor's assets is in keeping with the goals of the legislation.[21]

Conclusion on whether PWC is "a person who represents the creditors of the debtor" and the date on which the determination of priorities should be made

[74] Giving effect to the unique wording of Ontario's *PPSA*; the history of the section; the opinion of scholars; existing jurisprudence holding that the role of a s. 47 *BIA* receiver is similar to that of a trustee in bankruptcy; and having regard to the section as a whole, to related provisions of the *PPSA*, as well as to the purpose of the section, I conclude that PWC's appointment as a s. 47 *BIA* receiver made it "a person who represents the creditors of the debtor" within s. 20(1)(b). Pursuant to s. 20(2)(b), the time for determination of priorities is thus "the date from which the person's representative status takes effect." PWC's representative status took effect on the date of its appointment under the Appointment Order, namely November 14, 2001. On that date, the Bank had a properly perfected first security interest.

PWC's alternative argument: did the relevant date for determining priorities change when the trustee in bankruptcy was appointed?

[75] I must also address PWC's submission that its status as interim receiver under s. 47 of the *BIA* effectively ended when it became trustee in bankruptcy on January 31, 2002 and that the relevant date for the purpose of determining the relative effectiveness of the Bank's security as against PWC is no longer the date on which PWC became the interim receiver, but is now the date on which it became the trustee in bankruptcy. PWC submits that because of the intervening bankruptcy, it is no longer in possession of any of the assets of State in its capacity as receiver and thus it has no interest in the assets that are subject to the Bank's security. Thus, it argues that the Bank's secured interest is no longer effective against it in its capacity as trustee in bankruptcy because that interest became unperfected prior to the assignment into bankruptcy by operation of s. 48(3) of the *PPSA*.[22]

[76] There are five considerations that lead me to reject PWC's submission that the date for assessing the effectiveness of the Bank's security interest was the date of the assignment into bankruptcy:

(a) the s. 47 *BIA* receivership did not end when the trustee in bankruptcy was appointed;

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(b) the date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift;
(c) the date when the respective security interests of the parties come into conflict is the date of the Appointment Order;
(d) the policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security; and
(e) giving effect to PWC's position would undermine the purpose of s. 20 of the *PPSA* and lead to commercial uncertainty.

[77] I now discuss each of these factors in turn.

(a) The s. 47 *BIA* receivership did not end when the trustee in bankruptcy was appointed

[78] PWC submits that the s. 47 *BIA* receivership and the bankruptcy of State are two separate judicial proceedings and that when PWC was appointed trustee in bankruptcy on January 31, 2002, the s. 47 *BIA* receivership ended. According to PWC, the Bank's priority status must therefore be reassessed as of January 31, 2002 when it became trustee in bankruptcy.

[79] PWC cites no authority for its proposition and, in my view, its position that the receivership ended upon the bankruptcy is not supported by the jurisprudence or by the terms of the Appointment Order. The effect of bankruptcy on the authority of a court-appointed receiver depends on the circumstances. See *Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd.* (1987), 63 C.B.R. (N.S.) 1 (Ont. C.A.). The court's brief endorsement (per Blair, Robins and Krever JJ.A.) states:

The appellants submitted that on the occurrence of the bankruptcy the court-appointed receiver was deprived of jurisdiction to deal with the property of the bankrupt. We do not accept this argument and agree with Hughes J. who held that the activities of a receiver-manager appointed by order of the court and a trustee in bankruptcy not so appointed can co-exist in the absence of conflict of interest and of jurisdiction.

[80] PWC's submission also ignores the wording of the Appointment Order, which is silent as to when PWC's receivership ends. There is no evidence before us that PWC has passed its final accounts as interim receiver thereby bringing its receivership to an end. More importantly, the Appointment Order specifically contemplates that PWC's receivership will continue after assigning State into bankruptcy. The order appointing PWC as interim receiver gave it broad powers, including the power to make an assignment in bankruptcy and to act as trustee.[23] Under s. 3 of the Order, PWC had the right to "take possession and control of the Property ... and all receipts ... arising out of or from the Property" of the Debtor. It was also given the power in s. 3(f) "to receive and collect *all monies* and accounts *now owed or hereafter owing* to the Debtor in respect of the Property". [Emphasis added.] The property of the debtor would include receivables such as an income tax refund.

[81] Further, s. 3(p) of the Appointment Order gives PWC as interim receiver the power to enter into arrangements with any trustee in bankruptcy, including an occupation agreement, and the power to lend money to the trustee, not exceeding $250,000 unless increased by the court. For the interim receiver to be in a position to lend money to the trustee in bankruptcy as contemplated by the Appointment Order, the s. 47 receiver must necessarily continue to exercise possession and control over the assets. I note that almost a year after the trustee was appointed, on December 19, 2002, the s. 47 BIA receiver transferred the amount of $1,180,243.72 (proceeds from the third asset sale) from its account to the account of the trustee in bankruptcy. The s. 47 BIA receiver then distributed $950,000 to the Bank.

[82] Thus, in this case, the role of the s. 47 *BIA* receiver and that of the trustee in bankruptcy were intended to be complimentary.[24] The process envisaged was that the interim receiver would realize all of State's assets and take possession of them, and would continue to act in conjunction with the trustee in bankruptcy. Accordingly, the receivership and the bankruptcy were not two separate and distinct procedures.

(b) The date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift

[83] PWC submits that the appointment of a s. 47 *BIA* receiver did not "crystallize" the rights of the parties who had a claim against the assets of State.

[84] Contrary to PWC's submission, when a secured party acts to realize on its security, that is generally the date on which to apply priority rules. Richard McLaren in *The 2008 Annotated Ontario Personal Property Security Act*, *supra*, at p. 246, states in reference to s. 30:

A general issue which may arise through the course of the application of the priority rules is the date upon which the priority dispute will be determined. Generally, this will be the date where a secured party acts to realize upon its security.

This passage was also in an earlier version of McLaren's text and was quoted with approval in *Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée* (2004), 7 P.P.S.A.C. (3d) 194 (Ont. S.C.J.).

[85] PWC relies on the Model Order referred to above (see para. 25), which expressly permits the filing of registrations under provincial personal property regimes, in support of its position that the appointment of a s. 47 *BIA*

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receiver is not the date that triggers the application of priority rules. However, at the time the events in the case at bar occurred, the practice in Ontario was to interpret the stay of proceedings in receivership orders to include a stay of any action on the part of a secured creditor to reperfect its security through registration of a financing statement.[25] A secured creditor whose interest had become unperfected could not reregister its interest without leave of the court. Thus, at the relevant time, the practice was to consider the appointment of a s. 47 *BIA* receiver as a triggering event. The effect of PWC's submission is to suggest that the 2004 procedural change to the standard form template receivership order has retrospective substantive implications.

[86] The change in practice does not affect the fact that the appointment of a s. 47 *BIA* receiver continues to result in a court-ordered stay of all actions and that this appointment still affects the enforcement rights of unsecured creditors. In that sense, the date of the appointment of the s. 47 *BIA* receiver is a triggering event and the date of the receiver's appointment can still be used to determine priorities.

(c) The date when the respective security interests of the parties came into conflict was the date of the Appointment Order

[87] In *Sperry Inc. v. Canadian Imperial Bank of Commerce* reflex, (1985), 50 O.R. (2d) 267 (C.A.), aff'g (1982), 40 O.R. (3d) 54 (H.C.), Morden J.A. dealt with a priority conflict between a bank, whose security interest had become unperfected through a lapse in registration, and an inventory supplier, whose security interest was also unperfected. After resolving the priority issue on the basis of which creditor's interest had attached first, Morden J.A. expressed his view on a different basis for coming to the same conclusion. He stated at para. 35:

...I think that it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interests came into conflict. This would appear to be March 14, 1980, when the bank sought to enforce its interest against collateral in which Sperry claimed a superior interest. The issue arose at that time – what right did the bank have against Sperry to enforce its security?

The step the bank took on March 14, 1980 to enforce its interest in the collateral was the appointment of a private receiver pursuant to its general security agreement.

[88] In this case, the Bank acted to realize upon its security by giving a s. 244 notice and by asking the court to appoint a s. 47 *BIA* receiver pursuant to its general security agreement. The effect of the Bank's act was to have all actions against the debtor stayed by court order. The question of the Bank's right to enforce its security over all of the assets of the debtor arose at that time. The asset sales in November and December merely converted those assets into proceeds which could be distributed according to the priorities over them when the receiver was appointed. I am not aware of any authority that suggests that the date for determining priorities should be the date when funds owing to a debtor are actually received.

(d) The policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security

[89] The policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security. Frank Bennett, in *Bennett on Creditors' and Debtors' Rights and Remedies*, 4th ed. (Toronto: Carswell, 1994) states at p. 703: "The trustee in bankruptcy acquires title to the assets of the bankrupt subject to the rights of secured creditors." Similarly, at p. 416 of *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2006), Lloyd W. Houlden and Geoffrey B. Morawetz state:

The policy of the *BIA* in the case of bankruptcy is not to interfere with secured creditors except in so far as it may be necessary to protect the estate as to any surplus on the assets covered by the security.

....

No leave is necessary for a secured creditor to proceed to realize upon its security...

[90] The statutory stay of proceedings contained in s. 70(1) of the *BIA* specifically excepts "the rights of a secured creditor", as does s. 71, which vests the property of the bankrupt in the trustee. If the debtor gives notice of his intention to make a proposal, the stay imposed by s. 69(1) does not apply where the secured creditor has given notice of its intention to enforce its security under s. 244(1) more than ten days before the proposal.

[91] In light of my earlier comments about the Supreme Court's decision in *Re Giffen*, it is also important to observe that *Re Giffen* does not justify using the date of the bankruptcy, rather than the date of the receivership, as the necessary reference date for determining priorities for the significant reason that the wording of the Ontario legislation is different from that considered by the Supreme Court in *Re Giffen*. The B.C. provision the Supreme Court was asked to interpret read: "A security interest ... in collateral is not effective against ... a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy." The B.C. legislation, unlike Ontario's *PPSA*, does not refer to "a person who represents the creditors of the debtor." Section 20(2)(b) of the Ontario *PPSA* further specifies that the rights of the creditor's representative are to be "determined as of the date from which the person's representative status takes effect" while the B.C. legislation forces an inquiry as to whether the security interest was perfected at the date of the bankruptcy.

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This different legislative language means that the decision in *Re Giffen* cannot be applied to set the date of the bankruptcy, rather than the date of the receivership, as the starting point.[26]

[92] The importance of the wording of the applicable provincial legislation in determining parties' rights in a bankruptcy is highlighted by the decision of *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63 (CanLII), [2004] 3 S.C.R. 326. In *Lefebvre*, the bankruptcy judge and the majority of the Quebec Court of Appeal had applied *Re Giffen* to two priority disputes, the facts of which were indistinguishable from those considered in *Re Giffen*. Writing for the court, Lebel J. allowed the appeal and held at para. 40 that the Quebec courts had given *Re Giffen*:

...a significance it did not in fact have, as the court failed to take into account the statutory context established by the provincial legislation of British Columbia, which defined the respective rights of a long-term lessor of a motor vehicle and the trustee in bankruptcy of the lessee. ... [T]he provincial legislation itself defined the nature of the respective rights of lessors and trustees. ... As has already been mentioned, the *Civil Code of Quebec* does not provide for a similar consequence for failure to publish the rights out of a lease. In this context, *Giffen* did not justify the solution adopted by the Court of Appeal.

[93] *Lefebvre* thus makes it clear that *Re Giffen* cannot be applied generally without regard to the statutory context.

[94] To interpret s. 20(2)(b) in a manner that shifts the reference point for the determination of priorities from the date the Bank acted to realize on its security by appointing a s. 47 *BIA* receiver to the date the trustee in bankruptcy was appointed interferes with the enforcement process and is not consonant with bankruptcy policy.

(e) Giving effect to PWC's position would undermine the purpose of s. 20 of the *PPSA* and lead to commercial uncertainty

[95] Finally, to read the reference point for determining priorities between the representative of the creditors and the secured creditor as changing in the way that PWC suggests undermines the purpose of s. 20 which, as I have indicated, is to preserve the priorities as they stood at the time "a person who represents the creditors of the debtor" was appointed. From a practical point of view, changing the date for determining priorities would lead to commercial uncertainty. As noted by Winkler J. in *Sun Life Assurance Co. of Canada v. Royal Bank* (1995), 10 P.P.S.A.C. (2d) 246 (Ont. Ct. (Gen.Div.)), the purpose of the *PPSA* registration regime is to impart order and certainty to commerce. To reverse priorities in the middle of the distribution process when there has been no change in the receiver's control over the assets is completely contrary to the goals of the legislation.

Conclusion

[96] Although the Bank was not exempt from the obligation to file a financing change statement or a fresh financing statement upon learning of State's name change, its failure to do so in this case did not result in a loss of priority. In my opinion, the date for determining the effectiveness of the Bank's security interest is November 14, 2001, when the court appointed PWC as interim receiver. This date for determining priorities did not change with the appointment of PWC as trustee in bankruptcy.

Disposition

[97] For the reasons I have given, I would allow the appeal, set aside the order of the motion judge, and in its place provide the following direction to PWC:

That the security granted by State to the Bank as Agent is fully effective as against PWC with respect to the Estate Funds (as defined in PWC's notice of motion and attached report) and that PWC act in the administration of the Estate accordingly.

[98] With respect to costs, I note that no award of costs was made to the Bank or to St Paul at first instance as this was a novel issue and the costs of PWC were ordered to be paid out of the estate. I would make the same order here.

"Karen M. Weiler J.A."

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FELDMAN J.A.:

[1] When the appellant bank sought the appointment of an interim receiver of the debtor company, it held a perfected security interest over the assets of that company. However, during the receivership the appellant allowed its registration under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "*PPSA*") to lapse. The appellant did not re-perfect its security interest before the interim receiver assigned the debtor into bankruptcy, following which, a significant tax refund came into the debtor's estate.

[2] The appellant asserts priority under ss. 20(1)(b) and 20(2)(b) of the *PPSA* over the tax refund and some other undistributed funds, on the basis that the date when the receiver was appointed is the date for determining priority, and on that date, the appellant's security interest was perfected. In contrast, the trustee in bankruptcy says that the relevant date for determining priority is the date of the assignment into bankruptcy. Because on that date the appellant's security interest was unperfected as against the trustee, the appellant ranks as an unsecured creditor, *pari passu* with other unsecured creditors.

[3] The motion judge dismissed the appellant's claim. For the reasons that follow, I agree with the motion judge and would dismiss the appeal.

Background

[4] The appellant held a first registered general security interest over the personal property of State, the debtor, and sought to enforce its security by seeking the appointment of an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A court order appointing the respondent, PricewaterhouseCoopers Inc. ("PWC"), as interim receiver was issued on November 14, 2001. Following its appointment, the interim receiver sold the substantial assets of State in three sales. In accordance with the vesting orders of the court, the interim receiver distributed the proceeds of the first two sales to the creditors according to their respective priorities at the time of the sales. As part of the first sale on November 14, 2001, the receiver sold State's name triggering s. 48(3) of the *PPSA*, which provides:

> Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

[5] On January 31, 2002, in accordance with the terms of the order appointing it as interim receiver, PWC assigned the debtor into bankruptcy and PWC was appointed the trustee in bankruptcy of the debtor's estate. Following the assignment, the trustee in bankruptcy received an income tax refund of $4.325 million from the Canada Revenue Agency.

[6] Before the date of the debtor's assignment into bankruptcy (and before the third sale of assets) both the appellant bank and St. Paul Guarantee Insurance Company ("St. Paul"), a subsequent secured creditor, had knowledge of the sale of the debtor's name and failed to register a financing change statement. Therefore, both of their secured debts had become unperfected in accordance with s. 48(3).[27]

[7] Following the debtor's assignment into bankruptcy, the appellant bank asserted a first priority right to the income tax refund and some other funds held by the trustee by filing a proof of claim, which included a secured claim in the amount of $20 million, with PWC as trustee in bankruptcy. In response, the trustee in bankruptcy brought a motion for the advice and direction of the court as to whether the appellant bank's security interest, which was unperfected at the date of the bankruptcy, remained effective against it as trustee.

[8] The motion judge reached the following conclusions:

1. An interim receiver appointed under s. 47(1) of the *BIA* is not a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*.
2. The order appointing the interim receiver, which contemplated that interested parties could move for a lift of the stay it imposed, did therefore not have the effect of precluding the appellant from maintaining the perfected status of its security interest following the appointment of the interim receiver.
3. A court has no jurisdiction to override provisions of the *PPSA*, including s. 48(3), and the appellant's security interest became unperfected in accordance with that section.
4. As an alternative to its argument that the interim receiver is a person who represents the creditors of the debtor, the appellant argued before the motion judge that it held a perfected security interest in the income tax refund and other amounts on the basis that the interim receiver took possession of those funds "on behalf of" the appellant upon its appointment at the behest of the appellant. The motion judge rejected that argument and held that s. 26(2) of the *PPSA* has no application to the facts of this case, as the interim receiver did not take possession of the income tax refund on behalf of the appellant bank.[28]

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5. PWC only became a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* upon its appointment as trustee in bankruptcy. Because at that time the security interest of the appellant was unperfected, it was and remains ineffective against the trustee from that date.

Issues

[9] My colleague has identified two issues for determination on this appeal:

1. Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the *PPSA*?
2. Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?

The resolution of the second issue requires a determination of whether an interim receiver appointed under s. 47(1) of the *BIA*, although not referred to by name in ss. 20(1)(b) and 20(2)(b), is "a person who represents the creditors of the debtor" within the meaning of these provisions. It also requires a determination of the purpose and effect of ss. 20(1)(b) and 20(2)(b).

[10] During the applicable period, ss. 20(1) and 20(2) of the *PPSA* read as follows:

> 20(1) Except as provided in subsection (3), until perfected, a security interest,
>
> (a) in collateral is subordinate to the interest of,
>
> (i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or
>
> (ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or
>
> (iii) all persons entitled by the *Creditors' Relief Act* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has assumed control, or the proceeds of such property;
>
> (b) *in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy*;
>
> (c) in chattel paper, documents of title, securities, instruments or goods is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;
>
> (d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.
>
> 20(2) The rights of a person,
>
> (a) who has a statutory lien referred to in subclause (1) (a) (i) arise,
>
> (i) in the case of the bankruptcy of the debtor, at the effective date of the bankruptcy, or
>
> (ii) in any other case, when the lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien;
>
> (b) *under clause (1) (b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect*.
>
> [Emphasis added.]

[11] In his submissions, counsel for the appellant characterized the effect of ss. 20(1)(b) and 20(2)(b) to be that when a representative of creditors is appointed, "the music stops" under the *PPSA*, meaning that the priority rights of all parties are frozen for the purpose of distribution of the estate of the debtor.

[12] The appellant's position is that an interim receiver, appointed by the court under s. 47(1) of the *BIA*, is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The appellant submits that upon the appointment of the interim receiver, the priority interests of all creditors of the debtor are frozen and the interim receiver is to distribute the assets or proceeds of the assets of the debtor, no matter when they are realized or distributed, in accordance with the respective priority positions of the creditors as of the date of the receiver's appointment.

[13] To the extent that the security interest of a secured creditor may become unperfected under s. 48(3) of the *PPSA* following the appointment of a representative of creditors, submits the appellant, this post-appointment event has no bearing on the secured creditor's priority for the purpose of the distribution of assets of the debtor's estate. Or, put

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another way, the effect of the order appointing the interim receiver was to exempt the appellant from the requirement of complying with s. 48(3). Consequently, the fact that the appellant failed to file a financing change statement before the date of the debtor's assignment into bankruptcy and the appointment of the trustee in bankruptcy did not affect the appellant's entitlement to continue to be paid from the assets of the estate in accordance with its priority position as it stood on the date of the appointment of the interim receiver, at which time its security interest was perfected.

[14] I summarize my reasons for rejecting the appellant's position as follows. First, although an interim receiver may represent the creditors of the debtor for some purposes, it is not "a person who represents the creditors of the debtor" within the meaning and purpose of ss. 20(1)(b) and 20(2)(b), and the term "receiver" should not be read in to these subsections. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the collateral and obtains no priority rights under ss. 20(1)(b) or 20(2)(b) in the collateral, or in respect of the collateral, and thus is not in a priority contest with any creditor on behalf of unsecured creditors. The purpose of these subsections is to allow the representative of creditors to defeat unperfected security interests on behalf of unsecured creditors whose rights to collect outstanding debts from the debtor are statutorily stayed, such as on bankruptcy or assignment for the benefit of creditors. Unlike on a bankruptcy or assignment for the benefit of creditors, creditors' priority rights are not statutorily stayed on a receivership. Although such rights may be stayed by the order appointing the receiver, a creditor may apply to lift the stay in order to commence or continue proceedings to collect its debt.

[15] Second, the effect of ss. 20(1)(b) and 20(2)(b) is to determine the priority rights of creditors at a particular time, but not to freeze priorities for all time, or, in the words of appellant's counsel, to "stop the music". Neither these subsections nor the order appointing the interim receiver had the effect of exempting the appellant from the requirement of complying with s. 48(3). Consequently the appellant's security interest became unperfected by its failure to file a financing change statement within the time period specified by s. 48(3). Because it also failed to re-register under s. 30(6) before the debtor's assignment into bankruptcy, the appellant's security interest is not effective against the trustee in bankruptcy.

Analysis

Issue 1: Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the *PPSA*?

[16] The motion judge found that the order appointing the receiver did not exempt the appellant from complying with s. 48(3), nor did the stay provisions of the order prevent the appellant from seeking to lift the stay in order to file a financing change statement. My colleague concludes that the motion judge was correct on this issue and I agree. In my view, the consequence of this conclusion is that the appellant's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against the trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b).

Issue 2: Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?

(i) Subsection 20(1) of the *PPSA*

[17] Subsection 20(1) prescribes the effect of perfection of a security interest in collateral in relation to other claims against the same collateral and defines the rules for determining priority between the holder of an unperfected security interest and others with a claim to, or an interest in, the collateral. Under s. 20(1)(a), an unperfected security interest "is subordinate to" perfected security interests in the same collateral as well to the interests of lienholders and of unsecured creditors who have seized the collateral through legal processes.

[18] In contrast, under ss. 20(1)(b), (c) and (d), an unperfected security interest "is not effective" against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy, and against certain transferees of the debtor's property. The different language is used because s. 20(1)(a) orders the priority among secured creditors and other creditors with a realized interest in the collateral, while under ss. 20(1)(b), (c) and (d), an unperfected security interest is treated as an unsecured interest as against the named persons.

[19] In order to interpret the meaning and scope of the term "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, one must examine the language of ss. 20(1)(b) and 20(2)(b), since both clauses work together, as well as the purpose of the provisions, which I will discuss later in these reasons.

[20] Clause 20(1)(b) states that a security interest in collateral, until perfected, "is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy." Before this provision was amended in 1989, it provided that an unperfected security interest in collateral was ineffective against three named representatives: a trustee in bankruptcy, an assignee for the benefit of creditors and a receiver. See *Personal Property Security Act*, R.S.O. 1980, c. 375, s. 22(1)(a)(iii). While in amending the provision the legislature specifically removed the reference to a "receiver", it also added the term "including", which now precedes "assignee for the benefit of creditors" and "trustee in bankruptcy". The appellant argues that because the legislature used the word "including", the removal of the reference to a "receiver" does not indicate an intention by the legislature to exclude receivers from the ambit of the provision.[29]

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[21] I disagree. The legislature's removal of a receiver from s. 20(1)(b) means the appellant cannot succeed without showing that an interim receiver is a "person who represents the creditors of the debtor" in the sense that fits the language and purpose of both ss. 20(1)(b) and 20(2)(b). There is no question that, in carrying out its functions and duties, an interim receiver can act in a representative capacity on behalf of some or all of the creditors.[30] The issue in this case is whether an interim receiver is the type of representative of creditors that is referred to in these two clauses.

(ii) A receiver does not obtain the debtor's proprietary interest in the collateral

[22] The first relevant difference between a receiver and a trustee in bankruptcy or an assignee for the benefit of creditors is that a receiver does not obtain the debtor's proprietary interest in the collateral. In their text *Personal Property Security Law* (Toronto: Irwin Law Inc., 2005), Professors Cuming, Walsh and Wood, at pp. 441-42, begin their discussion of the interface between s. 20 of the *PPSA* and the *BIA* by explaining that the vesting of the debtor's personal property in the trustee in bankruptcy under s. 71(2) of the *BIA* gives the trustee the independent status to defeat unperfected security interests in that property under s. 20:

> The *PPSA* provides that a security interest is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy. The effect of this is to give to the debtor's trustee in bankruptcy an independent status to defeat unperfected security interests in personal property that vests in the trustee as provided by *BIA* [sub]section 71(2). [Citations omitted.]

[23] The two creditors' representatives named in s. 20(1)(b) share an important characteristic: by virtue of statute (s. 71 of the *BIA* and ss. 7 and 8 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33), upon their respective appointments, the proprietary rights of the debtor in the collateral vest in these representatives.

[24] Section 71 of the *BIA* provides:

> 71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

[25] Sections 7 and 8 of the *Assignments and Preferences Act* provide:

> 7. Every assignment made under this Act for the general benefit of creditors, if the property is described in the words "all my personal property that may be seized and sold under execution and all my real estate, credits and effects", or in words to the like effect, vests in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging to the assignor at the time of the assignment, except such as are by law exempt from seizure or sale under execution, subject, however, as regards land, to the *Registry Act* and the *Land Titles Act*.
>
> 8. Every assignment for the general benefit of creditors, whether it is or is not expressed to be made under or in pursuance of this Act and whether the assignment does or does not include all the real and personal estate of the assignor, vests the estate, whether real or personal or partly real and partly personal, thereby assigned in the assignee therein named for the general benefit of creditors, and the assignment and the property thereby assigned is subject to all the provisions of this Act, and the same applies to the assignee named in the assignment.

[26] As a result, these representatives hold the debtor's proprietary interest in the collateral. This is to be contrasted with the role and legal status of a receiver, whether privately or court-appointed. I will discuss court-appointed receivers because in this case, PWC is a court-appointed receiver and a court-appointed receiver has statutory authority.

[27] One important difference between a court-appointed receiver and a trustee in bankruptcy (or assignee for the benefit of creditors) is that a receiver obtains its powers from an order of the court . These powers allow the receiver to administer the business and assets of the debtor, and to effect a sale of the debtor's assets pursuant to a vesting order of the court. However, the debtor's property rights in the assets, whether the debtor has full or partial title or merely a right of possession, do not devolve onto the receiver as they do onto a trustee in bankruptcy by statute under s. 71 of the *BIA*. As the motion judge stated at para. 29:

> The appointment of an Interim Receiver does not vest the assets of the debtor in the Interim Receiver, as in the case of a Trustee in Bankruptcy, nor do the liabilities of the debtor become liabilities of the Interim Receiver whereas, in the case of a bankruptcy, the liabilities become liabilities of the bankrupt estate to be administered and, subject to the

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> rights of secured creditors, paid or compromised by the Trustee out of the assets of the bankrupt estate.

[28] The receiver is solely an administrator accountable to the court and to all stakeholders in the receivership, appointed to ensure that the debtor's assets are realized in an orderly manner and for the maximum realizable value, and then to distribute the proceeds to creditors and other claimants in accordance with their respective priorities. It is in that way that a receiver may represent creditors. As the motion judge pointed out, a debtor could retain possession and remain in business during a receivership, and, subject to the terms of the order appointing the interim receiver, could borrow additional funds and create additional security that would continue after the termination of the receivership. In some circumstances the debtor could retain the business following the discharge of the receiver. The debtor is not stripped of all of its interest in the collateral upon the appointment of an interim receiver.

[29] The fact that ss. 20(1)(b) and 20(2)(b) deal with proprietary rights is reflected in the language and effect of s. 20(2)(b) which states:

> 20(2) The rights of a person,
>
> ...
>
> (b) under clause (1)(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

The effect of s. 20(2) is to define the time from which the rights of statutory lienholders under s. 20(1)(a)(i) and of representatives of creditors under s. 20(1)(b) are to be determined. The effective timing of the other rights under ss. 20(1)(a), (c) and (d) is built into the description of those rights. (See para. 10 above for the relevant provisions.)

[30] However, the wording of s. 20(2)(b) also tells us that s. 20(1)(b) has conferred "rights ... in respect of the collateral" on the representative of creditors and that those rights are to be determined "as of" the effective date of the representative's appointment. Although the term "rights", standing alone, is used in s. 60 of the *PPSA* to mean the right to take administrative steps, "rights ... in respect of the collateral" are rights that indicate a proprietary or priority interest in the collateral that entitles the holder of such rights to be paid out of the proceeds of that collateral in accordance with its priority.

(iii) A receiver does not assert the claim of the unsecured creditors against competing security interests

[31] A trustee in bankruptcy, unlike a receiver, represents the creditors in another way beyond administering the estate: the trustee holds the debtor's proprietary interest in the assets on behalf of the unsecured creditors. As Iacobucci J. stated in *Re Giffen*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91 at para. 41 (referring to the Saskatchewan Court of Appeal decision in *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, 1989 CanLII 287 (SK CA), [1989] 3 W.W.R. 481 at 490):

> [T]he trustee, after bankruptcy, acts as the representative of the unsecured creditors of the bankrupt and asserts "the claim of the unsecured creditors to the goods and possessions of the bankrupt pursuant to the priorities established for competing perfected and unperfected security interests."

[32] Consequently, a trustee occupies a priority position for the purpose of distribution of the proceeds of the debtor's estate. In that sense, a trustee in bankruptcy is in competition with other creditors for its priority position among creditors, and its rights in the collateral are in competition with the rights of other creditors in the collateral. In contrast, a receiver is not in competition with creditors and has no priority position itself because any rights it has in the collateral are administrative but not proprietary. It is merely an administrator who pays out the proceeds to the creditors, both secured and unsecured, if there are sufficient funds, in the order of their priority.

[33] In *Re Giffen*, Iacobucci J. discussed the purpose and effect of s. 20 of the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359 – which is the counterpart of s. 20 of the *PPSA* but with slightly different wording. He explained that the reason why the *PPSA* provides that a trustee in bankruptcy defeats an unperfected security interest is because, before bankruptcy, an unsecured creditor can take steps to obtain and enforce a judgment against the debtor through execution proceedings that will rank ahead of an unperfected security interest under s. 20(1)(a)(i). However, once bankruptcy occurs, "all claims are frozen and the unsecured creditors must look to the trustee in bankruptcy to assert their claims." *Re Giffen*, *supra* at para. 39. As Anthony Duggan and Jacob Ziegel explain when discussing *Re Giffen* in their article, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 U.T.L.J. 227 at 231: "If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70."

[34] In *Re Giffen*, *supra* at para. 39, Iacobucci J. adopted the following statement by Professor Cuming in his article entitled "Canadian Bankruptcy Law: A Secured Creditor's Heaven" (1994), 24 Can. Bus. L.J. 17 at 27-28:

> In effect, the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings and the trustee is now the representative of creditors who can no

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> longer bring their claims to a "perfected" status under provincial law. As the repository of enforcement rights, the trustee has status under s. 20(b)(i) of the B.C. *PPSA* to attack the unperfected security interest.

And at para. 41, Iacobucci J. agreed with the conclusion of the Saskatchewan Court of Appeal at p.490 of *Paccar* that: "It is simply a contest as between an unsecured creditor and the holder of an unperfected security interest."

[35] In their discussion of *Re Giffen*, Professors Duggan and Ziegel, *supra* at 231-34, explain how bankruptcy law works with the *PPSA* to preserve creditors' relative priority entitlements post-bankruptcy. The authors comment that Iacobucci J.'s decision in *Re Giffen* confirms "the complementary relationship between the federal bankruptcy statute and the provincial PPSAs": s*upra* at 249.

[36] It follows from *Re Giffen* that a receiver is not intended to be included as a "person who represents the creditors of the debtor" for the purpose and therefore within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*. The reasons for this conclusion are: (a) unlike in a bankruptcy, a receiver, including a court-appointed interim receiver, does not stand in for unsecured creditors in a priority contest with any other creditor; (b) a receiver is not the "repository of enforcement rights" of unsecured creditors with any status to "attack the unperfected security interest" (*Re Giffen*, *supra*, at para. 39); and (c) in a receivership, unlike in a bankruptcy, there is no statutory stay causing execution creditors to lose their priority and ability to realize on their debt.

(iv) Personal Property Security Acts of other provinces

[37] The conclusion that a receiver is not a person who represents the creditors of the debtor under s. 20 is also consistent with the correlative sections of the Personal Property Security Acts of the other common law provinces.[31] The comparable provisions in British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland do not include a receiver.[32] Only the relevant sections of the Manitoba and Ontario Acts formerly referred to a receiver, but both have since been amended to remove this reference.

[38] The Manitoba statute contained a provision with language identical to the previous version of the Ontario section, R.S.O. 1980, c. 375, which read:

> 22(1) [A]n unperfected security interest is subordinate to
> (a) the interest of a person
> ...
> (iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...
> 22(2) The rights of a person under sub-clause 1(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the unperfected security interest.

Manitoba's replacement provision does not use the term "includes", but instead lists only two representatives of creditors, neither of which is a receiver.[33]

[39] The Manitoba courts considered the effect of the former wording of s. 22 in the context of a court-appointed receivership in the case of *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receiver of)*, reflex, [1991] 6 W.W.R. 764 (Q.B.), aff'd reflex, (1992), 94 D.L.R. (4th) 611 (C.A.). The court had appointed a receiver of the debtor trucking company at the request of a secured creditor, Roynat. Another secured creditor, Paccar, had a prior purchase-money security interest in some of the trucks, but had inadvertently failed to renew its *PPSA* registration and was unperfected on the date of the appointment of the receiver. Paccar sought an extension of time to re-perfect its security under s. 65 of the Manitoba *PPSA*, which provided that when an extension is granted "the rights of other persons accrued up to the time of the registration of the order made under this section are not affected by the order." The receiver opposed Paccar's motion. It took the position that on its appointment as a receiver, by operation of ss. 22(1)(a)(iii) and 22(2), it had accrued the rights referred to in s. 65.

[40] In the Court of Queen's Bench, Scollin J. rejected the position of the receiver. He explained that even though a receiver was referred to in s. 22, the rights and interests of a receiver are not the same as those of a trustee in bankruptcy. He concluded at 768 that:

> [T]he provisions of s. 22 can be sensibly reconciled with the provisions of s. 65 by recognizing that the only rights of the creditor which should be subordinated to the interest and rights of the receiver are those which necessarily conflict with the due exercise of the rights of the receiver as representative of the creditors in executing the mandate of the court. The status of a receiver does not bring with it a cornucopia of rights.... Beyond his mandate, the receiver has no status. Unless his rights or interests are affected, no issue of subordination even arises. In this case he has demonstrated no

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> diminution of his rights or interest and no prejudice to any creditor. To recognize the substantive security interest of Paccar causes no injustice or prejudice to the receiver or to other creditors and permits full recognition of and harmony between ss. 22 and 65 of the Act. Absent prejudice, the receiver's rights or interest do not extend to defeating an application which, but for his appointment, would be effective to relieve against an inadvertent lapse.

[41] The Court of Appeal dismissed the appeal. Twaddle J.A. acknowledged that Scollin J. may have been correct in his view, distinguishing a trustee in bankruptcy from a receiver, that while a trustee in bankruptcy does acquire a priority property right on appointment, a receiver does not. However, he said he was not required to decide the issue because he could dismiss the appeal based on his interpretation that s. 22 did not defeat the remedial effect of s. 65. He stated at p. 615:

> An order made under s. 65 re-perfects the security interest as though it had never lapsed, subject only to the rights of those who have dealt with the debtor in the meantime and who would be prejudiced by permitting the order under s. 65 to have retroactive effect.

[42] In my view, Scollin J.'s analysis of the rights of a receiver was correct and consistent with the conclusion reached on the appeal. Furthermore, his understanding was given full effect when s. 22 was repealed and replaced in Manitoba in 1993 with the new provision that excludes a receiver from its ambit. As mentioned above, the equivalent statutory provisions of the other common law provinces do not make reference to a receiver.

(v) The effect of a court-ordered stay

[43] Other case law has also considered the issue of re-perfecting a security interest following the appointment of a receiver or of a monitor under s. 11.7 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. This case law arises because when a receiver (or monitor) is appointed, unlike in a bankruptcy, the debtor does not lose all rights and interest in the collateral and the rights of creditors are not statutorily frozen. Although an order appointing a receiver will normally stay all proceedings against the interests of the debtor, the court can always lift the stay to allow a creditor to take certain steps to enforce its rights or perfect its security against the debtor, subject to considering competing rights acquired by other creditors in the interim.

[44] Subsection 30(6) of the Ontario *PPSA* provides:

> Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

Using s. 30(6), a secured creditor with a security interest that is originally perfected by registration but becomes unperfected, can re-perfect by registration and regain its priority standing as against all other creditors except as against someone who "acquired rights in all or part of the collateral" while the creditor's security interest was unperfected.

[45] As was decided in *Roynat*, supra, on appointment, a receiver does not acquire any rights in the collateral that are in competition with the rights of any creditor. In other words, a receiver does not obtain the right to receive any portion of the proceeds of the estate of the debtor. Consequently, a secured creditor whose security interest had been perfected at some point but was unperfected on the date of the appointment of a receiver may re-perfect under s. 30(6) and retain its priority, regardless of the appointment of a receiver in the interim, by obtaining a lift-stay order from the court, if necessary.

[46] For example, in *Re TRG Service Inc.* 2006 CanLII 37967 (ON SC), (2006), 26 C.B.R. (5th) 203 at paras. 53-59 (Ont. Sup. Ct.), C. Campbell J. held that a monitor under the *CCAA* is not a representative of creditors within s. 20(1)(b) of the *PPSA*. He stated that "[t]he fact that the Initial Order envisaged the Monitor assessing claims as between creditors does not grant it any legal entitlement to or over the assets of the debtor": *Re TRG Service Inc.*, *supra* at para. 57. C. Campbell J. allowed the appeal from the decision of the monitor who had refused to allow a secured creditor to perfect its security after the *CCAA* order. He concluded that there was nothing in the *CCAA* that would permit the exercise of any jurisdiction to disallow registration and that s. 20(1)(b) did not apply for the reasons quoted.

[47] Similarly, in *Brookside Capital Partners Inc. v. RSM Richter Inc.* 2006 ABQB 572 (CanLII), (2007), 25 C.B.R. (5th) 273 (Alta. Q.B.), Richter was first a monitor of the debtor, Kodiak, under the *CCAA* and subsequently, receiver-manager of Kodiak appointed by the court to carry out a sale of its assets. Brookside was a secured creditor of Kodiak whose registration under the Alberta *PPSA* was defective. Consequently, both before and on the date of the appointment of the receiver, Brookside's security interest was unperfected.

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[48] Brookside registered a financing change statement on the day the receiver was appointed and sought leave of the court to lift the court-ordered stay and validate that registration *nunc pro tunc*. Richter, as Kodiak's receiver, took the position that Brookside's security interest was ineffective against it. As in this case, the receiver argued that its role was similar to a trustee in bankruptcy and it should therefore have the same tools as those provided to trustees in bankruptcy by the *PPSA*

[49] The first issue before the *Brookside* court was "whether a receiver should be seen as entitled to the same priority as is granted to a trustee in bankruptcy by s. 20(a)(i) of the *PPSA*": *supra* at para. 13. The second question was whether the stays under both appointment orders should be lifted to allow Brookside to validate its registration *nunc pro tunc*. The application judge made the important observation that the second issue would not arise if a receiver is the same as a trustee under s. 20(a)(i) because, in that event, Brookside's unperfected security interest would be ineffective against the receiver and "Brookside's attempted correction of its registration after the date of the Receivership Order *could not improve its position*": *supra* at para. 14. [Emphasis added.]

[50] The application judge concluded on the first question that because s. 20(a)(i) of the Alberta *PPSA* refers only to a trustee in bankruptcy, it cannot be interpreted to also refer to a receiver.[34] He then went on to decide the second question. He concluded that there would be no prejudice to the debtor or any of the other creditors by allowing Brookside to perfect its security as of the date of the receivership, because had the *CCAA* and receivership orders not been made, Brookside could have perfected at any time. Since s. 20(a)(i) did not apply, there was no reason why the secured creditor could not register under the *PPSA*. Nor was there any purpose in precluding the *ex post facto* registration.

[51] As these cases demonstrate, in a receivership, because a creditor's right to take steps against the debtor is stayed not by any legislative directive, but rather by virtue of the terms of the order appointing the receiver, such a stay can be lifted by the court to allow a secured or unsecured creditor to pursue its rights against the interests of the debtor in appropriate circumstances, including obtaining judgment or asserting a lien, and to effect relevant registrations. This includes registrations under s. 30(6) of the *PPSA* to regain priority for the purpose of distribution of the debtor's assets by the receiver.

[52] In fact, the new Standard Template Receivership Order of the Commercial List – which is to be used when a receiver is appointed by the Superior Court of Justice – clearly excepts registrations under the *PPSA* from the effect of the stay. Paragraph 9, which contains the stay order, specifically provides that nothing in that paragraph prevents "the filing of any registrations to preserve or perfect a security interest". This paragraph clearly describes the understanding of the bench and bar that the "music" does not stop on the appointment of a receiver because the ongoing need to register and to perfect security is recognized and acknowledged. There would be no cause or purpose in doing so if priorities were frozen on the date of the order.

[53] There is nothing in the *PPSA* that says that it stops being applicable at any time. In particular, s. 20 does not prevent ss. 48(3) or 30(6) from continuing to apply and to have effect. It does not freeze priority positions but just states the consequences of non-perfection at a point in time. There is no legislated freezing of priorities, or anything that "stops the music" in a receivership, other than the court order creating it which provides for the ability to seek and obtain a lift-stay order. Consequently, the result the appellant seeks to achieve – the freezing of priority positions – does not occur in a receivership. Nor are the unsecured creditors left in a position where they are necessarily precluded from taking further steps to enforce their rights against the interest of the debtor. Therefore, when a receiver is appointed, the unsecured creditors do not need s. 20(1)(b) to level the playing field for them as against unperfected security interests. A receiver is not a "repository of enforcement rights" like a trustee in bankruptcy; nor do unsecured creditors need to rely on a receiver to attack unperfected security interests

[54] In a bankruptcy, not only does the debtor have no further interest in the collateral, but also the priority rights of creditors are "frozen", as stated by Iacobucci J. in *Re Giffen*, *supra* at para. 39 by virtue of s. 71 and s. 69.3(1) of the *BIA*,[35] the latter of which provides:

> Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or may commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

[55] Consequently, in a bankruptcy, the effect of ss. 20(1)(b) and 20(2)(b) together with the *BIA* is that a security interest in collateral that is unperfected on the date of bankruptcy is ineffective against the trustee throughout the bankruptcy, and that unperfected status cannot be cured in relation to the trustee. Similarly, a security interest that is perfected on the date of bankruptcy is effective against the trustee and remains effective because the bankrupt estate is frozen and the debtor no longer has any interest in the collateral for the purposes of registration.

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(vi) Trustee's alternative argument

[56] The trustee in bankruptcy argued on this appeal that even if the receiver is "a person who represents the creditors of the debtor" under s. 20(1)(b), because the appellant bank's security interest was unperfected on the date when the trustee in bankruptcy was appointed, its security interest was ineffective against the trustee under the express words of s. 20(1)(b). The appellant's position was that once priorities were frozen on the appointment of the interim receiver, they remained frozen on the appointment of the trustee. My colleague has concluded that the interim receivership never terminated, that the tax refund came to the interim receiver, and that the sections operate from and relate back to the original date when PWC was first appointed as interim receiver, at which time the appellant's security interest was perfected.

[57] In respect of the trustee's position, I agree that the appellant's security interest is ineffective against the trustee. As I have explained, ss. 20(1)(b) and 20(2)(b) should not be read to apply to a receiver for two reasons. Unlike a trustee in bankruptcy and an assignee for the benefit of creditors, a receiver does not obtain the debtor's rights in respect of the collateral and is therefore not in a priority contest with any creditor on behalf of unsecured creditors. Also, in a receivership, the debtor maintains its rights in the collateral. Second, unlike in a bankruptcy, creditors' rights are not frozen on a receivership by statute. Those rights may be stayed by the court order appointing the receiver, but as in the order in this case, the stay can be and often is lifted in order to allow a creditor to register to maintain its perfected status — for example, under s. 48(3) — or to re-perfect under s. 30(6). As already noted, the new standard form of order for a court-appointed receiver no longer includes any stay of a creditor's right to perfect or re-perfect its security interest. The only purpose for a creditor to perfect or re-perfect after a receiver is appointed is to maintain its priority during the receivership.

[58] The motion judge found, in accordance with the record and the position of the trustee, that the tax refund came into the hands of PWC as trustee in bankruptcy. The interim receiver assigned the debtor into bankruptcy in accordance with the order appointing it, at which time the provisions of the *BIA* applied, including s. 71. It was not disputed, either before the motion judge (see para. 59 of his reasons) or on this appeal, that the property of the debtor passed to the trustee on the date of the bankruptcy. Section 20(1)(b) of the *PPSA* says that an unperfected security interest is ineffective against a trustee in bankruptcy. The court is required to give effect to that specific statutory provision.

Conclusion

[59] I agree with the motion judge that a receiver is not a representative of creditors within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* and the term "receiver" should not be read in to the legislation. Because the appellant's security interest became unperfected as a result of the operation of s. 48(3), and because it did not re-perfect its security interest before the assignment of the debtor into bankruptcy, it was unperfected on the date of the appointment of the trustee and its security interest is therefore ineffective against the trustee.

[60] The unfortunate result for the appellant, and apparent windfall for St. Paul, is that the appellant loses its priority over St. Paul, and even though St. Paul also lost its secured standing, they rank *pari passu* as unsecured creditors in the bankruptcy. This result flows from the fact that both were unperfected on the date of the appointment of the trustee and both their security interests are therefore ineffective against the trustee.

[61] I would dismiss the appeal with costs to the trustee and to St. Paul out of the estate. I would fix those costs in the amount of $15,000 each, inclusive of disbursements and G.S.T.

Signed: "K. Feldman J.A."
"I agree H.S. LaForme J.A."

RELEASED: "KMW" November 26, 2007

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[1] Section 1(1) of the *PPSA* defines "collateral" as "personal property that is subject to a security interest".

[2] Under s. 11(1) of the *PPSA*, a security interest is not enforceable against a third party unless the requirements of the *PPSA* for "attachment" are met. Attachment occurs when: (1) the creditor takes possession of the collateral or enters into a written security agreement with the debtor; (2) the agreement is signed by the debtor; and (3) the agreement contains a description of the collateral enabling it to be identified. In addition, "value" or consideration for the agreement must be given by the creditor and the debtor must have "rights" in the collateral.

[3] A security interest in investment property may now be perfected by control of the collateral under subsection 1 (2). *Securities Transfer Act, 2006*, S.O. 2006, c. 8, s. 123(9).

[4] There are a number of exceptions to the general priority rules contained in s. 30 with which we are not concerned. One exception is a Purchase Money Security Interest (PMSI) in inventory.

[5] Unless otherwise indicated, where the term "receiver" is used in these reasons, it is used to refer to an interim receiver appointed by the court under s. 47 of the *BIA*.

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[6] The motion judge held that the refund was a receivable that was not capable of being possessed. This aspect of the motion judge's decision is not under appeal. I make no comment as to the correctness of the motion judge's conclusion.

[7] Section 48(3) reads:

> (3) Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

[8] A financing change statement cannot be used to reperfect a lapsed security interest. A fresh financing statement is required. See s. 52(2) of the *PPSA*.

[9] The relevant provisions of s. 20 provide:

> 20 (1) Except as provided in subsection (3), until perfected, a security interest,
>
> (b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;
>
> ...
>
> (2) The rights of a person,
>
> ...
>
> (b) under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

[10] Section 30(6) reads:

> Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

[11] The exception in subs. (3) is not relevant on this appeal.

[12] The most common formulation is: "A security interest... in collateral is not effective against (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or (ii) a liquidator appointed under the *Winding-up Act (Canada)* if the security interest is unperfected at the date that the winding-up order is made..." as found, for example in Manitoba's *Personal Property Security Act*, C.C.S.M. c. P. 35, s. 20(b).

[13] Subsection (3) deals with purchase-money security interests, and its exception is not relevant here.

[14] McLaren goes on to comment that the 1992 amendments to the *BIA* brought with them regulation of receivers where a debtor is insolvent. He observes that federal bankruptcy legislation has increased the control and accountability of these privately-appointed receivers. He raises the possibility that in light of these statutory changes, privately-appointed receivers will also be held to be representatives of the creditors within the meaning of s. 20(1)(b) of the Act. Ziegel and Denomme, *supra*, query at p. 163 whether Ontario law would recognize a category of creditors' representatives who do not owe their status to statutory authority. In this case, we are not concerned with a privately-appointed receiver but a court-appointed interim receiver who derived his status from the *BIA*.

[15] If in fact PWC is acting as a representative of the Bank alone, it seems it would have been under a duty to apply to the court to lift the stay to permit it to register a financing change statement on behalf of the Bank.

[16] For example, the decision in *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (Receiver of),* reflex, [1991] 6 W.W.R. 764 (Man. Q.B.), aff'd reflex, (1992), 94 D.L.R. (4th) 611 (C.A.), discussed by Feldman J.A., not only deals with differently worded legislation, it is a case decided under the *BIA* prior to the 1992 amendments creating the s. 47 *BIA* interim receiver.

[17] Section 30(1) reads:

> 30. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:
>
> 1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
>
> 2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,
>
> > i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and

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ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.

3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.

4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

[18] Iacobucci J. also considered the meaning of the phrase "rights in goods" in s. 12(2) of B.C.'s *PPSA* dealing with leased goods. He concluded that a lessee had a proprietary interest in such goods (at para 36):

> I note that s. 12(2) of the *PPSA* also recognizes that a lessee obtains a proprietary interest in leased goods. Section 12(2) states explicitly that 'a debtor has rights in goods leased to the debtor...when he obtains possession of them in accordance with the lease. [Emphasis in original.]

[19] For ease of reference, ss. 20(1)(c) and (d) read:

> 20 (1) ...until perfected, a security interest,
>
> ...
>
> (c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;
>
> (d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

[20] Section 30(6) reads:

> (6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

[21] The importance of control is emphasized in Ontario's new *Securities Transfer Act, 2006* (*STA*), S.O. 2006, c.8 which came into force on January 1, 2007 together with related *PPSA* amendments. In addition to registration and perfection, a new, third, method of perfecting a security interest is by control of the security which can include an intangible interest. John Cameron, in his article on the *STA,* 22 B.F.L.R. 309-352 at 321, states," As the Comment notes, obtaining 'control' means a secured party has taken whatever steps are necessary to place itself in a position where it can have the securities sold, without further action by the owner." The secured party need not have exclusive control over the security. Other secured parties can have a concurrent right and a debtor can retain rights in the security.

[22] I acknowledge that in some cases, a secured creditor's failure to comply with s. 48(3) during a s. 47 *BIA* receivership could result in a loss of that party's priority depending on the nature of the court order appointing the interim receiver. The role of the s. 47 *BIA* receiver is very much defined by the terms of the court order appointing the receiver and the common law describing its role. As Farley J. noted in *Curragh*, *supra*, at para. 6, the regime providing for the appointment of a s. 47 *BIA* receiver is a flexible one and the court is empowered to give directions to the interim receiver that can meet the practical demands of any given case. If then, for example, the court did not order a stay of all actions on the appointment of a s. 47 *BIA* receiver, then this would affect the extent to which the particular s. 47 *BIA* receiver qualifies as "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). Also, if for some reason the s. 47 receivership ended before there was any priority conflict, then the failure to reregister could well have consequences following the debtor's emergence from receivership. In other words, the significance of a failure to reregister will depend on a number of relevant factors in each case.

[23] Other powers included the following: to take control of the property to preserve, protect, and liquidate it; to manage and carry on the business; to purchase or lease machinery; to receive and collect all money "now owed or hereafter owing" to the debtor; to execute transfers, conveyances, leases, bills of sale, or other documents respecting the property in the name and on behalf of the debtor; to report to, meet with and discuss with secured and unsecured creditors of the debtor deemed appropriate including offers and expressions of interest received; to apply for any vesting orders in order to convey the property; to register a copy of the Order appointing it and "any other Orders obtained by the Interim Receiver in respect of the Property against title to any or all property comprised in the Property" and; to sell, convey, or mortgage the property out of the ordinary course of business and without compliance with Part V of the *PPSA* (Ontario),

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or providing any other notice which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, with the approval of the Court.

[24] I am under the impression that, as here, the same person often acts as a s. 47 *BIA* receiver and trustee in bankruptcy. Based on my interpretation of their roles, namely, that a s. 47 receiver owes a fiduciary duty to the creditors of the debtor and its function is similar to that of a trustee in bankruptcy, a trustee in bankruptcy is not a third party vis-à-vis the s. 47 receiver who also represents those same creditors. Thus, I see no conflict in the same person fulfilling both roles. To hold otherwise and to open the door to a potential for conflict between the role of the s. 47 receiver and a trustee in bankruptcy would result in the same person ordinarily not being able to fulfill both roles with attendant increased expense, duplication of effort, and delay.

[25] A proceeding is any step that must be taken before a creditor or the creditor's representative can enforce its rights and may include the delivery of a copy of a certificate: *Re Woodward's Ltd.* reflex, (1993), 17 C.B.R. (3d) 236 at para. 26 (B.C.S.C.).

[26] McLaren, *supra*, at p. 172, in discussing s. 20(1)(b) and *Giffen*, writes that "the wording of the B.C. Act on debtor security interests is very different from Ontario's s. 20(1)(b).

[27] Nor did either re-perfect under s. 30(6) of the *PPSA*, discussed below.

[28] Subsection 26(2) of the *PPSA* provides that a "security interest in collateral in the possession of a person, other than the debtor, the debtor's agent or a bailee mentioned in subsection (1), is perfected by, (a) issuance of a document of title in the name of the secured party; (b) possession on behalf of the secured party; or (c) registration." No appeal was taken from this finding.

[29] Whether a particular representative of creditors, other than a receiver, may be included in s. 20(1)(b) need not be decided in this case.

[30] Although a court-appointed receiver owes duties to the court and to the creditors in respect of the proper conduct of the receivership (see for example *Toronto-Dominion Bank v. Usarco Ltd.* 2001 CanLII 24004 (ON CA), (2001), 196 D.L.R. (4th) 448 at paras. 28-30 (Ont. C.A.)), it is interesting to compare ss. 47(3) and 47.1(3) of the *BIA*. Under the first subsection, an interim receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of the creditor who sought the appointment, while under the second subsection, the receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of one or more creditors or the creditors generally. The difference may impact on the particular receiver's duties as a representative of creditors.

[31] In Quebec there is a different regime. See *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63 (CanLII), [2004] 3 S.C.R. 326 at paras. 19-40, where the Supreme Court of Canada discusses the regime in Quebec.

[32] See *Personal Property Security Act*, R.S.B.C. 1996, c. 359, s. 20(b); *Personal Property Security Act*, R.S.A. 2000, c. P-7, s. 20(a); *Personal Property Security Act*, S.S. 1993, c. P-6.2, s. 20(2)(b); *Personal Property Security Act*, C.C.S.M. c. P35, s. 20(b); *Personal Property Security Act*, S.N.S. 1995-96, c. 13, s. 21(2); *Personal Property Security Act*, S.N.B. 1993, c. P-7.1, s. 20(2); *Personal Property Security Act*, R.S.P.E.I. 1988, c. P-3.1, s. 20(2); *Personal Property Security Act*, S.N.L. 1998, c. P-7.1, s. 21(1).

[33] The equivalent provision of Manitoba's statute now reads:

> 20. A security interest
>
> ...
>
> (b) in collateral is not effective against
>
> (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or
>
> (ii) a liquidator appointed under the *Winding-up Act* (Canada) if the security interest is unperfected at the date that the winding-up order is made.

Personal Property Security Act, C.C.S.M. c. P.35.

[34] The judge is referring only to ss. 20(a)(i), not 20(a)(ii), which also lists a liquidator under the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11.

[35] Section 71 of the *BIA* is set out above at para. 24. Section 69.4 of the *BIA* allows the court to declare that sections that freeze rights do not apply to a particular creditor if that creditor is likely to be materially prejudiced by the continued operation of the sections or it is otherwise equitable to make such a declaration. It is unlikely that this section could be used to assist an unperfected secured creditor because such a person is always going to be prejudiced by the operation of s. 20(1)(b) of the *PPSA*. As this court has held in *Re Ma* 2001 CanLII 24076 (ON CA), (2001), 143 O.A.C. 52 at paras. 2 and 3, 'The role [of the courts under s. 69.4] is one of ensuring that sound reasons, consistent with the scheme of the [*BIA*] exist for relieving against the otherwise automatic stay.... [L]ifting the automatic stay is far from a routine matter.' [Citations omitted.] In most instances, a lift stay is ordered under s. 69.4 where (a) the proceeding in respect of which the lift is requested is one in relation to which the debtor's liability would not be released by an order of discharge from

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bankruptcy, or (b) where the bankrupt "is a necessary party for the completed adjudication" of the relevant proceeding: see *Re Koval* 2003 CanLII 20584 (ON SC), (2003), 48 C.B.R. (4th) 103 at para. 6 (Ont. Sup. Ct.).

Directions to interim receiver - Sec. 47(2)
(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;
(b) exercise such control over that property, and over the debtor's business, as the court considers advisable;
(c) take conservatory measures; and
(d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made - Sec. 47(3)
(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or
(b) the interests of the creditor who sent the notice under subsection 244(1).

Place of filing - Sec. 47(4)
(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.
R.S., 1985, c. B-3, s. 47;
1992, c. 27, s. 16;
2005, c. 47, s. 30;
2007, c. 36, s. 14.

Appointment of interim receiver - Sec. 47.1
47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,

(a) the trustee under the notice of intention or proposal;
(b) another trustee; or
(c) the trustee under the notice of intention or proposal and another trustee jointly.

Duration of appointment - Sec. 47.1(1.1)
(1.1) The appointment expires on the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,
(b) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
(c) court approval of the proposal.

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc., 1994 CanLII 7468 (ON SC) Power of Court to Appoint and Maintain Interim Receiver for Extended Periods

Date: 1994-04-03
Docket: B112/93-C

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Parallel citations: 114 DLR (4th) 176; 27 CBR (3d) 148
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Ontario Supreme Court
Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.
Date: 1994-04-03

R. In Right of Canada (represented by Minister of Indian Affairs and Northern Development)
and
Curragh Inc.

Ontario Court of Justice (General Division) [Commercial List] Farley J.
Heard – March 17, 1994[1].
Judgment – April 3, 1994.

K. McElcheran and Andrea Nicholls, for Peat Marwick Thorne Inc., receiver of Curragh Inc. relating to Faro Mine.
Fred Myers, for certain lien claimants pursuant to Miners Lien Act of Yukon Territory.
R.B. Jones, for Round Table Resources Inc., Ross River Dena Development Corporation and Kaska Inc.
D. Dowdall, for noteholders.
John Porter, for plaintiff.
Edward Sellers, for Yukon Territorial Government.
Johanna Superina, for Bank of Nova Scotia.
Stephen Pike, for Mitsui & Co. (Canada) Ltd.
C. Cole, for Triathlon Leasing Inc.
(Doc. B112/93-C)

[1] April 3, 1994. FARLEY J.: – Peat Marwick Thorne Inc. was appointed as the interim receiver ("IR") of the defendant's Faro mine pursuant to s. 47 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended in 1992 ("BIA") by my order of October 15, 1993. What the IR proposed was that for the purpose of facilitating a sale of the Faro mine, the IR would advertise for any claims against that asset and that if a claim were not made by a certain date (originally proposed to be April 22, 1994) then the IR wanted an order from this Court barring any claims against those assets or the IR (but not against the defendant). The draft order went on to provide for this Court requesting the aid and assistance of any court in Canada, the United States of America or elsewhere to the extent necessary to give effect to the terms of this order. The IR's position was that this Court had the inherent jurisdiction to issue such an order notwithstanding the location of the Faro mine in the Yukon. The position of the lien claimants (claiming pursuant to the *Miners Lien Act,* R.S.Y.T. 1968, c. 116 ("MLA") was that this Court should not attempt to deal with any in rem matter affecting Yukon assets.

[2] On January 12, 1994, I granted leave pursuant to para. 14 of my October 15, 1993 order to any MLA claimants to pursue their claims in the Supreme Court of the Yukon Territory (including priority aspects vis-à-vis the Bank of Nova Scotia security), provided they not enforce any judgment by sale of the property except by further leave from this Court. Thus it would appear to me that this Court operating as the bankruptcy court under the insolvency legislation of the BIA retains overall jurisdiction in this matter. That is appropriate in my view given that the defendant's head office is in Toronto but with operations literally at the very opposites of Canada (Nova Scotia, British Columbia and the Yukon Territory).

[3] I do pause to note that the BIA involves and affects secured creditors to a degree that was not present under the pre-1992 legislation. Under the previous legislation, the practical result was that secured creditors were not affected – as witness the lead-in provisions such as "subject to the rights of secured creditors…". However, under the revised legislation a debtor company is able to initiate action leading to a proposal and thereby bind, at least for the time being, secured creditors. Perhaps more to the point is the requirement of s. 244 requiring any secured creditor who wishes to enforce his

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security on the debtor company's general undertaking to give notice and refrain from taking that enforcement action for 10 days. However s. 47 allows for the appointment of an interim receiver in such s. 244 circumstances. Section 47 provides:

> 47(1) *Where the court is satisfied that a notice is about to be sent or has been sent under subsection 244(1), the court may,* subject to subsection (3), *appoint a trustee as interim receiver* of all or any part of the debtor's property that is subject to the security to which the notice relates, for such term as the court may determine.
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (*a*) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (*b*) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (*c*) take such other action as the court considers advisable.
>
> (3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
>
> (*a*) the debtor's estate; or
>
> (*b*) the interests of the creditor who sent the notice under subsection 244(1).

[Emphasis added.]

[4] The provisions of s. 47 should be contrasted with the provisions of s. 46:

> 46(1) *The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of a petition for a receiving order and before a receiving order is made, appoint a licensed trustee as interim receiver of the property of the debtor* or of any part thereof and direct him to take immediate possession thereof on such undertaking being given by the petitioner as the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the petition being dismissed.
>
> (2) The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for the conservatory purposes or to comply with the order of the court.

[Emphasis added.]

[5] Certainly under these circumstances, the interim receivership has survived for a much longer period of time than the 10 days. It would seem that in many practical aspects in these circumstances that the IR is functioning as a quasi-receiver and manager/trustee in bankruptcy. It would not be generally said that interim receivers have "sale powers" – beyond of course the aspect of disposing of perishable goods or those items with a predilection to depreciation in value. These aspects are referred to in s. 46(2); it would not seem reasonable to assume that a s. 47(1) interim receiver had less authority in this regard. Although we may observe that one is not dealing with fruit which is subject to rot, one is dealing with mining properties which involve certain potential environment frailties and the possibility of safety risks if not attended to. It is perhaps unfortunate that certain of those directly involved in the protection of the public (i.e. the governmental organizations) have not taken a more aggressive and positive role in funding the activities of the IR since it is only the IR which stands in between the band-aid environmental solution and the abandonment of the property with ensuing environmental risks. Indeed the environmental legislation regime appears to have frozen the situation with the likelihood that the IR will "continue" until the Faro mine is in fact sold. It appears that the object of the process at the present time is to maintain the property on a shoestring (which has thus far worked) while marketing it with a view towards its sale. With a sale the new owner would then take charge of the property, with the general requirement to maintain it in good condition for environmental purposes and exploiting it in due course when it is determined that conditions are favourable.

[6] The 1992 amendments to the BIA significantly affected this legislation, especially in respect of affecting the rights of secured creditors and more extensively dealing with the aspect of insolvency (as contrasted with bankruptcy). Pre-amendment cases must be analyzed with care, especially those of some antiquity. For example, *Westlake v. Martin* (1930), 11 C.B.R. 469 (Ont. C.A.) dealt with an interim receiver. However as Fisher J.A. pointed out at p. 477:

> But the defendant having been appointed receiver and subsequently custodian and trustee his duties as such are clearly defined by the Act. Under sec. 5(2) of *The Bankruptcy Act* [9 C.B.R. 37],
>
> "an *interim receiver* may, under the direction of the court, summarily dispose of any perishable goods and carry on the business of the debtor for all conservatory purposes."
>
> Under sec. 34(2) [9 C.B.R. 99] a *custodian* has the same powers as a receiver, and by subsec. (3) he "shall remain in possession until a trustee is appointed by the creditors"; and after his appointment as trustee he is governed by the powers given to him by sec. 43 [9 C.B.R. 112].
>
> The appointment of a receiver does not effect a transfer of the debtor's property; he has no estate vested in him, the object of his appointment being simply for protection of the estate: see *In re Berry; Duffield v. Williams,* [1896] 1

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> Ch. 939, at p. 944, 65 L.J. Ch. 245, and unless it is for protection or preservation of the property, a receiver has no right to sell property of the debtor: see *In re Wells and Croft* (1895), 72 L.T. 359, 2 Manson 41.

He had previously observed at p. 474 that the court order appointing the interim receiver was not expansive:

> The order appointing the defendant as receiver contains, apart from the usual undertaking as to damages, authority to "take possession of the property" to "summarily dispose of any perishable goods" "to control the receipts and disbursements of the business of the debtor" and "to not unduly interfere with the carrying on of the business of the debtor in the ordinary way."

Certainly in that case the interim receiver went beyond the authority granted under the then legislation and the appointment order since at p. 476 Fisher J.A. recited that the interim receiver "[c]arried on the business *generally"* and did not limit himself to perishable goods. This should be contrasted with the rather flexible regime under a s. 47(1) BIA appointment of an interim receiver; the court may allow the interim receiver to exercise control over the business in question – but as well pursuant to s. 47(2)(*c*) it would be possible for the interim receiver to apply to the court for directions. Certainly it would appear that these directions should be tailored to meet the practical demands of the situation which are being encountered in any given case.

[7] The IR relies upon s. 47(2) and s. 188 of the BIA with respect to the requested order. It submits that the sale aspect is a natural development or extension of the process in these circumstances – and that a sale would be enhanced if potential bidders were alerted to the number, nature and extent of claims against the property and with a confidence that these would be the sole claims, all others having been barred. I am of the view that this would be an obvious practical benefit in the circumstances. Section 47(2) has been set out above; s. 188 provides:

> 188(1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.
>
> (2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

[8] I think it also helpful to recall that the bankruptcy court is the court of superior jurisdiction in the various provinces and territories: see s. 183(1). Thereby the BIA confers on a pre-existing court a jurisdiction in bankruptcy and insolvency and judges of these courts have jurisdiction therein and the power to deal with such matters: see *Re Dominion Shipbuilding & Repair Co.* (1926), 7 C.B.R. 349 (Ont. S.C.); *Holley v. Gifford Smith Ltd.* (1986), 59 C.B.R. (N.S.) 17, 54 O.R. (2d) 225, 26 D.L.R. (4th) 230, 14 O.A.C. 65 (C.A.).

[9] Houlden and Morawetz, *The Annotated Bankruptcy and Insolvency Act 1993* (Toronto, Carswell) at pp. 354-355 state:

> It is sometimes a difficult matter to decide whether or not the bankruptcy court has jurisdiction. In deciding the issue, there are two aspects which have to be considered. First, the person against whom the proceeding is brought. If the action is taken against the person who is not a creditor but is a stranger to the bankruptcy, the bankruptcy court may not have jurisdiction. Second, the nature of the remedy that is sought. If the action seeks a remedy that is given by [the] Bankruptcy and Insolvency Act, such as an action to declare a transaction, a settlement or preference, the bankruptcy court has jurisdiction. But if the remedy is not given by the Bankruptcy and Insolvency Act or by comparable provincial legislation, the bankruptcy court ordinarily does not have jurisdiction: see *Case Comment Re M.B. Greer & Co.* (1953), 33 C.B.R. 69 (Ont. S.C.) at pp. 74-75; *Mancini v. Falconi* (1987), 65 C.B.R. (N.S.) 246 (Ont. S.C.) and Annotation at p. 247, and Bankruptcy Rule 89.

[10] In the 1994 edition of the foregoing book, Houlden and Morawetz further examine this having broken down the topic into various categories. The following excerpts at pp. 365-367 are illustrative; while the cases referred to deal with trustees and bankruptcy situations, there will be some relevance to interim receivers in s. 244 situations:

> (1) *Generally*
>
> Generally speaking, the Bankruptcy Court has jurisdiction over matters relating to the administration of the bankrupt estate. The bankrupt and the creditors, being parties to that administration, are subject to that jurisdiction. Furthermore, there are transactions, such [as] fraudulent preferences, settlements, and invalid personal property securities, which by provincial or federal legislation are also subject to the jurisdiction of the court, even though they involve third parties. But the mere fact that a trustee in bankruptcy has a claim against a stranger to the bankruptcy does not *ipso facto* give the Bankruptcy Court jurisdiction to hear the matters: *Ellis v. Silber* (1872), 8 Ch. App. 83, 42 L.J. Ch. 666, 28 L.T. 156, 21 W.R. 346 (L.C.). In some cases the Bankruptcy Court has jurisdiction, and in other cases it does not.

[p. 365]

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(2) *Proceedings to Determine Whether or not a Person is a Creditor or the Rights and Obligations of a Creditor*

If proceedings are taken to determine whether a person is a creditor of the bankrupt estate or the rights and obligations of a creditor, the Bankruptcy Court has jurisdiction ...

[p. 365]

(5) *Proceedings Against Strangers to the Bankruptcy*

Although it is said that the trustee has no right to bring a stranger into the Bankruptcy Court and to compel him to submit his rights for determination by that court (see, for example, *Re Reynolds* (1928), 10 C.B.R. 127, 62 O.L.R. 271, [1928] 2 D.L.R. 520 (S.C.), affirmed (1928), 10 C.B.R. 127 at 131, 62 O.L.R. 360, [1928] 3 D.L.R. 562 (C.A.)), this statement is too wide.

In determining jurisdiction where strangers to the bankruptcy are involved, it is submitted that the court has to assume that the trustee will be successful in his application. The question then is, will the unsuccessful claimant be a creditor of the bankrupt estate as a result of losing the application? If the answer is yes, then the Bankruptcy Court has jurisdiction. If the answer is no, then the Bankruptcy Court does not have jurisdiction ...

[p. 366]

(9) *Concurrent Jurisdiction of Bankruptcy Courts and Ordinary Civil Courts*

The jurisdiction of the Bankruptcy Court is not exclusive. Even though a remedy can be claimed in the Bankruptcy Court, the same remedy can also be claimed in the ordinary civil courts: *Stillwater Lumber & Shingle Co. v. Canada Lumber & Timber Co.* reflex, (1923), 3 C.B.R. 807, [1923] 1 W.W.R. 1333, 32 B.C.R. 81, [1923] 2 D.L.R. 900 (C.A.). *Re Westam Development Ltd.* (1967), 10 C.B.R. (N.S.) 61, 59 W.W.R. 65, 61 D.L.R. (2d) 421 (B.C. C.A.); *Phoenix Assurance Co. v. Montréal (Ville) Office municipal d'habitation* (1979), 34 C.B.R. (N.S.) 158 (Que. S.C.); *Discovery Enterprises Inc. v. Hongkong Bank of Canada* 1990 CanLII 2067 (BC SC), (1990), 3 C.B.R. (3d) 309, 48 C.P.C. (2d) 290 (B.C. S.C.), leave to appeal to B.C. C.A. refused 1991 CanLII 1765 (BC CA), (1991), 3 C.B.R. (3d) 318, 48 C.P.C. (2d) 300.

[p. 367]

[11] What do we have here regarding the lien claimants under the MLA? That legislation (incorporating the definitions of the *Yukon Quartz Mining Act,* R.S.C. 1985, c. Y-4) involves liens which attach to mining interests. Sections 2 and 3 provide:

2(1) Any person who performs any work or service in respect of or places or furnishes any material to be used in the mining or working of any placer or quartz mine or mining claim shall, by virtue thereof, have a lien for the price of such work, service or material upon the minerals or ore produced from and the estate or interest of the owner in the mine or mining claim in or in respect of which such work or service is performed or material furnished, limited however in amount to the sum justly due to the person entitled to the lien.

(2) The lien shall attach upon the estate or interest of the owner and of all persons having any interest in the mine or mining claim and all appurtenances thereto, the minerals or ores produced therefrom, the land occupied thereby or enjoyed therewith and the chattels, equipment and machinery in, upon or used in connection with such mine, mining claim or land.

(3) Upon registration, the lien shall attach and take effect as against persons purchasing and mortgagees and other encumbrancers registering their mortgages or encumbrances subsequent to the commencement of performance of work or service or furnishing of material in respect of which the lien is claimed.

3. Any lien registered under this Act shall, as to one-half of the output from the mine or mining claim in respect of which the lien is claimed, take priority over all mortgages and encumbrances registered subsequent to November 16, 1957.

This legislation and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory. It was felt appropriate to have the courts of the Territory deal with the interpretation and entitlement of those provisions. Certainly their approach is the preferable one when looked at from the aspect of one court according due deference to another with a "closer" connection to the situation and this course alleviates the necessity of having to deal with the MLA through opinions on foreign law. It would appear to me on a cursory review that the nature of the lien is an in rem claim against real property interests in the Territory: see *W.J.C. Kaufmann Co. v. Berberi* (1982), 36 O.R. (2d) 774 (Div. Ct.) at p. 780:

Enforcement of the lien is therefore by an action *in rem* against the land or money standing in place of the land (see *Pankka v. Butchart et al.,* [1956] O.R. 837, 4 D.L.R. (2d) 345 (C.A.)).

It would therefore seem to me that I should not do anything which would interfere with the determination of the rights which persons claiming under the MLA would have against the Faro mine (i.e. its output).

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[12] However, does that mean that what we will have is a fork in the road with the problem being not that one has to chose between the two branches but rather that participants in this matter must in effect straddle to keep a foot on both paths. I think not for this would be to give everyone the worst of all possible solutions.

[13] Clearly a solution which allows for the determination of the exact nature and amount of the claim against the Faro mine will be of assistance in marketing that asset. A prospective purchaser will know what he is facing when making an offer for the mine. It would therefore be of significant assistance if this determination could be made rather soon as to clarify the situation before offers are requested.

[14] I do not see that an order providing for advertising for claims – including those under the MLA – would infringe upon the jurisdiction of any other court nor the rights of any potential claimant. It was proposed that a letter go out to any person shown in the books of the defendant as a potential claimant as well as advertising in several newspapers having circulation in material areas. The point in contention would appear to be whether this Court has jurisdiction to order that a claim that has not in effect been registered with this Court by a certain date (by filing a proof of claim with the IR who would then report to this Court) could be barred.

[15] Certainly the non-bankruptcy courts of this country have exercised their inherent jurisdiction to bar claims against specified assets and receivers: see *Ultracare Management Inc. v. Gammon,* Order of Austin J. dated October 19, 1993; *Liquidators of Wallace Smith Trust Co. v. Dundalk Investment Corp.,* Order of Blair J. dated September 22, 1993. As Macdonald J. said in *Re Westar Mining Ltd.,* 1992 CanLII 1863 (BC SC), [1992] 6 W.W.R. 331 (B.C. S.C.) at p. 337:

> I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction
> to achieve that end: see *Winnipeg Supply& Fuel Co. v. Genevieve Mortgage Corp.,* reflex, [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160 (Man. C.A.), at p. 657 [W.W.R.].
> The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by *Halsbury's* (4th ed., vol. 37, para. 14) as:
> "... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so ..."
> Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

In commenting on this decision and discussing the stay provisions of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA") and the U.S. *Bankruptcy Code,* Tysoe J. observed in *Re Woodward's Ltd.,* [1993] B.C.J. No. 42 at p. 11 [17 C.B.R. (3d) 236, at pp. 247-248]:

> Hence, it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In *Westar* Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisite to the Court exercising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.
> In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

[16] While the BIA is generally a very fleshed out piece of legislation when one compares it to the CCAA, it should be observed that s. 47(2)(*c*): "The court may direct an interim receiver... to... (*c*) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability. I think it should be emphasized again what I was discussing earlier in my reasons: that an asset of the nature of the Faro mine is not one which can be easily mothballed and insulated from nature affecting its present condition. Rather, it must be constantly attended to so as to avoid adverse environmental deterioration which will

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not only be very costly to clean up but will create a health and safety hazard. The danger cannot be ignored. (I do not mean to imply that this asset is unusual or out of the ordinary for other mines in similar circumstances.) Abandonment of the property would likely carry heavy political consequences given the ultimate responsibility of the various levels of government for environmental and other concerns. A shoestring (budget) will support a great weight – but only momentarily. Given the conditions prevailing and these circumstances, it would appear to me that the best practical solution would be that a new owner take over care and custody of this asset through purchase.

[17] Ought I to do anything to assist in this regard? As was stated in *Tezcan v. Tezcan* 1987 CanLII 157 (BC CA), (1987), 46 D.L.R. (4th) 176 (B.C. C.A.) at p. 179:

> The general rule is that the courts of a country have no jurisdiction to adjudicate on the right and title to lands not situate within its borders. Only the courts of the jurisdiction in which lands are situate, may adjudicate on the rights and title to such lands: *Duke v. Andler,* 1932 CanLII 32 (SCC), [1932] S.C.R. 734. The rule is not confined to the formalities of transfer of title, but extends to all disputes touching the land, including debt, trust, or tort: see *Deschamps v. Miller,* [1908] 1 Ch. 856; *Purdom v. A.E. Pavey & Co.* 1896 CanLII 17 (SCC), (1896), 26 S.C.R. 412; *British South Africa Co. v. Companhia de Mocambique,* [1893] A.C. 602 (H.L.).

See also J.G. Castel, *Canadian Conflict of Law,* 2nd ed. (1986; Butterworths, Toronto) at pp. 405-406.

[18] However I do not see that these principles answer all the question. It must be recognized that Yukon law and the Yukon courts will determine the amount of the MLA claims and their priority; however this must interface with the general aspect of the defendant's insolvency. It strikes me that we might well analogize to the overall problem of multi-jurisdiction bankruptcies which I discussed in my paper "Potpourri of Current Topics" given at the 1993 Insolvency Institute of Canada Conference. I said at pp. 29-30:

> There are three possible approaches to insolvency where assets and creditors are located in more than one country (see: Warren and Westbrook, *The Law of Debtors and Creditors* (1986), p. 721):
>
> > (1) The universalist approach whereby the courts of one country have exclusive jurisdiction over the insolvency of a particular debtor, and all the creditors have to bring their claims before that original bankruptcy court. Such a solution could only be achieved by means of a multinational treaty.
> >
> > (2) The strict territorial approach, whereby each country distributes the assets located within its jurisdiction according to its own law, and does not recognize any foreign representative of creditors.
> >
> > (3) A mixed or compromise approach, whereby the courts of each country exercise insolvency jurisdiction over the assets present in that country, but recognize the interests of foreign representatives of creditors and seek to co-operate with foreign courts.
>
> For an interesting discussion of choice of law issues vis-à-vis the traditional approach (territoriality, unity and universality) and proposals for new approaches see: Jay L. Westbrook, "Conflict of Laws Issues In International Insolvencies", The Twenty-Third Annual Workshop on Commercial and Consumer Law: Conference on International and Comparative Commercial Insolvency Law, (June 24-26, 1993), University of Toronto, Faculty of Law, p. 718.

I am of the view that the mixed or compromise approach is the reasonable one to adopt in these circumstances. It seems to me that this can be achieved by having the Yukon court adjudicate the MLA claims but providing that this Court as the one involved in the insolvency proceedings grant an order that any MLA claims for which proofs of claim not filed with the IR for adjudication in the Yukon Court (assuming no excess problem) by a specific date will be barred. In this regard, I would request the aid of the Yukon Court in its bankruptcy capacity (see s. 188 BIA) to assist in the implementation of this to the extent necessary. 19 I have indicated that there should be a specific period of time to allow for the advertising and submission of claims. Given that several weeks have elapsed since this motion was heard, it would seem to me that the originally proposed time frame is likely too tight. I would request the counsel for the IR and MLA claimants see me at a convenient 9:30 this coming week to resolve the timing question.

Order accordingly.

---

[1] Further material submitted by lien claimants and interim receiver on March 25. 1994.

Directions to interim receiver - Sec. 47.1(2)

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;

(b) take possession of all or part of the debtor's property mentioned in the order of the court;

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(c) exercise such control over that property, and over the debtor's business, as the court considers advisable;
(d) take conservatory measures; and
(e) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made - Sec. 47.1(3)
(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
(a) the debtor's estate; or
(b) the interests of one or more creditors, or of the creditors generally.

Place of filing - Sec. 47.1(4)
(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.
1992, c. 27, s. 16;
2005, c. 47, s. 31;
2007, c. 36, s. 15.

Orders respecting fees and expenses - Sec. 47.2
47.2 (1) If an appointment of an interim receiver is made under section 47 or 47.1, the court may make any order respecting the payment of fees and disbursements of the interim receiver that it considers proper, including an order giving the interim receiver security, ranking ahead of any or all secured creditors, over any or all of the assets of the debtor in respect of the interim receiver's claim for fees or disbursements, but the court shall not make such an order unless it is satisfied that all secured creditors who would be materially affected by the order were given reasonable advance notification and an opportunity to make representations to the court.

Meaning of disbursements - Sec. 47.2(2)
(2) In subsection (1), "disbursements" do not include payments made in operating a business of the debtor.

Accounts, discharge of interim receivers - Sec. 47.2(3)
(3) With respect to interim receivers appointed under section 46, 47 or 47.1,
(a) the form and content of their accounts, including their final statement of receipts and disbursements,
(b) the procedure for the preparation and taxation of those accounts, and
(c) the procedure for the discharge of the interim receiver
shall be as prescribed.
1992, c. 27, s. 16;
2004, c. 25, s. 30;
2005, c. 47, s. 32.

Application of sections 43 to 46 - Sec. 48
48. Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary,

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commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.
R.S., 1985, c. B-3, s. 48;
1997, c. 12, s. 28.

ASSIGNMENTS

Assignment for general benefit of creditors - Sec. 49
49. (1) An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors.

Sworn statement - Sec. 49(2)
(2) The assignment must be accompanied by a sworn statement in the prescribed form showing the debtor's property that is divisible among his or her creditors, the names and addresses of all his or her creditors and the amounts of their respective claims.

Filing of assignment - Sec. 49(3)
(3) The assignment made under subsection (1) shall be offered to the official receiver in the locality of the debtor, and it is inoperative until filed with that official receiver, who shall refuse to file the assignment unless it is in the prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2).

Appointment of trustee - Sec. 49(4)
(4) Where the official receiver files the assignment made under subsection (1), he shall appoint as trustee a licensed trustee whom he shall, as far as possible, select by reference to the wishes of the most interested creditors if ascertainable at the time, and the official receiver shall complete the assignment by inserting therein as grantee the name of the trustee.

Cancellation of assignment - Sec. 49(5)
(5) Where the official receiver is unable to find a licensed trustee who is willing to act, the official receiver shall, after giving the bankrupt five days notice, cancel the assignment.

Procedure in small estates - Sec. 49(6)
(6) Where the bankrupt is not a corporation and in the opinion of the official receiver the realizable assets of the bankrupt, after the claims of secured creditors are deducted, will not exceed five thousand dollars or such other amount as is prescribed, the provisions of this Act relating to the summary administration of estates shall apply.

Future property not to be considered - Sec. 49(7)
(7) In the determination of the realizable assets of a bankrupt for the purposes of subsection (6), no regard shall be had to any property that may be acquired by the bankrupt or devolve on the bankrupt before the bankrupt's discharge.

Where subsection (6) ceases to apply - Sec. 49(8)

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(8) The official receiver may direct that subsection (6) shall cease to apply in respect of the bankrupt where the official receiver determines that

(a) the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand dollars or the amount prescribed, as the case may be, or

(b) the costs of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets,

and the official receiver considers that such a direction is appropriate.
R.S., 1985, c. B-3, s. 49;
1992, c. 1, s. 15, c. 27, s. 17;
1997, c. 12, s. 29;
2004, c. 25, s. 31(E);
2005, c. 47, s. 33.

SB Directive: 20, Bankruptcy Assistance Program (BAP)
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 20

BANKRUPTCY ASSISTANCE PROGRAM

Issued: August 14, 2009

(Supersedes Directive No. 11 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"BAP" means the Bankruptcy Assistance Program;

"OSB" means the Division Office of the Office of the Superintendent of Bankruptcy in the locality of the debtor;

"Out-of-pocket expenses" refers to the expenses delineated in subsection 128(2) of the Rules;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

PROGRAMME D'ACCÈS À LA FAILLITE

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 11 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le bureau de division du Bureau du surintendant des faillites dans la localité du débiteur;

« débours » renvoie aux débours tels que définis au paragraphe 128(2) des Règles;

« Loi » désigne la *Loi sur la faillite et l'insolvabilité*;

« PAF » s'entend du Programme d'accès à la faillite;

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité*.

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Canada

OSB • BSF Protecting the Integrity of the Insolvency System / Protéger l'intégrité du système d'insolvabilité

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Authority and Purpose

2. This Directive is issued pursuant to paragraph 5(4)(c) of the Act.

3. The purpose of this Directive is to set out the framework of a program that will permit a debtor who has insufficient funds to cover the cost of an administration of a bankruptcy to have access to the bankruptcy system. This Directive sets out the procedure and criteria for eligibility.

Procedure

4. Debtors initially contacting the OSB for advice relative to their financial affairs will be provided with a list of trustees participating in the BAP.

5. If unable to obtain the services of a trustee after consulting at least two (2) trustees, or the sole trustee in the area where there is only one trustee, the debtor may again contact the OSB if the debtor considers that bankruptcy remains a potential solution. At such time, a registration form detailing the debtor's name, address and telephone number and the name(s) of trustee(s) previously contacted will be prepared.

6. On a rotational basis, the designated Bankruptcy Analyst will deliver the registration form to a participating trustee, who becomes the designated trustee to administer the assignment.

7. The debtor will contact the trustee designated by the designated Bankruptcy

Autorité et objet

2. La présente instruction est émise en vertu de l'alinéa 5(4)*c*) de la Loi.

3. La présente instruction a pour objet de présenter le cadre du programme qui permet aux débiteurs n'ayant pas les fonds suffisants pour couvrir les frais d'administration d'une faillite d'avoir accès au système de faillite. Elle énonce les modalités et les critères d'admissibilité à ce programme.

Modalités

4. Un débiteur demandant initialement conseil au BSF parce qu'il ne peut faire face à ses obligations se verra remettre une liste de syndics qui se sont engagés à rencontrer les exigences du PAF.

5. Si le débiteur est dans l'impossibilité d'obtenir les services requis après avoir consulté deux (2) syndics, ou le syndic lorsqu'il y en a un seul dans le secteur, le débiteur pourra recommuniquer avec le BSF s'il estime que la faillite demeure une solution envisageable. Un formulaire renfermant le nom, l'adresse, le numéro de téléphone du débiteur et le nom des syndics contactés sera alors préparé.

6. Sur une base rotative, l'analyste des faillites désigné transmettra le formulaire d'enregistrement à un syndic participant qui deviendra de fait le syndic désigné pour administrer la cession.

7. Le débiteur communiquera avec le syndic désigné par l'analyste des faillites désigné afin

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Analyst in order to fully discuss the alternatives to bankruptcy and the consequences of declaring bankruptcy or making a proposal.

8. Provided that the debtor is eligible for the BAP pursuant to sections 14 and 15 below, and decides to declare bankruptcy, the designated trustee will prepare the necessary documentation for the filing of the assignment.

9. If the assignment is not filed within thirty (30) days of the debtor's assessment, the trustee is obliged to report this fact to the designated Bankruptcy Analyst. In remote geographical areas, a slightly longer period of time may be acceptable, subject to the approval of the designated Bankruptcy Analyst.

10. Trustees must be available for service throughout the entire year and agree to ensure that files accepted under the BAP will receive the same level of service as similar files accepted outside of the program.

11. The application for a bankrupt's discharge is not to be delayed due to the lack of full payment of a trustee's fee. Trustees, however, are entitled to payment in full of their out-of-pocket expenses.

12. In cases where third-party deposits or guarantees are taken by the trustee, such arrangements must be made in accordance with Directive No. 16, *Third-Party Deposits and Guarantees*

de discuter pleinement des solutions de rechange à la faillite et des conséquences de la faillite ou du dépôt d'une proposition.

8. Si le débiteur est admissible au PAF aux termes des paragraphes 14 et 15 ci-après et s'il décide de faire faillite, le syndic désigné devra préparer la documentation nécessaire en vue de déposer la cession

9. Si la cession n'est pas déposée dans les trente (30) jours suivant l'évaluation du débiteur, le syndic devra en faire rapport à l'analyste des faillites désigné. Dans les régions éloignées, une période de temps plus longue pourrait être acceptable, sous réserve de l'approbation de l'analyste des faillites désigné.

10. Les syndics doivent pouvoir offrir le service tout au long de l'année et doivent s'assurer que tous les dossiers acceptés en vertu du PAF seront traités de la même manière que les autres dossiers similaires acceptés par les syndics hors du programme.

11. La demande de libération du failli ne doit pas être retardée parce que les honoraires du syndic n'ont pas été entièrement versés. Toutefois, les syndics ont droit au paiement intégral de leurs débours personnels.

12. Dans les cas où des dépôts ou garanties de tierces personnes sont acceptés par le syndic, il faut que l'instruction n° 16, *Dépôts et garanties de tierces personnes*, soit respectée.

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13. If the debtor does not meet with the trustee at the trustee's office or does not proceed with an assignment after the assessment, the designated trustee will return the registration form indicating the reasons for the non-assignment to the OSB.

Eligible Debtors

14. Following attempts to secure the services of a trustee, insolvent individuals wishing to make an assignment in bankruptcy and who contact the OSB may be accepted into the BAP, except individuals:

(a) who are incarcerated;

(b) who were previously or are currently involved in commercial activities where the administration of the bankruptcy could give rise to an appreciable amount of administrative or investigative work for the trustee; or

(c) who are required to make surplus income payments in accordance with the Directive No. 11R2, *Surplus Income*.

15. Where a debtor's income increases after being accepted into the BAP, the debtor will be required to make payments on the surplus income where required pursuant to the Directive No. 11R2, *Surplus Income*.

13. Si le débiteur ne se présente pas au bureau du syndic ou s'il décide de ne pas faire cession de ses biens suite à l'évaluation, le syndic désigné retournera le formulaire d'enregistrement en donnant les raisons du désistement au BSF.

Débiteurs admissibles

14. Après avoir essayé d'obtenir les services d'un syndic, toute personne insolvable qui désire faire une cession et qui communique avec le BSF pourra être admissible au PAF, sauf les personnes :

a) qui sont incarcérées;

b) qui participaient ou participent à des activités commerciales dans le cadre desquelles l'administration de la faillite pourrait entraîner un travail de gestion ou d'enquête important pour le syndic; ou

c) qui sont tenues de faire des paiements au titre du revenu excédentaire conformément à l'instruction n° 11R2, *Revenu excédentaire*.

15. Lorsqu'un débiteur voit ses revenus augmenter après son admission au PAF, le débiteur doit effectuer des paiements au titre du revenu excédentaire lorsqu'il est tenu de le faire en vertu de l'instruction n° 11R2, *Revenu excédentaire*.

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Eligible Trustees

16. A participating trustee, once designated, must agree to accept and process assigned eligible debtors except in those situations where the trustee will be in a conflict of interest. For the purpose of this Directive, conflicts of interest shall be governed by the applicable provisions of the Act and the Rules.

17. All trustees requesting to participate in the BAP will be eligible to do so subject to the following provisions:

(a) they fully agree to adhere to all the requirements of the BAP;

(b) new trustees requesting to participate in the BAP will be added to the list of participating trustees every January 1 and July 1;

(c) any trustee withdrawing from the BAP, either voluntarily or involuntarily, will not be permitted to return to the program for a period of two (2) years from the withdrawal date. Subsequent readmittance into the program would be at the discretion of the designated Assistant Superintendent; and

Syndics admissibles

16. Un syndic participant au programme, lorsque désigné, doit accepter tous les débiteurs admissibles demandant de l'aide en matière de faillite, sauf lorsque l'acceptation placerait le syndic dans une situation de conflit d'intérêt. Aux fin de la présente instruction, les situations de conflit d'intérêt seront régies selon les dispositions applicables de la Loi et des Règles.

17. Tous les syndics demandant de participer au PAF seront admissibles, sous réserve des dispositions suivantes :

a) ils conviennent de se conformer à toutes les exigences du PAF;

b) les nouveaux syndics demandant de participer au PAF verront leur nom ajouté à la liste des participants le 1er janvier et le 1er juillet de chaque année;

c) tout syndic se retirant du PAF, de façon volontaire ou non, ne pourra être réadmis au programme avant l'expiration d'un délai de deux (2) ans. Sa réadmission à l'intérieur du programme sera laissée à la discrétion du surintendant adjoint désigné; et

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(d) should any trustee withdraw from the program due to exceptional circumstances (e.g. sickness), the designated Assistant Superintendent would decide as to when the trustee would be admitted back into the BAP.

18. To prevent undue advantage to any participating trustee, periodic rearrangement of the trustee list will be made by the OSB.

19. Trustees participating in the program, subject to section 21 of this Directive, shall be resident trustees having a principal office unless bankruptcy service is otherwise unavailable in a particular area.

20. Only one name for each trustee office will be permitted in the listing. A non-resident trustee may be listed as a participating trustee in areas not served by a resident trustee.

21. Trustees not complying with the spirit or conditions of the BAP may see their name deleted from the list of participating trustees by the Superintendent of Bankruptcy.

Coming into Force

22. This Directive comes into force on September 18, 2009.

d) advenant que le syndic se retire du programme en raison de circonstances exceptionnelles (p. ex., maladie), il reviendra au surintendant adjoint désigné de déterminer quand celui-ci pourra être admis de nouveau au PAF.

18. Afin d'éviter un avantage indu en raison de l'ordre des syndics sur la liste, ladite liste sera réaménagée périodiquement par le BSF.

19. Les syndics participant au programme devront, sous réserve de l'article 21 de la présente instruction, être des syndics locaux possédant un bureau principal, à moins que les services d'un syndic ne puissent être retenus dans une région particulière.

20. Un seul nom de syndic par bureau sera inscrit sur la liste. Le nom d'un syndic possédant un bureau secondaire peut être inscrit sur la liste des syndics participants lorsque la région où est situé ce bureau n'est desservie par aucun autre syndic.

21. Les syndics ne se conformant pas au exigences et à l'esprit du PAF pourront voir leur nom retiré de la liste par le surintendant des faillites.

Entrée en vigueur

22. La présente instruction entre en vigueur le 18 septembre 2009.

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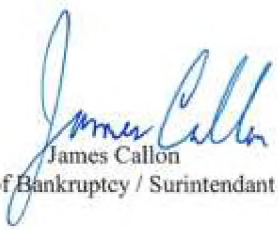
Enquiries

23. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

23. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.



James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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CRA Internal Operations Manual - Bankruptcy
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Bankruptcy

Collections Manual Updates

This chapter is currently under revision.

Overview

The Bankruptcy and Insolvency Act (BIA) is designed for the rehabilitation of debtors. When a person or corporation is insolvent, protection from the creditors is sought under this Act. The BIA is administered by Industry Canada.

Legislation

This section identifies legislation related to Bankruptcy:

- Bankruptcy and Insolvency Act
- Excise Tax Act, sections: 165, 265, 295(5)(a), 296 and 317
- Income Tax Act, sections: 128, 224(1.2), 241(4)(a), 227(4)
- Provincial Executions and Exemptions Acts

Key Legislative Items:

- **Providing Tax Information to Trustees**
- **Definition of Legal Representative**
- **Deemed Agent of a Bankrupt**
- **Clearance Certificate Not Required**
- **Summary Administration**
- **Ordinary Administration**

Providing Tax Information to Trustees

Canada Revenue Agency (CRA) may disclose tax information to trustees in limited situations. The authority for such disclosure is found in the Income Tax Act (ITA), paragraph 241(4)(a) and (k) and the Excise Tax Act (ETA), paragraph 295(5) and subparagraph 295(5)(c)(ii). For further detail refer to **Confidentiality**.

Definition of Legal Representative

As a result of Bill C-28 which received Royal Assent on June 18, 1998 subsections 159(1), (2) and (3) changed references to "persons required to file a return" and to "responsible representatives". A "legal representative" was concurrently added to subsection 248(1) of the ITA. Subsection 248(1) of the ITA is amended to add a definition of "legal representative" of a taxpayer. This definition contemplates persons who are

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acting in a fiduciary or a representative capacity. Specifically, trustees in bankruptcy, assignees, liquidators, curators, receivers of any kind, trustees, heirs, administrators, executors or committees as well as any other like person are considered to be legal representatives, provided that they administer, wind up, control or otherwise deal in a representative or fiduciary capacity with the taxpayer's property or property held for the taxpayer's benefit. For further details, refer to the Directives, **Bill C-28 Impacts on Accounts Receivable Program** – RCD 98-04 and **Lien and Charge Registration** - RCD 98-08.

Deemed Agent of a Bankrupt

The Excise Tax Act, paragraph 265(1)(a) and the Income Tax Act, paragraph 128(1)(a) deems the trustee to be an agent of the bankrupt.

Any actions performed by the trustee in the administration of the estate of the bankrupt or in carrying on the business affairs of the bankrupt is deemed to be performed by the trustee on behalf of the bankrupt.

Clearance Certificate Not Required

In a bankruptcy situation, the trustee does not require a Clearance Certificate prior to the distribution of property.

Summary Administration

If the bankrupt is not a corporation and the realisable assets of the bankrupt do not exceed $10,000 after deducting the claims of the secured creditors, the estate may be subject to a summary administration in order to reduce administration time and costs.

For additional details regarding right of secured creditors, refer to Directive ARD 03-09, **The Relationship between Bankruptcy and Insolvency Events**

Ordinary Administration

Where the official receiver determines that:

- the realizable assets of the bankrupt, after the claims of the secured creditors are deducted, exceed $5,000 or the amount prescribed, as the case may be, or
- the costs of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets, and
- the official receiver considers that such a direction is appropriate.

Background Information

This section identifies background information related to Bankruptcy:

- **Methods of Declaring Bankruptcy**
- **Registration of Security**
- **Trustees Liability**

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- Trustees Obligations
- Bankrupts Obligations
- Offences Under Bankruptcy and Insolvency Act
- Discharge of the Bankrupt
- Discharge of Trustees
- Non-Refundable Credit in Year of Bankruptcy
- Unpaid Suppliers' Rights
- GST Registrants Eligibility to Claim Input Tax Credits
- Objective of Orderly Payment of Debts
- Impact of OPD on GST
- Information you can Obtain
- Exceptions that Supersede Deemed Trust Provision

Methods of Declaring Bankruptcy

The Bankruptcy and Insolvency Act provides three different ways to go into bankruptcy.

- voluntary
- involuntary
- deemed

For additional details, refer to Directive ARD 03-09, **The Relationship between Bankruptcy and Insolvency Events**

Related Topics:

- Voluntary Assignment
- Involuntary Assignment
- Deemed Bankruptcy
- Effect of Bankruptcy

Voluntary Assignment

A voluntary assignment in bankruptcy can be made pursuant to the Bankruptcy and Insolvency Act, section 49. It provides that insolvent persons make an assignment of all their assets for the general benefit of all creditors. The bankruptcy is subject to the provincial Executions and Exceptions Acts.

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For additional details, refer to Directive, ARD 03-10, **Determining the Date of Bankruptcy**.

Involuntary Assignment

An involuntary assignment in bankruptcy is made pursuant to the Bankruptcy and Insolvency Act, sections 43 to 45. Involuntary bankruptcy occurs when a creditor files a petition in a provincial court for a **receiving order** against the debtor's assets. An individual may be petitioned into bankruptcy when the following conditions exist:

- amount of debt owing the petitioning creditors exceeds $1,000.00
- debtor has committed an **act of bankruptcy**

For additional details, refer to Directive, ARD 03-10, **Determining the Date of Bankruptcy**.

Deemed Bankruptcy

A debtor is deemed bankrupt when a proposal pursuant to the Bankruptcy and Insolvency Act, section 50 to 53, has failed. For further information refer to **Proposals in Bankruptcy and Insolvency**.

For additional details, refer to Directive, ARD 03-10, **Determining the Date of Bankruptcy**.

Effect of Bankruptcy

When a debtor becomes bankrupt, most debts and liabilities to which the bankrupt is subject are deemed to be **claims provable in bankruptcy**. When an **assignment in bankruptcy** is made or the debtor is **petitioned into bankruptcy**, no creditor, including CRA, with a claim provable in bankruptcy shall commence or continue any action, execution or take other proceedings to enforce payment of the debt, except when an enhanced Requirement to Pay has been issued under the Income Tax Act, section 224(1.2) or the Excise Tax Act, section 317(3).

Registration of Security

According to the Bankruptcy and Insolvency Act, subsection 86(1), all provable Crown claims, rank as unsecured, unless the Crown has perfected the security. To obtain perfection, CRA must register the security in a public registry system of a province or a territory. The registration of security does not provide CRA with a priority over other secured claims.

This does not apply to deemed trust property.

To perfect the security by registration, refer to the procedures **Registering a Security**.

Related Topic:

- **Exemptions From Registration**

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Exemptions From Registration

Exemptions from registration include the regular types of security instruments accepted by CRA, such as:

- bank letter of guarantee
- security deposit agreement

Trustees Liability

Amended subsection 159(1) provides that the legal representative of a taxpayer is jointly liable with the taxpayer to pay any amount payable by the taxpayer and to perform any duty or obligation imposed under the ITA. This clarifies that, for all purposes of the ITA (including assessments, objections and appeals as well as collection, administration and enforcement), the legal representative is considered to be the taxpayer's agent, for example, where the legal representative carries on the business of the taxpayer, the representative will be required to deduct, withhold and remit amounts that the taxpayer would have been required to deduct, withhold and remit. Further actions and proceedings under the ITA taken by the representative or taken by the Minister against the representative, will be binding on the taxpayer. For example, the issuance of a notice of assessment against a legal representative of the taxpayer (say a parent corporation that wound up its subsidiary and acquired its assets) will have the same effect as if it had been issued against the dissolved taxpayer, assuming it had been in existence at the time.

The liability of the legal representative to pay an amount extends to any amount payable by the taxpayer under the ITA at or before the time the legal representative is called upon for a payment. The liability of the legal representative acting in good faith is limited to the property in the possession or control of the legal representative which belonged to the taxpayer (i.e. was not subject to any security interests) when that person is called upon to make a payment on behalf of the taxpayer.

Where it is determined that the legal representative is liable for payment, raise a memo assessment under S. 159 as outlined in the **Memorandum Assessments** Chapter.

For further details, refer to the Directives, **Bill C-28 Impacts on Accounts Receivable Program** - RCD 98-04 and **Lien and Charge Registration** - RCD 98-06.

Trustees Obligations

The conduct of trustees is regulated by a code of ethics, prescribed by regulations under the Bankruptcy and Insolvency Act (BIA) and established by the **Canadian Insolvency Practitioners Association**.

Related Topics:

- **Trustees' Obligations Under BIA**
- **Trustees' Obligations Under ETA and ITA**

Trustees' Obligations Under BIA

Trustees' obligations under the Bankruptcy and Insolvency Act (BIA) include:

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1. Make an inventory of the debtor's assets.

2. Prepare a Statement of Affairs.

3. At the meeting of the creditors, report on the affairs and property of the debtor.

4. At least ten days before the first meeting of creditors, send a condensed statement of the debtor's assets and liabilities to all known creditors.

5. Send the following notices to the bankrupt entity, all known creditors and to the **Superintendent of Bankruptcy**:

   - Notice of Bankruptcy
   - notice of impending automatic discharge of the bankrupt or an application for discharge of the bankrupt and the trustee
   - information concerning the financial situation of the bankrupt and the obligation of the bankrupt to make surplus payments required under section 68 of the BIA

6. Other duties as specified in the BIA, sections 16(3) to 24, such as: insure the property and take possession of the debtor's books and records.

Trustees' Obligations Under ETA and ITA

Trustees' obligations under the Excise Tax Act (ETA) and the Income Tax Act (ITA) include:

1. Act as the insolvent person's agent, including:

   a) Filing all applicable returns.

   b) Making all payments and remittances.

2. Send all information and correspondence required under the Bankruptcy and Insolvency Act, the ETA and the ITA to: the Tax Services Office in the locality of the tax debtor, attention Revenue Collections:

   - Notice of Bankruptcy
   - Goods and Services Tax returns, remittances and payments

3. With the exception of tax returns, do not send this information to the Processing Centres.

4. Inform CRA of any bankruptcy of a person or entity engaged in a commercial activity that is taxable for GST purposes, but had failed to register.

Bankrupts Obligations

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The duties of a bankrupt are regulated by the Bankruptcy and Insolvency Act (BIA), sections 158 to 160. These duties are identical whether the bankrupt is an individual or a corporation.

In the case of a bankrupt corporation, the officer executing the assignment or the person who had control of the corporation performs the duties imposed by the BIA.

Related Topics:

- **List of Obligations**
- **Rights of a Bankrupt**
- **Obligations of First-Time Consumer Bankruptcies**

List of Obligations

The obligations of the bankrupt include:

1. Deliver all property under the possession or control of the bankrupt to the trustee, including:
   - assets
   - credit cards
2. Deliver all books and records relating to the property or affairs of the bankrupt to the trustee, including:
   - title papers
   - insurance policies
   - tax records and returns
3. Appear before the **Official Receiver** for an examination under oath.
4. Prepare and submit a Statement of Affairs to the trustee, identifying:
   - particulars of assets and liabilities
   - names and addresses of the creditors and amounts owed
   - securities held by the creditors and the dates the securities were given
   - other pertinent information
5. Assist the trustee in taking an inventory of all assets.
6. Disclose all assets disposed of in the last year other than in the normal course of business to the trustee.
7. Attend the first meeting of creditors and any other meetings of creditors, inspectors, or trustee to answer questions, as requested.

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8. Execute powers of attorney, conveyances, deeds and instruments to the trustee, as required.

9. Advise the trustee of the bankrupt's place of residence or address until such time as the application for discharge has been disposed of and the administration of the estate is completed.

Rights of a Bankrupt

The bankrupt has the right to earn a living. For this purpose, the bankrupt is allowed to engage in or continue a taxable commercial activity, outside of the estate, following a bankruptcy.

In the case of a Goods and Services Tax account, the trustee is responsible for the bankrupt's previous account number only.

Obligations of First-Time Consumer Bankruptcies

Special rules apply to individuals who have never before been bankrupt under the laws of Canada, including:

- automatic discharge of the bankrupt individual following expiration of a nine month period, unless a creditor, the trustee or the **Superintendent of Bankruptcy** opposes the discharge
- debt counselling provided to all first-time bankrupts, arranged by the trustee and paid by the estate of the bankrupt

Offences Under the Bankruptcy and Insolvency Act

The Bankruptcy and Insolvency Act (BIA) is designed for the rehabilitation of debtors. Any person or corporation who attempts to abuse the BIA is subject to severe penalties.

Related Topics:

- **List of Offences**
- **Types of Penalties**

List of Offences

Actions that constitute an offence under the Bankruptcy and Insolvency Act include:

- failing to perform the obligations of the bankrupt, without reasonable cause
- fraudulently disposing of property before or after the bankruptcy
- refusing or neglecting to answer questions truthfully
- concealing, destroying, mutilating, falsifying, omitting, or disposing of a book or document relating to the affairs of the debtor

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- entering into a transaction with the purpose of gaining an advantage the debtor would otherwise not be entitled to

For further information on offences refer to the BIA, sections 198, 199, 200 and 201(3).

Types of Penalties

If convicted of an offence under the Bankruptcy and Insolvency Act, the debtor may be subject to a fine not exceeding $5,000.00 and/or imprisonment of up to one year.

Discharge of a Bankrupt

The Bankruptcy and Insolvency Act sets parameters for:

- discharging the bankrupt
- timely closing of files with respect to the estate trust account
- filing a certificate of compliance
- remitting undeclared dividends

Related Topics:

- **First-Time Consumer Bankruptcies**
- **Repeat Consumer Bankruptcies**
- **Bankrupt Corporations**
- **Reasons A Bankrupt Remains Undischarged**

First-Time Consumer Bankruptcies

All first-time bankrupt entities may obtain an automatic discharge if the following preconditions are met:

- nine months have elapsed after the date of bankruptcy
- the creditors, trustee or the Superintendent of Bankruptcy do not oppose the discharge
- the bankrupt received mandatory debt counselling

If the discharge is not opposed, the Court issues to the bankrupt a Certificate of Discharge and a copy is sent to the Superintendent.

If the discharge is opposed, the trustee applies to the Court to obtain an appointment for the hearing of the opposition.

The automatic **discharge** does not apply if the bankrupt does any one of the following:

- applies for a discharge before the nine month period

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- refuses or neglects to receive counselling

Repeat Consumer Bankruptcies

For repeat consumer bankruptcies, the making of a receiving order against or of an assignment by a person operates as an application for discharge. After a minimum of three months and a maximum of 12 months from the date of bankruptcy, the trustee applies to the Court for an appointment for the hearing of the application for discharge. The notification of the hearing of the application for discharge is sent to all proven creditors. Any creditor may oppose the discharge.

In addition, under the Bankruptcy and Insolvency Act (BIA) subsection 169(3), a bankrupt may apply for a discharge at any time, at his own expense.

Bankrupt Corporations

A bankrupt corporation may apply for a discharge only after the corporation has fully satisfied the claims of all creditors and pays 5% interest on all proven claims. The discharge of a corporation rarely occurs.

Reasons A Bankrupt Remains Undischarged

A bankrupt individual may remain undischarged for the following reasons:

- the delay for the bankrupt's automatic discharge under the BIA has not elapsed
- bankrupt is not entitled to an automatic discharge, the bankrupt did not apply to the court for a discharge
- the court refused to grant the bankrupt an absolute discharge, and the bankrupt made no further application for a discharge
- the court suspended the bankrupt discharge for a specified time, which has not elapsed yet
- the court granted an order of discharge subject to terms or conditions, which the bankrupt did not yet fully meet
- a creditor successfully opposes the bankrupt's application for an absolute discharge; and
- the bankrupt's trustee recommends that the application be adjourned sine die
- the bankrupt has not met the required obligations under the BIA

Discharge of Trustees

Where a trustee has completed the duties with respect to the administration of the property of a bankrupt, the trustee shall apply to the court for a discharge.

Subsection 41(1) of the BIA allows a trustee, who has completed the duties required in administering the bankrupt's estate, to apply to the court for a discharge; and, under

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subsection 41(2), the court may discharge the trustee on such administration, or for sufficient cause before the estate has been fully administered.

An example of sufficient cause could be where the bankrupt has failed to:

- respect the conditions for the discharge; and
- provide the trustee with monthly income-and-expense statements and affidavits as to earnings

When such is the case, the debtor remains as an undischarged bankrupt. This status does not preclude a creditor from taking collection action.

Related Topic:

- **Requirements for Trustee's Discharge**
- **Effect of a Trustee's Discharge**

Requirements for Trustee's Discharge

The trustee is required to:

1. Apply for the taxation of the trustee's account and for a discharge by sending to the Superintendent:
   - final statement of receipts and disbursements
   - dividend sheet
   - where inspectors were appointed by the creditors, a copy of the minutes of the meeting of inspectors at which the final statement of receipts and disbursements and dividend sheet were approved or refused
   - Notice of Application for Discharge of the trustee
2. Once the trustee's account is taxed, the trustee will, within 30 days after receiving the Superintendent's comments, send to each creditor:
   - a notice of taxation of the account
   - copy of the trustee's discharge
   - copy of final statement of receipt and disbursements
   - dividend sheet
   - the final dividend owed to the creditor

Under **summary administration**, the trustee's discharge is automatic if the Superintendent or a creditor does not object.

Effect of a Trustee's Discharge

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By subsection 69.3(1) of the BIA, a creditor has to wait for the trustee's discharge before taking action against a bankrupt, with respect to recovering a claim provable in bankruptcy. CRA takes the position that it is not necessary to obtain the court's permission to take action against a bankrupt, once the trustee is discharged.

Even though the trustee is discharged, the bankrupt may not be and if not discharged the bankrupt is no longer protected from creditors. Case law holds that when a trustee is discharged but the bankrupt is not, the bankrupt should not be shielded from creditors when he or she has not complied with the duties imposed under the BIA. In this case, the duties would be the conditions imposed for obtaining the discharge from bankruptcy, and the courts have held that a bankrupt should be entitled to the stay-of-proceedings provisions under the BIA, only as long as that person demonstrates a willingness to perform those duties.

A stay-of-proceedings provision is critical to the orderly administration of the bankrupt's estate, as it ensures that a creditor's position will not be improved at the expense of other creditors. During the stay, the trustee plays an essential role in administering that estate. One of that official's task is to liquidate the bankrupt's property and distribute the funds from the liquidation. Another task is to try and persuade the bankrupt to comply with the duties imposed by the court. However, once the trustee is discharged, the stay no longer applies.

The courts have held that the bankrupt loses any rights to the stay, when the trustee has been discharged, and a creditor should be free to take any action against an undischarged bankrupt, without first obtaining the permission of the court.

Non-Refundable Credit in Year of Bankruptcy

Where an individual becomes bankrupt, subsection 128(2) of the ITA divides the calendar year in which the bankruptcy occurs into two taxation years: one that runs from January 1 to the day before the bankruptcy (pre-bankruptcy) and the other that begins on the day of the bankruptcy and runs to December 31 (post bankruptcy).

Section 118.95 of the ITA ensures that, where an individual becomes bankrupt in a calendar year, non-refundable tax credits in respect of each of the two periods in the calendar year will be calculated on a pro-rata basis.

This amendment is effective for 1995 and subsequent taxation years where the date of bankruptcy is after April 26, 1995. For detailed information about bankruptcy and the effects on the collection program, refer to the Bankruptcy & Insolvency Handbook dated March 1997. Refer to **Bill C-28 Impacts on Accounts Receivable Program** - RCD 98-04 for further details.

Unpaid Suppliers' Rights

Unpaid suppliers have a statutory right to repossess goods, in the case of a bankruptcy of a purchaser. This right ranks above every other claim or right, except where a subsequent purchaser buys the goods for value in good faith, without having knowledge that the supplier had demanded repossession of the goods.

For further detail, refer to the directive, **The Rights of Unpaid Suppliers in a Bankruptcy or an Insolvency**, RCD 00-22.

Related Topic:

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- **Conditions for Repossession**

Conditions for Repossession

The supplier has 10 days to repossess the goods from the date at which all of the following conditions are met:

- supplier must present the tax debtor or the trustee with a written demand for repossession within 30 days after the delivery of the goods
- goods have to be in the possession of the purchaser or the trustee and not have been resold to a subsequent arm's-length purchaser
- goods have to be identifiable as those delivered by the supplier
- goods have to be in the same state as they were on delivery

Farmers, fishermen and aquaculturists are granted a first charge over the purchaser's entire inventory where the indebtedness to the supplier arose with respect to products delivered 15 days before the purchaser's bankruptcy or receivership.

For further detail, refer to the directive, **The Rights of Suppliers in a Bankruptcy or an Insolvency**, RCD 00-22.

GST Registrants Eligibility to Claim Input Tax Credits

Purchasers, who are GST registrants, are eligible under the Excise Tax Act (ETA) to claim an input tax credit (ITC) for the GST paid or payable on property and services acquired for use in their commercial activities. The purchaser is eligible to claim an ITC for the GST payable on the supply even if he/she has not actually paid the GST. The supplier, on the other hand, in his net tax calculation for a given reporting period, must include GST amounts that become collectible by him/her in that reporting period even if he/she does not actually collect the GST amounts from the purchaser in that reporting period. The supplier must remit to the Crown an amount of net tax equal to the formula A-B (A being the amount of GST collected or collectible on supplies in a given reporting period; and B being the amount of ITC to which the supplier is entitled).

Related Topics:

- **Bankrupt Purchasers Eligibility to Claim Input Tax Credits**
- **Example of Bankrupt Purchasers Eligibility to Claim Input Tax Credits**
- **Situation When Duplicate Claim for ITC is Created**

Bankrupt Purchasers Eligibility to Claim Input Tax Credits

A bankrupt purchaser in his net tax calculations, can claim a deduction equal to 7/107ths when the amount, is recognized as a bad debt. This may result in a loss to the Crown as the GST on the supply is indirectly refunded twice and/or in some cases refunds or rebates are paid to the insolvent purchaser's estate in bankruptcy.

Example of Bankrupt Purchasers Eligibility to Claim Input Tax Credits

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P buys taxable supplies from S on credit in the amount of $20,000 plus GST of $1,400 for a total of $21,400. S as required remits the GST to CRA P does not pay S and makes an assignment in bankruptcy.

S files a Proof of Claim for $21,400, but as an unsecured creditor, S is unable to recover his claim. He then writes-off the amount of $21,400 as a bad debt and, as Section 231 of the ETA entitles him to do, S. deducts 7/107th (for example: $1,400) of the amount written-off as a bad debt, when calculating his net tax payable.

The resulting effect: the $1,400, which S previously remitted to CRA, is credited to S, and no GST was paid with respect to the transaction between S and P.

Since P can claim an ITC as soon as the GST is payable (that is, as soon as the transaction is completed), he is entitled to claim the ITC of $1,400, even though he did not and will never pay the GST of $1,400 to S.

The resulting effect: if CRA were to refund the ITC to P, since we did not receive any of that amount, CRA would lose the amount twice (one to S and once to P).

For further detail, refer to the directive, **Assessment of Insolvent purchasers under 296(1)(b) of the ETA**, (96-12)

Situation When Duplicate Claim for ITC is Created

Duplicate claims are created when the supplier files a Proof of Claim for a purchaser's debt which includes a GST component for which the supplier has already accounted for and remitted to the Receiver General, and CRA files a Proof of Claim for the tax payable assessment against the same purchaser. The onus has been on CRA to prove that there is no duplication.

Objective of Orderly Payment of Debts

The Orderly Payment of Debts (OPD) provisions are found in Part X of the Bankruptcy and Insolvency Act (BIA). The objective of the OPD legislation is:

- to provide non-corporate debtors with a method to repay certain debts within a reasonable time frame in accordance with their ability to pay
- to protect, during this time frame, the non-corporate debtors from legal action by their creditors

Note: GSTC and CFB (CCTB) debts are to be included in OPD consolidations.

Impact of OPD on GST

To determine whether GST debts are excluded from the application of the OPD provisions refer to subsection 218(2). The provisions also impose monetary limits and restrictions as to the types of debts to which the OPD scheme applies.

Related Topics:

- **GST Debts Exempt from the Application of OPD**
- **GST Debts that may Qualify for Application of OPD**

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GST Debts Exempt from the Application of OPD

GST debts incurred by a non-corporate debtor in the course of his/her business cannot be subject to an OPD order even if at the time the application is made for the OPD order, the individual is no longer carrying on the business which gave rise to the debts.

If a non-corporate trader or merchant incurs a GST debt during the ordinary course of business, that debt is exempt from the OPD provisions.

If a non-corporate debtor or trader is no longer carrying business which gave rise to the GST debt, that dept is exempt for the OPD provisions.

GST Debts that may Qualify for Application of OPD

If an individual is the recipient of a supply taxable, and it is for his or her personal use, that person incurs a GST liability. If the individual fails to pay that GST and the supplier does not account for it in its net tax calculation as and when required by the ETA, CRA can raise an assessment against the individual pursuant to paragraph 296(1)(b) of the ETA for the GST payable.

If such an assessment is raised against the individual, and the individual applies for an OPD order, the GST debt that is the subject of the assessment would not constitute a debt incurred by the individual in the ordinary course of his/her business and would therefore be a part of the OPD order.

When an assessment is raised against the recipient (other than a corporation) of a taxable supply pursuant to paragraph 296(1)(b) of the ETA, the collection officer should find out from Audit if, in fact, the taxable supply was incurred for personal rather than business use. As a result, the collection officer will be able to determine whether or not the GST debt falls within paragraph 218(2)(d) of the BIA. It should be noted that these assessments are not common.

If a non-corporate trader or merchant did not incur a GST debt during the ordinary course of business, that debt could qualify for the OPD provisions.

Example of OPD Order

P, is a proprietor in Manitoba and sells recreational vehicles. P buys a cabin cruiser (a taxable supply) from S in the amount of $20,000 plus GST of $1,400 for a total of $21,400. S does not account or remit the GST to CRA.

An audit is conducted on P's business. During the course of the audit it is determined that in addition to unremitted net tax, the purchase of the cabin cruiser was for personal use. Audit raises an assessment for GST owing in the amount of $6,500.00 (broken down as: $1,400.00 tax payable assessment for the purchase of the cabin cruiser [296(1)(b) ETA] and net tax arrears related to P's commercial activities for $5,100.00).

P experiences financial problems and applies for an OPD Consolidation Order. P's debts to CRA are as follows:

• personal income tax	$ 5,000.00
• GST outstanding	$ 6,500.00
• Source deductions	$ 3,500.00
Total due	$15,000.00

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In the above example, the following amounts would be subject to the OPD Consolidation Order:

$5,000.00 [personal income tax debt (T1)]
$1,400.00 [GST tax payable assessment – the cabin cruise]
$6,400.00
and

the following amounts excluded by virtue of paragraph 218(2)(d) of the BIA would not be subject to the OPD

$3,500 [source deductions debt]
$5,100.00 [GST net tax debt]
$8,600.00

Information you can obtain

Related Topics:

- **Section 170 Report**
- **Surplus Income**
- **Change in Income**

Section 170 report

This is the report that a trustee must file when the bankrupt applies to be discharged from his or her bankruptcy. The information includes the causes of the person's bankruptcy, and the bankrupt's conduct during bankruptcy. You can use the information to determine whether to oppose the bankrupt's application for a discharge.

Surplus income

Starting in April 1998, a bankrupt must contribute surplus income to his or her estate. The trustee shall set out in a notice to creditors the established amount. After comparing the surplus amount with the information obtained from the T1 return, you may determine that the amount is not adequate. If it is not adequate you must notify the trustee and provide him or her with the reasons for your objection within 30 days of from the date of bankruptcy. The trustee will then advise the official receiver that the surplus payment amount is to be mediated.

For further details, refer to Directive RCD 00-04, **Surplus Income: Financial Contribution from a bankrupt**.

Change in income

At your request you will be informed of any change in the amount that the bankrupt is required to pay. The bankrupt must inform the trustee of any material change in his or her financial situation. On obtaining information regarding a change in a bankrupt's financial situation and surplus payments required, you may make representations to the trustee if you determine that the surplus amount is insufficient.

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Exceptions that Supersede Deemed Trust Provision

The only exceptions that supersede the deemed trust provisions are a prescribed security interest (mortgages) and for the right of an unpaid supplier of goods to repossess those goods as provided under sections 81.1 and 81.2 of the Bankruptcy and Insolvency Act. This legislation is retroactive to June 15, 1994.

If a situation arises that may benefit from invoking this new subsection or if you have further questions, please call Art Weston who can be reached at (613) 954-1513.

Similar amendments are made to the *Canada Pension Plan* and the Employment Insurance Act and a reference to new subsection 227(4.1) of the ITA is added to the deemed trust exception in the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act at the same time as similar clarification are made to the priority status of equivalent provincial deemed trusts. For further details, refer to the Directives, **Bill C-28 Impacts on Accounts Receivable Program** - RCD 98-04, **Lien and Charge Registration** - RCD 98-06 and **The Companies' Creditors Arrangement Act** – ARD 01-02.

Policy

This section provides policies related to Bankruptcy:

- **Management of Bankrupt Accounts**
- **Application of Proof of Claim**
- **First Meeting of Creditors**
- **Collector Appointed Inspector**
- **Right of Offset in Bankruptcy**
- **Treatment of Canada Child Tax Benefit in a Bankruptcy**
- **Opposition to Discharge Cases**
- **Collection Action on an Undischarged Individual Bankrupt**
- **When is Collection Action Taken on a Corporate Bankrupt**
- **Enhanced Requirements to Pay**
- **Proposals Made After Bankruptcy**
- **Impact on Directors' Liability**
- **Trustee's Reasonable Fees and Costs**
- **Offset of Refunds Pursuant to 296(4) of the ETA**
- **Application of Credits on a Pre-Bankruptcy**
- **In-Bankruptcy Overpayments**

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- **Completion of Proof of Claim - ELCS # 19673**

Management of Bankrupt Account

A bankrupt account is managed by the Tax Services Office of record. Accounts for bankrupt individuals are transferred to the sub-ledger from the T1System. This office is responsible for the following actions:

1. Filing the Proofs of Claim.
2. Investigating other possible actions pursuant to the Bankruptcy and Insolvency Act.
3. Assuming all other actions such as:
   - attending the meeting of creditors
   - acting as inspector, etc.

Application of Proof of Claim

To receive funds from a bankruptcy proceeding or to vote at a meeting of creditors, a proof of claim must be filed.

Related Topics:

- **When to File Separate Proof of Claim**
- **When Proof of Claim Not Filed**
- **When to Amend Proof of Claim**

When to File Separate Proof of Claim

File a separate Proof of Claim for the following:

- **deemed trust claim**
- **unsecured claim**

A deemed trust claim includes amounts for:

- employee Canada Pension Plan (CPP) contributions
- employee Unemployment Insurance (UI) and Employment Insurance (EI) premiums
- federal tax
- provincial tax
- Goods and Services Tax (GST) if an enhanced Requirement to Pay was issued prior to the bankruptcy date

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An unsecured claim includes amounts for:

- employer portion of the CPP contributions
- employer portion of the UI and EI premiums
- GST
- individual and corporate tax
- all penalties and interest

When Proof of Claim Not Filed

A **Proof of Claim** is not required to be filed if the following conditions are met:

- debt is below minor balance threshold
- all returns are filed up to the date of bankruptcy, and
- no outstanding audit exists

Note: A late filing penalty raised against a late return filed by a trustee is not a provable claim.

For further details, see Directive RCD 00-15, **Proving a Claim Under the bankruptcy and Insolvency Act for a Late Filing Penalty**.

When to Amend Proof of Claim

Amend CRA's Proof of Claim in the following situations:

- a payment other than dividends is received for prebankruptcy debt
- a change in the prebankruptcy debt occurs attributable to an additional assessment or reassessment

First Meeting of Creditors

The first meeting of creditors is held within 21 days of the trustee's appointment. For special circumstances, the Official Receiver may extend the meeting date by 10 days and up to 30 days. The extension is permitted as long as no creditors are prejudiced and the general administration of the estate is not compromised.

If CRA has not filed a proof of claim, a collection officer, as a representative of the Crown may attend the first meeting of creditors as an observer. An observer cannot vote on any resolution or participate in questioning the bankrupt entity. These limitations cause this type of attendance to be a fact finding mission alone.

For procedures to follow when attending the first meeting of creditors, refer to **Deciding to Attend First Meeting of Creditors** and **Participating at First Meeting of Creditors**.

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Collector Appointed Inspector

An inspector acts on behalf of the general benefit of all creditors. It is a role in which interested persons volunteer to be an **inspector**.

Related Topics:

- **Criteria to Consider for Inspector's Role**
- **Inspector's Duties**
- **Inspector's Expenses**

Criteria to Consider for Inspector's Role

Consider the following criteria to determine the feasibility of taking on the role as an inspector on an account:

- size of the liability
- if there are substantial assets in the estate
- need to monitor the estate
- priority ranking of CRA's claim and the likelihood of receiving a satisfactory dividend
- how the effort of being an inspector will benefit CRA's claim

Inspector's Duties

The inspector's duties are carried out until the trustee is discharged. The duties of the inspector do not cease when an employee quits CRA or leaves Collections, unless they formally resign from the Board of Inspectors.

The inspector's duties include:

1. Disbursements.
2. Provide general supervision of the trustee's administration of the estate.
3. Authorize the trustee to perform certain acts such as selling assets.
4. Account for all assets.

Inspector's Expenses

When a collector is appointed as an inspector, any fees are turned over to CRA and any expense will be reimbursed.

Right of Offset in Bankruptcy

CRA offsets a debit balance by a refund or rebate in these circumstances:

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- the debit and the credit both pertain to periods prior to the date of bankruptcy
- the debit and the credit both pertain to periods after the date of bankruptcy

Related Topics:

- **Refunds or Rebates Owing to Debtors**
- **Refunds or Rebates Owing to Estates in Bankruptcy**

Refunds or Rebates Owing to Debtors

Any refund, rebate or other amounts owing to the tax debtor in any prebankruptcy period are sent to the trustee provided that the following conditions are met:

- trustee has notified the Tax Services Office located in the debtor's locality
- all returns for prebankruptcy periods are filed
- no returns are being amended
- no crown debt exists

For additional details refer to the Directive, RCD 00-24, **Treatment of Refunds in a Bankruptcy**.

Refunds or Rebates Owing to Estates in Bankruptcy

Any refund, rebate or other amount owing to the estate of the bankrupt entity is sent to the trustee:

For Income Tax:

- in the case of a pre-bankruptcy refund, after the application of any crown set-off
- in the case of a post-bankruptcy refund, if the refund is part of the bankruptcy assets or pursuant to a written understanding between the trustee and the bankrupt

For Goods and Services Tax:

- once all required returns are filed
- if post-bankruptcy returns are not being amended

For additional details refer to the Directive, RCD 00-24, **Treatment of Refunds in a Bankruptcy**.

Treatment of Canada Child Tax Benefit in a Bankruptcy

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A refund arising from CCTB is exempt property and does not form part of the bankrupt's estate. Consequently, a tax debtor would receive such a refund, regardless of whether that person is bankrupt or not.

The only time a bankrupt tax debtor would not receive a payment is when that tax debtor has a CCTB debt arising from the excess payment of CCTB. In these situations, the CCTB payment will be offset against the CCTB debt if the payment and the debt arise from the same bankruptcy period. All years prior to the year in which the tax debtor is bankrupt are pre-bankruptcy years for the purposes of CCTB.

Note: CCTB payments are never issued to trustees in bankruptcy.

For further detail refer to the Communication ARD-2005-004, **Treatment of the Canada Child Tax Benefit in Bankruptcy**.

Opposition to Discharge Cases

The Department of Justice will provide legal advice or opinions on collection matters and initiate or defend an action in Court on behalf of CRA.

Representation on behalf of CRA by individuals who are not members of the Bar, and who are not working for, or as an agent of, the Department of Justice, is not acceptable.

Collection Action on an Undischarged Individual Bankrupt

CRA may take any collection action against a bankrupt once the trustee is discharged without first having to obtain the court's permission.
The amount collected is not to be remitted to the bankrupt's estate.

CRA takes the position that based on the plain meaning of subsection 69.3(1) of the Bankruptcy and Insolvency Act, it may take any type of collection action, and if it incurs the financial risks associated with the action, it should be entitled to keep any funds recovered, and not have to share them with the other creditors of the estate.

For further detail, refer to the directives, **Collection Action on an Undischarged Bankrupt**, RCD **97-01**, **99-03** and **00-01**.

Related Topic:

- **Amounts that can be Collected from an Undischarged Bankrupt**

Amounts that can be Collected from an Undischarged Bankrupt

The amount that can be recovered is:

- the amount we proved against the estate
- the amount we could have proved against the estate, and
- interest computed from the date of bankruptcy to the date we are taking action

Refer to procedures on **Collecting from an Undischarged Bankrupt** and to the directives, **Collection Action on an Undischarged Bankrupt**, RCD **97-01**, **99-3** and **00-01**.

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When to Collection Action Taken on a Corporate Bankrupt

CRA may take collection action on a corporate bankrupt, once the trustee is discharged, and further assets or income that could be liquidated to the benefit of creditors are located. Advise the trustee who, notwithstanding his discharge, remains the trustee of the estate for the performance of such duties as may be incidental to the full administration of the estate.

If the trustee refuses to liquidate the assets located, CRA may apply to the court to take proceedings pursuant to section 38 of the BIA.

On the application of any interested person, the court may also appoint a trustee to complete the administration of the estate.

To collect on a bankrupt, refer to the procedures **Collecting from an Undischarged Bankrupt**.

Statutory Set-Off

When garnishing an account receivable for a business entity, the Crown has a right of set-off pursuant to subsection 97(3) of the Bankruptcy and Insolvency Act. The right of set-off is not affected by the stay of proceedings with respect to amounts owing up to the date of the bankruptcy. It would be improper to withdraw the statutory set-off in such circumstances. Therefore, a statutory set-off with respect to an account receivable from the federal government should not be withdrawn as the federal Crown has the right of set-off pursuant to subsection 97(3) of the BIA. The right of set-off is not affected by the stay of proceedings with respect to an amount owing up to the date of bankruptcy.).

Enhanced Requirements to Pay

Before the date of bankruptcy, enhanced Requirements to Pay may be issued to collect both a debt from Source Deductions and Goods and Services Tax. After the date of bankruptcy, enhanced Requirements to Pay may only be issued to collect a debt from Source Deductions.

The allocation for payments received from enhanced Requirements to Pay differs whether the payment was received prior to, or after the date of bankruptcy.

Related Topics:

- **Applying Amounts to Source Deduction Accounts**
- **Applying Amounts to GST Accounts**

Applying Amounts to Source Deductions Accounts

When payments are received prior to the date of bankruptcy, they are allocated in the same priority established in the system.

When payments are received after an account is bankrupt, they are applied in the following order:

1. penalties
2. interest

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3. employer's portion of Canada Pension Plan (CPP) contribution

4. employer's portion of Unemployment Insurance (UI) and Employment Insurance (EI) contributions

5. provincial tax

6. employee's portion of the CPP contribution

7. employee's portion of the UI and EI contributions

8. federal tax

Applying Amounts to GST Accounts

Payments received from a Goods and Services Tax Enhanced Requirement to Pay are applied to the oldest debt covered by the Enhanced Requirement to Pay, starting with the penalties, the interest and the tax and repeating for the next oldest assessment.

Proposals Made After Bankruptcy

The approval of a proposal made after a bankruptcy annuls the bankruptcy and **re-vests** in the debtor all the right, title and interest of the trustee, unless otherwise stated in the proposal.

Proposals made after a bankruptcy may be extremely complicated due to the various combinations of claims that may exist and must be approved by the inspectors, if any.

For further information on proposals, refer to **Proposals in Bankruptcy and Insolvency**.

Related Topic:

- **Effective Date of Claim**

Effective Date of Claim

When a proposal is made after bankruptcy, the effective date of CRA's claim is the date of filing the proposal.

Impact on Directors' Liability

In order to raise an assessment and pursue the Directors for their joint and several liability, CRA must file a Proof of Claim within six months of the date of the assignment into bankruptcy.

Directors' Liability assessments pursuant to section 323 of the ETA cannot be raised on paragraph 296(1)(b) assessments, but may be raised if warranted against any net tax amounts due on the same Notice of Assessment.

For further information on raising a Directors' Liability assessment refer to the Chapter **Directors' Liability** and to the directive, **Assessment of Insolvent purchaser under 296(1)(b) of the ETA**.

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Trustee's Reasonable Fees and Costs

A trustee may recover reasonable fees and costs in situations where CRA could benefit directly from the trustee's expertise in maximizing recovery of amounts due under Enhanced Requirement to Pay or deemed trusts. The circumstances under which CRA might allow a practitioner reasonable fees and costs, are those where the trustee would recover amounts that the Crown might not have otherwise been able to recover.

Note: For further detail, refer to the directive: **Reasonable Fees and Costs** (RCD 95-08).

Related Topics:

- **Indicators of Reasonable Fees and Costs**
- **Indicators of Unreasonable Fees and Costs**
- **Requirements of Trustee's Invoice for Fees and Costs**

Indicators of Reasonable Fees and Costs

Indicators of the reasonableness of fees and costs are:

- the amount of time spent on the file
- the amount realized, and the difficulties encountered in bringing about that result
- the importance and urgency of the matters with which the practitioner has had to deal
- the success with respect to those problems encountered in the administration
- the expenses incurred which were reasonably necessary to fulfil the duties

Indicators of Unreasonable Fees and Costs

Indicators of unreasonable fees and costs are:

- services not authorized by law
- decisions that are not prudent and that produce no positive results
- conduct contrary to instructions
- office expenses

Requirements of Trustees Invoice for Fees and Costs

The trustee will send an invoice to CRA as proof of services rendered. To justify payment, the trustee is required to itemize actions taken that would be commensurate with the amount deducted. This includes:

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- a detailed description of the work done
- time spent actually doing the various items of work

  Note: Not simply hourly rate times the number of hours.
- a description of the degree of success vis-à-vis the problems encountered
- an accounting of the amount realized on behalf of the Crown
- a reasonable description of disbursements made

Offset of Refunds Pursuant to 296(4) of the ETA

CRA will not prove a claim for amounts assessed and will not participate in the distribution of dividends under the BIA for that amount.

CRA will assess, for the purposes of satisfying a debt for "tax payable" owed to the Crown by insolvent purchasers, and will continue to offset those amounts pursuant to subsection 296(4). Moreover, CRA will use the authority of subsection 97(3) (Law of set-off to apply) of the BIA to exercise its right of set-off against pre-bankruptcy credit refunds/rebates, even if the application for the credit refund/rebate, relating to a period prior to bankruptcy, is filed after the bankruptcy occurs. In this regard, CRA will use a statutory set-off notice to offset against credits, refunds/rebates payable to the insolvent purchaser by another Crown department for pre-bankruptcy debts.

Application of Credits on a Pre-Bankruptcy

When both the bankrupt and the trustee have been discharged, credits for this period can be applied to a debit for the same period or to an in-bankruptcy debit, whether that debit has been written off or is still owing. In this situation, the credit cannot be applied to a post-bankruptcy or subsequent debit.

When only the bankrupt has been discharged, credits for this period can be applied to a debit for the same period, whether that debit has been written off or is still owing. In this situation, the credit cannot be applied to a post-bankruptcy or subsequent debit.

In-Bankruptcy Overpayments

A refund arising from an in-bankruptcy return cannot be applied to a pre-bankruptcy debt; it can only be applied to a liability stemming from an in-bankruptcy return.

Completion of Proof of Claim - ELCS # 19673

The proof of claim form has been revised to accommodate recent amendments to the BIA. As a result of the amendments, CRA may request certain information from a trustee-in-bankruptcy about the affairs of the bankrupt, you should request the information (available for individuals only), as it could assist in opposing the discharge or getting the bankrupt to contribute more of his or her surplus income. For further detail, refer to the directive, **Revised Proof of Claim for Bankruptcy** (98-03).

The following provides further detail on completing the Proof of Claim - ELCS # 19673:

- Unsecured Claim

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a) Select the first box, if you are proving an unsecured claim; that is, a claim for the debt of an individual ("T1"), a corporation ("T2"), GST, or a director who has been assessed pursuant to section 227.1 of the ITA or section 323 of the ETA, if CRA has not taken any security for any of those types of debts.

b) Select the second box, if you are proving a preferred claim by virtue of section 136 of the BIA; that is, you are claiming certain fees and costs, allowed under certain conditions, to be recovered from the estate in priority to certain claims. These fees are generally out-of-pocket expenses incurred in taking legal action against the taxpayer before the taxpayer becomes bankrupt.

- Secured Claim

  Select, if you are proving a secured claim; that is, if the Department holds a mortgage, pledge, charge, lien or privilege on or against the taxpayer's property as security for the tax debt.

  If a portion of the debt exceeds the amount of security held, you must prove an unsecured claim for that portion.

- Claim against director

  An amendment to the BIA permits a claim for directors' liability to be compromised, when the corporate debt has been compromised as a result of the filing of a proposal. Select this box, if you are proving such a claim.

  You may have to file such a claim for a GST debt. This should not apply for payroll deductions given that, under subsection 60(1.1) of the BIA, CRA is guaranteed full payment of that debt.

Procedures

This section provides procedures relating to Bankruptcy:

- **Amending Current Collection Actions**
- **Registering a Security**
- **Collecting on a Bankrupt Account**
- **Guidelines for Preparing a Proof of Claim**
- **Deciding to Attend First Meeting of Creditors**
- **Participating at First Meeting of Creditors**
- **Considering Opposing Discharge Application**
- **Opposing Discharge Application**
- **Monitoring Account**

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- **Collecting from an Undischarged Bankrupt**
- **Coding a GST Account Where a 296(1)(b) Assessment Exists**
- **Applying QPD Payment to GST Accounts**

Amending Current Collections Actions

Once a bankruptcy is confirmed, the quicker the collection actions are amended, the greater the opportunity for recovery to CRA.

To amend current collection actions once a bankruptcy is confirmed:

1. Arrange to have the trustees send to the attention of Revenue Collections of the Tax Services office in the locality of the bankrupt the following:
   - all information and correspondence required under the Bankruptcy and Insolvency Act (BIA), the Excise Tax Act (ETA) and the Income Tax Act (ITA)
   - copy of the Notice of Bankruptcy
2. Cancel all arrangements and legal actions regarding arrears.
3. Return post-dated cheques to the bankrupt.
4. Withdraw all Requirements to Pay under the ETA, subsections 317(1),(2) or (6) and the ITA, subsections 224(1) and (1.1).

   Do not withdraw enhanced Requirements to Pay. Pursue collection of the amounts garnished or in some cases, it may be preferable to allow the trustee to collect the accounts receivable and pay the funds to CRA.
5. Return all writs and orders issued to the applicable Federal Court or to Headquarters as policy dictates.
6. Cancel any instructions issued to a sheriff concerning seizure or sale of property.

   In the case where CRA instructed the sheriff to seize assets before the bankruptcy, the BIA, subsection 73(2) provides that the sheriff must deliver the said property back to the trustee even if the execution or attachment was performed prior to the assignment. Consequently, CRA may not file a preferred claim for legal costs, sheriff's fees and land registry fees if it is the first creditor to initiate such an action.
7. If the account is a Goods and Services Tax account:

   a) Change the collections status code to "bankruptcy".

   b) Ensure that all pertinent flags are set, in order to:
      - prevent issuance of collections notices
      - prevent refunds from being issued

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- monitor the account
- prevent the system from spawning the credits to pre-bankruptcy debits

c) Change the mailing address and contact name to reflect the trustee.

For those accounts that have direct deposit, changing the mailing address to reflect the trustee's address has no effect on the direct deposit facility. Therefore, you must also check to see if the account is coded for direct deposit by accessing the Retrieve Direct Deposit Information screen (=DDP RDDI). If the account is coded for direct deposit, a written request to cancel direct deposit must be faxed to:

Summerside Tax Centre
Remittance/Returns Processing
Fax: (902) 432-5730
Tel: (902) 432-5034

The request should indicate your name, telephone number and the reason why direct deposit is being cancelled, for example, bankrupt, receivership or proposal etc.

8. Compare the actual balance of the account to the balance declared on the Notice of Bankruptcy for noticeable differences.

9. Compare the assets declared on the Notice of Bankruptcy (Statement of Affairs) with the assets discovered during the course of CRA's investigations to determine:

- undeclared assets
- preferential treatment of creditors
- improper disposal of assets

For further details, refer to Directive RCD 00-02, **Statement of Affairs of a Bankrupt**

Registering a Security

To register a security, ensure that the following conditions are met:

- registration is completed before the date the bankruptcy starts
- registration is for amounts owing at the time of registration plus accruing interest

Refer to **Security** for further detail.

Collecting on a Bankrupt Account

To collect on a bankrupt account when advised or informed of a bankruptcy:

1. File the **Proof of Claim**.

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2. If the account relates to a source deductions debt, send the Enhanced Requirements to Pay to all receivables.

3. Request a payroll audit and a regular audit where appropriate.

4. Notify the trustee of the obligation to file all returns.

5. Intercept internal funds.

6. Bring to the attention of the trustee and/or an inspector any actions that would constitute an offence under the Bankruptcy and Insolvency Act.

Guidelines for Preparing Proof of Claim

To receive any funds from a bankruptcy proceeding or to vote at a meeting of creditors, a **Proof of Claim** must be filed.

To prepare a Proof of Claim, apply the following guidelines:

1. Ensure the accuracy of the following information:
   - proper legal name of the bankrupt entity
   - date of the assignment, proposal or receiving order
   - amount of the debt as of the date of bankruptcy
   - payments received toward arrears in the last 90 days
2. Sign the Proof of Claim and have the signature witnessed.

Deciding to Attend First Meeting of Creditors

To decide to attend a first meeting of creditors:

1. Determine if it is necessary to attend the creditors' meeting. Consider the following:
   - amount, content and proportion of liability relative to other creditors
   - priority of the payment of CRA's debt relative to other creditors
   - investigations reveal reasons to be appointed inspector in the bankruptcy
   - any suspicion of fraud
   - whether the value of the assets of the estate is high
2. Prior to the meeting, file a Proof of Claim. This must be filed whether or not you decide to attend the first meeting of creditors.
3. If you decide to attend the first meeting of creditors, obtain a **proxy** signed by the appropriate Departmental authority.

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Participating at First Meeting of Creditors

When asking questions at the first meeting of creditors, adhere to the confidentiality restrictions of the Excise Tax Act, section 295(5)(a) and the Income Tax Act, section 241(4)(a). For further information, refer to **Confidentiality**.

To participate at the first meeting of creditors:

1. Discuss **reviewable transactions**.
2. Obtain detailed accounting information about the debtor's affairs.
3. Compare accounting information with the historic data on the account.
4. Discuss Directors' Liability.

Considering Opposing Discharge Application

To consider if CRA should oppose a discharge application, evaluate the case in the context of information relating to the following questions:

- is it possible to recover more funds?
- does the bankrupt entity have high income-earning potential which justifies a **conditional discharge**?
- does it appear that the reason for bankruptcy is to avoid the payment of taxes?
- is CRA able to provide factual grounds, as stated in the Bankruptcy and Insolvency Act, section 173, on which the discharge may be opposed?

The result of opposing a discharge may result in the following:

- the Court may order up to five years of continuing payments to be made by a discharged bankrupt

  Note: Longer terms of payment may be imposed in exceptional circumstances.

- the Court has the power to grant, refuse or suspend the discharge or order a conditional discharge

Opposing Discharge Application

To oppose a discharge application:

Provide the following information to the Department of Justice as soon as possible, or at a minimum, two months prior to the automatic discharge date:

- date of bankruptcy and number of previous bankruptcies
- marital status, number of dependants and amount of child support or alimony payments

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- source of income, assets, liabilities and CRA account status of the bankrupt (provide supporting documents)
- spouse's source of income, assets, liabilities and CRA account status
- tax history and report on collections actions taken (identify if this information was provided by the Ministère du Revenu du Québec)
- reviewable transactions including transfer or disposal of assets during the previous year and contributions to Registered Retirement Savings Plans during the previous five years
- Statement of Account and Statement of receipts and disbursement
- copies of the Proofs of Claim and the supporting documentation

Monitoring Account

To monitor an account in bankruptcy:

1. On a regular basis, input all pertinent information on the bankrupt's account, for example: ACSES diary, GST collections log.
2. Regularly check RAPID Option E for Industry Canada updates on the status of the Estate.

   Note: The CRA receives a weekly tape from Industry Canada [the Office of the Superintendent of Bankruptcy (OSB)] containing details of new insolvency filings and updates on previous filings. This information, as it relates to individuals, is displayed on RAPID Option E. These displays include numerical Estate Type Codes and Estates Discharge Type Codes. For explanations of these codes refer to Directive RCD 02-02, **Access to Insolvency Information on RAPID**.
3. With the trustee determine which property and/or secured claims have been filed.
4. Follow up with the trustee to ensure the filing and processing of any missing returns.
5. Set proper intercept flags, for example: CORLOC, status code.
6. Follow up on the completion of any outstanding audits.
7. Whenever a payment is made or a change in the debt occurs, amend Proofs of Claim.
8. Consider other methods of recovery, including:
   - assessments pursuant to the Directors' liability provisions of the Excise Tax Act and the Income Tax Act
   - assessments where there is evidence of non-arm's length transfers
   - non-compliance of any Requirement to Pay issued to a third party

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9. Determine if a balance remains on the account:

   a) If a balance remains and the trustee has been discharged, initiate write-off procedures.

      For further information on write-off procedures, refer to **Uncollectible Debts**.

   b) In the case of a GST account, upon acknowledgement of the trustee's discharge, if no balance remains, send a request to have the account closed.

Collecting from an Undischarged Bankrupt

To collect from an undischarged bankrupt:

1. Verify that any dividend shown on the dividend sheet is credited to the account.

2. Ascertain from Option E on RAPID that the trustee is discharged.

3. Establish that the undischarged bankrupt has the ability to pay. Where the bankrupt was conditionally discharged as a result of CRA's opposing the discharge, the file will usually contain helpful information on ability to pay. The assumption that there is no ability to pay is not sufficient; confirmation to this effect is necessary.

4. Contact the bankrupt for payment, if there is ability to pay advise of legal action if payment is not made. Refer to ELCS letter #19687.

5. If the bankrupt does not reply, proceed with step #7.

6. If the bankrupt has started any action in order to be put back under the BIA's protection, check with the trustee to confirm the information that the bankrupt provided.

7. Proceed to collect the account, as you would any other.

   Note: To accommodate the updating of interest, the debit will have to be moved from the bankruptcy Subledger Account Type 121 as it is non-interest bearing. As a result of system limitations, the T1 Accounting System cannot properly handle the future accounting ramifications. So, the debit will have to remain on the Subledger System as Account Type 100. Requests for these actions are to be sent to T1 Client Services at your TC.

   For further detail, refer to the directive, **Collection Action on an Undischarged Bankrupt**, (97-01), (99-03) and (00-01).

Coding a GST Account Where a 296(1)(b) Assessment Exists

Upon notification that an account is in bankruptcy or receivership proceed in the following manner:

1. Input the appropriate collection status code.

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2. Manually allocate the pre-bankruptcy credits to the appropriate reporting periods.

3. When credit returns or rebate claims exceeding **PROTECTED** have been filed by the registrant, trustee and/or receiver, access the GST system and place a refund hold on the account using the Maintain Account Refund/Credit Hold (MARH) screen.

4. Place an Account Maintenance Hold on the account, using the MARH screen, to allow for the cancellation of any post-bankruptcy credits which have been automatically transferred to pre-bankruptcy periods (note: post-bankruptcy credits cannot be used to offset existing pre-bankruptcy debit). The distribution instructions for the credits can be found in the Account Maintenance Manual.

   Confirm that the account has been allocated for audit. If an audit is not planned, and the **PROTECTED** threshold has been exceeded prepare an audit request to identify the net tax amounts as well as the tax payable amounts on the Notice of Assessment.

5. Pursuant to section 318 of the ETA, issue statutory set-off notices on any pre-bankruptcy income or corporate tax refunds as well as pre-bankruptcy amounts payable from other federal departments (for example: Public Works and Government Services Canada).

6. Prepare a Proof of Claim for any net tax payable amounts only, do not include the tax payable amounts assessed under paragraph 296(1)(b) of the ETA.

7. Monitor the account for receipt of dividends from the bankrupt estate and the trustee's final Receipts and Disbursements statement.

8. Submit the account for write-off. Refer to procedures outlined in **Uncollectible Debts**.

For further detail, refer to the directive, **Assessment of Insolvent Purchasers under 296(1)(b) of the ETA**, (96-12).

Applying OPD Payments to GST Accounts

To apply OPD payments to GST accounts:

1. If the GST debt is excluded from the application:

   - continue with collection action
   - do not change the collection status of the account

2. If the GST debt is not excluded from the application:

   - change the collection status of the account to 14
   - record the particulars of the Consolidation Order in the account diary

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Glossary

Act of Bankruptcy

Specifies the conditions that must exist in a debtor's affairs in order for a creditor to be entitled to ask the Court to declare the debtor bankrupt, for example, ceasing to meet liabilities as they fall due.

Assignment in Bankruptcy

Legal document signed by an individual or by officers of a corporation declaring the person or corporation to be bankrupt. Once the document is filed with the Bankruptcy Court, all property becomes vested in a trustee for the benefit of all creditors. An assignment in bankruptcy is a voluntary bankruptcy.

Canadian Insolvency Practitioners Association

A body of accountants who specialize in insolvency matters.

Claims Provable in Bankruptcy

A claim or liability provable by a creditor in proceedings under the Bankruptcy and Insolvency Act.

Conditional Discharge

Discharge of the bankrupt that is conditional on the bankrupt performing certain acts, such as payment of moneys, consentment to judgements or compliance with such other terms as the Court may direct.

Deemed Trust Claim

Claims for which the moneys are to be held in trust for Her Majesty.

Discharge

Complete legal forgiveness of a debtor's legal obligation to repay debts owed.

Inspector

Persons, often representatives of the larger creditors, appointed by the creditors to oversee the administration of the estate and to ensure that the trustee acts in accordance with the Bankruptcy and Insolvency Act.

Official Receiver

Person appointed as officer of the Court to perform the duties and take on the responsibilities specified by the Bankruptcy and Insolvency Act and the related General Rules.

Ordinary Administration

Where the official receiver determines that the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand dollars or the amount

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prescribed, as the case may be, or the cost of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets, and the official receiver considers that such a direction is appropriate.

Petition into Bankruptcy

A legal document filed with the Court which requests the Court to consider adjudging the debtor bankrupt and making a receiving order against the debtor. The petition is always supported by an affidavit of trust by the petitioner.

Proof of Claim

A legal document affirming the amount due and CRA's legal priority to these funds.

Proxy

A person who is appointed or authorized by proper Tax services office authority to represent the Crown at a meeting.

Receiving Order

A Court Order setting out the nature and the dates of the acts of bankruptcy upon which the order is made. The receiving order also appoints a trustee to the bankrupt estate. The order is deemed to have been made on the day that the receiving order is issued. Issuance of a receiving order creates an involuntary bankruptcy.

Registration of Security

A general system of registration of securities available to any creditor and open to the public for inspection. Securities registered under provincial Personal Property Security legislation, Registry Office or Land Titles Office are acceptable.

Re-vest

Returns the right of control.

Superintendent of Bankruptcy

Appointed by the Governor in Council, to perform a general supervisory function over all bankrupt estates. Trustees are bound by and obliged to follow all directions issued by the Superintendent.

Summary Administration

Applies when the bankrupt is not a corporation and the realizable assets of the bankrupt, after deducting claims of secured creditors, do not exceed $ 10,000.

Trustee

An individual or a corporation that is the legal representative of the trust or an estate in bankruptcy. A trustee exercising the powers provided in the Bankruptcy and Insolvency Act (BIA), subsection 164(1), is regarded as a person legally entitled to tax information under the Income Tax Act (ITA), paragraph 241.4(k) or the Excise Tax Act (ETA), paragraph 295(5)(c).

Reviewable Transactions

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Transactions entered into, other than at arms-length.

Unsecured Claim

A claim made by a creditor for funds owed by the debtor for which no security was given.

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PART III
PROPOSALS
DIVISION I
GENERAL SCHEME FOR PROPOSALS

Summary: General Proposals, Their Character and Their Effect - Sections 50 Through 66

Section 50 generally provides that a proposal to the creditors can be made by:

- An insolvent person
- A trustee in bankruptcy in charge of the bankrupt's property
- The bankrupt
- A secured creditor's receiver

While subs. (1.1) disallows a proposal to be made in respect of a consumer proposal attended to in other provisions in the BIA.

Pursuant to subs. (1.2) the proposal must be made for the benefit of all the creditors generally while if it includes secured creditors it shall be made on a class by class basis to all those affected per class. Subs. (1.4) determines that for purposes of class segregation the following will be considered as criteria:

- the nature of the debts giving rise to the claims;
- the nature and rank of the security in respect of the claims;
- the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;
- the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and
- such further criteria, consistent with those set out in paragraphs (*a*) to (*d*), as are prescribed

while subs. (1.5) allows the court to determine into which class a secured claim may fall. Subs. (1.6) and (1.7) provide methods for the secured creditor to place a value on his claim.

Pursuant to subs. (1.8) all questions concerning the proposal, except its acceptance or refusal, shall be determined by ordinary resolution of the creditors.

Subs. (2) sets out the mechanics by which a proposal is filed: via submission of such documents ass stated with a trustee in the locality of the debtor while subs. (2.1) requires that filing to also be made to the official receiver of the same locality.

Subs. (3) provides that the inspectors of the proposer bankrupt shall approve the proposal before any action is commenced.

Subs. (4) provides that effectively no proposal can be withdrawn without the approval of the court or creditors.

Subs. (4.1) allows a party who has made a proposal to further make an assignment of his property.

Subs. (5) prompts the trustee of the proposal too make an investigation of the debtor's affairs to determine the accuracy of the statements as well as the cause of the proposal for purposes of presentation at the meeting of creditors.

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Subs. (6) provides for various filings by the trustee including a monthly cash-flow of the debtor, while subs. (7) allows any creditor to obtain said filing and the court may interfene in preventing the disclosure of the cash-flow when:

- such release would unduly prejudice the insolvent person; and
- non-release would not unduly prejudice the creditor or creditors in question.

Subs. (10) allows the trustee access to the debtor's property to verify all material aspects of the filings she is compelled to make in respect of the debtor's affairs. This access is similar to that under bankruptcy orders. The trustee thereby files the information she realizes with the official receiver, the court as well as the creditors. Subs. 11 provides similar duties on the interim receiver if such has been appointed.

Subsection (12) allows the court to declare any proposal void, if, on application of the trustee, interim receiver or creditor it finds that:

- the debtor has not acted, or is not acting, in good faith and with due diligence;
- the proposal will not likely be accepted by the creditors; or
- the creditors as a whole would be materially prejudiced if the application.

If such happens, following subs. (12.1) there is a deemed assignment and the s. 57 applies.

Subsections (13) and (14) allow a proposal to encompass the liabilities of the directors of corporate debtors however such does not include:

- relate to contractual rights of one or more creditors arising from contracts with one or more directors; or
- are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors

while subs. (15) allows the court to intervene and disallow a compromise involving directors if it would not be just or equitable. Subs. (16) and (17) allows the court to determine director claimant classes while the latter transfers said claims to be made against those acting in that capacity for the corporation.

Section 50.1 attends to instances where secured creditors are allowed to vote on the proposal, based on their proven secured claim value while subs. (2) sets the value of the claim to be that of its face or the assessed value and subs. (3) provides that the difference between the face and the lower assessed value votes as an unsecured creditor. Subs. (4) allows the secured creditor to apply to court to have an assessed value contested and set by the court. Subs. (5) provides that when no secured creditor provides proof of claim at or before the meeting of the creditors then they all are deemed to have refused the proposal.
Section 50.2 provides that when a secured creditor has not has her claim affected with a proposal - it continues at face - then they shall not be allowed to vote on any proposal as interested affected parties.
Section 50.3 provides that when a bankruptcy results from, effectively, refusal of the proposal then the secured creditor claims are then subject to different demanding requirements of proof under the bankruptcy provisions cited.

Section 50.4 creates with the insolvent person the opportunity to gain some deferral until determination of the proposal via filing with the official receiver an "notice of intention" whereby they must file with that party the consenting trustee identity who has agreed to act, the notice to file a proposal and a list of creditors with claims over $250. Subs. (2) thereby prompts for the timely filing of cash-flows of the debtor, attested for reasonableness with the official receiver while subs. (3) allows any creditor affected to obtain such information while subs. (4) protects the trustee if a party has detrimentally relied on the filing made if they have exercised good faith and reasonable care. In the absence of the creditor asking for a filing the trustee

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is obligated to send to each a copy of the notice and the information above listed. Subs. (7) allows the trustee in respect of the proposal to have open access to as much of the insolvent person's records and business as is necessary to make necessary filings. Subs. (8) prompts for the failure of the action on the notice of intention, at the end of 30 days without action of the insolvent party or trustee, whereby an assignment has then been deemed to have been made thereby prompting for the application of the rest of the BIA as if an act of bankruptcy has occurred, however, subs. (9) allows the debtor to ask the court for an extension of time for varying series of time to carry through but only where:

- the insolvent person has acted, and is acting, in good faith and with due diligence;
- the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- no creditor would be materially prejudiced if the extension being applied for were granted.

Subs. (11) allows a creditor amongst other acting parties, to ask the court to terminate the extension period obtained by the debtor if:

- the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- the creditors as a whole would be materially prejudiced were the application under this subsection rejected.

Section 50.5 prompts the trustee under the notice of intention to be actively involved in the proposal's construction as well as any negotiations leading up to it.

Section 50.6 allows the court to set up security of rank on the debtors property in effort to inject additional cash funding to the debtor to improve the chance of acceptance. Subs. (3) and (4) allows the court to charge the assets while the latter allows the court to shift the charges already made but only with the consent of those affected through a previous action. Subs. (5) provides the criteria to determine whether this type of order should be made which consists of:

- the period during which the debtor is expected to be subject to proceedings under this Act;
- how the debtor's business and financial affairs are to be managed during the proceedings;
- whether the debtor's management has the confidence of its major creditors;
- whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- the nature and value of the debtor's property;
- whether any creditor would be materially prejudiced as a result of the security or charge; and
- the trustee's report referred to in paragraph 50(6)(*b*) or 50.4(2)(*b*), as the case may be.

Section 51 provides that the trustee shall prompt for the calling of a meeting of the known creditors by sending each the particulars, as well as copy to the official receiver. Subs. (2) provides that if a prior meeting was informally held by the debtor and his creditors and the condition of the estate of the debtor has not substantially changed then the information prescribed in the primary subsection shall not have to be filed. Subs. (3) prompts for the official rreceiver to chair the meeting called, while his opinion is binding on any disputes that may arise, though can be appealed to court.

Section 52 allows for an adjournment of the 1st meeting to allow for further investigation of the debtors affairs.

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Section 53 provides for pro-active prior assent or dissent on any voting to be made at the meeting as if it were at the meeting itself.

Section 54 provides that at the meeting it shall be voted by the creditors to either accept or dismiss the proposal. Subs. (2) provides a distinct structure of voting classes being:

- the following creditors with proven claims are entitled to vote:
  - all unsecured creditors, and
  - those secured creditors in respect of whose secured claims the proposal was made;
- the creditors shall vote by class, according to the class of their respective claims, and for that purpose
  - all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and
  - the classes of secured claims shall be determined as provided by subsection 50(1.4);
- the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and
- the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Subs. (2.1) deems Crown claims related to income tax, CPP or EI, or their provincial equivalent, not to be secured claims for the above purposes.
Subs. (2.2) prompts that when no secured creditor has voted at the meeting them they have refused the proposal. Subs. (3) provides that related creditors can only vote against a proposal while if the trustee is a creditor she cannot vote at all.

Section 54.1 provides that equity claims are all of one class, unless directed contrary by the court, and that they cannot vote on any proposal.
Section 55 allows the creditors to adjust the terms of the proposal at the meeting, though, with the consent of the debtor.
Section 56 provides that the creditors can appoint up to 5 inspectors to have the affairs of debtor monitored.

Section 57 provides that when a proposal is refused there is an automate deemed assignment and, effectively, an act of bankruptcy occurs, and that consequently, the trustee must take further steps in relation thereto specified. Section 57.1 allows a court to substitute the specified acting trustee of the proposal that has failed, iff it is in the best interests of the creditors.
Section 58 provides the “going in” provisions, to court, when a proposal has been accepted. It sets out the parties and time frames to provide information to the interested parties who include every creditor known so that they are aware of possible court acceptance and their interest in the on-going proceedings. This allows any creditor who may have voted against the proposal to make representations to court upon hearing to affect its acceptance.

Section 59 provides that the court can hear almost all evidence related to the proposal before it is sanctioned which includes, primarily, the report from the trustee, the debtor and any creditor voting in any manner. Pursuant to subs. (2) the court must refuse to sanction the proposal if it is detrimental to the creditors as a whole or if the debtor has perpetrated any offence under the relevant sections in the BIA.

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Subs. (3) allows for withholding of the sanction by the court when any of the below acts have occurred unless the court is satisfied that at least 50% of the unsecured claims of debtors will be paid:

- the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
- the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;
- the bankrupt has continued to trade after becoming aware of being insolvent;
- the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;
- the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;
- the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;
- the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action;
- the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors;
- the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities;
- the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors;
- the bankrupt has been guilty of any fraud or fraudulent breach of trust;
- the bankrupt has committed any offence under this Act or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder;
- the bankrupt has failed to comply with a requirement to pay imposed under section 68;
- the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness; and
- the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

Subs. (4) allows the court to order any amendment to the debtor's constating documents as needed to give effect to the proposal.

Section 60 provides for the ordering of trustee fee payment out of possible distributions to be ahead of those otherwise. If such is not the case the proposal will not be allowed.

Subs. (1.1) provides that Crown claims in the form of income tax, CPP and EI (and provincial equivalent) must be provided for full satisfaction before a proposal will be sanctioned by the court. Subs. (1.3) provides that employee costs must be satisfied or validly made provision for before a proposal can be extended.

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Subs. (1.4)-(1.5) equally provide that employees have no voting ability as well as specific rules related to prescribed pension plan funding.
Subs. (1.7) provide for lower ranking in a proposal of all equity claims until all other claims are paid in full.
Subs. (2) provides that all monies paid by the debtor pursuant to the proposal will be to the trustee who will then distribute them pursuant thereto to the affected creditors while subs. (3) affects the same arrangement to instances of promissory notes or shares of the debtor.
Subs. (4) provides that any distributions will be taxed on same terms of s. 147 in respect of fees to the Superintendent.
Subs. (5) allows the court to refuse a proposal if the above subsection particulars are not adhered to.

Section 61 operates to annul any bankruptcy in fact if the proposal that is made is accepted by the creditors. All powers and titles then remain with the bankrupt to carry on her business. Subs. (2) thereof allows the court to annul a proposal whereby:

- the insolvent person is deemed to have thereupon made an assignment;
- the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- (*b.1*) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- the trustee shall, within five days after the day the certificate mentioned in paragraph (*b*) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Subs. (4) provides that any fees incurred to prepare a proposal shall not be met out the estate of the debtor, unless they are trustee fees.

Section 62 provides that any proposal by an insolvent person shall be filed by the trustee with the official receiver in prescribed form. Subs. (1.1) provides for the timing of valuation of the claims of the creditors for these purposes to be the either the date of:

- the notice of intention; or
- the proposal, if no notice of intention was filed

while with respect to proposal arising out of bankruptcies the date of valuing the claims shall be the date of bankruptcy. Subs. (2) provides that once the proposal has been accepted by both the creditors and the court it shall be binding on all unsecured claims as well as any class of secured claims which voted in favour of it to the extent of a majority or 2/3rds in value. Subs. (2.1) provides that acceptance of a proposal does not release the debtor from s. 178 claims unless the proposal makes provision for such. They are:

(*a*) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;
(*a.1*) any award of damages by a court in civil proceedings in respect of
(i) bodily harm intentionally inflicted, or sexual assault, or
(ii) wrongful death resulting therefrom;
(*b*) any debt or liability for alimony or alimentary pension;
(*c*) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

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(*d*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;
(*e*) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;
(*f*) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;
(*g*) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student; or

(*h*) any debt for interest owed in relation to an amount referred to in any of paragraphs (*a*) to (*g*).

Section 62.1 attends to instances of default of the proposal. The nature of the default that prompts for the trustee to inform the official receiver as well as the creditors is limited to:

- default is made in the performance of any provision in a proposal,
- the default is not waived
    - by the inspectors, or
    - if there are no inspectors, by the creditors,

  and
- the default is not remedied by the insolvent person within the prescribed time.

Section 63 provides that where the court can over-turn a previously sanctioned proposal where there is injustice or undue delay or that the approval of the court was obtained through fraud, however, pursuant to subs. (2) for all intents and purposes anything previously done under the proposal is not undone. Subs. (3) allows the trustee or any debtor to make application to the court to have a proposal sanctioned undone when there has been a conviction of the debtor of an offence under the BIA. Subs. (5) and (6) thereafter then provide that once a proposal has been annulled there is, effectively, an assignment and thus an act of bankruptcy and that the trustee is then compelled to file additional disclosures to the official receiver.

Section 64 allows for the removal of directors who, through their conduct, are undermining an effort to make a proposal while subs. (2) allows the court to fill any resulting vacancy.
Section 64.1 allows the court to charge assets of the corporate debtor proposer in respect of any director liability that that party may become subject to in carrying out the terms of the proposal while pursuant to subs. (2) such rank can exceed any secured creditor but only if the director cannot obtain indemnity insurance for her function in this regard. Subject to subs. (4) said charge cannot be made with it results from a director's actions that were of gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 64.2 allows for charging of debtor's assets in respect of costs to carry out the proposal which include:

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(*a*) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
(*b*) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
(*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division

While subs. (2) allows prior ranking against secured creditors.

Section 65 opens up financing alternatives to debtors with respect to their proposals by allowing for the subscription of shares or other securities however if a creditor chooses not to participate her claim shall be valued and extinguished with cash.

Section 65.1 allows for preventing of acceleration of private agreement clauses in the case of notices or proposals by statutorily preventing them from being operative: this considerably allows some leeway in arranging proposals. Subs. (2) and (3) provide coverage of leases that shall not be terminated and the continuation of utilities. Subs. (6) allows a petitioning supplier who is subject to these subsections to approach the court to allow them not to have effect if such would cause financial hardship to the applicant.

Section 65.11 allows a debtor, on the day of the proposal or intention, to disclaim or resiliate any agreement that it may have with any party. This allows additional reflexability to ensuring that a proposal will be successful. Subs. (2) prevents, in the case of an individual debtor, such, unless she is carrying on business and only in respect of the a business arrangement. It should be noted that the other party may apply to court to have the agreement maintained, pursuant to subs. (3) while if the trustee also disagrees the debtor can apply to court to have it carried through. Subs. (5) prompts the court to consider, in whether to order:

- whether the trustee approved the proposed disclaimer or resiliation;
- whether the disclaimer or resiliation would enhance the prospects of a viable proposal being made in respect of the debtor; and
- whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Pursuant to subs. (8) the other party, who suffers a loss, then has a provable claim. Note that pursuant to subs. (10) this opportunity does not apply to:

- an eligible financial contract;
- a lease referred to in subsection 65.2(1);
- a collective agreement;
- a financing agreement if the debtor is the borrower; or
- a lease of real property or of an immovable if the debtor is the lessor.

Section 65.12 covers collective agreements whereby the debtor can restructure its terms on provision of notice. If the bargaining agent does not comply with the demand the debtor can apply to court to do so while the court will sanction such only if:

- the insolvent person would not be able to make a viable proposal, taking into account the terms of the collective agreement;
- the insolvent person has made good faith efforts to renegotiate the provisions of the collective agreement; and

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- the failure to issue the order is likely to result in irreparable damage to the insolvent person.

The rest of the section deals with other mechanics by which collective agreements are dealt with.

Section 65.13 provides that the debtor which has a proposal or intention in process cannot dispose of assets other than in the normal course of its business while the court may order such. Given subs. ((3) the court give notice to the affected secured creditors if it applies to court to authorize an asset disposition. The criteria for granting the order to dispose are not limited to but include:

- whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- whether the trustee approved the process leading to the proposed sale or disposition;
- whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- the extent to which the creditors were consulted;
- the effects of the proposed sale or disposition on the creditors and other interested parties; and
- whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Subs. (5) and (6) deal with related (non-arm's length) transfers and provides additional steps to ensure that the instance is not taken advantage of at the demise of the creditors. Subs. (7) allows for the court to order a transfer of free title with shifting of secured creditor claim to other assets of the debtor.

Section 65.2 through 65.22 allows a debtor, under a proposal/intention or bankruptcy, to disclaim a commercial lease they may have, within the parameters specified in its subsections.

Section 66 allows all the provisions in the BIA to apply to proposals under the Division, applied as per circumstances. Subs. (2) prompts for the inapplicability of the CCAA compromise scenario if the BIA was used instead, making them mutually exclusive. Iff a CCAA compromise has failed to be accepted then further action under the BIA cannot be pursued.

Who may make a proposal - Sec. 50

50. (1) Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

Where proposal may not be made - Sec. 50(1.1)

(1.1) A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

To whom proposal made - Sec. 50(1.2)

(1.2) A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

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Idem - Sec. 50(1.3)
(1.3) Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, the proposal must be made to all secured creditors in respect of secured claims of that class.

Classes of secured claims - Sec. 50(1.4)
(1.4) Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts giving rise to the claims;
(b) the nature and rank of the security in respect of the claims;
(c) the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;
(d) the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and
(e) such further criteria, consistent with those set out in paragraphs (a) to (d), as are prescribed.

Court may determine classes - Sec. 50(1.5)
(1.5) The court may, on application made at any time after a notice of intention or a proposal is filed, determine, in accordance with subsection (1.4), the classes of secured claims appropriate to a proposal, and the class into which any particular secured claim falls.

Canadian Airlines Corp. (Re), 2000 CanLII 28185 (AB QB) - Defining of "Class of Creditor"

Date:	2000-05-12
Docket:	0001-05071
Parallel citations:	19 CBR (4th) 12
URL:	http://canlii.ca/t/2bqpf
Citation:	Canadian Airlines Corp. (Re), 2000 CanLII 28185 (AB QB), <http://canlii.ca/t/2bqpf> retrieved on 2013-08-18
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Alberta Court of Queen's Bench
Canadian Airlines Corp. (Re)
Date: 2000-05-12
A.L. Friend, Q.C., H.M. Kay, Q.C., and R.B. Low, Q.C., for Canadian Airlines.
V.P. Lalonde and Ms M. Lalonde, for AMR Corporation.
S. Dunphy, for Air Canada.
P.T. McCarthy, Q.C., for PricewaterhouseCoopers.
D. Nishimura, for Resurgence Asset Management LLC.
E. Halt, for Claims Officer.
A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.
(Calgary No. 0001-05071)
May 12, 2000.

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[1] PAPERNY J. (orally): — Resurgence Asset Management LLC "Resurgence" appeared on behalf of holders of approximately 60 percent of the unsecured notes issued by Canadian Airlines Corporation in the total amount of $100 million U.S. These unsecured note holders are proposed to be classified as unsecured creditors in the plan that is the subject of these proceedings.

[2] Resurgence applied for the following relief:

1. An order lifting the stay of proceedings against Canadian Airlines Corporation and Canadian Airlines International Ltd. (respectively "CAC" and "CAIL" and collectively called "Canadian") to permit Resurgence to commence and proceed with an oppression action against Canadian, Air Canada and others.
2. Further, and in the alternative, Resurgence sought the same relief described in item one above in the context of the C.C.A.A. proceedings.
3. An order that any and all unsecured claims held or controlled, directly or indirectly by Air Canada shall be placed in a separate class and either not allowed to be voted at all, or, alternatively, allowed to be voted in separate class from all other affected unsecured claims.
4. An order that there be a separation in class between creditors of CAC and CAIL
5. An order striking Section 6.2(2)(ii) of the plan on the basis that it is contrary to the C.C.A.A.

[3] Resurgence abandoned the application described in item 1 above, and the application in item 2 was addressed in my ruling given May 8, 2000, in these proceedings.

Standing

[4] Prior to dealing with the remaining issues of classification, voting and Section 6.2(2)(ii) of the plan, the issue of standing needs to be addressed. This was a matter of some debate, largely in the context of the first two applications. Canadian argued that Resurgence was only a fund manager and did not hold the unsecured notes, beneficially or otherwise, and, accordingly, did not have standing to make any of the applications. The evidence establishes that Resurgence is not the legal owner and the evidence of beneficial ownership is equivocal.

[5] Canadian has not raised this issue on any of the previous occasions on which Resurgence has been before the court in these proceedings. There has been a consent order involving Resurgence and Canadian.

[6] In my view, it is not appropriate now for Canadian to suggest that Resurgence does not represent the interests of the holders of 60 percent of the unsecured notes and essentially seek a declaration that Resurgence is a stranger to these proceedings.

[7] I am not prepared to dismiss the applications of Resurgence on classification, voting and amending the plan out of hand on the basis of standing.

[8] Resurgence was also supported in these applications by the senior secured note holders. For the purposes of these applications, I accept that Resurgence is representing the interests of 60 percent of the unsecured note holders.

Classification of Air Canada's Unsecured Claim

[9] By my April 14, 2000 order in these proceedings, I approved transactions involving CAIL, a large number of aircraft lessors and Air Canada, which achieved approximately $200 million worth of concessions for CAIL. In exchange for granting the concession, each creditor received a guarantee from Air Canada and the assurance that the creditor would immediately cease to be affected by the C.C.A.A. proceedings.

[10] These concessions or deficiency claims were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved the method of quantifying these claims and recognized the value of the concessions to Canadian. In that order I reserved the issue of classification and voting to be determined at some later date. The plan provides for two classes of creditors, secured and unsecured.

[11] The unsecured class is composed of a number of types of unsecured claims, including aircraft financings, executory contracts, unsecured notes, litigation claims, real estate leases and the deficiencies, if any, of the senior secured note holders.

[12] In one portion of the application, Resurgence seeks to have Air Canada vote the promissory notes in separate class and relied on several factors to distinguish the claims of other Affected, Unsecured Creditors from Air Canada's unsecured claim, including the following:

1. The Air Canada appointed board caused Canadian to enter into these C.C.A.A. proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.

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3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

[13] Air Canada and Canadian argue that the legal right associated with Air Canada's unsecured promissory notes and with the other Affected, Unsecured Claims, are the same and that the matters raised by Resurgence, as relating to classification, are really matters of fairness, more appropriately dealt with at the fairness hearing. Air Canada and Canadian emphasized that classification must be determined according to the rights of the creditors, not their personalities.

[14] The starting point in determining classification is the statute under which the parties are operating and from which the court obtains its jurisdiction. **The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims; see, for example, *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.)**

[15] **Beyond identifying secured and unsecured classes, the C.C.A.A. does not offer any guidance to the classification of claims. The process, instead, has developed in the case law.**

[16] **A frequently cited description of the method of classification of creditors for the purposes of voting on a plan, under the C.C.A.A., is *Sovereign Life Assurance Co. v Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.).**

[17] At page 583 (Q.B.), Bowen, L.J. stated:

> **The word 'class' is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.**

This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply in classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.

[18] Generally, the cases hold that classification is a fact-driven determination unique to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible and remedial jurisdiction involved; see, for example, *Re Fairview Industries Ltd.* reflex, (1991), 11 C.B.R. (3d) 71 (N.S. T.D.)

[19] The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has vis-a-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment of creditors under a liquidation scenario. In the absence of bad faith, motivation for supporting or rejecting a plan is not a classification issue in the authorities.

[20] In considering what interests are included in the commonality of interest test, Forsyth J., in *Norcen Energy Resources Ltd.* (Supra) had to determine whether all the secured creditors of the company ought to be included in one class. The creditors all had first-charge security and the same method of valuation was applied to each secured claim in order to determine security value under the plan. The distinguishing features were submitted to be based on the difference in the security held, including ease of marketability and realization potential. In holding that a separate class was not necessary, Forsyth J., said at page 29:

> Different security positioning and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender.

In doing so, Forsyth J. rejected the "identity of the interest" approach in which creditors in a class must have identical interests.

[21] It was also submitted in *Norcen Energy Resources Ltd.* that since the purchaser under the plan had made financing arrangements with the Royal Bank, the bank had an interest not shared by the other secured creditors. Forsyth J., held that in the absence of any allegation that the Royal Bank was not acting bona fide in considering the benefit of the plan, the secured creditors could not be heard to criticize the presence of the Royal Bank in their class.

[22] Forsyth J., also emphasized in *Norcen Energy Resources Ltd.* that the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A., which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C.C.A.A. grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur.

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[23] The *Norcen Energy Resources Ltd.* approach was specifically adopted in British Columbia in *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), where it was held that various mortgagees with different mortgages against different properties were included in the same class.

[24] In *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) the Alberta Court of Appeal rejected the argument that shareholders who have private arrangements with the applicant or who are brokers or officers or otherwise in a special position vis-a-vis the debtor company, should be put in a special category.

[25] At page 158 the court stated in regard to the test applied to classification:

> We do not think that this rule justifies the division of shareholders into separate classes on the basis of their presumed prior commitment to a point of view. The state of facts, common to all, is that they are all offered this proposal, face as an alternative the break-up of this apparently insolvent company and hold shares that appear to be worthless on break-up. In any event, any attempt to divide them on the basis suggested, would be futile. One would have as many groups as there are shareholders.

The commonality of interest test was addressed by the British, Columbia Supreme Court in *Re Woodward's Ltd.* 1993 CanLII 870 (BC SC), (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.). Tysoe J. rejected the identity of interest approach and held that it was permissible to include creditors with different legal rights in the same class, so long as their legal rights were not so dissimilar that it was still possible for them to vote with a common interest.

[26] Tysoe J. went on to find that legal interests should be considered in the context of the proposed plan and that it was also necessary to examine the legal rights of creditors in the context of the possible failure of the plan.

[27] In other words, "interest" for the purpose of classification does not include the personality or identity of the creditor, and the interests it may have in the broader commercial sphere that might influence its decision or predispose it to vote in a particular way; rather, "interest" involves the entitlement of the debt holder viewed within the context of the provisions of the proposed plan. In that regard, see *Woodward's Ltd.* at page 212.

[28] In *Fairview Industries Ltd.*, the court held that in classification there need not be a commonality of interest of debts involved, so long as the legal interests were the same. Justice Glube (as she then was) stated that it did not automatically follow that those with different commercial interests, for example, those with security on "quick" assets, are necessarily in conflict with those with security on "fixed" assets. She stated that just saying there is a conflict is insufficient to warrant separation.

[29] In *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* reflex, (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626 like *Norcen Energy Resources Ltd.,* the "identity of interests" approach was rejected. The court preserved a class of creditors which included debenture holders, terminated employees, realty lessors and equipment lessors.

[30] Borins J. held that not every difference in the nature of the debt warrants a separate class and that in placing a broad and purposive interpretation on the C.C.A.A., the court should "take care to resist approaches which would potentially jeopardize a potentially viable plan." He observed that "excessive fragmentation is counterproductive to the legislative intent to facilitate corporate reorganization" and that it would be "improper to create a special class simply for the benefit of an opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power." (p. 627).

[31] In summary, the cases establish the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;
4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.
5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

[32] With this background, I will make several observations relating to the reasons asserted by Resurgence that distinguish Air Canada from the rest of the Affected Unsecured Creditors.

[33] The first two reasons given relate to interests of Air Canada extraneous to its legal rights as a unsecured creditor. The third reason relates largely to the further assertion that Air Canada should not be allowed to vote at all. The matter of voting is addressed more specifically later in these reasons.

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[34] The factors described by Resurgence distinguish between Air Canada and other unsecured creditors relate largely to the fact that Air Canada is the assignee of the unsecured debt. In my view, that approach is to be discouraged at the classification stage. To require the court to consider who holds the claim, as distinct from what they hold, at that point would be untenable. I note that Mr. Edwards recognizes in 1947 in his article, *"Reorganizations under the Companies Creditors Arrangement Act",* (1947), 25 Cdn. Bar Rev. 587, and observe this concern is heightened in the current commercial reality of debt trading.

[35] Resurgence also asserted that a court should avoid placing creditors with a potential conflict of interest in the same class and relies on *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.), a case in which the court considered a potential conflict of interest between subcontractors and direct contractors. To the extent this case can be seen as decided on the basis of the distinct legal rights of the creditors, I agree with the result. To the extent that the case determined that a class could be separated based on a conflict of interest not based on legal right, I disagree. In my view, this would be the sort of issue the court should consider at the fairness hearing.

[36] Resurgence also relied on the decisions of the British Columbia Supreme Court in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.), a case decided prior to *Norcen Energy Resources Ltd.*. In that case the court held that a subsidiary wholly owned by Northland Bank was incorporated to purchase certain bonds from Northland in exchange for preferred shares and was not entitled to vote. The court found that would be tantamount to Northland Bank voting in its own reorganization and relied on *Re Wellington Building Corp.,* [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.) In this regard. I would note that the passage relied upon at page 5 in that case, in *Wellington Building Corp* (Supra) dealt with whether the scheme, as proposed, was unfair.

[37] All creditors proposed to be included in the class of Affected, Unsecured Creditors, are all unsecured and are treated the same under the plan. All would be treat similarly under the BIA. The plan provides that they will receive 12 cents on the dollar. The Monitor opined that in liquidation unsecured creditors would realize a maximum of 3 cents on the dollar. Their legal interests are essentially the same. Issue is taken with the presence of Air Canada, supporter and funder of the plan, also having taken an assignment of a substantial, unsecured claim. However, absent bad faith, who creditors are is not relevant. Air Canada's mere presence in the class does not in and of itself constitute bad faith.

[38] Further, all of these methods of distinguishing Air Canada's unsecured claim at their core are fundamentally issues of fairness which will be addressed by the Court at the fairness hearing on June 5, 2000. I am prepared to give serious consideration to these matters at that time and direct that there be a separate tabulation of the votes cast by Air Canada arising from any assignments of promissory notes they have taken, so that there is an evidentiary record to assist me in assessing the fairness of the vote when and if I am called upon to sanction the plan. This approach was taken by Justice Forsyth in *Norcen Energy Resources Ltd.,* and in my view is consistent with the underlying purpose of the C.C.A.A. I wish to emphasize that the concerns raised by Resurgence will form part of the assessment of the overall fairness of the plan.

[39] Permitting the classification to remain intact for voting purposes will not result in a confiscation of rights of or injustice to the unsecured note holders. Their treatment does not at this point depart from any other Affected Unsecured Creditors and recognizes the similarity of legal rights. Although based on different legal instruments, the legal rights of the unsecured note holders and Air Canada are essentially the same. Neither has security, nor specific entitlement to assets. Further, the ability of all of the Affected Unsecured Creditors to realize their claims against the debtor companies, depend in significant part, on the company's ability to continue as a going concern.

[40] The separate tabulation of votes will allow the "voice" of unsecured creditors to be heard, while at the same time, permit rather than rule out the possibility that a plan might proceed.

[41] It is important to preserve this possibility in the interests of facilitating the aim of the C.C.A.A. and protecting interests of all constituents. To fracture the class prior to the vote, may have the effect of denying the court jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the C.C.A.A.

Separating the Claims Against CAC and CAIL

[42] Resurgence briefly argued that since Air Canada's debt is owed by CAIL only, it could only look to CAIL's assets in a bankruptcy and would not be able to look to any CAC assets. In contrast, Resurgence suggested that the unsecured note holders are creditors of both CAIL under a guarantee, and CAC under the notes. Resurgence submitted that the resulting difference in legal rights destroys the commonality of interests.

[43] There is insufficient evidence to suggest that the unsecured note holders are also creditors of CAIL. Counsel referred only to a statement made by Mr. Carty on cross-examination that there was an "unsecured guarantee". However, no documents have been brought to my attention that would support this statement and, in of itself, the statement is not determinative. In any case, I do not have sufficient evidence before me to conclude that there would be a

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meaningful difference in recoveries for unsecured creditors of CAC and CAIL in the event of bankruptcy. I, therefore, cannot conclude on this basis that rights are being confiscated, unlike Tysoe J.'s ability to do so in *Re Woodward's Ltd*. Simply looking to different assets or pools of assets will not alone fracture a class; some unique additional legal right of value in liquidation going unrecognized in a plan and not balanced by others losing rights as well is needed on the analysis of Tysoe J.

[44] I recognize the struggle between the unsecured note holders, represented by Resurgence on one side, and Air Canada and Canadian on the other. Resurgence fears the inclusion of Air Canada and the Affected Unsecured Creditors' class will swamp the vote. Air Canada and Canadian fear that exclusion of Air Canada will result in the voting down of a plan which, in their view, otherwise stands a realistic chance of approval. As unsecured creditors, they do share similar legal rights. As supporters or opponents of the plan, they may well have distinctly different financial or strategic interests. I believe that in the circumstances of this case, these other interests and their impact on the plan, are best addressed as matters of fairness at the June 5, 2000 hearing, and in this way, the concerns will be heard by the court without necessarily putting an end to the entire process.

Voting

[45] Although my decision on classification makes it clear that I will permit Air Canada to vote on the plan, I wish to comment further on this issue. Air Canada submitted that it should be entitled to vote the face value of the promissory notes which represent deficiency claims assigned to it from aircraft lessors in the same fashion as any other creditor who has acquired the claims by assignment. All parties accept that deficiency claims such as these would normally be included and voted upon in an unsecured claims class. The request by Resurgence to deny them a vote would have the effect of varying rights associated with those notes.

[46] The concessions achieved in the re-negotiation of the aircraft leases, represent value to CAIL. The methodology of calculation of the claims and their valuation was reviewed by the Monitor and this is not being challenged. Rather, it is because it is Air Canada that now holds them, that it is objectionable to Resurgence. Resurgence asserts that Air Canada manufactured the assignment so it could preserve a 'yes' vote. This, in my view, is a matter going to fairness. Is it fair for Air Canada to vote to share in the pool of cash funded by it for the benefit of unsecured creditors? That matter is best resolved at the fairness hearing.

[47] Resurgence relied on *Northland Properties Ltd*. in which a wholly owned subsidiary of the debtor company was not allowed to vote because to do so would amount to the debtor company voting in its own reorganization. The corporate relationship between Air Canada and CAIL can be distinguished from the parent and wholly owned subsidiary in *Northland Properties Ltd*.. Air Canada is not CAIL's parent and owns 10 percent of a numbered company which owns 82 percent of CAIL. Further, as noted above, the court in *Northland Properties Ltd*. apparently relied on the passage from *Wellington Building Corp* which indicated in that case the court was being asked to approve a plan as fair. Again, the basis on which Resurgence seeks to deprive Air Canada of its vote is really an issue of fairness.

Section 6(2)(2) of the Plan

[48] Resurgence wishes me to strike out Section 6(2)(2) of the plan, which essentially purports to provide a release by affected creditors of all claims based in whole or in part on any act, omission transaction, event or occurrence that took place prior to the effective date in any way relating to the debtor companies and subsidiaries, the C.C.A.A. proceeding or the plan against:

1. The debtor companies and its subsidiaries;
2. The directors, officers and employees;
3. The former directors, officers and employees of the debtor companies and its subsidiaries; or
4. The respective current and former professionals of the entities, including the Monitor, its counsel and its current officers and directors, et cetera. Resurgence submits that this provision constitutes a wholesale release of directors and others which is beyond that permitted by Section 5.1 of the C.C.A.A. CAIL and CAC submit that the proposed release was not intended to preclude rights expressly preserved by the statute and are prepared to amend the plan to state this.

[49] Section 5.1(3) of the C.C.A.A. provides that the court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

[50] In this application of Resurgence, the court must deal with two issues: One, what releases are permitted under the statute; and, two, what releases ought to be permitted, if any, under the plan.

[51] In my view, I will be in a better position to assess the fairness of the proposed compromise of claims which is drafted in extremely broad terms, when I consider the other issues of fairness raised by Resurgence. Accordingly, I leave that matter to the fairness hearing as well.

[52] In summary, the application contained in paragraph (d) of the Resurgence Notice of Motion is dismissed. The application in paragraph (e) is adjourned to June 5, 2000.

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Application dismissed.

Creditors' response - Sec. 50(1.6)
(1.6) Subject to section 50.1 as regards included secured creditors, any creditor may respond to the proposal as made to the creditors generally, by filing with the trustee a proof of claim in the manner provided for in

(a) sections 124 to 126, in the case of unsecured creditors; or
(b) sections 124 to 134, in the case of secured creditors.

Effect of filing proof of claim - Sec. 50(1.7)
(1.7) Hereinafter in this Division, a reference to an unsecured creditor shall be deemed to include a secured creditor who has filed a proof of claim under subsection (1.6), and a reference to an unsecured claim shall be deemed to include that secured creditor's claim.

Voting - Sec. 50(1.8)
(1.8) All questions relating to a proposal, except the question of accepting or refusing the proposal, shall be decided by ordinary resolution of the creditors to whom the proposal was made.

Documents to be filed - Sec. 50(2)
(2) Subject to section 50.4, proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate,

(a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and
(b) the prescribed statement of affairs.

Filing of documents with the official receiver - Sec. 50(2.1)
(2.1) Copies of the documents referred to in subsection (2) must, at the time the proposal is filed under subsection 62(1), also be filed by the trustee with the official receiver in the locality of the debtor.

Approval of inspectors - Sec. 50(3)
(3) A proposal made in respect of a bankrupt shall be approved by the inspectors before any further action is taken thereon.

Proposal, etc., not to be withdrawn - Sec. 50(4)
(4) No proposal or any security, guarantee or suretyship tendered with the proposal may be withdrawn pending the decision of the creditors and the court.

Assignment not prevented - Sec. 50(4.1)
(4.1) Subsection (4) shall not be construed as preventing an insolvent person in respect of whom a proposal has been made from subsequently making an assignment.

Duties of trustee - Sec. 50(5)

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(5) The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

Trustee to file cash-flow statement - Sec. 50(6)
(6) The trustee shall, when filing a proposal under subsection 62(1) in respect of an insolvent person, file with the proposal

(a) a statement — or a revised cash-flow statement if a cash-flow statement had previously been filed under subsection 50.4(2) in respect of that insolvent person — (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the person making the proposal, reviewed for its reasonableness by the trustee and signed by the trustee and the person making the proposal;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the person making the proposal regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the person making the proposal.

Creditors may obtain statement - Sec. 50(7)
(7) Subject to subsection (8), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception - Sec. 50(8)
(8) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (7) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected - Sec. 50(9)
(9) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, he is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to monitor and report - Sec. 50(10)
(10) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a proposal in respect of an insolvent person shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the proposal until the proposal is approved by the court or the insolvent person becomes bankrupt, and shall

(a) file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

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(ii) with the court at any time that the court may order;

(a.1) send a report about the material adverse change to the creditors without delay after ascertaining the change; and

(b) send, in the prescribed manner, a report on the state of the insolvent person's business and financial affairs — containing the trustee's opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101 do not apply in respect of the proposal and containing the prescribed information, if any — to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held.

SB Directive: 24, Information to Be Provided to Creditors in Commercial Proposals
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 24

INFORMATION TO BE PROVIDED TO CREDITORS IN COMMERCIAL PROPOSALS

Issued: August 14, 2009

(Supersedes Directive No. 20 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this Directive is to establish the Superintendent's standards as to the information to be provided to creditors in a commercial proposal with a view to ensuring

RENSEIGNEMENTS À ÊTRE FOURNIS AUX CRÉANCIERS DANS LES PROPOSITIONS COMMERCIALES

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'Instruction n° 20 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction vise à définir les normes du surintendant quant à l'information qui doit être fournie aux créanciers dans le cas de propositions commerciales afin de

Canada

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that the creditors have the necessary information to make a well-informed decision on the acceptance or refusal of the proposal.

Guidelines

4. In all commercial proposals, the trustee must prepare a written report to the creditors to provide them with the necessary information to make a well-informed decision.

5. The suggested format in Appendix A should serve as a guideline to the trustee for the preparation of this report.

6. Trustees are encouraged to send the report and/or the pertinent information available along with the notice to creditors so that the creditors, including those who will not be attending the meeting but will vote by proxy or voting letter, will be able to study the report and be well informed.

Coming Into Force

7. This Directive comes into force on September 18, 2009.

Enquiries

8. For any questions pertaining to this Directive, please contact your local OSB office.

s'assurer que les créanciers obtiennent tous les renseignements nécessaires pour pouvoir prendre une décision éclairée quant à l'acceptation ou au refus de la proposition.

Lignes directrices

4. Pour toute proposition concordataire commerciale, le syndic doit préparer un rapport écrit aux créanciers afin de leur fournir tous les renseignements nécessaires à une prise de décision éclairée.

5. Le format suggéré à l'annexe A devrait servir de modèle au syndic pour la préparation de ce rapport.

6. On encourage les syndics à envoyer le rapport ou les renseignements pertinents disponibles avec l'avis aux créanciers afin que les créanciers puissent l'étudier et que tous ceux qui ne seront pas présents puissent voter par procuration ou par formulaire de votation en étant bien renseignés.

Entrée en vigueur

7. La présente instruction entre en vigueur le 18 septembre 2009.

Demandes de renseignements

8. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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APPENDIX A

TRUSTEE'S REPORT ON THE PROPOSAL

A. Background

Explain the evolution of the debtor's position through the current situation and mention the main factors of that evolution. Also, names of the principal shareholder(s) and of the directors of the company should be mentioned if applicable, together with the percentage of shares owned and the positions occupied. Any related or associated corporations of the debtor, if pertinent, as well as any third party associated with the proposal should be disclosed.

B. Summary of Proposal

If appropriate, a brief summary of the proposal is to be made.

C. Financial Position and Causes of Difficulties

Comply with subsection 50(5) of the *Bankruptcy and Insolvency Act* as to the appraisal and investigation of the affairs and property of the debtor to estimate with reasonable accuracy the debtor's financial situation and the causes of his or her difficulties.

Where the operations of the debtor's business are significant to the proposal, the status of these operations should be reported on, including whether they are to be continued or discontinued.

Advise the creditors as to the availability of the most recent financial statements and make comments if applicable. Such comments should include a brief synopsis of the general order of the financial statement(s) and what degree of reliance, if any, was placed upon the financial statement(s) by the trustee.

D. Interim Receiver

If an interim receiver has been appointed, the creditors should be advised as to any pertinent information arising from this appointment.

E. Identification and Evaluation of Assets

For the purpose of projecting the realization in a bankruptcy situation, attempt to evaluate the assets of the debtor by class and disclose the basis of evaluation. If such an evaluation has

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not been done, mention that such is the case and give the reasons for not evaluating the assets. Also, attempt to identify and report to creditors on any encumbrances against the said assets.

F. Conduct of the Debtor

Attempt, to the best of your ability, to identify any preferential payment, settlement or reviewable transaction that the debtor may have been a party to and report to the creditors. The trustee should also disclose the extent of the work performed in identifying these transactions. If no work has been done in this area, provide an explanation to the creditors.

Report to the creditors on any offences under the *Bankruptcy and Insolvency Act* that might have been noted.

G. Creditors' Claims

Report on the proofs of claim received and on material differences with the liabilities indicated on the Statement of Affairs, if any.

Bring to the attention of the creditors all claims in the estate involving parties related to the debtor as well as the nature of the review of the trustee to ascertain the validity of the transactions.

Attempt to identify any trust claim and report accordingly to the creditors as to the implications in a bankruptcy situation.

Indicate whether or not a legal opinion has been obtained on the validity of the securities if there are secured creditors.

H. Previous Business Dealings with the Debtor

State if the trustee or a firm with whom he or she is related:

i) has provided previous services to the debtor (i.e. interim receiver, auditor, accountant, consultant, agent, receiver, etc.); and

ii) may be in a possible conflict of interest situation as a result of having provided these services.

Disclose all previous dealings with the debtor, including any remuneration received.

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I. Informal Meetings with Major Creditors

Information regarding previous meetings with major creditors may be provided to the other creditors.

J. Remuneration of Trustee

An estimated fee in the proposal could be shown in a Statement of Realization;

and

Trustees should disclose their fees in the proposal. If the fees aren't disclosed in their entirety, trustees should disclose the basis on which they will recover their fees and also the existence of any deposit, guaranty or private arrangement.

K. Other

Any other pertinent facts, such as legal proceedings or contract arrangements in which the debtor is involved, should be mentioned to the creditors as these could influence their decision.

L. Statement of Estimated Realization

A statement of estimated realization should be included in the report. The statement should show both scenarios (i.e. in the eventualities of accepting the proposal and of bankruptcy). The format is at the trustee's discretion; however, there should be as much disclosure as possible to indicate the amount that would be available for distribution to unsecured creditors.

M. Recommendations

It is the trustee's duty to inform the creditors in an objective and professional manner. The trustee must state whether or not, in his or her opinion, the proposal is to the advantage of the creditors. To this end, the trustee may take into account not only the terms of the proposal but also some other factors, such as the volume of business that the debtor could bring to the creditors in the future. If no recommendation is made in the report, the trustee must indicate the reasons for this situation

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ANNEXE A

RAPPORT DU SYNDIC SUR LA PROPOSITION

A. Historique

Expliquer l'évolution de la situation du débiteur et faire état des principaux facteurs ayant mené à sa situation actuelle. Le nom des principaux actionnaires et des administrateurs de l'entreprise devrait être indiqué, le cas échéant, de même que le pourcentage d'actions détenues et les postes occupés. Lorsque applicable, faire mention des tiers ou des personnes morales du débiteur impliqués ou associés à la proposition.

B. Sommaire de la proposition

Lorsque approprié, un sommaire de la proposition devrait être fait

C. Situation financière et causes des difficultés

Se conformer au paragraphe 50(5) de la *Loi sur la faillite et l'insolvabilité* en ce qui a trait à l'estimation et à l'enquête relativement aux affaires et aux biens du débiteur afin d'estimer avec un degré raisonnable d'exactitude la cause des difficultés financières et la situation financière du débiteur.

Lorsque l'exploitation de l'entreprise du débiteur est considérable dans le cadre de la proposition, l'état de cette gestion devrait être mentionné, qu'il y ait ou non continuation de l'entreprise.

Informer les créanciers en ce qui a trait à la disponibilité des états financiers les plus récents et commenter si nécessaire. Dans les commentaires, le syndic devrait inclure une brève synthèse expliquant l'ordre général de l'état financier et indiquer le degré de fiabilité, le cas échéant, de l'état financier.

D. Séquestre intérimaire

Si un séquestre intérimaire a été nommé, les créanciers devraient être avisés de tout renseignement pertinent relativement à cette nomination.

E. Détermination et évaluation des actifs

Dans le but de faire des projections en ce qui concerne la réalisation en situation de faillite, tenter d'évaluer les actifs du débiteur par classe et divulguer la base de l'évaluation.

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Lorsqu'une telle évaluation n'a pas été faite, mentionner que c'est le cas et donner les raisons pour lesquelles les actifs n'ont pas été évalués. Tenter également de déterminer tout privilège sur lesdits actifs et en rendre compte aux créanciers

F. Conduite du débiteur

Tenter, dans la mesure du possible, de mettre au jour tout paiement préférentiel, disposition de biens ou transaction révisable auxquels le débiteur aurait pu être associé et en rendre compte aux créanciers. Le syndic devrait aussi divulguer la nature du travail exécuté pour mettre au jour ces transactions. Si aucun travail n'a été fait à ce chapitre, en fournir une explication aux créanciers.

Rendre compte aux créanciers de toute infraction à la *Loi sur la faillite et l'insolvabilité* qui aurait pu être commise.

G. Réclamations des créanciers

Rendre compte des preuves de réclamation reçues et des écarts importants, s'il en est, par rapport aux dettes indiquées au bilan.

Porter à l'attention des créanciers toutes les réclamations au dossier visant des personnes liées au débiteur de même que la nature de l'examen fait par le syndic pour assurer la validité des transactions.

Tenter de relever toute réclamation en fiducie ou en fiducie présumée et rendre compte aux créanciers des conséquences en situation de faillite.

Indiquer si une opinion légale a été obtenue sur la validité des garanties lorsqu'il y a des créanciers garantis.

H. Relations d'affaires antérieures avec le débiteur

Déclarer si le syndic ou un bureau de syndics avec lequel le débiteur est lié :

i) a fourni des services au débiteur par le passé (p. ex., séquestre intérimaire, comptable, vérificateur ou consultant); ou

ii) pourrait être dans une situation de conflit d'intérêts en raison de ces services.

Divulguer toute transaction antérieure conclue avec le débiteur, y compris toute rémunération reçue.

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I. Assemblées informelles avec les principaux créanciers

Informer les autres créanciers de toute assemblée informelle préalable avec les principaux créanciers.

J. Rémunération du syndic

Le syndic pourrait fournir, dans un état de réalisation, une estimation de la rémunération dans la proposition

et

Le syndic devrait faire mention de ses honoraires dans la proposition. Si les honoraires ne sont pas tous divulgués, le syndic devrait faire état de la base de sa rémunération ainsi que de l'existence de tout dépôt, garantie ou entente privée.

K Autre

Tout autre fait pertinent mettant en cause le débiteur, tel qu'une procédure légale ou un arrangement contractuel, devrait être mentionné aux créanciers étant donné que ce fait pourrait influencer leur décision.

L. État de réalisation estimée

Un état de réalisation estimée devrait être intégré au rapport. Cet état devrait présenter les deux scénarios (c'est-à-dire dans l'éventualité de l'acceptation de la proposition ou de la faillite). La présentation est laissée à la discrétion du syndic; l'état de réalisation estimée devrait toutefois contenir le plus de renseignements possible afin d'indiquer le montant qui serait disponible pour distribution aux créanciers ordinaires.

M. Recommandations

Le syndic a le devoir d'informer les créanciers d'une manière objective et professionnelle. Il doit signifier si, selon son opinion, la proposition est ou non à l'avantage des créanciers. À cette fin, il peut prendre en considération non seulement les modalités de la proposition, mais aussi certains autres facteurs tel le volume d'affaires que le débiteur pourrait générer dans le futur pour les créanciers. Si aucune recommandation n'est émise dans le rapport, le syndic doit en indiquer les raisons.

Report to creditors - Sec. 50(11)

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(11) An interim receiver who has been directed under subsection 47.1(2) to carry out the duties set out in subsection (10) in substitution for the trustee shall deliver a report on the state of the insolvent person's business and financial affairs, containing any prescribed information, to the trustee at least fifteen days before the meeting of creditors referred to in subsection 51(1), and the trustee shall send the report to the creditors and the official receiver, in the prescribed manner, at least ten days before the meeting of creditors referred to in that subsection.

Court may declare proposal as deemed refused by creditors - Sec. 50(12)
(12) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that

- **(a) the debtor has not acted, or is not acting, in good faith and with due diligence;**
- **(b) the proposal will not likely be accepted by the creditors; or**
- **(c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.**

Effect of declaration - Sec. 50(12.1)
(12.1) If the court declares that the proposal is deemed to have been refused by the creditors, paragraphs 57(a) to (c) apply.

Claims against directors — compromise - Sec. 50(13)
(13) A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception - Sec. 50(14)
(14) A provision for the compromise of claims against directors may not include claims that

- **(a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or**
- **(b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.**

Powers of court - Sec. 50(15)
(15) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be just and equitable in the circumstances.

Application of other provisions - Sec. 50(16)
(16) Subsection 62(2) and section 122 apply, with such modifications as the circumstances require, in respect of claims against directors compromised under a proposal of a debtor corporation.

Determination of classes of claims - Sec. 50(17)
(17) The court, on application made at any time after a proposal is filed, may determine the classes of claims of claimants against directors and the class into which any particular claimant's claim falls.

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Resignation or removal of directors - Sec. 50(18)
(18) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this section.
R.S., 1985, c. B-3, s. 50;
1992, c. 27, s. 18;
1997, c. 12, s. 30;
2001, c. 4, s. 27(E);
2004, c. 25, s. 32;
2005, c. 47, s. 34;
2007, c. 36, s. 16.

Secured creditor may file proof of secured claim - Sec. 50.1
50.1 (1) Subject to subsections (2) to (4), a secured creditor to whom a proposal has been made in respect of a particular secured claim may respond to the proposal by filing with the trustee a proof of secured claim in the prescribed form, and may vote, on all questions relating to the proposal, in respect of that entire claim, and sections 124 to 126 apply, in so far as they are applicable, with such modifications as the circumstances require, to proofs of secured claim.

SB Directive: 8R11, Proof of Claim
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
Bureau du surintendant des faillites Canada

An Agency of Industry Canada
Un organisme d'Industrie Canada

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4th Floor
Ottawa, Ontario
K1A 0H5
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4e étage
Ottawa (Ontario)
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http://osb-bsf.ic.gc.ca

Date: NOV 0 9 2010

To: **OSB Staff, Trustees and Registrars**

Subject: ***Bankruptcy and Insolvency Act* Forms — Form 31, *Proof of Claim*, and Form 79, *Statement of Affairs (Non-Business Bankruptcy/Proposal)***

Date : 0 9 NOV. 2010

À : **Employés du BSF, syndics et registraires**

Objet : **Formulaires de la *Loi sur la faillite et l'insolvabilité* – Formulaire 31, *Preuve de réclamation* et Formulaire 79, *Bilan (faillite ou proposition non commerciale)***

The Office of the Superintendent of Bankruptcy (OSB) has amended Form 31, *Proof of Claim*, and Form 79, *Statement of Affairs (Non-Business Bankruptcy/Proposal)*.

Le Bureau du surintendant des faillites (BSF) a modifié le formulaire 31, *Preuve de réclamation*, et le formulaire 79, *(Bilan (faillite ou proposition non commerciale)*.

Form 31, *Proof of Claim*

Form 31, *Proof of Claim*, has been amended to allow creditors to request to be informed of the amount fixed under subparagraph 68(4)(*a*)(i) of the *Bankruptcy and Insolvency Act* (BIA) of surplus income that the bankrupt is required to pay to the estate of the bankrupt. Form 31 has also been amended to allow creditors to request to be informed, pursuant to paragraph 68(4)(*b*) of the BIA, if the trustee determines that there is no surplus income.

Formulaire 31, *Preuve de réclamation*

Le formulaire 31, *Preuve de réclamation*, est modifié pour permettre aux créanciers de demander qu'on les informe du montant de revenu excédentaire fixé en vertu du paragraphe 68(4) de la *Loi sur la faillite et l'insolvabilité* (LFI) que le failli doit verser à l'actif de la faillite. De plus, le formulaire 31 a été modifié afin de permettre aux créanciers de demander qu'on les informe, conformément au paragraphe 68(4) de la LFI, si le syndic conclut que le failli n'a aucun revenu excédentaire.

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Form 79, *Statement of Affairs (Non-Business Bankruptcy/Proposal)*

Paragraph (c) under "Information relating to the affairs of the bankrupt/debtor" has been amended to be consistent with the language used in paragraph 158(g) of the Act. The part pertaining to whether or not the debtor knew himself/herself to be insolvent has been removed. Paragraph 158(g) of the Act leaves determination of whether or not the bankrupt was insolvent at the time of the transfer to the trustee after disclosure of all transfers at undervalue.

Coming into Force

Amended Forms 31 and 79 come into force on March 18, 2011, and apply to persons to which the September 18, 2009, amendments apply.

Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

Formulaire 79, *(Bilan (faillite ou proposition non commerciale)*

Sur le formulaire 79, le paragraphe C de la section intitulée « Renseignements relatifs aux affaires du failli ou du débiteur » a été modifié conformément au libellé de l'alinéa 158g) de la Loi. La partie de la question visant à savoir si le débiteur se savait insolvable a été supprimée. Selon l'alinéa 158g) de la Loi, il appartient au syndic de déterminer si le failli était insolvable au moment de la disposition du bien et ce, suite à la déclaration de toutes les opérations sous-évaluées.

Entrée en vigueur

La version modifiée des formulaires 31 et 79 entre en vigueur le 18 mars 2011, et s'applique aux personnes visées par les modifications entrées en vigueur le 18 septembre 2009.

Demandes de renseignements

Si vous souhaitez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus près.

P.j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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An Agency of Industry Canada

Bureau du surintendant des faillites Canada
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Directive / Instruction

N° 8R11

THE *BANKRUPTCY AND INSOLVENCY ACT* FORMS

Issued: NOV 0 9 2010

(This Directive amends Directive No. 8R10 issued on September 15, 2010, on the same topic.)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"Forms" means the Forms under the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*c*) and (*e*) of the Act for the purpose of prescribing amendments to Form 31, *Proof of Claim*, and

FORMULAIRES DE LA *LOI SUR LA FAILLITE ET L'INSOLVABILITÉ*

Émise : 0 9 NOV. 2010

(La présente instruction modifie l'instruction n° 8R10 émise le 15 septembre 2010 sur le même sujet.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » Le Bureau du surintendant des faillites.

« Formulaires » Les formulaires émis en vertu de la *Loi sur la faillite et l'insolvabilité*.

« Loi » La *Loi sur la faillite et l'insolvabilité*.

« Règles » Les *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*c*) et *e*) de la Loi, et a pour objet de prescrire des modifications au formulaire 31, *Preuve de*

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Form 79, *Statement of Affairs (Non-Business Bankruptcy/Proposal)*

Summary

3. This Directive amends Form 31, *Proof of Claim*, to allow creditors to request, by selecting the appropriate checkbox, to be informed, pursuant to subparagraph 68(4)(*a*)(ii) of the Act, of the amount fixed under subparagraph 68(4)(*a*)(i) of the Act of surplus income that the bankrupt is required to pay to the estate of the bankrupt.

4. This Directive also amends Form 31 to allow creditors to request, by selecting the appropriate checkbox, to be informed, pursuant to paragraph 68(4)(*b*) of the Act, if the trustee determines that there is no surplus income.

5. This Directive amends Form 79, *Statement of Affairs (Non-Business Bankruptcy/Proposal)*, paragraph C under "Information relating to the affairs of the bankrupt/debtor" to be consistent with the language used in paragraph 158(*g*) of the Act. The part pertaining to whether or not the debtor knew himself/herself to be insolvent has been removed. Paragraph 158(*g*) of the Act leaves determination of whether or not the bankrupt was insolvent at the time of the transfer to the trustee after disclosure of all transfers at undervalue.

réclamation, et au formulaire 79, *tBilan (faillite ou proposition non commerciale)*

Résumé

3. La présente instruction modifie le formulaire 31, *Preuve de réclamation*, pour permettre aux créanciers de demander, en cochant la case appropriée, qu'on les informe du montant de revenu excédentaire fixé en vertu du paragraphe 68(4) de la Loi que le failli doit verser à l'actif de la faillite.

4. De plus, le formulaire 31 a été modifié afin de permettre aux créanciers de demander qu'on les informe, conformément au paragraphe 68(4) de la LFL si le syndic conclut que le failli n'a aucun revenu excédentaire.

5. La présente instruction modifie le formulaire 79, *tBilan (faillite ou proposition non commerciale)*, au paragraphe C de la section intitulée « Renseignements relatifs aux affaires du failli ou du débiteur » conformément au libellé de l'alinéa 158g) de la Loi. La partie de la question visant à savoir si le débiteur se savait insolvable a été supprimée. Selon l'alinéa 158g) de la Loi, il appartient au syndic de déterminer si le failli était insolvable au moment de la disposition du bien et ce, suite à la déclaration de toutes les opérations sous-évaluées.

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Coming into Force

6. Amended Forms 31 and 79 come into force on March 18, 2011, and apply to persons to which the September 18, 2009, amendments apply.

Entrée en vigueur

6. La version modifiée des formulaires 31 et 79 entre en vigueur le 18 mars 2011 et s'applique aux personnes visées par les modifications entrées en vigueur le 18 septembre 2009.

Enquiries

7. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

7. Si vous souhaitez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus près

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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FORM 31

Proof of Claim
(Sections 50.1, 81.5, 81.6, Subsections 65.2(4), 81.2(1), 83.3(8), 81.4(8), 102(2), 124(2), 128(1), and Paragraphs 51(1)(c) and 66.14(*b*) of the Act)

All notices or correspondence regarding this claim must be forwarded to the following address

In the matter of the bankruptcy (*or* the proposal *or* the receivership) of _____ (*name of debtor*) of (*city and province*) and the claim of _____, creditor

I, _____ (*name of creditor or representative of the creditor*), of (*city and province*), do hereby certify

1. That I am a creditor of the above-named debtor (*or* that I am _____ (*state position or title*) of _____ (*name of creditor or representative of the creditor*))

2. That I have knowledge of all of the circumstances connected with the claim referred to below

3. That the debtor was, at the date of bankruptcy (*or* the date of the receivership, *or* in the case of a proposal the date of the notice of intention *or* of the proposal, *if no notice of intention was filed*), namely the _____ day of _____, _____, and still is, indebted to the creditor in the sum of $ _____ as specified in the statement of account (*or* affidavit) attached and marked Schedule "A", after deducting any counterclaims to which the debtor is entitled. (*The attached statement of account or affidavit must specify the vouchers or other evidence in support of the claim.*)

4. *Check and complete appropriate category*

☐ A UNSECURED CLAIM OF $ _____

(*Other than as a customer contemplated by Section 262 of the Act*)

That in respect of this debt, I do not hold any assets of the debtor as security and

(*Check appropriate description*)

☐ Regarding the amount of $ _____, I claim a right to a priority under section 136 of the Act.
☐ Regarding the amount of $ _____, I do not claim a right to a priority.

(*Set out on an attached sheet details to support priority claim*)

☐ A CLAIM OF LESSOR FOR DISCLAIMER OR RESILIATION OF A LEASE OF $ _____

That I hereby make a claim under subsection 65.2(4) of the Act, particulars of which are as follows:

(*Give full particulars of the claim, including the calculations upon which the claim is based*)

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FORM 31 -- *Continued*

☐ C. SECURED CLAIM OF $

That in respect of this debt, I hold assets of the debtor valued at $ as security, particulars of which are as follows:

(Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents)

☐ D. CLAIM BY FARMER, FISHERMAN OR AQUACULTURIST OF $

That I hereby make a claim under subsection 81.2(1) of the Act for the unpaid amount of $

(Attach a copy of sales agreement and delivery receipts)

☐ E. CLAIM BY WAGE EARNER OF $

☐ That I hereby make a claim under subsection 81.3(8) of the Act in the amount of $ _____
☐ That I hereby make a claim under subsection 81.4(8) of the Act in the amount of $ _____

☐ F. CLAIM BY EMPLOYEE FOR UNPAID AMOUNT REGARDING PENSION PLAN OF $ _____.

☐ That I hereby make a claim under subsection 81.5 of the Act in the amount of $ _____
☐ That I hereby make a claim under subsection 81.6 of the Act in the amount of $ _____

☐ G. CLAIM AGAINST DIRECTOR $ _____

(To be completed when a proposal provides for the compromise of claims against directors)

That I hereby make a claim under subsection 50(13) of the Act, particulars of which are as follows:

(Give full particulars of the claim, including the calculations upon which the claim is based)

☐ H. CLAIM OF A CUSTOMER OF A BANKRUPT SECURITIES FIRM $ ____

That I hereby make a claim as a customer for net equity as contemplated by section 262 of the Act, particulars of which are as follows:

(Give full particulars of the claim, including the calculations upon which the claim is based)

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FORM 31 -- *Concluded*

5 That, to the best of my knowledge, I am (*or* the above-named creditor is) (*or* am not *or* is not) related to the debtor within the meaning of section 4 of the Act, and have (*or* has) (*or* have not *or* has not) dealt with the debtor in a non-arm's-length manner

6 That the following are the payments that I have received from, the credits that I have allowed to, and the transfers at undervalue within the meaning of subsection 2(1) of the Act that I have been privy to or a party to with the debtor within the three months (*or, if the creditor and the debtor are related within the meaning of section 4 of the Act or were not dealing with each other at arm's length,* within the 12 months) immediately before the date of the initial bankruptcy event within the meaning of subsection 2(1) of the Act. (*provide details of payments, credits and transfers at undervalue*)

7 (*Applicable only in the case of the bankruptcy of an individual*)

☐ I request to be informed, pursuant to subparagraph 68(4)(a)(i) of the Act, of the amount fixed under subparagraph 68(4)(a)(i), which is the amount of surplus income that the bankrupt is required to pay to the estate of the bankrupt

☐ If the trustee determines that there is no surplus income, I request to be informed of that determination in accordance with paragraph 68(4)(b) of the Act.

☐ I request that a copy of the report filed by the trustee regarding the bankrupt's application for discharge pursuant to subsection 170(1) of the Act be sent to the above address

Dated at _____, this _____ day of _____.

_____ _____

Witness Creditor

Telephone No.. _____

Fax No.. _____

Email address. _____

NOTES If an affidavit is attached, it must have been made before a person qualified to take affidavits

If a copy of this Form is sent electronically, the name and contact information of the sender, prescribed in Form 11, must be added at the end of the document.

WARNINGS A creditor may, pursuant to subsection 128(3) of the Act, redeem a security or payment to the secured creditor of the sale or the value of the security as assessed, in a period of 30 months after the secured creditor

Subsection 201(1) of the Act provides severe penalties for making any false claim, proof, declaration or statement of account

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FORMULAIRE 31

Preuve de reclamation
(articles 50.1, 81.5 et 81.6, paragraphes 65.2(4), 81.2(1), 81.3(8), 81.4(8), 102(2), 124(2) et 128(1) et alineas 51(1)c) et 66.14b) de la Loi)

Expédier tout avis ou toute correspondance concernant la présente réclamation à l'adresse suivante

_____ _____
_____ _____

Dans l'affaire de la faillite (ou de la proposition ou de la mise sous séquestre) de _____ (*nom du débiteur*) de _____ (*ville et province*) et de la réclamation de _____ (*créancier*)

Je soussigné, _____ (*nom du créancier ou du représentant du créancier*), de _____ (*ville et province*), certifie ce qui suit :

1. *Je suis le créancier du débiteur susnommé (ou je suis* _____ *[préciser le poste ou la fonction]* de _____ *[nom du créancier ou de son représentant]*)

2. Je suis au courant de toutes les circonstances entourant la réclamation visée par le présent formulaire.

3. Le débiteur était, à la date de la faillite (ou à la date de la mise sous séquestre ou, s'il s'agit d'une proposition, à la date du dépôt de l'avis d'intention ou, à défaut, à la date du dépôt de la proposition), sous le _____, endetté envers le créancier et l'est toujours, pour la somme de _____ $, comme l'indique l'état de compte (ou l'affidavit) ci-annexé et désigné comme l'annexe A, après déduction du montant de toute créance compensatoire à laquelle le débiteur a droit. (*L'état de compte ou l'affidavit annexé doit faire mention des pièces justificatives ou de toute autre preuve à l'appui de la réclamation.*)

4. (*Cochez la catégorie qui s'applique et remplissez les parties requises.*)

☐ A. RÉCLAMATION NON GARANTIE AU MONTANT DE _____ $

(*autre qu'une réclamation d'un créancier visée par l'article 262 de la Loi*)

En ce qui concerne cette créance, je ne détiens aucun avoir du débiteur à titre de garantie et :

(*Cochez ce qui s'applique.*)

☐ pour le montant de _____ $, je ne revendique aucun droit à un rang prioritaire.

☐ pour le montant de _____ $, je revendique le droit à un rang prioritaire en vertu de l'article 136 de la Loi.

(*Indiquez sur une feuille annexée les renseignements à l'appui de la réclamation prioritaire.*)

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FORMULAIRE 31 (*suite*)

☐ B. RÉCLAMATION DU LOCATEUR SUITE À LA RÉSILIATION D'UN BAIL, AU MONTANT DE _____ $

J'ai une réclamation en vertu du paragraphe 65.2(4) de la Loi, dont les détails sont mentionnés ci-après :

(*Donnez tous les détails de la réclamation, y compris les calculs s'y rapportant.*)

☐ C. RÉCLAMATION GARANTIE AU MONTANT DE $

En ce qui concerne la créance susmentionnée, je détiens des avoirs du débiteur à titre de garantie, dont la valeur estimative s'élève à $ et dont les détails sont mentionnés ci-après :

(*Donnez des renseignements complets au sujet de la garantie, y compris la date à laquelle elle a été donnée et la valeur que vous lui attribuez, et annexez une copie des documents relatifs à la garantie.*)

☐ D. RÉCLAMATION D'UN AGRICULTEUR, D'UN PÊCHEUR OU D'UN AQUICULTEUR AU MONTANT DE $

J'ai une réclamation en vertu du paragraphe 81.2(1) de la Loi pour la somme impayée de $. (*Veuillez joindre une copie de l'acte de vente et des reçus de livraison.*)

☐ E. RÉCLAMATION D'UN SALARIÉ AU MONTANT DE $

☐ J'ai une réclamation en vertu du paragraphe 81.3(8) de la Loi au montant de _ _____ $
☐ J'ai une réclamation en vertu du paragraphe 81.4(8) de la Loi au montant de __ ____ .$

☐ F. RÉCLAMATION D'UN EMPLOYÉ RELATIVE AU RÉGIME DE PENSION AU MONTANT DE _____ $

☐ J'ai une réclamation en vertu du paragraphe 81.5 de la Loi au montant de _____ $.
☐ J'ai une réclamation en vertu du paragraphe 81.6 de la Loi au montant de $.

☐ G. RÉCLAMATION CONTRE LES ADMINISTRATEURS AU MONTANT DE _____$

(*À remplir lorsque la proposition vise une transaction quant à une réclamation contre les administrateurs.*)

J'ai une réclamation en vertu du paragraphe 50(13) de la Loi, dont les détails sont mentionnés ci-après :

(*Donnez tous les détails de la réclamation, y compris les calculs s'y rapportant.*)

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FORMULAIRE 31 (*suite*)

☐ II. RÉCLAMATION D'UN CLIENT D'UN COURTIER EN VALEURS MOBILIÈRES FAILLI AU MONTANT DE _____ $

J'ai une réclamation en tant que client en conformité avec l'article 262 de la Loi pour des capitaux nets, dont les détails sont mentionnés ci-après :

(Donner tous les détails de la réclamation, y compris les calculs s'y rapportant.)

5. Au meilleur de ma connaissance, je suis lié (*ou* le créancier susnommé est lié) (*ou* je ne suis pas lié *ou* le créancier susnommé n'est pas lié) au débiteur selon l'article 4 de la Loi, et j'ai (*ou* le créancier susnommé a) (*ou* je n'ai pas *ou* le créancier susnommé n'a pas) un lien de dépendance avec le débiteur.

6. Les montants suivants constituent les paiements que j'ai reçus du débiteur, les crédits que j'ai attribués à celui-ci et les opérations sous-évaluées selon le paragraphe 211 de la Loi auxquelles j'ai contribué ou été partie intéressée au cours des trois mois (*ou, si le créancier et le débiteur sont des « personnes liées » au sens du paragraphe 4(2) de la Loi ou ont un lien de dépendance*, au cours des 12 mois) précédant immédiatement l'ouverture de la faillite, telle que définie au paragraphe 2(1) de la Loi. (*Donnez les détails des paiements, des crédits et des opérations sous-évaluées.*)

7. *(Applicable seulement dans le cas de la faillite d'une personne physique)*

☐ Je demande que l'on m'avise, conformément au paragraphe 68(4) de la Loi, du montant de revenu excédentaire que le failli doit verser à l'actif de la faillite.

☐ Si le syndic conclut que le failli n'a aucun revenu excédentaire, je demande que l'on m'avise de cette conclusion, conformément au paragraphe 68(4) de la Loi.

☐ Je demande qu'une copie du rapport dûment rempli par le syndic quant à la demande de libération du failli, en conformité avec le paragraphe 170(1) de la Loi, me soit expédiée à l'adresse susmentionnée.

Date le _____, à _____ _____ —.

_____
Témoin

_____
Créancier

Numéro de téléphone :
Numéro de télécopieur :
Adresse électronique :

REMARQUES : Si un affidavit est joint au présent formulaire, il doit avoir été fait devant une personne autorisée à recevoir des affidavits.

Lorsqu'une copie du présent formulaire est envoyée par voie électronique, par des moyens tels que le courriel, le nom et les coordonnées de l'expéditeur, tels qu'indiqués sur le formulaire 1.1, doivent figurer à la fin du document.

AVERTISSEMENTS : Le syndic peut, en vertu du paragraphe 128(3) de la Loi, exiger une garantie du créancier garantie de la créance ou de la valeur de la garantie telle qu'elle a été fixée par le créancier garanti dans la preuve de garantie.

Le paragraphe 201(1) de la Loi prévoit l'interdiction de porter sciemment en cas de présentation de réclamations, de preuves, de déclarations ou d'états de compte qui sont faux.

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FORM 79

Statement of Affairs (Non-Business Bankruptcy Proposal)
(Subsections 49(2) and 158(*d*) of the Act / Subsections 50(2) and 62(1) and Paragraph 66.13(2)(*d*) of the Act)

(Title Form 1)

□ **Original** □ **Amended**

ASSETS							
Type of assets		Description (*provide details*)	Estimate dollar value	Exempt property		Secured amount/ liens	Estimated net realizable dollar value*
				Yes	No		
1. Cash on hand							
2. Furniture							
3. Personal effects							
4. Cash-surrender value of life insurance policies, RRSPs, etc.							
5. Securities							
6. Real property or immovables	House						
	Cottage						
	Land						
7. Motor vehicle	Automobile						
	Motorcycle						
	Snowmobile						
	Other						
8. Recreational equipment							
9. Estimated tax refund							
10. Other assets							
TOTAL							

_____
Date

_____
Bankrupt/Debtor

*For a summary administration, indicate value net of the direct realization costs referred to in Rule 128(1) of the *Bankruptcy and Insolvency Act*.

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FORM 79 -- *Continued*

LIABILITIES						
			Liabilities type code (LTC) 1 Real property or immovable mortgage or hypothec 2 Bank loans (except real property mortgage) 3 Finance company loans 4 Credit cards - bank/trust company issuers 5 Credit cards - other issuers 6 Taxes - federal/provincial/municipal 7 Student loans 8 Loans from individuals 9 Other			
Creditor	Address, including postal code	Account No.	Amount of debt			Enter LTC
			Unsecured	Secured	Preferred	
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						
20						
	TOTAL	Unsecured				
	TOTAL	Secured				
	TOTAL	Preferred				

Date

Bankrupt/Debtor

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FORM 79 -- *Continued*

A. INFORMATION RELATING TO THE AFFAIRS OF THE BANKRUPT/DEBTOR			
1. Family name:	Given names:		Date of birth: ____/____/____ YYYY/MM/DD
	Gender: F ☐ M ☐		
2. Also known as:			
3. Complete address, including postal code:			
4. Marital status: (*specify month and year of event if it occurred in the last five years*)	____ ____ Married	____ ____	Single
	Widowed	____ ____	Separated
	____ ____ Divorced	____ ____ partner	Common-law
5. Full name of spouse or common-law partner:			
6. Name of present employer:		Occupation (bankrupt/debtor):	
7A. Number of persons in household family unit, including bankrupt/debtor:			
7B. Number of persons 17 years of age or younger:			
8. Have you operated a business within the last five years?	Yes	No	(If yes) Name, type and period of operation:

B. WITHIN 12 MONTHS PRIOR TO THE DATE OF THE INITIAL BANKRUPTCY EVENT, HAVE YOU, EITHER IN CANADA OR ELSEWHERE:		
9A. Sold or disposed of any of your property?	Yes	No
9B. Made payments in excess of the regular payments to creditors?	Yes	No
9C. Had any property seized by a creditor?	Yes	No
C. WITHIN FIVE YEARS PRIOR TO THE DATE OF THE INITIAL BANKRUPTCY EVENT, HAVE YOU, EITHER IN CANADA OR ELSEWHERE:		
10A. Sold or disposed of any property?	Yes	No
10B. Made any gifts to relatives or others in excess of $500?	Yes	No

_____ Date

_____ Bankrupt/Debtor

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FORM 79 – *Concluded*

D. BUDGET INFORMATION: ***Attach Form 65 to this form***
11A. Have you ever made a proposal under the *Bankruptcy and Insolvency Act*? Yes ___ No ___
11B. Have you been bankrupt before in Canada? Yes ___ No ___
(If yes, provide the following details for all insolvency proceedings: (a) filing date and location of the proceedings; (b) name of trustee or administrator; (c) if applicable, was the proposal successful; (d) date on which Certificate of Full Performance or Discharge was obtained.)
12. Do you expect to receive any sums of money that are not related to your normal income, or any other property within the next 12 months? Yes ___ No ___
13. If you answered Yes to any of questions 8, 9 or 11, provide details:
14. Give reasons for your financial difficulties:

I, _____, of the _____ of _____ in the Province of _____, do swear (*or* solemnly declare) that this statement is, to the best of my knowledge, a full, true and complete statement of my affairs on the day of and fully discloses all property and transactions of every description that is or was in my possession or that may devolve on me in accordance with the *Bankruptcy and Insolvency Act*.

SWORN (*or* SOLEMNLY DECLARED)
before me at _____ (*city, town or village*),
in the Province of _____,
on this ___ day of _____ _____

_____ _____
Commissioner of Oaths
for the Province of

_____
Bankrupt/Debtor

NOTE If a copy of this Form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

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FORMULAIRE 79

Bilan – Faillite ou proposition non commerciale
(paragraphe 49(2), alinéa 158*d*), paragraphes 50(2) et 62(1) et alinéa 66.13(2)*a*) de la Loi)

(*Intitulé Formulaire 1*)

□ original □ modifié

ACTIF							
Genre d'actif		Description (*Veuillez donner des détails*)	Valeur estimée en dollars	Biens exemptés		Montant garanti / privilège	Valeur estimée nette en dollars*
				Oui	Non		
1. Espèces en main							
2. Ameublement							
3. Effets personnels							
4. Valeur de rachat de la police d'assurance-vie, des REER, etc.							
5. Valeurs mobilières							
6. Immeubles et biens réels	Maison						
	Chalet						
	Terrain						
7. Véhicules à moteur	Automobile						
	Motocyclette						
	Motoneige						
	Autre						
8. Équipement de loisirs							
9. Remboursement d'impôt estimé							
10. Autres éléments d'actifs							
TOTAL							

Date

Failli ou débiteur

* Pour une administration sommaire, veuillez indiquer la valeur nette après déduction des coûts directement liés à la réalisation prévus à la Règle 128(1) de la *Loi sur la faillite et l'insolvabilité*.

FORMULAIRE 79 (*suite*)

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PASSIF						
			Code du genre de passif (CGP) 1 Hypothèques sur les biens immeubles 2 Prêts bancaires (excepté hypothèques sur les biens immeubles) 3 Prêts des sociétés de crédit 4 Cartes de crédit émises par les banques et les sociétés de fiducie 5 Autres émetteurs de cartes de crédit 6 Impôts fédéral/provincial, taxes municipales 7 Prêts étudiants 8 Prêts de particuliers 9 Autre			
Créancier	Adresse, incluant le code postal	N° de compte	Montant de la dette			Entrer le CGP
			Non garantie	Garantie	Privilégiée	
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						
20						
	TOTAL	Non garantie				
	TOTAL	Garantie				
	TOTAL	Privilégiée				

Date

Failli ou débiteur

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FORMULAIRE 79 (*suite*)

RENSEIGNEMENTS RELATIFS AUX AFFAIRES DU FAILLI OU DU DÉBITEUR				
1. Nom de famille :	Prénom(s) :		Né(e) le : ___/___/___ JJ / MM / AAAA	
	Sexe : F □ H □			
2. Pseudonymes :				
3. Adresse complète – y compris le code postal :				
4. État civil : *(Précisez le mois et l'année si l'événement est survenu dans les cinq dernières années)*	____ ____ Marié(e)		____ ____ Célibataire	
	____ ____ Veuf (veuve)		____ ____ Séparé(e)	
	____ ____ Divorcé(e)		____ ____ Conjoint(e) de fait	
5. Nom complet de l'époux ou du conjoint de fait :				
6. Nom du présent employeur :			Occupation (failli ou débiteur)	
7A. Nombre de personnes dans l'unité familiale, incluant le failli ou le débiteur :				
7B. Nombre de personnes âgées de 17 ans et moins :				
8. Avez-vous exploité une entreprise au cours des cinq dernières années?	Oui	Non	(Si oui) Nom, type d'entreprise et période d'exploitation :	
B – AU COURS DES 12 MOIS PRÉCÉDANT L'OUVERTURE DE LA FAILLITE, AVEZ-VOUS, AU CANADA OU AILLEURS :				
9A. Vendu quelques-uns de vos biens ou disposé de ces biens?			Oui	Non
9B. Fait des paiements en plus des remises ordinaires à vos créanciers?			Oui	Non
9C. Subi des saisies de biens par vos créanciers?			Oui	Non
C – AU COURS DES CINQ ANNÉES PRÉCÉDANT L'OUVERTURE DE LA FAILLITE, AVEZ-VOUS, AU CANADA OU AILLEURS :				
10A. Vendu quelques biens ou disposé de ces biens?			Oui	Non
10B. Fait des dons de plus de 500 $ à des parents ou à d'autres personnes?			Oui	Non

_____ Date

_____ Failli ou débiteur

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FORMULAIRE 79 (*suite*)

D – RENSEIGNEMENTS BUDGÉTAIRES : *Veuillez joindre le formulaire 65 au présent formulaire.*
11A. Avez-vous déjà fait une proposition en vertu de la *Loi sur la faillite et l'insolvabilité*? Oui_____ Non____
11B. Avez-vous déjà été en faillite au Canada? Oui_____ Non_____
Si vous avez répondu par l'affirmative, veuillez fournir les détails suivants pour toute procédure d'insolvabilité : a) Date et lieu du dépôt des procédures; b) Nom du syndic ou de l'administrateur; c) Si applicable, indiquez si la proposition a été exécutée intégralement; d) Date à laquelle le débiteur a obtenu le certificat d'exécution intégrale ou date de sa libération. _____ _____
12. Vous attendez-vous à recevoir des sommes d'argent en dehors du cours normal des affaires ou d'autres biens au cours des 12 prochains mois? Oui_____ Non_____
13. Si vous avez répondu par l'affirmative aux questions 8, 9 ou 11, veuillez donner des détails. _____
14. Donnez les raisons de vos difficultés financières. _____

Je soussigné, _____, de _____ de _____, dans la province de _____, étant dûment assermenté (*ou* ayant déclaré solennellement), déclare que le bilan est, au meilleur de ma connaissance, un relevé complet, véridique et entier de mes affaires en ce _____(*date*), et indique au complet tous mes biens et transactions de quelque nature qu'ils soient, en ma possession et dévolus, tels que définis par la *Loi sur la faillite et l'insolvabilité*

ASSERMENTÉ (*ou* DÉCLARÉ SOLENNELLEMENT)
devant moi à _____ (*ville ou village*)
dans la province de _____,
ce jour de

_____ _____
Commissaire à l'assermentation Failli ou débiteur
pour la province de _____

REMARQUE : Lorsqu'une copie du présent formulaire est envoyée par voie électronique, par des moyens tels que le courriel, le nom et les coordonnées de l'expéditeur, tels qu'indiqués sur le formulaire 1.1, doivent figurer à la fin du document.

Proposed assessed value - Sec. 50.1(2)

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(2) Where a proposal made to a secured creditor in respect of a claim includes a proposed assessed value of the security in respect of the claim, the secured creditor may file with the trustee a proof of secured claim in the prescribed form, and may vote as a secured creditor on all questions relating to the proposal in respect of an amount equal to the lesser of

(a) the amount of the claim, and

(b) the proposed assessed value of the security.

Idem - Sec. 50.1(3)

(3) Where the proposed assessed value is less than the amount of the secured creditor's claim, the secured creditor may file with the trustee a proof of claim in the prescribed form, and may vote as an unsecured creditor on all questions relating to the proposal in respect of an amount equal to the difference between the amount of the claim and the proposed assessed value.

Idem - Sec. 50.1(4)

(4) Where a secured creditor is dissatisfied with the proposed assessed value of his security, the secured creditor may apply to the court, within fifteen days after the proposal is sent to the creditors, to have the proposed assessed value revised, and the court may revise the proposed assessed value, in which case the revised value henceforth applies for the purposes of this Part.

Where no secured creditor in a class takes action - Sec. 50.1(5)

(5) Where no secured creditor having a secured claim of a particular class files a proof of secured claim at or before the meeting of creditors, the secured creditors having claims of that class shall be deemed to have voted for the refusal of the proposal.

1992, c. 27, s. 19;

1997, c. 12, s. 31(F).

Excluded secured creditor - Sec. 50.2

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy - Sec. 50.3

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention - Sec. 50.4

50.4 (1) Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

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(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

Certain things to be filed - Sec. 50.4(2)

(2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

Creditors may obtain statement - Sec. 50.4(3)

(3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

Exception - Sec. 50.4(4)

(4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

Trustee protected - Sec. 50.4(5)

(5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

Trustee to notify creditors - Sec. 50.4(6)

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

Trustee to monitor and report - Sec. 50.4(7)

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

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(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

Where assignment deemed to have been made - Sec. 50.4(8)

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Extension of time for filing proposal - Sec. 50.4(9)

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time - Sec. 50.4(10)

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal - Sec. 50.4(11)

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

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(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.
1992, c. 27, s. 19;
1997, c. 12, s. 32;
2004, c. 25, s. 33(F);
2005, c. 47, s. 35;
2007, c. 36, s. 17.

Trustee to help prepare proposal - Sec. 50.5
50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.
1992, c. 27, s. 19.

Order — interim financing - Sec. 50.6
50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Individuals - Sec. 50.6(2)
(2) In the case of an individual,
(a) they may not make an application under subsection (1) unless they are carrying on a business; and
(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Priority - Sec. 50.6(3)
(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priority — previous orders - Sec. 50.6(4)
(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

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Factors to be considered - Sec. 50.6(5)
(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;
(b) how the debtor's business and financial affairs are to be managed during the proceedings;
(c) whether the debtor's management has the confidence of its major creditors;
(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
(e) the nature and value of the debtor's property;
(f) whether any creditor would be materially prejudiced as a result of the security or charge; and
(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

2005, c. 47, s. 36;
2007, c. 36, s. 18.

Calling of meeting of creditors - Sec. 51
51. (1) The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

(a) a notice of the date, time and place of the meeting;
(b) a condensed statement of the assets and liabilities;
(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books;
(d) a copy of the proposal;
(e) the prescribed forms, in blank, of

(i) proof of claim,
(ii) in the case of a secured creditor to whom the proposal was made, proof of secured claim, and
(iii) proxy,

if not already sent; and
(f) a voting letter as prescribed.

In case of a prior meeting - Sec. 51(2)
(2) Where a meeting of his creditors at which a statement or list of the debtor's assets, liabilities and creditors was presented was held before the trustee is required by this section to convene a meeting to consider the proposal and at the time when the debtor requires the convening of the meeting the condition of the debtor's estate remains substantially the same as at the time of the former meeting, the trustee may omit observance of the provisions of paragraphs (1)(b) and (c).

Chair of first meeting - Sec. 51(3)
(3) The official receiver, or the nominee thereof, shall be the chair of the meeting referred to in subsection (1) and shall decide any questions or disputes arising at the meeting, and any creditor may appeal any such decision to the court.

R.S., 1985, c. B-3, s. 51;
1992, c. 1, s. 20, c. 27, s. 20;
1999, c. 31, s. 19(F);
2005, c. 47, s. 123(E).

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Adjournment of meeting for further investigation and examination - Sec. 52

52. Where the creditors by ordinary resolution at the meeting at which a proposal is being considered so require, the meeting shall be adjourned to such time and place as may be fixed by the chair

(a) to enable a further appraisal and investigation of the affairs and property of the debtor to be made; or

(b) for the examination under oath of the debtor or of such other person as may be believed to have knowledge of the affairs or property of the debtor, and the testimony of the debtor or such other person, if transcribed, shall be placed before the adjourned meeting or may be read in court on the application for the approval of the proposal.

R.S., 1985, c. B-3, s. 52;
2005, c. 47, s. 123(E).

Creditor may assent or dissent - Sec. 53

53. Any creditor who has proved a claim, whether secured or unsecured, may indicate assent to or dissent from the proposal in the prescribed manner to the trustee prior to the meeting, and any assent or dissent, if received by the trustee at or prior to the meeting, has effect as if the creditor had been present and had voted at the meeting.

R.S., 1985, c. B-3, s. 53;
1992, c. 1, s. 20, c. 27, s. 21.

Vote on proposal by creditors - Sec. 54

54. (1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

Voting system - Sec. 54(2)

(2) For the purpose of subsection (1),

(a) the following creditors with proven claims are entitled to vote:

(i) all unsecured creditors, and

(ii) those secured creditors in respect of whose secured claims the proposal was made;

(b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and

(ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);

(c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Certain Crown claims - Sec. 54(2.1)

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(2.1) For greater certainty, subsection 224(1.2) of the Income Tax Act shall not be construed as classifying as secured claims, for the purpose of subsection (2), claims of Her Majesty in right of Canada or a province for amounts that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Caisse populaire Desjardins de l'Est de Drummond *v.* Canada, 2009 SCC 29, [2009] 2 S.C.R. 94 - Crown's Interest on Deemed Trust of Income Tax/EI as Security Interest under ITA

Caisse populaire Desjardins de l'Est de Drummond,
in Right of the Caisse populaire du Bon Conseil *Appellant*

v.

Her Majesty The Queen in Right of Canada *Respondent*

Indexed as: Caisse populaire Desjardins de l'Est de Drummond *v.* Canada

Neutral citation: 2009 SCC 29.

File No.: 31787.

2008: February 29; 2009: June 19.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation — Income tax — Trust for moneys deducted — Employer defaulting on line of credit and financial institution exercising right of compensation on employer's term deposit pursuant to agreement — Deemed trust in favour of Crown over property of employer that has deducted income tax and employment insurance premiums at source — Crown seeking to collect amount due by employer for unremitted source deductions from proceeds of term deposit — Whether compensation agreement between financial institution and employer created "security interest" within meaning of s. 224(1.3) of Income Tax Act — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 224(1.3) "security interest", 227(4.1).

On September 18, 2000, the Caisse granted Camvrac a line of credit up to $277,000. A week later, Camvrac deposited $200,000 with the Caisse in accordance with a "Term Savings Agreement". Under the agreement, the deposit was neither negotiable nor transferable. On the same day, the Caisse and Camvrac entered into a "Security Given Through Savings" agreement in which Camvrac agreed to maintain and permit the Caisse to retain the deposit of $200,000 for the duration of its indebtedness to the Caisse. It also agreed that, in the event it defaulted, there would be compensation between the credit agreement and the term deposit. Camvrac defaulted on the loan on November 25, 2000, and later made an assignment in bankruptcy. The Caisse noted on its copy of the "Term Savings Agreement": "To be closed on 21/2/2001 to realize on security". Since Camvrac had failed to remit to the Crown income tax and employment insurance premiums deducted at source, the Crown gave the Caisse notice to pay the amount owing to the Crown from the proceeds of the deposit. Section 227(4.1) of the *Income Tax Act* ("*ITA*") and s. 86(2.1) of the *Employment Insurance Act* ("*EIA*") create a deemed trust in favour of the Crown over property of the employer that has deducted income tax and employment insurance premiums at source. This trust applies to property of an employer and property

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held by any secured creditor of the employer that, but for its security interest, would be property of the employer. The property is impressed with the deemed trust at the time the unremitted amounts were deducted at source by the employer. The Caisse unsuccessfully challenged the recovery process. The prothonotary, the Federal Court and the Federal Court of Appeal held that the Crown was entitled to recover the amounts due and the interest paid at the rate provided for in ss. 36(2) and 37(2) of the *Federal Courts Act*.

Held (LeBel and Deschamps JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Fish, Charron and Rothstein JJ.: The agreement between the Caisse and Camvrac gave rise to a "security interest" for the purposes of s. 224(1.3) *ITA*. Camvrac's property subject to the security interest is thus deemed to be held in trust for the Crown under s. 227(4.1) *ITA* and s. 86(2.1) *EIA* because Camvrac did not remit to the Crown income tax and employment insurance premiums deducted at source. [1] [2]

The definition of "security interest" in s. 224(1.3) does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a security interest within the meaning of this section. Parliament has chosen an expansive definition of security interest in s. 224(1.3) in order to enable maximum recovery by the Crown under its deemed trust for unremitted income tax and employment insurance premiums deducted at source by employers. It is open to Parliament to define a term in an area of its own legislative competence in order to ensure that there is a rule of general application across all of the provinces. [12] [14] [15]

Whether a contract providing for a right to compensation (in Quebec) or a right to set-off (in the common law provinces) also gives rise to a security interest within the meaning of s. 224(1.3) requires that the terms of the contract be carefully considered to determine whether the parties intended to confer on one party an interest in the property of the other party that secures payment or performance of an obligation. If the substance of the agreement demonstrates that the parties intended an interest in property to secure an indebtedness, then a security interest exists within the meaning of s. 224(1.3). In this case, it was the five-year term and the maintenance and retention of the $200,000 deposit, as well as Camvrac's agreement not to transfer or negotiate the deposit and that the deposit could only be used as security with the Caisse, that created the Caisse's interest in Camvrac's property for the purposes of s. 224(1.3) *ITA*. In the absence of these encumbrances on Camvrac's deposit, Camvrac could have withdrawn the deposit at any time. Should it have done so and still been indebted to the Caisse, the Caisse's right to compensation would be ineffective because it would not be indebted to Camvrac at the time the Caisse had to resort to the remedy of compensation. [23] [25] [30]

The Caisse is liable to pay to the Crown the amounts for employment insurance premiums and income tax deducted at source by Camvrac up to, and including, any deductions not remitted as of February 21, 2001 — the date on which the Caisse realized on its security. The trust created by s. 227(4.1) *ITA* and s. 86(2.1) *EIA* is deemed to be in effect at any time. It does not matter that the term deposit became the property of Camvrac only after some of the employment insurance premiums and income tax deductions went unremitted since the deemed trust encompasses property which comes into the hands of the tax debtor after the trust arises. The proceeds of Camvrac's term deposit are therefore available to the Crown to discharge all of the outstanding employment insurance premiums and income tax deducted at source by Camvrac, whether the unremitted deductions occurred before or after Camvrac entered into the "Term Savings Agreement" and until February 21, 2001. Interest is calculated in accordance with ss. 36(2) and 37(2) of the *Federal Courts Act* from February 21, 2001, when the Caisse effected compensation, to the date of payment. [59] [61] [63]

Per LeBel and Deschamps JJ. (dissenting): Compensation is not a "security interest" as that term is defined in s. 224(1.3) *ITA*. For the purposes of s. 224(1.3), it is not enough that compensation offers protection similar to that of a security interest: it must also confer a real right. To limit the concept of security interest in s. 224(1.3) to rights that are real in nature is consistent both with the shared meaning of the terms ("security interest" and "*garantie*") used in the two versions of the provision and with Parliament's purpose of giving the deemed trust priority over the security interests referred to in s. 224(1.3). This deemed trust was created to ensure that employers remit income tax deducted from their employees' salaries to the Receiver General for Canada. [65] [98] [101]

Although compensation can be likened to a security interest, it cannot be equated with one in the sense that the term "security interest" must be given in the context of s. 224(1.3) *ITA*. Where compensation may be effected between two debts, the effect is clearly analogous to that of a "security interest" in the broad sense of the term; nevertheless, compensation or set-off is not regarded, in the positive law of either Quebec or the common law provinces, as having the characteristics of a real right. The automatic extinction of mutual debts is an effect of compensation, but it does not constitute the enforcement of a real right in the property in question. Furthermore, a conclusion that compensation is a "security interest" as that term is defined in the federal statute would conflict with the meaning given to the term in provincial personal property security statutes, which exclude set-off. Such an interpretation would also be inconsistent with the common law concept of "set-off", on which numerous business transactions are based. Finally, whether considered in isolation or as a whole, the term for repayment of the deposit amount, the obligation to maintain,

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the right to withhold and the limits on the right to transfer, hypothecate or negotiate the deposit created only personal obligations. [102] [107] [122] [132]

Insofar as the amounts had not been deducted at the time the agreement was entered into, the Caisse's right to conventional compensation may be set up against Her Majesty because Her Majesty cannot have more rights than Camvrac itself had. In Quebec civil law, as at common law, the rule for asserting contractual rights against third-party assignees is based on the general principles governing obligations. The right to conventional compensation is assessed as of the time the right is granted, not as of the time it is exercised. The protection of third parties, codified in art. 1681 *C.C.Q.*, applies to rights acquired before the compensation agreement was signed. Thus, where the trust applies to a claim, it attaches to a legal relationship that corresponds to an active contractual situation, which explains why the beneficiary of the trust may assert only those rights held by the tax debtor. When Parliament wished to give the deemed trust more teeth, it took care to give Her Majesty priority over secured creditors. It did not alter the general rules governing the rights a debtor can assert against its original creditor. [65] [147] [148] [150] [152]

Camvrac's right to recover its claim was subject to the right to compensation that had been granted to the Caisse in September 2000 in the agreement to give savings as security. In the context of that agreement, the right to compensation was a right held by the Caisse that could not be negated solely by the fact of the deemed trust becoming effective. Her Majesty, as a third party, could not demand that the Caisse discharge its debt to Camvrac if the conditions for repayment had not been met. The Caisse's right had to be respected by third parties who acquired rights after the agreement was signed. Consequently, Her Majesty must abide by the compensation agreement, given that her right is subsequent to it. [153]

Her Majesty may, however, claim from the Caisse the amount owed by Camvrac before the compensation agreement was signed in September 2000. The claims of the Caisse and Camvrac have distinct sources: one is based on the variable credit contract, the other, on the term savings agreement. The Caisse's claim against Camvrac dates from September 18, 2000 and Camvrac's claim, from September 25, 2000. On the latter date, Camvrac undertook, first in the term savings agreement, "to make, on the date of acquisition, a deposit in the amount of $200,000", and then in the agreement to give savings as security, to "maintain" a deposit in the amount of $200,000. For Camvrac to be able to undertake in the agreement to give savings as security to "maintain" the deposited amount, its claim resulting from the term savings agreement had to take on an independent existence, if only at the time the deposit was made. Given that the deposit was made before the right to compensation was granted, the deemed trust could have become effective in respect of Camvrac's claim up to the total of the amounts owed to Her Majesty as of September 25, 2000. This is not a case in which the respective debts have the same source and the claim is subject to a right to compensation. Just as Her Majesty's rights are subordinated to the right to compensation for deductions subsequent to the signing of the agreement, the Caisse's right must give way to Her Majesty's pre-existing right. [154] [156]

On the interest issue, there is no need to vary the decision of the Federal Court of Appeal. [157]

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By Deschamps J. (dissenting)

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APPEAL from a judgment of the Federal Court of Appeal (Desjardins, Létourneau and Pelletier JJ.A.), 2006 FCA 366, 361 N.R. 77 (*sub nom. Minister of National Revenue v. Caisse populaire du Bon Conseil*), [2007] 3 C.T.C. 70, 2007 D.T.C. 5220, [2006] F.C.J. No. 1775 (QL), 2006 CarswellNat 5050, affirming a decision of Pinard J., 2005 FC 1563, [2007] 2 C.T.C. 44, 2007 D.T.C. 5664, [2005] F.C.J. No. 1933 (QL), affirming a decision by Mireille Tabib, Prothonotary, 2005 FC 731, 293 F.T.R. 166, 2006 D.T.C. 6385, [2005] F.C.J. No. 900 (QL). Appeal dismissed, LeBel and Deschamps JJ. dissenting.

Reynald Auger and *Jean-Patrick Dallaire*, for the appellant.

Pierre Cossette and *Guy Laperrière*, for the respondent.

The judgment of McLachlin C.J. and Binnie, Fish, Charron and Rothstein JJ. was delivered by

[1] ROTHSTEIN J. — The primary issue in this appeal is whether the agreements between the Caisse populaire ("Caisse") and its customer, Camvrac Enterprises Inc. ("Camvrac"), give rise to a "security interest" within the meaning of that term in s. 224(1.3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"). The definition of "security interest" in s. 224(1.3) *ITA* has also been incorporated by reference in s. 86(2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"). If the agreements between the Caisse and Camvrac do fall within the definition of "security interest" in s. 224(1.3) *ITA*, then the property of Camvrac that is subject to the security interest of the Caisse is deemed to be held in trust for the Crown under s. 227(4.1) *ITA* and s. 86(2.1) *EIA* because Camvrac did not remit to the Crown income tax and employment insurance premiums deducted at source by Camvrac.

[2] In my view, the agreements between the Caisse and Camvrac gave rise to a "security interest" for the purposes of s. 224(1.3) *ITA*. Camvrac's property subject to the security interest was property that was subject to the Crown's deemed trust. I would dismiss the appeal.

I. Facts

[3] On September 18, 2000, the Caisse granted Camvrac a line of credit up to $277,000. On September 25, 2000, Camvrac deposited $200,000 with the Caisse in accordance with a "Term Savings Agreement" providing that the deposit would mature on October 16, 2005. The "Term Savings Agreement" sets out the terms of Camvrac's entitlement to the deposit and the Caisse's obligation to pay Camvrac $200,000. The relevant portions of the "Term Savings Agreement" stated:

[TRANSLATION]

Date of maturity: October 16, 2005

. . .

PROVISIONS GOVERNING THE PRINCIPAL

2. The member [Camvrac] agrees to make, on the date of acquisition, a deposit in the amount of $200,000 (hereinafter referred to as the "initial amount of deposit").
3. On the date of issue associated with the applicable term ("date of issue"), the initial amount of deposit and the interest then accrued on that amount shall be reinvested in the form of a deposit maturing on the maturity date associated with the applicable term ("date of maturity").
4. This deposit may neither be negotiated nor transferred. No amount in principal or interest shall be redeemable or payable before the date of maturity.
5. This deposit may be hypothecated or given as security only in favor of the issuing Caisse.

. . .

[4] The Caisse and Camvrac also entered into a "Security Given Through Savings" agreement. The most relevant terms read:

[TRANSLATION]

1. RIGHT TO WITHHOLDING AND COMPENSATION

To secure the repayment of any sum in principal, interest, costs and accessories owed or to be owed the Caisse by:

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: the Depositor [Camvrac]

. . .

under:

: (a) a line of credit agreement in the amount of $277,000.00 granted to him (her) on 2000-09-18;

. . .

: and under any debts or obligations, present or future, direct or indirect held by:

: the Depositor

. . .

(hereinafter referred to as "the Credit Contract[s]")

the Depositor undertakes to maintain and consents to the withholding by the Caisse, in the account(s) or on the certificate(s) of deposit mentioned below, of the amount of $200,000.00 distributed as follows:

Account or certificate of deposit identification (for deposit certificates, state date issued amount and certificate number)	**Sum withheld by the Caisse**
ALTERNATIVE TERM SAVINGS 5 YEARS IN THE AMOUNT OF $200,000.00	$200,000.00
_____	$_____

. . .

The Caisse may withhold the sums shown above, . . . as long as all the amounts due under the Credit Contract(s) have not been fully repaid and, in the case of a line of credit, as long as it has not been cancelled. In cases of default as provided for below, there shall be compensation between the Credit Contract(s) and the certificate(s) of deposit or the amounts deposited defined above, as provided for in Section 7.

2. SAFEKEEPING OF CERTIFICATES

For the whole term of this agreement, the above-mentioned certificate(s) of deposit shall be kept by the Caisse.

3. HYPOTHEC

To further secure the repayment of any sum owed or to be owed under the Credit Contract(s), the Depositor hypothecates and pledges the above-mentioned certificate(s) of deposit and sums deposited, for an amount equal to the total amount of the sums withheld. The parties also agree that the clause shown on the certificate(s) of deposit stipulating that such certificate(s) are neither negotiable nor transferable shall be deemed cancelled, effective from the date of these presents.

. . .

7. DEFAULT

The Depositor shall be in default in any of the following cases:

(a) if any of the commitments under the Credit Contract(s) or these presents is not fulfilled;

(b) if the Depositor or the Borrower becomes insolvent or goes bankrupt, or if he(she) makes a proposal and it is rejected or annulled;

. . .

In the event of any default:

(a) any sums owing under the Credit Contracts shall immediately become payable;

(b) the Caisse may use the sums deposited or the certificate(s) of deposit contemplated herein, regardless of its(their) having matured or not, to compensate its claim under the Credit Contract(s);

. . .

The consequences of a default are for the exclusive benefit of the Caisse and the latter may waive them expressedly. The Caisse may, among others, without any prejudice to its rights, wait for the maturity date of the certificate(s) of deposit before exercising its rights as provided for in paragraphs (b) and (c) above.

8. RESERVE OF RECOURSES

. . . Furthermore, failure by the Caisse to avail itself of any of its rights in case of default shall not be interpreted as a waiver of such rights.

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[5] Camvrac failed to pay the interest on its line of credit on November 25, 2000 and so was technically in default on that date. However, the Caisse took no steps as a result of the default and, according to the Caisse's account summaries, Camvrac's line of credit continued to accrue interest until January 31, 2001. On February 7, 2001, Camvrac made an assignment in bankruptcy. On February 21, 2001, the Caisse made the following note on its copy of the "Term Savings Agreement" : [TRANSLATION] "To be closed on 21/2/2001 to realize on security." Finally, on June 12, 2001, the Crown gave the Caisse notice to pay the amount owing to the Crown for unremitted employment insurance premiums and income tax deducted at source by Camvrac from the proceeds of the term deposit the Crown said was subject to its deemed trust.

[6] Prothonotary Tabib of the Federal Court, Justice Pinard of the Federal Court, and Justice Létourneau writing for the Federal Court of Appeal found in favour of the Crown: 2005 FC 731, 2006 D.T.C. 6385, aff'd 2005 FC 1563, 2007 D.T.C. 5664, aff'd 2006 FCA 366, 361 N.R. 77. The Caisse now appeals to this Court.

II. The Primary Issue

[7] Under the "Security Given Through Savings" agreement, the Caisse was entitled to effect compensation to reduce or eliminate Camvrac's indebtedness to it if Camvrac defaulted on its line of credit. The Caisse did so. The issue is whether the Crown is the beneficial owner of Camvrac's term deposit to the extent of the unremitted employment insurance premiums and income tax deducted by Camvrac at source as a result of the deemed trust created by s. 227(4.1) *ITA* and s. 86(2.1) *EIA*.

III. Analysis

A. *The Definition of "Security Interest" in Section 224(1.3) of the Income Tax Act*

[8] Parliament has defined "security interest" in s. 224(1.3) *ITA*. This definition provides that:

> "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

[9] Section 227(4.1) *ITA* and s. 86(2.1) *EIA* create a deemed trust in favour of the Crown over property of the employer that has deducted income tax and employment insurance premiums at source. The deemed trust applies to property of the employer and property held by any secured creditor of the employer that, but for its security interest, would be property of the employer. The property is impressed with the deemed trust at the time the unremitted amounts were deducted at source by the employer. Section 227(4.1) *ITA* provides:

> Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

Section 86(2.1) *EIA* is to the same effect with respect to employment insurance premiums deducted by employers at source.

[10] While the definition of "security interest" is similar to legal terminology used in the personal property security and other legislation of the provinces, the definition in s. 224(1.3) *ITA* is the only relevant definition of "security interest" for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*. Both s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, which incorporate by reference the definition of "security interest" from s. 224(1.3) *ITA*, apply

> [n]otwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law . . . [s. 227(4.1) *ITA*]

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> [n]otwithstanding the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law . . . . [s. 86(2.1) *EIA*]

This is a clear indication that the scope of the deemed trust created by these provisions over property of the tax debtor is to be defined in terms of the statutory definition of "security interest" provided by Parliament in s. 224(1.3) *ITA* and not as the term security interest may be used in provincial legislation.

[11] As Binnie J. recently noted in *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 16, "[f]or particular purposes Parliament can and does create its own lexicon." Parliament's authority to define terms without reference to provincial law in areas of federal legislative competency was considered with respect to bankruptcy in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Gonthier J. held for the majority, at para. 32, that

> the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act.

[12] It is therefore open to Parliament to define a term in an area of its own legislative competence (*Constitution Act, 1867*, s. 91(2A) "Unemployment Insurance" and s. 91(3) "The raising of Money by any Mode or System of Taxation"), as it has done here, in order to ensure that there is a rule of general application across all of the provinces. Were provincial law used to define the meaning of "security interest" in s. 224(1.3) *ITA* and, in turn, the scope of the deemed trust created by s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, uniformity could not be achieved. Rather, what constituted a "security interest" for the purposes of s. 224(1.3) *ITA* could be different from province to province. The Minister's ability to recover unremitted source deductions would then vary depending on an employer's location.

[13] Further, if provincial law were used to define the meaning of a "security interest" under s. 224(1.3) *ITA*, a change in the provincial law of property security would affect the scope of the deemed trust created by s. 227(4.1) *ITA* and s. 86(2.1) *EIA* from time to time. This level of uncertainty cannot have been what Parliament intended with the words "any interest in property that secures payment or performance of an obligation" in s. 224(1.3) *ITA*. This definition is incorporated by reference in s. 227(4.1) *ITA* and s. 86(2.1) *EIA* which create the deemed trust in favour of the Crown "[n]otwithstanding . . . any enactment of a province".

[14] In this case, Parliament has chosen an expansive definition of "security interest" in s. 224(1.3) *ITA* in order to enable maximum recovery by the Crown under its deemed trust for unremitted income tax and employment insurance premiums deducted at source by employers. Parliament did so, in part, in response to this Court's decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, which interpreted the former deemed trust provisions in the *ITA* narrowly.

[15] In order to constitute a security interest for the purposes of s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, the creditor must hold "any interest in property that secures payment or performance of an obligation". The definition of "security interest" in s. 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a "security interest" within the meaning of this section. While Parliament has provided a list of "included" examples, these examples do not diminish the broad scope of the words "any interest in property": see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 68, and R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 61-68.

[16] I agree with my colleague that the common linguistic meaning of the defined term "security interest" in s. 224(1.3) *ITA* is the English term "security interest". A "security interest" is defined as any interest in property or "*droit sur un bien*" (right over property) that secures the performance of an obligation.

[17] For the reasons that follow, I conclude that the definition of "security interest" in s. 224(1.3) *ITA* applies to the facts before this Court.

B. *The Relationship Between Contractual Compensation or Set-Off and a Security Interest*

[18] Compensation and set-off are terms of art which I do not purport to define exhaustively in these reasons. Compensation in Quebec is similar to set-off in the common law provinces. There are a number of circumstances giving rise to compensation or set-off. There are also different kinds of compensation and set-off. "Legal compensation" is defined in arts. 1672 ff. of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"). Articles 1672 and 1673 state in part that:

> **1672.** Where two persons are reciprocally debtor and creditor of each other, the debts for which they are liable are extinguished by compensation, up to the amount of the lesser debt.

. . .

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> **1673.** Compensation is effected by operation of law upon the coexistence of debts that are certain, liquid and exigible and the object of both of which is a sum of money or a certain quantity of fungible property identical in kind.

[19] In the common law provinces, "legal set-off" is similarly statutorily defined. In the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, for example, "legal set-off" is defined in s. 111:

> **111.** — (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.
>
> (2) Mutual debts may be set off against each other even if they are of a different nature.
>
> (3) Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance.

[20] "Equitable set-off" was compared and contrasted with legal set-off by Wilson J. in *Holt v. Telford*, [1987] 2 S.C.R. 193. Wilson J. said of equitable set-off, at pp. 205-6:

> The distinction between set-off at law and set-off in equity was canvassed by the British Columbia Court of Appeal in *C.I.B.C. v. Tuckerr Indust. Inc.*, *supra*, at p. 605:
>
> Such a set-off has its origin in equity and does not rest on the statute of 1728. It can apply where mutuality is lost or never existed. It can apply where the cross obligations are not debts.

Equitable set-off, like legal set-off, is also raised by way of cross-claim (see *Holt*, at pp. 212-13).

[21] There may be some differences between legal compensation (in Quebec) and legal and equitable set-off (in the common law provinces). However, the differences between legal compensation and legal and equitable set-off do not arise in this case because this Court is considering a right to compensation conferred on the Caisse by a contract between the Caisse and Camvrac (i.e. the "Security Given Through Savings" agreement). The Caisse and my colleague use the term "*compensation conventionnelle*". I translate "*compensation conventionnelle*" as "contractual compensation".

[22] Contractual compensation achieves a similar goal to legal compensation or legal or equitable set-off, the discharge of mutual debts. However, contractual compensation achieves this goal through mutual consent. It provides the contracting parties with a self-help remedy that avoids the technical requirements of legal compensation or legal or equitable set-off : see J.-L. Baudouin and P.-G. Jobin, *Les obligations* (5th ed. 1998), at para. 981, and K. R. Palmer, *The Law of Set-Off in Canada* (1993), at pp. 263-64. Both a contract providing for a right of compensation in Quebec and a contract providing for a right of set-off in the common law provinces are to be interpreted by a court in a manner that gives effect to the intentions of the parties as reflected in the words of the contract.

[23] I do not think it is correct to make a blanket determination that a contractual right to compensation or a contractual right to set-off can never be associated with a "security interest" or that they are always associated with a "security interest". Whether a contract providing for a right to compensation or a right to set-off also gives rise to a "security interest" within the meaning of s. 224(1.3) *ITA* requires that the terms of the contract be carefully considered to determine whether the parties intended to confer on one party or the other "any interest in property [of the other party] that secures payment or performance of an obligation".

[24] In *The Law of Set-Off* (3rd ed. 2003), Professor S. R. Derham argues, I think persuasively, that some contracts including a right of set-off (or, in this case, contracts including a right of compensation) should be said also to involve security. As an example of a set-off agreement that also contains a security interest, Professor Derham describes a situation very similar to the one before this Court in the following words, at para. 16.82:

> . . . a bank as a condition to the grant of a facility requires that a deposit be made with it which the depositor is not permitted to access until all indebtedness under the facility has been paid, and the parties agree that the bank may appropriate the deposit in discharge of the debt in the event of default in payment. The essence of the arrangement is that the depositor's property, in the form of the account in credit, is to function as a security. Indeed, in the case of a charge-back in which express words of charge are used, a contractual set-off is the very remedy that would be contemplated . . . . [Emphasis added.]

[25] The essence of contractual compensation or set-off is that the terms of the contract reflect the mutual intention of the parties: see Derham, at para. 16.86. If their mutual intention is to create a security interest to ensure that the right of compensation or set-off will be an effective remedy, there is no reason to think that a security interest does not exist simply because the parties have chosen one mechanism for realizing on the security, rather than another. What must be considered is the substance of the agreement. If the substance of the agreement demonstrates that the parties intended an interest in property to secure an indebtedness, then a security interest exists within the meaning of s. 224(1.3) *ITA*.

C. *Application of the Deemed Trust Provisions*

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[26] In this case, the Caisse says that its contractual right to effect compensation with Camvrac is not a "security interest" within the meaning of s. 224(1.3) *ITA*. It says that this contractual right did not confer on it an interest in Camvrac's property with the intention of securing the line of credit that it extended to Camvrac. Rather, the Caisse says that the contractual right allowed it simply to extinguish its own indebtedness to Camvrac.

[27] The Crown submits that the definition of "security interest" in s. 224(1.3) *ITA* is broad enough to include the Caisse's contractual right to effect compensation contained in the "Security Given Through Savings" agreement between the Caisse and Camvrac. It says that the deemed trust created by s. 227(4.1) *ITA* and s. 86(2.1) *EIA* protected its interest in the proceeds of Camvrac's term deposit because the property of Camvrac subject to the Caisse's security interest is beneficially owned by the Crown under its deemed trust to the extent of the unremitted source deductions.

[28] The issue then is whether the Caisse and Camvrac intended the agreements, which included the Caisse's right to effect compensation, to create a "security interest" within the meaning of s. 224(1.3) *ITA*. In my view, they did.

[29] The relevant facts are these. Camvrac made a deposit of $200,000 with the Caisse. Camvrac and the Caisse entered into a "Term Savings Agreement" under which Camvrac and the Caisse agreed that:

(a) Camvrac's deposit would be for a term of five years;
(b) Camvrac could not negotiate or transfer the deposit;
(c) the term deposit could be hypothecated or given as security, but only in favour of the Caisse.

Camvrac and the Caisse also agreed to enter into the "Security Given Through Savings" agreement. Under this agreement, Camvrac and the Caisse agreed that:

(a) "To secure repayment of any sum . . . owed or to be owed the Caisse" by Camvrac under its line of credit that:
    (i) Camvrac would maintain a deposit of $200,000;
    (ii) Camvrac consented to the Caisse withholding repayment of the sum of $200,000;
    as long as the line of credit was still outstanding.
(b) In the event of default, there would be compensation between the line of credit and the deposit of $200,000.

These agreements expressly conferred on the Caisse an interest in the property of Camvrac (i.e. Camvrac's deposit) to secure repayment of Camvrac's indebtedness to the Caisse.

[30] It was the five-year term and the maintenance and retention of the $200,000 deposit, as well as Camvrac's agreement not to transfer or negotiate the deposit and that the deposit could only be used as security with the Caisse, that created the Caisse's interest in Camvrac's property for the purposes of s. 224(1.3) *ITA*. In the absence of these encumbrances on Camvrac's deposit, Camvrac could have withdrawn the deposit at any time. Should it have done so and still been indebted to the Caisse, the Caisse's right to compensation would be ineffective because it would not be indebted to Camvrac at the time the Caisse had to resort to the remedy of compensation. However, in this case the terms of the agreements provided that Camvrac agreed to the encumbrances on its deposit of $200,000 so that the Caisse would continuously be indebted to Camvrac and that on default there would be effective compensation. It is the fact that the agreements secured the Caisse's right to effective compensation by conferring on the Caisse an interest in Camvrac's property that created a "security interest" for the purposes of s. 224(1.3) *ITA*.

[31] I note here, from the words of the agreements, that the Caisse itself conceived of its agreements with Camvrac as creating "security" for the line of credit. The "Term Savings Agreement" provided that the term deposit "may be hypothecated or given as security only in favor of the issuing Caisse" (emphasis added). In the "Security Given Through Savings" agreement, it was Camvrac's term deposit which was used "[t]o secure the repayment" of the line of credit (emphasis added). The hypothecation provision contained in the "Security Given Through Savings" agreement was "[t]o further secure the repayment" (emphasis added). Thus, even in the absence of hypothecation, the agreements granted the Caisse rights over Camvrac's deposit to ensure an effective compensation remedy. The rights and obligations ensuring an effective compensation remedy were the Caisse's primary security because the hypothecation was viewed as "further" security.

[32] While the mechanism by which the Caisse would realize on its security was compensation, that mechanism in no way detracts from the fact that the deposit was encumbered by the conditions agreed to by Camvrac and imposed by the Caisse in order to ensure that the remedy of compensation would be effective. Nor does the fact that the Caisse could realize on its security by means of a book entry diminish the fact that the deposit secured Camvrac's obligation to the Caisse. In the absence of the restrictions imposed by the Caisse, Camvrac's right to repayment of its deposit of $200,000 could have been encumbered or transferred to a third party as security: see arts. 1637 and 2710 *C.C.Q.* and B. Crawford, *The Law of Banking and Payment in Canada* (loose-leaf), vol. 2, at § 9:30.20. Just because a

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creditor holding a security interest (the Caisse) is also the debtor (the Caisse owes the $200,000 deposited by Camvrac to Camvrac) does not make it any less of a security interest for the purposes of s. 224(1.3) *ITA*.

[33] The situation in this case is in contrast to one in which a bank has what may be a standard term in a deposit agreement that any credit in the customer's account may be appropriated by the bank in discharge of the customer's potential indebtedness to the bank. In that case, there is no obligation on the customer to maintain a specific sum or, indeed, any amount deposited in the account at all as security for a loan that may or may not exist. There is no continuous right in the customer's property to protect the bank against default. The customer may withdraw any or all of the amounts in the account at any time. No specific property secures repayment. In these circumstances, based on this type of deposit agreement, the customer's property — its right to claim a deposit — cannot be said to secure its indebtedness to the bank. Unlike the case before this Court, this is a simple contractual right to set-off or compensation without attendant security.

D. *Responses to Deschamps J.*

[34] In my view, the difference in the results reached by Deschamps J. and myself in this case stems from the approaches we have taken. If I understand my colleague's approach correctly, she focusses on the remedy of compensation to conclude it is not a security interest. Under my approach, it is necessary to consider all of the relevant terms of the agreements between Camvrac and the Caisse and not solely the provisions entitling the Caisse to the remedy of compensation. In my view, the issue is not whether compensation alone is viewed as a security interest. It is whether the agreements between the parties — including the Caisse's contractual right to effect compensation — created a "security interest" to ensure that the remedy of compensation would be effective.

[35] Deschamps J. says that a creditor with a right to effect compensation or set-off attains a goal analogous to a security interest. However, in her view, creditors who exercise their right to compensation or set-off are not enforcing a security by realizing on the debtor's property, but are instead just extinguishing mutual obligations.

[36] I agree with her that compensation or set-off is the extinguishment of mutual obligations. However, mutual obligations must exist for compensation to be an effective remedy. If a debtor can, at its own option, eliminate the creditor's liability to it (by withdrawing its deposit), the creditor may have a right of compensation or set-off, but it may not be effective. It is the encumbrances placed on the debtor's claim against the creditor that ensure that the creditor will remain liable to the debtor and, in this way, ensure an effective compensation remedy.

[37] Deschamps J. also notes that compensation is not specifically enumerated in s. 224(1.3) *ITA* and that this is important for two reasons. First, she relies on academic authorities who assert that a contractual right to set-off cannot create a security interest because the right does not confer on the creditor an interest in the debtor's property. Second, she says that compensation would have to be specifically enumerated in s. 224(1.3) *ITA* because compensation and set-off are not included in the provincial statutes respecting personal property security. Legal compensation is not included in the division relating to hypothecs in the *Civil Code of Québec*. She also says that set-off is excluded from the personal property security legislation of the common law provinces which all include definitions of security interest that are similar to that in s. 224(1.3) *ITA*. In light of the exclusion of contractual compensation and contractual set-off from provincial legislation dealing with security interests over property and the fact that contractual compensation does not confer on the creditor an interest in the debtor's property, its absence from the list of examples of security interests provided in s. 224(1.3) *ITA* is evidence that Parliament did not intend to include contractual compensation or contractual set-off within its definition of "security interest".

[38] With respect to my colleague's reliance on academic authorities who say that a contractual right to set-off does not confer on a creditor an interest in property, I understand these authorities differently than my colleague. Professor Derham explains that a contract containing a right to set-off like the one at issue in this case can also confer on a creditor an interest in a debtor's property: see Derham, at para. 16.82. However, the authors upon whom Deschamps J. relies do not address the precise issue before this Court. For example, R. C. C. Cuming, C. Walsh and R. J. Wood say, in *Personal Property Security Law* (2005):

> Set-off, whether contractual or procedural, does not involve a security interest because neither party to the set-off acquires a property interest. [p. 87]

And Professor R. M. Goode says, in *Goode on Legal Problems of Credit and Security* (4th ed. 2008):

> The party asserting it [the right of set-off] never acquires rights in the other's monetary claim at all; he merely asserts a countervailing claim which operates in pro tanto extinction of his monetary liability. [para. 1-19]

However, in this case, the Caisse has acquired rights in Camvrac's property by the encumbrances placed on Camvrac's deposit. Those rights ensured that Camvrac's claim against the Caisse for its deposit would continuously exist in order to ensure that the compensation remedy would be effective. The P. Wood quote relied upon by Deschamps J. states:

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> [With respect to set-off] . . . a depositor does not grant a property right over the depositor's ownership of the deposit claim back to the bank to secure a loan owed by the depositor to the bank.
> (*Set-Off and Netting, Derivatives, Clearing Systems* (2nd ed. 2007), at para. 1-008)

Yet, in this case, Camvrac did grant the Caisse a continuous interest in its deposit.

[39] It appears these authors were considering a bare right to contractual set-off such as the standard form deposit agreement I have discussed above. I believe these authors are saying that the remedy of set-off results in no property of the debtor coming in the hands of the creditor as the result of a set-off. All that occurs is the extinguishment of mutual debts. These authors are not addressing the period of time before set-off takes place where, as in this case, the creditor has taken steps to place restrictions on the debtor's property to ensure that the creditor continuously remains liable to the debtor so that the set-off remedy will be effective.

[40] I agree with my colleague that legal compensation does not appear grouped with hypothecs in the *Civil Code of Québec*. However, the issue is not whether compensation is a security interest. The fact that the terms "contractual compensation" or "contractual set-off" do not specifically appear as examples of the defined term "security interest" in s. 224(1.3) *ITA* does not mean that an agreement which provides for compensation, but which also conforms to the statutory definition of a "security interest" in s. 224(1.3) *ITA* is to be exempted from the purview of this definition. The list is non-exhaustive. Even when the remedial mechanism is compensation, so long as an agreement confers on a creditor an interest in property that secures the payment or performance of an obligation through compensation, the agreement will constitute a "security interest" within the meaning of s. 224(1.3) *ITA*.

[41] Although it is unnecessary for me to decide this point in order to resolve the issues in this appeal, I would respectfully disagree with my colleague that any agreement that provides for contractual set-off is categorically excluded from the personal property security legislation of the common law provinces. In the common law provinces, the approach to personal property security arrangements is functional, rather than formal. For example, s. 3(1) of Alberta's *Personal Property Security Act*, R.S.A. 2000, c. P-7, states that it applies to

> (a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
> (b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.

See also the personal property security acts of the other provinces and territories: s. 3(1) in New Brunswick (S.N.B. 1993, c. P-7.1), Prince Edward Island (R.S.P.E.I. 1988, c. P-3.1), Manitoba (C.C.S.M., c. P35) and Saskatchewan (S.S. 1993, c. P-6.2); s. 2(1) in British Columbia (R.S.B.C. 1996, c. 359), Northwest Territories and Nunavut (both S.N.W.T. 1994, c. 8); s. 4(1) in Nova Scotia (S.N.S. 1995-96, c. 13) and Newfoundland and Labrador (S.N.L. 1998, c. P-7.1); s. 2(a) in Ontario (R.S.O. 1990, c. P.10); and s. 2 in Yukon (R.S.Y. 2002, c. 169).

[42] Given the functional approach to personal property security arrangements in these statutes, it is difficult for me to see how any transaction that confers an interest on a creditor in a debtor's property to secure an obligation could be categorically excluded unless that type of transaction has been defined and expressly excluded by the legislation itself. To my knowledge, an agreement that provides for security together with a right of set-off to realize on that security is not expressly excluded in any of the common law provincial personal property security statutes. What is required by the common law provincial personal property security statutes is a decision about whether a particular contract or agreement in a given case functions as a security interest.

[43] Deschamps J. says the Caisse did not rely on its hypothec. She says the mere obligation of Camvrac to maintain its deposit and the Caisse's right to withhold repayment of the deposit do not create the real right necessary for a "security interest". She distinguishes between "*droit de rétention*", which she says only applies to corporeal property and which has some of the attributes of a real right and a "*droit de retenue*", which applies to retention of amounts of money and which has no attributes of a real right and corresponds to compensation.

[44] At both civil and common law, a claim, like a deposit, may be charged with a real right or become the subject of a creditor's interest in property. For example, accounts receivable are often assigned to lending institutions as security for loans. Indeed, a deposit in a bank or caisse is an account receivable in favour of the customer. In the case of term deposits, in the absence of restrictions imposed by the lending institution, a term deposit may be assigned just like other receivables. An assignee has an interest in or a real right over the account receivable, that is an encumbrance on the claim of the creditor to the proceeds of the receivables whether from debtor customers or from a debtor bank or caisse.

[45] In s. 224(1.3) *ITA*, the word "interest" in English is rendered as "*droit*" or right in French. As Marc Cuerrier notes in "The Harmonization of Federal Tax Legislation" (section 2.3), booklet 7 published in *The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism* (2001), this terminological

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difference in the English and French reflects differences in the two major legal systems of Canada. While in the common law it is possible to speak independently of both rights and interests in property, only rights are recognized in the civil law. As Martin Lamoureux notes in his article "The Income Tax Act, the Excise Tax Act and the Term Interest: An Interesting Case for Harmonization" published in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism — Collection of Studies in Tax Law 2001* (2002), 7.1, the term "*droit*" in civil law corresponds most to the term "interest" in common law.

[46] In this case, the issue is not whether the Caisse's interest in or right over Camvrac's property is one that conforms with the property security legislation of the provinces. This is because the deemed trust created by s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, which incorporate by reference the definition of "security interest" in s. 224(1.3) *ITA*, applies "[n]otwithstanding . . . any enactment of a province" (see also *DaimlerChrysler Financial Services (debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 212 D.L.R. (4th) 41, at para. 31). However, it is of note that the agreements between the Caisse and Camvrac did conform to the requirements for a movable hypothec with delivery established by this Court in *Caisse populaire Desjardins de Val-Brillant v. Blouin*, 2003 SCC 31, [2003] 1 S.C.R. 666, so as to constitute a real right under the *Civil Code of Québec*.

[47] In the *Civil Code of Québec*, a hypothec is defined as a real right (art. 2660 *C.C.Q.*). As my colleague notes, a claim, like an account receivable, can be hypothecated with or without delivery (art. 2710 *C.C.Q.*). In *Val-Brillant*, Gonthier J., for the majority, considered what was necessary for a movable hypothec with delivery over a non-negotiable claim, like the one at issue in this case. He held at para. 28 that:

> A movable hypothec with delivery on a non-negotiable claim is therefore validly granted and published [per arts. 2702 and 2703 C.C.Q.] where (i) the debtor has transferred effective control of the claim to the creditor by giving the creditor the right to collect directly in the event of default, without further authorization by the debtor; (ii) where the claim is evidenced by a non-negotiable title which it is possible to hand over, such title has been handed over to the creditor; and (iii) the necessary steps have been taken so that the hypothec may be set up against the debtor of the claim in accordance with art. 1641 C.C.Q.

[48] In this case, the agreements between the Caisse and Camvrac met these criteria. First, the Caisse had effective control over Camvrac's claim. The five-year term and the conditions in the "Security Given Through Savings" agreement ensured that the Caisse had effective control over Camvrac's deposit and that, in the event of default, the Caisse could effect compensation between the line of credit and Camvrac's deposit without further authorization from Camvrac. Second, it is not clear on the record whether a certificate of deposit was or was not issued in this case. Both clause 2 of the "Security Given Through Savings" agreement and the fact that the Caisse noted on its copy of the "Term Savings Agreement" that it had been [TRANSLATION] "To be closed on 21/2/2001 to realize on security" suggest that, if a certificate of deposit was issued, it was held by the Caisse. However, nothing turns on whether Camvrac's term deposit was evidenced by a certificate of deposit. Gonthier J.'s second criteria for a movable hypothec with delivery over a non-negotiable claim only applies where a non-negotiable title exists. Where it does not, the second criteria is not applicable. Third, a movable hypothec with delivery is set up against the account debtor and all other claimants by taking the necessary steps under art. 1641 *C.C.Q.* Under art. 1641 *C.C.Q.*, the assignment may be set up against the account debtor and other claimants as soon as the account debtor has acquiesced in it. In this case, in respect of Camvrac's deposit, the Caisse is the account debtor as well as the assignee. Obviously, the Caisse as account debtor acquiesced in the assignment of its debt to itself as assignee. In my view, because the agreements between the Caisse and Camvrac met the criteria of a movable hypothec with delivery on a non-negotiable claim and because a hypothec is defined as a real right in the *Civil Code of Québec*, the Caisse must have held a real right over Camvrac's property.

[49] As my colleague notes at para. 129, art. 2702 *C.C.Q.* has been amended and these amendments have come into force since this case was heard. It is not necessary to embark upon an interpretation of these amendments. However, what they point out is that, should provincial law form the basis for defining a "security interest" under s. 224(1.3) *ITA*, the scope of the deemed trust created by s. 227(4.1) *ITA* and s. 86(2.1) *EIA* could change from time to time with changes to provincial property security law. In my view, this result is not contemplated by the words of ss. 224(1.3) and 227(4.1) *ITA*, and s. 86(2.1) *EIA*.

[50] Deschamps J. says that Camvrac's obligation to maintain the deposit and the Caisse's right to withhold repayment "were of residual application" only (para. 120). During the term of the deposit, the Caisse was not required to return the deposit until the term had expired.

[51] Even if the obligation to maintain and the right to retain are residual and apply only after the five-year term of the deposit has expired, they are nonetheless encumbrances that could affect Camvrac's use of its property. Indeed, as Deschamps J. says, they are mechanisms provided "to ensure that legal or conventional compensation could be effected" (para. 120). That is precisely the point. The agreements entered into by Camvrac and the Caisse created

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rights and obligations, including the Caisse's right of retention and Camvrac's obligation to maintain the deposit, to ensure that the Caisse would remain liable to Camvrac if the Caisse had to resort to compensation as a remedy.

[52] Finally, Deschamps J. says that the Caisse's right of retention of Camvrac's $200,000 deposit does not confer on the Caisse a real right to Camvrac's term deposit. She says at para. 121:

> The most important thing to bear in mind is that none of the clauses . . . created a real right or [a] security interest . . . . A term is a deadline for repayment. The right to deduct is simply the right of a creditor not to perform an obligation to pay as long as a debt is owed to him or her. It is, in a way, an extension granted for repayment. As for the obligation to maintain, it is clearly an undertaking by one person to another to perform an obligation. The limit on the right to transfer, hypothecate or negotiate constitutes an obligation "not to do".

[53] She further says, at para. 124, that my approach may conflict with how negative pledges are treated under the functional approach to personal property security in the common law provinces. She quotes Professors Cuming, Walsh and Wood who say, at p. 86:

> A "negative pledge" clause or negative covenant in a loan agreement under which the borrower covenants not to encumber or dispose of some or all of her personal property until the loan is repaid does not create a security interest since, standing alone, the covenant does not create an interest in the property of the borrower. A negative pledge clause in a security agreement cannot prevent the covenantor from giving another effective security interest in the collateral. [Emphasis added.]

[54] I believe her paras. 121 and 124 highlight the difference between us. I would agree with my colleague that no security interest has been created if a contractual right to compensation only means that, should the debtor default, the creditor may retain amounts owed to the debtor, if any. I would also agree that a negative pledge "standing alone" does not "prevent the covenantor from giving another effective security interest in collateral".

[55] However, much more was occurring here. From the outset, the Caisse required that Camvrac make a term deposit subject to encumbrances in order to ensure that the Caisse would remain liable to Camvrac, in the event that the Caisse had to resort to the remedy of compensation as a result of default. The right of retention, the obligation to maintain and Camvrac's pledge not to hypothecate or use its term deposit as security in favour of anyone besides the Caisse were three of a series of encumbrances that created the Caisse's interest in or right over Camvrac's property to ensure that compensation would be an effective remedy.

E. *To Which of the Unremitted Source Deductions Did the Deemed Trust Apply?*

[56] Having concluded that the agreements between the Caisse and Camvrac created a "security interest" within the meaning of s. 224(1.3) *ITA*, it is now necessary to determine whether the deemed trust covered all unremitted source deductions that the Crown sought from the Caisse.

[57] On the facts of this case, some of the unremitted employment insurance premiums and income tax deducted was owed by Camvrac to the Crown before Camvrac entered into the "Term Savings Agreement" with the Caisse. There is some question, then, in this case, whether the deemed trust provisions in s. 227(4.1) *ITA* and s. 86(2.1) *EIA* can confer beneficial ownership on the Crown over Camvrac's after-acquired property (i.e. the term deposit).

[58] A second issue is at what point the Caisse realized on its security in the term deposit by effecting compensation. The Caisse says that the relevant date was the date of default, November 25, 2000. The Crown says that the relevant date was February 21, 2001. Under s. 227(4.1) *ITA* and s. 86(2.1) *EIA*, Camvrac's property is impressed with the Crown's deemed trust from the time income tax and employment insurance premiums were deducted at source by Camvrac. The date at which the Caisse effected compensation is important because unremitted employment insurance premiums and income tax were deducted by Camvrac until the end of January 2001. If the Caisse is correct, as of November 25, 2000 the Crown would have no entitlement to the proceeds of the term deposit for source deductions that were deducted after November 25, 2000 since the term deposit would no longer have been the property of Camvrac once compensation had been effected and could not be subject to the deemed trust created by s. 227(4.1) *ITA* and s. 86(2.1) *EIA*. If the Crown is correct, then the proceeds would be subject to the deemed trust for the full amount of the unremitted source deductions to February 21, 2001 (as the date when compensation was effected by the Caisse).

[59] With respect to whether the deemed trust provisions apply to after-acquired property, this Court interpreted s. 227(4.1) *ITA* broadly in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, as applying to both property in the hands of the tax debtor and after-acquired property. In *First Vancouver*, Iacobucci J. held for the Court, at para. 38, that

> based on the plain language of ss. 227(4) and 227(4.1) as supported by the purpose of the provisions and intentions of Parliament, the deemed trust created by these sections encompasses property which comes into the hands of the tax debtor after the trust arises.

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The trust created by s. 227(4.1) *ITA* and s. 86(2.1) *EIA* is deemed to be in effect "at any time". It does not matter that the term deposit became the property of Camvrac only after some of the employment insurance premiums and income tax deductions went unremitted since the deemed trust "encompasses property which comes into the hands of the tax debtor after the trust arises". The proceeds of Camvrac's term deposit are therefore available to the Crown to discharge all of the outstanding employment insurance premiums and income tax deducted at source by Camvrac, whether the unremitted deductions occurred before or after Camvrac entered into the "Term Savings Agreement" and until the date that the Caisse realized on its security.

[60] As to the date on which the Caisse exercised its right to compensation, I agree with the Crown for two reasons. First, February 21, 2001 is the date on which the Caisse itself noted on its copy of the "Term Savings Agreement": [TRANSLATION] "To be closed on 21/2/2001 to realize on security." This is evidence that the Caisse believed that compensation was effected on that date and not earlier. Second, the Caisse, according to its account records, continued to charge interest on the line of credit until January 31, 2001 despite the fact that Camvrac had defaulted on November 25, 2000 by failing to make its interest payment to the Caisse due on that date. The "Security Given Through Savings" agreement stated that:

> **7. DEFAULT**
>
> . . .
>
> The consequences of a default are for the exclusive benefit of the Caisse and the latter may waive them expressedly. The Caisse may, among others, without any prejudice to its rights, wait for the maturity date of the certificate(s) of deposit before exercising its rights as provided for in paragraphs (b) and (c) above.
>
> **8. RESERVE OF RECOURSES**
>
> . . . Furthermore, failure by the Caisse to avail itself of any of its rights in case of default shall not be interpreted as a waiver of such rights.

[61] These terms acknowledged that the Caisse had a discretion as to the timing of when compensation would be effected. The Caisse was entitled, as it did here, not to effect compensation immediately upon default, but instead could choose to allow the line of credit to remain open. This is what the Caisse did. It did not effect compensation until February 21, 2001. The Caisse is liable to pay to the Crown the amounts for employment insurance premiums and income tax deducted at source by Camvrac up to, and including, any deductions not remitted as of February 21, 2001.

F. *Interest Calculation*

[62] This issue may be disposed of quickly. The Caisse says that if it is liable to the Crown, the law of Quebec with respect to pre-judgment interest rather than ss. 36(2) and 37(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, applies. I cannot agree with the Caisse. *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, is dispositive of the issue. Indebtedness under the *ITA* and *EIA* gives rise to a cause of action outside of a particular province and so the rules respecting pre-judgment interest in ss. 36(2) and 37(2) of the *Federal Courts Act* apply: see *Markevich*, at paras. 39-40. The cause of action was that of the Crown against the Caisse for unremitted source deductions pursuant to its deemed trust which arose because the Caisse appropriated funds belonging to Camvrac which were impressed with the Crown's deemed trust.

IV. Conclusion

[63] For these reasons, I find that the terms of the "Term Savings Agreement" and the "Security Given Through Savings" agreement between the Caisse and Camvrac created a "security interest" within the meaning of s. 224(1.3) *ITA*. The Caisse was liable to the Crown for the unremitted employment insurance premiums and income tax deducted at source by Camvrac up to and including February 21, 2001. Interest is calculated in accordance with ss. 36(2) and 37(2) of the *Federal Courts Act* from February 21, 2001, when the Caisse effected compensation, to the date of payment.

[64] The appeal should be dismissed with costs in this Court only.

English version of the reasons of LeBel and Deschamps JJ. delivered by

[65] DESCHAMPS J. (dissenting) — The Court is once again being asked to consider the scope of the rights resulting from the deemed trust created by Parliament to ensure that employers remit income tax and employment insurance premiums deducted from their employees' salaries to the Receiver General for Canada. For the reasons that follow, I find that compensation is not a "security interest" within the meaning of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), and the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), and that the appellant's contractual right may be set up against the respondent because the respondent cannot have more rights than the employer itself had. I would accordingly allow the appeal and remand the case to the trial judge to establish the amount of the deductions that had not been remitted at the time the compensation agreement was signed.

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1. Issues

[66] The main issue in this appeal concerns the effect of the deemed trust provided for in the *ITA* and the *EIA* on assets subject to compensation under an agreement between the Caisse populaire Desjardins de Bon Conseil, to whose rights the appellant ("Caisse") has succeeded, and the employer, Camvrac Enterprises Inc. ("Camvrac"). The Caisse raises an additional issue related to the calculation of interest. It submits that as a result of ss. 36(1) and 37(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, interest should have been calculated in accordance with the rule that applies in Quebec. The respondent contends that ss. 36(2) and 37(2) of that Act apply instead, because the cause of action arose outside Quebec. I will discuss the issue relating to the deemed trust first before turning to the interest issue.

2. Facts

[67] Between May 2000 and January 2001, Camvrac, an employer doing business in Quebec, failed to remit $26,863.53 in income tax and employment insurance premiums deducted from its employees' salaries to the Receiver General for Canada. Nothing in the evidence specifies the amount owed by Camvrac as of September 25, 2000, but according to the Federal Court prothonotary who heard the matter at trial, the unremitted deductions totalled $5,558.72 in October 2000.

[68] On September 18, 2000, the Caisse and Camvrac signed a variable credit contract under which the Caisse extended $277,000 in credit to Camvrac. A few days later, on September 25, 2000, two additional agreements were signed: a term savings agreement under which Camvrac deposited $200,000 in the Caisse for a term expiring on October 16, 2005, and an agreement to give savings as security for the repayment of any amount owed to the Caisse, in which Camvrac granted the Caisse a "right to withholding and compensation" and a hypothec. Only the right to compensation is in issue in this appeal: neither the hypothec nor the right to withhold was raised, enforced or exercised, or set up against the respondent. Although excerpts from the relevant clauses are also set out in the Appendix, I will reproduce one here that I will be discussing more specifically:

> [TRANSLATION]
>
> **1. RIGHT TO WITHHOLDING AND COMPENSATION**
>
> To secure the repayment of any sum in principal, interest, costs and accessories owed or to be owed the Caisse by the Depositor under a line of credit agreement in the amount of $277,000.00 granted to him (her) on 2000-09-18 and under any debts or obligations, present or future, direct or indirect held by the Depositor, the Depositor undertakes to maintain and consents to the withholding by the Caisse, in the account(s) . . . mentioned below, of the amount of $200,000.00 distributed as follows: . . . . Alternative term saving 5 years in the amount of $200,000.00 . . . .
>
> The Caisse may withhold the sums shown above, along with the interest from the certificates of deposit if applicable, as long as all the amounts due under the Credit Contract(s) have not been fully repaid and, in the case of a line of credit, as long as it has not been cancelled. In cases of default as provided for below, there shall be compensation between the Credit Contract(s) and the certificate(s) of deposit or the amounts deposited defined above, as provided for in Section 7.

[69] I note that the parties and the courts below have sometimes referred to the term deposit as a "certificate of deposit". In my opinion, as is indicated in the term savings agreement, it is simply a term deposit. But what it is called is of no consequence in light of the mechanisms that are at issue in this appeal.

[70] On November 25, 2000, Camvrac defaulted on the interest on the borrowed amount. On December 1, 2000, that interest was paid by means of a manual transfer of funds effected by the Caisse. A statement dated December 31, 2000, shows a debt of $277,000 owed by Camvrac to the Caisse; it also indicates that monthly interest on the total amount of the loan was charged to Camvrac. A savings and investment account statement dated January 31, 2001 shows a balance of $200,578 in respect of the deposit. On February 5, 2001, Camvrac made an assignment in bankruptcy. On its copy of the deposit agreement, the Caisse made the following note: [TRANSLATION] "To be closed on 21/2/2001 to realize on security."

[71] On June 12, 2001, the respondent required the Caisse to pay her $26,863.53 owed by Camvrac for payroll deductions. She submits that this amount was protected by the deemed trust resulting from provisions of the *ITA* and the *EIA*. The Caisse counters that the note made on the deposit agreement on February 21, 2001 was merely administrative in nature and that its debt to Camvrac was extinguished by compensation.

3. Judicial History

[72] Before a prothonotary of the Federal Court, the respondent argued that the deposited amount was property of Camvrac that was subject to the deemed trust, and that in enforcing its security interest on February 21, 2001, the Caisse had realized on that certificate and should have paid her the amount of the deductions Camvrac had failed to remit. The Caisse submitted that under the agreement with Camvrac, the mutual debts — its own and that of Camvrac — became exigible when Camvrac defaulted and that those debts had been extinguished by compensation. In the

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prothonotary's opinion, there was no doubt that the deposited amount was held as security, that in "cashing it in", the Caisse was enforcing a security interest, and that the deposited amount was subject to the deemed trust. She therefore held that "the value of the benefit conferred on the [Caisse] through the realization on its security interest in the certificate of deposit constitutes the proceeds from the certificate of deposit, and must be paid to the Receiver General" (2005 FC 731, 2006 D.T.C. 6385, at para. 22). According to the prothonotary, legal compensation could not be relied on, because the term of the deposit had not expired. She added that if the Caisse wanted to avail itself of its contracts with Camvrac, it had to manifest its intention to enforce them, which it did not do until February 21, 2001, by which time the respondent's right had priority. The prothonotary therefore ordered the Caisse to pay the amount claimed by the respondent. She awarded interest at the rate provided for in ss. 36(2) and 37(2) of the *Federal Courts Act*.

[73] The Federal Court upheld the prothonotary's judgment (2005 FC 1563, 2007 D.T.C. 5664). In response to the Caisse's argument that the prothonotary had failed to consider the forfeiture of the term clause in the term savings agreement, the court stated that although conventional compensation could have been effected under the terms of the contract before the expiry of the term of the deposit, the Caisse had not exercised its right to do so until February 21, 2001, by which time the deposit amount was subject to the deemed trust. The Federal Court rejected the Caisse's argument that compensation is not a security interest, relying instead on the French version of the definition of "security interest" (*garantie*) in s. 224(1.3) *ITA* to conclude that even if compensation were held to constitute a payment, it would be considered a "security interest" within the meaning of the *ITA*.

[74] The Federal Court of Appeal also concluded that the *ITA*'s definition of "security interest" is sufficiently broad to include the Caisse's right to compensation in respect of Camvrac's deposit, and that the provisions concerning the deemed trust authorized the respondent to recover from the Caisse the amounts owed by Camvrac (2006 FCA 366, 361 N.R. 77). On the interest issue, the Court of Appeal relied on *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, and *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31, and upheld the trial judgment.

4. Parties' Arguments Concerning the Deemed Trust

[75] The Caisse advances three arguments: (1) the courts below erred in finding that the mechanism it relies on is a security interest within the meaning of ss. 224(1.3) and 227(4.1); (2) compensation is not a mechanism for performing obligations; and (3) the time when the debt was extinguished does not depend on whether the compensation is characterized as legal or conventional, but in the alternative, if it must be characterized, it should instead be regarded as a contractual arrangement for compensation in the future. This last argument does not appear to have been raised as forcefully in the courts below, but the facts and legal concepts relied on remain the same.

[76] The respondent contends that the deemed trust creates an absolute priority and that, regardless of whether the compensation is conventional or legal or of whether compensation constitutes a security interest, the proceeds from the "cashing in" of the term deposit must be paid to her up to the amount of the source deductions owed by the employer.

[77] Because the courts below held that compensation constitutes a "security interest" as defined in s. 224(1.3) *ITA*, I will deal with this issue first. I will then consider whether the contractual right to compensation may be set up against the respondent.

5. "Security Interest" as Defined in Section 224(1.3) *ITA*

[78] Over ten years ago, Gonthier J. observed in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 22, that a clash between conflicting legislative objectives had given rise to a competition of priorities between deemed trusts and consensual security interests. In 1998, Parliament enacted legislation to expand the scope of the deemed trust (S.C. 1998, c. 19, s. 226(1)) and give it priority over every "security interest" as that term is defined in s. 224(1.3). In this context, it is important to clearly delineate the concept of "security interest" as defined in that provision.

[79] Although the provisions in issue in this appeal — ss. 224(1.3), 227(4) and 227(4.1) *ITA* and the corresponding provisions of the *EIA* — are reproduced in the Appendix, I will nevertheless reproduce the more relevant passages here for ease of reference. Section 224(1.3) *ITA* defines "security interest" for the purposes of the deemed trust. The English version of the definition reads as follows:

> "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

[80] The terminology used in the French version is different. On the one hand, the term "security interest" is rendered as "*garantie*". On the other hand, whereas the word "interest" is used in the English expression "interest in property", the word "*droit*" is used instead in the expression "*droit sur un bien*" in French:

> « garantie » Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les droits nés ou découlant de débentures, hypothèques, privilèges,

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> nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs.

[81] The concept of "*garantie*" can vary in scope depending on the context. It is therefore important that the two versions be read together and that the meaning of the terms "security interest" and "*garantie*" be harmonized in the context of s. 224(1.3) *ITA*. It should be noted that there is no distinct federal common law: *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, and P. Denault, *La recherche d'unité dans l'interprétation du droit privé fédéral* (2008), at p. 38. Where the suppletive law must be applied to interpret a concept incorporated into a federal rule, the law of the province is the relevant source: *Federal Law—Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, s. 8, amending the *Interpretation Act*, R.S.C. 1985, c. I-21. As a result, absent an express provision to the contrary, federal legislation must be interpreted in a manner consistent with the concepts and institutions of the legal system of the province in which it is to be applied: A. Morel, "La rédaction de lois bilingues harmonisées avec le droit civil", in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism — Collection of studies* (1997), 309, at p. 313.

[82] Furthermore, not only must reference be made — when necessary to interpret federal legislation — to the law of the province in which it is to be applied, but both the English and French versions must be taken into consideration: M. Bastarache et al., *The Law of Bilingual Interpretation* (2008), at pp. 42 *et seq*. I will begin by analysing the English and French versions to determine whether a shared meaning can be established. In the case at bar, this analysis leads to a notion common to the civil law and the common law that makes it possible to harmonize the application of the taxing provision in the two legal systems.

[83] Given that the terms "security interest" in the English version and "*garantie*" in the French version may not have the same scope, it will be necessary to establish the shared meaning of the English and French versions by applying the principles of bilingual interpretation recently reiterated in *R. v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675, at paras. 14-16 (see also Bastarache et al. and P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327).

[84] There are two steps to this analysis: identifying the shared meaning and establishing Parliament's intent. At the first step, there are three possibilities (*S.A.C.*, at para. 15):

> First, the English and French versions may be irreconcilable. . . . Second, one version may be ambiguous while the other is plain and unequivocal. The shared meaning will then be that of the version that is plain and unambiguous: *Daoust*, at para. 28; Côté, at p. 327. Third, one version may have a broader meaning than the other. According to LeBel J. in *Schreiber*, at para. 56, "where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning".

[85] The first possibility can be ruled out: the two versions are not irreconcilable. In English, the expression "security interest" has a well-established meaning, whereas the French word "*garantie*" is more general. While every security interest is necessarily a *garantie*, the opposite is not necessarily true. For example, a personal surety provides a *garantie* but does not establish a security interest in his or her property. The English term is therefore more specific than the French. However, in light of the broad scope of the "security interest" concept, I do not consider it appropriate to say that the English version is "narrow" and the French version broad. If a choice had to be made between the second and third categories, therefore, the question would have to be placed in the second, that of the unequivocal version/ambiguous version. Here, this choice does not change the outcome, since in either case the shared meaning is that of the term used in the English version: "security interest".

[86] At the second step in the interpretation of bilingual statutes, it must be determined whether the shared meaning of the two versions is consistent with Parliament's intent (*S.A.C.*, at para. 16). It is clear that the successive amendments to the *ITA* and the *EIA* in respect of the deemed trust were intended to give enhanced protection to the tax creditor. Beyond this immediate objective, however, I cannot conclude that Parliament intended that the priority set for the taxing authorities should be vague. Such an interpretation would make it impossible for a tax debtor's creditors to determine their rights in advance. Given that the common law and civil law concepts are compatible, Parliament can only have intended to treat all Canadian taxpayers the same way and to enable both communities to predict how the legal mechanisms they use to organize their affairs will be interpreted. Only the shared meaning makes it possible to attain this objective. Accordingly, I conclude that Parliament's intent is consistent with the well-established concept of "security interest" as opposed to the more ambiguous concept of "*garantie*" (see ss. 8.1 and 8.2 of the *Interpretation Act*, introduced by the *Federal Law — Civil Law Harmonization Act, No. 1*; Denault, at p. 117).

[87] If, in the instant case, the shared meaning corresponds to the unequivocal concept of "security interest", it is because there is a concept common to a "security interest" in the sense of "interest in property" and a "*garantie*" in the sense of "*droit sur un bien*". It is this concept that must be identified. In "The Income Tax Act, the Excise Tax Act and the Term Interest: An Interesting Case for Harmonization", in *The Harmonization of Federal Legislation with Quebec Civil Law*

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and Canadian Bijuralism (2002), published in the *Collection of Studies in Tax Law 2001*, Martin Lamoureux points out that a term like "interest" may be impossible to define without considering the context. In his view, "depending on the context, the expression 'interest in property' appears to be the converse of the notion of absolute ownership" (p. 7:9). According to this interpretation, therefore, the security interest — the right in question in s. 224(1.3) *ITA* — is distinct from a right of absolute ownership.

[88] After analysing how the "interest" concept is used in the *ITA* and in the *Excise Tax Act,* R.S.C. 1985, c. E-15 ("*ETA*"), Lamoureux proposes the concept of "real right" as a basis for harmonizing those of "interest" and "*droit*". He explains this as follows:

> As we stated in part three, we propose to harmonize the notion of "interest" (*intérêt*) with its Quebec equivalent which is "real right" (*droit réel*). This conclusion is based on a comparative analysis which shows a great similarity between the two concepts. In fact, a comparison of the two concepts shows a similarity between several of their general attributes, for example, the right to follow, the right to assert *adversus omnes*, a direct right to the thing and the dismemberment of property over time. [p. 7:22]

[89] This proposal is relevant in the case of s. 224(1.3), because the words "interest" and "*droit*" are used in the English and French versions of that provision. However, Lamoureux mentions some differences between the "interest" and "real right" concepts: for instance, beneficial ownership, equity and future interest can give rise to an interest in property but do not necessarily have equivalents in civil law. He accordingly suggests that Parliament should define "real right" in the *ITA* and the *ETA*, and include common law concepts needed for certain specific purposes in the definition. I agree with using the "real right" concept to harmonize the concept of "interest in property" with that of "*droit sur un bien*" (right in property). In classical civil law, a *droit sur un bien* is a real right, not a personal right. The accessory real right (known in French as a "*droit réel accessoire*" and, often, as a "*droit réel de garantie*") forms an essential component of a security: P.-C. Lafond, *Précis de droit des biens* (2nd ed. 2007), at paras. 422-23 and 440-47; *Private Law Dictionary and Bilingual Lexicons: Obligations* (2003), "accessory real right", at pp. 4-5; D.-C. Lamontagne, *Biens et propriété* (6th ed. 2009), at paras. 103-4.

[90] At common law, the term "real right" and its close cousins "right *in rem*" and "*jus in re*", although less common, are nevertheless established. Professor Royston Miles Goode writes in *Goode on Legal Problems of Credit and Security* (4th ed. 2008), at para. 1-17, that "a security interest is a right in rem". Professors Ronald C. C. Cuming, Catherine Walsh and Roderick J. Wood also refer to the concept of "real right" or "right *in rem*" in *Personal Property Security Law* (2005):

> A creditor who is given a security interest in the debtor's property obtains a proprietary right to the collateral. The defining characteristic of a proprietary right (which is also referred to as a real right or a right *in rem*) is that it is a right in a thing that is generally enforceable against the world. [p. 511]

See also R. A. Macdonald, "Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies" (1994), 39 *McGill L.J.* 761; J. Austin, *Lectures on Jurisprudence, or, The Philosophy of Positive Law* (5th ed. 1885), at pp. 381-91; T. E. Holland, *The Elements of Jurisprudence* (12th ed. 1916), at pp. 146-47; W. N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917), 26 *Yale L.J.* 710, at pp. 714-15; J. W. Salmond, *Jurisprudence* (10th ed. 1947), at pp. 252-56; G. W. Paton, *A Text-book of Jurisprudence* (2nd ed. 1951), at pp. 232-36; *Reagan v. Murphy*, 105 So.2d 210 (La. 1958); *Harwood Oil & Mining Co. v. Black*, 124 So.2d 764 (La. 1960).

[91] Moreover, just as an interest in property may be considered to be similar in many respects to a civil law real right, at common law, the notion of a "real right" is considered to be essential to a finding that a security interest exists in the area of personal property security. It is now well established that a functional approach has been adopted in the common law provinces and that form is not determinative of whether a security has been created. The fact remains, however, that the basis for a security interest continues to be a real right. Professors Cuming, Walsh and Wood explain this clearly:

> The elimination of form as a determinant of the existence of a security agreement necessitates a close look at some types of transactions that, on the surface, appear to fall outside the scope of a PPSA but that may provide for interests that fall on one side of the line or the other, depending upon the presence or absence of a feature. In each case, it is necessary to determine whether the essential characteristics of a security agreement are present. This involves answering the question: does the transaction involve the contractual recognition or creation of an interest in the personal property of one person that secures an obligation owing to another person? . . . The "interest" involved must be a real right in personal property in the sense that it is exercisable against not only the obligor but also against third parties with subsequent interests in the property. [pp. 85-86]

Professor Goode makes a similar comment in this respect (at para. 1-17):

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> Even where the creditor is to be given rights in respect of an asset, it is necessary to distinguish real rights from personal rights. . . . [A] security interest is a right in rem and in principle the secured creditor is entitled to remove the asset from the general body of creditors.

[92] The common law concept of security interest therefore corresponds, in civil law terms, not to a personal right, but to a real right. In short, although no single expression is used at common law, what can be seen is that the right holder has a right in the property itself, as opposed to a right to compel a person to perform an obligation, which is the essence of a personal right. Thus, the "real right" concept is common to the two legal traditions. This concept is also inherent, and literally so, in the English expression "interest in property" and the French expression "*droit sur un bien*" used in s. 224(1.3).

[93] The "real right" concept is also inherent in the mechanisms listed in s. 224(1.3). From the perspective of the civil law, the list in that provision includes forms of security formerly provided for in the *Civil Code of Lower Canada* and certain special statutes, such as the *Act respecting the special powers of legal persons*, R.S.Q., c. P-16, that have been consolidated in the *Civil Code of Québec* in the concept of the hypothec; the forms of security in question conferred real rights on creditors. Some of the mechanisms set out in the list in s. 224(1.3) *ITA* warrant comment.

[94] For instance, the term "assignment" refers to an assignment by way of security, not an absolute assignment (*Alberta (Treasury Branches) v. M.N.R.*, [1996] 1 S.C.R. 963, at para. 22; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, at para. 39). In the *Civil Code of Québec*, an assignment by way of security takes the form of a movable hypothec (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin with the collaboration of N. Vézina, at No. 942).

[95] As for the trust, it is true that, in civil law, property is transferred in trust to a patrimony by appropriation (art. 1261 *C.C.Q.*). However, the transferred right is in the "property" (art. 1260 *C.C.Q.*). Moreover, a creditor who is a beneficiary of a security trust is not an ordinary creditor; the beneficiary's right may be characterized as a hybrid or *sui generis* right and has some of the characteristics of a real right (R. A. Macdonald, "The Security Trust: Origins, Principles and Perspectives", in *Contemporary Utilisation of Non-Corporate Vehicles of Commerce* (1997), Meredith Lectures, 155, at pp. 203-4; J. B. Claxton, *Studies on the Quebec Law of Trust* (2005), at pp. 553-55; J. E. C. Brierley, "Title Six: Certain Patrimonies by Appropriation — Articles 1256-1298", in *Reform of the Civil Code* (1993), vol. 1-B, at p. 17). And it should be noted that a legislature may expressly include, in a technical definition of a term, mechanisms that do not fall within the usual definition of the term.

[96] The same reasoning applies to the mechanisms listed in the provision if they are viewed from a common law perspective. Some of them (mortgage, trust, assignment) transfer legal or equitable title to the secured creditor. Others, such as the pledge or the charge, are comparable to the civil law's hypothec, with or without delivery. As for the lien, it may take a number of forms: it is akin sometimes to a pledge, where it includes a right to sell the property (Goode, at para. 1-49), and sometimes to a legal mortgage, where it is non-possessory. Finally, "encumbrance" is a very broad term that is defined in *Black's Law Dictionary* (6th ed. 1990) as "[a]ny right to, or interest in, land which may subsist in another to diminution of its value" (p. 527). Although this term can refer to an easement, it should be noted that where its use to refer to a form of security is concerned, the examples given are usually the mortgage, the lien and the trust (D. A. Dukelow, *The Dictionary of Canadian Law* (3rd ed. 2004), at p. 408). Thus, the mechanisms mentioned above give the creditor a right that can be characterized as a "real right" within the shared meaning of this expression in the two legal traditions.

[97] The debenture is the only item in the list in s. 224(1.3) *ITA* that does not create a real right. However, it is a special case. The debenture has historically been central to secured lending transactions (L. Payette, *Les sûretés réelles dans le Code civil du Québec* (2nd ed. 2001), at pp. 387-89 and 815-20; B. A. Garner, *A Dictionary of Modern Legal Usage* (2nd ed. 1995), at p. 250; *The Dictionary of Canadian Law*, at pp. 318-19; H. Reid, *Dictionnaire de droit québécois et canadien* (3rd ed. 2004), at p. 162). Ordinarily, a debenture is issued and secured in a single instrument. One such instrument was considered by this Court in *Royal Bank of Canada v. First Pioneer Investments Ltd.*, [1984] 2 S.C.R. 125. The following comment by P. L. Davies helps clarify the scope of the mechanism to which the term "debenture" as used in s. 224(1.3) *ITA* applies: "The expression 'debenture' is applied indiscriminately to the instrument creating or evidencing the indebtedness and to the debt itself and the bundle of rights vested in the holder to secure its payment" (*Gower and Davies' Principles of Modern Company Law* (7th ed. 2003), at p. 809). The debenture is also mentioned in s. 2(a) of Ontario's *Personal Property Security Act*, R.S.O. 1990, c. P.10, as an example of a transaction that creates a security interest. Cuming, Walsh and Wood explain this as follows: ". . . it can be assumed that, in this context, the term refers to a corporate obligatio[n] secured by some form of security agreement in personal property" (p. 62, n. 21). In short, even though a debenture can be seen, in a technical sense, as merely a debt obligation (P. Martel, *Business Corporations in Canada* (2005), at pp. 32-14 and 32-15), the term "debenture" must be interpreted in its

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commercial and historical context, and its inclusion in the list in s. 224(1.3) *ITA* leads to the conclusion that Parliament intended to include the types of security that are most frequently used to grant real rights in property.

[98] In my opinion, since compensation has not been included in the list, the Caisse's right can constitute a security interest only if it entails a real right. To limit the concept of security interest in s. 224(1.3) *ITA* to rights that are real in nature is consistent both with the shared meaning of the terms ("security interest" and "*garantie*") used in the two versions of the provision and with Parliament's purpose of giving the deemed trust priority over the security interests referred to in s. 224(1.3) *ITA*: *First Vancouver Finance*.

[99] It must now be determined whether compensation is a "security interest" as that term is defined in s. 224(1.3) *ITA*.

6. Right to Compensation and Security Interest

[100] Before determining whether compensation is a "security interest" as that term is defined in s. 224(1.3) *ITA*, I must mention that many Quebec commentators have characterized compensation as a *form* or *type* of "*garantie*". It is important to note their use of the French term "*garantie*", which, as I mentioned above, has a less precise meaning than "security interest". Thus, Baudouin, Jobin and Vézina state, at No. 1035, that compensation [TRANSLATION] "serves as a *garantie* by making it possible to avert the risks of debtor insolvency". In their view, compensation gives [TRANSLATION] "ordinary creditors a measure of priority in not requiring them to compete with other creditors" (see also: D. Lluelles and B. Moore, *Droit des obligations* (2006), at No. 2672; V. Karim, *Les obligations* (2nd ed. 2002), vol. 2, arts. 1497 à 1707 C.c.Q., at pp. 749-50; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), at p. 612). Moreover, compensation is a mechanism for extinguishing obligations that operates differently depending on the context in which it is effected: A. Bélanger, *Essai d'une théorie juridique de la compensation en droit civil québécois* (2004), at p. 299.

[101] These observations, although relevant to a description of compensation and its effects, do not support a conclusion that compensation is a "security interest" as that term is defined in s. 224(1.3) *ITA*. Although compensation may have the same effect as a security interest, care must be taken not to refer to the flexible sense that can be derived only from the French term "*garantie*". For the purposes of s. 224(1.3) *ITA*, it is not enough that compensation offers protection similar to that of a security interest: it must also confer an "interest in property", that is, a real right.

[102] Although it is true that compensation can be likened to a security interest, it cannot be equated with one in the sense that the term "security interest" must be given in the context of s. 224(1.3) *ITA*. Where compensation may be effected between two debts, the effect is clearly analogous to that of a "security interest" in the broad sense of the term; nevertheless, compensation or set-off is not regarded, in the positive law of either Quebec or the common law provinces, as having the characteristics of a real right. The automatic extinction of mutual debts is an effect of compensation, but it does not constitute the enforcement of a real right in the property in question. Since compensation is not specifically mentioned in the definition of "security interest" in s. 224(1.3) *ITA*, I find that it is not a security interest for the purposes of that provision.

[103] Guy Duboc, a French author, suggests in *La compensation et les droits des tiers* (1989), at pp. 244-47, Nos. 360-64, that compensation agreements should be recognized as pledge agreements that are subject to the same conditions and have the same effects as a pledge. But he is alone in his opinion, and he himself acknowledges that his position is a bold one. In my view, this position cannot be incorporated into Quebec law, especially in light of the consolidation of all forms of security that took place in the course of the reform of the *Civil Code of Québec*. Rather, it must be concluded that the provisions on compensation, located as they are in the chapter on the extinction of obligations, do not support the argument that compensation is a pledge that would be considered a hypothec under the *Civil Code of Québec*. To reach the same conclusion as Duboc would be contrary to the objective pursued by the codifiers in 1991 of consolidating the various forms of security.

[104] There is another reason why I would place compensation, or set-off, outside the ambit of s. 224(1.3) *ITA*. The term "security interest" used in the English version is one that is used extensively in the common law provinces in, specifically, the context of personal property security law. For example, it is defined as follows in the English version of Ontario's *Personal Property Security Act*:

> "security interest" means an interest in personal property that secures payment or performance of an obligation, and includes . . . .

As can be seen, this definition is very similar to the one in the English version of s. 224(1.3) *ITA*:

> "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of . . . .

[105] Furthermore, in most of the common law provinces, the French versions of this provision do not raise the same problems as the French version of the federal provision (see, for example, in addition to the Ontario

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statute, those of New Brunswick (*Personal Property Security Act*, S.N.B. 1993, c. P-7.1) and Manitoba (*Personal Property Security Act*, C.C.S.M., c. P35)). In the Ontario statute, the French version reads as follows:

> « sûreté » Intérêt sur des biens meubles qui garantit le paiement ou l'exécution d'une obligation, notamment les intérêts suivants . . . .

Thus, the term "security interest" is rendered as "*sûreté*" in the Ontario statute, as opposed to "*garantie*" — a word that requires interpretation because of its vagueness — in the federal statute.

[106] All the personal property security statutes of the common law provinces include broad, functional definitions of "security interest" (see, for example, s. 1 ("security interest") of Ontario's *Personal Property Security Act* and s. 1 ("security interest") of New Brunswick's *Personal Property Security Act*). Despite this liberal approach, all these statutes — except that of Ontario — give priority to contractual rights that arise before an assignment to another creditor is known. The Ontario statute was to the same effect until 2006; since then, it has provided that the right arises as of the time the debt becomes payable. The new Ontario provision does not appear to have been considered by the courts. However, regardless of when such rights arise, they are always dealt with separately from security interests (e.g., Ontario's *Personal Property Security Act*, s. 40; New Brunswick's *Personal Property Security Act*, s. 41; all other such statutes have virtually identical provisions), which shows that the legislatures did not consider set-off to be included in the concept of "security interest". In the only case in which the most common wording of the provisions creating this type of right has been interpreted, *518718 Alberta Ltd. v. Canadian Forest Products Ltd.*, 1998 ABQB 619, 63 Alta. L.R. (3d) 371, the Alberta Court of Queen's Bench held that a creditor with a contractual right of set-off has priority over an assignee provided that the creditor's right arises before the assignment (paras. 54, 55 and 63) (in that case, the result was altered on the basis of estoppel, but estoppel is not in issue in the case at bar).

[107] A conclusion that compensation is a "security interest" as that term is defined in the federal statute would therefore conflict with the meaning given to the term in the provincial personal property security statutes, which exclude set-off. Such an interpretation would also be inconsistent with the common law concept of "set-off", on which numerous business transactions are based. Cuming, Walsh and Wood express the following opinion (at p. 87):

> Set-off, whether contractual or procedural, does not involve a security interest because neither party to the set-off acquires a property interest.

Professor Goode adds the following, at para. 1-19:

> A right of set-off, even if given by contract, is a purely personal right to set one claim against another. The party asserting it never acquires rights in the other's monetary claim at all; he merely asserts a countervailing claim which operates in pro tanto extinction of his monetary liability. It follows that a contractual set-off does not create a security interest.

P. Wood expresses the same opinion in *Set-Off and Netting, Derivatives, Clearing Systems* (2nd ed. 2007), at para. 1-008:

> Although set-off has a similar commercial effect to a security interest, set-off is not a security interest in that the creditor does not grant the debtor a property interest over the creditor's property in the debt owed to the creditor to secure the cross-claim owed by the creditor to the debtor, eg a depositor does not grant a property right over the depositor's ownership of the deposit claim back to the bank to secure a loan owed by the depositor to the bank. Nor is set-off a right of retention like a lien because the bank does not retain the coins or notes of the depositor: the property in the benefit of the deposit account is held by the depositor and the bank has no property to retain.
>
> Hence a right of set-off would not normally conflict with negative pledges typical of unsecured bank loan agreements whereby the borrower agrees not to create security over its assets. Negative pledges which widen the concept to include transactions similar to security interests should also not prohibit set-offs since a security interest and related title finance transactions (sale and leaseback, factoring, sale and repurchase) usually involve property transfers, but set-off is not a property transfer. A negative pledge which prohibited set-off would effectively prevent the debtor from becoming reciprocally indebted to a counterparty — impracticable in the normal case.
>
> Professor Grant Gilmore, one of the US architects of Article 9 of the Uniform Commercial Code, when requested to exclude set-off from the definition of security interests, remarked, "One might as well exclude fan-dancing". Nevertheless he reluctantly gave in: Article 9 does not apply to "a right of recoupment or set-off": see s. 9-109(d)(10). In New Zealand the equivalent Personal Property Security Act does not apply to a right of set-off, netting or combination of accounts: see s. 23(c).

[108] Although I will be discussing the reasons of Rothstein J. below, I wish at this point to draw attention to one aspect of his reasoning. He relies on an excerpt from S. R. Derham's book *The Law of Set-Off* (3rd ed. 2003) to conclude that if the parties intended to create a security interest, that interest must be covered by the definition in s.

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224(1.3) *ITA*. With respect, the following statement by Derham must be borne in mind: ". . . the predominant view is that a set-off agreement is not a charge" (para. 16.80). Thus, it must be understood that the passages cited by my colleague are part of a discussion of arguments in support of an unconventional approach. As with my rejection of Duboc's novel interpretation of French law, I find that it would not really be appropriate to incorporate into federal law a concept that is not recognized at common law and is totally unknown in civil law. In my view, it is very dangerous to assert that a real right in property can result from the parties' intention without basing that assertion on a mechanism known to the law.

[109] This review of the academic commentaries thus leads me to conclude that, under the common law as it now stands, set-off is excluded from the field of personal property security. The fact that a legal mechanism enables a creditor to obtain an effect similar to that of a "security interest" in the generic sense of the term does not make that mechanism a security interest.

[110] Despite the arguments presented in all courts, my colleague Rothstein J. considers that the question to be answered is not whether compensation is a security interest. Rather, in his view, the issue is whether the agreement created a "security interest" as defined in s. 224(1.3) *ITA*. He concludes that such an interest did in fact result from the juxtaposition of certain rights of the Caisse and obligations of Camvrac.

[111] As Rothstein J. sees it, compensation is merely a remedy (para. 30). The undertakings that gave rise to an "interest in property" as defined in s. 224(1.3) *ITA* were those relating to the term for repayment of the deposit amount, the obligation to maintain the deposit, the right to withhold and the limits on transferring, negotiating and hypothecating the deposit (para. 30). Rothstein J. does not concern himself with whether those rights, either individually or collectively, created a real right. Yet even though he does not expressly accept that a security interest entails a real right, he considers that, in the case at bar, the Caisse held a movable hypothec with delivery in accordance with the reasoning of the majority in *Caisse populaire Desjardins de Val-Brillant v. Blouin*, 2003 SCC 31, [2003] 1 S.C.R. 666. For several reasons, I cannot accept my colleague's interpretation of the "security interest" concept or his recourse to the hypothec to conclude that the deemed trust had priority. I will discuss my objections under two heads.

Novel Approach to the "Security Interest" Concept

[112] I must say that Rothstein J.'s approach to the "security interest" concept is a novel one. He states that he agrees that the shared meaning lies in the English version, which implies that the English term corresponds to a legally recognized common concept. As I mentioned above, there is no federal common law. To identify the purpose Parliament was pursuing when it chose the "security interest" concept, it is necessary to refer to the common law, which is provincial law. The analysis cannot therefore disregard provincial law. However, the effect of my colleague's interpretation is to expand the "security interest" concept beyond its accepted scope in Canadian commercial law. Since his approach does not correspond at all to the shared meaning, its effect is to disregard both the principles applicable to the interpretation of bilingual legislation and those applicable to the harmonization of federal law and provincial law.

[113] Rothstein J. concludes on the basis of inchoate accessory rights that an interest in property — or, in other words, a "security interest" as defined in s. 224(1.3) LIR — was created (at para. 30):

> It was the five-year term and the maintenance and retention of the $200,000 deposit, as well as Camvrac's agreement not to transfer or negotiate the deposit and that the deposit could only be used as security with the Caisse, that created the Caisse's interest in Camvrac's property for the purposes of s. 224(1.3) *ITA*.

What my colleague overlooks in his analysis is the fact that under s. 224(1.3) *ITA*, the interest in the property must make it possible to realize on the security. To simply find that an interest in property exists without regard for the context is not sufficient.

[114] At common law, a security interest typically entails three fundamental rights: (1) the right to realize on property given as security; (2) a right to priority with respect to the proceeds of realization; and (3) the right to follow the property in the hands of a third party to whom it has been transferred (Cuming, Walsh and Wood, at p. 1). None of the rights mentioned by Rothstein J. enable the person concerned to appropriate the property. Thus, neither the term for repayment, nor the obligation to maintain, nor the right to withhold, nor the limit on the right to transfer, hypothecate or negotiate would enable the Caisse to realize on the deposit or appropriate the deposit amount to ensure performance of the secured obligation. I cannot imagine that Parliament intended the provision to apply to any mechanism other than the one known at common law that makes it possible to appropriate the property to which the security interest relates. What must be done under s. 224(1.3) *ITA* is to identify a *security* interest, not a simple interest.

[115] Although my colleague does not include compensation in the above list in support of his conclusion that an interest in property was created, he does ultimately refer to it, describing it as a remedy. What I conclude from this is that he does not see compensation as an interest in property and that according to his interpretation only the rights he mentions create such an interest. I believe that a few comments about each of these rights will be helpful here.

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[116] Regardless of what standpoint is taken in reviewing the Caisse's obligation with respect to the term, the clause establishing the term cannot be viewed as stipulating anything other than a deadline for repayment of the deposit. It is well established that in the context of a banking contract, to deposit an amount in a financial institution is to make a loan. The financial institution becomes the owner of the loaned amount and must return it with the interest agreed on (art. 2330 *C.C.Q.*). The transaction is, in a word, a simple loan (art. 2329 *C.C.Q.*). The clause that establishes the term merely fixes the time when the loaned amount is to be returned. Camvrac's relationship with the Caisse with respect to the deposit was merely one of creditor and debtor that entailed only a right to be repaid upon expiry of the term. The establishment of a term did not alter the nature of the legal relationship between the Caisse and Camvrac. The right was not a real right, but a simple personal right.

[117] The same analysis applies to the covenants to which Camvrac agreed, those relating to Camvrac's claim against the Caisse. The undertakings to maintain the deposit and not to transfer, negotiate or hypothecate the claim conferred on the Caisse no right in the claim Camvrac had against it. In the event of default, these rights would be of no assistance unless they were violated, in which case they might give rise to an action for failure to perform the contract. All these rights were personal rights, not real rights. The right to withhold warrants more specific comment.

[118] In considering the meaning to be given to the expressions "*droit de retenue*" and "*droit de rétention*" and the nature of the right that has been created, the context is essential. In civil law, there is one concept known as the "*droit de rétention*" (under, for example, arts. 875, 974, 1250 and 2543 *C.C.Q.*), which is a right to retain corporeal property, and another known as the "*droit de retenue*", or right to deduct (see arts. 2111, para. 2 and 2123 *C.C.Q.*). The right to deduct is different from the right to retain: it applies to an amount of money, not to corporeal property. There is therefore no right to follow. Also, the creditor's claim does not have priority. The right to deduct has none of the characteristics on the basis of which a right to retain can be likened to a real right.

[119] In the instant case, in the agreement to give savings as security, the following appears as the title of clause 1: "*Droit de rétention et de compensation*" ("Right to withholding and compensation" in the English version of the Caisse's standard form contract). Regarding obligations, the agreement provides that the depositor "consents to the withholding by the Caisse, in the account(s) . . . mentioned below, of the amount of . . .", and that "[t]he Caisse may withhold the sums . . . in the case of a line of credit, as long as it has not been cancelled". Despite the use of the expression "*droit de rétention*" in the title of the clause, the purpose of the right is to deduct an amount of money and not to retain corporeal property, which means that it is a "*droit de retenue*", not a "*droit de rétention*" within the meaning of the *Civil Code of Québec*.

[120] This right to deduct could be of no help to the Caisse during the term of the deposit, as the Caisse was not required to return the deposited amount until the term expired, and this stipulation afforded it no additional protection. Since clause 11 of the term savings agreement provided that the term would be renewed automatically in the absence of notice to the contrary, the Caisse would be able to exercise the right to deduct only if Camvrac gave notice that it would not be renewing the term. Such notice could be given not later than seven days after the term expired. If a notice of non-renewal were received, it would then be open to the Caisse to request repayment under clause 5 of the variable credit contract. In such circumstances, compensation could be effected by operation of law upon the expiry of the term, and the right to deduct and the obligation to maintain the deposit would be irrelevant. If, however, the Caisse did not immediately cancel the line of credit when the term of the deposit expired owing to the non-renewal, Camvrac would be precluded from requesting repayment because of its undertaking to maintain the amount in a deposit and the Caisse's right to deduct the amount. The Caisse would then retain the power to cancel the line of credit at any time, at its discretion, in order to effect legal compensation or, in the case of default, conventional compensation. These scenarios show that the Caisse's right to deduct and Camvrac's obligation to maintain were mechanisms provided for in the agreement to ensure that legal or conventional compensation could be effected. They conferred no separate right to realize on the claim and, moreover, were of residual application.

[121] The most important thing to bear in mind is that none of the clauses on which Rothstein J. relies created a real right or an interest in property ("security interest" as defined in s. 224(1.3) *ITA*). A term is a deadline for repayment. The right to deduct is simply the right of a creditor not to perform an obligation to pay as long as a debt is owed to him or her. It is, in a way, an extension granted for repayment. As for the obligation to maintain, it is clearly an undertaking by one person to another to perform an obligation. The limit on the right to transfer, hypothecate or negotiate constitutes an obligation "not to do".

[122] Thus, I cannot see how these rights, whether considered in isolation or as a whole, might constitute a "security interest" as that term is defined in s. 224(1.3) *ITA*. None of them provides a basis for using the property to ensure performance of the obligation, and none of them constitutes an interest in property that secures performance of an obligation.

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[123] As Professors Cuming, Walsh and Wood point out, the elimination of form as a determinant of the creation of a security does not mean that every contractual undertaking can be regarded as security on personal property. The limits on which Rothstein J. relies can be compared with those applicable to flawed assets. According to the technique of flawed assets, property such as a bank deposit is subject to limits on withdrawal until the depositor has repaid his or her debt to the bank. It is well established that this technique does not create a security interest. Professor Goode explains this as follows (at para. 1-21):

> [The technique of flawed assets] does not of itself constitute a security, for the bank acquires no rights over the deposit, merely a right to withhold repayment.

[124] Cuming, Walsh and Wood also cite examples of undertakings pursuant to which creditors are given interests in property that cannot be characterized as security interests. One of them, the covenant not to dispose of or encumber property, is of interest, as it is analogous to one of the undertakings on which Rothstein J. relies:

> A "negative pledge" clause or negative covenant in a loan agreement under which the borrower covenants not to encumber or dispose of some or all of her personal property until the loan is repaid does not create a security interest since, standing alone, the covenant does not create an interest in the property of the borrower. A negative pledge clause in a security agreement cannot prevent the covenantor from giving another effective security interest in the collateral. [p. 86]

Adding one or more personal rights does not result in the creation of a real right, which, as we saw above, Cuming, Walsh and Wood consider essential to the creation of a security interest. If Rothstein J.'s conclusion that a contractual undertaking creates an interest in the property is based on the functional approach, a further issue that will arise is how the negative pledge — whether or not in combination with another personal right such as the right to compensation — is now to be characterized.

[125] Therefore, in my view, not only is Rothstein J.'s analysis of the expression "interest in property" or "*droit sur un bien*" unacceptable in that it disregards the fact that the principal purpose of a security interest must be to permit the property given as security to be realized, but it cannot be reconciled with the characterization of techniques similar to those adopted in the case at bar that do not create security interests.

Granting of a Movable Hypothec on a Claim With Delivery

[126] I also wish to comment on the argument that a hypothec was granted on the basis of the reasoning followed in *Val-Brillant*. First of all, I would point out that no evidence was adduced concerning a hypothec and that no submissions were made in this respect either before the prothonotary or in the Federal Court or the Federal Court of Appeal. I find this argument somewhat surprising in view of the fact that the parties neither produced evidence nor made submissions with respect to it. It will also be necessary to place *Val-Brillant* in context and to comment briefly on the use of the hypothec to confirm that the Caisse's right is subject to the deemed trust.

[127] In *Val-Brillant*, the issue was whether a non-negotiable certificate of deposit could be the object of a pledge (art. 2702 *C.C.Q.*). There were two opposing theories, of "materialization" or "dematerialization" of the pledge: Payette, at pp. 380-91; P. Ciotola and A. Leduc, "Arrêt *Val-Brillant*: évolution ou régression de l'hypothèque mobilière avec dépossession, en droit civil québécois?", in S. Normand, ed., *Mélanges offerts au professeur François Frenette: études portant sur le droit patrimonial* (2006), at p. 361. The majority accepted the theory of dematerialization and held that there could be a pledge on a non-negotiable instrument. Gonthier J., writing for the majority, concluded that effective control of a non-negotiable instrument for the purposes of arts. 2702 and 2703 *C.C.Q.* could be gained by means of the assignment of claims mechanism referred to in art. 2710 *C.C.Q.*

[128] The commentators have criticized the view that a movable hypothec with delivery can be granted in the manner described in *Val-Brillant*: Ciotola and Leduc; D. Pratte, "L'hypothèque avec dépossession de créances non représentées par un titre négociable ou le retour à une fiction accommodante", in *Mélanges offerts au professeur François Frenette: études portant sur le droit patrimonial*, at p. 421.

[129] Article 2702 *C.C.Q.* was amended on January 1, 2009. The *Civil Code of Québec* now explicitly provides that physical delivery of the property or instrument is essential for a pledge to be granted. This amendment to the *Civil Code of Québec* is a clarification made by the legislature in response to *Val-Brillant* (see: Quebec, National Assembly, *Journal des débats*, June 11, 2008, 1st Sess., 38th Leg., vol. 40, No. 46, at p. 1, Bill 47, *Securities and Other Financial Assets Transfer Act*; M. Deschamps, "Le nouveau régime québécois des sûretés sur des valeurs mobilières", lecture delivered on March 19, 2009 to the Chaire du notariat of the Université de Montréal, at p. 4, note 12 (online: //www.chairedunotariat.qc.ca/fr/conferences/mois/032009/Deschamps.pdf.). It is now clear that the instrument that is delivered must confer effective control over the claim without recourse being had to the assignment of claim mechanism as suggested by Gonthier J. By specifying that *physical* delivery is required, the legislature has indicated that the theory of materialization of the pledge has been accepted: the instrument must therefore be negotiable. The only exception to this requirement that the instrument be negotiable relates to certain securities (art. 2714.7 *C.C.Q.*). At the same time, in

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response to a concern expressed by the majority in *Val-Brillant*, the *Regulation respecting the register of personal and movable real rights* was amended to enable individuals who do not operate enterprises to hypothecate incorporeal property and claims — including claims represented by non-negotiable instruments — without delivery: O.C. 30-2009, (2009) 141 G.O. 2A, at p. 17A; art. 2683 *C.C.Q.* This amounts to a relaxation of the conditions under which an individual can grant a hypothec without delivery. As for a deposit, such as the one in the case at bar, it cannot be the object of a pledge.

[130] Having said this, I have difficulty understanding how the hypothec fits into the reasoning that leads Rothstein J. to conclude that the rights granted to the Caisse created a security interest. Two interpretations are possible. Does my colleague conclude that the respondent's right has priority over the Caisse's right solely because of the control exercised over the claim by means of the term, the obligation to maintain, the right to withhold and the limits on the rights to transfer, hypothecate and negotiate? Or is his conclusion based on the idea that in addition to those rights, Camvrac had granted a right to compensation that resulted in a hypothec? If the first interpretation is correct, the argument based on the hypothec is irrelevant. If the second is correct, the right to compensation becomes determinative even though my colleague does not include it among the sources of an interest in property. If Rothstein J.'s conclusion that the deemed trust has priority is based on the hypothec, his reasoning clashes with the clarification made by the Quebec legislature.

[131] Furthermore, I cannot accept the Court's recourse to an argument that has been raised neither by the Caisse nor by the respondent. As I mentioned above, the agreement to give savings as security provided for the granting of a hypothec, a right to withhold and a right to compensation, but only the right to compensation was raised and argued. The Caisse was not limited in the choice of rights it could exercise. If, for example, in addition to the hypothec and the right to compensation, the claim had been secured by another personal right, such as by suretyship, the respondent could not have claimed from the Caisse the amount received from the surety. It would have been clear that the Caisse was free to choose which right it would exercise. Thus, it could have chosen to exercise its right to compensation, or it could also — independently of the hypothec also provided for in the contract — have availed itself of the suretyship if such a right were provided for in the contract. The *Civil Code of Québec* provides, on the one hand, for compensation and, on the other hand, for hypothecs on claims. These two mechanisms must not, in my opinion, be confused. The reasons for the parties' choice may be based in fact. In my view, the question is not merely one of law. In all fairness to the parties, therefore, I do not consider it appropriate at this point to intervene in the "judicial contract" to alter the bases of the appeal before the Court.

[132] I therefore find, with respect, that as regards the term, the obligation to maintain, the right to withhold and the limits on the right to transfer, hypothecate or negotiate, all that have been created are personal obligations. Furthermore, since the parties did not raise the hypothec in this Court, I do not think that we can base our conclusion on an argument in respect of which no evidence was adduced and that does not correspond to the law. The appellant chose to exercise its right to compensation, and that is the right that must be considered.

[133] As a result, I conclude that the appellant is correct in arguing that compensation is not a "security interest" as that term is defined in s. 224(1.3) *ITA*. To accept the Caisse's first argument is not to dispose of the appeal, however. Despite my finding that the Federal Court of Appeal erred in holding that the respondent had priority on the basis that the Caisse, in effecting compensation, had created a security interest for itself, the case is not yet closed. It must still be determined whether the right to compensation may be set up against the respondent, who, as a result of the deemed trust, not only has a priority over secured creditors — as the term "secured creditor" is defined in s. 224(1.3) *ITA* — but also has a right in the tax debtor's property. To do this, it must be asked whether the respondent may exercise its right in respect of both the amounts that had not been remitted at the time the right to compensation was granted to the Caisse and those that were not remitted after that time. As I mentioned above, by September 25, 2000, the date the compensation agreement was signed, Camvrac had already failed to remit some amounts that had been deducted from its employees' salaries. Those amounts totalled approximately $5,000.

7. Possibility of Setting up the Compensation Agreement Against the Respondent

[134] I do not think it necessary to explain at length why, prior to the expiry of the term of the deposit, the Caisse's right was not a right to legal compensation. The Caisse's right cannot be dissociated from the contract in which it was granted, if only because one of the conditions for legal compensation was not met: Camvrac's debt was not exigible, because repayment of the deposit amount was not due until October 2005. It will therefore be necessary to refer to the agreements between Camvrac and the Caisse.

[135] The *Civil Code of Québec* does not mention conventional compensation. However, there is nothing that prohibits it. In fact, conventional compensation is merely the arrangement by contract of the mechanism provided for in the Code. Furthermore, commentators have long recognized the validity of compensation agreements (see: Baudouin, Jobin and Vézina, at No. 1057; Lluelles and Moore, at No. 2701).

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[136] The issue in the case at bar is whether the Caisse may set up its compensation agreement against the respondent. The respondent's right is provided for in s. 227(4.1) *ITA*. If I exclude the portions relating to the priority over secured claims, which I have already discussed, the respondent's right in Camvrac's property is set out as follows:

> **227.** . . .
>
> (4) Every person who deducts or withholds an amount under this Act is deemed . . . to hold the amount separate and apart from the property of the person . . . in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> (4.1) . . . where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed
>
> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty . . . and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was so deducted or withheld . . . .

[137] The statutory mechanism transfers the tax debtor's property to a trust. In *First Vancouver Finance*, the Court likened this mechanism to a floating charge over all the tax debtor's assets up to the amount due, in that the trust does not attach to any specific property and allows the tax debtor's business to be carried on as usual.

[138] All forms of security — including what was formerly referred to as a floating charge — are now consolidated in the Civil Code in a single mechanism, the hypothec. The transfer of property into a trust may also be likened to garnishment, since that is the procedure provided for in s. 224(1) *ITA* to enable the respondent to appropriate amounts owed to the tax debtor that are subject to the deemed trust: *Alberta (Treasury Branches)*. Whether the transfer into a trust is likened to a hypothec, to garnishment or to a simple assignment, the rules remain the same. The *Civil Code of Québec* and the *Code of Civil Procedure*, R.S.Q., c. C-25, provide that the rules governing the assignment of claims apply. The relevant provisions read as follows:

> *Civil Code of Québec*
>
> **1680.** A debtor who has acquiesced unconditionally in the assignment or hypothecating of claims by his creditor to a third person may not afterwards set up against the third person any compensation that he could have set up against the original creditor before he acquiesced.
>
> An assignment or hypothec in which a debtor has not acquiesced, but which from a certain time may be set up against him, prevents compensation only for debts of the original creditor which come after that time.
>
> *Code of Civil Procedure*
>
> **637.** If the affirmative declaration of the garnishee is not contested and does not show the existence of another seizure by garnishment in his hands, the clerk, upon an inscription by either party, orders the garnishee to pay to the seizing creditor the amounts which he owes to the judgment debtor to the extent of the amount of the judgment in capital, interest and costs. To that extent the order of the clerk effects an assignment, in favour of the seizing creditor, of the judgment debtor's claim, from the date of the seizure. Such order must be served on the garnishee and becomes executory 10 days later.

[139] The ability of the debtor of the assigned claim to set up against the assignee any recourse that the debtor may have against the assignor is based on the general rule that the assignee may not have more rights in the assigned claim than the assignor had. This rule is set down in art. 1637 *C.C.Q.*:

> **1637.** A creditor may assign to a third person all or part of a claim or a right of action which he has against his debtor.
>
> He may not, however, make an assignment that is injurious to the rights of the debtor or that renders his obligation more onerous.

[140] This provision is complemented by art. 1643 *C.C.Q.*, which provides that a debtor may rely on a cause of extinction that occurred before an assignment could be set up against him or her. The first paragraph of that article reads as follows:

> **1643.** A debtor may set up against the assignee any payment made to the assignor before the assignment could be set up against him, as well as any other cause of extinction of the obligation that occurred before that time.

[141] The commentators and the courts have accordingly recognized that any defences and any right to refuse to perform (exception for nonperformance) that arose prior to an assignment may be set up against the assignee by a debtor who has not acquiesced in the assignment. The same is true of the extinction of obligations by compensation: Karim, at p. 773; Baudouin, Jobin and Vézina, at No. 962; Lluelles and Moore, at No. 3176; Bélanger, at p. 189.

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[142] Furthermore, where the right to compensation arises from an agreement entered into before the assignment became enforceable against the debtor, the debtor's rights under the agreement may be set up against the assignee: *A. L. Green Ltd. v. Michaud*, [1975] C.A. 432, cited with approval in *Banque Royale du Canada v. Béliveau*, [1976] C.A. 539, and *Bandera Investment Co. v. Société immobilière du Québec*, J.E. 98-1667 (Sup. Ct.), SOQUIJ AZ-98021774. The above cases concerned claims for rent in respect of which the lessees had a right to deduct or a right to compensation. In each case, because the contractual right to compensation predated the assignment, the exercise of the right was authorized in respect of the period after the assignment. In these circumstances, it was held that the agreements could be set up against the third parties because they had acquired their rights after the compensation agreements were signed. Although the judges did not say so explicitly, it seems clear that this conclusion was based on the premise that art. 1681 *C.C.Q.* did not apply in the circumstances because the assignees had acquired no rights as of the time the compensation agreements were signed. Vincent Karim makes the following comment:

> [TRANSLATION] However, it will be hard for the creditors of an insolvent party to challenge a compensation agreement entered into at the same time as the contract giving rise to that party's claim, as the creditors will have difficulty proving that the agreement has caused them any prejudice. [p. 750]

[143] The same approach has been adopted for assignments of conditional claims: *Seigneur v. Immeubles Beneficial Ltée*, [1994] R.J.Q. 1535 (C.A.); *Banque Nationale du Canada v. Notre-Dame-du-Lac (Ville)* (1990), 31 Q.A.C. 45; and *Banque de Montréal v. Walsh & Brais Inc.*, [1990] R.L. 119 (C.A.).

[144] Conventional compensation — or contractual set-off — defies categorization, since it may take as many forms as the contract that provides for it will allow: Derham, at para. 16.85. However, there is no denying that the right to compensation has characteristics in common with such concepts as the conditional obligation, the exception for nonperformance, and even the right to deduct or the right to retain. In *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, at paras. 28-29, for example, the Court likened a statutory right to deduct to compensation. Moreover, the right to deduct was one of the very first justifications given in France for holding that the debt actually owed to an assignee was the net amount: Duboc, at p. 169, No. 239, commenting on Ch. civ., May 13, 1833, S. 1833.1.668. While it comes as no surprise that Quebec's rules lead to the same result as the rules of French law, it is interesting to note that common law commentators and courts also acknowledge that the right to set-off may be asserted against third parties.

[145] Where the French rules are concerned, however, it should be noted that allowing compensation to be effected is based on a concept that does not on its own form part of the positive law of Quebec. In France, where there is a sufficient nexus between two debts, compensation may be effected despite the assignment of a claim or a collective recovery procedure: D. R. Martin, "Contrats et obligations", *Juris-classeur civil*, arts. 1289 to 1293, fasc. 108 to 111, No. 75. Since a compensation agreement creates a sufficient nexus, the possibility of setting it up is not in dispute (unless the agreement was entered into during a period where solvency was in doubt): Cass. civ., July 13, 1942, J.C.P. 1943.II.2157 (Annot. Houin); Cass. com., June 3, 1997, D. 1998.Jur.61 (Annot. François). (See, however, Cass. com., Dec. 9, 1997, *Bull. civ.* IV, No. 327, and the critique of that decision by A. Honorat, "Redressement et liquidation judiciaires", D. 1998.Somm.325.) Some authors draw a distinction in the case of garnishment by a third party on the basis that the property would no longer be available after the seizure: Didier Martin, "Des techniques d'affectation en garantie des soldes de comptes bancaires", D. 1987.Chron.229, and Thierry Bonneau, in *Droit bancaire* (7th ed. 2007), at No. 395. Duboc disagrees, however, as do Jean-Louis Rives-Lange and Monique Contamine-Raynaud (*Droit bancaire* (6th ed. 1995)). According to Rives-Lange and Contamine-Raynaud, [TRANSLATION] "[t]here is no reason to decide cases involving collective seizures differently from those involving individual seizures" (p. 183, footnote 6). In Quebec, the French debate over the unavailability of seized property would have to be resolved in favour of the possibility of setting up a compensation agreement entered into before the seizure. As I mentioned above, since art. 637 of the *Code of Civil Procedure* provides that seizure results in assignment of the claim, the principles discussed above concerning the assignment of claims apply to garnishment.

[146] The number of cases in which common law courts have considered contractual set-off is small, but the few reported decisions on this subject have been favourable to the right to rely on set-off agreements. For instance, I have already mentioned *518718 Alberta*, in which the court held that a contractual right of set-off had priority over the assignee's rights. Likewise, the Ontario Court of Appeal held in *Ching v. Jeffery* (1885), 12 O.A.R. 432, that the defences available to the debtor on an assigned promissory note, including the right to reduce his or her debt by an amount owed by the assignor, could be raised against the assignee. In *Canadian Admiral Corp. v. L. F. Dommerich & Co.*, [1964] S.C.R. 238, it was held that the debtor had as against the assignee under a factoring agreement the same defence it would have had as against the assignor. Finally, in *Toronto-Dominion Bank v. Block Bros. Contractors Ltd.* (1980), 118 D.L.R. (3d) 311 (Alta. Q.B.), a contractual right to set-off (referred to by the parties as a right to "future set-off") was

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available against an assignee of security on the basis of cases in which courts had applied the general rule that an assignee cannot have any greater right than the assignor (p. 318).

[147] In sum, at common law, as in Quebec civil law, the rule for asserting contractual rights against third-party assignees is based on the general principles governing obligations. It can be inferred from the decisions cited above that the right to conventional compensation is assessed as of the time the right is granted, not as of the time it is exercised. The protection of third parties, codified in Quebec law in art. 1681 *C.C.Q.*, applies to rights acquired before the compensation agreement was signed. In *Traité de droit civil — Les obligations: les effets du contrat* (1992), No. 602, at p. 589, Professor Jacques Ghestin gives a clear explanation of the effect of the transfer of a claim. His comment clarifies the legal justification for the possibility of setting up a contractual right to compensation against third parties:

> [TRANSLATION] A claim is not only a patrimonial asset, but also a legal relationship. When a claim is alienated, therefore, what is transferred is not just an asset, but also an active contractual situation.
>
> The possibility of setting up a contract whose object is the transfer of a claim thus necessarily has some particularities that are accounted for in positive law on the basis that the contract produces effects in respect of certain third parties.

[148] Thus, where the deemed trust applies to a claim, it attaches to a legal relationship that corresponds to an active contractual situation, which explains why the beneficiary of the trust may assert only those rights held by the tax debtor at the time the trust became effective.

[149] It will also be helpful to refer back to s. 227(4.1) *ITA* and to review the cases in which the scope of the deemed trust has been considered. Before Parliament clarified the respondent's priority over secured creditors, the courts had held that prior rights could be disregarded only to the extent expressly provided for in the relevant provision. For example, in *Board of Industrial Relations v. Avco Financial Services Realty Ltd.*, [1979] 2 S.C.R. 699, Martland J. wrote:

> In [s. 5A] the absence of a specific statutory provision to that effect, in my view it should not be construed in a manner which could deprive third parties of their pre-existing property rights. [p. 706]

(See also *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, at p. 1199.)

[150] This suggests that it is necessary to be cautious in assessing the scope of the deemed trust on the tax debtor's property. When Parliament wished to give the deemed trust more teeth, it took care to give the respondent priority over secured creditors. It did not alter the general rules governing the rights a debtor can assert against its original creditor. In assessing the consequences of that decision, particularly with regard to compensation, one can but find support in an interpretation based on the normally applicable legal rules.

[151] Compensation is used in many business transactions and in the asset accounting of many businesses. M. E. Grottenthaler and P. J. Henderson state in *The Law of Financial Derivatives in Canada* (loose-leaf) that "Canada can be described as a 'netting friendly' jurisdiction" both in the context of insolvency and where contractual matters outside that context are concerned (p. 5-3). They explain that netting, which is a form of set-off, is crucial to derivatives transactions that affect the capitalization rules applicable to banks. They say the following about the importance of this mechanism:

> It is of the utmost importance to parties that the termination and close-out netting provisions are enforceable against the other party. Unlike the case with many commercial transactions, parties are not willing to accept the risk that these provisions may not be fully enforceable in an insolvency situation. There are several reasons for this. First, many entities that participate in the derivatives market are subject to regulatory requirements that they maintain a certain asset level in relation to their liabilities (i.e. adequate capital). For this purpose, it is desirable to account for their transactions with their various counterparties on a net basis. The Basel Committee on Banking Supervision developed a new framework for regulatory capital and risk management (known as Basel II). The implementing Capital Adequacy Requirements guidelines released by OSFI [the Office of the Superintendent of Financial Institutions] to apply to Canadian incorporated banks allow for the netting of contracts pursuant to contractual netting provisions if the bank can satisfy OSFI that certain conditions are met, including that the institution has a written and reasoned legal opinion that, in the event of any legal challenge, the relevant courts would find the exposure under the netting agreement to be the net amount under the laws of all relevant jurisdictions (which includes the counterparty's home jurisdiction and the governing law of the transactions and the netting agreement). The legal opinions must address the validity and enforceability of the netting agreements in the context of insolvency proceedings.
>
> Secondly, because the marketplace for derivatives transactions is a highly competitive and global marketplace, entities governed by the laws of a jurisdiction that does not recognize the effectiveness of

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termination and close-out netting in an insolvency situation are put at a serious competitive disadvantage. [pp. 5-2 and 5-3]

[152] This is just one example of the use of compensation in a context that does not involve the "security interest" concept and of the great importance of this mechanism both in Canadian law and in international economic relations. Parliament thus seems to have had reasons for acting as it did in modifying the deemed trust only to give the respondent priority over creditors with security interests. I have concluded that the deemed trust does not give the respondent more rights than the tax debtor had and that, insofar as the amounts had not been deducted at the time the agreement was entered into, the Caisse's right may be set up against the respondent. What this finding means in practice must now be determined.

[153] In the case at bar, Camvrac's right to recover its claim was subject to the right to compensation that had been granted to the Caisse in the agreement to give savings as security. In the context of that agreement, the right to compensation was a right held by the Caisse that could not be negated solely by the fact of the deemed trust becoming effective. The respondent, as a third party, could not demand that the Caisse discharge its debt to Camvrac if the conditions for repayment had not been met. The Caisse's right had to be respected by third parties who acquired rights after the agreement was signed. Consequently, the respondent must abide by the compensation agreement, given that her right is subsequent to it.

[154] As I mentioned above, Camvrac had remitted nothing to the respondent since May 2000. Because the compensation agreement was entered into in September 2000, a question that arises is whether the respondent may claim from the Caisse amounts owed prior to that date. This is the issue that remains to be addressed.

[155] In certain circumstances, the debt itself can consist only of the net balance owed by the debtor. Thus, where, as in *Bandera*, the amount of an assignment of rent is established only after adjustments, the amount of the rent corresponds to the net balance payable to the landlord. In such a situation, regardless of when the assignee's right first arises, his or her claim cannot exceed the actual amount owed by the debtor of the assigned claim, that is, the post-compensation amount. In other cases, such as where the respective claims do not have the same source, the date the creditor's right arises may be relevant. The instant case is one such case.

[156] The claims of the Caisse and Camvrac have distinct sources: one is based on the variable credit contract, the other, on the term savings agreement. The Caisse's claim against Camvrac dates from September 18, 2000 and Camvrac's claim, from September 25, 2000. On the latter date, Camvrac undertook, first in the term savings agreement, [TRANSLATION] "to make, on the date of acquisition, a deposit in the amount of $200,000", and then in the agreement to give savings as security, to "maintain" a deposit in the amount of $200,000. These undertakings show that the respective claims of the Caisse and Camvrac are distinct. For Camvrac to be able to undertake in the agreement to give savings as security to "maintain" the deposited amount, its claim resulting from the term savings agreement had to take on an independent existence, if only at the time the deposit was made. Given that the deposit was made before the right to compensation was granted, the deemed trust could have become effective in respect of Camvrac's claim up to the total of the amounts owed to the respondent as of September 25, 2000. This is not a case in which the respective debts have the same source and the claim is subject to a right to compensation. Just as the respondent's rights are subordinated to the right to compensation for deductions subsequent to the signing of the agreement, the Caisse's right must give way to the respondent's pre-existing right. As I stated at the beginning of these reasons, the evidence in the record is insufficient to establish the amount of the unremitted deductions with any precision; therefore, failing an agreement between the parties, the case must be remanded to the court of original jurisdiction to establish that amount.

8. Interest Issue

[157] Regarding interest, the Court of Appeal correctly endorsed the application of *Markevich*, and there is no need to intervene.

9. Conclusion

[158] For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal, authorize compensation for the balance of the amounts deducted as of September 25, 2000 and, failing an agreement between the parties, remand the case to the court of original jurisdiction to establish the amount to be paid by the Caisse to the respondent, with costs throughout.

APPENDIX

A. Contractual Provisions

(a) *Variable Credit Contract*

[TRANSLATION]

1. LINE OF CREDIT

The Caisse agrees to extend to the Borrower, who accepts, a line of credit in the amount of $277,000.00. . . .

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. . .

At any point in time, the Caisse may notify the Borrower that no advance shall be granted to it thenceforth under this contract.

. . .

3. INTEREST

. . .

The interest shall be paid on the twenty-fifth day of each month. It shall be debited automatically from the . . . account . . . .

The Borrower further undertakes to pay, on any payment due not made, additional interest . . . , any arrears of interest being then considered as principal.

. . .

5. REQUEST FOR REPAYMENT

The Caisse reserves the right to demand at any time the immediate repayment of any balance owed in principal, interest, costs and accessories. The Caisse shall then be entitled to no longer carry out this agreement, subject to all its other rights and recourses.

. . .

7. DEFAULT

If the Borrower draws a cheque that brings the line of credit balance to an amount higher than the amount authorized hereunder, if it goes bankrupt, if it transfers its property or becomes insolvent or fails to meet any of the conditions and obligations stipulated herein, any balance then owing in principal, interest, costs and accessories shall become immediately payable.

(b) *Term Savings Agreement*

[TRANSLATION]

Date of maturity: October 16, 2005

. . .

PROVISIONS GOVERNING THE PRINCIPAL

2. The member agrees to make, on the date of acquisition, a deposit in the amount of $200,000 (hereinafter referred to as the "initial amount of deposit").
3. On the date of issue associated with the applicable term ("date of issue"), the initial amount of deposit and the interest then accrued on that amount shall be reinvested in the form of a deposit maturing on the maturity date associated with the applicable term ("date of maturity").
4. This deposit may neither be negotiated nor transferred. No amount in principal or interest shall be redeemable or payable before the date of maturity.
5. This deposit may be hypothecated or given as security only in favor of the issuing Caisse.

. . .

PROVISIONS GOVERNING DISPOSAL AT MATURITY

11. At maturity date, unless the Caisse is notified to the contrary not later than the seventh day following such date, the principal and interest shall be deposited (to a term savings account) for a term equal to the term of this deposit. The interest rate shall be the rate then in force at the Caisse for such deposit, depending on the applicable term. The interest shall be reckoned daily and capitalized annually.

. . .

THIS IS A DEPOSIT WITHIN THE MEANING OF THE DEPOSIT INSURANCE ACT.

(c) *Agreement to Give Savings as Security*

[TRANSLATION]

1. RIGHT TO WITHHOLDING AND COMPENSATION

To secure the repayment of any sum in principal, interest, costs and accessories owed or to be owed the Caisse by:

: the Depositor

9 Name of Borrower (if other than Depositor) _____

under:

: (a) a line of credit agreement in the amount of $277,000.00 granted to him (her) on 2000-09-18;

9 (b) a (Loan, line of credit, etc.) _____ agreement in the amount of $ _____ granted to him (her) on _____;

9 (c) the following agreements:

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_____
_____
_____

: and under any debts or obligations, present or future, direct or indirect held by:

: the Depositor

9 Name of Borrower (if other than Depositor) _____ towards the Caisse,

(hereinafter referred to as "the Credit Contract[s]")

the Depositor undertakes to maintain and consents to the withholding by the Caisse, in the account(s) or on the certificate(s) of deposit mentioned below, of the amount of $200,000.00 distributed as follows:

Account or certificate of deposit identification (for deposit certificates, state date issued amount and certificate number)	**Sum withheld by the Caisse**
ALTERNATIVE TERM SAVINGS 5 YEARS IN THE AMOUNT OF $200,000.00	$200,000.00
_____	$_____

The Caisse may withhold the sums shown above, 9 along with the interest from the certificates of deposit if applicable, as long as all the amounts due under the Credit Contract(s) have not been fully repaid and, in the case of a line of credit, as long as it has not been cancelled. In cases of default as provided for below, there shall be compensation between the Credit Contract(s) and the certificate(s) of deposit or the amounts deposited defined above, as provided for in Section 7.

2. SAFEKEEPING OF CERTIFICATES

. . .

3. HYPOTHEC

To further secure the repayment of any sum owed or to be owed under the Credit Contract(s), the Depositor hypothecates and pledges the above-mentioned certificate(s) of deposit and sums deposited, for an amount equal to the total amount of the sums withheld. The parties also agree that the clause shown on the certificate(s) of deposit stipulating that such certificate(s) are neither negotiable nor transferable shall be deemed cancelled, effective from the date of these presents.

4. WITHDRAWALS AND CHEQUES

. . .

5. REDEMPTION BEFORE MATURITY OF A CERTIFICATE OF DEPOSIT

. . .

6. MATURITY AND RENEWAL OF A CERTIFICATE OF DEPOSIT

. . .

7. DEFAULT

The Depositor shall be in default in any of the following cases:

(a) if any of the commitments under the Credit Contract(s) or these presents is not fulfilled;

(b) if the Depositor or the Borrower becomes insolvent or goes bankrupt, or if he (she) makes a proposal and it is rejected or annulled;

. . .

In the event of any default:

(a) any sums owing under the Credit Contracts shall immediately become payable;

(b) the Caisse may use the sums deposited or the certificate(s) of deposit contemplated herein, regardless of its (their) having matured or not, to compensate its claim under the Credit Contract(s);

. . .

The consequences of a default are for the exclusive benefit of the Caisse and the latter may waive them expressedly. The Caisse may, among others, without any prejudice to its rights, wait for the maturity date of the certificate(s) of deposit before exercising its rights as provided for in paragraphs (b) and (c) above.

8. RESERVE OF RECOURSES

. . . Furthermore, failure by the Caisse to avail itself of any of its rights in case of default shall not be interpreted as a waiver of such rights.

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B. Statutory Provisions

(a) *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

224. . . .

(1.3) In subsection (1.2),

. . .

"security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

227. . . .

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest . . . .

(b) *Employment Insurance Act*, S.C. 1996, c. 23

86. (1) All premiums, interest, penalties and other amounts payable by an employer under this Act are debts due to Her Majesty and are recoverable in the Federal Court or any other court of competent jurisdiction or in any other manner provided for by this Act.

(2) Where an employer has deducted an amount from the remuneration of an insured person as or on account of any employee's premium required to be paid by the insured person but has not remitted the amount to the Receiver General, the employer is deemed, notwithstanding any security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) in the amount so deducted, to hold the amount separate and apart from the property of the employer and from property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for the security interest would be property of the employer, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(2.1) Notwithstanding the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (2) to be held by an employer in trust for Her Majesty in the manner and at the time provided under this Act, property of the employer and property held by any secured creditor (as defined in subsection 224(1.3) of the *Income Tax Act*) of that employer that but for a security interest (as defined in subsection 224(1.3) of the *Income Tax Act*) would be property of the employer, equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted by the employer, separate and apart from the property of the employer, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(*b*) to form no part of the estate or property of the employer from the time the amount was so deducted, whether or not the property has in fact been kept separate and apart from the estate or property of the employer and whether or not the property is subject to such a security interest

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and is property beneficially owned by Her Majesty notwithstanding any security interest in such property or in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

(2.2) For the purposes of subsections (2) and (2.1), a security interest does not include a prescribed security interest.

(c) *Civil Code of Québec*, S.Q. 1991, c. 64

1637. A creditor may assign to a third person all or part of a claim or a right of action which he has against his debtor.

He may not, however, make an assignment that is injurious to the rights of the debtor or that renders his obligation more onerous.

. . .

1643. A debtor may set up against the assignee any payment made to the assignor before the assignment could be set up against him, as well as any other cause of extinction of the obligation that occurred before that time.

. . .

1671. Obligations are extinguished not only by the causes of extinction contemplated in other provisions of this Code, such as payment, the expiry of an extinctive term, novation or prescription, but also by compensation, confusion, release, impossibility of performance or discharge of the debtor.

1672. Where two persons are reciprocally debtor and creditor of each other, the debts for which they are liable are extinguished by compensation, up to the amount of the lesser debt.

Compensation may not be claimed from the State, but the State may claim it.

1673. Compensation is effected by operation of law upon the coexistence of debts that are certain, liquid and exigible and the object of both of which is a sum of money or a certain quantity of fungible property identical in kind.

A person may apply for judicial liquidation of a debt in order to set it up for compensation.

. . .

1680. A debtor who has acquiesced unconditionally in the assignment or hypothecating of claims by his creditor to a third person may not afterwards set up against the third person any compensation that he could have set up against the original creditor before he acquiesced.

An assignment or hypothec in which a debtor has not acquiesced, but which from a certain time may be set up against him, prevents compensation only for debts of the original creditor which come after that time.

1681. Compensation may neither be effected nor be renounced to the prejudice of the acquired rights of a third person.

(d) *Code of Civil Procedure*, R.S.Q., c. C-25

637. If the affirmative declaration of the garnishee is not contested and does not show the existence of another seizure by garnishment in his hands, the clerk, upon an inscription by either party, orders the garnishee to pay to the seizing creditor the amounts which he owes to the judgment debtor to the extent of the amount of the judgment in capital, interest and costs. To that extent the order of the clerk effects an assignment, in favour of the seizing creditor, of the judgment debtor's claim, from the date of the seizure. Such order must be served on the garnishee and becomes executory 10 days later.

Appeal dismissed with costs, LEBEL *and* DESCHAMPS JJ. *dissenting.*

Solicitors for the appellant: Langlois Kronström Desjardins, Lévis.

Solicitor for the respondent: Canada Department of Justice, Montréal.

Ivaco Inc., Re, 2006 CanLII 34551 (ON CA) - Ranking Between Provincial Deemed Employee Pension Trusts and Federal BIA

Date:	2006-10-17
Docket:	C44455
Parallel citations:	83 OR (3d) 108; 275 DLR (4th) 132; 26 BLR (4th) 43; 25 CBR (5th) 176
URL:	http://canlii.ca/t/1ps55
Citation:	Ivaco Inc., Re, 2006 CanLII 34551 (ON CA), <http://canlii.ca/t/1ps55> retrieved on 2013-08-18

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See also: CLAIMS FOR VACATION PAY HAVE NO PRIORITY UNDER BANKRUPTCY AND INSOLVENCY ACT, JUDGE RULES, Lancaster House

DATE: 20061017
DOCKET: C44455
COURT OF APPEAL FOR ONTARIO

LASKIN, ROSENBERG AND SIMMONS JJ.A.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.	**Frederick L. Myers and Jason Wadden for the appellant, The Superintendent of Finance Services (Ontario)**
AND IN THE MATTER OF A Plan or Plans of Compromise or Arrangement of Ivaco Inc. and the Applicants listed in Schedule "A"	**Andrew Hatnay for the respondent, Quebec Pension Committee of Ivaco Inc.** **Jeffrey S. Leon and Richard B. Swan for the respondent, National Bank of Canada** **Dan V. MacDonald for the respondent, Bank of Nova Scotia** **Geoff R. Hall for the respondent, QIT-Fer et Titane Inc.** **Robert W. Staley and Evangelia Kriaris for the respondent, Informal Committee of Noteholders** **Peter F.C. Howard for the Monitor, Ernst & Young Inc.** **Heard: February 22, 2006**

On appeal from the three orders of Justice James M. Farley of the Superior Court of Justice all dated July 18, 2005, reported at [2005] O.J. No. 3337.

LASKIN J.A.:

A. INTRODUCTION

[1] This appeal arises out of a priorities dispute between two groups of creditors of an insolvent company, Ivaco Inc., and its related group of companies. The dispute is over the sale proceeds of the assets of Ivaco. On one side of the dispute are the employees and retirees in Ivaco's underfunded non-union pension plans. They claim under the deemed trust and lien provisions of Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P.8, ss. 57(3), (4) ("PBA"), and seek to recover unpaid contributions to the plans outside of bankruptcy. On the other side of the dispute are Ivaco's financial and trade creditors. They wish to put Ivaco into bankruptcy in order to take advantage of the scheme of distribution under the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). **The dispute arises because provincial deemed trusts do not, by virtue of that legislative designation, enjoy priority under the federal bankruptcy statute.**

[2] Ivaco and its related group of companies (collectively "the Companies") became insolvent in 2003. In September 2003, the Companies sought and obtained court-ordered protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). All claims of creditors were stayed. A later order stayed the

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Companies' obligation to pay the outstanding past service contributions and special payments to the non-union pension plans. (Past service contributions are monies due to fund benefits or benefit enhancements for pension members' past service; special payments are extraordinary payments made because a pension plan is underfunded).

[3] The main purpose of CCAA proceedings is to facilitate the restructuring of an insolvent company so that it may stay in business. The Companies, however, were unable to restructure. In late 2004, virtually all of their assets were sold. All that remains is a pool of money: the proceeds of sale. All that remains to be done is to distribute this pool of money among the creditors.

[4] The Superintendent of Financial Services, representing the employees and retirees, brought a motion for an order that part of the sale proceeds be used to satisfy the unpaid past service and special contributions, which the Companies are deemed to hold in trust for the beneficiaries of the pension plans under the PBA. Alternatively, the Superintendent sought an order segregating this amount in a separate account. The Quebec Pension Committee ("QPC"), the administrator of the largest non-union plan, supported the Superintendent's motion. Two of the Companies' lenders, the Bank of Nova Scotia and the National Bank, brought motions for an order lifting the stay under the CCAA and petitioning the Companies into bankruptcy.

[5] Farley J., who had supervised these CCAA proceedings for over two and a half years, heard all three motions. By order dated July 18, 2005 he dismissed the Superintendent's motion and partly granted the banks' motions. He lifted the stay and permitted the bankruptcy petitions to proceed, but he did not put the Companies into bankruptcy.

[6] The Superintendent appeals. She argues that the motions judge erred either in law or in the exercise of his discretion. The Superintendent submits that the motions judge erred in law by failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount. The Superintendent contends that the PBA legally required that the deemed trusts for unpaid past service contributions and special payments be executed or protected before bankruptcy.

[7] Alternatively, the Superintendent submits that the motions judge erred by exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed without first protecting the claims of the pension beneficiaries. The Superintendent contends that the motions judge exercised his discretion on a wrong principle because he ignored the unfairness and prejudice to the Companies' most vulnerable creditors.

[8] The Superintendent also appeals an ancillary order made by the motions judge. To facilitate the bankruptcy petitions, the motions judge ordered that the head offices of two of the Companies be transferred from cities in Quebec to Toronto. The Superintendent and the QPC submit that the motions judge had no jurisdiction under the CCAA to do so, or alternatively, improperly exercised his discretion in doing so.

[9] This court granted leave to appeal under s. 13 of the CCAA. The court also stayed the two orders in favour of the banks pending the disposition of the appeal.

B. RELEVANT FACTS AND CHRONOLOGY

a) The Companies

[10] Six related corporations were granted protection under the CCAA: Ivaco Inc., Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc., Docap (1985) Corporation, Florida Sub One Holdings Inc. and 3632610 Canada Inc. Four of these corporations – Ivaco, IRM, Ifastgroupe and Docap – established the non-union pension plans in issue on this appeal.

[11] Ivaco, IRM and Ifastgroupe ceased operations after their assets were sold. Only Docap now has any operating assets. Its assets consist mainly of inventory and accounts receivable that have not yet been sold. Docap is a small entity. Neither restructuring it nor selling it as a going concern seems a viable option. The National Bank, Docap's principal secured creditor, wishes to put the company into bankruptcy and liquidate its assets.

b) The non-union pension plans

[12] The Companies had both a unionized and non-unionized workforce. They established various registered pension plans for their employees. These included four non-union plans: the Ivaco Salaried Plan, which is registered in Quebec and has both Quebec and Ontario members, the Designated Employees Plan, the Ingersoll Plan and the Docap Plan, all registered in Ontario.

[13] The QPC administers the Ivaco Salaried Plan, which is the largest of the four plans. Ivaco formerly administered the other three plans. However, the Superintendent appointed PricewaterhouseCoopers Inc. as administrator of the Designated Employees Plan and the Ingersoll Plan. A former Ivaco employee administers the Docap Plan for Ivaco.

c) The initial stay under the CCAA

[14] After their operations became financially troubled, the Companies sought and were granted protection from their creditors under the CCAA. On September 16, the motions judge granted a comprehensive stay of all creditor claims up to that time. He appointed Ernst & Young Inc. as Monitor. As a result of the stay, debts of the Companies existing on the date of the initial stay order have not been paid.

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[15] During the CCAA proceedings the Companies continued to pay the wages and benefits of all active employees. The Companies also continued to pay their current contributions to their various pension plans.

d) The pension stay order

[16] When the Companies began CCAA proceedings, the non-union pension plans were underfunded. Before the initial stay order the Companies had been making both special payments and past services contributions to rectify this underfunding. Under the PBA, past service contributions accrue daily and are to be paid monthly.

[17] Early in the CCAA proceedings, the Monitor concluded that the Companies would jeopardize their ability to restructure if they were required to continue making past service contributions and special payments. Because of the magnitude of these payments, the creditors would not agree to permit the DIP (debtor in possession) loan to be used for funding the pension plans. In their view, and in the view of the Monitor, doing so would imperil the possibility of restructuring. Relying on the Monitor's opinion, the Companies sought, and on November 28, 2003, were granted a pension stay order.

[18] The motions judge relieved the Companies from making past service contributions or special payments to the underfunded non-union pension plans during the CCAA stay. No interested party, including both the Superintendent and the QPC, opposed the order. All parties thought that relieving the Companies from making these payments would assist their restructuring efforts. The Companies still remained obligated to make current contributions to the non-union plans.

[19] Paragraph 4 of the pension stay order stipulated that none of the Companies would incur any obligation because of the failure to make these past service contributions and special payments during the stay period:

> THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

[20] Paragraph 5 of the pension stay order expressly recognized that statutory deemed trust, liens or other charges may arise because the Companies were relieved from paying past service contributions but that they would not have priority over the charges in the initial stay order:

> THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim, lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated order.

[21] Paragraph 6 of the order recognized that the pension stay did not compromise the Companies' obligations under their non-union pension plans:

> Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

e) The sale to Heico

[22] As the Companies were unable to restructure, they began to pursue a second option: selling their assets in a going concern sale. On August 18, 2004, the motions judge approved the sale of the assets of Ivaco, Ifastgroupe and IRM to the Heico Companies. As part of the transaction, the purchaser hired the Companies' unionized workforce and assumed the Companies' obligations to their unionized pension plans. The purchaser also hired almost all of the Companies' non-unionized workforce, but it was unwilling to assume the Companies' obligations to the four non-union pension plans. These obligations remained with the Companies.

[23] Nonetheless, the Monitor supported the sale. In the Monitor's view, the sale gave the creditors and workers greater recovery and benefits than they would obtain in either a bankruptcy or a liquidation. Again, no party, including both the Superintendent and the QPC, opposed the sale.

[24] The motions judge made two orders — on August 18, 2004 and November 30, 2004 — vesting the assets in the purchaser. These orders expressly preserved all claims that might have been made against the assets by providing that these claims could be made against the sale proceeds. In accordance with these orders, the Monitor is holding the sale proceeds in various trust accounts.

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[25] In December 2004, Ivaco, IRM and Ifastgroupe wound-up their non-union pension plans. Under the PBA, they are obligated to fund the wind-up liabilities of these plans.

f) The pension claims

[26] The Companies' non-union pension plans have been severely underfunded and the deficit has increased during the stay period. At the beginning of the CCAA proceedings in September 2003, unpaid past service contributions to the non-union plans totalled about $1.4 million and the solvency deficiency amounted to approximately $11.1 million. By December 2004 these figures had grown to approximately $11.6 million and $29.1 million respectively. They continued to grow while the pension stay order remained in place.

[27] The potential loss of benefits for each pensioner is significant. Counsel for the Superintendent advised the court that the average pensioner in the non-union plans is sixty-seven years old and earns a pension of $14,000 per year. These pensioners will receive their full pension only if the full wind-up deficit is paid. For example, if the plans do not recover the past service contributions suspended by the pension stay order, the average monthly pension will be reduced by 26 per cent from approximately $1,200 to $888. If only unpaid contributions are recovered, and not the full solvency deficiency, the average pension will be reduced by 17 per cent to $996 monthly.

g) The claims of the financial creditors

[28] The outstanding claims of the financial creditors of the Companies are also significant. We were told that the sale proceeds of the Companies' assets are insufficient to satisfy all claims, and are certainly insufficient to satisfy the unsecured claims.

[29] The Bank of Nova Scotia was the lender to IRM. By October 2003, IRM owed the Bank about $40 million. IRM had ceased to meet its liabilities generally as they became due, and had given notice to its creditors that it had suspended payment of its debts. On October 3, 2003 the Bank issued a petition for a receiving order against IRM. The issuance of the petition was permitted by the initial stay order, but that proceeding was otherwise stayed. The order under appeal lifted the stay and permitted the Bank of Nova Scotia to proceed with its petition.

[30] The National Bank lent money to Ivaco, Ifastgroupe and Docap. As of March 2005 it had a secured claim against Ivaco for $17 million,[1] and against Docap for $55,622 U.S. and $4.2 million Canadian. It also had an unsecured claim against Ifastgroupe for $45.5 million Canadian. Ifastgoupe is also indebted to La Caisse for $14.9 million.

[31] A large number of other creditors also have claims against the Companies: Ivaco has 792 creditors with claims totalling $554.9 million; Docap has 82 creditors with claims totalling $111.1 million; and Ifastgroupe has 645 creditors with claims totalling $253.3 million.

C. ANALYSIS

a) What is in issue on this appeal

[32] The scope of this appeal is quite narrow. There are three issues:

1) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts under the PBA or in failing to segregate this amount in a separate account?
2) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed, without protecting the claims of the pension beneficiaries?
3) Did the motions judge err in law or in the exercise of his discretion by ordering the transfer of Ivaco's and Ifastgroupe's head offices from Quebec to Toronto?

b) What is not in issue on this appeal

[33] There are also three issues raised by the parties that do not need to be decided on this appeal: (1) whether, outside of bankruptcy, the deemed trusts under the PBA have priority over the Bank of Nova Scotia's security under s. 427 of the *Bank Act*, S.C. 1991, c.46; (2) whether the Superintendent can show "sufficient cause" under s. 43(7) of the BIA to deny the application for a bankruptcy order; and, (3) whether the deemed trusts under the PBA also meet the requirements for a common law trust and thus on bankruptcy should be excluded from the property of the Companies under s. 67(1)(a) of the BIA.

[34] On my view of the appeal, the first of these issues does not have to be resolved. It may become relevant at the bankruptcy hearing, and, if so, should be dealt with by the bankruptcy judge. See *Abraham v. Canadian Admiral Corp. (Receiver of)* 1998 CanLII 2081 (ON CA), (1998), 39 O.R. (3d) 176 (C.A.). The second and third issues, I assume, will be dealt with at the hearing of the bankruptcy petitions. Admittedly, the motions judge made some observations on these two issues. However, he also said, at para. 20 of his reasons, that he was not deciding either one:

> However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it

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> would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

[35] In their written and oral submissions, the Superintendent and the QPC argued that some of the motions judge's general observations on these issues were wrong. I do not propose to consider these arguments because, as the motions judge recognized, they should be addressed at the hearing of the bankruptcy petitions. Instead, I will make a few brief observations of my own.

[36] In my view, the motions judge appropriately considered what would likely happen at the bankruptcy hearing. He did so because the likely implications of lifting the stay were relevant considerations to the exercise of his discretion.

[37] **The motions judge observed, at para. 14, that the discretion to refuse to make a bankruptcy order under s. 43(7) typically is exercised in two categories of cases: where the petitioner has an ulterior motive in seeking the order, or where the order would not serve any meaningful purpose. This observation reflects the current state of the case law under s. 43(7). See for example *Re Dallas/North Group Inc.* reflex, (1999), 46 O.R. (3d) 602 (Gen. Div.); *Buth-na-bodhiaga, Inc. v. Lambert* 2002 CanLII 45022 (ON CA), (2002), 60 O.R. (3d) 787 (C.A.). Although the motions judge added that the Superintendent's claim does not appear to come within either category, he left the final determination of that question for the bankruptcy judge.**

[38] The motions judge also observed, at para. 11 of his reasons, that a provincially created deemed trust does not by that fact alone enjoy priority under the BIA. This is not a contentious proposition. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute. See for example *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue,* 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453. Indeed, it is this jurisprudence that undoubtedly prompted the Superintendent's original motion and appeal to this court.

[39] The motions judge also correctly observed, at para. 11 of his reasons, that a provincial deemed trust will retained its priority in bankruptcy only if it also meets the three attributes – the three certainties – of a common law trust: certainty of intent; certainty of subject matter; and certainty of object. Only a trust that has these three attributes is a "true trust" that will be exempt from the bankrupt's estate under s. 67(1)(a) of the BIA. See for example *Henfrey Sampson*, *supra*. Whether the Superintendent can establish a true trust for unpaid past service contributions, even though the proceeds of the Heico sale have been commingled, will be decided at the bankruptcy hearing.

[40] I now turn to the issues that do arise on this appeal.

c) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount?

[41] The Superintendent's principal submission is that the motions judge erred in law in failing to order payment of the amount of the deemed trusts before bankruptcy or in failing to order the Monitor to segregate this amount during the CCAA proceedings. The submission that the motions judge was legally required to order payment or segregation of the amount of the deemed trusts was not advanced before him. The Superintendent advanced this submission for the first time in this court. I do not agree with it.

[42] I will deal first with whether the motions judge should have required the Monitor, Ernst & Young, to segregate the amount of the deemed trusts. The Superintendent contends that the Companies, and in their place the Monitor, had a statutory and fiduciary obligation to segregate. As the Monitor was an officer of the court, the motions judge should have compelled it to fulfill these duties. This contention faces three obstacles: the language of the PBA; the terms of the pension stay order; and the status and role of the Monitor.

[43] The deemed trusts for unpaid past service and special contributions are found in ss. 57(3) and (4) of the PBA. Subsection (3) is the basic provision that creates a deemed trust for unpaid employer contributions. Subsection (4) stipulates that on the wind up of a pension plan, employer contributions accrued but not yet due because of the timing of the wind up are also deemed to be held in trust:

> s. 57(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> s. 57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[44] At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R

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235, Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act*, *1987*, S.O. 1987, c.35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco* is correct, but I do not need to resolve the issue on this appeal.

[45] Under s. 57(5) of the PBA the plan administrator has a lien and charge on the assets of the employer for the amount of any deemed trust. The lien and charge permit the administrator to enforce the deemed trust.

> s. 57(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

[46] The Superintendent argues that these provisions required the Companies, and in their place the Monitor, to keep the unpaid contributions in a separate account. However, the language of s. 57 does not require the employer to hold the contributions separately. A "deemed trust" is, in a sense, a legal fiction. Outside of bankruptcy it does create a priority for pension contributions, a priority that would not exist but for the designation. Yet, as I have already said, this legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account it must legislate that separation. It has not done so.

[47] The Superintendent argues that the pension stay order supports her position because para. 5 the order, *supra*, recognized that a deemed trust for unpaid contributions may arise during the stay period and that para. 6 of the stay order, *supra*, did not compromise the Companies' obligation to make these contributions. This argument fails to take account of para. 4 of the pension stay order. Paragraph 4 stipulates that during the stay the Companies will not incur any obligation – statutory, fiduciary or otherwise – for failing to make contributions to the plan. In my view, the Superintendent's argument amounts to an impermissible collateral attack on para. 4 of the pension stay order.

[48] The Superintendent also tries to buttress her position by arguing that the Monitor stands in the shoes of the Companies, and like the Companies, has a fiduciary duty to the pension beneficiaries. I disagree.

[49] The Monitor was appointed under s. 11.7(1) of the CCAA to "monitor the business and financial affairs" of the Companies, and was given the functions set out in s. 11.7(3) of that statute: to examine the Companies' property, report to the court on the Companies' business and financial affairs and keep the creditors informed. Although the motions judge gave the Monitor additional powers, they were limited. The Monitor was given authority to deal with day-to-day administrative matters, to finalize the sale to Heico and to receive and control the proceeds of sale. I do not think it can be fairly said that the Monitor "stands in the shoes of the Companies".

[50] Equally important, the Monitor does not owe a fiduciary duty to the pension beneficiaries. The Superintendent's attempt to impose an obligation on the Monitor to segregate the contributions to the non-union plans depends at least on establishing that the Monitor acts as a fiduciary of the employees in those plans. Both the role of the Monitor and the initial stay order preclude the Superintendent's assertion.

[51] Pension plan administrators do owe a fiduciary duty to plan members. See E.E. Gillese, *The Fiduciary Liability of the Employer as Pension Plan Administrator* (Toronto: The Canadian Institute, November 18, 1996, pp. 1-25). But the Monitor was not given that role. It is not an administrator of any of the four non-union plans. Indeed, the Superintendent never asked the court to give the Monitor responsibility for administering these plans.

[52] Moreover, para. 59 of the initial stay order expressly states that the Monitor is not to be considered either a successor or related employer.

> THIS COURT ORDERS that nothing in this Order shall result in the Monitor being or being deemed or considered to be a successor or related employer, sponsor or payor with respect to any Applicant or any employees or former employees of any Applicant under any legislation, including ... the *Pension Benefits Act* (Ontario) ... or under any other provincial or federal legislation, regulation or rule of law or equity applicable to employees or pensions, or otherwise." [Emphasis added].

As the Monitor was neither a plan administrator nor a successor employer, it can owe no fiduciary duty to the members of the four plans.

[53] Therefore, the combination of the wording of s. 57 of the PBA, para. 4 of the pension stay order and the limited role of the Monitor, refute the Superintendent's segregation argument. The Superintendent, however, submits that two cases, the decision of this court in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* 2005 CanLII 3584 (ON CA), (2005), 74 O.R. (3d) 382 (C.A.) and an earlier decision of the motions judge in *Usarco*, *supra*, support the argument for segregation. In my view, both cases are distinguishable.

[54] In *TCT Logistics,* this court held that an interim receiver, who was both an officer of the court and stood in the shoes of the debtor, had a statutory duty under the legislation then in force, s. 15 of the *Load Brokers Regulation*, O.Reg. 556/92 (passed under the *Truck Transportation Act*, R.S.O. 1990, c. T.-22) to hold carriers' fees that it had collected in a separate trust account. *TCT Logistics* and this case differ in three critical ways.

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[55] First, the interim receiver in *TCT Logistics*, was not just an officer of the court, it stood in the place of the debtor company. Here, although the Monitor is an officer of the court, it does not stand in the place of the Companies. For the reasons outlined in para. 49 its role is far more limited.

[56] Second, in *TCT Logistics* the court order authorized the interim receiver to hold the carriers' fees in a separate bank account until entitlement to that money was decided. Here, the pension stay order prohibited the Companies from making any past service or special contributions during the stay period.

[57] Third, and perhaps most important, the applicable legislation in *TCT Logistics,* s. 15(2) of the *Load Brokers Regulation* required the debtor company to maintain a separate trust account and to keep the fees it collected for the carriers in that account. Here, s. 57 of the PBA does not similarly require an employer to keep its unpaid contributions in a separate trust account. Moreover, in *TCT Logistics,* despite s. 15(2) of the Regulation, this court held that the carrier fees previously collected by the debtor company lost their character as trust money because they had been commingled with other funds. *TCT Logistics* thus does not support the Superintendent's position.

[58] In *Usarco, supra,* at para. 16, Farley J. commented that the deemed trust provisions of the PBA "implied a fiduciary obligation on the part of Usarco", and that "a trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation". These comments do not apply to this case. The Monitor here, unlike the trustee in bankruptcy in *Usarco,* did not step into the shoes of the debtor. Thus, *Usarco* does not assist the Superintendent.

[59] For these reasons, I reject the Superintendent's argument that the motions judge was required in law to order the segregation of the amount of the deemed trusts during the CCAA proceeding. I now turn to the Superintendent's other submission: that the motions judge was required in law to order that the amount of the deemed trust be paid at the end of the CCAA proceedings, but before bankruptcy.

[60] The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds. See for example *Re United Maritimes Fisheries Cooperative* (1988), 68 C.B.R. (N.S.) 170 at 173 (N.B.Q.B.).

[61] The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the CCAA and the BIA in which the provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.

[62] The federal insolvency regime includes the CCAA and the BIA. The two statutes are related. A debtor company under the CCAA is defined in s. 2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a thirty-day stay of any current or prospective proceedings under the BIA, and s. 11(4) authorizes an extension of the initial thirty-day period. During the stay period, creditor claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

[63] For the Superintendent's position to be correct, there would have to be a gap between the end of the CCAA period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the CCAA period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the CCAA. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

[64] Where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

[65] Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. See *Husky Oil, supra,* at paras. 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the BIA. It cannot do so.

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[66] The Superintendent relies on one authority in support of its position: the decision of the motions judge in *Usarco, supra*. In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the PBA. However, the facts in *Usarco* differed materially from the facts in this case.

[67] In *Usarco*, CCAA proceedings did not precede the bankruptcy petition. Moreover, in *Usarco* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco* it was unclear whether bankruptcy proceedings would ever take place.

[68] Recently in *Re General Chemical Canada Ltd.*, [2005] O.J. No. 5436, Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:

> To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.

I agree. The factual differences between *General Chemical* and this case on the one hand, and *Usarco* on the other, render *Usarco* of no assistance to the Superintendent on this appeal.

[69] Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so. Last year it passed the *Wage Earner Protection Program Act*, S.C. 2005 c.47. That Act would amend the BIA and give special priority to unpaid pension contributions of a bankrupt employer. This statute, however, has not been proclaimed in force. That it was passed perhaps shows that under the existing legislative regime, claims like that of the Superintendent must fail. I would reject this ground of appeal.

d) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed?

[70] In my view, the motions judge's order lifting the stay was a discretionary order. He summarized his reasons for rejecting the Superintendent's position and exercising his discretion to allow the bankruptcy petitions to proceed at para. 18 of his decision:

> In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed and un-reconsidered order of November 28, 2003), the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

[71] Appellate review of a discretionary order under the CCAA is limited. See *Re Air Canada* 2003 CanLII 36792 (ON CA), (2003), 66 O.R. (3d) 257 at para. 25 (C.A.); *Re Royal Crest Lifecare Group Inc.* 2004 CanLII 19809 (ON CA), (2004), 46 C.B.R. (4th) 126 at para. 23 (Ont. C.A.); *Algoma Steel Inc. v. Union Gas Ltd.* 2003 CanLII 30833 (ON CA), (2003), 63 O.R. (3d) 78 at para. 16 (C.A.). Appellate intervention is justified only for an error in principle or the unreasonable exercise of discretion. The Superintendent submits that the motions judge exercised his discretion improperly – on a wrong principle – because he ignored the "unfair and prejudicial" effects of his order on the Companies' most vulnerable class of creditors: the pension beneficiaries. I disagree.

[72] The Superintendent argues that the motions judge's order was unfair to the pension beneficiaries in three related ways. First, she points out that the pension beneficiaries agreed to a stay of the past service contributions to keep the Companies afloat, which in turn permitted the going concern sale to Heico. That sale greatly enhanced the return to the creditors. The Superintendent contends that now permitting the bankruptcy petitions to proceed, which would potentially deprive the pension beneficiaries of their rights, produces an unfair outcome.

[73] Undoubtedly, and regrettably, the pension beneficiaries stand to suffer from the insolvency of the Companies. However, the Superintendent's argument implicitly assumes that the pension beneficiaries alone made sacrifices to maximize the recovery for all creditors. The motions judge rejected this assumption, which he said at para. 2 of his reasons, "somewhat overstates the situation". The motions judge accurately concluded:

> [O]ther stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial

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situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due.

In short, all creditors gave up something to permit the Companies to stay in business so that they could either reorganize or sell their assets in a going concern sale.

[74] Second, the Superintendent contends that the motions judge's order undermined his earlier pension stay order, which had expressly preserved the pension beneficiaries' deemed trust rights. I do not accept this contention. Although the pension stay order did not take away these deemed trust rights, it did not provide that the deemed trusts would be paid out of any sale proceeds. Instead, para. 4 of the pension stay order provided that the Companies would not incur any obligation because of their failure to pay past service contributions during the stay period. Moreover, even though the Superintendent and the QPC knew that a petition for bankruptcy (by the Bank of Nova Scotia) was pending when they agreed to the pension stay order, they did not ask that the order be conditional on payment of the amount of the deemed trusts when the stay was lifted.

[75] The third aspect of unfairness on which the Superintendent relies is that the motions judge's order fails to take account of the law's "special solicitude" for pensioners. Certainly provincial pension legislation has shown this solicitude. It has recognized the importance of ensuring that retirees have income security. Thus, it has legislated statutory trusts and liens to protect their pension claims. But federal insolvency law has not shown the same solicitude. It does not accord the claims of "sympathetic" creditors more weight than the claims of "unsympathetic" ones. Subject to specified exceptions, the BIA aims to distribute a bankrupt debtor's estate equitably among all of the estate's creditors. There are undoubtedly compelling policy reasons to protect pension rights in an insolvency. But, as I have said, it is for Parliament, not the courts, to do so.

[76] Therefore, I do not accept the Superintendent's unfairness argument. Also, in my view, numerous considerations supported the motions judge's decision to lift the stay and permit the bankruptcy petitions to proceed. These considerations include the following:

- The CCAA proceedings are spent. There are no entities to reorganize and no further compromises can be negotiated between the Companies and their creditors. There remains only a pool of money to distribute. The BIA is the regime Parliament has chosen to effect this distribution.
- The petitioning creditors have met the technical requirements for bankruptcy. And their desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order. See for example *Bank of Montreal v. Scott Road Enterprises Ltd.* 1989 CanLII 2726 (BC CA), (1989), 57 D.L.R. (4th) 623 at 627, 630-631 (B.C.C.A); *Re Harrop of Milton Inc.* (1979), 22 O.R. (2d) 239 at 244-245 (S.C.).
- The Superintendent and the QPC agreed to the CCAA process. They recognized that it benefitted the pension claimants. Thus, they did not oppose either the pension stay order or the sale to Heico. They did not ask to have the deemed trusts satisfied or an amount to satisfy them set aside, though they knew that bankruptcy was pending. They likely recognized that if they had insisted on a segregation order, the other creditors may not have agreed to the sale. It is now too late for the Superintendent and the QPC to ask for relief that they never sought during the entire CCAA process.
- The motions judge would have gone beyond his role as a referee in the CCAA proceedings if he had given effect to the Superintendent's claim. The Superintendent wants to jump ahead of all the other creditors by obtaining an extraordinary payment at the end of a long CCAA process. If the motions judge had ordered this payment, he would have upset the ground rules that all stakeholders agreed to and that he supervised for over two years.

[77] The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.

e) Did the motions judge err by ordering the transfer of Ivaco and Ifastgroupe's head offices from Quebec to Toronto?

[78] Ivaco's head office was in Montreal; Ifastgroupe's head office was in Marieville, Quebec. The motions judge ordered that these head offices be transferred to Toronto. He did so in the light of s. 43(5) of the BIA, which states that an application for a bankruptcy petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor. The Superintendent, supported by the QPC, submits that the motions judge had no jurisdiction to make this order, or that he improperly exercised his discretion in doing so. I disagree with both submissions.

[79] The Superintendent and the QPC contend that the CCAA does not expressly authorize a judge to transfer the location of the head office of a debtor company. And, although a judge in CCAA proceedings has inherent jurisdiction to

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control the court's processes, the judge does not have a similar jurisdiction to do what the motions judge did here: control the debtor Companies' or the creditors' processes. See *Re Stelco Inc.* 2005 CanLII 8671 (ON CA), (2005), 75 O.R. (3d) 5 at para. 38 (C.A).

[80] I accept the Superintendent's and the QPC's contention that the CCAA did not give the motions judge jurisdiction to order the transfer. I also accept that the transfer was not made to facilitate a restructuring under the CCAA. Instead it was made to facilitate future bankruptcy proceedings. Nonetheless, in my view, the motions judge did not need to resort to the CCAA because he had express authority to order the transfer in s. 191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Sections 191(1) and (2) provide:

> s. 191(1) In this section, "reorganization" means a court order made under;
> (a) section 241;
> (b) the *Bankruptcy and Insolvency Act* approving a proposal; or
> (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.
> s. 191(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might be lawfully be made by an amendment under section 173.

[81] The applicable section here is section 191(1)(c). The stay order is an order under an Act of Parliament, the CCAA, that affects the rights among the Companies, its shareholders and its creditors. See *Re Beatrice Foods Inc.* reflex, (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div.). Therefore, as both Ivaco and Ifastgroupe were subject to an order under s. 191(1)(c) of the CBCA, under s. 191(2) each of its articles may be amended to effect any change that might be made by an amendment under s. 173. Section 173(1)(b) of the statute permits a corporation to change the location of its head office:

> s. 173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
> ...
> (b) change the province in which its registered office is situated;

[82] On my reading of the statute, s. 191 is a stand-alone section that gave the motions judge authority to order the transfer. Provided a corporation is subject to an order under s. 191(1), its articles may be amended. The amending order under s. 191(2) need not serve the purpose of the triggering statute in s. 191(1), in this case the CCAA. If Parliament had wanted to limit amendments to those that would facilitate a reorganization, it could have said so. Thus, the combination of ss. 191(1)(c), 191(2) and 173(1)(b) gave the motions judge the jurisdiction to order the transfer of Ivaco and Ifastgroupe's head offices from Quebec to Toronto. Resort to the CCAA was unnecessary.

[83] The Superintendent and the QPC rely on this court's decision in *Re Stelco* in support of their argument. However, that case differs from the present case in a material way. In *Re Stelco* the issue was whether a motions judge in CCAA proceedings could order the removal of two members of the company's board of directors under s. 109(1) of the CBCA. The power to remove directors is vested in the shareholders. Blair J.A. held that the motions judge could not rely on the court's discretion under s. 11 of the CCAA to override or supplant the specific power in s. 109(1) of the CBCA. The discretion under s. 11 must be used to control the court's processes, not the company's processes.

[84] By contrast, in the present case, s. 191 of the CBCA gives the court express authority to order the transfer of the head office of a company that is subject to an order under the CCAA. Thus, to make a transfer order, the court need not rely on its discretion under s. 11 of the CCAA.

[85] However, the jurisdiction in s. 191(2) is discretionary, as evidenced by the use of the word "may". Therefore, the remaining question on this ground of appeal is whether the motions judge properly exercised his discretion in ordering the transfer. I think that he did.

[86] Ivaco and Ifastgroupe had not actively carried on business since the sale of their assets to Heico was completed in December 2004. The Monitor holds the proceeds of the sales in bank accounts in Toronto. Because of the lengthy and complex CCAA proceedings, the Ontario Superior Court – Commercial List is familiar with the affairs of Ivaco and Ifastgroupe. Having all the issues common to all the Companies administered at the same time before the court familiar with these issues will facilitate the most efficient, consistent and just administration and distribution of their estates.

[87] The QPC, in particular, objects to these head office transfers. It argues that the motions judge's order will enable the creditors to defeat a future motion to transfer to the Quebec Superior Court the question whether the Companies participating in the Ivaco Salaried Plan are "solidarily liable", that is jointly and severely liable, under Quebec law for satisfying the obligation to fund the plan.

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[88] The underpinning of the QPC's argument is as follows: the "solidarily liable" provision is unique to Quebec law and therefore should be decided by a Quebec court. Whether the Quebec or the Ontario Superior Court presides over this future motion will turn on the application of the *forum conveniens* principle. One relevant factor in assessing the *forum conveniens* is the residence or place of business of the parties. According to the QPC, transferring Ivaco's and Ifastgroupe's head offices to Toronto will tip the scales in favour of the Ontario Superior Court hearing the "solidarily liable" motion.

[89] It seems to me that this is a weak argument. The QPC has not yet brought this motion. When it does, the Ontario Superior Court can assess the relevant considerations affecting the appropriate forum. Now, however, the motions judge's transfer order just makes good sense. He, therefore, exercised his discretion properly. I would not give effect to this ground of appeal.

D. CONCLUSION

[90] The motions judge did not err in law in refusing to order the immediate payment of the amount of the deemed trusts under the *Pension Benefits Act* or in refusing to segregate that amount. Nor did he err in exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed. Finally, the motions judge did not err in ordering that the head offices of Ivaco and Ifastgroupe be transferred from Quebec to Toronto. Accordingly, I would dismiss the Superintendent's appeal.

[91] If the parties cannot agree on the costs of the appeal, they may make written submissions to the court. These submissions should be delivered within 30 days of the release of these reasons.

RELEASED:

"OCT 17 2006" "John Laskin J.A."

"JL" "I agree M. Rosenberg J.A."

"I agree Janet Simmons J.A."

---

[1] Taking into account a $12 million distribution to the National Bank permitted by the motions judge in December 2004.

Where no quorum in a class - Sec. 54(2.2)

(2.2) Where there is no quorum of secured creditors in respect of a particular class of secured claims, the secured creditors having claims of that class shall be deemed to have voted for the refusal of the proposal.

Related creditor - Sec. 54(3)

(3) A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

Voting by trustee - Sec. 54(4)

(4) The trustee, as a creditor, may not vote on the proposal.

R.S., 1985, c. B-3, s. 54;
1992, c. 27, s. 22;
2000, c. 30, s. 143;
2007, c. 36, s. 19;
2009, c. 33, s. 21.

Class — creditors having equity claims - Sec. 54.1

54.1 Despite paragraphs 54(2)(a) and (b), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2007, c. 36, s. 20.

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National Bank of Canada v. Merit Energy Ltd., 2001 ABQB 583 (CanLII) - Equity Claim or Unsecured Creditor?

Date:	2001-07-03
Docket:	0001-04994
Parallel citations:	294 AR 15; [2001] 10 WWR 305; 28 CBR (4th) 228; 95 Alta LR (3d) 166
URL:	http://canlii.ca/t/5m0n
Citation:	National Bank of Canada v. Merit Energy Ltd., 2001 ABQB 583 (CanLII), <http://canlii.ca/t/5m0n> retrieved on 2013-09-15
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Reflex Record	Related decisions, legislation cited and decisions cited

National Bank of Canada v. Merit Energy Ltd., 2001 ABQB 583

Date: 20010703
Action No. 0001-04994

Bankruptcy No. 073154

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:
NATIONAL BANK OF CANADA, BANK ONE,
NA AND BANK ONE, CANADA

Plaintiffs

- and -

MERIT ENERGY LTD.

Defendant

- and -

IN THE MATTER OF THE BANKRUPTCY OF MERIT ENERGY LTD.

[Note: An Erratum has been filed on July 5, 2001; the correction has been made to the text and the Erratum is appended to this Judgment.]

[Note: An Erratum has been filed on July 9, 2001; the correction has been made to the text and the Erratum is appended to this Judgment.]

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE SAL J. LoVECCHIO

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APPEARANCES:
Frank Dearlove and Chris Simard, Bennett Jones, LLP
for Arthur Andersen Inc.
William E. McNally, McNally and Cuming; David A. Klein, Klein Lyons
for Larry Delf, Representative Flow-Through Shareholder
Jim G. Shea, Shea Nerland Calnan
for the Flow-Through Shareholders who are not members of the Representative Class
Norman D. Anderson
agent for Magellan Aerospace Limited and Canada Dominion Resources Limited Partnership III
Matthew R. Lindsay and Phil J. Schreiber, Fraser Milner Casgrain
for the Underwriters except First Energy Capital Corporation
Tristram Mallet, Osler,Hoskin & Harcourt
for First Energy Capital Corporation
Douglas G. Stokes, Rooney Prentice
for certain Directors
D. Detomasi, Scott Hall
for Barry Stobo
Jeff Sharpe, Burnett Duckworth & Palmer
for Duncan Chisholm and Laurence Waller
Graham McLennan, McLennan Ross
for PriceWaterhouseCoopers LLP
Steven H. Leitl, Macleod Dixon
for National Bank of Canada, Bank One, NA and Bank One, Canada

INTRODUCTION

[1] On August 31, 2000, applications were brought by Dundee Securities Corporation, Peters & Co. Limited, Nesbitt Burns Inc., Newcrest Capital Inc., RBC Dominion Securities, Bunting Warburg Dillon Read Inc., First Energy Capital Corporation (being the underwriters in the flow-through common share offering of Merit Energy Ltd., described below), certain directors and officers of Merit Energy Ltd. and Larry Delf, a representative purchaser of flow-through common shares in Merit, to determine whether these applicants were entitled to a priority in the nature of an equitable lien over the proceeds of the sale of Merit's assets.

[2] I dismissed the equitable lien applications. The Underwriters, except First Energy Capital Corporation, appealed that decision.

[3] Needless to say, the applicants wanted to be recognized as ordinary creditors of Merit in the event they did not have an equitable lien.

[4] Pending the hearing of the equitable lien appeal, the administration of the estate of Merit continued. As a result of my dismissal of the equitable lien claim, the Trustee anticipated that a fund of approximately $10 million would be available for distribution to unsecured creditors.

[5] Accordingly, the Trustee sought a determination as to the right of the Flow-Through Shareholders, the Underwriters and the Directors and Officers to be recognized as ordinary creditors of Merit and to be included in the distribution.

[6] I heard argument on that issue on April 30, 2001 but reserved my decision until the results of the appeal were known. On May 18, 2001, the appeal was heard and dismissed[1], so it is now appropriate to make the requested determination.

[7] The Trustee takes the position that the claims in issue are in substance claims by shareholders for the return of equity and, on the basis of the decision in *Re: Blue Range Resource Corp.*[2], must rank behind the claims of Merit's unsecured creditors.

[8] Alternatively, the Trustee argues that their claims are too contingent to constitute provable claims under the ***Bankruptcy and Insolvency Act***. [3]

[9] The Flow-Through Shareholders, the Underwriters and the Directors and Officers[4] submitted that their claims were in substance creditor claims and that they were not too contingent, thus qualifying them to rank as unsecured creditors in Merit's insolvency. If that position is sustained, the quantification of those claims will be a separate issue.

BACKGROUND

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[10] Merit was in the business of the exploration, development and production of natural gas and crude oil in Alberta and Saskatchewan.

[11] On July 15, 1999, the Underwriters entered into an underwriting agreement with Merit whereby they agreed to participate in a public offering of 2,222,222 Flow-Through Shares of Merit. Paragraph 16 of the Underwriting Agreement states in part:

> The Corporation shall indemnify and save each of the Indemnified Persons harmless against and from all liabilities, claims, demands, losses, (other than losses of profit in connection with the distribution of common shares), costs, damages and expenses to which any of the Indemnified Persons may be subject or which any of the Indemnified Persons may suffer or incur, whether under the provisions of any statute or otherwise, in any way caused by, or arising directly or indirectly from or in consequence of:
>
> (a) any information or statement contained in the Public Record (other than any information or statement relating solely to one or more of the Underwriters and furnished to the Corporation by the Underwriters for inclusion in the Public Record) which is or is alleged to be untrue or any omission or alleged omission to provide any information or state any fact the omission of which makes or is alleged to make any such information or statement untrue or misleading in light of all the circumstances in which it was made;
>
> (b) any misrepresentation or alleged misrepresentation (except a misrepresentation or alleged misrepresentation which is based upon information relating solely to one or more of the Underwriters and furnished to the Corporation by the Underwriters for inclusion in the Public Record) in the Public Record.

[12] The Underwriting Agreement provides in Paragraph 2 (entitled "Corporation's Covenants as to Qualification") that:

> [Merit] agrees:
>
> (a) prior to the filing of the Preliminary Prospectus and thereafter and prior to the filing of the Prospectus, to allow the Underwriters to participate fully in the preparation of the Preliminary Prospectus (excluding the documents incorporated therein by reference) and such other documents as may be required under the Applicable Securities Laws in the Filing Jurisdictions to qualify the distribution of the Common Shares in the Filing Jurisdictions and allow the Underwriters to conduct all due diligence which the Underwriters may reasonably require (including with respect to the documents incorporated therein by reference) in order to (i) confirm the Public Record is accurate and current in all material respects; (ii) fulfill the Underwriters' obligations as agents and underwriters; and (iii) enable the Underwriters to responsibly execute the certificate in the Preliminary Prospectus or the Prospectus required to be executed by the Underwriters;
>
> (b) the Corporation shall, not later than on July 19, 1999, have prepared and filed the Preliminary Prospectus...with the Securities Commissions...
>
> (c) the Corporation shall prepare and file the Prospectus...as soon as possible and in any event not later than 4:30 p.m. (Calgary time) on August 3, 1999...
>
> ...
>
> (e) that, during the period commencing with the date hereof and ending on the conclusion of the distribution of the Common Shares, the Preliminary Prospectus and the Prospectus will fully comply with the requirements of Applicable Securities Laws of the Filing Jurisdictions and, together with all information incorporated therein by reference, will provide full, true and plain disclosure of all material facts relating to the Corporation and the Common Shares and will not contain any misrepresentation; provided that the Corporation does not covenant with respect to information or statements contained in such documents relating solely to one or more of the Underwriters and furnished to the Corporation by one or more of the Underwriters for inclusion in such documents or omissions from such documents relating solely to one or more of the Underwriters and the foregoing covenant shall not be considered to be contravened as a consequence of any material change occurring after the date hereof or the occurrence of any event or state of facts after the date hereof if, in each such case, the Corporation complies with subparagraphs 3(a), (b), (c) and (d).

[13] In accordance with its covenant, Merit filed a Preliminary Prospectus and a Prospectus to qualify the shares for issue and ultimately the offering closed on August 17, 1999, at which time 2, 222, 222 Flow-Through Shares of Merit were issued.

[14] The Prospectus indicated that:

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The gross proceeds of this Offering will be used to incur CEE in connection with the Corporation's ongoing oil and natural gas exploration activities. The Underwriters' fee and the expenses of this Offering will be paid from Merit's general funds...

The Flow-through Common Shares will be issued as 'Flow-through Shares' under the Act. The Corporation will incur on or before December 31, 2000, and renounce to each purchaser of Flow-through Common Shares, effective on or before December 31, 1999, CEE in an amount equal to the aggregate purchase price equal to the aggregate purchase price paid by such purchaser.
Subscriptions for Flow-through Common Shares will be made pursuant to one or more subscription agreements ('Subscription Agreements') to made between the Corporation and one or more of the Underwriters or one or more sub-agents of the Underwriters , as agent for, on behalf of and in the name of the purchasers of Flow-through Common Shares...

[15] The Prospectus also indicated that:

... Pursuant to the Subscription Agreements, the Corporation will covenant and agree (i) to incur on or before December 31, 2000 and renounce to the purchaser, effective on or before December 31, 1999, CEE in an amount equal to the aggregate purchase price paid by such purchaser for the Flow-Through Common Shares and (ii) that if the Corporation does not renounce to such purchaser, effective on or before December 31, 1999, CEE equal to such amount, or if there is a reduction in such amount renounced pursuant to the provision of the Act and as the sole recourse of the purchaser for such failure or reduction, the Corporation shall indemnify the purchaser as to, and pay in settlement thereof to the purchaser, an amount equal to the amount of any tax payable or that may become payable under the Act...by the purchaser as a consequence of such failure or reduction...
In respect of CEE renounced effective on December 31, 1999, and not incurred prior to the end of the period commencing on the date that the Subscription Agreement is entered into and ending on February 29, 2000, the Corporation will be required to pay an amount equivalent to interest to the Government of Canada. Any amount of CEE renounced on December 31, 1999 and not incurred by December 31, 2000 will result in a reassessment of deductible CEE to subscribers. However, interest in respect of additional tax payable under the Act by a purchaser of Flow-Through Common Shares will generally not be levied in respect of such reassessment until after April 30, 2001.

[16] The Underwriters each entered into Subscription and Renunciation Agreements with Merit for the purchase of the Flow-Through Shares, containing the covenants described in paragraph 15 above.

[17] Merit did not incur CEE as anticipated and in fact only approximately $4 million (of the anticipated $15 million of CEE) was renounced to the Flow-Through Shareholders prior to Merit being placed in receivership, leaving an $11 million shortfall. As a result, those Flow-Through Shareholders, who anticipated tax deductions based on $15 million of CEE, were potentially faced with a tax problem.

[18] The Directors and Officers entered into indemnity agreements with Merit, which state in part that:

To the full extent allowed by law, [Merit]...agrees to indemnify and save harmless the Indemnified Party, his heirs, successors and legal representatives from and against any and all damages, liabilities, costs, charges or expenses suffered or incurred by the Indemnified Party, his heirs, successors or legal representatives as a result of or by reason of the Indemnified Party being or having been a director and/or officer of [Merit] or by reason of any action taken by the Indemnified Party in his capacity as a director and/or officer of [Merit], including without limitation, any liability for unpaid employee wages, provided that such damages, liabilities, costs, charges or expenses were not suffered or incurred as a direct result of the Indemnified Party's own fraud, dishonesty or wilful default.

[19] Merit, the Underwriters and the Directors and Officers have been named as defendants in several actions commenced throughout Canada by or on behalf of the Flow-Through Shareholders. These actions allege that Merit, the Underwriters, the Directors and Officers and PriceWaterhouseCoopers are liable to the Plaintiffs because of misrepresentations made in the Prospectus. The Plaintiffs seek, *inter alia*, damages against all defendants, recission of their purchase of the Flow-Through Shares and damages for lost tax benefits associated with the Flow-Through Shares. The Underwriters have third-partied Merit and the Directors and Officers. As noted, the Underwriters and the Directors and Officers previously sought recognition as equitable lien holders (which was denied) and now they seek recognition as ordinary creditors.

[20] PriceWaterhouseCoopers was at all material times the auditor of Merit. As PriceWaterhouseCoopers had not yet filed a proof of claim at the time the Trustee filed its motion, the Trustee's materials did not address its claim as part of its application. However, the Trustee did not object to PriceWaterhouseCoopers participating in this application.

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[21] PriceWaterhouseCoopers is in a similar position as the Underwriters and the Directors and Officers as it too has an indemnity from Merit and has also been sued by the Flow-Through Shareholders for misrepresentation. Its indemnity states that:

> Merit Energy Ltd. hereby indemnifies PriceWaterhouseCoopers LLP ("PriceWaterhouseCoopers")...and holds them harmless from all claims, liabilities, losses, and costs arising in circumstances where there has been a knowing misrepresentation by a member of Merit Energy Ltd.'s management, regardless of whether such a person was acting in Merit Energy Ltd.'s interest. This indemnification will survive termination of this engagement letter. This release and indemnification will not operate where PriceWaterhouseCoopers ought to have uncovered such knowing misrepresentation but failed to, due the gross negligence or willful misconduct of PriceWaterhouseCoopers, its partners and/or employees.

ISSUES

1. Are the claims of the Flow-Through Shareholders subordinate to the claims of Merit's unsecured creditors?
2. Are the claims of the Underwriters, the Directors and Officers and PriceWaterhouseCoopers subordinate to the claims of Merit's unsecured creditors?

DECISION - ISSUE 1

The claims of the Flow-Through Shareholders are subordinate to the claims of Merit's unsecured creditors as they are in substance shareholder claims for the return of an equity investment.

ANALYSIS

[22] Central to this application are the reasons of my sister Romaine J. in ***Re: Blue Range Resource Corp***.

[23] In that case, Big Bear Exploration Ltd. completed a hostile takeover for all of the shares of Blue Range Resource Corporation. After the takeover was completed, Big Bear alleged that the publicly disclosed information upon which it had relied in purchasing the Blue Range shares was misleading and that the shares were worthless. As sole shareholder, Big Bear authorized Blue Range to commence CCAA proceedings and then submitted a claim as an unsecured creditor in Blue Range's CCCA proceedings, based on the damages it alleged it had suffered as a result of Blue Range's misrepresentations.

[24] Romaine J. rejected Big Bear's attempt to prove as an unsecured creditor and held that Big Bear's claim was "in substance" a shareholder claim for a return of an equity investment and therefore ranked after the claims of unsecured creditors according to the general principles of corporate law, insolvency law and equity.

[25] Romaine J. stated at pp. 176-177:

> In this case, the true nature of Big Bear's claim is more difficult to characterize. There may well be scenarios where the fact that a party with a claim in tort or debt is a shareholder is coincidental or incidental, such as where a shareholder is also a regular trade creditor of a corporation, or slips and falls outside the corporate office and thus has a claim in negligence against the corporation. In the current situation, however, the very core of the claim is the acquisition of Blue Range shares by Big Bear and whether the consideration paid for such shares was based on misrepresentation. Big Bear had no cause of action until it acquired shares of Blue Range, which it did through share purchases for cash prior to becoming a majority shareholder, as it suffered no damage until it acquired such shares. This tort claim derives from Big Bear's status as shareholder, and not from a tort unrelated to that status. The claim for misrepresentation therefore is hybrid in nature and combines elements of both a claim in tort and a claim as shareholder. It must be determined what character it has in substance.
>
> It is true that Big Bear does not claim recission. Therefore, this is not a claim for return of capital in the direct sense. What is being claimed, however, is an award of damages measured as the difference between the "true" value of Blue Range shares and their "misrepresented" value - in other words, money back from what Big Bear "paid" by way of consideration...A tort award to Big Bear could only represent a return of what Big Bear invested in equity of Blue Range. It is that kind of return that is limited by the basic common law principle that shareholders rank after creditors in respect of any return on their equity investment. ...
>
> I find that the alleged share exchange loss derives from and is inextricably intertwined with Big Bear's shareholder interest in Blue Range. The nature of the claim is in substance a claim by a shareholder for a return of what it invested qua shareholder, rather than an ordinary tort claim.

[26] Romaine J. went on at pp. 177-184 to describe five policy reasons which justified the conclusion that shareholders' claims such as Big Bear's should be ranked behind the claims of Blue Range's unsecured creditors. In summary, they are:

(i) the claims of shareholders rank behind the claims of creditors in insolvency;

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(ii) creditors do business on the assumption that they will rank ahead of shareholders in the event of their debtor's insolvency;
(iii) shareholders are not entitled to rescind their shares on the basis of misrepresentation after the company has become insolvent;
(iv) United States jurisprudence supports the priority of creditors in "stockholder fraud" cases; and
(v) to allow the shareholders to rank *pari passu* with the unsecured creditors could open the floodgates to aggrieved shareholders launching misrepresentation actions.

[27] ***Re Canada Deposit Insurance* v. *Canadian Commercial Bank*** [5] is also central to this application. That case involved an issue of priorities with respect to the insolvency of the Canadian Commercial Bank. In an effort to preserve the bank, a participation agreement was entered into among the governments of Canada and Alberta, the Canada Deposit Insurance Corporation and six commercial banks. The sum of $255 million was advanced and it was to be repaid by CCB out of certain portfolio assets and pre-tax income. The agreement promised an indemnity in the event of insolvency, and gave the participants a right to subscribe for shares in CCB at a named price.
[28] The Supreme Court of Canada held that although the participation agreement contained both debt and equity features, it was, in substance, a debt transaction. Iacobucci J. stated at p. 406:

> As I see it, the fact that the transaction contains both debt and equity features does not, in itself, pose an insurmountable obstacle to characterizing the advance of $255 million. Instead of trying to pigeon-hole the entire agreement between the Participants and C.C.B. in one of two categories, I see nothing wrong in recognizing the arrangement for what it is, namely, one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a creditor-debtor relationship. Financial and capital markets have been most creative in the variety of investments and securities that have been fashioned to meet the needs and interests of those who participate in those markets. It is not because an agreement has certain equity features that a court must either ignore those features as if they did not exist or characterize the transaction on the whole as an investment. There is an alternative. It is permissible, and often required, or desirable, for debt and equity to coexist in the given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing a characterization issue. Again, it is not because there are equity features that it is necessarily an investment in capital. This is particularly true when, as here, the equity features are nothing more than supplementary to and not definitive of the essence of the transaction. When a court is searching for the substance of a particular transaction, it should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement. [emphasis added]

[29] As noted, the Flow-Through Shareholders have commenced several actions. Against Merit, they seek recission or damages due to an alleged misrepresentation in the Prospectus (based on their statutory rights to these remedies as disclosed in the Prospectus). They also claim damages relating to lost tax benefits associated with the Flow-Through Shares. While this is a contractual remedy based on the Subscription and Renunciation Agreements, it also has elements of misrepresentation flowing from certain descriptive statements made in the Prospectus.
[30] The Flow-Through Shareholders submitted that they are entitled to be treated as creditors based on the actions they have commenced, but the Trustee objects to this treatment and has sought the direction of the Court in this regard.

i. The Trustee's Position

[31] The Trustee (through counsel) focussed on the allegations made in the statements of claim in its analysis. It suggested that the essential allegation of the Flow-Through Shareholders in their actions is misrepresentation and that as a result of such misrepresentation they have suffered damages. The Trustee then described the remedy sought as, in essence, a claim for a return of equity. The Trustee suggested that the claim for the anticipated tax benefits was no more than a claim for a benefit that was ancillary to their shareholding interest. The Trustee also described the Flow-Through Shareholders' application to prove as unsecured creditors as an attempt to take a "second kick at the can", following the failure of their equity investment.
[32] Using the reasoning of Romaine J. in ***Re: Blue Range Resource Corp***, the Trustee argued that the claim of the Flow-Through Shareholders must be subordinated to Merit's unsecured creditors. The Trustee submitted that all five policy reasons listed in that case (and described above) are present in this case, emphasizing that the dividend will be reduced 20 to 27% (from 15 to 11-12 cents) if the Flow-Through Shareholders' claims are included in the unsecured creditors' pool and that the facts in this case favour subordination even more than the facts in ***Re: Blue Range Resource***

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Corp., as some of the Flow-Through Shareholders are seeking to rescind their purchase of the Flow-Through Shares in their actions.

ii. The Flow-Through Shareholders' Position

[33] Arguments were filed separately by Mr. McNally, as Counsel for Larry Delf (Mr. Delf being the designate of the Representative Flow-Through Shareholders group), and by Mr. Shea as Counsel for certain other Flow-Through Shareholders.

The Representative Flow-Through Shareholders Group's Position

[34] Mr. McNally did not take issue with the suggestion that as a general rule, shareholders rank after secured creditors. He also did not object to the reasoning of Romaine J. in ***Re: Blue Range Resource Corp***., provided the case is limited to its context and not used to stand for the general proposition that in no circumstances may a shareholder ever have a claim provable in bankruptcy.

[35] Mr. McNally did object to the Trustee's characterization of the claim as a single claim for misrepresentation seeking damages equal to their purchase price for the shares. He suggested that the claims involved firstly, a right to damages or recission *qua* shareholder under securities legislation and secondly, a right to damages for breach of an indemnity provision *qua* debt holder. He also submitted that this latter claim may also be seen as having nothing to do with misrepresentation in the Prospectus or a return of capital, but arises independently as a result of Merit's failure to incur and then renounce CEE to the shareholders to enable them to obtain certain tax deductions.

[36] Mr. McNally suggested that this latter claim for tax losses was also a claim provable in bankruptcy. He referenced Laskin J.A.'s recognition in ***Re Central Capital Corporation*** [6] that shareholders may participate as creditors in the context of declared dividends because the liquidity provisions of corporate legislation would not have been triggered if the dividends had been declared prior to insolvency and would therefore be enforceable debts. Laskin J.A. stated at p.536:

> It seems to me that these appellants must either be shareholders or creditors. Except for declared dividends, they cannot be both... Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared it is a debt on which each shareholder can sue the corporation.

[37] Mr. McNally also relied on ***Re G.M.D. Vending Co.*** [7] where the British Columbia Court of Appeal allowed declared but unpaid dividends to rank with other unsecured claims in a bankruptcy.

[38] He also emphasized that the CEE aspect of the relationship between the Flow-Through Shareholders, on the one hand, and Merit, the Underwriters and the Directors and Officers, on the other, possesses many of the indicia of debt mentioned by Weiler J.A. in ***Re Central Capital Corporation*** in that: (1) Merit is obliged to expend the funds raised by the Prospectus on CEE and the funds are advanced by Flow-Through Shareholders for this specific purpose alone, (2) there is an indemnity provision in the Prospectus itself to the Flow-Through Shareholders if this does not occur, evidencing an intention that the investors are to be fully repaid for the loss of the tax benefit,[8] and (3) interest becomes due for the amount of the failed tax write-off and is covered by the indemnity provision as tax payable.

[39] He suggested that the indemnity provisions in the Subscription and Renunciation Agreements are enforceable at law without consideration of corporate liquidity and are an acknowledgment of the unique commercial position of the Flow-Through Shareholders in the event that the CEE is not renounced. He concluded by submitting that the potential liquidity problem and contingent liability must constitute the rationale for the presence of the indemnity in the Subscription and Renunciation Agreements in the first place.

The Other Flow-Through Shareholders Group's Position

[40] Mr. Shea suggested that not only were the claims for tax losses relating to the CEE provable claims, the tort/statutory aspects of their claims were also provable claims, albeit they would be dealt with as "contingent" claims within the meaning of ss. 121 and 135 of the BIA[9]. He further submitted that the fact they are claims by shareholders is irrelevant.

[41] He relied on ***Gardner* v. *Newton*** [10] as authority for the proposition that a contingent claim is a claim that may or may not ripen into a debt depending on the occurrence of some future event. Mr. Shea also suggested that so long as the claim is not too remote or speculative, a claim, even though it has not yet been reduced to judgment, may still be a contingent claim. Mr. Shea pointed out that the Ontario Court of Appeal in ***Re Confederation Treasury Services Ltd.*** [11] departed from the earlier cases relied upon by the Trustee, including ***Claude Resources (Trustee of)* v. *Dutton*** [12]. The Court of Appeal stated they imposed too high of a threshold for the establishment of a contingent claim and held that it was not necessary to demonstrate probability of liability but merely to show they were not too remote or speculative.

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[42] He asserted that the claims are not shareholder claims, but claims for statutory remedies and for breach of contract and must rank with Merit's other unsecured creditors for that reason. Mr. Shea also said the Court must look to the substance of the relationship between the claimant and the bankrupt and most importantly, the context in which the claim is made.

[43] Mr. Shea then argued that it would not be equitable to subordinate these claims while other claims based on tort, breach of contract or statutory remedy are allowed to rank as unsecured claims and concluded that the traditional principles for subordinating claims by shareholders do not apply to this case.

[44] He suggested that allowing claims for statutory remedies and/or breach of contract based on misrepresentation to rank as unsecured claims will not affect how creditors do business with companies. Further, he argued that allowing this result will not "open the floodgates" as the statutory remedies involved are narrow in scope and have strict and relatively short time frames.

iii. The Underwriters' Position

[45] Firstly, the Underwriters supported the Flow-Through Shareholders' submissions regarding the nature of their claims. They emphasized that ***Re: Blue Range Resource Corp*** should not stand for the proposition that shareholders must always be subordinated to unsecured creditors simply because they are shareholders. Rather, the nature and substance of their claims determines the treatment they receive in the estate.

[46] The Underwriters also suggested that ***Re: Blue Range Resource Corp*** turned on its unique facts of a purchaser of Blue Range shares having knowledge of misrepresentations yet exercising shareholder rights, such as authorizing the company to take CCAA proceedings and then making an unsecured claim in those proceedings for the loss associated with its share purchase. The shareholder in that case did not claim recission and did not deny or attempt to avoid its shareholder status. Moreover, there was no contractual right to be treated by the company as anything but a shareholder.

[47] The Underwriters distinguished the claims of the Flow-Through Shareholders from those of Big Bear in ***Re: Blue Range Resource Corp*** as follows: (1) the Flow-Through Shareholders are not pursuing tort claims based on their status as shareholders, but rather are asserting a statutory right of recission, thereby refuting their status as shareholders, (2) the Flow-Through Shareholders also allege a direct contractual claim for indemnity against Merit pursuant to Subscription and Renunciation Agreements in which Merit agreed to incur qualifying expenditures (CEE), to renounce the resulting tax benefits to them and to indemnify them if it failed to incur the CEE, and (3) if their claims are ultimately successful, the Flow-Through Shareholders will be former shareholders and current creditors of Merit.

Resolution- ISSUE 1

[48] I agree with Romaine J. that the correct approach is to first examine the substance of the claim made against the insolvent. There are the two claims mentioned by counsel for the Flow-Through Shareholders. The first is an alternate remedy for damages or recission based on the alleged misrepresentations contained in the Prospectus. I was advised that some have advanced only one of these alternative claims. The second is cast as a claim in damages under the indemnity in the Subscription and Renunciation Agreements for the failure to renounce CEE.

[49] The Flow-Through Shareholders' claims for recission or damages based on misrepresentation derive from their status as Merit shareholders. Regardless of how they are framed[13], the form the actions take cannot overcome the substance of what is being claimed. It is plain from the Prospectus and the Subscription and Renunciation Agreements that the Flow-Through Shareholders invested in equity. It is equally plain from their actions that what they seek to recoup, in substance, is their investments. As in ***Re: Blue Range Resource Corp***, the "very core" of these claims arises from the circumstances surrounding the acquisition of Merit shares. The Flow-Through Shareholders had no cause of action until they acquired the Flow-Through Shares and their claims include a direct claim for return of capital in their request for recission and in the case of a damage claim, just as in ***Re: Blue Range Resource Corp***, the measure of damages enables them to recover the purchase price of the shares.

[50] It is true these shareholders are using statutory provisions to make their claims in damages or recission rather than the tort basis used in ***Re: Blue Range Resource Corp***, but in substance they remain shareholder claims for the return of an equity investment. The right to a return of this equity investment must be limited by the basic common law principle that shareholders rank after creditors in respect of any return of their equity investment.

[51] Now what about the second aspect of the claims?

[52] The second claim of the Flow-Through Shareholders has some of the features of a debt and the Subscription and Renunciation Agreements provide for a specific remedy in the event Merit fails to comply with its undertaking to make and renounce the CEE expenditures .

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[53] While the discussion in ***Re Central Capital Corporation*** regarding the claim for declared dividends is appealing, it does not precisely apply in these circumstances. The tax advantages associated with flow-through shares is reflected in a premium paid for the purchase of the shares[14]. In essence, what happens in a flow- through share offering (as sanctioned by the ***Income Tax Act***[15]) is the shareholder buys deductions from the company. As the company has given up deductions, it wants to be paid for those deductions that it is renouncing. From the perspective of the purchaser of the shares, the premium for the shares would not have been paid without some assurance that the deductions will be available. I note the purchaser is also required to reduce their adjusted cost base of the shares (for tax purposes) by the amount of the deductions utilized by the purchaser.

[54] While the Flow-Through Shareholders paid a premium for the shares (albeit to get the deductions), in my view the debt features associated with the CEE indemnity from Merit do not "transform" that part of the relationship from a shareholder relationship into a debt relationship. That part of the relationship remains "incidental" to being a shareholder.

[55] In summary, the Flow-Through Shareholders' claims, regardless of the basis chosen to support them, are in substance claims for the return of their equity investment and accordingly cannot rank with Merit's unsecured creditors.

DECISION - ISSUE 2

The claims of the Underwriters, the Directors and Officers and PriceWaterhouseCoopers are not subordinate to the claims of Merit's unsecured creditors as they are in substance creditors' claims that are not too contingent to constitute provable claims.

i. The Trustee's Position

[56] The Trustee argued that while on their face, the Underwriters' and the Directors and Officers' claims are not shareholder claims, "in substance", they are shareholders' claims and are no more than an indirect passing-on to Merit of the Flow-Through Shareholders' claims. As a result, the Trustee submitted, equity dictates that since the Flow-Through Shareholders' claims must rank behind those of the unsecured creditors, the claims of the Underwriters and the Directors and Officers must fail as well. The Trustee suggested this subordination follows from the policy considerations set out by Romaine J. in ***Re: Blue Range Resource Corp***. Alternatively, the Trustee asserted that the claims of the Underwriters and the Directors and Officers are so contingent they must be valued at nil.

ii. The Underwriters' Position

[57] The Underwriters argued that regardless of how the Court characterized the Flow-Through Shareholders' claims, the Trustee cannot succeed against the Underwriters because: (1) the indemnity claims are based on contractual, legal and equitable duties owed to the Underwriters by Merit, to which the Flow-Through Shareholders are strangers and to which ***Re: Blue Range Resource Corp*** has no application; (2) equitable subordination has never been applied by Canadian courts and the Trustee cannot satisfy the test even if the court chooses to apply it, and (3) the Underwriters' claims are precisely the type of contingent claims contemplated by the BIA.

iii. The Directors' and Officers' Position

[58] The Directors and Officers conceded that, while some of the potential liability they face is as a result of the Flow-Through Shareholders' claims against them, or via indemnity claims brought by the Underwriters and Auditors against them, their claim is simply a claim in contract that is not an effort to obtain a return of equity. They argued that the enforceability of the indemnity is not contingent on the source of the potential liability.

[59] In any case, the Directors and Officers face claims other than from Merit's shareholders, which include: (1) a Saskatchewan action alleging the Directors and Officers assented to or acquiesed in Merit not paying its accounts and ought to be held liable for them, and (2) an Alberta action relating to ownership and lease payments on oilfield equipment. The Directors and Officers asserted that the existence of these claims demonstrate that they are not simply attempting to pass on shareholder claims, but rather they are making a contractual claim for all the potential liability they face, as the indemnity intends.

[60] The Directors and Officers also suggested that, as with the Underwriters, some of the contingency in their claim under the indemnity has been realized to the extent of legal fees incurred in defending the various actions. In any case, they agreed with the Flow-Through Shareholders and Underwriters that a contingent claim need not be "probable" in order to be "provable" but need only something more than to "remote and speculative in nature".

[61] Further, directors and officers require indemnities and commercial necessity dictates that these indemnities have real value.

Resolution - ISSUE 2

Nature of the Underwriters and the Directors' and Officers' claims against Merit

[62] The fundamental premise of the Trustee's argument is that the Underwriters' indemnity simply "flows through" or "passes on" the Flow-Through Shareholders' claim to Merit. This ignores the nature of the causes of action being

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advanced by the Underwriters and the existence of a contractual indemnity freely given by Merit for good and valuable consideration. The Trustee did not suggest that the indemnity was invalid or unenforceable, rather, it argued that this valid and enforceable right should be treated as a "shareholders' claim" and subordinated. With respect, I cannot agree with the Trustee's position.

[63] The Trustee's argument attempts to shift the Court's focus from the Underwriters' claim against Merit to the claim being asserted against the Underwriters, even though it is the former that the Trustee wants the Court to subordinate. The Flow-Through Shareholders' cause of action against the Underwriter's is predicated on the Underwriters' alleged failure to discharge a statutory duty and their liability is not contingent in any way on a successful claim by the Underwriters against Merit under the indemnity.

[64] The Underwriters' indemnity claims against Merit are not made as a shareholder or for any return of investment made by the Underwriters. Rather, they are based on contractual, legal and equitable duties owed directly by Merit to the Underwriters. Similarly, the other causes of action advanced by the Underwriters against Merit in the Third Party Notice do not arise from any equity position in the company, but are based on agency, fiduciary and contractual relationships between the Underwriters and Merit, to which the Flow-Through Shareholders are strangers and are unavailable for them to assert.

[65] For example, the Underwriters are entitled to an indemnity for defence costs even if the Flow-Through Shareholders' claims fail completely. The ultimate success or failure of the Flow-Through Shareholders' claims makes no difference to the existence and enforceability of this right against Merit.

[66] As the Underwriters' claims are not claims for a return of equity, ***Re: Blue Range Resource Corp*** does not apply. That decision only addressed equity claims of shareholders and I am not prepared to extend its application to the claims of the Underwriters in the application before me, simply because the claims triggering an indemnity by the Underwriters against Merit were shareholders' claims.

[67] As Firstenergy Capital Corp. emphasized, even if I were to apply the policy considerations for subordinating claims identified by Romaine J. in ***Re: Blue Range Resource Corp*** to the Underwriters' claims, these policy considerations support a conclusion that the Underwriters' claims are of the type I believe that Romaine J. would protect, not subordinate:

> **1. Shareholders rank behind creditors in insolvency** - the issue here is whether the Underwriters are properly characterized as equity stakeholders or creditors. This is done by considering the substance of their claim. Regardless of how the Flow-Through Shareholders' claims are characterized, the substance of the Underwriters' claims against Merit are contractual. They arise out of a contract for indemnity between Merit and the Underwriters. This is clearly distinct from a claim for return of shareholders' equity. The Trustee asked the court to consider the fact of a possible future payment from the Underwriters to the Flow-Through Shareholders in characterizing the claim of the Underwriters against Merit. Given the nature of the obligations under an indemnity, this is inappropriate. Describing the Underwriters' claims as "no more than and indirect passing-on of the Flow-Through Shareholders' claims" is based on a flawed analysis of the obligations under an indemnity and ignores the statutory duty of the Underwriters to the Flow-Through Shareholders. There are two distinct obligations.
>
> The first obligation relates to the Flow-Through Shareholders' claims against the Underwriters and any obligations that may be imposed on the Underwriters as a result. This obligation is completely unrelated to, and unaffected by the Underwriters' indemnity. The second obligation is between Merit, as indemnifier, and the Underwriters. This second obligation is the obligation that must be characterized in this application. The Flow-Through Shareholders are strangers to this claim.
>
> **2. Creditors do business with companies on the assumption they will rank ahead of shareholders on insolvency** - the focus of this analysis is the degree of risk-taking respectively assumed by shareholders and creditors. Unlike shareholders who assume the risks of insolvency, the Underwriters bargained, as any other creditor, for their place at the creditor table in an insolvency. An indemnity is a well-known commercial concept business people routinely use to eliminate or reduce risk and should be recognized as a necessary and desirable obligation.
>
> To subordinate the Underwriters' claim would amount to a reversal of the expectations of the parties to the indemnities. The evidence before me suggests that the Underwriters would not have participated in Merit's offering without the indemnity. I need not decide whether that is true.
>
> Subordinating the Underwriters would fundamentally change the underlying business relationship between underwriters and issuers, and would be unexpected in the industry. Such a result might make it impossible for an underwriter to recover under an indemnity from a bankrupt issuer in respect of an equity offering.

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3. Shareholders are not entitled to rescind shares after insolvency - this consideration has no bearing on the Underwriters as they are not shareholders seeking to rescind shares. Their claims against the bankrupt are for damages under a contract for indemnity. Further, I was not asked to determine this particular question in this application.

4. The principles of equitable subordination - In ***Re Canada Deposit Insurance* v. *Canadian Commercial Bank***, the Supreme Court of Canada expressly left open the question of whether equitable subordination formed part of Canadian insolvency law, but expressed its opinion as to the applicable test as developed in the United States:

> ...(1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute...(p. 420)

An application of these criteria would lead to the conclusion that equitable subordination would not apply in this case, even if it was part of Canadian law.

Although the Trustee suggested that the Underwriters may have "participated" in the misrepresentation, there is no evidence before me of inequitable conduct on their part. It is perhaps significant that the Flow-Through Shareholders have not alleged any such misconduct as against the Underwriters, but rather they have only advanced the statutory causes of action available to them under securities legislation.

As there is no evidence of inequitable conduct on the part of the Underwriters, there can be no corresponding injury to Merit's other creditors, or enhancement of the Underwriters' position.

Finally, the application of equitable subordination of the Underwriters' claims in this case would be inconsistent with the established priority scheme contained in the ***BIA***. The United States Supreme Court addressed this third requirement of consistency in ***United States* v. *Noland*** [16]:

> [t]his last requirement has been read as a 'reminder to the bankruptcy court that although it is a court of equity, it is not free to adjust the legally valid claim of an innocent party who asserts the claim in good faith merely because the court perceives the result as inequitable'

This statement encapsulates what the Trustee is asking to the Court to do: subordinate the claims of the Underwriters, who have asserted their claims under their indemnities as they are entitled to do, merely because the result may be perceived as inequitable. The words of the US Supreme Court are consistent with the view that equitable subordination is an extraordinary remedy that ought to be employed only where there is some misconduct on the part of the claimant. The statutory scheme of distribution in the ***BIA*** must be paramount, and if it is to be interfered with, it should only be in clear cases where demonstrable inequitable conduct is present.

5. Floodgates - Romaine J. considered that allowing Big Bear's claim for misrepresentation to rank with unsecured creditors would encourage aggrieved shareholders to claim misrepresentation or fraud. This consideration has no application to the Underwriters, who are not shareholders. Allowing the Underwriters' claims, which are based on a contractual right of indemnity, will not open the door to increased claims of misrepresentation or fraud by shareholders. The nature of the claims against the Underwriters and the Underwriters' claim against Merit are entirely different.

[68] In summary, the Underwriters' claims against Merit are creditors' claims which rank with Merit's other unsecured creditors.

[69] With this result I appreciate the potential for the Flow-Through Shareholders to be seen as obtaining some recovery from the estate before all the unsecured creditors are paid in full. It might even be suggested it may ultimately allow the Flow-Through Shareholders to achieve indirectly what they could not achieve directly, based on the substance of their claims. This may be the final economic result.

[70] However, success by the Flow-Through Shareholders against the Underwriters is not contingent upon success by the Underwriters against Merit nor does it automatically follow that success by the Flow-Through Shareholders against the Underwriters must inevitably lead to success by the Underwriters against Merit. A successful claim by the Underwriters against Merit will be determined on the basis of the provisions of the indemnity and the result of the claim against the Underwriters will be one of the factors in that analysis.

[71] As the possible economic result described in paragraph 69 does not flow from a continuous chain of interdependent events, the possibility that the Flow-Through Shareholders may indirectly recover some of their equity investment from others prior to Merit's unsecured creditors being paid in full would not be a sufficient reason to decide this application differently.

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[72] As with the Underwriters, I find that the Directors and Officers have creditors' claims entitled to rank with Merit's other unsecured creditors.

Contingent claims

[73] While the Trustee's primary argument was the claims of the Underwriters and the Directors and Officers are merely indirect shareholder claims, alternatively, it argued that these claims are too contingent and cannot constitute a provable claim on that basis.[17]

[74] The Trustee relied on the case of ***Claude Resources (Trustee of)* v. *Dutton*** in support of its position. In that case, an indemnity agreement was executed between the bankrupt and its sole shareholder, officer and director and entitled the individual to be indemnified for any liabilities arising out of actions taken in his capacity as an officer and director of the bankrupt. This individual was sued in relation to a debenture offering and sought to prove using his indemnity. Noble J. described the claim as having a "double contingency", in that as a first step the action on the debenture offering must be successful, and if so, then the claim on the application of the indemnity agreement must also succeed. Noble J. held that more is needed beyond evidence that the creditor has been sued and that liability may flow; some element of probability is needed.

[75] The Trustee submitted that there is no evidence as to the potential success of the Flow-Through Shareholders' claims against the Underwriters and/or the Directors and Officers, nor was it possible prior to judgment in those actions, to determine whether any liability of the Underwriters and/or the Directors and Officers to the Flow-Through Shareholders would qualify for indemnification.

[76] The fact that a claim is contingent does not mean it is not "provable"[18]. Provable claims include contingent claims as long as they are not too speculative: ***Negus* v. *Oakley's General Contracting*** [19]. Section 121 defines provable claims to include "all debts and liabilities, present or future,...to which the bankrupt may become subject...".

[77] Section 121 does not specify the degree of certainty required to make a claim provable, other than to include as provable all debts or liabilities to which the bankrupt may become subject. As stated, the Ontario Court of Appeal addressed this in ***Re Confederation Treasury Services Ltd.*** and held that the test of probable liability set out in ***Claude Resources (Trustee of)* v. *Dutton*** and ***Re Wiebe*** (also relied on by the Trustee) imposed too high of a threshold to establish a valid contingent claim. Rather, the Ontario Court of Appeal expressed that contingent claims must simply be not too "remote or speculative in nature". I agree with the Ontario Court of Appeal's view of the test.

[78] On a plain reading of the Underwriting Agreement, the indemnity appears to be engaged by the Flow-Through Shareholders' actions. The actions are under case management and are proceeding through discoveries at this time. Further, there are several authorities that suggest an indemnity becomes enforceable as soon as a claim of the type indemnified is alleged.[20] Finally, at least one part of the Underwriters' claim is not contingent - they have incurred costs and disbursements in defence of the Flow-Through Shareholders' claims and according to the terms of the indemnity are currently entitled to reimbursement for those costs, regardless of the outcome of the litigation.

iv. PriceWaterhouseCoopers

[79] PriceWaterhouseCoopers made similar submissions to the Underwriters and the Directors and Officers and emphasized the strong policy reason behind supporting auditors' indemnities as unsecured and not subordinated claims. In addition, PriceWaterhouseCoopers has an independent claim for negligent misrepresentation against the Directors and Officers, arising out of the provision of information to PriceWaterhouseCoopers by Merit management which PriceWaterhouseCoopers alleges was known, or ought to have been known, to be incorrect. PriceWaterhouseCoopers suggested this further distinguishes PriceWaterhouseCoopers' situation from the situation before the Court in ***Re: Blue Range Resource Corp***.

[80] I find that PriceWaterhouseCoopers' indemnity claim is a creditor's claim entitled to rank with Merit's other unsecured creditors. My reasoning with respect to the Underwriters' claims, as based on their indemnities, applies equally to PriceWaterhouse Coopers' claim based on its indemnity.

[81] I am aware that the indemnities of the Flow-Through Shareholders are not being accorded creditor status, while those of the Underwriters, the Directors and Officers and PriceWaterhouseCoopers are. However, as noted, the indemnity feature of the Flow-Through Shareholders' claims is related to certain deductions and those deductions were part of the purchase price for the shares. This in my view is more analogous to ***Re Canada Deposit Insurance* v. *Canadian Commercial Bank*** than to ***Re Central Capital Corporation*** and that to me is sufficient to justify the distinction.

CONCLUSION

[82] The claims of the Flow-Through Shareholders are in substance claims for the return of equity investment and rank behind the claims of Merit's unsecured creditors, which shall include the claims of the Underwriters, the Directors and Officers and PriceWaterhouse Coopers.

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[83] If the parties cannot agree on costs, they may see me within 30 days.
HEARD on the 30th day of April 2001.
DATED at Calgary, Alberta this 3rd day of July 2001.

_____
J.C.Q.B.A.

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An errata has been issued for the above Judgement as follows:

ERRATA OF THE REASONS FOR JUDGEMENT
OF THE HONOURABLE MR. JUSTICE SAL J. LoVECCHIO

**The Appearances have been revised to include Mr. David A. Klein. Mr. Klein of Klein Lyons attended with Mr. William E. McNally of McNally and Cuming,
for Larry Delf, Representative Flow-Through Shareholder.**

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An errata has been issued for the above Judgement as follows:

ERRATA OF THE REASONS FOR JUDGEMENT
OF THE HONOURABLE MR. JUSTICE SAL J. LoVECCHIO

Please replace page 2 of your copy of the Judgement.
The initials Q.C. should not follow the name of Douglas G. Stokes, of Rooney Prentice.

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[1] Reasons followed the dismissal from the bench 2001 ABCA 138 (CanLII), 2001 ABCA 138.
[2] 2000 ABQB 4 (CanLII), (2000), 15 C.B.R.(4th) 169 (Alta. Q.B.).
[3] R.S.C.1985, c.B-3
[4] PriceWaterhouseCoopers LLP, Merit's auditor at the material times, was not involved in previous applications but made similar submissions to the Underwriters, Directors and Officers. PriceWaterhouseCoopers' position will be addressed separately in these reasons.
[5] (1992), 97 D.L.R. (4th) 358 (S.C.C)
[6] 1996 CanLII 1521 (ON CA), (1996), 27 O.R. (3d) 494 (C.A.)
[7] 1994 CanLII 678 (BC CA), (1994), 94 B.C.L.R. (2d) 130 (B.C.C.A.)
[8] See ***Ontario Securities Commission* v. *Consortium Construction Inc***. (1993), 1 C.C.L.S. 117 at 138-139.
[9] **121(1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge ...shall be deemed to be claims provable in proceedings under this Act.**(2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
135(1.1) The trustee shall determine whether any contingent or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
[10] (1916), 29 D.L.R.276 (Man.K.B.)
[11] 1996 CanLII 8270 (ON SC), (1997), 43 C.B.R. (3d) 8.
[12] reflex, (1993), 22 C.B.R. (3d) 56 (Sask.Q.B.), referred to favourably by Farley J. in ***Canadian Triton Interational Ltd. (Re)*** reflex, (1997), 49 C.B.R. (3d) 192 (Ont. Gen. Div.) and followed in ***Re Wiebe*** 1995 CanLII 7367 (ON SC), (1995), 30 C.B.R. (3d) 109 (Ont. Gen. Div.)
[13] Counsel described the claims variously as "statutory", "statutory/tort and "contractual"
[14]V.M. Jog et al, "Flow Through Shares: Premium-Sharing and Trust-Effectiveness", (1996), 44 Can. Tax J. at p. 1017.
[15] R.S.C. 1985, (5th Supp.),c. 1.
[16] (1996), 517 U.S. 535 at 539.
[17] *Supra* footnote 9 for ***BIA*** definitions in ss. 121 and 135
[18] *ibid*.
[19] 1996 CanLII 5511 (NS SC), (1996), 40 C.B.R. (3d) 270 (N.S.S.C.)
[20] See for example, ***Re Froment; Alta. Lumber Co.* v. *Department of Agriculture*** ,reflex, [1925] 2 W.W.R. 415 (Alta. S.C.)

AMIC Mortgage Investment Corporation v. Abacus Cities Ltd., 1992 ABCA 57 (CanLII) - Freezing of Costs, When Incurred, Pre and Post Proposal/Bankruptcy Order

Date:	1992-03-10
Docket:	12132; 12135; 12138
Parallel citations:	89 DLR (4th) 84; [1992] 4 WWR 309; 11 CBR (3d) 193; 1 Alta LR (3d) 257
URL:	http://canlii.ca/t/2dtn9
Citation:	AMIC Mortgage Investment Corporation v. Abacus Cities Ltd., 1992 ABCA 57 (CanLII), <http://canlii.ca/t/2dtn9> retrieved on 2013-09-07

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In the Court of Appeal of Alberta
Citation: AMIC Mortgage Investment Corporation v. Abacus Cities Ltd., 1992 ABCA 57
Date: 19920310
Docket: 12132, 12135 & 12138
Registry: Calgary
Between:
AMIC Mortgage Investment Corporation in Liquidation
Appellant
(Cross-Respondent)
- and -
Thorne Riddell Inc., Trustee of the Estate of Abacus Cities Ltd., a Bankrupt
Respondent
(Cross-Appellant)
And Between:
Paramount Life Insurance Company, by its Administrator
Touche Ross Limited and Touche Ross Limited
Appellants
(Cross-Respondents)
- and -
Thorne Riddell Inc., Trustee of the Estate of Abacus Cities Ltd., a Bankrupt
Respondent
(Cross-Appellant)
And Between:
AMIC Mortgage Investment Corporation, in Liquidation
Paramount Life Insurance Company, by its Administrator
Touche Ross Limited, and the Fidelity Trust Company
Appellants
(Cross-Respondents)
- and -
Thorn Riddell Inc., Trustee of the Estate of Abacus Cities Ltd., a Bankrupt
Respondent
(Cross-Appellant)

The Court:
The Honourable Mr. Justice McClung
The Honourable Mr. Justice Kerans
The Honourable Mr. Justice Dixon

Reasons for Judgment of The Honourable Mr. Justice Kerans
Concurred in by The Honourable Mr. Justice McClung
And Concurred in by The Honourable Mr. Justice Dixon

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE FORSYTH OF THE COURT OF QUEEN'S BENCH DATED 12TH DAY OF OCTOBER, 1990

COUNSEL:
D. T. Gallagher, for appellant, AMIC Mortgage Investment Corporation, In Liquidation
L. Robinson, for respondent, Thorne Riddell Inc., Trustee of the Estate of Abacus Cities Ltd., A Bankrupt

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G. M. Meagher, Q.C. (Paramount Life Insurance) for appellants, Paramount Life Insurance Company, by its Administrator Touche Ross Limited and Touche Ross Limited
J. Shea, for the Fidelity Trust Company, In Liquidation

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE KERANS

[1] The Bankruptcy Court, when approving a Proposal under the Bankruptcy Act, R.S.C. 1985, c. B-3, may freeze interest owing on debts from the date of the proposal. Without such an order, the freeze is not automatic. Also, no rule of law forbids simpliciter the enforcement, for costs incurred by the creditor after bankruptcy, of a pre-bankruptcy cost indemnity given by the bankrupt. But a Bankruptcy Court may refuse to enforce that indemnity by a creditor who incurred costs other than in a commercially reasonable fashion or whose position otherwise amounts to an abuse of the bankruptcy process.

I

[2] In 1979, the Bankruptcy Court approved a Proposal filed by the bankrupt, Abacus Cities Ltd.

[3] In 1981, the Court held that the bankrupt had breached the Proposal, and deemed that to be an assignment in bankruptcy. The respondent and cross-appellant trustee, Thorne Riddell, Inc., became its trustee and proceeded with administration. A decade later, that task nears completion.

[4] Because a distribution looms, attention has turned to the valuation of claims. The three appellant mortgagees, AMIC Mortgage Investment Corporation, Paramount Life Insurance Company and Fidelity Trust Company realized their securities and filed demands for deficiencies. The trustee accepted these except the interest and costs portions.

[5] The trustee disputed any claim for interest or costs after the date of the original Proposal, and sought directions as a means to resolve the matter. The mortgagees intervened. They acknowledged before us that they cannot exact interest after the date of bankruptcy, but resisted an earlier termination date. They pointed to their security instruments, which contain a full right of recovery from the borrower of all collection costs. They say the trustee must honour this without regard to when the creditor incurred the expenses.

[6] We do not know the details of these expenses. But the mortgagees demand reimbursement of huge sums, and I suspect that they cover participation in many disputes involving this infamous bankruptcy over the past decade. That raises the problem whether one creditor shall, despite results, participate in litigation after bankruptcy at the expense of the other creditors.

[7] The learned Queen's Bench judge, sitting in Bankruptcy chambers, excluded interest after the date of proposal and costs after the date of bankruptcy. See reflex, (1990), 110 A.R. 295; 2 C.B.R. (3d) 196. The mortgagees appeal from both orders. The trustee also appeals because the order permitted costs after the date of the Proposal.

[8] It is common ground that no term in the statute clearly and unequivocally resolves either dispute, and no authority has yet reached precisely these topics. In my view, I stated the correct rules for this case at the start, and for the reasons that follow.

II

[9] Because the mortgagees conceded that they could not expect interest after the date of bankruptcy, the remaining dispute relates to interest from the date of the proposal to the date of the bankruptcy. Consequently, the argument turned upon whether the Act applied the after-bankruptcy rule to proposals.

[10] The starting point, then, must be the rule about interest after bankruptcy. Under the scheme of the Act, the only entitlement of a claimant to share in the realized assets of the bankrupt arises under s.121(1), (or because of an obligation incurred by the trustee during administration, which did not arise in this case). S. 121(1) provides:

> All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

[11] The trustee correctly said that the mortgagees fall within the scope of this rule. The mortgagees correctly responded that they can charge for an obligation that arises after bankruptcy provided that it must arise from a pre-bankruptcy obligation. And, of course, the mortgagees founded their claims both to interest and costs on a pre-bankruptcy agreement.

[12] The trustee pointed to s. 122(2) as offering yet another limit on post-bankruptcy interest. It provides:

> Where interest on any debt or sum certain is provable under this Act but the rate of interest has not been agreed on, the creditor may prove interest at a rate not exceeding five per cent per annum to the date of bankruptcy from the time the debt or sum was payable, if evidenced by a written instrument, or, if not so evidenced, from the time notice has been given the debtor of the interest claimed.

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[13] I agree that this rule assumes that interest is not payable after bankruptcy. It does not, however, make the rule.

[14] The trustee also argued that s. 121(2), discussed below, further limits the scope of future claims. I agree, but this limit does not apply to interest. I therefore will deal with that provision in greater detail when I come to the costs topic.

[15] In the end, the trustee could not point to any provision in the Act that forbids interest after bankruptcy. It must rely on common law.

[16] Several Canadian cases say that the trustee need not pay interest after bankruptcy even if in the face of a deficiency on realization of a security. See Re Levesque Auto Inc. (1978) 26 C.B.R. (N.S.) 234 (Que. S.C.), Re J.A. Gosselin Ltée. (1979) 30 C.B.R. (N.S.) 306 (Que. S.C.). They follow an old English case, Re Savin (1872) 7 Ch. App. 760. James, L.J. there followed the rule through several cases to a decision by Lord Loughborough in 1794. After first saying that he would apply the rule "whether a right and reasonable rule or not", James, L.J. offered this explanation for it at p.764:

> I believe, however, that if the question now arose for the first time I should agree with the rule, seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

[17] I accept that bankruptcy aims to freeze the affairs of debtors and, quickly and summarily, liquidate and distribute their assets. It is not entirely clear to me, however, why those who prudently bargained for interest in that event should lose that benefit. But the Court of Appeal in Savin overruled the Vice-Chancellor. He had contended that the rule did not apply in the case of an express agreement to pay interest on a secured debt. And that rule has persisted for more than a century.

[18] I suppose one also might view interest as somehow not having the same right to equality of treatment as the demands of other creditors. The chambers judge took that approach. But the ranking of contractual rights in terms of moral priorities offers difficulties. I fear we distinguish them more by their accidents than their essence. For example, interest to a moneylender represents profit. Suppliers of goods, on the other hand, build profit into price. Why should one be preferred? Here, we might more accurately speak of a hedge against loss from delayed payment rather than a profit. I suspect few firms profit when a debtor becomes bankrupt. But the distinction remains dubious. Interest on overdue debt (as well as the rate) depicts the moneylender's hedge; a reserve for doubtful accounts built into the price portrays the supplier's hedge.

[19] Nevertheless, I accept that Savin expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy. I would be loath, however, to extend it in a cause where the apparent rationale does not need it.

[20] The trustee, having gained acceptance of the rule, then relied upon s. 121(4) to date that rule back to the date of a Proposal. It provides:

> Where a proposal is made before bankruptcy, the claims provable shall be determined as of the date of the filing of the proposal.

[21] The trustee argued that this rule is "plain and unambiguous". That it is, but it does not plainly deal with the interest rule. The trustee must argue that s.121(4) also extends to proposals the restrictions on future interest that exist in common law for bankruptcies. That is not so clear. Mr. Robinson for the trustee acknowledged that its view required one, to borrow his metaphor, to "massage" the words in the Act.

[22] Not surprisingly, each party applied, if I may continue the metaphor, a selection of magic oils from the cupboard we call the canons of interpretation. As usual, that resourceful collection offered solace to both, and led to yet another example of the game of "thrust and parry". See: K. N. Llewellyn, The Common Law Tradition: Deciding Appeals, Boston, 1960, Little Brown, Appendix C. The canons claim to corral a chimera: an expression of legislative intent where none is present.

[23] The mortgagees first parried that s. 121(4) speaks to claims provable on a proposal, not those provable on a bankruptcy. They correctly argued that, on the making of a Proposal, creditors must prove claims in a way like bankruptcy. See s. 62(1). Moreover, the statutory rules governing proposals adopt, changing what ought to be changed, the rules governing bankruptcy. See s.66(1). S. 121(4), they said, must be read in that context. It merely confirms that, while the Act borrows some bankruptcy procedure for proposals, the cut-off date for proposals is the date of a proposal not the date of bankruptcy. Finally, they argued, many proposals contemplate that the debtor will continue in business, and incur new debt. The view taken by the trustee would deprive those new creditors of the hope of payment on a later bankruptcy, and thus destroy the proposal scheme.

[24] The counter-thrust of the trustee suggested that, if the provision means no more than what the mortgagees assert, then it is redundant. S. 62(1) already provides that the date of proposal "... shall constitute the time for

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determination of the claims of the creditors and for all other purposes of this Act". Indeed, the learned chambers judge viewed the closing words of that term as decisive. The mortgagees parried that s. 121(4) merely confirms what will occur if a Court rejects a proposal and a bankruptcy automatically follows. They added that, as a matter of law, the date of the proposal is not decisive for "all other purposes". They pointed to the rule that one counts from the date of bankruptcy for suits about fraudulent preferences where a bankruptcy follows a collapsed proposal. See Employers' Liability Assurance Corporation Limited v. Ideal Petroleum (1959) Ltd. (1976), 26 C.B.R. (N.S.) 84 at 92-93 (S.C.C.). Nothing in Re Gavex, a Resource Corporation (1989), 75 C.B.R. (N.S.) 178 (B.C.S.C.) supports the trustee's view. They in turn cited Re Crown Royal Clothing Co. (1969), 15 C.B.R. (N.S.) 203, at 205 (Que. S.C.), but I find nothing of great help in that decision.

[25] The trustee emphasized that Parliament placed the disputed rule in a section dealing with bankruptcy, not proposals. We should therefore understand that it deals with bankruptcy. The mortgagees relied upon the turgid legislative history of this very old and oft-amended Act. They contended that one should not much rely upon placement as an interpretive aid. And they conceded that perhaps s. 121 (4) merely confirms that a creditor need not re-file claims when a proposal fails and a bankruptcy follows.

[26] In my view, the interest rule, which might make sense in one context, might make no sense at all in another. Proposals can include on-going commercial activity by the debtor, not a sell-off. They might permit insolvent persons to hold creditors at bay and continue in business. That amounts to the opposite of a brief freeze to divide the "wreck of a man's property". I therefore would not extend an interest freeze, automatically and necessarily, to all proposals.

[27] Moreover, the rule proposed by the trustee offends the public interest. Proposals serve the public good because they keep businesses alive and preserve jobs and investment. Why should I encourage creditors to oppose them with a rule like this?

[28] Nor am I persuaded that Parliament has. I suppose someone might argue that s.121(4) deprives a creditor of interest during the life of a proposal only if it fails and a bankruptcy follows. If the proposal succeeds, and the debtor avoids bankruptcy, then the debtor pays interest. But this is an impossible rule that might encourage a debtor to fail, and that might lead to a creditor having to return monies earlier received. In any event, I would not read all that into this little section.

[29] The learned chambers judge said that, in this case, the proposal amounted to an assignment in bankruptcy. He said that "the fact of bankruptcy" was evident to all at that time. (I think he meant the fact of insolvency. Bankruptcy is a legal status, which the debtor did not have under the proposal.) I acknowledge that the Proposal here collapsed soon after approval. To a creditor, the difference must seem pointlessly technical. But I am dealing with a legal rule that would govern both successful and failed proposals.

[30] The powers of a Court hearing a request for approval of a Proposal might well include the power to freeze interest in the right case. I will not rule out consideration of arguments based upon the fairness of return of principal to all before the award of profit to some. Perhaps also the approving order might deal with the effect of an immediate collapse of some desperate attempt to preserve an enterprise. But no judge here exercised the power to deny interest during the life of a proposal. On the contrary, the Proposal approved by the Court had contemplated interest continuing.

[31] I would allow the appeal on the first point and direct the trustee not to reject interest to the date of bankruptcy.

III

[32] In my view, the costs rule proposed by the trustee offers even greater difficulties.

[33] Again, the trustee relied upon s. 121(1) as prohibiting future claims. Again, it had to acknowledge that a demand for costs incurred after bankruptcy that invokes an agreement made before bankruptcy falls within the scope of entitlement under that section. The precise point came before Baron Pollock and Viscount Cave in 1886. See In Re Smith, (1886) 3 Morrell 179, at 183-185 (Eng. Div. Ct.).

[34] In its factum, the trustee offered only an argument based upon the limit on future charges implied by operation of the valuation procedure in s. 121(2). In oral argument, Mr. Robinson expanded this by relying upon an analogy to the common law rule about post-bankruptcy interest.

[35] I will first deal with the argument based upon s. 121(2). It provides:

> The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value the claim, and the claim shall after that valuation be deemed a proved claim to the amount of its valuation.

[36] The trustee argued that this rule limits future exactions to those that can be valued before they arise. Future costs, unlike future interest, cannot readily be calculated in advance.

[37] I agree that this rule can limit future claims that otherwise fall within the scope of entitlement. In fact, some may not be provable when the trustee calls for proof. The trustee cites two examples: Re Carling Acceptance

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Limited (1976) 22 C.B.R. (N.S.) 258 (Ont. S.C.) and Re Stone (1980) 34 C.B.R. (N.S.) 87 (Ont. S.C.). Both offer difficulties. In Carling, the Court first found that the challenged demand was, by its terms, conditional. It then found that the condition, in fact, would never be met during the bankruptcy. The condition required that the bankrupt have a large surplus! One might dismiss the decision as merely one where the claimant failed to prove its case. In Stone, the bankrupt had guaranteed a debt payable by instalment. The primary debtor had defaulted, but, on the date of bankruptcy, only a portion of the debt had become due and payable. The claim of the primary creditor against the estate of the guarantor bankrupt was limited to what was due. That decision might be doubted because some contingent future liability existed to be valued. See, contra, In Re Froment, reflex, [1925] 2 W.W.R. 415, at 423 (Alta. S.C.T.D.). Ironically, in that case the Court did not discount the award for the contingency that the primary debtor might pay.

[38] One must take care not to over-state the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process. See In re Elliot Lake Ready-Mix Limited; Smith v. Elliot Lake Ready-Mix Limited (1961), 2 C.B.R. (N.S.) 187, at 190 (Reg. Ont. H.C.) and Re Wallace; Manitoba Public Insurance Corporation v. Wallace (1988), 69 C.B.R. (N.S.) 56, at 59 (Man. Q.B.).

[39] The trustee asserted that all must be valued as at the date of bankruptcy. As this case can be decided without challenge to this assertion, I accept it for that purpose. But I note that judicial valuation occurs only when the trustee asks for it. The valuing Court can have regard to events after bankruptcy, and before the hearing, to help it decide. I see nothing in the cases, or in common sense, to the opposite effect. The learned chambers judge here accepted the impossibility of valuation at the date of bankruptcy. I see no evidence to support that finding.

[40] Indeed, I doubt the fairness of reliance on s. 121(2) in this case because the trustee here has yet to make an application and the Court has yet to hear the evidence. If we treat this motion for directions as such an application, then the mortgagees can fairly say that, today, they can prove the sums they claim. The situation might have been very different had the trustee brought an application years ago. Of course, the mortgagees did not file a specific claim until 1989, after all securities were realized and a final deficiency calculation available.

[41] Delayed proof of a claim seems to be common and sensible practice. See Alberta v. Bank of Canada 82 Alta. L.R. (2d) 392 (C.A.). Indeed, s. 127(1) of the Act provides that a creditor must acknowledge only the "net" amount realized on a security, which implies a delayed valuation. Reasonable costs of sale, including legal fees, may be chargeable in any event by all secured creditors. See Royal Bank v. Sefel Geophysical Ltd. (1989), 76 C.B.R. (N.S.) 29 (Alta. Q.B.) and Re I. Shaffran Ltd.; M. Miller & Associates Ltd. v. Banque Royale Du Canada et al. (1982), 42 C.B.R. (N.S.) 66 (Que. S.C.).

[42] This case may be different because the mortgagees may charge for costs for some events other than realization efforts, and the indemnity agreements may be sufficiently wide to permit them. One before us offers indemnity for:

> ... all sums which the mortgagee may and does from time to time ... incur ... in exercising ... or in pursuance of any ... purpose ...

[43] It remains at least possible that the mortgagee might seek reimbursement for more than straightforward realization expenses. I think of cost awards made against it in earlier proceedings in this bankruptcy. Or expenses incurred in pursuit of some hare-brained notion rightly opposed by the trustee and all other creditors. All the more reason for a hearing under s. 121(2) to settle the facts.

[44] In the result, I do not accept that s. 121(2) necessarily defeats the mortgagees in this case.

[45] During oral argument, Mr. Robinson suggested a public policy reason to refuse to enforce a costs indemnity: enforcement might produce the anomalous result that other creditors fund litigation begun by the holder of the indemnity.

[46] This is an argument for equality of creditors not unlike the argument for the interest rule. Again, one can object that the courts should not refuse to enforce the reasonable exercise of fair bargains won by prudent creditors. We see the ancient argument about the enforcement of "unfair" contracts with a new twist: it is said that the bargain is unfair to other creditors, not the debtor.

[47] I agree that bankruptcy law aims to discourage litigation, and that to enforce an indemnity might have the opposite effect. One can imagine cases where invocation of the indemnity should not be permitted. It is not necessary to deal here with the rule outside bankruptcy. But bankruptcy involves special control of the affairs of the debtor and the creditors and includes the power to approve or deny claims for costs. See C.M.H.C. v. Conatv et al (1967) 61 D.L.R. (2d) 97 at 105 (Alta. C.A.). See also s. 197(4) of the Act. The late MacPherson, J. succinctly stated the correct view in Sefel [supra] at p.33:

> 161179 Canada Inc. also complained that the costs of realization for payment to the Royal Bank fell on the junior secured creditor and the unsecured. However, it has always been so. Courts in Canada have always upheld the

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right of a creditor to enforce the contract between it and the debtor so long as that contract was enforced in a commercially reasonable fashion.

[48] In conclusion, no rule of law forbids simpliciter the enforcement of a pre-bankruptcy cost indemnity given by the bankrupt to a creditor for expenses incurred after bankruptcy. But a Bankruptcy Court may refuse to enforce that indemnity. It might refuse when enforcement would countenance abuse of the bankruptcy process. Or where a creditor incurred costs other than in a "commercially reasonable fashion".

[49] In the result, I would allow the appeal and dismiss the cross-appeal. I would direct the trustee that it cannot simply reject costs claims arising during the proposal period or indeed the bankruptcy. It can, however, challenge specific items as beyond the scope of the indemnity or for other reasons.

DATED at CALGARY, Alberta
this 10th day of March,
A.D. 1992

Creditors may provide for supervision of debtor's affairs - Sec. 55

55. At a meeting to consider a proposal, the creditors, with the consent of the debtor, may include such provisions or terms in the proposal with respect to the supervision of the affairs of the debtor as they may deem advisable.

R.S., c. B-3, s. 37.

Appointment of inspectors - Sec. 56

56. The creditors may appoint one or more, but not exceeding five, inspectors of the estate of the debtor, who shall have the powers of an inspector under this Act, subject to any extension or restriction of those powers by the terms of the proposal.

R.S., c. B-3, s. 38.

Result of refusal of proposal - Sec. 57

57. Where the creditors refuse a proposal in respect of an insolvent person,

(a) the insolvent person is deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall either

(i) forthwith call a meeting of creditors present at that time, which meeting shall be deemed to be a meeting called under section 102, or

(ii) if no quorum exists for the purpose of subparagraph (i), send notice, within five days after the day the certificate mentioned in paragraph (b) is issued, of the meeting of creditors under section 102,

and at either meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

R.S., 1985, c. B-3, s. 57;
1992, c. 27, s. 23;
1997, c. 12, s. 33;
2005, c. 47, s. 38.

Appointment of new trustee - Sec. 57.1

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57.1 Where a declaration has been made under subsection 50(12) or 50.4(11), the court may, if it is satisfied that it would be in the best interests of the creditors to do so, appoint a trustee in lieu of the trustee appointed under the notice of intention or proposal that was filed.
1997, c. 12, s. 34.

Application for court approval - Sec. 58
58. On acceptance of a proposal by the creditors, the trustee shall

(a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;
(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;
(c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and
(d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

R.S., 1985, c. B-3, s. 58;
1992, c. 1, s. 20, c. 27, s. 23;
1997, c. 12, s. 35.

In the Matter of the Proposal of Maple Homes Canada Ltd., 2000 BCSC 1443 (CanLII) - Considerations in the Ct. Approval of a Proposal

Date:	2000-10-02
Docket:	202788/00
Parallel citations:	21 CBR (4th) 87
URL:	http://canlii.ca/t/1fmkd
Citation:	In the Matter of the Proposal of Maple Homes Canada Ltd., 2000 BCSC 1443 (CanLII), <http://canlii.ca/t/1fmkd> retrieved on 2013-08-16
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Citation:	In the Matter of the Proposal of Maple Homes Canada Ltd. 2000 BCSC 1443	Date: Docket:	20001002 202788/00
Registry: Vancouver			

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

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IN THE MATTER OF THE PROPOSAL OF
MAPLE HOMES CANADA LTD.

REASONS FOR JUDGMENT
OF THE
HONOURABLE MADAM JUSTICE LYNN SMITH

Counsel for Maple Homes Canada Ltd.:	John P. Sullivan
Counsel for Max Gomez:	Jeffrey P. Scouten
The Trustee, David Gray:	In Person
Date and Place of Hearing: September 11-12, 2000	Vancouver, BC

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INTRODUCTION

FACTS

[1] Maple Homes Canada Ltd. for eleven years has carried on a business of supplying distinctively Canadian building materials for the construction of homes outside Canada, particularly in Japan. It did not produce the materials itself but obtained them from suppliers in Canada and then arranged to have them loaded into containers and shipped to the overseas customer. It would charge a markup on the materials. At peak, in 1995, it employed 12 people and had annual sales of $8.6 million.

[2] Maple Homes lodged an Intention to make a Proposal on May 10, 2000. The Trustee under that Proposal, David Gray of Campbell Saunders Ltd., reported on June 30, 2000 that the debtor had assets of an estimated value of $13,000 and liabilities of $664,758.14. He stated the opinion that the causes of insolvency of the debtor were the decline in the Asian market and the bankruptcy of several large customers of Maple Homes. **He further stated the opinion that the conduct of the debtor is not subject to censure and that none of the facts mentioned in sections 143 and 147 (it is common ground that he meant to refer to those provisions whose new section numbers are 173 and 177) may be proved against the debtor.**

[3] The Trustee held a meeting of creditors at which a Special Resolution accepting the Proposal was passed, with 72.2% in favour in terms of the amounts voting.

[4] The Trustee reported that in his opinion the debtor's Proposal is an advantageous one for the creditors because the unsecured creditors will receive a dividend in the range of 7 – 8.5%, whereas in bankruptcy the unsecured creditors will not receive a dividend.

[5] The Proposal includes provisions that the debtor will liquidate its assets and pay the net proceeds of sale (after satisfaction of valid security interests) to the Trustee; cause Brad Grindler to sell his interest in a property on Pender Island and pay the net proceeds to the Trustee for the general benefit of unsecured creditors; cause Brad Grindler to pay to the Trustee from his future income the sum of $30,000 at the rate of not less than $500 per month; and cause Brad Grindler to waive any right he may have to a dividend under the Proposal. Paragraph 5 of the Proposal states:

> By accepting this Proposal, the unsecured creditors shall agree to accept the amounts paid and payable under paragraph 2, coupled with the waiver referred to in paragraph 4 above as payment in full for an assignment of their provable claims against the debtor under the Act, together with all rights of recovery they may have against Brad and Cathie Grindler in that regard. The assignment aforesaid shall be made to the debtor or to whomever it may direct.

[6] Mr. Max Gomez voted against the Proposal. Mr. Gomez is a resident of Montera in Cantabria, Spain. He had agreed in July 1999 to purchase materials from Maple Homes for construction of a home. The total purchase price was $177,589. He paid that in two instalments, on July 8, 1999 and September 13, 1999. He received one shipment from Maple Homes in September 1999, worth $76,179.23. Therefore, he is owed roughly $100,000 by the debtor.

[7] Before Mr. Gomez sent the first instalment, he received a fax from Mr. Grindler that informed him that the quote was being split up into three shipments, and stated:

> To get things moving, if all is fine with the First Shipment quotation, please sign page 2 of the quote where provided and fax it back to us. Once we confirm your deposit, we will place the orders. Then we will advise on the shipping.

Mr. Gomez signed the "quote" and returned it with his first instalment of $60,000 U.S. He requested that all invoices be made out to his family society, Operadora Cancun 1900, S.L. (I note here that counsel for Maple Homes argued that because of this the contract was really between Operadora Cancun and Maple Homes. Mr. Gomez in an affidavit deposed that Operadora Cancun is his personal and family tax society, which every family is entitled to have under the laws of Spain for tax benefits and the assignation and protection of personal assets. The "quote" was signed by Mr. Gomez, the payments came from him, and except for the one invoice, all other correspondence and dealings were with Mr. Gomez. Therefore, I am proceeding on the basis that the contract was between Maple Homes and Mr. Gomez and that he is the creditor and entitled to oppose approval of the proposal as he has done.)

[8] The events that led to Maple Homes's insolvency began in the fall of 1999. As the Trustee stated, the decline in the Asian market and the bankruptcy of some large customers seem to have been the turning points. From 1999 sales of $300,383.92 in August and $210,117.53 in September, there was a dramatic decline to $62,519.13 in October, $73,272.40 in November, $60,097.66 in December, $24,713,28 in January 2000, $16,430.96 in February, with an improvement again in March, 2000 to $117,628.11. As a result, although Maple Homes had actually received payment in full from Mr. Gomez, it proved unable to pay the suppliers (which had begun to demand cash on delivery) and to provide the materials it had contracted to send to Spain. This was despite the efforts described by Mr. Grindler to keep the company afloat — laying off employees, ceasing to draw any salary, and borrowing money from family members to put into the company. Mr. Grindler summarizes in his affidavit:

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> I worked exclusively for the Company from its start until the date of the Proposal, and have put an enormous amount of energy and effort into the Company. Until recently, Maple Homes was always a tremendous source of pride for me. As a result, however, it was very difficult for me this Spring to come to accept that Maples Homes could not make ends meet and could not meet its debts. I kept thinking that Maple Homes could turn things around and be a success again. As will be outlined below, I tried just about everything that I could think of, including reducing the number of Maple Homes' staff, borrowing from a family member, foregoing my own salary, seeking financing, and of course bidding on further work. In a particularly difficult period of time, I also sent some emails to Mr. Gomez which were untruthful, and which I deeply regret. During that period of time I was making every effort I could to assist Maple Homes to put together the money to pay the suppliers so that it could ship the products that Mr. Gomez had ordered, and I genuinely believed that Maple Homes would succeed in this regard. Unfortunately, however, that never proved to be possible, despite considerable effort.

[9] In the early spring of 2000, Mr. Grindler began to respond to Mr. Gomez's inquiries with untruthful statements in emails and faxes. In some of these he created elaborate lies to explain the delay in the shipment of materials. It was not until April 12, 2000 that Mr. Grindler informed Mr. Gomez that the shipment was not on its way and could not be sent because of the lack of funds in Maple Homes.

[10] Mr. Gomez deposes that he trusted Mr. Grindler and believed his representations that the funds Mr. Gomez provided to Maple Homes would be used for the specific purpose for which they were provided.

[11] Maple Homes has applied for court approval of the Proposal, which application is opposed by Max Gomez. Mr. Gomez has applied for an order and declaration that sections 69 to 69.3 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, no longer operate in respect of himself. He has commenced an action against Bradley Michael Grindler and Cathie Mae Grindler for damages for breach of trust and for an accounting. He has not sued Maple Homes but wishes to be able to do so. In his affidavit he states that he is concerned that his ability to trace and recover his funds and prove the details of the fraud he alleges will be impaired by the passage of time if his right to pursue action against Maple Homes is stayed.

ISSUES

A. Should the Proposal of Maple Homes Canada Ltd. be approved?

B. If the Proposal is approved, should Max Gomez be granted an exemption from the stay of proceedings pursuant to s. 69.4 of the Bankruptcy and Insolvency Act?

ANALYSIS

A. Should the Proposal of Maple Homes Canada Ltd. be approved?

[12] The relevant provisions of the ***Bankruptcy and Insolvency Act*** are:

> s.59 (1) The court shall, before approving the Proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the Proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the Proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the Proposal, and the court may refuse to approve the Proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.
>
> (3) Where any of the facts mentioned in sections 173 and 177 are proved against the debtor, the court shall refuse to approve the Proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.
>
> s.173 (1) The facts referred to in section 172 are:
>
> ...
>
> (c) the bankrupt has continued to trade after becoming aware of being insolvent; ...

1. Are the terms of the Proposal reasonable and calculated to benefit the general body of creditors pursuant to s. 59 of the Bankruptcy and Insolvency Act?

[13] The Trustee is recommending approval of the Proposal, pointing out that it will bring the unsecured creditors some return (a dividend of 7 – 8.5%) rather than no return. The Trustee estimated that if Mr. Grindler were petitioned into bankruptcy he would be required to make payments of $500 per month for between nine and twenty-one months (thus, a total of $4,500 - $10,500), rather than the total of $30,000 under the Proposal.

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[14] The principal of the company, Brad Grindler, is putting into the Proposal what appears to be his only remaining substantial asset, the family recreational property on Pender Island which is worth perhaps $40,000, in addition to $30,000 of his future income. Mr. Sullivan argued that the creditors will thus receive more under the Proposal than they would if they put both Maple Homes and Mr. Grindler into bankruptcy. He urged that if the Proposal is rejected Maple Homes will automatically be bankrupt which would destroy the goodwill it has built up in the market over 11 years.

[15] He referred to ***Re Pateman*** reflex, (1991), 5 C.B.R. (3d) 115 (Man. Q.B.) at p. 120 where Oliphant A.C.J.Q.B. wrote:

> The decision of the Newfoundland Supreme Court [In Bankruptcy] in ***Irving Oil Ltd. v. Noseworthy*** (1982), 42 C.B.R. (N.S.) 302, is authority for the proposition that where the majority of the creditors is in favour of the Proposal and it has not been demonstrated that public policy or good business morality or practice militate against it, the Proposal should be approved.

The Court in ***Re Pateman*** also noted that the onus is on the party seeking approval for the Proposal to establish that its terms are reasonable and for the benefit of the general body of creditors, that while the majority of creditors' views should be seriously considered, they are not binding, and that it is the duty of the court to be satisfied that creditors will be better off under the Proposal than in bankruptcy.

[16] Mr. Scouten argued that in this respect the Proposal did not meet the standard necessary for approval. He pointed out that Mr. Gomez is one of the largest creditors and perhaps one of the few with claims against Mr. Grindler personally. Thus, he argued, the aspect of the Proposal that Maple Homes cited as a reason for approval (the contribution by Mr. Grindler personally) was actually a reason to reject the Proposal because it may put his major personal asset out of reach of his creditors.

[17] Mr. Sullivan argued that approval of the Proposal is consistent with the two overriding objectives of the ***Bankruptcy and Insolvency Act***: to ensure the equitable distribution of an insolvent's assets amongst its creditors *pari passu*, and to assist the financial rehabilitation of debtors. Mr. Scouten urged on the other hand that the objectives of the legislation also encompass requiring debtors to act responsibly with respect to their creditors. He pointed to the dishonest statements made by Mr. Grindler to Mr. Gomez and to the possibility that Maple Homes continued to trade after knowing it was insolvent. He also urged that the proposed dividend was very modest, amounting to $700 per $10,000 of claim, and thus only marginally better than bankruptcy.

[18] The main ground for Mr. Gomez's position that the Proposal should not be approved was that a "fact mentioned" in s. 173(c) of the ***Act*** had been proved, namely that Maple Homes continued to trade while it knew it was insolvent. Mr. Scouten argued that at the latest by March 10, 2000, Mr. Grindler as principal of Maple Homes knew that it was insolvent. The definition of "insolvent person" under the ***Bankruptcy and Insolvency Act*** refers to a person:

> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due...

Mr. Scouten pointed to the evidence that the sales of Maple Homes had been in serious decline since September of 1999, having plummeted to 10% of previous levels, that a large prospective order from a German customer had fallen through at the end of February, that the company's suppliers had put it on a "C.O.D." basis, that Mr. Grindler had ceased to draw a salary, had borrowed money from family to put into the company and had laid off employees, and that Mr. Gomez had been demanding shipment of the goods worth roughly $100,000 for which he had already paid. I note that for Maple Homes to have reached the state of $13,000 assets and $664,758.14 liabilities by the date of the Trustee's report in June 2000, it would have to have been in something approaching that state by early March. I also note that, as counsel for Maple Homes urged, the evidence suggests that Mr. Grindler adopted the tactic of lying to Mr. Gomez about his shipment out of desperation.

[19] The law on this subject is summarized in Houlden and Morawetz, ***Bankruptcy and Insolvency Law of Canada,*** 3rd ed., at p. 6–92:

> Section 173(1)(c) makes it imperative that a debtor who is aware that he is insolvent should cease trading and either call a meeting of creditors or file an assignment in bankruptcy: *Re Lunenfeld* (1929), 10 C.B.R. 457 (Ont. S.C.). If a debtor continues in business, he has committed a fact under s. 173(1)(c). By continuing to trade, the debtor is continuing in business at the risk of his creditors if business does not improve, and a debtor has no right to do this: *Re Stainton, Ex parte Board of Trade* (1887), 4 Morr. 242....
>
> For the court to find that a fact has been committed under s. 173(1)(c), it is essential to prove that the debtor was aware of his insolvency.

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The ***Stainton*** case illustrates that this principle applies even when the debtor has a *bona fide* belief that trade must soon revive. Cave J. wrote at p. 251:

> Now, a man, of course has a perfect right as long as he is solvent, to determine that he will go on with a business, although it may be a losing business. He may trust that before he becomes insolvent matters will change, and he will again be in a condition of prosperity. But the moment he becomes insolvent, then he is no longer going on at his own risk in case of failure; he is going on at the risk of his creditors, in case things do not mend as he hopes they will. In my judgment a man has no right to do that. The moment things have got to such a pitch that he cannot pay 20*s.* in the pound, but he nevertheless thinks that if he goes on he may be able to retrieve his position, in my opinion he ought to call his creditors together, and leave them who will have to bear the loss in case his calculations are wrong, to determine whether that course of going on shall be proceeded with or not.

[20] Mr. Scouten submitted that this case provides an opportunity for the Court to make it clear that insolvent persons who are carrying on business at the risk of their creditors will not be allowed to do so without consequences for themselves.

[21] Mr. Sullivan, however, suggested that the older authorities must be read with some caution since the more recent trend is to view bankruptcy legislation through a less penal, and more rehabilitative, lens. He argued that an overly strict interpretation of the provisions regarding doing business while insolvent is inconsistent with the objectives of the legislation, and pointed out that since a debtor cannot make a Proposal until it is insolvent, an overly strict view would leave only a very brief opportunity to make a Proposal. He cited ***Mercure v. Marquette& Fils,*** 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547 at p. 556 where the Court stated:

> Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. it concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it. it seems to me that appellant is urging the Court to so interpret it.

[22] He referred to ***Re Moxam*** (1978), 31 C.B.C. 151 (B.C.S.C.) in which Low, L.J.S.C. (as he then was) allowed an application for discharge, stating at p. 153:

> I do not find any evidence that Mr. Moxam continued to trade after knowing that he was insolvent. He merely made reasonable efforts to salvage a situation that involved increasing despair.

[23] Mr. Scouten urged that the ***Moxam*** case is quite different on its facts. The debtor there was found to have been straightforward in his dealings with the creditors, which is not the case here. As well, he argued, in the case of Maple Homes, there was not a gradual decline, inevitable only with hindsight, but a tangible and definite occurrence — the loss of the large order from Germany at the beginning of March — after which Mr. Grindler must have known that Maple Homes was insolvent.

[24] Indeed, he argued, Mr. Grindler had admitted this in his affidavit, where he swore:

> Until recently, Maple Homes was always a tremendous source of pride for me. As a result, however, it was very difficult for me this Spring to come to accept that Maple Homes could not make ends meet and could not meet its debts.

However, I do not find this constitutes the admission alleged because the word "Spring" may refer to a season that extends to the beginning of May, which is when Maple Homes gave notice of its intention to make a Proposal to its creditors.

[25] Mr. Scouten's submissions, urging that persons in financial difficulty have an obligation to keep optimism in check and to be candid with their creditors, have force. Nevertheless, I have concluded that the evidence does not establish that this debtor continued to trade after it knew it was insolvent. The length of time for which the company had been in business, the concentrated efforts Mr. Grindler was making to solve the business's problems including continued bids on work, and the fact that a large order such as the one that fell through at the beginning of March could have permitted the company to continue, are consistent with good faith and reasonable efforts to carry on, rather than with knowledge that the business would fail. I am satisfied that, within a reasonable time of knowing that Maple Homes was insolvent, its principal, Mr. Grindler, gave notice of intention to make a Proposal and that a "fact" mentioned in s., 173(c) has not been proved.

[26] Because I am also otherwise satisfied for the reasons put forward by the Trustee and by counsel for Maple Homes that the Proposal of Maple Homes is reasonable and calculated to benefit the general body of creditors, that Proposal is approved.

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B. Should Mr. Gomez be granted an exemption from the stay of proceedings pursuant to s. 69.4 of the Bankruptcy and Insolvency Act?

[27] The relevant provisions of the ***Bankruptcy and Insolvency Act*** are:

> 69 (1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
>
> ...
>
> until the filing of a Proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.
>
> 69.1(1) Subject to subsections (2) to (6) and sections 69.4 and 69.5, on the filing of a Proposal under subsection 62(1) in respect of an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt; ...
>
> 69.3(1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.
>
> 69.31(1) Where a notice of intention under subsection 50.4(1) has been filed or a Proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the Proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.
>
> (2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the corporation's obligations or an action seeking injunctive relief against a director in relation to the corporation.
>
> ...
>
> 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.
>
> s.178(1) An order of discharge does not release the bankrupt from ...
>
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity ...

[28] Some grounds on which courts will lift stays of proceedings were set out in ***Re Advocate Mines Limited*** (1984), 52 C.B.R.(N.S.) 277 (Ont. S.C.) at p. 278:

> The court may, however, remove the stay of proceedings prescribed by that section in appropriate cases and has done so in the following circumstances:
>
> 1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
> 2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the ***Bankruptcy Act*** inappropriate.
> 3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
> 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
> 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.

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[29] It was common ground that the burden is on the applicant for a declaration under s. 69.4 to satisfy the court that one or more of those grounds is present and that the applicant is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration.

[30] The authorities establish that it is not for the court to inquire into the merits of the action the applicant wishes to bring. In ***Re Francisco*** 1995 CanLII 7371 (ON SC), (1995), 32 C.B.R. (3d) 29 (Ont. Gen. Div.) the court stated the position thus (at p. 34):

> Without intending to usurp the role of the trial judge to decide otherwise on the facts established before him, I am satisfied BPCO has pleaded sufficient allegations to bring its claim, at least arguably, within s. 178(1)(d).

Mr. Sullivan cited ***Wychreschuk v. Sellors*** (1988), 71 C.B.R. (N.S.) 37 (Man. Q.B.), appeal dismissed (1989), 73 C.B.R. (N.S.) 267 (C.A.) where Monnin J. observed that the granting of leave is a discretionary matter, and wrote at p. 39:

> In order for leave to be granted, an applicant must demonstrate to the court that there exist compelling reasons to permit an action either to commence or to proceed.

However, as Master Tokarek observed in ***Re Bond***, [1993] B.C.J. No. 1175 (Q.L.) (S.C.), there is little available guidance as to what may be considered a "compelling reason".

[31] In ***Eron Financial Services Ltd. (Receiver of) v. Biller*** 1999 CanLII 6194 (BC SC), (1999), 10 C.B.R. (4th) 252 (B.C.S.C.) the Receiver and Judicial Trustee of the plaintiffs wished to proceed with an action against the defendant before his Trustee in Bankruptcy had been discharged. They wished to bring an action claiming fraud and seeking a declaration of trust. The court decided to permit the action to proceed, stating at p. 256:

> The facts of the case are similar to those in ***J.B. Allen***, *supra*, where the Court relied upon the earlier decision in ***Cravit, Re*** (1984), 54 C.B.R. (N.S.) 214 (Ont. S.C.) where Master Ferron stated at p. 215:
>
> > ... in order to come to a conclusion that the plaintiffs should not be permitted to proceed I would have to conclude that the plaintiffs could either not succeed in the action in question or that if they succeeded they could not recover against the [bankrupt's] insurer.
> >
> > The function of the bankruptcy court is not to inquire into the merit of the action sought to be commenced or continued but rather to be assured that such an action, falling within the s. 49(1) [now s. 69.3] stay, should continue for the reasons which I detailed in ***Re Advocate Mines Ltd.***
>
> The bankrupt, Mr. Biller, is a necessary party to the action as he was an officer and director of many, if not all of the plaintiff companies. Further, the claim is based upon a cause of action for which, if successful, will not be defeated by the bankruptcy. Lastly, the Judicial Trustee ought to be able to pursue the action against the other defendants, the bankrupt's wife and their holding company.

[32] The parties referred me to a number of other authorities, including ***Likins v. Francis*** 1995 CanLII 7378 (ON SC), (1995), 33 C.B.R. (3d) 259 (Ont. Gen. Div.); ***Re Duvall*** 1992 CanLII 1917 (BC SC), (1992), 11 C.B.R. (3d) 264 (B.C.S.C.); ***Royal Bank v. Exner*** 1993 CanLII 7305 (AB QB), (1993), 23 C.B.R. (3d) 274 (Alta. Q.B.); ***Dutchak Estate v. Seidle***, [1998] S.J. No. 756 (Q.L.) (Sask. Q.B.); ***J.B. Allen & Co. v. D.E. Witmer Plumbing& Heating Ltd.*** reflex, (1992), 12 C.B.R. (3d) 272 (Ont. Gen. Div.); ***Don Bodkin Leasing Ltd. v. Rayzak***, [1994] O.J. No. 280 (Q.L.) (Ont. Gen. Div.); and ***Re Quality Carpets Ltd.*** 1995 CanLII 803 (BC SC), (1995), 36 C.B.R. (3d) 143 (B.C.S.C.).

[33] The principles that emerge from the jurisprudence may be summarized:

> (1) The general scheme of bankruptcy proceedings is that civil actions are stayed against the insolvent person; exemptions are to be made only where there are "compelling reasons". This flows from one of the major purposes of the ***Bankruptcy and Insolvency Act***, which is to permit the rehabilitation of the bankrupt unfettered by past debts.
>
> (2) An applicant for exemption from the stay must show that there will be material prejudice to the applicant if the stay is continued or that it is equitable on other grounds to allow the exemption.
>
> (3) The existence of one or more of the factors listed in ***Re Advocate Mines*** will be an important consideration, but is not determinative.
>
> (4) The court is not to attempt to determine the proposed claim on its merits.
>
> (5) Rather, it must assess whether it is a claim of the nature that would survive discharge, whether it is a claim that could not succeed, and whether if it did succeed it could not result in recovery against the defendants.

[34] The standard appears to be somewhat more stringent than that for permitting a cause of action to continue under a rule such as ***Supreme Court Rules***, B.C. Reg. 221/90, Rule 19(24), where a proceeding may be struck as disclosing no

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reasonable claim or defence only if the pleading itself makes it plain and obvious there is none. Given the purpose of bankruptcy legislation and the fact that continuing an action is the exceptional situation, I think that generally there must be more than pleadings or proposed pleadings disclosing a claim. There must also be some evidence supporting the conclusion that there is a fair issue to be tried. However, to expect more than that would be inconsistent with the statutory scheme. The legislation contemplates that claims of fraud or breach of fiduciary duty may survive bankruptcy or insolvency, and it will seldom be possible to prove such cases on a balance of probabilities at an early stage and without discovery.

[35] Should the exemption be granted in this case?

[36] The first question is whether this would be an action falling within any of the grounds listed in ***Re Advocate Mines***, *supra*. The applicant's position is that it is an action against the bankrupt for a debt to which a discharge would not be a defence, and that the company Maple Homes is a necessary party in the action against Bradley and Cathie Grindler.

[37] In claiming that the action is one for which discharge would not be a defence, the applicant here relies on s. 178(1)(d). He has issued a writ and statement of claim against Bradley Grindler and Cathie Grindler pleading that Maple Homes and Bradley Grindler, in using the funds Mr. Gomez provided for unauthorized purposes, and concealing that they had done so, committed a breach of trust. He also pleaded that Cathie Grindler was at all material times an active director and participant in Maple Homes and knowingly assisted in the misappropriation by Maple Homes and Bradley Grindler of the payments, the concealment of that misappropriation, and the continuing deceit upon the plaintiff. He further pleaded that the funds were used to pay third parties or to make payments to or for the benefit of the defendants, or to purchase assets now in the possession of the defendants or others, and seeks a tracing remedy in respect of the payments and assets. Maple Homes is not a party to the action.

[38] After the close of the hearing, and upon further review of the matter, I requested further submissions from counsel as to the impact of paragraph 5 of the Proposal. It appeared that there might be some question about whether the legislation encompassed a stay of all claims against the Grindlers personally, even though such a stay seemed to be assumed in the provisions of paragraph 5 of the Proposal and in the submissions of counsel for Maple Homes. The response from counsel for Maple Homes clarified that its position is that if the Proposal is approved, Mr. Gomez will lose *all* of his claims (against both the company and Mr. and Mrs. Grindler) except for claims (if any) for non-dischargeable debts under s. 178(1) of the ***Bankruptcy and Insolvency Act***.

[39] On the other hand, Mr. Scouten argued on behalf of Mr. Gomez that although the Proposal, if approved, would bind Mr. Gomez such that he would require a declaration under s. 69.4 in order to pursue an action against Maple Homes, paragraph 5 of the Proposal, in purporting to cover "all rights of recovery" against the Grindlers personally, goes beyond what is permitted by s. 50(13) and (14) of the ***Act***. Those sections provide:

> 50 (13) A Proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (14) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or
>
> (b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

[40] Mr. Gomez's position is that the Proposal goes further than the ***Act*** permits in these ways:

> (1) the claims against Mr. Grindler arising from things done or said by him personally, and otherwise than by law by virtue of his capacity as a director, such as the claims in deceit, are not covered under s. 50(13);
>
> (2) Cathie Grindler has maintained that she was not a director of Maple Homes at the time of the payments made by Mr. Gomez and, if so, claims against her are not covered under s. 50(13); and
>
> (3) in part, Mr. Gomez's claims against Mr. Grindler are based on allegations of misrepresentation and wrongful conduct on the part of Mr. Grindler, which are not covered under s. 50(13).

[41] Mr. Scouten argues that the Proposal is therefore bad on its face or, in the alternative, that if approved it can have no effect on the rights of Mr. Gomez to pursue claims against Bradley or Cathie Grindler since those claims either do not "relate to the obligations of the corporation where the directors are by law liable in their capacity as directors", or else (in Mr. Grindler's case) are based on allegations of "misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors". He argues that the claims do not fall within s. 50(13) in that they do not relate, for example, to a director's liability at law for unpaid statutory remittances, wages or similar debts of the company for which a director is liable *qua* director. He argues that s. 50(13) does not allow a corporate Proposal to include a term

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compromising *all claims* against directors of the company; the section, properly read, only covers terms compromising claims for conventional "director's liabilities" arising out of the director's legal capacity as a director.

[42] In response, Mr. Sullivan argues that the extent to which court approval of this Proposal would affect claims in the action against Bradley and Cathie Grindler will be a matter for the judge to decide in that action. He agrees that if the law does not allow a Proposal to affect a particular type of claim, then regardless of the provisions found within the Proposal, the Proposal cannot affect such claims.

[43] I conclude that Mr. Scouten is correct; the Proposal of Maple Homes cannot compromise all claims against Bradley and Cathie Grindler, for the reasons he has put forward.

[44] With respect to the application for a declaration permitting an action against Maple Homes, the argument on behalf of Mr. Gomez was that the debt arose out of a breach of trust. Mr. Gomez's position is that when he advanced the funds it was understood that they would be used to pay for the materials required to build his house. In his affidavit, Mr. Gomez deposes:

> Regarding paragraphs 16 through 20 of the Grindler Affidavit, when I met with Mr. Grindler in Vancouver, he specifically informed me that Maple Homes was not a manufacturer and he and Maple Homes would purchase for me and ship materials from different suppliers. I knew there would be a price mark-up for these services. Bradley Grindler took me to see a number of manufacturers/suppliers' show room locations and display facilities, including two display houses, while I was in Vancouver. At that time Mr. Grindler again confirmed the terms of our agreement: He told me "you select what you want and we will buy it for you". At these locations I then selected specific items which Bradley Grindler and Maple homes would purchase and ship to me. These included such items as the Jacuzzi, shower stalls, faucets, kitchen sink, the stairs ... and the mouldings for the walls and ceilings....
>
> Further Bradley Grindler took me and my wife for lunch and at that luncheon meeting, I specifically asked Mr. Grindler how I could be certain that if I paid him my money he would in fact purchase the house materials and ship them to me. He assured me he was a trustworthy person who had been in business for several years, operated a reputable company and I could trust him to buy and deliver all materials to me. I relied on those representations and I trusted that he would, for the price mark-up of Maple Homes, use my monies for the specific purpose of purchasing the materials, paying all suppliers and deliver the Materials to me.
>
> These statements, and Mr. Grindler's conduct in dealing with me throughout, left me with the clear understanding that Maple would be using the money that I sent to it to purchase and pay for the goods from his third party suppliers, and I understood this to be an important and central feature of the arrangement between us for the purchase and supply of products to me.

[45] That evidence was not contradicted. Although it is conceded that the funds were kept in the Maple Homes general account, the records show that the funds were tracked separately in that account, as were funds deposited by other customers. Mr. Scouten argued that implicit in a "deposit" is a trust-like notion; a "deposit" does not necessarily create a trust, but shows that the money is to be used for a particular purpose. He relied on a series of cases beginning with ***Barclay's Bank Ltd. v. Quistclose Investments Ltd.***, [1970] A.C. 567 (H.L.) in arguing that these arrangements gave rise to a relationship of a fiduciary character or trust in favour of the suppliers of the materials, and, secondly, if that trust failed, in favour of Mr. Gomez.

[46] Mr. Sullivan argued, however, that it was the practice of Maple Homes with all of its customers to require payment in advance for their orders, and that although Mr. Gomez had specifically chosen certain materials, those materials could have come from Maple Homes's inventory just as much as from the suppliers under the terms of the contract, which was simply to provide the materials. Acknowledging the seriousness of Mr. Grindler's admitted dishonest statements to Mr. Gomez after the funds were gone, Mr. Sullivan pointed to Mr. Grindler's contrition and to his affidavit stating that he had continued to hope that more orders would come in and he would be able to fulfil the contract. Mr. Sullivan argued that sometimes even honest people say things they regret, that it was a time of panic, and that the lies in that context do not make Mr. Grindler a "fraud artist".

[47] The law with respect to "***Quistclose*** trusts" is, as Mr. Scouten said, still under development. The ***Quistclose*** case itself involved a loan from Quistclose Investments to Rolls Razor Ltd., which was in financial difficulties. The loan was made on the agreed condition that it would be used to pay a dividend. The cheque was paid into a separate account opened for that purpose with the bank. The bank knew that the money was borrowed, and agreed with Rolls Razor Ltd. that the account would only be used for the purpose of paying the dividend. Before the dividend had been paid, Rolls Razor Ltd. went into voluntary liquidation. Quistclose brought an action claiming that the money had been held by Rolls Razor Ltd. on trust to pay the dividend; that trust having failed, there was then a resulting trust for Quistclose of which the

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bank had notice. Lord Wilberforce, with whom all other members of the Court agreed, held that the mutual intention of Quistclose and Rolls Razor, and the essence of their bargain, was that "the sum advanced should not become part of the assets of Rolls Razor Ltd., but should be used exclusively for payment of a particular class of its creditors, namely, those entitled to the dividend." He then stated at p. 580:

> That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years.

These cases do not detract, the court said, from the principle that in the absence of some special arrangement creating a trust, payments of this kind are made upon the basis that they are to be included in the company's assets. Further, the court rejected the argument that if a transaction was one of loan, giving rise to a legal action of debt, this necessarily excluded the implication of any trust relationship. Lord Wiberforce wrote at p. 581-82:

> There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose ...: when the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e., repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan. I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired: it would be to the discredit of both systems if they could not. In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it.

[48] Mr. Scouten cited ***Ling v. Chinavision Canada Corp.*** reflex, (1992), 10 O.R. (3d) 79 (Ont. Gen. Div.) which applied the principle stated in ***Quistclose***.

[49] Mr. Sullivan, however, argued that the principle is limited to situations where there is an express agreement that the funds will be kept separate and will be used only for the specified purpose. The fundamental premise articulated in ***Henry v. Hammond***, [1913] 2 K.B. 515 at p. 521, he argued, is solidly accepted:

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor.

He referred to ***Bank of Montreal v. B.C. (Milk Marketing Board)*** 1994 CanLII 2770 (BC SC), (1994), 94 B.C.L.R. (2d) 281 (S.C.). There the Court held that the principle that where A gives money to B for the specific purpose of paying C, the money is impressed with a trust and may not be appropriated by him, is undoubted. Newbury J. observed, however, that in both the ***Quistclose*** case itself and in ***Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd.*** 1986 CanLII 870 (BC SC), (1986), 11 B.C.L.R. (2d) 308 (S.C.) which applied it, that it appeared that (1) the recipient of the funds was required, either by express terms or the course of dealings between the parties, to keep the money separate from its own funds; and (2) the funds were paid on express conditions of trust which the payees later tried to repudiate. The Court, having commented that the case at bar involved a claim that a trust should be implied from the course of dealings, concluded at p. 288:

> Faced with the clear authority of ***Henry v. Hammond***, then, I must conclude that the absence of an obligation on McKinnon in the ordinary course to segregate funds received from the Board from its own funds is fatal to the inference that a trust existed in this case. Regardless of who was a conduit for the payment of funds to whom, and regardless of whether a direct liability existed between the receiving vendors and the defendant producers, such an obligation, express or implied, is "the essential thing" not proven here. It follows that the funds withheld from McKinnon by the Board constitute only a debt owing to the vendor, and that they must be distributed first to secured creditors and thereafter to other claimants in accordance with the *Bankruptcy Act*.

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[50] ***Henry v. Hammond*** has been cited and its principle followed a number of times in Canadian law. Mr. Sullivan cited, in addition to the above instance, ***M.A. Hanna Company v. The Provincial Bank of Canada***, 1933 CanLII 49 (SCC), [1935] S.C.R. 144; ***Salo v. Royal Bank of Canada***, [1988] B.C.J. No. 999 (Q.L.)(C.A.) and ***Toronto Dominion Bank v. Hayworth Equipment Sales Ltd.*** (1985), 56 C.B.R (N.S.) 82 (Alta. Q.B.).

[51] Given that on its face the proposed action against Maple Homes and Bradley and Cathie Grindler is one that would survive discharge, I must ask whether it is one that could not succeed. There is evidence that the parties had discussions which left Mr. Gomez with the understanding that his funds would be used to purchase and ship the materials he had ordered for his house. Those funds were placed in the Maple Homes general account but were tracked separately. There is some authority that would support the proposed claim, if the evidence were fully developed in a way favourable to the claimant. I conclude that this action meets the required standard.

[52] As well, I take into account that the action against Mr. and Mrs. Grindler can proceed despite the Proposal for the reasons set out above, and that action will involve the same events and raise many of the same issues as those in the proposed action.

[53] Is there material prejudice if Mr. Gomez is required to wait? Is it equitable to grant the exemption? The allegations are serious ones, relating to breach of fiduciary duty. Mr. Gomez, in all good faith, trusted Maple Homes to use the money he provided for the purchase of materials for his home in Spain. Maple Homes, through Mr. Grindler, proceeded in a course of deception for several months, until it was far too late for Mr. Gomez to try to retrieve his funds. He may or may not succeed at trial in establishing that there was a trust-like relationship, but he is entitled to try. He will be prejudiced due to passage of time in producing his evidence if he is required to wait. In all of the circumstances it would be inequitable to deny his application.

[54] Therefore, the exemption sought by Mr. Gomez will be granted.

CONCLUSIONS

1. The Proposal is approved. It meets the statutory requirements. It has not been established that the debtor continued to trade after it knew it was insolvent.
2. The application by Mr. Gomez for a declaration under s. 69.4 that sections 69 to 69.3 no longer apply to him, is granted. This is because the claim that he wishes to bring against Maple Homes for breach of trust meets the standard required under s. 69.4 in that it is the type of claim that would survive discharge, it could succeed, there would be prejudice to continue the stay and it is equitable to grant the exemption.

"Lynn Smith, J."
The Honourable Madam Justice Lynn Smith

Court to hear report of trustee, etc. - Sec. 59

59. (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal - Sec. 59(2)

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security - Sec. 59(3)

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment - Sec. 59(4)

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(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.
R.S., 1985, c. B-3, s. 59;
1997, c. 12, s. 36;
2000, c. 12, s. 10;
2007, c. 36, s. 21.

Priority of claims - Sec. 60
60. (1) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy.

Certain Crown claims - Sec. 60(1.1)
(1.1) Unless Her Majesty consents, no proposal shall be approved by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court approval of the proposal, of all amounts that were outstanding at the time of the filing of the notice of intention or of the proposal, if no notice of intention was filed, and are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;
(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or
(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Idem - Sec. 60(1.2)
(1.2) No proposal shall be approved by the court if, at the time the court hears the application for approval, Her Majesty in right of Canada or a province satisfies the court that the debtor is in default on any remittance of an amount referred to in subsection (1.1) that became due after the filing

(a) of the notice of intention; or
(b) of the proposal, if no notice of intention was filed.

Proposals by employers - Sec. 60(1.3)
(1.3) No proposal in respect of an employer shall be approved by the court unless

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(a) it provides for payment to the employees and former employees, immediately after court approval of the proposal, of amounts at least equal to the amounts that they would be qualified to receive under paragraph 136(1)(d) if the employer became bankrupt on the date of the filing of the notice of intention, or proposal if no notice of intention was filed, as well as wages, salaries, commissions or compensation for services rendered after that date and before the court approval of the proposal, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the bankrupt's business during the same period; and
(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

Voting on proposal - Sec. 60(1.4)
(1.4) For the purpose of voting on any question relating to a proposal in respect of an employer, no person has a claim for an amount referred to in paragraph (1.3)(a).

Proposals by employers — prescribed pension plans - Sec. 60(1.5)
(1.5) No proposal in respect of an employer who participates in a prescribed pension plan for the benefit of its employees shall be approved by the court unless

(a) the proposal provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

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Non-application of subsection (1.5) - Sec. 60(1.6)
(1.6) Despite subsection (1.5), the court may approve a proposal that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims - Sec. 60(1.7)
(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Payment to trustee - Sec. 60(2)
(2) All moneys payable under the proposal shall be paid to the trustee and, after payment of all proper fees and expenses mentioned in subsection (1), shall be distributed by him to the creditors.

Distribution of promissory notes, stock, etc., of debtor - Sec. 60(3)
(3) Where the proposal provides for the distribution of property in the nature of promissory notes or other evidence of obligations by or on behalf of the debtor or, when the debtor is a corporation, shares in the capital stock of the corporation, the property shall be dealt with in the manner prescribed in subsection (2) as nearly as may be.

Section 147 applies - Sec. 60(4)
(4) Section 147 applies to all distributions made to the creditors by the trustee pursuant to subsection (2) or (3).

Power of court - Sec. 60(5)
(5) Subject to subsections (1) to (1.7), the court may either approve or refuse to approve the proposal.
R.S., 1985, c. B-3, s. 60;
1992, c. 27, s. 24;
1997, c. 12, s. 37;
2000, c. 30, s. 144;
2005, c. 47, s. 39;
2007, c. 36, ss. 22, 99;
2009, c. 33, s. 22;
2012, c. 16, s. 79.

Annulment of bankruptcy - Sec. 61
61. (1) The approval by the court of a proposal made after bankruptcy operates to annul the bankruptcy and to revest in the debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide.

Non-approval of proposal by court - Sec. 61(2)
(2) Where the court refuses to approve a proposal in respect of an insolvent person a copy of which has been filed under section 62,

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(a) the insolvent person is deemed to have thereupon made an assignment;
(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

(3) [Repealed, 1992, c. 27, s. 25]

Costs when proposal refused - Sec. 61(4)
(4) No costs incurred by a debtor on or incidental to an application to approve a proposal, other than the costs incurred by the trustee, shall be allowed out of the estate of the debtor if the court refuses to approve the proposal.
R.S., 1985, c. B-3, s. 61;
1992, c. 27, s. 25;
1997, c. 12, s. 38;
2005, c. 47, s. 40.

Filing of proposal - Sec. 62
62. (1) If a proposal is made in respect of an insolvent person, the trustee shall file with the official receiver a copy of the proposal and the prescribed statement of affairs.

Determination of claims - Sec. 62(1.1)
(1.1) Except in respect of claims referred to in subsection 14.06(8), where a proposal is made in respect of an insolvent person, the time with respect to which the claims of creditors shall be determined is the time of the filing of
(a) the notice of intention; or
(b) the proposal, if no notice of intention was filed.

Determination of claims re bankrupt - Sec. 62(1.2)
(1.2) Except in respect of claims referred to in subsection 14.06(8), where a proposal is made in respect of a bankrupt, the time with respect to which the claims of creditors shall be determined is the date on which the bankrupt became bankrupt.

On whom approval binding - Sec. 62(2)
(2) Subject to subsection (2.1), a proposal accepted by the creditors and approved by the court is binding on creditors in respect of
(a) all unsecured claims; and
(b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, or represented by a proxyholder, at the meeting and voting on the resolution to accept the proposal.

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When insolvent person is released from debt - Sec. 62(2.1)
(2.1) A proposal accepted by the creditors and approved by the court does not release the insolvent person from any particular debt or liability referred to in subsection 178(1) unless the proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the proposal.

Certain persons not released - Sec. 62(3)
(3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.
R.S., 1985, c. B-3, s. 62;
1992, c. 27, s. 26;
1997, c. 12, s. 39;
2005, c. 47, s. 41;
2007, c. 36, s. 23.

Default in performance of proposal - Sec. 62.1
62.1 Where
(a) default is made in the performance of any provision in a proposal,
(b) the default is not waived
(i) by the inspectors, or
(ii) if there are no inspectors, by the creditors, and
(c) the default is not remedied by the insolvent person within the prescribed time,
the trustee shall, within such time and in such form and manner as are prescribed, so inform all the creditors and the official receiver.
1992, c. 27, s. 27.

Receiving order on default, etc. - Sec. 63
63. (1) Where default is made in the performance of any provision in a proposal, or where it appears to the court that the proposal cannot continue without injustice or undue delay or that the approval of the court was obtained by fraud, the court may, on application thereto, with such notice as the court may direct to the debtor, and, if applicable to the trustee and to the creditors, annul the proposal.

Validity of things done - Sec. 63(2)
(2) An order made under subsection (1) shall be made without prejudice to the validity of any sale, disposition of property or payment duly made, or anything duly done under or in pursuance of the proposal, and notwithstanding the annulment of the proposal, a guarantee given pursuant to the proposal remains in full force and effect in accordance with its terms.

Annulment for offence - Sec. 63(3)
(3) A proposal, although accepted or approved, may be annulled by order of the court at the request of the trustee or of any creditor whenever the debtor is afterwards convicted of any offence under this Act.

Effect of annulling order - Sec. 63(4)

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(4) On the annulment of a proposal, the debtor shall be deemed to have thereupon made an assignment and the order annulling the proposal shall so state.

Meeting of creditors to be called - Sec. 63(5)
(5) Where an order annulling a proposal has been made, the trustee shall, within five days after the order is made, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Consequences of annulment - Sec. 63(6)
(6) Where an order annulling the proposal described in subsection (5) has been made, the trustee shall forthwith file a report thereof in the prescribed form with the official receiver, who shall thereupon issue a certificate of assignment in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed pursuant to section 49.
R.S., 1985, c. B-3, s. 63;
1992, c. 27, s. 28;
2004, c. 25, s. 34(F).

Removal of directors - Sec. 64
64. (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor in respect of whom a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1) if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal being made in respect of the debtor or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy - Sec. 64(2)
(2) The court may, by order, fill any vacancy created under subsection (1).
R.S., 1985, c. B-3, s. 64;
1992, c. 27, s. 29;
1997, c. 12, s. 40;
1999, c. 31, s. 20;
2005, c. 47, s. 42.

Security or charge relating to director's indemnification - Sec. 64.1
64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Priority - Sec. 64.1(2)
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

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Restriction — indemnification insurance - Sec. 64.1(3)
(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault - Sec. 64.1(4)
(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
2005, c. 47, s. 42;
2007, c. 36, s. 24.

Court may order security or charge to cover certain costs - Sec. 64.2
64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

> **(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;**
> **(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and**
> **(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.**

Priority - Sec. 64.2(2)
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Individual - Sec. 64.2(3)
(3) In the case of an individual,

> **(a) the court may not make the order unless the individual is carrying on a business; and**
> **(b) only property acquired for or used in relation to the business may be subject to a security or charge.**

2005, c. 47, s. 42;
2007, c. 36, s. 24.

Where proposal is conditional on purchase of new securities - Sec. 65
65. A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal shall be valued by the court and shall be paid in cash on approval of the proposal.
R.S., 1985, c. B-3, s. 65;
2004, c. 25, s. 35(F).

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Certain rights limited - Sec. 65.1
65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Idem - Sec. 65.1(2)
(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

"(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed."

Idem - Sec. 65.1(3)
(3) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that

(a) the insolvent person is insolvent;

(b) a notice of intention or a proposal has been filed in respect of the insolvent person; or

(c) the insolvent person has not paid for services rendered, or material provided, before the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.

Certain acts not prevented - Sec. 65.1(4)
(4) Nothing in subsections (1) to (3) shall be construed

(a) as prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed;

(b) as requiring the further advance of money or credit; or

(c) [Repealed, 2012, c. 31, s. 415]

Provisions of section override agreement - Sec. 65.1(5)
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

Powers of court - Sec. 65.1(6)
(6) The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely cause it significant financial hardship.

Eligible financial contracts - Sec. 65.1(7)

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(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association established by the Canadian Payments Act from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with that Act and the by-laws and rules of that Association.

(8) [Repealed, 2007, c. 29, s. 92]

Permitted actions - Sec. 65.1(9)

(9) Despite subsections 69(1) and 69.1(1), the following actions are permitted in respect of an eligible financial contract that is entered into before the filing, in respect of an insolvent person of a notice of intention or, where no notice of intention is filed, a proposal, and that is terminated on or after that filing, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the insolvent person and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Net termination values - Sec. 65.1(10)

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (9) are owed by the insolvent person to another party to the eligible financial contract, that other party is deemed, for the purposes of paragraphs 69(1)(a) and 69.1(1)(a), to be a creditor of the insolvent person with a claim provable in bankruptcy in respect of those net termination values.

1992, c. 27, s. 30;
1997, c. 12, s. 41;
2001, c. 9, s. 573;
2004, c. 25, s. 36(E);
2005, c. 47, s. 43;
2007, c. 29, s. 92;
2012, c. 31, s. 415.

Disclaimer or resiliation of agreements - Sec. 65.11

65.11 (1) Subject to subsections (3) and (4), a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) may — on notice given in the prescribed form and manner to the other parties to the agreement and the trustee — disclaim or resiliate any agreement to which the debtor is a party on the day on which the notice of intention or proposal was filed. The debtor may not give notice unless the trustee approves the proposed disclaimer or resiliation.

Individuals - Sec. 65.11(2)

(2) In the case of an individual,

(a) they may not disclaim or resiliate an agreement under subsection (1) unless they are carrying on a business; and

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(b) only an agreement in relation to the business may be disclaimed or resiliated.

Court may prohibit disclaimer or resiliation - Sec. 65.11(3)
(3) Within 15 days after the day on which the debtor gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court ordered disclaimer or resiliation - Sec. 65.11(4)
(4) If the trustee does not approve the proposed disclaimer or resiliation, the debtor may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered - Sec. 65.11(5)
(5) In deciding whether to make the order, the court is to consider, among other things,
(a) whether the trustee approved the proposed disclaimer or resiliation;
(b) whether the disclaimer or resiliation would enhance the prospects of a viable proposal being made in respect of the debtor; and
(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation - Sec. 65.11(6)
(6) An agreement is disclaimed or resiliated
(a) if no application is made under subsection (3), on the day that is 30 days after the day on which the debtor gives notice under subsection (1);
(b) if the court dismisses the application made under subsection (3), on the day that is 30 days after the day on which the debtor gives notice under subsection (1) or any later day fixed by the court; or
(c) if the court orders that the agreement is disclaimed or resiliated under subsection (4), on the day that is 30 days after the day on which the debtor gives notice or any later day fixed by the court.

Intellectual property - Sec. 65.11(7)
(7) If the debtor has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation - Sec. 65.11(8)
(8) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation - Sec. 65.11(9)
(9) A debtor shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

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Exceptions - Sec. 65.11(10)
(10) This section does not apply in respect of
(a) an eligible financial contract;
(b) a lease referred to in subsection 65.2(1);
(c) a collective agreement;
(d) a financing agreement if the debtor is the borrower; or
(e) a lease of real property or of an immovable if the debtor is the lessor.
2005, c. 47, s. 44;
2007, c. 29, s. 93, c. 36, s. 26;
2009, c. 31, s. 63.

Application for authorization to serve a notice to bargain - Sec. 65.12
65.12 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) who is a party to a collective agreement and who is unable to reach a voluntary agreement with the bargaining agent to revise any of its provisions may, on giving five days notice to the bargaining agent, apply to the court for an order authorizing the insolvent person to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent.

Conditions for issuance of order - Sec. 65.12(2)
(2) The court may issue the order only if it is satisfied that
(a) the insolvent person would not be able to make a viable proposal, taking into account the terms of the collective agreement;
(b) the insolvent person has made good faith efforts to renegotiate the provisions of the collective agreement; and
(c) the failure to issue the order is likely to result in irreparable damage to the insolvent person.

No delay on vote on proposal - Sec. 65.12(3)
(3) The vote of the creditors in respect of a proposal may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent has not expired.

Claims arising from revision of collective agreement - Sec. 65.12(4)
(4) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the insolvent person, the bargaining agent that is a party to the agreement has a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

Order to disclose information - Sec. 65.12(5)
(5) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining

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agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

Unrevised collective agreements remain in force - Sec. 65.12(6)
(6) For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Parties - Sec. 65.12(7)
(7) For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.
2005, c. 47, s. 44.

Restriction on disposition of assets - Sec. 65.13
65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals - Sec. 65.13(2)
(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors - Sec. 65.13(3)
(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered - Sec. 65.13(4)
(4) In deciding whether to grant the authorization, the court is to consider, among other things,

- **(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;**
- **(b) whether the trustee approved the process leading to the proposed sale or disposition;**
- **(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;**
- **(d) the extent to which the creditors were consulted;**
- **(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and**
- **(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.**

Additional factors — related persons - Sec. 65.13(5)
(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

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(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons - Sec. 65.13(6)
(6) For the purpose of subsection (5), a person who is related to the insolvent person includes
(a) a director or officer of the insolvent person;
(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear - Sec. 65.13(7)
(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers - Sec. 65.13(8)
(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.
2005, c. 47, s. 44;
2007, c. 36, s. 27.

Insolvent person may disclaim or resiliate commercial lease - Sec. 65.2
65.2 (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial lessee under a lease of real property or an immovable, the insolvent person may disclaim or resiliate the lease on giving thirty days notice to the lessor in the prescribed manner, subject to subsection (2).

Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3, [2004] 1 SCR 60 - Whether repudiation of leases under s. 65.2 relieved first tenant of its obligations as original lessee

Date:	2004-01-29
Docket:	29196
Parallel citations:	2004 SCC 3 (CanLII); 70 OR (3d) 254; 234 DLR (4th) 513; 43 BLR (3d) 1; 46 CBR (4th) 35; 184 OAC 33
URL:	http://canlii.ca/t/1g98x
Citation:	Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3 (CanLII), [2004] 1 SCR 60, <http://canlii.ca/t/1g98x> retrieved on 2013-08-24
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Crystalline Investments Ltd. *v.* Domgroup Ltd., [2004] 1 S.C.R. 60, 2004 SCC 3

Domgroup Ltd. *Appellant*

v.

Crystalline Investments Ltd. and Burnac Leaseholds Ltd. *Respondents*

Indexed as: Crystalline Investments Ltd. *v.* Domgroup Ltd.

Neutral citation: 2004 SCC 3.

File No.: 29196.

2003: November 7; 2004: January 29.

Present: McLachlin C.J. and Iacobucci, Major, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for ontario

Bankruptcy — Proposals — Disclaimer of commercial leases — Tenant validly assigning leases and assignee subsequently becoming insolvent — Assignee giving landlords notice of intention to repudiate leases pursuant to s. 65.2 of Bankruptcy and Insolvency Act — Whether repudiation of leases under s. 65.2 relieved first tenant of its obligations as original lessee — Whether post-disclaimer, assignors and guarantors must be treated in same manner with respect to liability — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 65.2.

Landlord and tenant — Commercial leases — Assignment clause — Insolvent commercial tenant — Tenant validly assigning leases and assignee subsequently becoming insolvent — Assignee giving landlords notice of intention to repudiate leases pursuant to s. 65.2 of Bankruptcy and Insolvency Act — Whether rights between landlords and original tenant affected by proceedings under s. 65.2 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 65.2.

The appellant was the respondents' original tenant. Ultimately, F held the validly assigned leases. F later became insolvent and attempted reorganization under the *Bankruptcy and Insolvency Act*. F, through its trustee, repudiated the leases. Pursuant to s. 65.2(3) of the Act, the respondents received compensation payments equivalent to six months rent upon approval of the proposal. The respondents informed the appellant that F had repudiated the leases and asserted their right to be paid the outstanding rent under the assignment clause in the leases. The appellant declined to pay. The respondents filed suit and the appellant applied for summary judgment in both cases. Holding that the notices of repudiation given under s. 65.2 terminated the leases for all purposes, the motions judge granted summary judgment and dismissed the respondents' claims. The Court of Appeal reversed the judgment, finding that the rights between the respondents and the appellant were unaffected by proceedings under s. 65.2.

Held: The appeal should be dismissed.

The repudiation of the leases under s. 65.2 of the Act did not affect the appellant's obligations as the original lessee. Section 65.2 should be read narrowly. The plain purposes of the section are to free an insolvent from obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can. Repudiation benefits only the insolvent. Nothing in the Act protects third parties, including assignors, from the consequences of an insolvent's repudiation of a commercial lease. From the time a lease is completed, the original tenant is bound by all the conditions of the lease, including the term. The covenant is fully enforceable even if it has been assigned. Explicit statutory language is required to divest persons of rights they otherwise enjoy at law. So long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights.

The mere possibility that the original tenant may have a right of indemnity against his insolvent assignee and is able to make a claim to participate in the proposal proceedings as an unsecured creditor is not inconsistent with the Act. On the contrary, it is consistent with the circumstances applicable to other alternative debtors, and does not affect or alter the nature of the original tenant's contractual relationship and obligations. More importantly, it does not require that the original tenant be discharged from liability.

In distinguishing between a guarantor and an assignor post-disclaimer, *Cummer-Yonge Investments Ltd. v. Fagot*, [1965] 2 O.R. 152, has created uncertainty in leasing and bankruptcy and should be overruled. Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability.

Cases Cited

Overruled: *Cummer-Yonge Investments Ltd. v. Fagot*, [1965] 2 O.R. 152, aff'd [1965] 2 O.R. 157*n*; **referred to:** *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423; *McNeil v. Train* (1848), 5 U.C.Q.B. 91; *Wotherspoon v. Canadian Pacific Ltd.* (1979), 22 O.R. (2d) 385; *Francini v. Canuck*

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Properties Ltd. (1982), 35 O.R. (2d) 321; *Transco Mills Ltd. v. Percan Enterprises Ltd.* 1993 CanLII 2876 (BC CA), (1993), 100 D.L.R. (4th) 359; *Warnford Investments Ltd. v. Duckworth*, [1978] 2 All E.R. 517; *Peterborough Hydraulic Power Co. v. McAllister* (1908), 17 O.L.R. 145; *Stacey v. Hill*, [1901] 1 Q.B. 660; *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd.*, [1996] 1 All E.R. 737; *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453; *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, Part III, ss. 62(3), 65.2 [ad. 1992, c. 27, s. 30], 179.
Landlord and Tenant (Covenants) Act 1995 (U.K.), 1995, c. 30.
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Lem, Jeffrey W., and Stefan T. Proniuk. "Goodbye '*Cummer-Yonge*': A Review of Modern Developments in the Law Relating to the Liability of Guarantors of Bankrupt Tenants" (1993), 1 *D.R.P.L.* 419.

APPEAL from a judgment of the Ontario Court of Appeal 2002 CanLII 9612 (ON CA), (2002), 58 O.R. (3d) 549, 210 D.L.R. (4th) 659, 156 O.A.C. 392, 27 B.L.R. (3d) 102, 49 R.P.R. (3d) 171, 31 C.B.R. (4th) 225, [2002] O.J. No. 883 (QL), reversing a judgment of the Superior Court of Justice reflex, (2001), 39 R.P.R. (3d) 49, 31 C.B.R. (4th) 216, [2001] O.J. No. 736 (QL). Appeal dismissed.

Fred D. Cass, *Lawrence J. Crozier* and *David Stevens*, for the appellant.

Peter-Paul E. DuVernet, for the respondents.

The judgment of the Court was delivered by

MAJOR J. —

I. Introduction

1 This appeal arises from a motion for summary judgment. The facts are undisputed. The respondents, Crystalline Investments Limited ("Crystalline") and Burnac Leaseholds Limited ("Burnac"), while owners of different properties, are referred to collectively as the "landlords".

2 Dominion Stores Limited was the original tenant of the landlords. It is not clear from the record nor is it relevant whether Dominion Stores Limited became Domgroup Limited ("Domgroup") by reorganization or by a change of name. For purposes of this appeal, the appellant Domgroup can be viewed as the original tenant.

3 Domgroup assigned the leases to Coastal Foods Limited ("Coastal Foods"), a wholly owned subsidiary. The consent of the landlords was not required under the leases for the assignments. Domgroup subsequently sold Coastal Foods which amalgamated to form Food Group Inc. ("Food Group"). Food Group later became insolvent and attempted a reorganization under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), as amended to 1994.

4 The question is whether the terms of the reorganization by the insolvent assignee through its trustee where it purported to repudiate the leases under s. 65.2 of the Act affect the obligations between the landlords and the original tenant.

5 The procedure for granting summary judgment in Ontario was set out in rule 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. That rule provided as follows at the time:

> **20.04** . . .
>
> (2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

6 In *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423, at para. 27, Iacobucci and Bastarache JJ. discussed the legal principles that govern a motion for summary judgment:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* 1998 CanLII 4831 (ON CA), (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* reflex, (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules*, *supra*, at para. 15).

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The parties do not dispute the test for summary judgment.

7 The motions judge held that notices of repudiation given under s. 65.2 terminated the leases for all purposes. Relying on *Cummer-Yonge Investments Ltd. v. Fagot*, [1965] 2 O.R. 152 (H.C.), he found that, since the leases no longer existed, the liabilities that would have been owed by the original tenant to the landlords also disappeared. He granted summary judgment dismissing the claims of the landlords who sought damages from the original tenant. The Ontario Court of Appeal reversed the trial judge and held that the rights between the landlords and the original tenant were unaffected by proceedings under s. 65.2. The appeal was allowed and the summary judgments set aside.

8 For the reasons that follow, I agree with the Ontario Court of Appeal that the insolvency of the assignee and the order made pursuant to the Act do not affect the landlords who can continue to look to the original tenant for enforcement of the leases. The order affects the insolvent assignee and its creditors, including the original tenant and assignor of the leases, but does not reach to the landlords. I would dismiss the appeal.

9 In this appeal, the appellant sought to rely on certain common law remedies and, in particular, advanced the defence of surrender which was neither pleaded nor raised before the motions judge or the Court of Appeal. Surrender must be pleaded. See *McNeil v. Train* (1848), 5 U.C.Q.B. 91; *Wotherspoon v. Canadian Pacific Ltd.* (1979), 22 O.R. (2d) 385 (H.C.), at p. 562. In these circumstances the court refused to consider the question.

10 This appeal is limited to confirming that Food Group's repudiation of the leases assigned to it by Domgroup did not, by virtue of s. 65.2 alone, terminate Domgroup's rights and obligations under the leases. Section 65.2 relates to the repudiation of leases by insolvent commercial tenants. It is not concerned with the effects of that repudiation on third parties, such as assignors and guarantors. Whether the leases were terminated by surrender, as Domgroup argues for the first time in the Court, or by the application of some other principle of common law, is a question best left for trial.

II. Background

11 On April 30, 1979, Domgroup leased premises from Crystalline. On April 24, 1980, Domgroup leased a different location from Burnac. Both premises were located in New Brunswick. The leases had 25-year terms and contained the following assignment clause:

> Notwithstanding any assignment or sublease the Lessee shall remain fully liable under this lease and shall not be released from performing any of its covenants, obligations or agreements in this lease and shall continue to be bound by this lease.

12 On May 25, 1985, Domgroup assigned both leases to Coastal Foods which later became Food Group.

13 Food Group encountered financial difficulty and attempted a reorganization. In February of 1994, Food Group filed a notice of intention to make a proposal pursuant to Part III of the Act.

14 Food Group then prepared and filed its proposal, stating that it believed the proposal would be "of benefit to its creditors and employees, and will enable the Food Group to continue in business, albeit on a much reduced scale". Part of the proposal was that Food Group's leases with Burnac and Crystalline be terminated pursuant to s. 65.2.

15 On February 18, 1994, the insolvent Food Group, through its trustee, gave the original landlords, Burnac and Crystalline, notice of its intention to repudiate the leases. Neither Burnac nor Crystalline applied to the court to challenge the repudiation of the lease although entitled to do so under the Act. At no time did Food Group advise Domgroup of the proceedings.

16 On March 18, 1994, the proposal was approved by the Court of Queen's Bench for New Brunswick in Bankruptcy. On March 24, 1994, Burnac and Crystalline received compensation payments of $173,704.39 and $131,154.54, respectively, being the equivalent of six months rent under the leases pursuant to s. 65.2(3) of the Act. The repudiation was declared to be effective as of March 31, 1994.

17 Food Group vacated Crystalline's premises in March of 1994. It had previously vacated Burnac's premises one year earlier, but had continued to pay rent.

18 Burnac, one of the original landlords, entered into short-term leases with a bingo operation and started modifications to the premises to accommodate another tenant. Similarly, the other landlord, Crystalline, licensed its premises to kiosk-based vendors.

19 On January 20, 1995, Burnac and Crystalline informed the original tenant, Domgroup, by mail that the insolvent, Food Group, had repudiated the leases. At the same time, they asserted their rights to be paid outstanding rent pursuant to the assignment clause in the leases. The letters did not acknowledge the termination of the leases as of March 31, 1994.

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20 Domgroup declined to pay. Burnac and Crystalline both sued in Ontario Superior Court. Domgroup, on application, was granted summary judgment in both cases. Both were later reversed by the Ontario Court of Appeal.

III. Relevant Statutory Provisions

21 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

> **65.2** (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial tenant under a lease of real property, the insolvent person may repudiate the lease on giving thirty days notice to the landlord in the prescribed manner, subject to subsection (2).
>
> (2) Within fifteen days after being given notice of the repudiation of a lease under subsection (1), the landlord may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to such parties as it may direct, shall make such a declaration unless the insolvent person satisfies the court that the insolvent person would not be able to make a viable proposal, or that the proposal the insolvent person has made would not be viable, without the repudiation of that lease and all other leases that the tenant has repudiated under subsection (1).
>
> (3) Where a lease is repudiated pursuant to subsection (1), a proposal filed by the insolvent person must provide for payment to the landlord, immediately after court approval of the proposal, of compensation equal to the lesser of
>
> (*a*) an amount equal to six months rent under the lease, and
>
> (*b*) the rent for the remainder of the lease, from the date on which the repudiation takes effect.
>
> (4) For the purpose of voting on any question relating to a proposal referred to in subsection (3), the landlord does not have any claim in respect of accelerated rent, damages arising out of the repudiation, or the compensation referred to in subsection (3).
>
> (5) Nothing in subsections (1) to (4) affects the operation of section 146 in the event of bankruptcy.
>
> (6) Where an insolvent person who has made a proposal referred to in subsection (3) becomes bankrupt
>
> (*a*) after court approval of the proposal and before the proposal is fully performed, and
>
> (*b*) after compensation referred to in subsection (3) has been paid,
>
> the landlord has no claim against the estate of the bankrupt for accelerated rent.

IV. Judicial History

A. *Ontario Superior Court of Justice* (2001), 39 R.P.R. (3d) 49

22 The motions for summary judgment by Domgroup were heard by Trafford J. on March 1, 2001, and by consent, the legal issue was stated as follows:

> Is a landlord, following the Court-approved termination of a commercial lease under s. 65.2 of the 1992 Act and following acceptance of the compensation provided for by the statutory code, entitled to arrears of rent, or for damages, in respect of the unexpired term of the terminated lease as against the pre-proposal assignor of the lease?

23 The motions judge held that the court-approved termination of the leases ended all obligations of the parties and rendered the assignment clause inoperative. The compensation paid to the landlords under s. 65.2 constituted the total compensation for all damages to which they were entitled under the leases. Since the entire lease, including the assignment clause, was terminated by the court order, there was no basis in law for the claims made against the original tenant, Domgroup. He granted summary judgment in both cases.

B. *Ontario Court of Appeal* 2002 CanLII 9612 (ON CA), (2002), 58 O.R. (3d) 549

24 The Ontario Court of Appeal rejected the conclusion of the motions judge that the provisions of s. 65.2 terminated the leases for all purposes. In the view of Carthy J.A., the rights between the landlords and the original tenant were unaffected by the insolvency proceedings. He found no change in this result was warranted by the 1997 amendment to the English version of s. 65.2 from the term "repudiate" to "disclaim".

25 The Court of Appeal held that the consequences of repudiation should be restricted to those provided for in s. 65.2 having regard to the purposes of insolvency proceedings as a whole. While the insolvency proceedings permitted Food Group as the insolvent to shed its obligations, the rights and liabilities of Domgroup to the landlords under the leases remained intact.

V. Analysis

A. *The Construction of Section 65.2*

26 The dispute is whether the Act has relieved the appellant Domgroup of its obligations by the assignment of the leases ultimately to the insolvent. More precisely, should s. 65.2 be interpreted to bring all the

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obligations between the appellant and respondents to an end when the leases were repudiated by the insolvent, Food Group?

27 While the drafting of s. 65.2 focusses on bilateral relationships, such as a simple lease between a landlord and a tenant, the effect of the repudiation does not change in circumstances such as the present ones, involving a tripartite arrangement resulting from the assignment of a lease. In both situations, the repudiation must be construed as benefiting only the insolvent.

28 I, thus, agree with the Court of Appeal that s. 65.2 should be read narrowly. The plain purposes of the section are to free an insolvent from the obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can. Nothing in s. 65.2, or any part of the Act, protects third parties (i.e., guarantors, assignors or others) from the consequences of an insolvent's repudiation of a commercial lease. That is to say that they remain liable when the party on whose behalf they acted becomes insolvent.

29 When a lease is finalized, the landlord and tenant then have privity of contract and privity of estate. See *Francini v. Canuck Properties Ltd.* (1982), 35 O.R. (2d) 321 (C.A.), at pp. 322-23. When the lease is assigned, the landlord's privity of estate with the original tenant comes to an end, but the privity of contract continues and the original tenant remains liable upon its covenant. The estate or interest in the tenancy is transferred to the assignee, who, by being entitled to possession, is obliged to make payment of rent, but, subject to the terms of the lease and the agreement of the parties, the original tenant remains liable should his assignee not pay the rent. See C. S. Goldfarb, "The Rights and Obligations of the Original Tenant and Subsequent Tenants after an Assignment of Lease", in H. M. Haber, ed., *Assignment, Subletting and Change of Control in a Commercial Lease* (2002), 157.

30 Both the British Columbia Court of Appeal in *Transco Mills Ltd. v. Percan Enterprises Ltd.* 1993 CanLII 2876 (BC CA), (1993), 100 D.L.R. (4th) 359, at p. 366, and Carthy J.A., here, at para. 16, quoted from Vice-Chancellor Megarry in *Warnford Investments Ltd. v. Duckworth*, [1978] 2 All E.R. 517 (Ch. D.), at p. 526, where the position of an original tenant in bankruptcy proceedings is discussed. It is worth repeating:

> The original lessee is a person who as principal, undertook towards the lessor, the obligations of the lease for the whole term; and there is nothing in the process of assignment which replaced this liability by the mere collateral liability of a surety who must pay the rent only if the assignee does not. The bankruptcy of the assignee has for the time being destroyed the original lessee's right against the assignee to require him to discharge the obligations of the lease, and it has impaired the lessee's right of indemnity against him when he has to discharge the obligations himself; but it has not affected his primary liability towards the lessor, which continues unaffected. At no time does an original lessee become a mere guarantor to the lessor of the liability of any assignee of the lease. [Emphasis added.]

31 From the time a lease is completed, the original tenant is bound by all the conditions, including the term. Despite the hardship that may later develop, the covenant is fully enforceable even if it has been assigned. In England, however, public concern over the continuing liability of original tenants in post-assignment bankruptcy situations resulted in the enactment of the *Landlord and Tenant (Covenants) Act 1995* (U.K.), 1995, c. 30. As a result, when a tenant in England lawfully assigns a lease, that tenant will have no further obligations with respect to the covenant. To effect the same result in Canada, similar legislation is needed.

B. *Does the Common Law Indemnification Right Frustrate the Act?*

32 If the liabilities remain enforceable by the landlord against the original tenant, then presumably the original tenant can exercise its common law indemnification rights against its assignee as an unsecured creditor. See *Peterborough Hydraulic Power Co. v. McAllister* (1908), 17 O.L.R. 145 (C.A.), at p. 151. The original tenant could therefore prove a claim in insolvency against that assignee under this right of indemnity. As a result, the insolvent assignee could face an additional claim on the lease in excess of the preferred payment required to be paid to the landlord under s. 65.2.

33 The appellant submits this result would frustrate the objectives of the Act and is the reason that a repudiation under s. 65.2 should terminate a lease for all purposes. I disagree for two reasons.

34 First, an assignor is no different from other alternative debtors, none of which is excused under the Act. For example, s. 179 states:

> **179.** An order of discharge does not release a person who at the date of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with him, or a person who was surety or in the nature of a surety for him.

While s. 62(3) provides:

> **62.** . . .

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> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

Parliament therefore saw fit to conserve the liabilities of alternative debtors, yet chose not to extinguish their common law rights of indemnity.

35 Second, where an original tenant seeks indemnification on a contingent claim, provided the claim is provable and not disallowed, it would fall into the insolvency to be dealt with in accordance with the scheme of the Act. The assignor simply joins the other unsecured creditors in the proceedings. If such a claim is approved, it cannot satisfy and at the same time frustrate the Act.

36 Simply stated, the mere possibility that the original tenant may have a right of indemnity against his insolvent assignee and is able to make a claim to participate in the proposal proceedings as an unsecured creditor is not inconsistent with the statutory scheme. On the contrary, it is consistent with the circumstances applicable to other alternative covenantors, and does not affect or alter the nature of the original tenant's contractual relationship and obligations. More importantly, it does not require that the original tenant be discharged from liability.

37 I also question whether there is any justification for distinguishing between a guarantor and an assignor post-disclaimer. In *Cummer-Yonge*, *supra*, the landlord brought an action against guarantors of a bankrupt tenant for the unpaid rent accruing after the tenant's bankruptcy but prior to the reletting of the leased premises. The trustee in bankruptcy had disclaimed the lease in accordance with the trustees' rights under the then applicable federal bankruptcy and provincial landlord and tenancy legislation. The guarantee provision contained in the disclaimed lease provided as follows:

> The Guarantors if one is a party hereto join for the first five (5) years of the term hereby granted for valuable consideration and for the purpose of guaranteeing the due performance by the Lessee of all its covenants in this lease including the covenant to pay rent on the part of the Lessee to be performed.

38 Gale C.J.H.C. applied the reasoning of the English Court of Appeal in *Stacey v. Hill*, [1901] 1 Q.B. 660. He read the guarantee clause strictly as a pure surety provision and found that when the lease was disclaimed by a trustee in bankruptcy, the bankrupt's covenants to perform were dissolved. Since the guarantors' obligation is to assure performance of those covenants, their obligations disappeared with the covenants. The Ontario Court of Appeal affirmed the decision without reasons ([1965] 2 O.R. 157*n*).

39 *Cummer-Yonge* has created uncertainty in leasing and bankruptcy. Not only have drafters of leases attempted to circumvent the holding in *Cummer-Yonge* by playing upon the primary and secondary obligation distinction, but courts have also performed what has been called "tortuous distinctions" in order to reimpose liability on guarantors. See J. W. Lem and S. T. Proniuk, "Goodbye '*Cummer-Yonge*': A Review of Modern Developments in the Law Relating to the Liability of Guarantors of Bankrupt Tenants" (1993), 1 *D.R.P.L.* 419, at p. 436.

40 Despite the division over *Cummer-Yonge*, the distinction between guarantors as having secondary obligations that disappear when a lease is disclaimed by a trustee in bankruptcy, and assignors as having primary obligations that survive a disclaimer, thrives in Canadian case law.

41 Not surprisingly, *Stacey v. Hill*, *supra*, led to a similar situation in England. In *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd.*, [1996] 1 All E.R. 737 (H.L.), Lord Nicholls, faced with facts involving a guarantor of an assignor of a lease, gave a convincing illustration of the absurdity of maintaining this distinction, at p. 754:

> This would make no sort of legal or commercial sense. This would mean that directors who guarantee their company's obligations would *not* be liable if their *own* company became insolvent whilst tenant, but they *would* be liable if an *assignee* from their company encountered financial difficulties whilst tenant. Mr. Whitten, as guarantor of CIT's obligations, remains liable to the landlord. According to *Stacey v. Hill*, had he been a guarantor of Prest's liabilities [the assignee who became bankrupt], the disclaimer would have released him. What sort of a law would this be? [Emphasis in original.]

42 The House of Lords went on to overrule *Stacey v. Hill*. In my opinion, *Cummer-Yonge* should meet the same fate. Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations.

43 The appellant submits that the English bankruptcy statute that was applied in *Hindcastle* clearly stated that disclaimer will not "affect the rights or liabilities of any other person", and that s. 65.2 of the Act has no similar wording. I agree with the respondents' rebuttal to this argument that the English wording affirms the ordinary construction of the statute. In other words, explicit statutory language is required to divest persons of rights they otherwise enjoy at law. As Carthy J.A. observed in the Court of Appeal, at paras. 11-12, the lease may have real value to the original tenant and, on the wording of s. 65.2, cannot be eliminated in the absence of the original tenant's agreement. In any event, so long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot

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be used to subvert provincially regulated property and civil rights. See *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453; *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91.

44 As previously noted, the appellant sought to argue surrender in this Court despite not having pleaded surrender in either action as a defence, and not raising the issue before the motions judge or the Court of Appeal. Like the other defences, surrender represents an issue for trial. The decision whether to allow amendments to the pleadings, and on what terms if any, should be left to the trial judge.

VI. Disposition

45 I would dismiss the appeal and award the respondents their costs in this Court and below.

Appeal dismissed with costs.

Solicitors for the appellant: Aird & Berlis, Toronto.

Solicitors for the respondents: Glaholt & Associates, Toronto.

Lessor may challenge - Sec. 65.2(2)

(2) Within fifteen days after being given notice of the disclaimer or resiliation of a lease under subsection (1), the lessor may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to any parties that it may direct, shall, subject to subsection (3), make that declaration.

Circumstances for not making declaration - Sec. 65.2(3)

(3) No declaration under subsection (2) shall be made if the court is satisfied that the insolvent person would not be able to make a viable proposal without the disclaimer or resiliation of the lease and all other leases that the lessee has disclaimed or resiliated under subsection (1).

Effects of disclaimer or resiliation - Sec. 65.2(4)

(4) If a lease is disclaimed or resiliated under subsection (1),

(a) the lessor has no claim for accelerated rent;

(b) the proposal must indicate whether the lessor may file a proof of claim for the actual losses resulting from the disclaimer or resiliation, or for an amount equal to the lesser of

(i) the aggregate of

(A) the rent provided for in the lease for the first year of the lease following the date on which the disclaimer or resiliation becomes effective, and

(B) fifteen per cent of the rent for the remainder of the term of the lease after that year, and

(ii) three years' rent; and

(c) the lessor may file a proof of claim as indicated in the proposal.

Classification of claim - Sec. 65.2(5)

(5) The lessor's claim shall be included in either

(a) a separate class of similar claims of lessors; or

(b) a class of unsecured claims that includes claims of creditors who are not lessors.

Lessor's vote on proposal - Sec. 65.2(6)

(6) The lessor is entitled to vote on the proposal in whichever class referred to in subsection (5) the lessor's claim is included, and for the amount of the claim as proven.

Determination of classes - Sec. 65.2(7)

(7) The court may, on application made at any time after the proposal is filed, determine the classes of claims of lessors and the class into which the claim of any of those particular lessors falls.

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Section 146 not affected - Sec. 65.2(8)
(8) Nothing in subsections (1) to (7) affects the operation of section 146 in the event of bankruptcy.
1992, c. 27, s. 30;
1997, c. 12, s. 42;
2004, c. 25, s. 37.

Lease disclaimer or resiliation if lessee is a bankrupt - Sec. 65.21
65.21 If, in respect of a proposal concerning a bankrupt person who is a commercial lessee under a lease of real property or an immovable, the lessee's lease has been surrendered, disclaimed or resiliated in the bankruptcy proceedings, subsections 65.2(3) to (7) apply in the same manner and to the same extent as if the person was not a bankrupt but was an insolvent person in respect of which a disclaimer or resiliation referred to in those subsections applies.
1997, c. 12, s. 43;
2004, c. 25, s. 38.

Bankruptcy after court approval - Sec. 65.22
65.22 If an insolvent person who has disclaimed or resiliated a lease under subsection 65.2(1) becomes bankrupt after the court approval of the proposal and before the proposal is fully performed, any claim of the lessor in respect of losses resulting from the disclaimer or resiliation, including any claim for accelerated rent, shall be reduced by the amount of compensation paid under the proposal for losses resulting from the disclaimer or resiliation.
1997, c. 12, s. 43;
2004, c. 25, s. 39(E).

Certificate where proposal performed - Sec. 65.3
65.3 Where a proposal is fully performed, the trustee shall give a certificate to that effect, in the prescribed form, to the debtor and to the official receiver.
1992, c. 27, s. 30.

Act to apply - Sec. 66
66. (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

Assignments - Sec. 66(1.1)
(1.1) For the purposes of subsection (1), in deciding whether to make an order under subsection 84.1(1), the court is to consider, in addition to the factors referred to in subsection 84.1(3), whether the trustee approved the proposed assignment.

Final statement of receipts and disbursements - Sec. 65(1.2)
(1.2) For the purposes of subsection (1), the trustee is to prepare the final statement of receipts and disbursements referred to in section 151 without delay after

- **(a) the debtor files or is deemed to have filed an assignment;**
- **(b) the trustee informs the creditors and the official receiver of a default made in the performance of any provision in a proposal; or**
- **(c) the trustee gives the certificate referred to in section 65.3 in respect of the proposal.**

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Examination by official receiver - Sec. 65(1.3)
(1.3) For the purposes of subsection (1), the examination under oath by the official receiver under subsection 161(1) is to be held — on the attendance of the person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) — before the proposal is approved by the court or the person becomes bankrupt.

Division to be applied conjointly with other Acts - Sec. 65(1.4)
(1.4) The provisions of this Division may be applied together with the provisions of an Act of Parliament, or of the legislature of a province, that authorizes or provides for the sanction of compromises or arrangements between a corporation and its shareholders or any class of its shareholders.

Effect of Companies' Creditors Arrangement Act - Sec. 65(2)
(2) Notwithstanding the Companies' Creditors Arrangement Act,

> **(a) proceedings commenced under that Act shall not be dealt with or continued under this Act; and**
> **(b) proceedings shall not be commenced under Part III of this Act in respect of a company if a compromise or arrangement has been proposed in respect of the company under the Companies' Creditors Arrangement Act and the compromise or arrangement has not been agreed to by the creditors or sanctioned by the court under that Act.**

R.S., 1985, c. B-3, s. 66;
1992, c. 27, s. 31;
1997, c. 12, s. 44;
2005, c. 47, s. 45;
2007, c. 36, s. 28.

CRA Internal Operations Manual - Proposals

(see below image pages)

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Proposals in Bankruptcy and Insolvency

Collections Manual Updates

Overview

The *Bankruptcy and Insolvency Act* stresses the rehabilitation of debtors. As an alternative to bankruptcy, legislation provides insolvent individuals and corporations with an opportunity to restructure their finances and to offer a settlement to their unsecured creditors to repay, in whole or in part, the amount owed. If a proposal can be filed, the debtors normally retain most if not all of their assets. A proposal is made to creditors through a trustee/administrator. If a majority of the creditors vote in favour of the proposal it is binding on all unsecured creditors regardless of their voting position.

Legislation

This section identifies legislation related to proposals in bankruptcy:

- *Bankruptcy and Insolvency Act (BIA)*
- *Companies' Creditors Arrangement Act (CCAA)*
- *Excise Tax Act (ETA)*
- *Income Tax Act (ITA)* subsection 25(1), 99(2), 128 and 224(1.2)

Background Information

This section provides the following background information on proposals in Bankruptcy:

- **Types of Proposals**
- **Notice of Intention to File a Proposal**
- **Debtor Obligations**
- **Stay of Proceedings**
- **Termination of Stay of Proceedings**
- **Once a Division I Proposal is Filed**
- **Once a Division II Proposal is Filed**
- **Effect of an Approved Proposal**
- **Effects of a Failed Proposal**
- **Default and Annulment of a Proposal**
- **Duties of a Trustee/Administrator**
- **Section 80(13) of the *ITA* in Proposals**
- **Request to Change a Fiscal Period End (FPE)**

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Types of Proposals

The BIA provides for two different types of proposals, depending on the circumstances of the debtor.

Related Topics:

- **Division I Proposals**
- **Division II Proposals**

Division I Proposals

The Division I proposal, also known as a commercial proposal within the CRA, applies to and may be filed by insolvent:

- corporations
- cooperatives
- individuals with liabilities exceeding $75,000.00, excluding any amounts secured by a principal residence

Division II Proposals

The Division II proposal, also known as a consumer proposal within the *BIA* and the CRA, may be filed by insolvent individuals:

- whose liabilities do not exceed $75,000.00, excluding any amount secured by their principal residence

For further details, refer to: Directive ARD-03-09, **The Relationship between Bankruptcy and Insolvency Events**.

Note: There are situations where proposals are incorrectly filed, for example where a Division II proposal is filed where the individual debtor's total liabilities exceed $75,000.00. These proposals, will only be challenged if there is a benefit to the CRA.

For further details, refer to Directive RCD-00-30, **The Incorrect Filing of Proposals under the Bankruptcy and Insolvency Act**.

Notice of Intention to File a Proposal

Debtors filing a Division I proposal have two options:

- file a Notice of Intention (NOI) to file a proposal
- file a proposal

The filing of an NOI is not mandatory; however, an NOI provides the debtor:

- an Immediate Stay of Proceedings

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- time to review their financial situation with the trustee/administrator
- time to discuss proposal terms with creditors to obtain their support and help ensure the acceptance of the proposal

The effective period for filing a proposal, after an NOI has been filed, is 30 days. The Court may extend the time for filing a proposal in increments of 45 days. The extension will extend the Stay of Proceedings, and allow time to finalize the proposal. However, the total extensions may not exceed beyond six months of the date of the first filing. As a creditor, the CRA may oppose an extension.

If it appears that there is danger of loss, or the extension is frivolous, refer the case to the Department of Justice to oppose the time extension.

Note: There are no provisions in the *BIA* for an individual filing a Division II proposal to file an NOI.

Debtor Obligations

Aside from making payments as required by the terms of the proposal debtors have other obligations that they must meet to complete a successful compromise. These obligations vary depending on the type of proposal.

Related Topics:

- **After filing an NOI**
- **After filing a Division II Proposal**

After filing an NOI

The debtor must perform the following tasks:

- prepare and file a projected cash flow statement to the Official Receiver within 10 days
- file a Division I proposal, within 30 days of the date of the NOI or, within the extension of time granted by the Court

Failure to perform either of the above, within the allotted time, will result in the debtor's deemed assignment into bankruptcy.

For further details, refer to Directive ARD-03-10 **Determining the Date of Bankruptcy**.

After filing a Division II Proposal

The consumer debtor is required to attend two financial counselling sessions with the trustee/administrator or other qualified counsellor.

Stay of Proceedings

The Stay of Proceedings is pursuant to *BIA* s 69, 69.1 and 69.2(1) and applies to Division I and Division II Proposals.

Related Topics:

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- **Stay of Proceedings for Division I and NOI**
- **Stay of Proceedings for Division II**

Stay of Proceedings for Division I and NOI

The Stay of Proceedings ensures that no action is initiated or continued against the debtor or the debtor's property by the creditors, once a NOI or Proposal is filed, including payroll amounts that may be collected under subsection 224(1.2) of the *ITA*.

The Stay of Proceedings does not apply to secured creditors who:

- have taken possession of secured assets prior to the NOI or proposal or;
- have given notice of their intention to enforce security more than ten (10) days prior to the NOI or Proposal

The Stay does not prevent the CRA from pursuing deemed trust against a secured creditor who is or becomes eligible to realize a security on any property.

Note: If it appears that the debtor is attempting to liquidate assets, the file should be referred to the Department of Justice.

For further details, refer to Directive RCD-99-04, **Liquidation Proposals**.

Stay of Proceedings for Division II

A Stay of Proceedings applies to Division II proposals as outlined in section 69.2(1) of the *BIA*. The exception to this section is Source Deductions that can be collected via an Enhanced Requirement to Pay pursuant to subsection 224.1(1.2) of the *ITA*.

This exception is created by the combination of two clauses:

- the "notwithstanding" clause included in subsection 224.1(1.2) of the *ITA*
- the failure of the *BIA* to specify the Enhanced Requirement to Pay in section 69.2(1)

For further details, refer to Directive RCD-01-05, **The Status of Source Deductions in a Consumer Proposal**.

Termination of Stay of Proceedings

The Stay of Proceedings, with respect to payroll amounts collectible under subsection 224(1.2) of the *ITA*, is terminated and collections proceedings may commence when one of the following situations occurs:

- the debtor fails to remit current payroll deductions as they come due after the filing of the NOI or proposal
  - at this point the CRA may use an Enhanced Requirement to Pay to collect both the pre and post-NOI or proposal arrears
- a secured creditor commences realization of security that is subject to garnishment under the *Income Tax Act*, subsection 224 (1.2)

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A creditor or other person affected by a Stay imposed under the *BIA* may apply to the court to lift the Stay. To obtain an order, the court must be satisfied that the creditor is likely to be materially prejudiced, or it is equitable on other grounds that the Stay be lifted.

Once a Division I Proposal is Filed

A Division I Proposal:

- must provide for payment in full, within six months of court approval, all payroll amounts that may be subject to an Enhanced Requirement to Pay Demand pursuant to the *ITA*, subsection 224(1.2)
- must provide for the payment of all employee compensation claims, pursuant to paragraph 136(1)(d) of the *BIA*, in priority to other claims
- converts GST/HST Deemed Trust claims to unsecured debts, unless the CRA has certified the debt and registered that amount in a public property registration system, at which point a secured claim may be filed

For further details, refer to Communication TSDMB-2004-035, **Collecting GST/HST in an Insolvency.**

Once a Division II Proposal is Filed

The Division II process begins with the filing of the proposal. The trustee/administrator assists the consumer debtor with preparing the proposal. The Stay of Proceedings begins immediately.

A Division II proposal:

- must be no longer than five (5) years
- allows creditors 45 days to vote or to request a meeting of creditors
- requires a meeting of creditors if any objection is received within 45 days or if requested by creditors having at least 25% in value of all the proven claims
- is deemed to have been accepted by the creditors if no dissent is received within the 45 day period and there is no first meeting of creditors
- is approved or denied by a majority of votes at the first meeting of creditors unless deemed accepted

There are no provisions in the *BIA* that require payment in full of the source deductions claim within six months, however

- the CRA's policy is to request that all source deduction amounts be paid within six months of proposal approval
- if this request is refused the Agency may vote against the acceptance of the proposal and/or proceed with legal action through an Enhanced Requirement to Pay

For further details, refer to Directive RCD-01-05, **The Status of Source Deductions in a Consumer Proposal.**

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Effect of an Approved Proposal

Once approved a Division I or a Division II proposal is binding on all unsecured creditors, including the CRA, whether or not a Proof of Claim has been filed and regardless of how they voted.

Effects of a Failed Proposal

The effect of a proposal that fails after approval, or a proposal that fails to obtain the approval of creditors, depends on the proposal type:

- If a Division I proposal does not receive creditor or court approval, or, fails for any reason, after approval, the failure results in an automatic assignment in bankruptcy effective:
    - the date the proposal is annulled by the court or
    - the date of rejection by the creditors or
    - the date of rejection by the court
- If a Division II proposal fails, the rights of the creditor's are restored

For further details, refer to Directive RCD-00-19, **Collection Action When the Trustee or the Administrator Obtains a discharge from a Proposal** and Directive ARD-03-10, **Determining the Date of Bankruptcy**.

Default and Annulment of a Proposal

Where default occurs in the performance of any provision in a proposal, the trustee or the creditors may apply to the court to have the proposal annulled.

The annulment of a proposal differs depending on the type of proposal.

Related Topics:

- **Annulment of Division I Proposal**
- **Annulment of Division II Proposal**

Annulment of Division I Proposal

Annulment of a Division I proposal occurs by order of the court when any one of the following conditions exists:

- a default occurs in the performance of any provision of the proposal
- the court determines that:
    - the proposal cannot continue without injustice
    - the proposal cannot continue without undue delay
    - the approval of the court was obtained fraudulently

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- at the request of the trustee/administrator or the creditors where, after the approval of a proposal, the debtor has been convicted of an offence under the *BIA* s.63(3)

When a Division I proposal is annulled, an assignment in bankruptcy is deemed to have taken effect at the date of the order of annulment.

At this time the CRA's Proof of Claim must be amended for the bankruptcy. A revised Proof of Claim will be filed to reflect the amount due at the date of annulment, and any dividends received under the proposal

For further details on the procedures to follow in a bankruptcy, refer to the **Bankruptcy Chapter**.

Annulment of Division II Proposal

In the case of a Division II proposal the *BIA* provides for a deemed annulment to occur when:

- the consumer debtor defaults on monthly payments for a total of three months
- the consumer debtor is overdue by three months on any payment

The annulment of a consumer proposal can also occur by order of the Court,

- when any one of the following situations exists:
  - the debtor was not eligible to make a proposal
  - the debtor cannot continue without injustice or undue delay; or
  - approval of the court was obtained fraudulently.
- when the debtor is convicted of any offence under the *BIA* s.83.3(1)(3)

The annulment of a Division II proposal does NOT result in a deemed assignment into bankruptcy.

When a Division II proposal is annulled, the unsecured creditors may immediately commence collection action for the full amount of their debts, including accrued interest to date, less any dividends received

For further details, refer to Directive RCD-00-19; **Collection Action When the Trustee or the Administrator Obtains a discharge from a Proposal**.

Duties of a Trustee/Administrator

A Trustee/Administrator does not have to accept an appointment as trustee/administrator, however, once the appointment is accepted they must perform their duties until they are discharged or another trustee/administrator is appointed in their place. It is their responsibility, before accepting an appointment, to protect themselves against the possibility of having to bear their own expenses of administering the estate due to insufficient funds.

On the filing of a NOI or a proposal, a trustee/administrator who has accepted the appointment cannot resign without obtaining a court order.

Related Topics:

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- **Trustee's Duties Regarding a Notice of Intention**
- **Trustee's Duties Regarding a Division I Proposal**
- **Trustee's Duties Regarding a Division II Proposal**
- **Trustee's Duties After the Approval of Proposal**

Trustee's Duties Regarding a Notice of Intention

The trustee/administrator's duties after filing a NOI include:

- notify all creditors that a NOI has been filed, within five (5) days of the filing the NOI
- file the debtor's cash-flow statement, and trustee's report on the cash-flow statement, with the Official Receiver within ten (10) days of the NOI
- upon request forward the cash-flow statement to the creditors, pursuant to *BIA* subsection 50.4(3).
- assist the debtor with the preparation of the proposal
- make an appraisal and investigate the affairs and property of the debtor
- estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency
- report any material changes in the debtor's cash flow statement or business circumstances
- monitor the business and financial affairs of the insolvent debtor

Trustee's Duties Regarding a Division I Proposal

The trustee/administrator's duties regarding the Division I proposal includes the following:

- call a meeting of creditors within twenty-one (21) days of filing the proposal
- send to all creditors, at least ten (10) days before the creditors' meeting, copies of the following documents:
    - a condensed statement of the assets and liabilities
    - a list of creditors with claims greater than $250.00
    - a copy of the interim receiver's report, if any
    - the requirements for attending the meeting of creditors
    - a copy of the proposal
    - a blank Proof of Claim, Proxy and voting letter

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When a Division I proposal is rejected, the debtor is deemed to have made an assignment in bankruptcy. If the Division I proposal is rejected, the trustee must immediately call a meeting of creditors and file a report with the Official Receiver.

Trustee's Duties Regarding a Division II Proposal

The trustee/administrator must:

- conduct a financial investigation, pursuant to subsection 66.13(2)(a) of the *BIA*, of the debtor
- file a report, within ten (10) days, with the official receiver which contains
    - the results of the above investigation
    - an opinion as to the reasonableness, fairness and viability of the proposal
    - a statement of income, expenses, assets and liabilities
    - a list of creditors with claims greater than $250.00
- prepare and file the proposal with the official receiver
- send to all creditors, within ten (10) days:
    - a copy of the proposal
    - a copy of the report sent to the Official Receiver
    - a blank Proof of Claim form
    - a notice explaining that a creditor's meeting will only be held if requested, within forty-five (45) days, by creditors totalling more than 25% of the proven claims

Trustee's Duties after the Approval of Proposal

Unless stated in the proposal, debtors retain ownership of their property and the trustee/administrator is not required to file returns and remit taxes, unless specified by the court.

The trustee/administrator's duties after approval of the proposal include the following:

- ensure that the terms of the proposal are met
- administer the distribution of dividends
- issue Certificate of Full Performance of Proposal once the terms of the proposal have been fulfilled

Section 80(13) of the *ITA* in Proposals

When a tax debtor successfully files a proposal under the *BIA* to pay commercial obligations at less than 100 cents on the dollar, subsection 80(13) of the *ITA* states that the debtor must report the forgiven amount in the year in which the settlement or forgiveness occurred.

When analyzing a proposal under the *BIA*:

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- If there is a clause in the proposal asking the CRA not to apply subsection 80(13) of the *ITA*, you must ask that it be withdrawn
- If the tax debtor refuses to withdraw the clause, the CRA will vote against the proposal and advise the Court of its inappropriateness

Since forgiveness does not occur until after the proposal terms have been met and the Certificate of Full Performance is granted, the Section 80(13) assessment can only occur in the post proposal period.

For further details, refer to Directive RCD-97-04, **The application of section 80 of the Income Tax Act ("ITA") to proposals under the Bankruptcy and Insolvency Act ("BIA")** and Directive RCD-98-07, **The Debt-Forgiveness Rules: Section 80 of the Income Tax Act ("ITA")**.

Request to Change a Fiscal Period End (FPE)

Once a tax debtor adopts a fiscal period end, it can only be changed to take effect in future taxation years. In addition, the CRA must consent to the change.

This requirement is intended to prevent a tax debtor from rearranging the fiscal period end to minimize the payment of taxes. The CRA will approve a request for a change in fiscal period end only on the basis of sound business reasons other than obtaining tax benefits.

For further details, refer to Directive RCD-97-05, **Change in Fiscal Period End ("FPE") in a Proposal under the Bankruptcy and Insolvency Act ("BIA")** and Directive RCD-00-13, **Section 34.2 of the Income Tax Act**.

Related Topic:

- **The Effect of Changing the FPE in a Proposal**

The Effect of Changing the FPE in a Proposal

Changing the FPE in a proposal reduces the amount that the tax debtors would pay at 100 cents on the dollar. Changing a tax debtors' FPE, when they file a proposal under the BIA, could result in a loss of revenue to the Crown.

Policy

This section provides policies related to Proposals in Bankruptcy:

- **Tax Office Responsibilities for Account**
- **Legal Rights of Trustees/Administrators**
- **Treatment of Refunds in Proposal Situations**
- **Voting on a Proposal**
- **Proposals Made After Bankruptcy**
- **Director's Liability when the Corporation has filed a Proposal**

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- **Director's Liability when the Director has filed a Proposal**
- **Provisional Claims**
- **Verification of subsection 80(13) of the *ITA***
- **Request for a Change in Fiscal Period End When Negotiating a Proposal**

Tax Office Responsibilities for Account

With the implementation of the Regional Insolvency teams all initial documentation for all proposals is forwarded to the appropriate Regional Intake Centre for Insolvency (RICI). From there the determination will be made if the file is to be handled by the RICI, or by the High Risk Insolvency (HRI) Officers located in the various TSO's.

For further details refer to Communication TSDMB-2007-095(ARD). **Designing Insolvency Work for the Future ("DIW") - Information Update and Next Steps.**

The RICI or HRI handle the following tasks:

- investigating further collection avenues under the *BIA*, *ITA* and *ETA*
- filing Proof of Claims
- voting on the proposal
- assuming all other actions, such as attending the meeting of creditors and acting as inspector

Upon receipt of the creditor's package:

- cancel all previous arrangements and legal actions regarding arrears
- return all post-dated cheques
- if Writs of Seizure and Sale have been sent to Bailiff:
    - but have not been actioned, then instruct Bailiff to return the writs
    - and property has been seized, instruct the Bailiff to hold in abeyance until instruction from the Insolvency unit
    - and the property sold, instruct the Bailiff to await instruction concerning the disbursement of funds
- withdraw all Requirements to Pay pursuant to the *ETA*, subsections 317(1), (2) or (6) and the ITA, subsections 224(1) and (1.1)
- do not withdraw Enhanced Requirements to Pay. Issue ELCS letter #19755 to the Account Receivables which advises, the Enhanced Requirement to Pay is to be held in abeyance until further notice and to remit all funds to the debtor
- review the documents provided and compare with available CRA information

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- conduct the appropriate searches such as:
    - credit bureau
    - motor vehicle
    - property
    - land titles

Note: Creditors have 45 days after the filing of a Division II proposal and 21 days after the filing of a Division I proposal to review the file, prepare the Proof of Claim and submit a vote.

Legal Rights of Trustees/Administrators

Trustees/administrators have the right:

- to receive any information that is necessary to determine the debtor's liabilities and obligations
- to discuss the tax debtor's affairs with the collection officer in order to conclude the proposal

For further details refer to Directive RCD-00-14, **Disclosure of Confidential Information to Trustees-in-Bankruptcy and Receivers**.

Treatment of Refunds in Proposal Situations

Subsections 164(2) of the *ITA* and 296(7) of the *ETA* allow the CRA to withhold refunds owed to a taxpayer when they are, or are about to become, liable for any other amounts to the Crown.

This action becomes restricted, not ceased, by the Stay of Proceedings created with the filing of a Proposal or NOI.

Subsection 97(3) of the *BIA* recognises a creditor's right of set-off under certain conditions:

- a legal set-off where there is mutuality of debts
- an equitable set-off
- set-off by agreement of contract

Accordingly, the CRA will apply the right of set-off in the following situations:

- If a tax debtor has filed a Notice of Intention, or has filed a Proposal, the CRA will exercise the right of set-off until the court approves the Proposal, provided both the debit and credit exist in the pre proposal period
    - you cannot take a post proposal credit and apply it to a pre proposal debt
- If the tax debtor is involved in business, and the debt relates to that business, the debts being set off do not have to exist at the time of the filing the proposal or NOI, as long as both debts exist prior to court approval

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- if the debtor agrees, prior to court approval, the CRA will set-off amounts payable in the post filing period; an amount arising before but payable by the Crown to the tax debtor after the Stay of Proceedings is in place; against an amount owing at the filing of the Notice of Intention or the Proposal

For further details refer to Directive TSDMB-2006-063 (ARD), **Applying Set-off in a Proposal under the Bankruptcy and Insolvency Act**.

Related Topic:

- **Refunds not Set-Off**

Refunds not Set-Off

If, the CRA applies the right of set-off, proves a claim and accepts the proposal, which the court subsequently approves, it will return to the taxpayer amounts that it had set off between the filing of the Notice of Intention to file a proposal, or the filing of the Proposal, and the court's approval.

If the CRA has filed a provisional claim for the amount compromised in a Proposal under the *BIA*, and the tax debtor has received a refund for that year, set-off does not apply. Further, the CRA will cancel the provisional claim in respect of that amount.

For further details refer to Communication TSDMB-2007-007 (ARD), **Provisional Proofs of Claim**.

Voting on a Proposal

A proposal is a contract between a debtor and their creditors. Although the debtor may make a proposal, the creditors are not obliged to accept it.

Proposal approval requires acceptance by all classes of unsecured creditors as follows:

- the majority in numbers and
- two thirds the dollar value in claims

Once approved by the Court, a proposal is binding on all creditors, including CRA, even though we may have not voted or voted against the proposal.

For further details, refer to Communication TSDMB (ARD)-2006-073, **The Agency's Approach to Proposals under the Bankruptcy and Insolvency Act (BIA)**.

Related Topics:

- **Factors to consider when reviewing a Proposal**
- **Acceptance of Proposal**
- **Authority to Accept a Proposal**
- **Rejection of Proposal**

Factors to consider when reviewing a Proposal

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Every proposal situation is different and, notwithstanding the debtor's previous conduct, must be examined on its own merit. Investigating and evaluating a proposal allows maximum recovery and ensures that the interests of the Crown are protected.

The following factors should be considered before voting on a proposal:

- is the proposal the result of misfortune or did the debtor ignore his/her obligation to pay taxes
- is the purpose of the proposal to avoid paying taxes
- does the proposal protect other tax interests of the Crown
    - are current tax instalments, filing and payment compliance, throughout the duration of the proposal, addressed
- what is the level of risk involved in accepting the proposal
    - is there a risk that the debtor's liability could increase or could the debtor liquidate assets during the proposal and would this jeopardize the position of the CRA
- does the proposal represent a greater recovery than would be expected in a bankruptcy proceeding
- if returns are outstanding at the filing of the proposal,
    - the Agency will not compromise the current-year debt
    - the Agency may raise an assessment(s) for the period(s) for which returns are outstanding, and prove a claim for the assessed amount plus amounts already assessed
- is the proposal viable
    - can the debtor's financial situation support the proposal
    - is there an infusion of external funds to support it

Note: When a proposal includes amounts deferred by an election under section 34.2 of the *ITA* refer to Directive RCD-00-13, **Section 34.2 of the Income Tax Act**.

Acceptance of Proposal

A vote of approval for a proposal is based on certain conditions and considerations. The proposal should, where appropriate, provide for:

- the maximum recovery to CRA, as opposed to bankruptcy, net of administrative expenses
- the payment in full of all payroll account arrears within 6months 6 monthas required under the BIA
- the remittance of instalments, payroll deductions, and/or GST/HST as required for the duration of the proposal

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- the filing of information returns as required for the duration of the proposal
- the application, of refunds under the *ITA*, pertaining to the year of the proposal or prior years
- the application of refunds or rebates under the *ETA*, pertaining to all periods for which the liability is due
- payment terms that maximize ability to pay and should include a reasonable application of funds derived from equity in assets

For further details, refer to Communication TSDMB-2006-053, **Proposal Terms relevant to the Canada Revenue Agency** and Directive RCD-00-28, **Terms for Proposals under the Bankruptcy and Insolvency Act**.

Authority to Accept a Proposal

The minimum authority level to approve a proposal vote is the Manager. It may have to be approved by the Assistant Director, depending on office structure.

For further details refer to: **Amendments/Corrections to the Delegations Legislative and Policy Matrices**.

Rejection of Proposal

The risk that debtors face when they file a Division I proposal is that if the proposal is rejected by the creditors or the Court, or if they fail to meet any of the deadlines in the process, they are deemed to have made an assignment in bankruptcy.

The risk that debtors face when they file a Division II proposal is that if the proposal is rejected by the creditors or the Court, the rights of the creditors are restored. However, action cannot be taken to recover amounts until the trustee has been discharged.

Note: The consequences, of rejecting a proposal should be considered when voting against a proposal. Even if the creditors accept a proposal, final approval rests with the court.

Proposals Made After Bankruptcy

A proposal made after bankruptcy annuls the bankruptcy. This re-vests with the debtor all the rights, title and interest in property previously given to the trustee, unless otherwise stated in the proposal.

Proposals made after a bankruptcy may be extremely complicated due to the potential combinations of claims made. Facts must be discussed with senior personnel of the tax services office to determine the appropriate action to take.

Related Topics:

- **Inspector's Role**
- **Effective Date of Claim**

Inspector's Role

The Inspector's responsibilities in proposals made after bankruptcy include:

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- approving the proposal
- supervising the work of the trustee/administrator
- directing the issuance of dividends
- waiving a default, if the debtor can remedy the problem within 30 days
- refusing to waive a default if the debtor is unable to remedy the problem within 30 days

Effective Date of Claim

When a proposal is made after bankruptcy, the effective date of CRA's claim is the date on which the bankrupt became bankrupt.

Director's Liability when the Corporation has filed a Proposal

Section 69.31(1) of the *BIA* creates a Stay of Proceedings for actions against the director(s), when a notice of intention or a proposal has been filed. This Stay of Proceedings is in effect until the court approves the proposal or the corporation becomes bankrupt. During this period the CRA cannot commence or continue any action against the directors.

Section 50(13), of the *BIA*, permits a proposal to include a clause allowing the compromise of claims against directors. If the proposal is approved with that clause the CRA is bound by it. The court may declare that the claim against the directors not be compromised if the CRA proves that the compromise is unjust or that the directors have misrepresented themselves. These cases should be referred to the Department of Justice.

Director's Liability when the Director has filed a Proposal

In order to raise a Director's Liability Assessment, and prove a claim in the director's proposal, the CRA must complete the pre-requisites, as outlined in section 227.1(2) of the *ITA* and/or section 323(2) of the *ETA*.

In order to be eligible to receive a dividend in the proposal a claim should be filed as soon as possible. In the event that the assessment has not yet been completed send ELCS letter 80758 to the trustee to advise them of the pending assessment.

For more detailed information, refer to the **Directors' Liability** chapter.

Provisional Claims

A provisional claim is an estimate of tax liability. It covers the period beginning at the tax debtor's current fiscal year start (usually January 1) and ending on the date of the filing of an NOI or proposal, whichever is earlier.

Without a provisional claim, the entire year of the proposal is treated as post proposal, therefore, excluded from the proposal, and is fully collectible. In many cases this could result in the debtor being unable to meet the terms of the proposal and ultimately having the proposal fail.

Related Topics:

- **Pre-conditions to Filing a Provisional Claim**

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- Calculating the Provisional Claim
- Adjusting the Provisional Claim

Pre-conditions to Filing a Provisional Claim

Prior to the CRA filing a provisional claim and possibly compromising a current year debt, certain conditions must be met. It is the responsibility of the trustee to advise the debtor of the following:

- all outstanding income tax returns must be filed and assessed
- a provisional return must be filed with the proposal
- the provisional return must be based on income earned during the pre-proposal period and be reasonably accurate
- if no provisional return is filed with the proposal, it must be indicated on the proposal as "unknown" . If no provisional return is filed 10 days prior to when the creditors vote, CRA will not file a provisional proof of claim or the CRA will not file a provisional claim
- the provisional amount must be disclosed on the Statement of Affairs
- the proposal must contain the following clauses:
    - I confirm that the estimated current year pre-proposal income tax debt, based on the provisional return and disclosed on my statement of affairs, is a reasonable estimate of my actual current year pre-proposal income tax debt.
    - I will prepare and file, on or before the filing due date, a tax return for the tax year in which the proposal is filed as well as a detailed calculation of the actual current year pre-proposal income tax debt, which discloses the details of any differences from the estimated current year pre-proposal income tax debt.
    - I agree that if the amount of the actual current year pre-proposal income tax debt exceeds the estimated current year pre-proposal income tax debt, the excess will become a post proposal debt.
    - The income tax debt for the period from the date of filing of the proposal to December 31st of the year during which the proposal is filed is a post-proposal debt that is not affected by this proposal.

If the pre-conditions are not met, the entire amount will be treated as post-proposal and be fully collectible.

Calculating the Provisional Claim

For individual (T1) accounts, the provisional claim will be calculated based on the provisional return filed with the proposal.

For corporate ("T2") accounts, the trustee could base the estimate of the provisional claim on the calculation of the instalment amounts under section 157 of the *ITA*, prorated to the date of the proposal.

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Adjusting the Provisional Claim

Once the debtor files their final tax return for the year of the proposal, it may be necessary to adjust, or cancel the provisional claim as follows:

- if an amount is owing on assessment of the actual income tax return, the CRA will allocate the amount assessed between the pre and the post proposal periods
- if the amount allocated to the pre-proposal period, is greater than the amount on the provisional claim, the difference becomes post proposal debt
- if the amount allocated to the pre-proposal period is less than the amount on the provisional claim, a revised Proof of Claim must be filed
- if the assessment reflects a refund, the provisional Proof of Claim must be cancelled
- in the event that the reduction or cancellation of the claim is necessary, the CRA should notify the trustee immediately and any overpayment of dividends should be returned to the trustee

For further details refer to Directive RCD-95-07, **Provisional Claims**, Communication TSDMB-2004-007 (ARD), **Provisional Proofs of Claim** and Communication TSDMB (ARD)-2006-048, **Allocation of Current Year Tax in the Year of a Proposal**.

Verification of subsection 80(13) of the *ITA*

Audit administers section 80 of the *ITA*. It is essential that Audit have access to information about proposals under the BIA, to enable Audit to verify that subsection 80(13) is properly applied, send a copy of the proposal to the audit section.

For further details, refer to Directive RCD-97-04 **The application of section 80 of the Income Tax Act ("ITA") to proposals under the Bankruptcy and Insolvency Act ("BIA")**, Directive RCD-98-07 **The Debt-Forgiveness Rules: Section 80 of the Income Tax Act ("ITA")** and Directive RCD-00-17 **The Application of the Debt-Forgiveness Rules in a Proposal**.

Request for a Change in Fiscal Period End When Negotiating a Proposal

When negotiating a proposal under the *BIA*, collections will not honour a tax debtor's request for a change in the FPE.

A tax debtor does not have to request a change in fiscal period when:

- a law requires such a change, for example, as stated by section 128 of the *ITA*, the fiscal period changes automatically when a corporation, an estate, or a trust is bankrupt
- filing valid elections under the *ITA* will extend the fiscal period beyond the date that would be applicable if there were no such election, for example: a sole proprietor disposes of a business and an election is made under subsection 25(1) of the *ITA* to retain the year-end for a business disposed of by an individual proprietor

For further details, refer to Directive RCD-97-05 **Change in Fiscal Period End ("FPE") in a Proposal under the Bankruptcy and Insolvency Act ("BIA")** and Directive RCD-00-13 **Section 34.2 of the Income Tax Act**.

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Procedures

This section provides procedures related to proposals in Bankruptcy:

- **How to Action an Account**
- **Proving a Claim**
- **Evaluating a Proposal**
- **Determining Payment Terms of a Proposal**
- **Attending a Meeting of Creditors**
- **Accepting or Rejecting a Proposal**
- **Managing an Account after the Acceptance of a Proposal**
- **Writing down the Debt Once it is Transferred to a Subsidiary Ledger Account**
- **Updating the System When a Proposal is Completed**
- **Updating the System if a Proposal Fails**

How to Action an Account

To action an account after being advised of a proposal:

- Review the proposal document to evaluate the acceptability of its terms
- Determine the following amounts:
  - outstanding
  - assessed
  - unassessed
- File the necessary proofs of claim
- Review the proposal to determine if a representative from the CRA should attend the first creditors meeting, if a meeting of creditors is called
- Obtain a Proxy to vote

For further details, refer to **Attending Meeting of Creditors**.

Proving a Claim

A Proof of Claim must be filed with the Trustee/Administrator to ensure that CRA can:

- participate/vote at the meeting of creditors
- have the ability to request changes to the proposal

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- receive a dividend

Related Topics:

- **ELCS Verses**
- **Payroll Deemed Trust**
- **GST/HST Deemed Trust**
- **Amending a Proof of Claim**

ELCS Verses

For Income Tax debts (T1 & T2) use the following ELCS verses:

- 19672 - Cover Letter for Proof of Claim to Trustee
- 19673 - Proof of Claim
- 19674 - Schedule "A"

For a GST/HST account with no Deemed Trust use:

- 19675 - Cover letter for Proof of Claim to Trustee
- 19673 - Proof of Claim
- 19681 - Schedule "A"

Payroll Deemed Trust

You do not need to file a "property" claim for payroll deemed trust amounts in a Division I proposal as section 60(1.1) of the BIA requires the payroll account be paid in full within six (6) months of court approval.

Use ELCS letter # 82202 to advise the trustee of payroll amounts owing.

Division II of the *BIA* does not require the payroll account be paid in full within six (6) months. However, CRA policy is to require that clause be in the proposal. Should the debtor refuse, the CRA will proceed to issue an ERTP which may put the proposal at risk of failure.

In certain circumstances an extension beyond the six (6) months may be appropriate. The tax debtor's circumstances and reasons for the extension of time should be considered and approval sought from the team leader or manager.

For further details, refer to Directive RCD-01-05 **The Status of Source Deductions in a Consumer Proposal**.

GST/HST Deemed Trust

A property claim for GST/HST is only filed when the CRA has issued an Enhanced Requirement to Pay prior to the Stay of Proceedings coming into force.

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Note: The deemed trust amount cannot exceed the actual value of the Accounts Receivables regardless of the amount on the ERTP.

Use ELCS letter # 19796 to advise the trustee of any GST/HST deemed trust amounts owing.

Amending a Proof of Claim

Amend the CRA's Proof of Claim when:

- payment, other than dividends, is received for a pre proposal debt
- the pre proposal debt changes as a result of an additional assessment or reassessment
- where refunds, otherwise due to the tax debtor, are applied to reduce the liability

Evaluating a Proposal

Evaluating a proposal involves the analysis of three main factors, reliability, viability and acceptability.

Reliability is determined by comparing the information in the proposal with information obtained from other sources:

- are the assets and liabilities consistent with the information on file
- are you aware of any undisclosed assets
- does the cash flow statement reflect the information available from tax returns and other sources of information
- does the debtor have the ability to pay more
- has the debtor, in the past, been compliant with the CRA

Viability is the debtor's ability to fulfill the terms of the proposal. Review to determine:

- the debtor can generate the funds to support the proposal
- if the debtor cannot generate the funds to support the proposal, will there be an infusion of external funds to support the proposal
- can the debtor make current remittances, instalments and tax payments in addition to proposal payments

Acceptability of the proposal is how do the terms of the proposal impact the amount the CRA will realize from the debtor. Factors to consider are:

- is this the best option to maximize recovery
- does the proposal protect the interests of the crown
- are there terms that require current tax instalments
- are there terms that require filing and payment compliance throughout the duration of the proposal with respect to all revenue types

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- is there limited or no risk in accepting the proposal
- is there a risk that the debtor's liability could increase or could the debtor liquidate assets during the proposal, and jeopardize the position of the CRA
- the economic consequences such as potential loss of jobs, or a business being shut down in a depressed area as a result of an over aggressive repayment demand (management and Field Support should be informed immediately when these types of situations occur)
- the possibility of recovering more money if the tax debtor were adjudged bankrupt and RCA opposing the discharge

To evaluate the potential success of a proposal, ensure that the following conditions exist:

- debtor has the support of the secured creditors
- debtor's secured liabilities remain current
- debtor has additional credit for working capital
- debtor has a viable company or a reliable source of income
- debtor has management ability to implement the proposal
- debtor has management integrity

The amount of time and effort spent on a proposal should be commensurate with:

- the appearance that it is a tax driven proposal with a substantial debt to the CRA, poor compliance history and limited number of other creditors
- the tax debtor has been bankrupt or filed a proposal before
- the dollar amount and percentage of total claims that the CRA represents are large
- the potential amount to be recovered from the debtor
- the terms of the proposal are unsatisfactory

Determining Payment Terms of a Proposal

The *BIA* sets out terms appropriate to a proposal. As well, the CRA requires certain terms included to protect the Crown's interests.

For further details, refer to Communication TSDMB-2006-053 **Proposal Terms relevant to the Canada Revenue Agency** and Directive RCD-00-28 **Terms for Proposals under the Bankruptcy and Insolvency Act**.

Attending a Meeting of Creditors

The purpose of a meeting of creditors is to obtain pertinent information on the debtor and to vote on the proposal. If the CRA determines that it is in its best interest to attend the meeting, ensure all documentation such as the Proof of Claim, Proxy and other documents are prepared and

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ready to present prior to the meeting of creditors or at the meeting of creditors. If the intention is to postpone the meeting of creditors, ensure there is a valid cause to support the decision.

Related Topics:

- **Determining Whether to Attend a Meeting of Creditors**
- **Preparing for the First Meeting of Creditors**
- **Contributing at a Meeting of Creditors**

Determining Whether to Attend a Meeting of Creditors

To determine whether or not to attend a meeting of creditors or not, the following factors should be considered:

- amount and scope of the CRA's liability
- terms of the proposal
- the CRA wishes to act as an inspector or monitor in the proposal
- suspicion of fraud

Preparing for the First Meeting of Creditors

Prior to the first meeting of creditors:

- review the proposal documents and compare the information to that which the CRA already possesses or can obtain quickly
- conduct the appropriate searches
- request any documents or information you may need from the trustee/administrator or the taxpayer prior to the meeting of creditors.
- ensure all related accounts are filed up to date
- prepare and file Proofs of Claim
- prepare a list of questions to be asked at the meeting
- obtain a Proxy signed by the appropriate authority

For the correct level of authority to sign a Proxy refer to Communication TSDMB-2007-022 **Amendments/Corrections to the Delegations Legislative and Policy Matrices.**

Contributing at a Meeting of Creditors

When attending a meeting of creditors, keep in mind the confidentiality restrictions of the *Excise Tax Act*, section 295(5)(a) and the *Income Tax Act*, section 241(4)(a).

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For further details refer to Directive RCD-00-14 **Disclosure of Confidential Information to Trustees-in-Bankruptcy and Receivers** and **Disclosure to a Trustee in Bankruptcy or Receiver**.

This meeting should be used to:

- discuss reviewable transactions
    - creditors are permitted to ask questions of both the trustee/administrator and debtor to obtain a better understanding of the debtor's financial position
    - creditors may also request changes to the proposal
- obtain detailed accounting information about the debtor's affairs and compare it to historic data on the account

Based on the questions put forth by creditors and the answers of the debtor or amendments to the proposal, you may wish to have the meeting adjourned prior to a vote being conducted. The BIA supports the adjourning of a meeting so that creditors may further review the proposal and investigate the affairs of the debtor.

Accepting or Rejecting a Proposal

Prior to accepting or rejecting a proposal:

- forward the relevant facts to Tax Services Office management for review and appropriate approval
- If the proposal involves a compromise or settlement that reflects a significant public interest refer the case to Headquarters, Revenue Collections, Operations Directorate, Accounts Receivable Division

Managing an Account after the Acceptance of a Proposal

When a proposal is filed for an individual or corporate tax account, the debt must be transferred to a sub-ledger account. When the proposal is completed or if it fails, the system is updated. Monitoring of the debtor's account must continue until the successful completion of the proposal, and the deletion of all remaining account balances should be completed pursuant to current write-off policies.

Related Topics:

- **Transferring the Debt to a Subsidiary Ledger Account**
- **Other Subsidiary Ledger Account Codes**

Transferring the Debt to a Subsidiary Ledger Account

Transfer the debt to a subsidiary ledger account only in the case of individual (T1) and corporate (T2) tax accounts. GST/HST and Payroll accounts are managed on their regular systems.

To transfer a debt to a Subsidiary Ledger account:

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- for a T1 account an ERA request must be sent to the assigned Tax Centre, requesting the creation of a 31 124 subsidiary ledger account and the transfer of the debt owing with an effective interest date of the date of the proposal

- for a T2 account send an e-mail to the Corporate Services department of the applicable Tax Centre and request that they create a 32 254 subsidiary ledger account and the transfer of the debt owing with an effective interest date of the date of the proposal

Interest will not be charged on the amounts transferred to a subsidiary ledger account unless it is stipulated in the proposal agreement at the request of the creditor.

The transfer of the T1 account initiates the setting of a transfer code on the T1 system. As a result:

- the current year tax return, that is, the return for the year in which the proposal was filed will be processed on the Subsidiary Ledger account

- it is the responsibility of the collections officer to determine which portion of the ensuing assessment, if any, is not to be included in the proposal

For further details refer to Communication TSDMB-2006-048 **Allocation of Current Year Tax in the Year of a Proposal**.

- once the year of the proposal tax return has been processed, request the tax centre down the transfer code on the T1 system to ensure that future tax returns can be processed on the T1 account and place a keep code 6 on the T1 account

- if there is a re-assessment of the pre proposal period prepare an amended Proof of Claim immediately and advise the trustee/administrator of the change in amount due in the proposal

Other Subsidiary Ledger Type Codes

Other revenue types automatically accommodate any variations that may arise from a proposal on their systems.

For a detailed listing, refer to TSDMB STARS Definitions; **Subledger Revenue Types**.

Writing Down a Debt Once it is Transferred to a Subsidiary Ledger Account

Once the proposal debt is transferred to a Subsidiary Ledger Account, the debt must be written-down to the net realizable amount.

For further details refer to: **Write-Down of Proposal Accounts** and Communication TSDMB-2006-021 **Net Realizable Value and Uncollectible Debts**.

Updating the System When a Proposal is Completed

To update the system when a proposal is finalized and a certificate of full performance has been issued:

- Submit the balances remaining in the subsidiary ledger account for write-off.

- Remove the refund intercept, if applicable.

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Once the terms of the proposal have been met, the recovery of a debt or liability established by an assessment or a reassessment for a pre-proposal year is not permissible.

For further details, refer to Directive RCD-00-05 **Assessing or Reassessing a tax Debtor Already Discharged from a Proposal under the BIA**.

Updating the System if a Proposal Fails

If the debtor is deemed bankrupt (Division I proposal) by order of the Court:

- request the transfer of the corporate debt from the subsidiary ledger (32 354) back to the corporate (T2) account, as there are no subsidiary ledger accounts for bankrupt corporate accounts
- In the case of an individual that filed a Division I proposal, once option "E" is updated and changed to "bankrupt", the debt will be transferred from the subsidiary ledger 124 (proposal) to a subsidiary ledger 121 (bankruptcy) account

If the debtor is not deemed bankrupt (consumer proposal):

- request the transfer of the debt from the subsidiary ledger (31 124) back to the T1 account, the debt is now fully collectible
- for a GST/HST account, remove the proposal code, the debt is now fully collectible
- there are no special actions required in the case of a Source Deductions account, the debt is fully collectible

Resource Material

Directive RCD-95-07, **Provisional Claims**, issued October 27, 1995

Directive RCD-97-04, **The application of section 80 of the Income Tax Act ("ITA") to proposals under the Bankruptcy and Insolvency Act ("BIA")**, issued May 7, 1997

Directive RCD-97-05, **Change in Fiscal Period End ("FPE") in a Proposal under the Bankruptcy and Insolvency Act ("BIA")**, issued May 9, 1997

Directive RCD-98-07, **The Debt-Forgiveness Rules: Section 80 of the Income Tax Act ("ITA")**, issued September 18, 1998

Directive RCD-99-04, **Liquidation Proposals**, issued May 26, 1999

Directive RCD-00-05, **Assessing or Reassessing a tax Debtor Already Discharged from a Proposal under the BIA**, issued May 3, 2000

Directive RCD-00-13, **Section 34.2 of the Income Tax Act**, issued June 1, 2000

Directive RCD-00-14, **Disclosure of Confidential Information to Trustees-in-Bankruptcy and Receivers**, issued June 1, 2000

Directive RCD-00-17, **The Application of the Debt-Forgiveness Rules in a Proposal**, issued June 26, 2000

Directive RCD-00-19, **Collection Action When the Trustee or the Administrator Obtains a discharge from a Proposal**, issued August 24, 2000

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Directive RCD-00-28, **Terms for Proposals under the Bankruptcy and Insolvency Act**, issued October 20, 2000

Directive RCD-00-30, **The Incorrect Filing of Proposals under the Bankruptcy and Insolvency Act**, issued November 15, 2000

Directive RCD-01-05, **The Status of Source Deductions in a Consumer Proposal**, issued February 8, 2001

Directive ARD-03-09, **The Relationship between Bankruptcy and Insolvency Events**, issued September 24, 2003

Directive ARD-03-10, **Determining the Date of Bankruptcy**, issued September 24, 2003

Communication TSDMB-2004-007, **Provisional Proofs of Claim**, issued March 1, 2004

Communication TSDMB-2004-035, **Collecting GST/HST in an Insolvency**, issued June 17, 2004

Communication TSDMB-2006-021, **Net Realizable Value and Uncollectible Debts**, revised May 26, 2006

Communication TSDMB-2006-048, **Allocation of Current Year Tax in the Year of a Proposal**, issued July 24, 2006

Communication TSDMB-2006-053, **Proposal Terms relevant to the Canada Revenue Agency**, issued August 9, 2006

Communication TSDMB-2006-063, **Applying Set-off in a Proposal under the Bankruptcy and Insolvency Act**, issued September 22, 2006

Communication TSDMB-2006-073, **The Agency's Approach to Proposals under the Bankruptcy and Insolvency Act (BIA)**, issued October 23, 2006

Communication TSDMB-2007-022, **Amendments/Corrections to the Delegations Legislative and Policy Matrices**, issued March 30, 2007

Communication TSDMB-2007-095, **Designing Insolvency Work for the Future ("DIW") - Information Update and Next Steps**, issued October 26, 2007

Glossary

Proposal
A contract between debtors, who are experiencing financial difficulties, and their creditors. The purpose of the proposal is to permit debtors to reorganize their affairs in an attempt to improve their chances of financial survival. Proposals can include a proposal for a composition, an extension of time or a scheme of repayment. To be valid and binding, the proposal must be approved by the creditors and the Court.

Division I Proposal
Also known, within the CRA, as a commercial proposal, is a proposal made under Part III, Division I of the BIA. A process developed to accommodate proposals made by corporations and also by individuals where the debts, excluding obligations secured by the principal residence, are more than $75,000.00.

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Division II Proposal
Also known, within the BIA and the CRA, as a consumer proposal, is a proposal made under Part III, Division II of the Bankruptcy and Insolvency Act. A process developed to accommodate proposals made by individuals where the debts, excluding obligations secured by the principal residence, are less than $75,000.00.

Interim Receiver
A receiver appointed by the Court at the request of the creditors, for the protection of the debtor's estate or the interests of one or more creditors.

Nulla Bona Report
A report prepared by a sheriff stating that a writ of execution cannot be enforced because no asset was found or no asset is available for seizure and levy.

Proxy
A person who is appointed or authorized by the proper tax services office authority to represent the Crown at a meeting of creditors and to vote on the proposal.

Official Receiver
Person appointed as an officer of the Court to perform the duties and have the responsibilities specified by the Bankruptcy and Insolvency Act and the related General Rules.

Assignment in Bankruptcy
A legal document signed by an individual or by officers of a corporation declaring the person or corporation to be bankrupt. Once filed with the Bankruptcy Court, all property becomes vested in a trustee/administrator for the benefit of all creditors.

Consumer Debtor
Individual whose debts were primarily incurred for personal, family or household purposes and whose aggregate debts, excluding any debts secured by his/her principal residence, do not exceed $75,000.00 or such other maximum as is prescribed by the Bankruptcy and Insolvency Act.

Administrator
A licensed trustee or an administrator designated by the Superintendent of Bankruptcy.

Default
Omission or failure to perform a legal or contractual duty, omission to observe a promise or discharge an obligation or perform an agreement.

Reviewable Transactions
When a person enters into a transaction with another person other than at arm's length.

Notice of Intention (NOI)
The debtor can choose to file a Notice of Intention (NOI) to file a Division I proposal with the Official Receiver. The Notice of Intention results in an immediate Stay of Proceedings against the creditors.

Stay of Proceedings
The Stay of Proceedings provided by the NOI is 30 days in length; however, the court may extend the NOI in increments of 45 days at a time for up to six months from the date of the filing.

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DIVISION II
CONSUMER PROPOSALS

Definitions - Sec. 66.11
66.11 In this Division,

"administrator"
« administrateur »
"administrator" means

(a) a trustee, or

(b) a person appointed or designated by the Superintendent to administer consumer proposals;

"consumer debtor"
« débiteur consommateur »
"consumer debtor" means an individual who is bankrupt or insolvent and whose aggregate debts, excluding any debts secured by the individual's principal residence, are not more than $250,000 or any other prescribed amount;

"consumer proposal"
« proposition de consommateur »
"consumer proposal" means a proposal made under this Division.
1992, c. 27, s. 32;
1997, c. 12, s. 45;
2005, c. 47, s. 46.

Consumer proposal - - Sec. 66.12
66.12 (1) A consumer proposal may be made by a consumer debtor, subject to subsections (2) and 66.32(1).

Dealing with certain consumer proposals together - Sec. 66.12(1.1)
(1.1) Two or more consumer proposals may, in such circumstances as are specified in directives of the Superintendent, be dealt with as one consumer proposal where they could reasonably be dealt with together because of the financial relationship of the consumer debtors involved.

Restriction - Sec. 66.12(2)
(2) A consumer debtor who has filed a notice of intention or a proposal under Division I may not make a consumer proposal until the trustee appointed in respect of the notice of intention or proposal under Division I has been discharged.

To whom consumer proposal is made - Sec. 66.12(3)
(3) A consumer proposal shall be made to the creditors generally.

Creditors' response - Sec. 66.12(4)
(4) Any creditor may respond to a consumer proposal by filing with the administrator a proof of claim in the manner provided for in

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(a) sections 124 to 126, in the case of unsecured creditors; or
(b) sections 124 to 134, in the case of secured creditors.

Term of consumer proposal - Sec. 66.12(5)
(5) A consumer proposal must provide that its performance is to be completed within five years.

Priority of claims, fees - Sec. 66.12(6)
(6) A consumer proposal must provide
(a) for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of the consumer debtor;
(b) for the payment of all prescribed fees and expenses
(i) of the administrator on and incidental to proceedings arising out of the consumer proposal, and
(ii) of any person in respect of counselling provided pursuant to paragraph 66.13(2)(b); and
(c) for the manner of distributing dividends.
1992, c. 27, s. 32;
1997, c. 12, s. 46;
2005, c. 47, s. 47(E).

Commencement of proceedings - Sec. 66.13
66.13 (1) A consumer debtor who wishes to make a consumer proposal shall commence proceedings by
(a) obtaining the assistance of an administrator in preparing the consumer proposal; and
(b) providing the administrator with the prescribed information on the consumer debtor's current financial situation.

Duties of administrator - Sec. 66.13(2)
(2) An administrator who agrees to assist a consumer debtor shall
(a) investigate, or cause to be investigated, the consumer debtor's property and financial affairs so as to be able to assess with reasonable accuracy the consumer debtor's financial situation and the cause of his insolvency;
(b) provide, or provide for, counselling in accordance with directives issued by the Superintendent pursuant to paragraph 5(4)(b);
(c) prepare a consumer proposal in the prescribed form; and
(d) subject to subsection (3), file with the official receiver a copy of the consumer proposal, signed by the consumer debtor, and the prescribed statement of affairs.

SB Directive: 6R3, Assessment of Individual Debtor
(see image pages below)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

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Date: APR 30 2010

To: **OSB Staff, Trustees and Registrars**

Subject: **Directive No. 6R3, *Assessment Of An Individual Debtor.***

The Office of the Superintendent of Bankruptcy (OSB) has amended paragraph 12 of Directive No. 6R2, *Assessment Of An Individual Debtor*, to correct a mistake in reference. In paragraph 12, the correct reference should be to paragraph 14 rather than 15.

Coming into Force
The Directive No. 6R3, *Assessment Of An Individual Debtor* comes into force on April 30, 2010.

Enquiries
If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

Date : 30 AVR. 2010

À : **Employés du BSF, syndics et registraires**

Objet : **Instruction nº 6R3, *Évaluation d'un débiteur particulier***

Le Bureau du surintendant des faillites (BSF) a apporté une modification au paragraphe 12 de l'instruction nº 6R2, *Évaluation d'un débiteur particulier*, de manière à corriger une référence inexacte. Au paragraphe 12, la référence devrait renvoyer au paragraphe 14 plutôt qu'au paragraphe 15.

Entrée en vigueur
L'instruction nº 6R3, *Évaluation d'un débiteur particulier* entre en vigueur le 30 avril 2010.

Demande de renseignements
Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

p. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Protéger l'intégrité du système d'insolvabilité

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Directive / Instruction

N° 6R3

ASSESSMENT OF AN INDIVIDUAL DEBTOR

Issued: APR 30 2010

(Supersedes Directive No. 6R2 issued on August 14, 2009, on the same topic)

Short Title

1. Assessment Directive.

Interpretation

2. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act;*

"administrator" means an administrator of consumer proposals as defined in section 66.11 of the Act;

"assessment" means the first stage of the insolvency process, providing for a financial appraisal interview, a description of statutory and non-statutory options available to an individual debtor, and a discussion and review with that debtor of the merits and consequences of his or her choice;

ÉVALUATION D'UN DÉBITEUR PARTICULIER

Date d'émission : 30 AVR. 2010

(La présente instruction remplace et annule l'instruction n° 6R2 sur le même sujet émise le 14 août 2009.)

Titre abrégé

1. Instruction sur l'évaluation

Interprétation

2. Les définitions suivantes s'appliquent à la présente instruction :

« administrateur » renvoie à l'administrateur de propositions de consommateur tel que défini à l'article 66.11 de la Loi;

« BSF » désigne le Bureau du surintendant des faillites;

« évaluation » indique le premier stade du processus d'insolvabilité, qui inclut une entrevue afin d'évaluer la situation financière, une description des options – prévues ou non par la loi – qui s'offrent au débiteur particulier et une discussion informant le débiteur de la

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"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules* made pursuant to subsection 209(1) of the Act.

valeur et des conséquences liées à l'option choisie;

« Loi » désigne la *Loi sur la faillite et l'insolvabilité* (LFI);

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité* établies en vertu du paragraphe 209(1) de la Loi.

Authority and Purpose

3. This Directive is issued pursuant to paragraphs 5(4)(*b*) and *(c)* of the Act and establishes the duties and responsibilities of trustees and administrators in performing the assessment prior to filing an assignment in bankruptcy or making a proposal.

Autorité et objet

3. La présente instruction est émise en vertu des alinéas 5(4)*b*) et *c*) de la Loi et établit les fonctions et les responsabilités des syndics et des administrateurs dans la conduite de l'évaluation qui est effectuée avant le dépôt d'une cession ou d'une proposition.

Policy

4. Trustees and administrators may delegate only those tasks stated in paragraph 7 of this Directive.

5. Those individuals delegated by trustees or administrators to perform the tasks stated in paragraph 7 must satisfy the requirements listed in Schedule B of this Directive.

6. During the course of an assessment, when trustees or administrators identify the need for referral for non-budgetary counselling, they shall encourage the debtor to attend such counselling and attendance is at the debtor's discretion.

Politique

4. Les syndics et les administrateurs peuvent déléguer uniquement les tâches énoncées à l'article 7 de la présente instruction.

5. Les personnes déléguées par les syndics ou les administrateurs pour mener à bien les tâches énumérées à l'article 7 doivent répondre aux exigences précisées à l'annexe B de la présente instruction.

6. Lorsque, au cours d'une évaluation, le syndic ou l'administrateur découvre le besoin de diriger le débiteur vers des services de consultations non budgétaires, il encourage le débiteur à se prévaloir de tels services tout en lui laissant le choix de participer.

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Standards

7. For the purpose of the assessment, the individual conducting the assessment, or the relevant portion of it, shall inquire about the debtor's property and financial affairs and shall:

(1) prepare, on the basis of information obtained from the debtor, a complete statement of the debtor's financial affairs setting forth the following details:

(a) the debtor's assets;

(b) the debtor's liabilities;

(c) a detailed current monthly income and expense statement, including all income, gross and net, and all expenses, including special-needs expenses, alimony, support or maintenance payments, transportation costs, and medical and prescription expenses; and

(d) transfers, preferences and settlements of real or personal property of the debtor;

(2) discuss with the debtor his or her views respecting the debtor's immediate problems, evaluate the extent and nature of the problems facing the debtor, and review approaches for dealing with those problems;

(3) identify and discuss, in general, the options available to debtors for resolving

Normes

7. Pour les fins de cette évaluation, la personne chargée de mener l'évaluation, ou une partie de celle-ci, se renseigne sur les biens et les affaires du débiteur et :

(1) rédige, sur la base des renseignements obtenus du débiteur, un relevé complet de sa situation financière qui tient compte des éléments suivants :

a) l'actif du débiteur;

b) le passif du débiteur;

c) un état mensuel courant des revenus et dépenses qui inclut tous les revenus, bruts et nets; les détails de toutes les dépenses, y compris les dépenses pour besoins spéciaux, les pensions alimentaires, les paiements de soutien, les frais de transport, les dépenses médicales et les frais de médicaments; et

d) les actes de transfert, les préférences et les dispositions visant les biens du débiteur;

(2) discute du point de vue du débiteur concernant ses problèmes immédiats, évalue la nature et l'étendue de ces problèmes et passe en revue les méthodes pour les traiter;

(3) établit et expose de façon générale les options qui s'offrent aux débiteurs pour

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financial difficulties, including a discussion of the rights and responsibilities of debtors and creditors under each of the following options:

(a) non-legislative debt-settlement arrangements;

(b) an Orderly Payment of Debts under Part X of the Act, or similar option under provincial legislation, if applicable;

(c) a consumer proposal under Division II of Part III of the Act;

(d) a proposal under Division I of Part III of the Act; and

(e) an assignment in bankruptcy under section 49 of the Act; and

(4) explain the general meaning of the following credit and insolvency matters if pertinent to the circumstances:

(a) garnishment;
(b) co-signers;
(c) credit rating;
(d) assets;
(e) legal action;
(f) payments;
(g) windfalls;
(h) tax returns;
(i) tax credits;
(j) mediation; and

résoudre leurs difficultés financières, incluant une discussion sur les droits et responsabilités des débiteurs et créanciers pour chacune des options suivantes :

a) les méthodes non prévues par la loi pour régler ses dettes;

b) le paiement méthodique des dettes en vertu de la partie X de la Loi ou, le cas échéant, toute autre option similaire en vertu d'une loi provinciale;

c) une proposition de consommateur en vertu de la section II de la partie III de la Loi;

d) une proposition en vertu de la section I de la partie III de la Loi; et

e) une cession de biens en vertu de l'article 49 de la Loi;

(4) explique, lorsqu'approprié aux circonstances, le sens général des sujets suivants en matière de crédit et d'insolvabilité :

a) saisies-arrêts;
b) cosignataires;
c) cote de crédit;
d) biens;
e) poursuites judiciaires;
f) paiements;
g) retombées imprévues;
h) déclarations de revenu;
i) crédits d'impôt;
j) médiation;

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(k) the discharge process and types of discharge orders.

k) le processus de libération et les différentes ordonnances de libération.

8. If the tasks noted above were delegated, and the debtor is considering a solution under the Act (except under Part X), the trustee or the administrator shall complete the assessment in person with the debtor.

8. Lorsque les tâches susmentionnées ont été déléguées et que le débiteur envisage une solution en vertu de la Loi (à l'exception de la partie X), le syndic ou l'administrateur effectue l'évaluation en personne avec le débiteur.

9. To assist in choosing the appropriate option pursuant to the Act, the trustee or administrator shall discuss and review with the debtor:

9. Dans le but d'aider le débiteur à choisir l'option la plus appropriée en vertu de la Loi, le syndic ou l'administrateur discute avec le débiteur et passe en revue :

(a) the debtor's views of the situation;

a) le point de vue du débiteur face à sa situation;

(b) the merits and consequences of the pertinent options;

b) la valeur et les conséquences des options pertinentes;

(c) the rights and responsibilities of the debtor in a bankruptcy or a proposal;

c) les droits et obligations du débiteur dans une faillite ou une proposition;

(d) the specific effect of relevant credit and insolvency matters as they relate to the debtor's circumstances (i.e. wage garnishments, co-signing, credit rating, taxes, fees);

d) les effets précis sur le débiteur de questions pertinentes en matière d'insolvabilité et de crédit (p. ex., saisies-arrêts de salaire, cosignataires, cote de crédit, taxes et honoraires);

(e) the possible outcome of the discharge process as it may relate to the debtor's circumstances, including the trustee's statutory responsibility to report on any fact, matter or circumstances that may, if an opposition is filed,

e) le résultat possible du processus de libération tel qu'il s'applique à la situation du débiteur ainsi que la responsabilité statutaire du syndic de rapporter tout fait, élément ou circonstance qui justifierait un refus de la Cour

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justify the Court's refusal to grant an absolute order of discharge;

(f) the responsibility of a bankrupt to contribute surplus income to the estate, if appropriate; and

(g) the type and nature of counselling adapted to the debtor's needs that will be offered to assist in rehabilitation.

10. If at any time during the course of the above process the debtor chooses an option to which the Act does not apply, the process, as described herein, ceases and an Assessment Certificate will not be required.

Viable Proposals

11. The trustee shall determine whether or not the debtor has the potential to file a viable proposal by considering the following factors:

(a) the debtor
(i) has sufficient property available to make a "lump sum payment" proposal, or

(ii) has surplus income in accordance with Directive No. 11R2, *Surplus Income*, and also has the capacity at the time of assessment to sustain continued

d'accorder une ordonnance de libération absolue si une opposition est produite;

f) le cas échéant, la responsabilité du débiteur de verser la partie excédentaire de ses revenus à l'actif; et

g) la nature et le type de consultations adaptées à ses besoins qui sont offertes au débiteur pour aider à sa réhabilitation.

10. Si, à quelque moment au cours de ce processus, le débiteur choisit une option qui n'est pas prévue par la Loi, le processus tel que décrit dans la présente instruction est interrompu et le certificat d'évaluation n'est pas requis.

Propositions viables

11. Le syndic détermine si le débiteur est en mesure ou non de présenter une proposition viable en tenant compte des critères suivant :

a) le débiteur :
(i) possède suffisamment de biens pour lui permettre de faire une proposition de paiement forfaitaire, ou

(ii) a un revenu excédentaire, selon ce que prévoit l'instruction n° 11R2, *Revenu excédentaire*, et il a la capacité, au moment de l'évaluation, de faire des paiements continus

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payments to a proposal for a period of time;

(b) the family or personal situation of the debtor;

(c) the financial situation of the debtor;

(d) the number and type of creditors of the debtor, both secured and unsecured;

(e) the likelihood of acceptance of a proposal by the creditors; and

(f) whether the return to creditors from a potential proposal would be greater than the return from a bankruptcy.

12. If the trustee determines the debtor has the potential to file a viable proposal, the trustee shall inform the debtor of the trustee's duty pursuant to paragraph 14 of this Directive.

13. If the trustee determines the debtor has the potential to file a proposal, but it is unlikely that a proposal would be viable because of other circumstances, the trustee shall describe those circumstances in the section 170 report.

14. If the trustee determines the debtor has the potential to file a viable proposal, and the debtor chooses to file an assignment in bankruptcy rather than a proposal, the trustee shall comment in the section 170 report that a viable proposal could have been filed.

durant la période de temps prévue aux termes d'une proposition;

b) la situation familiale ou personnelle du débiteur;

c) la situation financière du débiteur;

d) le nombre et le genre de créanciers du débiteur, qu'ils soient garantis ou non garantis;

e) la probabilité que les créanciers acceptent une proposition; et

f) l'importance du dividende versé aux créanciers à la suite d'une éventuelle proposition, par rapport à ce qui serait versé dans une faillite.

12. Lorsque le syndic estime que le débiteur est en mesure de présenter une proposition viable, il informe le débiteur de l'obligation du syndic en vertu du paragraphe 14 de la présente instruction.

13. Lorsque le syndic estime que le débiteur est en mesure de présenter une proposition, mais que la viabilité de la proposition est improbable en raison d'autres circonstances, le syndic doit faire état de ces circonstances dans le rapport visé par l'article 170 de la Loi.

14. Lorsque le syndic estime que le débiteur est en mesure de présenter une proposition viable, mais que ce dernier choisit de faire une cession, le syndic mentionnera dans le rapport visé par l'article 170 de la Loi qu'une proposition viable aurait pu être faite.

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Assessment Certificate

15. At the end of the assessment, the trustee or administrator shall execute the Assessment Certificate (Appendix A) and shall:

(a) request the bankrupt or consumer debtor to sign the acknowledgement portion of the Certificate, confirming that an assessment has been provided, identifying the statutory option chosen to deal with his or her financial situation and confirming that the consequences of his or her choice have been explained thoroughly to him or her;

(b) retain the above-mentioned Assessment Certificate as part of the estate file of the bankrupt or debtor; and

(c) provide the official receiver with a copy of the Assessment Certificate referred to in paragraph 15(b) as follows:

(i) when bankruptcy is the option, at the time of filing the assignment;

(ii) when a proposal is the option, at the time of filing the proposal; or

(iii) if a notice of intention is filed, at the time of filing the notice of intention.

Certificat d'évaluation

15. Au terme de l'évaluation, le syndic ou l'administrateur exécute le certificat d'évaluation présenté à l'annexe A, et :

a) demande au failli ou au débiteur consommateur de signer la déclaration du certificat attestant qu'une évaluation a été menée, identifiant l'option prévue par la loi afin de remédier à sa situation financière et confirmant que les conséquences de son choix lui ont été pleinement expliquées;

b) conserve le certificat d'évaluation dans le dossier de l'actif du failli ou du débiteur; et

c) fournit au séquestre officiel une copie du certificat d'évaluation mentionné à l'alinéa 15*b*) au moment :

(i) du dépôt de la cession, lorsque la faillite est l'option choisie;

(ii) du dépôt de la proposition, lorsqu'une proposition est l'option choisie; ou

(iii) du dépôt de l'avis d'intention lorsqu'il y a dépôt d'un avis d'intention.

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EXCEPTIONS

16. (1) The requirement in paragraph 8 that a trustee complete the assessment of a debtor's options for resolving his or her financial situation in person does not apply:

(a) in designated areas if:

(i) the duties imposed in paragraph 7 are discharged in person by an individual registered with the Designated Senior Bankruptcy Analyst for this purpose, and

(ii) the trustee discharges his or her duties as listed in paragraph 9 by a telephone or video conference interview with the debtor;

(b) if, in the opinion of the Designated Senior Bankruptcy Analyst, extraordinary circumstances exist, he or she may allow an alternative method to be used in conducting assessment interviews in order to ensure access and availability.

(2) In this section, "designated area" means an area identified from time to time by the Designated Assistant Superintendent:

(a) in which there is no trustee available to conduct assessments in person; and

EXCEPTIONS

16. (1) L'obligation créée par l'article 8 selon laquelle un syndic effectue, en personne, l'évaluation des choix d'un débiteur afin de régler la situation financière de celui-ci ne s'applique pas :

a) dans les régions désignées, si :

(i) les tâches imposées par l'article 7 sont effectuées en personne par un individu inscrit auprès de l'analyste principal des faillites désigné à cette fin, et que

(ii) le syndic s'acquitte des tâches prévues à l'article 9 au moyen d'une entrevue avec le débiteur par téléphone ou vidéoconférence;

b) lorsque, selon l'analyste principal des faillites désigné, il y a présence de circonstances extraordinaires. L'analyste principal des faillites désigné, afin d'assurer l'accès et la disponibilité, pourra alors autoriser une autre méthode afin de procéder à des entrevues d'évaluation.

(2) Pour les fins du présent article, « région désignée » s'entend d'une région identifiée de temps à autre par le surintendant adjoint désigné :

a) dans laquelle aucun syndic n'est disponible pour effectuer les évaluations en personne; et

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(b) to which no trustee from another area is willing to travel for the purpose of conducting assessments in person.

(3) The Designated Assistant Superintendent shall maintain a list of "designated areas" for his or her district and distribute it to trustees in his or her district, the Superintendent and all other Designated Assistant Superintendents.

Coming into Force

17. This Directive comes into force on April 30, 2010.

Enquiries

18. For any questions pertaining to this Directive, please contact your local OSB office.

b) où aucun syndic n'accepte de voyager afin d'effectuer les évaluations en personne.

(3) Le surintendant adjoint désigné maintiendra une liste des « régions désignées » dans son district et la distribuera aux syndics de son district, au surintendant et aux autres surintendants adjoints désignés.

Entrée en vigueur

17. La présente instruction entre en vigueur le 30 avril 2010.

Demandes de renseignements

18. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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EXPLANATORY NOTE

(This note is not part of the Directive)

The remuneration prescribed by sections 128 and 129 of the Rules includes the fees for the first assessment. For ordinary estates or Division I Proposals, the fees for the first assessment are included in the remuneration taxed by the Court.

NOTE EXPLICATIVE

(Cette note ne fait pas partie de l'instruction.)

La rémunération prescrite par les articles 128 et 129 des Règles inclut les honoraires payables pour une évaluation. Dans les faillites ordinaires et les propositions de la section I, les honoraires pour l'évaluation sont inclus dans la rémunération taxée par la Cour.

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APPENDIX A

ASSESSMENT CERTIFICATE

To: **Superintendent of Bankruptcy**

From: _____
Name of trustee or administrator of consumer proposal

Re: _____.
Name of debtor

Date: _____.
Date of assessment

I, the undersigned, hereby certify that I have complied with Directive No. 6R3, *Assessment of an Individual Debtor*, and that I was assisted in the performance of the assessment by

_____
(name of registered individual, if applicable)

Dated at _____ **this** _____ **day of** _____, _____.

_____
Signature of trustee or administrator of consumer proposals

(please check off box if the assessment was performed in a designated area or pursuant to the extraordinary circumstances provision) ☐

ACKNOWLEDGEMENT

I, the undersigned debtor, have consulted with the above-named individual(s)

After having discussed my financial situation and the merits and consequences of each option available, I have decided on the following option

☐ (a) consumer proposal ☐ (b) Division I Proposal ☐ (c) assignment in bankruptcy

In the last six months, I have **not** received any advice regarding my financial situation other than the assessment referred to in this certificate ☐

- OR -

In the last six months, I have received advice regarding my financial situation other than the assessment referred to in this certificate. ☐

If other advice was received, indicate the amount paid $ _____ and the name of the provider of financial advice

Dated at _____ **this** _____ **day of** _____, _____.

_____
Signature of the debtor

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ANNEXE A

CERTIFICAT D'ÉVALUATION

Destinataire **Surintendant des faillites**

Expéditeur _____
Nom du syndic ou de l'administrateur de la proposition de consommateur

Objet :
Nom du débiteur

Date _____
Date de l'évaluation

Je, soussigné, atteste par la présente que je me suis conformé à l'instruction n° 6R3, *Évaluation d'un débiteur particulier*, et que j'ai été aidé dans l'exécution de cette tâche par _____
(Nom de la personne inscrite, le cas échéant)

Fait à_____, ce_____ jour de_____ _____.

_____
Signature du syndic ou de l'administrateur de la proposition de consommateur

(Veuillez cocher la case ci-contre si l'évaluation a été effectuée dans une région désignée ou en vertu des dispositions visant les situations extraordinaires.) ☐

DÉCLARATION

Je, débiteur soussigné, atteste avoir consulté la personne mentionnée ci-dessus. Après avoir discuté de ma situation financière, de la valeur et des conséquences des options disponibles, j'ai choisi l'option suivante :

☐ (a) une proposition de consommateur ☐ (b) une proposition de la section I ☐ (c) une cession de faillite

Au cours des six derniers mois je n'ai **pas** reçu de conseils touchant ma situation financière autre que lors de l'évaluation qui fait l'objet du présent certificat ☐

- OU -

Au cours des six derniers mois, j'ai reçu des conseils sur ma situation financière ailleurs que lors de l'évaluation ayant fait l'objet le présent certificat. ☐

Si d'autres conseils ont été reçus, prière d'en indiquer le coût $ et le nom de l'établissement ayant fourni les conseils financiers : _____.

Fait à_____, ce_____ jour de_____ _____.

_____
Signature du débiteur

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APPENDIX B

Individual Assisting in the Assessment

1. Since January 1, 1995, only trustees and administrators of consumer proposals are authorized to provide the assessment. However, registered individuals may be authorized to provide part of the assessment as described in Directive No. 6R3. *Assessment of an Individual Debtor*.

Qualification of Registered Individuals

2. In order to be registered with the Designated Senior Bankruptcy Analyst to provide that portion of the assessment that may be delegated, the following conditions will apply:

The trustee or the administrator of consumer proposals shall certify to and obtain approval from the Designated Senior Bankruptcy Analyst that the individual delegated to conduct the assessment:

(a) has and continues to have an employee or agent relationship with the trustee; and

(b) has demonstrated and continues to demonstrate that he or she has the character, ability, integrity, knowledge, experience and skills to perform the assessment adequately having regard to:
    (i) length of relevant experience; and
    (ii) formal training or courses of study.

The trustee or administrator shall advise the Designated Senior Bankruptcy Analyst in writing of any reason or change that would make the registered individual ineligible for certification. This notice will be provided within 10 days of the trustee becoming aware of its occurrence.

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ANNEXE B

Personnes déléguées pouvant mener l'évaluation

1. Depuis le 1er janvier 1995, seuls les syndics et les administrateurs d'une proposition de consommateur sont autorisés à mener les évaluations. Par ailleurs, les personnes inscrites peuvent être autorisées à mener une partie de l'évaluation telle que décrite dans l'instruction n° 6R3. *Évaluation d'un débiteur particulier.*

Qualification des personnes inscrites

2. Les conditions suivantes s'appliqueront pour l'inscription, auprès de l'analyste principal des faillites désigné, pour mener la partie des évaluations qui peut être déléguée :

Le syndic ou l'administrateur, afin d'obtenir l'autorisation de l'analyste principal des faillites désigné, doit attester auprès de ce dernier que le délégué pouvant mener une évaluation :

a) continue d'avoir un lien d'employé ou de mandataire avec le syndic; et

b) continue de démontrer qu'il a la réputation, les compétences, l'intégrité, les connaissances, l'expérience et les talents pour mener les évaluations adéquatement, principalement en ce qui a trait :
(i) au nombre d'années d'expérience pertinente;
(ii) aux études ou à la formation formelles.

Le syndic ou l'administrateur doit informer l'analyste principal des faillites désigné, par écrit, de tout changement dans la situation de la personne inscrite qui la rendrait inadmissible à l'inscription. Cet avis sera fourni dans les dix (10) jours suivant la connaissance de l'événement par le syndic.

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An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 1R3

COUNSELLING IN INSOLVENCY MATTERS

Issued: August 14, 2009

(Supersedes Directive No. 1R2 issued on December 21, 1994, on the same topic)

Short Title

1. Counselling Directive.

Interpretation

2. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act;*

"counselling" means to assist and educate bankrupts and/or relatives of bankrupts, or consumer debtors, on good financial management, including prudent use of consumer credit and budgeting principles; in developing successful strategies for achieving financial goals and overcoming financial setbacks; and, at any time, where appropriate, in making referrals to deal with non-budgetary causes of insolvency (i.e. gambling, addiction, marital and family problems, etc.);

CONSULTATIONS EN MATIÈRE D'INSOLVABILITÉ

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 1R2 sur le même sujet émise le 21 décembre 1994.)

Titre abrégé

1. Instruction sur les consultations.

Interprétation

2. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« conseiller qualifié » renvoie à une personne (un conseiller indépendant autorisé par le syndic, un syndic, un administrateur de propositions de consommateur et un employé d'un syndic ou d'un administrateur de propositions de consommateur) qui possède la compétence et les habiletés pour donner des consultations financières à un débiteur, un débiteur consommateur, un failli ou une personne liée à un failli;

« consultations » s'entend de l'aide et de l'éducation

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"date of initial bankruptcy event" means the date pursuant to section 2 of the Act;

"OSB" means the Office of the Superintendent of Bankruptcy;

"qualified counsellor" means an individual (independent counsellor authorized by the trustee, a trustee, an administrator of consumer proposals, and an employee of a trustee or administrator of consumer proposals) who has obtained the qualifications and skills to provide financial counselling to a debtor, consumer debtor, bankrupt or relative of a bankrupt;

"relative" means an individual connected by blood relationship, marriage or common-law relationship, or adoption, to the bankrupt, and includes same-sex partners;

"Rules" means the *Bankruptcy and Insolvency General Rules* made pursuant to subsection 209(1) of the Act;

"trustee" means a trustee licensed under section 13.1 of the Act and an administrator of consumer proposals as defined in section 66.11 of the Act.

Authority and Purpose

3. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

4. The purpose of this Directive is to establish the minimum content of the counselling stages and associated tasks.

données à un failli, à une personne liée au failli ou à un débiteur consommateur, sur la saine gestion financière, y compris la sage utilisation du crédit à la consommation et les principes applicables à la tenue d'un budget; l'élaboration de stratégies visant à réaliser des objectifs financiers et à surmonter les échecs; et, en tout temps, l'aiguillage vers des services spécialisés lorsque l'insolvabilité est attribuable à une cause non budgétaire (p. ex., jeu, dépendance, problèmes conjugaux ou familiaux);

« date d'ouverture de la faillite » s'entend de la date telle que définie à l'article 2 de la Loi;

« Loi » désigne la *Loi sur la faillite et l'insolvabilité*;

« personne liée » désigne une personne unie par le sang, le mariage ou une relation de conjoint de fait, ou unie par l'adoption au failli, et comprend des partenaires de même sexe;

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité* établies en vertu du paragraphe 209(1) de la Loi;

« syndic » désigne un syndic détenteur d'une licence émise en vertu de l'article 13.1 de la Loi et un administrateur de propositions de consommateur tel que défini à l'article 66.11 de la Loi.

Autorité et objet

3. La présente instruction est émise en vertu du pouvoir prévu aux alinéas 5(4)*b*) et *c*) de la Loi

4. L'objet de la présente instruction est d'établir le contenu minimal des phases des consultations et des tâches qui y sont associées.

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Policy

5. The counselling referred to in section 157.1 and paragraph 66.13(2)(*b*) of the Act shall consist of the following two stages:

(a) a first stage to be conducted, in accordance with paragraph 6(1) of this Directive,

(i) between 10 and 60 days following the date of initial bankruptcy event or the filing of a consumer proposal, or

(ii) within 10 days following the first meeting of creditors held pursuant to subparagraph 57(*c*)(i) of the Act where a Division I Proposal was refused by the creditors; and

(b) a second stage to be conducted, in accordance with paragraph 7(1) of this Directive, not before the end of a 30-day period after the first stage and no later than 210 days following the date of initial bankruptcy event, in the case of a bankrupt, or of filing a consumer proposal, in the case of a consumer debtor.

Standards

First Counselling Stage — Consumer and Credit Education

6. (1)(a) In the first stage, the qualified counsellor shall present information to provide the bankrupt and/or relative, or a consumer debtor, with consumer advice in the areas of:

(i) money management,

Politique

5. Les consultations prévues à l'article 157.1 et à l'alinéa 66.13(2)*b*) de la Loi comprennent les deux phases suivantes :

a) une première phase à être menée, conformément au paragraphe 6(1) de la présente instruction,

(i) entre 10 et 60 jours suivant la date d'ouverture de la faillite ou le dépôt d'une proposition de consommateur, ou

(ii) dans les 10 jours suivant la première assemblée des créanciers, tenue en vertu du sous-alinéa 57*c*)(i) de la Loi, lorsqu'une proposition de la section I a été rejetée par les créanciers;

b) une seconde phase à être menée, conformément au paragraphe 7(1) de la présente instruction, après une période de 30 jours suivant la première phase mais pas plus de 210 jours suivant la date d'ouverture de la faillite dans le cas d'un failli ou après le dépôt d'une proposition de consommateur dans le cas d'un débiteur consommateur.

Normes

Première phase des consultations – Éducation en matière de consommation et de crédit

6. (1)*a*) La première phase a pour objet de conseiller le failli, la personne liée ou le débiteur consommateur dans les domaines suivants :

(i) la gestion budgétaire;

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(ii) spending and shopping habits;

(iii) warning signs of financial difficulties; and

(iv) obtaining and using credit.

(b) With the agreement of the bankrupt and/or relative, or consumer debtor, this stage may be conducted in a group presentation. A group shall be more than two but no more than 20 participants.

Second Counselling Stage — Identification of Roadblocks to Solvency and Rehabilitation

7. (1) The second stage is to determine the budgetary and/or non-budgetary causes of insolvency or bankruptcy and requires that the qualified counsellor

(a) follow up on the application by the debtor of the principles presented in the first stage to assist the bankrupt and/or relative, or a consumer debtor, to better understand his or her strengths and weaknesses with regard to money management and budgeting skills;

(b) assist, where appropriate, the bankrupt and/or relative, or a consumer debtor:

(i) to identify the non-budgetary causes (such as gambling abuse, compulsive behaviour, substance abuse, employment and marital or

(ii) les dépenses et les pratiques de magasinage;

(iii) les signes avant-coureurs de difficultés financières; et

(iv) l'obtention et l'utilisation du crédit.

b) Avec le consentement du failli, de la personne liée ou du débiteur consommateur, cette phase peut faire l'objet d'une présentation de groupe. Un groupe doit comprendre plus de deux personnes et pas plus de 20.

Seconde phase des consultations — Identification des obstacles à la solvabilité et à la réhabilitation

7. (1) La seconde phase sert à déterminer les causes budgétaires ou non budgétaires de l'insolvabilité ou de la faillite et exige de la part du conseiller qualifié qu'il :

a) effectue un suivi de l'application que le débiteur fait des principes qui lui ont été présentés à la première phase en aidant le failli, une personne liée ou un débiteur consommateur à mieux comprendre ses forces et faiblesses en ce qui concerne la gestion financière et budgétaire;

b) aide, le cas échéant, le failli, une personne liée ou un débiteur consommateur :

(i) à identifier les causes non budgétaires qui ont contribué à ses difficultés financières telles que le jeu, un comportement compulsif,

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family difficulties) that may have contributed to his or her financial difficulties;

(ii) to better understand his or her behaviour in financial management and consumption habits; and

(iii) to make him or her aware of the existence of resources that will help him or her achieve and maintain economic stability; and

(c) cooperatively with the bankrupt and/or relative, or a consumer debtor, develop recommendations and alternatives for a financial plan of action that, if appropriate, may include referral for specialized counselling to deal with non-budgetary causes of insolvency.

une dépendance, des difficultés matrimoniales, familiales ou professionnelles;

(ii) à mieux comprendre son comportement en matière de gestion financière et d'habitudes de consommation; et

(iii) à mieux connaître les ressources qui lui permettraient d'atteindre et de maintenir une stabilité économique;

c) mette au point, en collaboration avec le failli, la personne liée ou un débiteur consommateur, des recommandations et des options pour un plan d'action financier qui peut inclure le fait de le diriger vers des consultations spécialisées sur les causes non budgétaires de son insolvabilité.

8. (1) On completion of each stage of counselling, the qualified counsellor shall:

(a) complete and sign the Counselling Certificate (Schedule I (first stage) or Schedule II (second stage));

(b) request that the bankrupt or consumer debtor sign the Acknowledgement (Schedule I (first stage) or Schedule II (second stage)) indicating that counselling has been provided; and

(c) where applicable, send to the trustee the Counselling Certificate for retention as part of the estate file of the bankrupt or consumer debtor

8. (1) À l'issue de chacune des phases des consultations, le conseiller qualifié :

a) complète et signe le certificat de consultation (annexe I [première phase] ou annexe II [seconde phase]);

b) demande au failli ou au débiteur consommateur de signer la déclaration (annexe I [première phase] ou annexe II [seconde phase]) dans laquelle il reconnaît avoir reçu les consultations; et

c) le cas échéant, envoie au syndic le certificat de consultation pour qu'il soit conservé dans le dossier de l'actif du failli ou du débiteur consommateur.

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(2) On request by the official receiver, the trustee shall provide the official receiver with a copy of the certificate referred to in paragraph 8(1)(c) of this Directive.

(3) Once the trustee has executed, or received from the qualified counsellor, the certificate referred to in paragraph 8(1)(c) of this Directive, the trustee may withdraw from the trust account to his or her benefit, or remit to the qualified counsellor, the prescribed amount for the payment of the specific counselling stage.

General

9. No fee or expense shall be paid from the estate trust account for counselling resulting from a referral mentioned in paragraph 7(1)(c) of this Directive.

10. Where the qualified counsellor provides counselling to a relative of a bankrupt, such counselling shall be provided at the same time as the counselling provided to the bankrupt.

11. (1) Subject to paragraph 11(2), each counselling stage shall be conducted in person by a qualified counsellor.

(2) In exceptional cases, where the bankrupt and/or relative, or the consumer debtor, resides in a remote area and where the counselling cannot be performed in person, the Designated Senior Bankruptcy Analyst may waive the requirement of paragraph 11(1) provided that the trustee ensures that resource materials are made available to the bankrupt and/or relative, or the consumer debtor, prior to counselling.

(2) Sur demande du séquestre officiel, le syndic lui fournit une copie du certificat mentionné à l'alinéa 8(1)c) de la présente instruction.

(3) Lorsque le syndic a complété ou reçu d'un conseiller qualifié le certificat mentionné à l'alinéa 8(1)c) de la présente instruction, il peut retirer du compte en fiducie à son bénéfice ou remettre au conseiller qualifié le montant prescrit pour le paiement de la phase des consultations.

Généralités

9. Aucun honoraire ni aucuns frais ne sont prélevés du compte en fiducie de l'actif pour avoir dirigé le failli, la personne liée ou un débiteur consommateur vers les consultations spécialisées mentionnées à l'alinéa 7(1)c) de la présente instruction.

10. Lorsque le conseiller qualifié donne des consultations à une personne liée au failli, ces consultations doivent être données en même temps que celles du failli.

11. (1) Sous réserve du paragraphe 11(2), chacune des phases des consultations est menée en personne par un conseiller qualifié.

(2) Dans des cas exceptionnels, lorsque le failli, la personne liée ou un débiteur consommateur réside dans une région éloignée et que les consultations ne peuvent être données en personne, l'analyste principal des faillites désigné peut accorder une dispense de l'exigence du paragraphe 11(1). Dans un tel cas, le syndic doit s'assurer que du matériel didactique est mis à la disposition du failli, de la personne liée ou du débiteur consommateur avant les consultations.

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Coming into Force

12. This Directive comes into force on the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force. This Directive, applies only to a person who, on or after the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force, is described in one of (a) – (f) listed below:

(a) the person becomes bankrupt;

(b) the person files a notice of intention;

(c) the person files a proposal without having filed a notice of intention;

(d) a proposal is made in respect of the person without the person having filed a notice of intention;

(e) an interim receiver is appointed in respect of the person's property and all or part of the person's property

Entrée en vigueur

12. La présente instruction entre en vigueur à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)*. La présente instruction ne s'applique qu'à l'égard des personnes suivantes .

a) celles qui deviennent faillis à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

b) celles qui déposent un avis d'intention, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

c) celles qui déposent une proposition, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

d) celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

e) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un

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comes into the possession or under the control of the interim receiver; or

(f) all or part of the person's property comes into the possession or under the control of a receiver.

As such, in order to determine whether Directive No. 1R3 applies to a particular insolvency file, the question that needs to be asked is whether one of the "triggering events" described in (a) -- (f) occurred on or after the coming into force date.

Enquiries

13. For any questions pertaining to this Directive, please contact your local OSB office.

séquestre intérimaire, nommé à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

f) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite.

Par conséquent, pour déterminer si l'instruction n° 1R3 s'applique à un dossier d'insolvabilité en particulier, la question qui doit être posée est de savoir si l'un des « événements déclencheurs » décrits aux alinéas *a)* à *f)*, est survenu à la date d'entrée en vigueur ou par la suite.

Demandes de renseignements

13. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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SCHEDULE I

COUNSELLING CERTIFICATE
FIRST STAGE

File number _____

To: **Superintendent of Bankruptcy**

From: _____
Name of qualified counsellor

Re: _____
Name of bankrupt or consumer debtor

Date: _____
Date of counselling

I, the undersigned, hereby certify that I have complied with the terms of Paragraph 6 of Directive No.1R3, *Counselling in Insolvency Matters*.

Dated at **this day of** , .

_____
Signature of qualified counsellor

ACKNOWLEDGEMENT

I, the undersigned, have attended an individual or group (cross out word that does not apply) session presented by the above-mentioned qualified counsellor and understand the information that was presented to me.

Dated at **this day of** , .

_____
Signature of bankrupt or consumer debtor

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SCHEDULE II

COUNSELLING CERTIFICATE
SECOND STAGE

File number_____

To: **Superintendent of Bankruptcy**

From: _____
Name of qualified counsellor

Re: _____
Name of bankrupt or consumer debtor

Date: _____
Date of counselling

I, the undersigned, hereby certify that I have complied with the terms of Paragraph 7 of Directive No. 1R3, *Counselling in Insolvency Matters*.

Dated at **this day of** , .

_____
Signature of qualified counsellor

ACKNOWLEDGEMENT

I, the undersigned, have consulted with the above-named qualified counsellor and acknowledge receiving and understanding the counselling referred to in this certificate.

Dated at **this day of** , .

_____
Signature of bankrupt or consumer debtor

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ANNEXE I

CERTIFICAT DE CONSULTATION
PREMIÈRE PHASE

N° de dossier : ___

Destinataire : **Surintendant des faillites**

Expéditeur : _____
Nom du conseiller qualifié

Objet : _____
Nom du failli ou du débiteur consommateur

Date : _____
Date des consultations

Je, soussigné, atteste par les présentes que je me suis conformé aux exigences du paragraphe 6 de l'Instruction n° 1R3, *Consultations en matière d'insolvabilité*.

Fait à , **ce jour de**

_____
Signature du conseiller qualifié

DÉCLARATION

Je, soussigné, reconnais avoir assisté à une session individuelle ou de groupe (biffer la mention inutile) présentée par le conseiller qualifié susmentionné et avoir compris l'information qui m'y a été transmise.

Fait à , **ce jour de**

_____
Signature du failli ou du débiteur consommateur

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ANNEXE II

CERTIFICAT DE CONSULTATION
DEUXIÈME PHASE

N° de dossier : _

Destinataire : **Surintendant des faillites**

Expéditeur : _____
Nom du conseiller qualifié

Objet : _____
Nom du failli ou du débiteur consommateur

Date : _____
Date des consultations

Je, soussigné, atteste par les présentes que je me suis conformé aux exigences du paragraphe 7 de l'Instruction n° 1R3, *Consultations en matière d'insolvabilité*.

Fait à , ce jour de

_____
Signature du conseiller qualifié

DÉCLARATION

Je, soussigné, reconnais avoir consulté le conseiller qualifié susmentionné et avoir reçu et compris les consultations mentionnées dans ce certificat.

Fait à , ce jour de

Signature du failli ou du débiteur consommateur

Where consumer proposal not to be filed - Sec. 66.13(3)

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(3) The administrator shall not file a consumer proposal under paragraph (2)(d) if he has reason to believe that

(a) the debtor is not eligible to make a consumer proposal; or

(b) there has been non-compliance with anything required by this section or section 66.12.

Where consumer proposal wrongly filed - Sec. 66.13(4)

(4) Where the administrator determines, after filing a consumer proposal under paragraph (2)(d), that it should not have been filed because the debtor was not eligible to make a consumer proposal, the administrator shall forthwith so inform the creditors and the official receiver, but the consumer proposal is not invalid by reason only that the debtor was not eligible to make the consumer proposal.

1992, c. 27, s. 32;
1999, c. 31, s. 21(E);
2005, c. 47, s. 48.

Duties of administrator - Sec. 66.14

66.14 The administrator shall, within ten days after filing a consumer proposal with the official receiver,

(a) prepare and file with the official receiver a report in the prescribed form setting out

(i) the results of the investigation made under paragraph 66.13(2)(a),

(ii) the administrator's opinion as to whether the consumer proposal is reasonable and fair to the consumer debtor and the creditors, and whether the consumer debtor will be able to perform it, and

(iii) [Repealed, 2005, c. 47, s. 49]

(iv) a list of the creditors whose claims exceed two hundred and fifty dollars; and

(b) send to every known creditor, in the prescribed form and manner,

(i) a copy of the consumer proposal and a copy of the statement of affairs referred to in paragraph 66.13(2)(d),

(ii) a copy of the report referred to in paragraph (a),

(iii) a form of proof of claim as prescribed, and

(iv) a statement explaining that a meeting of creditors will be called only if required under section 66.15 and that a review of the consumer proposal by a court will be made only if it is requested in accordance with subsection 66.22(1).

1992, c. 27, s. 32;
1997, c. 12, s. 47;
2005, c. 47, s. 49.

Carr (Re), 2007 BCSC 816 (CanLII) - Official Receiver Contests Fees of Administrator Due to Poor Performance/Handling

Date: 2007-06-11
Docket: 07/0938
Parallel citations: 35 CBR (5th) 268
URL: http://canlii.ca/t/1rrp8
Citation: Carr (Re), 2007 BCSC 816 (CanLII), <http://canlii.ca/t/1rrp8> retrieved on 2013-09-24
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IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: ***Carr (Re),***
2007 BCSC 816
Date: 20070611

Docket: 07/0938
Registry: Victoria
In the Matter of the Consumer Proposal
of
Alison Harcourt Carr
Before: Registrar Bouck
Reasons for Decision

Appearing for Abakhan & Associates Inc. Administrator of the Consumer Proposal	R. Robinson
Appearing for the Office of the Superintendent of Bankruptcy (the "OSB", also referred to as the official receiver)	L. Vogt
Date and Place of Hearing:	May 3, 2007 Victoria, B.C.

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THE APPLICATION

[1] This is an application by Abakhan & Associates Inc. ("Abakhan") for the taxation of fees claimed in the administration of Ms. Carr's Division II consumer proposal. It is one of nine similar applications by Abakhan heard on this day. All applications result from a negative comment letter issued by the official receiver. Those comments were expanded upon by Ms. Vogt in both oral and written submissions.

[2] The OSB challenges the administrator's entitlement to the fees on the basis that the administrator, relying on a clause in the proposal, by-passed the requirements under s. 66 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") with resulting prejudice to creditors.

[3] Specifically, the OSB suggests that the administrator failed in its duty to monitor the performance of the proposal. The OSB is also critical of the proposal's terms.

THE FEES CLAIMED

[4] The administrator claims fees of $2,406.68 representing $1,500 for preparatory work and 20% of the $4,533.42 collected under the proposal. The fees are claimed pursuant to Rule 129 of the *Bankruptcy and Insolvency General Rules* (the "*Rules*") which provides as follows:

> 129. (1) For the purposes of paragraph 66.12(6)(*b*) of the Act, the fees and expenses of the administrator of a consumer proposal that must be provided for in a consumer proposal are as follows:
>
> (*a*) $750, payable on filing a copy of the consumer proposal with the official receiver;
>
> (*b*) $750, payable on the approval or deemed approval of the consumer proposal by the court;
>
> (*c*) 20 per cent of the moneys distributed to creditors under the consumer proposal, payable on the distribution of the moneys;
>
> (*d*) the costs of counselling referred to in subsection 131(1);
>
> (*e*) the fee for filing a consumer proposal referred to in paragraph 132(*c*);
>
> (*f*) the fee payable to the registrar under paragraph 3(*b*) of Part II of the schedule; and
>
> (*g*) the amount of applicable federal and provincial taxes for goods and services.
>
> (2) Subsection (1) applies to consumer proposals in respect of which proceedings are commenced on or after April 30, 1998.

[5] The fees are not dependant on the successful completion of the proposal.

THE PROPOSAL

[6] Ms. Carr filed her consumer proposal on December 24, 2002. The appropriate notices were sent to the creditors and the official receiver, none of whom raised any concern as to the terms of the proposal. The proposal is in the name of Ms. Carr only, although the terms refer to a joint filing. Nothing turns on that language.

[7] The payment clause in the proposal provides:

> That beginning on the date of the filing of the joint Proposal the debtors shall pay to the administrator the following:
>
> - $200 per month for Thirty-six (36) months; and
> - the existing RRSP's (valued at approximately $10,000 before tax) will be de-registered as allowed by the plans and the "before tax" proceeds will be paid to the administrator over the same Thirty-six (36) months
>
> such that a total of $17,200 will be paid to the administrator over the Thirty-six (36) months.

[8] Between the filing of the proposal and November 2005, Ms. Carr missed four of the monthly payments due in December 2002, July 2003, May 2004 and October 2005. In December 2005, the administrator discovered that the RRSP had been de-registered and the proceeds dissipated. A total sum of $6,400 was paid under the proposal.

[9] On April 20, 2006, the administrator issued a Notice to Creditors and Report to the Official Receiver on Deemed Annulment of Consumer proposal. In that notice, the trustee states that the debtor "is in default to the extent of at least three months" of the payments required under the proposal. The notice was issued pursuant to s. 66.31(1) of the *BIA*.

[10] At this hearing, the administrator expressed the view that because the debtor had 36 months to complete the payment of the RRSP (and pay the total amount of $17,200), she was not in default until December 2005.

THE SUPERINTENDENT'S POSITION

[11] The OSB submits that the administrator's interpretation and application of the payment clause is simply wrong. The Notice of Deemed Annulment should have been issued 24 months earlier as by May 2004, Ms. Carr had missed three monthly payments.

[12] The failure to annul the proposal prejudiced the creditors in that the RRSP proceeds were no longer available for collection by the end of the 36 months. The stay of proceedings in force for the duration of the proposal prevented creditors from seeking to review the disposal of the RRSP.

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[13] The OSB is also critical of the administrator for failing to:

- include in his report to creditors that they will not be notified if payments are not made or that a stay of proceeding will remain in force for the duration of the proposal; and
- recognize that Ms. Carr was not in a position to remedy even one missed monthly payment.

[14] Regardless of the proposal's specific terms, once the proposal was deemed accepted, the OSB and the creditors should be able to rely on the administrator to both monitor the debtor's compliance and notify the creditors of any default.

[15] The OSB further suggests that the administrator should not have recommended the proposal in the first place.

[16] In her subsequent bankruptcy assignment, Ms. Carr failed to mention the $10,000 RRSP proceeds. The assignment was made through Abakhan. As trustee, Abakhan neglected to raise the issue in its s. 170 report. It was only after the OSB expressed its concerns that Abakhan filed a Notice of Opposition to Ms. Carr's discharge from bankruptcy, citing as grounds the disposal of the RRSP.

[17] The OSB submits that both the proposal's terms and the administrator's alleged inaction erode public confidence in the integrity of the *BIA*.

[18] In the result, the administrator should receive no fee or, if a fee is allowed, it should be commensurate to the dividend issued to creditors. The dividends paid to individual creditors in this case range from a low of $29.38 to a high of $940.51.

THE ADMINISTRATOR'S POSITION

[19] The administrator's position is three-fold: first, the terms of the proposal are within the scheme of the *BIA*; second, the proposal was not in default until the end of the 36 month term; and third, the creditors have not been prejudiced as, even absent the RRSP, they received a greater dividend than what might have been recovered in a bankruptcy.

[20] With respect to the performance of the payment clause, the administrator relies on a legal opinion obtained subsequent to the filing of this proposal. The legal opinion does not specifically address the administrator's duty to monitor the performance of the proposal. Nor does the opinion address the specific terms of this proposal.

[21] Rather, the opinion suggests that where there is flexibility in the amount to be paid, there can be no "missed" payments until the full term of the proposal comes to an end. Applying that proposition to this case, Ms. Carr had no obligation to de-register the RRSP and pay proceeds to the trustee until November 2005. Nor was she in default by failing to make the monthly payments as required as these were only a means to fulfill the ultimate payment of $17,200.

DISCUSSION

[22] The scheme for initiating and administering Division II consumer proposals is set out in ss. 66.11 to 66.40 of the *BIA*. An overview of the scheme is as follows:

- A debtor provides the administrator with prescribed information on the debtor's financial circumstances
- The administrator:
  - investigates the debtor's financial affairs to assess with reasonable accuracy the debtor's financial situation and cause or causes of the insolvency;
  - provides counselling; and
  - prepares a proposal in the prescribed form;
- The term of the proposal may not exceed 5 years;
- The proposal is then filed with the official receiver;
- Within 10 days of filing, the administrator:
  - reports to the official receiver, including whether the proposal is reasonable and fair to both the creditors and the debtor and whether the debtor can perform the proposal;
  - sends the proposal (and the report) to every known creditor with an explanation that a meeting of creditors will only be called if such a meeting is required by the official receiver and a review by the court of the proposal will be only sought if requested by the official receiver or an interested party;
  - if there is no request to have the proposal reviewed, the proposal is deemed accepted;
  - where payments under the proposal are to be made monthly and the debtor is in default to the extent of three months payments, the proposal will be deemed annulled and the administrator shall forthwith inform the creditors and file a report with the official receiver;
  - the proposal must provide for the payment of the administrator's fees and expenses which are governed by Rule 129.

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[23] Administrator's fees are taxed if there is a negative comment letter from the OSB or the creditors raise objections. At the taxation of the administrator's fees, the registrar shall consider the letter of comment from the OSB: Rule 103 of the *Rules*. It is not disputed that the OSB may also present oral argument.

[24] In this and the related applications, the OSB relies on various authorities which primarily address the ability of the administrator to waive default under a proposal. The OSB's summary of the decisions is reproduced below:

> ***Schrader, Re*** 13 C.B.R. (4th) 256, 1999 CarswellNS 330 (N.S.S.C.) — Registrar Hill decided Act did not permit discretion to forgive default, cannot revive proposal after Deemed Annulment.
>
> ***White, Re,*** 13 C.B.R. (4th) 128 (N.S.S.C.), 2001 CarswellNS 489 — Registrar Hill decided that tariff fees may only be based on amounts received while the proposal is in force. Any payments received after deemed annulment are not subject to fees.
>
> ***Dziewiacien, Re,*** 2002 CarswellOnt 3599, 37 C.B.R. (4th) 250 (Ont. S.C.J.) — Deputy Registrar Nettie decided that neither the creditors nor the court has authority to waive default, extend time to cure default or set aside deemed annulment and concludes that the debtor may seek leave of the court (S.66.32) to file an amended proposal only if they are able to demonstrate a good reason for the default and satisfy the court there is a reasonable prospect a new proposal would be accepted by creditors.
>
> ***Wiggins, Re*** 50 C.B.R. (4th) 306, 67 O.R. (3d) 133, 2003 CarswellOnt 3514 (Ont. S.C.J.) — Justice Swinton considered fact that debtor failed to make payments for 3 months - then resumed payments and made up arrears. Administrator made application to court for declaration that court had jurisdiction to waive default – application dismissed – jurisdiction cannot be exercised if conflicts with provision of Act.... S. 66.31 deals specifically with defaults = Deemed Annulment, therefore the court does not have jurisdiction to waive debtor's default.
>
> ***Williams, Re*** 2005 BCSC 108 (CanLII), 2005 BCSC 108, [2005] B.C.W.L.D. 2080 — Master Baker decided the Supt had very limited authority to question legality of terms, and found the term which enabled the Administrator to extend time for making payment as long as extension did not extend beyond five years – to be reasonable and useful and refers to the McManus decision – in which the OSB must file all proposals (S.62), and must have issues reviewed by the court approval (S.59), but does not consider the prejudice to creditors:
>
> - who are not sent notice when payments are not made and are precluded from making application to annul the proposal
> - stay of proceedings remain in force for the duration of the proposal (up to 5 years) even when it is evident the debtor does not earn sufficient income to complete the terms
> - post proposal creditors are free to realize upon income and assets, while the pre proposal creditors remain subject to the stay
> - assets may otherwise dissipate particularly when it is evident the proposal will not be completed
>
> ***Sztojka, Re*** 2005 CarswellOnt 7449 — Registrar Nettie decided that proposals which provide inspectors or Administrators with power to waive defaults – are both offensive to and prohibited by the Act.... S.66.31 provides that in event of default... proposal is deemed annulled unless:
>
> - court otherwise orders
> - or where an amended proposal is filed prior to deemed annulment

[25] ***Williams (Re),*** supra, concerns the administrator's application for a declaration that a particular term in a consumer proposal is valid and permissible. The OSB opposed the inclusion of the term but took no position in the application. The court found that the particular clause was neither prohibited by nor offensive to the *BIA* and was aimed at the general purpose of insolvency legislation. The clause in question granted the administrator the power to extend the time for making of any payments required so long as the extension was not beyond five years from the date of approval of the proposal before the court.

[26] At paragraph 8, the court states:

> 8. Other authorities should be noted at this point. The authors of Bankruptcy & Insolvency Law of Canada [See Note 7 below] state:
>
> > There can be a variety of plans put forward in a proposal. The only limits are the ingenuity of the draftsman and the necessity for finding terms which will be acceptable to creditors.
>
> As well, in Re McManus [See Note 8 below], Low J., of the Supreme Court of British Columbia, concluded (albeit in respect of a proposal that was not a Consumer Proposal):
>
> > Section 62(1) requires the trustee to file a copy of the proposal with the official receiver. It does not give the official receiver any discretion to refuse to accept it. It is nothing more than a procedural notice requirement. I can find nothing in the Act that gives the official receiver any control over the content of the proposal. Whether the proposal is legally valid and reasonable are

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> judicial determinations which fall to the court under s. 59, not to the official receiver under s. 62(1).
>
> These comments, taken together, in my view permit the Trustee and the debtor a great deal of flexibility in crafting a Consumer Proposal, the only limitation being that the proposed terms not offend or violate the terms of the Act. Moreover, the Superintendent's standing to question the legality of such terms is very limited.

[27] In contrast, ***Stojka (Re)***, supra, decides that any proposal which provides inspectors or administrators with power to waive default is both offensive to and prohibited by the *BIA*.

[28] While these last two decisions appear to be in conflict, neither addresses the issue before me. This is not an application to approve a so-called waiver term. In any event, the administrator submits that it did not waive any defaults. The real issue is whether the provisions of Ms. Carr's proposal permit her to miss one or more of the $200 monthly payments and delay de-registering the RRSP until the end of the proposal. If that is the case, then the administrator has done nothing wrong.

[29] The proposal's payment clause is poorly worded. It invites differing interpretations of Ms. Carr's obligation to de-register the RRSP. For example, it might be interpreted as requiring the de-registering of the RRSP "beginning on the date of filing the proposal" with net proceeds to be paid in increments "over...36 months." Alternatively, it could be interpreted as the administrator suggests, and apparently intended. That is, Ms. Carr was to de-register the RRSP and pay over the proceeds at any time over the 36 months, including waiting until the end of the proposal's term.

[30] However, separate and apart from that obligation, Ms. Carr was to pay $200 each month. The payment clause does not allow her to remit any lesser amount each month. Thus, the first three missed $200 payments should have triggered the default of the proposal.

[31] Alternatively, the administrator might have applied to amend the proposal. Or, if there had been an application, the court may have ordered the default forgiven: s. 66.3. The administrator took neither of these steps.

[32] In those circumstances, I agree with the OSB that the notice of deemed annulment should have been issued after the missed payment in May 2004. There has been maladministration of the proposal.

[33] In addition to this failure, the administrator failed to comply with the provisions of s. 66.251 of the *BIA* which provides that:

> Where a proposal is approved or deemed approved by the court and the terms of the proposal do not provide for the distribution of available moneys at least once every three months, the administrator shall forthwith, upon ascertaining any change in the consumer debtor's circumstances that leads the administrator to conclude, after consultation with the debtor where practicable, that such change could jeopardize the consumer debtor's ability to meet the terms of the proposal, in writing, notify the official receiver and every known creditor of the change.

[34] This section applies as payments were to be issued to creditors one month after the anniversary date of proposal. In my view, s. 66.251 imposes a duty on the administrator to monitor the debtor's ability to perform the proposal. The missed payments in 2002 and 2003 (which were never made up for by the debtor) should have led the administrator to consult with the debtor about a change of circumstances. There is no evidence that any such consultation took place.

[35] The next matter to consider is what impact these omissions should have on the administrator's claim for remuneration.

[36] The objects of a taxation are to:

1. allow the [administrator] fair compensation for his services;
2. prevent unjustifiable payments for fees to the detriment of the creditors; and
3. encourage, rather than to discourage, efficient, conscientious administration of the [proposal] for the benefit of the creditors.

Re Hess (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.) at page 218.

[37] Some of the OSB's comments relate to the administration of Ms. Carr's bankruptcy estate. Those comments should carry no weight in this taxation. The actions of Abakhan as trustee in bankruptcy are not under review. The OSB may choose to raise its concerns in a taxation of the trustee fees claimed in the bankruptcy proceeding.

[38] I have found that the administrator failed to recognize and act on defaults under the proposal. However, despite the defaults, the debtor paid a further $3,400 under the proposal.

[39] There is no information before me as to when the RRSP proceeds were dissipated. It may have been done within months of filing the proposal. It would be speculating to say that the proceeds were available to the creditors after May 2004.

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[40] Based on the information presented, I am unable to say that the creditors would, or could, have benefited had the notice of deemed annulment been issued when it ought to have been.
[41] Relying on the administrator's report, it appears that even with the defaults, the creditors would not have been better off if the debtor made a bankruptcy assignment in December 2002 or later. In the proposal, the creditors benefited to the extent that the administrator continued to collect the $200 monthly payments until November 2005.
[42] As for fairness of the proposal, at the time of filing, the debtor was employed on a full-time basis. The proposal appeared viable, if only just. The debtor's circumstances changed when she went on medical leave and suffered a reduction in income. Based on the circumstances at the time of filing, it was clear that a proposal was more advantageous to the creditors.
[43] I have given little weight to the OSB's concern that certain terms should have been included in the proposal. The official receiver is given notice of the proposal. If it has concerns with the terms, or lack thereof, it should ask the administrator to seek a review before the court. Otherwise, the terms of the proposal are deemed accepted.
[44] In summary, while the proposal was not administered perfectly, it is speculative to say that the creditors suffered as a result.
[45] In *Re Wright* [2005] B.C.J. No. 2507, Registrar Blok found that it was proper for the registrar to consider reducing a trustee's fees where the maladministration does not result in identifiable prejudice to the estate but where the integrity of the bankrupt system is undermined (at para. 52). Those comments are equally applicable to administrator's maladministration of a proposal.
[46] What, then, is the suitable fee for the administrator in this case?
[47] When there is no measurable loss to the creditors, there is no alternative formula for calculating a reduction in fees. The registrar must apply his or her own judgment to the circumstances and arrive at a "proper amount" that reflects the gravity and nature of the impugned conduct of the administrator: *Nelson (Re)* [2006] O.J. No. 2812 (S.C.) at para. 35.
[48] The views of the OSB with respect to fair fees should be given considerable weight: *Nelson (Re),* supra, at para. 36. I do not find the administrator's inaction to be of such gravity that its fees should be disallowed entirely. The OSB recommends, in the alternative, that fees should be commensurate with the dividend paid to creditors. As noted, those dividends ranged considerably, depending on the amount of the claim. In my view, it would be unfair to reduce the administrator's fee to only $940.00 which is the highest dividend paid
[49] The other method of arriving at the proper amount is to disallow fees collected after May, 2004 when the notice of deemed annulment should have been issued: *White (Re).* After May, 2004, the administrator collected fees of $906.68 (plus GST) which sum represents 20% of all moneys distributed to the creditors under the proposal. Such a reduction would, however, seem contrary to the intent of Rule 129(1) (c) which allows the administrator fees for its services in collecting and distributing monies received under the proposal.
[50] The alternative calculation is to reduce fees for those services performed after May, 2004. According to the administrator's records, the dividends paid to the creditors after May, 2004 amount to $2,862.42. Accepting that the administrator should not receive the benefit of the proposal after deemed annulment, fees should be reduced by $572.48 (20% of $2,862.42).
[51] While this would seem to be the tidy solution to calculating a reduction to the administrator's fees, I am not satisfied that the figure arrived at is a "proper" amount. The proposal was not monitored as it should have been. The notice of deemed annulment should have been sent out much earlier. However, the administrator's services in continuing to collect monthly sums benefited the creditors. And, I am not persuaded that the creditors have been prejudiced.
[52] Considering all of these factors, I find that the administrator's fees should be reduced by $ 300 (plus GST).

_____
Registrar C. P. Bouck

Castillo (Re), 2007 BCSC 828 (CanLII) - Official Receiver contests Shoddy Performance of Administrator

Date: 2007-06-11
Docket: 06/3903
URL: http://canlii.ca/t/1rrpc
Citation: Castillo (Re), 2007 BCSC 828 (CanLII), <http://canlii.ca/t/1rrpc> retrieved on 2013-09-24
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IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: ***Castillo (Re),***
2007 BCSC 828
Date: 20070611

Docket: 06/3903
Registry: Victoria
In the Consumer Proposal
of
Ricardo Rodriquez Castillo
Before: Registrar Bouck
Reasons for Decision

Appearing for Abakhan & Associates Inc., Administrators of the Consumer Proposal	R. Robinson
Appearing for the Office of the Superintendent of Bankruptcy (the "OSB", also referred to as the official receiver)	L. Vogt
Date and Place of Hearing:	May 3, 2007 Victoria, B.C.

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[1] This is a taxation of administrator's fees under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

[2] It is one of nine taxations heard on this day, all involving consumer proposals administered by Abakhan & Associates Inc. ("Abakhan"). The taxations result from a negative comment letter from the OSB. The OSB is critical of the form and content of the proposals as well as Abakhan's administration.

[3] With one exception, all of the matters concern the same form of proposal. In all cases, the administrator is accused of inaction resulting in prejudice to the creditors: see, for example *Carr (Re)* 2007 BCSC 816 (CanLII), 2007 BCSC 816 and *Papick (Re)* 2007 BCSC 818 (CanLII), 2007 BCSC 818.

[4] In this particular case, the OSB submits that the administrator failed to notify the creditors of defaults under the proposal. The result is that the creditors were subject to the stay of proceedings while the proposal was allegedly in arrears. I say allegedly because the administrator denies that it was under any obligation to report a missed payment.

[5] The OSB is also critical of the administrator recommending acceptance of the proposal. The viability of the proposal was marginal at best.

[6] On April 11, 2005, Mr. Castillo filed a joint proposal with his wife, Ana Isis Macias Romero. A separate court file was opened with respect to Ms. Romero, but there is only one fee claimed in the joint proposal under review.

[7] The proposal contained the following terms:

> 4. That the following payments be made to Abakhan & Associates Inc., the administrator of the consumer proposal, for the benefit of the unsecured creditors:
>
> That beginning on the date of the filing of the Proposal the debtors shall pay to the administrator an amount of $200.00 per month for thirty-six (36) months or such amount so that a total of $7,200.00 will be paid to the administrator within thirty-six (36) months. [my emphasis]
>
> 5. That the administrator of the consumer proposal shall distribute the moneys received to the unsecured creditors in accordance with the following schedule:
>
> That one month after each anniversary date of this proposal the administrator shall pay to the unsecured creditors who have filed a valid proof of claim the appropriate dividends as regulated under the Bankruptcy and Insolvency Act of Canada.

And

> 7. That the proposal may include the following additional terms:
>
> (a) The creditors may appoint up to three inspectors responsible for the consumer proposal of the consumer debtor. The inspectors may have, in addition to any powers of inspectors under the Act, the power to:
>
> (I) receive any notice of default in the performance of a provision of the consumer proposal and waive any such default; and
>
> (ii) approve any amendment to the consumer proposal without calling a meeting of creditors, if the amendment would alter the schedule for and the amount of the payments to be made by the consumer debtor, but would not change the total amount to be paid.
>
> (b) Such other terms as may be proposed.

[8] The proposal was to be completed by March 2006.

[9] In its report to the official receiver and creditors, the administrator opines that the proposal is more advantageous to creditors than a bankruptcy. Under the proposal, the creditors would receive $.27 on the dollar; nothing would be recovered in a bankruptcy. The proposal is considered viable because Mr. Castillo is "employable as a painter" and Ms. Romero is "looking for work".

[10] The debtors made three payments under the proposal: $300 on each of July 5, 2005 and July 26, 2005; and $400 on September 20, 2005.

[11] The proposal was annulled on September 6, 2006, on application by the administrator.

[12] There is no information of efforts made by the administrator to investigate why payments were not made after September 2005. In this case, the administrator's employee deposes that she attempted to contact the debtors (she does not say when) by email and phone but the home number was out of service and there was no record on file of any work number.

[13] The administrator's application to annul was the first notice to the creditors of any problem with the proposal.

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[14] The administrator submits that it did not fail in any duties as the proposal was not in default unless or until the sum of $7,200 was unpaid at the end of the 26 months. Under the proposal, the debtor could make monthly payments of $200 "or such amount", including nothing. The debtors' only obligation was to ensure that $7,200 was paid.
[15] In *Walter (Re)*, *supra*, and *Papick (Re)*, *supra*, I accepted that this was a reasonable interpretation and application of the payment clause. It was a term apparently accepted by the creditors and certainly not objected to by the official receiver.
[16] For the purposes of this taxation, I am not willing to fault the administrator for recommending acceptance of the proposal: *Walter (Re)*, *supra*. Nor am I willing to consider whether certain terms should have been included in the proposal. Both are matters that could have been addressed before the proposal was deemed accepted.
[17] However, Abakhan should still be faulted for its administration of the proposal. It failed in its obligation to monitor the debtors' circumstances. If properly monitored, the administrator might have concluded that the proposal was in jeopardy and given the appropriate notice to the creditors and the official receiver under s. 66.251 of the *BIA*. Given the infrequency of payments in the first six months of the proposal, it should have been obvious to the administrator that an investigation of the debtors' circumstances was warranted.
[18] It appears that in this particular case, the debtors were "signed up" and then forgotten. Such a practice reflects poorly not only on the administrator (not Mr. Robinson, I should add) but also on the integrity of the bankruptcy system. Fees can be reduced on that basis alone: *Wright (Re)* 2005 BCSC 1618 (CanLII), 2005 BCSC 1618.
[19] The creditors received nothing under this proposal. They would have received nothing if the debtors were assigned into bankruptcy. Thus, there is no measurable loss to the creditors despite the administrator's inaction. In the absence of any such measure, the registrar must decide what might be a "proper" reduction in fees: *Nelson (Re)* [2006] O.J. No. 2812.
[20] In accordance with the principles discussed in *Carr (Re)* 2007 BCSC 816 (CanLII), 2007 BCSC 816, the administrator's fees are reduced by $150 and allowed at $518 (plus GST).

_____
Registrar C. P. Bouck

Dela Cruz (Re), 2007 BCSC 834 (CanLII) - Administrator Receives No Fees for Attempt to By-Pass s. 66?

Date:	2007-06-11
Docket:	06/4298
URL:	http://canlii.ca/t/1rrph
Citation:	Dela Cruz (Re), 2007 BCSC 834 (CanLII), <http://canlii.ca/t/1rrph> retrieved on 2013-09-24
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IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: ***Dela Cruz (Re),***
2007 BCSC 834
Date: 20070611

Docket: 06/4298
Registry: Victoria
In the Consumer Proposal
of
Marita Cerezo Dela Cruz
Before: Registrar Bouck
Reasons for Decision

Appearing for Abakhan & Associates Inc., Administrator of the R. Robinson Consumer Proposal

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Appearing for the Office of the Superintendent of Bankruptcy (the "OSB", also referred to as the official receiver)	L. Vogt
Date and Place of Hearing:	May 3, 2007 Victoria, B.C.

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[1] This is another in a series of taxations heard May 3, 2007, all involving similar proposals administered by Abakhan & Associates Inc. ("Abakhan").

[2] In this, as in all of the other cases, the OSB suggests that Abakhan should receive no remuneration for its services. It submits that the administrator attempted to by-pass the provisions of s. 66 under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). In doing so, the administrator neglected to report defaults under the proposal resulting in prejudice to creditors.

[3] In all other cases, I have accepted that the administration of the particular proposal was deficient and reduced fees accordingly. Each proposal contained similar language and terms to those described below, but the administrative deficiencies differed in gravity. In most instances, there was no demonstrated prejudice to the creditors. However, I found that a failure to adhere to statutory duties alone justified a reduction in fees.

[4] Here the debtor filed a proposal on November 4, 2004. The proposal contained the following clauses:

> 4. That the following payments be made to Abakhan & Associates Inc., the administrator of the consumer proposal, for the benefit of the unsecured creditors:
>
> That beginning on the date of the filing of the Proposal the debtor shall pay to the administrator an amount of $150.00 per month for thirty-six (36) months or such amount so that a total of $5,400.00 will be paid to the administrator within thirty-six (36) months. [my emphasis]
>
> 5. That the administrator of the consumer proposal shall distribute the moneys received to the unsecured creditors in accordance with the following schedule:
>
> That one month after each anniversary date of this proposal the administrator shall pay to the unsecured creditors who have filed a valid proof of claim the appropriate dividends as regulated under the Bankruptcy and Insolvency Act of Canada.

And:

> 7. That the proposal may include the following additional terms:
>
> (a) the creditors may appoint up to three inspectors responsible for the consumer proposal of the consumer debtor. The inspectors may have, in addition to any powers of inspectors under the Act, the power to:
>
> (i) receive any notice of default in the performance of a provision of the consumer proposal and waive any such default; and
>
> (ii) approve any amendment to the consumer proposal without calling a meeting of creditors, if the amendment would alter the schedule for and the amount of the payments to be made by the consumer debtor, but would not change the total amount to be paid.
>
> (b) such other terms as may be proposed.

[5] The administrator recommended acceptance of the proposal on the basis that creditors would see a better return than if the debtor made an assignment into bankruptcy. **The official receiver did not require the court's review of** the proposal: s. 66.22 of the *BIA*. **Nor did the creditors raise any issue with respect to any of the proposal's terms. As a result, the proposal was deemed approved without the court's review.**

[6] Payments made by Ms. Dela Cruz during the first year of the proposal were sporadic. She did not make any payments for a five month period in 2005. The last payment was made in December 2005. The amount of the payments varied from a low of $150 to a high of $600. The total amount paid was $1,500.

[7] **At some point, the administrator's office attempted to contact the debtor by phone and mail.** The material before me does not say when those attempts were made. Phone messages were not returned, while mail was returned **with the notation "moved address unknown".**

[8] On October 4, 2006, the administrator obtained an order annulling the proposal.

[9] The administrator claims total remuneration of $1,092.44. There is no dividend payable to creditors as this sum, together with statutory fees and taxes, equals the amount paid by the debtor under the proposal.

[10] These circumstances are similar to those found in the other administrations under review: see *Papick (Re)*, 2007 BCSC 818 (CanLII), 2007 BCSC 818; *Castillo (Re)*, 2007 BCSC 828 (CanLII), 2007 BCSC 828; *Segi (Re)*, 2007 BCSC 831 (CanLII), 2007 BCSC 831, for example.

[11] The administrator argues that it should not be penalized because the proposal was not in actual default unless or until Ms. Dela Cruz failed to pay the full $5,400 due at the end of the 36 months. She was entitled to pay either the $150 or any other sum, including nothing.

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[12] In decisions considering a similar clause, I found that the administrator's interpretation and application of the payment provision was reasonable. I also question the weight to be given to the official receiver's objection to this term when it made no request for the proposal's review by the court.

[13] However, as with the other matters before me, I find that the administrator failed in its statutory duties under s. 66.251 of the *BIA*. That failure justifies a reduction in the administrator's fees. Like most of the other matters, there is no measurable loss to the creditors.

[14] The administrator's fees are reduced to reflect the nature and gravity of the maladministration: *Nelson (Re),* [2006] O.J. No. 2812 (S.C.). It is entitled to the sum of $800 (plus GST).

Registrar C. P. Bouck

Meeting of creditors - Sec. 66.15

66.15 (1) The official receiver may, at any time within the forty-five day period following the filing of the consumer proposal, direct the administrator to call a meeting of creditors.

Idem - Sec. 66.15(2)

(2) The administrator shall call a meeting of creditors

(a) forthwith after being so directed by the official receiver under subsection (1), or

(b) at the expiration of the forty-five day period following the filing of the consumer proposal, if at that time creditors having in the aggregate at least twenty-five per cent in value of the proven claims have so requested,

and any meeting of creditors must be held within twenty-one days after being called.

Notice to be sent to creditors - Sec. 66.15(3)

(3) The administrator shall, at least ten days before a meeting called pursuant to this section, send to the consumer debtor, every known creditor and the official receiver, in the prescribed form and manner, a notice setting out

(a) the time and place of the meeting;

(b) a form of proxy as prescribed; and

(c) such other information and documentation as is prescribed.

1992, c. 27, s. 32;

1997, c. 12, s. 48.

Chair of meeting - Sec. 66.16

66.16 (1) The official receiver, or the nominee thereof, shall be the chair of a meeting called pursuant to section 66.15 and subsection 66.37(1) and shall decide any questions or disputes arising at the meeting, and any creditor may appeal any such decision to the court.

Adjournment of meeting for further investigation and examination - Sec. 66.16(2)

(2) Where the creditors by ordinary resolution at the meeting so require, the meeting shall be adjourned to such time and place as may be fixed by the chair

(a) to enable a further appraisal and investigation of the affairs and property of the consumer debtor to be made; or

(b) for the examination under oath of the consumer debtor or of such other person as may be believed to have knowledge of the affairs or property of the consumer debtor, and the testimony of the consumer debtor or such other person, if transcribed, shall be placed before the adjourned meeting or may be read in court on the application, if any, for the approval of the consumer proposal.

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1992, c. 27, s. 32;
2005, c. 47, s. 123(E).

Creditor may indicate assent or dissent - Sec. 66.17
66.17 (1) Any creditor who has proved a claim may indicate assent to or dissent from the consumer proposal in the prescribed manner to the administrator at or prior to a meeting of creditors, or prior to the expiration of the forty-five day period following the filing of the consumer proposal.

SB Directive: 8R7, Revision to Form 49, Notice to Creditors of Consumer Proposal
(see below image files)

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Office of the Superintendent of Bankruptcy Canada
Bureau du surintendant des faillites Canada

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K1A 0H5
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Place Héritage
155, rue Queen
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Ottawa (Ontario)
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http://osb-bsf.ic.gc.ca

Date: **September 15 , 2009**

To: **OSB Staff, Trustees and Registrars**

Subject: **Revision to Form 49, *Notice to Creditors of Consumer Proposal***

Form 49, *Notice to Creditors of Consumer Proposal*, has been revised to reflect the legislative amendment to subsection 66.17(2) of the *Bankruptcy and Insolvency Act* (BIA), which was amended by Chapter 47 of the *Statutes of Canada, 2005*, and Chapter 36 of the *Statutes of Canada, 2007*, and to bring to creditors' attention the impact of the change.

According to section 66.17 of the BIA, any creditor who has proved a claim may indicate assent to or dissent from the consumer proposal at or prior to a meeting of creditors, or prior to the expiration of the 45-day period after the filing of the consumer proposal.

The amendment to subsection 66.17(2) is to clarify that any dissent received by the administrator of a consumer proposal is not a request for a meeting of creditors for the purpose of paragraph 66.15(2)(*b*), and will not be counted in a vote on the consumer proposal unless the administrator is required to call a meeting of creditors pursuant to section 66.15 of the Act.

Date : **Le 15 septembre 2009**

À : **Employés du BSF, syndics et registraires**

Objet : **Révision du formulaire 49, *Avis aux créanciers de la proposition de consommateur***

Le formulaire 49, *Avis aux créanciers de la proposition de consommateur*, a été révisé pour tenir compte de la modification apportée au paragraphe 66.17(2) de la *Loi sur la faillite et l'insolvabilité* (LFI), par le chapitre 47 des *Lois du Canada* (2005) et le chapitre 36 des *Lois du Canada* (2007), et pour porter à l'attention des créanciers les conséquences de ce changement.

En vertu de l'article 66.17 de la LFI, tout créancier qui a prouvé une réclamation peut, lors de l'assemblée des créanciers ou avant la tenue de celle-ci, ou encore avant l'expiration des 45 jours suivant le dépôt de la proposition de consommateur, indiquer s'il approuve ou désapprouve la proposition.

La modification apportée au paragraphe 66.17(2) de la LFI vise à préciser que toute désapprobation reçue par l'administrateur de la proposition de consommateur n'est pas une demande en vue de la convocation d'une assemblée des créanciers pour l'application de l'alinéa 66.15(2)*b*) et ne sera pas calculée dans le cadre d'un vote portant sur la proposition de consommateur, à moins que l'administrateur

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Protéger l'intégrité du système d'insolvabilité

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ne soit tenu de convoquer une assemblée des créanciers en vertu de l'article 65.15 de la Loi.

Form 49 has been amended to reflect the legislative amendment to subsection 66.17(2) and to make it clear that if there is no requirement to call a meeting of creditors, the consumer proposal is deemed to be accepted regardless of any dissent received.

Ainsi, le formulaire 49 a été modifié pour tenir compte de la modification apportée au paragraphe 66.17(2) de la Loi et pour préciser que si l'administrateur n'est pas tenu de convoquer une assemblée des créanciers, la proposition de consommateur est réputée avoir été acceptée, sans égard à toute désapprobation qui aurait été reçue.

Coming into Force

Entrée en vigueur

This Directive comes into force on the day on which subsection 1(1) of Chapter 36 of the *Statutes of Canada, 2007*, comes into force. This Directive applies only to a person who, on or after the day on which subsection 1(1) of Chapter 36 of the *Statutes of Canada, 2007*, comes into force, is described in one of (a) – (f) listed below:

La présente instruction entre en vigueur à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007). LA présente instruction ne s'applique qu'à l'égard des personnes suivantes :

(a) the person becomes bankrupt;

a) celles qui deviennent des faillis à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite;

(b) the person files a notice of intention,

b) celles qui déposent un avis d'intention à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite;

(c) the person files a proposal without having filed a notice of intention;

c) celles qui déposent une proposition à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

(d) a proposal is made in respect of the person without the person having filed a notice of intention;

d) celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

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(e) an interim receiver is appointed in respect of the person's property and all or part of the person's property comes into the possession or under the control of the interim receiver; or

e) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre intérimaire nommé à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite;

(f) all or part of the person's property comes into the possession or under the control of a receiver.

f) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite.

As such, in order to determine whether Directive No 8R7 applies to a particular insolvency file, the question that needs to be asked is whether one of the **"triggering events"** described in (a) - (f) occurred on or after the coming into force date.

Par conséquent, pour déterminer si l'instruction n° 8R7 s'applique à un dossier d'insolvabilité en particulier, la question qui doit être posée est de savoir si l'un des « **événements déclencheurs** » décrits aux alinéas *a)* à *f)* est survenu à la date d'entrée en vigueur ou par la suite.

Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Demandes de renseignements

Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

Att.

p. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 8R7

THE *BANKRUPTCY AND INSOLVENCY ACT* FORMS

Issued: September 15, 2009

(This Directive amends Directive No. 8R6 issued on August 19, 2009, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"Forms" means forms under the *Bankruptcy and Insolvency Act*.

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*c*) and (*e*) of the Act for the purpose of prescribing amendments to Form 49, *Notice to Creditors of Consumer Proposal*.

FORMULAIRES DE LA *LOI SUR LA FAILLITE ET L'INSOLVABILITÉ*

Date d'émission : le 15 septembre 2009

(La présente instruction modifie l'instruction n°8R6 sur le même sujet émise le 19 août 2009.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Formulaires » s'entend des formulaires émis en vertu de la *Loi sur la faillite et l'insolvabilité*;

« Loi » désigne la *Loi sur la faillite et l'insolvabilité* (LF1);

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction, qui est émise en vertu de l'autorité conférée par les alinéas 5(4)*c*) et *e*) de la Loi, a pour objet de prescrire des modifications au formulaire 49, *Avis aux créanciers de la proposition de consommateur*.

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Summary

3. This Directive amends Form 49 as a result of the coming into force of the legislative and regulatory amendments to the Act and Rules brought about by Chapter 47 of the Statutes of Canada, 2005, and Chapter 36 of the Statutes of Canada, 2007.

Coming into Force

4. This Directive comes into force on the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force. This Directive applies only to a person who, on or after the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force, is described in one of (a) - (f) listed below.

(a) the person becomes bankrupt;

(b) the person files a notice of intention;

(c) the person files a proposal without having filed a notice of intention;

(d) a proposal is made in respect of the person without the person having filed a notice of intention;

(e) an interim receiver is appointed in respect of the person's property and all or part of the

Résumé

3. La présente instruction modifie le formulaire 49 par suite des modifications apportées à la Loi et aux Règles en vertu du chapitre 47 des *Lois du Canada* (2005) et du chapitre 36 des *Lois du Canada* (2007).

Entrée en vigueur

4. La présente instruction entre en vigueur à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007). Elle ne s'applique qu'à l'égard des personnes suivantes :

a) celles qui deviennent des faillis à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite;

b) celles qui déposent un avis d'intention à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite;

c) celles qui déposent une proposition à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

d) celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

e) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre intérimaire

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person's property comes into the possession or under the control of the interim receiver; or

(f) all or part of the person's property comes into the possession or under the control of a receiver.

As such, in order to determine whether Directive No. 8R7 applies to a particular insolvency file, the question that needs to be asked is whether one of the **"triggering events"** described in (a) (f) occurred on or after the coming into force date.

Enquiries

5. For any questions pertaining to this Directive, please contact your local OSB office.

nommé à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite,

f) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada* (2007) ou par la suite.

Par conséquent, pour déterminer si l'instruction n° 8R7 s'applique à un dossier d'insolvabilité en particulier, la question qui doit être posée est de savoir si l'un des « **événements déclencheurs** » décrits aux alinéas *a*) à *f*) est survenu à la date d'entrée en vigueur ou par la suite.

Demandes de renseignements

5. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

Effect of assent or dissent - Sec. 66.17(2)

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(2) Unless it is rescinded, any assent or dissent received by the administrator at or before a meeting of creditors has effect as if the creditor had been present and had voted at the meeting.
1992, c. 27, s. 32;
1997, c. 12, s. 49;
2005, c. 47, s. 50.

Where consumer proposal deemed accepted - Sec. 66.18
66.18 (1) Where, at the expiration of the forty-five day period following the filing of the consumer proposal, no obligation has arisen under subsection 66.15(2) to call a meeting of creditors, the consumer proposal is deemed to be accepted by the creditors.

Idem - Sec. 66.18(2)
(2) Where there is no quorum at a meeting of creditors, the consumer proposal shall be deemed to be accepted by the creditors.
1992, c. 27, s. 32;
1997, c. 12, s. 50.

Voting on consumer proposal - Sec. 66.19
66.19 (1) At a meeting of creditors, the creditors may by ordinary resolution, voting all as one class, accept or refuse the consumer proposal as filed or as altered at the meeting or any adjournment thereof, subject to the rights of secured creditors.

Related creditor - Sec. 66.19(2)
(2) A creditor who is related to the consumer debtor may vote against but not for the acceptance of the consumer proposal.

Voting by administrator - Sec. 66.19(3)
(3) The administrator, as a creditor, may not vote on the consumer proposal.
1992, c. 27, s. 32.

Creditors may provide for supervision of consumer debtor's affairs - Sec. 66.2
66.2 The creditors, with the consent of the consumer debtor, may include such provisions or terms in the consumer proposal with respect to the supervision of the affairs of the consumer debtor as they may deem advisable.
1992, c. 27, s. 32.

Appointment of inspectors - Sec. 66.21
66.21 The creditors may appoint up to three inspectors of the estate of the consumer debtor, who shall have the powers of an inspector under this Act, subject to any extension or restriction of those powers by the terms of the consumer proposal.
1992, c. 27, s. 32.

Application to court - Sec. 66.22
66.22 (1) Where a consumer proposal is accepted or deemed accepted by the creditors, the administrator shall, if requested by the official receiver or any other interested party within fifteen

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days after the day of acceptance or deemed acceptance, forthwith apply to the court to have the consumer proposal reviewed.

Where consumer proposal deemed approved by court - Sec. 66.22(2)
(2) Where, at the expiration of the fifteenth day after the day of acceptance or deemed acceptance of the consumer proposal by the creditors, no obligation has arisen under subsection (1) to apply to the court, the consumer proposal is deemed to be approved by the court.
1992, c. 27, s. 32;
1997, c. 12, s. 51.

Procedure for application to court - Sec. 66.23
66.23 Where the administrator applies to the court pursuant to subsection 66.22(1), the administrator shall

(a) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the consumer debtor, to every creditor who has proved a claim and to the official receiver;
(b) forward a copy of the report referred to in paragraph (c) to the official receiver at least ten days before the date of the hearing; and
(c) at least two days before the date of the hearing, file with the court a report in the prescribed form on the consumer proposal and the conduct of the consumer debtor.

1992, c. 27, s. 32;
1997, c. 12, s. 52.

Court to hear report of administrator, etc. - Sec. 66.24
66.24 (1) The court shall, before approving the consumer proposal, hear the report mentioned in paragraph 66.23(c) and, in addition, shall hear the official receiver, the administrator, the consumer debtor, any opposing, objecting or dissenting creditor or other interested party, and such further evidence as the court may require.

Refusal to approve the consumer proposal - Sec. 66.24(2)
(2) Where the court is of the opinion that the terms of the consumer proposal are not reasonable or are not fair to the consumer debtor and the creditors, the court shall refuse to approve the consumer proposal, and the court may refuse to approve the consumer proposal whenever it is established that the consumer debtor

(a) has committed any one of the offences mentioned in sections 198 to 200; or
(b) was not eligible to make a consumer proposal when the consumer proposal was filed with the official receiver.

Proposal must comply with Act - Sec. 66.24(3)
(3) The court shall refuse to approve a consumer proposal if it does not comply with subsections 66.12(5) and (6).

Power of court - Sec. 66.24(4)
(4) Subject to subsections (1) to (3), the court may either approve or refuse to approve the consumer proposal.
1992, c. 27, s. 32.

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Withdrawal of consumer proposal - Sec. 66.25
66.25 A consumer debtor may withdraw a consumer proposal
(a) at any time before its deemed approval by the court by virtue of subsection 66.22(2), where no court review is requested; or
(b) where a court review is requested, at any time before its actual approval or refusal by the court pursuant to section 66.24.
1992, c. 27, s. 32.

Where periodic payments not provided for - Sec. 66.251
66.251 Where a proposal is approved or deemed approved by the court and the terms of the proposal do not provide for the distribution of available moneys at least once every three months, the administrator shall forthwith, upon ascertaining any change in the consumer debtor's circumstances that leads the administrator to conclude, after consultation with the debtor where practicable, that such change could jeopardize the consumer debtor's ability to meet the terms of the proposal, in writing, notify the official receiver and every known creditor of the change.
1997, c. 12, s. 53.

Payments to administrator - Sec. 66.26
66.26 (1) All moneys payable under the consumer proposal shall be paid to the administrator and, after payment of all fees and expenses mentioned in paragraph 66.12(6)(b), the administrator shall distribute available moneys to the creditors in accordance with the terms of the consumer proposal.

Deposit of moneys - Sec. 66.26(2)
(2) In such circumstances as are specified in directives of the Superintendent and with the approval of the Superintendent, the administrator may deposit all moneys relating to the administration of consumer proposals in a single trust account.

Section 147 applies - Sec. 66.26(3)
(3) Section 147 applies, with such modifications as the circumstances require, to all distributions made to the creditors by the administrator pursuant to subsection (1).
1992, c. 27, s. 32;
1997, c. 12, s. 54.

Notifications - Sec. 66.27
66.27 The administrator shall, within five days after
(a) the refusal of a consumer proposal by the creditors,
(b) the refusal of a consumer proposal by the court, and
(c) the withdrawal of a consumer proposal by the consumer debtor,
so notify in the prescribed form and manner the consumer debtor, every known creditor and the official receiver.
1992, c. 27, s. 32;
1997, c. 12, s. 55.

Time for determining claims - Sec. 66.28

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66.28 (1) The time with respect to which the claims of creditors shall be determined is the time of the filing of the consumer proposal.

On whom approval binding - Sec. 66.28(2)
(2) Subject to subsection (2.1), a consumer proposal accepted, or deemed accepted, by the creditors and approved, or deemed approved, by the court is binding on creditors in respect of

(a) all unsecured claims; and

(b) secured claims for which proofs of claim have been filed in the manner provided for in sections 124 to 134.

When consumer debtor is released from debt - Sec. 66.28(2.1)
(2.1) A consumer proposal accepted, or deemed accepted, by the creditors and approved, or deemed approved, by the court does not release the consumer debtor from any particular debt or liability referred to in subsection 178(1) unless the consumer proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the consumer proposal.

Certain persons not released - Sec. 66.28(3)
(3) The acceptance of a consumer proposal by a creditor does not release any person who would not be released under this Act by the discharge of the consumer debtor.
1992, c. 27, s. 32;
2005, c. 47, s. 51;
2007, c. 36, s. 29.

Administrator may issue certificate - Sec. 66.29
66.29 (1) If a consumer proposal is approved or deemed approved by the court, the administrator may, if the administrator believes on reasonable grounds that the debtor owns land or other valuable property, issue a certificate in respect of the proposal, and may cause the certificate to be filed in any place where a certificate of judgment, writ of seizure and sale or other like document may be filed or where a legal hypothec of judgment creditors may be registered.

Effect of filing certificate - Sec. 66.29(2)
(2) A certificate filed under subsection (1) operates as a certificate of judgment, writ of execution or legal hypothec of judgment creditors until the proposal is fully performed.
1992, c. 27, s. 32;
2004, c. 25, s. 40.

Annulment of consumer proposal - Sec. 66.3
66.3 (1) Where default is made in the performance of any provision in a consumer proposal, or where it appears to the court

(a) that the debtor was not eligible to make a consumer proposal when the consumer proposal was filed,

(b) that the consumer proposal cannot continue without injustice or undue delay, or

(c) that the approval of the court was obtained by fraud,

the court may, on application, with such notice as the court may direct to the consumer debtor and, if applicable, to the administrator and to the creditors, annul the consumer proposal.

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Canada (Minister of National Revenue) v. Engdahl, 1994 CanLII 4773 (SK QB) - Excessive Tax Liability Precludes Consumer Proposal

Date: 1994-07-13
Docket: Estate No. 020048; QB 1131/94 JCS
Parallel citations: 27 CBR (3d) 114; 122 Sask R 247
URL: http://canlii.ca/t/1nqw6
Citation: Canada (Minister of National Revenue) v. Engdahl, 1994 CanLII 4773 (SK QB), <http://canlii.ca/t/1nqw6> retrieved on 2013-09-15
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Q.B No. 1131 A.D. 1994
Estate No. 020048 J.C. S.

IN THE QUEEN'S BENCH
PROVINCE OF SASKATCHEWAN

IN BANKRUPTCY

IN THE MATTER OF THE CONSUMER PROPOSAL
OF JAMES BRUCE ENGDAHL

BETWEEN:
HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by the Minister of National Revenue
APPLICANT
- and -
JAMES BRUCE ENGDAHL
RESPONDENT
- and -
JEFFREY W. PINDER
ADMINISTRATOR

G. Berscheid for the applicant
J. Hesje for the respondent
J. Pinder appeared on his own behalf

JUDGMENT GUNN J.
July 13, 1994

Her Majesty the Queen in Right of Canada ("Revenue Canada Taxation") applies for an order pursuant to ss 66.3(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as am. S.C. 1992, c. 27 (the "BIA") annulling the consumer proposal of James Bruce Engdahl (the "debtor") filed with the official receiver on the 11th day of January, 1993 on the basis that the debtor was not eligible to make a consumer proposal when the consumer proposal was filed as the aggregate of his unsecured debts exceeded $75,000 on that date.

FACTS

The facts may be summarized as follows:

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1. On January 8, 1993 the debtor made a consumer proposal that was filed with the official receiver by Jeffrey W. Pinder, the administrator (the "administrator") on January 11, 1993.
2. The debtor says he disclosed to the administrator all his debts and liabilities including a liability to Revenue Canada Taxation. This consisted of his outstanding liability to Revenue Canada Taxation for the 1990 and 1991 taxation years of approximately $13,200 plus his estimate of his tax liability for 1992 of $12,600.
3. The debtor says these figures were a fair and honest estimate arrived at in consultation with his accountant and that at the time of making his proposal he was not aware of any personal tax liability, either actual or potential, other than the estimated $25,800 set out in his statement of affairs.
4. The debtor offered in the consumer proposal to pay the sum of $7,200 in full and final satisfaction of all claims of unsecured creditors by paying $200 on the first day of each month for 36 months.
5. On January 20, 1993, Revenue Canada Taxation received a copy of the debtor's consumer proposal and statement of affairs from the administrator in which the debtor listed Revenue Canada Taxation as an unsecured creditor with a debt of $25,800.
4. On February 12, 1993, the records of Revenue Canada Taxation indicated the debtor was indebted under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) in respect of the 1988 and 1991 taxation years in the sum of $13,242.58 and a proof of claim in that amount was filed by Revenue Canada Taxation with the administrator on that date.
5. There was no meeting of creditors on this consumer proposal, as no creditor requested a meeting, and the consumer proposal was not reviewed by the Court as the consumer proposal was deemed to be approved by the Court as at March 23, 1993, pursuant to ss. 66.22(2) of the BIA.
6. On April 30, 1993 the debtor filed his personal income tax return for the 1992 taxation year and reported therein as income the receipt of director's fees of $63,500 from Triple J. Enterprises Corp. ("Triple J").
7. After assessment of the 1992 income tax return the records of Revenue Canada Taxation indicated the income tax indebtedness of the debtor was $39,756.03 after including the additional unpaid income tax, penalty and interest of $25,885.59 due in respect of the 1992 taxation year and an amended proof of claim in the amount of $39,756.03 was filed by Revenue Canada Taxation with the administrator on August 18, 1993.
8. October 18, 1993 the administrator advised Revenue Canada Taxation that the sum of $7,200 had been paid to the administrator and the debtor had fully performed all his obligations under the consumer proposal.
9. October 19, 1993 the debtor was reassessed for the 1990 and 1991 taxation years to include the unreported amounts discovered during the course of the audit conducted by Revenue Canada Taxation and the records of Revenue Canada Taxation indicated the income tax indebtedness of the debtor was increased to $92,819.89 and a proof of claim in the amount of $92,819.89 was filed by Revenue Canada Taxation with the administrator on that date.
10. On October 26, 1993 Triple J was re-assessed for the 1990 and 1991 taxation years to include the non-deductible unreported

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amounts discovered during the course of the audit conducted by Revenue Canada Taxation and notice of re-assessment was mailed to Triple J on that date.
11. On or about November 3, 1993 the administrator sent to the Department of Justice (Canada), a draft receipts and disbursements, dividend sheet, and administrator's certificate.
12. On or about January 19, 1994, the administrator reported to Department of Justice (Canada) on the status of two secured creditors and advised that if no formal objection were filed the certificate of compliance would be issued.
13. February 8, 1994 the certificate of full performance was issued by the administrator pursuant to s. 65.3 of the BIA.
14. On February 21, 1994 Revenue Canada Taxation received from the administrator a cheque in the sum of $3,804.53 as a final dividend on its claim of $92,819.89.
15. The administrator says Revenue Canada Taxation never formally or informally objected to the consumer proposal. His first notice of their objection was the notice of application to annul the proposal.
1. The debtor says he does not agree with the reassessment made by Revenue Canada Taxation but has not filed a notice of objection as he believes his tax liability for 1991 and 1992 would be discharged upon compliance with his consumer proposal.
17. The debtor says if his consumer proposal is annulled he will be forced to make an assignment in bankruptcy.

ISSUES

1. Was the debtor eligible to make a consumer proposal?
2. Can the proposal be annulled after full compliance with the proposal and the issuance of a certificate by the administrator?
3. If so, is this a proper case for annulment?

LEGISLATION

The relevant sections of the BIA are as follows:
65.3 Where a proposal is fully performed, the trustee shall give a certificate to that effect, in the prescribed form, to the debtor and to the official receiver. . . .
66.11 In this Division . . .
"consumer debtor" means an insolvent natural person whose aggregate debts, excluding any debts secured by the person's principal residence, do not exceed seventy-five thousand dollars or such other maximum as is prescribed. . . .
66.18 (1) Where, at the expiration of the thirty day period following the filing of the consumer proposal, no obligation has arisen under subsection 66.15(2) to call a meeting of creditors, the consumer proposal shall be deemed to be accepted by the creditors.
(2) Where there is no quorum at a meeting of creditors, the consumer proposal shall be deemed to be accepted by the creditors. . . .
66.22 (1) Where a consumer proposal is accepted or deemed accepted by the creditors, the administrator shall, if requested by the official receiver or any other interested party within thirty days after the day of acceptance or deemed acceptance, forthwith apply to the court to have the consumer proposal reviewed.
(2) Where, at the expiration of the thirtieth day after the day of

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acceptance or deemed acceptance of the consumer proposal by the creditors, no obligation has arisen under subsection (1) to apply to the court, the consumer proposal shall be deemed to be approved by the court.

66.28 (1) The time with respect to which the claims of creditors shall be determined is the time of the filing of the consumer proposal.

(2) A consumer proposal accepted, or deemed accepted, by the creditors and approved, or deemed approved, by the court is binding on creditors in respect of

(a) all unsecured claims, and

(b) secured claims for which proofs of claim have been filed in the manner provided for in sections 124 to 134, but does not release the consumer debtor from the debts and liabilities referred to in section 178, unless the creditor assents thereto.

(3) The acceptance of a consumer proposal by a creditor does not release any person who would not be released under this Act by the discharge of the consumer debtor. . . .

66.3 (1) Where default is made in the performance of any provision in a consumer proposal, or where it appears to the court

(a) that the debtor was not eligible to make a consumer proposal when the consumer proposal was filed,

(b) that the consumer proposal cannot continue without injustice or undue delay, or

(c) that the approval of the court was obtained by fraud,

the court may, on application, with such notice as the court may direct to the consumer debtor and, if applicable, to the administrator and to the creditors, annul the consumer proposal.

(2) An order made under subsection (1) shall be made without prejudice to the validity of any sale, disposition of property or payment duly made, or anything duly done under or in pursuance of the consumer proposal, and notwithstanding the annulment of the consumer proposal, a guarantee given pursuant to the consumer proposal remains in full force and effect in accordance with its terms. . . .

66.32 (1) Unless the court otherwise orders, where a consumer proposal is annulled or deemed annulled, the consumer debtor

(a) may not make another consumer proposal, and

(b) is not entitled to any relief provided by sections 69 to 69.2

until all claims for which proofs of claim were filed and accepted are either paid in full or are extinguished by the operation of subsection 178(2).

(2) Where a consumer proposal is annulled or deemed annulled, the rights of the creditors are revived for the amount of their claims less any dividends received. . . .

66.38 Where a consumer proposal is fully performed, the administrator shall give a certificate to that effect, in the prescribed form, to the consumer debtor and to the official receiver.

. . .

69.2 (1) Subject to subsections 2(2) to (4) and sections 69.4 and 69.5 on the filing of a consumer proposal under subsection 66.13(2) or of an amendment to a consumer proposal under subsection 66.37(1) in respect of consumer debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy until the consumer proposal or the amended

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consumer proposal, as the case may be, has been

(a) fully performed; or

(b) withdrawn, refused, annulled or deemed annulled.

The following sections of the Income Tax Act are relevant:

Payment of Remainder

158. Where the Minister mails a notice of assessment of any amount payable by a taxpayer, that part of the amount assessed then remaining unpaid is payable forthwith by the taxpayer to the Receiver General. . . .

Debts to Her Majesty

222. Debts to Her Majesty. - All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

DISCUSSION

1.Was the Debtor eligible to make a consumer proposal?

Revenue Canada Taxation submits the debtor was not eligible to make a consumer proposal as the aggregate of his unsecured debts exceeded $75,000 on the date the consumer proposal was filed.

Revenue Canada Taxation says the debtor's income tax liability for 1992 was assessed after the date of the filing of the consumer proposal in the amount of $25,885.59 in respect of income earned in 1992, prior to the filing of the consumer proposal, and thus the debtor's unsecured liabilities on January 11, 1993 did exceed $75,000. In addition, the income tax liability of the debtor for 1990 and 1991 was also re-assessed after the date of filing this consumer proposal to include the income tax, interest and penalties arising from income earned in 1990 and 1991, and the debtor's unsecured liability under the Income Tax Act alone exceeded $75,000 on January 11, 1993 as the aggregate debt to Her Majesty the Queen existing in 1988, 1990, 1991 and 1992 was $92,819.87.

Revenue Canada Taxation relies on s. 222 of the Income Tax Act and ss. 152 and 158 of the Income Tax Act.

Associate Chief Justice Noel dealt with the issue of when tax liability exists in the case of R. v. Simard-Beaudry Inc. et al. (1971), 71 D.T.C. 5511 at 5515:

As to his second argument, namely that the debt arising from re-assessment of the taxpayer dates only from the time that the taxpayer is assessed, and that it did not accordingly, exist at the time the agreement was made, it seems to me that the answer to this is that the general scheme of the Income Tax Act indicates that the taxpayer's debt is created by his taxable income, not by an assessment or re-assessment. In fact, the taxpayer's liability results from the Act and not from the assessment. In principle, the debt comes into existence the moment the income is earned, and even if the assessment is made one or more years after the taxable income is earned, the debt is supposed to originate at that point. Here the re-assessments issued on August 14, 1969, for income earned in previous years seem to me to be at most a confirmation or acknowledgment of the amounts owing for these earlier years. Indeed, in my opinion, the assessment does not create the debt, but is at most a confirmation of its existence. . . .

Revenue Canada Taxation therefore submits the income tax debt of the debtor to Her Majesty the Queen existed in 1988, 1990,

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1991 and 1992 when the income that formed the subject matter of the tax was earned; and the aggregate amount of the unsecured debt to Her Majesty the Queen, being $92,819.87 exceeded $75,000 on the date the consumer proposal was filed and the debtor was therefore ineligible to file a consumer proposal on that date as the aggregate of his unsecured debts exceeded $75,000.

The debtor says he does not agree with the reassessment, and that he did not know he was ineligible at the time he made the proposal.

The time at which the claims of creditors must be determined is the date of the filing of the proposal (ss. 66.28(1) BIA) at which time the debtor was, based on his tax reassessment, ineligible to file a consumer proposal.

2.Can the proposal be annulled after full compliance with the proposal and the issuance of a certificate by the administrator?

The debtor submits that once there has been compliance with the terms of a proposal and the administrator has issued a certificate pursuant to ss. 66.38 there is nothing to annul.

Revenue Canada Taxation argues the Court has authority to annul a consumer proposal after a certificate of full performance has been issued and relies upon ss. 66.3(1) of the BIA. This section arguably provides authority to annul a consumer proposal and does not limit the authority of the Court to annulments prior to the issuance of a certificate of full performance, but instead provides annulment whenever a debtor was not eligible to make a consumer proposal.

In ss. 66.32(2) of the BIA it is provided that upon annulment of a consumer proposal creditors claims are "revived". If a debtor is released from his creditors' claims only upon the issuance of a certificate of full performance then annulment of a consumer proposal prior to issuance of a certificate of full performance would not require "revival" of creditors' claims. If a debtor is released from his creditors' claims only upon issuance of a certificate of full performance then an annulment subsequent thereto is contemplated by ss. 66.32(2) as creditors' claims are "revived".

The debtor says the filing of a proposal suspends the creditors' rights. If the proposal is annulled prior to the issuance of the proposal being fully performed and the issuance of the certificate, the rights of the creditors revive for the amount of their claims less any dividends received. The debtor submits s. 66.32(2) of the BIA does not provide any support for the proposition that a consumer proposal can be annulled after it has been fully performed and the certificate has been issued.

I do not agree. In my view ss. 66.3(1)(a) is very clear in providing authority to the Court, without limitation, to annul a consumer proposal if the debtor was not eligible to make a consumer proposal when the consumer proposal was filed. It cannot depend on how long the debtor's true financial affairs are unknown whether due to any advertent or inadvertent actions on the part of the debtor or others.

3.If so, is this a proper case for annulment?

The Court is given discretionary power to annul consumer proposals by s. 66.3(1) of the BIA. The principles on which judicial discretion is exercised in cases involving the annulment of commercial proposals were considered in Gavex, A Resource Corp., Re

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(1989), 77 C.B.R. (N.S.) 102 (B.C.S.C.) and T.E. Quinn Truck Lines Ltd., Re (1987), 64 C.B.R. (N.S.) 255 (Ont. S.C.).

In Gavex, A Resource Corp., supra, it was noted that the authority to annul a proposal is discretionary and that judicial discretion must be exercised in light of ss. 63(4) of the BIA which provides that upon annulment of a commercial proposal the debtor is automatically bankrupt. Lander J. at p. 107 of his decision then adopted and applied the principle quoted in T.E. Quinn Truck Lines Ltd., supra, at p. 259 from Halsbury's Laws of England (4th) Vol. 3, p. 250, para. 437 respecting the exercise of judicial discretion:
However, the court will not, in the absence of fraud, exercise the power of adjudging the debtor bankrupt, if it can see plainly that the creditors can gain nothing by it; but it will do so if there is a probability of gain for them.

Unlike the annulment of a commercial proposal, annulment of a consumer proposal does not automatically result in bankruptcy for, by virtue of s. 66.4, all provisions of the BIA, except Division I of Part III, (including ss. 63(4)) apply to consumer proposals. Section 66.4 provides as follows:
66.4 All the provisions of this Act, except Division I of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to consumer proposals.
Therefore, Revenue Canada Taxation argues different principles ought to apply in respect of the exercise of judicial discretion to annul consumer proposals as bankruptcy is not the automatic result.

Revenue Canada Taxation argues the debtor is largely in the same position after annulment as before except he would not be eligible to file another consumer proposal or be entitled to the benefit of the stay of proceedings in ss. 69 to 69.2 of the BIA unless by virtue of ss. 66.32(1) the Court ordered otherwise.

Revenue Canada Taxation says the creditors relied upon the accuracy of the documents filed by the debtor at the time of the proposal. It further argues that by the time the debtor filed his 1992 income tax return on April 30, 1993, the time for requesting a meeting of creditors or having the consumer proposal reviewed by the Court had already expired since the consumer proposal was deemed to be approved by the Court on March 23, 1993.

The debtor says that ss. 66.13(3) provides that the administrator shall not file a consumer proposal if it has reason to believe that the debtor is not eligible to make a consumer proposal. At the time of filing, there was no reason to believe that the debtor was not eligible. His known liabilities were less than $75,000. His liability to Revenue Canada Taxation was disclosed in an amount greater than the proof of claim originally filed by Revenue Canada Taxation because he included an estimate of his taxes for the 1992 taxation year.

The debtor says even where there has been non-compliance with the terms of a proposal, the courts have been reluctant to annul the proposal unless there is reason to believe that the unsecured creditors will gain as a result of the annulment. Here the only evidence on that issue comes from the debtor who says if the proposal is annulled he will be forced to make an assignment in bankruptcy.

The debtor submits the following considerations are relevant in determining whether to exercise my discretion to annul the proposal:

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(1) The debtor did not file a proposal knowing he was ineligible to file the proposal;
(2) The debtor has satisfied the terms of the proposal which all of the creditors were deemed to have accepted;
(3) On June 1, 1993, facts were within the knowledge of Revenue Canada Taxation indicating that the debtor was ineligible to make a consumer proposal, yet it raised no objection and took no steps to annul the proposal for a full nine months;
(4) Revenue Canada Taxation, after the facts were within its knowledge, allowed the debtor to continue to make payments under the proposal, and received the benefit of these payments in the form of a final dividend;
(5) Revenue Canada Taxation waited until after the certificate of compliance had been issued before taking any steps to annul the proposal.

The function of a court sitting in bankruptcy and insolvency matters is to take into account the interests of a debtor and his creditors and balance their interests while maintaining the integrity and confidence of the public.

The largest single unsecured creditor of the debtor is Her Majesty the Queen for arrears of income tax. In Katari, Re (1989), 74 C.B.R. (N.S.) 178 (Ont. S.C.) Granger J. characterized income tax debts by stating at pp. 183 and 184:

In my opinion, arrears of income tax are in a different category than other debts. Such arrears represent moneys which the bankrupt was obliged by law to forward to Revenue Canada Taxation, and as a result of the bankrupt's failure to carry out his duty he has made an assignment in bankruptcy and now seeks a discharge from such bankruptcy. The majority of Canadian citizens pay their tax when due and as a result have substantially less money available for the purchase of goods and services. The bankrupt in this case was able to retain the moneys which rightfully belonged to Revenue Canada and to enjoy the goods and services which such moneys provided.

I agree with the views expressed by Granger J. However, in the circumstances of this case I do not feel it is an appropriate case in which to annul the consumer proposal given the actions of Revenue Canada Taxation. I accept that the debtor did not know he was ineligible at the time of making the proposal. He has completed all his requirements pursuant to the proposal and has received the certificate of compliance from the administrator. I am not satisfied any benefit will accrue to the unsecured creditors if the proposal were to be annulled, based on the debtor's belief he will be forced to make an assignment in bankruptcy if the proposal were to be annulled.

Accordingly, on the evidence before me and in the exercise of my discretion, I decline to annul the consumer proposal of the debtor and the application by Revenue Canada Taxation is dismissed with costs to the debtor.

J.

Consumer Proposal of Sally Teresa Wiggins, (Re), 2003 CanLII 15976 (ON SC) - An Instance of Annulment When Lack of Fee Payment and Ct.'s Jurisdiction to Waive

Date: 2003-09-18

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Docket: 31-388321
Parallel citations: 67 OR (3d) 133; 50 CBR (4th) 306
URL: http://canlii.ca/t/5vbp
Citation: Consumer Proposal of Sally Teresa Wiggins, (Re), 2003 CanLII 15976 (ON SC), <http://canlii.ca/t/5vbp> retrieved on 2013-09-13
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COURT FILE NO.: 31-388321
DATE: 20030918
ONTARIO

SUPERIOR COURT OF JUSTICE

IN BANKRUPCY AND INSOLVENCY

RE: IN THE MATTER OF the Consumer Proposal of Sally Teresa Wiggins
BEFORE: Swinton J.
COUNSEL: Sanjeev P.R. Mitra for the Administrator
Valerie Anderson for the Superintendent of Bankruptcy

HEARD: September 16, 2003
ENDORSEMENT

[1] The Administrator of the Consumer Proposal of Sally Teresa Wiggins and other individuals listed in Schedules A, B and C of the Motion Record sought a declaration that this Court has the inherent jurisdiction to waive default in a consumer proposal more than three months following the default and for other relief.

[2] Section 66.31(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended, provides:

> **Independently of section 66.3,**
> **(a) where payments under a consumer proposal are to be made monthly or more frequently and the consumer debtor is in default to the extent of three months payments, or**
> **(b) where payments under a consumer proposal are to be made less frequently than monthly and the consumer debtor is in default for more than three months on any payment,**
> **the consumer proposal shall thereupon be deemed to be annulled unless the court has previously ordered otherwise or unless an amendment to the consumer proposal has previously been filed, and the administrator shall forthwith so inform the creditors and file a report thereof in the prescribed form with the official receiver.**

[3] In this case, Ms. Wiggins failed to make payments for three months. She then resumed payments and made up the arrears. However, pursuant to s. 66.3(1), her consumer proposal was deemed annulled. Nevertheless, the Administrator allowed her to pay the arrears and has continued to make distributions to creditors as if the consumer proposal remained in effect.

[4] Mr. Justice Ground approved the omnibus procedure for this motion, which groups individuals like Ms. Wiggins in Schedule A and seeks an order waiving the default and setting aside the deemed annulment. Schedule B includes individuals who were in arrears over three months and who are making progress to make up the arrears. The Administrator seeks an order of waiver of the default, the setting aside of the deemed annulment and filing of an amended proposal, or the granting of leave to file a second consumer proposal. Finally, Schedule C consists of individuals who were in arrears over three months and who made unsuccessful attempts to catch up. An order is sought with respect to the distribution of funds held by the Administrator which were received after the deemed annulment.

[5] Decisions of the Registrar in both Nova Scotia and Ontario have held that there is no specific authority under the *BIA* to allow a court to waive the default by the debtor following the deemed annulment of a consumer proposal (*Re Schrader* reflex, (1999), 13 C.B.R. (4th) 256 (N.S. Reg.); *Re Dziewiacien* reflex, (2002), 37 C.B.R. (4th) 250 (Ont. Reg.)). Deputy Registrar Nettie in *Re Dziewiacien* held that s. 187(11) of the Act does not permit the court to extend a time period in the Act where there has been an intervening statutory event consequent upon default. That decision was not appealed.

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[6] Section 183(1) of the Act vests the Superior Court of Justice in Ontario and the named courts in other jurisdictions with "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy". The Administrator argued that this section confers inherent jurisdiction on this Court, which should be exercised in this case to waive the default and set aside the deemed annulment under the Act for debtors in Schedule A and B. Counsel for the Superintendent agreed with this position, based on the facts before me in this motion.

[7] The Bankruptcy Court may authorize and sanction acts required to be done by a trustee for the due administration and protection of the bankrupt estate, even though there is no specific provision in the Act (*Re Tlustie* (1923), 3 C.B.R. 654 (Ont. Reg.)). However, inherent jurisdiction can not be exercised if the exercise conflicts with the provisions of the Act (*Wasserman Arsenault Ltd. v. Sone* 2000 CanLII 22507 (ON SC), (2000), 22 C.B.R. (4th) 153 (Ont. S.C.J.), aff'd 2002 CanLII 41494 (ON CA), (2000), 33 C.B.R. (4th) 145 (Ont. C.A.)). Here, s. 66.31 deals specifically with what follows if the consumer debtor is in default in payments for three months: the consumer proposal is deemed annulled unless the court has ordered otherwise or unless an amendment to the proposal has been filed *before* the three month period expires.

[8] In my view, there is no inherent jurisdiction to waive a default like that of Ms. Wiggins and to set aside the deemed annulment of her consumer proposal, given the express terms of the Act. While Ontario courts may have granted the relief sought in this motion prior to the decision in *Re Dziewiacien*, in my view, they had no inherent jurisdiction to do so.

[9] Given that individuals like Ms. Wiggins and those in Schedule A have continued to make payments as if the consumer proposal were still in effect, and the Administrator has continued to make distributions, leave is given to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2. Given the payment history since the default, it appears that there is a reasonable prospect of the new proposal being accepted by the creditors.

[10] Given the history of the Schedule B debtors, I also grant leave to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2 for the same reason.

[11] With respect to Schedule C, the Administrator has asked for directions with respect to the distribution of funds which it received after the deemed annulment. According to *Re White* 2002 CanLII 25275 (NS SC), (2001), 31 C.B.R. (4th) 128 (N.S. Reg.), those funds should be distributed to the creditors.

Released: September , 2003

Swinton J.

Re Newsham (Consumer Proposal), 2003 ABQB 930 (CanLII) - Possible to Have Proposal Annulled Due to Non-Performance

Date:	2003-11-18
Docket:	66449
Parallel citations:	48 CBR (4th) 121
URL:	http://canlii.ca/t/1r8
Citation:	Re Newsham (Consumer Proposal), 2003 ABQB 930 (CanLII), <http://canlii.ca/t/1r8> retrieved on 2013-09-24
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Reflex Record	Related decisions, legislation cited and decisions cited

Court of Queen's Bench of Alberta
Citation: Re Newsham (Consumer Proposal) , 2003 ABQB 930

Date: 20031118
Docket: 066449
Registry: Calgary

In the Matter of the Proposal
Of
Keith Ryan Newsham

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Memorandum of Decision
of
K. R. Laycock, Registrar in Bankruptcy

[1] On April 7th, 1999 the debtor filed a Consumer Proposal with the Official Receiver's Office. The statement of affairs disclosed assets of $2,650.00 and lists as creditors, the Brick for $3,000.00 and Revenue Canada Taxation for $24,000.00.

[2] Paragraph 5 of the proposal required the debtor to pay $500.00 upon filing the proposal and paying to the administrator $300.00 per month commencing May 15th, 1999 and continuing for 36 months for a total of $11,300.00.

[3] Paragraph 7 stated:

> The debtor further agrees that during the course of the proposal he will:
> (a) remit current year installment payments of individual tax and file income tax returns as required by the Income Tax Act.
> (b) remit current GST payments and file GST returns as required by the Excise Tax Act.

[4] The Consumer Proposal was forwarded to the creditors and deemed accepted pursuant to the Bankruptcy & Insolvency Act, section 66.18(1).

[5] The periodic payments required by the proposal have been made, however the debtor has failed to file income tax and GST returns for 2002. When he made his last proposal payment to the Administrator, he was in default in paying $479.00 for his 2001 income tax, he failed to file his 2001 GST return and failed to pay his March and June 2002 quarterly installment, each in the amount of $1100.00.

[6] The trustee has filed an affidavit stating that both he and Canada Customs and Revenue Agency have on various occasions demanded that his 2002 tax return and GST returns be filed and that any amounts payable be remitted. Notice of this application and the trustee's affidavit have been served on Mr. Newsham.

[7] The Bankruptcy & Insolvency Act allows or requires a proposal to be annulled or deemed annulled for non-compliance with the proposal or the Act. The trustee's application for an order annulling the proposal is made pursuant to section 66.3(1) which states:

> **Where default is made in the performance of any provision in a consumer proposal, or where it appears to the court**
> **(a) that the debtor was not eligible to make a consumer proposal when the consumer proposal was filed,**
> **(b) that the consumer proposal cannot continue without injustice or undue delay, or**
> **(c) that the approval of the court was obtained by fraud,**
> **the court may, on application, with such notice as the court may direct to the consumer debtor and, if applicable, to the administrator and to the creditors, annul the consumer proposal.**

[8] The Act encourages debtors to make proposals before considering bankruptcy as an option (section 173(1)(n)). Consumer proposals often result in the distribution of more funds to creditors then would normally occur in a bankruptcy. Consumer proposals permit the affairs to be dealt with quickly, efficiently and with a minimum of administration and expense.

[9] On an application to annul a consumer proposal the court is not required to annul the proposal for default in the performance of provisions in the consumer proposal. The court is vested with a discretion. The nature and extent of the default and the importance of the default to the integrity of the proposal must be considered.

[10]What some debtors fail to appreciate is that the process of bankruptcy, or arrangements with creditors through proposals is a learning process. In bankruptcy the debtor is required to attend two counselling sessions. A recognition of the cause of bankruptcy and the prevention of a repeat bankruptcy is a necessary ingredient of counselling. Budget preparation and the proper use of credit cards must be an important component of most counselling sessions. Because of the rise in second, third and fourth time bankruptcies, counselling to avoid repeat assignments is viewed by the courts as an important and necessary ingredient in the process.

[11]There are no mandatory counselling provisions for a consumer proposal. It is however necessary for the debtor to recognize the cause of the problem and avoid a repeat use of the bankruptcy and insolvency provisions. Mr. Newsham's primary creditor was the federal tax authorities. His proposal included a material provision for compliance with Canada's tax laws during the currency of the proposal. CCRA filed the only proof of claim filed in the proposal. They are keenly interested in Mr. Newsham learning from the process by requiring that he file all necessary returns and make his tax

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payments. The concept of payment has an element of mandatory budgeting or setting aside of funds to pay anticipated tax at year end.
[12]While payment of the funds under the proposal is an important ingredient, the failure of Mr. Newsham to file his income tax and GST returns for 2002 can not be considered a minor non-compliance.
[13]Mr. Newsham has failed to file an affidavit or appear on the application to explain his non-compliance.
[14]Recognizing the importance of compliance with the terms of the proposal, it is also recognized that there are advantages to the debtor and CCRA in completion of this proposal. CCRA will receive required income tax and GST returns and the debtor will be released from tax debts arising prior to the filing of the proposal. If the proposal is annulled the administrator will distribute the funds received by him and CCRA will be allowed to pursue the balance of the unpaid income tax plus interest thereon. In my view, the court under section 66.3 has more than two options. The court is not bound to either to annul a proposal or forgive the non-compliance. The court should encourage or require compliance before annulling the proposal.
[15]It is therefore ordered that Mr. Newsham file his 2002 income tax and GST returns within 45 days of being served with this decision. It is a further provision that Mr. Newsham shall pay any income tax or GST amounts within 90 days of the issuance by CCRA of any assessment or re-assessment notice. In default of either of these conditions the proposal shall forthwith be annulled.

Heard on the 05th day of November, 2003.
Dated at the City of Calgary, Alberta this 18th day of November, 2003.

K. R. Laycock
Registrar in Bankruptcy

Appearances:
Jack Cameron
(Cameron Okolita Inc.)
For the Applicant

Validity of things done - Sec. 66.3(2)
(2) An order made under subsection (1) shall be made without prejudice to the validity of any sale, disposition of property or payment duly made, or anything duly done under or in pursuance of the consumer proposal, and notwithstanding the annulment of the consumer proposal, a guarantee given pursuant to the consumer proposal remains in full force and effect in accordance with its terms.

Annulment for offence - Sec. 66.3(3)
(3) A consumer proposal, although accepted or approved, may be annulled by order of the court at the request of the administrator or of any creditor whenever the consumer debtor is afterwards convicted of any offence under this Act.

Notification of annulment - Sec. 66.3(4)
(4) Where an order annulling the consumer proposal of a consumer debtor who is not a bankrupt has been made pursuant to this section, the administrator shall forthwith so inform the creditors and file a report thereof in the prescribed form with the official receiver.

Annulment effect - Sec. 66.3(5)
(5) Where a consumer proposal made by a bankrupt is annulled,
(a) the consumer debtor is deemed on the annulment to have made an assignment and the order annulling the proposal shall so state;

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(b) the trustee who is the administrator of the proposal shall, within five days after the order is made, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another trustee in lieu of that trustee; and

(c) the trustee shall forthwith file a report thereof in the prescribed form with the official receiver, who shall thereupon issue a certificate of assignment in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed pursuant to section 49.

1992, c. 27, s. 32;
1997, c. 12, s. 56.

Deemed annulment — default of payment - Sec. 66.31

66.31 (1) Unless the court has previously ordered otherwise or unless an amendment to the consumer proposal has previously been filed, a consumer proposal is deemed to be annulled on

(a) in the case when payments under the consumer proposal are to be made monthly or more frequently, the day on which the consumer debtor is in default for an amount that is equal to or more than the amount of three payments; or

(b) in the case when payments under the consumer proposal are to be made less frequently than monthly, the day that is three months after the day on which the consumer debtor is in default in respect of any payment.

Bankruptcy of Williams, 2005 BCSC 108 (CanLII) - A Problematic Term of Consumer Proposal

Date:	2005-01-27
Docket:	B0523783
Parallel citations:	10 CBR (5th) 300
URL:	http://canlii.ca/t/1jpht
Citation:	Bankruptcy of Williams, 2005 BCSC 108 (CanLII), <http://canlii.ca/t/1jpht> retrieved on 2013-09-24
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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Bankruptcy of Williams* 2005 BCSC 108**

Date: 20050127
Docket: B0523783

Registry: Prince George

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IN BANKRUPTCY
IN THE MATTER OF THE PROPOSAL
OF BONNIE WILLIAMS

DECISION OF
MASTER BAKER
AS REGISTRAR

Counsel for the Trustee:	J. Christiansen
Date and Place of Hearing:	January 24, 2005 Prince George, BC

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ISSUE

[1] Mr. Hagen, the administrator / trustee ("the Trustee") for Ms. Williams, seeks a declaration that a particular term of a consumer proposal is valid and permissible. That term is:

> **10(b) In the absence of appointed Inspectors the Administrator of this Consumer Proposal shall have the power to extend the time for the making of any payment required to be made pursuant to this Proposal provided that no such extension shall extend beyond the five years following the approval of this Proposal by the Court;**

[2] Apparently this term's inclusion in the proposal concerns the Office of the Superintendent of Bankruptcy Canada, whose representatives advised Mr. Hagen, the Trustee, that they did not consider it an appropriate inclusion in a consumer proposal. Interestingly, however, the Superintendent's formal position, as stated in a letter to the Trustee's counsel, Mr. Christiansen, is that "...the Superintendent intends to take no position in respect of the application which is currently before the Court." Mr. Christiansen was therefore in the interesting position of placing all perspectives and all arguments, both for and against the term, before the court.

ANALYSIS

[3] The Bankruptcy and Insolvency Act[1] (the *Act*) imposes two important chronologies upon consumer proposals; the proposal must be completed within five years[2] and a default in any payments required by the proposal for three consecutive months results in a deemed annulment of the proposal[3]. A deemed annulment in a consumer proposal does not, as with conventional proposals, result automatically in bankruptcy. Rather, the party simply reverts to his/her pre-proposal circumstance, and creditors may pursue their remedies unhindered by the *Act*.

[4] Swinton J. of the Ontario Superior Court considered the effect of s. 66.31 in ***Re Wiggins[4]***. Ms. Wiggins' situation is precisely the situation and statutory result that Mr. Hagen's term attempts to avoid; after Ms. Wiggins failed for three months to make her payments, her proposal was deemed annulled. Despite her deemed annulment, however, Ms. Wiggins' administrator "...allowed her to pay the arrears and has continued to make distributions to creditors as if the consumer proposal remained in effect."[5]

[5] After noting that the BIA contains no specific authority permitting the court to waive default after a deemed annulment, Swinton J. concluded[6] that neither does the court have any inherent jurisdiction to waive default once the proposal is deemed annulled. Simply put, any application to waive default or to amend the proposal must be done *before* the three month period expires.

[6] It is interesting to note that, despite this black letter law statement, the Superintendent issued a "Position Statement" in May of 2004 which recognized the potential difficulties for consumer proposals that ***Wiggins*** noted. The Superintendent therefore instructed Trustees that:

> If, despite the deemed annulment of a proposal, the debtor has fully satisfied his or her financial obligations under the proposal prior to the administrator / trustee taking the actions prescribed by section 66.31, the administrator / trustee must forthwith issue a Certificate of Full Performance.

In other words, Trustees were directed by the Superintendent to ignore the clear effect and direction given by ***Wiggins***. The Superintendent's directive, apparently, was meant as a temporary solution to address possible inequities created by s. 66.31, and was to apply for 30 days, after which the Superintendent "...will insist on the rigorous application of section 66.31." It is hard to see how such a directive and consequent Certificate could withstand a challenge by, say, a creditor. Still, it points to the Superintendent's justifiable concern (in my view) that the deemed annulment aspect of s. 66.31 can have mischievous effects. The Superintendent gave further directions as to how Trustees were to treat deemed annulments if the debtor had resumed payments after a deemed annulment, but had not yet completed all required payments.

[7] It is also interesting to note that the Superintendent, following on ss. 5(4)(e) and 66.13(2) of the ***Act*** has prescribed Form 47 for use in Consumer Proposals, para. 6(a)(i) of which provides:

> The creditors may appoint up to three inspectors responsible for the consumer proposal of the consumer debtor. The inspectors may have, in addition to any powers of inspectors under the Act, the power to
> (i) receive any notice of default in the performance of a provision of the consumer proposal and waive any such default
> (Emphasis added)

As this form and its term imply, an attempt is made to fill a gap in the ***Act***: there is no authority in the ***Act*** for inspectors in a Consumer Proposal to waive default. Mr. Christiansen points to the irony of the Superintendent promulgating a form which gives inspectors rights that the ***Act*** does not, while disagreeing with an analogous term respecting Trustees.

[8] Other authorities should be noted at this point. The authors of *Bankruptcy & Insolvency Law of Canada[7]* state:

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> There can be a variety of plans put forward in a proposal. The only limits are the ingenuity of the draftsman and the necessity for finding terms which will be acceptable to creditors.

As well, in ***Re McManus[8]***, Low J., of the Supreme Court of British Columbia, concluded (albeit in respect of a proposal that was not a Consumer Proposal):

> Section 62(1) requires the trustee to file a copy of the proposal with the official receiver. It does not give the official receiver any discretion to refuse to accept it. It is nothing more than a procedural notice requirement. I can find nothing in the *Act* that gives the official receiver any control over the content of the proposal. Whether the proposal is legally valid and reasonable are judicial determinations which fall to the court under s. 59, not to the official receiver under s. 62(1).

These comments, taken together, in my view permit the Trustee and the debtor a great deal of flexibility in crafting a Consumer Proposal, the only limitation being that the proposed terms not offend or violate the terms of the ***Act***. Moreover, the Superintendent's standing to question the legality of such terms is very limited.

[9] The Superintendent's representatives advised Mr. Hagen that, in addition to there being no authority in the ***Act*** for the inclusion of the impugned term, the Superintendent considered that the term created a conflict of interest for the Trustee. One assumes that the possible conflict arises from the Trustee's entitlement to a fee for his / her services, payment of which is given priority by s. 66.26(1). As Mr. Christiansen pointed out in argument, Trustees constantly balance rights, including, to a degree, theirs, in administering estates. Moreover, it is hard to see how the Trustee's rights might bear unduly on a decision to waive default; in waiving default and extending the time for completion of the proposal the Trustee would, presumably, wait for payment of his / her fee in the same manner that creditors await payment.

CONCLUSION

[10] I cannot, therefore, see how the impugned term offends, or is prohibited by, the ***Act***. Its inclusion seems, with respect, aimed at the general purpose of insolvency legislation, namely to assist well intentioned but unfortunate debtors in ameliorating or rehabilitating their financial circumstances. While the specific authority for the provision is not found in the ***Act***, the term is as reasonable and useful as the analogous provision suggested by the Superintendent in the promulgation of Form 47. Finally, the term comes well within the ambit of the observations of Houlden and Morowitz, above, at para. 8. The term is therefore a valid, permissible, and binding term for inclusion in Consumer Proposals.

[11] The Trustee is entitled to his costs of this application, paid from the estate as requested.

"Master D. Baker as Registrar"

---

[1] R.S.C. 1992, c. 27, as amended
[2] s. 66.12(5)
[3] s. 66.31
[4] 2003 CanLII 15976 (ON SC), (2003), 50 C.B.R. (4th) 306
[5] at para. 3
[6] at para. 8
[7] Houlden and Morowitz 3rd ed. Thomson and Carswell at E3(1), p. 2-125
[8] reflex, (1993) 16 C.B.R. (3d) 6 at p.9

Consumer Proposal of Sally Teresa Wiggins, (Re), 2003 CanLII 15976 (ON SC) Ct. Considers Deemed Annulled though Continuing Proposals

Date:	2003-09-18
Docket:	31-388321
Parallel citations:	67 OR (3d) 133; 50 CBR (4th) 306
URL:	http://canlii.ca/t/5vbp
Citation:	Consumer Proposal of Sally Teresa Wiggins, (Re), 2003 CanLII 15976 (ON SC), <http://canlii.ca/t/5vbp> retrieved on 2013-09-24
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COURT FILE NO.: 31-388321
DATE: 20030918
ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPCY AND INSOLVENCY
RE: IN THE MATTER OF the Consumer Proposal of Sally Teresa Wiggins
BEFORE: Swinton J.
COUNSEL: Sanjeev P.R. Mitra for the Administrator
Valerie Anderson for the Superintendent of Bankruptcy

HEARD: September 16, 2003
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the consumer proposal shall thereupon be deemed to be annulled unless the court has previously ordered otherwise or unless an amendment to the consumer proposal has previously been filed, and the administrator shall forthwith so inform the creditors and file a report thereof in the prescribed form with the official receiver.

[3] In this case, Ms. Wiggins failed to make payments for three months. She then resumed payments and made up the arrears. However, pursuant to s. 66.3(1), her consumer proposal was deemed annulled. Nevertheless, the Administrator allowed her to pay the arrears and has continued to make distributions to creditors as if the consumer proposal remained in effect.

[4] Mr. Justice Ground approved the omnibus procedure for this motion, which groups individuals like Ms. Wiggins in Schedule A and seeks an order waiving the default and setting aside the deemed annulment. Schedule B includes individuals who were in arrears over three months and who are making progress to make up the arrears. The Administrator seeks an order of waiver of the default, the setting aside of the deemed annulment and filing of an amended proposal, or the granting of leave to file a second consumer proposal. Finally, Schedule C consists of individuals who were in arrears over three months and who made unsuccessful attempts to catch up. An order is sought with respect to the distribution of funds held by the Administrator which were received after the deemed annulment.

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[8] In my view, there is no inherent jurisdiction to waive a default like that of Ms. Wiggins and to set aside the deemed annulment of her consumer proposal, given the express terms of the Act. While Ontario courts may have granted the relief sought in this motion prior to the decision in *Re Dziewiacien*, in my view, they had no inherent jurisdiction to do so.

[9] Given that individuals like Ms. Wiggins and those in Schedule A have continued to make payments as if the consumer proposal were still in effect, and the Administrator has continued to make distributions, leave is given to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2. Given the payment history since the default, it appears that there is a reasonable prospect of the new proposal being accepted by the creditors.

[10] Given the history of the Schedule B debtors, I also grant leave to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2 for the same reason.

[11] With respect to Schedule C, the Administrator has asked for directions with respect to the distribution of funds which it received after the deemed annulment. According to *Re White* 2002 CanLII 25275 (NS SC), (2001), 31 C.B.R. (4th) 128 (N.S. Reg.), those funds should be distributed to the creditors.

Released: September , 2003

Swinton J.

Deemed annulment — amendment withdrawn or refused - Sec. 66.31(2)

(2) If an amendment to a consumer proposal filed before the deemed annulment of the consumer proposal under subsection (1) is withdrawn or refused by the creditors or the court, the consumer proposal is deemed to be annulled at the time that the amendment is withdrawn or refused.

Duties of administrator in relation to deemed annulment - Sec. 66.31(3)

(3) Without delay after a consumer proposal is deemed to be annulled, the administrator shall

(a) file with the official receiver a report in the prescribed form in relation to the deemed annulment; and

(b) send a notice to the creditors informing them of the deemed annulment.

Effects of deemed annulment — consumer proposal made by a bankrupt - Sec. 66.31(4)

(4) If a consumer proposal made by a bankrupt is deemed to be annulled,

(a) the consumer debtor is deemed to have made an assignment on the day on which the consumer proposal is deemed to be annulled;

(b) the trustee who is the administrator of the consumer proposal shall, within five days after the day on which the consumer proposal is deemed to be annulled, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, despite section 14, affirm the appointment of the trustee or appoint another trustee in lieu of that trustee; and

(c) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed annulment and the official receiver shall, without delay, issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49.

Validity of things done before deemed annulment - Sec. 66.31(5)

(5) A deemed annulment of a consumer proposal does not prejudice the validity of any sale or disposition of property or payment duly made, or anything duly done under or in pursuance of the consumer proposal and, despite the deemed annulment, a guarantee given under the consumer proposal remains in full force and effect in accordance with its terms.

Notice of possibility of consumer proposal being automatically revived - Sec. 66.31(6)

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(6) In the case of a deemed annulment of a consumer proposal made by a person other than a bankrupt, if the administrator considers it appropriate to do so in the circumstances, he or she may, with notice to the official receiver, send to the creditors — within 30 days, or any other number of days that is prescribed, after the day on which the consumer proposal was deemed to be annulled — a notice in the prescribed form informing them that the consumer proposal will be automatically revived 60 days, or any other number of days that is prescribed, after the day on which it was deemed to be annulled unless one of them files with the administrator, in the prescribed manner, a notice of objection to the revival.

Automatic revival - Sec. 66.31(7)
(7) If the notice is sent by the administrator and no notice of objection is filed during the period referred to in subsection (6), the consumer proposal is automatically revived on the expiry of that period.

Notice if no automatic revival - Sec. 66.31(8)
(8) If a notice of objection is filed during the period referred to in subsection (6), the administrator is to send, without delay, to the official receiver and to each creditor a notice in the prescribed form informing them that the consumer proposal is not going to be automatically revived on the expiry of that period.

Administrator may apply to court to revive consumer proposal - Sec. 66.31(9)
(9) The administrator may at any time apply to the court, with notice to the official receiver and the creditors, for an order reviving any consumer proposal of a consumer debtor who is not a bankrupt that was deemed to be annulled, and the court, if it considers it appropriate to do so in the circumstances, may make an order reviving the consumer proposal, on any terms that the court considers appropriate.

Duty of administrator if consumer proposal is revived - Sec. 66.31(10)
(10) Without delay after a consumer proposal is revived, the administrator shall
(a) file with the official receiver a report in the prescribed form in relation to the revival; and
(b) send a notice to the creditors informing them of the revival.

Validity of things done before revival - Sec. 66.31(11)
(11) The revival of a consumer proposal does not prejudice the validity of anything duly done — between the day on which the consumer proposal is deemed to be annulled and the day on which it is revived — by a creditor in the exercise of any rights revived by subsection 66.32(2).
1992, c. 27, s. 32;
2005, c. 47, s. 52;
2007, c. 36, s. 30.

Effects of annulment - Sec. 66.32
66.32 (1) Unless the court otherwise orders, where a consumer proposal is annulled or deemed annulled, the consumer debtor
(a) may not make another consumer proposal, and
(b) is not entitled to any relief provided by sections 69 to 69.2

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until all claims for which proofs of claim were filed and accepted are either paid in full or are extinguished by the operation of subsection 178(2).

Idem - Sec. 66.32(2)
(2) Where a consumer proposal is annulled or deemed annulled, the rights of the creditors are revived for the amount of their claims less any dividends received.
1992, c. 27, s. 32;
2005, c. 47, s. 53(F).

66.33 [Repealed, 2005, c. 47, s. 54]

Certain rights limited - Sec. 66.34
66.34 (1) If a consumer proposal has been filed in respect of a consumer debtor, no person may terminate or amend any agreement, including a security agreement, with the consumer debtor, or claim an accelerated payment, or the forfeiture of the term, under any agreement, including a security agreement, with the consumer debtor, by reason only that

(a) the consumer debtor is insolvent, or

(b) a consumer proposal has been filed in respect of the consumer debtor

until the consumer proposal has been withdrawn, refused by the creditors or the court, annulled or deemed annulled.

Idem - Sec. 66.34(2)
(2) Where the agreement referred to in subsection (1) is a lease, subsection (1) shall be read as including the following paragraph:

"(c) the consumer debtor has not paid rent in respect of a period preceding the filing of the consumer proposal."

Idem - Sec. 66.34(3)
(3) Where a consumer proposal has been filed in respect of a consumer debtor, no public utility may discontinue service to that consumer debtor by reason only that

(a) the consumer debtor is insolvent,

(b) a consumer proposal has been filed in respect of the consumer debtor, or

(c) the consumer debtor has not paid for services rendered, or material provided, before the filing of the consumer proposal

until the consumer proposal has been withdrawn, refused by the creditors or the court, annulled or deemed annulled.

Certain acts not prevented - Sec. 66.34(4)
(4) Nothing in subsections (1) to (3) shall be construed

(a) as prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the filing of the consumer proposal; or

(b) as requiring the further advance of money or credit.

Provisions of section override agreement - Sec. 66.34(5)

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(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

Powers of court - Sec. 66.34(6)
(6) The court may, on application by a party to an agreement or by a public utility, declare that this section does not apply, or applies only to the extent declared by the court, where the applicant satisfies the court that the operation of this section would likely cause it significant financial hardship.

Eligible financial contracts - Sec. 66.34(7)
(7) Subsection (1) does not apply in respect of an eligible financial contract.

Permitted actions - Sec. 66.34(8)
(8) Despite section 69.2, the following actions are permitted in respect of an eligible financial contract that is entered into before the filing of a consumer proposal and is terminated on or after that filing, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the consumer debtor and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Net termination values - Sec. 66.34(9)
(9) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the consumer debtor to another party to the eligible financial contract, that other party is deemed, for the purposes of subsection 69.2(1), to be a creditor of the consumer debtor with a claim provable in bankruptcy in respect of those net termination values.
1992, c. 27, s. 32;
2004, c. 25, s. 42(E);
2005, c. 47, s. 55;
2007, c. 29, s. 94.

Assignment of wages - Sec. 66.35
66.35 (1) An assignment of existing or future wages made by a consumer debtor before the filing of a consumer proposal is of no effect in respect of wages earned after the filing of the consumer proposal.

Assignment of debts at request of administrator - Sec. 66.35(2)
(2) In order to ensure compliance with the terms of a consumer proposal, the administrator may, at any time after the consumer proposal is filed, require of, and take from, the consumer debtor an assignment of any amount payable to the consumer debtor, including wages, that may become payable in the future, but no such assignment can, unless the consumer debtor agrees, be for an amount greater than is due and payable pursuant to the terms of the consumer proposal.

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Third parties protected - Sec. 66.35(3)
(3) An assignment made pursuant to subsection (2) is of no effect against a person owing the amount payable until a notice of the assignment is served on that person.

When section ceases to apply - Sec. 66.35(4)
(4) This section ceases to apply where the consumer proposal is refused by the creditors or by the court, or is withdrawn, annulled or deemed annulled.
1992, c. 27, s. 32;
1997, c. 12, s. 57.

No dismissal, etc., of employee - Sec. 66.36
66.36 No employer shall dismiss, suspend, lay off or otherwise discipline a consumer debtor on the sole ground that a consumer proposal has been filed in respect of that consumer debtor.
1992, c. 27, s. 32.

Amendment to consumer proposal - Sec. 66.37
66.37 If an administrator files an amendment to a consumer proposal before the withdrawal, refusal, approval or deemed approval by the court of the consumer proposal, or after the approval or deemed approval by the court of the consumer proposal and before it has been fully performed or annulled or deemed annulled, the provisions of this Division apply to the consumer proposal and the amended consumer proposal, with any modifications that the circumstances require, and, for that purpose, the definition "consumer debtor" in section 66.11 is to be read as follows:

"consumer debtor"
"consumer debtor" means an individual who is insolvent;
1992, c. 27, s. 32;
2005, c. 47, s. 56.

Certificate if consumer proposal performed - Sec. 66.38
66.38 (1) If a consumer proposal is fully performed, the administrator shall issue a certificate to that effect, in the prescribed form, to the consumer debtor and to the official receiver.

Britton, Re, 2005 CanLII 21871 (ON SC) - Early Certificates and OSB Deference

Date:	2005-06-21
Docket:	31-370436; 31-370437
Parallel citations:	11 CBR (5th) 204
URL:	http://canlii.ca/t/1l1s2
Citation:	Britton, Re, 2005 CanLII 21871 (ON SC), <http://canlii.ca/t/1l1s2> retrieved on 2013-09-24
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SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
In the Matter of the Proposal of Rosanna Joan Britton and
Milton Author Britton of the City of Toronto, in the
Province of Ontario
Court File No.: 31-370436/31-370437
June 21, 2005
Counsel: Philip J. Gertler – for the Administrator
Diane Tung – for the Office of the Superintendent of Bankruptcy
Karen Smith
Heard: June 20, 2005
Reasons

[1] This was a motion by Beallor & Partners Inc., the Administrator of the joint consumer proposal of Rosanna Joan Britton and Milton Author Britton, (the "Brittons"), for an Order validating the Certificate of Full Performance issued by the Administrator in this matter on August 4, 2004, (the "Certificate"). The motion was served on the Office of the Superintendent of Bankruptcy (the "OSB"), and all of the proposal creditors. Only the OSB appeared in response to the motion.

[2] The OSB indicated that it did not oppose the relief being sought by the Administrator. The OSB is taking issue only with the fees to be allowed the Administrator, and requires a date for the taxation of the Statement of Receipts and Disbursements, on which it has not provided a positive comment letter.

[3] In light of this, the Administrator would, *prima facie*, expect to receive the validation Order which it seeks. However, having read the materials filed, and having had the opportunity to hear from both counsel for the Administrator and the capable representatives of the OSB, I am not persuaded that it is an appropriate matter to exercise this Court's discretion and validate the Certificate, for the reasons that follow.

[4] It is now well settled in Ontario, starting from *Re Dziewiacien* reflex, (2002), 37 C.B.R. (4th) 250 (Superior Court of Justice), and as stated in *Re Wiggins* 2003 CanLII 15976 (ON SC), (2003), 67 O.R. (3d) 133 (Superior Court of Justice) by Swinton, J. at paragraph 9, that there is "no inherent jurisdiction to waive a default like that of [the Proponent] and to set aside the deemed annulment of [a] consumer proposal". Madam Justice Swinton went on to recognize that "while Ontario Courts may have granted the relief sought in this motion prior to the decision in *Dziewiacien, Re*, in my view, they had no inherent jurisdiction to do so". Prior to these two decisions, the practice had developed of applying to the Court for an Order waiving deemed annulments in consumer proposals. **The development of a practice validating the issuance of Certificates of Full Performance is tantamount to the previous, now discarded, practice of waiving default. The only discernible difference is that Administrators will wait until after all monies have been paid and a Certificate of Full Performance granted, to come to Court to bless their actions. This does nothing to require Administrators to properly monitor payments on consumer proposals, and alert proponents when they are nearing the point of deemed annulment. It also renders the obligations of the Administrator under s. 66.31(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the "Act"), meaningless. In not providing for any mechanism to revive consumer proposals, which have been deemed annulled, Parliament must have intended their administration to be undertaken with great care, and, in fact, provided for detailed duties and consequences upon their deemed annulment.**

[5] Contrast the Order being sought herein with the reasoning and decision of Swinton, J., in *Wiggins* where Her Honour provided for the making of second proposals by those proponents who were making their payments, but had previously been deemed annulled. This result recognizes the limitations of the Court's jurisdiction, and works within the Act to effect a pragmatic solution. The making of second proposals, essentially completion proposals, where the proponent proposes to pay all remaining payments under the annulled proposal to the creditors of that proposal seems a reasonable and legislatively authorized result. **The validation of Certificates of Full Performance, after the fact, is not so clearly authorized by the Act, and does nothing to promote the careful administration of these proposals by the Administrator.**

[6] I am cognizant of the Order made by Swinton, J., in *Wiggins* on December 12, 2003, wherein Her Honour, in effect, validated a number of Certificates of Full Performance. However, while I was provided a copy of the Order, I was not provided with any reasons for that Order, and can but conclude that there may have been specific facts in those Estates to warrant such an Order. I can find nothing in the case at bar to warrant such an Order. I find that it is contrary to the intent of the Act and Parliament to simply allow Administrators to carry on without regard to deemed annulment under the belief that if they carry on long enough, they can issue a Certificate of Full Performance and come to this Court to have that regularized. If the Administrator is not able to comply with s. 66.31(1)(a) of the Act to address a default and

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impending deemed annulment, then the proper procedure, from the cases cited, is to come to the Court, and seek an Order permitting the filing of a completion proposal. In that way, Certificates of Full Performance will continue to be able to be relied upon as, in fact, being certification that a proposal was fully performed – on time and in full, unless varied prior to annulment by the Court or the creditors. Of course, the tests for the relief set out by s. 66.32 of the Act, being a reasonable explanation for the default, and evidence of the likelihood of acceptance of a second proposal by the creditors, must be met.

[7] As a result, the relief sought in paragraph 1 of the Motion Record is denied. Having been issued after the deemed annulment of the Proposal, the Certificate is of no force and effect. Under the relief sought in paragraph 2 of the Motion Record, I do find it appropriate to Order that the Brittons are at liberty to file a second proposal to the creditors of the proposal that was deemed annulled. I find that they have satisfied me that, by their ultimate completion of payments, the default is reasonably excusable. I am also satisfied by the silence of the creditors in response to this motion, that a second proposal to those same creditors to complete the first proposal will likely meet with acceptance. The Administrator may retain any monies collected after deemed annulment, but not yet distributed, in trust pending the acceptance of another consumer proposal or return of the said monies to the Brittons upon rejection of another consumer proposal. The Brittons, upon making a further consumer proposal are entitled to the relief provided by ss. 69 to 69.2 of the Act.

[8] As for the desire of the OSB to tax the accounts of the Administrator, I concur with counsel for the Administrator that this hearing was not the proper forum for that. The OSB may require the Administrator to proceed to taxation of its Statement of Receipts and Disbursements in the usual manner, and cause a hearing date for that to be set.

[9] If necessary, I may be spoken to on costs.

_____

Scott W. Nettie
Deputy Registrar in Bankruptcy

Effect if counselling refused - Sec. 66.38(2)
(2) Subsection (1) does not apply in respect of a consumer debtor who has refused or neglected to receive counselling provided under paragraph 66.13(2)(b).
1992, c. 27, s. 32;
2005, c. 47, s. 56.

Administrator's accounts, discharge - Sec. 66.39
66.39 The form and content of the administrator's accounts, the procedure for the preparation and taxation of those accounts and the procedure for the discharge of the administrator shall be as prescribed.
1992, c. 27, s. 32.

Act to apply - Sec. 66.4
66.4 (1) All the provisions of this Act, except Division I of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to consumer proposals.

Where consumer debtor is bankrupt - Sec. 66.4(2)
(2) Where a consumer proposal is made by a consumer debtor who is a bankrupt,

(a) the consumer proposal must be approved by the inspectors, if any, before any further action is taken thereon;

(b) the consumer debtor must have obtained the assistance of a trustee who shall act as administrator of the proposal in the preparation and execution thereof;

(c) the time with respect to which the claims of creditors shall be determined is the time at which the consumer debtor became bankrupt; and

(d) the approval or deemed approval by the court of the consumer proposal operates to annul the bankruptcy and to revest in the consumer debtor, or in such other person as the court

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may approve, all the right, title and interest of the trustee in the property of the consumer debtor, unless the terms of the consumer proposal otherwise provide.

1992, c. 27, s. 32;
1997, c. 12, s. 58.

PART IV

PROPERTY OF THE BANKRUPT

Property of bankrupt - Sec. 67[2]

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the Income Tax Act, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the Income Tax Act in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the Family Orders and Agreements Enforcement Assistance Act, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

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2 For purposes of the BIA, as in its opening definitions, "property" means:

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

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Giffen (Re), [1998] 1 SCR 91 Perfection of Lessor's Ownership Title in face of Trustee in Bankruptcy under Common-law Statute (PPSA)

Date:	1998-02-12
Docket:	25193
Parallel citations:	1998 CanLII 844 (SCC); 155 DLR (4th) 332; [1998] 7 WWR 1; 1 CBR (4th) 115; 45 BCLR (3d) 1
URL:	http://canlii.ca/t/1fqv4
Citation:	Giffen (Re), 1998 CanLII 844 (SCC), [1998] 1 SCR 91, <http://canlii.ca/t/1fqv4> retrieved on 2013-08-06
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Giffen (Re), [1998] 1 S.C.R. 91

IN THE MATTER OF the Bankruptcy of Carol Anne Giffen
R. West & Associates Inc. and
the Attorney General of British Columbia *Appellants*
v.
Telecom Leasing Canada (TLC) Limited *Respondent*
and
The Attorney General of Canada,
the Attorney General for Ontario and
the Attorney General for Alberta *Interveners*
Indexed as: Giffen (Re)

File No.: 25193.
1997: October 8; 1998: February 12.
Present: L'Heureux-Dubé, Sopinka,* Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
on appeal from the court of appeal for british columbia

Bankruptcy and insolvency -- Personal property security -- Company employee leasing vehicle -- Lessor failing to register financing statements under B.C. Personal Property Security Act and thus perfect its security interest -- Employee making assignment in bankruptcy -- Property of bankrupt vesting in trustee under Bankruptcy and Insolvency Act -- Unperfected security interest in collateral not effective against trustee under Personal Property Security Act -- Whether trustee entitled to proceeds of sale of vehicle -- Personal Property Security Act, S.B.C. 1989, c. 36, s. 20(b)(i) -- Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 67(1), 71(2).

The respondent lessor leased a car to a company which in turn leased it to G, one of its employees. The lease between G and her employer was for more than one year and gave G the option of purchasing the vehicle from the lessor. Although the lessor was not a party to the lease agreement, it played an important role in the arrangement. The lessor received a deposit from G, it fixed the lease rates, and it was entitled to receive payments directly from G if her employer stopped paying her. The lessor and G were also named as the owners of the vehicle in the registration and insurance documents; the lessor was described as the "lessor" and G was described as the "lessee". G made an assignment in bankruptcy. Neither the lessor nor the employer had registered financing statements under the British Columbia *Personal Property Security Act* ("*PPSA*") in respect of their leases, with the result that the lessor's security interest in the car was not perfected. The lessor seized the vehicle and sold it with the appellant trustee's consent. The trustee subsequently brought a motion for an order that it was entitled to the proceeds of sale, relying on s. 20(b)(i) of the *PPSA*, which provides that a security interest in collateral is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy. The lessor opposed the claim on the grounds that the bankrupt never owned the car and that the trustee could not have a better claim to the car than the bankrupt had. The trial judge held that the lessor's unperfected security interest was of no effect as against the trustee. The Court of Appeal reversed the decision and held that the proceeds properly belonged to the lessor.

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Held: The appeal should be allowed.

The definition of "security interest" in the *PPSA* explicitly includes leases for a term of more than one year. The lessor's interest in the car is the reservation of title in the car; this interest, created by the lease agreement, falls within the ambit of the *PPSA*. Since the lessor did not have possession of the car and did not register its security interest, it held an unperfected security interest in the car prior to the bankruptcy. The bankrupt's right to use and possession of the car constitutes "property" for the purposes of the *Bankruptcy and Insolvency Act* ("*BIA*"), which passed to the trustee by virtue of s. 71(2). Section 12(2) of the *PPSA* also recognizes that a lessee obtains a proprietary interest in leased goods. Here, the trustee's possessory interest in the car comes into competition with the unperfected security interest of the lessor. On a plain reading of s. 20(b)(i) of the *PPSA*, the lessor's interest in the car is ineffective against the trustee. While the effect of s. 20(b)(i), on the present facts, is that the trustee ends up with full rights to the car when the bankrupt had only a right of use and possession, s. 20(b)(i) modifies the principle that a trustee is limited to the rights in the property enjoyed by the bankrupt. The issue is not ownership of the vehicle, but rather priority to it. Although federal bankruptcy legislation provides that a trustee shall step into the shoes of the bankrupt and as a general rule acquires no higher right in the property of the bankrupt than that which the bankrupt enjoyed, it is a policy choice of the legislature that an unsecured creditor's position, as represented by the trustee, is more meritorious than the unperfected security interest of a secured creditor.

The trustee can sell the car and confer good title. The lessor could have made a claim against the car under s. 81 of the *BIA*. This claim would have been defeated by the trustee in reliance on s. 20(b)(i) of the *PPSA.* Both the defeat of a claim and the failure to make a claim under s. 81 result in the effective abandonment or relinquishment of any claim to the car.

Section 20(b)(i) of the *PPSA* does not offend the priorities set out in the *BIA*, but rather is only one element of the provincial legislation which serves to define the rights of the parties involved in a bankruptcy. More particularly, s. 20(b)(i) serves, on the present facts, to define the rights of the lessor and indicates that for the purpose of the bankruptcy, the lessor does not have the status of a secured creditor. Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the *BIA* is dependent on provincial property and civil rights legislation in order to inform the terms of the *BIA* and the rights of the parties involved in the bankruptcy.

Since s. 20(b)(i) of the *PPSA* provides that the lessor's unperfected security interest is ineffective against the interest acquired by the trustee, the trustee need not make an election under s. 30(1)(*k*) of the *BIA* in order to realize its interest in the car.

G did not hold the car on resulting trust for the lessor, since the contract of lease does not contemplate the creation of a trust.

Cases Cited

Distinguished: *Fleeming v. Howden* (1868), L.R. 1 Sc. & Div. 372; *Flintoft v. Royal Bank of Canada*, 1964 CanLII 89 (SCC), [1964] S.C.R. 631; **approved:** *International Harvester Credit Corp. of Canada Ltd. v. Bell's Dairy Ltd. (Trustee of)* (1986), 61 C.B.R. (N.S.) 193; *Donaghy v. CNS Vehicle Leasing*, 1992 CanLII 6150 (AB QB), [1992] 6 W.W.R. 70; *David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of)*, 1996 ABCA 134 (CanLII), [1996] 7 W.W.R. 332; **referred to:** *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, 1989 CanLII 287 (SK CA), [1989] 3 W.W.R. 481; *Re Perepeluk; Canadian Imperial Bank of Commerce v. Touche Ross Ltd.*, reflex, [1986] 2 W.W.R. 631; *Robinson v. Countrywide Factors Ltd.*, 1977 CanLII 175 (SCC), [1978] 1 S.C.R. 753; *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453; *Re Nishi Industries*, reflex, [1978] 6 W.W.R. 736; *Re Cadieux and Jas. A. Ogilvy's Ltd.* (1952), 33 C.B.R. 15; *Deputy Minister of Revenue v. Rainville*, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24.

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Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 [am. 1992, c. 27, s. 2], ss. 2 "property", 30(1)(*k*), 67(1) [*idem*, s. 33], 71, 72, 81, 136(1).

Personal Property Security Act, S.B.C. 1989, c. 36, ss. 1 "security interest", 2(1), 3 [rep. & sub. 1993, c. 28, s. 16], 12(1)(b), (2), 20(b)(i), 21 [rep.& sub. 1990, c. 11, s. 5], 24, 25.

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APPEAL from a judgment of the British Columbia Court of Appeal 1996 CanLII 1429 (BC CA), (1996), 16 B.C.L.R. (3d) 29, 131 D.L.R. (4th) 453, [1996] 5 W.W.R. 111, 69 B.C.A.C. 161, 113 W.A.C. 161, 37 C.B.R. (3d) 297, [1996] B.C.J. No. 37 (QL), reversing a decision of the British Columbia Supreme Court reflex, (1994), 90 B.C.L.R. (2d) 326, [1994] 6 W.W.R. 439, 29 C.B.R. (3d) 309, [1994] B.C.J. No. 857 (QL), allowing the appellant trustee's action. Appeal allowed.

Geoffrey H. Dabbs, for the appellant R. West & Associates Inc.
R. Richard M. Butler, for the appellant the Attorney General of British Columbia.
John Douglas Shields and *Alastair Wade*, for the respondent.
Edward R. Sojonky, *Q.C.*, and *Jan Brongers*, for the intervener the Attorney General of Canada.
Richard J. K. Stewart, for the intervener the Attorney General for Ontario.
Written submissions only by *James A. Baird*, for the intervener the Attorney General for Alberta.
The judgment of the Court was delivered by

1 IACOBUCCI J. -- The principal question raised by this appeal is whether s. 20(b)(i) of the *Personal Property Security Act*, S.B.C. 1989, c. 36 ("*PPSA*"), can render a lessor's unperfected security interest in personal property ineffective against the rights acquired in the property by the trustee in bankruptcy, which finds its authority under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("*BIA*"). I conclude that s. 20(b)(i) operates, on the present facts, to defeat the unperfected security interest of the respondent Telecom Leasing Canada (TLC) Limited (the "lessor"), in favour of the interest acquired by the appellant R. West & Associates Inc. (the "trustee").

2 Constitutional questions were raised in this appeal; however, in my view of the case, it is not necessary to address these issues. A reading of the provisions of the *BIA* and the *PPSA* in question reveals that no conflict arises in the operation of the legislation.

1. Facts

3 On October 27, 1992, the lessor leased a 1993 Saturn car to the B.C. Telephone Company, which in turn leased the car to one of its employees, Carol Anne Giffen (the "bankrupt"). The bankrupt and her employer were parties to the agreement of lease entitled "Employee Agreement Personal Vehicle Lease Program/Flex Lease Program". The term of the lease was for more than one year. The lease gave the bankrupt the option of purchasing the vehicle from the lessor.

4 Although the lessor was not a party to the agreement, it played an important role in the arrangement contemplated by the agreement. More specifically, the lessor received a deposit from the bankrupt, it fixed the lease rates, and it was entitled to receive payments directly from the lessee/bankrupt if her employer stopped paying her. Further, the lessor and the bankrupt were named as the owners of the vehicle in the registration and insurance documents relating to the vehicle; the lessor was described as the "lessor" and the bankrupt was described as the "lessee".

5 The bankrupt made an assignment in bankruptcy on October 12, 1993. Neither the lessor nor the B.C. Telephone Company had registered financing statements under the *PPSA* in respect of their leases. The failure to register meant that the lessor's security interest in the car was not perfected, as defined in the *PPSA*, at the time of the assignment in bankruptcy.

6 The appellant was appointed as the trustee in bankruptcy. The lessor seized the vehicle and sold it with the trustee's consent; proceeds of $10,154.54 were held in trust by the lessor's counsel. The trustee subsequently brought a motion for an order that it was entitled to the proceeds of sale relying on s. 20(b)(i) of the *PPSA*. The lessor opposed the claim on the grounds that the bankrupt never owned the car and that the trustee could not have a better claim to the car than the bankrupt had.

7 Hood J. of the Supreme Court of British Columbia held that, by virtue of s. 20(b)(i) of the *PPSA*, the unperfected security interest of the lessor was of no effect as against the trustee. Hood J. ordered that the proceeds from the sale of the vehicle be paid over to the trustee. The lessor appealed to the Court of Appeal for British Columbia; the Attorney General of British Columbia was granted leave to intervene as a party respondent in the appeal. The Court of Appeal allowed the appeal and held that the proceeds properly belonged to the lessor.

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2. Relevant Statutory Provisions

8 *Personal Property Security Act*, S.B.C. 1989, c. 36

2. (1) Subject to section 4, this Act applies

(a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and

(b) without limiting the generality of paragraph (a), to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper where they secure payment or performance of an obligation.

3. Subject to sections 4 and 55, this Act applies to

(a) a transfer of an account or chattel paper,

(b) a commercial consignment, and

(c) a lease for a term of more than one year

that do not secure payment or performance of an obligation.

20. A security interest

. . .

(b) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy, . . .

21. Where the interest of a lessor under a lease for a term of more than one year or of a consignor under a commercial consignment is not effective against a judgment creditor under section 20 (a) or a trustee or liquidator under section 20 (b), the lessor or consignor is deemed, as against the lessee or consignee, as the case may be, to have suffered, immediately before the seizure of the leased or consigned goods or the date of the bankruptcy or winding-up order, damages in an amount equal to

(a) the value of the leased or consigned goods at the date of the seizure, bankruptcy or winding-up order, and

(b) the amount of loss other than that referred to in paragraph (a) that results from the termination of the lease or consignment.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

30. (1) The trustee may, with the permission of the inspectors, do all or any of the following things:

. . .

(*k*) elect to retain for the whole [or] part of its unexpired term, or to assign, surrender or disclaim any lease of, or other temporary interest in, any property of the bankrupt;...

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

71. (1) A bankruptcy shall be deemed to have relation back to, and to commence at the time of the filing of, the petition on which a receiving order is made or of the filing of an assignment with the official receiver.

(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

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(2) No receiving order, assignment or other document made or executed under the authority of this Act shall, except as otherwise provided in this Act, be within the operation of any legislative enactment in force at any time in any province relating to deeds, mortgages, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens or charges on real or personal property.

81. (1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

(2) The trustee with whom a proof of claim is filed under subsection (1) shall within fifteen days thereafter or within fifteen days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or give notice in writing to the claimant that the claim is disputed with his reasons therefor, and, unless the claimant appeals therefrom to the court within fifteen days after the mailing of the notice of dispute, he shall be deemed to have abandoned or relinquished all his right to or interest in the property to the trustee who thereupon may sell or dispose of the property free of any lien, right, title or interest of the claimant.

(3) The onus of establishing a claim to or in property under this section is on the claimant.

(4) The trustee may give notice in writing to any person to prove his claim to or in property under this section, and, unless that person files with the trustee a proof of claim in the prescribed form within fifteen days after the mailing of the notice, the trustee may thereupon with the leave of the court sell or dispose of the property free of any lien, right, title or interest of that person.

(5) No proceedings shall be instituted to establish a claim to, or to recover any right or interest in, any property in the possession of a bankrupt at the time of the bankruptcy, except as provided in this section.

(6) Nothing in this section shall be construed as extending the rights of any person other than the trustee.

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows. . . .

3. Judicial History

A. *British Columbia Supreme Court* reflex, (1994), 90 B.C.L.R. (2d) 326

9 Hood J. held that the trustee was entitled to the proceeds from the car. He began his analysis by examining the relationship between the parties and found that the respondent was the lessor and the bankrupt was the lessee of the car, even though the respondent was not party to the lease agreement. He also found that the lease agreement, which was for a period of more than one year, was a "security interest" for the purposes of the *PPSA.*

10 Hood J. analysed the holding of the Saskatchewan Court of Appeal in *International Harvester Credit Corp. of Canada Ltd. v. Bell's Dairy Ltd. (Trustee of)* (1986), 61 C.B.R. (N.S.) 193. The Saskatchewan Court of Appeal found that a trustee in bankruptcy may acquire a higher interest in property than that enjoyed by the bankrupt through the operation of the *PPSA*. The court also concluded, in accordance with the Saskatchewan *PPSA*, that a lessor's security interest is subordinate to the interest of a trustee in bankruptcy where the lessor failed to perfect its interest. Hood J. added that the trustee's claim in the present case was even stronger than that of the trustee in *International Harvester* since s. 20(b)(i) of the *PPSA* provides that an unperfected security interest will be "not effective against" a trustee in bankruptcy whereas the Saskatchewan equivalent provides that an unperfected security interest will be "subordinate to" the interest of a trustee in bankruptcy.

11 Hood J. held that the *PPSA* applied on the facts and in so doing he rejected the lessor's argument that this was a matter of exclusive federal jurisdiction governed by the *BIA*. He noted that the constitutionality of the *PPSA* was not in issue before him, and that in *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, 1989 CanLII 287 (SK CA), [1989] 3 W.W.R. 481 (Sask. C.A.), the Saskatchewan equivalent to s. 20(b)(i) was held to be constitutionally valid.

12 The learned trial judge rejected the lessor's argument that the trustee had disclaimed the property by failing to elect to retain the lease under s. 30(1)(*k*) of the *BIA.* He found that this argument ignored the statutory rights granted to the trustee under s. 20(b)(i) of the *PPSA*. Hood J. also dismissed the lessor's argument that a resulting trust existed between the bankrupt and the lessor, and therefore the vehicle did not form part of the bankrupt's estate, as provided by s. 67(1)(*a*) of the *BIA*. In Hood J.'s view, the equitable principle of resulting trust could not usurp the clear provisions of the *PPSA* and the rights it conferred upon the trustee. The lessor had also argued that the trustee was estopped from claiming that the vehicle was part of the bankrupt's estate, given that the bankrupt signed a statement of

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affairs which referred to the vehicle as "fully encumbered". Hood J. stated that the bankrupt's conduct or view of her interest was not determinative of the question of law at issue.

13 Hood J. concluded that the trustee was entitled to the net sale proceeds from the vehicle, together with an accounting.

B. *British Columbia Court of Appeal* 1996 CanLII 1429 (BC CA), (1996), 16 B.C.L.R. (3d) 29

14 Finch J.A., Macfarlane and Wood JJ.A. concurring, overturned Hood J. and held that the lessor was entitled to the proceeds of the car.

15 Finch J.A. disagreed with the reasoning and the result in *International Harvester*, which had been followed by the trial judge. In his view, both *International Harvester* and Hood J.'s decision in the case on appeal failed to account for the role of the *BIA* in the circumstances of a bankruptcy. Section 67 of the *BIA* provides that the trustee in bankruptcy shall receive only the "property of the bankrupt" thus there was no legitimate basis for granting to a trustee in bankruptcy a greater claim to the property than that which the bankrupt enjoyed. Finch J.A. held (at p. 40) that to allow the trustee a greater claim to the property than the bankrupt had would "overlook fundamental concepts of bankruptcy law" as expressed in *Fleeming v. Howden* (1868), L.R. 1 Sc. & Div. 372 (H.L.), and *Flintoft v. Royal Bank of Canada*, 1964 CanLII 89 (SCC), [1964] S.C.R. 631.

16 Finch J.A. rejected the Saskatchewan Court of Appeal's characterization of the trustee as "a representative of the creditors of the bankrupt", and he found that the Saskatchewan Court erred in relying on *Re Perepeluk; Canadian Imperial Bank of Commerce v. Touche Ross Ltd.*, reflex, [1986] 2 W.W.R. 631 (Sask. C.A.), as authority for that proposition. He did not find that *Perepeluk* "[laid] down any broad statement of principle to the effect that the trustee's obligation is to the creditors as opposed to the bankrupt" (p. 42). Further, Finch J.A. noted that the Saskatchewan Court of Appeal failed to consider that a trustee is an officer of the court, appointed to stand in the bankrupt's shoes and to represent the bankrupt's interests, even where those interests are adverse to the interests of the creditors. With these principles in mind, Finch J.A. underlined that the trustee could only succeed to the rights of the bankrupt.

17 Finch J.A. distinguished *Robinson v. Countrywide Factors Ltd.*, 1977 CanLII 175 (SCC), [1978] 1 S.C.R. 753, which the appellant Attorney General cited in support of the argument that assets other than those of the bankrupt may be distributed upon bankruptcy. Finch J.A. held that recovering for a bankrupt's estate property which the bankrupt had unlawfully concealed is not comparable to the present circumstances where provincial legislation operates to add to the bankrupt's estate property which never belonged to the bankrupt.

18 Finch J.A. also considered *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453, where this Court held that valid provincial workers' compensation legislation was inoperative where it conflicted with federal priorities as established by the *BIA*. The lessor argued that *Husky Oil* stood for the proposition that provincial legislation can neither remove nor add something to a bankrupt's estate owing to the primacy of the priority scheme of the *BIA*. Finch J.A. reviewed Gonthier J.'s comments in *Husky Oil* regarding the analysis which must be undertaken to determine whether two laws are in operational conflict. He then found that s. 20(b)(i) and the *BIA* do conflict since s. 20(b)(i) purports to define the property of the bankrupt in a way which is inconsistent with the definition provided in the *BIA*. He further found that s. 20(b)(i) is inconsistent with the *BIA* since it permits property which does not belong to the bankrupt to be distributed among the bankrupt's creditors.

19 Finch J.A. stated that the real question at issue is who holds title to the car. That is, did the bankrupt or the trustee in bankruptcy obtain title to the vehicle by reason of the lessor's failure to register its security interest? The bankrupt acquired only a right to use the car and a contingent future right of purchase. The learned judge concluded that s. 20(b)(i) cannot possibly have the effect of transferring title from the lessor, the true owner, to the trustee in bankruptcy because this would give the trustee greater proprietary rights in the car than the bankrupt enjoyed.

20 Finch J.A. rejected the argument that *Re Nishi Industries*, reflex, [1978] 6 W.W.R. 736 (B.C.C.A.), in which the British Columbia *Conditional Sales Act, 1961*, S.B.C. 1961, c. 9, was held to be constitutionally valid and was found to give a trustee in bankruptcy priority over a secured creditor, supported the trustee's position. He distinguished that case on the basis that, under a conditional sale or chattel mortgage, the mortgagee or the purchaser acquires a property interest, whereas in the present case the lessee does not acquire a property interest in the collateral. Rather, the bankrupt held only the right to possess the car while payments were being made.

21 Finch J.A. also dismissed the lessor's argument based on s. 30(1)(*k*) of the *BIA*, under which a trustee may elect to retain a lease. Finch J.A. found that s. 30(1)(*k*) applied only to leases of property belonging to the bankrupt and had no application where the bankrupt has leased the property of another.

22 Finding it unnecessary to address the other issues raised by the lessor or to deal with the constitutional questions raised by the Attorney General, Finch J.A. allowed the appeal and directed that the proceeds be paid to the lessor.

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4. Issues

23 There is one principal issue in the present appeal: can s. 20(b)(i) of the *PPSA* extinguish the lessor's right to the car in favour of the trustee's interest, or is the operation of s. 20(b)(i) limited by certain provisions of the *BIA*?

24 In my view, this issue can be resolved through a normal reading of the relevant provisions of both the *PPSA* and the *BIA*, buttressed by the policy considerations supporting these provisions.

5. Analysis

A. *The Locus of Title Is Not Determinative*

25 At the outset, it is important to note that the Court of Appeal's holding in the present appeal rests on the principle that the "property of the bankrupt" shall vest in the trustee (s. 71(2) *BIA*) and that only the property of the bankrupt shall be distributed among the bankrupt's creditors (s. 67(1) *BIA*). In the opinion of the Court of Appeal, the bankrupt, as lessee, did not have a proprietary interest in the car, and since the trustee obtains its entitlements to the contents of the bankrupt's estate through the bankrupt, the trustee cannot assert a proprietary interest in the car. In my view, the Court of Appeal, with respect, erred fundamentally in focussing on the locus of title and in holding that the lessor's common law ownership interest prevailed despite the clear meaning of s. 20(b)(i).

26 The Court of Appeal did not recognize that the provincial legislature, in enacting the *PPSA*, has set aside the traditional concepts of title and ownership to a certain extent. T. M. Buckwold and R. C. C. Cuming, in their article "The *Personal Property Security Act* and the *Bankruptcy and Insolvency Act*: Two Solitudes or Complementary Systems?" (1997), 12 *Banking& Finance L. Rev.* 467, at pp. 469-70, underline the fact that provincial legislatures, in enacting personal property security regimes, have redefined traditional concepts of rights in property:

> Simply put, the property rights of persons subject to provincial legislation are what the legislature determines them to be. While a statutory definition of rights may incorporate common law concepts in whole or in part, it is open to the legislature to redefine or revise those concepts as may be required to meet the objectives of its legislation. This was done in the provincial PPSAs, which implement a new conceptual approach to the definition and assertion of rights in and to personal property falling within their scope. The priority and realization provisions of the Acts revolve around the central statutory concept of "security interest". The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the Act itself. [Emphasis added.]

27 In *International Harvester*, *supra*, the Saskatchewan Court of Appeal recognized that the regime put in place to regulate competing interests in personal property does not turn on title to the collateral (at p. 204):

> There is nothing in the language of the section [s. 20 of the Saskatchewan *PPSA* which is the equivalent of s. 20 of the British Columbia *PPSA*], or its relationship with other sections, or indeed in the overall scheme of the Act to suggest, for example, that an unperfected security interest, because it is rooted in and attached to the title of particular goods in the possession of a debtor, should be treated as superior to the more generally derived and broadly attached interest which an execution creditor comes to have in a debtor's goods. Indeed, the very opposite is suggested not only by the language of the section, but by the overall thrust of the Act.

28 The Court of Appeal in the present appeal did not look past the traditional concepts of title and ownership. But this dispute cannot be resolved through the determination of who has title to the car because the dispute is one of priority to the car and not ownership in it. It is in this context that the *PPSA* must be given its intended effect and it is to this question that I now wish to turn.

B. *Definition of "Security Interest"*

29 The *PPSA* applies to "every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral" (s. 2(1)(a)).

30 Section 1 of the *PPSA* defines "security interest", in part, as "an interest in goods, chattel paper, a security, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation". This definition is elaborated upon by paragraph 1(a)(iii) of the *PPSA*, which provides that "security interest" means the interest of "a lessor under a lease for a term of more than one year, whether or not the interest secures payment or performance of an obligation" (emphasis added). Further, s. 3 of the *PPSA* deems certain agreements, which do not secure payment or performance of an obligation, to be security agreements for the purposes of the *PPSA*. Section 3 includes leases "for a term of more than one year that do not secure payment or performance of an obligation".

31 The elements of the definition of "security interest" explicitly include within the definition of "security interest" leases for a term of more than one year. The lessor's interest in the car is the reservation of title in the car; this interest, created by the lease agreement, falls within the ambit of the *PPSA*.

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C. *The Nature of the Lessor's Interest in the Car*

32 A security interest is valid and enforceable when it attaches to personal property. Section 12(1)(b) of the *PPSA* provides that a security interest "attaches" when the debtor acquires "rights in the collateral". Section 12(2) states explicitly that "a debtor has rights in goods leased to the debtor . . . when he obtains possession of them in accordance with the lease". Thus, upon delivery of the car to the bankrupt, the lessor had a valid security interest in the car that could be asserted against the lessee and against a third party claiming a right in the car. However, the lessor's security interest remained vulnerable to the claims of third parties who obtain an interest in the car through the lessee including, trustees in bankruptcy. In order to protect its security interest from such claims, the lessor must therefore perfect its interest through registration of its interest (s. 25), or repossession of the collateral (s. 24). The lessor did not have possession of the car, and it did not register its security interest. Thus, prior to the bankruptcy, the lessor held an unperfected security interest in the car. This brings us to the *BIA*.

D. *The Bankrupt's Interest in the Car Vests in the Trustee*

33 Section 71(2) of the *BIA* provides that, upon an assignment into bankruptcy, the bankrupt's "property . . . shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee". Section 2 of the *BIA* defines "property" very broadly to include "every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property".

34 In my opinion, the bankrupt's right to use and possession of the car constitutes "property" for the purposes of the *BIA* and the trustee, by virtue of s. 71(2) of the *BIA*, succeeds to this proprietary right. I find support for this conclusion in *Paccar Financial Services*, *supra*, where the Saskatchewan Court of Appeal held that "property" as it is used in the *BIA* is "broad enough to include a leasehold interest" (at p. 494, citing *Re Cadieux and Jas. A. Ogilvy's Ltd.* (1952), 33 C.B.R. 15 (Que. Sup. Ct.), at p. 16).

35 The trustee assumes the bankrupt's possessory interest in the car through the operation of s. 71(2); it is upon this basis that the trustee can assert a claim to the car.

36 I note that s. 12(2) of the *PPSA* also recognizes that a lessee obtains a proprietary interest in leased goods. Section 12(2) states explicitly that "a debtor has rights in goods leased to the debtor . . . when he obtains possession of them in accordance with the lease" (emphasis added). Thus, s. 12 operates to "deem or recognize that a lessee has a proprietary interest" (Buckwold and Cuming, *supra*, at p. 471). The Saskatchewan Court of Appeal considered a provision similar to s. 12 of the British Columbia *PPSA* in *International Harvester* and held that (at p. 206):

> . . . a trustee in bankruptcy, upon whom there devolves a chattel in the possession of the bankrupt under a commercial lease for a term exceeding a year, succeeds to the contractual or "possessory" interest of the bankrupt in that chattel, as well as the bankrupt's statutory or "proprietary" interest therein as conferred upon the debtor by s. 12 of the Act. [Emphasis added.]

37 From the perspective of both the *PPSA* and the *BIA* the bankrupt, as lessee, can be described as having a proprietary interest in the car.

E. *The Priority Contest and the Operation of Section 20(b)(i)*

(i) Purpose of Section 20(b)(i)

38 The Saskatchewan Court of Appeal explained the theory behind s. 20 of the Saskatchewan *PPSA* in *International Harvester* (at pp. 204-5). A person with an interest rooted in title to property in the possession of another, once perfected, can, in the event of default by the debtor, look to the property ahead of all others to satisfy his claim. However, if that interest is not perfected, it is vulnerable, even though it is rooted in title to the goods (at p. 205):

> A third party may derive an interest in the same goods by virtue of some dealing with the person in possession of them, and . . . he may become entitled to priority. That is, he may become entitled, ahead of the person holding the unperfected security interest, to look to the goods to satisfy his claim.

Public disclosure of the security interest is required to prevent innocent third parties from granting credit to the debtor or otherwise acquiring an interest in the collateral. However, public disclosure of the security interest does not seem to be required to protect a trustee who is not in the position of an innocent third party; rather, the trustee succeeds to the interests of the bankrupt. In one authority's opinion, trustees are given the capacity to defeat unperfected security interests because of the "representative capacity of the trustee and the effect of bankruptcy on the enforcement rights of unsecured creditors" (R. C. C. Cuming, "Canadian Bankruptcy Law: A Secured Creditor's Heaven" (1994), 24 *Can. Bus. L.J.* 17, at pp. 27-28).

39 Prior to a bankruptcy, unsecured creditors can make claims against the debtor through provincial judgment enforcement measures. Successful claims will rank prior to unperfected security interests pursuant to s. 20. Once a bankruptcy occurs, however, all claims are frozen and the unsecured creditors must look to the trustee in bankruptcy to assert their claims. Cuming describes the purpose of s. 20(b)(i) (at p. 29):

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> In effect, the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings and the trustee is now the representative of creditors who can no longer bring their claims to a "perfected" status under provincial law. As the repository of enforcement rights, the trustee has status under s. 20(b)(i) of the BCPPSA to attack the unperfected security interest.

40 The purpose behind granting a trustee in bankruptcy the power to defeat unperfected security interests was recognized by the Saskatchewan Court of Appeal in *International Harvester* (at p. 206):

> Indeed, the fact that a trustee in bankruptcy is a representative of creditors serves to shed light on more than one aspect of the issue. It explains -- or at least assists in the explanation of -- why a trustee in bankruptcy is included in s. 20, as well as why a trustee is not necessarily confined to the interest of the bankrupt.

41 The Saskatchewan Court of Appeal again acknowledged the representative role of the trustee in bankruptcy in *Paccar Financial Services*, which also involved a priority contest between a trustee and the unperfected security interest of a lessor. The court stated that the trustee, after bankruptcy, acts as the representative of the unsecured creditors of the bankrupt and asserts "the claim of the unsecured creditors to the goods and possessions of the bankrupt pursuant to the priorities established for competing perfected and unperfected security interests. It is simply a contest as between an unsecured creditor and the holder of an unperfected security interest" (p. 490).

42 The Court of Appeal erred, in my view, in not recognizing that the purpose of s. 20(b)(i) is, at least in part, to permit the unsecured creditors to maintain, through the person of the trustee, the same status *vis-à-vis* secured creditors who have not perfected their security interests which they enjoyed prior to the bankruptcy of the debtor.

(ii) The Present Appeal and Section 20(b)(i)

43 In the present appeal, the trustee's possessory interest in the car, acquired through the bankrupt under the authority of the *BIA*, comes into competition with the unperfected security interest of the lessor. Section 20(b)(i) of the *PPSA* states explicitly that a security interest in collateral "is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy". On a plain reading of s. 20(b)(i), the lessor's interest in the car is ineffective against the trustee.

44 Section 20(b)(i) does not grant title or any other proprietary interest to the trustee, but it prevents the lessor from exercising rights against the trustee. Admittedly, the effect of s. 20(b)(i), on the present facts, is that the trustee ends up with full rights to the car when the bankrupt had only a right of use and possession. The Court of Appeal refused to accept this result because, in its view, it violated fundamental concepts of bankruptcy law. In this respect, the Court of Appeal cites *Fleeming*, *supra*, and *Flintoft*, *supra*, in support of the proposition that a trustee in bankruptcy cannot receive a greater interest in the property than the bankrupt had at the time of the bankruptcy.

45 With respect, I disagree with the Court of Appeal for two reasons: first, *Fleeming* and *Flintoft* can be distinguished; and second, s. 20(b)(i) modifies the principle that a trustee is limited to the rights in the property enjoyed by the bankrupt.

46 Both *Fleeming* and *Flintoft* involved circumstances where the contested property was held on trust by the bankrupt and therefore did not form part of the bankrupt's estate. Consider the following statement of Lord Chelmsford from *Fleeming* (at pp. 380-81):

> The general principle of every Bankrupt Act is, that the person in whom the estate vests for distribution under the bankruptcy takes the property of the bankrupt exactly as he himself held it. Lord Elphinstone at the time of his death was a mere trustee under a condition to denude in favour of Lady Hawarden, consequently the estate could only vest in the trustee under the sequestration subject to this condition. . . .
>
> It appears to me, therefore, that the lands in question were not part of the heritable estate of the bankrupt which, within the meaning of the *Bankrupt Act*, would vest in the trustee for the benefit of the creditors.

47 Lords Cranworth, Westbury and Colonsay all agreed that Lord Elphinstone was vested with the disputed property as a mere trustee and for that reason the property could not vest in the trustee in bankruptcy appointed for Lord Elphinstone's estate (at pp. 378-80, 383-84, and 385, respectively).

48 In *Flintoft*, a dispute arose between a bank and a trustee in bankruptcy over the ownership of uncollected debts owing to the debtor at bankruptcy. The debts arose from the sale by the debtor of goods covered by valid *Bank Act* security. An express trust protected the bank's interest in the debtor's book debts; the debtor also assigned its interest in the debts to the bank. The basis of the trustee's challenge was that the assignment of book debts held by the bank was void for lack of timely registration. The court held that the trust sustained the bank's interest in the book debts; trust property is excluded from the property of the bankrupt. Consequently, the bank's failure to register the assignment did not result in the book debts falling into the hands of the trustee in bankruptcy.

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49 The trustee in bankruptcy cannot succeed to property held on trust by the bankrupt. This principle appears to be the source of comments made in *Fleeming* and *Flintoft* to the effect that a trustee in bankruptcy cannot take a greater interest than the bankrupt had. In my view, the proposition stated in these cases (that a trustee in bankruptcy cannot take a greater interest in property than the bankrupt had) should be restricted to the context in which they were made, namely, where the disputed property is held on trust by the bankrupt debtor. However, the bankrupt in the case on appeal did not hold the car on trust for the lessor.

50 I accept that there is a principle which provides that a trustee in bankruptcy cannot obtain a greater interest to the goods than the bankrupt (beyond the context of a trust where the goods are not property of the bankrupt). However, s. 20(b)(i) itself modifies that principle. Cases decided prior to the Court of Appeal decision in the case on appeal have consistently accepted that s. 20(b)(i), or its equivalent, can give the trustee a greater interest in the disputed property than that enjoyed by the bankrupt.

51 In *International Harvester*, the lessor of vehicles failed to register one security interest and improperly registered another. The lessee went bankrupt. The Saskatchewan Court of Appeal had to determine the nature of the interest that the trustee had in the vehicles. The Saskatchewan *PPSA* had a provision very similar to s. 20(b)(i), except it provided that an unperfected security interest shall be "subordinate to" the interest of a trustee in bankruptcy (as opposed to "not effective against"). The lessor argued that this provision could not be interpreted to permit the trustee to acquire a greater interest in property than the bankrupt had.

52 The court acknowledged that federal bankruptcy legislation provides that a trustee shall step into the shoes of the bankrupt and "as a general rule acquires no higher right in the property of the bankrupt than that which the bankrupt enjoyed" (p. 200). The court then considered the policy considerations supporting the *PPSA* regime and the potential for mischief which arises in security transactions where title to property is separated from possession of that property. Provincial legislatures, faced with a policy choice involving the competing interests of the true owner and those of third parties dealing with the ostensible owner, have decided that the true owner must forfeit title, when faced with a competing interest, if she failed to register her interest as required. The court also noted that true leases were not regulated by the personal property regimes until recently. Thus, "as a general rule the common law did not allow the lessor's title to leased goods to be defeated through some dealing of the lessee. However, the Personal Property Security Act has effected far-reaching changes to the law" (p. 201).

53 The court stated that to find that the trustee in bankruptcy cannot have a greater claim to the goods than the bankrupt enjoyed would (at p. 205)

> require resort to traditional common law concepts, to form over substance, to a technical construction of the term "interest", and to the defeat of the policy choice made by the legislature in choosing, as it did, to include within the scope of the Act a true lease of goods. It would render the section largely, if not wholly, ineffective in this instance. . . .

54 *International Harvester* was followed in *Donaghy v. CNS Vehicle Leasing*, 1992 CanLII 6150 (AB QB), [1992] 6 W.W.R. 70 (Alta. Q.B.), where a lessee leased a vehicle in Ontario and then moved to Alberta. The lessor failed to register its security interest in the vehicle in Alberta. The lessee went bankrupt and a contest developed between the trustee in bankruptcy and the lessor. The court found for the trustee. The court stated that the issue was not ownership of the vehicle, but rather priority to it. The court recognized that, for the purposes of priority, the *PPSA* replaces the common law principle that one cannot transfer better title than she possesses. It is a policy choice of the legislature that an unsecured creditor's position, as represented by the trustee, is more meritorious than the unperfected security interest of a secured creditor.

55 In *David Morris Fine Cars Ltd. v. North Sky Trading Inc. (Trustee of)*, 1996 ABCA 134 (CanLII), [1996] 7 W.W.R. 332 (Alta. C.A.), a car dealer leased a car to a corporation; the corporation went bankrupt. The lease was not registered. The trustee in bankruptcy claimed priority to the car. The court dealt primarily with the car dealer's argument that it was exempt from the registration requirement because the lease was out of its ordinary course of business. The court held that the car dealer was not entitled to the exemption and that the trustee's interest in the car prevailed. The court made the following comments at para. 16:

> We endorse the view of the chambers judge that the *PPSA* is consumer protection legislation which in many respects gives a trustee in bankruptcy greater rights than the bankrupt, and which would be undermined by the application of the common law principle that one cannot give what one does not possess.

56 I agree with the decisions of the courts that have held that the principle that a trustee in bankruptcy cannot obtain greater rights to the property than the bankrupt had has been modified through the policy choices of the legislatures represented in s. 20(b)(i) of the *PPSA*, and its equivalents in other provinces.

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F. *The Trustee Can Confer Clear Title*

57 Title could not defeat the trustee's claim under s. 20(b)(i) of the *PPSA*, but does the lessor's retention of title and the principle of *nemo dat quod non habet* prevent the trustee from selling the car, conferring clear title, and distributing its proceeds under the *BIA*?

58 Section 81 of the *BIA* provides a procedure through which third parties can file claims with the trustee against "property . . . in the possession of a bankrupt at the time of the bankruptcy". Subsection 81(2) provides that where the trustee disputes a claim, and the claimant does not appeal within the prescribed time period, then the claimant is "deemed to have abandoned or relinquished all his right to or interest in the property to the trustee who thereupon may sell or dispose of the property free of any lien, right, title or interest of the claimant". Section 81 does not specifically deal with the circumstances where a claimant's claim is defeated, but presumably the trustee would be able to sell the good free of the claim.

59 The lessor could have made a claim under s. 81 of the *BIA.* This claim would have been defeated by the trustee in reliance on s. 20(b)(i) of the *PPSA.* In my view, both the defeat of a claim and the failure to make a claim under s. 81 result in the effective abandonment or relinquishment of any claim to the car; the trustee can therefore sell the car and confer good title.

G. *The Federal Priority Scheme, Which Is Subject to the Rights of Secured Creditors, Is Not Disturbed*

60 Section 136 of the *BIA* sets out a priority scheme for the division of the property of the bankrupt; the interests of the various creditors are all "[s]ubject to the rights of secured creditors". Section 67 describes that which constitutes the property of the bankrupt.

61 This Court has held on a number of occasions that provincial legislatures cannot enact legislation which operates to interfere with the priority of distribution set out in the *BIA*, nor can they confer secured creditor status on a class of creditors not entitled to such status under the *BIA*. A very recent example is *Husky Oil*, *supra*, where a majority of the Court held that s. 133 of the *Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, was inapplicable in a bankruptcy because it operated to secure the Workers' Compensation Board's claim against the bankrupt's estate in violation of the priority of the Board's claim as set out in s. 136 of the *BIA.*

62 Previous to *Husky Oil* were the so-called "quartet" of judgments on this issue. In *Deputy Minister of Revenue v. Rainville*, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35, and *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785, this Court held that a province cannot claim to be a secured creditor in a bankruptcy pursuant to provincial legislation where the Crown claim is listed as a preferred claim with a particular ranking in the *BIA.* In *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061, the Court held that, where a secured creditor liquidates his security outside the bankruptcy proceedings, the property constituting the security is still property of the bankrupt and payment from the proceeds must be determined by the federal bankruptcy priorities and not in accordance with provincial law. Finally, in *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24, the Court held that the province cannot deem a statutory trust to remove property from the estate of a bankrupt and thereby create its own priorities.

63 The Court of Appeal applied this Court's decision in *Husky Oil* to conclude that a provincial law cannot add to the estate of a bankrupt property which the bankrupt never had. In my view, the Court of Appeal erred in its characterization of s. 20(b)(i). Section 20(b)(i) of the *PPSA* does not offend the priorities set out in the *BIA* as interpreted by the quartet and *Husky Oil*; rather, s. 20(b)(i) is but one element of the provincial legislation which serves to define the rights of the parties involved in a bankruptcy. More particularly, s. 20(b)(i) serves, on the present facts, to define the rights of the lessor and indicates that for the purpose of the bankruptcy, the lessor does not have the status of a secured creditor.

64 Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the *BIA* is dependent on provincial property and civil rights legislation in order to inform the terms of the *BIA* and the rights of the parties involved in the bankruptcy. Section 72(1) of the *BIA* contemplates interaction with provincial legislation.

65 This Court has recognized the important role that provincial legislation plays in the event of bankruptcy in *Husky Oil.* Gonthier J. stated, at p. 481:

> It is trite to observe that the *Bankruptcy Act* is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the *Bankruptcy Act* itself.

And I stated the following for the minority in *Husky Oil*, at p. 531:

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> [P]rovincial legislation is deeply involved in determining the priority, registration, and amount of indebtedness in the bankruptcy process. In fact, the proprietary and contractual rights that are regulated by the bankruptcy process are usually created by virtue of provincial law.

66 J. S. Ziegel lucidly underlined the role which provincial law plays in bankruptcy in his article "Personal Property Security and Bankruptcy: There Is No War!" (1993), 72 *Can. Bar Rev.* 44, at p. 50:

> The answer is confirmed by the opening words of section 136(1), "Subject to the rights of secured creditors . . .". How are those rights (and obligations) to be determined? Since the Bankruptcy [and Insolvency] Act does not spell them out the reply must surely be: by consulting the law that gave them birth, and that law, in the absence of conflicting federal prescriptions, also determines what conditions and restrictions are imposed on the recognition and enforceability of the security interest.

67 Section s. 20(b)(i) does not reorder federal priorities. Compliance with the perfection requirements of the *PPSA* is a precondition to maintaining secured creditor status under the *BIA*. In the event of bankruptcy, the consequences of a failure to perfect are spelled out in s. 20(b)(i). In effect, the secured party with an unperfected security interest becomes an unsecured creditor of the bankrupt:

> . . . any secured party with a security interest in personal property, who fails to meet the requirements of the Act for perfecting its security interest prior to the date a petition is filed or an assignment is made, loses the status of a secured creditor in the bankruptcy and is relegated to unsecured status.
> (Cuming, *supra*, at pp. 25-26).

H. *Other Arguments*

68 The respondent raised three other arguments which I need discuss only briefly. The lessor submits that s. 30(1)(*k*) of the *BIA* requires that the trustee either elect to retain or disclaim its rights to any property leased by the bankrupt. The lessor argues that, if the trustee did have any proprietary rights to the car, these rights were disclaimed as a result of the trustee's failure to retain the lease by making the lease payments.

69 In my view, s. 30(1)(*k*) of the *BIA* has no bearing on the resolution of the present appeal. Section 20(b)(i) provides that the lessor's unperfected security interest is ineffective against the interest acquired by the trustee; the trustee need not make an election under s. 30(1)(*k*) of the *BIA* in order to realize its interest in the car. If the lessor had a valid and enforceable security interest in the car then the trustee could choose, pursuant to s. 30(1)(*k*), to continue with the lease or return the car to the lessor, but none of that applies in this case.

70 The respondent also submits that the bankrupt held the car on resulting trust for the lessor; consequently, by virtue of s. 67(1) of the *BIA*, the car is excluded from the "property of the bankrupt". Like the trial judge, I find no merit in this argument. The contract of lease does not contemplate the creation of a trust. Further, a resulting trust arises only where

> legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who *did* give value for it. [Emphasis in original.]
> (D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 299.)

The transferee, who obtains the property gratuitously, holds the property on trust for the transferor, who is the rightful owner, because equity does not assume gifts (Waters, at p. 300).

71 In this case, the lessor holds title to the car and is its rightful owner, having purchased it. But the lessor entered into a contract of lease wherein the lessee, for value, obtained the right to use and possession of the car. In my opinion, the facts at hand cannot give rise to a resulting trust.

72 Finally, the respondent argues that the trustee is estopped from asserting a claim to the car because the lessee, whose interests the trustee succeeds, signed documents which indicated that she did not have ownership of the car. I also must reject this argument. First, the lessee's understanding of the transaction is not at issue here. Second, ownership of the car is not at issue; rather, the contest, as discussed above, is not one of title, but priority.

6. Conclusion and Disposition

73 In accordance with s. 20(b)(i), the lessor's unperfected security interest is ineffective against the possessory interest acquired by the trustee in bankruptcy. The trustee's interest in the car takes priority over that of the lessor; the trustee is therefore entitled to the proceeds of the car.

74 For the foregoing reasons, I would therefore allow the appeal with costs throughout, set aside the judgment of the British Columbia Court of Appeal, and restore the disposition ordered by the trial judge.

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Appeal allowed with costs.
Solicitors for the appellant R. West & Associates Inc.: Davis & Company, Vancouver.
Solicitor for the appellant the Attorney General of British Columbia: R. Richard M. Butler, Victoria.
Solicitors for the respondent: John Douglas Shields Law Corporation, Vancouver.
Solicitor for the intervener the Attorney General of Canada: The Deputy Attorney General of Canada, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: Richard J. K. Stewart, Toronto.
Solicitor for the intervener the Attorney General for Alberta: The Department of Justice, Edmonton.

Lefebvre (Trustee of); Tremblay (Trustee of), 2004 SCC 63, [2004] 3 SCR 326 - Perfection of Lessor's Ownership Title In Face of Trustee in Bankruptcy in Quebec Civil Code Environment

Date:	2004-10-28
Docket:	29770; 29780
Parallel citations:	2004 SCC 63 (CanLII); 244 DLR (4th) 513; 1 BLR (4th) 19; 7 CBR (5th) 243
URL:	http://canlii.ca/t/1j0tc
Citation:	Lefebvre (Trustee of); Tremblay (Trustee of), 2004 SCC 63 (CanLII), [2004] 3 SCR 326, <http://canlii.ca/t/1j0tc> retrieved on 2013-08-14
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Lefebvre (Trustee of); Tremblay (Trustee of), [2004] 3 S.C.R. 326, 2004 SCC 63

DaimlerChrysler Services Canada Inc. *Appellant*
v.
Jean-François Lebel *Respondent*
and between
GMAC Leaseco Limited *Appellant*
v.
Raymond Chabot Inc. *Respondent*
Indexed as: Lefebvre (Trustee of); Tremblay (Trustee of)
Neutral citation: 2004 SCC 63.
File Nos.: 29770, 29780.
2004: April 20; 2004: October 28.
Present: McLachlin C.J. and Major, Bastarache, Binnie and LeBel JJ.
on appeal from the court of appeal for quebec

Bankruptcy and insolvency — Long-term lease — Setting up of lessor's right of ownership against lessee's trustee in bankruptcy — Failure to publish rights resulting from lease within legislated time limit — Whether long-term lessor of automobile may set up right of ownership against lessee's trustee in bankruptcy even though lessor failed to publish rights within time prescribed in art. 1852 C.C.Q. — Whether lessor's right of ownership equivalent to simple security — Whether trustee may be considered third person for purposes of art. 1852 C.C.Q. — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 71, 81.

Two debtors leased motor vehicles for 36-month terms under leases of movables, and the related rights were assigned to the appellants. Before the leases had terminated, the debtors made assignments in bankruptcy that included the vehicles, and the respondents were appointed trustees in bankruptcy. The appellants sent the trustees proofs of claim so as to be put in possession of the vehicles, of which they were the owners. The trustees disputed the claims because the leases had not been published in the register of personal and movable real rights within the time limit provided for in art. 1852 C.C.Q. The Superior Court and Court of Appeal agreed with the trustees. They felt that the appellants' rights of ownership could not be set up against the trustees because of the late publication thereof.

Held: The appeals should be allowed.

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A lease contract does not effect a conveyance of ownership between the lessee and the lessor. The leased property remains in the lessor's patrimony. The lessee has only the status of a holder, which means that the property must be surrendered upon termination of the lease. Although the lessor's right of ownership does not arise out of the lease, the rules respecting the publication of rights alter its effects in relation to third persons, since it cannot be set up against third persons unless it is published. However, the publication requirement does not transform the right of ownership into a simple security. Nothing in the *Civil Code of Québec* or the *Bankruptcy and Insolvency Act* alters the nature of the lessor's right of ownership in the leased property or the resulting rights in relation to the lessee.

The status and duties attributed to the trustee following the initial bankruptcy event do not mean that he or she can be regarded as a third person against whom the lessor of the motor vehicle may not set up his or her rights owing to the failure to satisfy the publication requirement. The nature and legal characterization of the trustee's role vary depending on the nature of his or her actions. On the one hand, the trustee is subrogated to the bankrupt's rights in the exercise of his or her powers to hold and dispose of property of which he or she has been granted seisin; on the other hand, the law treats the trustee as the creditors' legal mandatary who will liquidate the property entrusted to him or her for the creditors' benefit. This dual nature does not give the trustee the status of a third person in relation to the bankrupt, especially given all the powers conferred upon the trustee by law in order to preserve and liquidate the debtor's property. When the trustee takes control of the property, his or her seisin is limited to the property in the debtor's patrimony and, apart from special powers, the trustee has no more rights with respect to the property than did the debtor.

In the case at bar, the appellants' rights of ownership can accordingly be set up against the trustees and their claims should have been admitted. The leased vehicles were never part of the debtors' patrimonies. The trustees, in refusing to deliver possession of the property, intended to dispose of property that was not included in their seisin.

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Referred to: *Ouellet (Trustee of)*, 2004 SCC 64 (CanLII), [2004] 3 S.C.R. 348, 2004 SCC 64; *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91; *Massouris (Syndic de)*, 2002 CanLII 39140 (QC CA), [2002] R.J.Q. 901; *Mervis (Syndic de)*, 2002 CanLII 41215 (QC CA), [2002] R.J.Q. 2268; *Civano Construction Inc. v. Crédit M.-G. Inc.*, [1962] C.S. 45; *Kowalski v. Trust Général du Canada*, [1976] C.A. 93; *Poliquin v. Banque de Montréal*, 1998 CanLII 13298 (QC CA), [1998] R.L. 560; *Mercure v. A. Marquette & Fils Inc.*, 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547; *Flintoft v. Royal Bank of Canada*, 1964 CanLII 89 (SCC), [1964] S.C.R. 631.

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Civil Code of Québec, S.Q. 1991, c. 64, arts. 1749, 1752, 1756, 1847, 1852, 1890, 2647, 2941.

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APPEAL from a judgment of the Quebec Court of Appeal, 2003 CanLII 47947 (QC CA), [2003] R.J.Q. 819, 229 D.L.R. (4th) 697, [2003] Q.J. No. 2304 (QL), affirming a decision of the Superior Court, 2001 CanLII 9358 (QC CS), [2001] R.J.Q. 2679, [2001] Q.J. No. 5074 (QL). Appeal allowed.

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APPEAL from a judgment of the Quebec Court of Appeal, [2003] Q.J. No. 2305 (QL), affirming a decision of the Superior Court, [2001] Q.J. No. 3446 (QL). Appeal allowed.

Yves Lacroix and *Gary Makila*, for the appellant DaimlerChrysler Services Canada Inc.

Hugues La Rue, for the appellant GMAC Leaseco Limited.

Martin P. Jutras, for the respondent Jean-François Lebel.

No one appeared for the respondent Raymond Chabot Inc.

English version of the judgment of the Court delivered by

LEBEL J. —

I. Introduction

1 These two appeals raise a similar issue: whether a long-term lessor of an automobile may set up his or her right of ownership against the lessee's trustee in bankruptcy even though the lessor failed to publish his or her rights in the Register of personal and movable real rights ("RPMRR") within the time prescribed in the *Civil Code of Québec*, S.Q. 1991, c. 64. The appeals were heard at the same time as a third case, which concerned an instalment sale contract and in which the issue was whether the seller's reservation of ownership had effect against the buyer's trustee in bankruptcy (*Ouellet (Trustee of)*, 2004 SCC 64 (CanLII), [2004] 3 S.C.R. 348, 2004 SCC 64). Separate reasons for judgment were handed down in that case.

2 In both of these cases, the Quebec Superior Court and Court of Appeal held that the lessor's right of ownership could not be set up against the trustee unless it was published in a timely manner. For the reasons that follow, I am of the opinion that the right of ownership justified the claim for the property in the trustee's hands and could be set up against the trustee. In my view, in light of the facts of these cases, the trustee cannot be considered a third party in relation to the appellants, who may lawfully exercise their rights to follow and rights of revendication as owners of the leased property. Consequently, I would allow both appeals and admit the appellants' claims.

II. Origin of the Cases

A. *DaimlerChrysler Services Canada Inc.*

3 In this case, Alfred Lefebvre leased a Dodge Dakota vehicle from an automobile dealership, Jules Baillot et Fils Ltée. The lease of a movable for a 36-month term was signed on April 19, 1999. On that same date, the dealer assigned the lease contract to the appellant, which now operates as DaimlerChrysler Services Canada Inc. ("DaimlerChrysler"). At the time the lease was signed, art. 1852 C.C.Q. had required since 1998 that rights arising out of leases of movables be published in the RPMRR. In this case, the rights were not published until November 24, 2000. That delay gave rise to this litigation.

4 Alfred Lefebvre made an assignment in bankruptcy on November 1, 2000, at a time when he was still the lessee of the Dodge Dakota, and the respondent Jean-François Lebel was appointed trustee. On November 24, 2000, in accordance with s. 81 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("B.I.A."), DaimlerChrysler sent the trustee a proof of claim so as to be put in possession of the vehicle, of which it was still the owner. As has been mentioned, DaimlerChrysler published its rights in the RPMRR that same day.

5 On December 5, 2000, the trustee notified DaimlerChrysler that he disputed its claim. According to him, the contract could not be set up against him because it had been published late. For that reason, he refused to deliver possession of the vehicle to DaimlerChrysler, which then filed a motion for appeal against this decision in the Quebec Superior Court. In that proceeding, DaimlerChrysler asked the court to recognize that its right of ownership was valid and could be set up against the trustee.

B. *GMAC Leaseco Limited*

6 In this case, Martin Tremblay leased a Chevrolet Cavalier automobile from an automobile dealership, Marlin Chevrolet-Oldsmobile Inc., for a 36-month term on September 28, 1998. That same day, the dealer assigned the contract to the appellant, GMAC Leaseco Limited ("GMAC"). The rights arising out of the lease were not published until January 9, 2001. On December 13, 2000, the lessee received a notice of repossession pursuant to s. 150.14 of the *Consumer Protection Act*, R.S.Q., c. P-40.1. On December 14, 2000, Mr. Tremblay went bankrupt. The respondent, Raymond Chabot Inc., was appointed trustee in bankruptcy. On December 15, 2000, GMAC sent the trustee a proof of claim pursuant to s. 81 B.I.A. and requested that it be put in possession of the vehicle.

7 The trustee responded by giving notice that it disputed the claim on the ground that GMAC's rights could not be set up against it because they had not been published in the RPMRR in a timely manner. On January 17, 2001, GMAC filed a motion for appeal in the Superior Court with a view to having its rights of ownership in the vehicle recognized and to repossessing it. During the course of this appeal, the parties agreed to sell the vehicle and place the proceeds in escrow.

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III. Judicial History

A. *Superior Court*

(1) *DaimlerChrysler*

8 Trudel J. heard DaimlerChrysler's motion for appeal. She first conceded DaimlerChrysler's point that a lessor's right of ownership is not, strictly speaking, a right resulting from the lease. The principal rights are the lessor's right to receive lease payments and the lessee's right to use the vehicle. However, relying on *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, a case whose principles she felt were applicable in Quebec law, she expressed the opinion that, as a result of the rules respecting the publication of rights in Quebec and of the requirement now imposed on lessors to publish rights arising out of a long-term lease of a motor vehicle published in the RPMRR, an unpublished lease cannot be set up against the lessee's trustee in bankruptcy. The right to repossess the property in the event of bankruptcy — which is defined as a default under the lease — must be treated as a right resulting from the contract of lease. This right is governed by art. 1852 C.C.Q. A failure to publish it therefore permits the trustee both to refuse to deliver possession of the property to its owner and to dispose of it for the benefit of the estate of the bankrupt. Trudel J. accordingly dismissed the appellant's motion: 2001 CanLII 9358 (QC CS), [2001] R.J.Q. 2679.

(2) *GMAC*

9 GMAC was no more successful in the Superior Court than DaimlerChrysler had been. Boisvert J. did recognize that GMAC's right of ownership did not arise out of the contract of lease. However, relying on *Giffen*, he held that, since the coming into force of art. 1852 C.C.Q., a right of revendication can no longer be set up against a trustee in bankruptcy where rights resulting from a lease have not been published within the prescribed time limits. Boisvert J. therefore dismissed GMAC's motion for appeal, as GMAC had not published its rights in a timely manner: [2001] Q.J. No. 3446 (QL).

B. *Quebec Court of Appeal (Beauregard, Dussault and Thibault JJ.A.)*

10 The appeals of DaimlerChrysler and GMAC were heard by the same panel of the Quebec Court of Appeal. The Court of Appeal delivered common reasons for judgment in the two cases; the majority rejected the arguments of the property owners, holding that their rights could not be set up against the trustees in bankruptcy: 2003 CanLII 47947 (QC CA), [2003] R.J.Q. 819, 229 D.L.R. (4th) 697, and [2003] Q.J. No. 2305 (QL). Thibault J.A. wrote the principal opinion, and Dussault J.A. concurred in it in separate reasons. Both of them held that the appellants' appeals should be dismissed. Beauregard J.A. wrote dissenting reasons in which he held that the lessors' rights of ownership could be set up against the trustees even though the rights resulting from the leases of movables in issue had not been published.

11 The majority opinions endorsed a line of authority established by the Quebec Court of Appeal in *Massouris (Syndic de)*, 2002 CanLII 39140 (QC CA), [2002] R.J.Q. 901, and *Mervis (Syndic de)*, 2002 CanLII 41215 (QC CA), [2002] R.J.Q. 2268, which addressed the effect of the failure to publish a contract of lease or a contract of sale with a reservation of ownership in respect of movable property on the possibility of setting up a right of ownership against a trustee. These cases decided that trustees had the status of third persons in relation to property owners.

12 Thibault J.A. conceded that the classic principles of civil law recognize the right of the owner of a movable to revendicate it against its possessor without further formalities. However, she relied on *Massouris* and *Mervis* to conclude that, where long-term leases and instalment sales involving motor vehicles are concerned, the Quebec legislature intended to change these traditional rules. In these situations, to prevent the creation of hidden securities, the legislature imposed a publication requirement and it intended to treat as a security the reservation of ownership that was in its opinion provided for in the lease. In the case of long-term leases of motor vehicles, art. 1852 C.C.Q. clearly entrenches this new principle, which the courts must apply. The trustee, who stands in the legal position of a third person for the purposes of art. 1852 C.C.Q., may therefore, on behalf of all the creditors, challenge the security the owner-creditor attempted to create for him or herself. Consequently, in Thibault J.A.'s opinion, the appellants could not exercise their rights of revendication against the trustees in bankruptcy of their lessees. Dussault J.A. reached the same conclusion. In his view, the legislature had implicitly equated a reservation of ownership under a lease or an instalment sale contract with a security.

13 Beauregard J.A. found himself in fundamental disagreement with his learned colleagues' reasons. He began by asserting the view that the cases at bar could be distinguished from *Giffen*. Unlike the *Civil Code of Québec*, the British Columbia legislation provided that the lease of a vehicle for a term of over one year was equivalent to a security interest and that if it were not published, it had to be treated as an unperfected security interest. In Beauregard J.A.'s opinion, the provisions relating to the publication of long-term leases and instalment sales have not changed the basic principles of civil law or, more specifically, the essential difference between a right of ownership and a

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security. A right of ownership need not be published. Although a right of ownership cannot be set up against certain subsequent acquirers identified in the *Civil Code of Québec*, the trustee in bankruptcy is not one of them. Bankruptcy does not confer any more rights on the trustee against the owner of the property than the bankrupt had, and the trustee cannot contest the appellants' claim. Beauregard J.A. would have allowed the appeals and recognized the appellants' rights.

14 The appellants were then given leave to appeal to this Court. In the case of *GMAC*, the respondent trustee did not take part in the proceedings in this Court but left the matter up to the Court. In the case of *DaimlerChrysler*, the respondent actively contested the appeal in all respects.

IV. Relevant Legislative Provisions

15 *Civil Code of Québec*, S.Q. 1991, c. 64

> **1852.** The rights resulting from the lease may be published.
>
> Publication is required, however, in the case of rights under a lease with a term of more than one year in respect of a road vehicle or other movable property determined by regulation, or of any movable property required for the service or operation of an enterprise, subject, in the latter case, to regulatory exclusions; effect of such rights against third persons operates from the date of the lease provided they are published within fifteen days. A lease with a term of one year or less is deemed to have a term of more than one year if, by the operation of a renewal clause or other covenant to the same effect, the term of the lease may be increased to more than one year.
>
> The transfer of rights under a lease requires or is open to publication, according to whether the rights themselves require or are open to publication.
>
> **2941.** Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect.
>
> Rights produce their effects between the parties even before publication, unless the law expressly provides otherwise.

V. Analysis

A. *Issues*

16 These cases raise issues relating to the interplay between Quebec civil law and federal bankruptcy and insolvency legislation. It will be necessary to review the legal characterization of certain movable real rights created under the *Civil Code of Québec* and the role and powers of trustees in bankruptcy in the exercise of those rights. This part of the analysis requires that we revisit the interpretation of the provisions of the *Civil Code of Québec*, art. 1852 C.C.Q. in particular, to determine whether the trustee may be considered a third person in relation to the lessor for the purposes of that provision. To do this, we will first consider the nature of the rights in issue and the scope and effect of the requirement to publish them in the RPMRR. Next, we will review the status of the trustee to determine whether the trustee may set up the failure to publish the rights against the lessor of the movable property. In short, it must be asked whether a long-term lessor of a motor vehicle has rights equivalent to a security and whether those rights must be published. It must then be asked whether the trustee is in the position of a third person and whether he or she may rely on the failure to publish the rights to defeat the claim for the property.

B. *Submissions of the Parties*

17 The appellants adopted a common position in these appeals. Their arguments can be summed up in a few basic propositions. The first is that the signing of a long-term lease does not reduce the lessor's right of ownership to a simple security. The lessor's right remains one of ownership, not one resulting from the lease within the meaning of art. 1852 C.C.Q. This right is therefore not subject to the publication requirement, as only rights resulting from the lease must be published. A failure to publish bars claims against third persons only. Owing to the nature of their role with respect to the property of bankrupts and the nature of their seisin under the *Bankruptcy and Insolvency Act*, trustees cannot be considered third persons in relation to lessors. A trustee has no more rights in the leased property than the bankrupt did, and this would also be true under art. 1749 C.C.Q. of property subject to a reservation of ownership as a result of an instalment sale. The failure to publish the lease does not effect a transfer of ownership, and the trustee cannot set up the failure to publish against the lessor's claim. In this context, *Giffen* cannot be said to apply. In that case, the British Columbia legislation provided that an unpublished automobile lease was not effective against a trustee or against creditors, as it treated the lease as a security interest, whereas Quebec's civil law does not attach such consequences to a failure to publish in relation to trustees in bankruptcy.

18 According to the respondent in the *DaimlerChrysler* appeal, the principles in *Giffen* do in fact apply. As was the case in British Columbia, the Quebec legislature has imposed publication as a necessary condition for setting up rights against third persons, including trustees in bankruptcy of lessees. In the respondent's opinion, the Court of

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Appeal's decision to equate a lease and the rights it recognizes or establishes with a security subject to publication is in keeping with the requirements of commercial life and with the legislature's intent. The legislature has made it clear that publication is required to set up a lease against third parties.

C. *The Legislative Context: Reform of the Law of Security at the Time of the Coming into Force of the Civil Code of Québec*

19 Before discussing the arguments advanced by the parties, we must make a few brief comments on the structure of the law of security in Quebec civil law following the coming into force of the *Civil Code of Québec* in 1994. At the same time, a review of some of the fundamental concepts of property law might be useful for the purposes of defining the nature of the issues, correctly characterizing the parties' rights and assessing the validity of the solutions proposed for resolving the difficulties these cases raise.

20 The coming into force of the *Civil Code of Québec* marked an important step in the evolution of the Quebec law of real security (L. Payette, *Les sûretés réelles dans le Code civil du Québec* (2nd ed. 2001)). The legislature reorganized this field of civil law, structuring it primarily around a single type of security, the hypothec, which applies to both movable and immovable property, although it also recognized, in art. 2647 C.C.Q., another type of right, the prior claim, which protects certain kinds of claims. (See Payette, *supra*, at pp. 2-3 and 59.) This solution was adopted in preference to the presumption of hypothec recommended by the Civil Code Revision Office, which would have grouped all forms of security, including "ownership securities" (*sûretés-propriétés*), under a single concept: the hypothec (*Report on the Québec Civil Code* (1978), vol. II, t. 1, at pp. 427-31). That proposal had attracted strong objections from many critics. (See Payette, *supra*, at pp. 60-64; R. A. Macdonald, "Faut-il s'assurer qu'on appelle un chat un chat? Observations sur la méthodologie législative à travers l'énumération limitative des sûretés, 'la présomption d'hypothèque' et le principe de 'l'essence de l'opération'", in *Mélanges Germain Brière* (1993), 527; see also *Commentaires du ministre de la Justice* (1993), t. II, at p. 1654.) Thus, instead of agreeing to organize the law of real security around the concept of presumption of hypothec, the Quebec legislature set up a simplified, unified security system that nevertheless maintained the fundamental distinction between the legal concepts of security and ownership in relation to the creation and exercise of real securities.

21 This distinction between security and rights of ownership remains a fundamental element of the classification of real rights in property law in the *Civil Code of Québec*. The right of ownership, which is the fundamental real right that theoretically confers full legal control over property, can be distinguished from a security such as a hypothec, which is an incidental real right. One author characterizes incidental real rights as "real rights of security" (*droits réels de garantie*) that relate to the monetary value of a thing rather than to the thing itself and are designed to complement another right by securing it or guaranteeing the payment of a claim (P.-C. Lafond, *Précis de droit des biens* (1999), at p. 192).

22 Together with the reform of the law of security, the codification of 1994 brought significant changes to the system for publishing rights. At the same time as it substantially revised the rules governing land registration, the legislation provided for the creation of the RPMRR. This register was established to remedy some serious flaws in the former system, which had to deal with a wide variety of types of security whose true nature was often not readily apparent because of the absence of a general publication mechanism. This meant that transactions involving many classes of movable property were risky from a legal standpoint. A fundamental goal in setting up this institution was to make public the types of security in respect of movable property that were created under the rules of the new *Civil Code of Québec*. (See D.-C. Lamontagne, in collaboration with P. Duchaine, *La publicité des droits* (3rd ed. 2001), at p. 301.) As in the case of land registration, the purpose of publication, as provided for in art. 2941 C.C.Q., is not to effect transfers of ownership but, generally speaking, to allow rights that may or must be published to be set up against third persons. (See Lamontagne and Duchaine, *supra*, at pp. 31-32.)

23 When the *Civil Code of Québec* came into force in 1994, it did not yet require that rights resulting from long-term leases of road vehicles be published in the RPMRR. This requirement was not introduced until 1998, when art. 1852 C.C.Q. was amended by s. 8 of the *Act to amend the Civil Code and other legislative provisions as regards the publication of personal and movable real rights and the constitution of movable hypothecs without delivery*, S.Q. 1998, c. 5. This new provision required that such rights be published from then on as a condition for setting them up against third persons so as to facilitate trading in movable property. It applied to leases already in existence when it came into force. Sections 6 and 7 of this amending Act also established publication requirements in respect of leasing and of reservations of ownership under instalment sale contracts by amending arts. 1752 and 1847 C.C.Q. A transitional provision, s. 24 of the Act, provided for a time limit of one year from its coming into force for publication of the rights in question.

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D. *The Legal Position of Lessees in Relation to Lessors*

24 The contract in issue in the case at bar is a lease. According to the fundamental rules applicable to leases, such a contract does not effect a conveyance of ownership between the lessee and the lessor. It merely gives the lessee the status of a holder and user by precarious title, which means that the property must be surrendered upon termination of the lease, as provided for in art. 1890 C.C.Q. The contracts in issue remain, by their very terms, leases, albeit long-term ones. Regardless of the nature of the legal relationships as described in these contracts, it must be determined whether they should be recharacterized in light of the wording of art. 1852 C.C.Q. and the requirement to publish imposed by it since 1998, to ensure that the rights arising out of them can be set up against third persons.

25 The majority of the Court of Appeal held that a recharacterization was necessary and, consequently, that the failure to publish could be relied on by the trustee, who had to be considered a third person for the purposes of art. 1852 C.C.Q. However, as Beauregard J.A. noted in his dissenting opinion, this position tends to confuse the concepts of ownership and security. This problem lies at the very heart of the solutions adopted by the Quebec Court of Appeal since *Massouris* to resolve conflicts that have arisen in the decisions of Quebec's trial courts with respect to long-term leases, leasing or instalment sales of vehicles, the related publication requirements and the rights of trustees in bankruptcy. In line with the very clear positions that were adopted in *Massouris*, the decisions of the Court of Appeal have presumed that all legal transactions by means of which an automobile is placed at the disposal of a user are secured credit transactions. This analysis and this characterization have made it possible subsequently to treat the owner's rights as the rights of the holder of a simple security. When this security has not been perfected because of a failure to publish it in a timely manner, it cannot be set up against a trustee in bankruptcy, who is regarded as a third party in his or her capacity as the creditors' representative.

26 This interpretation seems to reintroduce into Quebec's law of real security a concept that was rejected by the legislature in the 1994 codification, namely the presumption of hypothec. It might also be thought that this approach stems from a desire to identify the essence of the transaction and recharacterize the transaction accordingly. From an economic standpoint, it is quite likely that the various methods used by automobile dealers — long-term leases, leasing and instalment sales — all have the same objective: finding a customer, obtaining for the customer the credit needed to complete the transaction and placing the vehicle at the customer's disposal while protecting the interests of the credit provider. However, before dismissing all the applicable legal categories, it is necessary to consider the content of the contracts and where they fit in the classes of contracts established by the *Civil Code of Québec* and used by the parties.

27 In the context of these transactions, we must be careful to disregard neither the fundamental categories of property law nor the nature of the rights arising out of the framework of the type of nominate contract entered into in respect of the property in issue, namely, in the case at bar, a lease. Contrary to the proposals of the Civil Code Revision Office, no provisions of the *Civil Code of Québec* transform the lessor's right of ownership into a hypothec or bar the lessor from trading in automobiles by means of the legal instrument of a lease under which he or she retains ownership of the property. Under such an agreement, the automobile remains in the lessor's patrimony and the lessee has only a right to use it in accordance with the lease and the applicable legislation. It is therefore necessary to analyse the legal situation based on the fact that the lessor retains a right of ownership in the instant case, although the legislature may choose to adjust its effects in relation to third persons and trustees in bankruptcy. This raises the issue of the scope of the requirement to publish rights resulting from a lease on the right of ownership and the effectiveness of the right of ownership.

E. *The Requirement to Publish Rights*

28 When considering the publication requirement, it is important to first take into account the basic principle underlying Quebec's system for publishing rights. As stated in art. 2941 C.C.Q., be it for security on movables or immovables, publication is not a mechanism for transferring rights of ownership. Even if they are not published, the rights subject to the publication requirement retain their effects between the parties unless the law specifically provides otherwise. The function of the requirement is to allow these rights to be set up against third persons and to establish their rank or give them effect as provided by law:

> **2941.** Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect.
>
> Rights produce their effects between the parties even before publication, unless the law expressly provides otherwise.

29 The lessor's right of ownership does not arise out of the lease. It could be said that the right of ownership is pre-existing in relation to the lease. However, the rules respecting the publication of rights alter its effects in relation to third persons. Publication of these rights is now mandatory if they are to be set up against third persons. A failure to satisfy the publication requirement may therefore result in effective transfers of ownership based on the legal

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appearance created by possession, making it impossible to claim property in the hands of third persons. It does not follow from these possible consequences of implementing the rights publication system that publication creates the lessor's right of ownership or that publication is necessary for this right to exist. Publication is needed only to protect the right as against third persons, which is the essence of the concept of setting up rights.

30 Of course, the legislature may play a more active role in the legal relationships of the parties or other interested persons by recharacterizing the rights established by contracts or giving a more radical scope to the consequences of the failure to publish. An example of legislative action of this sort is found in art. 1756 C.C.Q., which governs sales with a right of redemption. In this provision of the *Civil Code of Québec*, a right of redemption used to secure a loan is equated with a hypothec. The seller is deemed to be a borrower, and the acquirer, a hypothecary creditor. The acquirer exercises his or her rights in accordance with the rules respecting hypothecs. Another example of this can be found in the law of bankruptcy and insolvency. In amendments made to the *Bankruptcy and Insolvency Act*'s definition of "secured creditor" by the *Federal Law — Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, Parliament equated the rights of a seller under a conditional or instalment sale, or of an acquirer under a sale with a right of redemption, with the rights of a secured creditor (ss. 25 and 28). Thus, as a result of this Act, the rights in question are subject to the publication requirement. The right of ownership accordingly becomes a debt relationship protected by a security that must be published.

31 In the case of a long-term lease, nothing in the *Civil Code of Québec* or the *Bankruptcy and Insolvency Act* alters the nature of the lessor's right of ownership in the leased property or the resulting rights in relation to the lessee. The lessor retains his or her status and rights of ownership in relation to the lessee. The lessee remains a holder by precarious title against whom the lessor may exercise, *inter alia*, the right to take back the property upon termination of the lease, upon resiliation of the lease or in cases provided for in the contract or by law. It is now necessary to consider whether, in light of the status and duties attributed to the trustee following the initial bankruptcy event, the trustee can be regarded as a third person against whom the lessor of the motor vehicle may not set up his or her rights because of the failure to satisfy the publication requirement. This question once again raises the difficulties resulting from the ambiguities inherent in the trustee's status in the law of bankruptcy and insolvency and from the need to adapt federal insolvency law to two modern legal systems that differ in their methods, their terminology and, in some instances, their basic classifications.

F. *The Position of the Trustee in Bankruptcy*

32 Following the logic of its characterization of the lessor's rights, the Quebec Court of Appeal equated trustees in bankruptcy with third persons and allowed the trustee to retain the property and dispose of it for the benefit of the bankrupt's creditors on the basis that the lessor's rights could not be set up against the trustee. This conclusion is based on an oversimplification of the multifaceted role of the trustee and the dual nature of his or her status at the time of the initial bankruptcy event, as well as of the nature of the assignment to the trustee of the bankrupt's property and the seisin the trustee consequently has of the property.

33 The terminology used in the *Bankruptcy and Insolvency Act* could lead a legal professional trained in the civil law to conclude too hastily that the assignment of property resulting from the bankruptcy constitutes a transfer of ownership to a third person. Section 71(2) B.I.A. provides that the bankrupt's property "shall . . . pass to and vest in the trustee". It would as a result be easy to believe that this is a case of alienation of property that, in a bankruptcy situation, would put the trustee in the position of a third person.

34 The legal content of the trustee's function is not easily defined. I am aware that the assignee concept was employed in judgments on which the Quebec courts have based their decisions for some time now, including the decision of Bernier J., as he then was, in *Civano Construction Inc. v. Crédit M.-G. Inc.*, [1962] C.S. 45. (See also *Kowalski v. Trust Général du Canada*, [1976] C.A. 93; *Poliquin v. Banque de Montréal*, 1998 CanLII 13298 (QC CA), [1998] R.L. 560 (C.A.), at p. 566; see also the comments of professors J. Auger and A. Bohémier, "The Status of the Trustee in Bankruptcy" (2003), 37 *R.J.T.* 57.) Defining the precise nature of the seisin vested in the trustee has proven to be extremely difficult. Can it be regarded as a *sui generis* right of ownership, as fiduciary ownership or even as a case of administration of the property of others within the meaning of Title Seven of Book Four of the *Civil Code of Québec*? (Auger and Bohémier, *supra*, at pp. 67 and 102-06)

35 The strict concept of ownership accounts poorly for the nature of the trustee's duties and the rights a trustee exercises over the bankrupt's property following the initial bankruptcy event. The trustee's rights are exercised only in relation to a patrimony whose content is legally defined in s. 67 B.I.A. This patrimony consists of only the property that could be liquidated for the benefit of the creditors. The trustee exercises certain statutory rights over this property that are in part similar to the rights of an owner. The trustee may dispose of the property of which he or she has seisin, but for a specific purpose, namely to pay the claims of the bankrupt's creditors rateably following the order of priority provided for in the *Bankruptcy and Insolvency Act*. In any cases, which are actually quite rare, in which there is a surplus

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following liquidation, the trustee may not retain the surplus but must return it to the bankrupt. The attribution and exercise of such powers do not correspond perfectly to alienation, so much so that some authors have expressed very strong criticism of the use of the assignee concept to describe the function of the trustee in bankruptcy (M. Cantin Cumyn, *Traité de droit civil: L'administration du bien d'autrui* (2000), at pp. 110-12).

36 At any rate, the use of the concept of *dévolution* (vesting) in the French version of s. 71(2) B.I.A. does not eliminate the distinction between the two aspects of the trustee's role following the initial bankruptcy event. In *Mercure v. A. Marquette & Fils Inc.*, 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547, this Court clearly noted this distinction, which serves as a basis for characterizing the legal position of the trustee when exercising the powers and performing the obligations the law ascribes to trustees. Referring to the concept of representation to explain the trustee's twofold responsibility, de Grandpré J. stated that in his view the trustee is a representative of both the debtor and the creditors (p. 553). In order to liquidate the bankrupt's property as directed by the *Bankruptcy and Insolvency Act*, the trustee must take control of it. At this stage, the trustee is the bankrupt's successor or, in a broad sense, his or her representative. However, the trustee's juridical personality is not to be confused with that of the debtor. In fact, as de Grandpré J. noted, the law recognizes that the trustee has the right to sue the debtor if necessary (p. 553). This power illustrates the importance of the other aspect of the trustee's functions, that of representing the creditors in the management and liquidation of the bankrupt's property. The trustee's legal position is therefore more akin to that of a third person in relation to the debtor. On the one hand, the trustee is subrogated to the bankrupt's rights in the exercise of his or her powers to hold and dispose of property of which he or she has been granted seisin. On the other hand, the law treats the trustee as the creditors' legal mandatary who will liquidate the property entrusted to him or her for the creditors' benefit. The dual nature of the trustee's duties does not therefore make it possible to regard the trustee as a third person in relation to the bankrupt, given all the powers conferred upon the trustee by law in order to preserve and liquidate the debtor's property. The nature and legal characterization of the trustee's role will vary depending on the nature of the duties that the trustee's actions will entail.

37 When the trustee takes control or becomes seised of the universality of property defined in s. 67 B.I.A., his or her seisin is limited to the property in the debtor's patrimony. Apart from the special powers accorded by law to the trustee, as representative of the creditors, to restore the patrimony to be liquidated in its entirety, the trustee has no more rights with respect to the debtor's property than did the debtor, of whom the trustee remains the successor in this regard. This principle is well established in relation to the application of s. 67 B.I.A. It was laid down by Judson J. in *Flintoft v. Royal Bank of Canada*, 1964 CanLII 89 (SCC), [1964] S.C.R. 631, at p. 634. More recently, Iacobucci J. confirmed the validity of the principle in *Giffen*. In my view, the trustee has no greater interest in the property under his or her responsibility than that of the bankrupt, unless otherwise provided for by legislation (*Giffen*, at para. 50).

38 This being said, under the *Bankruptcy and Insolvency Act*, and often under various provincial statutes, the trustee has special powers allowing him or her to restore the debtor's patrimony to its former state or to the state it should have been in, or to protect the estate of the bankrupt against rights unduly claimed or exercised against it. Such a situation may occur in cases where action must be taken to cancel preferential payments or improper transfers of the bankrupt's property or to contest a security that has been granted illegally or has not been perfected in accordance with the law.

39 However, these powers and the status they confer upon the trustee do not give the trustee the authority to liquidate property that was not in the bankrupt's patrimony, which is similar to the situation that has arisen in this appeal. The vehicles leased by the appellants were never part of the debtors' patrimonies. Since the lessors' rights cannot be considered simple claims guaranteed by real securities, the trustees, in refusing to deliver possession of the property, intended to dispose of property that was not included in their seisin.

40 At this stage of my analysis of these cases, I believe a few comments about *Giffen* are necessary. The Court of Appeal considered the principles in that case to be determinative in the case at bar. However, that interpretation gave *Giffen* a significance it did not in fact have, as the court failed to take into account the statutory context established by the provincial legislation of British Columbia, which defined the respective rights of a long-term lessor of a motor vehicle and the trustee in bankruptcy of the lessee. In *Giffen*, s. 20(b)(i) of the *Personal Property Security Act*, S.B.C. 1989, c. 36, provided that a lease in respect of an automobile was not effective against a trustee if the lease were not published as required by the *Personal Property Security Act*. Thus, the provincial legislation itself defined the nature of the respective rights of lessors and trustees. It allowed trustees to contest a lessor's claim and liquidate property for the benefit of creditors. As Iacobucci J. observed, s. 20(b)(i) of the *Personal Property Security Act* therefore gave the trustee an interest greater than that of the bankrupt, and this allowed the trustee to dispose of the property (para. 50). As has already been mentioned, the *Civil Code of Québec* does not provide for a similar consequence for failure to publish the rights arising out of a lease. In this context, *Giffen* did not justify the solution adopted by the Court of Appeal. On the

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contrary, *Giffen* confirmed the rules governing the composition of the bankrupt's patrimony. The appellants' claims should have been admitted. Their appeals therefore appear to be well founded.

G. *Costs*

41 The circumstances of these cases warrant a departure from the usual rules on the awarding of costs. In the appeal of GMAC, I would make no order as to costs, as the respondent did not participate in the appeal. In the appeal of DaimlerChrysler, it would be appropriate to award costs to the respondent on a solicitor-client basis. The appellant brought before this Court an issue of particular interest that it was more concerned about than the actual outcome of the case. The participation of the respondent and his counsel was helpful to the analysis of the issues raised by this case, and it would be unfair to make the respondent bear all the costs incurred in the general interest of the development of the law, which went beyond his narrow interest in the management of a relatively modest bankruptcy.

VI. Conclusion

42 For these reasons, I would allow the appeals and admit the appellants' claims. As the vehicle in *GMAC* has been sold, the appellant is entitled to the proceeds of the sale. The appeals should be allowed without costs in the case of *GMAC* and with costs to the respondent on a solicitor-client basis in the case of *DaimlerChrysler*.

Appeals allowed.

Solicitors for the appellant DaimlerChrysler Services Canada Inc.: Fasken Martineau DuMoulin, Québec.
Solicitors for the appellant GMAC Leaseco Limited: Pothier Delisle, Sainte-Foy, Québec.
Solicitor for the respondent Jean-François Lebel: Martin P. Jutras, Westmount, Québec.

Ouellet (Trustee of), 2004 SCC 64, [2004] 3 SCR 348 - Late Title Reservation on Installment Sale in Que. Set-up Against Trustee?

Date:	2004-10-28
Docket:	29864
Parallel citations:	2004 SCC 64 (CanLII); 244 DLR (4th) 532; 1 BLR (4th) 1; 7 CBR (5th) 277
URL:	http://canlii.ca/t/1j0td
Citation:	Ouellet (Trustee of), 2004 SCC 64 (CanLII), [2004] 3 SCR 348, <http://canlii.ca/t/1j0td> retrieved on 2013-08-29
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Ouellet (Trustee of), [2004] 3 S.C.R. 348, 2004 SCC 64

National Bank of Canada *Appellant*

v.

Samson Bélair Deloitte & Touche Inc., Trustee *Respondent*

Indexed as: Ouellet (Trustee of)

Neutral citation: 2004 SCC 64.

File No.: 29864.

2004: April 20; 2004: October 28.

Present: McLachlin C.J. and Major, Bastarache, Binnie and LeBel JJ.

on appeal from the court of appeal for quebec

Bankruptcy and insolvency — Instalment sale — Setting up of trustee's reservation of ownership — Failure to publish reservation within legislated time limit — Whether reservation of ownership not published within time limit provided for in art. 1745 C.C.Q. can be set up against trustee — Whether trustee can be considered third person for purposes of art. 1749 C.C.Q.

In 1997, the debtor bought property from a dealer in instalment sales, and the dealer assigned its rights to the appellant bank. A few years later, the debtor made an assignment in bankruptcy and the respondent was appointed trustee in bankruptcy. The bank then sent the respondent a proof of claim for its reservation of ownership in respect of the property. The trustee disputed the claim because the bank had not published the reservation within the time limit

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provided for in art. 1745 C.C.Q. The Superior Court and Court of Appeal agreed with the trustee. They felt that the reservation could not be set up against the trustee because of the failure to publish it within the prescribed time limit.

Held: The appeal should be allowed.

Based on the law applicable to this case, the reservation of ownership could be set up against the trustee. According to art. 1745 C.C.Q., an instalment sale is a term sale by which the seller reserves ownership of the property until full payment of the sale price, and this reservation of ownership must be published to have effect against third persons. If it is not published or if it is published late, art. 1749 C.C.Q. provides that the seller (or transferee) may take the property back only if it is in the hands of the original buyer. The reservation of ownership must not be equated with a security within the meaning of the *Civil Code of Québec*. The legal relationship between the original buyer and the seller must be interpreted as one of ownership. In this context, the rules regarding the scope of the trustee's seisin are relevant. Since a failure to publish does not have the effect of conveying ownership to the original buyer, the property sold does not become part of his or her patrimony. Upon bankruptcy, the trustee is vested with only the rights the bankrupt had in the property. He or she cannot be considered a third person acquirer for the purposes of art. 1749 C.C.Q. and cannot contest the claim of the seller, who still holds the right of ownership in the property.

Cases Cited

Referred to: *Lefebvre (Trustee of)*, 2004 SCC 63 (CanLII), [2004] 3 S.C.R. 326, 2004 SCC 63, rev'g 2003 CanLII 47947 (QC CA), [2003] R.J.Q. 819, 229 D.L.R. (4th) 697, and [2003] Q.J. No. 2305 (QL); *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91; *Venne v. Quebec (Commission de protection du territoire agricole)*, 1989 CanLII 84 (SCC), [1989] 1 S.C.R. 880.

Statutes and Regulations Cited

Act to amend the Civil Code and other legislative provisions as regards the publication of personal and movable real rights and the constitution of movable hypothecs without delivery, S.Q. 1998, c. 5, s. 2.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 81.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 1745, 1749, 2941.

Federal Law — Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4, ss. 25 to 28.

APPEAL from a judgment of the Quebec Court of Appeal, 2003 CanLII 11411 (QC CA), [2003] R.J.Q. 1434, [2003] Q.J. No. 5544 (QL), affirming a decision of the Superior Court, [2002] Q.J. No. 410 (QL). Appeal allowed.

Reynald Auger and *Lucien Godbout*, for the appellant.

Alain Vachon and *André J. Brochet*, for the respondent.

English version of the judgment of the Court delivered by

LEBEL J. —

I. Introduction

1 In this appeal, the Court must decide whether a reservation of ownership in respect of an automobile and a mobile home sold in instalment sales can be set up against the buyer's trustee in bankruptcy when the seller has failed to publish his or her rights in a timely manner in the register of personal and movable real rights ("RPMRR") as required under the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."). The case at bar was heard at the same time as two others that raise a similar issue, namely whether a lessor's right of ownership under a long-term lease of an automobile can be set up against the lessee's trustee in bankruptcy (*Lefebvre (Trustee of)*; *Tremblay (Trustee of)*, 2004 SCC 63 (CanLII), [2004] 3 S.C.R. 326, 2004 SCC 63 (hereinafter "*DaimlerChrysler*" and "*GMAC*")). A separate judgment is being filed today in those cases.

2 In the case at bar, the Quebec Superior Court and Court of Appeal both ruled that the reservation of ownership relied on by the appellant could not be set up against the trustee because it was not published within the time limit provided for in the *Civil Code of Québec*. For the reasons that follow, I find that the reservation of ownership could in fact be set up against the trustee. In the context of the facts relevant to this appeal, the trustee did not have the status of a third person for the purposes of the *Civil Code of Québec*. Consequently, I would allow the appeal and admit the claim of the appellant, the National Bank of Canada ("Bank").

II. Origin of the Case

3 On August 25, 1997, Stéphane Ouellet bought a mobile home, and on April 8, 1998, he purchased a Chevrolet Silverado. He bought this property from a dealer in instalment sales, and the dealer assigned its rights to the Bank on the day the contracts were signed. The reservation of ownership and the assignment thereof were not published in the RPMRR until February 28, 2001.

4 In the meantime, on December 1, 2000, Mr. Ouellet made an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("B.I.A."). The respondent was appointed trustee in bankruptcy. On February 1,

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2001, the appellant sent the respondent a proof of claim for its reservation of ownership in respect of the property and requested that it be put in possession of the property pursuant to s. 81 B.I.A. On February 8, 2001, the trustee gave notice that it disputed the claim because the Bank had not published the reservations of ownership, which consequently had no effect against the trustee. On February 23, 2001, the Bank brought a motion for appeal in the Superior Court against the notice of dispute.

III. Judicial History

A. *Superior Court*

5 Barakett J. dismissed the Bank's motion: [2002] Q.J. No. 410 (QL). He pointed out that a reservation of ownership in the context of an instalment sale must be published in the RPMRR. In his view, a reservation of ownership must be regarded as a security. Based on what he understood to be the principles laid down in *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, he held that, as the reservation of ownership had not been published within the legislated time limit, it had no effect against the buyer's trustee in bankruptcy. In his opinion, this conclusion also applied to the buyer's ordinary creditors.

B. *Court of Appeal (Rousseau-Houle, Rochette and Morin JJ.A.)*

6 The Bank appealed to the Court of Appeal, which unanimously affirmed the trial judgment: 2003 CanLII 11411 (QC CA), [2003] R.J.Q. 1434. The court relied on its own consistent case law, including the judgments rendered on March 19, 2003, in *Lefebvre (Syndic de)*, 2003 CanLII 47947 (QC CA), [2003] R.J.Q. 819, 229 D.L.R. (4th) 697, and *Tremblay (Syndic de)*, [2003] Q.J. No. 2305 (QL), which were subsequently appealed to this Court. The Court of Appeal expressed the opinion, based on its case law, that a reservation of ownership in respect of the sale of a road vehicle is in the nature of a security and must be published as required by law. Failing this, it cannot be set up against a trustee, who is a third person for the purposes of art. 1749 C.C.Q. and may therefore rely on the failure to publish.

IV. Relevant Legislative Provisions

7 *Civil Code of Québec*, S.Q. 1991, c. 64

> **1745.** An instalment sale is a term sale by which the seller reserves ownership of the property until full payment of the sale price.
>
> A reservation of ownership in respect of a road vehicle or other movable property determined by regulation, or in respect of any movable property acquired for the service or operation of an enterprise, has effect against third persons only if it has been published; effect against third persons operates from the date of the sale provided the reservation of ownership is published within fifteen days. As well, the transfer of such a reservation has effect against third persons only if it has been published.
>
> **1749.** A seller or transferee who, upon the default of the buyer, elects to take back the property sold is governed by the rules regarding the exercise of hypothecary rights set out in the Book on Prior Claims and Hypothecs; however, in the case of a consumer contract, only the rules contained in the Consumer Protection Act are applicable to the exercise by the seller or transferee of the right of repossession.
>
> If the reservation of ownership required publication but was not published, the seller or transferee may take the property back only if it is in the hands of the original buyer; the seller or transferee takes the property back in its existing condition and subject to the rights and charges with which the buyer may have encumbered it.
>
> If the reservation of ownership required publication but was published late, the seller or transferee may likewise take the property back only if it is in the hands of the original buyer, unless the reservation was published before the sale of the property by the original buyer, in which case the seller or transferee may also take the property back if it is in the hands of a subsequent acquirer; in all cases, the seller or transferee takes the property back in its existing condition, but subject only to such rights and charges with which the original buyer may have encumbered it at the time of the publication of the reservation of ownership and which had already been published.
>
> **2941.** Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect.
>
> Rights produce their effects between the parties even before publication, unless the law expressly provides otherwise.

V. Analysis

A. *Issues*

8 This appeal, like the appeals considered in *GMAC* and *DaimlerChrysler*, raises the issue of the interplay between the rights of the owner of property and the rights of the trustee in bankruptcy of the user of the property. However, this appeal presents the issue in a different context, as has already been mentioned. The dispute arises out of a contract for an instalment sale within the meaning of art. 1745 C.C.Q. It must therefore be determined

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whether the reservation of ownership in favour of the seller has effect against the buyer's trustee in bankruptcy even though the reservation was not published in the RPMRR within the legislated time limit.

9 In addressing this issue, I do not intend to go back over the distinction between the right of ownership and real security, the classification and definition of these concepts in the *Civil Code of Québec*, or the nature and effects of the publication of rights, or over the trustee's status and role and the scope of his or her seisin following a bankruptcy. On these topics, I refer the reader to the reasons for judgment in *GMAC* and *DaimlerChrysler*. In the instant case, it will suffice to review the aspects of the effect against third persons specific to the instalment sale and to the failure to publish the reservation of ownership provided for in the case at bar. In my opinion, by relying on its consistent line of authority, the Court of Appeal incorrectly equated the reservation of ownership with a security within the meaning of the *Civil Code of Québec* and treated the trustee as a third person for all purposes without giving adequate consideration to the complex nature of the trustee's role. As a result, the Court of Appeal found that a trustee was in the same position as a third person for the purposes of art. 1749 C.C.Q. and could argue that the reservation of ownership had no effect against it owing to the failure to publish. If the Court of Appeal had correctly characterized the rights arising out of the instalment sale and had accurately defined the trustee's position in relation to the bankrupt and hence the scope of the trustee's seisin, it would have recognized the appellant's right to claim the property to which its reservation of ownership applied.

B. *The Instalment Sale and the Reservation of Ownership*

10 The definition of an instalment sale has been debated often in Quebec civil law. In 1989, a decision of this Court settled the difficulties involved in defining the nature of such a contract. In *Venne v. Quebec (Commission de protection du territoire agricole)*, 1989 CanLII 84 (SCC), [1989] 1 S.C.R. 880, Beetz J. expressed the opinion that an instalment sale in respect of an immovable should be considered a term sale under which the transfer of ownership is suspended until the sale price is paid (pp. 900 and 902). Article 1745 C.C.Q. entrenched this analysis of this type of contract by defining the instalment sale as ". . . a term sale by which the seller reserves ownership of the property . . .". Ownership of the property thus remains with the seller until the term is fulfilled. Since the transfer of ownership takes effect only at that time, the property continues to be part of the seller's patrimony. The seller retains ownership rather than a mere security interest, according to the definition of an instalment sale contract adopted in art. 1745 C.C.Q.

11 Next comes the issue of the publication of rights. Since 1998, art. 1745 C.C.Q. has required that reservations of ownership be published in the RPMRR to have effect against third persons. This requirement was introduced into the *Civil Code of Québec* by s. 2 of the *Act to amend the Civil Code and other legislative provisions as regards the publication of personal and movable real rights and the constitution of movable hypothecs without delivery*, S.Q. 1998, c. 5. It is therefore necessary to consider the consequences of a failure to publish.

12 Article 1749 C.C.Q. attaches consequences to a failure to publish a reservation of ownership. In such cases, the seller may take the property back only if it is still in the hands of the original buyer, and subject to any charges with which it may have been encumbered in favour of a third person. In cases of late publication, repossession of the property is subject to any charges with which it may have been encumbered since the property was delivered to the buyer. In light of the facts of this appeal, it must now be determined whether the trustee should be considered a third person for the purposes of art. 1749 C.C.Q. and whether the trustee should be allowed to argue that the reservation had no effect against it because it had not been published at the time of the debtor's bankruptcy.

13 In considering this issue, we must avoid equating the reservation with a simple security interest. As has been noted above, art. 1745 of the *Civil Code of Québec* defines a reservation of ownership as a right of ownership. Article 1749 C.C.Q. recognizes the right to take the property back if it is still in the hands of the original buyer. Thus, despite the economic function of this type of contract in the automobile business, the legal relationship between the original buyer and the seller must always be interpreted as one of ownership in the legal sense and not as a security relationship.

14 In this context, the rules regarding the scope of the trustee's seisin, which I have discussed in the reasons for judgment in *GMAC* and *DaimlerChrysler*, remain relevant. A failure to publish does not have the effect of conveying ownership to the original buyer. The property sold does not become part of his or her patrimony. Upon bankruptcy, the trustee is vested with only the rights the bankrupt had in the property. In terms of this aspect of the trustee's role at the time of the bankruptcy, the trustee cannot be considered a third person acquirer and cannot contest the claim of the seller, who still holds the right of ownership in the property.

15 This is the conclusion that must be drawn from the law applicable to this case. However, it should be noted that amendments made to the *Bankruptcy and Insolvency Act* since the relevant time would have led to a different result had they been applicable to this case. The amendments made to this federal Act's definition of "secured creditor" by ss. 25 to 28 of the *Federal Law — Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, equate a reservation of

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ownership in an instalment sale with a security for the trustee's purposes. In the context of a bankruptcy, this right now is of no effect against the trustee if it is not published.

16 For the purposes of this appeal, the reservation of ownership retains its full effect. Thus, as the *Civil Code of Québec* does not permit this right of ownership to be characterized as a security, *Giffen* does not apply and the Bank's claim should have been admitted. The Bank's appeal was well founded in all respects.

C. *Costs*

17 As in *DaimlerChrysler*, the circumstances of this appeal justify awarding costs to the respondent on a solicitor-client basis even though the appeal is being allowed. The appellant wished to bring before this Court a broad issue relating to the law of security and insolvency that went far beyond the individual interests at stake in this case, especially for the trustee. The trustee, through its counsel, played a helpful role in the conduct of the appeal and the analysis of the problems it raised. It would accordingly be unfair to expect the respondent to bear the full burden of its participation in the case before this Court.

VI. Conclusion

18 For these reasons, I would allow the appeal so as to admit the appellant's claim to the property to which its reservation of ownership applied. However, I would award the respondent reasonable costs in this Court on a solicitor-client basis.

Appeal allowed.

Solicitors for the appellant: Langlois Kronström Desjardins, Lévis, Quebec.

Solicitors for the respondent: Brochet Dussault Larochelle, Sainte-Foy, Quebec.

Plante (Trustee of) v. John Deere Finance Ltd., 1996 CanLII 858 (ON CA) - Unperfected Security Interest in Collateral - Can it be Set-up Against Trustee?

Date:	1996-03-13
Docket:	c12480
Parallel citations:	28 OR (3d) 314; 133 DLR (4th) 580; 38 CBR (3d) 165; 89 OAC 261
URL:	http://canlii.ca/t/6jb8
Citation:	Plante (Trustee of) v. John Deere Finance Ltd., 1996 CanLII 858 (ON CA), <http://canlii.ca/t/6jb8> retrieved on 2013-09-15
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Court File No.C12480

COURT OF APPEAL FOR ONTARIO

HOULDEN, CARTHY and CHARRON JJ.A.

B E T W E E N :

PRICE WATERHOUSE LIMITED, Trustee in Bankruptcy of the Estate of Herve Julien Plante

Appellant

Sheldon L. Schwartz for the appellant

and

JOHN DEERE FINANCE LIMITED

Respondent

David G. Timms for the respondent

Heard: February 13, 1996

HOULDEN J.A.:

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By s. 20(1)(b) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "P.P.S.A."), an unperfected security interest in collateral is not effective against a trustee in bankruptcy. By s. 20(2)(b), the rights of a trustee in bankruptcy in respect of the collateral are to be determined as of the date from which the trustee's representative status takes effect. Where a receiving order in bankruptcy has been made against a debtor, does the trustee's representative status take effect as of the date of the filing of the petition in bankruptcy or as of the date of the making of the receiving order? Brockenshire J., in the court below, in a decision reported in reflex, (1992), 13 C.B.R. (3d) 40, held that the representative status takes effect as of the date of the receiving order. With respect, I disagree.

THE FACTS

On March 15, 1990, Julien H. Plante purchased a 41 foot Mainship cabin cruiser from Beacon Bay Marina McKay Yacht Agency for $300,000. At the time of the purchase, Plante executed a consumer purchase security agreement. On the same day, the agreement was assigned by Beacon Bay Marina to John Deere Finance Limited ("John Deere"), the respondent in the appeal.

On April 2nd, 1990, John Deere registered a financing statement under the P.P.S.A.. The debtor was described in the financing statement as Julien H. Plante. The name of the bankrupt on his Quebec birth certificate was Joseph Julien Hervé Plante. It appears that the debtor used a variety of names, including Julien Hervé Plante, Harvey Joseph Plante, Joseph Julien Plante, and Hervé Julien Plante. If a search had been made in the P.P.S.A. registration system under the name Joseph J. Plante, it would not have disclosed the financing statement of John Deere under the April 2nd, 1990 registration.

On September 4, 1990, a petition in bankruptcy was filed against Plante. The petition was disputed. On January 8, 1991, an interim receiving order was made in which the appellant was appointed interim receiver and directed to take immediate possession of all property of the debtor save for certain real property. On January 9, 1991, the interim receiver took possession of the cabin cruiser.

On January 25, 1991, John Deere filed a new registration in respect of the same collateral. In this registration, the name of the debtor was shown as Joseph J. Plante.

On January 29, 1991, after hearing oral evidence, McGarry J., sitting as Bankruptcy Judge, made a receiving order against the debtor. The appellant, Price Waterhouse Limited, was appointed trustee of the bankrupt estate. The trustee in bankruptcy brought a motion in the bankruptcy court for an order that the interest of John Deere was subordinate to the interest of the trustee in the collateral. The motion was dismissed by Brockenshire J. with costs.

SECTION 97 OF THE BANKRUPTCY ACT

Brockenshire J. was of the opinion that even if he was wrong in his interpretation of s. 20(2)(b) of the P.P.S.A., the priority of John Deere over the trustee in bankruptcy was saved by s. 97(1) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 (the name of the Act was changed in 1992 to the *Bankruptcy and Insolvency Act*, but this case arose prior to the change of name).

On the argument of the appeal, counsel for the respondent informed the court that he was no longer relying upon s. 97(1) to support the priority of John Deere. In view of the decision of the Supreme Court of Canada in *Halpenny v. Paddon*, 1982 CanLII 47 (SCC), [1982] 1 S.C.R. 559 on the effect of s. 97(1) where there has been a failure to register a security, I believe that counsel was right in concluding that s. 97(1) was of no assistance to the respondent in this case.

THE RELEVANT LAW FOR THIS APPEAL

By s. 16(1) of O. Reg. 372/89 (now s. 16(1) of R.R.O. 1990, Reg. 912), the name of the debtor who is a natural person should be set out in the financing statement to show the first given name, followed by the initial of the second given name, if any, followed by the surname. The financing statement registered by John Deere on April 2nd, 1990, should have shown the name of the debtor as Joseph J. Plante, as was done in the registration on January 25, 1991. Since a reasonable person making a search under the P.P.S.A. registration system under the name Joseph J. Plante would not have been able to discover the security interest of John Deere, the security interest of John Deere was unperfected at the date of the filing of the petition in bankruptcy. The curative section, s. 46(4) of the P.P.S.A., is of no assistance to John Deere, since the error in the name was likely to mislead materially a reasonable person: *Re Lambert* 1995 CanLII 3500 (ON CA), (1994), 20 O.R. (3d) 108 (C.A.).

The predecessor section to s. 20 of the P.P.S.A. was s. 22 of R.S.O. 1980, c. 375. The relevant parts of s. 22 for the purposes of this appeal are the following:

22. (1) Except as provided in subsection (3), an unperfected security interest is subordinate to,

(a) the interest of a person,

. . . .

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(iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver; and

. . . .

(2) The rights of a person under subclause (1)(a)(iii) in respect of the collateral *are referable to the date from which his status has effect* and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the unperfected security interest. [Emphasis added.]

The interpretation of these parts of s. 22 were discussed by Anderson J. in *Re Hillstead* (1979), 26 O.R. (2d) 289 (Bktcy.). In that case, the debtor, as purchaser, entered into two conditional sales contracts with the respondent as vendor. Before a financing statement was registered, a petition in bankruptcy was filed against the debtor. The financing statement was registered prior to the making of the receiving order.

In holding that the security interest of the conditional vendor was subordinate to that of the trustee in bankruptcy, Anderson J. relied on s-ss. (4) and (5) of s. 50 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. Subsections (4) and (5) of s. 50 are now s-ss. (1) and (2) of s. 71 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3. They provide:

71. (1) A bankruptcy shall be deemed to have relation back to, and to commence at the time of the filing of, the petition on which a receiving order is made or of the filing of an assignment with the official receiver.

(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

On the basis of these subsections, Anderson J. concluded (at p. 291) that "the date from which the status of the trustee has effect is the date of the filing of the petition."

In 1989, the *Personal Property Security Act*, R.S.O. 1980, c. 375 and amending Acts were repealed and replaced by the *Personal Property Security Act*, S.O. 1989, c. 16. Section 20 of that Act (now s. 20 of R.S.O. 1990, c. P.10) replaced s. 22 of the former Act. The relevant portions of s. 20 for the purposes of this appeal are the following:

20. (1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

. . . .

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

. . . .

(2) The rights of a person,

(a) who has a statutory lien referred to in subclause (1)(a) (i) arise,

(i) in the case of the bankruptcy of the debtor, *at the effective date of the bankruptcy*, or

. . . .

(b) under clause (1)(b) in respect of the collateral are *to be determined as of the date from which the person's representative status takes effect*. [Emphasis added.]

As can be seen, for a statutory lien, the rights of the holder of such a lien arise in the case of the bankruptcy of the debtor at the "effective date of bankruptcy". Brockenshire J. was of the opinion that, in light of s. 71(1) of the *Bankruptcy Act*, the "effective date of bankruptcy" is clearly the date of the petition. I agree with this interpretation of s. 20(2)(a)(i). The words "effective date of bankruptcy" are apt to describe the dating back of the trustee's title which occurs by reason of s. 71(1).

Brockenshire J. was, however, of the view that "the date from which the [trustee's] representative status takes effect" in s. 20(2)(b) refers to the date of the receiving order, not the date of the filing of the petition. At pp. 43-44, he set out his reasons for coming to this conclusion:

> In my view, in light of s. 71(1) of the *Bankruptcy Act*, the "effective date of a bankruptcy" is clearly the date of the petition. However "the date from which the trustee's representative status takes effect" in my view is the date of the receiving order which appoints the person. To hold that the latter date should also be the date of the petition would make meaningless the difference in wording of the two subsections of s. 20 of the new P.P.S.A. The words used in s. 20(2)(a)(i) are new to the statute, and the words in s. 20(2)(b) contain a significant change

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> from "status has effect", to "status takes effect". It has been said that where the legislature has changed the language of an Act, it is generally to be presumed that it thereby intended to change the law -- *Ottawa (City) v. Hunter* 1900 CanLII 10 (SCC), (1900), 31 S.C.R. 7. In my view "status has effect" can be taken to encompass the "relating back" provision, as was decided by Anderson J., but "status takes effect" can, in the context of s. 20 as a whole, and of the scheme of the *Bankruptcy Act*, only mean the date of the receiving order.

As I read this passage, Brockenshire J. arrived at the conclusion that the relevant date was the date of the receiving order for two reasons: (a) the use of the words "effective date of bankruptcy" in s. 20(2)(a)(i) as contrasted with "as of the date from which the person's representative status takes effect" in s. 20(2)(b); and (b) the change from "status has effect" in former s. 22(2) to "status takes effect" in s. 20(2)(b) of the present P.P.S.A.

With regard to the second reason, I can, with respect, discern no difference between "status has effect" and "status takes effect". In my opinion, the drafter of the legislation has simply used a more active verb "takes" in place of the rather passive verb "has".

The first reason is, however, more troublesome. Although it is difficult to say why the drafter used different wording in s. 20(2)(a)(i) and s. 20(2)(b), I do not believe that the drafter intended any change in s. 20(2)(b) from the interpretation that had been given by Anderson J. in *Re Hillstead*, *supra*. In their text, *The Ontario Personal Property Security Act - Commentary and Analysis*, Professor Jacob S. Ziegel and David L. Denomme (Aurora: Canada Law Book, Inc., 1994) refer to the decision in this case and Brockenshire J.'s query why the drafter would have used different wording, and they give this answer (at pp. 155-56):

We believe the answer to Brockenshire J.'s question is that there is no evidence to indicate the drafters of the new Ontario Act intended to change the prior position, and no reason why they should have, and that there is no rule of construction or even a presumption that differences in language indicate differences in desired outcomes unless there is additional evidence to support this conclusion. [Footnote omitted.]

I agree with these comments.

By virtue of s. 71(1) of the *Bankruptcy Act*, when a receiving order is made against a debtor, bankruptcy begins for all purposes at the date of the filing of the petition: *R. v. Louis Minden and Mindens Ltd.*, [1935] O.R. 486 at 489 (C.A.). The bankruptcy of a debtor is deemed to have relation back to and to commence at the time of the presentation of the petition on which the receiving order is made: *Re Clayton's Women's Wear Ltd.; Ex parte Louis K. Liggett Co. Ltd.,* [1933] O.R. 492 at 498 (C.A.). If Brockenshire J. is right in his interpretation of s. 20(2)(b), then s. 20(2)(b) would, in effect, be amending s. 71(1) of the *Bankruptcy Act*. By interpreting "the date from which the person's representative status takes effect" as being the date of the filing of the petition, this difficulty is avoided.

In *Re Cronin Fire Equipment Ltd.* reflex, (1993), 14 O.R. (3d) 269 (Gen. Div.), a financing statement purporting to renew a registration under the P.P.S.A. was registered after the filing of a petition in bankruptcy but before the making of a receiving order. In *Cronin*, Rosenberg J. declined to follow the decision of Brockenshire J. in this case and held that the interest of the trustee in bankruptcy had priority over the security interest of the creditor. The manner in which Rosenberg J. arrived at this result is commented on critically by Ziegel and Denomme, *op. cit.* (footnote 25 on P. 155). Suffice it to say that I agree with the result reached by Rosenberg J., even though the way in which the learned judge arrived at that result is not the same as mine.

CONCLUSION

For these reasons, in the case of a receiving order, I am of the opinion that "the date from which the person's representative status takes effect" in s. 20(2)(b) of the P.P.S.A. is the date of the filing of the petition. I would, therefore, allow the appeal, set aside the order below and, in its place, make a declaration that the interest of the respondent John Deere in the cabin cruiser is not effective against the appellant, the trustee in bankruptcy. The appellant will be entitled to its costs here and below.

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Court File No. C12480
COURT OF APPEAL FOR ONTARIO
HOULDEN, CARTHY and CHARRON JJ.A.

B E T W E E N :
PRICE WATERHOUSE LIMITED, Trustee in Bankruptcy of the Estate of Herve Julien Plante
Appellant
and
JOHN DEERE FINANCE LIMITED
Respondent

J U D G M E N T

Released:

Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd., 2000 BCCA 458 (CanLII) - Perfection of Title Sale to Bankrupt Ranking after Date of Bankruptcy, and Constructive Trust Argument

Date:	2000-08-18
Docket:	CA023765
Parallel citations:	190 DLR (4th) 47; 7 BLR (3d) 12; 19 CBR (4th) 166
URL:	http://canlii.ca/t/1d6df
Citation:	Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd., 2000 BCCA 458 (CanLII), <http://canlii.ca/t/1d6df> retrieved on 2013-08-29
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Citation:	KPMG (Trustee in Bankruptcy of Ellingsen) v. Hallmark Ford Sales Ltd. 2000 BCCA 458	Date:	20000818
		Docket:	CA023765

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

KPMG, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF THE BANKRUPT, GREG ALLAN ELLINGSEN

APPLICANT
(RESPONDENT)

AND:

HALLMARK FORD SALES LTD.

RESPONDENT
(APPELLANT)

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Before: The Honourable Chief Justice Justice McEachern
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Donald

J.J. Casey — Counsel for the Appellant

S.A. Wilson — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
8 March 2000

Place and Date of Judgment: Vancouver, British Columbia
18 August 2000

Majority Reasons by:
The Honourable Mr. Justice Donald (pp. 1-24, paras. 1-41)
Dissenting Reasons by:
The Honourable Chief Justice McEachern (pp. 25-29, paras. 42-57)
Majority Reasons by:
The Honourable Mr. Justice Lambert (pp. 30-43, paras. 58-81)
Reasons for Judgment of the Honourable Mr. Justice Donald:
[1] Hallmark Ford Sales Ltd. agreed to sell a truck to Greg Allan Ellingsen and let him take the truck to his logging operations without paying for it. Hallmark transferred ownership to Ellingsen on the expectation that the deal would be financed by a bank. Ellingsen would cover the balance by a trade-in.
[2] Various delays occurred in the financing arrangements. Three months after taking the truck Ellingsen went into bankruptcy. The Trustee now has the truck (or its sale proceeds) and asserts that it is an asset forming part of the general estate of the bankrupt.
[3] The Trustee brought a motion in the Supreme Court of British Columbia in bankruptcy for an order that the truck is vested in the Trustee free and clear of any claims by Hallmark and for an order that Hallmark discharge a registration against the truck in the Personal Property Registry. **The latter refers to a registration filed in desperation by Hallmark after the bankruptcy occurred.**
[4] On 29 September 1997 the motion was granted on the terms sought by the Trustee. Hallmark appeals from this decision on several grounds, including the contention that the chambers judge erred in failing to find a remedial constructive trust in its favour. As I would allow the appeal on that ground, I do not propose to discuss the other grounds of appeal. In my judgment, a constructive trust is necessary to prevent an unjust enrichment.
[5] **The deal in question took place on 2 January 1997 at Hallmark's lot in Surrey.** Hallmark agreed to take back a used truck it had earlier sold to Ellingsen under an incorrect declaration that the truck had not been in an accident involving more than $2,000 damage. In arranging the sale of the new truck Hallmark ascribed a trade-in value to the old truck as though it had not been previously damaged. To complete the purchase Ellingsen needed financing to pay out the outstanding balance of approximately $27,500 due under a conditional sales contract in favour of the Bank of Nova Scotia and to cover the balance of the purchase price of the new truck, $12,105.11.
[6] Ellingsen completed the required credit application, and advised Johann Halldorson, the salesman, that if the credit application was not approved, his own bank in Penticton, the Bank of Nova Scotia, would be willing to finance the deal. He said he needed to conclude the transaction quickly as he had to return to work up north in the bush. The credit application was left with Randy Jenks, the business manager of Hallmark.
[7] Jenks attempted to obtain financing on behalf of Ellingsen for the transaction. He initially called the Bank of Nova Scotia and determined the amount required to pay out the conditional sales contract and then called the Hongkong Bank to seek credit approval for the required amount of $39,641.10. **He also spoke to the manager of Ellingsen's bank in** Penticton, who indicated that he was prepared to work with Hallmark on the deal, but he wanted to see Ellingsen and receive the deal information first.
[8] Approximately three hours later that same day, Ellingsen returned to the dealership and was told by Jenks that financing had not yet been obtained. Ellingsen put pressure on Hallmark to complete the transaction as he was eager to

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leave for his job in the north. Jenks deposes that as a result of the pressure and based on the expectation that approval of financing would be forthcoming, he agreed to permit the delivery of the new truck to Ellingsen and to transfer the new truck into his name. Before doing so, Jenks had Ellingsen sign a Motor Vehicle Purchase Agreement dated 2 January, 1997; a Hongkong Bank Conditional Sales Agreement bearing the same date; a blank Scotia Bank Buyer's Statement and two blank Scotia Bank Conditional Sales Agreements; a blank Motor Vehicle Purchase Agreement; and a blank Credit Application for the Hongkong Bank of Canada. He also had Ellingsen sign a transfer form transferring the old truck to Hallmark which Jenks intended to process upon completion of the financing for the new truck. Jenks asked Ellingsen to sign the above noted documents in blank in case they were needed as part of the financing package. Hallmark executed the transfer but none of the other documents.

[9] Jenks then arranged for Ellingsen's insurance and Ellingsen left the dealership with the new truck. Jenks claims that the sale was conditional upon the financing being obtained, and says that although he never expressed to Ellingsen what would happen if the financing was not obtained, it was clear that the transaction was subject to the obtaining of financing. He maintains that it was always understood that Hallmark had not agreed to finance the transaction and that it was obvious that in the event financing approval was not obtained, Ellingsen would be required to return the new truck.

[10] The Motor Vehicle Purchase Agreement dated 2 January, 1997 signed by Ellingsen stipulated that the transaction was "subject to credit approval". Under "Purchaser Declarations" it said:

> Purchaser understands that this agreement does not become binding on the parties hereto until accepted and executed by a duly authorized official of the Dealer. Salespersons do not have this authority. Deposits, partial payments and down payments are non-refundable.

[11] Ellingsen denies that it was ever expressed to him that the sale was conditional, and agrees that the issue of what would happen if the financing was declined was never discussed, as he had not anticipated there would be a problem.

[12] On 8 January 1997 the Hongkong Bank advised Hallmark that it would finance the transaction provided Ellingsen made a downpayment of $5,000. Jenks called Ellingsen and told him about the approval subject to a downpayment, and Ellingsen advised that he could not make that payment until he arrived from his work up north. Jenks responded that this would be acceptable, and that he needed Ellingsen to sign a new Hongkong Bank Conditional Sales Agreement showing the downpayment. Ellingsen agreed to sign and return the document on receipt. Jenks sent the documents out, and when he did not receive them back, he made numerous unsuccessful attempts to reach Ellingsen.

[13] On 15 March 1997 Ellingsen called Hallmark to ask that it "pay out the lien" on the old truck, and if it did not, Hallmark would have to come and get the new truck. Halldorson told Ellingsen that Jenks needed the contract, referring to the $5,000 downpayment, signed and returned. Approximately one week later, Ellingsen spoke to Jenks, who informed him again that Hallmark could not pay out the lien on the old truck until the financing contract was signed and returned, and that the old truck had been sitting on Hallmark's lot since January and that Hallmark could not process the transfer until the financing on the new truck had been concluded. Ellingsen told Jenks, as he had told Halldorson earlier, that he would return from the bush in April and he would deal with the paperwork then.

[14] On 11 April 1997 Jenks received a call from an employee of the Bank of Nova Scotia about payment of the lien on the old truck. Jenks informed her that he could not pay out the amount owed until he had received the financing documentation on the new truck, and that if he had not received it within two weeks, he was going to try to find the new truck and bring it back to Hallmark. On the same day, Ellingsen filed an assignment into bankruptcy. After the bankruptcy, the Bank of Nova Scotia seized the old truck from the Hallmark lot pursuant to its conditional sales contract which had been registered at the Personal Property Registry.

[15] Shortly after the assignment into bankruptcy, a representative of the Trustee advised Hallmark that Hallmark had no claim on the new truck as a Financing Statement under the ***Personal Property Security Act*** had not been filed. Without obtaining legal advice, Hallmark then filed a financing statement in the Personal Property Registry.

[16] In the court below Hallmark framed its argument on the law of trust in the manner described by the chambers judge:

> [11] Hallmark's position is that there was never a concluded sale of the new truck to Ellingsen, and that beneficial ownership of the new truck did not ever pass. Hallmark says that Ellingsen held only bare legal title, and was a trustee of the beneficial interest in the new truck in favour of Hallmark. Hallmark further says that there was no security interest which existed and could be registered in this case given the nature of the transaction, and consequently, the PPSA has no application. Finally, Hallmark says that the trustee has no interest in the new truck, given the express provisions of the BIA [*Bankruptcy and Insolvency Act*], and particularly s. 67 of the same, which provides that the property of the bankrupt shall not comprise property held by a bankrupt in trust for another.

[17] The chambers judge concluded that the transaction was a sale rather than a creation of a trust. She held that the unpaid sales price gave rise to a security interest which could have been registered and had it been registered it would have protected Hallmark from the bankruptcy. Her reasoning went as follows:

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> [12] I cannot accept that the nature of the transaction between Hallmark and Ellingsen in January of 1997 was the creation of a trust. On the facts, Ellingsen must have considered that he had purchased, and that he owned, the new truck, even though the purchase price had not as of yet been paid. It is inconceivable that, as Hallmark now argues, Ellingsen could have driven the new truck in his work up north for more than three months, and then simply returned the new truck to Hallmark, or that he could have resisted an action by Hallmark for the purchase price of the new truck, on the basis that no deal had been made between the parties.
>
> [13] Further, Hallmark did not conduct itself in a way that would be consistent with a trust relationship, with mere legal title to the new truck having passed. Hallmark was aware, within weeks of the transaction, that there was a problem with financing. Hallmark made no effort to obtain possession of the truck, or to even demand return of the truck. The only interest Hallmark had at that time was to receive payment for the truck from someone, whether it be Ellingsen, or a finance company, or a combination of the two.
>
> [14] I have concluded, on these facts, that the nature of the transaction was a sale, with payment anticipated and agreed by the parties to be made shortly after the transfer of title and possession. The transaction created what was in substance a security interest, as that term is defined in s. 1 and s. 2 of the PPSA, on the part of Hallmark, which Hallmark could, and given what happened should, have registered in the Personal Property Registry. Given that Hallmark did not register, and thereby perfect, its security interest prior to the date of bankruptcy, I find that the new truck forms part of the bankrupt's estate, and is available for distribution to the estate's creditors.

[18] With respect, I do not think the evidence reasonably supports the finding that this was a sale and that Hallmark retained a security interest after it released the truck. The deal was subject to financing by a third party which never materialized. There was no enforceable instrument on which Hallmark could sue Ellingsen for the purchase price. As Hallmark did not sign the Motor Vehicle Purchase Agreement it was never brought into effect. Ellingsen did not agree to pay cash for the new truck and at no time did Hallmark agree to finance the deal itself. The documents make it plain that credit was to be approved by a lending institution.

[19] Hallmark imprudently transferred ownership registration to Ellingsen and therein lies the problem. On the surface the transfer implies that a concluded contract of purchase and sale took place and that the relationship between the parties was one of debtor and creditor. But on a full appreciation of all the circumstances I think the only reasonable conclusion is that the proposed sale never occurred because a condition precedent, the proposed financing, was not fulfilled. The transfer facilitated acquisition of insurance and moved the transaction along but it did not complete it.

[20] The Trustee argues that if the term "subject to credit approval" was a condition precedent Hallmark waived it by transferring ownership registration. With respect, I do not think that conforms to the fact that the financing continued to be a problem after the transfer. I note, in particular, that the Hongkong Bank was not prepared to finance the deal as written and insisted that Ellingsen put $5,000 down.

[21] The Trustee further argues that the Motor Vehicle Purchase Agreement and the Hongkong Bank Conditional Sales Agreement are structured so that the financing obligation is primarily between the seller and the purchaser with the bank taking the paper as assignee. This is said to establish a debtor-creditor relationship independent of the bank's involvement. While it is true that the full cost of borrowing and the payment schedule are set out in the sales agreement and that the conditional sales agreement is between the seller and purchaser with the bank as assignee, the fact remains that neither agreement was executed. They were not executed because financing was not concluded and so we return to the position that Ellingsen had a truck that he had no right to keep when he was unable to meet the conditions of financing.

[22] The more difficult area for analysis in this case is the relationship between the ***Personal Property Security Act*** (***PPSA***) and the law of remedial constructive trusts. Hallmark's case for a constructive trust can be broken down this way:

1. The contract of sale was ineffective through non-fulfillment of a condition precedent.
2. Hallmark is entitled to a proprietary remedy (return of the truck), on meeting three conditions:
   (a) no transaction effective to vest property rights has taken place;
   (b) it must be possible to trace the property;
   (c) against the actual holder of the property it is unjust that the claimant not be allowed to re-take it: G.H.L. Fridman and J.G. McLeod, ***Restitution*** (Toronto: Carswell, 1982) at 568-9.
3. Hallmark meets all three conditions: the contract was ineffective because no financing was arranged; the truck was still in Ellingsen's possession at time of bankruptcy; and Hallmark did not extend credit to Ellingsen. Not having extended credit, Hallmark occupies a different position from that of the general creditors of the bankrupt estate who did extend credit. The creditors would unfairly enjoy a windfall if the truck formed

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part of the assets available to them: P.D. Maddaugh and J.D. McCamus ***The Law of Restitution*** (Aurora: Canada Law Book, 1990) at 137.

4. Section 67(1)(a) of the ***Bankruptcy and Insolvency Act*** (***BIA***) provides that the property of the bankrupt should not comprise property held by a bankrupt in trust for another:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> *(a)* property held by the bankrupt in trust for any other person.

5. A trust in the form of a constructive trust should be imposed to prevent an unjust enrichment with the order taking effect just prior to the bankruptcy so that s. 67(1)(a) of the ***BIA*** is engaged.

6. Since the trust is constructed as a remedy by the court on the doctrine of unjust enrichment it falls within an exclusion provided in s. 4(a) of the ***PPSA*** as an "interest given by a rule of law". Section 4(a) of the ***PPSA*** reads:

> Except as otherwise provided in this Act, this Act does not apply to the following:
>
> (a) a lien, charge or other interest given by a rule of law or by an enactment unless the enactment contains an express provision that this Act applies;

[Emphasis added]

[23] Hallmark must find an exclusion from the ***PPSA*** because if its interest was "a security interest" within the meaning of the ***PPSA*** (such interest can include a "trust" if the trust secures payment or performance of an obligation: (s. 2(1)(b)), then unless the interest is perfected by registration it is not effective against the trustee in bankruptcy: s. 20(b)(*i*). Section 2(1) of the ***PPSA*** reads:

> **2** (1) Subject to section 4, this Act applies
>
> (a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) without limiting paragraph (a), to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper if they secure payment or performance of an obligation.

[Emphasis added]

Section 20(b)(*i*) reads:

> **20** A security interest
>
> (b) in collateral is not effective against
>
> (i) a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy, or ...

[24] "Security Interest" is defined in s. 1 of the ***PPSA*** as:

> **"security interest"** means
>
> (a) an interest in goods, chattel paper, a security, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and ...

[Emphasis added]

[25] The Trustee submits that this transaction comes within the ***PPSA*** and that the interest held by Hallmark is an unperfected interest and thereby ineffective against the Trustee under s. 20(b)(*i*). The argument is founded on two conditions on the reverse side of the Motor Vehicle Purchase Agreement which are said to reserve rights to Hallmark in the event of a default by the purchaser. They are conditions 3(a) and 7(a):

> 3. If any cheque or other bill of exchange tendered as payment of any amount due as set out on the reverse side hereof is dishonoured, such cheque or bill of exchange shall be deemed not to be payment and shall be null and void and of no effect. If any such dishonoured cheque or bill of exchange forms all or part of the amount due by the Purchaser to the Dealer, then:
>
> (a) the Purchaser agrees that the Dealer shall have immediate possession of the motor vehicle as if the Dealer had never parted with possession and the Dealer may exercise all rights to possession;
>
> .....
>
> 7. Subject to paragraph 3 of this Agreement, if the Purchaser defaults in the payment of any amount due hereby or defaults in the performance or observance of any other matter or thing required to be observed

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> or performed by the Purchaser or if any proceeding is commenced by or against the Purchaser under any bankruptcy or insolvency laws, then
>
> (a) the entire amount due by the Purchaser to the Dealer shall become immediately due and payable at the option of the Dealer.

[26] The difficulty with this argument is that it is premised on a concluded contract which is absent here. Hallmark's right to recover the truck does not arise, and could not arise, on the conditions quoted above; Hallmark's remedy lies outside the document and is found in the power of the court to provide a restitutionary remedy.

[27] The Trustee submits, in the alternative, that any equitable interest supporting a trust in the circumstances amounts to a security interest for the purposes of the ***PPSA***, in the sense that that interest only existed as a method for securing payment of the truck.

[28] I think this argument goes to the kind of trust, implied or resulting, for which Hallmark argued below and which formed part of Hallmark's alternative submissions before us. As I apprehend the position, an implied or resulting trust arises from an understanding that Ellingsen would hold the truck in trust for Hallmark until financing was completed. But I am not concerned with these other trusts having been persuaded that the appropriate remedy is the constructive trust. I do not know how it could be said that a constructive trust secures a payment or the performance of an obligation; rather its purpose is to prevent an unjust outcome. The chambers judge inquired whether the behaviour of the parties "was consistent with a trust relationship". That can only refer to an implied or a resulting trust and is not relevant to the question whether a constructive trust should be imposed.

[29] The final point raised by the Trustee in relation to the ***PPSA*** is that s. 20(b)(*i*) provides a "juristic reason" for the deprivation of Hallmark and the corresponding enrichment of the general creditors of the estate. This refers to the classic three-part formula for determining unjust enrichment. McLachlin J. (now C.J.C.) put it this way in ***Peter v. Beblow,*** 1993 CanLII 126 (SCC), [1993] 1 S.C.R. 980 at 987:

> The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out.

[30] If Hallmark's interest is a security interest the consequences of not registering the interest are prescribed by s. 20(b)(*i*) of the ***PPSA***. The collateral goes into the general estate by operation of statute and hence a juristic reason exists for the enrichment. It is necessary to repeat, in order to deal with this point, that in my opinion Hallmark's interest was not a security interest within the meaning of the ***Act***. There was nothing to register. The truck was not collateral to any enforceable contract. The substance of the transaction, not its form, must determine whether a security interest was created: see ***Skybridge Holdings Inc. (Trustee of) v. British Columbia (Registrar of Travel Services)*** 1999 BCCA 185 (CanLII), (1999), 173 D.L.R. (4th) 333, 68 B.C.L.R. (3d) 209 (C.A.). It follows that s. 20(b)(*i*) does not provide a juristic reason in answer to a claim of unjust enrichment.

[31] Is this an appropriate case for a remedial constructive trust? Two issues arise for discussion. First, why should equity intervene in a commercial transaction where Hallmark could have protected itself contractually? Second, is it appropriate to use a constructive trust to alter the priorities amongst creditors in a bankruptcy?

[32] On the first question, it is useful to refer to an article by D.M. Paciocco: "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989) 68 Canadian Bar Review 315. Professor Paciocco distinguishes between the application of the constructive trust in family and commercial settings, arguing that the courts should be cautious in ordering specific relief in commercial cases. The constructive trust was adopted in the matrimonial context as a means of explaining the specific relief that courts were already awarding under the awkward resulting trust analysis. There is no parallel in the commercial context. Unlike in the spousal context, in commercial contexts parties are expected to protect their interests contractually. In addition, there are the further considerations of security of title as tied to efficiency of commerce and the protection of third parties from undisclosed charges. He concludes at 351:

> In commercial cases proprietary relief will not be warranted where the plaintiff parted with the property or money which represents the defendant's enrichment, while accepting the role of a general creditor. This will occur where there is a valid contract between the parties which accounts for the defendant's enrichment, or a contract which has been avoided where the condition which rendered the contract ineffective does not vitiate the voluntariness of the plaintiff's decision to assume the role of a general creditor...

[33] In her majority reasons in ***Peter v. Beblow***, McLachlin J. refused to distinguish between family and commercial cases. She said at 996-97:

> I doubt the wisdom of dividing unjust enrichment cases into two categories – commercial and family – for the purpose of determining whether a constructive trust lies. ... In short, the concern for clarity and doctrinal integrity

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with which this court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

[34] The more specific answer to the learned commentator's proposition as quoted above is that in the present case Hallmark never intended to grant credit to Ellingsen and so there is no justification for placing Hallmark in a class of general creditors.

[35] As I have said, Hallmark was imprudent in allowing the truck to leave the lot as it did, but it accepted the risk in the interest of good customer relations that it may have to take back a used truck if financing fell through, and in that event it would not be able to recover the depreciation. Ellingsen induced Hallmark to believe that he would be able to meet the Bank's cash requirements for the loan and so Hallmark waited the three months before bankruptcy occurred. Ellingsen knew he had no right to keep the truck and said as much to Jenks, the business manager of Hallmark, when he suggested during the telephone conversation of 15 March 1997 that Hallmark would have to pick up the truck.

[36] On the second question, that dealing with the priority of creditors, I wish to refer to the Ontario Court of Appeal decision in ***Barnabe v. Touhey*** 1995 CanLII 1672 (ON CA), (1995), 26 O.R. (3d) 477, which reversed a ruling that a court may impose a constructive trust for the very purpose of securing priority for some claimants over other creditors. At 479 the Court said:

> While a constructive trust, if appropriately established, could have the *effect* of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that *purpose*. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

[37] The Court of Appeal went on to determine that there was no unjust enrichment on the facts of the case so the above remarks are probably *obiter dicta*. Nevertheless, the case serves as a useful caution that in weighing the equities other creditors may have to be considered. In my judgment, for the reasons I have given, Hallmark does not stand on the same footing as the general creditors and as a result I do not think the remedy I would impose unfairly deprives other creditors of an asset to which they have any reasonable entitlement.

[38] I turn to consider the issue of timing: can the constructive trust be imposed prior to the bankruptcy? In order for the remedy to have any practical effect, it must be imposed before the bankruptcy, otherwise s. 67(1)(a) of the ***BIA*** could not operate. Support for the proposed timing can be found in ***Rawluk v. Rawluk***, [1990] S.C.R. 70 at 91:

> It is important in this respect to keep in mind that a property interest arising under a constructive trust can be recognized as having come into existence not when the trust is judicially declared but from the time when the unjust enrichment first arose. As Professors Oosterhoff and Gillese state, "the date at which a constructive trust arises...is now generally accepted to be the date upon which a duty to make restitution occurs" (Oosterhoff and Gillese, *A.H. Oosterhoff: Text, Commentary and Cases on Trusts* (3rd ed. 1987), at p. 579). Professor Scott has stated in *Law of Trusts*, *op. cit.,* at pp. 323-4, that:
>
> > The beneficial interest in the property is from the beginning in the person who has been wronged. The constructive trust arises from the situation in which he is entitled to the remedy of restitution, and it arises as soon as that situation is created. ... It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when that duty is subsequently enforced.

[39] McLachlin J., in giving the minority judgment, agreed at 103 that the property interest, if conferred, may extend back to the point when it arose.

> That property interest, it appears, may be taken as extending back to the date when the trust was "earned" or perfected. In *Hussey v. Palmer*, in a passage referred to by Dickson J. in *Rathwell v. Rathwell*...Lord Denning postulated that the interest may arise at the time of declaration or from the outset, as the case may require. Scott views the trust as being in force from the outset, with a discretion in the court as to whether it should be enforced: Scott op. cit., §462.2. Another American scholar regards it as coming into existence only on an order being made, but having retrospective operation: Bogert, The Law of Trusts and Trustees, (2nd ed. 1979), §472.

[40] Hallmark was entitled to the return of the truck when it became certain that the condition precedent could not be fulfilled. This point would have been reached, at the latest, when it became obvious that Ellingsen was stalling Hallmark for time without any real prospect of being able to put $5,000 down on the truck. In these circumstances it would be appropriate to make the order for a remedial constructive trust effective on and after 15 March 1997 when Ellingsen told Hallmark that it would have to come and get the new truck. Accordingly, the remedial constructive trust would have been in effect on the date of Ellingsen's assignment in bankruptcy on 11 April 1997.

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[41] For these reasons I would allow the appeal and impose a constructive trust on the truck in favour of Hallmark with effect from 15 March 1997. I understand that by agreement the truck has been sold and the proceeds held by the Trustee pending the decision on this appeal. The restitutionary remedy I intend will be satisfied by payment of those proceeds plus costs.
"The Honourable Mr. Justice Donald"

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Dissenting Reasons for Judgment of the Honourable Chief Justice McEachern:

[42] I have read the Reasons for Judgment of Mr. Justice Donald on this appeal. I regret that I am unable to agree with the conclusions he has reached. I am, however, content to accept the careful statement of the facts that he has prepared and I need not repeat what he has said in that regard.

[43] In my judgment, Mr. Ellingsen purchased the new truck from Hallmark by turning in his old truck, by assuring Hallmark that his bank would finance the purchase if the dealer's financing resources were not fruitful, by signing a Motor Vehicle Purchase Agreement setting out conditions of sale, by accepting registration of the new truck in his name and by taking possession of the new truck.

[44] The Purchase Agreement signed by Mr. Ellingsen provided that the purchase balance would be payable "...in 60 equal monthly installments of $709.05 commencing on the 18 day of Feb. '97 with a final balance of $709.05 to be paid on the 18 day of Jan. 2002..." (clause 8).

[45] It is true this Agreement to Purchase, a printed form, stated "SUBJECT TO CREDIT APPROVAL". The Agreement, however, also provided remedies for the repossession of the truck in the event of non-payment, and Hallmark was at all times the unpaid vendor of the truck. Pending the completion of financing, the obligation of Mr. Ellingsen was to carry out the terms of the agreement. It is unthinkable that Mr. Ellingsen could retain the truck without completing the financing or that Hallmark would be without remedies. Either under the Agreement or at common law, Hallmark was entitled to be paid or to have the truck back. Hallmark, at least, waived the subject clause when it transferred title to Mr. Ellingsen. Mr. Ellingsen, in turn, must be taken to have waived the clause when he retained the truck without arranging the financing. However one analyzes this transaction, mutual obligations arose as soon as Mr. Ellingsen took possession of the truck.

[46] Accordingly, I have no doubt that this Purchase Agreement, or the mutual obligations undertaken by the parties, created a security interest in favour of Hallmark as defined in the ***Personal Property Security Act***, R.S.B.C. 1996, c. 359 (the ***Act***). In fact, Hallmark registered it as such after Mr. Ellingsen had filed for bankruptcy and declared the new truck as a part of his estate at the time of his assignment in bankruptcy.

[47] Mr. Casey, in his able argument, conceded that he had to rely upon a trust analysis in order to escape the consequences of the ***Act***. Mr. Justice Donald has undertaken such an analysis and concludes that there was no completed sale, and that it would be an unjust enrichment to the estate if Hallmark were deprived of its property interest in the new truck. He relies in part on the classic definition of a constructive trust furnished by McLachlin J. (now C.J.C.) in ***Peter v. Beblow***, 1993 CanLII 126 (SCC), [1993] 1 S.C.R. 980 at 987:

> ...An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment, (2) a corresponding deprivation, and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out.

[48] With respect, there are good juristic reasons for this enrichment (if such it is) in the provisions of the ***Act***, which is intended to provide the certainty that is so necessary in the commercial law. It is probably unnecessary to point out that the assertion of a constructive trust based on unjust enrichment could become commonplace, with unfortunate commercial consequences, if such a remedy is made available upon a failure to make the necessary filings under the ***Act***.

[49] Assuming for the moment that there was no completed purchase agreement in this case, which I do not accept, it becomes necessary to analyze further the position of Hallmark to see whether its then rights would prevail against a trustee in bankruptcy. This requires a closer examination of the ***Act***.

[50] As already mentioned, there is no doubt Mr. Ellingsen agreed to purchase the truck and pay for it by trading in his old truck and by financing the balance at his own bank if necessary. On this basis, he took possession (and title) to the truck. There was no thought or discussion of a trust.

[51] What happened, obviously, was that Hallmark took a chance that the purchase price would be paid by or on behalf of Mr. Ellingsen, and Hallmark neglected to perfect its security interest by the appropriate filing until after the bankruptcy of Ellingsen.

[52] This is precisely the kind of case the Legislature had in mind when it enacted the ***Act***.

[53] A "security interest" under the ***Act*** means "an interest in goods ... that secures payment or performance of an obligation..." At the very least, this transaction, even if characterized as a failed Purchase Agreement, entitled Hallmark to a return of the vehicle or to a debt and a corresponding obligation on Mr. Ellingsen to return the truck or pay for it. I need say no more about debt because such a debt would not prevail over a trustee in bankruptcy. If Hallmark's entitlement was to a return of the vehicle, that interest could only be protected by an appropriate filing under the ***Act***.

[54] This is because, subject to section 4, the ***Act*** applies:

> ...to every transaction that <u>in substance</u> creates a security interest, without regard to its form..." (section 2(1)(a)). (Emphasis added.)

[55] Under this definition the obligation to return the truck creates a security interest in Hallmark.

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[56] Turning to s. 4, the ***Act*** does not apply to interests "given by a rule of law" which could include a constructive trust, although I have serious reservations about the introduction of such concepts into consumer transactions. However, I have already concluded that there are strong juristic reasons militating against the recognition of an unjust enrichment or a constructive trust in the circumstances of this case.

[57] For these reasons, whether or not the Purchase Agreement was a completed agreement, Hallmark must fail in its attempt to establish an unregistered interest in this vehicle that survives a bankruptcy. I would dismiss this appeal.

"The Honourable Chief Justice McEachern"

Concurring Reasons for Judgment of the Honourable Mr. Justice Lambert:

[58] I have had the advantage of reading, in draft form, the reasons of Mr. Justice Donald and the reasons of Chief Justice McEachern. I agree with Mr. Justice Donald. But Chief Justice McEachern has expressed concerns about the integrity of the ***Personal Property Security Act*** and about the potential frustration of the legislative intention underlying that Act. Accordingly, I consider that I should indicate why I do not share those concerns in the circumstances of this case. To the extent that I repeat what has been said by Mr. Justice Donald, I do so only to emphasize that in my opinion the integrity of the ***Personal Property Security Act*** remains unimpaired by the decision in this case.

The Scholarly Writing

[59] I have been much assisted in my consideration of this appeal by the insights contained in David M. Paciocco, The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors (1989), 68 Can.Bar Rev. 315; Leonard Rotman, Deconstructing the Constructive Trust (1999), 37 (1) Alberta Law Review 133; and Robert Chambers, Constructive Trusts in Canada (1999), 37 (1) Alberta Law Review 173. That is by no means a complete list of the scholarly writing about the principles relevant to this appeal.

The Substance of the Transaction

[60] Section 2(1)(a) of the ***Personal Property Security Act*** affirms that the Act applies to every transaction that in substance creates a security interest, without regard to its form. That provision gives statutory force to the long-standing principle of equity that equity looks to the substance of events and not to their superficial appearance.

[61] In this case the contemplated transaction was never completed. The contemplated transaction was that Ellingsen would trade in the truck which had been sold to him by Hallmark under a misrepresentation and would purchase in its place a second truck for a higher price which would be financed either by the H.S.B.C. Bank or, if that financing did not go into place, by the Bank of Nova Scotia, Penticton Branch. It was never contemplated that Hallmark would finance the purchase. The contemplated financing security was to be in place before the transaction was complete. But because Ellingsen had bought the first truck under a misrepresentation, and because he needed a truck in his work, he was given possession of the truck, and of documents which made him the registered owner, before the financing was in place.

[62] In my opinion, the financing being in place was a condition precedent to the completion of the contract of purchase and sale of the second truck. That condition was never fulfilled. The registration of Ellingsen or his company as owner of the second truck is merely some evidence of ownership but it is not conclusive of true substantive ownership. The registration carries with it the consequence of being regarded as owner under the ***Motor Vehicle Act*** but it does not confer true ownership if ownership does not exist in fact. See ***Larocque v. Lutz*** reflex, (1980), 16 B.C.L.R. 348 at 351 (B.C.S.C. per Ruttan, J.) affirmed on this point and others, 1981 CanLII 419 (BC CA), (1981), 27 B.C.L.R. 357 at 366 (B.C.C.A.); ***Singh v. McRae,*** reflex, [1971] 5 W.W.R. 544 (B.C.S.C.); and ***Peters v. Shoreview Enterprises Ltd.***, [1987] B.C.J. No. 1687, (Q.L.) at p.9 (B.C.S.C.). Since the condition precedent to Ellingsen's acquisition of ownership of the second truck was never fulfilled and never waived, it is my opinion that Ellingsen never acquired ownership of the truck or of a proprietary interest in the truck.

[63] It seems to me to follow that the truck should not form any part of Ellingsen's estate in bankruptcy. Ellingsen had no interest at all in the truck after he told Hallmark that Hallmark could come and retake possession of the truck. At that time he abandoned any interest he may have had in the truck arising from his right to fulfil the condition precedent by completing the financing. So at that point the truck was owned entirely by Hallmark and Ellingsen only had simple possession.

[64] This point was not the focus of the argument at trial or on appeal, where it was assumed, as I understand the arguments, that Ellingsen had acquired some form of title. The argument was about whether that form of title was held as trustee for Hallmark. But when I consider the substance of the transaction between Ellingsen and Hallmark, as I am required to do both for the purposes of the ***Personal Property Security Act*** and for the purposes of determining the application of equitable principles, it is the substance which I have just described which ought to govern the application of the statute and the creation of the equities. However, the fact that Ellingsen's interest was mere possession does not prevent the imposition of a remedial constructive trust, either as against Ellingsen himself or against his trustee in bankruptcy. See ***Paciocco*** at p.329, and the authorities cited in footnote 75.

Unjust Enrichment in Commercial Cases

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[65] It was said in ***Pettkus v. Becker***, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834 at 848, and repeated often since, that what is required to establish an unjust enrichment is:

(1) An enrichment,
(2) a corresponding deprivation, and
(3) the absence of a juristic reason for the enrichment.

But like most simple legal tests it must be applied thoughtfully and not mechanically, particularly with respect to whether there is a juristic reason for the enrichment which is said to have taken the enrichment out of the category of being "unjust". The juristic reason may be legal or equitable or both. But it must be measured in accordance with the principles of equity which underlie the remedies of restitution and the remedial constructive trust. So the "injustice" of an enrichment must be measured by the standard of "good conscience" and, in a commercial case, the "good conscience" must be good commercial conscience.

[66] With respect to the requirement of "good commercial conscience", I refer to the majority judgment of four judges of this Court in ***Atlas Cabinets& Furniture Ltd. v. Nat. Trust Co.*** 1990 CanLII 1312 (BC CA), (1990), 45 B.C.L.R. (2d) 99, particularly at pp. 109-112. At p.109, in relation to the three tests for unjust enrichment set out in ***Pettkus v. Becker***, this was said:

> In the context of a domestic relationship those three circumstances are likely to be simpler to apply than in the context of a commercial relationship, where the essence of the relationship is the enrichment of the participants, perhaps at the expense of each other, all in the name of fair and honest business dealing. In a domestic relationship, equality of the parties to the relationship should normally be the standard of fairness. But, in a business relationship, honest dealing, not equal dealing, should set the standard of fairness. That is not to say that the three factors enumerated in ***Pettkus v. Becker*** are not equally applicable in commercial cases. They were referred to and treated as applicable in the majority reasons, on this point , of Chief Justice Dickson in ***Hunter v. Syncrude***, at p.471. But it is important to understand what is meant by "enrichment", by "deprivation" and by "juristic reason" in the context of a commercial relationship where ordinary and extraordinary flows of funds are part of the reality and purpose of the relationship. To my mind the key to the correct interpretation and application of the decisions of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the "unjust" element of "unjust enrichment".

...

> In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in ***Pettkus v. Becker*** when they are applied to a commercial relationship.

[67] In my opinion that passage continues to set out the applicable principles with respect to unjust enrichment in a commercial relationship.

The Remedial Constructive Trust in Commercial Cases

[68] The leading case on the application of a remedial constructive trust in a commercial case is ***Soulos v. Korkontzilas***, 1997 CanLII 346 (SCC), [1997] 2 S.C.R. 217 (S.C.C.) where the judgment of a majority of five judges in a seven judge division was given by Madam Justice McLachlin. The case was a commercial case. After reviewing the authorities, Madam Justice McLachlin said this, at p.236, para.34:

> It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

[69] While it is not necessary for the purposes of this case to add anything to the passage I have quoted, I think that these passages from the judgment of Mr. Justice Deane in the High Court of Australia in ***Muschinski v. Dodds***, [1986] 60 A.L.J.R. 52, at p.65 indicate an important feature of the limits of the remedial constructive trust:

> The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles:....

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> Viewed as a remedy, the function of the constructive trust is not to render superfluous, but to reflect and enforce, the principles of the law of equity.

[70] It is not necessary for the purposes of this case to decide whether the remedial constructive trust arises when the right to restitution arises, or when the enrichment occurs, or when the juristic reason for the enrichment fails, on the one hand, or whether it arises when declared by the court but with true retroactive effect (not merely retrospective effect) to the date when the right to restitution arose, or when the enrichment occurred, or the juristic reason for the enrichment failed, on the other hand. In this case, as in most cases, the result would be the same, which is probably why the point, as far as I know, must still be regarded as unsettled.

The Remedial Constructive Trust in This Case

[71] The principles applicable to this case are contained in the passage I have just quoted from the reasons of Madam Justice McLachlin in ***Soulos v. Korkontzilas***. A remedial constructive trust will be imposed only if it is required in order to do justice between the parties in circumstances where good commercial conscience determines that the enrichment has been unjust. But a remedial constructive trust is a discretionary remedy. It will not be imposed where an alternative, simpler remedy is available and effective. And it will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. In this case that would include other creditors of the bankrupt, (both secured creditors and general creditors, since the trust may defeat both), and any relevant third parties.

[72] For the reasons that I have given in describing the substance of the transaction, it is not, in my opinion, in accordance with sound commercial conscience as between Ellingsen and Hallmark to permit Ellingsen to be regarded as retaining a proprietary interest in the second truck over and above his continuing equitable interest, if any, in the first truck.

[73] I turn to the secured creditors and general creditors of the bankrupt. They are set out in the Statement of Affairs which was filed. Except for the bank account of $1,200 and furniture valued at $1,420, both of which were pledged as security, one to the Bank of Nova Scotia and the other to Trans Canada Credit Corporation, the only asset of the estate was said to be the second truck. If the second truck is made subject to a remedial constructive trust then the two secured creditors, if they have claims over and above their security, and all of the general creditors, will receive no recovery on their claims. But there is absolutely nothing in this matter to indicate that the creditors are anything other than ordinary household creditors or ordinary small trade creditors, or to indicate that they advanced credit on the basis that Ellingsen had an unencumbered proprietary interest in the second truck. There is no indication in the material that any third party was misled or prejudiced by an assumption that since no security interest was registered against the second truck, it must be available to meet the demands of Ellingsen's creditors.

[74] In those circumstances, the relationship between Ellingsen and Hallmark invites the imposition of a remedial constructive trust, and there is nothing in the evidence with respect to secured creditors, general creditors or third parties which would make the imposition of a remedial constructive trust improper or contrary to good commercial conscience.

The Integrity of the *Personal Property Security Act*

[75] If the ***Personal Property Security Act*** applied, it would not be prevented from operation by the fact that there was no legally effective document creating a security interest in the collateral represented by the second truck, because no such document is necessary to the registration of a financing statement to perfect a security interest in collateral.

[76] And if the ***Personal Property Security Act*** applied, it would not be prevented from operating by the fact that the interest of Ellingsen was possessory only until such time as the condition precedent was fulfilled, since an interest in possession by a non-owner may be sufficient to support the registration of a financing statement to record a security interest by the owner in the collateral.

[77] Furthermore, the ***Personal Property Security Act*** may never have applied because the interest of Hallmark in the second truck was not an interest "that secures payment of the performance of an obligation" within the meaning of the definition of "security interests" in the Act, with the result that, there being no security interest in collateral, the Act would have no application. But it is not necessary for me to decide that point and I prefer not to do so until a case arises where it is essential to the decision.

[78] The reason why that point need not be decided is that by the declaration of a remedial constructive trust such as is proposed in this case that trust would become effective at the time when Hallmark was told by Ellingsen on 15 March to come and collect the truck. At that point Ellingsen's possession of the truck unjustly enriched him without any continuing juristic reason and Hallmark became entitled to restitution.

[79] The ***Personal Property Security Act*** provides explicitly, in s.4(a), that the Act does not apply to an interest given by a rule of law. The remedial constructive trust that came into being on 15 March, either directly at the time, or retroactively to that time by the declaration of this Court, is an interest given by a rule of law and so is excluded from the operation of the Act.

[80] The integrity of the ***Personal Property Security Act*** is maintained because this is not a case of a simple failure to register a financing statement in a timely way. The two elements which protect the integrity of the Act, though imposing a

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remedial constructive trust in this case, are, first, that the acts of the parties and not the failure to register created the right to restitution and the unjust enrichment, both of which came into being entirely independently of the Act, and both of which came into being through a failure of a contract to arise at all and not from non-performance of a contract or from a breach of contract, and, second, that no one has been shown to have been prejudiced by an absence of registration, neither a secured creditor, nor a general creditor, nor a third party, all of whom must have taken their credit risks without any assumption that the second truck was unencumbered. There is no evidence of any party relying on the absence of registration to extend credit. If there had been such prejudice or any such reliance, then such prejudice or reliance might well have affected the question of whether a remedial constructive trust ought to be declared and, if so, on the terms and extent of the remedial constructive trust.

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Conclusion and Disposition

[81] I agree with Mr. Justice Donald. For the reasons I have given in supplement to the reasons of Mr. Justice Donald, I would respond to the motion for directions under s-s.34(1) of the ***Bankruptcy and Insolvency Act*** by declaring that the Truck referred to in the Notice of Motion was held by Ellingsen as a constructive trustee for the benefit of Hallmark on and after 15 March, 1997 and came into the possession of KPMG as Trustee in Bankruptcy of Mr. Ellingsen subject to that constructive trust. It follows, in accordance with s.67(1)(a) of the ***Bankruptcy and Insolvency Act*** that the truck was not the property of the bankrupt at the date of bankruptcy and that the funds arising from its disposition must be paid over to Hallmark.

"The Honourable Mr. Justice Lambert"

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 SCR 411 - Bank Creditor's Interest in Inventory Ahead of Crown's (and Trustees) in Bankruptcy?

Date:	1997-02-27
Docket:	24713
Parallel citations:	1997 CanLII 377 (SCC); 143 DLR (4th) 385; [1997] 2 WWR 457; 44 CBR (3d) 1; 51 DTC 5089; 46 Alta LR (3d) 87
URL:	http://canlii.ca/t/1fr2j
Citation:	Royal Bank of Canada v. Sparrow Electric Corp., 1997 CanLII 377 (SCC), [1997] 1 SCR 411, <http://canlii.ca/t/1fr2j> retrieved on 2013-08-24
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Royal Bank of Canada *v.* Sparrow Electric Corp., [1997] 1 S.C.R. 411

Her Majesty The Queen *Appellant*

v.

Royal Bank of Canada *Respondent*

Indexed as: Royal Bank of Canada *v.* Sparrow Electric Corp.

File No.: 24713.

1996: June 19; 1997: February 27.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for alberta

Crown -- Priority -- Employee source deductions not paid by company in receivership -- Company's inventory subject to fixed charge and to Bank Act security -- Whether bank had priority to proceeds of sale of inventory over statutory trust in favour of Her Majesty -- Bank Act, S.C. 1991, c. 46, s. 427 -- Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), ss. 153, 227(4), (5) -- Personal Property Security Act, S.A. 1988, c. P-4.05, s. 28(1).

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Banks and banking operations -- Security -- Company's inventory subject to fixed charge and to Bank Act security -- Employee source deductions not paid by company in receivership -- Whether bank had priority to proceeds of sale of inventory over statutory trust in favour of Her Majesty -- Bank Act, S.C. 1991, c. 46, s. 427 -- Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), ss. 153, 227(4), (5) -- Personal Property Security Act, S.A. 1988, c. P-4.05, s. 28(1).

The Royal Bank secured a loan made to Sparrow Electric with a general security agreement (GSA) covering Sparrow's present and after-acquired property and with *Bank Act* security (BAS) created by an assignment of inventory under s. 427 of the *Bank Act*. When Sparrow experienced financial difficulties, a standstill agreement was executed. This agreement allowed Sparrow to continue its business but permitted the bank, on default, to appoint a receiver and enforce its security. A receiver was appointed in November 1992 at which time it was discovered that Sparrow had not been remitting its payroll deductions as required by s. 153 of the *Income Tax Act* (*ITA*). It is probable that these defaults had occurred in 1992. In January 1993, the receiver received court permission to sell Sparrow's assets. An amount from the proceeds of sale equivalent to that owing the federal government was ordered to be held in trust pending resolution as to entitlement. The bank claimed priority based on its GSA and its BAS, which entitled it to inventory proceeds. The

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federal government's claim was based on the s. 227 *ITA* deemed trust provisions, which created a deemed statutory trust in the moneys deducted from wages but not remitted to Her Majesty.

On the first application to determine priority, the deemed trust was held to take priority over the GSA. On a subsequent application by the bank for a determination of whether its BAS took priority over the deemed trust, the Court of Queen's Bench found that the deemed trust took priority. The Court of Appeal found that the BAS took priority over the deemed trust. At issue here is whether the s. 227(5) *ITA* deemed trust takes priority over a previously executed GSA and a previously executed BAS with respect to the proceeds of the sale of the inventory.

Held (La Forest, Gonthier and Cory JJ. dissenting): The appeal should be dismissed.

(1) *Section 227(4) and (5) of the Income Tax Act*

Although the employer, at the point of withholding, becomes the trustee of a fund which is in law the property of its employee, s. 227(4) *ITA* has the effect of making Her Majesty the beneficiary under that trust. A conceptual difficulty arises when the tax debtor fails to set aside moneys which are to be remitted. The subject of Her Majesty's beneficial interest at that point becomes intermingled with the general assets of the tax debtor and Her Majesty's claim then becomes that of a beneficiary under a non-existent trust. Subsections (4) and (5) of s. 227 resolve this conceptual dilemma by clearly and unambiguously rendering amounts unremitted as held in trust for Her Majesty. In particular, s. 227(5) is designed to, upon liquidation, assignment, receivership or bankruptcy, seek out and attach Her Majesty's beneficial interest to property of the debtor which is in existence at that time. The trust is not a real trust, as its subject matter cannot be identified from the date of the trust's creation. However, s. 227(5) has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs *ex post facto*. Her Majesty has a statutory right to access whatever assets the employer then has, and may realize from those assets the original trust debt. This interpretation is consistent with the scheme of distribution under the *Bankruptcy and Insolvency Act*.

The s. 227(5) deemed trust operates to Her Majesty's benefit in a secondary manner. Under it, Her Majesty's interest can attach retroactively to disputed collateral if the competing security interest has attached after the deductions giving rise to Her Majesty's claim in fact occurred. Conceptually, the s. 227(5) deemed trust allows that claim to go back in time and attach its outstanding s. 227(4) interest to the collateral before that collateral became subject to a fixed charge. The same result occurs when a statutory lien attaches prior to the mortgaging of disputed collateral. Here, the deductions of tax from the employees' pay cheques occurred after the attachment of the bank's fixed charge to the inventory, so this second aspect of s. 227(5)'s operation did not arise.

The mechanism of s. 227(5) cannot accurately be described as a means of "tracing"; indeed, this subsection is antithetical to tracing in the traditional sense in that it requires no link at all between the subject matter of the trust and the fund or asset into which the subject matter is being traced. Section 227(5) is more accurately described as a "relaxation of the equitable tracing rules".

Section 227(5) does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor. Subsections (4) and (5) of s. 227 are manifestly directed towards the property of the tax debtor, and it would be contrary to well-established authority to stretch the interpretation of s. 227(5) to permit the expropriation of the property of third parties who are not specifically mentioned in the statute.

Therefore, the proper analysis in determining whether Her Majesty is entitled to priority pursuant to these subsections must utilize principles of property law. The nature of the interests competing with those of Her Majesty must be scrutinized in order to determine whether and to what extent such interests have title in the disputed fund. If it is found that legal title in the collateral is in the bank, and not Sparrow, Her Majesty's deemed trust could only attach to Sparrow's equity of redemption.

The "statutory trust" approach can be distinguished from other legislative methods, such as an explicit "Crown priority" provision, used to secure an interest to unremitted payroll deductions. The application of such a provision to a priority competition can proceed without regard to the quality of the "security interest" which competes with Her Majesty's claim. Such a provision simply transfers title in the collateral to Her Majesty regardless of whose interest may compete with it, so long as its requirements are met.

(2) *Characterization of the Bank's Interests*

The bank's interest in Sparrow's inventory must be characterized as either a floating charge or a fixed and specific charge. A specific charge is one that, without more, fastens on ascertained and definite property or property

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capable of being ascertained and defined. A floating charge floats with the property which it is intended to affect until it crystallizes. Crystallization occurs upon the default of the debtor and transforms the interest into a fixed and specific charge over the inventory. The critical significance of the characterizing of an interest as being fixed or floating is that it describes the extent to which a creditor can be said to have a proprietary interest in the collateral. During the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral and a statutory trust or lien attaching during this time will attach to the debtor's interest and take priority over a subsequently crystallized floating charge. A security interest characterized as a fixed and specific charge, however, will take priority over a subsequent statutory lien or charge because all that the lien can attach to is the debtor's equity of redemption in the collateral.

Common law principles did not alter the effect that legislation may have on the characterization of security interests. Here, the Alberta *Personal Property Security Act* (*PPSA*) and the *Bank Act* are determinative of the characterization of the bank's GSA and BAS, respectively. The *PPSA* explicitly removes statutory trusts from its operation and accordingly does not govern the priority competition between a statutory trust and a security interest. The Act's effect, however, fundamentally changes the characterization of security interests. Generally speaking, absent an express intention to the contrary, a security interest in all present and after-acquired personal property will attach when that agreement is executed by the parties. Once attachment has occurred, the GSA becomes in law a fixed and specific charge over the collateral. For these reasons, the GSA held by the respondent bank must be characterized as a fixed and specific charge with a licence to deal with the inventory that arose because of the bank's granting Sparrow permission to sell the encumbered inventory. The fixed charge attached on the agreement's execution.

Similarly, security taken under the *Bank Act* is in the nature of a fixed and specific charge. The concept of the fixed charge is correlative to the notion of a creditor's having legal proprietary rights in the collateral. It is misleading to suggest that s. 427 security is in the nature of a floating charge because the bank effectively acquires legal title. Unlike a floating charge which may apply to all property of a specified kind held by the borrower from time to time but does not affix itself specifically upon any particular item of property until it crystallizes upon default by the borrower, s. 427 security is a fixed charge on each item of assigned property held from time to time whether or not the loan is in default. This gives a bank significantly greater rights than it would hold under a floating charge debenture on inventory. For this reason, the security interest of the bank in the form of BAS should be characterized as a fixed and specific charge with a licence to sell the inventory.

The traditional concept of the fixed charge seems to be at odds with the notion of having a proprietary right over collateral such as after-acquired inventory which is not yet in existence at the time the security agreement is executed. A fixed charge over all present and future inventory represents a proprietary interest over a dynamic collective of present and future assets. The conception of this form of charge must change to meet the modern realities of commercial law and in particular the legislative provisions which have been brought to bear in this appeal. In effect, the fixed and specific charge gives to the secured creditor the title (subject to the debtor's equitable right of redemption) to the present inventory of the debtor, as well as the after-acquired inventory of the debtor. In this way, the secured creditor becomes the legal owner of inventory as it comes into possession of the debtor.

Where a secured creditor holds a fixed charge over a debtor's inventory, that charge will have the effect of ensuring the creditor has legal title to any and all inventory subject to the charge at any given time, subject to the caveat (not operative here) that no outstanding statutory payroll deductions had in fact been made prior to the attachment of the fixed charge. Here, the inventory which was subject to the liquidation sale belonged in law to the respondent bank: both under its GSA and its BAS the bank held a fixed charge over Sparrow's inventory. Her Majesty's beneficial interest accordingly could only attach, before its sale, to Sparrow's equity of redemption in the property.

(3) *Licence Theory*

Per Sopinka, McLachlin, Iacobucci and Major JJ.: The security interests that the respondent has under the *Bank Act* and the *PPSA* take priority over the deemed trust that arises in favour of Her Majesty by operation of s. 227(4) *ITA.* While the former interests are subject to a licence to sell, that licence is not nearly so broad as to encompass the satisfaction of income tax obligations. A licence to sell inventory authorizes at most only the satisfaction of obligations that are immediately incidental to an actual sale of the inventory.

The licence theory holds that a bank's security interest in a debtor's inventory, whether fixed and specific, is subject to a licence in the debtor to deal with that inventory in the ordinary course of business. The point is that the bank's claim to the inventory must as a consequence give way to any debts incurred in the ordinary course of business. In theory, a creditor who has granted a licence to sell inventory has thereby consented to his security interest's being subject to other obligations that may arise "in the ordinary course of business". The licence is thus supposed to afford evidence of the respondent's intention to take less than an entire security interest in the inventory.

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The licence affords no such evidence. The potential sale of the inventory does not amount to an actual limitation of the security interest. A great difference exists between saying, on the one hand, that if a debtor sells inventory and applies the proceeds to a debt to a third party, then the third party takes the proceeds free of any security interest and saying, on the other hand, that because a third party could take the proceeds free of any security interest, no security interest exists in the proceeds as against that third party. A licence to sell inventory in the ordinary course of business is a condition of the former kind. The consequent (defeasance of the security interest) follows only if the antecedent (sale of the inventory and application of proceeds to an obligation to a third party) is satisfied. The security interest in the inventory disappears only if the debtor actually sells the inventory and applies the proceeds to a debt to a third party.

In accordance with s. 28(1) *PPSA*, the result of a sale of inventory is to give the purchaser an unencumbered interest in the inventory and the licensor a continuing security interest in the proceeds of the sale. Only if the debtor subsequently uses the proceeds to satisfy an obligation to a third party will the proceeds be removed from the scope of the licensor's security interest in them. Accordingly, a security agreement with a licence to sell creates a defeasible interest; but the event of defeasance is the actual sale of the inventory and the actual application of the proceeds against an obligation to a third party.

By itself, s. 28(1) *PPSA* does not necessarily compel rejection of the broad interpretation of the licence to sell. However, the maxim *expressio unius est exclusio alterius* is appropriately invoked here to complete the argument. The statute prescribes certain consequences for the security interest that follow a dealing with inventory, and in particular, it prescribes the defeasance of the interest if the debtor actually sells the inventory and applies the proceeds to an obligation to a third party. Significantly, the statute does not contemplate a defeasance on the happening of any other event. The statute occupies the field and crowds out other possible interpretations of the licence.

Because the inventory in question was not sold pursuant to the licence, here the licence can have had no effect on the respondent's security interest. What the debtor might have done with the licence does not matter. If it were otherwise, the licence to sell inventory would entirely eviscerate the respondent's GSA.

The argument might be made that the deemed trust works by deeming an actual sale of the inventory to have been made. It this were correct, then it would not matter that the inventory was not actually sold pursuant to the licence. However, the deeming is not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. The deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. In this case the inventory was encumbered by the GSA.

The debtor's covenant in the GSA to pay all taxes was not part of the licence and was merely a covenant to obey the law. It adds nothing to s. 153(1) *ITA* and does not prescribe the outcome of a priority contest.

A number of policy considerations support this conclusion. Judicial innovation in this field risks legal uncertainty. Inventory financiers would have to provide against the risk that their security interest might be defeated by some rival claim. There is also a real possibility that recognition of a broad licence theory would obliterate the *PPSA* charge against inventory. If Parliament wishes to do so, it may step in and assign absolute priority to the deemed trust. But in the absence of clear statutory language to that effect, the bank's GSA must prevail.

Per La Forest, Gonthier and Cory JJ. (dissenting): The critical issue here was the scope of the contractual licence. In particular, if the bank's consent included the right to sell the inventory in order to pay wages, then that consent by necessity included the right to sell inventory to remit payroll deductions. In such a situation, Her Majesty's interest would be able to attach to the proceeds of the inventory and so take priority over the bank's interest.

The licence theory operates, in the context of the statutory scheme at issue here, as an exception to the general rule that at the time of "liquidation, assignment, receivership or bankruptcy" Her Majesty's interest cannot attach to property which is at that time the property of a secured creditor. Where a secured creditor has consented to the use of its collateral when deductions are made in order to pay the statutory deductions which are the object of a deemed trust, that creditor has bound itself by the statutory requirements relating to those deductions. Here, therefore, the wage deductions at issue were made at a time when the bank had permitted the sale of inventory in order to pay wages (and thus wage deductions), and the bank's inventory existent at the time of receivership can accordingly be attached under s. 227(5).

The critical factor in the "licence to sell" argument is the permission which must be found to have been granted with respect to the usage of the proceeds of the disputed collateral. While licences are often expressed in terms of a "right to sell in the ordinary course of business", this permission is made with respect to the usage of proceeds, which

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is the proper focus of the inquiry, and not necessarily the circumstances of sale. Here, Sparrow was permitted to sell its inventory in the ordinary course of its business and "use" the proceeds generated therefrom.

The licence to sell inventory in the ordinary course of business in this case necessarily included a licence to sell inventory to pay wages, and remit wage deductions, in the course of Sparrow's business. Where, as here, the secured party has security over the majority of the assets of the debtor, the security interest over the inventory must permit the debtor to sell the inventory and put it to the general use of its business, including towards the payment of wages. The scope of the licence can be ascertained either from the express terms of the security agreement or from the nature of the agreement and the conduct of the parties. The licence here was to sell inventory in the "ordinary course of [Sparrow's] business . . . and use [the proceeds]" which renders it of such a quality as to include a right to use the proceeds to pay wages. A licence to sell inventory may in certain circumstances be circumscribed so as not to include a right to use the proceeds to pay wages.

The true test of whether the licence to sell inventory includes the right to pay wages is a matter of interpreting the contractual arrangement between the parties. The focus is not so much on the circumstances of the selling of inventory, but rather the permitted usage of the proceeds of inventory. Where the licence has a limited scope, that licence may not include the right to use proceeds to pay wages. However, the expression of a limited use for proceeds of inventory cannot prevail if the arrangement between the parties is such as to allow, in practice, the debtor to use the inventory proceeds in the course of its business. The test should be whether the debtor had the freedom to use these funds in the ordinary course of business as opposed to being under an obligation to remit them to the secured party.

The GSA contained an express licence permitting Sparrow to sell inventory in the course of its business and use the proceeds available; the BAS contained an implied licence to this effect. While it is true that the GSA contained a trust proceeds clause, this clause cannot have the effect of limiting the scope of the licence where the real arrangement between the parties was, as expressly stated, that Sparrow could use the proceeds of inventory in the course of its business. The bank in this case was not a small inventory financier who required Sparrow to remit proceeds of inventory to it immediately. To the contrary, the bank was a large scale lender who permitted Sparrow to use inventory sales to maintain the viability of its enterprise. Under the licence at issue here, the bank permitted Sparrow to sell inventory to pay wages and, necessarily, payroll deduction obligations.

The appellant's s. 227(5) deemed trust must take priority over the bank's security interests in the disputed collateral. The trust fund representing the deducted amounts, while without identified subject matter from the date of its inception, is capable of identifying property subject to that trust *ex post facto*. This result is not precluded with respect to the BAS by virtue of s. 428(1) of the *Bank Act*. Although s. 428(1) secures the respondent bank's proprietary right to the disputed collateral, the bank nevertheless consented to the divestment of this interest. Such a waiver of priority renders s. 428(1) of no assistance to the bank.

The licence theory, in addition to providing certainty in disputes between consensual and non-consensual security interests, achieves fairness in commercial law. In essence, the bank is willing to accept the benefits of Sparrow's non-payment of statutory deductions and has permitted the use of its collateral to pay these deductions, but refuses to accept the burden of Sparrow's unlawful action at the time of its receivership. It should be the policy of the law that the respondent bank be held accountable for Sparrow's outstanding statutory obligations. The licence theory ensures that in appropriate circumstances this result will obtain.

The licence theory does not go so far as to mean that every subsequent claim should prevail over the GSA because every rival claim might have to be satisfied out of the proceeds of a hypothetical sale of the inventory. The consent to pay wages is a necessary but not sufficient condition. It did not *simpliciter* lead to the conclusion that Her Majesty's interest must prevail. What is significant is that the bank consented to payment of wages, including deductions, out of inventory which, at the time of the deductions and upon actual payment of wages, were deemed by statute to be taken out of the estate of the debtor. The unique nature of the statutory provisions applicable to wage deductions, and the bank's consent thereto, are integral to the success of the s. 227(5) claim in the case at bar. In this way, the licence theory is circumscribed in its ability to defeat prior secured interests.

In addition, the licence theory as applied here is not inimical to the integrity of commercial law. It operates narrowly, in conjunction with unique statutory provisions, so as to actualize legally performed obligations. It does not create uncertainty in commercial transactions.

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By Gonthier J. (dissenting)

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APPEAL from a judgment of the Alberta Court of Appeal reflex, (1995), 28 Alta. L.R. (3d) 153, 165 A.R. 132, 89 W.A.C. 132, [1995] 6 W.W.R. 718, 33 C.B.R. (3d) 34, 10 P.P.S.A.C. (2d) 1, allowing an appeal from judgments of Agrios J. 1993 CanLII 7257 (AB QB), (1993), 19 Alta. L.R. (3d) 183, 10 P.P.S.A.C. (2d) 1, at p. 3, [1995] 1 C.T.C. 101, and 1994 CanLII 8992 (AB QB), (1994), 21 Alta. L. R. (3d) 275, 156 A.R. 187, [1994] 9 W.W.R. 338. Appeal dismissed, La Forest, Gonthier and Cory JJ. dissenting.

Edward R. Sojonky, *Q.C.*, and *Michael J. Lema*, for the appellant.

Ray C. Rutman, for the respondent.

The reasons of La Forest, Gonthier and Cory JJ. were delivered by

1 GONTHIER J. (dissenting) -- This case involves a determination of priority between a deemed statutory trust and various security instruments in regard to the proceeds of a liquidation sale of inventory. In particular, the appeal requires a determination of the priority status of Her Majesty's deemed trust under s. 227(4) and (5) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (hereinafter "*ITA*"), these provisions becoming operative in this case because of the misappropriation of unremitted payroll deductions lawfully belonging to Her Majesty. In competition to this claim, the Royal Bank of Canada asserts priority under both a general security agreement and an assignment of inventory under s. 427 of the *Bank Act*, S.C. 1991, c. 46.

I - Facts

2 The debtor, Sparrow Electric Corporation (hereinafter "Sparrow"), carried on business as an electrical contractor in Alberta. The enterprise was of a substantial size, employing 200 to 300 employees in its business operations. To finance these operations, Sparrow borrowed heavily from the respondent Royal Bank of Canada (hereinafter the "bank"). The bank secured Sparrow's borrowing with various forms of security, covering most of the assets utilized in Sparrow's business. Of particular relevance to this appeal, however, the bank held a general security agreement over all of Sparrow's present and after-acquired personal property, as well as an assignment of inventory under s. 178 (now s. 427) of the *Bank Act*, R.S.C., 1985, c. B-1.

3 In 1992, it became apparent to the bank that Sparrow was having financial difficulties. On two occasions, August 5, 1992 and September 30, 1992, the bank wrote to Sparrow advising its management that Sparrow was in default on its loan obligations. On October 16, 1992, in order to give Sparrow some time to correct its default situation, the bank and Sparrow entered into a "Standstill Agreement". This agreement permitted Sparrow to continue carrying on business under the proviso that, should Sparrow's position fail to improve, the bank would be entitled to appoint a receiver and enforce its security.

4 Sparrow's financial position did not improve. For this reason, on November 19, 1992, the bank appointed a receiver to take over Sparrow's business, and on December 8, 1992, the bank successfully petitioned Sparrow into bankruptcy. The order appointing the receiver empowered the receiver to, among other things, carry on Sparrow's business as it deemed necessary. The receiver did in fact carry on Sparrow's business for some time, employing approximately 200 employees in order to fulfil Sparrow's outstanding contractual obligations. These employees were terminated effective January 15, 1993.

5 In addition to the failure to pay the loan obligations which inevitably led to its bankruptcy and receivership, Sparrow had failed to honour other obligations in its attempt to remain in business. In particular, Sparrow failed to remit payroll deductions as required by s. 153 *ITA*. While the record does not disclose the exact date of these failures, it appears that the first instance of non-remittance could have occurred no later than August 7, 1992. Having regard to the amount of payroll deductions outstanding as of August 7, and to the average number of Sparrow's employees on the payroll, we can conclude that the actual payroll deductions which give rise to Her Majesty's claim in all likelihood occurred some time in the year 1992. In any event, by the time of its receivership, in addition to substantial amounts outstanding to the bank, Sparrow was indebted to the appellant ("Her Majesty") in the amount of $625,990.86 for unremitted income tax payroll deductions.

6 On January 12, 1993, the receiver applied to the Alberta Court of Queen's Bench for authorization to sell various Sparrow assets. Part of the pool of assets to be sold included Sparrow's inventory which is the subject of this appeal. On January 15, 1993, Wilson J. authorized both the sale of the assets and remittance of its proceeds to the bank in partial repayment of its claims, but ordered that an amount equal to Her Majesty's claim for unremitted payroll deductions be held in trust pending a resolution as to the entitlement to this portion of the proceeds. At some later date, the assets were in fact sold, and the amount of $625,990.86 set aside. It has been

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held in judicial proceedings that the amount held is constituted entirely of proceeds from inventory (*Royal Bank v. Sparrow Electric Corp.*, Alberta Court of Queen's Bench, Edmonton, November 24, 1993, unreported). That ruling is not at issue in this appeal.

7 At present, the fund being held and constituting the proceeds of inventory is sufficient to satisfy either Her Majesty's claim, or part of the outstanding claims owing to the bank. The determination of priority in this appeal will therefore be determinative as to which party is entitled to the entirety of the disputed fund.

II - The Competing Interests

8 For convenience, I will at the outset outline the claims of the bank and of Her Majesty which are advanced as being entitled to the proceeds of the inventory.

(A) *The Bank*

9 The respondent bank advances two distinct security instruments in order to establish its claim to the disputed fund. First, the bank argues that its general security agreement ("GSA"), executed on February 25, 1992, and perfected pursuant to the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"), is entitled to priority. By this agreement, Sparrow assigned to the bank a security interest in all of its present and after-acquired personal property, including "all inventory of whatever kind and wherever situate" (para. 1(a)(i)). In addition, para. 7 of that agreement provided that proceeds of the collateral received by Sparrow would be received and held in trust for the bank. Of significance to this appeal, however, para. 4 of the GSA contained two express covenants, providing:

> So long as this Security Agreement remains in effect Debtor covenants and agrees:
>
> (a) to defend the Collateral against the claims and demands of all other parties claiming the same or an interest therein; to keep the Collateral free from all Encumbrances ...; provided always that, until default, Debtor may, in the ordinary course of Debtor's business, sell or lease inventory and, subject to Clause 7 hereof, use Money available to Debtor,
>
> ...
>
> (e) to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied, assessed or imposed against or in respect of Debtor or Collateral as and when the same become due and payable; [Emphasis added.]

Additionally, under the credit facilities agreement between Sparrow and the bank, dated January 22, 1992, Sparrow covenanted as follows:

> (3) it will promptly pay when due all business, income and other taxes properly levied on its operations and property and remit all statutory employee deductions when due; [Emphasis added.]

10 The bank's second claim is that its *Bank Act* security ("BAS") entitles it to priority to the inventory proceeds. That security instrument was executed on two occasions, January 29, 1990 and December 12, 1990. Under the General Assignment, Sparrow assigned to the bank, *inter alia*, "all goods inventory, [and] stock-in-trade" as continuing security for the payment of loans to the bank. In addition, as part of the Agreement as to Loans and Advances, Sparrow granted security in both its inventory and its proceeds. At the time these instruments were executed, s. 178 of the *Bank Act*, R.S.C., 1985, c. B-1, was in effect. However, on June 1, 1992, that Act was replaced with the *Bank Act*, S.C. 1991, c. 46. The relevant portions of these two acts are identical. However, as the facts giving rise to this case occurred while the latter Act was in force, I will refer to the provisions of this new Act for the purposes of this appeal. As such, the bank's claim for security under its BAS is grounded in s. 427 (formerly s. 178) of the *Bank Act*, which provides:

> **427.** (1) A bank may lend money and make advances
>
> (*a*) to any wholesale or retail purchaser or shipper of, or dealer in, products of agriculture, products of aquaculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers or goods, wares and merchandise, manufactured or otherwise, on the security of such products or goods, wares and merchandise and of goods, wares and merchandise used in or procured for the packing of such products or goods, wares and merchandise,
>
> ...
>
> (2) Delivery of a document giving security on property to a bank under the authority of this section vests in the bank in respect of the property therein described
>
> (*a*) of which the person giving security is the owner at the time of the delivery of the document, or

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(*b*) of which that person becomes the owner at any time thereafter before the release of the security by the bank, whether or not the property is in existence at the time of the delivery,

the following rights and powers, namely,

(*c*) if the property is property on which security is given under paragraph (1)(*a*), (*b*), (*g*), (*h*), (i), (*j*) or (*o*), under paragraph (1)(*c*) or (*m*) consisting of aquacultural implements, under paragraph (1)(*d*) or (*n*) consisting of agricultural implements or under paragraph (1)(*p*) consisting of forestry implements, the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, ...

...

and all such property in respect of which such rights and powers are vested in the bank under this section is for the purposes of this Act property covered by the security. [Emphasis added.]

Section 425(1) (formerly contained within s. 2(1)) provides that:

425. (1) ...

"goods, wares and merchandise" includes products of agriculture, products of aquaculture, products of the forest, products of the quarry and mine, products of the sea, lakes and rivers, and all other articles of commerce; [Emphasis added.]

And s. 435(2) (formerly s. 186(2)) provides:

435. ...

(2) Any warehouse receipt or bill of lading acquired by a bank under subsection (1) vests in the bank, from the date of the acquisition thereof,

(*a*) all the right and title to the warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof; and

(*b*) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom the goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of the goods, wares and merchandise.

11 In addition, the respondent directed this Court's attention to s. 428(1) (formerly s. 179(1)), which it was submitted affected the priority position of the bank's BAS:

428. (1) All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and the rights and powers of the bank in respect of the property covered by a security given to the bank under section 427 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, have, subject to subsection 427(4) and subsections (3) to (6) of this section, priority over all rights subsequently acquired in, on or in respect of that property, and also over the claim of any unpaid vendor. [Emphasis added.]

Finally, s. 434(2) (formerly s. 185(2)) provides:

434. ...

(2) Nothing in any charter, Act or law shall be construed as ever having been intended to prevent or as preventing a bank from acquiring and holding an absolute title to and in any mortgaged or hypothecated real property, whatever the value thereof, or from exercising or acting on any power of sale contained in any mortgage given to or held by the bank, authorizing or enabling it to sell or convey any property so mortgaged. [Emphasis added.]

12 While no provision in the BAS explicitly permitted Sparrow to sell its inventory, the respondent bank has conceded that such a licence existed, as a practical matter, as between the parties. In any event, I would have thought that once a licence to sell inventory had been granted under the GSA, it would be impossible to grant a more restricted licence to deal with the same collateral under the provisions of the BAS.

(B) *Her Majesty's Interest*

13 Her Majesty's claim arises under the s. 227 deemed trust provisions of the *ITA*. Section 153(1)(*a*) of that Act requires employers to withhold from the pay cheques of its employees and remit to the Receiver General amounts on account of the payee's tax for the year:

153. (1) Every person paying at any time in a taxation year

(*a*) salary or wages or other remuneration,

...

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> shall deduct or withhold therefrom such amount as may be determined in accordance with prescribed rules and shall, at such time as may be prescribed, remit that amount to the Receiver General on account of the payee's tax for the year.... [Emphasis added.]

Such amounts are deemed to be held in trust for Her Majesty by virtue of s. 227(4) and (5) *ITA*, which provide:

> **227.** ...
>
> (4) Every person who deducts or withholds any amount under this Act shall be deemed to hold the amount so deducted or withheld in trust for Her Majesty.
>
> (5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> (*a*) deemed by subsection (4) to be held in trust for Her Majesty, ...
>
> ...
>
> shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

As of June 15, 1994, these provisions have been repealed and replaced by a revised s. 227(4): S.C. 1994, c. 21, s. 104(1). However, as this amendment was not effective at the time the facts of this appeal arose, I decline to comment on the application of the new s. 227(4) to this case.

III - Judgments of the Courts Below

Alberta Court of Queen's Bench 1993 CanLII 7257 (AB QB), (1993), 19 Alta. L.R. (3d) 183

14 The first application brought to determine the priority over the inventory proceeds involved the competing claims under the GSA advanced by the bank, and Her Majesty's deemed trust. Agrios J. held that the deemed trust took priority over the GSA. In characterizing the statutory trust, Agrios J. concluded at p. 189 that the trust attaches to "whatever assets are left" upon bankruptcy. With regard to the GSA security interest, Agrios J. was of the view that it took the form of a fixed charge on the inventory with a licence to sell in the ordinary course of business. However, this latter characterization was not necessary to reach his decision, as the learned chambers judge ultimately reasoned, at p. 188, "[w]hether the charge is floating or fixed, if there is an ability to deal with an asset such as inventory, the asset becomes exposed to the normal market incidents of carrying on business". Relying on the decision of McLachlin J.A. (as she then was) in *R. in Right of B.C. v. F.B.D.B.*, 1987 CanLII 156 (BC CA), [1988] 1 W.W.R. 1 (B.C.C.A.) (hereinafter "*FBDB*"), Agrios J. found that a normal incident of selling inventory was the payment of statutory liens. The sale of the inventory therefore permitted the statutory trust to attach.

Alberta Court of Queen's Bench 1994 CanLII 8992 (AB QB), (1994), 21 Alta. L.R. (3d) 275

15 The bank subsequently applied for a determination of whether their BAS over Sparrow's inventory took priority over Her Majesty's deemed trust. For substantially similar reasons, Agrios J. held that the deemed trust once again took priority. Whether the BAS could be characterized as a fixed charge with a licence to sell, or a floating charge, the sale of the inventory subjected the bank's interest in it to the "normal incidents of business" (at p. 283). And, in Agrios J.'s view, one of these incidents was the paying of wages and withholdings. As these proceeds were impressed with the deemed trust, whatever interest the bank had could not attach to them, as they were no longer the property of Sparrow.

Alberta Court of Appeal reflex, (1995), 28 Alta. L.R. (3d) 153

16 Both the decisions of Agrios J. were appealed to the Alberta Court of Appeal. As such, the priority of both the GSA and the BAS were at issue before that court. However, the Court of Appeal, unanimously deciding to dispose of the appeal solely on the grounds that the BAS took priority over the statutory trust, neither heard oral argument nor ruled with regard to the priority of the GSA.

17 The Court of Appeal began with the premise that BAS was a fixed and specific charge transferring legal title to the bank and not a floating charge over inventory. For this proposition, the court relied upon two judgments of this Court, *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, 1980 CanLII 186 (SCC), [1980] 1 S.C.R. 1182, and *Bank of Montreal v. Hall*, 1990 CanLII 157 (SCC), [1990] 1 S.C.R. 121, both decisions which the court considered binding upon it. As the claim of Her Majesty arose subsequent to the execution of the BAS, in the court's opinion, the deemed trust could have nothing to attach to. In addition, the court rejected the argument that the inventory was subject to a licence to sell which would provide Her Majesty with an opportunity to attach its interest. The Court of Appeal found *FBDB*, *supra*, relied upon by Agrios J. to be distinguishable on the basis that

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the intimacy in that case between the sale of inventory and the statutory trust was not present in the case before it. In contrast, in the present case, the court found no conceptual or evidentiary link between the sale of inventory and the withholding of payroll deductions. In any event, the court found that any licence to sell inventory only lasted until default, and as the sale in this case occurred well after any default by Sparrow, the licence must therefore have been extinguished at the relevant time. For these reasons, the Court of Appeal found that the BAS took priority over Her Majesty's deemed trust.

IV - Issues

18 There are two issues to be resolved in this appeal: (1) whether, on the facts of this case, Her Majesty's s. 227(5) *ITA* deemed trust takes priority over a previously executed GSA with respect to the proceeds of the sale of inventory; and (2) whether, on the facts of this case, Her Majesty's s. 227(5) *ITA* deemed trust takes priority over a previously executed BAS with respect to the proceeds of the sale of inventory?

V - Analysis

(A) *Introduction*

19 The law reports are replete with cases involving competing claims between statutory liens and deemed trusts, such as the one found in s. 227 *ITA*, and other previously executed consensual security interests: *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, *supra*; *Board of Industrial Relations v. Avco Financial Services Realty Ltd.*, 1979 CanLII 230 (SCC), [1979] 2 S.C.R. 699; *Royal Bank of Canada v. G. M. Homes Inc.* (1984), 52 C.B.R. (N.S.) 244 (Sask. C.A.); *Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, 1992 CanLII 2767 (MB CA), [1992] 2 W.W.R. 641 (Man. C.A.); *FBDB, supra*; *Ford Motor Co. of Canada Ltd. v. Manning Mercury Sales Ltd. (Trustee of)*, 1994 CanLII 4852 (SK QB), [1994] 6 W.W.R. 372 (Sask. Q.B.); *National Bank of Canada v. Director of Employment Standards* (1986), 5 P.P.S.A.C. 326 (Ont. Div. Ct.); *Abraham v. Coopers & Lybrand Ltd.* reflex, (1993), 13 O.R. (3d) 649 (Gen. Div.) (under appeal); *Armstrong v. Coopers & Lybrand Ltd.* reflex, (1986), 53 O.R. (2d) 468 (H.C.), aff'd reflex, (1987), 61 O.R. (2d) 129 (C.A.), leave refused, *sub nom. National Bank of Canada v. Armstrong*, [1988] 1 S.C.R. xii. The ubiquitousness of this legal dilemma in our courts speaks no doubt, at least in part, to the prevalence of the unfortunate factual situation which such statutory trusts and liens were meant to counter. Namely, such deemed trusts or liens are devices which legislators often employ in order to recover moneys which ought to have lawfully been paid to them but have been unlawfully misappropriated by a debtor who subsequently encounters financial difficulty and is forced into winding up its business, e.g., *Canada Pension Plan*, R.S.C., 1985, c. C-8, s. 23(3) and (4); *Unemployment Insurance Act*, R.S.C., 1985, c. U-1, s. 57(2) and (3); and the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), s. 227(4) and (5). Indeed, it is perhaps more accurate to speculate that this sort of misappropriation of public funds is often a manifestation of an already-existing financial difficulty in a debtor's business, as a debtor foregoes statutory payments as required of it in order to increase artificially its supply of working capital.

20 At the same time that legislators have sought to protect the fiscal integrity of public institutions through the devices of statutory trusts and liens, however, they have also endeavoured to protect the security interests of those private institutions who are involved in providing credit to Canadian businesses. For example, the *Bank Act* has historically provided for the protection of the collateral of banking institutions. The current provision of the *Bank Act* granting a security interest in a debtor's inventory, s. 427, can be traced back over one hundred years to the enactment of its predecessor section, s. 74, in 1890 (S.C. 1890, c. 31). The historical and societal importance of this form of security was observed by this Court in *Hall*, *supra*, where, at p. 139, La Forest J. commented that "[i]n a word, the creation of the *Bank Act* security interest has been a key factor in the evolution of banking in this country". Later, at p. 140, La Forest J. concluded:

> The above considerations establish, to my satisfaction, that the s. 178 security interest, which originated as a policy response to structural deficiencies in the lending regimes of the nascent Canadian economy, has, since its inception, played a primordial role in facilitating access to capital by several groups that play a key role in the national economy. [Emphasis added.]

21 More recently, provincial legislatures have moved to protect secured creditors generally through the enactment of personal property security legislation: e.g. *Personal Property Security Act*, R.S.O. 1990, c. P.10; *Personal Property Security Act*, S.B.C. 1989, c. 36; and the *PPSA*. These statutory regimes have been implemented to increase certainty and predictability in secured transactions through the creation of a coherent system of priorities: Ronald C. C. Cuming and Roderick J. Wood, *British Columbia Personal Property Security Act Handbook* (2nd ed. 1993), at pp. 4-5; *G.M. Homes Inc.*, *supra*, at p. 252. The benefits of such certainty in

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commercial transactions, on basic economic principles, are intended to accrue to the health of the economy in general.

22 It can be seen from the foregoing, therefore, that the priority competition between statutory trusts and consensual security interests represents, in a broad sense, a clash between conflicting legislative objectives. To this extent, then, a resolution of the priority competition in the present case requires a sensitivity to the differing legislative objectives here at play. In particular, however, to the extent that the aim of personal property security regimes is to effect certainty in commercial transactions, the interpretation by the courts of such legislation and the development of the jurisprudence generally in this area must, to every extent possible, seek to achieve predictable results.

23 It has been unfortunate that the development of the case law, to this point, has not inspired the degree of certainty which is so manifestly desirable in this area of commercial law. Indeed, the jurisprudence has been referred to as a "troubled area of the law" (*Manitoba (Minister of Labour) v. Omega Autobody Ltd. (Receiver of)* 1989 CanLII 178 (MB CA), (1989), 59 D.L.R. (4th) 34 (Man. C.A.), at p. 36), and has been the subject of, at times, scathing academic criticism (Roderick J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" (1995), 10 *B.F.L.R.* 429, and Roderick J. Wood and Michael I. Wylie, "Non-Consensual Security Interests in Personal Property" (1992), 30 *Alta. L. Rev.* 1055). The general view, I believe, has been summarized by Professor Wood in his most helpful case commentary, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at p. 430: "[i]t is somewhat of an embarrassment that after more than two decades we still cannot confidently predict the outcome of a priority dispute between a deemed trust and a security interest". The above judicial and academic commentary, I believe, invites this Court to proceed steadfastly towards the pronouncement of clear principles to be applied in determining the priority between statutory trusts and consensual security interests.

24 With these general observations in mind, I will now proceed to analyze the specific aspects of the competing claims advanced by the parties in the present case.

(B) *The Nature of Section 227(4) and (5) Statutory Trusts*

25 Section 153(1)(*a*) *ITA* places an affirmative duty upon employers to deduct and withhold amounts from their employees' pay cheques, and remit those withholdings to the Receiver General on account of the employees' tax payable. By virtue of s. 153(3) *ITA*, these withholdings are deemed to become the property of the employee:

> **153.** ...
>
> (3) When an amount has been deducted or withheld under subsection (1), it shall, for all the purposes of this Act, be deemed to have been received at that time by the person to whom the remuneration, benefit, payment, fees, commissions or other amounts were paid.

In a perfect world, these deductions would be made, a cash fund would be set aside by the employer, and the withheld amounts would be promptly remitted to the Receiver General when due. The deducted amounts, lawfully the property of the employee, would in this way be transferred to Her Majesty to be set against his overall tax payable.

26 As a practical reality, however, these deductions are often not remitted as required under the *ITA*. Instead, the withholdings are commonly made solely as a book entry, and therefore the deduction of taxes from wages becomes merely a notional transaction; no cash is actually set aside for remittance and, often, the deductions are not transferred to the Receiver General: see, e.g., *Re Deslauriers Construction Products Ltd.*, [1970] 3 O.R. 599 (C.A.), at p. 601. It is at this point which a business becomes indebted to Her Majesty for the amount of moneys only fictionally deducted. I hasten to add, however, that while it can be said Her Majesty at this point becomes *de facto*, if not *de jure*, a creditor of the non-remitting employer, the arrangement is dissimilar to an ordinary debtor-creditor situation in two fundamental respects. First, in contrast to usual negotiated credit arrangements, this transaction is of manifestly a non-consensual nature. Second, by virtue of s. 153(3), the debtor can in law be considered to be utilizing an asset which is the property of its employees. In this sense, it is not inaccurate to characterize the non-remittance of payroll deductions as a "misappropriation" of the property of another. Indeed, the authorities, correctly in my view, commonly refer to the conduct of the tax debtor in this manner: *Roynat*, *supra*, at p. 646, *per* Twaddle J.A.; and *Pembina on the Red Development Corp. Ltd. v. Triman Industries Ltd.* 1991 CanLII 2699 (MB CA), (1991), 85 D.L.R. (4th) 29 (Man. C.A.), at p. 48, *per* Lyon J.A. dissenting.

27 The economic reality of this sort of misappropriation of statutory deductions is artificially to increase the working capital of the tax debtor. By foregoing a cash payment to Her Majesty in the amount of the payroll deductions, the tax debtor is able to utilize the freed resources elsewhere in its business. The effect of non-

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remittance was summarized by Lyon J.A. in his dissenting reasons in *Pembina on the Red Development*, *supra*, at p. 48:

> ... either the tax debtor used the misappropriated deductions for its own purposes or the pool of moneys available for distribution to the tax debtor's creditors ... has been increased by the amount which the tax debtor failed to remit to the Receiver-General.

28 It is against the backdrop of this unfortunate factual scenario that the provisions of s. 227(4) and (5) can be seen to have been enacted. While it can be said that at the point of withholding the employer becomes the trustee of a fund which is in law the property of its employee, s. 227(4) has the effect of making Her Majesty the beneficiary under that trust. I agree with the observation of the mechanics of s. 227(4) made by Twaddle J.A. in *Roynat*, *supra*, at p. 646, where he states:

> Although [s. 227(4)] calls the trust created by it a deemed one, the trust is in truth a real one. The employer is required to deduct from his employees' wages the amounts due by the employees under the statute. This money does not belong to the employer anymore. It belongs to the employees. The employer holds it in a statutory trust to satisfy their obligations.

The conceptual difficulty arises, of course, when the tax debtor fails to set aside moneys which are to be remitted. At this point, the subject of Her Majesty's beneficial interest becomes intermingled with the general assets of the tax debtor. As Twaddle J.A. rightly observed in *Roynat*, *supra*, at p. 646, "Her Majesty's claim ... then be[comes] that of a beneficiary under a non-existent trust". In short, the misappropriation of statutory deductions conceptually problematizes the legal vehicle -- the concept of the trust -- which Parliament has invoked in order to regain the moneys lawfully owed to Her Majesty.

29 This conceptual dilemma is resolved by s. 227(5). That provision states that:

> **227.** ...
>
> (5) Notwithstanding any provision of the *Bankruptcy Act*, in the event of any liquidation, assignment, receivership or bankruptcy of or by a person, an amount equal to any amount
>
> (*a*) deemed by subsection (4) to be held in trust for Her Majesty, ...
>
> ...
>
> shall be deemed to be separate from and form no part of the estate in liquidation, assignment, receivership or bankruptcy, whether or not that amount has in fact been kept separate and apart from the person's own moneys or from the assets of the estate.

The effect of s. 227(5) naturally falls to be determined through a proper interpretation of the language contained in that subsection.

30 This Court recently had occasion to review the principles of law to be applied to the interpretation of tax legislation. In *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, 1996 CanLII 244 (SCC), [1996] 1 S.C.R. 963, at pp. 975-76, Cory J. quoted this Court's decision in *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103, at pp. 112-14, where the relevant principles were summarized as follows:

> In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The principle that the plain meaning of the relevant sections of the *Income Tax Act* is to prevail unless the transaction is a sham has recently been affirmed by this Court in *Canada v. Antosko*, 1994 CanLII 88 (SCC), [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:
>
> > While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, 1988 CanLII 58 (SCC), [1988] 2 S.C.R. 175, at p. 194; see also *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695.
>
> I accept the following comments on the *Antosko* case in P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (1995), Section 22.3© "Strict and purposive interpretation", at pp. 453-54:

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> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.... (The *Antosko* case) is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.

At pp. 976-77 of *Alberta (Treasury Branches)*, *supra*, Cory J. concluded:

> Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be applied regardless of its object or purpose. I recognize that agile legal minds could probably find an ambiguity in as simple a request as "close the door please" and most certainly in even the shortest and clearest of the ten commandments. However, the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament".

31 In the present case, I find the language in s. 227(5) to be clear and unambiguous, especially when viewed as a provision directly following s. 227(4), which renders amounts unremitted as held in trust for Her Majesty. In my view, this section is designed to, upon liquidation, assignment, receivership or bankruptcy, seek out and attach Her Majesty's beneficial interest to property of the debtor which at that time is in existence. The trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust: D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117. However, s. 227(5) has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs *ex post facto*. In this respect, I agree with the conclusion of Twaddle J.A. in *Roynat*, *supra*, where he states the effect of s. 227(5) as follows, at p. 647: "Her Majesty has a statutory right of access to whatever assets the employer then has, out of which to realize the original trust debt due to Her".

32 I add that this approach was taken to a provision substantially similar to s. 227(5) by Gale C.J. in *Re Deslauriers Construction Products Ltd.*, *supra*, at p. 601, whose reasoning was affirmed by this Court in *Dauphin Plains*, *supra*. The *Deslauriers* case, *supra*, involved a priority competition between a trustee-in-bankruptcy and a statutory deemed trust provision created under the *Canada Pension Plan*, S.C. 1964-65, c. 51. Section 24(3) and (4) of that Act stated:

> **24.** ...
>
> (3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General of Canada, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.
>
> (4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed to be held in trust for Her Majesty shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

This Court in *Dauphin Plains*, *supra*, at p. 1198, approved of Gale C.J.'s conclusion as to the interpretation of s. 24(4) (at p. 601 of *Deslauriers*, *supra*):

> It seems to us that s-s. (4), and particularly the concluding six words thereof, were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.

33 This interpretation of s. 227(5) also has the virtue of being consistent with the scheme of distribution under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. Section 67 of that Act expressly removes claims for unremitted payroll deductions, which are held in trust (*inter alia*) pursuant to s. 227 *ITA*, from the bankrupt's estate:

> **67.** (1) The property of a bankrupt divisible among his creditors shall not comprise

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(*a*) property held by the bankrupt in trust for any other person,

...

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of subsections 227(4) and (5) of the *Income Tax Act*, subsections 23(3) and (4) of the *Canada Pension Plan* or subsections 57(2) and (3) of the *Unemployment Insurance Act*....

34 It is to be observed that in addition to attaching Her Majesty's interest to the debtor's property upon the triggering of any of the events mentioned in s. 227(5), the deemed trust operates to the benefit of Her Majesty in a secondary manner. Namely, s. 227(5) permits Her Majesty's interest to attach to collateral which is subject to a fixed charge if the deductions giving rise to Her Majesty's claim arose before that charge attached to that collateral. This proposition flows from the decision of this Court in *Dauphin Plains*, *supra*. *Dauphin Plains* involved a determination as to priority in respect of the proceeds of a liquidation sale of a receiver-manager. In that case, the claims of Her Majesty (*inter alia*) arose by virtue of the non-remittance of payroll deductions in regard to payments under the *Canada Pension Plan*, R.S.C. 1970, c. C-5, and the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48. Those Acts provided Her Majesty with claims pursuant to deemed trusts whose language is substantially similar to the version of s. 227(4) and (5) at issue in this appeal. In finding that these claims took precedence over a floating charge which had crystallized after the deductions at issue were actually made, Pigeon J. stated at p. 1199:

It should first be observed that, for reasons similar to those on which the decision in the *Avco* case, *supra*, was based, the claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge. The claim for the deductions arose subsequently and thus cannot affect this charge in the absence of a statute specifically so providing. However, the floating charge did not crystallize prior to the issue of the writ and the appointment of the receiver. In the present case it makes no difference which of the two dates is selected, both are subsequent to the deductions. [Emphasis added.]

Thus, s. 227(5) alternatively permits Her Majesty's interest to attach retroactively to the disputed collateral if the competing security interest has attached after the deductions giving rise to Her Majesty's claim in fact occurred. Conceptually, the s. 227(5) deemed trust allows Her Majesty's claim to go back in time and attach its outstanding s. 227(4) interest to the collateral before that collateral became subject to a fixed charge. The same result occurs when a statutory lien attaches prior to the mortgaging of disputed collateral. In *Avco*, *supra*, this Court *per* Martland J. commented upon just such a scenario, at p. 706:

From that date, the lien attaches to the employer's property and, as provided in subs. (1), it will take priority over any other claim, including an assignment or mortgage. In other words, after the lien attaches, its priority is unaffected by a disposition of his property made by the employer. Where a mortgage has been made prior to the lien attaching, it is not affected. The lien will only attach to the employer's equity in that property. [Emphasis added.]

See also *G.M. Homes Inc.*, *supra*, at p. 250.

35 In this appeal, however, the deductions of tax from the employees' pay cheques occurred after the attachment of the bank's fixed charge to the inventory. As such, this second aspect of s. 227(5)'s operation is not at issue in this case.

36 I find support for the interpretation of s. 227(5) that I have taken in as much as it is consistent with the overall purpose of s. 227(4) and (5). In *Pembina on the Red Development*, *supra*, Lyon J.A. (dissenting) had occasion to comment upon the purpose of the predecessor section to the current s. 224(1.2) *ITA*, namely s. 224(1.2) and (1.3) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, which were added by S.C. 1987, c. 46, s. 66. I find that Lyon J.A.'s comments in this respect to be fully applicable to the articulation of the purpose of s. 227(5). At p. 51, Lyon J.A. stated:

One must always remember that the withholding tax or source deduction to which s. 224 applies is at the heart of the collection procedures for personal income taxation in Canada. Indeed, if one makes a calculation from the statistics reported in "Taxation Statistics, 1987", a publication of Revenue Canada Taxation, Catalogue No. RV-1987, one finds that 87% of all personal income taxes paid in Canada are collected by source deductions. It can

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thus be seen that Parliament in passing s. 224(1.2) made it as all-encompassing as it is in order to ensure its continued viability. No other system is so crucial to the overall collection procedure adopted by the Crown. Parliament clearly meant to protect this system. Using the employer as a tax collector requires such extra protection in cases such as the one at bar where the employer converts the withheld tax money to its own purposes. Understandably, that conversion cannot be countenanced if the integrity of that system is to be preserved. Parliament, therefore, acting within its constitutional authority, has taken this extraordinary remedy to protect a major collection source.

Similarly, Parliament has clearly sought to protect the collection of unremitted payroll deductions through the device of the statutory deemed trust. Accordingly, s. 227(5) must be interpreted in light of this purpose. To summarize, it operates in a twofold manner: upon the triggering of an event specified in s. 227(5), Her Majesty's beneficial interest (i) attaches to the tax debtor's property then in existence; or (ii) attaches to collateral subject either to a fixed charge, or a crystallized floating charge, if the actual deductions giving rise to Her Majesty's claim occurred before the fixed charge attached, or the floating charge crystallized, respectively.

37 One further point with respect to terminology is necessary before leaving the present discussion. The method of attachment of Her Majesty's beneficial interest pursuant to s. 227(5) has been referred to at times as a "mechanism for tracing": *Roynat*, *supra*, at p. 647. This was indeed how it was presented by counsel for Her Majesty in his submissions before this Court. During the hearing of this case, it was questioned whether this was not an awkward usage of the word "tracing". After considering the matter, it is my view that it is not accurate to describe the mechanism of s. 227(5) as a means of "tracing"; indeed, it would seem that this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into: D. W. M. Waters, *Law of Trusts in Canada*, *supra*, at pp. 1037-53. For this reason, I find Professor Wood's description of the operation of s. 227(5), namely, a "relaxation of the equitable tracing rules", to be most accurate: Roderick J. Wood, "The Floating Charge in Canada" (1989), 27 *Alta. L. Rev.* 191, at p. 221; see also *Omega*, *supra*, at p. 43; and *Re Deslauriers Construction Products Ltd.*, *supra*, at p. 603.

38 In conclusion, s. 227(5) is a provision designed to minimize the adverse effect upon Her Majesty from the misappropriation of trust funds held by tax debtors on account of their employees' tax payable. The provision contemplates an intermingling of Her Majesty's property with that of a tax debtor's, such that the subject matter of the trust cannot be (or indeed never was) identifiable. To address this conceptual problem, s. 227(5) allows Her Majesty to attach its interest to any property which lawfully belongs to the debtor at the time of liquidation, assignment, receivership or bankruptcy; this property is then deemed to exist "separate" and apart from the tax debtor's estate. The *ITA* thus permits Her Majesty to transfer title in the property from the tax debtor to Herself in order to satisfy the tax debtor's outstanding unremitted payroll obligations.

39 I would hasten to add to this, however, that this provision does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor. Section 227(4) and (5) are manifestly directed towards the property of the tax debtor, and it would be contrary to well-established authority to stretch the interpretation of s. 227(5) to permit the expropriation of the property of third parties who are not specifically mentioned in the statute. As Martland J. stated in *Avco*, *supra*, at p. 706:

> The property to which a s. 5A lien attaches is not defined nor identified. In the absence of a specific statutory provision to that effect, in my view it should not be construed in a manner which could deprive third parties of their pre-existing property rights.

Similarly, in *Pembina on the Red Development*, *supra*, Scott C.J. stated the presumption against expropriation of property, at p. 38:

> In Cross, *Statutory Interpretation* (London: Butterworths, 1987), the author writes at p. 180:
>
> > There is a general presumption that Parliament does not intend to take away private property rights unless the contrary is clearly indicated. Lord Atkinson stated that there is a canon of interpretation "that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms." After all, the protection of property is generally regarded as one of the fundamental values of a liberal society. [Emphasis added.]

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Later in that same case, Twaddle J.A., in separate concurring reasons, articulated this same principle as follows, at p. 46, "[i]t is a long-established principle of law that, in the absence of clear language to the contrary, a tax on one person cannot be collected out of property belonging to another".

40 Thus, while s. 227(5) can be seen as a provision enacted to solve the conceptual dilemma precipitated by an intermingling of unremitted payroll deductions with a tax debtor's general assets, it is a legal vehicle not without its own conceptual limitations. Namely, while the s. 227(5) deemed trust permits Her Majesty to attach Her beneficial interest to property of the tax debtor upon liquidation (assignment, receivership or bankruptcy), it does not permit the expropriation of property which may belong to a third party creditor at the time the subsection becomes engaged.

41 However, as will be discussed in further detail, *infra*, it is my opinion that the licence theory may, in certain cases, create an exception to this general principle. In particular, where a secured creditor consents to the disposition of his collateral in order to pay wage deductions, that consent, coupled with the statutory trust provisions here at issue, may act to divest that creditor of its proprietary interest in that collateral at the time of liquidation, assignment, receivership or bankruptcy. Indeed, it is my view that this exception is engaged in the present case such that the s. 227(5) claim of Her Majesty must prevail.

(C) *The Nature of the Bank's Security Interests*

42 I begin from the observation that Parliament, in enacting s. 227(4) and (5), has chosen to secure Her Majesty's claims to unremitted payroll deductions through employing the concept of a deemed trust. Therefore, the proper analysis to follow in determining whether Her Majesty is entitled to priority pursuant to these subsections must utilize principles of property law. For this reason, it becomes relevant and indeed essential to scrutinize the nature of the interests which compete with Her Majesty's trust in order to determine whether and to what extent such interests have title in the disputed fund. As I mentioned previously, Her Majesty's trust can attach to the disputed collateral only to the extent that that collateral is not in law the property of a party other than the tax debtor at the time the deemed trust is engaged. More specifically, subject to the application of the licence theory, if it is found that legal title in the collateral is in the bank, and not Sparrow, Her Majesty's deemed trust could only attach to Sparrow's equity of redemption: see *Avco*, *supra*, at p. 706.

43 This "statutory trust" approach can be distinguished from other legislative methods which are used to secure an interest to unremitted payroll deductions, namely, through employing an explicit "Crown priority" provision. An example of such a provision can be found in s. 224(1.2) *ITA*, a subsection which was recently the subject of consideration of this Court in *Alberta (Treasury Branches)*, *supra*. That provision reads:

> **224.** ...
>
> (1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment
>
> (*a*) to another person ... who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or
>
> (*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,
>
> the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision, and on receipt of that letter by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest. [Emphasis added.]

In contrast to the "deemed trust" approach, the application of this section to a priority competition can proceed without regard to the quality of the "security interest" which competes with Her Majesty's claim. Indeed, s. 224(1.2) simply transfers title in the collateral to Her Majesty regardless of whose interest may compete with it, so long as the requirements of s. 224(1.2) are met: see, e.g., *Alberta (Treasury Branches)*, *supra*. For a general discussion of these two distinct analytical methods of determining priority between non-consensual security interests (such as statutory trusts) and consensual security interests, see Wood and Wylie, "Non-Consensual Security Interests in Personal Property", *supra*, at pp. 1072-83.

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44 In the present case, it therefore becomes necessary to characterize the bank's interest in Sparrow's inventory as either a floating, or a fixed and specific charge.

45 The basic distinction between fixed and floating charges was articulated by Lord Macnaghten in *Illingworth v. Houldsworth*, [1904] A.C. 355 (H.L.), at p. 358:

> A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

The "event ... or ... act" to which Lord Macnaghten refers to as causing the floating interest to "settle and fasten" is described in the modern authorities as "crystallization". Generally speaking, crystallization occurs upon the default of the debtor. Once the floating interest has been said to crystallize, that interest is transformed into a fixed and specific charge over the inventory. See Wood, "The Floating Charge in Canada", *supra*, at pp. 204-8.

46 The critical significance of the characterization of an interest as being fixed or floating, of course, is that it describes the extent to which a creditor can be said to have a proprietary interest in the collateral. In particular, during the period in which a charge over inventory is floating, the creditor possesses no legal title to that collateral. For this reason, if a statutory trust or lien attaches during this time, it will attach to the debtor's interest and take priority over a subsequently crystallized floating charge. However, if a security interest can be characterized as a fixed and specific charge, it will take priority over a subsequent statutory lien or charge; in such a case, all that the lien can attach to is the debtor's equity of redemption in the collateral: *Avco*, *supra*, at p. 706. This correlative relationship between fixed charges and legal ownership was articulated by this Court in *Dauphin Plains*, *supra*, at p. 1199, where Pigeon J. stated:

> It should first be observed that, for reasons similar to those on which the decision in the *Avco* case, *supra*, was based, the claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge. [Emphasis added.]

See also *Avco*, *supra*.

47 There has been much debate as to whether it is appropriate to characterize a security interest over inventory which permits the debtor to sell that inventory in the ordinary course of business as a floating charge. The debate centres around the ability to characterize a security interest as fixed, in the presence of a licence given to the debtor to sell the collateral, where such an arrangement involves "no final and irrevocable appropriation of property to the creditor": *FBDB*, *supra*, at p. 33. McLachlin J.A. (as she then was) in *FBDB*, *supra*, fully considered the conflicting authorities on this point and concluded at pp. 37-38 and 40:

> In short, the answer to the question of whether the courts have recognized a fixed charge subject to a licence to sell in the ordinary course of business is no, with the exception of the line of cases confirming the right of a chattel mortgagor to sell mortgaged stock in the ordinary course of business.
>
> ...
>
> If a charge conferred on the debtor the right to deal with the goods in the ordinary course of business then, regardless of what the parties chose to call it, it was regarded as floating, with the result that third party interests acquired prior to crystallization of the charge had priority over the chargeholder.

Adopting this "either-or" doctrine, McLachlin J.A. chose to characterize the security agreement in *FBDB*, which permitted the debtor to sell the secured collateral in the ordinary course of the debtor's business, as a floating charge.

48 I note also that this Court very recently referred to the decision of McLachlin J.A. in *FBDB*, *supra*, with approval: *Alberta (Treasury Branches)*, *supra*. While the issue in that case was different from that in *FBDB*, the comments of Cory J. can, I think, be taken as affirming the "either-or" doctrine as applied in *FBDB*.

49 The relevance of the "either-or" doctrine to the present case, of course, lies in the fact that Sparrow had been granted by the bank, both expressly and impliedly, a licence to sell the inventory over which the bank held a security interest. It therefore could be argued that such a licence renders the interest of the bank in the nature of a floating charge, an interest which must yield to a statutory trust which attaches prior to the charge's crystallization.

50 I do not find it necessary to comment on *FBDB* to the extent that that decision suggests that in the present case the interests of the bank should be characterized as a floating charge. It should be noted that the decision of McLachlin J.A. in the *FBDB* case predated the enactment of personal property security legislation in British

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Columbia, and so does not speak to the state of the law in a *PPSA* jurisdiction. Nor did that case deal with any other statutory enactment, such as the *Bank Act*, which could affect the characterization of the security agreement there at issue. For these reasons, I consider the comments of McLachlin J.A. in *FBDB* to be directed to the common law position with regard to the characterization of fixed and floating charges. Whatever those common law principles may be, they cannot be taken to alter the effect that legislation may have on the characterization of security interests. As it is my view that the Alberta *PPSA* and the *Bank Act* are determinative of the characterization of the bank's GSA and BAS, respectively, I do not need to address the common law view articulated in *FBDB*.

51 I turn now to consider each of the bank's security interests.

(i) The General Security Agreement (GSA)

52 Counsel for the appellant, Her Majesty, argued in his factum that the bank's GSA is to be considered in the nature of a floating charge. In support of this proposition, counsel advances the decision of the Ontario Court of Appeal in *Re Urman* (1983), 44 O.R. (2d) 248. In that case, involving a general assignment of book debts perfected under the Ontario *Personal Property Security Act*, the security interest was characterized as a floating charge.

53 For the reasons which follow, I cannot accept this submission. In my view, the general security agreement in this case, which was subject to the Alberta personal property security legislation, must be characterized as a fixed and specific charge subject to a licence to sell the inventory.

54 It is of course true that the *PPSA* does not govern the priority competition between a statutory trust and a security interest. Subsection 4(a) explicitly removes statutory trusts such as the one created by s. 227 *ITA* from the province of the Alberta *PPSA*:

> **4** Except as otherwise provided in this Act, this Act does not apply to the following:
>
> (a) a lien, charge or other interest given by an Act or rule of law in force in Alberta;

However, this does not mean that the *PPSA* does not affect the characterization of a charge executed in a jurisdiction which is subject to such an Act. To the contrary, the effect of personal property security legislation has been said to have "fundamentally changed the characterization of security interests": Wood and Wylie, "Non-Consensual Security Interests in Personal Property", *supra*, at p. 1082. In particular, while pre-*PPSA*, a security agreement purporting to create a floating charge could be said to remain unattached to the collateral until crystallization, s. 12(1) of the Alberta *PPSA* manifestly alters this situation. That subsection reads:

> **12**(1) A security interest, including a security interest in the nature of a floating charge, attaches when
>
> (a) value is given,
>
> (b) the debtor has rights in the collateral, and
>
> (c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,
>
> unless the parties specifically agree in writing to postpone the time for attachment, in which case the security interest attaches at the time specified in the agreement.

The relevant portion of s. 10 for our purposes states:

> **10**(1) Subject to subsection (2), a security interest is enforceable against a third party only where
>
> (a) the collateral is in the possession of the secured party, or
>
> (b) the debtor has signed a security agreement that contains
>
> ...
>
> (ii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property ....

Generally speaking, therefore, absent an express intention to the contrary, a security interest in all present and after-acquired personal property will attach when that agreement is executed by the parties. Once attachment has occurred, in my view, the GSA then becomes in law a fixed and specific charge over the collateral.

55 I find support in this conclusion as to the effect of personal property security legislation upon security interests from the fact that the academic literature is unanimous on this point. For example, Professor Jacob S. Ziegel in his article "Symposium: Recent and Prospective Developments in the Personal Property Security Law Area" (1985), 10 *Can. Bus. L.J.* 131, commented as follows, at p. 152:

> It is of the first importance to determine whether a security interest under the PPSA retains any of the common law characteristics of a floating charge and if so which. My own view is that once a security interest has attached under

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the PPSA it has no "floating" attributes even though the security agreement, expressly or impliedly, gives the debtor considerable powers to dispose of the collateral in the course of his business. In brief, the PPSA only recognizes specific or fixed security interests although admittedly the collateral itself may often change its character because of the express or implied powers of disposition given the debtor. [Emphasis added.]

This opinion is echoed by Professor Wood in his recent article "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at p. 433:

> Under pre-PPSA law, a plausible argument could be made that a security interest in the form of a fixed charge combined with a licence to deal is, in effect nothing more than a floating charge. However, this argument [is] untenable in the cases involving PPSA security interests....

Similarly, Professor Ronald C. C. Cuming, in "Commercial Law -- Floating Charges and Fixed Charges of After-Acquired Property: *The Queen in the Right of British Columbia* v. *Federal Business Development Bank*" (1988), 67 *Can. Bar Rev.* 506, at pp. 510-11, opined:

> In effect, [PPS] legislation treats all charges, including floating securities, as fixed charges. The legislatures that have enacted Personal Property Security Acts have implicitly declared that, as a matter of public policy, there is nothing objectionable to having a fixed charge on stock-in-trade of a debtor coupled with a licence to deal with the collateral in the ordinary course of business. [Emphasis added.]

At p. 519, the learned author concludes "there can be no such thing as a floating charge under a Personal Property Security Act".

56 Applying this principle to the case at bar, the GSA held by the respondent bank must certainly be characterized as a fixed and specific charge. It attached at the time the agreement was executed, February 25, 1992. More specifically, however, because of the permission granted by the bank which allowed Sparrow to sell the encumbered inventory, the GSA is in the nature of a fixed charge with a licence to deal with the inventory.

(ii) Bank Act Security (BAS)

57 The appellant has further submitted that the respondent bank's BAS is in the nature of a floating charge over the inventory. Several lower court decisions have been relied upon in support of this proposition: *Abraham*, *supra* (under appeal); *Armstrong*, *supra*; and *North Sky Trading Inc. (Bankrupt), Re* 1994 CanLII 8986 (AB QB), (1994), 158 A.R. 117 (Q.B.) (under appeal).

58 The earliest authority to comment upon the nature of BAS is the decision of this Court in *Royal Bank of Canada v. Workmen's Compensation Board of Nova Scotia*, 1936 CanLII 39 (SCC), [1936] S.C.R. 560. That case involved a priority competition between security under s. 88 of the *Bank Act*, R.S.C. 1927, c. 12, the predecessor of s. 427, and a lien created by s. 79(2) of *The Workmen's Compensation Act*, R.S.N.S. 1923, c. 129. In his concurring judgment, Davis J. observed the effect of s. 88 security as follows, at p. 567:

> . . . the security [does] not operate to transfer absolutely the ownership in the goods but ... the transaction [is] essentially a mortgage transaction and subject to the general law of mortgages except where the statute has otherwise expressly provided.... Section 88 set up by the *Bank Act* enables manufacturers, who desire to obtain large loans from their bankers in order to carry on their industrial activities, to give to the bank a special and convenient form of security for the bank's protection in the large banking transactions necessary in the carrying on of industry throughout the country. Until the moneys are repaid, the bank is the legal owner of the goods but sale before default is prohibited and provision is made for the manufacturer regaining title upon repayment. To say that Parliament did not use language to expressly provide that the bank shall have a first lien on the goods is beside the mark. The bank acquires ownership in the goods by the statute. [Emphasis added.]

59 More recently, this Court had occasion to consider the attributes of *Bank Act* security in *Hall*, *supra*. In that case, La Forest J. underlined this Court's previous ruling in *Workmen's Compensation Board of Nova Scotia*, *supra*, that BAS gives to the lender legal title in the collateral. At pp. 133-34, La Forest J. stated:

> By section 178(2) [now s. 427(2)], a bank may take security in property owned by the borrower at the time of the loan transaction, and any property acquired during the pendency of the security agreement. The rights and powers of the bank with respect to the secured property are set out in s. 178(2)(*c*). By the terms of s. 178(2)(*c*), these rights and powers are stated to be "the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which such property was described". These powers are defined, in turn, in s. 186 [now s. 435] of the Act where it is specified that any warehouse receipt or bill acquired by a bank as security for the payment of a debt, vests in the bank all the right and title to goods, wares and merchandise covered by the holder or owner thereof.

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The nature of the rights and powers vested in the bank by the delivery of the document giving the security interest has been the object of some debate. Argument has centred on whether the security interest should be likened to a pledge or bailment, or whether it is more in the nature of a chattel mortgage. I find the most precise description of this interest to be that given by Professor Moull in his article "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 *Can. Bar Rev.* 242, at p. 251. Professor Moull, correctly in my view, stresses that the effect of the interest is to vest title to the property in question in the bank when the security interest is taken out. He states, at p. 251:

> The result, then, is that a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower. The bank's interest attaches to the assigned property when the security is given or the property is acquired by the borrower and remains attached until released by the bank, despite changes in the attributes or composition of the assigned property. The borrower retains an equitable right of redemption, of course, but the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time. [Emphasis added.]

60 It follows from the comments of this Court regarding the ownership rights in inventory conferred by the *Bank Act* that security taken under that Act must be considered to be in the nature of a fixed and specific charge. As stated above, the concept of the fixed charge is correlative to the notion of a creditor's having legal proprietary rights in the collateral. I add that this view has been adopted by academic literature in this area: R. J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at p. 433; and William D. Moull, "Security Under Sections 177 and 178 of the Bank Act" (1986), 65 *Can. Bar Rev.* 242. I find this following passage, at p. 251, from the article written by Professor Moull which was cited with approval by this Court in *Hall*, *supra*, particularly persuasive:

Because of its scope and flexibility, some commentators have suggested that section 178 [now 427] security is in the nature of a floating charge. This can be misleading, however. Because the bank effectively acquires legal title, section 178 security is really in the nature of a fixed charge on the present and after-acquired property of the borrower assigned to the bank. One attribute that section 178 security may be said to share with a floating charge is its application to all property of a specified class held by the borrower from time to time. But while a floating charge may apply to all property of a specified kind held by the borrower from time to time, it does not affix itself specifically upon any particular item of property until it crystallizes upon default by the borrower. Conversely, a section 178 security is a fixed charge on each item of assigned property held from time to time whether or not the loan is in default. This gives a bank significantly greater rights than it would hold under a floating charge debenture on inventory.

61 For these reasons, I consider the security interest of the bank in the form of BAS to be in the nature of a fixed and specific charge with a licence to sell the inventory.

(iii) Summary -- Fixed and Specific Charge Over Inventory

62 It would seem appropriate at this point, before leaving the present discussion, to comment briefly upon this novel and perhaps abstract notion of possessing a fixed charge over all of the present and future inventory of a debtor. To begin with, I note that traditional definitions of the fixed charge, as for example the one I previously quoted above from *Illingworth*, *supra*, emphasize the ability to "settle and fasten" upon ascertainable and defined property as being an integral attribute to this particular form of charge. This type of attachment to tangible and ascertainable property, of course, is impossible to achieve in the case of an assignment of inventory, where that collateral is changing constantly. In short, the traditional concept of the fixed charge seems to be at odds with the notion of having a proprietary right over collateral such as after-acquired inventory which, by definition, is not yet in existence at the time the security agreement is executed.

63 In my view, however, a fixed charge over all present and future inventory represents a proprietary interest over a dynamic collective of present and future assets. To this extent, as stated above, this form of security interest challenges our traditional conception of a fixed charge; to the same extent, in my opinion, our conception of this form of charge must change to meet the modern realities of commercial law, and in particular the legislative provisions which have been brought to bear in this appeal.

64 In effect, the fixed and specific charge gives to the secured creditor the title (subject, of course, to the debtor's equitable right of redemption) to the present inventory of the debtor, as well as the after-acquired inventory of the debtor. In this way, the secured creditor becomes the legal owner of inventory as it comes into possession of the

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debtor. I note that the Alberta *PPSA* contains a specific provision securing a creditor's proprietary right to after-acquired property in this way:

> **13**(1) Except as provided in subsection (2), where a security agreement provides for a security interest in after-acquired property, the security interest attaches in accordance with section 12, without the need for specific appropriation. [Emphasis added.]

Professors Cuming and Wood, in their published annotation of the Alberta *PPSA*, observe that by virtue of this subsection "the security interest in after-acquired property has equal status with a security interest in collateral in existence at the time the security agreement is executed": Cuming and Wood, *Alberta Personal Property Security Act Handbook* (2nd ed. 1993), at p. 121 (emphasis added). Similarly, the BAS has the effect of presently attaching the secured creditor's interest to the after-acquired inventory of the debtor. In *Hall*, *supra*, La Forest J. approved of Professor Moull's description of the effect of the relevant provisions of the *Bank Act*, at p. 134, which is particularly apposite to the present discussion:

> The result, then, is that a bank taking security under section 178 [now s. 427] effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower. The bank's interest attaches to the assigned property when the security is given or the property is acquired by the borrower and remains attached until released by the bank, despite changes in the attributes or composition of the assigned property. The borrower retains an equitable right of redemption, of course, but the bank effectively acquires legal title to whatever rights the borrower holds in the assigned property from time to time. [Emphasis added.]

65 It follows from these observations that where, as here, a secured creditor holds a fixed charge over a debtor's inventory, that charge will have the effect of ensuring the creditor has legal title to any and all inventory subject to the charge at any given point in time. This, of course, is subject to the caveat (not operative in this case) that no outstanding statutory payroll deductions had in fact been made prior to the attachment of the fixed charge. Thus, in the present case, the inventory which was subject to the liquidation sale belonged in law to the respondent bank: both under its GSA and its BAS the bank held a fixed charge over Sparrow's inventory. As such, all that Her Majesty's beneficial interest could attach to, before its sale, was Sparrow's equity of redemption in the property: *Avco*, *supra*; *C.I.B.C. v. Klymchuk* reflex, (1990), 74 Alta. L.R. (2d) 232 (C.A.), at p. 240.

66 But this of course does not end the matter. While it is true that the bank held legal title in the inventory which is the subject of the dispute in this case, it is also true that at the time the deductions were made the bank had given its permission to Sparrow to sell this inventory in the course of its business. The GSA contained an express licence to this effect; and the BAS impliedly contained such a licence. In this way, the bank had consented, contractually, to the divestment of their interest in the collateral taken in inventory and the usage of the proceeds of that collateral for certain purposes. The critical issue which falls to be decided is, then, what is the scope of this contractual licence? In particular, if this bank's consent included the right to sell the inventory in order to pay wages, then that consent by necessity included the right to sell inventory to remit payroll deductions. In such a situation, for the following reasons, Her Majesty's interest would be able to attach to the proceeds of the inventory, and in this way take priority over the bank's interest.

67 As stated previously, at para. 41, it is my opinion that the licence theory may operate, in the context of the statutory scheme at issue in the present appeal, as an exception to the general rule that at the time of "liquidation, assignment, receivership or bankruptcy" Her Majesty's interest cannot attach to property which is at that time the property of a secured creditor. More specifically, where it can be said that at the time the deductions were made a secured creditor had consented to the use of its collateral in order to pay the statutory deductions which are the object of a deemed trust, it may also be said that that creditor has bound itself by the statutory requirements relating to those deductions. Here, therefore, if it can be said that at the time the wage deductions at issue were made the bank had permitted the sale of inventory in order to pay wages, and thus wage deductions, it will be possible for s. 227(5) to attach to the bank's inventory existent at the time of receivership. With regard to this approach to the licence theory, see *FBDB*, *supra*, at pp. 40-41, *Roynat*, *supra*, at pp. 649-50, and *G.M. Homes Inc.*, *supra*, at pp. 252-54.

68 In short, where the bank has consented to the reduction in the value of its security in order to pay statutory deductions at the time those deductions are made, they have to the same extent, by virtue of s. 227(5), consented to the reduction in their security at the time of receivership. The critical question which falls to be decided in this case, then, is what was the scope of the bank's consent to sell inventory at the time the deductions were made?

(D) *Whether on the Facts the Licence to Sell Included the Right to Use the Proceeds to Pay Wages*?

69 I underline at the outset that the critical factor in the "licence to sell" argument is the permission which must be found to have been granted with respect to the usage of the proceeds of the disputed collateral. Thus, while

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licences may often be mouthed in terms of a "right to sell in the ordinary course of business", it must not be forgotten that it is permission with respect to the usage of proceeds, and not necessarily the circumstances of sale, which is the proper focus of the inquiry.

70 When interpreting the contractual provisions which gave Sparrow the right to sell the encumbered inventory, it is necessary to look at the words of the contract, the nature of the transaction which the parties entered into, and all of the surrounding circumstances.

71 The express provisions of the GSA establishes that Sparrow was granted a licence to sell the encumbered inventory. In particular, the licence stated that:

> . . . until default, Debtor may, in the ordinary course of Debtor's business, sell or lease inventory and, subject to Clause 7 hereof, use Money available to Debtor. [Emphasis added.]

Therefore, Sparrow was permitted to sell its inventory in the ordinary course of its business and "use" the proceeds generated therefrom. The critical question is what "us[age]" this licence to sell in the "ordinary course of ... business" contemplated. In this connection, I find two of the express covenants in Sparrow's contractual arrangements to be salient. Paragraph 4(e) of the GSA required Sparrow:

> (e) to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied, assessed or imposed against or in respect of Debtor or Collateral as and when the same become due and payable; [Emphasis added.]

In addition, in the Credit Facilities Agreement, Sparrow covenanted to the bank as follows:

> (3) it will promptly pay when due all business, income and other taxes properly levied on its operations and property and remit all statutory employee deductions when due; [Emphasis added.]

72 Looking at these express provisions of the contractual arrangements between Sparrow and the bank, I conclude that the payment of payroll deductions would be a usage to which the bank contemplated Sparrow would use the proceeds of inventory sold in the "ordinary course of ... business". My conclusion in this respect is buttressed when the nature of the dealings between Sparrow and the bank, and all the surrounding circumstances, are observed.

73 The bank was Sparrow's primary lender; it held a security interest in most, if not all, of Sparrow's assets. In particular, the bank held various security interests in Sparrow's inventory. It was of course in the bank's best interest that Sparrow function as a viable economic unit. To do so, Sparrow was required to sell its services as an electrical contractor and, necessarily, sell its inventory. From the sales of the inventory, Sparrow could generate revenues to, *inter alia*, pay its outstanding operating debts. If it failed to do so, Sparrow could be petitioned into bankruptcy, with the result that Sparrow could no longer generate the profits necessary to pay its loan obligations to the bank in the long term. One of Sparrow's ongoing obligations, its costs of doing business, was the paying of wages. In order to stay in business, and operate as a profitable business enterprise, Sparrow would have to pay its employees. This is a necessary requirement of continuing in business. It would be reasonable that the bank expect, taking into consideration all the circumstances of this arrangement, that revenue from the sale of inventory would be used to pay wages.

74 From these observations, I consider the licence to sell inventory in the ordinary course of business in this case necessarily included a licence to sell inventory to pay wages, and remit wage deductions, in the course of its business. Where, as here, the secured party has security over the majority of the assets of the debtor, the security interest over the inventory must permit the debtor to sell the inventory and put it to the general use of its business, including towards the payment of wages. Indeed, the express terms of the licence intimates this, providing Sparrow could, "in the ordinary course of ... business, ... use Money available". The scope of the licence can thus be ascertained either from the express terms of the security agreement, or from the nature of the agreement and the conduct of the parties. To be clear, however, the scope of the licence in this case flows not merely from a right to sell inventory *per se*. Instead, it is the licence to sell inventory in the "ordinary course of [Sparrow's] business ... and use [the proceeds]" which renders it of such a quality as to include a right to use the proceeds to pay wages. As Professor Wood has correctly observed in "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at p. 435, a licence to sell inventory may in certain circumstances be circumscribed so as to not include a right to use the proceeds to pay wages:

> The fact that the secured party permits the debtor to sell the inventory does not in itself imply that the secured party permits the debtor to use these proceeds to pay employees. In some cases the secured party will not restrict the

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debtor's ability to use the proceeds in the ordinary course of business, but this depends entirely on the security arrangement negotiated between the debtor and the secured party. Consider the following scenario:

> SP finances the acquisition of inventory by an automobile dealer (D), and is granted a security interest in the inventory. The wholesale security agreement provides that D may sell the inventory in the ordinary course of business and that upon doing so D must immediately remit the wholesale purchase price of the automobile to SP.

In this scenario, SP clearly does not permit the debtor to use the proceeds of inventory to pay its employees. Indeed, it is common for SP to regularly monitor the debtor to ensure that the debtor is not "out of trust" by failing to remit the proceeds of sale.

75 In summary, the true test of whether the licence to sell inventory includes the right to pay wages must therefore be a matter of interpreting the contractual arrangement between the parties. The focus is not so much on the circumstances of the selling of inventory, but rather the permitted usage of the proceeds of inventory. As in Professor Wood's example, where the licence has a limited scope, that licence may not include the right to use proceeds to pay wages. However, the expression of a limited use for proceeds of inventory cannot prevail if the arrangement between the parties is such as to allow, in practice, the debtor to use the inventory proceeds in the course of its business. In this respect, I agree with Professor Wood's comments regarding the appropriate test for determining whether a licence to sell inventory includes permission to pay wages with the proceeds ("Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at pp. 435-36):

> This is not to say that the analysis should hinge on the existence of a trust proceeds clause or other contractual provision requiring the debtor to remit proceeds. A contractual provision of this type should not govern if the real arrangement between the parties is such that the debtor has the freedom to use the proceeds of inventory in the ordinary course of business.
>
> ...
>
> To make any sense at all, the licence theory must, at the very least, be restricted to cases where the secured party permits the debtor to pay employees either out of its collateral or out of the proceeds of its collateral. This permission cannot be derived merely from the existence of a licence to sell inventory. The test should be whether the debtor had the freedom to use these funds in the ordinary course of business as opposed to being under an obligation to remit them to the secured party. [Emphasis added.]

76 In the case at bar, the GSA contained an express licence permitting Sparrow to sell inventory in the course of its business and use the proceeds available; the BAS contained an implied licence to this effect. While it is true that the GSA contained a trust proceeds clause, I find that this cannot have the effect of limiting the scope of the licence where the real arrangement between the parties was, as expressly stated, that Sparrow could use the proceeds of inventory in the course of its business. The bank in this case was not a small inventory financier who required Sparrow to immediately remit proceeds of inventory to it. To the contrary, the bank was a large scale lender who permitted Sparrow to use inventory sales to maintain the viability of its enterprise. For these reasons, applying Professor Wood's test, I find that under the licence to "sell ... inventory" "in the ordinary course of ... business" and "use [the] [m]oneys available" the bank permitted Sparrow to sell inventory to pay wages and, necessarily, payroll deduction obligations.

77 For all these reasons, through the application of the licence theory, it is my conclusion that the appellant's s. 227(5) deemed trust must take priority over the bank's security interests in the disputed collateral. The trust fund representing the deducted amounts, while without identified subject matter from the date of its inception, is capable of identifying property subject to that trust *ex post facto*. To reiterate, the bank consented to the reduction in its security in inventory in order to pay wage deductions at the time those deductions were made, and s. 227(5) *ITA* has the effect of carrying forward that consent to the time of receivership. By consenting to the payment of wages out of the proceeds of inventory during the course of Sparrow's business, the bank *ipso facto* consented to the statutory scheme under the *ITA* designed to cover unpaid wage deductions. In short, in the present case the licence to deal with inventory proceeds coupled with the statutory scheme in s. 227(4) and (5) *ITA* gives priority to Her Majesty's claims for statutory wage deductions. This result is obtained both in regard to the bank's GSA, and its BAS.

78 The respondent bank has submitted that this result is necessarily precluded with regard to their BAS by virtue of s. 428(1) of the *Bank Act*, which provides as follows:

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> **428.** (1) All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and the rights and powers of the bank in respect of the property covered by a security given to the bank under section 427 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which that property was described, have, subject to subsection 427(4) and subsections (3) to (6) of this section, priority over all rights subsequently acquired in, on or in respect of that property, and also over the claim of any unpaid vendor. [Emphasis added.]

I cannot agree with this submission. It is true that s. 428(1) secures the respondent bank's proprietary right to the disputed collateral. However, for the reasons I have expressed, the fact remains that the bank has consented to the divestment of this interest. Such a waiver of priority, in my view, renders s. 428(1) of no assistance to the respondent bank.

79 I add as a final matter that in addition to providing certainty in disputes between consensual and non-consensual security interests, the licence theory has the virtue of achieving fairness in commercial law. Here, the respondent bank had permitted Sparrow to sell its inventory in the course of its business in order to, among other things, pay wages and wage deductions. To this extent, therefore, the bank permitted the reduction in the value of its security interest in Sparrow's inventory, during the ordinary course of Sparrow's business. Implicit in the bank's consent is the assumption that in so doing, Sparrow would generate profits from the conversion of inventory into revenues; this economic process, as I noted above, ensures that interest payments owing to the bank would be paid to them on a sustainable basis. In short, the bank benefitted in a general sense from Sparrow's carrying on its business operations, an endeavour which required Sparrow to pay wages and wage deductions. More specifically, however, when Sparrow stopped paying its wage deductions, as required, the bank could be said to benefit from the artificial increase in Sparrow's working capital, allowing an extension of the life of Sparrow's business.

80 Now, when Sparrow's business is no longer a viable enterprise, the bank says that it is entitled to the very payments which allowed Sparrow, in part at least, to stay in business longer than was legally economical. In essence, the bank is willing to accept the benefits of Sparrow's non-payment of statutory deductions, and can be said to have reasonably permitted the use of its collateral to pay these deductions at the time they should have lawfully been paid, but refuses to accept the burden of Sparrow's unlawful action at the time of its receivership. In my view, it should be the policy of the law that the respondent bank be held accountable for Sparrow's outstanding statutory obligations. The licence theory, as I have developed it, ensures that in appropriate circumstances this result will obtain. In this way, in my opinion the licence theory is grounded not only in legal principles, but also in sound policy.

81 Since writing the foregoing, I have had the benefit of reading the careful reasons of my colleague, Mr. Justice Iacobucci. With deference however, I do not share his views or his concerns.

82 I note that Iacobucci J., in his reasons, has taken me to have adopted the licence theory in extremely broad terms. Specifically, when summarizing the conceptual basis of my reasoning, he states at para. 91:

> Consequently, says the [licence] theory, the bank's claim to the inventory must give way to any debts incurred in the ordinary course of business. [Emphasis added.]

Similarly, Iacobucci J. writes at para. 97:

> The satisfaction of any legitimate debt or obligation, whenever incurred, is arguably "in the ordinary course of business". Certainly, the payment of creditors is a permissible "use" of the proceeds of a sale of inventory. Following my colleague's reasoning, this would mean that every subsequent claim should prevail over the respondent's general security agreement, because every rival claim might have been satisfied out of the proceeds of a hypothetical sale of the inventory. [Emphasis added.]

83 With respect, as he acknowledges, my reasons do not go this far. It is not the consent to payment of wage deductions from the proceeds of inventory *simpliciter* which drives me to the conclusion that Her Majesty's interest must prevail. This is a necessary, but not sufficient, condition. In addition, however, what is significant to the outcome of this case is that the bank has consented to payment of wages including deductions, out of inventory which, at the time of the deductions, are by statute deemed to be taken out of the estate of the debtor (see ss. 153(3) and 227(4) *ITA*). Section 227(5) carries that consent forward to the time of liquidation, assignment, receivership or bankruptcy, to realize Her Majesty's claim out of the bank's inventory.

84 Therefore, the unique nature of the statutory provisions applicable to wage deductions, and the bank's consent thereto, are integral to the success of the s. 227(5) claim in the case at bar. In this way, the licence theory, as I have employed it, is circumscribed.

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85 It must be stressed that the issue relates to wages actually paid to employees -- not a simple obligation to pay wages -- a portion of which has been deducted from the amount remitted to the employee and must be remitted to Her Majesty. Pending such remittance, the amount deducted is deemed under s. 227(4) to be held in trust for Her Majesty. By virtue of these *ITA* provisions, and unlike ordinary debts and obligations, unpaid wage deductions are, in law, performed obligations. The consent by the bank to the payment of wages out of the proceeds of the sale of inventory must be taken to cover the wages paid according to law including that portion which has been deducted from the remittance to the employee, pursuant to the *ITA*, in order that it be remitted to Her Majesty. While the value of the bank's security in the inventory may be thereby reduced, this is by virtue of specific statutory requirements under well-defined rules limited in their application to actual payment of wages. These requirements are well known and are encompassed by the bank's consent to the payment of wages in the ordinary course of business and do not open the door to uncertainty as to the value of security. Any risk to the bank's security is part of the very risk involved in consenting to the payment of wages. This does not open the door to any uncertainty as to the value of the bank's security arising from unperformed obligations incurred by the debtor in the ordinary course of business.

86 For these reasons, I cannot agree with the premise underlying Iacobucci J.'s reasons, namely, that the licence theory as I have employed it is inimical to the integrity of commercial law. It does not have the extensive application suggested by my colleague; it does not create uncertainty in commercial transactions. Instead, the licence theory operates narrowly, in conjunction with unique statutory provisions, so as to actualize legally performed obligations when they, in fact, exist.

VI - Conclusion

87 It is possible to summarize my conclusions in this case into the following five propositions:

1. Priorities between statutory trusts and consensual security interests are resolved by determining which interest has an attached interest in the disputed collateral at the time the statutory trust becomes operative.

2. The s. 227(5) *ITA* deemed trust attaches to any property of the debtor which exists upon liquidation, assignment, bankruptcy or receivership.

3. For example, if deductions are made prior to the attachment of a fixed charge over collateral, the s. 227(5) deemed trust will engage to retroactively attach Her Majesty's beneficial interest to that collateral. The fixed charge over that collateral will thereafter be subject to Her Majesty's pre-existing claims for unremitted payroll deductions.

4. Otherwise, if a security interest is in the nature of a fixed and specific charge, that interest gives the holder legal title to the collateral, such that a subsequent competing statutory trust will not be able to attach its interest. In such a case, all the statutory trust can attach to is the equity of redemption in the collateral.

5. However, as an exception to propositions 2 and 4, where the holder of a fixed security interest permits the debtor to sell the collateral, this may provide an opportunity for the statutory trust to attach. Whether this actually occurs depends entirely on the facts of each case. The test is whether, at the time the deductions occurred, the debtor had the right to sell the collateral and use the proceeds to pay the obligation to which the statutory trust is related.

88 I have found that, on the facts of this case, the licence invoked to sell inventory included the permission to use its proceeds to pay wages or wage deductions. The test in proposition 5 has therefore been made out. Accordingly, I would allow the appeal with costs.

The judgment of Sopinka, McLachlin, Iacobucci and Major JJ. was delivered by

89 IACOBUCCI J. -- I have read the lucid reasons of my colleague, Justice Gonthier, and although I agree with much of his reasoning, I cannot, with respect, accept the conclusion that he reaches. In particular, I do not accept that the deemed trust that arises in favour of the Crown by operation of s. 227(4) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (hereinafter "*ITA*"), takes priority over the security interests that the respondent has under the *Bank Act*, S.C. 1991, c. 46, and the *Personal Property Security Act*, S.A. 1988, c. P-4.05 (hereinafter "*PPSA*"). Even conceding that the latter interests are subject to a licence to sell, the licence is not nearly so broad as to encompass the satisfaction of income tax obligations. As I will discuss below, a licence to sell inventory authorizes at most only the satisfaction of obligations that are immediately incidental to an actual sale of the inventory.

90 Because my only disagreement with my colleague is in his application of the licence-to-sell approach to this case, I do not propose to discuss the facts or background that he has so ably described or to dwell on any other part of his reasons. I need not say anything more about the character of the respondent's security interests than that they are fixed and specific.

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91 My colleague disposes of this appeal on the basis of the so-called "licence theory". Briefly, the licence theory holds that a bank's security interest in a debtor's inventory, though it be fixed and specific, is subject nevertheless to a licence in the debtor to deal with that inventory in the ordinary course of business. Consequently, says the theory, the bank's claim to the inventory must give way to any debts incurred in the ordinary course of business. The leading articulation of the licence theory appears in McLachlin J.A.'s (as she then was) reasons in *R. in Right of B.C. v. F.B.D.B.*, 1987 CanLII 156 (BC CA), [1988] 1 W.W.R. 1 (B.C.C.A.) (hereinafter "*FBDB*"), at p. 40.

92 The theoretical basis of the licence theory seems to be that a creditor who has granted a licence to sell inventory has thereby consented to the subjection of his security interest to other obligations that may arise "in the ordinary course of business". My colleague says this in his reasons, at para. 68:

> In short, where the bank has consented to the reduction in the value of its security in order to pay statutory deductions at the time those deductions are made, they have to the same extent, by virtue of s. 227(5) [*ITA*], consented to the reduction in their security at the time of receivership.

This is sensible, because it is only if the licence is understood as a kind of tacit lessening of the creditor's security interest that the appellant's cause is advanced. Certainly the actual operation of the licence is not relevant, because in this case the inventory in question was never actually sold pursuant to the licence. Rather, the receiver sold it by court order. If the licence is to have anything to do with the disposition of this appeal, it must be by virtue of the evidence it affords of the respondent's intention to take less than an entire security interest in the inventory.

93 In my view, the licence affords no such evidence. My colleague seems to think that the potential sale of the inventory amounts to an actual limitation of the security interest. For my part, I do not see what the one thing has to do with the other. There is a great difference between saying, on the one hand, that if a debtor sells inventory and applies the proceeds to a debt to a third party, then the third party takes the proceeds free of any security interest and saying, on the other hand, that because a third party could take the proceeds free of any security interest, no security interest exists in the proceeds as against that third party. A licence to sell inventory in the ordinary course of business is a condition of the former kind. The consequent (defeasance of the security interest) follows only if the antecedent (sale of the inventory and application of proceeds to an obligation to a third party) is satisfied. In other words, the security interest in the inventory disappears only if the debtor actually sells the inventory and applies the proceeds to a debt to a third party.

94 That this is so is suggested by s. 28(1) *PPSA*, which provides:

> **28**(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest
>
> (a) continues in the collateral, unless the secured party expressly or impliedly authorized the dealing, and
>
> (b) extends to the proceeds,
>
> but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

In accordance with this provision, the result of a sale of inventory is to give the purchaser an unencumbered interest in the inventory and the licensor a continuing security interest in the proceeds of the sale. It is only if the debtor subsequently uses the proceeds to satisfy an obligation to a third party that the proceeds will be removed from the scope of the licensor's security interest in them. Accordingly, what a security agreement with a licence to sell creates is a defeasible interest; but the event of defeasance is the actual sale of the inventory and the actual application of the proceeds against an obligation to a third party.

95 I recognize that the operation of s. 28(1) *PPSA* is not necessarily inconsistent with the broad interpretation of the licence to sell that my colleague advances. However, it seems to me that this is an appropriate case for the invocation of the maxim *expressio unius est exclusio alterius*. The statute prescribes certain consequences for the security interest that follow a dealing with inventory. In particular, the statute contemplates defeasance of the interest if the debtor actually sells the inventory and applies the proceeds to an obligation to a third party. Significantly, the statute does not contemplate a defeasance on the happening of any other event. In my view, the statute occupies the field and crowds out other possible interpretations of the licence, including the one that Gonthier J. favours.

96 Because in this case there was no actual sale of the inventory in question, let alone any disposition of the proceeds, the licence can have had no effect on the respondent's security interest. What the debtor might have done with the licence does not matter.

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97 If it were otherwise, the licence to sell inventory would entirely eviscercate the respondent's general security agreement. The satisfaction of any legitimate debt or obligation, whenever incurred, is arguably "in the ordinary course of business". Certainly the payment of creditors is a permissible "use" of the proceeds of a sale of inventory. Following my colleague's reasoning, this would mean that every subsequent claim should prevail over the respondent's general security agreement, because every rival claim might have been satisfied out of the proceeds of a hypothetical sale of the inventory. Moreover, the priority rules of the *PPSA*, whose general policy is to assign priority to the earliest registered security interest, would be turned on their head. Presuming that every charge against inventory is subject to a licence to sell -- a presumption that accords with the interest of creditors in ensuring the debtor's continued vitality -- the last security interest would take priority over all earlier ones, because only the last interest would not be subject to some charge arising in the ordinary course of business. In answer to this objection, it might be said that as between two *PPSA* securities, the rules in the Act should be applied to determine priority. However, such an answer would not be consistent with the licence theory, which supposes that the original security interest in the inventory ends where obligations incurred in the ordinary course of business begin. The subsequent interest would prevail because the earlier interest would disappear before it.

98 It is open to my colleague to distinguish the fact situation in this appeal from the hypothetical priority contests I have mentioned on the ground that the Crown's interest in the inventory is unlike other charges against inventory in that it depends on the fictional device of deeming. What makes this case different, it might be said, is that the *ITA* deems to have been done what could have been done. On this understanding, it does not matter that the inventory was not actually sold and the proceeds were not actually remitted to the Receiver General, because s. 227(4) and (5) *ITA* deem these things to have been done. But in my view, this answer cannot succeed because the inventory was not an unencumbered asset at the moment the taxes came due. It was subject to the respondent's security interest and therefore was legally the respondent's and not attachable by the deemed trust. As Gonthier J. himself says (at para. 39):

> . . . [s. 227(4)] does not permit Her Majesty to attach Her beneficial interest to property which, at the time of liquidation, assignment, receivership or bankruptcy, in law belongs to a party other than the tax debtor.

99 The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer.

100 Indeed, Gonthier J. does seize on the peculiar nature of the deemed trust as a possible ground for distinguishing the Crown's interest from rival interests. However, his argument differs from the one I have outlined to the extent that it emphasizes the deemed performance of the obligation to the Crown. It appears to be my colleague's position that the licence to sell represents a reduction in the value of the security interest only with respect to performed obligations but not with respect to unperformed ones. In his view, this represents a sufficient check on the licence theory. I agree that, if the distinction between performed and unperformed obligations were maintainable, then the likelihood of the licence consuming the security interest would be greatly reduced. However, in my view, the distinction cannot be maintained. As Gonthier J. says more than once in his reasons, the licence theory rests on the consent of the parties. But the parties to this case consented to the sale of inventory "in the ordinary course of Debtor's business". The language is unqualified. No distinction is drawn between performed and unperformed obligations. The only performance that is contemplated in the licence is the actual sale of the inventory and the application of the proceeds to a debt. And, as I have already argued, the deeming mechanism does not furnish the needed actual sale. Accordingly, I conclude that if the words of the licence are to be given their due as an *indicium* of the parties' intent, then there can be no distinction between performed and unperformed obligations.

101 My colleague places great emphasis on the fact that the debtor covenanted, in the general security agreement, "to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied, assessed or imposed against or in respect of Debtor or Collateral as and when the same become due and payable". But this covenant is not part of the licence. And in any event, it is merely a covenant to obey the law. It adds nothing to s. 153(1) *ITA*. Furthermore, it does not prescribe the outcome of a priority contest. What is more, the covenant to pay taxes is only one of several in the agreement. Another covenant provides that the debtor shall "carry on and conduct the business of Debtor in a proper and efficient manner". Presumably the debtor

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might incur subsequent debts in the course of carrying on and conducting its business. Gonthier J. advances no principle that might permit the settlement of priority disputes as between the Crown and subsequent lenders. In the event of a dispute, both would have the benefit of the licence to sell inventory and of express covenants, so that some other criterion would have to be found to determine which takes priority. Here, as before, the prospect of a reversal of the ordinary priority rules is immediate and troubling.

102 My colleague also relies on comments made in *FBDB*. In that case, the British Columbia Court of Appeal said, after having disposed of the appeal on another ground, that a licence to sell inventory carries with it a requirement that the licencee should satisfy obligations incurred in "dealing with the stock in the ordinary course of business": *FBDB*, *supra*, at p. 40. Because the obligation to set aside provincial sales taxes is a "legal incident" of the sale of inventory, a lien for unpaid sales taxes comes within the scope of the licence and so is excepted from any security interest that is subject to it: *idem*.

103 As I understand the comments in *FBDB*, a licence to sell inventory permits the satisfaction of obligations out of the proceeds only to the extent of the "legal incidents" of the sale. In itself, this greatly limits the scope of the theory. Because the payment of wages, except perhaps to the sales agent, is not a "legal incident" of the sale of inventory, deduction of income taxes from wages does not come within the scope of the licence. This alone would appear sufficient to distinguish *FBDB* from the instant appeal.

104 However, I think that on closer examination it turns out that *FBDB* does not even depend on a licence theory, or at least does not depend on a licence theory of the kind advanced by my colleague. I say this because his reasons posit a charge that arises against the value of the inventory as a result of the operation of the licence. But the sales taxes that were at issue in *FBDB* were not against the value of the inventory. Rather, they were superadded to the underlying value, which is to say that they were calculated on the basis of the sale price of the inventory. Thus, the sales taxes that attend a sale of inventory represent something over and above the value of the inventory. Because a bank's charge is against the inventory, it does not extend so far as the sales taxes generated by a sale of inventory. But income taxes are not like sales taxes in that they are not as directly related to sales of inventory as sales taxes are. To the extent that income taxes have anything to do with the proceeds of a sale of inventory, they are payable out of the monies received for the value of the inventory. A bank's charge against the inventory is therefore adequate to defeat subsequent claims for the payment of income taxes. For this reason, McLachlin J.'s reasoning in *FBDB* is not contrary to what I am advancing herein.

105 I should also mention that in 1988, when the *FBDB* case was decided, British Columbia's *Personal Property Security Act*, S.B.C. 1989, c. 36, was not in force. As a consequence, the British Columbia Court of Appeal did not have to contend with the legislative considerations that we face in this appeal. In particular, there was at the time no equivalent in British Columbia law to s. 28(1) of Alberta's *PPSA*. The Court of Appeal therefore had greater latitude than we have to interpret a licence to sell as a tacit consent to a reduction of the security interest in the inventory. It seems to me that as a result of the enactment of the *PPSA*, something more than an unadorned licence to sell is needed to justify the conclusion that a creditor intended to abridge considerably its security interest in inventory.

106 And so I conclude that the licence to sell inventory is not an exception to the respondent's fixed and specific charge against the debtor's inventory. To hold otherwise would be to eviscerate the respondent's security interest. This is not to say, however, that Parliament could not legislate otherwise. Parliament has shown that it knows how to assert priority over rival security interests. See *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, 1996 CanLII 244 (SCC), [1996] 1 S.C.R. 963, at p. 975. All that is needed to overtake a fixed and specific charge is clear language to that effect.

107 Though I consider the above legal arguments sufficient to dispose of this appeal, I observe that policy considerations also tell in favour of the conclusion I have reached.

108 In this respect, the first thing to notice is that the security agreement that the debtor and the respondent had in this case is an example of a very common and important financing device. To a considerable extent, commerce in our country depends on the vitality of such agreements. As several leading academics have observed, the amounts at stake run into the billions of dollars each year. And though not every creditor seeks security, the incentives to do so are powerful. See Jacob S. Ziegel, Benjamin Geva and R. C. C. Cuming, *Commercial and Consumer Transactions* (Rev. 2nd ed. 1990), at pp. 957-60. Accordingly, tinkering with security interests is a dangerous business. The risks of judicial innovation in this neighbourhood of the law are considerable.

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109 Chief among these is the risk that attends legal uncertainty. If the legal rule is not clear, then inventory financiers will have to provide against the risk that their security interest might be defeated by some rival claim. The danger is particularly acute where as here, the language is as broad as "in the ordinary course of business". In this regard, I agree with what Professor Roderick J. Wood said in his article ("Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" (1995), 10 *B.F.L.R.* 429, at p. 429) that my colleague cites:

> . . . there is little controversy with the proposition that a priority rule should be capable of producing reasonably predictable results. An unclear priority rule imposes a number of social costs. It means that creditors must plan their affairs against less certain outcomes. Uncertain rules generate more litigation than clear rules. Over time an uncertain rule is sometimes transformed into a clear rule through the process of judicial interpretation. However, this is a piecemeal approach which often occurs at a glacial pace.

110 Indeed, the consequences of my colleague's approach might be more dire than even Professor Wood supposes. For, as I have observed, almost any subsequent financial arrangement might be in the ordinary course of business. Accordingly, the possibility is real that my colleague's proposed rule would effectively obliterate the *PPSA* charge against inventory. As insurance against this outcome, the costs of financing would presumably increase. I agree that if Parliament mandated this outcome, the courts must perforce accept it. However, judges should not rush to embrace such a weighty consequence unless the statutory language requiring them to do so is unequivocal.

111 Moreover, and for reasons I have already given, there is every likelihood that a broad interpretation of the licence theory would do violence to the *PPSA*. The Act clearly contemplates that inventory financing will be an important commercial device. But allowing the mere potential operation of a licence to sell to defeat a security interest in inventory would deprive the interest of all efficacy. It would not be any sort of security against subsequent obligations.

112 Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation.

113 It remains to make a few remarks by way of conclusion. Because I believe that the respondent's general security agreement gave it a fixed and specific charge against the debtor's inventory, and because I conclude that the licence to sell that inventory does not derogate from the respondent's security interest, I conclude that this appeal should be dismissed. I do not need to decide whether the *Bank Act* security would have priority over the deemed trust as well; though given that the licence to sell inventory under the *Bank Act* security is only implied, I do not see how the Crown could have a greater claim under the *Bank Act* than it has under the *PPSA*.

114 Therefore I would dismiss the appeal with costs.

Appeal dismissed with costs, LA FOREST, GONTHIER *and* CORY JJ. *dissenting*.

Solicitor for the appellant: The Attorney General of Canada, Ottawa.

Solicitors for the respondent: Milner, Fenerty, Edmonton.

Sinco Trucking Ltd. v. Paccar Financial Services Ltd., 1989 CanLII 287 (SK CA) - Conflict Between Provincial PPSA and Federal BIA on Interests

Date:	1989-02-21
Docket:	9518; 9532
Parallel citations:	57 DLR (4th) 438; [1989] 3 WWR 481; 73 CBR (NS) 28; 74 Sask R 181
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Court of Appeal for Saskatchewan
Date: 19890221
Docket: No. 9518 / 9532
File No. 9518
IN THE COURT OF APPEAL FOR SASKATCHEWAN
TOUCHE ROSS LIMITED,
the Trustee of the estate of Sinco Trucking Ltd., a bankrupt.
- and -
PACCAR FINANCIAL SERVICES LTD., AND BRIAN GREYEYES
RESPONDENTS
- and -
ANDREW BLAIR CARRIER
APPELLANT
CORAM: Vancfse, Wakeling and Gerwing JJ.A.
COUNSEL: Mr. Niel Halford for the appellant
Mr. Grant Scharfstein and Mr. Don Layh for Paccar
- AND -
[Page 2]
File No. 9532
TOUCHE ROSS LIMITED, as Trustee of the Estate of Sinco Trucking Ltd.. a Bankrupt
APPELLANT
- and -
PACCAR FINANCIAL SERVICES LTD., ANDREW BLAIR CARRIER. BRIAN ES. ROBERT BOUVIER. AND HER MAJESTY 'rte OUEEN IN RIGHT OF THE PROVINCE OF SASKATCHEWAN
RESPONDENTS
CORAM: Vancise, Wakeling and Gerving JJ.A.
COUNSEL: Mr. Joel Hesje for the Appellant, assisted by studentat-law Paul Stodalka
Mr. Grant Scharfstein and Mr. Don Layh for Paccar Mr. Niel Halford for Carrier (no submissions)
Mr. Graeme Mitchell for Sask. Justice
JUDGMENT PRONOUNCED February 21, 1989
VANCISE J.A.

There are two principal issues raised on this appeal. The first is whether s. 20(1)(d) of The Personal Property Security Act, S.S. 1979-80, c. P-6.1, which subordinates the interest of an unperfected lessor to the interests of a trustee in bankruptcy, is legislation in relation to "property and civil rights" and therefore within the constitutional authority of the Province.

The second issue, if the section is found to be constitutional, is whether it is rendered inoperative by reason of an operational conflict with s. 107 of the Bankruptcy Act, R.S.C. 1970, c. B-3.

a) Facts

On July 26, 1984, the respondent Paccar Financial Services Ltd. leased four Kenworth trucks to Sinco Trucking Ltd. It is common ground that the lease was a "pure lease" under which the lessee obtained no interest in the trucks.

On November 1, 1985, Sinco entered into a bill of sale with Carrier, purporting to sell him one of the trucks for $90,500, which was to be paid in full by December 31, 1985. On June 1, 1986, Sinco purported to sell Brian Greyeyes another of the trucks for $80,000, which was to be paid in full by June 30, 1986.

Both Carrier and Greyeyes had leased the trucks from Sinco prior to purchasing them and claimed the trucks as purchasers for value without notice of Paccar's interest.

On September 15, 1986, Sinco made an assignment in bankruptcy which resulted in the appointment of Touche Ross as trustee. The trustee immediately took possession of three of the trucks and made an arrangement with Greyeyes for the truck which was in his possession.

Carrier filed a claim for the truck he purported to purchase from Sinco pursuant to s. 56 of the Bankruptcy Act. On October 6, 1986, Paccar filed a proof of claim with the trustee, claiming to be the owner of the four trucks and seeking possession.

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Greyeyes did not file a claim, but the trustee has acknowledged that this claim is the same as Carrier's and will be dealt with on the same basis.

On October 20, 1986, the trustee served notice on Paccar that it disputed Paccar's right to ownership and possession in the following terms:

> Each of the vehicles referenced aforementioned was leased from Paccar Financial Services Ltd. by Sinco Trucking Ltd. by way of a Lease for a Term more than One Year as such term is defined in The Personal Property Security Act in and for the Province of Saskatchewan (hereinafter referred to as the "Act"). As Paccar Financial Services Ltd. had not perfected its security interest in the four vehicles in question prior to the date of the bankruptcy of Sinco Trucking Ltd., the interest of Paccar Financial Services Ltd. would be subordinate to the interest of the Trustee in accordance with Section 20(1) of the Act. The Leases of the four vehicles in question are Leases to which the terms and provisions of the Act apply.

On October 27, 1986, Paccar commenced proceedings pursuant to s. 59(2) of the Bankruptcy Act, seeking a declaration that it was the owner of and entitled to possession of the four trucks.

Paccar also gave notice pursuant to The Constitutional Questions Act, R.S.S. 1978, c. C-29, that it intended to argue that s. 20(1)(d) of The Personal Property Security Act was unconstitutional. Those grounds are set out as follows:

> 1. Those sections of The Personal Property Security Act that subordinate the interests of an unperfected lessor to the interests of the Trustee in Bankruptcy are ultra vires the provincial legislature since such legislation is in pith and substance directed toward matters of "Insolvency and Bankruptcy" and not toward "Property and Civil Rights in the Province"; or
>
> 2. Those sections of The Personal Property Security Act that subordinate the interests of an unperfected lessor to the interests of a Trustee in Bankruptcy, while being within the legislative competence of the Legislature of the Province of Saskatchewan, are in conflict with valid legislation of Parliament relating to insolvency and bankruptcy, namely, the Bankruptcy Act, R.S.C. 1970, Ch. B-3, and therefore, by virtue of the doctrine of federal paramountcy the federal legislation prevails.

Paccar also questioned the applicability of The Personal Property Security Act to its lease of the four Kenworth trucks in the following terms:

> The applicant is not regularly engaged in the business of leasing goods as defined in s. 2(y)(iv) of The Personal Property Security Act and, therefore, need not register its interest in the Personal Property Registry.

The relevant provisions of the Bankruptcy Act are ss. 47 and 107(1).

b) Constitutionality of section 20(1)(d)

Section 20(1) reads as follows:

> 20(1) An unperfected security interest is subordinate to the interest of:
>
> (a) a person who has a perfected security interest or who is otherwise entitled to priority under this Act;
>
> (b) a person who causes the collateral to be seized under legal process, including execution, attachment or garnishment, or that obtains a charging order or equitable execution affecting the collateral;
>
> (c) a sheriff who has seized or has obtained a right to the collateral under The Creditors' Relief Act; .
>
> (d) a representative of creditors, but only for the purposes of enforcing the rights of persons mentioned in clause (b), and a trustee in bankruptcy;
>
> (e) a transferee who is not a secured party and who acquires his interest for value without notice of the security interest and before it is perfected;
>
> (i) in documents of title, securities, instruments or goods, where the transferee receives delivery of the collateral;
>
> (ii) in intangibles other than accounts;
>
> (iii) in accounts acquired through a transaction not otherwise governed by this Act;
>
> (iv) in chattel paper acquired through a transaction not otherwise governed by this Act, where the transferee receives
>
> possession of the chattel paper.

When construing an impugned provincial statute, one must by virtue of the presumption of constitutionality, presume the legislature is acting within the sphere of its competence rather than without. See Deloitte, Haskins & Sells v. Workers' Compensation Board, 19 D.L.R. 457 at 593; Scowby v. Glendenning et al., 1986 CanLII 30 (SCC), [1986] 2 S.C.R. 226 at 233.

The proper approach to determine the issue here was outlined by Cartwright J. in The Validity of the Orderly Payment of Debts Act, 1959 (Alberta), 1960 CanLII 56 (SCC), [1960] S.C.R. 571 at 590 as follows:

> ... I think I am right in saying that in every decision of the Judicial Committee or of this Court in which provincial legislation, impugned on the ground that it affected the rights and obligations of an insolvent entity and its creditors

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> and thereby trenched on the subject matter comprised in head 21 of s. 91, has been upheld it appears that in the view of the Court two conditions were found to exist; (i) that the impugned legislation was not in truth and substance primarily in relation to Bankruptcy and Insolvency but rather in relation to one or more of the matters enumerated in s. 92; and (ii) that in so far as it affected the rights and obligations of an insolvent and its creditors it did not conflict with existing valid legislation of Parliament enacted in exercise of the power contained in head 21 of s. 91.

One must first determine whether s. 20(1)(d) of the Act is within the competence of the provincial legislature. To determine the dominant substance of this impugned section, one must first identify or characterize the subject matter. Hogg, in his text Constitutional Law of Canada (2nd ed. 1985), states at p. 318:

> The process of characterization is not a technical, formalistic exercise, confined to the strict legal operation of the impugned law....**The Court will look beyond the direct legal effects to inquire into the social or economic purposes** which the statute was enacted to achieve.

At this stage of the inquiry the provisions of the Bankruptcy Act are not relevant. If the section is in truth and substance legislation in relation to one or more of the enumerated heads in s. 92 and therefore constitutional it will, at that point, be necessary to determine whether s. 20(1)(d) is rendered' inoperative by reason of an. operational conflict with the provisions of the Bankruptcy Act. This two-stage approach was adopted by Dickson J. in Multiple Access Ltd. v. McCutcheon et al., 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161 at 168:

> As Professor Hogg has pointed out in his work Constitutional Law of Canada (1977), at p. 102, the doctrine of paramountcy applies where there is a federal law and a provincial law which are (1) each valid and (2) inconsistent, adding that "the issue does not arise unless each law has first been held to be valid as an independent enactment. In determining the validity of each law, the existence and terms of the other law are irrelevant".

The Parliament of Canada has by head 21 of s. 91 the exclusive legislative authority in relation to bankruptcy and insolvency. The primary purpose of the Bankruptcy Act is to protect the creditors of persons who are insolvent and to ensure that the assets of the bankrupt will be distributed in an orderly manner. See Langille et al. v. Toronto-Dominion Bank (1981), 37 C.B.R. (N.S.) 35 (N.S.S.C. A.D.), affirmed, 1982 CanLII 154 (SCC), [1982] 1 S.C.R. 34. The constitutionality of the Bankruptcy Act, and in particular ss. 47 and 107, is conceded by the Crown.

Head 13 of s. 92 gives the provincial legislature the power to legislate in relation to "Property and Civil Rights" in the Province. A part of that power encompasses the right to regulate the property and civil rights of debtors and creditors in the province and to establish a system of priorities. It was in furtherance of that power that the Province enacted The Personal Property Security Act. The object of that Act was recently commented on by this Court in Re Bell's Dairy Limited; International Harvester Corporation v. Touche Ross Limited, 1986 CanLII 158 (SK CA), [1986] 6 W.W.R. 161, where Cameron J.A. speaking for the Court, stated at pp. 168-9:

> The object of this Act is to modernize and consolidate the law of personal property as security for debts. The scope of the statute includes all transactions, regardless of their form and irrespective of the intention Of the parties, that either create or are deemed to create a security interest in personal property and fixtures. For the first time, both consignments of goods and true leases of goods are treated by the law as though the parties had intended the property to serve as security for the amounts owing by the consignee or lessee as the case may be. This is a singularly important departure from the law as it existed before this Act came into being.

That case involved a lessor of a vehicle who had failed to protect its security interest in the vehicle by registration. The lessor's security interest was subordinated to that of the trustee by virtue of s. 20(1)(d). The effect of that was to give to the trustee more rights than those possessed by the bankrupt. That is not a novel concept. The trustee in bankruptcy not only has the responsibility to gather in the assets of the bankrupt but also the responsibility to represent the creditors. Gilmore, Security , Interest in Personal Property (1965), Vol. II at p. 1286, describes the function of a trustee in bankruptcy as follows:

> Common law and statutory assignees for the benefit of creditors had always been thought of as standing in the debtor-assignor's shoes: claims which were good against the assignor were good against the assignee. From the beginning, the federal bankruptcy trustee had greater powers. In carrying out his function of assembling the bankrupt's assets and selling them, he was given a double capacity. In one capacity he acquired whatever property rights the bankrupt had before the institution of the proceeding. In his other capacity he acquired, or inherited, whatever rights the bankrupt's creditors had. Thus a claimed interest in the bankrupt's property was not necessarily good against the trustee simply because, under applicable state law, the claimant could have recovered the property from the bankrupt. To be good against the trustee the claim had to be effective not only against the bankrupt but against his other creditors. In his role as champion of the unsecured creditors, it was not only the trustee's right but his duty to seek to invalidate as many property claims as he could, since each defeated claim brought more assets into the estate and increased the fund for distribution. [Footnotes omitted.]

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Prior to the enactment of the Act, a trustee in bankruptcy could have obtained a higher interest than that of the bankrupt by reason that certain provincial statutes empowered unsecured creditors to defeat the claim of the holder of an unregistered security interest, despite the fact that the bankrupt could not assert that right. Both The Conditional Sales Act, R.S.S. 1978, c. C-25 and The Bills of Sale Act, R.S.S. 1978, c. B-1, provided that the interests of an unregistered security interest were void as against a creditor, which would include the creditor's representative.

What then is the overriding purpose of the Act? Is it to establish a modern personal property regime which establishes priority security interests, or is it an attempt to establish legislation in relation to bankruptcy by establishing a scheme of priorities whereby the estate of the bankrupt is to be administered for the orderly payment of debts? In my opinion it is clearly the former. The purpose of Act is to regulate the property interests of debtors and creditors within the province by the establishment of a system of priorities based upon the perfection of security interests by the method set out in the Act.

A lease for more than one year is defined in s. 2(y) of the Act as follows:

> 2. In this Act:
>
> (y) "lease for a term of more than one year" includes:
>
> (i) a lease for an indefinite term even though the lease is determinable by one or both parties within one year of its execution;
>
> (ii) a lease for a term of one year or less that is automatically renewable or that is renewable at the option of one of the parties or by agreement for one or more terms, the total of which may exceed one year;
>
> (iii) a lease initially for less than one year, where the lessee retains uninterrupted or substantially uninterrupted possession of the goods leased for a period in excess of one year after the day he first acquired possession of the goods, and the lease is deemed to be a lease for more than one year as soon as the lessee's possession extends beyond one year;
>
> but does not include:
>
> (iv) a lease transaction involving a lessor who is not regularly engaged in the business of leasing goods;
>
> (v) a lease of any prescribed goods, regardless of the length of the term of the lease; ...

An unperfected security interest, such as a lessor of a true lease for more than one year, is by s. 20 of Act, subordinated to the interests set out in sections "a" to "e". The purpose and function of the registration scheme is to protect third parties who acquire an interest in the goods from the person in possession of them. The security interest of a person who parts with possession of the goods and fails to perfect his security interest by registration is subordinated to the interests described. The fact that one of the persons in favour of whom the security interest is subordinated is the trustee in bankruptcy does not alter the fundamental nature of the transaction. The trustee in bankruptcy, as noted, is asserting the claim of the unsecured creditors. to the goods and possessiohs of the bankrupt pursuant to the priorities established for competing perfected and unperfected security interests. It is simply a contest as between an unsecured creditor and the holder of an unperfected security interest.

The function of s. 20 is to establish what interests are superior to an unperfected security interest. The inclusion of the trustee in bankruptcy in such scheme does not taint otherwise valid provincial legislation. The trustee in bankruptcy is utilizing the scheme of priorities established under the provincial legislation in gathering in the assets of the bankrupt. That a trustee can make use of a valid provincial legislation when administering the estate of a bankrupt was decisively determined in Robinson v. Countrywide Factors Ltd., 1977 CanLII 175 (SCC), [1978] 1 S.C.R. 753.

There the trustee moved under The Fraudulent Preferences Act, R.S.S. 1965, c. 397 (now R.S.S. 1978, c. F-20), to set aside as fraudulent a transaction entered into outside the three-month period provided for in the Bankruptcy Act for setting aside such transactions. Spence and Beetz JJ., endorsed a restrictive interpretation of the federal power in relation to bankruptcy. Mr. Justice Beetz stated at pp. 803-5 as follows:

> The primary meaning of "insolvency" in s. 91.21 of the Constitution is insolvency in a technical sense, not in a general sense. This Lord Thankerton made clear just a few lines after the passage quoted above: with respect to the jurisdiction of Parliament under s. 91.21, he referred to . . the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws ..."
>
> When the exclusive power to make laws in relation to bankruptcy and insolvency was bestowed upon Parliament, it was not intended to remove from the general legal systems which regulated property and civil rights a cardinal - concept essential to the coherence of those systems. The main purpose was to give to Parliament exclusive jurisdiction over the establishment by statute of a particular system regulating the distribution of a debtor's assets. However, given the nature of general legal systems, the primary jurisdiction of Parliament cannot easily be exercised together with its incidental powers without some degree of overlap in which case federal law prevails. On the other hand, provincial jurisdiction over property and civil rights should not be measured by the ultimate reach of federal power over bankruptcy and insolvency any more than provincial competence in relation to the administration of justice can be determined by every conceivable and potential use of the criminal law power.

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See also the comments of Spence J. to the same effect at p. 794.

If a trustee in bankruptcy can rely upon provincial fraudulent preference legislation to attack the validity of certain transactions and have those transactions voided, there would seem to be no constitutional impediment to the trustee in bankruptcy invoking the priority scheme found in s. 20 of the Act, in order to assert a claim on behalf of the creditors.

In my opinion, the impugned section is not "in truth and substance" legislation in relation to bankruptcy but rather it is in truth and substance legislation in relation to property and civil rights in the province. I agree with the learned chambers judge that the section in question is not ultra vires the Province.

d) Paramountcy

Having found that s. 20(1)(d) of that Act is constitutionally valid, and the Crown having conceded that the provisions of the Bankruptcy Act are constitutionally valid, it is necessary to consider whether the section is rendered inoperative by virtue of ss. 47 and 107(1) of the Bankruptcy Act.

The rule which has been adopted by the courts where there are inconsistent federal and provincial laws in actual and direct conflict of operation is the doctrine of federal paramountcy. Professor Hogg in his text states at p. 354:

> The doctrine of paramountcy applies where there is a federal law and a provincial law which are (1) each valid, and (2) inconsistent.... In determining the validity of each law, the existence and terms of the other law are irrelevant. Validity depends upon the principles discussed in the previous chapter: does the 'matter' (or pith and substance) of the law come within the 'classes of subjects' (or heads of power) allocated to the enacting Parliament or Legislature? If one law fails this test, then the problem is resolved without recourse to the doctrine of paramountcy. It is only if each law independently passes the test of validity that it is necessary to determine whether the laws are inconsistent.

The Supreme Court of Canada has recently dealt with the paramountcy rule in Multiple Access v. McCutcheon,supra, Dickson J. stated at p. 191:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other. The courts are well able to prevent double recovery in the theoretical and unlikely event of plaintiffs trying to obtain relief under both sets of provisions.

In reaching this conclusion Dickson J. considered Smith v. The Queen, 1960 CanLII 12 (SCC), [1960] S.C.R. 776 at 781, Robinson v. Countrywide Factors Ltd., supra, and Construction Montcalm Inc. v. Minimum Wage Commission, 1978 CanLII 18 (SCC), [1979] 1 S.C.R. 754.

Hogg, in his text, after reviewing those cases and Multiple Access, states at p. 363:

> The cumulative effect of the decisions seems to be that there is no room for an imputed inconsistency based on covering the field or negative implication. The sole test of inconsistency in Canadian constitutional law is express contradiction. This is the course of judicial restraint, allowing the fullest possible play to provincial legislation.

The respondent contends that there is an operational conflict.

The chambers judge in applying these principles found that there was an operational conflict between s. 20(1)(d) of the Act and the provision of the Bankruptcy Act. He noted that the Bankruptcy Act authorizes the trustee to take possession of and distribute the property of the bankrupt to his secured, preferred creditors as set out in s. 107(1) and, as well, the unsecured creditors as set forth in s. 107(3). He held that the property of the bankrupt is defined in terms of the common law and it does not include the "leased property of the bankrupt" within that definition. He equated the position of a lessor to that of a secured creditor. He stated at p. 507:

> In these circumstances, Paccar contends that the enactment of s. 20(1)(d)- to include the trustee in bankruptcy and the subsequent interpretation of the priorities created by s. 20, vis-a-vis goods leased for a term of more than one year, is in clear conflict with the distribution scheme under the Bankruptcy Act. Under the federal law the trustee would be required to return the leased goods to the owner. He cannot defeat the ownership interest of a lessor. Under the P.P.S.A. scheme the leased goods become a distributable asset for the benefit of the bankrupt lessee's creditors with the owner (lessor) reduced to the position of an unsecured creditor. When one considers that under the scheme of distribution outlined in the federal statute the owner's (lessor's) claim is the same as the secured creditor's, it is clear the two schemes of priority are in actual, not just perceived, conflict. In these circumstances, Paccar argues s. 20(1)(d) and any of the other provisions of the P.P.S.A. which support the scheme of priorities with respect to unperfected security interests, at least insofar as they affect true leases of goods for a period of more than one year, must yield to the distribution scheme of the federal statute.

And again at p. 508.

> While there is no doubt that the overriding objective of the P.P.S.A. is to protect the security of the holder of a "security interest" in goods through the mechanism of registration, it is my opinion that in the case of leased goods

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> for a term of more than one year the scheme is an actual and operative conflict with the scheme of distributions and priorities imposed upon a trustee in bankruptcy by the Bankruptcy Act. A lessor of goods under the P.P.S.A. loses his ownership to the bankrupt lessee's trustee. That could not happen to the lessor under the federal law. His ownership claim upon the goods is defeated by the purpose and intention of the scheme of priorities outlined in s. 20 of the P.P.S.A. This is an operational as opposed to an incidental or ancillary conflict between the two Acts and pursuant to the doctrine of paramountcy the provincial legislation, insofar as it relates to "leases for a term of more than one year", must yield to the federal statute. I might add that it has been noted that the P.P.S.A. in Saskatchewan is the only Act of this kind in Canada which includes commercial leases for more than one year within the definition of "security interest". One wonders if the reason is that it is recognized in other provinces that this type of revision creates a conflict with the scheme of distribution under the Bankruptcy Act?

With the greatest respect, I do not agree with the learned chambers judge. The primary position of the respondent is that it is a secured creditor under the Bankruptcy Act and that the registration scheme under the Act deprives it of its secured position. In my opinion that position is not correct. For convenience, I reproduce the definition of secured creditor which appears in s. 2 of the Bankruptcy Act.

> "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable; ...

The respondent Paccar submits that s. 107 gives him priority as a secured creditor. As examination of the definition of secured creditor reveals that a lessor does not fall within that definition. The lease is a true lease and not a security agreement which grants a charge or lien against the leased property as security for a debt due or accruing to a creditor. As noted by Cameron J.A. in Bell's Dairies et al. supra, the trustee in bankruptcy has, pursuant to s. 12(2), a duty to take into possession all property of the bankrupt as a representative of the creditors. "Property" is defined in the Bankruptcy Act as:

> "property" includes money, goods, things in action, land, and every description of property, whether real or personal, movable or immovable, legal or equitable, and whether situated in Canada or elsewhere and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property.

That definition is broad enough to include a leasehold interest. See In Re Cadieux (1952), 33 C.B.R. 15 at 16. Central to the finding of operational conflict by the chambers judge is his finding that under federal bankruptcy law the assets would belong to the respondent Paccar, and that by operation of the Act the goods are not subject to the same distribution scheme as a secured creditor. In so finding he has failed to take into account the nature of the security, the common law position of a lessor, and the integrated legislative scheme contemplated by the Bankruptcy Act.

The Bankruptcy Act is silent as to the rights of a lessor on the bankruptcy of a lessee. There is therefore no statutory conflict between the two Acts. Section 14(1)(k) does, however, set out the rights of the trustee in relation to leasehold property of the bankrupt. The section reads:

> 14(1) The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> (k) elect to retain for the whole part of its unexpired term, or to assign, surrender, or disclaim any lease of, or other temporary interest in, any property of the bankrupt.

The trustee succeeds to the possessory right of the bankrupt in the leased goods. As this Court stated in Bell's Dairies, supra, at p. 174:

> In the first place, then, a trustee in bankruptcy, upon whom there devolves a chattel in the possession of the bankrupt under a commercial lease for a term exceeding a year, succeeds to the contractual or "possessory" interest of the bankrupt in that chattel, as well as to the bankrupt's statutory or "proprietory" interest therein ... .
>
> In the second place--and this a critical point--a trustee in bankruptcy may, as a representative of the creditors of the bankrupt, assert the interests of those creditors in the goods of the bankrupt, including goods in the possession of the bankrupt pursuant to a commercial lease for a term exceeding a year.

Section 49(2) of the Bankruptcy Act provides that a secured creditor can realize or otherwise deal with the security as if the bankruptcy had not occurred. Section 50(1) provides that the rights of secured creditors are not affected by the bankruptcy and s. 107 provides that the distribution of proceeds is subject to the rights of a secured creditor. It will be noted that these sections preserve the rights of secured creditors. They do not define what rights a secured creditor has in the collateral. A determination of what rights a secured creditor has in the collateral is made under provincial law; in this case, the Act. Section 50(6) of the Bankruptcy Act recognizes this integrated scheme. That section reads as follows:

> 50(6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the the trustee is

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> entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

It is now clear that a legal integration of the Bankruptcy Act and the provincial laws relating to property and civil rights is not only permissible but desirable and essential. Mr. Justice Beetz, in concurring with Mr. Justice Spence, stated at pp. 808-9 of Robinson v. Countrywide Factors Ltd., supra:

> ... I am of the view that s. 50 subs. (6) of the Bankruptcy Act provides a clear indication that Parliament, far from intending to depart from the rule of operational conflict, did in fact aim at the highest possible degree of legal integration of federal and provincial laws: ...

Section 20(1)(d), far from conflicting with the provisions of the Bankruptcy Act, is an important part of the integrated scheme of legislation dealing with priorities in entitlement to property. In my opinion, there is no operational conflict between the Act and the Bankruptcy Act; the section remains operative and is determinative of the priority between the trustee and Paccar.

(a) Applicability of The Personal Property Security Act to Paccar

In addition to the constitutional questions which were submitted for resolution by the chambers judge, Paccar submitted that it was not required to perfect its security under the P.P.S.A. by reason that it was not regularly engaged in the business of leasing goods in the province and was therefore exempt pursuant to s. 2(y)(iv) of the Act. The chambers judge dealt with that issue fully and concluded that the exemption did not apply. He found that the exemption provisions in s. 2(y)(iv) were' designed to exempt a person who occasionally leased goods but could not be described as making it his business. He found in this case that Paccar did not fit the description because it was a large financial institution regularly engaged in financing the purchase of Kenworth trucks, and that while lease transactions were rarely used, they were in fact used for financing and as a result the exemption did not apply. I agree with that finding.

f) Claim of Carrier

In an effort to forestall further litigation in the event that he was wrong, the chambers judge considered the claim raised by Carrier respecting his claim to the goods as one who purchased the truck without notice of Paccar's interest in it.

The chambers judge considered all of the relevant material filed by the parties by way of affidavit, and concluded that Carrier did not have notice of Paccar's leasehold interest in the goods. In considering s. 20(1)(e) (reproduced above) and s. 67(3)(a), which reads as follows:

> 67(3) For the purposes of this Act, a person knows or has notice when:
>
> (a) in the case of an individual, information comes to his attention under circumstances in which a reasonable person would take cognizance of it.

he stated:

> So Paccar argues Carrier was not "without notice" because he had information come to his attention under circumstances that he should have known of Paccar's interest in the truck.
>
> However, on balancing the evidence on this issue I cannot agree with this contention because a reading of Carrier's explanation of his dealings with the management of Sinco explains clearly why he believed he was dealing with Sinco and why he would have no reason to believe Paccar had an ownership interest in the truck. The stealth and falsity of Sinco's treatment of Carrier is by any standard so reprehensible one is left to wonder why an investigation for fraud was not undertaken. Be that as it may, I am not satisfied on a balance of probabilities that Carrier had notice of Paccar's interest. It seems to me Sinco did everything possible to keep him from finding out they only had a lease on the truck when they purported to sell it to him. In my opinion, the evidence supports Carrier's contention that he was a purchaser of the truck without notice of Paccar's security interest.

I agree with that conclusion. In the dispute between Paccar and Carrier as to the entitlement to the collateral, Paccar's interest is subordinated to that of Carrier.

The question of priority between the trustee and Carrier was not in issue or argued before us. That determination must be made elsewhere.

The appeal is therefore allowed with costs to the trustee and Carrier on double Column V.

DATED at the City of Regina, in the Province of Saskatchewan, this 21st day of February, A.D. 1989..

VANCISE J.A.

I concur.

WAKELING J.A.

I concur.

GERWING J.A.

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Landry (Bankruptcy of) (Re), 2000 CanLII 16846 (ON CA) - Whether Property of Bankrupt Includes Lawsuit and Potential Proceeds

Date: 2000-09-06
Docket: C33175
Parallel citations: 50 OR (3d) 1; 192 DLR (4th) 728; 3 CCEL (3d) 1; 21 CBR (4th) 58; 135 OAC 381
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Bankruptcy and Insolvency Act, RSC 1985, c B-3 — 2; 7(2); 67; 67(1); 68; 71; 71(2); 80
Canada Labour Code, RSC 1985, c L-2
Solicitors Act, RSO 1990, c S.15 — 34
Wages Act, RSO 1990, c W.1
Decisions cited
Marzetti v. Marzetti, 1994 CanLII 50 (SCC)
Salloum (Re) (Trustee of), 1990 CanLII 2260 (BC CA)
Sylvester v. British Columbia, 1997 CanLII 353 (SCC)
Wallace v. United Grain Growers Ltd., 1997 CanLII 332 (SCC)

DATE: 20000906
DOCKET: C33175
COURT OF APPEAL FOR ONTARIO
OSBORNE A.C.J.O., WEILER and CHARRON JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF NYCOLE LANDRY, residing in the Township of Longueuil, in the County of Prescott, in the Province of Ontario	Robert J. Smith and John P. O'Toole, for the Appellant, Deloitte & Touche
	Matthew J. Halpin, for the Respondent Nycole Landry
	Heard: May 26, 2000

On appeal from the decision of the Honourable Mr. Justice James B. Chadwick dated September 13, 1999.

CHARRON J.A.:

[1] The respondent, Nycole Landry, declared bankruptcy on June 4, 1997 and the appellant, Deloitte & Touche, was appointed trustee of the bankrupt's estate. Landry has been discharged from bankruptcy on October 15, 1998. The trustee has not yet been discharged and is still attempting to realize upon the assets of the bankrupt's estate for the benefit of the creditors. This proceeding concerns one potential asset.

A. The Facts

[2] The relevant facts can be stated succinctly.

[3] In 1993, Landry was dismissed from her employment as a pilot with First Air. That same year, she brought a claim for unjust dismissal against First Air under the Canada Labour Code R.S.C. 1985, c. L-2. At the end of a first hearing, the arbitrator found that Landry had been unjustly dismissed.

[4] The employer successfully appealed the arbitrator's finding and a new hearing was ordered. Shortly before the second hearing, Landry changed solicitors. In May 1997, the first solicitor's costs were assessed in the amount of

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$77,500. Landry declared bankruptcy on June 4, 1997. The first solicitor is the main, if not the only, creditor in the bankruptcy.

[5] Landry obtained an absolute discharge from her bankruptcy on October 15, 1998 which effectively discharged her from her debt to the first solicitor. The trustee did not oppose the discharge but made it clear to Landry that the trustee maintained the right to claim any part of an eventual award of damages for unjust dismissal.

[6] In December 1998, at the conclusion of a second hearing under the Canada Labour Code, a different arbitrator also found that Landry was unjustly dismissed. When the trustee became aware of the arbitrator's decision, the trustee unsuccessfully attempted to intervene in the proceedings to claim the first solicitor's costs.

[7] The arbitrator's decision on the award has not yet been delivered and apparently awaits the outcome of this appeal. Although the exact amount is uncertain, the parties agree that Landry can expect to receive, as part of the award, some monies for lost wages.

B. The Trustee's Motion

[8] In the Spring of 1999, the trustee moved before Chadwick J. under ss. 67, 68 and 71 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") for various forms of relief with respect to the expected arbitrator's award. The trustee sought a declaration that any amount awarded in relation to lost wages[1] constituted property of the bankrupt that vested in the trustee for the benefit of the creditors, either through the automatic operation of ss. 67 and 71(2) or pursuant to an order that the court should make under s. 68. (Simply put, s. 67 defines the property of the bankrupt that is divisible among the creditors, s. 71(2) is a general vesting provision and s. 68 makes specific provisions with respect to either the "total income" of the bankrupt -if the current provision applies, or the bankrupt's "salary, wages, or other remuneration" from employment -if the former version applies.) The trustee also sought a declaration that Landry's claim against First Air vested in the trustee on the date of bankruptcy and that the trustee was therefore entitled to intervene in the proceedings before the arbitrator to seek an order for costs in relation to the first solicitor's account. Finally, the trustee sought an order for a lien under s. 34 of the Solicitors Act, R.S.O. 1990, c. S-15.

C. The Decision Under Appeal

[9] Chadwick J. held that, even if that part of the settlement related to wages in lieu of notice could arguably form part of the bankrupt estate under s. 67, 80% of this amount would be exempt pursuant to the provisions of the Wages Act, R.S.O. 1990, c. W-1 incorporated under s. 67(1)(b) of the BIA. In view of the small amount of money that could be apportioned, the motions judge stated that he was not prepared to make any order under s. 67. The motions held further that the current s. 68 applied but that the trustee was precluded from resorting to its provisions because the section applied only to undischarged bankrupts and because the trustee had not followed the procedure set out under s. 68. On the question of costs, the motions judge held that neither the trustee nor the former solicitors had any status in seeking an order for costs before the arbitrator as the costs are those of the client Landry and that she had waived her claim for costs as a result of her bankruptcy. Finally the motions judge refused to make an order for a lien under the Solicitors Act and dismissed the trustee's motion. The trustee appeals from this decision on all questions except that the trustee does not pursue the request for a lien under the Solicitors Act.

D. The Issues on the Appeal

[10] This appeal therefore raises the following questions:

1. Does Landry's claim against First Air or any part of the resulting award constitute property of the bankrupt that vests in the trustee under ss. 67 and 71(2)of the BIA?
2. If so, does any exemption apply pursuant to s. 67(1)(b) so as to except any part of the property from the estate of the bankrupt?
3. Is s. 67 superseded by the provisions of s. 68 in relation to a bankrupt's wages?
4. If so, which provision applies, the former s. 68 which was in force at the time Landry declared bankruptcy, or the present s. 68 which was in force at the time the trustee brought its motion?
5. Is the trustee precluded from resorting to s. 68 after the discharge of the bankrupt?
6. Is the trustee precluded from resorting to the current s. 68 because the procedure set out thereunder has not been followed?
7. Does the trustee have standing to intervene in the proceeding under the Canada Labour Code to claim Landry's costs incurred at the first arbitration hearing?

E. Analysis

1. Does Landry's claim against First Air or any part of the resulting award constitute property of the bankrupt that vests in the trustee under ss. 67 and 71(2) of the BIA?

[11] As stated earlier, s. 71(2) is a general vesting provision. It reads as follows:

71(2) Vesting of property in trustee – On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to

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this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

[12] "Property" is defined under s. 2 of the BIA as including:

money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property. [Emphasis added.]

[13] "Things in action" encompass a claim for damages for breach of contract, including an action for wrongful dismissal: Wallace v. United Grain Growers Ltd., 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701. The parties do not dispute that Landry's claim against her former employer under the Canada Labour Code is a "thing in action" and therefore constitutes "property" for the purpose of the BIA. Hence, pursuant to s. 71(2), Landry's claim against her former employer would vest in the trustee on the date she declared bankruptcy and she would cease to have any capacity to deal with it. However, s. 71(2) is subject to the other provisions of the BIA.

[14] Section 67 of the BIA defines what property of a bankrupt is divisible among her creditors and can serve to restrict the ambit of s. 71(2). The relevant part of s. 67 reads as follows:

67.(1) Property of bankrupt – The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

[15] It is clear that s. 67(1)(c) is wide enough to encompass Landry's claim against her former employer and, consequently, any award of damages (other than those relating to personal claims, see footnote 1, supra) would form part of the property divisible among her creditors under that provision. A question then arises whether any part of the property falls within the exception made for exempt property under s. 67(1)(b).

2. Does any exemption apply pursuant to s. 67(1)(b) so as to except any part of the property from the estate of the bankrupt?

[16] As provided under s. 67(1)(b), the property of the bankrupt divisible among her creditors shall not comprise any property that as against Landry is exempt from execution or seizure under the laws of Ontario. Landry relies on s. 7(2) of the Ontario Wages Act which provides that "80 per cent of a person's wages are exempt from seizure or garnishment." Therefore, if any part of the arbitrator's award constitutes "wages" within the meaning of s. 7(2), 80% of that amount would not constitute property divisible among Landry's creditors and, hence, would not vest in the trustee.

[17] At the hearing, counsel did not seriously dispute that the case of Wallace, supra provides support for the contention that the arbitrator's award of damages for unjust dismissal, in so far as it relates to lost wages, can be equated to actual wages.

[18] Wallace made a voluntary assignment into personal bankruptcy and remained an undischarged bankrupt when he commenced an action for wrongful dismissal against his former employer. A question arose whether Wallace could bring this action in his own name given the vesting provisions under s. 71(2) of the Bankruptcy Act, R.S.C. 1985, c. B-3 which, as s. 71(2) of the present BIA, provided that a bankrupt ceases to have any capacity to deal with his property.

[19] Iacobucci J., in the majority judgment, (all justices were in agreement on this issue) stated (para. 58) that the wording of the Act is clear and that an undischarged bankrupt has no capacity to deal with his or her property, including an action for breach of contract, outside the circumstances described in s. 99(1) (which circumstances are of no relevance to this appeal). The Court held further that the Act made no distinction whether that property was acquired before or after the assignment in bankruptcy. However, the Court went on to consider the provisions of s. 68(1) of the Bankruptcy Act as it then read (this is the provision which was in force at the time Landry declared bankruptcy) and concluded that it carved out an additional exception to this general rule. Section 68(1), in this earlier version, provided as follows:

68.(1) Notwithstanding subsection 67(1), where a bankrupt

(a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing the bankrupt...

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the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

[20] More will be said about the effect of s. 68 later in these reasons. What is of relevance to the question presently under consideration is the finding by the Court that Wallace, an undischarged bankrupt, could maintain his action against his former employer for damages for wrongful dismissal not because of the timing of the acquisition of the property "but rather, because of the nature of the property in question" (para. 59) which the court equated to "wages". Iacobucci J. wrote as follows (paras. 65-66):

As I see the matter, the underlying nature of the damages awarded in a wrongful dismissal action is clearly akin to the "wages" referred to in s. 68(1). In the absence of just cause, an employer remains free to dismiss an employee at any time provided that reasonable notice of the termination is given. In providing the employee with reasonable notice, the employer has two options: either to require the employee to continue working for the duration of that period or to give the employee pay in lieu of notice: D. Harris, Wrongful Dismissal (1989 (loose-leaf)), at p. 3-10. There can be no doubt that if the employer opted to require the employee to continue working during the notice period, his or her earnings during this time would constitute wages or salary under s. 68(1) of the Act. The only difference between these earnings and pay in lieu of notice is that the employee receives a lump sum payment instead of having that sum spread out over the course of the notice period. The nature of those funds remains the same and thus s. 68(1) will also apply in these circumstances.

In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled: Sylvester v. British Columbia, 1997 CanLII 353 (SCC), [1997] 2 S.C.R. 315. The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. An award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay in lieu of notice. Therefore, in accordance with the exception which is carved out in s. 68(1) for "salary, wages or other remuneration", this money is not divisible among a bankrupt's creditors and does not vest in the trustee. The right of action is the means of attaining these damages and is similarly exempt.

[21] On the authority of Wallace, I conclude that, to the extent that the arbitrator's award relates to the pay Landry should have received in lieu of notice, the monies would constitute "wages" for the purpose of the s. 67(1)(b) exception. However, what is also clear from Wallace is that s. 67 must be considered in conjunction with s. 68. This brings us to the next question.

3. Is s. 67 superceded by the provisions of s.68 in relation to a bankrupt's wages?

[22] Two versions of s. 68 must be taken into account: the former version under the Bankruptcy Act that was considered in Wallace and the current version under the BIA which will be discussed shortly. There are two reasons why both versions must be examined. The first is that the former version and its interconnection with s. 67 was considered by the Supreme Court of Canada in Wallace and in Marzetti v. Marzetti, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765 and the question arises whether the reasoning in those cases applies to the new version. The second reason is that the trustee contends that the former version is applicable to this case since it was in force at the time Landry declared bankruptcy rather than the current version which was in force at the time the motion was brought. This latter argument forms the subject-matter of the next question on this appeal and will be dealt with later. I will now deal with the interpretation of s. 68 and its interconnection with s. 67.

a) The former s .68

[23] Section 68 under the Bankruptcy Act provided the trustee with the means to obtain part of a bankrupt's salary, wages or other remuneration from employment notwithstanding the provisions contained in s. 67(1). For our purposes, it is only necessary to consider s. 68(1) and I reproduce it again for convenience:

68.(1) Notwithstanding subsection 67(1), where a bankrupt

(a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing the bankrupt, or

(b) is in receipt of, or is entitled to receive from a person any money as payment for or commission in respect of any services performed by the bankrupt,

the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

[24] This provision was considered at length by the Supreme Court of Canada in Marzetti. The particular facts and a number of other issues in Marzetti are not relevant to our discussion. What is relevant to this case is the Court's consideration of the interconnection between s. 67[2] and s. 68. Iacobucci J., in writing for the court, set out the issue as follows (at 178):

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... I must determine whether s. 68 always controls the disposition of a bankrupt's wages. Is s. 68 a substantive provision, that is, one which always removes wages from the scope of s. 67, or does it simply create a procedural device for trustees?

[25] Following his analysis, he concluded as follows (at 185):

To summarize briefly, it is my opinion that the language of s. 68, the inferred purpose of that provision, and the decision of this Court in Vachon, supra, all support the conclusion that s. 68 is a substantive provision, one which is intended to operate as a complete code in respect of a bankrupt's salary, wages, or other remuneration. These forms of property cannot fall within s. 67(c) of the Bankruptcy Act as a bankrupt's after-acquired "property", and they cannot be considered "property of a bankrupt divisible among his creditors" for the purposes of s. 67. They do not vest in the trustee through the simple operation of law.

[26] Hence, the Supreme Court in Marzetti, and later in Wallace, has authoritatively determined that s. 68 supercedes the provisions of s. 67 in so far as "salary, wages or other remuneration" from employment are concerned. It follows that, if this provision is applicable to this case, the Ontario Wages Act does not apply and neither does any other part of s. 67. There is no automatic vesting of Landry's claim against First Air or of any part of the arbitrator's award. The trustee, and the court, must look exclusively to s. 68 to determine what part, if any, of the award will form part of the bankrupt's estate for distribution to the creditors. The question becomes, does the same interpretation apply to the current s. 68 under the BIA?

b) Section 68 under the BIA

[27] The current s. 68 in the BIA differs from the former version in a number of respects. The full text is appended to these reasons for ease of reference. First, the section does not refer to "salary, wages or other remuneration" but to "total income". "[T]otal income" is defined for the purpose of s. 68 as including, "notwithstanding s. 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source". The section still allows the trustee to apply to the court for a determination of the amount that a bankrupt is required to pay to the estate of the bankrupt out of her total income but an elaborate procedure must be followed before such an application is made. For our purposes, this procedure can be summarized as follows.

[28] First, the Superintendent is directed to establish standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living. Second, the trustee, having regard to these standards and to the personal and family situation of the bankrupt, must fix the amount that the bankrupt is required to pay, inform the official receiver of his decision and take reasonable measures to ensure that the bankrupt complies with the requirement to pay. Third, where the official receiver determines that the fixed amount is not in accordance with the applicable standards, the official receiver must recommend an appropriate amount. Fourth, where the trustee and the bankrupt disagree on the amount to be paid, the trustee must send to the official receiver a request that the matter be determined by mediation. A creditor can also make a request for mediation. Fifth, the mediation takes place in accordance with prescribed procedures.

[29] In addition to this procedure, an application may be made to the court under s. 68(10):

68. (10) Where

(a) the trustee has not implemented a recommendation made by the official receiver under subsection (5),

(b) the issue submitted to mediation requested under subsection (6) or (7) is not thereby resolved, or

(c) the bankrupt fails to comply with the requirement to pay as determined under this section,

the trustee may, or on the request of the inspectors, any of the creditors or the official receiver shall, apply to the court for the hearing of the matter, and the court may, on the hearing, in accordance with the standards established under subsection (1) and having regard to the personal and family situation of the bankrupt, by order, fix the amount that the bankrupt is required to pay to the estate of the bankrupt.

[30] In my view, the reasoning in Marzetti and Wallace that led to the conclusion that s. 68 was a complete code with respect to wages applies equally to this new section. The current provision applies to the "total income" of the bankrupt and, as such, is even wider than the earlier reference to "salary, wages and other remuneration"; the provision expressly excludes the application of s. 67(1)(b)[3]; its purpose is no different than that described in Marzetti (except that applications to the court now appear to be limited to those cases where the issue cannot be otherwise resolved); and the jurisprudential principles reviewed by the Supreme Court in Marzetti are equally relevant.

[31] I therefore conclude that s. 67 is superseded by the provisions of the current s.68 in so far as the "total income" of the bankrupt is concerned. It follows that, as in Wallace, Landry's claim against her former employer and any consequent award relating to lost wages do not automatically vest in the trustee under ss. 67 and 71. Resort can only be had to s. 68 for payment of any portion thereof to the estate of the bankrupt.

4. Which provision applies, the former s.68 which was in force at the time Landry declared bankruptcy, or the present s.68 which was in force at the time the trustee brought its motion?

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[32] In my view, the motions judge was correct in holding that the current s. 68 of the BIA applies to this motion. The following transition provision (S.C. 1997, c. 12, s. 60(2)) is relevant:

Subsection (1) [which re-enacted s. 68] applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force [April 30, 1998].

[33] A plain reading of the section would indicate that the trustee's motion under s. 68 itself is a proceeding within the meaning of that provision. Counsel could not articulate any policy reason why the new section should not apply.

[34] I therefore conclude that the current s. 68 under the BIA applies to this proceeding.

5. Is the trustee precluded from resorting to s. 68 after the discharge of the bankrupt?

[35] The motions judge held that s. 68 was no longer available to a trustee after the discharge of a bankrupt. First, the motions judge noted that s. 68 refers to "a bankrupt" and that s. 2 defined "bankrupt" as "a person who has made an assignment or against whom a receiving order has been made or the legal status of that person". Second, the motions judge held that the section was intended to apply in the period from the assignment in bankruptcy or the receivership order until the discharge of the bankrupt. He therefore concluded that s. 68 applied to a bankrupt and not to a discharged bankrupt.

[36] In my view, this interpretation cannot be supported.

[37] First, it disregards the fact that the definition of "bankrupt" does not only refer to "the legal status of [the] person" - since Landry has been discharged, it is correct to say that she is no longer in the state of bankruptcy, but also to "a person who has made an assignment" - a description that clearly applies to Landry.[4]

[38] Second, the motions judge erred in his interpretation of the scope of the section. Although, from a practical standpoint, s. 68 may apply more commonly to periodic wages received during the period of time between the assignment and the discharge, I see nothing in the language of the provision that restricts its application to this time frame. It is clear from Wallace and Marzetti that s. 68 applies because of the nature of the property in question, regardless of the timing of the acquisition of the property or of the fact that the payment is made in a lump sum.

[39] Third, I do not see any policy reason why, in situations such as in this case where the income is only to be received after the discharge, resort to s. 68 would nonetheless have to be made before the discharge. Indeed, given the procedure set out under s.68, it may be impossible to resort to its provisions before payment is made or at least its quantum ascertained. Further, if resort to s. 68 were to be limited to the pre-discharge period, the trustee or the creditors would likely oppose any discharge if any payment of income was still pending at the time the bankrupt applied for a discharge. I am therefore concerned that such an interpretation would have the effect of unnecessarily postponing discharges until the full administration of the estate is completed. In cases where there is pending litigation over the payment of such income, the delay in obtaining a discharge could prove quite substantial. This result, in my view would militate against the prompt rehabilitation of the bankrupt. Finally, such an interpretation runs contrary to the established principle and practice that the trustee's obligation to realize and distribute the estate of the bankrupt continues until the trustee is discharged regardless of the prior discharge of the bankrupt: see Re Salloum 1990 CanLII 2260 (BC CA), (1990), 1 C.B.R. (3rd) 204 (B.C.C.A.).

[40] I therefore conclude that the trustee is not precluded from resorting to s. 68 by the fact that Landry has been discharged.

6. Is the trustee precluded from resorting to s. 68 because the procedure set out thereunder has not been followed?

[41] The motions judge was correct in noting that, before an application can be made to the court under s. 68(10) to fix the amount of the bankrupt's income that is payable to the estate of the bankrupt, the trustee must bring himself under the terms of that provision. As discussed earlier, by its terms, s. 68(10) effectively limits the number of applications to the court to those cases where the issue has not otherwise been resolved by consent or mediation in accordance with the established procedure. In this case, of course, it was impossible for the trustee to have followed this procedure since the arbitrator's award was not yet ascertained. Once the arbitrator's decision is made, the trustee will be in a position to fix the amount which, in its view, must be paid to the estate and the balance of the procedure set out in s. 68 can follow its course. Hence, the trustee's motion, in so far as it purports to be made under s. 68(10), is simply premature.

[42] However, the trustee's motion was not made strictly under s. 68(10). It is apparent from the relief sought, which was mainly declaratory in nature, that the motion was brought with a view to preserving a potential asset in anticipation of a future determination of the parties' rights under s. 68. In my view, the motions judge erred in foreclosing any resort to s. 68 on the basis that the procedure set out thereunder had not been followed. At worst, the motion could have been dismissed as premature. However, in the circumstances of this case, it is my view that the motions judge should have exercised his discretion and directed that any monies awarded by the arbitrator to Landry as compensation for lost wages be paid into court until the resolution of the parties' respective rights under s. 68 or until further direction of the court. It is

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open to this court to make an order which could have been made by the motions judge and I would therefore make such an order.

7. Does the trustee have standing to intervene in the proceeding under the Canada Labour Code to claim Landry's costs incurred at the first hearing?

[43] The question whether it would even be within the arbitrator's power to award costs in relation to the first hearing is not before this court. The issue here is whether Landry's right, if any, to claim costs in the Canada Labour Code proceeding vests in the trustee. In my view, it does not.

[44] As stated earlier, on the authority of Wallace, Landry's claim against her former employer did not vest in the trustee upon her bankruptcy. Hence Landry had the right, as she did, to pursue her proceeding under the Canada Labour Code in her own name. Any right she may have to claim costs in relation to this proceeding is not an independent thing in action. Rather, it is simply a consequential right that may flow from the result. The trustee has not established any basis upon which it could intervene. I would not interfere with the motions judge's decision on this point.

F. Disposition

[45] I would therefore answer the questions as follows:

1. Does Landry's claim against First Air or any part of the resulting award constitute property of the bankrupt that vests in the trustee under ss. 67 and 71(2)of the BIA?

Yes but these provisions are superseded by s. 68 of the BIA.

2. If so, does any exemption apply pursuant to s. 67(1)(b) so as to except any part of the property from the estate of the bankrupt?

Yes but this exception is superceded by s. 68 of the BIA.

3. Is s. 67 superceded by the provisions of s. 68 in relation to a bankrupt's wages?

Yes.

4. If so, which provision applies, the former s. 68 which was in force at the time Landry declared bankruptcy, or the present s. 68 which was in force at the time the trustee brought its motion?

The current s. 68 under the BIA.

5. Is the trustee precluded from resorting to s. 68 after the discharge of the bankrupt?

No.

6. Is the trustee precluded from resorting to the current s. 68 because the procedure set out thereunder has not been followed?

No.

7. Does the trustee have standing to intervene in the proceeding under the Canada Labour Code to claim Landry's costs incurred at the first arbitration hearing?

No.

[46] For these reasons, I would allow the appeal, set aside Chadwick J.'s order, order that any monies awarded by the arbitrator to Landry as compensation for lost wages be paid into the bankruptcy court until the resolution of the parties' respective rights under s.68 or until further directions of that court. I would allow the trustee its costs of the motion and of the appeal against the estate of the bankrupt.

(signed) "Louise Charron J.A."

(signed) "I agree C. A. Osborne A.C.J.O."

(signed) "I agree K. M. Weiler J.A."

RELEASED: September 6, 2000

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APPENDIX

Section 68 of the Bankruptcy and Insolvency Act

68. (1) Directives re standard of living factors – The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

(2) Interpretation – For the purposes of this section,

(a) "total income" referred to in subsection (1) includes, notwithstanding paragraphs 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source; and

(b) a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1)(b) and (b.1).

(3) Trustee to fix amount to be paid – The trustee shall

(a) having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;

(b) inform the official receiver in writing of the amount fixed under paragraph (a); and

(c) take reasonable measures to ensure that the bankrupt complies with the requirement to pay.

(4) Modification by trustee – The trustee may, at any time, amend an amount fixed under subsection (3) to take into account

(a) material changes that have occurred in the personal or family situation of the bankrupt; or

(b) a recommendation made by the official receiver under subsection (5).

(5) Official receiver recommendation – Where the official receiver determines that the amount required to be paid by the bankrupt under subsection (3) or (4) is substantially not in accordance with the applicable standards established under subsection (1), the official receiver shall recommend to the trustee and to the bankrupt an amount required to be paid that the official receiver determines is in accordance with the applicable standards.

(6) Trustee may request mediation – Where the trustee and the bankrupt are not in agreement with the amount that the bankrupt is required to pay under subsection (3) or (4), the trustee shall, forthwith, in the prescribed form, send to the official receiver a request that the matter be determined by mediation and send a copy of the request to the bankrupt.

(7) Creditor may request mediation – On the request in writing of a creditor made within thirty days after the date of bankruptcy or an amendment referred to in subsection (4), the trustee shall, within the five days following the thirty day period, send to the official receiver a request in the prescribed form that the matter of the amount the bankrupt is required to pay under subsection (3) or (4) be determined by mediation and send a copy of the request to the bankrupt and the creditor.

(8) Mediation procedure – A mediation shall be in accordance with prescribed procedures.

(9) File – Documents contained in a file on the mediation of a matter under this section form part of the records referred to in subsection 11.1(2).

(10) Court determination – Where

(a) the trustee has not implemented a recommendation made by the official receiver under subsection (5),

(b) the issue submitted to mediation requested under subsection (6) or (7) is not thereby resolved, or

(c) the bankrupt fails to comply with the requirement to pay as determined under this section,

the trustee may, or on the request of the inspectors, any of the creditors or the official receiver shall, apply to the court for the hearing of the matter, and the court may, on the hearing, in accordance with the standards established under subsection (1) and having regard to the personal and family situation of the bankrupt, by order, fix the amount that the bankrupt is required to pay to the estate of the bankrupt.

(11) Fixing fair and reasonable remuneration in the case of related persons – The court may fix an amount that is fair and reasonable

(a) as salary, wages or other remuneration for the services being performed by a bankrupt for a person employing the bankrupt, or

(b) as payment for or commission in respect of any services being performed by a bankrupt for a person,

where the person is related to the bankrupt, and the court may, by order, determine the part of the salary, wages or other remuneration, or the part of the payment or commission, that shall be paid to the trustee on the basis of the amount so fixed by the court, unless it appears to the court that the services have been performed for the benefit of the bankrupt and are not of any substantial benefit to the person for whom they were performed.

(12) Modification of order – On the application of any interested person, the court may, at any time, amend an order made under this section to take into account material changes that have occurred in the personal or family situation of the bankrupt.

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(13) Default by other person – An order of the court made under this section may be served on a person from whom the bankrupt is entitled to receive money and, in such case,
(a) the order binds the person to pay to the estate of the bankrupt the amount fixed by the order; and
(b) if the person fails to comply with the terms of the order, the court may, on the application of the trustee, order the person to pay the trustee the amount of money that the estate of the bankrupt would have received had the person complied with the terms of the order.
(14) Application is a proceeding – For the purposes of section 38, an application referred to in subsection (10) is deemed to be a proceeding for the benefit of the estate.

---

[1] The trustee acknowledged before the motions judge that any award of damages relating to personal claims other than for loss wages would not form part of the bankrupt's estate: Re: Holley (1986), 59 C.B.R. (N.S.) 17 (Ont. C.A.).
[2] Section 67 which was in force at the time has been modified in the current BIA but the changes are not relevant to this analysis.
[3] The fact that the current version is not expressly stated to apply notwithstanding the whole of s.67 as the earlier version did is, in my view, of no consequence. The remaining rationale in Marzetti leads to the conclusion that s.68 is a complete code with respect to this kind of property.
[4] The BIA contains many provisions where the word "bankrupt" is used in relation to the post-discharge period. See for example s.180 where the BIA provides that "[w]here a bankrupt after his discharge fails to perform the duties imposed on him by this Act, the court may, on application, annul his discharge." It is evident that "bankrupt" here applies to a discharged bankrupt.

Re Anderson (Bankrupt), 2004 ABQB 349 (CanLII) - Personal Injuries Award as Income or Property of Bankrupt's Estate

Date:	2004-05-04
Docket:	Bk0397439
Parallel citations:	358 AR 183; [2005] 2 WWR 145; 2 CBR (5th) 27; 32 Alta LR (4th) 335
URL:	http://canlii.ca/t/1h1gs
Citation:	Re Anderson (Bankrupt), 2004 ABQB 349 (CanLII), <http://canlii.ca/t/1h1gs> retrieved on 2013-09-15
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Reflex Record	Related decisions, legislation cited and decisions cited

Court of Queen's Bench of Alberta
Citation: Re Anderson (Bankrupt), 2004 ABQB 349

Date: 20040504
Docket: Bk03 97439
Registry: Edmonton

In the Matter of the Bankruptcy of
DEBBIE LYNN ANDERSON

REASONS FOR DECISION
of
R. P. Wacowich, Registrar in Bankruptcy

Application:
[1] The trustee applied for an absolute discharge of the bankrupt Debbie Lynn Anderson. Counsel for a major creditor appeared to make representations that funds received by the bankrupt during the bankruptcy in settlement of a motor vehicle personal injury claim should be paid to the trustee as part of the bankrupt's estate.
Facts:

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[2] The bankrupt was injured in a motor vehicle accident on October 11, 1999. The matter was settled during the bankruptcy on March 8, 2004. The insurer's letter of settlement indicated the bankrupt received general damages of $65,000.00, loss of earnings capacity of $50,000.00, and past loss of earnings $30,000.00. There was a contingency fee of 25% so that the bankrupt received $37,500.00 for the loss of earning capacity and $22,500.00 for past loss of earnings. The creditor claims these funds should form part of the bankrupt's estate. They are currently in the trust account of the bankrupt's lawyer. The law is clear that the personal injury general damages do not form part of the bankrupt's estate and this was conceded by counsel for the creditor.

Issue:

[3] Do the heads of damage for loss of earning capacity and past loss of earnings constitute property or income under the Bankruptcy and Insolvency Act (the Act). If so, are they payable to the bankrupt's estate?

Discussion:

[4] Cases dealing with personal injury compensation received during a bankruptcy often begin their review with a reference to ***Re Hollister*** (1926) 7 C.B.R. 629 (Ont. S.C.). In that case Fisher J. stated at pages 630-631:

> The law is well settled that the Bankruptcy Act never intended to increase the assets of an insolvent for division amongst his creditors of moneys recovered in an action for personal injuries, as these moneys are awarded as damages to the debtor for his pain and suffering and loss of comfort of life, to pay his physicians, nurses and hospital expenses and to compensate him whilst he is incapacitated from earning a living for himself and his family. (See Ex parte Vine; In ***re Wilson*** (1878) 8 Ch. D. 364, 47 L.J. Bk. 116, 38 L.T. 73, 26 W.R. 582). It is only actions which relate directly to the bankrupt's property and can be converted into assets for payment of creditors that pass to the debtor's trustee. Causes of action arising from bodily or mental suffering such as actions for assault, seduction, criminal conversation and damages for personal injuries remain in the bankrupt.

[5] The issue of loss of income recovered in an action for damages arising out of personal injury was dealt with in ***Lang v. McKenna***, (1994) 27 C.B.R. 3d (Ont. Ct. of Justice) and in ***Re Bell*** (1996) 39 C.B.R. 3d 236 (B.C.S.C.). In ***Lang***, after quoting ***Hollister*** Pardu J. states at page 213:

> Moneys recovered for lost wages in a personal injury action arising out of a motor vehicle accident are monies paid to compensate a party while he is incapacitated from earning a living for himself and his family and thus do not form part of a bankrupt's estate. It would be inappropriate for me to depart from this long standing authority of ***Re Hollister*** where no reason has been advanced to do so and where no contrary authority has been referred to me.

[6] According to Pardu J. then, in this case the bankrupt would be entitled to the past loss of income as money paid to compensate her while she was incapacitated from earning a living. This would be equally true for the future loss of income.

[7] In ***Re Bell***, Wern J. of the B.C. Supreme Court dealt with a personal injury award to the bankrupt before discharge which included an amount for loss of wages. He reviewed Justice Pardu's decision in ***Lang*** and states at page 238:

> On my review of ***Re Hollister*** and particularly the other authorities relied on by counsel for the trustee, it cannot be said that the passage from ***Re Hollister*** relied on by Pardu J. is anything more than dicta, and certainly not, with respect, to be long standing authority. Every other authority distinguishes between an award for damage to property on the one hand and an award for damage to the person on the other, and placing an award for wage loss or compensation for diminished earning capacity in the former category.

[8] Wern, J. also refers at page 239 to Houlden and Morawitz on Bankruptcy Law of Canada where the authors state:

> It will be observed that there might be in an action for damages, two distinct causes of action, one for injuries to the bankrupt's property which would ultimately belong to the trustee and the other for personal injuries which belong to the bankrupt.

[9] Wern J. concludes by referring to a comment by Dickson J. in ***Andews v. Grand and Toy Alberta Ltd.*** 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 at 251:

> What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not the loss of earnings but, rather, loss of earning capacity for which compensation must be made . . . A capital asset has been lost: What was its value?

[10] In conclusion Wern J. states:

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> The award therefore was to compensate Mr. Bell for loss of or impairment of property, the capital asset called the capacity to earn, and accordingly the award rightly passed to the trustee to be distributed to the creditors.

[11] With respect, I do not agree that the loss of earnings capacity or past loss of earnings should be characterized as a capital asset. ***Andrews*** was not a case dealing with bankruptcy and this isolated quote from it should not be determinative of the issue in this case. I prefer the result in ***Lang*** but wish to further consider this issue.

[12] How should these awards be categorized for the purpose of the Act? In ***Marzetti v. Marzetti***, 1994 CanLII 50 (SCC), (1994) 20 Alta. L.R. (3d) 1 the Supreme Court of Canada considered whether an income tax refund should go to the estate of the bankrupt. The case was decided under the previous section 68(1) (amended in 1997) which stated :

> 68(1) Notwithstanding subsection 67(1), where a bankrupt
>
> (a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing, or using the services of, the bankrupt, in this section referred to as "employer", the trustee, if directed by the inspectors or creditors, shall apply to the court for an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine, having regard to family responsibilities and personal situation of the bankrupt.

[13] At the Court of Appeal of Alberta (1992) 14 C.B.R. 3d 127, Major J.A., as he then was, explained that:

> "The reality of this situation is that the income tax refund, in so far as it relates to employer withholdings, represents wages that otherwise would have been paid to the bankrupt". (p. 134)

[14] At the Supreme Court, Iacobucci J. references the above quote and states at p. 11 in reference to it:

> He buttressed his conclusion with dicta from *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.,* 1980 CanLII 186 (SCC), [1980] 1 S.C.R. 1182 ... But he also qualified his conclusion by stating (at p. 135):
>
> "I do not conclude that all tax refunds are wages. It depends on the nature of the refund. In this case the refund was a result of taxes deducted directly from wages. Tax refunds may arise in other ways and to be determined when that case arises."

[15] Iacobucci J. goes on to discuss the very wide definition of property in the Act and concludes that the tax refund is in fact property for the purposes of the Act. He concludes at page 27 of Marzetti that:

> . . . Section 68 governs in this case as a complete code. Marzetti's post bankruptcy income tax refund retain its character as wages for the purposes of section 68. The trustee could access the refund only through section 68 application. None was made.

As a result, the income tax refund did not form part of the bankrupt's estate.

[16] In ***Wallace v. United Grain Growers Ltd.*** 1997 CanLII 332 (SCC), (1997) 3 S.C.R.701, the Supreme Court dealt with a similar issue concerning a bankrupt who received an award of damages for wrongful dismissal. The Court reviewed the same section 68 of the Act that was reviewed in ***Marzetti.*** Iacobucci J. states at page 731.

> In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled; ***Sylvester v. British Columbia***, 1997 CanLII 353 (SCC), [1997] 2 S.C.R. 315. The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. An award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay in lieu of notice. Therefore, in accordance with the exception which is carved out in section 68(1) for, "salary, wages or other remuneration", this money is not divisible among the bankrupt's creditors and does not vest in the trustee. The right of action is the means of attaining these damages and is similarly exempt.
>
> In support of this finding, I note that several courts have interpreted the phrase "salary, wages or other remuneration" broadly. It has been held to include disability benefits (*Re Ali* (1987), 62 C.B.R. (N.S.) 64 (Ont. S.C.)), severance pay (*Re Giroux* (1983), 45 C.B.R. (N.S.) 245 (Ont. S.C.), and *Re Greening* (1989), 73 C.B.R. (N.S.) 24 (N.B.Q.B.)) and income tax refunds (Marzetti v. Marzetti, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765).

[17] Iacobucci J. goes on to say at page 732:

> Until alternative employment has been obtained, the wrongly dismissed employee will require funds to support him - or herself and his or her family. A damages award will satisfy this need, in essence, filling the pocket that would have otherwise been filled by salary or wages. If such an award is

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considered property divisible among a bankrupt's creditors that vests in the trustee, the bankrupt and his or her family may be deprived of essential income during a time of need. In my opinion, to remain true to the spirit of the Act, the words "salary, wages or other remuneration" in section 68(1) must include an award of damages for wrongful dismissal. .... To hold otherwise would run contrary to Parliament's intention to put the needs of family ahead of those of creditors.

[18] Section 68 was amended in 1997 effective 1998. The section now reads:

68(1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

(2) For the purposes of this section,

(a)"total income" referred to in subsection (1) includes, notwithstanding paragraphs 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source; and

(b)a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1)(b) and (b.1).

Trustee to fix amount to be paid

(3) The trustee shall

(a)having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;

(b)inform the official receiver in writing of the amount fixed under paragraph (a); and

(c)take reasonable measures to ensure that the bankrupt complies with the requirement to pay.

Modification by trustee

(4) The trustee may, at any time, amend an amount fixed under subsection (3) to take into account

(a)material changes that have occurred in the personal or family situation of the bankrupt; or

(b)a recommendation made by the official receiver under subsection (5).

. . . . .

Creditor may request mediation

(7) On the request in writing of a creditor made within thirty days after the date of bankruptcy or an amendment referred to in subsection (4), the trustee shall, within the five days following the thirty day period, send to the official receiver a request in the prescribed form that the matter of the amount the bankrupt is required to pay under subsection (3) or (4) be determined by mediation and send a copy of the request to the bankrupt and the creditor.

. . . . .

(10) Where

(a)the trustee has not implemented a recommendation made by the official receiver under subsection (5),

(b)the issue submitted to mediation requested under subsection (6) or (7) is not thereby resolved, or

(c)the bankrupt fails to comply with the requirement to pay as determined under this section,

the trustee may, or on the request of the inspectors, any of the creditors or the official receiver shall, apply to the court for the hearing of the matter, and the court may, on the hearing, in accordance with the standards established under subsection (1) and having regard to the personal and family situation of the bankrupt, by order, fix the amount that the bankrupt is required to pay to the estate of the bankrupt.

. . . . .

Application is a proceeding

(14) For the purposes of section 38, an application referred to in subsection (10) is deemed to be a proceeding for the benefit of the estate.

[19] The main thrust of the amendment was to do away with bankrupts being treated differently throughout Canada because of the different exemptions existing in different provinces relating to a bankrupt's wages and salary. The Superintendent now sets out directives to determine what amount is required for a bankrupt and the bankrupt's family over and above which a portion of the surplus income goes to the estate. However, the main thrust of the section has remained unchanged as Parliament continues to be concerned with the personal and family situation of the bankrupt in considering the amount to be paid to the estate. Also the section continues to allow the involvement of the Court to

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determine this amount where necessary. As it applies to this case, the section was not materially changed from the discussion of its predecessor in ***Marzetti*** and ***Wallace***.

Analysis

[20] The decision in ***Bell*** classifying these funds as a capital asset would lead to a result inconsistent with the spirit and intent of the Act. When a person is discharged from bankruptcy they no longer have to contribute to the estate. It is clear that any future income earned is entirely that of the discharged bankrupt. The evidence is that this bankrupt can no longer work and has been compensated accordingly for funds she would have otherwise received in the future. The future income is not a capital asset.

[21] Were it necessary, I would follow the analysis in ***Lang*** over that of ***Bell*** and hold that both heads of damages in issue go to the bankrupt. However, I prefer to approach my decision based on the support of ***Wallace*** and ***Marzetti***.

[22] Case law indicates why it was determined that there was a distinction between rights of action which recovered property damages as opposed to rights of action which recovered personal injury damages. In ***Rogers v. Spence***, (1844) 13 M. NW. 571, 153 E.R. 239, Lord Denman C.J. stated:

> As the object of the law is manifestly to benefit creditors, by making all the pecuniary means and property of the bankrupt available to their payment, it has, in furtherance of this object, been construed largely, so to pass, not only what in strictness, may be called the property and debts of the bankrupt, but also those rights of action to which it was entitled for the purpose of recovering, in specie, real or personal property, or damages in respect of that which has been unlawfully diminished in value, withheld, or taken from him; but causes of action not falling within this description but arising out of a wrong personal to the bankrupt, for which he would be entitled to remedy whether his property were diminished or impaired or not, are clearly not within the letter, and have never been held to be within the spirit of the enactments, even in cases where injuries of this kind have been accompanied or followed by loss of property.

[23] The bankruptcy laws are not meant or intended to require payments by the bankrupt to the estate after the bankrupt's discharge. To require payment of any of the amount of future loss of wages to the estate would bring about this result. Accordingly, while the future loss amount may be property it is not property, "that may be acquired by or devolved on him before his discharge." (s. 67(1)(c)) And even if it could be said to have been acquired or devolved on him before discharge, it may be said that this constitutes personal damages because without the injury to the bankrupt through the motor vehicle accident there would be no entitlement to this head of damage under her action. Accordingly, no portion of the future loss of income is payable to the estate.

[24] Also, both past and future loss are "salary or wages" under s. 68 and are part of "total income" (s. 68(2)(a)). Even if it could be said that the creditor's position on this application constitutes a request under s. 68 for the bankrupt to pay the funds in issue to the estate, I would deny that application.

[25] With regard to the past loss of income the period of time during which the bankrupt was in bankruptcy was 19 months. Counsel are agreed that the estate would be entitled to surplus income over the amount of $1,600.00 per month net to the bankrupt. Counsel for the bankrupt has calculated the amount per month paid from past loss of income by dividing $22,500.00 by 53 being the number of months from the time of the accident to the time of the application before me which resulted in a monthly income of $424.53. In whatever way this amount is calculated, I am satisfied that the amount for this period would not leave any portion available as surplus income available to the estate. Accordingly for the 19 months in bankruptcy the bankrupt would receive a monthly income of $424.53 x 19.

[26] The question then arises as to the 34 months of income prior to the assignment in bankruptcy. The bankrupt's disability left her in dire financial straights. She could not work. Her house was foreclosed and she wasn't able to stay for the entire redemption period because she could not afford to pay the utilities. It is clear to me that if she had these funds for the 34 months prior to her assignment these funds would have been easily and properly expended. She was receiving $402.00 per month social assistance so if she received the additional $424.53 she would have received a total monthly net income of $826.53.

[27] However, there is a simpler way to approach this. The funds received were a lump sum for past loss of income and were received during the bankruptcy as income. The bankrupt was entitled to receive $1,600.00 per month with any additional funds constituting surplus income. As such the bankrupt is entitled to wages or salary during the period of bankruptcy of 19 months x $1,600.00 or $30,400.00 less the social assistance of $402 per month or $7,638. Therefore she is entitled to $30,400 less $7,638 or $22,762 which is more than she received for past loss of income.

[28] This finding is in keeping with the ***Wallace*** and ***Marzetti*** cases where the Supreme Court indicates that Parliament has demonstrated an overriding concern for the support of families before wages become divisible among

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creditors under section 68. In total the bankrupt will receive after contingency fees including general damages, $108,750 from the settlement. Hardly a windfall for a person who is unable to work.

[29] The bankrupt is granted an absolute discharge and is entitled to the funds in question. All parties will bear their own costs unless spoken to within the next 30 days.

Heard on the 7th day of April, 2004.

Dated at the City of Edmonton, Alberta this 4th day of May, 2004.

R. P. Wacowich
Registrar in Bankruptcy

Appearances:
Rhonda Fox Miles
Fox-Miles & Associates Inc.
Trustee in Bankruptcy
Stephen J. Livingstone
McLennan Ross
Counsel for the Bankrupt
Mark Kirwin
Kirwin & Kirwin
Counsel for the Creditor

Chetty v. Royal Bank of Canada, 1995 CanLII 3939 (SK CA) - A Case of Contingent Revenue Realized Post-Discharge - Is it Bankrupt's "Property"

Date:	1995-01-04
Docket:	1767; 1772
Parallel citations:	121 DLR (4th) 297; [1995] 3 WWR 153; 31 CBR (3d) 161; 125 Sask R 249
URL:	http://canlii.ca/t/1mdkx
Citation:	Chetty v. Royal Bank of Canada, 1995 CanLII 3939 (SK CA), <http://canlii.ca/t/1mdkx> retrieved on 2013-09-13
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THE COURT OF APPEAL FOR SASKATCHEWAN

ROYAL BANK OF CANADA
BURLINGHAM ASSOCIATES INC. and
APPELLANTS
- and -
PAB CHINNAPPA CHETTY
RESPONDENT

CORAM:
The Honourable Mr. Justice Vancise
The Honourable Mr. Justice Wakeling
The Honourable Madam Justice Jackson

COUNSEL:
Mr. W. Matkowski for the Royal Bank
Ms. A. Hardy for the Trustee, Burlingham Associates Inc.
Mr. B. Rourke for the Respondent

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DISPOSITION:

Appeal Heard:	6 June 1994
Appeal Allowed:	4 January 1995
On Appeal From:	QB 7545/92, J.C. Saskatoon
Appeal File:	1767 & 1772
Reasons by:	The Honourable Mr. Justice Wakeling
In concurrence:	The Honourable Mr. Justice Vancise
	The Honourable Madam Justice Jackson

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WAKELING J.A.

This appeal raises the issue of what impact a discharge in bankruptcy has on professional fees contracted for prior to bankruptcy but paid after an absolute discharge has been obtained.

The facts, sufficient only to assess the problems that arise, are these. The appellant Pab C. Chetty (Chetty) practised law in Saskatoon and incurred several debts including a substantial debt to the Royal Bank for which he gave a general security interest on his assets and an assignment of his accounts receivable. Both were dated June 30, 1987 and registered under *The Personal Property Security Act*, S.S. 1979-80, c. P-6.1 ("*PPSA*"). The burden of his debts became so great that on May 12, 1992 Chetty made an assignment in bankruptcy and subsequently received an absolute discharge on March 8, 1993.

In 1990 Chetty had been retained by the Ray family to pursue a damage claim resulting from injuries suffered by the members of the family in an automobile accident. Chetty entered into a contingency agreement with respect to the claims of the three adult members of the Ray family. It subsequently became apparent that a conflict of interest had arisen between the adults and the children consequent upon a seatbelt issue and in November of 1990 Chetty made arrangements to have another solicitor, Dennis Quon, represent the interests of the children. A contingency agreement establishing Quon's fees was entered into between him and the infant plaintiffs. Chetty and Quon then entered into a further agreement to split between them any fees generated on both the adult's and the children's claims. The particulars of these agreements are not of consequence so are not detailed in this judgment.

Chetty moved to carry on his practice in B.C. shortly after May 1992 when he made the assignment in bankruptcy. Nonetheless, Chetty continued in his efforts on behalf of the adult Rays and in particular arranged for and attended meetings regarding settlement. He failed to disclose to the trustee that he had ongoing files and in particular did not disclose the Ray claims he was working on. The trustee, without knowledge of the prospect that these or any other fees might be paid, supported Chetty's application for an absolute discharge which was obtained on March 8, 1993.

In June of 1993, efforts at settlement of the Ray family claims were rewarded by an agreement paying substantial damages to the adults and infants. Under the terms of the contingency agreements, Chetty became entitled to a fee of $125,299.79 and when the trustee became aware of it he demanded it be paid to him as trustee rather than to Chetty. As a result, Quon paid this sum to the trustee and it is currently held as an asset in the Chetty bankruptcy estate. Upon becoming aware of this payment, the Royal Bank made demand for payment of its' claim based upon its general security and assignment of bank debts.

The trustee was prepared to pay the Bank's claim but before that was accomplished Chetty brought a motion seeking payment to him of the funds held by the trustee alleging that the Bank's security did not attach this money. The matter came before a Queen's Bench Judge who on January 20, 1994 gave judgment indicating that these funds were not property within the meaning of the *Bankruptcy and Insolvency Act*, R.S., 1985, c.B-3 (the *Act*) and further that the Bank had no interest in these funds under their security agreements. This decision has been appealed by both the Royal Bank and the Trustee and both appeals have been consolidated into this one appeal.

The issues which arise are these:

1. **Did the contracts under which the contingency fees were paid constitute property within the meaning of the *Act*?**
2. **If they were, did the fact they were paid after the absolute discharge prevent them from being part of the bankruptcy estate?**
3. **If the fees were part of the bankruptcy estate, was the security of the Royal Bank effective after the absolute discharge of the bankrupt?**

There were other related issues raised by the appellants but they fall to be addressed in a general way when dealing with the above issues.

The answers to these issues would seem to require a review of what the *Act* describes as "property" and the impact a discharge has on the use and control of this property by the trustee.

Property is defined in s. 2 of the *Act* in this way:

> "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property.

This is a very broad description designed to catch every conceivable type of asset. Indeed, the general scheme of the *Act* is to include virtually all assets and then to exclude certain specific assets from distribution to the creditors as is provided in s. 67(1):

> 67 (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person,

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(*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

The control of these assets is then vested in the trustee by virtue of s.71(2):

71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

The chamber judge took the view that the contract to pay professional fees to the appellant was not property of the bankrupt within the meaning of the *Act*. He found the employment of a solicitor is a contract for personal services, different from other forms of employment in that it involves a selection of a solicitor for his or her personal skills and experience, it involves special aspects of confidentiality and calls for performance of services which could not be carried out by the trustee. Further, these fees were payable on a contingency basis so they might never be paid. Only when they were payable could the fees be described as property and this did not occur in this case until after Chetty had received his absolute discharge.

There is no doubt that there are authorities which support the chamber judge's conclusion that a contract for personal services is not property within the meaning of the *Act*. These include comments contained in cases such as: *Stead Lumber Company Limited v. Lewis* (1959-60), 37-38 C.B.R. 24; *Re Szatmari* (1974), 18 C.B.R. (N.S.) 309 (Ont. S.C.); *Re Goldman* (1982), 43 C.B.R. N.S. 30.

However, none of these cases contain an explanation of how a contract for personal services escapes inclusion in the definition of property which is so all inclusive under the *Act* that it is hard to conceive of an interest that has been left out. True, the definition does not specifically include a contract to pay professional fees, but surely that contract is caught up by a phrase such as "every description of property, whether real or personal, legal or equitable". And if that phrase doesn't cover such a contract, then s. 67(1) seems to take up any slack when it includes "any property wherever situated" and "such powers . . . in respect of the property as might have been exercised by the bankrupt for his own benefit." The definition of property is so complete you would expect that if a contract for personal services was intended to be excluded, you would find it mentioned in s.67(1) where the exclusions are specifically identified. The breadth of the definition of "property" in the *Act* has been recently commented upon by the Supreme Court of Canada in *Marzetti v. Marzetti*, 1994 CanLII 50 (SCC), [1994] 7 W.W.R. 623 at 635 and 636.

There is no doubt the contacts are accurately described as contracts of personal service for it is accepted that the trustee could not act as counsel for the Rays in place of the bankrupt Chetty, but why is that a telling factor? Chetty could have sold and disposed of his interest in his files to another lawyer as ever so many lawyers on retiring have done for one reason or another. I see no reason why the trustee could not do the same thing. Nor does the fact some files might be profitable and others unprofitable make them any less an item of commerce. I expect a lawyer interested in purchasing the files of another lawyer such as Chetty would assess and value each file and in so doing would apply a discount factor relative to the prospect of the client continuing to engage the services of the purchasing lawyer. The purchaser of a file would also assess the prospect of a successful result in a contingency contract. When one knows that a lawyer's files have commercial value, it is hard to rationalize why any one of them taken singly does not constitute an item of property.

The most that can be said is that traditionally the exemption for personal service contracts seems to have received judicial recognition. However, as a consequence of this apparent lack of logical consistency in the recognition of the special exemption granted personal service contracts, it seems appropriate to investigate the foundation for this exemption to determine if it remains applicable.

A useful starting point involves a more detailed consideration of *Stead Lumber Company Limited v. Lewis* (*supra*) at p. 34 which was primarily relied upon by the chamber judge. The quotation included in his judgment is as follows:

Rights under contracts where the personal skill or conduct of the bankrupt forms a material part of the consideration, which the trustee cannot perform on behalf of the bankrupt do not pass. As regards those contracts which the trustee can perform, he may elect either to adopt or disclaim them (2 Halsbury's Laws of England 3rd ed. p. 427).

This quotation seems to place reliance upon the dependability of the old and established *Halsbury's Laws of England* (3d ed.) which had this to say on the subject of personal service contracts in vol. 2 at p. 427:

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> Thus all rights under contracts which would pass as part of the bankrupt's personal estate to his personal representatives if he had died, pass to the trustee, but rights under contracts where the personal skill or conduct of the bankrupt forms a material part of the consideration (*p*), which the trustee cannot perform on behalf of the bankrupt, such as a contract to marry or to render personal services or to paint a picture or to write a book, do not pass (*q*).

The footnotes giving support for this statement include in *Re Shine, Ex Parte Shine*, [1982] 1 Q.B. 522 (C.A.) which related to payments made to a bankrupt actor for his services on the stage. It was acknowledged he could not be compelled to provide these services and obviously the trustee could not do so in his stead. However, the court held that when the actor did honour the contract the compensation he received, if not wages, was certainly income and subject to payment to the trustee for settlement of his debts.

Another footnote reference was *Bailey v. Thurston & Co., Limited*, [1903] 1 K.B. 137 (C.A.). This case dealt with a bankrupt architect who had commenced action on his own for breach of his employment contract without joining the trustee or getting the trustee's consent to conduct the action. The defendant contended the action could not be brought by the bankrupt, but only by his trustee and the trustee could not do so as he was not an architect and therefore no one was in a position to enforce the contract. All three judges on this appeal agreed that a contract of personal services such as this did not pass to the trustee on bankruptcy as he could not provide the professional services called for in the contract. However, each of them also concluded the fruits of the action taken by the bankrupt architect would pass to the trustee if he intervened to received them. Stirling L.J. said this at p. 145:

> Such a contract is incapable of assignment, and in my opinion it is impossible to hold that it would vest in the trustee on the bankruptcy occurring. Two cases—*Emden v. Carte* [17 Ch.D. 169, 768] and *Wadling v. Oliphant* [1 Q.B.D. 145] — were relied on to support the view that the plaintiff could not recover in this action; but they seem to me to decide no more than that the trustee may intervene and claim the damages which the plaintiff has recovered.

Cozens-Hardy L.J. had this to say on the subject at p. 146:

> If, however, at the date of the bankruptcy a sum of money is due in respect of services rendered under the contract, the trustee and not the bankrupt will take the money. But as to future services, the bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation.

The most recent edition of *Halsbury's* (4th ed.) retains exactly the same comment relating to contracts for personal services as referred to above, but the footnote instead of referring to decided cases for its authority, indicates:

> An order with respect to salary or income under a contract for personal services may be made, as with any other income, under the Insolvency Act 1986 s 310: see para 437 et seq post. [footnote 4, p. 223]

I take it from the above, that the situation remains basically unchanged in that there are no new decisions on the point, but the 1986 *Insolvency Act* in England has made it clear that earnings from personal services contracts are subject to an order for payment to the trustee in just the same way as any other earnings.

I return to the Canadian cases referred to by the chamber judge. The *Stead Lumber* case of 1957 referred to earlier involves a rather vague and uncertain building contract which the bankrupt completed and thereby avoided a complication the trustee did not wish to be involved in. The trial judge so stated at p. 35:

> I consider that in fact there was not an abandonment of the contract but that there was a variation thereof as a result of the bankruptcy, which prevented Kelland from carrying on business. The trustee's assent was given to his finishing this work on a basis that would permit him to retain his earnings and would save the trustee from involving the estate in any liability.

The case therefore adds little if anything to the law as set forth in *Halsbury's* which is quoted in the judgment.

R. v. Szatmari considered the issue of personal service contracts in the context of fees earned by a psychiatrist after his assignment in bankruptcy. Houlden J. concluded there was a difference in law between wage earnings and fees for professional services. He concluded the fees did not accrue to the trustee and he had this to say at p. 312:

> As I pointed out in *Re Rasky* (1971), 14 C.B.R. (N.S.) 296 (Ont.), I can see no reason why the earnings of a self-employed professional man should not be capable of being attached by a trustee as is the case in respect of a wage earner; however, this is not the law.

The issue was again considered in *Re Goldman* which dealt with legal fees earned after an assignment in bankruptcy and a claim by the Royal Bank to such funds under an assignment of accounts receivable which the case dealt more with the right of the Royal Bank, a secured creditor, to appear on an application for the discharge of the bankrupt than it does with a personal service contract, it does accept and affirm *Szatmari*. Henry J. had this to say at 32:

> In the present case, apart from all other general considerations, the income that the bankrupt earns from his professional services rendered after the date of the bankruptcy, according to the jurisprudence, is not

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> after-acquired property to which the trustee is entitled; see in this respect *Re Rasky* (1969), 13 C.B.R. (N.S.) 199 (Ont. S.C.), and *Re Szatmari*, [1972] 2 O.R. 348, 18 C.B.R. (N.S.) 309, 25 D.L.R. (3d) 508 (S.C.). As Houlden J. (as he then was) clearly indicated in the *Szatmari* case that proposition, notwithstanding any other reading of ss. 147 and 148 of the Bankruptcy Act, is the law.

To this point, I have referred only to those cases relied upon by the chamber judge, but I would also like to go one step further to consider the more recent decision of *Wallace v. United Grain Growers Ltd.*, reflex, (1993) 82 Man. R. (2nd) 253 (Man. Q.B.). In that case, Lockwood J. at p. 263 included in his judgment the following quotation from *Bailey v. Thurston & Co.* [1903] 1 K.B. 137:

> It has been established for many years that, notwithstanding the generality of the language used in the **Bankruptcy Acts**, there are some contracts and some rights that do not vest in the trustee. For the present purpose it is sufficient to mention contracts for purely personal service. Such unexecuted contracts are not assignable by deed, and they are not, by virtue of the statute, vested in the trustee. If, however, at the date of the bankruptcy a sum of money is due in respect of services rendered under the contract, the trustee and not the bankrupt will take the money. But as to future services, the bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation. It is clear that the plaintiff's contract of service did not pass to the trustee. The plaintiff continued to act as traveller for the defendants after the bankruptcy . . ."

And then went on to say:

> [55] UGG submits that **Bailey** has not been followed anywhere in Canada, although no cases directly on point were cited. It is true that there is no mention of **Bailey** in Houlden.

After further consideration of *Bailey* and the other cases, he then concluded that the definition of property was now more extensive than in former acts and therefore a contract for personal services was property which vested in the trustee and the consent of the trustee was required to enable the bankrupt to sue for recovery under such a contract.

What seems to me to result from a review of the cases relating to personal service contracts, is that there has developed a general misconception that they are not property of the bankrupt because they are incapable of assignment. It is obvious these contracts cannot be enforced by a trustee who cannot for example, paint the picture or provide the architectural services the contract calls for, but that does not equate to the contract being exempt property. If the bankrupt artist paints the picture or the bankrupt architect performs the architectural service, then the amount received for such services is the property of the trustee to be held for the benefit of the creditors. The general misconception that there was a complete exemption for personal service contracts apparently originated with the way the subject was dealt with in *Halsbury's*, which stated that a contract for personal services doesn't pass to the trustee, rather than stating that it cannot be enforced by the trustee. The cases referred to in the footnote in *Halsbury's*, make it clear that the unexecuted personal service contract was the property of the bankrupt and was not enforceable by the trustee for the very practical reason that he did not possess the skill contracted for. However, once executed, the benefit of the contract which resulted from the actions of the bankrupt passed to the trustee.

Perhaps there is no need to put too fine a point on these matters, for if one wishes to retain the notion a personal services contract can't be property if it is not a contract the trustee can perform, then it matters little so long as it becomes property subject to the claim of the trustee when the contract has been performed by the bankrupt. The net result is the same no matter what route is travelled to reach it.

This misunderstanding of what property passed to the trustee seems to have carried through to fees paid to professionals. Because it is a contract of personal service, it somehow escaped passing to the trustee while wages did not. That has apparently now been clarified by legislation in England (see the footnote in *Halsbury's* 4th ed. referred to earlier) and in this country by the recent *Bankruptcy and Insolvency Act*. Section 68.(1) provides as follows:

> 68.(1) Notwithstanding section 67(1), where a bankrupt
>
> . . .
>
> (*b*) is in receipt of, or is entitled to receive from a person any money as payment for or commission in respect of, any services performed by the bankrupt,
>
> the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

The authors of Houlden and Morawetz at p. 192 in their text *Bankruptcy and Insolvency Act 1994* confirm that now professional earnings are to be treated no differently than other wages as a result of this amendment:

> Section 68(1)(*b*) greatly extends this scope of the section. Under the former s. 68 if a bankrupt was self-employed, such as a dentist, no order could be made under s. 68. Now an order can be made attaching such earnings. [p. 192, ss. 69-69.5]

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I mention the amendments not to indicate my conclusions are dependent upon them, but to show fees and wages are now on a parity not previously recognized.

The net result, as I perceive it, is that contracts of personal service are property of the bankrupt, but they are not contracts which the trustee can take advantage of, and as such differ in this respect from other contracts. The trustee cannot compel the bankrupt to perform the contract, but if the contract is performed, then the benefits accrue to the trustee and in any event the trustee may elect to intervene as he may do with any after-acquired property, and in such case the fruits of the contract form part of the bankrupt's estate.

In this case, the relevant dates are as follows, the contracts between Chetty and the Rays were entered into in February of 1990, the further contract with Quon was entered into in December of 1990, the assignment in bankruptcy was made in May 1992, the bankrupt received a discharge on March 8, 1993, the settlement of the action which created the fees was made in June of 1993 and the trustee intervened to claim the fees which were received by Chetty in November 1993.

Certain conclusions are readily apparent from this synopsis of the facts: (1) the contracts for personal services were in existence before the date of the bankruptcy; (2) these agreements were executory contracts, the benefit of which would normally pass to the trustee; (3) the trustee could not avail himself of the benefit of the personal service contracts; (4) if Chetty performed them, the trustee was entitled to the benefits or at the very least to lay claim to the benefits the bankrupt would receive. Thus, the fees in question were, subject to considering the effect of the discharge of the bankrupt Chetty, properly payable to the trustee as part of the bankrupt's estate.

This leaves for consideration the effect of the absolute discharge which was granted before the fees became payable. Chetty alleges this discharge freed him from any further responsibility for payment of the bankruptcy debts. This is not the general scheme established by the *Bankruptcy and Insolvency Act* and the trustee continues to be responsible for the administration of the estate until all assets, including after-acquired property, are appropriately made available for the benefit of a bankrupt's creditors.

There is not a definition of after acquired property in the *Act* but I doubt whether this payment is properly so categorized. The money was received after Chetty had made his assignment but it arose from the performance of a contract entered into before the assignment. There is nothing to be gained by analyzing this issue as no matter how it is categorized it is subject to being claimed by the trustee as was the case here.

The next issue is whether the security held by the Royal Bank was invalidated by Chetty's absolute discharge. This Court in *Andrew v. Farmstart*, 1988 CanLII 217 (SK CA), [1989] 2 W.W.R. 127, made it clear that an absolute discharge in bankruptcy does not prevent a secured creditor from pursuing its security. Sherstobitoff J.A. at pp. 141 and 142 had this to say:

> The appellant also argued that the discharge of the appellant as a bankrupt extinguished his debt to the respondent by reason of s.148(2) [now s.178(2)] of the Act, which says that an order of discharge releases the bankrupt from all claims provable in bankruptcy (subject to certain exceptions which do not concern us). Such an argument was dealt with in *Pelyea* at p. 388:
>
> > As to the respondent's first submission, what is extinguished by s.135(2) [now s.148(2)] of the *Bankruptcy Act* in the case of a secured creditor is the debt owing by the debtor at the time of the bankruptcy, not the security which was validly in existence at the date of the bankruptcy. It remains a valid security that the creditor is entitled to realize on or have valued pursuant to the provisions of ss. 40(2), 86 and 87 [now s.49(2), 98 and 99] of the Act, and the debt owing by the bankrupt, in so far as s.135(2) is concerned, is the balance remaining of the original debt after the security has been realized and applied on account or valued.
>
> See also *Boe v. Boe*, reflex, [1988] 6 W.W.R 122, 70 C.B.R. (N.S.) 38 (Sask. Q.B.); *Pisiak v. Dyck* (1986), 63 C.B.R. (N.S.) 151, 32 D.L.R.) (4th) 287, 56 Sask. R. 107 (sub nom. *Pisiak v. Dyck (Bankrupt)*) (Q.B.); and *C.I.B.C. v. Woodgrove Hills Dev. Ltd.* (1982), 43 C.B.R. (N.S) 239 (Ont. H.C.). A secured creditor may realize upon his security after discharge of the bankrupt.

In summary, the contingency fee agreements with the Rays and Quon represented property of Chetty when he made an assignment in bankruptcy. The payment of the fees due under these agreements, though made after an absolute discharge had been granted to Chetty, was nonetheless part of the bankruptcy estate available for distribution. Finally, the Royal Bank is entitled to enforce its security agreement against this asset of the bankrupt.

The appeal therefore succeeds. The order of the chamber judge is set aside and an order shall go in the above terms. The appellants will each have costs of the appeal on double Column V.

DATED at the City of Regina in the Province of Saskatchewan this 4th day of January 1995.

_____

WAKELING J.A.

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Saulnier v. Royal Bank of Canada, 2008 SCC 58, [2008] 3 SCR 166 - Government Licences as "Property" of a Bankrupt

Date:	2008-10-24
Docket:	31622
Parallel citations:	2008 SCC 58 (CanLII); 271 NSR (2d) 1; 298 DLR (4th) 193; 50 BLR (4th) 1; 48 CBR (5th) 159
URL:	http://canlii.ca/t/218cz
Citation:	Saulnier v. Royal Bank of Canada, 2008 SCC 58 (CanLII), [2008] 3 SCR 166, <http://canlii.ca/t/218cz> retrieved on 2013-08-24
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SUPREME COURT OF CANADA

CITATION: Saulnier *v.* Royal Bank of Canada, [2008] 3 S.C.R. 166, 2008 SCC 58

DATE: 20081024
DOCKET: 31622

BETWEEN:
Benoit Joseph Saulnier and
Bingo Queen Fisheries Limited
Appellants
and
Royal Bank of Canada, WBLI Inc., in its capacity as receiver of Benoit Joseph Saulnier and Bingo Queen Fisheries Limited, and Goodman Rosen Inc., in its capacity as Trustee in bankruptcy of Benoit Joseph Saulnier
Respondents
- and -
Attorney General of Canada, Seafood Producers Association of Nova Scotia, Groundfish Enterprise Allocation Council, BC Seafood Alliance, Canadian Association of Prawn Producers and Fisheries Council of Canada
Interveners
CORAM: McLachlin C.J. and Bastarache,* Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 53) Binnie J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

* Bastarache J. took no part in the judgment.

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Saulnier *v.* Royal Bank of Canada, [2008] 3 S.C.R. 166, 2008 SCC 58

Benoit Joseph Saulnier and
Bingo Queen Fisheries Limited *Appellants*

v.

Royal Bank of Canada, WBLI Inc., in its capacity as Receiver of Benoit Joseph Saulnier and Bingo Queen Fisheries Limited, and Goodman Rosen Inc., in its capacity as Trustee in bankruptcy of Benoit Joseph Saulnier *Respondents*

and

Attorney General of Canada, Seafood Producers Association of Nova Scotia, Groundfish Enterprise Allocation Council, BC Seafood Alliance, Canadian Association of Prawn Producers and Fisheries Council of Canada *Interveners*

Indexed as: Saulnier *v.* Royal Bank of Canada
Neutral citation: 2008 SCC 58.

File No.: 31622.

2008: January 23; 2008: October 24.

Present: McLachlin C.J. and Bastarache,* Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for nova scotia court of appeal

Bankruptcy and insolvency — Property — Commercial fishing licences — Fisher signing general security agreement with bank — Fisher subsequently making assignment in bankruptcy — Whether fisher's commercial fishing licences constitute "property" within scope of bankruptcy and insolvency legislation and within scope of personal property security legislation — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2 "property" — Personal Property Security Act, S.N.S. 1995-96, c. 13, s. 2(w), (ad).

S holds four fishing licences. In order to finance his fishing business, he signed a General Security Agreement ("GSA") with a bank, as well as a guarantee for the debts of his company. The company entered into a parallel GSA. The GSAs gave the bank a security interest in "all . . . present and after acquired personal property including . . . Intangibles . . . and in all proceeds and renewals thereof". In 2004, the fishing business faltered and S made an assignment in bankruptcy. The following year, the receiver and the trustee in bankruptcy signed an agreement to sell the four licences and other assets to a third party for $630,000, but S refused to sign the necessary documents. The trustee in bankruptcy and the bank brought an application for declaratory relief. S claimed that the commercial fishing licences did not constitute "property" available to a trustee under the federal *Bankruptcy and Insolvency Act* ("*BIA*"), or to a creditor who has registered a GSA under the Nova Scotia *Personal Property Security Act* ("*PPSA*"). For different reasons, both the trial judge and the Court of Appeal rejected this position.

Held: The appeal should be dismissed.

The task in this case is to interpret the definitions of "property" in s. 2 of the *BIA* and of "personal property" in s. 2 of the *PPSA* in a purposeful way having regard to their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. A fishing licence is unquestionably a major commercial asset. The holder of such a licence, issued at the discretion of the Minister of Fisheries and Oceans under s. 7(1) of the *Fisheries Act*, obtains a good deal more than merely permission to do that which would otherwise be unlawful. A s. 7(1) licence confers to the holder a right to engage in an exclusive fishery under the conditions imposed by the licence, and a proprietary right in the fish harvested and the earnings from their sale. The subject matter of the licence, coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to a common law *profit à prendre* which is undeniably a property right. While these elements of the licence do not wholly correspond to the full range of rights necessary to characterize something as "property" at common law, the issue is whether they are sufficient to qualify the "bundle of rights" conferred on S as property for the purposes of the *BIA* and *PPSA*. [16] [23] [28] [34] [43]

In an industry where holding one of a very restricted number of licences is a condition precedent to participation, the licence unlocks the value in the fishers' other marine assets. While "commercial realities" cannot legitimate wishful thinking about the notion of "property" in the *BIA* and the *PPSA*, these statutes are largely commercial instruments which should be interpreted in a way best suited to enable them to accomplish their respective commercial purposes. [14] [42]

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The *BIA* is intended to achieve certain objectives in the event of a bankruptcy which require, in general, that non-exempt assets be made available to creditors. The s. 2 definition of "property" in the *BIA* should be construed accordingly to include a s. 7(1) licence. Parliament unambiguously signalled an intention to sweep up a variety of assets of the bankrupt not normally considered "property" at common law, and this intention must be respected if the purposes of the *BIA* are to be achieved. It is important to look at the substance of what is conferred, namely a licence to participate in the fishery coupled with a proprietary interest in the fish caught according to its terms and subject to the Minister's regulations. While it is true that the proprietary interest in the fish is contingent on the fish first being caught, the existence of that contingency is contemplated in the *BIA* definition and is no more fatal to the licence's proprietary status for *BIA* purposes than is the case with an equivalent contingency arising under a *profit à prendre*. It follows that the trustee was entitled to require S to execute the appropriate documentation to obtain a transfer of the fishing licences to the third party purchaser. [44] [46-47] [49]

A holding that a fishing licence is property in the hands of the holder for limited statutory purposes does not fetter the Minister's discretion under the *Fisheries Act* to issue, renew or cancel a fishing licence, according to the exigencies of the management of the fisheries. [48]

The fishing licence is also "personal property" within the meaning of s. 2 of the *PPSA*. The definition of "intangible" in that section includes an interest created by statute having the characteristics of a licence coupled with an interest at common law. The grant by the Minister of a licence, coupled with a proprietary interest in the fish caught, is thus sufficient to satisfy the *PPSA* definition. The registration is therefore valid to include the s. 7(1) licence and, in the absence of any other *PPSA* defence, the bank is entitled to proceed with its *PPSA* remedies. [51-52]

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Personal Property Security Act, S.N.S. 1995-96, c. 13, ss. 2(w), (ad).

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APPEAL from a judgment of the Nova Scotia Court of Appeal (Bateman, Hamilton and Fichaud JJ.A.) 2006 NSCA 91 (CanLII), (2006), 246 N.S.R. (2d) 239, 780 A.P.R. 239, 271 D.L.R. (4th) 34, 21 B.L.R. (4th) 1, 22 C.B.R. (5th) 38, 10 P.P.S.A.C. (3d) 221, [2006] N.S.J. No. 307 (QL), 2006 CarswellNS 323, 2006 NSCA 91, affirming in part a decision of Kennedy C.J.S.C. 2006 NSSC 34 (CanLII), (2006), 241 N.S.R. (2d) 96, 767 A.P.R. 96, 17 C.B.R. (5th) 182, [2006] N.S.J. No. 38 (QL), 2006 CarswellNS 41, 2006 NSSC 34. Appeal dismissed.

Andrew S. Nickerson, Q.C., for the appellants.

Carl A. Holm, Q.C., and *Christian Weisenburger*, for the respondents.

Peter M. Southey and *Christine Mohr*, for the intervener the Attorney General of Canada.

Richard F. Southcott and *Andrea F. Baldwin*, for the interveners the Seafood Producers Association of Nova Scotia, the Groundfish Enterprise Allocation Council, the BC Seafood Alliance, the Canadian Association of Prawn Producers and the Fisheries Council of Canada.

The judgment of the Court was delivered by

[1] BINNIE J. — The question raised by this appeal is whether a commercial fishing licence, which enables a fisher to engage in a regulated industry where participation is otherwise prohibited, constitutes "property" available to a trustee under the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), or a creditor who has registered a General Security Agreement ("GSA") under the Nova Scotia *Personal Property Security Act*, S.N.S. 1995-96, c. 13 ("*PPSA*").

[2] The appellant, a bankrupt commercial fisherman, and his wholly owned company, the appellant Bingo Queen Fisheries Limited, say that a fishing licence is merely a "privilege" to do that which would otherwise be illegal. As such, it does not pass to the respondent Royal Bank under the GSA which the appellants signed, nor to the respondent trustee in bankruptcy. In the result, they say, the appellant Saulnier, who holds the four fishing licences in question, is entitled to carry on fishing despite the bankruptcy, leaving the creditors to fight over the remaining assets. Without the licences the assets do not come close to covering the liabilities.

[3] The appellants were unsuccessful in the courts of Nova Scotia. The trial judge based his decision on "commercial reality". The Nova Scotia Court of Appeal agreed in the result but declined to base its decision on "commercial reality". Instead it looked to the rights acquired by the holder of a fishing licence to the earnings from the catch, and to the administrative law principles which the court felt would govern the exercise of the Minister's discretion in any application for renewal or transfer of the licence under the federal *Fishery (General) Regulations*, SOR/93-53 ("*Regulations*"). Collectively, in its opinion, the components of this "bundle of rights" invested the licence holder with property-like rights sufficient to bring the licences within the bankruptcy regime and the *PPSA*.

[4] For different reasons, and on a more limited basis, I also agree that the appeal must be dismissed.

I. Facts

[5] The appellant Saulnier holds four fishing licences (lobster, herring, swordfish and mackerel). Like most fishers, he required loans to finance his business. Accordingly, in April 1999, he signed a GSA with the Royal Bank. In January 2003, he signed a guarantee (limited to $215,000) to the Royal Bank for the debts of the appellant Bingo Queen, a company of which he was the sole owner. At that time, Bingo Queen also entered into a GSA. The standard form GSA gave the Bank a security interest in: "all . . . present and after acquired personal property including . . . Intangibles . . . and in all proceeds and renewals thereof". The GSA also specified that the term "intangible" would be interpreted according to its definition in the *PPSA*. The GSA contemplated a listing of specific property in Schedule C but in the case of both GSAs in question Schedule C was left blank.

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[6] In 2004, the appellants' fishing business faltered. As of July 6, Mr. Saulnier owed the Bank $120,449, and Bingo Queen owed $177,282. On July 8, Saulnier made an assignment in bankruptcy. His Statement of Affairs under the *BIA* showed liabilities of $400,330, of which about $250,000 was owed to the Royal Bank. The trial judge found that according to the evidence, Saulnier's four fishing licences had a market value in excess of $600,000. This amount, if available to creditors, would be sufficient to discharge all debts and provide a surplus.

[7] On November 18, 2004, four months after the bankruptcy, Saulnier purported to lease his lobster licence to Horizon Fisheries Limited, whose principal owner was his common law spouse. In March 2005, the receiver and the trustee in bankruptcy signed an agreement to sell Saulnier's fishing licences and other assets to a third party for $630,000 (the sale was conditional on the trustee being able to effect a transfer of the licences). Saulnier refused to sign the necessary documents. The trustee in bankruptcy and the Royal Bank brought the present application for declaratory relief.

II. Relevant Statutory Provisions

[8] *Fisheries Act*, R.S.C. 1985, c. F-14

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

. . .

9. The Minister may suspend or cancel any lease or licence issued under the authority of this Act, if

(*a*) the Minister has ascertained that the operations under the lease or licence were not conducted in conformity with its provisions; and

(*b*) no proceedings under this Act have been commenced with respect to the operations under the lease or licence.

Fishery (General) Regulations, SOR/93-53

2. . . .

"document" means a licence, fisher's registration card or vessel registration card that grants a legal privilege to engage in fishing or any other activity related to fishing and fisheries;

. . .

16. (1) A document is the property of the Crown and is not transferable.

(2) The issuance of a document of any type to any person does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

2. . . .

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

. . .

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Personal Property Security Act, S.N.S. 1995-96, c. 13

2. In this Act,

. . .

(w) "intangible" means personal property that is not goods, a document of title, chattel paper, a security, an instrument or money;

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. . .

(ad) "personal property" means goods, a document of title, chattel paper, a security, an instrument, money or an intangible;

III. Judicial History

A. *Supreme Court of Nova Scotia* 2006 NSSC 34 (CanLII), (2006), 241 N.S.R. (2d) 96, 2006 NSSC 34

[9] Kennedy C.J.S.C. found that "the fair and correct approach is to characterize the federal fishing licences based on the reality of the commercial arena" (para. 49). He added that "[t]o accept the argument . . . that there can be no property in these licences in the hands of the holder, because of ministerial control would . . . foster an unrealistic legal condition based on an historic definition of property that ignores what is actually happening in the commercial world that the law must serve" (para. 53). In his view, the bundle of rights conferred by the licences "constitute marketable property capable of providing security" (para. 54) and also "property for purposes of the *BIA*" (para. 57).

B. *Nova Scotia Court of Appeal (Bateman, Hamilton and Fichaud JJ.A.)* 2006 NSCA 91 (CanLII), (2006), 246 N.S.R. (2d) 239, 2006 NSCA 91

[10] Fichaud J.A., writing for the court, found that while commercial reality and the market value attached to licences "may be a determinant in the accounting or appraisal contexts" (para. 17), the legal issue should be determined with reference to the definitions of "property" and "personal property" in the *BIA* and the *PPSA*.

[11] Based on his consideration of ss. 2 and 16(1) of the *Regulations*, he concluded that the licence itself is the property of the Crown, and not of the holder. However, "during the term of a license, a licensee has a beneficial interest in the earnings from use of the license. That interest, and the right to those earnings, pass to the trustee in bankruptcy of the license holder" (para. 38). An important issue, in his view, was whether Mr. Saulnier had any rights relating to the renewal or reissuance of his licences, and whether these rights pass to the trustee. He considered it important that the holder of a fishing licence not only had the right to request a renewal but a right not to be arbitrarily denied it. In these circumstances

> [t]he license holder has a legally recognized right — limited though it may be — that constitutes intangible personal property. . . . The security holder or trustee in bankruptcy takes the license holder's limited legal right or beneficial interest. The security holder or trustee takes [it] subject to all the risks of non-renewal that applied to the license holder — i.e. non-renewal on grounds that are not arbitrary. This ensures that the interest of the security holder or trustee in bankruptcy does not degrade the regulatory scheme of the [fisheries] legislation . . . . [para. 49]

[12] Fichaud J.A. cited cases in which bad-faith ministerial decisions had given rise to damages or had been judicially reviewed by the courts including *St. Anthony Seafoods Limited Partnership v. Newfoundland and Labrador (Minister of Fisheries and Aquaculture)* (2004), 245 D.L.R. (4th) 597, 2004 NLCA 59. On the strength of these decisions, he found that "[a] legal right to damages or to set aside a ministerial decision is, in my view, intangible personal property under the broad definition in s. 2 of the *BIA*" (para. 52). Moreover, while "[t]he *PPSA*'s framework to define 'intangible' is less substantial than in the *BIA*", the result concerning the fishing licences is the same (para. 61). The holder's rights in the fishing licences are also personal property ("intangibles") for the purposes of the *PPSA*, in his view.

IV. Analysis

[13] A commercial fisher with a ramshackle boat and a licence to fish is much better off financially than a fisher with a great boat tied up at the wharf with no licence. Financial institutions looking for readily marketable loan collateral want to snap up licences issued under the federal *Regulations*, which in the case of the lobster fishery can have a dockside value that fluctuates up to a half a million dollars or more. Fishers want to offer as much collateral as they can to obtain the loans needed to acquire the equipment to enable them to put to sea.

[14] The Minister's claim to more or less unfettered discretion to renew or not to renew fishing licences each year is based on the legislation as interpreted in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 399 (SCC), [1997] 1 S.C.R. 12. In that case, Major J. wrote for the Court:

> Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). Licensing is a tool in the arsenal of powers available to the Minister under the *Fisheries Act* to manage fisheries. [para. 37]

Nevertheless, the fact is that the stability of the fishing industry depends on the Minister's predictable renewal of such licences year after year. Few fishers expect to see their loans paid off with the proceeds of a single year's catch. In an industry where holding one of a very restricted number of licences is a condition precedent to participation, the licence unlocks the value in the fishers' other marine assets.

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[15] Yet the appellants are correct to say that just because a "right" or "power" to fish has commercial value, it does not follow that licences also constitute property within the scope of the *BIA* or *PPSA*. Earlier trial level decisions in Nova Scotia had held that fishing licences were not property and were not claimable by the trustee in bankruptcy. See e.g. *Jenkins, Re* 1997 CanLII 808 (NS SC), (1997), 32 C.B.R. (4th) 262 (N.S.S.C.), and *Townsend, Re* 2002 CanLII 37699 (NS SC), (2002), 32 C.B.R. (4th) 318 (N.S.S.C.). We cannot wish away the statutory language, however, much practical sense is reflected in the result reached by the courts below.

A. *A Question of Statutory Interpretation*

[16] The questions before the Court essentially raise a dispute about statutory interpretation. We are not concerned with the concept of "property" in the abstract. The notion of "property" is, in any event, a term of some elasticity that takes its meaning from the context. The task is to interpret the definitions in the *BIA* and *PPSA* in a purposeful way having regard to "their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 1). Because a fishing licence may not qualify as "property" for the general purposes of the common law does not mean that it is also excluded from the reach of the statutes. For particular purposes Parliament can and does create its own lexicon.

[17] In determining the scope of the definition of "property" in a statutory context, it is necessary to have regard to the overall purpose of the *BIA*, which is to regulate the orderly administration of the bankrupt's affairs, keeping a balance between the rights of creditors and the desirability of giving the bankrupt a clean break: *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453, at para. 7. The exemption of designated property from distribution among creditors under s. 67(1) is to allow the bankrupt to continue a living pending discharge and, when discharged, to make a fresh start. Those exemptions do not, it seems to me, bear much similarity to the proposed "exempting" of a valuable asset such as a commercial fishing licence. If Saulnier had "sold" his licences prior to discharge the cash proceeds would, it seems, be after-acquired property that would be divided amongst his creditors under s. 67(1)(*c*) of the *BIA*.

[18] Within this overall purpose an appropriate interpretation must be given to the following definition of "property" in s. 2 of the *BIA*:

> "property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

[19] The *PPSA*, on the other hand, is designed to facilitate the creation of a security interest to enable holders of personal property to use it as collateral, and to enable lenders to predict accurately the priority of their claims against the assets in question.

> Proceeding from the premise that all security agreements are designed to accomplish the same end and that borrowers usually have little bargaining power, the PPSA prescribes a detailed system for the regulation of default rights and remedies which is designed to provide consistency and fairness in the enforcement of security interests.
>
> (J. S. Ziegel, B. Geva and R. C. C. Cuming, *Commercial and Consumer Transactions: Cases, Text and Materials* (3rd ed. 1995), vol. III, at p. 18)

To the same effect see *C.I.B.C. v. Marathon Realty Co.*, reflex, [1987] 5 W.W.R. 236 (Sask. C.A.), at p. 247, and *Credit Suisse Canada v. 1133 Yonge Street Holdings Ltd.* 1998 CanLII 6857 (ON CA), (1998), 41 O.R. (3d) 632 (C.A.).

[20] Within that overall purpose, an interpretation must be given to the somewhat circular definitions given in s. 2 of the *PPSA*:

> (w) "intangible" means personal property that is not goods, a document of title, chattel paper, a security, an instrument or money;
>
> . . .
>
> (ad) "personal property" means goods, a document of title, chattel paper, a security, an instrument, money or an intangible;

[21] Of course a creditor/lender who enters into a security agreement that is not registerable under the *PPSA* may still have contractual rights against the borrower. However, the objective of lenders is to achieve priority (or to know in advance what priority they *can* achieve) over other claimants. Otherwise a miscreant could enter into a series of unregistered financing agreements purporting to use and re-use the same boat and licence as collateral.

B. *The Interest Conferred by a Fishing Licence*

[22] The fishery is a public resource. The fishing licence permits the holder to participate for a limited time in its exploitation. The fish, once caught, become the property of the holder. Accordingly, the fishing licence is more than a

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"mere licence" to do that which is otherwise illegal. It is a licence coupled with a proprietary interest in the harvest from the fishing effort contingent, of course, on first catching it.

[23] It is extremely doubtful that a simple licence could itself be considered property at common law. See generally A. M. Honoré, "Ownership", in A. G. Guest, ed., *Oxford Essays in Jurisprudence* (1961). On the other hand, if not property in the common law sense, a fishing licence is unquestionably a major commercial asset.

[24] Successive Ministers of Fisheries have issued policies underscoring their support for stability in the fishing industry, which necessitates continuity in the ranks of licence holders. Despite a policy favouring stability and continuity, the Minister's *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* seeks to guard against any notion that such licences should be read as conferring a property interest on licence holders, which could possibly impose a fetter on the exercise of the Minister's "absolute discretion" in their issuance. Thus s. 5(a) of the Licensing Policy states:

> A "licence" grants permission to do something which, without such permission, would be prohibited. As such, a licence confers no property or other rights which can be legally sold, bartered or bequeathed. Essentially, it is a privilege to do something, subject to the terms and conditions of the licence.

The Minister's statement of policy expresses a departmental position that has no regulatory status and which, in the eye of the law, does not add to or subtract from his "absolute discretion" under s. 7(1) of the *Fisheries Act* to issue licences. Nor does this informal policy determine whether the licence can be construed as "property" for the purposes of the *BIA* and *PPSA*. The reality, as found by the courts below, is that the commercial market operates justifiably on the assumption that licences can be transferred on application to the Minister with the consent of the existing licence holder, that licences will be renewed from year to year, and that the Minister's policy will not be changed to the detriment of the existing licence holders. Thus, despite the Minister's protestations, the market attributes a high market value to what might otherwise be seen, as some of the cases put it, as a "transitory and ephemeral" right.

[25] The jurisprudence indicates a number of different approaches.

(i) The Traditional "Property" Approach

[26] The appellants rely on the decision of the Ontario Court of Appeal in *Re National Trust Co. and Bouckhuyt* reflex, (1987), 61 O.R. (2d) 640. In that case, the court dismissed the trust company's claim that a valuable tobacco quota listed in a chattel mortgage could properly be made the subject of Ontario *PPSA* registration. Cory J.A., as he then was, referred to some traditional indicia of rights of property and concluded that renewal of the tobacco quota year to year was subject to the "unfettered discretion of the [Tobacco B]oard" and that the quota itself was "transitory and ephemeral" (pp. 647-48). Accordingly, the quota did "not constitute intangible personal property as that term is utilized" in the Ontario *PPSA* (p. 649). The Quebec Court of Appeal reached a similar conclusion under the *BIA* in relation to a fishing licence in *Noël (Syndic) (Re)*, [1994] Q.J. No. 978 (QL).

[27] The *Bouckhuyt* approach has been followed in some of the Ontario *PPSA* cases; see e.g. *Canadian Imperial Bank of Commerce v. Hallahan* reflex, (1990), 69 D.L.R. (4th) 449 (Ont. C.A.), and *Bank of Montreal v. Bale* (1992), 4 P.P.S.A.C. (2d) 114 (Ont. C.A.), but it has been criticized as insufficiently sensitive to the particular context of personal property security legislation, which (so the critics say) commands a broader concept of intangible property if the purposes of that legislation are to be achieved. See e.g. J. S. Ziegel and D. L. Denomme, *The Ontario Personal Property Security Act: Commentary and Analysis* (1994), at pp. 41-42. As discussed below, more recent cases have tended to restrict *Bouckhuyt* to its facts. Even in the "regulatory cases" the courts now adopt a more purposeful approach to the definitions in the *BIA* and in personal property security legislation, and consider traditional common law notions of property as less of a stumbling block to recognition of licences and quotas as "property" for statutory purposes. I agree with this evolution.

[28] In any event, there is a significant difference between a quota (as in *Bouckhuyt*) and a fishing licence, which bears some analogy to a common law *profit à prendre* which is undeniably a property right. A *profit à prendre* enables the holder to enter onto the land of another to extract some part of the natural produce, such as crops or game birds (B. Ziff, *Principles of Property Law* (2nd ed. 1996), at pp. 333-34; *The Queen in Right of British Columbia v. Tener*, 1985 CanLII 76 (SCC), [1985] 1 S.C.R. 533; M. J. Mossman and W. F. Flanagan, *Property Law: Cases and Commentary* (2nd ed. 2004), at p. 545). Equally, a "profit of piscary" (being a type of *profit à prendre*) is recognized as a property right to fish in the privately owned waters of another.

[29] Fichaud J.A. in the court below noted numerous cases where it was held that "during the term of a license the license holder has a beneficial interest to the earnings from his license" (para. 37). See also: *Waryk v. Bank of Montreal* 1991 CanLII 945 (BC CA), (1991), 85 D.L.R. (4th) 514 (B.C.C.A.), at pp. 521-24; *British Columbia Packers Ltd. v. Sparrow*, 1989 CanLII 2706 (BC CA), [1989] 4 C.N.L.R. 63 (B.C.C.A.), at p. 68; *Buston v. Canada*, reflex, [1993] 2 C.T.C. 2720 (T.C.C.), at pp. 2733-34. This is another way of expressing substantially the same idea. The earnings flow from the catch which is lawfully reduced to possession at the time of the catch, as is the case with a *profit à prendre*.

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[30] Some analytical comfort may be drawn in this connection from the observations of R. Megarry and H. W. R. Wade on *The Law of Real Property* (4th ed. 1975), at p. 779:

> A licence may be coupled with some proprietary interest in other property. Thus the right to enter another man's land to hunt and take away the deer killed, or to enter and cut down a tree and take it away, involves two things, namely, a licence to enter the land and the grant of an interest (a profit *à prendre*) in the deer or tree.

And at p. 822:

> A right to "hawk, hunt, fish and fowl" may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned.

(See also *Kelly v. Kelly* (1990), 92 A.L.R. 74 (H.C.); *Pennington v. McGovern* (1987), 45 S.A.S.R. 27 (S.C.).)

[31] The analogy of a commercial fishing licence to the *profit à prendre* has already been noted by the High Court of Australia in *Harper v. Minister for Sea Fisheries* (1989), 168 C.L.R. 314. In that case a challenge was made to the authority of the Tasmanian government to issue a licence to fish for abalone, *inter alia*, in the Australian fishing zone beyond the coastal waters of the state of Tasmania. The facts are far removed from our case, as is the relevant statutory regime, yet of interest are the observations of Brennan J. with whom Dawson, Toohey and McHugh JJ. concurred:

> A fee paid to obtain such a privilege is analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no resource to which a right of access is obtained by payment of the fee. [p. 335]

[32] The concurring judgment of Mason C.J., Deane and Gaudron JJ. pointed out that notwithstanding its resemblance in some respects to a *profit à prendre*, the fishing licence is nevertheless a statutory creation:

> What was formerly in the public domain is converted into the exclusive but controlled preserve of those who hold licences. The right of commercial exploitation of a public resource for personal profit has become a privilege confined to those who hold commercial licences. This privilege can be compared to a profit à prendre. In truth, however, it is an entitlement of a new kind created as part of a system for preserving a limited public natural resource . . . . [p. 325]

[33] In my view these observations are helpful. A fishing licence is, no doubt, a creature of the *Fisheries Act* and its *Regulations*. Our Court has already emphasized the broad scope and discretion of the Minister in relation to such licences in *Comeau's Sea Foods*. Nevertheless, there are important points of analogy between the fishing licences issued to the appellant Saulnier and the form of common law property called a *profit à prendre*, which may include a profit of piscary. If the question were whether a fishing licence *is* a *profit à prendre*, the answer would almost certainly be no. But that is not the question. The question before us is whether the fishing licences thus conceived can satisfy the statutory definition of the *BIA* and *PPSA*, purposefully interpreted.

[34] My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature. It is thus reasonably within the contemplation of the definition of "property" in s. 2 of the *BIA*, where reference is made to a "profit, present or future, vested or contingent, in, arising out of or incident to property". In this connection the property in question is the fish harvest.

[35] Of course, the holder's rights under a fishing licence are limited in time, place and the manner of their exercise by the *Fisheries Act* and *Regulations*. To say that the fishing licence is *coupled* with a proprietary interest does not encumber the Minister's discretion with proprietary fetters. The analogy used for present purposes does not prevail over the legislation. The licence is no more and no less than is described in the relevant legislation. Nevertheless, during its lifetime, however fragile, the fishing licence clearly confers something more than a "mere" permission to do something which is otherwise illegal.

(ii) The Regulatory Approach

[36] *Bouckhuyt* resulted in a line of cases in which licences and quotas were held to be intangible property (or not) according to the degree of renewal discretion vested in the issuing authority. In *Sugarman (in trust) v. Duca Community Credit Union Ltd.* 1999 CanLII 800 (ON CA), (1999), 44 O.R. (3d) 257 (C.A.), the court distinguished *Bouckhuyt* on the basis that the authority issuing nursing home licences was bound to grant licences to operators that qualified, with little discretion to refuse, and an administrative appeal procedure in the event issuance or renewal *was* refused. See also *Foster (Re)* reflex, (1992), 89 D.L.R. (4th) 555 (Ont. Ct. (Gen. Div.)), at pp. 564-65. The Nova Scotia Court of Appeal in the present case adopted a variant of the "regulatory" approach in holding that a licence holder's ability to request a renewal or reissuance of a licence to its designate, and to resist an arbitrary denial by the Minister, forms part of a "bundle of rights" which collectively constitute a type of property in which a security interest can be taken. A

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somewhat similar approach was taken in the English case of *Re Rae*, [1995] B.C.C. 102, where the Court of Chancery held that a Minister's stated policy of renewing licences (similar to the policy in Canada) created what the Minister herself described as an "entitlement" sufficient to bring the fishing licence into the bankrupt's estate. It should be noted, however, that under the English legislation, unlike the Canadian legislation, a licence is issued "in respect of a named vessel", and the court was therefore able to say that the licence was an interest "incidental to property, namely his vessels" (p. 113).

[37] In my view, the debate about the extent to which licences are "transitory and ephemeral" is of limited value. A lease of land for one day or one hour is undeniably a property interest, as is a lease terminable at pleasure. A third party may be willing to pay "key money" to take over a shop lease that is soon to expire in the expectation (reasonable or not) that a renewal will be forthcoming. Uncertainties of renewal do not detract from the interest presently possessed by the holder, but nor does an expectation of renewal based on a Minister's policy which could change tomorrow, transform a licence into a property interest.

[38] A difficulty with the "regulatory approach" is that there are no clear criteria to determine how much "fetter" on the issuing authority's discretion is enough to transform a "mere licence" into some sort of interest sufficient to satisfy the statutory definitions in the *BIA* and the *PPSA*. In *Bouckhuyt*, the fetters on the authority issuing tobacco quota were considered too weak, the discretion too great, to qualify the tobacco quota as Ontario *PPSA* "property". In *Sugarman* and *Foster* the "fetters" placed on the issuing authorities of nursing home licences and taxi licences, respectively, were thought to be enough to confer a proprietary interest within the terms of the Ontario *PPSA*. The regulatory frameworks in all three cases were different to be sure, but at what point does a licence that does not qualify under personal property security legislation become transformed into a qualifying licence? See generally T. Johnson, "Security Interests in Discretionary Licences Under the *Ontario Personal Property Security Act*" (1993), 8 *B.F.L.R.* 123, at p. 240; J. S. Ziegel, "Regulated Licences and the OPPSA: No End in Sight to the Judicial Imbroglio" (1998), 30 *Can. Bus. L.J.* 284, at p. 284. The cases do not suggest an answer. No doubt criteria will emerge more clearly as cases that rely on a "regulatory approach" evolve. In this respect, however, I do not believe the "judicial review" paradigm offered by the Nova Scotia Court of Appeal in this case is helpful. The *Regulations* permit *anyone* to apply for a fisheries licence and *everyone* is entitled to a ministerial decision that complies with procedural fairness. I cannot agree that these elements are capable, as such, of constituting a licence "property" in the hands of a holder.

[39] In any event, I agree with the observation adopted by Major J. in *Comeau's Sea Foods* that he could not find in the fisheries legislation any legal underpinning for the "vesting" of an interest in a licence "beyond the rights which it gives for the year in which it was issued" (para. 33). See also *Joliffe v. The Queen*, reflex, [1986] 1 F.C. 511 (T.D.), at p. 520; *Bennett, Re* (1988), 67 C.B.R. (N.S.) 314 (B.C.S.C.); *Ward (Bankrupt), Re* reflex, (2000), 229 N.B.R. (2d) 121 (Q.B.), and *Dugas, Re* (2004), 50 C.B.R. (4th) 200, 2004 NBQB 200. To the extent the regulatory cases are considered relevant here they do not assist the appellants, in my opinion. Section 7(1) of the *Fisheries Act* says that the Minister's discretion is "absolute".

[40] However, I do not believe the prospect of renewal, whether or not subject to an "unfettered" discretion, is determinative. For present purposes the appellants do not have to prove a renewal or even the reasonable prospect of it. The question under the *PPSA* is whether the holder (in this case the appellant Saulnier) had a qualifying interest in the licence either *at the time he entered into a GSA* with the Royal Bank in April 1999, or at the time the Bank sought to realize on Saulnier's after-acquired property, and the question under the *BIA* is whether he had a qualifying interest within the meaning of that Act *when he made an assignment in bankruptcy* on July 8, 2004.

(iii) The "Commercial Realities" Approach

[41] This approach is well illustrated by the trial decision of Kennedy C.J.S.C. in this case, who put the argument succinctly:

> That evidence confirms my understanding, that on the east coast of Canada fishing licenses, particularly for lobster, are commonly exchanged between fishermen for a great deal of money.
>
> Fishing vessels of questionable value are traded for small fortunes because of the licences that are anticipated to come with them.
>
> . . .
>
> To ignore commercial reality would be to deny creditors access to something of significant value in the hands of the bankrupt. That would be both artificial and potentially inequitable. [paras. 51-52 and 58]

Similar views have been expressed in other licensing contexts: see *Saskatoon Auction Mart Ltd. v. Finesse Holsteins* (1992), 4 P.P.S.A.C. (2d) 67 (Sask. Q.B.); *G. Slocombe & Associates Inc. v. Gold River Lodges Ltd.* 2001 BCSC 840 (CanLII), (2001), 2 P.P.S.A.C. (3d) 324, 2001 BCSC 840, at para. 8; and the English cases of *Re Celtic Extraction Ltd.*, [2000] 2 W.L.R. 991 (C.A.), at p. 1000, and *Swift v. Dairywise Farms Ltd.*, [2000] 1 W.L.R. 1177 (Ch.).

[42] The criticism of this approach is that many things that have commercial value do not constitute property, while the value of some property may be minimal. There is no necessary connection between proprietary status and

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commercial value. See generally T. G. W. Telfer, "Statutory Licences and the Search for Property: The End of the Imbroglio?" (2007), 45 *Can. Bus. L.J.* 224, at p. 238. I agree with the Court of Appeal that "commercial realities" cannot legitimate wishful thinking about the notion of "property" in the *BIA* and the *PPSA*, although commercial realities provide an appropriate context in which to interpret the statutory provisions. The *BIA* and the *PPSA* are, after all, largely commercial statutes which should be interpreted in a way best suited to enable them to accomplish their respective commercial purposes.

(iv) The Preferred Approach

[43] As described above, the holder of a s. 7(1) licence acquires a good deal more than merely permission to do that which would otherwise be unlawful. The holder acquires the right to engage in an exclusive fishery under the conditions imposed by the licence and, what is of prime importance, a proprietary right in the wild fish harvested thereunder, and the earnings from their sale. While these elements do not wholly correspond to the full range of rights necessary to characterize something as "property" at common law, the question is whether (even leaving aside the debate about the prospects of renewal) they are sufficient to qualify the "bundle of rights" the appellant Saulnier *did* possess as property for purposes of the statutes.

(a) *Fishing Licences Qualify as Property Within the Scope of Section 2 of the BIA*

[44] For ease of reference I repeat the relevant part of s. 2:

> "property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

The terms of the definition are very wide. Parliament unambiguously signalled an intention to sweep up a variety of assets of the bankrupt not normally considered "property" at common law. This intention should be respected if the purposes of the *BIA* are to be achieved.

[45] Reliance was placed on s. 16 of the *Regulations* which provides that a fishing licence is a "document" which is "the property of the Crown and is not transferable". From this it was inferred that the licence, in its commercial dimension, is declared by the *Regulations* to be a property right in the hands of the Crown. I think s. 16 merely says that the *Regulations* contemplate that the *documentation* of the licence (as opposed to the licence itself) is the property of the Crown, in the same way that a Canadian Passport is declared to be the property of the Crown, not the holder: *Veffer v. Canada (Minister of Foreign Affairs)*, 2007 FCA 247 (CanLII), [2008] 1 F.C.R. 641, 2007 FCA 247, at para. 6. A fisher whose licence is suspended or revoked cannot refuse the Minister's demand for a return of the documentation on the basis the Minister gave it to him and it is now his property.

[46] I prefer to look at the substance of what was conferred, namely a licence to participate in the fishery coupled with a proprietary interest in the fish caught according to its terms and subject to the Minister's regulation. As noted earlier, the *BIA* is intended to fulfill certain objectives in the event of a bankruptcy which require, in general, that non-exempt assets be made available to creditors. The s. 2 definition of property should be construed accordingly to include a s. 7(1) fishing licence.

[47] It is true that the proprietary interest in the fish is contingent on the fish first being caught, but the existence of that contingency is contemplated in the *BIA* definition and is no more fatal to the proprietary status for *BIA* purposes than is the case with the equivalent contingency arising under a *profit à prendre*, which is undeniably a property interest.

[48] Counsel for the Attorney General of Canada was greatly concerned that a holding that the fishing licence is property in the hands of the holder even for limited statutory purposes might be raised in future litigation to fetter the Minister's discretion, but I do not think this concern is well founded. The licence is a creature of the regulatory system. Section 7(1) of the *Fisheries Act* speaks of the Minister's "absolute discretion". The Minister gives and the Minister (when acting properly within his jurisdiction under s. 9 of the Act) can take away, according to the exigencies of his or her management of the fisheries. The statute defines the nature of the holder's interest, and this interest is not expanded by our decision that a fishing licence qualifies for inclusion as "property" for certain statutory purposes.

[49] It follows that in my view the trustee was entitled to require the appellant Saulnier to execute the appropriate documentation to obtain a transfer of the fishing licences to the third party purchaser.

[50] It may well be that in the course of a bankruptcy the fishing licence will expire, or has already expired. If so, the trustee will have the same right as the original holder of an expired licence to go to the Minister to seek its replacement, and has the same recourse (or the lack of it) if the request is rejected. The bankrupt can transfer no greater

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rights than he possesses. The trustee simply steps into the shoes of the appellant Saulnier and takes the licence "warts and all".

(b) *The Fishing Licence Is Also "Personal Property" Within the Meaning of Section 2 of the PPSA*

[51] I repeat, for convenience, the relevant *PPSA* definitions:

> (w) "intangible" means personal property that is not goods, a document of title, chattel paper, a security, an instrument or money;
>
> . . .
>
> (ad) "personal property" means goods, a document of title, chattel paper, a security, an instrument, money or an intangible;

The definition of "intangible" simply describes something that otherwise constitutes "personal property" but is not one of the listed types of *tangible* personal property. "Intangible" would include an interest created by statute having the characteristics of a licence coupled with an interest at common law as in the case of a *profit à prendre*. Again, to repeat, I do not suggest that a fishing licence constitutes a *profit à prendre* at common law, for clearly there would be numerous conceptual objections to such a characterization. Our concern is exclusively with the extended definitions of "personal property" in the context of a statute that seeks to facilitate financing by borrowers and the protection of creditors. In my view the grant by the Fisheries and Oceans Minister of a licence coupled with a proprietary interest as described above is sufficient to satisfy the *PPSA* definition.

[52] In this respect, the registration is therefore valid to include the s. 7(1) fishing licence and, in the absence of any other *PPSA* defence, the respondent bank is entitled to proceed with its *PPSA* remedies.

V. Disposition

[53] For these reasons I would uphold the result of the decision of the courts below and dismiss the appeal with costs in this Court to the respondents.

Appeal dismissed with costs.

Solicitors for the appellants: Nickerson Jacquard, Yarmouth.

Solicitors for the respondents: Wickwire Holm, Halifax.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the interveners the Seafood Producers Association of Nova Scotia, the Groundfish Enterprise Allocation Council, the BC Seafood Alliance, the Canadian Association of Prawn Producers and the Fisheries Council of Canada: Stewart McKelvey, Halifax.

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* Bastarache J. took no part in the judgment.

Norkus Estate v. Direct Rental Centre (West) Ltd., 2001 ABCA 233 (CanLII) Interaction between Prov. PPSA, Civil Enforcement Act and BIA on Capturable Bankrupt's Property

Date:	2001-09-19
Docket:	9703-0554AC
Parallel citations:	299 AR 39; 205 DLR (4th) 651; [2002] 2 WWR 264; 18 BLR (3d) 214; 29 CBR (4th) 50; 97 Alta LR (3d) 213
URL:	http://canlii.ca/t/dw9
Citation:	Norkus Estate v. Direct Rental Centre (West) Ltd., 2001 ABCA 233 (CanLII), <http://canlii.ca/t/dw9> retrieved on 2013-09-13
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Norkus (Estate of) v. Direct Rental Centre (West) Ltd., 2001 ABCA 233

Date: 20010919

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Docket: 9703-0554AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE McFADYEN
THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MR. JUSTICE BERGER

IN THE MATTER OF THE BANKRUPTCY OF
JAMES ALAN NORKUS
No.#60347
IN THE MATTER OF THE BANKRUPTCY OF
SHELLY JEAN NORKUS
No.#60348
BETWEEN:

A. C. WARING & ASSOCIATES INC.
Trustee of the Estates of JAMES ALAN NORKUS
and SHELLY JEAN NORKUS

Appellant

- and -

DIRECT RENTAL CENTRE (WEST) LTD.

Respondent

- and -
THE ATTORNEY GENERAL OF CANADA AND
THE ATTORNEY GENERAL OF ALBERTA

Intervenors

APPEAL FROM THE DECISION OF
THE HONOURABLE MR. JUSTICE AGRIOS
DATED - October 28, 1997

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE PICARD
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE McFADYEN
DISSENTING REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE BERGER

COUNSEL:

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For the Appellant
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For the Respondent
Michael J. Lema
A.-G. of Canada
B. Commandeur
A.-G. of Alberta

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REASONS FOR JUDGMENT OF THE HONOURABLE
MADAM JUSTICE PICARD

[1] The appellant, A. C. Waring & Associates Inc., trustee in bankruptcy, appeals the decision that a sofa and television are exempt from distribution in a bankruptcy proceeding, and that the trustee has no right in them.

[2] The bankrupts, who are not parties to this suit, leased the chattels from Direct Rental Centre (West) Ltd. ("Direct"). Direct did not register the lease pursuant to the *Personal Property Security Act*, S.A. 1988, c. P-4.05.

[3] The appeal raises the interplay amongst the following: the distribution provisions of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("BIA"); the exemption provisions of the *Civil Enforcement Act*, S.A. 1994, c. C-10.5 ("CEA") and the priority provisions of the *Personal Property Security Act,* S.A. 1988, c. P-4.05 ("PPSA"). Relevant sections of those statutes are set out below.

Legislation

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3:

> 2(1) "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;
>
> 37. Where the bankrupt or any of the creditors of any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.
>
> 67(1) The property of a bankrupt divisible among his creditors shall not comprise
>
> > (*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or ....
>
> 71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

Civil Enforcement Act, S.A. 1994, c. C-10.5:

> 1(1) In this Act,
>
> > (kk) "property" includes
> > (i) things, as well as rights or interests in things,
> > (ii) anything regarded in law or equity as property or as an interest in property,
> > (iii) any right or interest that can be transferred for value from one person to another,
> > (iv) any right, including a contingent or future right, to be paid money or receive any other kind of property, and
> > (v) any cause of action;
>
> 5(1) The court may, on application by an interested party or an agency, give directions in respect of or determine any matter or issue that arises out of any civil enforcement proceedings.
>
> 88 The following property of an enforcement debtor is exempt from writ proceedings:
>
> > (c) household furnishings and appliances that are of a value not exceeding an amount prescribed by the regulations;
>
> 90(1) If
>
> > (a) an enforcement debtor owns more than one item of a type of property for which there is an exemption under section 88, and
> > (b) the total value of the items exceeds the maximum prescribed value of the exemption for that type of property,
>
> the enforcement debtor may select the items, up to the maximum prescribed value of the exemption, that will be exempt.
>
> (2) If the enforcement debtor does not in a timely manner make a selection under subsection (1), the bailiff may select the items that are exempt.

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91 On application to the Court to determine whether property is exempt, the Court must make its determination on the basis of the circumstances that exist

(a) at the time of the seizure, in the case of personal property that has been seized....

97 For the purposes of determining what constitutes a distributable fund, the following applies:

(c) money payable in accordance with section 89(2) or 98 does not constitute or form part of a distributable fund.

98 Where a distributing authority receives money that is exempt or that represents the proceeds of exempt property, that money constitutes a distributable fund subject to the following payments being made from that money:

(b) if there is not an enforcement creditor who qualifies to be paid under clause (a), the distributing authority shall, insofar as the amount of that money held by the distributing authority permits, pay to the enforcement debtor an amount that is equal to the maximum prescribed value of the exemption.

Civil Enforcement Regulation, Alta. Reg. 276/95:

37(1) The following are the maximum amounts allowed for exempt property under section 88 of the Act:

(b) the maximum exemption for household furnishings and appliances referred to in section 88(c) of the Act is $4000;

Personal Property Security Act, S.A. 1988, c. P-4.05:

12(2) For the purposes of subsection (1)(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods leased to him or consigned to him when he obtains possession of them in accordance with the lease or consignment.

20(1) A security interest

(b) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or ....

Intervenors

[4] At the request of this Court, both the Attorneys General of Alberta and Canada filed factums dealing with the question of whether there was a constitutional issue in the interplay of the PPSA and BIA in this case. They both submitted there was no constitutional issue. Their position is summarized in the following statement from the factum of the Deputy Attorney General of Canada:

> **Subparagraph 20(1)(b)(i) PPSA presumes a priority competition between the trustee and a creditor claiming to have a secured position. However, if the trustee has no stake in a given asset (in terms of realizing and distributing the proceeds) because the asset is exempt, no priority contest arises and subparagraph 20(1)(b)(i) does not come into play.**
>
> **The PPSA provision only applies where the assets in question are not exempt as against the trustee.**
>
> **In this case, the source of the exemption is paragraph 88(c) of the *Civil Enforcement Act* which, in combination with paragraph 37(1)(b) of the *Civil Enforcement Regulation*, exempts household furnishings up to a value of $4,000 from enforcement by judgment creditor.**

Facts

[5] The bankrupts entered into two leases with Direct, one for a sofa, the other for a television. Payments were to be made on a monthly basis for a maximum of 21 months. Provided that the bankrupts (lessees) were not in default of any term, they had the right to purchase the leased chattels either during the term of the lease, for an amount to be determined by Direct, or for $1.00 at the end of the 21 month period. Direct retained title to them until such time as the bankrupts acquired ownership pursuant to the terms of the agreement and could terminate for a default in payment. Direct did not register the leases at the Personal Property Registry although they could have been registered as they were for a term greater than one year.

[6] Therefore, Direct has an unperfected claim as a secured party.

[7] The leases were entered into approximately eight months before the bankrupts declared bankruptcy and the bankrupts were not in default at that time. It is accepted by all parties that the total value of the sofa and television is less than the exemption limit for furnishings under the CEA.

Decisions of the Registrar and Chambers Judge

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[8] Master Funduk, Registrar in Bankruptcy, found that the PPSA did apply to the leases and the issue was priorities and not ownership of the chattels. He found he was bound by a decision of the Court of Queen's Bench, *Re* ***McPeake*** 1994 CanLII 8985 (AB QB), (1994), 158 A.R. 144 ("***McPeake***"). He said he was not in a position to decide whether it was right or wrong. In response to submissions about that case, he said: "Nibbled to death by ducks is not, for me, a way to get around Re ***McPeake***." (AB 115). Thus, he felt compelled to the decision that no exemption could be claimed for the chattels.

[9] The chambers judge allowed an appeal from that decision. He refused to apply ***McPeake*** and held that chattels encumbered by a chattel mortgage, or other security instrument, will not automatically be rendered non-exempt for the purposes of bankruptcy. He said that the PPSA cannot render non-exempt that which the BIA would deem exempt and concluded that the sofa and television were exempt regardless of the provisions of the PPSA. He also concluded that the bankrupts had a sufficient property interest in the chattels to vest them in the trustee and claim an exemption. He found that the chattels were exempt regardless of who asserted the claim and that the leases remained in force.

Issues

[10] The appellant and respondent seek through this action to have a determination of the nature and extent of the rights of a trustee in bankruptcy in chattels subject to a lease that was not registered under the PPSA. The analysis of the issues can best be done through the following questions.

1. What are the initial responsibilities and powers of a trustee in bankruptcy over the property of the bankrupt?
2. Do the bankrupts have an interest in the sofa and television, and if so, is it eligible for an exemption?
3. What is the nature of the CEA exemption: right or privilege?
4. Does the exempt status of the bankrupts' property prevent the trustee from enjoying priority over Direct's unperfected security interest?

Standard of Review

[1] The issues raised are questions of law and therefore the standard of review is correctness: see ***Kuziw*** v. ***Kucheran Estate*** 2000 ABCA 226 (CanLII), (2000), 266 A.R. 284, [2000] A.J. No. 944 (C.A.) online: QL (AJ) at para. 7: "This Court will apply a standard of review of correctness to the learned chambers judge's decision insofar as error of law or principle is involved."

1. What are the responsibilities and powers of a trustee in bankruptcy over the property of the bankrupt?

[2] Upon a receiving order being made in a bankruptcy proceeding, a bankrupt ceases to have capacity to deal with his property and it vests in the trustee, subject to the Act and the rights of secured creditors: BIA, s. 71(2).

[3] The Supreme Court of Canada in ***Royal Bank of Canada*** v. ***North American Life Insurance Co. and Balvir Singh Ramgotra***, 1996 CanLII 219 (SCC), [1996] 1 S.C.R. 325 ("***Ramgotra***"), set out the stages of a bankruptcy. In the first, the property-passing stage, the trustee takes possession of the assets forming the bankrupt's estate. In the second, the estate administration stage, the trustee divides the property of the bankrupt amongst the creditors. But not all of the property is available to satisfy those claims as some is exempt from distribution: BIA, s. 67(1).

[4] In this case, the bankrupts' property in the sofa and television passed to the trustee. In order for the trustee to have the authority to deal with them, in the administration stage, it is necessary to determine the nature and scope of the exemption in them.

[5] The BIA states that the divisible property of the bankrupt shall not include any property exempt from seizure under laws applicable in the province where the property is situated.

[6] The provincial legislation that the BIA thereby engages is the CEA, s. 88(c) which, along with its regulations, makes exempt household furnishings up to a value of $4,000.

2. Do the bankrupts have an interest in the sofa and television, and if so, is it eligible for an exemption?

[7] There is no doubt that had the bankrupts purchased and taken title to the sofa and television those items would be exempt. The question of the extent or scope of the exemption arises because of the "lease-to own" basis upon which the bankrupts had possession. The question that arises here is whether the interest the bankrupts had in the two items comes within the definition of property so as to be suitable for an exemption.

[8] There is authority from this Court that the characterization of property as property within a class of exempt property is to be done on the facts as they existed at the time of the bankruptcy: ***Holthuysen (Trustee of)*** v. ***Holthysen*** (1986), reflex, [1987] 2 W.W.R. 304.

[9] What property in the sofa and television did the bankrupts have at the time of the bankruptcy? They had the right to possession and use and the right to purchase and acquire title either during the lease, for an amount that took into account their lease payments, or for one dollar after 21 months of payments.

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[10] The BIA, CEA and PPSA all have sections which define the term "property". The term is used in the BIA to describe what vests in the trustee, in the CEA to describe what is exempt and in the PPSA to describe the interest of a debtor as lessee in a lease.

[11] The definition of property in the BIA, s. 2, is very broad and includes "every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property". The CEA definition is similarly broad, including "rights or interests in things and anything regarded in law or equity as property or as an interest in property".

[12] While the BIA and CEA definitions are critical, it is interesting to note a provision in the PPSA that specifically deals with the interest of a lessee or debtor. The PPSA, s. 12(2) in dealing with the attachable security interest of a lessee defines the lessee's rights in goods: "a debtor has rights in goods leased to him or consigned to him where he obtains possession of them in accordance with the lease or consignment.

[13] In ***Re Giffen,*** 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91 ("***Giffen***"), the Supreme Court of Canada held that a bankrupt's interest in a leased car was property for the purposes of the BIA and thus vested in the trustee.

[14] The bankrupts' interest in the sofa and in the television falls within the definitions of property in all three statutes. I find that the interest that the bankrupts have in the sofa and television falls within the scope of the exemptions possible under the CEA.

[15] Put simply, all of the bankrupts' interest in the sofa and television capable of vesting in the trustee is eligible for an exemption.

3. What is the nature of an exemption under the CEA: right or privilege?

[16] A determination of the issues between the parties to the litigation requires a determination of whether an exemption under the CEA is a right that the debtor need not claim to be effective, or a privilege that the debtor must claim. Because the bankrupts made no claim, Direct can only succeed if an exemption is a right. Older cases under earlier legislation were divided on this question.

[17] Assuming the exemption is a right, once property is determined by the trustee to fall within the exemption provisions of the CEA, the property would be unavailable for distribution. If it is a privilege and is unclaimed, there is the possibility that the exemption could be lost.

[18] This is not a case where an issue of the limits of value or number arises as regards an exemption; that is, it is not a case where the limits of the exempt category of "household furnishings" is challenged by the sofa and television, and it is not a case where a choice must be made between two specified chattels for the exemption, as would be the case with two motor vehicles. Those cases might well raise problems of selection. A trustee may have problems determining a bankrupt's exemptions. I repeat, those problems are not raised in this case. However, a concern about how such issues would be resolved in that period when the legislation contained no provision for reference to the courts resulted in decisions that the only practical resolution of the problems would be to require that an exemption be claimed. This can be seen in an examination of the older cases under earlier legislation.

[19] The cases interpreting the predecessor legislation, the *Exemptions Act* and the *Seizures Act,* illustrate the difficulties. In ***Rodi & Wienenberger Aktiengescellschaft* v. *Kay*** reflex, (1959), 30 W.W.R. 229 (Alta. D.C.) ("***Rodi***") it was held that the debtor acquired an exemption as a right with no need to claim it. However in ***E.T. Marshall Co. Ltd.* v. *Flemming*** reflex, (1965), 55 W.W.R.11 (Alta. D.C.) ("***E.T. Marshall***") it was held that the exemption was a right or privilege that the debtor had to claim.

[20] In the ***Rodi*** case, the court was interpreting language very similar to that in the CEA: The ***Exemptions Act***, R.S.A. 1955, c. 104, s.2, identified property that "is exempt from seizure"; in the CEA, s.88 identifies property that "is exempt from writ proceedings". In arriving at its conclusion that an exemption was a right that need not be claimed, the court in the ***Rodi*** case stated that an injustice would be done if a debtor ignorant of his right failed to claim an exemption and thereby lost it.

[21] In the ***E.T. Marshall*** case, the court seemed very concerned with the administrative problems where there might be disputes and the possible need for a sheriff or bailiff to exercise a judicial function. This moved some courts to find an intention in the legislation that would at least partially deal with the problem, that is, a requirement that an exemption be claimed.

[22] It is critical that the older legislation did not provide for access to the Courts to resolve disputes. However, eventually, there was an amendment to the ***Exemptions Act*** which did just that. The decision and analysis of Stevenson, D.C.J. (as he then was), in ***Carmar Holdings Ltd.*** v. ***Harpe*** 1976 CanLII 281 (AB QB), (1976), 1Alta. L.R. (2d) 76, is most helpful to an understanding of the law at that time. He canvassed the law and said he preferred the interpretation in the ***Rodi*** decision. He noted that after the ***E.T. Marshall*** decision the legislation was amended, and the ***Exemptions Act***, R.S.A. 1970, c.129 addressed the problem of the identification of exempt property by permitting the creditor to apply to the courts for a declaration that specific goods were not exempt. In his analysis he considered s. 45 of

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the ***Seizures Act*** which permitted the sheriff to seize and hold items that may have been exempt until such time as their status could be determined, and if exempt, they could be returned to the debtor. The amendment to the legislation removed the concern about the resolution of disputes as to exemptions, so the justification disappeared for requiring the debtor to make a claim in order to get an exemption.

[23] The CEA provides for recourse to the courts where there are issues as to exemptions (s. 91) or for the determination, on the application by "an interested party or an agency" of "any matter or issue that arises out of any civil enforcement proceeding" (s. 5). Both sections are very broad.

[24] Thus, the concerns about the resolution of disputes about exemptions have been taken care of in the CEA. That might be enough upon which to found a conclusion that there are now no barriers to an exemption being held to be a right. However, a look at the structure and intent of the CEA further supports the conclusion that an exemption is a right.

[25] The comprehensive scheme provided for in the CEA balances the interests of debtors and creditors, implementing social policy to protect debtors from the severest of consequences. The legislation creates classes of property that are exempt (s. 88), precludes waiver of the exemptions by the debtor (s. 2), and prevents the proceeds of exempt property from becoming part of the fund distributable among the creditors (ss. 97, 98). Where there might be an excess in value or number relating to an exemption, there is provision for the debtor to select exempt property from within the applicable class of exempt property (s. 90(1)). The legislation also permits a bailiff to select the exempt property if the debtor fails to do so (s. 90(2)).

[26] When the CEA is reviewed in the light of the earlier legislation and case law, it is clear that it was meant to be remedial providing a complete scheme for the enforcement of civil proceedings while removing some of the ambiguities and inadequacies found in the earlier legislation.

[27] While the CEA does inform the BIA of what property is exempt, the BIA is the statute under which the parties to the bankruptcy must operate.

[28] In the BIA, s. 67(1)(b) states, without qualification, that exempt property is not divisible by the trustee. The Supreme Court of Canada has affirmed this interpretation in ***Ramgotra***. The trustee is the key to the proper administration of the legislative scheme in the BIA.

[29] It is significant that the trustee assumes responsibilities in two capacities: as the debtor's (or bankrupt's) representative and, as well, as the creditors' representative: ***L.Claude Mercure*** v. ***A. Marquette & Fils Inc.,*** 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547 at 553. Thus, once it is clear that property is exempt and therefore not available for creditors, the trustee is in no position to limit or qualify the bankrupt's interest in that exempt property.

[30] Like the CEA, the BIA also provides for the resolution of disputes and, specifically, anticipates and provides for situations where an act or decision of the trustee may be questionable. The BIA, s. 37, provides for an application to a court by any person who is aggrieved by an act or decision of the trustee and provides the court with the power to make such order as it thinks just.

[31] Legislation dealing with bankruptcy and legislation dealing with the civil enforcement proceedings have a common feature: a limited protection of a debtor from creditors.

[32] In summary, the legislative history, the scheme and provisions of the CEA and the intention of the CEA support the conclusion that an exemption is not a privilege but a right. The express provisions in the BIA excluding exempt property, and imposing a duty on the trustee not to distribute exempt property affirms the right.

[33] Those provisions in the BIA and the CEA for recourse to the courts where an "aggrieved party" (s. 37 BIA) or an "interested party" (s. 5 CEA) seeks a determination or directions are a complete answer to concerns about determining the scope and nature of contested exemptions.

[34] In conclusion, I find that the exemption was a right which did not need to be claimed by the bankrupt debtor. Direct can make the claim.

[35] The trustee takes the position that he is required because of the unperfected interest of Direct in the exempt property to make that property available for unsecured creditors. This raises the question of the interplay between the PPSA and the BIA.

4. Does the exempt status of the bankrupts' property prevent the trustee from enjoying priority over the Direct's unperfected security interest?

[36] The appellant submits that the decision of the Supreme Court of Canada in ***Giffen*** applies to this case. That is, because Direct did not register the leases under the PPSA, when the property interest that the bankrupts had in the chattel vested in the trustee at the time of bankruptcy, that vesting would have permitted the trustee to defeat Direct's claim to the chattels. As a result, the appellant submits, the trustee acquired Direct's property in the chattel and should be able to divide Direct's property in the chattel among the creditors. This would accord with the decision in ***McPeake***.

[37] There is no doubt that jurisprudence dealing with the combined effect of the PPSA and the BIA has been profoundly affected by the ***Giffen*** decision, because the decision provides that a trustee can obtain greater rights to

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property than the bankrupt had in it. The appellant urges the case upon us because if it applies, the appellant submits, there would be no property for Direct to look to for any rights it might have flowing from the leases. That would follow if at the administration stage of the bankruptcy, s. 20 of the PPSA would allow the trustee to acquire the property of Direct in the sofa and television because Direct had not registered the leases under the PPSA.

[38] However, ***Giffen*** did not deal with property that was exempt; furthermore, there was no issue involving exemptions engaged in the case. It is therefore distinguishable from this case.

[39] In ***Giffen***, a leasing company leased a car to an employer who then sub-leased it to its employee, the bankrupt. The leasing company did not register its lease under the PPSA of British Columbia. Upon the employee's bankruptcy the leasing company seized the car and sold it. The trustee claimed the net proceeds of the sale on the basis that since the leasing company's interest was not perfected by registration at the date of the bankruptcy, pursuant to s. 20 (which is the same in Alberta) the leasing company's interest was not effective against the trustee. The leasing company took the position that the trustee could not claim a greater interest in the vehicle than the bankrupt had in it. The Supreme Court of Canada held that the bankrupt had a leasehold right of use and possession and that this constituted "property" as defined by s. 2 of the BIA. Further, this property passed to the trustee upon the bankruptcy (s. 71(2) BIA), and the trustee could therefore assert a claim to the car. Thus, the Court had to determine the priority between the property interest of the bankrupt that had vested in the trustee and the leasing company's unperfected security interest. There was no claim by anyone that the car was exempt.

[40] The Court applied s. 20(b)(i) of the PPSA and held that the leasing company's interest was ineffective against the trustee, and that the trustee in effect, though notably not in fact, ended up with full rights in the car in the circumstances of that case. While the result was contrary to the general rule that a trustee cannot acquire rights in property greater than what the bankrupt had, the Court found that the legislation supported a policy choice when the PPSA was enacted which was to make unsecured creditors' interests as represented by the trustee more meritorious than the unperfected interest of a secured creditor.

[41] To achieve the result that the appellant argues for in this case, the interpretation of the legislative intent would have to be taken a step further to find that exempt property subject to an unperfected interest of a secured creditor was so tainted by the failure of the secured creditor to register the interest that the trustee could exercise the right to seize and sell property normally shielded by the existence of an exemption, and thereby defeat Direct's claim to the chattel. Such a result would undermine the policy of the BIA, the PPSA, and the CEA.

[42] The intention of s. 20 of the PPSA is to rank interests and not to confer them. In the ***Giffen*** case, the Court said that the PPSA does not confer interests, at para. 44:

> [Section 20] does not grant title or any other proprietary interest to the trustee, but it prevents the lessor from exercising rights against the trustee.

[43] As well, there is support for the conclusion that an exemption prevents the trustee from exercising the right of division of the bankrupt's property. In ***Ramgotra***, at para. 48 the Supreme Court of Canada found that the BIA barred the trustee from exercising the right of division with respect to exempt property. This principle and the principle identified above in ***Giffen*** operate in effect to prevent the trustee and the secured party respectively from exercising rights that would otherwise put them in competition with each other.

[44] The appellant also relies on ***McPeake*** apparently for the proposition that the exemption applies only to the debtor's interest in chattel, and that consequently the trustee is able to assert priority over the secured party's unperfected deemed security interest in the same chattel which, not being exempt, becomes available for division among the creditors. In light of the Supreme Court of Canada's decision in ***Giffen*** and ***Ramgotra***, ***McPeake*** is of no assistance to the appellant in the circumstances of the case at bar.

[45] In ***McPeake*** a bankrupt had mortgaged a mobile home. Legislation provided an exemption for mobile homes. The trustee apparently was not interested in the bankrupt's exempt property in the mobile home but contested the mortgagee's unregistered claim to the chattel. The judge found that all of the property in a mortgaged mobile home, in which the bankrupt retained an equitable interest, formed part of the bankrupt's estate, and to the extent that the mobile home was encumbered by the chattel mortgage it was not exempt from seizure.

[46] As is apparent in reading ***Giffen***, the property interests in chattel held by a third party with an unperfected deemed security interest are not altered by the operation of the PPSA. When seeking to enforce rights inherent in the property interest, a party will find that those rights will be viewed simply as giving rise to a deemed security interest and, being unperfected, that interest will lose priority to the interest of a secured party with a perfected security interest or to a trustee in bankruptcy. That being so, the mortgaged mobile home in the ***McPeake*** case, except for the equitable property interest that the bankrupt retained in the chattel, should not have formed part of the bankrupt's estate. In short, the mortgagee's interest in the chattel should never have become part of the bankrupt's estate. This is not to say that in the appropriate circumstances the trustee could not have seized, sold and transferred good title to the mobile home, this is simply to say

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that on the facts of the ***McPeake*** case, the appropriate circumstances do not appear to have existed. Though the property of the bankrupt vested in the trustee, the exempt status of that property should have precluded the trustee from contesting the unperfected deemed security interest of the mortgagee.

[47] The appellant in this case goes even further than the courts in either the ***Giffen*** case or the ***McPeake*** case. The appellant submits that the failure of Direct to register its leases permits the trustee to step into the shoes of Direct and acquire the interest of the bankrupts free of any exemption. They offer no authority to support this further proposition that the trustee steps into the shoes of Direct, other than ***Giffen***. This submission is without merit and is not supported by the reasons in ***Giffen***. At best the trustee steps into the shoes of the bankrupt and is able, in the appropriate circumstances, to defeat the claims of parties like Direct with unperfected security interests. However, that is not possible where there is an exemption as there is in this case.

[48] In light of the Supreme Court's decisions in the ***Giffen*** and ***Ramgotra*** cases, it is my view that the principle of law used to arrive at the result in ***McPeake*** was faulted. Nor does the Supreme Court's reasoning in the ***Giffen*** case lead one, on the facts in this case, to the same result as that in the ***Giffen*** case. The existence of an exemption in this case fundamentally alters the result that follows from an application of the principles enunciated in the ***Giffen*** case.

[49] In the case at bar, there is no basis for a contest over rights to the property as between the trustee and Direct. The property is exempt under the provisions of the CEA and the BIA and therefore the trustee has no right to divide it among the creditors. There is nothing to fight over.

[50] I find that the answer to the question is yes: The exempt status of the bankrupts' property in the chattels, which is the only property in the chattels that vest in the trustee, does prevent the trustee from enjoying priority over Direct's unperfected deemed security interest in the chattels.

[51] This conclusion is the same as that arrived at by the chambers judge. It is consistent with the policy underlying the PPSA. See the comments of Professors Ronald Cuming and Roderick Wood in ***Alberta Personal Property Security Act Handbook*** 4th ed. (Toronto: Carswell, 1998) at 193 - 195.

Post hearing Case Law

[52] Following the hearing of this case but prior to the release of any judgments, counsel provided to the panel a very recent decision from the Nova Scotia Court of Appeal, ***VW Credit Canada Inc.*** v. ***Roberts*** 2001 NSCA 42 (CanLII), (2001), 197 D.L.R. (4th) 274, 22 C.B.R. (4th) 266, [2001] N.S.J. No. 84, online: QL (NSJ).

[53] The majority in ***VW Credit,*** when considering the decision of the court below in this case, distinguished this case on the facts and, as well, said they chose to follow ***McPeake***. I discussed ***McPeake*** earlier.

[54] I agree that the cases are distinguishable. Furthermore the path taken by the majority did not require an analysis of the interplay between the BIA and the equivalent of the CEA which is central to this case. Their decision was based on the finding that the bankrupt did not, under their PPSA legislation, have an exemption against VW Credit (who was in a similar position to Direct) and that the consequence was that there was no exemption under the BIA.

[55] In his dissent, Justice Freeman did deal with the interplay between the BIA and the provincial legislation dealing with exemptions. He reviewed the duties of the trustee and held that the property was exempt to the limits of the category into which it fit. His analysis and conclusion is consistent, in general, with this decision.

Conclusion

[56] The bankrupts have an interest in the sofa and television which qualifies for an exemption and, given the value of the chattels and the limits of the exemption category into which they fall, the bankrupts' interest, being less than unencumbered ownership, must necessarily all be exempt. The exemption is a right and exists although they did not claim it. The exemption is not defeated by the fact that Direct did not register the leases under the PPSA. The trustee, barred by the BIA from dividing the bankrupts' exempt property, is unable to challenge and defeat Direct's unperfected security interest in the chattel in which the bankrupts had property.

[57] The appeal is dismissed.

APPEAL HEARD on December 1, 2000
REASONS FILED at Edmonton, Alberta
this 19th day of September, 2001

_____

PICARD J.A.

I concur:

_____

As authorized by: McFADYEN J.A.

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DISSENTING REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE BERGER

[11] The question to be decided in this appeal is whether a lessor who has failed to register a "lease-to-own" agreement as required by the ***Personal Property Security Act*** ("***PPSA***"), can rely upon the exemption provisions of the ***Civil Enforcement Act*** ("***CEA***") to preclude distribution by a trustee in bankruptcy of the property which is the subject of the agreement.

[12] The ***Bankruptcy and Insolvency Act*** ("***BIA***") sets out a scheme of distribution of the assets of a bankrupt subject to the rights of secured creditors as defined in s. 2 of the ***BIA***:

> "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable;"

[13] Upon bankruptcy, *prima facie*, a party with a perfected security interest has priority over the property that is the subject of the security interest by virtue of the ***PPSA.*** In ***Re Giffen***, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, the Supreme Court of Canada made clear that even though Parliament alone can determine distribution priorities, the ***BIA*** "is dependent on provincial property and civil rights legislation in order to inform the terms of the *BIA* and the rights of the parties involved in the bankruptcy." (at p. 118). See also ***Husky Oil Operations Ltd. v. Minister of National Revenue***, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453 per Gonthier, J. at p. 481 and per Iacobucci, J. at p. 531; J.S. Ziegel "Personal Property Security and Bankruptcy: There is No War! - A Reply to Roman and Sweatman" (1993), 72 *Can. Bar Rev.*, 44 at p. 50; and R.C.C. Cuming, "*Canadian Bankruptcy Law: A Secured Creditor's Heaven*" (1994-95), 24 Can. Bus. L.J. 17 at 25-26.

[14] Section 20(1)(b)(i) of the ***PPSA*** provides that "a security interest in collateral is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy."

[15] The parties are common cause that in the case at bar the "lease-to-own" agreement was not registered and, accordingly, was not perfected. The "property" which is the subject of the "lease-to-own" agreement consists of a sofa and television set of a total value not exceeding $4,000.

[16] Upon an assignment into bankruptcy, the bankrupt's property, subject to the ***BIA*** and the rights of secured creditors, forthwith passes to and vests in the trustee. Section 67(1)(b) of the ***BIA*** makes clear, however, that "any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides" cannot be distributed by the trustee.

[17] In Alberta, s. 88 of the ***CEA*** sets out the relevant exemptions:

> "88 The following property of an enforcement debtor is exempt from writ proceedings:
>
> ...
>
> (c) household furnishings and appliances that are of a value not exceeding an amount prescribed by the regulations;"

[18] Pursuant to s. 37(1)(b) of the Civil Enforcement Regulation, the maximum amount that can be claimed under s. 88(c) of the ***CEA*** is $4,000. Although the sofa and television set are acknowledged to be of a value not exceeding $4,000, it is unclear what the total value of household furnishings and appliances passing to and vesting in the trustee was.

[19] It follows that the following issues arise:

1. Does the merchandise which is the subject of the "lease-to-own" agreement qualify as "property" within the meaning of the ***BIA*** and ***CEA*** such that an exemption may be claimed?
2. What is the value of the exemption?
3. Must the exemption be claimed and, if so, who is entitled to claim it?

Does the merchandise which is the subject of the "lease-to-own" agreement qualify as "property" within the meaning of the *BIA* and *CEA* such that an exemption may be claimed?

[20] Property is defined in s.2 of the ***BIA*** as follows:

> "'property' includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest

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> and profit, present or future, vested or contingent, in, arising out of or incident to property;"

[21] Accordingly, subject to s. 67(1) of the ***BIA***, the sofa and television set fall within the definition of "property". However, because exemptions are governed by provincial legislation, the definition of property in the ***CEA*** will also be engaged. Section 1(1)(kk) of the ***CEA*** defines property as follows:

> "'property' includes
>
> i) things, as well as rights or interests in things,
>
> ii) anything regarded in law or equity as property or as an interest in property,
>
> iii) any right or interest that can be transferred for value from one person to another,
>
> iv) any right, including a contingent or future right, to be paid money or receive any other kind of property, and
>
> v) any cause of action."

[22] The parties are common cause that the bankrupt in this case does not hold title to the furnishings which are the subject of the "lease-to-own" agreement. No exemption may be claimed with respect to an interest that does not qualify as "property". The locus of title, however, is not determinative. As Iacobucci, J. stated in ***Re Giffen***, ***supra***, at pp. 108-109:

> "In my opinion, the bankrupt's right to use and possession of the car constitutes "property" for the purposes of the *BIA* and the trustee, by virtue of s. 71(2) of the *BIA*, succeeds to this proprietary right. I find support for this conclusion in *Paccar Financial Services*, *supra*, where the Saskatchewan Court of Appeal held that 'property' as it is used in the *BIA* is "broad enough to include a leasehold interest" (at p. 494, citing *Re Cadieux and Jas. A. Ogilvy's Ltd.* (1952), 33 C.B.R. 15 (Que. Sup. Ct.), at p. 16).
>
> The trustee assumes the bankrupt's possessory interest in the car through the operation of s. 71(2); it is upon this basis that the trustee can assert a claim to the car."

[23] In this case, the bankrupt has a possessory interest in the sofa and television set which falls within the definition of "property" under both the ***BIA*** and the ***CEA.*** The Supreme Court of Canada, however, did not address the question of exemptions in ***Re Giffen***. There are two conflicting cases from Alberta as to whether an exemption may be claimed in circumstances where title to and ownership of the asset is in the hands of a third party. In ***Re Exemptions Act and Seizures Act; Re General Steel Wares Ltd. and Clarke*** (1956-57), 20 W.W.R. 215, Edwards, D.C.J. held that the debtor was unable to claim an exemption in a vehicle in which approximately $1,100.00 remained owing because the debtor had neither the title to nor property in the automobile.

[24] Decore, C.J.D.C. in ***Armbruster Lumber Ltd. v. Fishburne*** reflex, (1966), 55 W.W.R. 223 held otherwise. He was of the view that the definition of "property", pursuant to the then applicable ***Exemptions Act***, included an equitable interest consistent with a fair, large and liberal construction of the statute. See also ***Gray Beverage (Alta.) Ltd. v. Wong*** reflex, (1981), 29 A.R. 385, ***Re Peterson*** 1996 CanLII 10376 (AB QB), (1996), 39 Alta. L.R. (3d) 187 and ***Re Cronin Fire Equipment Ltd.*** reflex, (1993), 14 O.R. (3d) 269 (Ont. Gen. Div.).

[25] In my opinion, the method of financing the purchase of a chattel cannot be the basis upon which an exemption is determined under the ***CEA***. It is the type of goods and their value and the type of interest the debtor holds in them that must govern. It must be remembered that although title to the chattels does not pass immediately to the lessee, the acquired interest is such that many of the benefits and disadvantages of ownership are obtained pursuant to the lease.

[26] I conclude, accordingly, that both the ***BIA*** and the ***CEA*** recognize equitable interest in chattels. I also find that the equitable interest of the bankrupt in this case falls within both definitions of "property" sufficient to allow for a claim of an exemption over the property.

WHAT IS THE VALUE OF THE EXEMPTION?

[27] The issue here is whether an exemption claim is limited to the debtor's equity in the property or whether it is based on market value.

[28] Section 89(1) of the ***CEA*** reads as follows:

> "Where the enforcement debtor's equity in the property referred to in section 88 exceeds the prescribed value of the exemption for the property, that property is subject to sale pursuant to writ proceedings."

[29] It is suggested that the latter provision, referring as it does to the debtor's equity, is confirmation that a market value approach to exemptions would be anomalous. I respectfully disagree. Section 89(1), in my opinion, is intended only to confirm that the debtor's equity interest in the property will not override the prescribed value of the exemption even if that equitable interest exceeds it.

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[30] Section 88(g) of the ***CEA*** (dealing with an enforcement debtor's residence) establishes that the property is exempt from writ proceedings only where the enforcement debtor's equity does not exceed the amount prescribed by the regulations. Again, there is no express legislative statement that would, on its face, limit the value of the exemption to the debtor's equity in the property. The enactment merely confirms that a debtor's equity interest will not override the prescribed maximum exemption value.

[31] It is the purview and policy of the Act, along with the consequences flowing from statutory interpretation, that must govern the determination of the issue. See ***Armbruster***, ***supra***, at pp. 226-227, citing with approval, ***Fry v. Inland Revenue Commissioners***, [1959] Ch 86, at 105, [1958] 3 W.L.R. 381:

> "It seems to us that on the language of section 7 (6) neither the view of the Inland Revenue Commissioners nor that of the plaintiff can be said to be obviously wrong. The court, then, when faced with two possible constructions of legislative language, is entitled to look at the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament."

[32] The market value approach has been affirmed in cases such as ***Re Ottaway*** 1980 CanLII 401 (BC CA), (1980), 110 D.L.R. (3d) 231 (B.C.C.A.) and ***Armbruster***, ***supra***. A contrary view was expressed by Bielby, J. in ***Re Pearson*** 1997 CanLII 14792 (AB QB), (1997), 51 Alta. L.R. (3d) 254. Her reasoning is premised, in part, on the proposition that there is no logical reason for interpreting the statute to create different results for unsecured creditors, depending on whether the debtor has or has not financed his property. With respect, that approach ignores the policy reasons underlying the need for exemptions as noted in ***Armbruster*** and as specifically approved in ***Ottaway***. It also ignores the justification for exemption statutes as set out in C.R.B. Dunlop's *Creditor-Debtor Law in Canada*, *supra*. Debtors should not be stripped of the means to support themselves and their families because poverty has precluded an outright purchase. The basic necessities of life, as a matter of legislative choice, are deemed to be equally vital to those who, through no fault of their own, are required to finance their purchases. The philosophical foundation for the exemption laws would be undermined if the value of an exemption were limited by the debtor's equity.

[33] I conclude, accordingly, that the exemption value must be calculated on the basis of the market value of the property.

MUST THE EXEMPTION BE CLAIMED AND, IF SO, WHO IS ENTITLED TO CLAIM IT?

[34] The question here is whether personal exemptions are mere privileges which must be claimed by the affected debtor, whether they may be claimed by creditors, or whether they are rights which exist whether asserted or not. In ***E.T. Marshall Co. Ltd. v. Fleming*** reflex, (1965), 55 W.W.R. 11 (Alta. D.C.), the Court held that pursuant to the ***Exemptions Act***, it was for the debtor, after seizure, to assert his claims for exemptions which would then be determined by the Court. At p. 18, Cullen, D.C.J. stated:

> "The statute does not prohibit seizure — it confers a right or a privilege which an execution debtor may, at his option, exercise. It would not be in accord with the *animus imponentis*, the intention of the lawmaker expressed in the statute as a whole, to read into it words which from a practical point of view would make the statute inoperative, and from an administrative point of view would charge the sheriff or his bailiff with the constant exercise of judicial function. There are no words of prohibition; let us not read these into the statute."

[35] This reasoning was approved in *obiter* by McDonald, D.C.J. in ***Winnicky v. Grande Prairie & District Savings & Credit Union Ltd.*** 1975 CanLII 270 (AB QB), [1976] 1 W.W.R. 80 (Alta. T.D.) at p. 84:

> "Although it is not necessary to my decision in the present appeal to pass upon the point, in my opinion, the decision of Cullen D.C.J. in *E.T. Marshall Co. Ltd. v. Fleming* is correct, and I would adopt the reasons given by him."

[36] In ***Spence (Trustee of) v. Yellowhead Feeders Co-operative Ltd.*** (1994), 6 P.P.S.A.C. (2d) 359 (Sask. Q.B.), Baynton, J. confirmed that, under Saskatchewan law, property is not considered exempt unless the bankrupt makes a claim for exemption. Referring to the decision in ***Royal Bank v. Demyen (Trustee of)*** reflex, (1986), 53 Sask. R. 224 (Q.B.) and noting that the result in ***Demyen*** was different from that in ***Spence*** because the exemption had not been claimed by the bankrupts themselves but by the secured creditor, he remarked at p. 371: "It makes good sense that a secured creditor who fails to perfect its security is not permitted to defeat other interests by relying on a protection granted by legislation to debtors, not to creditors."

[37] A contrary view was adopted in ***Rodi & Weinenberger AG v. Kay*** reflex, (1959), 30 W.W.R. 229 (Alta. D.C.). It has been suggested that the words "are exempt from seizure", mean exactly what they say, and are conclusive of the absolute prohibition of any seizure. See L. Rutman, et al, *Creditor's Remedies in Alberta*, 2nd ed., looseleaf, (Carswell: Scarborough, 1996) at 10-16, ***York v. Flatekval (Dayle)***, 1971 CanLII 208 (AB QB), [1971] 3 W.W.R. 289 (Alta. D.C.),

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Canadian National Railways v. Norwegian, reflex, [1971] 1 W.W.R. 766 (N.W.T.) and ***Carmar Holdings Ltd. v. Harpe*** 1976 CanLII 281 (AB QB), (1976), 1 Alta. L.R. (2d) 76 (D.C.).

[38] In my opinion, s. 46 of the ***CEA*** informs the legislative intent. For ease of reference, I set it out in full:

> "**46(1)** Where an enforcement debtor wishes to object to a seizure of personal property, the enforcement debtor must within 15 days from the day that
>
> a) the seizure documents are served under section 45(1)(a)(i) on the enforcement debtor or an adult member of the enforcement debtor's household, or
>
> b) the seizure documents are served under section 45(3) on the enforcement debtor,
>
> serve a notice of objection in the prescribed form on the agency that carried out the seizure.
>
> (2) On being served with a notice of objection, the agency shall not sell or otherwise dispose of the property unless permitted to do so by the Court.
>
> (3) A notice of objection is void and shall be disregarded if
>
> a) a reason for the objection is not set out in the notice of objection, or
>
> b) the notice of objection is not served on the agency within the 15-day period provided for under subsection (1)."

[39] In the light of the latter provisions, and mindful of s. 90 of the ***CEA*** which sets out the procedure for selection of exempt property in circumstances where the value of the items seized exceeds the exemption limit, I prefer the conclusion reached by the Court in ***Marshall***, ***supra***. The rationale for the requirement that the exemption must be asserted accords with the fact that it is the debtor who has the information needed to establish the exemption. After all, it is the debtor who, in most cases, is the person claiming the exemption, and upon whom the onus to establish that property is exempt should lie. (L.W. Houlden & G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed., vol. 1, looseleaf, (Carswell: Scarborough, 2001) at 3-58.1).

[40] In addition to the foregoing, there are practical impediments that would render it difficult to apply an absolute exemption standard. Suppose, for example, that a number of chattels were held to be absolutely exempt without the assertion of the debtor. If the total market value of the chattels exceeded the prescribed limit, which chattels would be exempt? Which creditors would benefit? If it had been the legislative intention to impose such a regime, a scheme for distribution in those circumstances would, surely, have been enacted.

[41] This accords with the policy reasons underlying the legislative choice to allow for exemptions and is consistent with the justification for exemptions as articulated by C.R.B. Dunlop in *Creditor-Debtor Law in Canada*, 2nd ed., (Carswell: Scarborough, 1995) at 454:

> "The obvious justification of exemptions statutes today is that they prevent judgment **debtors** from being stripped of all the means to support themselves and their families. It is not acceptable that creditors, no matter how just the debt, should have the power to take from **debtors** the basic necessities of life. Another aim often advanced to support exemptions laws is that they preserve to **debtors** the means to survive and to earn a living, thus contributing to their rehabilitation as citizens and to their capacity to repay their debts. . . . The philosophy of the exemptions laws is to encourage **debtors** to survive and to carry on their lives as economic and social elements in society." [Emphasis added]

[42] For all of these reasons, I conclude that an exemption under the ***CEA*** must be claimed and it is only the debtor or bankrupt who is entitled to claim it.

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CONCLUSION

[43] It follows that the Respondent who failed to register the "lease-to-own" agreement in compliance with the ***PPSA*** is precluded from asserting the exemption that might be available to the debtor himself. This conclusion accords with the fundamental principle expressed by Iacobucci, J. on behalf of the Supreme Court in ***Re Giffen***, ***supra***, as follows (at pp. 119-120):

> "Section 20(b)(i) does not reorder federal priorities. Compliance with the perfection requirements of the *PPSA* is a precondition to maintaining secured creditor status under the *BIA*. In the event of bankruptcy, the consequences of a failure to perfect are spelled out in s. 20(b)(i). In effect, the secured party with an unperfected security interest becomes an unsecured creditor of the bankrupt:
>
> > . . . any secured party with a security interest in personal property, who fails to meet the requirements of the Act for perfecting its security interest prior to the date a petition is filed or an assignment is made, loses the status of a secured creditor in the bankruptcy and is relegated to unsecured status. (Cuming, *supra*, at pp. 25-26)."

[44] In ***VW Credit Canada, Inc. v. Roberts*** 2001 NSCA 42 (CanLII), (2001), 192 N.S.R. (2d) 79 at 92 (N.S.C.A.), the majority of the Court expressed the view, as summarized by Freeman, J.A. (dissenting on other grounds) that:

> "... the main points in Giffen make it clear that in the absence of a perfected security document, a creditor who would otherwise have had first priority becomes an unsecured creditor who as such must look to the Trustee for a share of the assets found in possession of the bankrupt."
>
> . . . .
>
> "Any property in possession of the bankrupt that is not protected by a perfected security document the Trustee must recognize passes into the hands of the Trustee and out of the hands of the bankrupt pursuant to s. 71(2) of the BIA. No matter how the property came into the possession of the bankrupt, after the receiving order or assignment, it is under the Trustee's control. The Trustee, not the bankrupt, must then divide all the property that was in the possession of the bankrupt into two heaps, as it were. One heap is for property exempt from division among creditors pursuant to s. 67(1). Even if the bankrupt makes no claim for the return of property in that heap, unsecured creditors have no right to it and the Trustee has no authority to divide it among them. The other heap contains all the remaining property, which is to be divided among creditors in accordance with the BIA."

[45] In my opinion, there is no policy or principled reason to confer upon a creditor who has failed to meet the requirements of the ***PPSA*** for perfecting its security interest, an advantage over other unsecured creditors.

[46] For these reasons, I would allow the appeal and vacate the order of the learned chambers judge.

APPEAL HEARD on December 1, 2000
REASONS FILED at EDMONTON, Alberta,
this 19th day of September, 2001

_____

BERGER, J.A.

Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of), 2006 SCC 24, [2006] 1 SCR 865 - Who is the Owner for Purposes of BIA/CCAA When Other Acts Provide Scheme for Definition and in Complex Situation

Date:	2006-06-09
Docket:	30738; 30749; 30743; 30751; 30742; 30732; 30745; 30731; 30750; 30730; 30740; 30214; 30729
Parallel citations:	2006 SCC 24 (CanLII); 269 DLR (4th) 79; 20 CBR (5th) 1; 212 OAC 339
URL:	http://canlii.ca/t/1nht0
Citation:	Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of), 2006 SCC 24 (CanLII), [2006] 1 SCR 865, <http://canlii.ca/t/1nht0> retrieved on 2013-08-12
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Greater Toronto Airports Authority v. International Lease Finance Corp., 2004 CanLII 32169 (ON CA) - 2004-01-20

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Airports Act, RSO 1990, c A.15 — 9; 9(1); 9(3); 9(4); 10(1); 10(2); 35; 35(1)

Airport Transfer (Miscellaneous Matters) Act, SC 1992, c 5 — 9; 10

Bankruptcy and Insolvency Act, RSC 1985, c B-3 — 121; 122

Canadian Aviation Regulations, SOR/96-433 — 55(2); 101.01(1); 202.15; 202.16; 202.17

Civil Air Navigation Services Commercialization Act, SC 1996, c 20 — 1; 2(1); 2(2); 7; 8; 9; 9(1); 32; 36(3); 37(4); 44; 55; 55(1); 55(2); 56; 56(1); 56(3); 57(1)

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Marcotte v. Deputy Attorney General (Canada) et al., 1974 CanLII 1 (SCC)

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Wilmington Trust Co. v. Nav Canada, 2004 CanLII 41230 (QC CA)

Wilmington Trust Co. v. Nav Canada, 2004 CanLII 41230 (QC CA)

SUPREME COURT OF CANADA

Citation: Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of), [2006] 1 S.C.R. 865, 2006 SCC 24

Date: 20060609

Dockets: 30214, 30729, 30730, 30731, 30732, 30738, 30740, 30742, 30743, 30745, 30749, 30750, 30751

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Between:
NAV Canada et al.
Appellants / Respondents on cross-appeals
and
International Lease Finance Corporation et al.
Respondents / Appellants on cross-appeals

Between:
NAV Canada
Appellant
and
Wilmington Trust Company et al.
Respondents

Between:
NAV Canada
Appellant
and
G.I.E. Avions de transport régional et al.
Respondents

Between:
NAV Canada
Appellant
and
Inter-Canadian (1991) Inc. et al.
Respondents
and between:
Aéroports de Montréal
Appellant
and
Wilmington Trust Company et al.
Respondents

and between:
Greater Toronto Airports Authority
Appellant
and
Ottawa Macdonald-Cartier International Airport Authority et al.
Respondents
and between:
Ottawa Macdonald-Cartier International Airport Authority
Appellant
and
Wilmington Trust Company et al.
Respondents

Between:
NAV Canada
Appellant
and
Inter-Canadian (1991) Inc. et al.
Respondents
and between:

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Aéroports de Montréal
Appellant
and
Renaissance Leasing Corporation et al.
Respondents
and between:
Greater Toronto Airports Authority
Appellant
and
Ottawa Macdonald-Cartier International Airport Authority et al.
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Respondents

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Appellant
and
Newcourt Credit Group (Alberta) Inc. et al.
Respondents

Between:
Aéroports de Montréal
Appellant
and
Newcourt Credit Group (Alberta) Inc. et al.
Respondents
and between:
St. John's International Airport Authority et al.
Appellants
and
Newcourt Credit Group (Alberta) Inc. et al.
Respondents
and between:
Greater Toronto Airports Authority
Appellant
and
Greater London International Airport Authority et al.
Respondents

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and
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Respondents

Between:
Charlottetown Airport Authority Inc.
Appellant
and
CCG Trust Corporation et al.
Respondents
Coram: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

Reasons for Judgment: (paras. 1 to 98)	Binnie J. (McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish and Charron JJ. concurring)

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Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of), [2006] 1 S.C.R. 865, 2006 SCC 24

NAV Canada, Greater Toronto Airports Authority, Winnipeg Airports Authority Inc., Halifax International Airport Authority, Edmonton Regional Airports Authority, Calgary Airport Authority, Aéroports de Montréal, Ottawa Macdonald-Cartier International Airport Authority, Vancouver International Airport Authority and St. John's International Airport Authority — Appellants/Respondents on cross-appeals

v.

International Lease Finance Corporation, Hyr Här I Sverige Kommanditbolag, IAI X, Inc., Triton Aviation International LLC, Sierra Leasing Limited, ACG Acquisition XXV LLC, ILFC International Lease Finance Canada Ltd., U.S. Airways Inc., G.E. Capital Aviation Services Inc., as Agent and Manager for Polaris Holding Company and AFT Trust-Sub I, Pegasus Aviation Inc., PALS I, Inc., Ansett Worldwide Aviation, U.S.A., MSA V, RRPF Engine Leasing Limited, Canadian Imperial Bank of Commerce, Flight Logistics Inc., C.I.T. Leasing Corporation, NBB-Royal Lease Partnership One and GATX/CL Air Leasing Cooperative Association — Respondents/Appellants on cross-appeals

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NAV Canada — Appellant

v.

Wilmington Trust Company and Wilmington Trust Corporation — Respondents

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NAV Canada — Appellant

v.

G.I.E. Avions de transport régional, ATR Marketing Inc., Heather Leasing Corporation, Renaissance Leasing Corporation, Inter-Canadian (1991) Inc. and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. — Respondents

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NAV Canada — Appellant

v.

Inter-Canadian (1991) Inc., Wilmington Trust Company, Wilmington Trust Corporation, Aéroports de Montréal, Greater Toronto Airports Authority, Ottawa Macdonald-Cartier International Airport Authority and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. — Respondents

- and -

Aéroports de Montréal — Appellant

v.

Wilmington Trust Company, Wilmington Trust Corporation, NAV Canada, Greater Toronto Airports Authority, Ottawa Macdonald-Cartier International Airport Authority and Ernst& Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. — Respondents

- and -

Greater Toronto Airports Authority — Appellant

v.

Ottawa Macdonald-Cartier International Airport Authority,

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Wilmington Trust Company, Wilmington Trust Corporation, Aéroports de Montréal, NAV Canada, Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. and Inter-Canadian (1991) Inc. Respondents

- and -

Ottawa Macdonald-Cartier International Airport Authority Appellant

v.

Wilmington Trust Company, Wilmington Trust Corporation and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. Respondents

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NAV Canada Appellant

v.

Inter-Canadian (1991) Inc., Renaissance Leasing Corporation, Heather Leasing Corporation, G.I.E. Avions de transport régional, ATR Marketing Inc., Ernst & Young Inc., in its capacity

as trustee for the bankruptcy of Inter-Canadian (1991) Inc., Aéroports de Montréal, Greater Toronto Airports Authority and Ottawa Macdonald-Cartier International Airport Authority Respondents

- and -

Aéroports de Montréal Appellant

v.

Renaissance Leasing Corporation, Heather Leasing Corporation, G.I.E. Avions de transport régional, ATR Marketing Inc., Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc., NAV Canada, Greater Toronto Airports Authority and Ottawa Macdonald-Cartier International Airport Authority Respondents

- and -

Greater Toronto Airports Authority Appellant

v.

Ottawa Macdonald-Cartier International Airport Authority, Renaissance Leasing Corporation, Heather Leasing Corporation, G.I.E. Avions de transport régional, ATR Marketing Inc., Aéroports de Montréal, NAV Canada, Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. and Inter-Canadian (1991) Inc. Respondents

- and -

Ottawa Macdonald-Cartier International Airport Authority Appellant

v.

Renaissance Leasing Corporation, Heather Leasing Corporation, G.I.E. Avions de transport régional, ATR Marketing Inc. and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. Respondents

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Aéroports de Montréal Appellant

v.

Wilmington Trust Company, Wilmington Trust Corporation and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. Respondents

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Aéroports de Montréal Appellant

v.

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Newcourt Credit Group (Alberta) Inc., Canada Life Assurance Company, Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. and Renaissance Leasing Corporation — Respondents

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Aéroports de Montréal — Appellant
v.
Newcourt Credit Group (Alberta) Inc., Canada Life Assurance Company, CCG Trust Corporation, Greater London International Airport Authority, Greater Toronto Airports Authority, Saint John Airport Inc., St. John's International Airport Authority, Charlottetown Airport Authority Inc., Renaissance Leasing Corporation, Heather Leasing Corporation and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. — Respondents
- and -
St. John's International Airport Authority and Charlottetown Airport Authority Inc. — Appellants
v.
Newcourt Credit Group (Alberta) Inc., Canada Life Assurance Company, CCG Trust Corporation, Renaissance Leasing Corporation, Heather Leasing Corporation, Canadian Regional Airlines Ltd., Canadian Regional (1998) Ltd. and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. — Respondents
- and -
Greater Toronto Airports Authority — Appellant

v.
Greater London International Airport Authority, Saint John Airport Inc., St. John's International Airport Authority, Charlottetown Airport Authority Inc., Newcourt Credit Group (Alberta) Inc., Canada Life Assurance Company, CCG Trust Corporation, Aéroports de Montréal, Renaissance Leasing Corporation, Heather Leasing Corporation, Canadian Regional Airlines Ltd., Canadian Regional (1998) Ltd. and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. — Respondents

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Greater Toronto Airports Authority — Appellant
v.
Renaissance Leasing Corporation, Inter-Canadian (1991) Inc. and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. — Respondents

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Greater Toronto Airports Authority — Appellant
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Ottawa Macdonald-Cartier International Airport Authority — Appellant

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St. John's International Airport Authority Appellant
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Newcourt Credit Group (Alberta) Inc., Canada Life Assurance Company, CCG Trust Corporation, Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. and Renaissance Leasing Corporation Respondents

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Charlottetown Airport Authority Inc. Appellant
v.
CCG Trust Corporation and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. Respondents

Indexed as: Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of)
Neutral citation: 2006 SCC 24.
File Nos.: 30214, 30729, 30730, 30731, 30732, 30738, 30740, 30742, 30743, 30745, 30749, 30750, 30751.
2006: January 16, 17; 2006: June 9.
Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.
on appeal from the court of appeal for ontario
on appeal from the court of appeal for quebec

Transportation law — Airports — Seizure and detention of aircraft — Airlines operating fleets of aircraft under leasing agreements with legal titleholders — Airlines, registered owners of aircraft, incurring charges for civil air navigation and airport services — Service providers applying to superior court judge for authorization, pursuant to s. 9 of Airport Transfer (Miscellaneous Matters) Act and s. 56 of Civil Air Navigation Services Commercialization Act, to seize and detain aircraft operated by airlines for unpaid charges incurred prior to airlines' bankruptcies — Whether titleholders' right to repossess leased aircraft should take priority over service providers' seize and detain orders — Whether titleholders liable to service providers for unpaid charges — Whether seize and detain orders can be exercised against security posted by titleholders in substitution for aircraft — Whether lessors of engines attached to detained aircraft entitled to repossess engines — Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5, s. 9 — Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, ss. 55, 56.
Legislation — Interpretation — Contextual interpretation — Owner of aircraft — Whether word "owner" in s. 55 of Civil Air Navigation Services Commercialization Act includes legal titleholders of aircraft — Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, s. 55.
An airline in the modern era may consist of little more than a name, with its aircraft leased, its suppliers on week to week contracts and even its reservation and yield management systems outsourced to one of the global service providers such as Sabre or Galileo. Start-ups are relatively easy, balance sheets are often thin, and failure can be quick and (to outsiders) unexpected. Yet privatized Canadian airports and NAV Canada (the privatized civil air navigation service) are obliged by statute to provide service even to financially troubled airline operators. When an operator collapses leaving unpaid bills for airport charges and air navigation services, the question becomes: who takes the financial loss, the people who ultimately own the leased aircraft or the people who were obliged to (and did) provide the airport and navigation services?

Before going bankrupt, the airline companies Canada 3000 and Inter-Canadian operated their fleets of aircraft under leasing agreements with the respondent legal titleholders and were the registered owners of the aircraft under the Aeronautics Act. These airlines incurred approximately $33.75 million in charges for civil air navigation and airport services provided by NAV Canada and the airport authorities pursuant to the Airport Transfer (Miscellaneous Matters) Act ("Airports Act") and the Civil Air Navigation Services Commercialization Act ("CANSCA").

The Collapse of Canada 3000

In November 2001, Canada 3000 applied for protection under the Companies' Creditors Arrangement Act ("CCAA"). NAV Canada and the airport authorities applied to a judge of the Ontario Superior Court of Justice, under s. 56 of CANSCA and

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s. 9 of the Airports Act, for authorization to seize and detain certain aircraft operated by the airline. **The judge released the aircraft on the posting of security by the legal titleholders and later dismissed the seizure and detention motions, holding that the provisions in question of CANSCA and the Airports Act did not give the authorities priority over the rights of the legal titleholders to repossess the aircraft.** He also held that the titleholders were not jointly and severally liable for the charges owed to NAV Canada under s. 55 of CANSCA, since they were not "owners" within the meaning of the Act. The majority of the Court of Appeal upheld the motions judge's decision.

The Collapse of Inter-Canadian

In December 1999, the airport authorities and NAV Canada obtained, pursuant to s. 56 of CANSCA and s. 9 of the Airports Act, an order of the Quebec Superior Court to seize and detain a number of aircraft operated by Inter-Canadian. The airline was subsequently deemed to have made an assignment in bankruptcy. Faced with the legal titleholders' claims that they were entitled to repossess the aircraft, the trustee in bankruptcy applied to the Superior Court for directions. The judge allowed a motion to release the aircraft in exchange for security. He later held that the legal titleholders were jointly and severally liable for the amounts owing. The majority of the Court of Appeal overturned the motions judge's ruling, concluding that the lessors' right to repossession took priority and that the legal titleholders were entitled to the return of their aircraft free and clear of the unpaid charges.

Held: The appeals and cross-appeals should be allowed in part.

This case is from first to last an exercise in statutory interpretation, and the issues of interpretation are closely tied to context. Prior to CANSCA and the Airports Act, civil air navigation and airport services were provided by the federal government. Under the current legislative scheme, the privatized NAV Canada and airport authorities operate as self-funded corporations that provide services on the basis of a cost-based tariff fixed by government regulation. They cannot withhold airport or navigation services even from an obviously failing airline. At the time the measures in question here were enacted, airline insolvencies and bankruptcies had become a fact of life throughout the airline industry. **The legislative scheme shows that Parliament fully appreciated that in dealing with aircraft flown in and out of jurisdictions under complex leasing arrangements, the only effective collection scheme would be to render the aircraft themselves available for seizure, and thereafter to let those interested in them resolve their dispute about where the money should come from to pay the debts due to the service providers. [36-39]**

No Joint and Several Liability for Charges for Air Navigation Services

The appeals are dismissed with respect to NAV Canada's claim that the legal titleholders are jointly and severally liable for outstanding civil air navigation charges incurred by the registered owners and operators of the failed airlines, since the legal titleholders are not "owners" within the meaning of s. 55 of CANSCA. It is clear from the statutory scheme and the legislative record that Parliament intended to create a "user-pay" system for civil air navigation services, and that the only "users" of those services within the contemplation of the Act are the airlines. While in some contexts the meaning of "owner" could include legal titleholders, a purposive interpretation of s. 55 excludes them. The definition of "owner" in s. 55(2) lists only persons in possession or legal custody and control of the aircraft. Section 55(1) should be similarly construed. Interpreting the list in s. 55(2) as exhaustive of ownership for the purposes of s. 55(1) is consistent with the rest of the statutory scheme governing aeronautics, the legislative history, and conforms with common sense. If NAV Canada's interpretation of s. 55 were correct, it would mean that a seizure and detention order issued in respect of Canada 3000's unpaid user charges could in theory attach not only to a legal titleholder's aircraft leased to Canada 3000, but also to any other aircraft to which that lessor holds title, including aircraft leased to other airlines. Moreover, to interpret "owner" as argued by NAV Canada would give preference to the ambiguous English text of s. 55 over the relatively clear French provision. A restrictive interpretation of "owner" is consistent with the policy and practice throughout the federal aeronautics scheme where the term "owner" is used to refer to the person in legal custody and control of the aircraft, not the legal titleholder. In enacting CANSCA, Parliament intended not to replace or override the existing regulatory framework but rather to fit cohesively within it. [41-61]

The Seizure and Detention Remedy

Although the legal titleholders are not directly liable for the charges due to the service providers, NAV Canada and the airport authorities were entitled to orders seizing and detaining the aircraft pursuant to s. 56 of CANSCA and s. 9 of the Airports Act, and are entitled now to have their claims (as assessed by the motions judges) satisfied out of the security posted in substitution for the aircraft. Whereas s. 55 of CANSCA identifies a group of persons who are made legally liable for the amounts owing, the detention remedy set out in s. 9 of the Airports Act and s. 56 of CANSCA has a different focus. This court-granted remedy entitles the authorities to possess the aircraft until the debt is paid or security

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furnished. It does not confer any interest in the beneficial ownership of the aircraft, and it cannot be circumvented by a leasing arrangement made between an airline and an aircraft lessor. Since ss. 9(1) and 56(1) do not distinguish between the unpaid charges accumulated by specific aircraft operated by a defaulting owner or operator, the amount in respect of which the seizure of each aircraft is made is the entire amount owed by that registered owner or operator. There is no limitation of debts on an aircraft by aircraft basis. [9-10] [62-75] [85-86]

Much of the potential unfairness complained of by the legal titleholders in the operation of the detention remedy can adequately be addressed by the motions judge. The right to seize and detain is not automatic. It requires a prior court authorization which may be subject to such terms as the court considers necessary. The court also has a discretion to limit the duration of the remedy by requiring the applicable authority to release a detained aircraft from detention prior to payment of the amount with respect to which the seizure was made. In any event, an authority that obtains an order is required to release a detained aircraft upon payment of the outstanding charges, or upon the provision of acceptable security therefor. Parliament has thus left the door open for the motions judge to work out an arrangement that is fair and reasonable to all concerned provided that the object and purpose of the remedy (to ensure the unpaid user fees are paid) is fulfilled. [73] [92]

The legal titleholders are sophisticated corporate players and are well versed in the industry in which they have chosen to invest. Since they can select which airlines they are prepared to deal with and negotiate appropriate security arrangements as part of their lease transactions, they are in a better position to protect themselves against this type of loss than are the airport authorities and NAV Canada. [71-72]

The intervention of bankruptcy proceedings in both Quebec and Ontario created procedural complications. In the case of Inter-Canadian, the detention remedies were applied for well before the assignment in bankruptcy. In the case of Canada 3000, the detention remedies were applied for while the CCAA stay was in effect and Canada 3000 remained the registered owner of the aircraft in question. In neither case did the aircraft become part of the bankrupt estate (because ultimate ownership was in the legal titleholder). The aircraft were legitimate targets of the detention remedies as they were still sitting on a Canadian airport tarmac and were still "owned or operated" (within the meaning of the relevant statutes) by the airlines at the relevant date. Given the authority to charge interest, the interest continues to run to the first of the date of payment, the posting of security or the bankruptcy. [77] [96]

In the proceedings involving Inter-Canadian it was not necessary for the Quebec Superior Court judge to resort to provincial law or, more specifically, to the Civil Code of Québec. The Aeronautics Act, the Airports Act, and CANSCA are federal statutes that create a unified aeronautics regime. Parliament endeavoured to create a comprehensive remedy that would be applicable across the country and would not vary from one province to another. This uniformity is especially vital since aircraft are highly mobile and move easily across jurisdictions. [78-79]

Two of the respondents leased to Canada 3000 the engines attached to two of the aircraft which, when seized, were airworthy. For the present purposes, the engines are part of the aircraft in respect of which charges were incurred and that are the subject of the detention. The Aeronautics Act does not envisage the dismantling of the aircraft (and thus of its value as security) on the tarmac. [87-89]

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Clifton P. Prophet and Eric Wredenhagen, for NAV Canada (30214).
Lyndon A. J. Barnes and Jean-Marc Leclerc, for Greater Toronto Airports Authority (30214).
John T. Porter and Alan B. Merskey, for Winnipeg Airports Authority Inc., Halifax International Airport Authority, Edmonton Regional Airports Authority, Calgary Airport Authority, Aéroports de Montréal, Ottawa Macdonald-Cartier International Airport Authority, Vancouver International Airport Authority and St. John's International Airport Authority (30214).
Richard A. Conway, David P. Chernos, Linda M. Plumpton and Jana N. Stettner, for International Lease Finance Corporation, Hyr Här I Sverige Kommanditbolag, IAI X, Inc., Triton Aviation International LLC, Sierra Leasing Limited, ACG Acquisition XXV LLC, ILFC International Lease Finance Canada Ltd. and U.S. Airways Inc. (30214).
Christopher W. Besant and Joseph J. Bellissimo, for G.E. Capital Aviation Services Inc., as Agent and Manager for Polaris Holding Company and AFT Trust-Sub I, Pegasus Aviation Inc., and PALS I, Inc. (30214).
Barbara L. Grossman and Christopher D. Woodbury, for Ansett Worldwide Aviation, U.S.A., and MSA V (30214).
Kenneth D. Kraft, for RRPF Engine Leasing Limited and Flight Logistics Inc. (30214).

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Pamela L. J. Huff and Jill Lawrie, for C.I.T. Leasing Corporation and NBB-Royal Lease Partnership One (30214).
Written submissions only by Craig J. Hill and Roger Jaipargas, for GATX/CL Air Leasing Cooperative Association (30214).
Michel G. Ménard, for NAV Canada (30729, 30730, 30731, 30732).
Richard L. Desgagnés and Véronique E. Marquis, for Ottawa Macdonald-Cartier International Airport Authority, St-John's International Airport Authority and Charlottetown Airport Authority Inc. (30731, 30732, 30742, 30749, 30750, 30751).
Gerald N. Apostolatos, for Aéroports de Montréal (30731, 30732, 30738, 30740, 30742).
Sandra Abitan, David Tardif-Latourelle and Allon Pollack, for Greater Toronto Airports Authority (30731, 30732, 30742, 30743, 30745).
Bertrand Giroux, Markus Koehnen, Jeff Gollob, Jason Murphy, Jean-Yves Fortin and Geneviève Bergeron, for Wilmington Trust Company, Wilmington Trust Corporation, Renaissance Leasing Corporation, Heather Leasing Corporation, G.I.E. Avions de transport régional and ATR Marketing Inc. (30729, 30730, 30731, 30732, 30738, 30740, 30742, 30743, 30745, 30749, 30750).

Pierre Bourque and Eugene Czolij, for Newcourt Credit Group (Alberta) Inc., Canada Life Assurance Company and CCG Trust Corporation (30740, 30742, 30745, 30750, 30751).
No one appeared for Canadian Imperial Bank of Commerce, Inter-Canadian (1991) Inc., Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc., Greater London International Airport Authority, Saint John Airport Inc., Canadian Regional Airlines Ltd. and Canadian Regional (1998) Ltd.
The judgment of the Court was delivered by

1 Binnie J. — When an airline collapses leaving unpaid bills for airport charges and air navigation services, the question becomes who takes the financial loss (or, as it is sometimes said, "the haircut"), the people who ultimately own the aircraft or the people who were obliged to (and did) provide the airport and navigation services?

2 The question lands before the Court because of the collapse of "Inter-Canadian (1991) Inc. Airline" in 1999 and, in 2001, of Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"). The answer depends on the statutory interpretation to be given to provisions of the Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5 ("Airports Act"), and the Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20 ("CANSCA"). The important context for this interpretation is the unusual nature of the modern airline business.

3 After decades of financial turbulence, an airline in the modern era may consist of little more than a name, with its aircraft leased, its suppliers on week to week contracts and even its reservation and yield management systems outsourced to one of the global service providers such as Sabre or Galileo. Start-ups are relatively easy, balance sheets are often thin, and failure can be quick and (to outsiders) unexpected, as the history of Canada 3000 illustrates. When a financial collapse occurs (and these have been frequent in Canada and elsewhere in the past decade), there is little meat on the corporate bones for unsecured creditors. Doing business with such airline operators carries significant financial risks, yet the appellant Canadian airports operating under government supervision are obliged by statute to allow financially troubled airlines to make use of their services (and sometimes the airport will not know if an airline is in financial trouble or not). Airport costs are largely recovered through landing fees. If these and other fees go unpaid, the airport is out of pocket for the cost of the service it was obliged by law to provide.

4 "NAV Canada", the privatized successor to the former government-run civil air navigation system, is also obliged to offer its services to any aircraft flying through Canadian airspace on a cost-recovery basis. Its business is even riskier than that of the airports because quite often these aircraft do not even land in Canada, as in the case of transatlantic traffic flying the great circle route to and from the eastern seaboard of the United States: Pan American World Airways Inc. v. The Queen, 1981 CanLII 215 (SCC), [1981] 2 S.C.R. 565.

5 When Parliament adopted its policy of privatizing major airports and navigation services in the early 1990s putting such services on a commercial footing, potential investors were expected to insist on some assurance that they would in fact be financially viable serving the chronically unstable aviation business. Thus, Parliament decided to extend to the private operators of airport and navigation services a statutory power to apply to a superior court judge for an order to seize and detain aircraft until outstanding charges are paid, similar to the power Parliament had earlier conferred on the Crown in pre-privatization days under the Aeronautics Act, R.S.C. 1985, c. A-2, s. 4.5.

6 It is worth emphasizing that no power to seize and detain as such is conferred. A superior court judge is interposed between the aircraft sought to be seized and the airports or NAV Canada. As discussed below, the role of the judge is crucial to an understanding of the statutory detention remedy.

7 The respondents are primarily entities with the ultimate ownership of the aircraft in respect of which the charges in issue were incurred ("the legal titleholders"). Their position is that under the terms of their various leases with the defaulting airlines, they did not operate the aircraft, nor did they make use of the services for which charges were levied, nor did they derive benefit therefrom. They say that they are investors, and that when the lessees

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failed they were entitled to repossess their aircraft free of the charges which the defaulting airlines — not the legal titleholders — incurred. They consider it unjust that they were required in these cases to post security as a condition of removing "their" aircraft from the airports in question. The appellant airport authorities and NAV Canada, on the other hand, argue that the failure of Canada 3000 and Inter-Canadian reflects the sort of air carrier instability that Parliament rightly anticipated and in light of which it created the statutory remedies in question. Parliament must be taken to appreciate, they say, that an airline may be only a corporate shell but an aircraft under detention is a good, solid and enduring hostage for payment.

8 I agree with the courts below that the respondent legal titleholders are not subject to personal or corporate liability to pay the unpaid charges under s. 55 of CANSCA. But that is not to say that the aircraft are similarly unburdened.

9 In my view, the appellants are entitled to obtain judicially authorized seize and detain orders (hereinafter sometimes collectively referred to as the detention remedy) to be exercised against the security posted in substitution for the aircraft. The matters should be remitted to the motions judges to work out the details of the orders. Considered in the context in which the detention remedy was intended by Parliament to operate, the detention remedy cannot be circumvented as suggested by the respondents by the expedient of leasing arrangements made between the airlines and the aircraft lessors. The detention remedy is purely statutory and Parliament's intention to create an effective collection mechanism against the aircraft itself owned or operated by the person liable to pay the amount or charge must be given full effect.

10 On the other hand, the appellants' remedy, if an order is granted, is limited to possession. Simple possession under the statutes does not confer any interest in the beneficial ownership of the aircraft. I do not think the appellants' further claim to the airborne equivalent of a maritime lien is well founded, nor do they have any "implied" power to sell the aircraft once detained. They get what the statute says they get — a right to apply for a judicial order to seize and detain the aircraft until payment — no more, and no less.

11 For the reasons that follow, I would allow the appeals and the cross-appeals in part, and return the seizure and detention applications to the respective motions judges to be dealt with in accordance with this judgment.

I. Facts

12 In 1992, the Airports Act privatized airports formerly owned and operated by the federal government. In 1996, CANSCA implemented the same objective in relation to Canada's civil air navigation services. Thus NAV Canada was incorporated as a non-profit corporation for the purpose of developing, operating and maintaining the civil air navigation system; see House of Commons Debates, vol. 133, 2nd Sess., 35th Parl., March 25, 1996, at p. 1153. CANSCA implemented the transfer of what was Transport Canada's civil air navigation services to NAV Canada and established the commercial and economic regulatory arrangements for the continued operation of those services; see House of Commons Debates, vol. 134, 2nd Sess., 35th Parl., May 15, 1996, at p. 2821.

A. Canada 3000

13 On November 8, 2001, Canada 3000 applied for protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). The effect of an initial court order made on the same day stayed all proceedings by creditors pending the filing of a plan of arrangement. Although the stay contemplated the continuation of operations, some five hours later the airlines' management issued a press release declaring that the airlines had ceased operations. The next day, November 9, a further order was issued grounding the fleet and providing for the return of aircraft operated by the airlines to Canada.

14 On November 9, 2001, NAV Canada applied to the Ontario Superior Court of Justice under s. 56(1) of CANSCA for an authorization to seize and detain certain aircraft operated by Canada 3000. The Greater Toronto Airport Authority ("GTAA") applied for relief against Canada 3000 but did not at that time seek leave of the court to seize and detain any aircraft.

15 On November 10, 2001, the directors and officers of Canada 3000 resigned. The next day the Canada 3000 companies were put into bankruptcy. At that time, the Canada 3000 companies owed approximately $7.4 million to NAV Canada, $13 million to the GTAA, and $8.35 million to the other Canadian airport authorities. On November 12, the GTAA moved to seize and detain aircraft under s. 9 of the Airports Act and on November 23, the other airport authorities applied for similar relief.

16 The detention remedy sought by the authorities was in relation to 38 aircraft operated by the Canada 3000 companies and collectively worth approximately US $1.1 billion. Despite the existence of the legal titleholders, all of the aircraft were registered in the name of Canada 3000 as owner under the Aeronautics Act. Canada 3000 held leases with the various respondents in respect of 36 aircraft. The lessors retained legal title to the aircraft. At the time of the CCAA application, rental payments under the leases were significantly in arrears.

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17 The termination provisions varied somewhat from lease to lease. Under some, the leases came to an end and the lessors became entitled to repossession upon the granting of the CCAA order, under others by the cessation of operations, and under the rest by the assignment in bankruptcy. The CCAA stay operated, in effect, as an interim bar to repossession (see s. 11.31 CCAA). At the time the detention remedy was sought, the aircraft sought to be seized were grounded at the Canadian airports listed in the style of cause of the various proceedings.

18 On December 3, 2001, after the aircraft had been grounded for close to a month, the motions judge approved the terms of their release on the posting of security for 110 percent of the amounts alleged to be owed. The motions judge then heard the seizure and detention motions through December and into January 2002, and dismissed them on May 7, 2002. The airport authorities and NAV Canada appealed and on January 20, 2004, the Ontario Court of Appeal dismissed their appeal.

B. Inter-Canadian

19 Inter-Canadian operated its fleet of aircraft under leasing agreements with the legal titleholders but it too was the registered owner under the Aeronautics Act. On November 27, 1999, Inter-Canadian ceased operations and laid off 90 percent of its employees. At that point, it had accumulated unpaid charges totalling approximately $5 million owing to NAV Canada and to the airport authorities.

20 Through early December 1999 the airport authorities and NAV Canada moved to seize and detain a number of the aircraft. This was authorized by four orders made by the Quebec Superior Court between December 8 and 17. Before the seizure motions were launched, however, one of the respondents, Renaissance Leasing Corporation, had purported to terminate its lease with Inter-Canadian. The aircraft nevertheless remained on the tarmac at Dorval airport.

21 On January 5, 2000, Inter-Canadian filed a notice of intention to make a proposal to its creditors pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. The airline's creditors rejected its proposal in March and the company was deemed retroactively to have made an assignment in bankruptcy as of January 5. Faced with the legal titleholders' claims that they were entitled to repossession of the aircraft, the trustee in bankruptcy applied to the Superior Court for directions.

22 On July 7, 2000, the Superior Court allowed a motion to release the aircraft in exchange for security set at 150 percent of the claims of the airport authorities and NAV Canada. On November 9, 2000, Tremblay J., having heard the application on its merits, confirmed the validity of the detention and also held the legal titleholders liable for the amounts owing. His ruling was overturned by a majority decision of the Quebec Court of Appeal, which held that the lessors' right to repossession took priority and that the legal titleholders were entitled to the return of their aircraft free and clear of the unpaid charges.

II. Judicial History

A. Canada 3000

(1) Ontario Superior Court of Justice (Ground J.)

23 The motions judge concluded that the legal titleholders were not jointly and severally liable for the charges owed to NAV Canada under s. 55 of CANSCA. They were not "owners" within the meaning of the Act because none of the aircraft were registered in their name. Nor were any of the titleholders in possession of the aircraft when the charges were incurred. In his view, "the word 'owner' in [CANSCA] should not be interpreted to include persons who do not have custody or control of the aircraft, do not operate the aircraft, and do not make use of the air navigation services in respect of which the navigation charges are levied": 2002 CanLII 49584 (ON SC), (2002), 33 C.B.R. (4th) 184, at para. 52.

24 Further, the motions judge concluded that the seizure and detention remedies found in CANSCA and the Airports Act did not create a lien or security interest that ranked in priority to the ownership or perfected security rights of third parties. He preferred the analogy of a Mareva injunction:

I am not persuaded, however, that the legislation granting such detention rights should be interpreted as creating rights against third parties having ownership or perfected security interests in the aircraft such that they, in effect, become liable for the debts of third parties and must extinguish those debts before they can enforce their contractual rights to repossess the aircraft or enter into possession of the aircraft to realize on their security. [para. 43]

25 Accordingly, he dismissed the claims of NAV Canada and the airport authorities.

(2) Ontario Court of Appeal

(a) Cronk J.A., for the Majority

26 Cronk J.A. agreed with the motions judge that the titleholders were not jointly and severally liable under s. 55 of CANSCA. A restrictive definition of "owner" excluding legal titleholders was consistent with the user-pay model established by CANSCA, the broader regulatory system and the relevant legislative history, all of which demonstrated Parliament's intent to limit liability to "persons having legal custody and control and persons otherwise in possession of aircraft": 2004 CanLII 32169 (ON CA), (2004), 69 O.R. (3d) 1, at para. 118.

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27 Cronk J.A. also agreed that the seizure and detention provisions in CANSCA and the Airports Act do not give the authorities priority over the rights of the titleholders to repossess the aircraft:

I conclude that the remedies under the Detention Provisions, if granted, do not create rights in the Aircraft that rank in priority to the interests in the Aircraft of the Lessors, the legal titleholders to the Aircraft, in the face of a claim for repossession and recovery of the Aircraft by the Lessors. . . . The Detention Provisions are intended to apply to aircraft of persons having legal custody and control or who are otherwise in possession of the aircraft. [para. 190]

28 In the view of the majority, even if the aircraft had been properly detained, the engines attached to the aircraft and leased to Canada 3000 by two of the respondents could be removed by their respective owners. The appeal of the various authorities was dismissed.

(b) Juriansz J. (ad hoc), Dissenting in Part

29 Juriansz J. (ad hoc, now J.A.) would have allowed the appeal in respect of the detention remedies. In his view, these remedies focus on the aircraft and not the persons liable to pay. As long as the aircraft is owned or operated by a person liable to pay then it may be the subject of an application to seize and detain it. The fact that other persons may have property interests in the aircraft is of no consequence:

The remedy is "in addition to any other remedy available for the collection" of the outstanding charges. The remedy is not confined to collection of outstanding charges from persons liable for the charges. The remedy is not directed to persons at all, but rather to "aircraft", and permits the Authorities, under court supervision, to seize, to detain and to refuse to release the aircraft until somebody has satisfied the outstanding charges. [para. 255]

Juriansz J. also held that the detention provisions apply to the leased engines since they were affixed to the aircraft that were subject to the detention remedy.

B. Inter-Canadian

(1) Quebec Superior Court (Tremblay J.)

30 The motions judge held the titleholders to be jointly and severally liable for the unpaid charges due to NAV Canada under s. 55 of CANSCA. CANSCA and the Airports Act provide for a right to retain the aircraft operated by a party that has not paid its charges. The motions judge relied on arts. 1592 and 1593 of the Civil Code of Québec, S.Q. 1991, c. 64, and determined that the authorities' right of retention of the aircraft took priority over the lessors' interests: [2000] R.J.Q. 2935.

31 Accordingly, by order dated November 9, 2000, the motions judge confirmed the validity of the seizures, and declared the respondents liable to pay the overdue charges.

(2) Quebec Court of Appeal

(a) Pelletier and Morissette JJ.A., for the Majority

32 Pelletier and Morissette JJ.A. reversed the motions judge's decision and absolved the legal titleholders from liability for unpaid service charges to NAV Canada under s. 55 of CANSCA. In their view, limiting the definition of "owner" to the enumerated categories in s. 55(2) was the only interpretation consistent with both the English and French versions of the statute and the statutory context. They noted that NAV Canada's interaction is primarily with the user of the aircraft, not the legal titleholders. They concluded, at 2004 CanLII 41230 (QC CA), (2004), 247 D.L.R. (4th) 503, para. 106, that

[translation] these aircraft are in no way liable for the debts of Inter-Canadian for the simple reason that they do not belong to this debtor.

33 Moreover, in their view, neither the airport authorities nor NAV Canada had any right to an order to seize and detain the aircraft in priority to the rights of the legal titleholders. They rejected the motions judge's resort to the Civil Code.

(b) Nuss J.A., Dissenting

34 Nuss J.A. concluded that the intention and purpose of the statutory provisions would be defeated if the legal titleholders could obtain release of the aircraft without payment of the charges. However, he limited the liability of a legal titleholder to an obligation to pay the charges incurred in the operation of aircraft of which it is the titleholder:

. . . the titleholder, to obtain release of its seized aircraft must only pay all the charges, in the use of the airport, incurred (and unpaid) by the operator in the operation of any aircraft owned by the same titleholder. [Emphasis added; para. 145.]

III. Statutory Provisions

35 The statutory provisions are reproduced in the relevant paragraphs of the reasons.

IV. Analysis

36 This case is from first to last an exercise in statutory interpretation, and the issues of interpretation are, as always, closely tied to context. The notion that a statute is to be interpreted in light of the problem it was intended to address is as old at least as the 16th century; see Heydon's Case (1584), 3 Co. Rep. 7a, 76 E.R. 637. In a more

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modern and elaborate formulation, it is said that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87).

37 As this Court noted in 1915, part of the context is "the condition of things existent at the time of the enactment": Grand Trunk Railway Co. of Canada v. Hepworth Silica Pressed Brick Co. 1915 CanLII 65 (SCC), (1915), 51 S.C.R. 81, at p. 88. At the time the measures in question here were enacted, airline insolvencies and bankruptcies had become a fact of life throughout the airline industry. Many of the planes flown in and out of and across Canada were leased to, and flown by, airlines in, or close to, bankruptcy protection. Under the interpretation offered by the respondents and the majority decisions of the Courts of Appeal, the detention remedy would be opposable to everybody but the titleholder, whose aircraft is often the only asset to survive the financial wreckage. Parliament would be taken to have intended a remedy that is least effective when it is most needed. It is more likely that Parliament fully appreciated that in dealing with aircraft flown in and out of jurisdictions under complex leasing arrangements, the only effective collection scheme is to render the aircraft themselves available for seizure, and thereafter to let those interested in them, including legal titleholders, registered owners, sublessors and operators, resolve their dispute about where the money is to come from to pay the debts due to the service providers. I should add that I agree with Juriansz J. that the legal titleholders are not without benefit from the services provided, although the benefit is indirect. Without the day to day flight operations the legal titleholders would have no business. They lease the aircraft intending them to be used in the very activities for which the services are provided. By and large, the legal titleholders are sophisticated corporations. They are knowledgeable about the ways of the industry in which they have chosen to participate.

38 Part of the important context is the commercial reality of the marketplace where a statute is intended to function. Here the privatized appellants provide services on the basis of a cost-based tariff fixed by regulation. Prior to CANSCA and the Airports Act, civil air navigation and airport services were provided by the federal government. Central to the statutory scheme is the fact that these service providers are self-funded and intended to be financially viable and independent; see CANSCA, ss. 7 and 8; House of Commons Debates, March 25, 1996, at pp. 1152-54. The privatized service providers do not possess the financial resources of the Crown. The statutory remedies are clearly intended to promote financial viability within a risky business environment and to make privatization attractive and practicable to potential investors.

39 Another important commercial fact is that not only are NAV Canada and the airport authorities required to provide services according to a cost-based tariff, but they cannot withhold services from even an obviously failing airline. Pursuant to the lease agreement between Transport Canada and the Airport Authorities, the airports cannot limit the access of aircraft to their facilities except in cases of bad weather or emergency conditions; see Ottawa Macdonald-Cartier International Airport Ground Lease, s. 8.10.02. Similarly, NAV Canada is obligated under s. 9 of CANSCA to provide all users with its civil air navigation services. This reflects the obligation undertaken by Canada under international agreements; see, e.g., Air Transport Agreement Between the Government of Canada and the Government of the United States of America, February 24, 1995 ("USA-Canada Open-Skies Agreement"), Annex I, s. 1.

40 With these preliminary comments on context (and in particular the vitally important commercial context in which these statutes were designed to operate), I turn to the two major questions raised by the appeals. Firstly are the legal titleholders liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers? Secondly, even if they are not so liable, are the aircraft to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and Inter-Canadian?

A. Are the Legal Titleholders Jointly and Severally Liable to NAV Canada Under Section 55 of CANSCA for Outstanding Civil Air Navigation Charges?

41 In my view, on a purposeful interpretation of s. 55, the answer is no. I agree with Ground J. and with the unanimous view of both Courts of Appeal that the legal titleholders are not personally liable for the unpaid charges. Section 55 provides:

55. (1) [Joint and several liability] The owner and operator of an aircraft are jointly and severally liable for the payment of any charge for air navigation services imposed by the Corporation in respect of the aircraft.

(2) [Meaning of "owner"] In subsection (1), "owner", in respect of an aircraft, includes

(a) the person in whose name the aircraft is registered;

(b) a person in possession of an aircraft as purchaser under a conditional sale or hire-purchase agreement that reserves to the vendor the title to the aircraft until payment of the purchase price or the performance of certain conditions;

(c) a person in possession of the aircraft as chattel mortgagor under a chattel mortgage; and

(d) a person in possession of the aircraft under a bona fide lease or agreement of hire.

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42 The appellants contend that the word "owner" in s. 55(1) should be given its ordinary meaning to include the legal titleholders. Who, more than they, should be considered an "owner"? The legal titleholders respond that it would be absurd to make them jointly and severally liable for civil air navigation charges related to air operations in which they did not participate, any more than the owner of a rented car should be liable for charges incurred by a renter in using a toll bridge. They point out that the practical effect of NAV Canada's argument would be mischievous. In this case, for example, Canada 3000 leased a number of aircraft from International Lease Finance Corporation ("ILFC") based in California, one of the largest aircraft leasing companies in the world. If NAV Canada's interpretation of s. 55 is correct, it would mean that a seizure and detention order issued in respect of Canada 3000's unpaid user charges could in theory attach not only to the ILFC aircraft leased to Canada 3000, but also to any other aircraft to which ILFC holds title, including aircraft leased to other airlines (e.g. Lufthansa, British Airways or United Airlines). Thus the wreckage created by Canada 3000's collapse could spread disruption widely and perhaps unjustifiably trigger a further crisis in other airlines.

43 It seems clear from the statutes and the legislative record that Parliament intended to create a "user-pay" scheme for civil air navigation services, and that the only "users" of the civil air navigation services within the contemplation of the Act are the airlines, not the legal titleholders.

(1) The Meaning of "Owner"

44 If s. 55(1) were read in isolation, the ordinary and grammatical meaning of "owner" would include the legal titleholder. However, this Court held, in Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, 2002 SCC 42, that

one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. . . .

. . . It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous . . .". [Underlining added; paras. 29-30.]

45 Accordingly, to paraphrase the Court's decision in Bristol-Myers Squibb Co. v. Canada (Attorney General), 2005 SCC 26 (CanLII), [2005] 1 S.C.R. 533, 2005 SCC 26, it is necessary to suspend judgment on the precise scope of the word "owner" in s. 55(1) and first to examine the "contextual" elements of the Driedger approach.

(2) Statutory Context of Section 55

46 Understandably, the appellants lay great emphasis on the fact that s. 55(2) is introduced by the words

In subsection (1), "owner", in respect of an aircraft, includes . . . .

followed by a list of four subsections. In the French text, on the other hand, the introductory words are

Pour l'application du paragraphe (1), "propriétaire", relativement à un aéronef, s'entend . . . .

There was, as might be expected, much argument over the words "includes" and "s'entend" in s. 55(2). NAV Canada argues that "includes" expands the definition of owner beyond the enumerated groups and that its ordinary meaning encompasses titleholders. The legal titleholders respond that the sense of "s'entend" in the French text is usually conveyed by the English word "means", which generally precedes a definition to be construed as exhaustive, and which would therefore exclude them from personal liability.

47 The English word "includes" may also, depending on the context, precede a list that exhausts the definition; see, e.g., Dilworth v. Commissioner of Stamps, [1899] A.C. 99 (P.C.), at pp. 105-6; R. v. Loblaw Groceteria Co. (Manitoba) Ltd., 1960 CanLII 84 (SCC), [1961] S.C.R. 138.

48 In this case, in my view there are three significant reasons for adopting a restrictive interpretation of the word "includes" in s. 55(2), and thereby excluding the legal titleholders from liability under s. 55(1).

49 Firstly, it is significant that the French version signals a closed list; see Uniform Law Conference of Canada, Drafting Conventions for the Uniform Law Conference of Canada (online), s. 21(4). The shared meaning is not conclusive when such an interpretation would be contrary to the purpose and intent of the statute, but it is preferred; see Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, at pp. 1070-72; Schreiber v. Canada (Attorney General), 2002 SCC 62 (CanLII), [2002] 3 S.C.R. 269, 2002 SCC 62, at para. 56; and R. Sullivan, Sullivan and Driedger on the Construction of Statutes (4th ed. 2002), at pp. 79-90. Further, where one of the linguistic versions is broader than the other, the common meaning favours the more restricted or limited meaning; see Schreiber; R. v. Dubois, 1935 CanLII 1 (SCC), [1935] S.C.R. 378. As the English version is ambiguous, indicating that the list could be exhaustive or expansive depending on the context, the fact that the relatively clear French version signals that "owner" is restricted to the persons listed in s. 55(2) is a factor weighing against NAV Canada's expansive interpretation.

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50 Secondly, I conclude (as did the Courts of Appeal) that interpreting the list enumerated in s. 55(2) as exhaustive of ownership for the purposes of s. 55(1) is consistent with the regulatory scheme as a whole and its legislative history, outlined below. In restricting "owner" to those in possession and legal custody and control of the aircraft, s. 55(2) is brought into conformity with the meaning that the word "owner" carries throughout the interlocking statutes that regulate aeronautics. For example, under the Canadian Aviation Regulations, SOR/96-433 ("CARs"), only a person who has legal custody and control may be a registered owner. Sections 55(2)(b) to (d) all explicitly state that the "owner" must be in possession of the aircraft. Also of significance is s. 55(2)(d), which includes as owner someone "in possession of the aircraft under a bona fide lease". No reference is made therein to the lessor. Parliament put its mind to aircraft leasing agreements and decided that the person in possession of the aircraft is the owner for the purposes of user charges.

51 Thirdly, exclusion of legal titleholders is consistent with Parliament's manifest intent to limit the scope of liability to "users" of NAV Canada's civil air navigation services. Section 32 of CANSCA authorizes NAV Canada to impose charges only on a "user", which s. 2(1) of the Act defines as "an aircraft operator." Part III of CANSCA lays out detailed mechanisms through which NAV Canada may impose fees. All of its provisions contemplate that it is the user who will be charged. Section 36(3)(a)(i) states that notice of changes to existing charges and notice of new charges must be sent to representative user organizations. Section 37(4) states that NAV Canada must advise representative user organizations once a new charge has been approved. Section 44 limits the right to appeal charges to "any user, group of users or representative organization of users".

52 In contrast, titleholders are not provided with notice of rates or accounts of the charges that their aircraft accumulate. In this case, the respondents in the Canada 3000 case were only notified of the $7.4 million owing to NAV Canada the day before the airline filed for protection under the CCAA. Thus Cronk J.A. observed that

> the charges scheme of the CANSCA does not protect aircraft lessors and secured creditors from the possible imposition by NAV Canada of improper or arbitrary navigation charges precisely because it is not envisaged that such persons will have any liability for such charges. [para. 101]

53 In summary, in my view, the statutory context supports the exclusion of the legal titleholders from the definition of owner under s. 55 of CANSCA.

(3) The Broader Legislative Framework

54 As stated, aeronautics in Canada is governed by a complex web of statutes, regulations and international conventions. CANSCA and the Airports Act are part of this broader legislative framework. In R. v. Ulybel Enterprises Ltd., 2001 SCC 56 (CanLII), [2001] 2 S.C.R. 867, 2001 SCC 56, the Court emphasized, at para. 52, "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". See also Bell ExpressVu, at para. 27.

55 The policy and practice throughout the federal regulatory scheme is to use the term "owner" to refer to the person in legal custody and control of the aircraft, not the legal titleholder. The CARs, for example, define owner as "the person who has legal custody and control of the aircraft" (s. 101.01(1)). The Aeronautics Act refers only to "registered owners" and, under s. 4.4(5), only the operator or registered owner may face liability for charges imposed under that Act. Section 3(1) defines a registered owner as the person to whom a certificate of registration has been issued and the CARs make clear that an aircraft may only be registered by an owner who, again, must have legal custody and control of the aircraft; see ss. 202.15 to 202.17. Section 2(2) of CANSCA itself states that "[u]nless a contrary intention appears, words and expressions used in this Act have the same meaning as in subsection 3(1) of the Aeronautics Act." I appreciate that arguments are available to counter these points but in my view the legal titleholders have the better side of the debate.

56 Internationally, the Convention on International Civil Aviation, December 7, 1944, Can. T.S. 1944 No. 36 (the "Chicago Convention"), does not require legal title to correspond with registered ownership. Article 19 states that registration shall be in accordance with the laws of the contracting State. It is common ground that, by virtue of ss. 202.15, 202.16 and 202.17 of the CARs, an aircraft may only be registered in the Canadian Civil Aircraft Register by the "owner" of the aircraft as that term is defined under s. 101.01(1) of the CARs, and that that person is the entity having legal custody and control of the aircraft. Thus an airline operating aircraft in Canada under a long-term lease is named on the Certificate of Registration as "owner" of the aircraft, notwithstanding that title is actually held by the lessor; see D. H. Bunker, Canadian Aviation Finance Legislation (1989), at p. 764. We have been given no reason why the privatization legislation should be held to depart so strikingly from Canadian regulatory practice.

(4) Legislative History

57 Though of limited weight, Hansard evidence can assist in determining the background and purpose of legislation; Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 35; R. v. Morgentaler, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463, at p. 484. In this case, it confirms Parliament's apparent intent to exclude legal titleholders from personal liability for air navigation charges. The legislative history and the statute itself make it

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clear that Parliament did not intend CANSCA to replace or override the existing regulatory framework but rather to fit cohesively within it. In introducing CANSCA, the Minister of Transport stated that the Aeronautics Act, which establishes the essential regulatory framework to maintain safety in the aviation industry, "will always take precedence over the commercialization legislation" (House of Commons Debates, March 25, 1996, at p. 1154). In the Ontario Court of Appeal, Cronk J.A. highlighted a number of other instances where government spokespersons emphasized to Members of Parliament that CANSCA was to fit within the existing regulatory framework which generally favours the narrow meaning of "owner"; see, e.g., House of Commons Debates, May 15, 1996, at p. 2834; May 29, 1996, at p. 3144; June 4, 1996, at pp. 3394 and 3410; and Debates of the Senate, vol. 135, 2nd Sess., 35th Parl., June 10, 1996, at pp. 588-89.

58 In 1985, during passage of the Aeronautics Act, a concern was raised in Parliament that liability under s. 4.4(5) (that Act's liability provision) could extend to legal titleholders. In response, the Government inserted the term "registered owner". The Parliamentary Secretary to the Minister of Transport specifically stated that the change was made to ensure that liability did not extend to those who had a security or other financial interest in the aircraft; House of Commons Debates, vol. IV, 1st Sess., 33rd Parl., June 20, 1985, at pp. 6065-66.

59 In 1996, the Government considered Bill C-20 (which became CANSCA) as it transferred the operation of the civil navigation system from Transport Canada to NAV Canada. The Clause by Clause Analysis brief presented to the Senate Committee explained that s. 55 is based on the wording of the equivalent section of the Aeronautics Act which, as stated, restricts "owner" to registered owner; see "Clause by Clause Analysis for the Civil Air Navigation Services Commercialization Act", as presented to the Senate Committee on Transport and Communications, at pp. 51-52. However, the textual discrepancy noted above was not addressed.

(5) Conclusion on the Section 55 Issue

60 A purposive interpretation of s. 55 that takes into account the foregoing considerations compels rejection of the position urged by NAV Canada. Moreover, and importantly, the narrow interpretation of "owner" in s. 55(1) conforms with common sense. It would be a severe disruption to the functioning of the airline industry if, as a result of Canada 3000's failure to pay its charges, NAV Canada could seize and detain an aircraft operated by, for example, Air Canada. There is no reason to think Parliament intended to let the damage caused by a failed airline expand beyond that airline's fleet of aircraft.

61 Accordingly, applying Driedger's contextual approach to s. 55(1) of CANSCA, I agree with the Courts of Appeal that the titleholders of the aircraft are not jointly and severally liable for the charges due to NAV Canada. They are not "owners" within the meaning of that section.

B. The Detention Remedy

62 If the legal titleholders are not directly liable for the charges due to the service providers, they argue that it would be unfair and contradictory to hold their aircraft hostage for the payment. Section 56 of CANSCA and s. 9 of the Airports Act should be interpreted consistently with s. 55(1) of CANSCA, the legal titleholders argue, and their right to repossess the aircraft on termination of the lease should take priority over the statutory remedy.

63 On the other hand, Nuss J.A., dissenting in the Quebec Court of Appeal, put the contrary position:

If the titleholder could obtain release of the seized aircraft without the payment of the outstanding charges or providing security, the intention and purpose of the Detention Provisions enacted by Parliament would be defeated. This is so because the debt is constituted of charges incurred by the operator of the aircraft (who is often, as in this case, the registered owner) and not by the titleholder. Thus, if the contention of [the titleholders] were to prevail, the titleholder, who is neither the operator nor the "owner" within the meaning of the statutes, could always obtain release of the aircraft and the charges would not be paid. The recourse provided by Parliament would, inevitably, be of no avail. [para. 126]

I believe that Nuss J.A. is correct on this point.

64 The relevant provisions, which authorize applications to a superior court judge of the province in which any aircraft owned or operated by the person liable to pay the charge or amount is situated, are expressed in the two statutes in similar terms.

65 Section 56 of CANSCA provides:

56. (1) [Seizure and detention of aircraft] In addition to any other remedy available for the collection of an unpaid and overdue charge imposed by the Corporation for air navigation services, and whether or not a judgment for the collection of the charge has been obtained, the Corporation may apply to the superior court of the province in which any aircraft owned or operated by the person liable to pay the charge is situated for an order, issued on such terms as the court considers appropriate, authorizing the Corporation to seize and detain any such aircraft until the charge is paid or a bond or other security for the unpaid and overdue amount in a form satisfactory to the Corporation is deposited with the Corporation.

(2) [Application may be ex parte] An application for an order referred to in subsection (1) may be made ex parte if the Corporation has reason to believe that the person liable to pay the charge is about to leave Canada or take from Canada any aircraft owned or operated by the person.

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(3) [Release] The Corporation shall release from detention an aircraft seized under this section if
(a) the amount in respect of which the seizure was made is paid;
(b) a bond or other security in a form satisfactory to the Corporation for the amount in respect of which the seizure was made is deposited with the Corporation; or
(c) an order of a court directs the Corporation to do so.

66 Section 9 of the Airports Act, under which the airport authorities bring their seizure and detention applications, is to the same effect.

9. (1) [Seizure and detention for fees and charges] Where the amount of any landing fees, general terminal fees or other charges related to the use of an airport, and interest thereon, set by a designated airport authority in respect of an airport operated by the authority has not been paid, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on application to the superior court of the province in which any aircraft owned or operated by the person liable to pay the amount is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.
(2) [Idem] Where the amount of any fees, charges and interest referred to in subsection (1) has not been paid and the designated airport authority has reason to believe that the person liable to pay the amount is about to leave Canada or take from Canada any aircraft owned or operated by the person, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on ex parte application to the superior court of the province in which any aircraft owned or operated by the person is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.
(3) [Release on payment] Subject to subsection (4), except where otherwise directed by an order of a court, a designated airport authority is not required to release from detention an aircraft seized under subsection (1) or (2) unless the amount in respect of which the seizure was made is paid.
(4) [Release on security] A designated airport authority shall release from detention an aircraft seized under subsection (1) or (2) if a bond, suretyship or other security in a form satisfactory to the authority for the amount in respect of which the aircraft was seized is deposited with the authority.
(5) [Same meaning] Words and expressions used in this section and section 10 have the same meaning as in the Aeronautics Act.

67 According to these provisions, the airport authorities or NAV Canada (upon obtaining a court order) may take possession of an aircraft and detain it. **The aircraft must be either "owned" or "operated" by a person who is** liable to pay. Either is a sufficient basis for an application.

68 The key difference between the joint and several liability provisions in s. 55 of CANSCA and the detention remedy provided for in s. 56 of CANSCA and s. 9 of the Airports Act is that the seizure and detention remedy lies against the aircraft. Whereas s. 55 identifies a group of persons who are made legally liable for the amounts owing, the detention remedy has a different focus. It provides for a right to possess aircraft until the debt is paid or security provided.

69 The legal titleholders argue that the claim of NAV Canada and the airport authorities to detain the aircraft must yield to their right under their respective leases to repossession. They liken the seizure and detention remedies to a Mareva injunction, in which the assets are frozen while various parties work out their respective entitlements; see Aetna Financial Services Ltd. v. Feigelman, 1985 CanLII 55 (SCC), [1985] 1 S.C.R. 2. However, in my view, there is no need to resort to analogies, especially loose analogies (e.g. Mareva injunctions are interlocutory, whereas the detention remedy is available whether or not a judgment for the collection of the charge or amount has been obtained. Moreover, Mareva injunctions are directed at persons (Aetna Financial Services, at pp. 25-26), whereas the seizure and detention remedy targets the aircraft itself).

70 The CARs, adopted pursuant to the Aeronautics Act, **provide that an "operator" in respect of an aircraft "means the person that has possession of the aircraft as owner, lessee or otherwise"** (s. 101.01(1)). At the dates of the applications for seizure and detention orders, Canada 3000 and Inter-Canadian were still the registered owners of the aircraft. Accordingly, if the Court is to read the words of the detention remedy in the context of the realities of this industry previously discussed, it seems to me that those remedies must be available against the aircraft of Canada 3000 (except any aircraft already repossessed by the titleholder prior to the CCAA application on November 8, 2001) and Inter-Canadian. (Once a titleholder reclaims possession, it becomes an operator in possession within s. 55(1) of CANSCA. However, as its possession post-dates the charges, no personal liability is incurred on that account.)

71 It is difficult to endorse the indignation of the legal titleholders with respect to detention of their aircraft until payment is made for debts due to the service providers. They are sophisticated corporate players well versed

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in the industry in which they have chosen to invest. The detention remedies do not affect their ultimate title. Investors who have done their due diligence will recognize that detention remedies have deep roots in the transport business. In The Emilie Millon, [1905] 2 K.B. 817 ("Mersey Docks"), for example, the English Court of Appeal examined a statute that stipulated that the Mersey Docks and Harbour Board could cause a ship to be detained until all harbour and tonnage payments had been made despite the fact that the ownership of the ship did not correspond to the debtor who had incurred the charges. The ruling in that case reflects the traditional scope of this type of remedy (at p. 821):

The Mersey Docks and Harbour Board have a right by statute to detain the vessel until the dock tonnage rates and harbour rates are paid. That is an express statutory right, and the board have nothing to do with any sale of the vessel to a purchaser. That is a matter which only concerns those who are interested in the vessel. It does not concern the board. The board are entitled to detain the vessel, whoever is the owner, until the rates are paid. The order appealed against deprives them of that right, and without their consent purports to give them an option to try and make some claim to a lien upon or right against the fund in priority to other claimants. The board have no such lien or right. If this vessel had been allowed to leave the dock, the board would have been left to make a futile claim against the fund in court. [Emphasis added.]

This type of provision is not uncommon in the airline business, see, e.g., decisions under a differently worded U.K. Act such as Channel Airways Ltd. v. Manchester Corp., [1974] 1 Lloyd's Rep. 456 (Q.B.), at p. 461, in which it was held that the Manchester Corporation Act "mean[t] what it sa[id]", and that the city could detain aircraft in respect of which charges had been incurred until those charges had been paid. The legal titleholders face this problem on the other side of the Atlantic. It is a risk they manage there. No reason was given as to why they cannot manage it here.

72 The legal titleholders are in a better position to protect themselves against this type of loss than are the airport authorities and NAV Canada. The legal titleholders can select which airlines they are prepared to deal with and negotiate appropriate security arrangements as part of their lease transactions with the airlines. In the case of the aircraft at issue in these appeals, many if not all of the leases provided for substantial security deposits. For example, the total amount posted by Canada 3000 to the ILFC as security deposits for airport fees and charges was approximately $15,305,500. It is unnecessary to catalogue all of the possible security arrangements, but these deposits demonstrate a legal titleholder's ability to negotiate protection at a time when the airline is solvent to cover the amounts in overdue charges that the airline may eventually be required to pay to the statutory service providers.

73 I agree with Cronk J.A. (at para. 133) that the detention remedy under the statutes is subject to several constraints: (i) the remedy is not automatic and requires prior court authorization; (ii) the remedy is discretionary and may be subject to such terms as the court considers necessary; (iii) under s. 9(3) of the Airports Act and s. 56(3)(c) of CANSCA, the court also has a discretion to limit the duration of the remedy by requiring the applicable authority to release a detained aircraft from detention prior to payment of the amount with respect to which the seizure was made; (iv) in any event, an authority that obtains an order under the detention provisions is required to release a detained aircraft upon payment of the outstanding amount or charges in respect of which the seizure was made or upon the provision of acceptable security therefor (ss. 9(3) and 9(4) of the Airports Act and ss. 56(1) and 56(3) of CANSCA); and (v) an order is not available under the detention provisions if the aircraft in respect of which the order is sought is exempt from seizure and detention under provincial law (s. 10(1) of the Airports Act and s. 57(1) of CANSCA) or, in the case of the Airports Act, under a regulation made by the Governor in Council (s. 10(2)).

74 On the other hand, the conclusion of Juriansz J., dissenting in part, was correct that "the wording of the Detention Provisions makes apparent that aircraft may be seized and detained without regard to the property interests of persons who are neither the registered owners nor the operators of the aircraft under the legislation. As long as the aircraft is owned or operated by a person liable to pay the outstanding charges, it may be the subject of an application to seize and detain it. The fact that there may be other persons, who are not liable to pay the outstanding charges but have property interests in the aircraft, is of no consequence" (para. 239).

75 I turn, then, to a number of additional arguments raised on both sides which, in my view, with respect, unnecessarily complicate a straightforward task of statutory interpretation.

(1) Whether or Not a Lien Existed

76 In the Ontario case, there was considerable debate about whether the detention remedy created a lien. However, as the English Court of Appeal commented in Mersey Docks, there was no need for the port authority "to . . . make some claim to a lien" (p. 821). Nor is it necessary here. In this case, as in Mersey Docks, the remedy is purely a creature of statute. Whether or not a lien could be said to arise by operation of law is perhaps of theoretical interest but it has no practical bearing on the result in these appeals.

(2) Effect of the Bankruptcy Proceedings

77 The intervention of bankruptcy proceedings in both Quebec and Ontario created procedural complications. For present purposes, it is sufficient to note that the detention remedies in Quebec were applied for well

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before the assignment in bankruptcy. In Ontario, the detention remedies were applied for while the CCAA stay was in effect and Canada 3000 remained the registered owner of the aircraft in question. In neither case did the aircraft become part of the bankrupt estate (because ultimate ownership was in the legal titleholder). The aircraft were nevertheless legitimate targets of the detention remedies as they were still sitting on a Canadian airport tarmac and were still "owned or operated" (within the meaning of the relevant statutes) by the airlines at the relevant date.

(3) Resort to the Civil Code of Québec

78 In the Quebec Superior Court, Tremblay J. held that the seizure and detention provisions create a right similar to that found in arts. 1592 and 1593 of the Civil Code of Québec. However, with respect, there is no need to make reference to provincial law or, more specifically, to the Civil Code, and to do so here is inappropriate. Section 56 of CANSCA and s. 9 of the Airports Act specifically state that the remedy is to be "in addition to any other remedy", which includes remedies under provincial law.

79 The Aeronautics Act, the Airports Act and CANSCA are federal statutes that create a unified aeronautics regime. Parliament endeavoured to create a comprehensive code applicable across the country and not to vary from one province to another. This uniformity is especially vital since aircraft are highly mobile and move easily across jurisdictions.

80 NAV Canada also relied on ss. 8.1 and 8.2 of the Interpretation Act, R.S.C. 1985, c. I-21, to urge that s. 56 of CANSCA provides for a civiliste right of retention. However, neither section applies in this case. Section 8.1 states that

if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

If it were necessary to resort to provincial law, then the provincial law to be used is that of the province in which the provision is being applied: Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68 (CanLII), [2004] 3 S.C.R. 461, 2004 SCC 68. Here, for reasons stated, resort to provincial law is not necessary.

81 Section 8.2 of the Interpretation Act states that

when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

82 The issue here is not one of conflicting terminology. The language used in relation to the detention remedy is perfectly apt to make Parliament's intention clear bilingually and bijuridically. In short, resort to the Civil Code was neither necessary nor appropriate.

(4) Existence of a Power of Sale

83 The appellants argue that the existence of a seizure and detention implies (in their favour) a power of sale. No such power is contained in CANSCA or the Airports Act. Nor is it necessarily implied in the creation of a power to seize and detain. The only claim that the authorities have under federal aeronautics law is the claim to possession of the aircraft until their user charges are paid.

(5) Presumption Against Interference With Private Rights

84 The Ontario motions judge applied a narrow approach to the Detention Remedy on the basis that it invades what would otherwise be the proprietary rights of the legal titleholders. Reference was made to Royal Bank of Canada v. Sparrow Electric Corp., 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411, where it was held that the legislation at issue in that case did not impose a charge in the nature of a lien because of the absence of clear and unambiguous language. However, only if a provision is ambiguous (in that after full consideration of the context, multiple interpretations of the words arise that are equally consistent with Parliamentary intent), is it permissible to resort to interpretive presumptions such as "strict construction". The applicable principle is not "strict construction" but s. 12 of the Interpretation Act, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects"; see Bell ExpressVu, at para. 28:

Other principles of interpretation — such as the strict construction of penal statutes and the "Charter values" presumption — only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: Marcotte v. Deputy Attorney General for Canada, 1974 CanLII 1 (SCC), [1976] 1 S.C.R. 108, at p. 115, per Dickson J. (as he then was); R. v. Goulis (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; R. v. Hasselwander, 1993 CanLII 90 (SCC), [1993] 2 S.C.R. 398, at p. 413; R. v. Russell, 2001 SCC 53 (CanLII), [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. . . .)

In my view, there is no ambiguity in the statutory language creating the detention remedy and thus resort to "strict construction" is not called for.

(6) Limitation of Debts on an Aircraft by Aircraft Basis

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85 The titleholders argue that it would be extremely unfair that one titleholder's aircraft, however recently leased, may ultimately be held hostage for all of the unpaid user charges of the airline that flew it. They contend that if (which they deny) the titleholders must pay charges in order to recover an aircraft, they should only be required to pay the charges incurred by the individual aircraft sought to be released, as opposed to the charges outstanding in relation to the whole fleet of the defaulting airline.

86 However, the statute says that an aircraft operated by the person liable to pay the amount can be seized and, absent further court order, need not be released until the entire amount owed by that operator has been paid. This point is made clearly by the release provisions in s. 9(3) of the Airports Act and s. 56(3) of CANSCA. The authorities must only release the aircraft if "the amount in respect of which the seizure was made is paid". Since s. 9(1) and s. 56(1) do not distinguish between the amounts accumulated by specific aircraft operated by a defaulting owner or operator, it seems clear that the amount in respect of which the seizure was made is the entire amount owed by that registered owner or operator.

(7) Limitation of Seizure to Exclude Engines

87 Two of the respondents, RRPF Engine Leasing Ltd. and Flight Logistics Inc. (the "engine lessors"), leased to Canada 3000 the engines attached to two of the aircraft which, when seized, were airworthy. The engine lessors argue that they should be entitled to repossess their engines because seizure of the aircraft is not seizure of the engines. They cite Laskin J. (as he then was) in Firestone Tire & Rubber Co. of Canada v. Industrial Acceptance Corp., 1970 CanLII 140 (SCC), [1971] S.C.R. 357, for the proposition that the doctrine of accession does not apply to a removable and identifiable object such as the engines.

88 In my view, the engines are part of the aircraft for present purposes. Engines and equipment such as onboard computers fall under the definition of "aeronautical product" in the Aeronautics Act (s. 3(1)). If the engines could be removed, third-party lessors could cannibalize any "aircraft propeller or aircraft appliance or part or the component parts of any of those things, including any computer system and software"; see Aeronautics Act, s. 3(1).

89 Firestone Tire is not of assistance here. In that case, a truck was repossessed under a conditional sales contract. The vendor in possession of the seized truck sought to retain the tires mounted on the truck as against the claim of the unpaid conditional seller of the tires. Laskin J. was concerned about the windfall one creditor might receive when repossessing the property of another unpaid creditor for which he "has given no value" (p. 359). Here, no beneficial interest is implicated. The engines are attached to the aircraft in respect of which charges were incurred and that are the subject of the detention. The Act does not envisage the dismantling of the aircraft (and thus of its value as a security) on the tarmac.

(8) Effect of Sub-Leases

90 The respondents Ansett Worldwide Aviation, U.S.A. and MSA V leased three aircraft to Canada 3000, two of which, in turn, had been leased by those respondents from other persons under head leases. These sub-lessors stand in no better position than the legal titleholders, and the aircraft in which they have a leasehold interest were subject to seizure.

C. The Important Role of the Motions Judge

91 The detention remedy does not create any rights unless, and until, a court order is made authorizing the seizure and detention of an aircraft. Instead, the provisions create potential remedies, available at the discretion of the court and subject to such conditions as the court considers necessary, as Cronk J.A. noted, at para. 134.

92 Much of the potential unfairness which the titleholders envisage in the operation of the detention remedy can be addressed by the motions judge. Section 56(3)(c) of CANSCA states that NAV Canada must release the aircraft "if . . . an order of a court directs the Corporation to do so". Similarly, s. 9(3) of the Airports Act states that an airport authority need not release the aircraft until the charges are paid, "except where otherwise directed by an order of a court". Parliament has left the door open for the motions judge to work out an arrangement that is fair and reasonable to all concerned, provided that the object and purpose of the remedy (to ensure the unpaid user fees are paid) is fulfilled. It would be open to a judge on a detention remedy hearing to determine an allocation amongst the titleholders that reflected such factors as the number of seized aircraft, the amount of charges in relation to a particular aircraft or the short duration of an aircraft's life spent in the doomed fleet. The judge need not make each aircraft hostage for the full amount of the unpaid charges, provided the result is that the authority is paid in full. In this way, what may otherwise be portrayed as a draconian remedy can be reduced to a fair and proportionate judicial response to the airline collapse.

D. Interest

93 The Airports Act explicitly authorizes the airport authorities to charge interest on the overdue amounts. Section 9(1) defines the amount on account of which the seizure was made as the "amount of any landing fees, general terminal fees or other charges related to the use of an airport, and interest thereon". While CANSCA makes no explicit mention of interest, ss. 32 to 35 lay out a broad authority for NAV Canada to set and charge its fees. A procedure

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has been established under s. 35(1)(a), whereby the Minister of Transport approves the charges imposed by NAV Canada. The Minister has approved a regulation imposing interest. Notice was provided to airline operators (although not the legal titleholders) and no judicial review of this regulation was sought.

94 The time value of money is universally accepted in ordinary commercial practice; see Bank of America Canada v. Mutual Trust Co., 2002 SCC 43 (CanLII), [2002] 2 S.C.R. 601, 2002 SCC 43. There is no reason for this principle to be excluded in the case of privatized aeronautics services, and it is not surprising that NAV Canada has been permitted to incorporate interest on unpaid charges into its charging scheme.

95 The question then turns to how long the interest can run. The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.

96 Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the Bankruptcy and Insolvency Act.

97 A particular issue is raised in the Quebec appeals regarding proper notice of the interest charges. This is an issue to be dealt with by the motions judge when these matters are returned for further consideration and disposition.

V. Disposition*

98 For these reasons, I would allow the appeals and cross-appeals in part, as follows:

1. I would dismiss the appeals of NAV Canada seeking to hold the respondents liable in their personal/corporate capacity;
2. I would allow the appeals of NAV Canada and the airport authorities of the dismissal of their seizure and detention applications and remit those applications to the respective motions judges to be dealt with in accordance with these reasons;
3. I would set aside the orders requiring NAV Canada and the airport authorities to reimburse the respondents for the aircraft detention costs;
4. I would allow the appeals of NAV Canada and the GTAA of the ruling that the engine lessors are entitled to repossess the leased engines;
5. Interest on overdue charges continues to run to the first of the date of payment, the posting of security or bankruptcy.

In other respects, the appeals and cross-appeals will be dismissed. Aéroports de Montréal, St. John's International Airport Authority Inc. and Charlottetown Airport Authority Inc. are entitled to their costs in the Quebec appeals. All other parties shall bear their own costs.

Appeals and cross-appeals allowed in part.

Solicitors for NAV Canada (30214): Gowling Lafleur Henderson, Toronto.

Solicitors for Greater Toronto Airports Authority (30214): Osler Hoskin & Harcourt, Toronto.

Solicitors for Winnipeg Airports Authority Inc., Halifax International Airport Authority, Edmonton Regional Airports Authority, Calgary Airport Authority, Aéroports de Montréal, Ottawa Macdonald-Cartier International Airport Authority, Vancouver International Airport Authority and St. John's International Airport Authority (30214): Ogilvy Renault, Toronto.

Solicitors for International Lease Finance Corporation, Hyr Här I Sverige Kommanditbolag, IAI X, Inc., Triton Aviation International LLC, Sierra Leasing Limited, ACG Acquisition XXV LLC, ILFC International Lease Finance Canada Ltd. and U.S. Airways Inc. (30214): Torys, Toronto.

Solicitors for G.E. Capital Aviation Services Inc., as Agent and Manager for Polaris Holding Company and AFT Trust-Sub I, Pegasus Aviation Inc., and PALS I, Inc. (30214): Cassels Brock & Blackwell, Toronto.

Solicitors for Ansett Worldwide Aviation, U.S.A., and MSA V (30214): Fraser Milner Casgrain, Toronto.

Solicitors for RRPF Engine Leasing Limited (30214): Heenan Blaikie, Toronto.

Solicitors for Flight Logistics Inc. (30214): Morrison Brown Sosnovitch, Toronto.

Solicitors for C.I.T. Leasing Corporation and NBB-Royal Lease Partnership One (30214): Blake Cassels & Graydon, Toronto.

Solicitors for GATX/CL Air Leasing Cooperative Association (30214): Borden Ladner Gervais, Toronto.

Solicitors for NAV Canada (30729, 30730, 30731, 30732): Lapointe Rosenstein, Montréal.

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Solicitors for Ottawa Macdonald-Cartier International Airport Authority, St-John's International Airport Authority and Charlottetown Airport Authority Inc. (30731, 30732, 30742, 30749, 30750, 30751): Ogilvy Renault, Montréal.
Solicitors for Aéroports de Montréal (30731, 30732, 30738, 30740, 30742): Langlois Kronström Desjardins, Montréal.
Solicitors for Greater Toronto Airports Authority (30731, 30732, 30742, 30743, 30745): Osler Hoskin & Harcourt, Montréal.

Solicitors for Wilmington Trust Company, Wilmington Trust Corporation, Renaissance Leasing Corporation, Heather Leasing Corporation, G.I.E. Avions de transport régional and ATR Marketing Inc. (30729, 30730, 30731, 30732, 30738, 30740, 30742, 30743, 30745, 30749, 30750): Brouillette Charpentier Fortin, Montréal.
Solicitors for Newcourt Credit Group (Alberta) Inc., Canada Life Assurance Company and CCG Trust Corporation (30740, 30742, 30745, 30750, 30751): Desjardins Ducharme Stein Monast, Montréal.
Solicitors for Canadian Imperial Bank of Commerce (30214): Blake Cassels & Graydon, Toronto.
Solicitors for Inter-Canadian (1991) Inc. and Ernst & Young Inc., in its capacity as trustee for the bankruptcy of Inter-Canadian (1991) Inc. (30730, 30731, 30732, 30738, 30740, 30742, 30743, 30745, 30749, 30750, 30751): Kugler Kandestin, Montréal.
Solicitors for Greater London International Airport Authority and Saint John Airport Inc. (30742): Ogilvy Renault, Montréal.
Solicitors for Canadian Regional Airlines Ltd. and Canadian Regional (1998) Ltd. (30742): Fraser Milner Casgrain, Montréal.

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* The amendments to para. 98, issued on August 16, 2006, are included in these reasons.

Vachon v. Canada Employment and Immigration Commission, [1985] 2 SCR 417 - Overpayment/Redemption of EI Act Entitlements as Property

Date:	1985-11-21
Docket:	17252
Parallel citations:	1985 CanLII 12 (SCC); 23 DLR (4th) 641; 57 CBR (NS) 113
URL:	http://canlii.ca/t/1ftzv
Citation:	Vachon v. Canada Employment and Immigration Commission, 1985 CanLII 12 (SCC), [1985] 2 SCR 417, <http://canlii.ca/t/1ftzv> retrieved on 2013-08-15
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Legislation cited (available on CanLII)
Code of Civil Procedure, RSQ, c C-25 — 553.12
Gas, Water and Electricity Companies Act, RSQ, c C-44 — 73
Decisions cited
Industrial Acceptance Corp. v. Lalonde, 1952 CanLII 2 (SCC)
Vachon v. Canada Employment and Immigration Commission, [1985] 2 S.C.R. 417
André Vachon Appellant;
and
Canada Employment and Immigration Commission Respondent;
and
Attorney General of Canada Mis en cause.
File No.: 17252.
1984: December 14; 1985: November 21.
Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.
on appeal from the federal court of appeal

Bankruptcy -- Property of bankrupt -- Stay of proceedings -- Overpayment of unemployment insurance benefits before bankruptcy -- Overpayment reimbursed by source deduction from benefits payable to bankrupt during bankruptcy

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-- Whether s. 49 of Bankruptcy Act contravened -- Unemployment Insurance Act, 1971, 1970-71-72 (Can.), c. 48, s. 49(3) -- Bankruptcy Act, R.S.C. 1970, c. B-3, s. 49.

Appellant received unemployment insurance benefits to which he was not entitled. When he made an assignment of his property under the Bankruptcy Act, appellant owed respondent Commission $922. The latter filed its proof of claim with the trustee. During the bankruptcy, respondent, relying on s. 49(3) of the Unemployment Insurance Act, 1971, reimbursed itself from the benefits it would normally have paid appellant. As unemployment insurance benefits are exempt from execution, they are not part of the common fund available to creditors. After being discharged, appellant asked the Federal Court to declare that the deduction at source by respondent was unlawful. His action was dismissed and the Federal Court of Appeal affirmed the judgment. **The appeal at bar is to determine whether recovery of an overpayment by deduction from the benefits at source is a remedy or proceeding against the debtor or his property within the meaning of s. 49(1) of the Bankruptcy Act.**

Held: The appeal should be allowed.

The retentions made by respondent from the unemployment insurance benefits payable to appellant contravened s. 49(1) of the Bankruptcy Act. The remedies and proceedings mentioned in that subsection must be broadly interpreted and cover any kind of recovery, judicial or extrajudicial. These remedies and proceedings are not confined to property of the bankrupt which is part of the fund available for his creditors. The word "property" used in s. 49(1) is defined in s. 2, and is given a very broad definition not including such a limitation. Literal interpretation of the clear wording of the section supports the objectives of the Act, which is concerned not only with an equitable distribution of the debtor's property but also with his rehabilitation.

Cases Cited

In re Standard Pharmacy Ltd. (1926), 7 C.B.R. 424; Hudson v. Brisebois Bros. Construction Ltd. (1982), 42 C.B.R. (N.S.) 97; Re Plastiques Valsen Inc.; Gaz Metropolitain Inc. v. St-Georges (1981), 41 C.B.R. (N.S.) 7; Industrial Acceptance Corp. v. Lalonde, 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109, referred to.

Statutes and Regulations Cited

Act respecting the Québec Pension Plan, R.S.Q. 1977, c. R-9, s. 148.
Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 2 "property", 47, 48, 49(1), 107(1)(h), 187.
Canada Pension Plan Act, R.S.C. 1970, c. C-5, s. 65 [am. 1974-75-76 (Can.), c. 4, s. 33].
Code of Civil Procedure, art. 553.12.
Old Age Security Act, R.S.C. 1970, c. O-6, s. 22 [rep. & subs. R.S.C. 1970 (2nd Supp.), c. 21, s. 10; am. 1974-75-76 (Can.), c. 58, s. 8].
Pension Act, R.S.C. 1970, c. P-7, s. 23(8) [rep. & subs. 1976-77 (Can.), c. 28, s. 34].
Social Aid Act, R.S.Q. 1977, c. A-16, s. 25.
Unemployment Insurance Act, 1971, 1970-71-72 (Can.), c. 48, ss. 48 [am. 1974-75-76 (Can.), c. 80, s. 18; 1976-77 (Can.), c. 54, s. 44], 49.
Unemployment Insurance Regulations, SOR/71-324, s. 175.

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APPEAL from a judgment of the Federal Court of Appeal1, affirming a judgment of the Trial Division2. Appeal allowed.

1 F.C., No. A-436-80, January 28, 1982.
2 F.C., No. T-3791-79, June 5, 1980.

Guy Morin, André-Gilles Brodeur and Micheline Plante, for the appellant.
Gaspard Côté, Q.C., and Guy Leblanc, for the respondent and the mis en cause.

English version of the judgment of the Court delivered by

1. Beetz J.

I--Facts and Proceedings

2. The parties were agreed on the facts summarized by the unanimous judgment of the Federal Court of Appeal:

1. Appellant owed respondent Commission the sum of $922.00 when he made an assignment of his property under the Bankruptcy Act;

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2. This sum of $922.00 was owed by appellant under sections 47 and 49 of the Unemployment Insurance Act, 1971; however, the debt had been incurred without fraud on the part of appellant, with the result that it was a debt from which he should normally be released by the order of discharge (see section 148 of the Bankruptcy Act);

3. The claim of the Commission was [a] claim provable in bankruptcy and the Commission filed its proof of claim with the trustee;

4. During the bankruptcy, when the Commission had not yet received anything from the trustee and appellant had not yet been discharged, unemployment insurance benefits became payable to appellant;

5. Rather than paying appellant all the benefits owing to him, the Commission withheld the sum of $922.00 owed to it by appellant from these benefits.

3. On July 3, 1979 an order of discharge was made concerning appellant, and on July 27, 1979 he brought against respondent a declaratory action in which he asked the Federal Court to

[TRANSLATION] declare that defendant acted unlawfully in retaining unemployment insurance benefits amounting to $951, benefits which plaintiff was entitled to during his bankruptcy.

4. (Counsel for the appellant admitted at the hearing that the amount at issue is in fact $922, as stated by the Federal Court of Appeal, and not $951.)

5. The Federal Court dismissed the action and the Federal Court of Appeal, which considered the action as one for recovery of the monies retained, affirmed the trial judgment: hence the appeal.

6. In addition to the facts, the two parties admitted that:

7. (a) the Crown and respondent are bound by the Bankruptcy Act, R.S.C. 1970, c. B-3, in view of s. 187 of that Act;

8. (b) respondent's claim was a preferred debt under s. 107(1)(h) of the Bankruptcy Act, a debt which, if it had not been for the retention of benefits, would have been paid before the claims of ordinary creditors, had there been a distribution;

9. (c) unemployment insurance benefits which had become payable to appellant could not be assigned, charged, attached, anticipated or given as security, as a consequence of s. 48 of the Unemployment Insurance Act, 1971, 1970-71-72 (Can.), c. 48, s. 47 of the Bankruptcy Act and art. 553.12 of the Code of Civil Procedure.

II--Legislation and Point at Issue

10. Section 49 of the Unemployment Insurance Act, 1971 is what imposes on a claimant a duty to repay any overpayment and which provides the procedure for recovery, including in subs. (3) retention from subsequent payments, which respondent applied in the case at bar:

49. (1) Where a person has received benefit under this Act or the former Act for a period in respect of which he is disqualified or any benefit to which he is not entitled, he is liable to repay an amount equal to the amount paid by the Commission in respect thereof.

(2) All amounts payable under this section or section 47, 51 or 52 are debts due to Her Majesty and are recoverable as such in the Federal Court of Canada or any other court of competent jurisdiction or in any other manner provided by this Act.

(3) Where a benefit becomes payable to any claimant, the amount of any indebtedness described in subsection (1) or (2) may, in the manner prescribed, be deducted and retained out of the benefit payable to him.

11. This method of recovering an overpayment, by retention from subsequent benefits, is a technique which is found in many statutes having a social purpose, federal as well as provincial. See, for example, Canada Pension Plan, R.S.C. 1970, c. C-5, s. 65; Old Age Security Act, R.S.C. 1970, c. O-6, s. 22; Pension Act, R.S.C. 1970, c. P-7, s. 23(8); Social Aid Act, R.S.Q. 1977, c. A-16, s. 25; Act respecting the Québec Pension Plan, R.S.Q. 1977, c. R-9, s. 148.

12. The provision on which respondent's principal argument is based is s. 47 of the Bankruptcy Act:

47. The property of a bankrupt divisible among his creditors shall not comprise

...

(b) any property that as against the brankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides.

13. Finally, the provision which is at the heart of the dispute is s. 49(1) of the Bankruptcy Act, which must be cited in both versions:

49. (1) Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.

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49. (1) Lors de la déposition d'une proposition faite par une personne insolvable ou lors de la faillite de tout débiteur, aucun créancier ayant une réclamation prouvable en matière de faillite n'a de recours contre le débiteur ou contre ses biens, ni ne doit intenter ou continuer une action, exécution ou autres procédures pour le recouvrement d'une réclamation prouvable en matière de faillite, tant que le syndic n'a pas été libéré ou que la proposition n'a pas été refusée, sauf avec l'autorisation du tribunal et aux conditions que ce dernier peut imposer.

14. This provision is preceded by the subheading "Suspension des procédures", "Stay of Proceedings".

15. The question that must be decided is the following: does the recovery of an overpayment by retention from subsequent benefits, applied by respondent, constitute within the meaning of s. 49(1) of the Bankruptcy Act a remedy against the debtor or his property, an action, execution or other proceeding which had been stayed except, as provided by this section, with leave of the Court or on such terms as the Court might impose?

III--Trial Judgment and Judgment a quo

16. The trial judgment simply cited and approved the submissions made by counsel for the defendant Commission. Among the arguments so approved by the trial judge, the following are the two principal ones:

[TRANSLATION] (1)...the setoff allowed by . . . the Unemployment Insurance Act, is neither a remedy nor a proceeding within the meaning of s. 49 of the Bankruptcy Act. It is in fact an administrative act of recovery which is allowed by a specific statute and which, in my opinion, is not in the nature of a proceeding.

(2)...by thus reimbursing itself by recovery, the Unemployment Insurance Commission is not making payments to itself which are preferential over all other creditors, for its benefits cannot be attached and are not part of the fund available for creditors.

17. It would appear that the Federal Court of Appeal only adopted the first argument approved by the trial judge. Its entire reasoning is contained, be it said with respect, in one sibylline sentence:

In my view the right granted to the Commission under subsection 49(3) of the Unemployment Insurance Act, 1971 is not a remedy, action, execution or proceeding. Subsection 49(1) of the Bankruptcy Act does not therefore prevent it from being exercised.

18. The Federal Court of Appeal did not say why the right granted to the Commission by s. 49(3) of the Unemployment Insurance Act, 1971 is not a remedy or a proceeding. It may be that this is because the right is not a remedy or proceeding of a judicial nature. It is also possible that this is for other reasons which the Federal Court of Appeal did not disclose.

19. In this Court, counsel for the appellant sought to show, first, that the remedies and proceedings covered by s. 49(1) of the Bankruptcy Act are not confined to remedies and proceedings of a judicial nature and may include recovery by retention from subsequent benefits, such as that applied by respondent. Counsel for the appellant also sought, on the other hand, to answer the second argument approved by the trial judge, and adopted by counsel for the respondent, with further clarification, in support of the findings of the Federal Court of Appeal.

20. These two points must now be discussed.

IV-- General Nature of Stay of Proceedings Imposed by s. 49(1) of the Bankruptcy Act

21. Appellant in my view properly relied upon the English version of s. 49(1) of the Bankruptcy Act, where the word recours is rendered by the word "remedy", giving to it and to the words "autres procédures" ("other proceedings") a very broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial. Black's Law Dictionary (5th ed. 1979), defines "remedy":

The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated.

and below:

Remedy means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

22. Jowitt's Dictionary of English Law (2nd ed. 1977), vol. 2, gives an almost identical definition:

the means by which the violation of a right is prevented, redressed, or compensated. Remedies are of four kinds: (1) by act of the party injured . . .; (2) by operation of law . . .; (3) by agreement between the parties ...; (4) by judicial remedy, e.g. action or suit. The last are called judicial remedies, as opposed to the first three classes which are extrajudicial.

23. The courts have also interpreted the stay of proceedings imposed by s. 49(1) of the Bankruptcy Act very broadly.

24. Thus, in In re Standard Pharmacy Ltd. (1926), 7 C.B.R. 424, the City of Edmonton wished to use a proceeding mentioned in its Charter to collect unpaid taxes, consisting alternatively of a distress of personal property or a simple notice to the trustee that there were taxes which had not been paid by the bankrupt. Tweedie J. of the Supreme Court of Alberta, sitting in bankruptcy, cited s. 8B of the Bankruptcy Act--now s. 49(1)--and wrote, at pp. 430-31:

This section applies to both judicial and extra-judicial proceedings; and distress being a remedy within the meaning of that section the section is, in my opinion, an absolute bar to any proceedings judicial or otherwise to enforce payment of taxes without the leave of the Court, which was not granted to, nor applied for on behalf of, the city.

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...

In regard to the notice to be given by "the collector or other person authorized to collect the taxes" to the trustee in bankruptcy as provided in sec. 376a of the Charter it is evident from the reading of that section that the notice is a substitute for the distress, and that it was intended that such simple method, instead of the actual physical seizure of the property, should be the remedy to be pursued. Notice is a remedy or proceeding within the meaning of sec. 8B of The Bankruptcy Act and what has been said in regard to distress applies with equal force in regard to the notice and the city is deprived of its right to enforce payment in priority by the provisions of sec. 8B of The Bankruptcy Act.

25. At page 430, he gave the reason underlying this decision:

The city by reason of the authorized assignment was deprived of any opportunity of gaining priority in the distribution of the assets which it might have acquired in the enforcement of its remedies.

26. In Hudson v. Brisebois Bros. Construction Ltd. (1982), 42 C.B.R. (N.S.) 97, the Alberta Court of Appeal ordered that the trustee be repaid money distributed by the sheriff to certain creditors, in ignorance that the debtor was bankrupt at the time of the distribution. At page 103, Lieberman J. wrote in the unanimous reasons of the Court:

Section 49(1) has the effect of staying the proceedings taken by the appellant prior to the payment out by the sheriff. Thus the payment out by the sheriff, although completely innocent, contravenes s. 49(1) and is without authority.

27. In Quebec, public utilities have used s. 73 of the Gas, Water and Electricity Companies Act, R.S.Q. 1977, c. C-44, as authority for interrupting the service of a bankrupt subscriber. In a judgment, Re Plastiques Valsen Inc.; Gaz Metropolitain Inc. v. St-Georges (1981), 41 C.B.R. (N.S.) 7 (Que. S.C.), Jacques Dugas J. reviewed the decided cases, which as he recognized are far from being unanimous: but he nevertheless dismissed an application by Gaz Metropolitain Inc. for an order directing the trustee to give him access to the bankrupt's premises in order to cut off the natural gas service. He wrote (at pp. 10-11):

[TRANSLATION] Applicant enjoys no guarantee under the Bankruptcy Act. The rule for distributing property of a bankrupt is that the ordinary creditors receive equal shares of the common fund, once the trustee's expenses and secured debts have been paid. It would be contrary to the scheme of the Bankruptcy Act if it could by threatening to interrupt the service obtain more than the other ordinary creditors would get.

In Re Colonial Indust. Equipment Ltd.; Mercure v. Compagnie Bell Téléphone du Can., [1971] C.A. 564, the Court of Appeal vacated the payment which the telephone company had succeeded in prising from its debtor, six days before its bankruptcy, by threatening to interrupt service: this was a cancellable preferential payment. It would be unusual, to say the least, if the applicant could obtain from the trustee preference which the debtor could not give it: surely this is what the applicant is seeking here by making its threat of interrupting service.

...

The Court considers that the threat to interrupt service made by applicant is designed to obtain from the trustee preferential treatment for its debt, and this is contrary to the Bankruptcy Act. The Court has a duty to protect creditors against abusive use of s. 73 of the Gas, Water and Electricity Companies Act so as to obtain advantageous treatment at variance with the scheme of the Bankruptcy Act.

28. This Court of course does not have to decide whether the conclusions of these judgments are correct, but in my opinion the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the Bankruptcy Act. This broad meaning is confirmed by the fact that the legislator took the trouble to exclude actions against either the creditor or his property.

29. As Houlden and Morawetz wrote in Bankruptcy Law of Canada, vol. 1, p. F-70.1, under s. 49 of the Bankruptcy Act:

An ordinary unsecured creditor with a claim provable in bankruptcy can only obtain payment of that claim subject to and in accordance with the terms of the Bankruptcy Act. The procedure laid down by that Act completely excludes any other remedy or procedure.

30. The Bankruptcy Act governs bankruptcy in all its aspects. It is therefore understandable that the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the Act could be attained.

31. Accordingly, I consider that s. 49(1) of the Bankruptcy Act is sufficiently broad to include recovery by retention from subsequent benefits, such as the recovery at issue here.

V-- Section 49(1) of the Bankruptcy Act and the Immunity from Seizure of Unemployment Insurance Benefits

32. Respondent replied, however, through its counsel, that even if s. 49(1) of the Bankruptcy Act is so broadly worded as to include an extrajudicial remedy or proceeding, such a remedy or proceeding is not a remedy or proceeding within the meaning of s. 49(1) when its purpose is to recover property of the bankrupt which, in view of its immunity from seizure, does not fall within the fund available for his creditors, as provided by s. 47 of the Bankruptcy Act.

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33. Respondent submitted that s. 49(1) of the Bankruptcy Act must be interpreted in accordance with the principles underlying the Act, and what is in its submission the purpose or reason for the stay of proceedings imposed by s. 49(1).

34. In the factum submitted by its counsel, respondent explained the purpose of s. 49(1) of the Bankruptcy Act as follows:

[TRANSLATION] The true meaning of this section is determined by certain general principles underlying the Bankruptcy Act, both as regards the bankrupt's property and with respect to unsecured creditors.

So far as property owned by the bankrupt is concerned, it is worth recalling the rule in s. 50(5) of the Bankruptcy Act, that on a receiving order being made or an assignment being filed with an official receiver, "a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and subject to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment...."

As we know, bankruptcy does not have the effect of depriving a bankrupt of all his assets, without exception. The property which passes to the trustee is limited to that which, under s. 47 of the Bankruptcy Act, constitutes what the Act calls the property of the bankrupt "divisible among his creditors", that is, property the proceeds from which are to be distributed pari passu among the unsecured creditors.

The property in question includes anything belonging to the bankrupt on the date of the bankruptcy or which may devolve upon him before his discharge. On the other hand, it does not include property which, as against the bankrupt, is immune from seizure. It accordingly follows that in a bankruptcy proceeding the property of a bankrupt actually falls into two categories: what falls within the assets of his bankruptcy and what remains external to it.

If the situation is considered from the standpoint of unsecured creditors, the fundamental principle of the Act is that the latter are to be regarded as on an equal footing in relation to each other: their rights are limited to being collocated pari passu in the proceeds of sale of property held by the bankruptcy, in accordance with the order of priority specified in s. 107 of the Bankruptcy Act.

So as to give full effect to the fundamental principles discussed above, it was necessary for the legislator to put property that would be part of the bankruptcy fund beyond the reach of individual actions that might be brought by any of the bankrupt's creditors, seeking payment of their own debts from the property in question and so obtaining an advantage over other creditors. The solution decided on by the legislator was to provide that, from the date of the bankruptcy, no creditor with a claim provable in bankruptcy shall have any remedy, including an execution proceeding, against the debtor or his property, unless with leave of the Court and on such terms as the Court may impose. As can be seen from the wording of s. 49(1), such a prohibition applies to any type of remedy the aim of which is to recover a claim provable in bankruptcy, regardless of whether it is a remedy that can be exercised by an action, or is a remedy in the nature of an execution proceeding.

35. Respondent concluded with this argument, which constitutes the crux of its second submission:

[TRANSLATION] It follows, therefore, that the only remedies to which s. 49(1) applies are those the effect of which is to take out of the property included in the bankruptcy anything which under the Act devolves on the trustee for the common benefit of creditors of the bankrupt. This section thus clearly cannot be interpreted, in our opinion, as prohibiting the exercise of a right which has no adverse effect on the common fund available to creditors of the bankruptcy.

36. Respondent submitted that, as unemployment insurance benefits are property which is immune from seizure, they are not part of the common fund available to creditors, and the retentions made by respondent did not have the effect of depriving the ordinary creditors of anything which belonged to the bankruptcy creditors' common fund. Such retentions cannot then be regarded as contravening s. 49(1) of the Bankruptcy Act.

37. To this apparently plausible argument, the gist of which is contained in respondent's factum, counsel for the latter added another in their oral pleading, which also at first sight seems to carry considerable weight. It is the following: in reimbursing itself by retentions from subsequent benefits due to appellant, respondent did something which conferred a benefit on the mass of ordinary creditors--not only did it pay itself from property to which they had no right, but, at the same time, it released those ordinary creditors from the lien which it is given by s. 107(1)(h) of the Bankruptcy Act and in accordance with which it would have been paid before them in the event of a distribution.

38. However, the interpretation suggested by respondent comes up against a major obstacle: without adequate justification, it rejects the method of grammatical or literal interpretation of a very clear provision. This interpretation suggests that words be added to s. 49(1) of the Bankruptcy Act, by interpreting the word "property" as referring to "property divisible among his creditors". These words, which are contained in s. 47, are not found in s. 49(1) of the Act. That subsection uses only the word "property", of which s. 2 of the Act gives a broad definition not including the limitation in s. 47.

39. In The Interpretation of Legislation in Canada (1984), Prof. Pierre-André Côté wrote at p. 209:

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Assuming a statute to be well drafted, an interpretation which adds to the terms of its provisions or deprives them of meaning is suspect.

Since the judge's task is to interpret the statute, not to create it, as a general rule he should reject an interpretation which adds to the terms of the law. Legislation is deemed to be well drafted and to express completely what the legislator wanted to say:

"It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do." Per Lord Mersey, Thompson v. Goold & Co., [1910] A.C. 409, 420.

40. Respondent is thus asking the Court to make a distinction where the legislator makes none, and this prima facie is an error of interpretation.

41. Respondent sought to justify this distinction in reliance on a fundamental objective of the Bankruptcy Act, namely, an equitable distribution of property to the creditors.

42. First, it should be said that this is not the sole objective of the Bankruptcy Act. As Estey J. wrote, in giving the unanimous judgment of this Court in Industrial Acceptance Corp. v. Lalonde, 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109, at p. 120:

The purpose and object of the Bankruptcy Act is to equitably distribute the assets of the debtor and to permit his rehabilitation as a citizen, unfettered by past debts.

43. The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence. These measures are contained in s. 47 of the Bankruptcy Act concerning, inter alia, the exemption from execution of certain property, and in s. 48, regarding the wages of the bankrupt, which applies notwithstanding s. 47 and which empowers the Court to make

an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine having regard to the family responsibilities and personal situation of the bankrupt.

44. The part of the wages paid to creditors does not necessarily correspond to the part which may be attached. It may be more or less "having regard to the family responsibilities and personal situation of the bankrupt". Houlden and Morawetz, op. cit., vol. 1, write at pp. F-66 and F-69:

Since the enactment of s. 48, wages have been removed from the operation of s. 47 so that no part thereof vests in the trustee to be divided among creditors unless he makes an application under s. 48 and then only to the extent allowed by the court: Re Giroux (1983), 45 C.B.R. (N.S.) 245, 41 O.R. (2d) 351, 146 D.L.R. (3d) 103 (S.C.).

...

Applications under s. 48 of the Bankruptcy Act come down not to a question of law, but of fact; that is, whether the bankrupt after being given credit for his reasonable living expenses has excess funds which might be used to pay creditors. The Senate Committee poverty lines, while not binding on the court, are persuasive evidence: Re Michael; Re Superior Films Shops (1980), 34 C.B.R. (N.S.) 1 (Ont. S.C.).

45. In my view, appellant was right to see an analogy between the wages of a bankrupt and unemployment insurance benefits, and to argue that the partial or complete elimination of the latter may deprive the bankrupt of his means of subsistence, contrary to another objective of the Bankruptcy Act. If retentions from unemployment insurance benefits cannot be made without the Court's authority, as specified in s. 49(1), the Court will ensure that this other objective is not lost sight of.

46. Moreover, the sole objective of the Bankruptcy Act mentioned by respondent, namely an equitable distribution of the bankrupt's property to his creditors, and the interests of the latter, will also be taken into account by the Court, to which the respondent will apply pursuant to s. 49(1) for authority to recover the overpayment by retention from subsequent benefits. The Court may grant such authorization, refuse it or grant it only in part or on certain conditions, taking all the circumstances into account.

47. In other words, the grammatical or literal interpretation of s. 49(1) of the Bankruptcy Act, which makes retentions from unemployment insurance benefits subject to authorization by the Court, is not an obstacle to pursuing any of the objectives of the Bankruptcy Act. On the contrary, it makes possible the coherent pursuit of those various objectives, under the supervision of the Court. It may be added that it will also have the effect of facilitating the administration of the bankruptcy by the trustee, who will thus automatically be informed of retentions made by creditors who have also filed claims in the bankruptcy.

48. I accordingly consider that not only has respondent not shown any justification for an interpretation of s. 49(1) of the Bankruptcy Act other than the grammatical or literal one, but the latter is the only possible one in view of the general scheme of the Act. As Elmer A. Driedger writes, in an oft-cited passage from his text Construction of Statutes (2nd ed. 1983), at p. 87:

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Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

49. Before concluding, it may be worth mentioning that the Unemployment Insurance Regulations, SOR/71-324, also take into account the fundamental needs of a claimant, and even his bankruptcy. Section 175 of the Regulations in effect in 1977, when the bankruptcy in the case at bar occurred, provides:

Write-off of benefit wrongly paid

175. (1) Amounts owing under sections 47, 49, 51 and 52 of the Act may be declared by the Commission to be no longer due and owing, where

(a) the sums in the aggregate do not exceed five dollars, and a benefit period is not current;

(b) the claimant is deceased;

(c) the claimant is a discharged bankrupt;

(d) the claimant is an undischarged bankrupt, the final dividend has been received and the trustee has been discharged; and

(e) the Commission considers that, having regard to all the circumstances,

(i) the sums are uncollectable, or

(ii) the repayment of the sums would result in undue hardship to the claimant.

(2) Where the Commission, pursuant to subsection (1), declares that an amount is no longer due and owing, that amount shall be written off.

50. Neither of the two parties relied on this provision, which was not discussed. Counsel for the respondent simply referred to it in his oral argument, saying that he had not reproduced it in his factum, as he did not see how it was relevant.

51. It is probably unnecessary to say any more on the point. However, it may be observed that the additional benefit given to the bankrupt by this provision depends on the discretion of an administrative commission. It exists in addition to the rule stated in s. 49(1) of the Bankruptcy Act, but it in no way detracts from it.

VI--Conclusions

52. I am of the view that we should allow the appeal, set aside the judgments of the Federal Court of Appeal and the trial court, allow appellant's action and declare that respondent acted unlawfully by withholding, without the authorization of the bankruptcy court, unemployment insurance benefits totalling $922, to which appellant was entitled during his bankruptcy. The whole with costs in all courts.

Appeal allowed with costs.

Solicitor for the appellant: Guy Morin, Sherbrooke.

Solicitors for the respondent and the mis en cause: Gaspard Côté and Guy Leblanc, Montréal.

Pigeon v. Pigeon, 1993 CanLII 2583 (BC SC) - Rank of Spousal Interest in Matrimonial Home Under BIA

Date:	1993-01-14
Docket:	8387
Parallel citations:	18 CBR (3d) 100; 81 BCLR (2d) 100
URL:	http://canlii.ca/t/1dh8x
Citation:	Pigeon v. Pigeon, 1993 CanLII 2583 (BC SC), <http://canlii.ca/t/1dh8x> retrieved on 2013-08-29
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Date of Release: January 14, 1993 No. 08387

Kamloops Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ANNE MARY PIGEON) REASONS FOR JUDGMENT

PETITIONER) OF THE HONOURABLE

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	)	
AND:	)	MR. JUSTICE HUNTER
	)	
PAUL ERNEST PIGEON)	(IN CHAMBERS)	
	)	
RESPONDENT)		

APPEARANCES:
DAPHNE SMITH- Counsel for the Petitioner
HEIDI M. ZETZSCHE- Counsel for the Trustee in Bankruptcy, Price Waterhouse
PAUL ERNEST PIGEON- The Respondent Was Not Present and Was Not Represented by Counsel
DATE OF HEARING: December 7, 1992

This is an application by the petitioner for an order declaring her interest in the matrimonial home to be in priority to any interest of the Trustee in Bankruptcy.

Mr. and Mrs. Pigeon were married on April 27th, 1968, and separated June 26th, 1990. An order under s.44 of the ***Family Relations Act***, R.S.B.C. 1979, c.121, was made on April 7th, 1992 and a ***lis pendens*** was filed by Mrs. Pigeon in the Land Title Office on July 6th, 1992. A divorce was granted on July 29th, 1992. On September 22nd, 1992, Mr. Pigeon made an assignment in bankruptcy and on September 24th, 1992, the Trustee in Bankruptcy, Price Waterhouse, was appointed. On October 19th, 1992, Lamperson J. made a reapportionment order pursuant to s.51 of the Act granting to Mrs. Pigeon full title to the matrimonial home. Mr. and Mrs. Pigeon had, until that time, been registered as joint tenants of that property. It is a half duplex located in the city of Kamloops. There are no other family assets. Mrs. Pigeon is employed as a receptionist. Mr. Pigeon has, as his only source of income, a C.P.P. disability pension.

As a result of the declaration under s.44 of the ***Family Relations Act***, each party has an undivided one-half interest in the property as described in s.43(2) of the Act. The difficulties between the parties arise after the triggering event, which is the s.44 declaration. **Mrs. Pigeon says that her 100 percent interest in the equity of the matrimonial home as a result of the s.51 order granted by the court on October 19th, 1992 vested on the date of the triggering event, that is, April 7th, 1992, and relies on *Blackett* v. *Blackett* 1983 CanLII 200 (BC SC), (1989) 33 R.F.L. (2d) 366 for the proposition that reapportionment under s.51 of the Act is determined as at the date of the s.44 triggering event. The Trustee argues that the assignment to the Trustee in Bankruptcy was made under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, a federal statute, and thus is paramount over any reapportionment made under s.51 of the provincial *Family Relations Act*.**

Counsel for the Trustee argues further that a spouse cannot pursue proceedings for relief pursuant to Part 3 of the *Family Relations Act* after the assets of the other spouse have vested in the Trustee in Bankruptcy of that spouse's estate. Proceedings after that date must be brought under the *Bankruptcy and Insolvency Act*. Authority for this proposition appears in *Walters* v. *Walters* 1985 CanLII 528 (BC SC), (1985) 62 B.C.L.R. 334. MacKinnon J. cites various policy reasons supporting this decision at p.336:

> **The purpose of the *Bankruptcy Act* was to provide for the orderly and fair distribution of the property of a bankrupt among his creditors on a *pari passu* basis: Houlden and Morawetz, *Bankruptcy Law of Canada* (1984), vol.1, p.A-1.**
>
> **In addition, provisions of the *Bankruptcy Act* were enacted in order to avoid a multiplicity of proceedings: *Re Abacus Cities Ltd.; Levitt* v. *Abacus Cities* (1981), 38 C.B.R. (N.S.) 193 at 195 (B.C.C.A.).**
>
> **In addition, the *Bankruptcy Act* provides comprehensive procedures to ensure that the interests of all claimants (including the wife of the bankrupt) against the estate of the bankrupt are dealt with in a systematic and orderly fashion: ss.95(1), 95(2) and 97(1).**

It is settled law that the spouse of a bankrupt is simply another creditor under the *Bankruptcy and Insolvency Act*. A reapportionment under s.51 of the *Family Relations Act* cannot occur after an assignment in bankruptcy. The only option is for the other spouse to apply for an annulment of the assignment under s.181 of the *Bankruptcy and Insolvency Act* if there has been a previous restraining order under s.53(1) of the *Family Relations Act*.

It has been argued that the s.44 order creates a trust until a determination is made under s.51. It seems to me that this Act does not so provide.

Hall v. ***Hall*** 1990 CanLII 724 (BC SC), (1990), 26 R.F.L. (3d) 443 (B.C.S.C.) and ***Antenen*** v. ***Antenen*** 1992 CanLII 204 (BC SC), (1922), 68 B.C.L.R. (2d) 300 (S.C.) have been referred to me as authority for the proposition that a s.51

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reapportionment is made regarding the circumstances at the time of the triggering event thus, in the circumstances of Mr. Pigeon, a s.51 reapportionment has priority over an assignment in bankruptcy made after the triggering event. Those cases, however, have to do with having registered a judgment against an interest in property. The assignment in bankruptcy is different, it is a vested property interest as described in s.71(2) of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985 C. B-3. That section is as follows:

> On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee name in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

Re Nadeau (1980), 36 C.B.R. 168 (B.C.S.C.) is authority for the proposition that all the property of a bankrupt vests in the trustee upon the assignment in bankruptcy.

The spouse of a bankrupt does not have a preferential right over other creditors against the bankrupt. See ***Walters*** v. ***Walters, supra,*** where MacKinnon J. says at page 336:

> Subject to the rights of any secured creditors of her husband, his property is now vested in the trustee. The provisions of the ***Bankruptcy Act*** cannot abrogate or supersede the substantive provision of any other law or statute relating to property and civil rights that are not in conflict with it. However, no substantive provisions in the ***Family Relations Act*** or in any other statute which has been referred to me or of which I am aware grants unto the wife any preferred right over the other creditors of her husband.

Accordingly, since Mr. Pigeon's half interest in the home vested in the trustee when the assignment in bankruptcy occurred on September 22, 1992, Mr. Pigeon had no interest to be reapportioned under s.51 in favour of Mrs. Pigeon on October 19th, 1992.

Section 51 of the ***Family Relations Act*** is discretionary, just as is s.7(1) of the ***Matrimonial Property Act*** of the province of Alberta as set out in ***Deloitte, Haskins& Sells Ltd.*** v. ***Graham*** (1983) 47 C.B.R. 172 (Alta.Q.B.). As a result, s.51 does not grant any proprietary rights.

Accordingly, the trustee in bankruptcy has priority over Mr. Pigeon's one-half interest in the matrimonial home because the interest vested in the trustee under s.71(2) of the ***Bankruptcy and Insolvency Act*** and the trustee cannot be deprived of that interest. (See ***Biedler*** v. ***Biedler*** (1983) 33 R.F.L. (2d) at 336, particularly at p.375.)

The application of Mrs. Pigeon is therefore dismissed. In the circumstances I make no order as to costs.

Before concluding this matter I wish to comment on the federal paramountcy argument advanced on behalf of the trustee. I have concluded in these circumstances that this doctrine does not apply. To apply there must be inconsistent or conflicting federal and provincial laws, in which case the federal law prevails. (See Hogg, ***Constitutional Law of Canada***, 2d Ed., (Carswell: Toronto), 1985 at 354.)

Reapportionment under s.51 of the ***Family Relations Act*** is a discretionary power to be exercised by the courts in situations where an equal distribution of family assets would be unfair. Section 51 is not in conflict with the ***Bankruptcy and Insolvency Act*** because it does not have to be exercised. In addition, there is not a conflict simply because the ***Bankruptcy and Insolvency Act*** vests the bankrupt's interest in the trustee after the triggering event because there is no requirement under the ***Family Relations Act*** to retain the property until the time of a s.51 reapportionment unless a s.53 restraining order has been granted. Since there is no conflict, the doctrine of federal paramountcy does not apply.

Unfortunately, there are no other family assets and compensation to Mrs. Pigeon under s.52 of the ***Family Relations Act*** is not available.

"R.B. Hunter"
HUNTER J.

Kamloops, B.C.
12 January 1993

Thompson (Re Bankruptcy), 1993 CanLII 1036 (BC SC) - Family Relations Act Application re Matrimonial Property

Date:	1993-06-11
Docket:	9496
Parallel citations:	20 CBR (3d) 158; 82 BCLR (2d) 22
URL:	http://canlii.ca/t/1djv3

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Citation: Thompson (Re Bankruptcy), 1993 CanLII 1036 (BC SC), <http://canlii.ca/t/1djv3> retrieved on 2013-09-05
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Date of Release: June 11, 1993 No. 9496
Vernon Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

IN THE MATTER OF THE)
BANKRUPTCY OF)
CRAIG W. THOMPSON)
)

AND

IN THE SUPREME COURT OF BRITISH COLUMBIA

No. 11015
Kelowna Registry

BETWEEN:)
)
COLLEEN MAY THOMPSON)
)
)
Plaintiff)
)
) **REASONS FOR JUDGMENT**
)
) **OF THE HONOURABLE**
)
) **MR. JUSTICE HAMILTON**
AND:)
)
CRAIG WYMAN THOMPSON)
)
)
Defendant)

Place and date of hearing: Kelowna, British Columbia
7 June 1993

R.A. Clarke Counsel for the plaintiff
M. Newcombe Counsel for the defendant
F.J. Quinn Counsel for BDO Dunwoody, Ward, Mallette Inc. Trustee in Bankruptcy of the Estate of Craig W. Thompson

The plaintiff seeks, pursuant to section 69.4 of the Bankruptcy Act, a declaration that sections 69 to 69.3 do not operate to prevent the plaintiff from continuing with this action. The trustee opposes the application saying the wife should pursue her claim in the bankruptcy proceedings. The facts are as follows:

In the Family Relations action commenced July 25, 1991 the wife seeks in part the following relief:

(a)A declaratory judgment under Section 44 of the Family Relations Act, R.S.B.C. 1979 and amendments thereto, that the Plaintiff and the Defendant have no reasonable prospect of reconciliation with each other;

. . .

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(f)An Order for determination of which assets of the parties are family assets, the determination of ownership, right of possession, and division of property, pursuant to Part III of the Family Relations Act, R.S.B.C. 1979, Chapter 121 and amendments thereto;

(g)An Order for an unequal division of assets of the parties in favour of the Plaintiff, pursuant to Section 51 of the Family Relations Act, R.S.B.C. 1979, Chapter 121 and amendments thereto;

(h)An Order for determination respecting ownership, right of possession, division of and sale of property of the spouses, pursuant to Section 52 of the Family Relations Act;

(i)An Order that the Plaintiff and Defendant be restrained from disposing of family assets and other property at issue, without order of this Court or agreement between the parties, pursuant to Section 53 of the Family Relations Act;

On August 9, 1991 this Court made an order, pursuant to section 53 of the Family Relations Act, restraining both parties from disposing of or further encumbering any assets "until further order of the Court or until written agreement made between the parties." The principal assets of the parties were the husband's business which was sold by the receiver of the business, the matrimonial home, and the husband's RRSP's. On October 10, 1991 this Court made a declaration, pursuant to s. 44 of the Family Relations Act, that the parties have no reasonable prospect of reconciliation. On March 29, 1993 the husband was adjudged a bankrupt and a receiving order was made against him pursuant to the petition of the Royal Bank of Canada filed February 25, 1993.

The title to the matrimonial home is registered in the name of the wife alone. This property was appraised on December 15, 1991 at $400,000. subject to there being proper access. The land, appraised at $120,000., was a gift from the wife's father to the wife. The house was constructed through monies borrowed from the Bank of Nova Scotia which has now taken foreclosure proceedings against the property, there being some $300,000. owing against the property. The husband made the mortgage payments until a few months prior to his business being put in the hands of the receiver. Although there is legal access to the property, the only practicable access is through the wife's father's property. The wife's father agreed to grant his daughter an easement through his property to her property but has not done so. There may be some doubt that a successor in title could compel the wife's father to grant the easement and that doubt would have an adverse effect on the return that might be expected from a forced sale, which sale seems inevitable as neither the wife nor the trustee are in a position to redeem. The wife and children live in the matrimonial home, the wife is unable to fully support herself and the husband is no longer paying maintenance. In those circumstances the wife's claim for an unequal division of the matrimonial property cannot be said to be without merit.

The trustee does not say that the husband's bankruptcy deprives the wife of her rights under the Family Relations Act. He says simply that to avoid a multiplicity of actions in respect of various assets the wife's claim should be pursued under the Bankruptcy Act. He says that the wife's claim is no longer that of a wife against her husband but that of a creditor against a bankrupt's estate.

The law provides as follows:

THE FAMILY RELATIONS ACT

44. On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

43. (1) Subject to this Part, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

. . .

(b)a declaratory judgment under section 44;

. . .

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part;

. . .

(my emphasis)

51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to

(a)the duration of the marriage;

(b)the duration of the period during which the spouses have lived separate and apart;

(c)the date when property was acquired or disposed of;

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(d)the extent to which property was acquired by one spouse through inheritance or gift;
(e)the needs of each spouse to become or remain economically independent and self sufficient; or
(f)any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the Court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

(my emphasis)

52. (1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 51, and may make orders which are necessary, reasonable or ancillary to give effect to the determination.

53 (1) On application by a party to a proceeding under this Part, the court shall make an order restraining another party to the proceeding from disposing of a family asset or any other property at issue under this Part until or unless the other party establishes that a claim made by the applicant under this Part will not be defeated or substantially impaired by the disposal of that family asset or other property.

55 (2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

THE BANKRUPTCY ACT

67. (1) The property of a bankrupt divisible among his creditors shall not comprise
(a)property held by the bankrupt in trust for any other person,
(b)any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

but it shall comprise
(c)all property wherever situated of the bankrupt at the date of bankruptcy or that may be acquired by or devolve on him before his discharge, and
(d)such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

69. (1) Subject to subsections (2) and (3) and sections 69.4 and 69.5 on the filing of a notice of intention under section 50.4 by an insolvent person,
(a)no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

. . .

69.3 (1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

69.4 A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
(a)that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
(b)that it is equitable on other grounds to make such a declaration.

Because section 43 of the Family Relations Act begins: "Subject to this Part" and, because, section 51 expressly refers to section 43, sections 43 and 51 must be read together. When read together they provide that:

Each spouse is entitled to an undivided half interest in each family asset unless such a division would be unfair in which case the Court may Order that the property be divided into shares fixed by the Court.

When the property of a bankrupt vests in his trustee the only property that vests is that to which the bankrupt is entitled under the combined operation of sections 43 and 51. The trustee's rights, do not, in my view, afford him the benefit of the operation of sections 44 and 43 without reference to application of section 51. That is, the trustee cannot take advantage of legislation that says that a spouse is entitled to a half interest subject to the application of section 51 and then ignore section 51. The provisions of section 43 are expressly subject to the provisions of section 51. The property does not vest under section 43 and then divest if an order is made under section 51. The trustee takes the property either before the application of both sections 43 and 51 or after the application of both sections and not in between.

Counsel for the trustee submits that to read sections 43 and 51 together, as I have done, is contrary to the view taken by Hunter, J., in Pigeon v. Pigeon Kamloops Registry No. 08387, 14 January 1993. (to date unreported) In that case the facts were similar except the property was in joint tenancy and no section 53 restraining order had been made. I distinguish the

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decision of Hunter, J., not on the basis that the property here is in the wife's name alone but, on the basis that here a restraining order was made under section 53 prior to the section 44 declaration. Hunter, J. said at page 6:

> Reapportionment under s.51 of the **Family Relations Act** is a discretionary power to be exercised by the courts in situations where an equal distribution of family assets would be unfair. Section 51 is not in conflict with the **Bankruptcy and Insolvency Act** because it does not have to be exercised. In addition, there is not a conflict simply because the **Bankruptcy and Insolvency Act** vests the bankrupt's interest in the trustee after the triggering event because there is no requirement under the **Family Relations Act** to retain the property until the time of a s.51 reapportionment unless a s.53 restraining order has been granted. Since there is no conflict, the doctrine of federal paramountcy does not apply.
>
> (my emphasis)

I therefore find that I am able to distinguish the case at bar from that of Pigeon on the basis that a section 53 restraining order was made here before the section 44 declaration was made. Had that not been the case I would have felt bound to follow Hunter, J. on the basis of the principles set out in Re Hansard Spruce Mills Ltd. reflex, (1954), 13 W.W.R. 285, as this case does not, in my view, come within the exceptions found in that decision.

Inasmuch as I have concluded that the only interest that the bankrupt's estate has in the family assets is that which the husband would have following the applications of both sections 43 and 51 it is equitable that the determination of that interest be made in the Family Relations action because, if the husband has no interest in the family assets, those assets would not form part of his estate in bankruptcy.

The wife is entitled to a declaration pursuant to section 69.4 of the Bankruptcy Act that sections 69 to 69.3 do not operate to prevent the plaintiff from continuing the Family Relations action. The trustee, of course, must be made a party to that proceeding.

Kelowna, B.C.
June 11, 1993

"H.J. Hamilton, J."
H.J. HAMILTON, J.

Hansen (Trustee of) v. Hansen, 2003 SKQB 62 (CanLII) - Another Case of Matrimonial Property Rank in BIA

Date:	2003-02-06
Docket:	QB03059; QBG477/02JCR
Parallel citations:	39 CBR (4th) 224; 35 RFL (5th) 352; 230 Sask R 293
URL:	http://canlii.ca/t/fpl
Citation:	Hansen (Trustee of) v. Hansen, 2003 SKQB 62 (CanLII), <http://canlii.ca/t/fpl> retrieved on 2013-09-15
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2003 SKQB 62

Q.B.G. A.D. 2002
No. 477 J.C. R.

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF REGINA

BETWEEN:

DELOITTE & TOUCHE INC., Trustee in Bankruptcy
for SIMON PETER HANSEN

APPLICANT

- and -

LYNN HANSEN

RESPONDENT

AND

D.I.V. A.D. 2002
No. 552 J.C. R.

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IN THE QUEEN'S BENCH
(FAMILY LAW DIVISION)
JUDICIAL CENTRE OF REGINA

BETWEEN:

SIMON PETER HANSEN

PETITIONER

- and -

LYNN HANSEN

RESPONDENT

- and -

DELOITTE & TOUCHE INC., Trustee in Bankruptcy

DEFENDANT

Jeffrey P. Reimer — for Deloitte & Touche Inc., Trustee in Bankruptcy for Simon Peter Hansen

Michael S. Scott — for Simon Peter Hansen

Ian D. McKay, Q.C. — for Lynn Hansen

JUDGMENT — MALONE J.

February 6, 2003

---

[1] The respondent seeks permanent spousal maintenance and an unequal distribution of family property. The latter claim is based on her allegation the petitioner dissipated family property because of his addiction to gambling.

[2] The only remaining assets of the marriage that are subject to distribution are the petitioner's pension and the petitioner's share of the proceeds of the sale of the family home. Deloitte & Touche Inc., the Trustee in Bankruptcy for the petitioner, claims to be entitled to the petitioner's share of the proceeds of the sale of the family home and disputes the respondent's claim thereto.

[3] By agreement of all parties the various issues to be determined were consolidated in this proceeding.

[4] The petitioner and respondent were married on September 29, 1973, separated in 1997, reconciled in December of that year, and separated for the final time in 1998. The petitioner commenced his claim against the respondent in October of 2000.

[5] The family home was sold in September 2000. At the time the respondent executed the transfer she advised the petitioner, and the lawyer handling the sale on the their behalf, that she was claiming the petitioner's share of the proceeds as a result of her claim for an unequal distribution of family property. In due course the petitioner's share of the proceeds in the amount of $17,473.05 were paid into Court pending the outcome of these proceedings. The petitioner made an assignment in bankruptcy on January 9, 2001.

[6] On the basis of the petitioner's admissions and the evidence of the respondent I have little difficulty in finding the petitioner dissipated family property in the 1990s due to his gambling addiction. He exhausted all the family savings, cashed in RRSPs without the respondent's knowledge, on three occasions forged her name to cheques and, in due course, was required to obtain a new mortgage, the proceeds of which, in the main, were used to pay debts arising from his gambling addiction. It was not until 1997 that the respondent became aware of the seriousness of the petitioner's problem. They separated in 1997 which resulted in the petitioner finally obtaining counselling for his addiction. As a result of this they reconciled in December of 1997 however, the petitioner's gambling continued.

[7] Counsel for the petitioner argues that if any dissipation of family property occurred it took place at a time prior to two years before the petition was filed and relies on s. 28(1)(a)(i) and (b) of *The Family Property Act,* S.S. 1997, c. F-6.3 (formerly *The Matrimonial Property Act, 1997,* c. M-6.11) which provides as follows:

> **28**(1) Where an application has been made for a family property order, the court has the powers conferred by subsection (2) where it is satisfied that:
>
> (a) a spouse has, before or after the coming into force of this Act or *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*:
>
> (i) dissipated family property in whole or in part;
>
> ...
>
> (b) the dissipation occurred ... not more than two years before the day on which either spouse commenced the application for the family property order.

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[8] These proceedings were commenced on October 6, 2000 and accordingly it is necessary to consider the petitioner's conduct in the 24 months prior to this date.

[9] In the spring of 1998, the petitioner and respondent consolidated the family debt by taking out a mortgage for approximately $71,000.00. The sum of $18,000.00 was used to retire a debt owing by their daughter with the balance of $54,000.00 being used to pay the debts of the petitioner which were attributable to gambling. The parties also entered into a separation agreement on June 15, 1998 which contained the following provision:

> 2. The husband covenants and agrees that he shall not increase his debt load, either by non-payment of present debts as they come do [*sic*] or by obtaining new credit without first having obtained the wife's consent to same in writing prior to incurring any increased debt load. For further specificity, the husband warrants that the total debts consist of:
> (a) Mortgage on the matrimonial [family] home;
> (b) Personal loan with the Bank of Montreal;
> (c) MasterCard.

The petitioner also agreed to pay the respondent the sum of $2,000.00 per month as spousal support commencing June 1, 1998. In August 1998, the petitioner borrowed approximately $17,000.00 from the Bank of Montreal without the respondent's consent. He also exhausted his credit limit with American Express and CIBC, borrowed a further $8,000.00 from CIBC and a total of $6,000.00 from Associates Financial Services, all without the respondent's knowledge. Shortly after the proceedings were commenced he obtained an order from Kyle J. reducing his agreed monthly maintenance payments of $2,000.00 per month to $1,000.00 per month on the basis of his inability to pay the larger sum. Finally, he made an assignment in bankruptcy on January 1, 2001 claiming debts of $48,000.00 which were attributable to his gambling addiction. In 1998 the petitioner earned $93,000.00 and in excess of $90,000.00 for the years 1999, 2000 and 2001. He will continue to earn an income from his employment in excess of $90,000.00. Notwithstanding what many would consider to be a considerable income the petitioner continued to fall into debt as a result of his gambling which resulted finally in his assignment in bankruptcy. On the basis of these facts I, once again, have little difficulty in concluding that the petitioner dissipated family property in the two years prior to these proceedings being commenced and, accordingly, subject to the claim of the Trustee in Bankruptcy, find the respondent is entitled to an unequal distribution of family property.

[10] The respondent's claim to the petitioner's share of the proceeds from the sale of the family home is twofold. Firstly, she claims to be entitled to the sum of $4,500.00 pursuant to the order of Kyle J. as arrears of maintenance. Secondly, she claims the balance of the proceeds in support of her claim for an unequal distribution of family property.

[11] The order of Kyle J., of course, predated the assignment in bankruptcy however, for some reason, the funds were never paid out of Court to the respondent in accordance with the order. Counsel for the Trustee does not dispute the amount claimed, nor does counsel for the petitioner, however maintains that as a result of the assignment in bankruptcy the respondent's entitlement to this amount was in effect nullified. Furthermore, he argues because of the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as am. S.C. 1992, c. 17, s. 2 and certain authorities cited in this regard that the respondent is not entitled to any portion of the proceeds of the sale.

[12] With respect to the respondent's claim for arrears of maintenance counsel for the Trustee has referred me to two authorities *Burson v. Burson* reflex, (1991), 29 R.F.L. (3d) 454 (Ont. Gen.Div.) (wrongly cited in counsel's brief of law as *Peat Marwick Thorne Inc.(Trustee in Bankruptcy) v. Nesbitt Coulter Carr et al.* reflex, (1990), 4 C.B.R. (3d) 1) and *Canadian Imperial Bank of Commerce v. McFadzean and Ennis*, reflex, [1978] 5 W.W.R. 750 (Man. Q.B.).

[13] With respect to the last cited case I note that the Trustee in Bankruptcy paid from the estate of the bankrupt the then current arrears of maintenance and paid the balance of monies he held into court to determine whether a claim for future maintenance could be made against them. In dealing with the arrears of maintenance, Wright J. made the following comment at p. 752:

> No mention was made of the $1,000 paid for arrears and I therefore do not regard this as an issue on the motion.

[14] In the *Burson* case proceeds from the sale of a family home were paid to a trustee to be held until a court ordered some disposition of the money or until the parties themselves agreed to some other disposition of it. Thereafter Mr. Burson made an assignment in bankruptcy and the question arose as to whether the monies held in trust from the sale of the matrimonial home were subject to the bankruptcy proceedings. In this regard Misener J. stated at p. 459:

> ... No court order was made, and no agreement was reached with respect to its disposition up to the time of Mr. Burson's assignment into bankruptcy. With and by virtue of that assignment alone, Mr. Burson ceased to have any capacity to deal any further with his property and, subject only to the rights of secured creditors and to any express provisions of the

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> Bankruptcy Act to the contrary, all of Mr. Burson's property vested in the bankruptcy trustee for the benefit of Mr. Burson's creditors .... [Emphasis added]

[15] In my opinion these authorities are not of assistance to the Trustee. In one instance the Trustee in Bankruptcy paid the arrears of maintenance to the spouse and the court made no further comment in this regard.

[16] In the second instance the learned trial judge emphasized that no court order was made with respect to the monies in dispute.

[17] In the present set of circumstances, a Court order was made, that of Kyle J., which predated the assignment in bankruptcy. In my opinion the determining factor herein is that a Court order was made with respect to arrears of maintenance prior to the assignment in bankruptcy and accordingly effect should be given to that order in preference to the claim of the Trustee. I conclude therefore the respondent is entitled to be paid the sum of $4,500.00 from the monies presently paid into Court and order accordingly.

[18] The Trustee's claim to the balance of the monies in Court is, in my opinion, much stronger.

[19] Counsel for the respondent argues that the sale of the family home was not voluntary and the petitioner is entitled to claim the proceeds of the sale as being exempt pursuant to *The Exemptions Act*, R.S.S. 1978, c. E-14. In this regard he relies on the case of *Kirkpatrick, Re* reflex, (1984), 35 Sask. R. 97 (Q.B.). In this case Wright J. determined that a sale was not voluntary and made the following comment at p. 99:

> [6] The next question is whether the exemption was lost because the bankrupt made a voluntary disposition of his interest in the property. The evidence establishes that the bankrupt's calamitous financial position, his permanent separation from his wife and children, his wife's demands that he sell the house so that she might have her share of the proceeds, the arrears owing on the mortgage on the house, the suit brought by the wife's father to collect a loan granted to the bankrupt, the Third Party Demands of Revenue Canada upon his employer and other pressures combined to force him to sell. Where a debtor is so overburdened and is overcome by such demands, his action in selling the family home is not, in my respectful view, voluntary. Common sense says it is not....

[20] While the sale of the family home in these proceedings occurred because of the insistence of the respondent, the petitioner, at the time of the sale was not in the same dire financial position as that described by Wright J. in the *Kirkpatrick* decision. He was not being pursued by other creditors, the mortgage was not in arrears and there were no third party demands from Revenue Canada. The petitioner agreed with the respondent's demand that the family home be sold and went so far as to voluntarily make improvements to it in order to maximize its sale value. Accordingly, I find that the sale was voluntary and not forced. Furthermore, I note that the petitioner, for whatever reason, has never claimed that his share of the proceeds of sale is exempt pursuant to the provision of the Saskatchewan *Exemptions Act*.

[21] I agree with counsel for the Trustee's submission that the law is clear that the provincial exemption in a debtor's home is lost where there has been a voluntary sale of the home prior to an assignment in bankruptcy. The authorities for this statement are set out in counsel's brief and are *Gervais v. Canadian Imperial Bank of Commerce* (1985), 56 C.B.R. 238 (Sask. C.A.); *Regal Distributors Limited v. Freele*, reflex, [1931] 1 W.W.R. 299 (Alta. S.C. App. Div.); *Alberta Treasury Branches v. Wilson* reflex, (1996), 38 C.B.R. (3d) 245 (Alta. C.A.); and *Dhalla, Re* 1991 CanLII 5921 (AB QB), (1991), 8 C.B.R. (3d) 57 (Alta. Q.B.).

[22] Accordingly I find the Trustee in Bankruptcy is entitled to the petitioner's share of the proceeds from the sale of the family home less the maintenance arrears of $4,500.00 and so order.

[23] The remaining asset of the marriage is the petitioner's pension through his employment at Co-op Refinery in Regina. In my opinion the circumstances of this case demand that the pension be valued as of the date of trial and that it be divided equally between the parties at such time as the petitioner is eligible to receive the proceeds thereof and order accordingly.

[24] With respect to the claim for spousal maintenance I note that the petitioner and respondent were married on September 29, 1973 and accordingly the marriage can be considered as "a long-term marriage" or "a traditional marriage" as those terms are used in the various authorities. The respondent worked from time to time during the marriage however, her earnings were used initially to maintain the family unit and laterally to pay debts incurred by the petitioner arising from his gambling addiction. The only assets the respondent has received as a result of the termination of the marriage are her one-half share of the proceeds of the sale of the family home being $17,473.05 and, in due course, one-half of the petitioner's benefits. The petitioner however, will continue to earn a significant income in excess of $90,000.00 per year until such time as he retires. While I find the respondent is capable of obtaining employment, she will never be in a position to earn an income to the extent enjoyed by the petitioner.

[25] In these circumstances, I am of the opinion that the respondent should receive spousal support until such time as she is entitled to one-half of the petitioner's pension in the amount of $2,000.00 per month and so order. The

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order is to be effective as of November 1, 2002 and any arrears that have accumulated shall be paid by the petitioner to the respondent in the sum of $500.00 per month.

[26] With respect to the issues between the respondent and the Trustee, I make no order as to costs. The respondent however, is entitled to recover the taxable costs of the proceeding from the petitioner.

_____ J.

Marzetti v. Marzetti, [1994] 2 SCR 765 - Husband filing voluntary assignment in bankruptcy and assigning post-bankruptcy income tax refund to trustee rather than for spousal support

Date:	1994-07-14
Docket:	23273
Parallel citations:	1994 CanLII 50 (SCC); 116 DLR (4th) 577; [1994] 7 WWR 623; 26 CBR (3d) 161; 5 RFL (4th) 1; 20 Alta LR (3d) 1
URL:	http://canlii.ca/t/1frqh
Citation:	Marzetti v. Marzetti, 1994 CanLII 50 (SCC), [1994] 2 SCR 765, <http://canlii.ca/t/1frqh> retrieved on 2013-08-24
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Marzetti *v.* Marzetti, [1994] 2 S.C.R. 765

Peat Marwick Thorne Inc., Trustee of the Estate of Arden Anthony Marzetti, a Bankrupt	*Appellant*
v.	
The Director of Maintenance Enforcement, the Attorney General of Canada and the Attorney General for Alberta	*Respondents*
and	
The Superintendent of Bankruptcy	*Intervener*
and between	
Jacqueline Jeannine Marzetti	*Petitioner*
v.	
Arden Anthony Marzetti	*Respondent*

Indexed as: Marzetti *v.* Marzetti

File No.: 23273.

1994: February 3; 1994: July 14.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for alberta

Bankruptcy -- Priority -- Post-bankruptcy income tax refund -- Husband ordered to pay monthly amount for child and spousal support to Director of Maintenance Enforcement -- Husband later filing voluntary assignment in bankruptcy and assigning post-bankruptcy income tax refund to trustee -- Director filing notice of continuing attachment against federal Crown -- Whether income tax refund properly payable to trustee or to Director -- Bankruptcy Act, R.S.C., 1985, c. B-3, ss. 67, 68.

After his payments of child and spousal support fell into arrears, M was ordered to pay a monthly sum to the Director of Maintenance Enforcement. He later filed a voluntary assignment in bankruptcy and executed an agreement letter authorizing that any refund resulting from a post-bankruptcy income tax return be mailed to the appellant trustee as an asset for distribution to the creditors. The Director filed a notice of continuing attachment against the federal Crown. After M was discharged from bankruptcy, a garnishee summons was issued putting the notice of continuing attachment into effect. The trustee filed a post-bankruptcy income tax return, and a refund became payable. In response to a motion by the trustee, the Master declared that the refund constituted property of the bankrupt which vested in the trustee. Under s. 67(*c*) of the *Bankruptcy Act*, the property of a bankrupt divisible among his creditors comprises all property of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge. Under s. 68(1), however, "the trustee, if directed by the inspectors or the creditors, shall apply to the court for an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine, having regard to the family responsibilities and

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personal situation of the bankrupt". Section 68(2) provides that the order must be directed to the bankrupt and his employer. The Master was prepared to accept that s. 68 removes wages from the scope of s. 67(*c*), but was not prepared to accept that income tax deductions from an employee's wages retain the character of wages. The Court of Queen's Bench reversed the Master's decision and ordered that the refund be returned to the Director. The Court of Appeal affirmed that judgment.

Held: The appeal should be dismissed.

A bankrupt's interest in a post-bankruptcy income tax refund can be considered "property" for the purposes of s. 67(*c*) of the *Bankruptcy Act*. Even if a taxpayer who makes overpayments has no right to compel a refund prior to filing a return, that taxpayer has at least a future and contingent interest in the ultimate tax refund which would come within the definition of "property" in s. 2 of the Act. The property need not also meet the requirements of s. 67(*d*) before the trustee can claim it, since s. 67(*c*) and (*d*) should be treated as alternatives. The bankrupt's interest in his refund did not, however, vest automatically in his trustee. Section 68 is a complete code in respect of a bankrupt's salary, wages or other remuneration, and such forms of property thus cannot be "property of a bankrupt divisible among his creditors" for purposes of s. 67. The trustee can access them only following a court application as contemplated by s. 68(1), and no such application was made in this case. A plain language interpretation of s. 68(1) favours the view that it is a substantive provision: the opening words "[n]otwithstanding section 67" are intended to make it clear that wages will not come within s. 67(*c*) but will be dealt with by s. 68. The mischief which s. 68 was intended to remedy reinforces this view. Since the section was intended to remedy province-to-province disparities in the application of the *Bankruptcy Act*, it necessarily follows that it is a substantive rather than a procedural modification to the pre-existing scheme.

The post-bankruptcy income tax refund in this case retained the character of wages to the extent that it represented a return of employer withholdings. The bankrupt earned a certain amount as wages after his voluntary assignment in bankruptcy, and the fundamental character of these wages is not affected by the fact that a portion was, by virtue of statute, automatically directed toward his tax liability. The only problems with the characterization of an income tax refund as deferred wages for the purposes of s. 68 of the *Bankruptcy Act* are structural ones. The trustee's inability to act independently is a flaw inherent in s. 68(1), which has now been corrected by a statutory amendment. The fact that s. 68(2) orders can be directed only toward "the bankrupt and his employer" is a more serious problem, but this deficiency cannot affect the conclusion that an income tax refund retains its character as wages. While it would be preferable, from a trustee's point of view, to obtain an order directly against the Crown in respect of an income tax refund, an order against the bankrupt person alone does provide the trustee with the necessary legal entitlement to the refund. Moreover, the fact that the court is to have "regard to the family responsibilities and personal situation of the bankrupt" demonstrates an overriding concern for the support of families. The discretion given to courts by s. 68 is amplified by the discretion which is necessarily left in the trustee, creditors and inspectors. Since these kinds of discretion are better able to respond to the costs of raising families, a purposive interpretation should be given to the word "wages" in s. 68, notwithstanding difficulties associated with s. 68(2).

The agreement letter was incapable of creating an effective assignment owing to s. 67 of the *Financial Administration Act*, which states that "[e]xcept as provided in this Act or any other Act of Parliament . . . a Crown debt is not assignable". "Crown debt" is defined to include not only existing debts, but also future debts "due or becoming due". The *Financial Administration Act* fails to permit such assignment, and no express authorization appears in any other federal statute. By taking steps to garnish the income tax refund, the Director thus necessarily obtained priority in this case.

Cases Cited

Disapproved: *Re Northward Airlines Ltd.* (1981), 37 C.B.R. (N.S.) 137; *Re Beaton* (1979), 30 C.B.R. (N.S.) 225; *Re Hoffer* (1980), 34 C.B.R. (N.S.) 222; *Re Kellaway* (1977), 24 C.B.R. (N.S.) 14; **distinguished:** *Re Bertrand*, [1980] 2 N.Z.L.R. 72; **referred to:** *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Industrial Acceptance Corp. v. Lalonde*, 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109; *Federal Commissioner of Taxation v. Official Receiver* (1956), 95 C.L.R. 300; *Re Goulet* (1977), 24 C.B.R. (N.S.) 222; *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, 1980 CanLII 186 (SCC), [1980] 1 S.C.R. 1182; *Munich Reinsurance Co. (Canada Branch) v. M.N.R.*, 91 D.T.C. 1137; *Hughes v. The Queen*, 91 D.T.C. 5290; *Re Giroux* (1983), 45 C.B.R. (N.S.) 245; *Re McCullough* (1984), 52 C.B.R. (N.S.) 313; *Re Ali* (1987), 62 C.B.R. (N.S.) 64; *Vachon v. Canada Employment and Immigration Commission*, 1985 CanLII 12 (SCC), [1985] 2 S.C.R. 417; *Re Szatmari* (1972), 18 C.B.R. (N.S.) 309; *Re Walker* (1982), 43 C.B.R. (N.S.) 319; *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813.

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Bankruptcy Act, S.C. 1919, c. 36, s. 25.
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Family Orders and Agreements Enforcement Assistance Act, R.S.C., 1985, c. 4 (2nd Supp.), ss. 23, 24, 28.

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Family Support Orders and Agreements Garnishment Regulations, SOR/88-181, s. 3(*a*).
Financial Administration Act, R.S.C., 1985, c. F-11, ss. 66, 67, 68(1), 69, 70.
Income Tax Act, R.S.C. 1952, c. 148, ss. 153(3), 164(1).
Maintenance Enforcement Act, S.A. 1985, c. M-0.5, s. 4.
Tax Rebate Discounting Act, R.S.C., 1985, c. T-3, s. 2(2).

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House of Commons Debates, vol. VI, 1st Sess., 27th Parl., June 16, 1966, at p. 6488.

APPEAL from a judgment of the Alberta Court of Appeal reflex, (1992), 14 C.B.R. (3d) 127, 131 A.R. 154, 25 W.A.C. 154, 4 Alta. L.R. (3d) 97, 42 R.F.L. (3d) 76, 94 D.L.R. (4th) 394, affirming a judgment of the Court of Queen's Bench (1991), 8 C.B.R. (3d) 238, 123 A.R. 1, 82 Alta. L.R. (2d) 67, 35 R.F.L. (3d) 225, reversing a decision of Master Funduk (1990), 2 C.B.R. (3d) 109, 112 A.R. 70, awarding the bankrupt's income tax refund to the trustee of his estate. Appeal dismissed.

Michael J. McCabe, for the appellant.
Jeanette Fedorak, for the respondent the Director of Maintenance Enforcement.
Ingrid C. Hutton, *Q.C.*, and *Robert Moen*, for the respondent the Attorney General of Canada.
No one appeared for the respondent the Attorney General for Alberta.
Rick T. G. Reeson, for the intervener.
The judgment of the Court was delivered by

IACOBUCCI J. -- This appeal involves a priority contest, the subject matter of which is a bankrupt's post-bankruptcy income tax refund. The contestants are a trustee in bankruptcy and the Director of Maintenance Enforcement. The appeal has been brought as a test case, with the parties proceeding on an agreed statement of facts.

I. Facts

In 1986, Arden Anthony Marzetti was ordered to pay monthly child and spousal support pursuant to the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). He fell into arrears, and a default hearing was held in December 1988. As a consequence, Marzetti was ordered to pay $250 per month to the Director of Maintenance Enforcement (the "Director"), who is appointed pursuant to s. 4 of the *Maintenance Enforcement Act*, S.A. 1985, c. M-0.5.

On June 7, 1989, Marzetti filed a voluntary assignment into bankruptcy. On that date, he also executed an "Agreement Letter" as requested by his Trustee in Bankruptcy, Peat Marwick Thorne Inc. The Agreement Letter reads:

> I hereby authorize Peat Marwick Limited, as Trustee of my Estate, to complete and file with Revenue Canada - Taxation my post-bankruptcy income tax return for the year 1989. I further authorize that any refund resulting from the post-bankruptcy income tax return be mailed to Peat Marwick Limited as an asset pursuant to Section 47 of the Bankruptcy Act for distribution to my creditors.

On February 15, 1990, the Director filed a Notice of Continuing Attachment against the federal Crown under the *Family Orders and Agreements Enforcement Assistance Act*, R.S.C., 1985, c. 4 (2nd Supp.). The Notice instructed the Crown to pay to the Director specified monies, namely, sums otherwise payable to Marzetti under any Act of Parliament.

On March 7, 1990, Marzetti was granted an absolute discharge from bankruptcy.

On April 13, 1990, the Department of Justice issued a garnishee summons, thus putting into effect the Notice of Continuing Attachment previously filed.

On April 30, 1990, the Trustee filed a post-bankruptcy income tax return for Marzetti. That return summarized Marzetti's tax liability for the period between June 7, 1989 and December 31, 1989. A post-bankruptcy income tax refund totalling $2,066.90 became payable.

Before the refund was paid, the Trustee applied for a declaration that the refund was properly payable to the Trustee rather than the Director. Although the Crown in right of Canada was served with notice of the Trustee's motion, the tax refund was nonetheless paid to the Director in August 1990. Counsel for the Attorney General of Canada acknowledged that this payment was made in error, and that the Minister of National Revenue did not intentionally make payment prior to resolution of the priority dispute.

In response to the Trustee's motion, an Alberta Master declared that the refund constitutes property of Marzetti which vested in the Trustee: (1990), 2 C.B.R. (3d) 109, 112 A.R. 70. The Director was ordered to pay the amount of the refund to the Trustee. The Court of Queen's Bench of Alberta allowed the Director's appeal, and ordered that the refund be returned to the Director: (1991), 8 C.B.R. (3d) 238, 123 A.R. 1, 82 Alta. L.R. (2d) 67, 35 R.F.L. (3d) 225. The Court of Appeal

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for Alberta dismissed the Trustee's appeal: reflex, (1992), 14 C.B.R. (3d) 127, 131 A.R. 154, 25 W.A.C. 154, 4 Alta. L.R. (3d) 97, 42 R.F.L. (3d) 76, 94 D.L.R. (4th) 394. This Court granted leave to appeal from that decision: [1993] 1 S.C.R. vii.

The Attorney General for Alberta, a named respondent who participated in the proceedings below, was not represented in the appeal before this Court.

II. Relevant Statutory Provisions

A. *Bankruptcy Act*, R.S.C., 1985, c. B-3

2. In this Act,

. . .

"property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

. . .

67. The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

68. (1) Notwithstanding section 67, where a bankrupt is in receipt of, or is entitled to receive, any salary, wages or other remuneration from any person employing, or using the services of, the bankrupt, in this section referred to as the "employer", the trustee, if directed by the inspectors or the creditors, shall apply to the court for an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

(2) An order under subsection (1) shall be directed to the bankrupt and his employer and shall be expressed to continue for such time as the court may fix or until payment of a sum specified in the order and, unless otherwise stated in the order, it ceases to have effect on the discharge of the bankrupt.

. . .

(4) An order under subsection (1) shall be served on the bankrupt and is binding on him, and when the order is served on his employer, it is binding on the employer named therein and any subsequent employer of the bankrupt if a copy of the order is served on the subsequent employer, but nothing in this section shall be construed as requiring the trustee to serve such an order on any employer of a bankrupt if it appears to the trustee inexpedient to do so.

. . .

70. (1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and except the rights of a secured creditor.

. . .

71. ...

(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

. . .

158. A bankrupt shall

. . .

(*l*) execute such powers of attorney, conveyances, deeds and instruments as may be required;

. . .

(*o*) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed

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by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested . . .

B.*Family Orders and Agreements Enforcement Assistance Act*, R.S.C., 1985, c. 4 (2nd Supp.)

23. In this Part,

"garnishable moneys" means moneys authorized to be paid by Her Majesty by or under such Acts of Parliament or provisions thereof or programs thereunder as are designated by the regulations;

. . .

24. Notwithstanding any other Act of Parliament preventing the garnishment of Her Majesty, Her Majesty may, for the enforcement of support orders and support provisions, be garnisheed in accordance with this Part in respect of all garnishable moneys.

. . .

28. Subject to this Part and the regulations, service of the following documents on the Minister, namely,

(*a*) a garnishee summons,

(*b*) a copy of the support order or agreement containing the support provision to which the garnishee summons relates, and

(*c*) an application in the form prescribed by the regulations,

binds Her Majesty for one year in respect of all garnishable moneys payable to the judgment debtor named in the garnishee summons.

C.*Family Support Orders and Agreements Garnishment Regulations*, SOR/88-181

3. The following Acts, provisions thereof and programs thereunder are designated for the purposes of the definition "garnishable moneys" in section 23 of the Act:

(*a*) sections 164 and 216 of the *Income Tax Act* as they relate to the personal return of income of the taxpayer for a particular taxation year; . . .

D. *Financial Administration Act*, R.S.C., 1985, c. F-11

66. In this Part,

. . .

"Crown debt" means any existing or future debt due or becoming due by the Crown, and any other chose in action in respect of which there is a right of recovery enforceable by action against the Crown;

. . .

67. Except as provided in this Act or any other Act of Parliament,

(*a*) a Crown debt is not assignable; and

(*b*) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

E. *Tax Rebate Discounting Act*, R.S.C., 1985, c. T-3

2. ...

(2) For the purposes of this Act, a person acquires a right to a refund of tax where that person, as between himself and another person, acquires a right to a refund of tax or to an amount equal to the amount of a refund of tax, notwithstanding that, by virtue of section 67 of the *Financial Administration Act* or any provision of any other Act of Parliament or of the legislature of a province, the refund of tax is not assignable.

III. Judgments

A.*Alberta Court of Queen's Bench* (1990), 2 C.B.R. (3d) 109 (Master Funduk in Chambers)

Master Funduk asked whether an income tax refund can be considered property of a bankrupt which vests in a trustee by virtue of the *Bankruptcy Act*, R.S.C., 1985, c. B-3. He answered that a refund is *prima facie* "property", as that term is used in s. 67 of the *Bankruptcy Act*. However, he realized that some courts have treated refunds as deferred wages, and that such courts, by invoking s. 68 of the *Bankruptcy Act*, have held that refunds do not automatically vest in trustees under s. 67.

Master Funduk was prepared to accept that s. 68 of the *Bankruptcy Act* removes wages from the scope of s. 67(*c*). But after a comprehensive review of case law, he was not prepared to accept that income tax deductions from an employee's wages retain the character of wages. He stated, plainly: "I do not think that an income tax refund can logically be considered to be `deferred wages'" (p. 119).

Further, Master Funduk noted that, if the refund retained its character as wages, then the plain language of s. 68 would seem to preclude trustees from obtaining orders in respect of the refund. Pursuant to s. 68, while a trustee can secure an order to obtain wages, the s. 68 order can be directed only toward "the bankrupt and his employer". Master Funduk stated that s. 68 does not permit the attachment of a debt owed by a third party to a bankrupt.

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Accordingly, Master Funduk held that the income tax refund is not within the scope of s. 68 of the *Bankruptcy Act*. He held that it is property of the bankrupt within s. 67(*c*) which vested automatically in the Trustee. In light of these holdings, Master Funduk did not consider arguments relating to the Agreement Letter.

B.*Alberta Court of Queen's Bench* (1991), 8 C.B.R. (3d) 238 (Wachowich J.)

Wachowich J. (as he then was) agreed with Master Funduk that the tax refund is *prima facie* property within s. 67(*c*) of the *Bankruptcy Act*. He also agreed that the refund is neither wages nor deferred wages within s. 68. However, Wachowich J. indicated that "[w]hile the tax refund falls within s. 67(*c*), it seems clear from the language of the *Bankruptcy Act* that s. 67(*d*) must also apply *before* the property can be dealt with by the trustee" (pp. 246-47). Wachowich J. stated (at p. 247):

> This means that the trustee's right to deal with this property is limited to those rights the bankrupt would have had had he not been bankrupt . . . . if Marzetti had not been bankrupt, he would have had no power to collect the portion of the tax refund garnisheed by the Director because of the *Family Orders and Agreements Enforcement Assistance Act*. Similarly then, the trustee has no right to that portion of the tax refund garnisheed and paid to the Director.
>
> . . .
>
> Thus, the tax refund does not automatically vest in the trustee under ss. 67(*c*) and (*d*).

Wachowich J. next considered the Agreement Letter. He found that, under ss. 66 and 67 of the *Financial Administration Act*, R.S.C., 1985, c. F-11, "there is a statutory prohibition against the assignment of Crown debts except as specifically authorized by federal legislation" (p. 247). Wachowich J. accepted that, by virtue of *Re Northward Airlines Ltd.* (1981), 37 C.B.R. (N.S.) 137 (Alta. Q.B.), an assignment might nonetheless be effective as between an assignor and an assignee. However, Wachowich J. referred to *Tailby v. Official Receiver* (1888), 13 App. Cas. 523 (H.L.), and stated (at p. 249):

> ... while the assignment might bind the conscience of the assignor, it cannot bind the property until such time as the contract becomes capable of being performed. . . . the contract between the assignor and the assignee cannot be performed until the assignor has received his tax refund. Because of the nature of the garnishment proceedings available to the Director, the assignor (the bankrupt) never does receive the tax refund. Thus, the assignee's rights to the property never materialize.

Thus, Wachowich J. distinguished *Re Northward Airlines* on the ground that it did not involve a prior right to garnishee a Crown debt.

On the question of assignment, then, Wachowich J. concluded that the Trustee is "attempting to get through the back door something it could not get through the front" (p. 249). He stated that the Trustee could take action against the Director only if Marzetti could similarly take action, which he could not. He found that, once the refund passed to the Director, it ceased to be Marzetti's property under s. 67(*c*), in that Marzetti had "no power over or in respect of that property" (p. 249). Additionally, Wachowich J. stated that even if the assignment were otherwise enforceable, it would remain unenforceable on the facts because of the Trustee's failure to comply with ss. 69 and 70 of the *Financial Administration Act*.

The assignment being ineffective, and s. 67(*c*) of the *Bankruptcy Act* being inoperative, Wachowich J. allowed the appeal. He declared that the income tax refund was properly attached by the Director. Accordingly, he ordered the Trustee to remit the refund plus interest to the Director.

C.*Alberta Court of Appeal* reflex, (1992), 14 C.B.R. (3d) 127 (Major J.A. for the Court)

Major J.A. (as he then was) first discussed the role of s. 68 of the *Bankruptcy Act*. In his opinion, s. 68 legislatively overruled *Industrial Acceptance Corp. v. Lalonde*, 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109. Thus, Major J.A. interpreted s. 68 to mean that "only upon application to the court having regard to the enumerated considerations can a trustee access the wages or salary earned by a bankrupt" (p. 131).

Major J.A. next accepted as correct both *Federal Commissioner of Taxation v. Official Receiver* (1956), 95 C.L.R. 300 (Austr. H.C.) and *Re Goulet* (1977), 24 C.B.R. (N.S.) 222 (Ont. S.C.). This acceptance supported his conclusion, namely, that "tax deductions taken at source by an employer and remitted to Revenue Canada do not lose their character as wages" (p. 135). Major J.A. explained that "[t]he reality of the situation is that the income tax refund, insofar as it relates to employer withholdings, represents wages that otherwise would have been paid to the bankrupt" (p. 134). He buttressed his conclusion with dicta from *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, 1980 CanLII 186 (SCC), [1980] 1 S.C.R. 1182. But he also qualified his conclusion by stating (at p. 135):

> I do not conclude that all tax refunds are wages. It depends on the nature of the refund. In this case the refund was the result of taxes deducted directly from wages. Tax refunds may arise in other ways and can be determined when that case arises.

Then, as a final point on the wages issue, Major J.A. considered whether the language of s. 68 precludes a wages characterization for income tax refunds. He described the position of Master Funduk, namely, that since s. 68 does not contemplate an order against the Crown, a refund cannot constitute s. 68 "wages". For Major J.A., however, the alleged

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problem with s. 68 is irrelevant, inasmuch as it "cannot change the characterization of employer withholdings returned in the form of a tax refund as `wages'" (p. 135). He stated that any s. 68 problem associated with the making of orders is a problem for Parliament.

In the alternative, Major J.A. agreed with Wachowich J.'s other conclusions relating to the operation of s. 67 of the *Bankruptcy Act*, the effectiveness of the Agreement Letter, and the requirements of the *Financial Administration Act*. Major J.A. dismissed the appeal, and held that the Director was properly entitled to the refund because of the Notice of Continuing Attachment.

IV. Issues

The central issue in this appeal, as I have already noted, is whether the Trustee or the Director has priority in respect of Marzetti's post-bankruptcy income tax refund. In discussing this issue, I find it convenient to adopt the following structure:

A. What is the position under the *Bankruptcy Act*?

1.In general terms, is the *Bankruptcy Act*'s reference to "property" broad enough to embrace the facts of this case?

2.In specific terms, must a court conclude that both ss. 67(*c*) and 67(*d*) of the *Bankruptcy Act* have been satisfied in order to conclude that there exists "property of a bankrupt divisible among his creditors" for the purposes of s. 67?

3.Is s. 68 a complete code in respect of a bankrupt's wages?

4.Should a post-bankruptcy income tax refund be considered "wages" for the purposes of s. 68?

B. Did the Agreement Letter create an enforceable assignment?

In answering these questions, I will make frequent reference to the *Bankruptcy Act*. I do so with full knowledge that the relevant statute is now entitled the *Bankruptcy and Insolvency Act*: see S.C. 1992, c. 27, ss. 1 and 2. However, since the statute was known as the *Bankruptcy Act* at the pertinent times, and since none of the 1992 amendments materially affects my opinion, I will generally find it unnecessary to have regard to the amended version.

V. Analysis

A.*What is the Position Under the Bankruptcy Act?*

Perhaps more for logic than for law, I consider it helpful, as an initial matter, to consider s. 67 of the *Bankruptcy Act* in isolation. That section is of critical importance to the Act's operation, inasmuch as it establishes certain rules regarding what will, and what will not, comprise "property of a bankrupt divisible among his creditors". These rules, in turn, rest upon a definition of "property" found in s. 2 of the *Bankruptcy Act*.

Both s. 67 and the "property" definition can trace their legislative roots back to the original *Bankruptcy Act*, S.C. 1919, c. 36. The "property" definition in that early statute is nearly identical to the existing definition found in s. 2. Likewise, s. 25 of the early statute performed much the same function as the current s. 67. In contrast, s. 68 is historically rooted in a relatively recent amendment: S.C. 1966-67, c. 32, s. 10. Although I will later conclude that s. 68 is operative in this case, both the long history and the fundamental importance of s. 67 lead me first to consider that section of the *Bankruptcy Act* in isolation.

1.In general terms, is the *Bankruptcy Act*'s reference to "property" broad enough to embrace the facts of this case?

Section 67(*c*) of the *Bankruptcy Act* provides that "[t]he property of a bankrupt divisible among his creditors . . . shall comprise . . . all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge". At the "date of his bankruptcy" in this case, Marzetti had no interest in the tax refund, since that refund relates to income he earned following his voluntary assignment into bankruptcy. Accordingly, the relevant issue is whether Marzetti "acquired" any property, or whether any property "devolve[d] on him", prior to his discharge.

In discussing this issue, it must first be observed that Marzetti's income tax return was not filed until after his discharge from bankruptcy. This means that, if Marzetti acquired property in respect of the refund, or had such property devolve upon him, the acquisition or devolution cannot depend upon the filing of the income tax return itself. Can it be said that, prior to his discharge, Marzetti had property in respect of his eventual income tax refund, even though a return was not filed until after his discharge?

According to the Director, it cannot, and for this proposition the Director cited *Munich Reinsurance Co. (Canada Branch) v. M.N.R.*, 91 D.T.C. 1137 (T.C.C.). In that case, Rip T.C.J. stated that "the right to a refund does not arise at the time an overpayment of any tax instalment is made but it arises on the day a return is filed" (p. 1143). In making this statement, however, Rip T.C.J. was speaking in terms of the taxpayer having "an enforceable right against the Minister" (p. 1143, emphasis added). In particular, he was considering whether the taxpayer who overpays an instalment acquires a right to receive interest income.

Viewed in context, therefore, the conclusion in *Munich* does not rest upon Rip T.C.J.'s independent assessment of the proprietary character of overpayments. Rather, it derives inferentially from the existence of a statutory refund procedure in s. 164(1) of the *Income Tax Act*, R.S.C. 1952, c. 148 as amended. In the words of Rip T.C.J., "[a]s section 164 makes clear, a refund is not due and payable until a return is filed" (p. 1143). Accordingly, assuming that *Munich* is correctly decided, it is of

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little assistance to the Director. There is a marked distinction between the existence, and the statutory enforceability, of a proprietary right.

Is there, then, a proprietary character to tax overpayments? Not surprisingly, the *Bankruptcy Act* defines the word "property" in very broad terms. In particular, I note that the definition includes "every description of property, whether . . . legal or equitable", and it specifically mentions "every description of . . . interest . . . present or future, vested or contingent, in, arising out of or incident to property": s. 2. Even if a taxpayer who makes overpayments has no right to compel a refund prior to filing a return, surely that taxpayer has at least a future and contingent interest in the ultimate tax refund.

During oral argument, counsel for the Director was asked whether it might be valid to compare a tax overpayment to a demand promissory note, the suggestion being that each is a form of property, but that neither is enforceable prior to the satisfaction of certain preconditions. In the case of the promissory note, the precondition is the demand. In the case of the tax overpayment, the recognized preconditions relate to the filing of the return: see, e.g., *Munich*, *supra*, and *Hughes v. The Queen*, 91 D.T.C. 5290 (F.C.T.D.). In my view, the comparison is a good one. The argument of the Director artificially restricts the *Bankruptcy Act* definition of "property", and it fails to distinguish between accrued legal debts and other, inchoate, forms of property.

On this preliminary issue, therefore, I conclude that the *Bankruptcy Act*'s reference to "property" is broad enough to embrace the facts of this case. More specifically, using the language of s. 67(*c*), I conclude that Marzetti acquired at least a future and contingent interest in his income tax refund at the time excess overpayments were withheld on his behalf.

2.In specific terms, must a court conclude that both ss. 67(*c*) and 67(*d*) of the *Bankruptcy Act* have been satisfied in order to conclude that there exists "property of a bankrupt divisible among his creditors" for the purposes of s. 67?

According to Wachowich J., ss. 67(*c*) and 67(*d*) of the *Bankruptcy Act* must both be satisfied before a court can conclude that there exists "property of a bankrupt divisible among his creditors". Those two paragraphs provide:

> The property of a bankrupt divisible among his creditors . . . shall comprise
>
> (*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
>
> (*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

In other words, like Master Funduk, Wachowich J. concluded that the income tax refund could be considered "property" for the purposes of s. 67(*c*), such that it was capable of vesting automatically in the Trustee. However, for Wachowich J., s. 67(*d*) precluded automatic vesting on the facts. He reasoned that, by virtue of s. 67(*d*), the Trustee could exercise only those powers in respect of the refund which might have been exercised by Marzetti but for the bankruptcy. And, he stated, if the bankruptcy had not occurred, Marzetti could have exercised no power over the refund because of the garnishee instituted by the Director. So while Marzetti had "property" in respect of the refund, there was no "property of a bankrupt divisible among his creditors". The Court of Appeal approved this reasoning, but without analysis.

With respect, Wachowich J. misinterpreted ss. 67(*c*) and 67(*d*). In effect, Wachowich J. characterized s. 67(*c*) as an inclusionary provision, and s. 67(*d*) as an exclusionary provision. Section 67(*c*) giveth, and s. 67(*d*) taketh away. But this interpretation ignores the structure of s. 67 as a whole, since ss. 67(*a*) and (*b*) are preceded by the phrase "[t]he property of a bankrupt . . . shall not comprise" (emphasis added), whereas ss. 67(*c*) and (*d*) are preceded by the phrase "[t]he property of a bankrupt...shall comprise" (emphasis added). If s. 67(*d*) were intended to limit the scope of s. 67(*c*), why would it not have been placed with (*a*) and (*b*)?

This criticism of Wachowich J.'s interpretation is echoed by L. W. Houlden and C. H. Morawetz in *Bankruptcy and Insolvency Law of Canada* (3rd ed. rev. 1992), vol. 1, at p. 3-6, where the authors comment upon Wachowich J.'s trial decision:

> . . . Wachowich J. of the Alberta Court of Queen's Bench was of the opinion that if property falls within [s. 67(*c*)], it must also meet the requirements of [s. 67(*d*)] before the trustee can claim it. With respect, this seems wrong. Section [67(*c*)] and (d) have always been treated as alternatives.

In other words, because of the statutory structure, it is inappropriate to read paragraphs (*c*) and (*d*) restrictively when those paragraphs are intended broadly and inclusively to define the "property of a bankrupt divisible among his creditors". Surely the better view is to give, at least at this stage of the analysis, a wider effect to these paragraphs so as not to reduce artificially the estate available to creditors. In grammatical terms, the word "and" which appears at the end of the English version of s. 67(*c*) must, by reason of its context, be read disjunctively. As stated by E. A. Driedger, "[t]he inclusive *or* and the several *and* produce the same result, and it remains for the context to indicate in what sense these two little words are used": *Construction of Statutes* (2nd ed. 1983), at p. 18.

Moreover, I am fortified in this conclusion by the French text of s. 67. Although the parties failed to highlight the point, the word "*et*" does not appear as a conjunction between ss. 67(*c*) and 67(*d*). Although the absence of a conjunction in

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the French version does not make Wachowich J.'s interpretation impossible, it does make the interpretation even less defensible.

For these reasons, a bankrupt's interest in a post-bankruptcy income tax refund can be considered "property" for the purposes of s. 67(*c*) of the *Bankruptcy Act*. Moreover, it can be considered "property of a bankrupt divisible among his creditors" for the purposes of s. 67 as a whole, since s. 67(*d*) in no way qualifies the operation of s. 67(*c*). This, then, is my initial conclusion.

In the absence of other considerations, the logical consequence of my initial conclusion would be that Marzetti's interest in his refund vested automatically in his Trustee: see s. 71(2). In this way, the Trustee would have obtained priority over the Director's garnishment: see s. 70(1). However, as I will now proceed to explain, my initial conclusion cannot govern in this case. It is overruled by s. 68.

To assess the importance of s. 68 in this case, I must do two things. First, I must determine whether s. 68 always controls the disposition of a bankrupt's wages. Is s. 68 a substantive provision, that is, one which always removes wages from the scope of s. 67, or does it simply create a procedural device for trustees? Second, if I determine that s. 68 is a complete code in respect of a bankrupt's wages, I must then proceed to consider whether Marzetti's post-bankruptcy income tax refund retained its wages character.

3.Is s. 68 a complete code in respect of a bankrupt's wages?

Prior to the enactment of what is now s. 68, it was clear that the salary, wages, or other remuneration of a bankrupt could sometimes constitute after-acquired "property", and so be considered "property of a bankrupt divisible among his creditors" for the purposes of what is now s. 67. The pre-amendment position was clarified by *Industrial Acceptance Corp.*, *supra*.

In *Industrial Acceptance Corp.*, this Court was asked to explain whether wages or salary could be excluded from the definition of divisible property by s. 23(ii) (later s. 67(*b*)) of the *Bankruptcy Act*. According to the respondent bankrupt in *Industrial Acceptance Corp.*, the terms of s. 23(ii) could not operate to exclude wages or salary, inasmuch as wages or salary can "only be reached by a garnishee or attachment procedure" (p. 118). This procedural reality was said to be important because s. 23(ii) excluded from the definition of divisible property only property exempted from "execution or seizure" under provincial law. Estey J. rejected the distinction between garnishment or attachment procedures on the one hand, and procedures by way of execution or seizure on the other hand, in the following terms (at p. 117):

> It would appear that Parliament, in adopting the language of s. 23(ii) (particularly when compared with the language of s. 38(2) in the English act) intended that only such portion of the salary as was subject to seizure by legal process under the law of the respective provinces should vest in the trustee. Moreover, the omission of any such provision as that contained in s. 51(2) of the English act, under which, on the application of the trustee, an order might be made against a bankrupt in receipt of a salary to pay the whole or part thereof to the trustee, appears to support the foregoing view.

In modern terms, *Industrial Acceptance Corp.* established that the language of s. 67(*b*), which removes from "property of a bankrupt divisible among his creditors . . . any property that as against the bankrupt is exempt from execution or seizure under the laws of the province", can operate to exclude wages or salary as contemplated by provincial exemptions.

In effect, therefore, the pre-amendment position was this: after taking into account provincial wage and salary exemptions, any remaining wages or salary of a bankrupt was "property of a bankrupt divisible among his creditors". These excess wages vested automatically in the trustee. And it is clear from *Industrial Acceptance Corp.* that this conclusion was partly driven by the absence of a provision like s. 68, namely, one which permits, "on the application of the trustee, an order . . . against a bankrupt in receipt of a salary to pay the whole or part thereof to the trustee" (p. 117). But what is not clear in *Industrial Acceptance Corp.*, and what must be resolved in this appeal, is how the presence of s. 68 alters this pre-existing structure.

Two possibilities present themselves. First, it can be argued that s. 68 is a complete code in respect of a bankrupt's salary, wages, or other remuneration. Under this view, such forms of property cannot be "property of a bankrupt divisible among his creditors" for s. 67. They do not automatically vest in the trustee. The trustee can access them only following a court application as contemplated by s. 68(1). Proponents of this first view characterize the s. 68 amendment as a substantive amendment to the pre-existing structure, in so far as s. 68 leaves no room for the operation of s. 67 in respect of a bankrupt's salary, wages, or other remuneration. The substantive view has judicial support: *Re Giroux* (1983), 45 C.B.R. (N.S.) 245 (Ont. S.C.); *Re McCullough* (1984), 52 C.B.R. (N.S.) 313 (Ont. S.C.); *Re Ali* (1987), 62 C.B.R. (N.S.) 64 (Ont. S.C.).

The second view, not surprisingly, is that s. 68 is simply a procedural provision. Proponents of this view contend that the pre-amendment position persists, and that wages, salary, and other remuneration can still vest automatically in the trustee as non-exempt property under s. 67(*b*). To explain s. 68's existence, a procedural purpose is advanced to demonstrate that s. 68 applications can be beneficial from the trustee's perspective. Two variations of the procedural argument can be identified.

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The first variation characterizes s. 68 as creating an additional remedy for trustees. It is said that s. 68 permits a trustee to access not only the non-exempt portion of a bankrupt's wages (which vests automatically), but also the otherwise exempt portion, subject to the court's discretion as defined by s. 68. This view is expressed in *Re Beaton* (1979), 30 C.B.R. (N.S.) 225 (Ont. C.A.), where Arnup J.A. stated (at pp. 227-28):

> Section 48 [now s. 68], in my view, adopted and enlarged upon the procedure in the English Act. It gave the trustee an expeditious and convenient means of getting into his hands not only the [non-exempt portion] which by s. 47 [now s. 67] was already the divisible property of the bankrupt . . . but possibly more, if the court saw fit to order a larger portion to be paid to the trustee....

The second variation of the procedural argument, which is not inconsistent with the first, emphasizes the convenience of s. 68 over its potential to increase a trustee's access to wages. This view is expressed by Kroft J. in *Re Hoffer* (1980), 34 C.B.R. (N.S.) 222 (Man. Q.B.), at p. 234:

...under s. 47 [now s. 67] alone the trustee could not attach the [non-exempt portion] until it fell due. How wages were attached as they became due was a source of considerable confusion, and the approaches across Canada were inconsistent.

> Section 48 [now s. 68] appears to have been passed to give trustees a fair and convenient procedure by which they can ask a court to determine the portion of wages which will be available to creditors and to direct the manner of payment.

In addition to *Re Beaton* and *Re Hoffer*, the procedural view was advanced in *Re Kellaway* (1977), 24 C.B.R. (N.S.) 14 (B.C.S.C.), though without explanation.

To proceed, I restate the question: is s. 68 a substantive or procedural provision in respect of a bankrupt's salary, wages, or other remuneration? In my opinion, the case law debate summarized above should be resolved in favour of the substantive view for three reasons. First, that view better accords with the language of s. 68. Second, it permits s. 68 to remedy more effectively the mischief which led to the original amendment. And, third, it has some support in authority from this Court. I will now elaborate upon each of these reasons in turn.

The language of s. 68 twice favours the substantive view. These points of support were described by Thorson J.A. dissenting in *Re Beaton*, *supra*. I can do no better than quote his cogent discussion of each. First, Thorson J.A. considered the implications of the phrase "an order directing the payment to the trustee", as that phrase is used in s. 68 (then s. 48(1)) of the *Bankruptcy Act*. He stated (at p. 237):

> It is not without significance that the only order which s. 48(1) authorizes the court to make is "an order directing the payment to the trustee" of a part of the bankrupt's earnings. The inference which I draw from this phrasing of language is that it contemplates a payment being made to the trustee to which the trustee would not be entitled in the absence of the order. There is no hint or suggestion anywhere in the subsection that the payment which is to be made is to take the place of, or is to be in addition to, some part of those earnings to which the trustee is in any event already entitled; rather there is the reverse implication that, but for the order, the trustee would have *no* right to be paid whatever part of those earnings he is seeking to have paid to him. [Emphasis in original.]

Second, Thorson J.A. examined the significance of the words "such part of the salary, wages or other remuneration" as they appear in s. 68(1). In the following passage, Thorson J.A. explains how those words favour the substantive view (at pp. 237-38):

> Furthermore, I cannot conclude that no significance is to be attached to the language of the legislative condition of s. 48(1), beginning with the words "where a bankrupt is in receipt of, or is entitled to receive, any salary, wages or other remuneration from any person employing, or using the services of, the bankrupt", when that language is then followed by language authorizing the making of an order directing payment to the trustee of "such part of *the* salary, wages or other remuneration" (the italics are mine) as the court may determine. If the contention of counsel for the trustee were to be accepted, the only meaning that could be given to the words "such part of *the* salary, wages or other remuneration" would be "such part of *the portion of* the salary, wages or other remuneration *that has not already vested in the trustee*", i.e., the portion that remains after deducting the 30 per cent portion of the bankrupt's wages to which the trustee has already become entitled.
>
> This is equally the result, in my opinion, of the argument of counsel for the Superintendent of Bankruptcy that s. 48 was not intended to, and does not, take away any rights that the trustee might otherwise have to the bankrupt's wages "at least until he has proceeded under s. 48". If he is correct, the only possible starting point of earnings from which a court could proceed to make an order under s. 48 would be from the remaining [otherwise exempt] portion of the bankrupt's earnings. [Emphasis in original.]

I agree with both points made by Thorson J.A. in *Re Beaton*, *supra*. In my opinion, a plain language interpretation of s. 68(1) favours the view that it is a substantive provision. When s. 68(1) indicates that it applies "[n]otwithstanding section 67", it means that it operates as a complete code in respect of the listed forms of property. Or, as stated by Houlden and

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Morawetz, *supra*, at p. 3-126: "The opening words `notwithstanding section [67]' are intended to make it clear that wages, etc. will not come within [s. 67(*c*)] but will be dealt with by s. 68".

My interpretation of s. 68 is reinforced by my understanding of the mischief which that provision was intended to remedy. As described above, prior to the enactment of s. 68's predecessor, while wages could vest in trustees automatically, provincial law could operate to exempt wages from the definition of "property of a bankrupt divisible among his creditors": *Industrial Acceptance Corp.*, *supra*. The necessary, and problematic, consequence of this statutory structure was that the treatment of a bankrupt's wages for *Bankruptcy Act* purposes varied from province to province: Houlden and Morawetz, *supra*, at p. 3-127.

Parliament no doubt considered it unreasonable for the treatment of bankrupt persons to depend upon the happenstance of provincial residence. Of course, even if one accepts that s. 68 is a complete code in respect of salary, wages, and other remuneration, the potential for uneven treatment across Canada remains in respect of other provincially exempted property. But it is hardly surprising that Parliament selected an important form of property -- salary, wages, and other remuneration -- and gave that property special treatment. In *Re Beaton*, *supra*, Thorson J.A. made the following statement with which I agree (at p. 235):

> It is thus legitimate to speculate that one of Parliament's objectives in enacting s. 48 [now s. 68] was to avoid this potential for unevenness (and its consequent potential unfairness both to bankrupts and to creditors alike) by providing an entirely separate regime for dealing with salary, wages or other remuneration received or entitled to be received by a bankrupt from his employer, which would apply uniformly throughout Canada regardless of differences in provincial laws.

The view I take is, moreover, reflected in Hansard extracts. Then Minister of Justice, the Hon. Louis-Joseph-Lucien Cardin, proposed to amend the *Bankruptcy Act* in the following speech (*House of Commons Debates*, June 16, 1966, at p. 6488):

> Other amendments clearly set out a procedure whereby bankrupts may be required to contribute some part of their post-bankruptcy income to the trustee for the benefit of the creditors. The present act would seem to indicate that a contribution may be required but this has been left to the discretion of trustees and the courts with the result that debtors are treated in a most inconsistent manner across the country. [Emphasis added.]

Accepting as I do that s. 68 is intended to remedy province-to-province disparities in the application of the *Bankruptcy Act*, the conclusion necessarily follows that s. 68 is a substantive rather than a procedural modification to the pre-existing scheme. If s. 68 were only intended to give trustees access to funds in excess of the non-exempt portion defined by s. 67(*b*), then uniformity of provincial application could only be achieved if courts in all provinces made s. 68 orders calculated to reflect the lowest common denominator of provincial exemption. In my view, however, not only is this outcome anomalous, but it is also probably prevented by the language of s. 68(1) itself, which language compels courts to have "regard to the family responsibilities and personal situation of the bankrupt" prior to making s. 68 orders. It is thus reasonable to suppose that uniformity of provincial application was intended to be achieved through the operation of s. 68 as a complete code, whereby courts make orders in respect of a bankrupt's salary, wages, or other remuneration after considering only one standard: the one specified in s. 68 itself.

As a final point of support for the substantive view, I draw attention to the decision of this Court in *Vachon v. Canada Employment and Immigration Commission*, 1985 CanLII 12 (SCC), [1985] 2 S.C.R. 417. In *Vachon*, Beetz J. discussed the rehabilitative purpose of the *Bankruptcy Act*. He did so in terms which suggest this Court's acceptance of the substantive view (at p. 430):

> The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence. These measures are contained in s. 47 [now s. 67] of the *Bankruptcy Act* concerning, *inter alia*, the exemption from execution of certain property, and in s. 48 [now s. 68], regarding the wages of the bankrupt, which applies notwithstanding s. 47 and which empowers the Court to make
>
> an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine having regard to the family responsibilities and personal situation of the bankrupt.

The part of the wages paid to creditors does not necessarily correspond to the part which may be attached. It may be more or less "having regard to the family responsibilities and personal situation of the bankrupt". Houlden and Morawetz, *op. cit.*, vol. 1, write at pp. F-66 and F-69:

> Since the enactment of s. 48, wages have been removed from the operation of s. 47 so that no part thereof vests in the trustee to be divided among creditors unless he makes an application under s. 48 and then only to the extent allowed by the court: *Re Giroux* (1983), 45 C.B.R. (N.S.) 245, 41 O.R. (2d) 351, 146 D.L.R. (3d) 103 (S.C.).

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> Applications under s. 48 of the Bankruptcy Act come down not to a question of law, but of fact; that is, whether the bankrupt after being given credit for his reasonable living expenses has excess funds which might be used to pay creditors. [Emphasis added.]

As I read the above quotation, Beetz J. approves of the highlighted passage from Houlden and Morawetz, which passage, in turn, rests upon *Re Giroux*, *supra*. Interestingly, while Houlden and Morawetz reach a more qualified conclusion in the current version of their work, they continue to favour the substantive view. The authors state (*supra,* at p. 3-126): "The position in *Re Giroux* and *Re McCullough* seems more consonant with the amendment that was made to the Act by the addition of s. 68".

To summarize briefly, it is my opinion that the language of s. 68, the inferred purpose of that provision, and the decision of this Court in *Vachon*, *supra*, all support the conclusion that s. 68 is a substantive provision, one which is intended to operate as a complete code in respect of a bankrupt's salary, wages, or other remuneration. These forms of property cannot fall within s. 67(*c*) of the *Bankruptcy Act* as a bankrupt's after-acquired "property", and they cannot be considered "property of a bankrupt divisible among his creditors" for the purposes of s. 67. They do not vest in the trustee through the simple operation of law.

Finally, for the sake of completeness, I note that this conclusion is not contradicted by Commonwealth authorities cited to this Court. The intervener the Superintendent of Bankruptcy cited *Re Bertrand*, [1980] 2 N.Z.L.R. 72 (C.A.). In that case, McMullin J. considered a provision which the Superintendent argued is similar to s. 68(1) of the *Bankruptcy Act*, and characterized it as "primarily a machinery provision" (at p. 77). But it is apparent from reading *Re Bertrand* that there is, in fact, no similarity between the two provisions at all. In the New Zealand case, the relevant provision operated "[w]ithout prejudice to any other rights conferred by" the Act in which it was found, and McMullin J. recognized that the provision was, therefore, not "intended to interfere with the pattern of vesting" (p. 77) otherwise apparent in the statute: cf. *Federal Commissioner of Taxation*, *supra*.

And it is also germane to observe that my reading of s. 68 in no way emasculates the importance of s. 67(*b*). There are many provincial exemptions from "execution or seizure" which have nothing to do with salary, wages, or other remuneration. See, for example, Houlden and Morawetz, *supra,* at pp. 3-39 *et seq*., where the authors review provincial exemptions in respect of such things as pension plans (at p. 3-45), real estate and homesteads (at p. 3-45), and tools and chattels used in the bankrupt's business, profession or calling (at p. 3-47). See also *Canadian Encyclopedic Digest* (Western 3rd ed.) vol. 13, Title 59, at pp. 59-83 *et seq*., and *Canadian Encyclopedic Digest* (Ontario 3rd ed.) vol. 12, Title 58, at pp. 93 *et seq*.

So I proceed upon the footing that anything called "wages" will not vest automatically in a trustee. But this case, of course, involves not wages *per se*, but rather Marzetti's post-bankruptcy income tax refund. This means that s. 68's role as a complete code will only matter if Marzetti's refund retained, for present purposes, its character as wages.

4.Should a post-bankruptcy income tax refund be considered "wages" for the purposes of s. 68?

Major J.A. held that Marzetti's refund retained the character of wages to the extent that it represented a return of employer-withholding deductions. The available authority supports his position, with which I agree.

The principal Canadian case is *Re Goulet*, *supra*, which raised the precise issue being considered, viz., whether a bankrupt or a trustee was entitled to a tax refund arising from post-bankruptcy wages. Henry J. held (at p. 223):

> When the minister returns the fund it then comes into the hands of the taxpayer, in this case the bankrupt, in the form of deferred wages. The fund in question is identified throughout as a deduction from wages earned and never loses its character as wages until it is finally applied by the minister to defray some portion of the tax liability.

Like Master Funduk, I fail to appreciate how *Re Szatmari* (1972), 18 C.B.R. (N.S.) 309 (Ont. S.C.), relied upon by Henry J. in *Re Goulet*, supports the passage quoted above. But *Re Goulet* was followed in *Re Walker* (1982), 43 C.B.R. (N.S.) 319 (Ont. S.C.), and I accept that both cases offer some direct support for the proposition that a tax refund can be characterized as deferred wages for *Bankruptcy Act* purposes.

There is also Commonwealth authority on point. In *Federal Commissioner of Taxation*, *supra*, legislation similar to the *Bankruptcy Act* in all material respects was considered by the Australian High Court. The court held that a tax refund should be considered "a refund of part of the earnings of the bankrupt and money which he is entitled to retain in the absence of an order of the court under s. 101 of the Act [the equivalent of s. 68]" (at p. 316 *per* Williams J.).

In an attempt to suggest that there is also contrary Commonwealth authority, the Trustee again cited *Re Bertrand*, *supra*, to this Court. The attempt must fail. In *Re Bertrand*, the New Zealand bankruptcy legislation considered by the Court of Appeal had no provision comparable to the Canadian s. 68 or the Australian s. 101. For this reason, the potential characterization of a tax refund as wages or earnings was irrelevant, since, under the common law, wages and earnings, like other forms of property, vest automatically in trustees. The court in *Re Bertrand* explicitly distinguished *Federal Commissioner of Taxation*, *supra,* on this basis (at pp. 77-78).

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Finally, the Director cited *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, *supra*, and argued that *obiter* remarks by Pigeon J. in that case support a wages characterization. At issue in *Dauphin* was not a tax refund *per se*, but rather the nature of an employer's deduction, or withholding, in respect of an employee's taxes. Pigeon J. stated (at p. 1191):

> It is important to consider the nature of the deduction for income tax. It is not a deduction for the benefit of the employer, it is a withholding for the benefit of the employee because it is to be remitted to the Receiver General of Canada on account of the employee's tax indebtedness. By virtue of other provisions of the *Income Tax Act* if, as happens in a large number of cases, the withholdings exceed the employee's tax liabilities, a refund will be made to the employee by the Department of National Revenue. Therefore, the amount withheld remains a part of the wages, and subs. 153(3) provides that it is "deemed to have been received" by him at the time the payment was made less the deduction. [Emphasis added.]

I am willing to accept that the emphasized line in the above passage supports the Director's position. Certainly, the support is qualified, inasmuch as Pigeon J.'s opinion must be tied to s. 153(3) of the *Income Tax Act*, which states that withholdings are "deemed to have been received" by employees at the time of withholding, but which establishes this result only "for all the purposes of this Act" (emphasis added). But there is an element of support in *Dauphin* nonetheless, since Pigeon J. concludes that "the amount withheld remains a part of the wages" before he discusses s. 153(3).

Adopting a stance in opposition to these authorities, Master Funduk thought it was not "logical" to view tax refunds as deferred wages. He stated that "the statutory deduction requirement is just an enforcement process to ensure that the employee makes payments on account of his tax liability" (p. 120). I agree with Master Funduk that withholding provisions are designed to ensure that employees pay taxes, but, with respect, I fail to see how this advances his position. If an excess of wages is withheld, that excess does not fulfil the enforcement purpose. Accordingly, its character is not informed by that purpose.

In my opinion, the transformation of Marzetti's wages over time does not alter their fundamental character. Marzetti earned a certain amount as wages after his voluntary assignment into bankruptcy. The fact that some portion of his wages was, by virtue of statute, automatically directed toward his tax liability does not affect the question. The intervention of statute speaks to how Marzetti spent his wages, not to how much he earned in the first place. In common parlance, taxpayers do not draw false distinctions between the wages they earn and the refunds they receive. As stated by Fullagar J. in *Federal Commissioner of Taxation*, *supra*, "[h]is right to payment arises because, and only because, he worked for a remuneration which is found, on a contingency which was contemplated throughout, not to have been paid to him in full" (p. 322).

Therefore, Major J.A. was, I suggest, entirely justified in concluding that a tax refund is analytically similar to deferred wages in this case. He noted that "[i]f there is any money that can be easily traced in a modern society, it is the amount of taxes paid and the amount of taxes owed" (p. 133). It is difficult to dispute this statement, and I reject the Superintendent of Bankruptcy's suggestion that a wages characterization is precluded by the commingling of withheld sums in the Consolidated Revenue Fund. Equally, I agree with Major J.A. that there is no necessary inconsistency between holding that a tax refund is a debt owed by the Crown, and holding that a tax refund represents deferred wages originally owed by an employer. Again, as stated by Fullagar J. in *Federal Commissioner of Taxation*, *supra*, "to say that payment of the sum . . . will be a repayment of income tax overpaid is not inconsistent with saying that that sum represents personal earnings of the bankrupt for the purposes of the *Bankruptcy Act*" (p. 321).

Furthermore, like Major J.A., I note that there is no doubt in this case that the post-bankruptcy income tax refund derived from Marzetti's wages. Of course, tax refunds can be generated by other sources of income. In the words of Major J.A., therefore, the wages characterization "depends on the nature of the refund" (p. 135).

The only problems with the characterization of an income tax refund as deferred wages for the purposes of s. 68 of the *Bankruptcy Act* are structural ones which relate to the trustee's ability to make applications, and the court's ability to make orders. The former problem causes me little concern. It is said that s. 68(1) of the *Bankruptcy Act* permits a trustee to make an application only "if directed by the inspectors or the creditors", and that the trustee's inability to act independently is a reason to reject the wages characterization. But this aspect of s. 68(1) is an inherent flaw, and it equally affects the trustee's ability to access a bankrupt's salary, wages, and other remuneration *per se*. The flaw does not become more serious simply because the definition of "wages" is expanded. Moreover, the flaw has now been corrected such that s. 68(1) permits applications "on the trustee's own initiative": see S.C. 1992, c. 27, s. 34(1).

A bigger problem exists with respect to the making of s. 68(2) orders. Such orders can be directed only toward "the bankrupt and his employer", and not, for example, against third-party revenue authorities. Although s. 68(2) has also been amended by S.C. 1992, c. 27, s. 34(1), the amendment does not seem to resolve this problem.

Like Major J.A. at the Court of Appeal, I am content to state that any deficiency in s. 68(2) cannot affect the conclusion that an income tax refund retains its character as wages. Major J.A. stated (at p. 135):

> ...the master opined that even if the refund could be characterized as "wages," s. 68 does not contemplate an order against the Crown. Therefore, he concluded, the refund could not possibly be wages under the *Bankruptcy Act*. With

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respect, that is irrelevant. The trustee has not nor is not seeking an order under s. 68. The difficulties, if any, in the wording of s. 68 cannot change the characterization of employer withholdings returned in the form of a tax refund as "wages." That may be a problem for Parliament but not in this appeal.

Although it would be preferable, from a trustee's point of view, to obtain an order directly against the Crown in respect of an income tax refund, the deficiency in s. 68(2) does not entirely remove refunds from a trustee's grasp. Orders can still be obtained as against bankrupt persons and employers under s. 68(2). Of course, in the circumstances of an income tax refund, service of a s. 68(2) order upon the employer would be meaningless. In this respect, I note that s. 68(4) of the *Bankruptcy Act* permits trustees to withhold service of the s. 68(2) order where the trustee regards same as "inexpedient". Thus, the trustee can effectively obtain a s. 68(2) order as against the bankrupt person alone, and although such an order is not ideal, it does provide the trustee with the necessary legal entitlement to the refund.

My opinion is, furthermore, fortified by public policy considerations. Although the absence of language in s. 68(2) permitting an order to be made against the Crown weighs in favour of the Trustee in this case, when family needs are at issue, I prefer to err on the side of caution. In s. 68 of the *Bankruptcy Act*, Parliament has indicated that, before wages become divisible among creditors, it is appropriate to have "regard to the family responsibilities and personal situation of the bankrupt". This demonstrates, to my mind, an overriding concern for the support of families.

Furthermore, the discretion given to courts by s. 68 is amplified by the discretion which is necessarily left in the trustee, creditors, and inspectors. As stated by Houlden and Morawetz: "It is unlikely that the trustee would make, or that the inspectors or creditors would authorize, [a s. 68] application, unless the earnings of the bankrupt were in excess of what was needed for the adequate maintenance of the bankrupt and of his family" (*supra,* at p. 3-127). Since these kinds of discretion are better able to respond to the costs of raising families, I favour a purposive interpretation of the word "wages" in s. 68, notwithstanding difficulties associated with s. 68(2).

Moreover, there are related public policy goals to consider. As recently recognized by L'Heureux-Dubé J. in *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, "there is no doubt that divorce and its economic effects" (p. 854) are playing a role in the "feminization of poverty" (p. 853). A statutory interpretation which might help defeat this role is to be preferred over one which does not.

To summarize briefly, s. 68 governs in this case as a complete code. Marzetti's post-bankruptcy income tax refund retained its character as wages for the purposes of s. 68. The Trustee could access that refund only through a s. 68 application. None was made.

Accordingly, the contest in this case narrows, and priority will be accorded in respect of one of two happenings: first, the execution of the Agreement Letter; second, the Director's garnishment. Since the Agreement Letter came first in time, if it is effective, it will prevail over the garnishment because the latter could have taken effect only once statutory requirements were satisfied: *Family Orders and Agreements Enforcement Assistance Act*, s. 28. And so I turn to the final issue, and ask whether the Agreement Letter created an enforceable assignment.

B. *Did the Agreement Letter Create a Valid Assignment?*

The parties debated the effectiveness of the Agreement Letter under several heads, most of which I will not examine. They disagreed as to whether the Director's garnishee, in substance, created an equitable assignment, such that the priority contest might truly involve two equitable assignees. And, leaving aside other statutory considerations, they fundamentally disagreed as to whether the Agreement Letter could have created an effective assignment. This latter disagreement involved component disputes. Does the Letter demonstrate an intention to assign, or does it merely direct a Crown payment? Is the characterization of the assigned interest as future property significant? And, is it necessary to find consideration to support the Agreement Letter?

In my opinion, these points of contention do not require resolution in this appeal, inasmuch as the Agreement Letter is rendered ineffective by s. 67 of the *Financial Administration Act*. Section 67 provides, in part, that "[e]xcept as provided in this Act or any other Act of Parliament . . . a Crown debt is not assignable". The expression "Crown debt" is defined in s. 66 to include not only existing debts, but also future debts "due or becoming due". Marzetti did not obtain an accrued legal debt in respect of his post-bankruptcy income tax refund until his income tax return was filed, as I have already mentioned. But his interest in that return can legitimately be described as an interest in a future Crown debt becoming due.

This Crown-debt characterization means that the *Financial Administration Act* operates to prohibit assignment of an income tax refund, due or becoming due from the Crown, unless assignment is permitted by that Act or another "Act of Parliament". There is no question that the *Financial Administration Act* fails to permit such assignment, and no express authorization appears in any other federal statute.

In this context, I pause to note s. 2(2) of the *Tax Rebate Discounting Act*, R.S.C., 1985, c. T-3. That section permits a person to "acquire. . . a right to a refund of tax . . . notwithstanding that, by virtue of section 67 of the *Financial Administration Act* . . . the refund of tax is not assignable". This provision effectively illustrates a simple point: when Parliament means to make income tax refunds assignable, it can do so easily and with clarity.

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The only effort made in this appeal to find statutory authorization for the Agreement Letter involved s. 158 of the *Bankruptcy Act*, but that effort must go unrewarded. Under s. 158(*l*), bankrupt persons are obliged to execute specified documents "as may be required", but this obligation says nothing about the independent validity of such documents in the face of a statutory proscription. Likewise, under s. 158(*o*), a bankrupt may be obliged to do "all such acts and things in relation to his property . . . . as may be reasonably required by the trustee", but it cannot be said that a trustee can "reasonably require" that which Parliament expressly prohibits.

In ss. 67 and 68 of the *Bankruptcy Act*, Parliament has established a regime which determines whether there exists "property of a bankrupt divisible among his creditors". In my opinion, it would be very odd if trustees could attain that which appears to be unattainable on the face of those provisions, namely, an entitlement to an income tax refund without the need for a court application. In other words, I do not believe that a trustee and a bankrupt can use contract law to circumvent statutory law in this area.

In the absence of clear statutory authority to permit the assignment envisioned by the Agreement Letter, s. 67(*a*) of the *Financial Administration Act* takes hold and renders that Crown debt not assignable. Moreover, the grip of s. 67(*a*) is not loosened by *Re Northward*, *supra*, which was cited by the Trustee.

In *Re Northward*, an airline company purported to assign its book debts to a bank. The company later declared bankruptcy at a time when the federal Crown was the company's debtor. The bank claimed the value of the Crown debt as assignee, but the trustee relied upon the *Financial Administration Act*. MacDonald J. in *Re Northward* responded to these facts by holding that the rules of equity continued to apply as between the assignor and the assignee, notwithstanding the *Financial Administration Act*. MacDonald J. reasoned that the company as assignor would hold monies received from the Crown in trust for the bank, and that trust monies, under the equivalent of s. 67(*a*) of the *Bankruptcy Act*, would not constitute property of the bankrupt which could vest in the trustee.

With respect, I think that *Re Northward* is wrongly decided. MacDonald J. stated that the *Financial Administration Act* "does not abrogate the rights of parties except to the extent of exercising rights or remedies in respect of the Crown debt" (p. 140). In other words, MacDonald J. held that an assignment will be invalid only to the extent that an assignee attempts to exercise "rights or remedies" directly against the Crown debtor. But this holding ignores the broad language chosen by Parliament in s. 67(*b*).

MacDonald J. in *Re Northward* interpreted s. 67(*b*) as if Parliament enacted a prohibition against attempts to assign to "any person any rights or remedies <u>against the Crown as debtor</u> in respect of [the Crown] debt". But, of course, s. 67(*b*) renders ineffective attempts to assign to "any person <u>any</u> rights or remedies in respect of [the Crown] debt" (emphasis added). I do not think it is possible to go behind this broad language as *Re Northward* suggests. Moreover, since s. 67(*a*) prohibits the assignment of a Crown debt, that prohibition alone would presumably give the Crown the same protection as would s. 67(*b*) under the *Re Northward* interpretation. In my view, s. 67(*b*) amplifies the broad prohibition apparent in s. 67(*a*), so that a purported assignment of a Crown debt is rendered absolutely ineffective, as between debtor and creditor, and as between assignor and assignee.

For these reasons, I conclude that the Agreement Letter executed by Marzetti was statutorily incapable of creating an effective assignment. Priority in respect of the post-bankruptcy income tax refund remains unaffected by that instrument, and falls to be determined according to the principles I have already described.

VI. <u>Conclusion and Disposition</u>

Under s. 24 of the *Family Orders and Agreements Enforcement Assistance Act*, the Crown may be garnisheed in respect of "garnishable moneys". By virtue of s. 23 of that Act, read in conjunction with s. 3(*a*) of the *Family Support Orders and Agreements Garnishment Regulations*, SOR/88-181, an income tax refund constitutes "garnishable moneys". Accordingly, the Director was properly able to file the Notice of Continuing Attachment as against the Crown to recover Marzetti's income tax refund, and thus to instigate the process which led to the garnishee summons.

In conclusion, by taking steps to garnish the income tax refund, the Director necessarily obtained priority in this case. That is because the refund did not automatically vest in the Trustee. It could have been accessed by the Trustee only through an application under s. 68 of the *Bankruptcy Act*. However, since no application was made prior to the garnishment -- indeed, since no application was ever made -- the Director's claim to priority is effectively unchallenged.

I would dismiss the appeal. By agreement among the parties, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant: Cruickshank Karvellas, Edmonton.

Solicitor for the respondent the Director of Maintenance Enforcement: Jeannette W. Fedorak, Edmonton.

Solicitors for the respondent the Attorney General of Canada: Ingrid C. Hutton and Robert Moen, Edmonton.

Solicitors for the intervener: Barr, Wensel, Nesbitt & Reeson, Edmonton.

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Poulin v. Serge Morency et Associés Inc., [1999] 3 SCR 351 - Transformation of Interest in Retirement Funding from Statutory Plan to Personal RRSP Opens up Seizability

Date: 1999-09-17
Docket: 26340
Parallel citations: 1999 CanLII 662 (SCC); 177 DLR (4th) 283; 12 CBR (4th) 280
URL: http://canlii.ca/t/1fqkd
Citation: Poulin v. Serge Morency et Associés Inc., 1999 CanLII 662 (SCC), [1999] 3 SCR 351, <http://canlii.ca/t/1fqkd> retrieved on 2013-08-15
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Poulin *v.* Serge Morency et Associés Inc., [1999] 3 S.C.R. 351

Gilles Poulin *Appellant*

v.

Serge Morency et Associés Inc. *Respondent*

and

RBC Dominion Securities Inc. *Mis en cause*

Indexed as: Poulin *v.* Serge Morency et Associés Inc.

File No.: 26340.

1999: April 21; 1999: September 17.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

on appeal from the court of appeal for quebec

Bankruptcy -- Property of bankrupt -- Exemption from seizure -- Registered retirement savings plan -- Whether sums contributed by employee to Government and Public Employees Retirement Plan continued to be unseizable after being transferred into RRSP – Act respecting the Government and Public Employees Retirement Plan, R.S.Q., c. R-10, s. 222 -- Code of Civil Procedure, R.S.Q., c. C-25, art. 553(12) -- Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 67(1)(b).

In 1991, after his termination of employment, the appellant asked the Government of Quebec's Commission administrative des régimes de retraite et d'assurance (CARRA) to transfer into his RRSP the sums that stood to his credit in the Government and Public Employees Retirement Plan. The appellant's RRSP is a self-directed fixed-term annuity plan. Under this plan, the funds are invested mainly in guaranteed investment certificates or in Canadian securities, and may be withdrawn in whole or in part, subject to the conditions imposed by tax legislation. The appellant exercised that right on one occasion. In 1993, the appellant made an assignment into bankruptcy. The amount transferred by CARRA in 1991 was worth $77,603 on December 31, 1993. The trustee requested the reimbursement of the appellant's RRSP. The appellant refused and filed an application for declaratory judgment in which he asked that the sums held in his RRSP be declared unseizable. The Superior Court found that the amount transferred by CARRA was unseizable, together with an amount for appreciation in proportion to the total increase in the value of the plan. However, it declared the portion of the RRSP funds derived from the appellant's personal contributions to be seizable. The Court of Appeal, in a majority decision, reversed that judgment and declared that all of the assets of which the appellant's RRSP was composed were seizable.

Held: The appeal should be dismissed.

Section 67 of the *Bankruptcy and Insolvency Act* refers to the laws that apply in the province within which the bankrupt resides and within which the property is situated in order to determine what property is exempt from execution or seizure. Articles 1980 and 1981 *C.C.L.C.* set out the principle that seizability is the rule and unseizability the exception. Provisions that depart from this principle must be narrowly construed. Article 553(12) *C.C.P.* includes in the list of unseizable property anything declared unseizable "by law". In the instant case, s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* provides that "[a]ll sums paid or reimbursed under Titles I and IV [of the Act] are inalienable and unseizable". The sums that were reimbursed to the appellant and then transferred into his RRSP are not included in the expression "sums paid or reimbursed". It cannot be said that the appellant holds "sums" in his RRSP. When the sum reimbursed was transferred at the appellant's request into his RRSP,

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its nature, and the appellant's rights in it, changed. That sum was used to acquire an RRSP, that is, to create an onerous contract or purchase a "tax envelope". As of that moment, and from then on, the appellant's rights, and the sum invested, were governed by the contract. Moreover, the only way not to produce an absurdity and to give some meaning to the words "inalienable" and "*incessible*" in s. 222 is to interpret the expression "sums paid or reimbursed" to mean "the right to payment or to reimbursement of sums". **Once that right has been extinguished, that is, once the sums have in fact been paid or reimbursed, their inalienable and unseizable nature has been permanently lost. This interpretation of the expression "sums paid or reimbursed" is consistent with the manner in which other declarations of unseizability have been construed. However, if the sum reimbursed to the appellant had been transferred directly into an unseizable plan, it would have remained sheltered from any seizure. The appellant instead chose a seizable RRSP.**

It is also impossible to accept that the appellant's RRSP is unseizable because of the source of the funds used to create it, because the wording of s. 222 is not sufficiently clear to establish a new case of investment, reinvestment or real subrogation. **Although there is a general principle of personal subrogation in civil law, our law contains no general principle of real subrogation and applies it only in a fragmented fashion. In addition, investment and reinvestment cases are exceptional and are expressly provided for in the law. When the Quebec legislature intended to extend the unseizability of certain sums derived from a retirement plan to the RRSP into which they had been transferred, it did so expressly and clearly.**

Cases Cited

Referred to: *Re Neuls* (1985), 56 C.B.R. 132; *Quebec Association of Protestant School Boards v. Wadsworth*, J.E. 92-1421; *Re Moysey* (1977), 80 D.L.R. (3d) 152; *Lachance-Gariépy v. Page*, [1983] C.A. 562; *Caisse populaire de Lévis v. Maranda*, [1950] B.R. 249; *Cie Trust Royal v. Caisse populaire Laurier*, 1989 CanLII 426 (QC CA), [1989] R.J.Q. 550; *Morgentaler v. The Queen*, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616; *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350; *Barreau du Québec v. Morin*, 1988 CanLII 1044 (QC CA), [1988] R.J.Q. 2629.

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Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 67(1)(*b*) [am. 1992, c. 27, s. 33].

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Civil Code of Québec, S.Q. 1991, c. 64, arts. 418, 450, 450(3), 451, 1230, 1244, 1651, 2497, 2644, 2645.

Code of Civil Procedure, R.S.Q., c. C-25, arts. 552 [am. 1986, c. 55, s. 3; am. 1992, c. 57, s. 296], 553(7) [am. 1979, c. 37, s. 29; am. 1980, c. 21, s. 4; am. 1989, c. 55, s. 30], 553(11) [am. 1986, c. 55, s. 4; am. 1992, c. 57, s. 297], 553(12).

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Loi nº 91-650 du 9 juillet 1991, J.O., July 14, 1991, 9228, s. 15.

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APPEAL from a judgment of the Quebec Court of Appeal, 1997 CanLII 10011 (QC CA), [1997] R.J.Q. 2421, 16 C.C.P.B. 293, [1997] Q.J. No. 2950 (QL), reversing a decision of the Superior Court, J.E. 95-1850. Appeal dismissed.

Mireille Arseneault and *Nathalie Giguère*, for the appellant.

Daniel O'Brien and *Marie-Pierre Allard*, for the respondent.

English version of the judgment of the Court delivered by

GONTHIER J. --

I - Issue

1 This appeal raises a very specific issue relating to the interpretation of the expression "sums paid or reimbursed" found in s. 222 of the *Act respecting the Government and Public Employees Retirement Plan*, R.S.Q., c. R-10, and the extent to which those sums are unseizable under that section. The issue may be put as follows: did the sums contributed by the appellant to the Government and Public Employees Retirement Plan continue to be unseizable after they were transferred into a registered retirement savings plan (RRSP)?

II - Facts

2 The appellant is a physician. From March 17, 1981 to November 30, 1990, while he was employed by the Government of Quebec, he contributed to the Government and Public Employees Retirement Plan (Retirement Plan). On November 30, 1990, the accumulated value of the appellant's retirement plan was $55,982.31.

3 On December 20, 1990, the appellant acquired a self-directed RRSP. The Société nationale de fiducie was the trustee, and McNeil, Mantha Inc. was the agent. On January 21, 1991, the appellant asked the Government of Quebec's Commission administrative des régimes de retraite et d'assurance (CARRA) to transfer into his RRSP the sums that stood to his credit in the Retirement Plan. Since there was a waiting period of 210 days from the date of termination of employment before the contributions could be refunded, the appellant had to complete a second application for reimbursement, which he did on July 2, 1991. It was not until September 3, 1991 that CARRA finally sent the Société nationale de fiducie a cheque for $55,982.31, as reimbursement of the contributions paid by the appellant.

4 In the meantime, the appellant had an RRSP that he held with Lévesque Beaubien Geoffrion Inc. transferred to McNeil, Mantha Inc. On March 31, 1991, the appellant's two accounts with McNeil, Mantha Inc. were merged. On May 15, 1991, the appellant requested that his initial RRSP be replaced by an "unseizable RRSP" and a self-directed fixed-term annuity plan was then substituted for the original plan. The appellant designated his sister as beneficiary. That designation is revocable. On August 31, 1991, before the reimbursement was received from CARRA, the appellant had accumulated $16,778.36 in his RRSP.

5 In early 1992, the *mis en cause* acquired all accounts and plans held by McNeil, Mantha Inc., and Montreal Trust became the trustee of the appellant's RRSP. On February 10, 1992, the *mis en cause* RBC Dominion Securities Inc. sent the appellant a letter informing him that he had become its customer, and that [TRANSLATION] "[b]ased on current trends in the case law, your 'unseizable' RRSP account could in fact become seizable".

6 Under the appellant's fixed-term annuity plan, the funds are invested mainly in guaranteed investment certificates or in Canadian securities, and they may be withdrawn in whole or in part, subject to the conditions imposed by tax legislation. The appellant exercised that right when he withdrew $4,950 from his RRSP on February 26, 1993. He invested an additional $1,974 on November 4, 1992.

7 On April 6, 1993, the appellant made an assignment into bankruptcy. On December 31, 1993, the amount transferred by CARRA ($55,982.31) was worth $77,603. The other sums invested by the appellant were worth $20,011 on that date.

8 On April 5, 1994, the respondent requested the reimbursement of the appellant's RRSP. When the appellant refused, it informed him by letter dated November 24, 1994, that it would act unilaterally unless proceedings were taken to contest the trustee's position. On December 6, 1994, the appellant served an application for declaratory judgment on the respondent in which he asked that the sums held in his RRSP be declared unseizable. In the Superior Court, Landry J. found that an amount equal to the amount transferred by CARRA was unseizable, together with an amount for appreciation in proportion to the total increase in the value of the plan. However, he declared the portion of the RRSP funds derived from the appellant's personal contributions to be seizable. That decision was reversed by the Quebec Court of Appeal, which declared, by a majority, that all of the assets of which the appellant's RRSP was composed were seizable. Rousseau-Houle J.A. dissented.

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III - Relevant Statutory Provisions

9 *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (*B.I.A.*)

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

. . .

(*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides. . . .

Code of Civil Procedure, R.S.Q., c. C-25 (*C.C.P.*)

553. The following are exempt from seizure:

. . .

(7) Benefits payable under a supplemental pension plan to which an employer contributes on behalf of his employees, other amounts declared unseizable by an Act governing such plans and contributions paid or to be paid into such plans;

. . .

(12) Anything declared unseizable by law.

Act respecting the Government and Public Employees Retirement Plan, R.S.Q., c. R-10

222. All sums paid or reimbursed under Titles I and IV are inalienable and unseizable.

IV - Judicial History

A. *Superior Court of Quebec*, J.E. 95-1850

10 For the purposes of his analysis, Landry J. drew a distinction between the funds accumulated by the appellant in the Retirement Plan and the RRSP accumulated through his personal investments. He dealt first with the funds that derived from the Retirement Plan. After noting that s. 222 of the *Act respecting the Government and Public Employees Retirement Plan*, unlike the legislative provision at issue in *Re Neuls* (1985), 56 C.B.R. 132 (Sask. C.A.), on which the respondent relied, refers to sums reimbursed and not to "moneys payable", Landry J. said he was of the view that the legislature had intended to express a different intention by using different terminology, that is, to protect "the principal" and not only "the act of reimbursement". Landry J. cited *Quebec Association of Protestant School Boards v. Wadsworth*, J.E. 92-1421 (Sup. Ct.), in support of that position. He concluded that by virtue of the combined effect of art. 553(7) *C.C.P.* and s. 222 of the *Act respecting the Government and Public Employees Retirement Plan*, the sums reimbursed to the appellant after his employment terminated were unseizable and continued to be unseizable even when they were invested in an RRSP with the *mis en cause*. He pointed out that the appellant had at no time had in his possession the sums transferred.

11 On the question of the sums that had been accumulated through personal investments, Landry J. held that they were seizable, given that the designated beneficiary of the appellant's fixed-term annuity RRSP was not one of the beneficiaries referred to in art. 2552 *C.C.L.C.*, and accordingly that the requirements in order for s. 178 of the *Act respecting Trust Companies and Savings Companies*, R.S.Q., c. S-29.01, to apply had not been met.

B. *Quebec Court of Appeal*, 1997 CanLII 10011 (QC CA), [1997] R.J.Q. 2421

12 Since the appellant had withdrawn his incidental appeal on the question of whether the sums that derived from his personal investments were unseizable, the only issue to be resolved by the Court of Appeal was the issue relating to the funds accumulated in the Retirement Plan by the appellant and later transferred into his RRSP.

(1) Deschamps J.A. (Tourigny J.A. concurring)

13 Deschamps J.A. pointed out that most decisions at the trial level in which an RRSP has been declared to be unseizable when the funds used to create it were initially unseizable have relied either on one another or on *Re Moysey* (1977), 80 D.L.R. (3d) 152, a decision of the Saskatchewan Court of Queen's Bench. She was of the opinion that a cautious approach must be taken in examining common law decisions, and that because of the decision of the Saskatchewan Court of Appeal in *Re Neuls*, *supra*, the position adopted in *Re Moysey*, *supra*, no longer carries the weight that was formerly attributed to it.

14 Deschamps J.A. found it difficult to include the securities held in the appellant's self-directed RRSP in the "sums paid or reimbursed" that s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* declares to be unseizable. After noting that cases of reinvestment are exceptional, she pointed out that the appellant's rights in respect of his self-directed RRSP had nothing in common with the rights he had in respect of the Retirement Plan. In her view, a creditor of protected rights can rely on the unseizable nature of the sums only so long as they retain the characteristics that are the reason the law protects them.

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15 Deschamps J.A. rejected the argument that the different wording of s. 222 of the *Act respecting the Government and Public Employees Retirement Plan*, that is, the use of the expression "sums paid or reimbursed" instead of the expression "benefits payable", meant that the position adopted by the Court of Appeal in *Lachance-Gariépy v. Page*, [1983] C.A. 562, could be rejected, and the protection against seizure extended to the reinvestment of sums derived from the Retirement Plan. In her view, the words "sums paid or reimbursed" are insufficient to create a separate body of property that would allow the protection against seizure to be perpetuated.

16 In conclusion, Deschamps J.A. wrote, at p. 2433:

> [TRANSLATION] Because only the property specifically set out in the Act is unseizable, because the vehicle chosen by the respondent is not one such type of property, because neither s. 222 of the Act nor art. 553 C.P. create a separate body of property which would allow for tracing, the securities held in his RRSP devolved in their entirety to the trustee.

(2) Rousseau-Houle J.A. (dissenting)

17 Rousseau-Houle J.A. was of the opinion that the trial judge was correct in declaring the sum accumulated by the appellant while he was contributing to the Retirement Plan, which was then transferred into an RRSP, to be unseizable. In her opinion, the sums that were reimbursed to the appellant did not cease to be benefits paid to an employee under a supplemental pension plan when they were reimbursed. Accordingly, those sums were exempt from seizure in the new retirement plan to which they were directly transferred, regardless of whether or not the new plan was seizable. Rousseau-Houle J.A. found that the amendments to art. 553(7) *C.C.P.* and the new wording of s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* clearly indicated that the legislature intended to declare both sums paid and sums reimbursed after withdrawal from the Retirement Plan to be unseizable. Moreover, those changes meant that the decision of the Quebec Court of Appeal in *Lachance-Gariépy v. Page*, *supra*, and the decision of the Saskatchewan Court of Appeal in *Re Neuls*, *supra*, no longer applied. Rousseau-Houle J.A. concluded as follows, at p. 2424: [TRANSLATION] "If the sums paid derive from a pension fund that was itself unseizable by law, they continue to be unseizable in the new retirement plan in which they have been reinvested."

V - Analysis

A. *Introduction*

18 Section 67 *B.I.A.* refers to the laws that apply in the province within which the bankrupt resides and within which the property is situated in order to determine what property is exempt from execution or seizure. Articles 1980 and 1981 *C.C.L.C.* read as follows at the time the appellant made an assignment into bankruptcy:

> **1980.** Whoever incurs a personal obligation, renders liable for its fulfilment all his property, moveable and immoveable, present and future, except such property as is specially declared to be exempt from seizure.
>
> However, a creditor may agree with his debtor that the latter will be bound to fulfil his obligation only on the property they describe and which is affected with a legal cause of preference in favour of the creditor.
>
> **1981.** The property of a debtor is the common pledge of his creditors, and where they claim together they share its price rateably, unless there are amongst them legal causes of preference.

The following are the corresponding articles of the *Civil Code of Québec*, S.Q. 1991, c. 64:

> **2644.** The property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors.
>
> **2645.** Any person under a personal obligation charges, for its performance, all his property, movable and immovable, present and future, except property which is exempt from seizure or property which is the object of a division of patrimony permitted by law.
>
> However, the debtor may agree with his creditor to be bound to fulfil his obligation only from the property they designate.

These articles set out the principle that seizability is the rule and unseizability the exception. Provisions that depart from this principle must be narrowly construed: see *Caisse populaire de Lévis v. Maranda*, [1950] B.R. 249, at pp. 259 (Galipeault C.J.) and 262 (Bissonnette J.). In addition, given that all declarations that property is unseizable affect the rights of the creditors, they may be expected to be worded clearly and precisely.

19 The Quebec legislature has included declarations that property is unseizable in a number of statutes, but they are found primarily in arts. 552 and 553 *C.C.P.* Paragraph 7 of art. 553 *C.C.P.* concerns supplemental pension plans. Since para. 12 of that article includes in the list of unseizable property anything declared unseizable "by law", and s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* declares "[a]ll sums paid or reimbursed under Titles I and IV" of that Act to be unseizable, it is not necessary to decide whether art. 553(7) *C.C.P.* is

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applicable and whether the Retirement Plan to which the appellant contributed constitutes a supplemental pension plan despite the fact that it is not governed by the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 (s. 2(4) of that Act excludes from its application pension plans established by an Act). The issue can be decided by referring solely to s. 222 of the *Act respecting the Government and Public Employees Retirement Plan*. But before looking further at that section, it is necessary to examine the overall scheme of the *Act respecting the Government and Public Employees Retirement Plan*, and the nature of an RRSP in Quebec civil law.

B. *Act respecting the Government and Public Employees Retirement Plan*

20 The *Act respecting the Government and Public Employees Retirement Plan* is divided into five titles. Section 222 is part of Title V, "Miscellaneous and Transitional Provisions". Title I, to which s. 222 refers, includes provisions regarding the scope of application of the Act, pensionable salary, years of service, contributions and contributory amounts, benefits, and transfer and purchase of service. Titles II and III deal with regulations and the administration of retirement plans, respectively. Title IV deals with "Temporary Measures", including sabbatical leave with deferred salary, early retirement, anticipation of pension benefits, and persons placed on reserve.

21 Under that Act, an employer to which the Act applies must withhold the contribution set by the Act from its employee's salary. It must then pay that contribution to CARRA at the same time as its own contribution to the plan. By contributing to the Retirement Plan, an employee becomes entitled to receive a pension when he or she retires. The annual amount of the pension is based on the employee's average pensionable salary and years of service.

22 Reimbursement of contributions is governed by Title I of the *Act respecting the Government and Public Employees Retirement Plan*, and more specifically by Division III of Chapter IV. At present, an employee who has at least two years of service and who ceases to participate in the Retirement Plan is not entitled to have his or her contributions reimbursed. Such an employee is entitled only to a deferred annuity: see s. 51. However, at the time when the appellant ceased to be employed, s. 48 read as follows:

> **48.** Except where section 21 applies, if an employee ceases to participate in the plan before becoming entitled to a pension or to a deferred annuity, he may, if he has at least two years of service, apply for a deferred annuity or obtain, provided he does not again participate in the plan and subject to section 58, the refund of his contributions as long as he has not attained 65 years of age.
>
> In case of death, the contributions shall be refunded to his spouse or, if he has no spouse, to his assigns.

Thus in 1990 an employee who ceased to participate in the Retirement Plan had the option of choosing a refund or a deferred annuity. However, an employee who ceased to be employed before becoming eligible for a pension, and who was at least 45 years old and had at least 10 years' service, was not entitled to have his or her contributions refunded. Such an employee was entitled only to a deferred annuity or to a sum representing up to 25 percent of the actuarial value of that deferred annuity and a deferred annuity adjusted to take into account the payment of that sum (s. 51). The deferred annuity became payable to the pensioner only on the date of his or her sixty-fifth birthday (s. 54).

23 We see from reading s. 48 of the *Act respecting the Government and Public Employees Retirement Plan* that the appellant had the option of leaving his contributions in the Retirement Plan and requesting a deferred annuity instead of reimbursement of his contributions. However, he chose to request a refund and to invest the reimbursed sum in an RRSP.

C. *Nature of an RRSP*

24 There are many varieties of RRSPs in Canada. They are offered by different institutions, including life insurance companies, trust companies, banks, caisses populaires, loan companies and securities brokers. RRSPs are tax creatures (M.-B. Paré, L. Quesnel and G. Carrière, "Les régimes d'épargne-retraite", [1986] 1 *C.P. du N.* 151, at p. 169). The Quebec Court of Appeal has examined the question of the nature of an RRSP in Quebec civil law, and concluded that an RRSP was simply a creditor-debtor relationship governed by the clauses of the contract between the two parties: see *Cie Trust Royal v. Caisse populaire Laurier*, 1989 CanLII 426 (QC CA), [1989] R.J.Q. 550. Authors have written that [TRANSLATION] "the retirement savings plan is not property, but rather an agreement that produces rights and obligations or, if you prefer, a tax envelope by means of which certain property may be acquired": see Paré, Quesnel and Carrière, *supra*, at p. 171.

25 The sums invested in an RRSP are therefore used to acquire other property. Accordingly, the nature of those sums changes, as do the rights of the person who invested them: they are then determined by the agreement between the parties.

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26 In the instant case, the appellant acquired a self-administered RRSP offered by McNeil, Mantha Inc. Under the rules governing that RRSP, the trustee undertook to purchase an annuity payable to the Annuitant or to his or her spouse within the 120 days preceding the maturity date of the RRSP. The Annuitant in turn undertook not to contribute more than the maximum exemption permitted under federal and provincial income tax legislation. It is stated that [TRANSLATION] "[t]he contributions and any increase in the value thereof, in accordance with the instructions received from the Annuitant, may be retained in cash, invested in guaranteed investment certificates or invested, provided that no such investment is prohibited by the Income Tax Act or the regulations." (Emphasis added.) The appellant was therefore entitled to give instructions as to the investments to be made, something that he could not do when he was contributing to the Retirement Plan. Moreover, he had the option of withdrawing the funds invested, in whole or in part, at any time, subject to the conditions imposed by tax legislation. As I noted earlier, the appellant exercised that right by withdrawing $4,950 from his RRSP in February 1993.

D. *Meaning of the Expression "Sums Reimbursed"*

27 Section 222 of the *Act respecting the Government and Public Employees Retirement Plan* declares certain "sums" ("*sommes*" in the French version) to be inalienable and unseizable. In the instant case, the appellant had a sum of money reimbursed to him. After the appellant applied for reimbursement and met all of the legal and administrative requirements, a sum of money equivalent to the contributions he had paid was transferred directly into his RRSP with McNeil, Mantha Inc., in accordance with his instructions. While the appellant never had that sum of money in his possession, he did have it reimbursed and his "claim" against CARRA was extinguished.

28 The appellant contends that the sums held in his RRSP are the same as the sums reimbursed by CARRA and that their nature has not changed. I cannot accept that argument, for two main reasons.

29 First, it cannot be said that the appellant holds "sums" in his RRSP. It will be recalled that under the appellant's fixed-term annuity plan, the funds invested are used to acquire guaranteed investment certificates, Canadian securities or other types of investments. As a result, when the sum reimbursed was transferred at the appellant's request into his RRSP, its nature, and the appellant's rights in it, changed. That sum was used to acquire an RRSP, that is, to create an onerous contract or purchase a "tax envelope". As of that moment, and from then on, the appellant's rights, and the sum invested, were governed by the contract. The appellant's rights under his RRSP are in fact different from the rights he had under the Retirement Plan, the most striking difference undoubtedly being that he had the option of withdrawing the funds invested in his RRSP, in whole or in part, at any time.

30 In short, what the appellant "holds" under his RRSP are rights that are conferred on him in the contract he has with the trustee and the agent. Those rights are not "sums paid or reimbursed", as the nature of those sums has changed. As a result, the declaration in s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* that the sums are unseizable no longer applies to them.

31 The second reason why I cannot accept the appellant's argument is that I am of the opinion that s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* does not protect the sums once they have been taken out of the Retirement Plan. If we were to interpret the expression "sums paid or reimbursed" in such a way as to cover the sums once they have been taken out of the Retirement Plan, the result would be absurd. If we read s. 222, we see that not only has the Quebec legislature declared sums paid or reimbursed to be unseizable, but it has also declared them to be inalienable ("*incessible*" in the French version). Of what use might inalienable or unassignable sums of money be? Such sums could not be alienated in order to be applied to a payment and would quite simply be useless. Consequently, if we consider the nature of a sum of money, saying that a certain sum is inalienable or unassignable is nonsense, and produces an absurd result. As Dickson J. wrote in *Morgentaler v. The Queen*, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616, at p. 676:

> We must give the sections a reasonable construction and try to make sense and not nonsense, of the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities.

Concerning this rule of interpretation, see also *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350, at pp. 363-64, and P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 373 *et seq.* The only way not to produce an absurdity and to give some meaning to the words "inalienable" and "*incessible*" in s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* is to interpret the expression "sums paid or reimbursed" to mean "the right to payment or to reimbursement of sums". Moreover, the concept of *incessibilité* to which the French version of s. 222 refers usually applies only to rights. It is defined in the *Dictionnaire de droit privé et Lexiques bilingues* (2nd ed. 1991), at p. 301, as follows: [TRANSLATION] "Attribute of a right not susceptible of assignment." (Emphasis added.) The definition of the term "*cession*" ("assignment") is found at p. 81: [TRANSLATION] "*Inter vivos*

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transfer of a right, by onerous or gratuitous contract, in particular in relation to a claim." (Emphasis added.) Once the right to payment or to reimbursement has been extinguished, that is, once the sums have in fact been paid or reimbursed, their inalienable and unseizable nature has been permanently lost. It goes without saying, however, that sums paid or reimbursed that are transferred into another unseizable "vehicle" acquire the unseizable nature of their new "vehicle". Consequently sums reimbursed that are directly transferred into an unseizable "vehicle" remain sheltered from any seizure. Moreover, the appellant could have asked that the sums reimbursed be transferred into an unseizable plan, both at the time of reimbursement and later before his assignment into bankruptcy, but he did not do so, choosing instead a seizable RRSP.

32 I do not believe that interpreting the expression "sums paid or reimbursed" as meaning "the right to payment or to reimbursement of sums" does any violence to the text of s. 222 of the *Act respecting the Government and Public Employees Retirement Plan*. On the contrary, this interpretation is consistent with the manner in which other declarations of unseizability have been construed. As Deschamps J.A. pointed out in her reasons, if we examine the situations in which the law provides for unseizability, the desire to protect claims for support in the broad sense seems to prevail. The objective is often to prevent seizures in the hands of third parties, that is, seizures at source. We need only consider art. 553(11) *C.C.P.*, which declares a portion of "gross salaries and wages" to be unseizable.

33 As Côté notes, *supra*, at pp. 236 *et seq.*, the meaning of words depends in part on the context in which they are used. The overall context of an enactment includes, *inter alia*, the other provisions of the statute, the related statutes and the other rules of the legal system. See *Barreau du Québec v. Morin*, 1988 CanLII 1044 (QC CA), [1988] R.J.Q. 2629 (C.A.), at pp. 2639-40. The manner in which other declarations of unseizability have been worded and construed is therefore a relevant factor to be considered in construing s. 222 of the *Act respecting the Government and Public Employees Retirement Plan*. The fact that the Quebec legislature has clearly specified in certain enactments that it intends to grant protection for support claims after they are paid is also highly relevant. For example, s. 16.3 of the *Act respecting Family Assistance Allowances*, R.S.Q., c. A-17, provides that "[a]llowances are unassignable and unseizable. They do not become part of the patrimony of the person who receives them." (Emphasis added.) Unlike the wording of that section, the wording of s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* does not extend the protection against seizure to the period after payment or reimbursement.

34 In short, because the nature of the sums reimbursed has changed, and because s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* cannot be interpreted as protecting the sums that have been reimbursed once they have been taken out of the Retirement Plan, I believe that the sums that were reimbursed to the appellant and then transferred into his RRSP are not included in the expression "sums paid or reimbursed" in s. 222.

E. *Property That Is Unseizable by Virtue of the Origin of the Funds*

35 The appellant further submits that an RRSP may become unseizable if the funds that were paid into it were themselves unseizable under a specific statute. I cannot accept that argument. That would amount to arbitrarily extending the meaning of the expression "sums paid or reimbursed" and creating a new category of unseizable property. It would also go against the rule that exemptions from seizure should be narrowly construed, since, it must be recalled, they are exceptions.

36 The appellant's position, namely that there is property that is unseizable by virtue of the source of the funds used to acquire it, raises the problem of how to circumscribe the protection afforded by a declaration of unseizability. Where do we draw the line? Is the property unseizable in perpetuity, regardless of what use is made of the sums declared to be unseizable? Carrying the unseizable nature of certain sums over to an RRSP or to something else, as well as the very concept of "source of the funds", necessarily require that the rules of investment and reinvestment, and, it could even be argued, of real subrogation, be applied, since [TRANSLATION] "[t]he new property takes the place of the former property and is subject to the same legal status": see J. Carbonnier, *Droit civil*, vol. 3, *Les biens* (14th ed. 1991), at p. 118. Reinvestment is in fact described as [TRANSLATION] "a particular application of real subrogation": see L. Baudouin, *Le droit civil de la province de Québec* (1953), at p. 1035. Although there is a general principle of personal subrogation in civil law (arts. 1154 *C.C.L.C.* and 1651 *C.C.Q.*), our law contains no general principle of real subrogation, and applies it only in a fragmented fashion: see art. 450(3) *C.C.Q.* concerning the private property of the spouses, and art. 2497 *C.C.Q.* relating to the payment of an insurance indemnity to creditors holding hypothecs on the damaged property. See also Carbonnier, *supra*, at p. 118; V. Ranouil, *La subrogation réelle en droit civil français* (1985), at p. 21; F. Terré and P. Simler, *Droit civil -- Les biens* (5th ed. 1998), at pp. 334-37. In addition, investment and reinvestment cases are exceptional, and are expressly provided for in the law (see, for example, art. 418 *C.C.Q.* concerning the family

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patrimony, arts. 1230 and 1244 *C.C.Q.* concerning substitution and arts. 450 and 451 *C.C.Q.* concerning partnership of acquests). There is no provision of this sort in the case before us, and the expression "sums paid or reimbursed" cannot reasonably be construed in such a way as to create a new case of investment or reinvestment and to protect any use of such sums against seizure.

37 When the Quebec legislature intended to extend the unseizability of certain sums derived from a retirement plan to the RRSP into which they had been transferred, it did so expressly and clearly. For instance, s. 264 of the *Supplemental Pension Plans Act* provides:

> **264.** Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:
>
> (1) all member or employer contributions paid or payable into the pension fund or to the insurer, with accrued interest;
>
> (2) all amounts refunded or pension benefits paid under a pension plan or this Act and derived from member or employer contributions;
>
> (3) all amounts awarded to the spouse of a member following partition or any other transfer of benefits effected pursuant to Chapter VIII, with accrued interest, and the benefits deriving from such amounts.
>
> Except as far as they derive from additional voluntary contributions, any of the above-mentioned amounts that have been transferred to a pension plan contemplated by section 98, with accrued interest, any refunds of and benefits resulting from such amounts, and any pension or payment having replaced a pension pursuant to section 92 are also unassignable and unseizable. [Emphasis added.]

Section 98 of the *Supplemental Pension Plans Act*, to which s. 264 refers, allows a member of a pension plan governed by that Act to transfer certain sums into another pension plan governed by the *Supplemental Pension Plans Act* or into any pension plan or annuity contract prescribed by regulation. Section 28(3) of the *Regulation respecting Supplemental Pension Plans*, (1990) 122 O.G. II, 2323, reads as follows:

> **28.** The pension plans not governed by the Act and to which transfers may be made under sections 98 and 100 of the Act are:
>
> . . .
>
> (3) for the contributions and interest referred to in subparagraph 1 of the first paragraph of section 98 of the Act, a registered retirement savings plan or a deferred profit-sharing plan; [Emphasis added.]

By the combined effect of ss. 264 and 98 of the *Supplemental Pension Plans Act* and s. 28 of the Regulation, the unseizable nature of certain sums that are held in a pension plan governed by that Act may therefore be carried over to an RRSP. As I noted earlier in para. 19 of these reasons, the Retirement Plan into which the appellant paid is not governed by the *Supplemental Pension Plans Act*, and the *Act respecting the Government and Public Employees Retirement Plan* contains no provision stipulating that the unseizable nature of the sums reimbursed is carried over to an RRSP.

38 It is also worth noting that other legislatures have also thought it advisable to make specific statutory provision for carrying over to an RRSP the unseizable nature of certain funds, in order to avoid any doubt. We might refer, for example, to s. 63(1) of the Saskatchewan *Pension Benefits Act, 1992*, S.S. 1992, c. P-6.001, which provides:

> **63**(1) Subject to subsection (3), benefits, moneys that have been transferred to another plan, to a prescribed RRSP or to any other prescribed retirement plan that is registered pursuant to the *Income Tax Act* (Canada), including moneys transferred before January 1, 1993, and moneys earned by those transferred moneys:
>
> (a) may not be assigned, charged, alienated or anticipated; and
>
> (b) are exempt from execution, seizure or attachment.

39 French legislation also expressly provides, in s. 15 of *Loi nº 91-650 du 9 juillet 1991*, J.O., July 14, 1991, 9228, and s. 44 of *Décret nº 92-755 du 31 juillet 1992*, J.O., August 5, 1992, 10530, that when a bank account is credited with an amount from an unseizable source, the unseizability is transferred to the extent of that amount to the balance in the account. In other words, it has provided an exception to the rule of the fungibility of money and instituted [TRANSLATION] "a genuine theory of unseizable claims": see H. Croze, "Le décret du 31 juillet 1992 instituant de nouvelles règles relatives aux procédures civiles d'exécution: Guide de lecture", *J.C.P.* 1992.I.3635, at p. 560. No such theory as yet exists in Quebec law: see N. L'Heureux and É. Fortin, *Droit bancaire* (3rd ed. 1999), at pp. 90-91.

F. *Change of Wording*

40 The appellant attempted to base an argument on the change in the wording of s. 222 of the *Act respecting the Government and Public Employees Retirement Plan*. The former s. 152 was worded as follows:

> **152.** The benefits payable under this act are inalienable and unseizable.

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It is worth reproducing the wording of s. 222 in order to facilitate comparison between the two sections:

> **222.** All sums paid or reimbursed under Titles I and IV are inalienable and unseizable.

The appellant contends that the use of the term "reimbursed" in s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* can mean nothing other than that the unseizable nature of funds that derive from the Retirement Plan is preserved, because otherwise [TRANSLATION] "the legislature would have spoken in vain". I do not agree with this submission. In view of the clear language used in s. 264 of the *Supplemental Pension Plans Act* and the meaning of the expression "sums reimbursed", I am unable to conclude that by using the word "reimbursed" in s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* the legislature intended to create a new case of reinvestment.

41 That does not mean, however, that the legislature spoke in vain when it amended s. 222. The previous version of s. 222 dealt only with "benefits payable", and did not cover reimbursements of contributions. The sums reimbursed could therefore be seized, even in the hands of third parties. That is in fact what had happened in *Lachance-Gariépy v. Page*, *supra*. In that case, the Court of Appeal concluded that a seizure in third party hands became possible once an application for reimbursement had been made, because as of that moment participation in the Retirement Plan was terminated and the right to withdraw amounts from the plan had become part of the debtor's patrimony. Section 222 of the *Act respecting the Government and Public Employees Retirement Plan* now protects both benefits payable and sums reimbursable. Because the right to reimbursement is unseizable, seizures in the hands of third parties are no longer permitted, and the sums are protected until they are withdrawn from the Retirement Plan.

G. *Conclusion*

42 In summary, I am of the opinion that the sums contributed by the appellant to the Retirement Plan did not retain their unseizable nature after they were transferred into an RRSP. The expression "sums paid or reimbursed" in s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* does not cover sums that have been withdrawn from the Retirement Plan. In addition, the sums used to acquire an RRSP cannot be described as "sums reimbursed" under the *Act respecting the Government and Public Employees Retirement Plan*, because the nature of those sums, and the appellant's rights to those sums, changed upon their being used to fund that onerous contract. Lastly, it is not possible to accept the appellant's argument that his RRSP is unseizable because of the source of the funds used to create it, because the wording of s. 222 is not sufficiently clear to establish a new case of investment, reinvestment or real subrogation.

VI - Disposition

43 For the foregoing reasons, I am of the opinion that the appeal should be dismissed with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: Arseneault, Moreau, Webster, Charlesbourg.

Solicitor for the respondent: Daniel O'Brien, Québec.

Amherst Crane Rentals Ltd. v. Perring, 2004 CanLII 18104 (ON CA) - Direct Beneficiary under RRSP or Not - Do Proceeds Become Part of Deceased's Insolvent Estate?

Date:	2004-06-16
Docket:	C38627
Parallel citations:	241 DLR (4th) 176; 50 CBR (4th) 1; 58 DTC 6584; [2004] 5 CTC 5; 187 OAC 336
URL:	http://canlii.ca/t/1h9v3
Citation:	Amherst Crane Rentals Ltd. v. Perring, 2004 CanLII 18104 (ON CA), <http://canlii.ca/t/1h9v3> retrieved on 2013-09-07
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DATE: 20040616
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COURT OF APPEAL FOR ONTARIO

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LASKIN, GOUDGE and FELDMAN JJ.A.

B E T W E E N:	)	
	)	
AMHERST CRANE RENTALS LIMITED	)	
	)	**Angela Assuras**
	)	**for the appellant**
	)	
Applicant (Appellant)	))	
	)	
- and -	)	**Mark Muir Rodenburg**
	)	**for the respondent**
	)	
ARLENE CLARE PERRING, personally and as trustee of the estate of Ashley Perring, deceased	)	
	)	
Respondent (Respondent)	))	**Heard: October 3, 2003**

On appeal from the judgment of Justice Donald R. Cameron dated July 7, 2002 and the costs award dated September 19, 2002.

FELDMAN J.A.:

[1] This case raises for the first time in this court, the issue of the proper treatment of RRSP proceeds following the death of the owner of the RRSP. **Simply stated, the issue is whether: (a) following the death of the owner of an RRSP, the proceeds of the RRSP devolve directly to the designated beneficiary or form part of the estate of the deceased owner; and (b) even if they do not form part of the estate, whether creditors of the estate who remain unpaid have any claim against the proceeds of the RRSP in the hands of the designated beneficiary. This issue has caused a divergence of judicial opinion both within Ontario and in other provinces.**

[2] The facts of the case are quite typical. The appellant is a creditor of the deceased. The respondent is the widow of the deceased and the designated beneficiary of two RRSP funds. She received the proceeds of the two funds from the two plan administrators. Because the estate of the deceased was unable to pay all of its debts and declared bankruptcy, the creditor sought to obtain payment of the outstanding debt owed by the estate from the beneficiary out of the proceeds of the RRSPs.

[3] The application judge denied the creditor any recovery. He held that RRSPs do not form part of the estate of the deceased but instead devolve directly to the designated beneficiary. He held further, and contrary to the position taken by the Manitoba Court of Appeal in *Clark Estate v. Clark* reflex, (1997), 115 Man. R. (2d) 48 (C.A.), that the creditor had no right to seek repayment of the debt from the proceeds of the RRSPs in the hands of the designated beneficiary when the estate was unable to pay its debts.

[4] I agree with the conclusion reached by the application judge. For the reasons that follow, I would dismiss the appeal.

FACTS

[5] Ashley James Perring died April 30, 1998. He made a will in 1994 naming his wife, the respondent, the executrix and sole beneficiary of his estate. He also designated the respondent as the beneficiary of two RRSPs, both in the will and in separate designations filed with the administrators of the RRSPs, one with Canada Trust Company and the other with the Royal Bank of Canada. The respondent received the proceeds of the RRSPs ($117,000) in May 1998. The estate filed an assignment in bankruptcy in April 1999, following which, the trustee in bankruptcy demanded that the respondent pay the proceeds of the RRSPs to the estate. She refused and proceeded to collapse the RRSPs, pay the withholding tax and retain the balance of $82,000. The respondent was also the beneficiary of her husband's three life insurance policies and upon his death received the proceeds in the amount of approximately $1.27 million.

[6] The appellant is a creditor of the bankrupt estate. The debt of $53,679.28 was owed by the deceased as a director of a contractor corporation for breach of trust under s. 13 of the *Construction Lien Act*, R.S.O. 1990, c. C. 30. The appellant filed a proof of claim in the bankruptcy but remains unpaid. The appellant obtained an assignment of the claim of

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the trustee against the respondent under s. 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B. 3 in respect of the RRSP proceeds, and brought the application in this matter on its own behalf.

[7] Cameron J. held that the RRSP proceeds do not form part of the deceased's estate and therefore of the bankrupt estate. He also addressed the secondary question whether the creditor could seek payment of its debt directly from the beneficiary of the RRSPs in accordance with the decision of the Manitoba Court of Appeal in *Clark*. Cameron J. declined to follow *Clark* on this second issue, and held that there is no basis for a creditor to claim any interest in proceeds that do not form part of the estate of the debtor. He therefore dismissed the application. He awarded the respondent costs of the application that he fixed in the amount of $30,000. The appellant seeks leave to appeal the amount of the costs award regardless of the outcome of the appeal on the merits.

ISSUES

(1) Do the proceeds of an RRSP devolve directly to the designated beneficiary, or do they form part of the deceased's estate?

(2) If the RRSP devolves to the beneficiary, do the unpaid creditors of the estate have a claim against the RRSP proceeds in the hands of the beneficiary?

(3) Should this court reduce the amount of costs ordered by the application judge?

Issue 1: Do the proceeds of an RRSP form part of the deceased's estate?

[8] The appellant submits that the application judge erred by not holding that the proceeds of an RRSP devolve to the designated beneficiary through the estate. The appellant relies on s. 2(1) of the *Estates Administration Act*, R.S.O. 1990, c. E. 22 together with the proposition that at law, the designation of a beneficiary of a fund is a testamentary disposition and therefore the fund devolves to the estate and is subject to the claims of creditors before it can be paid out to a designated beneficiary: see A.H. Oosterhoff, *Oosterhoff on Wills and Succession*, 5th ed. (Toronto: Carswell, 2001) at 499; James MacKenzie, *Feeney's Canadian Law of Wills,* 4th ed. (Markham: Butterworths, 2000) at 1.4 (para. 1.8). The appellant completes the argument by pointing to legislation in two provinces, British Columbia and Prince Edward Island, which specifically excludes the proceeds of an RRSP from an estate and, in the case of Prince Edward Island, from the claims of the estate's creditors, and to s. 196(1) of the Ontario *Insurance Act*, R.S.O. 1990, c. I. 8,[1] which specifically excludes insurance proceeds from the estate of the insured and from the reach of creditors of the insured. The appellant says that there is no comparable legislation for RRSP proceeds.

[9] Section 2(1) of the *Estates Administration Act* provides:

> 2(1) All real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative...as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the persons' debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.

[10] In *Canadian Imperial Bank of Commerce v. Besharah* reflex, (1989), 68 O.R. (2d) 443 (H.C.J.), the first case to address the issue of how an RRSP devolves to a designated beneficiary, the trial judge reasoned that: (a) the RRSP was vested in the deceased during his life and the designated beneficiary had no vested interest in it until his death;(b) under s. 2(1) of the *Estates Administration Act*, the deceased's vested RRSP devolved to his personal representative; (c) counsel could not refer the court to any statutory exemption from the general rule, applicable to RRSPs, comparable to the section of the *Insurance Act*, R.S.O. 1980, c. 218, s. 173(1) (now R.S.O. 1990, c. I. 8, s. 196) which provides that proceeds of a life insurance policy devolve directly to the designated beneficiary, not to the estate and are not subject to the claims of creditors of the estate; and (d) the RRSP therefore devolved to the deceased's estate to be paid out to the designated beneficiary after the creditors of the estate were satisfied.

[11] Unfortunately, counsel in the *Besharah* case did not refer the trial judge to s. 53 of the *Succession Law Reform Act,* R.S.O. 1990, c. S. 26, Part III, entitled "Designation of Beneficiaries of Interest in Funds or Plans", which provides:

> 53. Where a participant in a plan has designated a person to receive a benefit under the plan on the death of the participant,
>
> (a) the person administering the plan is discharged on paying the benefit to the person designated under the latest designation made in accordance with the terms of the plan...; and
>
> (b) the person designated may enforce payment of the benefit payable to him under the plan but the person administering the plan may set up any defence that he could have set up against the participant or his or her personal representative.

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[12] Cameron J. read this section as excluding the personal representative of the deceased owner of the RRSPs from any right to enforce payment of the proceeds of a fund where there is a designated beneficiary, and as an exception for RRSPs (and other such funds) from s. 2(1) of the *Estates Administration Act*.

[13] This conclusion is fully in accord with the analysis of the majority of the Supreme Court of Canada in the 1957 case of *Kerslake v. Gray*, 1957 CanLII 13 (SCC), [1957] S.C.R. 516. In that case, the issue was whether a life insurance policy made payable by a declaration by the deceased under the *Insurance Act,* R.S.O. 1950, c. 183, to an ordinary beneficiary, formed part of the estate of the deceased. Section 164 of the *Insurance Act* specifically provided that insurance monies payable to a preferred beneficiary were held in trust for the preferred beneficiary, were not subject to the control of the insured or his creditors and did not form part of the insured's estate. Section 161, which dealt with ordinary beneficiaries, did not so provide. Section 161(2) was in virtually the same terms as the current s. 53 of the *Succession Law Reform Act*. Section 161(1) permitted the insured to designate a beneficiary by contract or declaration and subsequently change the beneficiary; s.161(2) enabled the beneficiary to enforce the contract at its maturity for the beneficiary's own benefit and provided that the insurer could set up against the beneficiary any defence it had against the insured, and that payment made to the beneficiary discharged the insurer.

[14] The Supreme Court held that s. 161 operated with respect to ordinary beneficiaries in the same way that s. 164 operated in respect of preferred beneficiaries, and that the personal representatives of the deceased insured had no claim to monies that were payable under an insurance policy to an ordinary beneficiary. Those monies did not form part of the estate.

[15] Importantly, although s. 161 did not contain explicit words, such as those found in s. 164, protecting the proceeds of the insurance policy for the benefit of ordinary beneficiaries both from inclusion in the deceased's estate and from creditors of the insured, the court held that the effect of the two sections was the same.

[16] The Manitoba Court of Appeal in *Clark*, *supra*, interpreted a provision in the Manitoba legislation which dealt with RRSP proceeds and was worded similarly to s. 161 of the *Insurance Act* (as it was worded in *Kerslake*) and to s. 53 of the Ontario *Succession Law Reform Act*, to have the same meaning and effect as those sections. The *Retirement Plan Beneficiaries Act*, C.C.S.M. c. R. 138 was amended following the Manitoba Court of Appeal decision in *Pozniak Estate v. Pozniak* reflex, (1993), 88 Man. R. (2d) 36 (C.A.). In that case, the Court had followed the Ontario court in the *Besharah* case, holding that the proceeds of an RRSP fund formed part of the gross value of the estate and were available to pay the debts of the estate. Sections 14 and 15 of the amended Act read:

> 14. A person to whom a benefit is payable under a plan pursuant to a designation may enforce payment of the benefit against the administrator of the plan, but the administrator may set up any defence against the person that it could have set up against the participant who made the designation.
>
> 15. Payment by the administrator of a plan of the benefits under the plan in accordance with a designation is, in the absence of actual notice of a subsequent designation or a subsequent revocation of the designation, a full discharge to the administrator of its obligations under the designation.

[17] Based on the combination of the two new sections, and particularly on the wording of s. 15, which is virtually identical to s. 53(a) of the *Succession Law Reform Act*, the court in *Clark* held that the new sections were added to modify the decision in *Pozniak*, and to allow the court to find that the RRSP fund passed directly to the designated beneficiary and did not form part of the deceased's estate.

[18] In my view, the decision of the Supreme Court in *Kerslake,* which has not been overruled or disapproved since it was decided, compels the interpretation given by Cameron J. and by the Manitoba Court of Appeal in *Clark*. It appears very clear that neither that case nor s. 53 of the *Succession Law Reform Act* was brought to the attention of the trial judge in *Besharah* to assist the court in its analysis of the devolution of RRSP proceeds to a designated beneficiary.

[19] The appellant also relies on the Supreme Court of Canada decision in *MacInnes v. MacInnes,* 1934 CanLII 16 (SCC), [1935] S.C.R. 200, which held that a document made outside a will that designates a beneficiary to a profit sharing fund is a testamentary document. The appellant argues that an RRSP designation is such a document and because it is testamentary, the proceeds of the RRSP fall into the estate of the RRSP's owner. The problem with this argument is that it does not take the appellant any further than did s. 2(1) of the *Estates Administration Act*, because s. 53 of the *Succession Law Reform Act* has been interpreted to constitute a statutory exemption to the general rule that would otherwise apply.

[20] Cameron J. found logical support for his conclusion that the legislature intended to except the proceeds of an RRSP that have been designated to a beneficiary from devolution to the estate, in s. 72(1) of the *Succession Law Reform Act* which provides:

> 72. (1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his or her death, whether benefitting his or

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her dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause 63(2)(f),

(a) gifts *mortis causa*;

(b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the survivor or survivors of those persons with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;

(d) any disposition of property made by a deceased whereby property is held at the date of his or her death by the deceased and another as joint tenants;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his or her death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;

(f.1) any amount payable on the death of the deceased under a policy of group insurance; and

(g) any amount payable under a designation of beneficiary under Part III.

[21] Section 72(1) lists a number of transactions by a deceased, the proceeds of which are deemed to be included as part of the deceased's estate for the purpose of making and enforcing orders for dependants' relief. Cameron J. reasoned that the existence of the section implies that the transactions listed in the section are not otherwise testamentary dispositions and their proceeds do not actually form part of a deceased's estate. Subsection (g) of s. 72(1): "any amount payable under a designation of a beneficiary under Part III" includes RRSPs. Section 51(1) in Part III provides:

> 51. (1) A participant may designate a person to receive a benefit payable under a plan on the participant's death,
>
> (a) by an instrument signed by him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or
>
> (b) by will,
>
> and may revoke the designation by either of those methods.

And "Plan" is defined in s. 50 of Part III as follows:

> "plan" means,
>
> (a) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement or a fund, trust, scheme, contract or arrangement for other benefits for employees, former employees, directors, former directors, agents or former agents of an employer or their dependants or beneficiaries,
>
> (b) a fund, trust, scheme, contract or arrangement for the payment of a periodic sum for life or for a fixed or variable term, or
>
> (c) a fund, trust, scheme, contract or arrangement of a class that is prescribed for the purposes of this Part by a regulation made under section 53.1
>
> *and includes a retirement savings plan*, a retirement income fund and a home ownership savings plan as defined in the Income Tax Act (Canada) and an Ontario home ownership savings plan under the Ontario Home Ownership Savings Plan Act. ("regime") R.S.O. 1980, c. 488, s. 50; S.O. 1990, c. 9, s. 10; S.O. 1994, c. 27, s. 63(4), in force December 9, 1994 (R.A.). [Emphasis added.]

[22] Cameron J. concluded that if the proceeds of an RRSP were already part of the estate of a deceased, then s. 72(1)(g) would be meaningless. The appellant disputes this conclusion, arguing that the section is there to remove any doubt whether RRSP proceeds are included in the estate for the purpose of dependants' relief. In my view, Cameron J. is correct. The legislature has specifically included RRSPs in the s. 50 definition of a "plan", the benefit of which may be

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made payable to a designated beneficiary, and by virtue of s. 53, has excluded RRSPs from the estate of the owner. Section 72(1)(g) then includes RRSPs in the value of an estate for the specific purpose of dependants' relief. In this statutory context, there is no basis to suggest that the legislature was in doubt about an issue over which it maintained legislative control.

[23] Cameron J. noted that the Ontario cases, *Fekete Estate v. Simon* (2000), 32 E.T.R. (2d) 202 (Ont. Sup. Ct.) and *Banting v. Saunders Estate* (2000), 34 E.T.R. (2d) 163 (Ont. Sup. Ct.), followed *Clark* on the issue of the devolution of RRSP proceeds, rather than *Besharah*. After reviewing the current state of the law, he agreed with the recent case law that "the proceeds of RRSPs vest in the designated beneficiary on the death of the owner of the RRSPs."

[24] One issue that concerns some commentators about this interpretation of s. 53 of the *Succession Law Reform Act* is why the legislature did not use language similar to s. 196 of the *Insurance Act*, if its intent was to exempt RRSP proceeds from s. 2(1) of the *Estates Administration Act* and from devolving to the estate of a deceased planholder. The argument is that s. 53 is procedural only, but does not vest the proceeds of the RRSP plan in the beneficiary to the exclusion of the personal representative of the deceased or of the deceased's creditors.[2] One answer to this argument is that it is not necessary to compare and justify two sections that were enacted at different times and in different statutes. A second answer is that for all the reasons set out above, and following the interpretation given by the Supreme Court of Canada in *Kerslake* to language similar to s. 53, its effect is to vest the proceeds of an RRSP in the designated beneficiary to whom they are paid, without the specific language found in s. 196 of the *Insurance Act.*

Issue 2: Do creditors have a claim against the RRSP proceeds in the hands of the beneficiary?

[25] Cameron J. declined to follow the second part of the decision of the Manitoba Court of Appeal in *Clark,* that the proceeds of an RRSP in the hands of the designated beneficiary remain answerable for the debts of the deceased if there are insufficient funds in the estate to satisfy all of the creditors of the deceased. He found that there is neither a legal nor equitable basis for that conclusion.

[26] He began by observing that there is no authority other than *Clark* and the two Ontario cases that followed it, to support the conclusion reached by those courts on this
issue. In summary, the analysis in the *Clark* case is: (1) there is no specific statutory exemption from creditors for RRSP proceeds; (2) unlike life insurance proceeds that never belonged to the deceased, RRSP proceeds did belong to the deceased before death and were answerable for the owner's debts; (3) therefore, if the estate cannot pay the debts, the proceeds should be available in the hands of the beneficiary to respond to the claims of creditors, because creditors rank ahead of a volunteer: *Re Diplock* [1948] 1 Ch. 465 (C.A.); (4) sections 14 and 15 of the *Retirement Plan Beneficiaries Act*, the equivalent to s. 53 of the *Succession Law Reform Act*, is only a mechanism for the payment of the RRSP proceeds to the beneficiary and does not immunize those proceeds from the claims of creditors of the deceased.

[27] Cameron J. disputed these findings and legal conclusions both as a matter of logic and statutory interpretation and as a matter of policy, to the extent that policy considerations assist in the interpretation of the intent and effect of s. 53.

[28] First, dealing with the legal effect of the RRSP proceeds devolving to the designated beneficiary and not the estate, Cameron J. stated that once that happens, there is no security interest in the proceeds in favour of the creditors or other means by which the proceeds remain liable to the claims of creditors. He likened the effect in that respect to jointly held property: prior to death, the creditors of each joint owner can claim that owner's share of the jointly held property, but upon the death of one owner, the whole property vests in the surviving joint owner and the creditors of the deceased have no further claim against it.

[29] Cameron J. next addressed the argument that insurance proceeds are different from RRSP proceeds because they never belonged to the insured and therefore could never be attached by the insured's creditors, whereas the RRSP was liable during the life of the owner to the claims of creditors. The argument here is that very specific language is therefore needed to remove the creditors' entitlement to RRSPs, whereas in the case of insurance proceeds, the creditors never had any claim to them during the life of the insured, so that nothing is being taken away. In response, Cameron J. pointed out first that contrary to this argument, some insurance policies have a cash surrender value that can be dealt with by an insured during his or her life and therefore potentially claimed by creditors during the life of the insured. Second, from a policy point of view, to the extent that both RRSPs and life insurance are used by people to provide security for their dependant spouses following their death, insurance paid for by premiums and RRSPs accumulated by tax-deferred savings over the years, are essentially equivalent vehicles. On that view, barring statutory language that would preclude such a result, both should be treated in the same way in the hands of a surviving beneficiary and not be subject to the claims of creditors of the deceased.

[30] Developing that theme further, Cameron J. weighed the claim of a spouse who has provided physical and emotional support to the other spouse during his or her lifetime against the claims of creditors of the deceased spouse, and rejected the conclusion that the equities necessarily favour the creditors. Put another way, a spouse beneficiary of an

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RRSP is not a mere volunteer in the commonly understood sense; rather, a spouse has given consideration or a *quid pro quo* during the lifetime of the other spouse, and in return, receives the RRSP proceeds for support after the death of the other spouse.

[31] Finally, Cameron J. observed that there is no need for a specific statutory exemption from creditors in order to immunize RRSP proceeds from the claims of creditors of the deceased, again comparing the RRSP to jointly held property that devolves to the other joint tenant free of claims of creditors of the deceased without any specific exemption. He held that the absence of a specific exemption from creditors is not enough to conclude that, by default, creditors have a claim on the RRSP proceeds in the hands of a designated beneficiary. The comparison to jointly held property in this context may be less relevant because on death, the property passes by right of survivorship and belongs solely to the surviving joint owner; consequently there is nothing left that belongs to the deceased from which to except the claims of creditors of the deceased. However, as discussed above, I agree with Cameron J. that the absence of words that specifically exempt RRSP proceeds designated to a beneficiary from creditors does not derogate from the effect of s. 53, which is to remove the proceeds of an RRSP that have been designated to a beneficiary from the estate of the owner of the RRSP, and to insulate those proceeds from the claims of creditors of the deceased's estate.

[32] I also note the priority and procedural concerns for creditors suggested by Barry Corbin in "RRSPs: Partial Protection Against Creditors?" (2000) 20 E.T.P.J. 33 at 43-44, if the *Clark* analysis on the second issue is correct: (a) If there are two or more unsatisfied creditors, how do they attach the RRSP proceeds in the hands of the beneficiary and is there a mechanism for them to share those proceeds? (b) If there is more than one beneficiary, are they entitled to contribution and indemnity among themselves? (c) What is the priority between the estate creditors and creditors of the beneficiary, particularly if the beneficiary is bankrupt? Although these issues could be resolved on a case-by-case basis, their existence enhances the cogency of the argument that the legislature intended s. 53 to be a full exemption of RRSP proceeds from the estate of the deceased and from the claims of estate creditors. Otherwise, it would make more sense for the executor of the estate to have the obligation of collecting the RRSP proceeds and distributing them after creditors' claims have been paid.[3]

[33] I agree with Cameron J. that there is neither a legal principle nor statutory authority that requires that the creditors have any claim on the proceeds of an RRSP that devolve directly to a designated beneficiary. I also agree that the equities do not necessarily favour the claims of creditors over those of beneficiaries of RRSP. The beneficiaries are often spouses, and therefore, not volunteers in the traditional sense, but partners in life, who have provided support to their spouses with the expectation that they will be supported after the death of their spouses. Finally, there are several potential procedural difficulties if creditors are permitted to pursue beneficiaries directly for the proceeds of the RRSPs in their hands.

[34] I am also satisfied that in order to give full effect to s. 53 as an exemption from the rule that an RRSP designation is a testamentary disposition, and following *Kerslake*, it would be anomalous to hold that RRSP proceeds that have devolved to the designated beneficiary remain subject to the claims of the creditors of the deceased.

[35] I therefore conclude that the effect of s. 53 is to except RRSP proceeds in the hands of a designated beneficiary from the claims of creditors of a deceased RRSP owner's estate.

Issue 3: Should this court reduce the application judge's award of costs?

[36] The appellant submits that the application judge erred in his award of costs. He ordered costs payable by the appellant creditor on the partial indemnity scale in the amount of $30,000. The application judge justified the size of the costs award in part on the basis that the application originally included a claim to the life insurance proceeds of $1.27 million, which the appellant abandoned only 4 or 5 days before the hearing, after respondent's counsel had prepared his factum.

[37] I agree with the appellant that the application judge erred in this regard. Counsel are encouraged to abandon (or settle) in a timely manner, claims that they conclude are not meritorious. Although the costs award could take some account of the relatively late timing in this case, it is an error to award costs as if $1.27 million were at stake in this application.

[38] The application judge also viewed the case as putting the entire $82,000 of RRSP proceeds at risk, when the appellant's claim was for $53,679.28. Under rule 57.01 of the *Rules of Civil Procedure*, the first factor to be taken into account in considering the appropriate amount to award for costs is the amount in issue. The rule reflects the principle that the costs must be commensurate with the value of the lawsuit to the parties. In that light, an award of costs of $30,000 on the partial indemnity scale constitutes an error in principle, and rather appears to be an award on the substantial indemnity scale.

[39] I would grant leave to appeal the award of costs and reduce the award to $15,000.

CONCLUSION

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[40] I would dismiss the appeal on the substantive issues, but grant leave to appeal and allow the appeal with respect to costs and reduce the costs awarded to $15,000.

[41] With respect to the costs of the appeal, this case raised jurisprudential issues for the first time in this court on a matter on which there is significant developing and conflicting case law and legal scholarship. For that reason and also again because of the amount in issue, I would limit the respondent's costs on the appeal to $15,000 inclusive of disbursements and G.S.T.

Released: June 16, 2004 "JL"

"K. Feldman J.A."
"I agree John Laskin J.A."
"I agree S.T. Goudge J.A."

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[1] *Law and Equity Act*, R.S.B.C. 1996, c. 253:

49.(2) If, in accordance with the terms of a registered plan, an annuitant designated a person to receive a benefit payable under the registered plan in the event of the annuitant's death,

…

(b) the person designated may enforce payment of the benefit, and

(c) the benefit is not part of the estate of the annuitant,

51.(2) Subject to subsection (5), if, in accordance with the terms of a registered plan, an annuitant designates a person to receive a benefit payable under the registered plan in the event of the annuitant's death,

…

(b) the person designated may enforce payment of the benefit, and

(c) the benefit is not part of the estate of the annuitant;

Designation of Beneficiaries Under Benefit Plans Act, R.S.P.E. I. 1998, c. D-9, s. 9:

9. Where a beneficiary is designated, any benefit payable to the beneficiary is not, from the time of the happening of the event upon which it becomes payable, part of the estate of the participant, and is not subject to the claims of the creditors of the participant.

Insurance Act R.S.O. 1990, c.I.8

196. (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

[2] See some commentaries on the issue: V. Lindsay & H. Rawding, "Non-Insurance RRSPs After Death: What Are They?" Willpower, CCH, June 2000, No. 66; Anne Werker, "Non-Insurance RRSP Designations – Testamentary Dispositions of Property that do no Form Part of the Estate" (2003) 22 E.T.P.J. 103; B.S. Corbin, "RRSPs: Partial Protection against Creditors?" (2000) 20 E.T.P.J. 33.

[3] In his article, Barry Corbin suggests that to avoid these potential problems, RRSPs should devolve to the estate and not directly to the designated beneficiary.

Perron-Malenfant v. Malenfant (Trustee of), [1999] 3 SCR 375 - Cash Surrender Value of Bankrupt's Life Insurance - Includable?

Date:	1999-09-17
Docket:	26451
Parallel citations:	1999 CanLII 663 (SCC); 177 DLR (4th) 257
URL:	http://canlii.ca/t/1fqkg
Citation:	Perron-Malenfant v. Malenfant (Trustee of), 1999 CanLII 663 (SCC), [1999] 3 SCR 375, <http://canlii.ca/t/1fqkg> retrieved on 2013-08-27
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Perron-Malenfant *v.* Malenfant (Trustee of), [1999] 3 S.C.R. 375

In the Matter of the Bankruptcy of Raymond Malenfant,

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Colette Perron, Alain Malenfant, Eusthelle Malenfant,
France Malenfant and Lynn Malenfant
between
Pierre Poliquin of the Firm Samson Bélair/Deloitte & Touche Inc.,
trustee in the Bankruptcy of debtors Raymond Malenfant,
Colette Perron, Alain Malenfant, Eusthelle Malenfant,
France Malenfant and Lynn Malenfant *Appellant*
v.
Colette Perron-Malenfant *Respondent*
and
La Laurentienne Vie Inc. *Respondent in the Quebec Superior Court*
Indexed as: Perron-Malenfant *v.* Malenfant (Trustee of)
File No.: 26451.
1999: March 15; 1999: September 17.
Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

on appeal from the court of appeal for quebec

Bankruptcy -- Property of bankrupt -- Life insurance policy -- Right to surrender -- Policy not exempt from seizure under provincial law -- Whether cash surrender value of policy should be excluded from property divisible among creditors in bankruptcy -- Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 67(1) -- Civil Code of Lower Canada, arts. 2547, 2552, 2554.

The respondent policyholder insured her husband's life in a life insurance policy and designated herself a revocable beneficiary. She had the right to surrender the policy for its cash surrender value pursuant to the terms of the policy. The respondent, her husband and her children were petitioned into receivership. The trustee in bankruptcy advised the insurer that he was exercising the right to surrender the policy on behalf of the respondent, and that it should therefore resiliate the policy and pay into the bankruptcy its cash surrender value. The insurer complied. The Superior Court dismissed the respondent's motion for an order enjoining the trustee to return the cash surrender value to the insurer, and for another order enjoining the insurer to reinstate the policy. The Court of Appeal reversed the decision and ordered the trustee to return the cash surrender value to the insurer.

Held: The appeal should be allowed.

The trustee is entitled to seize the policy and exercise the surrender right to obtain its cash surrender value. The exemption provisions of the *Civil Code of Lower Canada* governing life insurance contracts were meant by the legislature to be exhaustive. The legislature's intention is derived from the language of arts. 2552 and 2554 *C.C.L.C.*, considering the legislative history of the provisions and in particular the fact that the articles were introduced into the *Civil Code of Lower Canada* as part of the comprehensive insurance-law revision that took place in Quebec in the early 1970s, and the interpretation of arts. 2552 and 2554 *C.C.L.C.* themselves in the context of the themes running through the revision of the *Civil Code of Lower Canada*. It is clear that the legislature intended the provisions to protect from seizure all rights under those contracts that qualify, especially the right to surrender. At the same time, the legislature specifically stipulated that these rights were exempt from seizure only under the two described classes of policies. The natural conclusion, *a contrario*, is that the rights under all other policies, including the right to surrender for a cash surrender value, are seizable. The legislature chose to protect two particular classes of policies from seizure because it perceived a significant threat to these, namely the threat that creditors, to whom the right to surrender a life insurance policy was otherwise generally available, could terminate a policy by exercising the right. It is open to the legislature to enact an exhaustive set of rules governing seizability in a particular area. Where that is the case, the express rules themselves, and only those rules, govern seizability.

By virtue of s. 67(1)(*b*) of the *Bankruptcy and Insolvency Act*, this exclusive provincial code of unseizability is determinative as to what rights the trustee can seize and exercise for the benefit of creditors. This determination avoids the need to consider the personal rights doctrine under both the *Bankruptcy and Insolvency Act* and the general law of Quebec. The best interpretation of the life insurance seizability exemptions is that all the rights under a non-exempt policy are seizable, including the right to surrender the policy for its cash surrender value.

Here, the respondent's policy does not qualify under either of the only available exemptions, since under the policy, the respondent is both beneficiary and policyholder and since the designation of the respondent as beneficiary was never made irrevocable, and does not benefit from the presumption of irrevocability of art. 2547 *C.C.L.C.* Articles 2552 and 2554 *C.C.L.C.* therefore do not operate under s. 67(1)(*b*) of the *Bankruptcy and Insolvency Act* to exclude the rights

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attached to the respondent's life insurance policy from the property that passes to the bankruptcy trustee. The Quebec legislature maintained the unseizable class of family life insurance policies defined *vis-à-vis* the beneficiary's relationship to the policyholder, not the life insured. This Court cannot undo the Quebec legislature's express choices and adopt the policy of the common law provinces, only because it is convenient to do so in a particular case. This is something to be left for the consideration of the legislature itself.

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Referred to: *Banque canadienne nationale v. Carette-Poulin* (1934), 56 B.R. 143; *Lauwers v. Tardiff*, [1966] C.S. 79; *Royal Bank of Canada v. North American Life Assurance Co.*, 1996 CanLII 219 (SCC), [1996] 1 S.C.R. 325; *Mercure v. A. Marquette & Fils Inc.*, 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547; *Re Pearson* (1977), 23 C.B.R. (N.S.) 44; *Zenith Tire & Repair v. Angle & Lemessurier Reg'd*, Sup. Ct. Mtl., E-106243, February 13, 1934; *Jarry Automobile Ltée v. Medicoff*, [1947] C.S. 465; *Gagnon v. City of Montreal*, [1956] R.P. 385; *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701; *Re Holley* (1986), 59 C.B.R. (N.S.) 17; *In re Max Mendelson* (1940), 21 C.B.R. 304; *Crown Life Insurance Co. v. Perras*, [1953] B.R. 659; *Fortier v. Nault*, [1954] C.S. 131; *Re de Grandpré* (1969), 15 C.B.R. (N.S.) 262; *Re Comptois* (1981), 40 C.B.R. (N.S.) 118; *Aubry (Syndic de)*, reflex, [1988] R.J.Q. 2211; *Banque Canadienne Nationale v. Carette*, 1930 CanLII 49 (SCC), [1931] S.C.R. 33; *Construction Gilles Paquette ltée v. Entreprises Végo ltée*, 1997 CanLII 352 (SCC), [1997] 2 S.C.R. 299; *Lalonde v. Sun Life Assurance Co. of Canada*, 1992 CanLII 39 (SCC), [1992] 3 S.C.R. 261.

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APPEAL from a judgment of the Quebec Court of Appeal, 1997 CanLII 10201 (QC CA), [1998] R.J.Q. 1, 2 C.B.R. (4th) 303, [1997] Q.J. No. 3716 (QL), setting aside a decision of the Superior Court, [1993] Q.J. No. 2117 (QL). Appeal allowed.

Maurice Dussault, *Madeleine Roy* and *Pierre Hémond*, for the appellant.

Jean-Philippe Gervais and *Simone Bonenfant*, for the respondent.

English version of the judgment of the Court delivered by

1 GONTHIER J. – This case raises the following question: if a life insurance policy is not exempt from seizure under the law of Quebec, should its cash surrender value nevertheless be excluded from the property divisible among creditors in a bankruptcy? At the heart of this appeal is whether, notwithstanding the Quebec legislature's express choice to exempt from seizure the rights under only certain specific types of life insurance policies in arts. 2552 and 2554 of the *Civil Code of Lower Canada* (hereinafter "*Civil Code*"), the right to surrender a non-exempt policy should nevertheless be excluded from the trustee's seizin on the basis that it is a right strictly attached to the person. The analysis considers the relevant articles in the context of the *Civil Code* as a whole, while paying due attention to their source, *An Act respecting insurance*, S.Q. 1974, c. 70 (hereinafter "*Insurance Act*"), which introduced a new and complete code of rules to govern life insurance.

2 For the reasons set out below, I have concluded that the Quebec legislature intended its exemption provisions for life insurance contracts, that is arts. 2552 and 2554 of the *Civil Code*, to be exhaustive, and therefore, by virtue of s. 67(1)(*b*) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, determinative as to what rights the trustee can seize and exercise for the benefit of creditors. This determination avoids the need to consider the personal rights doctrine under both the *Bankruptcy and Insolvency Act* and the general law of Quebec. In my view, the best interpretation of the life insurance seizability exemptions is that all the rights under a non-exempt policy are seizable, including the right to surrender the policy for its cash surrender value.

I – Facts

3 On March 30, 1978, the respondent insured her husband's life for $300,000 in a life insurance policy taken out with La Laurentienne Vie Inc. (hereinafter "the Company"). The respondent policyholder designated herself a revocable beneficiary. The respondent had the right to surrender the policy for its cash surrender value pursuant to the following term of the policy:

[TRANSLATION] **Cash surrender value or paid-up insurance**

On written request and in consideration of the cancellation of this coverage and of any related extended benefit, the policyholder may:

– obtain the amount of the surrender value as determined according to the attached Table A;

4 From the mid-1960s to December 1992, the respondent was in business with her husband. At some time during this period (the record not being clear on this point), their children joined in. They operated hotels and office buildings. In December 1992, they were petitioned into receivership. On April 16, 1993, the appellant trustee in bankruptcy advised the Company that he was exercising the right to surrender the policy on behalf of the respondent, and that the Company should therefore resiliate the policy and pay into the bankruptcy its cash surrender value. At that time, the cash surrender value was worth $84,900. The Company complied with the trustee's request, resiliating the policy on May 5, 1993.

5 The respondent brought a motion to the Superior Court for an order enjoining the appellant to return the cash surrender value to the Company, and for another order enjoining the Company to reinstate the policy.

II – Applicable Legislation

6 The relevant provisions from the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (hereinafter "*Bankruptcy Act*"), are ss. 2 and 67(1):

> **2.** In this Act,
>
> . . .
>
> "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;
>
> **67.** (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person, [or]

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(*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit. [Emphasis added.]

7 The *Bankruptcy Act*, as it applies in this case, incorporates by reference the exemptions from seizure for life insurance policies under the laws applicable in Quebec. The policy, at the time of the bankruptcy, was governed by Chapter Second – "Of Insurance of Persons" – of Title Fifth of Book Fourth of the *Civil Code*. Within this chapter (arts. 2501-2561), the rights under two classes only of life insurance are exempt from seizure. These classes are defined by arts. 2552 and 2554:

2552. When the beneficiary of the insurance is the consort, descendant or ascendant of the policyholder or of the participant, the rights under the contract are exempt from seizure as long as the beneficiary has not received the sum insured.

2554. The stipulation of irrevocable designation binds the owner even if the beneficiary has no knowledge of it.

As long as the designation of a beneficiary as irrevocable subsists, the rights of the policyholder, the participant and the beneficiary are unseizable. [Emphasis added.]

These exemptions from seizure also serve as the relevant exemptions in the *Code of Civil Procedure*, R.S.Q., c. C-25:

553. The following are exempt from seizure:

. . .

(12) Anything declared unseizable by law.

III – Judgments

A. *Superior Court*, No. 200-11-001360-919, November 5, 1993

8 Letarte J. of the Superior Court rejected the respondent's motion. In keeping with the dominant view of the jurisprudence and doctrine in Quebec, he held that the respondent, as policyholder and beneficiary of the policy, possessed in her patrimony the right to surrender the policy for its cash surrender value, and that this right passed to the trustee pursuant to ss. 2 and 67(1)(*c*) and (*d*) of the *Bankruptcy Act*. The respondent's policy was not of the kind that benefited from either of the two exemptions from seizure provided for in the *Civil Code*, namely the exemption for privileged beneficiaries (art. 2552) and the exemption for policies with the designation of an irrevocable beneficiary (art. 2554).

9 The trial judge rejected the respondent's theory that the right to surrender the policy for its cash surrender value could not pass to the trustee because such a right was "exclusively attached to the person" (*Civil Code*, art. 1031). Instead, Letarte J. endorsed the view that the provisions of the *Bankruptcy Act* extend further than art. 1031 of the *Civil Code*, even if this meant that the trustee in bankruptcy enjoyed greater rights than creditors did before bankruptcy.

B. *Court of Appeal*, 1997 CanLII 10201 (QC CA), [1998] R.J.Q. 1

10 The Court of Appeal reversed the decision of the trial judge. Writing the unanimous opinion of the court, Baudouin J.A. arrived at his conclusion working from what he identified as the two controlling principles in the case.

11 The court held that the right to surrender a life insurance policy, in civil matters, had always been considered a "purely personal" right or a right "exclusively attached to the person". In support, Baudouin J.A. cited a line of authority extending from *Banque canadienne nationale v. Carette-Poulin* (1934), 56 B.R. 143, to *Lauwers v. Tardiff*, [1966] C.S. 79, referred to also in several subsequent Federal Court and Provincial Court decisions of the early 1980s. Creditors could never exercise for their benefit those of their debtor's rights that were extrapatrimonial or "purely personal". This, according to Baudouin J.A., was an established principle of both civil and common law. In Quebec civil matters, this principle was illustrated by art. 1031 of the *Civil Code* (the oblique action).

12 The court below extended this principle into the bankruptcy area, applying a second principle that Baudouin J.A. derived from this Court's decision in *Royal Bank of Canada v. North American Life Assurance Co.*, 1996 CanLII 219 (SCC), [1996] 1 S.C.R. 325: [TRANSLATION] "*bankruptcy cannot confer on creditors greater rights than they would have had if the bankruptcy had not occurred*" (*per* Baudouin J.A., at p. 5, italics in original). Since the bankruptcy could not place creditors in a better position *vis-à-vis* their debtor, and since the right to surrender the policy for its cash

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surrender value could not be exercised by creditors in an oblique action, the court below allowed the appeal, and ordered the trustee to return the cash surrender value to the Company.

IV – Issue

13 The issue before this Court is whether the right to surrender a bankrupt's life insurance policy is exempt from seizure, even though the rights under the policy are not exempt, and whether a trustee in bankruptcy is thereby prevented from exercising this right and distributing the policy's cash surrender value among the bankrupt's creditors.

V – Analysis

A. *The Bankruptcy Act*

14 The *Bankruptcy Act* gives the trustee broad seizin over the bankrupt's property. The trustee, in essence, steps into the shoes of the bankrupt at the onset of the bankruptcy. In *Mercure v. A. Marquette & Fils Inc.*, 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547, de Grandpré J. considered the role of the trustee as regards the bankrupt's insurance policies, in that case a fire insurance policy. At p. 553, he wrote:

> When the trustee is appointed he assumes responsibility in two areas:
> (a) he becomes the debtor's representative;
>
> (b) he becomes the representative of all the general creditors to the extent that he can even act on their behalf against the debtor.
>
> . . .
>
> From the time of the bankruptcy onward, all insurance policies should read as if the trustee's name appeared in place of that of the debtor: nothing more.

In *Royal Bank*, *supra*, at para. 49, I adopted as a correct statement of the law the following passage from the reasons of Henry J. of the Ontario Supreme Court in *Re Pearson* (1977), 23 C.B.R. (N.S.) 44, at p. 48:

> What comes into the hands of the trustee on the occurrence of the bankruptcy are the rights and interests of the insured in the insurance money and in the contract as they stood at the date of the bankruptcy.

Henry J.'s passage, and my reasons in *Royal Bank*, *supra*, at para. 49, went on to explain the relevance and operation of provincial exemptions from seizure in the bankruptcy context:

> . . . while an asset which is exempt under provincial law passes into the possession of the trustee at the time of bankruptcy, the exemption itself bars the trustee from dividing the asset among creditors where s. 67(1)(*b*) [of the *Bankruptcy Act*] is operative.

15 In this case, it would appear from the face of the relevant provincial legislation that s. 67(1)(*b*) is not operative. The respondent's life insurance policy is not exempt from seizure under the relevant law applicable in Quebec at the time of the bankruptcy, namely arts. 2552 and 2554 of the *Civil Code*. Article 2552 exempts from seizure the rights under a life insurance contract "[w]hen the beneficiary of the insurance is the consort, descendant or ascendant of the policyholder". The respondent's policy does not qualify for the exemption, since under her contract with the Company she is both beneficiary and policyholder. Being united in one person, there is no privileged relationship between the two "parties" that would attract the protection provided under art. 2552. Article 2554 exempts from seizure the rights of the policyholder and the beneficiary "[a]s long as the designation of a beneficiary as irrevocable subsists". Once again, the respondent's policy does not qualify for the statutory exemption, since the designation of the respondent as beneficiary was never made irrevocable, and does not benefit from the presumption of irrevocability of art. 2547 of the *Civil Code*. Articles 2552 and 2554 therefore do not operate under s. 67(1)(*b*) of the *Bankruptcy Act* to exclude the rights attached to the respondent's life insurance policy from the property that passes to the bankruptcy trustee.

B. *The Parties' Submissions*

16 The respondent submits that the right to surrender the policy is nevertheless exempt from seizure, drawing on jurisprudence under art. 1031 of the *Civil Code*. This provision codifies the creditor's remedy known as an oblique action:

> **1031.** Creditors may exercise the rights and actions of their debtor, when to their prejudice he refuses or neglects to do so; with the exception of those rights which are exclusively attached to the person. [Emphasis added.]

Over the years, Quebec courts were required to determine which rights were "exclusively attached to the person". They found that the surrender option was such a right.

17 In *Zenith Tire & Repair v. Angle & Lemessurier Reg'd*, Sup. Ct. Mtl., E-106243, February 13, 1934, the Superior Court held that allowing a judgment creditor to exercise his debtor's right to surrender a life insurance policy would be "an illegal and unjust interference both in the rights of the insured and in the business of the [insurance]

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Company" (p. 3). The right to surrender was also referred to as "personal", and therefore unavailable to a judgment creditor, in *Jarry Automobile Ltée v. Medicoff*, [1947] C.S. 465.

18 In the case *Gagnon v. City of Montreal*, [1956] R.P. 385 (Sup. Ct.), at p. 393, the court concluded as follows:

> If, as a matter of principle, any judgment creditor of an insured was to be held to be entitled, at all times, to the cash surrender value of an insurance policy issued on his debtor's life, then the purpose for which life insurance is sought and obtained and the protection given by law to insured and beneficiaries would become illusory, precarious and would consequently be defeated. . . . On the ground of public policy, the right to exercise the cash surrender value option which automatically cancels all other essential rights under the policy must be held to be exclusively personal to the insured.

In that case, the creditors were seeking payment of court costs owed to them by the debtor, who held an insurance policy on his own life for the benefit of his mother.

19 In *Lauwers v. Tardiff*, *supra*, the Superior Court refused to grant the creditor's motion to order the debtor to surrender his life insurance policy. The insurance provider was subject to a garnishment order, and the cash surrender value would have gone to the creditor. The court held, first, that the oblique action was not appropriate in these circumstances, since the debtor had not neglected to exercise a right in any meaningful sense; he had simply decided to opt for keeping his insurance in place. In addition, the court held that the right to surrender the policy was personal, and could not be exercised by the creditor (at p. 81):

> [TRANSLATION] The right to exercise the surrender option accorded to the insured is personal; a creditor cannot decide to exercise this right in order to receive the cash surrender value. An insurance contract is an act which provides for future contingencies, and it would be contrary to its nature to allow creditors to divert it from its purpose by forcing surrender by the insured.

20 David Norwood, in his treatise on the law of life insurance in Canada, *Norwood on Life Insurance Law in Canada* (2nd ed. 1993), provides a comprehensive discussion on the protection against exigibility by an ordinary judgment creditor that the courts in Quebec and the rest of Canada have accorded to the right to surrender an in-force life insurance policy. I find it useful for our purposes to quote from his text (at pp. 246-48) at some length:

> The contest of execution by a creditor of the insured is most commonly exemplified by the attempt by the creditor to force the surrender of an in-force life insurance policy to meet the debt owed by the insured. The [Uniform Life Insurance] Act and the [Civil] Code expressly protect certain beneficiaries, but the issue of exigibility is best tested where there is **no** beneficiary in place, so that no statutory exemptions from execution or seizure cloud the picture.
>
> As will be discussed in detail, the in-force life insurance product is simply not exigible at law by a judgment creditor to the point that it may be forced into surrender, even when the eventual policy benefit is in favour of the insured or the insured's estate, and a beneficiary has not been designated.
>
> . . .
>
> [S]urrender of a life insurance policy is **cancellation** of the contract and its insurance benefits. Surrender releases the insurer of its future obligation to pay insurance benefits upon the happening of the event insured against. The insurer may pay a cash surrender value for this release, but forcing surrender would destroy the basic purpose of the contract.
>
> . . .
>
> Cancellation of the life insurance contract by a creditor would bring about irretrievable consequences, since the insured cannot buy back or restore the life insurance contract, which one could accomplish in almost every other form of personal property siezed [*sic*] by a creditor. In other words, a debtor whose property is seized may replace it at a later stage by buying it back or buying other property of equal value. This is not so, in the case of an in-force life insurance policy, for the reasons that (i) the life insured may no longer be insurable and (ii) even if the life insured is insurable, the individual cannot be insured at the original premium price because the life insurance premium is geared to age.
>
> In Quebec, civil law protects the insured from execution by a creditor against an in-force policy upon the basis that surrender is a **personal** right not available to the insured's creditors [art. 1031 of the *Civil Code*]. It is submitted that this has the same basis in logic as applies in the common law provinces. The Quebec courts have loudly pronounced the basic legal position that to permit a creditor to execute against the policy would cause an irrevocable loss contrary to the shelter inherent to the nature of life insurance. . . .
>
> Certainly, in the common law provinces as well as in Quebec, no court has allowed an ordinary judgment creditor to force the surrender of an in-force life insurance policy, even when no beneficiary is in the picture. [Emphasis in original.]

21 The respondent seeks to import this protective logic into the bankruptcy context by one of two ways. The first method involves invoking a principle that I acknowledged in *Royal Bank*, *supra*, at para. 16: "creditors should not gain on bankruptcy any greater access to their debtors' assets than they possessed prior to bankruptcy". The second method involves using bankruptcy case law in which courts have decided that certain rights of the bankrupt will not vest in

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the trustee on account of their "personal" nature. See e.g. *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para. 38; *Re Holley* (1986), 59 C.B.R. (N.S.) 17 (Ont. C.A.), at p. 35. In effect, we have been asked to find that the "personal rights" immunity co-exists at all times with, and should apply in addition to, the statutory exemptions for rights under specific life insurance contracts provided in arts. 2552 and 2554.

22 The appellant trustee pointed this Court to authority that has consistently upheld a bankruptcy trustee's power to seize and exercise the bankrupt's right to surrender a life insurance policy. In the case *In re Max Mendelson* (1940), 21 C.B.R. 304, the bankrupt had a life insurance policy on his own life, and had designated his brother beneficiary. The bankrupt died. The Appellate Division of the Supreme Court of New Brunswick held that the trustee in bankruptcy could not take the life insurance proceeds, but only because the trustee had not changed the beneficiary before the bankrupt's death. Before his death, the court held, the trustee had all the powers of the bankrupt policyholder, and could have surrendered the policy for its cash value.

23 In *Crown Life Insurance Co. v. Perras*, [1953] B.R. 659, the Quebec Court of Appeal dismissed an appeal from a decision granting the trustee the power to surrender a life insurance policy, but only because the insured had acquiesced in the trustee's surrender. Barclay J.A., for the majority, dismissed the appeal because the bankrupt himself failed to appear, and the insurance company who did appear was held to have no standing. In *Fortier v. Nault*, [1954] C.S. 131, the Superior Court addressed the merits of the issue, and concluded (against some of the *obiter dicta* of the judges in *Crown Life*, *supra*) that the trustee does indeed have the power to surrender the bankrupt's policy. Ste-Marie J. cited s. 39(*d*) of the *Bankruptcy Act* (now s. 67(1)(*d*)), which gives the trustee broad powers over the debtor's property, and concluded that its scope extended beyond the limits on creditors' rights that had been held to exist under art. 1031 of the *Civil Code*. We were also referred to *Re de Grandpré* (1969), 15 C.B.R. (N.S.) 262 (Que. Sup. Ct.); *Re Comptois* (1981), 40 C.B.R. (N.S.) 118 (Que. Sup. Ct.); and *Aubry (Syndic de)*, reflex, [1988] R.J.Q. 2211 (Sup. Ct.). In this review of the jurisprudence, it is also worth noting that in *Lauwers v. Tardiff*, *supra*, in which the surrender right was held to be "personal" and unavailable to an ordinary judgment creditor, Mayrand J. recognized that a different conclusion had been reached in the bankruptcy context, where a trustee's power had been held to include the exercise of the right (citing *Fortier*, *supra*).

24 The appellant also cited several learned authors who support the position that the trustee is vested with the power to exercise the surrender option under a life insurance contract. Didier Lluelles, in *Droit des assurances — aspects contractuels* (2nd ed. 1986), at p. 293, writes:

> [TRANSLATION] With respect to the trustee in bankruptcy, however, since the trustee is vested with the powers of the bankrupt in or over his or her property (*Bankruptcy Act*, R.C.S., 1970, c. B-3, s. 47(*d*)), the trustee may exercise the surrender option if there is no irrevocable beneficiary (C.c. 2554 and *Bankruptcy Act*, s. 47(*b*)) or no revocable beneficiary protected by article 2552 C.c. (*Bankruptcy Act*, s. 47(*b*)).

See also J.-G. Bergeron, *Les contrats d'assurance (terrestre)* (1992), vol. 2, at p. 474; S. Hardy-Lemieux, *L'assurance de personnes au Québec* (1989), at pp. 8,152 and 8,155. In his treatise at pp. 253-54, Norwood also devotes some attention to the trustee's, as opposed to an ordinary creditor's, position *vis-à-vis* the rights under the debtor's life insurance policy:

> Where the insured not only fails to meet a creditors's [*sic*] claim but goes bankrupt, federal law under the *Bankruptcy Act* meets up with provincial insurance common law and statutory law. In essence, the *Bankruptcy Act* prevails except where it expressly defers to provincial **exemptions**. . . . [T]he *Bankruptcy Act* honours the Uniform Act and the *Civil Code* when they exempt life insurance proceeds in the hands of a beneficiary since the proceeds fall outside of the estate of the insured, and exempt the in-force life insurance policy itself when a family beneficiary or an irrevocable beneficiary or a beneficiary for value is in place.
>
> Otherwise, the trustee in bankruptcy (unlike the ordinary judgment creditor) "steps into the shoes" of the insured, and may, accordingly, surrender the policy where it is payable to the estate of the insured or to a non-family beneficiary in circumstances where the insured himself could do so. [Emphasis in original.]

C. *Articles 2552 and 2554 of the Civil Code*

25 Reviewing these various arguments, I have decided that the most coherent way to approach this appeal is to decide first whether the exemption provisions of the *Civil Code* governing life insurance contracts, introduced in 1974 as part of a sweeping revision of insurance law in Quebec, were meant by the legislature to be exhaustive. To the extent that the legislature did so intend, arts. 2552 and 2554 displace and supersede, for the purposes of this appeal, the jurisprudence regarding the exigibility of the surrender value of life insurance contracts under art. 1031. Because I conclude that the legislature did so intend, this Court need not decide in this case whether the right to surrender a life insurance policy is a "personal right". Articles 2552 and 2554 of the *Civil Code* make irrelevant in the life insurance context any other basis for exemption which may have existed, and which might still exist for other purposes, under the general law of Quebec or the *Bankruptcy Act*.

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26 In undertaking my analysis, I have considered Baudouin J.A.'s warning (at p. 9) against confusing the unseizability of an asset with the inherent nature of a right:

> [TRANSLATION] The concept of seizability of property or an asset must not be confused with the nature of the right. In order for a right to be seizable by creditors, it must necessarily be patrimonial in nature. Thus, the legislator may exempt an asset from seizure by the creditors, as it did, for example, in articles 2552 C.C. and 2457 C.C.Q., since the debtor's patrimony is the "common pledge" of his or her creditors (art. 2644 C.C.Q.). It appears to me to be another matter to be determined that, as is the case here, despite its unquestionable economic value, the right itself cannot be exercised by anyone other than the bankrupt. In such a case, unseizability has no importance whatsoever nor any legal relevance because it is not the monetary value which is unavailable to the third party, but the very exercise of the right that could lead to the recovery of that value.

In my view, however, it is open to the legislature to enact an exhaustive set of rules governing seizability in a particular area. Where that is the case, the express rules themselves, and only those rules, govern seizability. The court applies those rules to the exclusion of other considerations not because it has confused seizability as provided by those rules with the inherent nature of the rights at issue, but because the legislature's express and exhaustive rules supersede considerations that would cut across and undo the legislated divisions.

27 In this case, the legislature's intention of creating a comprehensive and exhaustive "unseizability code" for life insurance contracts is derived from the language of arts. 2552 and 2554, considered in their proper context. The analysis proceeds in two steps. I first consider the legislative history of the provisions, and in particular the fact that the articles were introduced into the *Civil Code* as part of the comprehensive insurance-law revision that took place in Quebec in the early 1970s. With this background, I then focus in on the interpretation of arts. 2552 and 2554 themselves, in the context of the *Civil Code* as a whole.

1. Legislative History

28 Articles 2552 and 2554 were introduced into the *Civil Code* as part of a comprehensive revision of insurance law in Quebec initiated in 1974 by Bill 7, which was adopted as the *Insurance Act* (proclaimed in force in 1976). This statute modernized the insurance law of Quebec and, of particular relevance to this appeal, significantly expanded the scope and detail of life insurance regulation in the *Civil Code*.

29 Before the adoption of the *Insurance Act*, there was no comprehensive body of rules regulating life insurance in Quebec. When Bill 7 was introduced in the National Assembly, there were 10 articles governing life insurance in the *Civil Code*, and a special statute governing life insurance in a narrowly circumscribed area of family relations, the *Husbands and Parents Life Insurance Act*, R.S.Q. 1964, c. 296.

30 When Quebec's civil law was codified in 1866, marine insurance was the most important branch of insurance law, and its rules the most elaborated. Life insurance contracts were at that time looked upon with disfavour in the civil law, having been expressly prohibited in France until the mid-19th century. See É. Couteau, *Traité des assurances sur la vie* (1881), vol. 1, especially paras. 43-52. They were regulated in the *Civil Code* by a mere nine articles (arts. 2585-2593). A tenth (art. 2593*a*), relating to presumptions of death in relation to absentee insured, was added in 1933. None of these provisions exempted any class of life insurance from seizure.

31 The first life insurance legislation applicable in Quebec pre-dated Confederation. This was the *Act to secure to Wives and Children the benefit of Assurances on the lives of their Husbands and Parents*, S. Prov. C. 1865, 29 Vict., c. 17. This Act allowed a husband to insure his life for the benefit of his wife (and children), derogating from the prohibition against *inter vivos* gifts between spouses contained in art. 1265 of the *Civil Code*. The legislation was completely revised in 1878, by S.Q. 1878, 41-42 Vict., c. 13, which among other things introduced a policy of protecting family beneficiaries. The benefit of the life insurance policy could only be revoked in favour of another family beneficiary (s. 12), and the policy was "exempt from attachment for debts due either by the insured or by the persons benefited" (s. 26). In 1925, the Act became known as the *Husbands' and Parents' Life Insurance Act*, R.S.Q. 1925, c. 244. A discussion of the various permutations of this Act in the latter part of the 19th century, and a commentary on its policy of protecting the family, is provided in Rinfret J.'s decision in *Banque Canadienne Nationale v. Carette*, 1930 CanLII 49 (SCC), [1931] S.C.R. 33, at pp. 42-44.

32 Already in the 1930s, there was discontent with the state of insurance law in Quebec. In the introduction to his *Report on the Codification of Quebec Life Insurance Law* (1936), at pp. 1, 2 and 8-9, M. Versailles summed up the situation:

> The chief end and purpose of this report is to determine how the *lacunae* of Quebec Life Insurance law can be remedied by means of a codification of the principles and rules of law governing this particular subject.
>
> The Civil Code of Lower Canada, which was promulgated on August 1, 1866, contains but nine articles dealing exclusively with the subject of life insurance.

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The Codifiers, at page 258 of their Seventh Report, say: "It is remarkable how few legal points relating to this contract have been litigated or settled by judicial authority. The reported cases are not numerous and they seem to have arisen oftener upon questions of fact than of law. The chapter consists of nine articles which have been derived chiefly from the few decisions alluded to, and some of them are taken from the Draft of a civil code for New York."

This clearly shows the paucity of authorities on this subject when the Civil Code was enacted, and the juridical inadequacy of these few rules to cover the modern technical development of the life insurance contract.

In 1865, the Parliament of Canada passed an Act (29 Vict., ch. 17) entitled: "An act to secure to wives and children the benefit of assurance on the lives of their husbands and parents." This Act was evidently copied from some American statute. It is very superficial in character, containing but six sections or articles.

. . .

At present, in Quebec, we are in the anomalous position of having what I might call two different sets of rules governing the rights of beneficiaries under life insurance contracts.

If the beneficiary is the wife or child of the assured, the rights of such beneficiaries are governed by an Act passed in 1878. . . .

If the beneficiary is anyone but the wife or child of the assured, the rights of such beneficiaries are governed by the principles underlying Article 1029 CC. . . . [Emphasis added.]

Versailles recommended the repeal of the *Husbands' and Parents' Life Insurance Act* and of the then nine articles of the *Civil Code* that related to life insurance, and he suggested the adoption, with appropriate modifications, of a French code on the subject of life insurance law.

33 By the 1960s, a consensus had emerged in favour of a complete reordering of insurance law as treated by the *Civil Code*. See J. E. C. Brierley and R. A. Macdonald, eds., *Quebec Civil Law — An Introduction to Quebec Private Law* (1993), at para. 812; see also L. Plamondon, "Life Insurance in Quebec Since 1976: Some Points of Interest", in Meredith Memorial Lectures 1978, *The New Quebec Insurance Act* (1979), 69, at p. 69. As early as 1959, a draft law to replace the title on insurance of the *Civil Code* had been proposed. See Québec, Ministère des Institutions financières, Compagnies et Coopératives, Service des assurances, *Rapport Faribault* (1957-60).

34 In 1974, the legislature finally reacted to these calls for reform, and adopted the *Insurance Act*. The wide-ranging criticism of the pre-existing state of insurance law is a compelling factor militating in favour of a finding that the legislature intended its revision of the law to be comprehensive. Such a conclusion is bolstered by the scope and detail of the reform apparent from the enactment itself. The *Insurance Act* replaced entirely the title on insurance of the *Civil Code* and re-organized completely the regulation of insurance contracts, including life insurance contracts. Some 100 new articles were added to the *Civil Code*. Articles 2468-2500 constituted a general introductory chapter on insurance. Reversing the priorities of the Code of 1866, provisions governing insurance of persons, including life insurance, received prominent treatment as the next chapter of the title on insurance (arts. 2501-2561). The *Insurance Act* also revised the regulation of property, fire and liability insurance (arts. 2562-2605), and to a lesser extent, because of its highly developed and detailed nature in the original Code of 1866, the provisions regulating marine insurance (arts. 2606-2692). In addition to introducing these amendments to the *Civil Code* in a first part, the *Insurance Act* also contained, in a second part, over 400 provisions that modernized and codified the administration and regulation of insurance companies as business entities (now R.S.Q., c. A-32).

35 With the necessary caution required in using this material (see *Construction Gilles Paquette ltée v. Entreprises Végo ltée*, 1997 CanLII 352 (SCC), [1997] 2 S.C.R. 299, at para. 20; P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 364-67), I also draw attention to the legislative debates surrounding the adoption of Bill 7. These are of assistance in establishing the historical context within which the *Insurance Act* was passed, and show that the hypothesis of a legislative intention to enact a complete code on insurance law is not fanciful or far-fetched. On its second reading in the National Assembly, the Minister of Financial Institutions, Companies and Cooperatives, who sponsored the Bill, spoke generally about the proposed law:

[TRANSLATION] Bill 7 replaces the Insurance Act, the Husbands and Parents Life Insurance Act, the Diocesan Mutual Insurance Companies Act, the title on insurance in the Civil Code and the Claims Adjusters Act. It partially amends the provisions of the Civil Code with respect to marine insurance.

Mr. Speaker, the first part of the bill concerns the insurance contract. It deals with all of its aspects.

. . .

The contractual part of the current bill is based on the work of Marcel Faribault and the Honourable Judge Gérard Trudel, the law of Ontario, French insurance law, the work of the Civil Code Revision Office, submissions by various associations and works from a variety of other sources. [Emphasis added.]

(Assemblée nationale du Québec, *Journal des débats*, 2nd sess., 30th Leg., vol. 15, No. 82, November 19, 1974, at p. 2873.)

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1. Marcel Léger, Member of National Assembly for Lafontaine, contributed the following: [TRANSLATION] "If it is hardly an exaggeration to speak of a code one book of which will be in our statutes and the other in the Civil Code, it is no exaggeration either to speak of a modern code." (*Id.*, at p. 2875.)

36 The *Insurance Act* was therefore quite clearly intended to be a codification of insurance law in Quebec, in the sense given to the word by Côté in his text *The Interpretation of Legislation in Canada*, *supra*, at p. 43:

> Applied to an entire statute, "codification" indicates the incorporation in a single enactment of a series of legal rules relating to a given subject. Codifiers may draw on both existing statutes and the rules of the common law. The result is deemed to give a coherent and sometimes exhaustive picture of the law in a specific field. The *Bills of Exchange Act* [R.S.C. 1985, c. B-4], the *Criminal Code* [R.S.C. 1985, c. C-46], and the *Quebec Labour Code* [R.S.Q., c. C-27] are examples. [Emphasis added.]

In other words, the legislature turned its mind to every aspect of insurance law, and where the *Civil Code*'s general provisions were not adequate, crafted new provisions, all contained in the expanded title on insurance, to set out its new vision of the law.

37 The *Insurance Act* created an insurance code within the *Civil Code.* Each new provision, following the cardinal principle of interpretation of the *Code,* must also be read in the context of the *Civil Code* as a whole. See F. P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (1980), at p. 100; Brierley and Macdonald, *supra*, at para. 113. With this in mind, I now turn to consider the interpretation of arts. 2552 and 2554.

2. Articles 2552 and 2554

38 Articles 2552 and 2554 exempt from seizure the rights under only two classes of life insurance contracts, those with "privileged" or family beneficiaries and those with irrevocable beneficiary designations:

> **2552.** When the beneficiary of the insurance is the consort, descendant or ascendant of the policyholder or of the participant, the rights under the contract are exempt from seizure as long as the beneficiary has not received the sum insured.
>
> **2554.** The stipulation of irrevocable designation binds the owner even if the beneficiary has no knowledge of it.
>
> As long as the designation of a beneficiary as irrevocable subsists, the rights of the policyholder, the participant and the beneficiary are unseizable.

Given these provisions, should the rights under other types of life insurance contracts not declared exempt from seizure, such as the respondent's, also be exempt from seizure? In particular, should the right to surrender a policy be exempt from seizure under all life insurance contracts, whatever the particular relationships between policyholder, life insured and beneficiary therein? In my view, the provisions, considered as part of the *Insurance Act* reforms and within the context of the *Civil Code* as a whole, manifest a contrary legislative intention.

39 In undertaking its comprehensive reform of life insurance law, and determining what to exempt from seizure in arts. 2552 and 2554, the legislature must have had all elements of the life insurance contract in mind, including the right to surrender the contract for its cash surrender value. For a creditor, the most valuable right in his debtor's in-force life insurance policy is the right to surrender the policy for its cash surrender value. In this case, for example, that value amounted to $84,900. Indeed, it is the only right in an in-force life insurance policy that has the potential to create an immediate realization of value for the seizing creditor. At p. 251 of his treatise on life insurance law in Canada, Norwood discusses what other rights are available to a creditor if he cannot exercise the right to surrender the policy:

> The courts may make an order in favour of the creditor or appoint an equitable receiver to take any payment demanded by the insured from the insurer for **the insured** as and when the payment falls in, and this binds the insurer to turn over the payment which would otherwise flow into the hands of the debtor insured. In other words, if the insured later surrenders the policy or seeks the benefits of the policy, for example, in the form of eventually collecting annuity instalments, these proceeds have to flow to the creditor. [Bold in original; underlining added.]

In other words, if the exemption of "rights" in arts. 2552 and 2554 was not meant to protect the right to surrender the policy, the only remaining purpose of the articles would be to protect the debtor against a creditor who attaches the policy, and waits until the insured volunteers to surrender it or until some other payment eventually comes due. In my view, this would be an unreasonably restrictive reading of the provisions.

40 The legislature did not in any way restrict or qualify the use of the word "rights" in arts. 2552 and 2554. Moreover, art. 2501, in the same chapter of the *Code*, gives us important evidence of what "rights" the legislature had in mind in drafting the exemption provisions:

> **2501.** In addition to the particulars prescribed in article 2480, the policy of insurance of persons must, where such is the case, indicate:

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. . .

(*e*) the right of the owner to the surrender value or to advances on the policy; [Emphasis added.]

It is clear, therefore, that the legislature intended the provisions to protect from seizure all rights under those contracts that qualify, especially the right to surrender. At the same time, the legislature specifically stipulated that these rights were exempt from seizure only under the two described classes of policies. The natural conclusion, *a contrario*, is that the rights under all other policies, including the right to surrender for a cash surrender value, are seizable.

41 Any alternative interpretation of these articles empties them of much of their meaning. The respondent submits that arts. 2552 and 2554 simply supplement an underlying rule of unseizability for the right to surrender that exists for all policies under the general law, derived from art. 1031 of the *Civil Code*. If that were the case, however, the legislature's enactment of arts. 2552 and 2554 would in large part be redundant, given that the right to surrender, as we have seen, is the principal component of the life insurance contract that is being protected by these provisions. I prefer an interpretation which accords with the principle that the legislature does not speak for nothing. The legislature chose to protect two particular classes of policies from seizure because it perceived a significant threat to these, namely the threat that creditors, to whom the right to surrender a life insurance policy was otherwise generally available, could terminate a policy by exercising the right.

42 This interpretation is also suggested by the particularity of the language with which the legislature chose to express itself in arts. 2552 and 2554. Compared to art. 1031 for example, which is a general expression of the oblique action, arts. 2552 and 2554 are detailed and technical rules governing a particular feature of life insurance law. Article 1031 does not deal specifically with life insurance. Articles 2552 and 2554, on the other hand, describe in considerable detail the life insurance policies whose rights are exempt from seizure, and thereby set out, by necessary implication, those whose rights are not. This is an appropriate case in which to apply the maxim *generalia specialibus non derogant* and to give precedence to the particular rules of arts. 2552 and 2554 introduced by the *Insurance Act*. See *Lalonde v. Sun Life Assurance Co. of Canada*, 1992 CanLII 39 (SCC), [1992] 3 S.C.R. 261, at pp. 278-79. The legislature's decision to express itself in such detailed and specific language indicates an intention not to have the rules contained therein undermined by the application of more general provisions.

43 This textual analysis alone, however, is not determinative of the issue. Ultimately, whether to read the unseizability provisions as a code unto themselves, and as impliedly excluding other bases of exemption from seizure, depends on the coherence of the framework they would provide as such a code. In my view, the exhaustiveness of arts. 2552 and 2554 is supported by the larger themes running through the insurance law reform of the 1970s.

44 As is apparent from the legislative debates, the *Insurance Act* reforms were part of the larger movement to revise the *Civil Code*. Indeed, one of the sources for the *Insurance Act* was work done within the Civil Code Revision Office. See *Journal des débats*, *supra*, at p. 2873; Brierley and Macdonald, *supra*, at paras. 72-73, 75. It is therefore not surprising that the new insurance contract provisions, brought in by the *Insurance Act*, are rooted in the very themes championed by the revision of the *Civil Code*. These include consumer protection, the protection of the family unit, and the modernization of real security mechanisms over moveable property, giving a broader segment of society access to collateralized credit. See Civil Code Revision Office, *Report on the Québec Civil Code* (1978), vol. 1, at pp. xxix-xxxiii.

45 Consumer protection, while an overriding concern of the legislature in the reform of the insurance contract provisions of the *Civil Code* generally, plays no meaningful role in the interpretation of arts. 2552 and 2554. The legislative debates surrounding the adoption of the *Insurance Act*, on numerous occasions, attest to a concern for consumer protection, as does art. 2500, which makes many of the provisions governing life insurance contracts of public order, and others a minimum standard of conduct from which the parties to the insurance contract can derogate only "to the extent that it is more favourable to the policyholder or to the beneficiary". The exemption provisions, however, have little to do with consumer protection, since they involve not the relationship between the policyholder and the insurance company, but rather the relationship between the policyholder and his or her creditors.

46 Of greater significance for evaluating the coherence of the exemptions set out in arts. 2552 and 2554 are the competing considerations of family protection and financial flexibility and innovation. The exemption provisions are a manifestation of the legislature's desire to strike an appropriate balance between these policies.

47 Article 2552 continues the important policy of exempting from seizure the rights under life insurance contracts involving certain family relationships. This policy first appeared in Quebec in 1865, in the original version of the *Husbands and Parents Life Insurance Act* which prohibited seizure by creditors of the insurance money due to beneficiaries at the maturation of the policy. Nothing was said in the legislation about seizure pre-maturity. In *Carette*, *supra*, however, Rinfret J. ruled that creditors could not terminate or seize an in-force policy under the Act, since that would harm the rights of the family beneficiaries. After several minor amendments in 1869-70, the legislature in 1878 consolidated the law to secure to wives and children the benefit of life insurance. The earlier acts were repealed, and

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replaced by a lengthier statute of 29 articles (S.Q. 1878, 41-42 Vict., c. 13). Section 12 thereof introduced the notion of limited revocability: the benefit of the insurance policy to a family beneficiary could only be revoked in favour of another permitted beneficiary. Section 26 introduced broad protection for these insurance policies from creditors: it provided that the policies "shall be exempt from attachment for debts due either by the insured or by the persons benefited, and shall be unassignable by either of such parties". Such exemption did not apply, however, to any policy whose benefit reverted to and was held by the insured. The Act was amended several times thereafter, with no consequence to the exemption provision (except that it became s. 30, R.S.Q. 1964, c. 296). In *Carette*, *supra*, at p. 42, Rinfret J. noted that the policy of this special law, through its various permutations, was the protection of family beneficiaries. I underlined the importance of this policy in the bankruptcy context, in *Royal Bank*, *supra*, at par. 17, in that case implemented through s. 158(2) of the *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26:

> [T]he policy of exempting life insurance investments and policies from execution or seizure under the [*Bankruptcy and Insolvency Act*], where family members are designated as beneficiaries, is sound. Given the importance of insurance in providing for the welfare of dependents upon the death of the insured, an insurance policy may be characterized as a necessity.

48 Articles 2552 and 2554 in one sense broadened the protection of family in the life insurance context. Article 2552 broadened the class of relationships attracting protection from seizure for insurance contracts from wives and children under the *Husbands and Parents Life Insurance Act* to consorts, descendants and ascendants. Moreover, to the extent that the policyholder now wanted to protect a beneficiary that fell outside of the traditional family unit, art. 2554 now allowed him or her to do so by simply designating that person as an irrevocable beneficiary.

49 The *Insurance Act* revisions also weakened the protection of family in the insurance context. For example, while the designation of a family beneficiary was essentially irrevocable under s. 12 of the *Husbands and Parents Life Insurance Act*, under art. 2547 of the *Civil Code*, introduced by the *Insurance Act*, only the designation of a spouse is presumed irrevocable, and the policyholder can defeat the presumption by contrary stipulation. In *Lalonde*, *supra*, at p. 277, I noted that "art. 2547 . . . reflects an intention on the part of the legislature to make protection of the family property less strict".

50 In my view, arts. 2552 and 2554 demonstrate a careful balancing of the relevant considerations. Protection was accorded, but carefully circumscribed, to certain family beneficiaries, and to irrevocable beneficiaries. Underpinning these limits on protection of the family in arts. 2552 and 2554 was the legislature's desire to maximize the financial utility of insurance policies in the hands of their owners, illustrative of another broad policy pursued by the legislature in the revision of the *Civil Code*, namely the creation of a legal context within which individuals would better be able to use their moveable assets to secure credit.

51 This policy is evident in the new *Civil Code of Quebec*, S.Q. 1991, c. 64, which contains a general regime of hypothecs on moveable property (arts. 2696-2714 *C.C.Q.*). It is also evident in the insurance provisions introduced by the *Insurance Act* in 1974. As a result of the insurance reforms, a policyholder can now assign and pledge his or her rights under an insurance contract, even where the beneficiary has been designated irrevocably (arts. 2556-2558 *C.C.L.C.*; now arts. 2460-2462 *C.C.Q.*). Moreover, the assignment of insurance entails the revocation of the revocable designation of the beneficiary (art. 2558 *C.C.L.C.*; now art. 2462 *C.C.Q.*). See L. Plamondon, "Des bénéficiaires et des propriétaires subrogés en assurance sur la vie", in Meredith Memorial Lectures 1978, *The New Quebec Insurance Act*, *supra*, 115, at pp. 134-36. This is a significant change from the pre-existing law. Under the *Husbands and Parents Life Insurance Act*, s. 30, assignment of a family life insurance policy required agreement between the insured and the beneficiaries.

52 Against this background, it defies common sense to assume that the legislator wished to remain silent, in its exemption provisions, on the most important value of a life insurance policy for creditors – the cash surrender value. On the contrary, given the legislator's policy of making rights under insurance contracts more available to creditors as part of the policyholder's collateral, the most reasonable conclusion is that the cash surrender value of the insurance contract was exactly what the legislature had in mind when determining, in arts. 2552 and 2554, which policies should be exempt, and which should not be. The legislature, in carrying out its reform, would most certainly have wanted to address the very feature of the pre-existing law that hindered its policy, namely the tendency of the law to protect the cash surrender value from creditors. Why would a creditor want a policy as collateral if he could not exercise its principal value? It makes much more sense to conclude that the legislator wanted this value to be available to creditors, unless the policies themselves were exempt.

53 For these reasons, therefore, I conclude that the legislature intended arts. 2552 and 2554 to be a comprehensive and exclusive set of rules governing the seizability of rights under life insurance contracts.

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D. *Application to This Case*

54 In this case, the respondent's policy fails to qualify for either exemption. For a policy to be exempt from seizure under art. 2552, the beneficiary must be the consort (or descendant/ascendant) of the policyholder. Here, the beneficiary is the consort not of the policyholder, but of the life insured (the individual whose life is insured). Nor does the respondent qualify for the exemption provided in art. 2554. She did not designate herself the irrevocable beneficiary of her own policy.

55 The respondent sought to impress upon this Court the relevance of the fact that she was the beneficiary of a policy insuring her husband's life. While she, as beneficiary, was not the consort of the policyholder, and therefore did not strictly meet the requirements of art. 2552, she was the consort of the life insured. The respondent argued that her policy was therefore of the same familial nature as those described by art. 2552 and merited similar protection from seizure.

56 This argument cannot succeed. The Quebec legislature maintained the unseizable class of family life insurance policies defined *vis-à-vis* the beneficiary's relationship to the policyholder, not the life insured. This is historically based in the *Husbands and Parents Life Insurance Act*, which defined the category of protected policies *vis-à-vis* the family of the policyholder, who was also always the life insured. This is noted by Norwood at pp. 249-50, who contrasts Quebec's statutory exemptions with those provided under the *Uniform Life Insurance Act* of the common law provinces:

> Protected family beneficiaries, under the Uniform Act encompass the spouse, child, grandchild or parent of the **life insured**. Family beneficiaries under the *Civil Code* encompass the spouse, descendant or ascendant of the **insured**. The distinction between the common law provinces and Quebec is historical in that the original Uniform Act statutory trust extended to all policies, so that the common denominator was the life insured, whereas Quebec's *Husbands' and Parents' Life Insurance Act* was applicable only to personal policies owned by the insured on the insured's own life, so that the protection rested upon the relationship between the policyholder and the beneficiary. [Emphasis in original.]

This Court cannot undo the Quebec legislature's express choices and adopt the policy of the common law provinces, only because it is convenient to do so in a particular case. This is something to be left for the consideration of the legislature itself.

E. *Disposition*

57 In conclusion, having regard to their language, their legislative history and their discernible policy justification, I believe that in arts. 2552 and 2554 the Quebec legislature has enacted a comprehensive and exclusive code regarding the unseizability of life insurance contracts, intended by the legislature to supersede more general rules provided elsewhere in the *Civil Code* or existing in the jurisprudence. This exclusive provincial code of unseizability meshes with s. 67(1)(*b*) of the *Bankruptcy Act*. Because the respondent's policy does not qualify under either of the only available exemptions, the trustee is entitled to seize the policy and exercise the surrender right to obtain its cash surrender value. The appeal is therefore allowed, the judgment of the Court of Appeal is set aside and the judgment of the Superior Court dismissing the respondent's motion is affirmed, with costs to the appellant in all courts.

Appeal allowed with costs.

Solicitors for the appellant: Brochet Dussault Larochelle, Sainte-Foy.

Solicitors for the respondent: Gervais & Gervais, Montréal.

Re Piraux (Bankrupt), 2006 ABQB 409 (CanLII) - Problems with Appraisal values to Access Prov. Exempt Property Status

Date:	2006-06-05
Docket:	25 084844; 25 084845
Parallel citations:	398 AR 66; 23 CBR (5th) 247; 61 Alta LR (4th) 128
URL:	http://canlii.ca/t/1nl6c
Citation:	Re Piraux (Bankrupt), 2006 ABQB 409 (CanLII), <http://canlii.ca/t/1nl6c> retrieved on 2013-09-15
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Court of Queen's Bench of Alberta

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Citation: Re Piraux (Bankrupt), 2006 ABQB 409

Date: 20060605
Docket: 25 084844; 25 084845
Registry: Calgary

In the Matter of the Bankruptcy of
Timothy Allen Piraux
And in the Matter of the Bankruptcy of
Glenda Lynn Piraux

Reasons for Judgment
of the
Honourable Mr. Justice S.J. LoVecchio

Introduction

[1] The Applicants Timothy Allen Piraux and Glenda Lynn Piraux are husband and wife. They made individual assignments in bankruptcy on January 31, 2003 appointing the Respondent Cameron Okolita Inc. as Trustee in Bankruptcy for each of their estates. They are both first-time bankrupts and there are no inspectors in the estates.[1]

[2] Among their assets was their residence located in northeast Calgary which they own as joint tenants. On their statement of affairs, the Applicants estimated the value of the residence at $165,000. They claimed the entire asset as exempt. Their justification for so doing is straight forward.

[3] First, they stated that approximately $130,000 was owing on a first and second mortgage, leaving them with equity of only $35,000. As this amount was below the $40,000 exemption amount prescribed in the *Civil Enforcement Regulation*, the property was considered to be exempt.[2]

[4] The encumbrances on the residence, in fact, totaled only approximately $128,000; but that is not the real problem. The Respondent was not satisfied with the Applicants' estimate of the value of the property and wanted it appraised. The Respondent did not specify a particular effective date for the valuation. The Applicants obtained an appraisal of their residence, which valued the property at $193,000 as at August 7, 2003.

[5] Needless to say, acceptance of this value by the Respondent and the Applicants might have created some residual value in the property for creditors as there might be $65,000 in net equity (193,000 - 128,000) being $25,000 in non-exempt equity (65,000 - 40,000). I say might because, as will be seen below, the date the property is valued (when we have a volatile real estate market) is critical to that determination.

[6] Unsatisfied with the $193,000 valuation and believing the appropriate effective date for the appraisal should have been January 31, 2003 (the date of their assignment in bankruptcy), the Applicants requested a further appraisal to value the property as at January 2003. The second appraisal valued the property at $185,000 as at January 15, 2003.

[7] This value might also have given rise to some residual value to the creditors. If the value of $185,000 were accepted, the net equity of the Applicants would be approximately $57,000, leaving $17,000 in non-exempt equity for creditors (57,000 - 40,000).

[8] In 2004, the Applicants obtained a further appraisal which valued the property at $180,000 as at January 14, 2004. This appraisal would also suggest there may be a small amount of residual value for the creditors – in this case $12,000.

[9] The Applicants suggest that the Respondent should, as a practical matter, treat the property as totally exempt even though in strict numbers there may be $25,000, $17,000 or perhaps $12,000 in equity for the creditors. Again, the justification for so doing is straight forward.

[10] The Applicants submit that, by the time real estate commissions, legal fees and any other expenses associated with a sale are paid, the excess value will be eroded such that there will be effectively no residual amount left for distribution to the creditors.

[11] The values assigned to the property in the various appraisals was not raised as an issue.

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The Issue

[12] What is in issue are two divergent interpretations of the law respecting which party receives the benefit, or bears the burden, of a fluctuating marketplace in respect of limited exemption assets in a bankruptcy.

[13] To answer that question, this Court must examine at what point in time in the bankruptcy should the value be set for the bankrupts' residence. Based on the arguments made, only two possible points in time need to be discussed. They are the date of the assignment in bankruptcy or an essentially moving target, being the date the property is effectively dealt with by the Trustee.

Discussion and Analysis

[14] When an insolvent person becomes bankrupt, all of their property is vested in a trustee.[3] The trustee then administers the estate, which includes the realization and distribution of proceeds of the bankrupt's property to creditors.

[15] The *Bankruptcy and Insolvency Act* also provides that, notwithstanding this vesting of the property of a bankrupt with a trustee, certain property of a bankrupt will not be available for division and distribution among their creditors.

[16] More specifically, Section 67(1)(b) states that "any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides . . ." is not available.

[17] In the case of Alberta, the applicable exemption is found in Section 88 of *Civil Enforcement Act*.[4] It provides in subsection (g) that "the principal residence of an enforcement debtor, including a residence that is a mobile home, *up to the value prescribed* by the regulations for that residence . . ." is exempt. [Emphasis added.]

[18] As already noted the amount prescribed by regulation is up to $40,000.

[19] What is important to note is that it is not the principal residence of a bankrupt that is exempt, but rather up to $40,000 of the value attributable to that property.

[20] There are several distinct phases of a bankruptcy; the first two are of import in this analysis. The first is the vesting phase triggered by the assignment. The second is the administration phase, during which a trustee determines which property will be realized and divided among creditors. It is during this second phase when exemptions and property values become important as they will ultimately dictate the source and the value of the fund from which a bankrupt's creditors will be paid.

[21] During this phase, a trustee must examine the value of the principal residence and determine whether or not the proceeds from a sale of the residence will exceed the aggregate of any amounts payable to any creditors secured by the property, the $40,000 exemption and any expenses of the sale.

[22] If it is clear the proceeds will exceed such amounts, then it is very likely a sale will occur; if it is clear they will not, then it is unlikely a sale will occur and in such a case the property would simply be returned to the bankrupt.

[23] There is a grey area in which the excess of the value over the secured creditor claims and the exemption amount approximates the projected expenses of sale. In such circumstances, I would be of the view that a trustee should simply be practical. That is, make a deal with the bankrupt, whereby the projected expenses of sale that are saved are taken into account in an equitable fashion in a return of the property to the bankrupt. There would be no prejudice to creditors, as they would be better off in that they would be receiving at least part of the amounts otherwise payable as expenses of sale, and they are the group the Trustee is trying to protect. In so saying, I am cognizant of the fact that in a negotiation between a bankrupt and a trustee, the field is not divided exactly in half.

[24] What we cannot lose sight of at this point are two things: first, the trustee is vested with the property; and second, the decision whether or not to proceed with a sale, return the property entirely to the bankrupt or negotiate with the bankrupt about a return of the property will depend upon a trustee's assessment of its potential sale value. Obviously, in a fluctuating marketplace, the point in time at which the property is valued – bankruptcy or a later point before discharge – will be of principal importance in deciding which avenue to follow.

What Date Should Control This Value?

[25] Four possible values for the property at various effective dates were part of the evidence in this case. They were:

(a) $165,000 – estimated by the bankrupts as at January 31, 2003, the date of their assignment into bankruptcy;
(b) $185,000 – an appraised value as at January 15, 2003;
(c) $193,000 – an appraised value as at August 7, 2003; and
(d) $180,000 – an appraised value as at January 14, 2004.

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[26] The Applicants argue that the date at which the property should be valued is the date of bankruptcy – January 31, 2003. They submit that this approach provides a fixed point at which all of the variables will be either known or capable of estimation and will not be changing. With this certainty, the bankrupts may then bargain with the trustee for the non-exempt equity in their home, knowing the landscape will not change.

[27] The Respondent argues it is the point in time at which the property is effectively dealt with that should control the determination of its value.

[28] If I were to adopt the Applicants' submissions and value the property as at the date of bankruptcy, two of the aforementioned values might apply: $165,000 or $185,000. The $165,000 valuation was the Applicants' estimate and the $185,000 was from a third party appraiser. In the circumstances, I would select the $185,000 appraised amount as at January 15, 2003 as the best evidence of value as at the date of bankruptcy and on that basis there would be $17,000 (less any projected expenses of sale) in non-exempt equity available for creditors.

[29] Now if the bankrupt had negotiated a purchase of the non-exempt equity in the property any rise or fall in the value of the property after the date of the bankruptcy would have the economic effect of either increasing or decreasing the value to the bankrupt of the $40,000 exemption. The Applicants' counsel conceded this point in oral argument before this Court. Counsel also suggested that, by approaching the problem in this fashion, the Trustee would have no economic incentive to delay dealing with the bankrupt in a rising market such as we are experiencing in Calgary at the present time. That is true. However, in a declining market the Trustee may have no economic incentive to act as the economic consequences of delay would come out of the bankrupts exemption.

[30] On the other hand, if the Respondent's submission is correct, and the property is to be valued at the date it is effectively dealt with, then any increase or decrease in value during the administration of the bankruptcy would be reflected in the amount potentially available to the creditors as the exemption amount would remain constant. Here again, depending on which direction the market is moving there may or may not be an economic incentive to move.

[31] That being said, being a trustee is a statutory function and they are officers of the Court. As such, they must act responsibly and in an even handed fashion and I doubt speculating on the movement of real estate prices to gain a few dollars one way or the other should be a part of the job description. They should simply act expeditiously to settle the estate so the creditors may be paid and the bankrupts may get on with their lives.

[32] The Applicants have referred me to a number of authorities which they suggest support their position.

[33] In *Re Prior*,[5] a creditor objected to the bankrupts' discharge on the basis that the bankrupts' residence had appreciated in value during bankruptcy, and argued that a conditional order should issue requiring the bankrupts to pay the value of the increase into the estate. The Court in *Re Prior* determined that, in the circumstances, it was acceptable for the trustee to value the property at the date of bankruptcy in order to determine the exemptions.

[34] While at first blush this case would seem to be directly on point, it is important to note that *Re Prior* was a discharge application. Such applications are governed by Sections 172 and 173 of the *Bankruptcy and Insolvency Act.* As a result, the Court's decision in *Re Prior* would have turned on whether any of the facts in Section 173 were proven.

[35] The Court held that the increase in value of the residence was not large enough to diminish the integrity of the bankruptcy process and accordingly declined to take into account the increase in value between the date of bankruptcy and the date of discharge in the discharge application.[6]

[36] The Applicants also referred to the case of *Re Gruber*.[7] In that case, the Court dealt with a situation where the bankrupts voluntarily sold their exempt residence in the face of a foreclosure by a mortgagee. The trustee in that case sought advice and directions from the Court as to whether the proceeds of the residence were also exempt.

[37] Justice Forsyth found that the proceeds were exempt because assets that are exempt at the date of bankruptcy remain exempt, even if they are converted into otherwise non-exempt types of assets.[8] With respect, I do not think this case is helpful to the position of the Applicants; I would similarly suggest it is also not harmful. It really deals with a different issue – the notion that the Court would make an effort to preserve the substance of an exemption Parliament and the Legislature have seen fit to create is one I have little difficulty in supporting. No one is attempting to take away the exemption of the Applicants in this case.

[38] The Applicants also referred to the case of *Re Firestone*.[9] In that case, the Registrar held that a trustee was bound by an early disclaimer of the trustee's interest in the bankrupt's principal residence, notwithstanding a substantial increase in the property's value during the bankruptcy. Registrar Waller further opined in *obiter dicta* that if a principal residence is not subject to sale at the date of bankruptcy because of its value, then any increase in the value of the property during bankruptcy should accrue to the bankrupt. He acknowledged that his opinion differed from others in this Court and indeed other Registrars.

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[39] Finally, the Applicants referred to the case of *Re Dodyk*.[10] In that case, Registrar Waller was asked to approve a settlement agreement whereby the bankrupts would purchase the non-exempt equity in their residence from the trustee. Registrar Waller found a conflict between *Gazelle* (a case I will discuss below) and *Gruber* because he had "difficulty reconciling Justice Burrows' interpretation of *Gruber* [in *Gazelle*] with Justice Forsyth's concluding paragraph" in *Gruber*. In view of the apparent conflict, Registrar Waller determined that the compromise between the bankrupt and the trustee was appropriate to avoid the cost of litigating the issue.[11]

[40] The Respondent relies primarily on the decision of my brother Justice Burrows in *ICI Paints v. Gazelle*.[12]

[41] In *Gazelle*, the applicant had obtained permission under Section 38 of the *Bankruptcy and Insolvency Act* to commence a fraudulent preference action against the bankrupt relating to the transfer of the bankrupt's interest in his residence. While the trustee had determined at the date of bankruptcy that the residence would have been exempt and as a result took no interest in it, the value of the residence increased substantially during the 15 months after the assignment in bankruptcy.

[42] Justice Burrows reviewed the existing authorities. He explained in his decision that the *Gruber* line of authority stands for the principle that the conversion of exempt assets after bankruptcy into a non-exempt asset does not change the exemption available to the bankrupt. He noted, however, that the character of the property was not the issue – the value of the exemption was.[13] The Court ultimately held in *Gazelle* that the increase in value of the property during bankruptcy was non-exempt equity, which properly belonged to the trustee for the benefit of creditors.

[43] The Respondent also referred me to the case of *Re Kabaachi*.[14] In that case, Registrar Alberstat held that the increase in value of a principal residence beyond the $40,000 prescribed exemption belonged to the estate, not the bankrupt. He called the appreciation and the result that the property be sold "bad luck for the bankrupt."[15] As the Registrar noted, it would be unfair to hold that the creditors should go without a dividend while the bankrupt effectively would receive a windfall from the appreciation of his property. After all, it was the creditors who supported the bankrupt's lifestyle and essentially funded the acquisition of the property in the first place.[16]

[44] In my view, Justice Burrows and Registrar Alberstat have it right. The date of bankruptcy should not govern but rather the point at which the property is effectively dealt with should govern its proper valuation. This removes any market risk that might erode the economic value of the exemption and ensures the bankrupt has a certain amount with which to make a fresh start which is precisely the rationale for the exemption in the first place.

[45] This principle is not in conflict with the authorities noted such as *Re Prior*, *Re Gruber*, *Re Dodyk* and others.

[46] More specifically: when a principal residence vests in a trustee upon an assignment, the exemption remains unchanged during the second phase of the bankruptcy, even if the original property is converted (*Re Gruber*); it may be equitable to permit a bankrupt to retain the principal residence if its value is later found to exceed the exemption by a relatively insignificant amount as it were at the discharge phase (*Re Prior*); if a trustee has disclaimed his interest in the property based upon a determination of its value at the date of bankruptcy, the trustee should, as a matter of equity, be bound by that disclaimer even if the property increases in value (*Re Firestone*); and similarly, where an appropriate date for valuation is uncertain, a trustee may make a business decision to fix a value and reach a settlement with the bankrupt to achieve certainty for the creditors (*Re Dodyk*).

Conclusion on the Issue

[47] As I said, because the Legislature has determined that $40,000 in the value of the principal residence of the bankrupts is to remain with the bankrupts, it follows that the creditors, not the bankrupts, should effectively bear the burden of a declining market in a bankruptcy. By the same token, the creditors should receive the obvious benefit of a rising market as they have carried the risk for a declining market.

[48] The only way to preserve this result is to value the property at the date it is dealt with by the trustee. This approach strikes the necessary balance in that it preserves the statutory right of the bankrupts to a fixed sum with which to make a fresh start, while preserving the integrity of the bankruptcy system in maximizing the return for creditors.

[49] I am not insensitive to the fact that this decision will have the consequence in a rising market, such as we are currently experiencing, of requiring bankrupts possibly to purchase the non-exempt equity from their trustees when, at the date of their bankruptcies, there may not have been any such equity.

[50] I am also sensitive to the apparent inadequacy in the current housing market of a $40,000 exemption for the purpose of replacing a home and I note from an excerpt of the *Holthuysen* decision, quoted in *Re MacKay*, that the $40,000.00 exemption came into force in 1984.[17]

[51] A generation later, the $40,000 maximum might well be past its best before date. However, that is a matter for the Legislature not the Courts.

Disposition

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[52] The Notice of Motion seeks a declaration as to the amount, if any, that should be properly paid by the Applicants in respect of the non-exempt equity in their residence. The evidence of whether there was a deal between the Applicants and the Respondent is in dispute. There is also conflicting evidence of value. This application is not the proper forum to weigh and determine the conflicting evidence. Therefore, I should not in this application make a final determination of the proper amount to be paid to the Respondent, if any.

[53] However, in this case a lot of water has passed under the bridge since the Applicants were discharged (with this item left for another day) and real estate values in Calgary are going out of sight. In these circumstances, using the average value of the three appraisals that were in evidence and making some adjustment for the projected expenses of sale may give something to everyone, which in this case may not be a bad result and may well avoid the cost of additional court applications for all concerned.

Costs

[54] The matter of costs was not really argued at the hearing of this matter. If the parties cannot agree as to their disposition, they may be spoken to within 30 days from the date of these reasons.

Heard on the 8th day of March, 2006.

Dated at the City of Calgary, Alberta this 5th day of June, 2006.

S.J. LoVecchio
J.C.Q.B.A.

Appearances:

Terry L. Czechowskyj
for the Bankrupts

Brian W. Summers
for the Trustee in Bankruptcy

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[1]While I may occasionally refer to Mr. Piraux and Ms. Piraux in these reasons as "the bankrupts," it should be noted that the Registrar in Bankruptcy granted them an absolute discharge in November 2005: *Re Piraux (Bankrupt)*, 2005 ABQB 925 (CanLII), 17 C.B.R. (5th) 217, 2005 ABQB 925 (Registrar).

[2]Alta. Reg. 276/95, s. 37(1)(e).

[3]*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, s. 71(2).

[4]R.S.A. 2000, c. C-15.

[5]2003 BCSC 1475 (CanLII), 47 C.B.R. (4th) 129, 2003 BCSC 1475 (Master).

[6]*Ibid.*, at paras. 6-9.

[7]143 A.R. 301, 11 Alta. L.R. (3d) 342 (Q.B.).

[8]*Ibid.*, at para 23.

[9]2003 ABQB 417 (CanLII), 14 Alta. L.R. (4th) 194, 2003 ABQB 417 (Registrar).

[10]290 A.R. 362, 2001 ABQB 573 (CanLII), 2001 ABQB 573 (Registrar), at para. 7.

[11]*Ibid.*, at para. 11; see *Gazelle*, *infra*, note 12; and *Gruber*, *supra*, note 7.

[12] 343 A.R. 1, 2001 ABQB 233 (CanLII), 2001 ABQB 233.

[13]*Ibid.*, at para. 13.

[14]343 A.R. 5, 2003 ABQB 753 (Registrar).

[15]*Ibid.*, at para. 25.

[16]*Ibid.*, at para. 24.

[17]*Re MacKay*, 318 A.R. 315, 2002 ABQB 598 (CanLII), 2002 ABQB 598 (Registrar), at para. 41.

Board of Review for Manitoba v. The Trust and Loan Co. of Canada / In re McEwen, [1941] SCR 542 - Attempt to Obtain Clear Title Through Devise of Mortgaged Land Held an Abuse

Date: 1941-06-24

Parallel citations: 1941 CanLII 54 (SCC)

URL: http://canlii.ca/t/fsmv7

Citation: Board of Review for Manitoba v. The Trust and Loan Co. of Canada / In re McEwen,

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Supreme Court of Canada

Board of Review for Manitoba v. The Trust and Loan Co. of Canada / In re McEwen, [1941] S.C.R. 542

Date: 1941-06-24

In The Matter of The Farmers' Creditors Arrangement Act, 1934, and Amendments Thereto
and
In Re Jane McEwen
and
The Chief Commissioner and The Commissioners of The Board of Review for Manitoba and Others Appellants;
and
The Trust and Loan Company of Canada Respondent.

1941: April 28, 29, 30; 1941: June 24.

Present: Duff C.J. and Rinfret, Crocket, Davis and Hudson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Debtor and Creditor—Farmers' Creditors Arrangement Act (Bom.) 1934—Jurisdiction of Board of Review to entertain proposal—Party making proposal under the Act—Whether a "debtor"—Whether respondent is a "secured creditor"—Absence of privity—Grounds against proposal raised by way of certiorari—Jurisdiction of the Court of Appeals-Illegal transfer of property in order to bring it within reach of machinery of the Act—Abuse of statutory procedure—Certiorarir—Applicability to Board of Review—Board's confirmation of proposal quashed—Devisee of mortgaged land obtaining title after May, 1935—Effect of section 19 of the Act—When a debt is "incurred" in the sense of that section—Whether creditor should not have raised grounds against proposal before County Court—Farmers' Creditors Arrangement Act (Dom.) 1934—Section 2 (2); section 2 (d) as amended by c. 47 of 1938; sections 5, 7, 12(5) (6) and section 19 as enacted by amending statute of 1938.

In September, 1919, one John McEwen borrowed $4,000 from the respondent and executed a mortgage upon his land in favour of the latter. He died on August 26th, 1934. His will appointed his wife, Jane, executrix and devised all his real and personal estate to her. The will was admitted to probate on August 13th, 1935. At the time of John McE.'s death, the whole of the mortgage debt was owing to the respondent, as well as a large sum for accumulated interest. The respondent, acting under the powers contained in its mortgage, leased the land to Robert J. McE. for terms from November, 1934, to November, 1936, and the widow continued to live on the farm until her death in 1940. In July, 1936, a proposal under the *Farmers' Creditors Arrangement Act, 1934,* was filed by the latter, in her personal capacity and not as executrix, with the Official Receiver, the only debts disclosed being the amount due to the respondent under its mortgage and a sum of $170 for taxes. Actually, Jane McE. had never assumed payment of the mortgage debt or interest, nor had she in any way obligated herself to the respondent. At the time of filing her proposal, the certificate of title to the land was held by the widow, not as owner but only as executrix. In October, 1936, she, as personal representative, purported to transfer the land to herself personally for an expressed consideration of $1, and a certificate of title was issued to her; but the estate had not yet been fully administered. Immediately upon receipt of notice of the proposal and again in November, 1936, the respondent advised the Official Receiver that it had no claim against Jane McE. and that she was not entitled to the benefit of the Act; and later, in March, 1937, the respondent's solicitors wrote to the Registrar of the Board of Review asserting lack of jurisdiction on the part of the Board. The Board of Review, in October, 1937, formulated its proposal, reducing the amount of the respondent's mortgage, and confirmed it in October, 1938. The respondent, in October, 1939, on its behalf as well as on behalf of all the creditors of the deceased, brought an action against the widow, both as executrix and in her own right, to have her required to administer the estate, to have the transfer of the land to herself as owner set aside and to have the land sold to discharge the respondent's debt. The Board's proposal was pleaded as a bar to the action, such proposal having allegedly operated to extinguish the liability of the estate. Jane McE. died in March, 1940, and probate of her will was granted to the appellants, Robert J. McE. and Edith McE. who obtained registration of the land in their names as personal representatives. On June 19th, 1940, they transferred the land to themselves in their personal capacities, and, on the same day, they both joined in a transfer to Robert J. McE. who became the registered owner. The respondent, in September, 1940, launched before the Court of Appeal for Manitoba an application for *certiorari* in order to bring the proposal before that Court and have it quashed. The Court of Appeal ordered the issue of

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the writ and later on made an order declaring the proposal to be beyond the powers of the Board of Review and directing that it be quashed.

Held, Davis J. dissenting, that the judgment of the Court of Appeal (reflex, [1941] 1 W.W.R. 129) should be affirmed.

Per the Chief Justice: Upon the admitted facts of this case, the land in question, before the transfer of it to herself in October, 1936, was not the property of Jane McE. in the sense of the *Farmers' Creditors Arrangement Act*. Being beneficially entitled to the residue of her husband's estate, she was entitled to have the land, subject to the rights of the mortgagee, applied in payment of the debts of the estate; and as legal personal representative, it was her duty to see that this was done. As the estate was admittedly insolvent, she had no interest in the land which could lawfully be made available to satisfy her personal debts if she had any. Under such circumstances she could not properly transfer the land to herself. The purpose of such transfer was evidently prompted by the supposition that it might enable her to bring the land and the mortgage debt within reach of the machinery of the Act. With such facts before them, the Board of Review ought to have declined to act on the proposal made by Jane McE. on the ground that they were confronted by a manifest abuse of the statutory procedure; and, if the question had been raised by an application to the Court, it must inevitably have been held that by such devices the creditors of the estate could not be deprived of their rights.—Moreover, even assuming that, the title to the farm being vested in Jane McE. in virtue of the certificate of title or of the transfer to her in October, 1936, it was her property in the sense of the *Farmers' Creditors Arrangement Act, 1934,* and that the mortgage debt could be deemed to be her debt for the purposes of the Act, the amendments of 1938 to that Act which, it was contended, brought her into privity of contract with the mortgagee, had no application, for the reason that section 19 of that Act, added thereto by statute of 1935, c. 20, provides that the "Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after May 1, 1935": the essential condition being that the property affected by the security shall have been the property of the debtor in the sense of the amending statute, consequently, the mortgage debt in this case never became (constructively) the debt of Jane McE. until long after that date.—A "debt" (if it be a mortgage debt) cannot be "incurred" in the sense of section 19 before the property or interest on which it is charged has become the "property" of the debtor within the contemplation of section 2 (*d*) of the statute.

Per Rinfret, Crocket and Hudson JJ.—Under the circumstances of the case, Jane McE. was not entitled to file a proposal under *The Farmers' Creditors Arrangement Act,* for the reasons that she was not the owner of the land and that there was no privity of contract between her and the respondent company. She was in no way the "debtor" of the respondent within the requirements of the Act, even after the introduction of the amendment of 1938 to section 2(*d*). The only debt appearing in the proposal formulated by the Board of Review was the respondent's mortgage account; that was not her debt, so much so that the respondent could not have sued her for it; it was not a "debt provable in bankruptcy" against her, or against her estate in bankruptcy: the sole object of the procedure being to obtain a reduction on the debt owing to the respondent by the estate. Therefore, under the circumstances of this case, the Board of Review had no jurisdiction to deal with the respondent's mortgage debt and more particularly to reduce the rate of interest on that mortgage; and the Board could not, consistently with the provisions of the Act, deal with Jane McE.'s request, or formulate a proposal, in complete disregard of the position and interest of the respondent.—Also, the provisions of section 2 (*d*) of the Act, as amended by c. 47 of 1938, defining the word "creditor" did not confer any greater jurisdiction upon the Board in the present case; the object of the amended definition has apparently enlarged the class of "creditors", but did not alter the status of the "debtor".—Moreover, section 19 of the Act, above referred to, finds application in this case: "the debt incurred," referred to in that section, is necessarily a debt personally incurred by an applicant and does not concern a debt which, though at present owing by the applicant farmer towards the creditor, had been incurred by a previous debtor (who may not have been a farmer) and at a date prior to the first day of May, 1935, as it is in the present case.—Therefore the proposals formulated by the Board of Review were made without authority and jurisdiction and were invalid. It should also be *held* that the Court of Appeal had power to deal with the matter in controversy in this case on an application for *certiorari* by the respondent; that the preliminary questions raised by the respondent were of such a nature that, in an ordinary case, they would properly give rise to an inquiry on *certiorari* by a superior court and that, for the purposes of that inquiry, the facts bearing on the question of jurisdiction could be put before that Court by means of affidavits.

Per Davis J. dissenting—In view of all the facts and circumstances of this case, on one hand, the conduct of the respondent throughout has been such as to disentitle it to relief in *certiorari* proceedings and, on the other hand, allowance of the appeal would put the appellants the Board of Review, the Registrar, the executors of Mrs. Jane McE. and her son R. J. McE. to the burden of excessive and unnecessary costs of litigation.—The effect of the lodging by Mrs. Jane McE. with the Official Receiver of a composition, extension or scheme of arrangement, on July 31st, 1936, was to put the subject-matter of the proposal into the exclusive jurisdiction, subject to appeal, of the County Court of Dauphin, which was the judicial district where Mrs. McE. resided and the farm was located; such district being designated by section 5 (1) of *The Farmers' Creditors Arrangement Act*. And the Act moreover gave to the Board of Review a right to work out a

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proposal which might involve secured creditors, even in the absence of their concurrence. Although the respondent had the right at its own risk to deliberately ignore the proceedings under the Act, on the alleged grounds that Mrs. Jane McE. was not its debtor and that it was not a secured creditor, a very convenient and speedy remedy was available to the respondent when it got notice of Mrs. Jane McE.'s application with the Official Receiver, by moving at once in the County Court to have the proposal set aside upon any of the grounds alleged by the respondent in its present proceeding by way of *certiorari*. The county judge would have certainly entertained any such application and would have dealt with the matter at the time in a speedy and inexpensive manner; and, moreover, a statutory right to appeal from any decision so rendered would have been available to the respondent.

APPEAL, by leave of appeal granted by the Court of Appeal for Manitoba from the judgment of that Court[1], allowing a motion in *certiorari* proceedings to quash an order by the Board of Review for Manitoba under *The Farmers' Creditors Arrangement Act, 1934,* confirming a proposal thereunder.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

H. A. Bergman K.C. for the appellants, the Board of Review and the Registrar.
A. T. Warnock for the appellants R. J. and I. E. McEwen.
W. C. Hamilton K.C. for the respondent.
H. A. Bergman K.C. and D. W. Mundell for the Attorney-General of Canada.
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THE CHIEF JUSTICE.—Jane McEwen's right to avail herself of the enactments of *The Farmers' Creditors Arrangement Act* as amended in 1938 necessarily rested upon two propositions:

first, that the farm which she as the legal personal representative of her husband had transferred to herself and for which she had procured a certificate of title to be issued to herself personally was her "property" within the meaning of sec. 2 (*d*) of the statute as amended in 1938;

and second, that the respondent company was a "secured creditor" within the meaning of the amending enactments of 1938.

On the admitted facts it is not open to dispute that before the transfer of it to herself in October, 1936, the land was not her property in the sense of the statute. Being beneficially entitled to the residue of her husband's estate, she was of course entitled to have the land, subject to the rights of the mortgagees, applied in payment of the debts of the estate; and as legal personal representative it was her plain duty to see that this was done. As the estate was admittedly insolvent, the assets being insufficient to meet the mortgage debt, she had, of course, no interest in the land which could lawfully be made available to satisfy her personal debts if she had any. She ought to have been advised that in the circumstances she could not properly transfer the land to herself. The purpose of this transfer is plain; it was prompted by the supposition that it might enable her to bring the land and the mortgage debt within reach of the machinery of the Act. With the facts before them, the Board of Review ought to have declined to act on Mrs. McEwen's proposal (of the 31st July, 1936) on the ground that they were confronted by a manifest abuse of the statutory procedure. Had the question been raised by an application to the Court, it must inevitably have been held that by such devices the creditors of the estate could not be deprived of their rights.

This alone would be a sufficient ground for dismissing the appeal; because the Court of Appeal having held that the remedy by *certiorari* is properly applicable, I think with the greatest respect that we are not required, in such a palpable case of abuse of statutory procedure, to hold that their exercise of discretion is vitiated by reason of the grounds relied upon by Mr. Bergman.

This appeal, however, may be considered on the assumption that the title to the farm being vested in Mrs. McEwen in virtue of the certificate of title of the 20th October, 1936, or of the transfer to her of the 14th October, 1936, it was her property in the sense of *The Farmers' Creditors Arrangement Act,* and that it was (from this point of view) sufficient that it should be so at the date when the Board of Review formulated their proposal, in order to give the Board jurisdiction in that behalf. Under the provisions of the amending statute of 1938 the respondent company is to be deemed by construction of law to have been at the date when the proposal was formulated by the Board of Review a secured creditor of Mrs. McEwen and the mortgage debt is deemed to be her debt, for the purposes of the Act.

As Mr. Bergman said in argument, the mortgage debt was, by force of the Act, her debt for the purposes of the Act. It would appear that the amending Statute of 1938 takes effect retrospectively at the date of the formulation of the proposal by the Board (if a proposal has been formulated) otherwise at the filing of the proposal of the debtor. But the essential condition is that the property affected by the security shall have been the property of the debtor in the sense of the amending statute; and consequently the mortgage debt in question here never became (constructively) the debt of Mrs. McEwen until long after the 1st of May, 1935.

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Within the intendment of sec. 19 the debt is "incurred" when it is "incurred" by the debtor; the mortgage debt in question was "incurred" in that sense, constructively, by force of the amending Statute (the only sense in which it was ever "incurred"), when that Statute came into force in 1938, and, by relation, at a date not earlier than the date of the certificate of title of the 20th October, 1936, or than that of the transfer of October 14th, 1936.

Debts so constructively "incurred" (in virtue of the amending statute) are in my opinion within the intendment of sec. 19; and, I repeat, such a "debt" (if it be a mortgage debt) cannot be "incurred" in the sense of that section before the property or interest on which it is charged has become the "property" of the debtor within the contemplation of sec. 2 (*d*) of the statute. On this point, as to the application of sec. 19, I respectfully concur with Mr. Justice Trueman.

The appeal should be dismissed with costs.

The judgment of Rinfret, Crocket and Hudson JJ. was delivered by

RINFRET J.—The facts of this case are complicated.

In September, 1919, one John McEwen, then of Dauphin, Manitoba, now deceased, borrowed four thousand dollars ($4,000) from the respondent and executed a mortgage upon his land in favour of the latter. The mortgage provided for repayment instalments of $250 on November 1st in each of the years 1921 to 1923 inclusive, and of the balance on November 1st, 1924, with interest at seven per cent per annum, payable annually.

John McEwen died on August 26th, 1934. Probate of his will was granted to his widow, Jane McEwen, on August 13th, 1935. By the will, the deceased after directing payment of his debts, devised and bequeathed all his real and personal estate to his widow.

At the time of John McEwen's death, the whole of the mortgage debt was owing to the respondent, as well as a large sum for accumulated interest thereon.

The respondent, acting under the powers contained in its mortgage, leased the land to Robert James McEwen for a term from November 7th, 1934, to November 1st, 1935, and for a further term from February 3rd to November 1st, 1936.

On or about July 31st, 1936, Jane McEwen, in her personal capacity, and not as executrix, filed with the Official Receiver of the Dauphin Judicial District a proposal purporting to be made under *The Farmers' Creditors Arrangement Act, 1934*. The only debts disclosed by the proposal were the amount owing to the respondent under its mortgage, there placed at $6,000, and the further sum of $170 payable to the Rural Municipality of Dauphin in respect of taxes.

Actually, Jane McEwen had never assumed payment of the mortgage debt or interest, nor had she in any way obligated herself to the respondent.

At the time of filing her proposal, Jane McEwen was not the owner of the land, although afterwards, on October 20th, 1936, she, as personal representative, purported to transfer the land to herself in her personal capacity for an expressed consideration of $1.

By the proposal, Jane McEwen asked that the respondent's debt be reduced to $2,500, with interest at 6 per cent. spread over a period of fifteen years, and that other accounts be not affected. Outside of the sum due to the municipality of Dauphin for taxes, Jane McEwen apparently was not indebted to any person whomsoever.

By the proposal, she valued the land at $2,500. When applying for probate, she had valued it at $3,000. Afterwards, on August 17th, 1937, she insured the buildings for $4,050.

Immediately upon receipt of notice of the proposal, the respondent advised the Official Receiver that it had no claim against Jane McEwen and that it was not affected by the proposal. On November 28th, 1936, the respondent again wrote the Official Receiver that Jane McEwen was not a debtor and not entitled to the benefit of the Act.

Later, on March 29th, 1937, the respondent's solicitors wrote to the Registrar of the Board of Review, setting forth fully the objections of the respondent and asserting lack of jurisdiction on the part of the Board.

The Board heard the application on March 31st, 1937, and, on October 29th, 1937, purported to formulate a proposal. The respondent's mortgage account was the only obligation attempted to be dealt with. The proposal states that the amount of that debt as of November 1st, 1936, stood at $6,336.65. At the date of the proposal, another year's interest had accrued, so that the actual amount owing at that time would be $6,678.15.

The Board proceeded to direct a reduction to $2,800, with future interest at 6 per cent. The respondent dissented, as appears from a letter from its solicitors to the Registrar, dated November 9th, 1937.

The Board gave no effect to the various protests and objections of the respondent and confirmed the proposal on October 5th, 1938.

The respondent further, on several occasions, advised both Jane McEwen and Robert James McEwen, as well as Mr. A. T. Warnock, the Official Receiver, who was also apparently acting as their solicitor, that it would not be bound by or recognize the proposal. The respondent's attitude was definite and consistent throughout.

On October 10th, 1939, the respondent commenced an administration action in the Court of King's Bench against Jane McEwen, both as executrix of her husband's estate and also in her personal capacity. The action was brought on behalf of the respondent itself, as well as on behalf of all the creditors of the deceased. By its statement of claim, the respondent

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took the position that the debt of the deceased to the respondent was unaffected by the proposal, that the full amount was still owing and that the conveyance of the land to Jane McEwen as a devisee before satisfying the debts of the deceased constituted a breach of her duties as executrix. The respondent asked that the estate be administered, the conveyance set aside and the land sold to discharge the respondent's debt.

The statement of defence delivered by Jane McEwen as executrix urged that the proposal had operated to extinguish the liability of the estate. The respondent, by its reply, after setting up that the estate was not a party to the proceedings before the Board of Review, contended that the Board was without authority to deal with the matter.

It is stated that, at the request of defendant's solicitor, made because of the illness of his client, the litigation was not pressed for the time being.

Jane McEwen died on March 27th, 1940; and, on May 9th, 1940, probate of her will was granted to the appellants, Robert James McEwen and Isabella Edith McEwen. On April 28th, 1940, the respondent's solicitors wrote the solicitor for the appellant estate asking to be advised of the issue of the grant of probate. The necessary information was given by a letter dated June 29th, 1940.

It then appeared that, following the grant of probate of the will of Jane McEwen, the appellants Robert James McEwen and Isabella Edith McEwen had obtained registration of the land in their names, as personal representatives.

On June 19th, 1940, they transferred the land to themselves in their personal capacities; and, on the same day, they both joined in a transfer to Robert James McEwen, who became the registered owner. The respondent then felt compelled to take some step to have the proposal made by the Board of Review declared to be of no effect. For that purpose, on September 17th, 1940, the respondent issued a notice of motion to be made to the Court of Appeal for Manitoba, in order that the proposal be brought before that Court by way of a writ of *certiorari,* and so that an application to have it quashed might be proceeded with.

The Court of Appeal ordered the issue of the writ, to which a return was made by the appellants, the Chief Commissioner, the Commissioners and the Registrar of the Board of Review for the province of Manitoba.

Following the return, an order declaring the proposal to be beyond the powers of the Board, and directing that it be quashed, was made by the Court of Appeal. That order is now appealed from, leave to appeal having been granted by the Court of Appeal of Manitoba.

Before this Court, the appellant Board of Review and the appellants Robert James McEwen and Isabella Edith McEwen appeared separately; but their grounds of appeal are substantially the same. They contend that the court *a quo* should have refused the motion for a writ of *certiorari* because it had no power to deal with such a matter under the Act and the rules as well as under the procedure set up by the King's Bench Act; that the proposal returned into court pursuant to the writ of *certiorari* constituted the only and entire record before the court on the motion to quash and it was not open to the court to go behind the return and to consider extraneous material; that the majority of the court, in effect, dealt with the case as if it were an appeal from the decision of the Board of Review and failed to keep within the limits of its jurisdiction on *certiorari;* that the application for *certiorari* was, in any event, barred by delay, prejudice and estoppel; that the court erred in holding that Jane McEwen did not properly administer the estate and, therefore, improperly conveyed title to herself, or in holding that, at the date of the filing of the proposal (July 31st, 1936), she was not the owner of the land; and finally that there was error in the holding of the court that the proposal of the Board of Review was a nullity, owing to absence of privity of contract between Jane McEwen and the company, as a consequence of the wrong interpretation of *The Farmers' Creditors Arrangement Act* as amended in 1938.

The grounds of appeal may, in reality, be grouped under two heads:

(1) The Court of Appeal erred in deciding that Jane McEwen was not entitled to file a proposal under the Act, because she was not the owner of the land, and because there was no privity of contract between her and the respondent company;

(2) The Court of Appeal had no jurisdiction to deal with these matters through a writ of *certiorari;* and it could not, pursuant to that writ, go behind the proposal of the Board of Review, whose jurisdiction, on the only record before the Court, was on its face conclusive.

Dealing first with head no. 1: In order that the Board of Review may have power and jurisdiction to formulate or confirm the proposal it did, on the application of Jane McEwen, it was necessary that she should be a farmer unable to meet her liabilities as they became due, and also that she should be the debtor of the respondent company which, in effect, in the premises, was her only alleged creditor. Otherwise, it stands to reason that the respondent could not be brought in the scheme of arrangement under the Act; and the Board of Review, in formulating its proposal, and subsequently in confirming it, exceeded its powers, authority and jurisdiction.

I think the recent decision in *Diewold* v. *Diewold**[2]** is conclusive on that point, so far at least as this Court is concerned.

The mortgage debt owing to the respondent, and which the proposal purported to reduce, was incurred by the deceased John McEwen. No other person ever assumed or personally became responsible for it before any application was made

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for a proposal. Following the death of John McEwen, the respondent had the right to look to his estate for payment of its debt.

The application which resulted in the proposal now under consideration was an application made by Jane McEwen in her personal capacity.

At that time (July 31st, 1936), Jane McEwen was not the debtor of the respondent and, moreover, was not insolvent. She was not, therefore, entitled to invoke the benefits of the Act, not to speak of the disputed question whether she could be classed as a farmer.

Had she come within that class, the only proposal which she could file with the Official Receiver was a proposal in respect of her actual personal obligations.

On the face of the proposal formulated by the Board, the only debt disclosed, for which she was liable, was the sum of $91 owing to The International Harvester Company of Canada, Limited, incurred in 1936 and which could not be the subject of a personal proposal.

The only other debt appearing in the proposal is the respondent's mortgage account. That was not her debt. The respondent could not have sued her for it. It was not a "debt provable in bankruptcy" against her, or against her estate in bankruptcy.

As it turned out, it seemed pretty clear that the sole object of the proceeding was to obtain a reduction in the debt owing to the respondent by the John McEwen Estate. Jane McEwen herself apparently was not indebted to any person whomsoever.

In order to bring the debt of the estate first before the Official Receiver, and then before the Board, the Act, at that time, contained no provision under which its benefits could be invoked. It was only in 1938, by the amendment adding sec. 6 (*A*) to the Act (sec. 4 of C. 47 of the statutes of Canada, 1938), that provision was made for proposals by legal representatives of farmers who died after the 3rd day of July, 1934, upon satisfying certain conditions there mentioned and obtaining leave of the court. This procedure was never resorted to in the present case.

Up to that amendment, it had been consistently held that an executor could only proceed as such, and not as a farmer; and, as a Board of Review could only deal with debts of farmers in order to keep them on the land, the necessary jurisdiction was lacking.

The form of the proposal herein and of everything connected therewith was, throughout, essentially a proceeding on behalf and for the benefit of the John McEwen estate ; and the only personal interest of Jane McEwen shewn therein was that her name appeared in it and purported to be signed, not by her, but "per Robert J. McEwen, her agent". It was the latter who verified the statement of affairs and who signed the statutory declaration before the Official Receiver.

The first duty of Jane McEwen as executrix of the estate of her deceased husband was to administer properly the estate and to apply the assets in reduction of the debts before any conveyance to a beneficiary. I need not here discuss the point whether, when attempting to transfer the land to herself, she committed a breach of trust, and, notwithstanding such transfer, she should be treated as a trustee for the creditors of the John McEwen's estate. It is sufficient to state that the security given by John McEwen for the respondent's loan could not be released, reduced or affected, so long as the liability of the estate existed, by means of a proposal made and filed by Jane McEwen personally.

Under the circumstances, the Board of Review had no jurisdiction to deal with the respondent's mortgage debt. More particularly, it had no authority to reduce the rate of interest on that mortgage; and the Board of Review could not, consistently with the provisions of *The Farmers' Creditors Arrangement Act,* deal with her request, or formulate a proposal, in complete disregard of the position and interest of the respondent.

It need not be said that, so that the Act may be validly invoked, it is not sufficient that there should be a debt; it is necessary that the applicant farmer should be the debtor of such a debt. Here, there was undoubtedly a debt, but the applicant for relief was not the debtor. The debtor was the John McEwen estate, which refrained from making an application, although it might have done so after the amending legislation of 1938.

On behalf of the appellants, it was argued that another amendment introduced by that legislation (1938), and to which reference has not yet been made, has had the effect of doing away with the necessity of some privity of contract between the applicant for a proposal and the creditor.

Up till then, the Court of Appeal for Ontario, in *Gofton* v. *Shantz**[3]*** and in *Nesbitt* v. *Hogg**[4]*** had held that the Act did not apply where the relation of debtor and creditor did not exist, as here. It was claimed, however, by the appellants that sec. *2*(*d*) of the Act, as amended by ch. 47 of the statutes of 1938, conferred jurisdiction upon the Board in this instance.

The subsection just referred to provides:

> (*d*) "Creditor" includes a secured creditor and, notwithstanding the absence of privity of contract between the debtor and any of the persons hereinafter mentioned, a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof and, in case the debtor holds real property

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> under an agreement of sale or under an assignment of an agreement of sale, the vendor of such property or any person entitled under an assignment by such vendor.

I do not think this new section helps the appellants.

The object of the amended definition appears to have been to enlarge the class of "creditors"; but it does not alter the status of the "debtor". This was pointed out by Masten, J. A., in *Swaffield* v. *Baycroft**[5]*. In that case, neither the holder of the mortgage, nor the owner of the land, was an original party to the mortgage; but the owner of the land had by an extension agreement specifically covenanted to pay the debt. Having become a "debtor", he would have come within the purview of the Act but for the fact that the extension agreement was entered into after May 1st, 1935, and that, by force of sec. 19, the Act "does not, without the consent of the creditor, apply in the case of any debt incurred after" that date.

Masten J.A., in my view, properly set forth the limits of the new definition:

> But there is nothing in the Act of 1938 which brings the situation within the principal Act if the farmer who is in possession does not owe the debt secured by the mortgage. By the statute of 1938 a limitation on this right additional to that created by the original Act is imposed on the holder for the time being of a security against the farm of the debtor; that is all. The rights and liabilities of the debtor are not referred to in the Act of 1938, and, in my view, are not affected.
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> * * *
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> And I should only add that, in my view, it is impossible to conceive that the statutory alteration in the definition of "creditor" carries with it by implication a corresponding alteration in the common law meaning of "debtor". That would, in my view, be legislation by the Court.

Independently of the language of section *2*(*d*), which does not purport to enlarge the class of "debtors," it should be noticed that the new definition therein contained still requires, notwithstanding the absence of privity of contract between the applicant and the "person holding a mortgage, hypothec, pledge, charge, lien or privilege," that the mortgage or hypothec, etc., must be a mortgage or hypothec "on or against the property of the debtor or any part thereof." This requirement would make it impossible to include Jane McEwen within the meaning of the definition, as, at the time of the proposal, she was not the owner of the property mortgaged.

The reasoning of Masten J.A. is further strengthened by reference to the other sections of the Act, which assume throughout that the applicant must also be the debtor. An example of this may be found in sec. 11 (1), whereby

> on the filing with the Official Receiver of a proposal, no creditor * * * shall have any remedy against the property or person of the debtor, or shall commence or continue any proceeding under the *Bankruptcy Act,* or any action, execution, or other proceeding for the recovery of a debt provable in bankruptcy * * * unless with leave of the court and on such terms as the court may impose.

There can be no debt "provable in bankruptcy" unless the applicant for the proposal is the debtor of the "creditor, whether secured or unsecured."

I fail to see how the respondent could validly be brought in a scheme of arrangement with Jane McEwen, who was not its personal debtor and who did not own the land upon which it held its mortgage. Jane McEwen was in no way the "debtor" of the respondent within the requirements of the Act, even after the introduction of the amendment of 1938 to section 2 (*d*).

And section 19 of the Act does not improve the appellants' situation. It has already been referred to. It enacts that the

> Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after the first day of May, 1935.

The appellants rely on that section and claim that, as the mortgage debt was incurred by John McEwen on September 29th, 1919, and as John McEwen died August 26th, 1924, the Act applies to the debt so incurred.

I do not overlook the respondent's contention that it cannot be so, since the will of John McEwen was probated only on August 13th, 1935, the transfer of the land to Jane McEwen made by her as personal representative to herself in personal capacity took place only on October 20th, 1936, and that, moreover, such a transfer was, in effect, a breach of trust which must be held ineffective, in so far as it may affect the interests and rights of the respondent. But it is sufficient to say that sec. 19 can have no other meaning than that the first day of May, 1935, therein mentioned, is referable and can be referable only to the date when the debt was incurred by the applicant farmer himself. The whole Act deals with the liabilities of the farmer who files a proposal with the Official Receiver and his "present and prospective capability * * * to perform the obligations prescribed", as well as "the productive value of his farm." The "composition, extension of time, or scheme of arrangement" for which he is authorized to file a proposal, or the Board of Review may formulate a proposal, concern only the applicant farmer, whom the Dominion Parliament has declared essential, in the interest of the country, to retain on the land as an efficient producer (See preamble of the Act). It follows that "the debt incurred", referred to in sec. 19, is necessarily the debt personally incurred by the applicant and does not concern a debt which, though at present

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owing by the applicant farmer, towards the creditor, was incurred by a previous debtor (who may not have been a farmer) and at a date prior to the first day of May, 1935, as is the case here.

As a consequence of the foregoing, the point raised by the respondent that if the Act, and more particularly sec. 2 (*d*), should be construed otherwise than was contended by it, the Act would be unconstitutional, need not be considered.

On that point, we have heard argument on behalf of the Attorney-General of Canada; and it is sufficient to say that as, in my view, the Act and the amendments of 1938 ought to be construed as submitted by the respondent, the latter has no interest to raise the question of constitutionality and it need not be gone into in the present case.

But the fact remains that the respondent has succeeded to establish that the Act did not apply to Jane McEwen at the time when she filed her proposal, or at the time when the Board of Review pretended to formulate or to confirm a proposal in respect of her liabilities; and that, accordingly these proposals were made without authority and jurisdiction and they were invalid, as held by the majority of the Court of Appeal of Manitoba.

There remains to discuss whether, as contended by the appellants, that Court had no power to deal with this matter on an application for *certiorari,* and it should have refused the motion for the issue of the writ.

I do not think this Court ought to concern itself with the procedure set up by the King's Bench Act and the rules thereunder. This is essentially a matter of practice which, at least in the present case, should properly be left as settled by the Court of Appeal of Manitoba.

The same thing may be said of the point raised by the appellants that the respondent's application for *certiorari* was, in any event, barred by delay, prejudice and estoppel. This, to my mind, was a matter to be determined according to the discretion of the Court of Appeal. Moreover, where the subject of the discussion raises not only the question of the competency of the Official Receiver and of the Board of Review, but might involve as well the constitutional jurisdiction of the Parliament of Canada, I do not think that, generally speaking, an objection based on delay, latches, or estoppel, could be held to deprive the courts of the power to inquire into the substantial points which are discussed in this appeal.

The fallacy of the appellants' contention is that the Official Receiver or the Board of Review were given the authority to pass upon these substantial questions. Starting from that erroneous premise, they asked the Court to hold that the Board of Review had made findings on these substantial questions, and, there being no appeal from the decisions of the Board, the findings so made must be held as conclusive and as thereby withdrawn from the supervisory authority of the provincial Supreme Court.

But, of course, a mere perusal of the Act shows that the Board of Review has been given no such authority. The Official Receiver or the Board, naturally, must proceed generally upon a *prima facie* case of jurisdiction being established, but that is vastly different from the suggestion that, in the exercise of their jurisdiction, the Official Receiver or the Board may determine the questions of law, as distinguished from the questions of pure fact (Reference concerning the Tariff Board of Canada)[6].

Of course, the status of a farmer, and whether he is able to meet his liabilities as they become due, and whether there exists between the interested parties the relation of debtor and creditor, are largely questions of fact; but whether these facts are covered by the Act, and whether they bring the matter within the meaning of the Act and under the jurisdiction of the Receiver and the Board are questions of law. The whole subject is one of mixed law and fact. Neither the Receiver, nor the Board, has been given by the Act the power to determine these questions in their legal aspect. The courts designated by the Act for that purpose are, in Quebec, the Superior Court and, in the other provinces, the County or District Court. The jurisdiction conferred on these courts by section 5 of the Act is stated to be "a jurisdiction in bankruptcy" and that wording implies a qualified jurisdiction. But such jurisdiction is sufficient to give to these courts the power to determine the status as a farmer of the applicant to the Official Receiver, as well as the other questions: Whether the farmer is unable to meet his liabilities as they become due and whether, for the purposes of the application of the Act, the relation of creditor and debtor exists between the interested parties.

Nowhere in the Act are the Official Receiver or the Board of Review given any such jurisdiction. And the existence of the status of farmer, or of his insolvency, or of the relation of debtor and creditor, is a condition precedent to the validity of the proceedings before the Official Receiver or before the Board; it is a prerequisite of their competency in the premises. Unless these conditions exist, the Official Receiver and the Board cannot enter into the matter at all. Further, the Receiver, or the Board, have not been given by the Act the power to decide these matters, they are specifically declared to be within the exclusive jurisdiction in bankruptcy of the courts named in section 5.

In this case, it was stated at bar, and it is apparent from the record, that these preliminary questions, which it was essential to have decided before the Receiver or the Board could acquire jurisdiction, were never brought before the County or District Court having territorial jurisdiction in Manitoba.

Upon the return to the writ of *certiorari,* the Board of Review certified to the Court of Appeal the proposal it made as of October 29th, 1937, confirmed as originally formulated and declared to be binding upon all creditors of the so-called

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farmer debtor on October 5th, 1938, and filed in the County Court of Dauphin on October 8th, 1938. This was the only document returned by the Registrar of the Board.

It is true that, as shown by that proposal, the Board therein found "the farmer entitled to the benefit of the Act," although it is not clear whether this may be taken as a finding that Jane McEwen was a farmer, or as assuming that she was a farmer and holding that she was otherwise entitled to the benefit of the Act. But, be that as it may, for the reasons above given, the exact meaning of the finding is immaterial. It is sufficient that it shows that the Board was treating Jane McEwen as a farmer entitled to invoke the Act and was proceeding to formulate a proposal as if the Act applied to her, notwithstanding the objections of the respondent clearly put before that body prior to the formulation of the proposal.

The document returned upon the writ and certified to by the Registrar of the Board of Review as being the proposal confirmed by the Board and intended to be binding upon the respondent discloses:

> That the farmer's son, Robert McEwen, who is at present living and working on the farm, intends to remain there and finds that the farm is being efficiently operated.

This statement is strongly suggestive of the fact that Jane McEwen herself was not farming the land, but that her son was the farmer who, in accordance with the preamble of the Act, was to be retained on the land as efficient producer. The statement so made, together with the facts otherwise established and related in the early part of this judgment (not forgetting that the farm was leased to the son by the mortgagee) sufficiently show that the status of Jane McEwen as a farmer was disputable and of such a doubtful character as should have required a decision by the court competent to pass upon it.

The proposal further states:

"There appeared to be no unsecured creditors"; and it mentions that

> the taxes levied against the said land by the rural municipality of Dauphin have been paid to the 31st December, 1935;

and that

> the claim of International Harvester Company of Canada, Limited, having been incurred since the first day of May, 1935, shall not be affected by this proposal.

The only liability apparent on the face of the document is the respondent's mortgage there stated to have been "given by John McEwen, now deceased, the farmer's late husband". Nowhere is it stated that this mortgage has become the debt of Jane McEwen either through will, through transfer or in any other way. As there shewn, it is a debt of the estate of John McEwen.

The result is that the document itself does not show the existence of any debt owing by Jane McEwen. If that be so, there was no evidence before the Board of the alleged insolvency of Jane McEwen and, accordingly, nothing to indicate or even to suggest that she was unable to meet her liabilities, since there were none. Nor was there even a scintilla of evidence that the relation of debtor and creditor existed between Jane McEwen and the respondent.

It is clear, therefore, on the proposal itself, that none of the conditions essential and prerequisite to the existence of the jurisdiction of the Board were present in the case. These facts were still made clearer, if necessary, by the evidence put before the Court of Appeal of Manitoba in the affidavits filed by the parties.

It was objected by the appellants that the proposal, returned into court pursuant to the writ of *certiorari,* constituted the only and entire record before the court on the motion to quash, and that it was not open to the court to go behind the return and to consider extraneous material. It was argued before us that, by taking the affidavits into account, the Court of Appeal was, in point of fact, exercising an appellate jurisdiction which it could not do in *certiorari* proceedings.

Although, in my view, the proposal itself is sufficient evidence of the lack of jurisdiction of the Board, more particularly if it is coupled with the admission at bar that the respondent's objections were never submitted to the County Court, it may be in order to mention that it is not strictly correct to say that a court, acting on *certiorari* in the exercise of its supervisory authority, should not be allowed to inquire into the actual facts, in order to determine the question of the jurisdiction of an inferior tribunal (9 Halsbury, p. 898, sec. 1514, notes (*p*) and (*q*); *Regina* v. *Bolton**[7]*).

The subject was fully considered in *Rex* v. *Nat Bell Liquors Limited**[8]*. In that case, Lord Sumner, delivering the judgment of their Lordships of the Privy Council, said (p. 153):

> In *Reg.* v. *Bolton*7, Lord Denman, in a well-known passage, says: "The case to be supposed is one * * * in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do * * * is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law * * * where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charge being really insufficient, he had mis-stated it

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> in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to have been insufficient, we would quash the conviction; * * * But, as in this latest case, we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry * * *

At page 154:

> The law laid down in *Reg.* v. *Bolton*7 has never since been seriously disputed in England.

At page 160:

> When it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought ad hoc before the Superior Court. How is it ever to appear within the four corners of the record that the members of the inferior court were unqualified, or were biased, or were interested in the subject-matter?

The hearing of the Board as a result of which the proposal was formulated was held *ex parte,* for the respondent did not appear, and there were no creditors present. The consequence was that the Board assumed the reality of the preliminary questions relating to its jurisdiction and, in the result, it established its jurisdiction, or took it for granted, by proceeding upon assumed facts. But, in the words of Lord Summer, "the reality of that assumption having been inquired into (in the Court of Appeal) on affidavit as to the facts, since questions going to the jurisdiction of the (Board) must, in case of need, be inquired into, and it having been found that in fact (Jane McEwen was not a farmer, was not insolvent and was not the debtor of the respondent), the order was rightly quashed" (*Nat Bell* case[9])., Further to quote Lord Sumner (p. 158):

> While the decision (of the Board) is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on *certiorari* by a superior court.

Coleridge, J., delivering the judgment of the Court in *Bunbury* v. *Fuller**[10]*, stated the rule thus:

> No court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry whether some collateral matter be or be not within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior court.

Upon the authority of those cases, I think it must be decided that the preliminary questions raised by the respondent were of such a nature that, in an ordinary case, they would properly give rise to an inquiry on *certiorari* by a superior court and that, for the purposes of that inquiry, the facts bearing on the question of jurisdiction could be put before that court by means of affidavits (*The Security Export Company* v. *Hetherington**[11]*).

The judgment of this Court in the *Hetherington* case11 was reversed on the ground that the proceeding there in question was not judicial, but merely administrative; but the learned Law Lords fully endorsed the exposition, there made by my Lord the present Chief Justice, of the law pertaining to *certiorari**[12]*.

Since the enactment of *The Farmers' Creditors Arrangement Act,* procedure by way of *certiorari* in respect of proposals under the Act has been held to be available in many cases: *Re Ratz* (Manitoba Court of Appeal[13],
Re Hawkins (Manitoba Court of Appeal)[14], *Re Hudson's Bay* (Alberta)[15], *Crédit Fonder* v. *Board of Review* (Saskatchewan Court of Appeal)[16], *Re Drewry* (Saskatchewan Court of Appeal)[17]. See also *The Queen* v. *Justice of Surrey**[18]* and *The King* v. *Stafford Justices**[19]*. Short & Mellor, 2nd Ed., p. 48.

But there was a special reason in this case why the writ of *certiorari* should be resorted to. It appears by the document certified by the Registrar of the Board of Review upon the return to the writ, that the proposal, as formulated by the Board, was confirmed by the latter and declared to be binding upon all creditors of the so-called farmer debtor on October 5th, 1938, and that it was "filed in the County Court of Dauphin, on the 8th day of Oct. 1938." This filing in the court concluded the whole matter, so far as the operation of the *Farmers' Creditors Arrangement Act* was concerned. Nothing remained to be done under it. The respondent Board of Review became *functus officio* as soon as it had confirmed the proposal formulated by it and such proposal was transmitted to the Official Receiver, to be filed by him in the court under Rule 23 of the Rules and Regulations made under the Act. The Official Receiver did file the proposal in court on October 8th, 1938, as appears on the face of the document returned upon the *certiorari.* There is no longer, under the Act, any provision that the proposal so filed should be approved by the court. Upon it being filed, it became immediately "binding upon all the creditors and the debtor" (subs. 6 of s. 12), and, in particular, upon the respondent, unless it elected to contest the validity of the same, so as to be relieved of the arrangement made by the Board.

As a consequence, the jurisdiction in bankruptcy given by s. 5 of the Act to the County Court was exhausted; and, assuming that jurisdiction was exclusive while the Act was operating, clearly it could no longer stand in the way of the supervisory authority of the Court of Appeal after the Act had accomplished its purpose and its effect (*Prudential Ins. Co.* v. *Berg.**[20]*.

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In the circumstances of this case, *certiorari* was a remedy open to the respondent.
The latter might also have continued its proceedings in the Court of King's Bench in respect of its mortgage account claim which, as we were told, is still pending, although the statement of defence in that action pleaded *The Farmers' Creditors Arrangement Act* and alleged that the confirmation and filing in court of the proposal was a bar to the respondent's action.
The respondent has refused consistently to recognize the jurisdiction of the Board of Review, it has never acquiesced in it, and it could validly invoke the authority of a superior court (in this case, the Court of Appeal of Manitoba) to question the jurisdiction of the Board and to have the Court inquire whether the conditions precedent and prerequisite to the Board's competency existed in this matter.
I have, therefore, come to the conclusion that the appeal should be dismissed with costs. There should be no costs to the Attorney-General of Canada.
DAVIS, J. (dissenting):—The Board of Review for the province of Manitoba under *The Farmers' Creditors Arrangement Act,* 1934, and amendments, assumed to reduce the amount of the respondent company's mortgage on, what may for convenience be called, the McEwen farm in Manitoba. The mortgage had been on the property since October, 1919; nothing has been paid on the principal amount of $4,000; and arrears of interest on the 1st of November, 1936, amounted to $2,332.15, which indicates that the interest on the mortgage could not have been paid for many years. No proceedings appear to have been taken at any time by the respondent either to recover the money debt or to enforce the security. John McEwen, who had made the mortgage in 1919, remained the owner of the farm until his death on the 26th of August, 1934. By his will he devised and bequeathed all his property, real and personal, to his wife, Jane McEwen, and appointed her the sole executrix of the will. The widow and a son appear to have continued to reside on and work the farm following upon the death of the husband and father. Then, on July 31st, 1936, Mrs. McEwen sought relief under the provisions of *The Farmers' Creditors Arrangement, Act,* 1934, by lodging with the Official Receiver for Dauphin Judicial District a proposal under the statute for a composition, extension or scheme of arrangement. With the proposal was the required statement of affairs in which Mrs. McEwen said that her principal occupation was farming; that she was unable to meet her liabilities as they became due; and she gave as the amounts of claims of creditors the respondent's mortgage at $6,000 and arrears of taxes on the farm of $170. She was then, the statement said, 76 years old; had 170 acres under cultivation; the causes of her financial difficulties were, "Debt too heavy. Failure of crops and low prices."
The proceedings in connection with this proposal moved rather slowly. It was not until March 31st, 1937, that the Board of Review for Manitoba constituted under *The Farmers' Creditors Arrangement Act* heard the matter, and it was not until October 29th, 1937, that the Board formulated, what is called under the statute, its proposal wherein it reduced the amount owing on the respondent's mortgage to $2,800 as at the 1st of January, 1937, including principal and interest, and the rate of interest (which had originally been 7 per cent per annum) from the said date was reduced to 6 per cent per annum; and special terms were imposed for the repayment of the reduced principal amount in instalments.
I interject in the narrative here the statement that the proceedings out of which this appeal comes to this Court were *certiorari* proceedings that were not commenced until September 17th, 1940, on which date the respondent served notice of motion upon the Registrar of the Board of Review and upon the executors of Jane McEwen (she having died in the meantime on the 27th of March, 1940) and upon the son, Robert James McEwen, to whom his mother had devised the property by her will and who was at the time in occupation of the farm. The notice of motion was made direct to the Court of Appeal for Manitoba (in accordance with the practice in that province)

> for an order that a writ of *certiorari* do issue out of this Honourable Court for the return into this Court of the proposal made by the Board of Review under "*The Farmers' Creditors Arrangement Act,*" and dated the 29th day of October, 1937, which said proposal purports to have been made binding by the filing of the same in the County Court of Dauphin, in order that the said proposal, or those portions contained in paragraphs numbered 1, 2, 3 and 4 thereof, may be quashed, and for such further or other order as to this Honourable Court may seem proper.

The grounds set forth in the notice of motion were that the Board of Review in making the said proposal acted without jurisdiction or in excess of jurisdiction; that Jane McEwen was not a farmer within the meaning of the statute and that she was not at the time of her application the owner of the property; and that she was not indebted to the respondent in respect of the said mortgage, never having assumed or undertaken to pay the debt secured by the said mortgage or to perform any of the covenants therein contained.
The Court of Appeal reviewed the matter at large, granted the writ and quashed the proposal made by the Board of Review, Dennistoun, J.A. dissenting, which meant that the reduction of the amount of the mortgage and the new terms of repayment were nullified. From that judgment the proceedings have come to this Court by way of special leave granted by the Court of Appeal. All phases of the matter were discussed at considerable length before us. Counsel for the respondent raised many objections to the whole course of proceedings under *The Farmers' Creditors Arrangement Act,* including an attack upon the constitutional validity of certain amendments to the Act that were made by Parliament in 1938. Some of the objections raised are undoubtedly formidable objections. But I am satisfied that the respondent misconceived its

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proper remedy and that in the special circumstances of this case the application for the issue of a writ of certiorari should have been refused. It may be fortunate for the respondent that an action it commenced in the courts of Manitoba many months prior to its commencement of these *certiorari* proceedings (to which action I shall later refer) is still pending. In that action the respondent itself put in issue the alleged invalidity of the proposal under *The Farmers' Creditors Arrangement Act* and the alleged lack of jurisdiction in the Board of Review to deal with the matter under the statute.

I return now to the first step that was taken by Mrs. McEwen under the statute, i.e., the lodging with the Official Receiver (having jurisdiction in the county or district in which Mrs. McEwen resided) of a composition, extension or scheme of arrangement. That was, as I said before, July 31st, 1936. The effect of that first step was to put the subject matter of the proposal into the exclusive jurisdiction, subject to appeal, of the County Court of Dauphin, which is admitted to be the judicial district where Mrs. McEwen resided and the farm was located. The exclusive jurisdiction of the County Court of Dauphin in the matter, subject to the right of appeal provided by the statute, is to me the fundamental and most important fact in considering the *certiorari* proceedings which have come before us. *The Farmers' Creditors Arrangement Act* is part of the bankruptcy and insolvency legislation of the Parliament of Canada and the Act was made to be read and construed as one with *The Bankruptcy Act.* Sec. 2 (2). For the purposes of *The Farmers' Creditors Arrangement Act,* Parliament saw fit to designate the local courts, the County or District Courts (except in the province of Quebec), to have jurisdiction in respect of the statutory means provided whereby compromises or rearrangements might be effected of debts of farmers who were unable to pay (the recital in the Act). The following is the provision of the statute which gave the County Court of Dauphin exclusive jurisdiction, subject to appeal:

> Sec. 5. (1) In the case of an assignment, petition or proposal, in the province of Quebec, the Superior Court of the judicial district where the farmer resides, and in other provinces, the county or district court, shall have exclusive jurisdiction in bankruptcy subject to appeal as provided in section one hundred and seventy-four of the *Bankruptcy Act.*

Section 7 enacts that a proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review. I am not forgetting that one of the strongest points made by counsel for the respondent is that the respondent was not a secured creditor of Mrs. McEwen because she was not its debtor. But leaving that question aside for the moment, it is important, I think, to observe that Parliament gave to the Board of Review a right to work out a proposal which might involve secured creditors, even in the absence of their concurrence.

The Board of Review is under the statute essentially an administrative body. A proposal first goes to the Official Receiver having jurisdiction in the locality and if at a meeting of creditors called by him the proposal or some modification of it is not approved by the creditors, the Official Receiver reports this fact to the Board of Review, and the Board then shall, at the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested. Sec. 12 (4). If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court and shall be binding on the debtor and all the creditors. Sec. 12 (5). But if the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be filed in the court (i.e., again the County Court) and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the Court. Sec. 12 (6).

The proposal formulated and confirmed by the Board of Review was filed in the County Court of Dauphin October 8th, 1938. I think it obvious that the Board must have withheld the filing of the document, which was dated October 29th, 1937, because of its own doubt as to whether or not the Act applied to the case of a mortgage security which, while it lay as a charge against the farmer's lands, was not a debt which the farmer himself had incurred or had undertaken to assume and pay, until the 1938 amendments to the statute, which became effective July 1st, 1938, attempted at least to bring this sort of claim within the ambit of the statute.

In considering whether or not *certiorari* proceedings against the Board became available on the notice of motion that was not made until September 17th, 1940, it is important to observe that as early as August 5th, 1936, when the respondent was notified by the Official Receiver of the proposal he had received from Mrs. McEwen, the respondent took the position in a letter to the Official Receiver of that date, and has adhered to the position consistently throughout, that it was not in any way affected by the proposal. But the respondent at no time appeared or took any proceedings, either before the Official Receiver or before the Board of Review or in the County Court of Dauphin. Holding consistently to its position that Mrs. McEwen was not its debtor and that it was not a secured creditor, the respondent deliberately ignored, as it had a perfect right to do at its own risk, the proceedings under *The Farmers' Creditors Arrangement Act,* A very convenient and speedy remedy was available to the respondent when it got notice in August, 1936, that Mrs. McEwen had filed an

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application with the Official Receiver. It could have moved at once in the County Court of Dauphin, which in my view had exclusive jurisdiction, subject to appeal, to have the proposal set aside upon any of the grounds alleged by the respondent, that is, that Mrs. McEwen was not a farmer within the meaning of the statute, that she was not the owner of the lands and that she was not entitled to the benefit of the Act, or to stay proceedings or to have it determined that in any event the respondent was not a creditor of the applicant and was not affected by the proposal or proceedings under the statute. I have not the slightest doubt that the County judge would have entertained any such application and would have dealt with the matter at the time in a speedy and inexpensive manner. A statutory right to appeal from any decision that he might give was available. It may be that a declaratory action might have been brought in the Court of King's Bench to determine the rights of the parties and to grant relief by injunction or otherwise, though I do not find it necessary to pass upon that as an available remedy. The respondent did, however, commence an action in the Court of King's Bench on December 9th, 1939, (more than three years after Mrs. McEwen sought relief under the statute and more than a year after the Board of Review's proposal had been filed in the County Court of Dauphin), against Mrs. McEwen as executrix under the will of her deceased husband and against herself personally, for the administration of the estate of John McEwen and to have the lands ordered to be sold, subject to the mortgage, to satisfy the debts. In the statement of claim the respondent alleged that there was then owing to it under the mortgage the sum of $7,102 and that it had security for a portion of the said debt, namely, the sum of $2,612:15, but had no security for the balance, being the sum of $4,489.85. The important point is that in that action, in reply to a demand for particulars, the respondent as plaintiff in the action stated that the figure it had given for the security on the loan was the amount fixed by the Board of Review under *The Farmers' Creditors Arrangement Act,* and in reply to the statement of defence, set up that the Board of Review

> was without power or jurisdiction to compromise, reduce or in any way deal with the debt of the deceased or his estate

under the mortgage, and, in the alternative, that

> if the said proposal does purport to compromise, reduce or deal with the said debt, such proposal was made without power or jurisdiction and is void and of no effect.

That reply was delivered January 16th, 1940. No further step appears to have been taken by the respondent in that action and it was admitted that the action is still pending in the Court of King's Bench for Manitoba. Eight months after the respondent put in issue in that action the alleged invalidity of the proposal and the alleged want of jurisdiction of the Board of Review, it commenced these *certiorari* proceedings in the Court of Appeal for Manitoba against the Board, seeking an order that the proposal of the Board be quashed. The Board had become functus so far as this matter was concerned when it filed its proposal in the County Court of Dauphin in October, 1938. The proposal rested thereafter in the said County Court, which had exclusive jurisdiction in the matter, subject to the right of appeal.

Further, it is to be observed that sec. 11 (3) of the statute provides that no proposal shall be received in the province of Manitoba later than the 30th day of June, 1939. That means in this case that if the proposal is quashed, no new proposal can now be made by the owner of the farm to gain the advantage of the provisions of the statute. Notwithstanding that the original proposal was brought to the notice of the respondent by the Official Receiver as early as August, 1936, the respondent did not institute these proceedings by way of *certiorari* until September, 1940.

The Court of Appeal reviewed the evidence submitted to it as if the proceedings were by way of an appeal from the Board of Review, examining the merits of the case to the extent of even admitting particulars of fire insurance policies on the buildings and contents in an effort on the part of the respondent to show that the valuation of the applicant to the Board had been an undervaluation. Further, the confirmation and filing of the Board's proposal in the County Court made that proposal, by force of the statute (sec. 12 (6)), "binding upon all the creditors and the debtor" and had the effect of a judgment of that Court. There appears to be no reported decision in which *certiorari* has been granted to quash the judgments of inferior courts of civil jurisdiction. Halsbury, 2nd ed., Vol. IX, page 844, para. 1431, note (*q*).

In view of all the facts and circumstances of the matter, I am of the opinion that the conduct of the respondent throughout has been such as to disentitle it to relief in *certiorari* proceedings. To dismiss this appeal with costs is in my opinion, with great respect to those with whom I differ, to put the appellants the Board of Review, the Registrar, the executors of Mrs. McEwen and her son, Robert James McEwen, to the burden of what appear to me to be excessive and unnecessary costs of litigation.

The application for the writ ought, in my opinion, to have been dismissed and I should therefore allow the appeal and direct that the order be refused, with costs to the appellants throughout.

Appeal dismissed with costs.

Solicitors for the appellants—The Board of Review and the Registrar: Johnson & Bergman.

Solicitors for the appellants: R. J. and I. E. McEwen: A. T. Warnock.

Solicitors for the respondent: Hamilton & Hamilton.

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[1] reflex, [1941] 1 W.W.R. 129; [1941] 2 D.L.R. 54; 22 C.B.R. 183.
[2] 1940 CanLII 52 (SCC), [1941] S.C.R. 35.
[3] [1937] O.R. 856.
[4] (1938) 19 C.B.R. 254.
[5] [1939] O.R. 1.
[6] 1934 CanLII 57 (SCC), [1934] S.C.R. 538, at 548.
[7] (1841) 1 Q.B. 66.
[8] [1922] 2 A.C. 128.
7 (1841) 1 Q.B. 66.
7 (1841) 1 Q.B. 66.
[9] [1922] 2 A.C. 157.
[10] (1853) 9 Ex. 11, at 140.
[11] 1923 CanLII 45 (SCC), [1923] S.C.R. 539, at 549, *et seq.*
11 1923 CanLII 45 (SCC), [1923] S.C.R. 539, at 549, *et seq.*
[12] [1924] A.C. 988.
[13] (1939) 47 M.R. 381.
[14] (1939) 47 M.R. 429, at 439.
[15] reflex, [1938] 2 W.W.R. 412, at 420,
[16] reflex, [1939] 3 W.W.R. 632, at 636.
[17] reflex, [1940] 2 W.W.R. 389, at 390.
[18] (1870) L.R. 5 Q.R. 466.
[19] [1940] 2 K.B. 33, at 43, 44.
[20] reflex, [1940] 2 W.W.R. 381.

Tradmor Investments Ltd. v. Valdi Foods (1987) Inc., 1995 CanLII 7377 (ON SC) - Deposit in Court as Part of Bankrupt's Estate when Action Not Continued?

Date:	1995-06-29
Docket:	93-CQ-39905
Parallel citations:	33 CBR (3d) 244
URL:	http://canlii.ca/t/1wbb5
Citation:	Tradmor Investments Ltd. v. Valdi Foods (1987) Inc., 1995 CanLII 7377 (ON SC), <http://canlii.ca/t/1wbb5> retrieved on 2013-09-15
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Ontario Supreme Court
Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.
Date: 1995-06-29

Tradmor Investments Limited
and
Valdi Foods (1987) Inc.

Ontario Court of Justice (General Division) Carruthers J.
Heard – May 23, 1995.
Judgment – June 29, 1995.

Robert J. Arcand, for applicant.

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John Honsberger, for respondent.
(Doc. 93-CQ-39905)
[1] June 29, 1995. CARRUTHERS J.: – This is yet another in a long line of cases in which a trustee in bankruptcy is involved in a contest over the ownership of funds standing in court to the credit of an action.
[2] Here the plaintiff commenced an action claiming some $90,000 as arrears of rent due under an offer to lease. On the 11th January 1994 it moved before Matlow J. for summary judgment under R. 20. On 13th May, 1994 [unreported] Matlow J. dismissed the motion ordering "that the action proceed to trial on condition that the defendant pay into court on or before 31 May 1994 the sum of $70,719.63 as security for the Plaintiff's claim".
[3] That sum was paid into court by the defendant within the required time and, two weeks later, on the 13th April 1994, the defendant was declared bankrupt and Richter & Associés Inc. was named as its trustee in bankruptcy. The trustee now moves for an order paying out to it all the money now in court.
[4] Although the plaintiff has yet to move for leave to continue its action against the defendant, it resists the trustee's motion principally on the ground that it is a secured creditor and intends to take the necessary steps to proceed with this action.
[5] The plaintiff relies upon the decision of *Re Ford, Ex parte Trustee,* [1900] 2 Q.B. 211 as support for its position that it is a secured creditor. In that case, as here, the plaintiff moved for judgment and leave was granted to the defendant to defend. The operative part of the order in that case reads as follows [at p. 211]:

> "It is ordered that the plaintiffs be at liberty to sign final judgment for the claim indorsed [sic] on the writ and costs to be taxed unless the sum of 1000£ be paid into court within three days."

[6] The money was paid into court and the defendant delivered a defence on 10th January, 1900. On January 29th, 1900 the defendant filed his own petition in bankruptcy and a receiving order was made. The trustee in bankruptcy applied for an order that the money in court be declared a "part of the bankrupt's estate and should be paid out to him". The application was dismissed.
[7] Wright J. at p. 213 states as follows:

> It seems plain in principle and on the authorities that Messrs. Jay are for the present entitled to the benefit of the security which they obtained by the order of September 21, 1899, and the payment into court in compliance with that order. The order must be treated as an order that the right to the money when paid into court shall abide the event: see *Bird v. Bastow* (1), where the order appears to have been in the same form as in this case; and it is settled that where money is ordered to be paid into court to abide the event it must be treated as a security that the plaintiff shall not lose the benefit of the decision of the court in his favour: *Ex parte Banner* (2); *Ex parte Bouchard* (3); *Ex parte Navalchand* (4); *Tomlinson v. Hampson* (5). The very object of such an order is that the plaintiff shall be in as good a position, so far as the money paid in extends, against contingencies such as bankruptcy as if he had got an immediate judgment; and the cases cited shew that, where the plaintiff has without default on his part failed to get judgment before the bankruptcy, "the event" is the decision of his right in the bankruptcy. The money must remain in court until "the event" is decided by the trial of the action, if that is to be tried, or by adjudication upon a proof by the plaintiffs in the bankruptcy.

[8] I was told by counsel for the plaintiff that the *Bankruptcy Act* in vogue at the time of *Ford* was similar in its provisions to the present Act and, specifically, s. 70(1) thereof.
[9] It appears to me that Wright J. had only in mind the provisions of the rule under which the money was paid into court in that case. The wording of that rule is of some significance given the language of the order of Matlow J. here. The rule referred to in *Ford* includes the words "subject to such terms as to giving security". The order, however, as can be seen above, does not in fact refer to the word "security".
[10] Of some interest for my present purposes is the fact that while of the five cases referred to by Wright J. in *Ford,* four involve bankruptcy proceeding, only one contains any reference to the provisions of what then represented the present s. 70(1) or "secured creditor".
[11] In *Re Keyworth, Ex parte Banner* (1874), 9 Ch. App. 379, counsel for the trustee in bankruptcy urged the court to conclude that the plaintiff in that action, who was claiming the money which had been paid into court, was not a "secured creditor under the terms of the 16th section of the *Bankruptcy Act, 1869."* The court in that case, in concluding that the plaintiff was entitled to the money standing in court, made no reference to whether it was a secured creditor under the *Bankruptcy Act.* Rather, the court concluded that [at p. 383] "[t]he sum in question was paid into Court to abide the event of the action... [i]t belongs to the party who was found eventually to be entitled to the sum in dispute."
[12] To my mind the essential issue in the present case, and, I would have thought as well in those earlier cases, including *Ford,* is whether the party opposed to the claim of the trustee in bankruptcy is, for the purposes of determining ownership of the funds in court, a secured creditor within the meaning of that term as it is used in the *Bankruptcy Act* [*Bankruptcy*

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and Insolvency Act]. If the plaintiff here is not such a secured creditor, then, it has no claim to the money in court in priority to that of the trustee in bankruptcy.

[13] Counsel for the trustee spent some time in argument dealing with the provisions of s. 70(1) of the *Bankruptcy Act.* It is his position that the words "other processes" as found there include an order for payment into court such as that which was made by Matlow J. I am not prepared to agree with that contention. In my opinion those words, "other processes", must be interpreted ejusdem generis. In this respect I agree with the decision of Master Funduk in *V.I. International Holdings Ltd. v. Henbar Investments Ltd.* (1982), 41 C.B.R. (N.S.) 304 (Alta. Master), at p. 307.

[14] To the extent that s. 70(1) specifically exempts "the rights of a secured creditor," provisions of that section are relevant; otherwise, in my opinion its provisions are not determinative of the issue here.

[15] The *Bankruptcy Act* defines "secured creditor" as follows:

> "secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable;

[16] Matlow J. ordered the money to be paid into court pursuant to the provisions of r. 20.05(3)(*a*) which reads as follows:

> (3) Where an action is ordered to proceed to trial, in whole or in part, the court may give such directions or impose such terms as are just, including an order
>
> (*a*) for paying into court of all or part of the claim;...

[17] In my opinion, an order made pursuant to the provisions of that rule does not make the person putting forward the claim in respect of which the money is paid into court a secured creditor within the meaning of the *Bankruptcy Act.* In this respect I agree with the decision of Barr J. in *Bank of Montreal v. Faclaris* reflex, (1984), 48 O.R. (2d) 348 (H.C.).

[18] To my mind, the fact that Matlow J. added the words "as security for the plaintiff's claim" to those of the rule, does not alter my conclusion. I hold the same view about the "security" to which Wright J. refers in *Ford.*

[19] There is a suggestion in some of the cases that when the judgment is ultimately obtained the money in court then belongs to the plaintiff exclusively. I cannot agree with that position because, if the plaintiff is not a secured creditor then s. 70(1) must apply at the time of judgment. In that event the money in court is available to be distributed along with the rest of the bankrupt's property in accordance with the terms of the Act. In circumstances such as the present it would be an anomaly if the plaintiff, prior to judgment, was given a greater right to the money in court than it would have following judgment. To my mind that appears to be the result attained in *Ford* and the cases referred to therein. For this reason I cannot follow them.

[20] In my opinion when paid into court pursuant to Matlow J.'s order, the money was the property of the bankrupt and has remained to be such. At the time of the claim of the trustee in bankruptcy to that money, it cannot be said that the plaintiff was a secured creditor within the meaning of the *Bankruptcy Act.*

[21] Accordingly the trustee is entitled to the relief which it seeks. If cots are not to follow the event counsel may make written submissions to me, with those on behalf of the trustee to be made first to be followed by those on behalf of the plaintiff within ten days and with a right of response to the trustee within three days.

Motion granted.

Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R., [1996] 1 SCR 963 - GST Trust on Bankruptcy in Relation to Book Debt Assignments

Date:	1996-04-25
Docket:	24056
Parallel citations:	1996 CanLII 244 (SCC); 133 DLR (4th) 609; [1996] 5 WWR 153; 27 BLR (2d) 147; 39 CBR (3d) 157; 50 DTC 6245; [1996] 1 CTC 395; 38 Alta LR (3d) 1
URL:	http://canlii.ca/t/1frc7
Citation:	Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R., 1996 CanLII 244 (SCC), [1996] 1 SCR 963, <http://canlii.ca/t/1frc7> retrieved on 2013-08-27
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Alberta (Treasury Branches) *v.* M.N.R.; Toronto-Dominion Bank *v.* M.N.R., [1996] 1 S.C.R. 963

Her Majesty The Queen *Appellant*

v.

Province of Alberta Treasury Branches *Respondent*

and between

Her Majesty The Queen *Appellant*

v.

Province of Alberta Treasury Branches *Respondent*

and between

Her Majesty The Queen *Appellant*

v.

The Toronto-Dominion Bank *Respondent*

Indexed as: Alberta (Treasury Branches) *v.* M.N.R.; Toronto-Dominion Bank *v.* M.N.R.

File No.: 24056.

1995: October 12; 1996: April 25.

Present: La Forest, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for alberta

Taxation -- Income tax -- Goods and Services Tax -- Garnishment -- Income tax and GST legislation providing for garnishment enabling Minister of National Revenue to intercept monies owed to tax debtors -- Whether provisions give Minister priority over creditors who have received general assignment of book debts from tax debtor -- Meaning of "secured creditor" -- Income Tax Act, S.C. 1970-71-72, c. 63, s. 224(1.2), (1.3) -- Excise Tax Act, R.S.C., 1985, c. E-15, s. 317(3), (4).

Bankruptcy -- Priorities -- General assignments of book debts -- Income tax and GST legislation providing for garnishment enabling Minister of National Revenue to intercept monies owed to tax debtors -- Whether provisions give Minister priority over creditors who have received general assignment of book debts from tax debtor.

The first case involved in these appeals arose from a loan made by the respondent Alberta Treasury Branches to a hotel operator which was secured in part by a general assignment of book debts ("GABD"). The hotel operator was in arrears to the Minister of National Revenue ("MNR") for unremitted GST, plus interest and penalties. The MNR served requirements to pay under s. 317(3) of the *Excise Tax Act* ("*ETA*") on all possible debtors of the hotel operator. That section provides for a form of garnishment which enables the MNR in certain circumstances to intercept monies owed to a tax debtor. It applies to a "secured creditor", defined as "a person who has a security interest in the property of another person". After the hotel operator made an assignment under the *Bankruptcy Act*, the trustee estimated the realization of the assets of the estate would leave a shortfall to Alberta Treasury Branches. The Court of Queen's Bench, in an application to determine priorities, held that the MNR had priority by virtue of the provisions of the *ETA*. In the second case, an excavation company borrowed money from Alberta Treasury Branches and granted it a GABD. After the company completed certain contract work, the client held holdback funds which were claimed by various creditors of the company, including the MNR, to whom the company was indebted for unremitted employee source deductions, interest and penalties. The MNR served two requirements to pay on the client, under s. 224(1.2) of the *Income Tax Act* ("*ITA*"), which provides for a garnishment remedy identical to the one provided for in the *ETA*. On an application to determine priority to the monies in question, the master decided that Alberta Treasury Branches had priority through its GABD. This decision was upheld on appeal. In the third case, a drilling company borrowed money from the respondent bank which was secured in part by a GABD. The company owed the MNR unremitted GST, interest and penalties. The MNR served requirements to pay under s. 317(3) *ETA* on the company's trade debtors. Another of its creditors successfully filed a petition under the *Bankruptcy Act* to have the company declared a bankrupt. In an application to determine priority, the Court of Queen's Bench held that the MNR had priority under the provisions of the *ETA*. In all three cases the Court of Appeal held that the lending institution had priority over the MNR.

Held (Iacobucci and Major JJ. dissenting): The appeals should be allowed.

Per La Forest, Cory and McLachlin JJ.: The definition of "security interest" is broad enough to include a GABD, and the wording of s. 224(1.2) *ITA* and s. 317(3) *ETA* is sufficiently clear and unequivocal to allow a transfer of property in the garnished funds to the MNR and to grant him a priority in circumstances where the balance of the section applies. Moreover, an assignee of a GABD is a "secured creditor" within the meaning of s. 224(1.3) *ITA* or s. 317(3) *ETA* because the assignee holds a security interest "in the property of another person". Each assignment of book debts made in these cases provides that it is to be a "continuing collateral security". Further, all the assignments limit liability to the extent of the outstanding indebtedness. Thus, if the loan secured by the GABD was repaid, the lending institution would have no further interest in the assignment. Since the assignment by its terms can be redeemed by payment of the debt, it should not be construed as an absolute assignment. Neither the lending institutions nor the debtor companies by their actions gave any indication that the

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institutions were the owners of the book debts. The lending institutions made no efforts whatsoever to realize upon the book debts or in any way to act as "owners" of them until the debtor companies were obviously in severe financial difficulty if not bankrupt. Both the wording of the documents and the actions of the parties indicate that they regarded the assignment to be given as collateral security for the indebtedness. So long as the possibility of redemption exists, the GABD remains as collateral security.

When there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts, then the statutory provision must be applied regardless of its object or purpose. However, the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the scheme of the Act, the object of the Act and the intention of Parliament. The Parliamentary intent was to confirm the overriding right of the MNR to collect by garnishment the taxes collected which ought to have been remitted by the debtor company to the MNR. These amounts so collected could be said to belong not to the collecting debtor entities but to the government. In those circumstances the priority granted to the MNR to recover such funds cannot possibly be said to be expropriation without compensation.

The same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. Pursuant to the instruments presented in this case the borrower retains the right to redeem the book debts once the debt is paid off. This right of redemption irrefutably demonstrates that the assignment is something less than absolute. A GABD represents a security interest with the legal title being with the lender and the equitable title remaining with the borrower. This conclusion is supported by s. 63 of the Alberta *Personal Property Security Act*, which stipulates the basis upon which the right of redemption in personal property, including book debts, will be terminated. To conclude that a GABD results in a change of ownership as a result of its absolute nature rather than constituting collateral security for a debt will have serious implications. It could result in a change in the ordering of priorities provided by the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act* and the *Canada Business Corporations Act*. Further, it could constitute the means by which an unscrupulous debtor company, knowingly or unknowingly abetted by a creditor company, could so order its affairs that many other *bona fide* creditors could be adversely affected.

Per **Major** J. (dissenting): A GABD falls within the definition of "security interest" in s. 224(1.3) *ITA*. The phrase an "assignment . . . of any kind whatever" is broad enough to encompass the absolute assignments of book debts which are at issue in these appeals. The lending institutions, however, do not fall within the definition of "secured creditor" because they do not hold a security interest "in the property of another person". An assignment passes title and therefore property in the book debts is held by the lending institution and not by the tax debtor. The assignments in each of the three cases involved here all contain language which makes it clear that they are immediate and absolute. The fact that the GABD is referred to as "continuing collateral security" in the instruments does not make the GABD anything less than absolute. While the tax debtor retains an equity of redemption upon an assignment of its book debts, here the value of the loans secured by the book debts far exceeds the value of the debts themselves and there is thus no value in the equity of redemption. Further, an absolute assignment of book debts makes those book debts the property of the assignee, and they remain the property of the assignee until the assignor actually exercises his equitable right to redeem. In determining whether the book debts, once assigned, are the "property" of the assignor or of the assignee, the court must interpret the word in its plain and ordinary sense. The plain and ordinary meaning of "property" is legal title and not a contingent future equitable right to reacquire property which one does not presently hold. In the circumstances of these appeals, a strict reading of the taxation statute is appropriate. In the absence of clear and unequivocal language, there is a presumption that proprietary rights are not to be taken away without provision being made for compensation. In the context of these appeals, the interpretation urged by the MNR would have the effect of expropriating property to which the lender is legally entitled under its security agreement with the tax debtor. The plain and ordinary meaning of the statutory words simply does not bear the strained interpretation of property that, absent the security interest, is the property of another person. In addition to offending the principle that extra words should not be read into a section unless absolutely necessary, this proposed reading attempts to read in wording which can be expressly found in another part of the same section. If there is an ambiguity in the meaning of the word "property", then the specific effect of this section warrants a strict resolution of any ambiguity in favour of the respondent lending institutions.

Per Iacobucci J. (dissenting): While the general principles of statutory interpretation outlined by Cory J. were agreed with, the general assignments of book debts in this case were tantamount to an absolute transfer of property, as found by Major J.

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Cases Cited

By Cory J.

Referred to: *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103; *Pembina on the Red Development Corp. v. Triman Industries Ltd.*, 1991 CanLII 2699 (MB CA), [1991] 6 W.W.R. 481; *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369, leave to appeal refused, [1982] 1 S.C.R. xi; *Bonavista (Town) v. Atlantic Technologists Ltd.* reflex, (1994), 117 Nfld.& P.E.I.R. 19; *Bank of Montreal v. Baird* (1979), 33 C.B.R. (N.S.) 256, leave to appeal refused, [1980] 1 S.C.R. v; *R.V. Demmings & Co. v. Caldwell Construction Co.* (1955), 4 D.L.R. (2d) 465; *R. in Right of B.C. v. F.B.D.B.* 1987 CanLII 156 (BC CA), (1987), 17 B.C.L.R. (2d) 273; *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.* reflex, (1958), 27 W.W.R. 38; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061; *Canada v. National Bank of Canada*, 1993 CanLII 2937 (FC), [1993] 2 F.C. 206; *TransGas Ltd. v. Mid-Plains Contractors Ltd.* 1993 CanLII 4413 (SK CA), (1993), 101 D.L.R. (4th) 238, aff'd 1994 CanLII 30 (SCC), [1994] 3 S.C.R. 753; *Berg v. Parker Pacific Equipment Sales*, reflex, [1991] 1 C.T.C. 442; *Lundrigans Ltd. (Receivership) v. Bank of Montreal* reflex, (1993), 110 Nfld. & P.E.I.R. 91.

By Major J. (dissenting)

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Income Tax Act, S.C. 1970-71-72, c. 63, ss. 153, 224(1) [rep. & sub. 1980-81-82-83, c. 140, s. 121], (1.2) [ad. 1987, c. 46, s. 66; am. 1990, c. 34, s. 1], (1.3) [ad. 1987, c. 46, s. 66].
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Edward R. Sojonky, *Q.C.*, and *Michael J. Lema*, for the appellant.

Written submissions only by *J. Gary Greenan* and *Scott Watson*, for the respondent Province of Alberta Treasury Branches.

Jeffery D. Vallis and *C. Bryce Code*, for the respondent the Toronto-Dominion Bank.

The judgment of La Forest, Cory and McLachlin JJ. was delivered by

I. CORY J. -- At issue on these appeals is whether, on the facts of this case, lending institutions are secured creditors pursuant to the provisions of s. 224 of the *Income Tax Act*, S.C. 1970-71-72, c. 63 (*ITA*) and s. 317 of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (*ETA*), which are practically identical in their provisions.

II. The facts giving rise to these appeals and the decisions of the court below have been ably set out in the reasons of Justice Major.

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III. Both the *ITA* and the *ETA* provide for the collection of funds due to the federal government by way of income tax deductions from the wages of employees and for the remission of monies owing for the Goods and Services Tax (GST). The sections under review provide for the recovery of monies owing from those who are responsible for the collection and remission of income tax deductions and GST collections by way of garnishment. This system of collection and remission of income tax is exceedingly important. For example, in 1987 some 87 per cent of all personal income tax was collected through employer's deduction and remission.

IV. In the cases under consideration, the company responsible for collection and remission of income tax and GST borrowed money from a lending institution. To secure their indebtedness the debtor companies made a general assignment of book debts (GABD) to the lending institution. If the submissions of the appellant prevail then the Government of Canada will recover the monies which ought to be paid to it by way of employees' income tax or GST. If the respondents are correct in their position, then the lending institutions will retain the funds which have come into their possession as a result of the GABD. Thus the decision in this case will have a very real significance for both the federal government and lending institutions.

V. In essence, s. 224(1.2) provides a form of garnishment enabling the federal government to intercept monies owed to tax debtors. It is not available for the collection of income tax generally, but is limited to the recovery of funds owing by a person or company which has withheld monies from another person, usually an employee, for income tax purposes pursuant to s. 153 *ITA* and has failed to remit the withheld amounts to the federal government. A similar garnishment remedy is provided by s. 317(3) *ETA*. It is applicable in circumstances where a company or an individual has failed to remit GST which was collected as required by the provisions of the *ETA*.

VI. Major J. has concluded that the Alberta Court of Appeal was correct in finding that an assignee of a GABD is not a "secured creditor"within the meaning of s. 224(1.3) *ITA* or s. 317(3) *ETA* because the assignee does not hold a security interest "in the property of another person". Rather, the assignee is the owner of those book debts. With respect I cannot agree with that conclusion. However I am in complete agreement with these conclusions:

1.The definition of "security interest" is broad enough to include a general assignment of book debts even where that assignment is absolute.

2.The wording of s. 224(1.2) *ITA* as amended in 1990 is sufficiently clear and non-equivocal to allow a transfer of property in the garnished funds to the Minister of National Revenue (MNR) and to grant him a priority in circumstances where the balance of the section applies.

The Provisions of the GABD Made in These Cases

VII. It would be helpful first to consider the assignment of book debts made in these cases in order to ascertain the apparent intentions of the parties. The two assignments in which the Treasury Branch was the lender provide:

> THE PRESENT assignment and transfer shall be a continuing collateral security to Treasury Branches for the payment of all and every present and future indebtedness and liability of the undersigned to Treasury Branches. . . . [Emphasis added.]

To a similar effect, the Toronto Dominion assignment reads in part:

PROVIDED and it is hereby distinctly understood and agreed that these presents are and shall be a continuing collateral security to the Bank for the general balance due at any time by the Assignor to the Bank. . . .

PROVIDED ALWAYS and it is hereby distinctly agreed that these presents are and shall be continuing and collateral security to the present and any future indebtedness of the Assignor to the Bank. . . . [Emphasis added.]

VIII. Further, all the assignments limit liability to the extent of the outstanding indebtedness. Thus, if the loan secured by the GABD was repaid the Bank or Treasury Branch would have no further interest in the assignment. The documents themselves refer to the assignment as being a continuing collateral security for the payment of the indebtedness. The clear intention of the parties is that the assignment is given as security for the payment of a debt and upon payment of the debt the GABD is to be of no force or effect. That is to say the lending institution could not, after payment of the debt, make use of the GABD to realise upon any of the book debts of the assignor. In my view since the assignment by its terms can be redeemed by payment of the debt it cannot or at least should not be construed as an absolute assignment.

IX. Neither the lending institutions nor the debtor companies by their actions gave any indication that the respondents were the owners of the book debts. This is demonstrated by the fact that the lending institutions made no efforts whatsoever to realise upon the book debts or in any way to act as "owners" of them until the debtor companies were obviously in severe financial difficulty if not bankrupt. Only then did the lending institutions seek to realise upon their security. Both the wording of the documents and the actions of the parties indicate that they regarded the assignment to be given as collateral security for the indebtedness. In commercial affairs, it is well known that a GABD is indeed a means of granting collateral security for a debt. In my view, so long as the possibility of redemption exists, the GABD remains as collateral security.

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X. In light of this customary commercial understanding of a GABD, it may be helpful to review the legislation to determine if, by its wording, it renders a GABD something other than collateral security for a debt and makes the assignee the owner of the book debts.

Pertinent Provisions of the *ITA* and the *ETA* and Their History

XI. As Major J. pointed out, prior to 1987 the provisions of the garnishment remedy in the *ITA* (s. 224(1)) were almost unanimously interpreted by the courts in such a way that a demand made under the section was ineffective to attach any of the assigned debts. The courts held that by the assignment the tax debtor had transferred all its interest in the accounts to the assignee with the result that there was nothing left for the Minister of National Revenue (MNR) to attach by garnishment.

XII. In an attempt to address these decisions, Parliament amended the *ITA* in 1987 by adding two new subsections. They provided that the MNR could garnish funds owed by a tax debtor to a "secured creditor" and defined the terms "secured creditor" and "security interest". As Major J. observed, there was a divergence of opinion in the provincial courts of appeal as to whether the 1987 amendments permitted the MNR to effectively garnish funds in the hands of an assignee of a GABD.

XIII. In order to further clarify the situation and resolve the differences of opinion in the appellate courts, Parliament again amended the *ITA* with the apparent aim of granting priority to the MNR. It may be helpful to set out s. 224(1.2) *ITA* as it now appears following the 1990 amendment:

> **224.** . . .
>
> (1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment
>
> (*a*) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or
>
> (*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,
>
> the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision, and on receipt of that letter by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest. [Emphasis added.]
>
> (1.3) In subsection (1.2),
>
> "secured creditor" means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator or any other person performing a similar function;
>
> "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

XIV. The question then is how should these sections be interpreted. At the outset it should be remembered that Parliament was responding to the division of opinion in the appellate courts and attempting to make it clear that the MNR could undertake garnishment procedure in those situations where a GABD has been made. The appropriate principles to be considered in interpreting taxation legislation were clearly set out in *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103, at pp. 112-14. There the principles were summarized in these words:

C. *Principles of Interpretation*

> The central question on this appeal of whether the appellant is entitled to take advantage of the inventory valuation method in s. 10 of the Act involves a careful examination of the wording of the provisions of the Act and a consideration of the proper interpretation of these sections in the light of the basic structure of the Canadian taxation scheme which is established in the *Income Tax Act*.
>
> In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in *Stubart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

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> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The principle that the plain meaning of the relevant sections of the *Income Tax Act* is to prevail unless the transaction is a sham has recently been affirmed by this Court in *Canada v. Antosko*, 1994 CanLII 88 (SCC), [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:
>
> While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, 1988 CanLII 58 (SCC), [1988] 2 S.C.R. 175, at p. 194; see also *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695.
>
> I accept the following comments on the *Antosko* case in P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (1995), Section 22.3(c) "Strict and purposive interpretation", at pp. 453-54:
>
> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision. . . . (The *Antosko* case) is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.

XV. Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be applied regardless of its object or purpose. I recognize that agile legal minds could probably find an ambiguity in as simple a request as "close the door please" and most certainly in even the shortest and clearest of the ten commandments. However, the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament". What then was Parliament's intention in enacting the 1990 legislation?

The Purpose of the Legislation

XVI. There can be no doubt of the importance of levying taxation. The *ITA* entrusts to employers the duty of deducting income tax from the wages of employees and remitting it on their behalf. Similarly the *ETA* imposes on those who provide goods and services to others the duty to collect and remit the GST which is payable. In essence, companies collect taxes which they hold in trust for the government.

XVII. The purpose of the 1987 legislation, which I think is even more appropriately applied to the 1990 legislation, was very clearly and forcefully set forth in *Pembina on the Red Development Corp. v. Triman Industries Ltd.*, 1991 CanLII 2699 (MB CA), [1991] 6 W.W.R. 481 (Man. C.A.). There, at pp. 488-89, Scott C.J.M. observed:

> To determine the dominant characteristic of the legislation, it is important to know the governmental policy behind the section. The tax debtor's bank is in the best position to know its customer and to structure its business arrangements accordingly. Revenue Canada, on the other hand, does not have the same opportunity to become acquainted with the affairs of the tax debtor or its creditors. It must therefore rely solely on the provisions of the legislation to mandate the employer to remit the employee income tax deductions as required by the [Income Tax] Act, and to establish its collectability in the event of default.
>
> . . .
>
> The purpose of the Act is not only to levy tax, but to collect it. There is a strong public duty on employers to remit; indeed, this is central to the scheme of self-assessment under the Act.

Further, Lyon J.A., dissenting in the result, stated at pp. 506-7:

> One must always remember that the withholding tax or source deduction to which s. 224 applies is at the heart of the collection procedures for personal income taxation in Canada. Indeed, if one makes a calculation from the statistics reported in "Taxation Statistics, 1987," a publication of Revenue Canada Taxation, catalogue No. RV-1987, one finds that 87 per cent of all personal income taxes paid in Canada are collected by source deductions. It can thus be seen that Parliament in passing s. 224(1.2) made it as all-encompassing as it is in

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> order to ensure its continued viability. No other system is so crucial to the overall collection procedure adopted by the Crown. Parliament clearly meant to protect this system. Using the employer as a tax collector requires such extra protection in cases such as the one at bar where the employer converts the withheld tax money to its own purposes. Understandably, that conversion cannot be countenanced if the integrity of that system is to be preserved. Parliament, therefore, acting within its constitutional authority, has taken this extraordinary remedy to protect a major collection source.
>
> . . .
>
> In my opinion it was intended by Parliament that anyone who, in the ordinary course of business, made credit arrangements with a tax debtor involving assignments of accounts receivable, did so subject to the overriding right of the Crown to satisfy the primary obligations of the tax debtor to collect and remit taxes withheld from its employees. The words of the statute can mean nothing less. The section is cast in the broadest of possible terms precisely because it was meant to interfere with and interrupt payments under such assignments and divert them to meet this statutory obligation. I do not know what other words Parliament could use to make its overriding intention and claim more clear.

XVIII. These statements can be applied even more forcefully to the 1990 amendments. The Parliamentary intent was to confirm the overriding right of the MNR to collect by garnishment the taxes collected which ought to have been remitted by the debtor company to the MNR.

What is the Nature of a General Assignment of Book Debts?

XIX. Like Major J., I am of the view that a GABD is a form of security for a loan which is always subject to the right of the debtor to redeem. It will be remembered that s. 224(1.3) defines the "security interest" in these words:

> "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

This definition encompasses the general assignments of book debts which are at issue in these appeals. However, I cannot agree with Major J.'s conclusion that the creditors are not secured creditors. I find it difficult, indeed impossible, to conclude that the same document can be both a security interest and an absolute assignment. The same document cannot, simultaneously, embrace two such conflicting concepts.

XX. Basically, security is something which is given to ensure the repayment of a loan. *Black's Law Dictionary* (6th ed. 1990), at p. 1357, gives a clear definition of a "security interest" in these terms:

> The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time, (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

XXI. This definition is consistent with that set out in the *ITA*. It is in sharp contrast to the definition of the word "absolute" set out in the same source at p. 9 in these terms:

> Complete; perfect; final, without any condition or incumbrance; as an absolute bond (*simplex obligatio*) in distinction from a conditional bond. Unconditional; complete and perfect in itself; without relation to or dependence on other things or persons.

XXII. These definitions are, in my view, correct. If that is the case, then it can be seen that the same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. By definition, a complete and perfect assignment cannot recognize the concept of an equity of redemption. An absolute assignment cannot function as a means of "securing" the payment of a debt since there would be no basis for the debtor to recover that which has been absolutely assigned. An absolute assignment is irrevocable. To say that the same instrument can operate both as an absolute assignment and as a security interest is to simultaneously put forward two incompatible positions. The two conflicting concepts cannot live together in the same document.

Cases Which Have Considered the Nature of a General Assignment of Book Debts

XXIII. Major J. expressed the opinion that it is "well-established law" that a GABD, such as those in issue, has the effect of transferring all title and ownership in the property assigned so that they can no longer be considered to be the property of the assignor. Yet ordinarily, in the world of commerce, a GABD is considered to be a security interest. As a security interest, it simply cannot transfer all "right, title and ownership in and to the property assigned". This conclusion has found support in other cases.

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XXIV. In *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369 (C.A.), leave to appeal refused, [1982] 1 S.C.R. xi, Wilson J.A. (as she then was) held, for a unanimous court, that a GABD is a security document. In that case she was required to consider an instrument which was very similar if not identical to those presented in these appeals. At p. 381 she concluded:

> While these provisions appear on their face to constitute the assignor a trustee for the bank of any payments it receives from its customers and to permit the bank to appropriate them at will, *whether or not any debt is then due to the bank by the assignor*, this seems to be quite incompatible with the nature of the instrument as a collateral security. [Emphasis in original.]

Similarly, in *Bonavista (Town) v. Atlantic Technologists Ltd.* reflex, (1994), 117 Nfld. & P.E.I.R. 19, Osborn J. considered a GABD. He wrote (at p. 24):

> One may ask, if the assignment is absolute to the point of ownership, why does it specifically give to the Bank the power to collect or dispose of the debts. Are not such powers incidents of ownership? Similarly, if the assignment is absolute, what remaining rights reside in the customer that may be "extinguished" if the Bank buys the accounts at a sale?
>
> In my view, the assignment contemplates that it will operate as a security interest. It vests in the Bank title to the debts owed to Atlantic, but such vesting is for the purpose of security; it is not to transfer ownership, as that term is commonly understood . . . . The Bank is a "secured creditor". The nature of the interest held by the Bank, even if considered to be an absolute assignment, cannot be divorced from the circumstances in which it arose. The commercial reality is that the Bank held a security interest in the property of Atlantic. Atlantic transferred its receivable to the Bank to secure payment of money Atlantic owed to the Bank. Once Atlantic paid off the Bank, it was entitled, not to a reassignment of the debt, but, by the wording of the assignment, "to the cancellation hereof". The Bank was a secured creditor holding a security interest. [Emphasis added.]

XXV. I agree with the reasoning expressed in these cases. As well, I would note that the Newfoundland Court of Appeal in *Bank of Montreal v. Baird* (1979), 33 C.B.R. (N.S.) 256, leave to appeal refused, [1980] 1 S.C.R. v, dealt with a GABD as a security interest. Further, the New Brunswick Court of Appeal in *R.V. Demmings & Co. v. Caldwell Construction Co.* (1955), 4 D.L.R. (2d) 465, found that a bank holding a GABD was a secured creditor, subject to an equity of redemption in the assignor company.

XXVI. I also find support for this conclusion from the reasoning in cases which considered a situation similar to that created by a GABD. These cases arise when a borrower grants to a lending institution a fixed charge or mortgage based upon the borrower's present and future stock-in-trade and inventory but reserves to the borrower the right to make sales of the stock-in-trade and inventory in the ordinary course of business.

XXVII. In *R. in Right of B.C. v. F.B.D.B.* 1987 CanLII 156 (BC CA), (1987), 17 B.C.L.R. (2d) 273, McLachlin J.A. (as she then was), on behalf of the majority of the Court of Appeal, considered the manner in which courts have dealt with such instruments and in so doing, reached the following conclusions at p. 303:

> Generally speaking, the authorities draw a clear distinction between fixed and floating charges, recognizing nothing between and taking the view that any charge which permits dealing in the ordinary course of business must be regarded as floating. . . .

XXVIII. She then went on, at pp. 303-4, to discuss the conceptual possibility of a fixed charge on stock-in-trade coupled with a licence to deal in those goods, a situation analogous to that which the lending institutions claim exists under a GABD. She noted at p. 305:

> The generally accepted view . . . is that such a charge should be regarded as floating rather than fixed because it involves no final and irrevocable appropriation of property to the creditor.

She also observed that the English courts have specifically rejected the possibility of an absolute assignment being coupled with a licence to deal (at pp. 305-6):

> . . . this theory was soon rejected by the English courts, as is seen from the comments of Lord Buckley in *Evans v. Rival Granite Quarries Ltd.*, [1910] 2 K.B. 979 at 999 (C.A.):
>
> A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is *not a specific security*; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. *A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security*, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security. [Emphasis added by McLachlin J.A.]

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XXIX. In determining whether a particular charge over book debts is fixed or floating, McLachlin J.A. referred (at p. 307) to R. A. Pearce in "Fixed Charges over Book Debts", [1987] *J. Bus. L.* 18, at p. 29:

> . . . the essential characteristic for deciding whether a charge of book debts is fixed or floating is whether the book debts can be disposed of free from the charge; if they can, the charge is a floating charge, otherwise it is a fixed charge.
>
> . . .
>
> Modern authorities have accepted the either-or approach to fixed and floating charges upon which the courts settled in the late 19th and early 20th centuries. For example, they accept the conclusion that a fixed charge on book debts is inconsistent with the assignor having the freedom to deal with proceeds in the course of his business: see *Siebe Gorman & Co. v. Barclays Bank Ltd.*, [1979] 2 Lloyd's Rep. 143 (Ch. D.); *Re Armagh Shoes Ltd.*, [1982] N.I. 59 (Ch. D.); *Re Keenan Bros. Ltd.* (1985), 5 I.L.R.M. 641 (S.C.). In *Great Lakes Petroleum Co. v. Border Cities Oil Ltd.*, [1934] O.R. 244, [1934] 2 D.L.R. 743 (C.A.), an assignment of book accounts which permitted the debtor to continue to "collect, get in, and deal with said debts, accounts, claims, moneys, and choses in action in the ordinary course of the business" was held to be a floating charge. The same result obtained in *R. v. Lega Fabricating Ltd.* 1980 CanLII 641 (BC SC), (1980), 22 B.C.L.R. 145 (S.C.).

She indicated that the sole exception to this rule appeared to be the case of *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.* reflex, (1958), 27 W.W.R. 38 (B.C.C.A.), cited by Major J. in his reasons. Significantly she went on to observe at p. 307:

> Why did the courts reject the concept of a fixed charge with a licence to deal? In doing so, they undeniably limited the freedom of debtor and creditor to contract as they might choose in an age when freedom of contract was paramount. The answer, it may be suggested, lies in the effects which recognition of such a concept would have upon the rights of third parties and general commercial activity, as well as the perceived injustice of allowing the debtor to trade freely while remaining immune from the normal incidents of legal process. As Fletcher-Moulton L.J. put it in *Evans v. Rival Granite Quarries Ltd.*, supra (p. 995):

> The results of such a contention are astonishing; it means that by giving such a debenture a company retains the full right of trading with untied hands and at the same time obtains immunity from the operation of all processes of law. I should be slow to come to the conclusion that such an anomaly was recognized by the law. Nor do I think that it is. A consideration of the effect of floating charges and of the fact that the freedom of the company to carry on its business is not based on special words creating that freedom, but on the nature of the charge itself, leads me to the conclusion that the right of the company to carry on its business as it wills pending the enforcement of the security must mean that it may carry it on in accordance with law, including a liability to the processes of the law if it does not pay its debts.

Finally, at p. 309, McLachlin J.A. concluded:

> In general, the courts have been unwilling to characterize charges which permit the debtor to deal with his property in the ordinary course of business as fixed charges with licenses to sell. Rather, the courts have characterized such charges as floating, with the result that they give the chargeholder no priority over third parties prior to crystallization. . . . In short, the answer to the question of whether the courts have recognized a fixed charge subject to a licence to sell in the ordinary course of business is no . . . .

<u>The Significance of the Equity of Redemption</u>

XXX. For the resolution of these appeals, it is essential that there be a clear recognition of the fundamental difference between an absolute and a conditional assignment of book debts. In an absolute assignment, all interests are transferred and no property remains in the hands of the assignor. It is, simply, a sale of the book debts of the company. This is the basis of the business of factoring. Factoring is described in R. Burgess, *Corporate Finance Law* (2nd ed. 1992), at p. 100, in this manner:

> "Factoring is a legal relationship between a financial institution (the factor) and a business concern (the client) selling goods or providing services to trade customers (the customers) whereby the factor purchases the client's book debts either with or without recourse to the client and administers the client's sales ledger."

From this definition it is apparent that factoring arrangements involve:

(1) the purchase of the client's book debts;

(2)the taking over and administration of the client's sales ledger and credit control functions; and

(3)the provision to the client of finance which will be a specified percentage of the nominal value of the debts.

The author goes on (at p. 101) to consider the requirements for an assignment of book debts under English law and observes that to be effective the assignment must be absolute. The text defines "absolute", in these terms:

> The ordinary legal meaning of "absolute" is unconditional, so, for an assignment to be absolute, it must not be conditional in any way; specifically, it must not purport to be by way of charge only.

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XXXI. A factoring of accounts receivable is based upon an absolute assignment of them. It is in effect a sale by a company of its accounts receivable at a discounted value to the factoring company for immediate consideration. In my view, s. 224 *ITA* does protect those engaged in the factoring business and those lending institutions that have succeeded in perfecting their security interest prior to any intervention by the MNR. However, I cannot accept the submission that Parliament, by this section, intended to create an interest which was both conditional as a security interest and at the same time unconditional as an absolute assignment. There cannot have been an intent to combine such incompatible concepts.

XXXII. Clearly a GABD does not meet the standard required for a factoring arrangement which requires an absolute transfer of the proprietary interest of the assignor in the book debts. Pursuant to the instruments presented in this case the borrower retains the right to redeem the book debts once the debt is paid off. This right of redemption irrefutably demonstrates that the assignment is something less than absolute.

XXXIII. I agree with the MNR that what the actual equity of the borrower in the book debts may be from time to time is irrelevant for the purpose of determining the legal effect of the equity of redemption. It would be absurd if a company were to fluctuate between having title and not having title to their book debts based on their ratio of debt to assets. This is particularly true of a company engaged in a seasonal business. Yet if a GABD is treated as an absolute assignment, this can be the only result, as the bank is limited to recovering the amount of the loan. Since the bank could not recover any book debts if the company had a surplus in their account, the book debts would belong to the company. When there was a deficit, some or all of the book debts would belong to the bank. Such a fluctuating state of affairs is inconsistent with the certainty required in commercial matters. I believe that the correct view is that a GABD represents a security interest with the legal title being with the lender and the equitable title remaining with the borrower. This is supported both by the jurisprudence and by the wording of the section.

XXXIV. This Court, in *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061, interpreted "property of a bankrupt" in what is now s. 67 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as including property subject to a security interest, even when the legal title to the property is transferred to the security holder. This indicates that the concept of "property" is not so narrow as to encompass only legal title. It would be inconsistent to hold in this case that a transfer of legal title by means of a GABD is an absolute transfer when it has already been held in another that an equity of redemption is a property interest which remains with the borrower.

XXXV. The recent case of *Canada v. National Bank of Canada*, 1993 CanLII 2937 (FC), [1993] 2 F.C. 206, applied *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, *supra*, to provide an appropriate answer to the question as to whether or not a borrower under a GABD retains a property interest in the book debts. Rothstein J. held (at pp. 224-25):

> Based on the reasoning of Houlden J. in *Re Broydon Printers*, *supra*, as approved by Lamer J. in *Federal Business Development Bank*, *supra*, the right of redemption of the book debts, in my view, comes within the definition of "property" in the *Bankruptcy Act*. As such, the reasoning of Lamer J. in *Federal Business Development Bank* would apply and the book debts would constitute "property of the bankrupt" for purposes of subsection 107(1) of the *Bankruptcy Act*.

In summary, an assignment cannot be both absolute and yet leave an equity of redemption in the form of the right to redeem with the assignor. The retention of an equity of redemption is consistent with a security interest and not with an absolute assignment. A GABD simply cannot constitute an absolute transfer of property.

XXXVI. This conclusion is supported by s. 63 of the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05, which stipulates the basis upon which the right of redemption in personal property, including book debts, will be terminated. There must be either a disposition of the collateral by the secured party or an irrevocable election made by the secured party creditor under s. 62 of the Act to take the collateral. In the absence of these events, the debtor has certain rights under the section to redeem the collateral. The facts presented on these appeals do not disclose whether the lending institutions prior to receiving notice from the MNR, sold or transferred the book debts, or met the requisite conditions in order to be deemed irrevocably to have taken the collateral. If they did not, it would appear that the debtor companies still retained a right of redemption under the statute.

XXXVII. I would further add that to conclude that a GABD results in a change of ownership as a result of its absolute nature rather than constituting collateral security for a debt will have serious implications. It could, for example, result in a change in the ordering of priorities provided by the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, and the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44. Further, it could constitute the means by which an unscrupulous debtor company, knowingly or unknowingly abetted by a creditor company, could so order its affairs that many other *bona fide* creditors could be adversely affected.

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Summary

XXXVIII. In *Friesen*, *supra*, it was held that the words of the *Income Tax Act* should be given their plain and ordinary meaning in accordance with the structure and purpose of the Act. It is clear that in enacting the sections of the *ITA* and *ETA* under consideration Parliament was attempting to ensure the priority of the claim of the MNR over that of other creditors. The primary task of collecting and remitting taxes and contributions under both Acts rests with those who are employers and those who sell goods and services. These amounts so collected could be said to belong not to the collecting debtor entities but to the government. In a sense the funds collected but not remitted might be considered to be held in a form of trust since the entities that have collected these funds are not in any circumstances entitled to retain them. Rather, they must remit the funds. In those circumstances the priority granted to the MNR to recover such funds cannot possibly be said to be expropriation without compensation.

XXXIX. In an effort to ensure the recovery of these amounts collected for the MNR, Parliament has endeavoured to ensure the priority of the claims of the MNR to these funds over other creditors. The majority of the courts that have considered this issue since the 1990 amendment have concluded that Parliament has succeeded in achieving this aim: see: *TransGas Ltd. v. Mid-Plains Contractors Ltd.* 1993 CanLII 4413 (SK CA), (1993), 101 D.L.R. (4th) 238 (Sask. C.A.), aff'd 1994 CanLII 30 (SCC), [1994] 3 S.C.R. 753; *Berg v. Parker Pacific Equipment Sales*, reflex, [1991] 1 C.T.C. 442 (B.C.S.C.); *Lundrigans Ltd. (Receivership) v. Bank of Montreal* reflex, (1993), 110 Nfld. & P.E.I.R. 91 (Nfld. T.D.); *Bonavista (Town) v. Atlantic Technologists Ltd.*, *supra*, as well as two of the trial decisions in this case on appeal.

XL. I am in agreement with Major J. that a GABD is a security interest and as well that "secured creditor" excludes those individuals who own property absolutely. However I cannot agree that a GABD constitutes an absolute assignment so that the assignee becomes the owner of the book debts. The two concepts in the same instrument are incompatible and an impossible contradiction. Quite simply, a GABD cannot be an absolute assignment since by its very nature it is a security interest.

XLI. In drafting the language of the sections it must be assumed that Parliament sought carefully to achieve its purpose, and that it did not intend to create an absurdity or a redundancy. My position can be summarized in this manner:

(i) The definitions of a "security interest" and a "secured creditor" cannot be contradictory. Parliament cannot have intended to create definitions which overlap and contradict each other with the result that the same instrument can, at the same time, be both a "security interest" and not a "security interest". This is not to say that all assignments are "security interests". Rather it is simply that an instrument, once having been defined as a "security interest", cannot also be an absolute assignment. By definition, an absolute assignment cannot be a "security interest".

(ii) GABDs are "security interests" and not absolute assignments because they:

(a) meet the definition of "security interests" as set out in s. 224(1.3) *ITA*;
(b) are defined as collateral security on their face;
(c) are treated as security for a loan on the part of the parties involved;
(d) have been defined by this Court as including an equity of redemption, and thus provide a property interest for the borrower. As a result they cannot be absolute;
(e) cannot be simultaneously a security interest and an absolute assignment;
(f) to recognize GABDs as absolute assignments would frustrate the purpose of several other statutes.

(iii) "secured creditor" is meant to exclude absolute owners. By definition, one cannot be a secured creditor and at the same time an owner of the security. An absolute assignee would be an owner of the book debts as is, for example, a factor. Parliament by this section has excluded those financial institutions engaged in factoring from the operation of the section, together with those financial institutions who have perfected their security interest by assuming ownership. There is no intention manifested by the 1990 amendment to accord any priority to holders of GABDs.

Disposition

XLII. I would allow the appeals, set aside the order of the Court of Appeal and confirm the priority of the MNR, and direct that the MNR recover in all three cases in the manner directed by the trial judge in *The Queen v. Toronto-Dominion Bank*. The MNR should have his costs throughout.

The following are the reasons delivered by

I. IACOBUCCI J. (dissenting) -- While I agree with the general principles of statutory interpretation outlined by my colleague Justice Cory, I agree with Justice Major that the general assignments of book debts in this case were tantamount to an absolute transfer of property. Accordingly, I would dispose of the appeals in the manner proposed by Major J.

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The following are the reasons delivered by

MAJOR J. (dissenting) --

I. Introduction

II. These are appeals from a decision of the Court of Appeal of Alberta involving three cases. In all cases Her Majesty in Right of Canada as represented by the Minister of National Revenue (the "MNR") is a party. Alberta Treasury Branches is a party in two of the cases and the Toronto-Dominion Bank is the other party. Each appeal involves a priorities contest between the MNR's garnishee summons, and a general assignment of book debts ("GABD") to the lending institutions.

III. Section 224(1.2) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, as amended in 1990, S.C. 1990, c. 34, s. 1, provides a form of garnishment which enables the MNR in certain circumstances to intercept monies owed to tax debtors. This form of garnishment is not available for the collection of income tax debts generally. It is limited to the collection of amounts owing by a person who has withheld, or should have withheld, monies from another under s. 153 of the *Income Tax Act* and who has failed to remit the withheld amounts. An identical garnishment remedy, provided by the *Excise Tax Act*, R.S.C. 1985, c. E-15, s. 317(3), applies where a person has failed to remit GST which was, or ought to have been, collected from other persons.

IV. The issue in these appeals is whether the sections apply to give the MNR a priority over creditors who have received an absolute assignment of book debts from the tax debtor. The resolution of the appeals turns on the definition of "secured creditor", which requires the holding of a security interest in the "property of another person".

V. In my opinion, the sections do not grant the MNR a priority over a creditor who holds an assignment of book debts. As a matter of law, such a creditor owns the book debts in question and thus cannot be said to have a security interest in the property of another person.

VI. This result is dictated by the common law as well as basic principles of the interpretation of the *Income Tax Act*. The wording of the sections is simply not sufficiently clear and unambiguous to authorize the expropriation, without compensation, of a proprietary interest from the innocent holder of the assignment of the book debts.

II. Facts

VII. The first case arose in 1987 from a loan made by the respondent, Alberta Treasury Branches, to Country Inns Inc., an Alberta hotel operator. The borrowed money was secured in part by a general assignment of book debts. Country Inns Inc. was in arrears to the appellant MNR for $33,312.67 in unremitted GST, plus interest and penalties. Zurich Canada owed Country Inns Inc. $15,000 while Zurich Insurance Company was alleged to owe $95,000.

VIII. In June 1992, the MNR served requirements to pay under s. 317(3) of the *Excise Tax Act* on Zurich Canada and Zurich Insurance Company, and all other possible debtors. After Country Inns Inc. made an assignment under the *Bankruptcy Act*, R.S.C., 1985, c. B-3, the trustee estimated the realization of the assets of the estate would leave a shortfall to the respondent Alberta Treasury Branches, which was owed in excess of $6,000,000. Forsyth J. of the Court of Queen's Bench, in an application to determine priorities, held that the MNR had priority by virtue of the provisions of the *Excise Tax Act*: 1992 CanLII 6182 (AB QB), (1992), 5 Alta. L.R. (3d) 141.

IX. In the second case, Pigott Project Management Ltd. contracted with Land-Rock Resources Ltd. for excavation work on the Old Man River Dam spillway. In 1989, Land-Rock borrowed monies from the respondent Alberta Treasury Branches and granted it a general assignment of book debts. After Land-Rock completed the contract work, Pigott held $161,821.77 in contract holdback funds. These funds were claimed by various creditors of Land-Rock, including the appellant MNR, to whom Land-Rock was indebted for unremitted employee source deductions, interests and penalties.

X. In 1991, the MNR served two requirements to pay on Pigott, under s. 224(1.2) of the *Income Tax Act*, for almost $600,000. On an application to determine priority to the monies in question, Master Waller of the Court of Queen's Bench decided the respondent Alberta Treasury Branches had priority through its general assignment of book debts. An appeal to Hunt J. was dismissed: 1993 CanLII 7052 (AB QB), (1993), 9 Alta. L.R. (3d) 349.

XI. In the third case, Bodor Drilling Ltd. operated a drilling company which borrowed monies from the respondent Toronto-Dominion Bank. The borrowed money was secured in part by a general assignment of book debts. Bodor owed the appellant MNR $83,325.19, in unremitted GST, interest and penalties.

XII. In March 1992, the MNR served requirements to pay under s. 317(3) of the *Excise Tax Act* on the trade debtors of Bodor. Another of Bodor's creditors successfully filed a petition under the *Bankruptcy Act* to have Bodor declared a bankrupt. Bodor was indebted to the respondent Toronto-Dominion Bank in the amount of $266,331.12. In an application to determine priority, MacLeod J. of the Court of Queen's Bench held that the MNR had priority under the provisions of the *Excise Tax Act*.

XIII. All three cases were appealed to the Alberta Court of Appeal. It held that in each case the lending institution had priority over the MNR: 1994 ABCA 11 (CanLII), (1994), 16 Alta. L.R. (3d) 1.

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III. Analysis

XIV. Before 1987, the primary garnishment remedy in the *Income Tax Act* was provided by s. 224(1), which stated:

> **224.** (1) Where the Minister has knowledge or suspects that a person is or will be, within 90 days, liable to make a payment to another person who is liable to make a payment under this Act (in this section referred to as the "tax debtor"), he may, by registered letter or by a letter served personally, require that person to pay forthwith ... the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

XV. Where a tax debtor had assigned its debts to another party as part of a security arrangement, courts were virtually unanimous in finding that a demand under s. 224(1) was ineffective to attach any of the assigned debts. The courts held that, by the assignment, the tax debtor had transferred its interest in its accounts to the assignee, leaving nothing for the MNR's garnishment to attach. See: *Royal Bank of Canada v. R.* (1984), 52 C.B.R. (N.S.) 198 (F.C.T.D.), at pp. 210-13, aff'd (1986), 60 C.B.R. (N.S.) 125 (F.C.A.).

XVI. Parliament amended the *Income Tax Act* in 1987 (S.C. 1987, c. 46, s. 66) and added two additional subsections (ss. 224(1.2) and (1.3)). Sections 317(3) and (4) were also added to the *Excise Tax Act*. For the purposes of the issue raised in these appeals the wording of the sections in the *Excise Tax Act* is identical to that of the *Income Tax Act*. For the sake of convenience I will refer to the sections of the *Income Tax Act*.

XVII. Section 224(1.2) provided that the MNR could garnish funds owed to a tax debtor or to a "secured creditor". Section 224(1.3) provided, *inter alia*, definitions of "secured creditor" and a "security interest":

> **224.** ...
>
> (1.2) Notwithstanding any other provision of this Act, the *Bankruptcy Act*, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment
>
> (*a*) to another person who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or to a legal representative of that other person (each of whom is in this subsection referred to as the "tax debtor"), or
>
> (*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,
>
> the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole in or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision.
>
> (1.3) In subsection (1.2),
>
> "secured creditor" means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator, or any other person performing a similar function;
>
> "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

XVIII. The operation of the 1987 version of s. 224(1.2) as against the holder of a GABD was considered by courts in Alberta, British Columbia, Saskatchewan, Manitoba and Nova Scotia.

XIX. In Alberta, in *Lloyds Bank of Canada v. International Warranty Co.* 1989 CanLII 3035 (AB QB), (1989), 64 Alta. L.R. (2d) 340 (Q.B.), rev'd 1989 ABCA 155 (CanLII), (1989), 68 Alta. L.R. (2d) 356 (C.A.), McDonald J. held that the new definition of "security interest" was broad enough to include monies which were equitably assigned by a tax debtor to a bank (at pp. 352-53):

> ...the definition of "security interest" is so broad as to include moneys which have been equitably assigned by the tax debtor to, for example, a bank. The ownership by the bank of the funds that are the subject of the assignment constitutes an "interest in property". That interest in property is one which "secures payment" of the "obligation" of the tax debtor.... The provision of such security is the very purpose of the assignment of book debts. Moreover, the bank's interest is one "created by or arising out of [an] assignment...of any kind whatever, however or whenever arising..."

As a result, he held that the MNR obtained priority to the garnished funds over the claim of Lloyds Bank as the assignee of the book debts.

XX. The Alberta Court of Appeal reversed the trial decision in *Lloyds Bank* but on other grounds. Relying on its decisions in *Re Lamarre; University of Calgary v. Morrison*, 1978 ALTASCAD 50 (CanLII), [1978] 2 W.W.R. 465, and

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Attorney General of Canada v. Royal Bank of Canada, 1978 ALTASCAD 354 (CanLII), [1979] 1 W.W.R. 479, the Court of Appeal held that the provisions of s. 224(1.2) provided at most for a form of extra-judicial attachment which could bring the funds into the custody of the MNR. The court held that the section fell short of effecting a transfer of property in the funds or establishing the priority of the MNR's claim. It concluded (at p. 362) that "[s]omething further is required to accomplish either purpose".

XXI. The decision of the Alberta Court of Appeal in *Lloyds Bank* was followed by the Manitoba Court of Appeal in *Pembina on the Red Development Corp. v. Triman Industries Ltd.*, 1991 CanLII 2699 (MB CA), [1991] 6 W.W.R. 481, and the British Columbia Court of Appeal in *Concorde International Travel Inc. v. T.I. Travel Services (B.C.) Inc.* 1990 CanLII 1485 (BC CA), (1990), 72 D.L.R. (4th) 405. In the B.C. decision, Hinkson J.A. referred to the decision of the Alberta Court of Appeal in *Lloyds Bank* and stated at p. 409:

> In my opinion, s. 224 styled as it is "Garnishment" deals in s-ss. (1) and (1.2) with the mechanics of garnishment. The Minister in serving a demand pursuant to that section must be proceeding upon the basis that he asserts a tax debtor's liability to him. That justified garnishing the funds in the hands of a creditor of the tax debtor. But, I am unable to see in that section any provision that would have the effect of transferring the property in the funds to the Minister or establishing a priority of Revenue Canada's claim. That was the point dealt with by the Alberta Court of Appeal. [Emphasis added.]

XXII. To the opposite effect are decisions by courts in Saskatchewan and Nova Scotia: *Royal Bank of Canada v. Saskatchewan Power Corp.*, reflex, [1991] 1 W.W.R. 1 (Sask. C.A.), aff'g reflex, [1990] 2 W.W.R. 655 (Sask. Q.B.) and *Touche Ross Ltd. v. M.N.R.* 1990 CanLII 2606 (NS SC), (1990), 71 D.L.R. (4th) 648 (N.S.S.C.T.D.).

XXIII. Apparently in order to deal with the competing lines of authority as to whether s. 224(1.2) was sufficient to grant a priority to the MNR, Parliament amended the section in 1990 by adding the following to the end of the section:

> ...and on receipt of that letter [i.e. the garnishment summons] by the particular person, the amount of those moneys that is required by that letter, to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest.

XXIV. This 1990 amendment was made to both the *Income Tax Act* and the relevant provisions of the *Excise Tax Act*. The three trial decisions in the cases at issue in these appeals are principally concerned with the issue of whether this amendment constituted the "something further" which *Lloyds Bank* had held was necessary to transfer the property interest in the funds to the MNR or to grant a priority to the MNR.

XXV. Two judges of the Court of Queen's bench held that the 1990 amendments did constitute the "something further" and that as a result the MNR gained priority over the book debts to the lending institutions in question. Forsyth J. based his decision expressly on the wording of the 1990 amendment and held that it was sufficiently explicit. In addition to the 1990 amendments, MacLeod J. placed reliance on the finding of McDonald J. in *Lloyds Bank* that a GABD falls within the definition of a security interest in s. 224(1.3).

XXVI. In the third case, the Master in Chambers held that the 1990 amendments were still not sufficiently broadly worded to allow Revenue Canada to attach monies in which the tax debtor has no interest by virtue of an absolute assignment. Hunt J. on appeal agreed with his conclusion. She relied on a perceived ambiguity in the definition of security interest, stating at pp. 360-61:

> I am of the view, moreover, that it is not clear whether the modifying provisions at the end of the definition of "security interest" (the words "of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for") are meant to apply to each of the enumerated types of interests or instruments (debenture, mortgage, assignment, etc.) or whether these words are meant only to modify the term "encumbrance". McDonald, J. [in *Lloyds Bank*, *supra*] assumed the former to be the case, but in my view the meaning is not without doubt. There is a third way of reading the modifying words at the end, namely that the words "of any kind whatever" describe "encumbrance", with the balance of the words applying to each of the listed types of interests. The words "of any kind whatever" might also be taken to apply to assignments *and* encumbrances. Were this provision more clear, it would be easier to conclude that Parliament meant to include *all* types of assignments, including unconditional assignments, in the definition. This would make it plainer that, indeed, Parliament intended Revenue Canada's claim to take priority over the property of someone other than the tax debtor, such as an assignee of the tax debtor's book debts. [Emphasis in original.]

XXVII. I agree with Forsyth J. that the 1990 amendments to the *Income Tax Act* and the *Excise Tax Act* were sufficient to provide the "something further" which the Alberta Court of Appeal thought to be necessary in *Lloyds Bank.* As Côté J.A. in the decision of the Court of Appeal in this case stated about the amendment to s. 224(1.2), at p. 6:

> ...the amendments to that subsection say that service transfers the debt to Her Majesty, and that it shall be paid to Her Majesty notwithstanding the security interest, and in priority to the security interest. Where those amendments

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apply, in my view they reverse our *Lloyds Bank* decision and give the M.N.R. priority over earlier mortgages and assignments. I cannot confine them to floating or conditional assignments and must disagree with one of the Justices appealed from.

XXVIII. I also agree with MacLeod J. that McDonald J. at trial in *Lloyds Bank* was correct to hold that a GABD falls within the definition of security interest in s. 224(1.3). That section defines "security interest" as including:

... any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of ... [an] assignment ... of any kind whatever, however or whenever arising ....

XXIX. With respect, I do not accept the conclusion of Hunt J. that the definition of "security interest" is ambiguous and that the phrase "of any kind whatever" should be read to modify only "encumbrance" which is the last type of security listed. When the definition is read in its plain and ordinary sense, it is clear that the broad phrase "of any kind whatever" is intended to cover all of the listed types of security including an assignment. The phrase "a[n] assignment ... of any kind whatever" is broad enough to encompass the absolute assignments of book debts which are at issue in these appeals.

XXX. The finding that a GABD is a security interest for the purposes of the *Income Tax Act* or the *Excise Tax Act* is also consistent with the manner in which the assignments are dealt with in the contracts which create the assignments. For instance, the instrument which creates the assignment of book debts from Land-Rock Resources Ltd. to Alberta Treasury Branches provides, *inter alia*:

THE PRESENT assignment and transfer shall be a <u>continuing collateral security</u> to Treasury Branches for the payment of all and every present and future indebtedness and liability of the undersigned to Treasury Branches and any ultimate unpaid balance thereof with interest. [Emphasis added.]

XXXI. My conclusions that the GABDs at issue in these appeals fall within the statutory definition of a security interest and that the 1990 amendment is effective, when it applies, to give the MNR a priority over earlier mortgages and assignments, do not, however, lead inevitably to the conclusion that the MNR has priority over the lending institutions to the debts at issue in these appeals.

XXXII. A new argument was raised before the Alberta Court of Appeal and this Court to the effect that even if an unconditional GABD is a security interest, the lending institutions do not fall within the definition of "secured creditor" in s. 224(1.3) of the *Income Tax Act*. Côté J.A. held at pp. 7-8:

The M.N.R. must believe or suspect that the intended recipient of the letter is liable, or will soon become liable to make a payment under para. (*a*) or para. (*b*) of the operative subs. (1.2). No one suggests that para. (*a*) applies here, given the general assignments of book debts and other assignments. So the effective precondition in these cases is para. (*b*). It says:

(*b*) to a secured creditor who has a right to receive the payment that, but for [a] security interest in favour of the *secured creditor*, would be payable to the tax debtor. (emphasis added)

Subsection (1.3) defines "security interest", and that definition appears to be satisfied in the present cases. But subs. (1.3) also defines "secured creditor".... I will restate that definition slightly using square brackets:

... a [certain] person who has a security interest *in the property of another person* or who acts for or on behalf of that person with respect to the security interest and includes... (emphasis added)

In each of these three appeals, there was a general assignment of book debts which purported immediately to transfer title to the Bank or Treasury Branch. Doubtless it was done to secure a loan, but legal title was thereafter in the transferee, the Bank or Treasury Branch. Therefore, the Bank or Treasury Branch is not a "secured creditor" under this definition, because it does not have any interest "in the property of another person". The Bank or Treasury Branch itself is the owner. The tax debtor, both sides agree, would have to be the "other person". But he has no title. So one cannot say that the book debts (receivables) assigned are "the property of" the tax debtor.

XXXIII. I agree. The wording of s. 224(1.2) clearly requires not only that there is a security interest, but also that the payment be made either to the tax debtor or to a secured creditor. Here, because of the assignments, the payments are made to the lending institutions and the question is whether these lending institutions meet the definition of "secured creditor" as defined in the statutes.

XXXIV. The definition of secured creditor is a "person who has a security interest in the property of another", that other being the tax debtor. The critical issue is whether, after an assignment, the lending institutions have a security interest in the property of the tax debtor. In my view, they do not. An assignment passes title and therefore property in the book debts is held by the lending institution and not by the tax debtor.

XXXV. It is well-established law that a GABD, such as the ones at issue in these appeals, has the effect of transferring all right, title and ownership in and to the property assigned so that it can no longer be considered the property of the assignor. See: *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.* reflex, (1958), 27 W.W.R. 38

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(B.C.C.A.), at p. 42; *Lettner v. Pioneer Truck Equipment Ltd.* reflex, (1964), 47 W.W.R. 343 (Man. C.A.), at pp. 348-49; *Royal Bank of Canada v. Attorney General of Canada* (1977), 25 C.B.R. (N.S.) 233 (Alta. S.C.T.D.), at pp. 236 and 241, aff'd 1978 ALTASCAD 354 (CanLII), [1979] 1 W.W.R. 479; *Royal Bank of Canada v. R.*, *supra*, at pp. 206 and 212; *Toronto-Dominion Bank v. Minister of National Revenue* reflex, (1990), 39 F.T.R. 102, at p. 105.

XXXVI. In *Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd.*, the plaintiff attempted to garnish funds owing to the defendant which were held by a bank. A second bank held a GABD executed by the defendant. The British Columbia Court of Appeal concluded that the GABD passed property in the book debts absolutely, and that the defendant no longer had an interest that could be garnisheed.

XXXVII. In *Royal Bank of Canada v. R.*, Muldoon J. of the Federal Court Trial Division came to a similar conclusion which was unanimously confirmed by the Federal Court of Appeal. Under the terms of the assignment, the assignor Miles contracted to act as a trustee for the funds assigned by him to the Royal Bank under a GABD. The MNR argued that an assignee can have no greater claim on the garnished money than the assignor. Muldoon J. rejected this argument and held at p. 212:

> With respect, that contention misses the point. To equate the respective rights of the assignee and the assignor in and upon the book debts is to overlook the very nature and effect of the assignment, for the assignee owns the book debts and the assignor does not. To those who have not searched in the personal property security register, the assignor, of course, might still appear to be an ordinary trade creditor, but having assigned the book debts, the assignor, Miles, was in reality a trustee of them for the assignee, the plaintiff bank. Here, the Crown has received that which belonged to the bank.

XXXVIII. In *Lettner v. Pioneer Truck Equipment Ltd.*, Guy J.A. of the Manitoba Court of Appeal commented upon the nature and effect a GABD as follows at pp. 348-49:

> As between Pioneer Truck and the bank, Pioneer Truck knows that its accounts receivable or book debts belong to the bank. In equity it cannot be heard to say that it owns these book debts.
>
> . . .
>
> The fact that banking practice in Canada permits the extension of credit to going concerns, and permits the borrowers (by licence, as it were) to collect some accounts to pay wages and current creditors, does not destroy the absolute and specific quality of the legal assignment to the bank.

XXXIX. In *Toronto-Dominion Bank v. Minister of National Revenue*, Jerome A.C.J. of the Federal Court Trial Division conducted a thorough review of the authorities, including those discussed above, and concluded at p. 105:

> In light of the preceding authorities, and particularly in light of the Federal Court of Appeal's decision in *Royal Bank of Canada v. The Queen*, which is entirely binding on this Court, I must conclude that the general assignment of book debts granted April 26, 1983, by J.K. Campbell and Associates Limited to the Toronto-Dominion Bank constituted an absolute transfer of all property and interest previously held by J.K. Campbell in its accounts or other book debts, present or future. Accordingly, after April 26, 1983, the Toronto-Dominion Bank had full legal and equitable title in all accounts that were owing or that would become owing by debtors of J.K. Campbell unless such right was otherwise expropriated by competent and valid legislation.

XL. In addition to establishing that an absolute assignment of book debts transfers property in the debts to the assignee, the cases discussed above also stand for the simple and obvious proposition that the true nature of an assignment can only be determined by examining the particular wording of the instrument which creates the assignment.

XLI. The assignments in each of the three cases which are involved in these appeals all contain language which makes it clear that they are immediate and absolute. Typical is the assignment from Land-Rock Resources to Alberta Treasury Branches, which provides:

> THE UNDERSIGNED Land-Rock Resources Ltd. for valuable consideration HEREBY ASSIGNS AND TRANSFERS to Province of Alberta Treasury Branches (herein called "Treasury Branches") all debts, demands and choses in action now due or hereafter to become due, together with all judgments and securities for the said debts, demands and choses in action, and all other rights and benefits in respect thereof which now are or may hereafter become vested in the undersigned.

XLII. It was noted in *Royal Bank of Canada v. R.*, at p. 202, that there may be a distinction between an absolute assignment and one that provides that, in the event of default and the non-remedy of the default, the bank may without further notice deal with the book debts. Such wording appears to be less than an absolute assignment and creates for the lending institution a charge on the book debts which does not crystallize into property in the debts until there has been an unremedied default.

XLIII. While it does not fall to be decided in this case, it seems likely that such an assignment does not transfer property to the lending institution and thus, at least prior to default on the part of the assignor, the lending institution would be a

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secured creditor under s. 224(1.3). This type of conditional wording is not present in any of the instruments at issue in these appeals, all of which are unconditional and absolute.

XLIV. Moreover, at least one of the instruments provides that the assignor is a trustee for the book debts held by the lending institution. In *Royal Bank of Canada v. R.,* Muldoon J. held that the fact that the assignor is in the position of a trustee is a further indication that the assignment passes property to the assignee. The assignment from Bodor to the Toronto-Dominion Bank provides:

> IT IS HEREBY DECLARED AND AGREED that all money received by the Assignor in payment of any debts, demands and choses in action...shall be received and held by the Assignor in trust for the Bank.

XLV. It should be noted that the fact that the GABD is referred to as "continuing collateral security" in two of the instruments does not make the GABD anything less than absolute. In both *Evans Coleman* and *Lettner*, the GABDs contained language that the general assignment of book debts would be continuing collateral security and in each case the courts held that such language did not affect the absoluteness of the assignment.

XLVI. At the Alberta Court of Appeal, the MNR took the position that even if legal title was transferred to the assignee by the GABD, the assignor tax debtor retained an equitable interest in the nature of an equity of redemption which was sufficient for the book debts to remain the "property" of the tax debtor.

XLVII. Côté J.A. responded to this argument by stating that while in theory the tax debtor held an equity of redemption, this equity could not be exercised in practice except by application to a court of equity. Such an application would only be granted by a court of equity where the value of the book debts exceeded the value of the loans which they secured. He concluded that in cases like the three on appeal, where the value of the loans exceeded the value of the book debts, there is no real equity of redemption. He also held that the only property of the tax debtor was the equity of redemption and that the MNR did not claim that interest.

XLVIII. I agree with Côté J.A. that the tax debtor retains an equity of redemption upon an assignment of its book debts. *Halsbury's Laws of England* (4th ed. 1980), vol. 32, at para. 401, defines a mortgage as "a disposition of property as security for a debt" which "may be effected ... by an assignment of a chose in action" such as a book debt. At para. 407 *Halsbury's* also states that:

> Incident to every mortgage is the right of the mortgagor to redeem, a right which is called his equity of redemption.... This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate.

Thus *prima facie* an assignor of book debts retains an equitable right to redeem his assignment of the book debts once the debt obligation which is secured by the book debts has been completely discharged by the assignor.

XLIX. I also agree with Côté J.A. that in the context of these appeals the fact that the tax debtors in theory hold an equity of redemption in their book debts is of purely academic interest since, on the facts, the value of the loans secured by the book debts far exceeds the value of the debts themselves. Thus there is no value in the equity of redemption held by the tax debtors. While the equity of redemption theoretically exists, for practical purposes it is incapable of any realization.

L. The appellant MNR argues, however, that Côté J.A. erred by focusing his attention on whether the value of the loans exceeds the value of the book debts. The MNR points out that if the relative value of the loan and the security is the only relevant factor then a tax debtor who operates his business with the assistance of a revolving line of credit secured by an assignment of book debts (which is a common business arrangement) would fluctuate between being and not being a secured creditor on an almost daily basis depending on the relative value of the collectibles and the line of credit of the business.

LI. I share the MNR's concern that the relative value of the loan and the book debts is not the sole determining factor as to whether the assignor's equity of redemption makes the book debts his "property".

LII. As a matter of law, an absolute assignment of book debts makes those book debts the property of the assignee. Those book debts remain the property of the assignee until the assignor actually exercises his equitable right to redeem. It is a necessary precondition to the exercise of the equity of redemption that the loans secured by the assignment be paid off in full, along with any accrued interest and costs.

LIII. With respect, however, while it is a necessary precondition that the value of the security exceed the value of the loan in order to exercise the right of redemption, the fulfilment of this precondition is not sufficient to return the book debts to the property of the assignor. The assignor must also choose to exercise the right of redemption which will mean a termination of the loan arrangement with the lending institution.

LIV. At base, the equity of redemption is no more than a recognition that the assignment of debts to the creditor, while immediate and absolute, is for a limited purpose. In equity, the creditor cannot unjustly enrich itself by realizing on more security than the value of the loan which is secured. At any given time the value of the security may exceed the value of the loan, but upon termination of the lending relationship, the assignor of the security is entitled, in equity, to an accounting.

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LV. In determining whether the book debts, once assigned, are the "property" of the assignor or of the assignee, the Court must choose between two competing definitions of "property". One definition is the immediate legal title to what had been assigned and the other is a potential interest enforceable only in equity to reacquire property which has been assigned to another, contingent upon successfully fulfilling the terms of the loan agreement.

LVI. In *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103, it was held that the words of the *Income Tax Act* are to be read in their plain and ordinary sense. The plain and ordinary meaning of "property" is legal title and not a contingent future equitable right to reacquire property which one does not presently hold. The very term "equity of redemption" highlights the fact that property is not presently held by the assignor, but rather there is a limited right to reacquire property at a future date.

LVII. The central thrust of the MNR's submissions in this Court is contained in para. 45 of his factum, where he states that where title to property is transferred, the phrase "property of another person" must be read to mean "property that, *absent the security interest*, is the property of the person giving the security".

LVIII. This proposition is contrary to the traditional Canadian jurisprudence that the words of a taxing statute are to read strictly for their plain and ordinary meaning and that only if there is a true ambiguity is the intention of Parliament to be considered.

LIX. In the circumstances of these appeals, a strict reading of the taxation statute is appropriate. As pointed out by Hunt J. at p. 361, these appeals raise not only the traditional tax interpretation principle of resolution of ambiguity in favour of the taxpayer: *Johns-Manville Canada Inc. v. The Queen*, 1985 CanLII 43 (SCC), [1985] 2 S.C.R. 46, at p. 72. They also raise the well-known principle that, in the absence of clear and unequivocal language, there is a presumption that proprietary rights are not to be taken away without provision being made for compensation.

LX. In the context of these appeals, the interpretation of s. 224 urged by the MNR would have the effect of expropriating property to which the lender is legally entitled under its security agreement with the tax debtor. The taxes which would be garnished and withheld from the lending institution are not taxes owed by the lender but rather taxes owed by its debtor.

LXI. The lending institutions are innocent third parties whose proprietary rights would be expropriated by the provisions of s. 224 and accordingly those provisions must be read strictly to determine whether the expropriatory language is clear and unequivocal.

LXII. However, it is not necessary to resort to strict interpretation to resolve these appeals. In this case the plain and ordinary meaning of the phrase "property of another person" is property now held by another person. This interpretation makes sense of the words without reading anything into the statute and respects the well-established principle of interpretation that statutes are to be read as though presently speaking.

LXIII. One of the cardinal principles of the plain and ordinary meaning approach is that nothing be read into a section unless no sense can be made of that section without the addition of the extra words. The plain and ordinary meaning of the statutory words simply does not bear the strained interpretation urged by the MNR of "property that, *absent the security interest*, is the property of the person giving the security".

LXIV. In addition to offending the principle that extra words should not be read into a section unless absolutely necessary, this proposed reading attempts to read in wording which can be expressly found in another part of the same section. Section 224(1.2)(*b*) applies to "a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor". The emphasized words in s. 224(1.2)(*b*) are identical in effect to the words which the MNR seeks to introduce into the definition of secured creditor.

LXV. The use of a particular phrase in other parts of the *Income Tax Act* militates against reading that same phrase into a section of the Act where it is not found. This is particularly so where the phrase is found in the very same section as the disputed wording, and the section in question has been the subject of amendments twice within the last decade.

LXVI. If Parliament had intended that s. 224(1.2) should cover all persons who hold a security interest, it could have defined "secured creditor" as any person who holds a security interest without the deliberately limiting words "in the property of another person". Alternatively, it could have expressly provided "property that but for a security interest in favour of the secured creditor would be the property of another person", thus echoing the phrasing found in the rest of the section.

LXVII. In spite of two recent amendments to this section, Parliament chose not to define secured creditor in the manner urged by the appellant MNR. To read into the section the words suggested by the MNR would be an unwarranted judicial usurpation of the legislative function. The only conclusion which can be drawn from the plain and ordinary meaning of the words which do appear in the Act is that Parliament did not intend to bring creditors who actually owned the title to the security interest within the purview of the section.

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LXVIII. It is my conclusion that these appeals can be resolved without resort to any special principles of interpretation tailored to the expropriatory nature of this particular provision.

LXIX. If I am mistaken in this conclusion, and there is an ambiguity in the meaning of the word "property" then I would hold that the specific effect of this section warrants a strict resolution of any ambiguity in favour of the respondents. Such an interpretation requires that "property" be read to mean present legal title in preference to a future contingent equitable right to reacquire property not currently held. It also requires that words expressly found in another part of the same section not be read without cause into the definition of secured creditor.

LXX. In summary, these appeals should be resolved as follows:

1.The definition of "security interest" is broad enough to include a general assignment of book debts even where that assignment is absolute.

2.The wording of s. 224(1.2), as amended in 1990, is sufficiently clear and unequivocal to allow a transfer of property in the garnished funds to the MNR and to grant him a priority in circumstances where the rest of that section applies.

3.An assignee of an absolute assignment of book debts is not a "secured creditor" within the meaning of s. 224(1.3) because he does not hold a security interest "in the property of another person".

4.Therefore, s. 224(1.2) of the *Income Tax Act* and s. 317(3) of the *Excise Tax Act* are not effective to grant the appellant MNR an interest in or priority over debts owed to the assignee of a GABD.

IV. Disposition

LXXI. All three appeals should be dismissed with costs to the respondents.

Appeals allowed with costs, IACOBUCCI *and* MAJOR JJ. *dissenting*.

Solicitor for the appellant: The Deputy Attorney General of Canada, Ottawa.

Solicitors for the respondent Province of Alberta Treasury Branches: Bruni Greenan Klym, Calgary; Parlee McLaws, Calgary.

Solicitors for the respondent the Toronto-Dominion Bank: Howard, Mackie, Calgary.

SB Directive: 25, Realization of Estate Assets
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 25

REALIZATION OF ESTATE ASSETS

Issued: August 14, 2009

(Supersedes Directive No. 22 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this Directive is to outline the position of the Superintendent with regard to realization of estate assets.

RÉALISATION DES BIENS DE L'ACTIF

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 22 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction a pour objet d'exposer la position du surintendant concernant la réalisation des biens de l'actif.

Canada

OSB • BSF Protecting the Integrity of the Insolvency System / Protéger l'intégrité du système d'insolvabilité

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Policy

4 Except for property held in trust by the bankrupt or property exempt from execution or seizure, all property of the bankrupt, wherever situated at the date of bankruptcy or that may be acquired by or devolve on him or her before the discharge, is available for the creditors within the meaning of section 67 of the *Bankruptcy and Insolvency Act*. The trustee must therefore take possession of the assets and realize upon them for the benefit of the estate unless:

(a) the asset is specifically exempt from seizure or execution under the law;

(b) a specific applicable jurisprudence renders the asset exempt;

(c) a specific order has been obtained from the Court to exempt the asset; or

(d) in the opinion of the trustee, there would be no financial benefit to the estate as the cost of realization would exceed or equal the realizable value of the asset. In such a case, a document of explanation should be kept in the estate file

5. The onus of having an asset declared exempt from execution lies with the bankrupt, at the bankrupt's own expense, and not at the expense of the estate.

Politique

4 Au sens de l'article 67 de la Loi, tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui avoir été dévolus avant sa libération, constituent le patrimoine attribué à ses créanciers, à l'exception des biens détenus en fiducie par le failli ou des biens exempts d'exécution ou de saisie. Par conséquent, le syndic doit prendre possession des biens de l'actif et les réaliser pour le bénéfice de la masse des créanciers à moins que :

a) l'actif ne soit expressément exempt d'exécution ou de saisie en vertu des lois;

b) la jurisprudence expressément applicable ne rende l'actif exempt;

c) une ordonnance précise n'ait été obtenue du tribunal, rendant l'actif insaisissable; ou

d) selon l'opinion du syndic, il n'y ait pas d'avantage financier pour l'actif car le coût de réalisation serait égal ou supérieur à la valeur réalisable de l'actif. Dans ce cas, un document explicatif devrait être gardé au dossier de l'actif.

5. La responsabilité de faire déclarer un bien insaisissable incombe au failli, qui doit le faire à ses frais et non pas à ceux de l'actif.

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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Realization of Assets

6. The following are examples of minimum requirements in the realization of certain assets by trustees. This list is not exhaustive as there are many other types of assets to be realized in the administration of estates, some of which are already covered under other directives (i.e. surplus income, tax refunds, etc.).

(a) Motor Vehicle

Although exemption provisions vary from one province to another, the fundamental principles are the same: unless exempted by the applicable legislation or applicable jurisprudence, a motor vehicle constitutes an asset of the estate and there is a statutory obligation on the part of the trustee to realize the asset.

If expedient, a trustee may choose to sell the motor vehicle back to the bankrupt. Before doing so, the trustee must obtain the consent of the inspectors and/or the creditors and document the file on the method by which the value of the vehicle was obtained (e.g. written appraisal, black book or other source).

Any payment for the motor vehicle made by the bankrupt to the estate shall not be considered as part of the payments from surplus income but rather from that portion of the bankrupt's income that he or she is entitled to retain.

Réalisation des biens de l'actif

6. La liste suivante comprend des exemples d'exigences minimales requises par le syndic dans le cadre de la réalisation de certains actifs. Cette liste n'est pas exhaustive, car il existe plusieurs autres genres d'actifs à être réalisés dans l'administration de dossiers, dont certains sont déjà couverts par d'autres instructions (p. ex., revenu excédentaire et remboursement d'impôt).

a) Véhicule à moteur

Bien que les modalités d'insaisissabilité varient d'une province à l'autre, les principes fondamentaux sont les mêmes : à moins d'être déclaré insaisissable par la loi ou la jurisprudence pertinente, un véhicule à moteur constitue un bien de l'actif et le syndic a l'obligation statutaire de le réaliser.

Lorsqu'un syndic le juge à propos, il peut choisir de vendre le véhicule à moteur au failli. Cependant, il doit obtenir, au préalable, le consentement des inspecteurs ou des créanciers et documenter son dossier sur la méthode par laquelle la valeur du véhicule a été déterminée (p. ex., évaluation écrite, livre noir ou autre source).

Tout paiement fait à l'actif par le failli pour le véhicule à moteur ne doit pas provenir du revenu excédentaire du failli mais de la portion du revenu qu'il peut conserver.

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(b) Life Insurance

Although insurance legislation varies from one province to another, generally the trustee in bankruptcy is entitled to realize the proceeds of a life insurance policy if payable to the estate of the bankrupt.

If a life insurance policy exists, as a minimum, the trustee must examine the bankrupt's life insurance policy, which may include a request to the insurance company for a written statement on the status of the policy to ensure that all moneys available for distribution to the creditors are paid to the estate.

(c) Registered Retirement Savings Plan

Under section 67 of the Act, amounts held in RRSPs are exempt from seizure in bankruptcy, subject to a possible clawback for contributions made in the 12 months preceding bankruptcy that will comprise property of the bankrupt's estate. Where provincial legislation exempts RRSPs from execution, the provincial legislation will apply. Where provincial legislation is silent regarding the treatment of RRSPs, they will be exempt subject to the clawback referred to above.

b) Assurance-vie

Bien que la législation sur les assurances varie d'une province à l'autre, en général, le syndic a le droit de réaliser le produit de la police d'assurance-vie si celle-ci est payable à la succession du failli.

Lorsqu'il y a une police d'assurance-vie, le syndic doit, comme mesure minimale, examiner la police d'assurance-vie du failli, ce qui pourrait inclure une demande à la compagnie d'assurance pour une confirmation écrite du statut de la police d'assurance-vie afin de s'assurer que les sommes disponibles pour distribution aux créanciers sont payées au syndic pour le compte de l'actif.

c) Régime enregistré d'épargne-retraite

En vertu de l'article 67 de la Loi, les régimes enregistrés d'épargne-retraite (REER) immobilisés sont insaisissables lors d'une faillite, mais les contributions effectuées durant l'année précédant la faillite sont saisissables et font partie de l'actif du failli. Là où la législation provinciale exempte les REER de la saisie, la législation provinciale s'appliquera. Là où la législation provinciale est silencieuse concernant le traitement des REER, ceux-ci seront insaisissables sauf pour les contributions effectuées durant l'année précédant la faillite

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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Supporting Documents

7. As it is a statutory obligation on the part of a trustee to realize on all assets for the benefit of the estate, it is therefore expected that a trustee will document the files as much as possible in support of the receipts, disbursements and actions taken on all the transactions. The official receiver may, at his or her discretion, request from the trustee a copy of that documentation.

Pièces justificatives

7. Étant donné que le syndic a l'obligation statutaire de réaliser tous les biens de l'actif pour le bénéfice des créanciers, il importe que le syndic justifie, autant que possible, toutes ses transactions quant aux recettes, déboursés et actions prises. Le séquestre officiel, lorsqu'il le juge à propos, peut demander au syndic de lui fournir une copie de ces documents.

Coming into Force

8. This Directive comes into force on September 18, 2009.

Entrée en vigueur

8. La présente instruction entre en vigueur le 18 septembre 2009.

Enquiries

9. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

9. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Deemed trusts - Sec. 67(2)

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(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny, 2009 SCC 49, [2009] 3 SCR 286 - Crown Claims to Sales Taxes - Ordinary Creditor or Owner

Date:	2009-10-30
Docket:	32489; 32492; 32486
Parallel citations:	2009 SCC 49 (CanLII)
URL:	http://canlii.ca/t/26c8k
Citation:	Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny, 2009 SCC 49 (CanLII), [2009] 3 SCR 286, <http://canlii.ca/t/26c8k> retrieved on 2013-08-29
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SUPREME COURT OF CANADA

CITATION: Quebec (Revenue) *v.* Caisse populaire Desjardins de Montmagny, 2009 SCC 49, [2009] 3 S.C.R. 286

DATE: 20091030
DOCKET: 32486, 32489, 32492

BETWEEN:
Deputy Minister of Revenue of Quebec and Her Majesty The Queen
Appellants
and
Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc.
Respondents
- and -
Canadian Association of Insolvency and Restructuring Professionals
Intervener
AND BETWEEN:
Deputy Minister of Revenue of Quebec and Her Majesty The Queen
Appellants
and
Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor, Consortium Promecan Inc.
Respondent
AND BETWEEN:
Deputy Minister of Revenue of Quebec and Her Majesty The Queen
Appellants
and
National Bank of Canada

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Respondent
- and -
Canadian Association of Insolvency and Restructuring Professionals
Intervener
OFFICIAL ENGLISH TRANSLATION
CORAM: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 30) — LeBel J. (McLachlin C.J. and Binnie, Fish, Abella, Rothstein and Cromwell JJ. concurring)

Quebec (Revenue) *v.* Caisse populaire Desjardins de Montmagny, 2009 SCC 49, [2009] 3 S.C.R. 286

Deputy Minister of Revenue of Quebec and Her Majesty The Queen in right of Canada — *Appellants*
v.
Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc. — *Respondents*
and
Canadian Association of Insolvency and Restructuring Professionals — *Intervener*
- and -
Deputy Minister of Revenue of Quebec and Her Majesty The Queen in right of Canada — *Appellants*
v.
Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor, Consortium Promecan Inc. — *Respondent*
- and -
Deputy Minister of Revenue of Quebec and Her Majesty The Queen in right of Canada — *Appellants*
v.
National Bank of Canada — *Respondent*
and
Canadian Association of Insolvency and Restructuring Professionals — *Intervener*

Indexed as: Quebec (Revenue) *v.* Caisse populaire Desjardins de Montmagny
Neutral citation: 2009 SCC 49.

File Nos.: 32486, 32489, 32492.
2009: March 17; 2009: October 30.
Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.
ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Crown claims — Goods and services tax — Provincial sales tax — Tax amounts that have been collected but not remitted, or are collectible, at time of bankruptcy of supplier — Legal characterization of Crown's rights in amounts of such taxes — Whether federal or provincial Crown is ordinary creditor or owner of tax amounts — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(1), (1.1) — Act respecting the Ministère du Revenu, R.S.Q., c. M-31, s. 20 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(2).

The GST imposed under the *Excise Tax Act* ("*ETA*") and the QST payable under the *Act respecting the Québec Sales Tax* are taxes that are collected, and in respect of which credits are available, at each step of the manufacturing and marketing of taxable goods and services. They are payable by the recipient, who is regarded as the debtor in respect of the tax liability to the Crown. In principle, the supplier acts only as a mandatary of the Crown in collecting and remitting these taxes and is deemed to hold the amounts so collected in trust for Her Majesty.

A number of businesses went bankrupt. The Canadian and Quebec tax authorities (the "tax authorities") claimed from the trustees the GST and QST amounts that had been collected but not remitted, or were collectible, by

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those businesses as of the dates of their bankruptcies. The tax authorities submitted that they were entitled to the amounts in issue as the owners thereof. Financial institutions that held various security interests in the property of the bankrupts contended that, under the law applicable in bankruptcy matters, the federal or provincial Crown is only an ordinary creditor and must be ranked as such with the debtors' other creditors, and that their security interests could therefore be set up against the Crown. The Quebec Superior Court found for the tax authorities on the basis that the GST and QST amounts were not part of the bankrupts' patrimonies. The Quebec Court of Appeal set aside the judgments.

Held: The appeals should be dismissed.

When a supplier goes bankrupt, the tax authorities do not own GST and QST amounts that have been collected but not remitted or are collectible at the time of the bankruptcy. Instead, they have an unsecured claim against the supplier. The legal characterization of the relationships between the tax authorities and the suppliers and recipients of goods and services cannot be considered in isolation from the overall context of the system for the collection and remittance of these taxes and from the provisions of the *Bankruptcy and Insolvency Act* ("*BIA*"). The tax authorities' position amounts to maintaining that the deemed trusts established by s. 222 *ETA* and s. 20 of the *Act respecting the Ministère du Revenu* ("*AMR*") continue to exist after a bankruptcy, which conflicts with both the words and the intent of the statutory provisions in question, and is inconsistent with the nature of the tax authorities' rights under the system for the collection and remittance of the GST and QST. [7] [21] [28-29]

In light of the 1992 amendments to s. 67 *BIA*, the deemed trusts established by ss. 222 *ETA* and 20 *AMR* are terminated at the time of the bankruptcy. Parliament also enacted concordance amendments to the *ETA* by adding subs. (1.1) to s. 222. As a result of this provision, deemed trusts intended to secure GST claims are ineffective in bankruptcy situations. Although the Quebec legislation does not contain a provision similar to s. 222(1.1) *ETA*, Parliament's legislative authority over bankruptcy prevents the provincial legislatures from modifying the order of priority established in the *BIA*. Thus, the trustee is responsible for liquidating patrimonies that include the GST and QST amounts in issue. The mandate the supplier or the trustee is deemed to have been given with respect to the two taxes involves the performance of obligations to collect and then to remit, not the amounts collected, but a balance resulting from offsetting claims of the Crown and the supplier. [7-8] [16-17] [23] [27-28]

Cases Cited

Referred to: *Reference re Quebec Sales Tax*, 1994 CanLII 48 (SCC), [1994] 2 S.C.R. 715; *Reference re Goods and Services Tax*, 1992 CanLII 69 (SCC), [1992] 2 S.C.R. 445; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52 (CanLII), 2005 SCC 52, [2005] 2 S.C.R. 564; *Victuni AG v. Minister of Revenue of Quebec*, 1980 CanLII 169 (SCC), [1980] 1 S.C.R. 580; *Lefebvre (Trustee of)*, 2004 SCC 63 (CanLII), 2004 SCC 63, [2004] 3 S.C.R. 326; *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24; *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29 (CanLII), 2009 SCC 29, [2009] 2 S.C.R. 94.

Statutes and Regulations Cited

Act respecting the Ministère du Revenu, R.S.Q., c. M-31, ss. 20, 23, 24.
Act respecting the Québec sales tax, R.S.Q., c. T-0.1, ss. 16, 82, 302.1, 422, 425, 427, 437.
Act respecting the Québec sales tax and amending various fiscal legislation, S.Q. 1991, c. 67.
Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof, S.C. 1992, c. 27.
Bank Act, S.C. 1991, c. 46, s. 427.
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 86(1), 87(1).
Constitution Act, 1867, s. 92(2).
Excise Tax Act, R.S.C. 1985, c. E-15, ss. 141.01, 165, 169(1), 221(1), 222(1), (1.1), (3), 223, 224, 228, 265, 296(1)(*b*).

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APPEAL from a judgment of the Quebec Court of Appeal (Forget, Doyon and Duval Hesler JJ.A.), 2007 QCCA 1837 (CanLII), 2007 QCCA 1837, [2008] R.J.Q. 39, 40 C.B.R. (5th) 18, [2008] G.S.T.C. 3, SOQUIJ AZ-50464769,

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[2007] J.Q. nº 14712 (QL), 2007 CarswellQue 12231, setting aside a decision of Boisvert J., 2006 QCCS 2108 (CanLII), 2006 QCCS 2108, 34 C.B.R. (5th) 245, [2007] G.S.T.C. 185, SOQUIJ AZ-50368833, [2006] J.Q. nº 3613 (QL), 2006 CarswellQue 3427. Appeal dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Forget, Doyon and Duval Hesler JJ.A.), 2007 QCCA 1835 (CanLII), 2007 QCCA 1835, 40 C.B.R. (5th) 18, [2008] G.S.T.C. 3, SOQUIJ AZ-50464328, [2007] J.Q. nº 14713 (QL), 2007 CarswellQue 12231, setting aside a decision of St-Julien J., 2006 QCCS 6370 (CanLII), 2006 QCCS 6370, SOQUIJ AZ-50412620, [2006] J.Q. nº 15239 (QL), 2006 CarswellQue 11998. Appeal dismissed.

APPEAL from a judgment of the Quebec Court of Appeal (Forget, Doyon and Duval Hesler JJ.A.), 2007 QCCA 1813 (CanLII), 2007 QCCA 1813, 40 C.B.R. (5th) 18, [2008] G.S.T.C. 3, SOQUIJ AZ-50464770, [2007] J.Q. nº 14564 (QL), 2007 CarswellQue 12231, setting aside a decision of Bouchard J., 2006 QCCS 2656 (CanLII), 2006 QCCS 2656, 21 C.B.R. (5th) 289, [2006] G.S.T.C. 123, SOQUIJ AZ-50373960, [2006] J.Q. nº 11028 (QL), 2006 CarswellQue 4759. Appeal dismissed.

Christian Boutin, *Michel Beauchamp* and *Jean-Yves Bernard*, for the appellant the Deputy Minister of Revenue of Quebec.

Pierre Cossette and *Guy Laperrière*, for the appellant Her Majesty The Queen.

Reynald Auger and *Jean-Patrick Dallaire*, for the respondents Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc.

Mason Poplaw and *Miguel Bourbonnais*, for the respondent Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor, Consortium Promecan Inc.

Marc Germain, for the respondent the National Bank of Canada.

Éric Vallières and *Sidney Elbaz*, for the intervener.

English version of the judgment of the Court delivered by

LEBEL J. —

I. Introduction

[1] In these three cases, the Canadian and Quebec tax authorities, on the one hand, and the trustees in bankruptcy of certain businesses and financial institutions holding various security interests in the property of the bankrupts, on the other, disagree about what should be done with taxes on consumption that had been collected but not remitted, or were collectible, as of the date of the bankruptcy. The tax authorities submit that they are entitled to the amounts in issue as the owners thereof. The respondents contend that, under the law applicable in bankruptcy matters, the federal or provincial Crown is only an ordinary creditor and must be ranked as such with the debtors' other creditors. The financial institutions submit that their security interests can be set up against the Crown as against any ordinary creditor. The Quebec Superior Court found for the Crown. The Quebec Court of Appeal set aside the judgments and accepted the arguments of the trustees and financial institutions. In my view, that decision is well founded, and I would uphold it.

II. Origins of the Cases

[2] These three cases result from the bankruptcies of a number of businesses and from problems that arose as a result of their insolvency in respect of the administration of the federal goods and services tax ("GST") imposed under the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and the Quebec sales tax ("QST") payable under the *Act respecting the Québec sales tax*, R.S.Q., c. T-0.1 ("*AQST*"). To begin, I will summarize the facts that must be considered to understand these cases. The relevant statutory provisions are reproduced in the Appendix.

A. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its Capacity as Trustee in Bankruptcy of 9083-4185 Québec Inc.*

[3] In this case, a manufacturing company required, as a supplier, to collect the GST and the QST went bankrupt on September 7, 2005. Raymond Chabot Inc. was appointed trustee in bankruptcy. The debtor had hypothecated its claims and accounts receivable in favour of the respondent Caisse populaire Desjardins de Montmagny. Quebec's Deputy Minister of Revenue gave the trustee notice that he considered it to be his mandatary for the recovery of GST and QST amounts that had been collected but not remitted or were collectible. The tax authorities claimed that they owned the amounts in question. Furthermore, the record shows that some of the taxes that had been collected or were collectible at the time of the bankruptcy had been payable for more than 60 days. The Caisse populaire Desjardins de Montmagny claimed to hold valid security interests, which could be set up against the tax authorities, in the tax amounts related to the claims hypothecated in its favour. In view of these conflicting claims, the trustee asked the Superior Court to determine to whom the tax amounts belonged.

B. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. Raymond Chabot Inc. in Its Capacity as Trustee for the Estate of the Debtor, Consortium Promecan Inc.*

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[4] In this case, Consortium Promecan Inc. went bankrupt on March 20, 2004, and Raymond Chabot Inc. was appointed trustee. The debtor had not filed returns with respect to the GST and the QST since February 1, 2004. Quebec's Deputy Minister of Revenue asked the trustee to remit to him all GST and QST amounts in respect of the period between February 1 and March 20, 2004 that had been collected or were collectible. The trustee replied that, in its view, the Deputy Minister was only an ordinary creditor in the bankruptcy, and it denied his request. The Crown appealed that decision to the Superior Court.

C. *Deputy Minister of Revenue of Quebec and Her Majesty the Queen in Right of Canada v. National Bank of Canada*

[5] The tax claims in this case result from the bankruptcies of two companies, Alternative Granite et Marbre inc. and Stone Vogue Ressources inc., on November 5, 2004. The Crown claimed GST and QST amounts related to the accounts receivable of the bankrupt debtors. The National Bank of Canada had obtained, on those accounts, security under s. 427 of the *Bank Act*, S.C. 1991, c. 46, and movable hypothecs. It tried to exercise its rights under these various security interests and claimed the proceeds of the accounts receivable as well as the GST and QST amounts related to these claims. It then applied to the Superior Court to resolve the resulting dispute between itself and the tax authorities. In the meantime, the Bank's mandatary, the trustee and the Crown all collected portions of the disputed taxes and even of the accounts receivable.

III. Judicial History

A. *Quebec Superior Court*

[6]The Superior Court heard the three cases separately. The result was the same in all of them. All three judges concluded that the Crown owned the disputed GST and QST amounts. If the trustee in bankruptcy collected them, it was as a mandatary of the tax authorities. Quebec's Deputy Minister of Revenue and the Minister of National Revenue could not be considered to be mere ordinary creditors. In essence, the Superior Court judges held that the GST and QST amounts were not part of the bankrupt's patrimony: 2006 QCCS 2108 (CanLII), 2006 QCCS 2108, 34 C.B.R. (5th) 245 (*per* Boisvert J.), 2006 QCCS 6370, [2006] J.Q. nº 15239 (QL) (*per* St-Julien J.), 2006 QCCS 2656 (CanLII), 2006 QCCS 2656, 21 C.B.R. (5th) 289 (*per* Bouchard J.). All three judgments were appealed to the Quebec Court of Appeal.

B. *Quebec Court of Appeal, Forget, Doyon and Duval Hesler JJ.A.*

[7] Duval Hesler J.A., writing for the Court of Appeal, allowed the appeals and set aside the Superior Court's judgments: 2007 QCCA 1837 (CanLII), 2007 QCCA 1837, 2007 QCCA 1835, 2007 QCCA 1813, [2008] R.J.Q. 39. She acknowledged that the QST and the GST are direct taxes payable by the recipient of the good or service. But in her view, as a result of the 1992 amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the tax authorities must be treated as an ordinary creditor in such a case. They do not own tax amounts payable by purchasers of goods and services that are subject to the GST and QST, but instead have a claim against the supplier. Furthermore, any deemed trust in favour of the tax authorities ended at the time of the bankruptcy. The tax amounts in issue were therefore part of the bankrupt's patrimony but remained subject to any security interests that had been validly granted to creditors like the Caisse populaire Desjardins de Montmagny and the National Bank of Canada. This Court granted leave for three appeals from that judgment.

IV. Analysis

A. *Issues and Positions of the Parties*

[8] The issue is the nature of the rights of the tax authorities, the trustee in bankruptcy and the secured creditors to GST and QST amounts that have been collected but not remitted or are collectible at the time of the bankruptcy of a supplier within the meaning of the *AQST* and the *ETA*. In sum, the tax authorities submit that they own these amounts. In their opinion, the trustee collects the taxes on their behalf, as their mandatary, and these amounts are not part of the bankrupt's patrimony. The respondents reply that the amounts are part of the bankrupt's patrimony, subject to any validly granted security interests. In their view, the Crown does not have a right of ownership in the tax amounts and enjoys only the rights of an ordinary creditor in a bankruptcy situation. To resolve this issue, it will be necessary to begin by considering the nature of the two taxes in issue, the GST and the QST, and the mechanism for administering them. I will also need, before ruling on the legal characterization of the Crown's rights, to discuss the effect of the 1992 amendments to the *BIA*.

B. *Nature of the GST and the QST*

[9] The GST and the QST are similar types of taxes on consumption. The legal framework for imposing them was established almost 20 years ago now. They are considered to be direct taxes, and the ultimate recipient of taxable goods and services is responsible for paying them. However, the taxes are collected, and credits apply, at each step of the manufacturing and marketing chains. In principle, the supplier acts only as a mandatary of the Crown in collecting and remitting these taxes (*Reference re Quebec Sales Tax*, 1994 CanLII 48 (SCC), [1994] 2 S.C.R. 715, at pp. 720-22).

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[10] The GST, which was implemented in 1990 by legislation that amended the *ETA* (S.C. 1990, c. 45), replaced the former federal manufacturers' sales tax. The GST can be regarded as a value-added tax. It is collected at every stage of the manufacturing and marketing of goods and services and is payable by the recipient, who is regarded as the debtor in respect of the tax liability to the Crown (s. 165 *ETA*). However, the supplier is responsible for collecting and remitting the tax (s. 221(1) *ETA*). The supplier is deemed to hold the amounts so collected in trust for Her Majesty (s. 222(1) and (3) *ETA*) and must periodically file returns and make remittances. In addition, the Act establishes a system under which input credits can be claimed, at each step of the marketing and supply of the good, in respect of the taxes the supplier has had to pay to his or her own suppliers (ss. 141.01 and 169(1) *ETA*). The ultimate recipient bears the full burden of the tax (R. Brakel & Associates Ltd., *Value-Added Taxation in Canada: GST, HST, and QST* (2nd ed. 2003), at pp. 2-3). This Court has confirmed this as a valid exercise of the Parliament of Canada's taxing power (*Reference re Goods and Services Tax*, 1992 CanLII 69 (SCC), [1992] 2 S.C.R. 445).

[11] In parallel with this federal tax reform, an in-depth review of the consumption tax system took place in Quebec. In 1991, the National Assembly enacted new sales tax legislation, the *Act respecting the Québec sales tax and amending various fiscal legislation*, S.Q. 1991, c. 67. The National Assembly's intention in enacting this statute was to achieve extensive harmonization with the GST and to align this aspect of Quebec's tax system with the model chosen by the Parliament of Canada. The legislation came into force on July 1, 1992 (Brakel, at pp. 3-4). Under an agreement with the Government of Canada, the Quebec government is responsible for collecting both the GST and the QST in Quebec (Brakel, at p. 4). Moreover, pursuant to s. 20 of the *Act respecting the Ministère du Revenu*, R.S.Q., c. M-31 ("*AMR*"), amounts collected by suppliers of goods and services are deemed to be held in trust for the State. This Court held that this new sales tax falls within the provincial taxing power under s. 92(2) of the *Constitution Act, 1867* (*Reference re Quebec Sales Tax*).

C. *Effects of the Amendments to the BIA on the Status of Claims of the Crown*

[12] In 1992, the Parliament of Canada also made extensive changes to the *BIA*, and those changes are of particular relevance to this issue of the nature and extent of the Crown's rights to recover the GST and QST amounts. The amendments in question were set out in the *Act to amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, S.C. 1992, c. 27. Some of these changes related to the Crown's priority in bankruptcy situations. The federal government seemed at the time to want to respond to criticisms that the system establishing the priority of the Crown's claims often left nothing for a bankrupt's ordinary creditors. A government spokesperson acknowledged these concerns at the time of the introduction of the legislation to revise the Crown priority system:

> We also took steps to limit the priority of the Crown, one of the more blatantly unfair aspect[s] of the present Bankruptcy Act.
>
> (*House of Commons Debates*, vol. II, 3rd Sess., 34th Parl., June 19, 1991, at p. 2106)

[13] Felix Holtmann, the Chairman of the Standing Committee on Consumer and Corporate Affairs and Government Operations, also acknowledged the problems and injustices caused by the proliferation of deemed trusts developed to protect the Crown's claims. He stressed the need to reduce the extent of such trusts in order to achieve a better balance among creditors in bankruptcy situations:

> One of the main areas is Crown priority. Under the present Bankruptcy Act the Crown has a preferred claim for various types of taxes and ranks ahead of all unsecured creditors. In 1970 a study report made reference to Crown priority; then again in 1986 proposed bankruptcy amendments recommended the abolition of the Crown priority. With the Crown priority, creditors are less likely to participate in an insolvency, in a bankruptcy, and today rarely come out to meetings of creditors because there are no assets. The assets are fully secured to the secured creditors, banks and major lenders as well as to Crowns. As a result there is virtually nothing left for the unsecureds. We recommend that the Crown priority be abolished and that if the Crown wants to contract directly with the debtor, it be entitled to a contractual priority but not a Crown priority.
>
> (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 9, September 5, 1991, at p. 9:5)

[14] During the parliamentary debates on Bill C-22 regarding the amendment of the *BIA*, comments by the government spokesperson confirmed that the government intended to reduce the Crown to the rank of an ordinary creditor in bankruptcy situations:

> A second very important point in the legislation is that the Government of Canada, the Crown, does not put itself in a priority position. It stands in line with the unsecured creditors in almost all cases except for the deductions of tax and unemployment owed.
>
> (*House of Commons Debates*, vol. IV, 3rd Sess., 34th Parl., November 1, 1991, at p. 4354)

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In the course of the discussions in the Standing Committee on Consumer and Corporate Affairs and Government Operations, the government spokesperson had clearly expressed the intention to abolish the deemed trust in respect of the GST in bankruptcy situations:

> As far as the GST is concerned, if there is a deemed trust for GST, it will not come under this particular provision so it will not survive. If there is a statutory lien or priority, or a statutory security interest for GST, it will not take priority under this legislation unless it is a registered interest.
>
> (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 10, September 5, 1991, at p. 10:18)

[15] The amendments to the bankruptcy legislation appear to be consistent with the legislative intention announced during the parliamentary debates. First of all, s. 67 *BIA* reinforces the principle that all the bankrupt's property is part of the estate of the bankrupt and constitutes the common pledge of the creditors, although with the exception of property held in trust for another person. However, s. 67(2) *BIA* provides that, with certain exceptions, property may not be regarded as held in trust unless it would be so regarded in the absence of a statutory provision. This renders statutory trusts ineffective without affecting trusts resulting from the common law or the civil law or statutory trusts that secure claims of the federal and provincial Crowns related to source deductions for income tax, a comprehensive pension plan or the federal employment insurance program (s. 67(3) *BIA*). No mention is made of trusts related to the GST or to provincial taxes such as the QST. Moreover, s. 86(1) *BIA* confirms that the Crown is only an ordinary creditor in a bankruptcy situation:

> **86.** (1) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

[16] In addition, not long after these changes to the *BIA*, the Parliament of Canada enacted concordance amendments with regard to GST claims (S.C. 1993, c. 27). It added subs. (1.1) to s. 222 *ETA*. As a result of this provision, deemed trusts intended to secure GST claims are ineffective in bankruptcy situations:

> **222.** . . .
>
> (1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

[17] The Quebec legislation respecting the QST does not contain a provision similar to s. 222(1.1) *ETA* that renders the deemed trust in favour of the tax authorities ineffective in bankruptcy situations. However, according to a settled principle of constitutional law regarding the Parliament of Canada's legislative authority over bankruptcy and insolvency, the provincial legislatures may not modify the order of priority established in the *BIA*. In the event of conflict, the *BIA* will prevail and the provincial statute will be inapplicable regardless of the legislature's intention (*D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52 (CanLII), 2005 SCC 52, [2005] 2 S.C.R. 564, at para. 12, *per* Deschamps J.).

[18] The tax authorities do not dispute the clear terms of the statutory provisions. Rather, they argue that those provisions do not apply to the GST and the QST and that the Crown is not a creditor, but the owner of the tax amounts. Thus, the amounts collected or collectible at the time of the bankruptcy in respect of the GST or the QST do not form part of the bankrupt's patrimony. As a result, they are not included in the property that is to be liquidated in accordance with the order of priority established in the *BIA*. It will therefore be necessary to resolve the issue of the legal characterization of the Crown's rights with respect to the GST and QST amounts. The characterization of those rights will essentially resolve the dispute before this Court.

D. *Legal Characterization of the Crown's Rights*

[19] In this analysis, it is important to abide by the fundamental rules of contemporary statutory interpretation. Parliament's intent must be ascertained, and to do this, it is often necessary to review the statutory provisions at issue in their overall context (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 276). This approach casts doubt on the validity of the tax authorities' arguments.

[20] The appellants' arguments consist of a few fundamental propositions. They submit, first, that the GST and the QST are direct taxes on consumption. They are imposed on the consumer, and more specifically on the ultimate recipient of a taxable good or service. The legislation establishes a direct link between the Crown and the recipient, as the former may claim the taxes payable directly from the latter if they have not been collected (s. 296(1)(*b*) *ETA*). The appellants contend that where the GST is collected by a trustee in bankruptcy, the trustee, like the bankrupt supplier, collects it as an agent of, and on behalf of, the Crown. And the Crown is in a similar legal situation where the QST is concerned. The recipient owes the sales tax to the Crown pursuant to ss. 16 and 82 *AQST*. The supplier collects the tax on the Crown's behalf and is deemed to be a mandatary of the Crown pursuant to s. 422 *AQST*. Moreover, under

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s. 23 *AMR*, a person who does not collect a tax he or she was required to collect becomes a debtor of the State for that amount. The appellants further submit that, in the context of the *ETA* and the *AQST*, the supplier, a mandatary of the Crown, is responsible, after supplying a taxable service or good to a consumer, for the recovery of property — a GST or QST amount — that belongs to the Crown and that remains Crown property, until it is remitted to the Crown. The legal situation is the same regardless of whether the tax is collected by the supplier or by a trustee after its bankruptcy. In the appellants' view, when the collected tax is remitted, the mandatary does not settle a claim, but remits to the Crown its own property. Moreover, according to this argument, this Court has established a general principle that, in performing its obligation, the mandatary does not discharge a debt, but delivers over property belonging to the mandator (*Victuni AG v. Minister of Revenue of Quebec*, 1980 CanLII 169 (SCC), [1980] 1 S.C.R. 580, at p. 584, *per* Pigeon J.).

[21] This set of legal propositions disregards the mechanisms for administering the GST and the QST. The legal characterization of the relationships between the tax authorities and the suppliers and recipients of goods and services cannot be considered in isolation from the overall context of the system for the collection and remittance of these taxes and from the provisions of the *BIA*.

[22] An initial comment must be made about the impact of the federal bankruptcy legislation. The appellants are oversimplifying the trustee's role and, in particular, his or her legal situation *vis-à-vis* the bankrupt. This Court has noted the complexity of the trustee's duties in, for example, *Lefebvre (Trustee of)*, 2004 SCC 63 (CanLII), 2004 SCC 63, [2004] 3 S.C.R. 326, at paras. 35-37. The trustee's role is not limited to representing the bankrupt. The trustee manages the bankrupt's patrimony and is seized thereof as a result of the bankruptcy, but he or she also represents the creditors and is responsible to them for the liquidation and orderly distribution of the patrimony.

[23] In the cases before the Court, the trustees were responsible for liquidating a patrimony that included the GST and QST amounts in issue, as the Court of Appeal concluded (see paras. 51-55). In her reasons, Duval Hesler J.A. clearly and correctly defined the nature of the trustee's role in this respect. The reason why the supplier was given the status of a mandatary was to ensure that the tax qualified as a direct tax so that the imposition, by the province of Quebec, of the QST in a form compatible with that of the federal GST would be constitutional (para. 50). However, the fact that this tax is ultimately borne by the recipient does not support a finding that the supplier and then the trustee, the bankrupt's representative, merely collect and remit the Crown's "property" or "thing". The nature of the collection mechanism for the two taxes suggests another interpretation of the legal situation.

[24] This mechanism is designed to implement a direct tax that is also a tax on the value added at each stage of the production and marketing of the good or service until it is acquired by its ultimate recipient. In such a system, as Duval Hesler J.A. noted, —TRANSLATION— "[t]he dollar collected is not the dollar remitted" (para. 52).

[25] First of all, the collection mechanism does not require separate invoices for the GST and the QST. These taxes are indicated and included in the invoice or other document given to the recipient (s. 223 *ETA*; s. 425 *AQST*). Next, the tax amounts collected by suppliers are remitted in accordance with the accrual, not cash, method of accounting. At periodic intervals, which vary depending on the individual supplier's sales and sometimes on the nature of the business, suppliers remit to the tax authorities amounts corresponding to the tax amounts that have been billed for and are collectible during the reporting period in question even if these collectible amounts have not in fact been collected from the recipients. When sending remittances, suppliers deduct from the amounts being remitted credits corresponding to their own inputs, that is, to the taxes they have paid to their own suppliers. Thus, they remit net tax amounts based on the difference between the taxes they have collected and the taxes they themselves have paid (s. 228 *ETA*; s. 437 *AQST*). At times, under this system, they can obtain rebates.

[26] Moreover, nothing in the legislation respecting the GST and the QST requires suppliers to keep the taxes they collect separate. Until a bankruptcy occurs, only the deemed trusts established by s. 222 *ETA* and s. 20 *AMR* lead to this legal result by giving the tax authorities a right to equivalent amounts from the suppliers' assets. Finally, while it is true that the recipient owes the tax to the Crown, a supplier who has remitted the tax owed by the recipient but has not collected it has a cause of action against the recipient (s. 224 *ETA*; s. 427 *AQST*).

[27] The statutory mandate imposed on the supplier to collect the GST and the QST differs from the mandate in issue in *Victuni*, which related to the acquisition and development of an immovable. The mandate with respect to the two taxes involves the performance of obligations to collect and then to remit, not the amounts collected, but a balance resulting from offsetting claims of the Crown and the supplier. The existence of these offsetting claims confirms that claims for the amounts collected by suppliers are fungible, as this Court in fact pointed out in *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24, at pp. 34-35.

[28] I note that the appellants' position amounts to maintaining that the deemed trusts established by s. 222 *ETA* and s. 20 *AMR* continue to exist after a bankruptcy. The appellants' argument is inconsistent with the nature of their rights under the system for the collection and remittance of the GST and QST. It also conflicts with Parliament's clear intent and with the very explicit wording of the relevant statutory provisions regarding what is to happen if a supplier

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goes bankrupt. Before 1992, the Crown held a priority where certain tax claims were concerned. These claims were often protected by an increasingly complex series of statutory deemed trusts. The 1992 amendments to the *BIA* rendered these trusts ineffective in a bankruptcy situation, although there were exceptions with respect, for example, to claims for income tax source deductions (see, for example, *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29 (CanLII), 2009 SCC 29, [2009] 2 S.C.R. 94). Other than where these exceptions apply, when a debtor goes bankrupt, the Crown becomes an ordinary creditor. The trustee will give it the same priority as other creditors of the same rank. The trustee will be personally responsible for paying the GST or QST in respect of its own activities only (s. 265 *ETA*; s. 302.1 *AQST*).

[29] Canadian tax authorities are bound by the choice of legislative policy now expressed in the *BIA*. The order of priority established in the *BIA* is also binding on the Quebec tax authorities, even though the *AMR* is silent on what happens to the deemed trust established in s. 20 thereof in the event of bankruptcy. The appellants' arguments conflict with both the words of the statutory provisions in question and their underlying legislative intent, and cannot be accepted.

V. Conclusion

[30] For these reasons, I would affirm the decision of the Quebec Court of Appeal and dismiss the appellants' appeals with costs.

APPENDIX

Excise Tax Act, R.S.C. 1985, c. E---15

165. (1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

. . .

221. (1) Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

. . .

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

An Act respecting the Québec sales tax, R.S.Q., c. T---0.1

16. Every recipient of a taxable supply made in Québec shall pay to the Minister of Revenue a tax in respect of the supply calculated at the rate of 7.5% on the value of the consideration for the supply.

. . .

422. Every person who makes a taxable supply shall, as a mandatary of the Minister, collect the tax payable by the recipient under section 16 in respect of the supply.

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An Act respecting the Ministère du Revenu, R.S.Q., c. M---31

20. Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for the State, separately from the person's patrimony and the person's own funds, for payment to the State in the manner and at the time provided under a fiscal law.

Where at any time an amount deemed by the first paragraph to be held by a person in trust for the State is not paid to the State in the manner and at the time provided under a fiscal law, an amount equal to the amount thus deducted, withheld or collected is deemed, from the time the amount is deducted, withheld or collected, to be held in trust for the State, separately from the person's patrimony and the person's own funds, and to form a separate fund not forming part of the property of that person, whether or not the amount has in fact been held separately from that person's patrimony or that person's own funds.

. . .

23. Every person who does not collect a duty that he was bound to collect as a mandatary of the Minister or does not withhold a duty that he was bound to withhold, under a fiscal law or a regulation made under such a law, shall become a debtor of the State for the amount of that duty, with the exception of the withholding provided for in section 1015 of the Taxation Act (chapter I---3), unless the withholding concerns a duty that a person was required to withhold from an amount paid to another person who is not resident in Canada for services performed in Québec.

. . .

24. Every person who deducts, withholds or collects an amount under a fiscal law is bound to pay to the Minister, at the date fixed by such law, or in accordance with the provision for such payment, an amount equal to that which the person must remit under the said Act.

. . .

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B---3

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

. . .

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

87. (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation

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to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

Appeals dismissed with costs.

Solicitor for the appellant the Deputy Minister of Revenue of Quebec: Attorney General of Quebec, Montréal.

Solicitor for the appellant Her Majesty The Queen: Attorney General of Canada, Montréal.

Solicitors for the respondents Caisse populaire Desjardins de Montmagny and Raymond Chabot Inc., in its capacity as Trustee in bankruptcy of 9083-4185 Québec Inc.: Langlois Kronström Desjardins, Lévis.

Solicitors for the respondent Raymond Chabot Inc., in its capacity as Trustee for the estate of the debtor, Consortium Promecan Inc.: McCarthy Tétrault, Montréal.

Solicitors for the respondent the National Bank of Canada: Stein Monast, Québec.

Solicitors for the intervener: McMillan, Montréal.

Exceptions - Sec. 67(3)

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

R.S., 1985, c. B-3, s. 67;
1992, c. 27, s. 33;
1996, c. 23, s. 168;
1997, c. 12, s. 59;
1998, c. 19, s. 250;
2005, c. 47, s. 57;
2007, c. 36, s. 32.

Directives re surplus income - Sec. 68

68. (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the surplus income of an individual bankrupt and the amount that a bankrupt who has surplus income is required to pay to the estate of the bankrupt.

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Landry (Bankruptcy of) (Re), 2000 CanLII 16846 (ON CA) - Wage Income Awards as Property

Date:	2000-09-06
Docket:	C33175
Parallel citations:	50 OR (3d) 1; 192 DLR (4th) 728; 3 CCEL (3d) 1; 21 CBR (4th) 58; 135 OAC 381
URL:	http://canlii.ca/t/1cvmz
Citation:	Landry (Bankruptcy of) (Re), 2000 CanLII 16846 (ON CA), <http://canlii.ca/t/1cvmz> retrieved on 2013-08-29
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DATE: 20000906
DOCKET: C33175

COURT OF APPEAL FOR ONTARIO
OSBORNE A.C.J.O., WEILER and CHARRON JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF NYCOLE LANDRY, residing in the Township of Longueuil, in the County of Prescott, in the Province of Ontario

Robert J. Smith and John P. O'Toole, for the Appellant, Deloitte & Touche

Matthew J. Halpin, for the Respondent Nycole Landry

Heard: May 26, 2000

On appeal from the decision of the Honourable Mr. Justice James B. Chadwick dated September 13, 1999.

CHARRON J.A.:

[1] The respondent, Nycole Landry, declared bankruptcy on June 4, 1997 and the appellant, Deloitte & Touche, was appointed trustee of the bankrupt's estate. Landry has been discharged from bankruptcy on October 15, 1998. **The trustee has not yet been discharged and is still attempting to realize upon the assets of the bankrupt's estate for the benefit of the creditors. This proceeding concerns one potential asset.**

A. The Facts

[2] The relevant facts can be stated succinctly.

[3] In 1993, Landry was dismissed from her employment as a pilot with First Air. That same year, she brought a claim for unjust dismissal against First Air under the *Canada Labour Code* R.S.C. 1985, c. L-2. At the end of a first hearing, the arbitrator found that Landry had been unjustly dismissed.

[4] The employer successfully appealed the arbitrator's finding and a new hearing was ordered. Shortly before the second hearing, Landry changed solicitors. In May 1997, the first solicitor's costs were assessed in the amount of $77,500. Landry declared bankruptcy on June 4, 1997. The first solicitor is the main, if not the only, creditor in the bankruptcy.

[5] Landry obtained an absolute discharge from her bankruptcy on October 15, 1998 which effectively discharged her from her debt to the first solicitor. The trustee did not oppose the discharge but made it clear to Landry that the trustee maintained the right to claim any part of an eventual award of damages for unjust dismissal.

[6] In December 1998, at the conclusion of a second hearing under the *Canada Labour Code*, a different arbitrator also found that Landry was unjustly dismissed. When the trustee became aware of the arbitrator's decision, the trustee unsuccessfully attempted to intervene in the proceedings to claim the first solicitor's costs.

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[7] The arbitrator's decision on the award has not yet been delivered and apparently awaits the outcome of this appeal. Although the exact amount is uncertain, the parties agree that Landry can expect to receive, as part of the award, some monies for lost wages.

B. The Trustee's Motion

[8] In the Spring of 1999, the trustee moved before Chadwick J. under ss. 67, 68 and 71 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") for various forms of relief with respect to the expected arbitrator's award. The trustee sought a declaration that any amount awarded in relation to lost wages[1] constituted property of the bankrupt that vested in the trustee for the benefit of the creditors, either through the automatic operation of ss. 67 and 71(2) or pursuant to an order that the court should make under s. 68. (Simply put, s. 67 defines the property of the bankrupt that is divisible among the creditors, s. 71(2) is a general vesting provision and s. 68 makes specific provisions with respect to either the "total income" of the bankrupt -if the current provision applies, or the bankrupt's "salary, wages, or other remuneration" from employment -if the former version applies.) The trustee also sought a declaration that Landry's claim against First Air vested in the trustee on the date of bankruptcy and that the trustee was therefore entitled to intervene in the proceedings before the arbitrator to seek an order for costs in relation to the first solicitor's account. Finally, the trustee sought an order for a lien under s. 34 of the *Solicitors Act*, R.S.O. 1990, c. S-15.

C. The Decision Under Appeal

[9] Chadwick J. held that, even if that part of the settlement related to wages in lieu of notice could arguably form part of the bankrupt estate under s. 67, 80% of this amount would be exempt pursuant to the provisions of the *Wages Act*, R.S.O. 1990, c. W-1 incorporated under s. 67(1)(b) of the *BIA*. In view of the small amount of money that could be apportioned, the motions judge stated that he was not prepared to make any order under s. 67. The motions held further that the current s. 68 applied but that the trustee was precluded from resorting to its provisions because the section applied only to undischarged bankrupts and because the trustee had not followed the procedure set out under s. 68. On the question of costs, the motions judge held that neither the trustee nor the former solicitors had any status in seeking an order for costs before the arbitrator as the costs are those of the client Landry and that she had waived her claim for costs as a result of her bankruptcy. Finally the motions judge refused to make an order for a lien under the *Solicitors Act* and dismissed the trustee's motion. The trustee appeals from this decision on all questions except that the trustee does not pursue the request for a lien under the *Solicitors Act*.

D. The Issues on the Appeal

[10] This appeal therefore raises the following questions:

1. Does Landry's claim against First Air or any part of the resulting award constitute property of the bankrupt that vests in the trustee under ss. 67 and 71(2)of the *BIA*?
2. If so, does any exemption apply pursuant to s. 67(1)(b) so as to except any part of the property from the estate of the bankrupt?
3. Is s. 67 superseded by the provisions of s. 68 in relation to a bankrupt's wages?
4. If so, which provision applies, the former s. 68 which was in force at the time Landry declared bankruptcy, or the present s. 68 which was in force at the time the trustee brought its motion?
5. Is the trustee precluded from resorting to s. 68 after the discharge of the bankrupt?
6. Is the trustee precluded from resorting to the current s. 68 because the procedure set out thereunder has not been followed?
7. Does the trustee have standing to intervene in the proceeding under the *Canada Labour Code* to claim Landry's costs incurred at the first arbitration hearing?

E. Analysis

1. Does Landry's claim against First Air or any part of the resulting award constitute property of the bankrupt that vests in the trustee under ss. 67 and 71(2) of the BIA?

[11] As stated earlier, s. 71(2) is a general vesting provision. It reads as follows:

71(2) Vesting of property in trustee – On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

[12] "Property" is defined under s. 2 of the *BIA* as including:

money, goods, *things in action*, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property. [Emphasis added.]

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[13] "Things in action" encompass a claim for damages for breach of contract, including an action for wrongful dismissal: *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701. The parties do not dispute that Landry's claim against her former employer under the *Canada Labour Code* is a "thing in action" and therefore constitutes "property" for the purpose of the *BIA*. Hence, pursuant to s. 71(2), Landry's claim against her former employer would vest in the trustee on the date she declared bankruptcy and she would cease to have any capacity to deal with it. However, s. 71(2) is subject to the other provisions of the *BIA.*

[14] Section 67 of the *BIA* defines what property of a bankrupt is divisible among her creditors and can serve to restrict the ambit of s. 71(2). The relevant part of s. 67 reads as follows:

67.(1) Property of bankrupt – The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

[15] It is clear that s. 67(1)(c) is wide enough to encompass Landry's claim against her former employer and, consequently, any award of damages (other than those relating to personal claims, see footnote 1, *supra*) would form part of the property divisible among her creditors under that provision. A question then arises whether any part of the property falls within the exception made for exempt property under s. 67(1)(b).

2. Does any exemption apply pursuant to s. 67(1)(b) so as to except any part of the property from the estate of the bankrupt?

[16] As provided under s. 67(1)(b), the property of the bankrupt divisible among her creditors shall not comprise any property that as against Landry is exempt from execution or seizure under the laws of Ontario. Landry relies on s. 7(2) of the Ontario *Wages Act* which provides that "80 per cent of a person's wages are exempt from seizure or garnishment." Therefore, if any part of the arbitrator's award constitutes "wages" within the meaning of s. 7(2), 80% of that amount would not constitute property divisible among Landry's creditors and, hence, would not vest in the trustee.

[17] At the hearing, counsel did not seriously dispute that the case of *Wallace, supra* provides support for the contention that the arbitrator's award of damages for unjust dismissal, in so far as it relates to lost wages, can be equated to actual wages.

[18] Wallace made a voluntary assignment into personal bankruptcy and remained an undischarged bankrupt when he commenced an action for wrongful dismissal against his former employer. A question arose whether Wallace could bring this action in his own name given the vesting provisions under s. 71(2) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 which, as s. 71(2) of the present *BIA,* provided that a bankrupt ceases to have any capacity to deal with his property.

[19] Iacobucci J., in the majority judgment, (all justices were in agreement on this issue) stated (para. 58) that the wording of the Act is clear and that an undischarged bankrupt has no capacity to deal with his or her property, including an action for breach of contract, outside the circumstances described in s. 99(1) (which circumstances are of no relevance to this appeal). The Court held further that the Act made no distinction whether that property was acquired before or after the assignment in bankruptcy. However, the Court went on to consider the provisions of s. 68(1) of the *Bankruptcy Act* as it then read (this is the provision which was in force at the time Landry declared bankruptcy) and concluded that it carved out an additional exception to this general rule. Section 68(1), in this earlier version, provided as follows:

68.(1) Notwithstanding subsection 67(1), where a bankrupt

(a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing the bankrupt...

the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

[20] More will be said about the effect of s. 68 later in these reasons. What is of relevance to the question presently under consideration is the finding by the Court that Wallace, an undischarged bankrupt, could maintain his action against his former employer for damages for wrongful dismissal not because of the timing of the acquisition of the property "but rather, because of the nature of the property in question" (para. 59) which the court equated to "wages". Iacobucci J. wrote as follows (paras. 65-66):

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As I see the matter, the underlying nature of the damages awarded in a wrongful dismissal action is clearly akin to the "wages" referred to in s. 68(1). In the absence of just cause, an employer remains free to dismiss an employee at any time provided that reasonable notice of the termination is given. In providing the employee with reasonable notice, the employer has two options: either to require the employee to continue working for the duration of that period or to give the employee pay in lieu of notice: D. Harris, *Wrongful Dismissal* (1989 (loose-leaf)), at p. 3-10. There can be no doubt that if the employer opted to require the employee to continue working during the notice period, his or her earnings during this time would constitute wages or salary under s. 68(1) of the Act. The only difference between these earnings and pay in lieu of notice is that the employee receives a lump sum payment instead of having that sum spread out over the course of the notice period. The nature of those funds remains the same and thus s. 68(1) will also apply in these circumstances.

In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled: *Sylvester v. British Columbia*, 1997 CanLII 353 (SCC), [1997] 2 S.C.R. 315. The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money. An award of damages in a wrongful dismissal action is in reality the wages that the employer ought to have paid the employee either over the course of the period of reasonable notice or as pay in lieu of notice. Therefore, in accordance with the exception which is carved out in s. 68(1) for "salary, wages or other remuneration", this money is not divisible among a bankrupt's creditors and does not vest in the trustee. The right of action is the means of attaining these damages and is similarly exempt.

[21] On the authority of *Wallace*, I conclude that, to the extent that the arbitrator's award relates to the pay Landry should have received in lieu of notice, the monies would constitute "wages" for the purpose of the s. 67(1)(b) exception. However, what is also clear from *Wallace* is that s. 67 must be considered in conjunction with s. 68. This brings us to the next question.

3. Is s. 67 superceded by the provisions of s.68 in relation to a bankrupt's wages?

[22] Two versions of s. 68 must be taken into account: the former version under the *Bankruptcy Act* that was considered in *Wallace* and the current version under the *BIA* which will be discussed shortly. There are two reasons why both versions must be examined. The first is that the former version and its interconnection with s. 67 was considered by the Supreme Court of Canada in *Wallace* and in *Marzetti v. Marzetti*, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765 and the question arises whether the reasoning in those cases applies to the new version. The second reason is that the trustee contends that the former version is applicable to this case since it was in force at the time Landry declared bankruptcy rather than the current version which was in force at the time the motion was brought. This latter argument forms the subject-matter of the next question on this appeal and will be dealt with later. I will now deal with the interpretation of s. 68 and its interconnection with s. 67.

a) The former s .68

[23] Section 68 under the *Bankruptcy Act* provided the trustee with the means to obtain part of a bankrupt's salary, wages or other remuneration from employment notwithstanding the provisions contained in s. 67(1). For our purposes, it is only necessary to consider s. 68(1) and I reproduce it again for convenience:

68.(1) Notwithstanding subsection 67(1), where a bankrupt

(a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing the bankrupt, or

(b) is in receipt of, or is entitled to receive from a person any money as payment for or commission in respect of any services performed by the bankrupt,

the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

[24] This provision was considered at length by the Supreme Court of Canada in *Marzetti*. The particular facts and a number of other issues in *Marzetti* are not relevant to our discussion. What is relevant to this case is the Court's consideration of the interconnection between s. 67[2] and s. 68. Iacobucci J., in writing for the court, set out the issue as follows (at 178):

... I must determine whether s. 68 always controls the disposition of a bankrupt's wages. Is s. 68 a substantive provision, that is, one which always removes wages from the scope of s. 67, or does it simply create a procedural device for trustees?

[25] Following his analysis, he concluded as follows (at 185):

To summarize briefly, it is my opinion that the language of s. 68, the inferred purpose of that provision, and the decision of this Court in *Vachon*, *supra*, all support the conclusion that s. 68 is a substantive provision, one which is intended to operate as a complete code in respect of a bankrupt's salary, wages, or other remuneration. These forms of property cannot fall within s. 67(c) of the *Bankruptcy Act* as a bankrupt's after-acquired "property", and they cannot be considered

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"property of a bankrupt divisible among his creditors" for the purposes of s. 67. They do not vest in the trustee through the simple operation of law.

[26] Hence, the Supreme Court in *Marzetti,* and later in *Wallace,* has authoritatively determined that s. 68 supercedes the provisions of s. 67 in so far as "salary, wages or other remuneration" from employment are concerned. It follows that, if this provision is applicable to this case, the Ontario *Wages Act* does not apply and neither does any other part of s. 67. There is no automatic vesting of Landry's claim against First Air or of any part of the arbitrator's award. The trustee, and the court, must look exclusively to s. 68 to determine what part, if any, of the award will form part of the bankrupt's estate for distribution to the creditors. The question becomes, does the same interpretation apply to the current s. 68 under the *BIA*?

b) Section 68 under the BIA

[27] The current s. 68 in the *BIA* differs from the former version in a number of respects. The full text is appended to these reasons for ease of reference. First, the section does not refer to "salary, wages or other remuneration" but to "total income". "[T]otal income" is defined for the purpose of s. 68 as including, "*notwithstanding s. 67(1)(b)* and (b.1), all revenues of a bankrupt of whatever nature or source". The section still allows the trustee to apply to the court for a determination of the amount that a bankrupt is required to pay to the estate of the bankrupt out of her total income but an elaborate procedure must be followed before such an application is made. For our purposes, this procedure can be summarized as follows.

[28] First, the Superintendent is directed to establish standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living. Second, the trustee, having regard to these standards and to the personal and family situation of the bankrupt, must fix the amount that the bankrupt is required to pay, inform the official receiver of his decision and take reasonable measures to ensure that the bankrupt complies with the requirement to pay. Third, where the official receiver determines that the fixed amount is not in accordance with the applicable standards, the official receiver must recommend an appropriate amount. Fourth, where the trustee and the bankrupt disagree on the amount to be paid, the trustee must send to the official receiver a request that the matter be determined by mediation. A creditor can also make a request for mediation. Fifth, the mediation takes place in accordance with prescribed procedures.

[29] In addition to this procedure, an application may be made to the court under s. 68(10):

68. (10) Where

(a) the trustee has not implemented a recommendation made by the official receiver under subsection (5),

(b) the issue submitted to mediation requested under subsection (6) or (7) is not thereby resolved, or

(c) the bankrupt fails to comply with the requirement to pay as determined under this section,

the trustee may, or on the request of the inspectors, any of the creditors or the official receiver shall, apply to the court for the hearing of the matter, and the court may, on the hearing, in accordance with the standards established under subsection (1) and having regard to the personal and family situation of the bankrupt, by order, fix the amount that the bankrupt is required to pay to the estate of the bankrupt.

[30] In my view, the reasoning in *Marzetti* and *Wallace* that led to the conclusion that s. 68 was a complete code with respect to wages applies equally to this new section. The current provision applies to the "total income" of the bankrupt and, as such, is even wider than the earlier reference to "salary, wages and other remuneration"; the provision expressly excludes the application of s. 67(1)(b)[3]; its purpose is no different than that described in *Marzetti* (except that applications to the court now appear to be limited to those cases where the issue cannot be otherwise resolved); and the jurisprudential principles reviewed by the Supreme Court in *Marzetti* are equally relevant.

[31] I therefore conclude that s. 67 is superseded by the provisions of the current s.68 in so far as the "total income" of the bankrupt is concerned. It follows that, as in *Wallace*, Landry's claim against her former employer and any consequent award relating to lost wages do not automatically vest in the trustee under ss. 67 and 71. Resort can only be had to s. 68 for payment of any portion thereof to the estate of the bankrupt.

4. Which provision applies, the former s.68 which was in force at the time Landry declared bankruptcy, or the present s.68 which was in force at the time the trustee brought its motion?

[32] In my view, the motions judge was correct in holding that the current s. 68 of the *BIA* applies to this motion. The following transition provision (S.C. 1997, c. 12, s. 60(2)) is relevant:

Subsection (1) [which re-enacted s. 68] applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force [April 30, 1998].

[33] A plain reading of the section would indicate that the trustee's motion under s. 68 itself is a proceeding within the meaning of that provision. Counsel could not articulate any policy reason why the new section should not apply.

[34] I therefore conclude that the current s. 68 under the *BIA* applies to this proceeding.

5. Is the trustee precluded from resorting to s. 68 after the discharge of the bankrupt?

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[35] The motions judge held that s. 68 was no longer available to a trustee after the discharge of a bankrupt. First, the motions judge noted that s. 68 refers to "a bankrupt" and that s. 2 defined "bankrupt" as "a person who has made an assignment or against whom a receiving order has been made or the legal status of that person". Second, the motions judge held that the section was intended to apply in the period from the assignment in bankruptcy or the receivership order until the discharge of the bankrupt. He therefore concluded that s. 68 applied to a bankrupt and not to a discharged bankrupt.

[36] In my view, this interpretation cannot be supported.

[37] First, it disregards the fact that the definition of "bankrupt" does not only refer to "the legal status of [the] person" - since Landry has been discharged, it is correct to say that she is no longer in the state of bankruptcy, but also to "a person who has made an assignment" - a description that clearly applies to Landry.[4]

[38] Second, the motions judge erred in his interpretation of the scope of the section. Although, from a practical standpoint, s. 68 may apply more commonly to periodic wages received during the period of time between the assignment and the discharge, I see nothing in the language of the provision that restricts its application to this time frame. It is clear from *Wallace* and *Marzetti* that s. 68 applies because of the nature of the property in question, regardless of the timing of the acquisition of the property or of the fact that the payment is made in a lump sum.

[39] Third, I do not see any policy reason why, in situations such as in this case where the income is only to be received after the discharge, resort to s. 68 would nonetheless have to be made before the discharge. Indeed, given the procedure set out under s.68, it may be impossible to resort to its provisions before payment is made or at least its quantum ascertained. Further, if resort to s. 68 were to be limited to the pre-discharge period, the trustee or the creditors would likely oppose any discharge if any payment of income was still pending at the time the bankrupt applied for a discharge. I am therefore concerned that such an interpretation would have the effect of unnecessarily postponing discharges until the full administration of the estate is completed. In cases where there is pending litigation over the payment of such income, the delay in obtaining a discharge could prove quite substantial. This result, in my view would militate against the prompt rehabilitation of the bankrupt. Finally, such an interpretation runs contrary to the established principle and practice that the trustee's obligation to realize and distribute the estate of the bankrupt continues until the trustee is discharged regardless of the prior discharge of the bankrupt: see *Re Salloum* 1990 CanLII 2260 (BC CA), (1990), 1 C.B.R. (3rd) 204 (B.C.C.A.).

[40] I therefore conclude that the trustee is not precluded from resorting to s. 68 by the fact that Landry has been discharged.

6. Is the trustee precluded from resorting to s. 68 because the procedure set out thereunder has not been followed?

[41] The motions judge was correct in noting that, before an application can be made to the court under s. 68(10) to fix the amount of the bankrupt's income that is payable to the estate of the bankrupt, the trustee must bring himself under the terms of that provision. As discussed earlier, by its terms, s. 68(10) effectively limits the number of applications to the court to those cases where the issue has not otherwise been resolved by consent or mediation in accordance with the established procedure. In this case, of course, it was impossible for the trustee to have followed this procedure since the arbitrator's award was not yet ascertained. Once the arbitrator's decision is made, the trustee will be in a position to fix the amount which, in its view, must be paid to the estate and the balance of the procedure set out in s. 68 can follow its course. Hence, the trustee's motion, in so far as it purports to be made under s. 68(10), is simply premature.

[42] However, the trustee's motion was not made strictly under s. 68(10). It is apparent from the relief sought, which was mainly declaratory in nature, that the motion was brought with a view to preserving a potential asset in anticipation of a future determination of the parties' rights under s. 68. In my view, the motions judge erred in foreclosing any resort to s. 68 on the basis that the procedure set out thereunder had not been followed. At worst, the motion could have been dismissed as premature. However, in the circumstances of this case, it is my view that the motions judge should have exercised his discretion and directed that any monies awarded by the arbitrator to Landry as compensation for lost wages be paid into court until the resolution of the parties' respective rights under s. 68 or until further direction of the court. It is open to this court to make an order which could have been made by the motions judge and I would therefore make such an order.

7. Does the trustee have standing to intervene in the proceeding under the Canada Labour Code to claim Landry's costs incurred at the first hearing?

[43] The question whether it would even be within the arbitrator's power to award costs in relation to the first hearing is not before this court. The issue here is whether Landry's right, if any, to claim costs in the *Canada Labour Code* proceeding vests in the trustee. In my view, it does not.

[44] As stated earlier, on the authority of *Wallace*, Landry's claim against her former employer did not vest in the trustee upon her bankruptcy. Hence Landry had the right, as she did, to pursue her proceeding under the *Canada Labour*

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Code in her own name. Any right she may have to claim costs in relation to this proceeding is not an independent thing in action. Rather, it is simply a consequential right that may flow from the result. The trustee has not established any basis upon which it could intervene. I would not interfere with the motions judge's decision on this point.

F. Disposition

[45] I would therefore answer the questions as follows:

1. Does Landry's claim against First Air or any part of the resulting award constitute property of the bankrupt that vests in the trustee under ss. 67 and 71(2)of the *BIA*?

Yes but these provisions are superseded by s. 68 of the *BIA*.

2. If so, does any exemption apply pursuant to s. 67(1)(b) so as to except any part of the property from the estate of the bankrupt?

Yes but this exception is superceded by s. 68 of the *BIA*.

3. Is s. 67 superceded by the provisions of s. 68 in relation to a bankrupt's wages?

Yes.

4. If so, which provision applies, the former s. 68 which was in force at the time Landry declared bankruptcy, or the present s. 68 which was in force at the time the trustee brought its motion?

The current s. 68 under the *BIA*.

5. Is the trustee precluded from resorting to s. 68 after the discharge of the bankrupt?

No.

6. Is the trustee precluded from resorting to the current s. 68 because the procedure set out thereunder has not been followed?

No.

7. Does the trustee have standing to intervene in the proceeding under the *Canada Labour Code* to claim Landry's costs incurred at the first arbitration hearing?

No.

[46] For these reasons, I would allow the appeal, set aside Chadwick J.'s order, order that any monies awarded by the arbitrator to Landry as compensation for lost wages be paid into the bankruptcy court until the resolution of the parties' respective rights under s.68 or until further directions of that court. I would allow the trustee its costs of the motion and of the appeal against the estate of the bankrupt.

(signed) "Louise Charron J.A."

(signed) "I agree C. A. Osborne A.C.J.O."

(signed) "I agree K. M. Weiler J.A."

RELEASED: September 6, 2000

APPENDIX

Section 68 of the *Bankruptcy and Insolvency Act*

68. (1) **Directives re standard of living factors** – The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

(2) **Interpretation** – For the purposes of this section,

(a) "total income" referred to in subsection (1) includes, notwithstanding paragraphs 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source; and

(b) a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1)(b) and (b.1).

(3) **Trustee to fix amount to be paid** – The trustee shall

(a) having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;

(b) inform the official receiver in writing of the amount fixed under paragraph (a); and

(c) take reasonable measures to ensure that the bankrupt complies with the requirement to pay.

(4) **Modification by trustee** – The trustee may, at any time, amend an amount fixed under subsection (3) to take into account

(a) material changes that have occurred in the personal or family situation of the bankrupt; or

(b) a recommendation made by the official receiver under subsection (5).

(5) **Official receiver recommendation** – Where the official receiver determines that the amount required to be paid by the bankrupt under subsection (3) or (4) is substantially not in accordance with the applicable standards established under

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subsection (1), the official receiver shall recommend to the trustee and to the bankrupt an amount required to be paid that the official receiver determines is in accordance with the applicable standards.

(6) **Trustee may request mediation** – Where the trustee and the bankrupt are not in agreement with the amount that the bankrupt is required to pay under subsection (3) or (4), the trustee shall, forthwith, in the prescribed form, send to the official receiver a request that the matter be determined by mediation and send a copy of the request to the bankrupt.

(7) **Creditor may request mediation** – On the request in writing of a creditor made within thirty days after the date of bankruptcy or an amendment referred to in subsection (4), the trustee shall, within the five days following the thirty day period, send to the official receiver a request in the prescribed form that the matter of the amount the bankrupt is required to pay under subsection (3) or (4) be determined by mediation and send a copy of the request to the bankrupt and the creditor.

(8) **Mediation procedure** – A mediation shall be in accordance with prescribed procedures.

(9) **File** – Documents contained in a file on the mediation of a matter under this section form part of the records referred to in subsection 11.1(2).

(10) **Court determination** – Where

(a) the trustee has not implemented a recommendation made by the official receiver under subsection (5),

(b) the issue submitted to mediation requested under subsection (6) or (7) is not thereby resolved, or

(c) the bankrupt fails to comply with the requirement to pay as determined under this section,

the trustee may, or on the request of the inspectors, any of the creditors or the official receiver shall, apply to the court for the hearing of the matter, and the court may, on the hearing, in accordance with the standards established under subsection (1) and having regard to the personal and family situation of the bankrupt, by order, fix the amount that the bankrupt is required to pay to the estate of the bankrupt.

(11) **Fixing fair and reasonable remuneration in the case of related persons** – The court may fix an amount that is fair and reasonable

(a) as salary, wages or other remuneration for the services being performed by a bankrupt for a person employing the bankrupt, or

(b) as payment for or commission in respect of any services being performed by a bankrupt for a person,

where the person is related to the bankrupt, and the court may, by order, determine the part of the salary, wages or other remuneration, or the part of the payment or commission, that shall be paid to the trustee on the basis of the amount so fixed by the court, unless it appears to the court that the services have been performed for the benefit of the bankrupt and are not of any substantial benefit to the person for whom they were performed.

(12) **Modification of order** – On the application of any interested person, the court may, at any time, amend an order made under this section to take into account material changes that have occurred in the personal or family situation of the bankrupt.

(13) **Default by other person** – An order of the court made under this section may be served on a person from whom the bankrupt is entitled to receive money and, in such case,

(a) the order binds the person to pay to the estate of the bankrupt the amount fixed by the order; and

(b) if the person fails to comply with the terms of the order, the court may, on the application of the trustee, order the person to pay the trustee the amount of money that the estate of the bankrupt would have received had the person complied with the terms of the order.

(14) **Application is a proceeding** – For the purposes of section 38, an application referred to in subsection (10) is deemed to be a proceeding for the benefit of the estate.

---

[1] The trustee acknowledged before the motions judge that any award of damages relating to personal claims other than for loss wages would not form part of the bankrupt's estate: *Re: Holley* (1986), 59 C.B.R. (N.S.) 17 (Ont. C.A.).

[2] Section 67 which was in force at the time has been modified in the current *BIA* but the changes are not relevant to this analysis.

[3] The fact that the current version is not expressly stated to apply notwithstanding the whole of s.67 as the earlier version did is, in my view, of no consequence. The remaining rationale in *Marzetti* leads to the conclusion that s.68 is a complete code with respect to this kind of property.

[4] The *BIA* contains many provisions where the word "bankrupt" is used in relation to the post-discharge period. See for example s.180 where the *BIA* provides that "[w]here a *bankrupt after his discharge* fails to perform the duties imposed on him by this Act, the court may, on application, annul his discharge." It is evident that "bankrupt" here applies to a discharged bankrupt.

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Berthelette (Bankrupt) (Re), 1999 CanLII 18712 (MB CA) - Legality of Trustee Fees Post Discharge and Complications with Accounting

Date:	1999-06-24
Docket:	AI 98-30-03664
Parallel citations:	174 DLR (4th) 577; [1999] 11 WWR 67; 11 CBR (4th) 1; 138 Man R (2d) 109
URL:	http://canlii.ca/t/233tr
Citation:	Berthelette (Bankrupt) (Re), 1999 CanLII 18712 (MB CA), <http://canlii.ca/t/233tr> retrieved on 2013-09-13
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Manitoba Court of Appeal
Berthelette (Bankrupt) (Re)
Date: 1999-06-24
Docket: AI 98-30-03664
H. Günter and R.B. Lindey, for the appellant.
R. W. Schwartz, for the respondent, BDO Dunwoody Limited.
D.W. Leslie, for the respondent, Canadian Insolvency Practitioners Association.
The judgment of the court was delivered by *Philp J.A.*:
Introduction
[1] The amount in issue in this summary administration bankruptcy proceeding is $196.00. The Superintendent of Bankruptcy (the superintendent) argues, however, that important questions affecting the summary administration of estates under the *Bankruptcy and Insolvency Act* (the *Act)* are raised which have resulted in disparate judgments in the courts of other provinces.
The Facts
[2] The issues arise out of uncomplicated factual circumstances that, apart from one inference the Court is invited to draw, are not disputed. On January 4, 1994, Nicole Marie Berthelette (the bankrupt), a first-time bankrupt, made an assignment in bankruptcy under the *Act*. On the same day, she signed a document entitled "Agreement Letter," which provided:

> **I, Nicole Marie Bethelette [*sic*], hereby agree to pay David I. Guttman, Trustee in Bankruptcy, any deficiency in fees arising out of my Assignment in Bankruptcy.**

[3] The bankrupt's realizable assets were negligible, and the administration of her bankruptcy proceeded summarily. On March 29, 1995, she received an absolute discharge.
[4] The trustee1 filed its final statement of receipts and disbursements on September 12, 1996. The statement disclosed receipts totalling $1,080.25 and disbursements of $231.90, leaving $848.35 for the trustee's fees. The fees to which a trustee is entitled for the summary administration of an estate are calculated, pursuant to Rule 115(1) of the Bankruptcy and Insolvency Rules2, on the receipts of the estate. On receipts of $1,080.25, the amount of the fees under the Rule is $1,011.84. (The trustee's statement erroneously shows this calculation to be $1,009.58.)
[5] There was, therefore, a shortfall or deficiency of $163.49 between the trustee's fees calculated pursuant to the Rule and the amount available for distribution.
[6] On October 31, 1996, the trustee received a payment of $196.00 from the bankrupt pursuant to the agreement letter. Four days later, on November 4, 1996, the trustee filed an amended statement of receipts and disbursements, which included the payment of $196.00 as a receipt of the estate. In the amended statement, the receipts total $1,276.25 and the trustee's fees, calculated on those receipts pursuant to Rule 115(1), are shown as $1,080.44.
[7] The amount available for payment of the trustee's fees in the amended statement has increased to $1,044.35 ($848.35 the amount available in the first statement, plus the payment of $196.00). The revised amount available is insufficient to pay his re-calculated fees, but more than sufficient to pay the fees calculated in the first statement on receipts of the estate before the payment of $196.00.

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[8] The superintendent raised concerns that the trustee had not obtained an order under s. 68 of the *Act* with respect to the post-bankruptcy payment of $196.00 and with regard to the trustee's authority to collect or receive that payment after the bankrupt's absolute discharge. The superintendent requested that the trustee's accounts be taxed.

[9] To complete the factual circumstances, the superintendent invites the Court to make the finding not made by the registrar or the motions court judge that the payment of $196.00 came out of the bankrupt's modest monthly take-home pay. That is likely not an unreasonable inference to draw in light of her impecunious circumstances, but because of the conclusion I have reached with respect to the application of s. 68 of the *Act*, it is an inference I need not draw.

The Issue

[10] The registrar identified the issue before her as (reflex, (1997), 120 Man.R. (2d) 302, at para. 1):

> ...[W]hether the payment of $196 received from the bankrupt after her discharge should be included in the receipts on which the trustee's fee is based.

On appeal, Jewers J., the motions court judge, identified the issue in similar words. In this Court, the parties agree that the issue is:

> Did the Learned Motions Court Judge err in law in holding that there is no statutory provision, regulation, directive or policy which prevents the Trustee from accepting, and basing its fee upon, payments made by a bankrupt after the bankrupt's discharge pursuant to an agreement with the Trustee?

[11] As we will see, broader questions than those that have been put before the courts emerge from the factual circumstances.

Pertinent Legislation

[12] Sections 68(1), (2) and (8), 121(1), 178(1) and (2), and 202(1)(h) of the *Act*, as they were at the times relevant to the facts of this appeal, are set out in the appendix that follows these reasons. Section 68 was amended in 1997. A different regime for the attachment of a bankrupt's post-assignment (or post-receiving order) remuneration now applies to bankruptcies in respect of which proceedings are commenced after April 30, 1998 (the date the new section came into force). The earlier version, which applies to the circumstances of this appeal, is set out in the appendix.

Judgments

[13] The registrar concluded (at para. 9):

> ...[T]here is no statutory provision, regulation, directive or public policy which prevents the trustee from accepting, and basing its fee upon, payments made by a bankrupt after her discharge pursuant to an agreement with the trustee. Nor is there any judicial authority which binds or persuades me otherwise.

[14] In arriving at that conclusion, the registrar reasoned, and the motions court judge agreed, that court approval under s. 68 of the *Act* was not required "if the trustee and the bankrupt are in agreement."

[15] The registrar also reasoned (at para. 16) that any claim arising from the agreement letter arose "by reason of an *obligation incurred on the day she became a bankrupt*" and therefore "would not be a claim provable in a bankruptcy and would therefore not be released by s. 178(2)" (my emphasis). She declined to follow *Privé, Re* reflex, (1995), 36 C.B.R. (3d) 152 (Que. S.C.), in which Guthrie J. concluded (at para. 20) that s. 178(1) "must cover 'all debts' and not just 'claims provable in bankruptcy' (s. 178(2))" and that "[t]herefore, the 'debt' of the bankrupt towards the trustee, under the terms of their agreement, would also be released!"

[16] The motions court judge adopted the reasons of the registrar with respect to the application of s. 68 of the *Act* and the effect of s. 178(2). He, too, declined to follow *Privé, Re*. He wrote (reflex, (1998), 124 Man.R. (2d) 261, at para. 28):

> However, I agree with [counsel for the intervenor] that the reference to 'all debts' must be to debts provable in bankruptcy. The trustee can only certify that the debts provable in bankruptcy are released because the discharge obviously cannot and does not affect debts which are not provable in bankruptcy.

Analysis

Section 68

[17] I agree that s. 68 of the *Act* has no application to the circumstances of this bankruptcy, but not for the reasons given by the registrar and adopted by the motions court judge. The argument of the superintendent that "a trustee can only access [*sic*] a bankrupt's wages and salary for the purposes of making [*sic*] a deficiency in the minimum fees and disbursements that the trustee has set for its own internal purposes through a s. 68" order has no application to the facts before the Court. While it might be reasonable to infer that the payment of $196.00 came out of the bankrupt's wages or salary, it is not a reasonable inference that the payment, made 19 months after her discharge, was made out of her earnings after her assignment and prior to her discharge. The requirement for an order under s. 68 attaching post-assignment income of the bankrupt never arose in the factual circumstances of this appeal.

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[18] Parenthetically, it should be noted that s. 68 of the *Act*, as re-enacted in 1997, provides a quite different regime for the attachment of the post-assignment income of a bankrupt. The trustee is now required, without an application to the court, to fix the amount the bankrupt must pay to the bankrupt estate.

[19] *Marzetti v. Marzetti*, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765 (S.C.C.), it would appear, was not referred to the registrar or motions court judge, or considered by them. In that decision, Iacobucci J., writing for the Court, concluded (at p. 794) that s. 68 (the 1992 version) is "a substantive provision, one which is intended to operate as a complete code in respect of a bankrupt's salary, wages, or other remuneration."

[20] The registrar and the motions court judge appear to have concluded that, notwithstanding s. 68, nothing in the *Act* prevented agreements between a bankrupt and his/her trustee relating to post-assignment remuneration. Courts in Quebec have reached a similar conclusion. See: *Duquette*, *Re*, [1995] R.D.J. 403 (Que. CA.); *Sinsofsky*, *Re* (December 23, 1998), Doc. C.A. Montreal 500-09-000482-950 (Que. CA.); and *Vanderbanck*, *Re* (December 23, 1998), Doc. CA. Montreal 500-09-000483-958 (Que. CA.). In *Clark*, *Re* (Alta. Q.B., April 6, 1998, No. BK-01-055797) [reported 1998 CanLII 18153 (AB QB), (1998), 8 C.B.R. (4th) 2 (Alta. Q.B.)], Forsyth J. was of a different view. He rejected the conclusion of the motions court judge in this appeal and found "that agreements of this nature are not contemplated by the Bankruptcy Act."

[21] *Marzetti*, it seems to me, resolves the dichotomy. I do not see how agreements relating to a bankrupt's post-assignment earnings can survive the Supreme Court's characterization of s. 68 as "a substantive provision, ... a complete code in respect of a bankrupt's salary, wages, or other remuneration." However, that is a conclusion that need not be made in the circumstances of this appeal.

Sections 121(1) and 178(2)

[22] As noted above, the registrar concluded that the bankrupt's obligation under the agreement letter "would not be a claim provable in a bankruptcy and would therefore not be released by s. 178(2)." That is so, she reasoned, because the obligation was incurred on the day the bankrupt became a bankrupt. The registrar did not consider the other arm of claims provable under s. 121(1); namely, "[a]ll debts and liabilities, present or future, *to which the bankrupt is subject on the day on which the bankrupt becomes bankrupf* (my emphasis).

[23] From information provided to the Court at the second hearing of the appeal, it would appear that the assignment, statement of affairs, and agreement letter were signed by the bankrupt at the same time and in that order, and that the assignment and statement of affairs were filed later the same day with the official receiver.

[24] In Houlden & Morawetz, *The 1999 Annotated Bankruptcy and Insolvency Act* (1998), the authors acknowledge (at p. 436) that:

> The expression "the day on which the bankrupt becomes bankrupt" is ambiguous; presumably, it means the date on which the assignment is filed or the receiving order is made. A debt or liability incurred by the bankrupt after the filing of the petition but prior to the making of a receiving order is a provable claim: *Re Tunnell* (1924), 5 C.B.R. 73, 56 O.L.R. 100, [1924] 4 D.L.R. 862 (C.A.).

Other sections of the *Act* support that interpretation. Section 49(3) provides that an assignment "is inoperative until filed with [the] official receiver," and s. 71 (1)3 provides that "[a] bankruptcy shall be deemed to have relation back to, and to commence at the time ... of the filing of an assignment with the official receiver."

[25] Applying that interpretation to the factual circumstances of this appeal, I conclude that whatever debt or liability arose under the agreement letter was one "to which the bankrupt [was] subject on the day on which the bankrupt becomes bankrupt." Assuming that the bankrupt's obligation under the agreement letter was enforceable at law — a conclusion questioned by counsel for the trustee at the appeal hearing, but not an issue before the Court for determination on the appeal — the obligation was a claim provable in bankruptcy pursuant to s. 121(1) of the *Act*. On the bankrupt's absolute discharge on March 29, 1995, her obligation under the agreement letter was released — s. 178(2). She was under no legal obligation to pay any sum to the trustee under the agreement letter after her absolute discharge. The sum of $196.00 which the bankrupt paid to the trustee on October 31, 1996, was not a receipt of the estate for the purpose of calculating the fees of the trustee pursuant to Rule 115(1).

[26] Permit me a few *obiter* comments that are prompted by the reasons of the registrar and the motions court judge and by the shifting arguments that were put before the Court by counsel as the appeal progressed.

[27] Firstly, s. 202(1)(h) of the *Act* was cited to the Court by counsel for the superintendent. He argued that the motions court judge erred in concluding (at para. 18):

> ...[I]n this case the remuneration to which the trustee was entitled exceeded that actually charged and Parliament could not have intended to make it an offence for the trustee to agree with the bankrupt that the latter should make up any deficiency in the fees and disbursements properly payable under the **Act**.

He points out, as the motions court judge recognized, that "there is no minimum fee under Rule 115" and argues, therefore, "there can never be any 'deficiency' in the fees and disbursements 'properly' payable under the *Act*." However,

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whether or not the agreement letter constituted an offence under s. 202(1)(h) is a question that is not before the Court for determination on this appeal.

[28] Secondly, the thrust of the argument of the trustee (and the intervenor) is that "[t]he payment of $196.00 is a *voluntary payment* made by the bankrupt to the Trustee *pursuant to the agreement* made on the date of the bankruptcy" (my emphasis). That is a contradiction in terms. The argument that the agreement letter was "collateral to the assignment" and was "inoperative until the assignment was filed" is simply an attempt to put too fine a point on an issue that need not be determined on this appeal.

[29] Finally, the provisions in the *Act* for the summary administration of estates may invite a relaxed interpretation of the statutory duties and obligations imposed upon the trustee in the administration of a bankruptcy. Policy considerations — the ability of debtors like the bankrupt in this appeal, who possess few, if any, realizable assets, to obtain access to the scheme of the *Act* and to become rehabilitated unfettered by his/her past debts and liabilities — would seem to support that kind of interpretation. The registrar and the motions court judge concluded that the *Act* did not prevent payments by a bankrupt to his/her trustee pursuant to an agreement. However, Forsyth J. observed in *Clark, Re:*

> ...**[I]f it is determined that such agreements are of benefit to the creditors as a whole, it is up to parliament and not** to this court to make amendments to the Act sufficient to make it clear that arrangements of this nature are in order.

[30] The trustee referred the Court to Directive No. 11, issued by the superintendent on October 23, 1986, entitled *Bankruptcy Assistance Program*. That directive outlines a program to accommodate "overburdened debtors [who] are unable to demonstrate to a trustee that sufficient funds will be available in the estate to cover administration costs" and are therefore "unable to secure services of a trustee to administer their bankruptcy." Paragraph 18 of the directive provides:

> In cases where a debtor's income is in excess of the amounts determined by the Superintendent's guidelines (which are based on the Senate Committee Poverty Lines (SCPL) as amended), the debtor is expected *to provide voluntary payments to the estate* in accordance with the SCPL guideline. In those circumstances where the debtor, without valid reasons, refuses to abide by these guidelines, the trustee may refuse to grant the debtor's request for bankruptcy service.
>
> (my emphasis)

[31] However commendable the purposes of the directive and the provision for "voluntary payments" by a bankrupt may be, the authority of a trustee to attach the earnings of a bankrupt, even by the expectation that the bankrupt will provide voluntary payments to the estate, has been put in doubt by the decision of the Supreme Court in *Marzetti*. In any event, the directive has no application to the circumstances in this appeal. There is no evidence that the bankrupt availed herself of the program or that the trustee was a "participating" trustee "designated" to act under the program in providing services to her. And the purpose of the agreement letter was not to have the bankrupt "provide voluntary payments to the estate in accordance with the SCPL guideline"; it was an agreement by the bankrupt to pay the trustee "any deficiency in fees arising out of my Assignment in Bankruptcy."

Disposition

[32] The appeal is allowed. The payment of $196.00 received by the trustee from the bankrupt is not a receipt upon which the trustee's fee is calculated and is to be returned to the bankrupt. There will be no order as to costs.

Appeal allowed.

Appendix

> *68.* (1) Notwithstanding subsection 67(1), where a bankrupt
>
> (a) is in receipt of, or is entitled to receive, any money as salary, wages or other remuneration from a person employing the bankrupt, or
>
> (b) is in receipt of, or is entitled to receive from a person any money as payment for or commission in respect of any services performed by the bankrupt,
>
> the trustee may, on the trustee's own initiative or, if directed by the inspectors or the creditors, shall, make an application to the court for an order directing the payment to the trustee of such part of the money as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.
>
> (2) An order under subsection (1) shall be directed
>
> (a) to the bankrupt, and
>
> (b) to the person referred to in subsection (1) from whom the bankrupt is entitled to receive money, if the person is known,
>
> and shall state that the order is in force for such time as the court may fix or until payment of a sum specified in the order is made and, unless otherwise stated in the order, that order ceases to have effect on the discharge of the bankrupt.

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(8) An application referred to in subsection (1) shall, for the purposes of section 38, be deemed to be a proceeding for the benefit of the estate.

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

178. (1) An order of discharge does not release the bankrupt from

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

(b) any debt or liability for alimony;

(c) any debt or liability under a support, maintenance or affiliation order or under an agreement for maintenance and support of a spouse or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;

(e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation; or

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim.

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

202. (1) A person who

(h) being a trustee, makes any arrangement under any circumstances with the bankrupt, or any solicitor, auctioneer or other person employed in connection with a bankruptcy, for any gift, remuneration or pecuniary or other consideration or benefit whatever beyond the remuneration payable out of the estate, or accepts any such consideration or benefit from any such person, or makes any arrangement for giving up, or gives up, any part of his remuneration, either as a receiver or trustee, to the bankrupt or any solicitor, auctioneer or other person employed in connection with the bankruptcy,

. . . . .

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

1D.I. Guttman, the original trustee, was succeeded as trustee by the respondent, BDO Dun-woody Limited, in 1995

2Rule 115 was amended in 1998 and is now Rule 128

3Section 71(1) was repealed in 1997

Definitions - Sec. 68(2)
(2) The following definitions apply in this section.

“surplus income”
« revenu excédentaire »
“surplus income” means the portion of a bankrupt individual’s total income that exceeds that which is necessary to enable the bankrupt individual to maintain a reasonable standard of living, having regard to the applicable standards established under subsection (1).

“total income”
« revenu total »
“total income”
(a) includes, despite paragraphs 67(1)(b) and (b.3), a bankrupt’s revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt’s discharge, including those received as damages for wrongful dismissal,

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received as a pay equity settlement or received under an Act of Parliament, or of the legislature of a province, that relates to workers' compensation; but
(b) does not include any amounts received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, as a gift, a legacy or an inheritance or as any other windfall.

SB Directive: 11R2-2013, Surplus Income
(see below image pages)

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Date: MAR 18 2013

To: **OSB Staff, Trustees and Registrars**

Subject: **Directive No. 11R2-2013, *Surplus Income***

Please note that Directive No. 11R2, Appendix A, has been updated to reflect the Superintendent's standards for 2013. The examples in Appendix B of the Directive have also been revised.

Att.

Date : 18 MAR. 2013

À : **Employés du BSF, syndics et registraires**

Objet : **Instruction n° 11R2-2013, *Revenu excédentaire***

Veuillez prendre note que l'annexe A de l'instruction n° 11R2 a été révisée afin de refléter les normes du surintendant pour 2013. Les exemples à l'annexe B de l'instruction ont également été modifiés.

P. j.

Bill James
Superintendent of Bankruptcy / Surintendant des faillites

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Industry Canada
Office of the Superintendent of Bankruptcy Canada

Industrie Canada
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Directive / Instruction

N° 11R2-2013

SURPLUS INCOME

Issued: MAR 18 2013

(Directive No. 11R2-2013 updates Directive No. 11R2-2012, issued on March 20, 2012, on the same topic, to reflect the Superintendent's Standards for the year 2013.)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"spouse" means either of two persons who
- (a) are married to each other, or
- (b) are not married to each other and to whom at least one of the following situations applies:
  - (i) have been living together in a conjugal relationship for at least 12 continuous months;
  - (ii) have been living together in a conjugal relationship and
    - a child was born of their union;
    - have, together, adopted a child; or
    - one of them has adopted a child of the other;

REVENU EXCÉDENTAIRE

Date d'émission : 18 MAR. 2013

(L'instruction n° 11R2-2013 met à jour l'instruction n° 11R2-2012, émise le 20 mars 2012 sur le même sujet, afin de refléter les normes du surintendant pour l'année 2013.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« conjoint » désigne l'une ou l'autre de deux personnes qui
- *a)* sont mariées, ou
- *b)* ne sont pas mariées mais à qui au moins une des situations suivantes s'applique :
  - (i) vivent maritalement pendant au moins 12 mois continus;
  - (ii) vivent maritalement, et
    - un enfant est né de leur union; ou
    - ont ensemble adopté un enfant; ou
    - l'un d'entre eux a adopté un enfant de l'autre;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité* (LFI);

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"Superintendent's standards" refers to the table in Appendix A of this Directive;

"surplus income" means surplus income as defined in subsection 68(2) of the Act;

"total income" means total income as defined in subsection 68(2) of the Act.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraph 5(4)(c) and section 68 of the Act and is intended to assist the trustee in determining equitably and consistently the portion of the bankrupt's income that should be paid into the bankrupt's estate.

Sections of the Act Concerned

Sections 68, 168.1 and 172.1.

Family Unit

3. In determining the bankrupt's personal and family situation for the purposes of subsection 68(3) of the Act, it is necessary to establish the earnings and expenses of both the bankrupt and the bankrupt's family unit. The bankrupt must disclose the earnings and expenses of each member of the family unit by providing the trustee with income and expense statements for the entire period of bankruptcy. Trustees must use their professional judgment in exercising their duty to apply due diligence when determining the bankrupt's average monthly income. The trustee's file should clearly document the method by which he/she calculated the amount, if any, the bankrupt is required to pay to the estate. As well, the trustee may question each member of the family unit as to their earnings and expenses.

« normes du surintendant » renvoie au barème établi à l'annexe A de la présente instruction;

« revenu excédentaire » désigne le revenu excédentaire aux termes du paragraphe 68(2) de la Loi;

« revenu total » désigne le revenu total aux termes du paragraphe 68(2) de la Loi.

Autorité et objet

2. La présente instruction, émise en vertu de l'autorité conférée par l'alinéa 5(4)*c*) et l'article 68 de la Loi, vise à faire en sorte que le syndic détermine de façon constante et équitable la portion du revenu que le failli doit verser à l'actif de la faillite.

Dispositions pertinentes de la Loi

Articles 68, 168.1 et 172.1

Unité familiale

3. Afin de déterminer les charges familiales et la situation financière du failli aux fins de l'application du paragraphe 68(3) de la Loi, il est nécessaire d'établir les revenus et dépenses du failli et de l'unité familiale à laquelle il appartient. Le failli est tenu de déclarer les revenus et dépenses de chaque membre de l'unité familiale et doit soumettre au syndic des états des revenus et dépenses pour la période entière de la faillite. Les syndics doivent exercer leur jugement professionnel pour s'acquitter de leur obligation de diligence lorsqu'ils déterminent le revenu mensuel moyen du failli. Le syndic doit clairement consigner au dossier la méthode utilisée pour calculer le montant, s'il y a lieu, que le failli doit verser à l'actif. De plus, le syndic peut questionner chaque membre de l'unité familiale quant à ses

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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revenus et dépenses.

4. For the purposes of this Directive, the bankrupt's family unit includes, in addition to the bankrupt, any persons who reside in the same household and who benefit from either the expenses incurred or income earned by the bankrupt, or who contribute to such expenses or earnings. A person who does not reside in the same household shall be considered as a member of the family unit if the person benefits from or contributes to the expenses incurred or income earned by the bankrupt.

4. Pour les fins de la présente instruction, l'unité familiale du failli comprend, en plus du failli, toutes les personnes qui résident avec le failli et qui bénéficient d'une partie des dépenses encourues ou du revenu gagné par le failli ou qui contribuent aux revenus de l'unité familiale ou génèrent des dépenses pour l'unité familiale. Par ailleurs, une personne qui ne réside pas avec le failli pourra aussi être considérée comme un membre de l'unité familiale si elle bénéficie des dépenses encourues ou du revenu gagné par le failli, ou si elle y contribue.

Calculation

Calcul

5. (1) In order to apply the Superintendent's standards for determining surplus income (Appendix A), the bankrupt shall first complete the monthly income and expense statement of the family unit, including the bankrupt, in Form 65.

5. (1) Aux fins de l'application des normes du surintendant pour déterminer le revenu excédentaire (annexe A), le failli établit son état des revenus et dépenses ainsi que celui de l'unité familiale sur une base mensuelle en utilisant le formulaire 65.

(2) The family unit's total monthly income is determined by subtracting from the total of all of its members' monthly incomes the following amounts, as applicable:

(2) Le total du revenu mensuel de l'unité familiale est déterminé en déduisant de l'ensemble de ces revenus mensuels ceux des éléments suivants qui se rapportent à ce revenu :

(a) in the case of a salaried employee, minimum statutory remittances (income tax, pension and employment insurance deductions) and other mandatory deductions paid; or

a) dans le cas d'un salarié, les remises minimales exigées par la loi (l'impôt sur le revenu, les retenues en raison d'un régime de retraite ou de l'assurance-emploi) et les retenues obligatoires payées;

(b) in the case of a person who is self-employed, business expenses and deductions as permitted by the *Income Tax Act* or similar provincial legislation, minimum statutory remittances and instalment tax payments made.

b) dans le cas d'un travailleur autonome, les dépenses et retenues d'affaires permises par la *Loi de l'impôt sur le revenu* ou par des dispositions provinciales similaires, les versements statutaires minimaux et les acomptes provisionnels.

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(3) The family unit's available monthly income is determined by subtracting from the family unit's total monthly income the monthly non-discretionary expenses applicable to the personal and family situations of both the bankrupt and the bankrupt's family unit:

(a) child support payments;

(b) spousal support payments;

(c) child care expenses;

(d) expenses associated with a medical condition;

(e) Court-imposed fines or penalties that are in the process of being paid;

(f) expenses permitted by the *Income Tax Act* (or similar provincial legislation) that are a condition of employment;

(g) any other debt where a stay of proceedings has been lifted by the Court, and a recourse authorized; and

(h) interest paid on debts that are not dischargeable in bankruptcy under paragraph 178(1)(g) of the Act.

(4) The trustee shall verify the accuracy of the income and expense statement submitted by the bankrupt by requiring that the bankrupt provide:

(a) proof of income; and

(3) Le revenu mensuel disponible de l'unité familiale est déterminé en déduisant du total du revenu mensuel de l'unité familiale les dépenses mensuelles non discrétionnaires se rapportant à la situation personnelle et familiale du failli et de l'unité familiale, notamment :

a) les versements de pension alimentaire pour les enfants;

b) les versements de pension alimentaire destinés au conjoint;

c) les dépenses de garderie;

d) les dépenses relatives à une condition médicale;

e) les amendes et les pénalités imposées par le tribunal qui sont en cours de paiement;

f) les dépenses autorisées par la *Loi de l'impôt sur le revenu* (ou une législation provinciale similaire) qui sont une condition d'emploi;

g) toute autre dette pour laquelle une suspension des procédures a été levée par le tribunal, et l'exécution des recours, autorisée;

h) les intérêts payés sur des dettes dont le failli ne peut pas être libéré par la faillite en vertu de l'alinéa 178(1)g) de la Loi.

(4) Le syndic doit vérifier l'exactitude de l'état des revenus et dépenses soumis par le failli en exigeant que celui-ci fournisse :

a) ne preuve des revenus;

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(b) proof of payments made pursuant to paragraphs 5(2) and 5(3) above.

b) la preuve du paiement de tout montant versé en vertu des paragraphes 5(2) et 5(3) ci-dessus.

(5) For the purposes of subsection 68(3) of the Act, the trustee determines whether the bankrupt has surplus income by subtracting from the family unit's available monthly income the amount that, according to the Superintendent's standards (Appendix A), corresponds to the number of persons in the family unit.

(5) Aux fins du paragraphe 68(3) de la Loi, le syndic détermine si le failli a un revenu excédentaire mensuel en déduisant du revenu mensuel disponible de l'unité familiale le montant qui correspond au nombre de personnes composant l'unité familiale du failli, établi conformément aux normes du surintendant (annexe A).

(6) Where the bankrupt has monthly surplus income of less than $200, the bankrupt is not required to pay any amount to the bankrupt's estate under this Directive.

(6) Lorsque le failli a un revenu excédentaire mensuel inférieur à 200 $, il n'est pas tenu de verser un montant à l'actif de la faillite au titre de la présente instruction.

(7) Subject to the family situation adjustment described in paragraph 6(1) of this Directive and subject to an adjustment to the surplus income calculation based on average monthly income described under paragraph 7 or 8 of this Directive, where the bankrupt has monthly surplus income equal to or greater than $200, the bankrupt is required to pay 50 percent of the monthly surplus income to the bankrupt's estate.

(7) Sous réserve de l'ajustement selon la situation familiale décrit au paragraphe 6(1) de la présente instruction et de l'ajustement du revenu excédentaire fondé sur le revenu mensuel moyen décrit aux paragraphes 7 et 8 de la présente instruction, lorsque le failli a un revenu excédentaire mensuel égal ou supérieur à 200 $, il est tenu de verser à l'actif de la faillite 50 p. 100 du revenu excédentaire mensuel.

Family Situation Adjustment

6. (1) The amount that the bankrupt is required to pay to the bankrupt's estate as determined in paragraph 5(6) or 5(7) of this Directive shall be adjusted to the same percentage as the bankrupt's portion of the family unit's available monthly income.

Ajustement selon la situation familiale

6. (1) Le montant que le failli est tenu de verser à l'actif de la faillite, déterminé selon le paragraphe 5(6) ou 5(7) de la présente instruction, doit être ajusté selon la proportion du revenu mensuel disponible de l'unité familiale attribuable au failli.

(See example in Appendix B)

(Voir l'exemple à l'annexe B.)

(2) Where the non-bankrupt spouse refuses or neglects to divulge his or her income or expenses, the trustee shall, for the purposes of determining surplus income, apply 50 percent

(2) Si le conjoint non en faillite refuse ou néglige de divulguer son revenu ou ses dépenses, le syndic doit, pour les fins du calcul du revenu excédentaire, appliquer

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of the applicable Superintendent's standards (Appendix A) corresponding to the number of persons in the family unit.

(3) Where a person considered to be a member of the family unit as described in paragraph 4 of this Directive (other than a spouse), who is not a bankrupt, refuses or neglects to divulge his or her income and expenses, this person is deemed not to be a member of the family unit. The trustee shall describe these circumstances in Form 65, *Monthly Income and Expense Statement of the Bankrupt/Debtor and the Family Unit and Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt* and, when required, in Form 82, *Report of Trustee on Bankrupt's Application for Discharge*.

Average monthly surplus income — bankrupts who are eligible for automatic discharge under section 168.1 of the Act

7. (1) In addition to the requirements of subsection 68(3) of the Act, the trustee shall review the financial circumstances of a bankrupt who is eligible for an automatic discharge to determine whether the bankrupt is required to make payments under section 68 of the Act on at least the following two occasions: (1) at the outset of the file when completing Form 65; and (2) during the eighth month in the case of a first-time bankrupt and during the 23rd month in the case of a second-time bankrupt.

(2) When reviewing the bankrupt's financial circumstances, the trustee shall calculate the bankrupt's average monthly income based on the income and expense statements. The average monthly income is to be used to determine the amount the bankrupt is required to pay to the bankrupt's estate.

50 p. 100 de la norme du surintendant (annexe A) qui correspond au nombre de personnes composant l'unité familiale du failli.

(3) Lorsqu'un particulier considéré comme un membre de l'unité familiale au sens du paragraphe 4 de la présente instruction (sauf pour le conjoint) qui n'est pas un failli refuse ou omet de révéler ses revenus et dépenses, cette personne est réputée ne pas être un membre de l'unité familiale. Le syndic doit faire état de ces circonstances dans le formulaire 65, *État mensuel des revenus et dépenses du failli ou du débiteur et de l'unité familiale et information (ou information modifiée) concernant la situation financière d'un failli* et, lorsque requis, dans le formulaire 82, *Rapport du syndic sur la demande de libération du failli*.

Revenu excédentaire mensuel moyen – Failli admissible à une libération d'office en vertu de l'article 168.1 de la Loi

7. (1) En plus de respecter les dispositions du paragraphe 68(3) de la Loi, le syndic doit examiner la situation financière du failli admissible à une libération d'office pour déterminer si celui-ci est tenu de verser les paiements prévus à l'article 68 de la Loi au moins aux deux occasions suivantes durant la faillite : *(1)* au moment de l'ouverture du dossier, à l'établissement du formulaire 65 et (2) au huitième mois dans le cas d'une première faillite ou au 23e mois dans le cas d'une deuxième faillite.

(2) Au moment de l'examen de la situation financière du failli, le syndic calculera le revenu mensuel moyen du failli basé sur les états des revenus et dépenses. Il faut utiliser le revenu mensuel moyen pour calculer le montant que le failli est tenu de verser à l'actif de la faillite.

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(3) If, based on the average monthly income, there is a requirement to make payments under section 68 of the Act, the bankrupt will be required to continue to make payments under section 68 for an additional 12 months before being eligible for an automatic discharge under section 168.1 of the Act. Moreover, the average monthly income is to be used to determine the amount the bankrupt is required to pay to the bankrupt's estate for the 21 or 36 months, as the case may be. If there is a further material change in the bankrupt's financial situation, the trustee shall redetermine whether the bankrupt has surplus income, but the bankrupt is not eligible for an earlier discharge, subject to an application under subsection 168.1(2) of the Act.

(3) Si, selon son revenu mensuel moyen, le failli est tenu de verser des paiements au titre de l'article 68, il doit continuer de verser de tels paiements pendant une période supplémentaire de 12 mois avant d'être admissible à une libération d'office aux termes de l'article 168.1 de la Loi. En outre, il faut utiliser le revenu mensuel moyen pour calculer le montant que le failli est tenu de verser à l'actif de la faillite pendant la période de 21 ou de 36 mois, selon le cas. Si la situation financière du failli change de nouveau d'une manière considérable, le syndic doit réexaminer le dossier pour déterminer si le failli a un revenu excédentaire, mais celui-ci n'est pas admissible à une libération avant la date prévue, sous réserve d'une demande en vertu du paragraphe 168.1(2) de la Loi.

(4) If, however, based on the average monthly income, there is no requirement to make payments under section 68, the bankrupt is eligible for an automatic discharge at the expiry of the 9th month / 24th month after the date of bankruptcy, as the case may be.

(4) Si toutefois, compte tenu de son revenu mensuel moyen, le failli n'est pas tenu de verser des paiements en vertu de l'article 68, il est admissible à une libération d'office à la fin du neuvième ou du 24e mois suivant la date de la faillite, selon le cas.

(5) If the bankrupt is eligible for an automatic discharge on a date that is different from the date indicated on Form 68 or Form 69 sent by the trustee, the trustee shall immediately send an amended Form 68 or Form 69 indicating the new date on which the bankrupt will be eligible for an automatic discharge.

(5) Si le failli est admissible à une libération d'office à une date différente de celle qui figure dans le formulaire 68 ou 69 transmis par le syndic, ce dernier doit immédiatement envoyer un formulaire modifié indiquant la nouvelle date à laquelle le failli est admissible à une libération d'office.

(6) If the bankrupt fails to provide the trustee with the information needed to determine the average monthly income in accordance with paragraph 7(2) of this Directive, the trustee shall oppose the discharge of the bankrupt.

(6) Si le failli n'a pas fourni au syndic les renseignements nécessaires pour déterminer son revenu mensuel moyen conformément au paragraphe 7(2) de la présente instruction, le syndic doit s'opposer à la libération du failli.

(7) Subject to section 170.1 of the Act, if a bankrupt has not paid the required amount to the bankrupt's estate, the trustee shall oppose

(7) Sous réserve de l'article 170.1 de la Loi, si le failli n'a pas versé les montants prévus à l'actif de la faillite, le syndic doit s'opposer à

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the discharge of the bankrupt.

(8) The trustee is not required to return to the bankrupt any payments that are made to the estate under section 68 of the Act where it is determined, based on the average monthly income, that the bankrupt was required to make payments of a lesser amount or no payments under section 68.

Average monthly surplus income — bankrupts who are not eligible for automatic discharge under section 168.1 of the Act

8. (1) In addition to the requirements of subsection 68(3) of the Act, the trustee shall review the financial circumstances of a bankrupt who is not eligible for an automatic discharge to determine whether the bankrupt is required to make payments under section 68 of the Act on at least the following two occasions: (1) at the outset of the file when completing Form 65; and (2) when completing Form 82.

(2) When reviewing the bankrupt's financial circumstances, the trustee shall calculate the bankrupt's average monthly income based on the income and expense statements. The average monthly income is to be used to determine the amount the bankrupt is required to pay to the bankrupt's estate.

(3) If the bankrupt fails to provide the trustee with the information needed to determine the average monthly income in accordance with paragraph 8(2) of this Directive, the trustee shall oppose the discharge of the bankrupt.

(4) If a bankrupt has not paid the required amount to the bankrupt's estate, the trustee shall oppose the discharge of the bankrupt.

(5) The trustee is not required to return to the

la libération du failli.

(8) Le syndic n'est pas tenu de rembourser au failli les paiements versés à l'actif de la faillite en vertu de l'article 68 de la Loi s'il est déterminé, selon le revenu mensuel moyen, que le failli devait verser des paiements d'un montant inférieur ou nul en vertu de l'article 68.

Revenu excédentaire mensuel moyen - Failli non admissible à une libération d'office en vertu de l'article 168.1 de la Loi

8. (1) En plus de respecter les exigences du paragraphe 68(3) de la Loi, le syndic examine la situation financière du failli non admissible à une libération d'office pour déterminer si celui-ci est tenu de verser les paiements prévus à l'article 68 de la Loi au moins aux deux occasions suivantes : (1) au moment de l'ouverture du dossier, à l'établissement du formulaire 65; et (2) au moment de l'établissement du formulaire 82.

(2) Au moment de l'examen de la situation financière du failli, le syndic calculera le revenu mensuel moyen du failli basé sur les états des revenus et dépenses. Il faut utiliser le revenu mensuel moyen pour calculer le montant que le failli est tenu de verser à l'actif de la faillite.

(3) Si le failli n'a pas fourni au syndic les renseignements nécessaires pour déterminer son revenu mensuel moyen conformément au paragraphe 8(2) de la présente instruction, le syndic doit s'opposer à la libération du failli.

(4) Si le failli n'a pas versé les montants prévus à l'actif de la faillite, le syndic doit s'opposer à la libération du failli.

(5) Le syndic n'est pas tenu de rembourser au

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bankrupt any payments that are made to the estate under section 68 of the Act where it is determined, based on the average monthly income, that the bankrupt was required to make payments of a lesser amount or no payments under section 68.

(See example in Appendix B)

Discontinuation of Payments

9. The bankrupt's requirement to make payments under section 68 of the Act shall cease when the bankrupt is discharged, or as otherwise ordered by the Court. However, if an opposition to the automatic discharge has been filed, the bankrupt's requirement to make payments under section 68 of the Act ceases on the day on which the bankrupt would have been automatically discharged had the opposition not been filed, or as otherwise ordered by the Court.

Coming into Force

10. This Directive comes into force on the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force. This Directive, applies only to a person who, on or after the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force, is described in one of (a) – (f) listed below:

(a) the person becomes bankrupt;

(b) the person files a notice of intention;

(c) the person files a proposal without

failli les paiements versés à l'actif de la faillite en vertu de l'article 68 de la Loi s'il est déterminé, selon le revenu mensuel moyen, que le failli devait verser des paiements d'un montant inférieur ou nul en vertu de l'article 68.

(Voir l'exemple à l'annexe B.)

Cessation des versements

9. Le versement des montants que le failli est tenu de payer au titre de l'article 68 de la Loi prend fin dès la libération du failli ou selon l'ordonnance du tribunal. Si une opposition à la libération d'office est déposée, le versement de ces montants prend fin le jour où le failli aurait normalement été libéré d'office si l'opposition n'avait pas été déposée ou si le tribunal n'en avait pas ordonné autrement.

Entrée en vigueur

10. La présente instruction entre en vigueur à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)*. La présente instruction ne s'applique qu'à l'égard des personnes suivantes :

a) celles qui deviennent faillis à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

b) celles qui déposent un avis d'intention, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

c) celles qui déposent une proposition, à la

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having filed a notice of intention;

(d) a proposal is made in respect of the person without the person having filed a notice of intention;

(e) an interim receiver is appointed in respect of the person's property and all or part of the person's property comes into the possession or under the control of the interim receiver; or

(f) all or part of the person's property comes into the possession or under the control of a receiver.

As such, in order to determine whether Directive No. 11R2-2013 applies to a particular insolvency file, the question that needs to be asked is whether one of the "triggering events" described in (a) (f) occurred on or after the coming into force date.

Enquiries

11. For any questions pertaining to this Directive, please contact your local OSB office.

date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

d) celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;

e) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre intérimaire, nommé à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

f) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite.

Par conséquent, pour déterminer si l'instruction n° 11R2-2013 s'applique à un dossier d'insolvabilité en particulier, la question qui doit être posée est de savoir si l'un des « événements déclencheurs » décrits aux alinéas *a)* à *f)*, est survenu à la date d'entrée en vigueur ou par la suite.

Demandes de renseignements

11. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

Bill James
Superintendent of Bankruptcy / Surintendant des faillites

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APPENDIX A

SUPERINTENDENT'S STANDARDS

ANNEXE A

NORMES DU SURINTENDANT

2013

Persons / Personnes	S ($) / N ($)	FAMILY UNIT'S AVAILABLE MONTHLY INCOME ($) / REVENU MENSUEL DISPONIBLE DE L'UNITÉ FAMILIALE ($)															
		2206	2406	2606	2806	3006	3206	3406	3606	3806	4006	4206	4406	4606	4806	5106	5606
1	2006	200	400	600	800	1000	1200	1400	1600	1800	2000	2200	2400	2600	2800	3100	3600
2	2497	0	0	0	309	509	709	909	1109	1309	1509	1709	1909	2109	2309	2609	3109
3	3070	0	0	0	0	0	0	336	536	736	936	1136	1336	1536	1736	2036	2536
4	3728	0	0	0	0	0	0	0	0	0	278	478	678	878	1078	1378	1878
5	4228	0	0	0	0	0	0	0	0	0	0	0	0	378	578	878	1378
6	4768	0	0	0	0	0	0	0	0	0	0	0	0	0	0	338	838
7 +	5309	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	297

The Superintendent's Standards ("S") are derived from the Low Income Cutoffs (LICO) released by Statistics Canada. The Superintendent uses the before-tax LICO for urban areas with 500,000 people and over. The 2013 standards are updated by adding to the 2011 LICO, the 2012 Consumer Price Index (CPI) (1.50%) plus a 1.80% adjustment reflecting the 2013 CPI expectation.

Les normes du surintendant (« N ») sont dérivées à partir des seuils de faible revenu (SFR) publiés par Statistiques Canada. Le surintendant utilise les SFR avant impôt pour les régions urbaines de 500 000 habitants et plus. Les normes de 2013 sont mises à jour en ajoutant aux SFR de 2011 l'indice des prix à la consommation (IPC) de 2012 (1,50%) plus un ajustement de 1,80% qui représente l'IPC anticipé pour 2013.

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APPENDIX B

Example 1

Family Situation Adjustsent (Family unit of two)

Bankrupt's available monthly income:	$2800
Other family unit member's available monthly income:	$1000
Family unit's available monthly income:	$3800
Minus Superintendent's standard for a family unit of two as per Appendix A — 2013:	$2497
Total monthly surplus income:	$1303
Family Situation Adjustment (2800 ÷ 3800 = 73.68% 1303 x 73.68% = $960.05)	$960.05
Payment required from bankrupt as per paragraph 5(7) of this Directive: ($960.05 x 50% = $480.03)	$480.03

ANNEXE B

Exemple 1

Ajustement selon la situation familiale (unité familiale de deux membres)

Revenu mensuel disponible du failli :	2 800 $
Revenu mensuel disponible de l'autre membre de l'unité familiale :	1 000 $
Revenu mensuel disponible de l'unité familiale :	3 800 $
Moins la norme du surintendant pour une unité familiale de deux membres selon l'annexe A – 2013 :	2 497 $
Revenu excédentaire mensuel total :	1 303 $
Ajustement selon la situation familiale : (2 800 ÷ 3 800 = 73,68 % 1 303 x 73,68 % = 960,05 $)	960,05 $
Paiement requis du failli selon le paragraphe 5(7) de la présente instruction : (960,05 $ x 50 % = 480,03 $)	480.03 $

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Example 2

Increase in income

A single, first-time bankrupt has regular monthly income of $ 1700 and is not required to make payments to the estate under section 68 of the Act.

In completing Form 65, at the outset of the file:

Bankrupt's available monthly income:	$1700
Other family unit member's available monthly income:	$0
Family unit's available monthly income:	$1700
Minus Superintendent's standard for a family unit of one as per Appendix A — 2013:	$2006
Total monthly surplus income:	$0
Payment required from bankrupt:	$0

During the fifth month of bankruptcy, the bankrupt's income increases to $3000 per month.

The trustee would average the bankrupt's monthly income in the eighth month to determine whether the bankrupt has surplus income.

Bankrupt's total income for seven months:

$1700 x 4 months =	$6800
$3000 x 3 months =	$9000
	$15 800

Exemple 2

Augmentation du revenu

Une personne célibataire faisant faillite pour la première fois a un revenu mensuel régulier de 1 700 $ et n'est pas tenue de verser des paiements à l'actif de la faillite en vertu de l'article 68 de la Loi.

Données à l'établissement du formulaire 65, à l'ouverture du dossier :

Revenu mensuel disponible du failli :	1 700 $
Revenu mensuel disponible de l'autre membre de l'unité familiale :	0 $
Revenu mensuel disponible de l'unité familiale :	1 700 $
Moins la norme du surintendant pour une unité familiale d'un membre selon l'annexe A – 2013 :	2 006 $
Revenu excédentaire mensuel total :	0 $
Paiement requis du failli :	0 $

Durant le cinquième mois de la faillite, le revenu du failli augmente pour atteindre 3 000 $ par mois.

Le syndic calcule le revenu mensuel moyen du failli au huitième mois pour déterminer s'il y a revenu excédentaire.

Revenu total du failli pour les sept mois :

1 700 $ x 4 mois =	6 800 $
3 000 $ x 3 mois =	9 000 $
	15 800 $

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Bankrupt's average monthly income for seven months:	
$15 800 ÷ 7 =	$2257
Minus Superintendent's standard for a family unit of one as per Appendix A — 2013:	$2006
Total average monthly surplus income:	$251
Payment required from bankrupt as per paragraph 5(7) of this Directive:	
($251 x 50% = $125.50)	$125.50

Given that the increase in income has resulted in a requirement to make payments under section 68, the bankrupt must pay the amount owing to the estate ($125.50 x 9 months) and the bankrupt is required to continue to make payments under section 68 for an additional 12 months ($125.50 x 12 months), subject to a further material change in the bankrupt's financial situation that results in redetermination of whether the bankrupt has surplus income, before being eligible for an automatic discharge under section 168.1 of the Act.

Revenu mensuel moyen du failli pour les sept mois :	
15 800 $ ÷ 7 =	2 257 $
Moins la norme du surintendant pour une unité familiale d'un membre selon l'annexe A – 2013 :	2 006 $
Revenu excédentaire mensuel total :	251 $
Paiement requis du failli en vertu du paragraphe 5(7) de la présente instruction :	
(251 $ x 50 % = 125,50 $)	125,50 $

En raison de l'augmentation de son revenu, le failli est tenu de verser à l'actif de la faillite le montant prévu en application de l'article 68 (125,50 $ x 9 mois) et de continuer de verser des paiements au titre de l'article 68 pendant 12 mois supplémentaires (125,50 $ x 12 mois), sous réserve d'autres changements importants dans sa situation financière qui entraîneraient un nouveau calcul visant à déterminer s'il y a revenu excédentaire, avant que le failli ne soit admissible à une libération d'office en vertu de l'article 168.1 de la Loi.

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Example 3

Decrease in income

A single, first-time bankrupt has regular monthly income of $2400 and is required to make surplus income payments to the estate.

Bankrupt's available monthly income:	$2400
Other family unit member's available monthly income:	$0
Family unit's available monthly income:	$2400
Minus Superintendent's standard for a family unit of one as per Appendix A — 2013:	$2006
Total monthly surplus income:	$394
Payment required from bankrupt as per paragraph 5(7) of this Directive: ($394 x 50% = $197)	$197

During the fifth month of bankruptcy, the bankrupt's income decreases to $1000 per month.

The trustee will average the bankrupt's monthly income in the eighth month to determine whether the bankrupt has surplus income.

Bankrupt's total income for seven months:

$2400 x 4 months =	$9600
$1000 x 3 months =	$3000
	$12 600

Exemple 3

Diminution du revenu

Une personne célibataire faisant faillite pour la première fois a un revenu mensuel régulier de 2 400 $ et est tenue de verser des paiements à l'actif de la faillite parce qu'elle gagne un revenu excédentaire.

Revenu mensuel disponible du failli :	2 400 $
Revenu mensuel disponible de l'autre membre de l'unité familiale :	0 $
Revenu mensuel disponible de l'unité familiale :	2 400 $
Moins la norme du surintendant pour une unité familiale d'un membre selon l'annexe A – 2013 :	2 006 $
Revenu excédentaire mensuel total :	394 $
Paiement requis du failli en vertu du paragraphe 5(7) de la présente instruction : (394 $ x 50 % = 197 $)	197 $

Durant le cinquième mois de la faillite, le revenu du failli diminue à 1 000 $ par mois.

Le syndic calcule le revenu mensuel moyen du failli au huitième mois pour déterminer s'il y a revenu excédentaire.

Revenu total du failli pour les sept mois :

2 400 $ x 4 mois =	9 600 $
1 000 $ x 3 mois =	3 000 $
	12 600 $

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Bankrupt's average monthly income for seven months:	
$12 600 ÷ 7 =	$1800
Minus Superintendent's standard for a family unit of one as per Appendix A — 2013:	$2006
Total monthly surplus income:	$0
Payment required from bankrupt:	$0

Given that the decrease in income has resulted in no requirement to make payments under section 68, the bankrupt is not required to make payments under section 68, subject to a further material change in the bankrupt's financial situation that results in redetermination of whether the bankrupt has surplus income, before being eligible for an automatic discharge under section 168.1 of the Act. In accordance with paragraph 7(4) of this Directive, the bankrupt is eligible for an automatic discharge at the expiry of the ninth month.

Revenu mensuel moyen du failli pour les sept mois :	
12 600 $ ÷ 7 =	1 800 $
Moins la norme du surintendant pour une unité familiale d'un membre selon l'annexe A – 2013 :	2 006 $
Revenu excédentaire mensuel total :	0 $
Paiement requis du failli :	0 $

Comme le calcul après la diminution du revenu indique que le failli n'a pas à verser des paiements en vertu de l'article 68, ce dernier n'est pas tenu de payer un montant à l'actif de la faillite, sous réserve d'autres changements importants dans sa situation financière qui entraîneraient un nouveau calcul visant à déterminer s'il y a revenu excédentaire, avant que le failli ne soit admissible à une libération d'office en vertu de l'article 168.1 de la Loi. Aux termes du paragraphe 7(4) de la présente instruction, le failli est admissible à une libération d'office à l'échéance du neuvième mois.

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Example 4

Irregular income

A salesperson who works on commission and receives payment on an irregular basis files for the first time an assignment in bankruptcy. During the seventh month of bankruptcy, the bankrupt receives three commissions in the amount of $5000, $4000 and $5000 for a total of $14 000. The average monthly income during the seven-month period of bankruptcy is $2000 ($14 000 ÷ 7 months = $2000) and this amount is the basis upon which to determine whether the bankrupt has surplus income according to the Superintendent's standards in place at the date of the bankruptcy and to determine the date on which the bankrupt is eligible for an automatic discharge.

Example 5

Increase in income (lump sum payment of pre-bankruptcy income)

If during the bankruptcy, the bankrupt receives a lump sum payment that represents a pre-bankruptcy income entitlement, for example, a wrongful dismissal settlement or a pay equity award, the trustee is required to determine what portion of the settlement or award is considered to be income for the purposes of section 68 of the Act. That amount then accrues to the estate for distribution to the creditors, except to the extent that it is required to meet the current needs of the bankrupt and his or her family. For greater clarity, the bankrupt is entitled to retain a sufficient amount of the payment to bring his or her income during the entire course of the bankruptcy up to the amount the trustee would normally allow the bankrupt to retain if the

Exemple 4

Revenu irrégulier

Une personne qui travaille à commission et reçoit des paiements à intervalles irréguliers fait faillite pour la première fois. Au cours du septième mois de la faillite, le failli reçoit trois commissions de 5 000 $, 4 000 $ et 5 000 $, totalisant 14 000 $. La moyenne mensuelle du revenu pendant la période de sept mois de la faillite s'établit à 2 000 $ (14 000 ÷ 7 mois = 2 000 $); c'est ce montant qui sert à déterminer si le failli a un revenu excédentaire selon les normes du surintendant en vigueur à la date de la faillite, et à fixer la date à laquelle le failli est admissible à une libération d'office.

Exemple 5

Augmentation du revenu (paiement forfaitaire d'un revenu gagné avant la faillite)

Si, durant la faillite, le failli reçoit un paiement forfaitaire correspondant à un revenu gagné avant la faillite, par exemple en règlement d'un congédiement injustifié ou à la suite d'un rajustement paritaire, le syndic doit déterminer quelle portion du montant doit être considérée comme un revenu aux fins de l'article 68 de la Loi. Ce montant revient ensuite à l'actif de la faillite aux fins de distribution aux créanciers, sauf dans la mesure où il est nécessaire au failli pour subvenir aux besoins courants de sa famille. En d'autres termes, le failli peut conserver une part suffisante du paiement forfaitaire pour amener son revenu sur l'ensemble de la période de faillite au montant maximal que le syndic autorise pour le revenu gagné sur une

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income were available on a periodic basis.

For example, a first-time bankrupt with regular monthly income of $1000 is not required to make monthly payments to the estate because the monthly income is below the Superintendent's standard for a family unit of one as per Appendix A. If, during the course of the bankruptcy, the bankrupt receives a wrongful dismissal award of $15 000 in the form of a lump sum payment (the full amount of which is considered to be income), the trustee determines the amount the bankrupt is required to pay to the estate in the following manner:

Bankrupt's monthly income:	$1000
Minus Superintendent's standard for a family unit of one as per Appendix A — 2013:	$2006
Total monthly surplus/shortfall:	($1006)
Bankrupt's lump sum payment:	$15 000
Minus shortfall x 9 months: ($1006 x 9 = $9054)	$9054
	$5946
Portion of lump sum to accrue to estate:	$5946

In this example, the bankrupt is required to pay $5946 of the lump sum award to the estate, but has no ongoing requirement to make payments under section 68 of the Act. Subject to the exceptions noted in section 168.1 of the Act, the bankrupt is eligible for an automatic discharge at the expiry of nine months after the date of bankruptcy.

base périodique.

Par exemple, une personne faisant faillite pour la première fois et ayant un revenu mensuel régulier de 1 000 $ n'est pas tenue de faire des paiements mensuels à l'actif de la faillite puisque son revenu mensuel est inférieur à la norme du surintendant (annexe A) pour une unité familiale d'une personne. Si, durant la période de faillite, le failli reçoit un paiement forfaitaire de 15 000 $ en règlement d'un congédiement injustifié (qui est considéré en totalité comme un revenu), le syndic détermine comme suit le montant que le failli est tenu de verser à l'actif de la faillite :

Revenu mensuel du failli :	1 000 $
Moins la norme du surintendant pour une unité familiale d'un membre selon l'annexe A – 2013 :	2 006 $
Excédent (déficit) mensuel du revenu :	(1 006 $)
Paiement forfaitaire reçu par le failli :	15 000 $
Moins le déficit x 9 mois : (1 006 $ x 9 = 9 054 $)	9 054 $
	5 946 $
Portion du paiement forfaitaire à verser à l'actif de la faillite :	5 946 $

Dans cet exemple, le failli est tenu de verser à l'actif de la faillite une partie du montant forfaitaire qu'il a reçu, soit 5 946 $, mais n'a pas à effectuer d'autres versements par la suite au titre de l'article 68 de la Loi. Sous réserve des exceptions énoncées à l'article 168.1, le failli est admissible à une libération d'office à l'échéance de la période

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de neuf mois suivant la date de la faillite.

However, if the bankrupt's monthly income is such that the bankrupt is required to make payments under section 68 of the Act, the trustee determines what portion of the settlement or award is considered to be income for the purposes of section 68 of the Act. That amount then accrues to the estate for distribution to the creditors. Subject to the exceptions noted in section 168.1 of the Act, the bankrupt is eligible for an automatic discharge at the expiry of 21 months after the date of bankruptcy.

Toutefois, si le revenu mensuel du failli est tel que ce dernier est tenu de verser des paiements à l'actif de la faillite en vertu de l'article 68 de la Loi, le syndic détermine quelle portion du règlement ou de la prime est considérée comme un revenu aux fins de l'article 68 de la Loi. Ce montant revient ensuite à l'actif de la faillite aux fins de distribution aux créanciers. Sous réserve des exceptions énoncées à l'article 168.1, le failli est admissible à une libération d'office à l'échéance de la période de 21 mois suivant la date de la faillite.

Example 6

Non-bankrupt spouse refuses or neglects to divulge his or her income or expenses

In a family unit of four, where the non-bankrupt spouse refuses to divulge his or her income, the trustee, for the purposes of determining surplus income, would base the calculation on the amount of $1862.50 ($3728 x 50% = $1862.50) instead of $3728.

(Family unit of four)

Bankrupt's available monthly income:	$2200
Other family unit members' available monthly income **(spouse refuses to divulge income):**	$0
Family unit's available monthly income:	$2200

Exemple 6

Le conjoint non en faillite refuse ou néglige de divulguer son revenu ou ses dépenses

Dans le cas d'une unité familiale de quatre membres, lorsque le conjoint non en faillite refuse de divulguer son revenu, le syndic, pour les fins du calcul du revenu excédentaire, fondera le calcul sur la somme de 1 862,50 $ (3 728 $ x 50 % = 1 862,50 $) plutôt que sur 3 728 $.

(Unité familiale de quatre membres)

Revenu mensuel disponible du failli :	2 200 $
Revenu mensuel disponible des autres membres de l'unité familiale **(le conjoint refuse de divulguer son revenu) :**	0 $
Revenu mensuel disponible de l'unité familiale :	2 200 $

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Minus Superintendent's standard for a family unit of four as per Appendix A -- 2013: ($3728 x 50% = $1862.50)	$1862.50	Moins la norme du surintendant pour une unité familiale de quatre membres selon l'annexe A – 2013 : (3 728 $ x 50 % = 1 862,50 $)	1 862,50 $
Total monthly surplus income:	$337.50	Revenu excédentaire mensuel total :	337,50 $
Payment required from bankrupt as per paragraph 5(7) of this Directive: ($337.50 x 50% = $168.75)	$168.75	Paiement requis du failli selon le paragraphe 5(7) de la présente instruction : (337,50 $ x 50 % = 168,75 $)	168,75 $

SB Directive: 8R10, Monthly Income and Expense Statement

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Office of the Superintendent of Bankruptcy Canada
Bureau du surintendant des faillites Canada

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Date: September 15, 2010

To: OSB Staff, Trustees and Registrars

Subject: Directive No. 8R10, *Bankruptcy and Insolvency Act* Forms — Forms 65 and 84

The Office of the Superintendent of Bankruptcy (OSB) has amended Forms 65 and 84 to correct technical inconsistencies. The amendments are housekeeping in nature in that they amend incorrect cross-references only, reflecting no substantive changes to the forms.

Summary of Changes

1. Form 65, *Monthly Income and Expense Statement of the Bankrupt/Debtor and the Family Unit and Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt*

Form 65 has been amended to correspond to the schema of the OSB electronic filing system. A reference to section 156.1 of the *Bankruptcy and Insolvency Act* (BIA) has been removed from line 12 of the form, resolving a discrepancy between the paper version of the form and the electronic version.

Date : 15 septembre 2010

À : Employés du BSF, syndics et registraires

Objet : Instruction n° 8R10, Formulaires de la *Loi sur la faillite et l'insolvabilité*

Le Bureau du surintendant des faillites (BSF) a apporté des modifications aux formulaires 65 et 84 de manière à corriger des incohérences. Les modifications sont de nature administrative et ont pour objet de corriger des renvois. Aucune modification de fond n'a été apportée.

Résumé des modifications

1. Formulaire 65 – *État mensuel des revenus et dépenses du failli ou du débiteur et de l'unité familiale et information (ou information modifiée) concernant la situation financière d'un failli*

Le formulaire 65 a été modifié afin de correspondre au schéma du système de dépôt électronique du BSF. La ligne 12 du formulaire a été modifiée afin d'y supprimer la référence à l'article 156.1 de la *Loi sur la faillite et l'insolvabilité* (LFI). Ceci résout les problèmes de concordance entre la version papier du formulaire et la version électronique.

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2. Form 84, *Certificate of Discharge*

Form 84 has been amended by replacing an incorrect reference to section 168 of the BIA with a reference to section 168.1 of the BIA.

Coming into Force
Directive No. 8R10, *Bankruptcy and Insolvency Act* Forms, comes into force on September 20, 2010.

Enquiries
If you require further information, please do not hesitate to contact the OSB office nearest you.

All

2. Formulaire 84 – *Certificat de libération*

Le formulaire 84 a été modifié de façon à supprimer un renvoi erroné à un article de la LFI. Le formulaire a été modifié de façon à remplacer le renvoi erroné à l'article 168 de la LFI par le renvoi pertinent à l'article 168.1 de la LFI.

Entrée en vigueur
L'instruction n° 8R10, *Formulaires de la Loi sur la faillite et l'insolvabilité*, entre en vigueur le 20 septembre 2010.

Demandes de renseignements
Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

p.p.

James Catlon
Superintendent of Bankruptcy / Surintendant des faillites

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 8R10

BANKRUPTCY AND INSOLVENCY ACT FORMS

Issued: September 15, 2010

(This Directive amends Directive No. 8R9 issued on April 30, 2010.)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"Forms" means forms under the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*c*) and (*e*) of the Act for the purpose of prescribing amendments to Form 65, *Monthly Income and Expense Statement of the Bankrupt/Debtor and the Family Unit and Information (or Amended Information) Concerning the Financial*

FORMULAIRES DE LA *LOI SUR LA FAILLITE ET L'INSOLVABILITÉ*

Émise : Le 15 septembre 2010

(La présente instruction modifie l'instruction n° 8R9 émise le 30 avril 2010.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Formulaires » renvoie aux formulaires émis en vertu de la *Loi sur la faillite et l'insolvabilité*;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction, qui est émise en vertu de l'autorité conférée par les alinéas 5(4)*c*) et *e*) de la Loi, a pour objet de prescrire des modifications au formulaire 65, *État mensuel des revenus et dépenses du failli ou du débiteur et de l'unité familiale et information (ou information modifiée) concernant la*

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Situation of the Individual Bankrupt and Form 84, *Certificate of Discharge*.

Summary

3 This Directive amends Forms 65 and 84. The amendments are housekeeping in nature in that they amend incorrect cross-references only, reflecting no substantive changes to the forms.

Form 65 has been amended to correspond to the schema of the OSB electronic filing system. A reference to section 156.1 of the Act has been removed from line 12 of the form, resolving a discrepancy between the paper version of the form and the electronic version of the form.

Form 84 has been amended by replacing an incorrect reference to section 168 of the Act with a reference to section 168.1 of the Act.

Coming into Force

4. Amended Forms 65 and 84 come into force on September 20, 2010.

Enquiries

5. For any questions pertaining to this Directive, please contact your local OSB office.

situation financière d'un failli ainsi qu'au formulaire 84, *Certificat de libération*.

Résumé

3. La présente instruction modifie les formulaires 65 et 84. Les modifications sont de nature administrative et ont pour objet de corriger des renvois. Aucune modification de fond n'a été apportée aux formulaires.

Le formulaire 65 a été modifié afin de correspondre au schéma du système de dépôt électronique du BSF. La ligne 12 du formulaire a été modifiée afin d'y supprimer la référence à l'article 156.1 de la Loi. Ceci résout les problèmes de concordance entre la version papier du formulaire et la version électronique du formulaire.

Le formulaire 84 a été modifié de façon à supprimer un renvoi erroné à un article de la Loi. Le formulaire a été modifié de façon à remplacer le renvoi erroné à l'article 168 de la Loi par le renvoi pertinent à l'article 168.1 de la Loi.

Entrée en vigueur

4. Les formulaires 65 et 84 révisés entreront en vigueur le 20 septembre 2010.

Demandes de renseignements

5. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Cullon
Superintendent of Bankruptcy / Surintendant des faillites

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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FORM 65

Monthly Income and Expense Statement of the Bankrupt/Debtor and the Family Unit
and Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt
(Section 68 and Subsection 102(3) of the Act; Rule 105(4))

(*Title Form*)

☐ Original ☐ Amended

Information concerning the monthly income and expense statement of the bankrupt/debtor and the family unit, financial situation of the bankrupt/debtor and bankrupt's obligation to make payments required under section 68 of the Act to the estate of the bankrupt are as follows:

MONTHLY INCOME	Bankrupt/Debtor	Other members of the family unit	Total
Net employment income	_____		
Net pension/annuities	_____		
Net child support	_____		
Net spousal support	_____		
Net employment insurance benefits	_____		
Net social assistance	_____		
Self-employment income			
Gross _____Net	_____		
Other net income	_____		
(*Such as amounts received as damages for wrongful dismissal, as pay equity settlement or that relate to workers' compensation*)			
(*Provide details* _____)			
TOTAL MONTHLY INCOME	$_____(1)	$_____(2)*	
TOTAL MONTHLY INCOME OF THE FAMILY UNIT ((1) + (2))			➢$_____(3)
MONTHLY NON-DISCRETIONARY EXPENSES			
Child support payments	_____		
Spousal support payments	_____		
Child care	_____		
Health condition expenses	_____		
Fines/penalties imposed by the Court	_____		
Expenses as a condition of employment	_____		
Debts where stay has been lifted	_____		
Other expenses	_____		
(*Provide details*_____)			
TOTAL MONTHLY NON-DISCRETIONARY EXPENSES		$_____(4)	$_____ (5)
TOTAL MONTHLY NON-DISCRETIONARY EXPENSES OF THE FAMILY UNIT ((4) + (5))			➢$_____(6)
AVAILABLE MONTHLY INCOME OF THE BANKRUPT/DEBTOR ((1) - (4))	$_____ (7)		
AVAILABLE MONTHLY INCOME OF THE FAMILY UNIT ((3) - (6))			➢$_____(8)
BANKRUPT'S/DEBTOR'S PORTION OF THE AVAILABLE MONTHLY INCOME OF THE FAMILY UNIT ((7) / (8) X 100)			➢% _____(9)

* If one or more members of the bankrupt's/debtor's family unit have refuse to divulge this information, please provide details as required by paragraph 6(3) of Directive No. 11R2.

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FORM 65 – *Concluded*

MONTHLY DISCRETIONARY EXPENSES (*Family unit*)

Housing expenses
- Rent/mortgage/hypothec
- Property taxes/condo fees
- Heating/gas/oil
- Telephone
- Cable
- Hydro
- Water
- Furniture
- Other

Personal expenses
- Smoking
- Alcohol
- Dining/lunches/restaurants
- Entertainment/sports
- Gifts/charitable donations
- Allowances
- Other

Non-recoverable medical expenses
- Prescriptions
- Dental
- Other

Living expenses
- Food/grocery
- Laundry/dry cleaning
- Grooming/toiletries
- Clothing
- Other

Transportation expenses
- Car lease/payments
- Repair/maintenance/gas
- Public transportation
- Other

Insurance expenses
- Vehicle
- House
- Furniture/contents
- Life insurance
- Other

Payments
- To the estate
- To secured creditor (*Other than mortgage and vehicle*)
- Other

TOTAL MONTHLY DISCRETIONARY EXPENSES (FAMILY UNIT) . . . . . - $_____ (10)
MONTHLY SURPLUS OR (DEFICIT) FAMILY UNIT ((8) - (10)) . . . . . =$_____ (11)

INFORMATION (OR AMENDED INFORMATION) CONCERNING THE FINANCIAL SITUATION OF THE INDIVIDUAL BANKRUPT

Payments to the estate as per agreement
Number of persons in household family unit, including bankrupt
Total amount bankrupt has agreed to pay monthly . . . _____ (12)
Amount bankrupt has agreed to pay monthly to repurchase assets
(*Provide details*)_____ _____ (13)
Residual amount paid into the estate ((12) - (13)) . . . . . _____ (14)

Payments required by Directive No. 11R2 (Surplus Income)
Monthly amount required by Directive No. 11R2 (Surplus Income) based on percentage established on line (9) . . _____ (15)
Difference between (14) and (15) _____ (16)
Other applicable comments (*If amount on line (14) is less than amount on line (15) explain why the required payments are not being made.*_____)
Amendment or material change (*If the information relates to a material change or an amendment, provide details:* _____)

Dated at _____ this _____ day of _____

_____ Trustee

_____ Bankrupt/Debtor

Notes: In a joint assignment, only one form is required and each debtor's monthly income and non-discretionary expenses have to be explained in detail.

If a copy of this Form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

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FORMULAIRE 65

État mensuel des revenus et dépenses du failli ou du débiteur et de l'unité familiale et information (ou information modifiée) concernant la situation financière d'un failli
(article 68 et paragraphe 102(3) de la Loi et Règle 105(4))

(Intitulé Formulaire 1)

☐ original ☐ modifié

Les renseignements concernant l'état mensuel des revenus et dépenses du failli ou du débiteur et de l'unité familiale, la situation financière du failli ou du débiteur et l'obligation du failli de faire les versements à l'actif de la faillite en vertu de l'article 68 de la Loi sont les suivants :

REVENU MENSUEL	Failli ou débiteur	Autres membres de l'unité familiale	Total
Revenus d'emploi nets	_____		
Pension et rentes nettes	_____		
Pension alimentaire nette pour les enfants	_____		
Pension alimentaire nette pour le conjoint	_____		
Prestations d'assurance-emploi nettes	_____		
Prestations d'assistance sociale nettes	_____		
Revenu d'un travail indépendant	_____		
Brut_____ Net	_____		
Autres revenus nets	_____		
(par exemple, montants reçus à titre de dommages-intérêts pour congédiement abusif, de règlement en matière de parité salariale ou d'indemnisation des accidents du travail)			
(Veuillez préciser _____)			
TOTAL DU REVENU MENSUEL	_____ $ (1)	_____ $ (2)*	
TOTAL DU REVENU MENSUEL DE L'UNITÉ FAMILIALE ((1) + (2))			➤_____ $ (3)
DÉPENSES MENSUELLES NON DISCRÉTIONNAIRES			
Pension alimentaire pour les enfants	_____		
Pension alimentaire pour le conjoint	_____		
Frais de garde d'enfants	_____		
Dépenses relatives à une condition médicale	_____		
Amendes et pénalités imposées par le tribunal	_____		
Dépenses relatives à une condition d'emploi	_____		
Dettes sujettes à une levée des procédures	_____		
Autres dépenses	_____		
(Veuillez préciser _____)			
TOTAL DES DÉPENSES MENSUELLES NON DISCRÉTIONNAIRES	_____ $ (4)	_____ $ (5)	
TOTAL DES DÉPENSES MENSUELLES NON DISCRÉTIONNAIRES DE L'UNITÉ FAMILIALE ((4) + (5))			➤_____ $ (6)
REVENU MENSUEL DISPONIBLE DU FAILLI OU DU DÉBITEUR ((1) - (4))	_____ $ (7)		
REVENU MENSUEL DISPONIBLE DE L'UNITÉ FAMILIALE ((3) - (6))			➤_____ $ (8)
POURCENTAGE DU REVENU MENSUEL DISPONIBLE DE L'UNITÉ FAMILIALE ATTRIBUABLE AU FAILLI OU AU DÉBITEUR ((7) / (8) X 100)			➤_____ % (9)

* Lorsqu'un ou plusieurs membres de l'unité familiale du failli ou du débiteur refusent de révéler cette information, veuillez fournir les détails tel que requis au paragraphe 6(3) de l'instruction n° 11R2.

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FORMULAIRE 65 (*suite*)

DÉPENSES MENSUELLES DISCRÉTIONNAIRES (*unité familiale*)

Dépenses relatives au logement
- Loyer/Hypothèque _____
- Taxes foncières/Frais de copropriété _____
- Chauffage/Gaz/Huile _____
- Téléphone _____
- Câble _____
- Électricité _____
- Eau _____
- Ameublement _____
- Autre _____

Dépenses personnelles
- Tabac _____
- Alcool _____
- Repas/Restaurants _____
- Divertissements/Sports _____
- Cadeaux/Dons de charité _____
- Allocations _____
- Autre _____

Dépenses médicales non remboursables
- Prescriptions _____
- Soins dentaires _____
- Autre _____

Dépenses relatives aux frais de subsistance
- Nourriture/Épicerie _____
- Buanderie/Nettoyage à sec _____
- Soins personnels _____
- Vêtements _____
- Autre _____

Dépenses de transport
- Location/Paiements pour automobile _____
- Entretien/Réparation/Essence _____
- Transport en commun _____
- Autre _____

Dépenses d'assurance
- Véhicule _____
- Maison _____
- Ameublement/Autres biens _____
- Vie _____
- Autre _____

Paiements
- Effectués à l'actif _____
- Effectués à un créancier garanti (*Autres que l'hypothèque et le véhicule*) _____
- Autre _____

TOTAL DES DÉPENSES MENSUELLES DISCRÉTIONNAIRES (UNITÉ FAMILIALE) . . . . . - _____ $ (10)

SURPLUS (DÉFICIT) MENSUEL (UNITÉ FAMILIALE) ((8) - (10)) = _____ $ (11)

Information (ou information modifiée) concernant la situation financière d'un failli

Paiements à l'actif suivant une entente

Nombre de personnes dans l'unité familiale incluant le failli _____

Montant total que le failli a convenu de verser chaque mois . . . . . _____ (12)

Montant que le failli a convenu de verser chaque mois pour racheter des éléments d'actif (*veuillez préciser*) _____ . . . . . _____ (13)

Montant résiduel versé à l'actif (12) - (13) . . . . . _____ (14)

Paiements requis suivant l'instruction n° 11R2, *Revenu excédentaire*

Montant mensuel requis par l'instruction n° 11R2, *Revenu excédentaire*, basé sur le pourcentage établi à la ligne (9) . . . . . _____ (15)

Différence entre les montants aux lignes (14) et (15) . . . . . _____ (16)

Autres commentaires pertinents (*Si le montant à la ligne (14) est moindre que le montant à la ligne (15), expliquez pourquoi les paiements requis ne sont pas faits* : _____)

Modification ou changement important (*Si l'information concerne un changement important ou une modification, veuillez préciser* _____)

Daté le _____ à _____

_____ _____
Syndic Failli ou débiteur

Remarques :

Dans le cas d'une cession conjointe, un seul formulaire est requis et les revenus et dépenses non discrétionnaires mensuels des débiteurs doivent être détaillés.

Lorsqu'une copie du présent formulaire est envoyée par voie électronique, par des moyens tels que le courriel, le nom et les coordonnées de l'expéditeur, tels qu'indiqués sur le formulaire 1.1, doivent figurer à la fin du document

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FORM 84

Certificate of Discharge
(Subsection 168.1(6) and Paragraph 170.1(4)(*a*) of the Act)

(*Title Form 1*)

Date of bankruptcy _____.

I, . trustee of the estate of . a bankrupt, hereby certify that

☐ the bankrupt has complied with the conditions that were established as a result of the mediation agreement and that, pursuant to subsection 170.1(4) of the Act, on the ____. day of _____. ____, the bankrupt is discharged and released from all debts, except those matters referred to in subsection 178(1) of the Act.

☐ pursuant to subsection 168.1(1) of the Act, on the _____ day of_____ ____, the bankrupt is discharged and released from all debts, except those matters referred to in subsection 178(1) of the Act.

(Please check applicable box)

The bankrupt is automatically discharged under the following provision:

☐ subparagraph 168.1(1)(*a*)(i) - Automatic discharge on the expiry of 9 months for first-time bankrupts without surplus income;
☐ subparagraph 168.1(1)(*a*)(ii) - Automatic discharge on the expiry of 21 months for first-time bankrupts with surplus income;
☐ subparagraph 168.1(1)(*b*)(i) - Automatic discharge on the expiry of 24 months for second-time bankrupts without surplus income;
☐ subparagraph 168.1(1)(*b*)(ii) - Automatic discharge on the expiry of 36 months for second-time bankrupts with surplus income.

☐ Pursuant to section 156.1 of the Act, the trustee and the bankrupt have entered into a post-discharge payment agreement.

Dated at _____, this _____ day of _____

Trustee

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FORMULAIRE 84

Certificat de libération

(paragraphe 168.1(6) et alinéa 170.1(4)*a)* de la Loi)

(Intitulé Formulaire 1)

Date de la faillite _____

Je soussigné, , syndic de l'actif de , failli, certifie

☐ que le failli a respecté les conditions prévues par l'entente consécutive à la médiation et que, conformément au paragraphe 170.1(4) de la Loi, il est libéré de toutes ses dettes à l'exception de celles mentionnées au paragraphe 178(1) de la Loi, à compter du _____.

☐ que le failli, conformément au paragraphe 168.1(1) de la Loi, est libéré de toutes ses dettes, à l'exception de celles visées au paragraphe 178(1) de la Loi, à compter du _____.

(Cochez la case pertinente.)

Le failli est libéré d'office en vertu de la disposition suivante :

☐ sous-alinéa 168.1(1)*a)*(i) – libération d'office à l'expiration des 9 mois dans le cas d'une première faillite, pour les faillis sans revenu excédentaire;

☐ sous-alinéa 168.1(1)*a)*(ii) – libération d'office à l'expiration des 21 mois dans le cas d'une première faillite, pour les faillis ayant un revenu excédentaire;

☐ sous-alinéa 168.1(1)*b)*(i) – libération d'office à l'expiration des 24 mois dans le cas d'une deuxième faillite, pour les faillis sans revenu excédentaire;

☐ sous-alinéa 168.1(1)*b)*(ii) – libération d'office à l'expiration des 36 mois dans le cas d'une deuxième faillite, pour les faillis ayant un revenu excédentaire.

☐ En vertu de l'article 156.1 de la Loi, le syndic a conclu avec le failli une entente relative à des paiements effectués après la libération.

Daté le _____, à _____

_____
Syndic

Determination of trustee re surplus income - Sec. 68(3)

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(3) The trustee shall, having regard to the applicable standards and to the personal and family situation of the bankrupt, determine whether the bankrupt has surplus income. The determination must also be made

(a) whenever the trustee becomes aware of a material change in the bankrupt's financial situation; and

(b) whenever the trustee is required to prepare a report referred to in subsection 170(1).

Duties of trustee relating to determination - Sec. 68(4)

(4) Whenever the trustee is required to determine whether the bankrupt has surplus income, the trustee shall

(a) if the trustee determines that there is surplus income,

(i) fix, having regard to the applicable standards, the amount that the bankrupt is required to pay to the estate of the bankrupt,

(ii) inform, in the prescribed manner, the official receiver, and every creditor who has requested such information, of the amount fixed under subparagraph (i), and

(iii) take reasonable measures to ensure that the bankrupt complies with the requirement to pay; and

(b) if the trustee determines that there is no surplus income, inform, in the prescribed manner, the official receiver, and every creditor who has requested such information, of that determination.

Dugas v. PricewaterhouseCoopers Inc., 2004 NBCA 15 (CanLII) - Can Trustee Obtain Control Over All of Bankrupt's Income on Failure to Properly Disclose

Date:	2004-02-26
Docket:	85/03/CA
Parallel citations:	268 NBR (2d) 290; 237 DLR (4th) 143; 47 CBR (4th) 205
URL:	http://canlii.ca/t/1gk4h
Citation:	Dugas v. PricewaterhouseCoopers Inc., 2004 NBCA 15 (CanLII), <http://canlii.ca/t/1gk4h> retrieved on 2013-09-13
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COURT OF APPEAL OF NEW BRUNSWICK
85/03/CA

CYRENUS JOSEPH DUGAS APPELLANT		**CYRENUS JOSEPH DUGAS** APPELANT
- and -		- et -
PRICEWATERHOUSECOOPERS INC. RESPONDENT		**PRICEWATERHOUSECOOPERS INC.** INTIMÉE
Dugas v. PricewaterhouseCoopers Inc., 2004 NBCA 15		Dugas c. PricewaterhouseCoopers Inc., 2004 NBCA 15

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CORAM: The Hon. Chief Justice Drapeau The Honourable Justice Rice The Honourable Justice Deschênes		CORAM: L'honorable juge en chef Drapeau L'honorable juge Rice L'honorable juge Deschênes
Appeal from a decision of: Léger, J. May 27, 2003		Jugement de première instance : Léger, j.c.b.r. le 27 mai 2003
Appeal heard: January 27, 2004		Appel entendu : le 27 janvier 2004
Judgment rendered: February 26, 2004		Jugement rendu : le 26 février 2004
Reasons for judgment by: The Hon. Chief Justice Drapeau		Motifs de jugement : L'honorable juge en chef Drapeau
Concurred in by: The Honourable Justice Rice The Honourable Justice Deschênes		Souscrivent aux motifs : L'honorable juge Rice L'honorable juge Deschênes
Counsel at hearing: For the appellant: Brigitte Sivret For the respondent: Cyril W. Johnston and Chantal A. Thibodeau		Avocats à l'audience : Pour l'appelant : Brigitte Sivret Pour l'intimée : Cyril W. Johnston et Chantal A. Thibodeau
THE COURT The Court dismissed the appeal. There will be no order of costs.		**LA COUR** La Cour a rejeté l'appel. Il n'y aura pas d'ordonnance quant aux dépens.

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The judgment of the Court was delivered by

DRAPEAU C.J.N.B.

[1] Under the ***Bankruptcy & Insolvency Act***, R.S.C. 1985, c. B-3 (the "***Act***"), the portion of the bankrupt's earnings that exceeds reasonable living expenses may be attached and used to pay creditors in bankruptcy. It is common ground between the parties that the bankrupt's earnings do not constitute property divisible among creditors pursuant to section 67(1) of the ***Act*** and that proceedings to attach those earnings can only be brought under section 68. The leading case on point is ***Marzetti v. Marzetti***, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765.

[2] That said, on occasion, the Trustee lacks the information required to fix the amount that the bankrupt is required to pay out of his or her earnings in accordance with s. 68(3) and a constellation of circumstances operate to give rise to a real and substantial possibility that those earnings may dissipate. **The question raised by the present appeal is whether, in those circumstances, s. 183(1) of the *Act* authorizes the Court of Queen's Bench to make an order granting the Trustee temporary control over the bankrupt's earnings, despite s. 68's silence on the subject. Section 183(1) is a provision of general application that invests the Court of Queen's Bench with such jurisdiction at law, and in equity, as will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy.**

[3] In the case at bar, Justice Léger of the Court of Queen's Bench in a decision reported at [2003] N.B.J. No. 210 (Q.B.)(Q.L.), allowed the Trustee's application for relief under the ***Act*** and ordered that: (1) the revenues arising in 2003 from the appellant's crab-fishing license be paid directly to the Trustee; (2) the Trustee immediately pay all reasonable *bona fide* arm's length expenses arising out of the ordinary course of the fishing activities, including salaries; (3) the Trustee prepare a report for the benefit of the bankrupt and the creditors in bankruptcy of all revenues and expenses and then proceed in accordance with s. 68; and (4) any unresolved issues relating to the fishing activities, including reasonable expenses, be submitted for judicial determination.

[4] The appellant, Cyrenus Joseph Dugas, contends that Justice Léger lacked jurisdiction to make that order. In Mr. Dugas' submission, s. 68 constitutes a complete code for the Trustee's and the Court's jurisdiction over the bankrupt's earnings, and the provision does not authorize the making of an asset-preservation order of the kind made in the court below.

[5] Relying on ***Landry (Re)*** 2000 CanLII 16846 (ON CA), (2000), 192 D.L.R. (4th) 728 (Ont.C.A.), the Trustee counters that s. 68 only comes into play once it is possible to fix the amount to be paid out of earnings to the bankrupt's estate. The Trustee submits that where it is impossible to fix that amount, and the bankrupt's earnings are in need of protection for the benefit of the creditors in bankruptcy, the court may make an asset-preservation order, such as the order under appeal, effective until such time as the Trustee is able to make the determination under section 68(3).

[6] After hearing counsel for Mr. Dugas, the Court dismissed the appeal, with reasons to follow. These are the reasons.

The context

[7] On August 23, 2001, Peter Gaudet, Adam Gaudet, 508571 N.B. Ltd. and 100167 P.E.I. Inc. obtained a consent judgment in the Court of Queen's Bench of New Brunswick against Mr. Dugas in the amount of $2,100,000. Under the terms of that judgment, Mr. Dugas was ordered to pay the sum of $50,000 forthwith and $2,050,000 within thirty days. The sum of $50,000 was paid, but Mr. Dugas defaulted on his obligation to pay the balance of $2,050,000. That debt remains outstanding in full.

[8] From April to October 2002, Mr. Dugas fished for crab, earning gross revenues in excess of $800,000. As noted, he did not pay down the judgment debt mentioned above.

[9] On October 27, 2002, following the end of the crab fishing season, Mr. Dugas made an assignment in bankruptcy for the general benefit of his creditors. The Trustee at the time, J.G. Touchie & Associates Ltd., filed with the Official Receiver, a copy of Mr. Dugas' Statement of Affairs. The only creditor listed in that document was Adam Gaudet who was shown as being owed $2,050,000.00.

[10] Under s. 68(3) of the ***Act***, the Trustee is required to have regard "to the personal and family situation of the bankrupt" in fixing the amount that the latter is required to pay from earnings to the estate of the bankrupt. Form 65, entitled "Monthly Income and Expense Statement of the Bankrupt and the Family Unit and Information Concerning the Financial Situation of the Individual Bankrupt", is designed to assist the Trustee in assessing the bankrupt's personal and family situation.

[11] Mr. Dugas filed a Form 65 that indicated "0.00$" whenever a specific amount was to be provided. Thus, he specified "0.00$" for his net employment income, "0.00$" for the total monthly income of the

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family unit, "0.00$" for his monthly non-discretionary expenses, "0.00$" for the monthly non-discretionary expenses of the family unit, "0.00$" for his available monthly income, "0.00$" for the available monthly income of the family unit, "0.0%" for his portion of the available monthly family unit income and "0.00$" for the monthly surplus or (deficit) of the family unit.

[12] On November 1, 2002, Peter Gaudet, Adam Gaudet, 508571 N.B. Ltd. and 100167 P.E.I. Inc. filed proofs of claim. No other creditor, whether secured or unsecured, filed a proof of claim.

[13] The first meeting of creditors was held on November 19, 2002. At that time, PricewaterhouseCoopers Inc. took over as Trustee and the list of creditors was expanded to include Peter Gaudet, 508571 N.B. Ltd. and 100167 P.E.I. Inc. On December 6, 2002, the first meeting of creditors reconvened and Mr. Dugas' examination began. At that time, Mr. Dugas testified that he had received an allocation of the snow crab quota for nearly every year since 1977 and that, in 2002, his gross income from crab-fishing amounted to $820,000.00, while the amount indicated in his tax return as taxable income was $287,000.73. Mr. Dugas disclosed, as well, that the expenses deducted from his gross income included the sum of $85,000 paid to his son, Serge, even though the latter had no direct involvement in fishing for crab. The meeting ended without Mr. Dugas' examination being completed.

[14] Mr. Dugas has since refused to submit to any further out-of-court examination by the Trustee.

[15] As mentioned, on May 27, 2003, Justice Léger allowed the Trustee's application and made the following order:

(a) That all revenues arising from Mr. Dugas' crab fishing licence for the year 2003 be paid directly to the Trustee;

(b) That the Trustee pay immediately all reasonable *bona fide* arm's length expenses arising out of the ordinary course of the fishing activities including salaries;

(c) That the Trustee prepare a report for the benefit of the Bankrupt and the Creditors of all revenues and expenses and then proceed according to the provisions of Section 68 of the ***Act***; and

(d) That the hearing into the Trustee's motion resume on the 2nd day of July, 2003 at 1:30 p.m. in Bathurst, New Brunswick or at such other time as the parties may agree in order to determine all unresolved issues relating to the 2003 crab fishing activities including reasonable expenses.

[16] On May 29, 2003, Mr. Dugas filed a Notice of Appeal from Justice Léger's decision. That filing triggered the application of s. 195 and, as a result, all proceedings under Justice Léger's May 27, 2003 order were stayed until I made an order canceling that stay on June 6, 2003 (see ***Dugas (Re)***, [2003] N.B.J. No. 230 (C.A.)(Q.L.)).

[17] The parties agreed to adjourn *sine die* the hearing before Justice Léger scheduled for July 2, 2003. Neither party has sought directions from him with respect to the many "unresolved issues relating to the 2003 crab fishing activities including reasonable expenses".

Relevant Legislative Provisions

68. (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

(2) For the purposes of this section,

(a) "total income" referred to in subsection (1) includes, notwithstanding paragraphs 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source; and

(b) a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1)(b) and (b.1).

68. (1) Le surintendant fixe, par instruction, pour les provinces ou pour un ou plusieurs districts ou parties de district, des normes visant l'établissement du montant du revenu total d'un particulier failli qui excède ce qui est nécessaire au maintien d'un niveau de vie raisonnable.

(2) Pour l'application du présent article :

a) le revenu total d'un failli comprend, malgré les alinéas 67(1)b) et b.1), ses revenus de toutes natures ou sources;

b) les biens du failli, à l'exception des biens visés à ces alinéas, peuvent faire l'objet d'une exécution à titre de montant à payer à l'actif de la faillite.

(3) Le syndic fixe, conformément aux normes applicables et compte tenu des charges familiales et de la situation personnelle du failli,

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(3) The trustee shall
(a) having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;
(b) inform the official receiver in writing of the amount fixed under paragraph (a); and
(c) take reasonable measures to ensure that the bankrupt complies with the requirement to pay.
(4) The trustee may, at any time, amend an amount fixed under subsection (3) to take into account
(a) material changes that have occurred in the personal or family situation of the bankrupt; or
(b) a recommendation made by the official receiver under subsection (5).
(5) Where the official receiver determines that the amount required to be paid by the bankrupt under subsection (3) or (4) is substantially not in accordance with the applicable standards established under subsection (1), the official receiver shall recommend to the trustee and to the bankrupt an amount required to be paid that the official receiver determines is in accordance with the applicable standards.
(6) Where the trustee and the bankrupt are not in agreement with the amount that the bankrupt is required to pay under subsection (3) or (4), the trustee shall, forthwith, in the prescribed form, send to the official receiver a request that the matter be determined by mediation and send a copy of the request to the bankrupt.
(7) On the request in writing of a creditor made within thirty days after the date of bankruptcy or an amendment referred to in subsection (4), the trustee shall, within the five days following the thirty day period, send to the official receiver a request in the prescribed form that the matter of the amount the bankrupt is required to pay under subsection (3) or (4) be determined by mediation and send a copy of the request to the bankrupt and the creditor.
(8) A mediation shall be in accordance with prescribed procedures.
(9) Documents contained in a file on the mediation of a matter under this section form part of the records referred to in subsection 11.1(2).
(10) Where
(a) the trustee has not implemented a recommendation made by the official receiver under subsection (5),
(b) the issue submitted to mediation requested

le montant que celui-ci doit verser à l'actif de la faillite, en avise le séquestre officiel par écrit et prend les mesures indiquées pour que le failli s'exécute.
(4) Le syndic peut modifier le montant fixé en application du paragraphe (3) pour tenir compte soit de tout changement important des charges familiales ou de la situation personnelle du failli, soit de la recommandation faite par le séquestre officiel au titre du paragraphe (5).
(5) S'il estime que le montant que doit payer le failli diffère substantiellement du montant payable en application des normes visées au paragraphe (1), le séquestre officiel recommande au syndic et au failli le montant à verser, au titre de celles-ci, à l'actif de la faillite.
(6) À défaut d'entente avec le failli sur le montant à verser, le syndic transmet sans délai au séquestre officiel, en la forme prescrite, une demande de médiation et en expédie une copie au failli.
(7) Sur demande écrite du créancier faite dans les trente jours suivant la date de la faillite ou de la modification visée au paragraphe (4), le syndic transmet au séquestre officiel, dans les cinq jours suivant l'expiration des trente jours, une demande de médiation en la forme prescrite relativement au montant que le failli doit verser à l'actif, et en expédie une copie au failli et au créancier.
(8) La procédure de médiation est fixée par les Règles générales.
(9) Les documents constituant le dossier de médiation font partie des dossiers visés au paragraphe 11.1(2).
(10) S'il ne met pas en oeuvre la recommandation du séquestre officiel ou s'il y a échec de la médiation ou défaut du failli d'effectuer ses paiements, le syndic peut, d'office, ou doit, sur demande des inspecteurs, des créanciers ou du séquestre officiel, demander au tribunal d'établir, par ordonnance, le montant du revenu que le failli doit verser à l'actif de la faillite, compte tenu des normes fixées par le surintendant et des charges familiales et de la situation personnelle du failli.
(11) Le tribunal peut fixer un montant équitable à titre de traitement, salaire ou autre rémunération pour les services rendus par le failli à un employeur ou à titre de paiement ou de commission pour services rendus à un tiers si ces personnes sont liées au failli; il peut établir, par ordonnance, le montant à verser au syndic sur la base du montant fixé, sauf s'il

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under subsection (6) or (7) is not thereby resolved, or
(c) the bankrupt fails to comply with the requirement to pay as determined under this section,
the trustee may, or on the request of the inspectors, any of the creditors or the official receiver shall, apply to the court for the hearing of the matter, and the court may, on the hearing, in accordance with the standards established under subsection (1) and having regard to the personal and family situation of the bankrupt, by order, fix the amount that the bankrupt is required to pay to the estate of the bankrupt.
(11) The court may fix an amount that is fair and reasonable
(a) as salary, wages or other remuneration for the services being performed by a bankrupt for a person employing the bankrupt, or
(b) as payment for or commission in respect of any services being performed by a bankrupt for a person,
where the person is related to the bankrupt, and the court may, by order, determine the part of the salary, wages or other remuneration, or the part of the payment or commission, that shall be paid to the trustee on the basis of the amount so fixed by the court, unless it appears to the court that the services have been performed for the benefit of the bankrupt and are not of any substantial benefit to the person for whom they were performed.
(12) On the application of any interested person, the court may, at any time, amend an order made under this section to take into account material changes that have occurred in the personal or family situation of the bankrupt.
(13) An order of the court made under this section may be served on a person from whom the bankrupt is entitled to receive money and, in such case,
(a) the order binds the person to pay to the estate of the bankrupt the amount fixed by the order; and
(b) if the person fails to comply with the terms of the order, the court may, on the application of the trustee, order the person to pay the trustee the amount of money that the estate of the bankrupt would have received had the person complied with the terms of the order.
(14) For the purposes of section 38, an application referred to in subsection (10) is deemed to be a proceeding for the benefit of the estate.

estime que les services rendus n'ont bénéficié qu'au failli et n'ont pas procuré un bénéfice important à son employeur ou au tiers.
(12) Sur demande de tout intéressé, le tribunal peut modifier l'ordonnance rendue au titre du présent article pour tenir compte de tout changement important des charges familiales ou de la situation personnelle du failli.
(13) Lorsqu'une ordonnance rendue au titre du présent article est signifiée à une personne qui doit une somme d'argent au failli, elle est tenue de s'y conformer; si elle ne s'y conforme pas, le tribunal peut, sur demande du syndic, lui ordonner de verser la somme au syndic.
(14) La demande présentée au tribunal au titre du paragraphe (10) constitue, pour l'application de l'article 38, une procédure à l'avantage de l'actif.
183. (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :
a) dans la province d'Ontario, la Cour supérieure de justice;
b) [Abrogé, 2001, ch. 4, art. 33]
c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;
d) dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;
e) dans la province de l'Île-du-Prince-Édouard, la Section de première instance de la Cour suprême;
f) dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;
g) dans la province de Terre-Neuve, la Division de première instance de la Cour suprême;
h) au Yukon, la Cour suprême du Yukon, dans les Territoires du Nord-Ouest, la Cour suprême des Territoires du Nord-Ouest et, au Nunavut, la Cour de justice du Nunavut.

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183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
(a) in the Province of Ontario, the Superior Court of Justice;
(b) [Repealed, 2001, c. 4, s. 33]
(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
(e) in the Province of Prince Edward Island, the Trial Division of the Supreme Court of the Province;
(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
(g) in the Province of Newfoundland, the Trial Division of the Supreme Court; and
(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Analysis and Decision

(a) Preliminary procedural issues

(i) Non-compliance with Rule 37.03(b)

[18] Mr. Dugas contests the Trustee's right to invoke s. 183(1) of the ***Act*** to buttress its submission in support of Justice Léger's jurisdiction. Mr. Dugas rightly points out that the Trustee's Notice of Motion does not refer to section 183(1). Rule 37.03(b) of the ***Rules of Court*** is clear on the subject. A Notice of Motion must state the grounds to be argued, including a reference to any statutory provision to be relied on (see ***Lloyd's of London v. Norris***, [1998] N.B.J. No. 351 (C.A.) leave to appeal dismissed reflex, (1998) 218 N.B.R. (2d) 400 (S.C.C.) at para. 10; ***Waugh et al. v. Canadian Broadcasting Corp. et al.*** (2000), 224 N.B.R. (2d) 39 (C.A.) at paras. 11-14 and ***Doiron v. Cameron***, [2003] N.B.J. No. 301 (Q.B.)(Q.L.) at paras. 14-15).

[19] There is, however, nothing in the record to indicate that counsel for Mr. Dugas in the court below - who was not his current counsel, Ms. Sivret - raised any objection on the ground of non-compliance with Rule 37.03(b). Moreover, and contrary to what was noted in passing in my June 6, 2003 reasons for judgment, the motion heard in the court below was not concerned solely with sections 67 and 68 of the ***Act***. Indeed, the Notice of Motion's prayer for relief is worded broadly and invokes the full jurisdiction of the Court of Queen's Bench under the ***Act***. As well, the motion appears to have been heard and determined on that basis. In his reasons for judgment, at paras. 1 and 2, Justice Léger describes the relief sought in these terms:

> This motion is brought by the Trustee in Bankruptcy [PriceWaterHouseCoopers] Inc as trustee of the Bankrupt Cyrenus Joseph Dugas requesting an order that the revenues from the 2003 crab fishing season be declared the property of the Bankrupt and therefore divisible among the creditors pursuant to the provisions of section 67 and 68 of the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3 (hereinafter "the **Act**"), as amended.
> The other remedies sought in the motion are that all revenues derived from the fishing activities be paid directly to the Trustee who shall fix the amount to be paid to the Estate of the Bankrupt in accordance with Section 68 of the **Act**, *supra*. (Emphasis added)

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[20] In my view, there is every reason to bring s. 183(1) into the mix as a potential source of jurisdiction for the order under appeal.

(ii) Further evidence

[21] By motion, Mr. Dugas asks that this Court receive evidence as to matters that have occurred since Justice Léger's May 27, 2003 order. Under Rule 62.21 (2)(b), the Court may receive evidence of this nature if it is relevant to the issues requiring determination on appeal.

[22] The issue at hand is whether Justice Léger had jurisdiction to make the May 27, 2003 order. Evidence as to matters that have occurred since then is irrelevant to the determination of that issue. Accordingly, I would dismiss Mr. Dugas' motion and reject the proffered evidence.

(b) Scope of s. 183(1)

[23] In ***Sam Lévy & Associés Inc. v. Azco Mining Inc.,*** 2001 SCC 92 (CanLII), [2001] 3 S.C.R. 978, at para. 17, the Court noted that, on its face, the intent of s. 183(1) is to attribute to the bankruptcy court "powers and duties co-extensive with Parliament's jurisdiction over 'Bankruptcy' under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself." The Court went on to note, at para. 38, that the broad scope of authority conferred by s. 91(21) of the ***Constitution Act, 1867*** to Parliament had "been passed along to the bankruptcy court in s. 183(1) of the ***Act***, which confers correspondingly broad jurisdiction."

[24] In ***Landry (Re)***, the bankrupt had brought an action for wrongful dismissal against her former employer and had been proceeding through arbitration, when she was discharged under the ***Act***. The bankrupt was successful at arbitration and prior to payment of the award, the Trustee brought an application for a declaration that any amount awarded for lost wages constituted property of the bankrupt that vested in the Trustee for the benefit of the creditors in bankruptcy. The Trustee submitted that vesting could occur by way of section 68. The motions judge rejected that submission on the ground, among others, that the Trustee had not followed the procedure set out in s. 68 for the making of a claim in respect to earnings.

[25] On appeal, it was argued that the Trustee was precluded from resorting to s. 68 because the procedure provided therein had not been followed. The Ontario Court of Appeal dealt with that issue, as follows at pp. 741-742:

> 6. Is the trustee precluded from resorting to s. 68 because the procedure set out thereunder has not been followed?
>
> [41] The motions judge was correct in noting that, before an application can be made to the court under s. 68(10) to fix the amount of the bankrupt's income that is payable to the estate of the bankrupt, the trustee must bring himself under the terms of that provision. As discussed earlier, by its terms, s. 68(10) effectively limits the number of applications to the court to those cases where the issue has not otherwise been resolved by consent or mediation in accordance with the established procedure. In this case, of course, it was impossible for the trustee to have followed this procedure since the arbitrator's award was not yet ascertained. Once the arbitrator's decision is made, the trustee will be in a position to fix the amount which, in its view, must be paid to the estate and the balance of the procedure set out in s. 68 can follow its course. Hence, the trustee's motion, insofar as it purports to be made under s. 68(10), is simply premature.
>
> [42] However, the trustee's motion was not made strictly under s. 68(10). It is apparent from the relief sought, which was mainly declaratory in nature, that the motion was brought with a view to preserving a potential asset in anticipation of a future determination of the parties' rights under s. 68. In my view, the motions judge erred in foreclosing any resort to s. 68 on the basis that the procedure set out thereunder had not been followed. At worst, the motion could have been dismissed as premature. [Emphasis added.]

[26] Viewing the Trustee's motion as one brought for the purpose of preserving a potential asset in anticipation of a future determination of the parties' rights under s. 68, the Ontario Court of Appeal held that the motions judge had jurisdiction to direct that any monies awarded by the arbitrator as compensation for lost wages be paid into court until the parties' rights under s. 68 were determined. The Court allowed the appeal, and so ordered. Additionally in ***Cole (Re),*** [2001] N.S.J. 155 (Q.L.), at para. 41, Registrar Hill makes the following observations in connection with a yet-to-be adjudicated claim for lost income arising out of a motor-vehicle accident:

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> ... If, prior to the amount of "income" to be received by the Bankrupt being determined, the Trustee becomes concerned that his ability to obtain any funds subject to a s. 68 order may be prejudiced for some reason, the Trustee may apply for an order such as that granted in Landry. In Landry the court ordered that any monies to be paid by the employer to the bankrupt as compensation for lost wages be paid into court pending resolution of the amount to be paid under s. 68.

[27] Courts should be chary of interpreting the ***Act***'s provisions in a manner inimical to the attainment of its objectives, chief among which is the equitable distribution of a bankrupt's assets among the creditors in bankruptcy (see ***Husky Oil Operations Ltd. v. Minister of National Revenue***, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453, per Gonthier J., for the majority, at para. 7). In my view, the court's earnings-related jurisdiction under s. 183(1) is not limited to making an order directing their payment into court. Indeed, such an order would have been impractical in the case at hand. In my view, the scope of s. 183(1) is accurately delineated in Houlden & Morawetz, ***2004 Annotated Bankruptcy and Insolvency Act***, (Toronto: Carswell, 2004), at p. 774:

> For carrying out the purposes of the Act, there is deemed to be vested in the Bankruptcy Court the necessary power and jurisdiction to authorize and sanction acts required to be done by the trustee for the due administration and protection of the bankrupt estate, even though there is no specific provision in the Act expressly conferring such power and jurisdiction
> [Citations omitted.]

In that context, "bankrupt estate" is to be understood as including the bankrupt's "total income" within the meaning of section 68(1).

(c) Application to the case at hand

[28] I begin by noting that, in the court below, Mr. Dugas did not take issue with Justice Léger's jurisdiction to make the order under appeal. In fact, he was prepared to turn over to the Trustee 20% of the total income from his fishing operations in 2003. He suggested that the Trustee could then assess the amount to be given to him for reasonable living expenses in accordance with s. 68 of the ***Act***. That said, Justice Léger could not acquire jurisdiction by consent: his capacity and authority to make the order under appeal must spring from the ***Act***.

[29] In his reasons for judgment, Justice Léger makes the following observations:

(1) Historically, Mr. Dugas' crab fishing operations have generated substantial income over a very short period of time;

(2) Mr. Dugas is not a first-time bankrupt;

(3) The Trustee entertains serious doubts as to whether the expenses claimed in previous years by Mr. Dugas (in reduction of his gross income) were truly business-related;

(4) Mr. Dugas did not know the price of crab for the 2003 season. (In the affidavit that he filed in opposition to the Trustee's motion, Mr. Dugas asserted that the price could not be forecast because it would be influenced, to an unpredictable extent, by factors such as the exchange rate, the war in Iraq and "problems in North Korea").

[30] Justice Léger concluded that Mr. Dugas' earnings from crab-fishing were in need of protection and that "the best approach to ensure that the assets are protected is to order that all revenues from the 2003 crab fishing activities under the crab license # 23622 issued to the Bankrupt Cyrenus Dugas be paid directly to the Trustee [PriceWaterHouseCoopers] Inc." As noted, he went on to order that the Trustee prepare a "report for the benefit of the Bankrupt and the Creditors of all revenues and expenses and then proceed according to the provisions of Section 68 of the Act."

[31] Under s. 68(3), the Trustee must have regard for the bankrupt's personal and family situation in fixing the amount payable out of earnings to the bankrupt's estate. A duly completed Form 65 is essential if the Trustee is to competently perform his statutory mandate. Mr. Dugas failed, without justification, to complete Form 65 in any useful manner. Moreover, Mr. Dugas subsequently refused to fully comply with the Trustee's requests for financial information. Finally, the Trustee's doubts regarding the reliability of the financial data that Mr. Dugas did provide concerning his business operations in 2002 were far from fanciful and they led the Trustee to conclude that Mr. Dugas' 2003 earnings were in need of protection for the benefit of his creditors. In those circumstances, it was entirely proper for the Trustee to apply to the Court of Queen's Bench for an asset-preservation order under section 183(1).

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[32] **Section 183(1) invests the Court of Queen's Bench with capacity and authority to make any order that will enable it to exercise its original, auxiliary and ancillary jurisdiction in bankruptcy. Under s. 183(1), the Court of Queen's Bench may authorize acts required "for the due administration and protection of the bankrupt estate, even though there is no specific provision in the Act expressly conferring such power and jurisdiction" (see Houlden & Morawetz, *Bankruptcy & Insolvency Act*, at p. 774). In my view, nothing said in *Marzetti* contradicts that proposition. Any order designed to by-pass illegitimate obstacles to the due administration of the bankrupt's estate in accordance with the *Act* is authorized under section 183(1).**

[33] **The order under appeal falls squarely within the broad jurisdiction recognized by section 183(1). It was rendered having regard to the Trustee's inability to perform the mandate contemplated by s. 68 and the need to temporarily protect the bankrupt's earnings for the benefit of the creditors in bankruptcy. The order in question is both authorized by the *Act* and a judicious response to a practical problem whose genesis can be traced to the bankrupt.**

Disposition

[34] For the reasons outlined above, the Court dismissed the appeal. There will be no order of costs.

J. ERNEST DRAPEAU, J.A.
CHIEF JUSTICE OF NEW BRUNSWICK

WE CONCUR:

ROBERT C. RICE, J.A.

ALEXANDRE DESCHÊNES, J.

Hynes (Re), 2000 CanLII 1511 (NS SC) - - Sec. 68 : Applies to Pre or Post Bankruptcy Income?

Date:	2000-09-18
Docket:	No.B22720; EstateNo.51-080621
Parallel citations:	187 NSR (2d) 394; 20 CBR (4th) 98
URL:	http://canlii.ca/t/1f1fl
Citation:	Hynes (Re), 2000 CanLII 1511 (NS SC), <http://canlii.ca/t/1f1fl> retrieved on 2013-09-15
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CANADA
SUPREME COURT OF NOVA SCOTIA
COURT NO. 22720
ESTATE NO. 51-080621
IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY
IN THE MATTER OF THE BANKRUPTCY OF
HEATHER DARLENE HYNES

D E C I S I O N

HEARD BEFORE:	Tim Hill, Registrar in Bankruptcy
DATE HEARD:	July 17, 2000
DECISION:	September 18 , 2000

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COUNSEL:

Heather Darlene Hynes,
the Bankrupt, representing herself
Joseph Wilkie representing the
Trustee, White Burgess Langille
Inman

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Heather Hynes is the mother of three girls. They are aged 13, 12 and 8. Her only source of income is the wages she earns working for the Federal Government. Her monthly net income is $2,180.00. She does not receive any support from her former spouse.

Ms. Hynes has worked for the Federal Government for about 11 years. She qualified for a pay equity payment. She received a payment after she had made an assignment in bankruptcy, but before her discharge. The exact amount of the pay equity payment was not put into evidence. However, the Trustee's report filed under s. 170 of the *Bankruptcy and Insolvency Act* states that the amount of the pay equity payment was $19,000.00.

The Trustee objected to the discharge of the Bankrupt. On the application for discharge, the Trustee argued that there should be a conditional order of discharge, whereby Ms. Hynes would be required to pay to the Trustee for the benefit of the Estate the pay equity payment she received, or at least a part of that payment.

There was scant evidence before me as to the nature of the pay equity payment. For the purposes of my decision here I characterize that payment as a payment of pre-bankruptcy earnings. This being the case, it is necessary to consider whether or not the Trustee's application should have been made pursuant to s. 68 of the *Bankruptcy and Insolvency Act*.

Does s. 68 apply to both pre-bankruptcy and post-bankruptcy wages?

A very useful article which addresses the question is that of Robert A. Klotz, *Who Gets the Bankrupt's Pre-Bankruptcy Earning?* (2000), 15 C.B.R. (4th) 153. In that article the author analyzes in particular the approach taken by the Supreme Court of Canada in three cases decided by the Court in which the Court had occasion to interpret s. 68 of the *Bankruptcy and Insolvency Act: Marzetti* v. *Marzetti*, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765, 5 R.F.L. (4th) 1, 26 C.B.R. (3d) 161, 169 N.R. 161, 20 Alta.L.R. (3d) 1, [1994] 7 W.W.W. 623; *Ramgotra (Trustee Of)* v. *North American Life Assurance Co.*, 1996 CanLII 219 (SCC), [1996] 1 S.C.R. 325, 37 C.B.R. (3d) 141, 132 D.L.R. (4th) 193, [1996] 3 W.W.R. 457; *Wallace* v. *United Grain Growers Limited* 1997 CanLII 332 (SCC), (1997), 152 D.L.R. (4th) 1, 3 C.B.R. (4th) 1, [1999] 4 W.W.R. 86.

Marzetti dealt with post-bankruptcy income, in the form of an income tax refund. However, nowhere in that case did the Court specifically restrict its findings as to the applicability of s. 68 to post-bankruptcy earnings. The Court found that s. 68 was a substantive rather than procedural modification to the scheme in existence prior to its enactment. This being the case, the Court held that s. 68 was intended to operate as a complete code in respect of a bankrupt's salary, wages, or other remuneration. Consequently, those forms of property did not fall within s. 67(c) of the *Bankruptcy Act* (as it then was titled) and were not to be considered "property of a bankrupt divisible amongst his creditors" for the purposes of s. 67 (at p. 644, W.W.R.).

That s. 68 is a substantive provision (rather than procedural) was supported in the view of the Supreme Court of Canada by three reasons. Viewing s. 68 as a substantive provision better reflected the language of s. 68. As a substantive provision, s. 68 would more effectively remedy the mischief which lead to its enactment. Finally, there was some support in authority found in prior decisions of the Supreme Court of Canada to take the substantive approach.

Section 68(1), as reviewed by the Supreme Court in *Marzetti*, and s. 68 as it now exists, are somewhat different, the present section having come into force on April 30, 1998. Neither s. 68 as it was, or as it is, specifically differentiate between pre and post-bankruptcy income. Section 68(1), as it now reads, provides for the establishment of standards to assist the Court in determining the portion of the total income of a bankrupt which exceeds that necessary for the bankrupt to maintain a reasonable standard of living:

> The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

Section 68(2) provides an interpretation of the words "total income" referred to in s. 68(1):

> (a) 'Total income' referred to in subsection (1) includes, notwithstanding paragraph 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source; and
>
> (b) a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1)(b) and (b.1).

Section 68(10) provides in certain circumstances that a Trustee may, or when requested by the estate inspectors, any creditor, or the official receiver, shall, apply to the Court to determine the amount that the bankrupt is required to pay to the Estate.

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In my view, the dominant rationale for the Supreme Court of Canada's decision in *Marzetti* was that a substantive reading of s. 68 better reflected the underlying intent of Parliament in enacting the section. Prior to its enactment, there was uneven treatment of salary, wages, and other remuneration depending upon the province of residence of the individual bankrupt. As noted by the Court:

> Parliament no doubt considered it unreasonable for the treatment of bankrupt persons to depend upon the happenstance of provincial residence. Of course, even if one accepts that s. 68 is a complete code in respect of salary, wages, and other remuneration, the potential for uneven treatment across Canada remains in respect of other provincially exempted property. But it is hardly surprising that Parliament selected an important form of property--salary, wages and other remuneration– and gave that property special treatment. (at p. 642, W.W.R.).

The end result of the analysis in *Marzetti* was that s. 68 was a complete code, and that the "wages, salary, or other remuneration" in question could only be accessed by the Trustee through an application under the section. I note that in the case at bar there is no application under s. 68, but merely an objection to discharge whereby the Trustee seeks that I make a conditional order for payment.

In *Ramgotra* the Court briefly discussed s. 68. In differentiating between the estate-administration stage of bankruptcy and the property-passing stage of bankruptcy, the Court had occasion to refer to s. 68, although the application of s. 68 played no part in the decision. The Court commented:

> After-acquired property is also dealt with in s. 68, which constitutes a complete code in respect of a bankrupt's salary, wages, or other remuneration. The provision stipulates that after-acquired remuneration will not pass to and vest in the Trustee unless the Trustee intervenes by applying for a court order directing the payment of the remuneration (or a portion of it) to the Trustee. (at p. 480, W.W.R)..

The Court was, of course, referring to s. 68 as it was then, and not as it is now. However, there can be no doubt that the Court viewed s. 68 as dealing only with after-acquired wages, salary or other remuneration.

In the *Wallace* case the Supreme Court, in its analysis, rested its conclusion on fairly broad public policy grounds, and found that Wallace's right to sue for severance pay arose not because of the time of the acquisition of a property right in that payment, but rather because of the nature of the property in question, i.e. wages. As noted by Robert A. Klotz in the article referred to: "Wallace won not because his claim was after-acquired property, but because it derived from wages and thus fell within s. 68." (at p. 157).

I agree with Mr. Klotz's interpretation of the decision in Wallace; however, it must be recognized that Wallace dealt with a fact situation where the wages, salary or other remuneration in question was "after-acquired".

Each of the Supreme Court of Canada decisions referred to dealt with s. 68 as it stood prior to the amendments which came into force in 1998. Nothing in the amendments would lead me to conclude that s. 68 is other than the substantive provision the Supreme Court of Canada found the prior legislation to be. However, I have concluded, based both on my analysis of the Supreme Court of Canada decisions referred to, and my analysis of s. 68 as it now stands, that s. 68 has application to both pre and post-bankruptcy income.

Section 68 as was referred to "any salary, wages, or other remuneration from any person employing, or using the services of, the bankrupt." Section 68 as it now reads speaks not to "wages, salary or other remuneration", but "total income". Total income is defined to be "all revenues of a bankrupt of whatever nature or source." It seems to me that by enacting s. 68 in its present form, the Parliament of Canada has clarified any confusion which may have existed in the minds of some as to the application of s. 68 to pre-bankruptcy income. Section 68 is a complete code. The "total income" in that section includes all the revenue of a bankrupt of whatever nature or source. Revenue, of course, would and does include income from employment. If we are dealing with income from employment of "whatever nature or source", surely we are dealing with both pre and post-bankruptcy income.

I am strengthened in this conclusion when I review the dominant rationale of the Supreme Court's decision in *Marzetti* as noted above. I see no reason why individuals in different provinces of this Country should have their income, either pre or post-bankruptcy, treated differently based on their province of residence. If it was unclear before, I believe it now to be clear that persons will not be so treated.

The issue of whether a pay equity settlement such as this was an asset that devolved upon a Trustee was considered by Registrar Sharp in Manitoba in *Re Parkinson* reflex, (1998), 9 C.B.R. (4th) 61 (Man.Q.B.). The Registrar found that the pay equity settlement in question was not "property". The Registrar reached this conclusion after an

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analysis of the nature of the pay equity award itself, finding that it constituted a "chose". He found the test was whether, at the date of the assignment or later, the Trustee could sustain an action for recovery of the monies. He found the Trustee could not and, therefore, it did not constitute "property". For the purposes of the pay equity award which is the subject of the application before me, it is interesting that Registrar Sharp in his decision also held that s. 68 had application, notwithstanding that the monies covered by the pay equity award would certainly have been earned prior to the assignment. I note that the Registrar did not refer to *Ramgotra*. As noted by Robert Klotz in his article (at footnote 21), the decision in *Parkinson* was reversed in an oral judgment of the Court of Queens Bench.

While I perhaps disagree with the ultimate conclusion reached by Mr. Klotz in his article, I would agree where he states

> ...it appears that the 'vesting' approach--under which the Trustee accrues 100 percent of the pre-bankruptcy wage entitlement--is no longer defensible, despite its eminent pedigree. One cannot be unhappy about this, because that approach has the affect of depriving the bankrupt of all of his or her unpaid pre-bankruptcy income, without regard to need or family responsibility. (at p. 158).

In *Re Charron*, [2000] J.Q. No. 527 (S.C.) the Supreme Court of Quebec found that a pay equity settlement paid after the date of bankruptcy which related to income in the pre-bankruptcy period fell within s. 68. I agree, and for the reasons noted I find that this pay equity settlement, which was paid after the date of bankruptcy, but which related to the period prior to bankruptcy, still falls within s. 68. There is no s. 68 application before me, and that being the case, I would decline to act.

I would note that even if this matter had come before me under the appropriate section, I would not be inclined to make an order. The income of Ms. Hynes, with which she is to support herself and her three daughters, falls well below the guidelines established by the Superintendent under s. 68(1). From the limited information before me it would appear that after taxes, and applied over the period of bankruptcy, the monies received would still not, on a monthly basis between the date of bankruptcy and the date of the hearing before me, bring the Bankruptcy's salary up to the minimum amount noted in the Guidelines. The Bankrupt is entitled to retain a reasonable amount of her income to sustain herself and her family. I would, therefore, not be inclined to make any conditional order for payment.

In summary, s. 68 applies to both pre and post-bankruptcy "income". There being no application under s. 68, I am not able to make an order. Even if s. 68 did not apply, I would not be inclined to make a conditional order for discharge for the reasons I have noted. I also note that if I am wrong in my interpretation of s.68 and it does not apply to pre-bankruptcy earnings the property in question would have vested in the Trustee upon the assignment, and no further order of this Court would be necessary in order to pass the property to the Trustee.

The Bankrupt shall have her discharge without conditions.
Dated at Halifax, Nova Scotia this day of September, 2000.

_____
Registrar in Bankruptcy

Official receiver recommendation - Sec. 68(5)
(5) If the official receiver determines that the amount required to be paid by the bankrupt is substantially not in accordance with the applicable standards, the official receiver shall recommend to the trustee and to the bankrupt an amount required to be paid that the official receiver determines is in accordance with the applicable standards.

Trustee may fix another amount - Sec. 68(5.1)
(5.1) On receipt of the official receiver's recommendation, the trustee may fix, having regard to the applicable standards, another amount as the amount that the bankrupt is required to pay to the estate of the bankrupt, and if the trustee does so, the trustee shall

(a) inform the official receiver and every creditor, in the prescribed manner, of the amount fixed under this subsection; and

(b) take reasonable measures to ensure that the bankrupt complies with the requirement to pay.

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Trustee may request mediation - Sec. 68(6)
(6) If the trustee and the bankrupt are not in agreement with the amount that the bankrupt is required to pay under subsection (4) or (5.1), the trustee shall, without delay, in the prescribed form, send to the official receiver a request that the matter be determined by mediation and send a copy of the request to the bankrupt.

SB Directive: 8R14 - Form 60, Request for Mediation
(see below image file)

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Industry Canada
Office of the Superintendent of Bankruptcy Canada
155 Queen Street
4th floor
Ottawa, Ontario
K1A 0H5

Industrie Canada
Bureau du surintendant des faillites Canada
155, rue Queen
4e étage
Ottawa (Ontario)
K1A 0H5

Date: JUN 06 2013

To: **OSB Staff, Trustees and Registrars**

Subject: **Directive No. 8R14, The *Bankruptcy and Insolvency Act* Forms—Form 60, *Request for Mediation Made by Trustee*, Form 63, *Mediation Settlement Agreement // Mediation Settlement Agreement - Expedited Mediation Process*, and Form 68, *Notice of Bankruptcy, First Meeting of Creditors and Impending Automatic Discharge of Bankrupt***

Date : 06 JUN 2013

À : **Employés du BSF, syndics et registraires**

Objet : **Instruction n° 8R14, Formulaires de la *Loi sur la faillite et l'insolvabilité* – formulaire 60, *Demande de médiation par le syndic*, formulaire 63, *Entente résultant de la médiation // Entente résultant de la médiation – Procédure de médiation accélérée*, et formulaire 68, *Avis de la faillite, de la première assemblée des créanciers et de la libération d'office imminente du failli***

The Office of the Superintendent of Bankruptcy (OSB) has amended Form 60, *Request for Mediation Made by Trustee*, and Form 63, *Mediation Settlement Agreement*, to introduce an email option to streamline the mediation process in cases where a mediation settlement agreement has been reached between the parties prior to the actual meeting.

Furthermore, to eliminate unnecessary administrative obligations of trustees when administering ordinary bankruptcy estates of individuals, the OSB has combined Form 67, *Notice of Bankruptcy and First Meeting of Creditors*, and Form 68, *Notice of Impending Automatic Discharge of Bankrupt*, into one new Form 68, *Notice of Bankruptcy, First Meeting of Creditors and Impending Automatic*

Le Bureau du surintendant des faillites (BSF) a apporté des modifications au formulaire 60, *Demande de médiation par le syndic*, et au formulaire 63, *Entente résultant de la médiation*, afin d'y incorporer une option de courriel visant à rationaliser le processus de médiation lorsqu'une entente a été conclue entre les parties avant la date fixée pour la médiation.

De plus, afin d'éliminer les obligations administratives inutiles des syndics dans l'administration ordinaire d'un dossier de faillite d'une personne physique, le BSF a combiné le formulaire 67, *Avis de la faillite et de la première assemblée des créanciers*, et le formulaire 68, *Préavis de la libération d'office du failli*, dans un nouveau formulaire 68 intitulé *Avis de la faillite, de la première*

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Discharge of Bankrupt. Note that Form 67 is revoked.

Coming into Force

Amended Forms 60, 63 and 68 come into force on December 20, 2013, and apply to persons to whom the September 18, 2009, amendments apply.

Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

assemblée des créanciers et de la libération d'office imminente du failli. Par conséquent, le formulaire 67 est révoqué.

Entrée en vigueur

Les versions modifiées des formulaires 60, 63 et 68 entrent en vigueur le 20 décembre 2013 et s'appliquent aux personnes visées par les modifications entrées en vigueur le 18 septembre 2009.

Demandes de renseignements

Si vous souhaitez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

P. j.

Bill James
Superintendent of Bankruptcy / Surintendant des faillites

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Industry Canada / Industrie Canada
Office of the Superintendent of Bankruptcy Canada / Bureau du surintendant des faillites Canada

Directive / Instruction

N° 8R14

The *BANKRUPTCY AND INSOLVENCY ACT* FORMS

Issued: JUN 0 6 2013

(This Directive amends Directive No. 8R13 issued on December 19, 2012, on the same topic.)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"Forms" means the forms under the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*c*) and (*e*) of the Act for the purpose of prescribing the form of certain documents required by the Act and the information to be given therein.

3. This Directive prescribes amendments to Form 60, *Request for Mediation Made by Trustee*, Form 63, *Mediation Settlement*

FORMULAIRES DE LA *LOI SUR LA FAILLITE ET L'INSOLVABILITÉ*

Date d'émission : 0 6 JUN 2013

(La présente instruction modifie l'instruction n° 8R13 émise le 19 décembre 2012 sur le même sujet.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » Le Bureau du surintendant des faillites;

« Formulaires » Les formulaires émis en vertu de la *Loi sur la faillite et l'insolvabilité*;

« Loi » La *Loi sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction, qui est émise en vertu de l'autorité conférée par les alinéas 5(4)*c*) et *e*) de la Loi, établit la forme de certains documents requis par la Loi ainsi que les renseignements à y porter.

3. La présente instruction prescrit des modifications au formulaire 60, *Demande de médiation par le syndic*, au formulaire 63,

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Agreement, and Form 68, *Notice of Impending Automatic Discharge of Bankrupt*.

Entente résultant de la médiation, et au formulaire 68, *Préavis de la libération d'office du failli*.

4. This Directive revokes Form 67, *Notice of Bankruptcy and First Meeting of Creditors*.

4. La présente instruction révoque le formulaire 67, *Avis de la faillite et de la première assemblée des créanciers*.

Summary

Résumé

5. Form 60, *Request for Mediation Made by Trustee*, and Form 63, *Mediation Settlement Agreement*, have been amended to introduce an email option to streamline the mediation process in cases where an agreement has been reached between the parties prior to the time set for the mediation. In these select cases, the OSB believes that email provides a suitable alternative to telephone conference calls or in-person mediation provided that all parties to the mediation agree to proceed by email. Therefore, parties choosing to communicate by way of email will have the ability to transmit a signed Form 63, *Mediation Settlement Agreement – Expedited Mediation Process*, electronically.

5. Le formulaire 60, *Demande de médiation par le syndic*, et le formulaire 63, *Entente résultant de la médiation*, ont été modifiés afin d'y incorporer une option de courriel visant à rationaliser le processus de médiation lorsqu'une entente a été conclue entre les parties avant la date fixée pour la médiation. Dans ces cas particuliers, le BSF estime que le courriel offre une bonne solution de rechange à la téléconférence ou à la médiation en personne, à condition que toutes les parties à la médiation acceptent de procéder par courriel. Ainsi, les parties ayant choisi de communiquer par courriel pourront transmettre par voie électronique le formulaire 63, *Entente résultant de la médiation – Procédure de médiation accélérée*, dûment signé.

6. Standard confidentiality clauses have been added to Form 63 for cases where the expedited mediation process is chosen. These clauses remind the parties that they must keep confidential all information disclosed during the mediation and must not use the information for any purpose other than for the mediation, except to the extent required by law or as authorized by the person to whom the confidential information relates.

6. Des clauses de confidentialité standard ont été ajoutées au formulaire 63 pour les cas où la procédure de médiation accélérée est choisie. Ces clauses rappellent aux parties qu'elles doivent garder confidentielle toute l'information divulguée pendant la médiation et qu'elles ne doivent pas utiliser cette information à des fins autres que la médiation, sauf lorsqu'elles y sont tenues par la loi ou lorsqu'elles ont obtenu le consentement de la personne visée par l'information confidentielle.

7. To eliminate unnecessary administrative obligations of trustees when administering ordinary bankruptcy estates of individuals,

7. Afin d'éliminer les obligations administratives inutiles des syndics dans l'administration ordinaire d'un dossier de

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Form 67, *Notice of Bankruptcy and First Meeting of Creditors*, and Form 68, *Notice of Impending Automatic Discharge of Bankrupt*, have been combined into one new Form 68, *Notice of Bankruptcy, First Meeting of Creditors and Impending Automatic Discharge of Bankrupt*. Note that Form 67 is revoked.

faillite d'une personne physique, le formulaire 67, *Avis de la faillite et de la première assemblée des créanciers*, et le formulaire 68, *Préavis de la libération d'office du failli*, ont été combinés dans un nouveau formulaire 68 intitulé *Avis de la faillite, de la première assemblée des créanciers et de la libération d'office imminente du failli*. Par conséquent, le formulaire 67 est révoqué.

8. Paragraphs 2-6 of revoked Form 67, *Notice of Bankruptcy and First Meeting of Creditors*, were added to newly amended Form 68, *Notice of Bankruptcy, First Meeting of Creditors and Impending Automatic Discharge of Bankrupt*. As a result, in cases where the bankrupt is an individual, trustees will now send the notice of bankruptcy and first meeting of creditors along with the notice of impending automatic discharge of the bankrupt. Merging two forms into one will streamline some of the administrative obligations of trustees and enhance practical application.

8. Les paragraphes 2 à 6 du formulaire 67 révoqué, *Avis de la faillite et de la première assemblée des créanciers*, ont été ajoutés au nouveau formulaire 68, *Avis de la faillite, de la première assemblée des créanciers et de la libération d'office imminente du failli*. Par conséquent, lorsque le failli est une personne physique, les syndics enverront dorénavant l'avis de la faillite et de la première assemblée des créanciers avec l'avis de la libération d'office du failli. La fusion des deux formulaires en un seul vise à rationaliser certaines obligations administratives des syndics et à améliorer l'application pratique.

Coming into Force

Entrée en vigueur

9. Amended Form 60, *Request for Mediation Made by Trustee*, Form 63, *Mediation Settlement Agreement // Mediation Settlement Agreement - Expedited Mediation Process*, and Form 68, *Notice of Bankruptcy, First Meeting of Creditors and Impending Automatic Discharge of Bankrupt*, come into force on December 20, 2013.

9. Les versions modifiées du formulaire 60, *Demande de médiation par le syndic*, du formulaire 63, *Entente résultant de la médiation // Entente résultant de la médiation – Procédure de médiation accélérée*, et du formulaire 68, *Avis de la faillite, de la première assemblée des créanciers et de la libération d'office imminente du failli*, entrent en vigueur le 20 décembre 2013.

10. Amended Forms 60, 63 and 68 apply to persons to whom the September 18, 2009, amendments apply.

10. Les versions modifiées des formulaires 60, 63 et 68 s'appliquent aux personnes visées par les modifications entrées en vigueur le 18 septembre 2009.

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Enquiries

11. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

11. Si vous souhaitez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

Bill James
Superintendent of Bankruptcy / Surintendant des faillites

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FORM 60

Request for Mediation Made by Trustee
(Subsections 68(6), 68(7) and 170.1(1) of the Act)

(Title Form 1)

I, _____, trustee of the estate of _____, a bankrupt, who made an assignment (*or* against whom a bankruptcy order was made) on the _____ day of _____, _____, hereby apply to the official receiver to refer this matter to the mediator, who shall set the time and place for the mediation.

This application for mediation is being made for the following reasons:

(Check appropriate description(s))

☐ Subsection 68(6) - There is disagreement as to the amount of surplus income to be paid by the bankrupt.

☐ Subsection 68(7) - There is a written request from _____, a creditor, _____ *(creditor's address)*, to proceed with the mediation process.

☐ Subsection 170.1(1) - The trustee is opposed to the discharge of the bankrupt on a ground referred to in paragraph 173(1)(*m*) or (*n*) of the Act.

☐ Subsection 170.1(1) - _____, a creditor, _____ *(creditor's address)*, is opposed to the discharge of the bankrupt on a ground referred to in paragraph 173(1)(*m*) or (*n*) of the Act.

An income and expense statement of the bankrupt is attached to this request (Form 65).

(Indicate names, mailing addresses, phone numbers and email addresses of all parties, including the trustee's representative (if applicable))

_____ _____ _____
_____ _____ _____
_____

(Provide details (names and estate number) of any related estate file requiring concurrent mediation (e.g., spousal file))

_____
_____ _____ _____
_____ _____ _____

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(Check applicable box(es))

Has a *Mediation Settlement Agreement* (Form 63) been reached by the parties?

Yes

No

If "yes,"

i) Has the *Mediation Settlement Agreement* (Form 63) been signed by the parties?

Yes, and a copy of the signed settlement agreement is attached to this request.

No, but details pertaining to the settlement agreement (draft - Form 63) are attached to this request.

ii) Are you willing to proceed with this mediation via email, *if applicable*?*

Yes

No

Dated at _____, this _____ day of _____ .

_____

Trustee

* Note: Subject to the mediator's discretion pursuant to subsection 105(5) of the *Bankruptcy and Insolvency General Rules*, the mediator will only consider conducting the mediation via email where all parties to the mediation agree to proceed by this means of communication and where an agreement has been reached prior to the mediation.

Upon determining that the requested mediation may be eligible for the expedited process (mediation via email), the mediator will contact the parties by telephone to obtain/confirm their email address and to ensure that all parties agree and are able to have the mediation conducted by email.

If the mediator determines that the expedited mediation process is not feasible, the standard mediation process will be required and face-to-face or telephone mediation will be arranged.

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FORM 63

Mediation Settlement Agreement
(Rule 105(18))

(For the Expedited Mediation Process, insert:)
Mediation Settlement Agreement - Expedited Mediation Process
(Rule 105(18))

(Title Form 1)

⊏ Final ⊏ Draft

The parties acknowledge that an agreement was reached in the mediation held on _____, the ___ day of _____, and that the results of the mediation are as follows:

_____
_____
_____
_____
_____
_____
_____
_____

(For the Expedited Mediation Process, use the following box:)

The parties acknowledge that an agreement was reached before the mediation session and was confirmed by email on _____, the ___ day of _____, and that the results of the mediation are as follows:

_____
_____
_____
_____
_____
_____
_____

Confidentiality

We accept that the mediator cannot be asked by any of the parties to testify in any proceedings before a court of law.

We accept that all statements or documents obtained during the course of mediation, which would not have been obtained otherwise, will not be used when discussing the

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matter before the court or during any other proceedings. Also, we accept that all the information obtained during the course of mediation will not be admissible as evidence or to impeach the credibility of a party.

We understand that the mediator or any party to the mediation shall not disclose to the public any confidential information concerning an issue submitted to mediation unless the disclosure is:

(a) Required by law, in such cases where one party has committed an offence in violation of the *Bankruptcy and Insolvency Act* or any other legislation.

(b) Authorized by the person to whom the confidential information relates.

Signature of the mediation agreement

We hereby agree that this agreement may be signed in counterparts and submitted electronically to the Office of the Superintendent of Bankruptcy.

Dated at _____, this ___ _____day of _____.

_____	_____
Bankrupt	**Bankrupt's Legal Counsel** *(if applicable)*
_____	_____
Trustee	**Trustee's Legal Counsel** *(if applicable)*
_____	_____
Creditor *(as applicable)*	**Creditor's Legal Counsel** *(if applicable)*

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FORM 68
Notice of Bankruptcy, First Meeting of Creditors
(Subsection 102(1) of the Act)

(*Where the bankrupt is an individual, add:*)
and Impending Automatic Discharge of Bankrupt
(Paragraph 168.1(4) and section 168.2 of the Act)

(*Title Form 1*)

☐ **Original** ☐ **Amended**

Take notice that:

1. _____ (*name of bankrupt*) filed (*or* was deemed to have filed) an assignment (*or* a bankruptcy order was made against _____ (*name of bankrupt*)) on the _____ day of _____ ____, and the undersigned, _____ (*name of trustee*), was appointed as trustee of the estate of the bankrupt by the official receiver (*or* the Court); subject to affirmation by the creditors of the trustee's appointment or substitution of another trustee by the creditors.

2. The first meeting of creditors of the bankrupt will be held on _____ (*date*), at _____ (*time*) at the office of _____ (*meeting office*), at _____ (*address of meeting office*).

3. To be entitled to vote at the meeting, a creditor must file with the trustee, before the meeting, a proof of claim and, where necessary, a proxy.

4. Enclosed with this notice are a proof of claim form, proxy form and list of creditors with claims amounting to $25 or more showing the amounts of their claims.

5. Creditors must prove their claims against the estate of the bankrupt to share in any distribution of the proceeds realized from the estate.

(*Where the bankrupt is an individual, include paragraphs 6, 7, 8, 9 and 10*)

6. Included pursuant to subsection 102(3) of the Act is information concerning the financial situation of the bankrupt and the obligation of the bankrupt to make payments to the estate of the bankrupt, as required under section 68 of the Act.

7. Pursuant to section 168.1 of the Act, the bankrupt will be given an automatic discharge on the _____ day of _____ ____, unless the Superintendent of Bankruptcy, the trustee of the estate of the bankrupt or a creditor of the bankrupt gives notice of intended opposition to the discharge of the bankrupt before that date.

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FORMULAIRE 60

Demande de médiation par le syndic
(paragraphes 68(6), 68(7) et 170.1(1) de la Loi)

(*Intitulé Formulaire 1*)

Je soussigné, _____, syndic de l'actif de _____, failli, qui a fait une cession de biens (*ou* contre lequel une ordonnance de faillite a été rendue) le _____, par les présentes, demande au séquestre officiel de confier le dossier à un médiateur qui fixera la date, l'heure et le lieu de la médiation.

La présente demande de médiation est produite pour les raisons suivantes :

(*Cochez ce qui s'applique.*)

- Paragraphe 68(6) – Il y a défaut d'entente sur le montant du revenu excédentaire à verser par le failli.
- Paragraphe 68(7) – Il y a demande écrite de _____, créancier, _____ (*adresse du créancier*), de procéder à la médiation.
- Paragraphe 170.1(1) – Le syndic a fait une opposition à la libération du failli en vertu des alinéas 173(1)*m*) ou *n*) de la Loi.
- Paragraphe 170.1(1) – _____, créancier, _____ (*adresse du créancier*), a fait une opposition à la libération du failli en vertu des alinéas 173(1)*m*) ou *n*) de la Loi.

Un état des revenus et dépenses du failli (formulaire 65) est joint à la présente demande.

(*Indiquez les nom, adresse postale, numéro de téléphone et adresse électronique de toutes les parties, y compris le représentant du syndic (le cas échéant).*)

_____
_____
_____

(*Donnez les détails [nom et numéro de l'actif] de tout dossier connexe nécessitant une médiation conjointe [p. ex. dossier du conjoint].*)

_____
_____
_____

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(Cochez les cases qui conviennent.)

Une *Entente résultant de la médiation* (formulaire 63) a-t-elle été conclue par les parties?

- ☐ Oui
- ☐ Non

Si « oui »,

i) L'*Entente résultant de la médiation* (formulaire 63) a-t-elle été signée par les parties?

- ☐ Oui, et une copie signée de l'entente est jointe à la présente demande.
- ☐ Non, mais les détails concernant l'entente (ébauche – formulaire 63) sont joints à la présente demande.

ii) Êtes-vous disposé à participer à une médiation par courriel, *le cas échéant*?*

- ☐ Oui
- ☐ Non

Daté le _____ _____, à _____.

_____ _____

Syndic

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* Remarque : Sous réserve de la discrétion attachée à ses fonctions conformément au paragraphe 105(5) des *Règles générales sur la faillite et l'insolvabilité*, le médiateur n'envisagera la tenue d'une médiation par courriel que si toutes les parties acceptent de procéder de cette façon et si une entente a été conclue par les parties avant la séance de médiation.

Après avoir déterminé que la médiation demandée pourrait être admissible à la procédure accélérée (médiation par courriel), le médiateur téléphone aux parties pour obtenir ou confirmer leur adresse de courriel et s'assurer qu'elles acceptent que la médiation se fasse par courriel.

Si le médiateur détermine qu'il ne peut y avoir recours à la procédure de médiation accélérée, les parties doivent avoir recours à la procédure de médiation normale et les dispositions nécessaires seront prises pour que la médiation ait lieu en personne ou par téléphone.

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FORMULAIRE 63

Entente résultant de la médiation
(Règle 105(18))

(Dans le cas d'une procédure de médiation accélérée, insérer :)

Entente résultant de la médiation – Procédure de médiation accélérée
(Règle 105(18))

(Intitulé Formulaire 1)

□ final □ ébauche

Les parties reconnaissent qu'elles ont conclu une entente dans le cadre de la médiation tenue le _____.

Les modalités convenues sont les suivantes :

_____
_____
_____
_____
_____
_____
_____

(Dans le cas d'une procédure de médiation accélérée, utiliser le texte qui suit :)

Les parties reconnaissent qu'elles ont conclu une entente avant la séance de médiation qui a été confirmée par courriel le _____.

Les modalités convenues sont les suivantes :

_____
_____
_____
_____
_____
_____
_____

Confidentialité

Nous acceptons que le médiateur ne puisse être appelé par aucune des parties à la médiation afin de témoigner dans le cadre d'une procédure ou requête devant le tribunal.

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Nous acceptons que toutes déclarations faites et/ou tous documents produits dans le cadre de la médiation, et qui n'auraient pu être dévoilés autrement, ne soient utilisés lors de la communication du dossier au tribunal ou lors de toute autre procédure. De plus, nous acceptons que toutes les informations obtenues dans le cadre de la médiation ne soient pas admissibles en preuve, et ce, même pour attaquer la crédibilité d'une partie.

Nous comprenons que le médiateur et les parties à la médiation ne peuvent divulguer au public aucun renseignement confidentiel concernant la médiation, sauf dans les cas suivants :

a) lorsqu'ils y sont tenus par la loi, dans les situations où une partie a commis une infraction à la *Loi sur la faillite et l'insolvabilité* ou de toute autre loi;

b) lorsqu'ils ont obtenu le consentement de la personne visée par le renseignement confidentiel.

Signature de l'entente

Nous convenons que l'entente peut être signée en plusieurs exemplaires et transmise par voie électronique au Bureau du surintendant des faillites.

Daté le _____. _____, à _____.

_____	_____
Failli	Conseiller juridique du failli (*le cas échéant*)
_____	_____
Syndic	Conseiller juridique du syndic (*le cas échéant*)
_____	_____
Créancier (*le cas échéant*)	Conseiller juridique du créancier (*le cas échéant*)

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FORMULAIRE 68

Avis de la faillite, de la première assemblée des créanciers
(paragraphe 102(1) de la Loi)

(dans le cas d'un failli qui est une personne physique, ajouter :)
et de la libération d'office imminente du failli
(paragraphe 168.1(4) et article 168.2 de la Loi)

(Intitulé Formulaire 1)

□ **original** □ **modifié**

Avis est donné de ce qui suit :

1. _____ (*nom du failli*) a déposé (*ou* est réputé avoir déposé) une cession (*ou* Une ordonnance de faillite a été rendue à l'égard de _____[*nom du failli*]) le_____(*date*), et le soussigné, _____ (*nom du syndic*), a été nommé syndic de l'actif du failli par le séquestre officiel (*ou* par le tribunal), sous réserve de la confirmation par les créanciers de sa nomination ou de la nomination par ceux-ci d'un syndic de remplacement.

2. La première assemblée des créanciers du failli sera tenue le _____ (*date*), à _____ (*heure*), au bureau de (*bureau où se tiendra l'assemblée*), au _____ (*adresse du bureau où se tiendra l'assemblée*).

3. Pour avoir le droit de voter à l'assemblée, chaque créancier doit déposer à l'intention du syndic avant l'assemblée une preuve de réclamation et, au besoin, une procuration.

4. Sont joints au présent avis un formulaire de preuve de réclamation, un formulaire de procuration et une liste des créanciers dont les réclamations se chiffrent à 25 $ ou plus ainsi que le montant de leurs réclamations.

5. Les créanciers doivent prouver leurs réclamations à l'égard de l'actif du failli pour avoir droit de partage dans la distribution des montants réalisés provenant de l'actif.

(Inclure les paragraphes 6, 7, 8, 9 et 10 dans le cas d'un failli qui est une personne physique.)

6. Sont aussi joints au présent avis, conformément au paragraphe 102(3) de la Loi, les renseignements sur la situation financière du failli et sur l'obligation de celui-ci de faire des versements à l'actif aux termes de l'article 68 de la Loi.

7. En vertu de l'article 168.1 de la Loi, le failli sera libéré d'office le _____, _____, à moins que le surintendant des faillites, le syndic de l'actif du failli ou un créancier du failli ne donne, avant cette date, un préavis de son opposition à la libération du failli.

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(Cochez la disposition pertinente relativement à la libération du failli.)

Dans le cas d'un particulier qui fait faillite pour la première fois :

- ☐ à l'expiration du délai de 9 mois suivant la date de la faillite;
- ☐ à l'expiration du délai de 21 mois suivant la date de la faillite lorsque le failli est tenu de payer des montants à l'actif de la faillite en vertu de l'article 68 de la Loi.

Dans le cas d'un particulier qui fait faillite pour la deuxième fois :

- ☐ à l'expiration du délai de 24 mois suivant la date de la faillite;
- ☐ à l'expiration du délai de 36 mois suivant la date de la faillite lorsque le failli est tenu de payer des montants à l'actif de la faillite en vertu de l'article 68 de la Loi.

8. Tout créancier qui entend s'opposer à la libération du failli doit soumettre par écrit les motifs de son opposition au bureau de division du BSF, au syndic de l'actif du failli et au failli, avant le _____ (*inscrivez la date indiquée au paragraphe 7*).

9. Tout créancier qui s'oppose à la libération du failli doit payer des frais judiciaires.

10. En cas d'opposition à la libération du failli, le syndic demandera sans délai au tribunal une convocation pour une audition de l'opposition de la façon prévue par la Loi, sous réserve de la médiation prévue à l'article 170.1 de la Loi.

Daté le _____ , à _____.

_____
Syndic

REMARQUE : Lorsqu'une copie du présent formulaire est envoyée par voie électronique, par des moyens tels que le courriel, le nom et les coordonnées de l'expéditeur, tels qu'indiqués sur le formulaire 1 1, doivent figurer à la fin du document.

Creditor may request mediation - Sec. 68(7)

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(7) On a creditor's request made within 30 days after the day on which the trustee informed the creditor of the amount fixed under subsection (4) or (5.1), the trustee shall, within five days after the day on which the 30-day period ends, send to the official receiver a request, in the prescribed form, that the matter of the amount that the bankrupt is required to pay be determined by mediation and send a copy of the request to the bankrupt and the creditor.

Mediation procedure - Sec. 68(8)
(8) A mediation shall be in accordance with prescribed procedures.

File - Sec. 68(9)
(9) Documents contained in a file on the mediation of a matter under this section form part of the records referred to in subsection 11.1(2).

Application to court to fix amount - Sec. 68(10)
(10) The trustee may, in any of the following circumstances — and shall apply if requested to do so by the official receiver in the circumstances referred to in paragraph (a) — apply to the court to fix, by order, in accordance with the applicable standards, and having regard to the personal and family situation of the bankrupt, the amount that the bankrupt is required to pay to the estate of the bankrupt:

- **(a) if the trustee has not implemented a recommendation made by the official receiver under subsection (5);**
- **(b) if the matter submitted to mediation has not been resolved by the mediation; or**
- **(c) if the bankrupt has failed to comply with the requirement to pay as determined under this section.**

Fixing fair and reasonable remuneration in the case of related persons - Sec. 68(11)
(11) The court may fix an amount that is fair and reasonable

- **(a) as salary, wages or other remuneration for the services being performed by a bankrupt for a person employing the bankrupt, or**
- **(b) as payment for or commission in respect of any services being performed by a bankrupt for a person,**

where the person is related to the bankrupt, and the court may, by order, determine the part of the salary, wages or other remuneration, or the part of the payment or commission, that shall be paid to the trustee on the basis of the amount so fixed by the court, unless it appears to the court that the services have been performed for the benefit of the bankrupt and are not of any substantial benefit to the person for whom they were performed.

Modification of order - Sec. 68(12)
(12) On the application of any interested person, the court may, at any time, amend an order made under this section to take into account material changes that have occurred in the financial situation of the bankrupt.

Default by other person - Sec. 68(13)
(13) An order of the court made under this section may be served on a person from whom the bankrupt is entitled to receive money and, in such case,

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(a) the order binds the person to pay to the estate of the bankrupt the amount fixed by the order; and
(b) if the person fails to comply with the terms of the order, the court may, on the application of the trustee, order the person to pay the trustee the amount of money that the estate of the bankrupt would have received had the person complied with the terms of the order.

Application is a proceeding - Sec. 68(14)
(14) For the purposes of section 38, an application referred to in subsection (10) is deemed to be a proceeding for the benefit of the estate.

Property included for enforcement purposes - Sec. 68(15)
(15) For the purpose of this section, a requirement that a bankrupt pay an amount to the estate is enforceable against the bankrupt's total income.

When obligation to pay ceases - Sec. 68(16)
(16) If an opposition to the automatic discharge of a bankrupt individual who is required to pay an amount to the estate is filed, the bankrupt's obligation under this section ceases on the day on which the bankrupt would have been automatically discharged had the opposition not been filed, but nothing in this subsection precludes the court from determining that the bankrupt is required to pay to the estate an amount that the court considers appropriate.
R.S., 1985, c. B-3, s. 68;
1992, c. 27, s. 34;
1997, c. 12, s. 60;
2005, c. 47, s. 58;
2007, c. 36, s. 33.

Assignment of wages - Sec. 68.1
68.1 (1) An assignment of existing or future wages made by a debtor before the debtor became bankrupt is of no effect in respect of wages earned after the bankruptcy.

Assignment of book debts - Sec. 68.1(2)
(2) An assignment of existing or future amounts receivable as payment for or commission or professional fees in respect of services rendered by a debtor who is an individual before the debtor became bankrupt is of no effect in respect of such amounts earned or generated after the bankruptcy.
1992, c. 27, s. 35;
1997, c. 12, s. 61;
2005, c. 47, s. 59.

STAY OF PROCEEDINGS

Stay of proceedings — notice of intention - Sec. 69
69. (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

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(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on
(i) the insolvent person's insolvency,
(ii) the default by the insolvent person of an obligation under the security agreement, or
(iii) the filing by the insolvent person of a notice of intention under section 50.4,
the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,
(c) Her Majesty in right of Canada may not exercise Her rights under
(i) subsection 224(1.2) of the Income Tax Act, or
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that
(A) refers to subsection 224(1.2) of the Income Tax Act, and
(B) provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,
in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and
(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the Income Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,
until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

Forest v. Hancor Inc., [1996] 1 FC 725 - Possible to adapt s. 73 to proposals - Filing of proposal not stripping purchaser in good faith of title in immovable purchased in judicial sale if sheriff not notified of proposal before sale by service of certified true copy.

Date:	1995-10-24
Docket:	A-1221-92; A-1259-92
Parallel citations:	1995 CanLII 3536 (FCA); 37 CBR (3d) 117
URL:	http://canlii.ca/t/4nfz
Citation:	Forest v. Hancor Inc., 1995 CanLII 3536 (FCA), [1996] 1 FC 725, <http://canlii.ca/t/4nfz> retrieved on 2013-08-31
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Reflex Record Related decisions, legislation cited and decisions cited
A-1221-92
Gilbert Forest (*Sheriff/Appellant*)
v.
Hancor Inc. and **United Extrusions Ltd.** (*Judgment Creditors/Respondents*)
and
Les systèmes de drainage modernes Inc. (*Judgment Debtor/Respondent*)
and
Caron Bélanger Ernst & Young Inc. (*Trustee for the Judgment Debtor/Respondent*)
and
Laurentian Bank of Canada and **Laurentian Trust of Canada** (*Creditors/Respondents*)
and
118353 Canada Ltée and **167899 Canada Inc.** (*Purchasers/Mises en cause*)
and
Registrar of the Vaudreuil Registry Office (*Mis en cause*)
A-1259-92
118353 Canada Ltd. and **167899 Canada Ltd.** (*Purchasers/Appellants*)
and
Hancor Inc. and **United Extrusions Ltd.** (*Plaintiffs/Respondents*)
v.
Les systèmes de drainage modernes Inc. (*Defendant/ Respondent*)
and
Caron Bélanger Ernst & Young Inc. (*Trustee/ Respondent*)
and
Laurentian Bank of Canada and **Laurentian Trust of Canada Inc.** (*Creditors/Respondents*)
and
Gilbert Forest (*Sheriff/Mis en cause*)
and
Registrar of the Vaudreuil Registry Office (*Mis en cause/Mis en cause*)
Indexed as: Forestv. Hancor Inc. (C.A.)
Court of Appeal, Hugessen and Décary JJ.A. and Chevalier D.J.A."Montréal, October 3; Ottawa, October 24, 1995.
Practice " Judgments and orders " Enforcement " Appeal from order vacating sale of seized immovable " Bailiff seizing immovable on sheriff's instructions " Motions Judge erred in holding sheriff lacked power to act through bailiffs " "Provincial" sheriffs acting as sheriffs of Federal Court may, unless otherwise provided by Rules, execute writs of execution in same manner as writs executed in performance of usual duties " Motions Judge erred in relying on Federal Court Act, s. 55(5), Federal Court Rule 360 as apply only when writ cannot be directed to sheriff or sheriff unwilling to act " Federal and provincial laws complementary " No implied delegation of power " Bailiffs carrying out seizure, sale as officers of sheriff.
Creditors and debtors " Immovable seized by bailiff on sheriff's instructions " After seizure creditors accepting proposal approved by Superior Court of Quebec " Notice of stay of proceedings served on seizing bailiff " Immovable sold in judicial sale to purchaser in good faith " Neither sheriff nor purchasers notified of proposal before sale " Code of Civil Procedure requiring notice concerning execution of writ be served on sheriff " Seizing bailiff ceasing to be sheriff's officer once seizure completed " Sheriff's sale set aside only in exceptional, limited circumstances " Seizure, judgment valid " Immovable belonging to judgment debtor " Purchaser acting in good faith " Sheriff's conduct beyond reproach " Alleged irregularity existing long before sale, and due to

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misunderstanding between judgment creditor, secured creditor, judgment debtor and trustee " Filing of proposal not stripping purchaser in good faith of title in immovable purchased in judicial sale if nobody notified sheriff of proposal before sale by sending him certified true copy.
Civil Code " Code requiring any notice concerning execution of writ must be sent to sheriff himself " Service of notice of stay on bailiff acting for sheriff in seizure of immovable not equivalent to service on sheriff " Bailiff authorized to act only in respect of seizure " Although art. 673 providing for consent to suspension of sale by parties to seizure, must inform sheriff of consent for it to be effective.
Bankruptcy " Bankruptcy Act, s. 69(1) providing on filing proposal, no creditor shall continue execution for recovery of claim provable in bankruptcy until proposal refused " S. 69 applying to both proposal and bankruptcy " S. 73, applying only to bankruptcy, providing if judgment executed anyway and sheriff not receiving certified true copy of assignment at time of sale, purchaser in good faith retaining title " S. 66(1) providing all provisions of Act, in so far as applicable, apply with such modification as circumstances require to proposals " Possible to adapt s. 73 to proposals " Filing of proposal not stripping purchaser in good faith of title in immovable purchased in judicial sale if sheriff not notified of proposal before sale by service of certified true copy.
These were appeals from an order to vacate the sale of a seized immovable. After obtaining judgment in the Federal Court against Les systèmes de drainage modernes Inc., Hancor Inc. and United Extrusions Ltd. obtained a writ of *fieri facias*. On the instructions of the sheriff of the District of Beauharnois (Forest), bailiff Trudel seized the immovable. After the seizure, SDM lodged a proposal with its creditors and appointed a trustee. The creditors accepted the proposal, which was approved by the Superior Court of Quebec. The Trustee served a "notice of stay of proceedings" pursuant to *Bankruptcy Act* , section 69 on the Registry and bailiff Trudel. On the sheriff's instructions another bailiff, de Repentigny, sold the immovable in a judicial sale. The Motions Judge relied on *Federal Court Act*, subsection 55(5) and *Federal Court Rules*, Rule 360 in concluding that although the writ was directed to the sheriff, he asked bailiffs to act for him thus usurping a power of delegation which is conferred on sheriffs by Quebec law, but which they do not possess when acting as officers of the Federal Court under the *Federal Court Rules*. *Federal Court Act*, subsection 55(5) provides that where a sheriff is unable or unwilling to act, the process of the Court shall be directed to a deputy sheriff. *Federal Court Rules*, paragraph 360(1)(*b*) provides that where the sheriff or marshal in Quebec is unable or unwilling to act, any process may be issued to a bailiff duly authorized to act as such for the purposes of the *Code of Civil Procedure*.
The issues were: (1) whether the seizure and judicial sale of the immovable were carried out by a person with the authority to do so under the *Federal Court Act* and *Federal Court Rules*; (2) where an immovable is the subject of a proposal after seizure, must a judicial sale thereof to a purchaser in good faith be vacated?
Held, the appeal should be allowed.
(1) The Motions Judge erred in concluding that the sheriff lacked the power to act through bailiffs. "Provincial" sheriffs who act as sheriffs of the Federal Court may, unless otherwise provided by the Rules, execute writs of execution in the same manner as the writs they execute in performing their usual duties. The writ was directed to the sheriff of the District of Beauharnois. He executed the writ in the same manner as he executes any writ directed to him, by asking a bailiff to act for him. That constituted both execution of the writ by the sheriff to whom it was directed within the meaning of subsection 55(4) of the Act (requiring a sheriff to execute the process of the Court that is directed to him), and execution in the manner permitted by subsection 56(3), i.e., in the same manner as similar writs are required to be executed by the law of Quebec.
The Motions Judge could not rely on subsection 55(5) and Rule 360 to find that the sheriff lacked the power to act in the circumstances since those provisions concern cases in which the writ cannot be directed to a sheriff or where the sheriff is unwilling to act, which was not the case herein. Once subsection 55(4) applies, subsection 55(5) and Rule 360 no longer apply.

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The purpose of *Federal Court Act*, subsections 13(2) and 56(3) and Rule 5 is to ensure that federal and provincial schemes of execution are complementary and fill any possible gaps by resorting, where necessary, to the provincial schemes. The Court must adopt the interpretation that best facilitates the integration of the two schemes. Reasons of administrative convenience as much as of certainty in civil rights matters have led the federal authorities to rely for all practical purposes on provincial practices.

There was no implied delegation of power. According to subsection 13(2), the provincial sheriff is a sheriff of the Court. According to the *Sheriffs' Act*, section 2, the bailiff acts for the sheriff and not in his place. The seizure was made by bailiff Trudel in his capacity as an officer of the sheriff. The sale was carried out by bailiff de Repentigny in his capacity as an officer of the sheriff. In both cases, the power exercised was that of the sheriff even though it was exercised by a bailiff.

(2) (a) Neither the sheriff nor the purchasers were told before the sale of the existence of a proposal. Although notice of stay had been served on the seizing bailiff Trudel, the Quebec *Code of Civil Procedure* provides that any notice concerning execution of a writ must be sent to the sheriff himself. Furthermore, bailiff Trudel was authorized to act for the sheriff only in respect of the seizure. Once the seizure was completed, he ceased to be a sheriff's officer. He was not a sheriff's officer for the purposes of the judicial sale.

(b) Once a sheriff's sale has taken place, it is only exceptionally and on very limited grounds that it can be set aside. This was not an exceptional case. The seizure and the judgment pursuant to which it was made were valid. The immovable sold by judicial authority belonged to the judgment debtor. The purchaser acted in good faith, the sheriff's conduct was beyond reproach and the alleged irregularity existed long before the date fixed for the sale and was due solely to the misunderstanding that arose between the judgment creditor, the secured creditor, the judgment debtor and the trustee.

(c) *Bankruptcy Act*, subsection 69(1) provides that on the filing of a proposal, no creditor shall continue execution for the recovery of a claim provable in bankruptcy until the proposal has been refused. Subsection 69(1) applies to both a proposal and a bankruptcy. Section 73, which applies only to bankruptcy, moderates substantially the scope of the stay under subsection 69(1). If in spite of the prohibition imposed by subsection 69(1), a creditor nevertheless proceeds to execute the judgment and if the officiating sheriff has not at the time of the sale received a certified true copy of the assignment, the judicial sale will be valid, the purchaser in good faith will retain title and the sheriff may only, to the detriment of the judgment creditor, deliver the proceeds of the sale to the trustee. Subsection 66(1) provides that "All the provisions of this Act in so far as they are applicable, apply with such modifications as the circumstances require to proposals". In order to avoid inconsistencies concerning when a purchaser's title would be valid, subsection 66(1) should be given a more liberal interpretation than that proposed in the past. It is possible to adapt section 73 to proposals. The filing of a proposal, even one accepted by the creditors and approved by the Court, does not strip a purchaser in good faith of title in an immovable purchased in a judicial sale if nobody notified the sheriff of the proposal before the sale by sending him a certified true copy thereof. Such notice could, as in the case of bankruptcy, have been sent to the sheriff by the debtor personally, by one of the creditors or by the trustee.

statutes and regulations judicially considered

Bailiffs Act, R.S.Q. 1977, c. H-4, s. 1 (as am. by S.Q. 1989, c. 57, s. 3).

Bankruptcy Act, R.S.C., 1985, c. B-3 , ss. 42(1)*i*), 57(1), 60(2), 63, 66(1), 69, 72(1), 73, 75.

Code of Civil Procedure, R.S.Q. 1977, c. C-25, arts. 596, 660, 673, 674, 679, 698.

Federal Court Act, R.S.C., 1985, c. F-7 , ss. 13(1),(2), 55(4),(5), 56(3).

Federal Court Rules, C.R.C., c. 663, RR. 5, 360 (as enacted by SOR/79-58 , s. 2).

Sheriffs' Act, R.S.Q. 1977, c. S-7, s. 2.

cases judicially considered

applied:

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Garcia Transport Ltée v. Royal Trust Co., 1992 CanLII 70 (SCC), [1992] 2 S.C.R. 499; *McGregor v. Canada Investment and Agency Co.* (1892), 21 S.C.R. 499; affg *Canada Investment and Agency Co. & McGregor* (1892), 1 Que. Q.B. 197; *Anjou (Town of) v. C.A.C. Realty Ltd. et al.*, 1977 CanLII 178 (SCC), [1978] 1 S.C.R. 819; (1978), 18 N.R. 301; *Motor Transport Board of Manitoba v. Purolator Courier Ltd.*, 1981 CanLII 208 (SCC), [1981] 2 S.C.R. 364; (1981), 126 D.L.R. (3d) 385; 12 Man. R. (2d) 61; 38 N.R. 465.
distinguished:
Rossie c. Gosselin, [1979] C.S. 273; *Blanchette c. Vertu* (January 13, 1983), St-François 450-05-000562-815 (Sup. Ct), SOQUIJ No. 83-217; *Stebenne c. Banque de commerce canadienne impériale*, [1982] C.S. 884; *Sauvegarde (La), Cie d'assurance sur la vie c. Tapis Laberge Inc.*, [1983] C.S. 835.
referred to:
Stephens v. R. (1982), 26 C.P.R. 1; [1982] CTC 138; 82 DTC 6132; 40 N.R. 620 (F.C.A.); *Roynat Inc. c. Grenier*, [1985] R.D.J. 89 (C.A.); *Vachon v. Canada Employment and Immigration Commission*, 1985 CanLII 12 (SCC), [1985] 2 S.C.R. 417; (1985), 23 D.L.R. (4th) 641; 57 C.B.R. (N.S.) 113; 63 N.R. 81; *R. v. Fitzgibbon*, 1990 CanLII 102 (SCC), [1990] 1 S.C.R. 1005; 78 C.B.R. (N.S.) 193; 55 C.C.C. (3d) 449; 76 C.R. (3d) 378; 107 N.R. 281; 40 O.A.C. 81; *Gobeil v. Cie H. Fortier et al.*, 1982 CanLII 188 (SCC), [1982] 1 S.C.R. 988; 138 D.L.R. (3d) 50; 42 C.B.R. (N.S.) 209; 44 N.R. 384; *Hudson (trustee in bankruptcy) v. Brisebois Bros. Construction Ltd.* 1982 ABCA 115 (CanLII), (1982), 37 A.R. 48; 135 D.L.R. (3d) 166; [1982] 4 W.W.R. 84; 19 Alta. L.R. (2d) 276; 42 C.B.R. (N.S.) 97 (C.A.); *Amanda Designs Boutique Ltd. v. Charisma Fashions Ltd.*, [1972] 3 O.R. 68; (1972), 27 D.L.R. (3d) 392; 17 C.B.R. (N.S.) 16 (C.A.); *In re Hanna (W.) & Company Ltd.* (1961), 2 C.B.R. (N.S.) 40 (Ont. S.C.); *In re Coupal et Frères Ltée: Vibrapipe Concrete Products Ltd. et Ville de Chambly*, [1968] C.S. 91; (1967), 12 C.B.R. (N.S.) 28.
authors cited
Bohémier, Albert. *Faillite et Insolvabilité*, tome 1, Montréal (Qué.): Éditions Thémis, 1992.
APPEALS from order vacating a judicial sale of a seized immovable on the ground that the method of carrying out the seizure and sale, although recognized under Quebec law, was not authorized by the *Federal Court Act* and *Federal Court Rules* (*Hancor Inc. et al. v. 118353 Canada Ltd. et al.* reflex, (1993), 56 F.T.R. 82 (F.C.T.D.)). Appeal allowed.
counsel:
Marcus Spivock for sheriff/appellant in A-1221-92, sheriff/mis en cause in A-1259-92.
Martin Bernard and *Claude Morency* for Hancor Inc. and United Extrusions Ltd., judgment creditors/respondents in A-1221-92, plaintiffs/respondents in A-1259-92.
Michel Morissette for Les systèmes de drainage modernes Inc., judgment debtor/respondent in A-1221-92, defendant/respondent in A-1259-92.
Alain Robichaud for Laurentian Bank of Canada and Laurentian Trust of Canada (Inc.), creditors/ respondents in A-1221-92 and A-1259-92.
Michel La Roche and *Jean-François Gauvin* for 118353 Canada Ltd. and 167899 Canada Inc./Ltd., purchasers/mises en cause in A-1221-92, purchasers/appellants in A-1259-92.
solicitors:
Bernard, Roy and Associates, Montréal, for sheriff/appellant in A-1221-92, sheriff/mis en cause in A-1259-92.
Byers, Casgrain, Montréal, for Hancor Inc. and United Extrusions Ltd., judgment creditors/ respondents in A-1221-92, plaintiffs/respondents in A-1259-92.
Morissette, Downs, Montréal, for Les systèmes de drainage modernes Inc., judgment debtor/ respondent in A-1221-92, defendant/respondent in A-1259-92.
de Grandpré, Godin, Montréal, for Laurentian Bank of Canada and Laurentian Trust of Canada (Inc.), creditors/respondents in A-1221-92 and A-1259-92.

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Michel La Roche, Montréal, for 118353 Canada Ltd. and 167899 Canada Inc./Ltd., purchasers/ mises en cause in A-1221-92, purchasers/appellants in A-1259-92.

The following is the English version of the reasons for judgment rendered by

Décary J.A.: What, according to the *Federal Court Act* [R.S.C., 1985, c. F-7] and *Federal Court Rules* [C.R.C., c. 663], are the powers of a sheriff appointed by the Quebec authorities when seizing and selling an immovable by judicial authority in his or her capacity as sheriff of the Federal Court? Where an immovable is the subject of a proposal after being seized, must a judicial sale thereof be vacated to the detriment of a purchaser in good faith even though no notice of stay appears to have been served on the sheriff before the sale? These are the basic questions raised by these two appeals from the decision of a motions judge reported at reflex, (1993), 56 F.T.R. 82.

Background

On the strength of a favourable judgment of the Federal Court (the Court) in a patent case against Les systèmes de drainage modernes Inc. (SDM), Hancor Inc. and United Extrusions Ltd. (Hancor) obtained a writ of *fieri facias* (the writ) from the Court and seized an immovable belonging to SDM.

After the seizure, SDM lodged a proposal with the trustee Caron Bélanger Ernst & Young Inc. (the trustee) and the said proposal was accepted by the creditors, including the judgment creditor Hancor and the secured creditors Laurentian Bank of Canada and Laurentian Trust of Canada (Laurentian), and approved by the Superior Court of Quebec.

Due to a host of errors and misunderstandings that are outside the scope of the case before the Court,[1] the immovable under seizure was subsequently sold by the sheriff Gilbert Forest (the sheriff) in a judicial sale and awarded to purchasers, namely 118353 Canada Ltd. and 167899 Canada Inc./Ltd. (purchasers), whose good faith was not challenged in this Court.

Essentially on the basis that the judicial sale had been conducted in a manner contrary to the *Bankruptcy Act*[2] as it read prior to the 1992 amendments[3] and in contravention of the essential conditions and formalities prescribed by the Quebec *Code of Civil Procedure* [R.S.Q. 1977, c. C-25], three motions to vacate the sheriff's sale were filed, one by SDM and the trustee, a second by Hancor and a third by Laurentian. The Motions Judge allowed the three motions, not on the grounds alleged therein, which he dismissed, but on the ground, raised for the first time at the hearing, that the method chosen by the sheriff to carry out the seizure and sale, which is recognized under Quebec law, is not authorized by the *Federal Court Act*[4] and *Federal Court Rules*. The sheriff and the purchasers each appealed the decision and the two appeals were joined for the purposes of hearing and judgment.

The argument in this Court was limited to the two questions I asked at the outset of these reasons and to questions incidental thereto.

Question 1: Were the seizure and judicial sale of the immovable carried out by a person with the authority to do so under the *Federal Court Act* and *Federal Court Rules*?

The facts relevant to this part of the case are not in dispute. On October 10, 1991, at Hancor's request, a writ of *fieri facias* was issued by the Court in Toronto to the "Sheriff of the District of Beauharnois". On November 7, 1991 Hancor's Montréal counsel sent a copy of the writ to his usual bailiffs, Villeneuve et associés, to have them seize the immovable. On November 11, 1991 the bailiff Sylvain Trudel, a member of Villeneuve et associés, visited the sheriff of the district of Beauharnois, Gilbert Forest, and gave him the writ. The sheriff then instructed the bailiff Trudel to seize the immovable, writing the following words on the back of the writ:

[translation] Valleyfield, November 11, 1991
Instructions to bailiff Sylvain Trudel
To seize and sell
(signed) Gilbert Forest, Sheriff
[N.B.: the words "and sell" on this standard form were crossed out by hand.]

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On November 14, 1991 the bailiff Trudel seized the immovable.

On January 11, 1992 the sheriff inserted a notice of public sale in the *Gazette officielle du Québec*. On January 27, 1992 he sent the said notice to the Vaudreuil registry office. On February 2, 1992 he inserted the notice in a local newspaper.

On March 10, 1992 the sheriff instructed another bailiff, Jacques de Repentigny, to sell the immovable in a judicial sale, which he did that very day. After the sale, the bailiff gave the sheriff the minutes of the sale, his report and the cheque issued by the purchasers. On March 30, 1992 the sheriff completed his own report, in which he certified that he had seized the immovable and that on March 10, 1992 he had offered it for sale by auction and awarded it to the two purchasers jointly and severally.

According to the evidence, this procedure (with the probable exception of the delay in preparing the sheriff's report) is that ordinarily followed by counsel, bailiffs and the sheriff in the district of Beauharnois and is in all ways consistent with the requirements of Quebec law.

The trustee and Laurentian argued before the Motions Judge that the said procedure was contrary to the requirements of the *Federal Court Act* ("the Act" in this first part) and *Federal Court Rules* (the Rules). The Motions Judge agreed with them.

The Motions Judge relied basically on subsection 55(5)[5] of the Act and Rule 360[6] [as enacted by SOR/79-58 , s. 2] in concluding that although the writ had been directed to the sheriff of the district of Beauharnois, the said sheriff, though there was no evidence that he was unwilling to act, instead decided to instruct the bailiff Trudel to seize the immovable and the bailiff de Repentigny to sell it in a judicial sale. In asking a bailiff to act for him, the sheriff is alleged to have usurped a power of delegation which is conferred on sheriffs by Quebec law but which they do not possess when acting as officers of the Federal Court under the Rules of this Court. Thus, the seizure and judicial sale are alleged to have been carried out by a bailiff to whom the writ was not directed and who was not authorized under federal law to carry out a seizure and judicial sale.

In my opinion, the Motions Judge was on the wrong track in his interpretation of the facts, the applicable provisions and the intent underlying those provisions.

It can be seen from a joint reading of subsections 13(1) and (2) of the Act[7] that if no sheriff of the Federal Court has been appointed by the Governor in Council for the district of Beauharnois"which is the case"the sheriff appointed by the provincial authorities in the said district becomes *ex officio* the sheriff of the Court.[8] Thus, in the case at bar, the responsibilities of a sheriff of the Court were conferred on the sheriff Forest in addition to those already incumbent on him under provincial law.

One of the responsibilities he inherited in his capacity as sheriff of the Court is that, provided for in subsection 55(4),[9] of executing the process of the Court that is directed to him.

According to subsection 56(3),[10] unless otherwise provided by the Rules, the sheriff is to execute all writs of execution "as nearly as possible in the same manner as similar writs or process, issued out of the superior courts of the province in which the property to be seized is situated, are, by the law of that province, required to be executed."

Article 660 of Quebec *Code of Civil Procedure* provides that a writ of seizure of immovables "is executed by the sheriff himself or by one of his officers". Furthermore, section 2 of the *Sheriffs' Act*[11] confers on every sheriff "the selection of the bailiffs to be employed by and to act for him in the several districts of Québec," and section 1 of the *Bailiffs Act*[12] provides that a bailiff is an officer "empowered to serve written proceedings issuing out of any court, carry out judicial decisions that are executory and perform any other duty devolving upon him by law."

It unquestionably follows that "provincial" sheriffs who act as sheriffs of the Federal Court may, unless otherwise provided by the Rules of this Court, execute writs of execution in the same manner as the writs they execute in performing their usual duties.

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It has been established in the instant case that the writ was directed to the sheriff of the district of Beauharnois. It was adduced in evidence that the sheriff executed the writ in the same manner as he executes any writ directed to him, that is, by asking a bailiff to act for him. In my view, that constitutes both execution of the writ by the sheriff to whom it was directed within the meaning of subsection 55(4) of the Act and execution in the manner permitted by subsection 56(3), that is, in the same manner as similar writs are required to be executed by the law of Quebec. Thus, the Motions Judge committed his first error in concluding that the sheriff lacked the power to act through bailiffs. That error led to a second, which we will now discuss.

Once subsection 55(4) comes into play, subsection 55(5) and its complement, Rule 360, are no longer applicable. Those two provisions concern cases in which the writ cannot be directed to a sheriff or where the sheriff is unwilling to act. Since that is not the case here, the Motions Judge could not rely on subsection 55(5) and Rule 360 to find that the sheriff lacked the power to act in the circumstances.

If there were any doubt, and in my view there is none, it would still be necessary to interpret the word "execute" in subsection 55(4) in a manner that reflects the acknowledged intention of the federal authorities. The clear purpose of subsections 13(2) and 56(3) of the Act and Rule 5[13] is to ensure that the federal and provincial schemes of execution are complementary and to fill any possible gaps by resorting where necessary to the provincial schemes. These provisions are all invitations to the Court to refrain from inflexibility and adopt the interpretation that best facilitates the integration of the two schemes.

The reasons for this are easy to explain. The Federal Court is in a way a court of exception that was grafted onto the existing network of superior courts. Its judgments have significant civil implications and it is essential, if they are to be understandable to litigants and if these implications are to be at all uniform, for execution procedures to be as similar as possible to those of the superior courts. This is all the more essential in that the Court as a general rule uses officers of the court appointed, and the seizure and judicial sale machinery established by, provincial authorities. Thus, reasons of administrative convenience as much as of certainty in civil rights matters have led the federal authorities to rely for all practical purposes on provincial practices.

The arguments revolved, wrongly in my view, around the concept of implied delegation of power. There was strictly speaking no such delegation in the case at bar. According to subsection 13(2) of the Act, the provincial sheriff is a sheriff of the Court. According to the very words of section 2 of the *Sheriffs' Act*, the bailiff acts for the sheriff and not in his or her place. The seizure was made by the bailiff Trudel in his capacity as an officer of the sheriff. The sale was carried out by the bailiff de Repentigny in his capacity as an officer of the sheriff. In both cases, the power exercised was that of the sheriff even though it was exercised by the bailiff.

Finally, the solution adopted by the Motions Judge, which was proposed by the respondents, is impracticable. It places obligations"those of personally seizing everything and selling everything in a judicial sale"on Quebec sheriffs, the very persons to whom subsection 13(2) of the Act entrusts the task of executing such writs, obligations that they do not perform in the course of their everyday duties. At the same time, it places constraints on the machinery established by provincial authorities, which the federal authorities are employing, that the provincial authorities cannot be assumed to have intended to apply thereto. I cannot adopt an interpretation that might paralyze the system. Thus, I consider the following comments by Monnin J.A., which Dickson J. (as he then was) adopted in *Motor Transport Board of Manitoba v. Purolator Courier Ltd.* ,[14] to be relevant even though made in a different context:

I must assume that this federal legislation which was purely a delegation of federal powers to the various provincial transport boards, expects these boards to operate in their usual manner and no more. If such were not the case, it would lead to ridiculous situations and I am not prepared to find that Parliament of necessity desired ridiculous situations.

I accordingly conclude that in the case at bar the provincial law and federal law are complementary rather than inconsistent and that the Motions Judge erred in holding that a judicial sale carried out by the sheriff in conformity with the requirements of Quebec law and federal law was invalid.

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This argument of the respondents was accordingly unfounded.

Question 2: Where an immovable is the subject of a proposal after being seized, must a judicial sale thereof to a purchaser in good faith be vacated?

The respondents relied on both the Quebec *Code of Civil Procedure* and the *Bankruptcy Act* ("the Act" in this second part). They submitted, in short, that the sheriff had been informed of the settlement in progress or of the settlement between the parties, that the parties had reached an agreement and the debt had been extinguished at the time of the judicial sale and that, however that may be, the filing of a proposal resulted automatically in a stay of the execution proceedings, and they argued that these were all grounds for vacating the sheriff's sale.

Les intimés se fondent à la fois sur le *Code de procédure civile* du Québec et sur la *Loi sur la faillite* ("la Loi" dans cette deuxième partie). Ils soutiennent grosso modo que le shérif avait été informé du règlement en cours ou du règlement intervenu entre les parties, qu'il y avait entente entre les parties et extinction de la dette au moment de la vente en justice, et que, quoi qu'il en soit, le dépôt d'une proposition concordataire amenait d'office l'arrêt des procédures d'exécution, autant de motifs, selon eux, d'annulation du décret.The seizure was made on November 11, 1991 by the sheriff Forest acting through the bailiff Trudel. On December 3, 1991 Laurentian registered at the Vaudreuil registry office [translation] "a notice of default and declaration of payment due which have the effect of rendering all securities created under the deed of trust enforceable" in respect of the immovable under seizure. On December 4, 1991 Laurentian filed in the Registry of this Court in Montréal a "motion for a stay of execution by writ of *fieri facias*" and an "opposition to seizure in execution", which were to be presented on December 9, 1991.

On December 6, 1991 SDM made a proposal to its creditors under Part III of the *Bankruptcy Act* and appointed Caron et associés trustee therefor. That same day, the trustee served a "notice of stay of proceedings" pursuant to section 69 of the *Bankruptcy Act* on counsel for SDM, the Registry of the Federal Court and the bailiff Trudel.

On December 9, 1991 Laurentian withdrew its motion to stay and opposition in view of the filing of SDM's proposal.

On January 20, 1992 SDM filed an amended proposal, which was duly accepted by the creditors that same day on the condition, *inter alia*, that SDM and Hancor enter into an agreement and that Hancor [translation] "release all seizures of SDM's assets". Hancor and Laurentian were represented at that meeting.

As agreed on January 20, 1992, Hancor and SDM discharged each other on February 26, 1992 in respect of all past, present or future claims resulting from the events related in the record of the Court and Hancor released all its seizures of SDM's assets. On February 28, 1992 the Superior Court of the district of Beauharnois approved the amended proposal of January 20, 1992.

Then, on March 10, 1992 the sheriff sold the immovable in a judicial sale.

(a) Knowledge of the agreement by the sheriff

It is clear from the evidence, and the finding of fact by the Motions Judge in this respect is unassailable, that neither the sheriff nor the purchasers

were told before the sale of the existence of a proposal, that a notice to stay was sent to them or even that an agreement signed by all the parties had been definitely concluded ending the matter.[15]

It can of course be seen from the evidence that the corporation's president, Mr. Kohen, had contacted the sheriff's office on February 3, 1992 to complain about the notice of sale; however, Mr. Kohen did not mention the existence of a proposal but merely asked that the sale be halted on the ground that [translation] "everything had been settled". The sheriff's deputy with whom he spoke simply said that she [translation] "had nothing in the file indicating that it was settled" and asked him to [translation] "contact his lawyers to have them send us a release, or else the sale would take place".

Similarly, one of Hancor's counsel testified that he too had telephoned Ms. Veillette in early February 1992 to inform her of the proposal, but Ms. Veillette denied taking part in any conversation whatsoever with counsel

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concerned. The finding by the Motions Judge that the sheriff had not been informed of the existence of a proposal suggests that the Judge did not accept counsel's testimony.

In view of the evidence, which I must say is overwhelming, that the trustee and the counsel for SDM, Hancor and Laurentian quite simply, due to a misunderstanding, failed to tell the sheriff what was going on and in particular to serve any document whatsoever on him, the respondents fell back in desperation on the fact that the notice of stay of December 6, 1991 had been served on the seizing bailiff Trudel.

If, they submitted at the hearing, the Court were to conclude (which it did in the first part) that the bailiff Trudel had seized the immovable in his capacity as a sheriff's officer, it would follow that the service on that officer of the notice of stay on December 6, 1991 was equivalent to service on the sheriff himself.

I do not find this argument convincing. It is the sheriff who is responsible for executing the writ and the Quebec *Code of Civil Procedure* provides that any notice concerning its execution must be sent to the sheriff himself. A party may not confer on a bailiff a mandate to represent the sheriff that only the sheriff himself may confer. Furthermore, in the case at bar the bailiff Trudel had been authorized by the sheriff to act for him only in respect of the seizure (moreover, Hancor's counsel had asked the bailiff only to seize the immovable). Once the seizure had been completed, he ceased to be a sheriff's officer. At any rate, he was definitely not a sheriff's officer for the purposes of the judicial sale.

Furthermore, that is what Hancor, SDM and the trustee themselves understood to be the case. It was to the office of the sheriff that the president of SDM complained by fax and telephone on February 3, 1992. It was from the sheriff's office that Hancor's counsel received the notice of sale and it was that office that he claims to have telephoned. Another of Hancor's counsel attributes the publication of the notice to [translation] "a clerical error by the sheriff". SDM's Montréal counsel was also aware of this, since the draft release he prepared on January 24, 1992 contained a notice to the sheriff of Beauharnois.[16]

The trustee was also aware of this since, even though it had served the notice of stay on the bailiff Trudel, it can be seen from the testimony of its administrator, Ms. Vincent, that the notice of stay had intentionally not been given to the sheriff for two reasons: the first was that the proposal did not confer possession of the seized assets on the trustee, which was merely an intermediary between SDM and its creditors, and the second was that [translation] "[Hancor's] counsel had already been told to halt the proceedings and it had in fact been agreed that [counsel concerned] would terminate those proceedings".

In short, nobody ever thought that the notice of stay had been served on the sheriff and that the sale had accordingly been suspended. On the contrary, it can be seen without a shadow of a doubt from the evidence that everyone was aware that the sheriff was preparing to hold the sale and that it was he who had to be contacted to prevent it. No such action was taken and the sheriff was never told.

(b) The agreement between the parties and vacating of the sale

The Supreme Court of Canada recently noted that:[17]

. . . while it remains possible, it is only exceptionally that the vacating of sales at law will be permitted and then, only on limited and enumerated grounds. Those exceptions are found in arts. 698 and 699 *C.C.P.*

. . .

This rule suffers few exceptions. A sale based upon a judgment or a seizure which is null may be vacated . . . . Similarly, a sale made *super non domino*, that is, of property which does not belong to the debtor but to a third party, may be vacated . . . .

In summary, then, once a sheriff's sale has taken place, it is only exceptionally and on very limited grounds that it can be set aside.

A comparison of the grounds for opposition, annulment and vacation in respect of seizures in execution of immovable property is especially revealing of the National Assembly's intention: there are more grounds for annulling a seizure than there are for vacating a sale. Moreover, the further one gets from the seizure and the

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closer to the sale, the fewer the possibilities of stopping the process and the smaller the number of persons who may do so.

Thus, a judgment debtor and a third party with a sufficient interest may oppose and ask for the annulment of the seizure of an immovable on the following grounds:[18]

1. on the ground of an irregularity in the seizure, which causes him a serious prejudice . . . ;
2. on the ground of the property being exempt from seizure;
3. on the ground of the extinction of the debt;
4. on any other ground of a nature to affect the judgment sought to be executed.

However, and in my view this is a decisive indication of the National Assembly's intention, such an opposition must be served at least ten days before the date fixed for the sale or else it cannot stop the sale "except upon the order of the prothonotary . . . for sufficient cause."[19]

A sheriff's sale may be vacated at the instance of any interested person:[20]

698. . . .

(1) If, with the knowledge of the purchaser, fraud was employed to keep persons from bidding;

(2) If the essential conditions and formalities prescribed for the sale have not been observed; but the seizing creditor cannot vacate the sale for any irregularity attributable to himself or his attorney.

Thus, where the grounds for annulment are known prior to the sale and are unrelated to the sale as such, the lateness of the opposing parties may be fatal to them: if they fail to come forward at least ten days before the sale they are taking a great risk; if they come forward after the sale, it is generally too late. Furthermore L'Heureux-Dubé J. stated the following in *Garcia*:[21]

The requirement that the party who opposes a sale must do so before the sale takes place is very well established in Quebec . . .

She also made an impressive inventory of judgments in which opposing parties had lost their rights by failing to act and repeated the following comment by Taschereau J. in *McGregor v. Canada Investment and Agency Co.*:[22]

Assuming that he had rights to this property the appellant has lost them by the sheriff's sale. *Vigilantibus non dormientibus subvenit lex.*

The respondents asked this Court to follow, as a "trend in the case law", certain Quebec court judgments that allowed motions to vacate a sheriff's sale on the ground that there was an agreement between the parties at the time of the sale and that the debt was extinguished. The judgments to which they referred the Court are: *Rossie c. Gosselin* , [1979] C.S. 273; *Blanchette c. Vertu*, unreported, St-François Sup. Ct., No. 450-05-000562-815, January 13, 1983, SOQUIJ No. 83-217; *Stebenne c. Banque de commerce canadienne impériale*, [1982] C.S. 884; and *Sauvegarde (La), Cie d'assurance sur la vie c. Tapis Laberge Inc.*, [1983] C.S. 835.

I note at the outset that none of them were mentioned by L'Heureux-Dubé J. in *Garcia* as examples of exceptional cases on the vacating of sheriff's sales. I am not sure, therefore, that they constitute a "trend in the case law" with precedential value. However that may be, the circumstances of those cases are not really comparable to those of the case at bar.

In *Rossie* and *Stebenne*, the sale was suspended by the sheriff at the request of the parties, but the judgment creditor then unilaterally ordered the sheriff to continue the execution proceedings. In *Blanchette*, the purchaser knew about the agreement between the parties. In *La Sauvegarde*, the sheriff held the sale after announcing that it was being vacated.

In the case at bar, however, various avenues were open to the respondents well before the sale.

Thus, the parties to the seizure, namely Hancor and SDM, could under article 673 C.C.P. have consented to the suspension of the sale. While it is true that they wanted to do so, they did not do what was necessary to give effect to their consent. As the Motions Judge held, it is not enough that the parties consent, as the sheriff still has to be informed of their consent, and it can be seen from the evidence that he was not. It must not be

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forgotten that the sheriff is ordered by the Court to sell the immovable ("[t]he writ . . . orders the sheriff" (C.C.P., art. 660)). I cannot conceive that article 673 C.C.P. provides for the automatic suspension of a sale where the parties consent without the sheriff's knowledge. A party could probably ask for a sheriff's sale to be vacated on the ground that the sheriff wrongly refused to suspend the sale,[23] but I do not see how a sheriff could wrongly refuse to suspend if the parties have not asked him to do so. Article 673 C.C.P. does not require that the sheriff take the initiative to suspend a sale he or she is required to hold by Court order: quite the contrary.

Similarly, SDM and its creditors could on the strength of a duly approved proposal have opposed the sale ten days before it took place or, with leave, within a shorter period before it took place. They did not do so.

I make no secret of the fact that it would be tempting from the point of view of equity to give one more chance to parties each of whom believed in good faith that the sale would not take place because there was no longer any reason for it and who failed, as a result of confusion and blundering, to take the necessary action to stop it. But the law is there, and it seeks to protect a person, the purchaser, who also acted in good faith and, above and beyond the interests of the parties to the case, to preserve what Pigeon J., in *Anjou (Town of) v. C.A.C. Realty Ltd. et al.*,[24] called the "principle of the inviolability of judicial sales".

I do not think that this is an exceptional case of the type to which L'Heureux-Dubé J. alluded in *Garcia*. The seizure was valid. The judgment pursuant to which the seizure was made was valid. The immovable sold by judicial authority belonged to the judgment debtor. Furthermore, the purchaser acted in good faith, the sheriff's conduct was beyond reproach and the alleged irregularity, if it is an irregularity, existed long before the date fixed for the sale and was due solely to the misunderstanding that arose between the judgment creditor, the secured creditor, the judgment debtor and the trustee. I note that, where the judgment creditor is concerned, I could not have allowed its motion even if I had found that there was an irregularity, as article 698 C.C.P. bars it from availing itself of an irregularity attributable to itself.

This second argument must fail in so far as it is based on the provisions of the Quebec *Code of Civil Procedure*. The respondents have only one other chance: the *Bankruptcy Act*.

(c) The stay of proceedings and section 69 of the *Bankruptcy Act*

Subsection 69(1) of the *Bankruptcy Act* reads as follows:

69. (1) On the filing of a proposal made by an insolvent person or on the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.

The respondents argued that a proposal results in an automatic stay of proceedings, that this stay bars a judgment creditor from having property belonging to the debtor sold in a judicial sale and that any judicial sale of such property is null regardless of whether or not the sheriff has been told about the proposal.

The purchaser countered this by arguing that subsection 69(1) does not provide for an automatic stay or that at the very least the stay cannot be set up against a purchaser. It added on the basis of subsection 66(1)[25] of the Act that the protection granted by section 73[26] to purchasers in good faith in respect of a bankruptcy should also be granted to them in respect of a proposal.

Thus, the resolution of a case in which a judicial sale takes place in respect not of a bankruptcy but of a proposal depends on the interpretation of subsections 66(1), 69(1) and section 73 of the Act.

The substance of the debate is quite simple.

Subsection 69(1) applies, by its very wording, to both a proposal and a bankruptcy. The generality of the stay of proceedings under this subsection is established; the courts do not allow a creditor, by enforcing an individual remedy, to frustrate the *Bankruptcy Act* and for his or her own benefit unjustly reduce a debtor's estate by continuing execution proceedings without leave of the court.[27]

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Section 73, which according to its wording applies only to bankruptcy, moderates substantially the scope of the stay under subsection 69(1). If, in spite of the prohibition imposed on him or her by subsection 69(1), a creditor nevertheless proceeds to execute the judgment and if the officiating sheriff has not at the time of the sale received a copy of the assignment certified by the trustee as a true copy thereof, the judicial sale will nevertheless be valid, the purchaser in good faith will retain his or her title and the sheriff may only, to the detriment of the judgment creditor, deliver the proceeds of the sale to the trustee.[28]

It was in my view quite unnecessary for certain courts to expatiate upon the absolute or relative nature of the stay of proceedings under subsection 69(1). The question is fine in theory but is in practice resolved less by quashing execution proceedings unlawfully undertaken by a creditor than by delivering the proceeds of those proceedings to the trustee or the general body of creditors.[29]

In view of section 73, it should be pointed out that: (1) it is not the fact of bankruptcy that bars the sheriff from holding the sale or, if the sale has been held, requires him or her to deliver the proceeds of the sale to the trustee, but the notice the sheriff receives; as long as the sheriff is not notified in the prescribed manner, he or she is not only under no obligation to suspend the sale but has no right to do so;[30] (2) it is not necessary that the trustee give the prescribed notice personally, as subsection 73(2) merely requires that a copy of the assignment certified by the trustee as a true copy thereof be sent to the sheriff without specifying who must send it; and (3) the only obligation imposed by subsections 73(2) and (3) is the requirement that the sheriff deliver the property to the trustee if he or she receives the notice before the sale or deliver the proceeds of the sale to the trustee if the notice is received after the sale.[31]

Since section 73, unlike section 69, refers only to "property of the bankrupt" and "an act of bankruptcy", it remains to be determined whether the scheme of subsection 66(1) protects the rights of a purchaser in good faith where, unknown to the sheriff, a proposal is filed before the sale in the same way as if there were a bankruptcy and assignment of the property to the trustee.

The wording of subsection 66(1) has rightly been criticized by Professor Albert Bohémier in *Faillite et Insolvabilité*.[32] Parliament should, in so far as is possible, indicate in a statute what provisions apply to a given situation. By leaving it up to the courts to decide what provisions of the *Bankruptcy Act* apply in the case not of a bankruptcy but of a proposal, Parliament opened the door to uncertainties inconsistent with the economic stability that the *Bankruptcy Act* is nevertheless intended to promote.

According to a common interpretation discussed by Professor Bohémier, it is necessary to start from the idea that the fundamental distinction between a bankruptcy and a proposal lies in the fact that the debtor loses possession of his or her property in a bankruptcy but generally retains it in the case of a proposal, and accordingly to interpret subsection 66(1) to mean that only those provisions of the Act that may apply regardless of whether or not the debtor loses possession are applicable *mutatis mutandis* to a proposal.

However, this approach causes a problem in the case of section 73. As Professor Bohémier noted:

[translation] There are cases involving a composition, which are clearly debatable, in which the courts have refused to apply sections 70 and 73 B.A. mutatis mutandis to a proposal other than a proposal-assignment expressly authorizing the trustee to act. To circumvent this problem, it is advisable to appoint an interim receiver (s. 47 B.A.) and to confer on him or her the right to take possession of the seized property.[33]

It is enough to note that a proposal leads directly to a bankruptcy in the event of a refusal by the creditors (subsection 57(1) of the Act), a default in performance (paragraph 42(1)(*i*) of the Act) or an annulment (subsection 63(4)) to wonder about the fate of a judicial sale that takes place before the refusal, default or annulment or is itself the cause of the default or annulment. Would the purchaser's title be valid in the case of a bankruptcy, invalid in the case of a proposal and valid in the case of a proposal that has become a bankruptcy? Such a result would to say the least be inconsistent.

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It is in my view possible to avoid such inconsistency by giving subsection 66(1) an interpretation that is more liberal than the one proposed in the past and that corresponds more closely to the particularly general wording of that subsection.

The words used by Parliament are significant: "All the provisions", "in so far as they are applicable" and "with such modifications as the circumstances require". Parliament was aware of the theoretical and practical differences between the scheme of bankruptcy and that of proposals. Whether due to indolence or economy, it did not consider it necessary for the provisions it had passed in respect of bankruptcy to be repeated in or adapted to the case of proposals. At the same time, however, it was very careful to say"at least that is how I understand the words it used"that all the provisions of the Act apply to proposals in so far as they can be applied. In other words, it wanted the courts to find a way, above and beyond their obvious differences, to harmonize the rules applicable to bankruptcy with those applicable to proposals in so far as is possible. It did not say that this must be done at any price: there are cases in which it will not be possible. However, it did say that an attempt must be made to do so on a case-by-case basis and that those involved in this harmonization effort must not hesitate to use their imaginations. Parliament has invited the courts to participate in a process of intelligent harmonization and adaptation, not one of blindly literal application.

The adoption of this approach sheds considerable light on the situation. In section 69, Parliament was concerned solely with the interests of creditors and debtors. In section 73 (and in section 75,[34] which is irrelevant here), it was concerned primarily with the interests of purchasers in good faith, while at the same time conferring on creditors, debtors and trustees the right to block the seizure and sale. Parliament clearly intended to protect purchasers where, unknown to themselves and to the sheriff, they venture into the minefield of bankruptcy and insolvency.

I see nothing in this protection accorded to the purchaser in good faith that depends on whether the debtor or the trustee was in possession of the property sold. In other words, the debtor not being in possession of the property does not change the fact that the intention was to protect the purchaser's title. Indeed, it would be surprising if the judicial sale were valid where the debtor is not in possession of the property sold and invalid where he or she is in possession. It is true that, since this section was drafted in terms of bankruptcy, the obligations it imposes on the sheriff are expressed in a context in which it is a trustee who is in lawful possession of the bankrupt's property and the proceeds of the sale must be delivered to the trustee. However, that is the very challenge faced by the courts under subsection 66(1): is it possible to disregard these concepts proper to a bankruptcy and adapt them to a proposal?

I am all the more comfortable in believing that there is no objection in theory to applying section 73 to a proposal in that the Act itself, in subsection 63(2) on the annulment of a proposal, confirms the validity of a sale made in pursuance of the proposal.

Furthermore, this interest displayed by Parliament in purchasers in good faith is very much in line with its policy, as defined in subsection 72(1) of the Act, not to:

. . . abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act . . . .

It can be seen from my analysis in the preceding section that my decision to apply section 73 to proposals also ensures compliance with the principle of the inviolability of judicial sales that is so profoundly rooted in Quebec civil law.

In my view, it is entirely possible to adapt section 73 to proposals, as subsection 66(1) permits and encourages us to do. It is enough to conclude, by making "such modifications as the circumstances require", that the filing of a proposal, even one accepted by the creditors and approved by the court, does not strip a purchaser in good faith of his or her title in an immovable purchased in a judicial sale if nobody notified the sheriff of the proposal, composition or approval before the sale by sending him or her a certified true copy of the proposal,

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composition or judgment of approval. Such notice could, as in a case of bankruptcy, have been sent to the sheriff by the debtor personally, by one of the creditors or by the trustee.

To whom, therefore, must the sheriff deliver the proceeds of the judicial sale, as he or she is required to do by subsection 73(3)? Maybe to the trustee for distribution or delivery to whomsoever is entitled thereto, since subsection 60(2) of the Act provides that all moneys payable under the proposal are to be paid to the trustee and section 63 provides that the trustee is not *functus* where a proposal is annulled due to a default in performance. I do not need to answer this question for the purposes of the case at bar.

It is possible that upholding the validity of the judicial sale will result in annulment of the proposal due to the debtor's failure to respect its undertaking to obtain the release of the seizure. However, I do not have to concern myself with the possible ramifications of the Court's decision in this respect. Parliament laid down the consequences of a default in performance in section 63 and paragraph 42(1)(*i*)[35] and it does not matter whether this default results from an intentional act or from a simple mistake made in good faith. Parliament chose to respect the rights of a purchaser in good faith and the debtor, its creditors and the trustee have only themselves to blame if a mistake made by one or more of them made it impossible to perform the proposal.

This third argument must be rejected.

DISPOSITION

I would allow the appeals, reverse the decision of the Motions Judge and dismiss the three motions to vacate the sheriff's sale.

The appellant purchasers shall have their costs at trial and on appeal against each of the respondents in file No. A-1259-92; the appellant sheriff shall have his costs at trial and on appeal against each of the respondents in file No. A-1221-92.

Hugessen J.A.: I agree.

Chevalier D.J.: I agree.

[1] In this respect, I adopt the following comments of the Motions Judge (reflex, (1993), 56 F.T.R. 82, at p. 84):

There is no question that as the issue in this case has been resolved between the parties as part of a proposal, the forced sale proceeding on this real property should never have been completed. The confusion resulted from an obvious lack of communication between the parties, their counsel and the officers of the Court responsible for the sale. Many persons were to blame, but it is not for this court in hearing the applications at bar to distribute blame or identify those responsible, except to ascertain that the procedure for the court sale was followed and that the essential conditions and requirements for the sale were observed.

[2] R.S.C., 1985, c. B-3.

[3] S.C. 1992, c. 27.

[4] R.S.C., 1985, c. F-7.

[5] S. 55(5) of the Act reads as follows:

55. . . .

(5) In any case where there is no sheriff or marshal or a sheriff or marshal is unable or unwilling to act, the process of the Court shall be directed to a deputy sheriff or deputy marshal, or to such other person as may be provided by the Rules or by a special order of the Court made for a particular case, and any such person is entitled to take and retain for his own use such fees as may be provided by the Rules or the special order.

[6] R. 360 reads as follows:

Rule 360. (1) In any case where there is no sheriff or marshal or a sheriff or marshal is unable or unwilling to act, any process (including a warrant for arrest of property under Rule 1003) may be issued

(*a*) to any person to whom process of a superior court of the province in which the process is to be executed could be issued, and

(*b*) without limiting the generality of paragraph (1), where the province in question is the province of Quebec, to a bailiff duly authorized to act as such for the purposes of the *Code of Civil Procedure* of that province.

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(2) This rule is made as contemplated by section 55(5) of the Act.

[7] Ss. 13(1) and (2) of the Act read as follows:

13. (1) The Governor in Council may appoint a sheriff of the Court for any geographical area.

(2) Where no sheriff is appointed under subsection (1) for a geographical area, the sheriff and deputy sheriffs of the county or other judicial division or part thereof within that geographical area who are appointed under provincial law are *ex officio* sheriff and deputy sheriffs of the Court.

[8] See *Stephens v. R.* (1982), 26 C.P.R. 1 (F.C.A.), at p. 7.

[9] S. 55(4) of the Act reads as follows:

55. . . .

(4) A sheriff or marshal shall execute the process of the Court that is directed to him, whether or not it requires him to act outside his geographical jurisdiction, and shall perform such other duties as may be expressly or impliedly assigned to him by the Rules.

[10] S. 56(3) of the Act reads as follows:

56. . . .

(3) All writs of execution or other process against property, whether prescribed by the Rules or authorized by subsection (1), shall, unless otherwise provided by the Rules, be executed, with respect to the property liable to execution and the mode of seizure and sale, as nearly as possible in the same manner as similar writs or process, issued out of the superior courts of the province in which the property to be seized is situated, are, by the law of that province, required to be executed, and the writs or other process issued by the Court shall bind property in the same manner as similar writs or process issued by the provincial superior courts, and the rights of purchasers thereunder are the same as those of purchasers under those similar writs or process.

[11] R.S.Q. 1977, c. S-7.

[12] R.S.Q. 1977, c. H-4, s. 1 (as am. by S.Q. 1989, c. 57, s. 3).

[13] R. 5 reads as follows:

Rule 5. In any proceeding in the Court where any matter arises not otherwise provided for by any provision in any Act of the Parliament of Canada or by any general rule or order of the Court (except this Rule), the practice and procedure shall be determined by the Court (either on a preliminary motion for directions, or after the event if no such motion has been made) for the particular matter by analogy

(*a*) to the other provisions of these Rules, or

(*b*) to the practice and procedure in force for similar proceedings in the courts of that province to which the subject matter of the proceedings most particularly relates,

whichever is, in the opinion of the Court, most appropriate in the circumstances.

[14] 1981 CanLII 208 (SCC), [1981] 2 S.C.R. 364, at p. 390.

[15] reflex, (1993), 56 F.T.R. 82, at p. 86

[16] The document eventually signed at Exeter on February 26, 1992 omitted any reference to the sheriff.

[17] ;*Garcia Transport Ltée v. Royal Trust Co.*, 1992 CanLII 70 (SCC), [1992] 2 S.C.R. 499, at pp. 540-541, *per* L'Heureux-Dubé J.

[18] C.C.P., arts. 674 and 596.

[19] C.C.P., art. 679.

[20] C.C.P., art. 698.

[21] *Supra*, note 17, at p. 539.

[22] (1892), 21 S.C.R. 499, at p. 516; aff'g (1892), 1 Que. Q.B. 197.

[23] See *Roynat Inc. c. Grenier*, [1985] R.D.J. 89 (C.A.), at p. 94.

[24] 1977 CanLII 178 (SCC), [1978] 1 S.C.R. 819, at p. 828.

[25] S. 66(1) of the Act reads as follows:

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66. (1) All the provisions of this Act, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals.

[26] S. 73 of the Act reads as follows:

73. (1) An execution levied by seizure and sale of the property of a bankrupt is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the property in good faith under a sale by the sheriff acquires a good title thereto against the trustee.

(2) Where an assignment or a receiving order has been made, the sheriff or other officer of any court or any other person having seized property of the bankrupt under execution or attachment or any other process shall, on receiving a copy of the assignment or the receiving order certified by the trustee as a true copy thereof, forthwith deliver to the trustee all the property of the bankrupt in his hands.

(3) Where the sheriff has sold the property of a bankrupt or any part thereof, he shall deliver to the trustee the money so realized by him less his fees and the costs referred to in subsection 70(2).

[27] See *Vachon v. Canada Employment and Immigration Commission*, 1985 CanLII 12 (SCC), [1985] 2 S.C.R. 417, at p. 423 *et seq.*; *R. v. Fitzgibbon*, 1990 CanLII 102 (SCC), [1990] 1 S.C.R. 1005, at p. 1015 *et seq.*

[28] See *Gobeil v. Cie H. Fortier et al.*, 1982 CanLII 188 (SCC), [1982] 1 S.C.R. 988.

[29] See *Gobeil, supra*, note 28; *Hudson (trustee in bankruptcy) v. Brisebois Bros. Construction Ltd.* 1982 ABCA 115 (CanLII), (1982), 37 A.R. 48 (C.A.); *Amanda Designs Boutique Ltd. v. Charisma Fashions Ltd.*, [1972] 3 O.R. 68 (C.A.).

[30] See *Gobeil, supra*, note 28.

[31] See *Hudson, supra*, note 29, at p. 56.

[32] A. Bohémier, *Faillite et Insolvabilité*, t. 1 (Montréal: Thémis, 1992), at p. 293 *et seq.*

[33] *Ibid.*, at p. 353. The cases characterized as debatable include *In re Hanna (W.) & Company Ltd.* (1961), 2 C.B.R. (N.S.) 40 (Ont. S.C.); and *In re Coupal et Frères Ltée: Vibrapipe Concrete Products Ltd. et Ville de Chambly*, [1968] C.S. 91.

[34] S. 75 of the Act reads as follows:

75. Notwithstanding anything in this Act, a deed, conveyance, transfer, agreement for sale, mortgage, charge or hypothec made to or in favour of a *bona fide* purchaser or mortgagee for adequate valuable consideration and covering any real property affected by a receiving order or an assignment under this Act is valid and effectual according to the tenor thereof and according to the laws of the province in which the property is situated as fully and effectually and to all intents and purposes as if no receiving order or assignment had been made under this Act, unless the receiving order or assignment, or notice thereof, or caution, has been registered against the property in the proper office prior to the registration of the deed, conveyance, transfer, agreement for sale, mortgage, charge or hypothec in accordance with the laws of the province in which the property is situated.

[35] S. 42(1)(*i*) of the Act reads as follows

Act of Bankruptcy

42. (1) A debtor commits an act of bankruptcy in each of the following cases:

. . .

(*i*) if he defaults in any proposal made under this Act . . . .

Limitation - Sec. 69(2)

(2) The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the

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notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;
(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or
(d) [Repealed, 2012, c. 31, s. 416]

Limitation - Sec. 69(3)
(3) A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if
(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the notice of intention and could be subject to a demand under
(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or
(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under
(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in

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subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

R.S., 1985, c. B-3, s. 69;
1992, c. 27, s. 36;
1997, c. 12, s. 62;
2000, c. 30, s. 145;
2005, c. 3, s. 12, c. 47, s. 60;
2007, c. 36, s. 34;
2009, c. 33, s. 23;
2012, c. 31, s. 416.

Stay of proceedings — Division I proposals - Sec. 69.1

69.1 (1) Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing of a notice of intention under section 50.4 or of a proposal under subsection 62(1) in respect of the insolvent person,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as the insolvent person would otherwise have, has any force or effect until the trustee has been discharged or the insolvent person becomes bankrupt;

(c) Her Majesty in right of Canada may not exercise Her rights under subsection 224(1.2) of the Income Tax Act or any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, until

(i) the trustee has been discharged,

(ii) six months have elapsed following court approval of the proposal, or

(iii) the insolvent person becomes bankrupt; and

(d) Her Majesty in right of a province may not exercise Her rights under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in

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subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,
in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation, until
(iii) the trustee has been discharged,
(iv) six months have elapsed following court approval of the proposal, or
(v) the insolvent person becomes bankrupt.

Limitation - Sec. 69.1(2)
(2) The stays provided by subsection (1) do not apply
(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the proposal was filed from dealing with those assets;
(b) unless the secured creditor otherwise agrees, to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before
(i) a notice of intention was filed in respect of the insolvent person under section 50.4, or
(ii) the proposal was filed, if no notice of intention under section 50.4 was filed
from enforcing that security;
(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or
(d) [Repealed, 2012, c. 31, s. 417]

Cumberland Trading Inc., Re, 1994 CanLII 7458 (ON SC) - Failure of Proposal Leads to Immediate Request for Appointment of Trustee

Date:	1994-01-24
Docket:	31-282225
Parallel citations:	23 CBR (3d) 225
URL:	http://canlii.ca/t/1wb8x
Citation:	Cumberland Trading Inc., Re, 1994 CanLII 7458 (ON SC), <http://canlii.ca/t/1wb8x> retrieved on 2013-08-18
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Ontario Supreme Court
Cumberland Trading Inc., Re
Date: 1994-01-24

Re proposal of Cumberland Trading Inc.

Ontario Court of Justice (General Division [Commercial List]) [In Bankruptcy] Farley J.
Judgment – January 24, 1994.
Kevin J. Zych, for secured creditor, Skyview International Finance Corporation.
Jeff Carhart, for debtor, Cumberland Trading Inc.

(Doc. 31-282225)

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[1] January 24, 1994. FARLEY J.: – Skyview International Finance Corporation ("Skyview") brought this motion for a declaration that the stay provisions (ss. 69 and 69.1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 as amended ("BIA") no longer operate in respect of Skyview taking steps to enforce its security (including accounts receivable and inventory) given by Cumberland Trading Inc. ("Cumberland") which it has been financing for the last 9 years. In addition Skyview moved for a declaration that the 30 day period to file a proposal mentioned in s. 50.4(8) BIA was terminated. Thirdly, Skyview was asking for an order removing Doane Raymond Limited ("Doane") which was Cumberland's choice as trustee and substituting A. Farber Associates ("Farber") as trustee under the Notice of Intention to File a Proposal of Cumberland. In the alternative to the relief awarded in the last two aspects, Skyview wished to have an order appointing Farber as interim receiver.

[2] On January 5, 1994 Skyview demanded payment in full of its operating financing loan to Cumberland and gave a s. 244 BIA notice of its intention to enforce its security in ten days. The affidavit filed on behalf of Skyview indicated that Cumberland was not cooperating with it in providing appropriate financial information for the last half year. This was disputed in the affidavit filed by Cumberland. Suffice it to say that there has been a falling out between the two. Skyview asserted that it was owed $966,478 and that there was an exposure to it under a guarantee given on Cumberland's behalf to a potential of approximately $200,000 U.S. Skyview's deadline for repayment was January 16th. On January 14th Cumberland filed with the Official Receiver a Notice of Intention to make a Proposal (s. 50.4(1) BIA) and pursuant to s. 69 BIA there would be a stay of proceedings upon this filing.

[3] Skyview's president swore that:

> 21. In light of the unpleasant and frustrating experience Skyview has had to endure over the preceding 3 to 4 months with Cumberland, including specifically the persistent refusal by Cumberland to account for its sales from the Retail Business, the misrepresentation of Cumberland's pre-sold orders referred to above and particularly its secretive purported "termination" of its direction to accord to pay sums to Skyview in reduction of Cumberland's indebtedness, Skyview's faith and confidence in the management of Cumberland has been irreparably damaged such that Skyview would not be prepared to vote in terms of any proposal which Cumberland may make.

and further that

> 24. The continued operation of a stay of proceedings preventing Skyview from enforcing its security will be materially prejudicial to the rights of Skyview. The assets of Skyview consist primarily of inventory and receivables (both from the Distribution Business and the Retail Business). With each day that passes Cumberland is converting its inventory (financed by Skyview) into cash (primarily in the Retail Business) and receivables (primarily in the Distribution Business) and it is Skyview's fear that those sums will be used by Cumberland to pay its other creditors and to fund the professional costs which it inevitably must incur in formulating and implementing a proposal. This fear is especially heightened insofar as the receivables generated from the Retail Business are concerned as they are under the direct and immediate control of Cumberland and are not collected by Accord.

[4] Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under the BIA regime one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-à-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

[5] Cumberland's essential position is that it must have some time under BIA to see about reorganizing itself. While I am mindful that both BIA and the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA") should be classified as debtor friendly legislation since they both provide for the possibility of reorganization (as contrasted with the absence of creditor friendly legislation which would allow, say, creditors to move for an increase in interest rates if inflation became rampant), these acts do not allow debtors absolute immunity and impunity from their creditors. I would also observe that all too frequently debtors wait until virtually the last moment, the last moment or, in some cases, beyond the last moment before even beginning to think about reorganization (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spadework. It is true that under BIA an insolvent person can get an automatic stay by merely filing a Notice of Intention to File a Proposal – as opposed to the necessity under CCAA of convincing the court of the appropriateness of granting a stay (and the nature of the stay). However BIA does not guarantee the insolvent person a stay without review for any set period of time. To keep

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the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case Skyview is utilizing s. 50.4(11) to do so.

[6] Cumberland relies upon *Re N.T.W. Management Group Ltd.* reflex, (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.), a decision of Chadwick J. Skyview asserts that *N.T.W.* is distinguishable or incorrectly decided and secondly that the philosophy of my decision in *Re Triangle Drugs Inc.* reflex, (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.) should prevail. In *Triangle Drugs* I allowed the veto holding group of unsecured creditors to in effect vote at an advance poll in a situation where there appeared to be a gap in the legislation. The key section of BIA is s. 50.4(11) which provides:

> The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> > (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
> >
> > (*b*) the insolvent person will not likely be able to make a viable
> > proposal before the expiration of the period in question,
> >
> > (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
> >
> > (*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It does not seem to me that there is any gap in this sector of the legislation.

[7] As the headnote in *N.T.W.* stated, Chadwick J. viewed a situation similar to this one as requiring that the debtor must have an opportunity to put forth its proposal when he stated at p. 163:

> The bank had stated that it would not accept any proposal. However, since the companies had not yet had the opportunity to put forth their proposal, it was impossible to make a final determination under s. 50.4(11)(*c*). The companies should have the opportunity to formulate and make their proposal.

However I note that in this instance Cumberland has filed its Notice of Intention to File a Proposal the day before Skyview's s. 244 notice would have allowed it to take control of the security. Cumberland's president swore that:

> 2. The efforts which Cumberland is currently undertaking represent a bona fide effort, made in good faith, to restructure its finances in order to preserve the business of the company for the benefit of all of the creditors of the company, including Skyview. It is my belief that the proposal process will represent a significantly better treatment of all such creditors then would be available through either an enforcement by Skyview of its security against the assets of Cumberland, a bankruptcy of Cumberland or other processes available in the circumstances.

and further that:

> I intend to submit a proposal, pursuant to the provisions of the Bankruptcy and Insolvency Act, which represents the most advantageous treatment available, in my view, to all of the creditors of Cumberland and which allows for the continued viability of the business of Cumberland. This proposal is being prepared, and will be presented, in complete good faith. In the course of reviewing and preparing this proposal material with Mr. Godbold, I have determined that the legitimate claim of Skyview does not, in fact, represent in excess of 66-2/3 of all of the claims against Cumberland. At this time, Doane Raymond Limited is already in the position of Trustee under the proposal, in accordance with the provisions of the
> Bankruptcy and Insolvency Act. In addition, as noted above, I am prepared to consent to the appointment of Doane Raymond Limited as interim receiver of Cumberland. In the circumstances, I respectfully submit that the stay in favour of Cumberland pursuant to the Bankruptcy and Insolvency Act should not be lifted.

No explanation was given as to the lower share indicated for Skyview but in any event there was no assertion that Skyview lost its veto.

[8] However we do not have any indication of what this proposal proposes to be – notwithstanding that 10 days have now passed since Cumberland filed its Notice of Intention to File a Proposal and five days since Skyview served Cumberland with this motion. In a practical sense one would expect, given Skyview's veto power and its announced position, that Cumberland would have to present "something" to get Skyview to change its mind – e.g. an injection of fresh equity or a take out of Skyview's loan position. However there was not even a germ of a plan revealed – but merely a bald assertion that the proposal being worked on would be a better result for everyone including Skyview. This is akin to trying to box with a ghost. While I agree with the logic of Chadwick J. when he said at p. 168 of N.T.W. that:

> C.I.B.C. the major secured creditor has indicated they will not accept any proposal put forth, other than complete discharge of the C.I.B.C. indebtedness. Other substantial creditors have taken the same position. There is no doubt that the insolvent companies have a substantial obstacle to overcome. *As the insolvent companies have not had*

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> *the opportunity to put forth this proposal, it is impossible to make the final determination.* In *Triangle Drugs Inc.* Farley J. had the proposal. Well over one-half of the secured [sic; in reality unsecured] creditors indicated they would not vote for the proposal. As such, he then terminated the proposal. We have not reached that stage in this case. The insolvent companies should have the opportunity of putting forth the proposal.

[emphasis added]

[9] However this analysis does not seem to address the test involved. With respect I do not see this logical aspect as coming into play in s. 50.4(11)(*c*) which reads:

> The court may, on application by... a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8)... if the court is satisfied that
>
> ...
>
> (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> ...
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period had expired.

It seems to me that clause (*c*) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when one considers that the court need only be satisfied that "the insolvent person will not *likely* be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors..." (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

[10] Skyview of course also has the option of proceeding under s. 69.4 BIA which provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (*a*) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (*b*) that it is equitable on other grounds to make such a declaration.

[11] Is Skyview entitled to the benefit of s. 69.4(a) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one – i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Chamberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of $450,000 and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no erosion of Skyview's position by, say, getting a cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

[12] I note that Cumberland does not oppose Skyview's request for an interim receiver. But for my conclusion that Skyview succeeds in its second relief request (to have the 30 day period in which to file a proposal terminated) and the ancillary third relief request of substitution of Farber for Doane as trustee, I would have granted the fourth relief request of appointing Farber as interim receiver. I would also award Skyview costs of $600 payable out of the estate of Cumberland from the proceeds first realized.

Order accordingly.

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Limitation - Sec. 69.1(3)

(3) A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the proposal and could be subject to a demand under

(i) subsection 224(1.2) of the Income Tax Act,

(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under

(i) subsection 224(1.2) of the Income Tax Act,

(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Limitation - Sec. 69.1(4)

(4) If, by virtue of subsection 69(3), the stay provided by paragraph 69(1)(c) or (d) does not apply or terminates, the stay provided by paragraph (1)(c) or (d) of this section does not apply.

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Secured creditors to whom proposal not made - Sec. 69.1(5)
(5) Subject to sections 79 and 127 to 135 and subsection 248(1), the filing of a proposal under subsection 62(1) does not prevent a secured creditor to whom the proposal has not been made in respect of a particular security from realizing or otherwise dealing with that security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

Where secured creditors vote against proposal - Sec. 69.1(6)
(6) Subject to sections 79 and 127 to 135 and subsection 248(1), where secured creditors holding a particular class of secured claim vote for the refusal of a proposal, a secured creditor holding a secured claim of that class may henceforth realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.
1992, c. 27, s. 36;
1994, c. 26, s. 8(E);
1997, c. 12, s. 63;
2000, c. 30, s. 146;
2005, c. 3, s. 13, c. 47, s. 61;
2007, c. 36, s. 35;
2009, c. 33, s. 24;
2012, c. 31, s. 417.

Stay of proceedings — consumer proposals - Sec. 69.2
69.2 (1) Subject to subsections (2) to (4) and sections 69.4 and 69.5, on the filing of a consumer proposal under subsection 66.13(2) or of an amendment to a consumer proposal under subsection 66.37(1) in respect of a consumer debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy until

(a) the consumer proposal or the amended consumer proposal, as the case may be, has been withdrawn, refused, annulled or deemed annulled; or
(b) the administrator has been discharged.

Exception - Sec. 69.2(2)
(2) Subsection (1) does not apply where the consumer proposal, other than an amendment to a consumer proposal referred to in section 66.37, is filed within six months after the filing of a previous consumer proposal in respect of the same debtor.

Idem - Sec. 69.2(3)
(3) Subsection (1) does not apply where an amendment to a consumer proposal is filed within six months after the filing of a previous amendment to the same consumer proposal.

Secured creditors - Sec. 69.2(4)
(4) Subject to sections 79 and 127 to 135 and subsection 248(1), the filing of a consumer proposal under subsection 66.13(2) does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall

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not postpone the right of the secured creditor to realize or otherwise deal with his security, except as follows:

(a) in the case of a security for a debt that is due at the date of the approval or deemed approval of the consumer proposal or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and

(b) in the case of a security for a debt that does not become due until more than six months after the date of the approval or deemed approval of the consumer proposal, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or act, or law, creating the security.

Exception - Sec. 69.2(5)

(5) No order may be made under subsection (4) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.

1992, c. 27, s. 36;
1997, c. 12, s. 64;
2004, c. 25, s. 43(E);
2007, c. 29, s. 95.

Stays of proceedings — bankruptcies - Sec. 69.3

69.3 (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

End of stay - Sec. 69.3(1.1)

(1.1) Subsection (1) ceases to apply in respect of a creditor on the day on which the trustee is discharged.

Secured creditors - Sec. 69.3(2)

(2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his or her security, except as follows:

(a) in the case of a security for a debt that is due at the date the bankrupt became bankrupt or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and

(b) in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for

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more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.

Ronald (Bankrupt), Re, 2008 MBCA 104 (CanLII) - Unrealized Government program Funds as "Property" Available to Secured Creditors?

Date:	2008-09-16
Docket:	AI 07-30-06766
Parallel citations:	[2008] 11 WWR 592; 47 CBR (5th) 214; 231 Man R (2d) 87
URL:	http://canlii.ca/t/20rt1
Citation:	Ronald (Bankrupt), Re, 2008 MBCA 104 (CanLII), <http://canlii.ca/t/20rt1> retrieved on 2013-09-13
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Citation: Ronald (Bankrupt), Re, 2008 MBCA 104 Date: 20080916
Docket: AI 07-30-06766

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice Martin H. Freedman
Mr. Justice Richard J. Chartier

B E T W E E N:

	)	***R. W. Schwartz***
	)	*for the Appellant*
CARGILL LIMITED and CANADIAN IMPERIAL BANK OF COMMERCE	)	***D. R. M. Jackson***
	)	*for the Respondents*
(Appellants) Respondents	)	
	)	***B. R. Mayes***
- and -	)	*for the Intervener*
	)	*the Executrix of the*
MEYERS NORRIS PENNY LIMITED, TRUSTEE OF THE ESTATE IN BANKRUPTCY OF ROBERT GLENN	)	*Estate of Robert Glenn Ronald*
RONALD	)	*Appeal heard:*
	)	***April 11, 2008***
(Respondent) Appellant	)	
	)	*Judgment delivered:*
	)	***September 16, 2008***

FREEDMAN J.A.
OVERVIEW

1 This appeal involves a contest between a trustee in bankruptcy, two secured creditors of the now deceased bankrupt, and the executrix (the Executrix) of his legal estate. The subject matter of the contest

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is money in the possession of the Trustee in Bankruptcy, paid to it pursuant to the Canadian Agricultural Income Stabilization Program (CAIS), a federal government assistance program designed to help farmers.

FACTS

2 **Robert Glenn Ronald (Ronald) farmed in south central Manitoba. In July 2002, he executed a security agreement pursuant to which he granted to Canadian Imperial Bank of Commerce (CIBC) a security interest in all his present and after-acquired undertaking and personal property, including receivables (defined to include all debts, claims and choses in action), intangibles and money. In April 2004, he executed a similar security agreement with Cargill Limited (Cargill), pursuant to which he granted Cargill a similar interest in similar property. Each of CIBC and Cargill (the Creditors) duly perfected its respective security interests under *The Personal Property Security Act*, C.C.S.M., c. P35.**

3 **Ronald made an assignment in bankruptcy under the *Bankruptcy and Insolvency Act* (the *Act*) in December 2004. He designated Meyers Norris Penny Limited (the Trustee) as his trustee in bankruptcy. At some time afterwards, according to the evidence of the Trustee, he told the Trustee that "he was participating in the CAIS Program, but that he had not completed an application package for 2004." In May 2005, the Trustee made an application under CAIS.**

4 **Ronald had been ill and died in August 2005. In October 2005, CAIS advised the Trustee that its application had been accepted and that a payment (the CAIS Money) of over $159,000 would be made. Such a payment was, in fact, soon made by cheque to the Trustee. It appears to be undisputed that the payment was entirely from federal government funds, and did not include any return of moneys that might have been paid into the program by Ronald. The Creditors, acting together, advanced a claim to the CAIS Money, claiming priority under their security agreements. The Trustee rejected their claims.**

JUDICIAL PROCEEDINGS

5 **The matter came before the Registrar in Bankruptcy. He decided that the CAIS Money did not constitute "property" under the *Act*. Since it was not "property" under the *Act*, the Trustee had no claim to it. For the same reason, the security interests of the Creditors did not attach to it. That left the legal estate of the bankrupt (which had not been represented at the hearing before the Registrar) as the entity entitled to the CAIS Money. Both the Trustee and the Creditors appealed the Registrar's decision to that effect.**

6 The appeal was heard by a Queen's Bench judge. The Executrix of the legal estate of the bankrupt was an intervener, and was represented by counsel, as were the Trustee and the Creditors. In a lengthy decision, the judge allowed the appeal in most respects. His conclusions may be set out in three categories. The first is findings regarding which there is no appeal by the Trustee or the Creditors, although the Executrix, also granted intervener status in this court, raises an issue about such findings. The second is findings which the Trustee appeals. The third is findings which the Creditors appeal.

7 The judge's conclusions which neither the Trustee nor the Creditors appeal are:

1. contrary to the decision of the Registrar, the CAIS Money was "property" under the *Act*. The Executrix argues this issue was wrongly decided by the judge; and
2. the CAIS Money was, therefore, part of Ronald's "total income" for the purposes of s. 68 of the *Act*. The Executrix says that before anything from this source is paid to creditors, the needs of Ronald's family must be taken into account. This issue is related to two that follow, set out in Nos. 8 and 9 below.

8 The findings appealed by the Trustee are:

3. the two security agreements held by the Creditors constituted valid equitable assignments in their favour;
4. once the CAIS Money was paid to the Trustee, the Creditors were entitled to enforce their rights under the security agreements against the Trustee;
5. such enforcement would be in priority to the unsecured creditors of the bankrupt regarding the balance of the CAIS Money; and
6. the CAIS Handbook does not have the authority of a statutory enactment.

9 The Creditors appeal the judge's findings that:

7. the Creditors are precluded by s. 67 of the *Financial Administration Act* (the *FAA*) from having a security interest that attaches to the CAIS Money;
8. the Creditors' security interests do not attach to the CAIS Money until after the application of s. 68 of the *Act*; and
9. the Creditors' security interests attach only to the "surplus income" component of the CAIS Money after the application of s. 68 of the *Act*.

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10 Rather than now setting out a summary of the judge's reasons, with which, for the most part, I agree, it will be preferable to refer to the reasons at appropriate places in this judgment.

THE LEGISLATION

11 Several statutes were referred to in the written and oral arguments. Of those, the only ones that are necessary to refer to in this decision are the *Act*, the *FAA* and the *Farm Income Protection Act* (the *FIPA*).

12 The provisions of those three statutes, as they were at the date of bankruptcy, that will be referred to below are:

(1) The *Act*:

Definitions

2. In this Act,

. . . . .

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

. . . . .

Property of bankrupt

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

. . . . .

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Directives re standard of living factors

68. (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

Interpretation

(2) For the purposes of this section,

(*a*) "total income" referred to in subsection (1) includes, notwithstanding paragraphs 67(1)(*b*) and (*b*.1), all revenues of a bankrupt of whatever nature or source; and

(*b*) a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1)(*b*) and (*b*.1).

Trustee to fix amount to be paid

(3) The trustee shall

(*a*) having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;

(*b*) inform the official receiver in writing of the amount fixed under paragraph (*a*); and

(*c*) take reasonable measures to ensure that the bankrupt complies with the requirement to pay.

Assignment of wages

68.1 (1) An assignment of existing or future wages made by a debtor before the debtor became bankrupt is of no effect in respect of wages earned after the bankruptcy.

Assignment of book debts

(2) An assignment of existing or future amounts receivable as payment for or commission or professional fees in respect of services rendered made by a debtor who is a natural person before the debtor became bankrupt is of no effect in respect of such amounts earned or generated after the bankruptcy.

Stay of proceedings – bankruptcy

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69.3 (1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the bankruptcy of any debtor, **no creditor has any remedy against the debtor or the debtor's property, or may commence or continue** any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

Secured creditors

(2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, ...

Vesting of property in trustee

71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

Priority of claims

136.(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

. . . . .

[emphasis added]

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(2) The *FAA*:

Definitions

66. In this Part,

. . . . .

"Crown debt" means any existing or future debt due or becoming due by the Crown, and any other chose in action in respect of which there is a right of recovery enforceable by action against the Crown;

. . . . .

General prohibition

67. Except as provided in this Act or any other Act of Parliament,

(a) a Crown debt is not assignable; and

(b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

Limitation of application of this Part

70. This Part does not apply

(*a*) to any negotiable instrument[.]

[emphasis added]

(3) The *FIPA*:

Definitions

2. In this Act,

. . . . .

"net income stabilization account program" means a program under which

(a) a participating producer elects to contribute to an account established pursuant to an agreement and to which Canada and the provinces that are parties to the agreement contribute, and

(b) that enables payments to be made to that producer from that account on terms and conditions set out in the agreement;

. . . . .

Governor in Council authorization

4. (1) The Governor in Council may, by order, authorize the Minister to enter into an agreement with one or more provinces to provide for the establishment of any of the following programs:

(*a*) a net income stabilization account program;

. . . . .

Elements to be contained in all agreements

5. (1) An agreement shall provide for the required elements of each program to be established under the agreement, including, without limiting the generality of the foregoing, any elements that may be prescribed and the following required elements:

. . . . .

(*e*) the circumstances in which and the conditions under which a payment will be made to a producer or group of producers, the method of determining the amount of a payment, and the manner in which the payment will be made;

. . . . .

CAIS

13 Over the years there have been many government programs, both federal and provincial, designed to aid and assist farmers. CAIS was the current incarnation at the material times (it has since been replaced by another program). It was intended to supplement shortfalls in farmers' incomes. There was no specific legislation establishing CAIS; rather, it was created under the aegis of the *FIPA*. The province had enacted parallel enabling legislation (*The Farm Income Assurance Plans Act*, C.C.S.M., c. F30) and the necessary agreements were entered into for the establishment of CAIS, which was administered by the federal government in this province.

14 CAIS was a "net income stabilization account program," as defined in s. 2 of the *FIPA*. A very detailed "Program Handbook" (the Handbook) was created and published to facilitate the delivery of services under CAIS. Among its provisions are the following:

3.2.4 BANKRUPTCY

An individual or entity that is in the state of bankruptcy in the program year may participate through the trustee in bankruptcy. ....

5.4 TREATMENT OF CAIS PROGRAM PAYMENTS

Based on CRA tax guidelines:

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- o Withdrawals from your CAIS program account are not taxable;
- o Government contributions paid to you are taxable in the year the cheque is dated;
- o Payment of government contributions must be reported as farming income for tax purposes;
- o The CAIS Program Administration will issue an *AGR-1 Supplementary – Statement of Farm Support Payments* tax information slip for taxable benefits over $100.

The government contributions received from the CAIS program cannot be assigned, deferred (for income tax purposes), or otherwise encumbered.

7.4 NO LEGAL EXEMPTIONS

Accounts will be subject to the operation of laws relating to estates, bankruptcies, separations, and divorces.

ISSUES ON APPEAL

15 **The parties raised a number of issues on appeal. They may be conveniently grouped, and analyzed, in much the same manner as was done by the judge, and in the course of the analysis all the issues of relevance will be addressed. The matters for consideration are:**

1. Is the CAIS Money "property" under the *Act*?;

2. What is the relevance, if any, of the provisions of the *FAA*, and in particular s. 67, restricting assignments of Crown debts?; and

3. How does s. 68 of the *Act*, relating to the "total income" of a bankrupt, apply in this case, and who is entitled to the CAIS Money?

DECISION

1. Is the CAIS Money "property" under the *Act*?

16 The judge's decision on this issue that the CAIS Money did constitute "property" under the *Act* reflected the position argued before him by both the Trustee and the Creditors. It is challenged before us only by the Executrix. She relies mainly on the reasoning in the Registrar's decision, and on the decision of this court in *Collins (Keith G.) Ltd. (Trustee In Bankruptcy Of Stocks Estate) v. Director, Veterans' Land Act and Stocks (Bankrupt)* reflex, (1987), 46 Man.R. (2d) 96.

17 The Registrar had found that the CAIS Money was not "property," and the result was that neither the Trustee nor the Creditors could claim an interest in it. He based his conclusion on several factors 2006 MBQB 262 (CanLII), (2006 MBQB 262, 210 Man.R. (2d) 93 at para. 62). In rejecting the Registrar's analysis, the judge said that one of the considerations that appeared to have influenced the Registrar was that there was no contractual relationship between Ronald and CAIS and that Ronald had no right to compel payment of the CAIS Money 2007 MBQB 102 (CanLII), (2007 MBQB 102, 216 Man.R. (2d) 138 at para. 13). The judge also referred to the Registrar's findings of a lack of certainty, inherent in the CAIS program, about whether an application would actually be approved and funds paid.

18 The definition of "property" in s. 2 of the *Act* (see para. 12 (1) above) is extremely broad (see *Marzetti v. Marzetti*, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765 at 783), although it will not capture every interest. For example, as the Creditors pointed out in their factum:

> ... [T]here are some specific causes of action which are so personal to the bankrupt that they do not constitute "property" which would otherwise flow to the Trustee .... In particular, damage claims for mental distress, loss of reputation and punitive damages: see *Holley v. Gifford Smith* (1986), 59 C.B.R. (N.S.) 17 (Ont. C.A.) ....

19 Nevertheless, unless there is some governing provision to the contrary in the CAIS program, or some provision in the *Act* pointing in a different direction, the breadth of the statutory definition is in my view clearly sufficient to capture the right of Ronald to participate in that program, and equally to capture the CAIS Money once paid to the Trustee.

20 The Registrar relied on the decision of the Nova Scotia Court of Appeal in *Saulnier (Receiver of) v. Saulnier*, 2006 NSCA 91 (CanLII), 2006 NSCA 91, 22 C.B.R. (5th) 38 (leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 351 (QL)), a case concerning fishing licences. As was argued before us by the Creditors, that decision is more supportive of their position (and the Trustee's) on this issue than the Executrix's. The court found (see paras. 36 and 55) that while fishing licences were, by statute, property of the Crown and did not vest in the trustee in bankruptcy, the licensee had a right to apply for a renewal and resist an arbitrary denial of a renewal, and that right was "property" passing to the trustee.

21 I agree with the judge that while a farmer might not be able to compel payment under CAIS (not at issue here), nevertheless the undisputed right of a farmer to participate in CAIS constitutes a "property" interest. In

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Marzetti, Iacobucci J. for the Supreme Court said that even if a taxpayer who overpays his taxes has no right to compel a refund prior to filing a tax return, he has "a future and contingent interest" (at p. 783) in the refund. In my opinion, that phrase describes the nature of Ronald's right, prior to his assignment in bankruptcy, in any payments that might be made under CAIS pursuant to an application that he (or the Trustee) might make in the future. That right to receive payment, should any be made, vested in the Trustee on the assignment. That right was a "property" interest.

22 In this respect, I find useful the analysis of Barkman J. in *Portage Credit Union Ltd. v. 62031 Manitoba Ltd. et al. (No. 2)* reflex, (1989), 59 Man.R. (2d) 315 (Q.B.). He was dealing with a farm assistance program where a receiver and manager had become involved. He concluded that a security agreement with similar charging provisions was broad enough in scope to attach *ex gratia* government payments. He said (at para. 9):

> .... The program specified who would be eligible producers and that payments will be made only to actual producers. It is clear from the evidence that some of the defendants qualified as eligible producers and therefore became entitled to a proportionate share of the one billion dollar grant. I am satisfied that some of the defendants became so entitled. Whether they could sue the federal government for their entitlement under the program or not, to my mind is of no consequence in deciding whether the payments are a gift. Because they became entitled to payment under the said program they acquired an interest in the said fund. This interest in the said fund, after the defendants qualified or became eligible under the program became part of "the debtor's undertaking and all its business, property and assets of whatever nature and kind, both present and future ..." (Exhibit C affidavit of Richard W.J. Schmuelgen sworn January 20, 1989). These payments then are a future asset referred to in the security agreement. The initial payments were paid to the solicitor for the defendants in accordance with the assignment submitted to the Department of Agriculture. The final payment is retained pending a final judicial decision as to who is entitled to these funds.

23 In *Kallenberger v. Beck (Trustee of)*, 2005 ABQB 895 (CanLII), 2005 ABQB 895, 18 C.B.R. (5th) 113, LoVecchio J. found that "[t]here is little doubt that the CAIS payment from the Federal Government received by Mr. Beck is 'money' so it must be seen as comprising property of Mr. Beck after its receipt by him" (at para. 14). *Beck* and *Pettersen, Re*, 2006 ABQB 792 (CanLII), 2006 ABQB 792, 26 C.B.R. (5th) 129, appear to be the only reported bankruptcy decisions involving the CAIS program, apart from the one under appeal. Neither *Beck* nor *Pettersen* dealt with the rights of secured creditors, and they are of little help here.

24 This court's decision in *Stocks* does not alter the conclusion that the CAIS Money is "property." That decision involved an agreement of sale under the *Veterans' Land Act*. The bankrupt had not yet fully paid for the land and until then he was a tenant on the land. The court found on the basis of the applicable legislation that any assignment of any rights of any kind that he might have in the land was completely prohibited, and that this extended to an assignment in bankruptcy. Whatever rights he might have did not constitute "property" within the meaning of the *Act* (as it then was) since he had no interest in the land before full payment for it was made, and that had not happened. The decision rests, as the court was at pains to point out, on the unique provisions of the legislation. The case has no bearing here.

25 The Executrix argued that the *FIPA* is "long on language" to enable the federal government to devise measures to assist agricultural producers, but "short on the specific details" of those measures. Thus, she said, the Handbook, which, among other matters, states that contributions received from CAIS cannot be assigned, should be given considerable weight. In my view, the appropriate characterization of the Handbook was well described by the Federal Court of Appeal in *Sander Holdings Ltd. et al. v. Canada (Attorney General)*, 2005 FCA 9 (CanLII), 2005 FCA 9, 329 N.R. 214, when assessing the nature of guidelines under NISA (Net Income Stabilization Account Program), one of the predecessors of CAIS, also established pursuant to the *FIPA*. The court said (at para. 46):

> .... [T]his argument implies the guidelines have the status of legal norm, which they do not. They are not more than guidance, for officers, with the intent of seeking a reasonable measure of consistency in the exercise of discretion. That does not establish the guidelines as equivalent to law; ....

26 The judge here correctly found (at para. 25) that the CAIS Handbook cannot restrict the rights of the Creditors in this instance, as the Handbook does not have the force of law.

27 As is explained clearly by C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Toronto: Carswell, 1995) at 84ff, exemptions against execution are primarily creatures of statute. I agree with counsel for the Creditors when he argued that "the proceeds of [the CAIS program] will be exempt or incapable of being the subject of a security interest only where ... legislation expressly states it to be so." See *Beer (Bankrupt), Re* reflex, (1988), 53

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Man.R. (2d) 200 at paras. 29-30 (Q.B.). There is nothing in the *FIPA* that suggests any limitation on the assignability, whether by bankruptcy or otherwise, of the right to participate in the CAIS program.

28 The judge concluded on this point as follows (at para. 28):

> I have come to the conclusion that proceeds paid to a farmer pursuant to the CAIS program do constitute property within the definition of [the *Act*]. The right to participate in the CAIS program is incidental to the bankrupt's business and undertaking as a farmer. As such there exists the right to make application for payment under the CAIS program in any year in which the bankrupt qualifies. The right to participate in the program represents a future contingent interest in CAIS program funding. The Trustee's right to participate in the CAIS program is a power in respect of property as might have been exercised by the bankrupt on his own behalf. As such any payments made under the program fall within the definition of property under [the *Act*].

29 I fully agree, and find no basis to sustain the argument of the Executrix. The CAIS Money is "property" under the *Act*.

2. The *FAA*, and s. 67

30 The Trustee argued that s. 67 of the *FAA* (see para. 12(2) above), which provides that "a Crown debt is not assignable," meant that the Creditors' security agreements could not effectively create a security interest in the CAIS Money. In support of this position it relied on *Marzetti*. In that case, the bankrupt had executed an "Agreement Letter" in favour of his bankruptcy trustee authorizing tax refunds to be sent to the trustee for distribution to creditors.

31 Iacobucci J. for the Supreme Court said (at pp. 802-3):

> ... [T]he Agreement Letter is rendered ineffective by s. 67 of the *Financial Administration Act*. Section 67 provides, in part, that "[e]xcept as provided in this Act or any other Act of Parliament ... a Crown debt is not assignable". The expression "Crown debt" is defined in s. 66 to include not only existing debts, but also future debts "due or becoming due". Marzetti did not obtain an accrued legal debt in respect of his post-bankruptcy income tax refund until his income tax return was filed, as I have already mentioned. But his interest in that return can legitimately be described as an interest in a future Crown debt becoming due.
>
> This Crown-debt characterization means that the *Financial Administration Act* operates to prohibit assignment of an income tax refund, due or becoming due from the Crown, unless assignment is permitted by that Act or another "Act of Parliament". There is no question that the *Financial Administration Act* fails to permit such assignment, and no express authorization appears in any other federal statute.

Moreover, Iacobucci J. said (at p. 805):

> .... In my view, s. 67(*b*) amplifies the broad prohibition apparent in s. 67(*a*), so that a purported assignment of a Crown debt is rendered absolutely ineffective, as between debtor and creditor, and as between assignor and assignee.

32 There are important distinctions between the facts in *Marzetti* and this case. One such distinguishing characteristic is that in *Marzetti*, at a point in time in the tax refund process, the taxpayer would have a legal and enforceable right to his tax refund. There would exist a "Crown debt," as referred to in s. 67 of the *FAA*. In the present situation, the right to apply for funds and to participate in the CAIS program does not automatically confer a legal and enforceable right to any funds. Even if a farmer's application is approved, it is by no means clear that such approval results in a right to compel payment of what is essentially a discretionary grant.

33 Section 67 only extends to a "Crown debt," a term defined in s. 66 as "any existing or future debt ... and any other chose in action in respect of which there is a right of recovery enforceable by action against the Crown." I think the Creditors have accurately captured the essence of the CAIS program when they describe funds paid under the program as being "in the nature of a gift or subsidy." This was also the expressed view of the Registrar, with whom on this point I agree. He said (at para. 66) that there was no right of action against the Crown for the benefit of a CAIS participant.

34 On this view of the matter, s. 67, which only applies to debts, has no application at all. But, even if it could apply in some manner, and even if the assignment by Ronald of any property interest in the CAIS program was ineffective against not only the Crown but also the Trustee (a result supported by the dicta of Iacobucci J. at pp. 802-3 of *Marzetti* (see para. 31 above)), any such ineffectiveness, which would necessarily depend upon the interest in question being a "Crown debt," would cease once such debt was paid and the CAIS Money was received by the Trustee. On the most generous view of the situation, once the CAIS Money was paid and received, there could no longer be an extant debt. Since the CAIS Money when received was "property" in the hands of the Trustee, it was then (if not before) captured by the security agreements.

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35 Section 67 does not nullify the security agreements in question, nor, in my view, does it purport to do so. They are still valid and subsisting instruments, creating rights and responsibilities in the parties to them. See also the comments of McLellan J. in *Rendamax/G.P. Industries Ltd. (Bankrupt), Re* reflex, (1994), 119 Sask.R. 121 at para. 19 (Q.B.) and of Brenner C.J.S.C. in *Fontaine v. AG Canada*, 2007 BCSC 1841 (CanLII), 2007 BCSC 1841, [2008] 4 W.W.R. 724 at para. 31.

36 As well, s. 70 of the *FAA* states, in effect, that s. 67 does not apply to any negotiable instrument, a term defined in s. 2 of the *FAA* to include "cheque." Section 2 also defines "money" to include "negotiable instruments." Taken together, these provisions are consistent with my conclusion that once the CAIS Money was paid to the Trustee, any possible *FAA*-imposed suspension of the enforcement rights of the Creditors regarding those funds had been lifted.

3. Section 68 of the *Act*, the "total income" of a bankrupt and entitlement to the CAIS Money

37 The judge found that the CAIS Money was "a replacement or substitute for income" (at para. 44) for Ronald. That conclusion has ample support in the authorities (see, e.g., *North 40 Farms (Bankrupt), Re,* 2002 MBQB 138 (CanLII), 2002 MBQB 138, 164 Man.R. (2d) 44, *Beatch, Re*, 2005 SKQB 3 (CanLII), 2005 SKQB 3, 7 C.B.R. (5th) 41 and *Beck*) and it is not challenged by the Trustee or the Creditors. He found that the CAIS Money was part of the "total income" of the bankrupt under s. 68 of the *Act* (see para. 12(1) above), and that s. 68 was the governing provision relating to entitlement to the CAIS Money. It is those findings that are attacked by the Creditors on appeal.

38 The judge said that *Marzetti* was the guiding case on s. 68. The Supreme Court had said (at p. 794):

> To summarize briefly, it is my opinion that the language of s. 68, the inferred purpose of that provision, and the decision of this Court in *Vachon*, [1985 CanLII 12 (SCC), [1985] 2 S.C.R. 417], all support the conclusion that s. 68 is a substantive provision, one which is intended to operate as a complete code in respect of a bankrupt's salary, wages, or other remuneration. These forms of property cannot fall within s. 67(*c*) of the *Bankruptcy Act* as a bankrupt's after-acquired "property", and they cannot be considered "property of a bankrupt divisible among his creditors" for the purposes of s. 67. They do not vest in the trustee through the simple operation of law.

39 The relevant provisions of the *Act* have been amended since *Marzetti*, but it has been held by the Ontario Court of Appeal that the effect is unchanged (see *Landry, Re*, 2000 CanLII 16846 (ON CA), (2000), 21 C.B.R. (4th) 58 at para. 30).

40 Against this background the judge held that "it is only after the requirements of s. 68 of [the *Act*] have been met that the equitable assignment of Cargill and CIBC can attach the CAIS proceeds" (at para. 54). This meant that the CAIS Money was only available to creditors of the bankrupt to the extent that the CAIS Money exceeded what was necessary for the bankrupt to maintain a reasonable standard of living.

41 In making this finding, it is my view, with respect, that the judge erred. It is important to keep in mind that, as argued here by the Creditors, "the rights of secured creditors are dealt with outside the confines" of the *Act*, except if there is specific statutory language to the contrary. This is effectively explained in The Honourable L. W. Houlden, The Honourable Geoffrey B. Morawetz& Dr. Janis P. Sarra, *The 2008 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2007) at 630: "Where a debtor has made an assignment ... the policy of the *Act* is not to interfere with secured creditors except insofar as may be necessary to protect the estate as to any surplus in the assets covered by the security: ...." Once the CAIS Money was in the hands of the Trustee, it was presumptively captured by the security agreements, unless some statutory or other governing provision clearly negated that result.

42 Section 68 is intended to assist the trustee in accessing the bankrupt's wages for the benefit of the estate's creditors; aside from s. 68.1, there is no indication in the legislation that s. 68 was intended to alter the position of secured creditors *vis-à-vis* the bankrupt. Section 69.3(2) states that the position of secured creditors is not altered by the bankruptcy of the debtor and ss. 71 and 136(1) confirm the priority granted to secured creditors by the bankruptcy regime. It is notable that s. 68.1 is limited in its application to assignments of existing or future wages, commissions or professional fees. It was not argued here that s. 68.1 could be applicable.

43 *Marzetti* did not involve the rights of a secured creditor. None of the other cases cited in relation to this issue involved the rights of secured creditors. Section 68 of the *Act* does not limit or restrict a secured creditor's interest in a bankrupt's assets which, by that section, are characterized as "total income." The Trustee is, of course, limited and restricted by the provisions of s. 68, and it must apply distributable funds in accordance with that section, but funds in the Trustee's hands to which a secured creditor has a supervening right cannot fall within that category.

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44 In my opinion, the law is clear that, unless otherwise expressly provided in the *Act* or another governing provision, to quote again from Houlden, Morawetz & Sarra, "secured creditors may ignore the bankruptcy and deal with their security in the usual manner" (at p. 630) (*Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061). This is so even though the monies in question have been realized through the efforts of the Trustee.

45 The general scheme of distribution under the *Act* (s. 136(1)) is stated to be "[s]ubject to the rights of secured creditors." Moreover, while there are a few sections in the *Act* which provide that particular provisions apply to secured creditors (see, e.g., s. 69.3(2), among others), none have been identified here that could defeat the present claims of the Creditors.

46 I will add that, in my opinion, Menzies J. went a little too far in *Lintott v. Bank of Montreal*, 2004 MBQB 214 (CanLII), 2004 MBQB 214, 188 Man.R. (2d) 228, when he said that "[s]ection 68 is a complete code for determining what if any portion of a bankrupt's 'total income' will be made available for distribution among creditors whether secured or not" (at para. 25). As indicated, the rights of secured creditors are not impaired by bankruptcy unless expressly so provided in legislation, and s. 68 does not so provide.

47 To summarize, nothing has been pointed out, in the *Act* or elsewhere, that could adversely affect and limit the rights of the Creditors to claim the CAIS Money under their admittedly valid and perfected security agreements. Absent explicit legislative provisions, such as are found in s. 68.1, the interests of secured creditors prevail over those of a bankruptcy trustee, even with respect to the income of the bankrupt. Since the case at bar does not involve an assignment of wages and is not otherwise affected by s. 68.1, it follows that the Creditors prevail over the Trustee, as s. 68 has no application to them. This is not to say that payments from CAIS may not form part of a bankrupt's "total income" for the purposes of s. 68, but that question does not arise in this case, as s. 68 has no application to the Creditors here.

48 Accordingly, I would hold that the rights and interests of the Creditors by virtue of their security agreements apply to the CAIS Money without reduction as a result of the application of s. 68 of the *Act*, and in this respect I would allow the cross-appeal.

CONCLUSION

49 I would dismiss the appeal of the Trustee, would allow the cross-appeal of the Creditors and would order that the security interests of the Creditors in the CAIS Money under their security agreements have priority over the rights and interests of the Executrix and the Trustee. Before us, all counsel agreed that costs of all parties should be paid out of the CAIS Money, and I would so order.

_____ J.A.

I agree:

_____ J.A.

I agree:

Exception - Sec. 69.3(2.1)

(2.1) No order may be made under subsection (2) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.

(3) [Repealed, 2012, c. 31, s. 418]
1992, c. 27, s. 36;
2005, c. 3, s. 14, c. 47, s. 62;
2007, c. 29, s. 96, c. 36, s. 36;
2012, c. 31, s. 418.

Stay of proceedings — directors - Sec. 69.31

69.31 (1) Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are

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under any law liable in their capacity as directors for the payment of such obligations, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.

Exception - Sec. 69.31(2)
(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the corporation's obligations or an action seeking injunctive relief against a director in relation to the corporation.

Resignation or removal of directors - Sec. 69.31(3)
(3) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this section.
1997, c. 12, s. 65.

Court may declare that stays, etc., cease - Sec. 69.4
69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

1992, c. 27, s. 36;
1997, c. 12, s. 65.

Ma v. Toronto-Dominion Bank, 2001 CanLII 24076 (ON CA) - Grounds to Lift BIA Stay - Need for Prima facie case

Date:	2001-03-23
Docket:	C34958
Parallel citations:	24 CBR (4th) 68; 143 OAC 52
URL:	http://canlii.ca/t/1fbr1
Citation:	Ma v. Toronto-Dominion Bank, 2001 CanLII 24076 (ON CA), <http://canlii.ca/t/1fbr1> retrieved on 2013-08-16
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DATE: 20010404
DOCKET: C34958
COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF JAMES HOI-PANG MA, OF THE CITY OF MISSISSAUGA, IN THE REGIONAL MUNCIPALITY OF PEEL, IN THE PROVINCE OF ONTARIO

RE: JAMES HOI-PANG MA (Bankrupt (Appellant)) and TORONTO DOMINION BANK (Applicant (Respondent))
BEFORE: ABELLA, CHARRON and SHARPE JJ.A.

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COUNSEL: Chi-Kun Shi
For the appellant
Bruce S. Batist
For the respondent
William J. Meyer, Q.C.
For the Trustee in Bankruptcy
HEARD: March 23, 2001

E N D O R S E M E N T

Released orally March 23, 2001

[1] The appellant argues that when considering an application to lift a stay under s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, the applicant is required to establish a *prima facie* case for the proposed action. *Bowles v. Barber* (1985), 60 C.B.R. 311 (Man. C.A.) is cited in support of this proposition. It is argued that to the extent Ontario cases such as *Arrojo Investments v. Cardamone* 1995 CanLII 7376 (ON SC), (1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.) apply a more lenient standard, they are inconsistent with decisions from other provinces.

[2] In our view there is no requirement to establish a *prima facie* case and no inconsistency in the case law. We do not agree that *Bowles v. Barber* imposes a *prima facie* case requirement. More importantly, that requirement is not imposed by the statute. Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* 1995 CanLII 7371 (ON SC), (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court 1996 CanLII 10233 (ON CA), (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):

> **In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings.**

[3] As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

[4] In the case before us, Justice Lane found that the Deputy Registrar was correct in finding that the applicant would suffer sufficient prejudice to justify an order lifting the stay. This finding accords with s. 69.4 and is supported by the record. We see no basis for interfering with his conclusion. The appeal is therefore dismissed with costs.

"R. S. Abella J.A."
"Louise Charron J.A."
"Robert J. Sharpe J.A."

Non-application of certain provisions - Sec. 69.41
69.41 (1) Sections 69 to 69.31 do not apply in respect of a claim referred to in subsection 121(4).

No remedy, etc. - Sec. 69.41(2)
(2) Notwithstanding subsection (1), no creditor with a claim referred to in subsection 121(4) has any remedy, or shall commence or continue any action, execution or other proceeding, against
(a) property of a bankrupt that has vested in the trustee; or
(b) amounts that are payable to the estate of the bankrupt under section 68.
1997, c. 12, s. 65.

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No stay, etc., in certain cases - Sec. 69.42

69.42 Despite anything in this Act, no provision of this Act shall have the effect of staying or restraining, and no order may be made under this Act staying or restraining,

(a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;

(b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the Canada Deposit Insurance Corporation Act; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the Winding-up and Restructuring Act.

2001, c. 9, s. 574.

Provincial legislation - Sec. 69.5

69.5 Except for paragraphs 69(1)(c) and (d) and 69.1(1)(c) and (d), sections 69 to 69.3 do not affect the operation of any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(a) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(b) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of this section, the provision is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the Income Tax Act in respect of a sum referred to in paragraph (a), or as subsection 23(2) of the Canada Pension Plan in respect of a sum referred to in paragraph (b), and in respect of any related interest, penalties or other amounts.

1992, c. 27, s. 36;

2000, c. 30, s. 147.

Meaning of "regulatory body" - Sec. 69.6

69.6 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — sections 69 and 69.1 - Sec. 69.6(2)

(2) Subject to subsection (3), no stay provided by section 69 or 69.1 affects a regulatory body's investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

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Exception - Sec. 69.6(3)
(3) On application by the insolvent person and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable proposal could not be made in respect of the insolvent person if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the stay provided by section 69 or 69.1.

Declaration — enforcement of a payment - Sec. 69.6(4)
(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the insolvent person and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.
2007, c. 36, s. 37.

GENERAL PROVISIONS

Precedence of bankruptcy orders and assignments - Sec. 70
70. (1) Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor.

Canadian Credit Men's Trust Association Ltd. v. Beaver Trucking Ltd., [1959] SCR 311 - Rank of Garnishment vs. Trustee

Date:	1959-01-27
Parallel citations:	1959 CanLII 58 (SCC)
URL:	http://canlii.ca/t/22wn5
Citation:	Canadian Credit Men's Trust Association Ltd. v. Beaver Trucking Ltd., 1959 CanLII 58 (SCC), [1959] SCR 311, <http://canlii.ca/t/22wn5> retrieved on 2013-08-15
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Supreme Court of Canada
Canadian Credit Men's Trust Association Ltd. v. Beaver Trucking Ltd., [1959] S.C.R. 311
Date: 1959-01-27
The Canadian Credit Men's Trust Association Limited as Trustee in Bankruptcy for T. L. Cleary Drilling Company Ltd. (*Defendant*) *Appellant*;
and
Beaver Trucking Limited (*Plaintiff*) *Respondent*;
and
The California Standard Company (*Garnishee*).
1958: November 12, 13; 1959: January 27.

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Present: Locke, Cartwright, Fauteux, Martland and Judson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA.

Bankruptcy—Garnishment—Monies paid into Court—Rights of garnishor and trustee in bankruptcy—Whether garnishor a "secured creditor"— The Bankruptcy Act, R.S.C. 1952, c. 14, ss. 2(r), 41(1), 42(2), 43(2), 86, 95(2).

Section 41(2) of the *Bankruptcy Act* provides that every receiving order and every assignment "takes precedence over all ... garnishments ... except such as have been completely executed by payments to the creditor or his agent, and except also the rights of a secured creditor".

The plaintiff caused to be served a garnishing order upon the garnishee who paid the money into court. The defendant subsequently made a voluntary assignment in bankruptcy, and the trustee in bankruptcy and the plaintiff each claimed the money which was still in court. The trustee's claim was dismissed by a local judge in chambers whose decision was affirmed by a judge of the Court of Queen's Bench. This judgment was in turn affirmed by a majority in the Court of Appeal, which held that the plaintiff was a "secured creditor". The trustee appealed to this Court.

Held: The appeal should be allowed and payment out of the monies in court should be made to the trustee. The plaintiff did not fall within either of the exceptions to s. 41(1) of the *Bankruptcy Act.*

Per Locke J.: The meaning to be assigned to s. 41, as it applies to the present case, is plain. In the clearest terms, it is provided that the assignment shall take precedence over a garnishment, except where such has been completely executed by payment to the creditor or his agent. Here, no such payment was made. If the service of a garnishing order creates an equitable charge upon the debt in favour of the garnishing creditor, and if such a charge falls within the definition of a secured creditor in s. 2(*r*) of the Act, it must be taken that since the rights of garnishing creditors have already been dealt with they are not included in the expression "the rights of a secured creditor" in the concluding words of s. 41(1). *Galbraith v. Grimshaw,* [1910] 1 K.B. 343.

Per Cartwright, Fauteux, Martland and Judson JJ.: The provisions of s. 41(1) are clear, and even a literal interpretation does not lead to the conclusion reached by the majority in the Court of Appeal. The compelling inference is that whoever the secured creditor may be whose rights are excepted from the operation of the section, he is not the attaching or garnisheeing creditor whose position has already been fully dealt with. The intention is to ensure the distribution of the debtor's property in accordance with the Act and not according to the execution procedures mentioned in the section, all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment. It must be concluded, therefore, that judgment creditors who have made use of the execution procedures set out in s. 41(1) are subject to the provisions of the Act unless they have been paid, that they do not come within the class of secured creditors mentioned in the exception, and that they are not secured creditors under the Act as defined in s. 2(*r*).

APPEAL from a judgment of the Court of Appeal for Manitoba1, affirming a judgment of Monnin J. Appeal allowed.

J. S. Lamont, Q.C., and *N. H. Layton,* for the defendant, appellant.

No one appeared for the plaintiff, respondent.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba2, pursuant to leave granted by that Court from its judgment dismissing the appeal taken by the present appellant from an order of Monnin J. by which an appeal from an order of His Honour Judge Buckingham, local judge for the Western Judicial District, was dismissed. The Chief Justice of Manitoba, with whom Schultz J.A. agreed, dissented and would have allowed the appeal.

The facts to be considered in dealing with the matter are as follows:—On November 5, 1956, the respondent commenced an action against T. L. Cleary Drilling Co. Ltd. for the recovery of the sum of $2,282.50 and caused to be served a garnishing order upon the California Standard Company, a debtor of the Cleary company. On February 9, 1957, the garnishee paid into the Court of Queen's Bench at Brandon the sum of $2,282.50. On May 13, 1957, default judgment was signed in the action against the Cleary company for the amount claimed and taxed costs. On June 18, 1957, that company made a voluntary assignment in bankruptcy, in the statutory form, to the Canadian Credit Men's Trust Association Ltd.

On November 18, 1957, the trustee applied for payment out of the amount so paid by the garnishee and which was then in court and, contemporaneously, the present respondent made an application for payment out to it and both motions were by consent heard together by the local judge. By an order dated December 16, 1957, the application by the trustee was dismissed and it was ordered that the amount in court be paid out to the Beaver Trucking Co. Ltd.

Proceedings were stayed on this order, pending an appeal to a judge of the Court of Queen's Bench by the present appellant and, as stated, that appeal was dismissed by Monnin J. on February 28, 1958, in a considered judgment. The reasons for judgment of the majority of the Court of Appeal were delivered by Tritschler J.A.

Section 41 of the *Bankruptcy Act,* R.S.C 1952, c. 14, so far as it is relevant to the present appeal, reads:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment,

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> judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.
>
> (2) Notwithstanding subsection (1), one solicitor's bill of costs, including sheriff's fees and land registration fees, shall be payable to the creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against the property of the bankrupt.

It is in reliance upon the first of these subsections that the trustee claims that the moneys in court should be paid to it for distribution among the creditors. The position taken by the garnishing creditor is that, by reason of the service of the garnishing order upon the California Standard Company in advance of the assignment in bankruptcy, it is a secured creditor within the meaning of that expression in s. 41 and, as such, has priority over the trustee's claim.

The expression "secured creditor" is defined in s. 2(r) of the Act to mean:

> a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable.

By Rule 526 of the Queen's Bench Rules, the Court is empowered in the matter of a claim such as that of the present respondent to make an order that all debts, obligations and liabilities owing, payable or accruing due from any person who is indebted or liable to the debtor shall be attached. A form of the order which may be made appears as form 74 in the Appendix to the Rules. The nature of the order, in so far as it might concern the present matter, does not differ from the orders *nisi* authorized by Order 45, Rule 1 of the Rules of the Supreme Court 1883 in England. That rule authorizes the making of an order that all debts owing or accruing due from a third person to the debtor shall be attached to answer the judgment or order.

I refer to these rules since in certain of the cases decided in Manitoba it has been held that a garnishing creditor is, by virtue of the service of a garnishing order, a secured creditor within the meaning of s. 41(1) of the *Bankruptcy Act, In re Doyle,* (a *bankrupt*)3, and on appeal4, though, as pointed out by Adamson C.J.M., the decision did not turn upon that point.

While, in my opinion, it is unnecessary to decide this question in dealing with the present appeal, I think it should be noted that *Ex parte Joselyne*5, relied upon in coming to the above conclusion, dealt with a bankruptcy matter under the *Bankruptcy Act 1869,* (Imp.). It was there decided that a judgment creditor who before the filing of the bankruptcy petition had obtained a garnishee order *nisi* attaching debts due to the debtor was a secured creditor within the meaning of ss. 12 and 15 of that Act. Neither in the sections referred to nor elsewhere in the Act of 1869 is there any provision such as that portion of s. 41 which expressly states that an assignment takes precedence over all judicial or other attachments and garnishments and, with great respect, I think the decision does not affect the question to be decided here.

In my opinion, the meaning to be assigned to s. 41, as it applies to the present case, is plain. In the clearest terms it is provided that the assignment shall take precedence over a garnishment, except where such has been completely executed by payment to the creditor or his agent. Here, no such payment was made. The moneys were paid into court to the credit of the cause and remain there.

If, as is stated by Farwell L.J. in *Galbraith v. Grimshaw*6, the service of a garnishing order creates an equitable charge upon the debt in favour of the garnishing creditor and, if such a charge falls within the definition of a secured creditor in the *Bankruptcy Act,* it must be taken that, since the rights of garnishing creditors have already been dealt with, they are not included in the expression "the rights of a secured creditor" in the concluding words of the subsection.

If there were ambiguity in the language of the first subsection of s. 41, and I think there is none, it would be necessary for us to construe it in the manner directed by s. 15 of the *Interpretation Act,* R.S.C. 1952, c. 158, and to give to it such interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. The purpose of the *Bankruptcy Act* and of all bankruptcy legislation in Canada and in England is to assure that, in the case of insolvent debtors, their assets shall be divided fairly among their creditors, having due regard to the position of persons such as mortgagees who, having advanced moneys upon the security of assets of the debtor, are to be afforded the rights of secured creditors, and to those claims which are by statute entitled to preference.

Section 86 and those sections immediately following it declare the position of secured creditors and define the extent to which they are entitled to priority. Subject to such rights and to preferences to which other claims such as those of the Crown may be declared to be entitled and the costs and expenses of the trustee, it is the purpose of the Act that the creditors shall rank *pari passu* upon the estate. The construction of the Act contended for by the respondent in the present matter would mean that a creditor sufficiently alert to bring an action and attach moneys owing to a debtor on the brink of insolvency may thereby obtain preference over other creditors who refrain from bringing actions, for the amount of his claim in full and not merely for his costs, as provided by s. 41(2). This, in my opinion, is directly contrary to the intent and

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purpose of the *Bankruptcy Act,* and any such contention should be rejected unless the language of the Act should require it in the clearest terms.

I would allow this appeal with costs against the respondent in the proceedings before the local judge and before Monnin J. and the Court of Appeal. In the circumstances, the trustee's costs of this appeal should be paid out of the moneys paid into court by the garnishee and no order for costs be made against the respondent. The balance remaining in court should be paid to the appellant.

The judgment of Cartwright, Fauteux, Martland and Judson JJ. was delivered by

JUDSON J.:—A judgment creditor and the trustee in bankruptcy of the judgment debtor are in competition here for monies in court paid in pursuant to a garnishee order issued by the judgment creditor. When the bankruptcy occurred the plaintiff already had a default judgment, the money had been paid into court by the garnishee but no move had been made for payment out. When the plaintiff moved after the bankruptcy of the judgment debtor, it was met with a counter-motion by the trustee, who claimed that the bankruptcy had precedence over the attachment under the terms of s. 41 of the *Bankruptcy Act,* R.S.C. 1952, c. 14, subs. (1) of which reads:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

The trustee in bankruptcy is the appellant before this Court from a judgment awarding the money to the judgment creditor. Until the concluding phrase of the section "and except also the rights of a secured creditor", words could not be plainer. The claim of the trustee prevails over that of the judgment creditor under any of the execution procedures mentioned unless there has been payment to the creditor or his agent. It is not sufficient that the fund may have been stopped in the hands of the garnishee or that it may be in court subject to further order or even subject to payment-out on an order already issued. Nor does it matter when the money was attached or paid into court or what the status of the action may have been when bankruptcy supervened. The only question is—has the execution procedure been completed by payment to the creditor or his agent?

In the judgment under appeal, the Court of Appeal7 has held that the section has no such operation because a judgment creditor who has caused a garnishee order to be served is a secured creditor. After specific and clear directions concerning the rights of the garnisheeing creditor and the trustee in bankruptcy, it is held that the section has said nothing because the creditor whose position and rights are defined and limited in the first part of the section is the same creditor who is removed from its scope and put within the exception.

Only the plainest language could compel an interpretation which produces this conclusion and I do not think that this compulsion exists in the present case. With all respect to the majority opinion in the Court of Appeal, I agree with the dissenting opinion expressed by Adamson C.J., that the provisions of the section are clear and that even a literal interpretation does not lead to the conclusion reached by the majority. To me the compelling inference is that whoever the secured creditor may be whose rights are excepted from the operation of the section, he is not the attaching or garnisheeing creditor, whose position has already been fully dealt with. The intention that I find plainly expressed is to ensure the distribution of the debtor's property in accordance with the *Bankruptcy Act* and not according to the execution procedures mentioned in the section, all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment.

There are subsequent sections which carry out this intention and reinforce my conclusion. These sections, also, would be without meaning if the judgment under appeal is correct. Although under s. 41(1) the execution creditor must give way to the trustee in bankruptcy, by the next subsection the one who has first attached by way of garnishment or lodged a writ of execution with the sheriff gets his solicitor's bill of costs paid and this is done in accordance with the priorities established in s. *95*(*g*). Next there is provision in s. 42(2) for delivery to the trustee of any property of the bankrupt under execution or attachment, and finally, by s. 43(2), the trustee is enabled to have himself registered as the owner of any land "free of all the encumbrances or charges mentioned in s. 41(1)".

My conclusion, therefore, is that judgment creditors who have made use of the execution procedures set out in s. 41(1) are subject to the provisions of the *Bankruptcy Act* unless they have been paid, that they do not come within the class of secured creditors mentioned in the exception, and that they are not secured creditors under the *Bankruptcy Act* as defined in s. 2(*r*).

The same conclusion is involved in *Royal Bank of Canada v. Larue*8, which held, affirming a judgment of this Court9, that a judicial hypothec upon the real property of the bankrupt was postponed to an authorized assignment under the *Bankruptcy Act.* When *Larue* was decided, the exception which has given rise to difficulty in the present litigation had already come into the Act, having been enacted by 1921, 11-12 Geo. V., c. 17, s. 10. I cannot find any distinction between

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the present s. 41(1) and the legislation upon which the decision in *Larue* was founded, which would in any way impair the authority of that case. There was no suggestion either in the judgment of this Court or in the reasons of the Privy Council that the exception took the Bank as holder of a judicial hypothec outside the scope of the first part of the section. The result was that the priority of the trustee in bankruptcy, established by the section, attached for all purposes, including distribution of the proceeds according to the priorities established by the *Bankruptcy Act.* The recent decision of the Saskatchewan Court of Appeal in *Re Sklar and Sklar* (*Bankrupt*)10 upon the present s. 41(1) is to the same effect. These two judgments had to do with the position of a judgment creditor who had issued execution against land but under the terms of the section, there is, in my opinion, no possible distinction between the result that must follow from this procedure and procedure by way of attachment or garnishment of debts.

I am also in respectful agreement with Adamson C.J. that there was no authority in the Province of Manitoba which bound the Court of Appeal to hold that a judgment creditor who had served a garnishee order was a secured creditor under the *Bankruptcy Act.* This finding is based upon the judgment in *Kare v. North West Packers Limited et al*11, which was not a bankruptcy case and involved no determination of rights under s. 41(1) of the *Bankruptcy Act.* The contest there was between a garnisheeing creditor and a receiver appointed by a group of bondholders, seeking to enforce a floating charge. The judgment of the Court of Appeal awarded the money to the garnisheeing creditor on the ground that he was a secured creditor under the Queen's Bench rules at the time when the floating charge crystallized.

The next case was *McCurdy Supply Company Limited v. Doyle*12, affirmed without reasons13, which gave priority to a judgment creditor who had garnisheed a mortgage debt over a subsequent assignee of the mortgage. Again, no question concerning the effect of s. 41(1) of the *Bankruptcy Act* was involved but this matter did come up when Doyle went into bankruptcy a short time later. There were then three parties competing for the money, the garnisheeing creditor, the assignee of the mortgage and the trustee in bankruptcy of Doyle; *Re Doyle (A bankrupt): McCurdy Supply Company Ltd.*14 and on appeal15. The mortgage had been assigned for full value prior to bankruptcy and no attack was made on the propriety of that transaction. Therefore, whatever the position of the garnisheeing creditor may have been, whether that of secured creditor or not, there was a much more serious obstacle in the way of the trustee in bankruptcy. There was no property to pass to him because the bankrupt had made a complete assignment of the mortgage prior to bankruptcy. As pointed out by Adamson C.J. in his reasons in the present case, anything said about the position of the garnisheeing creditor was *obiter* and unnecessary to the decision, and the prior assignment of the mortgage was a complete answer to the trustee's claim.

In litigation concerned solely with the position of the garnisheeing creditor under s. 41(1) of the *Bankruptcy Act* it is unnecessary to enquire further into the authority of *Kare v. North West Packers Limited* as a determination of rights between such a creditor and the holder of a floating charge seeking to enforce his security, and although I express no opinion on this matter, these reasons should not be taken as an indirect affirmation of the principle of that decision.

The appeal should be allowed and an order made directing payment out of the monies in court to the trustee in bankruptcy. In the circumstances, the trustee's costs of this appeal should be paid out of the fund and there should be no order for costs against the respondent. In the Courts below the trustee is entitled to an order for costs against the respondent.

Appeal allowed.

Solicitors for the defendant, appellant: Lamont& Layton, Winnipeg.

Solicitor for the plaintiff, respondent: A. B. Rutherford, Virden.

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1 reflex, (1958), 25 W.W.R. 669, 37 C.B.R. 60.
2 reflex, (1958), 25 W.W.R. 669, 37 C.B.R. 60.
3 reflex, (1957), 22 W.W.R. 651, 36 C.B.R. 141.
4 (1958), 23 W.W.R. 661, 36 C.B.R. 134.
5 (1878), 8 Ch. D. 327, 38 L.T. 661.
6 [1910] 1 K.B. 339 at 343.
7 reflex, (1958), 25 W.W.R. 669, 37 C.B.R. 60.
8 [1928] A.C. 187.
9 1926 CanLII 49 (SCC), [1926] S.C.R. 218, 7 C.B.R. 285, 2 D.L.R. 929.
10 reflex, (1958), 26 W.W.R. 529, 15 D.L.R. (2d) 750.
11 (1955), 63 Man. R. 16, 14 W.W.R. (N.S.) 251, 2 D.L.R. 412.
12 (1957), 64 Man. R. 289.
13 (1957), 64 Man. R. 365.

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14 reflex, (1957), 22 W.W.R. 651, 36 C.B.R. 141.
15 (1958), 23 W.W.R. 661, 36 C.B.R. 134.

Costs - Sec. 70(2)
(2) Despite subsection (1), one bill of costs of a barrister or solicitor or, in the Province of Quebec, an advocate, including the executing officer's fees and land registration fees, shall be payable to the creditor who has first attached by way of garnishment or filed with the executing officer an attachment, execution or other process against the property of the bankrupt.
R.S., 1985, c. B-3, s. 70;
1992, c. 27, s. 37;
1997, c. 12, s. 66(F);
2004, c. 25, s. 44;
2005, c. 47, s. 63(E).

Vesting of property in trustee - Sec. 71
71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.
R.S., 1985, c. B-3, s. 71;
1997, c. 12, s. 67;
2004, c. 25, s. 44.

Deloitte & Touche LLP v. Marino, 2004 CanLII 4324 (ON CA) - Trustee Changes her Mind on Realization of Bankrupt's Real Property post her Discharge - Can it Be Realized?

Date:	2004-07-22
Docket:	C40885
Parallel citations:	72 OR (3d) 274; 2 CBR (5th) 290; 189 OAC 14
URL:	http://canlii.ca/t/1hjxl
Citation:	Deloitte & Touche LLP v. Marino, 2004 CanLII 4324 (ON CA), <http://canlii.ca/t/1hjxl> retrieved on 2013-09-13
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Reflex Record	Related decisions, legislation cited and decisions cited

DATE: 20040722

DOCKET: C40885

COURT OF APPEAL FOR ONTARIO

LASKIN, CHARRON and LANG JJ.A.

B E T W E E N:	)	
	)	
DELOITTE & TOUCHE LLP	)	Stuart R. Mackay

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	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
BRADLEY CHARLES MARINO and	)	Christopher A. Lewis
TRACY ANN MARINO	)	for the respondents
	)	
Respondents	)	
	)	
	)	Heard: June 4, 2004

On appeal from the order of Justice Peter B. Hockin of the Superior Court of Justice dated September 25, 2003.

LANG J.A.:

[1] Deloitte & Touche LLP, the trustee in bankruptcy, appeals the dismissal of its motion for possession and directions for the sale of the Marino home and the distribution of the sale proceeds to the Marinos' creditors. **This relief was sought almost five years after the Marinos first went bankrupt. Since declaring bankruptcy, the Marinos, relying on the trustee's assurances, continued to live in the home and expend funds on its upkeep and improvement. When faced with the trustee's motion, the Marinos brought a cross-motion seeking an order vesting the home in their names.**

Issues

1. **What is the standard of review?**
2. **Was the trustee precluded from moving to sell Mrs. Marino's interest in the home by reason of its discharge as her trustee?**
3. **Did the motions judge err in the application of s. 40?**
4. **Is the trustee estopped, or otherwise prohibited in equity, from realizing its interest in the home?**

Relevant Statutory Provisions

[2] The provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the Act") are relevant in the following order, with emphasis added:

> 71.(2) On a receiving order being made or an assignment being filed with an official receiver, **a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property**, **which shall**, subject to this Act and to the rights of secured creditors, forthwith pass to and **vest in the trustee** named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.
>
> 74.(2) **Where a bankrupt is the registered owner** of any land or charge, **the trustee**, on registration of the documents referred to in subsection (1), **is entitled to be registered as owner** of the land or charge free of all encumbrances or charges mentioned in subsection 70(1).
>
> 40.(1) **With the permission of the inspectors, any property of a bankrupt found incapable of realization shall be returned to the bankrupt prior to the trustee's application for discharge.**
>
> (2) **Where a trustee is unable to dispose of any property as provided in this section, the court may make such order as it may consider necessary.**
>
> 41.(10) N**otwithstanding** his **discharge**, **the trustee remains the trustee** of the estate **for** the performance of such **duties** as may be **incidental** to the full administration of the estate.
>
> 37. **Where the bankrupt** or any of the creditors or any other person **is aggrieved by** any act or decision of **the trustee**, **he may apply to the court** and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.
>
> 41.(11) The court, on being satisfied that there are assets that have not been realized or distributed, may, on the application of any interested person, appoint a trustee to complete the administration of the estate of the bankrupt, and the trustee shall be governed by the provisions of this Act, in so far as they are applicable.

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Background

[3] When the Marinos declared bankruptcy in April 1997, Deloitte & Touche LLP ("Deloitte & Touche") became their trustees in bankruptcy. Over the course of the ensuing years, several different employees of Deloitte & Touche worked with the Marinos as the trustee's representative: Mr. Shaw, Mr. Allen, Mr. Sholdice, Mr. Crocker and Mr. Bell. It was the frequent changes in representative, and the change in the representative's position, that led to this litigation about the property.

[4] Upon the Marinos' bankruptcy, pursuant to s. 71(2) of the Act, their home automatically vested in the trustee. At that time, the Marinos valued their home at $499,000, less outstanding mortgages and tax arrears of about $427,000. No issue is taken with those values. **The trustee's first report said that there "may be equity" in the home and, indeed, the inspectors instructed the trustee to register its interest on title, although it did not then proceed to do so.**

[5] The Marinos expected that they would lose their home and began looking for rental accommodation. **Two months after their bankruptcy, in June 1997, Deloitte & Touche (through Mr. Allen) told the Marinos that they could remain in the home and that the trustee would make no claim against the home, as the trustee did not feel it worthwhile to realize on the home.**

[6] In January, 1998, when the Marinos received their absolute discharges, which appeared to discharge them from all debt, Mr. Marino called the trustee (then Mr. Crocker) to confirm the status of the home. He was assured by Mr. Crocker that the trustee was claiming no interest. Mr. Crocker suggested that, to be sure, the Marinos should retain a lawyer, specifically Mr. Crocker's sister, to search the property's title. If that search revealed that the trustee had registered against the property, Mr. Crocker undertook to quitclaim the house back to the Marinos.

[7] In the summer of 1998, the trustee sent Mrs. Marino its Final Statement of Receipts and Disbursements ("Final Statement"). That document stated that there was no equity in the home available for the creditors: this confirmed the Marinos' belief that there was no claim against their home. That year, in reliance on the trustee's statements, the Marinos planned to pay all outstanding mortgage arrears and planned home renovations.

[8] In furtherance of those plans, and after the trustee was automatically discharged with respect to Mrs. Marino in October 1998, the Marinos retained Mr. Crocker's sister, who, after conducting a title search, confirmed that the trustee had not registered against the property. The lawyer told the Marinos that the property was registered in their names so it was unnecessary to prepare a transfer back from Deloitte & Touche.

[9] In June 1999, twenty-six months after the Marinos' bankruptcy, sixteen months after their discharge, and eight months after the trustee's discharge as Mrs. Marino's trustee, the trustee finally registered against the home, pursuant to s.74(2) of the Act. The trustee did not tell the Marinos it had done so. When the trustee applied for its discharge with respect to Mr. Marino on September 2, 1999, it sent a Final Statement that contained a footnote about the registration, but Mr. Marino did not notice that change in the trustee's position, and the trustee did nothing to bring that change in position to his attention.

[10] In mid-2000, another representative of the trustee (Mr. Sholdice) wrote the Marinos asking for information about the house. While acknowledging an apparent lack of equity in the home, Mr. Sholdice cautioned the Marinos that the trustee "would not release the property until we can satisfactorily settle our concerns".

[11] After a further exchange of correspondence, the Marinos heard nothing further until February 2002, when the trustee's then representative (Mr. Bell) initiated correspondence and discussions about the Marinos' purchase of the equity in their home. The Marinos contend that this is when they first became aware that the trustee had registered an interest in the home. Mr. Bell said he was "trying to get the file closed" because he was leaving Deloitte & Touche. This litigation eventually resulted.

[12] It was common ground that, upon the Marinos' bankruptcy, the home vested and remained vested in the trustee (s. 71(2) of the Act). The trustee maintains that this vesting continued after the discharge of both Marinos and after the trustee's discharge with respect to Mrs. Marino, despite the trustee's representation to the Marinos that it was not pursuing any interest in the equity. Any delay by the trustee, it argues, was irrelevant, because the property was vested and remained with the trustee throughout. Had the Marinos taken exception to this, argues the trustee, they had the option of applying to the court for a vesting order under s. 37 of the Act. They did not do so.

[13] The Marinos, on the other hand, take the position that they had relied upon the trustee's representations and, but for those representations, they would not have paid arrears or principal on the mortgages, nor have undertaken the substantial improvements they made to the home.

Reasons of the Motions Judge

[14] The motions judge found as a fact that the trustee had always known there was equity in the property and that, in fairness, "too much time" had passed for the trustee to now advance a claim against that equity (para. 15). The equities, found the trial judge, flowed "in the direction of the Marinos" (para. 18); the trustee's late effort to realize against

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the house was inconsistent with the Act's philosophy of providing bankrupts with a "fresh start". The judge was of the view that had the trustee intended to proceed against the equity, it should have opposed the Marinos' discharges from bankruptcy. In the result, the motions judge concluded that the home was "incapable of realization" within the meaning of s. 40(1) of the Act and ordered the property vested in the Marinos.

The Statutory Scheme

[15] Upon their bankruptcies, when the Marinos' interests vested and remained vested in the trustee, the Marinos were not entitled to the property unless it was released to them by the trustee, or if it was re-vested by court order under either s. 40 or s. 37 of the Act. In other words, some positive act was required to return the property. If that positive act was not forced by the bankrupt, the trustee was required to consider it at the time of application for its discharge.

[16] The requirement to consider the property is set out in s. 40(1); where property is "incapable of realization", the trustee is required to return it to the bankrupt before the trustee applies for discharge: *Thompson v. Coulombe*, [1984] Q.J. No. 11 (C.A.), *Re Zemlak and Deloitte, Haskins& Sells Ltd.* reflex, (1987), 42 D.L.R. (4th) 395 (Sask. C.A.). Alternatively, under s. 40(2), where the trustee is unable to dispose of property the court "may make such order as it may consider necessary". If the trustee takes no action, an "aggrieved" bankrupt has the option of applying to a court and "the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just" (s. 37).

[17] The Marinos were in different positions on this motion, however, because Deloitte & Touche had been discharged as Mrs. Marino's trustee in October 1998, but remained undischarged with respect to Mr. Marino.

Analysis

1. Standard of Review

[18] A judge must be correct in his or her determination of the law. Findings of fact, however, are subject to a less onerous standard of review. Whether made from oral or documentary evidence, findings of fact and inferences drawn from them cannot be overturned absent "palpable and overriding error". Findings of mixed fact and law are also accorded significant deference and, absent legal error or palpable and overriding factual error, are not to be disturbed on appeal: see *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.) and *Housen v. Nikolaisen*, [2003] 2 S.C.R. 235.

2. Did the trustee's discharge as Mrs. Marino's trustee preclude it from moving to sell her interest in the home?

[19] When the trustee was discharged in October 1998, it took no action with respect to Mrs. Marino's interest in the property. It did nothing to contradict its earlier assurance given to Mrs. Marino that it was making no claim against the home and even confirmed that assurance by way of its Final Statement. Accordingly, at the time the trustee applied for discharge from Mrs. Marino's bankruptcy, and at the time it was discharged, it considered her interest to be "incapable of realization". It did not, however, return to her her interest in the property.

[20] After discharge as Mrs. Marino's trustee, Deloitte & Touche continued in its position only for "such duties as may be incidental to the full administration of the estate" (s. 41(10)). If realization of the property was more than "incidental" to the administration of this estate, or if a court was satisfied that assets of the bankrupt remained unrealized or undistributed, the trustee could seek re-appointment as a trustee to complete the estate's administration (s. 41(11)). No such relief was or has been requested.

[21] Absent any application for re-appointment, and even though the property vested in the trustee, the trustee had no authority to deal with it unless such dealing was "incidental" to the administration of Mrs. Marino's estate.

[22] The sale of Mrs. Marino's interest in the home was not, however, merely incidental to the administration of her estate. On the facts, Mrs. Marino's interest in the home was her only asset of any significance: it was her estate. Accordingly, the trustee had no authority to make a claim against Mrs. Marino's interest in the home.

[23] In addition, the principles of estoppel discussed later in these reasons apply equally to Mrs. Marino's interest in the home as I find they do to Mr. Marino's interest.

3. With respect to Mr. Marino's interest, did the motions judge err in the application of s. 40?

[24] The trustee's claim against Mr. Marino's interest is different from its claim against Mrs. Marino's interest because the trustee had not been discharged with respect to Mr. Marino's bankruptcy, although it had applied for discharge. Accordingly, with respect to Mr. Marino's estate, the trustee was not restricted to "incidental" duties, as it was with respect to Mrs. Marino's estate (s. 41(10)).

[25] The issue therefore arises as to whether the motions judge erred in his conclusion that the property was now "incapable of realization" and, for that reason, ordering its re-vesting under s. 40(2).

[26] The plain wording of s. 40(1) addresses realization at the time of the trustee's application for discharge. In June 1997, January 1998, and July 1998, the trustee repeatedly represented to the Marinos that the property was not capable of realization. Subject to the question of promissory estoppel, the trustee is entitled to change its mind as was evident from its 1999 registration against title, its 1999 Final Statement to Mr. Marino, its 2000 correspondence and its 2002

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position. The property was not "incapable of realization" in the sense of an absence of palpable equity, in the trustee's view, at the time the trustee applied for its discharge in respect of Mr. Marino's estate.

[27] This is consistent with this court's decision in *Re Shelson*, [2004] O.J. No. 850 (C.A.), which was brought to our attention by counsel subsequent to the hearing of this matter. That case involved a trustee's entitlement to the bankrupt's interest in a civil proceeding ("the asset") that the bankrupt had started prior to his bankruptcy. At the time of the bankruptcy, the trustee undertook to return the asset to the bankrupt upon the bankrupt's discharge provided the creditors did not, in the meantime, require its realization. The trustee, however, did nothing about the asset prior to the bankrupt's discharge or prior to its own application for discharge. The bankrupt continued to pursue the action for some five years subsequent to his discharge, at which time the trustee purported to realize upon the asset.

[28] This court expressed its concern with the breadth of the proposition stated in *Zemlak*, *supra*, that when a trustee applies for its discharge, if it fails to elect to realize an asset, or to return it to the bankrupt, then the trustee holds that asset as trustee for the bankrupt and must return it to the bankrupt. Catzman J.A. said at para. 30:

> In my view, the proposition cannot be framed as a "bright-line" rule that admits of no exceptions. Even the court in *Zemlak* qualified its statement of the proposition by the introductory phrase "[I]n the circumstances of this case".... This court distinguished *Zemlak* and permitted a trustee in bankruptcy, following his discharge and that of the bankrupts, to take proceedings to pursue two properties, the values of which had been misrepresented by the bankrupts in their statements of affairs: *Rocher v. H. & M. Diamond& Associates* 2003 CanLII 29646 (ON CA), (2003), 43 C.B.R. (4th) 134. Even in instances short of misrepresentation or other misconduct by the bankrupt, it is not difficult to think of examples where an exception to the proposition would be appropriate. One is where an asset previously unknown to the trustee is discovered within a reasonable time of his application for discharge. Another is where the trustee learns within a reasonable time of his application for discharge that an asset previously considered to be unrealizable in fact had realizable value. In both examples, assuming that the asset is one which should, in the interests of the creditors of the estate, be realized, the court must retain some discretion to decide whether the proposition does or does not apply.... Failure to imbue the rule with some measure of flexibility renders a trustee's application for discharge a trap for the unwary [footnotes omitted].

[29] I agree. On the facts of this case, including the fact that the trustee was not discharged and that the trustee's Final Statement to Mr. Marino stated its newfound view that there was equity in the property, the trustee cannot be said to have determined that the asset was "incapable of realization" so as to found the basis for a s. 40(2) vesting order.

[30] Indeed, the motions judge appreciated that this property may have had realizable equity at the time of the trustee's application for discharge. The essence of his reasons addressed whether the trustee was precluded by its delay in realizing on that equity.

4. Is the trustee estopped, or otherwise prohibited in equity, from realizing its interest in the home?

[31] Mr. Marino argues that even if Deloitte & Touche had legal entitlement to realize upon the equity in the home, it is estopped from doing so.

[32] To rely on promissory estoppel Mr. Marino must establish:

(a) Deloitte & Touche, by words or conduct, made a promise or assurance which was intended to affect its legal relationship with Mr. Marino and intended Mr. Marino to act upon it; and

(b) Mr. Marino, relying on the representation, acted on it or in some way changed his position.

See *Maracle v . Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 S.C.R. 50 at 57.

[33] Where appropriate, the principles of promissory estoppel have been considered both for and against a trustee in bankruptcy: *Rocher v. H & M Diamond & Associates*, [2003] O.J. No. 1049 (C.A.); *Re Country Kitchen Donuts Ltd.*, [1980] O.J. No. 171 at para. 21 (H.C.J.).

[34] In this case, the motions judge found that the trustee had, through its representatives, until at least 2000, given assurances to the Marinos that it would make no claim against the equity in the property. The trustee did not tell them of its 1999 registration on title. Even though the trustee did raise the possibility in 2000 of requiring further information about the property's equity, it took no further action until 2002.

[35] Not only did the trustee give assurances to the Marinos, but the Marinos also did not engage in any conduct that would have misled the trustee. The trial judge found as a fact that the Marinos acted honestly.

[36] After the Marinos, and specifically Mr. Marino, received the trustee's 1997 assurance that the trustee would not proceed against the property, the Marinos acted upon that assurance. They continued to reside in the home, satisfied the outstanding mortgage arrears on the property and proceeded with upgrades to the property. But for the trustee's

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assurance, the Marinos could have earlier begun the "fresh start" contemplated by the Act, abandoned the premises to the trustee, and begun the process of building an equity in another property.

[37] In all those circumstances, the motions judge made no error in deciding that the equities favoured the Marinos.

[38] Accordingly, the representations and conduct of the trustee and the Marinos' actions in reliance on them, estops the trustee from now realizing upon its registered interest in the property.

Conclusion

[39] I would dismiss the appeal.

Costs

[40] We have received and considered the parties' written submissions on costs. In the circumstances, the Marinos are entitled to their costs, which we award on a partial indemnity basis fixed in the amount of $10,000, inclusive of disbursements and G.S.T.

Released: JUL 22 2004 Signed: "Susan E. Lang J.A."

JL "I agree John Laskin J.A."

"I agree Louise Charron J.A."

KPMG Inc. v. Armbruster, 2010 SKCA 125 (CanLII) - Can Trustee Unilaterally Transfer Undivided Interest In The Non-Exempt Portion Of A Bankrupt's Home?

Date: 2010-10-18

Docket: 1788

URL: http://canlii.ca/t/2d2cg

Citation: KPMG Inc. v. Armbruster, 2010 SKCA 125 (CanLII), <http://canlii.ca/t/2d2cg> retrieved on 2013-09-15

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THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2010 SKCA 125 Date: 20101018

Between: Docket: 1788

KPMG Inc., Trustee in Bankruptcy of the Estate of Veronica Leay Armbruster

Appellant

- and -

Veronica Leay Armbruster

Respondent

Coram:

Lane, Jackson & Ottenbreit JJ.A.

Counsel:

Murray W. Douglas for the Appellant

Michael J. Krawchuk for the Respondent

Appeal:

From: 2009 SKQB 201 (CanLII), 2009 SKQB 201

Heard: May 4, 2010

Disposition: Appeal Dismissed

Written Reasons: October 18, 2010

By: The Honourable Madam Justice Jackson

In Concurrence: The Honourable Mr. Justice Lane

The Honourable Mr. Justice Ottenbreit

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Jackson J.A.

I. Introduction

[1] This appeal concerns the claim of a trustee in bankruptcy to the non-exempt portion of a bankrupt's home. **The central issue is whether a trustee in bankruptcy can unilaterally transmit to itself an undivided interest in the non-exempt portion of a bankrupt's home in an attempt to claim a portion of the future proceeds of sale. On an application to the Court of Queen's Bench, Wimmer J. concluded that a trustee in bankruptcy cannot transmit a bankrupt's land in such circumstances (see: 2009 SKQB 201 (CanLII), 2009 SKQB 201, 334 Sask. R. 133). With that, the trustee appealed to this Court.**

[2] We agree substantially with the reasons of Wimmer J. As a matter of bankruptcy law, which adopts the exemptions law of the Province, a trustee cannot realize on the non-exempt equity in the home of a bankrupt in this jurisdiction, until the latter voluntarily sells it. As a matter of the law of real property, a trustee in bankruptcy cannot unilaterally convert a potential, future claim to a portion of the sale proceeds of the home into an undivided interest in the land and transmit that interest to itself. In the result, the appeal is dismissed.

II. Overview of the Evidence

[3] This case begins in the 1990's. A corporation, of which Veronica Armbruster was the sole shareholder, borrowed money from Saskatchewan Trust Company ("SaskTrust") on the partial security of a guarantee from Ms. Armbruster. When the corporation defaulted on its payments, the balance of the security was insufficient to cover the loan amount. SaskTrust subsequently encountered its own difficulties and folded. Deloitte & Touche Inc. became SaskTrust's liquidator. Deloitte & Touche then pursued Ms. Armbruster for the balance owing under her corporation's loan, and obtained a judgment against her. When Ms. Armbruster was unable to satisfy the judgment, Deloitte & Touche petitioned her into bankruptcy, effective June 8, 1995. The receiving order appointed Peat Marwick Thorne Inc. (now KPMG Inc.) as the trustee in bankruptcy (the "Trustee") of Ms. Armbruster. Her two principal creditors were Deloitte & Touche, as the liquidator of SaskTrust, and Revenue Canada, and they claimed the following amounts:

• Deloitte & Touche Inc., liquidator of SaskTrust	$290,357.56
• Revenue Canada	$ 57,431.06
Total:	$347,788.62

[4] On February 8, 1996, Peat Marwick gave "Notice of Impending Automatic Discharge of First-Time Bankrupt" to the creditors. The Notice advised that: (i) Ms. Armbruster had insufficient earnings to warrant a conditional order (see Statement of P.M. Tomney on behalf of Peat Marwick Thorne Inc., dated February 8, 1996); and (ii) effective March 8, 1996, Ms. Armbruster would be automatically discharged from bankruptcy, subject to receiving any notice of objection. The "Report of Trustee on Bankrupt's Application for Discharge" indicated that Ms. Armbruster was working as a receptionist earning $1,173 per month and that her only asset was her home. Her home was listed as having an approximate value of $200,000, subject to a mortgage of $25,000 and builders' liens in the amount of $12,500, leaving an approximate net equity of $162,500. The Trustee also indicated that it was in the process of "transmitting an 82% interest" in Ms. Armbruster's home into its own name.

[5] On the same day that the Trustee gave notice regarding Ms. Armbruster's discharge, it filed an application to have an 82/100 interest in Ms. Armbruster's land transmitted to it. The Land Titles Office issued a new title in February 1996 in the name of "Peat Marwick Thorne Inc. being Trustee in Bankruptcy of Veronica Leay Armbruster" for "an undivided 82% interest" in the land. Ms. Armbruster's title for the balance was endorsed to reflect this transmission having taken place.

[6] No one filed a notice of objection to Ms. Armbruster's discharge. As a result, on March 8, 1996, the Trustee gave Ms. Armbruster a "Certificate of Discharge" advising her that she was "discharged and released from all debts except those matters referred to in subsection 178(1) of the *BIA*" (*Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3). Since s. 178(1) of the *BIA* is not applicable, Ms. Armbruster was automatically, and unconditionally, discharged as of that date. The Trustee, however, did not move to obtain its own discharge.

[7] On April 15, 1996, Ms. Armbruster's husband filed a caveat against the Trustee's title, claiming a "homestead" right therein. Mr. and Mrs. Armbruster had been living in the home for approximately 13 years at the time of the bankruptcy, but they did not hold title as joint tenants. Ms. Armbruster had been the sole registered owner, prior to the Trustee's application for transmission.

[8] In 2003, an issue arose in relation to the insurance on the home. Up until 2003, the Trustee had been insuring the home under an "Insolvency Insurance Program." According to Ms. Laura Ryback, a vice-

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president with KPMG, its insurance was cancelled effective October 31, 2003 as the maximum time period for coverage of certain assets remaining in an estate in bankruptcy had expired (See: Affidavit of Laura Ryback sworn November 6, 2003). As a result of the pending cancellation of this insurance, the Trustee asked Ms. Armbruster for confirmation that the home was being properly insured, and for copies of her insurance policies. In an apparent attempt to force a resolution of the ongoing conflict, Ms. Armbruster refused KPMG access to her records.

[9] Following Ms. Armbruster's refusal, the Trustee applied in the Court of Queen's Bench for an order directing that Ms. Armbruster (i) permit an inspection of her home by the Trustee or any appraiser or potential insurer; and (ii) provide copies of all current insurance policies and renewal certificates, as well as details of any and all claims made pursuant to such policies in the past three years. The order was granted, and not appealed. As a result of this order, KPMG engaged the services of River City Insurance Services to enter the home and conduct an appraisal, which they did. Based on this appraisal, KPMG began insuring the premises on its own behalf.

[10] In June, 2005, the parties entered into discussions regarding a possible settlement. Ms. Armbruster wrote to Ms. Ryback making an offer to settle all issues between her and the Trustee in the amount of $10,000:

> In reply to your letter of June 9, 2005 regarding the property at 1540 Crerar Drive in Saskatoon. My offer of settlement is $10,000.00 (ten thousand dollars) for a full and final settlement of all claims relating to myself and KPMG. KPMG would discharge any registrations relating to this matter and provide a Final Release to me.
>
> The position of the Trustee is in question based on legal precedent and I am not willing to expend a large sum of money to challenge that position. Based on my life expectancy of approximately thirty years it will be many years before this issue is concluded if a settlement is not agreed to.

The Trustee rejected this offer, saying that it would entertain an offer "for an amount more reflective of 82% of the current market value" (see: the affidavit of Tim Reid, Senior Vice President of KPMG, dated May 8, 2009).

[11] In April 2009, Ms. Armbruster applied to the Court of Queen's Bench, invoking the Court's authority under ss. 37 and 40 of the *BIA* and s. 109 of *The Land Titles Act, 2000*, S.S. 2000, c. L-5.1. She sought an order declaring that the Trustee's interest in her home is incapable of realization and, as a result of the Trustee's actions in transmitting part of her home into its own name in 1996, she has been aggrieved since that time. By way of remedy, she asked for an order directing that the Registrar of Titles cancel the Trustee's title and issue a new title constituting her as the sole registered owner, subject only to the two pre-existing easements and the two builders' liens.

[12] In addition to the evidence referred to above, the affidavit evidence presented to the Chambers judge showed that:

- Ms. Armbruster had discharged the mortgage on the property at some point earlier;
- according to the City of Saskatoon's records, the fair market value of the home is $332,700 as of February 2009;
- the Trustee has incurred insurance costs of approximately $2,000 annually since 2003; and
- the Trustee remains undischarged to the present day.

III. Decision of Wimmer J.

[13] Wimmer J. allowed Ms. Armbruster's application and ordered that the title to the home be restored to her free of the Trustee's interest. In doing so, Wimmer J. relied on this Court's decision in *Re Zemlak and Deloitte, Haskins & Sells Ltd.* reflex, (1988), 42 D.L.R. (4th) 395. Based on *Zemlak*, he found that it was not appropriate for the Trustee to delay its discharge and await a future accumulation of equity:

> [9] Counsel for the trustee says the *Zemlak, supra* judgment is distinguishable from this case on the facts because the trustee there was discharged whereas here the trustee is not. That argument supposes that it is appropriate in summary bankruptcy administration proceedings for a trustee to withhold a timely application for discharge and await a market enhancement of the value of non-exempt equity in homestead property. I do not take *Zemlak* to stand for such a proposition. On the contrary, I take it to mean that only the value of non-exempt homestead equity existing at the time of the bankrupt's application for discharge can be attached by the trustee.
>
> [10] I will make the order applied for by the applicant including the order for costs. In so doing, I do not say that the trustee may not realize upon the value of her non-exempt equity in the homestead, but as at

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what date and to what extent remain open questions which can be addressed upon an application by the trustee for a discharge.

[14] Wimmer J. granted the order in the form that Ms. Armbruster requested. In substance, the order: (i) declares that the equity in the home above the exempted amount is incapable of realization; and (ii) directs that the Trustee's title be cancelled and the land be registered in Ms. Armbruster's name alone:

> 1. Pursuant to Section 37 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the Applicant, Veronica Leay Armbruster, has been aggrieved by the act or decision of the Respondent, KPMG INC., trustee in bankruptcy of the estate of Veronica Leay Armbruster, when the Respondent transmitted an 82% interest in the Applicant's personal residence, ... to the Respondent, said transmission dated February 8, 1996, and registered effective February 19, 1996 (the "Trustee's Interest");
>
> 2. Pursuant to Section 40 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the Trustee's Interest is incapable of realization and the Respondent is unable to realize on the Trustee's Interest;
>
> 3. Pursuant to Section 37 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the act or decision of the Respondent to transmit the Trustee's Interest to the Respondent is reversed and the Trustee's Interest shall be returned to the Applicant;
>
> 4. Pursuant to Section 109 of *The Land Titles Act*, S.S. 2000, c. L-5.1, the Registrar of Titles of the Saskatchewan Land Titles Registry is directed to: [cancel the existing title, and issue a new title subject to specific encumbrances, which make no reference to a claim by the Trustee].

IV. Submissions of the Parties

[15] In broad compass, the Trustee submits that the Chambers judge misconstrued *Zemlak*. According to the Trustee, the procedure it followed is an acceptable alternative to that established in *Zemlak* and, further, its undischarged status should have been considered a distinguishing feature between its position and that of the trustee in *Zemlak*. The Trustee also submits that the order taken out by Ms. Armbruster is inconsistent with the judgment. The latter contemplated that the Trustee would be able to raise the issue of the non-exempt equity at its own discharge. Ms. Armbruster relies on the reasons articulated by Wimmer J. to counter each of these arguments. In relation to whether the Trustee can raise the question of the non-exempt equity when it applies for its discharge, she submits that this issue is incapable of resolution on such an application, which means that, from her point of view, the Trustee is without any further remedy to pursue its claim.

V. Analysis

[16] Before embarking on the specific analysis required in this case, it is necessary to review *Zemlak*. A brief review of the facts in *Zemlak* will place the *ratio* of that decision in context:

- the bankrupt made an assignment in bankruptcy on June 5, 1984;
- the trustee filed a caveat against the bankrupt's home on June 29, 1984 pursuant to the *BIA*;
- the bankrupt was absolutely discharged on January 7, 1985;
- the trustee was discharged on January 7, 1985; and
- the bankrupt served a notice to lapse the trustee's caveat in August 1985.

The trustee's report did not mention the possibility of a non-exempt equity in the bankrupt's home or the trustee's intention to file a caveat against the home (see p. 400 of *Zemlak*). Indeed, on the date of the assignment in bankruptcy, the bankrupt's home was mortgaged, leaving little equity in the home over and above the $32,000 exemption (see p. 401 of *Zemlak*). Tallis J.A., writing for the Court in *Zemlak*, carefully articulated the issue arising out of those facts (at p. 396):

> ...whether a discharged trustee in summary administration proceedings in bankruptcy is entitled to maintain a caveat under s. 52(3) of the *Bankruptcy Act* (now s. 74(3) of the *BIA*) against the appellant's "homestead" after she has received an absolute discharge and in circumstances where the trustee has taken no part in the administration, control or management of the property and did not raise the issue of maintaining such caveat in the application for discharge of the bankrupt and trustee before the Registrar in Bankruptcy. [Footnote omitted.]

The Court held that the trustee was not entitled to maintain a caveat in those circumstances and directed that it be removed.

[17] In addition to resolving the particular case before it, the Court in *Zemlak* provided "minimal requirements" for a trustee which plans to maintain a claim against the non-exempt equity in a personal residence. In summary, a trustee must set forth the value of the non-exempt equity, indicate its intention to file a caveat and take specific steps to inform the creditors and the bankrupt of its intention to do so:

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This case raises a troublesome issue particularly in summary administration proceedings, which on their face only involve estates where the "realized" assets of the bankrupt, after deducting the claims of secured creditors, will not exceed $500. Without articulating specific rules to guide a trustee, we suggest that the following minimal requirements be met when dealing with a non-exempt equity in the bankrupt's homestead:

1. The report of the trustee on the bankrupt's application for discharge should set forth the value of any non-exempt equity asserted in the "homestead" if the trustee intends to attach it for future realization. In this way the Registrar in Bankruptcy will be alerted to a potential trap for the unwary and may give suitable directions.
2. The notice to creditors, a copy of which is served on the bankrupt, should also indicate clearly that the trustee proposes to maintain a caveat after discharge of the bankrupt.
3. When the trustee intends to maintain a caveat or other encumbrance against the home of the bankrupt, it is important for the bankrupt to have independent legal advice on this point. Since a bankrupt often looks upon the trustee as handling the matter for him (the bankrupt) — particularly in summary administration proceedings — the trustee should advise the bankrupt to retain counsel on the application for discharge (see p. 404).

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[18] From a review of the facts in the case before us, it is evident that the Trustee did not follow the procedure in *Zemlak* regarding how and when a caveat authorized by the *BIA* should be filed. For its part, the Trustee tried to distinguish *Zemlak* on the basis that the law permits a trustee to transmit part of a bankrupt's home into its own name, and that this procedure should have the equivalent value to the filing of a caveat pursuant to the *BIA*. This argument requires the Court to consider whether a trustee in bankruptcy has the authority to do what the Trustee did in this case, *i.e.*, transmit to itself an "undivided interest" in the bankrupt's home on the basis of a potential, future claim to a portion of the sale proceeds.

[19] This central issue can be examined either from the perspective of bankruptcy law or real property law. Both areas of law support the conclusion that a trustee in bankruptcy cannot do what KPMG did in this case.

[20] The pertinent provisions of s. 71(2) and s. 74 of the *BIA* provide for the vesting of the bankrupt's property in the trustee, the mechanics for the registration of the bankruptcy assignment, the effect of the registration and the circumstances in which a trustee may become the registered owner of a bankrupt's land:

> 71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.
>
> ...
>
> 74(1) Every receiving order, or a true copy thereof certified by the registrar or other officer of the court that made it, and every assignment, or a true copy thereof certified by the official receiver, may be registered by or on behalf of the trustee in respect of the whole or any part of any real property that the bankrupt owns or in which he has any interest or estate in the proper office in every district, county and territory wherein, according to the law of the province in which the real property is situated, deeds or transfers of title and other documents relating to lands or any interest therein may be registered.
>
> (2) Where a bankrupt is the registered owner of any land or charge, the trustee, on registration of the documents referred to in subsection (1), is entitled to be registered as owner of the land or charge free of all encumbrances or charges mentioned in subsection 70(1). [1] [Emphasis added.]

[21] These provisions find their parallel in s. 175(1) of *The Land Titles Act*, R.S.S. 1978, c. L-5, which describes when a trustee may become the owner of the bankrupt's land:

> 175(1) Upon an assignment being made for the general benefit of his creditors by the owner of land for which a certificate of title has been granted or by the owner of a mortgage, or upon the appointment of a trustee in bankruptcy of the property of any such owner, and upon an assignment, receiving order or caution being registered or filed in the land titles office, the trustee may apply to be registered as owner of the land or mortgage, and the registrar may, pursuant to the *Bankruptcy Act* (Canada) transmit the land or mortgage to the trustee who shall thereupon become owner thereof. [Emphasis added.]

[22] Thus, ss. 71 and 74 of the *BIA* and s. 175 of *The Land Titles Act* establish the rules for when and how the property of a bankrupt vests in the trustee, but they do not address what happens in relation to exempt property. Section 67(1)(b) of the *BIA* is the operative provision regarding exemptions:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> . . .
>
> (b) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides; [Emphasis added.]

As the Supreme Court of Canada stated in *Royal Bank of Canada v. North American Life Assurance Company,* 1996 CanLII 219 (SCC), [1996] 1 S.C.R. 325 at para. 49, "where the asset is exempt under s. 67(1)(b), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors."

[23] In Saskatchewan, the right to claim an exemption in one's home is found in s. 2(1)11 of *The Exemptions Act*, R.S.S. 1978, c. E-14:

> 2(1) 11 The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of writs of execution, namely:
>
> . . .

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> 11 the house and buildings occupied by the execution debtor and also the lot or lots on which they are situated according to the registered plan thereof to the extent of $32,000;

This is known as a "limited exemption," in that the land is exempt from seizure, but only up to a certain value. Limited exemptions raise questions about whether, and when and how, a creditor can gain access to the equity over and above the exempt amount.

[24] The question whether the non-exempt equity in a home can be seized by virtue of a writ of execution has long since been settled in this jurisdiction. The first case to consider the issue at length is *In re Hayes*, reflex, [1931] 1 W.W.R. 301 (Sask. K.B.). In *Hayes*, the trustee submitted that the Court should interpret *The Exemptions Act* [R.S.S. 1920, c. 51] so as to provide the trustee or a court official with a power of sale. Knowles J. noted that other jurisdictions specifically compel the sale of the personal residence to allow the trustee access to the non-exempt equity, but that Saskatchewan did not do so. In refusing to provide for such a mechanism by judicial fiat, Knowles J. said (at p. 302):

> ... In my opinion there is no machinery by which the surplus over the $3,000 value may be converted into money. It would seem to me that the sheriff having his writ in his hand is stopped on the very threshold of his functioning by the fact that there is a statutory prohibition against his seizing that home to the extent of a certain sum. He cannot seize the surplus or excess, or, to put it in positive language—before the sheriff can effect a sale he must seize the home, not part of it, but all of it. If I were to authorize him to seize all of it for the purpose of a sale I would be authorizing him to do something which the law-makers have said he must not do for the clearl have, saidpthat he, must not seize all of that home because a substantial part of it, or fraction of it, is exempt, and that being so the sheriff is, in my opinion, helpless as far as proceeding to a sale is concerned. If he cannot proceed to a sale of 100 per cent of the home he has no alternative but to stop altogether. I think that to say that the Legislature meant that the home might be seized in its entirety notwithstanding its prohibition that it must not be seized to the extent of $3,000 is a presumption, and to so adjudicate would be beyond the function or the jurisdiction of this Court. The Legislature could, if it had wished, have added a clause to the effect that notwithstanding the prohibition a home might be seized in its entirety, sold, and $3,000 given to the debtor, but they did not so legislate.... [Emphasis added.]

Knowles J. also recognized that, without a mechanism to seize and sell the whole of the land, the limited nature of the exemption confers little benefit on a creditor:

> I am not unimpressed by the fact that this interpretation of the statute results in almost making a nullity of the statute's words which limit the prohibition on the sheriff to the extent of $3,000, but even if that were so I would take the view that it is less serious or unwarrantable to regard certain words as unnecessary or even ineffective than to declare positively a power which the Legislature has deliberately withheld.... **The result will therefore be that the trustee is directed that** so long as the bankrupt uses the property as her home it is not comprised in the assets of the estate (at p. 303, emphasis added).

In *Re Touche Ross Ltd. and Neuls* reflex, (1985), 17 D.L.R. (4th) 554 (Sask. C.A.) at p. 559, this Court held that *Hayes* remains good law. Since then, this Court has affirmed *Neuls* in *Zemlak* at pp. 402-03 and in *Monteith (Trustee of) v. Monteith*, 2004 SKCA 63 (CanLII), 2004 SKCA 63, 240 D.L.R. (4th) 506 at para. 31.

[25] In short, s. 67(1)(b) of the *BIA* adopts the exemption laws of the jurisdiction where the bankrupt resides. *The Exemptions Act* of Saskatchewan declares certain land to be exempt to a certain value, but does not provide a mechanism to allow an execution creditor to seize and sell the excess above the exempt value. A trustee in bankruptcy has no greater power than an execution creditor in that regard. Only when the bankrupt sells the home voluntarily is a creditor or a trustee able to make a claim for the difference (see: *Neuls* at pp. 559-60 referring to *Re McNabb* reflex, (1979), 112 D.L.R. (3d) 407 (Sask. C.A.)). It is only the proceeds of a voluntary sale above the stipulated amount that are realizable.

[26] Applying this law to the facts of this case, Wimmer J. was correct when he declared that the non-exempt land of Ms. Armbruster is incapable of realization (see: *Hayes, Neuls, Zemlak* and *Monteith)*. The non-exempt equity represented by the proceeds of the sale of the property is realizable, but the land as such is not. In the case before the Court, the Trustee developed its own procedure and, thereby, effected a form of realization that is not contemplated either by the legislation or prior case law.

[27] **Instead of a voluntary transfer from the bankrupt, the Trustee "transmitted" to itself an 82/100 in**terest in **the land that it created, and thereby became the "registered owner" of that interest.** The Trustee is thus a tenant in common with Ms. Armbruster. The fact that the Trustee acquired its undivided interest by transmission does not confer upon it some lesser interest than that of Ms. Armbruster. A transmission is simply the means by which someone becomes the registered owner of land, when the actual owner is

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unwilling, or unable, to execute a transfer, and the person effecting the transmission has some right by law to obtain a conveyance of the land.

[28] The law of real property, however, does not permit a trustee in bankruptcy to create an undivided interest where one did not exist before, without the agreement of the bankrupt. A trustee in bankruptcy can transmit to itself an undivided interest in land that the bankrupt already holds as an undivided interest, or it can receive a voluntary transfer from the bankrupt of such an interest, but a trustee cannot speculate as to what the future sale price of land will be, subtract the value of any encumbrances and the amount of the exemption, and then say that the remaining dollar value gives it "an undivided interest" as a tenant in common in the whole of the land. The interest in land that this Trustee is entitled to hold, according to *Hayes*, *Neuls* and *Zemlak*, is a right to "proceeds," which is a future, contingent interest that will only arise if the bankrupt voluntarily sells the land. That interest cannot unilaterally be converted to an undivided interest in the land. "Land" is transmitted, not a "monetary equivalent" to a part of the land.

[29] Further, the Trustee purported to effect a realization of an undivided interest in the non-exempt land and the exempt land. While the Trustee did not hang a "for sale" sign on the bankrupt's lawn, it nonetheless holds an interest in the whole of the land. Tenants in common each "hold the whole and nothing separately, their occupation being undivided" (see: Anne Warner La Forest, *Anger & Honsberger: Law of Real Property*, looseleaf, 3rd ed., vol. 1 (Aurora: Canada Law Book, 2009) at §14:30.70). Thus, not only is the Trustee an 82/100 owner of what it considers the non-exempt property, it is also an 82/100 owner of the exempt property—all contrary to the exemptions law and jurisprudence of this Province.

[30] Allowing a trustee in bankruptcy to claim an undivided interest in these circumstances would raise several complex questions, if it were permitted. First, there is the question of the value of the interest. The Trustee arrived at its 82/100 interest according to these calculations (see Affidavit of Laura Ryback):

Potential sale price	$215,000.00
Less encumbrances (rounded)	(37,500.00)
Total equity:	$177,500.00
Respondent's exemption interest ($32,000.00/$177,500.00)	18%
Trustee's interest ($145,500.00/$177,500.00)	82%

The amount of the sale price, whether it should be a present or future value, and whether it should take into account selling costs, are difficult questions that admit of no clear solution. For example, the Trustee's report in this case shows two other values for the land as of 1995, and makes no adjustment for selling costs. Second, as the registered owner of an undivided interest in the property, the Trustee argues that it "owns" any increase in the value of the land, including any increase in the sale equity no matter what the origin of the increase might be, which is contrary to *Zemlak*. The bankrupt has satisfied her obligations under the mortgage on the property and the property has also increased substantially in value. Third, on appeal to this Court, the Trustee submitted that at some point there would have to be a settlement regarding the payment of "occupancy rent" as the bankrupt has been exclusively occupying the land of which it has been a part owner for 14 years. References were made to other expenses incurred by the Trustee, including its insurance costs. These comments may have been made as part of the negotiating process, but they nonetheless raise real issues. All of these questions arise at the intersection of the law of real property and the law of bankruptcy, and are largely questions of first instance. Their very existence demonstrates the practical difficulty of the Trustee's approach and supports the legal conclusions in *Zemlak* and this case.

[31] I recognize that Wedge J., on an application for a conditional discharge in *Nelson (Trustee of) v. Nelson*, 1995 CanLII 5917 (SK QB), [1995] 8 W.W.R. 249 (Sask. Q.B.), permitted the trustee to maintain an undivided interest in the bankrupt's home, until such time as he paid a specific sum of money. The bankrupt did not appeal *Nelson* to this Court. With this decision, however, *Nelson* can no longer be taken as authority for the proposition that a trustee in bankruptcy, without the bankrupt's agreement, is entitled to be a tenant in common with respect to a portion of the future proceeds of a possible, voluntary sale of the bankrupt's home. It is, however, noteworthy that the Court in *Nelson* could have followed the procedure in *Zemlak* and made the same type of conditional discharge order based on the filing of a caveat, and achieved the same result, *i.e.*, an enhanced payment to the creditors based on the satisfaction of a partial claim to the non-exempt equity.

[32] *Zemlak* provided a procedure to alert a subsequent claimant in the property that, if the bankrupt's home is sold, the trustee has a prior claim to the proceeds of a future voluntary sale. As part of that procedure, *Zemlak* contemplated that the question of the extent to which the creditors can share in the non-exempt equity would be dealt with early in the process, so that all options for an equitable resolution could be

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explored, including a hearing before the Registrar in Bankruptcy or the Court of Queen's Bench, or a proper consent to the terms of a discharge order. In developing the procedure for a trustee in bankruptcy to claim non-exempt equity, Tallis J.A. in *Zemlak* pointed out that in *Neuls*: (i) the bankrupt had a substantial non-exempt equity in the property; and (ii) the bankrupt was conditionally discharged to allow the trustee to realize upon that non-exempt equity. This is one type of resolution that can be considered at the time of the bankrupt's discharge. There are no doubt other possible solutions. Given that a trustee has no means to compel the sale of partially exempt land, the resolution of any given case may require more than simply calculating the value of the home, subtracting the amount of the exemption and declaring that the difference is the amount that a bankrupt can be expected to pay. Other factors may have to be taken into account, including such matters as the bankrupt's immediate limited ability to raise additional funds by virtue of his or her status as a bankrupt, the nature of the bankruptcy, the conduct of the bankrupt, the costs to all parties and the time value of money pending a future sale. Beyond this, little guidance can be provided by this Court without a specific appeal before it.

[33] The Court in *Zemlak* recognized that the question of the exigibility of a bankrupt's non-exempt equity can be a troublesome issue, but, nonetheless, the Court did not want to establish specific rules, opting instead to establish minimal requirements. This Court is in the same position. While bright lines are desirable, the administration of bankrupt estates confers significant discretion on trustees in bankruptcy. Speaking in general terms, trustees must keep in mind certain key principles including the need to allow bankrupts to make a fresh start, as well as maximizing returns for creditors and preserving the overall integrity of the bankruptcy system. The Registrar in Bankruptcy and the Court of Queen's Bench supervise this process and thereby provide the flexibility to meet the multiple goals of the bankruptcy system.

[34] That brings us to the question whether anything should be done at this stage to permit the Trustee to file a caveat to preserve any sort of claim in relation to the non-exempt equity in the future proceeds of sale. Wimmer J. concluded his judgment by leaving the impression that the Trustee would still be able to realize upon the "value" of the non-exempt equity:

> [10] ... I do not say that the trustee may not realize upon the value of her non-exempt equity in the homestead, but as at what date and to what extent remain open questions which can be addressed upon an application by the trustee for a discharge.

There is, however, no mechanism to address such an issue upon the Trustee's application for a discharge.

[35] I have considered whether this Court should expressly permit the Trustee to file a caveat at this time for, perhaps, a reduced claim, before the Trustee's title is cancelled and issued free and clear of any interests other than those listed by Wimmer J. I have decided against making such an order for these reasons. As the Court in *Zemlak* said, a trustee must not convert an absolute discharge into a conditional discharge. The same comment could be made in this case with even greater strength. Ms. Armbruster did not make an assignment in bankruptcy; she was petitioned into bankruptcy by one creditor. From all accounts, she was a model bankrupt, and complied fully with all aspects of the process. She has done nothing wrong. All she has done is rely upon what the laws of the Province permit her to do: remain in her own home. Nonetheless, she has been in conflict with the Trustee for over 14 years. The Trustee still has not moved to be discharged and, before this application was made, the Trustee gave every indication of continuing in its undischarged state indefinitely. Further, Ms. Armbruster has incurred significant costs in relation to the Trustee's insistence regarding insurance, and in relation to this application and appeal. All of this could have been avoided, if the Trustee had followed *Zemlak.*

[36] There is one final matter. The Trustee argued that Wimmer J. erred in not holding that Ms. Armbruster was estopped from making an application under s. 37 of the *BIA* because she had not applied earlier. Given all that has transpired, it is difficult to see how the Trustee can make this argument. Indeed, the issue of grievance is a continuing one, and as each year passes, Ms. Armbruster can legitimately consider herself to be more aggrieved. Ms. Armbruster indicated that she wanted to bring an application, challenging the Trustee's decision to acquire title to part of her home, from the beginning of this process, but that she lacked the financial wherewithal to do so until recently (see her affidavit dated March 18, 2009)—a completely acceptable statement given that she had been petitioned into bankruptcy. Thus, I have given no credence at all to the Trustee's estoppel argument.

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VI. Conclusion

[37] The appeal is dismissed. Ms. Armbruster will have her costs on column 2. I would like to thank both counsel for the clarity with which they have placed the issues before the Court.

DATED at the City of Regina, in the Province of Saskatchewan, this 18th day of October, A.D. 2010.

"Jackson J.A."
Jackson J.A.

I concur

"Jackson J.A. for"
Lane J.A.

I concur

"Ottenbreit J.A."
Ottenbreit J.A.

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[1] References are to the relevant statutory provisions as they existed in 1995.

Rahall v. McLennan, 1996 CanLII 10487 (AB QB) - Limits on Bankrupt's Ability to pursue Property and In Persona Actions for Damages

Date:	1996-10-18
Docket:	9603-13942; 9603-17829
Parallel citations:	[1997] 1 WWR 316; 44 CBR (3d) 191; 44 Alta LR (3d) 179
URL:	http://canlii.ca/t/28q8q
Citation:	Rahall v. McLennan, 1996 CanLII 10487 (AB QB), <http://canlii.ca/t/28q8q> retrieved on 2013-09-13
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Alberta Court of Queen's Bench
Rahall v. McLennan
Date: 1996-10-18

W. Paul Sharek and Susan L. Bercov, for applicant.
Monier Rahall in person.

(Edmonton 9603-13942, 9603-17829)
October 18, 1996.

Part I. *The Applications:*

[1] BELZIL J.:– On June 28, 1996, Monier M. Rahall (hereinafter referred to as Rahall) filed a Statement of Claim on behalf of himself and 23 corporations as Plaintiffs, with Roderick Graham McLennan and Roderick Alexander McLennan named as Defendants. This action (hereinafter referred to as the McLennan action) essentially involves a claim by the Plaintiffs that the Defendants, who are lawyers, improperly petitioned Rahall into bankruptcy and interfered with the bankruptcy proceedings. There is also an allegation that the Defendant Roderick Graham McLennan defamed Rahall.

[2] On August 26, 1996, Rahall filed a Statement of Claim on behalf of himself and the same 23 corporations, naming the Law Society of Alberta as a Defendant. This action (hereinafter referred to as the Law Society action) essentially involves allegations that the Law Society of Alberta has improperly failed to investigate complaints made to the Law Society by Rahall respecting a number of members of the Law Society of Alberta.

[3] I was appointed case management Justice on September 6, 1996.

[4] Counsel for the Defendants in both actions filed Notices of Motion returnable before me on September 11, 1996.

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[5] In the McLennan action, the Defendants seek an Order striking out the Statement of Claim, or, alternatively, striking out one or more Plaintiffs from the style of cause and an Order staying the action until the corporate Plaintiffs are properly represented.

[6] The grounds of the application are that Rahall is an undischarged bankrupt who has no status to bring the McLennan action, and that the action was brought by Rahall, who is not an active member of the Law Society of Alberta, on behalf of a number of corporate Plaintiffs in contravention of s. 103(1)(c) of the *Legal Profession Act.*

[7] In the Law Society action, the Defendant seeks an Order striking out the Statement of Claim, or, alternatively, an Order striking out one or more of the Plaintiffs from the style of cause and an Order staying the action until the corporate Plaintiffs are properly represented.

[8] The grounds raised in support of the application by the Law Society are the same as those raised in the McLennan action.

[9] In the Notice of Motion filed in the Law Society action the Defendant stated that should the Statement of Claim not be struck out, it wishes to bring further applications prior to filing a Statement of Defence including an application for further and better particulars and an application to strike out certain paragraphs of the Statement of Claim as disclosing no cause of action. Furthermore, it is stated that an application may be brought alleging that the Statement of Claim is, in effect, a request for judicial review and should have been brought by way of Originating Notice of Motion.

[10] As of this date, the Defendants have not filed any pleadings in either action.

[11] The applications were argued originally on September 11, 1996, with Rahall representing himself and the corporate Plaintiffs.

[12] Rahall, after presenting initial argument, requested an adjournment to present further argument. The adjournment request was granted, with the matters being put over to September 26, 1996.

[13] Prior to September 26, 1996, Rahall requested a further adjournment to October 3, 1996, which adjournment request was granted.

[14] On October 3, 1996, Rahall and counsel for the Defendants presented further oral argument and, as well, Rahall submitted written briefs in both actions, together with some case law.

[15] On October 3, 1996, at the conclusion of oral argument, Rahall requested leave to present further written argument if he wished to do so. Leave was granted to file further written material provided that the further written material was filed by October 10, 1996. No such further material was provided.

Part II. *M. Rahall Bankruptcy:*

[16] On October 3, 1995, Wilson, J., sitting in Bankruptcy, upon the petition of Alberta Treasury Branches ordered that Rahall be adjudged Bankrupt and issued a Receiving Order against him.

[17] No appeal was filed from the Order of Wilson, J.

[18] On July 9, 1996, Lefsrud, J., sitting in Bankruptcy, ordered that the application of Rahall to be discharged from bankruptcy be put over and adjourned for one year to July 9, 1997.

[19] On July 17, 1996, Rahall filed a Notice of Appeal to the Alberta Court of Appeal from the Order of Lefsrud, J.

[20] As of this date, the appeal from the Order of Lefsrud, J. has not been heard.

Part III. *Position of the Applicants (Defendants):*

[21] In support of its position, the Applicants rely on the Affidavit of David Turner, Deputy Secretary of the Law Society of Alberta, who deposes that Rahall is not a member of the Law Society of Alberta.

[22] The Applicants also rely on Rules 129, 186 and 548, as well as s. 103 of the *Legal Profession Act,* s. 71 (2) of the *Bankruptcy and Insolvency Act,* as well as the Orders of Wilson and Lefsrud, JJ.

[23] Dealing with the bankruptcy issue, the Applicants argue that as Rahall is an undischarged bankrupt, s. 71(2) of the *Bankruptcy and Insolvency Act* applies, and that therefore Rahall lacks the status to bring any actions except personal actions.

[24] The Applicants state that with the exception of paragraph 8 of the McLennan action, which is a claim in defamation, all other allegations in the two actions are barred by the provisions of s. 71(2) of the *Bankruptcy and Insolvency Act.*

[25] Furthermore, the Applicants rely on the decision of Marceau, J. in *Whissell v. Bennett Jones Verchere* 1996 CanLII 10399 (AB QB), (1996), 40 Alta. L.R. (3d) 147 (Q.B.), wherein Marceau, J. held that it would be a condition precedent for an undischarged bankrupt alleging impropriety in the bankruptcy proceedings to have the bankruptcy Order set aside. In this case, of course, the bankruptcy Order of Wilson, J. has not been appealed.

[26] The Applicants argue that while Rahall can represent himself, he cannot purport to act on behalf of the 23 corporations named as Plaintiffs in both actions. The Applicants rely on the decision of O'Leary, J. (as

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he then was) in the case of *Professional Sign Crofters (1988) Ltd. v. Wedekind* 1994 CanLII 9245 (AB QB), (1994), 19 Alta. L.R. (3d) 53 (Q.B.).

[27] The Defendants argue that the claims of the corporate Plaintiffs should be stayed pending the appointment of counsel to represent the corporate Plaintiffs.

Part IV. *Position of Rahall:*

[28] In the written materials supplied to me, Rahall submitted two Affidavits which outline his position in response to the two applications.

[29] In the McLennan action, the Affidavit is as follows:

1. Mr. Graham McLennan, hereinafter referred to as the Co-defendant admitted to my solicitor at the time, Mr. Roy Henning and myself on more than one occasion that the purpose of the Alberta Treasury Branches and the Co-Defendant petitioning me into bankruptcy was to deprive me of the resources necessary to pursue my litigation against the Alberta Treasury Branches by asking for security for costs after I had been petitioned into bankruptcy.
2. This intention was confirmed by Mr. Mark Gunderson, a colleague of the Co-defendant at the law firm McLennan Ross who attempted to intimidate me by continually reminding me that if I was not cooperative I would be petitioned into bankruptcy which eventually became the case.
3. The Co-defendant used the Bankruptcy and Insolvency Act maliciously as an instrument to prevent me from pursuing the litigation I had initiated against the Alberta Treasury Branches and in addition, to control all my actions through a Trustee who is being funded by the Alberta Treasury Branches.
4. In an action the Plaintiff brought against the Law Society of Alberta, the Counsel for the Law Society of Alberta has attempted to prevent me from pursuing the action based on my status of a bankrupt, thereby validating my cause of action.
5. By the use of the Bankruptcy and Insolvency Act, the Co-defendant's motives were to deprive me of my rights under the Canadian Bill of Rights and the Charter of Rights and Freedoms.
6. The petition in bankruptcy resulted in the destruction of the Plaintiff's credibility and reputation.
7. The Plaintiffs disputed the appraisals obtained by the Alberta Treasury Branches as being far too low. The Presiding Master then directed a three (3) month stay for the Plaintiffs to expose the properties to the market and establish an accurate value therefore, said stay to expire March 31, 1996.
8. On February 28, 1996 I wrote to the Co-defendant, the Solicitor for the Alberta Treasury Branches, advising that I had parties interested in the properties, and requested he advise whether I should present offers to the Court on his office. No reply was received, and on March 22, 1996, I wrote the learned Master directly.
9. The sales of these properties would have eliminated or greatly reduced, the amount owing to the Alberta Treasury Branches, and were in excess of the amounts suggested by the appraisals of the Alberta Treasury Branches.
10. The Learned Master suggested that I bring a Notice of Motion in Chambers, before him, which I did on March 29, 1996. On the morning of the hearing of this mater. Mr. McLennan presented a copy of an Affidavit, executed by his secretary, enclosing a letter received from the Solicitor who was acting on behalf of the proposed Purchaser, withdrawing the offers.
11. The proposed Purchaser had placed $25,000.00 in trust with Mr. J. Cox Counsel for the Purchaser, and had full disclosure with respect to the proceedings. The Purchaser indicated that his Counsel had been approached by Roderick Alexander McLennan, a senior partner in the Codefendant's firm.
12. It has been confirmed by the Purchaser that Mr. McLennan advised and influenced Mr. Cox that unless he and his client withdrew the offers, then both he and his client would be blackballed in the business and legal community.
13. I believe that had the offers been accepted, there would be little or no shortfall, as a result of which the Co-defendant the Solicitor for the Alberta Treasury Branches would no doubt have some difficulty with his client, and would have validated my earlier contentions that McLennan Ross have been systematically maliciously conspiring with the Alberta Treasury Branches to circumvent due process, and to utilize the legal process to harass and discredit the Plaintiffs.

[30] In the Law Society action, the Affidavit is as follows:

1. I am an officer of the Plaintiff corporations and as such have personal knowledge of the matters herein deposed to, except where stated to be on information and belief.
2. The Defendant is using as a defence, my cause of action in another brought against Roderick Graham McLennan and Roderick Alexander McLennan. The Defendant is relying on my status as a bankrupt in order to deny my ability to bring the action against the Defendant.
3. The Defendant notwithstanding its own published information to deal with a complaint within six weeks, has not dealt with my complaint since October of 1995.

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4. The Defendant has continued to insist that I resubmit my complaint in various written formats notwithstanding its own Rules of the Law Society, Part 3. Rule 85(2)(a) wherein the form of the complaint does not necessarily have to be written.

5. The Plaintiff claims the ability to bring this action pursuant to - Sec. 103(2) (h)(i)(j) of the Legal Profession Act.

6. The Defendant through its negligence and inaction has allowed certain of its members to continue to deprive me of my rights under the Canadian Bill of Rights - Sec. 2(e) and the Canadian Charter of Rights and Freedoms.

Rahall admits that he is not a lawyer, and is not and has never been a member of the Law Society of Alberta.

Part V. *Discussion:*

I. *Bankruptcy Issue:*

[31] Section 71 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, reads as follows:

71. (1) A bankruptcy shall be deemed to have relation back to, and to commence at the time of the filing of, the petition on which a receiving order is made or of the filing of an assignment with the official receiver.

(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

[32] As noted above, Rahall is an undischarged Bankrupt and no appeal has been taken from the Order of Wilson, J. which adjudged Rahall bankrupt.

[33] There is substantial case authority in Canada dealing with the effect of an Order under s. 71 and its predecessor in previous bankruptcy statutes.

[34] In the 1956 case of *Eggen v. Grayson* (1956), 36 C.B.R. 72, Mc-Bride, J. of the Alberta Supreme Court, sitting in Bankruptcy, stated as follows:

From the authorities the principle appears clear that the right of action for damages for injury to a bankrupt's property which lessened the value of his assets vests in and passes to his trustee and any such damages awarded go for the benefit of his creditors, but on the other hand, any right of action for injury to his character and reputation remains vested in the bankrupt and does not pass to the trustee; the bankrupt may sue for damages for such injury in his own name, and if an award is made, it is purely personal to him and he keeps the amount awarded and the trustee cannot intercept it.

[35] Several years later, Riley, J. of the Alberta Supreme Court, sitting in Bankruptcy, in the case of *Re Ritenburg* (1961), 3 C.B.R. (N.S.) 294, in dealing with a similar issue, quoted with approval the decision of *Rogers v. Spence* (1844), 13 M. & W. 571, 153 E.R. 239 (Ex. Ch.), wherein it was stated:

> ... As the object of the law is manifestly to benefit creditors, by making all the pecuniary means and property of the bankrupt available to their payment, it has, in furtherance of this object, been construed largely, so to pass, not only what in strictness may be called the property and debts of the bankrupt, but also those rights of action to which he was entitled for the purposes of recovering, in specie, real or personal property, or damages in respect of that which has been unlawfully diminished in value, withheld, or taken from him; but causes of action not falling within this description but arising out of a wrong personal to the bankrupt, for which he would be entitled to remedy whether his property were diminished or impaired or not, are clearly not within the letter, and have never been held to be within the sprit, of the enactments, even in cases where injuries of this kind have been accompanied or followed by loss of property.

[36] In the case of *Cherry v. Ivey* (1982), 43 C.B.R. (N.S.) 174, the Ontario Supreme Court stated the following at p. 176:

> There is no question on the authorities that the cause of action to recover damages for embarrassment, anxiety and emotional trauma, humiliation, mental distress and physical upset is clearly a personal matter that remains with the debtor, notwithstanding his bankruptcy. It is also clear from the cases, in my view, that the unlawful destruction of the credit and repute of a person, if actionable, is, generally speaking, actionable by the undischarged bankrupt personally.

[37] A similar issue was dealt with by the Ontario Court of Appeal in the decision of *Holley v. Gifford Smith Ltd.* (1986), 59 C.B.R. (N.S.) 17, wherein the Court, after citing the decisions of *Eggen v. Grayson* and *Cherry v. Ivey,* stated the following:

> It is clear that where the damages for which the bankrupt asserts a claim are personal in nature, whether it be for physical suffering resulting from physical injuries sustained as a result of the negligence of another person or mental suffering resulting from a libel or slander perpetrated upon him, such cause of action does not become the

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property of his trustee in bankruptcy because it is not the policy of the law to convert into money for the creditors the mental or physical anguish of the debtor.

[38] Marceau, J. dealt with a similar issue in the case of *Whissell v. Bennett Jones,* supra, at which time Marceau, J. accepted the following statement as a correct statement of the law:

> These authorities establish, with reasonable clarity, that the dividing line is to be placed between actions which are brought with respect to damages or loss relating to the bankrupt's property or assets and actions for damages to his person or reputation. An undischarged bankrupt has no status to bring the former because the damage was to his assets or estate which passes to the trustee to be used to satisfy his creditors. However, the bankrupt does have status to bring action in respect of an unlawful conduct which cause personal injury or harm and therefore has not diminished the estate which passes to the trustee.

[39] The issue then arises as to whether or not any of the allegations in the two actions are "personal" as defined by the case law.

1. *The McLennan Action:*

[40] The allegations in the McLennan action are as follows:

1. The Plaintiff, Monier M. Rahall, is a resident of the Province of Alberta.
2. The Plaintiff Corporations are corporations incorporated under the laws of the Province of Alberta, and carried on business in the Province of Alberta.
3. The Defendant, Roderick Graham McLennan, is a solicitor of the firm McLennan Ross and, as far as the Plaintiff is aware a resident of the Province of Alberta. The Defendant, Roderick Alexander McLennan, is a solicitor and founding partner of the firm McLennan Ross and as far as the Plaintiff is aware, a resident of the Province of Alberta.
4. The Plaintiff and his corporations were damaged by the actions of the Defendants.
5. The Plaintiff had confidential information propagated by the Defendant violating conflict of interest guidelines.
6. Roderick Graham McLennan represented the Alberta Treasury Branches at the same time that other members of his firm represented other lenders and the receivers, all in conflict of interest. The Defendant not only condoned this behaviour, he promoted it.
7. Roderick Graham McLennan conspired to take away the Plaintiff's rights to due process by petitioning the Plaintiff into bankruptcy and using the Bankruptcy Act as an abusive instrument also as a method of avoiding litigation. His actions were reckless and with little regard to other financial matters.
8. Roderick Graham McLennan defamed the Plaintiff to several members of the professional community in Edmonton and propagated confidential information knowingly damaging the Plaintiff's integrity and reputation with the counsel of other financial institutions.
9. Roderick Graham McLennan violated the rules of court in order to harass the Plaintiff under the guise of legal proceedings and deprive the Plaintiff of his rights to due process. The Defendant brought motions of civil contempt that violated the rules of court.
10. In order to get favourable rulings against the Plaintiff. Roderick Graham McLennan contrived to bring motions before one particular Justice even though another had been appointed as case management judge, once again knowingly abusing the process to the detriment of the Plaintiff and the courts.
11. Roderick Graham McLennan prepared orders that allowed Coopers& Lybrand who had worked for the Plaintiff as debtor to then work for the creditor, all the while knowing that such orders put Coopers & Lybrand into a serious conflict of interest with respect to the Plaintiff. The conflict of interest was pre-meditated and promoted by the Defendant who prepared the orders knowingly.
12. Roderick Graham McLennan continually was derelict in his duties by not responding to written correspondence and caused the Plaintiff damages.
13. The Defendants conspired to withdraw and tamper with the submission of offers for sale of properties to ensure that the Plaintiff was kept in bankruptcy longer. They intentionally induced breach of contract.
14. Roderick Graham McLennan controlled and interfered with the actions of a court-appointed officer, the Trustee, on several occasions to the detriment of the Plaintiff.
15. Roderick Graham McLennan continually violated the rules of court to the detriment of the Plaintiff.
16. The Defendants contacted other lenders, ex-employees, relatives, accountants and business associates of the Plaintiff with the intention of being to the Plaintiff's detriment. These individuals were induced to work against the Plaintiff's interests in return for access to the disposal of the Plaintiff's assets. These offers of inducement are now occurring.

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17. Roderick Graham McLennan prepared an order that allowed an unsecured creditor to rank ahead of secured creditors. The Defendant continually conspired to undermine any restructuring or viable proposals as a method of undermining the Plaintiff.
18. The Defendant, Roderick Alexander McLennan, conspired with the co-Defendant to interfere and otherwise tamper with bona fide offers that were to be presented to the Court for the sale of various properties resulting in the withdrawal of those offers to the financial detriment of the Plaintiff's estate knowingly making it more difficult for the Plaintiff to be discharged from bankruptcy.

[41] It is clear from the case law that actions by an undischarged bankrupt are barred unless the actions are "personal." Accordingly, unless it is made clear in a pleading that the action is personal, the action is barred.

[42] To bring oneself within the exception, the cause of action must be clearly drafted to reflect an allegation of injury to a person and/or his credit or reputation.

[43] In my view, the only allegation which is personal in the McLennan action is paragraph 8, which refers to an injury to the Plaintiff Rahall's reputation and integrity.

[44] All other allegations in the McLennan action relate to allegations of damage to the bankrupt's property.

[45] Rahall argues that the *Bankruptcy and Insolvency Act* has been used to undermine the *Canadian Bill of Rights,* specifically paragraph 2(e).

[46] Paragraph 2(e) of the *Canadian Bill of Rights,* 8-9 Eliz. II, c. 44 (Canada) [R.S.C. 1985, App. III], reads as follows:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights,* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ...
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

[47] Rahall alleges that improper use has been made of the *Bankruptcy and Insolvency Act,* and argues that his rights have been violated. These arguments were open for Rahall to raise before Wilson, J. and it is significant to note that Rahall has not seen fit to appeal the Order of Wilson, J. The *Bankruptcy and Insolvency Act* does provide for a mechanism for a fair hearing which involves due process of a law. All persons are treated equally before the Court, and all persons are afforded the same rights of appeal under the statute.

[48] Rahall argues that the cost of filing a Notice of Appeal limits the right of appeal and limits rights to due process, and argues that his rights under the Bill of Rights have been undermined.

[49] No evidence has been presented before me that the cost of appeal under the *Bankruptcy and Insolvency Act* is in any way discriminatory. The fact is that Rahall has only seen fit to appeal the Order of Lefsrud, J. and not the Order of Wilson, J.

[50] As was pointed out in the decision of *Whissell v. Bennett Jones Verchere* (supra) by Marceau, J., it is a condition precedent to any action attacking a bankruptcy Order that the bankruptcy Order should be set aside. In this case, the issue of Rahall's bankruptcy has been determined against him and no appeal has been filed, and accordingly, the Order stands.

[51] With the exception of paragraph 8 in the McLennan action, all of the other allegations relate to the bankruptcy proceedings.

[52] Rahall cannot relitigate the issues which were before Wilson, J. unless and until an appellate court sets aside the Order of Wilson, J.

[53] Legal consequences flow from the Order of Wilson, J. and Rahall cannot circumvent a valid Court Order under the guise of these proceedings.

II. *Law Society Action:*

[54] The Law Society action reads as follows:

1. The Plaintiff, Monier M. Rahall, is a resident of the Province of Alberta.
2. The Plaintiff Corporations are corporations incorporated under the laws of the Province of Alberta, and carried on business in the Province of Alberta.
3. The Defendant, The Law Society of Alberta, is a self-governing association of all practising lawyers in the Province of Alberta.
4. The Plaintiff, and the Plaintiff corporations were damaged by the negligence of the Defendant.
5. The Defendant acted negligently by violating its own rules governing the operation of the Law Society of Alberta.

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6. By letters dated October 4, 11, December 15, 1995, February 27, 29, 1996, March 26, 1996, April 4, 17, 19, 1996, and August 6, 1996 the Plaintiffs filed complaints against David Mark Gunderson, Q.C., Roderick Alexander McLennan, Q.C., Charles Paul Russell, Roderick Graham McLennan, Douglas Neil Tkachuk, Katherine L. Hurlburt. The Law Society of Alberta has maliciously and in bad faith for improper reasons refused to investigate those complaints.
7. The Defendant was negligent by not acting on complaints in a timely manner as prescribed in the Rules of the Law Society of Alberta thereby exposing the Plaintiffs to further damages.
8. The Defendant's negligence allowed certain of its members to escalate their moral turpitude because of its lack of disciplinary action in conjunction with the complaints set forth in Paragraph 6.
9. The Defendant, by not addressing conflicts of interest with regard to certain of its members named in Paragraph 6, has created a breeding ground for additional conflicts of interest by not acting on the complaints set forth in Paragraph 6.
10. The Defendant, by not addressing the accountability of certain of its members named in Paragraph 6, has allowed future actions to fall victim to some dishonest, unethical, and incompetent conduct.
11. The Defendant was negligent in its duty to protect the public interest.
12. The Defendant has been deliberately evasive in dealing with the Plaintiff's complaint hoping a Judicial decision will mitigate the complaint. Complaints were repeatedly stalled by the Defendant to wait for a judicial decision in hope that it would absolve them of their responsibility. The Defendant's inaction has had and will have effect on the outcome of such a decision because the lawyers involved are allowed to continue their moral turpitude and unethical practices.

[55] As noted above, the issues of whether or not this is a proper case for judicial review and whether or not a cause of action exists in favour of an individual Plaintiff have not been argued, and I express no opinion on these issues at this time.

[56] Ignoring for the moment the issues of whether or not the Statement of Claim is drafted even creates a cause of action in an individual, the question that arises as to whether or not the Statement of Claim is one in which it is alleged that a "personal" injury to reputation or credit has occurred.

[57] No such allegations have been pleaded, nor have any facts been pleaded which would found "personal" claims as defined by the case law.

II. *Legal Profession Act Issue:*

[58] There is no issue that Rahall can act for himself. Rahall admits he is not a lawyer and is not a member of the Law Society of Alberta.

[59] O'Leary, J., in the case of *Professional Sign Crafters (1988) Ltd. v. Wedekind* (supra), discussed the effect of s. 103 of the *Legal Profession Act* in the context of a situation wherein a sole director and officer of corporate plaintiffs prepared and issued a statement of claim.

[60] O'Leary, J. also discussed the provisions of Rules 5.2, 5.3 and 5.4 of the *Alberta Rules of Court.*

[61] In this particular situation, Rahall has filed Statements of Claim on behalf of 23 corporations in which Rahall is an officer.

[62] The *Legal Profession Act,* S.A. 1990, c. L-9.1, regulates the practice of law in the Province of Alberta. The relevant parts of s. 103 of the *Legal Profession Act* are as follows:

103(1) No person shall, unless he is an active member of the Society.
(a) practise as a barrister or as a solicitor,
(b) act as a barrister or as a solicitor in any court of civil or criminal jurisdiction,
(c) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person, or
(d) settle or negotiate in any way for the settlement of any claim for loss or damage founded in tort.
(2) Subsection (1) does not apply to the following:
(h) a person who acts on his own behalf in an action, matter or proceeding to which he is a party:
(j) an officer or employee of a corporation, partnership or unincorporated body in respect of the preparation of a document for the use of the corporation, partnership or unincorporated body or to which it is a party;
(1) a person permitted by statute to appear as the agent of another person before a justice of the peace, the Provincial Court or a provincial judge in respect of services provided by that person as an agent:

[63] In his decision, O'Leary, J. stated the following at p. 57 and following:

(8) In order to place the issues in perspective it is important to distinguish between the inherent discretion of a superior Court to permit a non-lawyer to appear physically in Court or before a judge as the representative or

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advocate of another person (the "right of audience"). and the right of an individual to represent another person in respect of legal matters generally, that is, the right to practice law.

9 Unless clearly taken away or modified by statute, the Court of Queen's Bench, as a superior Court, has, by virtue of its inherent jurisdiction to control its own procedure, a discretion to permit an individual other than a member of the Law Society of Alberta to appear in Court as an agent or advocate on behalf of another person: Collier v. Hicks (1831), 2 B. & Ad. 663, 109 E.R. 1290: Abse v. Smith, [1986] Q.B. 536 (C.A.).

10 Rule 5.4 is a recognition and confirmation of the Court's inherent discretion. It manifests an intention on the part of the Judges of the Court of Queen's Bench to retain the right to control who may appear in Court on behalf of parties to litigation. It is one of three Rules promulgated in 1992 as Pt. 1.1 of the Rules of Court under the heading "Audience Before the Court" (Alta. Reg. 87/92). It is preceded by R. 5.2 and 5.3:

"5.2 Subject to this Part, a person shall only be represented before the Court by a Solicitor.

"5.3 An individual may represent himself before the Court."

11 The Court's inherent discretion may, of course, be modified or taken away completely by statute. If the Act affects the Court's inherent jurisdiction, then the discretion must give way to the extent that it is inconsistent with the legislation. The wording of s. 103(1)(c) must be examined since, at first glance, it appears to remove the discretion by prohibiting anyone but a lawyer from representing another person "before a court or judge":

"(1) No person shall, unless he is an active member of the Society.

"(c) Commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person."

12 To effectively take away or modify the Court's inherent jurisdiction the legislature must do so in clear and unequivocal terms: *Cook v. Ip* 1985 CanLII 163 (ON CA), (1985), 22 D.L.R. (4th) 1 (Ont. C.A.). *Jahnke v. Wylie* 1993 CanLII 7155 (AB QB), (1993), 13 Alta. L.R. (3d) 31 (Q.B.).

13 In my opinion, s. 103(1)(c), properly construed, does not remove or diminish the Court's inherent discretion to decide who it will permit to address it and is not in conflict with R. 5.4. The Legislature could not have used the word "before" in the sense of a physical presence in a courtroom in front of a judge. Subsection (1)(c) would not make sense if that were the case. One does not "commence" an action or proceeding in a courtroom or in the presence of a judge. The words "carry on or defend any action or proceeding" are equivocal. They may refer to physical attendances in Court in the course of civil or criminal litigation, or to steps in an action or proceeding taken entirely outside a courtroom and away from the presence of a judge.

14 A secondary meaning must be given to the words "before a court or judge". The expression "before the court" is commonly used interchangeably with "in court" where the word "court" refers to the institution rather than the place. For example, "before" and "in" appear to have the same meaning in s. 19 of the *Judicature Act,* R.S.A. 1980, c. J-1, and neither word refers to a physical presence in a courtroom or otherwise in front of a judge. Section 19(1) provides that no proceeding "pending in the Court" may be restrained by prohibition or injunction. Subsection (2) then says:

"(2) Nothing in subsection (1) disables the Court from directing, if it thinks fit, a stay of proceedings in a proceeding pending *before* it, and any person, whether a party or not to any proceeding at any time pending *in* the Court ..." [emphasis added]

15 In my view, the expression "before a court or judge" in s. 103(1)(c) means "in a court" in the institutional rather than the physical sense. Subsection (1)(c) therefore means that a non-lawyer cannot act for or represent another person in respect of litigation, that is, in respect of matters "in" or "before a Court." The prohibition is general and extends to all aspects of acting for or representing another person in connection with litigation. In my opinion, more precise language than that used in subs. (1)(c) would be required in order to displace the inherent and fundamental jurisdiction of a superior Court to control its own procedure. The purpose of the provision is to regulate the practice of law for the benefit of the public and not to restrict the right of audience. The continued existence of the Court's inherent discretion does not conflict with this purpose. My interpretation of s. 103(1)(c) leaves intact the inherent jurisdiction of the Court to control the right of audience as expressed in R. 5.4. A corporation may, therefore, be represented in Court by any individual to whom the Court grants permission in the exercise of its inherent jurisdiction.

16 An individual has the right to commence and conduct litigation on his own behalf. Section 103(2)(h) recognizes that right by excluding "a person who sues on his own behalf in an action, matter or proceeding to which he is a party" from the restrictions contained in s. 103(1). The Courts have traditionally accorded the right of audience to an individual appearing on his own behalf. Rule 5.3 confirms that practice and complements s. 103(2)(h).

17 The Court's discretion should be exercised with care. There are valid policy reasons for restricting the right of audience to qualified members of the Law Society of Alberta. In *Maclab Enterprises Inc. (Midwest Property*

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Management) v. Rawdah 1983 CanLII 1064 (AB QB), (1983), 27 Alta. L.R. (2d) 164 (Q.B.), Veit, J. held that a corporation had the capacity to appear in a courtroom "in person" by a senior officer, and thus came within the exception now contained in s. 103(2)(h). She questioned, however, whether the right of audience should be extended to a corporation appearing in that manner. At p. 169 she alluded to some policy reasons for requiring that corporations be represented by members of the Bar:

"Limitations could be placed upon corporations for legitimate reasons of public policy and for reasons of professional policy ...

"In my view, it might be decided in Alberta as it has been elsewhere, notably in England, that in order to enhance the efficiency of the courts, maintain the control of the judiciary over those who appear in the courts, and preserve the existence of lawyers as a learned and reputable profession, specific rules or statutes should be enacted so as to take away from corporations the right which they have to appear in our courts in person."

As I have already indicated, it is my view that the Court has a discretion to permit a corporation to be represented in Court by an appropriate individual. That discretion existed when *Maclab* was decided and was acknowledged by Veit J. With respect, I do not believe it was necessary for her to base her decision on the exemption now contained in s. 103(1)(h).

18 Similar policy concerns were expressed by May L.J. in *Abse v. Smith,* supra, at p. 555:

"First, I have no doubt that it is essential for the proper administration of justice in the courts of this country and the maintenance of the rule of law throughout the land that every court must retain the untrammelled power of regulating its own proceedings at least in all cases where these are not already regulated by ancient usage or statute.

"Secondly, from the accumulated wisdom of the courts, as exemplified in the authorities ... as well as from my own experience both as advocate and judge, I think that it is essential that those who act as advocates in our courts, particularly in the higher courts ... should be members of a profession or professions subject to a strict code of discipline and etiquette and who have been thoroughly trained and practiced in the skills of advocacy, in the proper and expeditious conduct of litigation and in the law. One of the most important factors tending not only to the just, but also to the swift, determination of litigation, which is so desirable, is that those who act as advocates for the litigants concerned have been thoroughly trained and are indeed adequately experienced to do so."

21 The Defendants submit that in preparing, issuing and serving the Statement of Claim, Stanley commenced the action on behalf of the Plaintiffs and was therefore in breach of s. 103(1)(c). The Plaintiffs argue that s. 103 does not bar a closely-held corporation from commencing an action through the individual who controls it. A corporation is a legal person and the Plaintiffs say they are each exempted from the prohibition contained in subs. (1)(c) by subs. (2)(h) as "a person who acts on his own behalf in an action ... to which he is a party".

22 The Plaintiffs rely on *Maclab Enterprises Inc. v. Rawdah,* supra, where Veit J. held that a corporation has the capacity and the right to appear "in person" in the Court of Queen's Bench by a senior officer. *Maclab* was concerned with the right of audience and did not specifically consider the propriety of a controlling individual commencing an action on behalf of the corporation. Since Veit J. found that a corporation was equivalent to a natural person and therefore within the exemption now expressed in s. 103(2)(h), it is implicit in her judgment that she considered a corporation acting through a senior officer to be excluded from all of the restrictions of s. 103(1).

23 I do not propose to adopt the approach taken by Veit J. in *Maclab*. In my view the conclusion that a corporation can act "in person" within the meaning of s. 103(2)(h) of the Act was obiter and unnecessary for the disposition of the case. Further, the statute then in force has since been repealed and replaced and the new version, although containing some precise exemptions for corporate representation, does not expressly or impliedly treat corporations in the same manner as natural persons and covered by the "in person'" exemption.

24 Veit J. did not have to find that a corporation fails within the "in person" exemption now set out in s. 103(2)(h). The issue in *Maclab* was the right of a senior officer to appear in Court as agent for a corporation, that is, the right of audience. The Court had a discretion to permit or forbid the individual to appear as agent. The matter could have been resolved by simply granting the individual permission to appear pursuant to the Court's inherent discretion.

25 The statute then in effect, the *Legal Profession Act,* R.S.A. 1980, c. L-9, has since been repealed and replaced: S.A. 1990, c. L-9.1. The current version refers to corporate representation in several exempting subsections of s. 103(2). A new provision, subs. (2)(j), exempts an officer or employee of a corporation in respect of the preparation of legal documents to which the corporation is a party and for its own use. This does not refer to pleadings. I believe it is significant that the Legislature, which apparently considered the question of corporate

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representation in legal matters in some detail, made specific allowance for the preparation of legal documents by officers and employees of corporations but said nothing about the right of officers and employees to act as agents in the preparation of pleadings and the commencement and prosecution of legal proceedings free of the restraint of s. 103(1).

26 The Plaintiffs cite two other authorities in support of their contention that a one-person corporation can commence and carry on legal proceedings through the individual who controls it.

27 In *Venrose Holdings Ltd. v. Pacific Press Ltd.* 1978 CanLII 378 (BC CA), (1978), 7 B.C.L.R. 298, 88 D.L.R. (3d) 523, the British Columbia Court of Appeal held that a corporation could commence an action by issuing a Writ of Summons signed on its behalf by a senior officer. A provision of the *Rules of Court* required that a Writ be signed by the Plaintiff or by his solicitor and this was interpreted as authorizing a corporation to issue a Writ without the intervention of a lawyer. The statute regulating the practice of law did not expressly state that an action could only be commenced on behalf of another person by a lawyer. That distinguishes the decision from the case at Bar. Here, the Act says in clear terms that only a member of the Law Society can commence an action as agent for another person.

28 In *Northern Homes Ltd. v. Steel-Space Industries Ltd.* (1975), 57 D.L.R. (3d) 309, 23 B.L.R. 297 [reflex, [1975] 5 W.W.R. 115] (N.W.T.S.C.). Morrow J. held that a corporation could commence proceedings through its President and, further, that the same individual was entitled to appear before the Court on behalf of the corporation in connection with the proceedings. Morrow J. interpreted a provision of the rules of practice permitting a party to issue pleadings in person or through a solicitor as sufficiently broad to authorize a corporation to commence an action by Statement of Claim without the necessity of employing a lawyer. Unlike the situation here, there was apparently no legislation specifying that only a lawyer could commence proceedings on behalf of another.

29 Section 103(1)(c) clearly forbids anyone but a member of the Law Society from commencing and carrying on an action or proceeding on behalf of another person. Unless Stanley can bring himself within an exception in subs. (2) his conduct in preparing and issuing the Statement of Claim as agent of the plaintiffs was a violation of s. 103(1)(c). In my view, it cannot be said that the Plaintiffs were acting "in person" through Stanley so as to bring them within subs. (2)(h) as persons acting on their own behalf in an action or matter to which they are parties. A corporation is a legal entity separate from its shareholders and directors. It is incapable of doing anything except through the acts of individuals acting as its agents. Those are fundamental concepts of corporate law. They have not changed in substance since the decision of the Appellate Division of the Supreme Court of Alberta in *R. v. Cook,* [1932] 1 D.L.R. 88, [1931] 3 W.W.R. 707, 26 Alta. L.R. 156 (C.A.), where MacGillivray J.A. said at p. 94 D.L.R.:

"The corporation although a legal entity included in the definition of 'person' is none the less not a visible person: it is without physical existence: it 'has neither body parts nor passions' and so in my view is quite incapable of doing anything required to be done 'in person.'

"Where an act is done on behalf of a corporation by an agent or attorney it may be said that it is the act of the corporation but it cannot be said that it is the act of the corporation 'in person:' it is the agent or attorney who is acting 'in person.' *Wood v. Swann* (1880), 25 Sol. Jo. 134; Holmsted, p. 326."

In my opinion those words are as apt today as they were when first written.

30 Section 103(1) of the Act forbids the commencement of an action in the Court of Queen's Bench by an individual who is not a member of the Law Society. Subsection (2) exempts certain individuals and circumstances from that prohibition. A corporation cannot act "in person" within subs. (2)(h) and no other exemption applies. A corporation is a legal entity separate from its shareholders, directors, officers and employees and none of them can commence an action on behalf of the corporation without contravening s. 103. I agree with the Master's conclusion that Stanley violated the Act when he prepared, issued and served the Statement of Claim on behalf of the Plaintiffs.

31 The Defendants argue that since the action was commenced through the agency of an unqualified individual in breach of s. 103 of the Act, the proceedings are a nullity and void ab initio. They say that this is not a case of incomplete, improper or non-compliance with a rule of practice which might constitute a curable irregularity, but, rather, a failure to comply with a mandatory statutory prerequisite for the valid commencement of proceedings in the Court of Queen's Bench. The Master accepted this submission and found the action to be a nullity.

32 In my view it is unnecessary to consider the distinction between acts or omissions which give rise to curable irregularities and those which result in nullities.

33 The purpose of the Act is to protect the public by preventing unqualified individuals from practicing law. Those who contravene the Act are subject to penalties. There is nothing express or implied in the statute imposing any

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sanctions on those for whom unqualified individuals purport to act. In many cases the "clients" will be ignorant of the lack of qualifications and it would be harsh to strike out their actions as nullities. I cannot imagine a valid reason for doing so.

34 It was Stanley who contravened the Act, not the Plaintiffs, and it is he who should answer for his conduct. He may be prosecuted for contravening the Act. I have treated the Plaintiffs as entities separate from Stanley for the purpose of interpreting subs. (2)(h) of the Act and it would be inconsistent to now ignore that principle and punish them for Stanley's misconduct.

35 In my opinion, there is no justification in principle or practice for declaring the action a nullity. The Court has jurisdiction over the parties and the subject-matter. It is not suggested that the Statement of Claim is defective in form or that it does not disclose a cause of action. The Defendants have suffered no prejudice which cannot be remedied in costs. There is no policy reason for declaring the action a nullity. The provisions of the Act can be enforced against those who contravene its terms without the necessity of striking out the underlying proceedings.

36 In my opinion the proper disposition of this application is to direct a stay of the action until such time as the Plaintiffs are represented on the record by a qualified agent as required by the Act and the *Rules of Court*.

[64] In my view, the issue facing me dealing with Rahall's attempt to commence legal action on behalf of 23 corporations is identical to the issue which O'Leary, J. dealt with in the *Professional Sign Crafters* case.

[65] While it is accepted that Rahall is an officer of the subject corporations, the fact remains that the corporations are separate legal entities.

[66] Rahall violated the *Legal Profession Act* when he prepared, issued and served the two Statements of Claim on behalf of the corporate Plaintiffs.

[67] In the *Professional Sign Crafters* case, O'Leary, J. discussed the consequences which flow from the fact that corporate actions were commenced by an unqualified individual.

[68] Counsel for the Applicants did not argue that the corporate actions are a nullity, but rather urged upon me that the actions by the corporate Plaintiffs be stayed pending the appointment of counsel authorized to practice law in the Province of Alberta pursuant to the *Legal Profession Act*.

[69] Counsel also submitted that a deadline should be imposed for the corporate Plaintiffs to appoint counsel.

[70] While I accept that the actions by the corporate Plaintiffs must be stayed pending the appointment of counsel. I do not accept that any deadline should be imposed on the corporate Plaintiffs to do so. Needless to say, the corporate Plaintiffs are subject, like all litigants, to Part 24 of the *Alberta Rules of Court,* and in particular. Rules 244 and 244.1.

Part VI. *Conclusions*:

1. *McLennan Action:*

(a) With the exception of paragraph 8, the claims of Rahall are struck out on the basis that Rahall is an undischarged bankrupt and prohibited by s. 71(2) of the *Bankruptcy and Insolvency Act* from advancing the claims.

(b) The claims by the corporate plaintiffs are stayed pending the appointment of counsel who is a member of the Law Society of Alberta.

2. *The Law Society Action:*

(a) The claim of Rahall is struck out on the basis that Rahall is an undischarged bankrupt and prohibited by s. 71(2) of the *Bankruptcy and Insolvency Act* from advancing the claims.

(b) The claims by the corporate plaintiffs are stayed pending the appointment of counsel who is a member of the Law Society of Alberta.

Part VII. *Costs:*

[71] The Parties may speak to costs within 14 days.

Applications allowed.

Application of other substantive law - Sec. 72

72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

Operation of provincial law re documents executed under Act - Sec. 72(2)

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(2) No bankruptcy order, assignment or other document made or executed under the authority of this Act shall, except as otherwise provided in this Act, be within the operation of any legislative enactment in force at any time in any province relating to deeds, mortgages, hypothecs, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens or charges on real or personal property or immovables or movables.
R.S., 1985, c. B-3, s. 72;
1997, c. 12, s. 68(F);
2004, c. 25, s. 45.

Purchaser in good faith at sale protected - Sec. 73
73. (1) An execution levied by seizure and sale of the property of a bankrupt is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the property in good faith under a sale by the executing officer acquires a good title to the property against the trustee.

Forest v. Hancor Inc., [1996] 1 FC 725 - Proposal Not Stripping Good Faith Purchaser

Date:	1995-10-24
Docket:	A-1221-92; A-1259-92
Parallel citations:	1995 CanLII 3536 (FCA); 37 CBR (3d) 117
URL:	http://canlii.ca/t/4nfz
Citation:	Forest v. Hancor Inc., 1995 CanLII 3536 (FCA), [1996] 1 FC 725, <http://canlii.ca/t/4nfz> retrieved on 2013-08-29
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A-1221-92
Gilbert Forest (*Sheriff/Appellant*)
v.
Hancor Inc. and **United Extrusions Ltd.** (*Judgment Creditors/Respondents*)
and
Les systèmes de drainage modernes Inc. (*Judgment Debtor/Respondent*)
and
Caron Bélanger Ernst & Young Inc. (*Trustee for the Judgment Debtor/Respondent*)
and
Laurentian Bank of Canada and **Laurentian Trust of Canada** (*Creditors/Respondents*)
and
118353 Canada Ltée and **167899 Canada Inc.** (*Purchasers/Mises en cause*)
and
Registrar of the Vaudreuil Registry Office (*Mis en cause*)
A-1259-92
118353 Canada Ltd. and **167899 Canada Ltd.** (*Purchasers/Appellants*)
and
Hancor Inc. and **United Extrusions Ltd.** (*Plaintiffs/Respondents*)
v.
Les systèmes de drainage modernes Inc. (*Defendant/ Respondent*)
and
Caron Bélanger Ernst & Young Inc. (*Trustee/ Respondent*)
and
Laurentian Bank of Canada and **Laurentian Trust of Canada Inc.** (*Creditors/Respondents*)
and

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Gilbert Forest (*Sheriff/Mis en cause*)
and
Registrar of the Vaudreuil Registry Office (*Mis en cause/Mis en cause*)
Indexed as: Forestv. Hancor Inc. (C.A.)
Court of Appeal, Hugessen and Décary JJ.A. and Chevalier D.J.A."Montréal, October 3; Ottawa, October 24, 1995.
Practice " Judgments and orders " Enforcement " Appeal from order vacating sale of seized immovable " Bailiff seizing immovable on sheriff's instructions " Motions Judge erred in holding sheriff lacked power to act through bailiffs " "Provincial" sheriffs acting as sheriffs of Federal Court may, unless otherwise provided by Rules, execute writs of execution in same manner as writs executed in performance of usual duties " Motions Judge erred in relying on Federal Court Act, s. 55(5), Federal Court Rule 360 as apply only when writ cannot be directed to sheriff or sheriff unwilling to act " Federal and provincial laws complementary " No implied delegation of power " Bailiffs carrying out seizure, sale as officers of sheriff.
Creditors and debtors " Immovable seized by bailiff on sheriff's instructions " After seizure creditors accepting proposal approved by Superior Court of Quebec " Notice of stay of proceedings served on seizing bailiff " Immovable sold in judicial sale to purchaser in good faith " Neither sheriff nor purchasers notified of proposal before sale " Code of Civil Procedure requiring notice concerning execution of writ be served on sheriff " Seizing bailiff ceasing to be sheriff's officer once seizure completed " Sheriff's sale set aside only in exceptional, limited circumstances " Seizure, judgment valid " Immovable belonging to judgment debtor " Purchaser acting in good faith " Sheriff's conduct beyond reproach " Alleged irregularity existing long before sale, and due to misunderstanding between judgment creditor, secured creditor, judgment debtor and trustee " Filing of proposal not stripping purchaser in good faith of title in immovable purchased in judicial sale if nobody notified sheriff of proposal before sale by sending him certified true copy.
Civil Code " Code requiring any notice concerning execution of writ must be sent to sheriff himself " Service of notice of stay on bailiff acting for sheriff in seizure of immovable not equivalent to service on sheriff " Bailiff authorized to act only in respect of seizure " Although art. 673 providing for consent to suspension of sale by parties to seizure, must inform sheriff of consent for it to be effective.
Bankruptcy " Bankruptcy Act, s. 69(1) providing on filing proposal, no creditor shall continue execution for recovery of claim provable in bankruptcy until proposal refused " S. 69 applying to both proposal and bankruptcy " S. 73, applying only to bankruptcy, providing if judgment executed anyway and sheriff not receiving certified true copy of assignment at time of sale, purchaser in good faith retaining title " S. 66(1) providing all provisions of Act, in so far as applicable, apply with such modification as circumstances require to proposals " Possible to adapt s. 73 to proposals " Filing of proposal not stripping purchaser in good faith of title in immovable purchased in judicial sale if sheriff not notified of proposal before sale by service of certified true copy.
These were appeals from an order to vacate the sale of a seized immovable. After obtaining judgment in the Federal Court against Les systèmes de drainage modernes Inc., Hancor Inc. and United Extrusions Ltd. obtained a writ of *fieri facias*. On the instructions of the sheriff of the District of Beauharnois (Forest), bailiff Trudel seized the immovable. After the seizure, SDM lodged a proposal with its creditors and appointed a trustee. The creditors accepted the proposal, which was approved by the Superior Court of Quebec. The Trustee served a "notice of stay of proceedings" pursuant to *Bankruptcy Act* , section 69 on the Registry and bailiff Trudel. On the sheriff's instructions another bailiff, de Repentigny, sold the immovable in a judicial sale. The Motions Judge relied on *Federal Court Act*, subsection 55(5) and *Federal Court Rules*, Rule 360 in concluding that although the writ was directed to the sheriff, he asked bailiffs to act for him thus usurping a power of delegation which is conferred on sheriffs by Quebec law, but which they do not possess when acting as officers of the Federal Court under the *Federal Court Rules*. *Federal Court Act*, subsection 55(5) provides that where a sheriff is unable or unwilling to act, the process of the Court shall be directed to a deputy sheriff. *Federal Court Rules*, paragraph 360(1)(*b*) provides that where the sheriff or marshal in Quebec is unable or unwilling to act, any process may be issued to a bailiff duly authorized to act as such for the purposes of the *Code of Civil Procedure*.
The issues were: (1) whether the seizure and judicial sale of the immovable were carried out by a person with the authority to do so under the *Federal Court Act* and *Federal Court Rules*; (2) where an immovable is the subject of a proposal after seizure, must a judicial sale thereof to a purchaser in good faith be vacated?
Held, the appeal should be allowed.
(1) The Motions Judge erred in concluding that the sheriff lacked the power to act through bailiffs. "Provincial" sheriffs who act as sheriffs of the Federal Court may, unless otherwise provided by the Rules, execute writs of execution in the same manner as the writs they execute in performing their usual duties. The writ was directed to the sheriff of the District of Beauharnois. He executed the writ in the same manner as he executes any writ directed to him, by asking a bailiff to act for him. That constituted both execution of the writ by the sheriff to whom it was directed within the meaning of subsection 55(4) of the Act (requiring a sheriff to execute the process of the Court that is directed to him), and execution in the

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manner permitted by subsection 56(3), i.e., in the same manner as similar writs are required to be executed by the law of Quebec.
The Motions Judge could not rely on subsection 55(5) and Rule 360 to find that the sheriff lacked the power to act in the circumstances since those provisions concern cases in which the writ cannot be directed to a sheriff or where the sheriff is unwilling to act, which was not the case herein. Once subsection 55(4) applies, subsection 55(5) and Rule 360 no longer apply.
The purpose of *Federal Court Act*, subsections 13(2) and 56(3) and Rule 5 is to ensure that federal and provincial schemes of execution are complementary and fill any possible gaps by resorting, where necessary, to the provincial schemes. The Court must adopt the interpretation that best facilitates the integration of the two schemes. Reasons of administrative convenience as much as of certainty in civil rights matters have led the federal authorities to rely for all practical purposes on provincial practices.
There was no implied delegation of power. According to subsection 13(2), the provincial sheriff is a sheriff of the Court. According to the *Sheriffs' Act*, section 2, the bailiff acts for the sheriff and not in his place. The seizure was made by bailiff Trudel in his capacity as an officer of the sheriff. The sale was carried out by bailiff de Repentigny in his capacity as an officer of the sheriff. In both cases, the power exercised was that of the sheriff even though it was exercised by a bailiff.
(2) (a) Neither the sheriff nor the purchasers were told before the sale of the existence of a proposal. Although notice of stay had been served on the seizing bailiff Trudel, the Quebec *Code of Civil Procedure* provides that any notice concerning execution of a writ must be sent to the sheriff himself. Furthermore, bailiff Trudel was authorized to act for the sheriff only in respect of the seizure. Once the seizure was completed, he ceased to be a sheriff's officer. He was not a sheriff's officer for the purposes of the judicial sale.
(b) Once a sheriff's sale has taken place, it is only exceptionally and on very limited grounds that it can be set aside. This was not an exceptional case. The seizure and the judgment pursuant to which it was made were valid. The immovable sold by judicial authority belonged to the judgment debtor. The purchaser acted in good faith, the sheriff's conduct was beyond reproach and the alleged irregularity existed long before the date fixed for the sale and was due solely to the misunderstanding that arose between the judgment creditor, the secured creditor, the judgment debtor and the trustee.
(c) *Bankruptcy Act*, subsection 69(1) provides that on the filing of a proposal, no creditor shall continue execution for the recovery of a claim provable in bankruptcy until the proposal has been refused. Subsection 69(1) applies to both a proposal and a bankruptcy. Section 73, which applies only to bankruptcy, moderates substantially the scope of the stay under subsection 69(1). If in spite of the prohibition imposed by subsection 69(1), a creditor nevertheless proceeds to execute the judgment and if the officiating sheriff has not at the time of the sale received a certified true copy of the assignment, the judicial sale will be valid, the purchaser in good faith will retain title and the sheriff may only, to the detriment of the judgment creditor, deliver the proceeds of the sale to the trustee. Subsection 66(1) provides that "All the provisions of this Act in so far as they are applicable, apply with such modifications as the circumstances require to proposals". In order to avoid inconsistencies concerning when a purchaser's title would be valid, subsection 66(1) should be given a more liberal interpretation than that proposed in the past. It is possible to adapt section 73 to proposals. The filing of a proposal, even one accepted by the creditors and approved by the Court, does not strip a purchaser in good faith of title in an immovable purchased in a judicial sale if nobody notified the sheriff of the proposal before the sale by sending him a certified true copy thereof. Such notice could, as in the case of bankruptcy, have been sent to the sheriff by the debtor personally, by one of the creditors or by the trustee.
statutes and regulations judicially considered
Bailiffs Act, R.S.Q. 1977, c. H-4, s. 1 (as am. by S.Q. 1989, c. 57, s. 3).
Bankruptcy Act, R.S.C., 1985, c. B-3 , ss. 42(1)*i*), 57(1), 60(2), 63, 66(1), 69, 72(1), 73, 75.
Code of Civil Procedure, R.S.Q. 1977, c. C-25, arts. 596, 660, 673, 674, 679, 698.
Federal Court Act, R.S.C., 1985, c. F-7 , ss. 13(1),(2), 55(4),(5), 56(3).
Federal Court Rules, C.R.C., c. 663, RR. 5, 360 (as enacted by SOR/79-58 , s. 2).
Sheriffs' Act, R.S.Q. 1977, c. S-7, s. 2.
cases judicially considered
applied:
Garcia Transport Ltée v. Royal Trust Co., 1992 CanLII 70 (SCC), [1992] 2 S.C.R. 499; *McGregor v. Canada Investment and Agency Co.* (1892), 21 S.C.R. 499; affg *Canada Investment and Agency Co. & McGregor* (1892), 1 Que. Q.B. 197; *Anjou (Town of) v. C.A.C. Realty Ltd. et al.*, 1977 CanLII 178 (SCC), [1978] 1 S.C.R. 819; (1978), 18 N.R. 301; *Motor Transport Board of Manitoba v. Purolator Courier Ltd.*, 1981 CanLII 208 (SCC), [1981] 2 S.C.R. 364; (1981), 126 D.L.R. (3d) 385; 12 Man. R. (2d) 61; 38 N.R. 465.
distinguished:

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Rossie c. Gosselin, [1979] C.S. 273; *Blanchette c. Vertu* (January 13, 1983), St-François 450-05-000562-815 (Sup. Ct), SOQUIJ No. 83-217; *Stebenne c. Banque de commerce canadienne impériale*, [1982] C.S. 884; *Sauvegarde (La), Cie d'assurance sur la vie c. Tapis Laberge Inc.*, [1983] C.S. 835.
referred to:
Stephens v. R. (1982), 26 C.P.R. 1; [1982] CTC 138; 82 DTC 6132; 40 N.R. 620 (F.C.A.); *Roynat Inc. c. Grenier*, [1985] R.D.J. 89 (C.A.); *Vachon v. Canada Employment and Immigration Commission*, 1985 CanLII 12 (SCC), [1985] 2 S.C.R. 417; (1985), 23 D.L.R. (4th) 641; 57 C.B.R. (N.S.) 113; 63 N.R. 81; *R. v. Fitzgibbon*, 1990 CanLII 102 (SCC), [1990] 1 S.C.R. 1005; 78 C.B.R. (N.S.) 193; 55 C.C.C. (3d) 449; 76 C.R. (3d) 378; 107 N.R. 281; 40 O.A.C. 81; *Gobeil v. Cie H. Fortier et al.*, 1982 CanLII 188 (SCC), [1982] 1 S.C.R. 988; 138 D.L.R. (3d) 50; 42 C.B.R. (N.S.) 209; 44 N.R. 384; *Hudson (trustee in bankruptcy) v. Brisebois Bros. Construction Ltd.* 1982 ABCA 115 (CanLII), (1982), 37 A.R. 48; 135 D.L.R. (3d) 166; [1982] 4 W.W.R. 84; 19 Alta. L.R. (2d) 276; 42 C.B.R. (N.S.) 97 (C.A.); *Amanda Designs Boutique Ltd. v. Charisma Fashions Ltd.*, [1972] 3 O.R. 68; (1972), 27 D.L.R. (3d) 392; 17 C.B.R. (N.S.) 16 (C.A.); *In re Hanna (W.) & Company Ltd.* (1961), 2 C.B.R. (N.S.) 40 (Ont. S.C.); *In re Coupal et Frères Ltée: Vibrapipe Concrete Products Ltd. et Ville de Chambly*, [1968] C.S. 91; (1967), 12 C.B.R. (N.S.) 28.
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Bohémier, Albert. *Faillite et Insolvabilité*, tome 1, Montréal (Qué.): Éditions Thémis, 1992.
APPEALS from order vacating a judicial sale of a seized immovable on the ground that the method of carrying out the seizure and sale, although recognized under Quebec law, was not authorized by the *Federal Court Act* and *Federal Court Rules* (*Hancor Inc. et al. v. 118353 Canada Ltd. et al.* reflex, (1993), 56 F.T.R. 82 (F.C.T.D.)). Appeal allowed.
counsel:
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Martin Bernard and *Claude Morency* for Hancor Inc. and United Extrusions Ltd., judgment creditors/respondents in A-1221-92, plaintiffs/respondents in A-1259-92.
Michel Morissette for Les systèmes de drainage modernes Inc., judgment debtor/respondent in A-1221-92, defendant/respondent in A-1259-92.
Alain Robichaud for Laurentian Bank of Canada and Laurentian Trust of Canada (Inc.), creditors/ respondents in A-1221-92 and A-1259-92.
Michel La Roche and *Jean-François Gauvin* for 118353 Canada Ltd. and 167899 Canada Inc./Ltd., purchasers/mises en cause in A-1221-92, purchasers/appellants in A-1259-92.
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de Grandpré, Godin, Montréal, for Laurentian Bank of Canada and Laurentian Trust of Canada (Inc.), creditors/respondents in A-1221-92 and A-1259-92.
Michel La Roche, Montréal, for 118353 Canada Ltd. and 167899 Canada Inc./Ltd., purchasers/ mises en cause in A-1221-92, purchasers/appellants in A-1259-92.
The following is the English version of the reasons for judgment rendered by
Décary J.A.: What, according to the *Federal Court Act* [R.S.C., 1985, c. F-7] and *Federal Court Rules* [C.R.C., c. 663], are the powers of a sheriff appointed by the Quebec authorities when seizing and selling an immovable by judicial authority in his or her capacity as sheriff of the Federal Court? Where an immovable is the subject of a proposal after being seized, must a judicial sale thereof be vacated to the detriment of a purchaser in good faith even though no notice of stay appears to have been served on the sheriff before the sale? These are the basic questions raised by these two appeals from the decision of a motions judge reported at reflex, (1993), 56 F.T.R. 82.
Background
On the strength of a favourable judgment of the Federal Court (the Court) in a patent case against Les systèmes de drainage modernes Inc. (SDM), Hancor Inc. and United Extrusions Ltd. (Hancor) obtained a writ of *fieri facias* (the writ) from the Court and seized an immovable belonging to SDM.
After the seizure, SDM lodged a proposal with the trustee Caron Bélanger Ernst & Young Inc. (the trustee) and the said proposal was accepted by the creditors, including the judgment creditor Hancor and the secured creditors Laurentian Bank of Canada and Laurentian Trust of Canada (Laurentian), and approved by the Superior Court of Quebec.
Due to a host of errors and misunderstandings that are outside the scope of the case before the Court,[1] the immovable under seizure was subsequently sold by the sheriff Gilbert Forest (the sheriff) in a judicial sale and awarded to

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purchasers, namely 118353 Canada Ltd. and 167899 Canada Inc./Ltd. (purchasers), whose good faith was not challenged in this Court.

Essentially on the basis that the judicial sale had been conducted in a manner contrary to the *Bankruptcy Act*[2] as it read prior to the 1992 amendments[3] and in contravention of the essential conditions and formalities prescribed by the Quebec *Code of Civil Procedure* [R.S.Q. 1977, c. C-25], three motions to vacate the sheriff's sale were filed, one by SDM and the trustee, a second by Hancor and a third by Laurentian. The Motions Judge allowed the three motions, not on the grounds alleged therein, which he dismissed, but on the ground, raised for the first time at the hearing, that the method chosen by the sheriff to carry out the seizure and sale, which is recognized under Quebec law, is not authorized by the *Federal Court Act*[4] and *Federal Court Rules*. The sheriff and the purchasers each appealed the decision and the two appeals were joined for the purposes of hearing and judgment.

The argument in this Court was limited to the two questions I asked at the outset of these reasons and to questions incidental thereto.

Question 1: Were the seizure and judicial sale of the immovable carried out by a person with the authority to do so under the *Federal Court Act* and *Federal Court Rules*?

The facts relevant to this part of the case are not in dispute. On October 10, 1991, at Hancor's request, a writ of *fieri facias* was issued by the Court in Toronto to the "Sheriff of the District of Beauharnois". On November 7, 1991 Hancor's Montréal counsel sent a copy of the writ to his usual bailiffs, Villeneuve et associés, to have them seize the immovable. On November 11, 1991 the bailiff Sylvain Trudel, a member of Villeneuve et associés, visited the sheriff of the district of Beauharnois, Gilbert Forest, and gave him the writ. The sheriff then instructed the bailiff Trudel to seize the immovable, writing the following words on the back of the writ:

[translation] Valleyfield, November 11, 1991
Instructions to bailiff Sylvain Trudel
To seize and sell
(signed) Gilbert Forest, Sheriff
[N.B.: the words "and sell" on this standard form were crossed out by hand.]

On November 14, 1991 the bailiff Trudel seized the immovable.

On January 11, 1992 the sheriff inserted a notice of public sale in the *Gazette officielle du Québec*. On January 27, 1992 he sent the said notice to the Vaudreuil registry office. On February 2, 1992 he inserted the notice in a local newspaper.

On March 10, 1992 the sheriff instructed another bailiff, Jacques de Repentigny, to sell the immovable in a judicial sale, which he did that very day. After the sale, the bailiff gave the sheriff the minutes of the sale, his report and the cheque issued by the purchasers. On March 30, 1992 the sheriff completed his own report, in which he certified that he had seized the immovable and that on March 10, 1992 he had offered it for sale by auction and awarded it to the two purchasers jointly and severally.

According to the evidence, this procedure (with the probable exception of the delay in preparing the sheriff's report) is that ordinarily followed by counsel, bailiffs and the sheriff in the district of Beauharnois and is in all ways consistent with the requirements of Quebec law.

The trustee and Laurentian argued before the Motions Judge that the said procedure was contrary to the requirements of the *Federal Court Act* ("the Act" in this first part) and *Federal Court Rules* (the Rules). The Motions Judge agreed with them.

The Motions Judge relied basically on subsection 55(5)[5] of the Act and Rule 360[6] [as enacted by SOR/79-58 , s. 2] in concluding that although the writ had been directed to the sheriff of the district of Beauharnois, the said sheriff, though there was no evidence that he was unwilling to act, instead decided to instruct the bailiff Trudel to seize the immovable and the bailiff de Repentigny to sell it in a judicial sale. In asking a bailiff to act for him, the sheriff is alleged to have usurped a power of delegation which is conferred on sheriffs by Quebec law but which they do not possess when acting as officers of the Federal Court under the Rules of this Court. Thus, the seizure and judicial sale are alleged to have been carried out by a bailiff to whom the writ was not directed and who was not authorized under federal law to carry out a seizure and judicial sale.

In my opinion, the Motions Judge was on the wrong track in his interpretation of the facts, the applicable provisions and the intent underlying those provisions.

It can be seen from a joint reading of subsections 13(1) and (2) of the Act[7] that if no sheriff of the Federal Court has been appointed by the Governor in Council for the district of Beauharnois"which is the case"the sheriff appointed by the provincial authorities in the said district becomes *ex officio* the sheriff of the Court.[8] Thus, in the case at bar, the responsibilities of a sheriff of the Court were conferred on the sheriff Forest in addition to those already incumbent on him under provincial law.

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One of the responsibilities he inherited in his capacity as sheriff of the Court is that, provided for in subsection 55(4),[9] of executing the process of the Court that is directed to him.

According to subsection 56(3),[10] unless otherwise provided by the Rules, the sheriff is to execute all writs of execution "as nearly as possible in the same manner as similar writs or process, issued out of the superior courts of the province in which the property to be seized is situated, are, by the law of that province, required to be executed."

Article 660 of Quebec *Code of Civil Procedure* provides that a writ of seizure of immovables "is executed by the sheriff himself or by one of his officers". Furthermore, section 2 of the *Sheriffs' Act*[11] confers on every sheriff "the selection of the bailiffs to be employed by and to act for him in the several districts of Québec," and section 1 of the *Bailiffs Act*[12] provides that a bailiff is an officer "empowered to serve written proceedings issuing out of any court, carry out judicial decisions that are executory and perform any other duty devolving upon him by law."

It unquestionably follows that "provincial" sheriffs who act as sheriffs of the Federal Court may, unless otherwise provided by the Rules of this Court, execute writs of execution in the same manner as the writs they execute in performing their usual duties.

It has been established in the instant case that the writ was directed to the sheriff of the district of Beauharnois. It was adduced in evidence that the sheriff executed the writ in the same manner as he executes any writ directed to him, that is, by asking a bailiff to act for him. In my view, that constitutes both execution of the writ by the sheriff to whom it was directed within the meaning of subsection 55(4) of the Act and execution in the manner permitted by subsection 56(3), that is, in the same manner as similar writs are required to be executed by the law of Quebec. Thus, the Motions Judge committed his first error in concluding that the sheriff lacked the power to act through bailiffs. That error led to a second, which we will now discuss.

Once subsection 55(4) comes into play, subsection 55(5) and its complement, Rule 360, are no longer applicable. Those two provisions concern cases in which the writ cannot be directed to a sheriff or where the sheriff is unwilling to act. Since that is not the case here, the Motions Judge could not rely on subsection 55(5) and Rule 360 to find that the sheriff lacked the power to act in the circumstances.

If there were any doubt, and in my view there is none, it would still be necessary to interpret the word "execute" in subsection 55(4) in a manner that reflects the acknowledged intention of the federal authorities. The clear purpose of subsections 13(2) and 56(3) of the Act and Rule 5[13] is to ensure that the federal and provincial schemes of execution are complementary and to fill any possible gaps by resorting where necessary to the provincial schemes. These provisions are all invitations to the Court to refrain from inflexibility and adopt the interpretation that best facilitates the integration of the two schemes.

The reasons for this are easy to explain. The Federal Court is in a way a court of exception that was grafted onto the existing network of superior courts. Its judgments have significant civil implications and it is essential, if they are to be understandable to litigants and if these implications are to be at all uniform, for execution procedures to be as similar as possible to those of the superior courts. This is all the more essential in that the Court as a general rule uses officers of the court appointed, and the seizure and judicial sale machinery established by, provincial authorities. Thus, reasons of administrative convenience as much as of certainty in civil rights matters have led the federal authorities to rely for all practical purposes on provincial practices.

The arguments revolved, wrongly in my view, around the concept of implied delegation of power. There was strictly speaking no such delegation in the case at bar. According to subsection 13(2) of the Act, the provincial sheriff is a sheriff of the Court. According to the very words of section 2 of the *Sheriffs' Act*, the bailiff acts for the sheriff and not in his or her place. The seizure was made by the bailiff Trudel in his capacity as an officer of the sheriff. The sale was carried out by the bailiff de Repentigny in his capacity as an officer of the sheriff. In both cases, the power exercised was that of the sheriff even though it was exercised by the bailiff.

Finally, the solution adopted by the Motions Judge, which was proposed by the respondents, is impracticable. It places obligations"those of personally seizing everything and selling everything in a judicial sale"on Quebec sheriffs, the very persons to whom subsection 13(2) of the Act entrusts the task of executing such writs, obligations that they do not perform in the course of their everyday duties. At the same time, it places constraints on the machinery established by provincial authorities, which the federal authorities are employing, that the provincial authorities cannot be assumed to have intended to apply thereto. I cannot adopt an interpretation that might paralyze the system. Thus, I consider the following comments by Monnin J.A., which Dickson J. (as he then was) adopted in *Motor Transport Board of Manitoba v. Purolator Courier Ltd.* ,[14] to be relevant even though made in a different context:

I must assume that this federal legislation which was purely a delegation of federal powers to the various provincial transport boards, expects these boards to operate in their usual manner and no more. If such were not the case, it would lead to ridiculous situations and I am not prepared to find that Parliament of necessity desired ridiculous situations.

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I accordingly conclude that in the case at bar the provincial law and federal law are complementary rather than inconsistent and that the Motions Judge erred in holding that a judicial sale carried out by the sheriff in conformity with the requirements of Quebec law and federal law was invalid.

This argument of the respondents was accordingly unfounded.

Question 2: Where an immovable is the subject of a proposal after being seized, must a judicial sale thereof to a purchaser in good faith be vacated?

The respondents relied on both the Quebec *Code of Civil Procedure* and the *Bankruptcy Act* ("the Act" in this second part). They submitted, in short, that the sheriff had been informed of the settlement in progress or of the settlement between the parties, that the parties had reached an agreement and the debt had been extinguished at the time of the judicial sale and that, however that may be, the filing of a proposal resulted automatically in a stay of the execution proceedings, and they argued that these were all grounds for vacating the sheriff's sale.

Les intimés se fondent à la fois sur le *Code de procédure civile* du Québec et sur la *Loi sur la faillite* ("la Loi" dans cette deuxième partie). Ils soutiennent grosso modo que le shérif avait été informé du règlement en cours ou du règlement intervenu entre les parties, qu'il y avait entente entre les parties et extinction de la dette au moment de la vente en justice, et que, quoi qu'il en soit, le dépôt d'une proposition concordataire amenait d'office l'arrêt des procédures d'exécution, autant de motifs, selon eux, d'annulation du décret.The seizure was made on November 11, 1991 by the sheriff Forest acting through the bailiff Trudel. On December 3, 1991 Laurentian registered at the Vaudreuil registry office [translation] "a notice of default and declaration of payment due which have the effect of rendering all securities created under the deed of trust enforceable" in respect of the immovable under seizure. On December 4, 1991 Laurentian filed in the Registry of this Court in Montréal a "motion for a stay of execution by writ of *fieri facias*" and an "opposition to seizure in execution", which were to be presented on December 9, 1991.

On December 6, 1991 SDM made a proposal to its creditors under Part III of the *Bankruptcy Act* and appointed Caron et associés trustee therefor. That same day, the trustee served a "notice of stay of proceedings" pursuant to section 69 of the *Bankruptcy Act* on counsel for SDM, the Registry of the Federal Court and the bailiff Trudel.

On December 9, 1991 Laurentian withdrew its motion to stay and opposition in view of the filing of SDM's proposal.

On January 20, 1992 SDM filed an amended proposal, which was duly accepted by the creditors that same day on the condition, *inter alia*, that SDM and Hancor enter into an agreement and that Hancor [translation] "release all seizures of SDM's assets". Hancor and Laurentian were represented at that meeting.

As agreed on January 20, 1992, Hancor and SDM discharged each other on February 26, 1992 in respect of all past, present or future claims resulting from the events related in the record of the Court and Hancor released all its seizures of SDM's assets. On February 28, 1992 the Superior Court of the district of Beauharnois approved the amended proposal of January 20, 1992.

Then, on March 10, 1992 the sheriff sold the immovable in a judicial sale.

(a) Knowledge of the agreement by the sheriff

It is clear from the evidence, and the finding of fact by the Motions Judge in this respect is unassailable, that neither the sheriff nor the purchasers

were told before the sale of the existence of a proposal, that a notice to stay was sent to them or even that an agreement signed by all the parties had been definitely concluded ending the matter.[15]

It can of course be seen from the evidence that the corporation's president, Mr. Kohen, had contacted the sheriff's office on February 3, 1992 to complain about the notice of sale; however, Mr. Kohen did not mention the existence of a proposal but merely asked that the sale be halted on the ground that [translation] "everything had been settled". The sheriff's deputy with whom he spoke simply said that she [translation] "had nothing in the file indicating that it was settled" and asked him to [translation] "contact his lawyers to have them send us a release, or else the sale would take place".

Similarly, one of Hancor's counsel testified that he too had telephoned Ms. Veillette in early February 1992 to inform her of the proposal, but Ms. Veillette denied taking part in any conversation whatsoever with counsel concerned. The finding by the Motions Judge that the sheriff had not been informed of the existence of a proposal suggests that the Judge did not accept counsel's testimony.

In view of the evidence, which I must say is overwhelming, that the trustee and the counsel for SDM, Hancor and Laurentian quite simply, due to a misunderstanding, failed to tell the sheriff what was going on and in particular to serve any document whatsoever on him, the respondents fell back in desperation on the fact that the notice of stay of December 6, 1991 had been served on the seizing bailiff Trudel.

If, they submitted at the hearing, the Court were to conclude (which it did in the first part) that the bailiff Trudel had seized the immovable in his capacity as a sheriff's officer, it would follow that the service on that officer of the notice of stay on December 6, 1991 was equivalent to service on the sheriff himself.

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I do not find this argument convincing. It is the sheriff who is responsible for executing the writ and the Quebec *Code of Civil Procedure* provides that any notice concerning its execution must be sent to the sheriff himself. A party may not confer on a bailiff a mandate to represent the sheriff that only the sheriff himself may confer. Furthermore, in the case at bar the bailiff Trudel had been authorized by the sheriff to act for him only in respect of the seizure (moreover, Hancor's counsel had asked the bailiff only to seize the immovable). Once the seizure had been completed, he ceased to be a sheriff's officer. At any rate, he was definitely not a sheriff's officer for the purposes of the judicial sale.

Furthermore, that is what Hancor, SDM and the trustee themselves understood to be the case. It was to the office of the sheriff that the president of SDM complained by fax and telephone on February 3, 1992. It was from the sheriff's office that Hancor's counsel received the notice of sale and it was that office that he claims to have telephoned. Another of Hancor's counsel attributes the publication of the notice to [translation] "a clerical error by the sheriff". SDM's Montréal counsel was also aware of this, since the draft release he prepared on January 24, 1992 contained a notice to the sheriff of Beauharnois.[16]

The trustee was also aware of this since, even though it had served the notice of stay on the bailiff Trudel, it can be seen from the testimony of its administrator, Ms. Vincent, that the notice of stay had intentionally not been given to the sheriff for two reasons: the first was that the proposal did not confer possession of the seized assets on the trustee, which was merely an intermediary between SDM and its creditors, and the second was that [translation] "[Hancor's] counsel had already been told to halt the proceedings and it had in fact been agreed that [counsel concerned] would terminate those proceedings".

In short, nobody ever thought that the notice of stay had been served on the sheriff and that the sale had accordingly been suspended. On the contrary, it can be seen without a shadow of a doubt from the evidence that everyone was aware that the sheriff was preparing to hold the sale and that it was he who had to be contacted to prevent it. No such action was taken and the sheriff was never told.

(b) The agreement between the parties and vacating of the sale

The Supreme Court of Canada recently noted that:[17]

. . . while it remains possible, it is only exceptionally that the vacating of sales at law will be permitted and then, only on limited and enumerated grounds. Those exceptions are found in arts. 698 and 699 *C.C.P.*

. . .

This rule suffers few exceptions. A sale based upon a judgment or a seizure which is null may be vacated . . . . Similarly, a sale made *super non domino*, that is, of property which does not belong to the debtor but to a third party, may be vacated . . . .

In summary, then, once a sheriff's sale has taken place, it is only exceptionally and on very limited grounds that it can be set aside.

A comparison of the grounds for opposition, annulment and vacation in respect of seizures in execution of immovable property is especially revealing of the National Assembly's intention: there are more grounds for annulling a seizure than there are for vacating a sale. Moreover, the further one gets from the seizure and the closer to the sale, the fewer the possibilities of stopping the process and the smaller the number of persons who may do so.

Thus, a judgment debtor and a third party with a sufficient interest may oppose and ask for the annulment of the seizure of an immovable on the following grounds:[18]

1. on the ground of an irregularity in the seizure, which causes him a serious prejudice . . . ;
2. on the ground of the property being exempt from seizure;
3. on the ground of the extinction of the debt;
4. on any other ground of a nature to affect the judgment sought to be executed.

However, and in my view this is a decisive indication of the National Assembly's intention, such an opposition must be served at least ten days before the date fixed for the sale or else it cannot stop the sale "except upon the order of the prothonotary . . . for sufficient cause."[19]

A sheriff's sale may be vacated at the instance of any interested person:[20]

698. . . .

(1) If, with the knowledge of the purchaser, fraud was employed to keep persons from bidding;

(2) If the essential conditions and formalities prescribed for the sale have not been observed; but the seizing creditor cannot vacate the sale for any irregularity attributable to himself or his attorney.

Thus, where the grounds for annulment are known prior to the sale and are unrelated to the sale as such, the lateness of the opposing parties may be fatal to them: if they fail to come forward at least ten days before the sale they are taking a great risk; if they come forward after the sale, it is generally too late. Furthermore L'Heureux-Dubé J. stated the following in *Garcia*:[21]

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The requirement that the party who opposes a sale must do so before the sale takes place is very well established in Quebec . . .

She also made an impressive inventory of judgments in which opposing parties had lost their rights by failing to act and repeated the following comment by Taschereau J. in *McGregor v. Canada Investment and Agency Co.*:[22]

Assuming that he had rights to this property the appellant has lost them by the sheriff's sale. *Vigilantibus non dormientibus subvenit lex*.

The respondents asked this Court to follow, as a "trend in the case law", certain Quebec court judgments that allowed motions to vacate a sheriff's sale on the ground that there was an agreement between the parties at the time of the sale and that the debt was extinguished. The judgments to which they referred the Court are: *Rossie c. Gosselin* , [1979] C.S. 273; *Blanchette c. Vertu*, unreported, St-François Sup. Ct., No. 450-05-000562-815, January 13, 1983, SOQUIJ No. 83-217; *Stebenne c. Banque de commerce canadienne impériale*, [1982] C.S. 884; and *Sauvegarde (La), Cie d'assurance sur la vie c. Tapis Laberge Inc.*, [1983] C.S. 835.

I note at the outset that none of them were mentioned by L'Heureux-Dubé J. in *Garcia* as examples of exceptional cases on the vacating of sheriff's sales. I am not sure, therefore, that they constitute a "trend in the case law" with precedential value. However that may be, the circumstances of those cases are not really comparable to those of the case at bar.

In *Rossie* and *Stebenne*, the sale was suspended by the sheriff at the request of the parties, but the judgment creditor then unilaterally ordered the sheriff to continue the execution proceedings. In *Blanchette*, the purchaser knew about the agreement between the parties. In *La Sauvegarde*, the sheriff held the sale after announcing that it was being vacated.

In the case at bar, however, various avenues were open to the respondents well before the sale.

Thus, the parties to the seizure, namely Hancor and SDM, could under article 673 C.C.P. have consented to the suspension of the sale. While it is true that they wanted to do so, they did not do what was necessary to give effect to their consent. As the Motions Judge held, it is not enough that the parties consent, as the sheriff still has to be informed of their consent, and it can be seen from the evidence that he was not. It must not be forgotten that the sheriff is ordered by the Court to sell the immovable ("[t]he writ . . . orders the sheriff" (C.C.P., art. 660)). I cannot conceive that article 673 C.C.P. provides for the automatic suspension of a sale where the parties consent without the sheriff's knowledge. A party could probably ask for a sheriff's sale to be vacated on the ground that the sheriff wrongly refused to suspend the sale,[23] but I do not see how a sheriff could wrongly refuse to suspend if the parties have not asked him to do so. Article 673 C.C.P. does not require that the sheriff take the initiative to suspend a sale he or she is required to hold by Court order: quite the contrary.

Similarly, SDM and its creditors could on the strength of a duly approved proposal have opposed the sale ten days before it took place or, with leave, within a shorter period before it took place. They did not do so.

I make no secret of the fact that it would be tempting from the point of view of equity to give one more chance to parties each of whom believed in good faith that the sale would not take place because there was no longer any reason for it and who failed, as a result of confusion and blundering, to take the necessary action to stop it. But the law is there, and it seeks to protect a person, the purchaser, who also acted in good faith and, above and beyond the interests of the parties to the case, to preserve what Pigeon J., in *Anjou (Town of) v. C.A.C. Realty Ltd. et al.*,[24] called the "principle of the inviolability of judicial sales".

I do not think that this is an exceptional case of the type to which L'Heureux-Dubé J. alluded in *Garcia*. The seizure was valid. The judgment pursuant to which the seizure was made was valid. The immovable sold by judicial authority belonged to the judgment debtor. Furthermore, the purchaser acted in good faith, the sheriff's conduct was beyond reproach and the alleged irregularity, if it is an irregularity, existed long before the date fixed for the sale and was due solely to the misunderstanding that arose between the judgment creditor, the secured creditor, the judgment debtor and the trustee. I note that, where the judgment creditor is concerned, I could not have allowed its motion even if I had found that there was an irregularity, as article 698 C.C.P. bars it from availing itself of an irregularity attributable to itself.

This second argument must fail in so far as it is based on the provisions of the Quebec *Code of Civil Procedure*. The respondents have only one other chance: the *Bankruptcy Act*.

(c) The stay of proceedings and section 69 of the *Bankruptcy Act*

Subsection 69(1) of the *Bankruptcy Act* reads as follows:

69. (1) On the filing of a proposal made by an insolvent person or on the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.

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The respondents argued that a proposal results in an automatic stay of proceedings, that this stay bars a judgment creditor from having property belonging to the debtor sold in a judicial sale and that any judicial sale of such property is null regardless of whether or not the sheriff has been told about the proposal.

The purchaser countered this by arguing that subsection 69(1) does not provide for an automatic stay or that at the very least the stay cannot be set up against a purchaser. It added on the basis of subsection 66(1)[25] of the Act that the protection granted by section 73[26] to purchasers in good faith in respect of a bankruptcy should also be granted to them in respect of a proposal.

Thus, the resolution of a case in which a judicial sale takes place in respect not of a bankruptcy but of a proposal depends on the interpretation of subsections 66(1), 69(1) and section 73 of the Act.

The substance of the debate is quite simple.

Subsection 69(1) applies, by its very wording, to both a proposal and a bankruptcy. The generality of the stay of proceedings under this subsection is established; the courts do not allow a creditor, by enforcing an individual remedy, to frustrate the *Bankruptcy Act* and for his or her own benefit unjustly reduce a debtor's estate by continuing execution proceedings without leave of the court.[27]

Section 73, which according to its wording applies only to bankruptcy, moderates substantially the scope of the stay under subsection 69(1). If, in spite of the prohibition imposed on him or her by subsection 69(1), a creditor nevertheless proceeds to execute the judgment and if the officiating sheriff has not at the time of the sale received a copy of the assignment certified by the trustee as a true copy thereof, the judicial sale will nevertheless be valid, the purchaser in good faith will retain his or her title and the sheriff may only, to the detriment of the judgment creditor, deliver the proceeds of the sale to the trustee.[28]

It was in my view quite unnecessary for certain courts to expatiate upon the absolute or relative nature of the stay of proceedings under subsection 69(1). The question is fine in theory but is in practice resolved less by quashing execution proceedings unlawfully undertaken by a creditor than by delivering the proceeds of those proceedings to the trustee or the general body of creditors.[29]

In view of section 73, it should be pointed out that: (1) it is not the fact of bankruptcy that bars the sheriff from holding the sale or, if the sale has been held, requires him or her to deliver the proceeds of the sale to the trustee, but the notice the sheriff receives; as long as the sheriff is not notified in the prescribed manner, he or she is not only under no obligation to suspend the sale but has no right to do so;[30] (2) it is not necessary that the trustee give the prescribed notice personally, as subsection 73(2) merely requires that a copy of the assignment certified by the trustee as a true copy thereof be sent to the sheriff without specifying who must send it; and (3) the only obligation imposed by subsections 73(2) and (3) is the requirement that the sheriff deliver the property to the trustee if he or she receives the notice before the sale or deliver the proceeds of the sale to the trustee if the notice is received after the sale.[31]

Since section 73, unlike section 69, refers only to "property of the bankrupt" and "an act of bankruptcy", it remains to be determined whether the scheme of subsection 66(1) protects the rights of a purchaser in good faith where, unknown to the sheriff, a proposal is filed before the sale in the same way as if there were a bankruptcy and assignment of the property to the trustee.

The wording of subsection 66(1) has rightly been criticized by Professor Albert Bohémier in *Faillite et Insolvabilité*.[32] Parliament should, in so far as is possible, indicate in a statute what provisions apply to a given situation. By leaving it up to the courts to decide what provisions of the *Bankruptcy Act* apply in the case not of a bankruptcy but of a proposal, Parliament opened the door to uncertainties inconsistent with the economic stability that the *Bankruptcy Act* is nevertheless intended to promote.

According to a common interpretation discussed by Professor Bohémier, it is necessary to start from the idea that the fundamental distinction between a bankruptcy and a proposal lies in the fact that the debtor loses possession of his or her property in a bankruptcy but generally retains it in the case of a proposal, and accordingly to interpret subsection 66(1) to mean that only those provisions of the Act that may apply regardless of whether or not the debtor loses possession are applicable *mutatis mutandis* to a proposal.

However, this approach causes a problem in the case of section 73. As Professor Bohémier noted:

[translation] There are cases involving a composition, which are clearly debatable, in which the courts have refused to apply sections 70 and 73 B.A. mutatis mutandis to a proposal other than a proposal-assignment expressly authorizing the trustee to act. To circumvent this problem, it is advisable to appoint an interim receiver (s. 47 B.A.) and to confer on him or her the right to take possession of the seized property.[33]

It is enough to note that a proposal leads directly to a bankruptcy in the event of a refusal by the creditors (subsection 57(1) of the Act), a default in performance (paragraph 42(1)(*i*) of the Act) or an annulment (subsection 63(4)) to wonder about the fate of a judicial sale that takes place before the refusal, default or annulment or is itself the cause of the default

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or annulment. Would the purchaser's title be valid in the case of a bankruptcy, invalid in the case of a proposal and valid in the case of a proposal that has become a bankruptcy? Such a result would to say the least be inconsistent.

It is in my view possible to avoid such inconsistency by giving subsection 66(1) an interpretation that is more liberal than the one proposed in the past and that corresponds more closely to the particularly general wording of that subsection.

The words used by Parliament are significant: "All the provisions", "in so far as they are applicable" and "with such modifications as the circumstances require". Parliament was aware of the theoretical and practical differences between the scheme of bankruptcy and that of proposals. Whether due to indolence or economy, it did not consider it necessary for the provisions it had passed in respect of bankruptcy to be repeated in or adapted to the case of proposals. At the same time, however, it was very careful to say"at least that is how I understand the words it used"that all the provisions of the Act apply to proposals in so far as they can be applied. In other words, it wanted the courts to find a way, above and beyond their obvious differences, to harmonize the rules applicable to bankruptcy with those applicable to proposals in so far as is possible. It did not say that this must be done at any price: there are cases in which it will not be possible. However, it did say that an attempt must be made to do so on a case-by-case basis and that those involved in this harmonization effort must not hesitate to use their imaginations. Parliament has invited the courts to participate in a process of intelligent harmonization and adaptation, not one of blindly literal application.

The adoption of this approach sheds considerable light on the situation. In section 69, Parliament was concerned solely with the interests of creditors and debtors. In section 73 (and in section 75,[34] which is irrelevant here), it was concerned primarily with the interests of purchasers in good faith, while at the same time conferring on creditors, debtors and trustees the right to block the seizure and sale. Parliament clearly intended to protect purchasers where, unknown to themselves and to the sheriff, they venture into the minefield of bankruptcy and insolvency.

I see nothing in this protection accorded to the purchaser in good faith that depends on whether the debtor or the trustee was in possession of the property sold. In other words, the debtor not being in possession of the property does not change the fact that the intention was to protect the purchaser's title. Indeed, it would be surprising if the judicial sale were valid where the debtor is not in possession of the property sold and invalid where he or she is in possession. It is true that, since this section was drafted in terms of bankruptcy, the obligations it imposes on the sheriff are expressed in a context in which it is a trustee who is in lawful possession of the bankrupt's property and the proceeds of the sale must be delivered to the trustee. However, that is the very challenge faced by the courts under subsection 66(1): is it possible to disregard these concepts proper to a bankruptcy and adapt them to a proposal?

I am all the more comfortable in believing that there is no objection in theory to applying section 73 to a proposal in that the Act itself, in subsection 63(2) on the annulment of a proposal, confirms the validity of a sale made in pursuance of the proposal.

Furthermore, this interest displayed by Parliament in purchasers in good faith is very much in line with its policy, as defined in subsection 72(1) of the Act, not to:

. . . abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act . . . .

It can be seen from my analysis in the preceding section that my decision to apply section 73 to proposals also ensures compliance with the principle of the inviolability of judicial sales that is so profoundly rooted in Quebec civil law.

In my view, it is entirely possible to adapt section 73 to proposals, as subsection 66(1) permits and encourages us to do. It is enough to conclude, by making "such modifications as the circumstances require", that the filing of a proposal, even one accepted by the creditors and approved by the court, does not strip a purchaser in good faith of his or her title in an immovable purchased in a judicial sale if nobody notified the sheriff of the proposal, composition or approval before the sale by sending him or her a certified true copy of the proposal, composition or judgment of approval. Such notice could, as in a case of bankruptcy, have been sent to the sheriff by the debtor personally, by one of the creditors or by the trustee.

To whom, therefore, must the sheriff deliver the proceeds of the judicial sale, as he or she is required to do by subsection 73(3)? Maybe to the trustee for distribution or delivery to whomsoever is entitled thereto, since subsection 60(2) of the Act provides that all moneys payable under the proposal are to be paid to the trustee and section 63 provides that the trustee is not *functus* where a proposal is annulled due to a default in performance. I do not need to answer this question for the purposes of the case at bar.

It is possible that upholding the validity of the judicial sale will result in annulment of the proposal due to the debtor's failure to respect its undertaking to obtain the release of the seizure. However, I do not have to concern myself with the possible ramifications of the Court's decision in this respect. Parliament laid down the consequences of a default in performance in section 63 and paragraph 42(1)(*i*)[35] and it does not matter whether this default results from an intentional act or from a simple mistake made in good faith. Parliament chose to respect the rights of a purchaser in good faith and the debtor, its creditors and the trustee have only themselves to blame if a mistake made by one or more of them made it impossible to perform the proposal.

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This third argument must be rejected.

DISPOSITION

I would allow the appeals, reverse the decision of the Motions Judge and dismiss the three motions to vacate the sheriff's sale.

The appellant purchasers shall have their costs at trial and on appeal against each of the respondents in file No. A-1259-92; the appellant sheriff shall have his costs at trial and on appeal against each of the respondents in file No. A-1221-92.

Hugessen J.A.: I agree.

Chevalier D.J.: I agree.

[1] In this respect, I adopt the following comments of the Motions Judge (reflex, (1993), 56 F.T.R. 82, at p. 84):

There is no question that as the issue in this case has been resolved between the parties as part of a proposal, the forced sale proceeding on this real property should never have been completed. The confusion resulted from an obvious lack of communication between the parties, their counsel and the officers of the Court responsible for the sale. Many persons were to blame, but it is not for this court in hearing the applications at bar to distribute blame or identify those responsible, except to ascertain that the procedure for the court sale was followed and that the essential conditions and requirements for the sale were observed.

[2] R.S.C., 1985, c. B-3.

[3] S.C. 1992, c. 27.

[4] R.S.C., 1985, c. F-7.

[5] S. 55(5) of the Act reads as follows:

55. . . .

(5) In any case where there is no sheriff or marshal or a sheriff or marshal is unable or unwilling to act, the process of the Court shall be directed to a deputy sheriff or deputy marshal, or to such other person as may be provided by the Rules or by a special order of the Court made for a particular case, and any such person is entitled to take and retain for his own use such fees as may be provided by the Rules or the special order.

[6] R. 360 reads as follows:

Rule 360. (1) In any case where there is no sheriff or marshal or a sheriff or marshal is unable or unwilling to act, any process (including a warrant for arrest of property under Rule 1003) may be issued

(*a*) to any person to whom process of a superior court of the province in which the process is to be executed could be issued, and

(*b*) without limiting the generality of paragraph (1), where the province in question is the province of Quebec, to a bailiff duly authorized to act as such for the purposes of the *Code of Civil Procedure* of that province.

(2) This rule is made as contemplated by section 55(5) of the Act.

[7] Ss. 13(1) and (2) of the Act read as follows:

13. (1) The Governor in Council may appoint a sheriff of the Court for any geographical area.

(2) Where no sheriff is appointed under subsection (1) for a geographical area, the sheriff and deputy sheriffs of the county or other judicial division or part thereof within that geographical area who are appointed under provincial law are *ex officio* sheriff and deputy sheriffs of the Court.

[8] See *Stephens v. R.* (1982), 26 C.P.R. 1 (F.C.A.), at p. 7.

[9] S. 55(4) of the Act reads as follows:

55. . . .

(4) A sheriff or marshal shall execute the process of the Court that is directed to him, whether or not it requires him to act outside his geographical jurisdiction, and shall perform such other duties as may be expressly or impliedly assigned to him by the Rules.

[10] S. 56(3) of the Act reads as follows:

56. . . .

(3) All writs of execution or other process against property, whether prescribed by the Rules or authorized by subsection (1), shall, unless otherwise provided by the Rules, be executed, with respect to the property liable to execution and the mode of seizure and sale, as nearly as possible in the same manner as similar writs or process, issued out of the superior courts of the province in which the property to be seized is situated, are, by the law of that province, required to be executed, and the writs or other process issued by the Court shall bind property in the same manner as similar writs or process issued by the provincial superior courts, and the rights of purchasers thereunder are the same as those of purchasers under those similar writs or process.

[11] R.S.Q. 1977, c. S-7.

[12] R.S.Q. 1977, c. H-4, s. 1 (as am. by S.Q. 1989, c. 57, s. 3).

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[13] R. 5 reads as follows:
Rule 5. In any proceeding in the Court where any matter arises not otherwise provided for by any provision in any Act of the Parliament of Canada or by any general rule or order of the Court (except this Rule), the practice and procedure shall be determined by the Court (either on a preliminary motion for directions, or after the event if no such motion has been made) for the particular matter by analogy
(*a*) to the other provisions of these Rules, or
(*b*) to the practice and procedure in force for similar proceedings in the courts of that province to which the subject matter of the proceedings most particularly relates,
whichever is, in the opinion of the Court, most appropriate in the circumstances.
[14] 1981 CanLII 208 (SCC), [1981] 2 S.C.R. 364, at p. 390.
[15] reflex, (1993), 56 F.T.R. 82, at p. 86
[16] The document eventually signed at Exeter on February 26, 1992 omitted any reference to the sheriff.
[17] ;*Garcia Transport Ltée v. Royal Trust Co.*, 1992 CanLII 70 (SCC), [1992] 2 S.C.R. 499, at pp. 540-541, *per* L'Heureux-Dubé J.
[18] C.C.P., arts. 674 and 596.
[19] C.C.P., art. 679.
[20] C.C.P., art. 698.
[21] *Supra*, note 17, at p. 539.
[22] (1892), 21 S.C.R. 499, at p. 516; aff'g (1892), 1 Que. Q.B. 197.
[23] See *Roynat Inc. c. Grenier*, [1985] R.D.J. 89 (C.A.), at p. 94.
[24] 1977 CanLII 178 (SCC), [1978] 1 S.C.R. 819, at p. 828.
[25] S. 66(1) of the Act reads as follows:
66. (1) All the provisions of this Act, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals.
[26] S. 73 of the Act reads as follows:
73. (1) An execution levied by seizure and sale of the property of a bankrupt is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the property in good faith under a sale by the sheriff acquires a good title thereto against the trustee.
(2) Where an assignment or a receiving order has been made, the sheriff or other officer of any court or any other person having seized property of the bankrupt under execution or attachment or any other process shall, on receiving a copy of the assignment or the receiving order certified by the trustee as a true copy thereof, forthwith deliver to the trustee all the property of the bankrupt in his hands.
(3) Where the sheriff has sold the property of a bankrupt or any part thereof, he shall deliver to the trustee the money so realized by him less his fees and the costs referred to in subsection 70(2).
[27] See *Vachon v. Canada Employment and Immigration Commission*, 1985 CanLII 12 (SCC), [1985] 2 S.C.R. 417, at p. 423 *et seq.*; *R. v. Fitzgibbon*, 1990 CanLII 102 (SCC), [1990] 1 S.C.R. 1005, at p. 1015 *et seq*.
[28] See *Gobeil v. Cie H. Fortier et al.*, 1982 CanLII 188 (SCC), [1982] 1 S.C.R. 988.
[29] See *Gobeil, supra*, note 28; *Hudson (trustee in bankruptcy) v. Brisebois Bros. Construction Ltd.* 1982 ABCA 115 (CanLII), (1982), 37 A.R. 48 (C.A.); *Amanda Designs Boutique Ltd. v. Charisma Fashions Ltd.*, [1972] 3 O.R. 68 (C.A.).
[30] See *Gobeil, supra*, note 28.
[31] See *Hudson, supra*, note 29, at p. 56.
[32] A. Bohémier, *Faillite et Insolvabilité*, t. 1 (Montréal: Thémis, 1992), at p. 293 *et seq*.
[33] *Ibid.*, at p. 353. The cases characterized as debatable include *In re Hanna (W.) & Company Ltd.* (1961), 2 C.B.R. (N.S.) 40 (Ont. S.C.); and *In re Coupal et Frères Ltée: Vibrapipe Concrete Products Ltd. et Ville de Chambly*, [1968] C.S. 91.
[34] S. 75 of the Act reads as follows:
75. Notwithstanding anything in this Act, a deed, conveyance, transfer, agreement for sale, mortgage, charge or hypothec made to or in favour of a *bona fide* purchaser or mortgagee for adequate valuable consideration and covering any real property affected by a receiving order or an assignment under this Act is valid and effectual according to the tenor thereof and according to the laws of the province in which the property is situated as fully and effectually and to all intents and purposes as if no receiving order or assignment had been made under this Act, unless the receiving order or assignment, or notice thereof, or caution, has been registered against the property in the proper office prior to the registration of the deed, conveyance, transfer, agreement for sale, mortgage, charge or hypothec in accordance with the laws of the province in which the property is situated.
[35] S. 42(1)(*i*) of the Act reads as follows
Act of Bankruptcy

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42. (1) A debtor commits an act of bankruptcy in each of the following cases:
. . .
(*i*) if he defaults in any proposal made under this Act . . . .

Executing officer to deliver property of bankrupt to trustee - Sec. 73(2)
(2) If an assignment or a bankruptcy order has been made, the executing officer or other officer of any court or any other person having seized property of the bankrupt under execution or attachment or any other process shall, on receiving a copy of the assignment or the bankruptcy order certified by the trustee as a true copy, immediately deliver to the trustee all the property of the bankrupt in their hands.

In case of executing officer's sale - Sec. 73(3)
(3) If the executing officer has sold the property or any part of the property of a bankrupt, the executing officer shall deliver to the trustee the money so realized less the executing officer's fees and the costs referred to in subsection 70(2).

Effect of bankruptcy on seizure of property for rent or taxes - Sec. 73(4)
(4) Any property of a bankrupt under seizure for rent or taxes shall on production of a copy of the bankruptcy order or the assignment certified by the trustee as a true copy be delivered without delay to the trustee, but the costs of distress or, in the Province of Quebec, the costs of seizure are a security on the property ranking ahead of any other security on it, and, if the property or any part of it has been sold, the money realized from the sale less the costs of distress, or seizure, and sale shall be paid to the trustee.
R.S., 1985, c. B-3, s. 73;
1997, c. 12, s. 69(F);
2004, c. 25, s. 46.

Registration of bankruptcy order or assignment - Sec. 74
74. (1) Every bankruptcy order, or a true copy certified by the registrar or other officer of the court that made it, and every assignment, or a true copy certified by the official receiver, may be registered by or on behalf of the trustee in respect of the whole or any part of any real property in which the bankrupt has any interest or estate, or in respect of the whole or any part of any immovable in which the bankrupt has any right, in the registry office in which, according to the law of the province in which the real property or immovable is situated, deeds or transfers of title and other documents relating to real property, an immovable or any interest or estate in real property or any right in an immovable may be registered.

Effect of registration - Sec. 74(2)
(2) If a bankrupt is the registered owner of any real property or immovable or the registered holder of any charge, the trustee, on registration of the documents referred to in subsection (1), is entitled to be registered as owner of the real property or immovable or holder of the charge free of all encumbrances or charges mentioned in subsection 70(1).

Caveat may be filed - Sec. 74(3)
(3) If a bankrupt owns any real property or immovable or holds any charge registered in a land registry office or has or is believed to have any interest, estate or right in any of them, and for any reason a copy of the bankruptcy order or assignment has not been registered as provided in

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subsection (1), a caveat or caution may be filed with the official in charge of the land registry by the trustee, and any registration made after the filing of the caveat or caution in respect of the real property, immovable or charge is subject to the caveat or caution unless it has been removed or cancelled under the provisions of the Act under which the real property, immovable, charge, interest, estate or right is registered.

Duty of official - Sec. 74(4)
(4) Every official to whom a trustee tenders or causes to be tendered for registration any bankruptcy order, assignment or other document shall register it according to the ordinary procedure for registering within the official's office documents relating to real property or immovables.
R.S., 1985, c. B-3, s. 74;
1997, c. 12, s. 70;
2004, c. 25, s. 47;
2005, c. 47, s. 64(E).

Law of province to apply in favour of purchaser for value - Sec. 75
75. Despite anything in this Act, a deed, transfer, agreement for sale, mortgage, charge or hypothec made to or in favour of a bona fide purchaser, mortgagee or hypothecary creditor for adequate valuable consideration and covering any real property or immovable affected by a bankruptcy order or an assignment under this Act is valid and effectual according to the tenor of the deed, transfer, agreement for sale, mortgage, charge or hypothec and according to the laws of the province in which the property is situated as fully and effectually and to all intents and purposes as if no bankruptcy order or assignment had been made under this Act, unless the bankruptcy order or assignment, or notice of the order or assignment, or caution, has been registered against the property in the proper office prior to the registration of the deed, transfer, agreement for sale, mortgage, charge or hypothec in accordance with the laws of the province in which the property is situated.
R.S., 1985, c. B-3, s. 75;
2001, c. 4, s. 28(F);
2004, c. 25, s. 47.

Property not to be removed from province - Sec. 76
76. No property of a bankrupt shall be removed out of the province in which the property was at the date when the bankruptcy order or assignment was made, without the permission of the inspectors or an order of the court in which proceedings under this Act are being carried on or within the jurisdiction in which the property is situated.
R.S., 1985, c. B-3, s. 76;
2004, c. 25, s. 47.

Contributory shareholders - Sec. 77
77. (1) Every shareholder or member of a bankrupt corporation is liable to contribute the amount unpaid on his shares of the capital or on his liability to the corporation, its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company or otherwise.

Liability of contributory an asset - Sec. 77(2)

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(2) The amount that the contributory is liable to contribute under subsection (1) shall be deemed an asset of the corporation and a debt payable to the trustee forthwith on the bankruptcy of the corporation.
R.S., 1985, c. B-3, s. 77;
1999, c. 31, s. 22(F).

Bank must notify trustee - Sec. 78
78. Where a banker has ascertained that a person having an account with the banker is an undischarged bankrupt, it is his duty forthwith to inform the trustee of the existence of the account, and thereafter the banker shall not make any payments out of the account, except under an order of the court or in accordance with instructions from the trustee, unless on the expiration of one month from the date of giving the information no instructions have been received from the trustee.
R.S., c. B-3, s. 56.

Inspection of property held in pledge - Sec. 79
79. Where property of a bankrupt is held as a pledge, hypothec, pawn or other security, the trustee may give notice in writing of the trustee's intention to inspect the property, and the person so notified is not thereafter entitled to realize the security until the person has given the trustee a reasonable opportunity of inspecting the property and of exercising the trustee's right of redemption.
R.S., 1985, c. B-3, s. 79;
1997, c. 12, s. 71.

Protection of trustee - Sec. 80
80. If the trustee has seized or disposed of property in the possession or on the premises of a bankrupt without notice of any claim in respect of the property and after the seizure or disposal it is made to appear that the property, at the date of the bankruptcy, was not the property of the bankrupt or was subject to an unregistered security or charge, the trustee is not personally liable for any loss or damage arising from the seizure or disposal sustained by any person claiming the property, interest in property or, in the Province of Quebec, a right in property, or for the costs of proceedings taken to establish a claim to that property, interest or right, unless the court is of opinion that the trustee has been negligent with respect to the trustee's duties in relation to the property.
R.S., 1985, c. B-3, s. 80;
1997, c. 12, s. 71;
2004, c. 25, s. 48.

Persons claiming property in possession of bankrupt - Sec. 81
81. (1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

How claim disposed of - Sec. 81(2)
(2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or send notice in the

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prescribed manner to the claimant that the claim is disputed, with the trustee's reasons for disputing it, and, unless the claimant appeals the trustee' decision to the court within 15 days after the sending of the notice of dispute, the claimant is deemed to have abandoned or relinquished all his or her right to or interest in the property to the trustee who may then sell or dispose of the property free of any right, title or interest of the claimant.

Onus on claimant - Sec. 81(3)
(3) The onus of establishing a claim to or in property under this section is on the claimant.

Require proof of claim - Sec. 81(4)
(4) The trustee may send notice in the prescribed manner to any person to prove his or her claim to or in property under this section, and, unless that person files with the trustee a proof of claim, in the prescribed form, within 15 days after the sending of the notice, the trustee may then, with the leave of the court, sell or dispose of the property free of any right, title or interest of that person.

No other proceeding to be instituted - Sec. 81(5)
(5) No proceedings shall be instituted to establish a claim to, or to recover any right or interest in, any property in the possession of a bankrupt at the time of the bankruptcy, except as provided in this section.

Rights of others not extended - Sec. 81(6)
(6) Nothing in this section shall be construed as extending the rights of any person other than the trustee.
R.S., 1985, c. B-3, s. 81;
2005, c. 47, s. 65.

Barrington and Vokey Ltd., Re, 1996 CanLII 5193 (NS SC) - Claims for Inventories not Properly Advanced

Date:	1996-12-13
Docket:	S.H. No. 130252
Parallel citations:	158 NSR (2d) 391; 48 CBR (3d) 270
URL:	http://canlii.ca/t/1mlz7
Citation:	Barrington and Vokey Ltd., Re, 1996 CanLII 5193 (NS SC), <http://canlii.ca/t/1mlz7> retrieved on 2013-08-18
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1996 S.H. No. 130252

IN THE SUPREME COURT OF NOVA SCOTIA
IN THE MATTER OF THE BANKRUPTCY OF
BARRINGTON AND VOKEY LIMITED
ON APPEAL FROM THE REGISTRAR
DECISION

HEARD: at Halifax, Nova Scotia before the Honourable Mr. Justice Jamie W.S. Saunders in Special Chambers November 13, 1996

DECISION: December 13, 1996

COUNSEL: Robert Aske, Esq., solicitor for the appellant, Dineen Construction (Atlantic) Inc.

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Gary J. Corsano, Esq., solicitor for the appellant, JonelJim Construction (1994) Limited
D. Bruce Clarke, Esq., solicitor for the respondent, the Trustee in Bankruptcy

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SAUNDERS, .I.

BACKGROUND TO PROCEEDINGS

The hearing conducted in Special Chambers on November 13, 1996 comprised two separate appeals from the decision of the Registrar in Bankruptcy dated June 18, 1996.

Barrington and Vokey Limited (B & V) was a mechanical subcontractor with its head office in Sydney. Evidently the business had prospered for many years. In 1994 the bankrupt decided to expand its business and moved its central office to Halifax. It started work on a number of large projects spread throughout Nova Scotia and New Brunswick. Within a year the bankrupt ran out of money and voluntarily declared bankruptcy on March 17, 1995. On that date B & V had a number of construction jobs with JonelJim Concrete Construction (1994) Limited; Dineen Construction (Atlantic) Incorporated and Maxim Construction Inc.. B & V had delivered certain of its inventories to each job site for the purpose of installation in the various projects. **They had not been installed or paid for as of the date of bankruptcy.**

Each of the general contractors took the position that they were entitled to use the inventories in order to complete the projects. A general outline of the contracts and projects is contained at pp. 2 - 4 of the decision of the Registrar. Maxim Construction Inc. and the Guaranty Company of North America did not participate in the appeals, as the dispute with those parties was settled.

Two separate appeals were heard together. The appeal filed by JonelJim Concrete Construction (1994) Limited ("JonelJim") is dated October 28,1996. No objection was taken to the late filing of this appeal document. Mr. Clarke, solicitor for the Trustee of the Estate of B & V took the position that the appeal filed by JonelJim was within time.

The second Notice of Appeal filed by Dineen Construction (Atlantic) Incorporated ("Dineen") is dated August 6, 1996.

The decision of A. Martin Smith, Q.C., Registrar in Bankruptcy is dated June 18, 1996. In summary, he concluded as follows:

(1) He had jurisdiction to deal with the matters set out in the Amended Notice of Motion dated February 15, 1996;

(2) He dismissed the defence of setoff;

(3) The contracts in question were contracts for work and materials and the property did not pass to the general contractors as of the date of bankruptcy;

(4) Neither Dineen nor JonelJim had properly appealed the disallowance of the Proof of Claim by the Trustee and had therefore lost any rights to the assets which they might have had.

In a series of correspondence subsequent to his decision, the Registrar held that the dollar value of the claim would be equal to the invoice value of the goods and further held that JonelJim was obliged to pay a rental payment to the Estate in the amount of $1,926.00.

REASONS FOR JUDGMENT

Having considered the submissions of counsel and the authorities to which I was referred, I conclude that the arguments advanced by Mr. Clarke for the Trustee are sound, and that the appeals of Dineen and JonelJim ought to be dismissed, with costs payable to the Estate, here and below.

I will adopt and apply much of the same analysis employed by Mr. Clarke in his submission when addressing each of the issues raised by the appellants in their grounds of appeal.

I will deal first with the appeal by JonelJim and follow that with a consideration of the appeal by Dineen.

APPEAL BY JONELJIM

I will use the same paragraph numbers set out in the Notice of Motion dated October 28, 1996.

1. JonelJim states that the Registrar erred in finding that the Proof of Claim of JonelJim constituted a valid claim against the inventory without first hearing the appeal of the Disallowance filed by JonelJim dated June 16,1995.

As a preliminary observation I note that this ground of appeal is factually incorrect. The Registrar never found that the Proof of Claim of Jonefrn constituted a valid claim against the inventory.

In argument, Mr. Corsano, counsel for JonelJim argued that the appeal of the Disallowance which they filed in June, 1995 should have been heard prior to the motion of the Trustee in Bankruptcy. However, the record indicates that this matter was never raised as an objection before the Registrar. JonelJim had the opportunity to set their appeal of disallowance down for hearing and never did so. In any event, the same issues would have been determined. JonelJim had every right to argue, and did in fact argue, the issues relating to their appeal of the disallowance during the Trustee's application.

2. That the Registrar erred in finding that the Appeal of the Disallowance dated June 16, 1995 by JonelJim had not been perfected because it was not set down for hearing.

The Appeal of the Disallowance is governed by s. 81(2) of the *Bankruptcy and Insolvency Act.* Any appeal by a creditor from the trustee's decision is to be made to the Bankruptcy Court in accordance with the General Rules.

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Rule 97 directs that appeals from a disallowance of proof of claim shall be by motion "of the Court" (sic). Rules 12 through 14 set out the procedures to be followed on a motion to the Court. These provisions indicate that a motion must not only be filed but must be set for hearing on a date certain. Form 45 found in **Houlden and Morawetz** contains the form of Notice of Appeal. The Form requires that a date certain be inserted in the appeal document prior to being filed.
In argument during the appeal, while conceding that the forms designed by **Houlden and Morawetz** are customarily used in general practice, Mr. Corsano argued that they are not legislative enactments and that simply because the form prescribes a date for hearing is not determinative of the issue. He suggested it would be a "denial of natural justice to disallow JonelJim's right to be heard" and that at the very least JonelJim "should have been told of its obligation to set its claim down for hearing or be at risk of having it struck out".

With respect, there is no merit to either argument. JonelJim was not prejudiced. Its position was advanced and considered during the Trustee's application before the Registrar.
There is ample support for the determination made by the Registrar that a notice of appeal is not perfected unless it is filed in accordance with the Rules, with a date certain. Otherwise, a notice may simply be filed by a creditor and the matter never pursued or concluded. That is in fact what happened in this particular case. I am satisfied that if the Estate had not filed its application, the matter never would have come before the Court.
I accept the submission made by Mr. Clarke that the proper test on an appeal from a decision of the Registrar should be that applied by Justice K. Peter Richard in **Re Dr. Siraj Husain** B17658 (unreported, oral decision delivered January 6, 1994, released March 16, 1994). In that case, Richard, J. approved and applied the observations of Justice Anderson in **Re Barukory Investments Ltd.** (Ont.) (1979), 32 CBR 185 at p. 186:

> " . . . Save in extraordinary circumstances, I do not think the differing opinion of the judge, if he entertains one, should be substituted for that of the registrar. Putting it in a slightly different fashion, unless there is demonstrated on the part of the registrar some error in principle, some failure to take into account a proper factor or some taking into account of an improper factor, which demonstrably led to a wrong conclusion. I think that his disposition in the matter should stand."

I accept that as a proper statement of the law. There is no authority referred to me which is contrary to the decision of the Registrar. I find that his decision is a reasonable one taking into account the provisions of the Bankruptcy Rules and the forms annexed thereto.

3. That the Registrar erred by finding that the ownership in the inventory had not transferred to JonelJim under s. 7(c) of the JonelJim Purchase Order or s. 5.5(a) of the Canadian Standard Construction Subcontract.

The Registrar determined that the construction contract between the parties was a contract for labour and materials. It was not a contract for the sale of particular chattels. That finding was not the subject of challenge or comment on the appeal.
I am satisfied that the Registrar's determination is in accordance with the Registrar's previous decision involving Emco Supply in this same bankruptcy, and is also consistent with such Nova Scotia cases as **McNeil v. Ja Ron Construction Company Limited and Loughran** (1979), 35 N.S.R. (2d) 150 (NSSC,TD); and **Newell Fisheries Limited v. Gough et al** (1983), 22 BLR 179 (NSSC,TD). In such cases the title of goods to be used in the construction does not pass to the general contractor or the owner until they are incorporated into the project or affixed to the real estate. The mere fact that they are delivered to a construction site is insufficient to pass title.
In support of their respective claims and appeals each of JonelJim and Dineen rely upon Article 5.5 of the Canadian Standard Construction Subcontract (CSCS) which provides:

> If the contractor terminates the subcontract under the conditions set out in 5.1 and 5.4, he is entitled to:
>
> a) take possession of the subcontractor's products and utilize the subcontractor's construction machinery and equipment, the whole subject to the rights of third parties, and to finish the subcontract work by whatever method he may deem expedient but without undue delay or expense;
> b) withhold any further payments to the subcontractor until the subcontract work is finished;
> c) upon total performance of the subcontract work, charge the subcontractor the amount by which the full cost of finishing the subcontract work together with a reasonable allowance to cover the cost of any corrections required by the warranties for which the subcontractor is liable exceeds the unpaid balance of the subcontract price; or if such cost of finishing the work is less than the unpaid balance of the subcontract price, pay the subcontractor the difference; and

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d) on expiry of such warranty period as may exist, charge the subcontractor the amount by which the cost of corrections under warranty exceeds the allowance provided for such corrections, or if the costs of such correction is less than the allowance, pay the subcontractor the difference.

JonelJim had no such provision in its contract with B & V. The $1.5 Million contract between B & V and JonelJim consists of a single, double-sided page (purchase order) wherein (see Term and Condition No. 6, for example) the risk of assets was clearly that of B & V. While it is true that Term and Condition No. 7(c) gave JonelJim an election to convert its contract with B& V to a CSCS, there is no evidence it ever did so. There is absolutely no merit to JonelJim's submission that the unsigned pages of the CSCS became or "ought to be incorporated" in the one page purchase order/contract it signed with B & V.

The Registrar was in a perfect position to decide this issue, and did so. I will not interfere.

4. JonelJim states that the Registrar erred in finding that the Trustee had ownership of the inventory.

In an affidavit sworn January 31, 1996 by Derek G. Cramm, CMA, CIP, licensed Trustee for the Trustee of the Estate, claim is made to ownership of the inventories. It was never contested before the Registrar that these inventories were not the assets of B & V as of the date of bankruptcy, March 17, 1995. The assets vest in the Estate pursuant to the provisions of the *Bankruptcy and Insolvency Act*.

5. JonelJim submits that the Registrar erred in failing to find that JonelJim had a legitimate claim against the Trustee for services of Mr. Peach and Mr. Brown during the inventory count in April of 1995 for the sum of $1,926.00.

It is evident from the record that JonelJim and the Trustee, both directly and through their respective solicitors, negotiated a rental for a piece of equipment. JonelJim agreed to pay the Estate the sum of $1,926.00.

It is equally apparent that when the Estate tried to collect the agreed upon rental amount, JonelJim "created" an off-setting invoice. Mr. Cramm's affidavit (Clause 14) and evidence while testifying before the Registrar on February 28, 1996 (Dineen's Appeal Book, Tab 8) make it clear that the Estate never requested any services from those persons nor was any invoice issued by JonelJim or discussed between JonelJim and the Estate prior to its issuance on September 15, 1995. An affidavit sworn by Mr. Knickle which might have been used in an effort to buttress JonelJim's claim, was struck by the Registrar because Mr. Knickle did not make himself available for cross-examination. As a result, the only evidence before the Court was the evidence of Mr. Cramm, which was accepted. I am satisfied the Registrar made no error of law in that respect.

6 (a) JonelJim wishes to have removed from the provisions of the Order certain assets which JonelJim either purchased from the Trustee or purchased from third parties with valid property claims.

It was accepted at the time of the hearing that items which fall into this category were not being claimed by the Estate. It therefore does not constitute a ground of appeal. It was understood between the parties that these matters were excluded.

6 (b) JonelJim submits that it was an error for the Registrar not to require the Trustee to take possession of any items still in the possession of JonelJim which had not been incorporated into the project.

There was no evidence before the Registrar that there were any assets which met this description. As a result, it would not have been possible for the Registrar to have dealt with this issue.

6 (c) JonelJim submits that the Registrar erred in determining that the valuation of the inventory should be based on their full invoice value, rather than an auction value.

There is no rule or principle of law which dictates a single method of valuation. The Registrar chose invoice value as the appropriate method. It should be remembered that in this case Dineen seized the inventory and incorporated the inventory in the project. What the goods would have sold for on the open market is unknown. What is clear is that they were of considerable value on the date of bankruptcy to the General Contractor, who required them in order to complete the work. Consequently, it is a very different situation than, for example, the sale of scrap at auction.

I am satisfied that the Registrar's determination of inventory value was a reasonable one. There was no error in principle, no failure to take into account a proper factor and no application of improper considerations. The Registrar's conclusion is not demonstrably wrong. Applying the test in **Re Dr. Siraj Husain, supra**, his determination with respect to valuation of the inventory should not be disturbed.

6 (d) Setoff

While both JonelJim and Dineen raised the issue of setoff, Mr. Corsano, in argument, adopted and relied upon the detailed submissions made by Mr. Aske. Therefore I propose to deal with the analysis of this ground of appeal in the section relating to Dineen.

APPEAL BY DINEEN

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Dineen's appeal was limited to three issues:

(1) Whether the Registrar had jurisdiction;
(2) Whether the affidavit of Alfred F. Frizzle sworn February 27, 1996 and filed on behalf of Dineen (Dineen's Appeal Book, Tab 4) was properly filed; and
(3) Whether Dineen has a right of setoff.

On appeal before me Dineen abandoned its jurisdictional challenge and the Trustee conceded that the affidavit deposed to by Mr. Frizzle was properly before the Court. Consequently the primary thrust of Dineen's appeal related to the issue of setoff. In its Notice of Motion filed August 6, 1996, Dineen seeks a variation of the Registrar's decision to recognize:

> " . . . that the Trustee's claim to the property of the Bankrupt at the Project Site is subject to Dineen's right to set-off the amount by which the cost to complete the work required by Barrington and Vokey's subcontract have exceeded the unpaid balance of the subcontract price."

Setoff

The thrust of Mr. Aske's argument is that pursuant to the provisions of Article 5.5 Dineen had the right to make use of B & V's inventory and that the Trustee cannot ignore the terms of a contract entered into in good faith by the bankrupt. This was a bona fide contract negotiated between the parties which established their rights and remedies when involved in this multimillion dollar project. When B & V walked off the site, Dineen was, according to Mr. Aske, "left high and dry". Article 5.5 is a customary provision in a standard contract designed to protect general contractors and provide the means to complete the project with the least interruption. Mr. Aske argues that on March 17, 1995 the Trustee assumed no higher a position and acquired no higher rights than B & V had on that date.

In his factum Mr. Aske frames the argument concisely and urges that the particular circumstances be kept in context.

> "Barrington and Vokey went bankrupt and abandoned its work. Dineen incurred substantial costs, in excess of Subcontract monies available, to complete their work. The Trustee is seeking payment for inventory supplied by Barrington and Vokey pursuant to its Subcontract. But both the Subcontract and the *Bankruptcy and insolvency Act* recognize that Dineen can set off its costs against payments to Barrington and Vokey, and the Trustee. To ignore this right of set-off would permit Barrington and Vokey to be paid more than it is owed under the terms of its Subcontract. We are aware of no provisions in the *Bankruptcy and Insolvency Act* which require such an unjust result." (Dineen's factum, p. 12)

Thus Dineen relies upon its contractual rights with the bankrupt in order to defeat or modify the Trustee's claim.

Despite the able submissions of Mr. Aske I cannot agree. The *Bankruptcy and Insolvency Act* recognizes two types of claims to property; secured claims or trust claims. Dineen was not a valid, secured creditor. There is no suggestion of trust in the record before me and neither appellant is suggesting that such a classification applies here.

In the result both Dineen and JonelJim are unsecured creditors. The *Bankruptcy and Insolvency Act* does not acknowledge the existence of a contractual right to seize the property of a bankrupt unless it is a valid, secured or trust claim. In this sense it is too simplistic to say that the Trustee stands in the shoes of a bankrupt. By virtue of the provisions of the *Bills of Sale Act,* a trustee in bankruptcy, representing the creditors of a bankrupt, is conferred certain specific powers which are in addition to any rights which the bankrupt itself had. Furthermore, a trustee in bankruptcy has conferred upon it certain powers with respect to fraudulent preferences which are not powers available to the bankrupt. (See for example *Re Frechette* (1982), 42 CBR 50). There, a shareholders' agreement which allowed a purchase of shares at a discount was null and void as being contrary to public policy. Although such a provision may be enforceable as between the shareholders, in the event of a bankruptcy the trustee had the right to set that provision aside either for public policy reasons or because it constituted a reviewable transaction under the *Bankruptcy and Insolvency Act.*

I accept that Articles 5.1 and 5.5 are contractual provisions negotiated and executed by the parties, entitling the contractor to take possession and use the "products" of the subcontractor should it choose to exercise that option. It permits the contractor to finish the project expeditiously in situations where (bankruptcy, for example) the subcontractor is unable to complete its work, thus triggering termination of the contract by the contractor pursuant to the application, in tandem, of Articles 5.1 and 5.5. but this contractual entitlement does not pass title in the inventory to the contractor. Neither does it work to defeat or modify the trustee's entitlement to the bankrupt's assets which vested in the trustee immediately on the date of bankruptcy.

On the date of this bankruptcy, March 17, 1995, all of the assets of B & V vested in the Trustee for the benefit of the general body of creditors by virtue of the operation of s. 67 of the *Bankruptcy and Insolvency Act.* The Trustee became obligated and empowered to take possession of the property of the bankrupt under s. 16 of the *Bankruptcy and Insolvency Act* ("the Act"), the intention being that all creditors would receive the distribution to which they were entitled.

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As of the date of bankruptcy, Dineen had a cause of action against the Estate for losses sustained as a result of B & V's breach of contract. A stay of proceedings was in effect by virtue of s. 69.3 whereby Dineen was prohibited from exercising any remedy against B & V or its property unless a cessation of the stay were obtained. That option was open to it. Dineen made a conscious decision not to seek an exempting declaration pursuant to s. 69.4, or at least chose to seize the inventories and use them for its own purposes in completing this project.

The right or defence of setoff involves two competing claims in existence as of the date of bankruptcy. Setoff requires mutuality of parties and existence of mutual cross obligations. The rights of the parties are to be determined as of the date of bankruptcy. A right of setoff does not arise where one of the claims relates to an obligation arising after the date of bankruptcy or one entered into or incurred by the trustee in bankruptcy on behalf of the estate.

I think the following illustrations proffered by Mr. Clarke show that the thesis advanced by Dineen is untenable. For example:

a) A trustee in bankruptcy could sell assets of the estate to someone who is a creditor of the estate. That creditor could purchase the assets and take delivery of them but then refuse to pay for them, raising set off as the defence. **Re Coburg Felt Company** (1925) 5 CBR 622 (Ont) considered a similar case and held that the attempt to exercise a right of set off in such a situation would be "a fraud on the bankruptcy laws";

b) A disgruntled creditor could seize assets of the bankrupt before a trustee could take possession of them and could refuse to return them or pay for them based upon a defence of set off;

c) A trustee in bankruptcy could continue to operate the business of the bankrupt and could order goods from a supplier and then raise set off as a reason not to pay the supplier.

I believe these examples advanced on behalf of the Trustee support the view that a claim to setoff is limited to situations where both claims exist as at the date of bankruptcy and are rights as between the bankrupt and a third party.

The following extracts from **Houlden and Morawetz** also illustrate this same point:

a) A bankrupt's estate includes only the net amount of a debt owing to the bankrupt after proper allowance for the recognized common law right of set off (page 4-91);

b) The debts could arise from transactions of a different nature, provided they could be ascertained with certainty at the relevant date (page 4-92);

c) Mutual debts are debts due from either party to the other for liquidated sums or money demands which can be ascertained with certainty at the date of bankruptcy. Each party must have the right to enforce its claim at the date of bankruptcy, and if one party cannot do so, there is no right of legal set off (page 4-92);

d) In order for there to be a right of set off, the mutuality of debts must exist at the date of bankruptcy (page 4-92);

e) A right of set off not existing at the date of bankruptcy cannot be acquired afterwards (page 4-93);

f) If the bankrupt was indebted to a creditor prior to bankruptcy for goods supplied, and the same creditor became indebted to the trustee for work done after bankruptcy pursuant to a contract entered into before bankruptcy, there can be no set off as they are not mutual debts. (page 4-93);

g) Although equitable set off does not require symmetry of remedies or accounts, the creditor asserting a claim to equitable set off must at the date of bankruptcy have an entitlement to a remedy in its own right. (page 4-98).

Further support for the position taken by the Trustee may be found in s. 97(3) of the *Bankruptcy and Insolvency Act* which provides:

> "The law of set off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were a plaintiff or defendant, as the case may be, except in so far as any claim for set off is affected by the provisions of the Act respecting frauds or fraudulent preferences."

Thus it is clear from the legislation that the law of setoff is retained to the extent to which it relates to actions instituted by the Trustee for the "recovery of debts due to the bankrupt". In this case, the Trustee is not attempting to collect an accounts receivable owing to the bankrupt as of the date of the bankruptcy. The Trustee is attempting to liquidate assets which had vested in the Estate on March 17, 1995.

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Mr. Aske, for the appellant Dineen cites **Telford v. Holt** 1987 CanLII 18 (SCC), (1987), 41 D.L.R. (4th) 385 (S.C.C..) and **Husky Oil Operations v. MNR** 1995 CanLII 69 (SCC), (1995), 128 D.L.R. (4th) 1 (S.C.C.) in support of his submissions. With respect, I do not think either case is helpful to the appellant.

In both cases the discussion of setoff was of a general nature and in a different context. In **Telford, supra**, there was no bankruptcy involved and no seizure by a creditor of assets of the bankrupt after bankruptcy.

In **Husky Oil, supra,** a bankruptcy was involved but there the Court was asked to consider whether the *Workers' Compensation Act (Saskatchewan)* had the right to create a setoff where to do so would be contrary to the scheme of distribution under the *Bankruptcy and Insolvency Act.* The Court (in a 5:4 decision) held that the provincial legislation was inapplicable in bankruptcy by reason of there being a conflict with the *Bankruptcy Act,* R.S.C. 1985, c. B-3. The Court was not asked to consider setoff in the context of this particular case. I note in particular, that Justice Gonthier, writing for the majority, introduced his discussion of the setoff component of the Saskatchewan legislation with these observations:

> "But the right to set-off is triggered - and thus the security interest created - by the Board when it decides to create a deemed debt and impose liability on the principal for the contractor's liability." (at p. 24)

On the facts of the case the Saskatchewan Workers' Compensation Board "decided to create a deemed debt" and impose liability on Husky Oil by serving its notice of assessment on Metal Fab, dated March 2, 1992 claiming that $208,850.00 was due and payable to the Board. The assessment predated the bankruptcy by 17 days as Metal Fab made its assignment in bankruptcy on March 19, 1992. I conclude that the decision of the Supreme Court of Canada in **Husky Oil, supra** contemplates that both debts would be in existence as outstanding claims as of the date of bankruptcy. That is not what happened here. In the result I conclude that set off has no application in the present circumstances and that neither JonelJim nor Dineen had the right to take assets away from the Trustee in Bankruptcy without paying for them.

CONCLUSION

The appeals brought by JonelJim and Dineen are each dismissed, with costs payable to the Estate, here and below.

If counsel cannot agree on costs I will be pleased to hear them at their convenience.

J.

Right of unpaid supplier to repossess goods - Sec. 81.1

81.1 (1) Subject to this section, if a person (in this section referred to as the "supplier") has sold to another person (in this section referred to as the "purchaser") goods for use in relation to the purchaser's business and delivered the goods to the purchaser or to the purchaser's agent or mandatary, and the purchaser has not fully paid for the goods, the supplier may have access to and repossess the goods at the supplier's own expense, and the purchaser, trustee or receiver, or the purchaser's agent or mandatary, as the case may be, shall release the goods, if

(a) the supplier presents a written demand for repossession to the purchaser, trustee or receiver, in the prescribed form and containing the details of the transaction, within a period of 15 days after the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

(b) the goods were delivered within 30 days before the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

(c) at the time when the demand referred to in paragraph (a) is presented, the goods

(i) are in the possession of the purchaser, trustee or receiver,

(ii) are identifiable as the goods delivered by the supplier and not fully paid for,

(iii) are in the same state as they were on delivery,

(iv) have not been resold at arms' length, and

(v) are not subject to any agreement for sale at arms' length; and

(d) the purchaser, trustee or receiver does not, forthwith after the demand referred to in paragraph (a) is presented, pay to the supplier the entire balance owing.

Thomson Consumer Electronics Canada, Inc. v. Consumers Distributing Inc. (Receiver of), 1996 CanLII 8271 (ON SC) - Right of Supplier to Person Other Than Bankrupt re: Goods

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Date: 1996-10-14
Docket: 31-205739-T; B226/96
Parallel citations: 43 CBR (3d) 77
URL: http://canlii.ca/t/1wbvd
Citation: Thomson Consumer Electronics Canada, Inc. v. Consumers Distributing Inc. (Receiver of), 1996 CanLII 8271 (ON SC), <http://canlii.ca/t/1wbvd> retrieved on 2013-09-11
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Ontario Supreme Court
Thomson Consumer Electronics Canada, Inc. v. Consumers Distributing Inc. (Receiver of)
Date: 1996-10-14

Re bankruptcy of Consumers Distributing Inc.;
Re application under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, for compromise or arrangement with respect to Consumers Distributing Inc.;
Re intended application in Ontario Court (General Division) (Commercial List);
Thomson Consumer Electronics Canada, Inc., Philips Electronics Ltd., Sharp Electronics of Canada Ltd., Gusdorf Canada Ltd., Daco Manufacturing Ltd., Sanyo Canada Inc., Tyco Toys (Canada) Inc., Nintendo of Canada Ltd., York Barbell Company Ltd., Bionaire Inc., Mattel Canada Inc., Canada Games Company, and Manor House Mattress Company
and
Coopers & Lybrand, in its capacity as receiver and manager of Consumers Distributing Inc., Tibbett & Britten Group Canada Inc., and Storcare Supply Chain Management Inc.
Ontario Court of Justice (General Division) [Commercial List] Farley J.
Heard – October 11, 1996.
Judgment – October 14, 1996.
Kevin McElcheran and Susan Grundy, for applicants.
Frederick L. Myers and Steven Gollick, for respondents Tibbett & Britten Group Canada Inc. and Storcare Supply Chain Management Inc.
Brian Campbell, for Evenflo Company Inc.

(Docs. 31-205739-T, B226/96)

October 14, 1996. Endorsement.

[1] FARLEY J.: – This endorsement applies to the (i) Evenflo and (ii) Thomson et al applications. I am also advised that Timex, Teledyne and Sunbeam have withdrawn from the Thomson et al application.

[2] The functionality of s. 81.1 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended ("*BIA*") has been otherwise questioned; one wonders if it presents an illusory hope to suppliers.

[3] One as well wonders if the peculiar fact circumstances of the subject case would have been considered as a "mainstream" case by those drafting s. 81.1, as a "sidestream" case or as one which had not received much thought, if any.

[4] The way that s. 81.1 is set up appears to be consider that a supplier is to be dealing with a purchaser, trustee or receiver with respect to repossessing the subject goods**. It does not appear to consider explicitly a situation in which the supplier has to deal with some other person with respect to this repossession.**

[5] On September 6, 1996 Consumers was adjudged bankrupt and KPMG Inc. was appointed bankruptcy trustee. That same day Coopers& Lybrand Ltd. ("Coopers") was appointed as receiver and manager of Consumers pursuant to security held by various banks; it was a private receiver. The s. 81.1 rights of unpaid suppliers had been maintained through the period of the *CCAA* relief (July 29-September 6, 1996) by virtue of Houlden J.A.'s order of July 29, 1996. Thus the 30 day period stretched back to June 29, 1996 from July 29, 1996. The 30 day period is a moving date depending on the date on which notice is given on or after September 6, 1996 (i.e. if s. 81.1 notice were not given until September 16, 1996, then the goods subject to repossession would have been those sold and delivered in the period July 9-29, 1996).

[6] Tibbett & Britten Group Canada Inc. ("T&B") assert that the applicants' claims should fail for the following reasons:

> (a) the goods were not in the possession of the "purchaser, trustee or receiver" at the time the applicants demanded their return as required by s.81.1(1)(c)(i);

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(b) on true construction of the scheme established by s. 81.1 as a whole, the term "possession" must mean actual physical possession for the other subsections to make sense and for there to be sufficient certainty for the entire system to be workable; and

(c) the applicants have not provided any evidence whatsoever to attempt to meet their onus under the remaining provisions of s. 81.1 to prove that the goods which they sold to Consumers are in T&B's warehouse and are properly identifiable and in the same state as when delivered.

It would seem to me that arguments (a) and (b) are clearly connected.

[7] Section 81.1 provides an exception to the general policy of the *BIA* (a pari passu sharing amongst unsecured creditors) by giving a right to reclaim property to certain unsecured creditors (suppliers) of a bankrupt which is not available to the general body of unsecured creditors. Thus the court is required to narrowly construe such an exception to the fundamental policy of the *BIA;* see *Crabtree (Succession de) c. Barrette,* (sub nom. *Barrette v. Crabtree Estate*) 1993 CanLII 127 (SCC), [1993] 1 S.C.R. 1027; *Langille v. Toronto Dominion Bank* (1981), 37 C.B.R. (N.S.) 35 (N.S. C.A.), affirmed 1982 CanLII 154 (SCC), (1982), 131 D.L.R. (3d) 571 (S.C.C.). I also agree that it is an established canon of statutory interpretation that when legislation confers a right or benefit on persons which they would not have had at common law, the conditions which the legislation prescribes for the acquisition of that right or benefit are mandatory: see *John Goodison Thresher Co. v. McNab* (1908), 19 O.L.R. 188 (C.A.), at p. 214, affirmed 1910 CanLII 10 (SCC), (1910), 44 S.C.R. 187; *Czerwonka v. Paslawski* (1989), 8 R.P.R. (2d) 73 (Sask. C.A.); Bennion, F. Statutory Interpretation, (Butterworths, London 2nd ed. 1992) at p. 32. Thus the applicants are required to prove that at the time their demands were presented, the goods were in the possession of the purchaser (Consumers), trustee or receiver: s. 81.1(1)(c)(i).

[8] However, the goods are in the physical possession of T&B, (not Consumers, the trustee or receiver) at the time of the demand. T&B is not the purchaser; it is not a trustee in bankruptcy; it is not a receiver within the meaning of s. 243(2) *BIA* as it does not possess "all or substantially all" of the inventory of Consumers, nor was it appointed as receiver. T&B came into physical possession of the goods pursuant to its contractual arrangements with Consumers. Most importantly it has held that possession adverse to Consumers under the CCAA order (see para 9 thereof) and it has physically excluded Coopers as receiver from taking the goods.

[9] Section 81.1 talks of the supplier not only selling the goods – but *delivering* them. If the supplier is successful under s. 81.1, then the purchaser, trustee or receiver is required to *release* the goods. See also the reasons expressed in *Hawker Siddeley Canada Ltd. v. Sigurdson* (1974), 19 C.B.R. (N.S.) 240 (B.C. C.A.). I think it telling that in addition to these elements of *physical* possession internal to s. 81.1, if one looks at s. 243(2), a section introduced in 1992 at the same time as s. 81.1., it talks of a receiver being defined as a person appointed to take *"possession or control".* It would appear that BIA uses broader terms such as *"control"* or *"power"* when Parliament wishes to extend beyond *physical possession.* See for example s. 163(1 "in his possession or power" or s. 17(1) "in his possession or power". One may find it interesting to check through the Insolvency Institute database for possible other examples. There would be a problem interpreting s. 243(2) and s. 81.1 otherwise in the case of a receiver caught under s. 243(2). Section 81.1(1)(c)(i) would be meaningless as a receiver pursuant to s. 243(2) is by definition in *possession or control* If possession for s. 81.1 included both possession and control, then s. 81.1(1)(c)(i) would be satisfied automatically.

[10] It should be recognized that *City Fur Manufacturing Co. v. Fureenbond (Brokers) London Ltd.,* [1937] 1 All E.R. 799 (K.B.), was dealing with the notion of possession pursuant to another Act – namely the UK *Sale of Goods Act 1893* and there at p. 802 Branson J. stated:

> Possession by an agent, possession by a warehouseman or mercantile agent, is a perfectly well known form of possession in the business world, and I can see no reason for confining the meaning of it to personal possession or actual possession of the person who has sold the goods.

However, in the subject case, there appears good reason for so confining it. I also note that it would appear that 30 day goods was a live issue right from the start of the *CCAA* proceedings - such that Houlden JA specifically preserved those rights (in suspension) during the period of the *CCAA* proceedings; however no one took advantage of the comeback clause to submit that T&B was gaining an advantage which was not otherwise previously noticed.

[11] Other persons claiming a priority (eg: Revenue Canada, Employment Standards) do not have possession. Whilst I have sympathy for the unpaid suppliers, it appears to me that on the facts of this case, they cannot show that the purchaser, trustee or receiver is in possession of the subject goods. The application falls on that basis. T&B had a *legitimate* possession of the goods adverse to Consumers, the trustees or the receiver even if one were to look at any deviation from actual physical possession.

[12] I would also note the other aspect of the applicants not having satisfied that the goods said to be 30 day goods are, in fact, same. In this regard see *Re Stokes Building Supplies Ltd.* reflex, (1994), 30 C.B.R (3d) 36(Nfld. T.D.),at p.37:

> Clearly, the onus is on the applicant, Window Land, to establish on the balance of probabilities that the goods are so identifiable. In considering this matter, I accept that identification under s. 81.1 need not be apparent on the face

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of the goods. In other words one need not have serial numbers or other distinctive stamps on the face of the goods, although that obviously would be sufficient. Identification can come from records such as invoices, purchase orders and from the evidence of representatives of suppliers and purchasers. To use an example if evidence established that Window Land had supplied Stokes goods only within the preceding thirty days that would be identification although the goods might not be stamped, marked or otherwise distinctive.

[13] Thus I would agree that if the applicants were shown to have supplied goods in the 30 day period and at the start of that period I was shown that there was a zero inventory of those goods, that would be sufficient identification. However once one gets beyond that one is into very boggy ground. Essentially what the applicants are relying on is the testing by the receiver Coopers – but it was acknowledged by Mr. Holmes of Coopers that he was operating from a logical but wrong premise. It was claimed by Mr. Johnston of T&B that T&B storage methodology in practice did not accord under the assumptions and logic of Coopers. It is unfortunate that neither Mr. Holmes nor Mr. Johnston had any direct involvement with the applicants "goods" in the period June 29-July 29, 1996. Their information is thus second hand. We are therefore left with the unresolved aspect of Johnston claiming that there was significant movement of goods within the warehouse which would not show up on the computer or be obvious from an inspection – eg. whether the boxes on the pallet (which pallet was tagged) had been used up and the pallet strength replenished from the overstock area. However it was apparently the view of personnel speaking to Coopers personnel that such movement was not significant. However, it appears that the computer system was designed to track numbers of goods rather than to track the specific goods – thus gets into a question of identifying what should be there rather than what is there and is a variation of the "book count" problems.

[14] Unfortunately, for the applicants' case, in addition it appears that a number of the invoices of the applicants show delivery to warehouses other than T&B Cambridge. As well many of the delivery slips are dated more than 30 days prior to delivery of demand kicking in. Further it would seem that there is a problem with linking invoices with specific goods said to be delivered to the warehouse. It would seem that this compounds the problem of proof – the onus of which is on the applicants. A difficulty is shown by example in the Evenflo situation where the demand kick in would only catch goods sold and delivered from July 6-July 29, 1996; however, Evenflo was not precise enough and has claimed for goods said to be sold and delivered in the June 29-July 5 period. See also the difficulty of Spencer's unprecise affidavit as to paras. 21-22 and the reference as well to Ex N (ie. p. 122). Spencer says she identified the goods but does not say how.

[15] It would not seem to me that the state of the goods was changed by their being removed from bulk shrink wrap. This would seem to be packing or packaging of the goods – and not a change to the goods themselves. They apparently would be sold in their intended state as sold by the supplier – ie: in their original form (including perhaps individual boxing). Certainly there has been no transformation of the goods (or incorporation into other goods).

[16] Acceptance of the goods as being 30 day goods by the Receiver in these circumstances would not be binding in these circumstances upon T&B. It would also seem to me that the applicants have not sufficiently overcome the hurdle of showing that they meet the requirements of s. 81.1(1)(c) and so they would not meet the onus, except where they have demonstrated that there was a zero inventory where the period began to run.

[17] Thus it would appear that on the basis of worst case against T&B that T&B had *legitimate* possession of the goods (adverse to Consumers (as purchaser), the trustee in bankruptcy or the receiver (that is, Consumers, trustee and receiver or their agents did not have physical possession for legitimate reasons) that the application fails as the applicants have not shown that they fit within the conditions of s. 81.1(1)(c)(i). In addition, it is an onus not met by the applicants in all but the situations where the period starts off with a zero inventory of the subject goods as to the question of the identity and matching of the 30 day goods as such.

[18] The applications are therefore dismissed. The applicants are to pay T&B $20,000 for their costs. (I understand that the applicants will sort out the amount to be borne by each amongst themselves in this joint and several liability for costs).

Application dismissed.

Where goods have been partly paid for - Sec. 81.1(2)

(2) Where, at the time when the demand referred to in paragraph (1)(a) is presented, the goods have been partly paid for, the supplier's right to repossess under subsection (1) shall be read as a right

(a) to repossess a portion of the goods proportional to the unpaid amount; or

(b) to repossess all of the goods on paying to the purchaser, trustee or receiver an amount equal to the partial payment previously made to the supplier.

(3) [Repealed, 1999, c. 31, s. 23]

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If notice of intention or proposal was filed - Sec. 81.1(4)
(4) If a notice of intention under section 50.4 or a proposal was filed in respect of the purchaser after the delivery of the goods to the purchaser and before the purchaser became bankrupt or became a person who is subject to a receivership, the 30-day period referred to in paragraph (1)(b) is the 30-day period before the filing of the notice of intention or, if there was no notice of intention, the filing of the proposal.

Expiry of supplier's right - Sec. 81.1(5)
(5) A supplier's right to repossess goods under this section expires if not exercised within the 15-day period referred to in paragraph (1)(a), unless the period is extended before its expiry by the trustee or receiver, or by the court.

Ranks above other claims - Sec. 81.1(6)
(6) Notwithstanding any other federal or provincial Act or law, a supplier's right to repossess goods pursuant to this section ranks above every other claim or right against the purchaser in respect of those goods, other than the right of a bona fide subsequent purchaser of the goods for value without notice that the supplier had demanded repossession of the goods.

Application to court for directions - Sec. 81.1(7)
(7) The purchaser, trustee or receiver may apply to the court for directions in relation to any matter relating to this section, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

Supplier may appeal to court - Sec. 81.1(8)
(8) Where a supplier is aggrieved by any act, omission or decision of the purchaser, trustee or receiver, the supplier may apply to the court and the court may make such order as it considers proper in the circumstances.

Other rights saved - Sec. 81.1(9)
(9) Nothing in subsection (7) or (8) precludes a person from exercising any right that the person may have under subsection 34(1) or section 37.

No payment - Sec. 81.1(10)
(10) A supplier who repossesses goods pursuant to this section is not entitled to be paid for those goods.

Provincial rights saved - Sec. 81.1(11)
(11) Nothing in this section precludes a supplier from exercising any right that the supplier may have under the law of a province.

Definitions - Sec. 81.1(12)
(12) The following definitions apply in this section.

"person who is subject to a receivership"
« mise sous séquestre »

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"person who is subject to a receivership" means a person in respect of whom any property is under the possession or control of a receiver.

"receiver"
« séquestre »
"receiver" means a receiver within the meaning of subsection 243(2).
1992, c. 27, s. 38;
1999, c. 31, s. 23;
2005, c. 47, s. 66.

Special right for farmers, fishermen and aquaculturists - Sec. 81.2
81.2 (1) Where

(a) a farmer has sold and delivered products of agriculture, a fisherman has sold and delivered products of the sea, lakes and rivers, or an aquaculturist has sold and delivered products of aquaculture, to another person (in this section referred to as the "purchaser") for use in relation to the purchaser's business,
(b) the products were delivered to the purchaser within the fifteen day period preceding
(i) the day on which the purchaser became bankrupt, or
(ii) the first day on which there was a receiver, within the meaning of subsection 243(2), in relation to the purchaser,
(c) as of the day referred to in subparagraph (b)(i) or (ii), the farmer, fisherman or aquaculturist has not been fully paid for the products, and
(d) the farmer, fisherman or aquaculturist files a proof of claim in the prescribed form in respect of the unpaid amount with the trustee or receiver, as the case may be, within thirty days after the day referred to in subparagraph (b)(i) or (ii),

the claim of the farmer, fisherman or aquaculturist for the unpaid amount in respect of the products is secured by security on all the inventory of or held by the purchaser as of the day referred to in subparagraph (b)(i) or (ii), and the security ranks above every other claim, right, charge or security against that inventory, regardless of when that other claim, right, charge or security arose, except a supplier's right, under section 81.1, to repossess goods, despite any other federal or provincial Act or law; and if the trustee or receiver, as the case may be, takes possession or in any way disposes of inventory covered by the security, the trustee or receiver is liable for the claim of the farmer, fisherman or aquaculturist to the extent of the net amount realized on the disposition of that inventory, after deducting the cost of realization, and is subrogated in and to all rights of the farmer, fisherman or aquaculturist to the extent of the amounts paid to them by the trustee or receiver.

Definitions - Sec. 81.2(2)
(2) In this section,

"aquaculture"
« aquiculture »
"aquaculture" means the cultivation of aquatic plants and animals;

"aquaculture operation"
« exploitation aquicole »
"aquaculture operation" means any premises or site where aquaculture is carried out;

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“aquaculturist”
« aquiculteur »
“aquaculturist” includes the owner, occupier, lessor and lessee of an aquaculture operation;

“aquatic plants and animals”
« organismes animaux et végétaux aquatiques »
“aquatic plants and animals” means plants and animals that, at most stages of their development or life cycles, live in an aquatic environment;

“farm”
« ferme »
“farm” means land in Canada used for the purpose of farming, which term includes livestock raising, dairying, bee-keeping, fruit growing, the growing of trees and all tillage of the soil;

“farmer”
« agriculteur »
“farmer” includes the owner, occupier, lessor and lessee of a farm;

“fish”
« poisson »
“fish” includes shellfish, crustaceans and marine animals;

“fisherman”
« pêcheur »
“fisherman” means a person whose business consists in whole or in part of fishing;

“fishing”
« pêche »
“fishing” means fishing for or catching fish by any method;

“products of agriculture”
« produits agricoles »
“products of agriculture” includes
(a) grain, hay, roots, vegetables, fruits, other crops and all other direct products of the soil, and
(b) honey, livestock (whether alive or dead), dairy products, eggs and all other indirect products of the soil;

“products of aquaculture”
« produits aquicoles »
“products of aquaculture” includes all cultivated aquatic plants and animals;

“products of the sea, lakes and rivers”
« produits aquatiques »

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"products of the sea, lakes and rivers" includes fish of all kinds, marine and freshwater organic and inorganic life and any substances extracted or derived from any water, but does not include products of aquaculture.

Interpretation — products and by-products - Sec. 81.2(3)
(3) For the purposes of this section, each thing included in the following terms as defined in subsection (2), namely,

(a) "products of agriculture",
(b) "products of aquaculture", and
(c) "products of the sea, lakes and rivers",

comprises that thing in any form or state and any part thereof and any product or by-product thereof or derived therefrom.

Section 81.1 applies - Sec. 81.2(4)
(4) For greater certainty, "goods" in section 81.1 includes products of agriculture, products of the sea, lakes and rivers, and products of aquaculture.

Other rights saved - Sec. 81.2(5)
(5) Nothing in this section precludes a farmer, fisherman or aquaculturist from exercising

(a) the right that that person may have under section 81.1 to repossess products of agriculture, products of the sea, lakes and rivers, or products of aquaculture; or
(b) any right that that person may have under the law of a province.

1992, c. 27, s. 38;
1997, c. 12, s. 72(F);
2004, c. 25, s. 49.

Security for unpaid wages, etc. — bankruptcy - Sec. 81.3
81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of $2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

Commissions - Sec. 81.3(2)
(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the period referred to in that subsection, are deemed to have been earned in that period.

Security for disbursements - Sec. 81.3(3)
(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the period referred to in subsection (1) is secured, as of the date of the bankruptcy, to the extent of $1,000 — less any amount paid for those disbursements by the trustee or by a receiver — by security on the bankrupt's current assets on that date.

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Rank of security - Sec. 81.3(4)
(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

Liability of trustee - Sec. 81.3(5)
(5) If the trustee disposes of current assets covered by the security, the trustee is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the trustee.

Claims of officers and directors - Sec. 81.3(6)
(6) No officer or director of the bankrupt is entitled to have a claim secured under this section.

Non-arm's length - Sec. 81.3(7)
(7) A person who, in respect of a transaction, was not dealing at arm's length with the bankrupt is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the trustee, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Proof by delivery - Sec. 81.3(8)
(8) A claim referred to in this section is proved by delivering to the trustee a proof of claim in the prescribed form.

Definitions - Sec. 81.3(9)
(9) The following definitions apply in this section.

"compensation"
« rémunération »
"compensation" includes vacation pay but does not include termination or severance pay.

"receiver"
« séquestre »
"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).
2005, c. 47, s. 67;
2007, c. 36, s. 38;
2009, c. 2, s. 355(F).

Security for unpaid wages, etc. — receivership - Sec. 81.4
81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services

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rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of $2,000 — less any amount paid for those services by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Commissions - Sec. 81.4(2)
(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

Security for disbursements - Sec. 81.4(3)
(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of $1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Rank of security - Sec. 81.4(4)
(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

Liability of receiver - Sec. 81.4(5)
(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

Claims of officers and directors - Sec. 81.4(6)
(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

Non-arm's length - Sec. 81.4(7)
(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Proof by delivery - Sec. 81.4(8)
(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

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Definitions - Sec. 81.4(9)
(9) The following definitions apply in this section.

"compensation"
« rémunération »
"compensation" includes vacation pay but does not include termination or severance pay.

"person who is subject to a receivership"
« personne faisant l'objet d'une mise sous séquestre »
"person who is subject to a receivership" means a person any of whose property is in the possession or under the control of a receiver.

"receiver"
« séquestre »
"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).
2005, c. 47, s. 67;
2007, c. 36, s. 38;
2009, c. 2, s. 356(F).

Security for unpaid amounts re prescribed pensions plan — bankruptcy - Sec. 81.5
81.5 (1) If the bankrupt is an employer who participated or participates in a prescribed pension plan for the benefit of the bankrupt's employees, the following amounts that are unpaid on the date of bankruptcy to the fund established for the purpose of the pension plan are secured by security on all the assets of the bankrupt:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(iii) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament,

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament, and

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(iii) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act.

Rank of security - Sec. 81.5(2)
(2) A security under this section ranks above every other claim, right, charge or security against the bankrupt's assets, regardless of when that other claim, right, charge or security arose, except

(a) rights under sections 81.1 and 81.2;
(b) amounts referred to in subsection 67(3) that have been deemed to be held in trust; and
(c) securities under sections 81.3 and 81.4.

Liability of trustee - Sec. 81.5(3)
(3) If the trustee disposes of assets covered by the security, the trustee is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.
2005, c. 47, s. 67;
2012, c. 16, s. 80.

Security for unpaid amounts re prescribed pensions plan — receivership - Sec. 81.6
81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;
(b) if the prescribed pension plan is regulated by an Act of Parliament,
(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and
(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,
(iii) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act; and
(c) in the case of any other prescribed pension plan,
(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament,
(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament, and

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(iii) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act.

Rank of security - Sec. 81.6(2)
(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

Liability of receiver - Sec. 81.6(3)
(3) If the receiver disposes of assets covered by the security, the receiver is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

Definitions - Sec. 81.6(4)
(4) The following definitions apply in this section.

"person who is subject to a receivership"
« personne faisant l'objet d'une mise sous séquestre »
"person who is subject to a receivership" means a person any of whose property is in the possession or under the control of a receiver.

"receiver"
« séquestre »
"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).
2005, c. 47, s. 67;
2007, c. 36, s. 39;
2012, c. 16, s. 81.

Trustee to have right to sell patented articles - Sec. 82
82. (1) Where any property of a bankrupt vesting in a trustee consists of patented articles that were sold to the bankrupt subject to any restrictions or limitations, the trustee is not bound by the restrictions or limitations but may sell and dispose of the patented articles free and clear of the restrictions or limitations.

Right of manufacturer - Sec. 82(2)
(2) Where the manufacturer or vendor of the patented articles referred to in subsection (1) objects to the disposition of them by the trustee as provided by this section and gives to the trustee notice in writing of the objection before the sale or disposition thereof, that manufacturer or vendor has the right to purchase the patented articles at the invoice prices thereof, subject to any reasonable deduction for depreciation or deterioration.
R.S., 1985, c. B-3, s. 82;
1993, c. 34, s. 10(E).

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Copyright and manuscript to revert to author - Sec. 83

83. (1) Notwithstanding anything in this Act or in any other statute, the author's manuscripts and any copyright or any interest in a copyright in whole or in part assigned to a publisher, printer, firm or person becoming bankrupt shall,

(a) if the work covered by the copyright has not been published and put on the market at the time of the bankruptcy and no expense has been incurred in connection with that work, revert and be delivered to the author or their heirs, and any contract or agreement between the author or their heirs and the bankrupt shall then terminate and be void or, in the Province of Quebec, null;

(b) if the work covered by the copyright has in whole or in part been put into type and expenses have been incurred by the bankrupt, revert and be delivered to the author on payment of the expenses so incurred and the product of those expenses shall also be delivered to the author or their heirs and any contract or agreement between the author or their heirs and the bankrupt shall then terminate and be void or, in the Province of Quebec, null, but if the author does not exercise their rights under this paragraph within six months after the date of the bankruptcy, the trustee may carry out the original contract; or

(c) if the trustee at the end of the six-month period from the date of the bankruptcy decides not to carry out the contract, revert without expense to the author and any contract or agreement between the author or their heirs and the bankrupt shall then terminate and be void or, in the Province of Quebec, null.

If copies of the work are on the market - Sec. 83(2)

(2) Where, at the time of the bankruptcy referred to in subsection (1), the work was published and put on the market, the trustee is entitled to sell, or authorize the sale or reproduction of, any copies of the published work, or to perform or authorize the performance of the work, but

(a) there shall be paid to the author or his heirs such sums by way of royalties or share of the profits as would have been payable by the bankrupt;

(b) the trustee is not, without the written consent of the author or his heirs, entitled to assign the copyright or transfer the interest or to grant any interest therein by licence or otherwise, except on terms that will guarantee to the author or his heirs payment by way of royalties or share of the profits at a rate not less than the rate the bankrupt was liable to pay; and

(c) any contract or agreement between the author or their heirs and the bankrupt shall then terminate and be void or, in the Province of Quebec, null, except with respect to the disposal, under this subsection, of copies of the work published and put on the market before the bankruptcy.

Marketable copies to be first offered for sale to the author - Sec. 83(3)

(3) The trustee shall offer in writing to the author or his heirs the right to purchase the manufactured or marketable copies of the copyright work comprised in the estate of the bankrupt at such price and on such terms and conditions as the trustee may deem fair and proper before disposing of the manufactured and marketable copies in the manner prescribed in this section.

R.S., 1985, c. B-3, s. 83;

2004, c. 25, s. 50.

Effect of sales by trustee - Sec. 84

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84. All sales of property made by a trustee vest in the purchaser all the legal and equitable estate of the bankrupt therein.
R.S., 1985, c. B-3, s. 84;
2004, c. 25, s. 51(F).

Assignment of agreements - Sec. 84.1
84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

Individuals - Sec. 84.1(2)
(2) In the case of an individual,
(a) they may not make an application under subsection (1) unless they are carrying on a business; and
(b) only rights and obligations in relation to the business may be assigned.

Exceptions - Sec. 84.1(3)
(3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under
(a) an agreement entered into on or after the date of the bankruptcy;
(b) an eligible financial contract; or
(c) a collective agreement.

Factors to be considered - Sec. 84.1(4)
(4) In deciding whether to make the order, the court is to consider, among other things,
(a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and
(b) whether it is appropriate to assign the rights and obligations to that person.

Restriction - Sec. 84.1(5)
(5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order - Sec. 84.1(6)
(6) The applicant is to send a copy of the order to every party to the agreement.
2005, c. 47, s. 68;
2007, c. 29, s. 97;
2009, c. 31, s. 64.

Certain rights limited - Sec. 84.2
84.2 (1) No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under — any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.

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Lease - Sec. 84.2(2)
(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend, or claim an accelerated payment or forfeiture of the term under, the lease by reason only of the bankruptcy or insolvency or of the fact that the bankrupt has not paid rent in respect of any period before the time of the bankruptcy.

Public utilities - Sec. 84.2(3)
(3) No public utility may discontinue service to a bankrupt individual by reason only of the individual's bankruptcy or insolvency or of the fact that the bankrupt individual has not paid for services rendered or material provided before the time of the bankruptcy.

Certain acts not prevented - Sec. 84.2(4)
(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the time of the bankruptcy; or

(b) requiring the further advance of money or credit.

Provisions of section override agreement - Sec. 84.2(5)
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Powers of court - Sec. 84.2(6)
(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Eligible financial contracts - Sec. 84.2(7)
(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with the Canadian Payments Act and the by-laws and rules of that Association.

Permitted actions - Sec. 84.2(8)
(8) Despite section 69.3, the following actions are permitted in respect of an eligible financial contract that is entered into before the time of the bankruptcy, and is terminated on or after that time, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the individual bankrupt and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

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Net termination values - Sec. 84.2(9)
(9) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the individual bankrupt to another party to the eligible financial contract, that other party is deemed, for the purposes of paragraphs 69(1)(a) and 69.1(1)(a), to be a creditor of the individual bankrupt with a claim provable in bankruptcy in respect of those net termination values.
2005, c. 47, s. 68;
2007, c. 29, s. 98;
2009, c. 31, s. 64.

PARTNERSHIP PROPERTY

Application to limited partnerships - Sec. 85
85. (1) This Act applies to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee.

Actions by trustee and bankrupt's partner - Sec. 85(2)
(2) If a member of a partnership becomes bankrupt, the court may authorize the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner, and any release by the partner of the debt or demand to which the action relates is void or, in the Province of Quebec, null.

Notice to partner - Sec. 85(3)
(3) Notice of the application for authority to commence an action under subsection (2) shall be given to the bankrupt's partner, who may show cause against it, and on his application the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and, if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the court directs.
R.S., 1985, c. B-3, s. 85;
2004, c. 25, s. 52.

CROWN INTERESTS

Status of Crown claims - Sec. 86
86. (1) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

Deloitte Haskins & Sells v. Workers' Comp. Board, [1985] 1 SCR 785 - Historic Workers' Compensation Board Status as Secured Creditor
Date: 1985-06-13
Docket: 17587

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Parallel citations: 1985 CanLII 82 (SCC); 63 AR 321; 19 DLR (4th) 577; [1985] 4 WWR 481; 55 CBR (NS) 241; 38 Alta LR (2d) 169
URL: http://canlii.ca/t/1ftz3
Citation: Deloitte Haskins & Sells v. Workers' Comp. Board, 1985 CanLII 82 (SCC), [1985] 1 SCR 785, <http://canlii.ca/t/1ftz3> retrieved on 2013-08-12
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Constitution Act, 1867, The, 30 & 31 Vict, c 3 — 91(21)
Decisions cited
Construction Montcalm Inc. v. Min. Wage Com., 1978 CanLII 18 (SCC)
Davis v. Alberta (Workers' Compensation Board), 1979 CanLII 1192 (AB QB)
Deloitte Haskins and Sells Limited v. Alberta (Workers' Compensation Board), 1983 ABCA 35 (CanLII)
Deputy Minister of Rev. (Que.) v. Rainville, 1979 CanLII 2 (SCC)
Multiple Access Ltd. v. McCutcheon, 1982 CanLII 55 (SCC)
Produits de Caoutchouc Marquis Inc. v. Trottier, 1962 CanLII 79 (SCC)
Quebec North Shore Paper v. C.P. Ltd., 1976 CanLII 10 (SCC)
Smith v. The Queen, 1960 CanLII 12 (SCC)
Workers' Compensation Board v. Kinross Mortgage Corporation, reflex
Workmen's Compensation Board v. Alberta (Provincial Treasurer), reflex

Deloitte Haskins & Sells v. Worker's Comp. Board, [1985] 1 S.C.R. 785

Deloitte Haskins and Sells Limited Appellant;
and
The Workers' Compensation Board Respondent;
and
Attorney General of Canada, Attorney General for Alberta, Attorney General of Nova Scotia, Workers' Compensation Board of New Brunswick, Workers' Compensation Board of Ontario, Workers' Compensation Board of British Columbia and Workers' Compensation Board of the Yukon Interveners.

File No.: 17587.

1983: December 14; 1985: June 13.

Present: Laskin C.J.* and Ritchie*, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

*Laskin C.J. and Ritchie J. took no part in the judgment.

on appeal from the court of appeal for alberta

Constitutional law -- Bankruptcy -- Assessments owed provincial board given secured status by provincial statute -- Lesser status and priority accorded under Bankruptcy Act -- Whether or not conflict -- Whether or not provincial provision inoperative -- Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 50(6), 107(1)(h) -- The Workers' Compensation Act, 1973 (Alta.), c. 87, s. 78(4).

Respondent Board claimed unpaid assessments owing under The Workers' Compensation Act from an employer and filed a proof of claim as secured creditor following the employer's declaration in bankruptcy. Appellant, which was the trustee in bankruptcy, sold the assets, settled a bank claim and applied the balance to its own fees rather than to the Board's claim. Both lower court's accepted the Board's argument that the Board was a secured creditor, with a higher priority than a trustee's fees, because of the operation of the provincial statute which created a charge on the employer's property to the extent of the moneys owed. The trustee contended that, notwithstanding the provincial statute, the Board should be accorded the status of preferred creditor pursuant to the Bankruptcy Act and therefore have a lower priority than the fees of a trustee in bankruptcy. The constitutional question before this Court was whether or not s. 107(1)(h) of the Bankruptcy Act conflicted with s. 78(4) of The Workers' Compensation Act, such as to render inoperative s. 78(4).

Held (Estey J. dissenting): The appeal should be allowed.

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Per Dickson, Beetz and Chouinard JJ.: Section 78(4) of The Workers' Compensation Act is valid legislation that can stand alone and have its own legitimate spheres of influence independent of that of s. 107(1)(h) of the Bankruptcy Act.

In the case of bankruptcy s. 107(1)(h) disposes of the matter.

The constitutional question must be answered in the affirmative: s. 78(4) is inoperative in a bankruptcy situation.

Per McIntyre, Lamer and Wilson JJ.: A claimant in bankruptcy cannot claim by virtue of a provincial Act to be a secured creditor within the opening words of s. 107(1) of the Bankruptcy Act and thereby avoid the priority accorded by s. 107(1). A contrary interpretation of s. 107(1) would effectively allow the provinces to determine priorities on bankruptcy--a matter within exclusive federal jurisdiction. Since the provincial legislation does not purport to deal with a bankruptcy situation it can and should be construed in accordance with the presumption of constitutionality as inapplicable to such a situation. The paramountcy doctrine only applies if there is direct conflict between the federal and provincial laws. When properly construed s. 78(4) of The Workers' Compensation Act does not conflict with s. 107(1)(h) of the Bankruptcy Act. Absent such direct conflict both provisions can stand and have their own proper spheres of influence.

Per Estey J. dissenting: The distribution scheme of a debtor's estate, as adopted by Parliament, did not affect the legal consequences and status of the secured charge created by provincial legislation. A claimant is excepted from the distribution of s. 107 of the Bankruptcy Act by the opening words in subs. (1) if the provincial legislation creates a charge which falls within the definition of s. 2 and if the appropriate paragraph under s. 107(1) does not reduce the status of secured creditor to that of preferred creditor. Parliament, while it has the exclusive authority to determine priorities in the event of bankruptcy and while it can relegate a secured creditor to a lesser status if it chooses to do so, has not reduced respondent's status in these circumstances. Respondent therefore ranks as a secured creditor.

Cases Cited

By the majority

Workmen's Compensation Board v. Provincial Treasurer of Alberta reflex, (1967), 59 W.W.R. 298; Royal Bank of Canada v. Larue, [1928] A.C. 187; Produits Caoutchouc Marquis Inc. v. Trottier (Re Gingras Automobile Ltée), 1962 CanLII 79 (SCC), [1962] S.C.R. 676; Deputy Minister of Revenue v. Rainville (Re Bourgault), 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35; Director of Labour Standards of Nova Scotia and Workers' Compensation Board of Nova Scotia v. Trustee in Bankruptcy (1981), 38 C.B.R. (N.S.) 253, affirming Re Black Forest Restaurant Ltd. (1981), 37 C.B.R. (N.S.) 176, considered; Davis v. Workers' Compensation Board, 1979 CanLII 1192 (AB QB), [1980] 2 W.W.R. 349; Re Clemenshaw; Workers' Compensation Board v. Canadian Credit Men's Trust Association Ltd. (1963), 4 C.B.R. (N.S.) 238; Re R. A. Nelson Construction Ltd. (1966), 8 C.B.R. (N.S.) 221; Re Trinel Office Products Ltd.; Workers' Compensation Board of Alberta v. Davis (1971), 14 C.B.R. (N.S.) 248; L'écoute Compensation Board v. Kinross Mortgage Corporation, reflex, [1982] 1 W.W.R. 87; Smith v. The Queen, 1960 CanLII 12 (SCC), [1960] S.C.R. 776; Construction Montcalm Inc. v. Minimum Wage Commission, 1978 CanLII 18 (SCC), [1979] 1 S.C.R. 754; Multiple Access Ltd. v. McCutcheon, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161; Quebec North Shore Paper Co. v. Canadian Pacific Ltd., 1976 CanLII 10 (SCC), [1977] 2 S.C.R. 1054, referred to.

By the minority

Workmen's Compensation Board v. Provincial Treasurer of Alberta reflex, (1967), 59 W.W.R. 298; Deputy Minister of Revenue v. Rainville (Re Bourgault), 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35; Re Clemenshaw; L'écoute Compensation Board v. Canadian Credit Men's Trust Association Ltd. (1963), 4 C.B.R. (N.S.) 238; Produits Caoutchouc Marquis Inc. v. Trottier (Re Gingras Automobile Ltée), 1962 CanLII 79 (SCC), [1962] S.C.R. 676; Director of Labour Standards of Nova Scotia and L'écoute Compensation Board of Nova Scotia v. Trustee in Bankruptcy (1981), 38 C.B.R. (N.S.) 253, affirming Re Black Forest Restaurant Ltd. (1981), 37 C.B.R. (N.S.) 176.

Statutes and Regulations Cited

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 2, 50(6), 107(1)(h), (j).

Retail Sales Tax Act, R.S.Q. 1964, c. 71, s. 30.

L'écoute Compensation Act, 1973 (Alta.), c. 87, s. 78(4)(a), (b).

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APPEAL from a judgment of the Alberta Court of Appeal, 1983 ABCA 35 (CanLII), [1983] 3 W.W.R. 587, 144 D.L.R. (3d) 525, 25 Alta. L.R. (2d) 57, 43 A.R. 241, dismissing an appeal from a judgment of Hope J. Appeal allowed, Estey J. dissenting.

L. N. Boddy and M. J. McCabe, for the appellant.

J. Douglas Carr, for the respondent.

T. B. Smith, Q.C., and Susan Clarke, for the intervener the Attorney General of Canada.

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William Henkel, Q.C., for the intervener the Attorney General for Alberta.
Gordon D. Gillis, for the intervener the Attorney General of Nova Scotia.
Levi E. Clain and Catherine Walsh, for the intervener Workers' Compensation Board of New Brunswick.
A. M. Austin, for the intervener Workers' Compensation Board of Ontario.
Gerald Massing, for the intervener Workers' Compensation Board of British Columbia.
Don Kidd, for the intervener Workers' Compensation Board of the Yukon.
The judgment of Dickson, Beetz and Chouinard JJ. was delivered by

1. Chouinard J.--I agree with Madame Justice Wilson that s. 78(4) of The L'écoute Compensation Act [1973 (Alta.), c. 87] and s. 107(1)(h) of the Bankruptcy Act [R.S.C. 1970, c. B-3] can stand and have their own legitimate spheres of operation.

2. That section 78(4) is perfectly valid legislation is, in my view, beyond dispute.

3. There is nothing in the Act however to suggest that s. 78(4) would not apply in a bankruptcy situation. Were it not for the Bankruptcy Act it would undoubtedly apply. It is not because of anything inherent in s. 78(4) that it has no application in a bankruptcy but because of s. 107(1)(h) of the Bankruptcy Act which disposes of the matter.

4. In the result I am of the view, with respect, that the constitutional question must be answered in the affirmative: s. 78(4) is inoperative in a bankruptcy situation.

5. I would otherwise dispose of the appeal in the manner proposed by Madame Justice Wilson.

The following are the reasons delivered by

6. Estey J. (dissenting)--As the judgment of my colleague Wilson J. has set out the facts and the relevant provisions in the provincial and federal legislation, it is not necessary to repeat those matters here. The following constitutional question was stated by order of the Chief Justice of Canada dated May 19, 1983:

Does s. 107(1)(h) of the Bankruptcy Act, R.S.C. 1970, c. B-3 conflict with s. 78(4) of the L'écoute Compensation Act, 1973 (Alta) c. 87, such as to render inoperative s. 78(4)?

I would dismiss the appeal on the basis of interpretation of the bankruptcy statute and therefore find it unnecessary to answer the constitutional question or indeed to inquire into the constitutional basis under either the Bankruptcy Act, supra, or The L'écoute Compensation Act, supra. The issue is not whether the Parliament of Canada could regulate the effect in law of the Alberta statute for the purposes of bankruptcy procedures but rather, has the Parliament of Canada done so with reference to a charge arising under the provincial compensation statute. The result of course amounts to the same thing as answering the constitutional question in the negative.

7. The provincial Act, s. 78(4)(a) clearly and validly establishes a charge against the property of a delinquent employer. The section in part states:

78. ...
(4) ... the amount due to the Board by an employer upon any assessment made under this Act...
(a) is a charge upon the property or proceeds of property of the employer....

The reach of that charge in law is further elaborated on in para. (b) of this section where it is given priority over all "... liens, charges, mortgages or other encumbrances whatsoever ...." The nature of this charge having been clearly established in the law, the second and determinative question is: how is this charge treated by the Parliament of Canada in the Bankruptcy Act, supra, as regards the distribution of the estate of a bankrupt? Section 2 of the Bankruptcy Act defines a secured creditor as follows:

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable;

It is to be noted at once that in defining a secured creditor Parliament has not made any exception for charges or other security established by provincial statute either generally or specifically with reference to those statutes of the provinces which are named in s. 107 of the Act.

8. In section 107 Parliament has established a "Scheme of Distribution" for the assets of the estate of a bankrupt. The detailed scheme is introduced as follows:

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(Emphasis added.)

The scheme of distribution is entirely predicated upon the prior rights of secured creditors. There is nothing in the use of the term "secured creditors" in the opening of this plan of distribution of a bankrupt's assets to indicate that Parliament did not intend to incorporate into s. 107 the statutory definition of that term.

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9. The priorities of claimants other than secured creditors is then established by paras. (a) to (j) of s. 107(1). We are here concerned with para. (h) which provides as follows:

(h) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the Income Tax Act or the Income War Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, pari passu;

It will be noted again that this paragraph does not refer to charges created under The L'écoute Compensation Act, nor does the paragraph make any reference such as "notwithstanding any secured claim arising thereunder". Nor does Parliament refer back to the exception of secured creditors in the opening of the subsection or to the definition of "secured creditor" in s. 2, supra. The issue, in my respectful view, is not whether the Workers' Compensation Board of a province can create the status of secured creditor which can be recognized in bankruptcy proceedings, but whether the bankruptcy procedures as laid out by the Parliament of Canada recognize a secured creditor status as created under The L'écoute Compensation Act of Alberta. The natural sequence, in my view, is that the provincial statute is examined to determine the character of the status of the claim in provincial law. The federal Act is then examined to determine whether the provincial claim so established will be recognized as a secured claim or otherwise in the bankruptcy scheme adopted by Parliament.

10. The Alberta Court of Appeal some time ago in Workmen's Compensation Board v. Provincial Treasurer of Alberta reflex, (1967), 59 W.W.R. 298, concluded that the then equivalent of s. 78(4) of the Alberta statute established a floating charge covering all of the employers' property which crystallized into a fixed charge upon perfection pursuant to the terms of the statute. Such a fixed charge created by valid legislation is clearly included in s. 2, supra. Here the Board did indeed perfect its secured claim by placing a Distress Warrant in the hands of the appropriate Sheriff, and further by registration in the Land Titles Office in Edmonton, prior to the assignment in bankruptcy under which the appellant has been appointed as trustee.

11. It is not surprising to find a statement by Parliament in the Bankruptcy Act which recognizes the continued existence of substantive provisions in other law. I refer to s. 50(6):

> 50. ...
>
> (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

The reference to the entitlement of the trustee to avail himself of such other laws cannot be read as an indirect directive from Parliament that creditors may not do likewise.

12. It is said that this Court in Deputy Minister of Revenue v. Rainville (Re Bourgault), 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35, has so construed s. 107 as to reduce the respondent's charge to a preferred claim. With respect I do not believe such to be the case. The Court was there concerned with s. 107(1)(j) which read as follows:

> 107. (1)...
>
> (j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

Parliament was there concerned with claims of the Crown not previously mentioned. The claim of the Board here was, of course, mentioned in para. (h) ranking in priority to para. (j). The principal distinguishing feature between these two paragraphs is, however, the rider at the end of para. (j) which expressly mandates that distribution shall be "pari passu notwithstanding any statutory preference to the contrary". There is, of course, no such directive, express or implicit, in para. (h) with reference to indebtedness under any workmen's compensation legislation. Pigeon J., writing for the majority in Re Bourgault, explicitly stated, at p. 44, that " the case turns upon the interpretation of para. 107(1)(j)". Later in the judgment His Lordship stated, at pp. 44-45:

There is of course a contradiction between the reservation at the outset of the rights of secured creditors which include privileges and "notwithstanding any statutory preference ..." However, it is certainly clear that the reservation is a general rule and the "notwithstanding" an exception which takes precedence wherever applicable.

There may be comments in the majority judgment which can be extended to refer to a broader base for the disposition there made by the Court but, in my view, those comments are unnecessary to the decision of the case and are clearly disavowed by Pigeon J. in his several references to the precise and unique wording of para. (j). For example, at p. 44:

It is abundantly clear that this was intended to put on an equal footing all claims by Her Majesty in right of Canada or of a province except in cases where it was provided otherwise, namely, para. (c), the levy, and para. (h), workmen's compensation or unemployment insurance assessments and withholdings for income tax.

and at p. 43:

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Due to the "notwithstanding", I find it even clearer in para. 107(1)(j) that the federal Parliament intended to deal with the preferential rights of the federal and provincial tax collectors, just as it intended in para. 107(1)(e) and (f) to define those of municipal corporations and of lessors.

13. Paragraph (h) was before the British Columbia Court of Appeal in Re Clemenshaw; L'écoute Compensation Board v. Canadian Credit Men's Trust Association Ltd. (1963), 4 C.B.R. (N.S.) 238. Wilson J.A., speaking for a unanimous court, held at p. 244:

The argument is that this allocation by Parliament to the Workmen's Compensation Board of the status of a preferred creditor of the eighth class deprives it of the position given it by provincial law as the holder of the senior charge on the property involved. I cannot accept this as correct. The rights stated in s. 95 are expressly made subject to the primary rights of secured creditors. If Parliament had intended to deprive the Workmen's Compensation Board of the position of secured creditor which is given it by s. 2(r) of the Bankruptcy Act, Parliament would have said so in explicit language. No member of any of the classes of persons listed in the scheme of distribution in s. 95 is to be taken, by reason of his being named in that section, as deprived of the benefit of any security he may hold.

In Re Bourgault, supra, Pigeon J. commented on that case by noting that the British Columbia court made no reference to an earlier case of this Court (Produits Caoutchouc Marquis Inc. v. Trottier (Re Gingras Automobile Ltée), 1962 CanLII 79 (SCC), [1962] S.C.R. 676, dealing with a landlord's privilege under the Quebec Civil Code), and then added: "... and the wording of the paragraph [para. (h)] is also quite different", that is from para. (j) then before the Court. It should be noted in passing that Re Gingras Automobile Ltée, supra, was concerned with the status of a claim by a landlord for arrears of rent under the secured creditor definition in the Bankruptcy Act. The Court came to the conclusion that the landlord's claim under the Quebec Civil Code was not a secured interest which fell within the definition of secured creditor in the Bankruptcy Act. This, of course, is very different from the nature of the charge held by the respondent in these proceedings.

14. The Nova Scotia courts in Re Black Forest Restaurant Ltd. (1981), 37 C.B.R. (N.S.) 176, (on appeal Director of Labour Standards of Nova Scotia and L'écoute Compensation Board of Nova Scotia v. Trustee in Bankruptcy (1981), 38 C.B.R. (N.S.) 253) concluded that a charge under the L'écoute Compensation Act of Nova Scotia did not qualify under s. 107(1) of the Bankruptcy Act as a secured claim. With reference to that decision, I respectfully adopt the comments of Lieberman J. in the court below in the case at bar:

In my view Re Bourgault and Re Black Forest are distinguishable from the case at bar and are not authority for the proposition that a claimant whose claim falls within s. 107 cannot be a "secured creditor" even if the claim satisfies the requirements of s. 2. The L'écoute Compensation Act of Nova Scotia provides that the claim of the Board establishes a lien against the assets of the employer without the Board having to perform an overt act, whereas in the Alberta legislation (s. 78(4)) a floating charge is created which becomes a proprietary interest only after the Board has performed overt acts of filing the certificate and initiating distress proceedings. The Board in this case has performed those overt acts and in my view it has caused a floating charge to be crystallized in accordance with s. 78(4) of the L'écoute Compensation Act. The claim thus comes within the definition of "secured creditor" in s. 2 of the Bankruptcy Act.

15. The Nova Scotia case and the comments upon it in the court below further illustrate the proper interrelationship between the provincial and the federal legislation where bankruptcy takes place. It is not a case where provincial legislation, by creating a secured and fixed charge, defeats a scheme of distribution under the Bankruptcy Act. It is quite the reverse. The relevant question is whether the scheme of distribution of a debtor's estate as adopted by Parliament affects the legal consequences and status of a secured charge created by provincial legislation. If the provincial legislation creates a charge which falls within the definition of s. 2, and if the appropriate paragraph under s. 107(1) does not reduce the status of the secured creditor to that of a preferred creditor, then the claimant is excepted from the distribution of s. 107 by the opening words in subs. (1). It is not because the provincial legislature has defeated or subverted the federal statutory scheme. It is because the federal scheme recognizes the provincially legislated charge which gives the claimant the status of a secured creditor. It is, in my view, quite contrary to law to translate this interrelationship between the provincial and the federal statutes as elevating the provinces to the position where they may determine priorities in the event of a bankruptcy. This is undoubtedly the exclusive domain of the Parliament of Canada. Parliament can, as it did in para. (j), relegate a secured creditor to a lesser status if it chooses so to do. It has not chosen to do so in para. (h) and until Parliament does so, persons claiming, in the circumstances of the respondent, in my view, rank as secured creditors.

16. Accordingly I would dismiss the appeal with costs.

The reasons of McIntyre, Lamer and Wilson JJ. were delivered by

17. Wilson J.--The issue on this appeal is the interaction of s. 78(4) of The L'écoute Compensation Act, 1973 (Alta.), c. 87, and s. 107(1)(h) of the Bankruptcy Act, R.S.C. 1970, c. B-3.

18. Section 78(4) of The L'écoute Compensation Act provides:

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78. ...

(4) Notwithstanding anything in any other Act, the amount due to the Board by an employer upon any assessment made under this Act or in respect of any amount that the employer is required to pay to the Board under any of its provisions or upon any judgment for that assessment or amount,

(a) is a charge upon the property or proceeds of property of the employer, including moneys payable to, for or on account of the employer, within Alberta, and

(b) has priority over all assignments by way of security, debts, liens, charges, mortgages or other encumbrances whatsoever, whenever created or to be created, except wages due to workers by their employer in cases where the exercise of the priority would deprive the workers of their wages.

(Emphasis added.)

19. Section 107(1)(h) of the Bankruptcy Act provides:

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(h) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the Income Tax Act or the Income War Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, pari passu;

(Emphasis added.)

20. The question arising under these two provisions is whether the charge created by s. 78(4) makes the respondent Board a secured creditor of the bankrupt employer for purposes of the opening words of s. 107(1) of the Bankruptcy Act or whether the respondent Board's claim falls under para. (h) of the subsection and is postponed to the claims listed in paras. (a) to (g). The appeal proceeded upon an agreed statement of fact as follows:

1. At all material times to this action Jacs Jackets & Crests Ltd. was an employer in an industry within the scope of The L'écoute Compensation Act, c. 87, S.A. 1973, and amendments thereto and was liable to pay assessments to the Board.

2. On or about January 9, 1980 the Board placed a Distress Warrant in the hands of the Sheriff of the Judicial District of Edmonton claiming unpaid assessments by Jacs Jackets & Crests Ltd. in the amount of $3,646.18 under the provisions of The L'écoute Compensation Act.

3. On January 15, 1980 the Board also registered a Certified Statement at the Land Titles Office at Edmonton in the amount of $3,648.68 under the provisions of The L'écoute Compensation Board [sic].

4. On January 28, 1980 Jacs Jackets & Crests Ltd. made an assignment into bankruptcy and Deloitte Haskins and Sells Limited was appointed Trustee of the Estate.

5. On February 6, 1980 the Board filed a Proof of Claim in the sum of $3,657.08 as a secured creditor of Jacs Jackets & Crests Ltd. under the provisions of Section 78(4) of The L'écoute Compensation Act.

6. The Trustee admittedly made a search of the Bankrupt's creditors under the name of "Jack's" rather than the proper name of "Jacs", both at the Land Titles Office and at the Sheriff's Office Edmonton, which revealed no creditors.

7. The Trustee then sold the assets of the Bankrupt in the amount of $11,700.00 and settled a claim of the Bank of British Columbia under a Chattel Mortgage in the amount of $8,950.00, the balance being applied to the Trustee's fees.

8. The Board filed an Objection to the final Statement of Receipts and Disbursements and the discharge of the Trustee alleging the monies received by the Trustee were distributed contrary to law and established practice.

9. The Trustee had refused or declined to pay the Board's claim and the Board applied to The Court of Queen's Bench of Alberta for Direction of Judgment in this matter.

10. There are sufficient funds available for distribution so that the question of priorities between the Board and the claimant Bank will not arise if the Judgment of the Chambers Judge is affirmed.

21. The learned Chambers judge who heard the application held that the Board was a secured creditor within the definition of s. 2 of the Bankruptcy Act. That section reads as follows:

2. In this Act

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable;

Accordingly, the Board had priority over the claims of the trustee in bankruptcy. The Court of Appeal agreed. The trustee was granted leave to appeal to this Court.

22. By order of the Chief Justice of Canada dated May 19, 1983 a constitutional question was stated as follows:

Does s. 107(1)(h) of the Bankruptcy Act, R.S.C. 1970, c. B-3 conflict with s. 78(4) of the L'écoute Compensation Act, 1973 (Alta) c. 87, such as to render inoperative s. 78(4)?

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The Attorney General of Canada and the other interveners were granted leave to intervene on the appeal.

23. The main ground of appeal is that the Court of Appeal was wrong in according the Board secured, as opposed to preferred, status in bankruptcy. Although s. 78(4) of The L'écoute Compensation Act gave the Board the status of a secured creditor in a non-bankruptcy situation, the provisions of the Bankruptcy Act had to be looked to for its status in bankruptcy. Section 107(1) of that Act, a provision establishing priorities among non-secured creditors, specifically included claims such as the claim of the Board in para. (h). In face of that specific reference, how can it be argued that such claims are secured and covered by the opening words of s. 107(1)? Counsel submits that para. (h) is conclusive evidence of Parliament's intention to treat such claims as unsecured. If effect is given to s. 78(4) in a bankruptcy context it will change the priority given to workers' compensation claims from priority (h) to a first priority as secured claims.

24. Counsel for the trustee submits that the Court of Appeal fell into error because it approached the problem of the interaction of the federal and provincial legislation in the wrong way. The federal statute, he submits, must be looked at first because it discloses Parliament's intention with respect to priorities in a bankruptcy context. If the provincial legislation is looked at first in order to establish the nature of the claim, then the policy of the Bankruptcy Act with respect to priorities could be completely defeated. Moreover, there would be no guarantee of consistency in the treatment of claims arising in different provinces. Their ranking for bankruptcy purposes would be controlled by the provincial legislatures instead of by the federal Parliament to which exclusive legislative jurisdiction in relation to "Bankruptcy and Insolvency" was given under s. 91(21) of the Constitution Act, 1867. There are two valid laws, counsel submits, one federal and one provincial and they are in operational conflict. In such circumstances the rule is that the federal law must prevail.

25. Counsel for the Board responds that the Alberta legislature, acting within its constitutional authority in relation to "Property and Civil Rights in the Province", has conferred on the Board in s. 78(4) a first charge on the property of the employer. In Workmen's Compensation Board v. Provincial Treasurer of Alberta reflex, (1967), 59 W.W.R. 298, the Alberta Court of Appeal held that the Board's charge under s. 78(4) is a floating charge on all the employer's property which, upon registration, crystallizes into a fixed legal charge. Accordingly, the Board, if it has perfected its security by registration prior to the bankruptcy, has a secured claim. If it has not perfected its security in time, then it has a preferred claim under s. 107(1)(h): see Davis v. L'écoute Compensation Board, 1979 CanLII 1192 (AB QB), [1980] 2 W.W.R. 349.

26. Counsel for the Board relies further on s. 50(6) of the Bankruptcy Act which provides:

> 50. ...
>
> (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

Counsel submits that this provision clearly recognizes the application and effect of provincial statutes relating to property and civil rights. The Bankruptcy Act, he says, merely defines secured creditors, it does not create them, the latter being the constitutional prerogative of the provinces.

27. Some assistance on the interaction of the federal and provincial legislation is to be derived from the authorities. The seminal case is the decision of the Privy Council in Royal Bank of Canada v. Larue, [1928] A.C. 187. In that case the Privy Council held that the exclusive legislative jurisdiction conferred on the federal legislature in relation to Bankruptcy and Insolvency enabled it to legislate the relative priorities of creditors on a bankruptcy. Although it was competent to a provincial legislature under the head of Property and Civil Rights to secure certain debts on property of the debtor, as soon as such provincial legislation came into conflict with federal bankruptcy legislation, the federal bankruptcy legislation prevailed. Quoting from the judgment of Viscount Cave L.C., at p. 197:

> In Attorney-General of Ontario v. Attorney-General for Canada ([1894] A.C. 189, 200), Lord Herschell observed that a system of bankruptcy legislation might frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated, and added: "It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament." Taking these observations as affording assistance in the construction of s. 91, head 21, of the Act of 1867, their Lordships are of opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment.

28. In Produits Caoutchouc Marquis Inc. v. Trottier (Re Gingras Automobile Ltée), 1962 CanLII 79 (SCC), [1962] S.C.R. 676, Abbott J. followed Royal Bank of Canada v. Larue, supra. He said, at p. 678:

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The present Act, like its predecessor acts, provides that subject to the Act all debts proved in bankruptcy shall be paid pari passu. To that rule of absolute equality, certain exceptions are made including those provided for by s. 95. The exclusive authority given to Parliament by s. 91(21) of the British North America Act to deal with all matters arising within the domain of bankruptcy and insolvency, enables Parliament to determine the relative priorities of creditors under a bankruptcy: Royal Bank v. Larue. To the extent that such priorities may be in conflict with provincial law, the federal statute must prevail.

29. In Deputy Minister of Revenue v. Rainville (Re Bourgault), 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35, this Court had to consider the interaction of s. 30 of the Retail Sales Tax Act, R.S.Q. 1964, c. 71, and s. 107(1)(j) of the Bankruptcy Act. Section 30 of the Quebec statute made any sums due to the Crown under the Act "a privileged debt" ranking immediately after law costs. Section 107(1)(j) of the Bankruptcy Act provided:

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, pari passu notwithstanding any statutory preference to the contrary.

30. The Deputy Minister alleged that he was a "secured creditor" within the definition of s. 2 of the Act and therefore did not fall within the purview of para. (j). Pigeon J., writing for the majority, found otherwise. He said, at p. 44:

Accordingly, I find that the case turns upon the interpretation of para. 107(1)(j). When s. 95 (now 107) of the 1949 Bankruptcy Act is compared with s. 51 of the 1919 Bankruptcy Act, it is apparent that by the new Act, Parliament has established a much more elaborate "Scheme of Distribution". Its power to legislate concerning the provincial as well as federal Crown privilege, in the case of bankruptcy, having been established by In re Silver Brothers Ltd. ([1932] A.C. 514), the provision clearly indicates its intention to do so and the only question remaining is as to the scope of the provision. It is abundantly clear that this was intended to put on an equal footing all claims by Her Majesty in right of Canada or of a province except in cases where it was provided otherwise, namely, para. (c), the levy, and para. (h), workmen's compensation or unemployment insurance assessments and withholdings for income tax. Paragraph (j) ends with the following words "notwithstanding any statutory preference to the contrary". The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on an equal footing; it therefore cannot have intended to allow provincial statutes to confer any higher priority. In my opinion, this is precisely what is being contended for when it is argued that, because the Quebec statute creates a privilege on immovable property effective from the date of registration, the Crown thereby becomes a "secured creditor" and thus escapes the effect of the provision which gives it only a lower priority.

31. Estey J. dissented in Re Bourgault on the basis that the Deputy Minister was a secured creditor by virtue of the provincial legislation and s. 107 of the Bankruptcy Act elevated his claim over the preferred claims listed in the scheme of distribution in s. 107. Although he does not refer to the case in his reasons, the approach taken by Estey J. is similar to that taken by the British Columbia Court of Appeal in Re Clemenshaw; L'écoute Compensation Board v. Canadian Credit Men's Trust Association Ltd. (1963), 4 C.B.R. (N.S.) 238, and adopted in Re R. A. Nelson Construction Ltd. (1966), 8 C.B.R. (N.S.) 221 (B.C.S.C.), in Re Trinel Office Products Ltd.; L'écoute Compensation Board of Alberta v. Davis (1971), 14 C.B.R. (N.S.) 248 (Alta. S.C.), and Davis v. L'écoute Compensation Board (Alberta) (1979), 33 C.B.R. (N.S.) 146 (Alta. Q.B.)

32. Counsel for the appellant submits that Re Bourgault is a judgment of this Court directly in its favour. Counsel for the Board distinguishes Re Bourgault on the basis it was dealing with a claim under para. (j) of s. 107(1) as opposed to para. (h) and para. (j) ends with the phrase "notwithstanding any statutory preference to the contrary". This, he submits, makes it clear that the provincial legislation yields to the scheme of distribution under s. 107(1) as far as claims under para. (j) are concerned. No such overriding language appears in para. (h).

33. With respect, it seems to me that the "notwithstanding" language in para. (j) was a second string to the Court's bow in Re Bourgault. I think this is the significance of Pigeon J.'s comment at p. 43 of his reasons:

Due to the "notwithstanding", I find it even clearer in para. 107(1)(j) that the federal Parliament intended to deal with the preferential rights of the federal and provincial tax collectors, just as it intended in para. 107(1)(e) and (f) to define those of municipal corporations and of lessors.

(Emphasis added.)

The "notwithstanding" language reinforced the principle in Royal Bank of Canada v. Larue and Re Gingras Automobile Ltée, that provincial legislation yields to federal in the event of bankruptcy. I do not think the majority reasons in Re Bourgault can be divorced from the wider principle and made to rest solely on the "notwithstanding" provision. I am supported in this view by the judgment of Cowan C.J. in Re Black Forest Restaurant Ltd. (1981), 37 C.B.R. (N.S.) 176. The Chief Justice said at p. 191:

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The claim of the Worker's Compensation Board is specifically referred to in s. 107(1)(h) and is not removed from the scope of that paragraph by the opening words of s. 107(1) preserving the rights of secured creditors. It is entitled to the priority provided for by s. 107(1)(h) and is not entitled to the statutory security or priority which s. 125 of the Workers' Compensation Act purports to create, and which would be valid and effective in the absence of bankruptcy of the employer.

And at p. 192:

The result, in my opinion, is that so long as there is no bankruptcy, full effect must be given to statutory provisions such as those contained in the Labour Standards Code of this province and in the Workers' Compensation Act of this province, which create liens and charges on property ranking ahead of pre-existing interests such as those created by mortgages or assignments of book debts, affecting the property said to be subject to the statutory liens and charges. However, when bankruptcy occurs, the provisions of s. 107 of the Bankruptcy Act take effect and the scheme of distribution of the property of the bankrupt coming into the hands of the trustee must be followed. The statutory liens and charges, to the extent to which they are affected by the provisions of s. 107, cease to be of any force and effect. The rights of secured creditors, whose security arises apart from such statutes, are preserved and may be enforced against the property charged by way of security. The creditors for whose benefit the statutory liens and charges were created are no longer entitled to enforce those statutory liens and charges, except to the extent permitted by s. 107, and their claims are dealt with in the priority set out in s. 107.

34. The Chief Justice was affirmed in the Nova Scotia Court of Appeal sub nom. Director of Labour Standards of Nova Scotia and L'écoute Compensation Board of Nova Scotia v. Trustee in Bankruptcy (1981), 38 C.B.R. (N.S.) 253. Jones J. speaking for the court said, at p. 260:

In view of these remarks I fail to see how it can be argued that Re Clemenshaw can still be considered a valid interpretation of s. 107(1) of the Bankruptcy Act. Mr. Justice Pigeon made it abundantly clear that priorities of provincial claims must be determined in accordance with s. 107(1) of the Bankruptcy Act notwithstanding any statutory preference to the contrary. Debts under the Workers' Compensation Act fall under s. 107(1)(h) of the Act. Claims for wages are governed by s. 107(1)(d). With deference, it is not open to the province to provide any higher or more extensive priority for wages in view of the express provisions contained in that clause. It is clear from Rainville that the provincial Crown cannot claim as a secured creditor under the Bankruptcy Act, notwithstanding the form of the provincial legislation, where the claim is governed by s. 107(1) of the Bankruptcy Act. In my view, the claims in the present case fall under s. 107(1) and accordingly the appeals must be dismissed with costs.

35. The Court of Appeal of British Columbia, sitting as a panel of five, followed Re Black Forest Restaurant Ltd. in L'écoute Compensation Board v. Kinross Mortgage Corporation, reflex, [1982] 1 W.W.R. 87, and agreed with the Nova Scotia courts that its own earlier decision in Re Clemenshaw must be taken to have been overruled by this Court in Re Bourgault.

36. I believe that these authorities are determinative of the issue before us on this appeal and that the basis on which the Alberta Court of Appeal sought to distinguish them is an untenable one. I refer to the following excerpt from the reasons of Lieberman J.:

In my view Re Bourgault and Re Black Forest are distinguishable from the case at bar and are not authority for the proposition that a claimant whose claim falls within s. 107 cannot be a "secured creditor" even if the claim satisfies the requirements of s. 2. The L'écoute Compensation Act of Nova Scotia provides that the claim of the Board establishes a lien against the assets of the employer without the Board having to perform an overt act, whereas in the Alberta legislation (s. 78(4)) a floating charge is created which becomes a proprietary interest only after the Board has performed overt acts of filing the certificate and initiating distress proceedings. The Board in this case has performed those overt acts and in my view it has caused a floating charge to be crystallized in accordance with s. 78(4) of the L'écoute Compensation Act. The claim thus comes within the definition of "secured creditor" in s. 2 of the Bankruptcy Act.

37. With respect, the issue in Re Bourgault and Re Black Forest Restaurant Ltd. was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the Bankruptcy Act. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the Bankruptcy Act and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

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38. How then should the constitutional question stated by the Chief Justice be answered? Does s. 107(1)(h) of the Bankruptcy Act conflict with s. 78(4) of The L'écoute Compensation Act so as to render the latter provision inoperable? I do not believe so. Section 78(4) does not purport to deal with a bankruptcy situation and, by virtue of the presumption of constitutionality, the provincial legislature is presumed to be legislating within its competence rather than outside it. Faced with the choice of construing the provincial legislation in a way which would cause it to invade the federal sphere, thereby attracting the doctrine of paramountcy, or construing it in accordance with the presumption of constitutionality, I prefer the latter course. I believe also that it accords better with the more recent authorities on the scope of the paramountcy doctrine.

39. In Smith v. The Queen, 1960 CanLII 12 (SCC), [1960] S.C.R. 776, Martland J. expressed the view at p. 800 that the doctrine of paramountcy only applies so as to render provincial legislation inoperative when "compliance with one law involves breach of the other". This approach was continued in Construction Montcalm Inc. v. Minimum Wage Commission, 1978 CanLII 18 (SCC), [1979] 1 S.C.R. 754, where Beetz J. stated at p. 780 that "it was incumbent upon Montcalm to establish that it could not comply with provincial law without committing a breach of the federal Act" and that "Montcalm had to prove that federal and provincial law were in actual conflict for the purposes of this case". In Beetz J.'s view a person challenging provincial legislation on the basis of the paramountcy doctrine must establish an inevitable conflict between the two pieces of legislation in the particular situation: it was not enough that the two provisions might on one reading conflict.

40. This approach has most recently been re-affirmed by Dickson J. (as he then was) in Multiple Access Ltd. v. McCutcheon, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161. He states, at p. 191:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

I do not believe that this is the case here. I think rather that the applicable principle is the one stated by Laskin C.J. in Quebec North Shore Paper Co. v. Canadian Pacific Ltd., 1976 CanLII 10 (SCC), [1977] 2 S.C.R. 1054, at p. 1065, to the effect that "if the provincial legislation is of general application, it will be construed so as not to apply to such enterprises", i.e., those within federal competence.

41. As Professor Hogg points out in his text Constitutional Law of Canada, the narrower the definition of conflict, the broader the scope within which valid provincial legislation can operate: the broader the definition of conflict, the greater the impact of the paramountcy doctrine to cut it down. He states, at p. 103:

When are two laws deemed to be inconsistent (or conflicting) so as to attract the doctrine of paramountcy? The question has profound implications for the scope of judicial review and for the balance of power in the federal system. Given the overriding force of federal law, a wide definition of inconsistency will result in the defeat of provincial laws in "fields" which are "covered" by federal law; a narrow definition, on the other hand, will allow provincial laws to survive so long as they do not "expressly contradict" federal law. The wide definition is the course of judicial activism in favour of central power; the narrow definition is the course of judicial restraint, leaving all but the irreconcilable conflicts to be resolved in the political arena.

42. I believe that the trend of the more recent authorities favours a restrictive approach to the concept of "conflict" and a construction of impugned provincial legislation, where this is possible, so as to avoid operational conflict with valid federal legislation. Where this is done both provisions can stand and have their own legitimate spheres of operation. In this sense I find no conflict between s. 107(1) of the Bankruptcy Act and s. 78(4) of The L'écoute Compensation Act. I would accordingly answer the question as framed by stating that s. 107(1)(h) of the Bankruptcy Act applies to determine priorities on a bankruptcy and s. 78(4) of The L'écoute Compensation Act has no application in such a situation.

43. I would allow the appeal and grant the appellant its costs throughout to be taxed on the appropriate scale.

Appeal allowed with costs, Estey J. dissenting.

Solicitors for the appellant: Ogilvie & Company, Edmonton.

Solicitor for the respondent: J. Douglas Carr, The L'écoute Compensation Board Legal Department, Edmonton.

Solicitor for the intervener the Attorney General of Canada: Roger Tassé, Ottawa.

Solicitor for the intervener the Attorney General for Alberta: Ross W. Paisley, Edmonton.

Solicitor for the intervener the Attorney General of Nova Scotia: Gordon F. Coles, Halifax.

Solicitors for the intervener L'écoute Compensation Board of New Brunswick: McKelvey, Macaulay, Machum, St. John.

Solicitors for the intervener L'écoute Compensation Board of Ontario: Weir & Foulds, Toronto.

Solicitor for the intervener L'écoute Compensation Board of British Columbia: Gerald W. Massing, L'écoute Compensation Board, Richmond.

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Solicitors for the intervener L'écoute Compensation Board of the Yukon: Boylan, Preston, Kidd & O'Brien, Whitehorse.

Exceptions - Sec. 86(2)

(2) Subsection (1) does not apply

(a) to claims that are secured by a security or charge of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

(i) pursuant to any law, or

(ii) pursuant to provisions of federal or provincial legislation, where those provisions do not have as their sole or principal purpose the establishment of a means of securing claims of Her Majesty or of a workers' compensation body; and

(b) to the extent provided in subsection 87(2), to claims that are secured by a security referred to in subsection 87(1), if the security is registered in accordance with that subsection.

Exceptions - Sec. 86(3)

(3) Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the Income Tax Act in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the Canada Pension Plan in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

R.S., 1985, c. B-3, s. 86;
1992, c. 27, s. 39;
1997, c. 12, s. 73;
2000, c. 30, s. 148;
2005, c. 47, s. 69;
2009, c. 33, s. 25.

Statutory Crown securities - Sec. 87

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87. (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

Idem - Sec. 87(2)
(2) In relation to a bankruptcy or proposal, a security referred to in subsection (1) that is registered in accordance with that subsection

(a) is subordinate to securities in respect of which all steps necessary to make them effective against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

R.S., 1985, c. B-3, s. 87;
1992, c. 27, s. 39;
1997, c. 12, s. 74;
2004, c. 25, s. 53;
2005, c. 47, s. 70.

PRIORITY OF FINANCIAL COLLATERAL

Priority - Sec. 88
88. In relation to a bankruptcy or proposal, no order may be made under this Act if the order would have the effect of subordinating financial collateral.
R.S., 1985, c. B-3, s. 88;
1992, c. 27, s. 39;
1994, c. 26, s. 6;
2007, c. 29, s. 99, c. 36, s. 112;
2009, c. 31, s. 65.

89. and 90. [Repealed, 1992, c. 27, s. 39]

PREFERENCES AND TRANSFERS AT UNDERVALUE

91. [Repealed, 2005, c. 47, s. 71]
92. and 93. [Repealed, 2000, c. 12, s. 12]
94. [Repealed, 2005, c. 47, s. 72]

Preferences - Sec. 95
95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is

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three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Robinson v. Countrywide Factors Ltd., [1978] 1 SCR 753 - Is There Conflict Between BIA and Provincial Fraudulent Preferences Acts

Date:	1977-01-25
Parallel citations:	1977 CanLII 175 (SCC); [1977] 2 WWR 111
URL:	http://canlii.ca/t/1z71w
Citation:	Robinson v. Countrywide Factors Ltd., 1977 CanLII 175 (SCC), [1978] 1 SCR 753, <http://canlii.ca/t/1z71w> retrieved on 2013-08-24
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Supreme Court of Canada
Robinson v. Countrywide Factors Ltd., [1978] 1 S.C.R. 753
Date: 1977-01-25
Donald A. Robinson, Trustee in Bankruptcy of Kozan Furniture (Yorkton) Ltd. *(Plaintiff) Appellant;*
and
Countrywide Factors Ltd. *(Defendant) Respondent.*
1976: February 17, 18; 1977: January 25.
Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.
ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN
Bankruptcy—Debtor and creditor—Fraudulent preferences—Whether The Fraudulent Preferences Act, R.S.S. 1965, c. 397, ultra vires provincial Legislature—Alternatively whether ss. 3 and 4 of Act, while being within legislative competence of provincial Legislature, in conflict with valid federal legislation—Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 50(6), 73.

The appellant was trustee in bankruptcy of K Co. pursuant to a receiving order of November 19, 1968. On November 19, 1966, K Co. entered into a transaction with a pressing creditor, the respondent, whereby it sold certain stock-in-trade to a third person (payment being made to the respondent which reduced the indebtedness of K Co. accordingly) and also agreed to give the respondent a debenture on its stock-in-trade for its remaining indebtedness. The debenture was executed in March 1967 and duly registered. After the receiving order against K Co. was made, proceedings were taken by the appellant to set aside the transaction of November 19, 1966, as constituting a fraudulent preference under ss. 3 and 4 of *The Fraudulent Preferences Act,* R.S.S. 1965, c. 397, and to recover the money paid to the respondent and to annul the debenture.

The trial judge found that K Co. was insolvent at the time of the transaction of November 19, 1966, that there was a concurrent intention of K Co. and the respondent to give and receive a preference, and that, consequently, both the payment made to the respondent and the debenture constituted fraudulent preferences under *The Fraudulent Preferences Act* and were hence impeachable. On appeal, this judgment was set aside on the view of the majority of the Court of Appeal that the appellant had failed to prove that K Co. was insolvent on November 19, 1966.
[Page 754]

Upon the trustee in bankruptcy obtaining leave to appeal to this Court, the respondent, in accordance with the Rules of this Court, and in view of the fact that it wished to argue the *ultra vires* character of *The Fraudulent Preferences Act,* applied for directions and this Court ordered that notice be served on the Attorney General of Canada and the

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Attorneys General of the Provinces of the following questions: 1. Whether *The Fraudulent Preferences Act,* R.S.S. 1965, c. 397, is *ultra vires* of the Legislature of the Province of Saskatchewan. 2. Alternatively, whether ss. 3 and 4 of *The Fraudulent Preferences Act,* while being within the legislative competence of the Legislature of the Province of Saskatchewan, are in conflict with valid legislation of the Parliament of Canada relating to bankruptcy and insolvency, namely, the *Bankruptcy Act,* R.S.C. 1970, c. B-3.

Held (Laskin C.J. and Martland, Dickson and de Grandpré JJ. dissenting on the constitutional issue): The appeal should be allowed and the judgment at trial restored.

Per Judson, Ritchie, Spence, Pigeon and Beetz JJ.: *The Fraudulent Preferences Act* is not *ultra vires* and ss. 3 and 4 of the Act are not in conflict with the provisions of the *Bankruptcy Act.*

On a consideration of the main cases on the subject, the better view is to confine the effect of s. 73 of the *Bankruptcy Act* to providing for the invalidity of transactions within its exact scope, *i.e.* transactions within the three-month period provided for in the section. To that extent, the Parliament of Canada, by valid legislation upon "bankruptcy" and "insolvency", has covered the field but has refrained from completely covering the whole field of transactions avoided by provincial legislation. The enactment in 1949 of the provisions now found in s. 50(6) of the *Bankruptcy Act* is a plain indication that Parliament recognized that provisions in provincial statutes dealing with preferential transactions were still valid provincial enactments in reference to "property" and "civil rights" and were valuable aids to trustees in bankruptcy in attacking the validity of such transactions and should be available to the said trustees in bankruptcy.

The appellant trustee had produced a *prima facie* case to show that the debtor was unable to pay his debts in full by realization of his assets in November 1966, and, accordingly, s. 4 of *The Fraudulent Preferences Act* applied to avoid the transaction in question.

Per Pigeon and Beetz JJ.: When the exclusive power to make laws in relation to bankruptcy and insolvency was bestowed upon Parliament, it was not intended to remove from the general legal systems which regulated property and civil rights a cardinal concept essential to the coherence of those systems, namely the concept of insolvency in the non-statutory sense. The main purpose was to give to Parliament exclusive jurisdiction over the establishment by statute of a particular system regulating the distribution of a debtor's assets. However, given the nature of general legal systems, the primary jurisdiction of Parliament cannot easily be exercised together with its incidental powers without some degree of overlap in which case federal law prevails. On the other hand, provincial jurisdiction over property and civil rights should not be measured by the ultimate reach of federal power over bankruptcy and insolvency any more than provincial competence in relation to the administration of justice can be determined by every conceivable and potential use of the criminal law power.

Laws provincial in their purpose, object and nature cannot be rendered *ultra vires* because of virtual federal paramountcy: they can only become inoperative in case of actual repugnancy with valid federal laws. Section 50(6) of the *Bankruptcy Act* provides a clear indication that Parliament, far from intending to depart from the rule of operational conflict, did in fact aim at the highest possible degree of legal integration of federal and provincial laws: attacks upon transactions within the three-month period provided by s. 73 of the *Bankruptcy Act* constitute a minimum but the trustee in bankruptcy is entitled to avail himself of all other rights and remedies provided by provincial law "as supplementary to and in addition to the rights and remedies provided by" the *Bankruptcy Act.*

Per Laskin C.J. and Martland, Dickson and de Grandpré JJ., *dissenting on the constitutional issue:* Provincial legislation which purports to provide for impeachment of preferences to creditors given by a person who is then insolvent, where insolvency is the *sine qua non* of impeachability, is invalid as a direct invasion of exclusive federal power in relation to bankruptcy and insolvency. Hence, ss. 3 and 4 of the Saskatchewan *Fraudulent Preferences Act* are *ultra vires.* Moreover, in so far as these sections prescribe an impeachment period which enables a creditor to set aside a preference made beyond the period fixed by the *Bankruptcy Act,* and hence not impeachable under that Act, it interferes with the operation of the *Bankruptcy Act* and is, indeed, repugnant to it. It must be remembered that where, as in the present case, there has been a receiving order, the intrusion of provincial legislation relating to transactions entered into by an insolvent, must interfere with the rateable distribution of the bankrupt's property according to the scheme of distribution prescribed by the *Bankruptcy Act.* Whether that scheme is faulty in the view of a Court is immaterial; the correction must come from the responsible Legislature. No more under bankruptcy and insolvency law than under the criminal law can a Province make unlawful what is lawful under valid federal legislation, nor make lawful what is unlawful under valid federal legislation.

[*A.G. Ont. v. A.G. Can.,* [1894] A.C. 189; *Re Davison* (1922), 52 O.L.R. 244; *Hoffar Ltd. v. Canadian Credit Men's Trust Association Ltd.,* reflex, [1929] 1 W.W.R. 557, leave to appeal refused, 1929 CanLII 26 (SCC), [1929] S.C.R. 180; *Re Pommier* (1930), 65 O.L.R. 415; *Re Trenwith,* [1934] O.R. 326; *Re Bozanich, A.H. Boulton Co. Ltd. v. Trusts & Guarantee Co. Ltd.,* 1942 CanLII 2 (SCC), [1942] S.C.R. 130; *Totem Radio Supply Co. Ltd. v. Stone et al.* reflex, (1959), 29 W.W.R. 552; *A.G. Alta. v. Nash and Guelph Engineering Co.* reflex, (1964), 50 W.W.R. 155; *Re Panfab Corp. Ltd.,*

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[1971] 2 O.R. 202; *Traders Finance Corporation Ltd. v. Levesque,* 1960 CanLII 80 (SCC), [1961] S.C.R. 83; *Gingras v. General Motors Products of Canada Ltd.,* 1974 CanLII 215 (SCC), [1976] 1 S.C.R. 426, referred to.]

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of MacPherson J. Appeal allowed, Laskin C.J. and Martland, Dickson and de Grandpré JJ. dissenting.

D.G. McLeod, Q.C., and G. Morris, for the plaintiff, appellant.

W.N. Lawton, Q.C., for the Attorney General of Saskatchewan.

J. Polika, for the Attorney General of Ontario.

W.G. Burke-Robertson, Q.C., for the Attorney General of British Columbia.

W. Henkel, Q.C., for the Attorney General of Alberta.

E.J. Moss, Q.C., and B.J. Scherman, for the defendant, respondent.

T.B. Smith, Q.C., for the Attorney General of Canada.

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The judgment of Laskin C.J. and Martland, Dickson and de Grandpré JJ. was delivered by

THE CHIEF JUSTICE (*dissenting*)—There are two issues in this appeal which is here by leave of this Court. The first is whether a certain transaction and, in particular, a certain debenture, granted on a debtor's stock-in-trade in pursuance of the transaction between the debtor and the respondent creditor, was a fraudulent preference that was impeachable under ss. 3 and 4 of *The Fraudulent Preferences Act,* R.S.S. 1965, c. 397; and the second is whether, if it was so impeachable, those provisions of the provincial Act were *ultra vires* as an invasion of exclusive federal power in relation to bankruptcy and insolvency or, alternatively, were inoperative in the face of the preference provisions of the *Bankruptcy Act,* R.S.C. 1970, c. B-3.

The appellant is trustee in bankruptcy of Kozan Furniture (Yorkton) Ltd. pursuant to a receiving order of November 19, 1968. On November 19, 1966, Kozan entered into a transaction with a pressing creditor, the respondent, whereby it sold certain stock-in-trade to a third person (payment being made to the respondent which reduced Kozan's indebtedness accordingly) and also agreed to give the respondent a debenture on its stock-in-trade for its remaining indebtedness. The debenture was executed on or about March 20, 1967, and duly registered. After the receiving order against Kozan was made, proceedings were taken by the appellant trustee in bankruptcy to set aside the transaction of November 19, 1966, as constituting a fraudulent preference under the provincial *Fraudulent Preferences Act* and to recover the money paid to the respondent and to annul the debenture.

MacPherson J. found that Kozan was insolvent at the time of the transaction of November 19, 1966, that there was a concurrent intention of Kozan and the respondent to give and receive a preference, and that, consequently, both the payment made to the respondent and the debenture constituted fraudulent preferences under the provincial statute and were hence impeachable. On appeal, this judgment was set aside on the view of the majority of the Saskatchewan Court of Appeal that the appellant had failed to prove that Kozan was insolvent on November 19, 1966. The trial judge was not called upon to deal with any constitutional issue, and the majority of the Court of Appeal did not have to do so in view of its finding on insolvency. Hall J.A. who dissented supported the trial judge's finding of insolvency, and in a one sentence assertion, in reliance upon *Re Panfab Corp. Ltd.*[2], he rejected the contention that *The Fraudulent Preferences Act* was *ultra vires.*

I would not interfere with the findings of the judge of first instance that Kozan was insolvent at the material time and that Kozan intended to give and the respondent intended to receive a preference. This is the view of my brother Spence who, in exhaustive reasons, also concluded that *The Fraudulent Preferences Act* as a whole was not *ultra vires* nor was either s. 3 or s. 4 inoperative in the face of the *Bankruptcy Act.* I have a different opinion on the constitutional issue in this case, as appears from what now follows. That issue does not invite this Court to pronounce on the validity of provincial legislation dealing with fraudulent conveyances or with fraudulent transactions in general. Thus, to take as an example the *Fraudulent Conveyances Act,* R.S.O. 1970, c. 182, nothing said in these reasons is to be taken as impugning the validity of that or similar enactments. They do not, *ex facie,* depend on proof of insolvency or on bankruptcy. In so far as any of the case law, some of it canvassed by my brother Spence, relates to such legislation and carries it into a consideration of the validity of provincial preference legislation which depends, as do ss. 3 and 4 of the Saskatchewan *Fraudulent Preferences Act,* on a condition of insolvency, I find it inapt for the determination of the constitutional question in this appeal.

Sections 3 and 4 aforesaid are in the following terms:

> 3. Subject to sections 8, 9, 10 and 11 every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in a bank, company or corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent

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to defeat, hinder, delay or prejudice his creditors or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

4. Subject to sections 8, 9, 10 and 11 every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in a bank, company or corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency to or for a creditor, with intent to give that creditor preference over his other creditors or over any one or more of them, is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

Sections 8, 9, 10 and 11, to which each of the foregoing provisions is subject, do not affect the constitutional issue, being concerned with *bona fide* sales or payments to innocent purchasers, to valid sales for consideration and to protection of security given up by a creditor. The present cases does not involve ss. 8 to 11.

I approach the question of validity on principle and on authority. So far as principle is concerned, the starting point is in relevant words of the *British North America Act,* namely s. 91(21), "bankruptcy and insolvency", as they relate to s. 92(13), "property and civil rights in the Province". The elucidation of the meaning and scope of s. 91(21), as of the meaning and scope of any other heads of legislative power, can hardly ever be a purely abstract exercise, even where an attempt is made at neutral definition; but I see no reason why judicial pronouncements, especially at the appellate level where they are those of the Court, should not be considered as throwing light upon the integrity of the head of power in the scheme of the *British North America Act* as a whole.

Four things stand out. First, s. 91(21) is an exclusive federal power; second, it is a power confided to the Parliament of Canada notwithstanding anything else in the Act; third, it is a power, like the criminal law power, whose ambit, did not and does not lie frozen under conceptions held of bankruptcy and insolvency in 1867: see the *Farmers' Creditors Arrangement Act* reference, *Attorney-General for British Columbia v. Attorney General for Canada*[3], at pp. 402-403; and, fourth, the term "insolvency" in s. 91(21) has as much an independent operation in the reservation of an exclusive area of legislative competence to the Parliament of Canada as the term "bankruptcy"; see *Canadian Bankers Association v. Attorney-General of Saskatchewan*[4], per Rand J., at p. 46.

The view taken by the Privy Council and by this Court as to the meaning of "insolvency", as well after as before the abolition of Privy Council appeals, has been a uniform one. Lord Thankerton, speaking for the Privy Council in the *Farmers Creditors Arrangement Act* reference, *supra,* at p. 402, expressed it as follows:

> In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration.

This definition was referred to with approval in the majority judgment of the Supreme Court of Canada delivered by Kerwin C.J.C. in *Reference re Validity of the Orderly Payment of Debts Act, 1959 (Alta.)*[5], at p. 576. Earlier in *Reference re Alberta Debt Adjustment Act*[6], at p. 40, Duff C.J.C. speaking for all but one of the members of the Court took as an additional ground for invalidating the challenged provincial legislation in that case that the powers of the provincial statutory tribunal set up under that legislation would normally "come into operation when a state of insolvency exists"; and he continued: "It is not too much to say that it is for the purpose of dealing with the affairs of debtors who are pressed and unable to pay their debts as they fall due that these powers and duties are created." If it is for Parliament alone to deal with insolvency, indeed to define it where it chooses to do so and to leave it otherwise to judicial definition, there can be no argument about unlawful invasion of provincial power in relation to property and civil rights. A limitation upon such power necessarily inheres in the federal catalogue of powers in s. 91, and it was recognized as early as 1880 in *Cushing v. Dupuy*[7], at p. 415, in respect of the federal bankruptcy and insolvency power.

I refer to two other propositions before turning to what I consider to be the relevant cases. First, there is the well-recognized proposition that federal abstinence from legislation in relation to an exclusive head of legislative power does not leave that legislative area open to provincial action: see *Union Colliery Co. v. Bryden*[8], at p. 588. The principle of our Constitution as it relates to legislative power is not one of simple concurrency of authority subject only to a variable doctrine of paramountcy. Exclusiveness is central to the scheme of distribution, save as to a specified number of concurrent powers, such as those in s. 95. It is only under the umbrella of the doctrine of exclusiveness that the relative scope of federal and provincial authority is assessed, the assessment being carried forward to determine whether there is preclusion or supersession where both federal and provincial legislation are in competition. This brings me to the second point. I take the same view here that was taken by Duff C.J.C. in the *Alberta Debt Adjustment Act* reference and I adopt his words at p. 40, namely that although the motives of a provincial Legislature may be laudable ones, it is precluded from seeking to realize its object by entering into a field not open to it.

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Attorney-General of Ontario v. Attorney-General for Canada[9], generally known as the *Voluntary Assignments* case, stands as the general support for provincial legislation of the kind or allied to the kind of legislation that is challenged in the present case. It concerned only one section, s. 9, of the *Ontario Assignments and Preferences Act,* R.S.O. 1887, c. 124, first enacted in 1885 by 1885 (Can.), c. 26. That section was as follows:

> An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sherrif's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sherriff's hands.

This Act replaced the earlier pre-Confederation legislation found in C.S.U.C. 1859, c. 26, under the title *The Indigent Debtors Act,* which was continued in the post-Confederation legislation of Ontario as *An Act respecting The Fraudulent Preference of Creditors by persons in insolvent circumstances,* and included in R.S.O. 1877, c. 118. What is significant in this earlier legislation is that (as set out in s. 2 of R.S.O. 1877, c. 118) it dealt with "any person being at the time in insolvent circumstances or unable to pay his debts in full, or knowing himself to be on the eve of insolvency". The substituted Act of 1885 continued the reference to insolvency in respect of preferences, but it also introduced new provisions respecting assignments for the benefit of creditors and these provisions, as was noted in the *Voluntary Assignments* case, were not predicated on insolvency and, indeed, were to a large degree separated from the preference provisions of the Act, as is reflected in s. 3 of R.S.O. 1887, c. 124.

Certainly, as the Privy Council noted, the challenged provision, s. 9, had to be taken in the context of the entire Act. There is no doubt, as well, that the issue of validity was recognized as arising at a time when there was no federal bankruptcy or insolvency legislation in force, the only such legislation, the *Insolvency Act* of 1875 having been repealed in 1880 by 1880 (Can.), c. 1. The majority of the Ontario Court of Appeal, to which the question of the validity of s. 9 had been referred, found that it was *ultra vires* as invading exclusive federal power in relation to bankruptcy and insolvency; see *Re Assignments and Preferences Act, Section 9*[10]. The reversal of this judgment by the Privy Council was accompanied by an acknowledgement of the broad scope of federal power under s. 91(21) when affirmatively exercised but it was held that this power was not invaded by an enactment relating to an assignment that was purely voluntary.

The explanation for this result is found in two passages of the Privy Council's reasons. First, "it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto" (at p. 198). Second, "the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not insolvent... The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent" (at p. 199). What is evident, therefore, from that case is that, unlike the situation here, the operation of the provincial enactment did not depend on insolvency and the Privy Council was willing to treat s. 9 as having an object that was independent of it. This may even be a supportable view today, albeit there is a range of existing federal legislation dealing with bankruptcy and insolvency. I should note, however, that in the majority judgment of this Court in *Reference re the Validity of the Orderly Payment of Debts Act, 1959 (Alta.)*[11], at pp. 576-577, Kerwin C.J.C. referring to the *Voluntary Assignments* reference, said "it is doubtful whether in view of later pronouncements of the Judicial Committee it would at this date be decided in the same sense, even in the absence of Dominion legislation upon the subject of bankruptcy and insolvency".

The later pronouncements of the Privy Council include its judgment in the *Alberta Debt Adjustment Act* reference[12], as well as in the *Farmers' Creditors Arrangement Act* reference, *supra.* Equally important is the judgment of this Court in *Canadian Bankers Association v. Attorney-General of Saskatchewan*[13], dealing with the validity of provincial moratorium legislation. It was in line with the decision in the *Alberta Debt Adjustment Act* reference in finding an invasion of federal power in relation to bankruptcy and insolvency. I think it enough, for present purposes, to refer to what Locke J., speaking for the majority of the Court, said, at p. 42:

> Power to declare a moratorium for the relief of the residents of a Province generally in some great emergency, such as existed in 1914 and in the days of the lengthy depression in the thirties is one thing, but power to intervene between insolvent debtors and their creditors irrespective of the reasons which have rendered the debtor unable to meet his liabilities is something entirely different.

Although judgments of the Privy Council and of this Court (and I add to those already cited *Royal Bank of Canada v. Larue*[14]) have recognized the broad power of Parliament to embrace in its legislation in relation to bankruptcy or insolvency provisions which might otherwise fall within provincial competence, I know of no case in those Courts, other than *Ladore v. Bennett*[15], where provincial legislation has been sustained, either in the absence of or in the face of federal legislation, when such provincial legislation depends for its operation only upon insolvency. *Ladore v. Bennett* can best be explained as involving municipal reorganization and hence as being concerned with the amalgamation and

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financial restructuring of units of local government for which the provincial Legislature has a direct responsibility, albeit some of the municipalities involved in the legislatively-directed reorganization were insolvent. It is, indeed, a special case of a piece of special legislation enacted in pursuance of the power conferred by s. 92(8) of the *British North America Act,* and I do not regard it as offering any lead to continuing legislation relating to private debtors and their creditors.

It is plain to me that if provincial legislation avowedly directed to insolvency, and to transactions between debtor and creditor consummated in a situation of insolvency, can be sustained as validly enacted, unless overborne by competent federal legislation, there is a serious breach of the principle of exclusiveness which embraces insolvency under s. 91(21). This Court so held in a series of cases where the encroachment on the federal bankruptcy and insolvency power was less obvious than that exhibited here. I refer, of course, to the *Alberta Debt Adjustment Act* reference, *supra,* to the *Canadian Bankers' Association* case, *supra,* and to the *Orderly Payment of Debts Act 1959* (*Alta.*) reference, *supra.* It would be a curious reversal of the proposition, enunciated in *Madden v. Nelson and Fort Sheppard Railway Co.*[16]*,* namely, that you cannot do indirectly what you cannot do directly, to hold that the Province can do directly what it cannot do indirectly.

The case put forward by the appellant and by the intervening Provinces which supported him goes even farther. It is contended that notwithstanding the existence of federal bankruptcy legislation dealing with preferences, the challenged provincial legislation can still operate in respect of a particular preference which is given outside of the time limits within which the federal control operates, so long at least as the provincial provision is not more stringent.

I do not follow this line of reasoning, especially on the submission of greater or lesser stringency.

The relevant federal provision is s. 73 of the *Bankruptcy Act* which reads as follows:

> 73. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.
>
> (2) Where any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.
>
> (3) For the purposes of this section, the expression "creditor" includes a surety or guarantor for the debt due to such creditor.

This provision cannot be taken in isolation. The *Bankruptcy Act* is a code on the subject of bankruptcy and insolvency, defining what is an act of bankruptcy, who is an insolvent person, prescribing what are vulnerable settlements as well as what are vulnerable preferences, declaring what is comprised in a bankrupt's estate, providing for priorities in distribution and for rateable distribution. It provides also, as in the present s. 31(1), for the making of an assignment by an insolvent person for the benefit of creditors as well as providing by s. 24(1)(*a*) that it is an act of bankruptcy to make an assignment for the benefit of creditors whether the assignment is or is not authorized by the *Bankruptcy Act.* In short, apart from the question whether provincial legislation predicated on insolvency is *ipso facto* invalid, I see no room for any assertion that such provincial legislation can continue to have operative effect in the face of the scope of the *Bankruptcy Act* embracing both bankruptcy and insolvency in its provisions.

It is worth a reminder that there is no common law of bankruptcy and insolvency, and hence it cannot be said that there was an existing common law course of decision which was being embraced by provincial legislation. The common law did not distinguish the fraudulent from the insolvent debtor; it was through legislation that such a distinction was made. If a provincial Legislature wishes to proscribe fraudulent transactions, it is compelled by the *British North America Act* to ensure that its legislation dealing with such transactions does not focus on insolvency.

Of the many cases cited in argument before this Court, I can put to one side *Re Davison*[17] and *Re Panfab Corp. Ltd.*[18], both of which, decisions of single judges, dealt largely with the Ontario *Fraudulent Conveyances Act* which, as I have already said, does not depend for its activation either on insolvency or on bankruptcy nor on any question of preference such as that presented here. Similarly, I put to one side *Allison& Burnham Concrete Ltd. v. Mountain View Construction Ltd.*[19], a judgment of Ruttan J. of the British Columbia Supreme Court, in so far as it was concerned with the British Columbia *Fraudulent Conveyances Act,* akin to the Ontario Act of the same name.

Chronologically, the first of the cited cases that calls for consideration here is *Hoffar Ltd. v. Canadian Credit Men's Trust Association Ltd.*[20]*;* leave to appeal refused[21]. It was a judgment of the British Columbia Court of Appeal involving the question whether s. 3 of the provincial *Fraudulent Preferences Act* (similar to ss. 3 and 4 of the Saskatchewan Act in the present case) was in conflict with the then preference provision, s. 64, of the federal *Bankruptcy Act.*

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It is important to note, as stated by British Columbia Chief Justice Macdonald, that no argument was raised in the *Hoffar* case as to the validity of either the provincial *Fraudulent Preferences Act* or the *Bankruptcy Act*. A second significant aspect of the decision is that the Court felt it was immaterial that the federal Act prescribed a three-month period for invalidation of a transaction while the provincial Act prescribed a 60-day period. In fact, the transaction sought to be impugned was made less than 60 days before an assignment under the *Bankruptcy Act,* and there was a finding that the debtor was insolvent at the time of the transaction. The judge of first instance found that although the transaction had the effect of giving a preference it was not made with a view thereto. Under the *Bankruptcy Act,* there was a rebuttable presumption in such a case that the transaction was concluded with a view to a preference and it was found that there was rebutting evidence. However the provincial Act made the transaction void irrespective of rebutting evidence, and the judge at first instance applied this Act.

The British Columbia Court of Appeal reversed this decision holding that the provincial provisions were inoperative because they were in conflict with the federal Act. *A fortiori,* the provincial provisions would be inoperative, in my view, if a transaction was made with a view to giving a preference. Leave to appeal was refused by Mignault J. in the Supreme Court of Canada on the ground that the decision sought to be appealed was plainly right; and he added a reference to a passage in the reasons in the *Voluntary Assignments* case where the Privy Council spoke of the preclusion of the provincial Legislature from interfering with federal bankruptcy legislation.

This preclusive principle of non-interference is as applicable in connection with the federal power in relation to bankruptcy and insolvency as it is in the field of criminal law. In that connection, I point to the words of the late Justice Rand in *Johnson v. Attorney General of Alberta*[22], at p. 138, and adapt them here to say that "any local legislation of a supplementary nature that would tend to weaken or confuse [the] enforcement [of the *Bankruptcy Act*] would be an interference with the exclusive power of Parliament".

It is worth adding that in his reasons in the British Columbia Court of Appeal in the *Hoffar* case M.A. Macdonald J.A. indicated that provincial fraudulent conveyances legislation could be invoked where the *Bankruptcy Act* did not apply on the facts, even if provincial fraudulent preference legislation could not be.

The next case for consideration is *Re Pommier*[23], a judgment of Fisher J.A. sitting in bankruptcy. I accept one of its premises, namely, that the *Bankruptcy Act* did not oust all provincial legislation respecting fraudulent transactions, as for example, the Ontario *Fraudulent Conveyances Act*. This was the same point taken in the *Hoffar* case. However, unlike the result in the *Hoffar* case (which was cited but not followed) the Court in *Re Pommier* held that in the case of a preferential transaction which took place more than three months before an assignment in bankruptcy (and therefore outside the preference period under the federal Act), resort could be had to the provincial *Assignments and Preferences Act,* R.S.O. 1927, c. 162 to impeach it. The learned judge invoked a so-called doctrine of overlapping, which he distinguished from a situation of conflict, in holding the provincial Act to be available. In my opinion, he misconceived its purport as it was enunciated in *Grand Trunk Railway Co. v. Attorney General of Canada*[24], at p. 68. The proposition there related to a situation where "the field is clear" to one Legislature or the other. The Privy Council noted that "if the field is not clear and in such a domain the two legislations meet, then the Dominion legislation must prevail".

It is only necessary to add that *Re Pommier* was overruled by the Ontario Court of Appeal in *Re Trenwith*[25], where Masten J.A. said at p. 333 (after referring to the *Voluntary Assignments* case, to *Royal Bank of Canada v. Larue* and to the *Hoffar* case):

> ...it seems clear to me that the common field of legislation respecting the distribution of the estates of insolvents having now become occupied by the Dominion Bankruptcy Act, the provisions of the Assignments and Preferences Act respecting the preference of one creditor over another have been thereby superseded and have ceased to have any operation. If I am right in this conclusion, the effect is to overrule... *Re Pommier.*

Davis J.A. who dissented on other grounds was also of the opinion that "since the enactment of bankruptcy legislation by the Dominion Parliament this provincial statute cannot be invoked" (at p. 343).

To the same effect was the opinion of this Court expressed by Duff C.J.C. in *In re Bozanich*[26], at p. 136, that "the provisions of R.S.O. 1927, c. 162 in relation to preferences are superseded by s. 64 of the *Bankruptcy Act,* and that the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of s. 64, suspended in view of the concluding clause of s. 91 [of the *British North America Act*]".

Three judgments at first instance may be mentioned before I go on to consider the unanimous judgment of the Alberta Appellate Division, sitting as a Bench of five, in *Attorney-General of Alberta v. Nash and Guelph Engineering Co.*[27] The three cases are *Crown Coal Co. Ltd. v. Swanson Lumber Co. Ltd.*[28]; *Gard v. Yates*[29]; and *Totem Radio Supply Co. Ltd. v. Stone*[30]. All three of these cases concerned issues of alleged conflict between provincial and federal legislation respecting rights of creditors of a person who has made an authorized assignment or was insolvent at a material time. The *Crown Coal Co. Ltd.* case, an Alberta judgment, did not turn on a constitutional issue and, at any rate, it cannot stand in the face of the *Nash and Guelph Engineering Co.* case. I am, similarly, unable to appreciate how either *Gard v. Yates*

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or the *Totem Supply* case, both British Columbia decisions, can stand against the reasoning in *Nash and Guelph Engineering,* the views expressed in *Re Trenwith* and those expressed by Duff C.J.C. in *In re Bozanich*. The first represents a decision overtaken by later authority, and the second cites no authorities at all, but on the point of alleged conflict between the respective provincial and federal preference provisions is content to say simply that there is no conflict where the preference is given outside the three-month period fixed by the federal *Bankruptcy Act* when the provincial Act fixes a larger period for impeachment. Reliance was placed on the then s. 41(6), now s. 50(6) of the *Bankruptcy Act* to which I will return later in these reasons. I should add that in another later British Columbia case, the *Allison & Burnham Concrete Ltd.* case, already mentioned, also a judgment of a single judge, Ruttan J. did canvass later authorities but decided to rest on earlier decisions, such as *Gard v. Yates,* to justify a construction that avoided any constitutional infirmity if the provincial Act gave a longer impeachment period than the federal Act. In effect, his view was to leave the constitutional issue to a higher Court. That is where it now is.

Attorney-General of Alberta v. Nash and Guelph Engineering Co. came before Milvain J., as he then was, through a proceeding by a trustee in bankruptcy to set aside payments made by the bankrupt company to its creditors within one year prior to bankruptcy but, save as to one payment, beyond the three-month period under the then s. 64, now s. 73, of the *Bankruptcy Act*. The trustee relied on s. 4 of the Alberta *Fraudulent Preferences Act* which, like the Saskatchewan provisions in issue here, is predicated for its operation on insolvency. It fixes a one-year period within which a transaction having the effect of giving a preference may be impeached as being utterly void. Milvain J. held that the Alberta Act was *ultra vires* as being in pith and substance insolvency legislation.

In the Alberta Appellate Division, Johnson J.A., speaking for a unanimous Court of five, was content to consider the Alberta *Fraudulent Preferences Act,* first enacted in 1922, and, in particular, s. 4 (with a 60-day impeachment period, enlarged in 1931 to one year) from the standpoint of its preclusion by the prior enactment of the federal *Bankruptcy Act* and its preference provisions. After a canvass of the authorities to date, he said this (at pp. 160-161):

> There can, I think, be no doubt that the impugned Act was *ultra vires* of the legislature when it was passed. Whatever can be said for similar legislation that was passed before the *Bankruptcy Act* become [sic] operative, this legislation, viewed in the light of sec. 64, becomes an attempt to cover the same ground that section covers. The enlargement of the time from 60 days to one year must be viewed as an attempt to strengthen the remedy which sec. 64 gives to creditors. Sec. 4 cannot be looked upon as legislation which was intended to deal with contracts and which only incidentally and as part of a larger scheme dealt with matters which were within the scope of one or more of the subjects mentioned in sec. 91. This section is what it purports to be. Legislation intended to prevent a person "at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency" (4 [*a*]), from disposing of his property in such a manner as to prefer one creditor over another. It is exactly what sec. 64 of the *Bankruptcy Act* was passed to prevent. If it is not in pith and substance insolvency legislation under the earlier cases, it has become so under the enlarged definition [of later cases] and also by virtue of sec. 64 of the *Bankruptcy Act*.
>
> Viewing sec. 64 as being ancillary to bankruptcy and insolvency legislation, there can be no doubt of the conflict between that section and this section of *The Fraudulent Preferences Act*. Sec. 64 fixes three months as the time within which proceedings must be taken to avoid preferential dealings. Transactions beyond that period cannot be attacked under that section and are, therefore, legal. To enlarge that period to one year is to render void payments and transfers of property which were valid under sec. 64. The exclusions from the operation of the two sections, while similar, exhibit a differing approach and there can be little doubt that sec. 64 gives a wider exemption than sec. 7 of *The Fraudulent Preferences Act*.

In coming to the conclusion that s. 4 of the Alberta Act was in conflict with the then s. 64 of the Federal Act, the learned judge in the *Nash and Guelph Engineering* case took into consideration s. 41(6) of the *Bankruptcy Act,* now s. 50(6), which reads as follows:

> **41.** ...
>
> (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

In my opinion, this provision is not designed to enlarge provincial authority, and Johnson J.A. rightly held that because of conflict it had no application. The provision aforesaid does not provide for the effacement of federal legislation to allow provincial legislation to operate but relates to provincial provisions which satisfy two conditions: first, they must be provisions which are independently valid; and, second, they must be provisions which do not conflict with the application and operation of federal provisions. I do not see how provincial legislation whose operation is predicated on insolvency can be anything but insolvency legislation, nor do I see how a provincial statute can validly provide that what a federal

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statute says is not impeachable can nonetheless be impeached. There is no difference, in my view, between the situation where a Province seeks to narrow the period of impeachability of a transaction and the situation where it seeks to enlarge it, especially when in either case it is doing this from the standpoint of insolvency as the triggering factor. This is a different thing from legislation dealing only with fraudulent preferences apart from or unrelated to insolvency. Here, although such legislation may be valid in the absence of federal legislation, there may nonetheless be operative incompatibility in particular cases but no general supersession or preclusion.

I wish now to address myself to an issue which, I think, has influenced the approach by single judges to the constitutional question in this case, and wrongly so. That issue is the undesirability of interfering with what appeared to be a practical way of reaching as many alleged preferences in fraud of creditors as possible, to use provincial legislation where federal legislation did not reach far enough, and to use provincial insolvency legislation if nothing else was available. Hence, the approach by way of construction, albeit a dip into a constitutional area was inevitable, avoiding a direct constitutional confrontation. There are cases even in this Court and on this very subject which have proceeded on a straight construction basis to examine whether operative effect can be given to provincial legislation in the face of a federal enactment. Two examples are *Traders Finance Corp. Ltd. v. Levesque*[31], and *Produits de Caoutchouc Marquis Inc. v. Trottier*[32]. I do not regard either of these cases as requiring a decision on constitutional grounds. The *Traders Finance* case concerned a largely procedural matter, namely, whether the failure of a trustee in bankruptcy to impeach a preference illegal under the *Bankruptcy Act,* precluded a suit by a creditor to that end. The *Trottier* case dealt with the effect of the *Bankruptcy Act* on the extent of a landlord's claim to rank as a preferred creditor.

There are numerous illustrations in other branches of the law where practices carried on for some time without objection on constitutional grounds were brought to an end when the constitutional question was raised directly. Perhaps the most celebrated instance was that considered by the Privy Council in *Nadan v. The King*[33], where a federal enactment of 1888 purporting to exclude appeals to the Privy Council in criminal matters was invalidated almost forty years later. Equally significant, because the issue was well known to the Ontario Bar which seems to have agreed to live with it as a matter of convenience, was the constitutional propriety of provincial legislation vesting jurisdiction in the Master to try mechanics' lien actions in the County of York. Once the constitutional issue was squarely raised the Courts did not back away from it and held that s. 96 of the *British North America Act* was offended: see *Attorney-General for Ontario and Display Service Co. Ltd. v. Victoria Medical Building Ltd.*[34]

There have been a number of recent cases where this Court has proceeded on a construction basis rather than on a constitutional basis in respect of the operation of both federal and provincial legislation, although aware that a constitutional question was involved but unwilling to deal with it unless raised by a party so that necessary notice could be given to the Attorneys-General, federal and provincial. One example is *Les Immeubles Fournier Inc. v. Construction St-Hilaire Ltée*[35], involving s. 8 of the *Interest Act,* R.S.C. 1970, c. I-18. Another is *Canada Labour Relations Board v. Canadian National Railway Co.*[36], which concerned the scope of s. 53(*g*) of the federal *Industrial Relations and Dispute Investigation Act,* R.S.C. 1952, c. 152 (now s. 108, Part V of the *Canada Labour Code,* R.S.C. 1970, c. L-1) and whether it embraced (validity not put in issue) a hotel operated by the respondent railway.

Finally, on this phase of the case, I refer to *Gingras v. General Motors Products of Canada Ltd.*[37], which involved a question of prescription in respect of an action by a trustee in bankruptcy to set aside an illegal preference under the *Bankruptcy Act.* No constitutional question was directly involved, and the majority judgment held that a certain prescriptive provision of the *Civil Code* of Quebec did not apply so as to limit the trustee's right of action.

I conclude, therefore, as follows. Provincial legislation which purports to provide for impeachment of preferences to creditors given by a person who is then insolvent, where insolvency is the *sine qua non* of impeachability, is invalid as a direct invasion of exclusive federal power in relation to bankruptcy and insolvency. Hence, ss. 3 and 4 of Saskatchewan *Fraudulent Preferences Act* are *ultra vires.* Moreover, in so far as these sections prescribe an impeachment period which enables a creditor to set aside a preference made beyond the period fixed by the *Bankruptcy Act,* and hence not impeachable under that Act, it interferes with the operation of the *Bankruptcy Act* and is, indeed, repugnant to it. It must be remembered that where, as in the present case, there has been a receiving order, the intrusion of provincial legislation relating to transactions entered into by an insolvent, must interfere with the rateable distribution of the bankrupt's property according to the scheme of distribution prescribed by the *Bankruptcy Act.* Whether that scheme is faulty in the view of a Court is immaterial; the correction must come from the responsible Legislature. No more under bankruptcy and insolvency law than under the criminal law can a Province make unlawful what is lawful under valid federal legislation, nor make lawful what is unlawful under valid federal legislation.

In the result, I would answer the two questions in issue here in the affirmative. The judgment of the Saskatchewan Court of Appeal should be varied so as to restore the finding of insolvency by the trial judge but the appeal should otherwise be dismissed in view of the affirmative answers aforesaid. Leave is also given for a reference to determine the amount due

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under the debenture if the parties are unable to agree thereon. The respondent should have its costs in this Court but there should be no order as to costs to or against any of the intervenors.

Judson, Ritchie and Pigeon JJ. concurred with the judgment delivered by

SPENCE J.—This is an appeal from the judgment of the Court of Appeal for Saskatchewan pronounced on March 14, 1974. By that judgment, the Court of Appeal allowed an appeal from the judgment of MacPherson J. pronounced on June 16, 1971. By the latter judgment, MacPherson J. had declared that the payment of the sum of $9,152.31 to the respondent was void as a preference under *An Act respecting Fraudulent or Preferential Transfers,* R.S.S. 1965, c. 397, and had given judgment in favour of the appellant against the respondent for that amount.

The issue determined by MacPherson J., in so far as may be adjudged from a perusal of the reasons for judgment delivered by the learned trial judge, was simply whether the transaction was or was not a preferential one voided by the provisions of that statute.

On the appeal to the Court of Appeal, the present respondent not only dealt with that issue but with the issue of whether the provincial statute was available to the appellant in this Court, there respondent, in an attack on the transaction.

Maguire J.A., in giving reasons for the majority of the Court of Appeal, held that the transaction was not a preferential one within the meaning of the section in the provincial *Act respecting Fraudulent or Preferential Transfers* and, therefore, was not called upon to determine whether that statute was available in whole or in part to the trustee in bankruptcy. Hall J.A., giving a dissenting judgment, found that the transaction was a preferential one within *The Fraudulent Preferences Act* and was, therefore, called upon to deal with the issue as to the validity and applicability of the provisions of *The Fraudulent Preferences Act.* Perhaps realizing that his reasons were dissenting, he did so in a very short paragraph, which I quote:

> The appellant contends that *The Fraudulent Preferences Act, supra,* is *ultra vires* of the legislation of the Province. For the reasons given in *Re Panfab Corp. Ltd.* [1971] 2 O.R. 202, with which I agree, this contention must be rejected.

Upon the trustee in bankruptcy obtaining leave to appeal to this Court, the respondent Countrywide Factors Ltd., in accordance with the Rules of this Court, and in view of the fact that it wished to argue the *ultra vires* character of the provincial *Fraudulent Preferences Act,* applied to this Court for directions and this Court ordered that notice of two questions be served on the Attorney General of Canada and the Attorneys General of the Provinces. The two questions were:

> 1. Whether The Fraudulent Preferences Act, R.S.S. 1965, Chapter 397, is *ultra vires* of the Legislature of the Province of Saskatchewan.
>
> 2. Alternatively, whether sections 3 and 4 of The Fraudulent Preferences Act, R.S.S. 1965, Chapter 397, while being within the legislative competence of the Legislature of the Province of Saskatchewan, are in conflict with valid legislation of the Parliament of the Dominion of Canada relating to bankruptcy and insolvency, namely, the Bankruptcy Act, R.S.C. 1970, Chapter B-3.

As will be demonstrated hereafter, the transaction attacked by the trustee in bankruptcy occurred on November 19, 1966, or, at any rate, not later than March 20, 1967.

Kozan Furniture (Yorkton) Ltd. was the subject of a receiving order in bankruptcy on November 19, 1968. Therefore, the *Bankruptcy Act* provisions as to preferential transactions contained in s. 73 of the *Bankruptcy Act,* R.S.C. 1970, c. B-3, which provides:

> 73. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void, as against the trustee in the bankruptcy.
>
> (2) Where any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.
>
> (3) For the purposes of this section, the expression "creditor" includes a surety or guarantor for the debt due to such creditor.

has no application nor has s. 5 of *The Fraudulent Preferences Act,* R.S.S. 1965, c. 397. In the *Bankruptcy Act,* the interval between the transaction and the declaration of bankruptcy is limited to three months and in *The Fraudulent Preferences Act,* s. 7 only applies if the attack is made within 60 days after the transaction. Therefore, in order to succeed, the

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appellant must have available to him the provisions of ss. 3 and 4 of the said *Fraudulent Preferences Act.* It is the submission of the respondent that either of those sections, or indeed the whole statute, is *ultra vires* of the Province of Saskatchewan or that ss. 3 and 4, while being within the legislative competence of the Legislature of the Province, are in conflict with the legislation of the Parliament of Canada relating to bankruptcy and insolvency. That problem is one which has plagued the Courts from 1894 on.

The *Bankruptcy Act* was only enacted in the year 1919 but in *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*[38], the Judicial Committee dealt with the problem of whether s. 9 of an Ontario statute, the then counterpart of the present Ontario *Assignments and Preferences Act,* R.S.O. 1970, c. 34, was *intra vires* of the Province of Ontario. It is to be remembered that s. 91, subheading 21, of the *British North America Act* granted exclusive legislative jurisdiction to the Parliament of Canada on subjects entitled "Bankruptcy and Insolvency". Section 9 of the Ontario statute read as follows:

> An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriffs hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriffs hands.

The Judicial Committee held that such a provision was within the constitutional powers of the Province as granted in s. 92, heading 13, of the *British North America Act, i.e.,* "Property and Civil Rights in the Province". The Lord Chancellor said at pp. 198-9:

> But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.
>
> It is to be observed that the word "bankruptcy" was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law.
>
> Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent.

and at pp. 200-1 continued:

> It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define, what is covered by the words "bankruptcy" and "insolvency" in sect. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.
>
> In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament,

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> are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

It will be seen, therefore, that the Judicial Committee in this decision only determined that a system providing for voluntary assignments enacted in a province prior to the enactment of any federal Bankruptcy Act was *intra vires* but acknowledged that a subsequently enacted Bankruptcy Act by the federal Parliament might well overcome the provisions of the provincial statute. It would seem that the decision is quite silent as to the effect of provisions in a provincial Assignments and Preferences Act other than one permitting a voluntary assignment of debts except that one might well argue that by implication provisions in the provincial statute dealing with fraudulent preferences would be equally within the purview of the province under "property" and "civil rights" unless and until overcome by federal legislation ancillary to its power in bankruptcy and insolvency.

In 1922, Orde J. gave a decision in *Re Davison*[39], in a matter where a mortgage was being attacked by a trustee in bankruptcy as void under *The Fraudulent Conveyances Act* and also *The Assignments and Preferences Act*. The mortgagee submitted that if the transaction could not be avoided under s. 31 [now s. 73] of the *Bankruptcy Act,* it could not be set aside at all. In other words, that the provincial statutes aforesaid were no longer applicable in the province when bankruptcy occurs, having been superseded by the provisions of the *Bankruptcy Act*. At p. 245, the learned justice said:

> This is a startling suggestion, and, if sound, would turn back the clock for three centuries and enable a debtor to commit a deliberate fraud upon his creditors, and by holding off his bankruptcy for three months to validate the transaction. There is nothing in sec. 31 or in any other part of the Bankruptcy Act which either expressly or impliedly abrogates the existing law of each Province as to the invalidity of fraudulent transactions. On the contrary, in the enumeration of the different kinds of acts of bankruptcy in sec. 3, para. (*b*), it is clearly intended to include cases of fraudulent conveyances which are fraudulent quite independently of the Bankruptcy Act, those which are fraudulent under the Act being mentioned in para. (*c*). Rule 120 clearly contemplates other laws than the Bankruptcy Act itself, under which a transaction may be declared invalid, though, if the effect of the Act is as Mr. White contends, the Rules cannot nullify that effect.

Orde J. was the first judge dealing with bankruptcy matters in Ontario after the enactment of the statute. The report books for the years following the enactment of the statute are filled with his wise decisions in reference to bankruptcy and, in my view, he firmly established the course of bankuptcy law in Ontario and largely affected the course of the law throughout Canada in the early years of bankruptcy administration. I am of the view that his observation which I have cited is a very sound one and is still applicable today. I might even go further: it is not only possible for a debtor to hold off his bankruptcy for three months in order to validate the transaction but it is quite possible for a creditor, improperly and fraudulently preferred, to support a debtor and enable him to postpone the date of his eventual declaration of bankruptcy beyond the three months.

The view expressed by Orde J. seems to have prevailed for a considerable length of time.

In *Hoffar Ltd. v. Canadian Credit Men's Trust Association Ltd.*[40], the Court of Appeal for British Columbia had considered a situation where a transfer had been made by a debtor less than 60 days before the debtor's assignment under the provisions of the *Bankruptcy Act*. The transaction was attacked under two grounds: firstly, that it was avoided by the provisions of s. 64 [now s. 73] of the *Bankruptcy Act,* and, secondly, that it was utterly void as against the trustee under the provisions of s. 3(2) of the *Fraudulent Preferences Act* of British Columbia. It was found, at trial, and not contested on appeal, that s. 64 of the *Bankruptcy Act* could not apply because it had not been proved that the transaction was made with a view to prefer one creditor over another and, in the Court of Appeal, it was also held that s. 3 of the provincial statute had been rendered inoperative by the enactment of s. 64 of the *Bankruptcy Act*. M.A. Macdonald J.A. said:

> The Dominion statute adds however subsec. (2) quoted *ante,* stating when the view or intent to prefer shall be presumed. If it has the effect of giving a preference it is *prima facie* proof that it was made with that intent. That is a presumption and evidence may be adduced to rebut it. That right is given by the Dominion Act on a state of facts common to both Acts. The provincial statute denies that right. Given the insolvency as in the Dominion Act and the intent as in the Dominion Act ("with a view of") the transfer is utterly void under sec. 3(1) without any right to offer evidence to rebut it. And under sec. 3, subsec. (2), if action is taken within 60 days or if an assignment follows within 60 days the transfer is void.
>
> The provincial Act is not dealing with a new situation; the variation in words and figures does not affect the subject-matter. But the result is different. Under the provincial Act the transfer is void; under the Dominion Act it is deemed void with however the right to rebut. If this is given by Dominion legislation a provincial Act destroying it is *ultra vires* to the extent of the conflict. Under the Dominion Act the assignor has the benefit of that right. Under the provincial Act invalidity is an irrebuttable presumption. That is the conflict.

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M.A. Macdonald J.A. added the very important comment:

> This is not to say that the trustee cannot resort to a provincial Act to impeach a transaction. Provincial legislation respecting fraudulent conveyances may be resorted to. The *Bankruptcy Act* does not abrogate provincial Acts simply because they deal with preferential transactions. But obviously both Parliaments cannot enact that one result shall follow in one case and a different result in the other. Counsel for respondent submitted that the section in the provincial Act deals with a topic not dealt with by the Dominion Act. I cannot agree. He also urged that there is no conflict where the Dominion Act voids a transaction on one ground and a provincial Act avoids it on other and additional grounds; in other words, the Dominion Act does not say that transactions of another kind shall be lawful. That is not this case. We are dealing with legislative results following the same transaction and the results differ. That result in case of conflict must be determined by the Dominion Act. The test is, can both sections be enforced?

So, in *Hoffar,* the Court of Appeal for British Columbia acknowledged that, of course, valid federal legislation on the subject of bankruptcy and insolvency would overcome provincial legislation on the subject of property and civil rights but only to the extent of the conflict. In that case, the Court found a conflict but foresaw cases where there would be no conflict and where, therefore, the provincial legislation would still be in full force and effect. Leave to appeal to this Court in the *Hoffar* case was refused by Mignault J.[41]

In *Re Pommier*[42], Fisher J.A. considered an application to set aside as preferential a transaction between the bankrupt and the creditor which took place more than three months before the making of the authorized assignment and which, therefore, was not within the prohibition in s. 64 [now s. 73] of the *Bankruptcy Act*. At pp. 419-20, the learned justice said:

> After careful consideration of the provisions of the Bankruptcy Act, the Assignments and Preferences Act, and the decisions to which I shall make reference, I am unable to give effect to Mr. **Hellmuth's contentions**.
>
> I frankly admit that conflict is to be found when sec. 64 is read in connection with sec. 5 of the Assignments and Preferences Act and the following sections, except possibly sec. 12, and that, the Bankruptcy Act being Dominion legislation, as to this conflict the Dominion Act prevails; but, in my opinion, sec. 64 does not attempt to interfere directly with provincial legislation dealing with the same subject-matter, because it is quite clear that subsecs. (3) and (4) of sec. 4 of the Assignments and Preferences Act cover transactions not covered by the Bankruptcy Act, and in those respects are not in conflict with the Bankruptcy Act, and that these subsections are still operative; but, even if it could be said that these subsections do deal with the same subject-matter, it is not one of conflict but of "**overlapping**".

And at p. 422, said:

> It appears to me, and I am of opinion, that the combined effect of Rule 142, sec. 64, and the other sections of the Acts to which I have referred, is to give to a trustee in bankruptcy, without special enabling words, power to impeach all fraudulent or preferential transactions which may by the Bankruptcy Act or provincial law be avoided; that neither the Assignments and Preferences Act nor the Fraudulent Conveyances Act has been abrogated, and that these Acts, apart from the conflicting sections mentioned, are still running concurrently with the provisions of the Bankruptcy Act and may be resorted to by a trustee under that Act, if it is found that relief cannot be obtained thereunder, or, to adopt the words of Macdonald, J.A., in the Hoffar case:—
>
> > Unless on the same state of facts we find a different result arising, resort may be had to the provisions of whichever legislation fits the case.

So, therefore, another most eminent and experienced judge in bankruptcy matters came to the like conclusion that the provincial statute in so far as it was not overcome by the provisions of the *Bankruptcy Act* was still available to the trustee in bankruptcy.

However, the Court of Appeal for Ontario in *Re Trenwith*[43], again considered a transaction allegedly preferential which had occurred much more than three months prior to the petition which resulted in the receiving order. Kerwin J., as he then was, had at trial set aside the impugned transaction using the provisions of *The Assignments and Preferences Act* being of the opinion that he was so required by the decision in *Re Pommier, supra.* But upon appeal Masten J.A. said at p. 332:

> The question is therefore open for adjudication by this court, and on a consideration of the cases of *Attorney-General of Ontario v. Attorney-General for Canada,* [1894] A.C. 189, at p. 200; *Royal Bank of Canada v. Larue,* [1928] A.C. 187, 8 C.B.R. 579, and *Canadian Credit Men's Trust Association Ltd. v. Hoffar Ltd.,* 1929 CanLII 26 (SCC), [1929] S.C.R. 180, 10 C.B.R. 374, it seems clear to me that the common field of legislation respecting the distribution of the estates of insolvents having now become occupied by the Dominion Bankruptcy Act, the provisions of The Assignments and Preferences Act respecting the preference of one creditor over another have been thereby superseded and have ceased to have any operation. If I am right in this conclusion, the effect is to overrule the view expressed by Fisher J. in *Re Pommier* (1930), 65 O.L.R. 415, 11 C.B.R. 449.

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The Court of Appeal for Ontario, therefore, came to exactly the opposite conclusion, not to the actual decision in *Hoffar* but to the reservation made by M.A. Macdonald J.A. and which I have cited above and to a conclusion opposite to that reached by Fisher J.A. in *Re Pommier*. The conclusion, however, may well be considered *obiter* because Masten J.A. follows the statement which I have quoted above with a holding that although the transaction could not be attacked under either s. 64 of the then *Bankruptcy Act* or under *The Assignments and Preferences Act* of the Province it could be attacked as a settlement under the then s. 60 [now s. 69] of the *Bankruptcy Act*.

The statement which I have quoted above, however, is plainly that by enacting the then s. 64 of the *Bankruptcy Act* the federal Parliament enacting valid legislation on the subject of bankruptcy and insolvency has covered the field and, therefore, cannot be reconciled with decisions to which I have referred which reduce the deleterious effect of the federal legislation to points of actual conflict only. The decision, however, has some support in this Court and in the Courts of Appeal of the Provinces. In *Re Bozanich, A.H. Boulton Co. Ltd. v. Trusts & Guarantee Co. Ltd.*[44], this Court considered whether a chattel mortgage was or was not a settlement within the meaning of the then s. 60 of the *Bankruptcy Act* and held it was not such a settlement. There seems to have been no allegation whatsoever that the transaction could be subject to attack under the provisions of the Ontario *Assignments and Preferences Act* or the Ontario *Fraudulent Conveyances Act,* but Duff C.J. said at p. 136:

> I may add that, in my opinion the provisions of R.S.O. 1927, Chap. 162, in relation to preferences are superseded by section 64 of the *Bankruptcy Act,* and that the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of section 64, suspended in virtue of the concluding paragraph of section 91.

The statement is, of course, plainly *obiter* and it is not reflected in the reasons for judgment of Rinfret J. who came to the same result as did the Chief Justice.

In 1949, the Parliament of Canada enacted an amendment to the *Bankruptcy Act* which now appears as s. 50, subs. (6) of the statute and which provides:

> (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

In *Totem Radio Supply Co. Ltd. v. Stone et al.*[45], Whittaker J., sitting in single judge court, held that the *Fraudulent Preferences Act,* R.S.B.C. 1948, c. 132, was not in conflict with s. 64 [now s. 73] of the *Bankruptcy Act,* and at p. 553, said:

> Prior to 1949 there were conflicting decisions as to whether or not the dominion legislation entirely superseded provincial Acts dealing with preferences, but this matter is now resolved by sec. 41(6) of the *Bankruptcy Act* of 1949:

Other cases in the various provincial Courts went either way but the next case which I shall consider is *Attorney-General of Alberta v. Nash and Guelph Engineering Company*[46]. There the Appellate Division of the Province of Alberta held, confirming Milvain J., that *The Fraudulent Preferences Act* of Alberta was *ultra vires*. Johnson J.A. said at pp. 160-1:

> There can, I think, be no doubt that the impugned Act was *ultra vires* of the legislature when it was passed. Whatever can be said for similar legislation that was passed before the *Bankruptcy Act* became operative, this legislation, viewed in the light of s. 64, becomes an attempt to cover the same ground that section covers. The enlargement of the time from 60 days to one year must be viewed as an attempt to strengthen the remedy which sec. 64 gives to creditors. Sec. 4 cannot be looked upon as legislation which was intended to deal with contracts and which only incidentally and as part of a larger scheme dealt with matters which were within the scope of one or more of the subjects mentioned in sec. 91. This section is what it purports to be. Legislation intended to prevent a person "at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency" (4 [*a*]), from disposing of his property in such a manner as to prefer one creditor over another. It is exactly what sec. 64 of the *Bankruptcy Act* was passed to prevent. If it is not in pith and substance insolvency legislation under the earlier cases, it has become so under the enlarged definition and also by virtue of sec. 64 of the *Bankruptcy Act*.

Johnson J.A. cited s. 41(6) [now s. 50(6)] of the *Bankruptcy Act* and then continued:

> Whittaker J. of the British Columbia supreme court considered this amendment in *Totem Radio Supply v. Stone* reflex, (1959) 29 WWR 552, and as he could find no conflict between sec. 64 of the *Bankruptcy Act* and the section of the *Fraudulent Preferences Act,* RSBC, 1948, ch. 132 (similar to our Act), set aside a mortgage which had been given more than three months before the company became bankrupt. With respect, I must disagree with his conclusion. Having concluded, as previously stated, that there is a conflict between the two sections, it would follow that the section in the provincial Act is unaffected by the amendment.

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> The Court of Appeal of Ontario again considered *the Assignments and Preferences Act,* RSO, 1960, ch. 25, in *Re Shelly Films Ltd.*; *Clarkson Co. v. Overland Finance Corpn.* [1963] 1 OR 431, 4 CBR (NS) 186, reversing [1961] OWN 371, 3 CBR (NS) 94, and held that sec. 12(1) of that Act was abrogated by sec. 64 of the *Bankruptcy Act*. Because no mention was made of the amendment to the *Bankruptcy Act* in that case, we are asked to assume that it had been overlooked and was not considered by that court. Judicial comity would make one hesitate to impute to the court of another province such an oversight. The case does point out the conflicts in the two Acts and it is much more reasonable to assume that the amendment was in fact considered by the court.
>
> It may be that certain sections of the *Fraudulent Preferences Act* are continued effective by the amendment to sec. 41 of the *Bankruptcy Act,* but because of the conflict between the section we are considering and sec. 64, sec. 4 is not one of them.

It would seem that Johnson J.A.'s judgment, although he commences with the statement that the Act is *ultra vires,* ends with the conclusion that only the section under attack in that particular decision was *ultra vires*. The particular section was s. 4 which avoided preferential transactions where an action had been brought within one year thereafter. The statute under consideration in this appeal, the Saskatchewan *Fraudulent Preferences Act,* in ss. 3 and 4 makes no reference whatsoever to any time limit. The section which does make such reference and which creates a presumption is s. 5 and it is not advanced by the trustee.

In *Re Panfab Corp. Ltd.*[47], Houlden J. considered an appeal from a registrar to whom an issue had been directed as to the validity of a security given by an individual to a corporation and held that s. 64A [now s. 74] did not apply. He continued at p. 206:

> The next issue is whether the transaction, not being a fraudulent preference because it does not come within s. 64A, can be attacked as a fraudulent conveyance. Counsel for the appellants gave notice to the Attorney-General for Canada and the Attorney-General for Ontario pursuant to s. 33 of the *Judicature Act,* R.S.O. 1960, c. 197, that he proposed to argue that the *Fraudulent Conveyances Act,* R.S.O. 1960, c. 154, was *ultra vires* the Legislature of the Province of Ontario, or ineffective in that it is legislation relating to either bankruptcy or insolvency which by s. 91, para. 21 of the B.N.A. Act, 1867, is under the exclusive legislative authority of the Parliament of Canada.

And at p. 207, he expressed the view that *The Fraudulent Conveyances Act* in Ontario was not in pith and substance bankruptcy legislation but was valid legislation as in reference to property and civil rights within s. 92, para. 13 of the *British North America Act*. He continued:

> The *Fraudulent Conveyances Act* is used constantly to attack transactions which have no connection with bankruptcy. It is an important part of the weapons available to creditors in recovering assets that have been fraudulently transferred by debtors. In my opinion, there is no conflict between the provisions of the *Fraudulent Conveyances Act* and the *Bankruptcy Act*. Section 41(6) of the *Bankruptcy Act* recognizes that provincial legislation such as the *Fraudulent Conveyances Act* exists and provides that the trustee is entitled to make use of such legislation in addition to the rights and remedies provided by the *Bankruptcy Act*.

Houlden J.'s decision is *obiter,* however, in that he found that the transaction was not within *The Fraudulent Conveyances Act* because it was *bona fide.* It is to be noted also that Houlden J.'s concern was with *The Fraudulent Conveyances Act* while this appeal is concerned with the exact provisions of ss. 3 and 4 of *The Fraudulent Preferences Act* of Saskatchewan. Perhaps it should also be noted that Houlden J., in the *Panfab* case had inclined to the opposite conclusion in reference to this problem which he found, in his article reported in 38 C.B.R. 114, to be one of great importance, and where he found the decision in *Re Trenwith* had been a block to trustees. Houlden J. does not mention *Re Trenwith* in his reasons for judgment in *Panfab.* It is to be remembered that *Re Panfab Corporation* was not appealed to the Court of Appeal and we, therefore, have not an opportunity to determine whether that Court had recanted from its view taken thirty-five years before in *Re Trenwith.*

In *Traders Finance Corporation Ltd. v. Levesque*[48], the Court considered a transaction, allegedly preferential, occurring within three months before the declaration of bankruptcy. The attack upon the transaction, however, was not made until more than a year after the bankruptcy when the creditor, the trustee having refused to take the action, obtained the leave of the Court to proceed under the provisions of s. 16 of the *Bankruptcy Act* [now s. 20]. The provisions of art. 1040 of the *Civil Code* purported to place a limitation period of one year upon such attack. This Court, confirming the Court of Appeal of Quebec, by a majority judgment, held that art. 1040 of the *Civil Code* would not apply because the action was taken within a year of the creditors' obtaining knowledge of the payment as the said article provides. Locke J. did consider art. 1040 of the *Civil Code* and held that it had no application whatever to proceedings under the provisions of the *Bankruptcy Act,* saying at p. 90:

> It may be said that provisions similar to those contained in the articles of the *Civil Code* to which I have referred are to be found in statutes of most of the provinces of Canada. They are to be found in British Columbia in the

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> *Fraudulent Preferences Act,* R.S.B.C. 1948, c. 132, in Alberta in the *Fraudulent Preferences Act,* R.S.A. 1955, c. 120, in Saskatchewan in the *Fraudulent Preferences Act,* R.S.S. 1953, c. 362, in Manitoba in the *Assignments Act,* R.S.M. 1954, c. 11, and in Ontario in the *Assignment and Preferences Act,* R.S.O. 1950, c. 26. All of these statutes deal with the rights of creditors to set aside conveyances made by persons in insolvent circumstances, which have the effect of giving a creditor a preference over the others and all of them provide that, in the event of action being brought within a certain period of the date of the conveyance, it is to be held null and void. The remedies thus given are quite distinct from those given to the trustee in bankruptcy under c. 64 of the *Bankruptcy Act.* The right to enforce such claims by creditors does not depend upon the fact that the person making the transfer has been declared bankrupt and these rights may be enforced under the provincial statutes unless bankruptcy has intervened. This has been held in a number of cases in various provinces, which are to be found collected in the 3rd ed. of Bradford and Greenberg on the Bankruptcy Act, at p. 158 et seq. In Quebec the limitation provided by art. 1040 only refers to proceedings under the articles mentioned.

One might infer from Locke J.'s words that once bankruptcy has intervened then the provincial statutes have no application even to a transaction occurring before the period covered by the present s. 73. Ï am not of the view that that is a proper implication from Locke J.'s words. I am assisted in coming to that conclusion by the decision of this Court in *Gingras v. General Motors Products of Canada Ltd.*[49], a judgment pronounced on November 27, 1974, and as yet unreported. There, the Court of Appeal of Quebec had confirmed a decision of the Superior Court which had dismissed a "motion to cancel preferential payments" instituted by the trustee in bankruptcy. The trustee had in such motion attacked a transaction which had occurred less than three months before the declaration of the bankruptcy but had not instituted the action within one year of his appointment as provided in art. 1040 of the *Civil Code.*

The defendant filed an exception relying on the said art. 1040 of the *Civil Code* and such exception was successful in both Courts below. However, this Court, by a majority judgment, held that the trustee, in taking action under s. 73 of the *Bankruptcy Act* to attack a transaction as a preference occurring within three months before the bankruptcy, was not affected by art. 1040 of the *Civil Code* and was controlled alone by the provisions of the *Bankruptcy Act.* De Grandpré J., dissenting, was of the opinion that in proceeding in the Superior Court the trustee was governed by the procedural provisions of the *Civil Code* and that, therefore, art. 1040 would apply to bar the action.

It is noted that Pigeon J. giving reasons, concurred in by Martland and Dickson JJ., said at p. 8 of the English version of his reasons:

> Ï would therefore allow the appeal and dismiss the exception to dismiss submitted by respondent. This does not mean that the latter will not be entitled to rely on Art. 1040 in answer to a claim based on the goods taken back, if the trustee should contend that his petition allows him to go beyond the three months preceding the bankruptcy, and base a claim not only on the *Bankruptcy Act* but also on Arts. 1032 to 1040 C.C.

In my view, Pigeon J., therefore, expressed the view that in the attack upon transactions not within the three month period provided by s. 73 of the *Bankruptcy Act* the trustee was free to use the provisions of the *Civil Code* as to preferential transactions.

De Grandpré J., in his dissenting reasons, at p. 4 of the English version said:

> In my view, the *Bankruptcy Act* overrides the Paulian action only to the limited extent that it deals with acts in defraud of the debtor; all aspects of fraudulent action falling outside the provisions of the *Bankruptcy Act* may be considered in the light of the principles of the *Civil Code.*

Again, a plain statement that any reference to transactions outside of the narrow limits of the provisions of what is now s. 73 of the *Bankruptcy Act,* the *Civil Code* remained in full force and available to the trustee in bankruptcy.

I have dealt with what, in my view, are the main cases upon the subject in Canada. Upon considering them all, as well as the decision of the Judicial Committee in *A.G. of Ontario v. A.G. for Canada, supra,* I have come to the conclusion that the better view is to confine the effect of what is now s. 73 of the *Bankruptcy Act* to providing for the invalidity of transactions within its exact scope. To that extent, the Parliament of Canada, by valid legislation upon "bankruptcy" and "insolvency", has covered the field but has refrained from completely covering the whole field of transactions avoided by provincial legislation. I am of the opinion that the enactment in 1949 of the provisions now found in s. 50(6) of the *Bankruptcy Act* is a plain indication that Parliament recognized that provisions in provincial statutes dealing with preferential transactions were still valid provincial enactments in reference to "property" and "civil rights" and were valuable aids to trustees in bankruptcy in attacking the validity of such transactions and should be available to the said trustees in bankruptcy.

I am assisted in coming to this conclusion by the view which I believe was behind the Lord Chancellor's reasons in *A.G. of Ontario v. A.G. for Canada, supra,* that the words "bankruptcy" and "insolvency" in s. 91, para. 21, of the *British North America Act* were aimed at legislative schemes which had the purpose of governing the distribution of a debtor's property amongst his creditors. There may well be, and there are, provisions in such legislative schemes, *i.e.,* the *Bankruptcy Act,* dealing with "property" and "civil rights". Such provisions are properly ancillary to the bankruptcy and insolvency

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legislation, and to the extent to which they go overcome existing valid provincial legislation and bar future provincial legislation *contra* thereto but do not purport to extend beyond that point to invalidate other valid provincial legislation upon "property" and "civil rights".

I have, therefore, come to the conclusion that the provisions of ss. 3 and 4 of *The Fraudulent Preferences Act* of Saskatchewan are valid and subsisting provincial legislation available to the trustee in his attack upon the transactions with which this appeal is concerned. In my view, s. 3 of that statute dealing with transactions taken with the intent to defeat, hinder, delay or prejudice creditors is not as relevant as s. 4 which provides:

> 4. Subject to sections 8, 9, 10 and 11 every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in a bank, company or corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency to or for a creditor, with intent to give that creditor preference over his other creditors or over any one or more of them, is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

and is concerned with transactions taken with the intent to give one creditor preference over other creditors.

In order to determine whether that section applies to avoid the transaction in question in this appeal, a detailed analysis of the circumstances is necessary.

Kozan Furniture (Yorkton) Ltd. had carried on business for a period of years in Saskatchewan. Part of that business was the sale of floor coverings, paints, draperies, interior decorating material, etc. The supplier of those items was Kennedy Flooring Limited of Winnipeg, a wholly-owned subsidiary of Gaultco Limited of Winnipeg. Another wholly-owned subsidiary of the said Gaultco was Countrywide Factors Limited. By some mysterious and unspecified arrangement, Countrywide Factors Limited became the accounting firm and the billing agent for Kennedy Flooring.

The three corporations, Gaultco Limited, Kennedy Flooring Limited and Countrywide Factors Limited, were all controlled by the same officers, and we are not concerned with the arrangements between the three companies.

As early as 1965, Countrywide Factors Limited was unsatisfied with the payments being received from Kozan Furniture (Yorkton) Limited on its open account and placed Kozan Furniture (York-ton) Limited on a "C.O.D." basis. The learned trial judge found, and it was confirmed by the majority on appeal, that by the spring of 1966 Kozan Furniture (Yorkton) Limited was not paying the accounts as they became due. One Tony Ollinger was the manager of the floor covering department in Kozan Furniture (Yorkton) Limited and he arranged with Kozan Furniture (Yorkton) Limited and its controlling shareholder George E. Kozan to purchase the floor covering inventory for the sum of $10,300. Of course, it was of crucial interest to Ollinger that he should continue to have Kennedy Flooring Limited supply him with stock. On November 19, 1966, two officers of Countrywide Factors went from Winnipeg to Yorkton, Saskatchewan, and conferred with George E. Kozan and Tony Ollinger. The two officers were Mr. David Albert Bowles, a director of Countrywide and also its solicitor, and Mr. Philip Douglas Medhurst, its credit manager. As a result of that conference, a document was drawn up and executed which read as follows:

> I, Tony Ollinger, agree to pay Countrywide Factors Ltd. $10,300.00 (more or less) representing sale of inventory of floor coverings, paint & Drapery as determined by stocktaking of Sept. 21/66; payment as follows:
>
> (a) Before Nov. 26/66 $7,000.00
>
> (b) Before Jan. 31/67, the balance & int. at 7%
>
> (If substantially paid—say within $300.00—this will be adequate compliance & any unpaid balance will be paid by the last day of Feb. 1967.)
>
> Countrywide will agree to the sale of said inventory on such compliance & will reduce the account of Kozan Furniture (Yorkton) Ltd. now at $25,000.00 (more or less) by the amount of said inventory price.
>
> George Kozan guarantees repayment of the account of Kozan Furniture (Yorkton) Ltd. as set out in his letter of Oct. 1/66& attached. He & Kozan Furniture (Yorkton) Ltd. will give a debenture on the stock in the form attached, an assignment of book debts in Countrywide's form & a collateral mortgage on 76 and 80 Circlebrook Drive.
>
> Kozan Furniture (Yorkton) Ltd. Countrywide Factors Ltd.
>
> Per: "George E. Kozan" Per: "D.A. Bowles"
>
> "Tony Ollinger"

At the same time and place, George E. Kozan executed a personal guarantee of the debt to Countrywide and, in accordance with the agreement set out above, in February of 1967 Kozan Furniture (Yorkton) Limited granted to Countrywide Factors Limited a debenture in the sum of $35,512 covering all of its remaining assets. The floor coverings which under the transaction had been transferred from Kozan Furniture (Yorkton) Limited to Tony and Rudolph Ollinger were conveyed by a bill of sale which was, however, only executed on February 15, 1967. Again, a mysterious company appears. That transfer was not made by Kozan Furniture (Yorkton) Limited, the owner of the inventory, but purportedly by a corporation entitled Kozan Interiors Limited and purportedly for a consideration of $10,300. The actual inventory of the

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material covered in the bill of sale had only amounted to $9,152.31 and that was the exact amount of the money paid by Ollinger to Countrywide under the provisions of the agreement of November 19, 1966, which I have set out in full above.

Kozan Interiors Limited was unknown to Kennedy Flooring Limited and, in fact, the learned trial judge refers to that corporation in the words "...if ever incorporated (which is unlikely) never carried on business and never owned the assets which were the subject of D22" (the bill of sale of February 17, 1967). George E. Kozan attempted to explain the interjection of this corporate name. The learned trial judge referred to that explanation in the following words:

> Mr. Kozan weakly suggested that he made the mistake when he instructed Mr. Wentzell, the solicitor who drew D 22. I suppose it is the type of error made by a businessman who is in the troes [sic] of insolvency.

Another light may be thrown on the topic by a document produced at trial and marked as Ex. P-10, which reads as follows:

> IN THE MATTER OF A CERTAIN SALE MADE UNDER THE BULK SALES ACT FOR THE PROVINCE OF SASKATCHEWAN.
> BETWEEN:
> KOZAN INTERIORS LTD.,
> of Yorkton, in the Province
> of Saskatchewan,
> —and—
> ANTHONY OLLINGER and RUDOLPH OLLINGER,
> both of Yorkton, in the Province of Saskatchewan,
> KNOW ALL MEN BY THESE PRESENTS that Country Wide Factors Ltd., the undersigned does for the purpose of Section 6 of the Bulk Sales Act for the Province of Saskatchewan, HEREBY RENOUNCE AND WAIVE any right which the said Country Wide Factors Ltd., has under the said Act against Anthony Ollinger and Rudolph Ollinger and against any right or claim to any of the goods, draperies, paints, floorings and materials covered in the sale agreement dated the 7th day of February, A.D. 1967.
> IN WITNESS WHEREOF Country Wide Factors Ltd., has hereunto set their hands and affixed their corporate seal on its behalf this 13th day of April A.D. 1967.
> COUNTRY WIDE FACTORS LTD.
> Secty-Treasurer.

Certainly the transaction between Kozan Furniture (Yorkton) Limited and Ollinger whereby the title to the floor coverings was transferred from one to the other but the sale price was paid to Countrywide Factors was one within the provisions of *The Bulk Sales Act,* but if the vendor had, in truth, been Kozan Interiors Limited, then that company had no creditors and *The Bulk Sales Act* provisions would not have applied. It is, I think, significant in dealing with the *bona fides* of the transaction. After that transfer of the inventory of floor coverings, etc., Kozan Furniture (Yorkton) Limited was said to have paid to Countrywide Factors the following sums:

1966	November	$1,000.00
1967	February	1,000.00
	March	6,000.00
	April	2,152.31
	June	1,000.00
	September	500.00

As a matter of fact, the payments in March, April and June were payments by Ollinger totalling $9,152.31, the amount of the inventory, and the amount which he had agreed to pay to Countrywide Factors by the agreement of November 19, 1966.

Kozan Furniture (Yorkton) Limited continued doing business, after a fashion, until November 19, 1968, when a receiving order in bankruptcy was made out against the company.

On July 10, 1969, the trustee in bankruptcy moved for an order that the proceeds of the sale be declared a fraudulent preference *contra* to the provisions of ss. 3 to 6 of *The Fraudulent Preferences Act* and for an order directing the respondent to pay the sum of $10,300 to the said trustee. MacPherson J. directed a trial of that issue and then himself conducted the trial. MacPherson J., in written and detailed reasons, found that the transaction was a preference and directed that the trustee recover from Countrywide the sum of $9,152.31 and that the debenture given by Kozan Furniture (Yorkton) Limited to Countrywide Factors Limited be declared void. The majority of the Court of Appeal, Maguire J.A. giving reasons which were concurred in by Woods J.A., reversed that judgment holding that the trustee had failed to establish that Kozan Furniture (Yorkton) Limited, on November 19, 1966, the date of the agreement aforesaid or in March

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1967, the date when the payments under that agreement to Countrywide Factors Limited commenced, was insolvent, unable to pay its debts in full or on the eve of bankruptcy. Hall J.A. dissented being of the opinion that Kozan Furniture (Yorkton) Limited was, on either of those dates and throughout, insolvent. Hall J.A. expressed the view that *The Fraudulent Preferences Act* was *intra vires* and applicable.

It would appear, from a perusal of the reasons given by Maguire J.A. for the majority, that he was of the opinion that in order to bring himself within the benefit of the section the trustee had to prove that the debtor was not only in insolvent circumstances but was also unable to pay his debts in full and knew that he was on the eve of insolvency. A reading of the section would seem to make it quite clear that those three are alternatives and not conjunctives and that all the trustee had to prove was that the debtor was insolvent or that he was unable to meet his debts in full or that he knew he was on the eve of insolvency. I am not concerned particularly with the last-named alternative as that is quite subjective and I do not find it necessary to pierce the mind of George E. Kozan.

I am in agreement with the view expressed by Hall J.A. that although the burden is on the trustee to prove the insolvency of the debtor at the time of the transaction, as the burden is always upon the plaintiff to prove his case, the trustee may adduce such a *prima facie* case which will call upon the defendant to adduce evidence to rebut that *prima facie* evidence. It must be remembered that a trustee is often faced with a situation, which faced this trustee when he was not appointed until November 1968, where he had to go back into the past and establish an insolvency which he alleged had existed in November 1966. The trustee in such a situation must deal with records which are, in many cases, fragmentary and may well be intentionally deceptive. He has no means of checking the actual stock-in-trade which existed at that date, and sometimes can place little dependence upon the evidence of the debtor. In the particular case, I am of the opinion, as was Hall J.A. and MacPherson J., that the trustee as plaintiff, here appellant, had certainly shown such a *prima facie* case.

Maguire J.A. giving reasons for the majority of the Court of Appeal, said:

> It is established that Kozan as early at least as spring of 1966 was not paying all accounts as they became due.

In *Ladore v. Bennett*[50], Lord Atkin said at p. 480:

> Insolvency is the inability to pay debts in the ordinary course as they become due; and there appears to be no doubt that this was the condition of these corporations.

I am of the opinion that the statement by Maguire J.A. which I have quoted above would have been sufficient to have disposed of the issue and justify a holding that the debtor was in insolvent circumstances within the words of s. 4 of *The Fraudulent Preferences Act* at the time of the transaction. However, there is no need to put the decision on that single ground for I have come to the conclusion that the debtor was unable to pay his debts in full at the date of the transaction.

The Court of Appeal, as I have said, seemed to be of the opinion that the difficulty facing the trustee was that he could not prove that the debtor was unable to pay his debts in full or, to use the words appearing in *Walter v. Adolph Lumber Co. et al.*[51], that "he had not the means of paying his creditors in full out of the assets which could be realized upon the sale for cash or its equivalent" because the trustee could not prove the extent of the inventory possessed by the debtor on November 19, 1966. It is true that the debtor had no inventory which could be produced and to which a dollar and cents value could be attached. Mr. Medhurst, credit manager of the respondent, however, had given some evidence where he, in a very casual manner, estimated the value of that inventory at that time at about $75,000, admitting, however, he was no expert on furniture valuations. Since Mr. Medhurst was anxious to uphold the transaction and, therefore, to see that the debtor had assets sufficient to cover his liabilities, he certainly would not have underestimated the value of the inventory. Therefore, even if we take that valuation of $75,000, we have this situation, and I am quoting here figures adopted by Maguire J.A. and appearing in his majority reasons for the Court of Appeal:

Trade accounts and liabilities to bank	$ 111,199.16	
Shareholders' loan	22,702.62	
Total liabilities		$ 133,901.78
Accounts receivable	$ 44,099.62	
Value of truck—subsequently sold by trustee	1,000.00	
Total of those two assets		$ 45,099.62

Even adopting those figures, the other assets in inventory, that is, stock-in-trade and store fixtures, would have had to amount to $88,802.16; yet, two full years later, those remaining assets were sold for only $31,200 which sum was subject to a landlord's lien for $3,200 leaving a net amount in the trustee's hands of only $28,000 not $88,000. In addition, the accounts receivable shown in Maguire J.A.'s figures at $44,099.62 were reduced in December 1966 on the instructions of the debtor's auditor to $23,598.51 so that to establish that the debtor could have paid all his debts by realization of his assets would have required an increase in the value of the stock-in-trade and fixtures of another $20,600, requiring the valuation of that stock-in-trade and fixtures at over $100,000, an amount for which there has been no scintilla of evidence.

I agree with Hall J.A. when he said:

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> There was in my opinion evidence from which the trial judge could infer the value of the stock-in-trade was nowhere near $100,000.

Under the circumstances, I am of the opinion that the trustee had produced a *prima facie* case to show that the debtor was unable to pay his debts in full by realization of his assets in November 1966. As MacPherson J. remarked:

> Two years is a long time to continue in a state of insolvency, that is true, but the evidence indicates that that is what happened. There was no time in that period when it was not insolvent. Perhaps its affairs were worse, perhaps better, from time to time, but there was a continued state of insolvency.

For these reasons, I am of the opinion that the appeal should be allowed, the judgment of the Court of Appeal of Saskatchewan quashed and the judgment at trial restored. As I have already said, the questions upon which leave was given to the various intervenors should be answered as follows:

Question 1: No.

Question 2: Sections 3 and 4 of *The Fraudulent Preferences Act,* R.S.S. 1965, c. 397, are not in conflict with the provisions of the *Bankruptcy Act*.

The appellant should have his costs against the respondent in the Court of Appeal and in this Court. There will be no costs to intervenors.

Pigeon J. concurred with the judgment delivered by

BEETZ J.—I have had the advantage of reading the opinions of the Chief Justice and of Mr. Justice Spence. I agree with Mr. Justice Spence. To his reasons for judgment I would however like to add some of my own.

The power to repress fraud by avoiding fraudulent conveyances and preferences is an indisputable part of provincial jurisdiction over property and civil rights. The risk of fraud is increased when a debtor finds himself in a situation of impending or actual insolvency and, in my view, provincial laws can, without undergoing a change in nature, focus upon that situation as upon a proper occasion to attain their object. Given their purpose, they do not cease to be laws in relation to property and civil rights simply because they are timely and effective or because Parliament could enact similar laws in relation to bankruptcy and insolvency.

Insolvency has been defined by Lord Thankerton in the *Farmers' Creditors Arrangement Act* reference, *Attorney-General for British Columbia v. Attorney-General for Canada*[52], at p. 402:

> In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration.

The primary meaning of "insolvency" in s. 91.21 of the Constitution is insolvency in the technical sense, not in the general sense. This Lord Thankerton made clear just a few lines after the passage quoted above: with respect to the jurisdiction of Parliament under s. 91.21, he referred to "...the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws...".

There is no common law of bankruptcy and insolvency in the technical sense, but the disruptions resulting from insolvency in the general sense had of necessity to be taken into account by general legal systems such as the common law and the civil law. Insolvency lies at the core of those parts of the common law and of the civil law which relate to such matters as mortgage, pledge, pawning, suretyship and the securing of debts generally which are implicitly or explicitly predicated on the risk of insolvency and which produce their full effect when the risk has been converted into reality; so it is with the rules which determine the rank of privileges and hypothecs or which ordain that an insolvent or bankrupt debtor shall lose the benefit of the term (art. 1092 of the Quebec *Civil Code*). Some of the most fundamental principles of the civil law are expressed in arts. 1980, 1981 and 1982 of the Quebec *Civil Code:*

> Art. 1980. Whoever incurs a personal obligation, renders liable for its fulfilment all his property, moveable and immoveable, present and future, except such property as is specially declared to be exempt from seizure.
>
> Art. 1981. The property of a debtor is the common pledge of his creditors, and where they claim together they share its price rateably, unless there are amongst them legal causes of preference.
>
> Art. 1982. The legal causes of preference are privileges and hypothecs.

Although not expressly referred to, insolvency forms the web of these articles; there would be little need for them, particularly the last two, were it not for insolvency. But I cannot be persuaded that they are not laws relating to property and civil rights.

When the exclusive power to make laws in relation to bankruptcy and insolvency was bestowed upon Parliament, it was not intended to remove from the general legal systems which regulated property and civil rights a cardinal concept essential to the coherence of those systems. The main purpose was to give to Parliament exclusive jurisdiction over the

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establishment by statute of a particular system regulating the distribution of a debtor's assets. However, given the nature of general legal systems, the primary jurisdiction of Parliament cannot easily be exercised together with its incidental powers without some degree of overlap in which case federal law prevails. On the other hand, provincial jurisdiction over property and civil rights should not be measured by the ultimate reach of federal power over bankruptcy and insolvency any more than provincial competence in relation to the administration of justice can be determined by every conceivable and potential use of the criminal law power. This, I believe, is the general import of the *Voluntary Assignments* case, *Attorney-General of Ontario v. Attorneys-General for Canada*[53]. The Judicial Committee declared that the validity of the provision it had to consider and of the assignments made under the authority of that provision did not depend on the insolvency of the assignor: an assignment was also open "to any debtor who might deem his insolvency doubtful...". All that one can say is that legislation of the type considered in the *Voluntary Assignments* case presents little interest for prosperous persons; it is of concern chiefly to debtors in strained circumstances whose solvency is, at best, uncertain. It should be noted that the impugned voluntary assignments enactment did not only deal with assignments: it also provided that an assignment for the general benefit of creditors should take *precedence* of all judgments and of all executions not completely executed by payment.

I am reinforced in those views by a consideration of the *Civil Code of Lower Canada, 1866,* in light of *An Act Respecting Insolvency,* 1864 (Can.), c. 17. Both were enacted at a time when Confederation was being discussed. The French title of *The Insolvent Act of 1864,* was "*l'Acte concernant la faillite, 1864*", the word "faillite" being the one now currently used to translate the word "bankruptcy". In spite of its English title, the Act was in fact a bankruptcy act. It applied to all persons in Upper Canada and to traders only in Lower Canada and it contained detailed provisions relating to fraudulent conveyances and preferences. Nevertheless, the *Civil Code* comprised a section of nine articles, (arts. 1032 to 1040 incl.) entitled "Of the Avoidance of Contracts and Payments made in Fraud of Creditors", applicable to traders and to non-traders alike except where *The Insolvent Act* was to prevail. The legislative history of those articles was set forth by Mr. Justice Pigeon in *Gingras v. General Motors Products of Canada Ltd.*[54] Some have been amended. It will suffice to quote a few of them as they then read:

> 1034. A gratuitous contract is deemed to be made with intent to defraud, if the debtor be insolvent at the time of making it.
>
> 1035. An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud.
>
> 1036. Every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received or the value thereof, for the benefit of the creditors according to their respective rights.
>
> 1037. Further provisions concerning the presumption of fraud and the nullity of acts done in contemplation of insolvency are contained in The Insolvent Act of 1864.

Article 17.23 of the *Code* defines "bankruptcy" ("faillite") as meaning "the condition of a trader who has discontinued his payments"; insolvency was left undefined, the word being clearly used by the *Code* in the general sense. Even though articles 1034, 1035 and 1036 are predicated on insolvency, the Commissioners appointed for codifying the laws of Lower Canada in civil matters would have been astonished had they been told that those articles formed no part of the civil law: except perhaps for art. 1036 which appears to be an improvement of relatively modern origin (although it was not considered new law), such provisions were derived from a division of Roman law called Paulian law and, from time immemorial, had constituted a pivot of the civil law system. Other provisions of the *Code* are of the same nature and also depend on insolvency, such as art. 803 (revocation of a gift made by an insolvent debtor), and art. 2023 (hypothec consented to by an insolvent debtor). Other provisions still, although not expressly predicated on insolvency are related to insolvency and to the protection of creditors, for instance, art. 655 (the creditors of an heir who renounces a succession to their prejudice can have the renunciation rescinded and accept the succession in his stead).

The constitutional validity of such provisions is not in issue: they antedate Confederation and were continued by s. 129 of the Constitution. The only issue which could arise with respect to them is whether they are in conflict with federal law. But the content and integrity of the *Civil Code* are indicative of the extent of provincial jurisdiction over property and civil rights: *Citizens Insurance Company of Canada v. Parsons*[55], at pp. 110 and 111. The fact that there existed a statutory scheme of bankruptcy and insolvency to which the *Code* explicitly referred as to a distinct and specific body of law, without curtailing for that reason its own normal ambit, illustrates how the respective domains of property and civil rights and of bankruptcy and insolvency were viewed during the very period when the federal union was being discussed; it also reveals how it was intended that the distribution of powers should operate with respect to those domains.

In the *Alberta Debt Adjustment Act* reference[56], in *Canadian Bankers Association v. Attorney-General of Saskatchewan*[57], and in *Reference re Validity of the Orderly Payment of Debts Act, 1959*[58] (Alta.), the various provincial laws found *ultra vires* were predicated upon insolvency. But they went further and set up elaborate statutory

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schemes involving one or more of the following features: the denial of creditors' access to courts or the restriction of their right to enforce their claims, the establishment of administrative boards, mediation, composition, arrangements, moratoriums, consolidation orders, staying of proceedings and the relief of debtors from liability to pay their debts. No such features are to be found in the presently impugned Saskatchewan statute where all that is at stake is the avoidance of fraudulent acts for the better enforcement of civil obligations. Some doubt was expressed in the *Orderly Payment of Debts Act, (1959) (Alta.)* reference at pp. 576 and 577 as to whether the *Voluntary Assignments* case would have been decided in the same way at a later date even in the absence of federal legislation on the subject of bankruptcy and insolvency. But even if this doubt was not expressed in an *obiter dictum,* I would regard it as questioning not the general principles enunciated in the *Voluntary Assignments* case, but their application in that particular instance. Accordingly, I do not think that those previous decisions of the Judicial Committee and of this Court preclude my abiding by my conclusions: laws provincial in their purpose, object and nature as those under attack cannot be rendered *ultra vires* because of virtual federal paramountcy: they can only become inoperative in case of actual repugnancy with valid federal laws.

On this latter point, I believe the test of repugnancy to be applied in this case should not differ from the one which was admitted in *Provincial Secretary of Prince Edward Island v. Egan*[59]; *O'Grady v. Sparling*[60], and *Ross v. The Registrar of Motor Vehicles et al.*[61]: provincial law gives way to federal law in case of operational conflict. Even if the test be one of conflict of legislative policies entailing no operational inconsistency and depending solely "upon the intention of the paramount Legislature" as was said by Dixon J., in a passage of *Ex p. McLean*[62], at p. 483, quoted by Mr. Justice Pigeon in the *Ross* case (at p. 15), I am of the view that s. 50, subs. (6) of the *Bankruptcy Act* provides a clear indication that Parliament, far from intending to depart from the rule of operational conflict, did in fact aim at the highest possible degree of legal integration of federal and provincial laws: attacks upon transactions within the three-month period provided by s. 73 of the *Bankruptcy Act* constitute a minimum but the trustee in bankruptcy is entitled to avail himself of all other rights and remedies provided by provincial law "as supplementary to and in addition to the rights and remedies provided by" the *Bankruptcy Act.*

I would dispose of this appeal as is proposed by Mr. Justice Spence.

Appeal allowed with costs, LASKIN C.J. and MARTLAND, DICKSON and DE GRANDPRÉ JJ. dissenting.

Solicitors for the plaintiff, appellant: Pedersen, Norman, McLeod and Todd, Regina.

Solicitors for the defendant, respondent: Balfour, Moss, Milliken, Laschuk, Kyle, Vancise & Cameron, Regina.

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[1] (1974), 19 C.B.R. (N.S.)24.
[2] [1971] 2 O.R. 202.
[3] [1937] A.C. 391.
[4] 1955 CanLII 78 (SCC), [1956] S.C.R. 31.
[5] 1960 CanLII 56 (SCC), [1960] S.C.R. 571.
[6] 1941 CanLII 52 (SCC), [1942] S.C.R. 31.
[7] (1880), 5 App. Cas. 409.
[8] [1899] A.C. 580.
[9] [1894] A.C. 189.
[10] (1893), 20 O.A.R. 489.
[11] 1960 CanLII 56 (SCC), [1960] S.C.R. 571.
[12] [1943] A.C. 356.
[13] 1955 CanLII 78 (SCC), [1956] S.C.R. 31.
[14] [1928] A.C. 187.
[15] [1939] A.C. 468.
[16] [1899] A.C. 626.
[17] (1922), 52 O.L.R. 244.
[18] [1971] 2 O.R. 202.
[19] reflex, (1965), 53 W.W.R. 274.
[20] reflex, [1929] 1 W.W.R. 557.
[21] 1929 CanLII 26 (SCC), [1929] S.C.R. 180.
[22] 1954 CanLII 68 (SCC), [1954] S.C.R. 127.
[23] (1930), 65 O.L.R. 415.

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[24] [1907] A.C. 65.
[25] [1934] O.R. 326.
[26] 1942 CanLII 2 (SCC), [1942] S.C.R. 130.
[27] reflex, (1964), 50 W.W.R. 155, aff'g 48 W.W.R. 420.
[28] [1935] 3 W.W.R. 245.
[29] reflex, [1936] 1 W.W.R. 212.
[30] reflex, (1959), 29 W.W.R. 552.
[31] 1960 CanLII 80 (SCC), [1961] S.C.R. 83.
[32] 1962 CanLII 79 (SCC), [1962] S.C.R. 676.
[33] [1926] A.C. 482.
[34] 1959 CanLII 20 (SCC), [1960] S.C.R. 32.
[35] 1974 CanLII 155 (SCC), [1975] 2 S.C.R. 2.
[36] 1974 CanLII 154 (SCC), [1975] 1 S.C.R. 786.
[37] 1974 CanLII 215 (SCC), [1976] 1 S.C.R. 426.
[38] [1894] A.C. 189.
[39] (1922), 52 O.L.R. 244.
[40] reflex, [1929] 1 W.W.R. 557.
[41] 1929 CanLII 26 (SCC), [1929] S.C.R. 180.
[42] (1930), 65 O.L.R. 415.
[43] [1934] O.R. 326.
[44] 1942 CanLII 2 (SCC), [1942] S.C.R. 130.
[45] reflex, (1959), 29 W.W.R. 552.
[46] reflex, (1964), 50 W.W.R. 155.
[47] [1971] 2 O.R. 202.
[48] 1960 CanLII 80 (SCC), [1961] S.C.R. 83.
[49] Now reported 1974 CanLII 215 (SCC), [1976] 1 S.C.R. 426.
[50] [1939] A.C. 468.
[51] reflex, (1915), 8 W.W.R. 351.
[52] [1937] A.C. 391.
[53] [1894] A.C. 189.
[54] 1974 CanLII 215 (SCC), [1976] 1 S.C.R. 426.
[55] (1881), 7 App. Cas. 96.
[56] [1943] A.C. 356.
[57] 1955 CanLII 78 (SCC), [1956] S.C.R. 31.
[58] 1960 CanLII 56 (SCC), [1960] S.C.R. 571.
[59] 1941 CanLII 1 (SCC), [1941] S.C.R. 396.
[60] 1960 CanLII 70 (SCC), [1960] S.C.R. 804.
[61] 1973 CanLII 176 (SCC), [1975] 1 S.C.R. 5.
[62] (1930), 43 C.L.R. 472.

Hudson v. Benallack, [1976] 2 SCR 168 - SCC on Concurrent Intent of Preferred Transaction

Date:	1975-10-07
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Supreme Court of Canada
Hudson v. Benallack, [1976] 2 S.C.R. 168

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Date: 1975-10-07

Blaine L. Hudson, The Trustee of the Estate of G.S. & D. Construction Ltd., a Bankrupt *Appellant;*
and
John Alexander Benallack and Lillian M. Benallack *Respondents.*

1974: December 4; 1975: October 7.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Bankruptcy—Fraudulent preference—Whether concurrent intent on part of both insolvent debtor and creditor required—The Bankruptcy Act, R.S.C. 1970, c. B-3, s. 73.

A company assigned to the respondents its interest as purchaser, in an agreement for sale of certain lands. The consideration for the assignment was stated to be $15,250. At the time the assignor company was indebted to the assignees in the amount of $15,000 with interest and this indebtedness was used to offset the purchase price of the assignor's interest in the agreement of sale. All of the issued shares of the company were owned by the son and daughter-in-law of the respondents. The company made an assignment in bankruptcy within the 12-month period mentioned in s. 74 of the *Bankruptcy Act,* R.S.C. 1970, c. B-3, and the appellant was named as trustee. Subsequently, an application to have the assignment declared void as against the trustee was granted. The Appellate Division of the Supreme Court of Alberta reversed, whereupon the trustee appealed to this Court. **The question at issue was whether the words "with a view to giving such creditor a preference" contained in s. 73(1) of the *Bankruptcy Act* require only an intention on the part of the insolvent debtor to prefer or a concurrent intent on the part of both debtor and creditor.**

Held: The appeal should be allowed.

A finding of concurrent intent is not necessary in order to set aside a payment as a fraudulent preference under s. 73 of the *Bankruptcy Act.* **The cognizance of the creditor or its absence is not relevant. Although one can sympathize with the rationale of concurrent intent, which is the desire to protect an innocent creditor who accepts payment of a debt in good faith, this point of view cannot be reconciled with the language of the statute, with the history of bankruptcy legislation, or with the right of other innocent creditors to equal protection.**

Benallack v. Bank of British North America 1905 CanLII 18 (SCC), (1905), 36 S.C.R. 120, distinguished.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Cullen J. Appeal allowed.

J.L. MacPherson, Q.C., for the appellant.

G.C. Hawco, for the respondents.

The judgment of the Court was delivered by

DICKSON J.—

I

This appeal raises a question of statutory construction which, one should think, would not cause difficulty, but which has indeed given rise to an abundance of conflicting legal opinion and a thoroughly obfuscated state of the law. The question is whether the words "with a view to giving such creditor a preference" contained in s. 73(1) of the *Bankruptcy Act,* R.S.C. 1970, c. B-3, require only an intention on the part of the insolvent debtor to prefer or a concurrent intent on the part of both debtor and creditor. Sections 73 and 74 of the Act read as follows:

> **73.** (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.
>
> (2) Where any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.
>
> (3) For the purposes of this section, the expression "creditor" includes a surety or guarantor for the debt due to such creditor.
>
> **74.** Where the conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in section 73 is in favour of a person related to the insolvent person, the period limited in subsection 73(1) shall be twelve months instead of three months.

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Any conveyance or transfer of property or payment made by an insolvent person in favour of any creditor with a view to giving such creditor a preference over other creditors is deemed fraudulent and void as against the trustee in bankruptcy if the insolvent person becomes bankrupt within three months thereafter or within twelve months where the insolvent person and the preferred creditor are related persons.

II

In the present case the transaction impugned is the assignment on March 1, 1972, by G.S. & D. Construction Ltd. to the respondents, John Alexander Benallack and Lillian M. Benallack, of the assignor's interest, as purchaser, in an agreement for sale of certain lands in the City of Calgary. The consideration for the assignment was stated to be $15,250. At the time the assignor company was indebted to the assignees in the amount of $15,000 with interest and this indebtedness was used to offset the purchase price of the assignor's interest in the agreement of sale. All of the issued shares of G.S. & D. Construction Ltd. were owned by George Bayard Benallack and Shirley Edna May Benallack, the son and daughter-in-law respectively of the respondents. G.S. & D. Construction Ltd. made an assignment in bankruptcy on June 27, 1972, within the 12-month period mentioned in s. 74 of the Act, and the appellant Hudson was named as trustee. The learned Chambers Judge, Cullen J., made a number of findings, of which the following are of moment:

1. On March 1, 1972, the date of the assignment, the bankrupt company was an insolvent person within the meaning of the *Bankruptcy Act;*
2. The bankrupt and the respondents were related persons within the meaning of the Act and s. 74 applied;
3. The respondents received a preference over other creditors as a result of the assignment;
4. The bankrupt intended to give the respondents a preference over its other creditors.

Cullen J. held against the need for concurrent intent and declared the assignment to be void as against the trustee in bankruptcy. The Appellate Division of the Supreme Court of Alberta reversed. Mr. Justice McDermid, with whom Mr. Justice Prowse concurred, considered the Supreme Court of Canada decision in *Benallack v. The Bank of British North America*[2] to be binding, although Mr. Justice McDermid was of the opinion that if he had been originally considering the proper interpretation of s. 73, he would not have read into the section the secondary meaning that the creditor as well as the debtor must have the view of giving the creditor a preference over other creditors. Mr. Justice Clement concurred in judgment of McDermid J.A., but he did not share the opinion of Mr. Justice McDermid as to the proper construction of s. 73.

III

On the question whether proof of concurrent intent on the part of the debtor and creditor must be shown before the transaction can be set aside, there is, as I have indicated, a wide divergence of opinion. There are many decisions in which it has been held that concurrent intent must be proved; others in which it has been held that the Court is concerned only with the intent of the debtor; and still others in which the point has been left unresolved.

In the jurisprudence of British Columbia one finds such cases as *Re Blenkarn Planer Ltd.*[3], in which Mr. Justice Ruttan held, *obiter,* that the view of the debtor alone is to be considered. In *Re Totem Painting Co. Ltd.*[4], Mr. Justice Wilson apparently was of the opinion that the intention of the creditor was of importance. In *Re B.C. Boat Sales Ltd.*[5], two of the judges held the evidence established a double intent and it was therefore unnecessary to decide whether s. 64 (now s. 73) of the Act called for consideration of the creditor's intent. Norris J.A. strongly supported the position that the intent of the person receiving the benefit is irrelevant. Wilson C.J.S.C. reached the same conclusion in *Re Pacific Belting Co. Ltd.*[6], followed in *Re Lock Enterprises Ltd.*[7] The British Columbia Court of Appeal in the recent case of *Flor-Lay Services Ltd. v. Stewart*[8], reviewed many of the authorities and concluded that the principle enunciated in *Benallack v. Bank of British North America* was not applicable to s. 73 of the *Bankruptcy Act* and that the Court need have regard only to the intent or view of the debtor. McIntyre J.A. (Robertson and Taggart JJ.A. concurring) made this observation in the course of his reasons for judgment (at p. 465):

> It would then seem that the law on this subject is well settled. However, one cannot review the many cases decided on this point without sensing that the judges in Canada, including appellate judges, have grown restive under the need to apply the concurrence of intent principle from the *Benallack* case to the construction of s. 73 of the Bankruptcy Act.

When one examines the decisions in the Province of Alberta one also finds diversity of opinion: compare Beck J.A., in *In re Cohen and Mahlin*[9], and Riley J. in *Re McIntosh-Marshall Equipment Ltd.*[10]

In an early Manitoba Court of Appeal decision, *In re Bell*[11], frequently referred to, two members of the Court, Perdue C.J.M. and Dennistoun J.A., held that the 1905 *Benallack* case should be followed and, therefore, a common or concurrent intent must be found in order to constitute a preference under s. 31 (now s. 73) of the *Bankruptcy Act.* Cameron J.A. dissented in a carefully researched and persuasive judgment.

In Ontario one finds frequent reference to the case of *In re Webb*[12], in which Orde J. held that there must be a concurrence of intent on the one side to give and on the other side to accept a preference over other creditors. The year

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after the decision in *In re Webb* Sir William Mulock C.J. Ex., in *Burns v. Royal Bank of Canada*[13], reached the opposite conclusion, holding that to constitute a fraudulent preference there must be present two circumstances: a preference in fact and an intention on the part of the debtor to prefer. An appeal from the judgment of Mulock C.J. Ex. was dismissed without written reasons by the Appellate Division[14]. Oddly, the very next year the Appellate Division, differently constituted, relying on *In re Bell, supra,* and on the judgment of Orde J. in *In re Webb, supra,* made a finding of common intention in *Briscoe v. Standard Bank of Canada*[15]. Then in 1928 Orde J.A., delivering the judgment of the Appellate Division of the Supreme Court of Ontario in *Canadian Credit Mens Association v. Jenkins*[16], appears to have adopted the judgment of Mulock C.J. Ex. in the *Burns* case. After quoting the following words of Duff J., as he then was, in *Salter& Arnold, Ltd. v. Dominion Bank*[17], at p.625:

> "It is settled law that the intention to give a preference envisaged by sec. 3.1 is an intention in fact, and whatever else may be said about it, it must be an intention entertained by the debtor:"

Orde J.A. added (at p. 80):

> See also to the same effect, Mulock C.J. in *Burns v. Royal Bank of Canada* (1922) 2 C.B.R. 241, at p. 253, 51 O.L.R. 564, at p. 572; *Ex parte Taylor; In re Goldsmid* (1886), 18 Q.B.D. 295, 56 L.J.Q.B. 195.

Two more recent Ontario cases might be mentioned in which it was held that the concurrent intent of both debtor and creditor are not necessary to show a fraudulent intent: *Re Echlin Press Ltd.*[18], *and Re Suta*[19].

Cases from the Province of Quebec reflect the different points of view: *In re La Corporation des Obligations Municipales Ltée*[20] (appeal dismissed[21]) and *Gavsie v. Goldberg*[22]. See also *In re Piette et Frère*[23].

The cases from the Province of Nova Scotia of *In re Star Grocery Co.*[24], and *In re George E. Boak & Son Ltd.*[25], apply a concurrent intent test. The only other judgment which I would add to those of this illustrative, but by no means exhaustive, list is *In re Mills and Mills*[26] in which Winter J. came to the conclusion that the doctrine of concurrent intent appeared "wrongly conceived and bad in law."

IV

Although the Courts of the country appear divided, more or less evenly, on the need for a concurrent intent before invalidating a transaction, the textbook writers and commentators do not evidence such divergence of opinion. The editors of Duncan & Honsberger, *Bankruptcy in Canada,* 3rd ed., p. 485, point out that s. 64 (now s. 73) makes no reference to the view of the creditor and that the cases in England and in the other Dominions on corresponding sections in Bankruptcy Acts contain no references to the view of the creditor, the view of the debtor alone being considered. The editors of Houlden & Morawetz, *Bankruptcy Law of Canada,* Cumulative Supplement, 1974, p. 83, say:

> In view of the plain meaning of Sec. 73, the concurrent intent of both debtor and creditor is not necessary to show a fraudulent preference. The intention of the debtor alone is to be considered.

and in Bradford & Greenberg's *Canadian Bankruptcy Act,* 3rd ed., p. 163, the authors cite "an intention on the part of the debtor to prefer" as one of the two circumstances constituting a fraudulent preference. See also 2 C.E.D. (Ont. 3d) 15-334: "The intention of the debtor alone is to be considered" and *Comment* in (1958-59), 37 C.B.R. 153, and *Notes on Section 64 of the Bankruptcy Act* by Professor Réginald Savoie in (1967), 9 C.B.R. (N.S.) 1.

V

If this Court is free to decide the issue of concurrent intent untrammelled by earlier decisions, there would seem to be at least three reasons why we should not engraft upon s. 73 of the *Bankruptcy Act* an additional concept, that of concurrent intent: first, the policy of the *Bankruptcy Act;* second, the history of the Act; third, the language of s. 73.

The object of the bankruptcy law is to ensure the division of the property of the debtor rateably among all his creditors in the event of his bankruptcy. Section 112 of the Act provides that, subject to the Act, all claims proved in the bankruptcy shall be paid *pari passu.* The Act is intended to put all creditors upon an equal footing. Generally, until a debtor is insolvent or has an act of bankruptcy in contemplation, he is quite free to deal with his property as he wills and he may prefer one creditor over another but, upon becoming insolvent, he can no longer do any act out of the ordinary course of business which has the effect of preferring a particular creditor over other creditors. If one creditor receives a preference over other creditors as a result of the debtor acting intentionally and in fraud of the law, this defeats the equality of the bankruptcy laws.

The cognizance of the creditor or its absence should be irrelevant. One can sympathize with the rationale of concurrent intent, which is the desire to protect an innocent creditor who accepts payment of a debt in good faith, but it is hard to reconcile this point of view with the language of the statute, with the history of bankruptcy legislation, and with the right of other innocent creditors to equal protection.

VI

Section 73(1) of the present *Bankruptcy Act* had its counterpart in s. 31 of the *Bankruptcy Act,* 1919 (Can.), c. 36, as amended by 1920 (Can.), c. 34, which was the first Canadian bankruptcy Act (although not the first Canadian Act related to insolvency). The section is derived from s. 44 of the English *Bankruptcy Act,* 1914 (U.K.), c. 59, which in turn derived

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from the earlier Acts of 1869 and 1883. Therefore the English jurisprudence arising from the interpretation of those statutes may help in understanding our own Act.

It is interesting to note that even before those enactments and as early as 1777 Lord Mansfield in *Rust v. Cooper*[27] held that where a transaction is carried out to defeat the equality of the bankruptcy laws, the fact the defendant was a meritorious creditor would not warrant the transaction. In *Bills v. Smith*[28], Cockburn C.J. referred to the intention of the party making the payment, to defeat the law, as the "cardinal point on which the whole question turned". The Act of 1869 was under consideration in *Ex parte Blackburn; In re Cheesebrough*[29]. There Sir James Bacon C.J., referring to the phrase "in favour of any creditor with a view of giving such creditor a preference over other creditors" said, p. 364: "The act of the debtor is alone to be considered—the object and purpose for which the payment is made can alone be enquired into...". This statement of the law was approved in *Ex parte Topham; In re Walker*[30]. Another case to which one might refer is *Butcher v. Stead*[31]. Section 92 of the 1869 Act, 32 & 33 Vict., c. 71, which governed that case, was in terms almost identical to s. 73(1) of our present Act but the English Act of that time contained a provision reading:

> ...but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration.

Such a proviso introduced the question of the good faith of the payee or creditor and in *Butcher v. Stead* it saved the transaction. But a proviso in these words was not carried forward into the later English *Bankruptcy Act* of 1883 and such a proviso has never formed part of the Canadian *Bankruptcy Act.* According to *Williams on Bankruptcy,* 18th ed., p. 382: "...the introduction of the concluding words in the 1883 Act restored the common law rule, with the result that the bona fides of the preferred creditor is today immaterial."

The English attitude is reflected in the following words of Lord Esher, quoted with approval by the Earl of Halsbury L.C. in *Sharp v. Jackson*[32], p. 421:

> "The question whether there has been a fraudulent preference depends, not upon the mere fact that there had been a preference, but also on the state of mind of the person who made it. It must be shewn not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called "intention" or "view" or "object" does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors."

VII

I come now to consider the decision of this Court in *Benallack v. Bank of British North America.* The case has stood on the books for seventy years. Many judges have considered it controlling on the question of concurrent purpose as applied to s. 73(1) of the *Bankruptcy Act.* I approach the case, therefore, with the respect to which those considerations entitle it, but I must at once observe that the case was decided in 1905, some fourteen years before the enactment of the Canadian *Bankruptcy Act* in 1919. It concerned a Yukon Ordinance having to do with preferential assignments, c. 38 of the Consolidated Ordinances of the Yukon Territory 1902. To permit comparison with s. 73(1) of the *Bankruptcy Act,* I will give the Ordinance in its entirety:

> An Ordinance respecting Preferential Assignments.
>
> 1. Every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bonds, bills, notes, securities or of shares, dividends, premiums or bonus in any bank, company or corporation made by any person at any time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency with intent to defeat or delay or prejudice his creditors or to give to any one or more of them a preference over his other creditors or over any one or more of them or which has such effect shall as against them be utterly void.
>
> 2. Every such gift, conveyance, assignment, transfer, delivery over or payment whether made owing to pressure or partly owing to pressure or not, which has the effect of defeating, delaying or prejudicing creditors or giving one or more of them a preference shall as against the other creditors of such debtor be utterly void.
>
> 3. Nothing in this Ordinance shall apply to any deed of assignment made and executed by a debtor for the purpose of paying and satisfying rateably and proportionately and without preference or priority all the creditors of such debtor their just debts or any bona fide sale of goods or payment made in the ordinary course of trade or calling, to innocent purchasers or parties.

The wording of the Ordinance differs from that of s. 73(1) of the *Bankruptcy Act;* in particular s. 3 introduces concepts of *bona fides* and "innocent purchasers or parties" not found in s. 73(1).

The action in the 1905 *Benallack* case was brought to set aside several instruments, consisting of a chattel mortgage, land transfer and book debt assignments, in favour of a bank, as being void against creditors under the Ordinance. The bank was ignorant of the true financial condition of the debtor. Idington J., who delivered the unanimous judgment of a five-man Court, after referring to the cases of *Stephens v. McArthur*[33], and *Gibbons v. McDonald*[34], said:

> And if a fraudulent preference to whom is the having such a purpose to be attributed?

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> Is it enough to shew that the assignor may have had such an intent?
> Must not the assignee as well as the assignor be a party to the fraudulent intent?
> Such would seem to be the result of a long line of decisions upon which the commercial world as had a right to act for a long time past. And though there may not have been any express decision on the point upon this legislation in this Court the late Chief Justice, Sir William Ritchie, in *Gibbons v. McDonald,* at page 589 indicates that in his view there must be
> "a concurrence of intent on the one side to give and on the other to accept a preference over other creditors."
> Counsel for the appellants properly conceded that the evidence here did not show knowledge on the part of the bank such as would enable us to find this concurrence of purpose.
> Until the legislature obliterates the element of intent in such legislation and clearly declares that, quite independently of intent, the preferential result or effect of the transaction impeached is to govern, it will be exceedingly difficult to arrive at any other conclusion in cases of this kind. The results that might flow from such legislation ought not to be brought about without such purpose being most clearly expressed by the legislature.

The case is unsatisfactory, if I may, with respect, say so, in that none of the "long line of decisions" upon which Idington J. relies is identified and no reasons are given for concluding that the intent to which the Ordinance refers must be entertained by the creditor as well as the debtor. In the later case of *Salter & Arnold, Ltd. v. Dominion Bank, supra,* as I have already mentioned, Duff J. observed that whatever else may be said about the intention to give a preference envisaged by s. 31 (now s. 73) "it must be an intention entertained by the debtor". These words have been interpreted by some judges to mean that the intention with which one is concerned is only that of the debtor. I think, however, that we must give effect to the words of Duff J. "whatever else may be said about it". What Duff J. intended, in my opinion, was merely to leave the matter open, just as Cartwright J., as he then was, did in the penultimate paragraph of his judgment in *Velensky v. Canadian Credit Men's Trust Association Limited*[35], (reported in 38 C.B.R. 162 as *In re Bernard Motors Ltd.*). The paragraph in question, for some reason, was not printed in the report of the case in the Supreme Court Reports but is contained in the 38 Canadian Bankruptcy Reports, p. 167 and reads:

Before parting with the matter, I wish to observe that Bridges J. suggests a doubt as to whether if he were untrammelled by authority he would hold that, on the true construction of s. 64, to render void a preference in fact it is necessary that there be an intention on the part of the creditor to be preferred as well as an intention on the part of the debtor to prefer. In *In re Blenkarn Planer Ltd.* reflex, (1958), 37 C.B.R 147, 26 W.W.R. 168, 14 D.L.R. (2d) 719, 1958 Can. Abr. 55, Ruttan J. examines a number of decisions and expresses the opinion that the view of the debtor alone has to be considered. I mention this for the purpose of making it clear that in the case before us this point does not require decision and I express no opinion upon it.

I have concluded that a finding of concurrent intent is not necessary in order to set aside a payment as a fraudulent preference under s. 73 of the *Bankruptcy Act.* I do not believe that the decision of this Court in *Benallack v. Bank of British North America* is authoritative in interpreting s. 73 of the *Bankruptcy Act.* However similar may be the wording, I do not think that a phrase in a provincial or territorial Ordinance of three paragraphs dealing with preferential assignments and having a particular legislative history and jurisprudence should govern the language of a federal Act of some 213 sections dealing with bankruptcy and having an entirely different legislative history and jurisprudence.

One must recall that fraudulent preference statutes and fraudulent conveyance statutes outside of the bankruptcy laws have generally contained a section exempting from the application of the statute any assignment or payment or *bona fide* sale of goods made in the ordinary course of trade to innocent purchasers. Such saving provisions are contained in our provincial fraudulent preference statutes and in each of the cases relied on in the 1905 *Benallack* judgment a similar statute was under consideration. These statutes required consideration of the knowledge or *bona fides* of the creditor. Under the law relating to bankruptcy the rule has been different, as the English authorities cited earlier in these reasons will confirm.

I am further of the view that s. 3 of the Yukon Ordinance plays the same role in the interpretation of the Ordinance as the proviso to s. 92 of the English Act of 1869 played in *Butcher v. Stead,* requiring consideration of the knowledge and intent and privity of the creditor; but there is no counterpart of s. 3 of the Ordinance to be found in s. 73(1) of the *Bankruptcy Act.* Section 75(1) of the Act, which protects certain transactions, is the only section in which the *bona fides* of the creditor emerges. Section 75(1) is very limited in scope. It is expressly made "Subject to the foregoing provisions of this Act... with respect to the avoidance of certain settlements and preferences..." and only comes into operation when s. 73(1) does not apply. Section 75(1) in express terms calls for double intent whereas s. 73(1) does not.

Our duty is to construe the language of s. 73 of the *Bankruptcy Act* within the ambit and policy of that Act; if we go to the words of the statute we find that what is to be considered as fraudulent and void is:

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"Every conveyance… of property" (*i.e.,* the assignment in favour of respondents) "… made by any insolvent person" (*i.e.,* G.S. & D. Construction Ltd.) "in favour of any creditor" (*i.e.* the respondents) "…with a view to giving such creditor a preference…"

It seems to me plain from the quoted words that the view, the only view, with which s. 73(1) of the Act is concerned is that of the insolvent person making the conveyance and we should not be diverted to any other conclusion by reliance upon a case in which a different statute in different language was construed. Whether or not a conveyance or payment is a fraudulent preference depends entirely on the intention of the debtor. The trial judge has found against the respondents on this point.

I would allow the appeal, set aside the judgment of the Appeal Division and restore the judgment of Cullen J. with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: MacPherson, Kelly & O'Neil, Calgary.

Solicitors for the respondents: Nelson, Benders & Hawco, Calgary.

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[1] 1973 ALTASCAD 103 (CanLII), [1974] 1 W.W.R. 548, 41 D.L.R. (3d) 624.
[2] 1905 CanLII 18 (SCC), (1905), 36 S.C.R. 120.
[3] (1958), 37 C.B.R. 147 (B.C.S.C.).
[4] (1960), 1 C.B.R. (N.S.) 38 (B.C. S.C.).
[5] (1962), 4 C.B.R. (N.S.) 168 (B.C. C.A.).
[6] (1971), 14 C.B.R. (N.S.) 233 (B.C. S.C.).
[7] (1971), 16 C.B.R. (N.S.) 83 (B.C. S.C.).
[8] reflex, [1975] 2 W.W.R. 459.
[9] reflex, [1927] 1 W.W.R. 162 (Alta. C.A.).

Employer's Liability Assurance Corp. Ltd. v. Ideal Petroleum (1959) Ltd., [1978] 1 SCR 230 - Prescription on Preferential Payments

Date:	1976-12-07
Parallel citations:	1976 CanLII 142 (SCC)
URL:	http://canlii.ca/t/1z73p
Citation:	Employer's Liability Assurance Corp. Ltd. v. Ideal Petroleum (1959) Ltd., 1976 CanLII 142 (SCC), [1978] 1 SCR 230, <http://canlii.ca/t/1z73p> retrieved on 2013-08-15
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Supreme Court of Canada
Employer's Liability Assurance Corp. Ltd. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230
Date: 1976-12-07

The Employer's Liability Assurance Corporation Limited (*Plaintiff) Appellant;*
and
Ideal Petroleum (1959) Ltd. (*Defendant) Respondent.*

1976: March 2 and 3; 1976: December 7.

Present: Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUÉBEC

Bankruptcy—Preferential payments—Five-year prescription—Suspension of the prescription—Date of bankruptcy—Effect of the composition proposal—Bankruptcy Act, R.S.C. 1952, c. 14, ss. 16, 34(6), 38(1), 41(4), 64—Bankruptcy Act, R.S.C 1970, c. B-3, ss. 39(1), 41(10), 43(4), 44—Civil Code, arts. 1040 and 2232.

In 1957-58, Lewis Brothers Asphalt Paving Ltd., a company which subsequently went bankrupt, had made some payments to respondent, which was one of its creditors at the time. Appellant, also claiming to be a creditor of Lewis Brothers, brought an action in 1965 to request the annulment of these payments, because in its opinion they were

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preferential payments. In September 1957, Lewis Brothers undertook to perform certain work for C.N. under contract; under a contract of guarantee, appellant became jointly responsible with Lewis Brothers for the performance of the contract. On February 6, 1958, a petition in bankruptcy, which is still pending, was brought against Lewis Brothers, and on February 20, 1958, Lewis Brothers submitted a composition proposal to its creditors that was accepted by them in March 1958. However, since Lewis Brothers was insolvent, C.N. would no longer deal with the company; as a result appellant had to pay a substantial sum to complete the contract. Finally, in October 1961, Lewis Brothers made an assignment of its property since it could no longer meet its obligations as stated in the composition proposal.

The Superior Court and the Court of Appeal allowed the plea of prescription submitted by respondent, and the action was dismissed in these two courts without further comment on the other aspects of the case.

Held: The appeal should be allowed in part.

On the basis of the law at the time, the Court of Appeal, like the Superior Court, had to allow the plea of prescription and dismiss the action, making no distinction between the Paulian and bankruptcy aspects. However, *Gingras v. General Motors Products of Canada Ltd.,* 1974 CanLII 215 (SCC), [1976] 1 S.C.R. 426, has since modified the position of the parties by holding that, under the *Bankruptcy Act,* the prescription is for five years in commercial matters. Moreover, for purposes of this prescription, it must be considered that it was "absolutely impossible for" the creditor "to act", as long as the circumstances have not created suspicion. Consequently, in the case at bar, the prescription was suspended: the five-year prescription did not come into effect until October 6, 1961—which was less than five years before the proceedings were instituted—since until that date Lewis Brothers had complied with its obligations. Nevertheless, the payments challenged cannot be annulled, because they were not made within three months of the bankruptcy, which occurred on the same date as the assignment, namely October 6, 1961. The bankruptcy cannot be moved back to February 6, 1958, the date of the petition in bankruptcy, because the petition filed at that time was not followed by a receiving order. Nor can the bankruptcy be moved back to February 20, 1958, the date of the composition proposal, since under the *Bankruptcy Act* of 1952 such a proposal does not constitute an act of bankruptcy.

However, since, under the composition proposal, respondent received dividends to which it was not entitled, it must pay appellant the amounts in question, which were paid to it either directly or indirectly through its assignee.

Gingras v. General Motors Products of Canada Ltd., 1974 CanLII 215 (SCC), [1976] 1 S.C.R. 426, applied; *In re Legault* (1956), 36 C.B.R. 167, distinguished; *Traders Finance Corp. Ltd. v. Lévesque,* 1960 CanLII 80 (SCC), [1961] S.C.R. 83; *Joy Oil Ltd. v. McColl Frontenac Oil Co. Ltd.,* 1943 CanLII 33 (SCC), [1943] S.C.R. 127; *Gagnon v. Lesage,* [1951] Que. K.B. 571; *Lussier v. Marquis,* [1960] Que. Q.B. 20, rev'd [1960] S.C.R. 449; *Alain v. Fonds d'indemnisation des victimes d'accidents d'automobile,* [1974] C.A. 89; *Amanda Designs Boutique Ltd. v. Charisma Fashions Ltd.* (1972), 17 C.B.R. (N.S.) 16; *Perras v. Boulet,* 1959 CanLII 96 (SCC), [1959] S.C.R. 838, referred to.

APPEAL from a decision of the Court of Appeal of Quebec dismissing an appeal against a judgment of Tellier J. of the Superior Court. Appeal allowed in part.

David Wood, for the appellant.

Carol Laramée and Raymond Hébert, for the respondent.

The judgment of the Court was delivered by

DE GRANDPRE J.—Appellant, claiming to be a creditor of Lewis Brothers Asphalt Paving Ltd. (hereinafter referred to as Lewis Brothers), a bankrupt company, brought an action against respondent because the latter had received preferential payments in 1957 and 1958, thus giving rise to a Paulian action and an action under the *Bankruptcy Act* then in effect, R.S.C. 1952, c. 14. These proceedings could clearly have been instituted by the trustees, but they refused to do so, and on November 9, 1965 appellant obtained from the Court the necessary authorizations under the *Bankruptcy Act,* followed some days later by the transfer of the trustees' rights (s. 16). It should be noted that the action under s. 16 is personal to appellant and is conferred on it by the Act (*Traders Finance Corporation Limited v. Lévesque*[1]).

The relevant facts are as follows:

(a) on September 27, 1957, Lewis Brothers obtained a contract from C.N. covering certain work at the Côte de Liesse railway yard in Montreal;

(b) on October 1, 1957, appellant issued a guarantee of performance in favour of C.N., under which it became jointly responsible with Lewis Brothers for the performance of the contract;

(c) on February 6, 1958, a petition in bankruptcy was brought against Lewis Brothers; during the hearing, this petition was still outstanding;

(d) on February 20, 1958, Lewis Brothers submitted a proposal to its creditors offering them a payment of thirty-five cents on the dollar over a period of four years, which was accepted by the creditors on March 28 and ratified by the Court on April 25, 1958;

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(e) in the intervening period, that is on March 6, 1958, C.N. refused to deal any longer with Lewis Brothers with respect to the contract of September 1957, since Lewis Brothers was insolvent, with the result that appellant had to pay the sum of $169,247.55 to complete the contract;
(f) on October 6, 1961, Lewis Brothers, having paid three of the dividends promised in the proposal and having been unable to pay the fourth, made an assignment of its property, which was followed by various proceedings, in particular a judgment of March 20, 1962, recognizing the validity of the claim of $167,247.55 filed by appellant; however, no judgment was made annulling the proposal.
The preferential payments allegedly received by respondent were:

$ 5,000	on December 12, 1957
$ 5,000	on December 19, 1957
$10,576.61	on December 9, 1958

They resulted from the sale of petroleum products by respondent to Lewis Brothers in 1957. Appellant requested that these payments be declared void and that respondent be condemned to pay the sum of $17,070.26, that is, the difference between the preferential amounts mentioned above and the dividends to which respondent was entitled under the proposal and the assignment, with interest, of course.
To this action, respondent pleaded that the amounts it had received were not preferential payments, and that, moreover, the petroleum products had not been sold to Lewis Brothers but to Pavage Richelieu Limitée. Respondent added that in any case the claim is prescribed, whether the action is considered as a Paulian action or as a case under ss. 64 *et seq.* of the *Bankruptcy Act* of 1952.
The Superior Court and the Court of Appeal did not consider the facts except for determining whether the plea of prescription had any merit. Having found in the affirmative on this point, the Quebec courts went no further in their study of the record, and this Court does not have the benefit of their views on the other aspects of the case.
A preliminary question arises: does appellant have the status of a creditor which would permit it to challenge the payments made in 1957 and 1958, when it had certainly not paid out anything before the two payments of 1957, and it had probably not spent a penny before the payment of December 1958? In my opinion, this status should be admitted. Once the guarantee of performance was signed, appellant became a debtor of C.N. It is true that this obligation was coupled with a suspensive condition and could only take complete effect on default by Lewis Brothers. When this default occurred in March 1958, the condition disappeared and appellant's obligation became complete, retroactively to the date of the guarantee of performance. It remained only to determine the amount of appellant's debt to C.N.
I have already noted that the Quebec courts accepted the plea of prescription. They held unanimously that appellant was aware of the payments and their grave appearance of fraud more than a year before the institution of proceedings in December 1965. The trial judge said as much:

> [TRANSLATION] ...it is clear that this decision by plaintiff to bring an action followed facts of which it had been aware since at least 1963, through its accountant Whalen, who, according to the evidence, made a "final" report in May 1964.

Bélanger J.A. affirmed this in the Court of Appeal:

> [TRANSLATION] More than a year before the action, through its counsel and investigating accountant, it was aware of the payments which it challenged, of the insolvency of L.B.A.P. at that time, and of other circumstances which, according to its allegations, rendered these payments fraudulent.

Appellant did not succeed in establishing that these consistent findings were contrary to the evidence, and I have no hesitation in accepting them.
With respect to the Paulian aspect of the action, the Superior Court and the Court of Appeal were correct in finding that in law, knowledge of the facts by appellant involved application of the one-year prescription against it. I cannot accept its contention that it did not have to act while its file was not in fact complete. Like the Quebec courts, I believe that the beginning of the prescription cannot be deferred until such time as almost all aspects of the evidence have been assembled.
Having found in the record evidence that more than twelve months had elapsed between the appellant acquiring knowledge of the relevant facts and the institution of proceedings, the judgment rendered, like that of the Superior Court, in accordance with the law at the time, had to apply art. 1040 of the *Code* and dismiss the action, making no distinction between the Paulian and bankruptcy aspects. Since then, however, the decision of this Court in *Gingras v. General Motors Products of Canada Ltd.*[2], has held that prescription under the *Bankruptcy Act* is for five years in commercial matters, as in the case at bar.
The question presented is whether this five-year prescription ran from the date of the preferential payments of 1957 and 1958, or whether this is a case of suspension, it having been "absolutely impossible for them to act" (art. 2232, *Civil Code*) before the end of 1960, that is, five years before service of the proceedings. The exact scope of this article has given rise

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to differing conclusions. This may be seen in the following decisions, *inter alia: Joy Oil Limited v. McColl Frontenac Oil Co. Limited*[3]*; Gagnon v. Lesage*[4]*; Lussier v. Marquis*[5]*,* set aside on another point[6]; and *Jean-Paul Alain v. Fonds d'indemnisation des victimes d'accidents d'automobile*[7]*.* For the limited purposes of this case, I shall note the following:
(1) the old law recognized that prescription must not run against someone who found it impossible to act;
(2) the *Code Napoléon* (art. 2251) did not repeat this rule in its text;
(3) French cases, notwithstanding the silence of the text, have held that factual obstacles, arising from circumstances external to the creditor which make it impossible to act, retain their suspensive value;
(4) many French authors criticize this line of authority, but there is no unanimity of opinion;
(5) in their third report (1865), the Commissioners wrote, with respect to the maxim *contra non valentem* (at p. 424):

> It is remarkable that it is not textually inserted in the French code, although it is the basis of all its particular provisions, and has an extensive application to many other cases which do not result from the natural or legal state of the parties concerned.

This reason for suspension must be understood. In the case at bar, I do not believe that a creditor, presented with a petition in bankruptcy by another creditor or having received a proposal from the debtor, must immediately act as though the debtor had contravened the Act and made preferential payments. On the contrary, it seems to me that the presumption is the opposite, and that it must be considered that it was "absolutely impossible for" the creditor "to act", as long as the circumstances have not created suspicion. In the case at bar, as long as the proposal was complied with, that is until October 1961, the creditor was perfectly justified in not moving; it was only later that the questions arose. In other words, the evidence established to my satisfaction that the rule of suspension applies in the case at bar, since appellant had no opportunity to act before certain facts came to its attention, and this did not occur more than five years before proceedings were instituted. The plea of prescription could therefore not be maintained against the action, considered from the point of view of the *Bankruptcy Act.*
The plea of prescription having been rejected, the real question is as follows: is it possible, although the assignment of property dates from October 1961, to go back in time to the autumn of 1957, since s. 64 limits the action to cases in which a person guilty of preference "becomes bankrupt within three months" after the date the preference is given? In seeking an answer, I of course assume that the payments were in fact preferential, a point which it will be necessary to study if I come to the conclusion that, in the circumstances of this case, the month of October 1961 immediately followed the autumn of 1957. It must be remembered that the difficulties of the bankrupt were divided into three periods:
(1) a petition in bankruptcy in February 1958, which was never followed by a judgment;
(2) a proposal in March 1958, which remained in effect until the autumn of 1961, after being accepted and ratified, and resulted in various dividend payments; this proposal was never annulled by judgment;
(3) an assignment in October 1961, which was followed by all the usual proceedings.
Appellant asks this Court to relate the assignment of October 1961 either to the petition in bankruptcy of February 1958 or to the proposal of March 1958, so that the first two preferential payments would have been made within the three months mentioned in s. 64. In order to do this, appellant relied on *In re Legault*[8]. The facts in that case should be summarized:
—March 8, 1955: hypothec giving a preference;
—April 5, 1955: receiving order;
—May 28, 1955: proposal approved by the Court, whose judgment annulled the receiving order;
—November 3, 1955: annulment of the proposal and receiving order.
On subsequent application by the trustees challenging the hypothecary transaction of March 8 and demanding that it be cancelled, Montpetit J. related the bankruptcy back to either the first receiving order (April 5) or the date the proposal was approved (May 28). On the first point, he stated (at p. 169):

> [TRANSLATION] What is the meaning of the expression "becoming bankrupt"? In my opinion, it is concerned with the case of the person against whom a receiving order is made. This was the situation for the bankrupt on April 5.

After dismissing the objection that the proposal had annulled the first receiving order, the learned judge continued (at p. 169):

> [TRANSLATION] Moreover, this aspect is of secondary importance, since the proposal was approved on May 28. In fact, is it not legitimate and reasonable to say, using s. 38(1) which states that all provisions of the *Bankruptcy Act,* to the extent to which they are applicable, apply *mutatis mutandis* to proposals, that s. 64 may be relied on in a case in which the person who effected the challenged transfer has a proposal approved within a three-month period after the said transfer? It appears to me that this is to apply to proposals, *mutatis mutandis,* what the Act provides for bankruptcy.

The facts of the case before this Court are different: it is sufficient to note that here, the petition in bankruptcy of February 1958 was not followed by a judicial decision, and that the proposal which followed it several days later was never annulled

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by a judgment. Moreover, *In re Legault* has not met with complete approval, as shown by the criticism found in L.W. Houlden's article, "The first ten years of the 1949 *Bankruptcy Act*", 1 C.B.R. (N.S.), at p. 97:

> It is submitted that this decision is not correct and is not justified on the wording of the *Bankruptcy Act.*

It is therefore, quite properly, necessary to reread the Act.

Is it possible in the case at bar, notwithstanding the proposal duly approved by the Court, to relate the bankruptcy back to the filing of the petition in February 1958 by relying on s. 41(4)? The text of s. 41(4) is as follows:

> The bankruptcy shall be deemed to have relation back to and to commence at the time of the filing of the petition on which a receiving order is made or of the filing of an assignment with the official receiver.

It is clear that this section relates only to the petition on which a receiving order is made, which is not the case here, since the petition was never followed by an order. Failing an order, the date of filing of the assignment is conclusive. It would perhaps be otherwise—but the Court is not asked to decide this—if an order had been made annulling the proposal and stating what the Court could consider "proper in the circumstances" (s. 36(1)). I do not see how it could be possible to relate the bankruptcy back to the petition of February 1958.

Can it be related back to the proposal of March 1958? The relevant Act being that of 1952, it is not possible for me to rely on the 1966 Act, where the beginning of a solution may perhaps be found in ss. 39(1), 41(10), 43(4) and 44. In my opinion, under the former Act, the question posed at the beginning of this paragraph must be answered in the negative. The proposal is a contract between the debtor and his creditors. When it is made in accordance with certain formalities prescribed in the Act this contract, which binds all the creditors, even the dissenting minority, is not an act of bankruptcy, and the situation which results from it is not a situation of bankruptcy. This is what Kelly J., speaking for the Court of Appeal of Ontario, held in *Amanda Designs Boutique Limited v. Charisma Fashions Limited*[9]. Although written in another context, the following sentence expresses the situation well (at p. 20):

> Accordingly, when filed the proposal has the potentiality of bankruptcy which does not crystallize until the proposal is refused and never crystallizes if the proposal be approved.

However, we must go further: even in the case of a proposal by an already bankrupt person, approval of the proposal by the Court—and here this approval was given—"operates to annul the bankruptcy" (s. 34(6)). The provisions of the Act thus leave to the debtor the entire administration of his property if the proposal is the first stage in the solution of his difficulties, and returns it to him if the proposal was preceded by bankruptcy. Except in extraordinary circumstances which do not exist in this case, the trustee has only one function, that is the distribution of the amounts which the debtor has undertaken to pay to the creditors.

This finding should not be ignored because s. 38(1) provides that all provisions of the Act apply *mutatis mutandis* to proposals. In view of the clear words of s. 41(4) and the provisions of the Act as a whole, it is not possible for me to state that in cases where a proposal is followed by an assignment, the date of the bankruptcy should be related back to the date of the proposal.

Moreover, I do not see how it can be said that the proposal survived the assignment because it was not expressly annulled. When, as in the case at bar, the assignment was accepted by all the creditors who had accepted the proposal at the outset, the latter disappeared without any order to that effect being necessary. Although the point was not discussed in *Perras v. Boulet*[10], it seems to me that acceptance of it was necessary to the unanimous finding of the Court.

One conclusion necessarily results from all this: the date of the assignment, that is October 1961, is the only relevant date. It follows that the payments received by respondent, assuming that they were preferential, cannot be ignored, since they dated from 1957 and 1958.

Appellant submitted as an alternative argument that the appeal should be allowed in part, since respondent recognized in its pleadings that it had no right to a dividend under the terms of the proposal, and as a result, it was prepared to return the dividend of $561.22 which it received on July 28, 1958. The Court of Appeal gave effect to this offer and ordered respondent to pay that amount, with interest, to appellant, and the latter submitted that it should also have received two other dividends of $1,122.44 each, paid not directly to respondent but to its assignee, Jeanne LeSieur, on May 10, 1960 and May 15, 1961. There is no doubt that the evidence disclosed the payment of these two dividends totalling $2,244.88, as well as receipt of these amounts by Jeanne LeSieur and the fact that she had no personal claim to put forward, but was simply the assignee of respondent. As a result, I agree with appellant's arguments on this point. Respondent raised the objection that, in the absence of Jeanne LeSieur from the record, it was impossible for the Court to rule on the point. I cannot accept this proposition, since the Court is not ruling on the validity of the transfer between respondent and Jeanne LeSieur, but simply on the fact that respondent had no right to receive the above-mentioned sums, either directly or indirectly.

I would therefore allow the appeal in part, amend the judgment appealed from, and condemn respondent to pay to appellant the sum of $2,806.10, with interest at the legal rate from the date of notice of the action, and the costs of an action of this type in all courts.

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Appeal allowed in part.
Solicitors for the appellant: Wood & Aaron, Montreal.
Solicitors for the respondent: Laidley, Howard, Lesage, McDougall, Ewasew, Graham & Stocks, Montreal.

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[1] 1960 CanLII 80 (SCC), [1961] S.C.R. 83.
[2] 1974 CanLII 215 (SCC), [1976] 1 S.C.R. 426.
[3] 1943 CanLII 33 (SCC), [1943] S.C.R. 127.
[4] [1951] Que. K.B. 571.
[5] [1960] Que. Q.B. 20.
[6] 1960 CanLII 66 (SCC), [1960] S.C.R. 442.
[7] [1974] C.A. 89.
[8] (1956), 36 C.B.R. 167.
[9] (1972), 17 C.B.R. (N.S.) 16.
[10] 1959 CanLII 96 (SCC), [1959] S.C.R. 838.

Bank of Montreal v. Coopers Lybrand Inc., 1996 CanLII 5026 (SK CA) - Settlement as Matrimonial Transfer of Property Pre-Bankruptcy

Date:	1996-07-04
Docket:	1744
Parallel citations:	137 DLR (4th) 441; 40 CBR (3d) 161; 23 RFL (4th) 415; 144 Sask R 207
URL:	http://canlii.ca/t/1mb6n
Citation:	Bank of Montreal v. Coopers Lybrand Inc., 1996 CanLII 5026 (SK CA), <http://canlii.ca/t/1mb6n> retrieved on 2013-09-01
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THE COURT OF APPEAL FOR SASKATCHEWAN

BANK OF MONTREAL
RESPONDENT (Applicant)
- and -
COOPERS LYBRAND INC. and
ANTHONY OSTAPOWICH
APPELLANTS (Respondents)

CORAM:
The Honourable Mr. Justice Vancise
The Honourable Mr. Justice Wakeling
The Honourable Mr. Justice Lane

COUNSEL:
Mr. D. Kovatch for the Appellant
Mr. R. Van Beselaere for the Respondent Bank
Mr. J. Kroczynski for Anthony Ostapowich (interested party)

DISPOSITION:
Appeal Heard: January 23, 1996
Appeal Allowed: July 4, 1996

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On Appeal From: QBM 944/93 Judicial Centre of Regina
Appeal File: 1744
Reasons by: The Honourable Mr. Justice Lane
In concurrence: The Honourable Mr. Justice Vancise and
The Honourable Mr. Justice Wakeling

LANE J.A.

The issue before us is whether a judgment in a matrimonial property action consented to by a party who subsequently becomes bankrupt, can be attacked through the summary proceedings of the *Bankruptcy and Insolvency Act,* R.S.C., 1985, c.B-3 ("*B.I.A.*") as a settlement or a fraudulent conveyance.

The facts are not in dispute: On December 5, 1991 the appellant, Rose Ostapowich, commenced an action against her husband, Anthony Ostapowich ("bankrupt") out of the Unified Family Court of Saskatoon claiming a division of matrimonial property. In April of 1993, after several adjournments, Rose Ostapowich made an application for the matrimonial property division. Anthony Ostapowich executed a consent form and Carter J. issued the judgment in the form filed. The terms were amended by consent on May 10, 1993 and June 4, 1993 and Carter J. granted an Amended Consent Judgment in the terms requested.

On June 23, 1993 Anthony Ostapowich made an assignment in bankruptcy.

On November 23, 1993, the respondent ("Bank"), representing itself and other creditors, made an application for an order pursuant to s. 38 of the *B.I.A.* to take action on behalf of the creditors as the Trustee refused to act. Hrabinsky J. made the following order:

1. Pursuant to s. 38 of *The Bankruptcy and Insolvency Act,* the Bank of Montreal is hereby authorized to take any proceeding that in its opinion would be for the benefit of the estate of the bankrupt, Anthony Ostapowich with respect to the Consent Judgment in favour of Rose Ostapowich dated June 4, 1993;

2. Notice of this Order shall be given to all creditors as have filed a proof of claim with the Trustee in Bankruptcy of Anthony Ostapowich, and it is hereby specified that they shall advise whether they will be participating in the said proceedings within ten days of the date of service upon them of this Order, in writing to the solicitors for the Applicant, Bank of Montreal;
3. Since Rose Ostapowich has not yet been served with these proceedings, all other matters are adjourned sine die to be brought forward on four days notice.

On November 25, 1993, acting under this authority, the Bank brought an application by way of Notice of Motion to the Court of Queen's Bench asking for the following relief:

1. setting aside the vesting order made and the other portions of a Consent Judgment in a matrimonial property proceeding between Rose Ostapowich and Anthony Ostapowich;
2. an order directing that all monies which already have been paid to Rose Ostapowich as a result be immediately paid into Court to the credit of the proceedings or the applicant ("Bank") on behalf of the Estate of Anthony Ostapowich as the said Judgment and Order being void as at the assignment in bankruptcy.

Its application was in the following form:

> AND FURTHER TAKE NOTICE that this application is brought by Bank of Montreal following an Order pursuant to s. 28 of the said *Bankruptcy and Insolvency Act* and an assignment by the Trustee in Bankruptcy of Anthony Ostapowich, vesting all rights of the said Trustee to pursue the said consent matrimonial property judgment dated June 4, 1993 as a settlement, fraudulent preference or otherwise being void against the Estate of Anthony Ostapowich in Bankruptcy.
>
> AND FURTHER TAKE NOTICE that the said Consent Order dated June 4, 1993 is a settlement within the meaning of s. 91 of the said *Bankruptcy and Insolvency Act* and is therefore voidable as at the date of bankruptcy. Alternatively, the said Order is a frivolous and vexatious abuse of process, and is a fraudulent preference or fraudulent conveyance pursuant to *The Fraudulent Preferences Act,* R.S.S. 1978, c. f-21.

On December 14, 1993 Maurice J. made the following order:

> IT IS HEREBY ORDERED that the following issue be determined by a trial, such issue being whether the amended consent judgment referred to herein and dated June 4, 1993 is voidable pursuant to s. 91 of *The Bankruptcy and Insolvency Act* as a settlement of property or is a fraudulent conveyance and/or preference within the meaning of *The Fraudulent Conveyances Act* and should be set aside;

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AND IT IS FURTHER ORDERED that the parties will have the right to Examinations for Discovery and production of documents. The matter shall be set down for trial in the usual manner. Bank of Montreal, on its own behalf and as representative of other creditors participating in these proceedings shall be the Plaintiff, and Rose Ostapowich and Anthony Ostapowich shall be the Defendants;

AND IT IS FURTHER ORDERED that pending determination of the issues stated above, all monies due and owing under the mortgages given by Mark Ostapowich or under the Judgment given by Anthony Ostapowich which are payable to Rose Ostapowich, will be paid into court by the said Rose Ostapowich, including the payment of any monies due under the mortgages as at December 1, 1993 whether paid prior to this date or otherwise.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application shall be reserved for the Trial Judge.

Rose Ostapowich, named a defendant by the order of Maurice J., appeals the order.

ARGUMENT

The appellants contend the application by the Bank was in substance a collateral attack on a valid judgment of the Court. They argue the *B.I.A.* does not change the common law and as a consent judgment is a judgment of the Court and not a mere agreement between the parties, there are only three ways such a judgment can be attacked:

(1) through an application to the Court to vary its judgment;

(2) through an appeal of the judgment;

(3) by a separate action to set aside the judgment on the basis it was obtained by fraud or deceit upon the Court.

None of the above avenues were pursued by the respondent in this case.

The respondent Bank contends it is not attacking the judgment, which it submits is still valid, but is rather attacking the underlying arrangement made between the parties. The Bank argues the summary proceedings of the *B.I.A.* are the appropriate procedures to follow once the trustee is appointed, because the transaction then falls within the scope of the *B.I.A.* and ss. 95 and 96 of the *B.I.A.* and Rule 89 allow the trustee to attack any proceeding. It contends the consent judgment is merely an agreement which can be properly attacked through the summary procedures of the *B.I.A.*

In the Bank's submission the judgment is a "settlement" within the definition of settlement in the *B.I.A.* or, in the alternative, if not a settlement it is a fraudulent conveyance. The bank contends this is the fundamental issue which must be decided by the Court. The issue of whether or not there was a fraud against the Court involves different considerations which in its submission is not relevant in these circumstances.

RELEVANT SECTIONS AND RULES OF THE *B.I.A.*:

2. "settlement" includes a contract, covenant, transfer, gift and designation of beneficiary in an insurance contract, to the extent that the contract, covenant, transfer, gift or designation is gratuitous or made for merely nominal consideration;

. . .

91. (1) Any settlement of property, if the settlor becomes bankrupt within one year after the date of the settlement, is void against the trustee.

(2) Any settlement of property, if the settlor becomes bankrupt within five years after the date of the settlement, is void against the trustee if the trustee can prove that the settlor was, at the time of making the settlement, unable to pay all his debts with the aid of the property comprised in the settlement or that the interest of the settlor in the property did not pass on the execution thereof.

(3) This section does not extend to any settlement made

(*a*) before and in consideration of marriage;

(*b*) in favour of a purchaser or incumbrancer in good faith and for valuable consideration; or

(*c*) on or for the spouse or children of the settlor of property that has accrued to the settlor after marriage in right of the settlor's spouse or children.

. . .

95. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving that creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering it becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering it, be deemed fraudulent and void as against the trustee in the bankruptcy.

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(2) Where any conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in subsection (1) has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed, in the absence of evidence to the contrary, to have been made, incurred, taken, paid or suffered with a view to giving the creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be admissible to support the transaction.

(3) For the purposes of this section, the expression "creditor" includes a surety or guarantor for the debt due to the creditor.

96. Where the conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in section 95 is in favour of a person related to the insolvent person, the period limited in subsection 95(1) shall be twelve months instead of three months.

Rule 89:

89. Where a trustee or any other person applies to the court to set aside or avoid any settlement, conveyance, charge, obligation, proceeding, transfer, security or payment, or for a declaration for or against the title of the trustee to any property, the court may

(a) proceed in a summary manner to try the question or issue in the case;
(b) adjourn the hearing;
(c) direct or settle any question or issue to be tried;
(d) give directions for the preparation and filing of pleadings and for the trial of the question or issue; or
(e) make such further order as the court considers necessary or desirable.

DECISION

The argument of the respondent appears to be predicated on the premise a consent judgment is merely a decision of the parties which is then approved or rubber-stamped by the Court. This is simply not the case. A judgment is a final determination by the Court of the rights and obligations of the parties. A consent judgment, even if it is in the terms consented to by the parties, is not a decision of the parties but is a decision of the Court. The fact the judgment was consented to makes it no less a valid and subsisting judgment. See: The *Hardy Lumber Co. v. The Pickerel River Improvement Co.* [1899] 29 S.C.R. 211; *City of Toronto v. Toronto R.W. Co.* [1917] 39 O.L.R. 310 at p. 313. Any agreement between the parties must receive the independent sanction of the Court before it can become a judgment. This Court has held if an issue is consented to by the parties a judge is not obligated to follow it. See *Peterson v. Bishop et al.*, [1923] 3 W.W.R. 25; *Hope Hardware et al. v. Fields Stores Ltd. et al.* 1978 CanLII 254 (BC SC), (1978), 7 B.C.L.R. 321. In a matrimonial property application, if the parties come to an agreement the judge must still decide whether the agreement is just and equitable before making the order and thus has a power of review over any agreement and is not bound by the parties' agreement. The Court must decide, based on the facts and the law, and that decision may ultimately reflect the agreement made by the parties but it is still the Court's decision, not that of the parties.

No matter from what perspective one views the application by the bank it is in substance an attack on a valid subsisting judgment of the Court and thus the appellant is correct such judgment can only be attacked in one of the three aforementioned ways:

1. By an application to the Court to vary its judgment;
2. By appeal;
3. By a separate action to set aside the judgment on the basis it was obtained by fraud. See: *R. v. Wilson*, 1983 CanLII 35 (SCC), [1984] 1 W.W.R. 481.

Simply put, if the respondent were to be successful in this appeal its effect would be to render the consent judgment nugatory. The respondent, therefore, has not chosen the correct procedure to attack the judgment.

The second issue is whether the judgment is a settlement under the B.I.A. In my opinion, a judgment cannot be a settlement. A settlement involves an action specified in s. 91 of the *B.I.A.* by the settlor, whereas a judgment is a decision of the Court and not the settlor.

The respondent's argument ss. 95 and 96 of the *B.I.A.* allow the trustee to challenge the judicial proceeding must fail as it is acknowledged the appellant is not a creditor of the bankrupt and such transaction was not therefore in "favour of any creditor".

As to the respondent's contention there is authorization for the action in Rule 89, it must be noted the rules cannot extend the jurisdiction of the Court (See *Re Loxtave Buildings of Canada, Limited* (1943), 25 C.B.R. 22 and *Re Jenny Lind Candy Shops* (1942), 23 C.B.R. 316). Here, the Bankruptcy Court does not have the jurisdiction to decide the challenge to the consent judgment.

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The respondent relies on *C.I.B.C. v. Shapiro* (1985), 54 C.B.R. 134 which in my opinion can be distinguished. In that case, a bankrupt was, prior to the assignment, granted a *decree* for divorce. The order included a disposition of the matrimonial home in accordance with the minutes of settlement which provided the husband's interest in the matrimonial home should vest in the wife's consideration of her release of any and all claims to support and maintenance. The Ontario Supreme Court determined the transaction "was a compromise, or resolution of certain claims exerted against him (the bankrupt) in the course of the matrimonial litigation which compromise or resolution was arrived at in good faith and for valuable consideration. The wife was held to be a purchaser and the transaction was held not to be a settlement. The Court went on to find the disposition was not a fraudulent one and not done with a view to giving preference over other creditors. However, the issue of whether or not the action was a collateral attack on a valid subsisting judgment was not considered and therefore, in my view, the case is of no persuasive value in the circumstances.

The appeal is therefore allowed. The order of Maurice J. is set aside with costs on double Column V.

DATED at the City of Regina, in the Province of Saskatchewan this 4th day of July A.D. 1996.

LANE J.A.

I concur.

VANCISE J.A.

I concur.

WAKELING J.A.

Preference presumed - Sec. 95(2)
(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception - Sec. 95(2.1)
(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions - Sec. 95(3)
(3) In this section,

"clearing house"
« chambre de compensation »
"clearing house" means a body that acts as an intermediary for its clearing members in effecting securities transactions;

"clearing member"
« membre »
"clearing member" means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary;

"creditor"

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« créancier »
"creditor" includes a surety or guarantor for the debt due to the creditor;

"margin deposit"
« dépôt de couverture »
"margin deposit" means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations.
R.S., 1985, c. B-3, s. 95;
1997, c. 12, s. 78;
2004, c. 25, s. 56;
2007, c. 29, s. 100, c. 36, ss. 42, 112.

Transfer at undervalue - Sec. 96
96. (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Gingras v. General Motors Products of Canada Ltd., [1976] 1 SCR 426 - Prescription on Fraudulent Preference in Quebec

Date:	1974-11-27
Parallel citations:	1974 CanLII 215 (SCC)
URL:	http://canlii.ca/t/1z6gk
Citation:	Gingras v. General Motors Products of Canada Ltd., 1974 CanLII 215 (SCC), [1976] 1 SCR 426, <http://canlii.ca/t/1z6gk> retrieved on 2013-09-04
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Supreme Court of Canada
Gingras v. General Motors Products of Canada Ltd., [1976] 1 S.C.R. 426
Date: 1974-11-27

Paul Gingras *Appellant;*
and
General Motors Products of Canada Ltd. *Respondent.*

1974: March 22; 1974: November 27.

Present: Martland, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Bankruptcy—Preferential payments—Petition by trustee to set aside—Time limit under Civil Code for Paulian actions not applicable—Repeal of federal act, consequence—Long line of cases—Interpretation Act—Civil Code, art. 1040—Bankruptcy Act, R.S.C. 1952, c. 14, s. 64—Interpretation Act, R.S.C. 1970, c. I-23, s. 37.4.

Appellant, the trustee in bankruptcy of Boulevard G.M.C. (1964) Inc., filed a petition alleging that respondent had received from the debtor preferential payments contrary to s. 64 of the *Bankruptcy Act,* R.S.C. 1952, c. 14, and also taken back goods, which constituted a fraudulent payment. This petition was served more than one year after the appointment of the trustee and was dismissed by the lower courts on the ground that the prescription or time limit of one year specified in Art. 1040 *C.C.* for Paulian actions was applicable to the remedy of a trustee under s. 64. Hence the appeal to this Court.

Held (de Grandpré J. dissenting): The appeal should be allowed.

Per Martland, Pigeon and Dickson JJ.: Article 1040, as it stands, does not apply to the remedy created by the *Bankruptcy Act* for the purpose of having preferential payments declared void. It cannot be supposed that in enacting art. 1040, the Legislature intended that this prescription period or time limit of one year should apply not only to the remedy based on anything contained in that section of the code, but to the wider provisions contained in the *Insolvent Act* of 1864 as well. The Legislature did not intend in any way to affect what had been enacted some years earlier in that act which was a statute applicable to Upper Canada also. Whatever may have been the effect of the repeal by Parliament in 1880 of all legislation on insolvency, its result certainly could not have been that when a new *Bankruptcy Act* was introduced in 1919, art. 1040 became applicable to the provisions of that Act concerning preferential payments, when it had never been so applicable to analogous provisions in prior bankruptcy statutes. The special remedy provided, in the case of bankruptcy, for having preferential payments declared void, has always been legislatively distinct from the Paulian action since the first insolvency statute was adopted in 1864. There is thus no reason not to give a literal interpretation to art. 1040.

These are not here circumstances comparable to those which sometimes led this Court to regard provincial precedents as decisive. This case deals with the application of provincial law to proceedings instituted under a federal statute. Section 37(4) of the *Interpretation Act* prevents its reenactment being regarded as an adoption of such judicial construction.

Per Beetz J.: At the outset, Art. 1037 *C.C.* may have had the effect to incorporate for certain purposes within Section VI of the *Civil Code* the "further provisions concerning the presumption of fraud and the nullity of acts done in contemplation of insolvency ... contained in the *Insolvent Act* of 1864". Such incorporation, if any, ceased to exist with the repeal of legislation on insolvency in 1880 and the repeal of Art. 1037 *C.C.* and the final words of Art. 1039 *C.C.* in 1886, and, in view of the wording of Art. 1040 *C.C.,* it could not subsequently revive in the absence of some clear provision which only Parliament was empowered to enact; the *Act respecting Bankruptcy* of 1919 and amendments contain no such provision. Accordingly, it is the limitation periods of general application, of thirty or five years, as the case may be, which must be applied to the remedy provided by s. 64 of the *Bankruptcy Act.*

Per de Grandpré J., *dissenting*: Constitutional theory requires that in a field such as that of bankruptcy, the federal legislator has priority only in the portion occupied by him. Consequently, federal and provincial legislation may exist side by side in the field of preferential payments, since the *Bankruptcy Act* overrides the Paulian action only to the limited extent that it deals with acts in defraud of the debtor; all aspects of fraudulent action falling outside the provisions of the *Bankruptcy Act* may be considered in the light of the principles of the *Civil Code.* In view of the silence of the *Bankruptcy Act* on prescription of the trustee's remedies, therefore, these remedies can be made subject to prescription under the *Civil Code,* whether for thirty years, five years or one year. Since the remedy in the *Bankruptcy Act* and that in the Paulian remedy are the same in substance, the best prescription to apply is that of Art. 1040 of the *Civil Code.* The pre-Confederation legislator intended at that time prescription of the trustee's remedies in cases of preferential payments to

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be subject to the rule of Art. 1040. Nothing since then has altered this position, and the remedy in s. 64 of the *Bankruptcy Act* remains subject to annual prescription.

[*Cie de Construction de Charlesbourg v. Demers,* [1948] Que. Q.B. 745; *Grobstein v. Bank Canadian National,* [1963] Que. Q.B. 215; *Bissonnette v. Bank of Nova Scotia,* [1964] Que. Q.B. 918; *Mercure v. Vary,* [1970] C.A. 480; *Traders Finance Corporation Ltd. v. Lévesque,* 1960 CanLII 80 (SCC), [1961] S.C.R. 83, referred to. *Ace Holdings Corporation v. The Montreal Catholic School Commission,* 1971 CanLII 165 (SCC), [1972] S.C.R. 268; *Village de la Malbaie v. Boulianne,* 1932 CanLII 51 (SCC), [1932] S.C.R. 374, distinguished]

APPEAL from the Court of Queen's Bench, Appeal Side, Province of Quebec, affirming a bankruptcy judgment of the Superior Court. Appeal allowed, de Grandpré J. dissenting.

M. Hickson, for the appellant.

J. Turgeon, for the respondent.

The judgment of Martland, Pigeon and Dickson JJ. was delivered by

PIGEON J.—This appeal is against a decision of the Court of Appeal of Quebec, affirming a judgment of the Superior Court, bankruptcy side, dismissing the petition of appellant, the trustee in bankruptcy of Boulevard G.M.C. (1964) Inc. That petition alleged that respondent has received from the debtor within the three months preceding its bankruptcy preferential payments amounting to $27,000, contrary to s. 64 of the *Bankruptcy Act.* It also alleged that, within the few months prior to the bankruptcy, respondent took back goods valued at $98,862.74, which constituted a fraudulent preferential payment.

The only ground raised in respondent's exception to dismiss was that appellant was appointed trustee on May 25, 1967, and his petition was served on respondent on February 18, 1970. This exception was allowed for the reason that the prescription or time limit of one year specified in Art. 1040 of the *Civil Code* of Quebec was held to be applicable to the remedy of a trustee under s. 64 of the *Bankruptcy Act* (R.S.C. 1952, c. 14, now R.S.C. 1970, c. B-3, s. 73). This decision is in accordance with earlier judgments of the Court of Appeal of Quebec: *Cie de Construction de Charlesbourg v. Demers*[1]; *Grobstein v. Bank Canadian National*[2], *Bissonnette v. Bank of Nova Scotia*[3]; *Mercure v. Vary*[4].

However, a contrary view was expressed in this Court by Locke J. in *Traders Finance Corporation Ltd. v. Lévesque*[5]. In that case, as in the others, the trustee did not act within a year from his appointment; however, the action was instituted not by him but by a creditor authorized to do so under s. 16 of the *Bankruptcy Act* (now s. 20), under which "the trustee shall assign and transfer to the creditor all his rights". This creditor had only learned of the fraudulent payment less than a year before his action was instituted, and for this reason the Quebec courts held[6] that the prescription or time limit affecting the remedy of the trustee was not applicable to him. However, Choquette J.A. took the view that Art. 1040 *C.C.* was wholly inapplicable (at pp. 274-275):

> [TRANSLATION] 1. The payment impugned by respondent is in fact one considered by s. 64 of the *Bankruptcy Act* to be "fraudulent and void as against the trustee in the bankruptcy". The court relied on that section in declaring this payment void:
>
> > Whereas respondent (the appellant) has not rebutted the presumption created by s. 64 of the *Bankruptcy Act.*
>
> Now, Art. 1040 C.C. applies exclusively to the Paulian action of the *Civil Code,* Arts. 1032 to 1039 C.C., which are grouped under the title: "Of the avoidance of contracts and payments made in fraud of creditors".
>
> Indeed, the text of Art. 1040 C.C. could not possibly be more explicit.
>
> I do not see how we could apply a provision of such a limited nature to a remedy which it does not cover, particularly to the remedies based on ss. 60-67 of the *Bankruptcy Act,* which exist independently of Arts. 1032-1040 of the *Civil Code.* The position is not altered in any way by the new s. 41(6), which leaves unchanged provisions concerning property and civil rights not in conflict with federal law. That section only confers on the trustee all civil remedies which are "supplementary to and in addition to the rights and remedies provided by this Act"; it does not incorporate in ss. 60-67 a time limit applicable exclusively to a remedy peculiar to the *Civil Code.*
>
> That is why I would only apply *Cie de Construction Charlesbourg Inc.: Lefaivre et al v. Demers* [1948] Que. Q.B. 745 to contracts and payments made more than three months before the bankruptcy, and not covered by ss. 60-67 of the *Bankruptcy Act*; as such contracts and payments were not contemplated by the aforementioned sections, the law governing them must be applied to them. We were referred to *Lefebvre v. Cartierville Lumber Co. and Perras* [1955] Que. Q.B. 474 and *Trahan v. Lamarre and Roy and Custeau* [1956] Que. Q.B. 1, but in those cases the payment or contract impugned was made more than three months prior to the bankruptcy.
>
> I conclude that Art. 1040 C.C. does not bar respondent's petition.

The majority decision in this Court did not deal with the point, Fauteux J. saying (at p. 87 as translated in 26 D.L.R. (2d) 390):

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> Consequently it is unnecessary to decide whether the loss of rights, specifically established in art. 1040 of the *Civil Code* for remedies which, while related to those authorized by s. 16, differ from them, may be applied in the case in question. But assuming, without deciding it, that such were the case, I would say, in agreement with Justices Pratte and Choquette, that the starting point of the loss of rights provided for by this article varies according to whether the action is instituted by the creditor or the Trustee. It would follow, then, that the respondent having sued within the year in which knowledge of the fraudulent payment was acquired, his action could not be considered late within the terms of this section.

However, Locke J. said (at pp. 90-91):

> The limitation in art. 1040 is that no payment can be avoided *"by reason of anything contained in this section"* and it is not by reason of anything contained in section 6, being art. 1032 to 1036 and 1038 to 1040 both inclusive, that the respondent sought to recover and did recover. The article, therefore, in my opinion does not affect the matter.
>
> It may be said that provisions similar to those contained in the articles of the *Civil Code* to which I have referred are to be found in statutes of most of the provinces of Canada.
>
> ...
>
> The remedies thus given are quite distinct from those given to the trustee in bankruptcy under c. 64 of the *Bankruptcy Act.* The right to enforce such claims by creditors does not depend upon the fact that the person making the transfer has been declared bankrupt and these rights may be enforced under the provincial statutes unless bankruptcy has intervened. This has been held in a number of cases in various provinces, which are to be found collected in the 3rd ed. of *Bradford and Greenberg on the Bankruptcy Act,* at p. 158 et seq. In Quebec the limitation provided by art. 1040 only refers to proceedings under the articles mentioned.
>
> If it were otherwise and art. 1040 on its face applied to the cause of action referred to in s. 64 of the *Bankruptcy Act,* when asserted either by the trustee or under s. 16 by a creditor claiming by virtue of an assignment, it would be necessary to consider whether the article was *intra vires* the Legislature of Quebec. The right of action is one given by a Dominion statute and the right of the trustee and his assignee to resort to the courts is a substantive right. Article 1040, if it applied, would deprive those entitled to assert that right after a defined period. It would be necessary to consider then the effect of the decision of this Court in *Attorney General of Alberta and Winstanley v. Atlas Lumber Co. Ltd.* 1940 CanLII 33 (SCC), [1941] S.C.R. 87, 1 D.L.R. 625.

At the hearing counsel for the respondent put considerable emphasis on the argument that, as the Quebec *Civil Code* predates Confederation, the provisions it then contained, such as Art. 1040, cannot be unconstitutional. But, this does not prevent such provisions from becoming inoperative if the federal Parliament occupies the field. The fact that, to be strictly correct, the issue should have been stated in those terms, in no way detracts from the value of the opinion of Locke J., which like that of Choquette J.A. was based on the unequivocal wording of Art. 1040 *C.C.*

The question is not whether the prescription periods fixed by provincial law apply to bankruptcy cases in the absence of any contrary provision. What has to be decided here is whether Art. 1040 *C.C.,* as it stands, applies to the remedy created by the *Bankruptcy Act* for the purpose of having preferential payments declared void. This article is not under the heading of prescription. It is not a general provision fixing the time required for prescription to have effect, as are Arts. 2240-2270. It is the final article in Section VI of the chapter Of Contracts. When the Code was adopted by the Legislature, that section read as follows:

> Of the Avoidance of Contracts and Payments made in Fraud of Creditors
>
> **1032.** Creditors may in their own name impeach the acts of their debtors in fraud of their rights, according to the rules provided in this section.
>
> **1033.** A contract cannot be avoided unless it is made by the debtor with intent to defraud, and will have the effect of injuring the creditor.
>
> **1034.** A gratuitous contract is deemed to be made with intent to defraud, if the debtor be insolvent at the time of making it.
>
> **1035.** An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud.
>
> **1036.** Every payment made by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received or the value thereof, for the benefit of the creditors according to their respective rights.
>
> **1037.** Further provisions concerning the presumption of fraud and the nullity of acts done in contemplation of insolvency are contained in The Insolvent Act of 1864.
>
> **1038.** An onerous contract made with intent to defraud on the part of the debtor, but in good faith on the part of the person with whom he contracts is not voidable; saving the special provisions applicable in case of insolvency of traders.

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> **1039.** No contract or payment can be avoided, by reason of anything contained in this section, at the suit of a subsequent creditor, unless he is subrogated in the rights of an anterior creditor; saving however the exception contained in The Insolvent Act of 1864.
>
> **1040.** [No contract or payment can be avoided by reason of anything contained in this section, at the suit of any individual creditor, unless such suit is brought within one year from the time of his obtaining a knowledge thereof.
>
> If the suit be by assignees or other representatives of the creditors collectively, it must be brought within a year from the time of their appointment]

Can it be supposed, even for a moment, that in thus enacting Art. 1040—a provision embodying new law as indicated by the square brackets,—the Legislature intended that this prescription period or time limit of one year should apply not only to the remedy based on *anything contained in this section,* but to the *further provisions ... contained in The Insolvent Act of 1864* as well? That Insolvent Act, it must be noted, contained at the outset the following provision:

> 1. This Act shall apply in Lower Canada to traders only, and in Upper Canada to all persons whether traders or non-traders.

Under the heading "Of fraud and fraudulent preferences" there was a lengthy section, of which I shall quote the first subsection only:

> 8. All gratuitous contracts or conveyances, or contracts or conveyances without consideration, or with a merely nominal consideration, made by a debtor afterwards becoming an involvent, with or to any person whomsoever, within three months next preceding the date of the assignment or of the issue of the writ of attachment in compulsory liquidation; and all contracts by which creditors are injured, obstructed or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious, are presumed to be made with intent to defraud his creditors.

In my view it is clear that, in enacting as it did Section VI of the chapter Of Contracts, the Legislature did not intend in any way to affect what had been enacted some years earlier in the *Act respecting Insolvency,* which was a statute applicable to Upper Canada also. This intent was indicated, not only by Art. 1037, but also by the following words added to Arts. 1038 and 1039 respectively:

> ... saving the special provisions applicable in case of insolvency of traders.
>
> ... saving however the exception contained in the Insolvent Act of 1864.

It is no doubt proper to note that, in the draft submitted with the *First Report* of the codifiers, on October 12, 1861, Section VI consisted of ten articles. The first five, Arts. 51 to 55, became Arts. 1032 to 1036 practically without change. Arts. 57 and 58 became 1038 and 1039, with the above-noted additions, and Art. 60 became Art. 1040. As to Arts. 56 and 59, which were provisions embodying new law suggested in amendment, the Legislature replaced them by Art. 1037. These two articles read as follows:

> (*Additional article suggested in amendment.*)
>
> **56.** (61) If any contract or payment designated in the three last preceding articles be made by a merchant or trader within ten days previous to his bankruptcy, his insolvency and intent to defraud, and the knowledge thereof by the creditor or the party with whom he contracted, are presumed.
>
> (*Additional article suggested in amendment.*)
>
> **59.** (64) Contracts and payments made by a merchant or trader within ten days previous to his bankruptcy may be avoided for the causes assigned in this section, at the suit of any creditor, although posterior thereto.

Clearly, if the Legislature had enacted the Code with these provisions in the section, Art. 1040 would have applied thereto, but due to the adoption of an insolvency act in the meantime, it deleted them. It thus clearly indicated that it intended to leave the insolvency act intact, whereas it would have introduced an important change by enacting a short period of prescription or time limit applicable thereto which did not exist previously. In this regard I should point out that, Art. 1040 aside, the prescription period of thirty years provided in Art. 2242 is not necessarily the only period applicable. Under Art. 2260(4) the five-year prescription period applies to *any claim of a commercial nature.*

It now remains to be seen how Art. 1037, and the final clause added to Art. 1039, disappeared. For this, it must first be noted that, after enacting two new statutes on insolvency in 1869 (32-33 Vict., c. 16) and in 1875 (38 Vict., c. 16) to replace the act of 1864, the federal Parliament completely repealed all legislation on insolvency in 1880 (43 Vict., c. 1). When the revision of 1886 was undertaken, there was therefore no longer an insolvency statute in existence. It was in view of this situation that, in Schedule A of the Revised Statutes of 1886, reference was made, *inter alia,* to Art. 1037 of the *Civil Code* and the last clause of Art. 1039, as being among the "Acts and parts of Acts repealed, from the date of the coming into force of the Revised Statutes of Canada, so far as the said Acts and parts of Acts relate to matters within the legislative authority of the Parliament of Canada". Subsequently, in the Revised Statutes of Quebec, 1888, under the heading "Federal amendments to Civil Code", the following sections were inserted:

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6233. Article 1037 is repealed by the Federal act respecting the Revised Statutes of Canada. 49 V., C, c. 4, s. 5, schedule A.

6234. Article 1039 should read as follows:

> "1039. No contract or payment can be avoided, by reason of anything contained in this section, at the suit of a subsequent creditor, unless he is subrogated in the rights of an anterior creditor". C.C., 1039; 43 V., C., c. 1; 49 V., C., c. 4, s. 5, schedule A.

In all previous cases on the construction of Art. 1040, I have found only a single opinion which refers to Art. 1037. It is that of Taschereau J.A. in *Mercure v. Vary*[7]. He said (at p. 482):

> [TRANSLATION] Regarding the contention of the trustee that Art. 1040 C.C. is unconstitutional, it should be borne in mind that it was enacted not by the Quebec legislature, but before Confederation by an Act of the Parliament of United Canada (1865, 29 Vict., c. 41), when only one jurisdiction existed. Laws enacted during this period have full force and effect unless repealed, abolished or altered by the Parliament of Canada, as provided by s. 129 of the *British North America Act,* which is worded as follows:
>
> > Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.
>
> Accordingly, the federal Parliament relied on this Act in repealing Art. 1237 C.C. in 1888, when the statutes were revised (Art. 6833), while leaving intact Art. 1040 C.C., dealing with the avoidance of contracts and payments made in fraud of creditors. That article is therefore constitutional, and must be implemented.

With respect, I have to point out that in that case the point was not fully considered. The Parliament of Canada definitely had no power to amend Art. 1040 *C.C.* The scope of that provision is limited to the remedies provided in the section which it includes. However, Parliament unquestionably had the right to repeal its own bankruptcy statute. That repeal undoubtedly made entirely useless and redundant any provisions referring to an Act which had been replaced by the *Bankruptcy Act.* Whatever may have been the effect of the repeal, its result certainly could not be that when a new *Bankruptcy Act* was introduced in 1919 (9-10 Geo. V., c. 36), Art. 1040 *C.C.* became applicable to the provisions of that Act concerning preferential payments, when it had never been so applicable to analogous provisions in prior bankruptcy statutes. If it could be shown that, in the case of bankruptcy, these provisions on preferential payments replace those in the *Civil Code* regarding the Paulian action, it might be logical, though not in keeping with the text, to apply the prescription period for the Paulian action thereto. However, that is not so. The special remedy provided, in the case of bankruptcy, for having preferential payments declared void, has always been legislatively distinct from the Paulian action since the first insolvency statute was adopted in 1864. There is thus no reason not to give a literal interpretation to Art. 1040 *C.C.*

There do not appear to be here circumstances comparable to those which led this Court to regard provincial precedents as decisive in *Ace Holdings Corporation v. Montreal Catholic School Commission*[8] and *Village de la Malbaie v. Boulianne*[9]. Those decisions concerned provisions retained without significant change when a new Code was drafted. They dealt with a strictly provincial matter, not with the application of a provision of provincial law to proceedings instituted under a federal statute. Although this statute was re-enacted by Parliament after the 1948 decision, s. 37(4) of the *Interpretation Act* (1967-68, c. 7, now R.S.C. c. I-23) prevents its being regarded as an adoption of this judicial construction. It may be noted that the Quebec *Interpretation Act* (R.S.Q. 1964, c. 1) contains no similar provision. In addition, it may be that the dissenting opinion of Locke J., coupled with that of Choquette J.A., expressed in a case in which it did not conflict with the majority view is enough to make it impossible to say that the case law has adopted a uniform approach.

I would therefore allow the appeal and dismiss the exception to dismiss submitted by respondent. This does not mean that the latter will not be entitled to rely on Art. 1040 in answer to a claim based on the goods taken back, if the trustee should contend that his petition allows him to go beyond the three months preceding the bankruptcy, and base a claim not only on the *Bankruptcy Act* but also on Arts. 1032 to 1040 *C.C.*

I conclude that the appeal should be allowed, the judgments of the Court of Appeal and of the Superior Court reversed, and the exception to dismiss made by respondent dismissed with costs in all courts.

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Having read the opinion of Beetz J., I must say that I would agree with him as to the consequences of the repeal of Art. 1037, if that provision was to be regarded as incorporating into Section VI, for certain purposes, some provisions of the 1864 *Act respecting Insolvency*.

BEETZ J.—I have had the considerable advantage of reading the opinion of Mr. Justice Pigeon and that of Mr. Justice de Grandpré.

At the outset Art. 1037 *C.C.* may not have been simply a cross-referencing provision. It may have had the effect to incorporate for certain purposes, within Section VI the "further provisions concerning the presumption of fraud and the nullity of acts done in contemplation of insolvency .. contained in the Insolvent Act of 1864." Art. 1037, which referred to the further provisions in the 1864 Act, was unquestionably a provision "contained in this section", in the words of Art. 1040. As the *Act respecting Insolvency* of 1864 specified no time limit within which the remedy of a Paulian nature it provided, should be exercised, it is not inconceivable that the Legislature, which then had jurisdiction over insolvency as well as over property and civil rights, and was reviewing these two areas of law at the same period, intended to make the limitation period of Art. 1040 applicable to the remedy provided by the *Act respecting Insolvency,* 1864, in preference to the limitation periods of general application. Support is lent to this hypothesis by the fact that, in their Supplementary Report, the Codifiers suggested adding to the end of the article which was to become Art. 1040 the words "saving the special provisions, relating to the insolvency of traders", but their suggestion was not taken up by the Legislature.

At all events, by repealing all legislation on insolvency in 1880, and then, in 1886, by repealing Art. 1037 *C.C.* and the final words of Art. 1039 *C.C.,* the federal Parliament terminated such an incorporation, if ever it had existed; in view of the wording of Art. 1040, such incorporation could not subsequently revive in the absence of some clear provision, which only the Parliament of Canada was authorized to enact. Neither the *Act respecting Bankruptcy* of 1919, 9-10 Geo. V., c. 36, nor its subsequent amendments, contain any provision to this effect.

Accordingly, I conclude that it is the limitation periods of general application, of thirty or five years as the case may be, which must be applied to the remedy provided by s. 64 of the *Bankruptcy Act,* and I would dispose of the appeal in the manner proposed by Mr. Justice Pigeon.

DE GRANDPRE J. (*dissenting*)—Appellant asks this Court to quash a decision of the Court of Appeal affirming a judgment of the Superior Court, bankruptcy side.

In general, the matter before the Court is the inter-relation of the articles of the *Civil Code* dealing with the Paulian action (1032 to 1040 *C.C.*) and the sections of the *Bankruptcy Act,* R.S.C. 1952, c. 14 (now R.S.C. 1970, c. B-3), dealing with preferential payments made in the three months preceding the bankruptcy. In particular, appellant submits that the prescription or avoidance of Art. 1040 *C.C.* does not apply to the remedy conferred on the trustee by s. 64 (now s. 73 as amended) of the *Bankruptcy Act.*

The argument derives from a "motion to cancel preferential payments" made in February 1970 by appellant, in his capacity as trustee in bankruptcy of Boulevard G.M.C. (1964) Inc. The latter company was one of respondent's distributors, and at the relevant times respondent held a claim against the debtor for a considerable sum. The motion alleges:

—an assignment of property on April 24, 1967;
—payments by cheque of a total of $27,000 in the three months preceding the bankruptcy;
—payments in the form of automobile parts of the sum of $93,862.74 in the months preceding the bankruptcy;
—respondent's awareness of the debtor's state of insolvency;

and, contending that this was a "preferential payment made to defraud other creditors of their rights", it prays the courts to declare these payments "void and unlawful as against the creditors", and order respondent to make repayment.

In reply to this motion respondent moved to dismiss on the basis of Art. 1040 *C.C.*; as more than a year elapsed between the time appellant was appointed and the start of his action, it was alleged that the latter should be dismissed. The Superior Court allowed this motion to dismiss and its judgment was unanimously affirmed. I quote from the short opinion of Lajoie J. the paragraph which sums up the views of the courts of Quebec:

> [TRANSLATION] There is abundant authority in this Court for the proposition that the prescription period enacted by the second paragraph of Art. 1040 C.C. applies to the remedy of a trustee under s. 64 of the *Bankruptcy Act.*

There is no question that the Court of Appeal of Quebec has always held to this effect:

Cie de Construction Charlesbourg Inc.: Lefaivre et al. v. Demers[10]*;*
Garage Causapscal Limitée: Traders Finance Corporation Ltd. v. Lévesque et al.[11];
Grobstein v. Bank Canadian National et al.[12]
Bissonnette v. Bank of Nova Scotia et al.[13]
Rainville v. Plouffe et al[14].

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In re Monette: Mercure v. Vary et al.[15]
Donat Delisle et Fils Limitée v. de Coster et al.[16]
Biais v. Shaw et al.[17].

The only disagreement was by Choquette J. in the aforementioned case of *Traders Finance Corporation Ltd. v. Lévesque;* the context of that decision suggests that his remarks were made *obiter.*

The Superior court has shown the same near-unanimity. As examples I refer to the following decisions:

In re Modern Hat Manufacturing Ltd[18]. (Boyer J.);
In re Roger Fortier[19] (Boyer J.);
In re Chabot, Rouleau et Frères Inc.[20] (Marier J.);
In re Gervais[21] (M. Archambault J.).

The consistency of these judicial authorities may not be an answer to appellant's arguments, but it requires us to use particular caution. Such unanimity compels respect, if not agreement.

This is the first time this Court has been called on to decide the point. In *Traders Finance Corporation Ltd. v. Emilien Lévesque*[22], four of the five judges expressly refused to do so; only Locke J. expressed the opinion that Art. 1040 *C.C.* cannot be pleaded against a motion by a trustee under s. 64 of the *Bankruptcy Act.* It may be noted in passing that the problem apparently does not arise in the other provinces, as the periods of prescription in the laws of those provinces are not as short as those in the *Civil Code.*

I

The first question that arises is: Does the fact of bankruptcy limit the recourse of creditors prejudiced by a preferential payment to proceedings under the *Bankruptcy Act,* and defeat their right to reply on the provisions of the *Civil Code* regarding the Paulian action? In other words, does a partial occupation of the field of preferential payments by the *Bankruptcy Act* (partial because limited in general to payments made in the three months preceding the bankruptcy) suspend the right of the *Civil Code* to occupy the part of the field not occupied by the *Bankruptcy Act*? If the foregoing must be answered in the affirmative, it necessarily follows that Art. 1040 *C.C.* cannot be pleaded against appellant.

The only reference to the point by this Court is a paragraph from the reasons of Duff C.J., speaking for himself and two of his colleagues, in *In re Bozanich—The A.H. Boulton Company Limited v. The Trusts and Guarantee Company Limited*[23], at p. 136:

> I may add that, in my opinion, the provisions of R.S.O. 1927, Chap. 162, in relation to preferences are superseded by section 64 of the *Bankruptcy Act,* and that the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of section 64, suspended in virtue of the concluding paragraph of section 91.

The two other judges, Rinfret and Crocket JJ., did not address themselves to the point. This paragraph has been regarded by some as holding that the entire field of preferential payments is outside provincial jurisdiction, as it is partially occupied by the *Bankruptcy Act.* I see nothing in the statement to support such a broad conclusion. Even if that were the case, suffice it to say the statement is not a binding authority on this Court, since it was made *obiter.* The only question indeed to be decided was whether a settlement was at issue, within the meaning of s. 60 (now s. 69) of the *Bankruptcy Act.* Reference to s. 64 of that Act was only necessary to determine the meaning of the preceding sections. Furthermore, as may be seen from the factums of the parties recourse to the Ontario statute was only had in this Court; as the provisions of the Ontario statute could only apply, because certain time limits had expired, on evidence of "intent to defeat... or prejudice" creditors, and as there was no finding "as to good faith and valuable consideration", this new argument by the respondent could not be accepted; it could be dismissed merely by reference to the foregoing.

If in fact Duff C.J. intended to give a broad scope to his proposition, I am unable to agree. Constitutional theory requires that in a field such as that in question, where both legislators are entitled to be present, the federal legislator has priority only in the portion occupied by him. *Attorney General of Ontario v. Attorney General of Canada*[24], at p. 200:

> In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament,

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are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

In my view, the *Bankruptcy Act* overrides the Paulian action only to the limited extent that it deals with acts in defraud of the debtor; all aspects of fraudulent action falling outside the provisions of the *Bankruptcy Act* may be considered in the light of the principles of the *Civil Code.*

In my view this is also the way we should read the judgment of Mignault J. in *Canadian Credit Mens Trust Association Ltd. v. Hoffar Limited*[25], when, sitting in chambers, he denied the leave to appeal requested. Before citing that judgment reference may be made to the finding and the principal passages of the judgment of the Court of Appeal of British Columbia which this Court was asked to consider. The extracts which follow are taken from reflex, [1929] 1 W.W.R. 557. First, the finding:

> Sec. 3 (quoted infra) of the *Fraudulent Preferences Act,* R.S.B.C., 1924, ch. 97, is repugnant to sec. 64 of the *Bankruptcy Act,* R.S.C., 1927, ch. 11, and is rendered inoperative thereby.
>
> While the *Bankruptcy Act* does not abrogate a provincial Act merely because the latter deals with preferential transactions, yet with respect to such transactions a provincial statute cannot be enforced if it provides that a certain result shall follow from circumstances which under the Dominion statute are followed by a different result.

Then, Macdonald C.J., at p. 558:

> The only question involved in this appeal is one of conflict between a provincial and a Dominion statute.
>
> The facts are not in dispute. The neat question is as to whether or not sec. 64 of the *Bankruptcy Act,* R.S.C. 1927, ch. 11, is repugnant to sec. 3 of the *Fraudulent Preferences Act,* R.S.B.C., 1924, ch. 97. The learned Judge held that it was not.
>
> No question of the validity of either statute was raised in argument.
>
> For many years there was no Bankruptcy Act in Canada, and during that period of time this and other provinces enacted legislation *pari materia* with 13 Eliz., and 27 Eliz., with some amendments. After the enactment of the *Bankruptcy Act* the provincial *Fraudulent Preferences Act* was retained on the statute book. It professes to deal with preferences given by a debtor to one creditor to the prejudice of others. Shortly, sec. 3 renders void an assignment such as the one attacked in this action, if attacked within a specified time, which this one was.
>
> Sec. 64 of the *Bankruptcy Act* makes preferential assignments and transfers made *with a view* to prefer one creditor over another void under conditions admitted to exist here, but subsec. (2) of sec. 64 declares that such assignments which "have the effect" of giving such preference "shall be presumed *prima facie"* to have been made with a view to giving such preference. The distinction between the two sections is found in this, that the presumption of the invalidity under sec. 3 is irrebuttable, while under sec. 64, subsec. (2), it may be rebutted. In this case the Judge has found as a fact that that presumption had been rebutted and the finding is accepted by both parties.
>
> Assuming then that the provincial Act is *intra vires,* sec. 3 has, in my opinion, been rendered inoperative by the overriding enactment of sec. 64. It would, I think, be difficult to find a clearer case of repugnancy. I would allow the appeal.

Reference may now be made to Mignault J., at p. 184:

> The difference between the two statutory enactments, both of which deal with fraudulent preferences, is that subsection 2 of section 64 of the *Bankruptcy Act,* when the transfer, made within three months of the assignment in bankruptcy, has the effect of giving any creditor a preference over other creditors, creates merely a *prima facie* presumption that the transfer was made with a view to give the creditor such a preference; whereas section 3 of the provincial statute renders the transfer, having the effect to give a creditor preference over other creditors, utterly void as against the assignee or any creditor authorized to take proceedings when it was made within sixty days before an assignment by the debtor for the benefit of his creditors. Under the former statute the presumption of a fraudulent intent can be rebutted, under the latter it cannot.
>
> The learned trial judge, upon consideration of section 64 of the *Bankruptcy Act,* found that the presumption of a fraudulent intent had been successfully rebutted, but he annulled the transfer under section 3 of the provincial statute, which he held established an irrebuttable presumption of fraudulent intent from the mere fact that the transfer, made less than sixty days before the assignment in bankruptcy, had the effect of giving the creditor a preference over the other creditors.
>
> The Court of Appeal, reflex, [1929] 1 W.W.R. 557, set aside this judgment for the reason that there was here a clear conflict between Dominion and Provincial legislation, and that the Dominion enactment should prevail. Inasmuch, therefore, as the fraudulent intent had been rebutted, the court held that the transfer could not be attacked.
>
> The petitioner now seeks leave to appeal from this judgment. In my opinion, the decision of the Court of Appeal is clearly right.

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In my opinion, federal and provincial legislation may exist side by side in the field of preferential payments, the latter yielding to the former only within the narrow limits I have indicated.

II

The second question is: In view of the silence of the *Bankruptcy Act* on prescription of the trustee's remedies, can such remedies be made subject to prescription under the *Civil Code,* whether for thirty years, five years or one year? In this Court appellant put forward the proposition that the *Civil Code* has a role to play, and he suggested applying the thirty-year prescription, but at the same time he referred the Court to the following extract from the reasons of Locke J. in *Lévesque,* cited above, at p. 90:

> If it were otherwise and art. 1040 on its face applied to the cause of action referred to in s. 64 of the *Bankruptcy Act,* when asserted either by the trustee or under s. 16 by a creditor claiming by virtue of an assignment, it would be necessary to consider whether the article was *intra vires* the Legislature of Quebec. The right of action is one given by a Dominion statute and the right of the trustee and his assignee to resort to the courts is a substantive right. Article 1040, if it applied, would deprive those entitled to assert that right after a defined period. It would be necessary to consider then the effect of the decision of this Court in *Attorney General of Alberta and Winstanley v. Atlas Lumber Co. Ltd.* 1940 CanLII 33 (SCC), [1941] S.C.R. 87. There, a statute of the Province of Alberta which deprived the holder of a promissory note of his right of access to the court without permission of the Debt Adjustment Board, constituted under the *Debt Adjustment Act, 1937, of Alberta,* was held to be *ultra vires.* This aspect of the matter was not raised before the courts of Quebec nor argued before us and I accordingly do no more than draw attention to the fact that, in my opinion, that question would arise if art. 1040 applied to the facts of this case.

Whatever the length of the prescription, its effect is to void the remedy after a given period. This, then, is the question before the Court.

With respect, I cannot share the first reaction of Locke J. that no provincial statute concerning prescription can be pleaded against a claimant on whom a right of action is conferred by a federal statute, when the latter contains no provision regulating this subject-matter. Accordingly, the right of action conferred by the *Bills of Exchange Act* (then R.S.C. 1906, c. 119, now R.S.C. 1970, c. B-5) was held subject to the five-year prescription of the *Civil Code* in *Dame O. Catellier v. Dame A. Bélanger*[26]. That decision indicates the path to be taken where, as here, the provincial legislation dates from before Confederation.

III

A *Civil Code* prescription period may thus be pleaded against the trustee; the question is which period, that of 1040 *C.C.* or that of the title "Of prescription"? It is this which we must now consider. To aid us in resolving it appellant submits, first, that there is a very clear distinction between the remedy provided by the *Bankruptcy Act* and the Paulian action. He summarizes his argument in the following paragraph from his factum:

> [TRANSLATION] The articles of the *Civil Code* list certain rules designed to protect and safeguard the debtor's inheritance, which serves as a common surety for creditors; however, the specific purpose of the *Bankruptcy Act* is to ensure that the property of an insolvent debtor is distributed between creditors, which in certain cases requires securing cancellation of preferential payments in order to reconstitute the mass for distribution.

I readily concede that such differences exist; however, those differences do not affect the very nature of the remedy: on the contrary. This was the view of the Court of Appeal of British Columbia in *Hoffar (supra)* concerning the situation in that province; the reasons of M.A. Macdonald J., at p. 561 of [1929] 1 W.W.R., are especially relevant. Comparison of the *Bankruptcy Act* and the *Civil Code* leads to the same conclusion. Furthermore, it is precisely because in substance the two remedies are identical that *pro tanto* the provincial legislation is suspended by the federal. We must refer at this point to the observations of Duff C.J. in *Bozanich (supra),* at p. 135:

> I pass now to section 64 which deals with transactions between an insolvent person and his creditor. The history of the law relating to such transactions is familiar. At common law there is nothing to prevent a debtor preferring one creditor to another. The Statute, 13 Elizabeth, Chap. 5, did not prohibit such transactions. This common law privilege is obviously opposed to the fundamental principle of bankruptcy law—the equitable distribution of assets among all entitled to share; and the law of fraudulent preference was originally developed by the courts on the basis of the principles of the Bankruptcy Acts. The principle of section 64 was first formulated by statute in section 92 of the *Bankruptcy Act* of 1869. In Canada in most of the provinces there were, prior to the *Bankruptcy Act,* statutory enactments making voidable transfers of property by an insolvent made with the intention of giving a particular creditor an "unjust preference".

Though this extract does not refer to the *Civil Code,* and in form is limited to English law, I feel its substance applies to the case at bar.

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Even in the observations of Locke J. in *Lévesque (supra)* I find a confirmation of this identity, though his decision appears to negate it. Speaking of s. 64 he says, at p. 89:

> The right of action conferred by the section is to obtain a declaration that the conveyance is null and void and to recover the property conveyed, and that right is given. alone to the trustee.

Moreover, discussing the provincial statutes, in particular the *Civil Code,* he states at p. 90:

> All of these statutes deal with the rights of creditors to set aside conveyances made by persons in insolvent circumstances, which have the effect of giving a creditor a preference over the others and all of them provide that, in the event of action being brought within a certain period of the date of the conveyance, it is to be held null and void.

It is true that Locke J. goes on to state that the remedies are different, but in my view this distinction between the remedies does not necessarily imply a difference in the substance of the action.

It must be borne in mind that, according to the decision of this Court in *Siméon Lamothe v. Adolphe Daveluy*[27] the Paulian action is not simply for the benefit of the creditor who starts proceedings, it is for the benefit of all concerned. Sir Charles Fitzpatrick C.J., speaking for the Court, says at p. 81:

> It is quite true that the plaintiff in such an action brought under the Quebec Code represents not only himself, but all the other creditors of the fraudulent debtor prejudicially affected by the sale (art. 1036 C.C.).

And subsequently, at p. 83, the learned Chief Justice reiterates:

> The Quebec Code differs from the French Code in this respect; by art. 1036 the defendant creditor is compelled to restore the thing received or the value thereof for the benefit of the creditors of the insolvent debtor according to their respective rights, and not exclusively as in France, for the benefit of the plaintiff in the action.

It is a fact that sixteen years earlier, in *John Ira Fiait et al. v. F.F. Ferland et al.*[28], the Court, without giving reasons, appears to have arrived at a different conclusion. It is also true that in *Alfred Fortier v. Wilfrid Poulin and Ovila Poulin*[29], this Court declined to admit jurisdiction on the ground that the amount at issue in the action instituted by the Paulian plaintiff was not sufficient in itself. On that occasion Rand J., speaking for the Court, said at p. 182:

> It is a settled rule that in these circumstances the benefit of a judgment recovered in an *action paulienne* enures solely to the creditor who is a party to it: Dalloz J.G. (1925) R.P. prem. partie, p. 223, notes 1, 2 and 3. On the other hand, treating the two conveyances as constituting a transfer from the husband to the wife and therefore void, the interest of the appellant is obviously limited to the judgment which he seeks to realize.

With respect, I feel the latter solution is not correct; I feel we must return to the rule laid down in *Lamothe v. Daveluy.* The *Fortier* decision rests on the authority of French jurists, in an area governed by rules which are peculiarly our own. In my opinion, the correct rule is to be found in the 19G8 *Lamothe* decision.

This substantive identity emerges clearly if we look again at the relevant parts of s. 64, and then of Art. 1036 *C.C.*:

> 64. (1) ... every payment made ... by any insolvent person in favour of any creditor ... with a view to giving such creditor a preference over the other creditors shall ... be deemed fraudulent and void as against the trustee in the bankruptcy.

I omit the parts which, while describing the remedy, do not change its nature.

> Art. 1036. Every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received or the value thereof, for the benefit of the creditors according to their respective rights.

Even the form of the February 1970 motion confirms this identity. Apart from the statement that it is made on the basis of the *Bankruptcy Act,* and that the payments were made within three months of the bankruptcy, it could be used without changing a single word to apply for the remedy provided by Section VI of Chapter I of the title "Of Obligations" of the *Civil Code.*

I am therefore unable to accept the argument of appellant regarding the substantive difference between the *Civil Code* remedy and that of the *Bankruptcy Act.* Appellant also maintains, however, that the actual wording of Art. 1040 *C.C.* is a bar to its application here, since it is limited to the avoidance of contracts "by reason of anything contained in this section". This was what Locke J. noted in *Lévesque,* at p. 90:

> The limitation in art. 1040 is that no payment can be avoided *"by reason of anything contained in this section"* and it is not by reason of anything contained in section 6, being art. 1032 to 1036 and 1038 to 1040 both inclusive, that the respondent sought to recover and did recover. The article, therefore, in my opinion does not affect the matter.

Is this in fact a limitation? If the two remedies are the same in substance, and if also a *Civil Code* prescription or avoidance must be applied to the remedy provided by the *Bankruptcy Act* (two points which I think may be assumed), what better prescription to apply to the case at bar than that of 1040 *C.C.*? In this closely defined area of the preferential payment made by an insolvent debtor, the *Civil Code* makes only one reference to the length of time available to the

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creditor for instituting proceedings in avoidance, and this is the appropriate place to look for the relevant provision as to time.

It may be assumed that this was the course taken by the Parliament of the province of Canada at the time of passage of the *Act respecting the Civil Code of Lower Canada* in 1865 (29 Vict., c. 41). It accepted the recommendation of the codifying commissioners to create new law by adding to the end of the chapter on the Paulian action what is now Art. 1040 of the *Civil Code,* which may be cited at this point.

> Art. 1040. No contract or payment can be avoided by reason of anything contained in this section, at the suit of any individual creditor, unless such suit is brought within one year from the time of his obtaining a knowledge thereof.
>
> If the suit be by assignees or other representatives of the creditors collectively, it must be brought within a year from the time of their appointment.

It may be noted at once that

—when the commissioners made their recommendation in 1.861, it is reasonable to assume that they were aware of 7 Vict., c. 10, which, in reference to bankruptcy, had enacted for a period of just over two years provisions concerning preferential payments, giving certain rights to the *syndic* (in English the "assignee"); it is not necessary here to consider the effect of 24 Vict., c. 5, s. 2, which provided for "continuing" for certain purposes 7 Vict., c. 10 and some others referred to by the section;

—when the Parliament of the province of Canada passed the *Civil Code* in 1865, it had before it its own law on bankruptcy, passed in 1864 (27-28 Vict., c. 17), which contained provisions relating to the *syndic* (in English the "assignee") and to preferential payments, but no provision concerning the prescription of remedies.

This is the background against which we must re-read Art. 1040 and the preceding articles, noting that

(1) Art. 1037, which disappeared in 1888, stated that broader provisions on the presumption of fraud and avoidance of acts done with a view to bankruptcy were to be found elsewhere;

(2) Art. 1038, in reference to onerous contracts made in good faith by third parties, lays down one rule for the case of *faillite* (in English, "insolvency of traders") and another for ordinary cases;

(3) Art. 1040 refers to two classes of plaintiffs, the creditors individually and their representatives, and for the latter class it uses the word *syndic* (in English "assignee"), which is especially characteristic of bankruptcy.

It seems to me the conclusion is obvious. The pre-Confederation legislator, having complete control over all matters now under consideration, intended at that time prescription of the trustee's remedies in cases of preferential payments to be subject to the rule of Art. 1040 *C.C.* Nothing since then has altered this position, and the remedy in s. 64 of the *Bankruptcy Act* remains subject to annual prescription.

On the whole, I would affirm the judgment *a quo* with costs in all courts.

Appeal allowed with costs, DE GRANDPRE J. dissenting.

Solicitors for the appellant: Rivard, Rivard, Hickson & Sirois, Quebec.

Solicitor For the respondent: Buchanan, McAllister, Blakely & Turgeon, Montreal,

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[1] [1948] Que. Q.B. 745.
[2] [1963] Que. Q.B. 215.
[3] [1964] Que. Q.B. 918.
[4] [1970] C.A. 480.
[5] 1960 CanLII 80 (SCC), [1961] S.C.R. 83.
[6] [1960] Que. Q.B. 264.
[7] [1970] C.A. 480.
[8] 1971 CanLII 165 (SCC), [1972] S.C.R. 268.
[9] 1932 CanLII 51 (SCC), [1932] S.C.R. 374.
[10] [1948] Que. Q.B. 745.
[11] [1960] Que. Q.B. 264.
[12] [1963] Que. Q.B. 215.
[13] [1964] Que. Q.B. 918.
[14] [1968] Que. Q.B. 756.
[15] [1970] C.A. 480.
[16] [1970] C.A. 740.
[17] [1971] C.A. 5.
[18] (1936-37), 18 C.B.R. 101.
[19] (1950-51), 31 C.B.R. 131.

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[20] [1957] R.L. 508.
[21] [1967] S.C. 714.
[22] 1960 CanLII 80 (SCC), [1961] S.C.R. 83.
[23] 1942 CanLII 2 (SCC), [1942] S.C.R. 130.
[24] [1894] A.C. 189.
[25] 1929 CanLII 26 (SCC), [1929] S.C.R. 180.
[26] [1924] S.C.R. 436.
[27] 1908 CanLII 77 (SCC), (1908), 41 S.C.R. 80.
[28] (1892), 21 S.C.R. 32.
[29] 1954 CanLII 49 (SCC), [1955] S.C.R. 181.

Goertz v. Goertz, 1995 CanLII 4042 (SK CA) - A Case of A Reviewable Transaction

Date:	1995-12-11
Docket:	1911
Parallel citations:	[1996] 2 WWR 372; 37 CBR (3d) 1; 137 Sask R 267
URL:	http://canlii.ca/t/1mdpc
Citation:	Goertz v. Goertz, 1995 CanLII 4042 (SK CA), <http://canlii.ca/t/1mdpc> retrieved on 2013-08-18
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THE COURT OF APPEAL FOR SASKATCHEWAN

PEAT MARWICK THORNE INC.
as Trustee in Bankruptcy of
THE ESTATE OF OTTO P. GOERTZ
APPELLANT

- and -

LYNN OCTAVIA GOERTZ and
OTTO P. GOERTZ
RESPONDENT

CORAM:
The Honourable Mr. Justice Vancise
The Honourable Mr. Justice Wakeling
The Honourable Mr. Justice Sherstobitoff

COUNSEL:
Mr. B.J. Slusar for the appellant
Mr. R.L. Miller for the respondent

DISPOSITION:
Appeal Heard: November 15, 1995
Appeal Decided: December 11, 1995
Reasons: December 11, 1995
On Appeal From: Q.B. 5809/91, J.C. of Saskatoon
Appeal File: 1911
Reasons by: The Honourable Mr. Justice Sherstobitoff
In concurrence: The Honourable Mr. Justice Vancise and
The Honourable Mr. Justice Wakeling

SHERSTOBITOFF J.A.

This appeal is by a bankrupt from that part of a judgment, reported at 1994 CanLII 4872 (SK QB), [1994] 8 W.W.R. 250, which set aside, under the authority of s. 91(2) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, certain conveyances of

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land made by him to his wife prior to his bankruptcy as having been made when he was unable to pay all his debts without the aid of the property conveyed.

There is also a cross appeal by the trustee in bankruptcy from that part of the same judgment which declared one quarter-section of the same land to be the homestead of the bankrupt within the meaning of s. 2(1)(h) of *The Saskatchewan Farm Security Act*, S.S. 1988-89, c. 17.1. A homestead was exempt from seizure under s. 66(k) of *The Saskatchewan Farm Security Act*, and as such, was not property divisible amongst the creditors of the bankrupt under s. 67(1)(b) of the *Bankruptcy Act* which provided as follows:

> **67.**(1) The property of a bankrupt divisible among his creditors shall not comprise
>
> . . .
>
> (b) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the bankrupt resides,

The bankrupt appeals on two grounds. The first is that the trustee failed to prove that the bankrupt was insolvent at the date of the impugned conveyance. The second is that, in respect of the conveyance of the homestead, s. 91(2) of the *Bankruptcy Act* should have no application since the property in question, being exempt from seizure, would not have been divisible amongst the creditors in any event, and, accordingly, the creditors suffered no loss, prejudice, injury or delay.

The trustee cross-appeals on the ground that the homestead property, having been previously conveyed by the bankrupt to his wife, had lost its character as a homestead as of the date of the assignment in bankruptcy. Since s. 91(2) made the conveyance void against the trustee, rather than void *ab initio*, the order setting aside the transaction could not affect the status of the land at the time of the assignment. Accordingly, at the time of the assignment the property was not a homestead, was not exempt from seizure, and was therefore divisible amongst the creditors.

The trial judge also considered the validity of the conveyances in question under the provisions of *The Fraudulent Preferences Act*, R.S.S. 1978, c. F-21, and the *Statute of Elizabeth*, 1571 (U.K.), 13 Eliz. I, c. 5. Since consideration of these statutes is not necessary for the determination of this appeal, we express no opinion with respect to their application to this case or the judge's reasons based upon them.

The wife of the bankrupt sought, on the argument of the appeal, to raise some claims against the property in question grounded in constructive trust and under *The Matrimonial Property Act*, S.S. 1979, c. M-6.1. Since these claims had not been raised in the court below, and since there was not a sufficient factual base on which to deal with them, the court did not entertain them.

The bankrupt's first ground of appeal is that the trustee had not proven that the bankrupt was insolvent at the date of the conveyance. However, s. 91(2) of the *Bankruptcy Act*, under which the application was made, provides as follows, with the emphasized portion specifying the criterion to determine whether the conveyance should be set aside:

> **91.** (2) Any settlement of property, if the settlor becomes bankrupt within five years after the date of the settlement, is void against the trustee *if the trustee can prove that the settlor was, at the time of making the settlement, unable to pay all his debts without the aid of the property comprised in the settlement* or that the interest of the settlor in the property did not pass on the execution thereof. [emphasis added]

The trial judge found the value of the bankrupt's assets at the date of the conveyance to be $252,167.00 including the lands conveyed, but only $68,517.00 without them. The amount of his debts at the same date were found to be $241,262.00. The judge concluded as follows, at p. 266:

> For the limited purpose of demonstrating Mr. Goertz's inability to pay all of his bills without the aid of the Claimed Lands, I have used the values sworn to by Mr. Goertz, notwithstanding that I believe them to be low. However, regardless of which of the three alternative values is used (or even if the average of the three values is used), the Trustee has proven to my satisfaction that Mr. Goertz was unable to pay all of his debts at the time of the Impeached Transaction without the benefit of the Claimed Lands.

There was evidence to support the findings of the trial judge as to the amounts of assets and debts, and it is apparent that he used the criterion provided by s. 91(2) to determine whether the transaction should be set aside. This ground of appeal must fail.

The bankrupt's second ground of appeal is that the homestead quarter, being exempt from seizure under provincial law, and thus not divisible amongst the creditors of a bankrupt under s. 67(1)(b) of the *Bankruptcy Act*, does not fall within the purview of s. 91(2) (or any other part) of the *Bankruptcy Act*. It seems to be common ground that the bankrupt and his wife remained in possession of the property at all material times, so that if the bankrupt had still owned it at the date of the assignment in bankruptcy, it would still have been a homestead. If, at both the time of the impugned conveyance and at the time of the assignment in bankruptcy, this property was exempt from seizure and thus not divisible amongst the creditors of a bankrupt, what was wrong with the transaction, and why should it be set aside? The bankrupt argues that the answer to this question is that there was nothing wrong with the transaction and hence it should not be set aside.

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While the argument on its face is an appealing one, it does not conform with the plain meaning of s. 91(2) and other provisions of the *Bankruptcy Act*. Section 91(2) refers to property of the bankrupt, not to exigible property or property divisible amongst creditors. To accept the argument of the bankrupt would require reading into s. 91(2) qualifications of the word property which are simply not there. Furthermore, the question of whether property of a bankrupt is divisible or non-divisible amongst creditors under s. 67(1)(b) depending on its exigibility under provincial law must be determined at the date of bankruptcy (see *Re Neuls and Neuls; Touche Ross Limited v. First City Trust Company et al.* (1985), 56 C.B.R. (N.S.) 132; 37 Sask. R. 60 at 64 (C.A.)), not at the date of settlement, and the situation as to exigibility may be different on the two dates. For the purpose of s. 67(1)(b), whether the property was exigible or not at the date of the conveyance is simply irrelevant. This ground of appeal must fail as well.

That brings us to the trustee's cross appeal. The trial judge found that upon the conveyance being declared void against the trustee, the homestead reverted to the bankrupt along with his right to exemption from seizure under provincial law, and the consequent exemption from divisibility amongst creditors under s. 67(1)(b) of the *Bankruptcy Act*. He relied largely on *Holthuysen (Trustee of) v. Holthuysen*, reflex, [1987] 2 W.W.R. 304, as support for this proposition. In that decision, the Alberta Court of Appeal held that improperly transferred land remains the property of the bankrupt:

> In our view, property conveyed by a bankrupt to defeat his creditors, the conveyance of which can be voided by the trustee, never ceases to be "property of an execution debtor" within the meaning of the Exemptions Act. For this view, it does not matter whether s. 69 [now s. 91 of *The Bankruptcy and Insolvency Act*] declares the conveyance to be voidable or void ab initio. Any other interpretation of the Exemptions Act would produce an absurd result because it would permit this bankrupt to profit from his misdeeds, or alternatively permit an exemption to arise after a bankruptcy. [at 307]

The last sentence refers to the fact that the bankrupt in that case was arguing that his exemption arose later, in order that he might take advantage of a change in the legislation which provided a considerably more generous exemption.

The trial judge erred in applying *Holthuysen* which is distinguishable from this case. In *Holthuysen*, the court took care to say that it made no difference to its decision whether a declaration under the present s. 91(2) of the *Bankruptcy Act* made a transaction voidable or void *ab initio*. It chose instead to base its decision on its interpretation of the relevant provisions of the Alberta *Exemptions Act*.

The issue in this case is the meaning to ascribe to the words "void *as against the trustee*" found in s. 91(2) of the *Act*. The emphasized words suggest that a disposition amounting to a settlement is only void on the happening of the event of bankruptcy. This position is implicit in Walker J.'s *obiter* remarks in *Camgoz (Trustee of) v. Sun Life Assur. Co. of Can.* (1988), 70 C.B.R. (N.S.) 131 at 135 (Sask. Q.B.),(affirmed on other grounds, (1988) 72 C.B.R. (N.S.) 319 (Sask. CA)):

> If there is a "settlement", Camgoz cannot go back and take an "exemption" for, theoretically speaking, the exemption would be the exemption of the trustee in bankruptcy, since if "settlement" is found it is void against the trustee under s. 69(1) [now s. 91(1) of *The Bankruptcy and Insolvency Act*] of the Bankruptcy Act, and s. 47 [now s. 67] of the Bankruptcy Act deals with property of a bankrupt divisible among his creditors not comprising certain property.

The principle that a settlement is void from the time the trustee acquires title only, that is, from the time of the assignment in bankruptcy, and not void *ab initio*, has been adopted by the British Columbia Court of Appeal in *Buckham v. Holythuysen et al.* (1986), 61 C.B.R. (N.S.) 300; 1 B.C.L.R. (2d) 202. It has also been, unequivocally, the law of England since *In re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776, which was reaffirmed recently in *In re Dent (a Bankrupt)*, [1994] 1 W.L.R. 956 (Div. Ct.). The English legislation in question was virtually identical to s. 91(2).

We agree with the concise summary of the principle in L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, (3d ed.), v. 1 (Scarborough: Carswell, 1995) at 4-3:

> A settlement, which falls within s. 91, is not void but only voidable. It only becomes void when bankruptcy occurs. It is not void as of the date of the making of the conveyance or the date when the court makes the order declaring it to be a settlement; it is the bankruptcy which is the triggering event: *Buckham v. Holythuysen* (1986), 61 C.B.R. (N.S.) 300, 1 B.C.L.R. (2d) 202 (C.A.). See *Camgoz (Trustee of) v. Sun Life Assurance Co. of Can.* (1988), 70 C.B.R. (N.S.) 131, 70 Sask. R. 70, affirmed 72 C.B.R. (N.S.) 319 (Sask. C.A.).

If the settlement is only void at the moment of bankruptcy, then from the time of the impeached transfer to the assignment in bankruptcy, the bankrupt had no interest in the lands.

A bankrupt may claim an exemption at any time prior to discharge: *Re Kreutzweiser* (1966), 10 C.B.R. (N.S.) 217 (Ont. S.C.). However, that claim is determined as of the time of the assignment: *Re Neuls and Neuls*; *Touche Ross Limited v. First City Trust Company et al., supra*. In this case, the bankrupt had no interest in the land in question at the time of the assignment. Accordingly, it could not be his homestead, was not exempt from seizure, and was property divisible amongst his creditors. The joint tenancy was revived and then converted into a tenancy-in-common with the event of assignment.

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The cross appeal of the trustee must therefore be allowed. There will be an order authorizing judicial sale of NW 9-35-5-W3, with one half of the proceeds to be paid to the trustee. In all other respects, the appeal and cross appeal are dismissed.

The trustee shall have its costs of this appeal under double Column V.

DATED at the City of Regina, in the Province of Saskatchewan, this 11th day of December, A.D. 1995.

SHERSTOBITOFF J.A.

I concur.

VANCISE J.A.

I concur.

WAKELING J.A.

Hartland Pipeline Services Ltd. (Trustee of) v. Jones, 2000 ABQB 412 (CanLII) - A Voidable Transfer?

Date:	2000-06-12
Docket:	69729
Parallel citations:	272 AR 319; 18 CBR (4th) 28
URL:	http://canlii.ca/t/5n5p
Citation:	Hartland Pipeline Services Ltd. (Trustee of) v. Jones, 2000 ABQB 412 (CanLII), <http://canlii.ca/t/5n5p> retrieved on 2013-09-07
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Hartland Pipeline Services Ltd. (Bankrupt) v. Bennett Jones, 2000 ABQB 412

Date: 20000612
Action No. 069729

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PRICEWATERHOUSE COOPERS INC., THE TRUSTEE OF THE ESTATE OF HARTLAND PIPELINE SERVICES LTD., A BANKRUPT

Applicant

- and -

BENNETT JONES, GRANT STAPON, BRIAN MURRAY, PETER LOUGHEED, ROBERT SARTOR, TERRY GOMKE, THE ROYAL BANK OF CANADA AND HARTLAND PIPELINE SERVICES LTD.

Respondents

REASONS FOR DECISION
of the
HONOURABLE MADAM JUSTICE M.S. PAPERNY

APPEARANCES:
M. R. Lindsay
E. D. D. Tavender, Q.C.
for the Former Directors
D. Haigh, Q.C.
D. Nishimura
for the Secured Lenders
J. Kruger
for the Trustee

[1] Pricewaterhouse Coopers Inc. ("PwC") in its capacity as Trustee of the Estate of Hartland Pipeline Services Ltd. ("Hartland"), a bankrupt, has brought an application for an Order setting aside as void a payment of

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three million dollars by Hartland to Bennett Jones on November 19, 1999 and setting aside as void a transfer of one million dollars by Hartland to Bennett Jones on November 23, 1999 on the basis that the transfer of monies into the account constitutes settlements within the provisions of sections 91 and 93 of the *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3 ("the B.I.A.") or fraudulent preferences within the provisions of section 95 of the B.I.A. or alternatively within the provisions of the *Fraudulent Preferences Act* R.S.A, 1980, c. F-18 and the *Statute of Elizabeth* 13 Eliz. c. 5, 1571.

[2] An Affidavit was filed by Mr. Stapon, the former Chairman of the Board of Directors of Hartland, in opposition to the above application on May 1, 2000. The Trustee has cross-examined on that Affidavit and has indicated to the court no further requirement to cross-examine.

[3] The secured lenders bring an application pursuant to section 163(2) of the B.I.A. for an order directing that Mr. Stapon appear for cross-examination on his Affidavit.

[4] Section 163(2) provides:

> On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

[5] The section requires that the applicant be the Superintendent, any creditor, or other interested person and that the applicant show sufficient cause for an examination. As well, the examination under section 163(2) is for the general benefit of creditors and must relate to the general administration of the bankrupt estate. It cannot be used by a creditor to pursue a private remedy. In that regard, see ***Re Assaf*** (1976), 23 C.B.R. (N.S.) 14 (Ont. S.C) and ***Re Witkowski*** (1987), 63 C.B.R. (N.S.) 271 (Ont. S.C.).

[6] The Applicants submit that they are creditors within the context of the Act and that the allegations of fraudulent preference are sufficient cause to be entitled to examine. Essentially, they argue that the nature of the allegations, coupled with statements made by Mr. Stapon in his Affidavit relating to the lenders, is sufficient to bring them within the parameters of section 163(2). They submit that the lenders were front and centre in discussions that predate the bankruptcy, that the tenor of the Affidavit suggests bad faith on the part of the lenders and as such, they have an interest such as to entitle them to cross-examine.

[7] Counsel for Mr. Stapon submits that pursuant to the rules of court and section 163(2) of the Act, the secured lenders are not parties. Further, they submit, that section 163(2) can be utilized only in circumstances where the trustee is unable to perform the function as provided for in section 163(1). They argue that the secured lenders in these circumstances do not have an independent right to cross-examine.

[8] The secured lenders properly fit within the description of any creditor or other interested person insofar as standing under this section is concerned. Further, I am satisfied that Mr. Stapon, as a former Director and C.E.O. of the bankrupt, is a person who may be examined pursuant to section 163(2). The issue before me is whether sufficient cause has been shown to permit the cross-examination.

[9] In ***Re Nablo*** (1964), 7 C.B.R. (N.S.) 149 (Ont. S.C.), in considering what was then sections 121(1) and (2) of the *Bankruptcy Act*, (now sections 163(1) and (2) of the B.I.A), the court held that, once an order to examine is granted under section 121(2), the examination may be as extensive as a trustee's examination under section 121(1). If it is shown that an examination of certain named witnesses is justified and may be done by the trustee without an order, but which the trustee, because of a lack of funds or otherwise, does not undertake, a creditor or other interested person may apply to the court for an order to conduct such examination.

[10] It is submitted by counsel for Mr. Stapon that the court's discretion to order such an examination should be confined to circumstances where the trustee has not undertaken the necessary examination. Further, it is argued that the Trustee has done so and has already indicated to the court that in the Trustee's opinion no further examination is required.

[11] I have considered the following authorities with respect to what is meant by "sufficient cause" under section 163(2) of the B.I.A.: ***Re NsC Diesel Power Inc.*** 1997 CanLII 1533 (NS SC), (1997), 49 C.B.R. (3d) 213 (N.S.S.C.) and 1998 CanLII 2241 (NS CA), (1998), 6 C.B.R. (4th) 96 (C.A.); ***Black* v. *Ernst & Young Inc.*** 1997 CanLII 15001 (NS CA), (1997), 47 C.B.R. (3d) 129 (N.S.C.A); ***Re R.L. Coolsaet of Canada Ltd.*** (1996), 45 C.B.R. (3d) (Ont. (Gen. Div.)); ***Saskatchewan Economic Development Corp.* v. *Kolody*** 1994 CanLII 5117 (SK QB), (1994), 26 C.B.R. (3d) 305 (Sask.

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Q.B.); ***Millan* v. *Specialty Foods Corp.***, [1993] M.J. No. 56 (QL) (Q.B.); ***Re Gervais*** reflex, (1993) 21 C.B.R. (3d) 95 (Ont. Ct. Gen. Div.); ***Parcell Steel Co.* v. *Ough*** reflex, (1992), 16 C.B.R. (3d) 305 (Sask. C.A.); ***Re Cadillac Explorations Ltd. (No. 1)*** (1984), 51 C.B.R. (N.S.) 174.

[12] In ***Re NsC Diesel Power Inc.*** (N.S.S.C.), Hood J. stated at p. 218:

> Examinations under Section 163(2) are only ordered when sufficient cause is shown and that sufficient cause must be directly related to the person sought to be examined. To say there is cause for questions to be asked and, as Mr. Blackrepeated in his oral submission, "I must start somewhere" is not what Section 163(2) requires. There must be some demonstrated connection between the evidence, if any, of something being amiss and the ability of the named person to shed some light on it as it relates to the administration of the Estate.

In ***Re NsC Diesel Power Inc.*** (N.S.C.A), Hallet J.A., for the majority, held at p. 108:

> The wording of s. 163(2) of the *Act* that requires an applicant to show sufficient cause to warrant the order being granted requires that the applicant put forth factual information in affidavit form or in sworn testimony that would disclose something more than a desire to go on a fishing expedition. The scheme of the *Act* and its proper functioning requires that trustees act with integrity and, in effect, assumes they will so act. Otherwise the purposes and objectives of the *Act* would be frustrated. If a trustee's actions are being questioned, as in this case, the *Act* properly requires that sufficient cause be shown to warrant an order for examination. This requires that evidence be put forward on the application that would indicate a problem existed with respect to the trustee's administration of the estate and that the person sought to be examined would likely have evidence relevant to the issue.

[13] In ***Black* v. *Ernst& Young Inc.***, the Nova Scotia Court of Appeal at p. 138 suggested that orders for section 163(2) examinations issue almost as a matter of course. However, the court also emphasized the importance of reviewing the affidavits submitted in support of the application to determine whether or not the applicant is on a "fishing expedition". In order to exercise its discretion under section 163(2) judicially, the court is required to carefully review the evidence put before it in support of the application.

[14] Unlike the facts of this case, in ***Re Coolsaet of Canada Ltd.***, the application for examination under section 163(2) was made after the Trustee had determined that the transactions in question were valid and no other action was necessary. Registrar Ferron held that a creditor is not bound by an opinion given to a trustee and should be able to make reasonable supplementary inquiries to be satisfied that the conclusions reached in those opinions are correct. However, he also emphasized the importance of preventing frivolous or potentially oppressive examinations. The Registrar held that the failure of the applicant to name specific persons he wished to examine prevented the court from determining within a broad range the object of the examination requested. Therefore, Registrar Ferron dismissed the motion.

[15] In most cases involving section 163(2), an examination has been granted on the basis that either the trustee has decided not to pursue an action despite the existence of evidence of irregularities in the administration of the bankrupt's estate (see ***Parcell Steel Co.* v. *Ough*; *Re Coolsaet of Canada Ltd.***) or the trustee has not had the funds to properly investigate the matter (see ***Saskatchewan Economic Development Corp.* v. *Kolody***; ***Millan* v. *Specialty Foods Corp.***).

[16] The facts of the present case are unique in that the Trustee has already made an application to have the transactions in question set aside. The Trustee has also utilized its examination powers to cross-examine on an Affidavit that addresses the circumstances surrounding the transactions that are the subject matter of the complaint.

[17] A review of the authorities satisfies me that section 163(2) permits examinations even when the trustee has already utilized its examination powers. However, the onus remains on the Applicant to satisfy the court that there is sufficient cause for additional examination. While the threshold for demonstrating sufficient cause is fairly low, an applicant must provide some evidence, usually in affidavit form, in support of a section 163(2) application. The evidence ought to demonstrate that the additional examination is neither frivolous nor oppressive, is for the general benefit of the creditors, and involves the general administration of the bankrupt's estate.

[18] In most applications under section 163(2), affidavit material is submitted in order to demonstrate sufficient cause (see ***Millan* v. *Specialty Foods Corp***; ***Parcell Steel Co.* v. *Ough, Re Cadillac Explorations Ltd. (No. 1)***; ***Black* v. *Ernst & Young Inc.***). Unfortunately, no affidavit material was filed with the court in support of this application. While it was suggested that the nature of the Motion before the court, coupled with the references to the role of the lenders in setting up the trust, raise, on its face, sufficient cause to grant the order. I disagree.

[19] In order to determine the object of the Applicant's proposed examination and whether it is for the general benefit of all creditors, the Applicant ought to provide the court with affidavit material in support of its application. While

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the relationship and conversations between Hartland and its lenders may be relevant to the ultimate determination of the court, if the Trustee has already adequately cross-examined Mr. Stapon, the additional examination by the secured lenders would be superfluous. The fact that the Trustee has presumably cross-examined Mr. Stapon with respect to the very issue with which the secured lenders seem to be concerned, that of fraudulent preference, heightens the need for an explanation of why additional examination is necessary.

[20] As such, I am dismissing the application with leave to reapply on further evidence.

HEARD on the 25th day of May, 2000.

DATED at Calgary, Alberta this 12th day of June, 2000.

_____

J.C.Q.B.A.

Kostiuk (Re) (Trustee of), 2002 BCCA 410 (CanLII) - Voidable Transfer of Co-Owner's Interests

Date:	2002-07-03
Docket:	CA028751
Parallel citations:	215 DLR (4th) 78; [2002] 8 WWR 457; 35 CBR (4th) 123; 2 BCLR (4th) 284
URL:	http://canlii.ca/t/5kcv
Citation:	Kostiuk (Re) (Trustee of), 2002 BCCA 410 (CanLII), <http://canlii.ca/t/5kcv> retrieved on 2013-08-18
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Bankruptcy of Kostiuk (Re) Date: 20020703
2002 BCCA 410 Docket: CA028751

COURT OF APPEAL FOR BRITISH COLUMBIA

IN THE MATTER OF THE BANKRUPTCY OF

LAWRENCE STEVE KOSTIUK

BETWEEN:

SUSAN BARNES and
DELOITTE & TOUCHE INC., Trustee in Bankruptcy
Of Lawrence Steve Kostiuk

APPELLANTS
(RESPONDENTS BY CROSS-APPEAL)
APPLICANTS
AND:

CAROLYN KOSTIUK

RESPONDENT
(APPELLANT BY CROSS-APPEAL)
RESPONDENT

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Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine
The Honourable Mr. Justice Smith

G. D. Phillips	Counsel for the Appellants
D. Soiseth, Agent for counsel J.P. Scouten	Counsel for the Respondent, Carolyn Kostiuk
Place and Date of Hearing: February 20, 2002	Vancouver, British Columbia
Place and Date of Judgment: July 3, 2002	Vancouver, British Columbia

Written Reasons by:
The Honourable Madam Justice Levine
Concurred in by:
The Honourable Madam Justice Newbury
Concurring Reasons by:
The Honourable Mr. Justice Smith (Page 27, Paragraph 63)
Concurred in by:
The Honourable Madam Justice Newbury

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Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] In this appeal, the appellant makes the novel claim that the principles of the assessment of damages for the tort of conversion should apply to the division between co-owners of the proceeds of the sale of land. The chambers judge correctly, in my view, rejected the appellant's arguments, as those arguments proceed from a misunderstanding of the legal nature of the remedy available to the appellant.

[2] Susan Barnes, the appellant and respondent in the cross-appeal, became the owner of the property as a tenant-in-common with Carolyn Kostiuk, the respondent and appellant in the cross-appeal, after the transfer by Lawrence Steve Kostiuk, a bankrupt, of his one-half interest in the property to Ms. Kostiuk, his wife, was declared void. Ms. Barnes obtained an order that the property be sold, and after the sale, brought an application for a determination of the division of the proceeds. This appeal and cross-appeal are from that determination.

[3] The reasons for judgment of the chambers judge are reported at 2001 BCSC 1002 (CanLII), (2001), 27 C.B.R. (4th) 67 (B.C.S.C.) and may be found at [2001] B.C.J. No. 1453 (S.C.)(QL) and 2001 BCSC 1002 (CanLII), 2001 BCSC 1002.

Background

[4] The issues raised on the appeal are more easily considered in the context of a chronology of relevant events.

[5] Mr. Kostiuk and Ms. Kostiuk owned the property, their family residence in West Vancouver, for many years as tenants in common.

[6] In 1992, Mr. Kostiuk mortgaged his one-half interest in the property for $300,000, to secure a personal line of credit.

[7] Between 1990 and 1995, Mr. Kostiuk was the chairman and chief executive officer of Evergreen International Technology Ltd.

[8] In 1993, Ms. Barnes, who had been employed by Evergreen, sued Mr. Kostiuk to recover shares and warrants of Evergreen she claimed had been issued to her in lieu of salary.

[9] On April 7, 1995, Mr. Kostiuk transferred his one-half interest in the property to Ms. Kostiuk for "$1.00 and natural love and affection". The existing mortgage for $300,000, registered against Mr. Kostiuk's interest in the property, was replaced by a new mortgage in the same amount, registered against Ms. Kostiuk's title to the whole property. On July 27, 1995, Ms. Kostiuk granted a further mortgage to the same bank for $150,000 and on October 18, 1995 granted a further mortgage to another creditor for $100,000.

[10] In March 1996, Ms. Barnes commenced an action against Mr. Kostiuk, claiming that the transfer of his one-half interest in the property to Ms. Kostiuk was a fraudulent conveyance, contrary to s. 1 of the ***Fraudulent Conveyance Act***, R.S.B.C. 1996, c. 163. She registered a certificate of pending litigation against the property.

[11] On March 21, 1997, R.D. Wilson J. awarded Ms. Barnes $1,758,109 in damages against Mr. Kostiuk for detinue of the shares and warrants of Evergreen.

[12] Effective May 7, 1997, Evergreen petitioned Mr. Kostiuk into bankruptcy. The bankruptcy stayed Ms. Barnes' fraudulent conveyance action.

[13] On October 10, 1997, Ms. Barnes obtained leave under s. 38 of the ***Bankruptcy and Insolvency Act***, R.S. 1985, c. B-3, to take proceedings in her own name to set aside the conveyance of the property to Ms. Kostiuk. The order required the trustee in bankruptcy to "execute an assignment assigning all his right, title and interest in the subject matter of the proceedings" and provided:

> ...such assignment shall vest in Susan Barnes and such other creditors as may join in these proceedings all the right, title and interest which the said trustee has, had or shall have in the subject matter of the proceedings by virtue of his office as trustee.

There is no copy of the assignment in the appeal books, but there is no dispute that an assignment as required by the order was executed by the trustee and that no other creditors joined in the proceedings with Ms. Barnes.

[14] On September 30, 1998, Sigurdson J. declared that the transfer of Mr. Kostiuk's interest in the property to Ms. Kostiuk was "null and void" as a settlement under s. 91 of the ***Bankruptcy and Insolvency Act***. In supplementary reasons issued March 9, 1999, Sigurdson J. ruled that the transfer was also void as a fraudulent conveyance. His order, entered May 12, 1999, provided with respect to the property:

> THIS COURT DECLARES that the transfers by the Bankrupt, to the respondent Carolyn Kostiuk of his one-half interests in:
>
> ...(the "Home") [the West Vancouver property];
>
> are void under section 91 of the *Bankruptcy and Insolvency Act* and also under the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163;

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> THIS COURT ORDERS that upon the filing in the Vancouver Land Title Offices of a certified copy of this Order, the registrar of the Vancouver Land Title Office shall register the transfer of an undivided one-half interest in the House to the applicant Susan Barnes;...
> THIS COURT FURTHER DECLARES that the applicant Susan Barnes is and has, since October 22, 1997, been, a tenant in common of the House...with the Respondent Carolyn Kostiuk, owning an undivided one-half interest in the House...;
> . . .

[15] In September 1998, after the bank foreclosed on the mortgages on the property, the mortgages were refinanced by Ms. Kostiuk with Ms. Barnes' consent.

[16] On January 5, 1999, Ms. Barnes commenced proceedings under the ***Partition of Property Act***, R.S.B.C. 1996, c. 347, for an order for sale of the property. On March 8, 1999, Vickers J. ordered the property sold.

[17] On February 25, 2000, the property was sold for $1,700,000. The net sale proceeds of $737,998 were deposited in Ms. Barnes' solicitor's trust account. Ms. Kostiuk and Mr. Kostiuk continued to occupy the property until it was sold.

[18] Ms. Barnes brought an application in the bankruptcy proceedings for an order dividing the net proceeds of the sale. On July 12, 2001, Hunter J. ordered the proceeds divided, with the following adjustments:

(a) Ms. Kostiuk will bear one-half of the burden of the $300,000 mortgage originally registered on Mr. Kostiuk's interest in the property, because she benefited from the proceeds;

(b) Ms. Kostiuk will bear the burden of the taxable costs of the refinancing of the three original mortgages and the increased interest rate under the refinanced mortgage.

Ms. Barnes' claim for occupational rent was rejected.

[19] The total amount awarded to Ms. Barnes was $632,061. Hunter J. awarded costs to Ms. Kostiuk.

[20] The property declined in value from the date of the fraudulent conveyance until the date of sale. Three appraisals of the property in evidence provided the following opinions as to value:

(a) as at April 7, 1995 (the date of the fraudulent conveyance): $2,100,000.

(b) as at May 7, 1997 (the date of the bankruptcy): $1,900,000.

(c) as at July 22, 1998: $1,800,000.

[21] The sales proceeds were $1,700,000.

Issues on Appeal

[22] Ms. Barnes appeals on the following grounds:

(a) The chambers judge erred in failing to award Ms. Barnes the value of the fraudulently conveyed interest in the property as of the date of the fraudulent conveyance, or alternatively, the date of the bankruptcy, in each case with interest. According to Ms. Barnes' calculations, under the first alternative, she would be entitled to all of the money held in her solicitor's trust account plus judgment against the respondent for the balance owing of $177,018.75, and under the second alternative, to 97.97% of the money held in trust.

(b) The trial judge erred in failing to award Ms. Barnes compensation for "ouster", calculated at $2,500 per month from the date of bankruptcy (May 7, 1997) to the date of sale (February 25, 2000) plus interest. According to Ms. Barnes' calculations, she would be entitled to 97.24% of the money held in trust.

[23] On the cross-appeal, Ms. Kostiuk claims the chambers judge erred in finding that she was to bear half of the burden of the $300,000 mortgage registered at the time Mr. Kostiuk conveyed his interest in the property to her.

[24] At the hearing, Ms. Kostiuk's counsel advised the Court that Ms. Kostiuk claimed that any occupational rent allowed to Ms. Barnes should be offset by expenses incurred by Ms. Kostiuk in maintaining the property while it was owned by Ms. Kostiuk and Ms. Barnes and occupied by Ms. Kostiuk and her family. That claim was not addressed in the notice of cross-appeal or in either of the factums. Both parties provided written submissions on this issue following the hearing.

[25] These grounds of appeal and cross-appeal raise the following issues:

(a) Do the principles of the assessment of damages for conversion apply to the determination of Ms. Barnes' share of the proceeds from the sale of the property?

(b) Is Ms. Barnes entitled to be compensated for being ousted from possession of the property?

(c) Is Ms. Kostiuk liable for half of the mortgage charging Mr. Kostiuk's interest in the property at the time she acquired it from him?

Division of Net Proceeds: the "Conversion" versus the "Joint Ownership" Approach

[26] In chambers and on this appeal, Ms. Barnes' counsel argued that the principles applicable to the assessment of damages for the tort of conversion should be applied in determining Ms. Barnes' share of the proceeds of the sale of the property.

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[27] Hunter J. rejected Ms. Barnes' arguments on the grounds that conversion does not apply to land and Ms. Barnes had not pleaded conversion. He also rejected her argument based on s. 98(2) of the ***Bankruptcy and Insolvency Act***. I agree with Hunter J.'s reasons for rejecting Ms. Barnes' arguments, but to meet counsel's arguments on the appeal, find it necessary to discuss in more general terms why the principles of the assessment of damages for conversion that counsel seeks to apply have no application in this case.

[28] Ms. Barnes' arguments are based on the principle that in an action for conversion, damages are assessed as the value of the property at the date of the wrong (John G. Fleming, ***The Law of Torts***, 9th ed. (Ontario: Carswell, 1998) at p. 76). Thus, where, as here, the value of the property declines between the date of the wrong and the date of judgment, a successful plaintiff does not bear the burden of that decline.

[29] Ms. Barnes' counsel cited numerous authorities to support his submission that courts have applied this principle of valuation in determining the entitlement of a creditor or trustee in bankruptcy who has sued to recover the value of property fraudulently conveyed by an insolvent debtor or bankrupt, whether or not the action is framed in conversion. None of the authorities, however, deal with a fraudulent conveyance or settlement of land. Indeed, it is clear in law, and not a matter of dispute in this appeal, that the tort of conversion does not apply to land. The authors of ***Prosser and Keeton on The Law of Torts***, 5th ed. (St. Paul, Minn.: West Publishing Co., 1984) explain why (at pp. 90-1):

> What property may be the subject of an action for conversion was at first determined on the basis of the fiction of losing and finding. Any tangible chattel could be lost and found, and so could be converted. Land, on the other hand, was obviously incapable of getting lost, and therefore, trover would not lie for the dispossession or withholding of real property.

[30] As I understand counsel's argument, he does not claim that Ms. Barnes is legally entitled to maintain an action for conversion. Rather, he says that there is no reason not to apply the same principles that govern the assessment of damages for conversion of goods to the wrongful taking of land by a fraudulent conveyance or void settlement. If those principles were applied, he says, Ms. Barnes' share of the net proceeds of the sale of the property would be valued at the date the wrongful conveyance took place, or alternatively, at the date of the bankruptcy, and she would not suffer the loss of value of the property between either of those dates and the date of sale. Counsel argues that as between the fraudulent transferee (Ms. Kostiuk) and the trustee in bankruptcy (or his assignee, Ms. Barnes), the fraudulent transferee should bear the burden of the loss of value. Counsel submits further that Ms. Barnes' claim should not fail due to a technicality of law or pleading.

[31] The short answer to this argument is that, with respect, it is based on a wrong premise. Ms. Barnes' claim is misconceived, not only because the subject-matter of the transfer was land (although that would bar an action for conversion), nor because of a mere technicality of law or formality of pleading.

[32] Ms. Barnes's claim to a share of the proceeds of the sale of the property derives from her proprietary interest in the property. She acquired that interest in the statutory proceedings she pursued to have the transfer of the property by Mr. Kostiuk set aside, so that she could execute against the property to satisfy her judgment against him. She has no claim for damages or compensation with respect to the transfer of the property by Mr. Kostiuk to his wife. Having been awarded title to a one-half interest in the property, she is entitled to that share of the property or the proceeds of its sale. The value of the property at the date of the transfer or bankruptcy is irrelevant to her claim to a share of the net proceeds.

[33] In his text, ***The Law of Damages***, (Aurora, Ontario: Canada Law Book Inc., 2001), Prof. S.M. Waddams discusses the difference between a proprietary remedy and compensation for property wrongfully taken (at p. 9-7):

> Whenever the plaintiff can assert an ownership interest in specific property, the effect will be to enable the plaintiff to capture any increase in value of the property in the defendant's hands [or suffer any loss where the value of the property declines]. This question was discussed in Chapter 1 in connection with the date for the assessment of damages. The questions of the right and the remedy, as is often the case, are intertwined. If property is wrongly taken from the plaintiff but the plaintiff is only allowed to recover its value at the date of the wrong, this amounts to saying that the plaintiff has lost proprietary interest, for if the law will not assist the plaintiff to regain possession of the property, one of the chief incidents of ownership is denied to the plaintiff. On the other hand, if the starting point is that the plaintiff remains, in the full sense, owner of the property, it follows that the plaintiff cannot be limited to compensation measured by its value at the date of the wrong, because the plaintiff will – for such are the incidents of ownership – be entitled to use self-help to recapture the property and to the legal remedies of replevin and detinue [in respect of chattels], and probably to injunctive and declaratory relief as well.

[34] Even if the principles of the assessment of damages were applicable to determine Ms. Barnes' share of the net proceeds of sale of the property (which they are not), the principles applicable to conversion, where damages are assessed based on the value of goods at the date of the wrongful taking, would not likely apply in any event. Because Ms. Barnes' claim is to specific property, any damages would likely be assessed as the value at the date of judgment or trial,

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as in an action for detinue or for damages in lieu of specific performance. That is because where the plaintiff's claim is to property which cannot be replaced or to specific property, the plaintiff's interest in the property continues until judgment.

[35] In an action for detinue of goods, the wrong is the failure or refusal to deliver up goods when demand is made. In assessing damages, the goods are valued at the date of trial: see ***R.F. Fry & Associates (Pacific) Ltd. v. Peter Reimer & Deacon Barclays De Zoete Wedd Ltd.*** 1993 CanLII 300 (BC CA), (1993), 83 B.C.L.R. (2d) 199 (C.A.) at para. 23, and ***Steiman v. Steiman et al.*** reflex, (1982), 143 D.L.R. (3d) 396 at 407 (Man.C.A.) where O'Sullivan J.A. for the majority, explained the difference between conversion and detinue:

> A person who finds his goods taken may continue to regard the goods as his own and sue in detinue for their return but if he elects to claim damages for conversion his damages must be based on the supposition that he has replaced the missing goods at market prices.
>
> The victim who replaces converted goods will not lose any appreciation in value by reason of a rising market. If the victim were permitted to recover damages as of the date of trial for goods which he has in fact replaced by purchase, he would gain twice from appreciation – once on the goods converted and once on the goods purchased.
>
> . . .
>
> It is true that where there is a wrongful taking the victim may have the alternative of claiming in detinue, where the unsuccessful defendant must replace the goods or pay the value at the time of trial. But the plaintiff then runs the risk of a falling market and of depreciation in value; the defendant's option to restore the goods continues to judgment and maybe even to execution.

[36] Prof. Waddams draws an analogy between the assessment of damages in detinue and for damages in lieu of specific performance (at p. 1-49):

> ...if the plaintiff brings an action in detinue, the court has jurisdiction to order specific delivery of the chattel claimed. Such an order has the effect of giving the plaintiff the benefit of any increase in the value of the chattel between the date of the wrong and the date of judgment. Just as in the case of damages in lieu of specific performance, it seems to follow that on refusal of specific delivery the plaintiff must be entitled to damages representing the value of the chattel at the date of judgment. The analogy was drawn in *Malhotra v. Choudhury* [[1980] 1 Ch. 52 at 78 (C.A.)]:
>
> > The equitable remedy of specific performance has features markedly different from damages at common law for breach of contract. But there is an analogy at common law to the equitable remedy of specific performance. This is to be found in the action in detinue...the action in detinue partakes of the nature of an action in rem in which the plaintiff seeks specific restitution of his chattel. In this action where an order for a writ of specific delivery can be made, the plaintiff has always been entitled instead to claim its value in money assessed at the date of judgment.

[37] Thus, there is no support in law for the argument that Ms. Barnes' proprietary interest in the property should be valued at a date other than the date of sale. Nor, with respect, is there any other reason that she should be compensated for the decline in value between the date of transfer or the date of bankruptcy, and the sale. Ms. Barnes had no proprietary interest in the property at either the date of the transfer or the date of bankruptcy that was affected by the transfer. At the date of the transfer of the property from Mr. Kostiuk to Ms. Kostiuk, Ms. Barnes was a plaintiff in a lawsuit against the transferor, Mr. Kostiuk, and at the time of the bankruptcy, she was a judgment creditor of Mr. Kostiuk. Ms. Barnes acquired her interest in the property only when title was awarded to her by Sigurdson J.

[38] I am of the opinion, therefore, that the chambers judge was correct in rejecting Ms. Barnes' claim that her share of the net proceeds should be determined applying principles applicable to conversion.

Ouster, Occupational Rent and Expenses

[39] Ms. Barnes claims that Ms. Kostiuk deprived her of possession and enjoyment of her interest in the property and she is entitled to be compensated by the payment of occupational rent. Ms. Barnes claims compensation from the date of bankruptcy, on the basis that the trustee in bankruptcy was entitled to possession of Mr. Kostiuk's former interest in the property as of that date, and Ms. Barnes stepped into the shoes of the trustee by the assignment.

[40] The chambers judge rejected Ms. Barnes' claim for occupational rent on the ground that she was not ousted within the definition stated in ***M. v. H.*** 1994 CanLII 7224 (ON SC), (1994), 17 O.R. (3d) 118 at 133 (Gen.Div): "...the act of wrongfully putting one out of rightful possession of his or her property".

[41] The concept of ouster and the circumstances in which occupation rent will be ordered is explained more fully in ***Dennis v. MacDonald***, [1981] 1 W.L.R. 810 at 816-7 (Fam.D.), affirmed [1981] 2 W.L.R. 275 (C.A.):

> Mr. Walker submitted, I think correctly, that when one looks at the judgment in ***M'Mahon v. Burchell***, 2 Ph. 127 together with the extract from the judgment of Stirling J. in *Hill v. Hickin* [1897] 2 Ch. 579 the true

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> position under the old authorities was that the Court of Chancery and Chancery Division would always be ready to inquire into the position as between co-owners being tenants in common either at law or in equity to see whether a tenant in common in occupation of the premises was doing so to the exclusion of one or more of the other tenants in common for whatever purpose or whatever means. If this was found to be the case, then if in order to do equity between the parties an occupation rent should be paid, this would be declared and the appropriate inquiry ordered. Only in cases where the tenants in common not in occupation were in a position to enjoy their right to occupy but chose not to do so voluntarily, and were not excluded by any relevant factor, would the tenant in common in occupation be entitled to do so free of liability to pay an occupation rent.

[42] Most of the cases in which these matters are considered concern co-owners who have, at one time, shared possession of the property, and one co-owner subsequently either leaves or is excluded. Many arise in cases of matrimonial disputes. There are few cases where, as here, the co-owners are strangers and one co-owner has never been in possession.

[43] The fact that a co-owner had sole possession does not prove ouster because one co-owner is entitled to be in possession of the entirety, but if possession is demanded and refused, on the grounds that the co-owner in possession claims the whole property as his own, "such possession is adverse and ouster enough" (***Doe v. Prosser*** (1774), 1 Cowp. 217, 98 E.R. 1052). The co-owner alleging ouster must prove that the other co-owner is in possession with the intention of ousting her (***Allison v. Smith*** (1877), 17 N.B.R. 199 (C.A.)).

[44] In this case, Ms. Kostiuk denied Ms. Barnes' claim during the litigation to set aside the transfer. In my view, that denial of title does not amount to ouster. Ms. Kostiuk was entitled to mount a defence to Ms. Barnes' claims.

[45] In January 1999, after Sigurdson J. declared the transfer void as a settlement, Ms. Barnes, through her counsel, demanded access to the property and was refused. On March 30, 1999, after Vickers J. made his order for sale, she attended at the property with a solicitor and demanded access, which was refused. She argues that these events are evidence of Ms. Kostiuk's intention to exclude Ms. Barnes from possession and amount to ouster.

[46] In my view, Ms. Barnes has failed to prove ouster. She had no proprietary claim to the house at the date of bankruptcy. It cannot be said that during the litigation to set aside the transfer Ms. Kostiuk was in possession with the intention of ousting either the trustee or Ms. Barnes. That Sigurdson J.'s order nullifying the transfer granted ownership to Ms. Barnes as of October 22, 1997, the date of the assignment of the trustee's claims to her, does not change the facts as they existed up to the date the order was granted.

[47] When Ms. Barnes demanded possession of the property in January 1999, she had already brought her application for an order for sale under the ***Partition of Property Act***. That indicates that she was not seriously demanding possession of the property, but was only attempting to create evidence to support a claim for occupational rent.

[48] In my view, the chambers judge made no error in denying the claim of ouster and for occupational rent.

[49] Related to Ms. Barnes' claim for occupational rent is Ms. Kostiuk's claim for expenses; however, it is not clear whether Ms. Kostiuk claims expenses independently or only in setoff of any occupational rent that may be awarded to Ms. Barnes.

[50] If Ms. Kostiuk's claim is that she is entitled to claim expenses in setoff of occupational rent, the denial of occupational rent to Ms. Barnes forecloses that claim.

[51] If Ms. Kostiuk is claiming entitlement to contribution for expenses independently of Ms. Barnes' claim for occupational rent, Ms. Kostiuk's claim is subject to an allowance for use and occupation or will be allowed only to the extent that she made improvements that have increased the value of the property (see ***Mastron v. Cotton***, [1926] 1 D.L.R. 767 (Ont. S.C.-App. Div.), and cases cited therein, including ***Pascoe v. Swan*** (1859), 27 Beav. 508, 54 E.R. 201 and ***Leigh v. Dickeson*** (1884), 15 Q.B.D. 60 (C.A.)).

[52] In her affidavit prepared for the hearing before Hunter J., Ms. Kostiuk claimed that she paid:

> ...all of the utilities, repair and upkeep costs and other expenses associated with ownership of the house. These expenses (which included hydro, landscaping fees, pool maintenance costs and other charges) averaged roughly $1,500 per month.

There is no evidence that any of these expenditures contributed in any lasting way to the value of the property.

[53] In all of these circumstances, I would make no allowance to Ms. Kostiuk for maintenance expenses incurred by her with respect to the property.

The Burden of the $300,000 Mortgage

[54] The chambers judge concluded that Ms. Kostiuk should share half of the burden of the $300,000 mortgage on Mr. Kostiuk's interest in the property at the time it was transferred to her, because she had benefited from it. Ms. Kostiuk does not dispute the finding of fact that she benefited from the proceeds of the mortgage, but says that fact gives Ms. Barnes,

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standing in the shoes of the trustee in bankruptcy, and derivatively, Mr. Kostiuk, no claim against her for half of Mr. Kostiuk's mortgage debt.

[55] Ms. Barnes' position is that if the proceeds of sale of the property are divided in accordance with the "joint ownership" approach, the charges on the property on the date of sale are presumptively divided equally and it is up to Ms. Kostiuk to prove that in equity she is entitled to shift the burden to Ms. Barnes.

[56] In my view, it is consistent with the approach to be taken to the division of the net proceeds to find that, subject to adjustments made on legal or equitable grounds, Ms. Kostiuk bears half the burden of the mortgages registered against both her interest and that of Ms. Barnes at the date of sale. (The parties agreed to the manner in which they would share the burden of the mortgages other than the original $300,000 mortgage.) The onus is on Ms. Kostiuk to show that she should be relieved of her share of the burden.

[57] The argument made by Ms. Kostiuk before Hunter J. was that she was entitled to the benefit of the principle of "equitable exoneration". That principle is summarized in ***Re Pittortou***, [1985] 1 All E.R. 285 at 287 (Ch.):

> As a general proposition, if there is found a charge on property jointly owned to secure the debts of one only of the joint owners, the other joint owner, being in the position of a surety, is entitled as between the two joint owners to have the secured indebtedness discharged so far as possible out of the equitable interest of the debtor. The principle is expressed in 22 Halsbury's Laws (4th edn) paras 1071-1076, under the general heading "Equity of Exoneration'. Paragraph 1071 begins:
>
> > 'If the property of a married woman is mortgaged or charged in order to raise money for the payment of her husband's debts, or otherwise for his benefit, it is presumed, in the absence of evidence showing an intention to the contrary, that she meant to charge her property merely by way of security, and in such case she in is the position of surety and is entitled to be indemnified by her husband, and to throw the debt primarily on his estate to the exoneration of her own...'
>
> . . .
>
> However, the equity of exoneration is a principle of equity which depends on the presumed intention of the parties. If the circumstances of the particular case do not justify the inference, that it was the joint intention of the joint mortgagors that the burden of the secured indebtedness should fall primarily on the share of that of them who was the debtor, then that consequence will not follow.

[58] The principle of "equitable exoneration", as it applies to property dealings involving husbands and wives, is derived from cases that were decided more than one hundred years ago: see ***Paget v. Paget***, [1898] 1 Ch. 470 (C.A.). The laws and social customs governing those dealings have little application today. Nonetheless, the principle is applied, in the proper case, taking into account modern marriage relationships: see ***Re Pittortou*** at pp. 288-9 and ***Slan v. Blumenfeld*** 1997 CanLII 12259 (ON SC), (1997), 34 O.R. (3d) 713 at 719 and 725 (Ont. Ct.-Gen. Div.). The question is the intention of the parties as to who should bear the burden of the indebtedness and whether the spouse who claims the benefit of the doctrine benefited from the debt: see, in addition to ***Re Pittortou*** and ***Slan***, ***Re Berry***, [1978] 2 N.Z.L.R. 373 (C.A.); ***Farrugia v. Official Receiver*** (1982), 43 A.L.R. 700 (Fed. Ct.); ***317363 Canada Inc. v. Doctor*** 1997 CanLII 12418 (ON SC), (1997), 50 C.B.R. (3d) 264 (Ont. Ct.-Gen . Div.); ***McCoy v. Hucker***, [1998] O.J. No. 2831 (Ont. Ct.-Gen. Div.)(QL).

[59] The chambers judge found that Ms. Kostiuk benefited from the mortgage and had agreed with Mr. Kostiuk that she would repay it. On those facts, the principle of equitable exoneration would not apply to shift the burden of the $300,000 mortgage to Mr. Kostiuk or on to his previous interest in the property. Although Ms. Kostiuk's counsel advised that she does not rely on the principle of equitable exoneration on this appeal, he made no alternate argument to satisfy the onus on her to show that her share of the mortgage should be borne by Ms. Barnes.

[60] I conclude that the chambers judge made no error in concluding that Ms. Kostiuk is not entitled to be relieved of the burden of half the $300,000 mortgage.

Conclusion

[61] Since writing these reasons for judgment, I have had the privilege of reading those of my colleague, Mr. Justice Smith, and agree with his elucidation of the issues raised in this appeal.

[62] I would dismiss the appeal and the cross-appeal.

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Madam Justice Newbury"

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Reasons for Judgment of the Honourable Mr. Justice Smith:

[63] I have had the privilege of reading the reasons for judgment of my colleague Madam Justice Levine in draft form and I agree with her proposed disposition of this appeal. I agree generally, as well, with her reasons but I wish to state in my own words my reasons in respect of the issue concerning the proper division of the proceeds of sale of the property.

[64] As my colleague has set out the facts fully, I will not mention them save as is necessary to make my points.

[65] In my opinion, Ms. Barnes has conflated the remedial aspects of a personal, common-law cause of action with the statutory rights of which she has availed herself as a judgment creditor of Mr. Kostiuk.

[66] Conversion, a proprietary cause of action at common law, lies only in respect of chattels. The action may be brought by anyone who was in actual possession of the chattels, or anyone who was entitled to their immediate possession, at the time of the conversion. The usual remedy is an order that the defendant pay the value of the chattel at the time that it was wrongfully taken together with any consequential loss. The nature and historical development of this cause of action are discussed in many learned treatises: see, for example, J.H. Baker, *An Introduction to English Legal History*, 2d ed. (London: Butterworths, 1979) at 328-335; John G. Fleming, *The Law of Torts*, 9th ed. (Ontario: Carswell, 1998) at 60-82.

[67] Neither the cause of action in conversion nor its remedies have anything to do with Ms. Barnes' rights in this proceeding. The subject matter of this proceeding is not a chattel and, until the order of Sigurdson J. vested title to Mr. Kostiuk's former interest in her name, Ms. Barnes had no ownership or possessory interest in the lands.

[68] Rather, Ms. Barnes' rights are purely statutory. They arose, initially, out of her status as a judgment creditor of Mr. Kostiuk. As such she had a statutory right to bring action under s. 1 of the ***Fraudulent Conveyance Act***, R.S.B.C. 1996, c. 163. Success in the action would have entitled her to a declaration that the conveyance by Mr. Kostiuk was fraudulent and void as against her and as against Mr. Kostiuk's other creditors and to a direction that Mrs. Kostiuk do whatever should be necessary to make Mr. Kostiuk's interest available for execution. The usual order is described in H.W. May, *The Law of Fraudulent and Voluntary Conveyances*, 3rd ed. (London: Stevens and Haynes, 1908) at 316:

> Where a deed is declared void against creditors, and the settlor is not a bankrupt, the Court will not order it to be delivered up to be cancelled, if any property passed by it, but will direct the trustees or grantees under it to do, and concur in, all acts necessary for making the property therein comprised available for creditors. The reason of this is, that the grantees are entitled, subject to the rights of creditors, and there might be a surplus after paying all the creditors. And where a deed is set aside by creditors, before all the assets are got in, the Court will consider the assets, when realised, as still subject to the settlement, if there be any surplus after meeting all the settlor's liabilities.
>
> Where, however, no property passes, or is intended to pass, by the deed, or the grantor is a bankrupt, the Court will order it to be delivered up to be cancelled, and has full jurisdiction to do so. [citations omitted]

[69] In that passage, the author was discussing orders made pursuant to the ***Statute of Elizabeth***, 1571 (13 Eliz. 1, c. 5), which is the model for our ***Fraudulent Conveyance Act***: see ***Ramgotra (Trustee of) v. North American Life Insurance Co.***, 1996 CanLII 219 (SCC), [1996] 1 S.C.R. 325 at paras. 61-63.

[70] As examples of cases where such orders have been made pursuant to fraudulent-conveyance legislation, see: ***Fuhr v. Fuhr***, reflex, [1936] 2 W.W.R. 237, 50 B.C.R. 438 (B.C.S.C.); ***Mackey v. Mackey***, reflex, [1930] 1 W.W.R. 604, 42 B.C.R. 440, [1930] 3 D.L.R. 497 (B.C.S.C.); ***Union Bank of Canada v. Johnson*** (1910), 3 Alta. L.R. 207, 13 W.L.R. 519 (Alta. S.C. (Trial)); ***Adams v. Adams*** reflex, (1961), 38 W.W.R. 54 (Sask. Q.B.); ***Jaston & Co. v. McCarthy*** 1998 CanLII 6455 (BC CA), (1998), 8 C.B.R. (4th) 25, [1999] 7 W.W.R. 243, 59 B.C.L.R. (3d) 168, 168 D.L.R. (4th) 415 at para. 70 (B.C.C.A.); ***Vern-View Investments Inc. v. Hale*** 1991 CanLII 1776 (BC CA), (1991), 58 B.C.L.R. (2d) 322 at para. 22 (C.A.).

[71] Thus, success by Ms. Barnes in her action under the ***Fraudulent Conveyance Act*** would not have entitled her to the value of Mr. Kostiuk's interest in the lands at an earlier date; it would have entitled her only to have the interest conveyed by Mr. Kostiuk made available for execution to satisfy her judgment. Ms. Barnes had no other interest in the property: see ***Taylor v. Cummings*** (1897), 27 S.C.R. 589, which involved an action brought under the ***Statute of Elizabeth*** in which the grantees had disposed of the property fraudulently conveyed in good faith and without notice of the grantor's fraud. At p. 592 of that decision, Sedgewick J. said:

> We are of opinion that this appeal should be dismissed, not only for the reasons stated by the learned judges below, but because in our view the action itself was baseless except in so far as it sought to set aside the deed in question and thereby render the property covered by it available for execution or garnishment at the instance of judgment creditors.
>
> The claim of the plaintiff for an account against [the defendants], with a view of making them pay over to the creditors the moneys received by them under the deed on account of the assignor's

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> indebtedness to them, is absolutely untenable under English law, in an action to declare a deed void under the statute of Elizabeth. No decree has ever yet been made ordering restitution of property parted with by the assignor of the deed or person claiming under him. That statute avoids the deed, nothing more – it leaves the creditor defeated to his ordinary remedies, execution, garnishment. No English case has been shown where, in a suit of this kind, a personal liability for property disposed of has been cast upon persons taking under the deed, and the reason is obvious. A creditor as such has no claim either at law or in equity to his debtor's property. He must first obtain his judgment and charge it by way of execution.
>
> (my emphasis)

[72] Sedgewick J. went on to indicate that the result might have been otherwise in that case had the grantor and the grantee deliberately combined and conspired to dispose of the property in fraud of the creditors. There is nothing of that sort here, as Mrs. Kostiuk did not dispose of the interest fraudulently conveyed to her by her husband. The interest remained vested in her and, therefore, amenable to an order under the ***Fraudulent Conveyance Act***.

[73] However, as my colleague has noted, Mr. Kostiuk's bankruptcy stayed the action before Ms. Barnes could proceed to judgment and, as a consequence, she obtained an order, pursuant to s. 38 of the ***Bankruptcy and Insolvency Act***, R.S. 1985, c. B-3, to take proceedings in her own name to set aside the conveyance of the property by Mr. Kostiuk. This, too, is a purely statutory right: see ***Jaston& Co. v. McCarthy***, *supra*, at paras. 27-28, 34.

[74] Section 38 provides, so far as is relevant:

> **38.** (1) Where a creditor requests a trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> (2) On an order under subsection (1) being made the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject matter of the proceeding, including any document in support thereof.
>
> (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.
>
> ...

[75] In ***Ramgotra***, *supra*, the Court observed that the general scheme of the ***Bankruptcy and Insolvency Act*** involves two distinct phases: the "property-gathering" stage and the "estate-administration" stage [paras. 44-46, and 49]. In the property-gathering stage, all of the bankrupt's property passes to and vests in the trustee by operation of s. 71(2) and the trustee is obliged, by s. 16(3), to "take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory. ..." [paras. 44]. Paragraph 46 of the decision describes actions that the trustee may take during the property-gathering stage to set aside transactions that have reduced the bankrupt's estate. Pursuant to s. 91, the trustee may set aside certain settlements. Similarly, the trustee may set aside certain assignments of book accounts, pursuant to s. 94, and certain transactions with creditors that are deemed to be fraudulent, pursuant to s. 95. As well, by s. 98(1), the trustee may take possession of the proceeds of sale of settled property to a third party where the original settlement is void. The fruits of such actions revert to the bankrupt's estate and fall into the possession of the trustee in bankruptcy.

[76] A trustee in bankruptcy may also take advantage of provincial legislation to attack fraudulent conveyances and preferences: ***Robinson v. Countrywide Factors Ltd.***, 1977 CanLII 175 (SCC), [1978] 1 S.C.R. 753. Unlike a creditor suing under the ***Fraudulent Conveyance Act,*** who may only have the property made available for execution, a trustee in bankruptcy may have the conveyance set aside and the property returned to the estate. Thus, by operation of s. 38(3) of the ***Bankruptcy and Insolvency Act***, any surplus remaining after satisfying the judgment creditor's claim vests in the estate for the benefit of all creditors.

[77] Here, Ms. Barnes did not commence a new proceeding on behalf of the trustee pursuant to the ***Fraudulent Conveyance Act***. Rather, she sought and obtained judgment in the bankruptcy proceeding on the pleadings filed and evidence taken in the fraudulent-conveyance action that she had earlier commenced. By consent of the parties, Sigurdson J. treated the motion in the bankruptcy proceeding as if it were a summary trial in the fraudulent-conveyance action conducted pursuant to Rule 18A of the ***Rules of Court***. The benefit of the action – the judgment – fell exclusively to Ms. Barnes to the extent of her judgment against Mr. Kostiuk and costs by operation of s. 38(3) of the ***Bankruptcy and Insolvency Act***.

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[78] No cases were cited to us in which, in an action under the ***Fraudulent Conveyance Act***, the plaintiff, whether judgment creditor or trustee in bankruptcy, has been awarded the value of land fraudulently conveyed to and retained by the grantee. That is not surprising as, it seems to me, such an award would be contrary to principle as established by venerable authority.

[79] In any event, whether the value of Mr. Kostiuk's interest in the lands was available to the trustee in bankruptcy or to Ms. Barnes' suing in the trustee's name under the ***Fraudulent Conveyance Act*** is not an issue in this case. The proper time for the submissions that were made to us by Ms. Barnes was when the appropriate form of judgment consequent on the reasons for judgment of Sigurdson J. was before him for decision. The judgment that he granted did not order that Mrs. Kostiuk pay to Ms. Barnes the value of the interest that she received from Mr. Kostiuk nor that she make the one-half interest available for execution by Ms. Barnes on her judgment against Mr. Kostiuk. Rather, he ordered that title to the one-half interest be registered in Ms. Barnes' name. The benefit obtained by Ms. Barnes pursuant to s. 38(3) of the ***Bankruptcy and Insolvency Act*** was, therefore, the property itself.

[80] Next, as my colleague has also set out, Ms. Barnes applied for an order for sale of the property pursuant to the ***Partition of Property Act***, R.S.B.C. 1996, c. 347, and was granted an order in that proceeding by Vickers J. on March 8, 1999. In his reasons for judgment, Vickers J. said:

> There will be an order pursuant to the provisions of s. 6 of the ***Act*** that the West Vancouver Property and the Whistler Property be sold, the petitioner to have exclusive conduct of the sale and be at liberty to list both properties for sale. The sale of the property will require approval of the court and the net proceeds of sale are to be paid into court pending a determination of the respective interests of the parties.

[81] Section 6 of the ***Partition of Property Act*** provides:

> **6.** In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of ½ or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.
>
> (my emphasis)

[82] Again, it must be noted that Ms. Barnes was asserting a statutory right, that is, to a sale of the property and to a distribution of the proceeds of sale.

[83] Sections 11 to 15 of the ***Partition of Property Act*** provide for the disbursement of the proceeds of sale of the property. The general principle upon which distribution of the sale proceeds should be made is described in ***Mastron v. Cotton***, [1926] 1 D.L.R. 767 at 768 (Ont.S.C., App. Div.):

> ... when a joint tenancy is terminated by a Court order for partition or sale, the Court may in such proceedings make all just allowances and should give such directions as will do complete equity between the parties: ***Gage v. Mulholland*** (1869), 16 Gr. 145; ***Rogers v. Mackenzie*** (1799), 4 Ves. 752, 31 E.R. 389; 33 Corp. Jur., p. 909; Taylor's Equity, p. 1666, para. 376.
>
> What is just and equitable depends on the circumstances of each case....

[84] In my opinion, Ms. Barnes had no legal or equitable interest in the proceeds of sale of the property beyond her right to have the proceeds distributed equitably in relation to her interest as a tenant-in-common. I agree with Madam Justice Levine that no error has been shown in the manner in which the chambers judge dealt with this matter.

"The Honourable Mr. Justice Smith"

I AGREE:

"The Honourable Madam Justice Newbury"

September 6, 2002

The following changes were made:

1) At p. 29, at the end of para. 69 reference to paras. 80-84 of **Ramgotra** should instead be to paras. 61-63;
2) At p. 32 in the first sentence of para. 75 reference to paras. 56-58 of **Ramgotra** should be to paras. 44-46, and 49.
3) At p. 32 in the second sentence of para. 75 reference to paras. 56-57 should be to para. 44.
4) At p. 33, in the third sentence of para. 75 reference to para. 59 of **Ramgotra** should be to para. 46;

Establishing values - Sec. 96(2)

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the

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court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Meaning of "person who is privy" - Sec. 96(3)
(3) In this section, a "person who is privy" means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.
R.S., 1985, c. B-3, s. 96;
1997, c. 12, s. 79;
2004, c. 25, s. 57;
2005, c. 47, s. 73;
2007, c. 36, s. 43.

Protected transactions - Sec. 97
97. (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;
(b) a payment or delivery to the bankrupt;
(c) a transfer by the bankrupt for adequate valuable consideration; and
(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Definition of "adequate valuable consideration" - Sec. 97(2)
(2) The expression "adequate valuable consideration" in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Law of set-off or compensation - Sec. 97(3)
(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.
R.S., 1985, c. B-3, s. 97;
1992, c. 27, s. 41;
1997, c. 12, s. 80;
2004, c. 25, s. 58;
2005, c. 47, s. 74.

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Date: 2005-10-06
Docket: 29822
Parallel citations: 2005 SCC 52 (CanLII); 258 DLR (4th) 213
URL: http://canlii.ca/t/1lqrh
Citation: D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General), 2005 SCC 52 (CanLII), [2005] 2 SCR 564, <http://canlii.ca/t/1lqrh> retrieved on 2013-08-15
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SUPREME COURT OF CANADA

CITATION: D.I.M.S. Construction inc. (Trustee of) *v.* Quebec (Attorney General), [2005] 2 S.C.R. 564, 2005 SCC 52

DATE: 20051006
DOCKET: 29822

BETWEEN:

Attorney General of Quebec,
Commission de la construction du Québec and
Commission de la santé et de la sécurité du travail
Appellants
v.
Raymond Chabot Inc., in its capacity as trustee in the bankruptcy of D.I.M.S. Construction Inc.
Respondent
- and -
Attorney General of Ontario
Intervener
OFFICIAL ENGLISH TRANSLATION

CORAM: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 75) Deschamps J. (Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ. concurring)

D.I.M.S. Construction inc. (Trustee of) *v.* Quebec (Attorney General), [2005] 2 S.C.R. 564, 2005 SCC 52

Attorney General of Quebec,
Commission de la construction du Québec and
Commission de la santé et de la sécurité du travail *Appellants*

v.

Raymond Chabot inc., in its capacity as trustee in the bankruptcy of D.I.M.S. Construction inc. *Respondent*

and

Attorney General of Ontario *Intervener*

Indexed as: D.I.M.S. Construction inc. (Trustee of) *v.* Quebec (Attorney General)
Neutral citation: 2005 SCC 52.

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File No.: 29822.
2004: December 8; 2005: October 6.
Present: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.
on appeal from the court of appeal for quebec

Bankruptcy — Scheme of distribution — Right to compensation and right to retain — Provincial statutes requiring employer who retains services of contractor to pay amounts due from contractor to provincial bodies — Statutes entitling employer to be reimbursed by contractor or to retain amount paid out of sums employer owes contractor — Whether, in context of bankruptcy, provincial statutes incompatible with scheme of distribution established by federal bankruptcy legislation — Whether equitable set-off applicable in bankruptcy in Quebec — Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001, s. 316 — Act respecting labour relations, vocational training and manpower management in the construction industry, R.S.Q., c. R-20, s. 54 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 97(3), 136 to 147.

Constitutional law — Division of powers — Bankruptcy — Scheme of distribution — Provincial statutes requiring employer who retains services of contractor to pay amounts due from contractor to provincial bodies — Statutes entitling employer to be reimbursed by contractor or to retain amount paid out of sums employer owes contractor — Whether provincial statutes inapplicable or inoperative by reason of being in conflict with scheme of distribution established by federal bankruptcy legislation — Constitution Act, 1867, s. 91(21) — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 97(3), 136 to 147 — Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001, s. 316 — Act respecting labour relations, vocational training and manpower management in the construction industry, R.S.Q., c. R-20, s. 54.

The Commission de la santé et de la sécurité du travail ("CSST") established an assessment in respect of the activities of a contractor. The contractor did not pay the assessment and the CSST required three employers that had awarded contracts to the contractor to pay the assessment pursuant to s. 316 of the *Act respecting industrial accidents and occupational diseases* ("AIAOD"). The Commission de la construction du Québec ("CCQ") also demanded that the same employers pay unpaid wages owed by the contractor, pursuant to s. 54 of the *Act respecting labour relations, vocational training and manpower management in the construction industry* ("ALRCI"). One employer paid the CCQ before the contractor went bankrupt. After the bankruptcy, the trustee demanded that the three employers pay all amounts owing for work performed by the contractor. Two of the employers contested the claim, citing the demands for payment made by the CSST and the CCQ. The trustee applied to the Superior Court for a declaration that s. 316 AIAOD and s. 54 ALRCI do not apply in bankruptcy. The Superior Court dismissed the motion, but the Court of Appeal set aside that judgment.

Held: The appeal should be allowed. Section 316 AIAOD and s. 54 ALRCI do not alter the scheme of distribution under the *Bankruptcy and Insolvency Act* ("BIA").

In light of art. 1656(3) C.C.Q., a payment made in performance of the obligation imposed by the first paragraph of s. 316 AIAOD allows the employer to be substituted for the CSST in order to claim the amount of the assessment from the contractor. The right to retain referred to in the third paragraph of s. 316 adds nothing to the rights arising out of the subrogatory payment. That paragraph eliminates any doubt as to the employer's right to be reimbursed for the amount paid on the contractor's behalf and, where applicable, to effect compensation between the amount the employer owes the contractor and the amount the contractor owes the employer. [27] [30-31]

The compensation mechanism authorized by s. 316 AIAOD does not go beyond the framework of s. 97(3) BIA, which expressly recognizes certain cases of compensation. If the employer pays the CSST before the bankruptcy, and if the mutual debts of the employer and the contractor are certain, liquid and exigible, legal compensation is effected by operation of law and the debts are extinguished up to the amount of the lesser debt (arts. 1672 and 1673 C.C.Q.). Since the bankruptcy has not yet occurred when legal compensation is effected, the scheme of distribution under the BIA is not affected, because the claim against the employer is not part of the property vested in the trustee. If the employer's payment is made before the bankruptcy but the claim is not liquid at the time of the bankruptcy, the employer may, once the claim has been appraised, rely on s. 97(3) BIA, which dispenses with the trustee's status as a third party for the purposes of compensation and allows compensation to be set up as if the bankrupt were the plaintiff. The right to compensation thus has its basis in the BIA, not the civil law, which is more restrictive. If the payment is made after the bankruptcy, this subrogatory payment cannot give rise to compensation. Since s. 97(3) is an exception to the rule of equality between creditors, it must be interpreted narrowly. It must therefore be read in

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conjunction with ss. 121, 136(3) and 141 BIA as implicitly requiring that the mutual debts come into existence before the bankruptcy. The BIA does not depart from the rules established by arts. 1651 and 1681 C.C.Q., which provide that subrogation does not give the subrogated person any more rights than the subrogating creditor and that compensation may not be effected to the prejudice of third persons. The employer may nevertheless file a proof of claim to avail him or herself of subrogation to be reimbursed as an ordinary creditor for the amount paid to the CSST (s. 121 BIA). [43-45] [49] [54-57] [72]

Section 316 AIAOD does not subvert the scheme of distribution under the BIA. First, the right to be reimbursed is compatible with the BIA and, second, the right to retain can be exercised only in the circumstances provided for in the BIA, which is more open to compensation than Quebec civil law. Furthermore, from the perspective of *Husky Oil*, the s. 316 mechanism is compatible with the BIA. This is not a case involving a deemed payment or an employer acting as a mere agent. The claim accrues to the employer at the time of payment, and not by reason of the fact that the employer might be liable to pay should the contractor fail to do so. No right is granted to the CSST, as a third party, to the detriment of the body of creditors. Only an employer who has paid may exercise the right to retain, and the CSST is not affected by the employer's right to collect. Finally, because s. 97(3) BIA must be applied in Quebec on the basis of civil law and not common law rules, equitable set-off is inapplicable in bankruptcy in Quebec. [58] [62-64]

Nor does s. 54 ALRCI subvert the scheme of distribution under the BIA. In the case of s. 54, the wages due from a contractor constitute a solidary obligation between the contractor and the employer. The employer who pays the wages may demand to be reimbursed by the contractor pursuant to art. 1536 C.C.Q. or may rely on legal subrogation pursuant to art. 1656(3) C.C.Q. The principles stated in relation to s. 316 AIAOD also apply to s. 54. [66-73]

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APPEAL from a judgment of the Quebec Court of Appeal (Robert, Nuss and Lemelin JJ.A.), 2003 CanLII 5967 (QC CA), [2003] R.J.Q. 1104, 227 D.L.R. (4th) 629, 30 C.L.R. (3d) 81, [2003] Q.J. No. 3660 (QL), affirming a decision of Trudeau J., [2000] R.J.Q. 3056, 2000 CarswellQue 2924. Appeal allowed.

Hugo Jean, for the appellant the Attorney General of Quebec.
Martine Sauvé, for the appellant Commission de la construction du Québec.

René Napert, for the appellant Commission de la santé et de la sécurité du travail.
Bernard Boucher et *Sébastien Guy*, for the respondent.
Robin K. Basu and *Sarah Wright*, for the intervener.

English version of the judgment of the Court delivered by

DESCHAMPS J. —

1. Introduction

1 The issue raised in the case at bar is whether the rights provided for in s. 316 of the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001 ("AIAOD"), and s. 54 of the *Act respecting labour relations, vocational training and manpower management in the construction industry*, R.S.Q., c. R-20 ("ALRCI"), subvert the scheme of distribution provided for in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

2 Under s. 316 AIAOD, the Commission de la santé et de la sécurité du travail ("CSST") may, where a contractor's services are retained by an employer to whom the AIAOD applies, require the employer to pay an assessment due from the contractor. The same section provides that once the employer has paid the assessment, the employer is entitled to be reimbursed by the contractor and may retain the amount paid to the CSST out of any sums he or she owes the contractor. Section 54 ALRCI establishes a mechanism that, although based on solidarity, has the same effect; it permits the Commission de la construction du Québec ("CCQ") to bring claims against employers for unpaid wages owed by contractors with whom they have contracted.

3 On November 4, 1998, the CSST established an assessment in respect of the activities of D.I.M.S. Construction inc. ("DIMS"), a contractor. DIMS did not pay the assessment. The CSST then demanded that three employers that had awarded contracts to DIMS pay the assessment in the proportion provided for in

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s. 316 AIAOD. It claimed amounts from the Ministère des Transports du Québec ("MTQ") on November 26, 1998, Pavage Chenail inc. ("Chenail") on November 30, 1998, and Compagnie de pavage d'asphalte Beaver ("Beaver"), a division of Groupe Devesco ltée, on February 10, 1999. According to the evidence in the record, none of the employers had paid the CSST when DIMS went bankrupt on April 1, 1999, after its creditors refused a proposal.

4 The CCQ demanded that the same employers pay unpaid wages owed by DIMS in respect of contracts performed for those employers. The exact dates these demands were made do not appear in the record, except in the case of Beaver, to which one was sent on February 12, 1999. According to one document in the record, Chenail paid the CCQ before DIMS went bankrupt.

5 On April 23 and 29, 1999, Raymond Chabot inc., the trustee in the bankruptcy of DIMS, demanded that the three employers pay all amounts owing for work performed by DIMS. Chenail paid the trustee subject to a special indemnification agreement. The MTQ and Beaver contested the trustee's claim, citing the demands for payment made by the CSST and the CCQ. The trustee applied to the Superior Court for a declaration that s. 316 AIAOD and s. 54 ALRCI do not apply in bankruptcy. The trustee relied on *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453, in which it was held that the withholding mechanism available to employers under Saskatchewan's *Workers' Compensation Act, 1979* had the effect of creating a priority that subverted the scheme of distribution under the BIA.

6 The Superior Court dismissed the trustee's case on the ground that Quebec's scheme differed from Saskatchewan's scheme: [2000] R.J.Q. 3056. The Court of Appeal came to the opposite conclusion, finding that s. 316 AIAOD and s. 54 ALRCI violated the principles stated in *Husky Oil*: 2003 CanLII 5967 (QC CA), [2003] R.J.Q. 1104. The Attorney General of Quebec, the CSST and the CCQ appealed, contending that the provision authorizing the CSST and the CCQ to demand that employers pay contractors' unpaid assessments was valid. They raised no arguments concerning the right of employers to be reimbursed or to set up compensation. Even though the employers are not parties to the case, both the right of the CSST and the CCQ to collect and the right to reimbursement are in issue here, because the trustee impugns s. 316 AIAOD and s. 54 ALRCI in their entirety. However, no specific arguments based on the contracts between the employers and the contractor are in issue, nor are the rights of any third parties, such as financial institutions or surety companies, that have rights in the amounts owed by the bankrupt under its contracts.

7 The constitutional questions stated by this Court reflect the questions submitted to the Superior Court and the Court of Appeal:

1. Is s. 54 of *An Act respecting labour relations, vocational training and manpower management in the construction industry*, R.S.Q., c. R-20, inapplicable or inoperable in whole or in part, by reason of being in conflict with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and in particular s. 136 thereof?
2. Is s. 316 of *An Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001, inapplicable or inoperable in whole or in part, by reason of being in conflict with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and in particular s. 136 thereof?

8 The appellants contest the Court of Appeal's decision, arguing that Quebec's scheme can be distinguished from Saskatchewan's scheme. They submit that the first and third paragraphs of s. 316 AIAOD set up two successive, distinct and independent steps: one establishing an obligation to pay, and the other setting out the rights of an employer who pays a contractor's assessment. The appellants point out that it was the right to withhold payment in respect of a deemed debt that led the Court to conclude in *Husky Oil* that the debt was indivisible, and that no such right exists in Quebec law. They contend that neither the first paragraph of s. 316 AIAOD nor the civil law mechanisms upon which s. 54 ALRCI is based subvert the scheme of distribution under the BIA.

9 The trustee argues that the mechanisms set out in the Quebec provisions are essentially identical to the one provided for in Saskatchewan's legislation. The trustee adds that it would not be enough to declare that the third paragraph of s. 316 AIAOD is inapplicable, since the rules of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), give the first paragraph of this section the same effect as the third and make it inapplicable in bankruptcy. To show that such a declaration would be insufficient, the trustee also submits that equitable set-off would enable an employer who has paid the CSST or the CCQ to refuse to pay the trustee.

10 For the reasons that follow, I am of the view that s. 316 AIAOD and s. 54 ALRCI do not subvert the scheme of distribution established by s. 136 BIA. I would allow the appeal and restore the judgment of the Superior Court.

2. Analysis

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11 Section 91(21) of the *Constitution Act, 1867*, gives Parliament jurisdiction over bankruptcy and insolvency. Parliament has exercised this jurisdiction to establish a scheme for distributing the property of bankrupts (ss. 136 to 147 BIA).

12 This Court has on many occasions ruled on conflicts between the BIA's order of priority and the orders resulting from various provincial statutes: see, *inter alia*, *Deputy Minister of Revenue v. Rainville*, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24; and *Husky Oil*. Those decisions established that statutory provisions enacted by the provinces, although valid in the context of provincial law, are inapplicable in bankruptcy if they conflict with the BIA. It is well established that the BIA will prevail regardless of a province's intention. Given these principles, it is necessary to determine the effect of s. 316 AIAOD and s. 54 ALRCI. Since there are differences between the two mechanisms, I will consider them separately.

13 I will begin by analysing the mechanism of s. 316 AIAOD, which is based on legal subrogation and compensation. The first step will be to review these concepts. Next, I will discuss the interaction between the right to retain under s. 316 AIAOD and the scheme of distribution under the BIA, and will distinguish the instant case from *Husky Oil*. I will also consider the application of equitable set-off in the case at bar. Lastly, I will discuss the mechanism of s. 54 ALRCI, which incorporates solidarity.

2.1 *The Mechanism of Section 316 AIAOD*

14 Only the first and third paragraphs of s. 316 AIAOD are relevant to the proceeding before the Court. The second paragraph merely sets out the method for calculating the amount owed by the employer. The section reads as follows:

> **316.** The Commission may demand payment of the assessment due by a contractor from the employer who retains his services.
>
> In the case of the first paragraph, the Commission may establish the amount of the assessment according to the proportion of the price agreed upon for the work corresponding to the cost of labour, rather than the wages indicated in the statement made according to section 292.
>
> The employer who has paid the amount of the assessment is entitled to be reimbursed by the contractor concerned and the employer may retain the amount due out of the sums that he owes the contractor.

15 The first paragraph of s. 316 AIAOD gives the CSST a recourse against an employer for an assessment due from a contractor whose services the employer has retained. The condition that must be met for the CSST to exercise this right is that the assessment be due from the contractor. For an assessment to be due, the CSST must establish the assessment (s. 306 AIAOD) and send the notice (s. 315 AIAOD). Under the AIAOD, the employer is the warrantor of the assessment due from the contractor to the CSST.

16 The parties disagree as to the real scope of the first paragraph. The trustee submits that the third paragraph adds nothing to the rights arising out of the employer's payment of the contractor's debt in accordance with the first paragraph of s. 316 AIAOD. The appellants contend that the two paragraphs have different functions: the first deals with the right to collect and could survive even if the third paragraph, which grants a right to be reimbursed and to retain, were to be found inapplicable. Does this last right arise automatically out of the payment of the assessment, as the trustee claims? To answer this question, it will be necessary to review the scope of the first paragraph of s. 316 AIAOD. After doing this, I will consider whether the right to retain subverts the scheme of distribution under the BIA and will conclude by explaining the differences between the provisions at issue in *Husky Oil* and s. 316 AIAOD, and the reasons why equitable set-off does not apply in Quebec.

2.1.1 Scope of the First Paragraph of Section 316 AIAOD

17 While the purpose of the first paragraph of s. 316 AIAOD is to give the CSST a recourse against employers, the consequences of exercising this recourse cannot be disregarded. The employer's payment has consequences not only for the CSST, but also for the employer and the contractor. As a result of art. 1671 C.C.Q., paying the assessment has the effect of extinguishing the contractor's obligation to the CSST. Subrogation to the rights of the paid creditor is incidental to the payment and accordingly extinguishes the subrogating creditor's rights as regards the debtor. Under the general rules of civil law, those rights are then transferred to the person who made the payment. Article 1651 C.C.Q. reads as follows:

> **1651.** A person who pays in the place of a debtor may be subrogated to the rights of the creditor.
>
> He does not have more rights than the subrogating creditor.

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18 The first paragraph of s. 316 AIAOD appears to make the application of subrogation possible, since the employer is obliged to pay when the assessment is due from the contractor. In this context, the employer is required to pay in the place of the original debtor and should be able to be subrogated to the rights of the creditor.

19 The C.C.Q. provides for two types of subrogation: conventional subrogation and legal subrogation (art. 1652 C.C.Q.). The case at bar does not involve conventional subrogation. The only possibility is legal subrogation. Article 1656 C.C.Q. provides that subrogation takes place by operation of law in the following five situations:

> **1656.** Subrogation takes place by operation of law
>
> (1) in favour of a creditor who pays another creditor whose claim is preferred to his because of a prior claim or a hypothec;
>
> (2) in favour of the acquirer of a property who pays a creditor whose claim is secured by a hypothec on the property;
>
> (3) in favour of a person who pays a debt to which he is bound with others or for others and which he has an interest in paying;
>
> (4) in favour of an heir who pays with his own funds a debt of the succession for which he was not bound;
>
> (5) in any other case provided by law.

20 The legislature has explicitly spelled out the right to subrogation in a number of statutes, sometimes departing from the conditions set out in the Civil Code, sometimes not: see, *inter alia*, the *Act to promote good citizenship*, R.S.Q., c. C-20, s. 11; the *Health Insurance Act*, R.S.Q., c. A-29, s. 18(1); the *Act respecting financial assistance for education expenses*, R.S.Q., c. A-13.3, s. 29; the *Building Act*, R.S.Q., c. B-1.1, s. 79.2. Because the express right to subrogation is not dealt with consistently, I conclude that the failure to mention subrogation explicitly in the first paragraph of s. 316 AIAOD does not mean that legal subrogation is unavailable under it. Of the five cases mentioned in art. 1656 C.C.Q., the third might apply.

21 While acknowledging the general scope of para. (3) of art. 1656 C.C.Q., Quebec commentators link this paragraph in particular to solidary or *in solidum* debts and to debts secured by suretyship: J.-L. Baudouin and P.-G. Jobin, *Les obligations* (5th ed. 1998), Nos. 916 to 918; J. Pineau, D. Burman and S. Gaudet, *Théorie des obligations* (4th ed. 2001), at p. 603, No. 336. In the case at bar, solidarity is not mentioned in s. 316 AIAOD and cannot be presumed (art. 1525 C.C.Q.). Nor can the employer's obligation be characterized as being *in solidum* with the contractor, since the instant case does not involve two concurrent debts having the same object: *Prévost-Masson v. General Trust of Canada*, 2001 SCC 87 (CanLII), [2001] 3 S.C.R. 882, 2001 SCC 87, at para. 27. The contractor must first be obliged to pay. It might be thought that this is a legal suretyship under art. 2334 C.C.Q., but the suretyship referred to in that article is one that a debtor must furnish when obliged to do so by the legislature: *Traité de droit civil du Québec*, vol. 13, by H. Roch and R. Paré, 1952, at p. 594; *Droit civil québécois* (loose-leaf), vol. 6, by D.-C. Lamontagne et al., § 2334 500, at p. 1256 602; J. Deslauriers, *Précis de droit des sûretés* (1990), at p. 23; P. Ciotola, *Droit des sûretés* (3rd ed. 1999), at p. 21. In the case of s. 316 AIAOD, the obligation is imposed directly on the warrantor, not on the debtor. This cannot be a true case of suretyship, since a warrantor under the AIAOD has no choice in taking on the obligation, whereas consent is an essential aspect of suretyship, which is by definition a contract (art. 2333 C.C.Q.). The Superior Court judge's statement of the law to the effect that s. 316 AIAOD establishes a legal suretyship is therefore wrong.

22 To conclude that the employer's payment to the CSST confers the benefit of legal subrogation, it would be necessary to rely on the generality of the words "bound . . . for others" used in para. (3) of art. 1656 C.C.Q. In *Salama v. Placements Triar inc.*, [2002] Q.J. No. 3372 (QL), the Quebec Court of Appeal, citing a passage from the work of Baudouin and Jobin, raised the possibility of giving para. (3) of art. 1656 C.C.Q. a broad scope (see also M. Tancelin, *Des obligations: actes et responsabilités* (6th ed. 1997), No. 1235). The historical evolution of this provision persuades me that such an interpretation is justified.

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23 The wording of para. (3) of art. 1656 C.C.Q. is derived from art. 1156 of the *Civil Code of Lower Canada*, which was itself based on art. 1251 of the *Code Napoléon*. The *Code Napoléon* restated a principle of old French law to the effect that marine underwriters were subrogated to the rights of the insured: J. Mestre, *La subrogation personnelle* (1979), at p. 277, No. 240. It was only after a century of equivocation that French courts finally conceded that subrogation could operate in cases in which the person making the payment was bound to make payment owing to a distinct source of obligation. It was in the context of the law of damage insurance that the French case law evolved. At first, in an 1829 decision, the Cour de cassation refused to recognize an insurer's right to legal subrogation: Civ., March 2, 1829, D.1829.I.163 (*Assurances v. Lanquetin*).

24 Despite ruling out legal subrogation, the French courts did, however, allow insurers of damage to sue persons who caused damage, on the basis that they had committed a delictual fault causing damage to the insurer. The Cour de cassation came full circle nearly a hundred years later, noting that subrogation in favour of insurers was accepted in maritime law: Civ., January 10, 1923, S.1924.I.257 (*Chem. de fer du Midi v. Comp. d'assur. marit. l'Alborada*). This evolution caused one French commentator to remark that the French courts had in so doing [TRANSLATION] "embarked on a creative tack, not hesitating to gradually break away from an overly ossified analysis of the Civil Code": Mestre, at p. 280, No. 245.

25 In Quebec insurance law, the issue remained contentious until the 1974 reform, which explicitly granted the right to subrogation (*Act respecting insurance*, S.Q. 1974, c. 70 (which came into force on October 20, 1976), incorporated into the *Civil Code of Lower Canada*, art. 2576, now art. 2474 C.C.Q.): D. Lluelles, *Précis des assurances terrestres* (3rd ed. 1999), at p. 337; *Sherwin-Williams Co. of Canada Ltd. v. Boiler Inspection and Insurance Co. of Canada*, [1949] S.C.R. 187, at p. 191; *Trépanier v. Plamondon*, [1985] C.A. 242; *contra*: J.-G. Bergeron, *Les contrats d'assurance (terrestre)* (1989), vol. 1, at p. 423; C.-A. Bertrand, "Effets des subrogations et des transports aux assureurs" (1953), 13 *R. du B.* 285; *Agricultural Insurance Co. v. Cité de Montréal*, [1943] R.L. 151 (Sup. Ct.); *Compagnie d'Assurance du Québec v. Dufour*, [1973] C.S. 840.

26 It must be recognized that the wording of para. (3) of art. 1656 C.C.Q. does not limit the paragraph's scope to obligations arising out of solidary or *in solidum* debts or debts secured by suretyship. To exclude statute-based obligations from its ambit is justified neither by the wording of the C.C.Q. nor by the historical evolution of the scope of the analogous provision in French law. Consequently, employers who pay a contractor's debt under s. 316 AIAOD may be subrogated to the rights of the CSST. As a result of subrogation, the CSST's right against the contractor is transferred to the employer. On making the payment, the employer takes the place of the CSST: *Forage Mercier inc. v. Société de Construction Maritime Voyageurs ltée*, [1998] Q.J. No. 2190 (QL) (C.A.). The employer acquires the claim from the time of payment, up to the amount paid: Pineau, Burman and Gaudet, at p. 604, No. 337, and at p. 606, No. 338. Thus, the employer may demand that the contractor pay the amount of the assessment paid to the CSST.

27 But if the payment made in performance of the obligation imposed by the first paragraph of s. 316 AIAOD allows the employer to be substituted for the CSST in order to claim the amount of the assessment from the contractor, what does the third paragraph of the same section add? It enunciates the right to be reimbursed and to retain. The right to be reimbursed is nothing more than the right to demand payment. Thus, the right to reimbursement does not add to the claim accruing to the employer by reason of legal subrogation. What about the right to retain? It requires a more nuanced analysis.

28 The Quebec legislature has used the right to retain in ways that are disparate. In some situations, it may be a right granted to a body to set off an amount owing to a person against an amount owed by that person without actually mentioning the right to compensation: *Crop Insurance Act*, R.S.Q., c. A-30, s. 78.1. In other cases, the provision establishing the right to retain clearly states that the right is based on compensation: *Act respecting financial services cooperatives*, R.S.Q., c. C-67.3, s. 69. At times, the right to retain is a means of collecting an assessment out of the wages owed to an employee: s. 82(*c*)(4) ALRCI. In still other cases, a body is authorized to retain an amount until an obligation to do something has been performed: *Education Act for Cree, Inuit and Naskapi Native Persons*, R.S.Q., c. I-14, s. 13. Context is therefore essential to determining the legal nature of the right to retain granted by a given statutory provision in Quebec.

29 The right described in the third paragraph of s. 316 AIAOD is not a general right allowing an employer to refuse to pay a debt or retain an amount until a condition imposed on another person is met. The paragraph specifies that the right held by the employer is to retain "out of the sums that he owes the contractor" an amount equal to the amount paid by the employer to the CSST. This right presupposes a mutual creditor-debtor relationship between the employer and the contractor. It also presupposes pecuniary obligations on the parts of both the employer and the contractor. When exercising the right to retain, the employer indicates

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that the debt owed to him or her by the contractor is being deducted from the amount the employer owes the contractor. In this way, the employer pays him or herself with the sums he or she owes. The two debts are discharged. The right to retain therefore corresponds to the right to compensation provided for in art. 1672 C.C.Q.:

> **1672.** Where two persons are reciprocally debtor and creditor of each other, the debts for which they are liable are extinguished by compensation, up to the amount of the lesser debt.
>
> Compensation may not be claimed from the State, but the State may claim it.

30 The right to retain referred to in the third paragraph of s. 316 AIAOD is thus merely a reiteration of the right to compensation arising out of the fact that the employer and the contractor have become both creditor and debtor to one another as a result of the subrogatory payment to the CSST.

31 This analysis leads necessarily to the conclusion, which means the trustee was correct on this point, that dividing up s. 316 AIAOD and retaining only the first paragraph is not a basis for distinguishing the Quebec scheme from Saskatchewan's scheme. If *Husky Oil* is to be distinguished in this case, it is not because the rights resulting from the first and third paragraphs are distinct from and independent of one another, as the appellants contend. What the third paragraph does is to eliminate any doubt as to the employer's right to be reimbursed for the amount paid on the contractor's behalf and, where applicable, to effect compensation between the amount the employer owes the contractor and the amount the contractor owes the employer.

32 Having completed this part of the analysis, I must now determine whether the right to retain subverts the scheme of distribution under the BIA.

2.1.2 Does the Right to Retain Subvert the Scheme of Distribution Under the BIA?

33 The trustee submits that the right to retain effectively guarantees the payment of amounts owed and in so doing subverts the scheme of distribution under the BIA. The syllogism put forward by the trustee is misleading. The scheme of distribution does not operate in a vacuum. If the BIA recognizes the right of creditors or debtors to avail themselves of mechanisms other than the one provided for in s. 136 BIA, which sets out the scheme of distribution, a provincial statute implementing such an alternative mechanism cannot be found to be inapplicable, because it would be perfectly compatible with the BIA. In discussing the scope of the first paragraph, we concluded that the right to retain is in fact a right to compensation. Since the BIA expressly recognizes certain cases of compensation, the real issue is whether the compensation mechanism authorized by the C.C.Q. and sanctioned by s. 316 AIAOD confers rights going beyond the framework of s. 97(3) BIA, which reads as follows:

> **97.** . . .
>
> (3) The law of set-off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off is affected by the provisions of this Act respecting frauds or fraudulent preferences.

34 The BIA thus incorporates, although without defining it, a compensation mechanism. To delimit this mechanism, it is necessary to refer not only to the BIA itself, but also to provincial law. Since the enactment of the *Federal Law–Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, it has been clear that in the province of Quebec, the civil law of Quebec is the suppletive law in bankruptcy matters. This means that in respect of aspects not governed by the BIA, the civil law rules of compensation apply. What are those rules?

35 Article 1672 C.C.Q. has already been quoted. Mutual debts are extinguished up to the amount of the lesser debt. Article 1673 C.C.Q. adds that when debts are certain, liquid and exigible, their mutual extinction takes place by operation of law. The article reads as follows:

> **1673.** Compensation is effected by operation of law upon the coexistence of debts that are certain, liquid and exigible and the object of both of which is a sum of money or a certain quantity of fungible property identical in kind.
>
> A party may apply for judicial liquidation of a debt in order to set it up for compensation.

36 There is another rule that is essential to understanding compensation in the context of insolvency. A debt owed to a party is an asset that is part of his or her patrimony. Since compensation has the effect of extinguishing mutual debts, the creditors of one or the other of the mutually indebted parties may be affected by the reduction or liquidation of the asset. Under Quebec civil law, compensation cannot be effected to the prejudice of a third person. Article 1681 C.C.Q. reads as follows:

> **1681.** Compensation may neither be effected nor be renounced to the prejudice of the acquired rights of a third person.

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If third persons have acquired rights before the right to compensation arises, art. 1681 C.C.Q. prohibits the application of compensation. The debt cannot be extinguished by compensation to the prejudice of the acquired rights of a third person. Without this rule, the asset would be reserved for one creditor — in this case, the employer — to the detriment of the principle of the equality of creditors (art. 2644 C.C.Q.), as in the case of a security: A. Bélanger, *Essai d'une théorie juridique de la compensation en droit civil québécois* (2004), at p. 144; G. Duboc, *La compensation et les droits des tiers* (1989), at p. 8, No. 4. In civil law, therefore, it may or may not be possible to exercise the right to retain, depending on whether or not the rights of third persons are affected. How does this apply in bankruptcy?

37 In the context of bankruptcy, trustees have a dual function: they represent both the bankrupt and the creditors. This dual role was considered recently in *Lefebvre (Trustee of)*, 2004 SCC 63 (CanLII), [2004] 3 S.C.R. 326, 2004 SCC 63. Some duties are consistent with a specific characterization of the trustee as the bankrupt's representative, so the trustee cannot be considered a third person in performing them. In most situations, however, as de Grandpré J. remarked in *Mercure v. Marquette & Fils*, 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547, at p. 555, the trustee's dual function must be borne in mind in assessing the rights and obligations of the trustee and the creditors.

38 At the time of bankruptcy, the contractor's claim against the employer constitutes property that is part of the patrimony that is divisible among the creditors within the meaning of s. 67 BIA:

> **67.** (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise
>
> . . .
>
> but it shall comprise
>
> (*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
>
> (*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Section 71(2) BIA adds that the property vested in the trustee can no longer be alienated by the bankrupt from the date of bankruptcy:

> **71.** . . .
>
> (2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

39 For the purposes of ss. 67(1) and 71(2) BIA, the trustee is consequently not only the bankrupt's successor, but also the representative of the creditors, on behalf of whom the trustee manages and liquidates the property vested in him or her. In this context, therefore, the trustee can be characterized primarily as a third person in relation to the bankrupt. If only these sections were taken into consideration, compensation could not be effected after bankruptcy, because bankrupts would no longer be in a position to use their property to pay their debts. Bankrupts would not be able to make payments or discharge debtors because they would no longer have the capacity to do so. They would therefore be unable to effect compensation, which is a mechanism for extinguishing debts, because they would no longer be the holders of their patrimonies. However, s. 97(3) BIA sets up a special scheme. Two aspects of this provision are relevant to our analysis of the right to retain under s. 316 AIAOD.

40 First, s. 97(3) BIA specifies that compensation applies to claims against the bankrupt's estate. Creditors must therefore meet the conditions set out in s. 121(1) BIA, the relevant portion of which reads as follows:

> **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Thus, a creditor who wishes to effect compensation must be able to prove the bankrupt was subject to a debt by reason of an obligation incurred before the bankruptcy.

41 Second, s. 97(3) BIA provides that compensation is effected in the same manner as if the bankrupt were a plaintiff or a defendant. Compensation is effected as if the bankrupt's patrimony had not vested in the trustee as a result of the bankruptcy. According to this provision, the mechanism established by s. 71(2) BIA

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does not apply in cases involving compensation. This rule sets aside the trustee's status as representative of the creditors. The argument that the trustee is a third person and that the bankrupt may no longer make payments as a result of the bankruptcy cannot be used to prevent a creditor who wishes to effect compensation from doing so.

42 Bearing in mind these particular features of s. 97(3) BIA and the civil law rules that supplement them, three possible scenarios can be envisaged in the context of s. 316 AIAOD. In the first, the payment is made to the CSST before the bankruptcy, and the mutual debts are certain, liquid and exigible before the bankruptcy. In the second hypothetical situation, the payment is made before the bankruptcy, the employer is in debt to the contractor, but one of the conditions for legal compensation is not met. In the third scenario, the payment is made after the bankruptcy.

2.1.2.1 *Payment Is Made Before the Bankruptcy, and the Mutual Debts Are Certain, Liquid and Exigible Before the Bankruptcy*

43 From the moment when the employer pays the CSST, the employer's claim becomes certain, liquid and exigible. As a result of subrogation, the CSST's claim is transferred to the employer. Since the employer's right against the contractor arises out of the payment to the CSST, the existence of the employer's claim is from that moment recognized, or certain. Furthermore, since the CSST's assessment is for a specific amount, the claim is liquid. The claim is also exigible, since the CSST was entitled to demand payment from the employer. If the employer is also in debt to the contractor, and if that debt is liquid and exigible, legal compensation is effected by operation of law in accordance with art. 1673 C.C.Q., which is reproduced above, and the debts are extinguished up to the amount of the lesser debt.

44 In this context, by the operation of the rules of the C.C.Q., the employer asserts not a right to retain, but the extinction of his or her debt to the contractor. The employer may avail him or herself of this mechanism at any time. He or she relies on the fact that the extinction of the debt occurred at the moment the mutual debts met the conditions for legal compensation. Since the trustee takes possession of the bankrupt's property as it exists at the time of vesting (s. 71(2) BIA), the trustee will find that the bankrupt's patrimony includes no claim against the employer.

45 Since in this scenario the bankruptcy has not yet occurred when legal compensation is effected, the scheme of distribution is not affected, because the claim against the employer is not part of the property vested in the trustee.

2.1.2.2 *Payment Is Made Before the Bankruptcy, the Employer Is in Debt to the Contractor, but One of the Conditions for Legal Compensation Is Not Met*

46 In the second scenario, the employer pays the amount of the contractor's unpaid assessment to the CSST before the bankruptcy. The employer's claim, which results from subrogation, is thus certain, liquid and exigible at the time of the bankruptcy. If one of the conditions for legal compensation is not met, it is necessarily related to the contractor's claim against the employer.

47 There are a number of grounds that may be available to the employer to defend against a claim by the trustee. The employer could, for example, assert that the claim is not certain or is not exigible. In such a case, the employer would not be relying on the right to retain, but would be asserting that the claim does not exist or is not due. If the contractor's claim is certain and exigible but not liquid, the contractor may, if he or she is not bankrupt, apply to a court to liquidate the debt. In this case, the employer would be applying for judicial compensation pursuant to the second paragraph of art. 1673 C.C.Q.

48 In civil law, however, compensation may not be effected if the rights of third persons are affected (art. 1681 C.C.Q.). To allow compensation would be to permit a creditor to be paid in full for a claim out of his or her debt to the debtor. If third persons have acquired rights before compensation is effected, compensation is consequently not available.

49 In bankruptcy, the claim against the employer is an asset vested in the trustee within the meaning of s. 71(2) BIA. If this claim is not liquid, the trustee can have it appraised and, if there is a dispute, institute legal proceedings (s. 30(1)(*d*) BIA). The employer may also rely on the special provision in s. 97(3) BIA, which dispenses with the trustee's status as a third party for the purposes of compensation and allows compensation to be set up as if the bankrupt were the plaintiff. The employer's right to compensation thus has its basis in the BIA, not the civil law, which because of art. 1681 C.C.Q. is more restrictive. In these circumstances, the right to retain under s. 316 AIAOD is not incompatible with the BIA, as it is merely an application of the BIA's provisions.

50 Quebec courts have on many occasions recognized the possibility of setting up compensation in bankruptcy matters: *In re Hil-A-Don Ltd.: Bank of Montreal v. Kwiat*, [1975] C.A. 157; *In re Le syndicat d'épargne*

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des épiciers du Québec: Laviolette v. Mercure, [1975] C.A. 599; *Goldstein v. Auerbach* (1991), 51 Q.A.C. 292. When the payment is made before the bankruptcy, the rights arising out of the subrogatory payment thus do not subvert the scheme of distribution under s. 136 BIA, because they can be implemented by means of a mechanism provided for in the BIA itself, in s. 97(3).

2.1.2.3 *The Employer's Payment Is Made After the Bankruptcy*

51 When the employer's payment is made after the bankruptcy, the question is whether the employer can exercise the right to retain or the right to compensation in the same manner as if the payment were made before the bankruptcy. In answering this question, it is helpful to refer to the legal relationship created by s. 316 AIAOD, which can be distinguished from the classic cases of conflicts between third persons and assignees. This is not a case, as provided for in art. 1680 C.C.Q., in which the debtor of an assigned claim seeks to set up against the creditor/assignee the same defence that would have been set up against the original creditor. Rather, this case concerns defences that the employer, the new creditor, wishes to set up against the contractor, the original debtor, at the time the contractor went bankrupt. The CSST owed the contractor nothing and could not therefore set up compensation. Following this line of reasoning, the employer was not a creditor of the contractor before the bankruptcy. The employer did not become a creditor until the subrogatory payment was made, that is, after the bankruptcy. The dual status of creditor and debtor did not arise until after the bankruptcy.

52 In the civil law of Quebec, a person who pays in the place of a debtor has no more rights than the subrogating creditor (art. 1651 C.C.Q.) on the one hand, while on the other hand, compensation cannot be effected to the prejudice of third persons (art. 1681 C.C.Q.). While it is difficult to liken the compensation mechanism to an additional right when considered from the standpoint of the debtor, the same cannot be said when the rights of third persons are taken into account. There is no question that third persons would be affected by compensation should it come into play. The effect of substituting creditors subsequent to the bankruptcy is such that the trustee must now deal with a creditor who is also a debtor of the bankruptcy, whereas the original creditor was not and would not therefore have been able to set up compensation. The employer's claim would, in a way, be secured by the amounts owed by the employer to the bankrupt, whereas the CSST's claim was not. In the civil law of Quebec, if third persons are affected, the employer cannot exercise the right to retain under s. 316 AIAOD, as this is prevented by arts. 1651 and 1681 C.C.Q.

53 It is nevertheless helpful to again consider whether the BIA includes provisions that have the effect of allowing employers to exercise their right to retain. We have already seen that s. 97(3) BIA has two features that are relevant here: (1) the claims must be provable by means of a proof of claim, in accordance with s. 121 BIA, and (2) compensation may be effected as if the bankrupt were the plaintiff.

54 As a result of subrogation, an employer who pays after a bankruptcy is subrogated to the rights of the CSST and may assert a claim against the bankrupt as if the bankrupt were the defendant. Pursuant to s. 121 BIA, the employer may assert a claim to which the bankrupt is subject by reason of an obligation incurred before the bankruptcy. Similarly, under s. 97(3) BIA, the trustee may assert a claim against the employer for payment of a debt owed to the bankrupt as if the bankrupt were the plaintiff. Thus, at first glance, these features of the BIA appear to allow compensation. As can be seen from a more thorough review, however, a subrogatory payment cannot give rise to compensation if it is made after the bankruptcy.

55 Few commentators have shown an interest in the effects of subrogation in bankruptcy matters, and the principles of Canadian bijuralism do not permit the importation of common law rules. The commentaries of authors from outside Quebec are nonetheless of interest for the purpose of reviewing the principles specific to the BIA (R. J. Wood, "Turning Lead into Gold: The Uncertain Alchemy of 'All Obligations' Clauses" (2003), 41 *Alta. L. Rev.* 801). Section 121 BIA allows the employer to exercise the rights that accrue to him or her by reason of the subrogatory payment. He or she holds no rights in addition to the rights conferred by the civil law. The employer has only those rights which the CSST could exercise. Just as the CSST could not set up compensation, neither can the employer if third persons are affected. Section 97(3) BIA does not provide that a claim may be transferred from one creditor to another so as to permit compensation where it could not otherwise be set up. Since s. 97(3) BIA is an exception to the rule of equality between creditors, it must be interpreted narrowly. It must therefore be read in conjunction with ss. 121, 136(3) and 141 BIA as implicitly requiring that the mutual debts come into existence before the bankruptcy.

56 What distinguishes a pre-bankruptcy payment from a post-bankruptcy payment is that, in the former case, the substitution of creditors takes place before the moment when the trustee acquires the bankrupt's property. In the case of a post-bankruptcy payment, the substitution occurs after the bankruptcy, and the trustee can object to it. The general principles of the BIA preclude any transaction that would have the effect of granting

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a security that did not exist before the bankruptcy. To sum up, where subrogation is concerned, the BIA contains no provisions that depart from the civil law and can serve as a basis for extending the scope of application of compensation.

57 Because of the constraints inherent in the civil law, an employer may not retain the amounts paid to the CSST from the sums owed to a contractor if, when the payment was made, third parties had acquired rights. A payment made pursuant to s. 316 AIAOD does, however, entitle an employer to avail him or herself of subrogation to be reimbursed as an ordinary creditor for the amount paid. The right to reimbursement may be exercised in a manner respectful of the rights of third persons. The employer may file a proof of claim, just as the CSST could have done. This right is consistent with arts. 1651 and 1681 C.C.Q. and with s. 136 BIA. Furthermore, in *Husky Oil*, the Court recognized the validity of the right to make a simple claim to the trustee to be reimbursed (p. 503).

58 The trustee's argument that s. 316 AIAOD subverts the scheme of distribution under the BIA cannot therefore be accepted. First, the right to reimbursement is compatible with the BIA and, second, if the right to retain cannot be exercised by an employer, it is because of the inherent constraints of the civil law rules governing subrogation and compensation. The right to retain is not in conflict with the BIA, because the only circumstances in which the right can be exercised are those provided for in the BIA, which is more open to compensation than Quebec civil law.

2.1.3 Distinction Between Quebec's Scheme and Saskatchewan's Scheme

59 In accepting the trustee's arguments, the Court of Appeal saw in s. 316 AIAOD a right similar to the one considered by this Court in *Husky Oil*. The comparison is, in my view, inappropriate. In *Husky Oil*, the Court considered s. 133 of the *Workers' Compensation Act, 1979*, which established a deemed debt mechanism and allowed sums owed to a contractor to be withheld even before the employer's claim against the contractor arose. Sections 133(1) and 133(3) read as follows:

> **133**—(1) Where a person, whether carrying on an industry included under this Act or not, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to ensure that any sum that the contractor or any subcontractor is liable to contribute to the fund is paid and, where the principal fails to do so and the sum is not paid, he is personally liable to pay that sum to the board.
>
> . . .
>
> (3) Where the principal is liable to make payment to the board under subsection (1), he is entitled to be indemnified by any person who should have made the payment and is entitled to withhold, out of any indebtedness due to that person, a sufficient amount in respect of that indemnity.

60 The right to withhold granted to employers under the *Workers' Compensation Act, 1979* arose at the time when the employer was liable to pay, that is, before the payment was even made. According to the Court's interpretation, under that Act, employers did not impair their own capital. They acted as collection agents: "it is [their] duty . . . to ensure that any sum that the contractor or any subcontractor is liable to contribute to the fund is paid . . .". The Court concluded from this that the Act established a deemed debt — as opposed to a real one — owed by the employer personally that, when combined with the right to withhold, constituted a security device that was incompatible with the BIA:

> [I]t is clear that when s. 133(1) operates in combination with s. 133(3), the effect is to secure the claim of the Board against assets of the contractor. This is accomplished through the *combined* operation of the statutory deemed debt imposed on the principal in the event of the contractor's default *and* the right of the principal to withhold and be indemnified from monies owing to the contractor. Thus, the combined effect of the deemed debt in s. 133(1) and set-off in s. 133(3) secures the Board's claim against the contractor's assets.
>
> . . .
>
> To repeat, it is the *combined effect* of the statutory deemed debt *and* the right to withhold (and then set off against) property of the bankrupt which secures the Board's claim against property of the bankrupt. It is for this reason that examining the constitutional validity of s. 133(1) separately from s. 133(3) fundamentally obscures the nature of the legal interest created. Such an approach misses that this is nothing but a straightforward security device triggered by the province for securing the Board's claim against the estate, in exactly the same way that breaking a contract of pledge into debt and bailment and examining the validity of

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these legal interests separately would obscure the essential character of pledge as a security device. [Emphasis in original; paras. 53 and 77.]

61 The Court did not reject all set-off mechanisms. Such an interpretation would obviously be inconsistent with the clear wording of s. 97(3) BIA and with the reasons for the Court's decision:

> Differently put, in the bankruptcy context, the law of set-off simply allows a debtor of a bankrupt who is also a creditor of the bankrupt to refrain from paying the full debt owing to the estate, since it may be that the estate will only fulfil a portion, if that, of the bankrupt's debt. Set-off is simply a defence to the payment of a debt, not a basis for validating statutory security devices which have the effect of securing the claims of *third parties* against the estate. . . . [Emphasis in original; para. 73.]

62 Section 316 AIAOD is consistent with the conditions placed on the application of compensation in *Husky Oil*. Only an employer who has paid may exercise the right to retain. This is not a case like *Husky Oil* involving a deemed payment or an employer acting as a mere agent. Nor does this case involve, as the trustee argues, a right to retain under a suspensive condition. The right resulting from the subrogatory payment comes into existence only when the payment is made. Mestre says that this rule is [TRANSLATION] "obvious, and results from the very spirit of the institution, created for the benefit of those who pay the debts of others" (p. 374, No. 321). Subject to the right under the BIA to make a contingent claim (s. 135 BIA), a warrantor cannot file a proof of claim before payment: Trib. corr. Auxerre, February 24, 1953, *Rev. gén. ass. terr.* 1953.190 (*Mayet et Destoumieux v. Faillot*). The employer/warrantor may not exercise any right against the contractor/debtor before he or she has paid the CSST, the original creditor. In civil law terms, subrogatory rights cannot be conferred under a suspensive condition: Mestre, at p. 375, No. 322. The claim accrues to the employer at the time of payment, and not by reason of the fact that the employer might be liable to pay should the contractor fail to do so. Moreover, no right is granted to the CSST, as a third party, to the detriment of the body of creditors. The CSST is not affected by the employer's right to collect. From the perspective of *Husky Oil*, the mechanism of s. 316 AIAOD is compatible with the BIA.

2.1.4 Equitable Set-off

63 The trustee also argues that equitable set-off applies in bankruptcy in Quebec and leads to the same conflict as in *Husky Oil*. The trustee points out that the Court of Appeal has incorporated equitable set-off into Quebec civil law: *Structal (1982) inc. v. Fernand Gilbert ltée*, 1998 CanLII 13101 (QC CA), [1998] R.J.Q. 2686.

64 The applicability of equitable set-off was questionable even before the *Federal Law–Civil Law Harmonization Act, No. 1*: Bélanger, at p. 153; A. Bélanger, "L'application en droit civil québécois de l'inapplicable *equitable set-off* de *common law*" (1999), 78 *Can. Bar Rev.* 486; M. Lemieux, "La compensation dans un contexte de proposition et de faillite" (1999), 59 *R. du B.* 321. Since that Act came into force, however, it has been clear that s. 97(3) BIA must be applied in Quebec on the basis of civil law and not common law rules. Equitable set-off cannot make up for the non-application of civil law compensation and cannot be introduced into Quebec law by s. 97(3) BIA. In Quebec, the suppletive law is Quebec civil law and, more specifically in this case, the rules governing compensation under the C.C.Q.

65 In short, the third paragraph of s. 316 AIAOD does nothing more than confirm the employer's right to be reimbursed, be it by filing a proof of claim under s. 121 BIA or by setting up compensation in accordance with s. 97(3) BIA. These two means are provided for in the BIA. Section 316 AIAOD grants no more rights than are permitted under the BIA. In no case is the scheme of distribution subverted.

2.2 *The Mechanism of Section 54 ALRCI*

66 The trustee also seeks to have s. 54 ALRCI declared inapplicable. This provision reads as follows:

> **54.** The wages due by a sub-contractor constitute a solidary obligation between the sub-contractor and the contractor with whom he has contracted, and between the sub-contractor, the sub-contractor with whom he has contracted, the contractor and every intermediary sub-contractor.
>
> Where the employer holds the appropriate licence issued under the Building Act (chapter B-1.1), such solidary obligation is extinguished six months after the end of the work carried out by the employer, unless the employee concerned filed a complaint with the Commission concerning his wages, a civil action was brought, or a claim was sent by the Commission pursuant to the third paragraph of subsection 1 of section 122 before the expiry of the six-month period.
>
> Such solidary obligation extends to the client having contracted, directly or through an intermediary, with a contractor who does not hold the appropriate licence issued under the Building Act, in respect of the wages due by the contractor and each of his sub-contractors.

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67 Unlike the AIAOD, which grants a right to reimbursement and a right to retain without actually referring to the mechanism under the Civil Code, the ALRCI, by using the expression "solidary obligation", characterizes the obligation in terms that explicitly incorporate the rights and obligations provided for in the C.C.Q.'s provisions on solidarity.

68 The CCQ's solidary remedy entitles it to claim the amount of the wages from either the employer or the contractor, as it chooses. This is the effect of art. 1523 C.C.Q.:

> **1523.** An obligation is solidary between the debtors where they are obligated to the creditor for the same thing in such a way that each of them may be compelled separately to perform the whole obligation and where performance by a single debtor releases the others towards the creditor.

69 An employer who pays the wages of a contractor's employees may demand to be reimbursed by the contractor pursuant to art. 1536 C.C.Q.:

> **1536.** A solidary debtor who has performed the obligation may not recover from his co-debtors more than their respective shares, although he is subrogated to the rights of the creditor.

With regard to the employer's liability under s. 54 ALRCI, it is clear that the contractor remains ultimately liable for the entire debt. The employer may therefore recover the total amount paid to the CCQ from the contractor. Moreover, an employer who pays the CCQ may also, as is the case for payments to the CSST, rely on legal subrogation pursuant to para. (3) of art. 1656 C.C.Q.:

> **1656.** Subrogation takes place by operation of law
>
> . . .
>
> (3) in favour of a person who pays a debt to which he is bound with others or for others and which he has an interest in paying;

70 By virtue of the solidary obligation imposed by s. 54 ALRCI, together with the recursory action and subrogation, the employer may claim the amount paid to the CCQ from the contractor.

71 If the payment is made before the bankruptcy, the above reasoning concerning the right to retain under s. 316 AIAOD applies. Where an employer is in debt to the contractor and the debt meets the conditions for legal compensation, the mutual debts are extinguished by operation of law up to the amount of the lesser debt (arts. 1672 and 1673 C.C.Q.). In such a case, the patrimony vested in the trustee at the time of bankruptcy does not include the bankrupt's claim, which has been extinguished by legal compensation. Where the payment is made before the bankruptcy but the contractor's claim is not liquid, employers may avail themselves of s. 97(3) BIA to effect compensation between the amounts they owe and the amounts owed to them.

72 In the case of a post-bankruptcy payment to the CCQ, the employer will have to prove his or her claim against the estate in accordance with the rules of s. 121 BIA. Even if the employer is in debt to the bankrupt, the BIA does not allow the claim to be transferred to the detriment of the creditors. The BIA does not depart from the rules established by arts. 1651 and 1681 C.C.Q., which provide that subrogation does not give the subrogated person any more rights than the subrogating creditor and that compensation may not be effected to the prejudice of third persons. The employer is thus limited to proving the claim without being able to set up compensation for payments made after the bankruptcy.

73 The rules of the C.C.Q. with respect to subrogation add no new security and create no additional debts as regards the bankrupt. The impugned provisions violate neither the letter nor the spirit of *Husky Oil*. It should be noted that in that case, what was at issue was a mechanism by which employers could withhold amounts owed to debtors before being held personally liable for paying the assessments. In a way, the employer acted as a collection agent for the Workers' Compensation Board. The same is not true in the case of the ALRCI, which provides that employers are personally liable for wages not paid by their contractors.

3. Conclusion

74 This case was submitted to the Superior Court as a motion for directions in which a ruling was sought on the legal effect of s. 316 AIAOD and s. 54 ALRCI in the context of the BIA. The relevant questions of law have been addressed above. As mentioned in the facts related at the beginning of these reasons, the payments made by the employers, with the exception of Chenail's payment to the CCQ, were not made before the bankruptcy. The principles stated above will apply in determining the employers' rights, and there is no need to consider the specific facts of each case, especially since the employers have chosen not to take part in the debate.

75 For these reasons, I would allow the appeal, answer the two constitutional questions in the negative, restore the judgment of the Superior Court and dismiss the trustee's motion, with costs against the estate.

Appeal allowed with costs.

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Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 3 SCR 453 - Provincial Stat. Set-off against Bankrupt's Debtors and Conflict w/ BIA?

Date:	1995-10-19
Docket:	23936
Parallel citations:	1995 CanLII 69 (SCC); 128 DLR (4th) 1; [1995] 10 WWR 161; 35 CBR (3d) 1; 137 Sask R 81
URL:	http://canlii.ca/t/1frhc
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Workers' Compensation Board *Appellant*
(*Respondent*)
v.
Husky Oil Operations Ltd. *Respondent*
(*Applicant*)
and
Her Majesty The Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty The Queen in right of the Province of Saskatchewan, as represented by the Minister of Human Resources, Labour and Employment, Her Majesty The Queen in right of the province of Saskatchewan, as represented by the Minister of Finance, Bank of Montreal, Eric Zimmerman, Garth Price, Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki, Terry Sapergia, SBW--Wright Construction Inc., Campbell West (1991) Ltd., Fuller Austin Insulation Inc., United Industrial Equipment Rentals Ltd., Atco Enterprises Ltd. and Deloitte & Touche Inc., as Trustee in Bankruptcy of the Estate of Metal Fabricating & Construction Ltd. *Respondents*

and

The Attorney General for Saskatchewan *Respondent*

(*Intervener in the Court of Appeal*)

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and

The Attorney General for Ontario,
the Attorney General for New Brunswick,
the Attorney General of British Columbia,
the Attorney General for Alberta, the Workers' Compensation Board of Ontario,
the Workers' Compensation Board of British Columbia,
the Workers' Compensation Board of Alberta and
the Yukon Workers' Compensation Health and Safety Board *Interveners*

Indexed as: Husky Oil Operations Ltd. *v.* Minister of National Revenue
File No.: 23936.
1995: January 25; 1995: October 19.
Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Bankruptcy -- Priorities -- Set-off -- Provincial law allowing Board to seek payments of monies owed by bankrupts from the bankrupt's creditors and the creditors entitled to set off that amount from any payment made to trustee in bankruptcy -- Whether or not conflict with priorities established by Bankruptcy Act -- The Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1, s. 133(1), (3) -- Bankruptcy Act, R.S.C., 1985, c. B-3, ss. 97(3), 136.

Constitutional law -- Division of powers -- Paramountcy -- Conflict between provincial and federal law -- Provincial law allowing Board to seek payments of monies owed by bankrupts from the bankrupt's creditors and the creditors entitled to set off that amount from any payment made to trustee in bankruptcy -- Whether or not conflict with priorities established by Bankruptcy Act.

Husky Oil Operations Ltd. (Husky) owed Metal Fabricating & Construction Ltd. (Metal Fab), a firm which, after being formally notified of its arrears to the Workers' Compensation Board (the Board) and after making a general assignment of its book debts to the Bank of Montreal, made an assignment in bankruptcy and ceased operations. The Board, when it learned that Metal Fab had ceased operations, looked to Husky for payment under s. 133(1) of *The Workers' Compensation Act, 1979*. Section 133(1) of the Saskatchewan *Workers' Compensation Act, 1979*, permitted the Board to obtain amounts owing its Injury Fund from a principal of a defaulting contractor. Husky in turn would be able to recover the amount paid on the Metal Fab's behalf by setting off that amount, pursuant to s. 133(3), from the amount it would otherwise pay Metal Fab. Husky and Metal Fab's creditors maintained that the operation of s. 133 conflicted with s. 136 of the federal *Bankruptcy Act*, which sets out the priorities of creditors on bankruptcy, in that the Board was able to obtain full payment to the detriment of the creditors who had a higher priority under the *Bankruptcy Act*. On a non-suit application made by Husky, *The Workers' Compensation Act, 1979*, was found to be inapplicable in a bankruptcy scenario and the Court of Appeal upheld this finding. The constitutional questions queried whether, in situations where the contractor is bankrupt, these provisions are constitutionally non-operational because of conflict with the *Bankruptcy Act* and whether they applied in the circumstances of this case.

Held (Sopinka, Cory, Iacobucci and Major JJ. dissenting): The appeal should be dismissed. Section 133 is inapplicable in bankruptcy when s. 133(1) of *The Workers' Compensation Act, 1979*, operates in tandem with s. 133(3). Section 133 was inapplicable when the contractor entered bankruptcy.

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The gravamen of this appeal was the alleged conflict between s. 133 of the Saskatchewan *Workers' Compensation Act, 1979*, and s. 136(1)(*h*) of the *Bankruptcy Act* which set the priorities for recovery. The question, however, was not whether the provisions in s. 133 were independently valid, but rather, whether when combined they had the effect of reordering priorities in bankruptcy. The combined effect of the statutory deemed debt and the right to set off against property of the bankrupt, when s. 133(1) is read with s. 133(3), is to secure the Board's claim against the bankrupt's estate. In so doing, s. 133 read as a whole conflicts with Parliament's intention to accord the Board's claim the priority established in s. 136 of the *Bankruptcy Act*.

The first goal of ensuring an equitable distribution of a debtor's assets is to be pursued in accordance with the federal system of bankruptcy priorities. The quartet (*Deputy Minister of Revenue v. Rainville*, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24) does not stand for the sole proposition that the provinces cannot "jump the queue" but rather embodies a consistent and

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general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements. The following propositions can be distilled from the quartet:

(1)provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the *Bankruptcy Act*;

(2)while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred s. 136(1) of the *Bankruptcy Act* determines the status and priority of the claims specifically dealt with in that section;

(3)if the provinces could create their own priorities or affect priorities under the *Bankruptcy Act* this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;

(4)the definition of terms such as "secured creditor", if defined under the *Bankruptcy Act*, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for the purposes of the *Bankruptcy Act*;

(5)in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly; and

(6)there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

The fifth and sixth propositions bear a close resemblance to the doctrine of colourability, but with two fundamental differences. First, the doctrine of colourability is a concept which only applies in assessing the pith and substance of the impugned legislation whereas propositions 5 and 6 continue to apply after the validity of the impugned provincial law has been determined. None of the quartet cases was concerned with colourable provincial legislation. Second, a legislative intention to intrude into an exclusive federal sphere is neither necessary nor sufficient to scrutinize the applicability of provincial law. The intrusion, and not the intention to intrude, is determinative for division of powers purposes.

When ss. 133(1) and (3) operate in tandem, the contractor discharges its own liability to the Board, mediated through the legally compelled agency of the principal. This is not a scheme of joint and several liability, since the principal and the contractor are not joint co-debtors at the outset and since the Board does not have an unfettered choice as to which party to sue for recovery for outstanding fund payments. This provision, rather, is more accurately characterized as creating a form of involuntary, statutory suretyship.

While the contractor is potentially liable for two debts (the debt to the Board for the unpaid assessment and the potential debt to the principal if the principal pays the contractor's assessment) in a formal way, these in reality are one and the same as against the contractor. The contractor cannot be liable for both cumulatively. There is thus an inseparable nexus between the Board's claim against the contractor and the principal's potential claim against the contractor.

When s. 133(1) operates in combination with s. 133(3), the effect is to secure the claim of the Board against assets of the contractor. This is accomplished through the combined operation of the statutorily deemed debt imposed on the principal in the event of the contractor's default and the right of the principal to withhold and be indemnified from monies owing to the contractor. Thus, the combined effect of the deemed debt in s. 133(1) and set-off in s. 133(3) secures the Board's claim against the contractor's assets.

Parliament has recognized that the "law of set-off applies to all claims made against the estate of the bankrupt" (s. 97(3) of the *Bankruptcy Act*). In the bankruptcy context, the law of set-off allows a debtor of a bankrupt who is also a creditor of the bankrupt to refrain from paying the full debt owing to the estate, since it may be that the estate will only fulfil a portion, if that, of the bankrupt's debt. But there is an inherent limit to this deference to the provincial law of set-off. While the operation of set-off is permitted to allow for the party claiming set-off to recover from the estate ahead of the stipulated order of his claim under the *Bankruptcy Act*, it most emphatically is not permitted to allow for the operation of provincial legislation to reorder the priorities of third parties against the estate.

The operation of s. 133 has the effect of reordering federal priorities with respect to the claims of any third parties against the estate. Prior to bankruptcy, the security device created by s. 133(3) and triggered by s. 133(1) is within the province's jurisdiction. However, if applicable in the event of bankruptcy, it would enter into conflict with the scheme of distribution under the *Bankruptcy Act*. Parliament has expressly indicated in s. 136(1)(*h*) that "all indebtedness of the bankrupt under any Workmen's Compensation Act" is to rank eighth in the list of preferred claims and is to be distributed after the claims of secured creditors. By contrast, the combined effect of ss. 133(1) and (3) of the Saskatchewan *Workers' Compensation Act, 1979*, is to secure the Board's claim against the bankrupt's estate ahead of its priority under the *Bankruptcy Act*. The two laws in their operation give rise to different and inconsistent orders of priority and are thereby in conflict.

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Section 133(4), which states that "[a]ll questions as to the right to and the amount of such indemnity shall be determined by the board", also has the effect of intruding into the exclusive federal sphere of bankruptcy. If allowed to apply in bankruptcy, this provision would have the effect of empowering a creditor of the estate (here the Board) to determine unilaterally the extent of its claim against the estate. As a result, the Board would be empowered to decide the size of the estate which is to remain available for the other secured, preferred and ordinary creditors. A province cannot empower a creditor of a bankrupt to determine the extent of a bankrupt's estate which is to be available for distribution. Thus, while otherwise perfectly valid provincial law, s. 133(4) is also inapplicable in the event of bankruptcy.

Section 133 is inapplicable, rather than inoperable, in bankruptcy for intruding into an exclusive federal sphere because bankruptcy is an exclusive federal domain within which provincial legislation does not apply, as distinguished from areas of joint or overlapping jurisdiction where federal legislation will prevail, rendering provincial legislation inoperable to the extent of any conflict. As bankruptcy is carved out from the domain of property and civil rights of which it is conceptually a part, valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, provincial legislation which conflicts with federal law must yield to the extent of the conflict and it becomes inapplicable to that extent. Consistent with the presumption of constitutionality -- that the enacting body is presumed to have intended to enact provisions which do not transgress the limits of its constitutional powers -- the provincial law should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body.

Where federal and provincial legislation potentially conflict, it must be first determined whether the laws are respectively valid federal or provincial legislation. If so, the actual operation of the laws must be examined to determine whether they are in operational conflict, and if so, the federal legislation prevails and the provincial legislation is without effect to the extent of this conflict. If the operational conflict is in a field of exclusive federal jurisdiction, the provincial legislation will be inapplicable as being *ultra vires* to that extent. If the conflict is in an area of concurrent or overlapping jurisdictions, the provincial legislation will remain *intra vires* but be inoperative. To the extent that there is operational conflict, there is no room for an incidental or ancillary effect of provincial legislation. If, on the other hand, there is no operational conflict, then both laws continue to operate and both continue to have effect to the extent that operational conflict does not arise. Short of operational conflict, provincial law may validly have an effect on bankruptcy. A clear operational conflict existed here in that ss. 133(1) and (3) in their operation together entailed a reordering or subverting of the federal order of priorities under the *Bankruptcy Act*. Such an intrusion into an exclusive federal sphere necessarily goes far beyond an incidental and ancillary effect.

Since as outlined s. 133 has no application in the event of bankruptcy, a number of threshold factual questions need not be addressed.

Per Sopinka, Cory, Iacobucci and Major JJ. (dissenting): Sections 133(1) and (3) of *The Workers' Compensation Act, 1979*, are severable and should be considered separately. Both are valid even where the contractor is or becomes bankrupt.

The doctrine of paramountcy, which arises where there is clear operational conflict between valid federal and provincial legislation, requires that the provincial legislation be declared inoperational to the extent of the conflict. Conflict for purposes of paramountcy analysis is found when compliance with the enactment of one level of government entails defiance with that of the other. Courts in applying the paramountcy doctrine should be restrained and look for co-existence rather than conflict.

A review of the legislative history and purpose of workers' compensation statutes did not give any indication that s. 133 was enacted for the purpose of improving the ranking of the Board in a bankruptcy.

The quartet of cases dealing with the paramountcy of the *Bankruptcy Act* over provincial enactments which directly interfered with the scheme of priorities established by s. 136 of the Act (*Deputy Minister of Revenue v. Rainville*, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24) should be given a narrow interpretation. The quartet stands for the position that only those provincial laws which directly improve the priority of a claim upon the actual property of the bankrupt over that accorded by the *Bankruptcy Act* are inoperative. The broader approach, which would find a province to be improperly attempting to alter the priorities of distribution any time provincial law affected the final result of a bankruptcy, would produce unacceptable results because it risks nullifying the broad array of provincial legislation underpinning the *Bankruptcy Act*.

Provincial law plays a critical role in defining both the number and type of participants in the bankruptcy process and the size of the bankrupt's estate. A bankruptcy priority is a category and its precise content can and does vary to some extent from one province to the next. Because the federal legislation already contemplates that provincial law will impact upon the bankruptcy process, the respondents must do more than simply show that s. 133 has an effect on a particular

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bankruptcy. They must demonstrate that s. 133 actually reorders the federally established priority scheme with regard to the property of the bankrupt by directly creating interests in that property.

Section 133(1) has nothing to do with the property of the bankrupt. It creates a strict *in personam* obligation from the principal owing to the Board. The property of the principal is in no way subject to the *Bankruptcy Act*. The bankrupt is not even involved. The provision simply creates a third-party guarantee by the principal that the contractor will pay its debts to the board. Section 133(1) only alters the Board's recovery by permitting it to recover from a non-bankrupt third-party. No direct conflict within the meaning of the quartet or of paramountcy doctrine more generally exists between s. 133(1) and the *Bankruptcy Act*. Nothing in the *Bankruptcy Act* precludes any creditor, even if specifically mentioned in s. 136, from pursuing its remedies against a third-party as well as or instead of proving a claim in bankruptcy. Section 133(1) does not involve property that is related to or part of the estate of the bankrupt and it is consequently not in operational conflict with the bankruptcy scheme. Section 136 encompasses a claim against the property of the bankrupt. The Board claim under s. 133(1) targets a solvent principal. The two provisions are co-extensive and complementary, not mutually exclusive.

Section 133(3) engages a more direct interference with the bankruptcy scheme than subs. (1) because, since it is the actual property of the bankrupt that is involved in the restitutionary claim launched by the principal, it constitutes the only linkage between the property of the principal and the estate of the bankrupt contractor.

Section 133(3) is merely declaratory of two different remedies existing at equity, set-off and indemnification. Set-off is the more intrusive of the two since it permits the principal to stand first in the priority scheme by taking away the property of the bankrupt before it enters the estate. A claim for indemnification would have only an ancillary effect on the bankrupt's estate since it only permits the principal to join the ranks of the unsecured creditors. Neither remedy is invalid as s. 97(3) of the *Bankruptcy Act*, which provides that the law of set-off is to persist in bankruptcy, reconciles the priority scheme of the Act with the common law of set-off (and implicity, of indemnification), and the claims embodied in s. 133(3) are merely reflective of those common law causes of action. Absent s. 133(3), such a claim would exist according to the law of restitution or the law of contract. In terms of restitution, it is settled that a person may claim for recoupment or reimbursement of monies expended by that person under compulsion of law if the effect of such a payment is to discharge the liability of another.

Set-off, independent of s. 133(3), also arises from the contractual relationship. The contracts oblige the contractor to "comply with all laws" and indemnify the principal from any expense arising from the "negligent performance, purported performance or non-performance of the contract" by the contractors.

The fact that the property of the bankrupt has been assigned to the Bank and, thus, that the debt is no longer technically owed to Metal Fab but to the Bank of Montreal, does not militate against a finding that the law of set-off applies. Equitable set-off (unlike legal set-off) can operate within the context of an assignment. The only pre-requisite to set-off against the assignee is that the claim against the assignee is to arise out of the same contract or series of events which gave rise to the original claim or be closely connected with that contract or series of events.

Although s. 133 renders the principal and the contractor jointly and severally liable to the Board, as between the principal and contractor, the primary liability lies with the contractor and, consequently, the solicitation of contribution for payments made on behalf of that contractor by the principal is consonant with commercial fairness.

Section 133(1) is still fully applicable in cases where there is either no indebtedness between the principal and the contractor or insufficient indebtedness to cover the full liability involved. To this end, not only does s. 133(1) operate in isolation of the bankruptcy, it also operates independently from s. 133(3). Subsection (1) is the key feature of s. 133 as a whole. It aims at preserving the integrity of the Injury Fund. Section 133(3) is clearly secondary in this regard and s. 133(1) accordingly was not intended to operate solely in conjunction with s. 133(3). While s. 133(3) and the equitable rights it codifies might not be able to operate independently from s. 133(1), s. 133(1) can operate independently from s. 133(3).

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APPEAL from a judgment of the Saskatchewan Court of Appeal reflex, (1993), 116 Sask. R. 46, 108 D.L.R. (4th) 681, 11 C.L.R. (2d) 1, 22 C.B.R. (3d) 153, [1994] 1 W.W.R. 629, dismissing an appeal from a judgment of Wedge J. reflex, (1992), 104 Sask. R. 225, 96 D.L.R. (4th) 495, 3 C.L.R. (2d) 194, 16 C.B.R. (3d) 290. Appeal dismissed, Sopinka, Cory, Iacobucci and Major JJ. dissenting. Section 133 is inapplicable in bankruptcy when s. 133(1) of *The Workers' Compensation Act, 1979*, operates in tandem with s. 133(3). Section 133 was inapplicable when the contractor entered bankruptcy.

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Edward R. Sojonky, *Q.C.*, and *Gordon Berscheid*, for the respondent Her Majesty The Queen in right of Canada.

Thomson Irvine, for the respondent the Attorney General for Saskatchewan.

Brian J. Scherman, for the respondent Bank of Montreal.

Hart Schwartz, for the intervener the Attorney General for Ontario.

Cedric L. Haines, for the intervener the Attorney General for New Brunswick.

R. Richard M. Butler, for the intervener the Attorney General of British Columbia.

Written submission only by *Nolan D. Steed* for the intervener the Attorney General for Alberta.

Written submission only by *Elizabeth Kosmidis* for the intervener the Workers' Compensation Board of Ontario.

Written submission only by *Gerald W. Massing* for the intervener the Workers' Compensation Board of British Columbia.

Written submission only by *Douglas R. Mah* for the intervener the Workers' Compensation Board of Alberta.

Written submission only by *Bruce L. Willis*, *Q.C.*, for the intervener the Workers' Compensation Health and Safety Board of Yukon.

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

1 GONTHIER J. -- I have had the benefit of the reasons of my colleague Justice Iacobucci. I respectfully disagree with his conclusion that s. 133 of *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, is applicable in bankruptcy, and that provincial legislation can, through the operation of set-off in this manner, effectively reorder the priorities otherwise provided in the *Bankruptcy Act*, R.S.C., 1985, c. B-3.

2 In my opinion, the combined effect of the deemed debt in s. 133(1) and set-off against property of the bankrupt in s. 133(3) is to secure the Workers' Compensation Board's (the Board) claim against the estate of the bankrupt. When ss. 133(1) and (3) operate in tandem as intended by the Legislature, the effect is that the Board's claim is satisfied with property of the bankrupt in the form of the monies withheld by the principal. The principal becomes nothing more than a conduit for transferring to the Board monies which form property of the bankrupt's estate. The end result is that the bankrupt's estate is diminished to the extent of the contractor's liability to the Board, and the Board is correspondingly enriched by an identical amount, thereby recovering its claim in full. On the other hand, the principal's estate or patrimony remains entirely unaffected. The Board's claim is thus secured against the bankrupt's estate, mediated through the legally compelled agency of the principal. In this way, the Board recovers against the estate ahead of the priority mandated by Parliament in s. 136(1)(*h*) of the *Bankruptcy Act*, creating an operational conflict.

3 Recourse to s. 97(3) of the *Bankruptcy Act*, which incorporates by reference the provincial law of set-off, does not provide much assistance to the Board in this case. It is true that set-off itself may give rise to a reordering of priorities in bankruptcy in the limited sense that the party claiming set-off will secure his or her claim against the estate rather than recover under the priority otherwise provided by the *Bankruptcy Act*. This much is acknowledged by Parliament in enacting s. 97(3). However, the real question is the extent to which Parliament has deferred to the relevant provincial law. Here, Parliament has deferred to the extent of allowing the party claiming set-off to recover exceptionally ahead of his priority. But Parliament has not deferred to the extent of allowing third parties the same benefit as a result of the operation of provincial legislation. Set-off, in other words, is simply a defence to the payment of a debt, not a basis for validating statutory security devices which have the effect of securing the claims of third parties against the estate ahead of the priority stipulated by Parliament. The question is thus not whether the province has created a proprietary interest, but rather, it is whether that interest can have the effect of defeating the scheme of distribution under the *Bankruptcy Act*. Here, s. 133 not only gives a priority to the principal claiming set-off, which is permissible under s. 97(3), it also has the effect of securing the Board's claim against the estate, which most assuredly is impermissible. As a result, if s. 133 were applicable in bankruptcy, it would enter into conflict with the order of priorities required by the *Bankruptcy Act*. Consistent

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with the presumption of constitutionality, it is my opinion that s. 133 should be read down to the extent of the conflict; that is, s. 133 is inapplicable in bankruptcy. I would therefore dismiss the appeal with costs throughout.

I. Background Facts, Relevant Legislation and the Courts Below

4 Since my colleague Iacobucci J. has helpfully summarized the relevant factual and legislative background together with the judgments of the courts below, I need not repeat that discussion. However, for reasons that will become apparent, it is important to reproduce the impugned provision, s. 133 of the Saskatchewan *Workers' Compensation Act, 1979*, in its entirety:

133.—(1) Where a person, whether carrying on an industry included under this Act or not, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to ensure that any sum that the contractor or any subcontractor is liable to contribute to the fund is paid and, where the principal fails to do so and the sum is not paid, he is personally liable to pay that sum to the board.

(2) The board shall have the same powers and be entitled to the same remedies for enforcing payment under subsection (1) that it possesses in respect of an assessment under this Act.

(3) Where the principal is liable to make payment to the board under subsection (1), he is entitled to be indemnified by any person who should have made the payment and is entitled to withhold, out of any indebtedness due to that person, a sufficient amount in respect of that indemnity.

(4) All questions as to the right to and the amount of such indemnity shall be determined by the board.

II. Issues on Appeal

5 The constitutional questions raised by this appeal were stated by the Chief Justice on September 14, 1994 as follows:

1 Where a contractor as referred to in s. 133 of *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, is in bankruptcy and but for the bankruptcy, the principal as referred to in s. 133 would be liable to pay the assessment due by the contractor under the Act, is s. 133 of the said Act inoperative or inapplicable in whole or in part, by reason of being in conflict with the *Bankruptcy Act*, R.S.C., 1985, c. B-3, and in particular ss. 17(1), 67, 95, 136(1)(*h*), 148, 158(*a*) and 198(*a*) thereof?

2 Was s. 133 of the said Act inoperative or inapplicable in the circumstances of this case?

6 I agree with my colleague Iacobucci J. that the parties before this Court focused their arguments on the alleged conflict between s. 133 of the Saskatchewan *Workers' Compensation Act, 1979*, and s. 136(1)(*h*) of the *Bankruptcy Act*. Certainly, that is the gravamen of this appeal. However, I respectfully disagree with Iacobucci J.'s restatement of the issues in the constitutional questions posed by the Chief Justice. Iacobucci J.'s reasons adopt the appellant's reformulation of the issues and examine the constitutional validity of ss. 133(1) and (3) separately. As will become apparent, in my view this manner of proceeding obscures the response to the constitutional questions. The question is not whether these provisions are independently valid, but rather, it is whether when combined they have the effect of reordering priorities in bankruptcy. When s. 133(1) is read together with s. 133(3), it is clear that the combined effect of the statutory deemed debt and the right to set-off against property of the bankrupt is to secure the Board's claim against the bankrupt's estate. In so doing, s. 133 read as a whole conflicts with Parliament's intention to accord the Board's claim the priority established in s. 136(1)(*h*) of the *Bankruptcy Act*.

III. Analysis

A. *The Purposes of Federal Bankruptcy Legislation*

7 At the outset, it is useful to remember that our bankruptcy system serves two distinct goals. The first is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se*. As one commentator has noted (Aleck Dadson, "Comment" (1986), 64 *Can. Bar Rev.* 755, at p. 755):

> Bankruptcy serves this goal by replacing a regime of individual action with a regime of collective action. While the pre-bankruptcy regime of individual action allows creditors to pursue their separate and competing claims to the debtor's assets, bankruptcy's regime of collective action sorts out those diverse claims and deals with the debtor's assets in a way which brings benefits to creditors as a group (reduced costs, increased recovery)....
>
> The collectivization of insolvency proceedings can only be achieved by denying to creditors the use of pre-bankruptcy remedies.

See also Peter W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at p. 25-3. The second goal of the bankruptcy system is the financial rehabilitation of insolvent individuals (Dadson, *supra*, at p. 755). This goal is furthered through the opportunity for an insolvent individual's discharge from outstanding debts.

8 It has long been accepted that the first goal of ensuring an equitable distribution of a debtor's assets is to be pursued in accordance with the federal system of bankruptcy priorities. In the seminal case of *Royal Bank of Canada v. Larue*, [1928] A.C. 187, affirming 1926 CanLII 49 (SCC), [1926] S.C.R. 218, Viscount Cave L.C. confirmed that the exclusive

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federal power over bankruptcy and insolvency in s. 91(21) of the *Constitution Act, 1867* enables Parliament to provide for the ranking of creditors in bankruptcy. He observed at p. 197:

In *Attorney-General of Ontario* v. *Attorney-General for Canada*, [1894] A.C. 189, 200, Lord Herschell observed that a system of bankruptcy legislation might frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated, and added: "It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament." Taking these observations as affording assistance in the construction of s. 91, head 21, of the Act of 1867, their Lordships are of the opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment. [Emphasis added.]

9 The power to determine the priorities of distribution of the bankrupt's assets thus confirmed, Parliament has created an equitable distribution wherein the general rule is that creditors are to rank equally, with claims provable in bankruptcy being paid rateably (*Bankruptcy Act*, s. 141). The rule of creditor equality is subject to 10 classes of debt which are accorded priority in a stated order, the so-called list of "preferred" creditors (s. 136). Included in these classes of exceptions is "all indebtedness of the bankrupt under any Workmen's Compensation Act" in s. 136(1)(*h*), ranked eighth in the list. Lastly, the entire scheme of distribution is "[s]ubject to the rights of secured creditors" (s. 136) which, as Professor Hogg has noted, "enables secured creditors to realize their security as if there were no bankruptcy" (Hogg, *supra*, at p. 25-9).

B. *The "Quartet" of Supreme Court Bankruptcy Decisions*

10 In recent years, the constitutional relationship between the scheme of distribution under the *Bankruptcy Act* and various branches of provincial law governing property has received heightened scrutiny in the so-called "quartet" of decisions of this Court. Since my interpretation of the quartet differs from Iacobucci J.'s, I hope that I will be forgiven for re-canvassing that familiar terrain in order to explain the basis of my position.

(i) Overview of the Quartet

11 First, in *Deputy Minister of Revenue v. Rainville*, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35 (hereinafter *Re Bourgault*), the trustee in bankruptcy sought to cancel a privilege registered by the Quebec Deputy Minister of Revenue on the bankrupt's immovable property under the provincial *Retail Sales Tax Act*, R.S.Q. 1964, c. 71. The Quebec Deputy Minister of Revenue argued that the province was a "secured creditor" under s. 2 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, since the Quebec *Retail Sales Tax Act* provided that sums due to the Crown under the Act were "a privileged debt ranking immediately after law costs".

12 Writing for the majority, Pigeon J. rejected the priority claimed by the province. In so doing, he offered the following remarks on the interpretation of s. 107(1)(*j*) of the *Bankruptcy Act* (now s. 136(1)(*j*)) (at p. 44):

Accordingly, I find that the case turns upon the interpretation of para. 107(1)(*j*).... It is abundantly clear that this was intended to put on an equal footing all claims by Her Majesty in right of Canada or of a province except in cases where it was provided otherwise, namely, para. (*c*), the levy, and para. (*h*), workmen's compensation or unemployment insurance assessments and withholdings for income tax. Paragraph (*j*) ends with the following words, "notwithstanding any statutory preference to the contrary". The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on an equal footing; it therefore cannot have intended to allow provincial statutes to confer any higher priority. In my opinion, this is precisely what is being contended for when it is argued that, because the Quebec statute creates a privilege on immovable property effective from the date of registration, the Crown thereby becomes a "secured creditor" and thus escapes the effect of the provision which gives it only a lower priority. [Emphasis in original.]

Pigeon J. later concluded at p. 46:

If the contention of the Deputy Minister of Revenue in the case at bar was upheld, it would mean that the Quebec tax collector, provided his privilege was registered before the bankruptcy, would obtain a special preference on the proceeds of the sale of the immovable property in question, instead of having only the *pari passu* priority contemplated in the scheme of distribution established by the *Bankruptcy Act*. In my opinion, such result would be contrary to the intent of Parliament and no imperfection in drafting could justify it.

13 This Court confirmed and extended this approach to the relationship between the *Bankruptcy Act* and provincial law in *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785. Section 78(4)(a) of the Alberta *Workers' Compensation Act*, S.A. 1973, c. 87, provided that the provincial Workers' Compensation Board retained a "charge upon the property or proceeds of property of the employer" for unpaid assessments under the Act. The question before the Court was whether this provision rendered the Board a secured

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creditor of the bankrupt employer for the purposes of the opening words of s. 107(1) of the *Bankruptcy Act* which subjected the list of preferred claims "to the rights of secured creditors", or whether the Board's claim was postponed to s. 107(1)(*h*) which expressly addressed "all indebtedness of the bankrupt under any Workmen's Compensation Act".

14 A majority of the Court ruled that the Board was not a secured creditor and could only recover under s. 107(1)(*h*) of the *Bankruptcy Act*. Speaking for the majority on this point, Wilson J. cited approvingly (at pp. 804-5) the following remarks of Jones J.A. in *Director of Labour Standards of Nova Scotia and Workers' Compensation Board of Nova Scotia v. Trustee in Bankruptcy* (1981), 38 C.B.R. (N.S.) 253 (N.S.C.A.), at p. 260, on the ratio of the *Re Bourgault* decision:

Mr. Justice Pigeon made it abundantly clear that priorities of provincial claims must be determined in accordance with s. 107(1) of the Bankruptcy Act notwithstanding any statutory preference to the contrary. Debts under the Workers' Compensation Act fall under s. 107(1)(*h*) of the Act. Claims for wages are governed by s. 107(1)(*d*). With deference, it is not open to the province to provide any higher or more extensive priority for wages in view of the express provisions contained in that clause. It is clear from [*Re Bourgault*] that the provincial Crown cannot claim as a secured creditor under the Bankruptcy Act, notwithstanding the form of the provincial legislation, where the claim is governed by s. 107(1) of the Bankruptcy Act. [Emphasis added.]

15 In the same vein, Wilson J. later added the following important comments at p. 806:

With respect, the issue in *Re Bourgault* and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) [now s. 136(1)] of the *Bankruptcy Act*. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the *Bankruptcy Act* and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me.... [This position] cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

16 Having concluded that the case was governed by *Re Bourgault*, the majority of the Court considered the question of the appropriate response to the constitutional question: Was the provincial legislation inapplicable or inoperative? Wilson J. (McIntyre J. and Lamer J. (as he then was) concurring) noted that by virtue of the presumption of constitutionality, a province should be presumed to be legislating within its competence rather than outside it. As a result, she concluded that there was no conflict between s. 78(4) of *The Workers' Compensation Act* and s. 107(1)(*h*) of the *Bankruptcy Act* since the former should be construed or read down as simply having no application in the event of bankruptcy (p. 808). By contrast, Chouinard J. (Dickson J. (as he then was) and Beetz J. concurring) agreed with the body of Wilson J.'s reasons but ruled that s. 78(4) was inoperative in the event of bankruptcy since it conflicted with s. 107(1)(*h*) of the *Bankruptcy Act* (pp. 788-89).

17 This Court's decision in *Deloitte Haskins* is thus "significant because it confirms that any statutory lien conferred by a province on creditors listed in [s. 136] will nonetheless be inoperative [or inapplicable] in bankruptcy proceedings" (Dadson, *supra*, at p. 758).

18 The third decision in the bankruptcy quartet is *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061 (*FBDB*). Subject to certain restrictions, s. 49(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3 (now s. 69(2)), entitled a secured creditor to "realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed". The question before the Court was whether federal or provincial law determined the order of priorities of distribution when a secured creditor availed himself of s. 49(2) to liquidate his security outside of the bankruptcy proceedings. Interestingly, the provincial security interest was a privilege registered on the debtor's immovable property by the Commission de la santé et de la sécurité du travail under s. 110(1) of the Quebec *Workmen's Compensation Act*, R.S.Q. 1977, c. A-3, which ranked its privilege as a claim "ranking immediately after law costs without registration".

19 Speaking for the Court, Lamer J. noted at p. 1066 that this provincial legislation was in direct conflict with the *Bankruptcy Act*:

If the provincial law rules prevail, respondent is a secured creditor and its debt ranks before that of the trustee. If on the other hand the *Bankruptcy Act* has priority, the scheme of distribution set out in s. 107 of the Act determines the priority ranking. According to the decision of this Court in *Deloitte, supra*, respondent would then lose the benefit of its privilege and become merely a preferred creditor, since its claim is dealt with by s. 107(1)(*h*)....

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20 After concluding that the immovable property remained "property of the bankrupt" within the meaning of s. 47 (now s. 67) of the *Bankruptcy Act* notwithstanding its seizure by the bankrupt's trustee and mandatary (p. 1068), Lamer J. stated at p. 1069:

The issue then is to determine what legislation, provincial or federal, applies here. A problem of the same type came before this Court in *Re Bourgault* and *Deloitte*, *supra*. In *Re Bourgault*, this Court held that in a bankruptcy matter s. 107(1)(*j*) of the *Bankruptcy Act* determines the priority of any claim covered by that provision. A provincial statute cannot override the scheme of distribution set out in s. 107 of the Act. To borrow the words of Pigeon J. (at p. 44), "Parliament intended to put all debts to a government on an equal footing; it therefore cannot have intended to allow provincial statutes to confer any higher priority". Similarly, the majority of the Court in *Deloitte* held that a creditor who holds a privilege under a provincial statute cannot claim the status of a secured creditor within the meaning of the *Bankruptcy Act* so as to avoid the order of distribution of s. 107 of the Act. In the event of bankruptcy, priorities are exclusively a matter for federal jurisdiction. [Emphasis added.]

21 It is important to stress that the respondent in *FBDB* sought to distinguish the Court's earlier decisions of *Re Bourgault* and *Deloitte Haskins*. Lamer J. stated the respondent's argument thus (at p. 1070):

... respondent is arguing that, as the hypothecated property was liquidated outside the bankruptcy proceeding, without involvement by the trustee in bankruptcy, the solution must be sought not in federal but in Quebec law. Respondent added that, as the trustee chose to realize his security himself outside the bankruptcy, he must bear the consequences of that choice and accept the order of collocation determined by provincial statutes.

But the Court rejected this attempt to circumvent the order of priorities required by the *Bankruptcy Act*. Lamer J. ruled at p. 1071:

... I feel that the decisions in *Re Bourgault* and *Deloitte* are conclusive as to the fate of the appeal. These cases stand for the following proposition: in a bankruptcy matter, it is the *Bankruptcy Act* which must be applied. If a bankruptcy occurs, the order of priority is determined by the ranking in s. 107 of the Act, and any debt mentioned in that provision must therefore be given the specified priority. [Emphasis added.]

22 As a result, Lamer J. classified the respondent as a preferred creditor in s. 107(1)(*h*) of the *Bankruptcy Act*. He accepted, at p. 1072, that this result might encourage secured creditors "to bring about the bankruptcy of their debtor in order to improve their title". Nevertheless, he was mindful that "this solution has obvious advantages". As he explained at p. 1072:

As soon as the bankruptcy occurs the *Bankruptcy Act* will be applied: the mere fact that a creditor is mentioned in s. 107 of the Act suffices for such creditor to be ranked as a preferred creditor and in the position indicated in that provision. As provincial statutes cannot affect the priorities created by the federal statute, consistency in the order of priority in bankruptcy situations is ensured from one province to another. [Emphasis added.]

23 Finally, in *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24, at issue was whether the deemed statutory trust created by s. 18 of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, in favour of the province for provincial sales tax collected was a valid trust within the meaning of s. 47(*a*) (now s. 67(*a*)) of the *Bankruptcy Act*. Section 47(*a*) exempted "property held by the bankrupt in trust for any other person" from "[t]he property of a bankrupt divisible among his creditors". A majority of the Court ruled that this deemed statutory trust was not a valid trust. Instead, the province's claim for the monies collected under the purported trust was really a Crown preferred claim under s. 107(1)(*j*) of the *Bankruptcy Act*, which covered "claims of the Crown ... in right of Canada or of any province".

24 Speaking for the majority, McLachlin J. noted at p. 30 that the impugned deemed statutory trust lacked the essential attributes of a trust under general principles of trust law, namely the possibility of being identified and traced. She stated at p. 33:

To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

25 Significantly, McLachlin J. also stated, at pp. 33-34, the Court's preference for an interpretation of s. 47(*a*) consistent with "the clear intention of Parliament, in enacting the *Bankruptcy Act*, of setting up a clear and orderly scheme for the distribution of the bankrupt's assets".

26 Moving to the nature of the legal interests created by s. 18 of the *Social Service Tax Act*, McLachlin J. noted at p. 34 that at the moment of collection the "trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law". However, she was cautious to note that the trust monies are soon mingled with other money in the hands of the merchant and converted to other property, and as a result they could not be traced. She observed at p. 34:

... as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust.

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Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt. [Emphasis added.]

McLachlin J. was thus at pains to stress that the reality of the property interest created by the province ought to govern over the form, and as a result the province's claim necessarily failed.

27 McLachlin J. also addressed the province's contention that it remained sovereign over the definition of what constitutes a trust. She made the following important observations at p. 35:

The province ... argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of "trust" which is operative for purposes of exemption under the *Bankruptcy Act* must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the *Bankruptcy Act*: *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*. [Emphasis added.]

28 As a result, McLachlin J. ruled that the provincial legislation was inapplicable in bankruptcy and that the province's claim was governed by s. 107(1)(*j*) of the *Bankruptcy Act*.

(ii) The Principles and Philosophy Embodied in the Quartet

29 What principles should be distilled from the quartet? The intervener Attorney General for Saskatchewan suggested that there are two possible interpretations of these decisions: what it called a broader "bottom line" approach which posits that "any time provincial law affects the final result of a bankruptcy, the province is improperly attempting to alter the priorities of distribution"; and a narrower "jump the queue" approach to the effect that "the province cannot attempt to alter the position of a person within the scheme of distribution created by Parliament, vis à vis the other creditors who are claiming from the bankrupt's estate".

30 My colleague Iacobucci J. properly rejects the broader "bottom line" approach since, as he indicates, such an approach "risks nullifying the broad array of provincial legislation underpinning the *Bankruptcy Act*" (para. 142). It is trite to observe that the *Bankruptcy Act* is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the *Bankruptcy Act* itself. Indeed, it is no exaggeration to say that there is no "bottom line" without provincial law. The "bottom line" approach is therefore not the appropriate characterization of the quartet.

31 However, even rejecting the simplistic "bottom line" approach, I do not agree that the quartet stands for the sole proposition that the provinces cannot "jump the queue". In my opinion, the quartet embodies a consistent and general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements. That philosophy cannot be captured in the pithy but limited proposition that the provinces cannot "jump the queue".

32 The quartet is better stated, in my view, as standing for a number of related propositions which are themselves part of a consistent philosophy. In their lucid and thorough study of the quartet, "The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. Bar Rev.* 77, at pp. 78-79, Andrew J. Roman and M. Jasmine Sweatman state that the quartet stands for the following four propositions:

(1)provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;

(2)while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;

(3)if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; and

(4)the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act.

33 See also for concurrence with Roman and Sweatman's general conclusions drawn from the quartet, Jacob S. Ziegel, "Personal Property Security and Bankruptcy: There is no War! -- A Reply to Roman and Sweatman" (1993), 72 *Can. Bar Rev.* 44, at p. 45.

34 My colleague Iacobucci J. states at para. 141 that the quartet "stands for the position that only those provincial laws which directly improve the priority of a claim upon the actual property of the bankrupt over that accorded by the *Bankruptcy Act* are inoperative" (emphasis added). This statement falls within Roman and Sweatman's proposition 1. However, as my summary of those cases has hopefully indicated, the quartet is clearly not limited to provincial "laws which directly improve the priority of a claim". To quote Roman and Sweatman, *supra*, at p. 78:

... the reasoning in [the quartet] is not limited to trusts, nor to situations of colourable legislation attempting to give an artificial preference to government. Rather, these rulings are broad enough to encompass any potential area of conflict

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between provincial power to legislate in the area of property and civil rights, and exclusive federal jurisdiction over bankruptcy and insolvency.

In a similar vein these authors add at p. 81:

The Supreme Court of Canada's quartet of decisions, although dealing with provincial statutory trusts which affected priorities in bankruptcy, has progressively and finally provided a definite ruling on the relationship between priorities under the Bankruptcy Act and *any* other provincial statute which directly or indirectly affects priorities. [Emphasis in original.]

Importantly, they conclude at p. 105:

The law, in our opinion, is settled by these four judgments of the Supreme Court of Canada. In all four cases the issues were not whether the provinces could directly and blatantly attempt to alter the scheme of interests of secured and other creditors under what is now section 136(1) of the Bankruptcy Act. Rather, the issue was whether a province could indirectly influence priorities under the Bankruptcy Act. Even in this weaker version of influence, the Supreme Court of Canada has held that the provinces could not.

And in so concluding, they are also quick to caution at p. 106:

It is also incorrect to state that in all four cases the provinces attempted to redistribute or change priorities by explicitly elevating one of the lower ranked claims to a higher rank. As seen from an examination of the dissenting judgments in *Deloitte Haskins* and *Henfrey*, the provinces were not attempting specifically to target the bankruptcy situation but, rather, to create a general priority.

35 As a result, the "jump the queue" or "directly improve bankruptcy priorities" approach captures only part of the reasoning of the quartet. As Roman and Sweatman noted, in the *Deloitte Haskins* and *Henfrey Samson* cases, for example, the provinces were not directly or intentionally attempting to influence bankruptcy priorities. Rather, the provinces enacted laws of general application which sought to create a general priority not necessarily targeted to bankruptcy, but which had the effect of altering bankruptcy priorities. This Court nevertheless ruled that such provincial laws were inapplicable in the event of bankruptcy.

36 I underline that the "effect" which Roman and Sweatman speak of is the effect on bankruptcy priorities (Roman and Sweatman, *supra*, at pp. 81-105). Consequently, clear conflict, that is an inconsistent or mutually exclusive result, which in this case entails a reordering of federal priorities, is necessary in order to declare a provincial law to be inapplicable in bankruptcy.

37 I also think it is important to emphasize the importance of Roman and Sweatman's proposition 3. While I agree with my colleague Iacobucci J. that complete standardization of the distribution of property in bankruptcies is not possible across Canada having regard to the diversity of provincial laws relating to property and civil rights, yet the value of a national bankruptcy system is confirmed by the placing of bankruptcy under exclusive federal jurisdiction. As Professor Hogg has explained (*supra*, at pp. 25-1 and 25-2):

... debtors may move from one province to another, and may have property and creditors in more than one province. A national body of law is required to ensure that all of a debtor's property is available to satisfy his debts, that all creditors are fairly treated, and that all are bound by any arrangements for the settlement of the debtor's debts. Indeed, without these assurances, lenders would be reluctant to extend credit to persons who could evade their obligations simply by removing themselves or their assets across a provincial boundary.

Furthermore, as my overview of the quartet hopefully indicated, the goal of maintaining a nationally homogeneous system of bankruptcy priorities has properly been a constant concern of this Court. Were the situation otherwise, "Canada [would] have a balkanized bankruptcy regime which [would] diminish the significance of the exclusivity of federal jurisdiction over bankruptcy and insolvency.... Otherwise there could be a different scheme in every jurisdiction; ten different bankruptcy regimes would make ordinary commercial affairs extremely complex, unwieldy and costly, not only for Canadians but also for our international trading partners" (Roman and Sweatman, *supra*, at pp. 80 and 104). This is a prospect which this Court has been acutely mindful of in the past, and its vigilance has ensured the continuing vitality of our nation's bankruptcy legislation. In my view, its past vigilance commends itself to the present and, barring an amendment to s. 91(21) of the *Constitution Act, 1867*, also to the future.

38 In this regard, I agree with Iacobucci J., at para. 147, that a bankruptcy priority is a category, and also that provincial law may result in the content of such categories being different from province to province. However, provincial law does not and cannot define the content of bankruptcy priorities or categories without limitation. Indeed, crucial limitation is imposed by the order of priorities in the *Bankruptcy Act* itself. Thus, while individual provinces can define and rank categories such as "secured creditor" and "trust" as they each have their own purposes, those provincial laws which enter into conflict with the provisions of the *Bankruptcy Act* are simply without application in bankruptcy. Such, indeed, was this Court's unequivocal holding in *Re Bourgault*, *Deloitte Haskins*, and *FBDB* with respect to "secured creditors" and in *Henfrey Samson* with respect to "trusts".

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39 Finally, I would observe that while in agreement with the above four propositions as embodying the reasoning of the quartet, in my view the list would be more complete with the addition of a fifth and sixth, as follows:

(5)in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;

(6)there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the effect of provincial legislation is to do so.

40 I would hope that these propositions need little if any explanation or defence. They are clearly important principles at work in McLachlin J.'s reasons for the majority of the Court in *Henfrey Samson* in concluding that while the province was clearly entitled to define "trust" as it chose for the purposes of provincial law, the substance of the interest created was what was really relevant for the purpose of applying the *Bankruptcy Act*. Furthermore, there was no suggestion in that case that the province intended to subvert the scheme of distribution of the *Bankruptcy Act*. Instead, it had simply enacted a valid law of general application pursuant to its exclusive jurisdiction in relation to property and civil rights in the province, and was attempting to give itself a general priority with respect to collected but unpaid sales tax revenues. The Court ruled that the legislation was only inapplicable upon the occurrence of bankruptcy, because it was then that, if it had been applicable, it would have had the effect of conflicting with the scheme of distribution of the *Bankruptcy Act*.

41 What is more, these fifth and sixth propositions bear a close family resemblance to the doctrine of colourability. In describing the colourability doctrine, Professor Hogg has observed (*supra*, at p. 15-17):

The courts are, of course, concerned with the substance of the legislation to be characterized and not merely its form. The "colourability" doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction.

See also *R. v. Morgentaler*, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463, at pp. 496-97, *per* Sopinka J. for the Court. The concern raised by colourable legislation has also been phrased thus: "it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly" (*Madden v. Nelson and Fort Sheppard Railway Co.*, [1899] A.C. 626 (P.C.), at pp. 627-28; see also *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, at p. 310).

42 There are, however, two fundamental differences between the doctrine of colourability and the above propositions 5 and 6. First, the doctrine of colourability is a concept which is only applicable in assessing the threshold question of the validity of the impugned legislation, which is to say, its pith and substance. The above propositions, by contrast, continue to apply after having determined the validity of the impugned provincial law when assessing its applicability in the exclusive federal sphere of bankruptcy (see Hogg, *supra*, at p. 15-25). In the case at bar, it has been accepted that the provincial law is valid within its sphere; the question is as to its applicability outside its sphere, when it intrudes into the exclusive federal sphere of bankruptcy and conflicts with federal bankruptcy legislation.

43 In light of this distinction, it will be evident that none of the quartet cases were concerned with colourable provincial legislation. There was no question as to the validity of the impugned legislation in any of the quartet. Those cases are devoid of any suggestion that the impugned laws were anything other than provincial laws of general application, and thus validly enacted laws under the provinces' exclusive jurisdiction in relation to property and civil rights. Instead, those cases were only concerned with the applicability of provincial laws in bankruptcy, not their validity.

44 This last observation is also an important additional reason why I respectfully believe that it is inaccurate to interpret the quartet as only prohibiting legislation which "directly improves the priority of a claim". Such a characterization suggests that the quartet was concerned with the validity of the impugned laws. However, if the provinces had been attempting to improve the priority of their claims in bankruptcy directly, presumably this Court would simply have declared their laws to be *ultra vires* and invalid for being in relation to an exclusive federal matter, and no question of applicability or operability would ever have arisen.

45 The second crucial distinction between the doctrine of colourability and the above propositions 5 and 6 is that the doctrine of colourability often connotes a legislative intention to intrude into an exclusive federal sphere (see Elizabeth Edinger, "Comment" (1985), 63 *Can. Bar Rev.* 203, at pp. 206-11, and Albert S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 494). But even without such an intention, provincial legislation can quite evidently have the effect of trespassing onto an exclusive federal domain, and would thus be equally subject to an examination as to its applicability in the federal sphere. Were the situation otherwise, our constitutional law would countenance the absurd situation that valid provincial legislation of general application which entered into clear conflict with a valid federal law promulgated in an exclusive federal sphere would be exempt from constitutional challenge. In short, a legislative intention to intrude into an exclusive federal sphere is neither necessary nor sufficient to scrutinize the applicability of provincial law. It is the fact of intrusion, and not the intention to intrude, which is determinative for division of powers purposes.

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46 As a result, the inquiry in the case at bar must be limited to assessing whether, if applied in bankruptcy, the effect of s. 133 of the Saskatchewan *Workers' Compensation Act, 1979*, would be to conflict with the scheme of distribution in the *Bankruptcy Act*. It is this question which I now address.

C. *Application of the Quartet to Section 133 of the Saskatchewan Workers' Compensation Act, 1979*

(i) The Nature of the Legal Interest Created by Section 133

47 As I indicated earlier, it is important to examine the operation of s. 133 as a whole in order to address the issue raised in this appeal. This provision creates a curious scheme of liability. Section 133(1) imposes a duty on a principal to ensure that its contractor pays into the Workers' Compensation fund, and declares the principal absolutely liable for those payments in the event of the contractor's default. Using the language of the Civil Law, one might say that the principal (or owner) is under an obligation of diligence or means to ensure that the contractor makes its payments, and in the event of the contractor's default the principal is under an obligation of guarantee to the Board for those payments (see Paul-André Crépeau, *L'intensité de l'obligation juridique ou des obligations de diligence, de résultat et de garantie* (1989), at pp. 8-14). Section 133(3) then entitles the principal to withhold and indemnify itself from any funds owing to the contractor if the principal is deemed liable for the contractor's debt to the Board. In other words, it entitles a principal to set off against monies owing to the contractor the principal's claim for having paid the contractor's assessments. Finally, s. 133(4) empowers the Board to determine all questions as to the right and amount of the principal's indemnity for discharging the contractor's obligation.

48 In essence, under this scheme the principal is the surety or guarantor of the contractor's obligation, with the right and extent of the principal's indemnification from the withheld funds being determined by the provincial Workers' Compensation Board. It is abundantly clear that it is the contractor's obligation which is primarily in issue, since s. 133(3) entitles the principal to be indemnified "by any person who should have made the payment" (emphasis added).

49 Furthermore, when ss. 133(1) and (3) operate in tandem as intended by this legislation, the principal's right to withhold and be indemnified from monies owing to the contractor in the event that the principal is deemed responsible for the contractor's liability means that the principal will ultimately not be responsible for that liability. Instead, the debt to the Board is effectively discharged with property of the contractor when the principal exercises its right of set-off. Differently put, when ss. 133(1) and (3) operate together, the principal is no worse off after having acted as the contractor's surety. The principal's estate or, to use Civil Law terminology, its patrimony remains entirely unaffected even after discharging its "personal" liability to the Board. As a result of the principal's right of set-off against monies owing to the contractor, it is the contractor's estate or patrimony which is diminished to the extent of the assessments owing to the Board. The reality of this scheme, then, is that the contractor discharges its own liability to the Board, mediated through the legally compelled agency of the principal.

50 I would add that this is not a scheme of joint and several liability, since the principal and the contractor are not joint co-debtors at the outset. Nor does the Board have an unfettered choice as to which party to sue for recovery for outstanding fund payments, as it would if the principal and contractor were jointly and severally liable for the assessments. (See, for the accepted definitions of joint and several liability: Gerald H. L. Fridman, *The Law of Torts in Canada* (1990), vol. 2, at pp. 350-51; Glanville L. Williams, *Joint Torts and Contributory Negligence* (1951), at pp. 49-50; *County of Parkland No. 31 v. Stetar*, 1974 CanLII 198 (SCC), [1975] 2 S.C.R. 884, at p. 899 (*per* Dickson J. as he then was).) Instead, upon default a personal liability of the principal is created for the amount owed by the contractor. As a result, the principal is compelled by statute to act as the surety for the contractor's obligation to the Board. I therefore believe that it is more accurate to characterize this provision as creating a form of involuntary, statutory suretyship. It is of course arguable that when the Board deems the principal liable for the contractor's default, they are jointly and severally liable for the assessment, even though the provision does not so specify expressly. But even this would only be an incident of the statutory suretyship in s. 133.

51 It is also clear that while formally the contractor is potentially liable for two debts, namely the debt to the Board for the unpaid assessment and the potential debt to the principal if the principal pays the contractor's assessment, the reality is that these are one and the same as against the contractor. The contractor cannot be liable for both cumulatively. There is thus an inseparable nexus between the Board's claim against the contractor and the principal's potential claim against the contractor. This point was well stated by Swinfen Eady L.J. in discussing the nature of suretyship in *Re Melton; Milk v. Towers*, [1918] 1 Ch. 37, at pp. 47-48, followed in *Re Coughlin & Co.* (1923), 4 C.B.R. 294, at p. 300 (Man. C.A.):

> It may well be that technically there are two claims against the debtor in respect of the transaction and two separate liabilities of the debtor arising out of the transaction. One of these is the debtor's liability to the bank for the money that he owed. The other, which is a separate liability arising out of the contract of guarantee, is the debtor's liability to indemnify the sureties in respect of their liability to the principal creditor. Technically, they are two separate liabilities, but in substance they are the same; and in respect of that liability there could not be a double proof against the estate. [Emphasis added.]

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52 As a result, in light of the wording of s. 133 creating a form of involuntary suretyship, I would respectfully qualify Iacobucci J.'s characterization of this provision as imposing joint and several liability on the principal and the contractor for the unpaid assessments (see paras. 129, 183, 184).

53 With these preliminary remarks on the structure of the scheme of liability in s. 133 in mind, it is clear that when s. 133(1) operates in combination with s. 133(3), the effect is to secure the claim of the Board against assets of the contractor. This is accomplished through the combined operation of the statutory deemed debt imposed on the principal in the event of the contractor's default and the right of the principal to withhold and be indemnified from monies owing to the contractor. Thus, the combined effect of the deemed debt in s. 133(1) and set-off in s. 133(3) secures the Board's claim against the contractor's assets.

54 Read in this way, s. 133 creates a straightforward security device. This device secures the claim of the Board. When s. 133(1) operates in tandem with s. 133(3), the principal becomes nothing more than a conduit for transferring to the Board monies which are otherwise owed to the contractor. In other words, the principal essentially transfers an asset of the contractor (i.e., monies owing from the principal to the contractor) to the Board. This is because it is the contractor's liability for unpaid assessments which is imposed on the principal, and the contractor's monies which are withheld as security in order to be paid to the Board for the contractor's default. While s. 133(1) speaks of the principal's personal liability in the event of the contractor's default, the reality of the matter is that it is the contractor who is still liable, since as a result of s. 133(3) monies owing to the contractor are used to satisfy the debt owing to the Board. The contractor's patrimony is diminished to the extent of the liability to the Board for the unpaid assessment, whereas the size of the principal's patrimony remains unaffected. The net effect is thus that the contractor's liability is discharged out of its own property, and not from any property of the principal. The exercise of set-off, triggered by the deemed debt, thus has the effect of securing the Board's claim against the contractor's assets.

(ii) Does Section 133 Apply in Bankruptcy?

55 It is apparent that it is the set-off component of this device, s. 133(3), which effects a security interest in property of the contractor. But the right to set-off is triggered -- and thus the security interest created -- by the Board when it decides to create a deemed debt and impose liability on the principal for the contractor's liability. This right is, of course, perfectly valid outside of bankruptcy. The question is whether it continues to apply or operate in bankruptcy. In order to answer this question, a few words about the operation of set-off in bankruptcy are in order.

(a) *The Operation of Set-Off in Bankruptcy*

56 In *Lister v. Hooson*, [1908] 1 K.B. 174 (C.A.), Fletcher Moulton L.J. stated what has become one of the most accepted rationales for allowing set-off in bankruptcy (at p. 178):

> The right of set-off in bankruptcy has been dealt with by various statutes, but takes its origin from the fact that the jurisdiction in bankruptcy was from the first an equitable jurisdiction. The successive statutory formulations of the consequence of this principle, embodied in the clauses as to mutual credit, dealings, &c., have never altered this fundamental principle, and, speaking for myself, I cannot see any ground why in the present instance the injustice should be perpetrated of making a person who in the balance is not a debtor to the estate pay in full the sum due to the estate and receive only a dividend on the sums due from the estate.

(See also *Fredericton Co-operative Ltd. v. Smith* (1921), 2 C.B.R. 154 (N.B.K.B.), at pp. 157-58; *Atlantic Acceptance Corp. v. Burns & Dutton Construction (1962) Ltd.* (1970), 14 D.L.R. (3d) 175 (Alta. C.A.), at p. 184; and, for a particularly thorough and helpful discussion of the issues relating to set-off in bankruptcy and insolvency, see Kelly R. Palmer, *The Law of Set-Off in Canada* (1993), at pp. 157-223.)

57 In the bankruptcy context, a right to set-off necessarily has the effect of securing the claim of the party claiming set-off against assets of the bankrupt's estate. This was recently recognized in unambiguous terms by Lord Hoffman in his speech for the unanimous House of Lords in *Stein v. Blake*, [1995] 2 All E.R. 961. His Lordship stated at p. 964:

> Bankruptcy set-off ... affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance.

58 The security character of set-off is also borne out in several academic authorities. John A. M. Judge and Margaret E. Grottenthaler note in their article "Legal and Equitable Set-Offs" (1991), 70 *Can. Bar Rev.* 91, in discussing equitable set-off, which alone operates in the context of an assignment (at p. 92):

> The application of equitable set-off answers, in whole or in part, the plaintiff's claim. In this sense it has a self-help remedial aspect. Because equitable set-off applies as against an assignee, a security interest is effectively created in favour of the defendant which takes priority over the claim of the assignee. [Emphasis added.]

They later add (at p. 117):

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If successful on his equitable set-off, the defendant's claim will be paid in full, or at least to the extent of the plaintiff's claim. Therefore, equitable set-off in effect gives an unsecured defendant priority over all secured and unsecured creditors.

Similarly, Palmer notes (*supra*, at p. 204):

... by allowing set-off to operate in a bankruptcy, an otherwise unsecured creditor can obtain a secured status and so can be paid the full value of the debt owed by the bankrupt before the general distribution of the estate to unsecured creditors.

Palmer also observes that the operation of set-off has been described as creating a "quasi-lien" against the cross-demand of the estate (Palmer, *supra*, at p. 206). The operation of set-off in bankruptcy can therefore be said to confer on the party claiming set-off a security interest or "quasi-lien" against assets of the bankrupt's estate.

59 Indeed, as a result of creating a type of security interest in the estate, the operation of set-off in bankruptcy has been the subject of academic criticism: see Palmer, *supra*, at pp. 204-7; Judge and Grottenthaler, *supra*, at p. 117; John C. McCoid, "Setoff: Why Bankruptcy Priority?" (1989), 75 *Va. L. Rev.* 15, and for counterpoint, Philip T. Lacy, "Setoff and the Principle of Creditor Equality" (1992), 43 *S. Cal. L. Rev.* 951. The central criticism has been that while outside of bankruptcy set-off strikes a fair balance between two parties with mutual obligations, in bankruptcy the material inquiry should be the rights of the estate's creditors *inter se*. An inquiry which considers the rights of creditors *inter se* must necessarily consider a broader range of interests than an inquiry limited to ensuring fairness between only two parties (McCoid, *supra*, at p. 43). Thus, allowing set-off in bankruptcy has been considered as unfairly limiting the class of relevant interests. The concern has also been voiced that allowing set-off in bankruptcy (Judge and Grottenthaler, *supra*, at p. 117):

... is disruptive of a complex and sophisticated system developed for establishing priorities amongst creditors of various types, particularly where registration of a secured interest is required.

This second concern is thus to the effect that allowing set-off gives a claimant the benefit of a security interest without imposing the important concomitant obligation of registering that interest.

60 While this academic debate is undoubtedly interesting, the fact remains that our Parliament has recognized in s. 97(3) of the *Bankruptcy Act* that the "law of set-off applies to all claims made against the estate of the bankrupt". As a result, in the bankruptcy context, the law of set-off allows a debtor of a bankrupt who is also a creditor of the bankrupt to refrain from paying the full debt owing to the estate, since it may be that the estate will only fulfil a portion, if that, of the bankrupt's debt. Consequently, in this limited sense the party claiming set-off has Parliament's blessing for the "reordering" of his priority in bankruptcy by virtue of the operation of the law of set-off.

61 But there is an inherent limit to this deference to the provincial law of set-off. While the operation of set-off is permitted to allow for the party claiming set-off to recover from the estate ahead of the stipulated order of his claim under the *Bankruptcy Act*, it most emphatically is not permitted to allow for the operation of provincial legislation to reorder the priorities of third parties against the estate -- and by "third parties" I do of course mean the priority of any person other than the person who claims set-off against the estate. If provincial legislation were to have this effect, on the consistent authority of the quartet it must be declared inapplicable in bankruptcy.

62 Indeed, the existence of such an intrinsic constitutional limit to the application of provincial law in relation to property and civil rights has also been found in the context of defining secured creditors. The *Bankruptcy Act* defines "secured creditor" in s. 2, but defers to provincial law for the purpose of creating secured claims. The quartet of cases in this Court decided that the provinces are entitled to define secured creditors as they wish for their own purposes, but in bankruptcy those definitions which have the effect of reordering the priorities in the *Bankruptcy Act* are simply without application. In the same vein, the law of set-off is permitted to operate, but only to the extent that provincial legislation purporting to create a set-off does not have the effect of reordering federal priorities with respect to the claims of third parties against the estate. Federal deference to provincial law is thus necessarily limited by the order of priorities in the *Bankruptcy Act*.

63 Differently put, to paraphrase Wilson J. in *Deloitte Haskins*, *supra*, at p. 806 (who in turn was discussing the ratio of this Court's decision in *Re Bourgault*, *supra*), the question in the case at bar is not whether a proprietary interest has been created under the relevant provincial legislation by combining the instruments of deemed debt and set-off. It is whether the provincial legislation, even if it has created a proprietary interest, can defeat the scheme of distribution under s. 136 of the *Bankruptcy Act*. In the case at bar, it will defeat that scheme if it secures against the estate the claims of third parties whom Parliament has given a lower priority under s. 136.

64 The question in this appeal thus reduces to the following: does the operation of s. 133 have the effect of reordering federal priorities with respect to the claims of any third parties against the estate?

(b) *Does Section 133 Affect Bankruptcy Priorities*?

65 Prior to bankruptcy, the security device created by s. 133(3) and triggered by s. 133(1) is, of course, perfectly within the province's jurisdiction. However, if applicable in the event of bankruptcy, it would enter into conflict with the scheme of

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distribution under the *Bankruptcy Act*. Parliament has expressly indicated in s. 136(1)(*h*) that "all indebtedness of the bankrupt under any Workmen's Compensation Act" is to rank eighth in the list of preferred claims, to be distributed after the claims of secured creditors. By contrast, the combined effect of ss. 133(1) and (3) of the Saskatchewan *Workers' Compensation Act, 1979*, is to secure the Board's claim against the bankrupt's estate ahead of its priority under the *Bankruptcy Act*. The two laws in their operation give rise to different and inconsistent orders of priority and are thereby in conflict. They operate as contrary directives as to the way assets on bankruptcy are to be distributed.

66 To explain how this result is effected, it is first important to remember that monies owing to the contractor but withheld by the principal are debts due to the bankrupt. They are thus unquestionably "property of the bankrupt" under the *Bankruptcy Act*, since s. 2 of the Act defines "property" to include "obligations". The monies held back are simply accounts receivable of the bankrupt (see, for example, *Re Invitation Prêt-à-Porter Inc.; Miller v. Polbro Realty Co.* (1979), 31 C.B.R. (N.S.) 54, at p. 58 (Que. S.C.); L. W. Houlden and C. H. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. 1993), vol. 1, at F§45; Lewis Duncan and John D. Honsberger, *Bankruptcy in Canada* (3rd ed. 1961), at pp. 307-8).

67 Next, it is accepted that where the principal retains monies owing to the contractor, the Board's decision to deem the principal liable for the contractor's assessment has the effect of allowing the principal a right of set-off against the bankrupt estate. This right of set-off allows the principal to realize on a security interest or "quasi-lien" against the estate. However, this process of realization has the effect of securing the Board's claim against the estate. The estate is diminished to the extent of the contractor's liability to the Board, and the Board is correspondingly enriched by an identical amount. The principal's estate or patrimony remains unaffected. The Board's claim has thus been secured against the bankrupt estate, mediated through the legally compelled agency of the principal.

68 Nor, incidentally, can this process be justified by reference to the law of set-off. While the law of set-off incorporated by reference in s. 97(3) of the *Bankruptcy Act* would permit the principal to secure its own claim against the estate, it does not permit the province to enact legislation which confers the same benefit on a third party, in this case the Board, since such legislation would have the effect of reordering priorities with respect to an entire class of preferred claims. We have consistently held that the deference to provincial law in the *Bankruptcy Act* does not extend to the reordering of claims against the estate. At that point, provincial law simply ceases to apply for intruding into an exclusive federal sphere. Such, then, must also be the fate of the impugned legislation in this appeal.

69 I therefore respectfully disagree with the conclusion of the Ontario Court of Appeal in *Ontario (Workers' Compensation Board) v. Evelyn Stevens Interiors Ltd. (Trustee of)* reflex, (1993), 100 D.L.R. (4th) 742, in holding that ss. 9(3) and (4) of the Ontario *Workers' Compensation Act*, R.S.O. 1980, c. 539 (equivalent to Saskatchewan's ss. 133(1), (3) and (4)), are applicable in bankruptcy. The court reasoned (at pp. 748-49):

> The principle is simple. The money owing under s. 9(3) is not property of the bankrupt and never comes into the hands of the trustee. The board is not required to make a claim under s. 136 of the *Bankruptcy Act*. The money comes to it under s. 9 of the *Workers' Compensation Act*. It is the *Bankruptcy Act* itself and not the provincial legislation that recognizes rights of set-off ....
>
> A valid set-off, as defined under provincial law, would inevitably alter the priorities in a bankruptcy but that is what the *Bankruptcy Act* itself contemplates....
>
> The money in the case at bar has never (or should never have) come into the hands of the trustee. It is money that has been (and should remain) in the hands of the principals to compensate them for money that they are (or will be) bound to pay to the board.

70 The court thus concluded, first, that the principal paid the Board out of its own funds and not from property of the bankrupt. But this is only true in a trivial sense. When the set-off is effected, the estate is diminished to the extent of the indemnity and the principal's patrimony is entirely unaffected. The principal's "personal" liability is thus converted by set-off to a mere bookkeeping entry, and the debt satisfied by the estate. As a result, with respect, here the Ontario Court of Appeal has chosen form over substance.

71 Second, the court appeared to attach considerable importance to the fact that the monies owing should never have come into the "hands of the trustee". But with respect, the relevant question was simply whether these monies were property of the bankrupt, and not whether they were or should have been in the hands of the trustee. And since such monies are unquestionably property of the bankrupt, the Board has in effect secured its claim against the estate.

72 Third, and perhaps most importantly, the Ontario Court of Appeal concluded that the *Bankruptcy Act* itself recognizes set-off, and this will inevitably alter priorities in bankruptcy. With respect, the Court of Appeal's statement is overly broad. As already indicated, it is true that s. 97(3) allows the principal to secure his claim against the estate, whatever his priority under s. 136. In this limited sense, a "valid set-off, as defined under provincial law, would inevitably alter the priorities in a bankruptcy". Here, however, the effect is much broader, and entails securing by legislation the claim of a third party against the estate, thereby circumventing the order of priorities in the *Bankruptcy Act*.

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73 Differently put, in the bankruptcy context, the law of set-off simply allows a debtor of a bankrupt who is also a creditor of the bankrupt to refrain from paying the full debt owing to the estate, since it may be that the estate will only fulfil a portion, if that, of the bankrupt's debt. Set-off is simply a defence to the payment of a debt, not a basis for validating statutory security devices which have the effect of securing the claims of third parties against the estate. Indeed, the defensive character of set-off is reflected in the wording of s. 97(3) which stipulates that set-off applies to "all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt".

74 As a result, with the greatest respect, the reasoning of the Ontario Court of Appeal is flawed for applying provincial legislation which has the effect of securing against the estate an entire class of claims specifically given a lower priority by the *Bankruptcy Act*.

75 What is more, if the Ontario Court of Appeal's interpretation of s. 97(3) were correct, the consequences would be far-reaching. The provinces would, in effect, be entitled to create property interests which have the effect of subverting the federal scheme of distribution by purporting to validate them as set-offs. Nor is there any reason in principle why the provinces would be limited to rearranging federal priorities with respect to unpaid workers' compensation assessments. Each and every province would be licensed to create similar security devices to secure claims of their choosing, and thereby subvert entirely Parliament's chosen scheme of distribution. This prospect was repudiated by this Court in each of the cases in the bankruptcy quartet. The concerns voiced in those cases apply with equal force to this appeal. To rule otherwise would be to invite a balkanization of the scheme of bankruptcy priorities across the country and to tolerate the evisceration of Parliament's exclusive jurisdiction over bankruptcy conferred by our Constitution. The provinces are not entitled to so proceed, and thereby do indirectly what they are prohibited from doing directly. Our courts must therefore be vigilant to scrutinize the substance of the interests created and not rest content with merely examining their form.

76 I would add that apart from the security device created by the combined effect of ss. 133(1) and (3), s. 133(4) also has the effect of intruding into the exclusive federal sphere of bankruptcy. It will be recalled that s. 133(4) states that "[a]ll questions as to the right to and the amount of such indemnity shall be determined by the board". If allowed to apply in bankruptcy, this provision would have the effect of empowering a creditor of the estate (here the Board) to determine unilaterally the extent of its claim against the estate. As a result, the Board would be empowered to decide the size of the estate which is to remain available for the other secured, preferred and ordinary creditors. A province cannot empower a creditor of a bankrupt to determine the extent of a bankrupt's estate which is to be available for distribution. Thus, while otherwise perfectly valid provincial law, s. 133(4) is also inapplicable in the event of bankruptcy.

77 At this point, I should perhaps stress that nothing I have said detracts from a province's authority to impose liability on a third party for a bankrupt's debt. What a province cannot do, however, is create a statutory security device which has the effect of reordering the priorities of distribution of the assets in the bankrupt's estate. In such a case, what is otherwise valid provincial legislation is simply without application upon the occurrence of bankruptcy. To repeat, it is the combined effect of the statutory deemed debt and the right to withhold (and then set off against) property of the bankrupt which secures the Board's claim against property of the bankrupt. It is for this reason that examining the constitutional validity of s. 133(1) separately from s. 133(3) fundamentally obscures the nature of the legal interest created. Such an approach misses that this is nothing but a straightforward security device triggered by the province for securing the Board's claim against the estate, in exactly the same way that breaking a contract of pledge into debt and bailment and examining the validity of these legal interests separately would obscure the essential character of pledge as a security device.

78 It is therefore my conclusion that s. 133 is inapplicable in bankruptcy for intruding into an exclusive federal sphere.

79 In the foregoing, I have proceeded on the basis that s. 133(1) operates in tandem with s. 133(3), that is, that the principal has monies owing to the contractor which it can use as a basis for set-off when the Board deems it liable for the contractor's assessment. Where a principal has such monies owing, it was clearly the Legislature's intention that such a right to set-off be exercised in order that the contractor ultimately be responsible for its own assessment. In this sense, where both ss. 133(1) and (3) potentially apply on the facts of a given case, it was clearly the Legislature's intention that the right to set-off be exercised. As a result, in such a case s. 133 is inapplicable *in toto* against the bankruptcy.

80 However, there may be instances where the principal does not hold or retain any monies owing to the contractor. While the Court did not have the benefit of extensive submissions on this point, I believe it is quite plausible to conclude that the principal can then claim from the estate as a preferred creditor under s. 136(1)(*h*), since its claim is comprehended within "indebtedness of the bankrupt under any Workmen's Compensation Act". This would appear to be permissible because on its plain wording s. 136(1)(*h*) specifies only the nature of the claim and not the identity of the claimant. As a result, if only s. 133(1) applies, the Board has not secured its claim against the estate but recovers only from the principal. The scheme of distribution of assets in the estate is thereby unaffected. In such a case, there is no constitutional reason why full effect should not be given to provincial law within its legitimate sphere of operation. I would therefore only read down s. 133 to the extent that in application it enters into conflict with the scheme of distribution in the

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Bankruptcy Act. Where s. 133(1) alone is engaged in a given case, the Board's claim against the principal continues to be fully applicable.

(c) *The Appropriate Remedy: Is Section 133 Inapplicable or Inoperative*?

81 I have already concluded that the impugned legislation must be declared inapplicable rather than inoperable in bankruptcy. I should perhaps explain that this is preferable for the simple reason that bankruptcy is an exclusive federal domain within which provincial legislation does not apply, as distinguished from areas of joint or overlapping jurisdiction where federal legislation will prevail, rendering provincial legislation inoperable to the extent of any conflict. However, as bankruptcy is carved out from the domain of property and civil rights of which it is conceptually a part, valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, provincial legislation which conflicts with federal law must yield to the extent of the conflict (*Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.); *Crown Grain Co. v. Day*, [1908] A.C. 504 (P.C.)) and it becomes inapplicable to that extent. Consistent with the presumption of constitutionality __ that the enacting body is presumed to have intended to enact provisions which do not transgress the limits of its constitutional powers __ the provincial law should be read down to the extent of the conflict. In other words, it should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body.

82 This, I believe, has been the trend of this Court's approach to matters of applicability and operability. For example, in refusing to apply the paramountcy doctrine in *Deloitte Haskins*, Wilson J. explained (at p. 807):

I think rather that the applicable principle is the one stated by Laskin C.J. in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, 1976 CanLII 10 (SCC), [1977] 2 S.C.R. 1054, at p. 1065, to the effect that "if the provincial legislation is of general application, it will be construed so as not to apply to such enterprises", *i.e.*, those within federal competence.

She concluded at p. 808:

I believe that the trend of the more recent authorities favours a restrictive approach to the concept of "conflict" and a construction of impugned provincial legislation, where this is possible, so as to avoid operational conflict with valid federal legislation. Where this is done both provisions can stand and have their own legitimate spheres of operation. In this sense I find no conflict between s. 107(1) of the *Bankruptcy Act* and s. 78(4) of *The Workers' Compensation Act*. I would accordingly answer the question as framed by stating that s. 107(1)(*h*) of the *Bankruptcy Act* applies to determine priorities on a bankruptcy and s. 78(4) of *The Workers' Compensation Act* has no application in such a situation.

83 Another way of explaining this approach is simply to say, with Lamer J. in *FBDB*, that "in a bankruptcy matter, it is the *Bankruptcy Act* which must be applied" (at p. 1071).

84 This was also the Court's approach in *Bank of Montreal v. Hall*, 1990 CanLII 157 (SCC), [1990] 1 S.C.R. 121. The case concerned the relationship between *Bank Act*, R.S.C., 1985, c. B-1, security interests and the provincial procedural requirements for seizure under the Saskatchewan *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16. Speaking for the Court, La Forest J. found the federal and provincial legislation to conflict in operation. However, he added at p. 155:

I have dealt with this case on the basis of paramountcy to meet the arguments put forward by counsel. But the issue can, I think, be answered more directly. At the end of the day, I agree with counsel for the Attorney General of Canada that this is simply a case where Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation.

In response to the third question, then, I would hold that ss. 19 to 36 of *The Limitation of Civil Rights Act*, if interpreted to include a s. 178 security, conflict with ss. 178 and 179 of the *Bank Act* so as to render ss. 19 to 36 inoperative in respect of the security taken pursuant to s. 178 by a chartered bank. To put it another way, ss. 19 to 36 of *The Limitation of Civil Rights Act* are inapplicable to security taken pursuant to ss. 178 and 179 of the *Bank Act*. [Emphasis added.]

85 I fully endorse this approach, and am of the opinion that my colleague La Forest J.'s remarks apply *mutatis mutandis* to the present appeal. Parliament has enacted a complete code in the *Bankruptcy Act*, one which necessarily calls upon provincial law for its operation. But Parliament's invitation stipulates an important limitation at the threshold of its domain, namely, that provincial law simply cannot apply when to do so would entail subverting the federal order of priorities in the *Bankruptcy Act*.

86 I therefore agree with the submissions of the Attorney General of Canada and find that s. 133 is inapplicable in bankruptcy when s. 133(1) operates together with s. 133(3) as it trenches on valid federal bankruptcy legislation.

87 In view of Iacobucci J.'s statement at para. 162 that provincial "[l]egislation that is *intra vires* is permitted to have an incidental and ancillary effect on a federal sphere", I think it appropriate in concluding to summarize my view as to the proper constitutional analysis where federal and provincial legislation potentially conflict. One must first determine whether the laws are respectively valid federal or provincial legislation. If so, the actual operation of the laws must be examined to

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determine whether they are in operational conflict, that is, inconsistent or incapable of being fully complied with in a given situation. If they are in operational conflict, the federal legislation prevails and the provincial legislation is without effect to the extent of this conflict. If the operational conflict is in a field of exclusive federal jurisdiction, the provincial legislation will be inapplicable as being *ultra vires* to that extent. If the conflict is in an area of concurrent or overlapping jurisdictions, the provincial legislation will remain *intra vires* but be inoperative. To the extent that there is operational conflict, there is no room for an incidental or ancillary effect of provincial legislation. If, on the other hand, there is no operational conflict, then both laws continue to operate and both continue to have effect to the extent that operational conflict does not arise. Short of operational conflict, provincial law may validly have an effect on bankruptcy, as I have indeed acknowledged in observing that there is no bankruptcy "bottom line" without provincial law (at para. 30). In the present case, I have found clear operational conflict in that ss. 133(1) and (3) in their operation together entail a reordering or subverting of the federal order of priorities under the *Bankruptcy Act*. Such an intrusion into an exclusive federal sphere necessarily goes far beyond an incidental and ancillary effect. I believe this proposition runs through my reasons.

D. *Residual Issues*

88 Finally, as my colleague Iacobucci J. notes, before this Court the Bank of Montreal raised factual and legal issues which had not been raised in the courts below. Specifically, the Bank argued that Husky was not liable under s. 133 for payment of Metal Fab's assessments since the Board was obliged to issue a demand against Metal Fab before issuing one against Husky. Similarly, the Board and the Bank argued that Husky cannot indemnify itself out of funds owing to Metal Fab since Husky received the demand from the Board after Metal Fab had given notice of assignment of its book debts to the Bank of Montreal. Since, as outlined, it is my opinion that s. 133 simply has no application in the event of bankruptcy, these threshold factual questions need not be addressed.

89 With respect to Husky's further argument that it was not in breach of its statutory duty under s. 133 to ensure payment by Metal Fab, again this question need not be addressed since s. 133 has no application upon the occurrence of bankruptcy.

90 The Bank also argued that s. 133 should be interpreted to limit Husky's liability to unpaid workers' compensation assessments with respect to the specific work performed for Husky by Metal Fab, and not for all Metal Fab's outstanding unpaid assessments which includes work for other principals. While it is not necessary to answer this question given my disposition of this appeal, I agree with Iacobucci J. that the liability under s. 133 is limited to unpaid assessments in respect of work performed for Husky. This less Draconian interpretation is confirmed by the recent clarifying amendment to s. 133 which inserted the words "pursuant to this Act with respect to that work" after "contribute to the fund" (*The Workers' Compensation Amendment Act, 1993*, S.S. 1993, c. 63, s. 40).

IV.Disposition

91 For the above reasons, I would answer the constitutional questions posed by Lamer C.J. as follows:

Question:1.Where a contractor as referred to in s. 133 of *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, is in bankruptcy and but for the bankruptcy, the principal as referred to in s. 133 would be liable to pay the assessment due by the contractor under the Act, is s. 133 of the said Act inoperative or inapplicable in whole or in part, by reason of being in conflict with the *Bankruptcy Act*, R.S.C., 1985, c. B-3, and in particular ss. 17(1), 67, 95, 136(1)(*h*), 148, 158(*a*) and 198(*a*) thereof?

Answer:Yes. Section 133 is inapplicable in bankruptcy when s. 133(1) operates in tandem with s. 133(3).

Question:2.Was s. 133 of the said Act inoperative or inapplicable in the circumstances of this case?

Answer:Yes. Section 133 was inapplicable when Metal Fab entered bankruptcy.

92 I would therefore dismiss the appeal with costs throughout.

The reasons of Sopinka, Cory, Iacobucci and Major JJ. were delivered by

93 IACOBUCCI J. (dissenting) -- The broad issue in this appeal is the extent to which a provincial statutory instrument can constitutionally assert itself in the bankruptcy context without entering into operational conflict with the federal *Bankruptcy Act*, R.S.C., 1985, c. B-3. The specific question at issue relates to the constitutional validity of ss. 133(1) and (3) of the Saskatchewan *Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1. These provisions permit the Workers' Compensation Board (the Board), in a situation where a contractor has failed to pay its Injury Fund contributions, to obtain these amounts from a principal of the contractor (subs. (1)). Subsection (3) permits the principal to indemnify itself from the delinquent contractor. It is argued in this case that ss. 133(1) and (3) are constitutionally non-operational in a situation where the contractor is bankrupt, especially when that bankrupt has assigned its estate to a secured creditor.

I. Background

94 Husky Oil Operations Ltd. (the principal, hereinafter "Husky") is an owner of a Bi-Provincial Heavy Oil Upgrader at Lloydminster, Saskatchewan. Husky entered into six contracts with Metal Fabricating & Construction Ltd. (the contractor, subsequently the bankrupt, hereinafter "Metal Fab") respecting the construction of the upgrader. Metal Fab made an assignment in bankruptcy before completing five of those contracts. At the time, Husky owed approximately $800,000 to

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Metal Fab in the form of hold-backs and contractual debt. These sums were paid into court upon the commencement of the instant legal proceedings.

95 Metal Fab had not paid its required Workers' Compensation Fund contribution for the employees on its payroll. It was alerted to this effect by the Workers' Compensation Board on March 2, 1992 by a Notice of Assessment showing that $208,850.50 was due and payable to the Board. Soon thereafter, the Bank of Montreal (the assignee) acquired a general assignment of book debts from Metal Fab for loans advanced to it. On March 12, 1992, Husky was notified of the Bank's security interest and told that it must pay to the Bank any amounts payable to Metal Fab. The Board was apprised of the ceasing of operations of Metal Fab on March 16, 1992. The Board then looked to Husky since s. 133(1) of *The Workers' Compensation Act, 1979*, made Husky personally liable in respect of the amounts that Metal Fab had not paid to the Board, but, pursuant to the terms of subs. (3), Husky could recover those sums from Metal Fab. Metal Fab made an assignment in bankruptcy on March 19, 1992. The co-respondent, Deloitte & Touche Inc., was appointed trustee in bankruptcy. Subsequent audits conducted by the Board revealed the amount owing by Metal Fab to the Injury Fund to be $246,745.26. Husky was advised of this increased amount by a letter, dated July 6, 1992. Under the assignment in bankruptcy, Metal Fab assigned a secured debt to the Bank of Montreal in the amount of $1,745,837.

96 Husky and Metal Fab's creditors submit that the operation of s. 133 conflicts with s. 136 of the federal *Bankruptcy Act*, which sets out the priorities of creditors on bankruptcy. Normally in bankruptcy the amount owed by Husky to Metal Fab would be used to satisfy lienholders and the secured creditor Bank of Montreal according to the priorities established in the *Bankruptcy Act*. In the appeal at bar, the Board, given its lower priority, would effectively recover none of the money owed to it by Metal Fab. However, s. 133 of the *Workers' Compensation Act* permits the Board to recover its debt directly from Husky and allows Husky, in turn, to set this off from the amount owed to the bankrupt, thereby effectively reducing the amount of money available to the secured creditor and, it is submitted, improperly affecting the priority scheme established by the *Bankruptcy Act*.

97 The aims of the litigants can be summarized as follows:

(1)Husky wants to avoid the operation of s. 133(1) but, if this provision is found to be valid, argues that s. 133(3) is also operative and, thus, Husky can set off the monies paid to the Board from the monies it owes the bankrupt.

(2)The Bank's position is influenced by the fact that, since it is the principal secured creditor, any funds set off to Husky are wholly funds that, in the absence of the intervention of the Board, would accrue to the Bank. Consequently, the Bank is principally preoccupied with affirming the non-operability of s. 133(3), realizing, however, that were Husky not to have any liability to the Board then there would be no set-off issue in the first place.

(3)The Board seeks the sums that the bankrupt should have paid to it all along. It relies on s. 133(1) of the provincial legislation and its creation of joint and several liability between the principal and contractor to this effect.

98 By a fiat, dated September 9, 1992, Wedge J. of the Court of Queen's Bench of Saskatchewan held that s. 133 of *The Workers' Compensation Act, 1979*, was constitutionally inoperative because it altered the scheme of distribution specified in the *Bankruptcy Act*, the ordering of this scheme falling entirely within the legislative competence of Parliament. The Saskatchewan Court of Appeal dismissed the Appellant Board's appeal from that decision. On April 28, 1994, leave to appeal was granted to this Court, [1994] 1 S.C.R. xii.

II. Relevant Constitutional and Statutory Provisions

Constitution Act, 1867

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,--

. . .

(21) Bankruptcy and Insolvency.

. . .

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,--

. . .

(13) Property and Civil Rights in the Province. . . .

The Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1

133.--(1) Where a person, whether carrying on an industry included under this Act or not, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to ensure that any sum

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that the contractor or any subcontractor is liable to contribute to the fund is paid and, where the principal fails to do so and the sum is not paid, he is personally liable to pay that sum to the board.

. . .

(3) Where the principal is liable to make payment to the board under subsection (1), he is entitled to be indemnified by any person who should have made the payment and is entitled to withhold, out of any indebtedness due to that person, a sufficient amount in respect of that indemnity.

Bankruptcy Act, R.S.C., 1985, c. B-3

97. ...

(3) The law of set-off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off is affected by the provisions of this Act respecting frauds or fraudulent preferences.

136.(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

. . .

(*h*) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

III. Judgments Below

Court of Queen's Bench of Saskatchewan, *per* Wedge J. reflex, (1992), 104 Sask. R. 225

99 This decision consisted of a fiat on a non-suit application by Husky that s. 133 of *The Workers' Compensation Act, 1979*, was inapplicable to it.

100 Wedge J. first reviewed the facts and found that s. 133(1) made Husky personally liable for the payments to the Board yet authorized it to recover these payments from Metal Fab, the contractor. The trial judge then went on to note that the questions at hand were: (1) whether, in a bankruptcy situation, s. 133 encroached upon the exclusive federal jurisdiction over bankruptcy; and (2) whether, if it did not, Husky was entitled to set off the amount it must pay to the Board against the monies held in court.

101 Wedge J. answered the first question in the affirmative. She found assistance, in reaching her conclusion, in the decisions of this Court in *Deputy Minister of Revenue v. Rainville*, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35 (hereinafter *Re Bourgault*) (later referred to by Wakeling J.A. as *Bourgault v. Quebec Deputy Minister of Revenue*), *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785, *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061 (*FBDB*), and *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24, colloquially referred to as the "quartet". While acknowledging at p. 228 that "...these decisions are not directly on point where, as here, the claim by the provincial body, is against a third party -- not the bankrupt", Wedge J. still felt they offered some guidance. In fact, the quartet, combined with some academic authority, lead her to conclude that provincial legislative initiatives are invalid simply when they affect the bankruptcy scheme.

102 Reference was also made to the Ontario case of *Re Evelyn Stevens Interiors Ltd.* reflex, (1990), 72 D.L.R. (4th) 712 (S.C.), where, according to Wedge J. at p. 228, McKeown J. "...relied upon the judgment of Madam Justice Wilson in *Deloitte Haskins* for the principle that provincial legislation cannot disturb the priority scheme in s. 136(1) of the *Bankruptcy Act*." It was noted that McKeown J.'s reasoning in *Evelyn Stevens* was adopted by Lawton J. in *Serdula Construction Management Inc. v. Workers' Compensation Board*, Q.B. (Regina), Q.B.M. 126/91 (April 12, 1991), a case which also involved a claim under s. 133 of *The Workers' Compensation Act, 1979*. In *Serdula*, Lawton J. acknowledged that the *Evelyn Stevens* case was being appealed, but considered that McKeown J. had been correct. Wedge J. found the facts of the case at bar to be indistinguishable from those in *Serdula*. Ultimately, Wedge J. held that s. 133 of *The Workers' Compensation Act, 1979*, has no application in a bankruptcy scenario.

103 Wedge J. then turned to the second issue and questioned whether the set-off issue could be separated from the s. 133(1) issue. She concluded at p. 229:

If Husky does not have to pay the Board out of the monies in court, the amount available to the Trustee is not diminished, the priority scheme in the *Bankruptcy Act* is not altered and there is no conflict between the provincial and federal legislation. It is only subs. (3) of s. 133, taken together with subs. (1) which would have the effect of disturbing the priority scheme. Thus the whole of s. 133 is under attack in the constitutional issue.

104 Wedge J. went on to reject the argument that the set-off provision in s. 133(3) is not in conflict with the *Bankruptcy Act* because, in s. 97(3), the Act itself recognizes rights of set-off. She reasoned at pp. 229-30:

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To interpret the general right of set-off in s. 97(3) as overriding the specific reference to Workers' Compensation payments in the order of priorities would, in my view, ignore the intention of the federal legislation, i.e. the standardization of bankruptcy priorities across Canada.

105 In the end, Wedge J. agreed with Lawton J. in *Serdula*. In the circumstances, she also found it unnecessary to decide the second issue given the interconnection between ss. 133(1) and (3), such that the invalidity of the former necessarily triggered the inoperation of the latter.

Saskatchewan Court of Appeal, per Wakeling J.A. reflex, (1993), 116 Sask. R. 46

106 The Court of Appeal for Saskatchewan dismissed the appeal by the Workers' Compensation Board.

107 Wakeling J.A. commenced his analysis by noting, at p. 47, that "[t]his appeal probes the extent to which provincial legislation may affect federal legislation relating to bankruptcy." It was noted that were s. 133 not to exist, the claim of the Board would rank eighth in priority and in many cases would go unpaid; if s. 133 is valid, the claim of the Board would be paid by the owner who would then have a claim against the bankrupt estate. According to Wakeling J.A. at p. 48, "[t]he net result is a clear advantage to the W.C.B. as it has managed to assure payment of its claim and leave it to the owner to struggle for repayment under the *Act* either claiming right of set-off or ranking at the bottom of the list of priorities as an unsecured creditor."

108 The observation was then made that the provinces are dissatisfied with the degree of priority s. 136 of the *Bankruptcy Act* provides them. Wakeling J.A., at p. 48, characterized this appeal as but one more attempt by a province "to circumvent the restriction which s. 136 of the *Act* has imposed on the ability of the W.C.B. to collect its claim."

109 Wakeling J.A. referred to the "quartet" decisions discussed by Wedge J. and held, at p. 50, that "[i]t is apparent from these cases that the Supreme Court has determined that where the federal powers over bankruptcy have been exercised in the [*Bankruptcy*] *Act*, it is not possible for provincial legislation to change the scheme of distribution which the *Act* has established." Wakeling J.A. rejected the argument according to which s. 133 does not threaten the bankruptcy scheme since it merely permits a right of recovery against a third party surety, not the estate of the bankrupt. He noted that any third party caught by the Board order will want to seek repayment and will use the set-off and indemnification provisions to this effect, thereby interfering with the distribution of the bankrupt's estate. He disagreed with the approach taken by the Ontario Court of Appeal in *Ontario (Workers' Compensation Board) v. Evelyn Stevens Interiors Ltd. (Trustee of)* reflex, (1993), 100 D.L.R. (4th) 742, in which it was decided that similar legislation which had been contained in the Ontario *Workers' Compensation Board Act*, R.S.O. 1980, c. 539, for many years was not in conflict with the federal bankruptcy scheme. As Wakeling J.A. elaborated, at p. 51:

> It [the Ontario Court of Appeal] concluded that the provincial legislation worked to require the principal to make payment to the Board so that the Board having received payment had no claim under the *Act* against the bankrupt so it did not need to rely on s. 136. The principal then had a right to set off what it had paid the W.C.B. against what it would otherwise pay the trustee in bankruptcy but that the right of set-off did not constitute a conflict with the *Act* as it was specifically provided for under [s. 97(3) of the *Bankruptcy and Insolvency Act*].

110 In Wakeling J.A.'s view, s. 97(3) was intended only to acknowledge and accept the application of the common law right of set-off as it has been developed over the years. To read more than a common law right of set-off into s. 97(3) would conflict with the *Henfrey Samson* decision. Furthermore, he observed that the Ontario Court of Appeal in *Evelyn Stevens* referred to only three members of the "quartet", failing to make reference to the *FBDB* case which, in his mind, has considerable relevance to this case. Wakeling J.A. added that the *FBDB* judgment applied the *Bourgault*, *Henfrey Samson* and *Deloitte Haskins* reasoning to parties not directly involved in a bankruptcy.

111 In the end, Wakeling J.A. concluded, at pp. 52-53, that "[t]here is no way that the bankruptcy pie can be cut as a consequence of this legislation without disturbing the scheme of distribution established under s. 136 of the *Act*." In fact, he held that it could hardly be disputed that without the legislation the distribution would be different.

112 Deeming s. 133(1) to be invalid, Wakeling J.A. basically affirmed the approach taken by Wedge J. regarding the severance of the set-off provision. He found that the provision was to be struck as a whole, given that there is no apparent justification for a conclusion that the legislators would have intended the principal to pay in full whether or not a right of set-off was available.

IV. Issues on Appeal

113 The issues in this appeal are set out in the constitutional questions stated by the Chief Justice on September 14, 1994:

> 1 Where a contractor as referred to in s. 133 of *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, is in bankruptcy and but for the bankruptcy, the principal as referred to in s. 133 would be liable to pay the assessment due by the contractor under the Act, is s. 133 of the said Act inoperative or inapplicable in whole or in part, by reason of being in conflict with the *Bankruptcy Act*, R.S.C., 1985, c. B-3, and in particular ss. 17(1), 67, 95, 136(1)(*h*), 148, 158(*a*) and 198(*a*) thereof?

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2 Was s. 133 of the said Act inoperative or inapplicable in the circumstances of this case?

114 In my view, the gist of the appeal comes down to the following questions, as proposed by the appellants:

(a)Is section 133(1) of *The Workers' Compensation Act* inoperative by reason of inconsistency with the *Bankruptcy Act*?

(b)Is section 133(3) of *The Workers' Compensation Act* inoperative by reason of inconsistency with the *Bankruptcy Act*?

(c)If section 133(3) is inoperative, does that render section 133(1) inoperative as well?

V. Analysis

115 For the reasons that follow, I would allow the appeal. Section 133(1) is valid even in a situation where the contractor is or becomes bankrupt; s. 133(3) is also valid in the bankruptcy context and permits the principal to set off the amount paid to the Board from funds that it owes to the bankrupt or assignee thereof. Although I am aware of the fact that the set-off involves monies constituting the property of the bankrupt and that it potentially interferes with the order of priorities established by s. 136, I find that s. 97(3) of the *Bankruptcy Act* eliminates any operational conflict between s. 133(3) and the Act since the cause of action contemplated by s. 133(3) is ordinarily available at law and equity. Further, when s. 133(3) is used simply for purposes of indemnification and this is pursued by the principal joining the ranks of the unsecured creditors then I believe any resultant interference with the bankruptcy scheme to be so incidental that it falls outside of the scope of the "clear conflict" required to trigger invalidation through the paramountcy doctrine.

116 At the outset, I note that the respondent's submissions that s. 133 is in conflict with ss. 17(1), 67, 95, 148, 158(*a*) and 198(*a*) of the *Bankruptcy Act* are of little, if any, merit. Nor were they seriously pleaded before us. The crux of this appeal involves s. 136(1) of the *Bankruptcy Act* and it is on this provision that I shall focus my attention.

A. *Paramountcy Doctrine*

117 Section 133 of *The Workers' Compensation Act, 1979*, is valid provincial legislation enacted pursuant to s. 92(13) of the *Constitution Act, 1867*. Similarly, the *Bankruptcy Act* is *intra vires* the legislative purview of Parliament, specifically s. 91(21) of the Constitution: *Attorney-General of Ontario v. Attorney General for the Dominion of Canada*, [1894] A.C. 189 (P.C.), at p. 197; *Royal Bank of Canada v. Larue*, [1928] A.C. 187, affirming 1926 CanLII 49 (SCC), [1926] S.C.R. 218. To this end, the constitutional issue herein asks whether s. 133 of *The Workers' Compensation Act, 1979*, is rendered inoperative by virtue of a conflict with the *Bankruptcy Act*. In a situation where there is clear operational conflict between valid federal and provincial legislation, the doctrine of paramountcy requires that the provincial legislation be, to the extent of the conflict, declared inoperational. It is upon this doctrine that the respondent relies.

118 I underscore that, in order to be triggered, the doctrine of paramountcy requires very clear conflict. As noted by Dickson J. (as he then was) in *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, at p. 191:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"....

119 Conflict for purposes of paramountcy analysis is found when compliance with the enactment of one level of government entails defiance with that of the other: *McCutcheon*, *supra*, at p. 191. There must be a situation where one cannot be able to obey the law of one level of government without disobeying the law of the other level of government: *Bank of Montreal v. Hall*, 1990 CanLII 157 (SCC), [1990] 1 S.C.R. 121.

120 The requirement that clear operational conflict be found effectively narrows the situations in which federal legislation will be deemed to be paramount over provincial enactments. The rationale behind this restrictive use of paramountcy is self evident: governmental regulation in Canada operates through a complex web of federal and provincial legislation. The regimes structuring many areas of public policy, such as, bankruptcy, actively involve both levels of government. To this end, barring a situation where obeying the enactment of one level places a citizen in disobeyance of the legislation of the other level, an attempt must be made to read overlapping provincial and federal legislation in a complementary manner.

121 I am buttressed in this approach by the general comments of Dickson C.J. in *General Motors of Canada Ltd. v. City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 S.C.R. 641. Although the *GM* case specifically involved validating legislation under the federal trade and commerce power, I find the following passage from Dickson C.J.'s reasons (at pp. 669-70) to be apposite to this appeal:

...it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate....

. . .

Both provincial and federal governments have equal ability to legislate in ways that may incidentally affect the other government's sphere of power.

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122 In the case at bar, the courts below did not demonstrate the appropriate level of judicial restraint in their application of paramountcy doctrine. In my view, courts should carefully look for co-existence, not strive to find conflict.

B. *The History and Purpose of Workers' Compensation Legislation in Canada*

123 The disposition of this appeal requires not only a sensitivity to the true nature of the paramountcy doctrine, but also an appreciation of the history and purpose of workers' compensation legislation.

124 Workers' compensation legislation creates a "no fault" system of benefits whereby injured workers are guaranteed compensation in connection with their injuries. As noted by the Workers' Compensation Board of Alberta, the concept of workers' compensation in Canada was introduced in order to elevate Canadian society from an industrial "state of nature".

125 In *Medwid v. Ontario* 1988 CanLII 193 (ON SC), (1988), 48 D.L.R. (4th) 272 (Ont. H.C.), at pp. 280-81, Montgomery J. described this "state of nature" as follows:

...in the years before there was workers' compensation. Economic necessity compelled people to work long hours, under conditions more hazardous than they would freely choose and without any opportunity to provide for their own personal safety. The physical conditions, equipment and work methods of the day often increased the likelihood of accidents and decreased the likelihood of recovery in tort. As many as half of the work place accidents were found to result from the hazards of the work place, not from anyone's fault. When an employer was at fault, he could erect the common law defences of contributory negligence and voluntary assumption of risk to insulate himself from liability. Both of those defences, though available generally, operated with particular harshness in the work place, because despite the dangers of the work place and the work tasks there were no real alternatives open to the worker. In addition, employers alone could assert the defence of common employment to neutralize claims based on the fault of a worker's fellow employees. All of these defences operated as absolute bars to recovery; all remain part of Ontario law, except where suppressed or modified by statute. Finally, even successful worker-plaintiffs had no assurance of meaningful recovery. Wealthy employers could often exhaust the worker's resources in a series of appeals. Legal fees and other costs reduced the amount realized from any award. Impecunious employers often could not pay the judgments against them. For slow developing industrial disease claims, workers might find their employers had gone out of business or disappeared.

126 In effect, the workers' compensation system involves an historic compromise. On the one hand, employees give up their rights of action against employers and other workers in exchange for benefits regardless of fault. On the other hand, employers are relieved of certain liabilities involving their employees but are obliged to fund wholly the burden of compensating injured workers through assessments paid to the Injury Fund. This compromise emanated from the 1913 Meredith Report, which constitutes the conceptual base for all workers' compensation legislation in Canada. In *Reference re Workers' Compensation Act, 1983 (Nfld.)* 1987 CanLII 118 (NL CA), (1987), 44 D.L.R. (4th) 501, affirmed 1989 CanLII 86 (SCC), [1989] 1 S.C.R. 922, the Newfoundland Court of Appeal, at p. 509, summarized the funding scheme proposed by Meredith as follows:

. . . Meredith recommended that Ontario model its legislation after the German system which emphasized the duty of the state to provide sustenance and support to injured workers through a collective, no-fault, industry-funded insurance scheme by means of a regulated accident fund....

127 The strength of the fund is thus key to the viability of the workers' compensation system. In turn, the financial integrity of the Workers' Compensation program depends on an effective means of ensuring that sufficient monies are paid into the Injury Fund. It is here that s. 133 plays a key role. It, along with other devices such as statutory liens, ensures that the Injury Fund continues to be replenished and remains solvent. This is accomplished by holding principals liable for the unpaid dues of contractors because, from the perspective of the workers, both contractors and principals are "employers". Moreover, from the point of view of rudimentary economic analysis, both gain from the surplus value of the workers' labour. Without the existence of effective methods to finance the Injury Fund, the workers' compensation system is emptied of any content and the "historical compromise" is rendered meaningless. Provisions such as s. 133 further the policy choice to shift losses for unpaid premiums from the Board and workers to principals. Workers' compensation legislation strives to visit the costs of industrial disease, death and injury on the employer community which exposes its workforce to those risks. An attempt is made to spread responsibility for those costs amongst multiple employers engaged in a single project.

128 On a related note, I would, with respect, expressly reject Wakeling J.A.'s characterization at p. 48 of this case as "...one more attempt by a province to circumvent the restriction which s. 136 of the *Act* has imposed on the ability of the W.C.B. to collect its claim." To the extent that Wakeling J.A.'s remarks are aimed at criticizing the province for enacting the impugned legislation with that object in mind, I cannot agree. There is no basis in law or history to ascribe such a pejorative intent to s. 133 of *The Workers' Compensation Act, 1979*. I note that the original precursor to s. 133 was enacted in 1911 (*The Workmen's Compensation Act*, S.S. 1910-11, c. 9, s. 9), well before the introduction of *The Bankruptcy Act* in 1919 (S.C. 1919, c. 36) and of the original version of s. 136(1)(*h*) which was enacted in 1921 (*The Bankruptcy Act Amendment Act, 1921*, S.C. 1921, c. 17, s. 39).

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129 From another angle, the present wording of s. 133 is essentially unchanged from the modifications made to s. 9 of the 1910 Act in the 1929 *Workmen's Compensation Act*, S.S. 1928-29, c. 73, s. 11. Now, s. 11 of the 1929 Act was modelled directly on the contemporaneous provisions of the Ontario *Workmen's Compensation Act*, R.S.O. 1927, c. 179, s. 10, these being originally enacted in 1915 and 1919: S.O. 1914, c. 25, s. 10, as amended by S.O. 1915, c. 24, s. 5, and S.O. 1919, c. 34, s. 4(2). The creation of joint and several liability as between contractors and principals for the contractor's unpaid compensation debts (as well as the concomitant right to indemnification) thus pre-dates the scheme of priorities established by bankruptcy legislation. Consequently, there could not have been, at the time of enacting workers' compensation legislation, a desire to undermine federal bankruptcy arrangements nor circumvent the priority scheme.

130 It is helpful to recall that s. 133 is not addressed specifically to situations in which the contractor is bankrupt, although such a situation may occasionally arise on the facts as it does here. Principally, s. 133 is aimed at granting the Board an alternate route to obtain the funds that, but for the delinquency, absconding or unscrupulousness of the contractor, it would ordinarily have received. Clearly, when the contractor and principal have a working relationship, it is easier for the principal to recover the monies from the contractor than it is for the Board since it is the principal who pays the contractor for work completed.

131 This review of the legislative history and purpose of workers' compensation statutes fails to unearth any indication that s. 133 was enacted for the purpose of improving the ranking of the Board in a bankruptcy. See *Evelyn Stevens* (Ont. C.A.), *supra*, at p. 747, for a similar conclusion within the Ontario context.

C. *Paramountcy in the Context of Bankruptcy: The "Quartet"*

132 On four occasions, this Court has been called upon to affirm the paramountcy of the *Bankruptcy Act* over provincial enactments which directly interfered with the scheme of priorities established by s. 136 of the federal legislation. As was mentioned above, these four cases are commonly referred to as the "quartet". Although they are not directly on all fours with the appeal at bar (since they do not involve the provincial body claiming against a third-party, only the bankrupt), I agree with Wedge J. that they are of significant interpretive assistance.

133 In *Re Bourgault*, *supra*, this Court considered s. 30 of the Quebec *Retail Sales Tax Act*, R.S.Q. 1964, c. 71, which provided that "[e]very sum due to the Crown" under that Act constituted "a privileged debt ranking immediately after law costs". The facts of the *Bourgault* case, put briefly, are as follows. Upon the bankruptcy of a debtor, the Deputy Minister of Revenue of Quebec maintained that, by virtue of s. 30 of the *Retail Sales Tax Act*, he was a "secured creditor" within the meaning of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, and was therefore entitled to greater priority than normally available for Crown claims under the bankruptcy scheme. This Court rejected the claim on the grounds that s. 107 (now s. 136) of the *Bankruptcy Act* established an elaborate scheme of distribution of a bankrupt's assets, intending to confer a certain priority on Crown claims, and that provincial statutes which attempted to confer a higher priority were inconsistent with the Act. Specifically, Pigeon J., writing for a majority of the Court, stated at p. 44:

> Accordingly, I find that the case turns upon the interpretation of para. 107(1)(*j*) [of the *Bankruptcy Act*].... It is abundantly clear that this was intended to put on an equal footing all claims by Her Majesty in right of Canada or of a province except in cases where it was provided otherwise, namely, para. (*c*), the levy, and para. (*h*), workmen's compensation or unemployment insurance assessments and withholdings for income tax. Paragraph (*j*) ends with the following words, "notwithstanding any statutory preference to the contrary". The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on an equal footing; it therefore cannot have intended to allow provincial statutes to confer any higher priority. In my opinion, this is precisely what is being contended for when it is argued that, because the Quebec statute creates a privilege on immovable property effective from the date of registration, the Crown thereby becomes a "secured creditor" and thus escapes the effect of the provision which gives it only a lower priority. [Emphasis in original.]

134 Similarly, in *Deloitte Haskins*, *supra*, this Court considered s. 78(4)(a) of the Alberta *Workers' Compensation Act*, S.A. 1973, c. 87, which provided that any amount owed to the Workers' Compensation Board by an employer constituted a priority charge on that employer's assets. The Court concluded that this provision did not apply in bankruptcy in that it could not provide the Workers' Compensation Board with a security interest within the meaning of the opening words of s. 107(1) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, so as to defeat the lower priority accorded to claims by Workers' Compensation Boards by s. 107(1)(*h*) of the *Bankruptcy Act*. Specifically, Wilson J. (on behalf of herself and two other judges, with Chouinard J. and two others concurring separately) relied on *Re Bourgault*, *supra*, and *Re Black Forest Restaurant Ltd.* (1981), 37 C.B.R. (N.S.) 176 (N.S.S.C.), in concluding at p. 806 that:

> With respect, the issue in *Re Bourgault* and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the *Bankruptcy Act*. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in that

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section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the *Bankruptcy Act* and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have the effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

How then should the constitutional question stated by the Chief Justice be answered? Does s. 107(1)(*h*) of the *Bankruptcy Act* conflict with s. 78(4) of *The Workers' Compensation Act* so as to render the latter provision inoperable? I do not believe so. Section 78(4) does not purport to deal with a bankruptcy situation and, by virtue of the presumption of constitutionality, the provincial legislature is presumed to be legislating within its competence rather than outside it. Faced with the choice of construing the provincial legislation in a way which would cause it to invade the federal sphere, thereby attracting the doctrine of paramountcy, or construing it in accordance with the presumption of constitutionality, I prefer the latter course. I believe also that it accords better with the more recent authorities on the scope of the paramountcy doctrine.

135 In *FBDB*, *supra*, this Court found that, where a secured creditor took advantage of s. 49(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, and liquidated his security outside the bankruptcy proceedings, the property constituting the security was still property of the bankrupt and the order of payment of creditors from the proceeds of the sale of the security was to be determined by the priorities specified in the *Bankruptcy Act* and not by the provisions of provincial law governing the order of collocation. Writing for the Court, Lamer J. (as he then was) stated at p. 1071:

In any event, I feel that the decisions in *Re Bourgault* and *Deloitte* are conclusive as to the fate of the appeal. These cases stand for the following proposition: in a bankruptcy matter, it is the *Bankruptcy Act* which must be applied. If a bankruptcy occurs, the order of priority is determined by the ranking in s. 107 of the Act, and any debt mentioned in that provision must therefore be given the specified priority.

Lamer J. went on to note that as provincial statutes cannot affect the priorities created by the federal statute, consistency in the order of priority in bankruptcy situations is ensured from one province to another.

136 Finally, in *Henfrey Samson*, *supra*, this Court reiterated its position in the three previous cases, holding that a deemed statutory trust created by s. 18(1) of the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388, over all amounts collected as taxes under the Act could not give the province priority over other creditors under the *Bankruptcy Act*, R.S.C. 1970, c. B-3. The issue was whether the deemed statutory trust could qualify as a trust within s. 47(*a*) of the *Bankruptcy Act* so as to exclude the amounts so held from the property of the bankrupt and instead require them to be given entirely to the provincial government. McLachlin J., writing for the majority, held at p. 33 that:

To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

137 In *Henfrey Samson*, no common law trust was found since the monies in the impugned trust had been mixed with other monies. Consequently, the s. 47(*a*) definition of trust was not triggered. However, the important point to be taken from *Henfrey Samson* is that if the province were to have drafted its tax collection legislation in a way that created a valid trust under the terms of the *Bankruptcy Act*, that money would have been excluded from the property of the bankrupt. From another perspective, the province would be able to affect the outcome of the bankruptcy; yet, because it would not have altered the priorities of distribution, the legislation would have survived paramountcy analysis. In *Henfrey Samson*, Cory J. dissented regarding the applicability of the questions of law to the specific facts at hand, holding that a valid trust was created and that there was no conflict between the provincial and federal legislation since the *Bankruptcy Act* specifically gave priority to a trust.

138 In my view, the quartet has given rise to two interpretations. One is broad, the other narrow.

139 The respondents in the instant appeal advocate the broad interpretation, according to which any time provincial law affects the final result of a bankruptcy, the province is improperly attempting to alter the priorities of distribution. The Attorney General for Saskatchewan refers to this as the "bottom line" approach. Under such an approach, s. 133, since it affects the end result of the bankruptcy process, would be deemed invalid.

140 The appellants, on the other hand, advocate a narrower interpretation: the quartet precludes a province only from altering the position of a creditor vis-à-vis the other creditors claiming from the same estate within the scheme of distribution created by s. 136(1). In other words, the only thing the province cannot do is "jump the queue" set up by Parliament. Consequently, in order to impugn a provincial law affecting the bankruptcy process, there must be an attempt to reallocate the priority scheme by directly creating interests in the property of the bankrupt.

141 In my opinion, the second interpretation is the correct one. The quartet stands for the position that only those provincial laws which directly improve the priority of a claim upon the actual property of the bankrupt over that accorded

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by the *Bankruptcy Act* are inoperative. This accords with the facts of the cases in the quartet. In each case, the provincial governments endeavoured to change the priorities of preferred creditors in s. 136(1) by elevating a lower ranked claim to a higher rank. In *Re Bourgault* and *Henfrey Samson*, the province attempted to "queue jump" claims of the Crown ranked last by s. 136(1)(*j*) by declaring such debts to be "privileges" (*Re Bourgault*) or deeming them to be "trust money" and hence outside the distribution scheme (*Henfrey Samson*). In *Deloitte Haskins*, the province attempted to elevate its claim through a proposed security interest and, finally, in *FBDB*, the province once again endeavoured to use the mechanism of a privilege/lien.

142 In many ways, the broad approach propounded by the respondents would produce unacceptable results since it risks nullifying the broad array of provincial legislation underpinning the *Bankruptcy Act*. I am sensitive to the arguments by the Saskatchewan Attorney General that provincial legislation is deeply involved in determining the priority, registration, and amount of indebtedness in the bankruptcy process. In fact, the proprietary and contractual rights that are regulated by the bankruptcy process are usually created by virtue of provincial law. All of these enactments somehow affect the "bottom line".

143 For example, provincial personal property security legislation establishes security interests (such as that relied upon by the Bank of Montreal in the instant appeal) that create secured creditors and validate claims against the estate of the bankrupt. Of similar import is builders' and mechanics' lien legislation that has been held to be constitutionally valid in *TransGas Ltd. v. Mid-Plains Contractors Ltd.*, 1994 CanLII 30 (SCC), [1994] 3 S.C.R. 753; see also *Ecarnot (Trustee of) v. Western Credit Union Ltd.* reflex, (1991), 7 C.B.R. (3d) 207 (Sask. C.A.) and *John M. M. Troup Ltd. v. Royal Bank of Canada*, 1962 CanLII 9 (SCC), [1962] S.C.R. 487, at p. 494, *per* Judson J.

144 Other valid provincial legislation invariably affecting the "bottom line" includes: consumer protection and warranties legislation; land titles statutes; sale of goods laws; and a further array of specific statutes such as *The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, s. 44 (protecting and exempting farmland and farm equipment from the property of the bankrupt's estate), the *Forest Act*, R.S.B.C. 1979, c. 140, s. 142, and the *Employment Standards Act*, S.B.C. 1980, c. 10, s. 19.

145 The fact that federal bankruptcy legislation is often contingent on provincial initiatives in the area of property and civil rights has been noted by Professor Hogg (*Constitutional Law of Canada* (3rd ed. 1992), at p. 25-9):

> The term "secured creditor" is defined [in federal bankruptcy legislation] ... in terms so general that the validity and effect of "a mortgage, pledge, charge, lien or privilege" is left to be determined under the provincial law relating to secured transactions. For example, if a creditor claims to hold a first mortgage on land in Ontario, the trustee in bankruptcy ... will look to Ontario's law of mortgages to determine whether the creditor is indeed a secured creditor and, if so, the extent to which the creditor can resort to the land in priority to all other creditors. In this way, provincial law has a profound, albeit indirect, effect on the distribution of the bankrupt's assets. [Emphasis added.]

To my mind, there is nothing inherently undesirable about this interplay between federal and provincial statutory initiatives in the regulation of the bankruptcy process.

146 The Alberta Court of Appeal has, for its part, also demonstrated a reluctance to invalidate provincial legislation which simply touches upon bankruptcy proceedings. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 336 (CanLII), [1991] 5 W.W.R. 577, the issue before the court was whether the *Bankruptcy Act* prevented a court-appointed receiver-manager of an insolvent and bankrupt oil company from complying with an order requiring that receiver-manager, in the interests of environmental integrity, carry out proper abandonment procedures on seven suspended oil wells. That work would be done at the expense of the secured creditors' entitlement under the *Bankruptcy Act*. At page 599, Laycraft C.J.A. held for the court:

> In my view, there is no...direct conflict in this case. The Alberta legislation regulating oil and gas wells in this province is a statute of general application within a valid provincial power. It is general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the *Bankruptcy Act* though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the receiver with the general law means less money will be available for distribution.

Northern Badger thus echoes the proposition that provincial laws of general application continue to apply in bankruptcy even though they may incidentally alter the amount of proceeds available in the bankrupt's estate for distribution.

147 Provincial law plays a critical role in defining both the number and type of participants in the bankruptcy process and the size of the bankrupt's estate. A number of this Court's decisions have emphasized the value of standardizing bankruptcy priorities across the country. But it is important to remember that a bankruptcy priority is a category. The precise content of that category can and does vary to some extent from one province to the next. It seems to me that s. 72(1) of the *Bankruptcy Act* is an example of the recognition of provincial diversity. Section 72(1) reads as follows:

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72. (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

148 Because the federal legislation already contemplates that provincial law will impact upon the bankruptcy process, the respondents must do more than simply show that s. 133 has an effect on a particular bankruptcy. Indeed, in *Robinson v. Countrywide Factors Ltd.*, 1977 CanLII 175 (SCC), [1978] 1 S.C.R. 753, Beetz J., commenting on the precursor to s. 72(1) (s. 50(6)), wrote (at pp. 808-9):

> ...I am of the view that s. 50, subs. (6) of the *Bankruptcy Act* [R.S.C. 1970, c. B-3] provides a clear indication that Parliament, far from intending to depart from the rule of operational conflict, did in fact aim at the highest possible degree of legal integration of federal and provincial laws...[Emphasis added.]

149 I conclude that within the context of the bankruptcy process judicial authority and common sense militate in favour of a guarded approach to invalidation under the paramountcy doctrine. When this analysis is applied to the case at bar, it obliges the respondents, in order to prevail, to demonstrate that s. 133 of the impugned provincial Act actually reorders the federally established priority scheme with regard to the property of the bankrupt Metal Fab by directly creating interests therein. I now turn to this issue.

D.*Application of the Law to Section 133 of The Saskatchewan Workers' Compensation Act, 1979*

(i) The Validity of Section 133(1)

150 I reproduce s. 133(1), with its important portion underscored:

> **133.**--(1) Where a person, whether carrying on an industry included under this Act or not, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to ensure that any sum that the contractor or any subcontractor is liable to contribute to the fund is paid and, where the principal fails to do so and the sum is not paid, he is personally liable to pay that sum to the board. [Emphasis added.]

151 In my opinion, s. 133(1) has nothing to do with the property of the bankrupt. It creates a strict *in personam* obligation from the principal owing to the Board. The property of the principal is in no way subject to the *Bankruptcy Act*. The bankrupt is not even involved: there is no concern for the specific monies held by Husky for Metal Fab or owing by Husky to Metal Fab. The provision simply creates a third-party guarantee by the principal that the contractor will pay its debts to the Board.

152 The respondent Husky alleges that, regardless of the fact that s. 133(1) does not involve the property of the bankrupt, it remains in operational conflict with the *Bankruptcy Act* since it may have the effect of allowing the Workers' Compensation Board to recover more money for the Injury Fund than it likely could have done by proving a claim in bankruptcy and relying on s. 136. It is suggested that s. 133 permits the Board to jump from eighth place (under s. 136(1)(*h*) of the *Bankruptcy Act*) to first, thereby circumventing the priorities in bankruptcy.

153 In response, I note that s. 133(1) only alters the Board's recovery by permitting it to recover from a non-bankrupt third-party. There is no direct conflict within the meaning of the quartet or of paramountcy doctrine more generally between s. 133(1) and the *Bankruptcy Act*. There is nothing in the *Bankruptcy Act* which precludes any creditor, even if specifically mentioned in s. 136, from pursuing its remedies against a third-party as well as or instead of proving a claim in bankruptcy, although double recovery would certainly be frowned upon.

154 The Attorney General for Saskatchewan takes this analysis one step further by suggesting two commonplace and intuitively reasonable examples of situations in which third-party liability operates in concordance with a bankruptcy: a situation involving a personal guarantee by a third party, and a plaintiff's claim in an action for negligence against two co-defendants. The Attorney General reasons as follows:

> [a]A lender may loan money on the condition of receiving a personal guarantee from a third party. If the borrower goes bankrupt, the lender has every right to pursue the third party under the guarantee, and may recover the full amount owing. The lender then will have "advanced its position rather dramatically", compared to what it could have received through the bankruptcy process. The net result is a "clear advantage" to the lender, who "has managed to assure payment of its claim and leave it to the [third party guarantor] to struggle for repayment under the *Act*," probably as an unsecured creditor of the bankrupt.
>
> [bIn] the claim of a plaintiff in an action for negligence against two co-defendants. If the plaintiff's claim succeeds, there is a judgment owing against the two defendants. The two defendants are jointly and severally liable for the judgment. If one defendant goes bankrupt, the plaintiff is fully entitled to proceed against the other defendant for the full amount of the judgment, and ignore the bankruptcy process entirely. Again, the net result is a "clear advantage" to the plaintiff, authorized by provincial statute: *Contributory Negligence Act*, R.S.S. 1978, c. C-71, s. 3(2).

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155 In this case, we are not really dealing with the debt of Metal Fab any more. The legislation has validly created two debts that, although interconnected, are independent: the debt from Husky to the Board as surety of the Injury Fund, and then the debt of Metal Fab to Husky for the sums paid by the latter for the delinquency of the former. There is a great difference between altering the priorities under the *Bankruptcy Act* and statutorily empowering the Board to seek relief from more than one creditor.

156 I do not accept the respondents' submission, supported by Wakeling J.A. on appeal, that the *FBDB* case extended the "no interference" principle to the relationship between a creditor and a third-party to the bankruptcy. The *FBDB* decision involved a bank seizing the property of Structal Inc. pursuant to a security agreement. Subsequent to this seizure, Structal made an assignment in bankruptcy. The Workers' Compensation Board of Quebec then tried to claim a priority interest in the seized property by relying on a provision of the workers' compensation legislation which stipulated that assessments for which the employer Structal was liable amounted to a privileged claim on all the property of the employer. This Court, noting that the property in question was still part of the estate of the bankrupt, deemed the Quebec WCB's order to amount to a reordering of the bankruptcy priorities. On this point, Lamer J., held at pp. 1066-67:

> In this Court [the Workers' Compensation Board] argued, *inter alia*, that the order of priority set out in...the *Bankruptcy Act* is not applicable, as the immovable in Royal Trust's possession at the time of the bankruptcy was not part of the estate which passed to the trustee in bankruptcy....
>
> . . .
>
> With respect, I cannot accept this reasoning. The immovable, encumbered to [FBDB] and seized by the trustee, is part of the "property of a bankrupt" mentioned in...the *Bankruptcy Act*.

157 Regarding the proper interpretation of the *FBDB* decision, I agree with the following submissions by the Attorney General of British Columbia and the appellant Board, respectively:

> [In *FBDB*] the parties in question were seeking to realize, albeit outside of the bankruptcy proceedings, against property of the bankrupt. But that property was nevertheless subject to the Act and so, therefore, were the creditors who sought to realize against it. Accordingly, the *Federal Business Development Bank* decision does not purport to extend the scheme of priorities of proven claims under the *Bankruptcy Act* to recovery of the underlying indebtedness from a third party.
>
> That [*FBDB*] analysis does not take the trilogy of cases "one step further" and apply [them] to parties or property not involved in bankruptcy. To the contrary, it specifically involves a situation where provincial legislation directly creates an interest in the property of the bankrupt . . . . [T]his is very different from the situation involved in this case where Husky's liability under section 133(1)...is strictly personal and involves no claim whatsoever against either Metal Fab or the property of Metal Fab. Accordingly, it is submitted that the reasoning of the Court of Appeal is a significant and unwarranted extension of the principles established by the leading cases.

158 Section 133(1) does not involve property that is related to or part of the estate of the bankrupt and it is consequently not in operational conflict with the bankruptcy scheme. I am strengthened in this conclusion by the decision of the Ontario Court of Appeal in *Evelyn Stevens*, *supra*, and the case of *Re French River Contracting Co.*, [1937] O.W.N. 665. In fact, I prefer the *Evelyn Stevens* approach over that of both the Saskatchewan Court of Appeal in its decision in the case at bar and the Saskatchewan Court of Queen's Bench in *Serdula*, *supra*, *per* Lawton J.

159 In *Evelyn Stevens*, *supra*, at p. 748, Grange J.A. held:

> The principle is simple. The money owing under s. 9(3) [Ontario equivalent to s. 133(1)] is not property of the bankrupt and never comes into the hands of the trustee.

160 The Bank of Montreal submits that *Evelyn Stevens* can be distinguished on the facts. Its argument revolves around the observation that in *Evelyn Stevens* there was a trustee overseeing a group of unsecured creditors. On the other hand, in the case at bar, there has been an assignment to a secured creditor and the set-off would deplete the funds normally accruing to this secured creditor. I agree that this difference is noteworthy. However, I am not convinced that this difference is sufficient to undermine the persuasive authority of the *Evelyn Stevens* decision. The *Evelyn Stevens* court did not mention that the absence of secured creditors affected in any way its decision to uphold the validity of the impugned provision.

161 In sum, s. 136(1)(*h*) encompasses a claim against the property of the bankrupt. The Board claim under s. 133(1) targets a solvent principal. The two provisions are co-extensive, not mutually exclusive. Use of s. 133(1) does not displace s. 136(1)(*h*); it complements it.

162 In closing, although I find there to be no conflict between s. 133(1) and the *Bankruptcy Act*, I posit that, even if there were to be some element of conflict, this must be evaluated in light of the fact that the provincial legislation is *intra vires*. Legislation that is *intra vires* is permitted to have an incidental and ancillary effect on a federal sphere. I would emphasize again that this Court has traditionally declined to invoke the paramountcy doctrine in the absence of actual operational conflict. I am uncomfortable with the "water-tight" approach to federal bankruptcy legislation propounded by

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the respondents. To interpret the quartet as requiring the invalidation of provincial laws which have any effect on the bankruptcy process is to undermine the theory of co-operative federalism upon which (particularly post-war) Canada has been built. In *Deloitte Haskins*, *supra*, at pp. 807-8, Wilson J. recognized it to be appropriate to adopt as narrow a definition of operational conflict as possible in order to allow each level of government as much area of activity as possible within its respective sphere of authority.

163 On a related note, a rather weak argument has been made to the effect that s. 133(1) is inoperative simply because it increases the total amount of the claims being made by creditors. I would respond that even if this were true on the facts, many pieces of provincial legislation achieve precisely the same goal. In fact, as discussed earlier, most claims against a bankrupt's estate are grounded in provincial legislation; I do not see why *The Workers' Compensation Act, 1979*, should be impugned because it may add a creditor to the list, when nearly all of the other creditors will have been added by virtue of other provincial statutes. Neither increasing the number of claims made nor decreasing the amount of assets in the estate is activity necessarily commensurate with altering the priorities of distribution among the creditors.

164 To this end, a principal's liability under s. 133(1) is not extinguished by the bankruptcy of the contractor.

(ii) The Validity of Section 133(3)

165 I find s. 133(1) to be constitutionally valid but because I believe (for reasons outlined *infra*) that the components of s. 133 are severable, I must evaluate s. 133(3) separately. As mentioned earlier, this provision engages a more direct interference with the bankruptcy scheme since it is the actual property of the bankrupt that is involved in the restitutionary claim launched by the principal. It constitutes, to my mind, the only linkage between the property of the principal and the estate of the bankrupt contractor. Section 133(3) reads as follows:

133.--...

(3) Where the principal is liable to make payment to the board under subsection (1), he is entitled to be indemnified by any person who should have made the payment and is entitled to withhold, out of any indebtedness due to that person, a sufficient amount in respect of that indemnity.

166 Before proceeding any further, I believe it necessary to subdivide s. 133(3) into two parts because the provision enshrines two different remedies: that of set-off as well as that of indemnification. Clearly, set-off is the more intrusive of the two since it permits the principal to stand first in the priority scheme by taking away the property of the bankrupt before it enters the estate. As to indemnification, any such claim by the principal might have but an ancillary effect on the estate of the bankrupt since it only permits the principal to join the ranks of the unsecured creditors. On this latter point, I note that it has been submitted that s. 136(1)(*h*) might cover the amount owing to the principal; if so, then the principal would rank well above the unsecured creditors. Although it is not necessary to decide this issue, I shall simply assume that s. 136(1)(*h*) does not have such a wide ambit.

167 As will soon become evident, this sub-dividing of s. 133(3) is important: given that paramountcy doctrine operates to invalidate only to the extent of the operational conflict, it could be that because of their varying effects, the "set-off" claim could be struck while the indemnification claim remains operational: *Robinson*, *supra*, at p. 808; *MacDonald v. Vapour Canada Ltd.*, 1976 CanLII 181 (SCC), [1977] 2 S.C.R. 134; Hogg, *supra*, at p. 16-18.

168 However, at this point in the analysis we come to s. 97(3) of the *Bankruptcy Act*. Neither claim will be invalid if s. 97(3) of the *Bankruptcy Act* can be interpreted in a way that will reconcile the priority scheme of the Act with the common law of set-off (and, implicitly, of indemnification) and if the claims embodied in s. 133(3) can be found to be merely reflective of those common law causes of action. Section 97(3), which provides that the law of set-off is to persist in bankruptcy, reads as follows:

(3) The law of set-off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off is affected by the provisions of this Act respecting frauds or fraudulent preferences. [Emphasis added.]

169 Section 97(3) thus specifically envisions that there will be cases where money owing to the bankrupt will not enter the bankrupt's estate because it will have been set off against a debt owed by the bankrupt to that individual. As Grange J.A. noted in *Evelyn Stevens* (at p. 748), the money comes to the Board by virtue of the *Workers' Compensation Act*, R.S.O. 1980, c. 539: "[i]t is the *Bankruptcy Act* itself and not the provincial legislation that recognizes rights of set-off". I note in passing that the right of set-off in s. 97(3) includes both legal and equitable set-off: Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. 1993), vol. 1, at pp. 4-90 and 4-91. This Court has recognized that legal set-off does not operate within the context of an assignment since that assignment destroys the mutuality of the cross-obligations between the parties: *Holt v. Telford*, 1987 CanLII 18 (SCC), [1987] 2 S.C.R. 193. In the case at bar, Metal Fab assigned its book debts to the Bank, thereby presumptively eliminating the availability of legal set-off. To this end, my focus shall be limited to equitable set-off.

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170 The fundamental question at this juncture is whether s. 133(3) is merely declaratory of the rights to set-off and indemnification that existed at equity. If s. 133(3) creates no new rights of set-off and merely confirms the availability of traditional equitable set-off, it is consistent with the *Bankruptcy Act*. In this regard, I rely on the *Henfrey Samson* case. In *Henfrey Samson*, McLachlin J. suggested at (pp. 34-35) that if the statutory device (in that case a trust) shared the characteristics of its common law counterpart, the former would be compatible with the *Bankruptcy Act* even if it affected the distribution scheme. On the other hand, if the statutory device was wider in scope than that available at law or equity, there would be conflict and the device would need to be declared a nullity. In *Henfrey Samson*, the Court found that the statutory trust shared none of the characteristics of a trust established under the general principles of law; accordingly, it was susceptible to invalidation on the ground of interference with the order of priorities. In this regard (and as shall become evident *infra*), *Henfrey Samson* is distinguishable from the case at bar. No "deeming" is necessary to bring Husky within the four corners of the "law of set-off" as that term is used in s. 97(3).

171 I note that set-off operated within the bankruptcy context as early as the time of Elizabeth I. The first specific statutory set-off clause was codified in a 1705 statute: Philip R. Wood, *English and International Set-Off* (1989), at p. 282. The rationale behind the use of set-off in the bankruptcy context is aptly summarized by Fletcher Moulton L.J. in *Lister v. Hooson*, [1908] 1 K.B. 174 (C.A.), at p. 178:

> The right of set-off in bankruptcy has been dealt with by various statutes, but takes its origin from the fact that the jurisdiction in bankruptcy was from the first an equitable jurisdiction. The successive statutory formulations of the consequence of this principle, embodied in the clauses as to mutual credit, dealings, &c., have never altered this fundamental principle, and, speaking for myself, I cannot see any ground why in the present instance the injustice should be perpetrated of making a person who in the balance is not a debtor to the estate pay in full the sum due to the estate and receive only a dividend on the sums due from the estate.

172 In my opinion, s. 133(3) is duplicative of the law of equitable set-off as delineated by this Court in *Telford*, *supra*, and confers a right that does not go beyond what would be ordinarily available at law or equity. Moreover, under s. 92(13) of the *Constitution Act, 1867*, a province has the competence to codify legal and equitable rules related to set-off. Ostensibly, the motivation behind the codification of these rules in s. 133(3) is to facilitate recovery by principals, many of whom would be more familiar with the terms of a statute than the intricacies of the common law.

173 Regarding the declaratory nature of Husky's claim against the now assigned estate of the bankrupt, I note that, absent s. 133(3), such a claim would exist according to the law of restitution or the law of contract. In terms of restitution, it is settled that a person may claim for recoupment or reimbursement of monies expended by him under compulsion of law if the effect of such a payment is to discharge the liability of another. In other words, A will be allowed to recover from B by way of set-off where A has been required to make a payment to C on B's behalf. I am supported in this conclusion by the following passage cited from *Moule v. Garrett* (1872), L.R. 7 Ex. 101, at p. 104:

> "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."

174 This point was addressed in a more detailed manner in the decision of Lord Wright M.R. in *Brook's Wharf and Bull Wharf, Ltd. v. Goodman Brothers*, [1937] 1 K.B. 534 (C.A.), at p. 544:

> The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal. [Emphasis added.]

175 In the case at bar (assuming that the order was validly made and limited to the liabilities arising from Metal Fab's work for Husky), Husky is eligible for set-off since Husky's liability to pay arose only as a consequence of Metal Fab's default regarding its requirement to make payments to the Injury Fund. Payment by Husky would have the obvious effect of releasing Metal Fab of its liability to the Board. Thus, in light of the fact that Husky is under a clear legal obligation to make the payments in question, it follows that this is a circumstance where Husky is entitled to seek restitution from Metal Fab. In this connection, the Workers' Compensation Board of British Columbia points out that the B.C. legislation does not include an explicit recognition of set-off, but still the B.C. courts appear to have read it according to the general principles of restitution.

176 The second ground for set-off independent of s. 133(3) arises from the contractual relationship between Metal Fab and Husky. The contracts binding the parties, in clauses 12.01 and 13.01, oblige the contractor to "comply with all laws" and indemnify the principal from any expense arising from the "negligent performance, purported performance or non-performance of the Contract" by the contractors. Given this language, Metal Fab's failure to pay amounts owing to the

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Board constituted a breach of its contractual obligations to Husky. An indemnification claim rises concomitantly. This claim stands apart from s. 133(3).

177 It is submitted that the fact that the property of the bankrupt has been assigned to the Bank and, thus, that the debt is no longer technically owed to Metal Fab but to the Bank of Montreal, militates against a finding that the law of set-off applies in this case. I disagree. Equitable set-off (unlike legal set-off) can operate within the context of an assignment, even of book debts: *Telford*, *supra*, at pp. 206-9, affirming *Government of Newfoundland v. Newfoundland Railway Co.* (1888), 13 App. Cas. 199 (P.C.). The only pre-requisite to set-off against the assignee is that the claim against the assignee is to arise out of the same contract or series of events which gave rise to the original claim or be closely connected with that contract or series of events. As noted by Wilson J. in *Telford*, *supra*, at p. 211:

. . . cases involving [set-off] debts that arise from the same contract or closely inter-related contracts form an exception to the general rule. In these cases a debt arising out of the contract or closely interrelated contracts may be set-off against the assignee even if the debt accrues due after the notice of the assignment.

178 In *Telford*, the two debts arose out of a land-swap. The Telfords and Canadian Stanley Development Ltd. exchanged lands of equal value, each paying the other a different cash sum and each taking back a first mortgage or a second mortgage. The end result of the transaction was that on closing Canadian Stanley would pay the Telfords $50,000 which the Telfords would use for the purpose of financing the construction of a residence on their new land. Five days prior to the closing of its deal with the Telfords, Canadian Stanley assigned its mortgage to the Holts to secure the balance of the purchase price on a piece of land the Holts had sold to Canadian Stanley, but failed to notify the Telfords about this assignment before the transaction with them was closed. The Telfords later agreed to a postponement of the Canadian Stanley mortgage resulting in the priority of that mortgage moving from second to third place on title. The Telfords only learned about Canadian Stanley's assignment after trying to tender their first payment on the mortgage. They then indicated that a court application for a discharge of the mortgage would be made. Shortly thereafter, the Holts demanded the payment then due ($50,000 plus interest, for a total of $50,886.60) and filed a statement of claim against the Telfords for the entire amount owing (this being $150,000, independent of the amount owing on the mortgage). This claim was based upon a clause in the Telford mortgage which provided that upon default of any payment of the principal the whole amount would become payable. After receiving notice of the Holts' statement of claim, the Telfords paid the $50,886.60 into court and then counter-claimed for a discharge of the mortgage, alleging that they had the right to set off the debt owed to them by Canadian Stanley against the assignee Holts' claim.

179 Wilson J. permitted the Telfords to use the doctrine of equitable set-off. It was duly noted that the debts did not accrue until after the assignment. However, Wilson J. did find that equitable set-off could operate since the debts were so closely connected that it would have been unfair to enforce one without allowing the setting off of the other.

180 The specific assignment and the specific bankruptcy extant in the case at bar satisfy the *Telford* test. I note that the debt from Metal Fab to Husky accrued on the date of the demand to Husky by the Board (March 16, 1992). This was four days after Husky was given notice of the assignment to the Bank yet before the occurrence of the actual assignment. However, the *Telford* test is met since Husky's indemnity claim arose out of the very contracts pursuant to which funds are now owing to the Bank of Montreal; in fact, Husky has a direct interest in the bankrupt's property which, by force of the assignment, is now held by the Bank. Moreover, the nexus between the amounts Husky seeks to set off and the assigned debt can be said to be more direct than it has been in other cases where equitable set-off has been allowed: *Hanak v. Green*, [1958] 2 All E.R. 141 (C.A.); *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, 1985 CanLII 144 (BC CA), [1985] 6 W.W.R. 14 (B.C.C.A.); *Federal Commerce and Navigation Ltd. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066 (C.A.), affirmed [1979] A.C. 757 (H.L.).

181 The cause of action specifically contemplated by Husky (i.e., a principal seeking restitution from an assignee for book debts from a assignor whose delinquency prompted the principal's liability in the first place) is of a sufficiently interconnected nexus so as to fit the "closeness" criteria mandated by the *Telford* test. This is especially the case when the assignee knew about the outstanding debts before receiving assignment of the estate. I am not persuaded by the Bank's submission that equitable set-off is not available because the right to indemnification did not arise under the contract. This analysis ignores the essential characterization of the debts. The basis of the indemnification in the appeal at bar is the debt paid by Husky on behalf of Metal Fab which related to the contracts signed between those two parties. Furthermore, according Husky the ability to set off also fulfils what is likely the principal *raison d'être* of the doctrine of equitable set-off in the first place, namely the promotion of fairness.

182 Lord Denning M.R., in the *Federal Commerce* case, remarks at p. 1078 (C.A.):

We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties?... This question must be asked in each case as it arises for decision....

183 I recognize that, in the appeal at bar, Husky is liable under the terms of s. 133(1). Moreover, s. 133(1) entrenches an absolute liability standard in order to create joint and several responsibility among all employers for the sums that one

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of them has left unpaid. The question then arises why it would remain "fair" to allow Husky to, in the end, escape the effects of this liability by permitting all of the unpaid dues to flow from the estate of the insolvent bankrupt, to the detriment of the other creditors.

184 My response is twofold: (1) although s. 133 renders the principal and the contractor jointly and severally liable to the Board, as between the principal and contractor it is clear that the primary liability reposes with the contractor and, consequently, the solicitation of contribution for payments made on behalf of that contractor by the principal is consonant with commercial fairness; and (2) Husky's insistence that the contract contain terms obliging Metal Fab to make the payments to the Board and its decision to hold back funds (this being a standard industry practice), although certainly not relieving it of liability under s. 133, does militate in favour of a finding that Husky's conduct was such that it would be equitable and fair to allow it the right of set-off.

185 Apart from United Kingdom jurisprudence, the most persuasive authority cited to us on the s. 133(3) issue is the Ontario Court of Appeal's decision in *Evelyn Stevens*. Grange J.A., after reviewing the authorities, concluded that equitable set-off was available to a principal who had become fixed with liability for the contractor's unpaid debts. He concluded at p. 749:

> Whether or not the money was due to the principal before the bankruptcy, it most assuredly "arose out of or was closely connected with the same contract or series of events".

186 The Bank of Montreal also submits that s. 97(3) is not applicable to a situation where there are secured creditors who own the funds of the bankrupt. To this end, although s. 97(3) may have been applicable to the facts in *Evelyn Stevens*, it is not so to the case at bar. In response, I note that s. 97(3) deems the law of set-off to operate in relation to all claims made against the estate of the bankrupt. There is no distinction made regarding the types of claims. And the Bank is the owner of nothing less and nothing more than the "estate of the bankrupt".

187 I thus find that, since s. 97(3) encapsulates the rights ordinarily available to Husky at equity, s. 133(3) is fully operative in the case at bar, as well as to all situations in bankruptcy where the principal would fall within the *Telford* test as I have interpreted it.

(iii) Does the Partial or Total Invalidity of Section 133(3) Render Section 133(1) Inoperative?

188 It is not necessary to consider this issue since I find that subs. (3) is constitutionally valid. However, I would like to offer certain comments on the interplay between ss. 133(1) and (3).

189 It is important to recognize that s. 133(1) does not make the principal's obligation to the Board in any way contingent upon the principal's ability to obtain indemnity (through set-off or otherwise) under s. 133(3). There may be many cases in which there is either no indebtedness between the principal and the contractor or insufficient indebtedness to cover the full liability involved. Yet, in either of these situations, s. 133(1) is still fully applicable. To this end, not only does s. 133(1) operate in isolation of the bankruptcy, it also operates independently from s. 133(3). Section 133(1) is the key feature of s. 133 as a whole. It aims at preserving the integrity of the Injury Fund. Section 133(3) is clearly secondary in this regard. Consequently, I do not accept Husky's argument that s. 133(1) was intended solely to operate in conjunction with s. 133(3). Although I might be prepared to find that s. 133(3) and the equitable rights it codifies cannot operate independently from s. 133(1), I have no doubt that s. 133(1) can operate independently from s. 133(3). The legislature contemplated that s. 133(3) may not always be available to assist a principal to recoup sums paid under subs. (1).

190 The argument was raised that s. 133(1) cannot stand alone since, without the accompaniment of s. 133(3), it is a draconian, unreasonable provision tantamount to an expropriation. But the point of the matter is that, since s. 133(3) is merely declaratory of law and equity, s. 133(1) does not exist without a right to indemnification (or to set-off).

191 If s. 133(3) were invalid and if the law did not incorporate the equitable right of set-off (as discussed *supra*), then s. 133(1) would operate to guarantee the Board payment from the principal without a corresponding restitutionary recourse on behalf of the latter. Although this may seem a difficult burden to bear, in a sense it is simply the cost of doing business in a context where, for public policy reasons, the yoke of the contractor's delinquency is placed on the principal's shoulders instead of those of the workers. Although heavy, this burden, in my mind, is not draconian. It is partly attenuated by the fact that Husky, as a sophisticated employer, can be safely assumed to be well-versed in the practice of obtaining clearance certificates to protect itself from principal's liability under s. 133(1). These certificates allow a principal to determine in advance of releasing funds to a contractor whether that contractor has outstanding indebtedness to the Board. However, even if it created a draconian burden, there is nothing barring the legislature from passing such legislation. The following passage from La Forest J.A. (as he then was) in *New Brunswick v. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201, at p. 214, is pertinent:

> The courts should not...place themselves in the position of frustrating regulatory schemes or measures obviously intended to reallocate rights and resources simply because they affect vested rights. For legislation almost inevitably affects vested rights.

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192 The legislature can even pass expropriation legislation (much more onerous than s. 133(1)) as long as the language is clear: *TransGas Ltd.*, *supra*; *Manitoba Fisheries Ltd. v. The Queen*, 1978 CanLII 22 (SCC), [1979] 1 S.C.R. 101.

193 There are also policy reasons as to why s. 133(1) ought to be viewed as operating independently from s. 133(3). The Workers' Compensation Board of Alberta argues convincingly:

> ...it is submitted that to not construe section 133(1)...separately from section 133(3) would allow mischief to creep into industrial practices. An unscrupulous employer could incorporate a subcontractor to provide all its labour services. Thereafter if that former employer (now a principal) could not be held liable under section 133(1) where the subcontractor is allowed to go into or assigns itself into bankruptcy, the Accident [Injury] Fund is at risk. Ultimately, if such a practice became widespread, the efficacy of the workers' compensation system could be undermined.

194 In sum, I respectfully disagree with the trial judge's and Court of Appeal's conclusions that s. 133 is to be treated as an indivisible whole. Although this finding is not necessary to dispose of this appeal, I hope that it may settle any extant, and preclude any future, confusion regarding the operation of s. 133, as well as its counterparts in the laws of the provinces other than Saskatchewan.

E. *Some Residual Issues*

195 The view of this Court was principally solicited for the purpose of answering the constitutional questions. However, several of the parties raise threshold factual issues which were not pleaded at trial which I should like to address, albeit briefly.

196 The Bank of Montreal submits that Husky was not liable under s. 133 for payment of Metal Fab's assessments. Husky itself raises a similar issue. This follows, it is alleged, from the following argument: within the context of s. 133, assessments should relate only to the work done by the delinquent contractor for the impugned principal. In the case at bar, it is submitted that there is no indication the assessments against Husky were specific only to the work completed for Husky by Metal Fab; in fact, some affidavit evidence is now tendered to the contrary. This evidence alleges that the assessment sent to Metal Fab by the Board was not related to any particular work, but calculated in accordance with an annual payroll estimate supplied by the contractor to the Board.

197 In response, I note that both the trial judge and the appeal judges found that the order under s. 133 had been validly issued. This finding was not contested in the courts below. Leave was not granted by this Court to hear this issue. For these reasons, I believe that this issue should not now be heard for the first time. The general practice of this Court is, given the lack of considered reasons of the courts below, to refuse to consider new matters raised for the first time, especially where, had the issue actually been raised, the parties may have been in a position to present relevant evidence and submissions: *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, 1991 CanLII 90 (SCC), [1991] 1 S.C.R. 671; *R. v. Amway Corp.*, 1989 CanLII 107 (SCC), [1989] 1 S.C.R. 21.

198 A far preferable procedure would be to permit this argument to be raised at the new trial that, given the constitutionality in bankruptcy of s. 133, shall be ordered pursuant to the disposition of the instant appeal. At that point, evidence can be adduced as to the exact sources of the $246,745.26 allegedly owed by Metal Fab to the Board. A trial judge, when properly presented with all of the material evidence, will be in a far better position to sift through the records and ascertain the true amount of Metal Fab's unpaid contributions for which Husky could be held liable. Although it could very well be that the extant assessments reveal Husky's true liability, at this juncture I am not prepared to make such a finding.

199 However, although not in a position to determine whether the assessments made against Husky by the Board involved unpaid contributions stemming from work Metal Fab completed for principals other than Husky, this Court can, as a question of law, determine whether s. 133 could permit the recovery of such amounts. I find it does not. The liability of the principal is to be limited to the specific work that was completed for it by the delinquent contractor.

200 It is unfortunate that the wording of s. 133 in the 1979 version of the statute was amended in an ambiguous form. In cases of ambiguity, courts are to rely on the principle of statutory interpretation according to which statutes purporting to pay the debts of one person out of the property of another are to be given a restrictive interpretation: *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 370; *Board of Industrial Relations v. Avco Financial Services Realty Ltd.*, 1979 CanLII 230 (SCC), [1979] 2 S.C.R. 699.

201 I am further fortified in this regard by the fact that the grandfather of s. 133, s. 9 of the 1910 *Workmen's Compensation Act*, limited the principal's liability to the actual work executed for it by the delinquent contractor: see also s. 11 of the 1928 legislation. In any event, gauging from the submissions made before this Court by the Appellants and some of the Interveners, such appears to be the practice of the provincial Boards when issuing notices under s. 133 and its companion provisions. This accords with common sense, as it would appear counter-intuitive to hold Husky liable for all of Metal Fab's outstanding debts to the Board. Under such a regime, liability could be virtually limitless since it might

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encompass all of the shortfall accruing to the contractor independent of the particular principal under whose contracts that shortfall actually arose.

202 However, I note that, although relevant to the amount of the assessment in the appeal at bar, this issue is not of wide public importance given that the Saskatchewan legislation was once again amended in 1993 (S.S. 1993, c. 63, s. 40) to provide expressly that the liability be limited to the specific work performed. As I see it, the 1993 amendment supports my conclusion that the liability of the principal be limited to the unpaid funds arising out of the specific work completed for it since this amendment appears to be intended as a clarification of the law, not as a substantive change.

203 I also find that limiting s. 133(1) to the debts arising out of the actual work completed for the principal permits the subsection to operate in tandem with subs. (3). As was discussed *supra*, subs. (3), in order to be valid in the bankruptcy context, must be interpreted to permit only set-off to the extent allowed at law or equity. I believe that the law of set-off would only allow the restitution of the sums paid by the principal to the Board that actually involved monies that the delinquent contractor was liable to pay by virtue of its nexus with the principal.

204 The Board and the Bank of Montreal raise a further issue. It is suggested that s. 133(3) does not entitle Husky to indemnify itself out of funds owing to Metal Fab because it received the demand for payment from the Board after it had been notified that Metal Fab had given notice of assignment of book debts to the Bank of Montreal. There was thus no "indebtedness towards the contractor", but only towards the assigned party.

205 Again, I note that this issue was not argued fully in the courts below; in fact, no questions were raised regarding the factual ability of Husky to indemnify itself from the property of the bankrupt. It thus comes as no surprise that the factual record to which this Court can turn to resolve this question is somewhat bare. I therefore conclude that this issue should not be decided at this point. It is better left to be determined by a trial court, perhaps even by fiat. I would suggest, however, that the fact that s. 133(3) is but declaratory of equitable set-off (as discussed *supra*), in which set-off can operate after the assignment has occurred, be seriously taken into account in the eventual disposition of this issue.

206 Husky argues that it did not breach its statutory duty to ensure payment by the contractor under s. 133(1) because it held back certain sums (in excess of the unpaid assessments) and ensured that Metal Fab would be contractually bound to pay the WCB fund. Until this point in the litigation, it was settled that Husky was, barring the non-operation of the statute, liable to pay the Board. There is no reason for this Court now to review the findings of the trial and appellate judges in this matter, especially, once again, given the paucity of the factual record advanced in favour of this proposition.

207 In any event, I note that the duty created by s. 133(1) is not one of due diligence. The statutory language has encumbered the principal with absolute liability. Nothing short of actually ensuring payment will discharge the duty. Husky's reading of s. 133(1) ignores the true purpose of the provision, namely the maintenance of the viability of the Injury Fund through the creation of joint and several liability among employers for the contributions.

208 Finally, on a related note, it is submitted that once the property passed into the hands of the assigned Bank, Husky was no longer in any position of control or supervision over Metal Fab. Therefore it no longer operated under the statutory duty to ensure that Metal Fab paid its assessments. For this reason, the ability of the Board to collect under s. 133(1) could not be invoked. Husky also submits that, were it to encourage the bankrupt to pay the amounts due to the Board, it would infringe s. 158 (obligation of a bankrupt to deliver all of the property to the trustee) and thereby effectively aid and abet in the commission of an offence contrary to s. 198(*a*) of the *Bankruptcy Act*. I reject this submission. A bankrupt's obligations under s. 158 are necessarily qualified by other provisions of the Act such as s. 72(1) (allowing interplay with provincial legislation) and s. 97(3) (recognizing rights of set-off against the bankrupt's estate). There is no operational conflict between ss. 133(1) and 158(*a*). I also note that s. 133(1) creates a situation in which, *ab initio*, the principal is liable for any debt owed to the Board by the contractor. It does not matter whether, *ex post facto*, control over the contractor's estate passes into other hands.

VI. Conclusions and Disposition

209 By way of summary, it may be helpful to state my conclusions:

1 There is no conflict between s. 133(1) of the Act and the *Bankruptcy Act*. Consequently, s. 133(1), although not primarily designed for the bankruptcy context, is applicable and operative if and when the contractor whose delinquency gave rise to the Board's order against the principal files an assignment in bankruptcy.

2 There is no conflict, as the term is understood in paramountcy analysis, between s. 133(3) and the *Bankruptcy Act*, regardless of whether s. 133(3) is used for purposes of set-off or indemnification from the estate of the bankrupt. Section 133(3) is declaratory of the equitable right of set-off and indemnification. Such an equitable right arises upon the facts of this case and is reconcilable with the *Bankruptcy Act* by virtue of s. 97(3).

3 In terms of constitutional analysis, the simple fact that a provincial undertaking may have an effect upon a bankruptcy does not necessarily mean that such an undertaking is to be nullified under paramountcy analysis. Further, the fact that the Board might be able to recover more money as a result of s. 133 does not mean that this provision is in operational

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conflict with the *Bankruptcy Act*. Operational conflict means that compliance with the provincial statute means offending the federal one. But the two pieces of legislation involved here are complementary.

4 The Court of Appeal erred in law in asserting that the "quartet" of Supreme Court of Canada cases, *Re Bourgault*, *Deloitte Haskins*, *Henfrey Samson*, and *FBDB*, are to be interpreted as invalidating any provincial law that affects the outcome of a bankruptcy.

210 I would answer the constitutional questions as follows:

1 Where a contractor as referred to in s. 133 of *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17, is in bankruptcy and but for the bankruptcy, the principal as referred to in s. 133 would be liable to pay the assessment due by the contractor under the Act, is s. 133 of the said Act inoperative or inapplicable in whole or in part, by reason of being in conflict with the *Bankruptcy Act*, R.S.C., 1985, c. B-3, and in particular ss. 17(1), 67, 95, 136(1)(*h*), 148, 158(*a*) and 198(*a*) thereof?

No.

2 Was s. 133 of the said Act inoperative or inapplicable in the circumstances of this case?

No.

211 Consequently, I would allow the appeal with costs throughout and set aside the judgment of the Saskatchewan Court of Appeal. I would remit the matter to trial in order to determine whether, on the facts of this case, the Board notice to pay was properly tendered under s. 133(1), whether Husky can (despite the assignment and the timing of the notice thereof) indemnify itself from the property of the bankrupt, and whether the amounts assessed were actually those which arose out of Metal Fab's work for Husky. If so, then the Board is statutorily entitled to recover the unpaid contributions from Husky and Husky, in turn, can set off these amounts from the hold-backs it has regarding the property of the bankrupt, which has been assigned to the Bank of Montreal. In the unlikely event of a shortfall between the contributions owing and the amount held back, Husky is entitled to file a claim for this shortfall as an unsecured creditor, unless it wishes to present legal submissions as to why it should be able to claim under s. 136(1)(*h*).

212 After these reasons were prepared, I had the benefit of reading the reasons of my colleague Gonthier J. I would like to offer a response on certain points. I am uncomfortable with reliance upon secondary sources -- even sources as allegedly succinct and helpful as the article by Roman and Sweatman, *supra* -- for interpretation of this Court's decisions. I believe that it is preferable to refer directly to the decisions, particularly when I find that the article in question advances propositions which I find problematic in the so-called "effect" aspect, which I will now discuss.

213 My understanding of the concept of "effect" in this Court's federalism jurisprudence is that both *vires* and paramountcy analyses hinge upon the *extent* of the effect. "An" effect on a federal sphere is, by itself, insufficient to invalidate provincial legislation. Rather, there must be a relatively substantial effect (i.e., an effect that is more than incidental or ancillary). Where this is so, the operational conflict must be express, as I have mentioned in these reasons; upon finding such an operational conflict, the provincial legislation will yield to the federal legislation to the extent of the conflict. In so far as my colleague has introduced some further refinements on this traditional analysis, dealing with exclusive as opposed to concurrent or overlapping jurisdictions, and invoking a separate concept or doctrine of "applicability" in this context, I, with respect, find this somewhat confusing. In short, it seems to me to confuse the doctrines of *vires* and paramountcy, as these have been traditionally understood, and I do not read the *Deloitte Haskins* and *Bank of Montreal* cases as supporting such a departure.

Appeal dismissed with costs, SOPINKA, CORY, IACOBUCCI *and* MAJOR JJ. *dissenting. Section 133 is inapplicable in bankruptcy when s. 133(1) of The Workers' Compensation Act, 1979, operates in tandem with s. 133(3). Section 133 was inapplicable when the contractor entered bankruptcy.*

Solicitors for the appellant: MacPherson, Leslie & Tyerman, Regina.

Solicitors for the respondent Husky Oil Operations Ltd.: Hleck, Kanuka, Thuringer, Regina.

Solicitor for the respondent Her Majesty The Queen in right of Canada, as represented by the Minister of National Revenue: The Attorney General of Canada, Ottawa.

Solicitor for the respondents Her Majesty The Queen in right of theProvince of Saskatchewan, as represented by the Minister of Human Resources, Labour and Employment, and Her Majesty The Queen in right of the province of Saskatchewan, as represented by the Minister of Finance: The Attorney General for Saskatchewan, Regina.

Solicitors for the respondent Bank of Montreal: Balfour, Moss, Saskatoon.

Solicitors for the respondents Eric Zimmerman, Garth Price,Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki and Terry Sapergia: Pederson, Norman, McLeod, Regina.

Solicitors for the respondent SBW--Wright Construction Inc.: Gauley & Co., Regina.

Solicitors for the respondent Campbell West (1991) Ltd.: McKercher, McKercher, Laing & Whitmore, Regina.

Solicitors for the respondent Fuller Austin Insulation Inc.: Johnston, Bennett & Sholter, Lloydminster.

Solicitors for the respondent United Industrial Equipment Rentals Ltd.: Kirzinger, Hall, Revering & Wells, Lloydminster.

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Solicitors for the respondent ATCO Enterprises Ltd.: Nussbaum & Burrows, Saskatoon.

Solicitors for the respondent Deloitte & Touche Inc., as Trustee in Bankruptcy of the Estate of Metal Fabricating & Construction Ltd.: MacDermid, Lamarsh, Saskatoon.

Solicitor for the respondent the Attorney General for Saskatchewan: The Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

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Solicitor for the intervener the Workers' Compensation Board of Alberta: The Workers' Compensation Board of Alberta, Edmonton.

Solicitors for the intervener the Workers' Compensation Health and Safety Board of Yukon: Preston, Hillis & Co., Whitehorse.

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Barrington and Vokey Ltd., Re, 1996 CanLII 5193 (NS SC) - Bankrupt's Inventories About to be Used - Who has Interest?

Date:	1996-12-13
Docket:	S.H. No. 130252
Parallel citations:	158 NSR (2d) 391; 48 CBR (3d) 270
URL:	http://canlii.ca/t/1mlz7
Citation:	Barrington and Vokey Ltd., Re, 1996 CanLII 5193 (NS SC), <http://canlii.ca/t/1mlz7> retrieved on 2013-09-01
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1996 S.H. No. 130252

IN THE SUPREME COURT OF NOVA SCOTIA

IN THE MATTER OF THE BANKRUPTCY OF
BARRINGTON AND VOKEY LIMITED
ON APPEAL FROM THE REGISTRAR
DECISION

HEARD: at Halifax, Nova Scotia before the Honourable Mr. Justice Jamie W.S. Saunders in Special Chambers November 13, 1996

DECISION: December 13, 1996

COUNSEL: Robert Aske, Esq., solicitor for the appellant, Dineen Construction (Atlantic) Inc.
Gary J. Corsano, Esq., solicitor for the appellant, JonelJim Construction (1994) Limited
D. Bruce Clarke, Esq., solicitor for the respondent, the Trustee in Bankruptcy

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SAUNDERS, .I.

BACKGROUND TO PROCEEDINGS

The hearing conducted in Special Chambers on November 13, 1996 comprised two separate appeals from the decision of the Registrar in Bankruptcy dated June 18, 1996.

Barrington and Vokey Limited (B & V) was a mechanical subcontractor with its head office in Sydney. Evidently the business had prospered for many years. In 1994 the bankrupt decided to expand its business and moved its central office to Halifax. It started work on a number of large projects spread throughout Nova Scotia and New Brunswick. Within a year the bankrupt ran out of money and voluntarily declared bankruptcy on March 17, 1995. On that date B & V had a number of construction jobs with JonelJim Concrete Construction (1994) Limited; Dineen Construction (Atlantic) Incorporated and Maxim Construction Inc.. B & V had delivered certain of its inventories to each job site for the purpose of installation in the various projects. **They had not been installed or paid for as of the date of bankruptcy**.

Each of the general contractors took the position that they were entitled to use the inventories in order to complete the projects. A general outline of the contracts and projects is contained at pp. 2 - 4 of the decision of the Registrar. Maxim Construction Inc. and the Guaranty Company of North America did not participate in the appeals, as the dispute with those parties was settled.

Two separate appeals were heard together. The appeal filed by JonelJim Concrete Construction (1994) Limited ("JonelJim") is dated October 28,1996. No objection was taken to the late filing of this appeal document. Mr. Clarke, solicitor for the Trustee of the Estate of B & V took the position that the appeal filed by JonelJim was within time.

The second Notice of Appeal filed by Dineen Construction (Atlantic) Incorporated ("Dineen") is dated August 6, 1996.

The decision of A. Martin Smith, Q.C., Registrar in Bankruptcy is dated June 18, 1996. In summary, he concluded as follows:

(1) He had jurisdiction to deal with the matters set out in the Amended Notice of Motion dated February 15, 1996;

(2) He dismissed the defence of setoff;

(3) The contracts in question were contracts for work and materials and the property did not pass to the general contractors as of the date of bankruptcy;

(4) Neither Dineen nor JonelJim had properly appealed the disallowance of the Proof of Claim by the Trustee and had therefore lost any rights to the assets which they might have had.

In a series of correspondence subsequent to his decision, the Registrar held that the dollar value of the claim would be equal to the invoice value of the goods and further held that JonelJim was obliged to pay a rental payment to the Estate in the amount of $1,926.00.

REASONS FOR JUDGMENT

Having considered the submissions of counsel and the authorities to which I was referred, I conclude that the arguments advanced by Mr. Clarke for the Trustee are sound, and that the appeals of Dineen and JonelJim ought to be dismissed, with costs payable to the Estate, here and below.

I will adopt and apply much of the same analysis employed by Mr. Clarke in his submission when addressing each of the issues raised by the appellants in their grounds of appeal.

I will deal first with the appeal by JonelJim and follow that with a consideration of the appeal by Dineen.

APPEAL BY JONELJIM

I will use the same paragraph numbers set out in the Notice of Motion dated October 28, 1996.

1. JonelJim states that the Registrar erred in finding that the Proof of Claim of JonelJim constituted a valid claim against the inventory without first hearing the appeal of the Disallowance filed by JonelJim dated June 16,1995.

As a preliminary observation I note that this ground of appeal is factually incorrect. The Registrar never found that the Proof of Claim of Jonefrn constituted a valid claim against the inventory.

In argument, Mr. Corsano, counsel for JonelJim argued that the appeal of the Disallowance which they filed in June, 1995 should have been heard prior to the motion of the Trustee in Bankruptcy. However, the record indicates that this matter was never raised as an objection before the Registrar. JonelJim had the opportunity to set their appeal of disallowance down for hearing and never did so. In any event, the same issues would have been determined. JonelJim had every right to argue, and did in fact argue, the issues relating to their appeal of the disallowance during the Trustee's application.

2. That the Registrar erred in finding that the Appeal of the Disallowance dated June 16, 1995 by JonelJim had not been perfected because it was not set down for hearing.

The Appeal of the Disallowance is governed by s. 81(2) of the *Bankruptcy and Insolvency Act.* Any appeal by a creditor from the trustee's decision is to be made to the Bankruptcy Court in accordance with the General Rules.

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Rule 97 directs that appeals from a disallowance of proof of claim shall be by motion "of the Court" (sic). Rules 12 through 14 set out the procedures to be followed on a motion to the Court. These provisions indicate that a motion must not only be filed but must be set for hearing on a date certain. Form 45 found in **Houlden and Morawetz** contains the form of Notice of Appeal. The Form requires that a date certain be inserted in the appeal document prior to being filed.
In argument during the appeal, while conceding that the forms designed by **Houlden and Morawetz** are customarily used in general practice, Mr. Corsano argued that they are not legislative enactments and that simply because the form prescribes a date for hearing is not determinative of the issue. He suggested it would be a "denial of natural justice to disallow JonelJim's right to be heard" and that at the very least JonelJim "should have been told of its obligation to set its claim down for hearing or be at risk of having it struck out".

With respect, there is no merit to either argument. JonelJim was not prejudiced. Its position was advanced and considered during the Trustee's application before the Registrar.
There is ample support for the determination made by the Registrar that a notice of appeal is not perfected unless it is filed in accordance with the Rules, with a date certain. Otherwise, a notice may simply be filed by a creditor and the matter never pursued or concluded. That is in fact what happened in this particular case. I am satisfied that if the Estate had not filed its application, the matter never would have come before the Court.
I accept the submission made by Mr. Clarke that the proper test on an appeal from a decision of the Registrar should be that applied by Justice K. Peter Richard in **Re Dr. Siraj Husain** B17658 (unreported, oral decision delivered January 6, 1994, released March 16, 1994). In that case, Richard, J. approved and applied the observations of Justice Anderson in **Re Barukory Investments Ltd.** (Ont.) (1979), 32 CBR 185 at p. 186:

> " . . . Save in extraordinary circumstances, I do not think the differing opinion of the judge, if he entertains one, should be substituted for that of the registrar. Putting it in a slightly different fashion, unless there is demonstrated on the part of the registrar some error in principle, some failure to take into account a proper factor or some taking into account of an improper factor, which demonstrably led to a wrong conclusion. I think that his disposition in the matter should stand."

I accept that as a proper statement of the law. There is no authority referred to me which is contrary to the decision of the Registrar. I find that his decision is a reasonable one taking into account the provisions of the Bankruptcy Rules and the forms annexed thereto.

3. That the Registrar erred by finding that the ownership in the inventory had not transferred to JonelJim under s. 7(c) of the JonelJim Purchase Order or s. 5.5(a) of the Canadian Standard Construction Subcontract.

The Registrar determined that the construction contract between the parties was a contract for labour and materials. It was not a contract for the sale of particular chattels. That finding was not the subject of challenge or comment on the appeal.
I am satisfied that the Registrar's determination is in accordance with the Registrar's previous decision involving Emco Supply in this same bankruptcy, and is also consistent with such Nova Scotia cases as **McNeil v. Ja Ron Construction Company Limited and Loughran** (1979), 35 N.S.R. (2d) 150 (NSSC,TD); and **Newell Fisheries Limited v. Gough et al** (1983), 22 BLR 179 (NSSC,TD). In such cases the title of goods to be used in the construction does not pass to the general contractor or the owner until they are incorporated into the project or affixed to the real estate. The mere fact that they are delivered to a construction site is insufficient to pass title.
In support of their respective claims and appeals each of JonelJim and Dineen rely upon Article 5.5 of the Canadian Standard Construction Subcontract (CSCS) which provides:

> If the contractor terminates the subcontract under the conditions set out in 5.1 and 5.4, he is entitled to:
>
> a) take possession of the subcontractor's products and utilize the subcontractor's construction machinery and equipment, the whole subject to the rights of third parties, and to finish the subcontract work by whatever method he may deem expedient but without undue delay or expense;
> b) withhold any further payments to the subcontractor until the subcontract work is finished;
> c) upon total performance of the subcontract work, charge the subcontractor the amount by which the full cost of finishing the subcontract work together with a reasonable allowance to cover the cost of any corrections required by the warranties for which the subcontractor is liable exceeds the unpaid balance of the subcontract price; or if such cost of finishing the work is less than the unpaid balance of the subcontract price, pay the subcontractor the difference; and

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d) on expiry of such warranty period as may exist, charge the subcontractor the amount by which the cost of corrections under warranty exceeds the allowance provided for such corrections, or if the costs of such correction is less than the allowance, pay the subcontractor the difference.

JonelJim had no such provision in its contract with B & V. The $1.5 Million contract between B & V and JonelJim consists of a single, double-sided page (purchase order) wherein (see Term and Condition No. 6, for example) the risk of assets was clearly that of B & V. While it is true that Term and Condition No. 7(c) gave JonelJim an election to convert its contract with B& V to a CSCS, there is no evidence it ever did so. There is absolutely no merit to JonelJim's submission that the unsigned pages of the CSCS became or "ought to be incorporated" in the one page purchase order/contract it signed with B & V.

The Registrar was in a perfect position to decide this issue, and did so. I will not interfere.

4. JonelJim states that the Registrar erred in finding that the Trustee had ownership of the inventory.

In an affidavit sworn January 31, 1996 by Derek G. Cramm, CMA, CIP, licensed Trustee for the Trustee of the Estate, claim is made to ownership of the inventories. It was never contested before the Registrar that these inventories were not the assets of B & V as of the date of bankruptcy, March 17, 1995. The assets vest in the Estate pursuant to the provisions of the *Bankruptcy and Insolvency Act*.

5. JonelJim submits that the Registrar erred in failing to find that JonelJim had a legitimate claim against the Trustee for services of Mr. Peach and Mr. Brown during the inventory count in April of 1995 for the sum of $1,926.00.

It is evident from the record that JonelJim and the Trustee, both directly and through their respective solicitors, negotiated a rental for a piece of equipment. JonelJim agreed to pay the Estate the sum of $1,926.00.

It is equally apparent that when the Estate tried to collect the agreed upon rental amount, JonelJim "created" an off-setting invoice. Mr. Cramm's affidavit (Clause 14) and evidence while testifying before the Registrar on February 28, 1996 (Dineen's Appeal Book, Tab 8) make it clear that the Estate never requested any services from those persons nor was any invoice issued by JonelJim or discussed between JonelJim and the Estate prior to its issuance on September 15, 1995. An affidavit sworn by Mr. Knickle which might have been used in an effort to buttress JonelJim's claim, was struck by the Registrar because Mr. Knickle did not make himself available for cross-examination. As a result, the only evidence before the Court was the evidence of Mr. Cramm, which was accepted. I am satisfied the Registrar made no error of law in that respect.

6 (a) JonelJim wishes to have removed from the provisions of the Order certain assets which JonelJim either purchased from the Trustee or purchased from third parties with valid property claims.

It was accepted at the time of the hearing that items which fall into this category were not being claimed by the Estate. It therefore does not constitute a ground of appeal. It was understood between the parties that these matters were excluded.

6 (b) JonelJim submits that it was an error for the Registrar not to require the Trustee to take possession of any items still in the possession of JonelJim which had not been incorporated into the project.

There was no evidence before the Registrar that there were any assets which met this description. As a result, it would not have been possible for the Registrar to have dealt with this issue.

6 (c) JonelJim submits that the Registrar erred in determining that the valuation of the inventory should be based on their full invoice value, rather than an auction value.

There is no rule or principle of law which dictates a single method of valuation. The Registrar chose invoice value as the appropriate method. It should be remembered that in this case Dineen seized the inventory and incorporated the inventory in the project. What the goods would have sold for on the open market is unknown. What is clear is that they were of considerable value on the date of bankruptcy to the General Contractor, who required them in order to complete the work. Consequently, it is a very different situation than, for example, the sale of scrap at auction.

I am satisfied that the Registrar's determination of inventory value was a reasonable one. There was no error in principle, no failure to take into account a proper factor and no application of improper considerations. The Registrar's conclusion is not demonstrably wrong. Applying the test in **Re Dr. Siraj Husain, supra**, his determination with respect to valuation of the inventory should not be disturbed.

6 (d) Setoff

While both JonelJim and Dineen raised the issue of setoff, Mr. Corsano, in argument, adopted and relied upon the detailed submissions made by Mr. Aske. Therefore I propose to deal with the analysis of this ground of appeal in the section relating to Dineen.

APPEAL BY DINEEN

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Dineen's appeal was limited to three issues:

(1) Whether the Registrar had jurisdiction;
(2) Whether the affidavit of Alfred F. Frizzle sworn February 27, 1996 and filed on behalf of Dineen (Dineen's Appeal Book, Tab 4) was properly filed; and
(3) Whether Dineen has a right of setoff.

On appeal before me Dineen abandoned its jurisdictional challenge and the Trustee conceded that the affidavit deposed to by Mr. Frizzle was properly before the Court. Consequently the primary thrust of Dineen's appeal related to the issue of setoff. In its Notice of Motion filed August 6, 1996, Dineen seeks a variation of the Registrar's decision to recognize:

> " . . . that the Trustee's claim to the property of the Bankrupt at the Project Site is subject to Dineen's right to set-off the amount by which the cost to complete the work required by Barrington and Vokey's subcontract have exceeded the unpaid balance of the subcontract price."

Setoff

The thrust of Mr. Aske's argument is that pursuant to the provisions of Article 5.5 Dineen had the right to make use of B & V's inventory and that the Trustee cannot ignore the terms of a contract entered into in good faith by the bankrupt. This was a bona fide contract negotiated between the parties which established their rights and remedies when involved in this multimillion dollar project. When B & V walked off the site, Dineen was, according to Mr. Aske, "left high and dry". Article 5.5 is a customary provision in a standard contract designed to protect general contractors and provide the means to complete the project with the least interruption. Mr. Aske argues that on March 17, 1995 the Trustee assumed no higher a position and acquired no higher rights than B & V had on that date.

In his factum Mr. Aske frames the argument concisely and urges that the particular circumstances be kept in context.

> "Barrington and Vokey went bankrupt and abandoned its work. Dineen incurred substantial costs, in excess of Subcontract monies available, to complete their work. The Trustee is seeking payment for inventory supplied by Barrington and Vokey pursuant to its Subcontract. But both the Subcontract and the *Bankruptcy and insolvency Act* recognize that Dineen can set off its costs against payments to Barrington and Vokey, and the Trustee. To ignore this right of set-off would permit Barrington and Vokey to be paid more than it is owed under the terms of its Subcontract. We are aware of no provisions in the *Bankruptcy and Insolvency Act* which require such an unjust result." (Dineen's factum, p. 12)

Thus Dineen relies upon its contractual rights with the bankrupt in order to defeat or modify the Trustee's claim.

Despite the able submissions of Mr. Aske I cannot agree. The *Bankruptcy and Insolvency Act* recognizes two types of claims to property; secured claims or trust claims. Dineen was not a valid, secured creditor. There is no suggestion of trust in the record before me and neither appellant is suggesting that such a classification applies here.

In the result both Dineen and JonelJim are unsecured creditors. The *Bankruptcy and Insolvency Act* does not acknowledge the existence of a contractual right to seize the property of a bankrupt unless it is a valid, secured or trust claim. In this sense it is too simplistic to say that the Trustee stands in the shoes of a bankrupt. By virtue of the provisions of the *Bills of Sale Act,* a trustee in bankruptcy, representing the creditors of a bankrupt, is conferred certain specific powers which are in addition to any rights which the bankrupt itself had. Furthermore, a trustee in bankruptcy has conferred upon it certain powers with respect to fraudulent preferences which are not powers available to the bankrupt. (See for example *Re Frechette* (1982), 42 CBR 50). There, a shareholders' agreement which allowed a purchase of shares at a discount was null and void as being contrary to public policy. Although such a provision may be enforceable as between the shareholders, in the event of a bankruptcy the trustee had the right to set that provision aside either for public policy reasons or because it constituted a reviewable transaction under the *Bankruptcy and Insolvency Act*.

I accept that Articles 5.1 and 5.5 are contractual provisions negotiated and executed by the parties, entitling the contractor to take possession and use the "products" of the subcontractor should it choose to exercise that option. It permits the contractor to finish the project expeditiously in situations where (bankruptcy, for example) the subcontractor is unable to complete its work, thus triggering termination of the contract by the contractor pursuant to the application, in tandem, of Articles 5.1 and 5.5. but this contractual entitlement does not pass title in the inventory to the contractor. Neither does it work to defeat or modify the trustee's entitlement to the bankrupt's assets which vested in the trustee immediately on the date of bankruptcy.

On the date of this bankruptcy, March 17, 1995, all of the assets of B & V vested in the Trustee for the benefit of the general body of creditors by virtue of the operation of s. 67 of the *Bankruptcy and Insolvency Act*. The Trustee became obligated and empowered to take possession of the property of the bankrupt under s. 16 of the *Bankruptcy and Insolvency Act* ("the Act"), the intention being that all creditors would receive the distribution to which they were entitled.

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As of the date of bankruptcy, Dineen had a cause of action against the Estate for losses sustained as a result of B & V's breach of contract. A stay of proceedings was in effect by virtue of s. 69.3 whereby Dineen was prohibited from exercising any remedy against B & V or its property unless a cessation of the stay were obtained. That option was open to it. Dineen made a conscious decision not to seek an exempting declaration pursuant to s. 69.4, or at least chose to seize the inventories and use them for its own purposes in completing this project.

The right or defence of setoff involves two competing claims in existence as of the date of bankruptcy. Setoff requires mutuality of parties and existence of mutual cross obligations. The rights of the parties are to be determined as of the date of bankruptcy. A right of setoff does not arise where one of the claims relates to an obligation arising after the date of bankruptcy or one entered into or incurred by the trustee in bankruptcy on behalf of the estate.

I think the following illustrations proffered by Mr. Clarke show that the thesis advanced by Dineen is untenable. For example:

a) A trustee in bankruptcy could sell assets of the estate to someone who is a creditor of the estate. That creditor could purchase the assets and take delivery of them but then refuse to pay for them, raising set off as the defence. **Re Coburg Felt Company** (1925) 5 CBR 622 (Ont) considered a similar case and held that the attempt to exercise a right of set off in such a situation would be "a fraud on the bankruptcy laws";

b) A disgruntled creditor could seize assets of the bankrupt before a trustee could take possession of them and could refuse to return them or pay for them based upon a defence of set off;

c) A trustee in bankruptcy could continue to operate the business of the bankrupt and could order goods from a supplier and then raise set off as a reason not to pay the supplier.

I believe these examples advanced on behalf of the Trustee support the view that a claim to setoff is limited to situations where both claims exist as at the date of bankruptcy and are rights as between the bankrupt and a third party.

The following extracts from **Houlden and Morawetz** also illustrate this same point:

a) A bankrupt's estate includes only the net amount of a debt owing to the bankrupt after proper allowance for the recognized common law right of set off (page 4-91);

b) The debts could arise from transactions of a different nature, provided they could be ascertained with certainty at the relevant date (page 4-92);

c) Mutual debts are debts due from either party to the other for liquidated sums or money demands which can be ascertained with certainty at the date of bankruptcy. Each party must have the right to enforce its claim at the date of bankruptcy, and if one party cannot do so, there is no right of legal set off (page 4-92);

d) In order for there to be a right of set off, the mutuality of debts must exist at the date of bankruptcy (page 4-92);

e) A right of set off not existing at the date of bankruptcy cannot be acquired afterwards (page 4-93);

f) If the bankrupt was indebted to a creditor prior to bankruptcy for goods supplied, and the same creditor became indebted to the trustee for work done after bankruptcy pursuant to a contract entered into before bankruptcy, there can be no set off as they are not mutual debts. (page 4-93);

g) Although equitable set off does not require symmetry of remedies or accounts, the creditor asserting a claim to equitable set off must at the date of bankruptcy have an entitlement to a remedy in its own right. (page 4-98).

Further support for the position taken by the Trustee may be found in s. 97(3) of the *Bankruptcy and Insolvency Act* which provides:

> "The law of set off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were a plaintiff or defendant, as the case may be, except in so far as any claim for set off is affected by the provisions of the Act respecting frauds or fraudulent preferences."

Thus it is clear from the legislation that the law of setoff is retained to the extent to which it relates to actions instituted by the Trustee for the "recovery of debts due to the bankrupt". In this case, the Trustee is not attempting to collect an accounts receivable owing to the bankrupt as of the date of the bankruptcy. The Trustee is attempting to liquidate assets which had vested in the Estate on March 17, 1995.

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Mr. Aske, for the appellant Dineen cites **Telford v. Holt** 1987 CanLII 18 (SCC), (1987), 41 D.L.R. (4th) 385 (S.C.C..) and **Husky Oil Operations v. MNR** 1995 CanLII 69 (SCC), (1995), 128 D.L.R. (4th) 1 (S.C.C.) in support of his submissions. With respect, I do not think either case is helpful to the appellant.

In both cases the discussion of setoff was of a general nature and in a different context. In **Telford, supra**, there was no bankruptcy involved and no seizure by a creditor of assets of the bankrupt after bankruptcy.

In **Husky Oil, supra,** a bankruptcy was involved but there the Court was asked to consider whether the *Workers' Compensation Act (Saskatchewan)* had the right to create a setoff where to do so would be contrary to the scheme of distribution under the *Bankruptcy and Insolvency Act*. The Court (in a 5:4 decision) held that the provincial legislation was inapplicable in bankruptcy by reason of there being a conflict with the *Bankruptcy Act,* R.S.C. 1985, c. B-3. The Court was not asked to consider setoff in the context of this particular case. I note in particular, that Justice Gonthier, writing for the majority, introduced his discussion of the setoff component of the Saskatchewan legislation with these observations:

> "But the right to set-off is triggered - and thus the security interest created - by the Board when it decides to create a deemed debt and impose liability on the principal for the contractor's liability." (at p. 24)

On the facts of the case the Saskatchewan Workers' Compensation Board "decided to create a deemed debt" and impose liability on Husky Oil by serving its notice of assessment on Metal Fab, dated March 2, 1992 claiming that $208,850.00 was due and payable to the Board. The assessment predated the bankruptcy by 17 days as Metal Fab made its assignment in bankruptcy on March 19, 1992. I conclude that the decision of the Supreme Court of Canada in **Husky Oil, supra** contemplates that both debts would be in existence as outstanding claims as of the date of bankruptcy. That is not what happened here. In the result I conclude that set off has no application in the present circumstances and that neither JonelJim nor Dineen had the right to take assets away from the Trustee in Bankruptcy without paying for them.

CONCLUSION

The appeals brought by JonelJim and Dineen are each dismissed, with costs payable to the Estate, here and below. If counsel cannot agree on costs I will be pleased to hear them at their convenience.

J.

Canada Trustco Mortgage Company v. Sugarman, 1999 CanLII 9288 (ON CA) - Equitable Set-off vis-à-vis Partnerships Members and Creditor

Date:	1999-10-21
Docket:	C31361
Parallel citations:	179 DLR (4th) 548; 12 CBR (4th) 1; 126 OAC 253
URL:	http://canlii.ca/t/1f9tm
Citation:	Canada Trustco Mortgage Company v. Sugarman, 1999 CanLII 9288 (ON CA), <http://canlii.ca/t/1f9tm> retrieved on 2013-08-18
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DATE: 19991021
DOCKET: C31361

COURT OF APPEAL FOR ONTARIO

CHARRON, ROSENBERG and MacPHERSON JJ.A.

B E T W E E N :	)	
	)	
CANADA TRUSTCO MORTGAGE	)	
COMPANY	)	Reeva M. Finkel and
	)	Ivan Y. Lavrence,
Appellant	)	for the appellant
	)	

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- and -)
)
DAVID DONALD SUGARMAN,)
STACY BRAD MITCHELL and) Gordon D. Bent,
SCHWARTZ LEVITSKY FELDMAN) for the respondents
)
Respondents)
)
- and -)
)
CANADIAN IMPERIAL BANK OF) Heard: September 13, 1999
COMMERCE)
)
Respondent)
)
)

On appeal from the final order of Mr. Justice Somers dated February 1, 1999

CHARRON J.A.:

[1] This appeal turns on whether an accounting firm can claim an equitable set-off against monies held in its capital account to the credit of two of its bankrupt partners, for payment made by the firm, after the bankruptcy of the two partners, to an unsecured creditor of the two bankrupts.

[2] The dispute over the monies is between the appellant, Canada Trustco Mortgage Company ("Trustco"), and the respondent, the Canadian Imperial Bank of Commerce ("CIBC"). Trustco is a creditor of the bankrupts who obtained an order under s.38 of the Bankruptcy and Insolvency Act R.S.C. 1985, c. B-3 ("BIA") authorizing it to bring an action against the accounting firm, Schwartz, Levitsky and Feldman ("SLF") for recovery of monies held in its capital account to the credit of the two bankrupt partners at the time of the bankruptcy. The CIBC is an unsecured creditor of the bankrupts who obtained the monies from SLF after the bankruptcy. SLF paid the CIBC in fulfillment of its undertaking to pay the bankrupts' loan upon the happening of certain events. In return for the payment, the CIBC agreed to indemnify SLF against any resulting liability to Trustco.

[3] Trustco brought a motion for summary judgment in this action against SLF and, in turn, SLF brought a motion for summary judgment against the third party, the CIBC. At the hearing, it was common ground between the parties that Trustco stood in the shoes of the trustee in bankruptcy and the contest was therefore essentially between the trustee in bankruptcy and one unsecured creditor, the CIBC. Somers J. resolved the contest in favour of the CIBC on the ground that SLF was entitled to set off the payments made to the CIBC against the monies held in its capital account to the credit of the bankrupts. Consequently, he dismissed Trustco's motion and its action against SLF and, in light of this conclusion, found it unnecessary to deal with SLF's motion for judgment against the CIBC. Trustco appeals from this decision.

[4] It is my view that the trustee in bankruptcy, represented by Trustco in this proceeding, has priority over the monies. The monies held in SLF's capital account to the credit of the two

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bankrupt partners vested in the trustee in bankruptcy at the time of bankruptcy. At that time, there was no debt owed by the bankrupts to SLF that could give rise to a claim by SLF to a right of set-off against those monies in priority to the rights of the trustee in bankruptcy. Further, SLF's obligation to repay the bankrupts' loan to the CIBC pursuant to its undertaking to do so does not, in the circumstances of this case, give rise to a claim for equitable set-off. Finally, whatever agreement SLF entered into with the CIBC after the bankruptcy cannot affect Trustco's priority over the monies.

2. The Facts

[5] The two bankrupts, David Donald Sugarman and Stacy Brad Mitchell, were chartered accountants. They practised together in partnership until February 1994 when they merged their practice with that of SLF. Upon joining SLF, they were required by SLF to inject capital into the firm. They each borrowed $100,000 from the CIBC for that purpose.

[6] At the time Sugarman and Mitchell joined SLF, they signed a partnership entry agreement and the existing SLF partnership agreement. The partnership entry agreement provided for SLF to assist Sugarman and Mitchell with respect to the capital loans in these terms:

> 2.3 Provisions Relating to Capital Loans.
>
> The Partnership shall assist Sugarman and Mitchell in arranging bank financing, if required, for the purposes of subsection 2.2(b) in the amount of One Hundred Thousand ($100,000) Dollars each, with a Canadian chartered bank or other lender. So long as such loan is outstanding, the Partnership shall make all payments of interest attributable to it, directly to the financial institution making such loan advance to Sugarman or Mitchell. In the event that either Sugarman or Mitchell ceases to be a Partner, the Partnership shall repay from the capital account of Sugarman or Mitchell as applicable, all principal and interest attributable to such loan, to the extent of such capital account. The parties acknowledge that at no time will the principal amount of any loan advanced by a financial institution to Sugarman or Mitchell pursuant to the provisions of this section exceed the capital account of Sugarman or Mitchell, as applicable. [Emphasis added.]

[7] SLF did accounting work for the CIBC and had a good relationship with the bank. At the request of the CIBC, SLF signed two letters of undertaking, one on behalf of Sugarman and one on behalf of Mitchell. The text in both letters is identical. The letter concerning Sugarman's loan reads as follows:

> UNDERTAKING

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Manager
Canadian Imperial Bank of Commerce
Private Banking Centre
One Eglinton Avenue East
Toronto, Ontario, M4P 3A1

Dear Sir:

Re: Capital Loan for David Sugarman

In consideration of the bank advancing the sum of $100,000 for the purpose of a Capital contribution to the firm of Schwartz Levitsky Feldman, we hereby agree to the following:

1. The Firm will maintain in their Capital Account at all times an amount equal to the amount outstanding of the Capital Loan maintained by the Bank on behalf of the subject.

2. In the event of the subject's death, withdrawal from the Firm or the dissolution of the Firm or withdrawal of Capital from the Firm for any other reason the Bank will be paid an amount equal to the amount of the Capital Loan outstanding in the name of the subject including accrued interest and other charges. [Emphasis added.]

Dated at Toronto this 22nd day of February, 1994.

Schwartz Levitsky Feldman
Chartered Accountants

[8] Paragraph 12.01 of the SLF partnership agreement also has some bearing on this appeal in that it gives SLF a right of set-off **against the value of any withdrawing partner's interest** for sums owing by the partner to the partnership:

> **In the event of the withdrawal ... of a partner, that such** partner shall cease to be a member of the partnership, his partnership interest will terminate and the partnership will pay to such partner the value of his partnership interest as determined in accordance with Article 11.00 of this agreement and as hereinafter provided, minus the amount of any sums owing by the partner in question to the partnership and not already accounted for in the valuation of his partnership interest. [Emphasis added.]

[9] Sugarman and Mitchell suffered a serious financial reversal as a result of a real estate transaction and, in the fall of

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1995, each of them filed a proposal under the BIA. The proposals were rejected by their creditors and they were deemed to have made an assignment in bankruptcy as of October 27, 1995. Upon their personal bankruptcy, both Sugarman and Mitchell lost their C.A. designation. Consequently, they were also deemed to have withdrawn from their partnership in SLF as of the same date.

[10] Upon the bankrupts making their proposal, the CIBC filed proofs of claim with the trustee in bankruptcy for the amounts of the loans as an unsecured creditor and demanded payment from SLF pursuant to the letters of undertaking. The trustee in bankruptcy also demanded that SLF pay the assets of each capital account of Sugarman and Mitchell to the estate. On September 19, 1996, SLF, faced with these competing claims, entered into a settlement agreement with the CIBC. Under the terms of this agreement, repayment of the loans was made to the CIBC by SLF, in return for which the CIBC agreed to indemnify SLF in the event any judgment or order was made against SLF with respect to this repayment. It was also agreed that SLF would take the position that it was entitled to set off the amount of the payments to the CIBC as against the bankrupts' capital accounts.

3. Analysis

[11] Upon the rejection of a proposal pursuant to the BIA, the insolvent person is deemed to have made an assignment in bankruptcy and all property belonging to the bankrupt passes to and vests in the trustee in bankruptcy: s. 57(a) and s. 71(2) of the BIA. Hence, any monies held by SLF in its capital account to the credit of Sugarman and Mitchell vested in the trustee in bankruptcy as of October 27, 1995. It is common ground between the parties that there was the total sum of $200,000 in the capital account at the time of bankruptcy. In this proceeding, Trustco stands in the shoes of the trustee in bankruptcy. Consequently, it is prima facie entitled to judgment for that amount.

[12] However, in certain circumstances, the trustee in bankruptcy will take the property of the bankrupts subject to certain equities. In this case, the respondent takes the position that the monies in the capital account were subject to SLF's right of set-off. The law of set-off is expressly preserved by s.97(3) of the BIA:

> The law of set-off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off is affected by the provisions of the Act respecting frauds or fraudulent preferences.

[13] In this case, Trustco, standing in the shoes of the trustee, is seeking recovery of monies due to the bankrupts by SLF, namely the monies in the capital account to the credit of each bankrupt, and this claim may be subject to a set-off by SLF against these monies. The question becomes whether SLF has any valid claim for set-off.

[14] A right of set-off may arise by agreement, at law, or in equity: Telford v. Holt 1987 CanLII 18 (SCC), (1987), 41 D.L.R. (4th) 385 (S.C.C.).

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(a) set-off by agreement

[15] In this case, the agreement between SLF and Sugarman and Mitchell expressly provided for a right of set-off. As noted earlier, paragraph 12.01 of the partnership agreement provided that, in the event of the withdrawal of a partner, SLF was obliged to pay to the partner the value of his partnership interest (which, by definition in the agreement, included the amount credited to the partner's capital account) minus the amount of any sums owing by the partner to the partnership. However, there were no moneys owed to the firm by either Sugarman or Mitchell at the time of their bankruptcy and, therefore, it is not alleged that any right of set-off arose by agreement.

(b) legal set-off

[16] A legal right of set-off exists if both obligations are debts (as opposed to unliquidated claims for damages) and are mutual cross-obligations, although not necessarily connected. The requirement of mutuality can sometimes be difficult to understand from the cases, particularly in situations where an issue arises as to whether the assignment of a debt has destroyed mutuality.1 However, in this case, it is clear that there is no mutuality. The cross-claims are not owed between the original parties, SLF and Sugarman and Mitchell. Rather, SLF is asserting a right to set off a debt that it owes to a third party, the CIBC, against the debt owed by the firm to the bankrupt estate. The respondent concedes that there is no right of legal set-off at law in this case. Rather, the respondent relies on equitable principles.

(c) equitable set-off

[17] Equitable set-off may be available in circumstances where the strict requirements of legal set-off cannot be met. Kelly R. Palmer, in The Law of Set-Off in Canada (1993), reviews the different rationales for allowing equitable set-off as it has evolved over the years, from the need to prevent the harshness of imprisonment for non-payment of debts, to more modern exigencies such as reducing the number of actions and avoiding circuitous claims. Whatever the rationale, it would appear from the cases that the remedy is firmly rooted in the need to achieve fairness between the parties.

[18] One of the main differences between legal set-off and equitable set-off is that, in the latter case, the claims between the parties do not need to be liquidated. Hence, claims for damages are available for equitable set-off. This difference does not matter in this case. Another important difference, and one that is of relevance here, lies in the fact that the requirement for mutuality is relaxed. Hence, equitable set-off may be available even though the situation is not strictly one where A seeks to set off his debt to B against the debt B owes to A. However, for equitable set-off to be available, the cross-claims must be closely connected. It is logical to conclude that this latter requirement arises because mutuality is not strictly insisted upon. After all, it is difficult to imagine why, in the interests of fairness, the courts would allow A to reduce his debt to B by the amount A owes to C, unless it was because of the

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close connection between the claims. Finally, it is important to note that, just because cross-claims are closely connected to one another, it does not mean that set-off will necessarily follow. Not only must the connection be sufficiently close to warrant an exercise of the equitable jurisdiction of the court, the remedy must not result in any form of inequity.

[19] In order to determine whether equitable set-off should be allowed in this case, it is therefore necessary to look at the connection between the claims and also to consider the effect the remedy would have on the equities between the parties.

[20] It is the respondent's position, as set out in its factum, that the right of set-off claimed by SLF "arises out of the contractual obligation to repay the personal loans to CIBC out of the capital accounts, in accordance with Article 2.3 of the Partnership Entry Agreement between the bankrupts and SLF, as well as the written Undertakings given by SLF to CIBC for the benefit of the bankrupts". The respondent submits that the claims are so connected that it would be unfair to require SLF to pay the monies in the capital account to the trustee in bankruptcy without allowing SLF to offset its obligation to repay the very loan that provided the capital sum in the first place.

[21] In my view, although superficially attractive, this argument cannot hold. I find the argument unconvincing because it ignores the important fact that there has been an intervening bankruptcy in this case. This is not simply a case, for example, where Sugarman and Mitchell would decide to go back to practising on their own and would seek payment of the monies held to their credit in the firm's capital account, leaving SLF behind to pay the loan to the CIBC pursuant to its undertaking. If this were the case, I have no doubt that equity would intervene to allow SLF a right to set off its obligation to the CIBC against the debt to Sugarman and Mitchell, even in the absence of an indemnity agreement between SLF and the two withdrawing partners.

[22] In this case, because of the intervening bankruptcy, the equities are no longer just between SLF and Sugarman and Mitchell or even between SLF and the CIBC. The rights of others have come into play. These rights cannot simply be ignored on the basis that the CIBC lent the money that created the capital account in question. If the respondent's argument was accepted, the unsecured creditor who lent the bankrupt money to buy a car would be able to claim priority over the car based on that fact alone and in the absence of any secured interest in the car. Such a result would be contrary to the scheme of distribution under the BIA. It would result in an unfair preference of one unsecured creditor over other unsecured creditors. Similarly, in this case, the resulting unfairness to SLF, if any, must be assessed in the context of the bankruptcy where other unsecured creditors may stand to lose.

[23] In my view, at the time of bankruptcy, SLF stood in no different position than any other unsecured creditor in the bankrupt's estate.2 At the time SLF gave its undertaking to the bank to repay the loan, it could have obtained some form of security from Sugarman and Mitchell. SLF chose not to do so. SLF is an accounting firm, not an unsophisticated creditor. Obviously, it suited its own purposes to give the undertaking to

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the CIBC. Indeed, the evidence shows that SLF was receiving two new partners, an injection of $200,000 in the firm's capital account and ongoing accounting business from the CIBC. There is really no reason why SLF should be treated any differently than others who stand to lose as a result of the two partners' bankruptcy.

[24] Further, the ultimate result of granting the remedy of equitable set-off cannot simply be ignored. Given the indemnity it received from the CIBC, SLF does not lose any money. The claim of equitable set-off is made for the CIBC's benefit. Granting relief in this case would be akin to elevating the CIBC's status in the bankruptcy from unsecured to secured creditor to the detriment of other unsecured creditors. There is no justification in this case to so interfere with the scheme of distribution under the BIA.

[25] For these reasons, I would allow the appeal, set aside the order of Somers J. and grant judgment to the appellant against Schwartz, Levitsky & Feldman for $200,000 plus interests and costs of the motion, the action and the appeal.

(signed) "Louise Charron J.A."
(signed) "I agree M. Rosenberg J.A."
(signed) "I agree J. C. MacPherson J.A."

RESERVED: October 21, 1999

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1 The case law is not entirely consistent on whether an assignment will automatically destroy mutuality. See Kelly R. Palmer, The Law of Set-Off in Canada (1993) Chapter 2 for a useful discussion of the case law on this point.

2 It is noteworthy that, according to the material before the court, SLF has not filed a proof of claim in the bankruptcy.

Engage Energy Canada, L.P. v. Blue Range Resource Corporation, 2000 ABCA 200 (CanLII) - Set-off of *Anticipated Damages*

Date:	2000-07-12
Docket:	99-18395; 99-18397
Parallel citations:	261 AR 162; [2000] 11 WWR 117; 84 Alta LR (3d) 65
URL:	http://canlii.ca/t/5rr8
Citation:	Engage Energy Canada, L.P. v. Blue Range Resource Corporation, 2000 ABCA 200 (CanLII), <http://canlii.ca/t/5rr8> retrieved on 2013-08-20
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Engage Energy Canada, L.P. v. Blue Range Resource Corporation, 2000 ABCA 200

Date: 20000712
Docket: 99-18395 & 99-18397

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE McFADYEN

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THE HONOURABLE MR. JUSTICE SULATYCKY
THE HONOURABLE MADAM JUSTICE RAWLINS

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BLUE RANGE RESOURCE CORPORATION
BETWEEN:

ENGAGE ENERGY CANADA, L.P.

Appellant
(Applicant)

- and -

BLUE RANGE RESOURCE CORPORATION
Respondent
APPEAL FROM THE ORDER OF
THE HONOURABLE MR. JUSTICE S.J. LoVECCHIO
DATED THE 18TH DAY OF JUNE, 1999

MEMORANDUM OF JUDGMENT

COUNSEL:
L.B. Robinson - Engage Energy Canada, L.P.
H.A. Gorman - Duke Energy Marketing Limited Partnership
K.M. Horner - PricewaterhouseCoopers Inc.
C.D. Simard

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MEMORANDUM OF JUDGMENT

THE COURT:

[1] This appeal arises from a Queen's Bench order dismissing an application by the appellants Duke Energy Marketing Limited Partnership ("Duke") and Engage Energy Canada L.P. ("Engage"). Duke and Engage sought an order lifting a stay granted under the *Companies' Creditor Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") with respect to all proceedings against the respondents Blue Range Resources Corp. ("Blue Range") and Humble Petroleum Marketing Ltd. ("Humble"). **In particular, Duke and Engage sought to set-off anticipated damages they would incur under certain natural gas marketing contracts against payments owed under these contracts for the delivery of natural gas.**

[2] Leave to appeal was granted by Fruman J.A. on the issue of whether equitable set-off was warranted in this case.

[3] We have the benefit of more recent jurisprudence on this issue than was before the chambers judge. It supports the application of equitable set off in the circumstances of this case and therefore we allow the appeal.

FACTS

[4] Duke and Humble entered into a long term contract for the supply of natural gas on June 25, 1996. Engage entered into a similar long term contracts with Blue Range. In accordance with industry practice both sets of contracts provided that any gas delivered within a given month would be paid for on the 25th day of the following month.

[5] Due to financial difficulties in early 1999 Blue Range and Humble, a wholly owned subsidiary of Blue Range, applied, *ex parte,* to the Court of Queen's Bench for an arrangement order pursuant to the CCAA. As part of the arrangement Blue Range and Humble requested and obtained a stay of all proceedings against them by order of March 2, 1999. Provisions 3(b) of the order is relevant to this appeal and states:

> 3(b) all Persons having arrangements or agreements, written or oral, with Blue Range for the supply of goods and/or services by or to Blue Range ... are hereby restrained from accelerating, terminating, suspending, modifying or cancelling any such agreements, arrangements or supply of goods and services, and are also hereby restrained from exercising any right of distress, recission, set-off or consolidation of accounts in relation to any indebtedness or obligation in favour of Blue Range ... without prior written consent of Blue Range ... or leave of this Honourable Court.

[6] The day the order was granted, Duke received a phone call from James Surbey, the senior Vice President of Humble and Blue Range, indicating that deliveries under their agreements would cease prior to the natural termination date of the contracts, October 31, 2008. On March 22, 1999 Mr. Surbey notified Duke, by telephone, that the contract would terminate as of March 31st and this was confirmed by letters dated March 29th. Engage received similar letters dated March 29th. Blue Range and Humble supplied natural gas under the contracts for the months of February and March, 1999 but on March 31, 1999 officially terminated the contracts. Under the contracts both Engage and Duke owe Blue Range and Humble the cost of the gas delivered in February and March. Specifically, the payments for the February deliveries were due March 25th, and payments for the March deliveries were due April 25th. Duke has paid this money into court while Engage has withheld payment pending the outcome of this appeal.

[7] Duke and Engage claim they will suffer significant losses as a result of the early termination of the natural gas supply contracts. According to Duke and Engage, and this is not disputed, the contracts were made at a time when the price of natural gas was significantly lower than it was at the time the contracts were terminated. In other words, the cost to the appellants to replace the gas is higher than the cost they were paying under the contracts. As a result, Duke and Engage assert that these unliquidated damages should be set off against the money they owe as a result of the February and March gas deliveries.

CHAMBERS DECISION

[8] Counsel and the court appeared to agree that the following principles from the Supreme Court of Canada decision in *Telford* v. *Holt* 1987 CanLII 18 (SCC), (1987), 41 D.L.R. (4th) 385 at 398 (S.C.C.) apply when dealing with equitable set-off:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands;
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed;
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim;

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4. The plaintiff's claim and the cross-claim need not arise out of the same contract; and
5. Unliquidated claims are on the same footing as liquidated claims.

In light of these considerations, the chambers judge found that the most contentious issue in the case was "whether the anticipated damages are so closely connected to the payments for the February and March natural gas that it would be manifestly unjust to require Duke and Engage to pay Blue Range for the natural gas without permitting Duke and Engage to set-off their claims for unliquidated damages" (para 72).

[9] Assessing whether or not the transactions were closely connected, the chambers judge relied on the decision of the B.C. Supreme Court in *Quintette Coal Ltd.* v. *Nippon Steel Corporation* reflex, (1990), 2 C.B.R. (3d) 291 (B.C.S.C.) affirmed on appeal 1990 CanLII 430 (BC CA), (1990), 2 C.B.R. (3d) 303 (B.C.C.A.). In *Quintette* the petitioner, a coal mining company, obtained an order under the CCAA allowing a reorganization between itself and its creditors. The order provided that no set-off was permitted. The respondent, Nippon Steel Corporation, was a major creditor of Quintette. In 1981, Nippon entered into contracts for the ongoing purchase of all of Quintette's coal production. The contracts provided for a price review every 4 years. In 1985, the parties were unable to agree on pricing and the matter was sent to arbitration. As a result of the arbitration it was determined that Quintette had overcharged Nippon and now owed Nippon, by way of refund, $46 million. Quintette continued to supply coal to Nippon and Nippon set off what it owed for the coal deliveries against the arbitration award. The B.C. Supreme Court found that this was not an appropriate case for set-off. Specifically the trial judge said:

> Nor do I accept the proposition that the order forces an overpayment by J.S.I. (Nippon) for future coal deliveries. They are obliged to pay, and Quintette is obliged to accept a price set pursuant to the arbitration award or any variation thereof pursuant to any appeal of that award. The award has created a debt owed by Quintette to J.S.I. and I see that as completely distinguishable from the debts incurred by J.S.I. for future coal deliveries (at 295-296).

[10] Following the reasoning in *Quintette* the chambers judge determined that the anticipated damages, owed to Duke and Engage, for the replacement costs of the natural gas arose after the obligation to pay for the February and March deliveries. He found that the future damages for non-delivery were sufficiently independent that it was not unjust to require Duke and Engage to pay for the natural gas they have already received (para 76).

[11] The chambers judge noted that *Quintette* was decided prior to the enactment of s. 18.1 of the CCAA which provides:

> 18.1. The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

This section was added to the CCAA in 1997 and the chambers judge recognized that even if the application of set-off had the result of preferring one creditor over others, parliament, by enacting s.18.1, made the decision that the general law of set-off is to apply in CCAA proceedings. It is apparent that the chambers judge had difficulty with this concept and was clearly of the view that allowing set-off was contrary to the purposes of insolvency legislation. He did, however, appear to instruct himself that this consideration should not carry any weight due to the addition of s.18.1. Specifically he said at paragraph 56:

> [56] Parliament has specifically mandated that, notwithstanding the well know purpose of the Act as a whole, namely to share amongst all of the creditors the asset shortfall, the general law of set-off is to apply to debts owed or claimed by the debtor company.

[12] While the chambers judge recognized that set-off was available in principle, in the end policy considerations regarding the priority of creditors appear to have influenced his decision. He says at paragraphs 82 and 83:

> [82] The anticipated damages arise after the completion of the deliveries. They arise after the stay order. They become an unsecured claim of any other unsecured creditor of Blue Range and lack the necessary relatedness to the deliveries and the consequent unfairness to take them out of this category.
>
> [83] Quite to the contrary, the applicants should share with the other unsecured creditors the burden of the reorganization and to hold otherwise would be potentially unfair to the other creditors.

ANALYSIS

[13] With respect, we find that the chambers judge erred in his application of the law of equitable set-off in a CCAA context. It appears to us that even though he recognized that concerns about the priority of creditors should be irrelevant in the face of s.18.1, his conclusion in paragraph 83 suggests he did not act on that recognition. Under s.18.1 set off was available to Duke and Engage and the chambers judge erred in taking into account potential prejudice to other creditors.

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[14] We have also concluded that the chambers judge erred in his application of equitable set-off in a general context. While we agree that the only contentious aspect of the equitable set-off test, as articulated in *Telford* v. *Holt*, is the "close connection" test, we are of the opinion that the test was not correctly applied. We are influenced in this conclusion by a recent decision not available to the chambers judge, *Cam-Net Communications* v. *Vancouver Telephone Co.* [1999] B.C.J. No. 2855 (C.A.). In this case, the B.C. Court of Appeal was faced with the application of equitable set-off in a CCAA context even though the creditor, Vancouver Telephone, decided not to partake in the CCAA proceedings.

[15] In 1995 Cam-Net Communications ("Cam-Net") entered into an agreement with Vancouver Telephone Co. ("VT") to provide long-distance telephone service to VT's customers. In November 1996 Cam-Net commenced an action against VT claiming amounts owing over $500,000. In January 1997 Cam-Net filed for protection under the CCAA and the B.C. Supreme Court issued an order staying present or future action against Cam-Net. The order also prevented any creditors from exercising rights of set-off.

[16] VT claimed a right to set-off alleging that Cam-Net had breached the contract by failing to provide services of a sufficient quality, unilaterally terminating the contractual services without adequate notice and failing to give proper notice of price increases to VT. As a result of these breaches VT alleged that they had to enter into other contractual relationships at higher rates in order to continue in business.

[17] The B.C. Supreme Court determined that this was not an appropriate case for equitable set-off but the B.C. Court of Appeal overturned that decision. In reaching their decision, the Court drew a distinction between abatement and equitable set-off as follows:

> The law recognizes a distinction between what may be termed abatement and equitable set-off. The former, a product of the common law, applies to cases in which a defendant can show that as a result of the plaintiff's breach, the goods, services, or work provided by the plaintiff are diminished in value. The latter, a product of equity, refers to cases in which a defendant raises a cross-claim which goes directly to impeach the plaintiff's demands, i.e. which is so closely connected with the plaintiff's claim that it would be unjust to allow the plaintiff to enforce payment without taking into account the cross-claim. The latter involves damages other than a diminution of the value of the goods or services provided (para 33).

The court here also relied on the words of Lord Denning in *Henriksens Rederi A/S* v. *T.H.Z. Rolimpex ("The Brede")*, [1974] 1 Q.B. 233 at 248 (C.A.) where he said:

> When the contractor sues for the contract price, the employer can say to him: "You are not entitled to that sum because you have yourself broken the very contract on which you sue, and you cannot fairly claim that sum unless you take into account the loss you have occasioned to me".

On this basis, the B.C. Court of Appeal found that this was an appropriate case for equitable set-off as VT's claim directly impeached Cam-Net's demand for payment.

[18] The fundamental facts in *Cam-Net* are very similar to those in this appeal. In essence both cases involved a debt incurred during the course of a contract that is then negated when the contract itself is broken. In addition, the distinction pointed out in *Cam-Net* between equitable set-off and abatement is highly instructive. In his comment at paragraph 74 that there was nothing wrong with the gas delivered by Blue Range in February and March, the chambers judge appears to be requiring a defect in the goods in order to apply equitable set-off. With respect, such a defect would perhaps lead to a situation of abatement but is not directly relevant in the application of equitable set-off.

[19] The important point for invoking equitable set-off is the close connection of the transactions. Would it be manifestly unjust to require Duke and Engage to pay the cost of the February and March deliveries in view of the fact that they will suffer significant losses due to the early termination of the same contract that called for the delivery of gas in February and March? In our view, such a requirement would be unjust. The contracts in question are not a series of discreet monthly contracts. Rather, they are long term contracts for the supply of natural gas which call for payments to be made in installments settled monthly. These contracts are intended to be relied upon as a whole. Through the contracts, Blue Range and Humble are able to rely on a consistent purchaser of their natural gas over an extended period of time allowing a steady long term income. Similarly, Duke and Engage are able to trade on the natural gas market knowing that they have a long term supply of natural gas at a set price. The fact that the damages owed to Duke and Engage arise after the stay order is not relevant when the obligations arise out of the same contracts. To hold, as did the chambers judge, that there were no damages owed by Blue Range and Humble at the time of the February and March deliveries ignores the overall effect and long term nature of these contracts.

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[20] We find, therefore, that all of the relevant transactions arose out of the same contracts and equitable set-off is available in these circumstances.
[21] The appeal is allowed.

APPEAL HEARD on April 13, 2000
MEMORANDUM FILED at, Alberta,
this 12th day of July, 2000

McFADYEN, J.A.

SULATYCKY, J.A.

RAWLINS, J.

Recovering proceeds if transferred - Sec. 98
98. (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside or, in the Province of Quebec, null or annullable and set aside, and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

Trustee may recover - Sec. 98(2)
(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

Operation of section - Sec. 98(3)
(3) Notwithstanding subsection (1), where any person to whom the property has been sold or disposed of has paid or given therefor in good faith adequate valuable consideration, he is not subject to the operation of this section but the trustee's recourse shall be solely against the person entering into the transaction with the bankrupt for recovery of the consideration so paid or given or the value thereof.

Trustee subrogated - Sec. 98(4)
(4) Where the consideration payable for or on any sale or resale of the property or any part thereof remains unsatisfied, the trustee is subrogated to the rights of the vendor to compel payment or satisfaction.
R.S., 1985, c. B-3, s. 98;
2004, c. 25, s. 59(E).

General assignments of book debts ineffective - Sec. 98.1
98.1 (1) If a person engaged in any trade or business makes an assignment of their existing or future book debts, or any class or part of those debts, and subsequently becomes bankrupt, the assignment of book debts is void as against, or, in the Province of Quebec, may not be set up against, the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

Foregoing provisions not to apply in some cases - Sec. 98.1(2)

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(2) Subsection (1) does not apply to an assignment of book debts that is registered under any statute of any province providing for the registration of assignments of book debts if the assignment is valid in accordance with the laws of the province.

Other cases - Sec. 98.1(3)
(3) Nothing in subsection (1) renders void or, in the Province of Quebec, null any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

Definition of "assignment" - Sec. 98.1(4)
(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.
2005, c. 47, s. 75.

Dealings with undischarged bankrupt - Sec. 99
99. (1) All transactions by a bankrupt with any person dealing with the bankrupt in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate, or interest or right, in the property that by virtue of this Act is vested in the trustee shall determine and pass in any manner and to any extent that may be required for giving effect to any such transaction.

Receipt of money by banker - Sec. 99(2)
(2) For the purposes of this section, the receipt of any money, security or negotiable instrument from or by the order or direction of a bankrupt by his banker and any payment and any delivery of any security or negotiable instrument made to or by the order or direction of a bankrupt by his banker shall be deemed to be a transaction by the bankrupt with his banker dealing with him for value.
R.S., 1985, c. B-3, s. 99;
2004, c. 25, s. 60.

100. [Repealed, 2005, c. 47, s. 76]

Inquiry into dividends and redemptions of shares - Sec. 101
101. (1) Where a corporation that is bankrupt has paid a dividend, other than a stock dividend, or redeemed or purchased for cancellation any of the shares of the capital stock of the corporation within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent.

Judgment against directors - Sec. 101(2)
(2) If a transaction referred to in subsection (1) has occurred, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, or solidarily, in the amount of the dividend or redemption or purchase price, with interest on the amount, that has not been paid to the corporation if the court finds that

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(a) the transaction occurred at a time when the corporation was insolvent or the transaction rendered the corporation insolvent; and

(b) the directors did not have reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or the transaction would not render the corporation insolvent.

Criteria - Sec. 101(2.1)

(2.1) In making a determination under paragraph (2)(b), the court shall consider whether the directors acted as prudent and diligent persons would have acted in the same circumstances and whether the directors in good faith relied on

(a) financial or other statements of the corporation represented to them by officers of the corporation or the auditor of the corporation, as the case may be, or by written reports of the auditor to fairly reflect the financial condition of the corporation; or

(b) a report relating to the corporation's affairs prepared pursuant to a contract with the corporation by a lawyer, notary, accountant, engineer, appraiser or other person whose profession gave credibility to the statements made in the report.

Judgment against shareholders - Sec. 101(2.2)

(2.2) Where a transaction referred to in subsection (1) has occurred and the court makes a finding referred to in paragraph (2)(a), the court may give judgment to the trustee against a shareholder who is related to one or more directors or to the corporation or who is a director not liable by reason of paragraph (2)(b) or subsection (3), in the amount of the dividend or redemption or purchase price referred to in subsection (1) and the interest thereon, that was received by the shareholder and not repaid to the corporation.

Directors exonerated by law - Sec. 101(3)

(3) A judgment pursuant to subsection (2) shall not be entered against or be binding on a director who had, in accordance with any applicable law governing the operation of the corporation, protested against the payment of the dividend or the redemption or purchase for cancellation of the shares of the capital stock of the corporation and had thereby exonerated himself or herself under that law from any liability therefor.

Directors' right to recover - Sec. 101(4)

(4) Nothing in this section shall be construed to affect any right, under any applicable law governing the operation of the corporation, of the directors to recover from a shareholder the whole or any part of any dividend, or any redemption or purchase price, made or paid to the shareholder when the corporation was insolvent or that rendered the corporation insolvent.

Onus of proof — directors - Sec. 101(5)

(5) For the purposes of subsection (2), the onus of proving

(a) that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent, or

(b) that the directors had reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or that the transaction would not render the corporation insolvent

lies on the directors.

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Onus of proof — shareholder - Sec. 101(6)
(6) For the purposes of subsection (2.2), the onus of proving that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent lies on the shareholder.
R.S., 1985, c. B-3, s. 101;
1997, c. 12, s. 82;
2004, c. 25, s. 61(E).

Application of sections 95 to 101 - Sec. 101.1
101.1 (1) Sections 95 to 101 apply, with any modifications that the circumstances require, to a proposal made under Division I of Part III unless the proposal provides otherwise.

Interpretation - Sec. 101.1(2)
(2) For the purposes of subsection (1), a reference in sections 95 to 101

> **(a) to "date of the bankruptcy" is to be read as a reference to "day on which a notice of intention is filed" or, if a notice of intention is not filed, as a reference to "day on which a proposal is filed"; and**
> **(b) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor in respect of whom the proposal is filed".**

Application of sections 95 to 101 if proposal annulled - Sec. 101.1(3)
(3) If the proposal is annulled by the court under subsection 63(1) or as a result of a bankruptcy order or assignment, sections 95 to 101 apply as though the debtor became bankrupt on the date of the initial bankruptcy event.
1992, c. 27, s. 42;
2007, c. 36, s. 44.

101.2 [Repealed, 2007, c. 36, s. 44]

PART V
ADMINISTRATION OF ESTATES

MEETINGS OF CREDITORS

First meeting of creditors - Sec. 102
102. (1) Subject to subsection (1.1), it is the duty of the trustee to inquire as to the names and addresses of the creditors of a bankrupt and, within five days after the date of the trustee's appointment, to send in the prescribed manner to the bankrupt, to every known creditor and to the Superintendent a notice in the prescribed form of the bankruptcy and of the first meeting of creditors, to be held within the twenty-one day period following the day of the trustee's appointment, at the office of the official receiver in the locality of the bankrupt, but the official receiver may, when the official receiver deems it expedient, authorize the meeting to be held at the office of any other official receiver or at such other place as the official receiver may fix.

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SB Directive: 30, Trustee's Report to the Creditors on Preliminary Administration (see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 30

TRUSTEE'S REPORT TO THE CREDITORS ON PRELIMINARY ADMINISTRATION

Issued: August 14, 2009

(Supersedes Directive No. 32 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy.

Authority and Purpose

2. This Directive is issued pursuant to paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this Directive is to clarify the minimal contents of the trustee's report on the preliminary administration to be presented to the creditors at the first meeting of creditors.

RAPPORT DU SYNDIC AUX CRÉANCIERS SUR L'ADMINISTRATION PRÉLIMINAIRE

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 32 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu des alinéas 5(4)*b*) et *c*) de la Loi :

3. La présente instruction vise à préciser le contenu minimal du rapport du syndic sur l'administration préliminaire, à être présenté aux créanciers au moment de la première assemblée des créanciers.

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OSB • BSF Protecting the Integrity of the Insolvency System / Protéger l'intégrité du système d'insolvabilité

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Policy

4 (1) In order to provide creditors with sufficient information to be in a position to properly exercise their rights, the trustee shall submit a preliminary report at the first meeting of creditors that includes the following information:

(a) brief background statement, including the causes or the reasons for the financial difficulties of the debtor;

(b) trustee's preliminary evaluation of assets and details of security interest;

(c) whether the trustee has taken possession of the books of the bankrupt;

(d) conservatory and protective measures;

(e) relevant information relating to provable claims and a description of creditors;

(f) legal proceedings, reviewable transactions and preference payments;

(g) details of third-party deposits or guarantees;

(h) disclosure of all details relating to the trustee's intention to act for secured creditors, as set out in

Politique

4. (1) Pour fournir aux créanciers suffisamment d'information afin qu'ils puissent exercer leurs droits adéquatement, le syndic doit présenter un rapport préliminaire à la première assemblée des créanciers. Celui-ci doit contenir les renseignements suivants :

a) bref historique mentionnant les causes et les raisons des difficultés financières du débiteur;

b) évaluation préliminaire des actifs par le syndic et de l'information sur les biens donnés en garantie;

c) si le syndic a pris possession des livres du failli;

d) mesures conservatoires et mesures de protection;

e) information pertinente concernant les réclamations prouvables et description des créanciers;

f) procédures judiciaires, transactions révisables et paiements préférentiels;

g) détails concernant les dépôts et garanties de tierces personnes;

h) divulgation de tous les détails concernant l'intention du syndic d'agir pour le compte des créanciers garantis, conformément

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subsection 13.4(1.1) of the Act;

(i) projected distribution and trustee's comments on anticipated asset realization, if possible;

(j) in the case of an individual, the amount of any voluntary payments or the amount dictated by the Directive No. 11R2, *Surplus Income*, and details provided by the bankrupt of any prior insolvencies that the debtor may have had; and

(k) any other matters regarding the administration of the estate.

aux dispositions du paragraphe 13.4(1.1) de la Loi;

i) lorsque possible, distribution projetée et commentaires du syndic sur la réalisation estimative;

j) dans le cas d'un particulier, montant de tout paiement volontaire ou montant dicté par l'Instruction n° 11R2, *Revenu excédentaire* et les détails fournis par le failli sur les insolvabilités antérieures du débiteur, le cas échéant;

k) toute autre affaire relative à l'administration de l'actif.

(2) The preceding list should neither restrict the presentation of any other material in the trustee's report nor interfere with the trustee's ability to maximize the realization for the estate.

(2) La liste précédente ne doit pas être de nature à limiter la portée du rapport du syndic, à empêcher la présentation de points pertinents ou à restreindre les activités du syndic afin d'optimiser la réalisation de l'actif.

5. The trustee shall provide the official receiver with a copy of his or her report to the first meeting of creditors.

5. Le syndic doit fournir au séquestre officiel une copie de son rapport à la première assemblée des créanciers.

6. The trustee shall review this report with the creditors before any motion is made. The report shall then be tabled for inclusion and appended to the minutes of the meeting.

6. Le syndic doit expliquer son rapport aux créanciers avant la présentation de toute motion. Le rapport est alors déposé pour être incorporé et annexé au procès-verbal de l'assemblée.

7. If, in the trustee's opinion, the administrative complexity of an estate is minimal and there are few substantive issues,

7. Lorsque, de l'avis du syndic, la complexité de l'administration de l'actif est minime et qu'il y a peu d'éléments à discuter, le rapport

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the report to the creditors may be delivered verbally at the meeting of creditors.

aux créanciers peut être fait sous forme de déclaration verbale au cours de l'assemblée des créanciers.

Coming into Force

8. This Directive comes into force on September 18, 2009.

Entrée en vigueur

8. La présente instruction entre en vigueur le 18 septembre 2009.

Enquiries

9. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

9. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Extension of days - Sec. 102(1.1)

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(1.1) The official receiver in the locality of the bankrupt may extend the period during which the first meeting of creditors must be held

(a) by ten days, or

(b) where the official receiver is satisfied that special circumstances exist, by up to thirty days, where the official receiver is satisfied that the extension will not be detrimental to the creditors and is in the general interests of the administration of the estate.

Documents to accompany notice - Sec. 102(2)

(2) The trustee shall include with the notice referred to in subsection (1) a list of the creditors with claims amounting to twenty-five dollars or more and the amounts of their claims together with a proof of claim and proxy in the prescribed form but no name shall be inserted in the proxy before it is so sent.

Information and notice - Sec. 102(3)

(3) In the case of the bankruptcy of an individual, the trustee shall set out in the notice, in the prescribed form, information concerning the financial situation of the bankrupt and the obligation of the bankrupt, if any, to make payments required under section 68 to the estate of the bankrupt.

Publication in local paper by trustee - Sec. 102(4)

(4) A notice in the prescribed form shall, as soon as possible after the bankruptcy and not later than five days before the first meeting of creditors, be published in a local newspaper by the trustee.

SB Directive: 23, Publication in Local Newspaper

(see below image pages)

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Bureau du surintendant des faillites Canada
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Directive / Instruction

N° 23

PUBLICATION IN LOCAL NEWSPAPER

Issued: August 14, 2009

(Supersedes Directive No. 19R issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the initial bankruptcy event;

(b) where the debtor has resided during the year immediately preceding the initial bankruptcy event; or

(c) in cases not coming within paragraph (*a*) or (*b*), where the

PUBLICATION DANS UN JOURNAL LOCAL

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 19R sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« journal » s'entend d'une publication, dans l'une des langues officielles du Canada, imprimée régulièrement et habituellement distribuée sur une base quotidienne, contenant nouvelles, publicités, opinions et autres éléments d'intérêt général;

« localité d'un débiteur » renvoie au lieu principal où, selon le cas :

a) le débiteur a exercé ses activités au cours de la dernière année précédant l'ouverture de sa faillite;

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greater portion of the property of the debtor is situated;

"newspaper" means a publication in one of Canada's official languages regularly printed and distributed, usually daily, containing news, advertisements, opinions and other items of general interest;

"OSB" means the Office of the Superintendent of Bankruptcy.

Authority and Purpose

2. This Directive is issued pursuant to paragraphs 5(4)(*b*), (*c*) and (*e*) of the Act for the purpose of establishing a standard for trustees as to what type of newspapers may be used according to the locality and to satisfy the requirements of the Act with respect to publication in a local newspaper.

Policy

3. The publication requirement under section 102(4) of the Act is intended to inform all creditors who may have been omitted from the list of creditors. It is also to advise the general public with whom the debtor has been dealing in the past, is dealing with currently or will be dealing in the future.

4. The notice of the first meeting of creditors must be published in a major newspaper that is read by a large segment of the population in the geographic locality of the debtor.

5. Depending on the locality of the debtor, the publication shall be in either official language and:

b) le débiteur a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie des biens de ce débiteur, dans les cas non visés aux alinéas *a*) ou *b*);

« Loi » désigne la *Loi sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu des alinéas 5(4)*b*), *c*) et *e*) de la Loi et vise à établir des normes pour les syndics quant au genre de journaux pouvant être utilisés selon les localités afin de satisfaire aux exigences de la Loi relativement à la publication dans un journal local.

Politique

3. L'exigence de publication énoncée au paragraphe 102(4) de la Loi sert à renseigner tous les créanciers qui auraient pu être omis dans la liste des créanciers. La publication sert également à aviser le public en général avec qui le débiteur a transigé par le passé, transige présentement et transigera à l'avenir.

4. L'avis de la première assemblée des créanciers doit être publié dans un journal important, lu par une grande partie de la population dans la localité géographique du débiteur.

5. Selon la localité du débiteur, la publication doit se faire dans l'une ou l'autre des deux langues officielles et :

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(a) in a metropolitan area, be in a major daily subscribed newspaper;

(b) in localities outside a metropolitan area where a local subscribed newspaper is published, be in the daily newspaper published locally. If such local publication is not available, the publication shall be in a weekly subscribed newspaper published locally;

(c) in a locality outside a metropolitan area where there are no newspapers published locally, be in the daily or weekly subscribed newspaper generally read by the population of the locality.

a) dans une région métropolitaine, se faire dans un quotidien important distribué par abonnement;

b) dans une localité située à l'extérieur d'une région métropolitaine où un journal local est publié, se faire dans le quotidien publié localement. Si un tel quotidien n'est pas disponible, la publication doit se faire dans un hebdomadaire publié localement et distribué par abonnement;

c) dans une localité située à l'extérieur d'une région métropolitaine où il n'y a pas de journal publié localement, se faire dans un quotidien ou un hebdomadaire distribué par abonnement qui est généralement lu par la population de cette localité.

6. In some regions, a regional newspaper, approved by the Office of the Superintendent of Bankruptcy, could be an appropriate replacement for the newspapers designated under section 5.

6. Dans certaines régions, un journal régional, approuvé par le Bureau du surintendant des faillites, peut remplacer les journaux désignés à l'article 5.

7. A magazine, a specialized publication or a weekend edition of a newspaper does not satisfy the requirements of this Directive.

7. Un magazine, une revue spécialisée ou l'édition du week-end d'un quotidien ne satisfont pas aux exigences de la présente instruction.

8. Publication must be in accordance with the prescribed form (Form 73), including the elements contained therein (bankrupt's full name, trade and occupation, business address or residence, etc.).

8. L'avis doit être conforme au formulaire prescrit sur le sujet (formulaire 73) et comprendre tous les éléments indiqués (nom au complet du failli, métier ou profession, adresse et lieu d'affaires, etc.).

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9. Publication of the notice is not to be used as a means of publicity for the trustee. The name, address and logo of the trustee should be of a reasonable size in relation to the rest of the notice. The reasonable width of an advertisement is normally one column.

Coming into Force

10. This Directive comes into force on September 18, 2009.

Enquiries

11. For any questions pertaining to this Directive, please contact your local OSB office.

9. La publication de l'avis ne doit pas servir à des fins de publicité pour le syndic. Le nom, l'adresse et le logo du syndic doivent être d'une taille raisonnable par rapport au reste de l'avis. La largeur normale de l'annonce est habituellement d'une colonne.

Entrée en vigueur

10. La présente instruction entre en vigueur le 18 septembre 2009.

Demandes de renseignements

11. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Purpose of meeting - Sec. 102(5)

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(5) The purpose of the first meeting of creditors shall be to consider the affairs of the bankrupt, to affirm the appointment of the trustee or substitute another in place thereof, to appoint inspectors and to give such directions to the trustee as the creditors may see fit with reference to the administration of the estate.
R.S., 1985, c. B-3, s. 102;
1992, c. 1, s. 20, c. 27, s. 43;
1997, c. 12, s. 84;
2005, c. 47, s. 77.

Meetings during administration - Sec. 103
103. (1) The trustee may at any time call a meeting of creditors and he shall do so when directed by the court and whenever requested in writing by a majority of the inspectors or by twenty-five per cent in number of the creditors holding twenty-five per cent in value of the proved claims.

Meetings convened by inspectors - Sec. 103(2)
(2) A meeting of the creditors may be convened by a majority of the inspectors at any time when a trustee is not available to call a meeting or has neglected or failed to do so when so directed by the inspectors.
R.S., c. B-3, s. 81.

Notice of subsequent meetings - Sec. 104
104. (1) Meetings of creditors other than the first shall be called by sending a notice of the time and place of the meeting together with an agenda outlining the items for discussion with a reasonable explanation of what is expected to be discussed for each item, not less than five days before the time of each meeting to each creditor at the address given in the creditor's proof of claim.

Notice to creditors with proved claims - Sec. 104(2)
(2) After the first meeting of creditors, notice of any meeting or of any proceeding need not be given to any creditors other than those who have proved their claims.
R.S., 1985, c. B-3, s. 104;
1997, c. 12, s. 85;
2005, c. 47, s. 78.

PROCEDURE AT MEETINGS

Chair of first meeting - Sec. 105
105. (1) The official receiver or his nominee shall be the chair at the first meeting of creditors and shall decide any questions or disputes arising at the meeting and from any such decision any creditor may appeal to the court.

Chair of subsequent meetings - Sec. 105(2)
(2) At all meetings of creditors other than the first, the trustee shall be the chair unless by resolution at the meeting some other person is appointed.

Casting vote - Sec. 105(3)
(3) The chair of any meeting of creditors shall, in the case of a tie, have a second or casting vote.

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Minutes of meeting - Sec. 105(4)
(4) The chair of any meeting of creditors shall, within a reasonable time after each meeting, cause minutes of the proceedings at the meeting to be prepared. The minutes shall be signed by the chair or by the chair of the next meeting and shall be retained as part of the books, records and documents referred to in section 26 relating to the administration of the estate.

Non-receipt of notice by creditor - Sec. 105(5)
(5) Where a meeting of creditors is called, the proceedings had and resolutions passed at the meeting, unless the court otherwise orders, are valid, notwithstanding that some creditors had not received notice.
R.S., 1985, c. B-3, s. 105;
2005, c. 47, ss. 79, 123(E).

Quorum - Sec. 106
106. (1) One creditor entitled to vote, or the representative of such a creditor, constitutes a quorum for a meeting of creditors.

Where no quorum - Sec. 106(2)
(2) Where there is no quorum at the first meeting of creditors,
(a) the appointment of the trustee shall be deemed to be confirmed; and
(b) the chair shall adjourn the meeting
(i) to such time and place as the chair fixes, or
(ii) without fixing a time or place for a future meeting.

Idem - Sec. 106(2.1)
(2.1) Where there is no quorum at any meeting of creditors other than the first meeting, the chair shall adjourn the meeting to such time and place as the chair fixes.

Adjournment with consent of meeting - Sec. 106(3)
(3) The chair of any meeting of creditors may with the consent of the meeting adjourn the meeting from time to time.
R.S., 1985, c. B-3, s. 106;
1992, c. 27, s. 44;
2005, c. 47, s. 123(E).

How creditors shall vote - Sec. 107
107. Every class of creditors may express its views and wishes separately from every other class and the effect to be given to those views and wishes shall, in case of any dispute and subject to this Act, be in the discretion of the court.
R.S., c. B-3, s. 85.

Galaxy Sports Inc. (Re), 2004 BCCA 284 (CanLII) - An Example of Complications in Voting with Related Parties

Date:	2004-05-20
Docket:	CA030731
Parallel citations:	240 DLR (4th) 301; 1 CBR (5th) 20; 29 BCLR (4th) 362

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URL: http://canlii.ca/t/1h4r5
Citation: Galaxy Sports Inc. (Re), 2004 BCCA 284 (CanLII), <http://canlii.ca/t/1h4r5> retrieved on 2013-08-24
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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Galaxy Sports Inc. (Re),***
2004 BCCA 284

Date: 20040520

Docket: CA030731
Between:
Galaxy Sports Inc.
Appellant
(Debtor)
And
Abakhan & Associates Inc., Trustee in the Proposal of Galaxy Sports Inc., Umbro Worldwide Limited, and Umbro International Limited
Respondents

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hall

J.P. Sullivan and D.A. Gagnon	Counsel for the Appellant
K.R. Doyle and M.B. Morgan	Counsel for the Respondents Umbro Worldwide Ltd. and Umbro International Ltd.
J.R. Sandrelli	Counsel for the Respondent Abakhan & Associates, Trustee
Place and Date of Hearing: January 27, 2004	Vancouver, British Columbia
Written Submissions Received:	April 8, 15, 16 and 19, 2004
Place and Date of Judgment: May 20, 2004	Vancouver, British Columbia

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Hall

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Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] Galaxy Sports Inc. ("Galaxy") appeals several rulings made by the Chambers judge below in connection with its proposal to creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "*BIA*"). For the most part, the questions raised by the appeal are very concrete and discrete; but some matters of principle that have apparently not been considered at the appellate court level in Canada also arise.

The Factual Background

[2] I turn first, however, to the facts of the case. Galaxy is a Canadian corporation, the shares of which are publicly listed. Until its insolvency, it was the exclusive distributor in Canada of "Umbro" sports clothing and related products. As such, Galaxy had a close working relationship with the Umbro companies, which I will refer to collectively as "Umbro". At some point, it is alleged that Galaxy and Umbro discussed Umbro's granting to Galaxy, or an American subsidiary thereof, a licence for the "big box" market in the United States. Allegedly, the parties even talked about Umbro's acquiring control of Galaxy. In reliance on representations made by Umbro, Galaxy says it turned down financing available to it from other sources.

[3] In early 2002, however, the negotiations came to a sudden halt. Umbro threatened to cancel Galaxy's licence, effective September 2002, unless certain alleged defaults were remedied. According to the Trustee's report, Galaxy could not remedy the defaults and foresaw that it would be unable to continue in business once the cancellation of its licence took effect. On August 23, 2002, Galaxy therefore filed a Notice of Intention to Make a Proposal under the ***BIA***. The proposal was forwarded to Galaxy's creditors on September 20, 2002. Galaxy also began an action for damages against, *inter alia*, Umbro Worldwide Limited ("Umbro Worldwide") and Umbro International Limited ("Umbro International"), both of which are respondents in this appeal, alleging breaches of fiduciary duty, fraudulent and negligent misrepresentation, and "bad faith conduct" leading to the unjust enrichment of the defendants. As well, Galaxy's American subsidiary sought protection under Chapter 11 of the U.S. ***Bankruptcy Act*** in Seattle, Washington.

[4] Galaxy's proposal in Canada was unusual in that it did not appear to contemplate the debtor's complete cessation of business or the sale of all its inventory and operating assets. Instead, Galaxy proposed to sell "so much of its inventory and operating assets as [would be] necessary" to pay liquidation costs, to pay its only secured creditor in full, and to pay the sum of $420,000 to the Trustee, the respondent Abakhan& Associates, for distribution to unsecured creditors. Galaxy also proposed to pursue diligently its lawsuit against the Umbro defendants to a conclusion and then to pay the Trustee 50 percent of the net recovery after payment of legal costs. By accepting the proposal, then, the unsecured creditors would be deemed to have agreed to accept the $420,000 and half of the net amount recovered in the lawsuit, in full settlement and satisfaction of their provable claims. If the lawsuit yielded nothing, they would receive approximately five cents on each dollar of their claims.

[5] As required, the Trustee carried out an investigation of Galaxy's affairs and prepared a report to creditors concerning the proposal. It stated that based on Galaxy's statement of affairs, ordinary unsecured creditors had claims totalling approximately $3,600,000; that there was only one registered secured creditor, a bank, to which Galaxy owed approximately $5,000,000; and that Galaxy's assets included inventory of some $3,200,000, accounts receivable of some $2,470,000 and bank deposits of some $804,446, the latter to be applied against the bank's secured claim. As well, the Trustee reported:

> Galaxy invested approximately $1.2 mil into the US operation by way of shareholders loan. The main asset available for liquidation is UMBRO brand inventory with an approximate value of $1.6 mil., which is being claimed by UMBRO International. The determination of the value of the amount due to Galaxy from the US Corp is dependent on the outcome of the UMBRO Litigation.
>
> UMBRO Litigation
>
> Management's current assessment is that there will be adequate funds from the litigation such that 50% of the net recovery will be adequate to pay the unsecured creditors 100% of their claims.

The Trustee estimated that if the proposal were to proceed, the estate would have available to it approximately $584,000, apart from any proceeds of the Umbro litigation. On the other hand, if Galaxy were to go bankrupt, the funds available to the estate would be approximately $62,000. Accordingly, the Trustee concluded:

> Should Galaxy be Bankrupt it would be up to the creditors to decide whether the Estate should pursue the UMBRO litigation. If the litigation were not pursued the creditors could recover approximately $260,000 of the asset liquidation proceeds which are currently slated to be paid to the litigation effort as legal fees. . . . This potential recovery would not offset the projected reduction in liquidation proceeds should management not participate.
>
> Based on this analysis, allowing management to proceed by approving Galaxy's proposal will likely result in more funds being available to the unsecured creditors than would be the case if Galaxy were to be Bankrupt.

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> Recommendation and Conclusion
>
> The Proposal of Galaxy allows management to realize on the existing operational assets and to pursue the litigation against UMBRO International. The quantum of funds projected to be available to the unsecured creditors is dependent on participation of management in those efforts. It is likely that should management not participate in the realization of assets and in the litigation that there will be less funds available to the unsecured creditors, perhaps NIL. Accordingly, the creditors will realize more in the proposal than they would in a Bankruptcy and that realization will be enhanced should the UMBRO litigation be successful.
>
> The Trustee recommends that the creditors accept the Proposal as they will likely realize more than would be the case should Galaxy be bankrupt.

[6] The first meeting of creditors was held on October 15 and continued after an adjournment on October 29, 2002. Mr. Nayer, an official receiver, chaired the meeting and received various objections from various parties regarding the proofs of claim filed by various creditors. For purposes of this appeal, I need note only three groups of such objections.

[7] First, Umbro Worldwide raised questions about the proofs of claim filed by Galaxy's two landlords (in respect of separate premises), Sun Life Assurance Company of Canada Ltd. ("Sun Life") and Cookstown Holdings Ltd. ("Cookstown"). Sun Life's claim (filed after the first meeting but before the second) was for $1,445,656.68, consisting of arrears of rent of $12,051.25, plus the aggregate amount (not discounted) of rent and operating costs that would, had the lease continued, have been payable by the tenant over the unexpired term ending September 30, 2007. Although this was referred to in Sun Life's statement of account as the "lease disclaimer", the disclaimer procedure provided by s. 65.2 of the ***BIA*** was not invoked in this case, since Galaxy required more time — two or three months — in occupation of the premises than what s. 65.2 would have permitted. Galaxy and Sun Life reached an understanding under which Galaxy agreed to vacate the leased premises by December 31, 2002 and to pay rent up to that date and acknowledged that Sun Life had "a preferred claim in the proposal or any further bankruptcy for the three months rent owed prior to August 23, 2002."

[8] With respect to Cookstown, an agreement was also reached in which the disclaimer procedure was expressly not invoked. Galaxy proposed in a letter of October 9 to Cookstown that it would "surrender" its lease by delivering vacant possession by November 1 at the latest, leaving Cookstown's "right to prove . . . actual losses" unaffected — a proposal the lessor apparently accepted. Accordingly, Cookstown claimed arrears of rent of $16,737.90 up to December 31, 2002, and again, the aggregate of anticipated rental and other amounts that would have been payable by the tenant over the unexpired term of the lease to December 31, 2005, or $311,798.16. The amount of Galaxy's original deposit and another minor amount were deducted, resulting in the final claim of $320,167.11.

[9] The amount of Sun Life's claim was the subject of considerable discussion at the meeting. On October 15, Galaxy's representative advised that the company expected to vacate the premises on or about December 15, 2002; that (in accordance with s. 136(1)(f) of the ***BIA***) rental arrears for the three months prior to the proposal would be a preferred claim; and that subject to mitigation, Sun Life's remaining loss would be an unsecured claim. Although the solicitor for Galaxy, Mr. Gagnon, expressed the hope that the premises "should not be vacant for too long", so that Sun Life's claim "should be minimized", Sun Life's representative stated that it had been offering the premises for rent, and that a similar "unit" on Annacis Island had been on the market for a year.

[10] By the time the meeting continued on October 29, Sun Life's proof of claim had been filed. Various creditors who objected to the claim being allowed in full contended that the landlord's position seemed similar to that of various suppliers of goods shipped to Galaxy but not received by it at the time of its proposal. Most of these had been assigned a "zero" value by the Trustee. Similarly, it was said, Sun Life's claim should not be allowed as a liquidated claim or at full value, since like the suppliers, Sun Life could mitigate its future losses over the course of the tenancy by re-letting the premises. Mr. Abakhan, the Trustee's representative, told the meeting that he did "not know how to value the claim other than how it is presented. Creditors can go to Court and appeal the Trustee's decisions." When pressed further, he added:

> . . . that the courts make a distinction between landlord's claims and unliquidated claims such that landlords are permitted to file their entire claim for the total unexpired term of the lease, regardless of potential mitigation, while creditors such as King's Fashion have no claim until they liquidate the asset in their possession.

[11] In the result, Sun Life's claim was allowed "for voting purposes in full". The Chair requested that if the proposal were accepted by the creditors, the Trustee would give "notice to everyone who voted of SunLife's claim and of the fact that any creditor with a concern could make submissions to the Court. This would ensure that creditors who sent in voting letters but did not attend the meeting would be aware of Sun Life's claim and the possible dilution of dividends." Later in the meeting, the Trustee ruled that Cookstown was "in the same position as SunLife", and allowed its claim at the full amount.

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[12] The second set of claims relevant to this appeal were those made by three of Galaxy's directors, Messrs. Dewar and Watson, who were also the President and the Chief Executive Officer respectively, and Mr. Gill, the chairman of the board. Mr. Dewar's claim was for $120,000. Attached as a schedule to his proof of claim was the statement "6 Months Severance Pay As Per Employment Contract — $120,000." Similarly, Mr. Watson, who claimed a total of $257,969.28 simply noted that his claim represented "15 Months Severance Pay Per Employment Contract." Mr. Gill's claim was for the reimbursement of some $4,600 of expenses apparently incurred on company business. Various creditors objected that these claimants were prohibited from voting by s. 109(6) of the ***BIA***, which is reproduced later in these Reasons. After discussion of that provision and s. 113(3)(c), however, the Chair ruled that the votes of all three directors would be counted at the full amounts of their claims and that "these decisions could be appealed to the Court."

[13] The third contentious issue was a claim filed by Umbro Worldwide in the amount of $1,208,016.45. The proof of claim had attached to it various invoices apparently prepared by Umbro International, rather than Umbro Worldwide, for royalties and other amounts due under the licence agreement. A lengthy colloquy took place at the creditors' meeting among the Chair, counsel for Umbro Worldwide and Galaxy's representative, focussing on a secured debt apparently owing to Galaxy by its U.S. subsidiary. Then, the following discussion ensued:

> Mr. Gagnon then advised the Chair that he takes the position that UMBRO does not have a valid claim. He had only just been made aware of the fact that the UMBRO Proof of Claim filed in the Proposal had been made and signed by UMBRO Worldwide Limited, however, all of the support for the claim (the Schedule "A"), including invoices and statements were to the account of UMBRO International, a separate and distinct legal entity. Accordingly, in his opinion the claim was invalid as filed, for voting purposes.
>
> There followed discussion on the issue of the validity of the UMBRO claim as filed. Mr. Doyle [counsel for Umbro] indicated that UMBRO International did the invoicing for UMBRO Worldwide and both companies were subsidiaries of UMBRO Holdings.
>
> The Chair ruled that the Proof of Claim filed by UMBRO was valid for voting purposes.

Shortly thereafter, the Trustee advised the meeting that it was valuing Umbro Worldwide's claim at approximately $640,000.

[14] At the close of the meeting, the Trustee advised that 79 votes representing 75.93 percent of the claims had been cast in favour of the proposal and that eight votes representing 24.07 percent of the claims had been cast against. The Chair declared that the proposal had been accepted by the creditors.

The Proceedings Below

[15] Four motions came before the Supreme Court judge in Chambers. First, the Trustee applied under s. 58(a) of the ***BIA*** for court approval of the proposal. Second, Umbro Worldwide applied under s. 163(2) for an order permitting it to examine representatives of Sun Life and Galaxy under oath; an order for the lessor's production of books and records relating to its claim; and an order that Galaxy produce all books and records in its possession "relating to the administration of the estate of Galaxy". In that motion, Umbro Worldwide also appealed the Trustee's ruling in respect of the voting entitlement of the three directors.

[16] Apparently in response to Umbro Worldwide's application to examine, Sun Life thereafter reached an understanding with Umbro Worldwide that the latter would not proceed with the application, in return for Sun Life's agreement that its claim would be reduced to $12,051.25 "for voting purposes only". This understanding was confirmed in a letter dated January 21, 2003 prepared by Sun Life's solicitors, which stated:

> We confirm that Umbro [Worldwide] will not take issue with Sun Life's Proof of Claim for the purposes of distribution from the Estate of Galaxy Sports Inc. Sun Life will, of course, revise its Proof of Claim downward if it is able to mitigate its losses prior to any eventual distribution from the Estate of Galaxy Sports Inc.

[17] By the time of the foregoing correspondence, Umbro Worldwide had filed another notice of motion in Supreme Court seeking orders that:

> 1. the Proofs of Claim filed by Sun Life Assurance Company of Canada and of Cookstown Holdings Ltd. are to be reduced to $12,051.25 and zero dollars respectively, solely for the purpose of the vote by Galaxy's creditors on its Proposal and the votes of these creditors on the Proposal are to be correspondingly reduced in the calculation of the vote by Galaxy's creditors on its Proposal;
> 2. the Proofs of Claim filed by the Officers and Directors be expunged and the votes of the Officers and Directors are not to be counted in the vote by Galaxy's creditors on its proposal;
> 3. there be a declaration that Galaxy's creditors refused to accept the Proposal;
>
> pursuant to s. 135(5) of the *Bankruptcy and Insolvency Act* and Rules 6 and 11 of the Bankruptcy and Insolvency General Rules.

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In support of this motion and its earlier motion, Umbro Worldwide filed and adduced affidavit material referring to or having appended to it documents that had not been before the Chair of the creditors' meeting in October 2002.

[18] The fourth motion before the Chambers judge was filed by Galaxy. It sought declarations that both Umbro defendants were disentitled by s. 109(6) of the ***BIA*** from voting at any creditors' meetings "as they did not, at all times in the year preceding commencement of this proceeding, deal with [Galaxy] at arm's length"; and in the alternative, that Umbro Worldwide was not entitled to vote "as a result of its failure to duly prove its claim by annexing a statement of account that evidenced a debt owing to it that is provable under the Act".

The Judgment Appealed From

[19] The motions came on for hearing in January 30 and 31, 2003 (although I note the date of hearing on the face page of the Reasons refers to a hearing on December 2, 2002). The Chambers judge's Reasons were released on March 31, 2003 and are reproduced at 2003 BCSC 493 (CanLII), 2003 BCSC 493. It does not appear from the judgment that counsel made any objection to her consideration of what I shall refer to as "fresh evidence" — i.e., documents and other materials that were not before the Trustee or the Chair of the meeting of creditors — nor that any specific application was made to adduce the "fresh evidence" at the hearing. It was simply filed and admitted without objection or argument.

[20] The Chambers judge began by dealing with the voting entitlement of Messrs. Watson, Dewar and Gill. She first addressed the question of whether they were prohibited from voting by s. 109(6) of the ***BIA***, which provides:

> (6) Except as otherwise provided by this Act, a creditor is not entitled to vote at any meeting of creditors if the creditor did not, at all times within the period beginning on the day that is one year before the date of the initial bankruptcy event in respect of the debtor and ending on the date of the bankruptcy, both dates included, deal with the debtor at arm's length.

Also relevant is s. 113(3)(b), which provides:

> (3) The following persons are not entitled to vote on the appointment of a trustee or inspectors: . . .
>
> (b) where the bankrupt is a corporation, any officer, director, or employee thereof; . . .

[21] The Chambers judge noted that whether parties are dealing at arm's length for purposes of s. 109(6) is a question of fact, citing ***Skalbania (Trustee of) v. Wedgewood Village Estate Ltd.*** (1989) 74 C.B.R. (N.S.) 97 (B.C.C.A.). She found that the three men were not "passive directors" in that Messrs. Watson and Dewar had signed various agreements and dealt with Umbro and that Mr. Watson had even executed the Chapter 11 proceedings in the United States for Galaxy's U.S. subsidiary. Each of these men, she said, "could influence the direction of Galaxy." As well, she noted, the claims of Messrs. Watson and Dewar were predicated on the assumption that their employment contracts had been terminated, whereas there was no evidence of termination. Indeed, the Trustee's report suggested that Galaxy had ongoing operations and that the continued services of management would be required at least in connection with the Umbro lawsuit. Based on these facts, the Chambers judge ruled that the votes of none of the three directors could be counted, and that the proofs of claim of Messrs. Watson and Dewar should be expunged pursuant to s. 135(5).

[22] The Chambers judge then moved to the question of the landlords' entitlement to vote the full amounts of their claims under Galaxy's leases. Cookstown did not appear in the court below. Sun Life, in accordance with the understanding it had reached with Umbro, did not oppose Umbro Worldwide's motion to reduce its claim to $12,051.25.

[23] The Chambers judge drew a strong analogy between the claims of the landlords and those of various suppliers whose proofs of claim had been disallowed in their entirety. (The only exception was King's Fashion, whose representative had advised the meeting that the product it had shipped to Galaxy would be difficult to sell elsewhere because of its "custom" nature. King's Fashion had a claim in excess of $1,318,000 but the Trustee valued it at $544,837 for voting purposes.) The Chambers judge stated:

> The cases of the landlords and the suppliers are alike. In each of these cases the creditor has retained an asset and by re-leasing or selling that asset, will be able to mitigate its losses. There has not been sufficient time for the landlords to have re-let the premises or for the suppliers to have sold the manufactured goods.
>
> Section 135 provides that the trustee shall determine if an unliquidated claim is a provable claim and, if so, the value of the claim. The trustee may require further evidence in support of a claim. A creditor with an unliquidated claim has no right to vote until his claim has been valued and has a provable claim only for the amount at which the trustee values the claim. In valuing the claim, the trustee should look at what is reasonable in the circumstances and apply an appropriate contingency in determining the amount at which to value the claim, as the court did in *Re Wiebe* 1995 CanLII 7367 (ON SC), (1995), 30 C.B.R. (3d) 109 (Ont. Gen. Div.). [paras. 17-18]

The Chambers judge noted the statement made by Mr. Gagnon on behalf of Galaxy at the first creditors' meeting that "[t]he actual losses incurred by Sun Life would be unsecured and will be subject to mitigation, and it is the understanding

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of Galaxy that this space should not be vacant for too long and the claim should be minimized." She agreed, noting that in valuing Sun Life's claim for voting purposes, the likelihood of re-letting the premises must be considered. She continued:

> The landlords and Galaxy could provide the trustee with information respecting re-letting the property as could real estate agents. To simply allow the claim for the unexpired term inflates the claim and accords it inappropriate voting power. A claim allowed for voting purposes at far more than its true value may well be sufficient to approve or defeat a proposal over the views of other creditors. It is given disproportionate weight.
>
> The claims of the landlords must be discounted to reflect the likely loss, and consider the likely recovery on re-letting. The evidence before me does not allow me to determine an appropriate reduction as contemplated by s. 135(5). The parties may adduce further evidence on this point, if necessary. [paras. 22-23]

Accordingly, the Court adjourned this aspect of the motion, declaring that the parties were at liberty to schedule another hearing regarding the valuation of the landlords' claims.

[24] The Court next turned to the claim filed by Umbro Worldwide. Appended to its proof of claim were invoices from Umbro International. There was evidence from Mr. Watson that Galaxy was normally invoiced by and made payment to Umbro International for goods shipped under the licence agreement. With respect to Galaxy's objection that "the wrong company" had filed the claim, the Chambers judge concluded on the evidence before her that Umbro International had assigned its licence agreement with Galaxy, to Umbro Worldwide in 1999, and had given notice of the assignment to Galaxy. Thus, she said, it was "appropriate that [Umbro Worldwide] file the proof of claim." (Para. 27.) As to the objection based on s. 109(6), the Chambers judge reviewed affidavit evidence filed by Mr. Watson concerning Galaxy's court action against the Umbro companies, the Statement of Claim, and various e-mails between Galaxy and Umbro discussing their possible merger back in 2001-2002, Umbro's financial assistance to Galaxy, and extensions of the time for Galaxy's payment of royalties. However, the Chambers judge found:

> Without a clear sworn statement from Mr. Watson or another Galaxy representative detailing the manner in which Galaxy says that Umbro was not dealing at arm's length and setting out facts in support, I cannot conclude that Umbro was not acting at arm's length.
>
> The statement of claim is merely an unsworn pleading. It is not a sworn statement of the facts which Galaxy says lead to the conclusion that Umbro was not acting at arm's length.
>
> The e-mails do not demonstrate a non-arm's length relationship, even if the court could speculate as to the nature of the relationship, negotiations, etc. without further evidence from the parties involved.
>
> I will not set aside the chairman's rulings on these issues, Galaxy's motion is dismissed. [paras. 31-34; emphasis added.]

[25] In light of her rulings on the voting entitlements of Galaxy's directors and the adjournment of the motion concerning the landlords' claims, the Chambers judge concluded that it would be inappropriate to deal with the Trustee's application for approval of Galaxy's proposal by the Court. Obviously, this appeal has suspended further proceedings below and the matter has unfortunately sat unresolved for several more months.

ON APPEAL

[26] The first ground of appeal advanced by Galaxy is that the Chambers judge erred in ordering that the landlords' respective claims must be reduced for purposes of the creditors' vote on the proposal. Galaxy contends that in so concluding, the Chambers judge erred in three respects. The latter two grounds — that she should not have directed that additional evidence be adduced regarding the leases, and that she failed to show "proper deference" to the Trustee's decision — may conveniently be dealt with first, and together, since the questions of what evidence is properly adduced on an appeal under s. 135, and what standard of review is to be applied on such an appeal, are obviously related.

First Evidence and Standard of Review

[27] Galaxy submits that the Chambers judge erred in making an order "that would involve evidence on the question of mitigation, and a further hearing." In this regard, counsel commends to us the comments of Farley J. in ***Re Canadian Triton International Ltd.*** reflex, (1997) 49 C.B.R. (3d) 192 (Ont. Ct. Gen. Div.), where he observed:

> It would seem to me to be reasonably obvious that the determination as to who is allowed to vote at a particular meeting has to be decided on the basis of what information (i.e., the appropriate material) was available to the Chair of the meeting (in this case the Official Receiver) at the time the vote was conducted. See *In Re Andrew Motherwell of Canada Limited* (1923), 4 C.B.R. 265 (Ont. S.C.) at p. 268: "Again I do not see how I can allow any new material to go in at this stage. We must deal with the proxies as of the date the votes were cast under them." In other words, it would be inappropriate to go back after the meeting and attempt to cooper up any observed deficiency with the material filed for the purpose of voting. That is not to be confused with material *then available* to the Chair. If it were otherwise, then

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> there could be a (never ending) string of attempts at bolstering the material so that it was objectively satisfactory and that the estate would continue to be in a state of uncertainty as to any vote taken. Any appeal from the Chair's decision should be in accord with the appeal provision and be on a single appeal basis. That is not to imply that the material could not be coopered up for any *future* vote or for the purpose of entitlement to any future distribution. The time for lodging the proxy according to Houlden and Morawetz, "The 1997 Annotated *Bankruptcy and Insolvency Act*" . . . at p. 335 "must, however, be filed with the Chair before the taking of the vote, not afterwards: *Re Britannia Canning Co.* (1938), 19 C.B.R. 250 (Ont. S.C.)." [para. 5; emphasis added.]

[28] Farley J.'s comments strike a pragmatic note, but one that would appear to be in keeping with the general scheme, or "purpose", of the ***BIA*** provisions relating to debtors' proposals and creditors' meetings. That scheme operates on fairly tight time lines: within five days of its appointment, the trustee is required to send to every known creditor a notice of the first meeting, to be held within 21 days of that appointment (s. 102(1)). Notice must be published in the local newspaper not later than five days prior to the first meeting of creditors (s. 102(4)), and after the first meeting, notice of meetings need not be given to any creditors other than those who have proven their claims (s. 104(2)).

[29] Sections 105-115 provide for the procedure to be followed at creditors' meetings generally. Section 105(1) states that the official receiver or his nominee shall chair the first meeting of creditors and "shall decide any questions or disputes arising at the meeting". A creditor may appeal any such decision to the court. (All subsequent meetings are required to be chaired by the trustee unless some other person is appointed by resolution at the meeting.) Section 107 requires that every class of creditors be permitted to express its views and wishes separately from every other class. Subject to the ***BIA***, the question of what effect is to be given to those views and wishes in the event of any dispute lies "in the discretion of the court." The chair is given the authority under s. 108 to reject or admit a proof of claim "for the purpose of voting", but his decision is subject to appeal to the court. Section 108(3) also states:

> Where the chairman is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

[30] At the same time, a person may not vote as a creditor unless he has duly proved a claim which has been duly lodged with the trustee prior to the meeting: s. 109(1). The formal requirements for proofs of claim are set forth in s. 124. Under s. 135, the trustee may disallow, in whole or in part, any claim or security. Further, where the claim is contingent or unliquidated, the trustee must decide whether it is a provable claim, and if it is, he or she must value it. Only when that has occurred is the claim "deemed to be a proved claim to the amount of its valuation": s. 135(1.1). This represents a change from earlier versions of the ***BIA***, which required that the court determine, on application by the trustee, whether any contingent or unliquidated claim was provable. If so, the court was also required to value the claim: see R.S.C. 1985, c. B-3, s. 121; R.S.C. 1970, c. B-3, s. 95; R.S.C. 1952, c. 14, s. 83; and S.C. 1949 (2nd Sess.), c. 7, s. 83.

[31] Under s. 135(1), the trustee in examining a proof of claim may require further evidence in support of the claim. Section 135(4) provides that the trustee's decision as to the value of a contingent or unliquidated claim or the disallowance of any claim under s. 135(2) is "final and conclusive" unless it is appealed within 30 days of service of the notice referred to in s. 135(3).

[32] The interrelationship of the chair and the trustee has not been the subject of much judicial comment, presumably because the trustee normally becomes the chair after the first meeting, and the two generally co-operate in the treatment of creditors' claims. I do note one case in which the two disagreed: in ***Northstone Power Corp. v. R.J.K. Power Systems Ltd.*** 2002 ABQB 405 (CanLII), (2002) 33 C.B.R. (4th) 261 (Alta. Q.B.), a trustee had disallowed a creditor's claim but the official receiver, acting as chair of a subsequent creditors' meeting, decided to allow the creditor to vote on the debtor's proposal, relying on ss. 108(1) and (3). Forsyth J. ruled on the appeal that the official receiver had erred in doing so, and that upon a clear reading of those provisions together with ss. 109(1) and 135, "Section 108 would only come into play when the Trustee had not yet ruled on the validity or otherwise of a proof of claim." (para. 15.) Further, he said:

> I referred earlier in this judgment to the Notice of Disallowance served by the Trustee on R.J.K. and the language set out therein. At this point in time, and subject to appeal, which had not yet been launched as of the April 2nd voting date, or an application for a stay which again had not been applied for, the claim had been disallowed in total and therefore R.J.K. was not entitled to vote at the meeting of April 2nd. I cannot read into Section 108 that where there has been a ruling on the validity of the claim, the Chairperson (Official Receiver) can override that decision of the Trustee and purport to allow a vote to take place even on the limited basis that it is subject to Court subsequently validating the vote or disallowing the claim of R.J.K. . . .

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> . . . I would note, however, that the Trustee did not make his decision absent any evidence whatsoever as to the debt claimed, but had the benefit of the investigation carried out by the party proposed under the contract entered into by both parties to be the person who would make the initial determination of the validities of various claims arising under the contract. The point is, that at the date of taking of the vote on April 2nd, the Trustee had clearly disallowed the claim in its entirety and I am satisfied that Section 108, as noted, does not give the Official Receiver, the Chairperson of the meeting, the right to override that decision and find that there was validity to the extent of allowing the vote to be taken and recorded. [paras. 17 and 18; emphasis added.]

[33] In any event, the foregoing provisions seem designed to encourage creditors to take the first meeting seriously (by requiring that they file complete proofs of claim) and to facilitate the prompt airing of the "views and wishes" of the various classes of creditors. Trustees at least are given a considerable degree of authority and have the benefit of the privative clause in s. 135(4). Presumably, this is because they possess specialized expertise in the areas of business financing, restructurings and insolvency, and are decision-makers to whom some deference is owed by a reviewing court. Expertise, of course, has been said to be the most important of the well-known factors to be considered in determining the standard of review applicable by a court of law to the decisions of administrative tribunals in accordance with the "pragmatic and functional" approach mandated by the Supreme Court of Canada. In ***Canada (Director of Investigation and Research) v. Southam Inc.*** 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, for example, the Court quoted at 773 the following passage from ***United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*** 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316:

> . . . the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* [*v. Canada (Canadian Radio-Television and Telecommunications Commission)* 1989 CanLII 67 (SCC), [1989] 1 S.C.R. 1722], it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction. [at 335]

(See also ***Pezim v. British Columbia (Superintendent of Brokers)*** 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557, ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)*** 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, ***Baker v. Canada (Minister of Citizenship and Immigration)*** 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, ***Dr. Q v. College of Physicians and Surgeons of British Columbia*** 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226, ***Law Society of New Brunswick v. Ryan*** 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, and the decision of this court in ***Aquasource Ltd. v. British Columbia (Information and Privacy Commission)*** 1998 CanLII 6444 (BC CA), (1998) 58 B.C.L.R. (3d) 61.)

[34] It is arguable that slightly different considerations apply to the decision of the chair when accepting or rejecting proofs of claim at the initial meeting of creditors. As earlier mentioned, he or she does not have the benefit of a privative clause. Instead, where a dispute arises concerning the effect to be given to the "views and wishes" of different classes of creditors, the matter is said to be "in the discretion of the court" (s. 107), and where the chair is in doubt as to whether a claim should be rejected, he or she must mark the proof as "objected to" and allow the creditor to vote, subject to the vote being invalidated if the objection is sustained — presumably, by the court (or the trustee if ***Northstone,*** *supra,* is correct).

[35] However, counsel before us did not differentiate between official receivers and trustees in this regard. Galaxy contends that in the bankruptcy area, the law has "long been clear" that in reviewing proofs of claim and determining voting rights at creditors' meetings, the chair (and presumably, the trustee where applicable) has a discretion which, if reasonably exercised, should not be interfered with unless the decision relates to a "mandatory" provision of the ***BIA***. The source generally cited for this well-known proposition is the judgment of Tweedie J. in ***Re McCoubrey*** (1924) 5 C.B.R. 248 (Alta. S.C.):

> Coming now to the various objections in regard to proofs of claim and proxies: In considering the objections, regard must be had to the provisions of the statutes and Rules in connection with which the objections are raised. If they are mandatory, it is the duty of the chairman to require strict compliance with them; if they are merely directory, he is entitled to exercise his discretion concerning them and if there are reasonable grounds for his exercising such discretion in the manner in which he does, his decision will not be interfered with. [at 252]

[36] The Umbro respondents take issue both with the applicability of the Court's remarks in ***Triton*** (which they characterize as *obiter* in any event) and the proposition that where the chair or trustee has a discretion to exercise, a court of law should not interfere if there were reasonable grounds for the decision. In their submission, the hearing before the Chambers judge below was a trial *de novo* in which the Court was entitled to hear evidence regarding the valuation of the landlords' claims that was "not necessarily before the trustee." On this point, they cite ***Re Eskasoni Fisheries Ltd.*** 2000

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CanLII 10880 (NS SC), (2000) 16 C.B.R. (4th) 173, a decision of the Registrar of the Nova Scotia Supreme Court dealing with a trustee's disallowance of a claim. The Registrar stated:

> Where a creditor appeals to the court from the decision of a trustee to disallow a claim that appeal will proceed by way of trial *de novo*. While I have found no specific case or commentary that makes this point clear, it is clear from a review of the cases generally that a Judge or Registrar hearing an appeal from a trustee's decision is not required simply to proceed upon the information before the trustee. In other words, on such appeals the court is entitled to accept and consider all evidence relevant to the claim. [para. 17]

(See also ***Re MacDonald*** [2002] O.J. No. 2744 at para. 19 (Ont. Sup. Ct.), ***Re Exner*** 2003 BCSC 260 (CanLII), (2003) 41 C.B.R. (4th) 49 at para. 22 (B.C.S.C.), and ***Re Beetown Honey Products Inc.*** [2003] O.J. No. 3853 at para. 16 (Ont. Sup. Ct.), all of which followed ***Eskasoni***. In ***Port Chevrolet Oldsmobile Ltd. (Re)***, 2004 BCCA 37 (CanLII), 2004 BCCA 37, a recent decision of this court, counsel did not challenge the "trial *de novo*" approach taken in ***Eskasoni***. The Court therefore proceeded on the assumption for purposes of that appeal that the Chambers judge below was entitled to consider material that had not been before the trustee in deciding whether a proof of claim had complied with s. 124 of the ***BIA***.)

[37] The respondents also argue that the chair or trustee is not a "specialized tribunal" of the kind discussed in ***Southam*** and that there was neither a "hearing" before them in this case nor any meaningful opportunity afforded at the creditors' meeting to adduce evidence to contradict the position taken by the debtor. Yet the ***BIA*** obviously intends that a meaningful opportunity be accorded to all creditors at their meeting to raise objections and arguments for consideration by the chair or the trustee in making their determinations under ss. 108 and 135 respectively. At this point, the decision-maker has a 'gatekeeping' role with respect to creditors' voting entitlement, which in turn may decide the fate of the debtor's proposal. The fact that many of the formalities of a hearing in a court of law may be lacking is a necessary feature of the bankruptcy provisions relating to debtors' proposals as I have described them above, but in my view it is not conclusive of the issue of standard of review. Further, I know of no binding authority to the effect that such a hearing must take place before the relevant decision-maker will be regarded as a "specialized tribunal" with expertise that commands some deference. Many statutory decision-makers whose roles are not strictly "adjudicative" have been subjected to the standard of review analysis described in ***Southam*** and the cases following it. Thus in Brown and Evans, ***Judicial Review of Administrative Action in Canada*** (loose-leaf, 1998) the authors observe:

> Until recently, the extension of the pragmatic or functional analysis to determine the appropriate standard of review to be applied to administrative action outside the adjudicative context has been sporadic. For the most part, courts have assumed that the interpretation of statutory provisions conferring legislative or administrative powers on non-adjudicative agencies or officials is subject to *de novo* determination by the courts. Judicial deference was typically not afforded to the decision-maker's view of what considerations are legally relevant to, or what purposes may legitimately be pursued by, the exercise of discretion. However, in a recent decision of the Supreme Court of Canada [*Baker v. Canada*, *supra*] a pragmatic or functional analysis was applied to the review of a refusal by an immigration officer to grant permanent residence status on humanitarian and compassionate grounds to a woman who had been living in Canada illegally.
>
> *Baker* makes two important changes to the review of the exercise of administrative discretion. First, it extends the doctrine of judicial deference to areas of administrative decision-making where it had previously been assumed that, as a general rule, any legal issue decided by the decision-maker was subject to review on a standard of correctness. Second, *Baker* firmly establishes the principle that, even if the decision-maker has committed none of the errors traditionally associated with the *ultra vires* doctrine, a reviewing court may still set the decision aside or declare it to be unlawful if the exercise of discretion fails to meet a basic standard of rationality. [at 15-95 to 15-96]

(See also ***Chamberlain v. Surrey School District No. 36*** 2002 SCC 86 (CanLII), [2002] 4 S.C.R. 710 at para. 4.)

[38] Proceeding on the basis that the "pragmatic and functional" approach can be applied to the decisions at issue here, the nature of the question being decided — whether it is one of fact, or mixed fact and law, and whether it involves consideration of "polycentric" factors — is another important factor in deciding where on the (three-point) "continuum" the decision falls. Indeed, it was said by Donald J.A. in ***Aquasource***, *supra*, that "whether an administrative tribunal's decision will attract curial deference largely depends on the question involved. It is no longer appropriate to grant blanket deference to the tribunal . . . ." (Para. 16.) It cannot be said that any of the decisions at issue here involves the balancing of polycentric interests. On the other hand, the chair's determination as to "what effect" to give to creditors' "views and wishes" and the trustee's power to allow or disallow a claim (for which the trustee must give written reasons) under s. 135

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(which in turn also involves the requirements of s. 124) seem to be decisions more of law than fact. On these matters, a judge of the Supreme Court may be assumed to have equal expertise. Further, these questions have important legal consequences, in that a person whose proof of claim is disallowed or rejected may not participate as a creditor in the bankruptcy generally or in the distribution of the bankrupt's estate.

[39] On a consideration of all the "contextual" factors mandated by the "pragmatic and functional" approach, I see no reason to disagree with the long-standing principle enunciated in ***Re McCoubrey***, *supra*, which requires the application of a "correctness" standard where compliance with a "mandatory" provision (which I would equate to a question of law or statutory compliance) is involved, and the application of a "reasonableness" standard where the determination of a factual matter or an exercise of true discretion is called for. In the former category, I would place the chair's decision under s. 108 rejecting a proof of claim for voting purposes and the trustee's decision disallowing a proof of claim under ss. 124 and 135(2). In the latter category, I would place the trustee's role in valuing contingent and unliquidated claims under s. 135(1.1). This general approach conforms with the objective, which I see as implicit in the ***BIA***, of enabling debtors to have their proposals voted upon expeditiously and permitting creditors to have their rights and claims determined in a business-like manner, while at the same time providing a meaningful appeal to a court of law on questions that clearly affect legal rights, engage the relative expertise of judges, and set precedents for other cases.

[40] I am also of the view that the Supreme Court's hearing of an appeal under s. 135(4) of the ***BIA*** is not intended to be a trial *de novo* but a true appeal. With all due respect to ***Re Eskasoni***, *supra,* the law in British Columbia is clear that unless the statute that provides an appeal also states that it is to take the form of a trial *de novo* (as do, for example, s. 119(4.1) of the ***Social Service Tax Act***, R.S.B.C. 1996, c. 431 and s. 822(4) of the ***Criminal Code***, R.S.C. 1985, c. C-46), the appeal will be an ordinary appeal. Thus in ***McKenzie v. Mason*** 1992 CanLII 2291 (BC CA), (1992) 72 B.C.L.R. (2d) 53, this court held that a statutory appeal to the Chief Gold Commissioner provided by s. 35 of the ***Mineral Tenure Act*** did not envisage a trial *de novo*. In the course of his reasons for the Court, Toy J.A. cited a passage from ***R. v. Dennis*** 1960 CanLII 34 (SCC), [1960] S.C.R. 286, where Ritchie J. wrote:

> . . . the distinction between "an appeal by holding a trial de novo" and an appeal to the provincial Court of Appeal is that although the object of both is to determine whether the decision appealed from was right or wrong, in the latter case the question is whether it was right or wrong having regard to the evidence upon which it was based, whereas in the former the issue is to be determined without any reference, except for purposes of cross-examination, to the evidence called in the Court appealed from and upon a fresh determination based upon evidence called anew and perhaps accompanied by entirely new evidence. [at 290-91]

McKenzie v. Mason was confirmed by a five-judge panel of this court in ***Dupras v. Mason*** 1994 CanLII 2772 (BC CA), (1994) 120 D.L.R. (4th) 127. There, Mr. Justice Lambert, speaking for the Court, reviewed the complaint procedure provided in the ***Mineral Tenure Act*** and said:

> Running through the consideration of s. 35 must be an understanding of the function and expertise of the chief gold commissioner. He or she may be expected to have had many years of experience with respect to the mining industry in general and the locating and recording of mineral claims in particular. That expertise will imbue the carrying out of his or her functions under s. 35. It will also make his or her decision under s. 34 about good faith non-compliance a decision which is well informed by practical experience of what constitutes a good faith attempt to comply with the Act and Regulations, and about whether a failure to comply was calculated to mislead other free miners.
>
> If an appeal were to be taken by trial *de novo* the chief gold commissioner's expertise would no longer be available in the process of decision-making under ss. 35 and 34. For that reason and for the other reasons set out by Mr. Justice Toy for this court in *McKenzie v. Mason*, including particularly the fact that the appeal is not specified in the statute to be by trial *de novo*, I conclude that s. 35(10) of the *Mineral Tenure Act* does not contemplate or permit an appeal to a Supreme Court judge by trial *de novo*.
>
> Having reached that conclusion, it follows that the appeal to the Supreme Court must be a true appeal confined to whether the chief gold commissioner made a reviewable error of fact, of law, or of procedure. [at 134-35; emphasis added.]

[41] In my opinion, similar considerations apply in this case with respect to the expertise of trustees in bankruptcy. As I have already mentioned, they can be expected to have considerable experience and expertise in the area of business financing, restructurings and insolvency. If "fresh evidence" — i.e., evidence not before the trustee or chair at the time of his or her decision — were to be adduced in Supreme Court on appeal as a matter of course, it seems to me that much would be lost in the way of efficiency in the operation of the bankruptcy scheme generally. Creditors who neglected to file proofs of claim in compliance with the requirements of s. 124 would suffer no practical consequences if, in Farley J.'s phrase, they could expect to "cooper up" their proofs at a later date in court; and the business now conducted at creditors'

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meetings by trustees (who are generally supervised by inspectors under the ***BIA***) would be largely co-opted to courts of law, with all the attendant expense, delay and formality.

[42] With respect to decisions of the chair under s. 108, again it is arguable that a less restrictive approach to "fresh evidence" is intended. However, since counsel were content to "lump together" the two decision-makers for purposes of this appeal, I will not pursue or decide this rather fine point on this occasion. It will be sufficient, I believe, to state my view that to the extent the Chambers judge below proceeded on the basis that the appeal was a trial *de novo* in which "fresh evidence" was considered as a matter of course, she fell into error. As unsatisfactory as the state of the evidence may have been, she should have proceeded to consider whether the Trustee had made a reviewable error in its treatment of the landlords' claims on the evidence before it. If counsel applied to adduce "fresh evidence", she would then have been obliged to decide whether its admissibility was justified in the interests of justice or on some other principled basis. Since counsel before us did not make submissions as to what the appropriate criteria would be in this regard, I will leave that point as well for another day. But before counsel on appeals under the ***BIA*** file large volumes of affidavits and exhibits in the Supreme Court bearing no resemblance to what was actually before the decision-maker whose decision is being appealed, consideration should be given to that question.

Landlords' Claims

[43] This brings me to Galaxy's remaining ground of appeal under this rubric, which is that the Chambers judge erred in applying the reasoning in ***Re Wiebe*** 1995 CanLII 7367 (ON SC), (1995) 30 C.B.R. (3d) 109 (Ont. Ct. Gen. Div.), to the landlords' claims. (Another point of law which this court raised, and on which we received written argument — the effect, if any, of s. 65.1 on these claims — will be addressed below.) Galaxy says that the landlords' claims are, by virtue of ***Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*** 1971 CanLII 123 (SCC), [1971] S.C.R. 562, "entirely uncontingent". With respect, however, the Chambers judge proceeded not on the basis that these claims were contingent, but on the basis that they were unliquidated. Although she did not cite ***Highway Properties***, she was correct on this point. ***Highway Properties*** made it clear that where (as here) a commercial lease is repudiated by the tenant prior to the expiration of its term, the "full armoury of remedies ordinarily available to redress repudiation of covenants" is available to the landlord, including "prospective remedial relief in damages." (At 576 and 573.) In ***Keneric Tractor Sales Ltd. v. Langille*** 1987 CanLII 29 (SCC), [1987] 2 S.C.R. 440, the Supreme Court of Canada applied similar reasoning to chattel leases and clarified that a repudiation of a lease "may be triggered by either the inability or the unwillingness of a party to perform his contractual obligations." (At 454.) The lessor's remedy was again to sue for damages as compensation for its "prospective loss." (See ***32262 B.C. Ltd. v. See-Rite Optical Ltd.*** 1998 ABCA 89 (CanLII), [1998] 9 W.W.R. 442 (Alta. C.A.), at paras. 20-22.) The reasoning in these cases, and various judgments delivered by various courts since then, leave little doubt that Sun Life's claim above and beyond the $12,051.25 represented an unliquidated claim for damages which, leaving aside for the moment s. 65.1 of the ***BIA***, the Trustee would have been required to evaluate in accordance with s. 135(1.1). Obviously, valuation is a matter of discretion in the sense that the Trustee could bring many factors, unspecified in the ***BIA***, to bear on it, and in the sense that there is no one "correct" answer. (See S. Waddams, "Judicial Discretion", (2001) 1 ***Cwth. L.J.*** 59.) Obviously, such a determination would call upon the Trustee's expertise in commercial insolvency matters. For these reasons and the reasons given above at paras. 27-39, the Trustee's decision in this regard would normally be scrutinized on a "reasonableness" standard.

[44] I am doubtful, however, that the Trustee can be said to have exercised its discretion at all in this instance. Mr. Abakhan stated at the meeting that he did not know how to value the claim "other than how it is presented." Moreover, his observation that "landlords are permitted to file their entire claim for the total unexpired term of the lease, regardless of potential mitigation" begged the question of what effect "potential mitigation" should have had on the valuation of Sun Life's claim. Although as counsel for Galaxy argues, the Trustee did not have specific "evidence" as to the probability that Sun Life or Cookstown could successfully mitigate their damages, this was not a hearing in a court of law, where fine distinctions are drawn on the basis of where an onus of proof may lie. Again setting aside for the moment s. 65.1, the Trustee, using its knowledge and expertise, would have been required to consider whether as a factual matter, the valuation of the claims at their full amounts was appropriate — just as it did in connection with the suppliers' claims. (See, e.g., ***Re Eftaxias*** (1962) 3 C.B.R. (N.S.) 152 (Que. Sup. Ct.).)

[45] Following the hearing of this appeal, however, counsel were asked to consider and make submissions to the Court on the effect, if any, of s. 65.1 of the ***BIA*** on the landlords' claims. Section 65.1 provides in material part:

> 65.1 (1) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement with the insolvent person, or claim an accelerated payment under any agreement with the insolvent person, by reason only that
>
> (a) the insolvent person is insolvent; or
>
> (b) a notice of intention or a proposal has been filed in respect of the insolvent person.

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(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

"(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed."

. . .

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

[46] Section 65.1 was enacted at the same time as s. 65.2, the "disclaimer" provision which permits the debtor to disclaim a lease on giving 30 days' written notice to the landlord. Where this occurs, the landlord has no claim for accelerated rent and may file a proof of claim only in respect of its "actual losses resulting from the disclaimer", or the formula amount set out in s. 65.2(4). Section 65.2 was not invoked by Galaxy in this case, since it wished to continue occupying the Sun Life and Cookstown premises, in order to sell its large inventory of clothing for a longer period than s. 65.2 would have permitted. At the same time, counsel for Galaxy informed the Court that his client wanted to avoid any action which could be taken as affirming the leases, since it wished to continue in occupation only for two or three months post-proposal. Galaxy therefore reached the understandings with the landlords described above at paras. 7 and 8.

[47] Our specific question to counsel was whether these arrangements contravened s. 65.1. Galaxy argued that the arrangements constituted a consensual "surrender" of the leases that fell outside both ss. 65.1 and 65.2. It submitted that Galaxy negotiated "terms of surrender" with the landlords and did so in a manner that did not prejudice the estate in bankruptcy in any way, since both agreements were premised upon the landlords' ability to claim actual losses, subject to mitigation. ("Actual losses" are, Galaxy emphasizes, one of the two options that the debtor may choose when a lease is disclaimed under s. 65.2.) Thus if Galaxy had invoked the disclaimer procedure, the landlords would be in exactly the same position, except that Galaxy (and thus the estate) would not have had the benefit of the extra time in the leased premises. In Galaxy's view, nothing in the ***BIA*** precludes it from "surrendering" its leases in this manner, and indeed ss. 30(1)(k) and 65.2(1) of the ***BIA*** both refer to the "surrender" of a lease as something different from a disclaimer.

[48] With respect to the specific terms of s. 65.1, Galaxy also submitted that the claim for damages by a landlord in accordance with ***Highway Properties*** does not constitute a claim for an accelerated payment, but simply the "present recovery of damages for [the landlord's] losing the benefit of the lease over its unexpired term." (At 570.) Thus it says the landlords' respective claims for damages upon Galaxy's "repudiation" of the leases and the landlords' agreements to "terms of surrender" leave the Trustee with claims provable like other claims under s. 121 of the ***BIA***. By reference, s. 121 leads back to the question of whether the claims are contingent or unliquidated for purposes of s. 135.

[49] In response, Umbro submitted that ss. 65.1 and 65.2 of the ***BIA*** constitute a complete statutory code intended to govern all aspects of the contractual relationship between a lessor and an insolvent lessee. In this regard, Umbro cites this court's decision in ***Re B.C. Boat Sales Ltd.; Casson v. Redisco Ltd.*** (1962) 4 C.B.R. (N.S.) 168, as well as ***Re Vanwood Forest Products*** (1983) 45 C.B.R. (N.S.) 254 (B.C.S.C.) and ***KPMG Inc. v. Alberta Dental Association*** reflex, (2003) 44 C.B.R. (4th) 236 (Alta. Q.B.). All of these refer to the ***BIA*** as providing a comprehensive code for certain purposes, but none deals specifically with ss. 65.1 and 65.2 or with lessors/lessee relationships generally. (See, however, ***Re Cosgrove-Moore Bindery Services Ltd.*** reflex, (2000) 48 O.R. (3d) 540 at para. 2 (Ont. Sup. Ct.).)

[50] The real question for us is whether the arrangements agreed upon between Galaxy and its landlords constituted the "termination" of an agreement or resulted in the claiming of an "accelerated payment" under an agreement by reason only of the facts described in subparagraphs (a) and (b) of s. 65.1(1) or in s. 65.1(2). On the first point, Umbro notes that the "surrender" of a lease is not the same as a "termination" and that where a lease is surrendered at law, any claim by the landlord to damages ceases. Thus in Anger and Honsberger's ***Law of Real Property*** (2nd ed., 1985), the authors note that "the surrender of a lease stops rent accruing", since the effect of a surrender is "to extinguish the interest created by the lease by means of the term merging in the reversion." (At §811.1.) Similarly, H.M. Haber in ***Landlord's Rights and Remedies in a Commercial Lease*** (1996) writes that "If the landlord accepts the tenant's surrender of its lease, although not strictly a waiver of the landlord's right to re-enter, such acceptance negates any claim for damages the landlord may make after the surrender." (At 80.) Accordingly, Umbro contends that the leases were not surrendered but were terminated, in contravention of s. 65.1(1).

[51] I agree that the leases were indeed terminated and that subject to Galaxy's argument concerning the purpose of s. 65.1, the terminations appear to have contravened that provision. However, the effect of this fact on the landlords' claims, for both voting and other purposes, would seem to depend upon whether damages under the rubric of ***Highway Properties*** constitute an "accelerated payment", in which event the claim is prohibited. That a broad meaning should be given to the phrase "accelerated payment" is indicated by s. 65.1(5), which states that any provision in an agreement that

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has the effect of providing for or permitting anything that "in substance" is contrary to subsection (1) is of no force or effect. Although a technical argument might be mounted to the effect that damages for the repudiation of a lease should not be equated with the phrase "accelerated payment under any agreement", I am of the view that invoking an acceleration clause in a lease may "in substance" be equated to suing for damages under the ***Highway Properties*** principle. Suing for damages is the "fourth alternative" referred to by Laskin J. in that case — "namely, that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term." (At 570.) At 573, the Court held that the landlord's termination of the leasehold estate in ***Highway Properties*** as a result of the tenant's repudiation of the lease did not mean an end "to all covenants therein to the point of denying prospective remedial relief in damages." In practical terms, such a damage claim seems indistinguishable from a claim for an "accelerated payment" under the lease or any other agreement between debtor and landlord.

[52] The next question is whether the leases were terminated "by reason only" of Galaxy's failure to pay rent in respect of the period prior to the filing of the notice of intention, or by reason of its insolvency. Galaxy did not make any specific argument in respect to this question, although it might have contended that the landlords' respective claims arose out of their agreements with Galaxy rather than Galaxy's insolvency *per se*. Again, however, I would not give effect to such an argument, since on the evidence that is available to us, there is no suggestion that anything other than Galaxy's insolvency led to its proposal to the landlords and ultimately to the landlords' agreements. In the result, I do not think one can conclude that the leases were terminated for any reason other than the insolvency.

[53] I return, then, to Galaxy's broader submission that s. 65.1 was not intended to apply where the insolvent tenant itself seeks the termination of the lease, since the apparent purpose of s. 65.1 is to "permit commercial businesses to avoid being dismantled in a bankruptcy and to survive in the hope of future viability". (***Crystalline Investments Ltd. v. Domgroup Ltd.*** 2002 CanLII 9612 (ON CA), (2002) 58 O.R. (3d) 549 at para. 8 (Ont. C.A.), aff'd 2004 SCC 3 (CanLII), 2004 SCC 3.) In this case, the arrangements reached between the parties were intended to assist, and presumably did assist, sales of inventory — an important aspect of Galaxy's proposal. Nevertheless, the interests of other creditors must be borne in mind. Very arguably, s. 65.1 is intended not only to prevent landlords from presenting burdensome proofs of claim that inhibit insolvents from regaining viability, but also to avoid prejudice to unsecured creditors whose ability to recover is dependent on the continued operation of the debtor. To that extent, s. 65 may be intended to prohibit the sort of arrangements that occurred in this case, notwithstanding Galaxy's willing promotion of those arrangements.

[54] Based on the foregoing, I am of the view that the landlords' claims to the "actual losses" over the unexpired terms of their leases were prohibited by s. 65.1(1) and that the Trustee was bound to reject their claims except insofar as they related to past arrears and rent as it became due monthly post-proposal. It follows that in the absence of a disclaimer by Galaxy, the claims of Sun Life and Cookstown for purposes of the creditors' meeting and other purposes must be so limited.

[55] I would allow the appeal insofar as the landlords' claims are concerned.

The Directors' Claims

[56] The Chambers judge disagreed with the Trustee's ruling which allowed Messrs. Watson, Dewar and Gill to vote as claimants at the creditors' meeting. The information available at that time was that Galaxy had over 300 shareholders, that it had five directors, and that the three individuals in question did not control, either through a related corporation or with a related group, more than 50 percent of the issued shares. The Chambers judge noted, correctly, that "arm's length" has generally been defined to mean that there are no bonds of dependence, control or influence, between the corporation and the person in question. She drew a distinction, however, between "passive" and "active" directors, finding that Messrs. Watson and Dewar were active managers and that "Each could influence the direction of Galaxy." With respect, I doubt that the ***BIA*** intended that a distinction be drawn between individual directors on that basis. All directors are required to devote their best efforts to the company's affairs, and every director can by the very nature of his or her office "influence" those affairs. (Presumably, each director had one vote of five on the board.) This does not mean, without more, that each was able to control the company or that the company was dependent on him.

[57] Thus while the three men were prohibited by s. 113(3)(b) from voting on the appointment of a trustee or inspectors, they were not in my view prohibited from filing proofs of claim and voting the dollar amount thereof by reason of the fact that they were directors, or even "active" directors. In this regard, I believe the Chambers judge erred.

[58] On the other hand, the Chambers judge was correct in concluding that the claims made by Messrs. Watson and Dewar assumed that their employment contracts had been terminated when there was no evidence of that fact, and indeed there was evidence to the contrary, before the Trustee. Moreover, any claims for severance they may have had would, unless their employment agreements provided otherwise, be claims for damages for wrongful dismissal, which would again be unliquidated claims subject to valuation by the Trustee. As it was, since there was no evidence of termination, the Chambers judge was correct in expunging the claims of Messrs. Watson and Dewar.

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Umbro Worldwide and Umbro International

[59] Last, Galaxy contends that the Chambers judge erred in affirming the Trustee's decision to permit Umbro Worldwide to vote on the proposal. On this point, Galaxy relies on the fact that Umbro Worldwide's proof of claim had attached to it various invoices bearing the name "Umbro International" or "Umbro International Ltd." At the creditors' meeting, Mr. Doyle on behalf of Umbro Worldwide had stated that "Umbro International did the invoicing for Umbro Worldwide and both companies were subsidiaries of Umbro Holdings." More importantly, there was evidence before the Chair that the Umbro licence agreement had been assigned by Umbro International to Umbro Worldwide in 1999. This fact had even been asserted at para. 13 of Galaxy's Statement of Claim in the legal action against Umbro, which was circulated and discussed at the meeting. Given this, I cannot accede to Galaxy's submission that Umbro Worldwide failed to comply with the requirements of s. 124 regarding the filing of proofs of claim, or that the Trustee erred in ruling that Umbro Worldwide had a provable claim entitling it to vote at the creditors' meeting. It simply does not lie in Galaxy's mouth to deny the connection, by way of assignment, between Umbro International and Umbro Worldwide, and it cannot be said that the proof of claim filed by the latter did not contain or refer to adequate statements of account showing particulars of its claim for purposes of s. 124 of the ***BIA.***

[60] It is also contended on appeal that the Chambers judge erred in declining to find on the evidence before her that Umbro Worldwide was not at arm's length to Galaxy in the year prior to the insolvency. Galaxy submits that the "arm's length" determination to be made pursuant to s. 109(6) of the ***BIA*** is less onerous than that required to be made under s. 3(1) in that it is "not transaction-specific and therefore must relate to the way the debtor and creditor conducted their business affairs in the subject period." In this regard, counsel notes the observations of the Court in ***Irving Oil Ltd. v. Noseworthy, Cook, Atlantic Transportation Company Limited and Heap Noseworthy Limited*** (1982) 42 C.B.R. (N.S.) 302 (Nfld. S.C.) that:

> Whether or not the dealings were at arm's length is a question of fact which cannot be decided by a finding that the companies concerned had a common director. There must be evidence of the existence of an unbusiness-like advantage.
>
> The agreement was in the ordinary course of business, and neither Peter Cook nor Roger Crosbie had control of the companies concerned, and there is no evidence to indicate that the dealings were not at arm's length. It can be said that, between all the parties concerned, each of them was selfishly seeking the best economic advantage and none had any reasons to expect from the others, nor would any party have been prepared to accord to another, any favours or concessions. [at 306]

Galaxy relies on the (fresh) affidavit evidence filed by Mr. Watson to which was appended various e-mails between him and the Umbro defendants concerning various dealings under the licence agreement. Even if this evidence were properly accepted, however, it does not show a relationship of dependence or control (which might lead to the existence of an "unbusiness-like advantage") between them. The parties may have been attempting to find common ground and to reach an understanding that would be of benefit to both sides, but the material falls short of proving that either had such influence that the other was sacrificing its own self-interest. I would therefore dismiss this aspect of the appeal.

Disposition

[61] I would allow the appeal to the extent of allowing Mr. Gill's claim to be voted at the meeting, and setting aside the Chambers judge's order directing that new evidence be adduced concerning the valuation of the landlords' claims. I would remit those claims to the Trustee for determination of the amounts of rent that have become due since the purported terminations, in respect of which s. 65.1 does not bar the claims, but damages under ***Highway Properties*** for loss of future rent are to be disallowed. Following the re-taking of the creditors' vote on the proposal, I would remit the motion for approval of the proposal back to the Supreme Court.

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[62] We are indebted to counsel for their helpful submissions, oral and written.

"The Honourable Madam Justice Newbury"
I Agree:
"The Honourable Madam Justice Rowles"
I Agree:
"The Honourable Mr. Justice Hall"

Chair may admit or reject proof - Sec. 108
108. (1) The chair of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

Accept as proof - Sec. 108(2)
(2) Notwithstanding anything in this Act, the chair may, for the purpose of voting, accept any letter or printed matter transmitted by any form or mode of telecommunication as proof of the claim of a creditor.

In case of doubt - Sec. 108(3)
(3) Where the chair is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.
R.S., 1985, c. B-3, s. 108;
1992, c. 27, s. 45;
2005, c. 47, s. 123(E).

Right of creditor to vote - Sec. 109
109. (1) A person is not entitled to vote as a creditor at any meeting of creditors unless the person has duly proved a claim provable in bankruptcy and the proof of claim has been duly filed with the trustee before the time appointed for the meeting.

Voting by proxy - Sec. 109(2)
(2) A creditor may vote either in person or by proxy.

Form of proxy - Sec. 109(3)
(3) A proxy is not invalid merely because it is in the form of a letter or printed matter transmitted by any form or mode of telecommunication.

Debtor may not be proxyholder - Sec. 109(4)
(4) A debtor may not be appointed a proxyholder to vote at any meeting of the debtor's creditors.

Corporation - Sec. 109(5)
(5) A corporation may vote by an authorized proxyholder at meetings of creditors.

Vote of creditors not dealing at arm's length - Sec. 109(6)
(6) If the chair is of the opinion that the outcome of a vote was determined by the vote of a creditor who did not deal with the debtor at arm's length at any time during the period that begins on the day

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that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, the chair shall redetermine the outcome by excluding the creditor's vote. The redetermined outcome is the outcome of the vote unless a court, on application within 10 days after the day on which the chair redetermined the outcome of the vote, considers it appropriate to include the creditor's vote and determines another outcome.

(7) [Repealed, 2005, c. 47, s. 80]
R.S., 1985, c. B-3, s. 109;
1992, c. 27, s. 46;
1997, c. 12, s. 86;
1999, c. 31, s. 24(F);
2004, c. 25, s. 63;
2005, c. 47, s. 80;
2007, c. 36, s. 45.

Claims acquired after date of bankruptcy - Sec. 110
110. (1) No person is entitled to vote on a claim acquired after the date of bankruptcy in respect of a debtor unless the entire claim is acquired.

Exception - Sec. 110(2)
(2) Subsection (1) does not apply to persons acquiring notes, bills or other securities on which they are liable.
R.S., 1985, c. B-3, s. 110;
2005, c. 47, s. 81.

Creditor secured by bill or note - Sec. 111
111. A creditor shall not vote in respect of any claim on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and who is not a bankrupt, as a security in his hands and to estimate the value thereof and for the purposes of voting, but not for the purposes of dividend, to deduct it from his claim.
R.S., c. B-3, s. 89.

Voting by secured creditor - Sec. 112
112. For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and he is entitled to vote only in respect of the balance, if any, due to him, after deducting the value of his security.
R.S., c. B-3, s. 90.

Trustee may vote - Sec. 113
113. (1) If the trustee is a proxyholder for a creditor, the trustee may vote as a creditor at any meeting of creditors.

Trustee's vote not to count in respect of certain resolutions - Sec. 113(2)

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(2) The vote of the trustee — or of the partner, clerk or legal counsel of the trustee, or of the clerk of the legal counsel of the trustee — as proxyholder for a creditor, shall not be counted in respect of any resolution affecting the remuneration or conduct of the trustee.

Persons not entitled to vote - Sec. 113(3)
(3) The following persons are not entitled to vote on the appointment of a trustee — and except with the permission of the court and on any condition that the court may impose, the following persons are not entitled to vote on the appointment of inspectors:

(a) the father, mother, child, sister, brother, uncle or aunt, by blood, adoption, marriage or common-law partnership, or the spouse or common-law partner, of the bankrupt;
(b) where the bankrupt is a corporation, any officer, director or employee thereof; and
(c) where the bankrupt is a corporation, any wholly owned subsidiary corporation or any officer, director or employee thereof.

R.S., 1985, c. B-3, s. 113;
R.S., 1985, c. 31 (1st Supp.), s. 73;
2000, c. 12, s. 13;
2004, c. 25, s. 64;
2005, c. 47, s. 82.

Evidence of proceedings at meetings of creditors - Sec. 114
114. (1) A minute of proceedings at a meeting of creditors under this Act signed at the same or the next ensuing meeting by a person describing himself as or appearing to be chair of the meeting at which the minute is signed shall be admitted in evidence without further proof.

Evidence of regularity - Sec. 114(2)
(2) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been signed by the chair shall be deemed to have been duly convened and held and all resolutions passed or proceedings thereat to have been duly convened and held and to have been duly passed or had.
R.S., 1985, c. B-3, s. 114;
2005, c. 47, s. 123(E).

Votes - Sec. 115
115. Subject to this Act, all questions at meetings of creditors shall be decided by resolution carried by the majority of votes, and for that purpose the votes of a creditor shall be calculated by counting one vote for each dollar of every claim of the creditor that is not disallowed.
R.S., 1985, c. B-3, s. 115;
1992, c. 27, s. 47.

Court order — interlocutory or permanent - Sec. 115.1
115.1 In an application to revoke or vary a decision that affects or could affect the outcome of a vote, the court may make any order that it considers appropriate, including one that suspends the effect of the vote until the application is determined and one that redetermines the outcome of the vote.
2007, c. 36, s. 46.

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INSPECTORS

Resolution respecting inspectors - Sec. 116
116. (1) At the first or a subsequent meeting of creditors, the creditors shall, by resolution, appoint up to five inspectors of the estate of the bankrupt or agree not to appoint any inspectors.

Persons not eligible - Sec. 116(2)
(2) No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceedings by or against the estate of the bankrupt.

Powers - Sec. 116(3)
(3) The powers of the inspectors may be exercised by a majority of them.

Filling vacancy - Sec. 116(4)
(4) The creditors or inspectors at any meeting may fill any vacancy on the board of inspectors.

Revocation and replacement - Sec. 116(5)
(5) The creditors may at any meeting and the court may on the application of the trustee or any creditor revoke the appointment of any inspector and appoint another in his stead.
R.S., 1985, c. B-3, s. 116;
2005, c. 47, s. 83.

Meetings - Sec. 117
117. (1) The trustee may call a meeting of inspectors when he deems it advisable and he shall do so when requested in writing by a majority of the inspectors.

Participation by telephone, etc. - Sec. 117(1.1)
(1.1) An inspector may, if all the other inspectors consent, participate in a meeting of inspectors by means of such telephone or other communication facilities as permit all persons participating in the meeting to communicate with each other, and an inspector participating in such a meeting by such means is deemed for the purpose of this Act to be present at that meeting.

Trustee votes in case of tie - Sec. 117(2)
(2) In the event of an equal division of opinion at a meeting of inspectors, the opinion of any absent inspector shall be sought in order to resolve the difference, and in the case of a difference that cannot be so resolved, it shall be resolved by the trustee, unless it concerns his personal conduct or interest in which case it shall be resolved by the creditors or the court.
R.S., 1985, c. B-3, s. 117;
1992, c. 27, s. 48.

Obligation of trustee when inspectors fail to exercise their powers - Sec. 118
118. If the inspectors fail to exercise the powers conferred on them, the trustee shall call a meeting of the creditors for the purpose of substituting other inspectors and for the purpose of taking any action or giving any directions that may be necessary.
R.S., 1985, c. B-3, s. 118;
2005, c. 47, s. 84.

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Creditors may override directions of inspectors - Sec. 119
119. (1) Subject to this Act, the trustee shall in the administration of the property of the bankrupt and in the distribution thereof among his creditors have regard to any directions that may be given by resolution of the creditors at any general meeting or by the inspectors, and any directions so given by the creditors shall in case of conflict be deemed to override any directions given by the inspectors.

Decisions of inspectors subject to review by court - Sec. 119(2)
(2) The decisions and actions of the inspectors are subject to review by the court at the instance of the trustee or any interested person and the court may revoke or vary any act or decision of the inspectors and it may give such directions, permission or authority as it deems proper in substitution thereof or may refer any matter back to the inspectors for reconsideration.
R.S., c. B-3, s. 94.

Inspector may not acquire property - Sec. 120
120. (1) No inspector is, directly or indirectly, capable of purchasing or acquiring for himself or for another any of the property of the estate for which he is an inspector, except with the prior approval of the court.

Formal defects - Sec. 120(2)
(2) No defect or irregularity in the appointment of an inspector vitiates any act done by him in good faith.

Duty of inspectors - Sec. 120(3)
(3) In addition to the other duties that are attributed to them under this Act, the inspectors shall from time to time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

SB Directive: 21R, Estate Security
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
Bureau du surintendant des faillites Canada

An Agency of Industry Canada
Un organisme d'Industrie Canada

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Date: JUL 21 2011

To: OSB Staff, Trustees and Registrars

Subject: Directive No. 21R, *Estate Security*

The Office of the Superintendent of Bankruptcy has amended Directive No. 21, *Estate Security*, to modify the wording in the French language version of subparagraph 5(c) of the Directive to more accurately reflect the English wording of this subparagraph.

Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

Date : JUL 21 2011

À : Employés du BSF, syndics et registraires

Objet : Instruction n° 21R, *Garantie de l'actif*

Le Bureau du surintendant des faillites a modifié le libellé du paragraphe 5c) de la version française de l'instruction n° 21, *Garantie de l'actif*, pour qu'il corresponde plus précisément au libellé de la version anglaise de ce paragraphe.

Demandes de renseignements

Si vous désirez de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

P.j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 21R

ESTATE SECURITY

Issued: JUL 21 2011

(Supersedes Directive No. 21 issued on August 14, 2009, on the same topic.)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy.

Authority and Purpose

2. This Directive is issued pursuant to paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this Directive is to provide guidance to official receivers, trustees and administrators of consumer proposals as to when the official receiver will set a security and how to determine the amount.

GARANTIE DE L'ACTIF

Date d'émission: JUL 21 2011

(La présente instruction remplace et annule l'instruction n° 21 sur le même sujet émise le 14 août 2009.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu des alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction a pour but de guider les séquestres officiels, les syndics et les administrateurs de propositions de consommateur quant aux circonstances dans lesquelles le séquestre officiel établira une garantie et au montant de cette garantie.

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Policy

4. If the appropriate amount can be ascertained, the security shall be set at the time the assignment is filed with the official receiver.

5. The following shall be taken into consideration in deciding the appropriateness of any security:

(a) in fixing the amount of the security, if any, the official receiver shall consider the risks to creditors and costs to the estate and take into consideration other forms of creditor protection, such as insurance coverage;

(b) the security shall be set in relation to the anticipated realization that will be available for distribution to preferred and unsecured creditors after payment of the trustee's costs of administration;

(c) where a "range of security amounts" cost a fixed premium, the security shall be set at the highest amount within the range to avoid the need for later increases within the range;

(d) subject to the provisions of paragraph (c), the estate security shall not be fixed at an amount in excess of the largest

Politique

4. Lorsque le montant approprié peut être déterminé, la garantie doit être établie au moment du dépôt de la cession auprès du séquestre officiel.

5 Il faudra tenir compte des principes suivants pour fixer une garantie :

a) le séquestre officiel devra prendre en considération les autres formes de protection des créanciers, telles les assurances en vigueur, ainsi que les risques véritables pour les créanciers et les coûts de cette protection additionnelle;

b) la garantie doit être établie en fonction de la réalisation prévue qui sera disponible pour distribution aux créanciers privilégiés et non garantis après déduction des frais d'administration du syndic;

c) si une prime fixe couvre toute une « gamme de montants de garanties », la garantie doit être établie selon le montant le plus élevé de la gamme afin de pallier à un besoin ultérieur d'augmentation à l'intérieur de la gamme;

d) sous réserve de l'alinéa *c*), la garantie ne devra pas excéder le montant le plus élevé prévu

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amount to be on hand at any one time;

(e) if the estimated amount to be available to preferred and unsecured creditors, as per paragraph (b), is less than $3,000, no security will normally be fixed; and

(f) if a security is to be considered in excess of $25,000, the official receiver may review other avenues, including additional controls such as multiple counter-signatures of principals of the corporate trustee, with a view to fixing a lower security and reducing costs to the estate.

en tout temps pendant l'administration;

e) si la répartition prévue aux créanciers privilégiés et non garantis selon l'alinéa b) est inférieure à 3 000 $, aucune garantie ne devrait être établie; et

f) si le montant de la garantie doit dépasser 25 000 $, le séquestre officiel peut explorer d'autres solutions, y compris le recours à des contrôles supplémentaires tel l'endossement multiple des officiers de la corporation, et ce, afin d'abaisser la garantie et de réduire les frais pour l'actif

Changing the Amount of the Security

6. The trustee and the inspectors shall periodically review the adequacy of the security in accordance with subsection 120(3) of the Act.

7. When circumstances warrant increasing or decreasing the amount of a security, the trustee shall notify the official receiver detailing the change in the anticipated realization and the suggested adjustment to the amount of the security.

8. When deemed appropriate, the official receiver may revise the adequacy of the security.

Modification du montant de la garantie

6 Le syndic et les inspecteurs doivent réviser périodiquement la suffisance de la garantie en vertu du paragraphe 120(3) de la Loi.

7. Lorsque les circonstances justifient une augmentation ou une diminution de la garantie, le syndic doit aviser le séquestre officiel du changement anticipé en égard à la réalisation attendue et suggérer un montant révisé de la garantie.

8 Lorsqu'il le juge approprié, le séquestre officiel peut réviser la suffisance de la garantie.

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Coming into Force

9. This Directive comes into force on the date that it is issued.

Entrée en vigueur

9. La présente instruction entre en vigueur à la date d'émission.

Enquiries

10. For any questions pertaining to this Directive, please contact your local OSB office

Demandes de renseignements

10. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

Approval of trustee's final statement by inspectors - Sec. 120(4)

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(4) Before approving the final statement of receipts and disbursements of the trustee, the inspectors shall satisfy themselves that all the property has been accounted for and that the administration of the estate has been completed as far as can reasonably be done and shall determine whether or not the disbursements and expenses incurred are proper and have been duly authorized, and the fees and remuneration just and reasonable in the circumstances.

Inspector's expenses and fees - Sec. 120(5)
(5) Each inspector

> **(a) may be repaid actual and necessary travel expenses incurred in relation to the performance of the inspector's duties; and**
> **(b) may be paid such fees per meeting as are prescribed.**

Special services - Sec. 120(6)
(6) An inspector duly authorized by the creditors or by the other inspectors to perform special services for the estate may be allowed a special fee for those services, subject to approval of the court, which may vary that fee as it deems proper having regard to the nature of the services rendered in relation to the obligations of the inspector to the estate to act in good faith for the general interests of the administration of the estate.
R.S., 1985, c. B-3, s. 120;
1992, c. 27, s. 49;
2001, c. 4, s. 30;
2004, c. 25, s. 65(F);
2005, c. 47, s. 85.

CLAIMS PROVABLE

Claims provable - Sec. 121
121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims - Sec. 121(2)
(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time - Sec. 121(3)
(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

Family support claims - Sec. 121(4)
(4) A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart

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from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.
R.S., 1985, c. B-3, s. 121;
1992, c. 27, s. 50;
1997, c. 12, s. 87;
2000, c. 12, s. 14.

Claims provable in bankruptcy following proposal - Sec. 122
122. (1) The claims of creditors under a proposal are, in the event of the debtor subsequently becoming bankrupt, provable in the bankruptcy for the full amount of the claims less any dividends paid thereon pursuant to the proposal.

Interest - Sec. 122(2)
(2) If interest on any debt or sum certain is provable under this Act but the rate of interest has not been agreed on, the creditor may prove interest at a rate not exceeding five per cent per annum to the date of the bankruptcy from the time the debt or sum was payable, if evidenced by a written document, or, if not so evidenced, from the time notice has been given the debtor of the interest claimed.
R.S., 1985, c. B-3, s. 122;
2004, c. 25, s. 66(E).

Proof in respect of distinct contracts - Sec. 123
123. Where a bankrupt was, at the date of the bankruptcy, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof, in respect of the contracts, against the properties respectively liable on the contracts.
R.S., c. B-3, s. 96.

PROOF OF CLAIMS

Creditors shall prove claims - Sec. 124
124. (1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

Proof by delivery - Sec. 124(2)
(2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

Who may make proof of claims - Sec. 124(3)
(3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

Shall refer to account - Sec. 124(4)

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(4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

(5) [Repealed, 2005, c. 47, s. 86]
R.S., 1985, c. B-3, s. 124;
2005, c. 47, s. 86.

Penalty for filing false claim - Sec. 125
125. Where a creditor or other person in any proceedings under this Act files with the trustee a proof of claim containing any wilfully false statement or wilful misrepresentation, the court may, in addition to any other penalty provided in this Act, disallow the claim in whole or in part as the court in its discretion may see fit.
R.S., c. B-3, s. 97.

Who may examine proofs - Sec. 126
126. (1) Every creditor who has filed a proof of claim is entitled to see and examine the proofs of other creditors.

Worker's wage claims - Sec. 126(2)
(2) Proofs of claims for wages of workers and others employed by the bankrupt may be made in one proof by the bankrupt, by someone on the bankrupt's behalf, by a representative of a federal or provincial ministry responsible for labour matters, by a representative of a union representing workers and others employed by the bankrupt or by a court-appointed representative, and that proof is to be made by attaching to it a schedule setting out the names and addresses of the workers and others and the amounts severally due to them, but that proof does not disentitle any worker or other wage earner to file a separate proof on his or her own behalf.
R.S., 1985, c. B-3, s. 126;
1997, c. 12, s. 88;
2005, c. 47, s. 87.

PROOF BY SECURED CREDITORS

Proof by secured creditor - Sec. 127
127. (1) Where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount realized.

May prove whole claim on surrender - Sec. 127(2)
(2) Where a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove his whole claim.
R.S., 1985, c. B-3, s. 127;
2004, c. 25, s. 67(F).

Proof may be requested - Sec. 128
128. (1) Where the trustee has knowledge of property that may be subject to a security, the trustee may, by serving notice in the prescribed form and manner, require any person to file, in the

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prescribed form and manner, a proof of the security that gives full particulars of the security, including the date on which the security was given and the value at which that person assesses it.

Where reply not received - Sec. 128(1.1)
(1.1) Where the trustee serves a notice pursuant to subsection (1), and the person on whom the notice is served does not file a proof of security within thirty days after the day of service of the notice, the trustee may thereupon, with leave of the court, sell or dispose of any property that was subject to the security, free of that security.

Dividend on balance - Sec. 128(2)
(2) A creditor is entitled to receive a dividend in respect only of the balance due to him after deducting the assessed value of his security.

Trustee may redeem security - Sec. 128(3)
(3) The trustee may redeem a security on payment to the secured creditor of the debt or the value of the security as assessed, in the proof of security, by the secured creditor.
R.S., 1985, c. B-3, s. 128;
1992, c. 27, s. 51;
1999, c. 31, s. 25;
2004, c. 25, s. 68(F).

May order security to be sold - Sec. 129
129. (1) Where the trustee is dissatisfied with the value at which a security is assessed, the trustee may require that the property the security comprises be offered for sale at such time and on such terms and conditions as may be agreed on between the creditor and the trustee or, in default of such an agreement, as the court may direct.

Sale by public auction - Sec. 129(2)
(2) Where a sale under subsection (1) is by public auction the creditor or the trustee on behalf of the estate may bid or purchase.

(3) [Repealed, 1992, c. 27, s. 52]

Costs of sale - Sec. 129(4)
(4) The costs and expenses of a sale made under this section are in the discretion of the court.
R.S., 1985, c. B-3, s. 129;
1992, c. 27, s. 52;
2004, c. 25, s. 69(F).

Creditor may require trustee to elect to exercise power - Sec. 130
130. Notwithstanding subsection 128(3) and section 129, the creditor may, by notice in writing, require the trustee to elect whether he will exercise the power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the court may allow, signify in writing to the creditor his election to exercise the power, he is not entitled to exercise it, and the equity of redemption or any other interest in the

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property comprised in the security that is vested in the trustee shall vest in the creditor, and the amount of his claim shall be reduced by the amount at which the security has been valued.
R.S., c. B-3, s. 101.

Amended valuation by creditor - Sec. 131
131. Where a creditor after having valued his security subsequently realizes it, or it is realized under section 129, the net amount realized shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor.
R.S., c. B-3, s. 102.

Secured creditor may amend - Sec. 132
132. (1) Where the trustee has not elected to acquire the security as provided in this Act, a creditor may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the court that the valuation and proof were made in good faith on a mistaken estimate or that the security has diminished or increased in value since its previous valuation.

Amendment at cost of creditor - Sec. 132(2)
(2) An amendment pursuant to subsection (1) shall be made at the cost of the creditor and on such terms as the court orders, unless the trustee allows the amendment without application to the court.

Rights and liabilities of creditor where valuation amended - Sec. 132(3)
(3) Where a valuation has been amended pursuant to this section, the creditor

> **(a) shall forthwith repay any surplus dividend that he may have received in excess of that to which he would have been entitled on the amended valuation; or**
> **(b) is entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend that he may have failed to receive by reason of the amount of the original valuation before that money is made applicable to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before the amendment is filed with the trustee.**

R.S., c. B-3, s. 103.

Exclusion for non-compliance - Sec. 133
133. Where a secured creditor does not comply with sections 127 to 132, he shall be excluded from any dividend.
R.S., c. B-3, s. 104.

No creditor to receive more than 100 cents in dollar - Sec. 134
134. Subject to section 130, a creditor shall in no case receive more than one hundred cents on the dollar and interest as provided by this Act.
R.S., c. B-3, s. 105.

ADMISSION AND DISALLOWANCE OF PROOFS OF CLAIM AND PROOFS OF SECURITY

Trustee shall examine proof - Sec. 135

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135. (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims - Sec. 135(1.1)
(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

J. J. Lacey In Re Bankruptcy & Insolvency Act, 2008 NLTD 9 (CanLII) - Provable Claims in Face of Fraudulent Activity to Undermine Creditor, An Action

Date:	2008-01-24
Docket:	51052033; 1994 01 6856
Parallel citations:	274 Nfld & PEIR 314; 41 CBR (5th) 137
URL:	http://canlii.ca/t/1vhqw
Citation:	J. J. Lacey In Re Bankruptcy & Insolvency Act, 2008 NLTD 9 (CanLII), <http://canlii.ca/t/1vhqw> retrieved on 2013-08-06
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Reflex Record	Related decisions, legislation cited and decisions cited

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

CITATION: *J. J. Lacey In Re Bankruptcy & Insolvency Act*, 2008 NLTD 9

CANADA
DISTRICT OF NEWFOUNDLAND AND LABRADOR
DATE: 20080124
ESTATE NO. 51052033
COURT NO. 1994 01 6856

APPEAL FROM ALLOWANCE OF CLAIM BY TRUSTEE
In the Matter of the Bankruptcy of J. J. Lacey Insurance Limited
(s. 135)
IN THE MATTER of an Appeal by M. J. Oppenheim, Attorney in Fact in Canada for Lloyd's Non-Marine Underwriters, from the allowance of a claim of Hiland Insurance Limited by the Trustee of the Estate in Bankruptcy of J. J. Lacey Insurance Limited

BETWEEN: **M. J. OPPENHEIMER, Attorney in Fact in Canada for LLOYD'S NON-MARINE UNDERWRITERS**

PLAINTIFF

AND: **J. J. LACEY INSURANCE LIMITED**

FIRST DEFENDANT

AND: **HILAND INSURANCE COMPANY LIMITED**

SECOND DEFENDANT

Before: The Honourable Mr. Justice Robert M. Hall

Place of hearing: St. John's, Newfoundland and Labrador

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Date of hearing: December 18, 2007
Appearances: Philip J. Buckingham for the Plaintiff/Applicant.
Neil L. Jacobs for the First Defendant/First Respondent.
D. Mark Pike for the Second Defendant/Second Respondent.

Authorities Cited:

CASES CONSIDERED: Re Eskasoni Fisheries Ltd. (2000), 16 C.D.R. (4d) 173.); **Re Galaxy Sports Inc.** (2004), 2004 Carswell BC 1112; **Re Canadian Triton International Ltd.** reflex, (1997), 49 C.B.R. (3d) 192 (Ont.Gen.Div.),

STATUTES CONSIDERED: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

REASONS FOR JUDGMENT ON APPLICATION TO ADMIT FRESH EVIDENCE ON BANKRUPCY APPEAL

HALL, J.:

BACKGROUND

[1] This application is brought by M. J. Oppenheim, Attorney in Fact in Canada for Lloyd's Non-Marine Underwriters ("Lloyd's"). The First Defendant, J. J. Lacey Insurance Limited ("Lacey") is subject to a Receiving Order made under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, on December 30, 1994. The Second Defendant, Hiland Insurance Company Limited ("Hiland"), was ordered to be wound up in accordance with the provisions of the *Winding-Up Act, R.S.C.* 1985, c. W-11, as amended.

[2] Hiland filed a Proof of Claim with the Trustee in Bankruptcy of Lacey which claim was allowed by the Trustee. Lloyd's was a creditor of Lacey and in July of 2000 it filed an appeal from the allowance by the Trustee of the claim of Hiland, seeking an order of the Court that the claim of Hiland against the bankrupt estate of Lacey is invalid and should be disallowed.

[3] The Plaintiff claims that Lacey and Hiland are related corporations and that both Lacey and Hiland were *de facto* controlled by one Clayton Gillingham. The Plaintiff alleges that between January 1 and December 31, 1992 Lacey, as Cover-holder, had two Binding Authority Agreements under which it was authorized to sell Automobile and Residential insurance for Lloyds. The persons authorized under the 1992 Binding Authority Agreements were Clayton Gillingham and Carol Scott. The Plaintiff alleges that between October 1992 and December 31, 1992 (during the same period that Clayton Gillingham and Lacey applied for a provincial insurance license for Hiland), Lacey collected premiums on Lloyd's policies without reporting the associated policies to Lloyd's or forwarding the collected premiums to Lloyd's. Additionally, the Plaintiff alleges that between June 1, 1991 and December 31, 1992 certain insurance policies were entered into by Lacey and the name of certain Underwriters at Lloyds but certain of those policies were either not reported to Lloyds or Lacey failed to remit the premiums to Lloyds in accordance with the terms of the Binding Authority Agreement.

[4] The Plaintiff filed a Notice of Appeal of the Trustee's allowance of a claim of Hiland against the bankrupt estate of Lacey's under s. 135 of the *Bankruptcy and Insolvency Act*. By an earlier Order of this Court the appeal was converted to a trial and the Plaintiff had the leave of the Court to issue a Statement of Claim which he has done.

[5] The Amended Statement of Claim filed in this matter alleges that during the periods earlier referred to both Lacey and Hiland by their Directors, officers, servants and agents unduly, unlawfully, maliciously and lacking *bona fides* conspired and agreed together, one with the other, or with persons unknown to, *inter alia*:

(a) submit false, inaccurate and misleading information to the Plaintiff for the purposes of obtaining without authorization and to convert to their own use or to the use of the directors, officers or shareholders, the benefit of premiums otherwise due to the Plaintiff;

(b) submit false, inaccurate and misleading information to the Plaintiff, the purpose of which was to mislead, misstate, and otherwise mislead the Plaintiff as to the true nature of the potential exposure to the Plaintiff from the issuance of insurance policies;

(c) mislead the Plaintiff as to the premiums written and the potential exposure incurred as a result of the generation of policies of insurance pursuant to the Binding Authority Agreements; and

(d) conceal from the Plaintiff a true reflection of the insurance risk that the Plaintiff, by operation of law, was otherwise obliged to provide cover notwithstanding the failure of the Defendants to remit the premiums.

[6] The Plaintiff generally claimed that the motivation of the Defendants was to obtain capital generated by the premiums for the operation of one or other or both of the Defendants, or for the use of the directors, officers, or directing minds thereof to their own benefit. The Plaintiff alleges that the Defendants, the directors, officers, and shareholders thereof, or combinations thereof, acted as one and failed to remit the appropriate information including the type, nature and duration of insurance policies pursuant to the Binding Authority Agreement and that they retained to their own benefit or for the benefit of their directors, officers or others the premiums thereof knowing that such retention was misleading and unlawful.

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[7] The Plaintiff claims that at all material times Hiland and Lacey and the affiliated companies as well as the shareholders, directors and officers shared a common purpose by designing and putting in place a plan of action so as to deny the Plaintiff of his lawful entitlement to payments collected on insurance policies generated pursuant to the Binding Authority Agreements and that under the law of Newfoundland the Defendants are liable for both their own acts and the acts and/or omissions of their subsidiaries, directors, officers or shareholders inasmuch as the Defendants operated their corporate entities as one entity with the sole and singular purpose of defrauding the Plaintiff of its lawful entitlement to the premiums collected. In particular the Plaintiff claims that Clayton Gillingham was the sole owner of Hiland and the *de facto* sole owner of Lacey and at all times controlled the day-to-day operations of both Hiland and Lacey, directing the staff of one or both of these corporate entities and their affiliates to set in place a scheme designed by Clayton Gillingham for the fraudulent activities referred to.

[8] As a result thereof the Plailntiff says that these fraudulent activities are such so as to deny the Defendants any reliance on the basic principles of corporate law to suggest that Hiland and Lacey should now be treated as separate operating entities as to do so would unjustly deprive the Plaintiff of its rights by means of the Defendants' very own misconduct and in particular would result in the allowance of a claim against the Estate of Lacey by Hiland to the detriment not only of the Plaintiff but as against all legitimate creditors of the bankrupt Estate of Lacey. As a result the Plaintiff in its Statement of Claim requests that the Court pierce the corporate veils of Hiland and Lacey as a consequence of the fraud alleged and as a result of the activities of the directing mind of Clayton Gillingham and that the claim of Hiland in the bankrupt Estate of Lacey be deemed invalid and disallowed. The amount of the claim of Hiland allowed in the bankruptcy of Lacey by the Trustee was approximately 2.9 million dollars.

FRESH EVIDENCE SOUGHT TO BE CALLED BY THE PLAINTIFF

[9] The Plaintiff indicated that, prior to the Order of the Court converting its Notice of Appeal to a Statement of Claim, it intended to file with the Court various pieces of affidavit and other evidence so as to properly ground its appeal. This evidence included:

(1) The Affidavit of Rita Christie, formerly of Lloyd's Non-Marine Underwriters;
(2) Discovery evidence of Clayton Gillingham and Carol Scott;
(3) Affidavit of Douglas Connolly, formerly of the Office of the Superintendent of Insurance;
(4) Affidavit of Karen Legge, formerly of the Office of the Superintend of Insurance;
(5) Corporate particulars of the Defendants and affiliated companies;
(6) Affidavit of David A. Howe, Chartered Accountant with NKHK Chartered Accountants;
(7) Affidavit of Alexia Mifflin, formerly of J. J. Lacey Insurance Limited and Hiland Insurance Company Limited.

[10] The Plaintiff/Applicant now seeks leave of the Court to call, *inter alia*, the above evidence either by viva voce or through the appropriate evidentiary process and such other evidence as it deems necessary to prove the allegations set forth in its Statement of Claim.

[11] The Plaintiff/Applicant alleges that the Trustee did not duly investigate the claim of Hiland and the Lacey bankruptcy but simply relied upon the evidence provided. In this regard the Trustee was in the difficult position as the Plaintiff/Applicant contends that the Trustee did not have evidence of the fraud and/or conspiracy of Hiland and Gillingham. Counsel for Lacey objects that the Statement of Claim raises a plethora of new grounds upon which the appeal is based, including the ground of conspiracy. Counsel for Lacey argues that the question is a simple question of disallowance of the Hiland claim. Counsel for Hiland objects that the Notice of Appeal was basically founded upon fraud and that not the Statement of Claim expands the claims to include conspiracy. Additionally, where counsel for the Plaintiff lays out the corporate interrelationships of Lacey and Hiland with their subsidiaries and shareholders, counsel for Hiland fears that the action is being turned into an investigation of the whole "family" of related companies. He contends that allowing such a procedure after the passage of 13 years takes away the certainty of the bankruptcy administration process and opens up the whole decision-making process of the Trustee to review by the Court, thus rendering the claims determination process of a trustee essentially ineffective.

[12] Counsel for the Plaintiff states that the sole purpose in outlining the family history of the interrelated companies is to show that Clayton Gillingham was the controlling mind of both Lacey and Highland. He contends that proving this will require very little evidence and very little time. Counsel for the Plaintiff contends that the Statement of Claim has put to rest the argument that the appeal was too general. Whether the allegation is fraud or conspiracy these issues are, in the mind of counsel for the Plaintiff/Applicant, two sides of the same coin. The relief sought is the same. Counsel for the Plaintiff/Applicant assured the Court that he was not getting into a forensic audit of all of the subsidiaries but intended to simply ask representatives of the Superintendent of Insurance to advise the Court where the various monies received by Lacey and Hiland went. He therefore asks leave to have the fresh evidence allowed.

APPEAL FROM DECISION OF TRUSTEE – TRUE APPEAL OR TRIAL *DE NOVO*?

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[13] Section 135 of the *Bankruptcy and Insolvency Act* deals with the admission or disallowance of proofs of claim and proofs of security by the Trustee of the Bankrupt estate. Section 135(1), (1.1.) and (2) state:

> "Trustee shall examine proof
> 135.(1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
> Determination of provable claims
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.
> Disallowance by trustee
> (2) The trustee may disallow, in whole or in part,
> (*a*) any claim;
> (*b*) any right to a priority under the applicable order of priority set out in this Act; or
> (*c*) any security.

[14] The *Bankruptcy and Insolvency Act*, s. 135(4) deals with appeals from such determinations or disallowances. It provides:

> "Determination or disallowance final and conclusive
> 135(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules."

[15] Generally it has been accepted that an appeal from the trustee's disallowance or determination of a claim is a hearing *de novo* and that the Court hearing the appeal is entitled to hear and consider all relevant information about the creditors' claims. (See **Re Eskasoni Fisheries Ltd**. (2000), 16 C.D.R. (4d) 173.) However recently, in **Re Galaxy Sports Inc.** (2004), 2004 Carswell BC 1112, the British Columbia Court of Appeal declined to follow **Eskasoni** and held that the hearing of an appeal of a trustee's valuation of a claim was not intended, under s. 135(4) to be a trial *de novo* but rather was a true appeal. That Court noted that if fresh evidence was adduced in the Appeal Court as a matter of course, there would be a loss of efficiency in the bankruptcy process, creditors who neglected to file proofs of claim in compliance with s. 124 would suffer no practical consequences, and the business conducted at creditors meetings would be co-opted by the Courts with attendant expense, delay and formality. The Court of Appeal held that the standard of review for trustees' legal determinations, such as the decision to allow or disallow a proof of claim, was one of correctness. The standard of reasonableness applies to the trustees' decisions of a factual nature, such as the valuation of a contingent or unliquidated claim.

[16] This decision of the British Columbia Court of Appeal was based, in part, on the decision of Mr. Justice James Farley in **Re Canadian Triton International Ltd.** reflex, (1997), 49 C.B.R. (3d) 192 (Ont.Gen.Div.), in which he stated that:

> "The determination as to who is allowed to vote at a particular meeting was to be decided on the basis of what information was available ... at the time that the vote was conducted."

Justice Farley went on to say that creditors were able to file additional material to "cooper up" the proofs of claim for future votes or for the purpose of entitlement to any future distribution.

[17] The Plaintiff argues this is a situation where a creditor contesting a determination or a disallowance of a claim did not have the opportunity of reviewing all of the materials that the trustee reviewed and relied upon in making the determination to allow the creditor's claim. More importantly, as I think is a likely consideration here, the Court would not know what information the trustee had not considered in coming to its determination. In this case the interrelationships of Hiland and Lacey and their common control allegedly by Clayton Gillingham gives some serious cause for concern as to whether the Trustee considered these elements in allowing the claim of Hiland in the bankruptcy of Lacey. There is certainly merit to the suggestion that efficacy and expedition ought to be brought to the claims determination and disallowance procedure. It is undoubtedly true that the entry of fresh evidence at the appeal level may result in the loss of efficacy in the bankruptcy process in that the business at creditors' meetings would be co-opted and extra expense, delay and formality would be imposed upon the process.

[18] However, in my view efficacy, expedition, concerns over extra expense and delay or increased formality should not be permitted to trump fairness and should certainty not allow the claims determination process to constitute a *de facto* "good housekeeping seal of approval" upon activities surrounding which there is a serious allegation of criminality. Whether such criminality or unfairness in fact exists is a question to be determined upon the hearing of appropriate

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evidence. In my view however the Court should not be denied the opportunity to hear such evidence simply because doing so would be disruptive to the efficacy of the claims determination process.

CONCLUSION

[19] I am therefore prepared to allow this matter to proceed as a trial *de novo* and that the fresh evidence sought to be introduced by the Plaintiff/Applicant as more particularly set out in its application for the admission thereof is allowed, either by *viva voce* evidence or through the appropriate evidentiary process and as well this ruling includes such other evidence as the Plaintiff/Applicant may deem necessary to prove the allegations set forth in its Statement of Claim.

COSTS

[20] I am not prepared to award costs to the Plaintiff/Applicant in this present application. In my view, the very considerable delays of the Plaintiff/Applicant in bringing this matter forward disentitle it to such costs.

_____

Justice

Marsuba Holdings Ltd. (Re) (Trustee of), 1998 CanLII 5248 (BC SC) - Creditor Expunges a Proof of Claim of Another

Date:	1998-12-17
Docket:	160675VA95
Parallel citations:	8 CBR (4th) 268
URL:	http://canlii.ca/t/1f7px
Citation:	Marsuba Holdings Ltd. (Re) (Trustee of), 1998 CanLII 5248 (BC SC), <http://canlii.ca/t/1f7px> retrieved on 2013-09-13
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Noteup:	Search for decisions citing this decision
Reflex Record	Related decisions, legislation cited and decisions cited

Date: 19981217
Docket: 160675VA95
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY OF

MARSUBA HOLDINGS LTD.

REASONS FOR JUDGMENT

OF

MASTER BOLTON

(IN CHAMBERS)

Counsel for the M. Wosk (Applicant): G. Dabbs
Counsel for the Trustee in Bankruptcy: S. Frame
Place and Date of Hearing: Vancouver, B.C.
December 1, 1998

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[1] This is an application by a creditor of the bankrupt to expunge a proof of claim of another creditor. The application is brought pursuant to s.135(5) of the *Bankruptcy and Insolvency Act*:

> **The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.**

[2] The trustee has not merely declined to interfere in the matter. It was counsel for the trustee who spoke in opposition to the application.

FACTS

[3] Marsuba Holdings Ltd., the bankrupt, owned and operated licensed premises in New Westminster. Till July 1994, they were run as a nightclub. Then the nightclub was closed, while substantial renovations were undertaken. It re-opened almost a year later, in June 1995, as a pub, restaurant and deli. The renovations resulted in numerous delays and cost overruns. These problems, combined with a shortfall in the anticipated revenue of the new operations, led to financial difficulties so serious that a receiving order was made on May 3, 1996.

[4] Prior to the commencement of the renovations, a Mr. Wosk was the president and sole director of Marsuba. He owned 80% of the shares. The other 20% were owned by the manager of the club, Mr. Sinclair, or by his corporate alter ego, 7012 Holdings Ltd. (Counsel told me they would not always distinguish between Mr. Sinclair and the company, and I will follow suit. Henceforth, I will refer simply to Mr. Sinclair, as nothing in these Reasons turns on the separate legal interests of the individual and his company.)

[5] At about the time of the commencement of the renovations, Mr. Wosk transferred a further 10% of Marsuba's shares to Mr. Sinclair, 15% to a Mr. Pulos, and 5% to a Mr. Palidwor. The reason these two individuals received their shares is not germane to the issue now before the court, although their involvement may become relevant later, as some sort of similar fact evidence.

[6] Before the renovations began, Mr. Sinclair had been paid $3,000 a month pursuant to a management contract. The provision for remuneration entitled him to receive "a management fee the amount and payment of which shall be negotiated and determined from time to time by the Parties hereto". When the nightclub was closed, Mr. Sinclair ceased to receive this salary. Instead, he was paid $1,500 a month by another company owned primarily by Mr. Wosk which operated a nightclub in Burnaby.

[7] The evidence before me was confined to affidavits, and does not deal extensively with any discussions between the parties with regard to the terms of Mr. Sinclair's remuneration, let alone the existence of a binding agreement on the subject. Basically, Mr. Wosk says that Mr. Sinclair has already received everything he was entitled to during the renovation period - $1,500 a month from the other company and an extra 10% of the shares. Mr. Sinclair says that his $3,000 a month was intended to continue, but was put in abeyance until the company started generating income again. To my knowledge, he has not explained what the $1,500 was intended to be for, nor why it should not be credited against the $3,000 he says he was supposed to receive. He says that the additional 10% of the shares he received were transferred to him because Mr. Wosk could not finance the renovations by himself. The renovations were in fact financed largely by shareholders' loans, and Mr. Sinclair says the assignment of the shares to himself, Mr. Palidwor and Mr. Pulos was made to induce them to advance funds to the company in proportion to their shareholdings.

[8] Both Mr. Wosk and Mr. Sinclair worked at the premises in connection with the renovations. The extent of the work done by each is now contested. When the premises re-opened, Mr. Sinclair went back to managing the business during the daytime. (Mr. Palidwor managed the evening shift). I presume there is evidence that Mr. Sinclair was paid nothing during this period, although I do not recall being referred to such evidence. But his claim for remuneration of $3,500 during this period makes no sense if he had been paid already. Although Mr. Sinclair purports to rely on the management contract to justify his salary of $3,000 a month during the renovations, he appears to have repudiated the contract for this post-renovation period by claiming $3,500, without alleging that the contract was renegotiated. He claims this sum, and the trustee allowed it, because Mr. Wosk also claimed a management fee or salary of $3,500 for this period (which was disallowed by the trustee).

[9] On about October 22, 1995, Mr. Wosk purported to terminate Mr. Sinclair's management contract and his employment by Marsuba. Mr. Sinclair has claimed wages of $1,500 per month from November 1, 1995 to April 30, 1996. The basis for this claim has not been explained to me. The only evidence is from the trustee, who has sworn that "this claim was considered by the inspectors and the trustee and was not considered unreasonable." Why they should have done so is completely beyond me.

[10] Following the dismissal of Mr. Sinclair, he, together with Mr. Palidwor and Mr. Pulos, petitioned the company into bankruptcy. Mr. Sinclair presented a proof of claim totalling some $171,000. The trustee disallowed $12,500 out of that because it had already been claimed by another creditor. The claim was also reduced by $8,646.13, part of a larger claim of $27,000 that Mr. Sinclair said should be added to his shareholder's loan account. This claim was for monies that Mr. Sinclair has said he paid "under the table" to contractors and work people engaged in the renovations. He produced a

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piece of paper saying that he had spent this $27,000, but the detailed breakdown on it amounted only to $18,353.87. After discussions with the inspectors, the trustee disallowed the difference of $8,646.13.

[11] The claim that appears to have been accepted by the trustee amounted to $152,641.98. The claim breaks down as follows:

Shareholders' Loan (as adjusted):	$ 83,353.87
Mastercard Purchases:	2,217.10
Satellite Dish Purchase:	3,799.00
Wages:	
(July 1, 1994 to June 23, 1995) at $3,000 per month:	35,200.00
(June 23, 1995 to October 31, 1995) at $3,500 per month:	14,933.00
(November 1, 1995 to April 30, 1996) at $1,500 per month:	9,000.00
G.S.T. at 7% on Wages of $59,133:	4,139.31
SUBTOTAL:	$152,642.28
Adjustment to Correct the Arithmetic:	(.30)
AMOUNT CLAIMED:	$152,641.98

[12] Mr. Wosk has accepted or, to be more accurate, has been forced to accept, as a result of earlier litigation, some of Mr. Sinclair's claims. However, he objects to all the wages claimed (and presumably the G.S.T. purported to be payable thereon), and the $18,353.87 remaining from the claim for $27,000 reimbursement, after taking into account the already disallowed $8,646.13.

THE ONUS AND STANDARD OF PROOF

On whom is the burden of proof?

[13] There is no debate on this issue. The onus is on the party seeking to have the claim expunged: ***Ostrander& Co. v. Canadian Credit Men's Trust Association***, [1930] 2 D.L.R. 88.

What precisely does the applicant have to prove?

[14] Counsel for the trustee says the applicant must show that the trustee acted unreasonably or improperly in accepting the proof of loss. Counsel would have it that so long as the trustee acted reasonably, the actual legitimacy of the claim is irrelevant. I respectfully disagree.

[15] Quite apart from questions of natural justice raised by this position (where officials would be given the power to make decisions on the legitimacy of claims, subject to no review other than on questions of the reasonableness of their conduct) this construction of s.135(5) is contrary to the tenor of s.135 as a whole. The first four sub-sections deal with the procedure to be followed where a creditor appeals the disallowance of a claim by a trustee, and in such cases the appeal is decided simply on the basis of the legitimacy of the claim. There is no reason at all why different considerations should apply to appeals of a decision by the trustee to allow a claim. The only question should be whether the claim is indeed legitimate.

[16] The trustee's position is also contrary to authority. In ***Re Browne*** (1960), 2 All E.R. 625, Cross J. said:

> ... if a trustee admits a proof on a view of the law which is generally thought to be right but subsequently turns out to be wrong the proof has been "improperly" admitted... .

[17] Self-evidently, a trustee would have been acting reasonably if he had admitted a proof on a view of the law which had generally been thought to be right. Thus, simply establishing that the trustee acted reasonably will not preclude a finding that the proof has been improperly admitted. The claim must stand or fall on its merits.

What is the standard of proof?

[18] In ***Re Browne*** (*supra*), the court declined to expunge the proof of loss, because it was not satisfied beyond any reasonable doubt that it had been improperly admitted. However, the court came to that conclusion after reviewing evidence of an extremely lengthy and prejudicial delay between the admission of the proof of loss and the application to expunge. The debtor had been adjudicated bankrupt in 1912. The creditor filed a proof of the debt in May 1913. The creditor died in 1919 and the debtor in 1921. The trustee was discharged in 1925. In 1958 a reversionary interest belonging to the debtor fell into possession. It was only on this event, when it appeared that some dividend would be payable to creditors, that the official receiver, as the successor to the discharged trustee, sought to have the creditor's proof expunged on the ground that it was an unenforceable gambling debt. There was no evidence available to the court concerning the circumstances of the debt, nor of the additional information the original trustee might have sought and

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considered when deciding whether to allow the claim. All sorts of speculations were canvassed by the various parties as to what the trustee may or may not have known about the facts of the case or the applicable law. The court concluded:

> In a case where the vital witnesses are dead and the relevant documentary evidence may have been lost the maxim *omnia praesumuntur rite esse acta* applies with peculiar force. In such a case it is not enough for the official receiver to say that, as the terms of the proof suggest that the debt in question was an unenforceable gambling debt, the onus is thrown on the creditors' representatives to show that it was not. It is for the official receiver to satisfy me that the proof was wrongly admitted, and not, as I see it, simply to satisfy me on the balance of probabilities but to satisfy me beyond any reasonable doubt.
>
> (my emphasis)

[19] In my view, the imposition of this extremely high standard of proof is limited by the words "in such a case". In the case at bar, although there has certainly been a lengthy (and to some extent unexplained) delay between the filing of the proof of claim in 1995 and the present application, there is no question of dead, missing, or even forgetful witnesses. I can see no reason in principle or on precedent why the issue should not be decided on a simple balance of probabilities. The application here will be decided accordingly.

THE MERITS OF THE CLAIM

[20] I cannot decide the merits on the basis of the affidavits before me. There are simply too many unanswered questions. What, if anything, did the contending parties agree should be the basis of Mr. Sinclair's remuneration during and after construction? What precisely was the consideration for the new shares issued to him? Did he do enough work in the Burnaby club to justify a salary of $1,500 a month for that work alone? Why did he claim an additional $500 a month after the facilities re-opened? Why should he be paid anything at all after November 1995? Is there any proof of the purpose and payment of any of the items making up the $27,000? Were these sums paid to contractors paid in cash with the object of evading G.S.T., and if so, is the payment tainted with sufficient illegality to preclude their recovery in law?

[21] As a general rule, an application to expunge a proof of claim should follow the same procedure as the appeal of a trustee's disallowance of a proof. Such applications are decided on the basis of *viva voce* evidence of relevant witnesses. The same procedure should be followed here. The application is adjourned to a registrar in bankruptcy, to be determined on the basis of *viva voce* evidence. It may be heard by any registrar presiding on the date set for the hearing, including myself, but I am not seized of the matter.

[22] I would respectfully suggest that if the trustee has not already given any thought to the propriety of retaining counsel to argue one creditor's claim against another, and the potential consequences in costs, it might be appropriate to do so before the hearing continues.

"Neil Bolton, Master"

Disallowance by trustee - Sec. 135(2)

(2) The trustee may disallow, in whole or in part,

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance - Sec. 135(3)

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive - Sec. 135(4)

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to

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whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Royal Bank of Canada v. Drummie Estate, 2002 NBQB 251 (CanLII) - Prescription on s. 135 Notice to Appeal Disallowance of Claim

Date:	2002-07-25
Docket:	NB8881
Parallel citations:	252 NBR (2d) 191; 36 CBR (4th) 96
URL:	http://canlii.ca/t/5kvp
Citation:	Royal Bank of Canada v. Drummie Estate, 2002 NBQB 251 (CanLII), <http://canlii.ca/t/5kvp> retrieved on 2013-09-13
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Noteup:	Search for decisions citing this decision
Reflex Record	Related decisions, legislation cited and decisions cited

2002 NBQB 251 Court File No.: **NB 8881**

Estate No.: **51-092558**

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON
IN BANKRUPTCY
IN THE MATTER OF the *Bankruptcy and Insolvency Act*
AND IN THE MATTER OF the Bankruptcy of Thomas Blair Drummie
BETWEEN:

THE ROYAL BANK OF CANADA (a.k.a. Royal Bank Financial Group)
Applicant

– and –

GRANT THORNTON, in its capacity as Trustee in Bankruptcy of the Estate of Thomas Blair Drummie
Respondent

– and –

THE SOCIETY OF LLOYD'S,
Intervenor

DECISION

Before: Mr. Chief Justice David D. Smith
Heard: July 18, 2002
Decision: July 25, 2002
Appearances: Amanda J. Frenette, solicitor for the Applicant
Gary Faloon, Q.C., solicitor for the Respondent
Bruce S. Russell, solicitor for the Intervenor

[1] This is an appeal pursuant to subsection 192(4) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (BIA) of a decision of the Registrar in Bankruptcy dismissing the Royal Bank of Canada's (RBC) appeal against a trustee's Notice of Disallowance on the ground that the appeal had not been filed within the 30-day period pursuant to subsection 135(4) of the BIA and therefore he did have the competence to hear the matter.

[2] The relevant facts of this matter are outlined below.

1. Mr. Thomas Blair Drummie filed an Assignment in Bankruptcy on March 29, 2001. The Respondent, Grant Thornton Limited (the "Respondent Trustee") was appointed the Trustee of the Estate of Bankrupt by the Official Receiver. The first meeting of creditors was held on April 19, 2001.

2. In April 2001, The Society of Lloyd's (the Respondent Lloyd's) proof of claim for an unsecured claim of $637,557.39 and a proxy appointing Mr. Bernard F. Miller in the matter of the Estate of Thomas Blair Drummie, iin Bankruptcy was delivered to the Trustee in Bankruptcy of Thomas Blair Drummie, Mr. V.L. Duff, Grant Thornton Limited (the "Trustee").

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3. The Royal Bank of Canada (the "RBC") also filed with the Trustee, Mr. Duff, a proxy and a proof of claim, both dated May 14, 2001, for a claim of $310,801.00 which it claimed was partially secured and estimated the value of the security at $200,000.00.
4. A Section 170 Report dated December 10, 2001, prepared by the Trustee, indicates a secured claim in the amount of $200,000 and unsecured claims in the amount of $838,359.29, including the Lloyd's claim of $637,557.39.
5. The Trustee disallowed the RBC's security on the property in whole pursuant to subsection 135(2) of the Bankruptcy and Insolvency Act, R.S., 1985, c. B-3 (The "BIA") and issued a Notice of Disallowance dated January 31, 2002 under subsection 135(3) of the BIA stating, in part:
The security given related to a specific loan in the amount of $150,000.00 and that loan was repaid in full prior to the date of bankruptcy.
6. On February 14, 2002, the Trustee informed Lloyd's that the solicitor representing the Royal Bank Financial Group had requested the Trustee to agree to an extension of time to March 29, 2002 to appeal the Trustee's decision to disallow its secured position, to which request the Trustee consented.
7. On March 13, 2002, Mr. George Benchetrit, agent and counsel of The Society of Lloyd's (the Intervenor) and the only inspector of the Estate of Thomas Blair Drummie in Bankruptcy, questioned the legal validity of the Trustee's consent to the late filing of an appeal from a notice of disallowance. In his letter dated March 13, 2002, he stated:
According to the wording in section 135(4) of the BIA, the trustee's disallowance of the claim by Royal Bank of Canada ("RBC") to a security interest is final and conclusive unless, within 30 days after service of the notice of disallowance, RBC appeals the trustee's decision or makes a court application to extend the 30-day period.
It is my understanding that the extension to March 29, 2002 mentioned in your letter was granted by you to counsel for RBC verbally. As I read the above-noted section of the BIA, it is the court (not the trustee) which can grant an extension of time for appealing the disallowance, and the court can only do so if the appellant applies for such an extension within the 30-day period.
Please let me know and when the trustee served the notice of disallowance on RBC. Also, please let me know if you have any reason to believe that the consent of a trustee to the late filing of an appeal from a notice of disallowance is legally valid.
8. On March 20, 2002, the RBC filed an appeal with Michael Bray, the Registrar of the Court of Queen's Bench in Bankruptcy in the Judicial District of Fredericton (the "Registrar in Bankruptcy"), of the Trustee's decision.
9. In response to Mr. Benchetrit's letter, the Trustee clarified his position as follows in a letter dated April 5, 2002:
By letter dated February 13, 2002, our solicitor received a request from the solicitor of the Bank for an extension of the time to file an appeal. This request was not unreasonable in our opinion nor could we see any prejudice to our consenting to the request, therefore we instructed our solicitor to consent to the extension to and including March 29, 2002.
It is now our understanding that the Bank's solicitor did not obtain a formal order from the Registrar extending time. we are advised that he will raise the issue with the Registrar at the hearing, which has been scheduled for May 13, 2002. If requested for input at the hearing by the Registrar we will confirm our knowledge of the events and advise that both the inspector of the Estate and a major unsecured creditor strongly object to the hearing of the appeal since a formal order extending the time was not obtained. It will then be the Registrar's decision as to whether or not the hearing is proceeded with.
10. The Society of Lloyd's requested by Notice of Motion dated May 6, 2002 that it be heard either as an added party or a friend of the Court on the issues which, according to the Trustee's April 5, 2002 letter, were to be raised at the hearing by the parties; that is the application of subsection 135(4) of the BIA and the Registrar in Bankruptcy's lack of jurisdiction to hear the appeal.
11. At the hearing of the RBC's appeal held on May 13th, 2002, the Registrar in Bankruptcy rendered three decisions, two of which are relevant to the present appeal:
a) right of The Society of Lloyd's to intervene – the motion of The Society of Lloyd's to intervene was granted insofar as The Society was permitted, as a friend of the Court, to make submissions on the issue of subsection 135(4) of the BIA, which issue the Registrar had previously stated would be addressed regardless of the outcome of the motion.
b) application of subsection 135(4) of the BIA to include the appeal of RBC because it did not fall within the 30-day period prescribed by the subsection.
[3] The issue is whether the Trustee had the authority to waive the prescribed 30-day period in which an appeal may be made pursuant to subsection 135(4) of the BIA by consenting to the RBC's request to extend said appeal period.
[4] Subsection 135(4) of the BIA:
Determination or disallowance final and conclusive – A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in

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subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

[5] The 2002 annotated BIA by Houlden & Morawetz at page 548 states that "the application for an extension must be made within the 30-day period; there is no jurisdiction in the court to extend the time after the 30-day period has expired".

[6] There is no question that the RBC requested an extension of time within the 30-day period from the Trustee and that it was consented to. The Trustee confirmed the consent in a letter dated April 5, 2002 in which he also states: "It is now our understanding that the Bank's solicitor did not obtain a formal order from the Registrar extending time". The RBC argues that the Trustee's consent amounts to a waiver of the 30-day appeal period in subsection 135(4). In other words, it states that a trustee can act in the stead of the court and without the necessity of a formal motion, extend the appeal period. The Appellant, the RBC, cites Re Norbert (1924) C.B.R. 586 (Que. K.B. – Appeal) as authority that the court may extend the period of appeal if the Trustee does not object to the delay. This case is obscure and I find it neither pursuasive nor binding on this court. See Wolf v. R 1974 CanLII 161 (SCC), [1975] 2 S.C.R. 107, and Reid v. Sigordson 17 B.C.L.R. 117. The leading case in New Brunswick regarding the extension of statutory appeal periods is K.C. v New Brunswick (Minister of Health and Community Services) [1998] N.B.J. No. 311 (C.A.) in which Drapeau, J.A. of the New Brunswick Court of Appeal states at para. 5:

There is no inherent jurisdiction to extend the time for appeal where it is set by statute. See OK Builders Supplies Ltd. v. British Columbia (Minister of Finance), [1983] B.C.J. No. 828 (B.C.S.C.). The power to extend the time for appeal must be found in the Act itself or in some other statute.

This case disposes of grounds one and two of the appeal.

[7] The third ground of appeal is that the Registrar erred in allowing the intervenor (Lloyd's) to raise non-compliance as a defense when the intervenor was not a party to the proceedings and was not a party to the consent to waive and extend time.

[8] This ground is without merit as the Registrar stated at the commencement of the hearing at page 219 of the Record on Appeal that "the question of subsection 135(4) will be addressed prior to the substantive issues of disallowance, regardless of the outcome of this motion" (the motion of Lloyd's to intervene).

[9] The fourth ground of appeal is that the intervenor was estopped from raising the limitation period in subsection 135(4). The appellant argues that Lloyd's should have given notice to it that strict compliance with the BIA would be sought after the 30-day appeal period. I find no authority which supports this ground.

[10] The fifth ground is that the Registrar erred in not exercising his equitable jurisdiction and dismissing the intervenor's objection to the Trustee's waiver of compliance with the 30-day period considering all the circumstances. The court clearly cannot exercise its' equitable jurisdiction contrary to statute.

[11] For the above reasons, I find that the Registrar in Bankruptcy has not erred in principle nor in the way in which he has applied or exercised his discretion. The appeal is dismissed with costs of $500.00 payable by the appellant to each to the respondents, The Society of Lloyd's and Grant Thornton Limited.

_____

David D. Smith C.J.C.Q.B.
Moncton, New Brunswick
July 25, 2002

Expunge or reduce a proof - Sec. 135(5)

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

R.S., 1985, c. B-3, s. 135;
1992, c. 1, s. 20, c. 27, s. 53;
1997, c. 12, s. 89.

SCHEME OF DISTRIBUTION

Priority of claims - Sec. 136

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

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(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;
(b) the costs of administration, in the following order,
(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),
(ii) the expenses and fees of the trustee, and
(iii) legal costs;
(c) the levy payable under section 147;
(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;
(d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;
(d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;
(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;
(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;
(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;
(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;
(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the Income Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;
(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and
(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

Payment as funds available - Sec. 136(2)

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(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

Balance of claim - Sec. 136(3)
(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.
R.S., 1985, c. B-3, s. 136;
1992, c. 1, s. 143(E), c. 27, s. 54;
1997, c. 12, s. 90;
2001, c. 4, s. 31;
2004, c. 25, s. 70;
2005, c. 47, s. 88.

SB Directive: 3R2, Employment Insurance
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Insolvency Circular / Circulaire sur l'insolvabilité

N° 3R2

EMPLOYMENT INSURANCE

Issued: March 7, 2008

(Supersedes Circular N°3 issued on March 28, 2000, on the same topic)

Purpose

1. The purpose of this Circular is to provide trustees with the document prepared by Service Canada (SC), Employment Insurance Branch, entitled: "*Subsection 46(1) of the Employment Insurance Act and its effects on a trustee acting pursuant to the Bankruptcy and Insolvency Act*".

2. The document provides guidelines respecting the procedure to be followed by SC and trustees in determining whether overpayments of Employment Insurance benefits are owed to SC when individuals produce claims for unpaid salary to a trustee and, where applicable, the procedure to be followed for forwarding that payment to SC.

3. In the context of this Circular, for an overpayment of Employment Insurance benefits to exist, the following conditions must be met:

ASSURANCE-EMPLOI

Émise : le 7 mars 2008

(Remplace et annule la circulaire n° 3 sur le même sujet émise le 28 mars 2000.)

Objet

1. La présente circulaire vise à transmettre aux syndics le document intitulé Application du paragraphe 46(1) de la Loi sur l'assurance-emploi et ses effets sur les syndics agissant aux termes de la Loi sur la faillite et l'insolvabilité, préparé par la Division de l'assurance-emploi de Service Canada (SC).

2. Le document fournit des lignes directrices sur la procédure à suivre par SC et par les syndics pour déterminer si des versements excédentaires de prestations d'assurance-emploi sont dus à SC lorsque des personnes produisent des réclamations de salaires impayés auprès d'un syndic. Il précise en outre la marche à suivre pour acheminer ce paiement à SC.

3. Dans le contexte visé par la présente circulaire, il y a versement excédentaire de prestations d'assurance-emploi si :

Canada

OSB • BSF Protecting the integrity of the insolvency System / Protéger l'intégrité du système d'insolvabilité

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- a trustee or receiver has been appointed to administer the estate;
- there has to be a work stoppage;
- Employment Insurance benefits are claimed from SC by the ex-employee;
- the benefits owed to the ex-employee (e.g.: severance pay, vacation pay, salary arrears, etc.) have to be claimed by the ex-employee in the employer's insolvent estate; and,
- the trustee declares a dividend regarding this type of claim.

Consequently, the amount of Employment Insurance benefits overpayment which SC could claim depends on the amount of the declared dividend. Therefore, SC informs us that this amount should not, in any circumstances, be greater than the amount of the dividend payable by the trustee.

4. In addition, we wish to inform practitioners that, pursuant to section 147 of the *Bankruptcy and Insolvency Act*, the Superintendent's levy applies before a payment is made to SC. Furthermore, the amount that must be reported by the trustee to SC in accordance with subsection 5.1(3), is the amount of the dividend after deduction of the Superintendent's levy.

- un syndic ou un séquestre a été nommé pour administrer l'actif;
- il doit y avoir cessation d'emploi;
- l'ex-employé réclame des prestations d'assurance-emploi à SC;
- les prestations à payer à l'ex-employé (p. ex., indemnité de départ, paie de vacances et arriérés de salaire) doivent faire l'objet d'une réclamation par l'ex-employé dans l'actif de l'employeur insolvable; et
- le syndic déclare un dividende à l'égard de ce type de réclamation.

Le montant du versement excédentaire de prestations d'assurance-emploi que pourrait réclamer SC dépend donc du dividende déclaré. Par conséquent, SC nous informe que ce montant ne devrait en aucun cas dépasser celui du dividende payable par le syndic.

4. De plus, nous désirons informer les praticiens que, conformément à l'article 147 de la *Loi sur la faillite et l'insolvabilité*, le prélèvement du surintendant doit être effectué avant qu'un montant soit versé à SC. C'est pourquoi le montant que le syndic doit déclarer à SC selon le paragraphe 5.1(3) est le montant du dividende, déduction faite du prélèvement du surintendant.

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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5 Where it has been determined that an "overpayment" is payable to SC, the trustee should communicate by letter with the individuals who have filed claims to inform them of the possibilities that amounts may be deducted from their claim. Examples of letters, appropriate for such circumstances, are attached to this circular for use by trustees at their discretion.

6. For any questions related to the interpretation or the application of this circular, please contact the Regulatory Affairs and Compliance Section of the Office of the Superintendent of Bankruptcy by email at: rac-car@ic.gc.ca.

5. S'il est établi qu'un versement excédentaire est payable à SC, le syndic devrait faire parvenir une lettre aux auteurs de la réclamation afin de les informer qu'un montant pourrait être déduit de leur réclamation. On trouvera ci-joint des exemples de lettres appropriées qui pourraient être utilisées à la discrétion des syndics.

6. Pour toute question relative à l'interprétation ou à l'application de la présente circulaire, veuillez communiquer avec la Section de la conformité et des affaires réglementaires du Bureau du surintendant des faillites, par courriel à l'adresse : rac-car@ic.gc.ca.

Patricia Alférez
Superintendent of Bankruptcy / Surintendant des faillites

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Employment Insurance Act - 46(1)

Subsection 46(1) of the *Employment Insurance Act* and its effects on a Trustee acting pursuant to the *Bankruptcy and Insolvency Act*

1. INTRODUCTION

Former employees of bankrupt employers quite often file claims for Employment Insurance (EI) benefits. If a settlement is subsequently made for unpaid wages, severance pay or other monies owed to the employee at the time of termination of employment, these earnings may be allocated, for EI purposes, to the period of time before or after termination. This action may result in the creation of an overpayment of EI benefits.

The *Employment Insurance Act*, effective 30 June 1996, clarified provisions with respect to the liability of trustees in bankruptcy. Pursuant to subsection 46(1) of the *EI Act* (Appendix A) an employer, a trustee in bankruptcy or any other person who becomes liable to pay earnings to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, shall ascertain whether an amount would be repayable if the earnings were paid to the claimant. If so they shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

For the purposes of this document, the term "Trustee" is used as a generic

Loi sur l'assurance-emploi - 46(1)

Application du paragraphe 46(1) de la *Loi sur l'assurance-emploi* et ses effets sur les syndics agissant aux termes de la *Loi sur la faillite et l'insolvabilité*

1. INTRODUCTION

Il arrive souvent que d'anciens employés d'un employeur failli réclament des prestations d'assurance-emploi (a.-e.). Lorsqu'un règlement à l'amiable est conclu plus tard en vue du paiement pour salaire impayé, indemnité de départ ou autre somme due à l'employé à la date de cessation d'emploi, il se peut que cette rémunération soit répartie, aux fins de l'a.-e., à la période antérieure ou postérieure à la cessation d'emploi, ce qui risque de donner lieu à un versement excédentaire de prestations d'a.-e.

La *Loi sur l'assurance-emploi*, entrée en vigueur le 30 juin 1996, comporte des dispositions précisant la responsabilité des syndics de faillite. Aux termes du paragraphe 46(1) de la *Loi sur l'a.-e.* (annexe A), l'employeur, le syndic de faillite ou toute autre personne tenue de verser une rémunération à un prestataire au titre d'une période et ayant des motifs de croire que des prestations ont été versées à ce prestataire au titre de la même période, doit vérifier si un remboursement serait dû. Dans l'affirmative, il est tenu de retenir le montant du remboursement sur la rémunération qu'il doit payer au prestataire et de le verser au receveur général à titre de remboursement d'un versement excédentaire de prestations.

Pour les fins du présent document, le terme « Syndic » est employé de façon générique,

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expression, to include any person acting as trustee or receiver, as these are defined pursuant to the *Bankruptcy and Insolvency Act*, and who may have an obligation pursuant to subsection 46 (1) of the *EI Act*.

2. PURPOSE

The purpose of this document is to establish guidelines for the application of subsection 46(1) of the *EI Act* and provide information concerning communications between Service Canada (SC) and trustees. It has been prepared for use of trustees and SC employees.

3. DETERMINATION OF EARNINGS

The Commission, with the approval of the Governor in Council, has the authority to make regulations that specify and clarify what constitutes earnings. Section 35 of the *EI Regulations* (Appendix A) has been made under that authority. It defines what monies are or are not earnings for benefit purposes.

Generally, earnings are the entire income arising out of any employment, including amounts payable to a claimant in respect of wages, accumulated sick leave credits, vacation pay, wages in lieu of notice, severance pay, bonuses, pecuniary benefits and all other advantages, pecuniary or non-pecuniary, that are related to, attached to or arising out of employment.

Earnings are taken into account to determine the amount to be deducted

pour inclure toute personne agissant comme syndic ou séquestre, tel que ces termes sont définis dans la *Loi sur la faillite et l'insolvabilité* et qui pourrait avoir une obligation aux termes du paragraphe 46 (1) de la *Loi sur l'a.-e.*

2. OBJET

Le présent document vise à énoncer les lignes directrices concernant l'application du paragraphe 46(1) de la *Loi sur l'a.-e.* et à fournir des renseignements concernant les communications entre Service Canada (SC) et les syndics. Il a été préparé à l'intention des syndics et des employés de SC.

3. LA DÉTERMINATION DE LA RÉMUNÉRATION

La Commission a le pouvoir, avec l'approbation du gouverneur en conseil, d'adopter des règlements qui indiquent et précisent ce qui constitue une rémunération. L'article 35 du *Règlement sur l'a.-e.* (annexe A) a été adopté en vertu de ce pouvoir. Il définit les sommes d'argent qui constituent ou non une rémunération aux fins des prestations.

En général, la rémunération s'entend du revenu intégral provenant de tout emploi, y compris les montants à payer à un prestataire au titre du salaire, des crédits de congés de maladie accumulés, de la paie de vacances, du salaire tenant lieu de préavis, de l'indemnité de départ, des primes, des prestations en espèces et de tout autre avantage, pécuniaire ou non, qui sont liés à un emploi ou qui en découlent.

La rémunération est prise en compte notamment pour fixer le montant à déduire des prestations, pour déterminer s'il y a eu

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from benefits, to determine an interruption of earnings and the amount of benefits to be repaid to the Commission under certain circumstances by the claimant, the employer or the trustee in bankruptcy.

Amounts payable as dividends concerning unpaid wages claims pursuant to paragraph 136(1)(d) and subsection 136(3) of the *Bankruptcy and Insolvency Act* (Appendix A) inter alia, are considered as earnings arising out of employment under subsection 35(2) of the regulation.

4. POLICY

4.1 To apply Subsection 46(1) it is necessary for the trustees and SC to work cooperatively to communicate and share information in order to provide timely service to the bankrupt.

4.2 Pursuant to subsection 46(1) of the *EI Act* where a trustee becomes liable to pay earnings to a claimant for a period and has reasons to believe that EI benefits have been paid to the claimant for that period, the trustee shall ascertain whether EI benefits are repayable to the Receiver General, and deduct that amount from the overall dividend for submission to the Receiver General.

4.3 In order to ensure an efficient process and timely service, a trustee should initiate contact with the SC Regional Coordinator and provide the necessary information to allow for a determination of whether an allocation of the trustee's payment would create overpayments of benefits against individual claimants.

un arrêt de rémunération et le montant des prestations devant être remboursées à la Commission dans certains cas par le prestataire, l'employeur ou le syndic de faillite.

Les montants versés par le syndic et payés comme dividendes à titre de salaires impayés conformément à l'alinéa 136(1)*d)* et au paragraphe 136(3) de la *Loi sur la faillite et l'insolvabilité* (annexe A), sont considérés notamment comme une rémunération provenant de l'emploi aux termes du paragraphe 35(2) du Règlement.

4. POLITIQUE

4.1 Aux fins du paragraphe 46(1), les syndics et SC doivent travailler en collaboration et s'échanger les renseignements nécessaires afin d'assurer un service opportun au failli.

4.2 Aux termes du paragraphe 46(1) de la *Loi sur l'a.-e.* le syndic qui est tenu de verser à un prestataire une rémunération, au titre d'une période, et qui a des motifs de croire que ledit prestataire a reçu des prestations d'a.-e. au titre de la même période, doit vérifier si des prestations d'a.-e. sont remboursables au receveur général, doit déduire ce montant du dividende total et doit le remettre au receveur général.

4.3 Pour que la procédure se déroule de façon efficace et que le service soit assuré en temps opportun, le syndic devrait communiquer avec le coordonnateur régional de SC et fournir les renseignements nécessaires en vue de déterminer si une répartition du paiement ou des paiements à verser donnerait lieu à des versements excédentaires de prestations au détriment de certains prestataires.

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4.4 Once advised by the SC Regional Coordinator of the amount of money paid in excess to a claimant, the trustee must deduct from the payment owed to that claimant an amount equal to the overpayment of EI benefits and remit such an amount to the Receiver General.

4.4 Une fois qu'il est informé par le coordonnateur régional de SC du montant versé en trop à un prestataire, le syndic doit déduire du paiement dû à ce même prestataire une somme correspondant au versement excédentaire en question et remettre cette somme au receveur général.

5. PROCESS

5.1 Trustee:

• Supply to the SC Regional Coordinator (Appendix B) a list, (if possible on diskette) preferably by Province, on former employees to whom payments are to be made and specifying, to the extent that such information is available:

1) the name of the company involved;

2) the name, the full address/Province and Social Insurance Number (SIN) of the individual;

3) the total amount of gross earnings to be paid as dividends by the trustee, the nature of the payment and the breakdown of such payment (unpaid wages, bonuses, accumulated sick leave credits, vacation pay, statutory holiday, severance pay , pension, employee's pension contribution, etc);

4) salary earned during last week worked;

5) the last day worked.

5. PROCÉDURE

5.1 Le syndic :

• Fournit au coordonnateur régional de SC (annexe B) une liste, préférablement par province, et si possible, une disquette, des anciens employés auxquels des paiements doivent être versés en y indiquant (pour autant que cette information soit disponible) :

1) le nom de l'entreprise en cause;

2) le nom, l'adresse au complet, la province et le numéro d'assurance sociale (NAS) de l'individu;

3) le montant total de la rémunération brute que le syndic doit verser au titre des dividendes, la nature du paiement et la ventilation de celui-ci (salaires impayés, primes, crédits de congés de maladie accumulés, paie de vacances, jours fériés, indemnité de départ, pension, cotisation de pension de l'employé, etc.);

4) le salaire gagné durant la dernière semaine de travail;

5) le dernier jour de travail

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5.2 Service Canada:

To facilitate contact and continuing communication with a trustee, the initial point of contact will be the Regional Office which covers the territory where the trustee is located.

5.2.1 Regional Coordinator:

- acknowledges receipt of the list supplied by the trustee;

- utilizes the Social Insurance Number to determine the existence of a benefit claim at the time of or after the bankruptcy;

- quickly identifies those with no claims and then shares this list immediately with the trustee;

- initiates discussions with the trustee to allow the determination of an acceptable time frame for completion of the process and also the frequency and method of communication of information;

- ensures that SC reviews and assesses each file to determine if an overpayment is to be created by the payment of earnings by the trustee;

- ensures that SC enters proper information to create the bankruptcy overpayment to allow recovery through the trustee;

- ensures that SC notifies the claimant of the earnings decision rendered based on the information received by the trustee and advises the claimant that the trustee will deduct from any dividend payment the amount of overpayment which is payable

5.2 Service Canada :

Afin de faciliter les communications avec le syndic, le point de contact initial sera le bureau régional couvrant le territoire où se situe le bureau du syndic.

5.2.1 Le coordonnateur régional :

- accuse réception de la liste fournie par le syndic;

- utilise le numéro d'assurance sociale pour vérifier si une demande de prestations existe à la date de la faillite ou après celle-ci;

- identifie rapidement les personnes pour lesquelles aucune demande n'existe et communique immédiatement cette liste au syndic;

- entreprend des discussions avec le syndic pour déterminer un délai acceptable aux fins de la procédure ainsi que la fréquence et la méthode de communication des renseignements;

- s'assure que SC revoit et évalue chaque dossier afin de déterminer si le paiement d'un montant par le syndic au titre de la rémunération donnera lieu à un trop-payé;

- s'assure que SC traite les données appropriées donnant lieu au versement excédentaire pour permettre le recouvrement du trop-payé par le syndic;

- s'assure que SC avise le prestataire de la décision prise sur la foi des renseignements reçus par le syndic et l'informe que celui-ci déduira de tout paiement de dividendes le montant du versement excédentaire devant être remis au receveur général;

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to the Receiver General;

• provides the trustee with a list giving solely the amount of overpayment arising from a dividend.

5.3 Trustee:

• shall deduct the amount of overpayment from the overall dividend for each individual and remit via the Regional Coordinator a cheque to the Receiver General, preferably a cheque for each province, if there is more than one concerned;

• attach to the cheque the list indicating the claimants, including SINs for which a repayment applies.

5.4 Regional Coordinator:

• will ensure that monies received from the trustee cover all overpayments to be recouped, or if that is not the case, will perform the appropriate reconciliation in cooperation with the trustee. The monies will have to be deducted from the claimant's dividend as repayment of an overpayment of benefits, according to Subsection 46 (1) of the *EI Act*.

• will also transfer the amount of monies owing, i.e. the list and the cheque received from the trustee, to Regional Financial Services, for deposit.

• fournit au syndic une liste indiquant le montant du trop-payé découlant uniquement du versement d'un dividende.

5.3 Le syndic :

• déduit le montant du versement excédentaire du dividende total pour chaque individu et remet par l'entremise du coordonnateur régional un chèque libellé au nom du receveur général (préférablement un chèque par province si plusieurs provinces sont concernées);

• annexe au chèque la liste des prestataires incluant les NAS pour lesquels le remboursement s'applique.

5.4 Le coordonnateur régional :

• s'assure que les montants reçus du syndic de faillite remboursent en totalité les trop-payés à recouvrer ou, si tel n'est pas le cas, fait les conciliations nécessaires en collaboration avec le syndic. Ces montants devront être déduits du dividende du prestataire à titre de remboursement des trop-payés, conformément au paragraphe 46(1) de la *Loi sur l'a.-e.*;

• transfère le montant des sommes d'argent dues, soit la liste et le chèque reçus du syndic, aux Services financiers régionaux, pour dépôt.

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Sue FosterDirector, Benefit Entitlement / Directrice, Admissibilité aux prestations

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Appendix A

Relevant Legislation

EI Act and Regulations

Return of benefits by employer or other person

46.(1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

Determination of earnings for benefits purposes

35.(1) The definitions in this subsection apply in this section.

"employment" means

(a) any employment, whether insurable, non insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the Canada Pension Plan

Annexe A

Législation appropriée

Loi et règlement sur l'assurance-emploi

Remboursement de prestations par l'employeur ou une autre personne

46.(1) Lorsque, soit en application d'une sentence arbitrale ou d'un jugement d'un tribunal, soit pour toute autre raison, un employeur ou une personne autre que l'employeur, notamment un syndic de faillite, se trouve tenu de verser une rémunération, notamment des dommages-intérêts pour congédiement abusif ou des montants réalisés provenant des biens d'un failli, à un prestataire au titre d'une période et a des motifs de croire que des prestations ont été versées à ce prestataire au titre de la même période, cet employeur ou cette autre personne doit vérifier si un remboursement serait dû en vertu de l'article 45, au cas où le prestataire aurait reçu la rémunération et, dans l'affirmative, il est tenu de retenir le montant du remboursement sur la rémunération qu'il doit payer au prestataire et de le verser au receveur général à titre de remboursement d'un versement excédentaire de prestations.

Détermination de la rémunération aux fins du bénéfice des prestations

35.(1) Les définitions qui suivent s'appliquent au présent article.

« emploi »

a) tout emploi, assurable, non assurable ou exclu, faisant l'objet d'un contrat de louage de services exprès ou tacite ou de tout autre contrat de travail, abstraction faite des considérations suivantes

(i) des services sont ou seront fournis ou non par le prestataire à une autre personne,

(ii) le revenu du prestataire provient ou non d'une personne autre que celle à laquelle il fournit ou doit fournir des services;

b) tout emploi à titre de travailleur indépendant, exercé soit à son compte, soit à titre d'associé ou de coïntéressé;

c) l'occupation d'une fonction ou charge au sens du paragraphe 2(1) du *Régime de pensions du Canada* (*employment*)

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"income" means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.

"pension" means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the Canada Pension Plan; or

(c) under a provincial pension plan

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings has occurred and the amount to be deducted from benefits payable under section 19 or subsection 21(3) or 22(5) of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments,

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan, or

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) of the Act;

« pension » Pension de retraite provenant de l'une des sources suivantes :

a) un emploi ou un emploi à titre de membre des forces armées ou de toute force policière;

b) le *Régime de pensions du Canada*;

c) un régime de pension provincial. (*pension*)

« revenu » Tout revenu en espèces ou non que le prestataire reçoit ou recevra d'un employeur ou d'une autre personne, notamment un syndic de faillite (*income*)

(2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour déterminer s'il y a eu un arrêt de rémunération et fixer le montant à déduire des prestations à payer en vertu de l'article 19 ou des paragraphes 21(3) ou 22(5) de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment :

a) les montants payables au prestataire, à titre de salaire, d'avantages ou autre rétribution, sur les montants réalisés provenant des biens de son employeur failli;

b) les indemnités que le prestataire a reçues ou recevra pour un accident du travail ou une maladie professionnelle, autres qu'une somme forfaitaire ou une pension versées par suite du règlement définitif d'une réclamation;

c) les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, aux termes :

(i) soit d'un régime collectif d'assurance-salaire,

(ii) soit d'un régime de congés payés de maladie, de maternité ou d'adoption,

(iii) soit d'un régime de congés payés pour soins à donner à un ou plusieurs enfants visés au paragraphe 23(1) de la Loi;

(iv) soit d'un régime de congés payés pour soins ou soutien donnés à un membre de la famille visé au paragraphe 23.1(2) de la Loi;

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(d) notwithstanding paragraph (7)(b) but subject to subsection (3), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding

(3) Where, subsequent to the week in which an injury referred to in paragraph (2)(d) occurs, a claimant has accumulated the number of hours of insurable employment required by section 7 or 7.1 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(4) Notwithstanding subsection (2), the payments a claimant has received or, on application, is entitled to receive under a group sickness or disability wage-loss indemnity plan or a workers' compensation plan are not earnings to be taken into account for the purpose of subsection 14(2).

(5) Notwithstanding subsection (2), the moneys referred to in paragraph (2)(e) are not earnings to be taken into account for the purposes of section 14.

d) malgré l'alinéa (7)*b)* et sous réserve du paragraphe (3), les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, dans le cadre d'un régime d'assurance-automobile prévu par une loi provinciale pour la perte réelle ou présumée du revenu d'un emploi par suite de blessures corporelles, si les prestations payées ou payables en vertu de la Loi ne sont pas prises en compte dans l'établissement du montant que le prestataire a reçu ou a le droit de recevoir dans le cadre de ce régime;

e) les sommes payées ou payables au prestataire, par versements périodiques ou sous forme de montant forfaitaire, au titre ou au lieu d'une pension;

f) dans les cas où les prestations payées ou payables en vertu de la Loi ne sont pas prises en compte dans l'établissement du montant que le prestataire a reçu ou a le droit de recevoir en vertu d'une loi provinciale pour la perte réelle ou présumée du revenu d'un emploi, les indemnité que le prestataire a reçues ou a le droit de recevoir, sur demande, en vertu de cette loi provinciale du fait qu'il a cessé de travailler parce que la continuation de son travail mettait en danger l'une des personnes suivantes :

(i) le prestataire,

(ii) l'enfant à naître de la prestataire,

(iii) l'enfant qu'allaite la prestataire

(3) Lorsque le prestataire a, après la semaine où il a subi les blessures corporelle visées a l'alinéa (2)*d)*, accumulé le nombre d'heures d'emploi assurable exigé aux articles 7 ou 7.1 de la Loi, les indemnités visées à cet alinéa ne sont pas comptées comme rémunération.

(4) Malgré le paragraphe (2), les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, dans le cadre d'un régime collectif d'assurance-salaire en cas de maladie ou d'invalidité ou d'un régime d'indemnisation des travailleurs ne sont pas comptées comme rémunération pour l'application du paragraphe 14(2)

(5) Malgré le paragraphe (2), les sommes visées à l'alinéa (2)*e)* ne sont pas comptées comme rémunération pour l'application de l'article 14.

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(6) Notwithstanding subsection (2), the earnings referred to in subsection 36(9) and allowances that would not be deducted from benefits by virtue of subsection 16(1) are not earnings to be taken into account for the purposes of section 14.

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(e), if the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of the benefit period of the claimant was accumulated after the date on which those moneys became payable and during the period in respect of which the claimant received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

(8) For the purposes of paragraphs (2)(c) and (7)(b), a sickness or disability wage-loss indemnity plan is not a group plan if it is a plan that

(a) is not related to a group of persons who are all employed by the same employer;

(b) is not financed in whole or in part by an employer;

(c) is voluntarily purchased by the person participating in the plan;

(d) is completely portable;

(e) provides constant benefits while permitting deductions for income from other sources, where applicable; and

(f) has rates of premium that do not depend on the experience of a group referred to in paragraph (a).

(6) Malgré le paragraphe (2), la rémunération visée au paragraphe 36(9) et les allocations qui ne seraient pas déduites des prestations en raison du paragraphe 16(1) ne sont pas comptées pour l'application de l'article 14.

(7) La partie du revenu que le prestataire tire de l'une ou l'autre des sources suivantes n'a pas valeur de rémunération aux fins mentionnées au paragraphe (2) :

a) une pension d'invalidité ou une somme forfaitaire ou une pension versées par suite du règlement définitif d'une réclamation concernant un accident du travail ou une maladie professionnelle;

b) les indemnités reçues dans le cadre d'un régime non collectif d'assurance-salaire en cas de maladie ou d'invalidité;

c) les allocations de secours en espèces ou en nature;

d) les augmentations rétroactives de salaire ou de traitement;

e) les sommes visées à l'alinéa (2)*e)*, si le nombre d'heures d'emploi assurable exigé aux articles 7 ou 7.1 de la Loi pour l'établissement de la période de prestations du prestataire a été accumulé après la date à laquelle ces sommes sont devenues payables et pendant la période pour laquelle il les a touchées ;

f) le revenu d'emploi exclu du revenu en vertu du paragraphe 6(16) de la *Loi de l'impôt sur le revenu*.

(8) Pour l'application des alinéas (2)*c)* et (7)*b)*, le régime d'assurance-salaire en cas de maladie ou d'invalidité est un régime non collectif s'il satisfait aux critères suivants :

a) il ne vise pas un groupe de personnes exerçant un emploi au service du même employeur;

b) il n'est pas financé en totalité ou en partie par un employeur;

c) il est souscrit volontairement par le participant;

d) il est complètement transférable;

e) il prévoit des indemnités fixes tout en permettant, le cas échéant, des déductions à l'égard des revenus d'autres sources;

f) il prévoit des taux de cotisation qui ne dépendent pas des statistiques d'un groupe visé à l'alinéa a).

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agreement between the claimant and the claimant's employer is not reasonable in the circumstances, the value shall be determined by the Commission based on the monetary value of the benefits.

(13) The value of living quarters referred to in paragraph (10)(d) includes the value of any heat, light, telephone or other benefits included with the living quarters.

(14) Where the value of living quarters is determined by the Commission, it shall be computed on the rental value of similar living quarters in the same vicinity or district.

(15) Where the remuneration of a claimant is not pecuniary or is only partly pecuniary and all or part of the non-pecuniary remuneration consists of any consideration other than living quarters and board furnished by the employer, the value of that consideration shall be included in determining the claimant's income.

(16) For the purposes of this section, living quarters means rooms or any other living accommodation.

pas sur cette valeur ou si la valeur sur laquelle ils s'entendent n'est pas raisonnable.

(13) La valeur du logement visé à l'alinéa (10)*d*) comprend la valeur du chauffage, de l'éclairage, du service téléphonique et des autres avantages que comporte ce logement.

(14) Lorsque la valeur du logement est déterminée par la Commission, le calcul se fait d'après le loyer de logements semblables dans le même voisinage ou district.

(15) Lorsque la rétribution du prestataire n'est pas pécuniaire ou ne l'est qu'en partie et que la totalité ou une partie de la rétribution non pécuniaire comprend des éléments autres que le logement et la pension fournis par l'employeur, la valeur de ces éléments est incluse dans le calcul de son revenu.

(16) Pour l'application du présent article, « Logement » s'entend de toute pièce ou autre local servant d'habitation.

Bankruptcy and Insolvency Act

Scheme of Distribution

136.(1)d) wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during the six months immediately preceding the bankruptcy to the extent of two thousand dollars in each case, together with, in the case of a travelling salesman, disbursements properly incurred by that salesman in and about the bankrupt's business, to the extent of an additional one thousand dollars in each case, during the same period, and for the purposes of this paragraph commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the six-month period, shall be deemed to have been earned therein;

136.(3) "Balance of claim" A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him

Loi sur la faillite et l'insolvabilité

Plan de répartition

136.(1)*d)* les gages, salaires, commissions ou rémunération de tout commis, préposé, voyageur de commerce, journalier ou ouvrier, pour services rendus au cours des six mois qui ont précédé la faillite jusqu'à concurrence de deux mille dollars dans chaque cas; s'il s'agit d'un voyageur de commerce, les sommes que ce dernier a régulièrement déboursées dans et concernant l'entreprise du failli, jusqu'à concurrence d'un montant additionnel de mille dollars dans chaque cas, pendant la même période; pour l'application du présent alinéa, les commissions payables sur expédition, livraison ou paiement de marchandises sont censées gagnées à cet égard durant la période des six mois, si les marchandises ont été expédiées, livrées ou payées pendant cette période;

136.(3) [Solde de réclamation] Tout créancier dont le présent article restreint les droits prend rang comme créancier non garanti, quant à tout solde de réclamation qui lui est dû.

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(9) For the purposes of subsection (8), "portable", in respect of a plan referred to in that subsection, means that the benefits to which an employee covered by the plan is entitled and the rate of premium that the employee is required to pay while employed by an employer will remain equivalent if the employee becomes employed by any other employer within the same occupation.

(10) For the purposes of paragraph (2), "income" includes

(a) in the case of a claimant who is not self-employed, that amount of the claimant's income remaining after deducting

(i) expenses incurred by the claimant for the direct purpose of earning that income, and

(ii) the value of any consideration supplied by the claimant, and

(b) in the case of a claimant who is self-employed in farming, 15 per cent of the claimant's gross income from

(i) farming transactions, and

(ii) any farming subsidies the claimant receives under any federal or provincial program;

(c) in the case of a claimant who is self-employed in employment other than farming, the amount of the gross income from employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein; and

(d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

(11) Subject to subsection (12), the value of the benefits referred to in paragraph (10)(d) shall be the amount fixed by agreement between the claimant and the claimant's employer and shall be an amount that is reasonable in the circumstances.

(12) Where the claimant and the employer do not agree on the value of the benefits referred to in paragraph (10)(d), or where the value fixed for those benefits by

(9) Pour l'application du paragraphe (8), « transférable » se dit du régime dans le cadre duquel les indemnités auxquelles a droit un employé participant au régime et le taux de cotisation qu'il doit payer pendant qu'il exerce un emploi au service d'un employeur demeureront les mêmes s'il passe au service d'un autre employeur dans la même occupation.

(10) Pour l'application du paragraphe (2), « revenu » vise notamment :

a) dans le cas d'un prestataire qui n'est pas un travailleur indépendant, le montant qui reste de son revenu après déduction des sommes suivantes :

(i) les dépenses qu'il a engagées directement dans le but de gagner ce revenu,

(ii) la valeur des éléments fournis par lui, le cas échéant;

b) dans le cas d'un prestataire qui est un travailleur indépendant exerçant un emploi relié aux travaux agricoles, 15 pour cent du revenu brut qu'il tire, à la fois :

(i) d'opérations agricoles,

(ii) de subventions agricoles qu'il reçoit dans le cadre d'un programme fédéral ou provincial;

c) dans le cas d'un prestataire qui est un travailleur indépendant exerçant un emploi non relié aux travaux agricoles, le reste du revenu brut qu'il tire de cet emploi après déduction des dépenses d'exploitation qu'il y a engagées et qui ne constituent pas des dépenses en immobilisations;

d) dans tous les cas, la valeur de la pension, du logement et des autres avantages accordés au prestataire à l'égard de son emploi par son employeur ou au nom de celui-ci

(11) Sous réserve du paragraphe (12), la valeur des avantages visés à l'alinéa (10)*d)* est le montant sur lequel s'entendent le prestataire et son employeur et qui est raisonnable dans les circonstances.

(12) La Commission détermine la valeur des avantages visés à l'alinéa (10)*d)*, selon leur valeur pécuniaire, lorsque le prestataire et son employeur ne s'entendent

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Appendix B **Annexe B**

List of contacts / Liste des personnes-ressources
Regional Coordinators / Coordonnateurs régionaux

List of names / Liste de noms	Tel # / Nº de téléphone
Sue Kodric **Leoni Hagan** Alberta / British Columbia / Northwest Territories / Nunavut / Yukon Alberta, Territoires du Nord-Ouest, Nunavut, Colombie-Britannique et Yukon	250-754-0222 780-495-7434
Lorne Funk Manitoba	204-984-6179
Betty Fitzgerald New Brunswick / Nouveau-Brunswick	506-851-6860
Warren Dinham Newfoundland and Labrador / Terre-Neuve-et-Labrador	709-772-6223
Brenda Hillier Nova Scotia / Nouvelle-Écosse	902-426-7718
Randy Schoch Ontario	519-571-5583
Linda Brazil Prince Edward Island / Île-du-Prince-Édouard	902-626-2721
Diane Brunet **Annick Dumoulin** **Sylvie Landry** **Mélanie Tremblay** Quebec / Québec	514-866-9995 x4742 514-866-9995 x4723 514-866-9995 x4708 514-866-9995 x4736
Gord Cowie **Joyce Hudye** Saskatchewan	306-564-5441 306-564-5442

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PROJECT

TO ALL EMPLOYEES OF: c/o

_____ 20___

Sir/Madam:

Re: In the MATTER of the BANKRUPTCY of_____ c/o_____

On _____, the bankruptcy inspectors authorized the payment of an interim dividend to the preferred (or ordinary) creditors. However, the bankruptcy trustee must verify whether Employment Insurance benefits in the name of former employees of the bankrupt should be reimbursed to the Receiver General for Canada

In order to do this, we have recently contacted the Employment Insurance Regional Office to determine whether there are benefits to be repaid by the employees, and if so, in what amount.

We will communicate with the employees again once we have obtained the requested information from the Employment Insurance Regional Office. This normally takes about 45 days.

Sincerely,

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PROJET

À TOUS LES EMPLOYÉS DE : **a/s de :**

Le _____ **20**___

Madame, Monsieur,

Objet : DANS L'AFFAIRE DE LA FAILLITE DE _____ **a/s de :** _____.

Le _____ , les inspecteurs en matière de faillite ont autorisé le paiement d'un dividende intérimaire aux créanciers privilégiés (ou ordinaires). Toutefois, le syndic de faillite doit, dans le cas des ex-employés du failli, vérifier si des prestations d'assurance-emploi doivent être remboursées au Receveur général du Canada.

Pour ce faire, nous avons récemment communiqué avec le Bureau régional de l'assurance-emploi afin d'obtenir le montant, s'il y a lieu, des prestations à être remboursées par les employés.

Nous communiquerons à nouveau avec les employés aussitôt que nous aurons obtenu du Bureau régional de l'assurance-emploi l'information demandée, ce qui devrait prendre environ 45 jours.

Veuillez agréer, Madame, Monsieur, l'expression de nos sentiments les meilleurs.

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PROJECT

TO ALL EMPLOYEES OF: c/o _____

_____ 20___

Re: In the MATTER of the BANKRUPTCY of _____ c/o _____

Pursuant to our letter of _____ concerning the payment of a dividend to preferred creditors, we wish to confirm that we have been informed by the Employment Insurance Regional Office as to the amount to be reimbursed to the Receiver General for Canada.

You will therefore find attached a cheque representing the dividend owing to you, with deductions having been made for Employment Insurance to be reimbursed to the Receiver General for Canada and the levy payable to the Superintendent of Bankruptcy.

Sincerely,

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PROJET

À TOUS LES EMPLOYÉS DE : _____ a/s de : _____

Le _____ 20___

Madame, Monsieur,

Objet : DANS L'AFFAIRE DE LA FAILLITE DE _____ a/s de : _____

Nous nous référons à notre lettre du _____ concernant le paiement d'un dividende aux créanciers privilégiés et désirons vous confirmer que nous avons obtenu du Bureau régional de l'assurance-emploi le montant qui doit être remboursé au Receveur général du Canada.

Vous trouverez donc sous pli un chèque représentant le montant du dividende qui vous est dû, déduction faite du montant de l'assurance-emploi remboursé au Receveur général du Canada et du prélèvement payable au surintendant des faillites.

Veuillez agréer, Madame, Monsieur, l'expression de nos sentiments les meilleurs.

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Postponement of claims — creditor not at arm's length - Sec. 137
137. (1) A creditor who, at any time before the bankruptcy of a debtor, entered into a transaction with the debtor and who was not at arm's length with the debtor at that time is not entitled to claim a dividend in respect of a claim arising out of that transaction until all claims of the other creditors have been satisfied, unless the transaction was in the opinion of the trustee or of the court a proper transaction.

(2) [Repealed, 2007, c. 36, s. 47]
R.S., 1985, c. B-3, s. 137;
2000, c. 12, s. 15;
2005, c. 47, s. 89;
2007, c. 36, s. 47.

138. [Repealed, 2007, c. 36, s. 48]

Postponement of claims of silent partners - Sec. 139
139. Where a lender advances money to a borrower engaged or about to engage in trade or business under a contract with the borrower that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits arising from carrying on the trade or business, and the borrower subsequently becomes bankrupt, the lender of the money is not entitled to recover anything in respect of the loan until the claims of all other creditors of the borrower have been satisfied.
R.S., c. B-3, s. 110.

Postponement of wage claims of officers and directors - Sec. 140
140. Where a corporation becomes bankrupt, no officer or director thereof is entitled to have his claim preferred as provided by section 136 in respect of wages, salary, commission or compensation for work done or services rendered to the corporation in any capacity.
R.S., c. B-3, s. 111.

Postponement of equity claims - Sec. 140.1
140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.
2005, c. 47, s. 90;
2007, c. 36, s. 49.

Claims generally payable rateably - Sec. 141
141. Subject to this Act, all claims proved in a bankruptcy shall be paid rateably.
R.S., c. B-3, s. 112.

Partners and separate properties - Sec. 142
142. (1) Where partners become bankrupt, their joint property shall be applicable in the first instance in payment of their joint debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts.

Surplus of separate properties - Sec. 142(2)

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(2) Where there is a surplus of the separate properties of the partners, it shall be dealt with as part of the joint property.

Surplus of joint properties - Sec. 142(3)
(3) Where there is a surplus of the joint property of the partners, it shall be dealt with as part of the respective separate properties in proportion to the right and interest of each partner in the joint property.

Different properties - Sec. 142(4)
(4) Where a bankrupt owes or owed debts both individually and as a member of one or more partnerships, the claims shall rank first on the property of the individual or partnership by which the debts they represent were contracted and shall only rank on the other estate or estates after all the creditors of the other estate or estates have been paid in full.

Costs out of joint and separate properties - Sec. 142(5)
(5) Where the joint property of any bankrupt partnership is insufficient to defray any costs properly incurred, the trustee may pay such costs as cannot be paid out of the joint property out of the separate property of the bankrupts or one or more of them in such proportion as he may determine, with the consent of the inspectors of the estates out of which the payment is intended to be made, or, if the inspectors withhold or refuse their consent, with the approval of the court.
R.S., c. B-3, s. 113.

Interest from date of bankruptcy - Sec. 143
143. Where there is a surplus after payment of the claims as provided in sections 136 to 142, it shall be applied in payment of interest from the date of the bankruptcy at the rate of five per cent per annum on all claims proved in the bankruptcy and according to their priority.
R.S., c. B-3, s. 114.

Right of bankrupt to surplus - Sec. 144
144. The bankrupt, or the legal personal representative or heirs of a deceased bankrupt, is entitled to any surplus remaining after payment in full of the bankrupt's creditors with interest as provided by this Act and of the costs, charges and expenses of the bankruptcy proceedings.
R.S., 1985, c. B-3, s. 144;
2004, c. 25, s. 71.

Proceeds of liability insurance policy on motor vehicles - Sec. 145
145. Nothing in this Act affects the right afforded by provincial statute of any person who has a claim against the bankrupt for damages on account of injury to or death of any person, or injury to property, occasioned by a motor vehicle, or on account of injury to property being carried in or on a motor vehicle, to have the proceeds of any liability insurance policy applied in or toward the satisfaction of the claim.
R.S., c. B-3, s. 116.

Application of provincial law to lessors' rights - Sec. 146

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146. Subject to priority of ranking as provided by section 136 and subject to subsection 73(4) and section 84.1, the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.
R.S., 1985, c. B-3, s. 146;
2004, c. 25, s. 72(E);
2007, c. 36, s. 50.

Levy payable out of dividends for supervision - Sec. 147
147. (1) For the purpose of defraying the expenses of the supervision by the Superintendent, there shall be payable to the Superintendent for deposit with the Receiver General a levy on all payments, except the costs referred to in subsection 70(2), made by the trustee by way of dividend or otherwise on account of the creditor's claims, including Her Majesty in right of Canada or of a province claiming in respect of taxes or otherwise.

Cutting Edge Foods Inc. (Re), 2008 ABQB 340 (CanLII) - Liability for Superintendent's Fees

Date:	2008-06-09
Docket:	BK03 95482; BK03 109703; BK03 95683
Parallel citations:	456 AR 40; [2009] 8 WWR 113; 50 CBR (5th) 218; 8 Alta LR (5th) 305
URL:	http://canlii.ca/t/23f6d
Citation:	Cutting Edge Foods Inc. (Re), 2008 ABQB 340 (CanLII), <http://canlii.ca/t/23f6d> retrieved on 2013-09-13
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Print:	PDF Format
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Reflex Record	Related decisions, legislation cited and decisions cited

Court of Queen's Bench of Alberta
Citation: Cutting Edge Foods Inc. (Re), 2008 ABQB 340

Date:20080609
Docket: BK03 95482
Registry: Edmonton

In the Matter of The Bankruptcy of Cutting Edge Foods Inc. Estate No. 95482
Between:

Dr. David Climenhaga

Applicant

- and -

Office of the Superintendent of Bankruptcy

Respondent

Docket: BK03 109703
Registry: Edmonton

In the Matter of The Bankruptcy of Fantasy Construction Ltd. Estate No. 109703
Between:

PriceWaterhouseCoopers Inc.

Applicant

- and -

Office of the Superintendent of Bankruptcy

Respondent

Docket: BK03 95683
Registry: Edmonton

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In the Matter of The Proposal of Southbend Construction Ltd. Estate No. 24-095683
Between:

Browning Crocker Inc.

Applicant

- and -

The Office of the Superintendent of Bankruptcy

Respondent

Reasons for Judgment
of the
Honourable Madam Justice J. E. Topolniski

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I. Introduction

[1] The Superintendent of Bankruptcy's (Superintendent) demand that four mortgagees (Re Fantasy Construction Ltd.), an equitable assignee of lands (Re Cutting Edge Foods Inc.), and builders' lien claimants (Re Southbend Construction Company Ltd.) pay the Superintendent's levy under s. 147 of the *Bankruptcy and Insolvency Act*[1] (*BIA*) is the subject of this dispute.

[2] PriceWaterhouseCoopers Inc. (PWC), the trustee in bankruptcy of Fantasy Construction Ltd., and Browning Crocker Inc. (BCI), the proposal administrator of Southbend Construction Company Ltd., seek advice and directions pursuant to s. 34 of the *BIA* as to the *vires* of the Superintendent's Directive No.10, entitled *Redemption of Security and Section 147 Levy of the BIA* (19 December 1997) and liability for the levy. Citing ss. 37, 136(2) and 147 of the *BIA* as the foundation for his application, Dr. David Climenhaga (Dr. Climenhaga), a secured creditor of Cutting Edge Foods Inc., seeks a declaration that he is not liable for the levy. Sufficient funds have been withheld in each case to pay the levy pending the outcome of the respective applications.

[3] A preliminary challenge by the Office of the Superintendent of Bankruptcy (OSB) to this Court's jurisdiction to determine the *vires* of Directive 10 resulted in my decision assuming jurisdiction[2] and an unsuccessful application for leave to appeal that decision.[3]

II. The Actors

[4] A brief overview of the circumstances of the three cases and the actors sets the stage for the analysis concerning the *vires* challenge and, ultimately, liability for the levy regardless of the outcome of that determination.

A. Fantasy Construction Ltd. (Fantasy)

[5] Banking on generating a better sale price, PWC obtained the cooperation of four mortgagees to refrain from commencing or continuing foreclosure proceedings in order to facilitate its attempt to sell the mortgaged lands. Ultimately, two of the mortgagees filed "proofs of claim." PWC secured an offer for the lands that would see the mortgagees paid in full. An unsecured creditor opposed the sale because it thought a better offer could be found. Burrows J. disagreed, and approved the sale and payout of the sale proceeds, with the mortgagees directed to
be paid in full. While the sale proved to be fruitful for the mortgagees and PWC (which had its account, the vast majority of which did not pertain to the sale, significantly paid down), no funds flowed to the unsecured creditors.

[6] PWC characterizes the sale as a redemption of the four mortgagees' interests in the land that cannot trigger the levy irrespective of the *vires* of Directive 10. The OSB characterizes the sale as participation by the mortgagees in the bankruptcy, which when coupled with the trustee's non-compliance with Directive 10, triggers the levy.

B. Southbend Construction Inc. (Southbend)

[7] The proposal in Southbend was made by a building contractor to compromise its unsecured creditors' claims and to resolve builders' lien claims, the claimants of which had *in rem* rights not against Southbend, but against its customers. The proposal referred to the lien claimants as secured creditors and called on them to deliver proofs of claim and voting letters to BCI. The proposal, which ultimately was accepted by the creditors and sanctioned by the Court, provided for payment of the lien claims on BCI's say-so and delivery of a discharge of lien. The payment was made from trust funds held by Southbend's solicitors, comprised of funds transferred by a British Columbia Supreme Court order made in a builder's lien action, funds paid by a landowner, and funds paid by Southbend prior to making the proposal.

[8] None of the lien claimants' proofs of claim were disallowed by BCI. The votes provided by twelve of the fourteen lien claimants were collected, but not counted in tallying the creditors' votes on the proposal. Ultimately, these lien claimants received payment (minus holdback for the levy) from Southbend's counsel, which also paid money directly to other lien claimants who, for some unknown reason, did not engage in the proposal process.

[9] BCI characterizes the lien claimants as property claimants incapable of attracting the levy, irrespective of the description of them as "secured creditors" in the proposal and their questionable participation in the proposal. It contends that the proposal simply provided an efficient means of resolving the builders' lien claims and furthering the capture of residual funds for the benefit of the estate. BCI argues that, in any event, as trust funds were the source of payments to the lien claimants, there can be no liability for the levy. The OSB's view is that the lien claimants participated in and benefited from the proposal. Therefore, they must pay.

C. Dr. David Climenhaga v. OSB (Cutting Edge Foods)

[10] Dr. Climenhaga's involvement in a sale of assets ultimately found to be secured in his favour began with his consenting to a Court order (made without prejudice to the rights of secured creditors to exercise their security rights) allowing the trustee, Bill McCullough & Associates Inc. (McCullough) to sell all of the bankrupt's assets. When Dr.

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Climenhaga's security was questioned, his consent became conditional on being paid in full from the sale proceeds. A tangle ensued.

[11] McCullough demanded a proof of claim and release of his interest in the assets covered by the security, and then obtained a Court order (again made without prejudice to the rights of secured creditors) approving the sale. The order provided that the proceeds were to stand in place of the secured assets, and directed McCullough to hold the proceeds in trust until further order. As Dr. Climenhaga's counsel had been unable to obtain instructions, the order was directed to be held. Six days later (coincidentally, one day after Dr. Climenhaga told McCullough that he opposed the sale and intended to enforce his security), McCullough obtained Court approval to enter the order. Dr. Climenhaga subsequently delivered a "proof of claim" and notice under s. 130 of the *BIA* requiring McCullough to elect whether to redeem the security. McCullough disallowed the proof of claim. After the disallowance was reversed on appeal, McCullough paid the full value of what Dr. Climenhaga said he was owed, less a holdback for the levy.

[12] Dr. Climenhaga characterizes his situation as one of an unwitting and unwilling participant in a sale of assets which were secured in his favour, the result of the sale being that he was paid the full value of his claim, minus a holdback for the levy. As such, he contends that he cannot be liable for the levy. The OSB maintains that the nature of Dr. Climenhaga's participation is irrelevant. He used and benefited from the system. Therefore, he must pay.

D. The Superintendent

[13] The Superintendent is a creature of statute, whose authority is derived from Part I of the *BIA*. Charged with supervising the administration of all *BIA* matters, a significant facet of the Superintendent's work involves licensing, monitoring and disciplining of trustees in bankruptcy. The Superintendent's work also includes investigating bankruptcy offences, record keeping and maintaining statistics.

[14] In ***Sam Lévy & Associés Inc. c. Mayrand***,[4] Martineau J. commented as follows on the supervisory function of the Superintendent:

> The decisions made by a trustee under the Act in the administration of the property of an insolvent debtor have a direct impact on the creditors' rights. Thus, it is clear that Parliament intended to guarantee a high degree of protection for creditors and public confidence in the system of bankruptcy and assignment of property by an insolvent debtor: hence the supervisory role assigned by the Act exclusively to the Superintendent.

[15] According to Beaudry J. of the Federal Court Trial Division in ***Canada (Attorney General) v. Sam Lévy et Associés Inc.***:[5] "[t]he Act gives the Superintendent the power to review the administration of trustees' affairs and estates. It allows him to take administrative and conservatory measures for the protection of the public."

[16] The Superintendent is authorized to intervene in any matter before the courts.[6] The Superintendent also is authorized to issue directives on a broad range of topics concerning administration of the *BIA*, a power derived from ss. 5(4)(b) to (e), which read:

> 5(4) The Superintendent may
>
> (b) issue, to official receivers, trustees, administrators of consumer proposals made under Division II of Part III and persons who provide counselling pursuant to this Act, directives with respect to the administration of this Act and, without restricting the generality of the foregoing, directives requiring them
>
> (i) to keep such records as the Superintendent may require, and
>
> (ii) to provide the Superintendent with such information as the Superintendent may require;
>
> (c) issue such directives as may be necessary to give effect to any decision made by the Superintendent pursuant to this Act or to facilitate the carrying out of the purposes and provisions of this Act and the General Rules, including, without limiting the generality of the foregoing, directives relating to the powers, duties and functions of trustees, of receivers and of administrators as defined in section 66.11;
>
> (d) issue directives governing the criteria to be applied by the Superintendent in determining whether a trustee licence is to be issued to a person and governing the qualifications and activities of trustees; and
>
> (e) issue directives prescribing the form of any document that is by this Act to be prescribed and the information to be given therein. [Emphasis added.]

III. The Issues

[17] There are two main issues in these applications:

1. Is Directive 10 *ultra vires* the Superintendent's powers?

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2. Is there liability for the levy in the Fantasy, Southbend, and Cutting Edge Foods matters?

IV. Is Directive 10 *ultra vires* the Superintendent?

A. Superintendent's Directives

[18] Directives issued by the Superintendent to date cover a variety of topics, both mundane and substantive, including the appropriate paper size to be used for fax transmissions (Directive 9R2 - *Fax and Electronic Filing*), the duties and responsibilities of trustees and administrators in performing the assessment of an individual debtor (Directive No. 6R - *Assessment of an Individual Debtor*), assisting the trustee in equitably and consistently determining the portion of the bankrupt's income that should be paid into the bankrupt's estate under s. 68(3) of the Act (Directive No. 11R - *Surplus Income*), and the subject directive about the requirements to avoid the levy payable under s. 147 of the *BIA* in the case of liquidation of encumbered assets on behalf of a secured creditor (Directive 10 - *Redemption of Security and Section 147 Levy of the BIA*).

[19] Section 5(5) of the *BIA* provides that: "Every person to whom a Superintendent's directive is issued under paragraph (4)(b) or (c) is obliged to comply with the directive in the manner and within the time specified therein."Accordingly, trustees must comply with the Superintendent's directives, failing which they are subject to disciplinary proceedings, which can lead to sanctions, the ultimate sanction being loss of the trustee's license to practice.[7]

[20] Pursuant to s. 5(6) of the *BIA*, directives issued by the Superintendent under s. 5 of the Act are deemed not to be statutory instruments within the meaning and for the purposes of the *Statutory Instruments Act*.[8]

[21] Subsections 5(4)(b) to (c), 5(5) and 5(6) of the *BIA* were enacted in 1992. To date, the reported decisions concerning the directives mainly address their application rather than their *vires*.[9]

B. Section 147 Levy

[22] The subject of Directive 10 is the levy under s. 147 of the *BIA*. Before embarking on a discussion of the *vires* of the directive, it is useful to describe the levy.

[23] It has been referred to as a "form of taxation"on creditors, intended to defray the general expenses of supervision by the OSB.[10] In characteristic fashion, Registrar Funduk minced no words in his description of the levy as: "... a tax regardless of semantics and it is a tax imposed on creditors who receive a dividend or a payment on account of the debt owed to them."[11] Similarly, the OSB characterizes the levy as "...in essence a tax imposed on debtors and creditors who use the bankruptcy system to deal with their affairs." It is payable on all payments made by a trustee by way of dividend or otherwise on account of the claims of creditors, whether unsecured, preferred or secured.

[24] The levy is authorized by s. 147 of the *BIA*, which reads as follows:

> 147(1) For the purpose of defraying the expenses of the supervision by the Superintendent, there shall be payable to the Superintendent for deposit with the Receiver General a levy on all payments, except the costs referred to in subsection 70(2), made by the trustee by way of dividend or otherwise on account of the claims of creditors, whether unsecured, preferred or secured creditors, and including Her Majesty in right of Canada or a province claiming in respect of taxes or otherwise.
>
> (2) The levy referred to in subsection (1) shall be at a rate to be fixed by the Governor in Council and shall be charged proportionately against all payments and deducted therefrom by the trustee before payment is made.[12]

[25] The predecessor of s. 147, s. 106, was enacted in 1950 and corresponds to s. 126 of the original *Bankruptcy Act*, which was enacted in 1919 and brought into force in 1920.[13] The provision has not been amended significantly since that time.

[26] Section 136(c) of the *BIA* affords the levy the status of a priority claim, ranking it in third place after testamentary expenses and the costs of administration/trustee's fees.

C. Directive 10

[27] Directive 10, issued on December 19, 1997, provides in part:

> *Purpose*
>
> This Directive is intended to specify the operation of section 147 of the *BIA* in the case of the liquidation of encumbered assets on behalf of a secured creditor. It is also aimed at ensuring greater transparency and uniformity in the trustee's presentation of the statements of receipts and disbursements, as well as a standard approach to the examination of these statements by bankruptcy officers.
>
> . . .
>
> *Subject*
>
> This Directive is issued pursuant to paragraph 5(4)(b) of the Act and it establishes the circumstances in which trustees are viewed as acting in a double capacity and the circumstances in which they are

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considered to be making a redemption of security. This Directive also establishes the cases in which the levy prescribed by section 147 of the Act is payable on amount[s] paid to secured creditors.
In addition, it establishes the procedure to be followed in presenting a redemption in the statement of receipts and disbursements.
Sections of the Act Concerned:

13.4; 128; 147; and 152.
Related Directive Concerned:
15R.
Policy
Except in the cases listed below, the section 147 levy is payable on all payments by a trustee to a secured creditor. This principle stands even if a third party such as, for example, a notary public, liquidator or an auctioneer makes the payment to the secured creditor for and on behalf of the trustee.
Since the redemption is not a "consensual operation", but rather a unilateral action taken by the trustee with the intention of obtaining an advantage for the estate, it therefore excludes the case of the trustee acting on behalf of the secured creditor.
A trustee acting in this capacity can redeem a security only through the mechanism provided for in subsection 128(3) of the Act.
Exceptions
1. The trustee obtained a mandate from the secured creditor and complied with the provisions of section 13.4 of the Act, Directive No. 15R, sections 245 and following sections (if applicable), and the assets were sold while the trustee acted as an agent, receiver or mandatary but not as trustee.
2. The trustee proceeded with redemption of the security within the meaning of subsection 128(3) of the Act. In such a case, all of the following conditions must be fulfilled:

a) the secured creditor must produce a proof of claim prior to the offering of the encumbered assets for sale. Should the secured creditor not produce a proof of claim, it is the trustee's responsibility to take advantage of the provisions of subsection 128(1) of the Act;

b) the encumbered assets must be sold at a net price superior to, or at least equal to, either the total of the claim or the amount of the valuation of the security as established by the creditor in the creditor's proof of claim;

c) to show that it is a redemption that fulfils these conditions, the trustee must file, with the statement of receipts and disbursements, an attestation pursuant to Appendix 1 of this Directive...

For the purpose of this directive the net price is the gross price paid by the purchaser less the trustee's disbursements and remuneration pertaining to the redemption.
The receipts, the disbursements as well as the trustee's remuneration pertaining to the redemption must be recorded in the statement of receipts and disbursements. If the trustee makes several redemptions, the trust must submit an equivalent number of Appendices with the statement.
In the event that the trustee sells unencumbered and encumbered assets in the same transaction, the disbursements must be shares *pro rata* between these two categories of assets. If another method is used, the trustee must indicate the method used and justify the choice.

[28] Directive 10 identifies as one of its objectives: "... to ensure that the body of creditors is not penalized in any way and does not bear any cost for the trustee's liquidation of encumbered assets on behalf of a secured creditor." The Directive indicates in the "*Subject*" statement that it is meant to establish "the circumstances in which trustees are viewed as acting in a double capacity and the circumstances in which they are considered to be making a redemption of security."

[29] The following general principles relating to the levy are relevant to this application:

1. A creditor disputing liability for the levy bears the onus of establishing that he or she is not so liable.[14]
2. Levy is not payable where the trustee is acting in another capacity (i.e. as mandatory, agent or receiver);[15]

[30] The law is divided on:

1. Whether s. 128 of the *BIA* is a complete codification of the trustee's right of redemption;[16]

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2. Whether the secured creditor must file a proof of claim before a trustee purports to redeem by paying the whole debt;
3. Whether a secured creditor who allows a trustee (not acting in a double capacity) to sell the bankrupt's assets covered by his or her security is necessarily liable for the levy;[17]
4. The effect of filing or not filing a proof of claim on a secured creditor's liability for the levy.[18]

D. *Vires* of Directive 10

[31] PWC and BCI assert that Directive 10 affects the rights of secured creditors, overrules case law, and usurps the court's function of interpreting the *BIA*. They contend the Directive is *ultra vires* as an unauthorized infringement on Parliament's right to legislate and the Court's right to adjudicate.

1. Rules of Statutory Interpretation

[32] Analysis of the *vires* of Directive 10 necessarily begins with an overview of the most relevant principles of statutory interpretation.

[33] The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in countless cases, including ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42 (CanLII), 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[34] Other relevant principles of statutory interpretation include:

1. The presumption of regularity, which requires the Court to proceed on the assumption that subordinate legislation is within the authority conferred by the enabling Act. The court is not to declare it invalid without clear evidence to support such a finding.[19]
2. Parliament is understood not to legislate gratuitously. Inferences of broader generality under the concept of *expressio unius* are discouraged.[20]
3. The presumption against absurdity; that is, an interpretation that leads to ridiculous or frivolous consequences, is extremely unreasonable or inequitable, is illogical or incoherent, is incompatible with other provisions or with the object of the legislative enactment, or defeats the purpose of a statute or renders some aspect of it pointless or futile.[21]

2. The *BIA* and Secured Creditors

[35] The *BIA* is a statute governed by business principles that puts day-to-day administration into the hands of business people (trustees in bankruptcy and often inspectors) and should not be interpreted in an overly narrow or legalistic fashion.[22] Stated otherwise, *BIA* issues require consideration of the realities of commerce, practicality and business efficacy.

[36] Subject to certain provisions of the *BIA*, ss. 79, 127 to 135 and 248(1) included, or unless the court orders otherwise, the bankruptcy of a debtor does not prevent secured creditors from realizing or otherwise dealing with their security as they would have but for the bankruptcy.[23] While secured creditors often are described as strangers to the bankruptcy process, such characterization is not entirely accurate. As noted by the Supreme Court of Canada in ***Federal Business Development Bank v. Québec (Commission de Santé et de la Securité du Travail du Québec)***:[24]

> The secured creditor did liquidate his security outside the bankruptcy proceeding. However, it must be kept in mind that it is the *Bankruptcy Act* itself which authorizes him to act in this way. Section 49(2) of the Act provides that "a secured creditor may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it" if s. 49(1) had not had the effect of staying proceedings brought by creditors of the debtor. It is therefore wrong to suggest that the *Bankruptcy Act* does not apply to a creditor who chooses to realize his security outside the bankruptcy proceeding. Sections 49, 57, 98, 101 and 102 of the Act, which deal with secured creditors in this context, only reinforce this opinion.

[37] Secured creditors may choose to participate in a bankruptcy by surrendering their security or proving the balance due them after realizing their security.[25] Secured creditors affected by a proposal may choose to participate by voting on the proposal.[26]

[38] There are two ways that a trustee can oblige a secured creditor to deliver a proof of security (as compared to a proof of claim, although both types of proof are provided by delivery of Form 31). The trustee can serve a notice under s. 149(1) or s. 128(1). In both cases, a creditor which fails to prove its claim within thirty days or such further time as the court allows, is excluded from receiving a dividend.

[39] Typically, notice under s. 149(1) is sent when the trustee is contemplating payment of a dividend and wants to ensure that a secured creditor will not be claiming a dividend as an unsecured creditor.[27] Notice under s. 128(1), which is

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discussed below in the context of redemption, is intended to allow the trustee to determine whether it should redeem the security.[28] It obliges the creditor to provide the trustee with a proof of security that gives particulars of the security, the date the security was given, and the value at which the secured creditor assesses the security.

[40] In the context of a bankruptcy, if a secured creditor delivers a proof of claim or proof of security, s. 135 obliges the trustee to examine it and allows the trustee to require further evidence in support of the claim or security. However, partial or complete disallowance of the security by the trustee under s. 135 does not alter the value of the security as assessed by the secured creditor in the proof of security under s. 128 for redemption or realization purposes. If the trustee disagrees with the secured creditor's assessed value, s. 129 provides for a procedure whereby the trustee may force a sale of the security. Section 135 relates to the allowance or disallowance, in whole or in part, of the security itself for the purpose of distribution of dividends from the bankrupt estate.[29]

[41] ***Re Workgroup Designs Inc.***[30] instructs proposal administrators to assess the value of a secured creditor's claim under s. 50.1, which specifically addresses the approach to be taken where a proposal has been made to secured creditors, rather than using the general provision in s. 135.[31]

3. The Nature of Directive 10

[42] In his Reasons on the jurisdiction challenge, Watson J.A. questioned whether Directive 10 should be classified as "hard" or "soft" law. Mr. Justice Watson's comments invited further discussion of the issue in the context of this application concerning the *vires* of Directive 10. Depending on their perspective, the parties posited that Directive 10 was "hard law" or a hybrid combining features of "soft law" and "hard law." PWC chose to extend the debate to discuss the effect of s. 5(6) of the *BIA*, which provides that the Superintendent's directives are not statutory instruments within the meaning of the *Statutory Instruments Act*. This in turn led to written submissions by the parties who, again depending on their perspective, advocated that Superintendent's directives should be defined as regulations or unenforceable administrative guidelines, given s. 5(6) of the *BIA*. Regrettably, this fulsome discussion did not occur at the time of the jurisdictional challenge.

[43] In the jurisdictional challenge I observed that the issuance of a general directive by the OSB was in the nature of a legislative act. I did not rule on whether the Superintendent was within his statutory jurisdiction to issue Directive 10, only that the Superintendent was purporting to do so and as such the action was a matter subject to "judicial scrutiny."

[44] *The Dictionary of Canadian Law*[32] defines "legislative act" as "[a]n action or decision which imposes a general rule of conduct. Contrasted with decisional or judicial act which concerns a particular case."

[45] Professor J.M. Evans in de Smith, Stanley A., *Judicial Review of Administrative Action*,[33] writes that:

> A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice.

[46] Based on these definitions, I am of the view that the Superintendent undertakes a legislative act in issuing directives pursuant to the *BIA*.

[47] In his Reasons for denying leave to appeal the jurisdiction challenge, Watson J.A. observed[34] that Directive 10 has legal consequences and, therefore, is "more affirmative as law than even 'soft law' procedural guidelines to regulate the tribunal process itself," referencing in that regard ***Thamotharem v. Canada (Minister of Citizenship and Immigration)***.[35]

[48] ***Thamotharem*** dealt with the validity of a guideline issued by the Chair of the Immigration and Refugee Board, which set a standard practice for questioning a person seeking refugee protection. In determining that the guideline was "soft law" that did not require Parliamentary approval, the court noted there was no sanction for non-compliance and the guideline was not binding in any event. Of interest is the court's observation at para. 55 that:

> Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case by case basis.

[49] In Denys C. Holland and John P. McGowan's text, *Delegated Legislation in Canada*,[36] the authors suggest that: "A general rule has developed to the effect that regulations and other examples of subordinate legislation form substantive law, while guidelines and directives, although authorized by statute, do not."

[50] The Alberta Court of Appeal in ***Johnston v. Alberta (Director of Vital Statistics)***[37] clarified that while this may be the general rule, there is an exception, stating:

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> The general rule is that regulations, rules, by-laws and orders are legally binding, but policy statements and guidelines are not, unless "[a] functional and purposive approach to the nature of [the] guidelines reveals that they are a form of law, akin to regulations:" ***Bell Canada v. Canadian Telephone Employees Assn.***, 2003 SCC 36 (CanLII), 2003 SCC 36, [2003] 1 S.C.R. 884 at para. 37; ***Maple Lodge Farms Ltd. v. Canada***, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2 at 6-7, 137 D.L.R. (3d) 558; ***Pezim v. British Columbia (Superintendent of Brokers)***, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557 at 596, 114 D.L.R. (4th) 385; ***Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)***, 2001 ABQB 624 (CanLII), 2001 ABQB 624, 292 A.R. 86 at paras. 75-82. [Emphasis added.]

[51] As the underlying statute in that case did not specifically or by inference contemplate a policy document, the court held the policy did not have the force of law and no legal rights and obligations arose from it.

[52] ***Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)***,[38] a decision of Slatter J. (as he then was), is of particular relevance to the issue of whether Directive 10 has legal effect, as there are a number of parallels between the two cases, including:

1. ***Skyline*** concerned a policy issued under the *Workers' Compensation Act*. The Act gave the Board the power to make policy and made such policies binding on the Appeals Commission. Slatter J. accepted[39] that the policy in issue was simply a clarification of a previous "directive" issued by the Assessment Management Committee that "individuals working in an industry to which the *WCA* applies and who are pooling their labour for completion of a labour contract for another person also engaged in an industry to which the *WCA* applies are each deemed to be workers of that other person ('the principal')." Here, Directive 10 was issued under the *BIA*, which gives the Superintendent the power to issue directives and makes such directives binding on trustees. Directive 10 refers to its substance as "policy."
2. The policy in ***Skyline*** was binding on the Appeals Commission but was of financial significance to Skyline, which, based on the policy, was found to be the employer of a subcontractor who had been injured on the job and, as the employer, was subject to assessment. Slatter J. commented that the policy was an "assessment policy" and that while assessments were not truly taxes, they were a compulsory statutory levy. Directive 10 concerns a similar levy and, while binding on trustees, has a potential financial impact on secured creditors.
3. The *Workers' Compensation Act* under consideration in ***Skyline*** specified that the orders, rulings, decisions or directions of the Board need not be published in the Alberta Gazette. Slatter J. declined to interpret this as meaning the policy was not otherwise covered by the *Regulations Act*, although he made no finding in that regard as he was of the view that it was unclear whether the policy was a regulation. Section 5(6) of the *BIA* provides that directives issued by the Superintendent under s. 5 of the Act are deemed not to be statutory instruments within the meaning and for the purposes of the *Statutory Instruments Act*.

[53] A notable difference between the present case and ***Skyline*** is that the matter before Slatter J. was a judicial review of a decision of the Workers' Compensation Appeals Commission, which had upheld a decision of the Workers' Compensation Assessment Review Committee finding Skyline to be the subcontractor's employer. The present applications concerning the *vires* of Directive 10 are for advice and directions.

[54] Interestingly, Slatter J. commented in ***Skyline*** on the potential for different results in scrutinizing a board's statutory interpretation undertaken in its adjudicative role as opposed to statutory interpretation involved in development of "policy," observing that:[40]

> ... As I have previously held, the standard of review for the decisions of the Board would generally be "patent unreasonableness." On the other hand, the standard of review for the validity of subordinate legislation would conventionally be "correctness:" ***Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources***, *supra*, para. 57. This leads to a rather unusual result. If the Board had decided this particular issue *ad hoc*, without any policy in place, its decision would not be reviewed unless it was patently unreasonable. However, if the Board enacts a statutorily authorized policy, conventional thinking would hold that the standard of review of the *vires* of the policy would be correctness. This apparent anomaly can perhaps be justified on the basis that if the decision was made *ad hoc*, the worker would have a right to a hearing, and would be allowed to address the issue without any presumptions. Once a policy is enacted, the worker must effectively explain why the policy should not be applied. Displacing a set policy is usually a significant task...

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[55] The applicant in ***Skyline*** argued that: (1) the policy in issue was *ultra vires* the Board; (2) the Board had applied the policy in a way that fettered its discretion; and (3) the policy could not be applied retroactively to the accident that had occurred.

[56] In the process of determining the appropriate standard of review to be applied, Slatter J. commented[41] that there were significant policy issues underlying the questions in that case and that those questions were "all within the core jurisdiction of the Workers' Compensation Board and its Appeals Commission, and were intended by the Legislature to be decided by them."

[57] Skyline submitted that, whatever the policy-making power of the Board, it could not make a policy that overrode a particular statutory requirement. Slatter J. concluded that the policy was not *ultra vires* as it was supported by the deeming powers given to the Board and complemented by the policy-making power granted to the Board under the Act.

[58] Of particular note are the following portions of Slatter J.'s decision:[42]

> In discussing this issue it is appropriate to highlight that there are two different kinds of policy recognized by the law. Almost all administrative tribunals will have various internal directions, precedents, policies, discussion papers, and other materials that indicate the general approach they take to various issues that come before them on a regular basis. These materials may or may not be designated as "policies" but I will refer to them as "informal policies". A second type of policy is a policy that is authorized and sanctioned by the enabling legislation. Section 3.1 of the *Workers' Compensation Act* (supra, para. 16) is an example of an express power granted to an administrative tribunal to adopt policies. Both informal policies and policies authorized by statute must be consistent with the underlying statute, unless a specific power is given to enact policies beyond the scope of the statute. The effect, however, of the two types of policies is potentially different. [Emphasis added.]
>
> . . .
>
> The high water mark in the effect of informal policies arose in ***Ainsley Financial Corp. v. Ontario Securities Commission*** 1994 CanLII 2621 (ON CA), (1994), 21 O.R. (3d) 104, 121 D.L.R. (4th) 79 (C.A.). The Securities Commission had adopted policies on "penny brokers." The policies were written in rigid, mandatory wording, much like regulations, and purported to impose penalties on those who did not comply. The Ontario Court of Appeal summarized the law as follows (at pp. 108-9, authorities omitted):
>
> > . . .
> > Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation... Nor can a non-statutory instrument preempt the exercise of a regulator's discretion in a particular case... Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue *de facto* laws disguised as guidelines...
>
> . . .
>
> The ***Ainsley*** decision resulted in the amendment of most Canadian securities acts to expressly authorize rules or policies of the type in question. Policies adopted pursuant to such specific statutory authority clearly stand on firmer ground, but even their status is not free from doubt. ***R. v. Beaver Creek Correctional Camp, Ex Parte MacCaud***, [1969] 1 O.R. 373, 2 D.L.R. (3d) 545 (C.A.) and ***Martineau v. Matsqui Institution***, 1977 CanLII 4 (SCC), [1978] 1 S.C.R. 118, 74 D.L.R. (3d) 1 both concerned Commissioner's directives authorized by s. 29(3) of the *Penitentiary Act*, R.S.C. 1970, c. P-6: ". . . the Commissioner may make rules, to be known as Commissioner's directives . . . ". Both decisions held that the Commissioner's directives did not have the full force of law, at least in the same sense as the statute or the regulations. These two decisions have been persuasively criticized: see D.C. Holland and J.P. McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at pp. 104-108. In ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, ***Martineau*** was explained on the basis that the directives were merely administrative, with no legislative content that could make them "law" under the *Federal Court Act* and so subject them to judicial review.
>
> Later cases have given greater effect to policies authorized by statute. In ***Macoon v. Alberta (Workers' Compensation Board)*** 1993 ABCA 9 (CanLII), (1993), 7 Alta. L.R. (3d) 201, 135 A.R. 183 (C.A.), a decision binding on me, the Court held that the Board's policies do have legal force. The particular policy in issue was found not to contradict the Act, but the Court implied that if it did, it would be invalid. If a statute, a regulation and a policy conflict, the statute would prevail over the regulation, and probably the

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> regulation would prevail over the policy. Other decisions giving legal effect to policies authorized by statute are: ***Strauts v. College of Physicians and Surgeons*** 1996 CanLII 8471 (BC SC), (1996), 42 Admin. L.R. (2d) 219 aff'd 1997 CanLII 3188 (BC CA), (1997), 47 Admin. L.R. (2d) 79 (B.C.) (resolutions on the appropriateness of a particular therapy); ***Friends of the Oldman River***, *supra*, ("*Guidelines Order*" under the Department of the Environment Act has legal force); ***Whelan v. Newfoundland (Workplace Health, Safety and Compensation Commission)*** 1999 CanLII 19145 (NL SCTD), (1999), 181 Nfld. & P.E.I.R. 192 (Nfld.) and ***Peet v. Canada (A.G.)***, 1994 CanLII 3484 (FC), [1994] 3 F.C. 128 (*Conflict of Interest Code* can create rights). [Emphasis added]
>
> Exactly how far a policy can go must in each case be a matter of statutory interpretation of the enabling legislation. As Holland and McGowan, *supra*, state at p. 109:
>
> > A careful examination of the relevant statute's enabling clause as well as of the instrument in question must be undertaken. In this respect, the title of the instrument may be of some, *albeit* slight, aid. The terms "guideline" and "circular", for instance, to us imply a less rigid and more informative content, while "rules" and "directives" seem to suggest a more mandatory, normative substance. We emphasize, however, that the terminology used to describe an instrument should never be seen as determinative of the issue.
>
> Particular issues about scope, such as whether a policy can be retroactive, or can impose sanctions, or levy fees, will depend on the context. See ***Friends of the Oldman River***, *supra*.

[59] One of the issues before Slatter J. was whether the statutory policy in issue could narrow, foreclose or "fetter" a discretion granted by the statute. Clearly, an informal policy could not. Mr. Justice Slatter took from his review of the case law that so long as a policy runs parallel to the statute, there is no problem even if the policy suggests how and when the discretion might be exercised. However, the statutory wording must be considered in determining whether a rigid and mandatory policy can constrain statutory discretion. The discretion involved in ***Skyline*** was the ability of the Board to declare a particular worker to be the worker of one principal rather than of another. In view of the power given to the Board in the definition of "employer" to "deem" a person to be an employer, he concluded that the legislative intent was to allow the Board, in that particular case, to fetter the discretion it was otherwise granted by the Act.

[60] In accordance with ***Skyline***, the starting point in determining the nature and effect of Directive 10 is the wording of the enabling provisions in the *BIA* and the directive itself.

[61] In ***BPCL Holdings Inc. v. Alberta***,[43] the appellant challenged the validity of regulations and standards issued pursuant to the *Public Health Act* as being beyond the scope of the authority given by the Act to the Lieutenant Governor in Council. The majority noted[44] that "subordinate legislation must be authorized by the empowering statute and must accord with its object and purpose." Further, the majority agreed[45] with the chambers' judge that a real and meaningful connection must exist between the subordinate legislation and the authority granted to the Lieutenant Governor by virtue of the Act.

[62] As stated above, the Superintendent has authority under s. 5(4) of the *BIA* to issue directives to trustees with respect to administration of the Act or as may be necessary to facilitate the carrying out of the purposes and provisions of the Act and the General Rules, including, without limiting the generality of the foregoing, directives relating to the powers, duties and functions of trustees.

[63] "To administer" has been described as meaning to serve governmental policy. It is variously defined as: "responsible for the implementation of (the law, justice, punishment, etc.)"[46] or "the management or performance of the executive duties of a government, institution, or business."[47]

[64] In ***British Columbia Development Corp. v. British Columbia (Ombudsman)***,[48] the Supreme Court of Canada, considered the words "administration" and "administrative" to be "... fully broad enough to encompass all conduct engaged in by a governmental authority in furtherance of governmental policy—business or otherwise."

[65] "Facilitate" is defined in the *The Canadian Oxford Dictionary*[49] as: "[to] make (an action, result, etc.) easier, less difficult, or more easily achieved."

[66] Directive 10 is said to be issued pursuant to s. 5(4)(b) of the *BIA*, which authorizes the Superintendent to issue directives relating to administration of the Act, including directives requiring trustees to: (i) keep such records as the Superintendent may require; and (ii) provide the Superintendent with such information as the Superintendent may require.

[67] To the extent that Directive 10 deals with administration of the Act (for example, the requirement that the trustee file an attestation to show a redemption), it is within the general scope of the authority given by the Act to the Superintendent.

[68] Directive 10 states that it is aimed at establishing the circumstances in which trustees will be viewed as acting in a double capacity and the circumstances in which they will be considered to be making a redemption of security. Also, it is intended to establish situations where the levy prescribed by s. 147 of the Act will be payable on amounts paid to

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secured creditors, and to establish the procedure to be followed by trustees in presenting a redemption in the statement of receipts and disbursements.

[69] In my view, these matters go beyond simple administration of the Act. However, they fall within the broader directive-making authority granted to the Superintendent under s. 5(4)(c) of the *BIA* to facilitate the carrying out of the purposes and provisions of the Act and the General Rules by trustees. Under s. 128(3) of the Act, trustees have the power to redeem security. Pursuant to s. 147(2), they are required to deduct levy from payments made "by way of dividend or otherwise on account of the claims of creditors."

[70] Superintendent's directives have been said to serve the purpose of providing trustees and the insolvency community with direction as to how the *BIA* should be interpreted and applied so there will be consistency across Canada.[50]

[71] However, the *BIA*, unlike the legislation at issue in ***Skyline***, does not give the Superintendent deeming authority with respect to the relevant provisions of the Act. The Superintendent is not entitled to deem that a trustee is acting as trustee of the bankrupt estate rather than as an agent, to deem that a redemption has or has not occurred, or to deem that levy is owing. Directives issued by the Superintendent are meant to assist in administration of or to facilitate the carrying out of the provisions of the *BIA* as properly interpreted.

[72] While the Superintendent may be required to interpret the Act in the course of developing directives, if he prefers one line of conflicting case authority over another, he must be correct. Similarly, if the Superintendent interprets a provision of the Act that has not been interpreted by the Courts, he must be correct. In other words, the Superintendent's interpretations must reflect the law. They cannot make or alter it.

[73] ***Re Dondale***,[51] a decision by Burnyeat J. of the British Columbia Supreme Court, does not specifically address the *vires* of a Superintendent's directive, but nevertheless it is instructive as it dealt with a requirement by the Superintendent that trustees follow a process that favoured one of two lines of conflicting case authority. The dispute in that case focused on whether a proposal administrator could extend the time for the making of payments under a consumer proposal by a provision in the proposal suspending the operation of s. 66.31 of the *BIA*, which deems the proposal annulled if the debtor is in default of three months of payments.

[74] Similar provisions in consumer proposals had been dealt with differently by two Registrars; ***Re Williams***[52] authorized suspension of the operation of s. 66.31, but ***Re Sztojka***[53] did not. By means of a "Position Statement," the Superintendent directed all trustees and administrators that the ***Re Sztojka*** approach was to be preferred. Later, the Superintendent amended Form 47 by way of directive in order to reflect the decision in ***Re Sztojka***.

[75] Burnyeat J. ruled in ***Re Dondale*** that the Superintendent could not dictate the terms of a proposal, stating that:[54]

> Fourth, it was the submission on behalf of the Superintendent that one of the functions of the Superintendent is to oversee compliance with the *Act* and to oppose the approval of proposals or, in this case, consumer proposals, that do not comply with the *Act*. That is not a duty which is imposed on the Superintendent of Bankruptcy under s. 5 of the *Act* or on Official Receivers pursuant to s. 12 of the *Act*. Rather, it is up to the Court to see that proposals and consumer proposals comply with the *Act* when requested to do so pursuant to s. 66.24 of the *Act*. Accordingly, while the Superintendent may intervene where the Superintendent "considers it expedient to do so" (s. 5(4)(a) of the *Act*) and while the Court must take into account submissions made by the Official Receiver (pursuant to s. 66.24(1) of the *Act*), it is up to the Court to decide whether there has been compliance with the *Act*.

[76] Burnyeat J. concluded that the effect of the Superintendent's actions was to ignore the clear effect and direction of one line of authority. He noted that in ***Re Williams***, Master Baker observed that while the Superintendent's direction was apparently meant as a temporary solution to address possible inequities created by s. 66.31, it was "hard to see how such a directive and consequent Certificate could withstand a challenge by, say, a creditor."[55]

[77] ***Re Dondale*** is under appeal by the OSB, which urges that it is both distinguishable and wrong. I agree that it is distinguishable on its facts, but it does provides insight into the Superintendent's right to chose one interpretation of the *BIA* over another in the face of conflicting law.

[78] The topics dealt with in Directive 10 are of interest not only to trustees but also to secured creditors. However, it is apparent that Directive 10 is aimed only at trustees and bankruptcy officers. Section 5(5) of the *BIA* provides that: "Every person to whom a Superintendent's directive is issued under paragraph (4)(b) or (c) is obliged to comply with the directive in the manner and within the time specified therein." Trustees are bound by the Directive if it is *intra vires*. As the Superintendent's interpretation of the Act in Directive 10 has the potential to effect secured creditors, that interpretation must be right.

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[79] In my view, Directive 10 is *intra vires* the Superintendent's powers only to the extent that it is consistent with and properly interprets the *BIA*. If it does not, the Superintendent has exceeded his authority in issuing the directive and it is *ultra vires*.[56]

[80] Certain cases have held that the courts are not bound by Superintendent's directives, although regard may be given to them.[57] Whether that conclusion is accurate depends on the *vires* and legal effect of the directive. If it is *intra vires* and was meant to have legal effect, the Court must give effect to the directive just as it would to a statute or regulation.

[81] In an annotation to ***Re Clements***,[58] the late C.W. Morawetz Q.C. posited that a Registrar in Bankruptcy could not be bound by a directive issued by the Superintendent unless the directive was strictly in accordance with the then *Bankruptcy Act* or *Bankruptcy Rules*, observing that: "After all, although a 'directive' might be persuasive, it is neither a statute nor a rule or regulation." This observation preceded the 1992 amendments to the *BIA*, which included the Superintendent's express power to make directives (ss.5(4)(b) and (c)), the duty of trustees to comply with those directives (ss.5(5)) and 5(6), and deeming of such directives not to be statutory instruments within the meaning and for the purposes of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22.6.

[82] In ***Sheriff v. Canada (Attorney General)***,[59] the Federal Court of Appeal considered a Superintendent's directive entitled "Disciplinary Process under sections 14.01 and 14.02 of the Act" in the context of the Superintendent's investigation into the conduct of a trustee, saying (without analysis as to why) this about the directive:

> The Superintendent's Directive describes the procedure to be followed by the OSB in examining the conduct of a trustee which may lead to disciplinary measures involving his or her license. While such directives do not have the force of an act or regulation, they can be used to provide legal context and inform decisions.

[83] In ***Re Ryan***,[60] the Superintendent sought a strict interpretation of Directive 12. The New Brunswick Court of Queen's Bench concluded:

> ...In 1992, ss. 5(4)(b) and (c) and ss. 5(5) and 5(6) were added to the *Act*. These amendments give statutory authority to the Directives issued by the Superintendent. If one accepts that a Directive has statutory authority, the Superintendent does not have the competence to waive its application in a specific case unless this power is conferred in the Act, which it is not.

[84] In *Bankruptcy and Insolvency Law of Canada*,[61] the authors comment:

> In 1992, ss. 5(4)(b) and (c) and ss. 5(5) and 5(6) were added to the Act. These amendments give statutory authority to the directives issued by the Superintendent. The directives are not statutory instruments so they do not have to be published. If a trustee fails without reasonable excuse to comply with a directive of the Superintendent, the trustee will be liable to have his or her licence suspended or cancelled under s. 14.01(1).

[85] Directive 10 is deemed not to be a statutory instrument within the meaning and for the purposes of the *Statutory Instruments Act*, which provides in part:

> 2(1) In this Act,
> "prescribed" means prescribed by regulations made pursuant to this Act;
> "regulation" means a statutory instrument
> (a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or
> (b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,
> and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;
> "statutory instrument"
> (a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> (i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or
> . . .
> but

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(b) does not include

. . .

(ii) any instrument referred to in paragraph (a) and issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament.

[86] Superintendent's directives are directions made in the execution of a power conferred by or under the *BIA*, which expressly authorizes issuance of directives by the Superintendent. Accordingly, directives appear to fit the definition of "statutory instrument" in the *Statutory Instruments Act*. Pursuant to s. 14.01(12) of the *BIA*, contravention of a directive by a trustee exposes the trustee to possible disciplinary action, including cancellation of the trustee's licence. This can be viewed as a penalty prescribed by an Act of Parliament. Directive 10 appears to have been issued in the exercise of a legislative power conferred by the Act. As a result, it appears to fit the definition of "regulation." However, the *BIA* expressly provides that it is not a statutory instrument for the purpose of the *Statutory Instruments Act*, leading to two possible interpretations:

(a) it is not a statutory instrument (and hence a legislative act with legal effect), despite the fact it facially meets the *Statutory Instruments Act* definition of such; or

(b) it is and all that s. 5(6) means is that it need not be promulgated in accordance with the *Statutory Instruments Act*.

[87] In my view, the deeming provision in the *BIA* would be unnecessary if directives, or at least some of them, were not in fact statutory instruments. I agree with the authors of *Bankruptcy and Insolvency Law of Canada* that the effect of deeming the directives not to be statutory instruments for purposes of the *Statutory Instruments Act* is that they do not have to be published and do not have to comply with the other formalities outlined in that Act.[62] However, for all other intents and purposes, Directive 10 does have the same legal effect as a regulation (if it is *intra vires* the Superintendent). This interpretation accords with the rule of statutory interpretation that Parliament is understood not to use words and to legislate gratuitously.

4. Redemption

[88] The heart of the debate on the *vires* of Directive 10 in Fantasy is whether it simply reflects the redemption provisions of the *BIA*, misstates them, or purports to augment them. The question that arises is whether Parliament modified the law of redemption by requiring that redemption occur only in compliance with s. 128 of the *BIA*, as specified in the Directive.

[89] "Redemption" and related terms have been defined as meaning:

1. "Redeem":

To buy back. To free property or article from mortgage or pledge by paying the debt for which it stood as security. To repurchase in a literal sense; as, to redeem one's land from a tax-sale. It implies the existence of a debt and means to rid property of that incumbrance.[63]

2. "Redemption":

The realization of the right to have the title of property restored free and clear of the mortgage; performance of the mortgage obligation being essential for that purpose; A repurchase; a buying back. The act of the vendor of property in buying it back from the purchaser at the same or an enhanced price...; The process of cancelling and annulling a defeasible title to land, such as is created by a mortgage or a tax-sale, by paying the debt or fulfilling the other conditions; Repurchase of notes, bonds, stock, bills, or other evidence of debt, by paying their value to their holders...[64]

... the right of parties entitled to such interest to obtain possession and enjoyment of real property and is a remedy which is available to a mortgagor, or other person, only when that person is out of possession. This means redemption is available only when the mortgagee is in actual or constructive possession of the real property.[65]

3. "Right of Redemption":

The right to disencumber property to free it from a claim or lien; specifically, the right (granted by statute only) to free property from the encumbrance of a foreclosure or other judicial sale, or to recover the title passing thereby, by paying what is due, with interest, costs, etc. Not to be confounded with the "equity of redemption," which exists independently of statute but must be exercised before sale.[66]

[90] Redemption is a unilateral act that operates irrespective of the wishes of the secured party.

[91] The equity of redemption in relation to land is an estate in the land that arises at common law in some jurisdictions and in others, such as in Alberta, by statute.[67] It enables the mortgagor, and hence the trustee, on payment

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of the mortgage debt, to obtain reconveyance of the lands in the case of a common law mortgage or a discharge or transfer of the mortgage in the case of a statutory mortgage. As stated by Baynton J. in ***Farm Credit Corp. v. Nelson***:[68]

> The right to redeem a common law mortgage was granted in equity to enable the mortgagor to obtain a re-conveyance of the land on payment of the mortgage. The right to redeem a statutory mortgage arises by statute, not the mortgage document itself. As well, it only arises when the mortgage is in default and foreclosure or sale proceedings have been commenced to enforce it. It is not only the mortgagor who has a right to redeem. Any subsequent encumbrancer who is faced with losing the land or the subordinate security is entitled as well to exercise this right.
>
> The right to redeem a Torrens system mortgage also arises by statute. "Redemption" is somewhat of a fiction as no notional re-conveyance is required. A right to redeem is the right to have the property freed from the secured charge. *Torrens System Mortgages*, pp. 90-91.

[92] Dickson J. noted in ***Petranik v. Dale***:[69]

> ... an equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land (Megarry and Wade, *The Law of Real Property* (3rd ed.) at p. 885, and *Cheshire's Modern Real Property* (10th ed.) at p. 568) and that equity has always jealously guarded the mortgagor's right to redeem.

[93] The equity of redemption in terms of a common law mortgage is an asset that vests in the trustee.[70] In Alberta, as there is no restriction on the statutory right of redemption in the *Law of Property Act* which would limit the right to the bankrupt alone, it too vests in the trustee.[71]

[94] The right to redeem chattel security in Alberta is covered by s. 63 of the *Personal Property Security Act*.[72] A similar provision exists in other jurisdictions.[73] As property of the bankrupt, it too vests in the trustee.[74]

[95] Turning to the relevant provisions of the *BIA*, s. 128 is the primary provision concerning redemption by the trustee. However, it cannot be read in isolation from ss. 127 to 134.

[96] Section 128 reads as follows:

> 128(1) Where the trustee has knowledge of property that may be subject to a security, the trustee may, by serving notice in the prescribed form and manner, require any person to file, in the prescribed form and manner, a proof of the security that gives full particulars of the security, including the date on which the security was given and the value at which that person assesses it.
>
> (1.1) Where the trustee serves a notice pursuant to subsection (1), and the person on whom the notice is served does not file a proof of security within thirty days after the day of service of the notice, the trustee may thereupon, with leave of the court, sell or dispose of any property that was subject to the security, free of that security.
>
> (2) A creditor is entitled to receive a dividend in respect only of the balance due to him after deducting the assessed value of his security.
>
> (3) The trustee may redeem a security on payment to the secured creditor of the debt or the value of the security as assessed, in the proof of security, by the secured creditor.

[97] Section 128 refers to "proof of security," not "proof of claim." A "proof of claim" is what a secured creditor delivers to the trustee under s. 127 where the secured creditor seeks to claim for any deficiency after realizing on the security or surrenders the security to the trustee for the general benefit of the creditors. The form prescribed by the Superintendent for both types of proof is the same - Form 31, entitled "Proof of Claim." Directive 10 uses the language of Form 31 rather than that of s. 128. The interchangeable use of the terms "proof of claim" and "proof of security," coupled with the dual use of Form 31, adds an unnecessary element of confusion to the mix.

[98] Section 129 provides in part: "Where the trustee is dissatisfied with the value at which a security is assessed, the trustee may require that the property the security comprises be offered for sale at such time and on such terms and conditions as may be agreed on between the creditor and the trustee or, in default of such an agreement, as the court may direct."

[99] Section 130 offers a mechanism for a secured creditor to require a trustee to elect to redeem the security. It reads:

> 130. Notwithstanding subsection 128(3) and section 129, the creditor may, by notice in writing, require the trustee to elect whether he will exercise the power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the court may allow, signify in writing to the creditor his election to exercise the power, he is not entitled to exercise it, and the equity of redemption or any other interest in the property comprised in the security that is vested in the trustee shall vest in the creditor, and the amount of his claim shall be reduced by the amount at which the security has been valued.

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[100] Section 132 refers to acquisition by the trustee of the security as provided in the *BIA*. It states that if the trustee has not elected to acquire the security, a secured creditor may amend the valuation and proof of security.

[101] Section 133 provides that if a secured creditor does not comply with sections 127 to 132, the creditor is excluded from receiving a dividend.

[102] It is important to remember that secured creditors do not stand outside the *BIA*. Rather, the *BIA* allows them to unilaterally enforce their security in certain circumstances, subject to the following:

(a) s. 69.3(2) permits the court to stay enforcement by a secured creditor;

(b) s. 79 provides that if the trustee wants to inspect the secured property, the creditor cannot realize on the security before allowing the inspection; and

(c) In the context of redemption, s. 128(1) halts enforcement, at least temporarily.

[103] When secured creditors want a dividend from the estate, they must become involved in the bankruptcy and with the trustee by complying with ss. 127 to 132.

5. Correctness of the Superintendent's Interpretation

[104] The Superintendent's interpretation of the *BIA*, as reflected in Directive 10, raises the following questions:

(a) Must the secured creditor produce a proof of security prior to the trustee redeeming the security? Implicitly, this question requires a determination of these overlapping questions:

(i) whether the *BIA* is a complete codification of the trustee's right of redemption, and

(ii) if so, whether redemption by payment of the "debt" per s. 128(3) is available in the absence of a proof of security?

(b) Must the sale of an encumbered asset result in a net price equal to or greater than the debt or value of the security per the proof of security in order to amount to a redemption?

(c) Absent compliance with s. 13.4 (the requirements for acting in a double capacity), is levy payable if the trustee sells encumbered assets for the secured creditor?

[105] If the answer to any of these questions is "No," the Superintendent's interpretation of the relevant provisions of the *BIA* is incorrect and that aspect of Directive 10 is *ultra views*.

(a) *Must the secured creditor produce a proof of security prior to the trustee redeeming the security?*

[106] As will become readily apparent, there has been no clear and consistent interpretation of the redemption provisions in the *BIA*. The result is a legal muddle.

[107] In advocating that "participation" in the bankruptcy process alone results in liability for the levy, the OSB relies on ***Re Kop Beverages***,[75] the first of a trilogy of cases decided by Mr. Justice Smily; ***Re Alger Press***, which followed ***Re Kop Beverages***; and ***Electric Zoo Graphics*** which, in turn, followed ***Re Alger Press***.

[108] In ***Re Kop Beverages***, the secured creditors had filed "proofs of claim" before an opportunity arose for sale of the property affected by their security, on terms requiring the trustee to pay off the security. They argued that the trustee's payout of monies due to them was in effect not a payment by the trustee, but one made by the purchaser on the trustee's direction. Smily J. rejected their argument, finding instead that the payment was indeed by the trustee. Mr. Justice Smily acknowledged that if the mortgage was assumed by the purchaser and then the purchaser paid it off, there would be no question of the payment being made by the trustee, but declined to rule on the point as the mortgage was not in evidence to show that the purchaser had that right. In the result, the payments were considered payments by the trustee on account of the creditors' claims and levy was payable. Smily J. commented that:[76]

> ...It may seem a rather hard provision against a secured creditor who has a security and would be entitled to realize from that security under certain circumstances and receive full satisfaction of his claim against the bankrupt, at any rate, if he had taken proceedings before the bankruptcy, but I do not think the court is concerned with that.

[109] In ***Re Hart Equipment***,[77] a creditor filed a proof of claim as a creditor with security on the bankrupt's inventory and certain equipment. The court found that an arrangement for the trustee to carry on the bankrupt's operations, consented to by the secured creditor, was one that was mutually beneficial to both, to which the levy applied. The creditor's failure to take possession of the assets secured in its favour appears to have been an important consideration.[78]

[110] In a commentary on ***Re Hart Equipment***,[79] the author cautioned the reader that:

> To avoid payment of the levy, a bank must be careful in the light of this decision to take possession of goods covered by s. 88 security before permitting a trustee in bankruptcy to act as its agent in processing or realizing on such goods. As regards the sale of the inventory on the closing out of the business, the present decision is to the same effect as the earlier opinion of the same learned judge in ***re Kop***

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> ***Beverages***, 32 C.B.R. 221, [1952] O.W.N. 647, 1 Abr. Con. (2nd) 415. The payment of levy could have been avoided by directing the purchaser to pay the amount on closing directly to the bank and having failed to do so, the levy was undoubtedly payable.

[111] That advice was taken to heart in ***Re Skingley***,[80] which involved four mortgagees holding security over properties sold by cash sales requiring discharges of their security. The purchaser paid out the security from the purchase monies, a scheme the trustee was involved in structuring. Three of four mortgagees had not filed claims in the estate. The court restricted ***Re Kop Beverages*** to cases where proofs of claim were filed by secured creditors. As to those mortgagees that had not filed proofs of claim, he said there could be no question of payments being made by the trustee to them as creditors in the estate or as by way of redeeming the mortgages in accordance with the provisions of the then *Bankruptcy Act*. As to the filing of a proof of claim by one mortgagee, that was an irrelevant consideration as it was "an ignored claim" filed by a mortgagee who could have its mortgage paid off at any time without notice or bonus, thereby allowing the purchaser to pay it off as a matter of adjustments. That the trustee was involved in directing the mechanics of the payout was also considered to be irrelevant, "more a matter of form or an extra precaution by the purchaser's solicitor." [81]

[112] The same result was reached in ***Re 339812 Ontario* Ltd.**[82]

[113] In ***Re Performance Drilling***,[83] Mr. Justice Riley considered payment of levy in situations where a trustee:

> (1) collected accounts owing to the estate by land owners and paid lien holders who had filed mechanics' liens against their lands;
>
> (2) instructed debtors who owed money to the estate for work done on lands to directly pay certain mechanics lien holders with the balance paid to the trustee; and
>
> (3) sold equipment owned by the estate, received the purchase price in trust upon transfer of free and clear title and from those proceeds paid chattel mortgagees, retaining the balance.

[114] In each situation, Riley J. found no levy was payable, noting[84] that a secured creditor is not obliged to pay the levy if he realizes his security, and that payments out of a trust fund, such as the fund for lien holders, are not subject to the levy.[85] In terms of the second category, he categorized the payment as one not made "by the trustee."[86]

[115] Mr. Justice Riley ruled that the third category, which is relevant to the present analysis, constituted an implied redemption by the purchaser (rather than the trustee), reasoning:[87]

> I think Q. (3) is a matter of doubt in view of ***Re Kop Beverages Ltd.*** 32 CBR 221, [1952] OWN 647, where it was held that payments to mortgagees and lienholders from the proceeds of property are payments by the trustee on which the levy is payable. However, in an annotation immediately following the case at p. 225, a Mr. W. D. Goodman of the Ontario bar explains this decision on the basis that the trustee had there impliedly redeemed the security of the mortgagee and the lienholders and payment to them then would clearly be within sec. 106. Mr. Goodman goes on to state at p. 225:
>
> > "If, for reasons of convenience, in completing the sale of the property, he [the trustee] arranges for the discharge of the mortgage and actually receives and hands over to the mortgagee an amount sufficient to discharge the mortgage (or if he directs the purchaser to discharge it out of the purchase price, he has in fact made no payment to the mortgagee on his own behalf and no levy is payable." [sic]
>
> The author relies on ***In re Colonial Mfg. Co.***, *supra*. The explanation appears to be that what actually occurs is that the trustee sells only the estate's equity in the property and at the same time he arranges for the purchaser to redeem the mortgage or the lien. As the author points out, no levy is then payable since the redemption of the security was made by the purchaser and not by the trustee.

[116] Mr. Justice Riley did not have the benefit of the Ontario Court of Appeal's ruling in ***Re Prudential Finance***,[88] which was decided the following year. The trustee in that case had redeemed securities held by a brokerage firm on a margin account for the full amount of the debt after obtaining a stay precluding the brokerage firm from realizing on its security. The firm had not surrendered its security, valued its security, or filed a proof of claim. The trustee attempted to deduct the levy from the payment made to the firm but the firm objected. The OSB argued that the payment was on account of a claim of the secured creditor and therefore was subject to the levy pursuant to the levy provision of the day, s. 106 of the *Bankruptcy Act*.

[117] McDermott J. expressed the view in ***Re Prudential Finance***[89] that the circumstances of the case did not warrant imposition of the levy due to uncertainty in the law as to application of the levy and in view of the frustration by the court of the efforts of the creditor to realize on its security through a sale which would have paid the debt in full. McDermott J. held that it would lead to an absurd result if s. 106 was construed so as to impose a levy in circumstances where no claim was made under the *Bankruptcy Act*. It appears that Justice McDermott recited but did not rule on the

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secured creditor's argument that the redemption should be characterized as one at common law rather than under the Act.[90]

[118] MacKay J.A., who delivered the judgment of the Ontario Court of Appeal in ***Re Prudential Finance***,[91] was of the opinion that the position of a secured creditor under the *Bankruptcy Act* may fall within any one of the following categories:

1. He may surrender his security and file a claim with the trustee in bankruptcy for the full amount of the debt owing to him.
2. He may have his security valued and if the value is less than the amount of the debt he may file a claim with the trustee for the balance of it.
3. If the value of the security is equal to or greater than the debt, he may (subject to the trustee's right to redeem) retain or sell sufficient of the securities held by him to pay the debt, in which case he can not make any claim in the bankruptcy proceedings, his debt having been paid.

[119] He acknowledged that the payment made by the trustee in that case was to redeem the securities. He held that the trustee was not paying a claim of the creditor.[92] Rather, he was purchasing the interest of the secured creditor in the securities and to do so had to pay the debt. He indicated the position of the secured creditor should be no different whether the sale of the securities is to a third party or to the trustee. In terms of liability for payment of the levy under s. 106, MacKay J.A. rejected the distinction made in some cases as to whether the amount owing to the creditor is paid by the trustee or assumed and paid by a person to whom the trustee sells the security. He commented that a secured creditor whose security is for an amount equal to or greater than his debt and who does not file a claim in the bankruptcy proceedings derives no benefit from the bankruptcy proceedings. In the end result, he agreed with McDermott J. that the secured creditor was entitled on redemption of his security by the trustee to payment of his debt in full without deduction for the levy. I find this reasoning more appealing than the "implied redemption by the purchaser" reasoning of ***Re Performance Drilling***.

[120] The author of an annotation to the appellate decision in ***Re Prudential Finance*** commented that payment of levy on secured claims had been a nuisance to trustees for far too long.[93] The call, made some 40 years ago, for what was then described as a long overdue amendment to clarify or change s. 106 (the predecessor of s. 147), remains unheeded. The author further suggested that ***Re Prudential Finance*** clearly established that if a secured creditor does not file a claim in the bankruptcy and the trustee redeems the security, there is no levy payable, but left unsettled the problem of what happens if a claim is filed and the trustee redeems at the value at which the security has been assessed. However, the more recent decisions in ***Re Alger Press***,[94] ***Electric Zoo Graphics***,[95] and ***Re Brittain Steel***[96] cast doubt on the first proposition.

[121] The court in ***Re Alger Press*** found, without discussing why, that absence of a proof of claim was not dispositive of liability for the levy by a secured creditor. ***Electric Zoo Graphics*** applied ***Re Alger Press*** without discussion. In *obiter dicta*, the British Columbia Court of Appeal in ***Re Brittain Steel*** questioned,[97] but did not discuss the proposition in ***Re Prudential Finance*** that no levy is payable by a secured creditor who has not filed a proof of claim.

[122] ***Re Alger Press*** cited ***Re Prudential Finance*** and ***Re Skingley*** for the principle that liability for the levy arises where payments are made by a trustee as such, and in the course of the administration of the estate. The court neither discussed nor applied the result of the cases concerning the effect of filing or not filing a proof of claim, finding instead that the case was governed by ***Re Kop Beverages*** and ***Re Hart Equipment***.

[123] The facts of ***Re Alger Press*** are straightforward. The bankrupt filed an assignment in bankruptcy. Peat Marwick Thorne Inc. was named trustee. It was also appointed agent by the Bank of Montreal, which had a first charge, to realize on Alger's accounts receivable and inventory. Algonquin held second position. It did not file a proof of claim. Peat Marwick Thorne Inc. thought it wise to complete outstanding orders for the benefit of the creditors. It did so, advising customers that in so doing it was acting as trustee. Remarkable success followed in realizing on the accounts receivable, both old and newly created. The bank was paid out its secured claim. There was also a surplus that arose mainly from equipment sales to a third party (on a free and clear basis) and the net proceeds of the trustee's operating the business

[124] Before the application on whether levy was payable by Algonquin, Mr. Justice Farley had allowed Algonquin's claim for entitlement to the benefit of the doctrine of marshalling, which had been a live issue amongst all interested parties from the start of the bankruptcy. Marshalling allowed Algonquin to share in the proceeds of the equipment sales since the bank had chosen to realize upon the accounts receivable and inventory instead of the equipment.

[125] Farley J. determined that levy was payable, finding that Algonquin did not realize its security, but benefited from the trustee liquidating the business of the bankrupt and distributing the proceeds to it. He related the term "or otherwise" in s. 147 of the *BIA* to the steps taken by the secured creditor to realize on its security, the role played by the trustee, and the relationship between the two, saying:[98]

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> It seems to me that Algonquin took no effort to realize upon the equipment. Rather it stood by while the trustee did so. Can it be said that all that was happening was that the trustee was realizing upon its equity on the equipment? I think that not only was it doing this but it was also realizing upon the equity of Algonquin. I am of the view that "or otherwise" must be given appropriate meaning in s. 147(1) of the *BIA*. The trustee was performing a function not as agent of Algonquin; it was not retained to do so. Rather it was liquidating the business of the bankrupt Alger and distributing the proceeds of such liquidation to the remaining secured creditor, Algonquin, and thereafter it could make a dividend to the unsecured creditors...
>
> It seems to me that the present situation is governed by ***Hart***, *supra*, and ***Kop***, *supra*. It does not appear that the fact that Algonquin did not file a claim with the trustee is dispositive of the matter. The trustee had no other relationship with Algonquin than as trustee; it was not in an agency relationship as was the case in ***Colonial***, *supra*. It took no action to realize upon its security even to the extent of taking possession. It seems that PMT did the sale as trustee.

[126] Mr. Justice Farley noted that Algonquin did not have direct security over the equipment (which was in essence the source of the payout), but the marshalling order resulted in it being treated as though it had it security over the equipment. He concluded that what had transpired was the trustee liquidating the bankrupt's business, distributing the proceeds to Algonquin, and thereafter making a dividend to the unsecured creditors. The filing of a proof of claim was not dispositive of the matter.

[127] ***Re Zutphen Bros.***[99] concerned secured creditors in a proposal scenario who filed proofs of claim, accepted the proposal, and agreed to have their claims paid by the trustee. Saunders J. found levy payable on the basis of participation in the process, noting that courts have consistently held that the question to be determined is whether the payment is made by a trustee as such and in the course of the administration of the estate.

[128] The OSB relies on the judgment of Nuss J.A. in ***Restaurant Ocean Drive***[100] to support its view that s. 128 is a complete codification of redemption rights for trustees and that a proof of security is a precondition to redemption. There, the National Bank had loaned $246,000 to the debtor restaurant, guaranteed by a conventional movable hypothec on the debtor's equipment. An assignment in bankruptcy followed about a year later. The next month, the bank served the trustee with a motion of forced surrender of the equipment and sale by judicial authority in which the bank valued its security at between $25,000 and $30,000. The required prior notice to surrender had been served on the debtor before the bankruptcy.

[129] The motion subsequently was amended by the secured creditor to seek authorization to sell the equipment to a company called Canpro Inc., the bankrupt's landlord, which had rented the restaurant to a third party, including the mortgaged equipment which the bank had agreed to sell it. Canpro had paid $7,500 to a third party when it was learned that some of the equipment belonged to the same third party. The bank reduced the value of its security to $16,000. The trustee made known his intention to redeem the security, which prompted Canpro to apply for a declaration of aggressive intervention, asking the court to forbid the trustee from redeeming the security and requiring the bank to sell it the equipment. The Quebec Superior Court allowed the bank's motion and Canpro's intervention.

[130] On appeal to the Quebec Court of Appeal, the trustee argued that it did not have to comply with s. 128 since it already had information about the creditor's claim from its application for forced surrender and, therefore, requiring a proof of claim under s. 128(1) would be redundant. The trustee also argued that a proof of claim under s. 128(1) was, in any event, not a prerequisite to redemption under s. 128(3) and that no prejudice to the creditor would result. Separate and varying reasons were given by Nuss J.A. and Beauregard J.A. Brossard J.A. concurred with both.

[131] Mr. Justice Nuss found that compliance with s. 128(1) was a prerequisite to redemption by a trustee under s. 128(3). He paid particular note to the circumstances of the case, stating:[101]

> The first judge concluded that the Trustee could not have recourse to section 128(3) *B.I.A.* without first having met the conditions set out in paragraph 1 of that section. I am of the opinion that he was right given the particular circumstances of this case, which involved the rights of a third party (Canpro) and contractual relationships - between that third party and the National Bank - that were established before the Trustee acted. [translation]

[132] He commented that a trustee cannot force a secured creditor to sell its security to the trustee if the trustee has not previously required a proof of security in the prescribed form,[102] citing ***Re F. Fiore & Son Limited***,[103] an excerpt from *Bankruptcy and Insolvency Law of Canada*,[104] and the severe consequences to a secured creditor who fails to comply with the s. 128(1) notice[105] as evidencing the importance of the notice in the case before him. He accepted this statement from ***Re Comptoirs Bizou Mode Inc. (Syndic de)***:[106]

> Redemption of a security under the *Bankruptcy Act* is not a consensual operation. Redemption is not complete until such time as the secured creditor is paid [***Re Bell's Ltd.***, (1986) 60 C.B.R. 244

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(Sask.Q.B.)] or the trustee has elected to acquire the security after having been required to do so [S. 130; ***Norris (Ex parte)***, (1886) 17 Q.B. 728 cited in ***In re Kleckner, Huck and Co.: Bank of Toronto v. Canada Permanent Trust Co.***, (1940-41) 22 C.B.R. 136 (Sask. C.A.), 141.]. The right of redemption is not an option until the secured creditor has definitively assessed the value of the security through the affidavit required by section 128. Therefore, only the trustee can force the redemption of the security, unless the Court authorizes the creditor to amend his or her valuation (s. 132).

[133] Beauregard J.A. agreed with the result, finding that there was no actual benefit to the general body of creditors in the trustee's offer to redeem. He dubbed the trustee a last minute gate-crasher and observed that to accept the trustee's position would let him profit from an abuse of rights. Noteworthy is Mr. Justice Beauregard's finding that failure to give notice under s. 128(1) does not necessarily prevent the trustee from redeeming a security under ss. 128(3). He commented that:[107]

> The secured creditor can render that notice unnecessary: in the case at bar, in its motion for surrender that was served on the trustee, the bank itself evaluated its security at between $25,000 and $30,000. It therefore would have been redundant for the trustee to request from the bank an evaluation of its security. Because this violation does not entail absolute nullity, it seems to me that a third party that has not yet become owner of the security cannot oppose its redemption by the trustee by invoking the absence of formal notice. Furthermore, as s. 128. (3) does not give any time limit for the trustee to redeem the security, the trustee may redeem the security as long as it has not become the property of a third party.

[134] ***Restaurant Ocean Drive*** was followed in ***9067-5661 Québec inc.***[108] There, a secured creditor with a judgment to recover goods secured in its favour ignored the bankruptcy until learning that the trustee, with knowledge of its security, had sold the bankrupt's assets, including the goods over which it had security. The creditor delivered a proof of claim valuing its security, causing the trustee to say it had redeemed the security and that after paying priority claims it would pay the creditor, *albeit* significantly less than the claim and security. In turn, the creditor delivered an amended proof of claim, which the trustee disallowed. The creditor and purchaser applied for relief. The court found that non-compliance with s. 128(1) resulted in the trustee's right of redemption never having seen the light of day.

[135] Section 128(1) notice non-compliance also was an issue in ***Hester Creek Estate***,[109] an appeal of a Master's decision applying ***Restaurant Ocean Drive*** and refusing to permit a trustee to redeem mortgage security for full payment of the debt in a sale by a receiver.

[136] In rejecting the contention that the trustee could not redeem because of notice non- compliance, Tysoe J. (as he then was) stated:[110]

> ... there is nothing on the face of s. 128 that requires the trustee to have received the proof of security before redeeming the security by payment of the full amount of the debt. Although the secured creditor will set out the amount of the debt in its proof of security, the trustee will have access to the records of the bankrupt to determine the amount of the debt or the trustee may be satisfied with a pay-out statement provided by the secured creditor.

[137] Tysoe J. distinguished ***Restaurant Ocean Drive***[111] on its facts (the trustee there was not looking to pay out the full amount of the debt) and observed that statutory amendments had undone the effect of ***Re F. Fiore & Son Limited***[112] (which said that reading all of s. 99 of the *Bankruptcy Act* (the predecessor to s. 128 of the *BIA*) together resulted in notice being a condition precedent to redemption) by clarifying that the trustee is not required to comply with s. 128(1) in order to redeem security when the sum paid is the full amount owing under the security.

[138] Of significance is Tysoe J.'s finding that requiring s. 128(1) notice to be a pre-condition to redemption leads to a perverse result since it emasculates trustees' ability to achieve the best recoveries for the estate by precluding sales of secured assets within the first 30 days of a bankruptcy (the time a secured creditor has to file a proof of security after receiving notice from the trustee).

[139] The result in ***Hester Creek Estate*** was that:[113]

1. Section 128 is not a complete codification of the trustee's right to redeem security. In other words, common law and provincial statutory rights of redemption continue and s. 128 is an adjunct to those rights.[114]
2. In the absence of an order absolute or order approving a sale, non-compliance with s. 128(1) does not preclude redemption by a trustee where all that is owed to the creditor is paid.[115]
3. Truly extraordinary circumstances must exist for the court to preclude redemption by a trustee by payment in full of the amount owed to the secured creditor before an order absolute or an order approving a sale the asset.[116]

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4. Section 128(1) compliance is required only if the trustee seeks to redeem security for less than the full amount owed under it or wants to force the secured creditor to sell the security to it.[117]
5. Section 128 may be addressing a circumstance which is different from redemption of mortgaged property as even though the terms "redemption of mortgaged property" and "redemption of security" often are used interchangeably, the phrase "may redeem a security" in s. 128(3) could mean something other than "the trustee exercising a right of redemption vested in it by redeeming the property and being entitled to a reconveyance of the legal title to the property..."

[140] In ***Royal Bank of Canada v. United Used Auto & Truck Parts Ltd.***,[118] assets subject to security by an individual named Mott were sold by PWC, which was acting in the dual capacity of trustee and receiver. Donning its trustee's hat, PWC sent a notice to Mott pursuant to s. 128(1) of the *BIA*. Before the 30 days for responding to the s. 128(1) notice had expired, PWC put on its receiver's hat and sought court approval of a sale which included the assets purportedly secured in Mott's favour

[141] Tysoe J. found that the sale was made by PWC as receiver. Accordingly, the effect of the s.128 notice was not truly in issue. He offered these views in *obiter*:[119]

1. The effect of s. 128 is to allow a trustee, with leave of the court, to sell assets free of any security the recipient of the notice may have in the assets if the recipient does not file a proof of security within 30 days.
2. Since nothing in s. 128 prevents a sale within the 30 day notice period, the only consequence is that the sale is made subject to the security.

[142] In ***Canada (Superintendent of Bankruptcy) v. Aberant Arnold and Chow Inc.*** [***George's Cycle***],[120] I found that secured creditors who had not taken enforcement proceedings, who had filed proofs of claim as both secured and unsecured creditors in a proposal, voted on the proposal, and received payments thereunder were liable for the levy. I also ruled that there was insufficient evidence to support a finding that the trustee was acting as agent of the secured creditors or had redeemed their security despite purported compliance with Directive 10.

[143] The secured creditor in ***Electric Zoo Graphics*** [121]was a principal of the bankrupt who failed to disclose the existence of his security before the trustee sold the bankrupt's assets. The court found that his deference to the trustee in allowing him to realize on the security attracted the levy even though he had not filed a proof of claim. Apart from the case being distinguishable on its facts, the reliance on ***Re Alger Press***[122] without discussion of ***Re Prudential Finance***[123] is of concern.

(i) Is the *BIA* a complete codification of the trustee's right of redemption?

[144] Directive 10 specifies that a trustee "can redeem a security only through the mechanism provided for in subsection 128(3) of the Act." The Superintendent, by this statement, is interpreting the *BIA* as a complete codification of the trustee's right of redemption and foreclosing resort by a trustee to any common law or statutory right of redemption which lies outside of the *BIA*.

[145] Section 72(1) of the BIA states that:

> 72(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

[146] Despite s. 72(1), I agree with the Superintendent that the *BIA* constitutes a complete codification of the trustee's right of redemption as it effectively covers the field occupied by common law and statutory rights of redemption codified in provincial legislation by providing for redemption on payment of the debt. It also enhances the trustee's right of redemption.

[147] Given the ability of the court to stay enforcement actions by secured creditors under s. 69.3(2) of the *BIA* in appropriate circumstances,[124] I am not persuaded the presumption against absurdity applies. In my view, one of the reasons for the inclusion of s. 69.3(2) was to ensure that trustees have the opportunity to consider whether redemption is a viable option in the initial phases of bankruptcy. While some caution may be required as to the timing of applications under s. 69.3(2), given what redemption requires and the court's inability to interfere with binding contracts entered into by the secured creditor with third parties (as in ***Restaurant Ocean Drive***[125] and ***Re Hallmac Limited***[126]), that does not mandate a contrary result.

[148] A review of the authorities and literature is instructive.

[149] ***Re Dunham***[127] clearly establishes that trustees must present cogent reasons and evidence to succeed in staying a secured creditor's right to realize on its security.[128]

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[150] In his article "The Race to the Swiftest? Entitlement to the Possession of the Property of a Bankrupt," Kenneth S. Atlas observed[129] that permitting a trustee to exercise the right granted under s. 49(2) of the *Bankruptcy Act* (the predecessor of s. 69.3(2)) after a trustee under a trust deed (fiduciaire) had taken possession of the assets of the bankrupt prior to bankruptcy could only benefit the preferred and unsecured creditors and prevent the fiduciaire from depriving the bankrupt estate of equity which would rightfully belong to it. He also noted the policy of non-interference with secured creditors except in situations where the trustee can prove that permitting a secured creditor to realize on its security will result in a loss of equity in the property subject to the security, which might properly be an asset of the bankrupt estate, citing ***Re Dunham***, ***Re Les Pharmacies Modernes Inc.*** and ***Re Dominion Lock Co.*** in support of his proposition.

[151] Relying largely on the evidence of the inspectors, who were experienced credit persons in the relevant industry, the court in ***Re Les Pharmacies Modernes Inc.***[130]granted a stay against the secured party to give the trustee and inspectors an opportunity to assess the situation and to devise a plan whereby the secured creditor could be paid "without undue depression of the balance of the assets."

[152] The trustee in ***Re Dominion Lock Co. (Trustee of)***[131] sought a 90 day stay against various secured creditors in anticipation of an offer that would pay out all of the secured creditors and generate a $550,000 surplus for the unsecured creditors. One of the secured creditors, which had taken possession of the assets secured in its favour, argued the court had no jurisdiction to order the stay given that realization had commenced. This argument was rejected, the court finding instead that in appropriate circumstances a stay for purposes of seeking offers which would put the trustee in funds to redeem the security would be appropriate. Noteworthy is the court's observation that it would be inconsistent with the philosophy of bankruptcy law if, after having expressly permitted the trustee to redeem security, the law did not permit reasonable delays to determine the extent to which offers could be found to put the trustee in funds to do so.

[153] In summary, ss. 127 to 134 and 69.3(2), when read together, lead to the conclusion that the *BIA* is a complete codification of redemption rights in bankruptcies. Reading ss. 128(2) in conjunction with 69.3(2) answers the concern of Mr. Justice Tysoe in ***Hester Creek Estate***, who did not have the benefit of the decision of McDermott J. in ***Re Prudential Finance***, or the decisions in ***Re Dunham***, ***Re Les Pharmacies Modernes Inc.***, or ***Re Dominion Lock Co.***

[154] By interpreting s. 128 as a complete codification of the trustee's rights of redemption, the need to apply local laws with potentially varying provisions is circumvented, and recognition is given to the *BIA* as a national, uniform method of resolving matters arising in insolvencies.

(ii) Is the s. 128(1) proof of security a precondition to redemption?

[155] Directive 10 states that a trustee can redeem security under s. 128(3) of the *BIA* only if the secured creditor either voluntarily or in response to a s. 128(1) notice has produced a proof of claim prior to the offering of the encumbered assets for sale.

[156] Section 128(3) of the *BIA* uses the disjunctive term "or." In my view, this indicates Parliament's intention that there are to be two distinct avenues for redemption open to trustees. They can either pay the debt of the secured creditor (the traditional means of redemption), or pay the value of the security as assessed in the proof of security by the secured creditor.

[157] Section 128(3) does not refer to proof of security in connection with redemption by debt satisfaction. Reference to proof of security is limited to the second avenue - paying the value of the security, as assessed in the proof of security, by the secured creditor.

[158] The court in ***Restaurant Ocean Drive***[132] was divided on whether notice under s. 128(1) was a prerequisite where the trustee was in possession of the information to assess the viability of a redemption. The case concerned redemption by paying the value of the security as assessed by the creditor, not by payment of the debt owed to the creditor, and is distinguishable on that basis.

In any event, the comments of Nuss J.A. concerning the correctness of the lower court decision in the "peculiar circumstances" of that case, the changes to the law underpinning his analysis, the divided court, and concurrence by Brossard J.A. with opposing conclusions, cast sufficient doubt on the precedential value of the case.

[159] In my view, Parliament recognized that in many cases trustees will be armed with sufficient information to make an informed decision about the validity of the security and amount of the debt, thereby obviating the need to call for a proof of security under s. 128(1) when contemplating redemption by payment of the debt. In gathering the bankrupt's property, trustees often will have ready access to security documentation and the attendant financial information. Such information also may be available from other sources; for instance, where the bankrupt possesses materials filed in enforcement proceedings which exhibit the security document and offer information on the debt. Some secured creditors may voluntarily deliver proofs of security.

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[160] The permissive language of s. 128(1) offers further support for this interpretation. It does not state that trustees 'shall' require a proof of security. It says they "may." Practically, trustees may choose to do so where their information about the validity of the security and/or debt is inadequate to make an informed decision about redemption. They also may choose to do so to force a secured creditor's hand, flesh out and potentially defeat questionable or dormant security (if the creditor fails to respond within 30 days), or pursue redemption for less than payment of the full debt. Doubtless there are many other situations where trustees would think it prudent to exercise their right to call on a creditor to prove his or her security.

[161] There is no need to import the requirement of notice for redemption by full payment of the debt. The trustee is duty bound to be satisfied of the validity of the security and amount of the debt before redeeming on this basis. The suggestion that the burden of notice under s. 128(1) is necessary to protect the interests of the unsecured creditors (from improper payouts of secured creditors under the guise of a redemption) ignores the fact that trustees are highly regulated officers of the court who are bound by professional codes of ethics and the provisions of the *BIA* to discharge that duty and to act honestly and with integrity in the interests of the general body of the creditors. It also ignores the role of inspectors in bankruptcies and trustees' ability to resort to the court for approval of their actions in appropriate circumstances.

[162] I am far from convinced that this approach will cause "a state of perpetual uncertainty" for all involved in the bankruptcy process, as suggested by some. In my view, this approach recognizes that the *BIA* is legislation designed to provide a pragmatic, expedient, and cost efficient means of resolving insolvency matters, something that slavish reliance on forms and form over substance does not further. It applies the plain language of s. 128(3) and respects the function and professionalism expected of trustees, who retain the option of delivering a notice under s. 128(1) even where they have an alternate source for obtaining information about security and debt.

[163] In summary, redemption of security by payment in full of the secured debt under s. 128(3) is not preconditioned on proof of security having been produced by the secured creditor. The secured creditor is not prejudiced, however, by having responded to a s. 128(1) notice or having voluntarily filed a proof of security. Levy is not payable on a redemption for payment of the debt, whether a proof of security has been filed or not, as the payment is not made on a claim of the creditor. Rather, it is payment to acquire the secured creditor's right or interest in the security.

[164] Having found that production of proof of security is not a precondition for redemption under the Act by full payment of the debt, I conclude that the Superintendent has misinterpreted the *BIA* and in doing so has exceeded his directive-making authority.

[165] That is not to say that the Superintendent could not issue a directive to trustees requiring that they obtain a proof of security before redeeming by payment in full. Breach of such a directive might well jeopardise the trustee's right to claim fees or disbursements of the transaction and might expose the trustee to sanction. However, the redemption would be a redemption nevertheless and the secured creditor would not be subject to the levy.

(b) *Must the sale of an encumbered asset result in a net price equal to or greater than the debt or value of the security per the proof of security in order to amount to a redemption?*

[166] Directive 10 specifies that the s. 147 levy is payable on all payments by a trustee to a secured creditor except in two situations, the second of which is redemption under s. 128 of the *BIA*. A condition of this exception requires that the encumbered assets be sold at a net price (after deduction of the fees pertaining to the transaction) superior to, or at least equal to, either the total of the claim or the amount of the value of the security as established by the creditor in the proof of security.

[167] Undoubtedly, redemption benefits secured creditors, who likely care a whit about the source of the funding used to satisfy the bankrupt's obligations to them. However, benefiting a secured creditor cannot be the impetus for a trustee selling encumbered assets. The trustee must perceive some advantage for the general body of creditors.[133]

[168] It is the responsibility of the trustee to make a sound business decision either to redeem the security because it is good for the general body of creditors or to walk away because it is not. The trustee must consider what the net result of the redemption likely will be in making such a decision. If, in the end, redemption is unlikely to benefit the general body of creditors, it is a hollow exercise. The trustee's decision in that case should be easy. But what if the trustee does not walk away? What if the trustee's business decision is not sound? What if the trustee neglects its duties by trying to curry favour with a secured creditor? What if the trustee innocently misjudges the market? Should these failings, innocent or not, be visited on the secured creditor by imposition of the levy? Given that redemption can be a unilateral act, particularly where initiated by the trustee and where payment of the debt in full is made, that cannot be what Parliament intended.

[169] It is likely that the Superintendent would be seen as acting within his authority in issuing a directive to trustees requiring that they only redeem if the net price realizable on the sale of an encumbered asset is likely to be equal to or

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greater than the debt or value of the security per the proof of security. That is not what Directive 10 says. In essence, it states that the sale of an encumbered asset at a net price which does not meet that criterion is not a redemption under s. 128.

[168] The redemption provisions of the *BIA* do not require that encumbered assets be sold at a net price (after deduction of the fees pertaining to the transaction) superior to, or at least equal to, either the total of the claim or the amount of the value of the security as established by the creditor in the proof of security. That condition is one which has been imposed by the Superintendent in an attempt to control the conduct of trustees. The *BIA* authorizes and, indeed, mandates that the Superintendent control trustees. However, he cannot do so by misinterpreting or adding to the *BIA* in such a manner as to affect third party rights.

[169] If there is no reasonable expectation of benefit for the general body of creditors from redemption, the trustee's right to claim fees or disbursements on the transaction may be at risk or the trustee may be subject to some other form of censure. However, in my view, a redemption under the Act remains a redemption nevertheless and no levy is payable by the secured creditor.

[170] In providing otherwise in Directive 10, the Superintendent has added a condition to redemption which does not appear in the Act and which prejudices secured creditors, thereby exceeding his authority. The relevant portions of Directive 10 are *ultra vires*.

(c) *Absent compliance with s. 13.4 (the requirements for acting in a dual capacity), is levy payable if the trustee sells encumbered assets?*

[171] Directive 10 provides that levy is not triggered if the trustee obtained a mandate from the secured creditor and complied with the provisions of s. 13.4 of the Act, Directive 15R ("Costs and Disclosure Associated with the Realization by the Trustee of Secured Creditors' Assets"), s. 245 and the assets were sold while the trustee acted as an agent, receiver or mandatary, but not as trustee.

[172] Section 13.4 provides:

> 13.4 (1) No trustee shall, while acting as the trustee of an estate, act for or assist a secured creditor of the estate to assert any claim against the estate or to realize or otherwise deal with the security that the secured creditor holds, unless the trustee has obtained a written opinion of a legal counsel who does not act for the secured creditor that the security is valid and enforceable as against the estate.
>
> (1.1) Forthwith on commencing to act for or assist a secured creditor of the estate in the manner set out in subsection (1), a trustee shall notify the Superintendent and the creditors or the inspectors
>
> (a) that the trustee is acting for the secured creditor;
>
> (b) of the basis of any remuneration from the secured creditor; and
>
> (c) of the opinion referred to in subsection (1).
>
> (2) Within two days after receiving a request therefor, a trustee shall provide the Superintendent with a copy of the opinion referred to in subsection (1) and shall also provide a copy to each creditor who has made a request therefor.

[173] The determination as to when a trustee sells encumbered assets in a capacity other than as trustee in bankruptcy is fact driven. Section 13.4 imposes certain obligations on trustees who purport to act in a dual capacity. Failure to comply with these obligations may lead to censure and sanction of the trustee under s. 14.1. However, trustee non-compliance with s. 13.4 does not necessarily obviate a finding that the trustee was selling encumbered assets as an agent, receiver, or mandatary. That is a question for the Court's determination based on the evidence. While compliance with s. 13.4 makes that determination easier, it is not the only factor that would be considered by the Court in making the determination.

[174] If the trustee, in fact, has acted as agent for the secured creditor in selling the encumbered assets, any fees of the trustee or costs associated with the sale would not be a liability of the bankrupt estate. Nor could payment to the creditor be characterized as payment on a claim. The entire transaction would fall outside of the bankruptcy.

[175] By purporting to direct that levy will be payable in the event of trustee non-compliance with s. 13.4, the Superintendent has misinterpreted the law and exceeded his authority. Consequently, the relevant provisions of Directive 10 are *ultra vires*.

5. Conclusion on *Vires* of Directive 10

[176] The Superintendent is doubtless conversant with the provisions of the *BIA* and may be called on to interpret the Act in fulfilling his duties. If he chooses to do so, his interpretation must be correct.

[177] Production by a secured creditor of proof of security is not a precondition to redemption of security under s. 128(3) of the *BIA* by payment in full of the debt. Directive 10 says that it is. To that extent, it is *ultra vires*.

[178] There is no requirement in the *BIA* that in order to constitute a redemption by the trustee, encumbered assets must be sold at a net price that equals or betters the total of the secured creditor's claim or value of the security per the

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proof of security. Directive 10 imposes such a requirement, thereby potentially affecting secured parties. To that extent, it is *ultra vires*.

[179] The requirement in Directive 10 that levy be paid in the event of non-compliance with s. 13.04 even where the trustee in fact acts as agent, receiver or mandatary, arises from misinterpretation of the *BIA* by the Superintendent. To that extent, Directive 10 is *ultra vires*.

V. Is Fantasy Liable for the Levy?

A. Facts

[180] Fantasy and a related company, Madison Development Corporation 1984 Ltd., developed a condominium project in Strathcona County, just east of Edmonton. The project was the subject of significant litigation both before and after the bankruptcy, which was in the fall of 2004. It has been case managed by Mr. Justice Burrows since the bankruptcy.

[181] With a view to conducting an orderly bloc sale of thirteen condominium units to generate a better sale price, PWC approached four mortgagees:

(i) Carevest Capital Inc. which held a mortgage on nine units and had commenced foreclosure proceedings;

(ii) Bank of Nova Scotia, which had commenced foreclosure proceedings on the one unit mortgaged in its favour;

(iii) Canadian Western Bank, which held a mortgage on two units, and agreed with PWC to not commence foreclosure proceedings; and

(iv) Capital City Saving & Credit Union Limited, which had not commenced foreclosure proceedings on the one unit on which it had a mortgage and presumably agreed (given C. Thomas Klaray's evidence that all of the mortgagees agreed to a sale by PWC) to refrain from taking such proceedings .

[182] Through counsel, PWC communicated this to Carevest:

> We can, if you require, plead to this matter, but with respect, we do not believe it is in anyone's interest to proceed with foreclosure at this time.
>
> PricewaterhouseCoopers has arranged a sale of the remainder of the lots at Sunrise Park. Subject to the priority claim by the County, we see no reason why Carevest would not be paid out in full, in respect of this sale.
>
> ...
>
> If you are in agreement to hold the foreclosure in abeyance pending the closing of the sale, please advise.

[183] C. Thomas Klaray, a senior vice president with PWC responsible for conduct of the bankruptcy, has deposed that it was "his belief throughout" that more monies would be generated for the estate if the lands were dealt with in an orderly fashion rather than by piecemeal foreclosures. In the end, he found a purchaser for the thirteen mortgaged units with an option to purchase others. The Inspectors approved the sale, but opposition from the Condominium Association (which considered PWC's sale efforts wanting) and the County of Strathcona (with which Fantasy was embroiled in litigation) prompted PWC to obtain an order from Mr. Justice Burrows approving the sale.

[184] In his affidavit in support of the sale motion, Mr. Klaray deposed that he considered the sale to be in the best interests of all concerned and proposed the net sale proceeds be applied in a fashion that would see the four mortgagees paid, PWC's fees paid down by about $400,000.00, a holdback for the County of Strathcona's contingent and disallowed claims (the latter then under appeal), and payment of all outstanding taxes in both estates. He also said (in his affidavit or on cross examination on that affidavit) that:

(i) He expected the sale of the condominium unit on which Capital City held a mortgage would net approximately $70,300.00 while the sale of the condominium unit on which the Bank of Nova Scotia held a mortgage would net approximately $7,400.00.

(ii) The condominium units over which Carevest and Canadian Western Bank held mortgage security were part of a bloc sale for $642,000.00, the proceeds of which would be applied to pay out, amongst other encumbrances, Carevest's mortgage in the estimated amount of $260,000.00 and an estimated $47,000.00 on the Canadian Western Bank mortgage.

(iii) PWC was now the largest creditor in the estates of Fantasy and Madison Developments, with a preferred claim over of $700,000.00 (not broken down by estate) that would be reduced to some $300,000.00 if the Court accepted the allocation of the net sale proceeds he had proposed.

[185] Satisfied that PWC's efforts to find a purchaser were sufficiently extensive and that the sale was in the interests of the estates, Burrows J. approved it,[134] referring to this statement from ***Re Hoque***:[135]

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> When it comes to making business decisions relating to the sale of the bankrupt's assets, a trustee, with the authorization of the inspectors, must exercise reasonable business judgment. The trustee must provide advice to the inspectors equivalent to the advice one would expect from a reasonably competent trustee in the circumstances. Both the trustee and the inspectors are entitled to rely on legal advice from counsel for the estate. And, of course, a trustee must act with honesty and integrity. Finally, the courts should show deference to business decisions made by those entrusted by the creditors and authorized by the Act to make such decisions.

[186] Burrows J. directed that PWC administer the sale proceeds in accordance with its proposed allocation.

[187] Mr. Klaray deposes on this application that Carevest and Canadian Western Bank filed "proofs of claim" as secured creditors. Canadian Western Bank's claim "for the full amount owing"and Carevest's claim for $175,585.06 (which is less than the amount proposed to be paid out on the mortgage) have not been put in evidence. The Bank of Nova Scotia and Capital City apparently did not file proofs of security.

[188] None of the evidence indicates when or why the Carevest and Canadian Western Bank "proofs of claim" were delivered. It is not clear whether they were proofs of security alone or also proofs of claim. Nor is it clear why PWC proposed a payout of $260,000.00 to satisfy Carevest's mortgages when Carevest's "proof of claim" was for $175,585.06. It is unclear whether the "full amount owing to it" claimed by Canadian Western Bank in its "proof of claim" was the $47,000.00 which PWC proposed to pay out to it. Finally, it is unclear whether the $70,300.00 net amount expected to be received on the sale of the condominium unit on which Capital City held a mortgage and the $7,400.00 net amount expected to be received on the sale of the condominium unit on which the Bank of Nova Scotia held a mortgage would cover payment in full of the debts owing to those secured creditors.

B. The Parties' Positions

[189] The OSB's position is that the sale of the secured assets cannot be regarded as a true redemption because of the poor quality of Mr. Klaray's evidence, there was no real benefit to the estate, and the mortgagees participated in and benefited from the bankruptcy process. Accordingly, it is a transaction that attracts liability for the levy.

[190] PWC sees the transaction as a redemption. It contends that the authorities which say "participation" in a bankruptcy attracts the levy are ill founded. It also submits that delivery of "proofs of claim" by two of the four mortgagees should not be considered evidence of their submission to the bankruptcy process as it would be unfair to treat the mortgagees differently.

C. Analysis

[191] In my discussion on the *vires* of Directive 10, I rejected the OSB's argument that redemption under the Act requires that a net price be obtained for the encumbered asset that is superior to, or at least equal to either the total of the claim or the amount of the value of the security as established by the creditor in the proof of security. Clearly, however, redemption does require that the secured creditor receive payment of the full amount of the debt or the value of the security as assessed, in the proof of security, by the secured creditor. If the full amount of the debt was not paid and no proof of security was submitted by the secured creditor assessing the value of the security or if the value of the security as assessed in the proof of security by the secured creditor was not paid, the transaction cannot be characterized as a redemption.

[192] PWC could have done a better job in presenting evidence on this application. I conclude, however that if Canadian Western Bank and Carevest were each paid the full amount of the debts owing to them, they are not liable for the s. 147 levy and there is no issue in terms of the proofs of claim submitted by them. As I have stated above in my discussion on the *vires* of Directive 10, filing proofs of claim does not convert a payment made as a redemption to a payment on a claim of the secured creditor attracting the s. 147 levy. If, however, the proofs of claim evidence an intention to surrender the security or to claim for a deficiency as an unsecured creditor, there is an issue as levy would follow payment of any dividend. Given that I do not have the proofs of claim before me, I leave it to PWC and the OSB to review the proofs of claim to ascertain whether levy is payable in accordance with my ruling. If they cannot agree, they may bring the matter back before me on notice to the secured creditor(s) involved.

[193] As to the Capital City and Bank of Nova Scotia transactions, I leave it to PWC to satisfy the OSB that payment was made of the debt in full in each case. If it was, levy is not payable by the secured creditors. If it was not in either case, the relevant parties may return before me, on notice to the secured creditor, and present further evidence and argument as to the nature of the transactions.

VI. Is Southbend Liable for the Levy?

A. Facts

[194] Financial straits prompted Southbend to make a Division I *BIA* proposal (Proposal). It had performed work on four projects: Petro-Canada projects in Alberta and the Yukon Territory (the Petro-Canada Projects), Imperial Oil Ltd.

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projects in Alberta (the Imperial Oil Projects), McDonalds Restaurants of Canada projects in British Columbia (the McDonalds Projects), and Starbucks Coffee projects in British Columbia (the Starbucks Projects).

[195] The language of the Proposal is curious. It includes the following definitions in clause 1:

> c. "Creditors" and "Proposal Creditors" means the Preferred Creditors and Ordinary Creditors of the Debtor existing at the Notice of Intention Date.
>
> e. "Lien Claimant" means those persons with claims to builders' liens against projects undertaken by the Debtor in Alberta, British Columbia and the Yukon Territory who have, as at the Proposal Date, registered their claim of lien in the appropriate land titles or land registry office against title to the lands on which the project was undertaken.
>
> g. "Lien Claimant Pools" means the funds established to satisfy Lien Claimant claims as outlined in paragraph 8 herein.
>
> i. "Ordinary Creditors" means those persons with claims that are proved in respect of debts and liabilities present and future to which the Debtor was subject at the Notice of Intention Date or to which it may become subject by reason of any obligations incurred before the Proposal Date, including claims of landlords and all sub-trades of the Debtor on any project wherever located except for these claims:
>
> > i. That have been finally and conclusively disallowed or found by the Court not to be provable;
> > ii. That are claims by Secured Creditors or Preferred Creditors;
> > iii. That there are claims relating to the SBC Projects; or
> > iv. That are claims relating to the Administrative Fees and Expenses.
>
> k. "Preferred Creditors" means creditors whose claims are directed by the Act on a Proposal made by a Debtor to be paid in priority to all other claims except for Administrative Fees and Expenses.
>
> n. "Proposal Funds" means the funds established for the purpose of the Proposal as outlined in paragraph 9 hereof.
>
> q. "Secured Creditors" means persons holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the Debtor or any part thereof as security for a debt or liability due to or accruing due to them by the Debtor including any Lien Claimant.

[196] Clause 2 states:

> 2. The classification of creditors for the purpose of considering and voting on this Proposal and either receiving payment from the Lien Claimant Pools or dividend shall be as follows:
>
> > a. Class I - Lien Claimants
> > b. Class II - Ordinary Creditors
>
> This Proposal is not being made to Secured Creditors other than Lien Claimants.

[197] Clause 8 deals with the treatment of Lien Claimants. It reads:

> 8. Lien Claimant Pools have been or will be established with funds sufficient to cover the claims of Lien Claimants in full with a provision for interest and costs. The Lien Claimant Pools will be held in trust by counsel for the Debtor, or as may be arranged with the applicable owner, and such funds will stand in the place and stead of the lands liened as security for the Lien Claimant claims. The claims of Lien Claimants will be administered as follows:
>
> > a. On or before 4 p.m. Mountain Stand[sic] Time of the last business day prior to the Meeting of Creditors, each Lien Claimant shall file with the Trustee a proof of claim with sufficient evidence to establish the validity of its claim of lien;
> > b. Any Lien Claimant who fails to file its proof of claim within the time stipulated in paragraph 8(a) will be deemed to have abandoned its claim of lien and will thereafter be treated as an Ordinary Creditor and will have its claim compromised in accordance with paragraph 9 to 11 herein [emphasis in the original];
> > c. Within 30 days of receipt of the Lien Claimants' proofs of claim, the Trustee will send a notice to each Lien Claimant so filing, a notice in writing advising the Lien Claimant that their claim has either been accepted as filed, accepted in part or rejected;
> > d. Where the Trustee makes a determination that the claim has been accepted only in part or has been rejected as a valid lien claim, that determination shall be deemed to be final and conclusive unless, within a 30 day period after service of the notice referred to in the preceding paragraph, the affected Lien Claimant files an appeal to the Court in

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Edmonton, Alberta in accordance with the *Bankruptcy and Insolvency Act General Rules* on notice to the Trustee and the Debtor's counsel...

e. Lien Claimants with accepted claims will receive funds within 30 days of being notified of the acceptance by the Trustee. In such cases, the Trustee will direct Debtor's counsel to release the approved sum to the appropriate Lien Claimant. Prior to receiving funds, such Lien Claimant shall provide appropriate registrable discharges of their lien or liens to Debtor's counsel. No funds will be provided until such documentation is provided;

f. Lien Claimants exercising rights of appeal as provided for in paragraph 8(d) will be protected for their claim until a decision has been made by the Court on the validity of their claim and all further appeals have been exhausted; and

g. Once all Lien Claimants have been paid from the Lien Claimant Pools and all appeals have been finalized, the balance remaining, if any, shall be paid to the Trustee and added to the Proposal Funds to be administered in accordance with paragraphs 9 to 11.

[198] Clause 9 says that (after payout of a major secured creditor and provision for the Lien Claimants) Southend anticipates it will have a total of $690.000 for distribution to its creditors.

[199] The Proposal goes on in clause 11 to provide that:

> 11. Upon acceptance of the Proposal by the requisite number of Creditors in each class, approval of the Proposal by the Court and payment of the Proposal Funds to the Trustee in accordance with paragraph 9, the Creditors shall have no further rights to enforce their claims except as provided in the Proposal and thereafter, each Creditor shall be deemed to release and forever discharge any and all claims, suits and causes of action, whether at law, in equity or under any statute, that each of them may have had against the Debtor or any of its principals, directors, officers or agents as at the Notice of Intention Date.

[200] In its August 22, 2002 Report to Creditors of Southbend, BCI said that Southbend had disclosed liabilities totalling $2,693,116, comprised of debt to secured creditors ($687,000), lien claimants ($275,000), preferred creditors ($70,000), and unsecured creditors ($1,661,116). BCI indicated that Southbend's disclosed assets, which it listed as including $275,000 in "lien holdbacks,"totalled $1,668,023. In describing the Proposal, BCI made no mention of payments to lien claimants or that lien claimants would constitute a separate voting class under the Proposal.

[201] According to the Minutes of the First Meeting of Creditors held on September 5, 2002, BCI tallied the votes of creditors and determined that 92.53 percent in dollar value and 93.33 percent in number of proven claims were in favour of the Proposal. Therefore, the Proposal was accepted.

[202] Robert Sword, Vice President of BCI, deposed that, prior to the first meeting of creditors, BCI received proofs of claim from fourteen lien claimants, all of which it reviewed and either allowed or disputed. It received voting letters from twelve of those lien claimants (totalling $303,102.38 in value). Mr. Sword deposed that the proofs of claim filed by the lien claimants "were not counted for the purposes of determining whether the requisite number and value of creditors had voted in favour of the Proposal." Attached as an exhibit to Mr. Sword's affidavit was a letter from a senior bankruptcy analyst with the OSB to BCI, dated April 6, 2006, in which the author made reference to a letter from BCI indicating that of the twelve lien claimants who submitted voting letters, "there was unanimous support for the proposal." However, Mr. Sword did not depose to that fact and it is not otherwise in evidence before me.

[203] In it's September 19, 2002 Report of Trustee on Proposal to the Court, BCI reported that: "... the proposal was accepted by the required majority of creditors in each class," offering that Southbend had assets which included cash in the bank, accounts receivable, and moneys due from a related company, totalling $1,387,850 in book value. In the Estimated Statement of Affairs (Adjusted), it mentioned liabilities to unsecured creditors, preferred creditors and secured creditors, the latter being listed at $686,000. Given that BCI's Report to Creditors indicated Southbend had disclosed liabilities of $687,000 to secured creditors other than lien claimants, presumably the liabilities to secured creditors shown in the Report to the Court did not include lien claims. BCI's Report to the Court appended its Report to Creditors and the Proposal, but did not otherwise refer to the lien claimant liability or holdback for same.

[204] The Proposal was sanctioned by the Court on October 1, 2002, the preamble to the order stating: "...AND UPON the Court being satisfied that the required majority of creditors have accepted the Proposal in the terms and conditions in the paper writing attached hereto and marked as Schedule 'A'..."

[205] According to the affidavit of Clayton Reitzel, funding for payments to the lien claimants came from four distinct sources:

1. Funds for payment of lien claimants on the Petro-Canada Projects came from Petro Canada, whose counsel imposed a trust condition that the money be used to pay lien claimants on the Petro-Canada Projects in Alberta and Yukon before any funds could be made available to Southbend and its creditors.

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2. Funds were paid to Southbend's counsel by Southbend before the Proposal in trust for payment of the lien claimants with respect to the Imperial Oil Projects. (There is no evidence before me as to whether these funds were provided to Southbend by Imperial Oil in trust for payment of the lien claims).
3. Funds for payment of the Starbucks Projects were paid to counsel for Southbend, who paid the funds in compliance with British Columbia lien legislation.
4. Funds for the McDonalds Projects were partly paid into court in a British Columbia Supreme Court lawsuit. Pursuant to an order of that court, the funds previously paid to the credit of the court action were paid to the trustee through Southbend's British Columbia counsel. The order directed BCI to hold a portion of the funds pending determination of the lien claims of Alpine Roofing Ltd. and Kore Irrigation Ltd. The latter claim was never pursued. The former eventually was settled. The order directed McDonald's British Columbia counsel to pay one lien claimant and pay the balance of the funds held by them with respect to the McDonalds Projects to the trustee.

[206] On receipt of discharges of liens and BCI's say-so, Southbend's counsel paid interim distributions to lien claimants from funds held in respect to the lien claims (the remainder being held in trust pending the outcome of this application). One of the allowed claims was paid by counsel for the owner of the lands (on which the work had been done by Southbend) directly to the lien claimant. Another payment was made by the trustee from funds provided by the debtor's counsel from the lien fund as settlement of a claim for interest and costs under the *Builder's Lien Act*. A third payment constituted a settlement and was made from funds paid to the trustee pursuant to the British Columbia Supreme Court order which directed that the funds be held in trust in lieu of a builder's lien until disallowance of the lien had been dealt with. In total, $171,401.48 has been or will be paid out to lien claimants (less any levy found payable).

[207] BCI advised in its Second Report to the Court, filed May 6, 2003, that it was seeking a number of orders, including an order confirming that proofs of claim not filed by the "claims bar date" were barred as lien claims but could be proved as unsecured ordinary creditor claims, an order directing that claimants who had failed to file a proof of claim in time or at all discharge their lien registrations, and an order confirming that certain liens were invalid for failure to file an appeal and that Southbend's counsel was at liberty to release specific funds held in trust to the trustee.

[208] In the spring of 2006, the OSB notified BCI that it was of the view BCI was in breach of Directive 10 and was responsible for remittance of the levy because it was duty bound to and had reviewed all of the claims submitted pursuant to the Proposal. The OSB took the position that, by accepting characterization of their claims as those of secured creditors, the lien claimants had participated in and benefited from the Proposal process. Accordingly, they were liable for payment of the levy.

B. Issues

[209] Southbend's stated intention in crafting the Proposal as it did was to create an efficient process to deal with the lien claimants and to create a pool of surplus funds for the ordinary creditors with any lien funds that were not paid out to the lien claimants. The lien claimants were *de facto* unsecured creditors of Southbend. Their security (in the form of a lien) was not against Southbend, but rather against the owners of the lands on which Southbend had performed work. Curiously, however, the Proposal included them under the definition of "Secured Creditors." The Proposal defined two classes of creditors: "Lien Claimants" and "Ordinary Claimants." In order for the Proposal to pass, acceptance by both classes of creditors was said to be required.

[210] The lien claimants' votes were not counted in the final tally on the creditors' vote accepting the Proposal. The Court approved the Proposal as it was presented to the creditors.

[211] The following questions arise as a result of this scenario:

1. Were the funds which were used to pay the lien claimants trust monies that do not attract the levy?
2. Can the language of the Proposal and the lien claimants' response to it convert trust claims into secured claims and trigger liability for the levy as a result?
3. What is the effect of the order sanctioning the Proposal in terms of characterization of the lien claimants' claims?

C. Analysis

[212] But for a few exceptions, none of which are pertinent to the present case, all of the provisions of the *BIA* apply to this Division I Proposal.[136]

1. Trust Claims/Property of the Debtor

[213] There is a significant body of law addressing builders' liens and trust property in the context of bankruptcy proceedings. The principles most relevant to the present application can be summarized as follows:

1. A trust claimant is in no worse or no better a position as a result of the bankruptcy.[137]

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2. A trust created by builders' lien legislation qualifies as a trust within the meaning of s. 67(1)(a) of the *BIA*.[138] As such, it is not property of the bankrupt. Rather, it provides protection for those down the contractual chain on construction projects.[139]
3. Money paid into court by the owner to remove builders' liens is not the property of the debtor/bankrupt.[140]
4. A trustee in bankruptcy may be considered as acting as a trustee under builders' and mechanics' lien legislation, under the provisions of which she holds funds, when distributing the funds to lien claimants.[141]

[214] Section 67 of the *BIA* states that any property held by a bankrupt in trust for another person shall not form any part of the bankrupt's estate divisible among his creditors.

[215] Section 72 of the *BIA* specifically provides that the *BIA* does not abrogate or supersede the provisions of provincial law dealing with property and civil rights. Therefore, provincial laws will apply in bankruptcy proceedings provided they do not conflict with the *BIA*. As noted in Houlden and Morawetz's *Bankruptcy and Insolvency Law of Canada*:[142]

> The trust fund provisions of the provincial lien Acts isolate contract monies and require them to be used for paying suppliers who have contributed to the contract or subcontract. By making the monies a trust, the suppliers are given protection in the event that the contractor or subcontractor becomes insolvent, since the monies will not form part of the bankrupt estate…

[216] Section 10 of the ***Builders' Lien Act*** of British Columbia[143] provides that any monies received by a contractor or subcontractor on account of the price of the contract or subcontract constitute "a trust fund for the benefit of persons engaged in connection with the improvement" and that the contractor or subcontractor is the trustee of the fund and not entitled to any of the money until all beneficiaries of the trust have been paid in full.

[217] Unlike the British Columbia statute, the Alberta and Yukon Acts do not create a trust, but rather create lien rights against the owners' land and establish obligations on the part of the owner. The lien right arises on the provision of work or materials and exists without registration of the lien against title to the lands. Registration of the lien against the title to the lands preserves the lien so that it will not lapse in accordance with the terms of the legislation.[144] Both Acts require that the owner retain a specified percentage of the value of the work actually done and materials actually furnished for a set period. The Acts allow the owner to pay the lien fund(s) into court, thereby discharging the owner from any liability with respect to the liens. The money paid into court stands in the place of the land.

[218] In ***Re Walter Davidson Co. (No. 2)***,[145] the court ruled that lien funds administered by a trustee in bankruptcy were not administered by the trustee as part of the bankrupt's estate and, therefore, could not attract the levy. The court commented:[146]

> This case is rather close to the line. I do feel, however, that these payments are not made by the trustee as part of the administration of the property of the debtor but rather as a trustee of the fund which is for the benefit of these persons who have supplied materials. It is true that he may become the trustee of the fund possibly by operation of the *Trustee Act*, as counsel for the Superintendent points out, but that does not mean in acting in that capacity he is administering the estate of the bankrupt but, rather, is administering this fund. This fund, while it may be in the legal title of the debtor, is really not the property of the debtor for distribution among the creditors under section 39 of the *Bankruptcy and Insolvency Act* and I think, therefore, these payments do not come within the meaning of section 106. I think section 106 covers the case and is intended to apply to the case where the payments are being made by the trustee as the trustee administering the estate of the bankrupt for the benefit of the creditors and not where he is making payments out of a fund which is a trust fund for certain lien holders. It is true they become *cestuis que trust* but, as I say, I think the payments and distributions of the fund are something outside of the exercise by the trustee of his duties as trustee in bankruptcy.

[219] ***Re Performance Drilling***[147] has previously been discussed. There, Riley J. ruled that the levy did not apply to moneys collected by the trustee from landowners who were indebted to the bankrupt estate under building contracts and paid out by the trustee to the lienholders who had filed liens against the lands of the landowners, relying on ***Re Walter Davidson Co. (No. 2***).

[220] In ***Re Stall Lake Mines Ltd. (N.P.L.)***,[148] the Manitoba Court of Appeal dealt with levy in the context of a trust obligation imposed on a trustee. Funding for the proposal in that case was provided by third parties (shareholders) on the trust condition that the money be used to make payment under the proposal if the proposal was accepted. If the proposal was not accepted, the monies were to be returned. The funds were not to become property of the bankrupt in the event of a deemed bankruptcy.

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[221] Drawing an analogy to builders' lien cases, the court ruled that there should be no distinction between a trust created by statute and one imposed on a trustee in bankruptcy by letter. In the result, the funds were held not to be the property of the debtor and levy was not imposed. The court stated:[149]

> In the mechanics' liens cases, moneys which have been paid to the bankrupt or to which he is entitled under his building contract are made subject, by statute, to a trust in favour of lienholders. It is well settled that payments of such moneys to lienholders are not subject to the levy. In the instant case, moneys were supplied to the trustee under a trust condition, imposed by letter, for payment of the claims of specified unsecured creditors. I am unable to see, in these circumstances, any ground for distinguishing between a trust created by statute and one specifically imposed by letter. In the instance case the argument against the levy being applicable is even stronger, because the money supplied to the trustee was not money of the bankrupt nor money to which the bankrupt was entitled. It was supplied by other persons. It never became the property of the bankrupt. In paying it to the specified creditors the trustee was not administering any property of the bankrupt. He was simply making payments according to the trust obligation imposed upon him and which he had assumed.

[222] The author of an annotation on ***Re Stall Lake Mines Ltd. (N.P.L.)***[150] criticized the decision as being indicative of the courts' unwillingness to fairly apply s. 147, noting that the case was unlike those where money is paid outside of the (then) *Bankruptcy Act* pursuant to a trust created by a mechanics' lien statute:

> Another reason given was that the funds distributed were not the property of the bankrupt but rather were received from third parties. In adopting this reason the courts relied on the decisions in the mechanics' lien cases where the money which was distributed was not an asset of the bankrupt estate by virtue of s. 39(a) of the *Bankruptcy Act* which provides that the property of a bankrupt divisible among creditors shall not comprise property held by the bankrupt in trust for any other person.
>
> The emphasis of this decision is on the source of the funds. A better distinction would be the method and provisions governing the distribution of the funds. If the procedure and provisions of the *Bankruptcy Act* apply, levy should be payable. If the money is paid outside the *Bankruptcy Act* whether pursuant to a trust created by a *Mechanics' Lien Act* or to a secured creditor to obtain a discharge of his security, no levy should be payable.

[223] The OSB criticizes all of the authorities that predate 1992 on the basis that lien claimants then could not participate in commercial proposals. It argues that the lien claimants here knew or ought to have known that any money paid into the Proposal to satisfy their claims would be subject to a trust condition that their lien be discharged. They also knew or ought to have known that BCI would handle those trust monies. Accordingly, it would be inconsistent to say that the characterization of the lien monies as "trust monies" would not attract levy since the lien claimants could have pursued payment of their claims without the benefit of the trustee and the bankruptcy system. The OSB's bottom line is that the lien claimants availed themselves of the bankruptcy system and the price they must pay is the levy.

[224] In my view, the addition of s. 50.1 to the *BIA*,[151] which allows secured creditors to take part in proposals, does not affect the precedential value of the authorities that predated it.

[225] The lien claimants here are not secured creditors within the meaning of the *BIA* and calling them so in the Proposal does not make them so. Section 2 of the *BIA* defines "secured creditor" as meaning:

> ... a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable...

[226] Clearly, the lien claimants are creditors of the debtor, but the security which they hold is not against the property of the debtor but rather is against the property of the owner for whom the debtor did work or supplied materials.

[227] I agree with BCI that in a proposal situation, just as in a bankruptcy, the debtor is not free to use property that is held in trust for another to fund its proposal. In dealing with such funds, the trustee is not acting as trustee under the proposal but rather as trustee of the trust fund.

[228] The focus should not be on what the lien claimants knew or ought to have known about the use and handling of trust funds to pay them out. It is on whether the funds were impressed with a trust for someone else. If they were, they belong to the other person and levy does attach.

[229] The OSB cites ***Re Baria***[152] for the broad proposition that participation in a proposal attracts levy even where trust monies held by the debtor's counsel are used to pay the proposal creditors on the trustee's say so. In my view, ***Re Baria*** does not stand for this proposition. The proposal in that case was made to secured and unsecured creditors. It included a term that $43,000 would be paid from funds paid by the debtor into his counsel's trust account held in satisfaction of a $70,000 debt secured by a collateral mortgage to the Bank of Nova Scotia. The Bank of Nova Scotia

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delivered a proof of claim for a reduced amount (as per its settlement with the debtor) and voted on the proposal. Levy was found to be payable on the basis that the trust funds were funds of the debtor, unlike the funds held in ***Re Stall Lake Mines Ltd. (N.P.L.)***, and in the event the proposal was not approved and there was a bankruptcy, the funds would have been received by the trustee and administered in the course of the bankruptcy. The court also determined that the funds being held by the debtor's solicitor were being held by him as agent for the proposal trustee and were properly paid as part of the proposal. The analysis is sound when viewed in that light.

[230] In assessing the trusts in the present case, I find that the monies paid to Southbend's counsel with respect to the Starbucks Projects were impressed with a statutory trust, the funding for which came from third parties. None of these monies would vest in the trustee on bankruptcy. Accordingly, the payments to lien claimants from those monies do not attract the s. 147 levy.

[231] The monies paid to lien claimants by the Proposal trustee in relation to the McDonald's Projects were from funds provided by the debtor's counsel from the lien fund and, therefore, were impressed with a statutory trust in favour of the lien claimant, or were from lien funds paid in trust to the trustee under the British Columbia order, and as such were also impressed with a statutory or at the very least a common law trust in favour of the lien claimant. In accordance with the authorities cited earlier, levy does not attach to those payments.

[232] The monies paid to Southbend's counsel for the Petro-Canada Projects were from the lien fund(s) held back by Petro-Canada. Southbend's only claim to those funds would be to the excess left after payment of any valid lien claims. The funds necessary to pay the lien claimants were impressed with a common law trust in their favour and, in my view, were not the property of Southbend.[153] As a result, payment of those funds to the lien claimants is not subject to the levy.

[233] Monies paid in relation to the Imperial Oil Projects do not necessarily stand on the same footing. Before the Proposal was made, those funds were deposited with Southbend's counsel by Southbend in trust that they be used to discharge the liens against Imperial Oil's Projects. There is no evidence before me as to whether those funds may have come from the holdback, when they were provided to Southbend's counsel, or the trust conditions imposed on Southbend's counsel. If the funds originally were paid to Southbend by Imperial in trust for payment of the lien claimants, the situation would be similar to payment of the lien claimants on the Petro-Canada Projects and levy would not be payable. If they were not, the relevant parties, on notice to the lien claimants, may return before me and present further evidence and argument as to the nature of the transactions.

2. Characterization of the Claimants

[234] The OSB argues that it is only to avoid imposition of the levy that BCI is now attempting to convert the lien claimants from "Secured Creditors" under the Proposal to property claimants.

[235] As I have stated above, the lien claimants do not fall within the definition of "secured creditor" in s. 2 of the *BIA*. Simply calling a person a "secured creditor" in a proposal does not make them one. The lien claimants here were not secured creditors as against Southbend within the meaning of s. 2 of the *BIA*. They were mere unsecured creditors of Southbend with an alternate remedy against the landowner by registration of a lien against the landowner's property. It is those landowners that the lien claimants had security against by virtue of the relevant provincial builders' lien legislation.[154]

[236] The question arises as to whether the lien claimant's tacit submission to the Proposal process by delivery of proofs of claim and, in the case of 12 of the 14 lien claimants, by submission of voting letters, coupled with BCI's acceptance of many of those claims, had the effect of converting their claims from those of lien claimants to those of secured creditors? In my view, it did not. The *BIA* provides that proposals may be made to secured creditors.[155] As the lien claimants here were not secured creditors of Southbend, they should not have been included in the Proposal unless they chose to participate as unsecured creditors. The definitions section of the Proposal clearly distinguishes between "Lien Claimants" and "Secured Creditors," although clause 2 creates some confusion by stating that the Proposal has not been made "to Secured Creditors other than Lien Claimants."

[237] Pursuant to clause 8 of the Proposal, the Lien Claimants are to be paid from Lien Claimant Pools, held in trust in place of the liened lands by counsel for the Debtor or as may be arranged with the applicable owner, and it is only once Lien Claimants with accepted claims have been paid from the Lien Claimant Pools and all appeals have been finalized that the balance remaining is to be paid to the trustee and added to the "Proposal Funds," to be administered in accordance with clauses 9 to 11 of the Proposal. Clause 8(a) of the Proposal calls on the lien claimants to provide a proof of claim along with "sufficient evidence to establish the validity of it's [sic] claim of lien."

[238] Reading the Proposal as a whole, it would appear that it was not designed to treat the lien claimants as secured creditors. Their inclusion does not affect the validity of the Proposal as the votes of the twelve lien claimants who submitted voting letters were not counted in determining whether the Proposal had been accepted by the unsecured creditors.

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[239] BCI points to s. 81 of the *BIA*, which provides a method whereby property claimants, including beneficiaries of trusts, may submit claims to the trustee and the trustee is then required to administer the claim by reviewing the proof of claim and either admitting it, delivering possession of the property to the claimant, or giving notice of dispute of the claim. An appeal procedure is also provided.

[240] Section 81 relates to bankruptcy, not to proposals. However, the analogy is apt. Levy is not payable when the trustee gives property in the possession of the bankrupt back to the rightful owner. While the property claimant may be required to file a proof of claim, that is simply to allow the trustee to verify the assertion of ownership or interest in the property and to enable the property to be identified. The property claimant is not making a claim on the estate of the bankrupt but rather is seeking the return of property to which they are entitled. Levy is not payable as the trustee is not making a payment on account of a claim of a creditor. In my view, the same applies in the present case.

[241] Given that the lien claimants could not properly take part in the Proposal and that payment to them must be taken as having been made outside of the Proposal process, presumably the trustee's fees and disbursements associated with processing the claims were not deducted from the Proposal Funds.

[242] The processing of lien claims in the fashion outlined in the Proposal was an arrangement which appears to have been agreed to by the land owners, Southbend, the trustee and the lien claimants who filed proofs of claim. It allowed for the efficient and orderly settling of lien claims. Such an arrangement is not necessarily to be discouraged. However, in future it is to be made clear to all concerned that the arrangement is not undertaken pursuant to the *BIA* or builders' lien legislation and if the party responsible for payment of the trustee's fees and disbursements is specified.

3. Effect of the Order Sanctioning the Proposal

[243] As a general rule, an order properly made and entered cannot be varied or set aside except on appeal. Once it is entered and served, the judge who made it is *functus officio*.[156] The Court has no power to amend its judgment once entered, except where there has been a slip in drawing it up, or where there has been an error or omission in regard to the Court's intention.[157]

[244] No evidence was presented at the hearing of the present matter as to what was said in oral submissions to Master Breitkreuz. Accordingly, this Court must rely on the order as granted and the Report of Trustee on Proposal presented to the Master.

[245] The body of BCI's Report on the sanctioning application did not mention the lien claimants, only creditors. The Proposal itself differentiated between creditors (unsecured, secured and preferred) and lien claimants. "Creditors" were defined in clause 1 as meaning "Preferred Creditors and Ordinary Creditors of the Debtor existing at the Notice of Intention Date."

[246] The Report indicated that a meeting of creditors was held on September 5, 2002 and that the Proposal was "accepted by the require majority of creditors in each class." The only class of creditors involved in the Proposal consisted of unsecured creditors. The Minutes of the First Meeting of Creditors only listed unsecured creditors. The Report of Trustee on Proposal did not list the lien claims as liabilities of Southbend. BCI opined in its Report that the Proposal was an advantageous one for "creditors." The order of Master Breitkreuz states in the recital that: "UPON the Court being satisfied that the required majority of creditors have accepted the Proposal..."

[247] In my view, it was the Proposal at it affected unsecured creditors that was approved by the Court. Given this interpretation, no issue of estoppel arises.

[248] I caution trustees who might consider entering into a similar arrangement in the future with lien claimants who are not secured creditors of the debtor that the arrangement should clearly be separated from any proposal made to creditors under the *BIA* in order to avoid the type of confusion which has arisen in this case.

VII. Is Cutting Edge Foods Liability for the Levy

A. Facts

[249] Dr. David Climenhaga loaned Cutting Edge Foods $400,000 to restore an asset purchase agreement with a third party (Agreement) into good standing. He took an assignment of the Agreement and a general security agreement as security for the loan (Security). Less than a month later came Cutting Edge Foods' assignment into bankruptcy. The following subsequently unfolded:

- April 8, 2002 - Before taking steps to realize on his security, Dr. Climenhaga's counsel wrote the trustee asking about its intended actions.
- April 29, 2002 – The trustee obtained an order to sell all of the bankrupt's assets by tender without prejudice to the right of secured creditors to exercise their security rights (Tender Order). The Tender Order was consented to by Dr. Climenhaga. Although the validity of the security had not yet been verified by the trustee, the Tender Order nevertheless referred to Dr. Climenhaga as a secured creditor in the preamble.

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- June 13, 2002 – Dr. Climenhaga's counsel notified the trustee's counsel that his client was the effective registered owner of certain land, that he would not agree to a sale of the bankrupt's assets until treatment of the security was resolved or the trustee agreed to pay him what he was owed.
- Also on June 13, 2002 – The trustee's counsel wrote to Dr. Climenhaga's counsel advising that the security could not be enforced without first proving the claim, obtaining a release from the trustee, and delivering a s. 130 notice to elect to redeem the security.
- June 14, 2002 – The trustee obtained an order approving the sale of the bankrupt's assets (Sale Order), the entry of which was stayed to allow Dr. Climenhaga's counsel the opportunity to obtain instructions. As the validity of Dr. Climenhaga's security had not yet been determined by the trustee, the Sale Order included this provision:

  > The sale proceeds shall be held in trust by the Trustee and shall stand in place and stead of the Purchased Assets as allocated in paragraph 5 subject to secured claims as the interests of secured creditors may appear and there shall be no distribution of the sale proceeds without further order of the Court. The sale of assets, and the holding of funds shall not prejudice the positions of any secured creditors or the Trustee in respect of claims to the Purchased Assets or the sale proceeds.

- June 19, 2002- Dr. Climenhaga's counsel wrote to the trustee's counsel advising of his client's opposition to the sale of the assets subject to his security, and of his intention to enforce the security.
- June 27, 2002 – The Court directed entry of the Sale Order.
- June 28, 2002 – Dr. Climenhaga's counsel delivered a notice under s. 130 for the trustee to elect to redeem the security (s. 130 notice), the response date for which was subsequently extended to July 31, 2002.
- July 30, 2002 – The trustee disallowed Dr. Climenhaga's claim and advised that the disallowance relieved it of its obligation to respond to the s. 130 notice.
- July 23, 2004 - Registrar Smart overturned the disallowance, finding that Dr. Climenhaga had an equitable interest in the lands, giving him a present charge on the lands in priority to the trustee.
- Unknown Date: The trustee filed an appeal of Registrar Smart's July 23rd order. The appeal was abandoned.
- Unknown date - Dr. Climenhaga delivered a "proof of claim" to the trustee. The "proof of claim" was not entered in evidence in these proceedings.
- Unknown date– The trustee paid Dr. Climenhaga the full value of his claim less a five percent holdback pending resolution of this application.

B. The Parties' Positions

[250] Dr. Climenhaga's position is that:

(a) His actions evidence resistance to being drawn into the bankruptcy process.

(b) At best, he was an unwilling participant in the bankruptcy, drawn in by the trustee's unfounded demand for a proof of claim.

(c) The orders made in connection with the asset sale preserved his security and/or created a trust in his favour.

[251] The OSB urges that:

(a) Dr. Climenhaga's circumstances are largely irrelevant. He participated in the process, received a payment from the trustee from funds generated by the trustee's efforts. He must pay the levy.

(b) The timing of Registrar Smart's order as to the validity of the security deprived Dr. Climenhaga of any protections afforded secured creditors by the Tender or Sale Orders.

(c) The "trust" referred to in the Sale Order is simply a "housekeeping trust."

(d) The court may not entertain equitable considerations because the levy is "tax legislation."

C. Analysis

[252] The relevant authorities have been canvassed in my decisions concerning Fantasy and Southbend and need not be revisited for the purposes of this analysis. Suffice to say that the concern in the present matter is the effect of Dr. Climenhaga's participation in the bankruptcy process by virtue of his delivery of a "proof of claim."

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[253] As I have stated in my discussion above on the *vires* of Directive 10, the fact that a secured creditor has filed a proof of claim does not in and of itself subject the creditor to levy unless the secured creditor has surrendered his security and is claiming as an unsecured creditor or seeks to prove the balance due him after realizing his security.

[254] No evidence was presented on the hearing of this matter as to whether the proof submitted by Dr. Climenhaga was of security or of a claim. Again, use of the same form and term for two very different types of proofs muddies the waters. If Dr. Climenhaga's "proof of claim" was simply a proof of security, it is no evidence of true participation in the process. If, on the other hand, he valued his security at less than the amount of the debt, he can be seen as participating to the extent of the shortfall. Given that he served the trustee with a s. 130 notice to elect to redeem security and a proof of claim, it seems highly unlikely that he was looking for a dividend.

[255] I have no hesitation in rejecting the OSB's suggestion that Dr. Climenhaga is precluded from taking advantage of the protection afforded secured creditors because the declaration of validity of his security came later. The preamble to the Tender Order, which was drafted by the trustee's counsel, specified that Dr. Climenhaga was a secured creditor although his security had not yet been accepted by the trustee. It spoke to preservation of secured creditors' rights. Moreover, the curiously coincidental timing of expiration of the time for responding to Dr. Climenhaga's notice to elect to redeem (extended at the trustee's request) and the disallowance of his security by the trustee, raise some concern. Finally and perhaps most importantly, to find otherwise opens the door for potential abuse, absurd results and improper erosions of secured creditors' rights.

[256] In addition, I have no hesitation in rejecting the notion that Dr. Climenhaga's failure to appeal the Sale Order should be regarded as his tacit acceptance to somehow being drawn into the bankruptcy process. The Sale Order preserved his rights. Why would he appeal it?

[257] The final issue concerning the Sale Order is whether it created a trust in Dr. Climenhaga's favour, thus removing any potential liability for the levy. The intention of the Sale Order *vis-a-vis* secured creditors was to segregate the sale proceeds and hold them for the benefit of the secured creditors who, to use the vernacular, "had their mud and metal converted to money." Courts routinely make orders like this to allow sales in insolvencies to proceed, leaving disputes about the validity, enforceability and priority of security to be resolved another day. The Sale Order did not purport to do more than that. It did not create a trust in Dr. Climenhaga's favour in the sense that he suggests.

[258] In the present case, the Sale Order specified that the sale proceeds were to be held in trust by the trustee in the place and stead of the purchased assets. Ultimately, Dr. Climenhaga's security was declared to be valid and he was paid out the full amount of the debt (minus the holdback for the levy pending this application). Dr. Climenhaga was relying on his security. He was not making a claim in the bankruptcy. Accordingly, the levy is not triggered.

[259] Given my findings, I need not be concerned with application of equitable principles, an issue of some concern to the OSB.

[260] I conclude that Dr. Climenhaga is not liable for payment of the levy.

VIII. Conclusions

[261] Production by a secured creditor of proof of security is not a precondition to redemption of security under s. 128(3) of the *BIA* by payment in full of the debt. Directive 10 says that it is. To that extent, it is *ultra vires*.

[262] There is no requirement in the *BIA* that in order to constitute a redemption by the trustee, encumbered assets must be sold at a net price that equals or betters the total of the secured creditor's claim or value of the security per the proof of security. Directive 10 imposes such a requirement, thereby potentially affecting secured parties. To that extent, it is *ultra vires*.

[263] The requirement in Directive 10 that levy be paid in the event of non-compliance with s. 13.04 even where the trustee in fact acts as agent, receiver or mandatary, arises from misinterpretation of the *BIA* by the Superintendent. To that extent, Directive 10 is *ultra vires*.

[264] As to liability for the levy in Fantasy:

(a) If Canadian Western Bank and Carevest were each paid the full amount of the debts owing to them, they are not liable for the s. 147 levy. There is no issue in terms of the "proofs of claim" submitted by them.

(b) If, however, the "proofs of claim" delivered by Canadian Western Bank and Carevest evidence an intention to surrender their security or to claim for a deficiency as an unsecured creditor, levy would follow payment of any dividend. PWC and the OSB are to review the "proofs of claim" to ascertain whether levy is payable in accordance with this ruling. If they cannot agree, they may bring the matter back before me on notice to the secured creditor(s) involved.

(c) As to the Capital City and Bank of Nova Scotia transactions, PWC is to satisfy the OSB that payment was made of the debt in full in each case. If it was, levy is not payable by the secured

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creditors. If it was not the parties may return before me, on notice to the secured creditor, and present further evidence and argument as to the nature of the transactions.

[265] Concerning liability for the levy in Southbend:

(a) The monies paid with respect to the Starbucks Projects were impressed with a statutory trust. Payments to lien claimants from those monies do not attract the levy.

(b) The monies paid to lien claimants in relation to the McDonald's Projects were from funds impressed with a statutory trust in favour of the lien claimants or were from lien funds paid in trust to the trustee under the British Columbia order which were also impressed with a statutory, or at the very least, a common law trust in favour of the lien claimant. The levy does not attach to those payments.

(c) The monies paid for the Petro-Canada Projects were from the lien fund(s) held back by Petro-Canada that were impressed with a common law trust. Payments to lien claimants from those monies do not attract the levy.

(d) There is no evidence as to whether monies paid in relation to the Imperial Oil Projects came from a holdback or as to the trust conditions imposed on Southbend's counsel. If the funds were paid to Southbend by Imperial in trust for payment of the lien claimants, the levy would not be payable. If they were not, the parties may, on notice to the lien claimants, return before me and present further evidence and argument as to the nature of the transactions.

(e) The lien claimants could not properly take part in the Proposal and payment to them must be taken as having been made outside of the Proposal process.

(f) Neither the description of the lien claimants as "secured creditors" in the Proposal nor the order sanctioning the Proposal has the effect of attracting the levy.

[266] The Sale Order made in Re Cutting Edge Foods Inc. specified that the sale proceeds were to be held in trust by the trustee in the place and stead of the purchased assets. Dr. Climenhaga is not liable for payment of the levy.

Heard on the 5th day of February, 2008.
Supplemental Written Submissions Received in March and April, 2008.
Dated at the City of Edmonton, Alberta this 6th day of June, 2008.

J.E. Topolniski
J.C.Q.B.A.

Appearances:
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[1] R.S.C. 1985, c. B-3
[2] ***Re Fantasy Construction Ltd.***, 2007 ABQB 502 (CanLII), 2007 ABQB 502
[3] ***Re Fantasy Construction Ltd.***, 2007 ABCA 335 (CanLII), 2007 ABCA 335
[4] 2005 FC 702 (CanLII), **2005 FC 702, [2006] 2 F.C.R. 543, aff'd** 2006 FCA 205 (CanLII), 2006 FCA 205, 28 C.B.R. (5th) 200, leave to appeal to S.C.C. refused [2006] C.S.C.R. no 317
[5] 2005 FC 208 (CanLII), **2005 FC 208, 280 F.T.R. 57 at para. 18, aff'd** 2005 FCA 318 (CanLII), 2005 FCA 318
[6] *BIA*, s. 5 (4)(a)

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[7] *BIA*, s. 14.01
[8] R.S.C. 1985, c. S-22
[9] A repeating theme in the reports concerns discharge applications and the applicability of Directive No. 11 - *Surplus Income* and Directive No. 12 - *Terms of Discharge.*
[10] ***Re Kop Beverages Ltd.*** (1952), 32 C.B.R. 221 at 223 (Ont. H.C.J.) [***Re Kop Beverages***]
[11] ***Re Cameron***, 2001 ABQB 915 (CanLII), 2001 ABQB 915 at para. 13, 29 C.B.R. (4th) 206, additional reasons at 2002 ABQB 92 (CanLII), 2002 ABQB 92, aff'd 2002 ABQB 267 (CanLII), 2002 ABQB 267, (2002) 32 C.B.R. (4th) 176
[12] *Bankruptcy Rule* 123(1). The present rate of levy is 5% on payments of $1 million or less. If the payments exceed $1 million but is not more than $2 million, 5% on the first million dollars and 1¼% of the balance. If the payments exceed $2 million, 5% on the first million dollars, 1¼% on the second million dollars, and ¼% on the balance.
[13] Houlden & Morawetz, *Bankruptcy Law of Canada*, orig. ed. (Toronto: Carswell, 1960), pp. 1, 214 and 215
[14] ***Re Zutphen Bros. Construction Ltd.*** reflex, (1994), 29 C.B.R. (3d) 84 (N.S.S.C.) [***Re Zutphen Bros.***]
[15] ***British Columbia (Superintendent of Bankruptcy) v. Coopers & Lybrand Ltd.*** 1995 CanLII 2669 (BC CA), (1995), 36 C.B.R. (3d) 130 (B.C.C.A.) [***Re Brittain Steel***]; ***Re Colonial Mfg. Co., Ex p. Bank of Nova Scotia***, [1934] 1 D.L.R. 703, [1934] O.R. 116, 15 C.B.R.244 (H.C.J.); ***Re Trynor Const. Co.*** (1965), 6 C.B.R. (N.S.) 98, 49 M.P.R. 268, 42 D.L.R. (2d) 271 (N.S. S.C.)
[16] No: ***Bank of Montreal v. Hester Creek Estate Winery Ltd.***, 2004 BCSC 724 (CanLII), 2004 BCSC 724, 2 C.B.R. (5th) 61 [***Hester Creek Estate***]; Maybe: ***Banque Nationale du Canada c. Restaurant Ocean Drive Inc.*** 1998 CanLII 12986 (QC CA), (1998), 23 C.B.R. (4th) 26, (Q.C.A.), leave to appeal to S.C.C. ref'd [1998] C.S.C.R. no 472 [***Restaurant Ocean Drive***]. Yes: ***9067-5661 Québec inc. c. Daniel Adam & Associés*** 2003 CanLII 36033 (QC CS), (2003), 48 C.B.R. (4th) 150 (Qué. S.C.); aff'd [2004] J.Q. no 10093 (C.A.) (QL) [***9067-5661 Québec inc.***]
[17] Yes: ***Re Hart Equipment Corp.*** (1957), 36 C.B.R. 103 (Ont. H.C.J.) [***Re Hart Equipment***]; ***Re Kop Beverages***, footnote 10; ***Re Alger Press Limited*** 1994 CanLII 7257 (ON SC), (1994), 18 O.R. (3d) 214 (Gen. Div.) [***Re Alger Press***]; ***Re 501666 B.C. Ltd. (c.o.b. Electric Zoo Graphics)***, 2005 BCSC 1882 (CanLII), 2005 BCSC 1882, 26 C.B.R. (5th) 224 [***Electric Zoo Graphics***]; No: ***Re Performance Drilling Co. Ltd.***, (1966), 9 C.B.R.(N.S.) 78 at para.7 (Alta. S.C.T.D.) [***Re Performance Drilling***]
[18] Yes: ***Re Kop Beverages***, footnote 10; ***Re Hart Equipment***, footnote 17; ***Electric Zoo Graphics***, footnote 17. Maybe: ***Re Alger Press***, footnote 17; ***Re Skingley*** (1963), 5 C.B.R. (N.S.) 234 (Ont.H.C.J.); ***Re Brittain Steel***, footnote 15. No: ***Re Prudential Finance Corp.*** (1967), 10 C.B.R. (N.S.) 70 (Ont. H.C.J.), aff'd [1968] 1 O.R. 242, 11 C.B.R. (N.S.) 138 (C.A.) [***Re Prudential Finance***]
[19] ***Heppner v. Alberta (Minister of Environment)*** 1977 ALTASCAD 206 (CanLII), (1977), 4 Alta. L.R. (2d) 139 at paras. 25-26 (S.C.(A.D.))
[20] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at p. 186
[21] Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Qué.: Yvon Blais, 1991) at pp. 378-380, as referred to in ***Re Rizzo & Rizzo Shoes Ltd.***, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 27
[22] ***Canada (Attorney General) v. Rassell***, 1999 ABCA 232 (CanLII), 1999 ABCA 232 at paras. 12-13, 237 A.R. 136; ***A. Marquette & fils Inc. v. Mercure***, 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547 at 556; ***Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*** 1994 CanLII 7468 (ON SC), (1994), 114 D.L.R. (4th) 176 at 185, 27 C.B.R. (3d) 148 (Ont. Ct. (Gen. Div.)
[23] *BIA*, s. 69.3(2)
[24] 1988 CanLII 105 (SCC), [1988] 1 S.C.R. 1061 at 1070
[25] *BIA*, s. 127
[26] *BIA*, s. 50
[27] L.W. Houlden and G.B. Morawetz, *Bankrutcy and Insolvency Law of Canada*, 3rd ed. rev'd (Toronto: Carswell, 1992-), G§50
[28] ***St. Anne-Nackawic Pulp Co. (Trustee of) v. New Brunswick (Minister of Business)***, 2005 NBQB 99 (CanLII), 2005 NBQB 99 at para. 34, 11 C.B.R. (5th) 296
[29] ***Re McEwen*** 1997 CanLII 9517 (NB CA), (1997), 50 C.B.R. (3d) 111 (N.B.C.A.)
[30] 2008 ONCA 214 (CanLII), 2008 ONCA 214
[31] Section 50.1 provides that, subject to subsections (2) to (4), a secured creditor has the right to vote the claim as a secured creditor for the entire amount once it has filed proof of security. Section 50.1(4) sets out the mechanism for appealing the proposal trustee's assessment. It states: "Where a secured creditor is dissatisfied with the proposed assessed value of his security, the secured creditor may apply to the court, within fifteen days after the proposal is sent to the creditors, to have the proposed assessed value revised, and the court may revise the proposed assessed value, in which case the revised value henceforth applies for the purposes of this Part."

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[32] Dukelow, Daphne A., *The Dictionary of Canadian Law*, 3d ed. (Scarborough, Ont.: Thomson Carswell, 2004) at p. 710
[33] 4th ed. (London: Stevens& Sons, 1980) at para. 71
[34] At para. 22
[35] 2007 FCA 198 (CanLII), 2007 FCA 198 at paras. 55-64, 2007 FCA 198 (CanLII), [2008] 1 F.C.R. 385, leave to appeal to S.C.C. denied [2007] S.C.C.A. No. 394
[36] (Toronto: Carswell, 1989) at p. 1037
[37] 2008 ABCA 188 (CanLII), 2008 ABCA 188 at para. 17
[38] 2001 ABQB 624 (CanLII), 2001 ABQB 624, 292 A.R. 86
[39] At paras. 70 and 71
[40] At para. 90
[41] At para. 50
[42] At paras. 75, 79-83
[43] 2008 ABCA 153 (CanLII), 2008 ABCA 153
[44] At para. 9
[45] At para. 8
[46] Barber, Katherine, ed., *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) at p. 16
[47] Garner, Bryan A., *Black's Law Dictionary*, 8th ed. (St. Paul: Thomson, 2004), p. 46
[48] 1984 CanLII 121 (SCC), [1984] 2 S.C.R. 447 at 470
[49] *The Canadian Oxford Dictionary*, footnote 46, p. 496
[50] ***Re Morriscey***, 2003 NSSC 200 (CanLII), 2003 NSSC 200 at para. 9, 47 C.B.R. (4th) 92
[51] 2007 BCSC 847 (CanLII), 2007 BCSC 847, 34 C.B.R. (5th) 113
[52] 2005 BCSC 108 (CanLII), 2005 BCSC 108, 10 C.B.R. (5th) 300 (B.C. Master)
[53] [2005] O.T.C. 1109 (S.C.J.)
[54] Footnote 51, at para. 35
[55] Footnote 52, at para. 28
[56] Denys C. Holland and John P. McGowan, *Delegated Legislation in Canada* (Carswell: Toronto, 1989) pp. 181, 182, 187, 188
[57] ***Re Pottie*** 2002 CanLII 40497 (NS SC), (2002), 32 C.B.R. (4th) 92, (N.S.S.C.); ***Re Mitchell***, 2003 ABQB 332 (CanLII), 2003 ABQB 332, 27 Alta. L.R. (4th) 281; ***Re Morris***, 2004 SKQB 4 (CanLII), 2004 SKQB 4, 243 Sask.R. 204; ***Re Cochran***, 2006 NSSC 242 (CanLII), 2006 NSSC 242, 24 C.B.R. (5th) 130
[58] (1990), 77 C.B.R. (N.S.) 233
[59] 2006 FCA 139 (CanLII), 2006 FCA 139 at para. 37, 25 C.B.R. (5th) 204
[60] 2006 NBQB 286, 24 C.B.R. (5th) 279 at para. 20
[61] Footnote 27, C§1, p. 1-32
[62] See also ***Re Dondale***, footnote 51, 2007 BCSC 847 (CanLII), 2007 BCSC 847 at para. 23
[63] *Black's Law Dictionary*, 5th ed., (St. Paul, Minn.: West Publishing, 1979) at p. 1149
[64] *Black's Law Dictionary*, footnote 63, at p. 1149
[65] *Falconbridge on Mortgages*, 5th ed., Walter M. Traub ed.-in-chief (Aurora, Ontario: Canada Law Book, 2003-) at p. 29-1
[66] *Black's Law Dictionary*, footnote 63, at p. 1149
[67] *Law of Property Act*, R.S.A. 2000, c. L-7, s.38(1):

> 38 (1) The Court has jurisdiction and shall grant relief from the consequences of the breach of a covenant or the non-payment of principal or interest by a mortgagor or purchaser in any case in which the mortgagor or purchaser remedies the breach of covenant or pays all the arrears due under the mortgage or agreement for sale with lawful costs and charges in that behalf
>
> (a) at any time before a judgment is recovered, or
>
> (b) within a time that by the practice of the Court relief in it could be obtained.

[68] reflex, [1993], 6 W.W.R. 518 at para.49 (Sask. Q.B.)
[69] 1976 CanLII 34 (SCC), [1977] 2 S.C.R. 959 at 995
[70] ***Hester Creek Estate***, footnote 16, ***Lindstrom v. Pollard*** ([1922), 22 O. W. N. 162 (S.C. (High Ct. Div.))
[71] *Bankruptcy and Insolvency Law of Canada*, footnote 27, § F1 says that where a specific right is created by statute and is only expressed to be exercisable by the bankrupt it does not pass to the trustee in bankruptcy.
[72] R.S.A. 2000, c. P-7, s. 63:

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63(1) At any time before the secured party has disposed of the collateral or has contracted for its disposition under section 60 or before the secured party is deemed to have irrevocably elected to take the collateral under section 62,

(a) any person entitled to receive a notice of disposition under section 60(4) or (8) may, unless the person has otherwise agreed in writing after default, redeem the collateral by tendering fulfilment of all obligations secured by the collateral, or

. . .

together with payment of a sum equal to the reasonable expenses of seizing, holding, repairing, processing and preparing for disposition and any other reasonable expenses incurred by the secured party.

[73] *Personal Property Security Acts*, R.S.B.C. 1996, c. 359, s. 62; S.N. 1993, c. 14, C.C.S.M. c. P35, s. 62; S.N.B. 1993, c. P-7.1, s. 62; S.N. 1998, c. P-7.1, s. 63; S.N.S. 1995-96, c. 13, s. 63; R.S.O. 1990, c. P10, s. 66; S.P.E.I. 1997, c. 33, s. 62; S.S. 1993, c. P-6.2, s. 62; R.S.Y. 1986, c. 130, s. 60.

[74] ***Canadian Acceptance Corp. Ltd. v. Gillespie*** (1985), 56 C.B.R. (N.S.) 197 (N.B.C.A.); ***Re Broydon Printers Ltd.*** (1974), 4 O.R. (2d) 48, 19 C.B.R. (N.S.) 226 (H.C.J.)

[75] Footnote 10

[76] At para. 4

[77] Footnote 17

[78] At p. 110

[79] (1957), 36 C.B.R. 103 at 111

[80] Footnote 18

[81] ***Re Skingley***, footnote 18, at para. 3

[82] reflex, (1996), 41 C.B.R. (3d) 183 (Ont. Gen. Div.)

[83] Footnote 17

[84] At para. 6

[85] ***Re Performance Drilling***, footnote 17, at para. 7

[86] At para. 8

[87] At paras. 6-7

[88] Footnote 18

[89] (1967), 10 C.B.R. (N.S.) 70, para. 32 (Ont. H.C.J.)

[90] Footnotes 18 and 89, at para. 45

[91] [1968] 1 O.R. 242, 11 C.B.R. (N.S.) 138 at para. 12 (C.A.)

[92] Footnotes 18 and 91, at para. 16

[93] [1968] 11 C.B.R. (N.S.) 144 at 145

[94] Footnote 17

[95] Footnote 17

[96] Footnote 15

[97] Footnote 15, at paras. 13 and 14

[98] ***Re Alger Press***, footnote 17, at paras. 10-11

[99] Footnote 14

[100] Footnote 16. This decision, which was issued in French, was translated at my request.

[101] ***Restaurant Ocean Drive***, footnote 16, at para. 42

[102] ***Restaurant Ocean Drive***, footnote 16, at para. 43

[103] (1983), 46 C.B.R. (N.S.) 316 (Ont. H.C.J.)

[104] Footnote 27, vol. 2, p. 5-72.1

[105] Under s. 128 (1.1) a creditor who fails to provide the proof of security within 30 days is liable to lose his or her security interest.

[106] reflex, [1990] R.J.Q. 1039 at 1045 (C.S.)

[107] ***Restaurant Ocean Drive***, footnote 16, at para. 6

[108] Footnote 16

[109] Footnote 16.

[110] Footnote 16, at para. 18

[111] Tysoe J. did not have the luxury of a translation of the decision.

[112] Footnote 103

[113] ***Hester Creek Estate***, footnote 16, at para. 25

[114] ***Hester Creek Estate***, footnote 16, at para. 23

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[115] Footnote 113
[116] ***Hester Creek Estate,*** footnote 16, at para. 29
[117] Footnote 113
[118] 2002 BCSC 487 (CanLII), 2002 BCSC 487, 32 C.B.R. (4th) 297 (S.C.) [***United Used Auto***]
[119] ***United Used Auto***, footnote 118, at para. 56
[120] [2004] A.J. No. 1601 (Q.B.) (QL) [***George's Cycle***]
[121] Footnote 17
[122] Footnote 17
[123] Footnote 18
[124] See, for example, ***Re Prudential Finance***, footnote 18
[125] Fotnote 16
[126] (1973), 19 C.B.R. (N.S.) 80, 1 O.R. (2d) 143 (H.C.J.).
[127] (1981), 40 C.B.R. (N.S.) 25 (Ont. S.C.)
[128] See for example, ***Re Les Pharmacies Modernes Inc.*** (1974), 19 C.B.R. (N.S.) 161 (Qué. S.C.) and ***Re Dominion Lock Co. (Trustee of)*** (1985), 56 C.B.R. (N.S.) 148 (Qué. S.C.) (headnote only in English)
[129] 56 C.B.R. (N.S.) 217 at 224
[130] Footnote 128
[131] Footnote 128
[132] Footnote 16
[133] ***Re 157637 Canada Inc. (syndic)*** reflex, (1996), 43 C.B.R. (3d) 146, 1996 (Qué. S.C.); ***George's Cycle***, footnote 120
[134] ***Re Fantasy Construction Ltd. and Madison Development Corporation 1984 Ltd. (Bankrupts)***, 2006 ABQB 357 (CanLII), 2006 ABQB 357 at para. 12, 22 C.B.R. (5th) 108
[135] 1996 CanLII 5578 (NS CA), (1996), 38 C.B.R. (3d) 133 at para. 12 (N.S.C.A.)
[136] Section 66(1) of the *BIA* provides: "All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.
[137] ***Blaxland v. Fuller*** reflex, (1990), 2 C.B.R. (3d) 125 (B.C. S.C.)
[138] ***John M.M. Troup Ltd. v. Royal Bank of Canada***, 1962 CanLII 9 (SCC), [1962] S.C.R. 487.
[139] ***Rudco Insulation Ltd. v. Toronto Sanitary Inc.*** 1998 CanLII 5529 (ON CA), (1998), 42 O.R. (3d) 292, 114 O.A.C. 272 at para. 28
[140] ***D & K Horizontal Drilling (1998) Ltd. (Trustee of) v. Alliance Pipeline Ltd.***, 2002 SKQB 86 (CanLII), 2002 SKQB 86, 33 C.B.R. (4th) 217, aff'd 2002 SKCA 145 (CanLII), 2002 SKCA 145, 39 C.B.R. (4th) 201
[141] ***Re Arthur J. Lennox Contractors Ltd. (No. 1)*** (1959), 38 C.B.R. 97 at para. 13 (Ont. H.C.J.)
[142]Footnote 27 at F§8(3), p.3-41
[143] S.B.C. 1997, c. 45
[144] Alberta *Builders' Lien Act*, R.S.A. 2000, c. B-7, s. 6; Yukon ***Builders' Lien Act***, R.S.Y. 2002, c. 18, ss. 3-4
[145] (1958), 37 C.B.R. 81 (Ont. H.C.J.). See also ***Re Arthur J. Lennox Contractors (No 1)***, footnote 140, at para. 12
[146] ***Re Walter Davidson Co. (No. 2)***, footnote 145, at para. 2
[147] Footnote 17
[148] (1969), 13 C.B.R. (N.S.) 58, 69 W.W.R. 543 (Man. C.A.)
[149] At para. 23
[150] (1970), 13 C.B.R. (N.S.) 71 at 71-71
[151] 50.1 (1) Subject to subsections (2) to (4), a secured creditor to whom a proposal has been made in respect of a particular secured claim may respond to the proposal by filing with the trustee a proof of secured claim in the prescribed form, and may vote, on all questions relating to the proposal, in respect of that entire claim, and sections 124 to 126 apply, in so far as they are applicable, with such modifications as the circumstances require, to proofs of secured claim.
[152] reflex, (1998), 7 C.B.R. (4th) 81 (Man. Q.B.)
[153] ***D & K Horizontal Drilling (1998) Ltd. (Trustee of) v. Alliance Pipeline Ltd.***, 2002 SKQB 86 (CanLII), 2002 SKQB 86 at para. 19:
[154] ***Re Reeve-Dobie Mines Ltd.*** (1921), 1 C.B.R. 540, 64 D.L.R. 534 (Ont. S.C. (H.C.D.))
[155] s. 50(1.2)
[156] ***Morguard Mortgage Investments Ltd. v. Faro Development Corp. Ltd.*** (1974), 50 D.L.R. (3d) 426 (Alta. C.A.)
[157] See Rule 377 of the Alberta *Rules of Court* and ***Paper Machinery Ltd. v. J.O. Ross Engineering Corp.***, 1934 CanLII 1 (SCC), [1934] S.C.R. 186.

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Rate of levy - Sec. 147(2)
(2) The levy referred to in subsection (1) shall be at a rate to be fixed by the Governor in Council and shall be charged proportionately against all payments and deducted therefrom by the trustee before payment is made.
R.S., 1985, c. B-3, s. 147;
2005, c. 47, s. 91.

SB Directive: 10R, Redemption of Security and Section 147 Levy of the BIA
(see below image pages)

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Date: **May 22, 2009**

To: **OSB Staff, Trustees and Registrars**

Subject: **Directive No. 10R, *Redemption of Security and Section 147 Levy of the BIA***

The Office of the Superintendent of Bankruptcy (OSB) has amended Directive No. 10, *Redemption of Security and Section 147 Levy of the BIA*, in order to provide trustees and other stakeholders with clearer direction as to how redemption of security and section 147 levy of the *Bankruptcy and Insolvency Act* (BIA) should be applied.

The amended Directive states that the levy under section 147 of the BIA is payable on all payments by a trustee to a secured creditor. Two noteworthy exceptions are: (1) when the trustee has acted as agent, receiver or mandatary for the secured creditor in selling the encumbered assets; and (2) when the trustee proceeded with redemption of the security within the meaning of subsection 128(3) of the BIA.

When proceeding with redemption of the security within the meaning of subsection 128(3) of the BIA, trustees must assess the value of the security and amount of the debt before redeeming in full. The assessment shall be made by examining the proof of claim or

Date : **Le 22 mai 2009**

À : **Employés du BSF, syndics et registraires**

Objet : **Instruction n° 10R, *Rachat de garantie et prélèvement en vertu de l'article 147 de la LFI***

Le Bureau du surintendant des faillites (BSF) a modifié l'instruction n° 10, *Rachat de garantie et prélèvement en vertu de l'article 147 de la LFI*, afin de donner aux syndics et autres intervenants une orientation claire quant à la manière de mettre en application le rachat de garantie et le prélèvement en vertu de l'article 147 de la *Loi sur la faillite et l'insolvabilité* (LFI).

L'instruction modifiée stipule que le prélèvement en vertu de l'article 147 de la LFI est exigible sur tous les paiements effectués par un syndic à un créancier garanti. Il existe deux exceptions notables à cette règle : 1) si le syndic a agi en qualité d'agent, de séquestre ou de mandataire pour le créancier garanti en vendant les biens grevés; et 2) si le syndic a procédé au rachat de la garantie aux termes du paragraphe 128(3) de la LFI.

Lorsqu'ils procèdent au rachat de la garantie aux termes du paragraphe 128(3) de la LFI, les syndics doivent évaluer la valeur de la garantie et le montant de la dette avant de procéder au rachat. L'évaluation doit se faire en examinant la preuve de réclamation ou la

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proof of security submitted by the secured creditor. Also, trustees should only redeem the security if the net price realizable on the sale of the encumbered asset is equal to or greater than the debt or value of the security as per the proof of security or proof of claim. The requirement to file an attestation with the statement of receipts and disbursements remains. The receipts, disbursements and trustee's remuneration must still be recorded in the statement of receipts and disbursements.

preuve de garantie soumise par le créancier garanti. De plus, les syndics devraient seulement racheter la garantie si le prix net réalisable sur la vente du bien grevé est égal ou supérieur à la créance ou à la valeur de la garantie selon la preuve de garantie ou la preuve de réclamation. L'exigence de déposer une attestation avec l'état des recettes et des débours est maintenue. Les recettes, les débours et la rémunération du syndic doivent encore être consignés dans l'état des recettes et des débours.

Coming into Force

Directive No. 10R, *Redemption of Security and Section 147 Levy of the BIA*, comes into force on May 22, 2009.

Entrée en vigueur

L'instruction n° 10R, *Rachat de garantie et prélèvement en vertu de l'article 147 de la LFI*, entre en vigueur le 22 mai 2009.

Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Demandes de renseignements

Si vous souhaitez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

Att.

P. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

No. 10R

REDEMPTION OF SECURITY AND SECTION 147 LEVY OF THE BIA

Issued: May 22, 2009

(Supersedes Directive No. 10 issued on December 19, 1997, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"Net price" means the gross price paid by the purchaser less the trustee's disbursements and remuneration pertaining to the redemption;

"OSB" means the Office of the Superintendent of Bankruptcy.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

3. This Directive is intended:

RACHAT DE GARANTIE ET PRÉLÈVEMENT EN VERTU DE L'ARTICLE 147 DE LA LFI

Date d'émission : le 22 mai 2009

(La présente instruction remplace et annule l'instruction n° 10 sur le même sujet émise le 19 décembre 1997.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« prix net » désigne la différence entre le prix brut payé par l'acheteur et les débours et la rémunération du syndic afférents au rachat.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction vise :

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(a) To clarify the operation of section 147 of the Act in the case of the liquidation of encumbered assets and a consequent payment to a secured creditor.

(b) It is also aimed at ensuring greater transparency and uniformity in the trustee's presentation of the statements of receipts and disbursements.

(c) To ensure that the body of creditors is not penalized in any way and does not bear any cost for the trustee's liquidation of encumbered assets on behalf of a secured creditor.

Sections of the Act concerned:

13.4, 128, 147 and 152.

Policy

4. Under section 147 of the Act, a levy is payable to the Superintendent of Bankruptcy on all payments (except the cost referred to in subsection 70(2) of the Act) made by the trustee by way of dividend or otherwise on account of the claims of creditors whether unsecured, preferred or secured. **The levy is payable when the payments are made by the trustee in its capacity as a trustee in the course of an administration under the Act.**

5. Except in the cases listed in paragraph 7 of this Directive, **the section 147 levy is payable on all payments by a trustee to a secured creditor.** This principle stands even if a third party, such as a notary public, a liquidator or an auctioneer, makes the payment to the secured creditor for and on behalf of the

a) à préciser l'application de l'article 147 de la Loi au regard de la réalisation de biens grevés et du paiement qui est fait en conséquence à un créancier garanti;

b) à améliorer la transparence et l'uniformité dans la présentation des états des recettes et des débours du syndic;

c) à assurer que la masse des créanciers n'est aucunement pénalisée et ne doit payer aucuns frais pour la réalisation, par le syndic, de biens grevés en faveur d'un créancier garanti.

Dispositions pertinentes de la LF

Articles 13.4, 128, 147 et 152.

Politique

4. En vertu de l'article 147 de la Loi, un prélèvement est versé au surintendant des faillites sur tous les paiements - à l'exception des frais mentionnés au paragraphe 70(2) de la Loi – faits par le syndic par voie de dividende ou autrement pour le compte des réclamations de créanciers, que ces créanciers soient privilégiés, garantis ou non garantis. **Le prélèvement est versé lorsque les paiements sont faits par un syndic agissant à titre de syndic au cours d'une administration sous la Loi.**

5. **Le prélèvement visé à l'article 147 est exigible sur tous les paiements faits par un syndic à un créancier garanti,** sauf les cas d'exception énumérés au paragraphe 7 de la présente instruction. Ce principe demeure même si un tiers, tel un notaire, un liquidateur ou un encanteur, effectue le paiement au

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trustee.

6. Since the redemption is not a "consensual operation," but rather a unilateral action taken by the trustee with the intention of obtaining an advantage for the estate, it excludes the case of the trustee acting as agent, receiver or mandatary for the secured creditor.

Exceptions

7. The section 147 levy is not payable on payments by a trustee to a secured creditor in situations where:

(a) The trustee has acted as agent, receiver or mandatary for the secured creditor in selling the encumbered assets;

(b) The trustee proceeded with redemption of the security within the meaning of subsection 128(3) of the Act.

8. When proceeding with redemption of the security within the meaning of subsection 128(3) of the Act:

(a) The trustee must assess the value of the security and amount of the debt before redeeming in full. The assessment shall be made by examining the proof of claim or proof of security submitted by the secured creditor. If the secured creditor does not produce a proof of claim, it is the trustee's responsibility to take advantage of the provisions of subsection 128(1) of the Act.

créancier garanti pour le syndic et en son nom.

6. Le rachat de garantie n'étant pas une « opération consensuelle », mais un acte unilatéral posé par le syndic dans le but de procurer un avantage à la masse, il exclut de ce fait le cas où le syndic agit à titre d'agent, de séquestre ou de mandataire pour le créancier garanti.

Exceptions

7. Le prélèvement en vertu de l'article 147 n'est pas exigible sur les paiements faits par un syndic à un créancier garanti dans les situations où :

a) le syndic a agi à titre d'agent, de séquestre ou de mandataire pour le créancier garanti en vendant les biens grevés;

b) le syndic a procédé au rachat de garantie aux termes du paragraphe 128(3) de la Loi.

8 Lorsqu'il procède au rachat de garantie aux termes du paragraphe 128(3) de la Loi :

a) le syndic doit évaluer la valeur de la garantie et le montant de la dette avant de procéder au rachat. L'évaluation doit se faire en examinant la preuve de réclamation ou la preuve de garantie soumise par le créancier garanti. Si le créancier garanti ne produit pas de preuve de réclamation, il incombe au syndic de se prévaloir des dispositions du paragraphe 128(1) de la Loi;

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(b) The trustee should only redeem the security if the net price realizable on the sale of the encumbered asset is equal to or greater than the debt or value of the security as per the proof of security or proof of claim.

9. Where the trustee has proceeded with redemption of a security within the meaning of subsection 128(3) of the Act, the trustee must file, with the statement of receipts and disbursements, an attestation, pursuant to Appendix I of this Directive, containing the following information:

- date of receipt of the secured creditor's proof of claim or proof of security;
- amount due to the secured creditor and valuation of the security;
- date the encumbered assets are offered for sale and date of sale of the said assets;
- gross price paid by the purchaser;
- trustee's disbursements and remuneration pertaining to the redemption; and
- date of redemption of the security.

10. The receipts and disbursements, as well as the trustee's remuneration pertaining to the redemption, must be recorded in the statement of receipts and disbursements. If the trustee makes several redemptions, the trustee must submit an equivalent number of Appendices with the statement of receipts and disbursements.

b) le syndic devrait seulement racheter la garantie si le prix net réalisable sur la vente du bien grevé est égal ou supérieur à la créance ou à la valeur de la garantie selon la preuve de garantie ou la preuve de réclamation.

9. Là où le syndic aura procédé au rachat d'une garantie aux termes du paragraphe 128(3) de la Loi, le syndic devra déposer avec son état des recettes et des débours une attestation conforme à l'annexe I de la présente instruction contenant les renseignements suivants :

- date de réception de la preuve de réclamation ou de la preuve de garantie du créancier garanti;
- somme due au créancier garanti et évaluation de la garantie;
- date de la mise en vente des biens grevés et date de la vente de ces biens;
- prix brut payé par l'acquéreur;
- débours et rémunération du syndic afférents au rachat; et
- date du rachat de la garantie.

10. Les recettes, les débours et la rémunération du syndic afférents au rachat doivent être portés à l'état des recettes et des débours. Si le syndic procède à plusieurs rachats, il doit déposer avec son état des recettes et des débours autant d'annexes

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11. In the event that the trustee sells unencumbered and encumbered assets in the same transaction, the disbursements must be shared *pro rata* between these two categories of assets. If another method is used, the trustee must indicate the method used and justify the choice.

Enquiries

12. For any questions pertaining to this Directive, please contact your local OSB office.

11. Dans l'éventualité où le syndic vend, dans la même transaction, des biens grevés et des biens non grevés, il devra répartir les débours *au prorata* entre ces deux catégories de biens. Si le syndic utilise une autre méthode, il devra indiquer la méthode utilisée et justifier son choix.

Demandes de renseignements

12. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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APPENDIX I

Attestation Concerning Redemption of the Security

In the matter of the bankruptcy of ___ . _____

I, _____, trustee, report to the Office of the Superintendent of Bankruptcy on the following:

1. I received the proof of claim or proof of security from the secured creditor, _____, on _____.

2. According to this proof of claim or proof of security, a sum of $_____ _ is due to the creditor. The creditor has estimated his/her security in the amount of $_____.

3. As trustee, I initiated the sale of the assets on _____ __ _.

4. I sold the encumbered assets on _____ for $_____.

5. The disbursements relating to the redemption are as follows:

$_____
$ _____
$ _
TOTAL $_____

6. The part of my remuneration pertaining to this redemption amounts to $_____.

7 I redeemed the security of the creditor, _____, and delivered the amount of $_____ to the creditor on _ .

Dated at _____, this _____ day of _____, 20___ ..

__ _____
Trustee

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ANNEXE I

Attestation concernant le rachat de garantie

Dans l'affaire de la faillite de _____ .

Je _____ , syndic, fais rapport au Bureau du surintendant des faillites de ce qui suit .

1. J'ai reçu la preuve de réclamation ou la preuve de garantie du créancier garanti. _____ ... _____ . . le ..

2. Selon cette preuve de réclamation ou cette preuve de garantie, une somme de _____ $ lui est due et il a évalué sa garantie à une somme de ____ $.

3. À titre de syndic, j'ai entamé le processus de vente des biens le _____.

4. J'ai vendu les biens grevés le __ _____ au prix de _____ $.

5. Les débours afférents au rachat sont les suivants :

___ __	$
_____	$
_____	$
TOTAL. _____ ____	$

6. La partie de ma rémunération afférente à ce rachat se chiffre à _____ $.

7. J'ai racheté la garantie du créancier, _____, en lui remettant la somme de _____ $, le _____.

Daté le _____, à _____ .

_____
Syndic

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DIVIDENDS

Trustee to pay dividends as required - Sec. 148
148. (1) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the trustee shall, from time to time as required by the inspectors, declare and distribute dividends among the unsecured creditors entitled thereto.

Disputed claims - Sec. 148(2)
(2) Where the validity of any claim has not been determined, the trustee shall retain sufficient funds to provide for payment thereof in the event that the claim is admitted.

No action for dividend - Sec. 148(3)
(3) No action for a dividend lies against the trustee, but, if the trustee refuses or fails to pay any dividend after having been directed to do so by the inspectors, the court may, on the application of any creditor, order him to pay it, and also to pay personally interest thereon for the time that it is withheld and the costs of the application.
R.S., c. B-3, s. 119.

Notice that final dividend will be made - Sec. 149
149. (1) The trustee may, after the first meeting of the creditors, send a notice, in the prescribed manner, to every person with a claim of which the trustee has notice or knowledge but whose claim has not been proved. The notice must inform the person that, if that person does not prove the claim within a period of 30 days after the sending of the notice, the trustee will proceed to declare a dividend or final dividend without regard to that person's claim.

Court may extend time - Sec. 149(2)
(2) Where a person notified under subsection (1) does not prove the claim within the time limit or within such further time as the court, on proof of merits and satisfactory explanation of the delay in making proof, may allow, the claim of that person shall, notwithstanding anything in this Act, be excluded from all share in any dividend, but a taxing authority may notify the trustee within the period referred to in subsection (1) that it proposes to file a claim as soon as the amount has been ascertained, and the time for filing the claim shall thereupon be extended to three months or such further time as the court may allow.

Certain federal claims - Sec. 149(3)
(3) Despite subsection (2), a claim may be filed for an amount payable under the following Acts or provisions within the time limit referred to in subsection (2) — or within three months after the return of income or other evidence of the facts on which the claim is based is filed or comes to the attention of the Minister of National Revenue or, in the case of an amount payable under legislation referred to in paragraph (c), the minister in that province responsible for the legislation:

- **(a) the Income Tax Act;**
- **(b) any provision of the Canada Pension Plan or Employment Insurance Act that refers to the Income Tax Act and provides for the collection of a contribution as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts;**

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(c) any provincial legislation that has a purpose similar to the Income Tax Act, or that refers to that Act, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, if the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection;

(d) the Excise Tax Act;
(e) the Excise Act, 2001;
(f) the Customs Act; and
(g) the Air Travellers Security Charge Act.

No dividend allowed - Sec. 149(4)
(4) Unless the trustee retains sufficient funds to provide for payment of any claims that may be filed under legislation referred to in subsection (3), no dividend is to be declared until the expiry of three months after the trustee has filed all returns that the trustee is required to file.
R.S., 1985, c. B-3, s. 149;
1992, c. 1, s. 20;
1997, c. 12, s. 91;
2005, c. 47, s. 92;
2007, c. 36, s. 51;
2009, c. 33, s. 26.

Right of creditor who has not proved claim before declaration of dividend - Sec. 150
150. A creditor who has not proved his claim before the declaration of any dividend is entitled on proof of his claim to be paid, out of any money for the time being in the hands of the trustee, any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before his claim was proved for the reason that he has not participated therein, except on such terms and conditions as may be ordered by the court.
R.S., c. B-3, s. 121.

Final dividend and division of estate - Sec. 151
151. When the trustee has realized all the property of the bankrupt or all thereof that can, in the joint opinion of himself and of the inspectors, be realized without needlessly protracting the administration, and settled or determined or caused to be settled or determined the claims of all creditors to rank against the estate of the bankrupt, he shall prepare a final statement of receipts and disbursements and dividend sheet and, subject to this Act, divide the property of the bankrupt among the creditors who have proved their claims.
R.S., c. B-3, s. 122.

Statement of receipts and disbursements - Sec. 152
152. (1) The trustee's final statement of receipts and disbursements shall contain

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(a) a complete account of

(i) all moneys received by the trustee out of the bankrupt's property or otherwise,

(ii) the amount of interest received by the trustee,

(iii) all moneys disbursed and expenses incurred by the trustee,

(iv) all moneys disbursed by the trustee for services provided by persons related to the trustee, and

(v) the remuneration claimed by the trustee; and

(b) full particulars of, and a description and value of, all the bankrupt's property that has not been sold or realized together with the reason why it has not been sold or realized and the disposition made of that property.

Prescribed form - Sec. 152(2)

(2) The statement referred to in subsection (1) shall be prepared in the prescribed form or as near thereto as the circumstances of the case will permit and together with the dividend sheet shall be submitted to the inspectors for their approval.

Copy to Superintendent - Sec. 152(3)

(3) The trustee shall forward a copy of the statement and dividend sheet to the Superintendent after they have been approved by the inspectors.

Superintendent may comment - Sec. 152(4)

(4) The Superintendent may comment as he sees fit and his comments shall be placed by the trustee before the taxing officer for his consideration on the taxation of the trustee's accounts.

Notice of final dividend, etc. - Sec. 152(5)

(5) After the Superintendent has commented on the taxation of the trustee's accounts or advised the trustee that the Superintendent has no comments to make and the trustee's accounts have been taxed, the trustee shall send, in the prescribed manner, to every creditor whose claim has been proved, to the registrar, to the Superintendent and to the bankrupt

(a) a copy of the final statement of receipts and disbursements;

(b) a copy of the dividend sheet; and

(c) a notice, in the prescribed form, of the trustee's intention to pay a final dividend after the expiry of 15 days from the sending of the notice, statement and dividend sheet and to apply to the court for his or her discharge on a subsequent date that is not less than 30 days after the payment of the dividend.

Objections - Sec. 152(6)

(6) No interested person is entitled to object to the final statement and the dividend sheet unless, prior to the expiration of the fifteen days referred to in paragraph (5)(c), that person files notice of his objection with the registrar setting out his reasons therefor and serves a copy of the notice on the trustee.

R.S., 1985, c. B-3, s. 152;
1992, c. 1, s. 20, c. 27, s. 55;
2005, c. 47, s. 93.

Dividends on joint and separate properties - Sec. 153

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153. Where joint and separate properties are being administered, the dividends may be declared together, and the expenses thereof shall be apportioned by the trustee.
R.S., c. B-3, s. 124.

Unclaimed dividends and undistributed funds - Sec. 154
154. (1) Before proceeding to discharge, the trustee shall forward to the Superintendent for deposit, according to the directives of the Superintendent, with the Receiver General the unclaimed dividends and undistributed funds that the trustee possesses, other than those exempted by the General Rules, and shall provide a list of the names and the post office addresses, in so far as known, of the creditors entitled to the unclaimed dividends, showing the amount payable to each creditor.

Receiver General to pay claims - Sec. 154(2)
(2) The Receiver General shall, after receiving the dividends and funds and the list referred to in subsection (1), on application, pay to any creditor his proper dividend as shown on that list, and such payment has effect as if made by the trustee.
R.S., 1985, c. B-3, s. 154;
1992, c. 27, s. 56.

SB Directive: 18, Unclaimed Dividends and Undistributed Funds
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 18

UNCLAIMED DIVIDENDS AND UNDISTRIBUTED FUNDS

Issued: August 14, 2009

(Supersedes Directive No. 8 issued on July 23, 1993, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules*.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

DIVIDENDES NON RÉCLAMÉS ET FONDS NON DISTRIBUÉS

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 8 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*;

« Règles » s'entend des *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

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Canada

OSB • BSF Protecting the Integrity of the Insolvency System / Protéger l'intégrité du système d'insolvabilité

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3. The purpose of this Directive is twofold:

(a) to minimize the amount of unclaimed dividends and undistributed funds in order to maximize dividends to creditors; and

(b) to reduce the number of unnecessary requests to the OSB for the return to creditors of money remitted as unclaimed dividends and undistributed funds.

Unclaimed Dividends

4. Trustees, when proceeding to the discharge phase of their administration in those estates where a dividend will be payable, should:

(a) in a case of an ordinary administration, apply for a discharge hearing date that will allow a longer period of time for the cashing of cheques, hence reducing the number of returned cheques as a result of a stop-payment or closed account. It is suggested that this period should be 45 to 60 days after the mailing of the cheques to allow for most, if not all, of the outstanding cheques to be cashed. This becomes particularly important for those creditors from outside Canada. In the case of a summary administration, the

3. La présente instruction a une double finalité :

a) réduire le montant des dividendes non réclamés et des fonds non distribués de manière à maximiser les dividendes versés aux créanciers; et

b) réduire les demandes inutiles de remboursement des créanciers auprès du BSF pour les sommes qui ont été remises à titre de dividendes non réclamés ou de fonds non distribués.

Dividendes non réclamés

4. Les syndics procédant à leur libération dans les administrations où un dividende sera payable aux créanciers devraient :

a) demander une date d'audience en vue de leur libération, dans le cas d'une administration ordinaire, qui assurera un délai suffisant pour l'encaissement des chèques, minimisant ainsi le nombre de chèques retournés en raison de la fermeture du compte bancaire. Il est suggéré que la période soit de 45 à 60 jours après l'envoi des chèques afin de permettre que la majorité, sinon la totalité, des chèques retardataires soient encaissés. Ceci devient encore plus important lorsqu'il y a des créanciers de l'extérieur du

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sending of the certificate of compliance should be delayed by the same amount of time.

(b) make a reasonable effort to trace the current address for the local financial institutions or nationally known businesses (or those that have local branches) whose notice of trustee discharge or cheque has been returned by the postal services in order to forward the cheque to the proper address;

(c) include any reference account number found on the proof of claim or support document to facilitate the tracing by the receiving firm; and

(d) upon expiration of the above period and before proceeding to their discharge, trustees must, in conformity with subsection 154(1) of the Act, forward to the Superintendent all outstanding dividends remaining in their account.

Canada. Dans le cas d'une administration sommaire, l'envoi du certificat de conformité et de libération présumée devrait être retardé du même nombre de jours.

b) faire un effort raisonnable afin de retracer l'adresse courante des institutions financières locales ou d'entreprises connues nationalement (ou celles ayant un établissement local) dont l'avis de demande de libération du syndic a été retourné, afin de pouvoir faire suivre le chèque à la bonne adresse;

c) inclure sur le chèque toute référence ou tout numéro de compte figurant sur la preuve de réclamation ou le document à l'appui pour permettre au bénéficiaire du chèque d'en connaître l'objet; et

d) à l'expiration du délai dont il est question à l'alinéa 4*c*) ci-dessus et avant de procéder à sa libération, le syndic est tenu, au terme du paragraphe 154(1) de la Loi, de faire parvenir au surintendant tous les chèques non encaissés encore dans son compte bancaire.

Undistributed Funds

5. Trustees are encouraged to distribute all available funds to the creditors instead of

Fonds non distribués

5. On incite les syndics à distribuer tous les fonds disponibles aux créanciers plutôt que de

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remitting them as undistributed funds to the Superintendent.

6. Trustees are, however, not expected to distribute immaterial amounts available for distribution to a large number of creditors if the cost of the distribution would appreciably exceed the amount to be distributed. As a guideline, to determine what constitutes materiality, the following will apply to both preferred and ordinary creditors:

(a) if there is only one (1) creditor, the funds are to be paid to the creditor where the gross amount available in the estate exceeds $5;

(b) if there are two (2) to five (5) creditors inclusive, the funds are to be paid to the creditors where the gross amount available in the estate exceeds $50; and

(c) if there are more than five (5) creditors, the funds are to be paid to the creditors where the average dividend to ordinary creditors in the estate (total amount of dividends to ordinary creditors divided by the number of ordinary creditors) will exceed $10.

7. If additional interest is received after the preparation of the Statement of Receipts and Disbursements, the amount should be distributed to the creditors by way of an

les remettre au surintendant des faillites à titre de fonds non distribués.

6. Les syndics ne sont cependant pas tenus de distribuer un montant très peu élevé devant être versé à un grand nombre de créanciers lorsque le coût de distribution dépasserait de beaucoup le montant à être distribué. Afin de déterminer ce que constitue un montant peu élevé, la norme suivante s'applique tant pour les créanciers privilégiés qu'ordinaires :

a) lorsqu'il y a un (1) seul créancier, les fonds doivent être versés au créancier lorsque le montant brut disponible au dossier dépasse 5 $;

b) lorsqu'il y a entre deux (2) et cinq (5) créanciers inclusivement, les fonds doivent être versés aux créanciers lorsque le montant brut disponible au dossier dépasse 50 $;

c) lorsqu'il y a plus de cinq (5) créanciers, les fonds doivent être versés aux créanciers lorsque le dividende moyen aux créanciers ordinaires (montant total des dividendes possibles aux créanciers ordinaires divisé par le nombre de créanciers ordinaires) est supérieur à 10 $.

7. Lorsque des intérêts additionnels sont reçus suite à la préparation de l'état des recettes et des déboursés, le montant devrait être distribué aux créanciers au moyen d'un bordereau de

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amended or additional dividend sheet if the amount available exceeds the guidelines provided in paragraph 6 above.

Coming into Force

8. This Directive comes into force on September 18, 2009.

Enquiries

9. For any questions pertaining to this Directive, please contact your local OSB office.

dividendes additionnel ou modifié lorsque le montant disponible excède la norme prévue au paragraphe 6 ci-dessus.

Entrée en vigueur

8. La présente instruction entre en vigueur le 18 septembre 2009.

Demandes de renseignements

9. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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SUMMARY ADMINISTRATION

Summary administration - Sec. 155

155. The following provisions apply to the summary administration of estates under this Act:

(a) all proceedings under this section shall be entitled "Summary Administration";

(b) the security to be deposited by a trustee under section 16 shall not be required unless directed by the official receiver;

(b.1) [Repealed, 1992, c. 1, s. 161]

(c) a notice of the bankruptcy shall not be published in a local newspaper unless such publication is deemed expedient by the trustee or ordered by the court;

(d) all notices, statements and other documents shall be sent in the prescribed manner;

(d.1) if a first meeting of the creditors is requested by the official receiver or by creditors who have in the aggregate at least 25% in value of the proven claims, the trustee shall call the meeting, in the prescribed form and manner, and it must be held within 21 days after being called;

(e) there shall be no inspectors unless the creditors decide to appoint them, and if no inspectors are appointed, the trustee, in the absence of directions from the creditors, may do all things that may ordinarily be done by the trustee with the permission of the inspectors;

(f) in such circumstances as are specified in directives of the Superintendent, the estates of individuals who, because of their relationship, could reasonably be dealt with as one estate may be dealt with as one estate;

(g) in such circumstances as are specified in directives of the Superintendent and with the approval of the Superintendent, the trustee may deposit all moneys relating to the summary administration of estates in a single trust account;

(h) a notice of bankruptcy and

(i) a notice of impending automatic discharge of the bankrupt, or

(ii) an application for discharge of the bankrupt

may be given in a single notice in the prescribed form;

(i) notwithstanding section 152, the procedure respecting the trustee's accounts, including the taxation thereof shall be as prescribed;

(j) notwithstanding subsections 41(1), (5) and (6), the procedure for the trustee's discharge shall be as prescribed; and

(k) the court's authorization referred to in subsection 30(4) for a sale or disposal of any of the bankrupt's property to a person who is related to the bankrupt is required only if the creditors decide that the authorization is required.

R.S., 1985, c. B-3, s. 155;
1992, c. 1, ss. 16, 161, c. 27, s. 57;
1997, c. 12, s. 92;
1999, c. 31, s. 26;
2005, c. 47, s. 94.

Fees and disbursements of trustee - Sec. 156

156. The trustee shall receive such fees and disbursements as may be prescribed.
R.S., c. B-3, s. 127.

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Bankruptcy of John Edward Los, 2000 BCSC 951 (CanLII) - Master Contests Trustee Fees for Delayed Administration

Date: 2000-06-19
Docket: 142625VA/92
URL: http://canlii.ca/t/53gg
Citation: Bankruptcy of John Edward Los, 2000 BCSC 951 (CanLII), <http://canlii.ca/t/53gg> retrieved on 2013-09-05
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Reflex Record Related decisions, legislation cited and decisions cited
Citation: Bankruptcy of Jon Edward Los 2000 BCSC 951 Date: 20000619
Docket No.: 142625VA/92
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE BANKRUPTCY OF JON EDWARD LOS

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE LOWRY

Counsel for Westgeest & Associates, Trustee: G.H. Dabbs

G.H. Dabbs

Counsel for The Superintendent of Bankruptcy: W.J.M. Divoky

Date and Place of Hearing: June 14, 2000
Vancouver, BC

[1] Westgeest & Associates, the trustee of the bankruptcy of Jon Edward Los, appeals from an order whereby a Master, sitting as Registrar, approved its final statement of receipts and disbursements but not its fees of $8,583.50. **The trustee obtained creditor approval of the remuneration sought, but the Superintendent of Bankruptcy intervened on the taxation and challenged the amount because of the trustee's unexplained delay of six years in the administration of the estate. The learned Master held that a reduction in the trustee's remuneration was warranted to offset interest lost to the creditors and to reflect the court's disapproval of inordinate delay. He approved a fee of $6,000.**

[2] The question now is whether it was open to the Master to arbitrarily set and approve a reduced fee. The trustee says that, in the absence of conduct on its part amounting to an abuse of its position in the bankruptcy process, the Master erred in imposing what amounts to a penal sanction to address the delay that was permitted to occur.

[3] The bankrupt made his assignment in 1992. Sixteen unsecured claims were made against the estate. They total $417,411. One, that of Ann Carmichael, is for $396,000 or 95% of the total amount of the claims. There was an absolute discharge in 1993 which was apparently annulled in 1999. The estate is not large: $22,230. The amount available for

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distribution (before any reduction in the trustee's fees) is $7,337. The trustee is criticised for not making at least an interim payment to the creditors of close to that amount, as it could have done in 1993.

[4] The trustee's final statement of receipts and disbursements (including its fee of $8,553.50) was approved at a duly called meeting of creditors in September, 1999. Ms. Carmichael was the only creditor who attended.

[5] A copy of the statement was then sent to the Superintendent who, in response, recommended that there be some reduction in the trustee's remuneration because of the delay in the administration of the estate. The Superintendent requested that the trustee proceed to a taxation and that his office be given notice tration of the estate. Tso that he could be represented.

[6] Under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c.B-3, a trustee's remuneration *shall* be such as is voted by ordinary resolution at a meeting of creditors, subject to an application by the trustee, a creditor, or a debtor for an order increasing or reducing the remuneration (s. 39(1)and (5)). It has, however, been accepted, at least in the courts of Quebec and Ontario, that the Superintendent is entitled to intervene on the taxing of a trustee's final statement (s. 152) for the purpose of disputing the remuneration sought by the trustee and, in order to control manifest abuses and to maintain the general credibility of the bankruptcy system, a registrar may approve a lower amount than the creditors have approved: ***Brune (syndic) (Re),*** [1999] J.Q. No. 2318 (C.A.), ***L'Heureux (syndic) (Re),*** 1999 CanLII 13791 (QC CA), [1999] R.J.Q. 945 (C.A.), ***Société de gestion Michel Douville Inc. (syndic) (Re),*** [1997] A.Q. No. 2348 (C.A.), and ***Re Hess*** (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.). However, a registrar's discretion in this regard must be exercised with great care and with due regard for the creditors' approval. In ***L'Heureux*** the point was made as follows:

[26] This power, however, must be used with a great deal of moderation and circumspection, and only for serious reasons. The legislator who provided for the procedure mentioned above certainly did not wish the registrar to sit *propio motu* in appeal against the creditors' decision if no complaint has been lodged. Neither did he wish, surely, in a process which should be expeditious, to delay the liberation of the bankrupt and the trustee by multiplying the stages of review. [translation]

[7] The only British Columbia decision to which I have been referred in relation to the point is ***Newbrook, Re*** 1998 CanLII 4948 (BC SC), (1998), 7 C.B.R. (4th) 231 (S.C.). There the Registrar refused a trustee's application for an increase over the amount of remuneration that had been voted to it at a meeting of the creditors in respect of a proposal. In my view, the decision is not at odds with the Quebec and Ontario cases and I respectfully adopt the views expressed by those courts.

[8] Only one of the cases cited is factually comparable to the case at bar. In ***Brune,*** the Quebec Court of Appeal upheld a registrar's decision to accept the Superintendent's challenge and reduce the amount of a trustee's remuneration where there had been a 10 year delay in the administration of the estate. There, creditors representing 74% of the claims made against the estate had approved the remuneration sought. It was, however, a much larger estate and, unlike the circumstances here, the trustee in that case failed to justify the services said to have been rendered in administering the estate. But the appellate court took the view that the delay alone was enough to justify the reduction in the trustee's remuneration that was made:

[10] The mere fact that the trustee left the file inactive for nearly 10 years, accumulating more than $58,800 of interest in his account, and during that time depriving the creditors of a dividend, is ample justification for setting aside the rule under which the creditors are the sole arbiters of the trustee's fees. ...

[9] The trustee accepts that the test this court must apply in considering this appeal is whether the Master made an error of law, made a manifest error of fact, or was clearly wrong: ***Teles, Re*** reflex, (1998), 1 C.B.R. (4th) 43 (S.C.) and ***Re Achilles*** reflex, (1993), 83 B.C.L.R. (2d) 116 (B.C.S.C.). Having considered the Master's reasons for reducing the trustee's fee, it is not clear to me to what extent he took into account the fact that the remuneration sought was approved by the creditor representing 95% of the unsecured claims against the estate and the limitation with which the exercise of his discretion was accordingly impressed. However, while I may not have reduced the trustee's remuneration by 30% as the Master did, it is not for me to substitute my judgment for his, and it cannot, in my view, be said that he erred in disposing of the matter as he did. He is not shown to have made an error in law nor an error of fact, and he was not clearly wrong.

[10] The ***Rules Amending the Bankruptcy and Insolvency Rules,*** SOR/98-240, prescribe a code of conduct for trustees that mandates that their duties be performed in a timely manner (s. 36). Confidence in the bankruptcy system demands that there be no unjustified delays of any consequence. Six years is, as the Master said, a substantial period of time in the context of the administration of an estate. A trustee who permits that time to pass without making a distribution to the creditors that should be made, and who offers no explanation is not fulfilling his duty. The Master cannot be said to have erred if, in response to the intervention of the Superintendent, he saw fit to exercise his discretion in favour of reducing the trustee's remuneration however arbitrary the reduction may seem.

[11] It follows that the trustee's appeal does not succeed and it will accordingly be dismissed.

"P.D. Lowry, J."

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The Honourable Mr. Justice P.D. Lowry
July 11, 2000 -- Memorandum to Legal Publishers issued as directed by Mr. Justice Lowry advising that the correct spelling is "Jon Edward Los" instead of "John Edward Los".
dvising that the correct spelling is "Jon Edward Los" instead of "John Edward Los".

Canada (A.G.) v. Rassell, 1999 ABCA 232 (CanLII) - Trustee Deducting *Hypothetical* Expenses - Legality

Date:	1999-07-23
Docket:	98-17752
Parallel citations:	177 DLR (4th) 396; 12 CBR (4th) 316; 71 Alta LR (3d) 85
URL:	http://canlii.ca/t/5s4h
Citation:	Canada (A.G.) v. Rassell, 1999 ABCA 232 (CanLII), <http://canlii.ca/t/5s4h> retrieved on 2013-08-31
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Reflex Record	Related decisions, legislation cited and decisions cited

Canada (A.G.) v. Rassell, 1999 ABCA 232

Date: 19990723
Docket: 98-17752

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MADAM JUSTICE HUNT

BETWEEN:

ATTORNEY GENERAL OF CANADA and
THE SUPERINTENDENT OF BANKRUPTCY

Appellants

- and -

DAVID ANTHONY RASSELL and
ANN KRISTEN RASSELL

Respondents

APPEAL FROM THE ORDER OF
THE HONOURABLE MR. JUSTICE FORSYTH
DATED THE 1ST DAY OF MAY, A.D. 1998
FILED THE 30TH DAY OF SEPTEMBER, A.D. 1998
(IN CHAMBERS)

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CÔTÉ
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE RUSSELL
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE HUNT

COUNSEL:

J. L. Medhurst-Tivadar
For the Attorney-General of Canada

S. L. Robinson Burns
For the Respondents David and Ann Rassell

M. J. McCabe

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For the Intervener Alberta Insolvency Practitioners' Assoc.

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REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE CÔTÉ

A. Issue

[1] The issue is as follows. To what extent should a trustee in bankruptcy who wishes to sell estate assets privately, deduct from the proposed sale price, commission or other expenses "saved" by not having a public sale?

B. Facts

[2] The respondents are a married couple who both went into bankruptcy. They lived in their own home, which had a mortgage. After allowing for the provincial exemption of $40,000, they had equity in the home upon which the trustee in bankruptcy could realize. There were two appraisals of the home, and it was eventually agreed to use the mid-point between the appraisals as the market value of the home; no one questions that. The trustee in bankruptcy agreed to sell the home back to the bankrupts for cash (presumably from some exempt source). The trustee properly gave credit on the sale for the provincial exemption, and for the mortgage balance. No one questions that either.

[3] However, the trustee in bankruptcy also deducted from the worth of the home what would have been the usual real estate commission, and the usual legal fees to the vendor, had the house been listed with a realtor and sold to a stranger.

[4] The Superintendent of Bankruptcy and the Minister of National Revenue (a small creditor of one of the bankrupts) questioned the propriety of the last-mentioned deductions.

[5] As a result, the trustee in bankruptcy moved for advice and directions. A Registrar in bankruptcy held that that deduction was improper, a chambers judge reversed that on appeal, and the Attorney-General of Canada now appeals to us. We heard argument from counsel for the Attorney-General, counsel for the bankrupts, and counsel for an intervener, the Alberta Insolvency Practitioners' Association. No one appeared for the trustee in bankruptcy.

C. The Law

[6] The Registrar in bankruptcy seemed to think that the question was whether to characterize this as a sale or not. I disagree (though I happen to think it is a sale).

[7] The factums tended to adopt opposing views of a simple question: whether commission or disposal expenses saved could be deducted in reaching fair value for a private sale. However, oral argument drew counsel closer together. Though counsel for the Attorney-General maintained that any such calculation had dangerous tendencies, and invited sloppy or misguided practice by a minority of trustees in bankruptcy, all three counsel came close to agreeing on the theory. And all three invited us to clarify the law in this area for a number of reasons.

[8] All three counsel agreed that a trustee about to sell should behave more or less as a reasonable person would, so far as reasonable efforts and business-like practices would permit. Within those limits, the trustee should try to maximize yield. And all three counsel agreed what a reasonable person would do who already knew one prospective buyer for a house, but could instead list the house for public sale. The reasonable vendor would first try to get the one known prospect to buy at a price higher than would be the net recovery after all expenses, were the house to be sold publicly.

[9] All counsel appeared to agree that one could not be more exact than that. How much more than that net recovery the reasonable vendor trustee should try to get from the known prospect, depends on many circumstances. Counsel agreed that there should not be any fixed percentage of the savings of selling expenses which should go to the vendor or to the purchaser.

[10] Counsel for the Attorney-General suggested that there may often be realistic alternatives to selling a house at full real estate commission. One might negotiate a lower commission, or try to use newspaper ads. In theory that is doubtless true, and whether it is a practical solution probably depends upon the time and the place, not to mention the particular asset to be sold. It is not necessary to sort out that narrow question today.

[11] Here is a summary of my own views of the principles involved here, which I hope are not very different from those of any of the three counsel.

[12] First, the ***Bankruptcy and Insolvency Act*** puts day-to-day administration into the hands of business people (trustees in bankruptcy and often inspectors). Of course the court has overriding control, and the Superintendent has some oversight, and now a power to issue directives. The point is that the administration is to be practical, not legalistic.

[13] Second, the trustee in bankruptcy has a duty to maximize the yield from all the assets legally available to the trustee, subject to practicalities and honesty.

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[14] Third, it would usually be futile to try to hold out for a sale price higher than fair market value (though there may occasionally be special exceptions).
[15] Fourth, it is often dangerous to sell for less than fair market value, though individual circumstances often dictate that, such as a thin market, an unusual asset, or heavy carrying costs or liabilities from continued possession. Doubtless there are many other circumstances which would permit that.

[16] Why should one focus upon fair market value? Not because of some notion of fairness between the vendor trustee and some purchaser. Rather, fair market value is defined as the price that an arm's-length willing vendor and willing purchaser would probably negotiate. If such a willing buyer can be found, by definition that is the price which the vendor realistically should try to get. If no willing buyer can be found, or the vendor trustee is legitimately in a hurry to sell, then the price may be lower.
[17] If a number of willing buyers can be found without any significant expense, or if no willing buyer can be found, there is little more to say. What if one or two willing buyers can be found without any particular expense, and more could be found only by incurring significant expense (as was likely the case here)? Then the principles do not change; but the bargaining power of the parties does change.
[18] As counsel for the respondent and the intervener reminded us, the one known prospective purchaser has significant bargaining power, because he or she is the only person who will buy without the vendor trustee's incurring any expenses in finding a buyer, such as real estate commissions. For the trustee to insist upon full market value, and to turn away this prospective buyer for offering anything less, would be foolish. That is because selling instead to some stranger would likely cost real estate commission or other disposition costs, and so net significantly less than fair market value.
[19] But consider the other side. The vendor trustee has special bargaining power also. If the prospective purchaser already lives in the home (as the respondent bankrupts did here), obviously they too would save money and inconvenience by not having to move. Moving vans do not work free any more than do realtors. And even if the prospective purchaser does not live in or even near the home, he has a good chance of bargaining the vendor down to somewhat below the usual fair market value. The prospective buyer is highly unlikely to find that advantage anywhere else. Any other suitable house which he finds will probably be listed through a realtor, and that other vendor will have to pay a commission, and have no incentive whatever to go below fair market value.
[20] So in this situation, if this vendor and this prospective buyer make a deal, each can do significantly better than if each dealt with a stranger instead. Both should try hard to make a deal. As a matter of pure logic, so long as either vendor or purchaser can gain even a dollar of the disposition expenses "saved", he or she should make this deal and not look elsewhere. Only if the entire "savings" were to go to the other party, should it be a matter of indifference to either party whether to deal here or elsewhere.

[21] Another way to view the matter is this. Assume that real estate commissions and other expenses would be about 7% on a "public" sale. So value to the vendor is only around 93% of market value. But value to the purchaser is 100% of market value, given the price of comparable houses. The values to the two people thus overlap. That is why it is wrong in principle to say that market value is only 93% and that therefore that is all that the purchaser can be expected to pay. That confuses value to vendor with several other things. Nor should the trustee look on this as enhancing the size of the exemption under the ***Civil Enforcement Act***.
[22] Of course on occasion the vendor might realize only the "net" price (say 93%). The opposite party might prove obdurate, and unwilling to yield a dollar in negotiation, insisting on having the entire "savings" of expenses for himself or herself.
[23] But, given the prospect of sharing the saved costs, and how most people bargain, most purchasers would not be so stubborn and so brave in negotiation as to risk all. Most would try to split the "savings" between the parties in some fashion, though doubtless trying to get a bigger fraction of the savings for his or her own side.
[24] I do not suggest that there is any set share of those savings which is proper. There is no formula such as 50:50.
[25] But what I do say, is that it is not logical for either party to fail even to attempt to make such a deal, or to fail to try to get any of the savings whatever for his or her side. The court does not care how people negotiating with trustees in bankruptcy bargain (so long as they do so honestly). But the court does care how trustees bargain, for they have a duty to try to maximize the yield from the assets.
[26] Therefore, it is not proper for a trustee in bankruptcy to consider that fair market value is automatically reduced by the full sum of all disposition costs, such as real estate commission. Nor is it proper for the trustee faced with a prospective known buyer in such a situation to make no attempt to bargain. For the same reason, it is not proper for the trustee to announce in advance that all that he or she seeks is the fair market value minus all disposition costs saved.

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That is not bargaining at all. A sensible negotiator has in mind a minimum position below which he or she will not make a deal, but normally does not announce that price as his or her opening bid. For the reasons given above, this type of case is particularly ill-suited to such a tactic.

[27] Least of all should a trustee in bankruptcy think that this is a mere exercise in arithmetic, or that there is a formula which will let him or her calculate the "proper" price to sell for.

[28] Cases on division of matrimonial property were cited or referred to at all three levels of court. But examination of some of them convinces me that the analogy afforded there is too imperfect to be of any net use here. In that, I agree with the chambers judge.

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D. The Present Case

[29] In the light of the principles above, should the court intervene here?

[30] This trustee in bankruptcy applied for advice and directions, yet her evidence really gave no actual express reasons for the decision which she made to sell at this particular price. Her affidavits deal with other matters, and at best hint at her true reasons, by annexing letters of calculations. She did not mention any bargaining (though counsel for the respondent bankrupts asked us not to assume that none had taken place).

[31] One of the bankrupts, with no asserted expertise, argued in an affidavit that selling without a realtor usually fails, and that when it succeeds the purchaser gets the saving in cost. I doubt that is admissible evidence. If it is, I would give it very little weight.

[32] In future, a trustee in bankruptcy who seeks approval for a course of action (as distinct from one who takes a neutral stance) should swear to explicit reasons for that course of action, so that the court does not have to guess at anything.

[33] In the present case, there are some hints that the trustee used the forbidden reasoning: see the calculations set out in the letters sent out to creditors by the trustee. Those letters are not secret, and there is great risk that the bankrupts who wished to buy saw or learned of them. The letters might be read as abandoning all "saved" disposition costs to the prospective known purchasers (the bankrupts).

[34] However, the courts are reluctant to interfere with reasonable business decisions by trustees in bankruptcy, and a few chambers judges handle bankruptcy and insolvency cases, and so gain great experience in these matters. Before us, an appellate court, there is no clear evidence of use of improper considerations, or total neglect of relevant considerations, by the trustee. The chambers judge based himself on the business judgment, and knowledge of all relevant considerations, by the trustee. I think it safer not to intervene.

[35] I would not interfere with the result in the present case, and would be content with the guidance which I have given above. It will instruct trustees in bankruptcy, and also give the Superintendent in Bankruptcy a chance to consider whether any kind of regulations or directives seem proper.

[36] In my view, the Attorney-General was right to appeal and to seek the court's guidance in the present case. The Rassells resisted the appeal, and (until partway through oral argument) advocated a proposition of law which has failed here. Under the circumstances, no costs will be payable to or for anyone in the Court of Appeal. I would not interfere with the costs in Queen's Bench.

[37] However, the formal order appealed from needs some adjustment, since it is expressed in terms of propositions of law rather than the disposition of this particular sale transaction (and its paragraphs are not numbered).

[38] As for propositions of law, I would let these reasons speak for themselves and not put them into the formal order. In the formal Queen's Bench order entered September 30, 1998, the first paragraph of recitals will stand. So will the third and last paragraph about costs, which I number 3. However, I would delete the middle paragraph (at the bottom of p. 47 of the appeal book), and in its place substitute the following:

1. IT WAS ORDERED that the appeal be allowed, and that the order of Registrar Waller entered the 8th day of January, 1998 be set aside.
2. AND IT WAS FURTHER ORDERED that the court do confirm the decision of the trustee in bankruptcy to sell the house and land in question to the bankrupts at the price proposed by the trustee in her two affidavits, filed.

[39] In all other respects, I would dismiss the appeal.

APPEAL HEARD on May 13, 1999
REASONS FILED at Calgary, Alberta,
this 23rd day of July, 1999

_____
CÔTÉ J.A.

I concur: _____
RUSSELL J.A.

I concur: _____
HUNT J.A.

Agreement to pay fees and disbursements - Sec. 156.1

156.1 An individual bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction and who is not required to make payments under section 68 to the estate

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of the bankrupt may enter into an agreement with the trustee to pay the trustee's fees and disbursements if the total amount required to be paid under the agreement is not more than the prescribed amount and that total amount is to be paid before the expiry of the 12-month period after the bankrupt's discharge. The agreement may be enforced after the bankrupt's discharge.
2005, c. 47, s. 95.

All other provisions of Act to apply - Sec. 157
157. Except as provided in section 155, all the provisions of this Act, in so far as they are applicable, apply with such modifications as the circumstances require to summary administration.
R.S., c. B-3, s. 128.

SB Directive: 19R, Reporting of the Receipts from the Realization of Certain Assets in Summary Addministrations
(see below image pages)

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Date: APR 2 1 2010

To: **OSB Staff, Trustees and Registrars**

Subject: **Revision to Directive No. 19, *Reporting of Receipts Resulting from the Realization of Certain Assets in Summary Administrations***

Directive No. 19, *Reporting of Receipts Resulting from the Realization of Certain Assets in Summary Administrations*, has been revised to eliminate any confusion that may result from the current wording of paragraph 6 of this Directive in light of subsection 128(1) of the *Bankruptcy and Insolvency General Rules* (the Rules).

According to subsection 128(1) of the Rules, the trustee's fees for services performed in a summary administration are calculated on the total receipts remaining after "deducting" necessary disbursements relating directly to the realization of the property of the bankrupt. The current wording of paragraph 6 of Directive No. 19 indicates that the costs of disposition of

Date : 2 1 AVR. 2010

À : **Employés du BSF, syndics et registraires**

Objet : **Révision de l'instruction n° 19, *Déclaration des recettes résultant de la réalisation des biens en cas d'administration sommaire***

L'instruction n° 19, *Déclaration des recettes résultant de la réalisation des biens en cas d'administration sommaire*, a été révisée en vue d'éliminer toute confusion pouvant découler du libellé actuel de l'article 6 de cette instruction, compte tenu du paragraphe 128(1) des *Règles générales sur la faillite et l'insolvabilité* (les Règles).

Aux termes du paragraphe 128(1) des Règles, les honoraires du syndic pour les services fournis dans le cas d'une administration sommaire sont calculés sur le total des recettes après « déduction » des débours nécessaires directement liés à la réalisation des biens du failli. Le libellé actuel de l'article 6 de l'instruction n° 19 indique que les frais engagés au titre de la vente de véhicules, meubles et autres biens

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vehicles and other personal property and movables should be "absorbed" in the disbursement provision under the tariff. This wording has been revised to clarify that the costs of disposition of these assets are to be deducted from the gross proceeds from the sale of these assets.

Enquiries

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Att.

personnels devraient être « absorbés » à l'intérieur du montant de déboursés compris dans le tarif. Le libellé a été modifié afin de préciser que les frais engagés au titre de la vente de ces actifs doivent être déduits des montants bruts découlant de cette vente.

Demandes de renseignements

Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

p. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Directive / Instruction

N° 19R

DIRECTIVE NO. 19R - REPORTING OF RECEIPTS RESULTING FROM THE REALIZATION OF CERTAIN ASSETS IN SUMMARY ADMINISTRATIONS

Issued: APR 2 1 2010

(Supersedes Directive No. 19 issued on August 14, 2009, on the same topic)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act;*

"OSB" means the Office of the Superintendent of Bankruptcy;

"Rules" means the *Bankruptcy and Insolvency General Rules.*

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

INSTRUCTION N° 19R - DÉCLARATION DES RECETTES RÉSULTANT DE LA RÉALISATION DES BIENS EN CAS D'ADMINISTRATION SOMMAIRE

Date d'émission : 2 1 AVR. 2010

(La présente instruction remplace et annule l'instruction n° 19 sur le même sujet émise le 14 août 2009.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction .

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » s'entend de la *Loi sur la faillite et l'insolvabilité*;

« Règles » renvoie aux *Règles générales sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

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3. The purpose of this Directive is to clarify the method by which receipts are to be reported in the realization of certain assets in summary administration bankruptcies.

4. The specific assets that require clarification are the following:

(a) vehicles and other personal property and movables;
(b) Registered Retirement Savings Plans (RRSPs);
(c) other trust claims; and
(d) real property or immovables.

Vehicles and Other Personal Property and Movables

5. The gross proceeds from the sale of these assets, whether by auction or private sale, are to be included as total receipts as itemized under the tariff.

6. It is recognized that there will be costs associated with the disposition of vehicles and other personal property and movables. The costs of disposition of these assets are to be deducted from the gross proceeds from the sale of these assets in accordance with Rule 128(1).

Registered Retirement Savings Plans

7. (1) Under section 67 of the Act, amounts held in RRSPs are exempt from seizure in bankruptcy, subject to a possible clawback for contributions made in the 12 months preceding

3. La présente instruction a pour objet de préciser la méthode qui doit être utilisée pour déclarer les recettes lors de la réalisation de certains biens d'un failli dans les cas d'administration sommaire.

4. Les biens qui demandent une clarification sont les suivants :

a) véhicules, meubles et autres biens personnels;
b) régimes enregistrés d'épargne-retraite (REER);
c) réclamations sur des biens détenus en fidéicommis; et
d) immeubles ou biens réels.

Véhicules, meubles et autres biens personnels

5. Les montants bruts découlant de la vente de ces actifs, par vente aux enchères ou vente privée, doivent être inclus dans les recettes totales spécifiées en vertu du tarif.

6. Il est admis que la vente des véhicules, meubles et autres biens personnels entraînera des frais. Les frais engagés au titre de la vente de ces actifs seront déduits des montants bruts découlant de la vente de ces actifs, conformément au paragraphe 128(1) des Règles.

Régimes enregistrés d'épargne-retraite

7. (1) En vertu de l'article 67 de la Loi, les REER immobilisés sont insaisissables lors d'une faillite, mais les contributions effectuées durant l'année précédant la

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bankruptcy that will comprise property of the bankrupt's estate. Where provincial legislation exempts RRSPs from execution, the provincial legislation will apply. Where provincial legislation is silent regarding the treatment of RRSPs, they will be exempt subject to the clawback referred to above.

faillite sont saisissables et font partie de l'actif du failli. Là où la législation provinciale exempte les REER de la saisie, la législation provinciale s'appliquera. Là où la législation provinciale est silencieuse concernant le traitement des RREER, ils seront insaisissables sauf pour les contributions effectuées durant l'année précédant la faillite.

(2) For those amounts that are not exempt, the plan issuer (trust company, chartered bank, etc.) would, upon termination, hold the moneys in trust for the bankrupt and the Canada Revenue Agency with respect to withholding tax.

(2) L'établissement qui propose le régime (société de fiducie, banque à charte, etc.) garde l'argent en dépôt pour le failli et pour l'Agence du revenu du Canada en ce qui concerne les retenues d'impôt.

8. The trustee may realize only the residual trust funds received from the plan issuer in respect of the deregistration of an RRSP after income tax considerations. Therefore, only the amount received by the estate, net of tax liability, should be recorded in the Statement of Receipts and Disbursements for tariff purposes.

8. Le syndic ne peut percevoir que le résidu des fonds en fidéicommis après déduction d'impôt, suite à l'annulation du REER. Le syndic devra, pour fins de calcul du tarif, ne tenir compte que du montant net après impôt reçu par l'actif et insurire ce montant dans l'état des recettes et des débours.

Other Trust Claims

Autres réclamations sur des biens détenus en fidéicommis

9. With respect to trust claims of the Crown or others, when the trustee receives funds from the sale of assets that are subsequently determined to be trust moneys, these proceeds do not represent receipts in the estate. The trustee would hold these funds in trust for the eventual trust beneficiary subject to the Directive concerning administrative agreements with trustees and receivers.

9. Lorsque le syndic reçoit des fonds qui découlent de la vente de biens qui sont par la suite considérés comme des sommes en fiducie, ces fonds ne constituent pas des recettes de l'actif. Le syndic gardera ces fonds en dépôt pour l'éventuel bénéficiaire des sommes ainsi déposées en fiducie sous réserve de l'instruction qui traite de l'entente administrative avec les syndics et les séquestres.

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10. The receipts and disbursements relating to a trust claim should be disclosed by way of a footnote or otherwise on the Statement of Receipts and Disbursements.

10. Toutefois, les recettes et les débours devraient être divulgués au moyen d'une annotation ou autrement à l'état des recettes et des débours.

Real Property or Immovables

11. In the case of real property or immovables, if there is expected material equity for the estate, the associated legal problems on the disposition of real property or immovables may warrant that any summary administration estate containing equity in real property or immovables should be converted to an ordinary administration.

Immeubles ou biens réels

11. Pour les immeubles ou biens réels, si l'on prévoit une valeur résiduelle appréciable de l'actif, les problèmes juridiques associés à la vente desdits immeubles ou biens réels peuvent justifier que toute administration sommaire comprenant une valeur résiduelle relativement à des immeubles ou biens réels soit convertie en administration ordinaire.

12. With respect to situations where it is apparent that the estate has no or minimal equity in the real property or immovables of the bankrupt, all legal costs with respect to the preparation of the quit claim documentation should be borne by the purchaser, who is the eventual beneficiary of the real estate.

12. Dans les situations où il est évident que l'actif constitué d'immeubles ou biens réels aura peu ou pas de valeur résiduelle, tous les frais juridiques concernant l'établissement des documents de l'avis de renonciation devraient être payés par l'acquéreur qui est l'éventuel bénéficiaire des biens immobiliers.

Reimbursement of Costs by a Secured Creditor

13. If the trustee is reimbursed by a secured creditor for costs incurred for the safekeeping of encumbered assets for which the estate has no interest, these receipts can be offset against the actual costs involved.

Remboursement de frais par un créancier garanti

13. Lorsque le syndic est remboursé par un créancier garanti pour les frais encourus pour la garde de biens nantis pour lesquels l'actif n'a aucun intérêt, le syndic peut faire compensation entre les coûts réels et le remboursement.

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Coming into Force

14. This Directive comes into force on April 23, 2010.

Entrée en vigueur

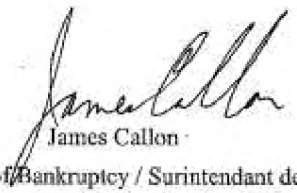
14. La présente instruction entre en vigueur le 23 avril 2010.

Enquiries

15. For any questions pertaining to this Directive, please contact your local OSB office.

Demandes de renseignements

15. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.



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Superintendent of Bankruptcy / Surintendant des faillites

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SB Directive: 2R2, Summary Administration Estates with Realizzable Assets Exceeding $15,000 (see below image pages)

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Date: **November 6, 2009**

To: **OSB Staff, Trustees and Registrars**

Subject: **Summary Administration Estates with Realizable Assets Exceeding $15,000**

Please take note that Circular No. 2R has been revised. The "Application" section in paragraph 5 of Circular No. 2R ought to have been deleted when the Circular was updated and issued on August 14, 2009. Paragraph 5 was a carry over from the previous round of reform in 1997. This was inadvertently overlooked.

Coming into force

The Coming into Force provision at section 11 of the Circular No 2R2 applies and effectively replaces the wording of paragraph 5 in Circular No. 2R which ought to have been deleted.

Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

Date : **Le 6 novembre 2009**

À : **Employés du BSF, syndics et registraires**

Objet : **Administration sommaire de l'actif lorsque les avoirs réalisables dépassent 15 000 $**

Veuillez noter que la circulaire n° 2R a été révisée. Le paragraphe 5, à la section « Application », aurait dû être supprimé lorsque la circulaire a été mise à jour et publiée le 14 août 2009. Ce paragraphe provient de la circulaire publiée dans la foulée des modifications législatives de 1997. Il a été laissé par inadvertance dans la version révisée.

Entrée en vigueur

La disposition sur l'entrée en vigueur, au paragraphe 11 de la circulaire n° 2R2, s'applique et remplace efficacement la formulation du paragraphe 5 de la circulaire n° 2R, lequel aurait dû être supprimé.

Demandes de renseignements

Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

p.j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Insolvency Circular / Circulaire sur l'insolvabilité

N° 2R2

SUMMARY ADMINISTRATION ESTATES WITH REALIZABLE ASSETS EXCEEDING $15,000

Issued: November 6, 2009

(Supersedes Circular No. 2R issued on August 14, 2009, on the same topic)

Background

1. Pursuant to subsection 49(6) of the Bankruptcy and Insolvency Act, if the bankrupt is not a corporation and in the opinion of the official receiver the realizable assets of the bankrupt, after the claims of secured creditors are deducted, will not exceed $15,000, sections 155, 156, 156.1 and 157 of the *Bankruptcy and Insolvency Act* apply until the official receiver directs that they cease to apply.

> **49.(8)** *The official receiver may direct that subsection (6) shall cease to apply in respect of the bankrupt where the official receiver determines that*
>
> (a) *the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand*

ADMINISTRATION SOMMAIRE DE L'ACTIF LORSQUE LES AVOIRS RÉALISABLES DÉPASSENT 15 000 $

Date d'émission : Le 6 novembre 2009

(La présente circulaire remplace et annule la circulaire n° 2R sur le même sujet émise le 14 août 2009.)

Contexte

1. En vertu du paragraphe 49(6) de la *Loi sur la faillite et l'insolvabilité*, lorsque le failli n'est pas une personne morale et que, de l'avis du séquestre officiel, ses avoirs réalisables, déduction faite des réclamations des créanciers garantis, ne dépassent pas 15 000 $, les dispositions des articles 155, 156, 156.1 et 157 de la Loi relatives à l'administration sommaire s'appliquent, à moins que le séquestre officiel n'ordonne le contraire.

> **49.** (8) *Le séquestre officiel peut ordonner que le paragraphe (6) cesse de s'appliquer au failli s'il détermine que les avoirs réalisables de celui-ci, déduction faite des réclamations des créanciers garantis, dépassent cinq mille dollars ou le montant prescrit, ou que (...) et s'il estime pareille mesure indiquée.*

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dollars or the amount prescribed, as the case may be, or

(...)

the official receiver considers that such direction is appropriate.

Rule 130: *For the purposes of subsections 49(6) and (8) of the Act, the prescribed amount is $15,000.*

Règle 130 : *Pour l'application des paragraphes 49(6) et (8) de la Loi, le montant prescrit est de 15 000 $.*

2. The trustee's fees and disbursement in a summary administration are calculated according to Rule 128 (1) of the *Bankruptcy and Insolvency General Rules*.

2. Les honoraires et les débours du syndic en cas d'administration sommaire sont calculés selon la règle 128 (1) des *Règles générales sur la faillite et l'insolvabilité*.

Rule 128(1): *The fees of the trustee for services performed in a summary administration are calculated on the total receipts remaining after deducting necessary disbursements relating directly to the realization of the property of the bankrupt, and the payments to secured creditors, according to the following percentages:*

Règle 128 (1) *Les honoraires du syndic pour les services fournis dans le cas d'une administration sommaire sont calculés sur le total des recettes après déduction, d'une part, des débours nécessaires directement liés à la réalisation des biens du failli et, d'autre part, des paiements aux créanciers garantis, selon les pourcentages suivants :*

(a) *100 percent on the first $975 or less of receipts;*

a) *100 pour cent des premiers 975 $ ou moins des recettes;*

(b) *35 percent on the portion of the receipts exceeding $975 but not exceeding $2,000; and*

b) *35 pour cent de la partie des recettes en sus de 975 $ jusqu'à 2 000 $;*

(c) *50 percent on the portion of the receipts exceeding $2,000.*

c) *50 pour cent de la partie des recettes en sus de 2 000 $.*

3. Direction from the official receiver that subsection 49(6) ceases to apply is commonly

3. Quand le séquestre officiel ordonne que le paragraphe 49(6) cesse de s'appliquer, on dit

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known as "converting" or "changing the status of" an estate from summary administration to ordinary administration.

Purpose

4. This policy establishes the procedure that the official receiver will apply in those cases where the realizable assets in a summary administration exceed $15,000.

Conversion from Summary to Ordinary Where Realizable Assets Exceed $15,000

5. Subject to paragraph 6, the official receiver will convert summary administration estates to ordinary administration estates if the realizable assets exceed $15,000.

6. If a trustee opts to limit his or her fees to the amount calculated on total receipts no greater than $15,000, the summary administration provisions may continue to apply. For greater certainty, the fees of the trustee will be calculated on the total receipts remaining after deducting necessary disbursements relating directly to the realization of the property of the bankrupt and payments to secured creditors, to a maximum of $15,000.

Example 1:

The total receipts are $20,000. After deducting necessary disbursements relating directly to the realization of the property of the bankrupt of $3,000, total net receipts are $17,000. There are no payments to secured creditors. The trustee opts to limit his or her fees to the

qu'il y a changement de statut d'administration sommaire à ordinaire.

Objet

4. La présente politique établit la procédure qu'appliquera le séquestre officiel dans les cas où les avoirs réalisables faisant l'objet d'une administration sommaire dépassent 15 000 $.

Changement de statut d'administration sommaire à ordinaire lorsque les avoirs réalisables dépassent 15 000 $

5. Sous réserve du paragraphe 6, le séquestre officiel changera le statut d'administration sommaire à ordinaire si les avoirs réalisables dépassent 15 000 $.

6. Lorsqu'un syndic choisit de limiter ses honoraires au montant calculé sur le total des recettes ne dépassant pas 15 000 $, les dispositions relatives à l'administration sommaire peuvent continuer de s'appliquer. Il est entendu que les honoraires du syndic seront calculés sur le total des recettes après déduction, d'une part, des débours nécessaires directement liés à la réalisation des biens du failli et, d'autre part, des paiements aux créanciers garantis, pour un maximum de 15 000 $.

Exemple 1 :

Le total des recettes est de 20 000 $. Après déduction des débours nécessaires directement liés à la réalisation des biens du failli de 3 000 $, le total des recettes nettes est de 17 000 $. Il n'y a pas de paiements aux créanciers garantis. Le syndic choisit de

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amount calculated on total receipts of $15,000. The official receiver does not convert the estate to an ordinary administration.

Fees of the Trustee

Total Receipts no greater than $15,000	$15,000.00
100% of $975.00	$975.00
35% of $1,025.00	$358.75
50% of $13,000.00	$6,500.00
Total Fees	$7,833.75

Example 2:

The total receipts are $17,000. After deducting necessary disbursements relating directly to the realization of the property of the bankrupt of $3,000, total net receipts are $14,000. There are no payments to secured creditors. The trustee calculates his or her fees on the total net receipts of $14,000. The official receiver does not convert the estate to an ordinary administration.

Fees of the Trustee

Total Net Receipts	$14,000.00
100% of $975.00	$ 975.00
35% of $1,025.00	$358.75
50% of $12,000.00	$6,000.00
Total Fees	$7,333.75

7. The nature and sum total of the realizable assets are irrelevant when applying paragraphs 5 and 6

limiter ses honoraires au montant calculé sur le total des recettes de 15 000 $. Le séquestre officiel ne change pas le statut pour une administration ordinaire.

Honoraires du syndic :

Total des recettes ne dépassant pas 15 000 $	15 000,00 $
100 % de 975,00 $	975,00 $
35 % de 1 025,00 $	358,75 $
50 % de 13 000,00 $	6 500,00 $
Total des honoraires	7 833,75 $

Exemple 2 :

Le total des recettes est de 17 000 $. Après déduction des débours nécessaires directement liés à la réalisation des biens du failli de 3 000 $, le total des recettes nettes est de 14 000 $. Il n'y a pas de paiements aux créanciers garantis. Le syndic calcule ses honoraires sur le total des recettes de 14 000 $. Le séquestre officiel ne change pas le statut pour une administration ordinaire.

Honoraires du syndic :

Total des recettes nettes	14 000,00 $
100 % de 975,00 $	975,00 $
35 % de 1 025,00 $	358,75 $
50 % de 12 000,00 $	6 000,00 $
Total des honoraires	7 333,75 $

7. Ni la nature ni la valeur totale des avoirs réalisables ne sont prises en compte pour l'application des paragraphes 5 et 6

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8. The trustee is expected to advise the official receiver as soon as possible after the realizable assets in a summary administration exceed $15,000.

9. In the event that there has been no inspector appointment prior to the conversion, it is suggested that the trustee thereupon proceed pursuant to either section 102 or 118 of the Act, as the circumstances allow.

10. It is recommended that the trustee include an explanatory footnote on the Final Statement of Receipts and Disbursements if the trustee has opted to limit his or her fees as described in paragraph 6.

Coming into Force

11. This Circular comes into force on the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force. This Circular applies only to a person who, on or after the day on which subsection 1(1) of Chapter 36 of the Statutes of Canada, 2007, comes into force, is described in one of (a) to (f) listed below:

(a) the person becomes bankrupt;

(b) the person files a notice of intention;

8. Le syndic devrait aviser le séquestre officiel le plus tôt possible lorsque les avoirs réalisables dans un cas d'administration sommaire dépassent 15 000 $.

9. Dans l'éventualité où il n'y a pas eu d'inspecteurs nommés préalablement à la conversion, il est suggéré que le syndic procède conformément à l'article 102 ou 118 de la Loi, selon le cas.

10. Il est recommandé que le syndic ajoute une note explicative à l'état définitif des recettes et débours indiquant que le syndic a choisi de limiter ses honoraires tel que stipulé au paragraphe 6.

Entrée en vigueur

11. La présente circulaire entre en vigueur à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)*. La présente circulaire ne s'applique qu'à l'égard des personnes suivantes :

a) celles qui deviennent faillis à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

b) celles qui déposent un avis d'intention, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;

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(c)	the person files a proposal without having filed a notice of intention;	*c)*	celles qui déposent une proposition, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;
(d)	a proposal is made in respect of the person without the person having filed a notice of intention;	*d)*	celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite, alors qu'elles n'avaient pas déposé d'avis d'intention;
(e)	an interim receiver is appointed in respect of the person's property and all or part of the person's property comes into the possession or under the control of the interim receiver; or	*e)*	celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre intérimaire, nommé à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite;
(f)	all or part of the person's property comes into the possession or under the control of a receiver.	*f)*	celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre, à la date d'entrée en vigueur du paragraphe 1(1) du chapitre 36 des *Lois du Canada (2007)* ou par la suite.

As such, in order to determine whether Circular No. 2R2 applies to a particular insolvency file, the question that needs to be asked is whether one of the " triggering

Par conséquent, pour déterminer si la circulaire n° 2R2 s'applique à un dossier d'insolvabilité en particulier, la question qui doit être posée est de savoir si l'un des

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events" described in (a) – (f) occurred on or after the coming into force date.

« événements déclencheurs » décrits aux alinéas *a*) à *f*), est survenu à la date d'entrée en vigueur ou par la suite.

Enquiries

12. For any questions pertaining to this Circular, please contact your local OSB office.

Demandes de renseignements

12. Pour toute question se rapportant à la présente circulaire, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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PART VI

BANKRUPTS

COUNSELLING SERVICES

Counselling - Sec. 157.1
157.1 (1) The trustee

(a) shall provide, or provide for, counselling for an individual bankrupt, and

(b) may provide, or provide for, counselling for a person who, as specified in directives of the Superintendent, is financially associated with an individual bankrupt,

in accordance with directives issued by the Superintendent pursuant to paragraph 5(4)(b), and the estate of the bankrupt shall pay the costs of the counselling, as costs of administration of the estate, according to the prescribed tariff.

Idem - Sec. 157.1(2)
(2) Where counselling is provided by a trustee to a debtor who is not a bankrupt, that counselling must be provided in accordance with directives issued by the Superintendent pursuant to paragraph 5(4)(b).

Effect on automatic discharge - Sec. 157.1(3)
(3) Subsection 168.1(1) does not apply to an individual bankrupt who has refused or neglected to receive counselling under subsection (1).
1992, c. 27, s. 58;
1997, c. 12, s. 93;
2005, c. 47, s. 96.

DUTIES OF BANKRUPTS

Duties of bankrupt - Sec. 158
158. A bankrupt shall

(a) make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;

(a.1) in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;

(b) deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;

(c) at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;

(d) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the

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bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;

(e) make or give all the assistance within his power to the trustee in making an inventory of his assets;

(f) make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

(g) make disclosure to the trustee of all property disposed of by gift or settlement without adequate valuable consideration within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

(h) attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;

(i) when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;

(j) submit to such other examinations under oath with respect to his property or affairs as required;

(k) aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;

(l) execute any powers of attorney, transfers, deeds and instruments or acts that may be required;

(m) examine the correctness of all proofs of claims filed, if required by the trustee;

(n) in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;

(n.1) inform the trustee of any material change in the bankrupt's financial situation;

(o) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested; and

(p) until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.

R.S., 1985, c. B-3, s. 158;
1992, c. 27, s. 59;
1997, c. 12, s. 94;
2004, c. 25, s. 73.

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SB Directive: 26, Notice to Bankrupts and Officers of a Bankrupt Corporation with Regard to Their Duties and Status
(see below image pages)

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Office of the Superintendent of Bankruptcy Canada
An Agency of Industry Canada

Bureau du surintendant des faillites Canada
Un organisme d'Industrie Canada

Directive / Instruction

N° 26

NOTICE TO BANKRUPTS AND OFFICERS OF A BANKRUPT CORPORATION WITH REGARD TO THEIR DUTIES AND STATUS

Issued: August 14, 2009

(Supersedes Directive No. 23 issued on July 23, 1993, on the same tuple)

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"debtor" means a debtor as defined in section 2 of the Act;

"OSB" means the Office of the Superintendent of Bankruptcy.

Authority and Purpose

2. This Directive is issued pursuant to paragraphs 5(4)(*b*) and (*c*) of the Act.

AVIS AUX FAILLIS ET AUX DIRIGEANTS D'UNE PERSONNE MORALE EN FAILLITE RELATIVEMENT À LEURS DEVOIRS ET OBLIGATIONS

Date d'émission : le 14 août 2009

(La présente instruction remplace et annule l'instruction n° 23 sur le même sujet émise le 23 juillet 1993.)

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction :

« BSF » désigne le Bureau du surintendant des faillites;

« débiteur » renvoie au débiteur tel que défini à l'article 2 de la Loi;

« Loi » s'entend de la *Loi sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction est émise en vertu des alinéas 5(4)*b*) et *c*) de la Loi.

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3. The purpose of this Directive is to clarify the trustee's responsibilities in regard to the bankrupt's comprehension of the bankruptcy process.

Policy

4. The trustee should explain to the bankrupt or officer of a bankrupt corporation his or her duties (sections 158 and 159 of the Act) and the bankruptcy offences (sections 198, 199, 200 and 204 of the Act).

5. The minimum information provided should include:

(a) information on bankruptcy for consumer debtors;

(b) pertinent excerpts from the Act;

(c) duties of the bankrupt; and

(d) debtor financial information (form and guide).

6. To fulfill those obligations, the booklets "Dealing with Debt: A Consumer's Guide" and "All about Bankruptcy Mediation" are available.

7. The Superintendent encourages trustees to distribute these booklets or their own similar brochures or information.

8. (1) In all cases, the bankrupt or officer of the bankrupt corporation must be served with

3. La présente instruction a pour objet de clarifier les responsabilités du syndic en ce qui a trait à la compréhension des procédures de faillite par le failli.

Politique

4. Le syndic doit expliquer au failli et aux dirigeants de la personne morale en faillite leurs devoirs (articles 158 et 159 de la Loi) et les infractions en matière de faillite (articles 198, 199, 200 et 204 de la Loi).

5. L'information mentionnée doit contenir au minimum :

a) l'information sur la faillite pour le débiteur consommateur;

b) les extraits pertinents de la Loi;

c) les devoirs du failli;

d) l'information financière pour le débiteur (formulaire et guide).

6. Pour faciliter cette tâche, les brochures intitulées *Se sortir de l'endettement . Guide pour les consommateurs* et *La médiation en matière de faillite* peuvent être utilisées.

7. Le surintendant encourage les syndics à distribuer ces brochures ou leurs propres brochures ou documentation similaire.

8. (1) Dans tous les cas, le failli ou le dirigeant de la personne morale en faillite doit recevoir

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a copy of the pertinent sections of the Act (Appendix A) and the trustee should obtain an acknowledgement from the bankrupt (Appendix B) that he or she has received, read and understood his or her duties and obligations. The acknowledgement signed by the bankrupt must be on file.

(2) Debtors (bankrupts) must sign the acknowledgement form (Appendix B). If a debtor refuses to sign despite being served, trustees must keep in their file details of the refusal (i.e. proof of service and details as to the refusal).

9. If, in the trustee's opinion, the bankrupt does not comprehend his or her obligations and duties, the trustee should consider asking a relative or friend of the bankrupt to attend the interview to assist the bankrupt in comprehending the process before rejecting the assignment.

Coming into Force

10. This Directive comes into force on September 18, 2009.

Enquiries

11. For any questions pertaining to this Directive, please contact your local OSB office.

une copie des articles pertinents de la Loi (annexe A) et le syndic doit obtenir un accusé de réception du failli (annexe B) dans lequel ce dernier confirme avoir reçu, lu et compris ses devoirs et obligations. L'accusé de réception signé par le failli doit être au dossier.

(2) Le débiteur (failli) doit signer l'accusé de réception (annexe B). Si le débiteur refuse de signer malgré la signification, le syndic doit maintenir dans son dossier, les détails du refus (p. ex., preuve de signification et détails quant au refus).

9. Si, d'après le syndic, le failli ne comprend pas ses devoirs et obligations, le syndic peut demander à un membre de la famille ou à un ami du failli d'assister à la rencontre pour aider ce dernier à comprendre le processus avant de rejeter la cession.

Entrée en vigueur

10. La présente instruction entre en vigueur le 18 septembre 2009.

Demandes de renseignements

11. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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SECTION 158

The bankrupt shall

(a) make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;

(a.1) in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;

(b) deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;

(c) at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;

(d) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;

(e) make or give all the assistance within his power to the trustee in making an inventory of his assets;

(f) make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

(g) make disclosure to the trustee of all property disposed of by gift or settlement without adequate valuable consideration within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

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(h) attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;
(i) when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;
(j) submit to such other examinations under oath with respect to his property or affairs as required;
(k) aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;
(l) execute any powers of attorney, transfers, deeds and instruments or acts that may be required;
(m) examine the correctness of all proofs of claims filed, if required by the trustee;
(n) in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;
(n.1) inform the trustee of any material change in the bankrupt's financial situation,
(o) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested; and
(p) until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all time of his place of residence or address.

SECTION 159

Where a bankrupt is a corporation, the officer executing the assignment, or such

(a) officer of the corporation, or
(b) person who has, or has had, directly or indirectly, control in fact of the corporation

as the official receiver may specify, shall attend before the official receiver for examination and shall perform all of the duties imposed on a bankrupt by section 158, and, in case of failure to do so, the officer or person is punishable as though that officer or person were the bankrupt.

SECTION 178

(1) An order of discharge does not release the bankrupt from

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(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

(a.1) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting therefrom;

(b) any debt or liability for alimony or alimentary pension,

(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

(g) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student; or

(h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g).

(1.1) At any time after five years after a bankrupt who has a debt referred to in paragraph (1)(g) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

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(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

SECTION 198

(1) Any bankrupt who

(a) makes any fraudulent disposition of the bankrupt's property before or after the date of the initial bankruptcy event,

(b) refuses or neglects to answer fully and truthfully all proper questions put to the bankrupt at any examination held pursuant to this Act,

(c) makes a false entry or knowingly makes a material omission in a statement or accounting,

(d) after or within one year immediately preceding the date of the initial bankruptcy event, conceals, destroys, mutilates, falsifies, makes an omission in or disposes of, or is privy to the concealment, destruction, mutilation, falsification, omission from or disposition of, a book or document affecting or relating to the bankrupt's property or affairs, unless the bankrupt had no intent to conceal the state of the bankrupt's affairs,

(e) after or within one year immediately preceding the date of the initial bankruptcy event obtains any credit or any property by false representations made by the bankrupt or made by any other person to the bankrupt's knowledge,

(f) after or within one year immediately preceding the date of the initial bankruptcy event, fraudulently conceals or removes any property of a value of fifty or more or any debt due to or from the bankrupt, or

(g) after or within one year immediately preceding the date of the initial bankruptcy event, hypothecates, pawns, pledges or disposes of any property that the bankrupt has obtained on credit and has not paid for, unless in the case of a trader the hypothecation, pawning, pledging or disposing is in the ordinary way of trade and unless the bankrupt had no intent to defraud,

is guilty of an offence and is liable, on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year or to both, or on conviction on

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indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

(2) A bankrupt who, without reasonable cause, fails to comply with an order of the court made under section 68 or to do any of the things required of the bankrupt under section 158 is guilty of an offence and is liable

(a) on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

SECTION 199

An undischarged bankrupt who

(a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or

(b) obtains credit to a total of $1,000 or more from any person or persons without informing them that the undischarged bankrupt is an undischarged bankrupt,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both.

SECTION 200

(1) Any person becoming bankrupt or making a proposal who has on any previous occasion been bankrupt or made a proposal to the person's creditors is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, if

(a) being engaged in any trade or business, at any time within the period beginning on the day that is two years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, that person has not kept and preserved proper books of account, or

(b) within the period mentioned in paragraph (*a*), that person conceals, destroys, mutilates, falsifies or disposes of, or is privy to the concealment, destruction, mutilation, falsification or disposition of, any book or document affecting or relating to the person's property or affairs, unless the person had no intent to conceal the state of the person's affairs.

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(2) For the purposes of this section, a debtor shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual or other stock takings.

SECTION 204

If a corporation commits an offence under this Act, any officer or director, or agent or mandatary, of the corporation, or any person who has or has had, directly or indirectly, control in fact of the corporation, who directed, authorized, assented to, acquiesced to or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.

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ANNEXE A

Dans l'affaire de la faillite de .....

.....

AVIS AUX FAILLIS OU AUX DIRIGEANTS D'UNE PERSONNE MORALE EN FAILLITE

Vous êtes par les présentes informés des devoirs qui vous sont imposés par la *Loi sur la faillite et l'insolvabilité* et de certaines autres particularités de ladite Loi qui vous touchent à titre de failli (ou, lorsque le failli est une compagnie à responsabilité limitée, à titre de fonctionnaire désigné aux termes de l'article 159 de la Loi). Vous devrez étudier attentivement le présent document, étant donné qu'un manquement aux devoirs indiqués ci-après vous rendra passible de poursuites pénales.

ARTICLE 67

(1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, selon le droit applicable dans la province dans laquelle ils sont situés et où réside le failli, ne peuvent faire l'objet d'une mesure d'exécution ou de saisie contre celui-ci;

b.1) dans les circonstances prescrites, les paiements qui sont faits au failli au titre de crédits de taxe sur les produits et services et qui ne sont pas des biens visés aux alinéas *a*) ou *b*);

b.2) dans les circonstances prescrites, les paiements prescrits qui sont faits au failli relativement aux besoins essentiels de personnes physiques et qui ne sont pas des biens visés aux alinéas *a*) ou *b*);

b.3) sans restreindre la portée générale de l'alinéa *b*), les biens détenus dans un régime enregistré d'épargne-retraite ou un fonds enregistré de revenu de retraite, au sens de la *Loi de l'impôt sur le revenu*, ou dans tout régime prescrit, à l'exception des cotisations au régime ou au fonds effectuées au cours des douze mois précédant la date de la faillite,

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération, y compris les remboursements qui lui sont dus au titre de la *Loi de l'impôt sur le*

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revenu relativement à l'année civile — ou à l'exercice lorsque celui-ci diffère de l'année civile — au cours de laquelle il a fait faillite, mais à l'exclusion de la partie de ces remboursements qui :

(i) soit sont des sommes soustraites à l'application de la présente loi,

(ii) soit sont des sommes qui lui sont dues et qui sont saisissables en vertu d'un bref de saisie-arrêt signifié à Sa Majesté en application de la *Loi d'aide à l'exécution des ordonnances et des ententes familiales* dans lequel il est nommé comme débiteur;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

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Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

ARTICLE 158

Le failli doit :

a) révéler et remettre tous ses biens qui sont en sa possession ou sous son contrôle, au syndic ou à une personne que le syndic autorise à en prendre possession en tout ou en partie;

a.1) dans les circonstances prévues par les instructions du surintendant, remettre au syndic, pour annulation, toutes les cartes de crédit délivrées au failli et en sa possession ou sous on contrôle;

b) remettre au syndic tous les livres, registres, documents, écrits et papiers, notamment les documents de titre, les polices d'assurance et les archives et déclarations d'impôt, ainsi que les copies de ce qui précède, se rattachant de quelque façon à ses biens ou affaires;

c) aux date, heure et lieu que peut fixer le séquestre officiel, se présenter devant ce dernier ou devant tout autre séquestre officiel délégué par le séquestre officiel, pour y subir un interrogatoire sous serment sur sa conduite, les causes de sa faillite et la disposition de ses biens;

d) dans les cinq jours suivant sa faillite, à moins que le séquestre officiel ne prolonge le délai, préparer et soumettre en quatre exemplaires au syndic un bilan en la forme prescrite attesté par affidavit et indiquant les détails de ses avoirs et de ses obligations, ainsi que les noms et adresses de ses créanciers, les garanties qu'ils détiennent respectivement, les dates auxquelles les garanties ont été respectivement données, et les renseignements supplémentaires ou autres qui peuvent être exigés; si les affaires du failli sont mêlées ou compliquées au point qu'il ne peut adéquatement lui-même en préparer un relevé convenable, le séquestre officiel peut, comme dépenses d'administration de l'actif, autoriser l'emploi d'une personne compétente pour aider à la préparation du relevé;

e) dresser un inventaire de ses avoirs ou donner au syndic toute l'assistance qu'il peut donner pour dresser l'inventaire;

f) révéler au syndic tous les biens aliénés au cours de la période allant du premier jour de l'année précédant l'ouverture de la faillite, ou de la date antérieure que le tribunal peut fixer, jusqu'à la date de la faillite inclusivement, et comment, à qui et pour quelle considération toute partie des biens a été aliénée, sauf la partie de ces biens qui

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a été aliénée dans le cours ordinaire du commerce, ou employée pour dépenses personnelles raisonnables;

g) révéler au syndic tous les biens aliénés par donation ou par disposition sans contrepartie valable et suffisante au cours de la période allant du premier jour de la cinquième année précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement;

h) assister à la première assemblée de ses créanciers, à moins d'en être empêché par la maladie ou pour une autre cause suffisante, et s'y soumettre à un interrogatoire;

i) lorsqu'il en est requis, assister aux autres assemblées de ses créanciers ou des inspecteurs ou se rendre aux ordres du syndic;

j) se soumettre à tout autre interrogatoire sous serment au sujet de ses biens ou de ses affaires, selon qu'il en est requis;

k) aider de tout son pouvoir à la réalisation de ses biens et au partage des produits entre ses créanciers;

l) exécuter les procurations, transferts, actes et instruments qu'il peut être requis d'exécuter;

m) examiner l'exactitude de toutes preuves de réclamations produites, s'il en est requis par le syndic;

n) s'il a connaissance que quelqu'un a produit une réclamation fausse, rapporter immédiatement le fait au syndic;

n.1) aviser le syndic de tout changement important de sa situation financière;

o) d'une façon générale, accomplir, au sujet de ses biens et du partage du produit parmi ses créanciers, tous actes et toutes choses que le syndic peut raisonnablement lui demander de faire, ou que les Règles générales peuvent prescrire, ou qu'il peut recevoir l'ordre de faire du tribunal par une ordonnance spéciale rendue à l'égard d'un cas particulier, ou rendue à l'occasion d'une requête particulière du syndic, d'un créancier ou d'une personne intéressée;

p) jusqu'à ce qu'il ait été disposé de sa demande de libération et jusqu'à ce que l'administration de son actif ait été complétée, tenir le syndic constamment informé de son adresse ou de son lieu de résidence.

ARTICLE 159

Lorsque le failli est une personne morale, le fonctionnaire qui exécute la cession ou tout dirigeant de la personne morale ou toute personne qui, directement ou indirectement, en a, ou en a eu, le contrôle de fait, désigné par le séquestre officiel, doit se présenter devant lui pour être interrogé et doit remplir toutes les obligations que l'article 158 impose à un failli, et, s'il omet de le faire, il est susceptible d'être puni comme s'il était le failli.

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ARTICLE 178

(1) Une ordonnance de libération ne libère pas le failli :

a) de toute amende, pénalité, ordonnance de restitution ou toute ordonnance similaire infligée ou rendue par un tribunal, ou de toute autre dette provenant d'un engagement ou d'un cautionnement en matière pénale;

a.1) de toute indemnité accordée en justice dans une affaire civile :

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant de celles-ci;

b) de toute dette ou obligation pour pension alimentaire;

c) de toute dette ou obligation aux termes de la décision d'un tribunal en matière de filiation ou d'aliments ou aux termes d'une entente alimentaire au profit d'un époux, d'un ex-époux ou ancien conjoint de fait ou d'un enfant vivant séparé du failli;

d) de toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors qu'il agissait, dans la province de Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

e) de toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation qui découle d'une réclamation relative à des capitaux propres;

f) de l'obligation visant le dividende qu'un créancier aurait eu droit de recevoir sur toute réclamation prouvable non révélée au syndic, à moins que ce créancier n'ait été averti ou n'ait eu connaissance de la faillite et n'ait omis de prendre les mesures raisonnables pour prouver sa réclamation;

g) de toute dette ou obligation découlant d'un prêt consenti ou garanti au titre de la *Loi fédérale sur les prêts aux étudiants*, de la *Loi fédérale sur l'aide financière aux étudiants* ou de toute loi provinciale relative aux prêts aux étudiants lorsque la faillite est survenue avant la date à laquelle le failli a cessé d'être un étudiant, à temps plein ou à temps partiel, au regard de la loi applicable, ou dans les sept ans suivant cette date,

h) de toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas *a*) à *g*).

(1.1) Lorsque le failli qui a une dette visée à l'alinéa (1)*g*) n'est plus un étudiant à temps plein ou à temps partiel depuis au moins cinq ans au regard de la loi applicable, le tribunal peut, sur demande, ordonner que la dette soit soustraite à l'application du paragraphe (1) s'il est convaincu que le failli a agi de bonne foi relativement à ses obligations découlant de cette

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dette et qu'il a et continuera à avoir des difficultés financières telles qu'il ne pourra pas acquitter celle-ci.

(2) Une ordonnance de libération libere le failli de toutes autres réclamations prouvables en matière de faillite.

ARTICLE 198

(1) Commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinq mille dollars et un emprisonnement maximal de un an, ou l'une de ces peines, ou, par mise en accusation, une amende maximale de dix mille dollars et un emprisonnement maximal de trois ans, ou l'une de ces peines, tout failli qui, selon le cas :

a) dispose d'une façon frauduleuse de ses biens avant ou après l'ouverture de la faillite;

b) refuse ou néglige de répondre complètement et véridiquement à toutes les questions qui lui sont posées à bon droit au cours d'un interrogatoire tenu conformément à la présente loi;

c) fait une fausse inscription ou commet sciemment une omission importante dans un état ou un compte;

d) après l'ouverture de la faillite, ou dans l'année précédant l'ouverture de la faillite, cache, détruit, mutile ou falsifie un livre ou document se rapportant à ses biens ou affaires, en dispose ou y fait une omission, ou participe à ces actes, à moins qu'il n'ait eu aucunement l'intention de cacher l'état de ses affaires;

e) après l'ouverture de la faillite, ou dans l'année précédant l'ouverture de la faillite, obtient tout crédit ou tout bien au moyen de fausses représentations faites par lui ou par toute autre personne à sa connaissance;

f) après l'ouverture de la faillite, ou dans l'année précédant l'ouverture de la faillite, cache ou transporte frauduleusement tout bien d'une valeur de cinquante dollars ou plus, ou une créance ou dette;

g) après l'ouverture de la faillite, ou dans l'année précédant l'ouverture de la faillite, hypothèque ou met en gage ou nanti tout bien qu'il a obtenu à crédit et qu'il n'a pas payé, ou en dispose, à moins que, dans le cas d'un commerçant, l'acte ne soit effectué selon les pratiques ordinaires du commerce et à moins qu'il n'ait eu aucunement l'intention de frauder.

(2) Le failli qui, sans motif raisonnable, ne se conforme pas à une ordonnance rendue en application de l'article 68 ou omet de remplir une obligation imposée par l'article 158 commet une infraction et encourt, sur déclaration de culpabilité :

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a) par procédure sommaire, une amende maximale de cinq mille dollars et un emprisonnement maximal de un an, ou l'une de ces peines;

b) par mise en accusation, une amende maximale de dix mille dollars et un emprisonnement maximal de trois ans, ou l'une de ces peines.

ARTICLE 199

Commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinq mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines, le failli non libéré qui, selon le cas :

a) entreprend un commerce ou un négoce sans révéler, à toutes les personnes avec qui il conclut des affaires, qu'il est un failli non libéré;

b) obtient du crédit de toutes personnes, pour un montant total de mille dollars ou plus, sans les informer qu'il est un failli non libéré.

ARTICLE 200

(1) Toute personne devenant en faillite ou présentant une proposition, qui, dans une occasion antérieure, a été en faillite ou a présenté une proposition à ses créanciers, commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinq mille dollars et un emprisonnement maximal d'un an ou l'une de ces peines, dans les cas suivants :

a) se livrant à un commerce ou à une entreprise, au cours de la période allant du premier jour de la deuxième année précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, elle n'a pas tenu ni conservé des livres de comptabilité appropriés;

b) pendant la même période, elle cache, détruit, mutile ou falsifie un livre ou document se rapportant à ses biens ou à ses affaires, ou en dispose, ou participe à ces actes, à moins qu'elle n'ait eu aucunement l'intention de cacher l'état de ses affaires.

(2) Pour l'application du présent article, un débiteur est réputé ne pas avoir tenu des livres de comptabilité appropriés s'il n'a pas tenu les livres ou comptes qui sont nécessaires pour montrer ou expliquer ses opérations et sa situation financière dans son commerce ou son entreprise, y compris un ou des livres renfermant des inscriptions au jour le jour et

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suffisamment détaillées de tous les encaissements et décaissements, et, lorsque le commerce ou l'entreprise a comporté la vente et l'achat de marchandises, les comptes de toutes les marchandises vendues et achetées, et des états des inventaires annuels et autres.

ARTICLE 204

En cas de perpétration par une personne morale d'une infraction à la présente loi, ceux de ses dirigeants, administrateurs ou mandataires, ou des personnes qui, directement ou indirectement en ont, ou en ont eu, le contrôle de fait, qui ont ordonné ou autorisé l'infraction, ou qui y ont consenti ou participé, sont considérés comme des coauteurs de l'infraction et encourent, sur déclaration de culpabilité, la peine prévue, que la personne morale ait été ou non poursuivie ou déclarée coupable.

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APPENDIX B

ACKNOWLEDGEMENT

I, ... bankrupt or officer of the bankrupt corporation acknowledge receipt of sections 67, 158, 159, 178, 198, 199, 200 and 204 of the *Bankruptcy and Insolvency Act* and state that the contents have been explained to me and that I understand my duties and obligations.

Dated at . this day of _____ ___ _ .

Witness Bankrupt (or Officer)

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ANNEXE B

ACCUSÉ DE RÉCEPTION

Je, ..., failli(e) ou dirigeant de la personne morale en faillite, accuse réception des articles 67, 158, 159, 178, 198, 199, 200 et 204 de la *Loi sur la faillite et l'insolvabilité* et déclare qu'on m'a expliqué la teneur de mes devoirs et obligations et que je les comprends.

Daté le _____, à _____.

_____ Témoin

_____ Failli (ou dirigeant de la personne morale en faillite)

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SB Directive: 3, Duties of the Bankrupt to Deliver Credit Cards to the Trustee (see below image pages)

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Date: JUL 21 2011

To: **OSB Staff, Trustees and Registrars**

Subject: **Directive No. 3, *Duties of the Bankrupt to Deliver Credit Cards to the Trustee***

Directive No. 3, *Duties of the Bankrupt to Deliver Credit Cards to the Trustee*, is being issued to specify under what circumstances a bankrupt shall deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt pursuant to subsection 158(*a.1*) of the *Bankruptcy and Insolvency Act*.

Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

Date : JUL 21 2011

À : **Employés du BSF, syndics et registraires**

Objet : **Instruction n° 3, *Devoirs du failli de remettre ses cartes de crédit au syndic***

L'instruction n°3, *Devoirs du failli de remettre ses cartes de crédit au syndic*, est publiée afin de préciser les circonstances dans lesquelles un failli doit remettre au syndic, pour annulation, toutes les cartes de crédit qui lui ont été délivrées ou qui sont en sa possession ou sous son contrôle, conformément à l'alinéa 158 *a.1*) de la *Loi sur la faillite et l'insolvabilité*.

Demandes de renseignements

Si vous désirez obtenir de plus amples renseignements, n'hésitez pas à communiquer avec le bureau du BSF le plus proche.

p. j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Protecting the integrity of the insolvency system / Protéger l'intégrité du système d'insolvabilité

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Directive / Instruction

N° 3

Duties of the Bankrupt to Deliver Credit Cards to the Trustee

Issued: JUL 2 1 2011

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*

"OSB" means the Office of the Superintendent of Bankruptcy.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act.

3. The purpose of this Directive is to specify, pursuant to subsection 158(*a.1*), under what circumstances a bankrupt shall deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt.

Policy

4. In all circumstances, the trustee shall require that the bankrupt deliver to the trustee, for cancellation, all credit cards issued to and in the

Devoirs du failli de remettre ses cartes de crédit au syndic

Date d'émission: JUL 2 1 2011

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction:

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » désigne la *Loi sur la faillite et l'insolvabilité* (LFI).

Autorité et objet

2. La présente instruction est émise en vertu de l'autorité conférée par les alinéas 5(4)*b*) et *c*) de la Loi.

3. La présente instruction a pour objet de préciser, conformément au paragraphe 158*a.1*), les circonstances dans lesquelles le failli doit remettre au syndic, pour annulation, toutes les cartes de crédit délivrées au failli et en sa possession ou sous son contrôle.

Politique

4. En toutes circonstances, le syndic doit exiger du failli qu'il lui remette, pour annulation, toutes les cartes de crédit qui ont

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possession or control of the bankrupt except those credit cards mentioned in paragraph 5 of this Directive, notwithstanding that there may not be any amount outstanding to the issuer of the credit cards.

5. The bankrupt is not required to deliver to the trustee, for cancellation, a credit card in the possession and control of the bankrupt where the credit card was issued to a third party (e.g., employer, spouse, friend, parent) and the issuer or the third party has authorized the bankrupt to continue to possess and use the credit card. The trustee must conserve documentation in the estate file justifying this exception.

Coming into Force

6. This Directive comes into force on the date that it is issued.

Enquiries

7. For any questions pertaining to this Directive, please contact your local OSB office.

ete delivrees au failli et qui sont en sa possession ou sous son contrôle, à l'exception de celles mentionnées au paragraphe 5 de la présente instruction, même si aucune somme n'est due à l'émetteur des cartes de crédit.

5. Le failli n'est pas obligé de remettre au syndic, pour annulation, une carte de crédit en sa possession ou sous son contrôle lorsque la carte de crédit est émise à une tierce partie (p. ex., employeur, époux, ami, parent) et que l'émetteur ou la tierce partie a permis au failli de continuer à posséder et utiliser ladite carte de crédit. Le syndic doit conserver au dossier de l'actif la documentation justifiant cette exception.

Entrée en vigueur

6. La présente instruction entre en vigueur à la date d'émission.

Demandes de renseignements

7. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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SB Directive: General Transitional 2011, Repeal of 3R, Duties of the Bankrupt to Deliver credit cards to the Trustee
(see below image pages)

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Date: MAY 16 2011

To: **OSB Staff, Trustees and Registrars**

Subject: **General Transitional Directive (2011) - Repeal of Directive No. 3R, *Duties of the Bankrupt to Deliver Credit Cards to the Trustee.***

Directive No. 3R, *Duties of the Bankrupt to Deliver Credit Cards to the Trustee*, respecting credit cards that are delivered by the bankrupt pursuant to subsection 158(b) of *Bankruptcy and Insolvency Act*, has been repealed.

Directive No. 3R had required trustees to cut up a bankrupt's credit cards to prevent further unauthorized use by the bankrupt and to return to the card issuer the destroyed credit cards accompanied by a notice of bankruptcy.

Provided the card issuer receives timely notification of the bankruptcy, the return of the destroyed cards to the issuer is not required to prevent further unauthorized use of the cards.

Date : 16 MAI 2011

À : **Employés du BSF, syndics et registraires**

Objet : **Instruction générale de transition (2011) - Abrogation de l'Instruction n" 3R, *Devoirs du failli de remettre ses cartes de crédit au syndic***

L'Instruction n° 3R, *Devoirs du failli de remettre ses cartes de crédit au syndic*, concernant les cartes remises par le failli conformément au paragraphe 158(b) de la *Loi sur la faillite et l'insolvabilité*, a été abrogée.

L'Instruction n" 3R exigeait du syndic qu'il coupe les cartes de crédit du failli pour en prévenir tout usage ultérieur sans autorisation et qu'il retourne à l'émetteur les cartes détruites accompagnées d'un avis de faillite.

À condition que l'émetteur de la carte soit avisé de la faillite en temps opportun, il n'est pas nécessaire de lui retourner les cartes détruites pour en prévenir tout usage ultérieur sans autorisation.

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Enquiries

If you require further information, please do not hesitate to contact the OSB office nearest you.

Att.

Demandes de renseignements

Pour de plus amples renseignements, veuillez communiquer avec le bureau du BSF le plus proche.

P.j.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Directive / Instruction

GENERAL TRANSITIONAL DIRECTIVE (2011)

Issued: MAY 16 2011

Interpretation

1. In this Directive,

"Act" means the *Bankruptcy and Insolvency Act*;

"OSB" means the Office of the Superintendent of Bankruptcy.

Authority and Purpose

2. This Directive is issued pursuant to the authority of paragraphs 5(4)(*b*) and (*c*) of the Act for the purpose of repealing Directive No. 3R, *Duties of the Bankrupt to Deliver Credit Cards to the Trustee*, issued on August 14, 2009.

Policy

3. Directive No. 3R, *Duties of the Bankrupt to Deliver Credit Cards to the Trustee*, is hereby repealed.

INSTRUCTION GÉNÉRALE DE TRANSITION (2011)

Émise: 16 MAI 2011

Interprétation

1. Les définitions qui suivent s'appliquent à la présente instruction:

« BSF » désigne le Bureau du surintendant des faillites;

« Loi » renvoie à la *Loi sur la faillite et l'insolvabilité*.

Autorité et objet

2. La présente instruction, émise en vertu de l'autorité conférée par les alinéas 5(4)*b)* et *c)* de la Loi, a pour objet d'abroger l'instruction n° 3R, *Devoirs du failli de remettre ses cartes de crédit au syndic*, émise le 14 août2009.

Politique

3. L'instruction n° 3R, *Devoirs du failli de remettre ses cartes de crédit au syndic*, est abrogée par le présent document.

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Coming into Force

4. This Directive comes into force on the date that it is issued.

Enquiries

5. For any questions pertaining to this Directive, please contact your local OSB office.

Entrée en vigueur

4 La présente instruction entre en vigueur à la date d'émission.

Demandes de renseignements

5. Pour toute question se rapportant à la présente instruction, veuillez communiquer avec le bureau du BSF le plus proche.

James Callon
Superintendent of Bankruptcy / Surintendant des faillites

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Date: 1942-03-03
Parallel citations: 1942 CanLII 2 (SCC)
URL: http://canlii.ca/t/1ttrz
Citation: A.H. Boulton Co. Ltd. v. Trusts & Guarantee Co. Ltd., 1942 CanLII 2 (SCC), [1942] SCR 130, <http://canlii.ca/t/1ttrz> retrieved on 2013-08-15
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Supreme Court of Canada
A.H. Boulton Co. Ltd. v. Trusts & Guarantee Co. Ltd., [1942] S.C.R. 130
Date: 1942-03-03

In the Matter of the Bankruptcy of George Bozanich.
The A.H. Boulton Company Limited *(Defendant) Appellant;*
and
The Trusts and Guarantee Company Limited *(Plaintiff) Respondent.*
1941: November 14; 1942: March 3.
Present: Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Bankruptcy—Bankruptcy Act, R.S.C. 1927, c. 11, ss. 60, 61, 62, 64—"Settlement" within meaning of ss. 60, 62 (3)—Chattel mortage to creditor for debt incurred in store business—Constitutional law—Ontario legislation as to preferences superseded by s. 64 of Bankruptcy Act—B.N.A. Act, s. 91.

On April 5, 1939, B. gave to appellant a chattel mortgage on certain chattels in B.'s store to secure payment of indebtedness to appellant incurred by B. in the course of business. On October 21, 1939, B. made an authorized assignment in bankruptcy. Respondent, the trustee in bankruptcy, attacked the validity, as against it, of the security of the chattel mortgage.

Held (reversing judgment of the Court of Appeal for Ontario, [1941] O.R. 21): The chattel mortgage was not a "settlement" within the meaning of ss. 60 and 62 (3) of the *Bankruptcy Act,* R.S.C., 1927, c. 11, and is valid and effectual as against respondent.

The enactment in s. 62 (3) that, for the purpose of ss. 60, 61 and 62, "settlement" "shall include any conveyance or transfer of property" does not so extend the ordinary meaning of the word "settlement" as to bring within its scope all conveyances or transfers of property.

Per the Chief Justice and Davis and Kerwin JJ.: In enacting said sections Parliament adopted in substance provisions in the English Act which had been the subject of discussion and decision in the English courts, and it is proper to assume that Parliament intended to adopt those provisions as construed by the English courts and applied in the administration of the bankruptcy law in England; and the settled law in England had been that, although in the form of definition the words now in said s. 62 (3) purport to enlarge the meaning of the term "settlement", they must, by reason of the context, be restricted in their scope. Broadly speaking, the settled principle in England was that those words had not the effect of bringing within the scope of the term "settlement", as used in provisions corresponding to said ss. 60, 61 and 62, transactions which have none of the essential elements of a "settlement" as that term is commonly understood. Reading said ss. 60, 61 and 62 together with s. 64 (as to preference given to a creditor) and considering these enactments in the light of the history of the law in relation to preferences, it must be held that such a transaction as that in question does not fall within the intendment of "settlement" as employed in said sections; it belongs to the class of transactions the validity of which is to be determined by the application of s. 64.

The provisions of the Ontario Act, R.S.O. 1927, c. 162, in relation to preferences are superseded by s. 64 of the *Bankruptcy Act,* and the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of said s. 64, suspended in virtue of the concluding paragraph of s. 91 of the *B.N.A. Act.*

Per Rinfret and Crocket JJ.: Said ss. 60 and 62 are directed against a "settlement of property", and it is apparent that in using the word "settlement" Parliament intended to connote a particular kind of gift or grant, excluding other kinds. Secs. 60 and 62 were adoption of provisions in the English Act, and the construction of the word had been settled in England and had there acquired an established meaning. A settlement in the ordinary sense of the word is intended; the transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer (*In re Player, Ex parte Harvey,* 15 Q.B.D. 682, at 686-7, and other cases, cited). The words "conveyance or transfer" in s. 62 (3) must be qualified by the word "settlement" in s. 60, and it is only such a conveyance or transfer as comes within the meaning of

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"settlement" in s. 60 that is by s. 60 declared void. The transaction in question had not any of the necessary elements of a settlement. (Doubt expressed whether an arrangement with a creditor may ever be considered a "settlement"; and inclination expressed to the opinion that, generally speaking, "settlement" involves the idea of a clear gift or that type of cases where provision is made for a trust of some sort. It should not be taken to include an ordinary business transaction between a debtor and a creditor.)

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario[1].

On April 5, 1939, one Bozanich (hereinafter called the debtor) executed and delivered to appellant a chattel mortgage on certain chattels in the debtor's store to secure payment of indebtedness to appellant incurred by the debtor in the course of business. On October 21, 1939, the debtor made an authorized assignment in bankruptcy. Respondent, the trustee in bankruptcy, attacked the validity, as against it, of the security of the chattel mortgage.

By an order in the Supreme Court of Ontario in Bankruptcy, Urquhart J. directed the trial of an issue in the County Court of the County of Essex before His Honour J.J. Coughlin, Esquire, Senior Judge of the said Court, in which the trustee in bankruptcy should be plaintiff and the present appellant (in said order called the creditor) should be defendant. The following question was ordered to be tried on the said issue:

> Is the chattel mortgage made by the said debtor to the said creditor on the 5th day of April, 1939, for the sum of $900 valid and effectual as against the said trustee and does the said creditor, by virtue of the said chattel mortgage, hold a valid security on the goods and chattels described in the said chattel mortgage?

(The question of the validity of a certain lien note, attacked by the trustee, was also ordered to be tried on said issue. This question was decided by the County Court Judge against the present appellant and no appeal was taken from this decision.)

The County Court Judge found that the chattel mortgage was valid and effectual as against the plaintiff and that the defendant by virtue of it held a valid security on the chattels described therein. He held that the transaction was not a "settlement" in the sense in which that word is used in s. 60 of the *Bankruptcy Act.*

On appeal by the plaintiff, Urquhart J.[2], feeling himself bound to follow the decision in *Re Trenwith*[3] (but intimating that, if not so bound, he would have held otherwise), held that the transaction in question was a "settlement"; but he directed a new trial before the County Court Judge on the question whether the chattel mortgage was made in favour of the incumbrancer "in good faith and for valuable consideration" within s. 60 (3) (*b*) of the *Bankruptcy Act.*

The decision of Urquhart J. was affirmed by the Court of Appeal for Ontario[4], Henderson J.A. dissenting, who would have restored the judgment of the County Court Judge.

The defendant appealed to the Supreme Court of Canada (special leave to do so was granted by a Judge of this Court).

Paul Martin K.C. for the appellant.

Lorne R. Cumming for the respondent.

The judgment of the Chief Justice and Davis and Kerwin JJ. was delivered by

THE CHIEF JUSTICE.—The material facts are stated in the respondent's factum, as follows:—

> The debtor, George Bozanich, operated a small retail grocery and meat market in the City of Windsor, under the name and style of "Goodwill Market" from January, 1936, until July, 1939, when he discontinued business. On October 21st, 1939, he made an authorized assignment under the Bankruptcy Act. The appellant company is a wholesale grocery firm with which the debtor had substantial dealings from the commencement of the business until April, 1939.
>
> On April 5th, 1939, the debtor executed a chattel mortgage in favour of the appellant to secure the sum of $900, the amount of a long past due indebtedness owing by the debtor to the appellant company. The chattel mortgage covered most of the debtor's store fixtures other than his cash register and it is alleged that the said fixtures at the time of the chattel mortgage and also at the time of the subsequent assignment constituted by far the greater part of the debtor's realizable assets.
>
> At the same time the appellant also took from the debtor a so-called lien note on the cash register as security for the sum of $361.45.
>
> Upon bankruptcy occurring the appellant claimed to be a secured creditor by virtue of both the chattel mortgage and the lien note, and the respondent, the trustee in bankruptcy, attacked the validity of both securities in a motion instituted in the Supreme Court of Ontario (in Bankruptcy) heard before the Honourable Mr. Justice Urquhart on April 1st, 1940.
>
> The learned Bankruptcy Judge directed the trial of an issue before the Senior Judge of the County Court of the County of Essex to determine the validity of the questioned securities. The trustee was made plaintiff in the issue and the present appellant was made defendant and the trial Judge was directed to find as to the validity of the chattel mortgage and the lien note and to find for or against the right of the appellant company to rank as a secured creditor under either or both of the said documents.

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On the trial of this issue the lien note was set aside and there has been no appeal from this decision. The County Court Judge, however, reported that the chattel mortgage was valid and effectual as against the trustee in bankruptcy and that it did not constitute a "settlement" within the meaning of Section 60 of the Bankruptcy Act.

An appeal was taken by the trustee in bankruptcy from the finding of the trial Judge with respect to the chattel mortgage and on this appeal the Honourable Mr. Justice Urquhart held that the chattel mortgage did constitute a "settlement" under the provisions of the said section of the Bankruptcy Act and ordered a new trial before the County Court Judge on this basis, directing also that both parties might adduce further evidence.

The trial Judge having failed to make any finding as to good faith and valuable consideration within the meaning of Section 60, subsection 3 (*b*), of the *Bankruptcy Act,* and the learned Bankruptcy Judge finding himself unable to determine this question on appeal, the new trial was directed for the purpose of deciding this question and it was directed that the onus of establishing good faith and valuable consideration would be on the creditor, the present appellant.

From the decision of the Bankruptcy Judge an appeal was taken by the present appellant to the Court of Appeal for the Province of Ontario on the ground that the finding that the chattel mortgage was a "settlement" was erroneous, and that in any event the decision of the trial judge amounted to a finding of good faith and valuable consideration.

The trustee cross-appealed from the portion of the judgment of the Bankruptcy Judge directing a new trial on the ground that the onus being on the creditor to establish good faith and valuable consideration, the failure of the trial judge to find affirmatively in favour of the creditor on these points was sufficient to entitle the trustee to the relief sought.

The appeal and cross-appeal came on for hearing on December 9th, 1940, before the Honourable Mr. Justice Riddell, Acting Chief Justice, the Honourable Mr. Justice Henderson and the Honourable Mr. Justice Gillanders. On December 21st, 1940, the majority of the Court delivered judgment dismissing the appeal and the cross-appeal and confirming the decision of the Bankruptcy Judge that the chattel mortgage was a "settlement" within the meaning of the Bankruptcy Act, Section 60, and also the directions of the Bankruptcy Judge for a new trial. The Honourable Mr. Justice Henderson dissented from this judgment and would have allowed the appeal and restored the report of the trial judge on the ground that the transaction was not a "settlement".

The question raised by the appeal concerns the interpretation of sections 60 to 62 inclusive and section 64 of the *Bankruptcy Act,* which are under the caption "Settlements and Preferences". Sections 60, 61 and 62 were enacted in 1919 and section 64 in the following year. These were, in substance, re-enactments of sections 42 and 44 of the English *Bankruptcy Act, 1914.*

The controversy turns upon the effect of section 62, subsection 3, which is in these words:—

> For the purpose of this section and sections sixty and sixty-one "settlement" shall include any conveyance or transfer of property.

It is contended that by force of this section the ordinary meaning of "settlement" is extended in such a manner as to bring within its scope any conveyance or transfer of property. The corresponding provision in the English *Bankruptcy Act,* which was found in the Act of 1869, was the subject of discussion and decision before the enactment of the Canadian *Bankruptcy Act* of 1919; and it may, I think, properly be said that in 1919 when these provisions were adopted by Parliament it was the settled law in England that, although in the form of definition these words purport to enlarge the meaning of the term "settlement", they must, by reason of the context, be restricted in their scope. Broadly speaking, the settled principle in England is that this clause has not the effect of bringing within the scope of the term "settlement", as used in the sections corresponding to sections 60, 61 and 62 of our Act, transactions which have none of the essential elements of a "settlement", as that term is commonly understood.

In the treatise on Bankruptcy and Insolvency in the 2nd edit. of Halsbury by Lord Justice Luxmoore, it is stated that the term "settlement" "implies an intention that the property shall be retained or preserved for the benefit of the donee in such a form that it can be traced". This construction was well settled in the year 1919 when the relative provisions of the English statute were enacted as part of the bankruptcy law of this country. It is proper to assume that it was the statute as it had been construed by the English courts and applied in the administration of bankruptcy law in England that Parliament intended to adopt.

I pass now to section 64 which deals with transactions between an insolvent person and his creditor. The history of the law relating to such transactions is familiar. At common law there is nothing to prevent a debtor preferring one creditor to another. The Statute, 13 Elizabeth, Chap. 5, did not prohibit such transactions. This common law privilege is obviously opposed to the fundamental principle of bankruptcy law—the equitable distribution of assets among all entitled to share; and the law of fraudulent preference was originally developed by the courts on the basis of the principles of the Bankruptcy Acts. The principle of section 64 was first formulated by statute in section 92 of the *Bankruptcy Act* of 1869. In

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Canada in most of the provinces there were, prior to the *Bankruptcy Act,* statutory enactments making voidable transfers of property by an insolvent made with the intention of giving a particular creditor an "unjust preference".

When sections 60, 61 and 62 of the *Bankruptcy Act* are read together with section 64 and these enactments are considered in light of the history of the law in relation to preferences, I find it impossible to convince myself that such a transaction as that with which we are now concerned falls within the intendment of "settlement", as employed in those sections. It belongs, I think, to the class of transactions, the validity of which is to be determined by the application of section 64.

I may add that, in my opinion, the provisions of R.S.O. 1927, Chap. 162, in relation to preferences are superseded by section 64 of the *Bankruptcy Act,* and that the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of section 64, suspended in virtue of the concluding paragraph of section 91.

The appeal should be allowed and the report of His Honour, Judge Coughlin, restored, with costs throughout.

The judgment of Rinfret and Crocket JJ. was delivered by

RINFRET J.—This case is a bankruptcy matter.

An order was made by the Supreme Court of Ontario in Bankruptcy that the parties proceed to the trial of the following issue:

Is the chattel mortgage made by the bankrupt debtor to his creditor (the appellant), on the fifth day of April, 1939, for the sum of $900, valid and effectual as against the trustee in bankruptcy (the respondent); and does the said creditor, by virtue of the said mortgage, hold a valid security on the goods and chattels described in the said chattel mortgage?

Another matter (in respect of a lien note) was also made the subject of the issue; but it has been disposed of in the bankruptcy court, and there is no appeal as to it.

The chattel mortgage was given by the debtor to the appellant on the 5th of April, 1939. The bankruptcy occurred on the 21st of October, 1939.

Section 64 of the *Bankruptcy Act* provides that:

> Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, * * * by any insolvent person in favour of any creditor * * * with a view of giving such creditor a preference over the other creditors shall, if the person * * * is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making * * * the same, * * * be deemed fraudulent and void as against the trustee in the bankruptcy * * *
>
> 2. If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, * * * it shall be presumed *prima facie* to have been made * * * with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

In this case, the chattel mortgage was given almost seven months before the date of the bankruptcy, and it does not come within that section.

There are, however, other sections of the *Bankruptcy Act* on which the respondent relies:

> 60. Any settlement of property made after the thirtieth day of June, one thousand nine hundred and twenty, shall, if the settlor becomes bankrupt or makes an authorized assignment within one year after the date of the settlement, be void against the trustee.
>
> 2. Any such settlement shall, if the settlor becomes bankrupt or makes an assignment as aforesaid at any subsequent time within five years after the date of the settlement, be void against such trustee, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.
>
> 3. This section shall not extend to any settlement made
>
> * * *
>
> (*b*) in favour of a purchaser or incumbrancer in good faith and for valuable consideration.
>
> * * *
>
> 62. (3) For the purpose of this section and sections sixty and sixty-one "settlement" shall include any conveyance or transfer of property.

The question is whether the chattel mortgage comes under those parts of sections 60 and 62 above reproduced.

His Honour the County Judge of the County of Essex determined that the chattel mortgage in question was valid. The trustee appealed to the Supreme Court in Bankruptcy, where Urquhart J., although holding the same view as the County Judge, felt bound by the decision of the Court of Appeal in the case of *Re Trenwith*[5] and said:

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> I cannot, in view of the very clear words of the Court of Appeal, see how I can distinguish the *Trenwith* case[5], although I realize that the circumstances there approach more nearly a settlement than the purely commercial transaction which occurred in the case at bar. I therefore feel bound to follow it.

He thought, however, that the question might come within the exception contained in subsection 3 (*b*) of section 60 "in favour of a purchaser or incumbrancer in good faith and for valuable consideration"; and, for that reason, he directed a new trial and that the matter might "be remitted to the County Court Judge for reconsideration on the evidence as adduced and extended and such further evidence as either the parties or the Judge may desire", so that the appellant may be able "to establish the question of good faith and valuable consideration".

In the Court of Appeal, this judgment was affirmed, Henderson, J.A., dissenting on the ground that the case could be distinguished from *Re Trenwith*[6].

As will have appeared, the case is simple, but by no means an easy one.

If one confines himself to the literal meaning of the material portions of ss. 60 and 62, which have to be construed, what is first to be noted is that the agreement against which these sections are directed is the agreement known as a "settlement of property". The word "settlement" is the one exclusively used in subsections 1, 2 and 3 of section 60.

Whether, therefore, "settlement" is or not a technical expression, it is apparent that, in the mind of the legislator, the use of the word "settlement" was intended to connote a particular kind of gift or grant excluding the others. Both sections 60 and 62, since over a quarter of a century, had been in the English Act in similar language; and the Canadian *Bankruptcy Act* borrowed them from the English statute. The construction of the word had been settled in England for some appreciable time and it had there acquired an established meaning.

It need not be stated that all conveyances or transfers of property are not settlements; nor can it be said that a settlement is a settlement because it happens to be a conveyance or a transfer.

Without attempting to give a definition of the word—and more particularly of that word as used in section 60—it seems to me sufficient for the purpose of interpreting the section to adopt a passage of Cave J., in the case of *In re Player; Ex parte Harvey*[7]:

> One must look at the whole of the language of the section in applying that definition, and consider what is meant by "settlement". Although "settlement", by the 3rd subsection, "shall for the purposes of this section include any conveyance or transfer of property", yet I think the view of my brother Mathew is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person.

This view was concurred in by Mathew and Wills JJ.

In the *Player* case[8], a gift of money to a son, made for the purpose ofling him to commence business on his own account, was held not to be a "settlement of property" within the meaning of the section of the English *Bankruptcy Act* which renders such settlements void in certain specified cases as against the trustee in bankruptcy of the settlor.

In the case of *In re Vansittart; Ex parte Brown*[9], upon an application under the section in the English Act (again, it should be noted, expressed in identical language with sections 60 and 62 (3) of the Canadian Act) to avoid a gift of valuable jewelry by the bankrupt, it appeared that such jewelry had been given by him as a present to his wife within two years of his bankruptcy. It was held that, to bring a transfer of personal property within the section, it must be manifest, from the nature and circumstances of the case, that it was the object of the transferor that the subject-matter of the transfer should permanently remain the property of the transferee; and, in the premises, it must be taken that the bankrupt contemplated the retention by his wife of the present which he had given her. In that case, Vaughan Williams J. approved the construction of Cave J. in the *Player* case[8]; and, applying it to the facts in the case then before him, he found that the donor contemplated the retention by his wife of the present which he gave her, and accordingly held the gift void against the trustee in bankruptcy.

Again, the Court of Appeal, in the case of *In re Plummer*[10]—Lord Alverstone, M.R., Rigby and Collins, LL.JJ.—approved of the principle stated in *In re Vansittart*[9] and *In re Player*[8] and held that the mere fact that some business had been acquired by the son partly by means of money obtained from or paid by the father was not sufficient to make the transaction a "settlement" within the section. "Settlement", in the English *Bankruptcy Act,* was held to mean such a conveyance or transfer by the donor as contemplates the retention of the property by the donee, either in its original form or in such a form that it can be traced, and does not extend to a conveyance or transfer of property which cannot be traced, as, for instance, where there is a gift of money to be employed in a business or in the purchase of a business and the money is so employed or spent, the business itself not being settled.

In his judgment, Rigby, L.J., referred to what Cave, J., had said (as above reproduced) in the *Player* case[11] and observed:

> I do not think that that judgment has been impeached by any of the later authorities that have been referred to.

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Collins, L.J., expressing the same view, said:

It is impossible, in my opinion, to treat such a transaction as the subject-matter of a "settlement" within the section. It seems that the word "settlement" used in the *Bankruptcy Act* does not embrace the set of circumstances constituting the facts of the case at bar. I doubt whether an arrangement with a creditor may ever be considered a settlement; and I would incline to the opinion that, generally speaking, "settlement" involves the idea of a clear gift, or that type of cases where provision is made for a trust of some sort. It should not be taken to include an ordinary business transaction between a debtor and a creditor.

The transaction in the case at bar was one to secure a past and future indebtedness. The chattel mortgage in question was given in the course of an ordinary commercial transaction. The mortgagor settled nothing on the mortgagee.

Subsection 3 of section 62 provides that "settlement" shall include any conveyance or transfer of property; but the section which declares the transaction void against the trustee is section 60. That section uses the word "settlement". It follows that "conveyance or transfer", in section 62 (3) must be qualified by the word "settlement" in section 60. The mere fact that the transaction is said to include any conveyance or transfer does not make the transaction a settlement. The transactions which are declared void under section 60 are such conveyances and transfers as come within the meaning of the word in section 60.

As pointed out by Henderson, J.A., the necessary elements of a settlement were found in the *Trenwith* case[12]; but they are not to be found in the case now under review, where the transaction does not include any of the elements which one must find present in a settlement.

The Act, as broad as it is, allows of a clear distinction between settlements though effected by a conveyance or transfer of property and conveyances or transfers of property not in the nature of a settlement.

In the circumstances of the present case, I think the appeal ought to be allowed and the decision of the County Court Judge restored with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Martin & Laird.

Solicitors for the respondent: Croll & Croll.

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[1] [1941] O.R. 21; 22 C.B.R. 143; [1941] 1 D.L.R. 570.
[2] 22 C B.R. 143, at 144-149.
[3] [1934] O.R. 326.
[4] [1941] O.R. 21; 22 C.B.R. 143; [1941] 1 D.L.R. 570.
[5] [1934] O.R. 326.
[6] [1934] O.R. 326.
[7] (1885) 15 Q.B.D. 682, at 686-687.
[8] (1885) 15 Q.B.D. 682.
[9] [1893] 1 Q.B. 181.
[10] [1900] 2 Q.B. 790.
[11] (1885) 15 Q.B.D. 682.
[12] [1934] O.R. 326.

Royal Bank of Canada v. North American Life Assurance Co., [1996] 1 SCR 325 - Prescription on "Settlement" that May Not Have Transferred Interest in RRSP/RRIF

Date:	1996-02-22
Docket:	24316
Parallel citations:	1996 CanLII 219 (SCC); 132 DLR (4th) 193; [1996] 3 WWR 457; 37 CBR (3d) 141; 50 DTC 6157; [1996] 1 CTC 356; 141 Sask R 81
URL:	http://canlii.ca/t/1frcv
Citation:	Royal Bank of Canada v. North American Life Assurance Co., 1996 CanLII 219 (SCC), [1996] 1 SCR 325, <http://canlii.ca/t/1frcv> retrieved on 2013-08-24
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Royal Bank of Canada *v.* North American Life Assurance Co., [1996] 1 S.C.R. 325

Royal Bank of Canada *Appellant*

v.

North American Life Assurance Company and
Balvir Singh Ramgotra *Respondents*

Indexed as: Royal Bank of Canada *v.* North American Life Assurance Co.

File No.: 24316.

1995: November 8; 1996: February 22.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for saskatchewan

Bankruptcy -- Settlement of funds -- RRSP transferred in good faith to RRIF (insurance annuity) for benefit of third party -- Settlements made up to five years prior to bankruptcy void against trustee in bankruptcy if interest of settlor in property did not pass on settlement -- RRIFs normally exempt from claims of bankrupt's creditors -- Bankruptcy declared within five years of transfer -- Whether transfer to RRIF a settlement -- If so, whether or not settlement void against trustee in bankruptcy -- If so, whether or not funds in RRIF available to satisfy claims of creditors notwithstanding exempt status of RRIF -- Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 67, 91 -- The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, ss. 2(kk), 158.

In June 1990, respondent Ramgotra transferred the funds from his RRSPs into a RRIF managed by respondent insurance company. His wife was designated beneficiary under the RRIF and payments began that August. Circumstances related to relocation of respondent's medical practice led him to make an assignment into bankruptcy in February 1992. On his absolute discharge from bankruptcy in January 1993, his only assets were his clothing and household contents, and the RRIF. While the RRSPs would have been subject to his creditors' claims, the RRIF constituted a life insurance annuity and was therefore exempt from their claims on the basis of s. 67(1)(*b*) (property divisible among creditors on bankruptcy does not include property exempt from seizure under provincial law) of the *Bankruptcy and Insolvency Act* (*BIA*), when read in conjunction with ss. 2(kk)(vii) (life insurance includes annuities) and 158(2) (life insurance money and contract is exempt from seisure where a spouse is designated beneficiary) of *The Saskatchewan Insurance Act*. The trustee in bankruptcy applied for a declaration that the transfer of the RRSP funds into the RRIF was void, pursuant to s. 91(2) of the *BIA*, which declares, in part, that "settlements" made one to five years prior to bankruptcy are void against the trustee if "the interest of the settlor in the property did not pass" upon settlement. The trustee's application was dismissed at trial because the transfer of the RRSP funds into the RRIF had been made in good faith and not for the purpose of defeating the claims of his creditors. Appellant's appeal to the Saskatchewan Court of Appeal was dismissed. The issues here were: (1) whether the transaction was a settlement within the meaning of s. 91 *BIA*; (2) if so, whether the settlement was void against the trustee in bankruptcy under the second branch of s. 91(2); and, (3) if so, whether the funds in the RRIF were available to satisfy the claims of the creditors despite the RRIF's exempt status under s. 67(1)(*b*).

Held: The appeal should be dismissed.

When respondent Ramgotra transferred the funds from his two RRSPs into an RRIF designating his wife as beneficiary, the funds became exempt from execution or seizure by reason of s. 67(1)(*b*) *BIA*, when read in conjunction with ss. 2(kk)(vii) and 158(2) of *The Saskatchewan Insurance Act*. Even if the beneficiary designation was a settlement within s. 91 *BIA*, and was void against the trustee in bankruptcy pursuant to the second branch of s. 91(2), the RRIF remained exempt from the claims of respondent Ramgotra's creditors and, in particular, the appellant.

Jurisprudential consensus has emerged that the designation of a beneficiary under a life insurance policy constitutes a s. 91 settlement. Respondent Ramgotra effected a settlement triggering s. 91.

Sections 67(1)(*b*) and 91 *BIA* are not in conflict. The two provisions can be reconciled by giving effect to their distinct terms, and by recognizing their distinct roles in bankruptcy. Section 91 dictates that certain settled property will fall back into the estate of the bankrupt in the possession of the trustee, while s. 67 is directed at the exercise of administrative powers over the estate by the trustee. Where a settlement is void against the trustee under s. 91, then in normal circumstances, the trustee is empowered to administer the settled asset and use it to satisfy the claims of creditors. However, in the special case where the asset is exempt under s. 67(1)(*b*), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors.

Respondent Ramgotra's property interest in the RRIF passed to and vested in the trustee in bankruptcy by operation of s. 71(2) *BIA*. The future contingent interest of the designated beneficiary under the RRIF was not captured by s. 71(2), since it had been settled on the designated beneficiary prior to bankruptcy. The trustee in bankruptcy could apply to have this settlement set aside under s. 91(2) *BIA*.

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The effect of s. 91 is to render certain settlements void against the trustee in bankruptcy. A life insurance policy, however, is rendered exempt under s. 67(1)(*b*) by the designation of a beneficiary and this status continues so long as the designation is "in effect" according to s. 158(2) of *The Saskatchewan Insurance Act*. The fact that a beneficiary designation is void against the trustee under federal legislation does not necessarily result in its no longer having effect *vis-à-vis* the claims of creditors under the provincial legislation which s. 67(1)(*b*) incorporates.

It was not necessary to decide whether respondent Ramgotra effected a void settlement under the second branch of s. 91(2) when he designated his wife as beneficiary of his RRIF. Even if the settlement were void against the trustee in bankruptcy, that would not allow the trustee to use the funds in the RRIF to satisfy the claims of creditors such as the appellant bank. The RRIF is an exempt asset pursuant to the provincial legislation incorporated into s. 67(1)(*b*): it is not property which is divisible among creditors. Given this, even if Mrs. Ramgotra's future contingent interest in the RRIF had passed into the possession of the trustee through the application of s. 91(2), the RRIF was property "incapable of realization" by the trustee pursuant to s. 40(1) *BIA*. Therefore, the trustee was obliged to return it to respondent Ramgotra prior to applying for his discharge. Regardless of whether or not respondent Ramgotra's settlement was void against the trustee, the exempt status of the RRIF is an absolute bar to the appellant's claim.

Whether a settlor has acted in good faith or for the purpose of defeating creditors is not relevant to the question of whether a settlement has been made within s. 91. In contrast, however, a settlor's intention is highly relevant where a settlement is being challenged under provincial fraud legislation. It was not necessary to determine if a life insurance beneficiary designation can be set aside as a fraudulent conveyance of property. The provincial fraud provisions are clearly remedial in nature and should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects. There is a strong case for concluding that a life insurance beneficiary designation is both a "juridical act" and a "disposition" or "conveyance" of "property".

The *Statute of Elizabeth*, assuming without deciding that it remains in force, would allow creditors to challenge fraudulent conveyances, including life insurance beneficiary designations, without having to prove that, at the time of the conveyance, the debtor was insolvent, was unable to pay his or her debts in full, or knew that he or she was on the eve of insolvency.

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APPEAL from a judgment of the Saskatchewan Court of Appeal 1994 CanLII 4696 (SK CA), (1994), 26 C.B.R. (3d) 1, 120 Sask. R. 277, 68 W.A.C. 277, 115 D.L.R. (4th) 536, [1994] 8 W.W.R. 26, [1994] I.L.R. ¶ 1-3089, dismissing an appeal from a judgment of Baynton J. reflex, (1993), 18 C.B.R. (3d) 1, 108 Sask. R. 257. Appeal dismissed.

Robert G. Kennedy and *Ian A. Sutherland*, for the appellant.

Gary A. Meschishnick and *Eric M. Singer*, for the respondent North American Life Assurance Co.

Robert D. Jackson, for the respondent Balvir Singh Ramgotra.

//Gonthier J.//

The judgment of the Court was delivered by

GONTHIER J. --

I. Issue

1 This case raises an important and controversial issue concerning the interpretation of ss. 67(1)(*b*) and 91 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, as amended (hereinafter "*BIA*"): Where a bankrupt has transferred registered retirement savings plan (RRSP) funds into a registered retirement income fund (RRIF) within the five years preceding bankruptcy, and where the RRIF is exempt from the claims of creditors under provincial legislation incorporated into the *BIA* by s. 67(1)(*b*), may a creditor set aside the transfer as a s. 91 "settlement", and thereby get at the RRIF despite its exempt status?

II. Factual Background

2 The respondent Ramgotra is a medical doctor who practised from 1971 to 1991 in Saskatoon, Saskatchewan. During this period, as a self-employed doctor responsible for his own retirement planning, he built up savings and investments, including two RRSPs. In May 1989, he became an associate at a Saskatoon medical clinic, but his share of the clinic expenses proved higher than expected. As a result, in February 1990, he opened his own practice. Unfortunately, the practice was not as successful as Dr. Ramgotra had hoped, partly because of a slow patient load, but also because Dr. Ramgotra suffers from insulin dependent diabetes and was required to reduce his work hours in response to his medical condition.

3 In June 1990, at the suggestion of a financial adviser, Dr. Ramgotra transferred the funds from his two RRSPs into an RRIF under which his wife was designated as beneficiary. The RRIF was to provide Dr. Ramgotra with a gross monthly income of $1,066.20, and these payments commenced in August 1990. The respondent North American Life Assurance Company is the financial institution responsible for the management of the RRIF.

4 Ten months later, in May 1991, Dr. Ramgotra applied for and obtained a position as permanent physician with the Town of Dinsmore, Saskatchewan. He then attempted to negotiate with his landlord in Saskatoon in order to terminate the commercial lease for his practice there. These negotiations were unsuccessful, and the landlord obtained a judgment against Dr. Ramgotra for approximately $30,000. This event led Dr. Ramgotra to make an assignment into bankruptcy in February 1992. When he received an absolute discharge from bankruptcy in January 1993, the only assets which he retained were his clothing and household contents, and the RRIF.

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5 While Dr. Ramgotra's RRSPs would have been subject to the claims of his creditors, the RRIF constituted a life insurance annuity, and was therefore exempt from their claims on the basis of s. 67(1)(*b*) *BIA*, when read in conjunction with ss. 2(kk)(vii) and 158(2) of *The Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26. However, the trustee in bankruptcy applied under r. 89 of the *Bankruptcy Rules*, C.R.C. 1978, c. 368, for a declaration that the transfer of the RRSP funds into the RRIF was void, pursuant to s. 91(2) *BIA*. That provision declares, in part, that "settlements" made one to five years prior to bankruptcy are void against the trustee if "the interest of the settlor in the property did not pass" upon settlement.

6 At trial, the trustee's application was dismissed because Dr. Ramgotra's transfer of the RRSP funds into the RRIF had been made in good faith, and not for the purpose of defeating the claims of his creditors. An appeal to the Saskatchewan Court of Appeal by the appellant Royal Bank, Dr. Ramgotra's major creditor, was also dismissed.

III. Relevant Statutory Provisions

Saskatchewan Insurance Act, R.S.S. 1978, c. S-26:

2. — ...

(kk) "life insurance" means insurance whereby an insurer undertakes to pay insurance money:

(i) on death;

(ii) on the happening of an event or contingency dependent on human life;

(iii) at a fixed or determinable future time; or

(iv) for a term dependent on human life;

and, without limiting the generality of the foregoing, includes:

...

(vii) an undertaking given by an insurer, whether before or after this section comes into force, to provide an annuity or what would be an annuity except that the periodic payments may be unequal in amount;

158. — (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

(2) While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the rights and interests of the insured in the insurance money and in the contract are exempt from execution or seizure.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, as amended:

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

...

(*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

91. (1) Any settlement of property, if the settlor becomes bankrupt within one year after the date of the settlement, is void against the trustee.

(2) Any settlement of property, if the settlor becomes bankrupt within five years after the date of the settlement, is void against the trustee if the trustee can prove that the settlor was, at the time of making the settlement, unable to pay all his debts without the aid of the property comprised in the settlement or that the interest of the settlor in the property did not pass on the execution thereof.

(3) This section does not extend to any settlement made

...

(*b*) in favour of a purchaser or incumbrancer in good faith and for valuable consideration; ...

IV. Decisions Below

1. *Saskatchewan Court of Queen's Bench* reflex, (1993), 18 C.B.R. (3d) 1

7 In his reasons, Baynton J. made two factual findings: (1) Dr. Ramgotra was solvent at the time he transferred the RRSP funds into the RRIF, and (2) the transfer was made in good faith, and not for the purpose of defeating creditors. Because of the former factual finding, the first branch of s. 91(2) *BIA* could not be used by the trustee to void the transfer. However, the second branch of s. 91(2) was still available, and the issue was whether the transfer was a "settlement" in which the interest of the settlor in the property did not pass at the time of settlement.

8 Relying on recent case law establishing that the exchange of non-exempt property for exempt property (i.e., "self-settlement") could constitute a settlement under s. 91 *BIA*, Baynton J. reached the tentative conclusion that the transfer in the case at bar fell within the second branch of s. 91(2) because it was a settlement in which, by definition, the property interest of the settlor did not pass. He refused, however, to declare the settlement void against the trustee in bankruptcy. He referred to his previous decision in *Royal Bank v. Oliver* reflex, (1992), 11 C.B.R. (3d) 82 (Sask. Q.B.), where a similar settlement was at issue. In *Oliver*, he decided that a ***bona fide*** exchange of property

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should not be a voidable settlement under s. 91(2). He effectively "borrowed" the concept of good faith which appears in s. 91(3)(*b*) *BIA* (but is not applicable in the case of self-settlement), and used it to limit the common law definition of settlement.

9 Since Dr. Ramgotra had acted in good faith, and not for the purpose of defeating creditors, when he transferred his non-exempt RRSP funds into an exempt RRIF, Baynton J. concluded that the transfer was not a settlement which could be set aside under s. 91(2).

2. *Saskatchewan Court of Appeal* 1994 CanLII 4696 (SK CA), (1994), 26 C.B.R. (3d) 1

10 The Saskatchewan Court of Appeal unanimously dismissed the appellant's appeal. For the court, Jackson J.A. rejected the submission (which had been accepted by Baynton J.) that a settlement had been effected by the transfer of the non-exempt RRSP funds into the exempt RRIF. In her view, settlement within the meaning of the *BIA* involved settlement on a third party; the mere conversion of non-exempt property into exempt property was insufficient.

11 However, after a review of the jurisprudence on the meaning of settlement, Jackson J.A. concluded that the designation of a beneficiary under an insurance policy could constitute a settlement. Thus, when Dr. Ramgotra designated his wife as beneficiary under the RRIF, he settled a property interest on her. Jackson J.A. characterized this interest as a future contingent property interest.

12 Jackson J.A. then considered whether such a settlement could be declared void under the second branch of s. 91(2) concerning the passing of property. In her view, the essential issue was whether or not it was necessary to convey, or give up control over, all the interests in a particular piece of property in order for the property passing exception to be met. Jackson J.A. reviewed the case law on this issue, most of which concluded that a settlement in the form of an insurance beneficiary designation does not involve the passing of property because the settlor always maintains property interests in, and control over, the insurance after the designation. However, she preferred to rely on two early English cases, *In re Lowndes; Ex parte Trustee* (1887), 18 Q.B.D. 677, and *Shrager v. March*, [1908] A.C. 402 (P.C.), for the proposition that property passes if a settlor divests him- or herself of all interest in the property acquired by a third party beneficiary. Thus, the beneficiary designation in the case at bar passed a contingent property interest to Mrs. Ramgotra, and fully divested Dr. Ramgotra of that same property interest. Jackson J.A. held that this was sufficient to meet the property passing requirement of the second branch of s. 91(2), with the result that Dr. Ramgotra's designation of his wife as beneficiary under the RRIF was not void against his trustee in bankruptcy.

13 Jackson J.A.'s conclusion that the property passing requirement had been met was further reinforced by her view that any other conclusion would be contrary to bankruptcy policy and the purpose of RRIFs. She noted that if the designation of a beneficiary under an insurance policy were not found to pass property to the beneficiary, then all insurance beneficiary designations made within five years of bankruptcy would be void against the trustee in bankruptcy by operation of the second branch of s. 91(2), including those made in good faith when the bankrupt was solvent. Jackson J.A. was of the view that s. 91 *BIA* should be interpreted to avoid such an absurd result.

14 Finally, with respect to the *bona fide* test applied by the trial judge, Baynton J., Jackson J.A. stated that it was not necessary for her to adopt his position, but she nevertheless endorsed his analysis of the difficulties associated with any interpretation of s. 91 *BIA* which would automatically void legitimate transactions made by solvent debtors. Jackson J.A. agreed with Baynton J. that to attack a beneficiary designation made by a solvent debtor, a trustee in bankruptcy should have to prove some lack of good faith on the part of the debtor. However, she disagreed that the creation of a good faith requirement for self-settlement under s. 91 would be appropriate. Instead, she opined that trustees may rely on other legislation, such as provincial fraud legislation, to attack bad faith self-settlements.

V. Analysis

1. *Introduction*

15 In my recent decision in *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453, I had the opportunity to review the two fundamental purposes underlying the *BIA*. As I stated there, the first such purpose is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors, while the second is to provide for the financial rehabilitation of insolvent persons (at para. 7). The case at bar demonstrates that these two purposes may come into conflict. The appellant bank, Dr. Ramgotra's principal creditor, wishes to attach his RRIF in order to satisfy its outstanding financial claims against him. Not surprisingly, in light of Dr. Ramgotra's post-bankruptcy financial position, he resists the bank's attempts to seize one of his few remaining assets. He argues that the RRIF, being life insurance under s. 2(kk)(vii) of *The Saskatchewan Insurance Act*, is exempt from execution or seizure by creditors (s. 158(2) of *The Saskatchewan Insurance Act* and s. 67(1)(*b*) *BIA*). In short, the bank seeks an "equitable distribution" of Dr. Ramgotra's assets, while Dr. Ramgotra's "financial rehabilitation" is furthered if he maintains his interest in the RRIF.

16 Since Dr. Ramgotra transferred the funds from his two RRSPs into his exempt RRIF when he was solvent, and not for the purpose of defeating his creditors, one might well wonder how the bank could get around the exempt status of

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the RRIF — a status which, on its face, constitutes an absolute bar to the bank's claim. In the general context of debtor-creditor relations, the bank would have no expectation at all of attaching Dr. Ramgotra's exempt RRIF. On the facts of this case, Dr. Ramgotra's creditors are not being denied something which they would otherwise have, since the general rule is that they would not be entitled to attach the RRIF unless it had been removed from Dr. Ramgotra's estate through a fraudulent conveyance. Why should Dr. Ramgotra's bankruptcy place creditors like the bank in a better position than they would be in absent the bankruptcy? The bank's position before this Court appears to conflict with the principle that creditors should not gain on bankruptcy any greater access to their debtors' assets than they possessed prior to bankruptcy: *M.N.R. v. Anthony* 1995 CanLII 5595 (NL CA), (1995), 124 D.L.R. (4th) 575 (Nfld. C.A.), at p. 580.

17 Moreover, the policy of exempting life insurance investments and policies from execution or seizure under the *BIA*, where family members are designated as beneficiaries, is sound. Given the importance of insurance in providing for the welfare of dependents upon the death of the insured, an insurance policy may be characterized as a necessity. In Saskatchewan, as in the other provinces, many other necessities are excluded from the property of a bankrupt which is subject to execution or seizure by creditors. Examples include food, fuel, clothing, household items, tools of a trade (*The Exemptions Act*, R.S.S. 1978, c. E-14, s. 2), farm buildings, farming equipment, and livestock (*The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, s. 65). One might well characterize exempt property collectively as the "bare minimum" which a bankrupt is entitled to maintain in order to facilitate his or her rehabilitation following bankruptcy.

18 Thus, the bank's claim before this Court is at odds with the exempt status of the property in question, the policy justification underlying that exempt status, and its own expectations prior to Dr. Ramgotra's bankruptcy as to what it would be able to attach. However, the bank is challenging the transaction which transferred the RRSP funds into the RRIF. The bank claims that this transaction was a settlement within the meaning of s. 91 *BIA*, that Dr. Ramgotra's property interest did not pass at the time of the settlement, and that the settlement is void pursuant to the second branch of s. 91(2) (i.e., the "property passing branch"). According to the bank, the funds at issue are not exempt from execution or seizure because the transaction which rendered them exempt is void.

19 The issues raised by the bank are three-fold: (1) is the transaction in the case at bar a settlement within the meaning of s. 91 *BIA*; (2) if so, is the settlement void against the trustee in bankruptcy under the second branch of s. 91(2); and (3) if so, are the funds in the RRIF available to satisfy the claims of Dr. Ramgotra's creditors despite the RRIF's exempt status under s. 67(1)(*b*). These issues are not new. They have been the source of considerable controversy in the lower courts, where four competing approaches have been adopted. I will deal with each of these in turn. However, I should state at the outset that I find none of them to be a satisfactory resolution of the problem presented by the case at bar and similar cases. I prefer an approach which recognizes the distinct roles of ss. 67(1)(*b*) and 91 in bankruptcy, as outlined below.

2. *The Competing Approaches in the Lower Courts*

(i) The exchange of a non-exempt asset for an exempt asset is a settlement under the *BIA*, and is voidable against the trustee in bankruptcy pursuant to s. 91 where made in the five years preceding bankruptcy (the "*Wilson* approach")

20 The first approach to the problem raised by the case at bar involves the more general issue of whether a self-settlement is caught by s. 91 *BIA*. Such an approach is typified by the decision of the Alberta Court of Appeal in *Wilson v. Doane Raymond Ltd.* (1988), 69 C.B.R. (N.S.) 156. There, the appellant dairy farmers sold their milk quota, a non-exempt asset, and used the proceeds to purchase a condominium, an exempt asset. A month later, they made assignments into bankruptcy. The trustee in bankruptcy sought an order declaring the condominium purchase to be a void settlement of property under s. 69(1) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3, (now s. 91(1)) *BIA*.

21 For the Court of Appeal, Haddad J.A. relied upon the decision of the Alberta Queen's Bench in *Re Wozniuk* 1987 CanLII 3436 (AB QB), (1987), 76 A.R. 42, a case the facts of which are strikingly similar to those of the case at bar. In *Re Wozniuk*, it was held that a self-settlement in which a non-exempt RRSP was exchanged for an exempt life insurance annuity was a settlement within the meaning of the *BIA*. Haddad J.A. agreed with this proposition, adding at p. 159 that "[a] settlement within the scheme of the statute occurs when a disposition of property reduces the bankrupt estate available to the trustee for distribution to creditors". He thus concluded that the appellants' conversion of non-exempt property into exempt property was a void settlement under the *BIA*, since it had the effect of reducing the estate which was available to creditors. It made no difference that the appellants had effected the conversion for the purpose of obtaining a home for themselves, and not for the purpose of defeating creditors.

22 The principle flowing from *Wilson* and *Wozniuk*, namely that the exchange of a non-exempt asset for an exempt asset is a settlement under the *BIA*, and is voidable under s. 91, has been adopted in numerous cases: *Re Malloy* (1983), 48 C.B.R. (N.S.) 308 (Ont. S.C.); *Alberta Treasury Branches v. Guimond* (1987), 70 C.B.R. (N.S.) 125 (Alta.

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Q.B.); *Camgoz (Trustee of) v. Sun Life Assurance Co. of Canada* (1988), 70 C.B.R. (N.S.) 131 (Sask. Q.B.), aff'd (1988), 72 C.B.R. (N.S.) 319 (Sask. C.A.); *Klassen (Trustee of) v. Great West Life Assurance Co.* reflex, (1990), 1 C.B.R. (3d) 263 (Sask. Q.B.). Moreover, this principle was adopted by the trial judge, Baynton J., in the case at bar, and in his earlier decision in *Oliver*, *supra*.

23 The approach which found favour with the Alberta Court of Appeal in *Wilson* was rejected, I think properly, by the Saskatchewan Court of Appeal in the case at bar. In my view, it is incorrect to conclude that a person may settle property on him- or herself. This is confirmed by the traditional judicial understanding of "settlement", as stated by this Court in *In re Bozanich*, 1942 CanLII 2 (SCC), [1942] S.C.R. 130. Rinfret J. described "settlement" as follows at pp. 138-39:

> Without attempting to give a definition of the word — and more particularly of that word as used in section 60 — it seems to me sufficient for the purpose of interpreting the section to adopt a passage of Cave J., in the case of *In re Player; Ex parte Harvey* (1885), 15 Q.B.D. 682, at 686-687:
>
> One must look at the whole of the language of the section in applying that definition, and consider what is meant by "settlement". Although "settlement", by the 3rd subsection, "shall for the purposes of this section include any conveyance or transfer of property", yet I think the view of my brother Mathew is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person. [Emphasis added.]

Rinfret J. then added, at p. 141:

> The Act, as broad as it is, allows of a clear distinction between settlements though effected by a conveyance or transfer of property and conveyances or transfers of property not in the nature of a settlement.

24 There is no room in the definition of settlement adopted by this Court in *Re Bozanich* for a "settlement onto oneself", since the settlement must involve the transfer of property to be held for the enjoyment of another person. It would seem that the lower courts have departed from this aspect of *Re Bozanich*, and have held that a self-settlement is a settlement under the *BIA*, because the exchange of non-exempt property for exempt property is one convenient means of defeating creditors. As the court reasoned in *Re Wozniuk* at p. 62, a bankrupt should not be able to "bootstrap himself" out of s. 91 "by taking non-exempt property and converting it into property which would be exempt".

25 Although the court in *Wilson* thought that excluding self-settlements from s. 91 *BIA* would allow for considerable abuse, it seems to me that the contrary conclusion is more problematic. If creditors may attach self-settled property by attacking the self-settlement under s. 91 *BIA*, notwithstanding the exempt status of the property, then the result follows that such property is attachable in all cases where the self-settlement occurred in the five years preceding bankruptcy, including those cases where the bankrupt was solvent and acting in good faith at the time of the impugned transaction. In his article, "Section 91 (Settlements) of the Bankruptcy and Insolvency Act: A Mutated Monster" (1995), 25 *Can. Bus. L.J.* 235, Professor Cuming strongly criticized the judicial extension of the concept of settlement to include self-settlement as "patently unreasonable", at p. 235, and "a dramatic mutation", at p. 238. He added, at p. 242:

> The problem of injustice arises when this expanded interpretation of the concept of settlement is combined with another Canadian-made adjunct to s. 91: that, in both such situations, the interest of the settlor does not pass on execution of the transfers, thereby bringing them within the third arm of s. 91. The logic of this reasoning appears to be as follows: the transfer of the property to the debtor is a settlement and the interest of the settlor did not pass on execution since, by definition, he retained or ended up with the interest or its equivalent.
>
> This approach alone, while unable to withstand close technical scrutiny, would not be a source of injustice if the property has not been converted into exempt property as a result of the unexecuted transaction. The "settled" property is divisible among the bankrupt settlor's creditors. The potential for injustice arises in situations where the "settlement" involves conversion of property from non-exempt to exempt property. [Emphasis added.]

26 I agree that there is considerable potential for injustice if the *Wilson* approach to self-settlement is adopted. The situation is quite different in the case of settlements on third parties, not only because in such cases the property of the settlor may well have passed, but also because of s. 91(3)(*b*). That provision states that a "settlement made ... in favour of a purchaser or incumbrancer in good faith and for valuable consideration" is not void against the trustee in bankruptcy, thus providing a *bona fide* exception to s. 91(1) and (2). However, the provision is not available in the case of self-settlement because, (1) there is no "purchaser or incumbrancer", and (2) there is no exchange of "valuable consideration". The Act therefore affords no protection to self-settlors like Dr. Ramgotra, who have acted in good faith. This anomaly is a persuasive indication that Parliament did not intend s. 91 to apply to self-settlement.

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27 Further to this, I think that the inclusion of self-settlements within s. 91 is contrary to the purpose of that provision. As I will explain in greater detail below, s. 91 empowers the trustee in bankruptcy to return property to the bankrupt's estate, where it has been removed from the estate through a settlement by the bankrupt on a third party. Since a self-settlement does not transfer property to a third party, the property remains in the bankrupt's estate and vests in the trustee at the time of the bankruptcy (s. 71(2) *BIA*). What possible role could s. 91 have in that situation? Moreover, the property passing branch of s. 91(2) has traditionally been viewed as providing a means by which the trustee in bankruptcy may challenge *in futuro* settlements by the bankrupt on third party beneficiaries, and thereby avoid future claims by those beneficiaries against the bankrupt's estate. In other words, as Jackson J.A. reasoned in the court below at para. 50, the property passing test catches those transactions by solvent debtors that do not confer an immediate interest. The purpose of the second branch of s. 91(2) would be distorted if creditors could employ it to attach self-settled property, since a self-settlement is qualitatively different from the kinds of dealings at which the property passing test is aimed.

28 Ultimately, I think that the *Wilson* approach to s. 91 fails to strike an appropriate balance between the Act's dual, and sometimes conflicting, purposes of protecting creditors and rehabilitating bankrupts. Even though a self-settlement which creates an exempt asset has the effect of reducing the property available to creditors, one must not lose sight of the fact that the result of the transaction is the acquisition of an asset which is so essential to the bankrupt and his or her dependents that it has been rendered exempt from execution or seizure by provincial legislation incorporated into the Act by s. 67(1)(*b*). To interpret s. 91 *BIA* in a manner which automatically allows creditors to attach exempt property of such an essential character is, in my view, going too far.

29 Thus, I see no reason in this case to depart from the definition of settlement adopted by this Court in *Re Bozanich*, which requires a disposition by the settlor to a third party. To borrow the words of Rinfret J., self-settlement is a transfer of property not in the nature of a settlement.

(ii) *Bona fide* self-settlements are not settlements under s. 91 *BIA* (the "*Oliver* approach")

30 In light of my rejection of the *Wilson* approach, it is not necessary to deal with the *bona fide* exception developed by Baynton J. in *Oliver*, *supra*, and applied in the case at bar. Suffice it to say that I share Baynton J.'s concerns about the harshness of the legal approach taken in cases like *Wilson*. While I appreciate his solution to the problem, I note that he was bound to follow the *Wilson* view that self-settlements are subject to s. 91, since the Saskatchewan Court of Appeal had accepted this proposition in *Camgoz*, *supra*. As I explain below, I do not think that good faith is relevant to the question of whether a settlement has been made within the meaning of s. 91. I prefer the approach to self-settlement taken by the Saskatchewan Court of Appeal in the instant case.

(iii) The designation of a beneficiary under a life insurance plan is a settlement under the *BIA*, and is voidable against the trustee in bankruptcy pursuant to s. 91 where made in the five years preceding bankruptcy (the "*Geraci* (Court of Appeal) approach")

31 Although the Court of Appeal in the instant case found that Dr. Ramgotra's exchange of a non-exempt asset for an exempt asset was not, by the fact of the exchange alone, a settlement under s. 91, Jackson J.A. proceeded to hold that when Dr. Ramgotra designated his wife as beneficiary of the RRIF, he effected a s. 91 settlement. This approach, which is particular to life insurance plans, was based on the decision of the Ontario Court of Appeal in *Re Geraci* (1970), 14 C.B.R. (N.S.) 253. There, at a time when the bankrupt was clearly insolvent, he designated his wife as beneficiary of a life insurance policy with a cash surrender value of $9,000. The effect of the designation was to render the insurance exempt from execution or seizure. The trustee in bankruptcy applied for a declaration that the beneficiary designation was void under the first branch (i.e., the "insolvency branch") of what is now s. 91(2) *BIA*. For the court, Jessup J.A. reasoned at pp. 255-56:

> I think there emerges from the authorities a definition of the ordinary meaning of "settlement" that it is a disposition of property to be held, either in original form or in such form that it can be traced, for the enjoyment of some other person; and that the designation of a beneficiary of an insurance policy is such a disposition.... Having regard to the wide ranging affairs to which the Bankruptcy Act applies, I do not think that the word "settlement" in s. 60(1) [now s. 91] of that statute should be given a restricted meaning. The respondent argues that the designation of the wife as beneficiary of the policy was not a disposition of property because she would acquire no property rights in or benefit from the policy, unless and until the prior death of the bankrupt. I think it would be more accurate to say the wife's rights are contingent on the death of her husband. But the definition of property in s. 2(*o*) of the Bankruptcy Act, which is in the widest terms, includes "every description of estate, interest and profit, present or future, vested or *contingent*, in, arising out of, or incident to property".... Moreover, the circumstance that the wife's contingent interest in the policy may be divested by the designation of a different beneficiary does not derogate from the fact that she has an interest until there is divestiture. [Italics added by Jessup J.A.]

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He thus concluded that the beneficiary designation in question, having been made when the bankrupt was insolvent, was void against the trustee in bankruptcy.

32 This reasoning appealed to Jackson J.A., and has been followed by several courts: *Re Douyon* reflex, (1982), 134 D.L.R. (3d) 324 (Que. Sup. Ct.); *Re MacDonald* 1991 CanLII 5982 (AB QB), (1991), 21 C.B.R. (3d) 211 (Alta. Q.B.); *Re Yewdale* 1995 CanLII 1292 (BC SC), (1995), 30 C.B.R. (3d) 194 (B.C.S.C.). I too find it persuasive. It is also significant that the *BIA* was amended in 1992 to include a definition of "settlement" as follows:

2. ...

"settlement" includes a contract, covenant, transfer, gift and designation of beneficiary in an insurance contract, to the extent that the contract, covenant, transfer, gift or designation is gratuitous or made for merely nominal consideration; [Emphasis added.]

(*Act to Amend the Bankruptcy Act*, S.C. 1992, c. 27, s. 3(2))

This definition was not in force when the circumstances of the instant appeal arose (in fact, between 1949 and 1992, there was no statutory definition of settlement in *BIA*). However, in light of *Geraci* and the cases following it, I think that a jurisprudential consensus has emerged that the designation of a beneficiary under a life insurance policy constitutes a s. 91 settlement. The new statutory definition reflects this consensus. On this basis, I agree with Jackson J.A. that Dr. Ramgotra effected a settlement triggering s. 91.

33 After concluding that the designation of Mrs. Ramgotra as beneficiary of Dr. Ramgotra's RRIF was a s. 91 settlement, Jackson J.A. turned to the second branch of s. 91(2), and inquired as to whether Dr. Ramgotra's interest in the settled property passed at the time of settlement. The settlement would only be void against the trustee in bankruptcy if Dr. Ramgotra's interest had not passed. This raised the perplexing issue of which "interest" should be considered in relation to the property passing requirement: Dr. Ramgotra's present interest in the RRIF itself, which certainly did not pass at the time of settlement, or the future contingent interest which he had obviously passed to Mrs. Ramgotra when she became his beneficiary? (For a general discussion of this controversial issue, see David J. McKee, "Debtor-Creditor Issues Affecting Annuity Contracts" (1993), 12 *Est. & Tr. J.* 247, at pp. 272-78, and Norwood and Weir, *Norwood on Life Insurance Law in Canada* (2nd ed. 1993), at pp. 253-56.)

34 Before this Court, the parties focused their submissions on the property passing issue. This was not surprising, as Jackson J.A. wrote substantial reasons justifying her conclusion that the relevant property interest was the future contingent interest which had passed to Mrs. Ramgotra. Jackson J.A.'s position was in direct conflict with the decision in *Re MacDonald*, *supra*. The difficulty with Jackson J.A.'s position is that it does violence to the distinction which s. 91(2) requires to be made between *in futuro* and immediate transfers of property. The settlement of a contingent and revocable future interest in RRIF funds is an *in futuro* settlement, i.e., the settlor's interest in the property does not pass at the moment of the settlement. If the settlement of a contingent and revocable future interest were considered an immediate transfer of property, as Jackson J.A. proposes, it is difficult to imagine what sort of settlement of future property could not be so described.

35 Since the designation of a beneficiary was an *in futuro* settlement made within the five years prior to Dr. Ramgotra's bankruptcy, it is void against the trustee, pursuant to s. 91(2). However, this does not mean that the RRIF funds may be distributed to the creditors of the estate. For the reasons given below, the exempt status of the life-assured RRIF remains in effect under provincial law so as to block the creditors' claims. Before explaining why this is so, I will examine the fourth approach to the problem raised in the instant case.

(iv) Where property is exempt from execution or seizure by creditors, pursuant to s. 67(1)(*b*) *BIA*, then its exempt status prevails over the fact that it became exempt as a result of a voidable settlement (the "*Geraci* (trial) approach")

36 Dr. Ramgotra argued forcefully in his submissions that since his RRIF was an exempt property under *The Saskatchewan Insurance Act*, and since this exemption is incorporated into the *BIA* by s. 67(1)(*b*), then it should be irrelevant that the funds in the RRIF were settled when his wife was designated as the beneficiary. In essence, Dr. Ramgotra urged this Court to hold that the exemption provision of the Act should be given effect regardless of s. 91.

37 Support for Dr. Ramgotra's submission can be found in the judgment of Houlden J. in the trial decision in *Re Geraci* (1969), 13 C.B.R. (N.S.) 86 (Ont. S.C.) (a judgment later overturned by the Ontario Court of Appeal, as discussed above). Houlden J. began by confirming that the designation of a beneficiary under a life insurance policy is a settlement within the *BIA*. He then observed that by reason of the beneficiary designation, the policy itself was exempt from execution or seizure by creditors pursuant to s. 162(2) of *The Insurance Act*, R.S.O. 1960, c. 190 (re-enacted by S.O. 1961-62, c. 63, s. 4) (now s. 196(2) of the *Insurance Act*, R.S.O. 1990, c. I.8). He construed the effect of the exemption as follows, at pp. 92-93:

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> ... I believe on a close examination of s. 162(2) that it is the clear intention of the section to make the policy immune from attack by creditors while the wife is designated as beneficiary.
>
> ...
>
> In my opinion, s. 162(2) has been drafted to provide for the group of persons who were formerly called "preferred beneficiaries". It is now possible to name a person who would formerly have been a preferred beneficiary and at the same time, if the designation is not irrevocable, to retain the right to borrow against, surrender or otherwise deal with the policy, but in my view, the Legislature by the wording of s. 162(2) has made it plain that the policy, while such a designation is in effect, is not to be "exigible for the benefit of (his) creditors": see Mulock C.J.O., in *Royal Bank of Canada v. Dumart*, [1932] O.R. 661 (C.A.).

Houlden J. recognized that some injustice would result from giving precedence to the exempt status of the life insurance policy. For example, an insolvent debtor could convert all his or her assets into cash, purchase a life insurance policy, and render it exempt from seizure by designating a family member as beneficiary. However, he wrote at p. 94:

> At the present time, if my interpretation of The Insurance Act is correct, the Legislature had decided that an insurance policy coming within s. 157(1) or s. 162(2) is not available to creditors and, in my opinion, there is good moral justification for this position. Insurance is a very different asset from say a house or an automobile.... It is purchased to provide for the dependants of the insured and it is ordinarily paid for in small amounts over the insured's lifetime. I believe there are very good reasons for exempting policies of insurance from seizure....

38 Houlden J.'s reasons in *Geraci* largely repeat the view he expressed in an earlier article, "Life Insurance Contracts in Ontario" (1963), 4 C.B.R. (N.S.) 113, at p. 115:

> If a [beneficiary] designation is made in favour of a spouse, child, grandchild or parent of a person whose life is insured, the rights and interests of the insured in the insurance money and in the contract are exempt from execution or seizure (s. 162(2)). Even if the designation of such a beneficiary is not irrevocable, a trustee in bankruptcy cannot deal with such a policy because the rights and interests of the insured are declared to be exempt from execution and seizure and by s. 39(*b*) [now s. 67(1)(*b*)] of the Bankruptcy Act property of a bankrupt does not include property which is exempt from execution or seizure. It would seem that s. 162(2) is drawn with s. 39(*b*) in mind as it uses the identical wording of s. 39(*b*).

39 On appeal, Jessup J.A. rejected Houlden J.'s construction of the exemption and settlement provisions of the *BIA*, arguing at p. 258:

> If a settlement of property which comes within s. 60(1) [now s. 91(1)] of the Bankruptcy Act, both as to substance and as to time, is none the less to be taken as exempt, by virtue of s. 39(*b*), from the claims of a bankrupt's creditors merely because it would enjoy that exemption under provincial law apart from s. 60(1), the result would be to make s. 60(1) completely nugatory. I cannot conceive that to have been the intent of Parliament. The proper rule of construction is to harmonize all sections of an enactment and this is achieved in the present case by applying s. 39(*b*) in the light of s. 60(1) and not despite s. 60(1). I would, therefore, hold that property settled by a bankrupt within a year before his bankruptcy includes property rendered exempt from execution or seizure, under the laws of the relevant province, as a result of the settlement. [Emphasis added.]

40 Jessup J.A.'s reasoning was expressly rejected in preference to that of Houlden J. by the British Columbia Supreme Court in *Re Sykes* 1993 CanLII 2360 (BC SC), (1993), 18 C.B.R. (3d) 148. Meredith J. noted, at para. 19, that Jessup J.A.'s reasons in *Geraci*

> ... seems... to tag onto s. 167(*b*) [*sic*] words such as "unless the disposition of the property referred to amounts to a settlement referred to in s. 91". That comes close to judicial legislation.

Meredith J. was not prepared to go that route, and instead concluded that the exempt status of the life insurance policy in question was conclusive in that it was not available for seizure by creditors, even though it became exempt as a result of a voidable settlement (see also, *Canadian Imperial Bank of Commerce v. Meltzer* reflex, (1991), 6 C.B.R. (3d) 1 (Man. Q.B.), which adopted Houlden J.'s construction of the exemption provisions of the *BIA*).

41 The debate between Houlden J. and Jessup J.A. in *Geraci*, which was taken up by Meredith J. in *Sykes*, was premised on the view that ss. 67(1)(*b*) and 91 *BIA* were in conflict. As Michael J. McCabe stated in his article, "Execution Against an R.R.S.P." (1990), 76 C.B.R. (N.S.) 218, at p. 234:

> The issue, simply stated, is which takes precedence, the exemption provision of s. 67 incorporating the provincial exemptions or the settlement provision of s. 91.

In resolving this issue, both Houlden J. and Jessup J.A. undertook a "lesser of two evils"-type analysis. Houlden J. preferred to give effect to s. 67(1)(*b*) over s. 91, to avoid the result that every designation of a beneficiary under a life insurance policy, made within one year of bankruptcy (or within five years if the designation was made when the debtor was insolvent, or if the property interest of the debtor did not pass when the beneficiary was designated), would be voidable. He thought that instances in which such a designation would be made for the purpose of defeating creditors would be rare, and that "it is better

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to permit injury to the creditors [in those rare cases] than to inflict the undoubted hardship of the forfeiture of a life's investment" (at p. 94). Jessup J.A. reached the opposite conclusion, because Houlden J.'s interpretation of s. 67(1)(*b*) would render s. 91 "completely nugatory". Nevertheless, Jessup J.A. added, at p. 259:

It does seem unjust that moneys paid in good faith over a period of years to secure a man's wife and children should be available to his creditors....

He then suggested a legislative amendment to avoid this result.

42 If I had to choose between the approaches of Houlden J. and Jessup J.A., then I would prefer that of Houlden J. for two reasons. First, I think that Jessup J.A. exaggerated the impact on s. 91 of Houlden J.'s construction, since settlements which change the status of property from non-exempt to exempt are only a portion of the settlements subject to s. 91. Houlden J.'s position certainly does not render s. 91 "completely nugatory", as stated by Jessup J.A. at p. 258. Second, Jessup J.A.'s interpretation of s. 67(1)(*b*) clearly favours the interests of creditors over the rehabilitation interest of the bankrupt settlor. The Act itself provides no indication that this should be so in the circumstances presented by the instant case, or *Geraci*. I do not believe that Parliament intended the funds in exempt life insurance plans to be subject to execution and seizure by creditors, simply on the basis that a settlement occurred when a beneficiary was designated. After all, it is the designation which makes the asset exempt under the provincial legislation incorporated into s. 67(1)(*b*). Are we really to believe that Parliament intended the very act which renders an asset exempt to be the cause of its losing its exempt status? I do not think so. Like Houlden J., I think that it would be preferable to respect the exempt status of a life insurance policy, even where the policy became exempt as a result of a s. 91 settlement.

43 In any event, I reject the view that ss. 67(1)(*b*) and 91 *BIA* are in conflict, and that the resolution of the case at bar requires me to choose one provision over the other on the basis of policy considerations. In fact, I think that it is possible to reconcile the two provisions by giving effect to their distinct terms, and by recognizing their distinct roles in bankruptcy.

3. *The Preferred Approach to the Problem in the Case at Bar*

(v) Even if a settlement which creates an exempt asset is void **against the trustee in bankruptcy** under s. 91, the exempt status of the asset under provincial law remains in effect to block **the claims of creditors**

44 In reconciling ss. 67(1)(*b*) and 91 *BIA*, it is important to remember that the general scheme through which a bankrupt's estate is divided by the trustee among creditors involves two distinct stages. First, the Act provides that an insolvent person "may make an assignment of all his property for the general benefit of his creditors" (s. 49(1)), or that creditors "may file in court a petition for a receiving order against a debtor" (s. 43(1)). At the time of the assignment or receiving order, the trustee in bankruptcy is obligated to take possession of the assets forming the estate of the bankrupt. Thus, by operation of s. 71(2), the bankrupt's property passes to and vests in the trustee:

> **71.** ...
>
> (2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

Section 16(3) *BIA* imposes a duty on the trustee to "take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory...." Section 158(*a*) imposes a complimentary duty on the bankrupt to inform the trustee of all his or her property which is in his or her possession or control, and to deliver it to the trustee. Other provisions of the Act elaborate upon the powers, duties and functions of the trustee during the property-passing stage of bankruptcy (see, in particular, ss. 17, 18, 19 and 24 *BIA*).

45 Once the bankrupt's property has passed into the possession of the trustee, the Act provides the trustee with the power to administer the estate. For example, the trustee may, with the permission of the estate inspectors, sell or dispose of assets (s. 30(1)(*a*)), lease real property (s. 30(1)(*b*)), carry on the business of the bankrupt (s. 30(1)(*c*)), or divide certain property among the creditors (s. 30(1)(*j*)). The ultimate purpose of these administrative powers is to manage the estate, in order to provide equitable satisfaction of the creditor's claims. This, then, is the estate-administration stage of bankruptcy, one distinct aspect of which is the distribution of the estate among creditors.

46 During the property-passing stage of bankruptcy, the trustee is empowered under s. 91 of the Act to set aside certain settlements which have reduced the size of the estate. Thus, s. 91 outlines the circumstances in which a settlement will be voidable at the behest of the trustee in bankruptcy. If a settlement is declared void against the trustee, then the settled property reverts back to the bankrupt's estate, and falls into the possession of the trustee in bankruptcy. Several other provisions of the *BIA* have relevance to the property-passing stage. For example, s. 94 renders certain assignments of book debts void against the trustee; s. 98(1) empowers the trustee to take possession

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of any money or proceeds from the sale of settled property to a third party, where the original settlement was void; and s. 99 dictates that while property acquired by the bankrupt after the bankruptcy vests in the trustee, it may be transferred by the bankrupt to a good faith purchaser, unless the trustee intervenes in the transaction (in which case the transaction is void against the trustee).

47 After-acquired property is also dealt with in s. 68, which constitutes a complete code in respect of a bankrupt's salary, wages or other remuneration. The provision stipulates that after-acquired remuneration will not pass to and vest in the trustee unless the trustee intervenes by applying for a court order directing the payment of the remuneration (or a portion of it) to the trustee (*Marzetti v. Marzetti*, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765, at p. 794). Where the trustee obtains such a court order, then the remuneration which passes into his or her possession is also divisible among creditors, even if it would otherwise be exempt from execution or seizure under provincial law. This is because s. 68 operates "notwithstanding section 67(1)", with the result that a provincial exemption for remuneration which would otherwise be incorporated into s. 67(1)(*b*) is ineffective: *Marzetti*, at pp. 792-93 and 795. I note that Parliament considered it necessary to exclude explicitly after-acquired remuneration from the operation of s. 67(1)(*b*), thereby overriding the exempt status of the remuneration under provincial law, in order to ensure that in those circumstances where such remuneration passed to the trustee, it was also divisible among creditors. This supports the view that absent a specific override of s. 67(1)(*b*), exempt property which passes to and vests in the trustee, whether as a result of ss. 71(2) or 91, will not be divisible among creditors.

48 Unlike provisions of the Act such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property. Thus, property which is divisible among creditors is defined very broadly in s. 67(1) as:

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

However, the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(*a*)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(*b*)). While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.

49 Thus, it can be seen that ss. 91 and 67 relate to two different stages of bankruptcy. Section 91 dictates that certain settled property will fall back into the estate of the bankrupt in the possession of the trustee, while s. 67 is directed at the exercise of administrative powers over the estate by the trustee. Where a settlement is void against the trustee under s. 91, then in normal circumstances, the trustee is empowered to administer the settled asset, and use it to satisfy the claims of creditors. However, in the special case where the asset is exempt under s. 67(1)(*b*), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors. This two-stage analysis is similar to the one adopted by Henry J. of the Ontario Supreme Court in *Re Pearson* (1977), 23 C.B.R. (N.S.) 44. That case was concerned with the issue of whether a trustee in bankruptcy could revoke the designation of a beneficiary under a life insurance plan, and substitute the estate as beneficiary. Although the plan itself was exempt from the *BIA*, the trustee sought to defeat the exemption by exercising a "power" under s. 47(*d*) [now s. 67(1)(*d*)]. Henry J. dismissed the trustee's application, and in doing so characterized the effect of the exemption provisions of the Act as follows, at pp. 48-49:

What comes into the hands of the trustee on the occurrence of the bankruptcy are the rights and interests of the insured in the insurance money and in the contract as they stood at the date of the bankruptcy. When that event occurred, those rights and interests were, by s. 170 of The Insurance Act, exempt from execution or seizure. In my opinion, so far as the creditors of the bankrupt are concerned, that situation crystallized at the time the bankruptcy occurred, and that property by virtue of s. 47(*b*) [now s. 67(1)(*b*)] of the Bankruptcy Act was impressed with its character of not being divisible among the creditors, for all the purposes of the bankruptcy.

I adopt this as a correct statement of the law. Therefore, while an asset which is exempt under provincial law passes into the possession of the trustee at the time of bankruptcy, the exemption itself bars the trustee from dividing the asset among creditors where s. 67(1)(*b*) is operative.

50 Relating this to the circumstances in the case at bar, at the time of Dr. Ramgotra's bankruptcy application, his property interest in the RRIF passed to and vested in the trustee in bankruptcy by operation of s. 71(2) *BIA*. Mrs. Ramgotra's future contingent interest as the designated beneficiary under the RRIF was not captured by s. 71(2), since it had been settled on her prior to bankruptcy. It was open to the trustee in bankruptcy to apply to have this settlement set aside under s. 91(2) *BIA*. As I noted above, the settlement was void under s. 91(2) and, consequently, Mrs. Ramgotra's future contingent interest passed to and vested in the trustee. The trustee in

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bankruptcy possessed the complete set of property interests associated with the RRIF. But the trustee could not divide the RRIF among creditors because its exempt status under s. 67(1)(*b*) *BIA* continued regardless of s. 91. In other words, the role of s. 91 is to bring settled property back into the estate of the bankrupt in the possession of the trustee. Therefore, while s. 91 could be employed to bring Dr. Ramgotra's RRIF fully into the possession of the trustee in bankruptcy, it has no bearing on the issue of whether or not the RRIF is exempt under s. 67(1)(*b*).

51 The appellant has argued that when a settlement creating an exempt asset has been set aside under s. 91, then the exempt status itself is no longer effective. In other words, the existence of a valid settlement is a logical precondition to the enforceability of a s. 67(1)(*b*) exemption. This argument found favour in *Re Yewdale*, *supra*, where Tysoe J. stated at p. 204:

> While s. 67(1)(*b*) does provide an exemption for insurance annuities, it cannot be viewed in isolation. An asset can only be properly exempted under s. 67(1)(*b*) if the transaction creating the asset is valid. If the transaction is void under s. 91 (or any other provision), the exempted asset must be considered to revert to its form prior to the invalid transaction. If its prior form was not an exempted asset, s. 67(1)(*b*) is not applicable.

With respect, I cannot agree. The effect of s. 91 is to render certain settlements void against the trustee in bankruptcy. However, in the case of a life insurance policy, it must be remembered that what renders it exempt under s. 67(1)(*b*) is the designation of a beneficiary. According to s. 158(2) of *The Saskatchewan Insurance Act*, the exempt status of the life insurance policy continues so long as the designation is "in effect". To reach the conclusion of Tysoe J. in *Re Yewdale*, I would have to find that the designation in the case at bar is no longer "in effect" for the purpose of preventing distribution of the funds in the RRIF to Dr. Ramgotra's creditors, because the designation "is void against the trustee". However, I do not think that the fact a beneficiary designation is void against the trustee under federal legislation necessarily results in it no longer having effect vis-à-vis the claims of creditors under the provincial legislation which s. 67(1)(*b*) incorporates. As I stated above, ss. 91 and 67(1)(*b*) are directed at different stages of bankruptcy, and play different roles. Section 91 assists in identifying the property of the bankrupt which comes into the possession of the trustee, whereas s. 67(1)(*b*) is relevant in determining the property in the trustee's possession over which he or she may exercise his or her administrative powers. I therefore prefer a construction of ss. 91 and 67(1)(*b*) which recognizes their distinct roles in bankruptcy, as opposed to a construction which holds one to be a precondition of the other.

52 Therefore, even though Dr. Ramgotra effected a void settlement under the second branch of s. 91(2) when he designated his wife as beneficiary of his RRIF, that does not allow the trustee to use the funds in the RRIF to satisfy the claims of creditors such as the appellant bank. The RRIF is an exempt asset pursuant to the provincial legislation incorporated into s. 67(1)(*b*), meaning that it is not property which is divisible among creditors. Given this, even though Mrs. Ramgotra's future contingent interest in the RRIF had passed into the possession of the trustee through the application of s. 91(2), the RRIF was property "incapable of realization" by the trustee pursuant to s. 40(1) *BIA*. Therefore, the trustee was obliged to return it to Dr. Ramgotra prior to applying for his discharge: *Thompson v. Coulombe* (1984), 54 C.B.R. (N.S.) 254 (Que. C.A.), at p. 257; *Zemlak (Trustee of) v. Zemlak* (1987), 66 C.B.R. (N.S.) 1 (Sask. C.A.), at pp. 9 and 11. Despite the fact that Dr. Ramgotra's settlement was void against the trustee, the exempt status of the RRIF is an absolute bar to the appellant bank's claim.

4. *The Application of Provincial Fraud Legislation*

53 In the lower courts which have considered the issue presented by the case at bar, considerable concern has been expressed over the fact that the conversion of a non-exempt asset into an exempt asset is a convenient means for a bankrupt to reduce the size of his or her estate available to creditors. Thus, the bankrupt's intention in effecting a transaction, and the impact of the transaction on creditors, have both been important factors directing the jurisprudence related to ss. 91 and 67(1)(*b*) *BIA*. Of course, in the case at bar, Dr. Ramgotra acted in good faith, and not for the purpose of defeating his creditors' claims. One could well imagine more troubling circumstances, however.

54 In her case comment on the Saskatchewan Court of Appeal decision in the instant case Lisa H. Kerbel Caplan ((1994), 26 C.B.R. (3d) 252), argues that at common law, the role of intention has focused "on the settlor's intention that the donee hold the settled property in its current form or in a traceable form", and not on the settlor's purpose in making a settlement (at p. 253). Like her, I am of the view that whether a settlor has acted in good faith, or for the purpose of defeating creditors, is not relevant to the question of whether a settlement has been made within s. 91.

55 In contrast, however, a settlor's intention is highly relevant where a settlement is being challenged under provincial (or territorial) fraud legislation: *Fraudulent Conveyances Act*, R.S.N. 1990, c. F-24, s. 3; *Assignments and Preferences Act*, R.S.N.S. 1989, c. 25, s. 4; *Assignments and Preferences Act*, R.S.N.B. 1973, c. A-16, s. 2; *Frauds on Creditors Act*, R.S.P.E.I. 1988, c. F-15, s. 2; *Civil Code of Québec*, art. 1631 ("Paulian Action"); *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, s. 4(1), and *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, s. 2; *The Fraudulent Conveyances Act*, R.S.M. 1987, c. F160, s. 2; *The Fraudulent Preferences Act*, R.S.S. 1978, c. F-21, s. 3; *Fraudulent Preferences Act*, R.S.A. 1980, c. F-18, s. 2; *Fraudulent Conveyance Act*, R.S.B.C. 1979, c. 142, s. 1, and

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Fraudulent Preference Act, R.S.B.C. 1979, c. 143, s. 3; *Fraudulent Preferences and Conveyances Act*, R.S.Y. 1986, c. 72, s. 2. (Note: the Northwest Territories has no legislation on fraudulent conveyances or preferences.) In fact, several lower courts have suggested that bad faith settlements, made for the purpose of defeating creditors, may be set aside under these statutes. Although it is not strictly necessary to decide this issue in the case at bar, since Dr. Ramgotra was found by Baynton J. to have acted in good faith, I am mindful of the need to provide some guidance to bankrupts, trustees, creditors and lower courts.

56 Generally, where a conveyance has rendered property exempt from execution or seizure by creditors under provincial legislation, but the conveyance itself is void against those creditors pursuant to provincial fraud legislation, then the exemption is not in effect vis-à-vis those creditors. In terms of the law of bankruptcy, I would hold that a bankrupt cannot enjoy the benefit of a s. 67(1)(*b*) exemption where the property in question became exempt by reason of a fraudulent conveyance declared void pursuant to provincial law. I note that Houlden J. concluded in *Geraci* (trial), at p. 92, that a s. 67(1)(*b*) exemption has force even where the property became exempt under provincial law as a result of a fraudulent conveyance. I do not agree. In my view, a precondition to s. 67(1)(*b*) protection is that the property in question is exempt against the claims of creditors under provincial law. A fraudulent conveyance rendering property exempt is void against creditors, as illustrated by s. 3 of the Saskatchewan Act:

> **3.** ... every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in a bank, company or corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced. [Emphasis added.]

Since a fraudulent conveyance rendering property exempt is void against creditors by operation of provincial law, the property is not exempt from execution or seizure by creditors under provincial law, as required by s. 67(1)(*b*) *BIA*. Section 67(1)(*b*) therefore has no application, once a fraudulent conveyance is found to have occurred.

57 Can a life insurance beneficiary designation be set aside as a fraudulent conveyance of property? This question has generated some conflict in the lower courts. In *Geraci* (trial), for example, Houlden J. found at p. 89 that the beneficiary designation could be attacked under s. 2 of Ontario's Act, since it was a conveyance made with the fraudulent intent of defeating creditors. The Court of Appeal, *per* Jessup J.A., agreed, at p. 259:

> I agree with the learned trial Judge that the declaration made by the bankrupt, changing the beneficiary of his policy of insurance to his wife while he was insolvent, was a fraudulent conveyance within the meaning of s. 2 of The Fraudulent Conveyances Act and, if it were necessary to do so, I would hold that it was therefore fraudulent and void against his creditors and that such a void designation does not attract the protection against creditors provided by either s. 162 or s. 157 of the present Insurance Act.

58 *Geraci* was not followed on this point in *Sovereign General Insurance Co. v. Dale* 1988 CanLII 3204 (BC SC), (1988), 32 B.C.L.R. (2d) 226 (S.C.). There, the defendant had transferred the funds from a non-exempt RRSP into an insurance annuity which was exempt from execution or seizure under s. 147 of British Columbia's *Insurance Act*, R.S.B.C. 1979, c. 200, because his wife was the designated beneficiary of the plan. The plaintiff, who had obtained judgment against the defendant, sought to set aside the transfer of the RRSP funds into the annuity on the basis that it was a fraudulent conveyance. Gibbs J. held that the defendant had the necessary intent for fraud because he effected the fund transfer in order to hinder the plaintiff from realizing on its judgment. He then turned to the question of whether the transfer was a "disposition of property" which could be set aside under the British Columbia's *Fraudulent Conveyance Act*. After stating that Jessup J.A.'s reasons in *Geraci* were obiter on this point, and that the issue remained unresolved, Gibbs J. held at pp. 230-31:

> In my opinion, it is not appropriate to look at the consequences that flow from the naming of the wife as beneficiary under the insurance contract to determine whether an interest in property has been disposed of. That seems to have happened in a number of the cases cited. With respect, I think that is the wrong approach for whatever statutory protection might or might not be afforded to the "interest" conveyed cannot be determinative of what the "interest" is. In my view, the task must be to inquire whether the "interest", if that is the correct terminology, has any of the commonly understood incidents of property. When I follow that course I am led to the conclusion that it does not.
>
> ...
>
> Until a vesting occurs, the expression "interest" is probably nothing more than a convenient label to describe a future expectation which may never become a reality; for instance, the insured may change the beneficiary, or the beneficiary may predecease the insured. Until vesting, if that ever occurs, the expectation of the beneficiary is not real property, or personalty; it is not a chose in action; it is not merchantable; it is not exigible. At the most

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> it is expectancy based upon a contingency. It has been held to be within the broad definition of property in the Bankruptcy Act which includes a future contingent interest incident to property, but it does not follow that it is subsumed within the single word "property" in the Fraudulent Conveyance Act. In my opinion, it is not.

Thus, according to Gibbs J., the transfer of funds at issue was not a conveyance of "property" which could be set aside under the British Columbia Act.

59 I do not intend to resolve this issue in the case at bar. However, I would make the following observation. The technical question of whether a life insurance beneficiary designation is a "property conveyance" does not arise under art. 1631 of the *Civil Code of Québec*, which allows creditors to set aside fraudulent "juridical acts":

> **1631.** A creditor who suffers prejudice through a juridical act made by his debtor in fraud of his rights, in particular an act by which he renders or seeks to render himself insolvent, or by which, being insolvent, he grants preference to another creditor may obtain a declaration that the act may not be set up against him.

However, the other provincial statutes all refer to some sort of "conveyance" or "disposition" of "property" with the "intent to defeat" creditors' claims. All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects, as required by provincial statutory interpretation legislation (see, for example, *The Interpretation Act, 1993*, S.S. 1993, c. I-11.1, s. 10). I agree with the following observation by Professor Dunlop in *Creditor-Debtor Law in Canada* (2nd ed. 1995), at p. 598, that the purpose of fraudulent conveyance legislation:

> ... is to strike down all conveyances of property made with the intention of delaying, hindering or defrauding creditors and others except for conveyances made for good consideration and *bona fide* to persons not having notice of such fraud. The legislation is couched in very general terms and should be interpreted liberally. [Emphasis added.]

60 Given the need for a broad and liberal interpretation, I would suggest that there is a strong case for concluding that a life insurance beneficiary designation is both a "juridical act", and a "disposition" or "conveyance" of "property".

5. *The Application of the Statute of Elizabeth*

61 In the Court of Appeal, Jackson J.A. suggested that *An Acte agaynst fraudulent Deedes Gyftes Alienations, &c. (Statute of Elizabeth)*, 1571 (Eng.) 13 Eliz. 1, c. 5, would be available to challenge fraudulent transactions rendering property exempt from execution or seizure. The *Statute of Elizabeth* is the model for the fraudulent conveyance legislation of the common law provinces, as discussed above. Its archaic language states that:

> ... all and every Feoffement Gyfte Graunte Alienation Bargayne and Conveyaunce of Landes Tenements Hereditams Goodes and Catalls or of any of them [[which were] contryved of Malyce Fraude Covyne Collusion or Guyle [with the] Purpose and Intent to delaye hynder or defraude Creditors] [shall be] clearely and utterly voyde frustrate and of none Effecte.

In *Nicholson v. Milne* (1989), 74 C.B.R. (N.S.) 263 (Alta. Q.B.), Virtue J. considered the applicability of the *Statute of Elizabeth* in a situation where the defendants had each rendered RRSP and mutual funds exempt under Alberta's *Insurance Act*, R.S.A. 1980, c. I-5, s. 265, by transferring the funds into life insurance policies under which family members were named as beneficiaries. The issue before Virtue J. was whether the transfers could be set aside under Alberta's *Fraudulent Preferences Act*, or alternatively under the *Statute of Elizabeth*. He observed that the principal difference between the two statutes was that the provincial legislation required the gift or conveyance to have been made when the debtor was insolvent, was unable to pay his or her debts in full, or knew that he or she was on the eve of insolvency, whereas this was not a requirement under the *Statute of Elizabeth*. He then decided to proceed under the *Statute of Elizabeth*, in order to avoid dealing with the insolvency issue. He found that the fund transfers were effected for the purpose of defeating creditors, and then decided that the transfers, and the beneficiary designations, were "conveyances" subject to the *Statute of Elizabeth*, at p. 274:

> The term "Conveyance" (like the term transfer) is itself wide enough to encompass every method of disposing of, or parting with, property or an interest therein, absolutely or conditionally. The word is of general meaning and, given a liberal interpretation, includes the transactions here which resulted in the transfer of entitlement to the benefits of the R.R.S.P. property from the debtor to another in such a way as to remove it from execution by creditors. In my view, such a transaction comes within the meaning of "conveyance", as that term is used in the Statute of Elizabeth.

Thus, the fraudulent transfers and beneficiary designations were void, and the funds in the life insurance policies were not exempt from execution or seizure under the *Insurance Act* (see also *Technurbe Building Construction Ltd. v. McKinley* (1989), 76 C.B.R. (N.S.) 106 (Alta. Q.B.)).

62 Several of the provincial fraudulent conveyance statutes impose an insolvency requirement, like that contained in Alberta's Act: Nova Scotia, New Brunswick, Prince Edward Island, Saskatchewan and Yukon. Thus, assuming without deciding that the *Statute of Elizabeth* remains in force in those jurisdictions, it would allow creditors to

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challenge fraudulent conveyances without having to prove that, at the time of the conveyance, the debtor was insolvent, was unable to pay his or her debts in full, or knew that he or she was on the eve of insolvency.

63 There remains some controversy as to whether the *Statute of Elizabeth* is in force in all of the common law provinces and territories. Professor Dunlop discusses this issue in *Creditor-Debtor Law in Canada*, *supra*, and suggests at p. 597 that the Statute has likely been repealed in British Columbia, Manitoba, Newfoundland and Ontario, where pure fraudulent conveyance legislation (i.e., legislation without the insolvency requirement) has been enacted. Since the matter was not argued in the case at bar, it would be inappropriate to decide here whether the *Statute of Elizabeth* remains in force in any particular jurisdiction. Suffice it to say that if the Statute is in force in a province or territory, then it will be available to challenge fraudulent conveyances rendering property exempt from execution or seizure under provincial law. I should add that my comments above concerning the issue of whether a life insurance beneficiary designation is a "property conveyance" apply equally in the case of the *Statute of Elizabeth*.

6. *Conclusion*

64 When Dr. Ramgotra transferred the funds from his two RRSPs into an RRIF under which his wife was the designated beneficiary, the funds became exempt from execution or seizure by reason of s. 67(1)(*b*) *BIA*, when read in conjunction with ss. 2(kk)(vii) and 158(2) of *The Saskatchewan Insurance Act*. Even though the beneficiary designation was a settlement within s. 91 *BIA*, and was void against the trustee in bankruptcy pursuant to the second branch of s. 91(2), the RRIF remained exempt from the claims of Dr. Ramgotra's creditors and, in particular, the appellant bank.

VI. Disposition

65 The appeal is therefore dismissed with costs to the respondents.

Appeal dismissed with costs.
Solicitors for the appellant: Gauley & Co., Saskatoon.
Solicitors for the respondent North American Life Assurance Company: MacDermid, Lamarsh, Saskatoon.
Solicitors for the respondent Balvir Singh Ramgotra: Goldstein, Jackson, Gibbings, Saskatoon.

Where bankrupt is a corporation - Sec. 159

159. Where a bankrupt is a corporation, the officer executing the assignment, or such

(a) officer of the corporation, or

(b) person who has, or has had, directly or indirectly, control in fact of the corporation

as the official receiver may specify, shall attend before the official receiver for examination and shall perform all of the duties imposed on a bankrupt by section 158, and, in case of failure to do so, the officer or person is punishable as though that officer or person were the bankrupt.

R.S., 1985, c. B-3, s. 159;
1992, c. 27, s. 60.

Performance of duties by imprisoned bankrupt - Sec. 160

160. If a bankrupt is undergoing imprisonment, the court may, in order to enable the bankrupt to attend in court in bankruptcy proceedings at which the bankrupt's personal presence is required, to attend the first meeting of creditors or to perform the duties required of the bankrupt under this Act, direct that the bankrupt be produced in the protective custody of an executing officer or other duly authorized officer at any time and place that may be designated, or it may make any other order that it deems proper and requisite in the circumstances.

R.S., 1985, c. B-3, s. 160;
2004, c. 25, s. 74(E).

EXAMINATION OF BANKRUPTS AND OTHERS

Examination of bankrupt by official receiver - Sec. 161

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161. (1) Before a bankrupt's discharge, the official receiver shall, on the attendance of the bankrupt, examine the bankrupt under oath with respect to the bankrupt's conduct, the causes of the bankruptcy and the disposition of the bankrupt's property and shall put to the bankrupt the prescribed question or questions to the like effect and such other questions as the official receiver may see fit.

Record of examination - Sec. 161(2)
(2) The official receiver shall make a record of the examination and shall forward a copy of the record to the Superintendent and the trustee.

Record of examination available to creditors on request - Sec. 161(2.1)
(2.1) If the examination is held

> **(a) before the first meeting of creditors, the record of the examination shall be communicated to the creditors at the meeting; or**
> **(b) after the first meeting of creditors, the record of examination shall be made available to any creditor who requests it.**

Examination before another official receiver - Sec. 161(3)
(3) When the official receiver deems it expedient, the official receiver may authorize an examination to be held before any other official receiver.

Official receiver to report failure to attend - Sec. 161(4)
(4) Where a bankrupt fails to present himself for examination by the official receiver, the official receiver shall so report to the first meeting of creditors.
R.S., 1985, c. B-3, s. 161;
1997, c. 12, s. 95;
2004, c. 25, s. 75(F);
2005, c. 47, s. 97.

Inquiry by official receiver - Sec. 162
162. (1) The official receiver may, and on the direction of the Superintendent shall, make or cause to be made any inquiry or investigation that may be deemed necessary in respect of the conduct of the bankrupt, the causes of his bankruptcy and the disposition of his property, and the official receiver shall report the findings on any such inquiry or investigation to the Superintendent, the trustee and the court.

(2) [Repealed, 2005, c. 47, s. 98]

Application of section 164 - Sec. 162(3)
(3) Section 164 applies in respect of an inquiry or investigation under subsection (1).
R.S., 1985, c. B-3, s. 162;
2004, c. 25, s. 76(F);
2005, c. 47, s. 98.

Examination of bankrupt and others by trustee - Sec. 163

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163. (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the bankrupt, respecting the bankrupt or the bankrupt's dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in that person's possession or power relating in all or in part to the bankrupt or the bankrupt's dealings or property.

Black v. NsC Diesel Power Inc. (Trustee of), 1998 CanLII 2241 (NS CA) - Examination of Personnel

Date:	1998-07-24
Docket:	C.A.No.143934
Parallel citations:	170 NSR (2d) 236; 6 CBR (4th) 96
URL:	http://canlii.ca/t/5zln
Citation:	Black v. NsC Diesel Power Inc. (Trustee of), 1998 CanLII 2241 (NS CA), <http://canlii.ca/t/5zln> retrieved on 2013-08-22
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Noteup:	Search for decisions citing this decision
Reflex Record	Related decisions, legislation cited and decisions cited

Date: 19980724 Docket: C.A.143934

NOVA SCOTIA COURT OF APPEAL

Chipman, Hallett and Cromwell, JJ.A.

IN THE MATTER OF:
THE BANKRUPTCY OF NsC DIESEL POWER INCORPORATED

BETWEEN:
FREDERICK W.L. BLACK

Appellant

- and -
ABN AMRO BANK CANADA,
as petitioning creditor

Respondent

-and -

THE INSPECTORS OF THE ESTATE

Intervenors

Appellant in person
David G. Coles
for the Respondent
Thomas M. Macdonald
for GMBH & Krupp Mark
Diesel Inc. (Watching only)
Intervenors in person
Appeal Heard: June 8, 1998

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Judgment Delivered: July 24, 1998

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Chipman, J.A. concurring; Cromwell, J.A. dissenting

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HALLETT, J.A.:

This is an application for leave to appeal and an appeal from Justice Hood's order refusing to reverse a prior decision she rendered refusing to order that Terrance Russell, a former employee of the respondent, be examined by the appellant pursuant to s. 163(2) of the **Bankruptcy & Insolvency Act,** R.S.C. 1985, c. B-3. The appellant did not appeal the first order of Justice Hood.

Terry Russell is a former assistant vice-president of the respondent Bank with primary responsibility for the loan to NsC Diesel during the period from 1989 to July 1992. In late 1991 the respondent Bank petitioned NSC Diesel into bankruptcy. On December 3r', 1991, the Supreme Court of Nova Scotia in Bankruptcy appointed Ernst & Young as Trustee.

Terrance Russell was appointed an Inspector under the provisions of the Act. He left the respondent Bank in late 1992 and is no longer an Inspector of NsC Diesel in bankruptcy. Both NsC Diesel and NsC Corp. are controlled by the appellant.

Section 163(2) of the Act authorizes the examination of a number of persons for the purpose of investigating, the administration of the estate. The applicant must show sufficient cause before the court will order the examination sought.

Section 163(2) states:

163(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

It must be remembered that this appeal is from a decision of Justice Hood on a motion brought by the appellant for her to reconsider her initial decision.

Section 187(5) of the Act provides:

187. (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

To succeed the appellant must satisfy this Court that on the reconsideration motion Justice Hood applied wrong principles of law or that the order she made has resulted in a patent injustice. It is an error in law if Justice Hood misapprehended or failed to consider relevant evidence **(Minkoff v. Poole and Lambert** 1991 CanLII 2516 (NS CA), (1991), 101 N.S.R. (2d) 143).

On the motion to reconsider the appellant asserted that Justice Hood did not have before her on the original application heard on August 20t", 1997, certain materials he was relying on in support of his motion to examine Terrance Russell. In particular, Exhibit "C" to the Inspector's affidavit of July 9t", 1996, which was initially filed in support of a 1996 application under s. 163(2) to examine a Mr. Tony Purchase who was employed by ACOA, a government agency. ACOA was involved in the financing of NsC Diesel and in discussions with the respondent Bank and others after NsC Diesel got into financial difficulties in 1989.

The appellant's notice of motion for the first application expressly stated that the appellant would be relying on two affidavits of the Inspectors; one dated July, 1994, and the other July 9th, 1996. There is no reference to Terrance Russell in the body of either of these affidavits.

In February, 1992, at the first meeting of the Inspectors, they authorized the Trustee to examine the Benn brothers of Corporation House. They had been advising the appellant in developing his project at Sheet Harbour. The project involved the construction of premises and related works to test ships' engines manufactured by Krupp MaK for installation in vessels operated by the Canadian Navy.

A May 25t", 1992, meeting with the Benn brothers and the Trustee was arranged by Terrance Russell as a result of the resolution. The Inspectors wished to ascertain if there was fraud in relation to the payment by NsC Diesel of an insurance premium on a performance bond arranged through Corporation House. The meeting took place as scheduled and certain information was obtained from Corporation House. The July 1994 affidavit of the Inspectors asserts that the Trustee refused to redo the examinations of the Benn brothers but acknowledged that the Trustee's refusal was due to the fact that, by this time, the Trustee was not being funded; the respondent Bank having ceased to fund the Trustee in late 1992.

The affidavit concludes with paragraph 15 which states:

15. **THAT** it is the belief of the Inspectors that further examination under s. 163 of the BIA respecting the conduct of the June, 1992 examinations by the Officer of the Bankrupt or any other interested person would potentially be beneficial to the Estate, assist in proper administration and not be harmful and the information obtained will be without cost to the Estate.

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There are ten exhibits attached to this affidavit. One of the exhibits is an affidavit of Joseph Brown dated September 31, 1993. With the exception of a paragraph in Joseph Brown's affidavit that Terrance Russell had been involved in arranging and administering the Bank's loan to NsC Diesel until July, 1992, there is no mention of Terrance Russell. Mr. Brown, at the time his affidavit was signed, was a vice-president of the respondent Bank and had primary responsibility for handling the NsC Diesel file since July of 1992. His affidavit was filed in an Ontario action brought by the respondent Bank against Krupp MaK and Collins Barrow.

Attached as Exhibit "H" to the Inspectors July, 1994, affidavit is a memorandum from the Inspectors to the Trustee dated October 23rd, 1993, in which the Inspectors outline their criticisms of the manner in which the Trustee performed its duties. The purpose of the memorandum was to advise the Trustee that they did not agree with the Trustee's opinion that the appellant's representation of NsC Diesel in legal proceedings had a negative effect. The memorandum also deals with the Inspectors' views concerning the role of Krupp MaK in the financial collapse of NsC Diesel in 1989. The Inspectors seem to support the appellant's theory that Krupp MaK wanted to regain control of the so-called technology agreement it had made with NsC Diesel and in order to do so did not honour its alleged commitment to invest approximately $4 million dollars in NsC Diesel and this precipitated the financial collapse of the company.

In his affidavit filed in the Ontario proceeding, Joseph Brown makes assertions which are at odds with the appellant's theory that Krupp MaK and the Bank conspired against NsC Diesel to cause its financial collapse. At paragraphs 8 and 13 Mr. Brown states:

8. Based on the information and documents referenced in the following paragraphs, it would appear that Black and Krupp Mak entered into arrangements, the effect of which was to create the appearance that a technology licencing agreement between Krupp Mak and NsC Diesel had a value of $4 million and that Black had made an equity injection of $5 million, neither of which were true. This appearance was created through a series of transactions which are summarized in the diagram attached as Exhibit "F" hereto, whereby Krupp MaK provided indirectly or directly the funds necessary to create on paper the appearance of the equity injection by Black in NsC Diesel when in fact such funds came from Krupp MaK, flowed through NsC Diesel and were sent immediately back to Krupp MaK.

13. Attached hereto and marked as Exhibit "M" is a letter dated December 2, 1988 from Black to NsC Diesel's representative Corporation House, which document I am advised by Gordon McGee and verily believe was obtained by him from Corporation House shortly before the commencement of this litigation. In that letter, Mr. Black states the following:

"As you fully understand, the $4 million value for technology is a paper value, which we use to inflate the overall project costs. MaK will forward this money, by way of a loan to F.W.L. Black, who will then invest it in the corporation and pay it back to Mak for the purchase of the technology."

Other than the references to Terrance Russell to which I have referred, the July, 1994, affidavit contains nothing relevant to Terrance Russell's involvement with NsC Diesel's loan or the meeting between the Trustee, its solicitors and the Benn brothers on May 26t", 1992. The evidence does disclose that he attended that meeting.

The appellant, with the support of the Inspectors, alleges that the Trustee acted improperly in (i) the examination of the Benn brothers; and (ii) providing information obtained at that meeting to the respondent Bank and not to the Inspectors. The appellant asserts that the Trustee did not protect the interests of the creditors in the technology agreement. I would also infer from the record that the only possible asset of NsC Diesel is its potential recovery in the lawsuits commenced by the appellant in his own name or in the name of NsC Diesel alleging conspiracies between the respondent Bank, Krupp as well as claims against the Trustee, etc. It would not appear from the record that the technology agreement has any value to the Estate of NsC Diesel in bankruptcy.

The July 9`", 1996, affidavit of the Inspectors focuses on a desire to examine Mr. Tony Purchase respecting discussions in 1989 between representatives of a few creditors, ACOA, the respondent Bank, Krupp MaK, the Benn brothers and Ernst & Young. The apparent purpose of these discussions was to see if the Sheet Harbour facility could be completed following NsC Diesel's defaults to its building contractor and other creditors.

It is alleged by the Inspectors that the parties to these 1989 discussions, and in particular Krupp and the respondent Bank, had an objective of securing the operating control of the bankrupt's project at Sheet Harbour to "the exclusion of the estate of the bankrupt". I would note that NsC Diesel was not in bankruptcy until December, 1991.

Exhibit "C" to the Inspector's affidavit of July, 1996, is a large binder containing documents estimated to be some 500 pages in length.

On the reconsideration hearing, the appellant only referred Justice Hood to certain documents in Exhibit "C". It would appear that he referred her to a document entitled "Issues for Meeting with Superintendent/Official Receiver". This document was prepared by the Inspectors and is dated May 30", 1994. It is contained at Tab B4 of Exhibit "C". Essentially the document complains of the failure of the Trustee to do certain things, including examinations under s. 163 of the Act of persons authorized by the Inspectors to be examined. The Inspectors wanted the Trustee to redo the examination of the

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Benn brothers with respect to the bonding issue and the Inspectors wanted information from the Benn brothers on the "transaction outline". This is a reference to a document created in 1989 for discussion at the meeting to which I have referred, of certain creditors, including the respondent Bank, to explore courses of action to enable the NsC Diesel project at Sheet Harbour to be completed. The appellant takes a different view as to the purpose of the meeting. In any event, the meeting pre-dated the bankruptcy by two years.

Tab B4 of Exhibit "C" also contains Minutes of the Inspector's first meeting in February, 1992, and certain correspondence between the Trustee and the Benn brothers or their corporation and correspondence between law firms, etc. Much of what is in Exhibit "C" is irrelevant to the motions requesting an order to examine Terrance Russell.

An exhibit attached to Exhibit "C" of the July, 1996, affidavit of the Inspectors is an affidavit of S. Gordon McGee, a partner of Blake, Cassels& Graydon, sworn on May 18", 1994, and filed in Ontario proceeding 92-CQ-29496A in connection with an application by the appellant to have Blake, Cassels & Graydon removed as solicitors for the respondent Bank.

The record shows that the respondent Bank had initially funded the Trustee but withdrew funding in late 1992. None of the creditors, including those substantial creditors whose principal shareholders or employees are inspectors of NsC Diesel in bankruptcy have since been prepared to fund the Trustee.

A review of the material in Exhibit "C" would indicate that, in the Trustee's opinion, there were no tangible assets of NsC Diesel upon which anything could be realized. A review of the documentation would indicate that the Inspectors apparently pinned their hopes for some recovery on the possible success of any of the appellant's many law suits, including those against the Trustee, its solicitors, the respondent Bank and Krupp MaK. The record also shows that the respondent Bank has sued the appellant for fraudulent misrepresentation that induced the Bank to advance several million dollars to NsC Diesel. I would infer from the documents in Exhibit "C" that the office of the Superintendent in bankruptcy has apparently not seen fit to carry out the sort of investigation of the Trustee that the Inspectors desire.

The extent of the proceedings commenced by the appellant arising out of the collapse of his companies, NsC Corp. and NsC Diesel is illustrated in paragraphs **47, 64 and 65 of the McGee affidavit of May 14, 1994, which I quote:**

47. In virtually all of the various proceedings described in Exhibit "O" hereto, Black has represented himself and NsC Corp. The following are some of the more salient highlights of the events in Nova Scotia as they relate to Black's conduct:

a) Black has, on five separate occasions, sought *ex parte* relief from the Nova Scotia Courts in circumstances where notice ought to have been given to the respondents, including ABN. On each occasion the requested relief was either refused or, if granted, subsequently set aside when it came to the notice of the effected party.

b) Black has, unsuccessfully, attempted through three separate claims or counterclaims and numerous motions in the bankruptcy proceedings to attack the petitioning into bankruptcy of NsC Diesel or sought damages from the trustee, ABN or ABN's counsel in respect thereto. On each occasion the proceedings have been stayed or dismissed, save for certain of his claims as against ABN which are ongoing.

c) Black has appealed virtually every decision made by the Nova Scotia Supreme Court or the Nova Scotia Bankruptcy Court. A total of eight appeals have been brought by him to the Nova Scotia Court of Appeal and five applications for leave to appeal to the Supreme Court of Canada. Each appeal or leave to appeal application has been unsuccessful.

64. In addition to those matters set out above relating to Black's role and conduct in the Nova Scotia Court, Black, NsC Corp. and/or NsC Diesel have commenced the following actions in the province of Ontario:

a) NsC Corp. issued a statement of claim against Krupp MaK and others in the Federal Court in Ottawa on June 4, 1990. A motion was brought in that action for an injunction, which was resolved on the basis of the delivery of an undertaking by one or more of the defendants. I have been advised by Krupp MaK's Ontario solicitors and believe that NsC Corp. is

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continuing to pursue that action.

b) Black, NsC Corp. and **others commenced an action against** Krupp MaK, Corporation House, Bruce Benn, Ron Benn, Steelwood Consulting Corporation, Gary Wiseman and others in the Supreme Court of Ontario at Ottawa on June 15, 1990 claiming damages in excess of $100 million. On December 13, 1990 the plaintiffs were ordered to add NsC Diesel (the corporate party who dealt with the defendants in that action) as a plaintiff in the action. That action has not proceeded further because NsC Diesel is a bankrupt and cannot be added as a party without leave of the Court, which leave has not been obtained. In May 1992 Krupp MaK brought a motion for security for costs in that action, which motion was dismissed by the Honourable Mr. Justice Cosgrove on May 22, 1992 on the basis that Black and NsC Corp. had demonstrated that they were impecunious.

c) NsC Corp. and Black commenced an action against Ernst & Young Inc. and Peter Cleveland (the partner at Ernst & Young Inc. responsible for the custodianship and receivership of NsC Diesel in the CCAA proceedings) on June 30, 1992 claiming damages in excess of $580 million. I have been advised by Michael Thompson, general counsel at Ernst & Young Inc., and believe that this action has been stayed on the basis that Ontario is not the convenient forum.

65. In addition to the within proceedings ABN also commenced a separate action in late 1991 against the solicitors who represented it in making the loan and in early 1992 a further action was commenced with respect to the loan insurance which was to be provided to it by ACOA. Examinations for discovery of all parties in these actions have been held (in excess of ten full days). These actions have been ordered tried together and are expected to be pre-tried within the next few months. A motion for summary judgment has been scheduled for September of **this year in the** action **against ACOA.**

I have already referred to Mr. Brown's affidavit filed in the respondent Bank's action in Ontario alleging conspiracy between Krupp MaK and NsC Diesel to misrepresent to the respondent Bank that Krupp MaK was investing $4 million in NsC Diesel when the transaction was, in the Bank's view, a sham.

There was no reference in the notice of motion on the original application to the July 14th, 1994, affidavit of the appellant in which affidavit Terrance Russell was mentioned as a person that ought to be ordered to be examined by the appellant.

On the first application Justice Hood refused to consider the Inspector's Resolution dated August 191", 1997, supporting the appellant's motion for an order to examine Terrance Russell. She refused to do so as the Resolution was not properly put before the court having been presented to the Court during the appellant's oral argument; and secondly, was not verified by an affidavit as being a resolution of the Inspectors.

In her decision on the original motion, Justice Hood made express reference to the two affidavits of the inspectors.

As noted by Justice Hood in her decision on the first application, the Supreme Court of Nova Scotia in Bankruptcy has, since 1991, dealt with a "myriad of applications" arising out of the bankruptcy of NsC Diesel and NsC Corporation.

It was within Justice Hood's discretion on the first application not to consider the Inspector's resolution of August 19`", 1997.

The essence of Justice Hood's decision on the first application is contained in the following paragraphs:

> Examinations under Section 163(2) are only ordered when sufficient cause is shown and that sufficient cause must be directly related to the person sought to be examined. To say there is cause for questions to be asked and, as Mr. Black repeated in his oral submissions, "I must start somewhere" is not what Section 163(2) requires. There must be some demonstrated connection between the evidence, if any, of something being amiss and the ability of the named person to shed some light on it as it relates to the administration of the Estate.
>
> Mr. Black says that there may be assets of the bankrupt estate which were not recovered. There is no evidence of this and nothing whatsoever to cause me to believe that even if it is true, Mr. Russell knows anything about it.
>
> I therefore refuse to exercise my discretion to order the examination of Terry Russell.

In her decision on the reconsideration motion, Justice Hood stated, with respect to material that may not have been available to her on the first application:

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> Material dated July of 1996 could have been available. If Mr. Black was concerned that it had material in it that was vital to the application before me in August of 1997, the onus was upon him to ensure that not only was it available, but the specific parts of it to which I need, according to him, direct my attention were in fact brought to my attention . . . . .
> I should also note that the only way for Mr. Black to ensure that on each court application the court has whatever material he wishes to have the court's attention drawn to is to take the responsibility himself of making that information available. If he wants the **court** to read an affidavit or if wants the court to read material then that material 'needs to be produced **for the court.**

I would infer that Justice Hood was referring to the possible absence, from the Inspector's July, 1996 affidavit, of Exhibit "C" to that affidavit.

I agree with Justice Hood's remarks that the appellant must alert the court to the evidence he relies on in support of his applications. There was no mention in the notices of motion filed with respect to the applications that the appellant was relying upon his July 1994 affidavit which had been filed in connection with another application. There was nothing in the body of the Inspector's affidavits of July, 1994 and July, 1996, that contained any reference to Terrance Russell let alone why he would have evidence that warranted an order for his examination. There is, however, the information in Exhibit "C" to the July, 1996 affidavit of the Inspectors that Terrance Russell was involved in a meeting between the Trustee and the Benn brothers on May 25t", 1992. This information is also in Joseph Brown's affidavit attached to the July, 1994, affidavit of the Inspectors. Whether Exhibit "C" was or was not before Justice Hood cannot be conclusively determined but it would appear from the record that it may not have been before her.

On the first application it is clear from the record that Justice Hood was aware that Terrance Russell attended the meeting on May 25'", 1992, at which meeting the Trustee obtained certain information from the Benn brothers and made that information available to the Bank. Justice MacPherson of the Ontario Supreme Court dealt with allegations made by the appellant in one of the proceedings in Ontario that the Trustee acted improperly in turning over this information to the bank. Justice MacPherson apparently found no fault with the Trustee having done so. As Justice Hood in her decision on the first application quoted from Justice MacPherson's decision as follows:

The information was obtained, with no objection from Corporation House, pursuant to various provisions of the *Bankruptcy and Insolvency Act, R.S.C.* 1985, c. B-3, especially ss. 26 and 163. The entire scheme of this Act is to permit the trustee to investigate the events surrounding a bankruptcy and to make the fruits of the trustee's investigation available to the creditors and their representatives, the inspectors. The information and documentation received from Corporation House comes squarely within this statutory scheme. The trustee was entitled to obtain it and all of the creditors, including ABN, are entitled to know about it.

The appellant persists in putting forward his argument that the Trustee or its solicitor acted improperly in turning over to the respondent Bank information obtained from Corporation House (the Benn brothers). The propriety of the Trustee's action has been resolved by Justice MacPherson's decision even though the appellant does not accept his finding.

A review of Exhibit "C" shows that on April 23rd, 1993, the Trustee sent to Mr. Jerry Dill, one of the Inspectors, the report of the Trustee's representative who had conducted the interview of the Benn brothers. In paragraphs 67 and 68 of S. Gordon McGee's affidavit of May 14, 1994, he stated:

67. As set out above, neither ABN nor Blake, Cassels & Graydon have any objections to producing to the parties in this litigation the documents which were obtained during the various interviews conducted in May and June of 1992 which they have in their possession and which they obtained from R. Benn, B. Benn, G. Wiseman and M. Panciuk. No prior request for the production of these documents has ever been made of Blake, Cassels & Graydon or ABN.

68. In paragraph 8 of Black's "Supplementary Factum" filed herein Black suggests:

These solicitors Blake, Cassels and Boyne Clarke, moved to protect the section 163 material obtained by the trustee and the solicitors of the Estate from Corporation House Limited (B. Benn and R. Benn) and to keep, this information confidential for sole use of (heir client the ABN Amro Bank in a Ontario Civil proceeding (this proceeding) and in direct contravention of the Bankruptcy and Insolvency Act and the Ontario Rules of Civil Procedure.

To the extent that these unsworn allegations require a response, I categorically deny them. At no time have I or, to my knowledge, any member of Blake, Cassels & Graydon, or Boyne Clarke, whether in our former capacity as solicitors for the trustee in bankruptcy, or in our capacity as solicitors for ABN, attempted to prevent any party from having access to the subject documents.

These allegations made by the appellant were rejected by Justice MacPherson and fly in the face of the documents in Exhibit "C" which show that the material information obtained by the Trustee from the **interview of the Benn brothers** was sent to Inspector Dill albeit not until several months after the information was given to the respondent Bank.

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The conspiracy that the appellant alleges between the respondent bank and Krupp MaK allegedly occurred in 1989, long before NsC Diesel was petitioned into bankruptcy. Therefore, questions that might be asked of Terrance Russell relevant to the alleged 1989 conspiracy have nothing to do with the administration of the estate of NsC Diesel in bankruptcy. The **Civil Procedure Rules** of Ontario relating to discovery are available to the appellant with respect to the actions he has commenced in Ontario. Section 163(2) of the Act and the **Rules** made thereunder are available to the appellant in the actions he has commenced in either or both his own name and that of NsC Diesel within the bankruptcy proceedings in Nova Scotia with respect to the administration of the estate. However, to obtain an order under s. 163(2) to examine Terrance Russell the appellant must show cause why such an order ought to be made.

The wording of s. 163(2) of the Act that requires an applicant to show sufficient cause to warrant the order being granted requires that the applicant put forth factual information in affidavit form or in sworn testimony that would disclose something more than a desire to go on a fishing expedition. The scheme of the Act and its proper functioning requires that trustees act with integrity and, in effect, assumes they will so act. Otherwise the purposes and objectives of the Act would be frustrated. If a trustee's actions are being questioned, as in this case, the Act properly requires that sufficient cause be shown to warrant an order for examination. This requires that evidence be put forward on the application that would indicate a problem existed with respect to the trustee's administration of the estate and that the person sought to be examined would likely have evidence relevant to the issue. The unwillingness of a Trustee, who is not being paid, to carry out tasks the Inspectors authorize is not a breach of the Trustee's duties under the Act.

Justice Hood did not fail to consider the evidence that was pro operly put forward by the appellant in support of his first motion to examine Terrance Russell. The appellant did not satisfy Justice Hood that there was sufficient cause shown to warrant issuing an order for the examination of Terrance Russell under s. 163(2) of the Act. Justice Hood found as a fact that there was no evidence before her of anything amiss in the administration of the estate of NsC Diesel in bankruptcy and no evidence that the bankrupt had assets that were not recovered by the Trustee or that if there were there is no evidence from which it could be inferred that Terrance Russell would likely have relevant evidence on the issue. A review of the record indicates that Justice Hood did not err in coming to this conclusion and, therefore, did not err in dismissing the original application.

The legal principles that would apply to a reconsideration motion under s. 187(5) of the Act are set out in Houlden & Morowetz text **Bankruptcy** 8Z **Insolvency Law of Canada,** 31 edition, vol. 2, at pp. 7-20 to 7-25 as follows:

(a) The jurisdiction given by Section 187(5) should be sparingly exercised; it is a matter of indulgence and must be carefully guarded.

(b) The discretion given by Section 187(5) must be exercised judicially ... different considerations apply to the exercise of the discretion according to the character of the Order sought to be varied or rescinded.

(c) The sub-section permits a judge to deal with continuing matters in the bankruptcy so as not to be bound by an earlier decision, if circumstances have changed ... there must be a fundamental change in circumstances between the original hearing and the time when a review is sought, or evidence must have been discovered which was not known at the time of the original hearing and which would have led to a different result.

(d) The question on a Section 187(5) application is not, as in an appeal, whether the original Order ought to have been made, but whether an Order ought to remain in force in the light of either of changed circumstances or in the light of fresh evidence.

(e) The onus is on the applicant to satisfy the Court that the Order should be varied or rescinded.

(f) **Section** 187(5) is not an alternative remedy to an appeal, nor is it designed merely to give a disgruntled party an opportunity to relitigate questions and issues already decided. There must be new material or material indicating a change in circumstances for the Court to make an Order under Section 187(5).

(g) If the applicant intends to proceed on the record that was before the Court when the original Order was made, the proper mode of proceeding is ordinarily an appeal. If there is new evidence or evidence of a change of circumstances, then an application under Section 187(5) is the appropriate remedy.

(h) Although Section 187(5) contains no time limit, an application must be made promptly and within a reasonable time of acquiring knowledge of the order sought to be varied or rescinded.

Section 187(5) of the Act is not an alternative remedy to an appeal of the original order of Justice Hood. Nor is it an opportunity to have an issue relitigated.

This was an interlocutory matter that required Justice Hood to exercise her discretion judicially. A review of the record discloses that Justice Hood did not appear to give consideration, to the support of the Inspectors of the

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appellant's motion to examine Terrance Russell. She said their support was irrelevant but did so in the context of stating that the discretion to make the order was hers, not the Inspectors. She was correct.

I would note that in the Minutes of the Inspectors' meeting of May 211, 1996, at which the Inspectors approved of an application for an order to examine Tony Purchase of ACOA, it is stated that one of the purposes of examining him was to assist one of the Inspectors "in a potential action against ACOA". That is not a proper reason to authorize examination under s. 163(2) of the Act. The Inspectors' resolution of August, 1997, supporting the appellant's application to examine Terrance Russell contains nothing of that sort. However, the appellant's law suits are the only straw the Inspectors have to grasp at if they hope to be paid anything on their outstanding accounts. Their support must be looked at in this light.

A review of Justice Hood's decision on the reconsideration motion shows that she applied the correct legal test in deciding that she would not reverse her original order as there was no change of circumstance since the original application nor was any new material put before her on the reconsideration motion that could not have been properly put before her on the original application. Therefore, it was not a legal error for Justice Hood to refuse to consider the evidence in Exhibit "C" put forward on the reconsideration motion.

I have reviewed the evidence in Exhibit "C" simply to show that it did not contain facts that could have resulted in a different decision on the first application, assuming that Justice Hood failed to consider Exhibit "C" on that application.

At first blush it may appear that an order for the examination of Terrance Russell might have been made either on the first application or on the motion for reconsideration. However, on analysis of the facts the appellant failed to show sufficient cause to warrant such an order. The application lacked facts to support the granting of the order sought. The support of the Inspectors does not change this deficiency in the application. If the Inspectors have evidence to put before the court that would warrant an order for the examination of Terrance Russell it is open to the Inspectors to make such an application. Therefore, Justice Hood's decision on the reconsideration motion has not resulted in a patent injustice. I **would not interfere** with the exercise by Justice Hood of her discretion on the reconsideration motion.

In **her reconsideration decision Hood, J. stated:**

With respect to costs, my decision from August indicated that costs were to be paid forthwith. If costs have not been paid forthwith I understand that in the Ontario Courts, the courts made a ruling that the costs have to be paid before further proceedings are taken. I think it is time that such an order be made in this court. If the costs with respect to the proceedings under S.H. No. 80055 are not paid, then no further proceedings are to be taken until those costs are paid. That may affect the hearing which I understand is scheduled for about two weeks from now. If the costs are not paid, then that hearing should not proceed.

Because of my decision today with respect to the necessity of the s. 187(5) application, I am going to order that the costs of the ABN AMRO Bank be paid forthwith. I order costs to be paid forthwith in the amount of $500.00.

The essence of this ruling was incorporated into the order issued on
December 19t", 1997.

The appellant asserts Justice Hood erred in ordering that he could not
proceed further without paying the outstanding cost awards.

In S. Gordon McGee's affidavit of May 181h'1994, which forms part of Exhibit
"C", the deponent states in paragraph 48:

48. I am advised by David Coles and believe that as a result of Black's and NsC Corp.'s unsuccessful efforts to attack the bankruptcy of NsC Diesel or to pursue the trustee in bankruptcy, ABN , or ABN's counsel, it has been ordered to pay ABN (or its counsel) costs on at least 17 separate occasions. I am advised by David Coles and believe that these cost Orders total in excess of $14,000.00. Six of the cost Orders which were granted were payable forthwith and are in the total amount of more than $10,000.00. I am advised by David Coles and believe that none of these latter cost Orders have been satisfied.

Attached hereto and marked as Exhibit `P"to this my affidavit are true copies of the six cost Orders, or reasons for decision on which Orders were subsequently granted, which were payable forthwith and which were granted by the Nova Scotia courts.

The appellant has disregarded the orders of the Nova Scotia courts. He submits that he is impecunious. He has not presented any evidence to support this submission. However, I do note that in 1992 he apparently satisfied Justice Cosgrove in Ontario that he was impecunious. Whether he still is I do not know.

Costs are in the discretion of the court. The court has an inherent jurisdiction to control its own process.

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The appellant acknowledged during the hearing of this appeal that there are approximately six outstanding orders requiring him to pay costs forthwith and that he has not complied with the Orders. Under the circumstances, I would not interfere with the exercise by Justice Hood of her discretion on this issue except to vary her Order so as to authorize a Judge of the Supreme Court to grant leave to the appellant to bring further proceedings or applications if circumstances are shown that it would be just to allow the appellant to initiate or continue any proceeding notwithstanding that costs remain outstanding.

Leave to appeal is granted but the appeal ought to be dismissed with costs to the Bank of $1,000.00 plus disbursements to be paid by the appellant and further costs to the Bank of $500.00 inclusive of disbursements payable by the Intervenors. Both cost awards ought to be paid forthwith.

Hallett, J.A.

Concurred in:

Chipman, J.A.

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CROMWELL, J.A.: (Dissenting)

In my view, the Chambers judge erred in principle in refusing to reconsider her earlier order. Accordingly, and with great respect to my colleague, Hallett, J.A., whose reasons I have had the advantage of reviewing, I would grant leave to appeal and allow the appeal. I will briefly set out my reasons for reaching this conclusion.

Section 163(2) of the Bankruptcy & Insolvency Act permits orders to be made for the examination under oath of persons for the purpose of investigating the administration of the estate. Interested persons may apply for these orders and they may be made if "sufficient cause" is shown. These orders are often made by the Registrar in Bankruptcy without notice to other interested parties. Their purpose is to help ensure that the estate is being administered in the interests of the creditors and in accordance with the law.

Section 187(5) of the **Bankruptcy Bz Insolvency Act** allows all courts making orders in bankruptcy matters to "review, rescind or vary" them. While its main purpose is to provide flexibility that is needed to deal with changing circumstances in the course of the administration of the estate, the authority granted by the section is extremely broad. It is appropriate to invoke these powers of review if evidence or points of law have been overlooked, if the consideration of the matter was in some way incomplete or if it is otherwise just and expedient in the control of the Court's process: see Re Strachan (1980), 34 C.B.R. 136 (Ont Sup Ct in Bank) at 139 and Re Quinn (1989), 72 C.B.R. 80 (Ont Sup Ct in Bank) at 82.

Since 1994, Mr. Black has attempted to obtain orders for the examination of various individuals under s. 163(2). In 1994, he applied to examine 15 people including one Terry Russell. That application was dismissed but on appeal to this Court, the dismissal was set aside and Mr. Black was given leave to make a fresh application.

He did so, this time limiting the application to a request for an examination of Mr. Russell. His application was dismissed by Hood, J. in August of 1997. Mr. Black applied to the learned judge for reconsideration of her decision. That application was dismissed in December of 1997. Hood, J. also made an order requiring Mr. Black to pay all outstanding cost awards presently due and payable by him to the ABN AMRO Bank before initiating or continuing any proceedings in respect to this bankruptcy file.

Mr. Black now seeks leave to appeal, if required, and appeals the dismissal of his application for reconsideration and the imposition of this condition.

In my respectful view, the learned judge applied the wrong test under s. 187(5) and applied the test she did adopt in an unduly rigid manner. In both respects she erred in principle. In essence, the teamed judge held that before she could review her earlier order, it had to be demonstrated that there was substantial new evidence that was not known or could not have been made available at the first hearing with reasonable diligence or that the circumstances had changed.

At the outset of the Chambers hearing, the learned judge referred to this principle as one that went to her jurisdiction to hear the matter. At another point, she referred to it as a "preliminary hurdle." While some of the cases assert this as the general rule, others, including **Re Strachan** to which the learned judge referred, make it clear that the approach to a s. 187(5) review should not be inflexible.

Of course, the section must not be used simply to relitigate points that have been settled. But on the other hand, the section is very broadly worded and is intended to provide a simple way to ensure that the substance of the matter before the court has been dealt with appropriately. In this way, the delay and expense of appeals are avoided. In my view, broadly framed statutory conferrals of jurisdiction to review, rescind and vary such as that found in s. 187(5) should not be circumscribed by inflexible, judicially created rules. Whether the evidence could have been placed before the court on the earlier occasion or there are changed circumstances are factors to be considered in exercising the discretion to review, vary or rescind. However, these factors are not inflexible rules of law to be applied without regard to other relevant considerations.

Even if these review applications require the applicant to show that there is new evidence that could not have been placed before the court with due diligence or that the circumstances have changed, I think , with respect, that the learned Chambers judge applied this test in an unduly restrictive way.

It was argued that a lengthy exhibit to an affidavit ought to have been before the judge on the earlier hearing but apparently was not. Of course, I agree completely with the Chambers judge that it was Mr. Black's responsibility to ensure that all the material necessary for the Court was placed before it. It is not enough to refer compendiously to material on file, particularly in a voluminous and complex file such as this. However, when this material was drawn to the Court's attention, at least some consideration ought to have been given to the substance of the argument rather than dismissing it purely on the basis that it could have been placed before the court on the earlier occasion. The learned Chambers judge stated that " whether or not it [i.e. the material relied on] is substantial ... does not need to be decided, and I am not going to make a decision on that issue." Adopting that approach was an error in principle.

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Further, the learned judge made no reference on the reconsideration application to a resolution of the Inspectors of the estate which she had ruled inadmissible at the first hearing because it was filed late. It is implicit in the learned judge's decision that the Inspectors' resolution was not new even though it had been presented at the earlier hearing and ruled inadmissible as a result of late filing. With great respect, this seems to me to take an unduly restrictive **approach to what may** constitute new evidence for the purposes of a s. 187(5) review. Of course, lack of diligence of the party advancing the material is relevant to the exercise of the discretion. However, to hold that evidence which was previously ruled inadmissible on technical grounds is not "new" when properly submitted and therefore precludes further consideration of it is an error in principle.

I also am of the view that the learned Chambers judge erred in her approach to the Inspectors' resolution. The Inspectors of the estate had expressed their support for the examination of Mr. Russell. Although not referred to in her decision, it seems from the transcript of the hearing that the judge accepted submissions made on behalf of the Bank that the position of the Inspectors was simply irrelevant to whether Mr. Black had shown sufficient cause for the examination of Mr. Russell.

Of course the decision to order, or not to order, the examination is for the Court and not the Inspectors. That does not make their views irrelevant. The examination under s. 163(2) is ultimately for the benefit of the creditors. The Inspectors are their representatives. Under s. 163(1) of the **Bankruptcy& Insolvency Act,** the Trustee, on the resolution of the creditors, may examine without order of the court a wide range of persons thought to have relevant information. In this bankruptcy, there was effectively no trustee in that the trustee by the time of this application was inactive because there were no funds to cover the trustee's fees. In addition, this bankruptcy is complex, with allegations and cross allegations of all manner of wrongdoing both before and after the petition. In these circumstances, the views of the inspectors, while not controlling the court's discretion in any way, were and are entitled to considerable respect. In the particular circumstances of this bankruptcy, I should have thought that a judge would wish to have substantial reasons for not giving the Inspectors' views very considerable weight in deciding whether sufficient cause had been shown for a s. 163(2) examination. Dismissing their views as irrelevant, as the learned Chambers judge appears to have done was, in my respectful view, an error in principle.

For these reasons, I conclude that the teamed Chambers judge erred in principle in her consideration of the application under s. 187(5) and that her order dismissing the application should be set aside.

By the combined effect of Rule 51 of the **Bankruptcy and Insolvency Rules and Civil Procedure Rule** 62.23(1) (a), this Court is authorized to make"... any order which might have been made by the court appealed from..." . I therefore turn to the question of whether the Chambers judge ought to have rescinded her earlier order and ordered the examination of Mr. Russell.

I do not wish to contribute unnecessarily to the repetition of allegations and cross-allegations of wrongdoing in this bankruptcy. I will limit myself to saying that the material before the Court raises questions that are relevant to the administration of the estate and about which Mr. Russell as a former inspector of the estate and senior officer of the Bank is likely to have relevant information. The evidence supporting this
conclusion is summarized by Flinn J.A. in the decision of this Court in this matter in May of 1997. The Inspectors think Mr. Russell should be examined. The Trustee, if active, could examine him without order at the request of the creditors. In my view, sufficient cause existed for the examination and I would issue an order authorizing Mr. Black to conduct it. I would therefore rescind the order of Hood, J. dated September 18, 1997, set aside her order dated December 19, 1997 and in their place issue an order authorizing the examination of Mr. Russell.

However, I would do so on conditions. As noted by the learned Chambers judge, various cost awards made against Mr. Black and payable forthwith in these proceedings remain unsatisfied. I would make my order authorizing the examination of Mr. Russell conditional on payment of all costs awards against Mr. Black which were directed to be payable forthwith and which remain unpaid in all bankruptcy proceedings involving Mr. Black in the Supreme Court of Nova Scotia in Bankruptcy or in this Court. Of course, any costs awards in his favour that have not been paid may be set off.

I would not award costs of either of the proceedings before Hood, J. or of this appeal.

Cromwell, J.A.

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1991 S.H. No. 80055

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY
IN THE MATTER OF THE BANKRUPTCY OF
NSC DIESEL POWER INCORPORATED
IN THE CITY OF DARTMOUTH
IN THE PROVINCE OF NOVA SCOTIA

HEARD: At Halifax, Nova Scotia before the Honourable Justice Suzanne M. Hood.

DATE: December 16th, 1997

WRITTEN RELEASE OF DECISION: February 12th, 1998

COUNSEL: David G. Coles, representing ABN AMRO Bank
Thomas M. Macdonald, representing Krupp - watching brief
Frederick Black, representing himself

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C.A. No.143934
NOVA SCOTIA COURT OF APPEAL

BETWEEN:
FREDERICK W.L.BLACK
Appellant
- and -

ABN AMRO BANK OF CANADA,
as the petitioning creditor
Respondent
REASONS FOR JUDGEMENT BY:
HALLETT, J.A.
CROMWELL, J.A.
(Dissenting)

Black v. NsC Diesel Power Inc., 1996 CanLII 5249 (NS CA) - Examination of Trustee's Counsel by Bankrupt and Inspector

Date:	1996-11-18
Docket:	C.A. No. 127649
Parallel citations:	155 NSR (2d) 90; 43 CBR (3d) 162
URL:	http://canlii.ca/t/1mmjw
Citation:	Black v. NsC Diesel Power Inc., 1996 CanLII 5249 (NS CA), <http://canlii.ca/t/1mmjw> retrieved on 2013-09-13
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Reflex Record	Related decisions, legislation cited and decisions cited

C.A. No. 127649

NOVA SCOTIA COURT OF APPEAL
(In Bankuptcy)
IN THE MATTER OF:
THE BANKRUPTCY OF NsC DIESEL POWER INCORPORATED
BETWEEN:
FREDERICK W. L. BLACK
(in all capacities)
Applicant/Appellant
- and -
KRUPP MaK MASCHINENBAU GmbH & KRUPP MaK DIESEL INC., ABN AMRO BANK CANADA, ERNST& YOUNG, INC., (Trustee) ERNST & YOUNG, INC., (Personal Capacity) SUPERINTENDENT IN BANKRUPTCY
Respondents
The Applicant/Appellant in Person
Richard N. Rafuse, Q.C. (on some issues)
Thomas M. Macdonald
David G. Coles
Tim Hill
Robert W. Wright, Q.C.
D. Bruce Clarke
KRUPP MaK MASCHINENBAU GmbH & KRUPP MaK DIESEL INC., ABN AMRO BANK CANADA, ERNST& YOUNG, INC., (Trustee) ERNST & YOUNG, INC., (Personal Capacity) SUPERINTENDENT IN BANKRUPTCY
Applicants
- and -

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FREDERICK W. L. BLACK

(in all capacities)
Respondent
Thomas M. Macdonald
David G. Coles
Tim Hill
Robert W. Wright, Q.C.
D. Bruce Clarke
The Respondent in Person
FREDERICK W. L. BLACK
(in all capacities)
Applicant on Cross-Motion
- and -
ERNST& YOUNG, INC., (Trustee)
ABN AMRO BANK
Respondents on Cross-Motion
The Applicant in Person
Tim Hill
David G. Coles
Application Heard: October 10-11, 1996
Judgment Delivered: November 18, 1996
BEFORE THE HONOURABLE CHIEF JUSTICE CLARKE
(IN CHAMBERS)

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CLARKE, C.J.N.S.: (In Chambers)

The Bankruptcy of NsC Diesel Power Inc. and its associated companies has resulted in a series of proceedings before the courts that have been spread over the last five years or thereabouts.

Mr. Frederick W. F. Black was its principal operating officer and also a director and shareholder. He has been both the applicant and the respondent in most of the matters which have been before the courts. Prompted by another flurry of applications by various of the parties who are intimately involved in this continuing proceeding, I agreed to hear the parties in Chambers on October 10 and 11, 1996.

It is to these matters that I shall refer in the pages that follow. There is some repetition in the narrative respecting certain of the applications which is difficult to avoid. Some of the proceedings are characterized by a measure of brevity which at the minimum should be understood by the parties.

The following abbreviations are used.

BIA refers to the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3.

General Rules refer to those made pursuant to the **Bankruptcy and Insolvency Act**.

CPR refers to the **Nova Scotia Civil Procedure Rules**.

Houlden& Morawetz refers to the 1996 **Annotated Bankruptcy and Insolvency Act** of which text Houlden & Morawetz are the authors.

SCC refers to the Supreme Court of Canada.

NSCA refers to the Nova Scotia Court of Appeal.

NSSC refers to the Nova Scotia Supreme Court.

The statutory provisions and rules to which reference is made in these reasons will be found in appendix A.

1. **This Proceeding**

On May 30, 1996, Mr. Black, creditors, the Superintendent in Bankruptcy, and the Inspectors appeared before me in chambers (NSCA) with several applications. I set down October 10, 1996 to hear all the applications filed by the parties relating to the Bankruptcy. The hearing continued on October 11, 1996.

On July 11, 1996, Mr. Black and the Inspectors appeared before Justice Roscoe in Chambers (NSCA) in Bankruptcy with an application seeking an Order for examination under s. 163 BIA of certain persons in now or formerly in the employ of the Ernst & Young Inc., Trustee and more particularly Messrs. Cleveland, Harris, Reiter and Purchase. She concluded that she did not have jurisdiction to hear the matter or to grant the Order. She made reference to the hearing scheduled before me on October 10, 1996, indicating that further consideration of this application might be given at that time. (C.A. No. 127649) Chambers.

On July 15, 1996, Ernst & Young Inc. (Trustee), Ernst & Young Inc. (personal capacity), ABN Amro Bank, Krupp MaK Maschinenbau GmbH and Krupp MaK Diesel Inc. filed separate notices of application for Orders, (1) quashing the respondent's (Mr. Black) notice of appeal pursuant to CPR 62.31(1) and CPR 14.25(1), (2) security for costs pursuant to General Rule 49(4) and CPR 42, and (3) solicitor-client costs in the event of the cause.

Krupp MaK Machinenbau GmnH and Krupp MaK Diesel Inc. requested, in addition to the above, an injunction and stay of proceedings with respect to issues in this matter already determined by the NSSC, NSCA and SCC.

On July 15, 1996, Mr. Black filed a notice of motion in the Court of Appeal in Chambers for an Order "reviewing and rescinding" Associate Chief Justice Palmeter's orders of June 20, 1994 and August 3, 8 and 10, 1994 on the grounds that "all offend the appropriate provisions of the BIA, the Judicature Act and its Rules of Practice and the Charter of Rights and Freedoms and prejudice the applicant Black, in the fulfilment of his duties and the majority of the Estate of NsC Diesel in the recovery of their claims".

On July 29, 1996, the Registrar of the Court of Appeal, by correspondence, informed Mr. Black that I granted him leave to make an application in Chambers for an Order of Examination pursuant to s. 163 BIA, provided Mr. Black limited his submissions to writing and that notice of such application is given to the other parties so that they would have an opportunity to respond in writing in a timely fashion.

On August 15, 1996, Mr. Black filed material regarding his application for the examination of Messrs. Harris, Reiter, Cleveland and Landers, all of or formerly, persons in the employ of Ernst & Young Inc., the Trustee of the Estate of the Bankrupt.

On August 15, 1996, Mr. Black also filed a cross-motion to the motions of the Trustee (Ernst & Young) and the creditor (ABN Amro Bank). The cross-motion alleging breach of trust sought to remove Ernst & Young Inc. as Trustee and remove its solicitors and agent as well as the solicitors and agents for the Bank.

The above reflects in a general way the matters that came before me on October 10 and 11, 1996.

2. **History of the Proceedings**

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The following is a chronological summary of relevant proceedings to date. It is accurate so far as I can ascertain from the considerable volume of applications, decisions and Orders that have accumulated to this time.

On February 13, 1993, Justice Boudreau (NSSC) (not reported) ordered that Mr. Black was not permitted to continue to act in the same manner as a counsel representing the appellant, NsC Corporation in proceedings before him relative to the Bankruptcy of NsC Diesel Inc. He stayed proceedings taken by NsC Corporation in Bankruptcy until such time as counsel was engaged. His decision was based on his concern that Mr. Black would be in a position of conflict should he be acting as counsel for the Bankrupt while at the same time be called as a witness giving evidence in preliminary and trial matters.

The decision of Justice Boudreau was upheld on Appeal to NSCA [reflex, (1993), 125 N.S.R. (2d) 223]. Leave to appeal to Supreme Court of Canada was dismissed.

On Friday, June 17, 1994, Mr. Black obtained from the Registrar in Bankruptcy an **ex parte** Order for Examination of certain persons in the employ of the Trustee including Messrs. Cleveland, Harris, Reiter and Landers. During the weekend, counsel for the Trustee contacted Associate Chief Justice Palmeter at his home to inform him of the Registrar's Order and indicated that the Trustee objected to the nature of the Order. The Associate Chief Justice was then the caseflow manager of an action in process before the NSSC.

On Monday, June 20, 1994, Associate Chief Justice Palmeter filed an ex parte Order which stayed the June 17, 1994 Order of the Registrar of Bankruptcy "pending further determination" by the Court.

On June 29, 1994, Mr. Black filed a notice of motion in the NSSC to rescind the Order of June 20, 1994 pursuant to s. 187(5) BIA.

On or about July 13, 1994, Associate Chief Justice Palmeter reconvened the case management process to permit an **inter partes** hearing on the June 17, 1994 Order of the Registrar and his June 20, 1994 Order by which he stayed the Registrar's Order. Associate Chief Justice Palmeter determined that the Registrar's Order was improper and he refused to exercise his discretion to revisit his own Order staying the Registrar's Order or further, to entertain an appeal. He also determined that all applications by Mr. Black would be stayed until Mr. Black obtained legal counsel. In July, 1994, Associate Chief Justice Palmeter, by correspondence, informed Mr. Black to "not correspond further with this Court except through counsel".

An appeal was filed in NSCA Chambers by Mr. Blacknrespecting the July 13, 1994 decision and the June 20, 1994 Order. Mr. Black set these down for hearing in NSCA Chambers on August 4, 1994.

On August 3, 1994, Associate Chief Justice Palmeter issued Orders confirming an earlier decision (July 13, 1994) in which he, (1) dismissed with costs Mr. Black's application for an Order removing Boyne Clarke as solicitor for ABN Amro Bank, (2) dismissed Mr. Black's application for an Order for examination of certain parties under s. 163 BIA and, (3) issued an order, upon the motion of the Court, requiring that all applications by Frederick W. L. Black as an officer of any of his related companies and any applications by the said companies be stayed until such time as they are represented by legal counsel authorized to carry on the practice of law in the province of Nova Scotia.

On August 4, 1994, Mr. Black sought directions before me in Chambers. After hearing submissions from Mr. Black and counsel for other parties, I set down his application to appeal the August 3, 1994 Order of Associate Chief Justice Palmeter for hearing by a panel of judges of the Court of Appeal.

On August 8, 1994, Associate Chief Justice Palmeter ordered, (1) upon the motion of the Trustee, that the application made by NsC Corporation Limited dated December 14, 1992 for removal of Ernst & Young Inc. as Trustee of the Estate of NsC Diesel Power Incorporated, a Bankrupt, be dismissed, and (2) granted the application of ABN Amro Bank to dismiss all applications to annul the Bankrupt being applications of June, 1992, August 7, 1992, September, 1992, December, 1992 and October, 1993.

On August 10, 1994, Associate Chief Justice Palmeter granted, (1) approval to Krupp MaK Diesel under s. 38(1) BIA to enable it to take action against Mr. Black for fraud, and (2) dismissed the Inspector's application to challenge the votes of Krupp and the Bank cast at a creditors' meeting in November, 1993.

On October 4, 1994, Mr. Black applied to the Court of Appeal in Chambers for an Order to, (1) nullify the Orders of Associate Chief Justice Palmeter dated August 8 and 10, 1994, (2) to change the venue for the balance of the Bankruptcy proceedings to NSCA, and (3) out of pocket costs on the motions.

On October 26, 1994, Justice Pugsley, in Chambers (NSCA), heard the application brought by Mr. Black. He (Mr. Black) stated he was not appealing the August 8 and 10, 1994 Orders of Associate Chief Justice Palmeter. Justice Pugsley found that, (1) he had no authority to "nullify" the Orders of Associate Chief Justice Palmeter dated August 8 and 10, 1994, and (2) that these Orders of Associate Chief Justice Palmeter were not proceedings under the August 3, 1994 Order and thereby could not be stayed pursuant to s. 195 BIA, and (3) he denied the motion to change venue on the basis

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that there was no evidence that Associate Chief Justice Palmeter was biased toward Mr. Black at the time he heard the August 8 and 10, 1994 matters. (C.A. No. 107528)
On October 26, 1994, Justice Pugsley also heard two applications brought by Ernst& Young Inc. in its personal capacity and by ABN Amro Bank. The Court granted an Order for security of costs against Mr. Black personally on the appeal of Associate Chief Justice Palmeter's August 3, 1994 Order. (C.A. No. 107528)
On November 24, 1994, Mr. Black sought to appeal the October 26, 1994 Orders of Justice Pugsley. This he made by application before me in Chambers (NSCA) pursuant to s. 193(a), (b), (c) BIA. He requested that the decisions appealed from be reversed. I considered it doubtful whether it was possible to appeal an Order of the NSCA in Chambers to a panel of the NSCA under s. 193, and stated in part, ... "the major hurdle confronting the appellant/applicant in this proceeding is whether (a), (b) and (c) of s. 193 have any application at all. The bottom line of this application is to have me reverse and set aside the referenced Orders of Pugsley, J.A. or, possibly, grant leave to have them considered by a panel of the Court of Appeal."
In upholding the Orders of Pugsley, J.A., I concluded that on the facts the above sections of s. 193 BIA did not apply and there was no cause for the Court to exercise its discretion to grant leave under s. 193(e) [1994 CanLII 3970 (NS CA), (1994), 137 N.S.R. (2d) 37].

On November 24, 1994, I also heard two further applications in Chambers brought by Ernst & Young Inc. in its personal capacity and by ABN Amro Bank. I ordered that Mr. Black's appeal from Associate Chief Justice Palmeter's August 3, 1994 Order be dismissed on the grounds that he failed to comply with the Order of Justice Pugsley respecting the posting of security for costs.
On March 2, 1995, Mr. Black brought an application in Chambers before Justice Freeman seeking leave to appeal to the Supreme Court of Canada from judgments of the Nova Scotia Supreme Court being the August 3, 1994 Order of Associate Chief Justice Palmeter, and decisions of the Court of Appeal in Chambers being mine of November 24, 1994, or, in the alternative, for leave to have the appeal set down to be heard before "an independent and unbiased panel" of the Court of Appeal. Justice Freeman observed that the first portion of the application could not be supported given that the appeal of the August 3, 1994 Order had been dismissed by this Court. He further denied leave to appeal on the basis that s. 195 BIA made all decisions of the Court on any appeal final and conclusive. He concluded there was no procedure for an appeal to a panel of this Court from a Judge of the Court of Appeal (NSCA) sitting in Chambers [1995 CanLII 4352 (NS CA), (1995), 140 N.S.R. (2d) 279].
Mr. Black filed a notice of application for leave to appeal the decisions of the Court of Appeal in Chambers (November 24, 1994 and March 2, 1995) to the Supreme Court of Canada. He did not file all the necessary material within the required time period and as a result, he applied for an extension of time for filing.
On December 15, 1995, Mr. Justice Major of the Supreme Court of Canada responded to the application for directions from Mr. Black with respect to the style of cause and also his application for an Order extending the time for serving and filing the materials. Mr. Justice Major, for the Supreme Court of Canada, ordered that "the style of cause shall remain as determined by the Registrar and the motion for an extension of time is denied". The style of cause identified Frederick W. L. Black as the Applicant. (S.C.C. File No. 24792).
On February 26, 1996, Chief Justice Glube, by letter, responded to Mr. Black's request for the N.S.S.C to vary, rescind or review the August 3, 1994 Order of Associate Chief Justice Palmeter. Chief Justice Glube concluded that the Court had "nothing on which to base such a request" and noted that one and one-half years had passed since the August 3, 1994 Order.
On April 11, 1996, Mr. Black brought an **ex parte** application before Justice Goodfellow (NSSC) pursuant to s. 187(5) BIA for an order to rescind the August 3, 1994 Order of Associate Chief Justice Palmeter. The application was dismissed on the grounds that the August 3, 1994 Order of Associate Chief Justice Palmeter had been in force for two years and the Court refused to exercise its discretion to review and rescind it. (S.H. No. 80055)
On April 29, 1996, a notice of appeal from the decision of Justice Goodfellow was filed by Mr. Black and the named creditors of the Estate of NsC Diesel Power Inc.

3. **Jurisdiction of the Nova Scotia Court of Appeal**

(a) Section 187(5) BIA

The form of relief sought by Mr. Black on the motion before me on October 10, 1996 is the "review and rescinding" of Associate Chief Justice Palmeter's Orders dated June 20, 1994 and August 3, 8 and 10, 1994. Mr. Black relies in part upon s. 187(5) BIA to request that this Court review and if required rescind the Orders of Associate Chief Justice Palmeter. According to **Houlden and Morawetz**, pp. 501-502 and General Rules 49, 50 and 51, matters in bankruptcy on

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appeal are to be dealt with according to the Court's ordinary procedures, except as varied by the **Act** or the General Rules.

Counsel for the Superintendent in Bankruptcy and the Trustee submit the NSCA does not have the jurisdiction to review and rescind the Orders of Associate Chief Justice Palmeter under s. 187(5) BIA. They contend that under s. 187(5), the jurisdiction to review an Order in bankruptcy is vested only in the Court having original jurisdiction in bankruptcy and cannot be exercised by the Court of Appeal. Conversely, a Bankruptcy Judge has no power under 187(5) to review or rescind an Order made by the Court of Appeal. (See **Houlden and Morawetz,** p. 419) In this instance, the Orders of Associate Chief Justice Palmeter issued in June and August, 1994 were made in his capacity as the Court of original jurisdiction (NSSC) pursuant to s. 183(1) BIA. In my opinion a Chambers Judge of the Court of Appeal does not have the jurisdiction under s. 187(5) to review or rescind the referenced Orders of Associate Chief Justice Palmeter.

(b) Sections 183(2) and 193 BIA

The jurisdiction of the Court of Appeal in bankruptcy, including a judge in Chambers, is restricted by statute. Pursuant to s. 183(2) BIA, the Nova Scotia Court of Appeal is given the jurisdiction to determine appeals from the courts vested with original jurisdiction. The jurisdiction of this Court is restricted by s. 193 BIA in that the Court must satisfy itself that the matter being appealed comes within one of the categories capable of being appealed as provided by s. 193 BIA. Under s. 193 an appeal lies to the Court in the following cases:

(a) if the point at issue involves future rights;
(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
(c) if the property involved in the appeal exceeds in value ten thousand dollars;
(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars;
...

Subsection (e) of 193 provides for one further and more discretionary provision, namely, "in any other case by leave of a judge of the Court of Appeal."

Mr. Black has brought an application to rescind the Orders of Associate Chief Justice Palmeter. As was the case when Mr. Black appeared before this Court on November 24, 1994, "the bottom line of this application is to have the court reverse and set aside the referenced orders of Palmeter, ACJ or, possibly, grant leave to have them considered by a panel of the Court of Appeal."

(c) Jurisdiction of an Appeal Court Judge in Chambers in Bankruptcy

The General Rules provide that all applications to the Court are to be by motions [R. 12, R. 13, R. 14 BIA]. The court to which reference is made is that of original jurisdiction and not a court of appeal. Applied to these proceedings, Associate Chief Justice Palmeter of NSSC exercised his "original, auxiliary and ancillary jurisdiction" in issuing the referenced Orders. As a judge of the Court of Appeal, it would appear that I can exercise the jurisdiction conferred upon me under s. 183(2); namely, to hear applications for leave to appeal from Orders of courts of first instance. [See **NsC Diesel Power Inc. (Bankrupt)** 1994 CanLII 3970 (NS CA), (1994), 137 N.S.R. (2d) 37 at 40 (Chambers); see **Re: 58494 Ontario Ltd.** (1985), 57 C.B.R. (N.S.) 272 (Ont.)]

The motions brought by Mr. Black come before me as a judge sitting in Chambers of the Court of Appeal in Bankruptcy. BIA s. 183 and s. 193 provide that bankruptcy matters that come before the Court of Appeal are to be in the form of appeals.

General Rule 51 (BIA) provides that if there is nothing in the **Act** or **Rules** governing appeals, then the Provincial Rules of Civil Procedure apply. Neither the BIA nor its General Rules specify the composition of the Court when hearing an appeal. Reference to the Civil Procedure Rules indicates that all appeals, whether granted by way of leave or as of right, must be heard by a panel of three judges of the Court of Appeal [CPR 62.23(4)].

The Civil Procedure Rules make a clear distinction between the authority of a judge in Chambers and that of the Court itself. A Chambers Judge is authorized to hear applications that are procedural in nature but do not deal with the substantive merits of the main appeal. The applications which may be brought before a Chambers Judge of the Court of Appeal include an,

(1) application to amend a notice of appeal [R. 62.04(4)];
(2) application to set down times for hearing appeals by the Court [R. 62.19];
(3) application for a stay of a judgment pending appeal [R. 62.10];
(4) application for leave to appeal [R. 62.11];
(5) application for an Order for security for costs of appeal [R. 62.13];
(6) application to extend time for hearing appeals [R. 62.14 and R. 62.31(8)(e)], and

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(7) application to direct the perfection of an appeal [R. 62.17(3)].
See also **Future Inns Canada Inc. v. Labour Relations Board, et al.,** C.A. No. 131106, judgment delivered October 31, 1996, Hallett, J.A. in Chambers.

As already indicated, Mr. Black is seeking to have the Orders of Associate Chief Justice Palmeter (June 20, August 3, 8 and 10, 1994) "reviewed and rescinded". In the case of the June 20, 1994 and August 3, 1994 Orders, lifting the stays imposed by those Orders would appear to be one form of relief available to respond to his application. However, I am unable to find a prescribed Rule under the Civil Procedure Rules or those of the BIA that permits a Chambers Judge of the Court of Appeal, on an application, to grant or lift a stay, except where the stay is of an Order pending appeal [CPR 62.10].
The authority of a judge of this Court sitting in Chambers is prescribed by BIA and the Rules of Civil Procedure. I have concluded that such authority is limited to extending the time for filing a notice of appeal [CPR 62.31(8)(e); General Rule 49] and granting leave to appeal the Orders of Associate Chief Justice Palmeter [CPR 62.11; BIA s. 193(e)].
(d) Granting Leave to Appeal
Mr. Black must fall within one of the "cases" described in s. 193 (BIA) before the Court of Appeal can deal with his application as an appeal from the Orders issued by Associate Chief Justice Palmeter. In my opinion, subsections (a), (b), (c) and (d) of s. 193 (BIA) do not apply. [See **Houlden and Morawetz,** p. 432.] As already noted, there is a fifth "case" provided in s. 193(e) and that is the discretion given to me to grant leave "in any other case".
General Rule 49(2) requires that where an appeal is brought pursuant to s. 193(e), the notice shall combine the notice of appeal and the application for leave. Mr. Black has filed neither a notice of appeal nor an application for leave to appeal the Orders of Associate Chief Justice Palmeter.
General Rule 49(1) requires that notice of an appeal be served within ten days of the Order or decision appealed from. A notice to appeal from Associate Chief Justice Palmeter's orders of June 20, August 3, 8 and 10, 1994 is clearly out of time. However, a judge, sitting in Chambers, of the Court of Appeal has the discretion to extend the time for filing and serving such notice. In such a case the appellant must establish, (1) a bona fide intention, within the time limit to appeal, (2) a reason why the notice of appeal was not filed within the time limit, and (3) that there is an arguable ground of appeal. [See **Re Gigault** (1979), 32 CBR 190 (Ont. S.C.) [Bankruptcy]. The overriding concern is whether justice requires that an extension of time be given. [See **Bratti v. Wabco Standard Trane Inc.** 1994 CanLII 1261 (ON CA), (1994), 25 CBR (3d), 1 (Ont. C.A.); see also **Hanna v. Maritime Life Assurance Co.** reflex, (1995) 150 N.S.R. (2d) 34, (NSCA).] In particular, in **ABN Bank Canada v. NsC Diesel Power Inc.** (1993), 125 N.S.R. (2d) 387 (C.A.), Matthews, J.A. stated at pp. 387-388:

> [5] The applicant argues that although the five decisions before Justice Roscoe concerned the **Bankruptcy and Insolvency Act** she applied the test for granting an extension of time for an appeal as set out in **Maritime Co-op Services Ltd. and Martin v. Maritime Processing Co., Hogg and Hillcrest Rent-A-Car et al.** (1979), 32 N.S.R. (2d) 71; 54 A.P.R. 71 (C.A.), as summarized in **Nova Scotia Annotated Rules of Practice** (Ehrlich), at p. 308:
>
> "The time period for filing a notice of appeal should only be extended where:
>
> (1) The appeal has sufficient merit on the basis that it is arguable that the trial judge made a clear error in his perception and evaluation of the evidence;
>
> (2) There was a bona fide intention to appeal while the right to appeal existed;
>
> (3) A reasonable excuse for the delay in launching the appeal is advanced."
>
> [6] A study of the test to be applied in bankruptcy proceedings discloses that it is similar to that expressed in **Maritime Co-op** particularly in that the applicant must show a bona fide intention to appeal before the expiration date of the appeal period. See **Re Gigault** (1979), 32 C.B.R.(N.S.) 190 (Ont. S.C.); **Re Flair Construction Ltd.; Venables v. Bank of Montreal** (1981), 38 C.B.R.(N.S.) 92 (B.C.C.A.), and **Hansen (Trustee of) v. Hansen** (1988), 71 C.B.R.(N.S.) 79 (B.C.C.A.).

Counsel for the respondents argue that Mr. Black is in effect appealing the Orders of Associate Chief Justice Palmeter for a second time. Counsel for Ernst & Young Inc. in its personal capacity submits that the "motion is made in the context of his attempted appeal from the decision of Justice Goodfellow ... it is completely inappropriate to now submit, in the guise of a motion within an appeal, what is in substance an attempt to again appeal from the decision of Associate Chief Justice Palmeter."

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An examination of the grounds set forth in Mr. Black's notice of motion persuade me that they are in effect grounds of appeal. It cannot be said that the respondents have not received notice. The form of the notice was served on them on July 15, 1996. Mr. Black has furnished the Court with comprehensive legal arguments and documents, sufficient to enable me to exercise my discretion to consider granting Mr. Black leave to appeal on these matters. The notice of motions and the material filed in support, combined with the material filed on behalf of the respondents, provide sufficient detail of the circumstances surrounding the issue of the Orders to permit the matter to proceed as a leave application before a single judge of the Court of Appeal in Chambers. [See s. 193(e) BIA; see also **Re 58494 Ontario Ltd.** (1985), 57 CBR (NS) 272 (Ont.)]

It remains to be determined whether the discretion to grant leave to appeal from these orders should be exercised and on what grounds. Granting leave is within the discretion of the Court and in my view should only be granted if the "Order or decision" appealed from appears to be "contrary to law, amounts to an abuse of judicial power, or involves obvious judicial error, causing prejudice, for which there is no remedy." [See **Re Leard 1994 CanLII 2673 (ON CA), (1994),** 25 CBR (3d) 210 (Ont. CA) [In Bankruptcy].

In the opinion of counsel for ABN Bank, Ernst & Young Inc. (as Trustee and also in its personal capacity) and Krupp MaK, the issues relating to the June 20, August 3, 8 and 10, 1994 Orders of Associate Chief Justice Palmeter are **res judicata.** They also raise the same argument on the application to quash the notice of appeal from the decision of Justice Goodfellow.

Mr. Black submits that the merits of the Orders issued by Associate Chief Justice Palmeter have not been reviewed by the Court of Appeal. He contends that as such, his application is not barred by the doctrine of **res judicata** and should be "reviewed and rescinded" by the Court. I have concluded that it is necessary to consider each of the Orders issued by Associate Chief Justice Palmeter separately.

(i) The Order of June 20, 1994

On June 20, 1994, Associate Chief Justice Palmeter filed an Order staying the Order of the Registrar of Bankruptcy dated June 17, 1994. The Registrar's Order was issued following an **ex parte** application made by Mr. Black for an examination of personnel of the Trustee, Ernst & Young Inc., pursuant to s. 163 (BIA). Four of the individuals listed in the June 17 Order are the same as those listed in the present application made by Mr. Black, namely: Matt Harris, Harold Reiter, Peter Cleveland and Ross Landers, all or formerly, of Ernst & Young Inc.

The June 20, 1994 Order provided:

> UPON APPLICATION of the Trustee, Ernst & Young Inc. (the "Trustee") made **ex parte;**
> IT IS ORDERED THAT the Order for examination dated June 17, 1994, granted by A. Martin Smith, Q.C., Registrar, be ending further determination by this Honourable Court:
> IT IS FURTHER ORDERED THAT the Notice of Examination dated June 17, 1994, directed to Harold Reiter, be set aside pending further determination by this Honourable Court.
> [emphasis added]

Both Orders of June 17, 1994 and June 20, 1994 were issued **ex parte.** Both involve the bankruptcy of NsC Diesel Power Inc. Neither parties received notice of the application of the other.

Counsel for ABN Amro Bank indicates that the events surrounding the issue of the June 20, 1994 Order necessitated the **ex parte** stay because it was a matter of urgency.

In his summary, counsel for the Bank states:

> On June 17, 1994, Mr. Black applied **ex parte** to the Registrar for an Order for Examinations pursuant to s. 163(2) of the **Bankruptcy Act.** This Order obtained on a Friday, without notice to counsel, and delivered by facsimile to the office of counsel for the Estate after normal business hours, provided in part, for the discovery of legal counsels, accountants and bank officials as early as Monday, June 20, 1994, in Toronto.
> Counsel for the Bank contacted the Case Management Justice at his home late on the evening of June 17, 1994, to advise His Lordship of the existence of the Registrar in Bankruptcy's Order. The Case Management Justice directed that counsel for the Estate deliver a copy of the Order to his residence on Saturday, June 18, 1994. On Sunday, June 19, 1994, counsel for Ernst & Young applied on an **ex parte** basis before Associate Chief Justice Palmeter for an Order staying the notices of examination authorized by the Registrar in Bankruptcy's Order. On June 20, 1994, Associate Chief Justice Palmeter filed an Order staying the Order of the Registrar in Bankruptcy.

The events which followed the issue of the June 20, 1994 Order are somewhat blurred as a result of conflicting accounts and an imperfect record. It appears that on June 29, 1994, Mr. Black, on behalf of NsC Diesel Power

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Inc., advanced a notice of motion in the Supreme Court to rescind the June 20, 1994 Order of the Associate Chief Justice. This was based upon s. 187(5) BIA. On July 13, 1994, Associate Chief Justice Palmeter reconvened the case management process for an **inter partes** hearing. According to the summary provided by the solicitor for the Bank, it appears that on July 13, 1994, Associate Chief Justice Palmeter considered Mr. Black's request but refused to exercise his discretion pursuant to s. 187(5) BIA to revisit his June 20, 1994 Order which stayed the Order of the Registrar permitting the examination of certain persons.

The June 20, 1994 Order plus the August 3, 1994 Order resulted in the dismissal of Mr. Black's application for an Order of Examination and stayed all applications of Mr. Black and named companies until legal counsel was obtained.

In his response to the submissions of the respondents, Mr. Black maintains his original position as set forth in his application of June 29, 1994, namely, that Associate Chief Justice Palmeter did not have the jurisdiction to issue the stay and that it has "caused injustice which cannot be remedied except by the recession of the offending order". As authority for his position, Mr. Black relies in part on **Bache Halsey Shields v. Charles** 1982 CanLII 730 (BC SC), (1982), 140 DLR (3d) 378 (BCSC).

As a judge sitting in Chambers of the Court of Appeal, I am satisfied that I have the discretion to extend the time to file and serve a notice of appeal from the Order of Associate Chief Justice Palmeter dated June 20, 1994. In the circumstances, Mr. Black has satisfied the requirements to justify the exercise of such a discretion. The material indicates that he had a bona fide intention to file an appeal of the June 20, 1994 Order which he in fact did but after appearing in the Chambers of this Court, elected to proceed with an appeal of the August 3, 1994 Order. There is an arguable ground of appeal based on the circumstances which gave rise to the June 20, 1994 Order. Finally, given Mr. Black's inability to obtain an Order for Examination of certain of the Trustee's personnel, it is in the interest of justice that time should be extended for filing and serving a notice of appeal.

Such an appeal, if made, should be perfected according to Rule 49 BIA and CPR Rule 62. Mr. Black would be required to file a notice of appeal regarding the June 20, 1994 Order along with the necessary documentation to comply with CPR 62.

I am satisfied I have the discretion to grant Mr. Black leave to have the matter heard by the Court of Appeal pursuant to s. 193(e) BIA. By reason of the decisions/Orders of Associate Chief Justice Palmeter on June 20, 1994 and July 13, 1994, coupled with that of August 3, 1994, Mr. Black has not been able to apply to the Court for an Order for Examination of the individuals listed in the Registrar's Order of June 17, 1994. This is especially disturbing given the fact that other interested parties have been able to obtain such Orders in the Supreme Court without difficulty.

I am unable to say with certainty that the matter is in fact **res judicata.** In my opinion, Mr. Black should not be denied leave to appeal the June 20, 1994 Order on that ground. Until such time as the arguments on appeal with respect to that Order are determined, Mr. Black will not be in a position to apply for an Order for Examination of the individuals named in the Registrar's original Order of June 17, 1994.

In my opinion, leave to appeal the June 20, 1994 Order should be granted.

(ii) The Order of August 3. 1994

Mr. Black alleges that Associate Chief Justice Palmeter's Order of August 3, 1994 was issued "without notice, without evidence, without argument, without service" contrary to certain rules of the **Bankruptcy Act** and contrary to the principles of natural justice.

Counsel for ABN Amro Bank submits that the Order of August 3, 1994 is an "exemplification" to that of Justice Boudreau's Order dated February 13, 1993. He considered that unless Mr. Black retained legal counsel he was not permitted to represent NsC Corporation in proceedings relating to the bankruptcy of NsC Power Diesel Inc. Proceedings commenced by NsC Corporation in bankruptcy were stayed until such time as counsel was engaged. The decision upheld on appeal [reflex, (1993), 125 N.S.R. (2d) 223] was based on a concern that Mr. Black would be in a position of conflict should he be acting as counsel for the bankrupt while at the same time being called as a witness in the trial matters. Counsel opposing Mr. Black's application to "rescind" the August 3, 1994 Order have not raised this as an issue in the present proceeding before me. Nor does it appear to have been the basis for the Orders issued by Associate Chief Justice Palmeter which were made to determine "matters relating to the practice and procedure" before the Court.

The Order of Associate Chief Justice Palmeter dated August 3, 1996 states:

> UPON IT APPEARING necessary to determine matters relating to the practice and procedure before this Honourable Court relating to the matter therein.
> NOW UPON MOTION of the Court.

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> IT IS ORDERED that all applications presently before this Court by the bankrupt NsC Diesel Power Incorporated, NsC Consultants Limited and Nova Scotia Commonwealth (NsC) Consultants Limited, or by Frederick W. L. Black as an officer of any of the said companies, be and the same are hereby stayed until such time as NsC Diesel Power Incorporated, NsC Consultants Limited and Nova Scotia Commonwealth (NsC) Consultants Limited, or Frederick W. L. Black as an officer of any of the said companies, shall be represented by counsel authorized to carry on the practice of law in the Province of Nova Scotia, or until further order of this Court.
> AND IT IS FURTHER ORDERED that all further applications relating to the Bankruptcy of NsC Diesel Power Incorporated shall be made to the case management Judge of the Court assigned to this matter, rather than to the Registrar in Bankruptcy, until further order of this Court. [emphasis added]

On matters having to do, **inter alia,** with security for costs, an appeal of this Order was dismissed [1994 CanLII 3970 (NS CA), (1994), 137 N.S.R. (2d) 37 (CA)].
Mr. Black brought an **ex parte** application pursuant to s. 187(5) BIA before Justice Goodfellow in Chambers (NSSC) seeking an order to rescind the August 3, 1994 Order of Associate Chief Justice Palmeter. The Chambers Judge dismissed the motion principally because of the two year delay in bringing the application. Justice Goodfellow made the following comments:

> ... the reasons are, one in my view I have no discretion or authority to overrule and rescind an order that was granted almost two years ago by a fellow justice. Secondly, if I have such discretion, the delay in my view is such and the background of this matter is such that it's not an appropriate exercise in discretion almost two years later to resurrect something that ought to have been deal with before. And you have had a run at the Court of Appeal. I'm not a hundred percent certain what transpired there, quite frankly, but my view if I have discretion it would be inappropriate to exercise my discretion with such a long period of delay. So, there, you can take those remarks to the Court of Appeal. (S.H. No. 80055).

On April 29, 1996, a notice of appeal was filed by Mr. Black and "Creditors of the Estate" of NsC Diesel Power Incorporated. The notice is signed by Mr. Black and creditors (or inspectors) of the Estate Heather Cruickshanks, Hanson Josey and Gerry Dell. This notice relates to an intended appeal of the decision of Justice Goodfellow referenced above. Counsel for Ernst & Young Inc., in its personal capacity, and for the Superintendent of Bankruptcy submit that the only appealable matter before the Court is the appeal of Justice Goodfellow's decision of April 17, 1996.
Counsel for ABN Bank asserts that "to entertain a reconsideration of the August 3, 1994 Order at this time in the manner sought by Mr. Black, would be to permit Mr. Black to 'escape by the back door' the consequences of the previous orders of this Honourable court respecting the posting of security for costs, and the consequences of the failure to comply with such order."
In response, counsel for each of the respondents submits that there remains on record a valid and binding Order of this Court dismissing Mr. Black's appeal. They say that the matter having gone forward to the Supreme Court of Canada, where leave to appeal was denied, Mr. Black is precluded from the right to appeal for a second time.
Counsel for the respondents have brought an application before me to quash the notice of appeal from the April 17, 1996 decision of Justice Goodfellow. They rely in part upon the doctrine of **res judicata** and argue that the appeal is frivolous, vexatious and without merit (CPR 62.18).

The effect of the Order of August 3, 1994 has impaired Mr. Black's ability to advance his case in the matters relating to the bankruptcy of NsC Diesel Power Inc. Since the stay was issued Mr. Black, as an interested party in the bankruptcy proceedings, has been prevented from participating in the proceedings. This has both directly and indirectly affected his rights as an officer of the bankrupt companies. The difficulties with which he has been confronted are well illustrated by the on-going problems he faces in being precluded from seeking an Order for Examination unless he retains counsel.
Section 187(5) BIA provides that an application can be made to the Court of original jurisdiction to review and rescind an Order of that Court. In this instance, Mr. Black availed himself of that provision and applied to Justice Goodfellow to exercise his discretion under s. 187(5) to rescind the August 3, 1994 Order of Associate Chief Justice Palmeter. As noted above, the application was dismissed and Mr. Black filed a notice of appeal from that decision. In the ordinary course an appeal from the decision of Justice Goodfellow, already set in motion, will enable Mr. Black to challenge the August 3, 1994 Order of Associate Chief Justice Palmeter. In my opinion, Mr.

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Black should be permitted to set down his appeal to a panel of this Court from the decision and Order of Justice Goodfellow. It is my further opinion that that is a more acceptable course of action than granting leave to appeal the August 3, 1994 Order.

(iii) The Orders of August 8, 1994

On August 8, 1994, it was ordered in part that the application made by NsC Corporation Limited dated December 14, 1992 for the removal of Ernst & Young Inc. as Trustee of the Estate of NsC Diesel Power Inc., a bankrupt, be dismissed. Counsel for the Trustee, in its personal capacity, submits that Associate Chief Justice Palmeter had given written directions on June 2, 1994 to the effect that "if NsC Diesel Inc. intended to proceed with an application to remove Ernst & Young as Trustee, it was to file a renewed application with supporting affidavits and memorandum no later than July 8, 1994."

Mr. Black did not file a renewed application and the Trustee subsequently filed an application to dismiss Mr. Black's original application to have Ernst & Young removed. On August 8, 1994, Associate Chief Justice Palmeter granted the Order and dismissed the earlier application made by Mr. Black.

On October 26, 1994, Mr. Black appeared before Justice Pugsley of the Court of Appeal, in Chambers. He indicated that he was not appealing the Orders of August 8, 1996 but rather was bringing a motion to "nullify" and stay the Orders pending the hearing of the appeal of Associate Chief Justice Palmeter's decision of August 3, 1994. Justice Pugsley concluded that the Court did not have jurisdiction to "nullify" the Orders and no further remarks as to the merits of the August 8, 1994 Orders were made. Furthermore, Justice Pugsley was not prepared to exercise his discretion to grant Mr. Black leave to appeal the Orders. On November 24, 1994, I upheld the Order of Justice Pugsley and found that s. 193(e) did not then apply.

After considering the record, the arguments and submissions, I am not convinced that Mr. Black has a right of appeal under s. 193 BIA. I find no grounds to justify exercising my discretion to grant leave to appeal from the August 8, 1994 Orders.

(iv) The Orders of August 10 1994

On August 10, 1994, Associate Chief Justice Palmeter granted Orders enabling Krupp MaK Diesel, under s. 38(1) BIA, to commence an action against Mr. Black and by Order dismissed the Inspector's application to challenge the votes of Krupp and the Bank as cast at a creditors' meeting in November, 1993.

Mr. Black argues that since the August 10, 1994 Orders have not been considered by this Court, they are not **res judicata.**

Counsel for Krupp MaK, respondent on this motion, submits that the jurisdictional issue surrounding the s. 38 application was already determined by Associate Chief Justice Palmeter by concluding that "an intended Defendant of such an application is not entitled to notice and is not to have the status to contest the validity of the claim or to oppose leave."

Counsel for Krupp MaK further submits that Associate Chief Justice Palmeter decided the issue with respect to the vote of the creditors and that this matter has already been dealt with by the Court of Appeal. Counsel refers to the following passage from the transcript of the August 10, 1994 hearing at which Associate Chief Justice Palmeter stated:

> The second matter relates to Krupp. The Trustee indicates that he accepted Krupp's claim as a liquidated amount; that there was a problem with it. He went to Mr. Macdonald, solicitor for Krupp, to get an explanation. He got an explanation. He was satisfied with the explanation. He accepted that as a liquidated amount. That was his obligation. He was to determine if, in his opinion, it was a liquidated amount.
>
> Again, no bad faith. I have no problem in finding that the trustee acted properly, and that Krupp should been allowed to vote at the meeting. So far as the application is concerned, I will deny the application. And confirm the actions of the trustee at the meeting in the December 1993.

When Mr. Black appeared before Justice Pugsley on October 26, 1994, he indicated that he was not appealing the Orders of August 8 and 10, 1994, but rather was bringing a motion to "nullify the decisions and any Order flowing therefrom made by Associate Chief Justice Palmeter on August 8 and 10." He further requested a stay of the Orders pending the hearing of the appeal of Associate Chief Justice Palmeter's decision of August 3, 1994.

Justice Pugsley concluded that the Court did not have jurisdiction to "nullify" the Orders. In rendering his decision he commented on the August 10, 1994 (s. 38 application). Order issued by Associate Chief Justice Palmeter concerning the s. 38 BIA application and concluded that Mr. Black did not have a right to be given notice or to contest the Order which was sought.

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Justice Pugsley further concluded that the remaining three applications considered by Associate Chief Justice Palmeter on August 8 and 10, 1994, were not proceedings arising under the August 3, 1994 Order. As such, the Orders were not stayed under s. 195 BIA.

On October 9, 1996, Mr. Black appeared before this Court by way of an appeal from an Interlocutory Order of Justice M. MacDonald (NSSC) who dismissed the motion to strike Krupp's statement of claim. In his appeal, Mr. Black made the same argument as advanced before me on October 10, 1996, namely, that Associate Chief Justice Palmeter was without jurisdiction to issue the s. 38 Order because Krupp is not a creditor of NsC Diesel Power Inc. This Court in its judgment delivered October 22, 1996 in C.A. 128144, affirmed the decision of Justice M. MacDonald and in turn affirmed the August 10, 1994 Orders of Associate Chief Justice Palmeter.

The August 10, 1994 Orders of Associate Chief Justice Palmeter have been upheld as valid Orders at different times by both the NSSC and the NSCA. The cumulative effect of all this leads me to the conclusion that the merits of the August 10, 1994 Orders have been considered by both NSSC and NSCA. They are **res judicata.**

The applicant has not satisfied me that he has a right of appeal under s. 193 BIA. Mr. Black's motions with respect to the Orders of August 10, 1994 are dismissed.

(v) Decision of Justice Goodfellow (N.S.S.C.) - April 11 and 17 1996 - S.H. No. 80055

A further matter to be considered is whether this Court has the jurisdiction to entertain an appeal from the decision of Justice Goodfellow dated April 17, 1996. His decision was made in his capacity as a Judge of the Nova Scotia Supreme Court and within that Court's original, or auxiliary, or ancillary jurisdiction in bankruptcy pursuant to s. 183(1) BIA. Mr. Black brought an application before Justice Goodfellow under s. 187(5) BIA. The section permits the Court to review and rescind its own Orders.

The record reveals that Mr. Black and certain named creditors filed a notice of appeal from the decision of Justice Goodfellow which notice is dated April 29, 1996. To the best of my knowledge no hearing date has yet been set.

Mr. Black is required under the General Rules of BIA to establish that an appeal lies to the Court under s. 193 BIA. From all that I have seen, heard and read, I am persuaded that the appellants ought to be given such leave pursuant to s. 193(e) BIA. A hearing date suitable to the Court remains to be settled upon in Chambers of the Appeal Court.

4. **Application for Order of Examination, s. 163 BIA**

On August 15, 1996, Mr. Black made an application in writing to this Court requesting Orders of Examination pursuant to s. 163 BIA. By correspondence, he further clarified that his intention was to apply to this Court "for a proper examination order so that evidence would be available for the deliberation of the Court on the hearings of October 10, 1996."

Mr. Black wished to cross-examine certain of the Trustee's personnel in order to have the evidence available to refute the applications brought by the Trustee and the Bank to strike the amended notice of appeal. He was informed by letter on September 6, 1996 that this Court would further consider his application after having heard submissions on all of the applications to come before me in Chambers.

Section 163(2) BIA states:

> On the application of any creditor or other interested person to the court, and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

In his notice of motion, Mr. Black alleges in part that:

> 2. The Trustee Ernst & Young, assisted by the then solicitors of the Estate, Blake, Cassels & Graydon and Boyne Clarke, originally wished to examine Mr. Purchase and the other parties, but has refused all requests from the Inspectors to do so since an Inspectors' Resolution was passed as the request of the Trustee on February 26, 1992. The trustee Ernst & Young and a solicitor from Blake, Cassels & Graydon, acting in his capacity as solicitor for the estate, did conduct one examination, that being an examination of the files of the Corporation House Limited (CHL)/Benn brothers as the former consultants to NsC Corporation.
>
> ...
>
> 7. The Trustee and the past and present solicitors of the Estate sought to, and have, suppressed the evidence of the conversion of the assets of the Estate.

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> 8. The applicant Black and the Inspectors of the Estate for the creditors of the Estate have repeatedly sought to complete the examination as directed by resolution of the Inspectors of the Estate dated February 26, 1992.
>
> 9. The information believed to be in the knowledge of Messrs. Cleveland, Reiter, Harris and Landers will be of assistance to the creditors of the Estate and its officer in their presentations to the Court on future motions to be heard when the evidence is available to help recover Estate assets for the benefit of the Creditors.

Mr. Black filed, in addition to his own affidavit, a number of affidavits including those of the Inspectors dated July 8, 1994 and July 9, 1996. Numerous exhibits have also been put before the Court in support of this application for an Order for Examination.

Counsel for the Trustee describes the issues arising in connection with this motion in the following way: "In seeking orders under s. 163 of the BIA, Mr. Black is, in essence, asking the Court to assume original jurisdiction. Section 183(2) of the BIA makes it clear that this Honourable court is a court of appeal. By virtue of s. 183(1)(c), the NSSC is the Court of original jurisdiction. If Mr. Black seeks such an order the appropriate place is in the NSSC ..."

On July 11, 1996, Mr. Black along with Inspectors, appeared before Justice Roscoe in Chambers (NSCA) in bankruptcy with an application seeking an Order for Examination under s. 163 BIA of three of the named individuals in the present application before the Court. Justice Roscoe concluded she did not have jurisdiction to hear the matter.

Since that time the Inspectors have obtained an Order from the NSSC for the examination of Mr. Purchase of Ernst & Young Inc. Mr. Black, on the other hand, has had to bring an application to this Court to seek the rescission of the June 20, 1994 Order of Associate Chief Justice Palmeter and in the alternative apply to this Court a second time for an Order of Examination.

I am satisfied that the Court of Appeal does not have the jurisdiction to issue an Order for Examination under s. 163(2) BIA. Such an Order can only be issued by a Court of original jurisdiction and in the context of these circumstances that means the Nova Scotia Supreme Court. It appears that if Mr. Black is to be able to obtain such an Order, he will have to be successful in his appeal from the Order of Associate Chief Justice Palmeter of June 20, 1994 and that of Justice Goodfellow in order to lift the stays imposed on June 20 and August 3, 1994.

The relief which Mr. Black seeks from this Court will not be granted. To repeat, the Court of Appeal lacks the jurisdiction to do so.

5. **Cross-Application brought by Mr. Black to remove Trustee and the Solicitors for the Trustee and ABN Amro Bank**

Mr. Black has requested a variety of Orders including the removal of the Trustee, Ernst & Young Inc,, and a direction to the Official Receiver to appoint an interim trustee. In addition he has applied to have the solicitors for the Trustee and their agent and the solicitors for the Bank and their agent removed.

Mr. Black alleges that the solicitors for the Bank breached their fiduciary duty to their former client, the Estate of the Bankrupt, by using confidential documents of the Estate to the benefit of the Bank. He further alleges that the solicitors for the Trustee acted contrary to the provisions of the BIA and the "directions" of the Estate, and that the Trustee has been acting in a conflict of interest since its appointment.

Mr. Hill, counsel for the Trustee, in his written submission asserts, in part:

> ... The application is not in the nature of an appeal. Original jurisdiction for such an application would vest in the Supreme Court. Such an application was previously made two years ago and essentially abandoned by Mr. Black at the time of Justice Palmeter's order requiring he be represented by counsel.

As discussed earlier, the jurisdiction of the Court of Appeal in bankruptcy, including the Judge in Chambers, is defined in s. 183(2) BIA. It provides that the Nova Scotia Court of Appeal is vested with the jurisdiction to determine appeals from courts vested with original jurisdiction. Mr. Black's cross-motion has been brought before this Court, not as an appeal, but as a matter to be dealt with as if the Court had original jurisdiction. Since this Court does not have such jurisdiction, it is my opinion that as a Judge of the Court of Appeal, sitting in Chambers (bankruptcy), I do not have the authority to grant the Orders Mr. Black has requested. Accordingly, the relief sought by his motion will be refused.

6. **Applications brought by Krupp MaK Maschinenbau GmbH and Krupp MaK Diesel Inc., ABN Amro Bank, and Ernst& Young Inc., in its personal capacity and as Trustee**

(a) An application to quash the amended notice of appeal from the April 17, 1996 decision of Justice Goodfellow

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On April 29, 1996, Mr. Black, on his behalf and "Creditors of the Estate" of NsC Diesel Power Incorporated, filed a notice of appeal from the decision of Justice Goodfellow (NSSC) delivered on April 17, 1996. The notice is signed by Mr. Black and creditors/inspectors Heather Cruickshanks, Hanson Josey and Gerry Dell.
Counsel on behalf of the applicant creditors and the Trustee brought applications before me to strike the amended notice of appeal on the grounds that it is frivolous and without merit. They rely upon CPR 14.25 and 63.31.
They submit that Justice Goodfellow was correct in refusing to exercise his discretion to review an Order of the Supreme Court that has been upheld by the Court of Appeal and the Supreme Court of Canada. They reason that the appeal is frivolous. They also argue that the notice of appeal should be struck because it is without merit. They contend there was neither any change in circumstances nor any new evidence upon which Justice Goodfellow could rely to exercise his discretion to rescind the August 3, 1994 Order of Associate Chief Justice Palmeter. They contend that s. 187(5) BIA is not an alternative to an appeal. Counsel for the Superintendent of Bankruptcy also made submissions on these issues.
The threshold issue is whether a Judge of the Court of Appeal sitting in Chambers has the authority to quash a notice of appeal on the grounds that it is frivolous, vexatious and without merit.
A review of the Civil Procedure Rules persuades me that the authority of a Judge of the Court of Appeal sitting in Chambers to deal with applications to quash a notice of appeal is restricted to either hearing applications to set a date for the main application to be heard by the Court [R. 62.18 and R. 62.30(2)] or applications to quash a notice of appeal where the appellant has failed to perfect the appeal [R. 62.11(d) and R. 62.17(1)]. (See **Blackburn v. Blackburn** 1991 CanLII 2533 (NS CA), (1991), 105 N.S.R. (2d) 348.)
However, it is the Court which is authorized by CPR Rule 62.18(1) to hear applications to quash a notice of appeal where the application is based on the ground that the appeal is frivolous, vexatious or without merit. Rule 62.01(d) defines "Court" as the Nova Scotia Court of Appeal. Civil Procedure Rule 62.24(3) provides that matters heard on appeal by the Court shall consist of a Court of three or more judges. Therefore, the Rules distinguish between the authority of the Court to grant an Order to quash a notice of appeal under CPR 62.18 and that of a Judge sitting in Chambers under CPR 62.11(d), which refers to a failure to comply and CPR 62.17, which refers to a failure to perfect.

(As I indicated earlier in these reasons, a useful discussion on the jurisdiction of a Judge of the Appeal Court sitting in Chambers is contained in the decision of Hallett, J.A., in Chambers, in **Future Inns Canada Inc. v. Labour Relations Board (N.S.) et al.**, C.A. 131106, judgment delivered October 31, 1996.)
As a result of all this, I conclude that my role as a Judge in Chambers is limited to setting down a hearing date for an application to quash the amended notice of appeal so that it may be heard by a panel of Judges in the Court of Appeal. Accordingly, for the record, I must dismiss the application which is before me to quash the amended notice of appeal from the decision of Justice Goodfellow. However, that does not mean the application is at an end. It means that the applicants may, if they wish, apply to a Judge in Chambers in the Court of Appeal for a date to have the application to quash set down for hearing.
(b) Injunction and Stays of Proceedings
Counsel for Krupp MaK Maschinenbau GmbH and Krupp MaK Diesel Inc. have requested that the proceedings be stayed with respect to the issues in this matter because they contend that they have already been determined during the course of proceedings before the Supreme Court, the Court of Appeal and the Supreme Court of Canada. They also seek an injunction to restrain Mr. Black from instituting further proceedings with respect to all of these issues.
In light of the conclusions which I have reached, which are to grant leave to appeal the June 20, 1994 Order of Associate Chief Justice Palmeter and the April 17, 1996 decision of Justice Goodfellow, it is neither necessary nor appropriate for this Court to issue a stay or injunction with respect to those matters.
(c) Security for Costs
In the event an appeal goes forward, all counsel have requested on behalf of their respective clients Orders against Mr. Black for security of costs.
General Rule 49(3) provides that, "Before entering an appeal to the Court of Appeal, the appellant shall deposit in court $100 as security for costs." General Rule 49(4) gives the Court of Appeal authority to increase, decrease or dispense with security for costs.
I have concluded that,

(i) if an appeal of the Order of Associate Chief Justice Palmeter dated June 20, 1994 is entered, Mr. Black will be required to deposit $500.00 as security for costs, and
(ii) if the appeal from the decision of Justice Goodfellow (S.H. No. 80055) is carried forward, the appellant(s) are required to deposit $500.00 as security for costs.

(d) Costs in the event of the Cause

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Counsel for Krupp MaK Maschinenbau GmbH and Krupp MaK Diesel Inc. have requested costs of the application in the amount of $1,000.00 from each of the appellants, in any event of the cause payable forthwith. Counsel for ABN Amro Bank request that solicitor-client costs should be awarded against all of the named applicants jointly and severally based on the conduct of Ms. Cruickshanks, Mr. Dell and Mr. Josey in bringing the notice of appeal as well their past involvement in bringing proceedings along with those of their co-applicant, Mr. Black.

Counsel for Ernst & Young Inc. in its personal capacity has requested costs awarded on this application on a solicitor-client basis against Mr. Black personally.

Counsel for Ernst & Young Inc. as Trustee has requested costs on the appeal on a solicitor-client basis.

Since success on these applications is divided, I am not prepared to order costs either by way of a specific sum or solicitor-client or in the event of the cause, apart from the Order for security for costs noted above under that head.

7. **Summary of Conclusions**

(a) Leave is granted, for which time is extended, to appeal the Order of Associate Chief Justice Palmeter dated June 20, 1994. If an appeal is entered by Mr. Black he will be required to deposit $500.00 as security for costs.

(b) Leave is granted to appeal the decision of Justice Goodfellow dated April 17, 1996 being S.H. No. 80055. To carry forward the appeal, the appellant(s) is/are required to deposit $500.00 as security for costs.

(c) Leave is refused to appeal the Orders of Associate Chief Justice Palmeter dated August 8, 1994.

(d) Leave is refused to appeal the Orders of Associate Chief Justice Palmeter dated August 10, 1994.

(e) The application to the Court of Appeal for an Order of Examination pursuant to s. 163 BIA is refused.

(f) The cross application to remove the Trustee and the solicitors for the Trustee and the solicitors for ABN Amro Bank is refused. The additional relief sought in the cross application is also refused.

(g) The application to quash the amended notice of appeal from the decision of Justice Goodfellow in S.H. No.80055 is dismissed.

(h) The application for a stay of proceedings relating to all the issues in this proceeding and an injunction to prohibit Mr. Black from instituting further proceedings is refused.

(i) Applications by the respondents for a variety of costs including sums certain, solicitor-client and in the event of the cause are dismissed.

(j) Applications made by Mr. Black for all forms of relief other than those granted above are refused.

Lorne Clarke
C.J.N.S.

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APPENDIX A
Civil Procedure Rules
Amendment

In July, 1994 the **Civil Procedure Rules** [Rel.No.30 - 7/94] and forms were amended by :

a. deleting the words "Trial Division" and "Trial Division of the Supreme Court" wherever the same shall appear and substituting the words "Supreme Court of Nova Scotia."

b. deleting the words "Appeal Division" and " Appeal Division of the Supreme Court of Nova Scotia" and substituting the words "Nova Scotia Court of Appeal."

Rule 1: General Definitions

1.05 In these Rules, unless the context otherwise requires,

...

(c) "Court of Appeal" means the Nova Scotia Court of Appeal;

(d) "application", means an originating or interlocutory application, motion, or petition made,

(i) in the Appeal Division, to a judge or the judges of the Appeal Division or to the Appeal Division;

(ii) in the Trial Division, to a judge in chambers, or to the court when sitting during a trial or pursuant to an order;

(e) "court" means,

(i) in the Appeal Division, the court or a judge or the judges thereof, whether sitting in court or in chambers;

(ii) in the Trial Division, the court or judge or the judges thereof, whether sitting in court or chambers; and where a prothonotary has power to act, the prothonotary respectively;

...

(k) "judge" means a judge sitting in chambers;

...

(x) "Rules" or "these Rules" mean the Civil Procedure Rules;

Rule 62: Civil Appeals

Definitions

62.01 In this Rule unless the context otherwise requires:

(a) "appeal" means an appeal to the Court and includes a cross-appeal, an application for leave to appeal (where the application is not required by enactment to be made to a Judge), an application for a new trial or to amend, quash or set aside a judgment appealed from, and any matter reserved, case stated or reference presented to the Court under any enactment or rule;

...

(d) "Court" means the Appeal Division;

...

(g) "Judge" means a judge of the Appeal Division;

...

Applications respecting initiation of appeal

62.11 In addition to any other powers conferred by Rule 62 or otherwise, a Judge may at any time and on such terms as he deems just, on the application of the Registrar or of any party to an appeal, order that

...

(c) leave or permission to appeal be granted or refused where by an enactment application for leave or permission to appeal must be made to a Judge before notice of appeal can be given;

(d) a notice of appeal be quashed because of failure by the appellant to comply with Rule 62 in respect thereof, provided that seven days' notice has been given to the appellant.

Application to quash or dismiss an appeal

62.18 (1) Any party to an appeal may apply in accordance with rule 62.30 to the Court at any time before or at the hearing of the appeal for an order quashing the notice of appeal or dismissing the appeal on the ground that no appeal lies to the Court or that the appeal is frivolous, vexatious or without merit or that the appellant has unduly delayed preparation and perfection of the appeal.

(2) The applicant in his notice shall state the reasons supporting the application supported by an affidavit setting forth any relevant facts not set forth in the judgment appealed from.

(3) On the application, the Court may deprive an applicant of costs or impose costs on him, if he has unduly delayed an application which should have been made soon after the notice of appeal was filed.

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Terms and Sessions of the Court

62.24 (3) Three or more Judges, designated from time to time by the Chief Justice, shall sit on each appeal or other matter heard by the Court.

Applications to the Court

62.30 (1) An application may be made to the Court under this rule 62.30 in any appeal or other matter where by this or any other rule or by the Supreme Court of Canada Act or any other enactment application may be made by notice, motion, petition or otherwise to the Court.

(2) An intended applicant may apply **ex parte** to a Judge to set a time for the hearing of an application by the Court and to specify the form of notice and who should be served with it.

(3) The Applicant shall give seven days' notice (or such other notice as may be prescribed by the Rule or enactment authorizing the application) in the form and on the persons specified by the Judge or the Rule or enactment together with any supporting material and shall at the same time file with the Registrar five copies of the notice and all material so served.

Application to a Judge

62.31 (1) A Judge shall have and may exercise any and all power and authority necessary to deal with any application authorized to be made to him by this or any other rule or any enactment.

...

(8) A Judge may order that

...

(d) the application be referred to the Court for hearing and disposition;

(e) any time prescribed by this Rule be extended or abridged before or after the expiration thereof.

(9) Costs of any application shall be in the Judge's discretion.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Interpretation

s. 2. In this Act

"court", except in paragraph 178(1)(*a*) and sections 204.1 to 204.3 and subject to subsection 243(1), means the court having jurisdiction in bankruptcy or a judge thereof, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act;

Jurisdiction of Courts

s. 183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

...

(*c*) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

...

(2) The courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act. 183(3) Supreme Court of Canada.

Authority of the Courts

...

s. 187 (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

...

(8) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of that judge or officer is subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall, subject to section 193, be to the Court of Appeal.

Appeals

s. 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(*a*) if the point at issue involves future rights;

(*b*) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(*c*) if the property involved in the appeal exceeds in value ten thousand dollars;

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(*d*) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(*e*) in any other case by leave of a judge of the Court of Appeal.

General Rules

12. (1) Subject to these Rules, every application to the court shall be made by motion unless the court otherwise orders.

(2) The Superintendent may intervene in any petition or application to the court by filing notice of his intervention with the court.

...

38. The court may, upon **ex parte** application by a trustee, order a solicitor to submit his bill to the trustee or bring it into court to be taxed, and upon default by the solicitor the court may upon **ex parte** application by the trustee order him to distribute the proceeds in his hands without regard to the solicitor's bill.

...

49. (1) No appeal to the Court of Appeal shall be brought unless notice thereof is filed with the registrar and served within 10 days after the day of the order or decision appealed from or within such further time as a judge of the Court of Appeal allows.

(2) Where an appeal is brought under paragraph 193(e) of the Act, the notice shall combine notice of appeal and of application for leave to appeal.

(3) Before entering an appeal to the Court of Appeal, the appellant shall deposit in court $100 as security for costs.

(4) The Court of Appeal may increase, decrease or dispense with security for costs.

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C.A. No. 127649

NOVA SCOTIA COURT OF APPEAL
(In Bankuptcy)
IN THE MATTER OF:
THE BANKRUPTCY OF NsC DIESEL POWER INCORPORATED
BETWEEN:
FREDERICK W. L. BLACK (in all capacities)
Applicant/Appellant
- and -
KRUPP MaK MASCHINENBAU GmbH & KRUPP MaK DIESEL INC., ABN AMRO BANK CANADA, ERNST & YOUNG, INC. (Trustee) ERNST & YOUNG, INC. (Personal Capacity) SUPERINTENDENT IN BANKRUPTCY
Respondents
KRUPP MaK MASCHINENBAU GmbH & KRUPP MaK DIESEL INC., ABN AMRO BANK CANADA, ERNST & YOUNG, INC. (Trustee) ERNST & YOUNG, INC. (Personal Capacity) SUPERINTENDENT IN BANKRUPTCY
Applicants
- and -
FREDERICK W. L. BLACK (in all capacities)
Respondent
FREDERICK W. L. BLACK (in all capacities)
Applicant on Cross-Motion
- and -
ERNST & YOUNG, INC., (Trustee)
ABN AMRO BANK
Respondents on Cross-Motion
BEFORE THE HONOURABLE CHIEF JUSTICE CLARKE, IN CHAMBERS

Leard (Re) (In Bankruptcy), 1994 CanLII 2673 (ON CA) - Examination Appealed

Date:	1994-04-08
Docket:	c17477
Parallel citations:	114 DLR (4th) 135; 25 CBR (3d) 210; 71 OAC 56
URL:	http://canlii.ca/t/6k06
Citation:	Leard (Re) (In Bankruptcy), 1994 CanLII 2673 (ON CA), <http://canlii.ca/t/6k06> retrieved on 2013-09-11
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C17477
COURT OF APPEAL FOR ONTARIO
IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY) John H. McNair and
OF WAYNE S. LEARD, of the City) M.J. Butkus
of London, Province of Ontario) for the applicant,
and related actions consolidated) Anthony H. Graat
pursuant to an Order dated July)
8th, 1993) Douglas D. Langley
) for the Trustee in
) bankruptcy
)
) Paul Vickery and
) Diane Winters for Attorney
) General of Canada

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)
)
) Heard: March 30, 1994

WEILER J.A.:

The applicant seeks leave to appeal from the order of Kennedy J. The Bankruptcy judge dismissed the applicant's motion for an order quashing a subpoena issued by the Deputy Registrar in Bankruptcy at the request of the Trustee in Bankruptcy ("the trustee") of the bankrupt estates of Wayne S. Leard ("Leard") and Leard's corporations and directed to the applicant Anthony H. Graat under the authority of ss. 163 and 164 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("the Act").

On an application for leave to appeal pursuant to s.193(e) of the Act, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error, causing prejudice, for which there is no remedy: Houlden and Morawitz, *Annotated Bankruptcy and Insolvency Act, 1994* p.396; *McNab v. B.S.& B. Enterprises Ltd.* (1951), 32 C.B.R. 53.

Kennedy J. found that Leard was involved in a pyramid scheme involving many individuals over a two and one-half year period. A typical arrangement between Leard and an investor entailed an investment in the purchase of a designated item of distressed inventory intended to be re-sold within a short period of time at substantial profit. In some instances co-venture agreements were executed by Leard and the investor, with Leard personally guaranteeing the obligations contained in the agreements. In other cases, investors provided funds to Leard with no such documentation. The trustee determined from the records available that very few actual purchases took place. Most exchanges were paper fabrications. No verified transactions which agree with the provisions of any co-venture agreements located to date have been found. There are no accounting records which summarize the activity of the various bankrupt estates, and not all transactions have been analyzed to date. A few investors who got into the scheme early, including the applicant Graat, are up substantial sums of money; most are down. Leard has been charged by the R.C.M.P. with 41 charges of fraud and one charge of obtaining property using false pretences arising from his dealings with such investors. Through his company, Key Property Management Corporation, the applicant invested funds with two Leard companies. Available records indicate Key Property Management had about 120 transactions with the Leard companies totalling approximately $24,000,000, and that profits realized by the applicant from his dealings in 1992 alone, were in excess of 1.5 million dollars.

By letter dated May 6, 1993, the Trustee wrote to the applicant and to other individuals and companies who entered into co-venture agreements with Leard and requested delivery of copies of all co-venture agreements, cheques written for trades participated in with Leard, and particulars of amounts received in respect of such transactions. The applicant did not comply with that request.

At a meeting of inspectors of the bankrupt estates, held on June 14th, 1993, the Trustee sought approval to examine certain individuals regarding the affairs of the bankrupt companies under the power conferred in s.163(1) of the Act.

The relevant portion of s.163(1) of the Act states:

> The trustee ... on the written request or resolution of a majority of the inspectors, may without an order, examine under oath before the registrar of the court or other authorized person ... any person reasonably thought to have knowledge of the affairs of the bankrupt ... respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

The inspectors passed a reolution authorizing the Trustee to conduct examinations of Mr. Wes Suchard and Mr. Jack Asbury "and any other party where the Trustee believes an examination would be appropriate."

No specific request or authorization by the inspectors was given to the Trustee to examine the applicant under s.163 in respect of the affairs of Leard or his corporations.

By letter dated July 5th, 1993, the Trustee advised the applicant that, pursuant to s.164(1) of the Act, the Trustee required production of the information and documentation requested in its earlier correspondence failing which the Trustee would compel the applicant to attend an examination to provide such information pursuant to s.164(2).

Section 164(2) states:

> Where a person fails to produce a book, document or paper or to deliver property as required by this section within four days of his being required so to do, the trustee may, without an order, examine the person before the registrar of the court or other authorized person concerning the property, book, document, or paper that he is supposed to have in his possession.

On September 14, the Trustee requested the Deputy Registrar in Bankruptcy to issue a subpoena commanding the Applicant's attendance at the Official Examiner's office on September 24, 1993, "to give evidence on behalf of the above-noted

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bankrupt" and to produce "any and all documents, material or things relating in any way to this matter." The proposed examination was adjourned to determine the motion heard before Kennedy J.

The applicant seeks leave to argue five grounds of appeal:

1. Was the Trustee validly authorized to examine the Applicant by resolution of inspectors of the estate on June 14th, 1993?
2. Did the Bankruptcy judge err in law in refusing to stay the proposed examination of the Applicant as unfair and oppressive, having regard to the Trustee's stated intention to commence legal proceedings against the Applicant?
3. Does the *Charter of Rights and Freedoms* ("the *Charter*") apply to govern the conduct of the Trustee?
4. Do the powers of examination under ss.163 (1) and 164(2) of the Act offend the protection conferred by s.7 of the *Charter*?
5. Does the compelled production of documents under s.164(1) offend s.8 of the *Charter*?

With respect to the first ground of appeal, the applicant argues that it was necessary for the inspectors to name the applicant as a person to be examined. The applicant submits that the blanket resolution passed does not suffice because it delegates to the Trustee the power to determine who is to be examined and gives the Trustee an unbounded discretion which goes beyond the intent of the section.

Kennedy J. took judicial notice of the fact that in another case before the court, *C.I.B.C. v. Key Property et al.*, the accountant Suchard, who had been named, was found to be the architect of the Graat financial empire. He concluded that, by naming Suchard, Graat was surely in the category of those whom the inspectors had in mind when the non-specific authority was directed to the Trustee and that the resolution was properly worded.

I can find no error in this conclusion by Kennedy J.

With respect to the second argument, that the proposed examination would be unfair or oppressive, Kennedy J. concluded:

> It is clear that the Trustee will be unable to complete its investigation and prepare the necessary accounting without the examination of Graat and the production of the documentation which he has. The proposed examination is critical to the investigation of the Trustee. Graat is the sole means by which the Trustee can obtain the missing documentation.

There would appear to be an ample evidentiary basis for Kennedy J. to come to this conclusion and accordingly the proposed examination is not unfair or abusive. The applicant argued that the proposed examination was simply a "fishing expedition" by the Trustee on behalf of the creditors who were down, and that this was not the role of the Trustee. In response to this argument, the respondent points out that the Trustee could advance trustee's remedies of fraudulent preference and settlement as part of the role of Trustee and that this was an additional reason why the action was not abusive. I accept this submission.

I now turn to the issues raised pursuant to the *Charter*. In paragraph 59 of its factum the applicant's solicitors state, "the proposed examination and production of documents is confined to the interests of those creditors and is in no sense related to the administrative or regulatory interests of the community at large." Kennedy J. found that, on the basis of *R.W.D.S.U. v. Dolphin Delivery Ltd.* (1986), 2 S.C.R. at 594, the Trustee was not a government actor and that the element of government intervention sufficient to require invocation of the *Charter* had not been demonstrated. The applicant does not really quarrel with this conclusion nor, I believe, could he. See *Mancini (Trustee of) v. Falconi* (1989), 17 A.C.W.S. (3d) 44 (Ont. H.C.).

The arguments raised with respect to s.7 have, in my opinion, all directly or implicitly been dealt with by the Supreme Court's decision in *Thomson Newspapers Ltd. et al v. Director of Investigations and Research et al.* 1990 CanLII 135 (SCC), (1990), 54 C.C.C. (3d) 417 (S.C.C.) and *R. V. McKinlay Transport Ltd.* 1990 CanLII 137 (SCC), (1990), 47 C.R.R. 151 (S.C.C), and Kennedy J. so held.

The *Thomson Newspapers* decision is also authority for the proposition that there is no requirement to establish relevancy before a subpoena is issued. It is sufficient if the subpoena can be challenged by way of judicial review after its issue with respect to relevancy and this is an adequate guarantee against abuse of the power (pp.532 and 535).

The point with respect to S.8, which the applicant seeks to raise on appeal, would appear to have been settled by the recent decision of the Supreme Court of Canada in *Le Comité paritaire de l'industrie de la chemise et le Procureur general du Quebec* on January 27, 1994, with reasons to follow. In that case the court was asked to answer the following question:

> Are the provisions of s.22(e) of *An Act Respecting Collective Agreement Decrees*, R.S.Q., c. D-2, which confer powers of inspection inconsistent with s.8 of the *Canadian Charter of Rights and Freedoms*?

This Act constitutes the Joint Committee of the Garment Industry as a civil corporation and gives the director general, the secretary and any inspector the right, at any reasonable hour, to examine certain records which are required to be kept by employers. These same persons can also compel production of the records listed in paragraph (e) or any document relating to the application of the Act. Any employer who refuses to furnish a document to a person authorized under the Act commits an infraction and is liable to be fined.

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The judge of the Quebec Court (Criminal and Penal Division) indicated that the real question to be answered was whether *Southam*, *supra*, is applicable in the context of a law and a process of inspection which are civil and administrative in nature. Relying on *Zeigler v. Hunter* (1984), 8 D.L.R. 648, a decision of the Federal Court of Appeal, he dismissed the contention that paragraph (e) violated s.8 of the *Charter of Rights*. The Quebec Court of Appeal reversed the decision. The Supreme Court of Canada held that paragraph (e) did not violate s.8 of the *Charter*.

While the reasons of the Supreme Court are yet to be released, the principle involved would appear to be the same as that raised in the instant motion for leave to appeal. Accordingly, leave to appeal is denied on this point also.

The application for leave to appeal is dismissed with costs to the Trustee and the Attorney General of Canada.

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C17477
COURT OF APPEAL FOR ONTARIO
IN BANKRUPTCY
WEILER J.A.

IN THE MATTER OF THE BANKRUPTCY OF WAYNE S. LEARD, of the City of London, Province of Ontario and related actions consolidated pursuant to an Order dated July 8th, 1993

J U D G M E N T

Released: April 8, 1994.

Examination of bankrupt, trustee and others by a creditor - Sec. 163(2)
(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

Examination to be filed - Sec. 163(3)
(3) The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.
R.S., 1985, c. B-3, s. 163;
1997, c. 12, s. 96;
2004, c. 25, s. 77(E).

Trustee may require books and property of bankrupt to be produced - Sec. 164
164. (1) Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.

Examination on failure to produce - Sec. 164(2)
(2) Where a person fails to produce a book, document or paper or to deliver property as required by this section within five days after being required to do so, the trustee may, without an order, examine the person before the registrar of the court or other authorized person concerning the property, book, document or paper that the person is supposed to possess.

Compelling attendance - Sec. 164(3)
(3) Any person referred to in subsection (1) may be compelled to attend and testify, and to produce on his examination any book, document or paper that under this section he is liable to produce, in

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the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as would apply to a bankrupt.
R.S., 1985, c. B-3, s. 164;
1997, c. 12, s. 97;
2004, c. 25, s. 78(F).

Admission of debt - Sec. 165
165. (1) Where a person on examination admits that he is indebted to the bankrupt, the court may, on the application of the trustee, order him to pay to the trustee, at such time and in such manner as to the court seems expedient, the amount admitted or any part thereof either in full discharge of the whole amount in question or not, as the court thinks fit, with or without costs of the examination.

Admission of having bankrupt's property - Sec. 165(2)
(2) Where any person on examination admits that he has in his possession any property belonging to the bankrupt, the court may, on the application of the trustee, order him to deliver to the trustee the property or any part thereof at such time, in such manner and on such terms as to the court may seem just.
R.S., c. B-3, s. 135.

Penalty for failure to attend for examination - Sec. 166
166. If the bankrupt fails to present himself or herself for examination before the official receiver as required by paragraph 158(c) or if the bankrupt or any other person is served with an appointment or a summons to attend for examination and is paid or tendered the proper conduct money and witness fees as fixed by the General Rules but refuses or neglects to attend as required by the appointment or summons, the court may, on the application of the trustee or the official receiver, by warrant cause the bankrupt or other person so in default to be apprehended and brought up for examination.
R.S., 1985, c. B-3, s. 166;
2005, c. 47, s. 99.

Questions must be answered - Sec. 167
167. Any person being examined is bound to answer all questions relating to the business or property of the bankrupt, to the causes of his bankruptcy and the disposition of his property.
R.S., 1985, c. B-3, s. 167;
2004, c. 25, s. 79(F).

ARREST OF BANKRUPTS

Arrest of bankrupts under certain circumstances - Sec. 168
168. (1) The court may by warrant cause a bankrupt to be arrested, and any books, papers and property in his possession to be seized, and the bankrupt, books, papers and property to be safely kept as directed until such time as the court may order, under the following circumstances:

> **(a) if, after the filing of a bankruptcy application against the bankrupt, it appears to the court that there are grounds for believing that the bankrupt has absconded or is about to abscond from Canada with a view of avoiding payment of the debt in respect of which the bankruptcy application was filed, of avoiding appearance to the application, of avoiding examination in**

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respect of their affairs or of otherwise avoiding, delaying or embarrassing proceedings in bankruptcy against them;
(b) if, after making an assignment, it appears to the court that there are grounds for believing that the bankrupt has absconded or is about to abscond from Canada with a view of avoiding payment of his debts or of avoiding examination in respect of his affairs;
(c) if, after the filing of a bankruptcy application or an assignment, it appears to the court that there are reasonable grounds for believing that the bankrupt
(i) is about to remove their property with a view to preventing or delaying possession being taken of it by the trustee, or
(ii) has concealed or is about to conceal or destroy any of their property or any books, documents or writings that might be of use to the trustee or to the creditors of the bankrupt in the course of the bankruptcy proceedings;
(d) if the bankrupt removes any property in their possession above the value of twenty-five dollars without leave of the court after service of a bankruptcy application, or without leave of the trustee after an assignment has been made; or
(e) if, after the commencement of proceedings under this Act, he has failed to obey an order of the court.

Payments after arrest - Sec. 168(2)
(2) No payment or proposal made or security given after arrest made under this section is exempt from the provisions of this Act relating to fraudulent preferences.
R.S., 1985, c. B-3, s. 168;
2004, c. 25, s. 80.

DISCHARGE OF BANKRUPTS

Automatic discharge - Sec. 168.1
168.1 (1) Subject to subsections (2) and 157.1(3), the following provisions apply in respect of an individual bankrupt other than a bankrupt referred to in subsection 172.1(1):
(a) in the case of a bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction, the bankrupt is automatically discharged
(i) on the expiry of 9 months after the date of bankruptcy unless, in that 9-month period, an opposition to the discharge has been filed or the bankrupt has been required to make payments under section 68 to the estate of the bankrupt, or
(ii) on the expiry of 21 months after the date of bankruptcy unless an opposition to the discharge has been filed before the automatic discharge takes effect; and
(b) in the case of a bankrupt who has been a bankrupt one time before under the laws of Canada or of any prescribed jurisdiction, the bankrupt is automatically discharged
(i) on the expiry of 24 months after the date of bankruptcy unless, in that 24-month period, an opposition to the discharge has been filed or the bankrupt has been required to make payments under section 68 to the estate of the bankrupt, or
(ii) on the expiry of 36 months after the date of bankruptcy unless an opposition to the discharge has been filed before the automatic discharge takes effect.

Baker (In Bankruptcy) (Re), 1995 CanLII 353 (ON CA) - Appeal Against Automatic Discharge

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Date: 1995-03-08
Docket: m15035
Parallel citations: 22 OR (3d) 376; 31 CBR (3d) 184; 83 OAC 351
URL: http://canlii.ca/t/6jtv
Citation: Baker (In Bankruptcy) (Re), 1995 CanLII 353 (ON CA), <http://canlii.ca/t/6jtv> retrieved on 2013-09-11
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M15035

COURT OF APPEAL FOR ONTARIO

RE: **IN THE MATTER OF THE BANKRUPTCY OF SAMUEL R. BAKER of the City of Toronto, in the Municipality of Metropolitan Toronto in the Province of Ontario, Lawyer**
Frank S. Kisluk Limited, the Trustee of the Estate of Samuel R. Baker, a bankrupt v. Samuel R. Baker

BEFORE: OSBORNE J.A. (In Chambers)

COUNSEL: John Honsberger for the moving party bankrupt
Frank Bennett for the trustee in bankruptcy

HEARD: January 17, 1995

E N D O R S E M E N T

The bankrupt appeals, or seeks leave to appeal if required, from the order of Farley J. (made on an appeal from the order of the Registrar) in which he set aside the automatic discharge of the bankrupt issued under s. 168.1 of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 as am. S.C. 1992, c. 27 (the "Act") by resort to the provisions of s. 187(9) of the Act.

Whether leave to appeal is required, and if leave is required whether it should be granted, are issues which must be considered in the context of the facts of this matter. Thus, before turning to the relevant provisions of the Act and the issues raised by counsels' submissions, I will briefly refer to the evidence.

The Evidence and the History of the Proceedings

Samuel R. Baker (the "bankrupt") is a lawyer. He was a adjudged bankrupt upon the issuance of a receiving order, on May 7, 1993. Frank S. Kisluk Limited is the bankrupt's trustee in bankruptcy (the "trustee").

In the course of the administration of the bankrupt's estate, the trustee, through inadvertence, did not provide notice to the creditors, as required by s. 168.1 of the Act, of the bankrupt's entitlement to an automatic discharge nine months after the issuance of the receiving order. In addition, through inadvertence, the trustee did not file notice opposing the automatic discharge within the prescribed time. The trustee first became aware of these errors when he received a request from the bankrupt for his discharge certificate.

At that point the trustee moved before the Registrar for an order declaring that there had been no automatic discharge under s. 168.1 of the Act. The bankrupt moved at the same time for an order directing the trustee to issue a certificate of discharge. On May 19, 1994, the Registrar held that the bankrupt was disentitled to an automatic discharge because he had refused or neglected to attend a mandatory counselling session and had thus failed to comply with s. 157.1(3) of the Act.

On the appeal, on September 16, 1994, Ground J. set aside the Registrar's declaration on the basis of his conclusion that a bankrupt against whom a receiving order is made is excused from complying with the counselling provisions of s. 157.1 of the Act. He then issued a declaration that the bankrupt was discharged, as of January 21, 1994. He held that his disposition of the appeal before him was without prejudice to the right of the trustee, or any creditor, to make further application to set aside the bankrupt's automatic discharge.

The trustee, relying on that part of Ground J.'s order, then renewed its earlier application to the Registrar in which it sought an order setting aside the bankrupt's automatic discharge. The Registrar dismissed the trustee's application to set aside the bankrupt's discharge on the basis that the court had no jurisdiction to set aside an automatic discharge granted under s. 168.1 of the Act. The trustee appealed. On the appeal, Farley J. issued an order dated

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December 18, 1994 invalidating the automatic discharge. It is this order which the bankrupt now appeals or, in the alternative, seeks leave to appeal.

Is Leave to Appeal Required?

Section 193 of the Act provides for appeals to this court. I set out s. 193 in full below.

> **193.** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value five hundred dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

As can be seen, subsections (a) through (d) provide for an appeal to this court as of right where certain conditions are satisfied. Subsection (e) permits an appeal to this court with leave. The bankrupt asserts a right of appeal under s. 193(d) and alternatively seeks leave to appeal under s. 193(e).

In respect of subsection (d), there is no question that the unpaid claims of the creditors exceed $500. Thus that criterion is satisfied. The bankrupt submits that Farley J.'s order which set aside his automatic discharge has the same gravity and substance as a refusal to grant a discharge and that, accordingly, s. 193(d) is applicable. If it is, the bankrupt has automatic right of appeal to this court. The trustee argues that there has not been a grant or a refusal to grant a discharge and that subsection (d) cannot be invoked in this case.

The decision to grant or refuse a discharge is an exercise of judicial discretion. That discretion is capable of being exercised on erroneous principles or on the basis of a misapprehension of the evidence. Further exploration of the theoretical scope of error is not required. It is the potential for error that Parliament has recognized in creating this specific right of appeal from an order granting or refusing a discharge. Parliament made no specific reference in s. 193 of the Act to automatic discharges or to the automatic discharge process. It seems to me that there can be no direct right of appeal unless the granting of an automatic discharge can by analogy be viewed as coming within s. 193(d) of the Act.

Although an order to set aside an automatic discharge may have the same consequence for a bankrupt as the court's refusal to grant a discharge, the court's determination of these two questions is based upon very different considerations, as is amply illustrated by this case. It seems to me, therefore, that the power conferred upon the Court of Appeal to review discharge decisions should not be invoked to authorize the review without leave of decisions which are different in character, even if the decision in issue has a somewhat comparable effect as refusing to grant a discharge. In addition, both Farley J. and the Registrar concluded, I think correctly, that an automatic discharge issued under s. 168.1 does not involve "any order or decision of a judge" as those words appear in s. 193 of the Act. I think, therefore, that there is no direct right of appeal under s. 193(d). In my view, leave to appeal is required.

Analysis and Conclusion

Section 193(e) is wide in its scope. It provides access to an appeal to this court, with leave, from "any order or decision of a judge of the court". The section makes no reference to the basis upon which leave may be granted, or refused. It is necessary to examine Farley J.'s decision to determine whether this is a proper case for granting leave.

Farley J. agreed with the Registrar's conclusion that s. 187(5) does not provide a basis to set aside the discharge. That section provides:

> Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

Simply put, Farley J. agreed with the Registrar that an automatic discharge issued under s. 168.1(1)(f) is not an order made by the court. He concluded, however, that:

> ...[I]t would be a miscarriage of the bankruptcy regime (including the salutary benefits to the bankrupt) if an automatic discharge were to slip between the cracks through an error of the trustee.

Farley J. proceeded on the basis that there was a bona fide error by the trustee. He found that had the required notice been given by the trustee, at least one creditor would have objected. He also found that, in the circumstances, the trustee itself would have objected.

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Having concluded that s. 187(5) did not provide access to an order setting aside the automatic discharge, Farley J. turned to the provisions of s. 187(9). It provides:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

He characterized the automatic discharge provisions of s. 168.1 as a "proceeding" within the meaning of s. 187(9). Further, he viewed the failure of the trustee to give notice to those entitled to it by the provisions of s. 168.1 as an irregularity in that proceeding.

In the result, Farley J. informed counsel that he intended to invalidate the bankrupt's automatic discharge by resort to s. 187(9) of the Act, however, before doing so he permitted counsel to argue the issue of the application of s. 187(9) of the Act because it had not been addressed in counsels' submissions before him. Counsel accepted his invitation and the matter was further argued.

In his submissions on the scope and application of s. 187(9), counsel for the bankrupt argued that the automatic discharge process was not a "proceeding" or a "proceeding in bankruptcy" as referred to in s. 187(9). He also argued that the trustee's failure to provide notice to those entitled to it should not be taken as a "formal defect or irregularity" within the meaning of s. 187(9).

Farley J. did not accept these submissions and maintained his position characterizing the trustee's failure to provide the required notice as an irregularity in the proceeding in bankruptcy. He considered the existence of prejudice to the creditors and the public at large, finding that there was prejudice to both. He weighed against that finding the relative absence of prejudice to the bankrupt, apart from the bankrupt's ability to take advantage of what Farley J. characterized as an "administrative slip-up". In the result he applied s. 187(9) and set aside the bankrupt's automatic discharge. He required the trustee to give notice, as required, forthwith. He provided that if there were objections the trustee should arrange for a discharge hearing at the earliest opportunity.

Both parties look to the decision of *McNab v. B.S. and B. Enterprises Limited* (1951), 32 C.B.R. 53 (Que. C.A.) on the issue of what factors should be taken into account in deciding whether to grant leave. They submit that leave should not be granted unless: (a) the judgment appears to be contrary to law, (b) the judgment was an abuse of judicial power, or (c) the judgment involves an obvious error causing prejudice for which there is no other remedy.

These factors were referred to in a recent judgment of this court in *In the Matter of the Bankruptcy of R.J. Nicol Homes Ltd.* (unreported, released January 12, 1995).

An alternative test for determining whether leave to appeal should be granted was proposed by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.). McLachlin J.A. set out the following consideration: (a) is the point appealed of significance to the practice; (b) is the point raised of significance in the action itself; c) is the appeal *prima facie meritorious*; and (d) will the appeal unduly hinder the progress of the action?

In my view, the factors generally relevant to the issue whether leave to appeal should be granted are set out by Goodman J.A. in *Nicol Homes*. I do not, however, think that in each case all of the listed factors should be given equal weight. It seems to me that in this case, the question whether the trustee's failure to provide the notice required by s. 168.1 of the *Act* can be remedied by resort to s. 187(9) of the *Act* is a matter of considerable general importance in bankruptcy practice. It seems to me to be likely that from time to time trustees handling a large number of personal bankruptcies will, due to administrative errors, not comply with the requirements of s. 168.1 (see Annotation to *Re Tong* reflex, (1993), 23 C.B.R. (3d) 39 (Ont. Gen. Div.)). In addition, while I am satisfied that there are arguable grounds of appeal, I do not express any view as to whether the appeal will, or will not, succeed.

In the result, leave to appeal is granted. If so advised, the panel hearing the appeal may consider the broader issue whether leave is required in these circumstances.

Costs should be left to the panel hearing the appeal.

Application not precluded - Sec. 168.1(2)

(2) Nothing in subsection (1) precludes a bankrupt from applying to the court for a discharge before the bankrupt would otherwise be automatically discharged, and that subsection ceases to apply to a bankrupt who makes such an application.

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Application of other provisions - Sec. 168.1(3)
(3) The provisions of this Act concerning the discharge of bankrupts apply in respect of an individual bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction, to the extent that those provisions are not inconsistent with this section, whether or not the bankrupt applies to the court for a discharge referred to in subsection (2).

Notice of impending discharge - Sec. 168.1(4)
(4) The trustee shall, not less than 15 days before the date of a bankrupt's automatic discharge, give notice of the impending discharge, in the prescribed form, to the Superintendent, the bankrupt and every creditor who has proved a claim, at the creditor's latest known address.

Effect of automatic discharge - Sec. 168.1(5)
(5) An automatic discharge is deemed, for all purposes, to be an absolute and immediate order of discharge.

Certificate - Sec. 168.1(6)
(6) Without delay after a bankrupt has been automatically discharged, the trustee shall issue a certificate to the discharged bankrupt, in the prescribed form, declaring that the bankrupt is discharged and is released from all debts except those matters referred to in subsection 178(1). The trustee shall send a copy of the certificate to the Superintendent.
1992, c. 27, s. 61;
1997, c. 12, s. 98;
2004, c. 25, s. 81;
2005, c. 47, s. 100.

Oppositions to automatic discharge - Sec. 168.2
168.2 (1) The following provisions apply in respect of oppositions to the automatic discharge of an individual bankrupt:

(a) if the Superintendent opposes the discharge, the Superintendent must give notice of the opposition, together with the grounds for it, to the trustee and to the bankrupt before the automatic discharge would otherwise take effect;
(b) if a creditor opposes the discharge, the creditor must give notice of the opposition, together with the grounds for it, to the Superintendent, to the trustee and to the bankrupt before the automatic discharge would otherwise take effect; and
(c) if the trustee opposes the discharge, the trustee must give notice of the opposition in the prescribed form and manner, together with the grounds for the opposition, to the bankrupt and the Superintendent before the automatic discharge would otherwise take effect.

Application for hearing - Sec. 168.2(2)
(2) If the Superintendent, a creditor or the trustee opposes the automatic discharge of an individual bankrupt, the trustee shall, unless the matter is to be dealt with by mediation under section 170.1, apply without delay to the court for an appointment for the hearing of the opposition in the manner referred to in sections 169 to 176, and the hearing must be held

(a) within 30 days after the day on which the appointment is made; or
(b) at any later time that may be fixed by the court at the bankrupt's or trustee's request.

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2005, c. 47, s. 100.

Bank of Montreal v. Giannotti, 2000 CanLII 16928 (ON CA) Tests to Allow Discharge

Date:	2000-11-10
Docket:	C32401
Parallel citations:	51 OR (3d) 544; 197 DLR (4th) 266; 21 CBR (4th) 199; 138 OAC 316
URL:	http://canlii.ca/t/1fbfb
Citation:	Bank of Montreal v. Giannotti, 2000 CanLII 16928 (ON CA), <http://canlii.ca/t/1fbfb> retrieved on 2013-08-16
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DATE: 20001110
DOCKET: C32401

COURT OF APPEAL FOR ONTARIO

CHARRON, MACPHERSON AND SHARPE JJ.A.

BETWEEN:	)	
BANK OF MONTREAL	)	Joshua Siegel
	)	for the appellant
(Appellant/Creditor)	)	
and	)	
PETER GIANNOTTI	)	Peter Giannotti
	)	for the respondent
(Respondent/ Bankrupt)	)	
	)	Heard: September 26, 2000

On appeal from the judgment of Justice Donald Cameron dated June 22, 1999.

MACPHERSON J.A.:

INTRODUCTION

[1] Most first-time bankrupts apply for a discharge approximately one year after they have been adjudged to be bankrupt. Pursuant to s.172 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, a judge sitting in bankruptcy court has a wide array of remedies at his or her disposal. Positive remedies which will provide some measure of relief to the bankrupt include an absolute discharge, a conditional discharge and a suspended discharge.

[2] A judge is entitled, under s.172, to refuse to make any type of discharge order. This appeal raises the issue of what type of circumstances and conduct would justify such an order.

A. FACTUAL BACKGROUND

[3] Peter Giannotti was a major real estate development player in the booming economy of the late 1980s. As a senior officer and directing mind of the Carlyle group of companies, he was involved in scores of construction projects. Some of the projects were of quite grand proportions; one, for example, was a condominium development project in Mississauga consisting of four phases and approximately 2000 separate units. In Mr. Giannotti's words "those were the good old days."

[4] As the calendar turned from the 1980s to the 1990s, the good old days disappeared. Many of Mr. Giannotti's projects turned sour as purchasers declined to close transactions and as lenders withdrew their support.

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[5] Mr. Giannotti had provided personal guarantees to several institutional lenders. On May 7, 1998, one of those lenders, the Bank of Montreal, and the Ontario New Home Warranty Program petitioned Mr. Giannotti into bankruptcy. At that juncture, he owed almost 30 creditors somewhere between $25,000,000 and $29,000,000, including $892,000 to the Bank of Montreal, $335,000 to the Ontario New Home Warranty Program and almost $19,000,000 to Montreal Trust.

[6] Just over a year later, Mr. Giannotti applied for a discharge. The Bank of Montreal opposed the discharge. The trustee in bankruptcy filed a report in which he was highly critical of Mr. Giannotti. Two other creditors, through counsel, appeared at the discharge and were given standing to cross-examine Mr. Giannotti.

[7] The discharge hearing took place before Cameron J. on June 22, 1999. At the conclusion of the hearing, Cameron J. granted a combined suspended and conditional discharge. His endorsement was:

> Discharge granted but operation of this order is suspended until 1 Jan. 2000. Discharge is conditional on bankrupt entering into an agreement with the Trustee to pay to the Trustee for the creditors one third of the amounts received by or for the Bankrupt prior to 1 Jan. 03 as evidenced by income tax returns of the Bankrupt together with a summary of the Bankrupt's business activities as sworn by him, by 30 Apr. of the year following that to which the return and summary relate.
>
> The Trustee may continue his rights to examine under the Bankruptcy Act, including the trustees of the Giannotti Family Trust who this court thinks have knowledge of the affairs of the Bankrupt, including the funding of the trust and placing of assets with it and the rights of the Bankrupt and members of his household under the Trust.

[8] **The Bank of Montreal appeals Cameron J.'s decision.** In its Notice of Appeal, the bank sought relief as follows:

> THE APPELLANT ASKS that the order be set aside and varied as follows:
>
> 1. That the application for discharge be refused.
> 2. In the alternative, that the terms of the Order of Mr. Justice Cameron remain intact save for the discharge granted on the condition that he pay the sum of $250,000 to the benefit of the estate.

[9] At the appeal hearing, the bank withdrew its request for alternative relief in the form of a conditional order requiring Mr. Giannotti to pay $250,000 to the benefit of the estate. The bank submits that Mr. Giannotti's post-bankruptcy conduct has been so egregious as to disentitle him to any relief.

B. ISSUE

[10] **The sole issue in this appeal is whether the bankruptcy judge erred by not refusing the bankrupt's application for discharge.**

C. ANALYSIS

[11] There is no question that a principal purpose of the *Bankruptcy and Insolvency Act* (*"BIA"*) is the rehabilitation of unfortunate debtors. As expressed by Houlden and Morawetz in their treatise, *Bankruptcy Law of Canada* (3rd ed., rev., Vol. 1, 1998) at p. 1-5:

> The Act permits an honest debtor, who has been unfortunate in business, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community.

[12] However, the rehabilitation of the debtor must be balanced with the interests of creditors who have lost money because of the bankrupt's conduct. This requirement of a balanced approach in discharge hearings was well articulated by Adams J. in *Re Goodman*, [1995] O.J. No.72 (Gen. Div.), at para. 1:

> The rehabilitative purpose of bankruptcy legislation is well understood. See *Re Willey* (1981), 38 C.B.R. (N.S.) 24 (Ont. S.C.). Individuals and society generally benefit from a process by which the crushing burden of financial debt can be lifted, thereby permitting a bankrupt to resume the life of a useful and productive citizen. See *Re Shakell* ...(1988), 70 C.B.R. (N.S.) 270 (Ont. S.C.) Equally important, however, is the integrity of the bankruptcy process itself. While the central purpose of the statute is to enable the honest but unfortunate debtor to make a fresh start, parity of treatment between debtors and fairness to creditors need to be kept in mind.

[13] Both Adams J. and Houlden and Morawetz use two adjectives to describe a debtor who should be entitled to the relief of a discharge – **"unfortunate" and "honest"**. I have no doubt that Mr. Giannotti has been unfortunate. The downturn in the real estate market in the late 1980s and early 1990s ruined many developers. Mr. Giannotti, with millions of dollars in personal guarantees behind his companies, was one of them.

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[14] However, I do not think that the adjective "honest" applies to the manner in which Mr. Giannotti conducted himself in this proceeding. My review of his testimony at the discharge hearing leads to the inevitable and overwhelming conclusion that Mr. Giannotti has not told the truth to his creditors, his trustee in bankruptcy, or the court at the discharge hearing. In *Re Miklos Gestetner and Phyllis Pearl Gestetner* (25 November 1996), (Ont. Gen. Div.) [unreported], Sharpe J. said, at para. 7:

> An honest but unfortunate debtor is entitled by the law to have a fresh financial start. The applicants may have been unfortunate, but I find that they have not been honest. In my view, they are not entitled to have the fresh start the law allows them unless they are prepared to be honest with their creditors and with the court. The court has an obligation to ensure that the integrity of the bankruptcy law is maintained. The applicants have refused to provide the court with the information required to make an appropriate judgment. In light of the evidence the applicants have offered and the level of disclosure they have made as to the true state of their financial affairs, I find that they are not entitled to discharges on any terms.

[15] I agree entirely with the philosophy manifest in this passage – a dishonest debtor, and a debtor unwilling to make full disclosure of his financial affairs, is entitled to *no* relief under the *BIA*. For several reasons, I find that every word of the above passage applies to Mr. Giannotti and, therefore, like the bankrupts in *Re Gestetner*, he was entitled to no relief at his discharge hearing.

[16] First, Mr. Giannotti did not co-operate with his trustee in bankruptcy as the trustee sought to administer his estate. Pursuant to s.170 of the *BIA*, the trustee filed a report on February 19, 1999 in which he criticized Mr. Giannotti in a number of aspects, including his refusal to provide information about a family trust, his inability to explain why he disclosed different years of birth on his statement of affairs and during his examination by the official receiver, and his failure to co-operate in appearing for an examination pursuant to s.163 of the *BIA*.

[17] In a supplementary report dated June 1, 1999, filed three weeks before the discharge hearing, the trustee expanded on his criticism of Mr. Giannotti. According to the trustee, Mr. Giannotti was continuing in his refusal to provide information about a family trust, he had put the trustee to unnecessary expense by frivolous and vexatious actions regarding his s.163 examination, he had refused to comply with undertakings after the s.163 examination, and he refused or was unable to answer questions about how rent and office expenses were being paid for a business in which Mr. Giannotti appeared to be involved after he became bankrupt.

[18] In my view, the integrity of the bankruptcy system requires a bankrupt to co-operate with the trustee. See *Mancini (Trustees of) v. Mancini* (1987), 63 C.B.R. (N.S.) 254 (Ont. S.C.), *Re Adelman* (1945), 26 C.B.R. 152 (Ont. S.C.), and *Re Rahall* 1997 CanLII 14970 (AB QB), (1997), 49 C. B. R. (3d) 268 (Alta. Q.B.). The trustee is appointed by order of the court. After a receiving order is made by the court, the trustee administers the bankrupt's estate on behalf of the court. Accordingly, a bankrupt who seeks relief, by way of discharge, from the court *must* co-operate fully with the trustee before seeking that relief. Mr. Giannotti did not comply with this obligation.

[19] Second, Mr. Giannotti's conduct and evidence with respect to the Giannotti Family Trust was, and continues to be, completely unacceptable. The family trust was established in the late 1980s with professional assistance from a major Toronto law firm and a sophisticated international accounting firm. In his testimony at the discharge hearing, Mr. Giannotti was extremely vague and unforthcoming about the origins, funding and beneficiaries of the trust. He tried to portray the trust as the brainchild of his father, a man of humble background and no business experience, and his wife, a part-time school teacher. Eventually, the bankruptcy judge intervened and asked a series of probing questions about the trust. Mr. Giannotti continued to be highly evasive, which ultimately provoked this observation from the bankruptcy judge:

> All right, now, I'm having trouble accepting that you didn't know who the beneficiaries were, you didn't know who funded this trust, only that you told Arthur Anderson and Borden Elliot you wanted to minimize your tax exposure, draft the trust agreement and that that was the extent of your understanding of the trust arrangement. As they say down in Georgia, I'm from Missouri.

[20] In my view, Mr. Giannotti's failure to co-operate with the trustee and his testimony at the discharge hearing concerning the family trust constitute serious barriers to a discharge. When the trust was established, Mr. Giannotti was a very successful property developer operating, by his own count, 48 companies in a boom economy. It is difficult to imagine that the family trust is not a substantial asset about which the court is entitled to know a good deal more. It is also discreditable that Mr. Giannotti would try to hide his own detailed knowledge about the trust behind his father and wife.

[21] Third, Mr. Giannotti was evasive and inconsistent with respect to funding for an office he used after he became bankrupt. The office consisted of approximately 6000 square feet and had a rent of over $5000 a month. Mr. Giannotti

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testified that Carlyle Management Services paid for the office rent, telephone expenses, and the salary of his sister who answered the telephone. He admitted that his sister answered the telephone "Ameriplex", yet he insisted that there was no relationship between Ameriplex and the Carlyle group of companies. After exploring this matter in some detail through questions, the bankruptcy judge observed: "I find this is an unusual relationship, something's missing, but maybe we'll find out later".

[22] Fourth, in an income and expense statement dated May 31, 1999, just three weeks before his discharge hearing, Mr. Giannotti declared his monthly income as $186, all of it coming from family members. Not only does this strain belief in light of the fact that he admitted going to work at the Ameriplex/Carlyle office almost every day; it is also inconsistent with his testimony that various family members had loaned him at least $130,000 in the year after he became bankrupt.

[23] Fifth, it is clear that Mr. Giannotti engaged in at least one development venture after he was petitioned into bankruptcy. He admitted to the bankruptcy judge that the trustee had told him that he could not engage in business deals while he was an undischarged bankrupt. After several pointed questions from the bankruptcy judge, Mr. Giannotti finally conceded, referring to the business deal, that "I ought not to have signed it".

[24] Sixth, I return to Adams J.'s observation in *Re Goodman* that there should be "parity of treatment between debtors and fairness to creditors" in the bankruptcy process. Mr. Giannotti owes more that $25,000,000 to almost 30 creditors. He has not paid one cent to the trustee for the benefit of those creditors. Yet, to cite but one example, after he became bankrupt he continued to be a member at the exclusive King Valley Golf Club where the annual membership is approximately $4500. This is hardly parity and fairness.

[25] The factors and conduct that I have summarized clearly placed Mr. Giannotti within s. 173 of the *BIA*. The bankruptcy judge could not have granted him an absolute discharge; his options were to grant either a suspended discharge or a conditional discharge, or to refuse to order any kind of discharge. The bankruptcy judge chose a combination of a suspended discharge and a conditional discharge.

[26] The case law establishes that a complete refusal of any type of discharge is an unusual order given the *BIA's* emphasis on rehabilitation of the debtor. In *Re Adelman*, Urquhart J. said that a refusal of discharge "is a harsh step ... which should be resorted to only in extraordinary cases" (*supra*, at p. 153). However, in this case, given Mr. Giannotti's conduct and testimony, a refusal of any kind of discharge was, in my view, required. Mr. Giannotti was simply too uncooperative, evasive and untruthful with both the trustee and the bankruptcy judge.

[27] The *BIA* seeks to provide relief to honest and unfortunate debtors. The word 'honest' introduces a strong element of integrity into the administration of the Act. In my view, a reasonable member of the public would seriously question the integrity of the *BIA* if Mr. Giannotti was given any form of relief at this juncture. He has not been honest with the trustee or the bankruptcy court. He is free to re-apply for a discharge, but he must co-operate with the trustee and make full disclosure of the relevant facts.

DISPOSITION

[28] I would allow the appeal. The applicant is entitled to its costs of the appeal and the discharge hearing.

Released: November 10, 2000

(signed) "J.C. MacPherson J.A."
(signed) "I agree L. Charron J.A."
(signed) "I agree R. J. Sharpe J.A."

Dawson (Syndic de), 2011 QCCA 235 (CanLII) Unconventional Student Loan Discharge and Criteria for Discharge

Date:	2011-02-09
Docket:	500-09-019179-084; 500-11-032395-085
URL:	http://canlii.ca/t/fnlbp
Citation:	Dawson (Syndic de), 2011 QCCA 235 (CanLII), <http://canlii.ca/t/fnlbp> retrieved on 2013-08-16
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Court of Appeal
Dawson c. Banque Royale du Canada, 2008 QCCA 2287 (CanLII) - 2008-12-03
Superior Court
Dawson (Syndic de), 2008 QCCS 5072 (CanLII) - 2008-10-30
Legislation cited (available on CanLII)
Bankruptcy and Insolvency Act, RSC 1985, c B-3 — 136; 173(1); 173(3); 176(3); 178(1)
Canada Student Financial Assistance Act, SC 1994, c 28
Canada Student Loans Act, RSC 1985, c S-23
Decisions cited
Dolgetta (Re), 2008 ABQB 556 (CanLII)
Houle c. Roy, 1989 CanLII 1097 (QC CA)
Insley (Re), 2007 SKQB 383 (CanLII)
Nasrin Karim Professional Corporation v. Bank of Nova Scotia, 2007 ABCA 10 (CanLII)

Unofficial English Translation

Dawson (Syndic de) 2011 QCCA 235
COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-019179-084
(500-11-032395-085)

DATE: February 9, 2011

CORAM: THE HONOURABLE JACQUES CHAMBERLAND, J.A.
JACQUES A. LÉGER, J.A.
GUY GAGNON, J.A.

IN THE MATTER OF THE BANKRUPTCY OF:

FUI YAO DAWSON
APPELLANT – Bankrupt debtor
and

ROYAL BANK OF CANADA
RESPONDENT – Opposing creditor
and
DE BILLY TREMBLAY ET ASSOCIÉS INC., in its capacity as trustee
IMPLEADED PARTY- Trustee

JUDGMENT

---

[1] THE COURT: On appeal from a judgment delivered from the bench on October 20, 2008 (reasons transcribed on October 30, 2008, and corrected on November 6, 2008), by the Superior Court, District of Montreal (the Honourable Mr. Justice Pierre Journet), Bankruptcy Division, which allowed the respondent's appeal from a judgment rendered on July

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18, 2008, by the registrar in bankruptcy (Mtre Pierre Pellerin), which ordered the appellant's conditional discharge from his debts.

[2] After having examined the file, heard the parties, and on the whole deliberated;

[3] For the reasons of Léger J.A., with which Chamberland and Gagnon, JJ.A. agree:

[4] ALLOWS the appeal in part for the sole purpose of substituting paragraph 31 of the judgment under appeal, as corrected, for the following paragraph:

Order the bankrupt to pay the amount of $199,903.61 to the trustee of the estate in the bankruptcy of Fui Yao Dawson, for the benefit of the body of creditors, in equal and consecutive payments of $200 per month from the month of December of 2008, until the month of June of 2011, and to then reimburse the remaining balance owed in minimum $10,000.00 yearly increments, with the possibility of making anticipatory payments at all times on the balance owed.

[5] WITH COSTS against the appellant.

JACQUES CHAMBERLAND, J.A.

JACQUES A. LÉGER, J.A.

GUY GAGNON, J.A.

Mtre Jean Lozeau
JOLI-COEUR LACASSE
For the appellant

Mtre Julie Frégeau
GOWLING, LAFLEUR, HENDERSON
For the respondent

Date of hearing: September 16, 2010

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REASONS OF LÉGER, J.A.

[6] This appeal concerns the conditions required for the appellant's discharge from his bankruptcy, to which the Royal Bank of Canada ("RBC") is opposed after having granted him a loan to finance his studies. Unlike government loans,[1] this type of loan is not explicitly protected from opportunistic bankruptcies in the Bankruptcy and Insolvency Act[2] ("BIA"). This appeal considers the relevant criteria in matters involving discharge and the terms of reimbursement of such loans.

I. BACKGROUND

[7] In broad strokes, the material facts necessary to understanding the present case are as follows.

[8] The appellant, from Ghana, is a foreign student who arrived in Montreal in 1999 to study biochemistry. After receiving his bachelor's degree in 2002, he worked at various odd jobs until the end of the summer of 2003. He then decided to return to school to obtain a university degree in podiatry.

[9] Admitted to the Faculty of Medicine at Finch University in Chicago, the appellant realized that he would be facing annual expenses of about US$40,000, that is, US$24,000 in school fees and about US$16,000 in living expenses.

[10] In September of 2003, after obtaining a first student loan from the Quebec government and another from the SLM Corporation (Sallie Mae), an American company, the appellant called on the respondent to help him finance his schooling in the United States for the three years to come. After reviewing his file and taking into account the fact that once the appellant completed his studies he would earn substantial income, the respondent made a Royal Credit Line Agreement for Students[3] available to him. Initially in the amount of $20,000 as at December of 2003, the appellant gradually increased this line of credit to $200,000, performing a final levy in the amount of $8,000 in May of 2007, a few weeks prior to obtaining his degree on June 4, 2007.

[11] The appellant obtained this line of credit without having to offer security or a guarantor. According to his explanations, he was to begin reimbursing the capital[4] of the accumulated debt only once he had obtained his first degree.

[12] Once he obtained this degree, however, the appellant chose to perfect his specialization in podiatry for four more years by accepting a residency position in a Boston hospital. During that time, his income was approximately $2,500 per month (net) with foreseeable monthly expenses of approximately $2,300. It was only upon finishing his residency, which was due to end in June of 2011, that his income would increase substantially to between US$93,000 and US$150,000, depending on the position he would then find.

[13] In June of 2007, the respondent required that the appellant begin making monthly payments of $1,500 ($1,000 in interest and $500 in capital), which amount he refused to pay, arguing his financial incapacity to meet such an obligation during his residency.

[14] In the fall of 2007, the appellant instead proposed to the respondent a deferral of the reimbursement of the capital until the end of his residency in June of 2011, while offering to pay monthly instalments of $200-300. The respondent refused, but stated that it was amenable to an increase of the line of credit, which the appellant refused because he was wary of increasing his indebtedness.

[15] Faced with this deadlock, the appellant made a voluntary assignment into personal bankruptcy on November 28, 2007, without first presenting a proposal in bankruptcy to the respondent, which might have allowed him to avoid bankruptcy.[5]

[16] On June 13, 2008, at the end of the statutory time limit, the trustee brought before the Registrar in bankruptcy an application for discharge, which was opposed by the respondent[6] on the grounds that [translation] "it was a debt arising from a student loan from which the bankrupt could not be discharged".

[17] At the hearing, the trustee's report identified a debt of $199,103.61 owed to the respondent and another of $57,170.49 owed to the Quebec department of education for a student loan, from which the appellant cannot be discharged pursuant to paragraph 178(1)(g) of the BIA. The appellant also had a few other debts that were relatively unimportant or undeclared, including one in the amount of $20,361.58 owed to the American company, Sallie Mae.

[18] The trustee foresees that the realization of the bankrupt's assets as a result of the assignment amounts to about $8,500.

II. JUDICIAL HISTORY

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1. Registrar's decision

[19] The respondent's opposition to the discharge of the bankrupt was heard on July 18, 2008, by Mtre Pierre Pellerin, the registrar in bankruptcy, who rendered his decision orally from the bench. He ordered that the appellant be discharged of his debts on the following conditions:

[translation]

[6] ORDERS that the debtor be discharged on the condition that he pay to the trustee a monthly amount of $150 to be distributed among the creditors from December 1, 2008, to June 1, 2011, (date on which the bankrupt ends the practice of his profession as a resident podiatrist);

[7] ORDERS that the debtor be discharged on the condition of payment of the above-mentioned monthly instalments and of the amount of $30,000, to be paid in $10,000 yearly instalments from 2011, until paid in full;

[8] RESERVES the debtor's ability to meet the above-mentioned conditions in advance and thus to benefit from an anticipatory discharge.

[20] He explained:

[translation]

This proposal, in light of all the circumstances, in light of the debtor's behaviour, in light of a risk that could have been assessed with, in my opinion, greater attention...greater scrutiny and maybe more detailed consideration, this risk that the opposing party chose to assume, in my opinion, was in every respect greater than the actual capacity of the debtor.

There is no question here of laying blame on the opposing creditor for giving individuals, like the debtor, the opportunity to pursue their studies. But, as lenders, we cannot fail to subscribe, to perform a thorough analysis of the risk we are undertaking and then, afterwards, attempt to impute this carelessness or this failure to a debtor.

2. Superior Court Judgment

[21] The respondent appealed this decision before the Superior Court. The hearing took place on October 20, 2008, before the Honourable Mr. Justice Pierre Journet, who set aside the registrar's decision.

[22] At the end of his analysis, the judge found that the bank had not committed an assessment error when it granted a line of credit to the appellant. Additionally, the judge found that the conditions imposed by the registrar for the discharge of the bankrupt were too lenient. He wrote:

[translation]

[18] In the case at hand, the Court is of the opinion that the bank did not have to perform a special risk assessment when it granted the loan to the bankrupt because the only risk it could foresee was the borrower failing his studies.

[19] As to the security of the loan, the bank had it through the bankrupt's eventual reimbursement capacity stemming from his anticipated income.

[20] With respect, the Court does not share the opinion of Registrar Pellerin, who erroneously interpreted the legislative rule set out in the BIA regarding the reimbursement of 50% of the debt to be discharged.

[21] The conditions for reimbursing the loan as decided by the registrar are contrary to the Act and to case law. With great respect, the Court points out that the risk of failing out of school did not materialize and the security has not been modified. Consequently, the Court does not see how it can allow an application for discharge without payment in full, as doing so would be contrary to the opposing creditor's rights and to public interest in general.

[22] The Bankruptcy Court must not become an escape route permitting the cancellation of debts without consideration of the circumstances that led to the debtor's assignment in bankruptcy.

[23] In the words of Osborne J. in Snedden, "It is incumbent upon the Court to guard against laxity in granting discharges so as not to offend against commercial morality".

[24] Consequently, the Court sees no reason to cancel or reduce the bankrupt's debt since he will have the means to reimburse it as planned.

[25] In the absence of reasons other than the desire to erase debts when the capacity to reimburse exists, the debtor cannot use bankruptcy as a means to erase debts incurred and loans granted in good faith.

[26] To allow such a manoeuvre would go against both public order and public interest, which dictate that one's undertakings be honoured except in the specific cases provided for in the Act.

[27] Considering that the bankrupt had no other reason justifying his failure to reimburse his debt, the Court cannot condone its reduction without jeopardizing the judicial system's credibility in matters of bankruptcy and insolvency.

[23] After rendering judgment from the bench on October 20, 2008, and filing his reasons on October 30, 2008, the judge corrected the conclusions on November 6, 2008:

[translation]

Orders the bankrupt to pay to the trustee in bankruptcy of Fui Yao Dawson the amount of $199,903.61, for the benefit of the Royal Bank of Canada, in equal and consecutive monthly payments of $200 from the month of December of 2008, to

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the month of June of 2011, and to then reimburse the balance of the outstanding sums in yearly instalments of at least $10,000.
Orders that the bankrupt be discharged once the sums described above have been paid in full.

III. GROUNDS OF APPEAL
[24] The appellant faults the trial judge for having improperly interpreted the evidence, improperly applied the accepted principles in matters of discharge, and imposed conditions on him that were too severe.
[25] He also argues that the judge erred with respect to the payment terms. First, the payments should not be made for the benefit of the respondent, but to the trustee for the benefit of the body of creditors.[7] Second, the judge should have left him the possibility of making anticipatory payments in order to be discharged more quickly, as the registrar had planned.
[26] For the purpose of analysis, we will categorize these diverse grounds under two main headings:
1. Did the trial judge err with respect to the bankrupt's payment terms?
2. Did the judge improperly assess the evidence and err in his application of the principles of discharge?

IV. ANALYSIS
1. Did the trial judge err with respect to the bankrupt's payment terms?
[27] In its statement, the respondent did not dispute the appellant's arguments concerning the payment terms, and at the hearing, it reiterated that it would defer to the Court's discretion on the matter.
[28] With respect, as to the beneficiary of the payments, in light of the absence of explanations from the judge justifying his choice, I am of the view that he should not have departed from the general principle that payments are remitted to the trustee for the benefit of the body of creditors.[8] Subsection 176(3) of the BIA is unequivocal:
176. (3) Where a conditional order of discharge of a bankrupt is made providing for payment of a further dividend or sum of money by the bankrupt, all payments on account thereof shall be made to the trustee for distribution to the creditors.
[29] This conclusion in the judgment a quo being wrong, I would intervene to correct the order so that any amounts to be paid shall be so paid to the trustee for the body of creditors.
[30] I am also of the view that the second term should be made more flexible and should allow the appellant to make anticipatory payments, if circumstances allow him to do so, which would in turn enable him to be discharged more quickly.
2. Did the judge improperly assess the evidence and err in his application of the principles of discharge?
[31] The appellant submits that the registrar did not commit any error justifying the intervention of the Superior Court judge. He points out that he did not cause his insolvency, nor did he display any reprehensible conduct. His bankruptcy was caused by the respondent's refusal to reduce his monthly reimbursement payments before he completed his residency. In these circumstances, no viable proposal in bankruptcy would have been possible for him.
[32] Moreover, the appellant asks us to correct the approach taken, specifically with regard to the so-called rule raised by the judge in his reasons whereby, in order to obtain a discharge, 50% of a student loan must be reimbursed.[9]
[33] As for the respondent, it argues that the judge of the Superior Court was justified in setting aside the registrar's decision because the latter had erroneously criticized the respondent for not sufficiently attending to its risk assessment. In its view, the line of credit was granted to the appellant because of the income that it could rightly expect a medical student to earn upon finishing his studies. The appellant is about to complete the final part of his professional training in the expected period of time and without having suffered any misfortune.
[34] The respondent maintains that it financed the higher education of the appellant, who thus acquired an intangible asset, exempt from seizure, that he will soon be able to use. The respondent argues that in the present case, if the appellant were allowed to declare bankruptcy and be so easily discharged, the integrity of the student loan system would be threatened.
[35] Finally, it argues that even if the period of time ordered by the judge of the Superior Court to reimburse the debt appears lengthy, it corresponds very closely to the initial period provided, except for an adjustment to take into account the evolution of the appellant's income.

* * * * *

[36] The appellant faults the judge for writing, at paragraph 20 of the judgment under appeal, that the registrar had [translation] "incorrectly interpreted the legislative rule set out in the BIA regarding the reimbursement of 50% of the debt to be discharged"; he argues that, in so doing, the judge erroneously implied that the statute requires that 50% of the debt be reimbursed before the bankrupt's discharge may be ordered.

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[37] Obviously, and even if the judge's comments might be considered ambiguous, the judge did not state that the statute requires that every debtor reimburse 50% of his debts prior to being discharged. There is no such rule according to the BIA, no more than there exists a rule requiring the debt to be reimbursed in full. Each case turns on its own facts.
[38] The judge's comments quite probably concern paragraph 173(1)(a) of the BIA regarding conditional discharge, which includes one of the facts that the judge took into account before rendering judgment:
173. (1) The facts referred to in section 172 are:
(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
[39] That being said, I am of the opinion that the other grounds raised by the appellant cannot succeed.
[40] The judge rightly found that the registrar had erred in faulting the respondent for improperly assessing its risk or for failing to pay sufficient attention to its assessment.
[41] First, in granting the line of credit to the appellant, the respondent did not improperly assess its risk because the loan was granted with the view that the appellant would obtain well-paid employment once his training was completed. Thus, the respondent's only risk was that the appellant might fail to complete his professional training or to obtain the projected income. The appellant did obtain his degree in podiatry, however, was earning money during his residency, and there is every reason to believe that he will be earning the projected income as of June 2011.
[42] In short, it was premature for the registrar to determine that the respondent had improperly assessed its risk because, in so doing, he considered the risk to stem from the disproportion of the amount loaned to the appellant and the income he earned during his residency. This can only be assessed upon completion of the appellant's professional training, however, once he enters the job market.
[43] Also, the appellant undoubtedly knew what expenses he would incur prior to undertaking his medical studies in the United States, which is reflected in his accumulated debt. Certainly, the aggregate of his various debts is not negligible, but we must keep in mind that his unprofitable financial situation is only temporary. Indeed, the appellant never alleged that he would be unable to pay his debt once his residency was completed. Thus, the conditions for reimbursement established by the trial judge very closely correspond to the compromise the appellant had put to the respondent prior to his bankruptcy, except that they were adapted to take into account his more limited short-term financial means.
[44] The judge was also right to conclude that the registrar applied the discharge principles improperly, which justified him in weighing up the evidence and substituting his own assessment. These criteria are: (a) an honest but unfortunate person's right to start afresh; (b) the prima facie right of creditors to be paid; (c) the right of the public to trust in the system and in its integrity.[10]

(a) an honest but unfortunate person's right to start afresh
[45] It is common ground that one of the objectives of the BIA is to enable the rehabilitation of individuals who, crumbling under their debt loads, merit a second chance and a fresh start. In Dolgetta, Re, Registrar J.B. Hanebury wrote the following in the context of an application for discharge:
[43] Is Ms. Dolgetta an honest but unfortunate debtor who is entitled to a fresh start? In this case, as in Ament, the bankrupt is graduating with the education that she bargained for. She, like many of her other fellow students, is completing her education with significant debt. Her misfortune was becoming involved in a negative personal relationship which resulted in depression and ultimately resulted in her working only on her Ph.D. and taking a leave from her medical studies until it was completed. However, I fail to see how this circumstance should result in an entitlement to a fresh start. It hasn't led to a poor result; she will still have two degrees and a promising career.[11]
[46] The same can be said of the appellant, who has not yet begun his professional career and whose financial situation is the result of his legitimate desire to acquire a high level degree that will serve as a springboard, once his residency is complete.
[47] The appellant has not been unfortunate, quite the opposite. He successfully completed his studies and obtained a degree in podiatry, while continuing to travel and to lead a normal life. What is more, from the moment his residency is completed in June of 2011, he will be able to rely on significant income, ranging from US$93,000 to US$150.000, and still more in the long term. His expectations, therefore, remain unchanged since the line of credit was granted by the respondent.
[48] There is nothing in the evidence to show any unforeseeable circumstance affecting the plan the appellant had initially made for himself, except his choice of filing for voluntary assignment into personal bankruptcy in November of 2007, citing the following grounds: "after failing to, obviously, have the bank work with me". Although the reimbursements

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that the appellant must make are spread over a lengthy period of time, this situation is no different from the one he had originally anticipated. In short, everything unfolded as planned.

[49] It is difficult to see, therefore, why he should benefit from a second chance. His indebtedness directly helped him to obtain an intangible asset allowing him to optimistically consider a medical career with all the attending financial benefits. Seen from this angle, the hardly restrictive conditions set by the registrar to obtain his discharge might be interpreted as incentive to behave irresponsibly.

(b) the prima facie right of creditors to be paid

[50] The evidence has shown that the respondent's claim represents 78% of the proved debts in the bankruptcy, the balance being due to the Quebec department of education, whose claim will not be extinguished by the appellant's discharge. His intangible durable asset, his degree in podiatry, will enable him to have the financial means to reimburse the amounts due to the respondent. On this issue, Registrar Nettie had the following to say in Ament (Re):

[10] It is clear that the Bankrupt has no present income or ability to make payments, under the Superintendent's guidelines or otherwise, to his creditors. However, it is equally clear that the Bankrupt may reasonably expect to have significant earning potential in the years to come, utilizing his medical education. In fact, not only is it reasonable for him to expect this, but both RBC and the US lender have lent on this basis. Nothing in the evidence detracts from the obvious conclusion that RBC, in particular, lent its funds to the Bankrupt not on the basis of his present ability to pay, but on the basis of his expected future to pay, and I so find.[12]

[51] In Coffey (Re), Registrar J. Orsborn aptly wrote the following, to the same effect:

[33] Coffey will earn a modest income for the next three years. After that, and as anticipated when he applied for the line of credit, his income will rise substantially. At that point he will begin to realize the benefit of the asset that he has acquired at least in part through the assistance of those who have financed his education.

[34] While Coffey may need present relief from his obligation to pay his creditors – although such obligations were not being pressed prior to his bankruptcy – he does not require relief from those obligations once he achieves his anticipated earnings potential. Neither has it been demonstrated that once Coffey acquires his specialist credentials, he will legitimately require relief from a significant portion of those obligations. To put it shortly, it appears that Coffey was advised to go into bankruptcy not because he needed relief from his creditors so he "could get back on his feet" and start again, but simply because it was thought that bankruptcy provided a legally-sanctioned way to avoid paying his debts.[13]

[52] In short, the respondent gave the appellant credit based on his representations that his indebtedness would allow him to acquire a quality, durable, intangible asset: in light of the circumstances of the case at hand, it is therefore entitled to expect that its claim will be reimbursed.

(c) the right of the public to trust in the integrity of the system

[53] In this case, the judge was correct to note that it could be offensive to commercial morality and to the integrity of the system if the appellant were allowed to get off so lightly.

[54] Loans granted by financial institutions for post-secondary studies serve in some capacity as intermediate support for students who wish to pursue their studies. As noted above, this type of loan is not given the particular legislative treatment that is given to government student loans,[14] but it should nonetheless be treated similarly. This was underlined in Korenic (Re),[15] where the registrar wrote:

[13] ... However, I come to this conclusion, not because it is a loan called "student loan", but because it was a loan for the acquisition of a long term durable asset, which is incapable of realization by the Estate, except through the mechanism of conditional discharge payments. It cannot be seized, or sold, except by a bankrupt. A bankrupt cannot be forced to work or utilize it, only incented through the imposition of payment terms on a bankrupt's discharge to realize on the asset and include the creditors in the fruits of that realization.

[14] To my view, it is the nature of the asset acquired by the loan, and not the name of the loan, which attracts the same type of analysis as in the former student loan cases. A similar analysis is occasionally applied where the dollar value of exempt assets is found by the Court to be unconscionably large and conditional payments are imposed on the discharge, notwithstanding the lack of income to fund them. In my view, the higher moral character attributed to loans of this type, is attributable not to the loan, but to the situation where there is a loan used to acquire an asset of the type described above, and found in the case at bar in the form of a professional degree. It would be inappropriate to allow a bankrupt to keep such an asset without any realization on it for the benefit of creditors. To find otherwise would undermine public confidence in the insolvency system. It is trite law to point out that a discharge Court is charged with the balancing not only of the rights of a bankrupt to a fresh start, and the right of creditors to be repaid, but also maintaining the integrity of the insolvency system, and public confidence in it, as an integral part of our country's system of commerce.

[55] Insley (Re)[16] is to the same effect. Therein, Saskatchewan's Court of Queen's Bench wrote:

[45] As noted, through her education, financed largely by the RBC, this bankrupt acquired a long term durable asset, and at that, a professional degree which is in demand and has the potential to generate a relatively high level of income. By

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law, assets vest in the trustee, however, an asset which is an 'education' cannot be realized upon for the benefit of creditors, and the only means to do so is by repayment of a significant amount owing. At para. 15 in Re Ament, supra, Registrar Nettie said: "It would be offensive to commercial morality and, in my view, call the integrity of the insolvency system into question if this asset were not realized upon for the benefit of the creditors." And in Re Saunders, supra, Registrar Funduk on the same point with similar facts observed at para. 14: "What is paramount here is the integrity of the bankruptcy process and the public's perception of it."

[46] This bankrupt is an intelligent, well-educated woman who can expect a bright and promising career. Like the bankrupt in Re Lopez, also a doctor, Registrar Herauf (as he then was), at para. 4 observed that he had: "received a highly sought after professional degree at the taxpayers expense, with the prospect of substantial income in the future." See also Re Saunders, supra.

[47] I am satisfied that hard work and effort by the bankrupt will result in a comfortable life for her. She acquired exactly what she bargained for – financial support for purposes of acquiring a long term, durable asset – and did so, in her own words, in the relative comfort that easy credit affords.

[56] This same reasoning was accepted by the registrar in Ament (Re),[17] where the bankrupt was ordered to pay an amount corresponding to the totality of his indebtedness to the financial institution.

[57] Lastly, in Dolgetta (Re),[18] the registrar noted that public confidence in the integrity of the bankruptcy system required that bankrupt individuals in situations similar to that of the appellant not be discharged from a debt that enabled them to acquire a post-secondary education. He concluded that the bankrupt was liable for the total debt due to the lending institution:

[45] Finally, for the public to have confidence in the integrity of the bankruptcy system, Ms. Dolgetta should not be allowed to wash her hands of this debt. She will be left with a valuable asset, the fruits of which she will likely enjoy for the rest of her life. As the court has noted, a debtor can expect to make long-term payments for a lifelong asset.

...

[47] In this case, Ms. Dolgetta states that she tried to renegotiate with the Royal Bank, to no avail. The notes attached to the affidavit of the bank's officer indicate that, at least once when renegotiation was apparently discussed, increased credit was sought. The evidence indicates that Ms. Dolgetta is seeking to avoid payment to her primary creditor, the Royal Bank. The integrity of the bankruptcy system requires that, in the facts of this case, this not be allowed to occur. Ms. Dolgetta hoped to obtain two degrees while most students were obtaining one. Her personal situation resulted in an adjustment to her timing. This is not a reason to permit her to graduate almost debt-free, while other students will be shouldering heavy debt loads as they commence their medical careers. Public confidence in the bankruptcy system would be diminished.

[58] It is self-evident that post-secondary education enables the acquisition of a durable and quality asset; in the present case, this intangible asset was acquired by the appellant thanks in part to the financing granted by the respondent. This asset will survive the bankruptcy and the appellant will continue to benefit from it his entire career. In these circumstances, it would be shocking to the public if the appellant were allowed to be so easily released from his obligations toward the respondent.

V. SUMMARY

[59] We reiterate that each case must be analyzed according to its particular context. Though it may sometimes be appropriate to impose less severe payments, the circumstances of the present case do not militate in favour of a discharge according to the conditions devised by the registrar. Thus, there is no cause to intervene in the corrections brought by the judge, with the exception to those regarding the payment terms.

[60] On the first question, I would allow the appeal in part for the sole purpose of reviewing the conclusions of the trial judgment to order that the payments be made by the bankrupt to the trustee for the benefit of the body of creditors, not to the respondent, in compliance with section 176(3) of the BIA. There is also cause to allow the bankrupt to make anticipatory payments to accelerate his discharge, as the case may be.

[61] On the second question, the trial judge's analysis is free from error. He correctly applied the criteria to be considered in the discharge of a bankrupt. There is no cause for intervention.

[62] Although the appeal has been allowed in part, I would nonetheless condemn the appellant to pay costs because the issues on which we are intervening are minor and unopposed by the respondent.

JACQUES A. LÉGER, J.A.

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[1] Section 178(1)(g) of the BIA provides that an order of discharge does not release the bankrupt from any debt or obligation in respect of a loan made under the Canada Student Loans Act, the Canada Student Financial Assistance Act or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or within seven years after the date on which the bankrupt ceased to be a full- or part-time student.
[2] R.S.C. (1985), c. B-3.
[3] As per the name given to the line of credit granted to students by the RBC.
[4] During his examination, he indicated that he dipped into his line of credit to pay the interest.
[5] See ss. 49, 50 and ff. of the BIA.
[6] See subs. 168(1) of the BIA.
[7] See subsection 173(3) of the BIA as well as section 136 indicating the priority in payment by the trustee to the creditor.
[8] See Hamelin (trustee of), J.E. 91-1749 (CA); see also Houle v. Roy, 1989 CanLII 1097 (QC CA), [1989] R.J.Q. 2347 (CA).
[9] Judgment a quo at para. 20 (reproduced hereinabove).
[10] See the case law considered by the trial judge at paras 16 and 17 of the judgment under appeal, including: Insley (Re), 2007 ABCA 10 (CanLII), 2007 CanLII 383 (SKQB). Other cases are discussed hereinafter for each of the criteria.
[11] Dolgetta (Re), 2008 ABQB 556 (CanLII), 2008 ABQB 556.
[12] Ament (Re), 2006 CarswellOnt 5376, [2006] O.J. No. 3538.
[13] Coffey (Re), 2004 NLSCTD 22, [2004] N.J. No. 43.
[14] Supra note 1.
[15] Korenic (Re), 2005 CarswellOnt 3523, [2005] O.J. No. 3377 (Ont. S.C.J.).
[16] Insley (Re), 2007 SKQB 383 (CanLII), [2008] 6 W.W.R. 376, 2007 CarswellSask 620 (Sask. Q.B.)
[17] Supra note 12 at para. 15.
[18] Supra note 11 at paras. 45 and 47.

Bankruptcy to operate as application for discharge - Sec. 169

169. (1) The making of a bankruptcy order against, or an assignment by, a person other than a corporation or an individual in respect of whom subsection 168.1(1) applies operates as an application for discharge.

Kozack v. Richter, [1974] SCR 832 - Bankruptcy Due To Judgment On Bankrupt's Tort—Order For Discharge—Principles Of Judicial Discretion

Date:	1973-05-07
Parallel citations:	1973 CanLII 166 (SCC); [1973] 5 WWR 470
URL:	http://canlii.ca/t/1xv1r
Citation:	Kozack v. Richter, 1973 CanLII 166 (SCC), [1974] SCR 832, <http://canlii.ca/t/1xv1r> retrieved on 2013-08-14
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Supreme Court of Canada
Kozack v. Richter, [1974] S.C.R. 832
Date: 1973-05-07
Janet Kozack *Appellant;*
and

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Daniel Richter *Respondent.*
1973: January 30; 1973: May 7.
Present: Abbott, Martland, Ritchie, Spence and Pigeon JJ.
ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN
Bankruptcy—Review of judicial discretion—Bankruptcy due to judgment on bankrupt's tort—Order for discharge—Principles of judicial discretion—Bankruptcy Act, R.S.C. 1970, c. B-3, s. 142(2).

The appellant was a gratuitous passenger in the respondent's car which collided with a train at a grade crossing in the City of Regina. As a result of this collision the appellant suffered serious head injuries. The respondent, a wage earner in modest circumstances and with a large family, was found fully responsible for the accident by reason of "wilful and wanton misconduct". Damages were assessed at $12,909.03 together with taxed costs of $1,194. The respondent appealed unsuccessfully and thereafter made an assignment in bankruptcy. When in due course the respondent applied for his discharge this was initially suspended for three months and later in the Court of Appeal granted on condition that the respondent consent to judgment being entered against him for $1,800 payable by monthly instalments of $50.

Held (Abbott J. dissenting): The appeal should be allowed.

Per Martland, Ritchie, Spence and Pigeon JJ: The effect of the order appealed from would be that the appellant would recover nothing: having regard to the proper application of judicial discretion as vested in the Courts by s. 142(2) of the *Bankruptcy Act,* R.S.C 1970, c. B-3, and the fact that the bankruptcy was precipitated by a judgment in damages for wilful and wanton misconduct in the operation of a motor vehicle, the damages should be increased to approximate 50 per cent of the total debt to the appellant without interest. The modest circumstances of the respondent were considered and the amount of monthly payment fixed by the Court of Appeal was not increased.

Per Abbott J. *dissenting:* The facts in this case are not in dispute and the only question concerns the principles to be applied by the Court in reviewing the exercise of judicial discretion. This Court is certainly in no better position to exercise that discretion than was the Court of Appeal for Saskatchewan. As a second appellate Court, this Court should not attempt to interfere.

APPEAL by special leave of the Supreme Court of Canada from an order of the Court of Appeal for Saskatchewan setting terms for a discharge in bankruptcy. Appeal allowed, Abbott J. dissenting.

E.F.A. Merchant, for the appellant.
R.W. Thompson, for the respondent.

ABBOTT J. (*dissenting*)—This appeal, by leave of this Court, is from a unanimous judgment of the Court of Appeal of Saskatchewan granting the respondent a conditional discharge under s. 142 of the *Bankruptcy Act.*

The relevant facts are not in dispute. They are admirably summarized in the reasons of my brother Pigeon and I need not repeat them.

The principles to be applied in the exercise of the judicial discretion given under s. 142 of the *Bankruptcy Act,* were considered by this Court in *Industrial Acceptance Corporation Ltd. et al. v. Lalonde et al.*[1] Esty J. who delivered the unanimous judgment of the Court said at p. 120:

> A judgment rendered in the exercise of a judicial discretion under s. 142 ought not to be disturbed by an appellate court, unless the learned judge, in arriving at his conclusion, has omitted the consideration of or misconstrued some fact, or violated some principle of law. *In re Richards* (1893), 10 Mor. B.R. 136; *In re Wood* (1915), Han. B.R. 53; *In re Labrosse* 5 C.B.R. 600; *In re Lobel* [1929] 1 D.L.R. 986; *Re Smith* [1947] 1 All E.R., 769. A consideration of the whole of the evidence, with great respect, does not warrant a reversal of the judgment of the learned judge of the first instance.
>
> Appellate courts, however, where they have concluded that the discretionary judgment of the judge of the first instance ought not to be disturbed, have repeatedly relieved against what has appeared to them to be an undue severity in the terms imposed. *Re Nicholas* 7 Mor. B.R. 54; *Re Swabey* 76 T.L.R. 534; *Re Thiessen* [1924] 1 D.L.R. 588. The purpose and object of the *Bankruptcy Act* is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge, however, is not a matter of right and the provisions of ss. 142 and 143 plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed only in cases where the conduct of the debtor has been particularly reprehensible, or in what have been described as extreme cases. The conduct of the debtor in this case, while not sufficient, with great respect, to justify the absolute refusal, does justify his discharge only subject to the imposition of terms.

As I have stated, the relevant facts are not in dispute. Those facts, as they relate to the automobile accident which gave rise to appellant's claim and to the respondent's bankruptcy, were carefully reviewed in the judgment of MacPherson J., the learned trial judge, and again by Culliton C.J.S., who delivered the unanimous judgment of the Court of Appeal confirming that judgment. Chief Justice Culliton also delivered the unanimous judgment granting the conditional

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discharge, which is now under appeal. As to the proceedings in bankruptcy, the court below had before it the same factual material as was placed before this Court, and it would not appear that it "has omitted the consideration of or misconstrued some fact".

Appellant argued before us that a distinction should be made between a bankruptcy arising out of trade debts and one arising out of the commission of a tort, but no such distinction exists under the *Bankruptcy Act.*

The sole issue here is whether the judicial discretion exercised by the court below was unreasonable. This Court is certainly in no better position to exercise that discretion than was the Court of Appeal of Saskatchewan. As a second appellate court, I do not think we should attempt to interfere.

I would dismiss the appeal with costs. Under the terms of the order granting leave, the appellant is entitled to her costs on the application for leave.

The judgment of Martland, Ritchie, Spence and Pigeon JJ. was delivered by

PIGEON J.—This is an appeal, by special leave of this Court, from a judgment of the Court of Appeal of Saskatchewan varying the order made by a judge of the Court of Queen's Bench on respondent's application for discharge under the Bankruptcy Act. This order had suspended the discharge for a period of three months only. In the Court of Appeal, it was directed that respondent be required to consent to judgment being entered against him in the sum of $1,800 payable without interest by monthly payments of $50 starting February 1st, 1970.

Respondent's debt towards the appellant arises out of an automobile accident. She was a gratuitous passenger in his car when she suffered serious head injuries in a collision with a train at a grade crossing in the City of Regina. Red lights were flashing and a warning bell was ringing and respondent was found fully responsible by reason of "wilful and wanton misconduct". Damages were assessed by MacPherson J. at $12,909.03 plus costs taxed at $1,194. Respondent's appeal from this judgment was unanimously dismissed. Thereupon, he made an assignment under the *Bankruptcy Act* and, in due course, applied for discharge.

The net result of the order appealed from is obviously that the appellant will recover nothing. With respect, I cannot agree that this is in conformity with the proper principles to be applied in the exercise of the discretion vested in the courts by the provisions of the *Bankruptcy Act* (R.S.C. c. B-3) respecting discharge. Section 142(2) reads:

> (2) The court shall on proof of any of the facts mentioned in section 143
>
> (*a*) refuse the discharge,
>
> (*b*) suspend the discharge for such period as the court thinks proper, or
>
> (*c*) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments, or comply with such other terms, as the court may direct.

The first fact mentioned in s.143 is:

> (*a*) the assets of the bankrupt are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible:

In the present case, respondent's bankruptcy was precipitated by his condemnation to pay damages to the appellant. This being due to a finding of "wilful and wanton misconduct" on his part, certainly his financial predicament cannot be said to have arisen "from circumstances for which he cannot justly be held responsible". The courts below did not ignore this provision. However, the sanction meted out in the first instance was purely nominal. In the Court of Appeal, respondent was in effect ordered to make payments that would hardly cover more than appellant's costs in the trial court and in the Court of Appeal. Although respondent is a wage earner with a large family in very modest circumstances, I cannot agree that the proper application of the provisions above quoted should result in a plaintiff making no recovery for personal injuries caused by gross negligence. It would mean that motorists in respondent's situation would be able to tell such a claimant: "There is no use suing me, if you lose you will have to pay the costs, if you win I will make an assignment in bankruptcy and you will get nothing".

Counsel for the appellant has referred us to a number of cases dealing with analogous situations on applications for discharge. Among recent cases, the following may be noted: *Rice v. Copeland*[2] in which the bankruptcy was similarly precipitated by a claim for damages arising out of a car accident which was said to be due to driving in an intoxicated condition. Dickson J. (as he then was) ordered the bankrupts to pay as a condition of their discharge 25% of their unsecured liabilities. He said (at p. 232):

> In *Re McIntosh, supra,* Williams, C.J.Q.B. agreed with the judgment of Smily J. *In re Buell* (35 C.B.R. 53, [1955] O.W.N. 421), that although the *Bankruptcy Act* is available to an insolvent not engaged in business, the Act was never intended to enable a judgment debtor to get rid of a judgment for damages and with no other purpose to serve than the convenience and comfort of the debtor.

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In *Sederoff v. Vigneault* (23 C.B.R. 228, [1942] Que K.B. 44), the debtor had gone into bankruptcy to escape payment of a judgment in damages arising out of an automobile collision. The bankruptcy judge, in the exercise of his discretion, suspended the discharge until the debtor had paid 50 cents in the dollar on the amount of his unsecured liabilities. The court of appeal refused to interfere.

In the present case, I would not increase the amount of the monthly payments fixed by the Court of Appeal, but I would increase the sum to be paid to approximate 50 per cent of the total debt to the appellant without interest.

For those reasons, I would allow the appeal with costs and vary the judgment of the Court of Appeal by increasing to $7,200 plus the costs in this Court the amount of the judgment to be satisfied by the respondent as a condition of his discharge.

Appeal allowed with costs. ABBOTT J. dissenting.
Solicitors for the appellant: Pedersen, Norman, McLeod & Todd, Regina.
Solicitors for the respondent: Bayda, Halvorson, Scheibel & Thompson, Regina.

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[1] 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109.
[2] reflex, (1965), 51 W.W.R. 227.

Appointment to be obtained by trustee - Sec. 169(2)
(2) The trustee, before proceeding to his or her discharge and in any case not earlier than three months and not later than one year after the bankruptcy of a person for whom there is an application for discharge by virtue of subsection (1) shall, on five days notice to the bankrupt, apply to the court for an appointment for a hearing of the application for the bankrupt's discharge, and the hearing must be held within 30 days after the day on which the appointment is made or at any other time that may be fixed by the court at the bankrupt's or trustee's request.

(3) [Repealed, 2005, c. 47, s. 101]

Bankrupt corporation - Sec. 169(4)
(4) A bankrupt corporation may not apply for a discharge unless it has satisfied the claims of its creditors in full.

Fees and disbursements of trustee - Sec. 169(5)
(5) The court may, before issuing an appointment for hearing on application for discharge, if requested by the trustee, require such funds to be deposited with, or such guarantee to be given to, the trustee, as it deems proper, for the payment of his fees and disbursements incurred in respect of the application.

Notice to creditors - Sec. 169(6)
(6) The trustee, on obtaining or being served with an appointment for hearing an application for discharge, shall, not less than 15 days before the day appointed for the hearing of the application, send a notice of the hearing, in the prescribed form and manner, to the Superintendent, the bankrupt and every known creditor, at the creditor's latest known address.

Procedure when trustee not available - Sec. 169(7)
(7) Where the trustee is not available to perform the duties required of a trustee on the application of a bankrupt for a discharge, the court may authorize any other person to perform such duties and

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may give such directions as it deems necessary to enable the application of the bankrupt to be brought before the court.
R.S., 1985, c. B-3, s. 169;
1992, c. 27, s. 62;
1997, c. 12, s. 99;
2004, c. 25, s. 82;
2005, c. 47, s. 101.

Trustee to prepare report - Sec. 170
170. (1) The trustee shall, in the prescribed circumstances and at the prescribed times, prepare a report, in the prescribed form, with respect to

(a) the affairs of the bankrupt,
(b) the causes of his bankruptcy,
(c) the manner in which the bankrupt has performed the duties imposed on him under this Act or obeyed the orders of the court,
(d) the conduct of the bankrupt both before and after the date of the initial bankruptcy event,
(e) whether the bankrupt has been convicted of any offence under this Act, and
(f) any other fact, matter or circumstance that would justify the court in refusing an unconditional order of discharge,

and the report shall be accompanied by a resolution of the inspectors declaring whether or not they approve or disapprove of the report, and in the latter case the reasons of the disapproval shall be given.

Filing and service of report - Sec. 170(2)
(2) Where an application of a bankrupt for a discharge is pending, the trustee shall file the report prepared under subsection (1) in the court not less than two days, and forward a copy thereof to the Superintendent, to the bankrupt and to each creditor who requested a copy not less than ten days, before the day appointed for hearing the application, and in all other cases the trustee, before proceeding to the discharge, shall file the report in the court and forward a copy to the Superintendent.

Superintendent may file report - Sec. 170(3)
(3) The Superintendent may make such further or other report to the court as he deems expedient or as in his opinion ought to be before the court on the application referred to in subsection (2).

Representation by counsel - Sec. 170(4)
(4) The trustee or any creditor may attend the court and be heard in person or by counsel.

Evidence at hearing - Sec. 170(5)
(5) For the purposes of the application referred to in subsection (2), the report of the trustee is evidence of the statements therein contained.

Right of bankrupt to oppose statements in report - Sec. 170(6)
(6) Where a bankrupt intends to dispute any statement contained in the trustee's report prepared under subsection (1), the bankrupt shall at or before the time appointed for hearing the application

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for discharge give notice in writing to the trustee specifying the statements in the report that he proposes at the hearing to dispute.

Bratti v. Wabco Standard Trane Inc., 1994 CanLII 1261 (ON CA) - Time To Appeal Discharge Conditions and Considerations in Reopening

Date:	1994-04-26
Docket:	m13207
Parallel citations:	25 CBR (3d) 1
URL:	http://canlii.ca/t/6k2k
Citation:	Bratti v. Wabco Standard Trane Inc., 1994 CanLII 1261 (ON CA), <http://canlii.ca/t/6k2k> retrieved on 2013-08-18
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File No. M13207

COURT OF APPEAL FOR ONTARIO

RE: **ROBERT BRATTI (Plaintiff (Appellant)) v. WABCO STANDARD TRANE INC. carrying on business as TRANE CANADA, TORONTO-DOMINION BANK and RELLUMCOR SALES INC. (Defendants (Respondents))**

BEFORE: **LASKIN J.A. (In Chambers)**

COUNSEL: ***WILLIAM J. HUBAR, Q.C.*** **for the applicant**
LOU BRZENZINSKI **for Wabco**
JEFFREY KRIWEZ **for Toronto-Dominion Bank**

HEARD: **APRIL 21, 1994**

ENDORSEMENT

The applicant Robert Bratti seeks leave to extend the time to file a notice of appeal from the judgment of Carruthers J. dated December 23, 1992.

The applicant filed an assignment in bankruptcy on February 25, 1992. He had made a previous assignment in bankruptcy some nine years earlier. On December 23, 1992, Carruthers J. heard the applicant's application for an unconditional discharge which was contested by three of the applicant's creditors. The applicant apparently had a falling out with his solicitor just prior to the discharge hearing and, as a result, represented himself. Carruthers J. ordered a discharge but conditional upon the applicant paying the sum of $500,000 within three years. Rule 49(1) of the *Bankruptcy Rules* provides:

> 49.(1) No appeal to the Court of Appeal shall be brought unless notice thereof is filed with the registrar and served within 10 days after the day of the order or decision appealed from or within such further time as a judge of the Court of Appeal allows.

The applicant neither appealed within the 10-day period nor gave any indication that he intended to do so. On January 20, 1993, a law firm retained by the applicant with respect to his bankruptcy wrote to the applicant's creditors stating that it had been advised that the applicant intended to appeal the decision of Carruthers J. The law firm asked for consent to an order extending the time for appealing. Consent was not forthcoming. On the evidence before me the applicant took no other steps to appeal until he brought this motion, which was launched over 15 months after the order of Carruthers J.

While appellate courts have considered a number of different factors in determining whether to grant leave to extend the time for appealing, the governing principle is simply whether the "justice of the case" requires that an extension be given. See *Frey v. MacDonald* (1989), 33 C.P.C. (2d) 13 (*per* Blair J.A.).

I have concluded that the justice of this case does not require the granting of a extension of time for appealing for the following reasons.

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(1) The applicant did not have a *bona fide* intention to appeal before the expiration of the appeal period provided in the Rules.

(2) The material filed on the motion does not even indicate that the applicant maintained a firm intention to appeal after January 20, 1993. If anything the opposite inference may be drawn.

(3) The applicant has provided no explanation for his delay in bringing this motion. Indeed the applicant has not filed an affidavit in support of his motion, but instead has relied upon the affidavit of an articling student in the law firm now representing him. That affidavit is silent as to why nothing occurred between January 1993 and March 1994. While the respondents on this motion have not submitted that they have been unduly prejudiced by the delay, it seems to me that there is an obligation on a party seeking the indulgence of the court to provide a reasonable explanation for his failure to move earlier. This applicant has not done so.

(4) The merits of the proposed appeal are dubious. Pursuant to s.172 of the *Bankruptcy and Insolvency Act* the plaintiff could not obtain an absolute discharge if any of the facts referred to in s.173 were made out. There is no doubt on the evidence before Carruthers J. that several of the subparagraphs of s.173 were proven and the applicant's counsel in this court did not suggest otherwise. Thus the only arguable issue on an appeal would be the amount of the payment ordered by Carruthers J. The applicant had debts in excess of 5.1 million dollars at the time of his assignment and his creditors asked for a payment to the trustee of half of that amount. Carruthers J. in the exercise of his discretion ordered the sum of $500,000. The applicant says the amount is excessive. On my review of the record the trial judge, in arriving at this figure, was justifiably influenced by the applicant's lifestyle which included continuing to live in a very large home and continuing to drive a luxury car, by the applicant's failure to disclose in his statement of affairs all of the benefits that he had received and by the fact that this was the applicant's second bankruptcy in less than 10 years.

The motion is dismissed with costs.

LASKIN J.A.
APRIL 26, 1994

/emr

Right of creditors to oppose - Sec. 170(7)
(7) A creditor who intends to oppose the discharge of a bankrupt on grounds other than those mentioned in the trustee's report shall give notice of the intended opposition, stating the grounds thereof to the trustee and to the bankrupt at or before the time appointed for the hearing of the application for discharge.
R.S., 1985, c. B-3, s. 170;
1997, c. 12, s. 100;
2005, c. 47, s. 102.

Toal (Bankrupt), Re, 1993 CanLII 3422 (AB QB) - A Taxpayer Who Can't Simply Walk Through a Bankruptcy to Shed Income Tax

Date:	1993-09-29
Docket:	36896
Parallel citations:	[1994] 1 WWR 542; 22 CBR (3d) 209; 13 Alta LR (3d) 74
URL:	http://canlii.ca/t/1p6km
Citation:	Toal (Bankrupt), Re, 1993 CanLII 3422 (AB QB), <http://canlii.ca/t/1p6km> retrieved on 2013-08-29
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Court of Queen's Bench of Alberta

Toal (Bankrupt), Re

Date: 19930929

Docket: 36896

Agrios, J.: A bankrupt medical doctor, 54, appeals the decision of the Registrar in Banruptcy, M. Funduk, providing for a conditional discharge of the bankrupt upon the consent to a judgment to survive the bankruptcy. The judgment is for 65% of an outstanding income tax liability of $267,000 owed to the one preferred creditor, the Minister of National Revenue, as of the date of bankruptcy.

I dismiss the appeal. I am satisfied that Registrar Funduk has not omitted the consideration of or misconstrued some fact or violated some principle of law. Accordingly, it would be improper for me, under the circumstances, to substitute my discretion for the Registrar's and I decline to do so.

As noted in Sillito (Bankrupt), Re (1993), 142 A.R. 127 (Q.B.) under the recently amended Bankruptcy and Insolvency Act, an opposed application for the discharge of a bankrupt is heard by a Registrar and an appeal from the Registrar is to a bankruptcy judge. Such an appeal is a true appeal and not a hearing de novo. To succeed the applicant must satisfy the judge that the Registrar erred in principle or in law in the way he exercised his discretion. In this case the applicant (appellant) has been unable to satisfy this overriding requirement.

The bankrupt, a practising medical doctor, assigned himself in bankruptcy in April 1992. The following creditors proved their claims:

1. One secured creditor for $31,065;
2. Two unsecured creditors for $16,467;
3. One preferred creditor, the Minister of National Revenue, for $267,000 inclusive of income tax liability plus penalties and interest.

There was also a contingent unsecured creditor for $410,000 for alleged medical negligence. The Registrar quite properly, in my view, refused to delay the discharge for this creditor, as at best this creditor, if successful, would still rank behind the Minister and it was apparent that the Minister's claim would not be paid in full.

In his reasons, the Registrar noted a cavalier attitude on the part of the bankrupt, which continued even after the bankruptcy. The bankrupt is liable for post-bankrupt income tax of about $40,000 and as of the date of the application to the Registrar in June of 1993, the bankrupt had only made one quarterly payment on his post-bankruptcy income. The Registrar said:

> **"Self-earners should not be able to abuse the system in this way. Self-earners should not be able to avoid income tax liability in this way. Self-earners should not be encouraged to not pay income tax, run it up and then go into bankruptcy.**
>
> **"In my view this bankrupt has a serious attitude problem.**
>
> **"The conclusion I draw is that this is simply a case of a bankrupt who has decided that he is going to keep all his income, spend it as he sees fit and just will not pay income tax.**
>
> **"That is just not acceptable."**

Counsel for the appellant argued that the Registrar's terms for a conditional discharge were "unduly severe and onerous" under the circumstances. This wording was taken from an Alberta Court of Appeal decision in Links v. Robinson (1970), 16 C.B.R. (N.S.) 180 (Alta. C.A.) at 185. Counsel also made reference to seven other cases involving Revenue Canada and professionals, all of which would tend to indicate that Dr. Toal's conditional discharge was unduly severe and onerous by comparison. I am not persuaded. To me, the two authorities cited by the Crown provide the more significant, relevant comparisons and distinctions in the various cases involving professionals and liability for income tax: Links and Steward v. A.G. Canada 1991 CanLII 1519 (BC CA), (1991), 4 C.B.R.(3d) 240 (B.C.C.A.).

In this case counsel for the respondent, Minister of National Revenue, set out the current pattern of earnings of the bankrupt and an appropriate shielding based on the Superintendent's guidelines. Counsel estimated that with the current earnings and appropriate payments on the proposed consent judgment, the judgment would be paid in a little over three years. Based on this data, I cannot say that the Registrar has imposed conditions that are unduly severe and onerous. Unlike Dr. Links, it may be said that Dr. Toal, in his failure to make appropriate deductions for income tax during the four years, 1988-1991 plus the first quarter of 1992, should be subject to censure. In the Links bankruptcy a series of economic disasters involving a farm operation drove Dr. Links into bankruptcy. In this case, our Court of Appeal noted the bankrupt's conduct, both before and after the bankruptcy, as the first and apparently the most important element to be

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taken into account. In the Links decision the Court of Appeal indicated at p. 185 that: "There is no criticism of his conduct throughout, either prior to or during the bankruptcy, except that his business undertaking outside his practice failed."
The question of conduct and the circumstances surrounding the incurring of the income tax liability as addressed in Links, foreshadowed the Steward decision by more than twenty years. The Steward decision of the B.C. Court of Appeal clearly delineated an important distinction in the question of bankruptcy discharges involving tax liability.
The distinction is between:

1. An unfortunate event overtaking the bankrupt; and
2. An indifference to obligations.

The Steward decision accepted the principle expressed in Re Katari (1989), 74 C.B.R. (N.S.) 178 (Ont. S.C.), that a debt for income tax is a debt owed to all members of the public of Canada. By this principle, such a debt should be treated as if in a different category than other debts and even a different category than debts to other preferred creditors. This distinction is made because of the nature of income tax obligations and because of the fact that everyone in the country must share the burden.
However, in both the cases of Dr. Links and Dr. Steward there was no evidence of indifference to tax responsibilities. Further, there was no evidence that the reason for the bankruptcy was the escape from tax obligation. Rather, in those cases, the bankruptcies were caused by unwise investments.
Registrar Funduk has effectively noted this distinction and applied the reasoning in Links and Steward. The court in Steward stated at 243:

> "If there is shown to have been a persistent ignoring of tax obligations and an indifference to sharing the tax responsibility of other Canadians then that would be a significant fact in determining the conditions which would be attached to a conditional discharge from bankruptcy. Such a scoffing at the tax system was present in the case of Re Katari."

Dr. Toal has very persistently ignored tax obligations and scoffed at the tax system, thus meeting the test referred to by the court in Steward. Registrar Funduk correctly analyzed the situation, in my view, when he said:

> "Nobody likes paying income tax. But I resile from the position that a taxpayer should not pay income tax when he incurs it (when he makes the income) and when the liability reaches a large amount go into bankruptcy and piously say that he cannot now pay that large debt and it has caused his bankruptcy. Debts do not cause bankruptcy. In this case it was the unacceptable conduct of the bankrupt which created this situation."

I find no error in Registrar Funduk's reasoning. The appeal is dismissed.
Appeal dismissed.
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Mediation required — paragraphs 173(1)(m) and (n) - Sec. 170.1
170.1 (1) If the discharge of a bankrupt individual is opposed by a creditor or the trustee solely on grounds referred to in either one or both of paragraphs 173(1)(m) and (n), the trustee shall send an application for mediation, in the prescribed form, to the official receiver within five days after the day on which the bankrupt would have been automatically discharged had the opposition not been filed or within any further time after that day that the official receiver may allow.

Mediation procedure - Sec. 170.1(2)
(2) A mediation is to be in accordance with prescribed procedures.

Court hearing - Sec. 170.1(3)
(3) If the issues submitted to mediation are not resolved by the mediation or the bankrupt failed to comply with conditions that were established as a result of the mediation, the trustee shall without delay apply to the court for an appointment for the hearing of the matter — and the provisions of this Part relating to applications to the court in relation to the discharge of a bankrupt apply, with any modifications that the circumstances require, in respect of an application to the court under this subsection — which hearing is to be held

(a) within 30 days after the day on which the appointment is made; or
(b) at a later time that is fixed by the court.

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Certificate of discharge - Sec. 170.1(4)
(4) If the bankrupt complies with the conditions that were established as a result of the mediation, the trustee shall without delay

(a) issue to the bankrupt a certificate of discharge in the prescribed form releasing the bankrupt from their debts other than those referred to in subsection 178(1); and
(b) send a copy of the certificate of discharge to the Superintendent.

File - Sec. 170.1(5)
(5) Documents contained in a file on the mediation of a matter form part of the records referred to in subsection 11.1(2).
1997, c. 12, s. 101;
2005, c. 47, s. 103;
2007, c. 36, s. 100.

Trustee's report - Sec. 171
171. (1) On a request therefor by the Superintendent the trustee shall, within two months after the trustee's appointment or within such longer period as the Superintendent may allow, prepare in the prescribed form and file with the Superintendent a report setting out the following information:

(a) the name of the debtor and, where the debtor is a corporation, the names and addresses of the directors and officers of the corporation and, when applicable, the names of the persons who in the opinion of the trustee actively controlled the day-to-day operations of the corporation or the business of the debtor or who in the opinion of the trustee were responsible for the greater proportion of the debtor's liabilities or under whose directions in the opinion of the trustee the greater proportion of the debtor's liabilities were incurred;
(b) whether in the opinion of the trustee the deficiency between the assets and the liabilities of the debtor has been satisfactorily accounted for or, if not, whether there is evidence of a substantial disappearance of property that is not accounted for;
(c) a statement of opinion by the trustee with respect to the probable causes of the bankruptcy, arrived at after consultation with the inspectors and other persons, which shall be expressed as resulting from one or more of the probable causes in the following enumeration:

(i) misfortune,
(ii) inexperience,
(iii) incompetence,
(iv) carelessness,
(v) over-expansion,
(vi) unwarranted speculation,
(vii) gross negligence,
(viii) fraud, and
(ix) other probable cause (to be specified); and

(d) a statement of the facts and information on which the trustee relied in arriving at the opinion expressed pursuant to paragraphs (b) and (c).

Report to persons concerned - Sec. 171(2)
(2) A separate report containing only the information to be given to the Superintendent pursuant to paragraphs (1)(a) and (b) shall be immediately prepared in the prescribed form by the trustee and a

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copy thereof shall be sent, by prepaid registered or certified mail in an envelope marked "private and confidential", to each of the persons named pursuant to paragraphs (1)(a) and (b) in the report to the Superintendent.

Report to official receiver - Sec. 171(3)
(3) After the expiration of two months from the date of filing the report with the Superintendent and not later than three months after that date, the trustee shall file with the official receiver the report prepared pursuant to subsection (2).

Application to court regarding report - Sec. 171(4)
(4) Notwithstanding subsection (3), where before he has filed his report with the official receiver pursuant to that subsection, the trustee is served with a copy of an application to the court, by any of the persons named pursuant to paragraphs (1)(a) and (b) in the report prepared pursuant to subsection (2), to have that report altered in any manner or to dispense with the requirements of subsection (3), the trustee shall not file the report under subsection (3) except as may be directed by the court.

Altering report to Superintendent - Sec. 171(5)
(5) Where the report to be filed under subsection (3) has been altered in any respect on the direction of the court, the trustee shall inform the Superintendent of any alteration so made, and the Superintendent shall alter the report made to him by the trustee accordingly.

Exoneration from liability - Sec. 171(6)
(6) The trustee is not liable for any statements made or opinions expressed by him in good faith and made or purporting to be made by him pursuant to this section, nor is any person liable for publishing, or referring to any matters contained in, the report of the trustee to the official receiver if the publication or reference is made after the filing of the report with the official receiver.
R.S., 1985, c. B-3, s. 171;
1992, c. 1, s. 20, c. 27, s. 63;
1997, c. 12, s. 102.

Court may grant or refuse discharge - Sec. 172
172. (1) On the hearing of an application of a bankrupt for a discharge, other than a bankrupt referred to in section 172.1, the court may

- **(a) grant or refuse an absolute order of discharge;**
- **(b) suspend the operation of an absolute order of discharge for a specified time; or**
- **(c) grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to the bankrupt's after-acquired property.**

Powers of court to refuse or suspend discharge or grant conditional discharge - Sec. 172(2)
(2) The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,

- **(a) refuse the discharge of a bankrupt;**
- **(b) suspend the discharge for such period as the court thinks proper; or**

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(c) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

Bankruptcy of Willier, 2005 BCSC 1138 (CanLII) - Third Bankruptcy Prompts for Withholding and Qualification of Discharge

Date:	2005-08-03
Docket:	05-24781
Parallel citations:	14 CBR (5th) 130
URL:	http://canlii.ca/t/1lb8q
Citation:	Bankruptcy of Willier, 2005 BCSC 1138 (CanLII), <http://canlii.ca/t/1lb8q> retrieved on 2013-08-18
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IN THE SUPREME COURT OF BRITISH COLUMBIA IN BANKRUPTCY

Citation: ***Bankruptcy of Willier***
2005 BCSC 1138

Date: 20050803

Docket: 05-24781
Registry: Prince George

IN THE MATTER OF THE BANKRUPTCY OF PETER JOSEPH WILLIER

Before: Master Baker
Decision as Registrar in Bankruptcy

Appearing for the Trustee:	C.C. Wikjord
Appearing for the Bankrupt:	P.J. Willier, In Person
Date and Place of Hearing:	July 19, 2005 Prince George, B.C.

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ISSUE

[1] Mr. Willier applies for his discharge from bankruptcy. The sole reason for the trustee's objection is the fact that this is Mr. Willier's third bankruptcy.

BACKGROUND

[2] Mr. Willier is 61 years of age and has no dependents. He lives alone. He is in good physical health but apparently receives medication for certain nervous conditions. He is unsure of the exact condition, but it sounds by his description to be a form of agoraphobia (the fear of open places and crowds) alternating occasionally with claustrophobia.

[3] Mr. Willier is a truck driver, though currently unemployed. He receives employment insurance of approximately $1,430.00 per month. Mr. Willier has no other skills or trade. Driving is the only thing he knows, and he says finding work is getting more and more difficult as employers tend to prefer younger employees.

[4] When asked what effects, if any, his bankruptcy had on his employability, he was vague, and seemed to indicate that his employment would likely be more influenced by his advancing age than by his bankruptcy status.

[5] Mr. Willier's assignment makes for interesting reading. He does not list a single asset: no cash on hand, no personal effects - nothing. All of his debts, therefore, are obviously unsecured, but they total only $16,850.00. I say "only", fully realizing that $16,850.00 is a significant sum, especially if you do not have it, but compared to most bankruptcies it is a relatively small sum. Certainly, it seems curious that it would be enough to trigger a third bankruptcy, when Mr. Willier must have been made aware of the significance of a third bankruptcy, and the possible implications.

[6] Mr. Willier has very limited schooling. When I asked the level of his education, he said ". . . about grade 6". It became obvious, as I discussed the matter with him, that literacy and writing are a real challenge to Mr. Willier. This simply confirmed my expectation that Mr. Willier's prospects are extremely limited.

[7] Mr. Willier's first bankruptcy occurred in 1979 and he was given an absolute discharge in 1981. His second bankruptcy began in 1985, and ended with his discharge in October 1995, almost 10 years later. His s. 170 report indicates that his discharge from his second bankruptcy was "Absolute (cond.)", which I assume means that, rather than receiving a suspension, he was given a condition. It is surprising to me that he did not receive a suspension on his second discharge. When I asked him why his second discharge took so long, he said that he was in contact with his then-trustee for those 10 years, but the trustee's fee "kept increasing", and that a fee that began at $1,000.00 increased to over $4,000.00, and that he was unable to pay it.

ANALYSIS

[8] A third bankruptcy is an extremely serious matter. The authors of *Bennett on Bankruptcy* (CCH Canadian Limited 8th ed. at p. 266) state in absolute terms that "Where the bankrupt goes into bankruptcy for the third time, the court will refuse the discharge", citing as authorities ***Re Hardy*** ((1979) 23 O.R. (2d) 227) and ***Re Resnick*** ((1990) C.B.R. (N.S.) 223). The pithy comment of Anderson J. in ***Hardy*** (at p. 228) is oft-quoted: "In my view, a third bankruptcy is one too many." The reasons for Mr. Hardy's various bankruptcies are not given, but they occurred in 1958, 1974, and 1977, a chronology not all that dissimilar to Mr. Willier's. Anderson J.'s thinking seemed simply to be that a "three strikes" rule is at work, and that the system should not permit "periodic purging" of debts.

[9] In ***Re Randall*** ((1984) 54 C.B.R. (N.S.) 121) Sutherland J. of the Ontario Supreme Court also refused a discharge to a third-time bankrupt. In Mr. Randall's case it seems there was more at work than just the problem of a third bankruptcy. Part of the court's frustration may have arisen from the fact that Randall was a medical professional (a chiropractor) yet "...he seems to pay creditors when they attach his OHIP moneys and when they hold security or threaten action against him" (at p. 123). That frustration is obvious in another comment:

> ...one simply does not know to what extent there are parallel human and emotional responsibility shortfalls reflected in the marital and parenting history of this bankrupt. (also at p. 123)

In considering ***Re Hardy***, Sutherland J. pointed out that that Anderson J. did not purport to "lay down the general rule of law" and regarded it as guidance, but not a binding authority. With respect, I agree; had the parliament intended that third-time bankrupts should be routinely refused discharge it would have provided for that in the amendments that have been made to the ***Bankruptcy and Insolvency Act*** (R.S. 1992 ch. 27) ("the ***Act***") since ***Hardy***.

[10] Finally, in ***Resnick*** Registrar Ferron also refused discharge on a third bankruptcy. The Registrar concluded that Resnick had systematically used the ***Act*** to avoid taxes (over $140,000.00 during the three bankruptcies), and that while enjoying a handsome income (over $7,000.00 per month in 1990) all was spent in daily expenses "...including the costs of three rental automobiles" (at p. 224). Having examined the bankrupt and his pattern of assignments, the Registrar concluded (at p. 224) that to discharge Mr. Resnick "...merely prepares the way for a fourth bankruptcy."

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[11] Mr. Willier, approaching the court for a third time, is already obviously in a very bad light. But he is not in as bad a light as Mr. Resnick; he does not seem to have routinely used the ***Act*** to avoid taxes. It cannot be said that he has such character flaws or familial failings as those that apparently afflicted Mr. Randall. No, the facts with Mr. Willier seem to suggest financial incompetence combined with a general lack of education that have produced disastrous results for him and for his creditors.

[12] By the time an individual has entered a third bankruptcy, the purpose and intent of the ***Act*** shifts from its remedial purpose of assisting well-intentioned but unfortunate debtors to one of protecting society, and in particular unsuspecting potential creditors. The best intentions and hopes of such bankrupts become subordinated to the need to protect others from the bankrupt's demonstrated financial incompetence, negligence, and carelessness. If there can be a concept of debtors' recidivism, it is demonstrated in stark relief by a third-time bankrupt.

[13] To even consider a discharge for a third time bankrupt the court must be satisfied that the bankrupt has gained sufficient insight and made sufficient changes in his or her life that it is not reasonably possible that further bankruptcy will occur. I have serious concerns about Mr. Willier on that score. When I asked what he would do differently to avoid another bankruptcy, his answer was simple and direct: "I am a poor businessman". By this he was referring to his failed attempt to run a restaurant in Chetwynd, B.C. Implicit in that was his conclusion (and, when asked, his assurance to the court) that he would not attempt his own business again, but would remain an employee for the balance of his working life. Against this, however, is his advancing age and his admitted difficulty in finding work as a truck driver when younger drivers are available. One wonders if, as work becomes more and more scarce, Mr. Willier might not be tempted to attempt self-employment or a business venture again.

[14] Related to this question of insight is the relatively small amount of his debts: one wonders why Mr. Willier did not attempt other forms of resolution before declaring bankruptcy. If he has not learned from his multiple bankruptcies to manage a relatively modest debt load, is it not likely that he will again, and possibly in short order, find himself in financial straits?

[15] On the other hand, one must qualify any expectations of Mr. Willier with the salient fact of his limited education, and the serious limitations on his literacy. Similarly, his age is a factor; he is now 61 and, bluntly put, he has less time in the future to create economic difficulties than might a younger person.

[16] Any financial condition on Mr. Willier's discharge could be insurmountable for him. Instead, Mr. Willier will be given his discharge, but it will be suspended for three years from the date of his application, being July 19, 2005. Such a lengthy suspension, in my view, serves the dual purpose of recognizing the seriousness of a third bankruptcy, while at the same time protecting unsuspecting future creditors for, probably, the balance of Mr. Willier's working career.

"Master D. Baker as Registrar"

Court may modify after year - Sec. 172(3)
(3) Where at any time after the expiration of one year after the date of any order made under this section the bankrupt satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in such manner and on such conditions as it may think fit.

Power to suspend - Sec. 172(4)
(4) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.
R.S., 1985, c. B-3, s. 172;
2005, c. 47, s. 104;
2007, c. 36, ss. 52, 101.

Exception — personal income tax debtors - Sec. 172.1
172.1 (1) In the case of a bankrupt who has $200,000 or more of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims, the hearing of an application for a discharge may not be held before the expiry of

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(a) if the bankrupt has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction,

(i) 9 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 9 months, or

(ii) 21 months after the date of bankruptcy, in any other case;

(b) if the bankrupt has been a bankrupt one time before under the laws of Canada or of any prescribed jurisdiction,

(i) 24 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 24 months, or

(ii) 36 months after the date of bankruptcy, in any other case; and

(c) in the case of any other bankrupt, 36 months after the date of the bankruptcy.3

Appointment to be obtained by trustee - Sec. 172.1(2)

(2) Before proceeding to the trustee's discharge and before the first day that the hearing could be held in respect of a bankrupt referred to in subsection (1), the trustee must, on five days notice to the bankrupt, apply to the court for an appointment for a hearing of the application for the bankrupt's discharge.

Powers of court to refuse or suspend discharge or grant conditional discharge - Sec. 172.1(3)

(3) On the hearing of an application for a discharge referred to in subsection (1), the court shall, subject to subsection (4),

(a) refuse the discharge;

(b) suspend the discharge for any period that the court thinks proper; or

(c) require the bankrupt, as a condition of his or her discharge, to perform any acts, pay any moneys, consent to any judgments or comply with any other terms that the court may direct.

Factors to be considered - Sec. 172.1(4)

(4) In making a decision in respect of the application, the court must take into account

(a) the circumstances of the bankrupt at the time the personal income tax debt was incurred;

(b) the efforts, if any, made by the bankrupt to pay the personal income tax debt;

(c) whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and

(d) the bankrupt's financial prospects for the future.

Requirements if discharge suspended - Sec. 172.1(5)

(5) If the court makes an order suspending the discharge, the court shall, in the order, require the bankrupt to file income and expense statements with the trustee each month and to file all returns of income required by law to be filed.

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3 For additional excellent reading on differing countries ranking of income tax debt in bankruptcy see American Bankruptcy Law Journal, Fall, 2000, 74 Am. Bankr. L.J. 461, ***"Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy"*** by Barbara K. Morgan.

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Court may modify after year - Sec. 172.1(6)
(6) If, at any time after the expiry of one year after the day on which any order is made under this section, the bankrupt satisfies the court that there is no reasonable probability that he or she will be in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in any manner and on any conditions that it thinks fit.

Power to suspend - Sec. 172.1(7)
(7) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.

Meaning of "personal income tax debt" - Sec. 172.1(8)
(8) For the purpose of this section, "personal income tax debt" means the amount payable, within the meaning of subsection 223(1) of the Income Tax Act without reference to paragraphs (b) to (c), by an individual and the amount payable by an individual under any provincial legislation that imposes a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, including, for greater certainty, the amount of any interest, penalties or fines imposed under the Income Tax Act or the provincial legislation. It does not include an amount payable by the individual if the individual is or was a director of a corporation and the amount relates to an obligation of the corporation for which the director is liable in their capacity as director.
2005, c. 47, s. 105;
2007, c. 36, s. 53.

Facts for which discharge may be refused, suspended or granted conditionally - Sec. 173
173. (1) The facts referred to in section 172 are:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

(b) the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

(c) the bankrupt has continued to trade after becoming aware of being insolvent;

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

(e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;

(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

(g) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action;

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(h) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors;
(i) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities;
(j) the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors;
(k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;
(l) the bankrupt has committed any offence under this Act or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder;
(m) the bankrupt has failed to comply with a requirement to pay imposed under section 68;
(n) the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness; and
(o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

Biblow (Re), 2009 SKQB 76 (CanLII) - Contested Discharge due to Dishonesty and Gambling with Issue of Leveraged Exempt Assets

Date:	2009-02-17
Docket:	16202 JCR; 22-1024537 JCR
Parallel citations:	51 CBR (5th) 303; 333 Sask R 95
URL:	http://canlii.ca/t/22jjp
Citation:	Biblow (Re), 2009 SKQB 76 (CanLII), <http://canlii.ca/t/22jjp> retrieved on 2013-09-15
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Bankruptcy No. 16202 **2009 SKQB 76**
Estate No. 22-1024537 J.C.R.

IN THE COURT OF QUEEN'S BENCH
PROVINCE OF SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY
IN THE MATTER OF THE BANKRUPTCY OF
DENIS WILLIAM BIBLOW

Rob Deniset, PriceWaterhouse Coopers, Trustee
Scott Armstrong, Official Receiver
Denis Biblow, bankrupt
Carleen Koroluk, Springside Credit Union, Inspector

JUDGMENT LIAN M. SCHWANN, Q.C.
February 17, 2009 Registrar in Bankruptcy

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[1] Denis Biblow ("Biblow") applies for his discharge from bankruptcy. His discharge is opposed by both the trustee and the Official Receiver (OR). While the Springside Credit Union did not oppose discharge, an employee of the Credit Union made submissions in her role as inspector which amplified the positions of the opposing parties.

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BACKGROUND

[2] Biblow assigned into bankruptcy in December 2007. An addiction to gambling is given as the cause. At the time of assignment he had declared assets of $837,442 against unsecured debts of $244,720 and secured debts of $16,300. Of the declared assets, the vast bulk (in excess of $765,000) is in the form of RRSP's which is exempt from execution by virtue of provincial law. [*The Registered Plan (Retirement Income) Exemption Act*, S.S, 2002, ch. R-13.01].**

[3] Biblow had been employed in the credit union system rising through its ranks to the branch manager position; however within months following assignment Biblow was terminated from his employment. He initially contested his dismissal for cause through Labour Standards but has since abandoned this claim and the trustee shows no interest in pursuing it on behalf of creditors.

[4] Shortly before assignment Biblow had been transferred from a credit union branch in Regina to Theodore, a small town in Saskatchewan. He and his wife resided in a credit union owned house from the time of transfer to dismissal however loss of employment also meant loss of the house. The bankrupt has decided to remain in that town primarily because of the lower cost of living. His wife resides with him. She is employed on a casual basis.

[5] Trustee opposition is premised on these four grounds set out in the trustee's section 170 Report:

- **the bankrupt failed to disclose the transfer of his half interest in the 2000 Prowler fifth wheel trailer to his son for a nominal fee;**
- **the bankrupt failed to disclose his half interest in a term deposit held by his spouse in the amount of $225,000;**
- **the bankrupt failed to disclose the existence of the boat lift and docks; and**
- **the bankrupt brought on his bankruptcy by gambling.**

[6] Although the evidence is somewhat unclear on this point, Biblow borrowed from both the Springside Credit Union and the Torquay Credit Union in the year prior to assignment using the bulk of the loans to acquire RRSP's. The OR claims these loans total $27,500 and suggests that little has been paid on principal. Biblow places the balance outstanding closer to $20,000 however based on the proven claims the trustee says $21,372 is owed.

[7] The OR examined Biblow under oath and filed both an OR Report and the bankrupt's written declaration which together shed further light on his bankruptcy and its cause. The information revealed that Biblow's gambling began about five years ago, becoming more frequent in the two years preceding bankruptcy. In total he estimates spending over $100,000 largely financed by cash advances. Repayment of debt was softened by loan extensions given to himself in his position as branch manager.

POSITION OF THE PARTIES

Trustee

[8] In spite of a relatively good income stream and a successful career in the financial industry, the financial problems which arose were attributable solely to his gambling addiction. This fact was not disputed by Biblow and is supported by the examination conducted by the OR. **While gambling alone is worthy of censure, the trustee argues that Biblow's failure to perform certain fundamental duties in bankruptcy should not go unnoticed**.

[9] These failures relate to the following:

½ interest in 2000 Prowler fifth wheel trailer - This asset was not listed on his Statement of Affairs, however he subsequently admits to having gifted it to his son. The sum of $4,885 was later collected from the son and forms part of realized assets.

½ interest in term deposit held by his spouse in the amount of $225,000 – The trustee recovered over $115,177 from a term deposit which again was not disclosed in his Statement of Affairs. The history behind this stems from the sale of his house in Regina. Net proceeds of $225,000 were placed in a term deposit solely in his wife's name with interest thereon paid monthly to her. The trustee considered this to be a settlement in favor of Mrs. Biblow and in due course she agreed to release ½ interest for the benefit of her husband's estate.

boat lift and docks - These were not disclosed initially. They appear to have no value or were fully secured as no amount was realized from them according to the s. 170 Report.

[10] Biblow had surplus income obligations for the first nine months of bankruptcy with the sum of $1,642 remaining. The trustee recommends that additional surplus income payments be made for the ensuing 12 month period calculated at the rate of $750 per month for a total of $9,000. In total, $10,642 is the recommended amount of surplus income.

[11] Further, a period of suspension of 6 to 12 months is recommended owing to the causes of bankruptcy.

Official Receiver

[12] The OR takes the position that the facts of this case warrant a conditional order in the amount of $30,000 which approximates loans outstanding to the Springside and Torquay Credit Unions obtained by Biblow to acquire exempt RRSP's. These loans were arranged on the eve of bankruptcy and at a time he was gambling heavily.

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[13] The OR highlights the fact Biblow's conduct only came to light through the diligence of inspectors and creditors and not through the bankrupt's candor. According to the OR Biblow acquired two RRSP's valued at $13,000 and $14,500 respectively, financed through loans from the Springside and Torquay Credit Unions in 2007. The OR further points to the fact these were acquired separately and knowingly, and were not part of a pension rollover.
[14] The OR urges this court to impose a sizeable conditional order in view of the conduct of the bankrupt and the large amount of exempt assets. Reliance is placed on *Kreese (Re),* 45 C.B.R. (3d) 36 and *Nelson (Trustee of) v. Nelson* 33 C.B.R. (3d) 292 in support of the position that a bankrupt should not be allowed to exit from bankruptcy with a large amount of exempt assets if doing so would undermine public confidence in the bankruptcy system.
[15] The OR is not completely satisfied full disclosure has been made and has therefore referred this case to the RCMP for further investigation.

Inspector

[16] The Inspector's comments were brief but pointed. She maintains that because of Biblow's senior position with the Credit Union he was able to advance money to himself with little or no oversight and with which he purchased RRSP's knowing them to be exempt from execution. His knowledge of the system and ability to easily facilitate loans to himself along with loan extensions – while knowing to be insolvent - should be sanctioned. Anything less would put lending institutions on notice and potentially cast a pall on lending practices for purposes of purchasing exempt RRSP's.

Biblow

[17] Biblow showed himself to be a polished, professional man. Through counseling, he claims to have quit gambling and changed his lifestyle. He now wishes to make amends to his family and move on.
[18] He is presently 61 years of age working on a temporary basis for a local business. Although he hopes to continue working for several more years, because of his age, the limited employment opportunities in a small community and his present circumstance, his options are limited. Work in the financial sector for instance, which had served him well over the years, would be difficult if not impossible to secure in light of what has transpired.
[19] Biblow offered no explanation to the many concerns expressed by the Trustee, the OR or the Inspector other than to briefly explain circumstances giving rise to the term deposit. He claims that when his Regina house sold, the net proceeds were initially paid to him alone despite his instructions to the contrary. He later put the money in a term deposit in the sole name of his wife so that she would have an income stream from interest earned on it. Although he did not say so expressly, the implication I was left to draw was that this was an innocent and well meaning gesture on his part and not a contrived attempt to avoid creditors.
[20] Finally he points to the fact that the vast bulk of his current RRSP's were accumulated through pension contributions and subsequent rollover well before his assignment into bankruptcy.

ANALYSIS

[21] This case comes down to this simple question: should this bankrupt be allowed to exit bankruptcy with a large amount of exempt assets without making a sizeable contribution to his creditors?
[22] Before addressing the central issue, a return to basic principles is in order. Section 172 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") allows this court to make an order of discharge which is either absolute, conditional or suspended. Where, however, a s. 173 fact is established, an absolute order is precluded.
[23] Gambling which brings on or contributes to bankruptcy is a recognized s. 173 fact. (*BIA*, s. 173(e)). Having found one fact, it is unnecessary to probe further however this file is rich with other conduct-based irregularities highlighted in paragraph 5 of the trustee's s. 170 Report. In each case (the fifth wheel trailer and gift to son, boat lift / docks, and ½ interest in the term deposit) the assets and transactions were purposively undisclosed at the time of assignment. What makes this even more offensive is the fact these irregularities only came to light after probing and investigation by the trustee and creditors. Biblow did not dispute these facts at the hearing nor offer any justification for them. I am satisfied these omissions and failures constitute a failure to perform duties under the *Act* which is a recognized s. 173 fact. (*BIA*, s. 73(o) and s. 158(f),(g) and (k)).
[24] Even if I am wrong about the existence of a s. 173 fact, this Court has discretion under **s**. 172(1) to make a conditional or a suspended order of discharge having regard to the bankrupt's conduct, income and other relevant factors. [see: *Papazoglou (Re)*, 11 C.B.R. (4th) 95; *Giesbrecht (Re)*, 50 C.B.R. (N.S.) 46].
[25] Discharge is discretionary, exercised judicially having in mind the objects and purposes of the *BIA*. Courts across Canada have routinely found the primary purpose of the Act to be this:

> ... it gives the honest but unfortunate debtor who has surrendered all non-exempt assets for distribution a new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debts.
> [J.M. Ferron, Q.C. "*The Approach of the Court to the Discharge of Bankrupt Judgment Debtors*" (1986) 61 C.B.R. (N.S.) 134.]

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[26] With those broad objects and purposes in mind, courts exercise discretionary power by striking a balance between three recognized factors.

> The first, the interest of the creditors who claim moneys that is properly owing to them. Second, the interest of the bankrupt who, faced with insurmountable debt obligations, seeks the process provided by the system for some relief from those obligations to the extent that he is unable to discharge them from his own resources. The third factor is the integrity of the system itself and the public perception of that integrity.
> [*Shakell (Re),* 70 C.B.R. (N.S.) 270]

[27] The OR places focus on the third factor advocating in favour of a sizeable conditional order where, as here, the size of the bankrupt's exempt assets would offend most reasonable people and thereby undermine the integrity of the bankruptcy system. The appropriate balance in this case tilts in favour of public perception and integrity of the system, they argue.

[28] The OR's position is a delicate one because almost all of the bankrupt's assets are exempt. Exemptions, of course, play a pivotal role underpinning the second of the three factors that being the rehabilitation of the bankrupt by allowing him to exit bankruptcy in an economically viable fashion. Houlden & Morawetz, (*Bankruptcy and Insolvency Law* of *Canada,* 3rd ed., loose-leaf, vol. 2 at 3-51) have described the role of exemptions in this fashion:

> The reason for conferring the exemption on bankrupts is (a) the social interest in preserving the viability of debtors so that their continued maintenance does not fall on society, and (b) the humane considerations of permitting debtors sufficient assets so that they may maintain themselves and their families at a reasonable standard of living.

[29] Notwithstanding the existence of exempt assets (which are not divisible amongst creditors by virtue of s. 67(1)(b) of the *BIA*), courts have not backed away from imposing conditional orders of discharge where considered appropriate. The case of *Nelson (Trustee of) v. Nelson*, is often cited as the leading authority in support of the principle advanced by the OR. There Wedge, J. concluded: "…leaving a bankruptcy with $250,000 in assets brings into question the integrity of the bankruptcy system."

[30] That case was followed in this province by *Kreese* where Registrar Herauf (as he then was) framed the issue more as a balancing of interests. On the one hand are exemptions the purpose of which, he says, is described by the Supreme Court of Canada as: "the bare minimum which a bankrupt is entitled to maintain in order to facilitate his or her rehabilitation following bankruptcy". [*Ramgotra (Trustee of) v. Northern American Life* 1996 CanLII 219 (SCC), (1996), 37 C.B.R. (3d) 141]

[31] Where the total value of the bankrupt's exempt assets goes beyond a 'bare minimum', other factors may take precedence. He concludes at paragraph 10:

> I have no doubt that this is the philosophy behind exemption legislation. As stated previously the difficulty arises when the size of the exemption is such that it would offend the majority of reasonable people and certainly diminish the integrity of the bankruptcy process. Notwithstanding this difficulty the courts must attempt to fashion orders that pay due deference to both these principles.

[32] This approach has been followed elsewhere. [See: *Wells (Re)*, 178 Sask. R. 150; *Davey (Re)* 1999 CanLII 14798 (ON SC), (1999) 44 O.R. (3d) 327 (Ont. S.C.J.); *Zibara (Re)*, 34 C.B.R.(4th) 149 (N.S.S.C.); *Fredette (Re*), 45 C.B.R. (4th) 34; *Bird (Re)* reflex, (2002), 37 C.B.R. (4th) 163 (Ont. S.C.J.)].

[33] To be clear, these cases do not stand for the bald proposition that no bankrupt should exit bankruptcy without a sizeable (or any) conditional order simply because the bankrupt has exempt assets. The dollar amount of the exempt assets coupled with the unique facts of each case informs the court on the appropriate disposition. In fact there have been just as many cases where the facts did not justify a conditional order. [See: *Huber (Re)*, 1986 Sask.R. 314; *Fernuik (Re)*, 169 Sask.R. 136; and *Poettcker (Re),* 38 C.B.R. (5th) 259 (Alta. Q.B.)].

[34] *Poettcker (Re),* the most recent case where the issue came to the fore, was an appeal from a decision of the Registrar who had granted an absolute discharge in the face of sizeable exempt assets. In dismissing the appeal, the court emphasized that the analysis was not reduced to a mere consideration of the ratio of exempt assets to proven claims; something more is required which is often an element of misconduct on the part of the bankrupt.

[35] Balancing the interests at play, I find that the third factor – the integrity of the bankruptcy system – must take precedence in the unique facts before me. I conclude that reasonable people would be offended if this bankrupt, given these facts, were to exit bankruptcy with such a sizeable amount of exempt assets. The integrity of the bankruptcy system would be seriously undermined in the minds of fair minded people if I were to give greater weight to his rehabilitation.

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[36] It is not just the large amount of exempt RRSP's which brings me to this conclusion. The actions and inactions of the bankrupt have a direct bearing on the result. First of all, this bankrupt was a seasoned employee in the financial lending sector, and at that, one who occupied a very senior position at the time of assignment. In such a position he likely had knowledge of debtor–creditor law including personal exemption laws and their interplay in bankruptcy. Armed with this knowledge, at a time he was insolvent and gambling, he acquired exempt RRSP's and allowed himself loan extensions.

[37] Second, his insolvency did not arise because he was *unfortunate*, instead it came about through gambling. As alluded to above, one of the purposes of the *BIA* is to facilitate the rehabilitation of honest but unfortunate debtors. While uncontrolled gambling can bring about misfortune in people's lives, it is not the same type of *misfortune* which the *BIA* was intended to remedy. This was not an unfortunate event that suddenly and inexplicably befell him such as illness, business or job loss, or sharp drop in family income. He gambled of his own choosing and had the ability to quit at any time before the losses began to undermine his financial position.

[38] Third, the bankrupt failed to make proper disclosure of his assets at the time of assignment as evidenced in the s. 170 Report. And to make matters worse, information about these assets only came to light after much prodding and digging by the trustee and creditors. This behavior, coupled with gambling, constitutes the requisite 'misconduct' element deemed necessary in *Poettcker*.

[39] In carrying out this balancing exercise, I must be mindful of the bankrupt's ability to make a monetary contribution to his estate. To the extent a bankrupt is financially able, he or she should contribute so that the creditors get the best possible return from the estate. [see: *Davey,* p. 334; and *Wells* at p.153]

[40] Biblow will exit bankruptcy with in excess of $765,000 in RRSP's plus pension and he will be relieved of his unsecured debts. This amount is a fairly sizeable nest egg for most people and one which he can look to in retirement. Payment to his estate for the benefit of creditors of a small amount will not in my view impose an undue burden on him nor undermine his financial viability in the short or long term.

[41] Further, although nearing the end of his working career, the bankrupt is in good health and fully capable of working for several years to come. He struck me as an articulate, polished businessman whose skills and training could be put to good use for several more years. He may encounter difficulty in finding a replacement job in his chosen field but that doesn't preclude him from finding a reasonably well paying job elsewhere.

[42] The last issue is the matter of surplus income. The trustee seeks a conditional order totaling $10,642 composed of $1,642 for the balance owing on the first nine months along with a further sum of $9,000 calculated on the basis of $750 per month for 12 months. His net income per month ranges from $2,500 to $5,000. Given these facts, surplus income is warranted.

CONCLUSION

[43] Based on these considerations and the balancing of interests required by the *BIA*, I find this to be an appropriate case for the bankrupt to make a sizeable contribution to his estate which I fix at $20,000. I further order the bankrupt to pay surplus income of $6,000.

[44] An order of discharge shall issue therefore conditional upon payment of $26,000. Payment may be made monthly at the rate of $500 per month, which I believe can be comfortably accommodated, beginning on the 1st of March, 2009 until fully paid. Judgment interest will accrue on any arrears. The bankrupt will enjoy the right of prepayment.

[45] Finally, as the bankrupt brought about this bankruptcy through gambling, I find it appropriate to also suspend his discharge for a period of 6 months following compliance with the terms of the conditional order.

DATED at the City of Regina, in the Province of Saskatchewan, this 17th day of February, A.D. 2009.

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Registrar in Bankruptcy

Application to farmers - Sec. 173(2)

(2) Paragraphs (1)(b) and (c) do not apply in the case of an application for discharge by a bankrupt whose principal occupation and means of livelihood on the date of the initial bankruptcy event was farming or the tillage of the soil.

R.S., 1985, c. B-3, s. 173;

1997, c. 12, s. 103.

Assets of bankrupt when deemed equal to fifty cents in dollar - Sec. 174

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174. For the purposes of section 173, the assets of a bankrupt shall be deemed of a value equal to fifty cents on the dollar on the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt has realized, is likely to realize or, with due care in realization, might have realized an amount equal to fifty cents on the dollar on his unsecured liabilities.
R.S., c. B-3, s. 144.

Court may grant certificates - Sec. 175
175. (1) A statutory disqualification on account of bankruptcy ceases when the bankrupt obtains from the court his discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part.

Appeal - Sec. 175(2)
(2) The court may, if it thinks fit, grant a certificate mentioned in subsection (1), and a refusal to grant such a certificate is subject to appeal.
R.S., c. B-3, s. 145.

Duty of bankrupt on conditional discharge - Sec. 176
176. (1) Where an order is granted on terms or conditions or on the bankrupt consenting to judgment, the bankrupt shall, until the terms, conditions or judgment is satisfied,

> **(a) give the trustee such information as he may require with respect to his earnings and after-acquired property and income, and**
> **(b) not less than once a year, file in the court and with the trustee a statement verified under oath showing the particulars of any property or income he may have acquired subsequent to the order for his discharge,**

and the trustee or any creditor may require the bankrupt to attend for examination under oath with respect to the facts contained in the statement or with respect to his earnings, income, after-acquired property or dealings.

Penalty for failure to comply - Sec. 176(2)
(2) Where the bankrupt fails to give information or to file a statement as required by subsection (1), to attend for examination when required to do so or to answer all questions fully and accurately with respect to his earnings, income, after-acquired property or dealings, the court may on the application of the trustee or of any creditor revoke the order of discharge.

Trustee to distribute funds payable under conditional discharge - Sec. 176(3)
(3) Where a conditional order of discharge of a bankrupt is made providing for payment of a further dividend or sum of money by the bankrupt, all payments on account thereof shall be made to the trustee for distribution to the creditors.
R.S., c. B-3, s. 146.
177. [Repealed, 2000, c. 12, s. 17]

Debts not released by order of discharge - Sec. 178
178. (1) An order of discharge does not release the bankrupt from

> **(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;**

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(a.1) any award of damages by a court in civil proceedings in respect of
(i) bodily harm intentionally inflicted, or sexual assault, or
(ii) wrongful death resulting therefrom;
(b) any debt or liability for alimony or alimentary pension;
(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;
(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;
(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;
(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;
(g) any debt or obligation in respect of a loan made under the Canada Student Loans Act, the Canada Student Financial Assistance Act or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred
(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or
(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student; or
(h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g).

Canada (Attorney General) v. Bourassa (Trustees of), 2002 ABCA 205 (CanLII) - Procedure on Fraudulently Incurred Debt

Date:	2002-09-12
Docket:	0103-0180-AC
Parallel citations:	312 AR 19; 219 DLR (4th) 32; [2002] 11 WWR 285; 36 CBR (4th) 181; 6 Alta LR (4th) 223
URL:	http://canlii.ca/t/5jbm
Citation:	Canada (Attorney General) v. Bourassa (Trustees of), 2002 ABCA 205 (CanLII), <http://canlii.ca/t/5jbm> retrieved on 2013-09-01
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Canada (A.G.) v. Bourassa (Trustees of), 2002 ABCA 205

Date: 20020912
Docket: 0103-0180-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE CHIEF JUSTICE FRASER
THE HONOURABLE MR. JUSTICE McCLUNG

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THE HONOURABLE MR. JUSTICE COSTIGAN

IN BANKRUPTCY AND INSOLVENCY
IN THE MATTER OF THE BANKRUPTCY OF
CORY SHANE BOURASSA
ESTATE NO. 82100
BETWEEN:

THE ATTORNEY GENERAL of CANADA for HUMAN RESOURCES DEVELOPMENT CANADA

Appellant
(Appellant)

- and -

FABER AND COMPANY Inc. TRUSTEES IN BANKRUPTCY for CORY SHANE BOURASSA

Respondent
(Respondent)

Appeal from the Judgment of
The Honourable Mr. Justice W. E. Wilson

Dated May 2, 2001
Filed May 9, 2001

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REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE McCLUNG
CONCURRED IN BY THE HONOURABLE MR. JUSTICE COSTIGAN
REASONS FOR JUDGMENT OF THE HONOURABLE CHIEF JUSTICE FRASER
CONCURRING IN THE RESULT

COUNSEL:

R. Nichwolodoff, Esq.
For the Appellant

D. Tkachuk, Esq.
For the Respondent

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REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE McCLUNG

[1] This appeal is directed to a determination of the procedural prerequisites sustaining a successful allegation that a listed bankruptcy debt was fraudulently incurred and therefore survives a discharge from bankruptcy. Section 178(1)(e) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, provides that among debts not released by an Order of Discharge is:

> **(e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation;**

The appeal originally came before us without oral argument. However, limited oral submissions were later taken on some points in dispute.

[2] This appeal features an Order of Discharge applied for by the Trustee, Faber and Company, which was granted by Registrar Breitkreuz. The Order for Discharge included a clause which required a further court application by the Appellant Attorney-General if it wished to treat its debt owed by Cory Shane Bourassa, the bankrupt, as a fraudulent debt to be excepted from the discharge under s. 178(1)(e), *supra*. The Appellant Attorney-General entered no appearance at the discharge application, and therefore did not oppose it. However, at the application the Trustee requested the inclusion of the clause in the discharge order, advising the Registrar that earlier, instead of obtaining a court order declaring that a debt fell under s. 178(1)(e), the Employment Insurance Commission had used its own internal mechanisms in deciding that debt was fraudulent. Upon exhaustion of the statutory appeal procedures, it would pursue the bankrupt for his debt. The Trustee successfully argued that the establishment of fraud, triggering a s. 178(1)(e) exemption, must be rooted to an adjudication to that effect and that a finding based on the Commission's internal procedures was at best collateral and in this proceeding not proven. Indeed the decision of the Employment Insurance Commission is not reproduced in the Appeal Book nor was it placed in evidence before the Registrar at the discharge hearing.

[3] This order that was made was upheld on appeal to Wilson J., who concluded that a court declaration that a debt survives bankruptcy is required, and that the procedures under s. 38 of the *Employment Insurance Act*, S.C. 1996, c. 23, were inadequate for this purpose.

[4] Before this Court, the Appellant Attorney-General argued that a debt which falls under s. 178(1)(e) survives bankruptcy by operation of law, so that no court declaration to this effect is required. As a consequence, it is argued, the Registrar lacked jurisdiction to impose such a condition obliging the Crown to pursue a further court application. The Appellant Attorney-General relies on the Employment Insurance Commission's internal finding of fraud, stressing that it is the bankrupt who must seek to refute that finding by either appealing it through the statutory appeal procedures found in the *Employment Insurance Act*, or by seeking to answer the Appellant Attorney-General's attempts to collect the debt on the basis of his bankruptcy and subsequent discharge.

[5] I disagree with the Appellant's stance. While it is true that s. 178(1)(e) does not expressly require a court declaration, a creditor, even the Crown, cannot be permitted to make its own determination of fraud and then revert to collection of its debt on that basis. A court order declaring fraud, whether obtained before, during or after a discharge from bankruptcy, is required to free a creditor to pursue its claim against a discharged bankrupt. In my view, the impugned condition that was imposed was merely a direction that is incidental to the core of the judgment and did not equate to a jurisdictional error. Indeed, it favoured the Attorney-General of Canada by giving him an opportunity to shore up a defective record when the application is renewed.

[6] The case law reflects the various ways in which such orders can be sought. For example, when a pre-bankruptcy judgment does not contain an express finding of fraud, a creditor can either seek a declaration of fraud at the time of the discharge application or he can seek a declaration from the Court of Queen's Bench after the discharge: *Berthold v. McLellan* reflex, (1994), 19 Alta. L.R. (3d) 28 (C.A.). Furthermore, if no judgment exists at the time of the bankruptcy, a creditor may subsequently initiate an action to recover the debt, pleading fraud. If the creditor can prove fraud, the existence of the discharge from bankruptcy will be no defence to the action: *Moose Jaw Credit Union Limited v. Kennedy* (1981), 13 Sask. R. 252 (Q.B.); *Canadian Imperial Bank of Commerce v. Aksoy* (1989), 75 C.B.R. (N.S.) 248; [1989] O.J. No. 867 (Ont. Dist. Ct.). On the other hand, when a judgment, which pre-dates the bankruptcy, expressly finds fraud, no further court order would be needed before the creditor may pursue collection of its debt: *Smith (Re)* reflex, (1985), 43 Sask. R. 27 (Q.B.), aff'd reflex, (1986), 45 Sask. R. 240 (C.A.). The same is true of a consent judgment from which an admission of fraud can be inferred: *Beneficial Finance v. Williamson* (1971), 16 C.B.R. (N.S.) 30 (Ont. Co. Ct.); *Demitor (Re)* (1993), 137 A.R. 381 (Master).

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[7] Section 38 of the *Employment Insurance Act* grants the Commission the power to impose penalties on a claimant when it is aware of facts that, in its opinion, establish that the claimant has made false or misleading representations. However, recitation of this power, without more, does not grant the Commission jurisdiction to establish internally "false pretences or fraudulent misrepresentation" for the purposes of the exemption set out in s. 178(1)(e) of the *Bankruptcy and Insolvency Act*.

[8] Wilson J. was understandably concerned when he balked at the Attorney-General's submission, noting:

> I have to say that I have difficulty with the suggestion that a finding of the Commission based on "facts of which they are aware" should be elevated to that status. Perhaps that is what the federal legislation says, but it does not accord with my view of how the rights of people are to be determined after full exploration of the facts in law, particularly when a matter of such importance as fraud is alleged.

[9] The Registrar's conclusion which was affirmed by Wilson J. is supported by the rules of practice touching allegations of fraud in civil proceedings. Fraud and its proof have their own distinct biosphere. In commercial disputes, allegations of fraud are frequently levelled. But they must be levelled with caution. At common law the claim must be specified and with particulars, or it will be struck: see *Canadian Abridgement,* vol. R17D, (2d) ed. (Toronto: Carswell, 1991) at Digest 1689 *et seq*. Regarding evidence of fraud, *Kerr on Fraud and Mistake* notes that; "fraud is not to be assumed on doubtful evidence. The facts constituting fraud must be clearly and conclusively established." Where fraud is unsuccessfully alleged, the success of the allegor otherwise may not earn costs, or may earn only a reduced costs award: *Husky Oil Operations Ltd. v. Forest Oil Corporation* 1990 CanLII 5502 (AB QB), (1990), 73 Alta. L.R. (2d) 223; *Gerber v. Eagle Star Insurance Co.*, [1981] I.L.R. 1-1442 (B.C. S.C.); *McLaughlin v. Colvin*, [1941] 4 D.L.R. 568 at 576, 583 (Ont. C.A.), aff'd [1942] 3 D.L.R. 292 (S.C.C.). An unsuccessful party, who has alleged but not proven fraud, may incur taxable costs on a scale well beyond that which would otherwise be payable: *Wong v. Schienbein* reflex, (1986), 49 Sask. R. 86 (Q.B.). An unfounded allegation of fraud by a defendant may even justify an award of costs to an unsuccessful plaintiff: *Snider v. New Brunswick Telephone Co.* reflex, (1986), 69 N.B.R. (2d) 8 (Q.B.), aff'd on different grounds reflex, (1987), 78 N.B.R. (2d) 266 (C.A.). These sanctions reflect the gravity with which the courts regard an allegation of fraud. Its existence will not be judicially noticed.

[10] He who alleges must prove. It is that simple. Counsel's assertion, which invites the dispensing of proof, is not enough. And internal administrative reviews, even reviews for which a right of appeal is provided, do not suffice. The Appellant must seek a judicial finding of fraud in order to pursue its debt. Registrar Breitkreuz' order was not beyond his jurisdiction as alleged. It merely reiterated this requirement.

[11] Here the record filed is silent on issues such as how fraud was found by the Employment Insurance Commission, and whether Bourassa had any input in the process.

[12] The bankruptcy court, by statute, normally determines what claims may survive a bankruptcy discharge application. The Court of Queen's Bench may exercise jurisdiction as well. *Berthold v. McLellan*, *ante*. But this Court is the forum which must decide whether the Registrar in Bankruptcy was wrong in the face of the evidence placed before him, i.e. whether the onus imposed by s. 178(1)(e) of the *Bankruptcy and Insolvency Act* has been satisfied. The record we have been given is neither adequate or reparable. The documents now offered by the Crown were available at the time of the hearing. They cannot now be received as exhibits via a fresh-evidence affidavit. For this appeal, it is too late.

[13] In future cases, the issue may be resolvable by timely proof of certification from the Employment Insurance Commission or the Federal Court of Canada that fraud permeates the debt that is involved. Thus, I do not foreclose a proper s. 178(1)(e) objection in future. I agree with Chief Justice Fraser that the possible equation of a s. 38 *Employment Insurance Act* declaration to s. 178(1)(e) Bankruptcy fraud cannot be resolved now but must await some future determination.

[14] We should be clear. The appeal of the Attorney-General of Canada is dismissed solely because of the inadequacy of the record that is filed to support it.

[15] To bring closure to this case, I would vary the judgment under appeal by directing that the Appellant Attorney-General of Canada institute any further application by filing and serving it not later than 60 days from the issuance of these reasons. Absent such application within the time allotted, Bourassa's debt to the Appellant Attorney-General of Canada will be deemed to have been discharged in its entirety. I would dismiss the appeal and in so doing affirm the Registrar's direction.

REASONS FILED at EDMONTON, Alberta,
this 12th day of September, 2002

McCLUNG J.A.

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I concur: COSTIGAN, J.A.

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REASONS FOR JUDGMENT OF
THE HONOURABLE CHIEF JUSTICE FRASER
CONCURRING IN THE RESULT

[16] The Registrar in Bankruptcy granted an Order of Discharge which was upheld by the chambers judge on appeal. The Registrar ordered at A.B. 11 that the Employment Insurance debt (EI debt) totalling $3060.00 owing by the bankrupt, Cory Shane Bourassa, "is discharged or the Stay of Proceedings is in place until Human Resources Development Canada makes a Court application and the Court subsequently declares that the Employment Insurance debt was a fraudulent debt pursuant to Section 178(1)(e) of the *Bankruptcy and Insolvency Act*" (*Bankruptcy Act*).

[17] The appeal focussed on whether a finding of fraud must be made by a court in order for a debt to fall within s.178(1)(e) of the *Bankruptcy Act* or whether a decision by the Canada Employment Insurance Commission (Commission) that a debt is owing due to a fraudulent Employment Insurance claim (EI claim) as determined under s.38 of the *Employment Insurance Act (EI Act)* will suffice for this purpose.

[18] The difficulty is that characterizing the issue in this way obscures, indeed ignores, two key underlying issues critical to this analysis:

1. Is a decision made under s.38 of the *EI Act* binding on the parties?
2. If so, what is the scope of that decision? In particular, is a debt owing to the Crown in respect of which a penalty has been levied against a claimant debtor under s.38 of the *EI Act* necessarily equivalent to a "debt or liability for obtaining property by false pretences or fraudulent misrepresentation" under s.178(1)(e) of the *Bankruptcy Act*?

[19] Focussing on who must make a finding of fraud in a vacuum also mixes these unaddressed and unresolved substantive issues with a third procedural issue, namely the manner in which it is determined that a debt falls within the scope of s.178(1)(e). Since the answer to the procedural issue is linked to the first two issues, the result of failing to deal with the core underlying issues is that the answer to the question as posed is "it depends".

[20] The Attorney General of Canada (Canada) takes the position that fraudulent debts survive a discharge of bankruptcy by operation of law pursuant to s.178(1)(e), independent of any court declaration. On this basis, therefore, Canada argues that the Registrar exceeded his jurisdiction in making the order he did.

[21] Canada concedes that penalties imposed under s.38 do not survive an individual's bankruptcy since the penalty portion of the debt does not represent property fraudulently obtained by the bankrupt. But it contends that the underlying debt does so. It points out that Parliament has expressly conferred on the Commission under s.38 of the *EI Act* jurisdiction to determine if an EI claim was "false and misleading", that is fraudulent.

[22] Canada submits that this is the conclusion which the Commission reached with respect to Bourassa's EI debt, namely that Bourassa obtained "property", the EI benefits, by "false pretences or fraudulent misrepresentation". In other words, the EI debt is a "fraudulent" one within the scope of s.178(1)(e) of the *Bankruptcy Act*. Since Bourassa did not appeal that decision, it is binding on Bourassa and thus his Trustee in Bankruptcy (Trustee).

[23] The Trustee contends that a Commission decision that a particular EI claim was a fraudulent one is not sufficient to bring the underlying debt within s.178(1)(e) of the *Bankruptcy Act*. It insists that no creditor, including the Commission, can make "its own finding of fraud". Only a court of competent jurisdiction can do so. The Trustee also claims that under the *EI Act*, the "onus" is on the debtor claimant to disprove the finding of fraud while under the *Bankruptcy Act*, it is on the creditor. According to the Trustee, this "reverse onus" is another reason why a court, and not simply the Commission, must determine this issue.

[24] Indeed, the Trustee went so far as to assert before the Registrar that "so often on our files where EI is involved they assume a person's fraudulent ...." [A.B.7]. In this regard, there is no evidence before this Court to substantiate this assertion.

[25] I turn first to the effect of a decision under s.38 of the *EI Act*. The *EI Act*, along with the related employment insurance regulations, constitutes a complete regulatory scheme for funding and payment of employment insurance benefits. Parliament's jurisdiction to enact this version of the legislation has not been challenged. The purpose of the legislation is to provide an income support safety net for those claimants who meet the qualifying criteria. In its present form, funding is provided solely through employer and employee contributions. In recent years, claimants have numbered in excess of a million annually. For example, in 2000/01, there were about 1.8 million new claims for EI benefits: The Canada Employment Insurance Commission, *Employment Insurance 2001 Monitoring and Assessment Report* (Ottawa: Human Resources Development Canada, 2002).

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[26] This comprehensive social welfare statute expressly confers on the Commission certain statutorily prescribed rights and obligations. Under s.38(1), the Commission is given the authority to impose penalties on claimants for 8 different categories of acts or omissions:

> 38 (1) The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has
>
> (a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;
>
> (b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;
>
> (c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;
>
> (d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;
>
> (e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;
>
> (f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;
>
> (g) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or deceiving the Commission; or
>
> (h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

[27] It is clear that the common denominator in more than one subsection of s.38 is that the claimant must have made a representation, claim or declaration which the claimant knew was "false or misleading". While other subsections of s.38 do not use the words "false or misleading", the proscribed conduct outlined in them could nevertheless arguably bring the resulting debt within the scope of s.178(1)(e) of the *Bankruptcy Act*.

[28] Whatever the scope of s.38, where a claimant debtor has received monies to which the claimant "was not entitled", he or she is liable to repay to the Commission an amount equal to any benefits so received: s.43. This necessarily includes a debt which is the subject of a penalty order under s.38. In turn, s.47 expressly provides that all amounts payable by the claimant under s.43 (and other sections) are "debts due to Her Majesty and are recoverable in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act."

[29] There are a number of methods under the *EI Act* for collecting overpayment debts owing by a claimant, whether the subject of a s.38 decision or otherwise:

1. action in a court of competent jurisdiction (s.47(1));
2. certifying that an amount has not been paid and filing that certificate in the Federal Court of Canada (s.126(2));
3. deduction from any benefits otherwise payable to the debtor claimant (s.47(2)); and
4. garnishment (s.126(4)).

[30] What is significant about this broad range of remedies is that Parliament has seen fit to confer on the Commission rights not extended to other creditors. For example, garnishment proceedings may be initiated without the necessity of first obtaining a court judgment for the amount of the overpayment: *Prevost v. Canada (Employment and Immigration Commission)* (1980) 36 C.B.R. (N.S.) 103 (F.C.T.D.). Further, the *EI Act* provides two alternative remedies where a person is alleged to have made false and misleading representations. First, s.38 permits the Commission to impose a penalty on so finding; and second, s.135 provides that a person who engages in any conduct proscribed under that section is guilty of an offence punishable on summary conviction and liable to a fine not to exceed $5,000, and imprisonment not to exceed 6 months.

[31] Most significant, when an amount is owing to the Commission, including a debt arising out of a fraudulent EI claim, the Commission has the right to file a certificate in the Federal Court certifying the amount of the outstanding debt. Pursuant to s.126(2) of the *EI Act*, once registered, the certificate "has the same force and effect, and all proceedings may be taken, as if the certificate were a judgment obtained in the Court for a debt of the amount specified in the certificate".

[32] All this being so, there is no merit to the Trustee's assertion that the Commission is wrongly seeking rights not extended to other creditors. The short answer is that Parliament has chosen to grant certain rights to the Commission under the *EI Act* and the constitutional validity of these provisions has not been challenged. That Parliament has devised

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a system for recovering overpayments, including fraudulent EI claims, which sidesteps the courts in the first instance is hardly surprising. The Commission handles a substantial volume of cases annually and overpayments will not generally be huge amounts in themselves. The provisions in the *EI Act* for collecting overpayments are consistent with the need to provide a reasonable and cost effective method of administering a system resting largely on self-reporting and voluntary compliance. Since the program is now fully self-funding by employers and employees, all administrative costs incurred in collecting overpayments would be passed along to the beneficiaries of the program: see *Prevost, supra*.

[33] Nor is it fair to suggest that the debtor's interests under this statutory regime are not protected. Any decision by the Commission under s.38 may be appealed by the claimant debtor through two appeal levels and then, if the grounds exist, through judicial review in the Federal Court of Canada. The first right of appeal is to a Board of Referees (s.114) and then to an Umpire (s.115). Umpires are appointed from among judges of the Federal Court of Canada and other federally-appointed or provincially-appointed judges or retired judges. The *EI Act* provides for an appeal as of right to an Umpire on certain statutorily prescribed grounds. In addition, the Umpire's decision is subject to judicial review in the Federal Court of Canada (s.118).

[34] Most important, for a penalty to be imposed under s.38, it must be proven that the claimant intended to make – and did make – a "false or misleading statement" at the time the statement was made, in other words, that the statement was made "knowingly": *Courty v. Canada (Employment and Immigration Commission)* reflex, (1987) 16 F.T.R. 36 (T.D.). It will also suffice if the statement was made recklessly without concern for the truth or falsity of the statement: *Canada (A.G.) v. Gates* 1995 CanLII 3601 (FCA), [1995] 3 F.C. 17 (C.A.). Unless this condition precedent is met, no penalty can be imposed under s.38.

[35] Nor does the statutory scheme reverse the burden of proof. Although the Trustee argued that the *EI Act* requires the claimant to disprove the claims against him or her, this is simply not so. The burden of proof rests on the Commission throughout. It is an error of law to impose on the claimant the burden of disproving that a statement was made knowingly: *Canada (A.G.) v. Antonio* (1998) 5 C.C.L.I. (3d) 105 (F.C.A.); *McDonald v. Canada (Employment and Immigration Commission)* reflex, (1991) 50 Admin. L.R. 258 (F.C.A.). That said, the evidentiary onus may well shift to the claimant in the course of the proceedings if an appropriate factual foundation has been laid by the Commission: *Antonio, supra*.

[36] In addition, s.41 of the *EI Act* provides a further safety net for the claimant debtor akin to a fresh evidence application in the courts. This section provides that the Commission may rescind a penalty or reduce it on the presentation of new facts or on being satisfied that the penalty was imposed without knowledge of, or on the basis of a mistake as to, some material fact.

[37] Thus, there is no merit to the submission that a Commission decision is nothing more than an internal administrative review which lacks the force of law. Although Commission decisions are made within the scope of the statutory scheme mandated by Parliament, and do not require subsequent court affirmation, this does not mean that they are bereft of any legitimacy in law. To the contrary. The *EI Act* speaks for itself on this point. Despite the gravity with which courts approach allegations of civil fraud, a Commission decision based on a finding of fraudulent conduct, if not appealed and reversed, can be enforced as if it were a judgment of the Federal Court of Canada on registration of the required certificate under s.126(2). In this regard, Commission decisions are comparable to those made by other administrative tribunals whose decisions may be enforced as judgments of a superior trial court, such as a labour relations board: see for example *Canada Labour Code* R.S.C. 1985, c.L-2, ss.23(3) and 23.1.

[38] Further, given the provisions of the *EI Act*, if a Commission decision is not successfully appealed in the manner prescribed by statute, it follows that the Commission findings under s.38 are *res judicata* as between the debtor and the Commission. There is no rational legal or policy basis for requiring that these issues be litigated afresh as between the claimant debtor and the Commission either in the course of the bankruptcy proceedings or thereafter. Had the subject Commission decision been registered in the Federal Court of Canada, there could be no argument that this decision did not bind the parties. Does the absence of registration undercut the binding effect of the decision for purposes of the *Bankruptcy Act*? In my view, it does not.

[39] Parliament intended that a Commission decision under s.38 have binding effect in law, subject of course to appeal rights. The fact that any such decision (not appealed or not reversed on appeal) can be enforced as if it were a judgment of the Federal Court confirms that intention. The law is clear that in a bankruptcy, a debtor is not relieved of any finding already made by a court of competent jurisdiction that the debtor has obtained property from a creditor by false pretences or by fraudulent misrepresentation. The judgment is conclusive on this point: *Re Smith* reflex, (1985) 43 Sask. R. 27 (Q.B.), aff'd reflex, (1986) 45 Sask. R. 240 (C.A.); and see also *Berthold v. McLellan* reflex, (1994) 19 Alta. L.R. (3d) 28 (C.A.). The same result follows where an admission of fraud can be inferred from a consent judgment: *Demitor (Re)* (1993) 137 A.R. 381 (Q.B.). A Commission decision not appealed by a claimant debtor is therefore analogous to a decision of a court of competent jurisdiction and should be treated as such.

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[40] Here, Bourassa did not appeal the Commission decision under s.38. Accordingly, that decision is binding in accordance with its terms.

[41] But whether a Commission decision is binding is not the only issue to be resolved. Its binding effect is one thing; its scope another issue altogether. This takes me therefore to the other key issue, the scope of the Commission's decision. In particular, does the Commission's imposition of a penalty under s.38 necessarily mean that the underlying debt is a "fraudulent" one within the meaning of s.178(1)(e) of the *Bankruptcy Act*? In other words, is a debt in respect of which a penalty has been levied by the Commission under s.38 of the *EI Act* necessarily a "debt or liability for obtaining property by false pretences or fraudulent misrepresentation"?

[42] To resolve this issue, one would be required to compare the foundational elements of a "fraudulent" debt within the meaning of s.178(1)(e) of the *Bankruptcy Act* with the foundational elements required for the imposition of a penalty under s.38. The purpose of this analysis would be to determine whether a finding under s.38 of the *EI Act* that a penalty is warranted because of a "false and misleading" EI claim is tantamount to a finding that the underlying debt is a "fraudulent" one within the meaning of s.178(1)(e) of the *Bankruptcy Act*.

[43] If the foundational elements were found to be congruent, then it may well be that fraudulent debts under the *EI Act* are subsumed in fraudulent debts under s.178(1)(e) of the *Bankruptcy Act*. In that event, then the Commission decision under s.38 would arguably be conclusive on this point and the subject debt exempt from discharge under s.178(1)(e).

[44] If not, then arguably Canada would be in no different position than any other creditor. Whether an EI debt in these circumstances would be exempt from discharge under s.178(1)(e) could potentially be dealt with in a number of ways.

[45] It may be that the findings made by the Commission regarding an EI debt for which a penalty had been levied under s.38 would permit the matter to be determined on the application for discharge rather than post-discharge: *Re Herdman* (1992) 128 A.R. 127 (Q.B.); *Re McKee* (1997) 203 A.R. 283 (Q.B.); *Re Mariyanayagam* reflex, (1998) 10 C.B.R. (4th) 105 (Ont. Gen. Div.). The court could also consider the evidence in support of the Commission decision if the findings did not expressly or by implication address the nature and extent of the fraudulent conduct: *Morgan v. Demers* 1986 ABCA 100 (CanLII), (1986) 71 A.R. 244 (C.A.). If necessary, the court might also see fit to direct the trial of an issue to determine whether the debt fell within s.178(1)(e): *Kushnir v. Voshall* 1989 CanLII 3337 (AB QB), (1989) 102 A.R. 146 (Q.B.).

[46] Alternatively, the Commission could initiate action to recover the debt post-discharge in the ordinary civil courts, whether by seeking a declaration that the subject debt falls within the s.178(1)(e) exemption or otherwise: *Beneficial Finance v. Durward* (1961) 2 C.B.R. (N.S.) 173 (Ont. Bktcy.); *Graves v. Hughes* 2001 NSSC 68 (CanLII), (2001) 25 C.B.R. (4th) 255 (N.S.S.C.). That the earlier decision was not based on fraudulent misrepresentation or false pretences may not necessarily be a bar to a Commission claim that a debt survives bankruptcy: *Re Phillips* 1994 CanLII 9102 (AB QB), (1994) 156 A.R. 123 (Q.B.). In this regard, it may well be that evidence of wrongdoing only emerges after the initial Commission decision, or, for that matter, after the bankrupt's discharge. Of course, should fraud be established or affirmed, a discharge of a bankrupt debtor does not provide a defence to the claim: *Wilson v. Wilson* 2001 CanLII 28111 (ON SC), (2001) 21 C.B.R. (4th) 304, additional reasons at (February 28, 2001) Doc. C31610/95 (Ont. S.C.J.).

[47] Regardless of which procedure were to be followed though, the onus would be on Canada to establish that the EI debt fell within the s.178(1)(e) exemption: *Peterson v. Peterson* [1996] 3 W.W.R. 426 (Alta. C.A.); *Jerrard v. Peacock* (1985) 61 A.R. 161 (Q.B.). This would be so unless Parliament elected to statutorily provide that all debts owing for fraudulent EI claims as determined by the Commission under s.38 of the *EI Act* were automatically exempt from any discharge order.

[48] However, since the parties did not address before either the Registrar or the chambers judge whether a s.38 decision by the Commission necessarily means that the underlying debt was for obtaining property, namely UI benefits, by false pretences or fraudulent misrepresentation within the meaning of s.178(1)(e) of the *Bankruptcy Act*, I decline to resolve this issue and what necessarily flows from it at this stage of the proceedings. Resolution of these matters must await another day.

[49] In these circumstances, I have concluded that the order staying the proceedings by Canada pending a further court application should stand. I would however strike that portion of the order indicating that the EI debt is discharged. It is an error of law to make such an order where, as here, there is no evidence as to what that debt entails. I would therefore dismiss the appeal but vary the order to the extent noted.

REASONS FILED at EDMONTON, Alberta
this 12th day of September, 2002.

Fraser, C.J.A.

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Simone v. Daley, 1999 CanLII 3208 (ON CA) - An Example of Fraudulently Incurred debt Not being Extinguished?

Date:	1999-03-01
Docket:	C24521
Parallel citations:	43 OR (3d) 511; 170 DLR (4th) 215; 8 CBR (4th) 143; 118 OAC 54
URL:	http://canlii.ca/t/1f9cq
Citation:	Simone v. Daley, 1999 CanLII 3208 (ON CA), <http://canlii.ca/t/1f9cq> retrieved on 2013-08-24
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Reflex Record	Related decisions, legislation cited and decisions cited

DATE:19990301
DOCKET: C24521

COURT OF APPEAL FOR ONTARIO

McKINLAY AND WEILER JJ.A. AND BLAIR J. (ad hoc)

BETWEEN:) Victor L. Freidin, Q.C.
) for Appellants and
MICHAEL SIMONE and SANDY) Respondents on Cross-
SIMONE) Appeal
)
Plaintiffs (Respondents and) E. Zeppieri and G.F. Ahmadi
Appellants on Cross-Appeal)) for Respondents and
) Appellants on Cross-Appeal
- and -)
)
SEAN LEO KEVIN DALEY, SANDRA)
MONTANARI PEAT MARWICK)
THORNE INC., TRUSTEE FOR THE)
ESTATE OF SEAN LEO KEVIN DALEY,)
MANULIFE BANK OF CANADA,)
GIUSEPPINA DINOTO, and DOMENIC) Heard: October 5 and 6, 1998
DINOTO)
)
Defendants (Appellants and)
Respondents on Cross-Appeal))

R. A. BLAIR J (ad hoc):

I - OVERVIEW AND FACTS

Overview

[1] On December 27, 1991, Michael and Sandy Simone orally agreed to purchase a home located at 55 Bayside Court in the Town of Vaughan from the Defendants, Sean Daley and Sandra Montanari. They moved in immediately, and have continued to live in the premises to the present time -- although not in their capacity as purchasers. The transaction was to have closed in January 1993, but it aborted. It failed to close largely because of the financial travails of the appellant, Sean Daley, which ultimately led to his voluntary assignment in bankruptcy in October 1993. Mortgagees sold under power of sale. Relatives of the Respondent purchasers acquired the premises from the mortgagee and the Simones still reside in the premises, but as tenants. In the

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meantime, they have lost more than $130,000 in payments they made to the appellant vendors on account of the purchase price, and on behalf of the appellants to the first mortgagee, and in improvements which they made to the property in contemplation of becoming its owners.

[2] The trial judge concluded that the transaction had failed to close because of Sean Daley's failure to arrange for the financing on closing, which he held Mr. Daley had agreed to do as part of the transaction. As a result of the breach the Simone's lost the amounts above referred to; however, the trial judge deducted from those amounts the sum of $11,000 for taxes which he held were the responsibility of the Simone's under the oral agreement, and a further sum of $64,800 for occupation rent. He therefore awarded the Simones damages in the amount of $53,320 plus pre-judgment interest from January 1, 1995. The trial judge also concluded that Mr. Daley had been acting in a fiduciary capacity and that his breach constituted a misappropriation or defalcation as contemplated in paragraph 178(1)(d) of the Bankruptcy and Insolvency Act R.S.C. 1985, c. B-3, as amended (the "BIA"), and accordingly he granted a declaration that Mr. Daley's discharge from bankruptcy does not extinguish the debt as against him.

[3] The central issue on this appeal relates to that declaration and to the trial judge's conclusion that Mr. Daley had committed a misappropriation or defalcation while acting in a fiduciary capacity. An additional element on the appeal relates to damages (the appellants argue further deductions should have been made), and the Respondents cross-appeal as to damages as well (submitting that fewer deductions should have been made).

Facts

[4] At the time of the agreement, Mr. Daley was a young lawyer recently called to the Bar, and Ms. Montanari was his secretary. They had been engaged to be married, but at the time had had a falling out1. In contemplation of their pending marriage they had purchased 55 Bayside Court, which was situated across the street from Ms. Montanari's parents. Because of the falling out, however, Mr. Daley no longer wished to live across the street from Ms. Montanari and her parents. Moreover, with a large mortgage against them and taxes, calling for monthly payments in the area of $5,000, the premises were difficult to carry. Accordingly, Mr. Daley was looking for a solution to this problem.

[5] He found what was thought to be the solution in his friend, Michael Simone. Mr. Simone is a real estate agent of 20 years experience. He and Mr. Daley had first become acquainted when Mr. Daley had successfully represented Mr. Simone in some court proceedings. A friendship developed. They began to socialize together. Mr. Daley became aware that Michael and Sandy Simone were looking for a place to live. Mr. Simone discovered that Mr. Daley was an interested seller. In late December, 1991 B with some involvement of Sandy Simone B they negotiated the agreement.

[6] The agreement, however, was never reduced to writing. The parties disagreed as to some of its terms. They were substantially in agreement that:

(a) the purchase price was to be

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$380,000.00;
(b) the Simones were to take possession immediately, and were to assume the costs of utilities;
(c) the Simones were to make monthly payments on account of the purchase price at a minimum of $1,000.00 to a maximum of $2,000.00 per month for about one year; and,
(d) title was to transfer from the defendants to the Simones in or about January 1993 when the balance of the purchase price was to be paid.

[7] There were three issues upon which the parties could not agree, however, and the trial judge was required to resolve them. The issues, and his findings with respect to them, were as follows:

(1) Who was responsible for the payment of municipal taxes during the period of possession prior to closing? Jennings J. found that the taxes were to have been paid by Mr. and Mrs. Simone, the purchasers.
(2) Had the Simones agreed to make a payment of up to $60,000 to Mr. Daley, on account of the purchase price, by June 30, 1992? The trial judge found that there was to be no such "maximum" payment made by that date.
(3) Who was to arrange for the financing required to pay the balance of the purchase price due on closing? Significantly, for the purposes of this case, the trial judge found that it was Mr. Daley who agreed to find the financing to close, and that he failed to comply with that obligation.

[8] In making his findings, the trial judge assessed the evidence of Michael Simone and of Sean Daley and concluded that where the evidence of the two differed on critical matters he preferred and accepted the evidence of Mr. Simone. It was open to the trial
judge to make the foregoing findings on the evidence, and I see no basis for interfering with them. The trial judge then went on to conclude that the appellants had breached their agreement of purchase and sale, that Sean Daley was in breach of fiduciary obligations owed to the plaintiffs, that his fiduciary breach constituted a misappropriation or defalcation as contemplated by paragraph 178(1)(d) of the BIA, and accordingly that the judgment against him survives his discharge from bankruptcy. I turn now to an analysis and consideration of those issues.

II - LAW AND ANALYSIS

Fiduciary Obligations

[9] From the start of his analysis, Jennings J. rejected "out of hand" the submission that Mr. Daley was acting as the Simone's solicitor in connection with the transaction. This finding is well-supported by the evidence. It meant, however, that the finding of a fiduciary relationship, if one were to be made, had to be based on something other than the existence of a solicitor-client relationship B a clear category of fiduciary. That

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circumstance has given rise to some difficulties in this case, in my view.

[10] The trial judge correctly relied upon the observations of appellate courts to the effect B as stated by Griffiths J.A. in Knoch Estate v. John Picken Ltd.reflex, (1991), 4 O.R. (3d) 385, at p. 394 B that,

> it is a question of fact in each case whether a fiduciary relationship exists and that it is the nature of the relationship, not the special category of the actors involved, which gives rise to the finding of a fiduciary.

[11] He then proceeded to examine the facts in light of the "three general characteristics" first attributed to fiduciaries by Wilson J., in dissent in Frame v. Frame, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99, and subsequently adopted by the majority of the Supreme Court of Canada (per Sopinka J.) in Lac Minerals Ltd. v. International Corona Resources Ltd., 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574, at pp. 598-599, as a "rough and ready guide", namely that:

(a) the fiduciary has scope for the exercise of some discretion or power;
(b) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and,
(c) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[12] Applying the foregoing principles to the circumstances of this case, Jennings J. concluded that, once the agreement had been made, the appellant vendors were in "a special relationship" with the plaintiffs by reasons of their obligation, as vendors, to act as trustees of the title to the property for the purchasers pending closing. I quote in full his reasoning with respect to the fiduciary finding, which is contained in the following passage from his Reasons:

> In the case before me, once the agreement was made, I find the defendants were in a special relationship with the plaintiffs. Although they were the legal owners of the property, the plaintiffs were the beneficial owners, subject to complying with the terms of the agreement. To that extent, the defendants acted as trustees of the title to the property. They were obliged to take no steps to deal with that title in a manner harmful to the plaintiffs' beneficial interest. As legal owners, they clearly had the scope to exercise power, and to exercise it unilaterally, to affect the beneficiaries' interest. As legal owners, they knew they were trusted, as friends of the plaintiffs, and because of that trust the plaintiffs were vulnerable to or at the mercy of any dealing they chose to take with the title.
>
> They were obliged to keep the mortgages

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> in good standing so that they could be discharged, and they did not. They were obliged to keep the title clear of executions so that a clear title could be transferred, and they did not. Most importantly, they were obliged not to further encumber the title, and by placing a third mortgage for $60,000 on title six months into the deal, without the knowledge of the plaintiffs, they breached what I find to be their fiduciary duty to the plaintiffs.

[13] I have serious reservations about the finding of a fiduciary relationship between the plaintiffs and the defendants in the circumstances here. Nonetheless, the existence of such a relationship is a question of fact for determination in each case, and I would not interfere with the trial judge's ultimate disposition in this regard. Some further comments with respect to the fiduciary aspect of this case are nevertheless in order however, in my opinion.

[14] The relationship between the parties was that of vendor and purchaser, and in my opinion the existence of such a relationship does not, in itself, give rise to fiduciary duties. Nor does the fact that the vendors and purchasers happened to be friends, elevate the relationship to a fiduciary level. The normal contractual relationship between a vendor and purchaser is not characterized by the reposing of a trust or confidence by one person in another and a consequent dependence resulting therefrom, which the authorities indicate give rise to a fiduciary duty. It is true that the vendor acts as trustee of the title for the purchaser pending completion of the transaction. However, to the extent that there may be an obligation of the vendor "to take no steps to deal with [the] title in a manner harmful to the [purchaser's] beneficial interest", as the trial judge concluded, it is only in the sense of an obligation to be in a position to deliver title on closing, in my view. Breach of the obligation to convey the title, on tender of the purchase price at closing, is remedied by damages or, in appropriate circumstances B because of the equitable requirement to hold title B by the equitable remedy of specific performance. There is no need to resort to the fiduciary concept.

[15] Thus, I would be reluctant to attribute to vendors and purchasers, generally, the obligations pending the completion of a sale which the trial judge attributes to them in order to seal the existence of a fiduciary obligation. It goes too far, in my respectful view, to suggest categorically that a vendor is obligated "to keep the mortgages in good standing so that they could be discharged", or "to keep the title clear of executions so that a clear title could be transferred", or even "not to further encumber the title". The obligation of a vendor is to convey clear title on closing. Not infrequently people find themselves in a position where it is necessary to re-organize and restructure their financial and proprietary affairs in order to place them on a sounder footing and avoid insolvency. They are

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not always successful in this endeavour. There will be many circumstances where mortgages continue to be in default with arrears continuing to accumulate, or where the property becomes subject to other executions because of a vendor's outstanding financial difficulties in other areas, pending the closing of a transaction. Such developments in themselves do not constitute the sort of unilateral exercise of power in respect of a "vulnerable" beneficiary which gives rise to a fiduciary duty or a breach of that duty. Even the placing of a further mortgage against the property is not necessarily prohibited, provided the vendor can convey title free of it on closing B particularly where, as here, the additional mortgage was placed on title in order to raise funds to reduce the outstanding obligations pursuant to the first mortgage.

[16] Purchasers are well able to protect themselves with respect to title by registering the agreement: see the Land Titles Act, R.S.O. 1990, c. L-5, section 71. I observe in passing that Mr. Simone, the purchaser in this case, was hardly a neophyte when it came to matters of real estate. He is a real estate agent with more than 30 years of experience. It is apparent that the trial judge was not impressed with Mr. Daley as a witness. Nor was he impressed with his financial and investment lifestyle, for a young professional of such limited experience. A fiduciary obligation must be grounded in the nature of the relationship which exists between the parties, however, and not on the result in law or equity which it is sought to reach. The courts have cautioned against the latter approach and the resort to what have been referred to as "false indicators of a fiduciary relationship", one of which may be the presence of conduct which attracts judicial sanction: see, Hodgkinson v. Simms, [1994] S.C.R. 277, per Sopinka J. and McLachlin J., at p. 463.

[17] Subject to the caveat of the foregoing reservations, however, I think there was evidence which might have supported a fiduciary finding in this case. That evidence relates to the undertaking on the part of Mr. Daley to arrange the financing, which he was unable to do. A fiduciary finding based upon the power/discretion/vulnerability analysis might have been sustained on that footing. In the end, I would not interfere with the conclusion of Jennings J. that in the peculiar circumstances of this case Mr. Daley owed a fiduciary duty to the plaintiffs.

Debt Surviving Bankruptcy

[18] Having concluded that Mr. Daley owed a fiduciary duty to the plaintiffs, the trial judge went on to find that he had committed a misappropriation or defalcation in that capacity, as contemplated by paragraph 178(1)(d) of the BIA. He accordingly granted the plaintiffs a declaration that the debt of Mr. Daley arising from the judgment was not extinguished by his discharge from bankruptcy.

[19] Respectfully, I am of the opinion that he erred in this regard.

[20] Section 178 of the BIA, in its entirety, reads as follows:

> 178(1) An order of discharge does not release the bankrupt from
> (a) any fine, penalty, restitution order or other order similar in nature to a fine,

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> penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;
> (b) any debt or liability for alimony;
> (c) any debt or liability under a support, maintenance or affiliation order or under an agreement for maintenance and support of a spouse or child living apart from the bankrupt;
> (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;
> (e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation; or
> (f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim.
> (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

[21] The trial judge addressed both paragraphs (d) and (e). He found that there was no evidence of false pretences, that Mr. Daley had not made any fraudulent misrepresentations, and that he had committed no fraud. This left him with the concepts of "misappropriation" and "defalcation", as contemplated by paragraph 178(d), and he concluded that Mr. Daley had fallen afoul of those provisions. Specifically, he held that Mr. Daley had committed a misappropriation and defalcation in a fiduciary capacity,

> (a) by failing to keep the mortgages in good standing so that they could be discharged;
> (b) by failing to keep title clear of executions so that a clear title could be transferred; and,
> (c) by further encumbering the title by placing a third mortgage on the property, without the knowledge of the purchasers.

[22] I have already indicated that, in my view, the foregoing conduct neither creates a fiduciary duty in relation to a real estate transaction, nor constitutes a breach of such a duty. Even accepting the existence of a fiduciary duty on the part of Mr. Daley, based on the evidence as a whole, I am satisfied, in the same way, that they do not amount to a "misappropriation or defalcation while acting in a fiduciary capacity", as contemplated in paragraph 178(1)(d) of the BIA. In the circumstances of this case, they do not entail the misapplication of, or failure to account properly for, property or funds entrusted to a fiduciary which is the characteristic of conduct amounting to misappropriation or defalcation.

[23] It is worth observing at this point that not only did the

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trial judge negative fraudulent misrepresentation and fraud on the part of Mr. Daley, and make no finding of bad faith; importantly, he did not make a finding that the parties had agreed the funds paid by the Simones were to be used solely for purposes of reducing the defendant's obligations vis € vis the subject property. It was Mr. Daley's position that he was permitted to use the funds to make payments towards other obligations. While Mr. Simone testified at one point that he was under the assumption the monies were going to be used to pay the mortgages on 55 Bayside Court, he ultimately conceded in cross-examination that he didn't care where the money went or what Mr. Daley did with it, as long as it went towards reducing the purchase price.

[24] The problems with accumulating arrears on the mortgages to which the property was subject, and the registration of executions against the lands, had their origins in Mr. Daley's inability to cope with his overall financial difficulties arising from the six or seven bad real estate investments in which he found himself entangled. He did not have sufficient revenues from all sources B including the monies coming from the Simone's B to defray the costs of carrying those investments. His financial world was tumbling down over his head. Even the criticized third mortgage in question, as I have previously noted, was placed on title in order to raise funds to reduce the outstanding obligations under the first mortgage, and thus did not have any overall negative affect on the net encumbrances outstanding against the property.

[25] Not infrequently, bankrupts are at least to some extent the authors of their own misfortune. This does not disqualify them from ultimately obtaining their discharge; nor should it necessarily turn them into fiduciaries of those with whom they have dealt. Suppose that people make reasonable, but ultimately unwise, attempts to stave off bankruptcy by agreeing to sell certain of their assets in order to reduce liabilities and free up funds to carry other remaining assets. Are those people to be precluded from obtaining a discharge, after bankruptcy, from liabilities relating to the failed attempts, because arrears have continued to accumulate against the properties which are subject to the sale pending closing, and third party executions are registered during the same period as a result of other judgments incurred? In my opinion, a significant purpose of bankruptcy legislation might well be jeopardized, if such were to be the case.

[26] I turn now to a consideration of that purpose and of the scheme of section 178 of the BIA, and to an examination of the concepts of "misappropriation" and "defalcation" as found in that section.

[27] An important purpose of bankruptcy legislation is to encourage the rehabilitation of an honest but unfortunate debtor, and to permit his or her re-integration into society B subject to reasonable conditions B by obtaining a discharge from the continued burden of crushing financial obligations which cannot be met: see, Re Newsome (1927), 8 C.B.R. 279 (Ont. S.C.); Canadian Bankers' Association v. Saskatchewan (Attorney General)

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(1955), 35 C.B.R. 135 (S.C.C.); Cleve's Sporting Goods Ltd. v. J.G. Touchie & Associates Ltd. (1986), 58 C.B.R. (N.S.) 304 (N.S.C.A.); Ironwood Investments Joint Venture v. Leggett (Trustee of) 1996 CanLII 8252 (ON SC), (1995), 38 C.B.R. (3d) 256 (Ont. Gen. Div.), at p. 264; and Jerrard v. Peacock (1985), 57 C.B.R. (N.S.) 54 (Alta. Q.B., Master).

[28] Debts which survive a bankruptcy as a result of the provisions of subsection 178(1), therefore, are exceptions to this overriding principle, and should be addressed accordingly.

[29] An analysis of the provisions of subsection 178(1) shows that the types of debt which survive a bankruptcy may be divided into four overall categories, namely,

(1) those which have been imposed by a court in the form of a fine or some other penalty for an offence against the state (paragraph (a));

(2) those which reflect the legislative policy decision to protect spouses and children requiring support (paragraphs (b) and (c));

(3) those arising out of acts of fraud, dishonesty, or misconduct while acting in a fiduciary capacity (paragraphs (d) and (e)); and finally,

(4) those which, if discharged, would undermine the integrity of the bankruptcy process itself (paragraph (f)).

[30] In Jerrard v. Peacock, supra, Master Funduk B an experienced official in matters of this nature B subjected section 178 to the following analysis, which in my opinion is an accurate one. At pp. 62-63 he said:

> Considering the new start object ingrained in the Act, the logical interpretation of the two subsections in question is that subs. (2) creates the general principle (being a release of all debts) with subs. (1) being an exception to the general principle. Subsection (2) [sic]2 establishes exceptions, not the principle, and must be viewed in that light.
>
> It is as if the section literally reads that the order of discharge releases the bankrupt from all claims provable in bankruptcy "except the following" and then lists the seven (now six) categories in subs. (1).
>
> . . .
>
> All of the exceptions in the section are based on what might be classed as an overriding social policy. In other words, they are the kinds of claims which society (through the legislators) considers to be of a quality which outweighs any possible benefit to society in the bankrupt being released of these obligations.
>
> Paragraph (a) is essentially an administration of justice concept. The liabilities caught by it will be in relation to criminal or quasi-criminal matters.

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> Paragraphs (b) and (c), regardless of the language used, are nothing other than society's vested interest in ensuring that a person "supports" a dependent spouse and children. Obligations incurred for that cannot be shucked by the bankruptcy.
>
> Paragraphs (d) and (e) are morality concepts which look at conduct. Those kinds of conduct are unacceptable to society and a bankrupt will not be rewarded for such conduct by a release of liability.

[31] Others have taken a different approach to paragraphs (d) and (e), however. In Smith v. Henderson 1992 CanLII 680 (BC CA), (1992), 10 C.B.R. (3d) 153, the British Columbia Court of Appeal held that a "defalcation while acting in a fiduciary capacity", as envisaged by paragraph 178(1)(d), did not necessarily involve dishonesty and that, in the case of a fiduciary, a simple failure to meet an obligation was sufficient. Herold D.C.J. (as he then was) adopted a similar view with regard to a "misappropriation" in Abstainer's Insurance Company v. Pellegrino (1989), 77 C.B.R. (N.S.) 108 (Ont. D.C.).

[32] Smith v. Henderson involved a judgment against Mr. Smith, the principal of a small trucking operation, Normax Transport Inc. Mr. Smith was an officer and director, and the operating mind of the company. Normax had contracted with another trucker, Mr. Henderson, to permit him to work off the purchase of a truck and trailer through the payment of $1500 per month over 48 months. Normax was itself purchasing the truck under a conditional sales contract. After 34 2 months and the payment of $43,128 by Mr. Henderson, however, the truck was repossessed by the conditional vendor because the company had not kept up payments or paid off liens which had accumulated against the vehicles for non-payment for repairs. At trial, Smith was found to be personally liable on the ground that, as the sole directing mind of the corporation, he had caused Normax to be in breach of trust by allowing the liens to accumulate and not making the payments, and accordingly he was equally liable for breach of trust. Smith ultimately went bankrupt. He was granted a discharge from bankruptcy, but the judge granting the discharge held that it did not release him from the liability under the judgment because it was caught by paragraph 178(1)(d) of the Bankruptcy Act. That decision was upheld on appeal.

[33] In Abstainer's Insurance Company v. Pellegrino (1989), 77 C.B.R. (N.S.) 108 (Ont. D.C.), the defendant, Pellegrino, had obtained judgment against Abstainer's for the recovery of accident benefits and for damages for mental distress, in an earlier action. The insurer had appealed, but had agreed to pay certain monies to the defendant in order to reduce the risk of post-judgment interest. The payment pending appeal, however, was subject to a negotiated condition that the defendant would repay the monies if the insurer were successful on an appeal. Abstainer's succeeded on the appeal. Nonetheless, the defendant refused to repay the monies. He had gone bankrupt in the interim and argued, amongst other things, that the debt had been extinguished by his bankruptcy. In response to this argument, Abstainer's relied upon paragraph 178(1)(d) of the Bankruptcy

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Act. Herold D.C.J. agreed with the insurer, concluding that the defendant's failure to repay the monies constituted a "misappropriation" of funds by a fiduciary in the circumstances. He held that the defendant had accepted the monies on the premise that he would have an obligation to account for them in the event the insurer was successful on the appeal, that he was acting on behalf of the insurer to the extent of an accounting, and that he had misused the position of trust which was created by his implied undertaking. At p. 111, Herold D.C.J. noted:

> The word "misappropriate" in the Bankruptcy Act is not, as I read the cases, used in any pejorative or accusatory sense; rather, it may simply be the failure of a person to account when he is called upon to do so, particularly where, as here, he is in possession of the necessary funds to do so and chooses for reasons which he believes are valid not to do so.

[34] Jennings J. followed Smith v. Henderson and Abstainer's Insurance.

[35] Mr. Justice Day, on the other hand, declined to follow the reasoning of Abstainer's Insurance in Ironwood Investments Joint Venture v. Leggett, supra. He does not appear to have been referred to Smith v. Henderson. Before Day J., the issue revolved around a disputed management fee which the promoter and manager of a joint venture, Mr. Leggett, had caused the joint venture to pay to him. The project failed and Mr. Leggett subsequently went bankrupt and was later discharged. The unit holders sought to recover the monies against him nonetheless, on the grounds that he had obtained the monies through fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity. Day J. immediately ruled out fraud or embezzlement on the part of Mr. Leggett. He was then faced with deciding whether or not the monies had been obtained as a result of misappropriation or defalcation while acting in a fiduciary capacity. Day J. concluded that the defendant had not deliberately misappropriated the funds, believing that he was entitled to them and that the fee had been disclosed to the unit holders, notwithstanding that under the strict terms of the agreement he had not properly formalized authorization for the payment. With regard to the interpretation of paragraph 178(1)(d) of the BIA, Day J stated (p. 264):

> In any event, the subsection read as a whole includes fraud and embezzlement, both of which are quasi-criminal in nature, along with misappropriation and defalcation. In my opinion if a debt is to survive bankruptcy pursuant to s. 178(1)(d) of the Bankruptcy and Insolvency Act, there must have been some wrongful conduct on the part of the debtor sufficient to exclude the debtor from the relief granted by the Act. One of the prime purposes of the Bankruptcy Act is to permit an honest but unfortunate debtor to obtain a discharge from his debts subject to

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> reasonable conditions. The Act is designed to permit a bankrupt to eventually receive a complete discharge so that he can integrate himself into the business life of the country as a useful citizen, free from the crushing burden of his debts: Re Newsome (1927), 8 C.B.R. 279 (Ont. S.C.); Canadian Bankers' Association v. Saskatchewan (Attorney General) (1955), 35 C.B.R. 135 (S.C.C.). Given that a bankrupt may be saved from the consequence of his negligence and incompetence, as was the case in Urbanowski v. Demkiw reflex, (1992), 12 C.B.R. (3d) 129 (Man. C.A.), it is preposterous that a discharged bankrupt might remain accountable for monies paid to himself as compensation, when in all the circumstances he had very good reason to believe he was acting properly and with the knowledge of the affected parties, with neither their objection nor challenge. Accordingly, I adopt the approach taken in Janco (Huppe), supra,3 that misappropriation is the act of misappropriating or turning to a wrong purpose.[Emphasis added.]

[36] Thus, there appear to be two approaches which have been taken to the interpretation of the words "misappropriation or defalcation while acting in a fiduciary capacity". On the one hand, the approach reflected in Ironwood Investments Joint Venture v. Leggett and in Jerrard v. Peacock views the words in the context of those with which they are associated in the paragraph and attributes to them some element of dishonesty, wrongdoing, or misconduct. On the other hand, decisions such as that of the British Columbia Court of Appeal in Smith v. Henderson suggest a broader interpretation which eschews the need for dishonesty, wrongdoing or misconduct, and is prepared to extend the exception to all cases in which a fiduciary is in breach of any fiduciary obligation.

[37] In my view, the former approach is the correct one, having regard to the purposes of bankruptcy legislation and to the language used in section 178, and keeping in mind as well that not all breaches of obligation by a fiduciary are breaches of a fiduciary obligation. They may simply be inadvertence, negligence or incompetence. In this latter regard, the remarks of Sopinka J. and McLachlin J. in Hodgkinson v. Simms, supra, concerning what they viewed as the second "false indicator" of a fiduciary obligation, are worth noting. At p. 463 they observed:

> The second consideration which may act as a false indicator of a fiduciary obligation is the "category" into which the relationship falls. Professional relationships like doctor-patient and lawyer-client often possess fiduciary aspects. But equally, many of the tasks undertaken pursuant to these relationships may not be

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> trust-like or attract a fiduciary obligation. (citation omitted)
>
> > Just as not every act in a so-called fiduciary relationship is encumbered with a fiduciary obligation, so conversely fiduciary obligations may arise in relationships which have not been traditionally considered as fiduciary. [Emphasis added.]

[38] I agree with the observation of Day J., cited above, that if bankrupts are normally saved from the consequences of their negligence or incompetence by a discharge, it makes no sense that they should remain accountable for similar conduct simply because the conduct is carried out by someone who may now be classified as falling within a certain category of relationship, namely that of fiduciary. The courts have resisted a rigid approach to the determination of what constitutes a fiduciary relationship, as previously noted, emphasizing that it is "the nature of the relationship and not the category of actors involved" which is important for purposes of that exercise. In this same spirit, it seems to me, the courts should avoid attempting to sweep into concepts such as "misappropriation" or "defalcation" B which in their ordinary meanings connote some element of wrong doing, improper conduct, or improper accounting B any and all failures by the fiduciary to comply with the obligations attending upon that capacity. When it comes to the application of insolvency legislation, the results of not resisting that temptation can be far reaching and inconsistent with the purposes of such legislation.

[39] The Shorter Oxford Dictionary defines the words "misappropriate", "defalcate", and "defalcation" as follows:

> Misappropriate
> To appropriate to wrong uses; chiefly, to apply dishonestly to one's own use. So, misappropriation.
> Defalcate
> To cut or lop off (a portion from the whole); to retrench, deduct; to curtail, reduce; to commit defalcations; to misappropriate property in one's charge.
> Defalcation
> To reduce by deductions; to lop off; to abate; defection; shortcoming; failure; a fraudulent deficiency in money matters; also, the amount misappropriated.

[40] Black's Law Dictionary, 6th ed., defines "misappropriation" as "the unauthorized, improper, or unlawful use of funds or other property for purpose other than that for which intended".

[41] In Smith v. Henderson, Legg J.A. cited the definition of "defalcation" from Black's Law Dictionary 5th ed., in the following fashion (supra, p. 158):

> Defalcation: The act of a defaulter . . . failure to meet an obligation . . .

[42] Respectfully, this citation omits important aspects of the full definition, and takes the phrase "failure to meet an obligation" out of context. The full definition in the 5th

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edition of Black's Law Dictionary reads as follows:

> Defalcation
> The act of a defaulter; act of embezzling; failure to meet an obligation; misappropriation of trust funds or money held in any fiduciary capacity; failure to properly account for such funds. Commonly spoken of officers of corporations or public officials.4

[43] Looked at in its entirety, then, the Black's definition demonstrates that the reference to a failure to meet an obligation must be read in the context of the references to "embezzling", to "misappropriation of trust funds" and to a "failure to properly account". Moreover, an examination of the American authorities on which the inclusion by Black's of "failure to meet an obligation" within the concept of defalcation for purposes of bankruptcy legislation, confirms that they can be explained in these terms, notwithstanding that they may appear on the surface to stand for the proposition that an innocent default in duty on the part of a fiduciary will suffice to create a debt that survives bankruptcy.

[44] Re Anderson (1986), 64 B.R. 331, a decision of the U.S. Bankruptcy Court, Northern District of Illinois, Western Division, is an example. In that case the court ruled that a creditor need not show wrongdoing on the part of a fiduciary debtor for the purposes of establishing a nondischargeable debt under section 523(a)(4) of the U.S. Bankruptcy Code. "Defalcation", for such purposes, was held to encompass a debt resulting from fraud or defalcation by a debtor while acting in a fiduciary capacity, a failure to meet an obligation, misappropriation of trust funds or money held in any fiduciary capacity, and a failure to properly account for such funds. Mr. Anderson, the bankrupt debtor, had undertaken to act as the treasurer for a non-profit corporation which was established to set up a bicycle racing track for community children, and which earned revenues through entry fees and concessions. He failed to account for the revenues he had received. There was no evidence of wrongdoing. During a period of ill health and family difficulties, he had failed to deposit the proceeds from three races in a timely fashion. Instead he kept the monies in a paper back in his desk at home. The monies were stolen from his home, apparently by someone else. Mr. Anderson agreed to repay the funds, and signed a promissory note to that effect, but eventually went bankrupt. The court held his debt survived his discharge from bankruptcy, concluding that his failure to deposit the monies that had been entrusted to him by the corporation in a timely fashion amounted to a failure to account properly, and constituted a breach rising to the level of a defalcation.

[45] In Re Anderson the court relied upon a decision of Justice Learned Hand in Central Hanover Bank & Trust Co. v. Herbst, 93 F. 2d 510 (2nd Cir. 1937). It attributed to Learned Hand J. the proposition that, in the context of the U.S. Bankruptcy Code, Adefalcation" did not contemplate fraud or dishonesty, but rather, because of the special trust given to a fiduciary, the word included innocent defaults in duty on the part of the

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fiduciary. An examination of Learned Hand J's decision shows, however, that the learned justice did not stop there.

[46] In Central Hanover Bank & Trust Co. v. Herbst a privately appointed receiver in a foreclosure action had withdrawn and spent for his own account monies which had been awarded to him on an interim passing of accounts when he knew that the time for appeal had not elapsed and without consulting with the plaintiff in the foreclosure action as to whether it intended to appeal. The plaintiff successfully appealed and obtained judgment against the receiver, who subsequently went bankrupt and obtained a stay of execution. The stay was vacated, and it was the appeal from the order vacating the stay which came before the Second Circuit. That Court held that when a fiduciary takes money upon a conditional authority which may be revoked and knows at the time that it may be, the fiduciary is guilty of a "defalcation" though it may not be a "fraud" or an "embezzlement" or perhaps not even a "misappropriation".

[47] The Court did not rule, however, that any innocent default on the part of a fiduciary gives rise to a debt which is not discharged by bankruptcy. It pointed out (p. 512) that the bankrupt "had not been entirely innocent . . . though possibly one may acquit him of deliberate wrongdoing." Learned Hand J. noted that in its origins a bankruptcy discharge "relieved bankrupts of all their debts without exception, provided they conducted themselves properly" (p. 511). His reference to "innocent defaults" was as follows (p. 511):

> . . . Colloquially perhaps the word, "defalcation," ordinarily implies some moral dereliction, but in this context it may have included innocent defaults, so as to include all fiduciaries who for any reason were short in their accounts. [Emphasis added.]

[48] Finally, and significantly, Learned Hand J. concluded (p. 512):

> . . . We do not hold that no possible deficiency in a fiduciary's accounts is dischargeable; in Re Bernard, 87 F. 2d 705, 707, we said that "the misappropriation must be due to a known breach of the duty, and not to mere negligence or mistake." Although that word probably carries a larger implication of misconduct than "defalcation," "defalcation" may demand some portion of misconduct; we will assume arguendo that it does. [Emphasis added.]

[49] See also: Re Gagliano, 44 B.R. 259 (Bankr. N.D. Ill. 1984), where an insurance agent who had failed to remit collected premiums to the insurance company had committed a defalcation; and Re Alvey, 56 B.R. 170 (Bankr. W.D. Kentucky, 1985), which involved the unauthorized use of cash collateral received by a debtor in possession under Chapter 11 proceedings without reporting to the court as required.

[50] Thus, it would appear that the American authorities which have held that a failure by a fiduciary to meet an obligation gives rise to a debt which is not discharged from bankruptcy, and

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which have given rise to the reference to such an event in the definition of "defalcation" in Black's Law Dictionary, are all cases where there has been "some portion of misconduct" in the sense, at least, of a failure by the fiduciary to account properly for funds entrusted to the fiduciaries possession and care.

[51] There is a qualitative difference in the nature of the breaches involved in the American authorities referred to above, and in the Canadian authorities which have extended the meaning of "defalcation" or "misappropriation" to innocent breaches, on the one hand, and the type of breach committed by Mr. Daley in the circumstances of this case, on the other hand. Those cases in which it has been held that an innocent default in duty or a failure to meet an obligation on the part of a fiduciary create a debt which survives a bankruptcy all involve at least a failure to account in a proper fashion for monies or entrusted to the fiduciary. That is not the case with Mr. Daley, whose breach was not a failure to account for monies paid to him by the Simones, but rather a failure to close the real estate transaction in his capacity as vendor.

[52] Consequently, I am not persuaded that the exception to a release of liability upon a bankruptcy discharge which is provided for in paragraph 178(1)(d) of the BIA should be extended to conduct which does not display at least some element of wrongdoing or improper conduct on the part of the fiduciary in question in the sense of a failure to account properly for monies or property entrusted to the fiduciary in that capacity or inappropriate dealing with such trust property. Had Parliament intended that any innocent breach of an obligation on the part of fiduciary would give rise to a debt that would not be released by a discharge from bankruptcy it could very easily have said so, by providing that an order of discharge does not release the bankrupt from any debt or liability arising from a breach of fiduciary obligation. It did not do so. It chose to couch the types of debts or liabilities "while acting in a fiduciary capacity" which would attract the exceptions of subsection 178(1), in the context of debts or liabilities arising from fraud, embezzlement or misappropriation, as well as defalcation. While these notions may have slightly different shades or gradations of meaning, I can only conclude that Parliament intended the words "misappropriation" and "defalcation" to bear their plain and ordinary meaning, as the context in which they are used suggests.

[53] Here, there was no finding of bad faith with respect to the conduct of Mr. Daley. The trial judge expressly found that there was neither fraud nor fraudulent misrepresentation on his part. Had there been a finding that Mr. Daley had agreed to use the funds paid by the Simones solely for purposes of paying down the mortgages and indebtedness against 55 Bayside Court, and that he had failed to do so, the results might arguably be different. In such a case, a finding that there had been a misappropriation or a defalcation would have been justified. There was no such finding, however.

[54] In my view, the declaration that the judgment against Mr. Daley survives his discharge from bankruptcy cannot be sustained.

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Damages

[55] The appellants submit that the trial judge erred in including in his assessment of damages the value of improvements made to the property by the respondents. They argue that the appellants received no benefit from the improvements, although the plaintiffs have, and that the plaintiffs assumed the risk of any improvements they made when they made them without title having yet been transferred. The appellants accordingly seek to have the damages assessed by the trial judge reduced by the sum of $40,000 which was allowed for improvements. They also seek a further reduction of $45,000 in the damages awarded on the basis that this later amount was paid by the Simones after they knew that the transaction had not closed in January 1993. These two deductions would have the effect of wiping out the damage award altogether.

[56] There is no merit in the latter claim. Mr. Daley and Ms. Montanari gladly accepted the $45,000 from the Simones during the period in question, after they knew that the transaction had not closed in January 1993. It hardly lies in their mouths now to say that the plaintiffs should not have paid the monies, particularly when approximately $32,000 of it went to pay down obligations on the first mortgage. All parties were operating on the hope, during this period of time, that the agreement would ultimately be completed. In my view the trial judge was quite correct in including those sums paid in the losses sustained by the plaintiffs.

[57] The issue of recovery for the improvements made by the plaintiffs stands on a different footing, however. There was no express approval on the part of the defendants for the improvements that were made, although it could be said that they were aware of them and acquiesced in what was being done. Neither Mr. Daley nor Ms. Montanari (except indirectly) received any benefit from any of the improvements. With the exception of the paving done to the driveway, which may have been necessary to meet subdivision requirement, the improvements seem to have been made by the Simone's without asking for permission on the premise -- as Mr. Simone testified -- that he "didn't think he needed to ask Daley's consent to do any work because it was my house", and to convenience them in their new home. It could be said that Ms. Montanari received at least some indirect benefit from the paving because her father had posted a letter of credit on behalf of the defendants in the amount of approximately $10,000 regarding the completion of the pavement. The other improvements consisted of such things as interior painting and decorating, including the installation custom light switches, expensive french doors between rooms, window screens, locks, and an alarm system. The Simones continue to enjoy the benefits of these improvements to this day, abeit as tenants rather than owners. As far as the interior improvements are concerned, they could in fact be said to be very much in the nature of tenants improvements.

[58] The trial judge did not provide any rationale for including the cost of the improvements in the recovery he awarded, other than to say that they formed part of the plaintiffs "investment' in the house. The respondents argue that they are entitled to

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such recovery on the basis of equitable compensation for breach of fiduciary duty. Except for the outside paving and related work B which could be said to be more "real property" related, and where at least an indirect benefit was enjoyed by the defendants as a result of the release of Mr. Montanari's letter of credit B I do not agree. The plaintiffs simply proceeded to decorate the premises to their liking, and they took the risk of losing these expenditures on improvements if the transaction, for whatever reason, failed to close: see Peter D. Maddaugh and John D. McCamus, The Law of Restitution, (Aurora: Canada Law Book), pp. 288-291.

[59] I would reduce the amount credited to the plaintiffs for their investment in the property by the sum of $15,000.00, representing the amount which the trial judge allowed for the interior decorating and finishing matters. I would not alter the trial judge's decision to permit the $25,000.00 which was expended on the outdoor paving, curbing and drainage work.

Cross-Appeal

[60] On the cross-appeal, the plaintiff respondents attack,

(a) the trial judge's finding that they were responsible for paying municipal taxes pending closing;

(b) the reduction of their recovery by an amount representing the sum of $1,800 per month for occupation rent, both in terms of its quantum and in terms of the period of time for which it was applied; and,

(c) the award of pre-judgment interest only from January 1, 1995, and only on the sum of $55,320.00 when the payments by the plaintiffs were made in 1992 and 1993.

Municipal Taxes

[61] The question whether it was the plaintiffs or the defendants who were to be responsible for the payment of municipal taxes under the terms of the agreement was one of fact. There was ample evidence upon which the finding of the trial judge in this regard could be based and it should not be interfered with.

Occupation Rent

[62] The trial judge was justified in the circumstances in finding the plaintiffs responsible for the payment of occupation rent. It is not correct to say, as the cross-appellants submit, that there was no evidence regarding what a reasonable rent would be. After the house was sold, in March 1995, the Simones have continued to live in it, as tenants to owners who are relatives, and they paid a monthly rental of $1,400. The amount they were to pay per month under the agreement with Mr. Daley pending closing was between $1,000 and $2,000. Moreover, Ms. Montanari B who had at least some experience in real estate matters as a legal clerk, and whose evidence the trial judge accepted in other respects B testified that in her view $2,500 per month was a reasonable rental for the premises. The trial judge made a finding in this regard, on the evidence he had, and I would not interfere with it.

[63] As to the length of "rent-free use of the property", the trial judge found on the evidence that the period ended at the end of 1994. It was shortly thereafter that the property was sold under power of sale and the new owners obtained title. The

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finding is not unsupported by the evidence, and should stand.

Pre-judgment Interest

[64] For the same reason, I would not interfere with the trial judge's determination of the timing of pre-judgment interest, or the amount on which it is to be paid. The amount of the judgment is an amalgam of the payments made by the plaintiffs over the period 1992 - 93, and the deductions for taxes and occupancy rent extending throughout 1994. The trial judge obviously considered that matters were finally terminated at the end of 1994, as between the parties, and he allowed pre-judgment interest from that point on.

[65] The court has a discretion under subsection 130(1) of the Courts of Justice Act R.S.O., c. C.43, to award pre-judgement interest for a period other than that provided for in section 128 of that Act. I would not interfere with the exercise of that discretion in the circumstances of this case.

Motion for Leave to Introduce Fresh Evidence on Appeal

[66] The appellants sought leave to introduce fresh evidence on the appeal to this Court. The evidence sought to be introduced related to an update of the plaintiffs' legal interest in and occupation of 55 Bayside Court since the date of the trial. It was said to relate to the issue of the plaintiffs' right to recover the cost of improvements.

[67] In my view the proposed evidence would not be dispositive of the appeal, or even particularly helpful in its determination, to the extent that it adds anything to what was conceded by the plaintiffs, namely, that they continue to live in the premises and that the premises are owned by relatives. I would dismiss the motion with costs.

III - DISPOSITION

[68] In the end, then, I would allow the appeal to the extent of setting aside the declaration that the judgment as against Mr. Daley is not extinguished by his discharge from bankruptcy, and to the extent of reducing the principal amount of the recovery awarded by $15,000, from the sum of $55,320.00 to $40,320.00. The appeal is otherwise dismissed. As success was divided, I would not award any costs of the appeal.

[69] The cross-appeal is dismissed. Again, in the circumstances, I would not award any costs of the cross-appeal.

Released: March 1, 1999

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1 They have since been married.

2 From the context, this is clearly an error, and should be a reference to subsection (1).

3 Janco (Huppe) v. Vereechen 1982 CanLII 487 (BC CA), (1982), 40 B.C.L.R. 106, 44 C.B.R. (N.S.) 211 (B.C.C.A.).

4 "Defalcation" also had a second meaning, namely that of set-off, recoupment or counterclaim, or the diminution of a debt or claim by deducting from it a smaller claim held by the debtor or payor. This aspect of "defalcation", also recited in Black's Law Dictionary, is not relevant to this case.

Court may order non-application of subsection (1) - Sec. 178(1.1)

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(1.1) At any time after five years after a bankrupt who has a debt referred to in paragraph (1)(g) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

Kelly, Re, 2000 CanLII 22497 (ON SC) - Can Student Loans be Discharged?

Date:	2000-11-06
Docket:	31-338171
Parallel citations:	20 CBR (4th) 251
URL:	http://canlii.ca/t/1w3t5
Citation:	Kelly, Re, 2000 CanLII 22497 (ON SC), <http://canlii.ca/t/1w3t5> retrieved on 2013-09-04
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Ontario Supreme Court
Kelly, Re,
Date: 2000-11-06
In the Matter of the Bankruptcy of Kimberley Kelly of the City of Toronto, in the Province of Ontario

Ontario Superior Court of Justice (In Bankruptcy and Insolvency) Deputy Registrar Sproat
Heard: September 22, 2000
Judgment: November 6, 2000
Docket: 31-338171
K. Kelly for herself.
E. Dumitru, for Her Majesty the Queen in Right of the Province of Ontario as represented by the Minister of Education and Training, Ontario Student Loans Plan.
D. Nakelsky, for Her Majesty the Queen as represented by the Minister of Human Resources, Canada Student Loans Program.

***Deputy Registrar Sproat*:**
[1] This is one of four applications heard together, for an order under subsection 178(1.1) of the *Bankruptcy and Insolvency Act (the "BIA")* that paragraph 178(1)(g) of the BIA no longer applies to the bankrupt. Such an order would have the effect of releasing the bankrupt from liability for student loans, as defined in paragraph 178(1)(g). For the purpose of these reasons, I will simply refer to such indebtedness as "student loans". The application is opposed by both the Ontario Student Loans Plan and Canada Student Loans Program.
The Facts
[2] The bankrupt obtained Canada student loans and Ontario student loans of about $8,000 and $15,278, respectively, for furthering her post-secondary education. She attended York University from 1992 to 1996 and graduated in 1996 with a Bachelor of Arts degree in Psychology and a Bachelor of Arts degree in Education. She is a qualified teacher. She searched for a teaching position for about 1 to 2 years and did volunteer work in various private and public schools in the hopes of "getting her foot in the door". As a mother of two teenaged children, she received family benefits during this period.
[3] The bankrupt was unable to secure employment as a teacher and, in August, 1997, she obtained work as a receptionist with Security Insurance Company of Hartford ("Hartford"). She earned $24,000 per annum in this position.

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She has remained employed with Hartford continuously since August, 1997. The bankrupt has proven to be a good employee and was recently promoted. She is now an underwriting assistant with Hartford, which has been described as an administrative position. She earns $37,000 per annum and has enjoyed a bonus in the past years (the latest being $1,350 received March, 2000).

[4] The bankrupt claims that she had difficulty servicing her debts and therefore she made an assignment in bankruptcy on October 6, 1997, two months after securing full-time employment with Hartford. She had limited contact from the administrators of the Ontario Student Loans Plan and said that she contacted a representative of the Royal Bank of Canada and her MPP about her student loan. She admitted, however, that she largely ignored the situation of her student loans and, in fact, she made no payments on account of this indebtedness.

[5] On August 13, 1998, the bankrupt obtained a conditional order of discharge from the court. The condition related to the completion of the mandatory counselling requirement. She fulfilled this condition and obtained her discharge in May, 2000.

Discussion

[6] The bankrupt brings this application under subsection 178(1.1) of the BIA. Before turning to the merits of this application, it may be helpful to provide some history as to debts or obligations in respect of loans made under the Canada Student Loans Act and other similar legislation. Until 1997, such liabilities were released by an order of discharge from bankruptcy, by operation of subsection 178(2) of the BIA, which provides that all claims provable in bankruptcy (with the exception of debts referred to in subsection 178(1)) are released by an order of discharge.

[7] However, in 1997, the BIA was amended. Subsection 178(1) of the BIA was amended to add paragraph 178(1)(g), which thereby excepted student loans from the operation of subsection 178(2) of the BIA. The amendment came into force on September 30, 1997. Thus, if the date of bankruptcy was after September 30, 1997, student loans were not automatically released by an order of discharge. A further amendment (subsection 178(1.1) of the BIA) was enacted to permit the bankrupt to effectively apply for the release of student loans upon the expiry of two years after the bankrupt ceased to be a full or part-time student.

[8] These amendments were motivated by the recognition that a bankrupt had and would continue to have the benefit from the education he or she obtained with the assistance of the student loans and to address a perceived abuse of the bankruptcy process. It was said that:

> The broad purpose of the Act is to permit honest but unfortunate debtors to obtain a discharge of their obligations in order to facilitate a return to stable participation in social and economic life, while balancing this objective against the interests of creditors. Section 178(1)(g) reflects a policy decision which accords with this objective and recognizes that student loans involve a situation where funds are advanced when there is no existing capacity of the debtor to repay the debt, but education obtained will hopefully enable the debtor to begin active and fruitful participation in the economy at some later date.
>
> Realization of earning potential associated with education can take some period of time after leaving school, so Parliament saw fit to disallow the immediate discharge of student loans, in this case for two years after ceasing to be a student. This measure addressed the perceived abuse of students using the Act to obtain a discharge of student loans prior to making reasonable efforts to realize upon their earning potential achieved through education.

(See *Re Minto* 1999 CanLII 13045 (SK QB), (1999), 14 C.B.R. (4th) 235 (Sask. Q.B.) at paragraph 16)

[9] Thus, the date on which the bankrupt filed for bankruptcy is of importance as to whether student loans are or are not automatically released. If a bankrupt made an assignment on or after September 30, 1997, liabilities for student loans were not released upon an order of discharge. In such a bankruptcy, to be released of liability for student loans, the bankrupt is required to bring an application under subsection 178(1.1) of the BIA, after the expiry of two years from the date the bankrupt ceased being a full or part-time student, for the requisite order.

[10] To complicate matters somewhat further, the BIA was again amended in 1998 to increase the time after which the bankrupt could apply to the court for an order under subsection 178(1.1). Thus, if the date of bankruptcy was on or after June 18, 1998, the bankrupt was not entitled to bring an application for the release of student loans until after the expiry of 10 years (as opposed to the 2 year period resulting from the 1997 amendments) from the date the bankrupt ceased being a full or part-time student.

[11] Thus, there are now three relevent time periods, insofar as student loan obligations are concerned. They are:

1. if the date of bankruptcy was after December, 1992 but before September 30, 1997, debts or obligations in respect of student loans were released by an order of discharge;
2. if the date of bankruptcy was on or after September 30, 1997 but before June 18, 1998, the bankrupt's student loans were not released by an order of discharge and the bankrupt was obligated to wait 2 years from the time the bankrupt ceased being a full or part-time student before applying to the court for an order that the student loans be released; and

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3. if the date of bankruptcy was on or after June 18, 1998, the bankrupt's student loans were not released and the bankrupt was obligated to wait 10 years from the time the bankrupt ceased being a full or part-time student before applying to the court for an order that the student loans be released.

[12] In this case, the date of bankruptcy is October 6, 1997. The bankrupt ceased being a full time student in April, 1996 and two years have since lapsed. The bankrupt is therefore entitled to bring this application for a release of her student loan obligations.

[13] The test which the bankrupt must meet on this application is set forth in subsection 178(1.1) of the BIA which provided (in 1997) as follows:

> At any time after two years after a bankrupt who has a debt referred to in paragraph (1)(g) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that
>
> (a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the loan; and
>
> (b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the liabilities under the loan.

[14] The test is conjunctive and the bankrupt therefore has the onus of establishing on a balance of probabilities that she has acted in good faith and has and will continue to experience financial difficulty such that she will be unable to pay her student loan liabilities.

(a) Good Faith

[15] Given the existence of the two year waiting period before an application could be brought for an order releasing student loans, there have been few occasions (until recently) where the court was required to consider the test set forth in subsection 178(1.1) of the BIA and what factors the court should consider on such an application.

[16] In *Re Minto, supra,* Registrar Herauf referred to the factors which the court had considered on applications for discharge of a bankrupt with student loans and determined that these same factors were relevant to an application under subsection 178(1.1) of the BIA. I agree. In *Re Minto,* Registrar Herauf summarized the following factors as relevant to the determination of the issue of "good faith": whether the money was used for the purpose loaned, whether the applicant completed the education, whether the applicant derived economic benefit from the education (i.e. is the applicant employed in an area directly related to the education), whether the applicant has made reasonable efforts to repay the debts and whether the applicant has made use of available options such as interest relief, remission, etc.

[17] However, I do not see these factors as exhaustive. I would add that the timing of the bankruptcy and whether the student loans form a significant part of the bankrupt's overall indebtedness as of the date of bankruptcy are factors that the court could consider in the determination of the good faith aspect of the test. I am of this view given the purpose of and the policy reasons for the 1997 amendments to the BIA.

[18] Having regard to the facts of this case, I am of the view that the bankrupt has not acted in good faith. I am not satisfied that the bankrupt made reasonable efforts to secure employment as a teacher (although I think that she did make some efforts). However, that is not all. I find as fact that the bankrupt failed to make any inquiries or at least meaningful inquiries as to the options which might have been available to her to reduce or avoid, at least in part, the burden relating to her student loans. For example, she may have been entitled to interest relief or loan forgiveness. She did not pursue these avenues of relief and admittedly ignored her student loan obligations.

[19] I think it also significant that she made her assignment in bankruptcy two months after she secured gainful employment. She claimed to have done so because she could not service her debts. In addition, the bankrupt had financial ability to make some provision for her student loans. She has, over the period August, 1997 to the present, managed to contribute about $4,500 into an RRSP plan (presumably on a receptionists' salary of $24,000 given that her promotion was recent). Yet, the bankrupt has made no provision for her student loans. In my view, the bankrupt has not made reasonable efforts to pay the student loans.

[20] I therefore find that the bankrupt fails on the first branch of the test on this application.

(b) Financial Difficulty

[21] As to the second branch of the test, it is necessary for the bankrupt to establish that she has *and* will continue to experience financial difficulty to such an extent that she will be unable to pay the student loans.

[22] The issue as to whether a bankrupt "will continue to experience financial difficulty" will in most cases pose the biggest obstacle for bankrupts bringing a subsection 178(1.1) application. The BIA does not provide any guidance to the court as to the appropriate duration of time into the future wherein the bankrupt must experience this financial difficulty. I agree with Registrar Herauf that the time period cannot be established with certainty and is dependent upon the facts of the particular case.

[23] In this case, I am not satisfied that the bankrupt has, in the past, experienced financial difficulty to such an extent that she was unable to pay her student loans. I come to this view as she has been employed on a full-time basis for

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about 3 years. During this period of time, she was capable of making contributions to an RRSP plan at the rate of about $85 every two weeks (which is roughly $184 per month).

[24] In addition, I am of the view that the bankrupt had and will have, in my view, sufficient income with which to make some provision for her student loans. Her monthly budget filed in support of the application revealed net income of $2,153, which figure was arrived at by multiplying her net income (for a two week pay period) of $994.19 by 26 pay periods and dividing by 12. However, the bankrupt neglected to include in her net income the $184 deduction automatically made from her pay on account of her RRSP contribution. If one adds the $184 RRSP contribution and the $170 child tax credit to her income, the total net income is $2,507. Her stated expenses are $2,286. Thus, the excess income of $221 would be available to make some provision on account of her student loans.

[25] Lastly, I note that she has about $4,500 in her RRSP that she could cash out and pay towards her student loans. She has failed to do so. She does not wish to do so. This is a liquid asset now available to her to pay down her student loan. She has also enjoyed income tax refunds of about $1,300 yearly. She has also enjoyed bonuses from her employer of a similar amount. These too could have been paid against the student loans. For these reasons, I do not think that the bankrupt has experienced financial difficulty to such an extent that she was unable to pay her student loans.

[26] Even if I am wrong on this issue, I would also find against the bankrupt on the issue as to whether she would continue to experience financial difficulty to such an extent that she would be unable to pay her student loans. The bankrupt has been steadily employed for the past three years. She is now remunerated very well. She has demonstrated an ability to make contributions to an RRSP over the past 3 years. I believe her prospects at Hartford are positive. She is 38 years of age and remains employable for many years. She has taken 3 of 12 courses required to become a fully qualified underwriter. Given the bankrupt's age, current assets and income and future prospects, I am not satisfied that she will continue to experience financial difficulty such that she will be unable to pay her student loans.

[27] I dismiss the application without costs.

Application dismissed.

Cardwell, Re, 2006 SKQB 164 (CanLII) - Can Student Loans be Discharged under Consumer Prposal?

Date:	2006-04-12
Docket:	Bankruptcy No. 13324 JCR; Bankruptcy No. 13329 JCR; Estate No. 23-025868 JCR; Estate No. 23-025961 JCR
Parallel citations:	20 CBR (5th) 175; 278 Sask R 106
URL:	http://canlii.ca/t/1n32p
Citation:	Cardwell, Re, 2006 SKQB 164 (CanLII), <http://canlii.ca/t/1n32p> retrieved on 2013-09-24
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Bankruptcy Nos.13324& 13329 **2006 SKQB 164**
Estate No. 23-025868& 23-025961 J.C.R.

IN THE COURT OF QUEEN'S BENCH
IN BANKRUPTCY AND INSOLVENCY
FOR THE PROVINCE OF SASKATCHEWAN

IN THE MATTER OF THE CONSUMER PROPOSALS OF
DEAN ANDREW CARDWELL and
DONNA ELIZABETH REDERBURG
AND IN THE MATTER OF APPLICATIONS UNDER
S. 178(1.1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,*
R.S.C. 1985, c. B-3, AS AMENDED

Dean Andrew Cardwell, applicant
Donna Elizabeth Rederburg, applicant
Anne E. Hardy, for the applicants
Marlon Miller, for Her Majesty the Queen in Right of Canada as represented by the Minister of Human Resources Development

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JUDGMENT **MAURICE J. HERAUF, Q.C.**
April 12, 2006 Registrar in Bankruptcy

INTRODUCTION

[1] Each applicant made a Consumer Proposal under the terms of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (the "*Act*"). When each applicant made the Consumer Proposal, they had outstanding student loans. Accordingly, their student loans fell under section 178(1) (g) of the *Act* as debts that would not be released upon a discharge from bankruptcy. One or more of the student loan creditors, including the Canada Student Loans Program or its agent, consented to the Proposal by voting for acceptance. Each applicant completed the Proposal and received a Certificate of Completion. At least one of the student loan creditors that consented to the Proposal recommenced pursuing the applicant for payment. The student loan creditor has charged interest at the rate originally set under the agreement with the applicant, including through the term of his or her Proposal.

[2] Both applicants are now applying for declarations that the debts of student loan creditors were discharged by operation of section 66.28(2) of the *Act*.

[3] The applicant Cardwell applies for relief in the alternative, namely for release of his debts under section 178(1.1) of the *Act* and for an order that section 178(1)(g) does not apply to his student loan debt.

ISSUES

A. What is the effect of a consent to a Proposal or Consumer Proposal by a student loans creditor?

B. In the case of Cardwell should an order be made under subsection 178(1.1) of the *Act* that subsection 178(1)(g) of the *Act* does not apply to the student loan debts of that applicant? To address this issue, the following questions must be considered:

1. Is such relief available to a person who has made a Proposal or Consumer Proposal?

2. What factors should be considered in determining whether to grant the relief sought?

Submissions on Issue A:

[4] The applicants submit that the Court can utilize section 183 of the *Act* to make a declaration that the student loan debts owing to those creditors who consented to the Consumer Proposal of the applicants were released upon the completion of the Proposal.

[5] The point in issue involves the proper construction of the words found in subsection 66.28(2) of the *Act* which reads:

> 66.28(2) A consumer proposal accepted, or deemed accepted,
> by the creditors and approved, or deemed approved,
> by the court is binding on creditors in respect of
> (a) all unsecured claims, and
> (b) secured claims for which proofs of claim have been filed in the manner provided for in sections 124 to 134,
> but does not release the consumer debtor from the debts and liabilities referred to in section 178, unless the creditor assents thereto.

[6] The applicants assert that this provision and the similar provision in subsection 62(2) have traditionally been interpreted to mean that creditor assent to a Proposal meant release of the debt even if that debt would normally survive a bankruptcy.

[7] The applicants point to similar provisions that have been included in English and Canadian bankruptcy legislation for many decades. The *English Bankruptcy Act, 1869* 32 & 33 Vict., c. 62, permitted debtors to make arrangements or compositions with creditors. Specifically s. 15 of this legislation provided that:

> Where a debtor makes an arrangement or composition with his creditors under the provisions of the Bankruptcy Act, 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends.

[8] Similarly, the *Bankruptcy Act, 1919* R.S.C. 1927, c. 11 permitted compositions by debtors with their creditors. Section 18(1) provided that:

> A composition, extension or scheme accepted and approved shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable under this Act, but shall not release the

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> debtor from any liability [for various debts], except to such an extent and under such conditions as the court expressly orders in respect of such liability.

[9] Ms. Hardy argues that the English provision makes it clear that if a creditor assented to a Proposal, it was bound by that Proposal, even if its debt would normally have survived a bankruptcy. Under the later Canadian bankruptcy legislation, the court ratifying a composition had the authority to release a debtor from debts that would normally not be released on a discharge from bankruptcy.

[10] This interpretation, according to Ms. Hardy, has until recently been applied to the current provisions of the *Act*. Therefore, if a creditor with a debt falling within section 178 assented to a Proposal, its debt would be discharged on completion of the Proposal: Houlden & Morawetz, 2004 Annotated *Bankruptcy and Insolvency Act*, sections E18(4) and E35.8.

[11] Because of this, the applicants take issue with the interpretation of the current provision by Master Bolton in *Re Slaney* 2004 BCSC 388 (CanLII), (2004), 4 C.B.R. (5th) 95 (B.C.S.C.) where the Court held that in a student loan debt a creditor must not only assent to the Proposal but also to the release of the debt upon completion of the Proposal. Counsel for the applicants submits that this decision did not consider the wording of the predecessor provisions under which the concern was whether the creditor assented to the composition, not the release of its debts. It also did not consider the accepted interpretation of the current provisions.

[12] According to Ms. Hardy, trustees in Bankruptcy, lawyers and insolvent persons have relied on the interpretation in Houlden & Morawetz in giving advice or deciding what action to take and that the decision in *Re Slaney, supra* is incorrect.

[13] Counsel for the respondent submits that the Court in *Re Slaney, supra* came to the correct conclusion relating to the current provisions in the *Act*. The Court recognized that the phrase "assents thereto" was ambiguous, and considered on a grammatical basis as capable of meaning either assents to the release of a s. 178 debt or assents to the Proposal.

[14] According to Mr. Miller, Master Bolton carefully considered the policy reasons for each interpretation in paragraphs 10 and 11 of the decision which bear repeating here:

> The argument for the bankrupt is that it is not fair to allow a s. 178 creditor to take advantage of a proposal to pay more than might otherwise be recoverable under a routine assignment in bankruptcy, and then turn round and claim the excess when the bankrupt has complied with all the terms of the proposal. Along these lines, I note that such a creditor could very well cast the decisive vote for or against a proposal, as in many cases a s. 178 debt is likely to be a very significant percentage of the whole estate. It can therefore be argued that it would be unjust not only to the bankrupt but to other creditors to allow a s. 178 creditor to dictate the course of a proposal when, no matter what the outcome of the proposal might be, it will still be able to pursue a claim to recover one hundred cents on the dollar.
>
> The contrary position is that the policy reasons for the special treatment of s. 178 debts are obvious from the very nature of the debts. There is no apparent policy reason why this treatment should differ in a bankruptcy pursuant to a proposal and in an assignment into bankruptcy. It would be unfair to bar a right to recovery by mere implication, when such a creditor is asked only to approve or reject a proposal.

[15] The learned Master in paragraph 12 considered the proper interpretation of the phrase "assents thereto" to be that it requires an explicit term in the Proposal that a section 178 debt is to be compromised. Master Bolton stated:

> There is merit in both arguments, but on balance I prefer the latter. No-one reading the voting letter sent out to the creditors here would be put on notice that assent to the proposal would cancel a debt that would otherwise survive the bankruptcy. I conclude that if a proposal is to have the effect of releasing the bankrupt from a s. 178 debt, it should do so explicitly, rather than pursuant to an implication read into a statute which can arguably be construed to be ambiguous.

[16] To bolster his contention that the finding in *Re Slaney, supra* is persuasive and its conclusion correct in law, Mr. Miller points to the proposed amendment to section 66.28 which would read as follows:

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> 66.28(2.1) A consumer proposal accepted, or deemed accepted,by the creditors and approved, or deemed approved, by the court does not release the consumer debtor from any particular debt or liability referred to in subsection 178(1) unless the consumer proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability has assented to the consumer proposal."

[17] Of course, this provision is not in effect as yet but when given the force of law would codify the interpretation of the current provision as found in *Re Slaney, supra*.

[18] In conclusion, counsel for the respondent submits that section 66.28(2) and its companion provision in section 62(2) of the *Act* stipulate that in order for a creditor to compromise the effect of its debt that would otherwise survive a discharge in bankruptcy, the creditor must explicitly agree to the compromise of its section 178 status. Since there is no evidence in either of these cases that would indicate Canada Student Loans explicitly agreed to compromise its status under section 178 the application should be dismissed.

Discussion and Analysis

[19] Despite the able argument and analysis put forward by counsel for the applicants I find myself in agreement with the position of the respondent.

[20] First of all I am not so sure that the cases cited in Houlden & Morawetz to support the applicant's position, namely *Skytal Ltd. V. Schiber* 1997 CanLII 12404 (ON SC), (1997), 46 C.B.R. (3d) 275 (Ont. Gen. Div.), aff'd 1998 CanLII 17736 (ON CA), (1999), 9 C.B.R. (4th) 129 (Ont. C.A.) and *Trade Collection & Mercantile Agency v. Derome* (1934), 16 C.B.R. 158 (Que. S.C.), actually stand for the principle that assenting to a proposal by a creditor means that one is also consenting to the release of a section 178 debt.

[21] Second, the interpretation of the provisions as outlined in *Re Slaney, supra,* accords with the object of the *Act* and the intention of Parliament and treats consumer debtors and bankrupts similar with respect to section 178 debts.

[22] Third, the *Re Slaney, supra* interpretation reflects what is obviously the intent of Parliament which will be clearly set out when the proposed amendment is proclaimed into force.

[23] Fourth, no one appears to have commented upon section 66.28(3) and section 62(3) of the *Act* which read as follows:

> 66.28(3) The acceptance of a consumer proposal by a creditor does not release any person who would not be released under this Act by the discharge of the consumer debtor.
>
> 62.(3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

[24] This provision, in my respectful opinion, appears to verify the non release of a section 178 debt where a creditor is simply consenting to the terms of the Proposal and not the release of the debt.

[25] Therefore, I decline to grant the relief requested by the applicants, namely that the completion of a Proposal or Consumer Proposal will release the debtor from debts falling within section 178 of the *Act*, including student loans debts within subsection 178(1)(g), if the creditor consented to the proposal itself.

[26] Since this was the only relief requested by Rederburg, the dismissal of this portion ends her involvement.

Submissions on B. 1

[27] Both parties assert that subsection 178(1.1) of the *Act* is available to a person who has made a Proposal or Consumer Proposal. Both contend that the decision in *Canada v. Snopko* 2004 CanLII 17058 (ON SC), (2004), 48 C.B.R. (4th) 41 (Ont. S.C.) is wrongly decided and should not be followed by this Court. In *Snopko*, *supra,* Sills, J. held relief pursuant to this provision was not available to a debtor in a Consumer Proposal. In coming to this conclusion, Justice Sills considered the definitions of a 'bankrupt' and an 'insolvent person' in subsection 2(1) of the *Act*, and the definition of a 'consumer debtor' in subsection 66.11. Counsel submit that the learned Justice failed to consider the effect of subsection 66(1) with respect to Proposals, and subsection 66.4(1) with respect to Consumer Proposals. These sections read as follows:

> 66(1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.
>
> 66.4(1)All the provisions of this Act, except Division I of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to consumer proposals.

[28] Counsel drew the Court's attention to two appellate court decisions which aid in the interpretation of these provisions.

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[29] In *Hancor Inc. v. Systemes de Drainage Modernes Inc.* 1995 CanLII 3536 (FCA), (1995), 37 C.B.R. (3d) 117 (Fed. C.A.), the Federal Court of Appeal was critical of the wording of subsection 66(1), but indicated that 'all the provisions of the *Act* apply to Proposals in so far as is possible.' The courts should 'participate in a process of intelligent harmonization and adaptation' of the rules applicable to bankruptcy with the rules applicable to Proposals.
[30] In *Re Perrette Inc.* 1998 CanLII 12721 (QC CA), (1998), 2 C.B.R. (4th) 165 (Que. C.A.); leave to appeal to S.C.C. refused (1998), 235 N.R. 398 (note), the Quebec Court of Appeal held that it is important to standardize rules applicable to bankruptcies with rules applicable to proposals. The words 'with such modifications as the circumstances require' mean that the provisions relating to bankruptcies are to be applied to subsections 50 to 65.3 by making the necessary terminological changes to other provisions.
[31] The parties argue that it is clear subsections 62(2) and 66.28(2) of the *Act* contain specific references to subsection 178(1) and therefore, that section applies to Proposals and Consumer Proposals as well as bankruptcies. Student loan debts were included in subsection 178(1) only on the understanding that relief against such debts would eventually be available in cases of hardship. It was expected that if student loan debts were not released upon a discharge from bankruptcy, debtors with student loans would be encouraged to make Consumer Proposals, thus paying a portion of their debts, rather than going into bankruptcy. In these circumstances, there is no reason that subsection 178(1.1) should not apply to Proposals and Consumer Proposals as well as bankruptcies. To hold otherwise would be to deny any recourse to persons who have made an effort to pay their debts in good faith. They would be in a worse position than persons who went into bankruptcy. Their only options in cases of hardship would be to make another Consumer Proposal or Proposal, go into bankruptcy or make a Proposal for the Orderly Payment of Debts. Subsection 178(1.1) should simply be interpreted to include debtors who have made Proposals or Consumer Proposals under Divisions I or II of the *Act*.
[32] In support of this position, Mr. Miller also contends that the object of section 178 of the *Act* is to define those specific debts and liabilities from which bankruptcy is not to provide relief, since by the wording of subsection (1) an order of discharge does not release the bankrupt from the debts and liabilities listed in paragraphs (a) to (h).
[33] This court in *Re Minto* 1999 CanLII 13045 (SK QB), (1999), 14 C.B.R. (4th) 235 (Sask. Q.B.) commented on the abuse paragraph 178(1)(g) was designed to avoid at para. 16:

> Section 178(1)(g) reflects a policy decision which accords with this objective and recognizes that student loans involve a situation where funds are advanced when there is no existing capacity of the debtor to repay the debt, but education obtained will hopefully enable the debtor to begin active and fruitful participation in the economy at some later date. Realization of earning potential associated with education can take some period of time after leaving school, so Parliament saw fit to disallow the immediate discharge of student loans in this case for two years after ceasing to be a student. This measure addressed the perceived abuse of students using the Act to obtain a discharge of student loans prior to making reasonable efforts to realize upon their earning potential achieved through education.

[34] The abuse that paragraph 178(1)(g) was designed to avoid is still maintained if a non-bankrupt consumer debtor is allowed to apply for relief under subsection 178(1.1) of the *Act* because applicants must meet the criteria in paragraphs (a) and (b) and also the application can only be brought ten years after the applicant ceased to be a student.
[35] Consequently, counsel for the respondent submits that the precise type of insolvency proceeding in which debt and liabilities are addressed, whether in the form of a bankruptcy or a Consumer Proposal, is of no consequence to the relief from student loan indebtedness at which subsection 178(1.1) is aimed. The passage of time after study in itself allows realization of earnings potential associated with education. The requirements of good faith and continued financial hardship preclude perceived potential abuses of failing to make reasonable efforts to realize upon earning potential through education.
[36] With respect to other creditors, the application of subsection 178(1.1) of the *Act* to non-bankrupt consumer debtors would not result in prejudice as they are no worse off than if the debtor was bankrupt and possibly better off if a former student's liability for subsection 178(1)(g) debt is relieved.
[37] It follows that the plain meaning of the words in subsections 66(1) and 66.4(1) is that the provisions in subsection 178(1.1) of the *Act* are to apply to Proposals and Consumer Proposals 'with such modifications as the circumstances require.' Accordingly, while the language of subsection 178(1.1) of the *Act* speaks of 'a bankrupt' applying for relief from student loans debt, the provision can be modified in circumstances involving non-bankrupt Proposal and Consumer Proposal debtors, by replacing the word 'bankrupt' with the words 'debtor or consumer debtor with an accepted and approved Proposal or Consumer Proposal under Division I or Division II of the *Act*.'

Discussion and Analysis

[38] I entirely agree with the thoughtful and articulate submissions of counsel. I have, therefore, little to add to this discussion.

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[39] I do note, however, that Parliament has caused confusion with the use of the word 'bankrupt' in subsections 178(1)(g) and (1.1) of the *Act*. This court in *Re Minto*, *supra*, was required to interpret the phrase 'bankrupt' to include a discharged bankrupt in order to make sense out of the provision.
[40] I also agree that a restricted interpretation of this provision to include bankrupts only and not debtors who have an approved Proposal would make little sense. Instead of encouraging Proposals as an alternative to bankruptcy for student loan debtors the opposite effect would result.
[41] Having come to this conclusion, it now remains for the Court to examine whether relief should be granted to the applicant Cardwell pursuant to subsection 178(1.1) of the *Act*.

Submissions on B. 2

[42] Before outlining the submissions it is necessary to set out Mr. Cardwell's personal and financial circumstances.
[43] The applicant obtained a Bachelor of Education Degree from the University of Saskatchewan in 1995. He also obtained a Bachelor of Arts in Studio Art from the University of Saskatchewan in 2001. The Arts degree was obtained with assistance from his parents and student loan funding was not involved.
[44] After graduation, Mr. Cardwell obtained some part-time work as a teacher but indicated that he did not earn a sufficient salary to pay anything toward his debt.
[45] Canada Student Loans obtained a judgment against Mr. Cardwell and garnished his pay. This prompted him to contact a Trustee in bankruptcy to discuss his options. At the suggestion of the Trustee he made a Consumer Proposal in February, 1998. The applicant was required to pay $250.00 per month for 48 months. The student loan creditors consented to the proposal. The applicant made all payments and received a Certificate of Full Performance in March of 2002.
[46] Mr. Cardwell gave evidence under oath that he was advised by his administrator that the remaining student loan debt would be discharged because the creditors consented to the Proposal. In the spring of 2004, Canada Student Loans contacted Mr. Cardwell and reactivated collection of the student loan debt. With the addition of interest the amount demanded exceeded the amount when he first made his proposal.
[47] The bankrupt is now 37 years old. He lives in a common-law relationship and supports two children of his partner from a previous relationship. Mr. Cardwell and his partner also have a 2 ½ year old daughter. His partner is self-employed with a net monthly income that averages only $100.00 per month. She is currently looking for part-time salaried work. His partner receives child support from the father of her two children and also receives the Child Tax Benefit for all three children.
[48] The applicant is gainfully employed as a teacher with net monthly income of $3,100.00. Total net family income is $3,988.05.
[49] The bankrupt and his partner obtained a mortgage, purchased a car and van and incurred other expenses on the premise that he no longer had student loans since he successfully completed his Consumer Proposal. As a result, his total monthly debt is $4,409.00 per month.

Submissions of the Parties

[50] The applicant contends that he has met the onus and satisfied the test set out in subsection 178(1.1) of the *Act*.
[51] Counsel for Cardwell submits that the applicant acted in good faith by entering into and satisfying the Consumer Proposal which resulted in dividends to the respondent of over $6,200.00. She also argues that the applicant should not be held responsible for the apparent confusion relating to the successful completion of a Consumer Proposal vis-à-vis a section 178 debt. As a result of this confusion, the applicant obtained a mortgage and car loans which basically leave no income available for payment toward this debt either now or in the foreseeable future.
[52] The respondent contends that the bankrupt has not met the onus upon him. Since the applicant is gainfully employed as a teacher and earning a healthy income with those earnings to continue, he has not satisfied the court that he will continue to have financial difficulty.
[53] In addition, despite graduating in 1995, the applicant made little effort to make payments until three years later when faced by enforcement remedies being utilized by the respondent.

Discussion and Analysis

[54] This court in *Re Minto*, *supra* set out various factors which a court should consider in this type of application. These factors have been followed and expanded upon in many decisions including *Re Kelly* 2000 CanLII 22497 (ON SC), (2000), 20 C.B.R. (4th) 251 (Ont. Gen. Div.). I do not intend to repeat the criteria here.
[55] To put it bluntly, I have not been convinced that the applicant has satisfied the requirements in subsection 178(1.1) of the *Act*. The applicant made no attempt to make any payment until compelled to do so by enforcement action brought against him. He did not take advantage of any interest relief mechanisms. While I certainly appreciate the effort by the applicant to complete a Consumer Proposal I cannot equate that effort as a show of good faith. It was judgment enforcement that prompted the Consumer Proposal and not a genuine effort by the applicant to pay down this debt.

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[56] I also agree with the respondent's submission that the applicant is gainfully employed in a profession for which he received a student loan funded education. Furthermore, he will be employed in that area for the foreseeable future. The applicant earns substantial remuneration for this work. To allow the application in the present circumstances would make a farce of this provision.
[57] I am not unsympathetic to the plight of the applicant who arranged his finances on the mistaken belief that the successful completion of his Proposal eradicated the remaining student loan payment obligation.
[58] As stated in *Re Minto, supra*, the court is limited in this type of application to either granting, dismissing or adjourning the application. The court also has no jurisdiction to eliminate interest on student loans: *Re Lowe* 2004 ABQB 255 (CanLII), (2004) 2 C.B.R. (5th) 277 (Alta. Q.B.)
[59] If this was a discharge application, I would carefully consider these facts when fashioning an appropriate order and I would request that the respondent do the same before taking any further action on the debt.

Conclusion

[60] The applicants' request for a declaration that the debts of student loan creditors who consented to their Proposals did not survive the completion of the Proposals is dismissed. Since this was the only relief requested by the applicant Rederburg, her application is dismissed.
[61] Relief under subsection 178(1.1) of the *Act* is available to a person who has made a Proposal or Consumer Proposal. However, the applicant Cardwell's application for relief pursuant to this provision is also dismissed for the reasons stated above.
[62] The Respondent did not request costs and none will be awarded.

DATED at the City of Regina, in the Province of Saskatchewan, this 12th day of April, A.D. 2006.

_____
Registrar in Bankruptcy

Lundrigan (Re), 2012 NSSC 231 (CanLII) - Were Actions in Good Faith?

Date: 2012-06-18
Docket: B 36348
URL: http://canlii.ca/t/frr1v
Citation: Lundrigan (Re), 2012 NSSC 231 (CanLII), <http://canlii.ca/t/frr1v> retrieved on 2013-09-24
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IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Lundrigan (Re), 2012 NSSC 231

Date: June 18, 2012
Docket: B 36348
Registry: Halifax

District of Nova Scotia
Division No. 03 - Sydney
Court No. 36348
Estate No. 51-1464188
In the Matter of the Bankruptcy of Daniel George Lundrigan

LIBRARY HEADING

Registrar: Richard W. Cregan, Q.C.
Heard: May 10, 2012
Written Decision: June 18, 2012

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Summary: The applicant's student loans were not discharged by his bankruptcy as he made his assignment before seven years had passed since he had ceased to be a student. He applied for relief under Subsection 178(1.1) of the *Bankruptcy and Insolvency Act*.

Result: The court was satisfied that he had acted in good faith respecting the loans. As his resources were limited and he had family responsibilities the court was also satisfied that he would continue experiencing financial difficulty so that he would not be able to pay the debt. Relief was granted.

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IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Lundrigan (Re), 2012 NSSC 231

Date: June 18, 2012
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District of Nova Scotia
Division No. 3 - Sydney
Court No. 36348
Estate No. 51-1464188
In the Matter of the Bankruptcy of Daniel George Lundrigan

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.
Heard: May 10, 2012
Present: Joseph R. Wall, representing the Attorney General of Canada.
Rita Anderson, representing the Trustee, PricewaterhouseCoopers.
Daniel George Lundrigan, representing himself.

[1] Background
This is an application by Daniel George Lundrigan for relief under Subsection 178(1.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) with respect to two student loans which have remained outstanding after his discharge from Bankruptcy. It is opposed by the Attorney General of Canada.

[2] Mr. Lundrigan enrolled in a two year course at the Marconi Campus in Sydney in 2003. However after completing one and a half years, his common law relationship ended leaving him responsible for debts totalling $27,000.00, in addition to two student loans, one under Federal sponsorship and the other under Provincial sponsorship, on which were owing on the date of his assignment, February 17, 2011, balances of $14,575.97 and $3,799.49 respectively.

[3] He ceased to be a student in June 2004. This date is 4 months short of seven years from the date of his assignment. Accordingly, because of the provisions of Subsection 178(1)(g) of the *BIA*, the student loans were not discharged with his automatic discharge on November 18, 2011.

[4] There was considerable pressure on him to deal with the indebtedness from his broken relationship. His father agreed to help him. They arranged a loan with the TD Bank for the $27,000.00. His father co-signed the loan on condition that he live at home and thus be able to make $600.00 payments each month against this loan. He had to leave his studies and find work. The loan apparently was paid in a timely manner. He then addressed his student loans. He had an understanding with the collection agency that he would pay $150.00 per month. That was all he could pay as he was no longer living at home. He only made 9 payments.

[5] He has been working throughout as a cashier at the casino in Sydney. He has married. He and his wife, Michelle Lynn Lundrigan, have twins, born July 19, 2010.

[6] His monthly take home pay averages $1,500.00. His wife's monthly take home pay averages $1,084.00. She also receives the Child Tax Benefits of $223.00 and Universal Child Care Benefit of $200.00 each month. The total current household monthly income is now $3,007.00.

[7] He works the evening shift at the casino and she works during the day so that one of them is always able to look after their children. This way they avoid child care expenses.

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[8] The claims made in his bankruptcy, in addition to the student loans, consisted of a secured claim by TD Canada Trust for $10,875.47, and an unsecured claims of Capital One Services, LLC for $4,163.76.

[9] Mr. Lundrigan's work at the casino is steady but he does not see any opportunity for advancement. He does not see that there are other opportunities in the region for him which would pay more.

[10] If he had completed the course at the Marconi Campus, he would be qualified for much better paying work. He needed another half year of study to complete it. He doubts that he could now complete the course. He probably would have to start all over again as the technology involved is always changing.

[11] Law

To be relieved of student loans under Subsection 178(1.1) a bankrupt must satisfy the court that:

> (a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and
>
> (b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

[12] I must be satisfied that Mr. Lundrigan has acted in good faith with respect to these debts. The following is a review I have made of cases and commentary on good faith. A number of points are relevant to Mr. Lundrigan's situation.

[13] I shall start by quoting what I wrote in *Hankinson (Re)*, 2009 NSSC 211 (CanLII), 2009 NSSC 211:

> [17] *Re Minto* 1999 CanLII 13045 (SK QB), (1999), 14 C.B.R. (4th) 235 (Sask., Registrar Herauf) is often referred to for its list of factors relevant to the determination of good faith. In paragraph [62] he says:
>
> > I agree with counsel that in the context of student loans one can look at certain factors considered in determining whether a condition should be imposed on the discharge of a bankrupt with student loan liabilities; namely, whether the money was used for the purpose loaned, whether the applicant completed the education, whether the applicant derived economic benefit from the education (ie: is the applicant employed in an area directly related to the education), whether the applicant has made reasonable efforts to pay the debts and whether the applicant has made use of available options such as interest relief, remission, etc.
>
> [18] Registrar Sprout in *Kelly, Re,* 2000 CanL II 22 497 (Ont., S.C.) after referring to these factors added:
>
> > - the timing of the bankruptcy, and
> > - whether the student loan forms a significant part of the bankrupt's overall indebtedness as of the date of bankruptcy.
>
> [19] I would add the following:
>
> > - whether the applicant had sufficient work and income to be reasonably expected to make payments on the loan,
> > - the lifestyle of the applicant,
> > - whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards,
> > - what proposals the applicant may have made to the loan administrators and the responses received, and
> > - whether the applicant was at any time disabled from working by illness.

[14] Black's Law Dictionary (9th ed): gives the following definition:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards or fair dealing in a given trade or business, or (4) absence of intent to defraud or to see unconscionable advantage. - Also termed *bona fides*.
>
> > "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; It excludes a variety of types of conduct

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> characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.,

and Barron's Law Dictionary, 3rd edition, the following:

> GOOD FAITH a total absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations. In the case of a merchant, good faith refers to honest in fact and the observance of reasonable commercial standards of fair dealing in the trade. U.C.C. §2-103(1)(b). More generally, the term means "honesty in fact in the conduct or transaction concerned. "U.C.C. §1-201(19).

[15] In Frank Bennett: *Bennett on Bankruptcy,* 14th ed, at page 564 the following factors are suggested:

- whether the money was used for the purpose loaned;
- whether the bankrupt completed the education;
- whether the bankrupt derived economic benefit from the education, namely whether the bankrupt obtained a job in the area directly related to the education;
- whether the bankrupt made reasonable efforts to repay the debts;
- whether the bankrupt had made use of available options such as interest relief, remission, etc.;
- the timing of the bankruptcy;
- whether the student loans form a significant part of the bankrupt's overall debts.
- whether the bankrupt has acquired a significant estate, property, savings, investments or has the bankrupt incurred and discharged other debts for non-necessaries, while continuing in default of the student loan;
- whether the bankrupt had sufficient work and income to be reasonably expected to make payments on the loan;
- the lifestyle of the applicant;
- whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards;
- what proposals the applicant may have made to the loan administrators and the responses received; and
- whether the applicant was at any time disabled from working by illness.

[16] The following is said in Roderick J. Wood: *Bankruptcy & Insolvency Law,* Irwin Law, 2009, at page 295:

> The good faith requirement means that the debtor must have acted honestly both in the bankruptcy and in obtaining the student loan.

[17] *Houlden, Morawetz & Sarra: Bankruptcy and Insolvency Law of Canada,* Fourth Edition, at H§40, page 6-185, says the following:

> "Good faith" implies honesty of intention. Failure to properly disclose the debtor's marital status on the student loan application shows dishonesty of intention: *Re Dustow* 1999 CanLII 13044 (SK QB), (1999), 14 C.B.R. (4th) 186, 1999 Carswell Sask 831, 193 Sask. R. 159 (Sask. Q.B.).
>
> In determining whether the bankrupt acted in good faith, the following factors may be considered:
>
> 1. Was the money used for the purpose loaned?
> 2. Did the bankrupt complete the education or make an honest effort to do so?
> 3. Did the bankrupt derive benefit from the education in the sense of gaining employment in an area directly related to the education?
> 4. Did the bankrupt make reasonable efforts to pay the loan or did the bankrupt make an immediate assignment in bankruptcy?

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> 5. Did the bankrupt take advantage of other options with respect to the loan such as interest relief or loan remission?
>
> 6. Was the bankrupt extravagant or irresponsible with his or her finances?
>
> 7. Did the bankrupt fairly disclose his or her circumstances on the application for the loan in the sense of acting with an honest intention?

[18] In *Duke* v. *Nanaimo* (*Regional District*)(1998), 50 M.P.L.R. (2d) 116 (B.C.S.C.) at paragraph 52 one finds the following:

> Although the phrase "good faith" always contains a component of honesty, it often connotes additional qualities depending on the circumstance in which it is used. In my view, the requirement of good faith mandates genuineness, realism and reasonableness both subjectively and objectively.

[19] *Lowe, Re,* 2004 ABQB 255 (CanLII), 2004 ABQB 255 (Romaine J.) concerned a modest balance owing on a student loan of a bankrupt, the head of a family of eight. He ran a successful business. The family income was well in excess of $100,000. It was observed they lived very well - two cars, several computers, involvement in sports, the expenses for which were very high. He never made voluntary payments on the student loan in question. He spent his money on family priorities. The point made in this case is that, although it is important that children be given access to sports, cultural activities etc., good faith requires that one's priorities reasonably reflect community standards. Put another way, a certain life style is necessary to earn a living and be a part of a community, and children should be able to participate in community activities, sports, etc., but the expenditures must be reasonable; extravagance is not acceptable. This observation applies to both the bankrupt's good faith and ability to pay.

[20] In *Cardwell, Re*, 2006 SKQB 164 (CanLII), 2006 SKQB 164, Registrar Herauf was first concerned with whether Subsection 178(1.1) relief was available to one who had made a consumer proposal. He determined that it did, but questioned whether making such was indicative of good faith. He said:

> 55.To put it bluntly, I have not been convinced that the applicant has satisfied the requirements in subsection 178(1.1) of the *Act*. The applicant made no attempt to make any payment until compelled to do so by enforcement action brought against him. He did not take advantage of any interest relief mechanisms. While I certainly appreciate the effort by the applicant to complete a Consumer Proposal I cannot equate that effort as a show of good faith. It was judgment enforcement that prompted the Consumer Proposal and not a genuine effort by the applicant to pay down this debt.
>
> 56. I also agree with the respondent's submission that the applicant is gainfully employed in a profession for which he received a student loan funded education. Furthermore, he will be employed in that area for the foreseeable future. The applicant earns substantial remuneration for this work. To allow the application in the present circumstances would make a farce of this provision.

[21] In *Fournier, Re*, 2009 Carswell Ont. 3522, Registrar Nettie considered the need for the applicant to have acquired a new automobile when it was apparent that she could be well served by public transit, as she lived and worked in central Toronto. He said:

> 14. When what apparently gives in her budget at the same time that the car is leased are the payments to the student loans, I find this not to be acting in good faith in respect of those loans. No evidence was offered of any real exploration of taking public transit, or of keeping the old car, either of which would have permitted continued or increased payments on the student loans, and I draw the adverse inference that either of those options could have resulted in money being paid under the loans, but that the Applicant chose to have a new car for reasons personal to herself, and not in keeping with her obligation to act in good faith to these two loan programs.
>
> 15. Turning to the second part of the test, financial difficulty, I find that while the Applicant certainly appears to be in financial difficulty, her present difficulty is of

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her own choosing - the car. But for that new car, which increases her regular transit costs from approximately $200.00 per month for bus passes to $800.00 or more, she would be able to make her support payments and pay something to the student loans.

[22] Analysis - Good Faith

Mr. Lundrigan has not benefitted from the education acquired with the money borrowed. The technology behind it is now stale. The asset he acquired with the loans in now of little, if any, value to him.

[23] One might criticize him for abandoning his studies with only six months left in the course. However, one must consider the situation he was in. In addition to these loans he was confronted with the debts he assumed from his previous relationship. No doubt he was being pursued by creditors more aggressive than the student loan authorities. He was a person with limited qualifications in an acknowledged depressed economic area. His father was willing to help him with the assumed debts. He let him stay at home free, so that from a modest income he was able to repay them, no doubt with his father seeing that such happened as quickly as possible. His father's generosity did not extend to the student loans. He had done his part. It might be argued that he preferred these creditors to his student loan creditors. I do not see this as a strong argument. He managed what he could with limited income. His father's help was limited.

[24] One can second guess what he did. Maybe he could have made a few more payments, but with his limited income the amount available would not be significant. In the situation he found himself I do not see that he can be accused of acting unreasonably. There is no suggestion of extravagance on his part nor of dishonesty. With the birth of his children and with his limited income I see no basis for suggesting that he should be paying anything on these loans to prove that he has been acting in good faith.

[25] As to the period before his children's birth, there is nothing before me to suggest that he was not acting in good faith. He made some payments. He discharged the other loans, which would not have been possible without his father's help and discipline. There would have been little, if anything, left over.

[26] Although the respondent has suggested bad faith on Mr. Lundrigan's part, and one must be careful in this regard, no real incidents of it have been proved. The question is simply - Has Mr. Lundrigan, considering all the circumstances and looking at the total picture, acted in good faith?

[27] He found himself in debt because of personal misfortune. He was fortunate that his father offered to help him out. He would not help him with the student loan, but at least he was relieved of the greater part of his indebtedness. There were few options for him. He did what he could, maybe not perfectly. He would not have had any significant surplus income prior to the birth of his children, and certainly has had none since. The most he could find for the student loans would be very little.

[28] Some flexibility and generosity regarding human nature has to be given in determining whether one has acted in good faith. One must look at his actions and ask whether he has he acted in good faith. His resources have been limited. To act in good faith does not require perfection. I think he, on the whole, has acted with honesty and reasonableness. I am thus satisfied that he has acted with the good faith required of him.

[29] Analysis - Financial Difficulty

As to financial difficulty, the household monthly income is approximately $3,000.00. The Superintendent's Standard for a family of four is currently $3,680.00. There is no reasonable expectation of any significant increase in the family income. He and his wife have two young children to raise on a modest income. Their circumstances are such that I am quite satisfied that they will continue to have financial difficulty and be unable to pay off these loans.

[30] Conclusion

He is entitled to the relief provided by Subsection 178(1.1) of the *BIA*.

R.

Halifax, Nova Scotia
June 18, 2012

Claims released - Sec. 178(2)
(2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.
R.S., 1985, c. B-3, s. 178;
R.S., 1985, c. 3 (2nd Supp.), s. 28;

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1992, c. 27, s. 64;
1997, c. 12, s. 105;
1998, c. 21, s. 103;
2000, c. 12, s. 18;
2001, c. 4, s. 32;
2004, c. 25, s. 83;
2005, c. 47, s. 107;
2007, c. 36, s. 54.

Partner or co-trustee not released - Sec. 179
179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.
R.S., 1985, c. B-3, s. 179;
2004, c. 25, s. 84(F);
2005, c. 47, s. 108(E).

Court may annul discharge - Sec. 180
180. (1) Where a bankrupt after his discharge fails to perform the duties imposed on him by this Act, the court may, on application, annul his discharge.

Annulment of discharge obtained by fraud - Sec. 180(2)
(2) Where it appears to the court that the discharge of a bankrupt was obtained by fraud, the court may, on application, annul his discharge.

Effect of annulment of discharge - Sec. 180(3)
(3) An order revoking or annulling the discharge of a bankrupt does not prejudice the validity of a sale, disposition of property, payment made or thing duly done before the revocation or annulment of the discharge.
R.S., 1985, c. B-3, s. 180;
2004, c. 25, s. 85(F).

Power of court to annul bankruptcy - Sec. 181
181. (1) If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

Wale, Re, 1996 CanLII 8275 (ON SC) - Ct.'s Ability to Refuse Bankruptcy Order When in Effort to Undermine Other Obligations

Date:	1996-11-29
Docket:	35-063684
Parallel citations:	45 CBR (3d) 15
URL:	http://canlii.ca/t/1wbvj
Citation:	Wale, Re, 1996 CanLII 8275 (ON SC), <http://canlii.ca/t/1wbvj> retrieved on 2013-09-01
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Ontario Supreme Court
Wale, Re
Date: 1996-11-29

In the matter of the bankruptcy of Henry John Wale
Ontario Court of Justice (General Division) [In Bankruptcy] O'Connor J.
Judgment – November 29,1996.

Mona Anis, for Applicant.
Ross Thompson, for Bankrupt.
Harold Poultney, Q.C., for Trustee.
(Doc. Owen Sound 35-063684)

[1] November 29, 1996. O'CONNOR J.:–Henry John Wale's assignment in bankruptcy was date-stamped by the Official Receiver an hour and a half before the commencement of his family law trial. His former wife brings this motion, under s. 181 of the *Bankruptcy and Insolvency Act,* to annul the bankruptcy and to vest his property in her pending the outcome of the family law trial, or to exempt her claims from the usual stay of creditor proceedings under s. 69.3, and other relief. **She argues his filing was motivated solely by his desire to defeat her family law claims and was an abuse of the process of the court. He says he had no such intention, he is an "insolvent person", as defined by the act and is entitled to its' protection.**

History of the proceedings

[2] Ms. Wale commenced family law proceedings by application on August 11, 1994. The parties were divorced in October 1995 and he has remarried. On December 15, 1995 McKay J., made an interim order, inter alia, restraining Mr. Wale from dissipating assets except in the ordinary course of business. At the outset of the trial on October 16, 1996, Ms. Wale sought an order declaring Mr. Wale in contempt for breach of the interim order, alleging he had sold his inventory and tools, removed all the furnishings from the matrimonial home and attempted to place other assets out of her reach. The court was also advised Mr. Wale had attended on a trustee in bankruptcy the previous week and filed an assignment late Friday afternoon, October 13, 1996. It was received and date-stamped by the Official Receiver at 8:30 am, October 16, 1996, the first day of trial. After one day's evidence and argument the matter was adjourned to October 28, 1996 to permit Ms. Wale to bring this motion to annul the bankruptcy assignment. Pending return of the matter, I ordered Mr. Wale's interest in the matrimonial home and all his assets be held in trust, the contents of the home be returned to it, that he make the mortgage and other payments, that Ms. Wale may occupy the home and the parties cooperate in selling it.

[3] The annulment motion was served on the parties, the trustee and all the creditors. Upon return of the motion the parties and the trustee were represented by counsel. None of the creditors attended or was represented. Pending this ruling I ordered several measures intended to preserve the *status quo,* including postponing the creditors meeting and requiring Mr. Wale deliver to the trustee $4500 (part of what he received on the sale of his inventory), out of which the trustee is required to pay the mortgage and other household expenses.

Evidence Summary

[4] The Wales lived together and were married for a total of eighteen years. He is a skilled cabinet-maker, specializing in custom-built kitchens. They developed a successful business, first designing and constructing pine furniture and then building and installing kitchens. They built a workshop and showroom behind their home in Chatsworth. She did the books and some of the sales and customer relations work and he built and installed the kitchens. During the several years before their separation in May, 1994 the business prospered and the Wales lived comfortably. At separation she moved out and he stayed in the matrimonial home and continued to run the business. She has one daughter living with her and he has a son and daughter living with him. In October 1995 they were divorced and he has remarried. Ms. Wale's claims in the matrimonial action include child and spousal support and an unequal division of the matrimonial property.

[5] Although it is difficult to determine exact figures for the business because some of it was done for cash, its' reported net incomes for the several years before separation were:

Year ended	Net income
February 1990	$73,072
February 1991	$44,182
February 1992	$8,540

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February 1993	$27,682
February 1994	$30,575

[6] He says that his business declined severely during 1995 and 1996. He was forced to declare bankruptcy, the close timing to the family law trial being merely coincidental. His reported net incomes for the years after separation were:

Year ended	Net Income
February 1995	$22,908
December 1995	$(15,334)

[7] However during a part of the year prior to his declaration Mr. Wale continued paying in excess of $1,500 per month against the mortgage, an accelerated rate of about three times that required by the bank About a week prior to the commencement of the family law trial Mr. Wale met with Richard Burnside, a trustee in bankruptcy. Mr. Burnside advised him an assignment would stay all creditors claims, including those of Ms. Wale, except for support. In the week prior to his declaration Mr. Wale removed all his tools and equipment from his workshop. They were appraised at $18,915 and are security for a line of credit with Scotiabank of about the same amount. He sold his inventory for $8,500 and used this money to pay some creditors and his trustees' fee, $750 to board his dog and cat and he kept $4,500 for "'Room and board for 3 children @ $1500 each". He took from the home all the furnishings and contents, appraised at $8896, and stored them at an unknown location. He left a mobile 4' x 6' sign at the bottom of the driveway, on Hwy. 10, which read, "Joyce Wale Your Kids Lost Their Home God Bless You. Closed Sorry".

[8] Although he says he lost money over 1996 and is unable to obtain credit to carry on his business, it appears he has been doing a considerable cash business. His trade creditors are owed less than $5700. When confronted with business records Ms. Wale found in the garbage after he moved out, he admitted receiving $17,885.27 in September and October of 1996. When he filed his assignment he had orders for at least five kitchen projects and had received deposits from four of these customers, totalling $3800. Ms. Wale says his usual practice was to take deposits of about 20% of the value of a project before starting it. Projecting the 20% figure, the deposits are evidence of orders for work worth about $19,000. His 1956 MGA sportscar was appraised at $9000 and a lawn tractor at $1200. He claims both are held by a repairman who is owed much of their values.

[9] In his Statement of Affairs, Mr. Wale declares assets of $157,000 and debts of $105,800. However, the values he placed on some of the assets are less than the appraised values mentioned above. Using the appraised values and including the cash he received for the inventory, his assets would total about $19,000 more than declared. Mr. Wale argues this figure may be decreased by an overstatement of the value of some assets, e.g. the home by $7000 and his tools by $1000.

[10] He declared income for himself and new wife of $1593 per month and expenses of $4428.82. However, the declared income does not take into account the $17,855.27 received in September and October, and the expenses appear to be inflated in that they include house taxes, mortgage and other expenses which he has not paid and has no intention of paying, as he had abandoned the house before the assignment.

[11] In summary, Mr. Wale moved out of the house, stored his furniture and tools, discontinued producing kitchens despite a backlog of orders which had been partly paid for, sold his inventory to obtain cash and stopped paying the mortgage and other expenses, apparently prepared to let the house be sold under a power of sale.

[12] Particularly telling of Mr. Wale's scheming are his plans to accelerate his loan payments to the Scotiabank once he finalized the divorce proceedings, as confirmed in the bank's letter to him, and a handwritten note on a bill to him from a real estate appraiser, "Okay to pay after court case".

The Parties' Positions

[13] Ms. Wale argues the purpose of the bankruptcy filing was obvious. Mr. Wale intended to stop the family law trial from proceeding in any meaningful way by removing the couples' assets from the reach of the court and Ms. Wale's claim for an unequal division of them. She points out that even he now admits his assumption he could no longer carry on the business may have been incorrect. He was determined to move anything movable out of her reach and devalue or destroy anything immovable, i.e. the house and shop, by allowing it to be sold under power of sale.

[14] Mr. Wale and his trustee argue there was nothing improper in his assignment immediately before the trial. He met the definition of an insolvent person. He had debts over $1000, he was "...unable to meet his obligations as they generally become due..." and he had "...ceased paying his current obligations in the ordinary course of business...". He had a right to avail himself of the act's protection against all his creditors, including Ms. Wale, who has no special status as his former wife. To grant the annulment would give Ms. Wale a preference over other creditors, which the Court ought not do. The filing in advance of the trial would actually assist the court by apprising it of his true financial circumstances. Annulment is a rarely granted remedy reserved only for cases of clear fraud or abuse of the process of the court. These circumstances do not exist here, he and his trustee argue.

Analysis

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[15] S. 181 of the *Bankruptcy and Insolvency Act* reads:

> (1) Where, in the opinion of the court, a receiving order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.
>
> (2) Where an order is made under subsection (1), all sales, dispositions of property, payments duly made and acts done theretofore by the trustee or other person acting under his authority, or by the court, are valid, but the property of the bankrupt shall vest in such person as the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate or interest of the trustee therein on such terms and subject to such conditions, if any, as the court may order.

[16] The jurisdiction of this court, sitting as a bankruptcy court, is limited by the special rules and procedures set out in the Act. The court has no authority, either on an interim or permanent basis to stay an assignment. However, the Act does give the court authority to annul a bankruptcy. *Kalau v. Dahl* (1985), 57 C.B.R. (N.S.) 296 (Alta. Q.B.).

[17] An annulment will be granted only where it is shown either the debtor was not an insolvent person when he made the assignment or where it is shown that the debtor abused the process of the court or committed a fraud on his creditors.

Was Mr. Wale an insolvent person when he made the assignment?

[18] An insolvent person is defined in s. 2:

> "insolvent person" means a person who is not bankrupt and who resides or carries on business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[19] Here, Mr. Wale's liabilities exceeded $1000 when he made the assignment. They totalled at least $105,000, and more, if the repair accounts for the sportscar and the lawn tractor are valid. He satisfies the preamble requirement.

[20] Subsections (a), (b) and (c) of the definition are disjunctive. If he has debts exceeding $1000 a person claiming insolvency must show either (a) he is unable to meet his obligations as they generally become due *or* (b) he has ceased paying his current obligations in the ordinary course of business *or* (c) establish his assets, if sold, would not yield sufficient money to pay his debts. Mr. Wale does not rely on ss.(c), as his assets, even allowing for devaluation caused by a quick or forced sale of them, would appear to exceed his liabilities.

[21] He argues he complies with both ss.(a) and (b). However, in considering ss.(a) it appears he had sufficient cash flow in the September and October of this year to meet his obligations as they became due. He received over $17,800, part of which arose from the sale of his inventory, a finished kitchen and part from the receipt of deposits from new orders. His trade debts were about $5700. He had orders for four or five kitchens or smaller jobs which would have produced further income. He declared personal living expenses of $4427 per month, and his loan payment to the Scotiabank was $500 per month. He clearly had an ability to meet his obligations as they generally became due. He simply chose not to do so. He does not meet the criteria under ss.(a).

[22] Mr. Wale had ceased paying his current obligations in the ordinary course of business as they generally became due. The cheques he wrote in payment of some of his trade creditors were returned NSF and he has not replaced them. Perhaps better organization of his affairs or the use of money he held as cash and put to personal use would have permitted payment of some or all of the trade creditors. However, unlike ss.(a) which requires the debtor to show an inability to meet obligations, ss.(b) requires only that the debtor "has ceased paying his current obligations in the ordinary course of business...". Unlike ss.(a) there is no requirement in ss.(b) for the debtor to show and thus no need to investigate his inability to make payments. If he has ceased paying current obligations, which he had, he meets the criteria of this sub-section. I must assume the reference by parliament to a debtor's "inability" in ss.(a) and not in ss.(b) is intentional and the easier test in the business oriented subsection, i.e.ss.(b), was imposed for a specific reason.

[23] Mr. Wale qualifies as an insolvent person, if only marginally so, and was therefore entitled to make an assignment in bankruptcy, unless in doing so he abused the process of the court or committed a fraud on his creditors.

Was there an abuse of the court's process?

[24] Numerous cases conclude that the debtor's motive in making an assignment is not generally relevant. There is nothing unlawful in declaring bankruptcy for the sole purpose of defeating the claims of one's creditors. *Irving Oil Co. v. Murphy* (1962), 5 C.B.R. (N.S.) 203 (P.E.I. S.C.). One of the objectives of bankruptcy legislation is to permit the debtor, in the words of Evershed M.R. "to protect himself from the evils which he might otherwise suffer". *Re Dunn,* [1949] 2 All E.R. 388 (C.A.). However, this general principle must always be tempered by the caveat that fraud or abuse of the process will

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permit a court to annul the assignment. In *Bankruptcy and Insolvency Law of Canada,* by Holden and Morawetz, Third Edition, Vol 2, at page 6-107, the learned authors say:

> The court must consider the rights not only of the debtor and of the creditors but also the rights of the public. A bankrupt should not be permitted to benefit from his own turpitude.

[25] In *Blaxland v. Fuller* reflex, (1990), 2 C.B.R. (3d) 125 (B.C. S.C.), Donald J. of the B.C. S.C. [In Bankruptcy], said at page 127: "If, however, the conduct is tainted by bad motives, then the Court remains able to annul a bankruptcy under s. 181 of the *Bankruptcy Act*".

[26] Under s. 181 the Court has a wide discretion when considering an annulment application. An exhaustive review of the circumstances surrounding the assignment should be made by the Court. There is no single test or principle to be applied. The test is flexible and fact specific. The debtor's motive is the primary consideration is determining abuse of process or fraud. After considering whether the debtor is an insolvent person some of the questions the court might pose to ascertain the debtor's motive are:

> (1) Is the debtor's financial situation genuinely overwhelming or could it have been managed?
>
> (2) Was the timing of the assignment related to another agenda or was bankruptcy inevitable in the near or relatively near furture?
>
> (3) Was the debtor forthcoming in revealing his situation to his creditors or did he hide assets or prefer some creditors over others?
>
> (4) Did the debtor convert money or assets to himself which would otherwise have been assets in the bankruptcy?
>
> (5) What had been the debtor's relationship with his creditors, particularly his major ones? Was it such that they might have assisted him, if he had approached them, by granting time or terms of repayment or had any goodwill been destroyed by past unfulfilled promises?
>
> (6) Are there other relationships–business partnerships shareholder arrangements, spousal, competitors for an asset, or simply personal associations which could cast light on a possible bad faith motive for making an assignment?

[27] In *Re Good* reflex, (1991), 4 C.B.R. (3d) 12 (Ont. Bktcy.), Rosenberg J. of the Ontario Court (General Division) annulled a bankruptcy where he found the husband in a bitter family law dispute filed an assignment because he was "... determined to destroy himself and all of his assets rather than allow his wife the benefit of any of those assets... In my view, a clear case of abuse of process has been established."

Conclusion

[28] Here, Mr. Wale's motives and conduct compel the Court to exercise its discretion under s. 181 to annul the assignment. He barely meets the definition of an insolvent person. With a modicum of effort and good intentions on his part he could easily have worked his way through his less than formidable financial problems. He was on good terms with Scotiabank, a major creditor which had agreed to reduced payments on its fully secured loan until after his matrimonial difficulties were settled. His mortgage to National Trust, upon which he had been paying three times the required amount within the year prior to the assignment, was current. His trade debts were only $5700 among five creditors with whom he had worked for years. He made no approaches to his mortgagee or his trade creditors to reduce or postpone parts or all of their accounts. The timing of the assignment, the day of his family law trial, is not coincidental, nor motivated by a desire to assist the Court. The visceral antipathy toward his former wife, as evidenced by the mobile sign he left at the property, the holy war that has raged between them since separation, his egregious conduct in selling assets and pocketing the cash shortly prior to the assignment, contrary to an order of the Court, and his removing and hiding the contents of the matrimonial home all overwhelmingly demonstrate *male fides* by him. I have little difficulty concluding he made his assignment with the intention of removing assets from the reach of the Court and his former wife so as to frustrate her claim for an unequal division of them. The assignment was an abuse of the process of the bankruptcy court and a fraud on at least one of his creditors, his former wife.

Order

[29] Accordingly an order will go:

> (1) Annulling the bankruptcy of Henry John Wale.
>
> (2) Vesting title to the Wale matrimonial home in Joyce Wale pending its sale and distribution of the net proceeds therefrom as ordered in my judgment in the family law matter, delivered coincidentally with these reasons.
>
> (3) Requiring Richard Burnside, the trustee, to account for all assets in his possession and to deliver same, except the matrimonial home and contents, to Henry John Wale.
>
> (4) Requiring the trustee to serve a copy of these reasons on all the creditors.
>
> (5) Requiring Henry John Wale to pay forthwith the costs of Joyce Wale for this motion, fixed at $3500.
>
> (6) There will be no order as to the payment of the trustee's costs.

Order accordingly.

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Effect of annulment of bankruptcy - Sec. 181(2)
(2) If an order is made under subsection (1), all sales, dispositions of property, payments duly made and acts done before the making of the order by the trustee or other person acting under the trustee's authority, or by the court, are valid, but the property of the bankrupt shall vest in any person that the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate, or interest or right of the trustee in the estate, on any terms and subject to any conditions, if any, that the court may order.

Final statement of receipts and disbursements - Sec. 181(3)
(3) If an order is made under subsection (1), the trustee shall, without delay, prepare the final statements of receipts and disbursements referred to in section 151.
R.S., 1985, c. B-3, s. 181;
2004, c. 25, s. 86;
2005, c. 47, s. 109.

Stay on issue of order - Sec. 182
182. (1) An order of discharge or annulment shall be dated on the day on which it is made, but it shall not be issued or delivered until the expiration of the time allowed for an appeal, and, if an appeal is entered, not until the appeal has been finally disposed of.

(2) [Repealed, 1992, c. 27, s. 65]
R.S., 1985, c. B-3, s. 182;
1992, c. 27, s. 65.

PART VII

COURTS AND PROCEDURE

JURISDICTION OF COURTS

Courts vested with jurisdiction - Sec. 183
183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;
(b) [Repealed, 2001, c. 4, s. 33]
(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
(e) in the Province of Prince Edward Island, the Trial Division of the Supreme Court of the Province;
(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
(g) in the Province of Newfoundland, the Trial Division of the Supreme Court; and
(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

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Elias v. Hutchinson, 1981 ABCA 31 (CanLII) - Bankrupt Attempts to Sue Trustee and Jurisdiction of the Court

Date: 1981-02-19
Docket: 12856
Parallel citations: 14 Alta LR (2d) 268
URL: http://canlii.ca/t/fp6nq
Citation: Elias v. Hutchinson, 1981 ABCA 31 (CanLII), <http://canlii.ca/t/fp6nq> retrieved on 2013-09-11
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In the Court of Appeal of Alberta
Citation: Elias v. Hutchinson, 1981 ABCA 31
Date: 19810219
Docket: 12856
Registry: Calgary
Between:
William H. Elias on his own behalf, and as representative of all the unsecured creditors of Catalina Exploration & Development Ltd. (in bankruptcy) and Catalina Exploration & Development Ltd.
Appellant
(Respondent)
- and -
J. Gordon Hutchinson
Respondent
(Applicant)

The Court:
The Honourable Chief Justice McGillivray
The Honourable Mr. Justice Moir
The Honourable Mr. Justice Laycraft

Reasons for Judgment of The Honourable Chief Justice McGillivray
Concurred in by The Honourable Mr. Justice Moir
And Concurred in by The Honourable Mr. Justice Laycraft

IN THE MATTER OF: THE BANKRUPTCY OF CATALINA EXPLORATION & DEVELOPMENT LTD.

COUNSEL:
William H. Elias, Esq., Appeared in person.
C. D. O'Brien, Esq., for J. Gordon Hutchison.

REASONS FOR JUDGMENT OF THE HONOURABLE CHIEF JUSTICE McGILLIVRAY

[1] This is an application to quash an appeal to the Court of Appeal of Alberta.

[2] Two arguments were advanced:

(1) that the appellant had no appeal as of right under Section 163 of The Bankruptcy Act; and

(2) that the appeal is an abuse of the process in that the very matter has earlier been the subject of a decision of the Appellate Division of the Supreme Court of Alberta.

[3] Briefly, the course of events leading up to this application is as follows:

[4] The trustee in bankruptcy was appointed shortly after the voluntary assignment in bankruptcy in early March 1971. A proposal to creditors by Mr. Elias to carry on the business of the bankrupt was rejected by the inspectors on April 21st, 1971, and the major asset of the bankrupt (a fully-equipped seismic vessel) was sold for a monetary consideration and the relinquishment of the claims of two creditors. By December 21st, 1971, the estate was substantially administered.

[5] On September 29th, 1975, Mr. Elias made application for:

(1) an order annulling the bankruptcy pursuant to Section 151 (1) of The Bankruptcy Act;

(2) Leave to commence an action against the trustee pursuant to Section 186 of The Bankruptcy Act.

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The application was dismissed.

[6] An appeal to the Appellate Division of the Supreme Court of Alberta from this dismissal was itself dismissed on June 16th, 1976. In March, 1980, the appellant applied again to a Judge of the Court of Queen's Bench for leave to sue the trustee and for an order pursuant to Section 157 (5) of The Bankruptcy Act to review, rescind or vary the order of September 29th, 1975, insofar as it was necessary for the Court to grant the leave sought. Section 157 (5) reads as follows:

> "157. ....
>
> (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction..."

[7] The application was dismissed by Waite, J. on March 21st, 1980. On March 28th, 1980, a notice of appeal was filed, no leave to appeal having been obtained pursuant to Section 163 (e) of The Bankruptcy Act.

[8] The application to quash, as mentioned, is brought on the ground that no appeal as of right lies under Section 163 and that the purported appeal is an abuse of the process.

[9] Sections 163 and 164 of The Bankruptcy Act read as follows:

> "163. Unless otherwise expressly provided an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value five hundred dollars;
>
> (d) from the grant of or refusal to grant a discharge of the aggregate unpaid claims of creditors exceed five hundred dollars;
>
> (e) in any other case by leave of a judge of the Court of Appeal..."
>
> "164. The decision of the Court of Appeal upon any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is granted by that court."

[10] The jurisdiction of this Court to hear an appeal is conferred by S. 163 of the Bankruptcy Act. As was said in In re Solloway Mills & Co.; Ex parte Solloway, 16 C.B.R., 161; (1935) O.R. 37:

> "The winding-up is a proceeding in bankruptcy and insolvency over which the Parliament of Canada has exclusive jurisdiction, not only as to substantive law but also as to procedure.... it is a general principle that appellate jurisdiction in this Court exists only where that jurisdiction, is specifically conferred by statute. The Parliament of Canada has expressly stated in sec. 103 of The Winding-up Act, the three cases in which an appeal lies to the Court of Appeal. Under the maxim mentio unius exclusio alterius these three cases are the only cases in which this Court has jurisdiction to entertain an appeal from a single judge."

[11] These observations apply equally to the jurisdiction conferred on the Court of Appeal under The Bankruptcy Act. It is plain, then, that the appellant must bring himself within one of the five subsections of Section 163.

[12] It will be seen that Subsections (b), (d) and (e) are not applicable, and the only questions in issue before us are whether or not Subsections (a) - "future rights" and (c) - "property involved in the appeal exceeds $500.00" -- confer jurisdiction upon the Court to hear the appeal.

[13] The appellant firstly contends that the point in issue involves future rights, those rights being, according to the appellant Elias' brief:

> "... the damages for which the Appellants in the case at Bar seek Leave to sue."

The appellant relies upon two decisions. The first is Re J. McCarthy & Sons Co. of Prescott Limited (1916) O.L.R. 3. In this case leave was given to a creditor of a company in liquidation to prosecute an action against the company in liquidation instead of proving its claim in the winding-up proceedings. The liquidator appealed, and a preliminary question arose as to whether the Court had jurisdiction to hear the appeal. The Court stated that it was difficult to perceive how "future rights" were directly involved, but concluded that authorities cited required a wide interpretation of the words "future rights"; and that there was indirectly involved the right of trial by ordinary methods involving future possible trial by jury and future unrestricted rights of appeal and other such like rights to the ordinary litigant. The Court also held that as the amount being claimed was some $3,000.00, it could be said indirectly that the property involved in the appeal exceeded in value $500.00.

[14] The second case relied upon by the appellant is that of In re Kern Agencies Ltd. 12 C.B.R., 279. In this case, a proposal was submitted through a trustee in bankruptcy which the majority of the creditors had accepted. Application was made to the Court for approval. That approval was refused. The trustee appealed. A motion was launched for an order quashing the appeal on the ground that the Court of Appeal had no jurisdiction. A right of appeal was given if:

> "... the question to be raised on the appeal involved future rights."

The Court there held that it could not distinguish the case from cases in which it had been held that an appeal lies from a refusal of a winding-up order under The Winding-Up Act, where, again, future rights were a condition of jurisdiction. One such case was In re Union Fire Insur. Co. (1886) 13 O.A.R., 268. Osler, J.A. is reported as follows:

> "It was argued that there was no right of appeal from the order in question under section 78 of the Act of 1882. That section provides 'that any one dissatisfied with an order of the Court may appeal (by leave of a Judge of the Court), in Ontario to the Court of Appeal. Provided that in the question to be decided on the appeal future rights are involved'.
>
> The question here is, whether the winding-up order now made shall stand, and that seems to me very clearly to involve the future rights of the creditors and shareholders of the company, which are directly affected by the winding-up proceedings which may take place under the order."

[15] I confess to difficulty in perceiving what exactly Parliament sought to do by providing for an appeal without leave in a case involving future rights while requiring leave in cases which do not involve future rights. Indeed,. I find the authorities leave me in a state of uncertainty as to what a future right is at all, leave alone what there is about a future right that would require a treatment of

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cases involving future rights different from cases that do not involve future rights. Perhaps a case which directly challenges the authority of a trustee to act in a particular way which will be a recurring situation with other trustees in other cases may be a case involving future rights, but certainly no element of that sort exists in the present case involving, as it does, specific complaints of fact.

[16] In the McCarthy case, it was said that future rights were involved in giving a creditor leave to sue instead of proving its claim in the bankruptcy. The Court said that mode of trial i.e. by jury or otherwise, or unrestricted rights of appeal were future rights. If future proceedings involve "future rights" within the meaning of the Bankruptcy Act, it is difficult to think of any case in which it could not be said that future rights were involved. I am unable to agree with the decision in the McCarthy case.

[17] The Kern Agencies decision is to my mind distinguishable from the McCarthy case. It can at least be argued that the bankruptcy or a winding-up will affect the rights of creditors or shareholders in the future and from that point of view are rights which are not presently existing.

[18] A more recent case where facts more closely resembled those alleged in the case at bar, is the decision of the Manitoba Court of Appeal in In re Bankruptcy of Dominion Foundry Co. Ltd.; Continental Forwarding Ltd. (Creditors) v. Canadian Credit Men's Association (trustee) reflex, (1965) 51 W.W.R., 679 (Man. C.A.). In this case the original motion in the Trial Court sought an order to set aside the sale of assets of Dominion Foundry Co. Ltd. It sought an injunction to restrain the trustee in bankruptcy from completing the sale, and it sought a directive that there be further and more thorough advertising. The Chambers Judge refused the application, finding that it could not be said that the sale was improvident, nor that the inspectors or the trustee were guilty of fraud, or acted in bad faith and contrary to the interests of the creditors. An appeal from that order was taken.

[19] Section 150 of The Bankruptcy Act, R.S.C. 1952, ch. 14, covered the jurisdiction of the Court of Appeal. That section is identical to the present Section 163 of The Bankruptcy Act.

[20] The Court concluded that neither future rights nor property involved in the appeal in excess of $500.00 was involved, and that the Court had no jurisdiction to hear the appeal. Mr. Justice Guy, who delivered the Judgment of the Court, referred to numerous authorities which he had considered and said this at page 682 with regard to "future rights" and with regard to whether "the property involved in the appeal exceeds in value $500.00":

> "I have read these decisions and others. Many deal with the Winding-Up Act, RSC, 1952, ch. 296, rather than the Bankruptcy Act, but in the main they apply the same basic principles. What can be gleaned from them, amongst other things, is this: Legal rights either exist or do not exist, unless the peculiar circumstances of the case clearly indicate that future rights will be affected; and as to the amount involved (whether or not it is over $500) the trend has been away from the Cushing case, supra, which held that there must be $500, specifically, in controversy-and in favour of the principle that the appeal may be heard if the amount in jeopardy is $500 or more; and further, that 'value of the property' means the same thing as 'amount involved' in these cases; but all the cases which deal with the aspect of procedure indicate that the conduct of the court-appointed trustee does not involve money or property within the meaning of sec. 150 (c) of the Bankruptcy Act."

[21] The decision of the Manitoba Court of Appeal then concluded with this statement:

> "In the motion before us, we have passed beyond the realm of common law civil dispute. We are now under the statute law of the Bankruptcy Act. The company is actually found to be bankrupt and has been placed by the court in the hands of a trustee with his attendant inspectors advising and assisting in the making of decisions relating to the duties imposed upon the trustee. The methods employed by the trustee and his inspectors to dispose of the assets of the bankrupt have been called in question. This is surely a matter of procedure. With respect, I adopt the language of Macdonald, C.J.A. of the British Columbia court of appeal in In re Coast Shingle Mill Co., supra, where he says at p. 537:
>
> > 'There are a number of cases bearing upon different facts, but on this fact they seem to agree, that where the question is a question of procedure it does not fall within either (a) or (c) of subsec. (2) of sec. 74; that is to say, no question of future rights arises, nor does any question of a specific sum of money.' "

[22] A right in a legal sense exists when one is entitled to enforce a claim against another or to resist the enforcement of a claim advanced by another. A present right exists presently; a future right is inchoate in that while it does not now exist, it may arise in the future. For the adjective "future" to have any meaning, it cannot refer to that which presently exists. Does the claim alleged against the trustee presently exist? It is a current allegation of existing facts though they may be procedurally blocked by a need to obtain leave to assert the claim.

[23] To give "future" the meaning that includes that which a litigant may obtain by success in litigation in the future is to say that a right of appeal exists in all cases. Any claim advanced is, in that sense, a future right to a judgment which does not yet exist. It would seem to me for clause (a) of Section 163 to have any meaning that it must refer to rights which could not at the present time be asserted but which will come into existence at a future time.

[24] It is sufficient to say that in my opinion a presently existing right to seek leave to sue a trustee in respect of presently existing facts is not a future right and the appellant does not bring the case within subsection (a) of Section 163 of the Bankruptcy Act.

[25] I then turn to the question of whether it can be said that "the property involved in the appeal exceeds in value $500.00" within the meaning of subsection (c) of Section 163.

[26] It is to be kept in mind that the appeal is from the Chambers Judge's refusal to grant to the appellant leave to sue for damages for allegedly wrongful acts in the course of his trusteeship. The case is akin on this score to the Dominion Foundry Company case which I have already quoted and in which it was held that Section 163 (c) of the Bankruptcy Act was not applicable.

[27] The decision of the Supreme Court of Canada in Gatineau Power Company and Freeman F. T. Cross 1929 S.C.R. 35 appears to be in point. In this case the Gatineau Power Company applied to a commission for authority to expropriate. The commission refused the authorization applied for. An appeal lay to the Court of King's Bench with leave of a judge of that Court. An application for leave to appeal was granted. The full Court of Appeal subsequently quashed the order for leave. The Gatineau Power

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Company then served notice of appeal to the Supreme Court of Canada and an application was made to quash the appeal for want of jurisdiction. Mr. Justice Rinfret stated the issue as being:

> "Whether an appeal lies to the Supreme Court of Canada from a judgment rendered in a provincial court where the appeal to that court was quashed for want of jurisdiction."

One of the requirements for appeal to the Supreme Court was that:

> "the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars."

Mr. Justice Rinfret said this:

> "Thus, the whole matter in controversy, even if traced back to the Commission - and we do not think it should be - is merely the right to have that body entertain an application for authority to expropriate. Such right is not appreciable in money. Still less so is the right of appeal to the Court of King's Bench which is the sole matter in controversy on the projected appeal here. The consequence of the authorization by the Commission might result in a proceeding in which the amount involved would exceed two thousand dollars; but the ultimate award on the expropriation is not the matter in controversy in this appeal? and, as was said in Lachance v. La Societe de Prets et de Placements de Quebec:
>
> > 'our jurisdiction does not depend on the possible consequences of a possible judgment.'
>
> We have no jurisdiction in this case as it now stands. The motion must be allowed and the appeal quashed with costs."

[28] I am of the view that the appellant does not bring himself within Section 163 (c) of the Bankruptcy Act and in the result the appeal must be quashed for want of jurisdiction.

[29] A further matter, in my opinion, stands in the way of the appellant. He earlier sought leave to sue the trustee. That leave was refused. That decision was affirmed by the Court of Appeal. The point of jurisdiction apparently was not raised. The learned Chambers Judge in respect of the present application before him said this:

> "On a consideration of all of the material before me I am satisfied that:
>
> 1. The substantive allegations were before the first Court, at least in general terms, and the disposition of those allegations by that Court, as affirmed by the Court of Appeal, must be deemed a final and conclusive adjudication of them as against the applicant.
> 2. Apart from possibly minor details, the substantive allegations against the Trustee were within the awareness of the applicant at the time of the first application, and the evidence in support of them was either known to him or, by the exercise of reasonable diligence, could have been so known."

[30] The appellant, in renewing his application to sue the trustee, relied on Section 157 (5) of the Bankruptcy Act which I have quoted earlier and which I repeat for convenience:

> "157. ...
>
> (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction..."

[31] While the language of this section is broad, it seems to me that it is designed to permit of a judge to deal with continuing matters in the bankruptcy so as not to be found by an earlier decision if faced by changing circumstances. Thus, while a judge might approve the appointment of a trustee, he at a future date might alter that order by appointing more than one trustee or removing a trustee. He might refuse a discharge to a bankrupt but later, having regard to then circumstances, vary that order so as to permit of a discharge on terms and he might again at a future date vary that order. Similarly, the manner of remuneration might from time to time be subject to variation and review. Against this, however, there is that type of case where a final adjudication has to be made. The claim of one class of creditors over another has to have priority. The question whether a particular piece of property forms part of the bankrupt's estate; the validity of the claim or the amount of the claim, are all matters which should be the subject of a final adjudication in respect of which an appeal with leave would lie, but surely, adjudication of claims of that sort cannot be the subject of repeated applications. There have been cases where an order disallowing a creditor's claim has been reviewed, but new evidence was available and it was apparently very cogent evidence, but I am of the view that by and large claims capable of final determination should not be the subject of repeated applications. The learned authors of Houlden and Morawetz Bankruptcy Law of Canada in thier 1980 revision of an earlier text, in dealing with this subject say this:

> "The power given by Sec. 157 (5) can only be applied in respect of judgments on interlocutory matters and not where a final judgment dealing with the rights of the parties has been given; in the latter type of situation an appeal under Sec. 163 is the proper remedy. A judgment dismissing a petition for a receiving order is a final judgment and an appeal under Sec. 157 (5) is the appropriate recourse: Traders Finance Corpn. Ltd. v. Garage Morrissett et Fils Ltee, (1960) Que. S.C. 712, 1 C.B.R. (N.S.) 267."

[32] In the circumstances as found by the learned Trial Judge, I am of the view that no right to review, rescind, or vary the earlier order refusing leave lies. In the result I am of the opinion that the appeal must be quashed for lack of jurisdiction. As the meaning to be attributed to future rights, in my mind at least, is obscure. I would direct that there be no costs.

DATED AT CALGARY
THIS 19th DAY OF
February, 1981.

Superior Court jurisdiction in the Province of Quebec - Sec. 183(1.1)

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

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Courts of appeal — common law provinces - Sec. 183(2)
(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec - Sec. 183(2.1)
(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada - Sec. 183(3)
(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.
R.S., 1985, c. B-3, s. 183;
R.S., 1985, c. 27 (2nd Supp.), s. 10;
1990, c. 17, s. 3;
1998, c. 30, s. 14;
1999, c. 3, s. 15;
2001, c. 4, s. 33;
2002, c. 7, s. 83.

Appointment of officers - Sec. 184
184. Each of the following persons, namely,
(a) the Chief Justice of the court,
(b) in Quebec, the Chief Justice or the Associate Chief Justice in the district to which the Chief Justice or Associate Chief Justice was appointed,
(c) in Yukon, the Commissioner of Yukon,
(d) in the Northwest Territories, the Commissioner of the Northwest Territories, and
(e) in Nunavut, the Commissioner of Nunavut,
shall appoint and assign such registrars, clerks and other officers in bankruptcy as deemed necessary for the transaction or disposal of matters in respect of which power or jurisdiction is given by this Act and may specify or limit the territorial jurisdiction of any such officer.
R.S., 1985, c. B-3, s. 184;
1993, c. 28, s. 78;
2002, c. 7, s. 84.

Assignment of judges to bankruptcy work by Chief Justice - Sec. 185
185. (1) The Chief Justice of the court, and in the Province of Quebec the Chief Justice or the Associate Chief Justice in the district to which he was appointed, may, if in his opinion it is advisable or necessary for the good administration of this Act, nominate or assign one or more of the judges of the court to exercise the judicial powers and jurisdiction conferred by this Act that may be exercised by a single judge, and the judgment, decision or order of a judge so nominated or assigned shall be deemed to be the judgment, decision or order of the court, and a reference in this Act to the court applies to any judge exercising the powers and jurisdiction of the court.

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No diminution of powers - Sec. 185(2)
(2) Nothing in this section diminishes or affects the powers or jurisdiction of the court or of any of the judges thereof not so specially nominated or assigned.
R.S., c. B-3, s. 155.

Exercise of power by judges of other courts on appointment by Minister - Sec. 186
186. The Minister may, if in his opinion it is advisable or necessary for the proper administration of this Act, authorize any district, county or other judge to exercise any or all of the powers and jurisdiction of the court or of a judge or registrar thereof, subject to any limitation or condition, and any judge so authorized shall be deemed a judge or registrar, as the case may be, of the court having jurisdiction in bankruptcy, and references to the court, to the judge of the court or to the registrar apply to that district, county or other judge according to the terms of his authority.
R.S., c. B-3, s. 156.

AUTHORITY OF THE COURTS

Seal of court - Sec. 187
187. (1) Every court shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of the court in all legal proceedings.

Court not subject to be restrained - Sec. 187(2)
(2) The courts are not subject to be restrained in the execution of their powers under this Act by the order of any other court.

Power of judge in chambers - Sec. 187(3)
(3) Subject to this Act and to the General Rules, the judge of a court may exercise in chambers the whole or any part of his jurisdiction.

Periodical sittings - Sec. 187(4)
(4) Periodical sittings for the transaction of the business of courts shall be held at such times and places and at such intervals as the court directs.

Court may review, etc. - Sec. 187(5)
(5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

Enforcement of orders - Sec. 187(6)
(6) Every order of a court may be enforced as if it were a judgment of the court.

Transfer of proceedings to another division - Sec. 187(7)
(7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

Trial of issue, etc. - Sec. 187(8)

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(8) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of that judge or officer is subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall, subject to section 193, be to the Court of Appeal.

Formal defect not to invalidate proceedings - Sec. 187(9)
(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

Haywood Securities Ltd. v. Witwicki, 1995 CanLII 3249 (BC CA) - Perfection of Objection to Discharge when Not Properly Delivered

Date:	1995-03-03
Docket:	CA018114
Parallel citations:	32 CBR (3d) 103; 7 BCLR (3d) 372
URL:	http://canlii.ca/t/1ddn1
Citation:	Haywood Securities Ltd. v. Witwicki, 1995 CanLII 3249 (BC CA), <http://canlii.ca/t/1ddn1> retrieved on 2013-08-16
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CA018114
Vancouver Registry
Court of Appeal for British Columbia

BETWEEN:
HAYWOOD SECURITIES LTD.
PLAINTIFF
(APPELLANT)

AND:
STANLEY WALTER WITWICKI
DEFENDANT
(RESPONDENT)

Before: The Honourable Chief Justice McEachern
The Honourable Madam Justice Southin
The Honourable Mr. Justice Hutcheon

D. Prince — Counsel for the Appellant
J. I. McLean — Counsel for the Respondent
Place and Date of Hearing: Vancouver, British Columbia
February 10, 1995
Place and Date of Judgment: Vancouver, British Columbia
March 3, 1995

Written Reasons by:
The Honourable Mr. Justice Hutcheon
Concurred in by:
The Honourable Chief Justice McEachern
The Honourable Madam Justice Southin

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CA018114
Vancouver Registry
Court of Appeal for British Columbia
Haywood Securities Ltd.
v
Stanley Walter Witwicki

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE HUTCHEON

1 The respondent, Stanley Walter Witwicki, made an assignment in bankruptcy on 29 April 1992. Under an amendment to the ***Bankruptcy and Insolvency Act*** R.S.C. 1985, C. B-3, effective 30 November 1992, he was entitled at the end of nine months to an automatic discharge from bankruptcy unless a notice of intended opposition was given prior to the expiration of the nine month period. One of the creditors, the appellant Haywood Securities Ltd., gave to the Trustee a written notice of opposition dated January 27, 1993**. That notice was given properly to the trustee within the nine month period but the creditor failed to give the bankrupt the required notice pursuant to s. 168.1(1)(b).**

> 168.1(1) Except as provided in subsection (2), the following provisions apply in respect of an individual bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction:
>
> . . .
>
> (c) where a creditor intends to oppose the discharge of the bankrupt, the creditor shall give notice of the intended opposition , stating the grounds therefor, to the Superintendent, to the trustee and to the bankrupt at any time prior to the expiration of the nine month period immediately following the bankruptcy;

2 The only issue of significance on this appeal is whether the failure by the creditor to give notice to the bankrupt could be relieved against under the provision of s.187(9) of the *Act*.

> **187(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.**

3 In allowing the appeal from the decision of Master Wilson, sitting as a registrar under the ***Bankruptcy Act***, Mr. Justice Tysoe stated:

> It is my view that Registrar Wilson erred in relying on this section. The automatic discharge from bankruptcy is not a proceeding in bankruptcy within the meaning of s.187[9]. The intent of s.187[9] is to deal with the matter where the court has made an order in circumstances where notice may not have been properly given to all interested persons. That is not the type of situation here. The challenge here is not to say that a proceeding is invalid but to attempt to make an automatic discharge from bankruptcy invalid. As it stands, the automatic discharge from bankruptcy is valid.

4 Counsel for the creditor submitted that the "proceeding" in question was the giving of the notice of objection by the creditor. Because that notice was not given to the bankrupt as required by s.168.1(1)(c) the proceeding was "invalidated", that is deprived of legal efficacy. The failure to give notice was a defect in form or an irregularity and should be relieved against by the use of s.187(9). If the faulty notice is relieved against, the provisions of s.168.1(1)(f) do not apply because a creditor has opposed the discharge. Instead the provisions of s.168.1(1)(e) are applicable. I quote the relevant parts of the two subsections:

> 168.1(1)(e) where the Superintendent, the trustee or a creditor opposes the discharge of the bankrupt, the trustee shall forthwith apply to the court for an appointment for the hearing of the opposition in the manner referred to in sections 169 to 176....
>
> 168.1(1)(f) where the Superintendent, the trustee or a creditor has not opposed the discharge of the bankrupt in the nine month period immediately following the bankruptcy, then subject to subsection 157.1(3),
>
> (i)on the expiration of that nine month period, the bankrupt is automatically discharged,

5 With due respect to the chambers judge, I cannot agree with his reasoning that the challenge was confined to the automatic discharge. The challenge was to the proceeding that is provided for by s.168.1 of the ***Act*** in the nine month period immediately following the bankruptcy.

6 In my view, the question that has to be decided is whether the failure to give the notice of objection to the bankrupt was a matter of form or a matter of substance. If it is a matter of substance, the authorities are all to the effect that s.187(9) is not available to relieve against the failure; what is a matter of form and what is a matter of substance depends on the circumstances of each case. ***Re Roosenboom*** (1973), 18 C.B.R. 180 citing ***Re Little***, (1924), 56 OLR 196, 5 CBR 244.

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7 The effect of applying s.187(9) to relieve against the failure to give notice of objection to the bankrupt prior to the expiration of the nine month period is to place Witwicki back into bankruptcy. Between January 29, 1993 and July 1993 when he received a copy of a notice of motion from the Trustee, Witwicki was entitled to consider himself a discharged bankrupt and conduct himself accordingly. The change of status from that of a discharged bankrupt to that of an undischarged bankrupt is clearly a matter of substance and not form.

8 In my opinion, s.187(9) is not available to remedy the failure of the creditor to give notice of objection to the bankrupt.

9 For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Hutcheon"

I AGREE: "The Honourable Chief Justice McEachern"

I AGREE: "The Honourable Madam Justice Southin"

Proceedings taken in wrong court - Sec. 187(10)
(10) Nothing in this section invalidates any proceedings by reason of their having been commenced, taken or carried on in the wrong court, but the court may at any time transfer the proceedings to the proper court.

Court may extend time - Sec. 187(11)
(11) Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

Court may dispense with certain requirements respecting notices - Sec. 187(12)
(12) Where in the opinion of the court the cost of preparing statements, lists of creditors or other material required by this Act to be sent with notices to creditors, or the cost of sending the material or notices, is unjustified in the circumstances, the court may give leave to omit the material or any part thereof or to send the material or notices in such manner as the court may direct.
R.S., 1985, c. B-3, s. 187;
1992, c. 1, s. 20, c. 27, s. 66;
2004, c. 25, s. 87.

Dugas v. PricewaterhouseCoopers Inc., 2004 NBCA 15 (CanLII) - Can Trustee Obtain Control Over All of Bankrupt's Income on Failure to Properly Disclose

Date:	2004-02-26
Docket:	85/03/CA
Parallel citations:	268 NBR (2d) 290; 237 DLR (4th) 143; 47 CBR (4th) 205
URL:	http://canlii.ca/t/1gk4h
Citation:	Dugas v. PricewaterhouseCoopers Inc., 2004 NBCA 15 (CanLII), <http://canlii.ca/t/1gk4h> retrieved on 2013-09-13
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COURT OF APPEAL OF NEW BRUNSWICK
85/03/CA

CYRENUS JOSEPH DUGAS APPELLANT		**CYRENUS JOSEPH DUGAS** APPELANT
- and -		- et -

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PRICEWATERHOUSECOOPERS INC. RESPONDENT		**PRICEWATERHOUSECOOPERS INC.** INTIMÉE
Dugas v. PricewaterhouseCoopers Inc., 2004 NBCA 15		Dugas c. PricewaterhouseCoopers Inc., 2004 NBCA 15
CORAM: The Hon. Chief Justice Drapeau The Honourable Justice Rice The Honourable Justice Deschênes		CORAM: L'honorable juge en chef Drapeau L'honorable juge Rice L'honorable juge Deschênes
Appeal from a decision of: Léger, J. May 27, 2003		Jugement de première instance : Léger, j.c.b.r. le 27 mai 2003
Appeal heard: January 27, 2004		Appel entendu : le 27 janvier 2004
Judgment rendered: February 26, 2004		Jugement rendu : le 26 février 2004
Reasons for judgment by: The Hon. Chief Justice Drapeau		Motifs de jugement : L'honorable juge en chef Drapeau
Concurred in by: The Honourable Justice Rice The Honourable Justice Deschênes		Souscrivent aux motifs : L'honorable juge Rice L'honorable juge Deschênes
Counsel at hearing: For the appellant: Brigitte Sivret For the respondent: Cyril W. Johnston and Chantal A. Thibodeau		Avocats à l'audience : Pour l'appelant : Brigitte Sivret Pour l'intimée : Cyril W. Johnston et Chantal A. Thibodeau
THE COURT The Court dismissed the appeal. There will be no order of costs.		**LA COUR** La Cour a rejeté l'appel. Il n'y aura pas d'ordonnance quant aux dépens.

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The judgment of the Court was delivered by

DRAPEAU C.J.N.B.

[1] Under the ***Bankruptcy & Insolvency Act***, R.S.C. 1985, c. B-3 (the "***Act***"), the portion of the bankrupt's earnings that exceeds reasonable living expenses may be attached and used to pay creditors in bankruptcy. It is common ground between the parties that the bankrupt's earnings do not constitute property divisible among creditors pursuant to section 67(1) of the ***Act*** and that proceedings to attach those earnings can only be brought under section 68. The leading case on point is ***Marzetti v. Marzetti***, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765.

[2] That said, on occasion, the Trustee lacks the information required to fix the amount that the bankrupt is required to pay out of his or her earnings in accordance with s. 68(3) and a constellation of circumstances operate to give rise to a real and substantial possibility that those earnings may dissipate. **The question raised by the present appeal is whether, in those circumstances, s. 183(1) of the *Act* authorizes the Court of Queen's Bench to make an order granting the Trustee temporary control over the bankrupt's earnings, despite s. 68's silence on the subject. Section 183(1) is a provision of general application that invests the Court of Queen's Bench with such jurisdiction at law, and in equity, as will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy.**

[3] In the case at bar, Justice Léger of the Court of Queen's Bench in a decision reported at [2003] N.B.J. No. 210 (Q.B.)(Q.L.), allowed the Trustee's application for relief under the ***Act*** and ordered that: (1) the revenues arising in 2003 from the appellant's crab-fishing license be paid directly to the Trustee; (2) the Trustee immediately pay all reasonable *bona fide* arm's length expenses arising out of the ordinary course of the fishing activities, including salaries; (3) the Trustee prepare a report for the benefit of the bankrupt and the creditors in bankruptcy of all revenues and expenses and then proceed in accordance with s. 68; and (4) any unresolved issues relating to the fishing activities, including reasonable expenses, be submitted for judicial determination.

[4] The appellant, Cyrenus Joseph Dugas, contends that Justice Léger lacked jurisdiction to make that order. In Mr. Dugas' submission, s. 68 constitutes a complete code for the Trustee's and the Court's jurisdiction over the bankrupt's earnings, and the provision does not authorize the making of an asset-preservation order of the kind made in the court below.

[5] Relying on ***Landry (Re)*** 2000 CanLII 16846 (ON CA), (2000), 192 D.L.R. (4th) 728 (Ont.C.A.), the Trustee counters that s. 68 only comes into play once it is possible to fix the amount to be paid out of earnings to the bankrupt's estate. The Trustee submits that where it is impossible to fix that amount, and the bankrupt's earnings are in need of protection for the benefit of the creditors in bankruptcy, the court may make an asset-preservation order, such as the order under appeal, effective until such time as the Trustee is able to make the determination under section 68(3).

[6] After hearing counsel for Mr. Dugas, the Court dismissed the appeal, with reasons to follow. These are the reasons.

The context

[7] On August 23, 2001, Peter Gaudet, Adam Gaudet, 508571 N.B. Ltd. and 100167 P.E.I. Inc. obtained a consent judgment in the Court of Queen's Bench of New Brunswick against Mr. Dugas in the amount of $2,100,000. Under the terms of that judgment, Mr. Dugas was ordered to pay the sum of $50,000 forthwith and $2,050,000 within thirty days. The sum of $50,000 was paid, but Mr. Dugas defaulted on his obligation to pay the balance of $2,050,000. That debt remains outstanding in full.

[8] From April to October 2002, Mr. Dugas fished for crab, earning gross revenues in excess of $800,000. As noted, he did not pay down the judgment debt mentioned above.

[9] On October 27, 2002, following the end of the crab fishing season, Mr. Dugas made an assignment in bankruptcy for the general benefit of his creditors. The Trustee at the time, J.G. Touchie & Associates Ltd., filed with the Official Receiver, a copy of Mr. Dugas' Statement of Affairs. The only creditor listed in that document was Adam Gaudet who was shown as being owed $2,050,000.00.

[10] Under s. 68(3) of the ***Act***, the Trustee is required to have regard "to the personal and family situation of the bankrupt" in fixing the amount that the latter is required to pay from earnings to the estate of the bankrupt. Form 65, entitled "Monthly Income and Expense Statement of the Bankrupt and the Family Unit and Information Concerning the Financial Situation of the Individual Bankrupt", is designed to assist the Trustee in assessing the bankrupt's personal and family situation.

[11] Mr. Dugas filed a Form 65 that indicated "0.00$" whenever a specific amount was to be provided. Thus, he specified "0.00$" for his net employment income, "0.00$" for the total monthly income of the

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family unit, "0.00$" for his monthly non-discretionary expenses, "0.00$" for the monthly non-discretionary expenses of the family unit, "0.00$" for his available monthly income, "0.00$" for the available monthly income of the family unit, "0.0%" for his portion of the available monthly family unit income and "0.00$" for the monthly surplus or (deficit) of the family unit.

[12] On November 1, 2002, Peter Gaudet, Adam Gaudet, 508571 N.B. Ltd. and 100167 P.E.I. Inc. filed proofs of claim. No other creditor, whether secured or unsecured, filed a proof of claim.

[13] The first meeting of creditors was held on November 19, 2002. At that time, PricewaterhouseCoopers Inc. took over as Trustee and the list of creditors was expanded to include Peter Gaudet, 508571 N.B. Ltd. and 100167 P.E.I. Inc. On December 6, 2002, the first meeting of creditors reconvened and Mr. Dugas' examination began. At that time, Mr. Dugas testified that he had received an allocation of the snow crab quota for nearly every year since 1977 and that, in 2002, his gross income from crab-fishing amounted to $820,000.00, while the amount indicated in his tax return as taxable income was $287,000.73. Mr. Dugas disclosed, as well, that the expenses deducted from his gross income included the sum of $85,000 paid to his son, Serge, even though the latter had no direct involvement in fishing for crab. The meeting ended without Mr. Dugas' examination being completed.

[14] Mr. Dugas has since refused to submit to any further out-of-court examination by the Trustee.

[15] As mentioned, on May 27, 2003, Justice Léger allowed the Trustee's application and made the following order:

(a) That all revenues arising from Mr. Dugas' crab fishing licence for the year 2003 be paid directly to the Trustee;

(b) That the Trustee pay immediately all reasonable *bona fide* arm's length expenses arising out of the ordinary course of the fishing activities including salaries;

(c) That the Trustee prepare a report for the benefit of the Bankrupt and the Creditors of all revenues and expenses and then proceed according to the provisions of Section 68 of the ***Act***; and

(d) That the hearing into the Trustee's motion resume on the 2nd day of July, 2003 at 1:30 p.m. in Bathurst, New Brunswick or at such other time as the parties may agree in order to determine all unresolved issues relating to the 2003 crab fishing activities including reasonable expenses.

[16] On May 29, 2003, Mr. Dugas filed a Notice of Appeal from Justice Léger's decision. That filing triggered the application of s. 195 and, as a result, all proceedings under Justice Léger's May 27, 2003 order were stayed until I made an order canceling that stay on June 6, 2003 (see ***Dugas (Re)***, [2003] N.B.J. No. 230 (C.A.)(Q.L.)).

[17] The parties agreed to adjourn *sine die* the hearing before Justice Léger scheduled for July 2, 2003. Neither party has sought directions from him with respect to the many "unresolved issues relating to the 2003 crab fishing activities including reasonable expenses".

Relevant Legislative Provisions

68. (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

(2) For the purposes of this section,

(a) "total income" referred to in subsection (1) includes, notwithstanding paragraphs 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source; and

(b) a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1)(b) and (b.1).

68. (1) Le surintendant fixe, par instruction, pour les provinces ou pour un ou plusieurs districts ou parties de district, des normes visant l'établissement du montant du revenu total d'un particulier failli qui excède ce qui est nécessaire au maintien d'un niveau de vie raisonnable.

(2) Pour l'application du présent article :

a) le revenu total d'un failli comprend, malgré les alinéas 67(1)b) et b.1), ses revenus de toutes natures ou sources;

b) les biens du failli, à l'exception des biens visés à ces alinéas, peuvent faire l'objet d'une exécution à titre de montant à payer à l'actif de la faillite.

(3) Le syndic fixe, conformément aux normes applicables et compte tenu des charges familiales et de la situation personnelle du failli,

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(3) The trustee shall
(a) having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;
(b) inform the official receiver in writing of the amount fixed under paragraph (a); and
(c) take reasonable measures to ensure that the bankrupt complies with the requirement to pay.
(4) The trustee may, at any time, amend an amount fixed under subsection (3) to take into account
(a) material changes that have occurred in the personal or family situation of the bankrupt; or
(b) a recommendation made by the official receiver under subsection (5).
(5) Where the official receiver determines that the amount required to be paid by the bankrupt under subsection (3) or (4) is substantially not in accordance with the applicable standards established under subsection (1), the official receiver shall recommend to the trustee and to the bankrupt an amount required to be paid that the official receiver determines is in accordance with the applicable standards.
(6) Where the trustee and the bankrupt are not in agreement with the amount that the bankrupt is required to pay under subsection (3) or (4), the trustee shall, forthwith, in the prescribed form, send to the official receiver a request that the matter be determined by mediation and send a copy of the request to the bankrupt.
(7) On the request in writing of a creditor made within thirty days after the date of bankruptcy or an amendment referred to in subsection (4), the trustee shall, within the five days following the thirty day period, send to the official receiver a request in the prescribed form that the matter of the amount the bankrupt is required to pay under subsection (3) or (4) be determined by mediation and send a copy of the request to the bankrupt and the creditor.
(8) A mediation shall be in accordance with prescribed procedures.
(9) Documents contained in a file on the mediation of a matter under this section form part of the records referred to in subsection 11.1(2).
(10) Where
(a) the trustee has not implemented a recommendation made by the official receiver under subsection (5),
(b) the issue submitted to mediation requested

le montant que celui-ci doit verser à l'actif de la faillite, en avise le séquestre officiel par écrit et prend les mesures indiquées pour que le failli s'exécute.
(4) Le syndic peut modifier le montant fixé en application du paragraphe (3) pour tenir compte soit de tout changement important des charges familiales ou de la situation personnelle du failli, soit de la recommandation faite par le séquestre officiel au titre du paragraphe (5).
(5) S'il estime que le montant que doit payer le failli diffère substantiellement du montant payable en application des normes visées au paragraphe (1), le séquestre officiel recommande au syndic et au failli le montant à verser, au titre de celles-ci, à l'actif de la faillite.
(6) À défaut d'entente avec le failli sur le montant à verser, le syndic transmet sans délai au séquestre officiel, en la forme prescrite, une demande de médiation et en expédie une copie au failli.
(7) Sur demande écrite du créancier faite dans les trente jours suivant la date de la faillite ou de la modification visée au paragraphe (4), le syndic transmet au séquestre officiel, dans les cinq jours suivant l'expiration des trente jours, une demande de médiation en la forme prescrite relativement au montant que le failli doit verser à l'actif, et en expédie une copie au failli et au créancier.
(8) La procédure de médiation est fixée par les Règles générales.
(9) Les documents constituant le dossier de médiation font partie des dossiers visés au paragraphe 11.1(2).
(10) S'il ne met pas en oeuvre la recommandation du séquestre officiel ou s'il y a échec de la médiation ou défaut du failli d'effectuer ses paiements, le syndic peut, d'office, ou doit, sur demande des inspecteurs, des créanciers ou du séquestre officiel, demander au tribunal d'établir, par ordonnance, le montant du revenu que le failli doit verser à l'actif de la faillite, compte tenu des normes fixées par le surintendant et des charges familiales et de la situation personnelle du failli.
(11) Le tribunal peut fixer un montant équitable à titre de traitement, salaire ou autre rémunération pour les services rendus par le failli à un employeur ou à titre de paiement ou de commission pour services rendus à un tiers si ces personnes sont liées au failli; il peut établir, par ordonnance, le montant à verser au syndic sur la base du montant fixé, sauf s'il

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under subsection (6) or (7) is not thereby resolved, or
(c) the bankrupt fails to comply with the requirement to pay as determined under this section,
the trustee may, or on the request of the inspectors, any of the creditors or the official receiver shall, apply to the court for the hearing of the matter, and the court may, on the hearing, in accordance with the standards established under subsection (1) and having regard to the personal and family situation of the bankrupt, by order, fix the amount that the bankrupt is required to pay to the estate of the bankrupt.
(11) The court may fix an amount that is fair and reasonable
(a) as salary, wages or other remuneration for the services being performed by a bankrupt for a person employing the bankrupt, or
(b) as payment for or commission in respect of any services being performed by a bankrupt for a person,
where the person is related to the bankrupt, and the court may, by order, determine the part of the salary, wages or other remuneration, or the part of the payment or commission, that shall be paid to the trustee on the basis of the amount so fixed by the court, unless it appears to the court that the services have been performed for the benefit of the bankrupt and are not of any substantial benefit to the person for whom they were performed.
(12) On the application of any interested person, the court may, at any time, amend an order made under this section to take into account material changes that have occurred in the personal or family situation of the bankrupt.
(13) An order of the court made under this section may be served on a person from whom the bankrupt is entitled to receive money and, in such case,
(a) the order binds the person to pay to the estate of the bankrupt the amount fixed by the order; and
(b) if the person fails to comply with the terms of the order, the court may, on the application of the trustee, order the person to pay the trustee the amount of money that the estate of the bankrupt would have received had the person complied with the terms of the order.
(14) For the purposes of section 38, an application referred to in subsection (10) is deemed to be a proceeding for the benefit of the estate.

estime que les services rendus n'ont bénéficié qu'au failli et n'ont pas procuré un bénéfice important à son employeur ou au tiers.
(12) Sur demande de tout intéressé, le tribunal peut modifier l'ordonnance rendue au titre du présent article pour tenir compte de tout changement important des charges familiales ou de la situation personnelle du failli.
(13) Lorsqu'une ordonnance rendue au titre du présent article est signifiée à une personne qui doit une somme d'argent au failli, elle est tenue de s'y conformer; si elle ne s'y conforme pas, le tribunal peut, sur demande du syndic, lui ordonner de verser la somme au syndic.
(14) La demande présentée au tribunal au titre du paragraphe (10) constitue, pour l'application de l'article 38, une procédure à l'avantage de l'actif.
183. (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :
a) dans la province d'Ontario, la Cour supérieure de justice;
b) [Abrogé, 2001, ch. 4, art. 33]
c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;
d) dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;
e) dans la province de l'Île-du-Prince-Édouard, la Section de première instance de la Cour suprême;
f) dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;
g) dans la province de Terre-Neuve, la Division de première instance de la Cour suprême;
h) au Yukon, la Cour suprême du Yukon, dans les Territoires du Nord-Ouest, la Cour suprême des Territoires du Nord-Ouest et, au Nunavut, la Cour de justice du Nunavut.

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183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
(a) in the Province of Ontario, the Superior Court of Justice;
(b) [Repealed, 2001, c. 4, s. 33]
(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
(e) in the Province of Prince Edward Island, the Trial Division of the Supreme Court of the Province;
(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
(g) in the Province of Newfoundland, the Trial Division of the Supreme Court; and
(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Analysis and Decision

(a) Preliminary procedural issues

(i) Non-compliance with Rule 37.03(b)

[18] Mr. Dugas contests the Trustee's right to invoke s. 183(1) of the ***Act*** to buttress its submission in support of Justice Léger's jurisdiction. Mr. Dugas rightly points out that the Trustee's Notice of Motion does not refer to section 183(1). Rule 37.03(b) of the ***Rules of Court*** is clear on the subject. A Notice of Motion must state the grounds to be argued, including a reference to any statutory provision to be relied on (see ***Lloyd's of London v. Norris***, [1998] N.B.J. No. 351 (C.A.) leave to appeal dismissed reflex, (1998) 218 N.B.R. (2d) 400 (S.C.C.) at para. 10; ***Waugh et al. v. Canadian Broadcasting Corp. et al.*** (2000), 224 N.B.R. (2d) 39 (C.A.) at paras. 11-14 and ***Doiron v. Cameron***, [2003] N.B.J. No. 301 (Q.B.)(Q.L.) at paras. 14-15).

[19] There is, however, nothing in the record to indicate that counsel for Mr. Dugas in the court below - who was not his current counsel, Ms. Sivret - raised any objection on the ground of non-compliance with Rule 37.03(b). Moreover, and contrary to what was noted in passing in my June 6, 2003 reasons for judgment, the motion heard in the court below was not concerned solely with sections 67 and 68 of the ***Act***. Indeed, the Notice of Motion's prayer for relief is worded broadly and invokes the full jurisdiction of the Court of Queen's Bench under the ***Act***. As well, the motion appears to have been heard and determined on that basis. In his reasons for judgment, at paras. 1 and 2, Justice Léger describes the relief sought in these terms:

> This motion is brought by the Trustee in Bankruptcy [PriceWaterHouseCoopers] Inc as trustee of the Bankrupt Cyrenus Joseph Dugas requesting an order that the revenues from the 2003 crab fishing season be declared the property of the Bankrupt and therefore divisible among the creditors pursuant to the provisions of section 67 and 68 of the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3 (hereinafter "the **Act**"), as amended.
> The other remedies sought in the motion are that all revenues derived from the fishing activities be paid directly to the Trustee who shall fix the amount to be paid to the Estate of the Bankrupt in accordance with Section 68 of the **Act**, *supra*. (Emphasis added)

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[20] In my view, there is every reason to bring s. 183(1) into the mix as a potential source of jurisdiction for the order under appeal.

(ii) Further evidence

[21] By motion, Mr. Dugas asks that this Court receive evidence as to matters that have occurred since Justice Léger's May 27, 2003 order. Under Rule 62.21 (2)(b), the Court may receive evidence of this nature if it is relevant to the issues requiring determination on appeal.

[22] The issue at hand is whether Justice Léger had jurisdiction to make the May 27, 2003 order. Evidence as to matters that have occurred since then is irrelevant to the determination of that issue. Accordingly, I would dismiss Mr. Dugas' motion and reject the proffered evidence.

(b) Scope of s. 183(1)

[23] In ***Sam Lévy & Associés Inc. v. Azco Mining Inc.,*** 2001 SCC 92 (CanLII), [2001] 3 S.C.R. 978, at para. 17, the Court noted that, on its face, the intent of s. 183(1) is to attribute to the bankruptcy court "powers and duties co-extensive with Parliament's jurisdiction over 'Bankruptcy' under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself." The Court went on to note, at para. 38, that the broad scope of authority conferred by s. 91(21) of the ***Constitution Act, 1867*** to Parliament had "been passed along to the bankruptcy court in s. 183(1) of the ***Act***, which confers correspondingly broad jurisdiction."

[24] In ***Landry (Re)***, the bankrupt had brought an action for wrongful dismissal against her former employer and had been proceeding through arbitration, when she was discharged under the ***Act***. The bankrupt was successful at arbitration and prior to payment of the award, the Trustee brought an application for a declaration that any amount awarded for lost wages constituted property of the bankrupt that vested in the Trustee for the benefit of the creditors in bankruptcy. The Trustee submitted that vesting could occur by way of section 68. The motions judge rejected that submission on the ground, among others, that the Trustee had not followed the procedure set out in s. 68 for the making of a claim in respect to earnings.

[25] On appeal, it was argued that the Trustee was precluded from resorting to s. 68 because the procedure provided therein had not been followed. The Ontario Court of Appeal dealt with that issue, as follows at pp. 741-742:

> 6. Is the trustee precluded from resorting to s. 68 because the procedure set out thereunder has not been followed?
>
> [41] The motions judge was correct in noting that, before an application can be made to the court under s. 68(10) to fix the amount of the bankrupt's income that is payable to the estate of the bankrupt, the trustee must bring himself under the terms of that provision. As discussed earlier, by its terms, s. 68(10) effectively limits the number of applications to the court to those cases where the issue has not otherwise been resolved by consent or mediation in accordance with the established procedure. In this case, of course, it was impossible for the trustee to have followed this procedure since the arbitrator's award was not yet ascertained. Once the arbitrator's decision is made, the trustee will be in a position to fix the amount which, in its view, must be paid to the estate and the balance of the procedure set out in s. 68 can follow its course. Hence, the trustee's motion, insofar as it purports to be made under s. 68(10), is simply premature.
>
> [42] However, the trustee's motion was not made strictly under s. 68(10). It is apparent from the relief sought, which was mainly declaratory in nature, that the motion was brought with a view to preserving a potential asset in anticipation of a future determination of the parties' rights under s. 68. In my view, the motions judge erred in foreclosing any resort to s. 68 on the basis that the procedure set out thereunder had not been followed. At worst, the motion could have been dismissed as premature. [Emphasis added.]

[26] Viewing the Trustee's motion as one brought for the purpose of preserving a potential asset in anticipation of a future determination of the parties' rights under s. 68, the Ontario Court of Appeal held that the motions judge had jurisdiction to direct that any monies awarded by the arbitrator as compensation for lost wages be paid into court until the parties' rights under s. 68 were determined. The Court allowed the appeal, and so ordered. Additionally in ***Cole (Re),*** [2001] N.S.J. 155 (Q.L.), at para. 41, Registrar Hill makes the following observations in connection with a yet-to-be adjudicated claim for lost income arising out of a motor-vehicle accident:

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> ... If, prior to the amount of "income" to be received by the Bankrupt being determined, the Trustee becomes concerned that his ability to obtain any funds subject to a s. 68 order may be prejudiced for some reason, the Trustee may apply for an order such as that granted in Landry. In Landry the court ordered that any monies to be paid by the employer to the bankrupt as compensation for lost wages be paid into court pending resolution of the amount to be paid under s. 68.

[27] Courts should be chary of interpreting the ***Act***'s provisions in a manner inimical to the attainment of its objectives, chief among which is the equitable distribution of a bankrupt's assets among the creditors in bankruptcy (see ***Husky Oil Operations Ltd. v. Minister of National Revenue***, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453, per Gonthier J., for the majority, at para. 7). In my view, the court's earnings-related jurisdiction under s. 183(1) is not limited to making an order directing their payment into court. Indeed, such an order would have been impractical in the case at hand. In my view, the scope of s. 183(1) is accurately delineated in Houlden & Morawetz, ***2004 Annotated Bankruptcy and Insolvency Act***, (Toronto: Carswell, 2004), at p. 774:

> For carrying out the purposes of the Act, there is deemed to be vested in the Bankruptcy Court the necessary power and jurisdiction to authorize and sanction acts required to be done by the trustee for the due administration and protection of the bankrupt estate, even though there is no specific provision in the Act expressly conferring such power and jurisdiction
> [Citations omitted.]

In that context, "bankrupt estate" is to be understood as including the bankrupt's "total income" within the meaning of section 68(1).

(c) Application to the case at hand

[28] I begin by noting that, in the court below, Mr. Dugas did not take issue with Justice Léger's jurisdiction to make the order under appeal. In fact, he was prepared to turn over to the Trustee 20% of the total income from his fishing operations in 2003. He suggested that the Trustee could then assess the amount to be given to him for reasonable living expenses in accordance with s. 68 of the ***Act***. That said, Justice Léger could not acquire jurisdiction by consent: his capacity and authority to make the order under appeal must spring from the ***Act***.

[29] In his reasons for judgment, Justice Léger makes the following observations:

(1) Historically, Mr. Dugas' crab fishing operations have generated substantial income over a very short period of time;

(2) Mr. Dugas is not a first-time bankrupt;

(3) The Trustee entertains serious doubts as to whether the expenses claimed in previous years by Mr. Dugas (in reduction of his gross income) were truly business-related;

(4) Mr. Dugas did not know the price of crab for the 2003 season. (In the affidavit that he filed in opposition to the Trustee's motion, Mr. Dugas asserted that the price could not be forecast because it would be influenced, to an unpredictable extent, by factors such as the exchange rate, the war in Iraq and "problems in North Korea").

[30] Justice Léger concluded that Mr. Dugas' earnings from crab-fishing were in need of protection and that "the best approach to ensure that the assets are protected is to order that all revenues from the 2003 crab fishing activities under the crab license # 23622 issued to the Bankrupt Cyrenus Dugas be paid directly to the Trustee [PriceWaterHouseCoopers] Inc." As noted, he went on to order that the Trustee prepare a "report for the benefit of the Bankrupt and the Creditors of all revenues and expenses and then proceed according to the provisions of Section 68 of the Act."

[31] Under s. 68(3), the Trustee must have regard for the bankrupt's personal and family situation in fixing the amount payable out of earnings to the bankrupt's estate. A duly completed Form 65 is essential if the Trustee is to competently perform his statutory mandate. Mr. Dugas failed, without justification, to complete Form 65 in any useful manner. Moreover, Mr. Dugas subsequently refused to fully comply with the Trustee's requests for financial information. Finally, the Trustee's doubts regarding the reliability of the financial data that Mr. Dugas did provide concerning his business operations in 2002 were far from fanciful and they led the Trustee to conclude that Mr. Dugas' 2003 earnings were in need of protection for the benefit of his creditors. In those circumstances, it was entirely proper for the Trustee to apply to the Court of Queen's Bench for an asset-preservation order under section 183(1).

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[32] **Section 183(1) invests the Court of Queen's Bench with capacity and authority to make any order that will enable it to exercise its original, auxiliary and ancillary jurisdiction in bankruptcy. Under s. 183(1), the Court of Queen's Bench may authorize acts required "for the due administration and protection of the bankrupt estate, even though there is no specific provision in the Act expressly conferring such power and jurisdiction" (see Houlden & Morawetz, *Bankruptcy & Insolvency Act*, at p. 774). In my view, nothing said in *Marzetti* contradicts that proposition. Any order designed to by-pass illegitimate obstacles to the due administration of the bankrupt's estate in accordance with the *Act* is authorized under section 183(1).**

[33] **The order under appeal falls squarely within the broad jurisdiction recognized by section 183(1). It was rendered having regard to the Trustee's inability to perform the mandate contemplated by s. 68 and the need to temporarily protect the bankrupt's earnings for the benefit of the creditors in bankruptcy. The order in question is both authorized by the *Act* and a judicious response to a practical problem whose genesis can be traced to the bankrupt.**

Disposition

[34] For the reasons outlined above, the Court dismissed the appeal. There will be no order of costs.

J. ERNEST DRAPEAU, J.A.
CHIEF JUSTICE OF NEW BRUNSWICK

WE CONCUR:

ROBERT C. RICE, J.A.

ALEXANDRE DESCHÊNES, J.

Enforcement of orders of other courts - Sec. 188
188. (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

Courts to be auxiliary to each other - Sec. 188(2)
(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

Enforcement of warrants - Sec. 188(3)
(3) Any warrant of a court may be enforced in any part of Canada in the same manner and subject to the same privileges as a warrant issued by a justice of the peace under or in pursuance of the Criminal Code may be executed against a person charged with an indictable offence.
R.S., c. B-3, s. 158.

Search warrants - Sec. 189
189. (1) Where on ex parte application by the trustee or interim receiver the court is satisfied by information on oath that there are reasonable grounds to believe there is in any place or premises any property of the bankrupt, the court may issue a warrant authorizing the trustee or interim receiver to enter and search that place or premises and to seize the property of the bankrupt, subject to such conditions as may be specified in the warrant.

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Use of force - Sec. 189(1.1)
(1.1) In executing a warrant issued under subsection (1), the trustee or interim receiver shall not use force unless the trustee or interim receiver is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

Commitment to prison - Sec. 189(2)
(2) Where the court commits any person to prison, the commitment may be to such convenient prison as the court thinks expedient.
R.S., 1985, c. B-3, s. 189;
R.S., 1985, c. 31 (1st Supp.), s. 28.

Evidence of proceedings in bankruptcy - Sec. 190
190. (1) Any document made or used in the course of any bankruptcy proceedings or other proceedings had under this Act shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, purports to be signed by any judge thereof or is certified as a true copy by any registrar thereof, be admissible in evidence in all legal proceedings.

Documentary evidence as proof - Sec. 190(2)
(2) The production of an original document relating to any bankruptcy proceeding or a copy certified by the person making it as a true copy thereof or by a successor in office of that person as a true copy of a document found among the records in his control or possession is evidence of the contents of those documents.
R.S., c. B-3, s. 160.

Death of bankrupt, witness, etc. - Sec. 191
191. In case of the death of the bankrupt or the spouse or common-law partner of a bankrupt or of a witness, whose evidence has been received by any court in any proceedings under this Act, the deposition of the deceased person, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.
R.S., 1985, c. B-3, s. 191;
R.S., 1985, c. 31 (1st Supp.), s. 76(E);
2000, c. 12, s. 19.

POWERS OF REGISTRAR

Powers of registrar - Sec. 192
192. (1) The registrars of the courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules,

- **(a) to hear bankruptcy applications and to make bankruptcy orders if they are not opposed;**
- **(b) to hold examinations of bankrupts or other persons;**
- **(c) to grant orders of discharge;**
- **(d) to approve proposals where they are not opposed;**
- **(e) to make interim orders in cases of urgency;**
- **(f) to hear and determine any unopposed or ex parte application;**

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(g) to summon and examine the bankrupt or any person known or suspected to have in his possession property of the bankrupt, or to be indebted to him, or capable of giving information respecting the bankrupt, his dealings or property;
(h) to hear and determine matters relating to proofs of claims whether or not opposed;
(i) to tax or fix costs and to pass accounts;
(j) to hear and determine any matter with the consent of all parties;
(k) to hear and determine any matter relating to practice and procedure in the courts;
(l) to settle and sign all orders and judgments of the courts not settled or signed by a judge and to issue all orders, judgments, warrants or other processes of the courts;
(m) to perform all necessary administrative duties relating to the practice and procedure in the courts; and
(n) to hear and determine appeals from the decision of a trustee allowing or disallowing a claim.

May be exercised by judge - Sec. 192(2)
(2) The powers and jurisdiction conferred by this section or otherwise on a registrar may at any time be exercised by a judge.

Registrar may not commit - Sec. 192(3)
(3) A registrar has no power to commit for contempt of court.

Appeal from registrar - Sec. 192(4)
(4) A person dissatisfied with an order or decision of a registrar may appeal therefrom to a judge.

Order of registrar - Sec. 192(5)
(5) An order made or act done by a registrar in the exercise of his powers and jurisdiction shall be deemed the order or act of the court.

Reference to judge - Sec. 192(6)
(6) A registrar may refer any matter ordinarily within his jurisdiction to a judge for disposition.

Judge may hear - Sec. 192(7)
(7) A judge may direct that any matter before a registrar be brought before the judge for hearing and determination.

Registrars to act for each other - Sec. 192(8)
(8) Any registrar in bankruptcy may act for any other registrar.
R.S., 1985, c. B-3, s. 192;
1992, c. 27, s. 67;
2004, c. 25, s. 88.

APPEALS

Court of Appeal - Sec. 193
193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

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(a) if the point at issue involves future rights;
(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
(c) if the property involved in the appeal exceeds in value ten thousand dollars;
(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
(e) in any other case by leave of a judge of the Court of Appeal.
R.S., 1985, c. B-3, s. 193;
1992, c. 27, s. 68.

3004876 Nova Scotia Ltd v. Laserworks Computer Services Inc., 1998 CanLII 2550 (NS CA) - Power of Appellate Ct. to Over-rule on Trial issue

Date:	1998-02-13
Docket:	CA141313
Parallel citations:	165 NSR (2d) 296; 37 BLR (2d) 226; 6 CBR (4th) 69
URL:	http://canlii.ca/t/1gmr2
Citation:	3004876 Nova Scotia Ltd v. Laserworks Computer Services Inc., 1998 CanLII 2550 (NS CA), <http://canlii.ca/t/1gmr2> retrieved on 2013-08-31
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Reflex Record	Related decisions, legislation cited and decisions cited

Date: 19980213 Docket: CA 141313

NOVA SCOTIA COURT OF APPEAL
Freeman, Pugsley and Cromwell, JJ.A.

BETWEEN:

3004876 Nova Scotia Limited
Appellant
-and-
LASERWORKS COMPUTER SERVICES INC.
Respondent

James A. Musgrave for the Appellant
Roy F. Redgrave for the Respondent
D. Bruce Clarke and Pamela J. Clarke-Priddle for the Respondent - Trustee
Appeal Heard: December 9, 1997
Judgment Delivered: February 13, 1998

THE COURT: The appeal is dismissed, per reasons for judgment of Freeman, J.A.; Pugsley and Cromwell, JJ.A., concurring.

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FREEMAN, J.A.:
The respondent LaserWorks Computer Services Inc., a dealer in supplies for laser printers, made a proposal to its creditors under the provisions of the **Bankruptcy and Insolvency Act,** R.S.C. 1985, c. B-3 (the **BIA**).
A competitor, Datarite, operating through the appellant 3004876 Nova Scotia Limited, acquired the claims of eighteen creditors and voted them over the objections of LaserWorks at the meeting of creditors, defeating the proposal. Only two of the remaining sixteen creditors opposed the proposal.
Acceptance required votes representing a majority in number and two-thirds in value of the class of unsecured creditors present in person or by proxy. The Registrar of Bankruptcy of the Supreme Court of Nova Scotia in Bankruptcy, Tim Hill, found:

> Upon the vote being taken, fourteen creditors with a total claim value of $206,531.65 voted in favour of the proposal. Twenty creditors with a total claim of $140, 370.00 voted against the proposal. Thus 41% of creditors representing 59% of the claims voted pro, and 59% of the creditors with 40.5% of the claims voted con. The proposal was defeated, subject to the resolution of the objections before the court today.

At the hearing into the objections the Registrar, after hearing evidence from the appellant's solicitor Victor Goldberg, who was not counsel on the appeal, disallowed the appellant's votes. He found the proposal had been accepted by the votes of the other creditors. His decision was upheld by Justice Stewart on an appeal to the Supreme Court of Nova Scotia in Bankruptcy.

Issues and Standard of Review
The overriding issue is whether the court's inherent supervisory jurisdiction should be invoked to interfere in a proposal to creditors under the BIA when it appears the statutory process is being used for purposes not contemplated by Parliament.
The appellant submits it was a true appeal before Justice Stewart, and not a hearing *de novo*, on the authority of **Re McCulloch Estate** 1992 CanLII 2799 (NS SC), (1992), 13 C.B.R. (3d) 201 Tr. Div.) and **Cockfield Brown Inc. (Trustee of) v. Reseau de Television TVA Inc.** (1988), 70 C.B.R. (N.S.) 59 (Que. C.A.) On further appeal to this court the grounds are whether Justice Stewart erred in:
1. Failing to reverse the Registrar's finding that 18 creditors of LaserWorks assigned their rights to the appellant;
2. Sustaining the Registrar's finding that Datarite engaged in an improper purpose in acquiring and voting the claims of the 18 creditors;
3. Sustaining the Registrar's finding that the Appellant's purpose in acquiring and voting the claims was relevant; and
4. Concluding that there was an abuse on a minority of a class of unsecured creditors and that a duty in this respect was owed by the appellant.

An appeal lies to this court under s. 193 of the **BIA** which reads in part:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
> (a) if the point at issue involves future rights;
> ...
> (e) in any other case by leave of a judge of the court of appeal.

The appellants assert future rights are involved and no leave is necessary. The respondents take no issue with this. Neither is issue taken with the jurisdiction of the Registrar and Justice Stewart to deal with the matters in question pursuant to the **BIA**. The issue is whether they erred.
The appellant's submission with respect to the standard of review is that:

> . . . the Registrar's discretion will not be disturbed on appeal unless he failed to consider or misconstrued a material fact or violated a principle of law. If the Registrar did not appreciate the nature of the evidence before him, it was open to the Supreme Court to substitute its discretion for that of the Registrar. There is also authority that the Registrar's decision should not be disturbed unless it was clearly wrong: **Re Achilles** reflex, (1993), 23 C.B.R. (3d) 20 B.S.S.C.).

It cites **Industrial Acceptance Corp. v. Lalonde**, 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109 p. 120; **Re Gilmartin (a bankrupt),** [1989] 2 All E.R. 835 (Ch. D.) p. 838; and **Re Barrick** (1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.) p. 290. In **Industrial Acceptance** Estey J., writing for the Supreme Court of Canada, held at page 120 that:

> A judgment rendered in the exercise of a judicial discretion under s. 142 ought not to be disturbed by an appellate court, unless the learned judge, in arriving at his conclusion, has omitted the consideration of or misconstrued some fact, or violated some principle of law.

The respondent LaserWorks urges that this court should only substitute its own discretion when the Registrar is clearly wrong. Apparent failure by the Registrar to appreciate the nature of the evidence before him is too low a threshold:

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> The court in **Re Barrick** ((1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.)) substituted its discretion for that of the trial judge only after ruling that he misapplied a legal test. Justice Taggert, at page 290, gives three reasons the Court of Appeal should substitute its discretion for that of the trial judge:
>
> > In these circumstances, it would seem to me that the learned judge has not applied the correct test, has not given the effect that ought to be given to the trustee's report and has not appreciated the nature of the evidence which was before him. In these circumstances, I think we are justified for substituting our discretion for that of the trial judge.

On that basis the respondent submits the first three grounds of appeal fail.

The Trustee under the Proposal submits that "the Appellant has not satisfied the onus upon it in this appeal to overturn the decision of the Honourable Justice Stewart to decline to substitute her discretion for that of the Registrar."

The respondent also referred to the principles stated by McLachlin, J., in **Toneguzzo-Norvel (Guardian Ad Litem of) v. Savein and Burnaby Hospital** 1994 CanLII 106 (SCC), (1994), 1 S.C.R. 114 at page 121, which this court has followed consistently:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see P. (D.) v. S. (C.), 1993 CanLII 35 (SCC), [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux-Dube J.), and all cases cited therein, as well as **Geffen v. Goodman Estate,** 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and **Stein v. The Ship "Kathy K",** 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

These principles apply in bankruptcy matters, and provide guidance when, as here, the Registrar's findings have been upheld by a judge of the Supreme Court.

The Registrar's Decision

The Registrar based his decision on the following findings:

> Before turning to deal with these submissions, it is essential that I make some findings of fact. In large part the facts are uncontested. No affidavits were filed, but counsel agree that I may rely on the minutes of the meeting of creditors, the testimony by Mr. Goldberg upon the section 163(2) examination, and the list provided by Mr. Goldberg in compliance with his undertaking on the examination.
>
> I find that Datarite through its solicitor approached some but not all of the creditors of Laserworks with the intention of obtaining an assignment of those creditors' claims and consequently rights to vote on the proposal. The claims were obtained and the votes utilized to defeat the proposal. This would have the effect under section 57(a) of the BIA of placing LaserWorks into bankruptcy by virtue of a deemed assignment.
>
> I can only conclude that the purpose of Datarite was to effect the bankruptcy of LaserWorks. It is a reasonable supposition that the purpose was to remove a competitor from the marketplace. I find that it was the intention of Datarite to put LaserWorks in bankruptcy.
>
> I further find that the motive was to lessen competition.
>
> In my view, Datarite was engaged throughout in an improper purpose not contemplated by the BIA, the purpose of which is far removed from the use to which Datarite put it.

It is apparent that the Registrar, in speaking of "purpose", included both motive or intent and the steps taken to give effect to that motive or intent. While the record is somewhat sparse, as counsel have remarked, there was evidence in support of these findings. I am not satisfied that the Registrar failed to appreciate the nature of the evidence before him or that he was clearly wrong, or alternatively that he omitted the consideration of or misconstrued some fact, or violated some principle of law. The questions before this court relate to the effect of these findings.

The Registrar disallowed the votes of the eighteen creditors represented by the appellant because he considered they had been cast for an improper purpose. In the absence of authority specific to proposals to creditors, he applied jurisprudence related to bankruptcy petitions, stating:

> It has long been held that the court will not grant a petition in bankruptcy where the petition is filed for an improper purpose: **Re E. De La Hooke** (1934), 15 C.B.R. 485 (Ont. S.C.); **Re Pappy's Good Eats Limited** (1985), 56 C.B.R. (N.S.) 304 (Ont. S.C.); **Dimples Diapers Inc. v. Paperboard Industries**

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Corporation reflex, (1992), 15 C.B.R. (3d) 204 (Ont. G.D.); **Re Shepard** reflex, (1996), 40 C.B.R. (3d) 145 (Man. Q.B.).

In **Hooke** the petitioner obtained an assignment of a judgment against the debtor for the sole purpose of filing a petition in bankruptcy and of removing the debtor as a business competitor. In that case, as is the situation in this case, there was no evidence that the debtor had any business dealings with the party seeking to place the debtor in bankruptcy. The petition was dismissed.

In **Hooke** the court made extensive reference to the decision of the House of Lords in **King v. Henderson**, [1898] A.C. 720. The comments of James, L.J., at p. 732 are particularly germane here:

> After what Lord Justice Cotton has said, in which I entirely agree, people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings.

Lord Justice Cotton had commented that the proceedings in bankruptcy were not taken to obtain payment of the debt, but rather the debt was purchased for the purpose of taking the proceedings. I would simply add that in tight of the decision I make here persons should certainly think twice before they purchase debts in order to defeat a proposal.

It is my opinion that the eighteen creditors are tainted with the improper motive of Datarite. In **Pappy's Good Eats** the petition was filed by a creditor with a genuine claim. The creditor entered into an agreement with three franchisees of the debtor. This agreement provided that the creditor would prosecute the bankruptcy proceedings while the franchisees financed the proceeding in exchange for a share of the dividends. The motive of the franchisees was to bring about a bankruptcy so as to terminate the franchise agreements between them and the debtor.

The court found that there had been an improper use of the bankruptcy legislation. The effect of the agreement was to embroil the creditor in the improper objectives of the franchisees who were intermeddling in the proceeding. This tainted the whole proceeding. Clearly where the object of the intermeddling party is to bring about the bankruptcy of the debtor an improper purpose is present. The court will act to prevent such an abuse of the legislation.

The other cases I have referred to, **Dimples Diapers Inc.** and **Shepard** also deal with bankruptcy petitions instigated for an improper collateral purpose. In **Dimples** that purpose was to recover a trademark and a business opportunity. In **Shepard** that purpose was to obtain control of certain shares.

While this case does not involve a bankruptcy petition, it does involve the placing of Laserworks into bankruptcy. In my view, it would be wrong to allow Datarite to do in the proposal process what it cannot do by petition. Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose. The court will not allow to be done by the back door what cannot be done by the front.

By entering into this arrangement with the numbered company the eighteen creditors have tainted themselves and become embroiled in the improper purpose of Datarite. Their votes cannot stand. If Laserworks has the right to be free of this type of interference the Court must be able to fashion a remedy. This court does have the inherent jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where that conduct constitutes an abuse of the provisions of the BIA. While creditors can certainly vote in their own best interest, they may not collude with a third party to place a debtor in bankruptcy for an improper purpose. Such activity lacks commercial morality and offends the integrity of the bankruptcy process.

While Datarite was not permitted to vote the claims it had acquired, they remained debts of the insolvent debtor.

Justice Stewart

The first ground of appeal to this court, the issue of whether the claims of 18 creditors were actually assigned to Datarite, does not appear to have been a ground of appeal before Justice Stewart.

On the next two grounds of appeal, whether the Registrar failed to appreciate the evidence before him in concluding that Datarite's purpose in acquiring and voting the 18 claims was an improper one, and whether such purpose was a relevant consideration, Justice Stewart, in upholding the Registrar, took a different route to arrive at the same conclusion. She stated:

> Although stated in the context of voting by debenture holders when the majority had votes to modify the rights of the debenture holders in a clause, the statements of principle by Viscount Haldane of the Judicial Committee of the Privy Council in **British America Nickel Corporation v. M. J. O'Brien,** [1927] A.C. 369 at p. 371 are, no less, here applicable:
>
> > To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a

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> power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the **English Companies Act** of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities, namely, that the power given must be exercised for the purpose of benefitting the class as a whole, and not merely individual members only.

And later at p. 373, noting this to be a principle which does not depend on misappropriation or fraud, stated:

> . . . but their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member.

The court, applying the principle stated by Viscount Haldane, should not sanction a scheme if it appears that the majority have not voted *bona fide* in the interests of the class as a whole.

Justice Quilliam in an unreported decision of the High Court of New Zealand, **Re: Farmers' Co-Operative Organization Society of New Zealand Limited** (M 12/97, 4 August 1987) in addressing the very issue of a company whose proposal had been defeated by the votes cast by some of its direct competitors, in circumstances where the majority had the right to bind the minority by statute relied on the principle enunciated in **British American Nickel Corp. Inc. v. O'Brien,** supra, during the objection to votes application before him. He concluded the votes should be discounted as their votes were cast out of self-interest and not in the interest of the class of creditors as a whole, or of the company. Unlike the present case, he did not determine there was specific activity of an improper purpose other than recognizing the votes were cast by creditors in direct commercial competition with the company.

The Registrar, on his finding of facts, was not faced with a preexisting creditor voting as it wished for whatever reason. He was faced with a unique set of circumstances where he found the appellant shelf company and Datarite, a competitor of Laserworks, involved a selective, secret arrangement with creditors against Laserworks, an arrangement that would hurt some creditors and favour other creditors, although as competitors rather than as creditors, given its purpose of removing Laserworks from the market place and diverting from it, its asset, the market share, so it could be available to Datarite, all of which would result in the balance of the creditors receiving little, if anything, and Laserworks having been deemed a bankrupt.

Justice Stewart found that Datarite was not entitled to use its votes for motives unrelated to the best interest of the creditor group and only pursuant to its own self interest in removing a potential competitor from the market place without regard to the interests of the other members of its class, the other voting creditors. She concluded:

> The Appellant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

On the fourth ground she found that while there had been no collusion by the eighteen creditors sufficient to deprive them of the right to vote, the Registrar was justified in determining that in the circumstances Datarite controlled the way the claims were voted. She upheld the Registrar's decision and declined to interfere with it.

Assignment--The First Ground

The appellant submits that the judge erred when she declined to address and reverse the Registrar's finding that 18 unsecured creditors of LaserWorks assigned their rights to the appellant. On a proper appreciation of the evidence, it submits, no assignment took place. It states in its factum:

> The appellant did not take issue with the Registrar's finding that four of the 18 creditors received payment for them prior to the vote .... Each of the four creditors provided executed assignments and proxies to Mr. Goldberg, and each assignment was completed by payment. The 14 remaining creditors did not receive payment for their claims prior to the vote, and the appellant submits that the teamed Registrar failed to

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> appreciate the evidence in this regard when he concluded that the claims of these 14 creditors had been assigned to the appellant before the vote was taken.

LaserWorks submits that the Registrar did not decide whether or not the claims voted by Datarite were assigned:

> The conclusion of the Registrar with respect to the assignment issue is:
>
> > Given my findings with respect to the intent and motive of Datarite, I find it unnecessary to consider whether Datarite should have exercised 1 vote or 18.
>
> The reference to 1 vote or 18 relates to the assignment of claims. If the 18 claims had been assigned to the Appellant, the authorities establish that only one vote could be cast on the proposal. The Registrar found it "unnecessary to consider" this issue. We submit that the Registrar would need to consider the issue before making a decision.

It seems reasonable that the Registrar did not intend to decide whether the claims were assigned because it would not determine the question before him. Even if the appellant were restricted to voting as one creditor, leaving a majority of creditors in favor of the proposal, the value of the claims voted by the appellant was sufficient to defeat the proposal and thus achieve the appellant's objective.

If the claims had been assigned to the appellant, the voting rights would have been merged and the appellant could only cast one vote for the value of the claims it had acquired. If the creditors retained their own claims, the appellant could have voted once for each creditor for whom it held a proxy. There is authority for this proposition and the parties seem in agreement with it. The rationale is clear. Each creditor has a vote, to be exercised in person or by proxy. If the claim is assigned, the assignor ceases to be a creditor. It loses its right to vote in person or to control the vote of the proxy. The assignor becomes a creditor and is able to vote its claim, no matter the amount of the claim. If it acquires the claims of other creditors the amount of its claim increases, but it does not pluralize itself. It remains one creditor, entitled to one vote.

The appellant referred to **Toia v. Cie de Cautionnement Alta Inc.** (1989), 77 C.B.R. (ICS.) 264 (Que. S.C.). The respondent insurance company paid out 19 claims against a bankrupt under a performance bond; each claimant signed a release and subrogated its claims to the respondent, which filed 19 proofs of claim. The Official Receiver permitted 19 votes but the Quebec Supreme Court reversed this, allowing only one vote. The appellant purports to distinguish **Toia** because "there the respondent completed the assignments by payment prior to the vote."

In my view it is of small importance whether the appellant bought for cash or on credit. The situation seems clear when creditors authorize votes on their behalf by proxy: each creditor is entitled to its vote and the proxy may cast votes for several creditors. It is equally clear when a creditor assigns its claim to another creditor: the assignee creditor has only one vote. This was the case with the four creditors whose assigned claims were accepted and paid for by the appellant. It is less clear with respect to the remaining fourteen creditors who had executed assignments to the appellant. The appellant says they had not yet been accepted, pending proof of the claims. However they had to be proven before they could be voted, and their values were proved for the purpose of calculating their percentage of the total of the unsecured claims. Any condition on the assignment would appear to have been met.

The intention of the parties must be determined: did the appellant vote those claims on its own behalf, or as an agent exercising the rights of the original creditors by proxy? If it had been necessary for the Registrar to decide this question, there was evidence before him that the original creditors had given control over their claims to the appellant by entering into enforceable contracts to assign them. That is, while the appellant voted the claim in the form of proxies, in fact it had acquired sufficient interest in the claims to vote them in its own right, as assignee, as though the assignments had been fully executed. It is clearly an improper practice for an assignee to purport to vote as the proxy of a creditor which has assigned its claim, thereby ceasing to be a creditor. If Datarite was otherwise entitled to vote at the creditor's meeting, it had one vote for the full value of the claims it had acquired. It was not justified in voting by proxy.

I would dismiss this ground of appeal.

Evidence of Datarite's purpose--the second ground

Mr. Goldberg testified as follows to Datarite's purpose in buying claims and voting against the proposal:

> Q. Can you tell me the benefit the numbered company will get in the bankruptcy of LaserWorks?
>
> A. Well, the purpose of the numbered company hopefully in buying the claims is that it'll buy the claims at a reduced price and get full payment one day.

The appellant states that Mr. Goldberg's evidence was uncontradicted, and submits:

> It is respectfully submitted that the Registrar was clearly wrong in his appreciation of the evidence. The learned Judge concluded that the Registrar made a finding of credibility with respect to Victor Goldberg's evidence on this issue. However, the Registrar's decision does not indicate that Mr. Goldberg's evidence on this key issue was even considered. The Registrar simply failed to address Mr. Goldberg's evidence on this issue at all. It is therefore open to this Honourable Court to substitute its discretion for that of the

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> Registrar. It is submitted that the Registrar could only find an improper purpose on the record by overlooking the only piece of direct evidence before him on Datarite's intentions.

Mr. Goldberg was obviously only stating his client's ostensible intentions, not its true ones. The Registrar in fact had commented on Mr. Goldberg's evidence after quoting a passage from the minutes indicating how he had responded to certain questions. He said:

> It is not unfair to say that Mr. Goldberg was obtuse to a very great degree. While this does not necessarily confirm suspicion as to the motives of his client, it does explain the concern expressed by the principals of LaserWorks.

The evidence before the Registrar included the proposal itself, which shows total liabilities of $585,459 of which $247,651 was unsecured, $334, 838 secured and $2,970 preferred. Assets totaled $306,158 including book debts of $170,000, leased vehicles $ 95,958, stock in trade $18,500, cash in the bank (which was the principal secured creditor) $8,000 plus fixtures, furnishings and equipment. Virtually all of the assets would be subject to security. The overall deficiency is shown as $279,301. It is difficult to see a basis for Mr. Goldberg's client's optimism that it might get full payment for the claims it bought at reduced value, or indeed, to see any significant source of dividends for unsecured creditors, on a bankruptcy.

Datarite had not been a creditor of LaserWorks before the proposal. There was evidence, however, that it had been a competitor. The Registrar was entitled to consider the evidence as a whole in making findings of fact and drawing inferences that led him to the conclusion that:

> ... Datarite's intention was to place Laserworks in bankruptcy. The motive was to remove a competitor. That motive reveals an improper purpose...

In my view the Registrar did not fail to appreciate the evidence nor otherwise err in arriving at this conclusion. Neither did Justice Stewart err in upholding him. I would dismiss this ground of appeal.

Is Purpose Relevant? The Third Ground.

(i) The Statute

The appellant submits that the trial judge erred in upholding the Registrar's decision that Datarite engaged in an improper purpose in acquiring and voting the claims of the 18 creditors, and that its purpose was relevant. In view of the conclusion on the second ground that the Registrar did not err in finding improper purpose, the appellant is left with the relevancy argument. It argues that the authority relied on by the Registrar, **De La Hooke, Pappy's Good Eats, Dimples Diapers** and **Shepard,** arises under s. 43(7) of the **BIA** which deals only with bankruptcy petitions:

> 43(7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for *other sufficient cause* no order ought to be made, it shall dismiss the petition. (emphasis added.)

It cites the discussion of the discretion thus created in Houlden & Morawetz, **Bankruptcy and Insolvency Law of Canada** (3d) at p. 2-50:

> Section 43(7) permits the court to dismiss a petition if it concludes "that for any other sufficient cause no order ought to be made". Section 43(7) confers a discretion; the exercise of that discretion must be founded on sound judicial reasoning based on credible evidence and must be exercised judicially according to common sense and justice in a manner which does not occasion a miscarriage of justice.

Section 43(7) clearly does not create the supervisory jurisdiction of the court over the bankruptcy regime; it is simply a concrete application of a discretionary power inherent in the scheme of the BIA. Each step in the bankruptcy process, whether initiated by a creditor's petition for a receiving order or a debtor's assignment for the benefit of creditors, is supervised by court officials or the court itself. For example s. 108 in Part V, the Administration of Estates, relates to "any meeting of creditors". At the meeting which gave rise to this appeal the chairman applied s. 108(3):

> 108(3) Where the chairman is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

Section 187(9) provides a broad directive:

> 187(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

The short answer to the question raised by this ground of appeal is that motive or purpose is relevant to a court authorized to remedy substantial injustice.

The appellant takes the narrow position that proposals are outside the discretionary supervisory jurisdiction of the court because they are not specifically included in s. 43(7) or some equivalent provision. This submission cannot be sustained.

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There is a similarity between a creditor's petition for a receiving order under s. 43 and refusal of a proposal. In either case it is something done by a creditor or creditors that places the debtor in bankruptcy, likely against its will. But a proposal is also similar to an assignment: the debtor has itself resorted to protection under the **BIA** and its proposal will be deemed to be an assignment unless it succeeds in persuading its creditors to accept it in their own best interests.

The appellant submits that s. 54 is the provision in the proposals Part of the **BIA** which corresponds with s. 43(7). S. 54 provides:

> 54(1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

While s. 43(7) provides an occasion for the exercise of the court's supervisory jurisdiction, an examination focused on the merits of the petition itself, s. 54(1) does not. Such an examination of a proposal is not necessary at that stage. The validity of the claims voted at the creditor's meeting at which the proposal is accepted or refused is subject to the court's scrutiny under s. 108(3). If the proposal is refused by a regular vote of creditors it vanishes and further examination is unnecessary; the debtor is deemed under s. 57(a) to have made an assignment in bankruptcy and the matter proceeds as on an actual assignment. If the creditors approve the proposal, it is then examined on its merits under s. 59, which provides:

> 59. (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Proposals are therefore just as much a part of the bankruptcy regime, and just as subject to the supervision of the court exercising an equitable jurisdiction under the statute, as petitions and assignments. In **Whiteman v. UDC Finance Ltd.,** [1992] 3 NZLR 684, Hardie Boys J., writing for the New Zealand Court of Appeal with respect to the New Zealand **Insolvency Act,** which varies in detail but not in principle from our own, said at p. 691 that proposals are merely

> . . . the other side of the coin to a petition for adjudication.

The only distinction between petitions and proposals in the exercise of the court's supervisory jurisdiction is that under the scheme of the **BIA** occasions for judicial scrutiny occur at different stages of the process. In the present appeal, court intervention was occasioned by objections to proofs of claims affecting the right to vote at the creditors' meeting considering the proposal. The correct procedure was followed, and the objections were considered by the Registrar who had jurisdiction under s.187(9) to remedy substantial injustice.

Motive or purpose is not relevant to objections to proofs of claim based on statutory exceptions under the **BIA**. These are established in several sections, including s.109(1), persons who had not duly proved and lodged a claim; s.54(3), a relative of the debtor (who may vote against but not for a proposal); 109(4), the debtor as proxy for a creditor; s.109(6), a creditor who did not deal with the debtor at arm's length (with exceptions); s.110(1), a person with a claim acquired after the bankruptcy unless the entire claim is acquired; s.111, a creditor with a claim on or secured by a current bill of exchange (subject to conditions); s.112, a creditor holding security (subject to conditions); and s. 113(2), a trustee as proxy (subject to restrictions). See also s. 109, the trustee as creditor.

(It will be noted that many of these exceptions arise from circumstances that could give rise to conflict of interest. This will be considered further under the fourth ground of appeal.)

However the statutory exceptions are not a code exhausting the forms in which substantial injustice may manifest itself. Objections will be sustained under s. 108(3) if they result from a crime or a tort against the debtor or a crteditor. In the present appeal, and in the authorities cited by the Registrar, the substantial injustice assumes the guise of tortious behavior, to which motive is relevant. In the s. 108(3) context the commonest torts, or instances of substantial injustice arising from tortious behavior, relate to abuse of process and fraud. However conspiracy to harm was also found in **Dimples Diapers.**

Tortious or tort-tike behavior falling short of a fully developed tort susceptible of formal proof or definition can nevertheless result in substantial injustice, particularly for persons at a point so vulnerable they must resort to insolvency protection. (See **Shepard**.) In my view that is why Parliament chose the language it did in s.187(9): to create a discretionary jurisdiction in courts that is not fettered, for example, by the high standards required for establishing such torts as abuse of process in other contexts. What remains to be considered is the threshold level of the substantial injustice which will result in remedial action by the court.

(ii)The Authorities

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The four cases cited by the Registrar establish that the threshold is crossed when the **BIA** is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament.

Farley J. held in **Dimples Diapers** that:

> . . . the **Bankruptcy Act**, R.S.C. 1985, c. B-3 has as its purpose the provision of "the orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis". (L.W.Houlden and C.H.Morawetz, Bankruptcy Law of **Canada**, 3rd ed. (looseleaf) (Toronto: Carswell, 1989) at p. 1-3 [A&4]....

In the cases cited the improper purpose takes the form of abuse of process or tortious behavior closely analogous to abuse of process. In each case the court reacted to what could be seen as substantial injustice. The remedy of choice arising under s. 43(7) is refusal of the petition. The appropriate remedy in the present case is rejection of the tainted votes.

In a vigorous judgment in **Dimples Diapers** Farley J. dismissed the bankruptcy petition because it was brought for an improper purpose, to recover the diaper trademark and business opportunity, and awarded damages for abuse of process and conspiracy against three creditors. He held at p. 219:

> ...The tort of abuse of process consists in the misuse of a legal process for any purpose other than that which it was designed to serve. It is immaterial in establishing abuse of process that the process was properly commenced or founded by the defendants and it does not matter that the process be concluded in the instigator's favour. The improper purpose is the gravamen of liability. See **Unterreiner v. Wilson** reflex, (1982), 40 O.R. (2d) 197, 24 C.C.L.T. 54, 142 D.L.R. (3d) 588 (H.C.), at p. 203 [O.R.], appeal dismissed reflex, (1983), 41 O.R. (2d) 472, 146 D.L.R. (3d) 322 (C.A.), and J.G.Fleming, **The Law of Torts**, 7th ed. (Sydney: Law Book, 1987) at pp. 591-592.
>
> Potts J. In **R. v. Cholkan & Co. v. Brinker** reflex, (1990), 71 O.R. (2d) 381, 1 C.C.L.T. (2d) 291, 40 C.P.C. (2d) 6 (H.C). at p. 8 [C.P.C.] said:
>
> > Most recently, Montgomery J. writing for the divisional Court in **Bentham v. Rothbart** reflex, (1989), 36 O.A.C. 13 (Div. Ct.), stated:
> >
> > The constituent elements of the tort of abuse of process are: (a) a collateral improper purpose such as extortion; and (b) a definitive act or threat in furtherance or a purpose not legitimate in the use of the process.

Montgomery J. was clearly using "extortion" as an example only. Any crime or tort would be an improper purpose.

In **de la Hooke** the petition was dismissed when petitioning creditors, who had had no business dealings with the debtor, obtained an assignment of a judgment debt he owed for the sole purpose of filing a petition in bankruptcy to remove him as a business competitor who was using a similar trade name. Registrar Cook cited a number of leading English cases relevant to the circumstances of the present appeal. These included **King v. Henderson**, [1898] A.C. 720 at p. 731 which considered abuse of process or fraud on the court; **Ex Partre Griffin; in re Adams** (1879), 12 Ch. Div. 480 in which a worthless debt was purchased to take proceedings in bankruptcy to force the debtor to give up a just debt, causing Brett L.J. to remark, "a viler fraud I have never heard of"; **Ex parte Harper; In re Pooley** (1882), 20 Ch. D. 585 at p. 692 in which buying a debt to force a bankruptcy in order to get rid of a trustee was found "a gross abuse of the bankruptcy laws;" and **In re a Debtor** [1928] 1 Ch. 199 at p. 211 in which the bankruptcy laws were used for the collateral purpose of extortion.

In **Pappy's Good Eats** a petition was denied when three franchisees of the debtor, who were not creditors, contracted with the petitioning landlord , who had a $65,000 unsatisfied judgment against the debtor, to pay the landlord's costs to petition the debtor into bankruptcy so they would be relieved of obligations under their franchise agreements. Henry J. held the effect of the agreement was to "embroil the petitioning creditor in the improper objective of the purchasers who as non-creditors have no status in these proceedings and are intermeddling in it. The whole proceeding is inescapably tainted; the petition must be dismissed." He found that "the abuse occurred when the parties agreed or arranged improperly to use the facility of the Act to advance the objectives of the franchisees to cause injury to the debtor."

In **Shepard** it was found that the purpose of the petitioner was to gain control over certain shares of the debtor, an important business advantage. "It is not appropriate or indeed, correct in law, to have the courts facilitate such an objective when the objective is very clearly the main purpose of the application." This finding is consistent with a finding of substantial injustice resulting from abuse of process.

(iii) The Present Case

It is most significant that the appellant was not a creditor of LaserWorks prior to the proposal. Intermeddling by strangers to the pre-existing debtor creditor relationship for an improper purpose was a determinative factor in **Pappy's Good Eats.** The practice of buying dubious claims against an insolvent for purposes foreign to the bankruptcy process was

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denounced in the English cases cited in **de la Hooke.** The Registrar in the present case understandably looked askance at it. Few legitimate reasons come to mind for buying into a bankrupt estate. When somebody does so, it is a matter of common sense to assume, subject to correction, they intend to use the bankruptcy process for some purpose it was not meant for. In the present case it was readily apparent that mischief was afoot.

The "orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis" was not the purpose behind the acts of the appellant. The appellant made separate approaches to each of the eighteen creditors whose claims it succeeded in acquiring. It negotiated a separate deal with each for varying considerations presumably seen to be more advantageous to the creditor than reliance on the proposal. From most of them it obtained an agreement, an executed assignment and a proxy. It purported to vote the proxies of former creditors whose claims had been assigned to it. Its purpose was not an orderly recovery of debts from the debtors assets but to limit competition by the debtor in its own marketplace by rejecting the debtor's proposal and forcing it into bankruptcy.

The appellant was acting on its own making sharp use of the provisions of the **BIA** for its own advantage. There was no evidence that the co-operating creditors were part of a conspiracy with the appellant to injure the debtor. Otherwise the tort of conspiracy to injure could be found where the predominant purpose of the appellant's conduct is to cause injury to the plaintiff, whether the means used by the defendants are lawful or unlawful: **Canada Cement LaFarge Ltd, v. British Columbia Lightweight Aggregate Ltd.,** [1983] 1 S.C.C. 452.

It is undeniable that the appellant caused injury to the debtor not negligently but deliberately. The debtor made its proposal to avoid bankruptcy; bankruptcy therefore must have been seen by Laserworks as a more injurious alternative than acceptance of the proposal by the creditors. Laserworks had the heavy burden of persuading its creditors that their best interests lay in approving the proposal; it did not have the impossible burden of dissuading a financially stronger competitor bent on using the provisions of the **BIA** to destroy it as a competitor. The appellant derailed the proposal procedure to force the debtor into bankruptcy. Using bankruptcy to cause injury, thereby eliminating the debtor as an entity capable of competing in the marketplace, is abusive of the purpose of the BIA. It does not qualify as "the orderly and fair distribution of (its) property." Annihilation of an individual business or a company may be an unfortunate consequence of a bankruptcy, an unavoidable side-effect, but it is not the purpose of the **BIA**. Use of the **Act** to accomplish such an objective is in my view so abusive of the purpose of the legislation as to engage the supervisory jurisdiction of the courts under s. 187(9). It is a substantial injustice to be remedied.

No distinction in principle is possible between the present case and the four cited by the Registrar. He identified the problem and he applied the remedy. He was upheld on appeal in the Supreme Court. I would dismiss this ground of appeal.

Class voting--The Fourth Ground

In upholding the Registrar Justice Stewart added a string to his bow by introducing the class voting analysis of Viscount Haldane in **British American Nickel**. In light of the holdings respecting the second and third grounds of appeal, it is not necessary to the outcome to decide this ground.

The appellant submits that the trial judge was wrong in concluding there was an abuse on a minority of a class of unsecured creditors and that a duty in this respect was owed by the appellant:

> . . . There was no abuse on a minority of the unsecured creditors and no duty was imposed on the Appellant to cause votes to be cast in the best interest of the class. Without such a duty the learned Judge was without authority to consider Datarite's motives and the votes in question should have been allowed.

In **British America Nickel** Viscount Haldane stated that where a power is conferred on a special class, a majority in exercising a power to modify the rights of a minority must exercise that power in the interests of the class as a whole.

> . . . But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member...

In the present case the minority creditors saw their alternative of furthering their best interests by voting in favour of the proposal disappear when the votes amassed by the appellant were exercised, not in the interest of making the most favourable recovery from a combination of a distribution of the assets of LaserWorks and its continuance in business as a customer or potential customer, but in the interests of removing a competitor of Datarite. Justice Stewart was concerned that the other creditors, as well as the debtor, suffered from the abusive use of the provisions of the **BIA**. Of the sixteen creditors who did not assign their claims to Datarite, fourteen voted in favour of the proposal.

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The rationale for Viscount Haldane's conclusion in **British America Nickel** was carefully reviewed by Hardie Boys J. in **Whiteman v. UDC Finance Ltd.** The court found it should not intervene in the refusal of a proposal by creditors including several who were being sued by the debtor, and who therefore had a collateral interest in seeing him out of business.
Hardie Boys J. cited the same passage quoted above by Justice Stewart from Vicount Haldane's judgment. It concludes that there is a restriction on powers conferred on a majority of a special class in order to enable that majority to bind a minority:

> ...They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.

Hardie Boys J. considered **Re Farmers' Co-operative,** which was also cited by Justice Stewart, in which votes of several creditors who were competitors of the debtor were disallowed .

> ...In a later development of the same matter, but not now involving the Court's sanction under s. 205, Gallen J. accepted that the Court has an overriding control, not limited to the approval stage under s. 205, and may restrict a right to vote where the equities of a particular situation require it: see [1992] 1 NZLR 348. It is unnecessary for present purposes to decide whether these cases were correctly decided, for even if they were, the principle is not of unlimited application, and does not apply to the exercise of voting rights generally. This is clear from what Viscount Haldane said in the **British America Nickel** case.
> Immediately after the passage already quoted, his Lordship said
>
> > Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share.
>
> Thus in **Pender v. Lushington** (1877) 6 Ch. D. 70, 75-76 Jessel MR said there is:
>
> > . . . no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.
>
> While the voting rights conferred by Part XV of the **Insolvency Act** are not akin to a "right of property attaching to a share", they are rights conferred without reservation. There is no requirement for class voting; there is instead a general right conferred equally on all creditors. The rationale of the principle does not apply. It is well settled that the motive (short of fraud) of a petitioning creditor, no matter how reprehensible, is irrelevant to his right to obtain an order of adjudication: **King v. Henderson** [1898] AC 720, **Re King, ex parte Commercial Bank of Australia Ltd.** (No. 2) [1920] VLR 490. The motive of a creditor voting on a proposal, really the other side of the coin to a petition for adjudication, can be no different. That is not to say that there may be no remedy in an extreme case, such as fraud or mistake. But certainly where, as here, there are perfectly legitimate reasons for opposing the proposal, a creditor is not to be denied that right because he may have some other motive as well...

If the exception made for fraud is broadened to "substantial injustice" I would take Hardie Boys J.'s conclusions to be a fair statement of the law in Canada as well, as applied by Canadian courts in the cases cited by the Registrar. The New Zealand court included mistake as well as fraud as an exception. A creditor is not to be deprived of the right to vote for wrongful motives alone; motive must be coupled with a tortious act to support a finding of improper purpose.
A Canadian case supporting a broad interpretation of the right of creditors to vote on proposals is **Re Bedard Louis Inc.** 1991 CanLII 3533 (QC CA), (1991) 22 C.B.R. (3d) 218. The debtor sued three creditors who had sought to seize his goods before judgment for amounts far exceeding their claims against him. One creditor petitioned for a receiving order, and the Quebec Superior Court rejected the debtor's argument that the petitioner was not a creditor because of the large undecided actions. The debtor was declared bankrupt and later filed a proposal. The trustee refused to let the three creditors vote at a creditors' meeting considering the proposal because of a possible conflict of interest. The Superior Court allowed an appeal against the trustee's decision, and the Quebec Court of Appeal upheld the Superior Court, holding (headnote) that:

> No provision of the Act authorizes the trustee to exclude a creditor whom he considers to have a conflict of interest. The debtor's action for damages against the creditors, which constituted a debt not yet payable, did not strip the creditors of their status of ordinary creditors. By the proposal, the debtor presented the creditors with terms of payment which were different from those provided legally by contract.

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> The Act was intended to allow the voting of all duly acknowledged creditors. Exceptions to that rule were properly specified in the Act and none of them pertained to a creditor against whom a debtor had filed legal proceedings.

The Proposals Part of the **BIA** recognizes only two classes of creditors, secured creditors who are presumably protected by the security they hold, and unsecured creditors, all the others. This does not appear to meet Viscount Haldane's criterion of a special class bound to exercise its voting rights for the benefit of the class as a whole. That concept seems surplus to and difficult to reconcile with the scheme of the **BIA** where, as the Quebec Court of Appeal found in **Bedard,** all duly acknowledged creditors are entitled to vote as they please, subject to exceptions set out in the **Act** (and the exception for tortious or criminal behavior.)

As remarked above, those exceptions reflect the manner in which Parliament dealt with conflicts of interest which might arise in the context of voting on proposals. Parliament has obviously legislated on the subject and cannot be assumed to have created by implication an exception for general, unspecified, conflicts of interest. The mere fact that a creditor is also a competitor of the debtor or otherwise in a conflict of interest with the debtor does not give rise to a statutory exception. The scheme for protecting minority creditors adopted under the BIA was not a class voting concept but rather a system of specific exceptions coupled with a discretionary power in the courts to remedy substantial injustice.

It is not necessary to make a final determination on this point. The rational of Justice Stewart's decision is found in her adoption of the Registrar's conclusions as to improper purpose in the following passage:

> The applicant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

That is, while the Registrar's decision was consistent with considerations of class voting, he was upheld on his findings of improper purpose.

I would dismiss the fourth ground of appeal.

Conclusion

The appellant attempted to abuse the provisions of the **BIA** by using them to intermeddle for an improper purpose with the proposal of a debtor to its creditors, giving rise to a substantial injustice. This affected not only the debtor but the remaining creditors who supported the proposal. The Registrar made no error in discerning this from the evidence and in exercising the court's discretionary jurisdiction to remedy substantial injustice. He was upheld on appeal to the Supreme Court. The appellant's actions are not to be condoned. I would dismiss the appeal with costs which I would fix costs at $3,000 plus disbursements to the Respondent and $3,000 plus disbursements to the Trustee.

Freeman, J. A.

Concurred in:

Pugsley, J.A.

Cromwell. J.A.

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1997 B19853

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY

IN THE MATTER OF the Proposal of Laserworks Computer Services Inc.
-and-
IN THE MATTER OF Section 194(2) of *Bankruptcy and Insolvency Act*, &S.C. 1985, c.B-3
- and -
IN THE MATTER OF an appeal by 3004876 Nova Scotia Limited

DECISION

HEARD: at Halifax, Nova Scotia, before the Honourable Justice Margaret J. Stewart on June 24, 1997
DECISION: August 13, 1997
COUNSEL: Michael, S. Ryan, Q.C.
Counsel for the Appellant, 3004876 Nova Scotia Limited
Roy F. Redgrave
Counsel for the Laserworks Computer Services Limited
D. Bruce Clarke
Counsel for McCuaig & Company Inc., Trustee under Proposal

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C.A. No. 141313

NOVA SCOTIA COURT OF APPEAL
BETWEEN:
3004876 NOVA SCOTIA LIMITED
Appellant
-and-
LASERWORKS COMPUTER SERVICES INC.
Respondent
REASONS FOR
JUDGMENT BY: Freeman, J.A.

Appeal to Supreme Court - Sec. 194
194. The decision of the Court of Appeal on any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is granted by that Court.
R.S., c. B-3, s. 164;
R.S., c. 44(1st Supp.), s. 10.

Stay of proceedings on filing of appeal - Sec. 195
195. Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.
R.S., 1985, c. B-3, s. 195;
1992, c. 27, s. 69.

No stay of proceedings unless ordered - Sec. 196
196. An appeal to the Supreme Court of Canada does not operate as a stay of proceedings, except to the extent ordered by that Court.
R.S., c. B-3, s. 166;
R.S., c. 44(1st Supp.), s. 10.

LEGAL COSTS

Costs in discretion of court - Sec. 197
197. (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

Dondale (Re), 2007 BCSC 1300 (CanLII) - Trustee's Legal Fees Assessed Against Superintendent
Date: 2007-08-30
Docket: 0729520
URL: http://canlii.ca/t/1sr08
Citation: Dondale (Re), 2007 BCSC 1300 (CanLII), <http://canlii.ca/t/1sr08> retrieved on 2013-09-24
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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Dondale (Re),*** 2007 BCSC 1300

Date: 20070830

Docket: 0729520
Registry: Prince George
IN BANKRUPTCY AND INSOLVENCY
IN THE MATTER OF THE JOINT CONSUMER PROPOSAL OF
Ronald Manning Dondale and Lynell Marie Dondale

Before: The Honourable Mr. Justice Burnyeat
Reasons for Judgment (In Chambers)

Counsel for the Trustee	J.B. McLean
Counsel for the Superintendent of Bankruptcy	D. Nygard
Date and Place of Hearing:	August 9, 2007 Vancouver, B.C.

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[1] Applying pursuant to s. 197 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*Act*"), Rules 41 and 47 of the *Rules of Court* and the inherent jurisdiction of the Court, Abakhan & Associates Inc. ("Trustee"), the Administrator under the Joint Consumer Proposal of Ronald Manning Dondale and Lynell Marie Dondale ("Proposal") applies for an order granting the Trustee its costs of these proceedings against the Superintendent of Bankruptcy ("Superintendent") subject to the assessment of those costs pursuant to the provisions of the *Act*. The materials indicate that the Trustee has incurred legal costs of $18,720.06 relating to this matter and that the total amount to be paid under the Proposal is $24,000.00 if all contemplated payments are made.

BACKGROUND

[2] The Trustee was the Administrator of the Joint Consumer Proposal of Mr. and Ms. Dondale. The Proposal contemplated monthly payments over a five year period. The creditors of Mr. and Ms. Dondale were notified of the Proposal and no objections were filed. Accordingly, the Proposal was deemed to have been accepted.

[3] However, the Official Receiver gave notice to the Trustee under s. 66.22(1) of the ***Act*** requiring the Trustee to apply to Court to have the Proposal reviewed. Section 66.22(1) of the ***Act*** states:

> Where a consumer proposal is accepted or deemed accepted by the creditors, the administrator shall, if requested by the official receiver or any other interested party within thirty days after the day of acceptance or deemed acceptance, forthwith apply to the court to have the consumer proposal reviewed.

[4] That application was set before the Court by the Trustee. On May 17, 2007, the Superintendent filed a Notice of Intervention pursuant to s. 5(4)(a) of the ***Act*** which provides that the Superintendent may: "intervene in any manner or proceeding in court, where the Superintendent considers it expedient to do so, as if the Superintendent were a party thereto". Under Rule 12 of the General Rules under the ***Act***: "The Superintendent may intervene at any application to the court by filing a notice of an intervention with the court."

[5] In opposing the application of the Trustee to have the Proposal approved by the Court, the Superintendent filed the affidavit of Ms. Vogt which contained the following paragraph:

> I swear this Affidavit in support of the application of the Superintendent of Bankruptcy for an Order not approving the Dondale Proposal in the form drafted.

[6] The application arose as a result of the conflict created by the decisions of Registrar Baker in ***Bankruptcy of Williams***, [2005] B.C.J. (Q.L.) No. 154 (B.C.S.C.), and of Registrar Nettie in ***Re Sztojka***, [2005] O.J. (Q.L.) No. 5551 (Ont. S.C.J.), whereby similar paragraphs in consumer proposals were dealt with differently by the two Registrars. The Superintendent favoured the decision reached in ***Sztojka*** whereas the Trustee favoured the decision reached in ***Williams***. Preferring the decision in ***Sztojka***, the Superintendent had provided directions to trustees and administrators across Canada that the decision reached in ***Sztojka*** should be preferred when dealing with the powers given to either inspectors or administrators of consumer proposals. The type of provision that produced the two conflicting decisions was set out in paragraph 7 of this Proposal:

> (a) The creditors may appoint up to three inspectors responsible for the Consumer Proposal of this consumer debtor. The inspectors may have, in addition to any powers of inspectors under the Act, the power to
>
> (i) receive any notice of default in the performance of a provision of the Consumer Proposal and waive any such default, and
>
> (ii) approve any amendment to the Consumer Proposal without calling a meeting of creditors, if the amendment would alter the schedule for the amount of the payments to be made by the consumer debtor, but would not change the total amount to be paid; and
>
> (b) In the absence of appointed Inspectors the Administrator of this Consumer Proposal shall have the power to extend the time for the making of any payment required to be made pursuant to this Proposal provided that no such extension shall extend beyond the five years following the approval of this Proposal by the court.

[7] Counsel appeared on behalf of the Superintendent and on behalf of the Trustee on the application to approve the Proposal. It was the position of the Superintendent that an Administrator should not be in a position to extend the time for making of payments because s. 66.31 of the ***Act*** provides for a deemed annulment of a consumer proposal if a consumer debtor is in default to the extent of three months of payments. It was the position of the Trustee that it was the creditors and not the Superintendent who should determine whether a consumer proposal was acceptable or not. The Proposal was approved (2007 B.C.S.C. 847). The question of costs was not spoken to nor were costs requested in the Motion of the Trustee.

APPLICABLE STATUTORY PROVISIONS

[8] The applicable provisions of the ***Act*** are the following:

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197(1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

197(2) The court in awarding costs may direct that the costs shall be taxed and paid as between party and party or as between solicitor and client, or the court may fix a sum to be paid in lieu of taxation or of taxed costs, but in the absence of any express direction costs shall follow the event and shall be taxed as between party and party.

147(1) For the purpose of defraying the expenses of the supervision by the Superintendent, there shall be payable to the Superintendent for deposit with the Receiver General a levy on all payments, except the costs referred to in subsection 70(2), made by the trustee by way of dividend or otherwise on account of the claims of creditors, whether unsecured, preferred or secured creditors, and including Her Majesty in right of Canada or a province claiming in respect of taxes or otherwise.

[9] Under the ***Bankruptcy and Insolvency General Rules***, Rule 3 provides:

In cases not provided for in the Act or these Rules, the court shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

[10] Rule 57(9) of the ***Rules of Court*** states:

57(9) Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

POSITION OF THE PARTIES ON THIS APPLICATION

[11] The Trustee submits that the Superintendent wished to establish a "test" case that it could apply nationally on the issue which was raised and that the burden of obtaining a decision beyond the decisions reached by Registrars should not fall on the creditors of this consumer proposal who would be deprived of some of the gross receipts of the Proposal if the legal account rendered to the Trustee must be paid out of the gross receipts. The creditors did not oppose the approval of the Proposal and should not bear the burden of the legal costs caused by the intervention of the Superintendent. As well, the intervention of the Superintendent was part of its supervision of the bankruptcy system for which it collects a levy pursuant to s. 147(1) of the ***Act*** to fund such supervisory activities.

[12] The Superintendent submits that, to the extent that this was a "test case", it was a test case for both the Superintendent and this particular Trustee. The Superintendent submits that the Superintendent has requested that all Trustees and Administrators across Canada cease including similar provisions and to amend those proposals which contain similar provisions but that this directive was ignored by this Trustee who proceeded rather than amending the Proposal. The Superintendent also submits that creditors opposing the approval of a proposal would not have costs awarded against them where it can be shown that their objection was not frivolous and was made in good faith: ***Re Rideau Carleton Raceway Holdings Ltd.*** (1971), 15 C.B.R. (N.S.) 72 (Ont. S.C.) at para. 25; and ***Re Alberta Western Wholesale Lumber Ltd.*** (1961), 27 D.L.R. (2d) 598 (B.C.S.C.) and that the same test should apply where the Superintendent intervenes pursuant to s. 5(4)(a) of the ***Act***. The Superintendent submits that it was acting in good faith over a concern for the integrity of the bankruptcy system and in the face of conflicting jurisprudence on the issue. Accordingly, the issues raised by the Superintendent were not frivolous in the circumstances. The Superintendent submits that the Superintendent and the Trustee should bear their own costs.

CASE AUTHORITIES AND DISCUSSION

[13] Under s. 197(1) of the ***Act***, the costs of a proceeding are in the discretion of the Court. Unless there are provisions to the contrary under the ***Act*** or under the ***General Rules*** established under the ***Act***, the ***Rules of Court*** apply. The normal rule in civil litigation in British Columbia is that costs follow the event: Rule 57(9). That same principle applies in bankruptcy matters: ***Down, Re*** 2001 BCSC 1303 (CanLII), (2001), 28 C.B.R. (4th) 194 (B.C.S.C.). That costs will follow the event is clearly set out in s. 197(2) of the ***Act*** where costs will "follow the event and should be taxed as between party and party" in the absence of any express direction from the Court.

[14] Costs on an "increased costs" basis or on a "Special costs" basis are not available as such costs are not provided for under the ***Act***: ***Interclaim Holdings Ltd. v. Down*** 2003 BCCA 201 (CanLII), (2003) 42 C.B.R. (4th) 12 (B.C.C.A.) at para. 25. Accordingly, the discretion is only to order either "party and party" or "solicitor and client" costs or to make no express direction so the "party and party" costs prevail.

[15] Section 197(1) of the ***Act*** provides the Court with a wide discretion regarding costs and there appears to be no reason why either Party and Party Costs or Solicitor and Client (full indemnification) costs cannot be awarded subject always to an assessment by the Registrar of the Court of any costs awarded. Accordingly, the question which arises is whether the Superintendent should be dealt with in a manner which is different from those who have traditionally been granted costs or against whom costs have been awarded?

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[16] Section 5(4)(a) of the ***Act*** creates a statutory right of intervention by the Superintendent. Ordinarily, interventions are allowed when persons or organizations have evidence which may be of assistance to the Court not only in presenting argument but also in adducing evidence. Whether such persons who are not actually parties to proceedings are entitled to or are liable for costs depends upon the circumstances: ***Janzen v. B.C. (Attorney General)***, [1993] B.C.J. (Q.L.) No. 2682 (B.C.C.A.); ***Polglase v. Polglase*** 1979 CanLII 587 (BC SC), (1979), 18 B.C.L.R. 294 (B.C.S.C.); Hines v. Nova Scotia (Registrar of Motor Vehicles) 1990 CanLII 2601 (NS SC), (1990), 78 D.L.R. (4th) 162 (N.S.S.C.); ***Evans Forest Products Ltd. v. B.C. (Chief Forester)*** (1995), 40 C.P.C. (3d) 322 (B.C.S.C.); ***M. v. H.*** (1996), 1 C.P.C. (4th) 167 (Ont. G.D.); ***Hines v. Nova Scotia (Registrar of Motor Vehicles)*** 1990 CanLII 2601 (NS SC), (1990), 105 N.S.R. (2d) 240 (N.S.S.C.); ***Holland v. Northwest Fuels Ltd.***, [2007] B.C.J. (Q.L.) No. 858 (B.C.S.C.).

[17] In ***Evans Forest Products Ltd. v. British Columbia (Chief Forester)*** (1995), 40 C.P.C. (3d) 322 (B.C.S.C.), Esson C.J.S.C., as he then was, stated:

> ... The decision in *Sierra Club v. Chief Forester* [*Sierra Club of Canada v. British Columbia (Chief Forester) et al* 1994 CanLII 6510 (BC SC), (1994), 94 B.C.L.R. (2d) 331 (B.C.S.C.) appeal dismissed 1995 CanLII 1448 (BC CA), (1995) 7 B.C.L.R. (3d) 375], (*supra*) establishes that there is no general principle that public interest litigants should be immune from party and party costs. The position of interveners, who generally play a very minor and closely restricted role in the proceeding, is distinguishable from that of a public interest litigant which brings the proceeding. While there is no rule precluding costs being awarded to or against interveners, it has not been the practice to do so. I think that there are good practical reasons for maintaining that as the general practice although, if an intervener were to materially prolong the proceedings, costs might be awarded against it. There may also be circumstances where it would be appropriate to award costs to an intervener but I doubt such circumstances will arise in many cases. (at para. 6)

[18] I am satisfied that the usual provisions as to whether an intervenor will be granted costs or will have an order made against it for costs do no apply. Under s. 5(4) of the ***Act***, it should be noted that the intervention of the Superintendent creates a situation "as if the Superintendent were a party. Because that is the case, the Superintendent is not merely an intervenor as that word is usually used in litigation and in dealing with the question of whether costs should be awarded to or against an intervenor. Rather, the Superintendent takes on a role as if it were a party and, as a party, the usual provisions should apply as to whether costs will be awarded or not.

[19] The phrase "as if ... a party thereto" has not been judicially considered in the context of the ***Act*** but similar phrasing in other legislation has been the subject matter of interpretation. ***United Brotherhood of Carpenters & Joiners of American Local 3054 v. Cassin Remco Ltd.*** (1979), 27 O.R. (2d) 25 (Ont. H.C.) dealt with s. 55(2) of the ***Labour Relations Act***, R.S.O. 1970, c. 232, which provided that the purchaser of a business would be bound by an existing collective agreement "as if he had been a party thereto". The issue was whether the purchasers of Cassin Remco were required to honour an award made by the Ontario Labour Relations Board and Steele J. held that the statute deemed the purchaser "to be the original signatory to the collective agreement" (at p. 29) so that the collective agreement was enforced. In ***Maritime Life Assurance Co. v. Chateau Gardens (Hanover) Inc.*** (1983), 43 O.R. (2d) 754 (Ont. H.C.J.), the court made a similar holding. In the case at bar, I interpret the phrase "as if ... a party thereto" in a similar manner so that the Superintendent becomes a party to the proceedings as if always a party.

[20] Even if I am wrong in coming to that conclusion, I am satisfied that there is authority for costs to be awarded against an intervenor or interested party who makes submissions in ongoing litigation. In ***Pacifica Papers Inc. (Re)***, [2001] B.C.J. (Q.L.) No. 1492 (B.C.C.A.), Hall J.A. dealt with the question of costs where Pacifica Papers Inc. had entered into an agreement whereby Norske Skog would acquire shares in Pacifica and Pacifica would become a wholly owned subsidiary of Norske, where a major shareholder of Pacifica objected to the plan of arrangement that was before the learned chambers judge, and where Norske made submissions at the hearing in favour of the plan. The question which arose was whether Norske was entitled to its costs in connection with the application. In concluding that Norske was entitled to two-thirds of its taxable costs, Hall J.A. concluded that the position of Norske was not that of an intervenor but as an interested party:

> It appears to me that it can fairly be said that here Norske Skog occupied a position more vitally involved in the issue before the Court than would normally be the case with an intervener. Norske Skog had entered into an agreement, (requiring subsequent approvals), to acquire the equity of Pacifica with a view to Pacifica becoming a subsidiary of Norske Skog. In these circumstances, Norske Skog had a clear economic interest in seeing the proposed arrangement proceed to completion. It was no doubt legally possible for it to stand aside from and take no part in these proceedings but it is wholly understandable that Norske Skog would feel it was appropriate for it to participate in and lend assistance to the successful petitioner, Pacifica. I believe its participation in the Chambers proceedings in both courts was quite

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> appropriate. It might well have sought status as a party but there was no particular necessity for it to do so since it had already been served with process and was undoubtedly an interested party with a stake in the outcome of the proceedings. Given its interest in the outcome of the proceedings, it seems doubtful that a court would refuse to hear submissions from Norske Skog. (at para. 7)

[21] Of similar effect are the decisions in ***Rigaux v. British Columbia (Commission of Inquiry into the Death of Vaudreuil - Gove Inquiry)***, [1998] B.C.J. (Q.L.) No. 2419 (B.C.S.C.) where costs were awarded against the Attorney General by Allan J. who stated: "I find that the Attorney General did not limit his role to *Amicus Curiae* or an intervenor; he was a full participant." (at para. 30) and the decision in ***Re Welk and Saskatchewan Social Services Appeal Board et al*** reflex, (1985), 23 D.L.R. (4th) 698 (Sask. Q.B.) where costs were awarded against the Attorney General relating to an application for *certiorari* to quash an order of the Saskatchewan Social Services Appeal Board and for *mandamus* to require the Board to re-hear an application for assistance. In concluding that costs should be awarded, Grotsky J. stated:

> In the instant case, counsel for the Attorney-General appearing on behalf of the appearing respondents did not appear on their behalf as intervenants. They were, as they were required to be by the legislation of the province, made parties. They appeared as such. Not as intervenors. (at p. 710)

[22] Whether "as if a party" or as a full participant, the Superintendent would have potentially been entitled to costs if successful in opposing the approval of the Proposal. Accordingly, the next question which arises is whether costs should be awarded against the Superintendent.

[23] Whether this Proposal was approved or not, it was treated by the Superintendent as a test case. The same cannot be said of the Trustee. From the policies in place regarding the operations of the Superintendent, it is clear that the Superintendent must have considered that this was a question of "national interest or importance concerning the bankruptcy process" otherwise it would not have intervened. The policy of the Superintendent regarding an intervention pursuant to s. 5(4)(a) of the ***Act*** has been in force since April 1, 1994. That part of the "Program" of the Superintendent is described as follows:

> **2) -- Guiding Principles**
>
> The Superintendent may intervene in court under this paragraph where it is a question of national interest or importance concerning the bankruptcy process or where the Superintendent feels it is in the public interest to do so.
>
> The intervention of the Superintendent may be as follows:
>
> a) as regulator to sustain a definite position;
>
> b) to make sure that proper facts are placed before the court;
>
> c) as an observer;
>
> **3) -- Criteria for intervention**
>
> • To sustain or have the court interpret a policy or Directive of the Superintendent;
>
> • To defend the constitutionality of a section of the Act or its Rules;
>
> • To clarify the legal interpretation of a section of the Act where it is a matter of general interest;
>
> • To avoid an abuse of the system. ....

[24] There is no statutory requirement for the Superintendent to intervene under s. 5(4)(a) of the ***Act***. The Superintendent elected to do so and only the Superintendent opposed the approval of the Proposal. None of the creditors of Mr. and Ms. Dondale opposed the Proposal in the first instance or appeared to oppose the approval of the Proposal.

[25] There appear to be no decisions where costs have been awarded against the Superintendent who has intervened under s. 5(4)(a) of the ***Act***. However, I am satisfied that the decisions in ***Black v. NsC Diesel Power Inc. (Trustee of)*** 2003 FCA 300 (CanLII), (2003), 243 F.T.R. 159 (F.C.A.) and ***Marchand Syndicates Inc. v. Canada (Superintendent of Bankruptcy)*** 2006 FCA 368 (CanLII), (2006), 28 C.B.R. (5th) 5, leave to appeal to S.C.C. refused, [2007] C.S.C.R. No. 16 (Q.L.) are authority for the proposition that costs can be awarded in favour of the Superintendent. If costs are available to the Superintendent where the Superintendent intervenes under s. 5(4) of the ***Act***, there is no reason why costs cannot be available against the Superintendent.

[26] I do not accede to the submission made by the Superintendent that costs should not be awarded where it can be shown that the objection made was not frivolous and was made in good faith. I am satisfied that the two authorities relied upon by the Superintendent are not applicable to the case at bar. First, the discretion provided by s. 197 of the ***Act*** is similar to the provisions of Rule 57(9) of the ***Rules of Court*** – "costs shall follow the event". In this Proposal, the Superintendent was unsuccessful in the position they advanced and the Trustee was successful. Second, I am satisfied the decisions in ***Re Rideau*** and ***Re Alberta Western Wholesale***, both *supra*, are based on the premise that a creditor should not be penalized twice if the objections are not frivolous and are made in good faith. It is likely that a creditor will not receive full payment of the balance owing by a proposing debtor. To then penalize that creditor again where that creditor objects to the proposal being approved by the Court would have the effect of penalizing that creditor twice. I am

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satisfied that is the basis for the decisions relied upon by the Superintendent. The question which arises is whether the creditors of Mr. and Ms. Dondale should bear the costs.

[27] If this was a test case at the instigation of the Superintendent or the Trustee, should the creditors of Mr. and Ms. Dondale bear the cost of that test? The answer to that question is "no". For the purpose of defraying the expenses of the Superintendent, s. 147(1) of the ***Act*** provides that there will be a levy payable on all payments made by trustees by way of a dividend or otherwise to creditors "whether unsecured, preferred or secured". It is out of this fund that the expenses of the Superintendent are paid in whole or in part. The intervention of the Superintendent was part of its supervision of the bankruptcy system and it would be unfair to require the creditors of Mr. and Ms. Dondale to bear the burden of the legal costs caused by the intervention. It would be equally unfair to have the creditors of Mr. and Ms. Dondale bear the burden of the legal costs caused by any test case being advanced by the Trustee.

[28] If the costs should not to be borne by the creditors of Mr. and Ms. Dondale, who should bear the legal costs incurred as a result of the Official Receiver requiring the Trustee to seek Court approval of the Proposal and of the intervention of the Superintendent? In the circumstances, I am satisfied that those legal costs should be borne by the Superintendent in the capacity of the Superintendent as an intervenor pursuant to s. 5(4)(a) of the ***Act***. The next question which arises is whether the costs against the Superintendent should be on a party and party or a solicitor and client basis.

[29] A summary of decisions in which solicitor and client costs have been awarded under the ***Act*** is set out by the learned authors of ***Bankruptcy and Insolvency Law of Canada***, Vol. 3, 3rd Ed. (Thomson-Carswell – Scarborough) 205:

> In court proceedings, the court may decide that it is appropriate to award costs for or against a trustee on a solicitor and client basis. The following cases illustrate some [of] the situations in which the court has decided that it is appropriate to order solicitor and client costs.
>
> Where a question is of importance in the administration of bankrupt estates generally, the court may direct that the costs be taxed on a solicitor and client basis: *British Columbia (Workmen's Compensation Board) v. Canadian Credit Men's Trust Assn.* (1962), 4 C.B.R. (N.S.) 17, 38 W.W.R. 426, 33 D.L.R. (2d) 524 (B.C. S.C.).
>
> If a trustee brings a test case against a party, the court may award costs to a successful respondent on a solicitor and client basis payable out of the bankrupt estate: *Alberta (A.G.) v. Nash* (1964), 7 C.B.R. (N.S.) 84, 48 W.W.R 420 (Alta. C.A.); *Nuraney Holdings Ltd. (Trustee o/) v. Canada (A.G.)* (1987), 70 C.B.R. (N.S.) 191, 19 B.C.L.R. (2d) 173 (B.C. C.A.).
>
> In *Re Commonwealth Investors Syndicate Ltd.* (1986), 62 C.B.R. (N.S.) 308 (B.C. S.C.), the court found that the trustee had put the applicant to considerable expense by refusing to retire voluntarily as trustee or to return the trust estate to the applicant. It therefore awarded costs against the trustee personally on a solicitor and client basis.
>
> In *Re Liakas* reflex, (1993), 25 C.B.R. (3d) 101, 1993 CarswellQue 45 (Que. S.C.), the court found that the trustee had, by his improper requests, put witnesses on a s. 163(1) examination to considerable expense: the trustee was ordered to pay personally the solicitor and client costs of the witnesses.
>
> In *Thorne Riddell Inc. v. Sinclair* (1983), 49 C.B.R. (N.S.) 196 (Ont. S.C.), there was an earlier decision squarely against the position being advanced by the trustee. In these circumstances, the court awarded the successful party costs on a solicitor and client basis.
>
> In *Re Century 21 Brenmore Real Estate Ltd.* (1980), 33 C.B.R. (N.S.) 170, 6 E.T.R. 205 (Ont. C.A.), the Court of Appeal of Ontario, on an appeal from an order made on a motion for directions, ordered the unsuccessful appellant to pay the costs of the trustee and of counsel appointed to represent ordinary creditors on a solicitor and client basis. Similarly the British Columbia Court of Appeal in *Nuraney Holdings Ltd. (Trustee of) v. Canada (A.G.)*, *supra*, ordered the Attorney General of Canada, who unsuccessfully appealed an order opposing a proposal, to pay the costs of the trustee on a solicitor and client basis. These cases appear to be correct because the successful appellants had no clients, and the only way in which they could be adequately compensated was by an award of solicitor and client costs.
>
> If a misleading affidavit has been used to obtain the appointment of an interim receiver, the court, in setting aside the order, may award costs on a solicitor and client basis. However, if more than one solicitor has been involved in the motion to set aside the order, the court will disallow any items of the claim for costs in which there has been duplication or overlapping: *Re 539618 Ontario Inc.* (1988), 69 C.B.R. (N.S.) 210 (Ont. S.C.).
>
> Where a trustee has been dragged into prolonged litigation without justification and where the reputation of the trustee is by virtue of the proceedings placed at risk, the court will award the trustee its

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costs on a solicitor and client basis: *Bank of Montreal v. AGT Mobility Inc.* 1999 ABQB 338 (CanLII), (1999), 9 C.B.R. (4th) 209, 1999 CarswellAlta 329 (Alta. Q.B.).

In *Saskatchewan Economic Development Corp. v. Michalyca Management Ltd.* reflex, (1991), 12 C.B.R. (3d) 277, 98 Sask. R. 93, 1991 CarswellSask 28 (Q.B.), an application was brought in the ordinary courts that should have been brought in the bankruptcy court. The court granted costs on a solicitor and client basis.

[30] This is not a case where this Trustee, the Superintendent, a creditor, or a bankrupt has acted inappropriately. Rather, the situation is closer to the decisions reached in ***Canadian Credit Men's Trust Association Ltd.*** and ***Nuraney***, both *supra*. ***Canadian Credit Men's Trust Association Ltd.*** dealt with the question of costs regarding an application whether the Workmen's Compensation Board was a secured creditor in the estate of a bankrupt. After determining that costs under the ***Act*** could be awarded against the Workmen's Compensation Board despite the provisions of provincial legislation that costs could not be awarded against the Crown, Hutcheson J. agreed with the submission made on behalf of the Trustee in Bankruptcy that the question was of such importance not only in the administration of that estate but in the administration of bankrupt estates generally that the court should direct the costs of the Trustee to be taxed as between solicitor and client. The fact that the Superintendent was of the view that there should be an intervention because the matter in dispute was a question of national interest or importance concerning the bankruptcy process leads me to the same conclusion as was reached by Hutcheson J.

[31] Of similar effect is the decision in ***Nuraney***, *supra*, where Lambert J.A. on behalf of the Court awarded costs to the Trustee against the Attorney General of Canada on a solicitor client basis stating:

> ... Counsel for the Trustee has the trustee has asked for costs in favour of the trustee against the Attorney General of Canada on a solicitor and client basis. He makes that request on the ground that in the course of argument counsel for the Attorney General of Canada said that the appeal had been brought to settle a point of general importance which would have application in many cases in which the Crown was involved.
>
> The effect of the Attorney General having taken these court proceedings will be that the expense will be borne by the company, and that will delay payments to the creditors who consented to the proposal, unless the costs amount to a more or less complete indemnification. In those circumstances I consider that this is an appropriate case for an award of costs on a solicitor and client basis under s. 168 of the *Bankruptcy Act*. ....
>
> In reaching this conclusion I would follow the decision of the Supreme Court of British Columbia in Bankruptcy, in *Re Clemenshaw* (1962) 4 C.B.R. 17, which was upheld on appeal without reference to the question of costs; to the decision of the Supreme Court of Alberta in Bankruptcy, in *Re Mackintosh-Marshall Equipment Ltd.* (1964) 7 C.B.R. 84, which was varied slightly with respect to costs on appeal in *Re Mackintosh-Marshall* 7 C.B.R. 92; and to the decision of the Ontario Court of Appeal in *Re Century 21 Brenmore Real Estate Limited* (1980) 33 C.B.R. 107.
>
> I would award costs in favour of the trustee against the Attorney General of Canada on a solictor and client basis. (at pp. 196-7 in 70 C.B.R.)

[32] I agree with the conclusion of the Superintendent that the point to be decided was a point of general importance which would have application in many proposals across Canada. However, it would be inappropriate for the creditors to bear the costs of that point being settled at a level above the level of Registrars. In the circumstances of this case, I exercise the discretion available to me to award the Trustee solicitor and client costs. I am satisfied that anything less would inappropriately penalize the creditors of Mr. and Ms. Dondale on what amounts to a dispute between the Superintendent and this Trustee. Additionally, I take into account that, despite the recent amendments to the ***Rules of Court***, the amounts available to a successful party under the provisions dealing with Party and Party Costs are hopelessly inadequate. In order to protect the position of the creditors under the Proposal, only costs "as between solicitor and client" are adequate.

[33] I direct that the costs of the Trustee will be assessed before the Registrar "as between solicitor and client".

"The Honourable Mr. Justice Burnyeat"

How costs awarded - Sec. 197(2)

(2) The court in awarding costs may direct that the costs shall be taxed and paid as between party and party or as between solicitor and client, or the court may fix a sum to be paid in lieu of taxation or of taxed costs, but in the absence of any express direction costs shall follow the event and shall be taxed as between party and party.

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Personal liability of trustee for costs - Sec. 197(3)
(3) Where an action or proceeding is brought by or against a trustee, or where a trustee is made a party to any action or proceeding on his application or on the application of any other party thereto, he is not personally liable for costs unless the court otherwise directs.

When costs payable - Sec. 197(4)
(4) No costs shall be paid out of the estate of the bankrupt, excepting the costs of persons whose services have been authorized by the trustee in writing and such costs as have been awarded against the trustee or the estate of the bankrupt by the court.

(5) [Repealed, 2005, c. 47, s. 110]

Priority of payment of legal costs - Sec. 197(6)
(6) Legal costs shall be payable according to the following priorities:

- **(a) commissions on collections, which are a claim ranking above any other claim on any sums collected;**
- **(b) when duly authorized by the court or approved by the creditors or the inspectors, costs incurred by the trustee after the bankruptcy and prior to the first meeting of creditors;**
- **(c) the costs on an assignment or costs incurred by an applicant creditor up to the issue of a bankruptcy order;**
- **(d) costs awarded against the trustee or the estate of the bankrupt; and**
- **(e) costs for legal services otherwise rendered to the trustee or the estate of the bankrupt.**

Costs of discharge opposed - Sec. 197(6.1)
(6.1) If a creditor opposes the discharge of a bankrupt, the court may, if it grants the discharge on the condition that the bankrupt pay an amount or consent to a judgment to pay an amount, award costs, including legal costs, to the opposing creditor out of the estate in an amount that is not more than the amount realized by the estate under the conditional order, including any amount brought into the estate under the consent to the judgment.

Costs where opposition frivolous or vexatious - Sec. 197(7)
(7) If a creditor opposes the discharge of a bankrupt and the court finds the opposition to be frivolous or vexatious, the court may order the creditor to pay costs, including legal costs, to the estate.

(8) [Repealed, 2005, c. 47, s. 110]
R.S., 1985, c. B-3, s. 197;
1997, c. 12, s. 106;
2004, c. 25, s. 89;
2005, c. 47, s. 110.

PART VIII
OFFENCES

Bankruptcy offences - Sec. 198

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198. (1) Any bankrupt who

(a) makes any fraudulent disposition of the bankrupt's property before or after the date of the initial bankruptcy event,

(b) refuses or neglects to answer fully and truthfully all proper questions put to the bankrupt at any examination held pursuant to this Act,

(c) makes a false entry or knowingly makes a material omission in a statement or accounting,

(d) after or within one year immediately preceding the date of the initial bankruptcy event, conceals, destroys, mutilates, falsifies, makes an omission in or disposes of, or is privy to the concealment, destruction, mutilation, falsification, omission from or disposition of, a book or document affecting or relating to the bankrupt's property or affairs, unless the bankrupt had no intent to conceal the state of the bankrupt's affairs,

(e) after or within one year immediately preceding the date of the initial bankruptcy event, obtains any credit or any property by false representations made by the bankrupt or made by any other person to the bankrupt's knowledge,

(f) after or within one year immediately preceding the date of the initial bankruptcy event, fraudulently conceals or removes any property of a value of fifty dollars or more or any debt due to or from the bankrupt, or

(g) after or within one year immediately preceding the date of the initial bankruptcy event, hypothecates, pawns, pledges or disposes of any property that the bankrupt has obtained on credit and has not paid for, unless in the case of a trader the hypothecation, pawning, pledging or disposing is in the ordinary way of trade and unless the bankrupt had no intent to defraud,

is guilty of an offence and is liable, on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year or to both, or on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

Jaston & Co. Ltd. v. McCarthy, 1998 CanLII 6455 (BC CA) - Standing to Action Against Reviewable Transaction

Date:	1998-12-15
Docket:	CA022340
Parallel citations:	168 DLR (4th) 415; [1999] 7 WWR 243; 8 CBR (4th) 25; 59 BCLR (3d) 168
URL:	http://canlii.ca/t/1f0vr
Citation:	Jaston & Co. Ltd. v. McCarthy, 1998 CanLII 6455 (BC CA), <http://canlii.ca/t/1f0vr> retrieved on 2013-08-31
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Reflex Record	Related decisions, legislation cited and decisions cited

Date: 19981215
Docket: CA022340, CA022840
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

CA022840

IN THE MATTER OF THE BANKRUPTCY OF
JOHN HOWARD McCARTHY

BETWEEN: CA022340

JASTON & COMPANY LIMITED and MULHOLLAND WEBSTER

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PLAINTIFFS
(APPELLANTS)

AND:

JOHN HOWARD McCARTHY, CAROL ANNE McCARTHY and MARJORY IRENE McCARTHY

DEFENDANTS
(RESPONDENTS)

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Braidwood
The Honourable Madam Justice Proudfoot

J.C. Fairburn — Counsel for the Appellants
J.M. Lepp and
J.P. Sullivan — Counsel for the Respondents

Place and Dates of Hearing — Vancouver, British Columbia
November 9 and 10, 1998

Place and Date of Judgment — Vancouver, British Columbia
December 15, 1998

Written Reasons by:
The Honourable Madam Justice Prowse

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Braidwood
The Honourable Madam Justice Proudfoot

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Reasons for Judgment of the Honourable Madam Justice Prowse:

NATURE OF APPEAL

[1] This is an appeal from the decision of a trial judge, pronounced August 28, 1996, dismissing the action of Jaston& Company Limited and Mulholland Webster (the "appellants") against John Howard McCarthy, Carol Anne McCarthy and Marjory Irene McCarthy (the "McCarthys"). **The action was to set aside two transactions pursuant to the provisions of the *Bankruptcy Act*, now the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and the *Fraudulent Conveyance Act*, R.S.B.C. 1979, c. 142. The trial judge held that the appellants lacked standing to bring the action as a result of their failure to comply with s. 38 of the *Bankruptcy Act*, as interpreted by this Court in *B.N.R. Holdings Ltd. v. Royal Bank* 1992 CanLII 1093 (BC CA), (1992), 74 B.C.L.R. (2d) 332. The trial judge also held that, if the appellants had had standing to bring the action, he would have set aside one of the impugned transactions involving the transfer of Mr. McCarthy's shares in McCarthy Realty (72) Ltd. and Dev-Gro Developments Ltd. to Ms. Carol McCarthy, but he would have declined to set aside a mortgage made by Mr. and Ms. McCarthy in favour of Mrs. Marjory McCarthy ("Mrs. McCarthy Sr.").**

[2] In supplemental reasons for judgment pronounced January 17, 1997, the trial judge dismissed an application by the appellants for reconsideration of his previous decision. He also dismissed as an abuse of process the appellants' application for summary judgment pursuant to a second order obtained by them on September 23, 1996 pursuant to s. 38 of the ***Bankruptcy Act***.

[3] This appeal was heard by a five-member panel for the purpose of reconsidering its earlier decision in ***B.N.R. Holdings***.

[4] As a matter of convenience, I will refer to the ***Bankruptcy Act*** as the "***BIA***".

ISSUES ON APPEAL

[5] The principal issue on this appeal is whether this Court should follow its earlier decision in ***B.N.R. Holdings*** concerning the correct interpretation and application of s. 38 of the ***BIA***, or whether it should adopt a more flexible approach to the interpretation of that section applied in such cases as ***Imprimerie Canadienne Gazette v. Turcotte*** (1991), 50 Q.A.C. 152 (C.A.); ***Toyota Canada v. Imperial Richmond*** 1993 CanLII 7074 (AB QB), (1993), 10 Alta. L.R. (3d) 127 (Q.B.), affirmed 1994 ABCA 261 (CanLII), (1994), 27 C.B.R. (3d) 1 (Alta. C.A.); leave refused reflex, (1995), 29 C.B.R. (3d) 153 (S.C.C.); and ***DeGroote v. Canadian Imperial Bank of Commerce*** 1996 CanLII 8277 (ON SC), (1996), 45 C.B.R. (3d) 132 (Ont. C.J.), affirmed under ***Re Montego Forest Products Ltd.*** 1998 CanLII 2640 (ON CA), (1998), 37 O.R. (3d) 651 (C.A.); leave refused (8 October 1998), S.C.C. Bulletin, 1998, p. 1477.

[6] In the event this Court decides to overrule its previous decision in ***B.N.R. Holdings***, two further issues arise. The first is whether the trial judge erred in refusing to exercise his discretion under s. 187(5) or 187(9) of the ***BIA*** to amend the original order obtained pursuant to s. 38 of the ***BIA***, *nunc pro tunc*, to specify the action before him as that which the appellants were permitted to take pursuant to that order. The second is whether the trial judge erred in finding that the mortgage made in favour of Mrs. McCarthy Sr. was executed on August 24, 1989 and, thus, was outside the time limits for transactions which could be successfully attacked under s. 95 of the ***BIA***.

BACKGROUND

[7] A detailed recitation of the background giving rise to these proceedings is set forth in the reasons for judgment of the trial judge, reported at 1996 CanLII 2982 (BC SC), (1996) 41 C.B.R. (3d) 212. For the purposes of this appeal, I will refer only to those aspects of that background which are germane to the issues raised on appeal. I begin with the facts relevant to the s. 38 order and the issue of standing.

[8] On September 5, 1990, Mr. McCarthy, a businessman, made a voluntary assignment into bankruptcy pursuant to s. 49(1) of the ***BIA***. His creditors, and the approximate amount owed to them, were as follows:

Preferred Creditors

1. Revenue Canada Taxation $ 33,668.71

Secured Creditors

1. Bank of Montreal 25,000.00
2. Hamilton Delong Ltd. 66,476.25
3. Jaston & Co. 983,173.75
4. Mulholland Webster 50,223.55
5. Toronto Dominion Bank 9,361.47

[9] On December 2, 1991, Mulholland Webster applied pursuant to s. 38 of the ***BIA*** for the following relief:

> a) an order authorizing Mulholland Webster to take this proceeding in its own name and at its own expense and risk pursuant to section 38(1) of the Bankruptcy Act, R.S.C. 1979 [sic], c. B-3;

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b) an order that any benefit derived from this proceeding to the extent of the claim of Mulholland Webster and the costs of the proceedings, belong exclusively to Mulholland Webster and the surplus, if any, belongs to the Estate, pursuant to section 38(3) of the Bankruptcy Act as aforesaid; and

c) an order confirming that service of this Notice of Motion and accompanying documentation by regular mail, postage prepaid to the other creditors of John Howard McCarthy pursuant to the mailing list attached as Minutes to this Notice of Motion at least ten clear days prior to the hearing of this application constitutes satisfactory service of same pursuant to Rule 13 of the General Rules under the Bankruptcy Act as aforesaid.

[10] An affidavit deposed to by a legal assistant at Mulholland Webster was filed in support of the motion. She deposed that Mr. McCarthy had made a voluntary assignment in bankruptcy on September 5, 1990 and that Wolrige Mahon Limited had been appointed as the trustee of the estate. She further deposed that the amount owing to Mulholland Webster pursuant to a certificate under the ***Legal Profession Act***, S.B.C. 1987, c. 25, s. 73, was $50,223.55. She stated that Mr. Fairburn had attended a meeting of creditors at the offices of the trustee on November 19, 1991 at which the trustee advised that he held only $13,000 on account of the bankruptcy. She stated that Mr. Fairburn had concluded that the trustee would be unable to commence legal proceedings against the bankrupt and that Mulholland Webster had decided to "proceed independently" by applying under s. 38 of the ***BIA***.

[11] Two letters from Mulholland Webster to the trustee were attached to the affidavit in support of the s. 38 order. The first letter, dated June 10, 1991, provided as follows:

> As you are aware, we are a judgment creditor of John Howard McCarthy, being owed the sum of $50,222.55 as of March 16, 1990. We have reviewed the documents enclosed with your letter of January 18, 1991, to our office, including the Joint Statement of Assets and Liabilities of Mr. McCarthy and his wife, Carol Anne McCarthy dated October 31, 1987. This discloses substantial assets on the part of Mr. McCarthy at that time.
>
> We also note that the bankruptcy of Mr. McCarthy was precipitated by a guarantee he granted in favour of Jaston & Company Limited dated June 14, 1988. Our preliminary inquiries have revealed that approximately one month prior to that date Mr. McCarthy disposed of his interest in McCarthy Realty (72) Ltd. to his wife for the stated consideration of $4.00. In addition, we have learned that Mr. and Mrs. McCarthy disposed of a property in Delta for the sum of $250,000.00 in April, 1990, after mortgaging this property in favour of Marjory Irene McCarthy the previous month for the sum of $180,000.00. The timing of these transactions is strongly suggestive of their being planned to avoid the creditors of Mr. McCarthy.
>
> We hereby request pursuant to s. 38 of the Bankruptcy Act that you take proceedings under both the Bankruptcy Act and the Fraudulent Conveyance Act for the benefit of the Estate to challenge these transactions without delay. We require your confirmation within ten days of the date of this letter that you will be initiating such proceedings, failing which we will take steps to assume conduct of this bankruptcy at our own expense and risk.

In its second letter to the trustee dated November 4, 1991, Mulholland Webster again requested the trustee to take action.

[12] It is common ground that the trustee either failed or refused to take action to set aside the transactions referred to by Mulholland Webster in its June 10th letter.

[13] The application for a s. 38 order, together with the materials in support of the order, were served on all creditors of Mr. McCarthy. The only creditor who expressed interest in joining with Mulholland Webster to pursue an action against the McCarthys was Jaston.

[14] The application for a s. 38 order was heard by Mr. Justice B.D. Macdonald on February 4, 1992. No one appeared at the hearing on behalf of the trustee, the Superintendent of Bankruptcy or any of the other creditors. Jaston did not appear, but consented to the order, which is in the following terms:

> THIS COURT ORDERS AND AUTHORIZES Mulholland Webster and Jaston & Co. to take this proceeding in their own names and at their own expense and risk pursuant to section 38(1) of the Bankruptcy Act, R.S.C. 1979, c. B-3.
>
> THIS COURT FURTHER ORDERS that any benefit derived from this proceeding to the extent of the claims of Mulholland Webster and Jaston & Co. and the costs of the proceedings, belong exclusively to Mulholland Webster and Jaston & Co., and the surplus, if any, belongs to the Estate, pursuant to section 38(3) of the Bankruptcy Act as aforesaid.
>
> THIS COURT FURTHER ORDERS AND CONFIRMS that service of this Notice of Motion and accompanying documentation by regular mail, postage prepaid, to the other Creditors of John Howard McCarthy pursuant to the mailing list attached as Minutes to the Notice of Motion filed the 2nd day of

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> December, 1991 at least ten (10) clear days prior to the original hearing of this application on the 19th day of December, 1991, constitutes satisfactory service of same.

[15] Thereafter, on March 9, 1992, the appellants commenced action against the McCarthys to set aside the two transactions involving the transfer of shares and the mortgage. The action was discontinued on February 5, 1993, because the appellants had failed to obtain an assignment from the trustee before commencing the action.

[16] The assignment was obtained on February 4, 1993. It provided that the trustee assigned to Mulholland Webster and Jaston & Co.:

> . . . our right, title and interest in the choses in action or proceedings which have accrued or will hereafter accrue to the Estate of John Howard McCarthy, as directed in the Order of Mr. Justice B.D. MacDonald, dated February 4th 1992. . . .

[17] On February 5, 1993, the appellants recommenced their action against the McCarthys seeking the following relief:

> a)a declaration and order that the transfers and transactions complained of aforesaid, are fraudulent and void as against the Plaintiffs, including the transfer of shares of the Defendant John Howard McCarthy in McCarthy Realty (72) Ltd. and Dev-Gro Holdings Ltd., and the granting of the mortgage in favour of the Defendant Marjory Irene McCarthy;
>
> b)an order transferring the shares of the Defendant John Howard McCarthy in McCarthy Realty (72) Ltd. and Dev-Gro Holdings Ltd. to the Plaintiffs and for such other directions as appropriate;
>
> c)an order that the Defendants forthwith pay to the Plaintiffs the sum of $180,000.00;

The transactions described in the statement of claim accord with those described in the June 10th letter from Mulholland Webster to the trustee quoted at para. 11 of these reasons and appended to the affidavit in support of the s. 38 application.

[18] On April 13, 1993, the McCarthys filed a statement of defence to the action. The critical paragraph of the statement of defence in relation to the issue of standing is para. 3:

> 3.In answer to the whole of the Statement of Claim the Defendants say that the Plaintiffs are without standing to bring these proceedings as the Order obtained by the Plaintiffs pursuant to section 38(1) of the Bankruptcy Act, R.S.C. 1979, chapter B-3, did not authorize or empower the Plaintiffs to assert the specific causes of action that are hereby asserted nor did it authorize and direct Wolrige Mahon Limited, the Trustee of the Estate of John Howard McCarthy, a bankrupt to assign such causes of action to the Plaintiffs.

[19] Although counsel for each of the parties indicated at various times during the course of the proceedings which followed that they were going to take steps to resolve the issue of standing, neither took the initiative to do so. Rather, the issue was left to be determined at trial. Following a nine-day trial, the issue was resolved against the appellants.

DECISION AT TRIAL

[20] In dealing with the issue of standing, the trial judge relied on the decision of this Court in ***B.N.R. Holdings*** and concluded that the appellants had not brought themselves strictly within s. 38 of the ***BIA***. In particular, the trial judge concluded that the s. 38 order obtained by the appellants did not authorize them to bring the action for the relief they sought in their statement of claim. He noted that the wording of the order authorized the appellants to take "this proceeding" in their own names and at their own expense, and he concluded that "this proceeding" must mean the bankruptcy proceeding in which the s. 38 order was obtained. At para. 10 of his reasons, the trial judge stated:

> The order does not expressly authorize the plaintiffs to take the present action; rather, it authorizes them to take the proceeding in which it was granted — the bankruptcy proceeding. Counsel for the plaintiffs submits that the authorization to take the bankruptcy proceeding, supplemented by the consequent assignment from the trustee, clothes the plaintiffs with authority to take any proceedings the trustee might have taken that the plaintiffs may consider to be for the benefit of the estate, including this action. The assignment, which was of "the choses in action or proceedings which have accrued or will hereafter accrue to the estate" of Mr. McCarthy, is of no effect unless it has been first authorized by an order made pursuant to s. 38(1): B.N.R. Investments [sic] Ltd., *supra*, at p. 340. I cannot agree that the plaintiffs are authorized to receive an assignment of the present causes of action and to bring this action by virtue of an order authorizing them to take the bankruptcy proceeding. What is required is an express authorization to commence action on the particular claims presented here. That conclusion is supported by a consideration of the words used in the section, by judicial interpretations of the section, and by bankruptcy practice.

The trial judge went on to emphasize that Parliament's intent in enacting s. 38 was to ensure that creditors of a bankrupt obtain an authorization and an assignment "in respect of distinct, identified claims."

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[21] The trial judge next dealt with the appellants' alternative submission that, if the s. 38 order was not effective to give them standing, the court should exercise its remedial powers under ss. 187(5) and (9) of the ***BIA*** to grant them standing, or to vary the order *nunc pro tunc* to permit them to bring the action. The trial judge rejected this submission on the basis that lack of standing was not a "formal defect" or an "irregularity" within the meaning of s. 187(9), but was a matter of substance. Further, he refused to amend the order since to do so would be to grant the appellants standing *nunc pro tunc* which, in his view, would be inconsistent with ***B.N.R. Holdings***.

[22] The trial judge went on to state that, even if he had the power to amend the order *nunc pro tunc* and thereby effectively grant the appellants standing retroactively, he would decline to exercise it in their favour. He based this decision on the appellants' delay in resolving the issue of standing after it was brought to their attention, and on his view that there was some prospect that the other creditors might have chosen to participate in the proceedings if the s. 38 order had specified the action which the appellants intended to pursue.

[23] Although the trial judge resolved the issue of standing against the appellants, he, nonetheless, went on to deal with the action on its merits. I will discuss his findings with respect to the merits later in my reasons.

DISCUSSION OF THE ISSUES

(1) The Appellants' Standing

(a) Relevant Provisions of the *BIA*

[24] The relevant provisions of the ***BIA*** for the purpose of this discussion are s. 38 and ss. 187(5) and (9).

[25] Section 38 provides:

> 38. (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> (2) On an order under subsection (1) being made the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.
>
> (3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.
>
> (4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

[26] Sections 187(5) and (9) provide:

> [187](5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.
>
> . . .
>
> (9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

(b) The s. 38 Order

[27] The order obtained by the appellants pursuant to s. 38 of the ***BIA*** is set out at para. 14 of these reasons. In my view, the trial judge was correct in finding that this order does not comply with s. 38 of the ***BIA***. In particular, it does not correctly set out the proceeding or proceedings which the appellants intended to pursue at their own expense and for their own benefit. Rather, according to its terms, it purports to permit the appellants to take over the bankruptcy proceeding. While the material filed in support of the order makes it clear that the two transactions which the appellants were seeking to set aside were those attacked in the action which they subsequently commenced, this is not evident on the face of the order. The matter is further confused by the wording of the assignment obtained pursuant to the order, which purports to grant the appellants the right to pursue unspecified actions in existence at the time of the assignment, or discovered thereafter.

[28] In summary, I agree with the trial judge that the appellants failed to comply with s. 38 of the ***BIA*** by failing to specify adequately in their order the precise proceeding or proceedings which they were seeking to pursue on their own behalf. I also agree with the trial judge that, in the absence of an amendment to the order, it did not grant the appellants standing to commence this action against the McCarthys. Nor could the assignment obtained pursuant to the order grant standing to commence an action which was not specified in the order.

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[29] The troubling issue which then arises is whether the trial judge erred in concluding that he had no power to amend the order, *nunc pro tunc*, to permit the appellants to specify this action as that which they intended to pursue. As earlier noted, the trial judge relied on the decision of this Court in ***B.N.R. Holdings*** as authority for the proposition that a failure to comply strictly with the requirements of s. 38 rendered the proceedings taken pursuant to the order a nullity.

(c) The Decision in *B.N.R. Holdings*

[30] The facts in ***B.N.R. Holdings*** were somewhat unusual. B.N.R. Ltd. ("B.N.R.") owned and operated a restaurant. The principals of B.N.R., Mr. and Mrs. Bishop, personally guaranteed a loan by the Royal Bank to B.N.R. Within a short period of time, B.N.R. went into bankruptcy and a trustee was appointed. The trustee was discharged in March 1982 leaving B.N.R. an undischarged bankrupt. In April, 1985, B.N.R. was struck from the register of companies for failure to file annual reports.

[31] In November 1985, B.N.R. and Mr. and Mrs. Bishop commenced an action in contract and in tort against the bank, the trustee and the former lessor of the restaurant premises. No order had been obtained under s. 38. The defendants applied to strike their statement of claim, and Mr. and Mrs. Bishop applied for an order under s. 38 of the ***BIA***, *nunc pro tunc*, to allow them to proceed with the action. The trial judge concluded that it was appropriate to make the latter order on the basis that there was no prejudice to the defendants.

[32] This Court allowed the defendants' appeal. Mr. Justice Seaton, speaking for the Court, succinctly summarized the issue before the Court as follows, at p. 333:

> The narrow question of law raised by this appeal [from 14 C.B.R. (3d) 233, [1992] B.C.W.L.D. 556] is whether the leave contemplated by s. 38 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, can be given after the trustee has been discharged, the company has been struck from the register and the action that was started years ago without regard for the section is plodding towards trial.

In concluding that the court had no jurisdiction to make an order *nunc pro tunc*, it is apparent that Mr. Justice Seaton considered himself bound by an earlier decision of this Court. At p. 339 of the decision, he stated:

> In *Sigurdson v. Reid* 1980 CanLII 381 (BC CA), (1980), 26 B.C.L.R. 336, 37 C.B.R. (N.S.) 146, 118 D.L.R. (3d) 555, this court decided that an action commenced without leave under s. 215 (then s. 186) of the *Bankruptcy Act* was a nullity and leave could not be granted nunc pro tunc. The court adopted with approval the language of Henry J. in *Re Pelee Motor Inn Ltd.* (1979), 30 C.B.R. (N.S.) 216, at p. 217 (Ont. H.C.):
>
> The situation therefore is embraced by s. 186, and according to the plain words of the section leave is required. Not only that, but it is also clear that no action lies unless leave is acquired, and hence it is a condition precedent to the right to issue the writ that leave be given before that time.

[33] Seaton J.A. noted that, while the ***Pelee*** decision had not been followed in later decisions in Ontario, that did not make the ***Sigurdson*** decision any less authoritative in British Columbia. He went on, at p. 340, to discuss the necessary steps to be taken under s. 38 of the ***BIA***:

> Section 38 offers an avenue by which a creditor can present a claim of the bankrupt and thereby recover its own claim against the bankrupt. The steps to be taken are clear:
>
> (1) The creditor must request the trustee to take proceedings,
> (2) The trustee must refuse or neglect to take the proceedings,
> (3) The creditor must apply to the court for an order authorizing it to take proceedings in its own name,
> (4) Notice of the contemplated proceedings must be given to the other creditors,
> (5) The trustee must assign and transfer the claim to the creditor.
>
> These are not just procedural steps. The assignment is essential — it is the foundation for the action. Clearly each of the other steps must precede the assignment.
>
> [Emphasis added]

[34] Mr. Justice Seaton also cited with approval a passage from L.W. Houlden & C.H. Morawetz, ***Bankruptcy Law of Canada***, 3rd ed., vol. 1 (Toronto: Carswell, 1989) stating that, since the right of a creditor to take proceedings in the name of the trustee is purely statutory, a creditor must bring himself strictly within s. 38 in order to do so.

(d) Other Appellate Authorities Considering s. 38

[35] Since ***B.N.R. Holdings*** was decided, the Alberta Court of Appeal and the Ontario Court of Appeal have considered the interpretation and application of s. 38 of the ***BIA*** in ***Toyota Canada*** and ***Re Montego Forest Products***, *supra*, respectively. In each of those decisions, the courts rejected the strict interpretation adopted in ***B.N.R. Holdings*** in favour of a more flexible approach. An earlier decision of the Quebec Court of Appeal, ***Imprimerie***, *supra*, which was not referred to in ***B.N.R. Holdings***, also adopted a more flexible approach to the application of s. 38.

[36] In ***Imprimerie***, the trustee elected not to continue a paulian action (to attack a fraudulent transfer) commenced prior to the bankruptcy against a party who subsequently went bankrupt. The creditor who had originally commenced the

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action, sought an order under s. 38 permitting it to continue with the action. The trial judge dismissed the application. Several issues were raised on appeal, one of which was whether leave of the court was required under s. 38 to permit the creditor to continue with the action. Mr. Justice Fish, speaking for the court, concluded that leave was required. In so doing, he followed an earlier decision of that court which held that s. 38 of the ***BIA*** required the pursuing creditor to satisfy two conditions precedent: the first was to ask the trustee to take proceedings; the second, if the trustee refused or failed to act, was to obtain the court's authorization. In other words, the court identified only two of the five steps set out in ***B.N.R. Holdings*** and referred to in para. 32 of these reasons as conditions precedent to a valid action.

[37] Subsequent to the ***Imprimerie*** decision, on facts more closely resembling those in this appeal, the Quebec Court of Appeal indicated that there was room for even greater flexibility in the interpretation and application of s. 38.

[38] In ***Banque Royale du Canada v. Dupont (syndic)***, [1993] A.Q. No. 3 (Q.C.A.), the bank commenced an action to have a transfer of property by a husband to his wife shortly before the husband went into bankruptcy declared invalid. The bank failed to obtain leave under s. 38 prior to commencing its action. The bankrupt applied to dismiss the action on the basis that the failure to obtain leave under s. 38 of the ***BIA*** precluded the bank from pursuing its claim. The trial judge stayed the application for dismissal so that it could be tried at the same time as the bank's application for leave under s. 38.

[39] The Court of Appeal dismissed the bankrupt's appeal. In so doing, the court stated that the ***Imprimerie*** decision did not decide the question of whether the court could remedy the default where a creditor failed to obtain authorization from the court under s. 38 prior to commencing proceedings. In other words, the court left open the possibility that failure to comply with this aspect of s. 38 did not automatically render the proceeding taken in the absence of such authorization a nullity.

[40] In ***Toyota Canada***, *supra*, the Alberta Court of Appeal considered the interpretation and application of s. 38. There, a creditor of the bankrupt obtained an order under s. 38 of the ***BIA*** without notice to the other creditors. It was a term of the order that the other creditors be given 60 days after service of the order upon them to participate in the action. The order and subsequent assignment from the trustee were obtained the last day before the limitation period for the action expired.

[41] The defendants sought to set aside the order and strike the statement of claim on the basis that there had not been strict compliance with s. 38 of the ***BIA***. The principal breach of s. 38 relied on by the appellants was the failure of the pursuing creditor to give notice of the application to the other creditors before commencing the action. The appellants relied on the decision of this Court in ***B.N.R. Holdings*** for the proposition that this failure to comply strictly with s. 38 was fatal to the action.

[42] Madam Justice Conrad, speaking for the court, identified two issues: (1) whether s. 38 required notice to other creditors to be given before the action is commenced, and (2) if so, whether failure to do so was fatal to the action, or simply a procedural irregularity which could be cured. In addressing these issues, she referred to the general approach to the interpretation of the ***Bankruptcy Act*** adopted by the Supreme Court of Canada in ***Mercure v. A. Marquette & Fils***, 1975 CanLII 195 (SCC), [1977] 1 S.C.R. 547, at 556:

> Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it. It seems to me that appellant is urging the Court to so interpret it.
>
> [Emphasis added]

[43] In the result, Madam Justice Conrad concluded that s. 38 did not require that notice be given to the other creditors before commencement of the action and that, while notice must be given, its timing was flexible. In so doing she expressed her preference for the approach taken by the Quebec Court of Appeal in ***Imprimerie*** to that taken by this Court in ***B.N.R. Holdings***.

[44] In the event she was wrong in her interpretation of the notice provision, Madam Justice Conrad concluded that failure to give notice prior to the commencement of the action was merely a procedural irregularity which could be cured under s. 187(9) of the ***BIA***. She would have applied the curative provision on the basis that none of the creditors had suffered prejudice.

[45] In ***Re Montego Forest Products***, the Ontario Court of Appeal also declined to follow the approach to the interpretation and application of s. 38 adopted by this Court in ***B.N.R. Holdings***. In that case, Montego Forest Products was petitioned into bankruptcy in 1990 by one of its secured creditors, C.I.B.C. In 1992, Montego and its principal shareholder, Roger DeGroote, together with others, commenced an action, against the C.I.B.C. and the trustee in bankruptcy claiming damages for breach of contract, trespass, conversion, and improvident realization of the assets of Montego. The trustee had neither refused nor failed to take action and no order had been obtained under s. 38 of the ***BIA***. The action was defended on the merits and the defendants did not take exception to the failure of the plaintiffs to

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obtain a s. 38 order until May, 1996. At that time, the defendants applied to have the action dismissed on the basis that it was a nullity. Madam Justice Lax held that the failure to obtain an order under s. 38 was an irregularity which could be cured by making an order under s. 38, *nunc pro tunc*, granting Montego leave to continue the action on its own behalf and on behalf of other creditors. The defendants appealed.

[46] The Court of Appeal dismissed the appeal. In so doing, the court set forth the issue and its resolution at 653-4 of the decision:

> Reduced to its essentials, the argument before this court was whether - as the appellants urged - the failure to obtain a s. 38 order before the commencement of the action was a foundational defect that rendered the action a nullity or whether - as the respondents urged - such failure constituted only an irregularity that could be cured by the making of a s. 38 order *nunc pro tunc*. This question has been addressed, with differing results, by appellate courts in Alberta and British Columbia. The Alberta Court of Appeal has held that non-compliance with s. 38 is a procedural irregularity which can be cured after the event: *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.* [citation given]. The British Columbia Court of Appeal has held that a s. 38 order is the foundation for the action and that failure to obtain such an order cannot be cured after the event: *B.N.R. Holdings Ltd. v. Royal Bank* [citation given]. We respectfully prefer the view of the Alberta Court of Appeal, and adopt the conclusion of Lax J. that the commencement of an action without the consent or refusal of the trustee and without a s. 38 order is an irregularity only, which may be cured through the mechanism of an order *nunc pro tunc*.
>
> Counsel for the appellants submitted that this result would open the door to a plethora of actions instituted without a s. 38 order in the confident expectation that the court would bestow its approval retroactively. We do not consider that concern to be realistic. It is not every case that will lend itself to the granting of a s. 38 order *nunc pro tunc*. Circumstances alter cases: the facts presented in many cases may not engage the discretion of the court to make such an order, whereas the facts presented in others may invite the exercise of that discretion. The present case falls into the latter category. This action (to which, it should be recalled, the trustee was a party from its inception [as a defendant]) proceeded for more than four years without objection by the appellants. Such objection was first raised the day before the scheduled pretrial conference, on the eve of the expiry, of the limitation period. In the words of Lax J., it was first put forward "only after much time and money had been expended by all parties to the litigation . . . [despite the fact that] the defendant Peat, as trustee of the bankrupt's estate, must have known of the absence of a s. 38 order". In these circumstances, it was open to Lax J. to exercise her discretion as she did, and we are not persuaded that she made any error in so doing.
>
> [Emphasis added]

(e) Conclusion - Nullity or Irregularity

[47] It is apparent from the authorities to which I have referred that the courts are moving away from a strict approach to the interpretation and application of s. 38 toward a more flexible approach more in keeping with that espoused by the Supreme Court of Canada in ***Marquette & Fils***, *supra*. This trend has resulted in the courts treating some or all of the steps set forth in s. 38 as being of a procedural, rather than a substantive nature. As a consequence, failure to comply, or incomplete compliance, with those steps has been treated as an irregularity which the court has the power to cure in appropriate circumstances. In my view, this is a salutary development since it permits the court to decide actions on their merits in circumstances in which the court is satisfied that non-compliance with s. 38 has not resulted in prejudice to any party or to other creditors of the bankrupt.

[48] The purpose of s. 38 of the ***BIA*** is to permit a creditor, or creditors, of the bankrupt to pursue actions in their own name and at their own expense and risk where the trustee has refused or failed to do so. A narrow interpretation of s. 38, which treats each of the steps set forth in it as a condition precedent to a valid action, is contrary to this purpose since it renders actions which have not been taken in strict compliance with s. 38 a nullity, without regard to whether anyone has been prejudiced by the non-compliance.

[49] In my view, the approach to the interpretation of s. 38 expressed by Mr. Justice Whalen in the following passages from ***Penfold v. Provenzano*** 1996 CanLII 8035 (ON SC), (1996), 42 C.B.R. (3d) 148, at paras. 16 and 18 (Ont. Gen. Div.), quoted with approval by Madam Justice Lax at para. 17 of ***DeGroote***, *supra*, is apposite:

> To begin with, I agree the interpretation of Section 38 should be large and liberal, in favour of its intended purposes and beneficiaries. Section 12 of the *Interpretation Act, 1985*, R.S.C. I-21 provides:
>
> 12. Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> * * *

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> If the creditors seeking the benefit of Section 38 fail, then they do so at their own risk, without consequence to the trustee or bankrupt. Therefore, a liberal interpretation of Section 38 accommodates the purposes intended and without prejudice to the bankrupt (in this case, the defendants). The contrasting, narrow approach proposed in the *B.N.R. Holdings Ltd.* case is interpretively inconsistent with these purposes.

[50] I also agree with the view expressed by the trial judge in ***Toyota Canada*** that the purpose of s. 38 is to protect the rights of creditors of the bankrupt to sue in the event of a refusal or failure of the trustee to act. In addition, s. 38 endeavours to treat all creditors equally by providing that they be given notice so that they may decide whether they wish to participate in the action.

[51] Nor am I persuaded that treating a failure to comply with s. 38 as an irregularity capable of being cured will operate as an open invitation to creditors to ignore s. 38. Non-compliance will invariably jeopardize the right of the creditor to continue with the action in the event that the failure has resulted in significant prejudice to a party to the action or to another creditor.

[52] In this case, all of the concerns raised by counsel for the McCarthys as to the dire consequences which will flow from taking a more liberal approach to the interpretation and application of s. 38 turn on potential prejudice to others. These concerns are matters well suited to resolution by the exercise of the trial judge's discretion in deciding whether the curative provisions of the ***BIA*** should be applied.

[53] In the result, I am persuaded that the preferred approach to the interpretation and application of s. 38 is the more liberal and flexible approach adopted by the Courts of Appeal in Quebec, Alberta and Ontario. Of those decisions, the facts in ***Re Montego Forest Products*** most closely resemble those here.

[54] In this case, the trial judge adopted the approach to the interpretation of s. 38 established by this Court in ***B.N.R. Holdings***, as he was bound to do. Because I am of the view that this approach should no longer be applied, I would set aside the finding of the trial judge that the failure of the appellants to comply strictly with s. 38 deprived them of standing to bring the action. Rather, I conclude that the non-compliance in this case amounted to an irregularity within the meaning of s. 187(9) which was capable of being cured by a variation of the order under s. 187(5).

[55] The next question which then arises is whether the trial judge erred in his alternative finding that, assuming he had a discretion to cure the irregularity, he would not have exercised it in favour of the appellants.

(f) Application of s. 187(5) and (9)

[56] The appellants relied on a combination of s. 187(5) and (9) of the ***BIA*** in asking the trial judge to cure the defect by amending the s. 38 order obtained before Mr. Justice Macdonald *nunc pro tunc*. The application of these curative provisions in any particular case is discretionary.

[57] In deciding whether the trial judge erred in the exercise of his discretion, the standard of review which this Court must apply is that set forth in such cases as ***Elsom v. Elsom***, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367, where Mr. Justice Gonthier, speaking for the court, stated that an appellate court should not interfere with the exercise of a trial judge's discretion unless the trial judge has misdirected himself or unless his decision is so clearly wrong as to amount to an injustice.

[58] In this case, the trial judge gave two reasons for refusing to exercise his discretion in favour of the appellants. First, he relied on the appellants' delay in seeking to resolve the issue of standing despite early notice that this was an issue. Second, he found that other creditors of Mr. McCarthy may have been prejudiced by the fact that the appellants had not specified in the order the precise action they were seeking to pursue.

[59] In my view, the second reason given by the trial judge for refusing to exercise his discretion in favour of the appellants is flawed. The materials before the trial judge were such that it could not reasonably be said that any of the creditors were prejudiced by the failure of the appellants to specify the precise action they intended to commence pursuant to the s. 38 order. As noted earlier, the two transactions that the appellants were seeking to pursue were identified in the materials filed in support of the order. Those materials were served on the creditors, together with an invitation to contact the solicitor for the appellants if they had any questions. Of the creditors served, only Jaston expressed any interest in participating in an action against the McCarthys. The action commenced by the appellants claimed relief limited to setting aside the transactions referred to in the materials served on the creditors. I am unable to see how any of them could have been misled in these circumstances. Even if the order requested and granted could be viewed as enabling the appellants to commence actions beyond setting aside the two transactions referred to in the materials filed in support of it, application of the curative provision would have narrowed the scope of the order to restrict the action to those transactions. This could only have operated to the benefit of the creditors.

[60] The fact that the creditors did not express any interest in participating in the action when served with notice of the second order under s. 38 (which correctly identified the action the appellants were seeking to pursue) also lends support to the conclusion that they were not prejudiced by the defect in the original order.

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[61] Since I have concluded that the trial judge erred in one of the two bases upon which he declined to exercise his discretion in favour of the appellants, it is open to this Court to make the order that the trial judge should have made. While I agree with the chambers judge that it would have been preferable for the appellants to have taken steps to clarify the issue of standing prior to trial, it was also open to the McCarthys to do so. Delay in moving to resolve that issue is not, in itself, a sufficient basis for refusing to amend the order. Prejudice to one of the parties or to the creditors would be a proper basis for refusing to do so. In this case, however, I am unable to find that there would be any prejudice to a party or to any of the creditors in varying the original order *nunc pro tunc* to specify the cause of action which was in fact pursued. On the other hand, there would be serious prejudice to the appellants in refusing to do so, given the findings of the trial judge in their favour on the merits of the action, at least in relation to the impugned share transaction.

[62] In the result, I would make an order that the order of Macdonald J. be amended, *nunc pro tunc*, to provide, in part, as follows:

> THIS COURT ORDERS that Mulholland Webster and Jaston & Company Limited be and are hereby authorized to take proceedings in their own names and at their own expense and risk, for the purpose of setting aside the transfer by John Howard McCarthy to Carol Anne McCarthy of his shares in McCarthy Realty (72) Ltd. and Dev-Gro Holdings Ltd., as a fraudulent conveyance pursuant to the *Fraudulent Conveyance Act*, R.S.B.C. 1979, c. 142, as amended, and ancillary relief in relation thereto.
>
> THIS COURT FURTHER ORDERS that Mulholland Webster and Jaston & Company Limited be and are hereby authorized to take proceedings in their own names and at their own expense and risk, for the purpose of setting aside a mortgage granted by John Howard McCarthy and Carol Anne McCarthy to Marjory Irene McCarthy, which mortgage is dated August 24, 1989 and was registered in the Vancouver Land Registry office on March 9, 1990, pursuant to s. 95 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.
>
> THIS COURT FURTHER ORDERS that any benefit derived from the proceedings taken pursuant to the preceding two paragraphs, to the extent of their claims and the costs, belong exclusively to Mulholland Webster and Jaston& Company Limited, and the surplus, if any, belongs to the estate of John Howard McCarthy, in bankruptcy.

Once the amended order is entered, the appellants should seek an assignment from the trustee consistent with the wording of the order.

(2) The Merits of the Action

[63] The trial judge found that the transaction whereby Mr. McCarthy transferred all of his shares in McCarthy Realty (72) Ltd. and Dev-Gro Holdings Ltd. to Ms. McCarthy was a fraudulent conveyance contrary to the ***Fraudulent Conveyance Act***. This finding is not challenged on appeal.

[64] The appellants, however, submitted that the trial judge erred in finding that a mortgage granted by Mr. and Ms. McCarthy to Mrs. McCarthy Sr. in the amount of $180,000 did not amount to a fraudulent preference contrary to s. 95 of the ***BIA***. In particular, the appellants submitted that the trial judge erred in finding that the mortgage was executed on August 24, 1989 rather than on March 9, 1990. If the mortgage had been executed on the latter date, it would have fallen within the one-year period during which transactions between related parties could successfully be attacked by virtue of a combination of ss. 95 and 96 of the ***BIA***. Those sections provide, in part, as follows:

> 95. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving that creditor a preference over the other creditors is, where it is made, incurred, taken or suffered within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date the insolvent person became bankrupt, both dates included, deemed fraudulent and void as against the trustee in the bankruptcy.
>
> (2) Where any conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in subsection (1) has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed, in the absence of evidence to the contrary, to have been made, incurred, taken, paid or suffered with a view to giving the creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be admissible to support the transaction.
>
> . . .
>
> 96. Where the conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in section 95 is in favour of a person related to the insolvent person, the period referred to in subsection 95(1) shall be one year instead of three months.

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[65] Counsel for the appellants referred to evidence from which the trial judge could have inferred that the mortgage was executed on March 9, 1990, including the fact that the mortgage was registered on that date. Counsel also submitted that the trial judge's negative findings regarding the credibility of Mr. and Ms. McCarthy with respect to other aspects of their testimony should have raised grave suspicions in his mind concerning their credibility with respect to the impugned mortgage transaction, so as to give rise to a *prima facie* case of fraud.

[66] The trial judge dealt with each of the arguments raised by the appellants in support of their position that the mortgage had been executed on March 9, 1990. After a thorough review of the evidence in that regard, including documents supporting Mr. and Mrs. McCarthy's evidence about the date the mortgage was executed, he concluded that it was executed on the date on its face, namely, August 24, 1989. Evidence of the solicitor before whom Mr. and Mrs. McCarthy executed the mortgage regarding his usual practice in attending to the execution of mortgages supported this conclusion.

[67] Counsel for the appellants drew our attention to a second date stamp on the mortgage bearing the date March 9, 1990. This date stamp was not put to any witness at trial, nor was it drawn to the attention of the trial judge. Its significance, therefore, is unknown. It is not improbable that it was placed on the document at the time the document was accepted for registration. In any event, it does not provide a reliable basis for overturning the decision of the trial judge on this issue.

[68] As has been stated on many occasions, it is not the function of this Court to substitute findings of fact or credibility for those of a trial judge in the absence of palpable and overriding error. In my view, the finding of the trial judge with respect to the date the mortgage was executed was supported by the evidence and cannot be said to be the product of palpable and overriding error.

[69] In the result, I would dismiss this ground of appeal.

CONCLUSION

[70] I would allow the appeal to the extent of setting aside the order dismissing the action, amending the order of Mr. Justice Macdonald dated February 4, 1992, *nunc pro tunc*, as set forth in para. 62 of these reasons, and making a further order including the following provisions:

(a) a declaration and order that the transfer of the shares of John Howard McCarthy in McCarthy Realty (72) Ltd. and in Dev-Gro Holdings Ltd. to Carol Anne Mccarthy are fraudulent transfers pursuant to the Fraudulent Conveyance Act and void and of no effect as against Jaston & Company Limited and Mulholland Webster;

(b) an accounting of the assets of McCarthy Realty (72) Ltd. and Dev-Gro Holdings Ltd. subsequent to May 1, 1988, and their disposition thereafter;

(c) such further and other orders as are necessary to give effect to the orders set forth in paras. (a) and (b).

[71] Subsequent to the hearing of this appeal, counsel provided submissions with respect to what further directions, if any, should be provided to the Supreme Court for the purpose of giving effect to the judgment of this Court. In my view, it would be preferable to leave the specific form of order arising from the setting aside of these transactions to the Supreme Court to be dealt with on the basis of further submissions before that court.

[72] With respect to the issue of costs, there was divided success. Further, it was the failure of the appellants to obtain the proper form of order in the first instance which gave rise to the issue of standing at trial and led to the necessity of this appeal. For that reason, I would order each party to bear its own costs, both of the trial and of the appeal.

"The Honourable Madam Justice Prowse"

I AGREE: "The Honourable Mr. Justice Donald"
I AGREE: "The Honourable Madam Justice Huddart"
I AGREE: "The Honourable Mr. Justice Braidwood"
I AGREE: "The Honourable Madam Justice Proudfoot"

Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68, [2004] 3 SCR 461 - Reviewable Transactions Between Related Corporations and Privy of Common Directors

Date:	2004-10-29
Docket:	29682
Parallel citations:	2004 SCC 68 (CanLII); 244 DLR (4th) 564; 49 BLR (3d) 165; 4 CBR (5th) 215
URL:	http://canlii.ca/t/1j0wc
Citation:	Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68 (CanLII), [2004] 3 SCR 461, <http://canlii.ca/t/1j0wc> retrieved on 2013-08-06

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Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, 2004 SCC 68
IN THE MATTER OF the Bankruptcy of Peoples Department Stores Inc./Magasins à rayons Peoples inc.
Caron Bélanger Ernst & Young Inc., in its capacity as Trustee
to the bankruptcy of Peoples Department Stores Inc./
Magasins à rayons Peoples inc. Appellant
v.
Lionel Wise, Ralph Wise and Harold Wise Respondents
and
Chubb Insurance Company of Canada Respondent
Indexed as: Peoples Department Stores Inc. (Trustee of) v. Wise
Neutral citation: 2004 SCC 68.
File No.: 29682.
2004: May 11; 2004: October 29.
Present: Iacobucci,* Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for quebec
Corporations — Directors and officers — Fiduciary duty and duty of care — Directors of bankrupt corporation being sued by trustee — Trustee claiming that directors breached fiduciary duty and duty of care — Whether directors owe fiduciary duty or duty of care to corporation's creditors — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1).
Bankruptcy and insolvability — Reviewable transactions — Transfer of assets between wholly-owned subsidiary and parent corporation — Wholly-owned subsidiary and parent corporation declaring bankruptcy — Parent corporation's directors sued by trustee of wholly-owned subsidiary — Trustee claiming that certain transactions were reviewable — Whether consideration for impugned transactions conspicuously less than fair market value — Whether directors "privy" to transactions — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 100.

Wise Stores Inc. ("Wise") acquired Peoples Department Stores Inc. ("Peoples") from Marks and Spencer Canada Inc. ("M & S"). L.W., R.W. and H.W. (the "Wise brothers") were majority shareholders, officers and directors of Wise, and the only directors of Peoples. Because of covenants imposed by M & S, Peoples could not be merged with Wise until the purchase price had been paid. Almost from the outset, the joint operation of Wise and Peoples did not function smoothly.

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Parallel bookkeeping, combined with shared warehousing arrangements, caused serious problems for both companies. As a result, their inventory records were increasingly incorrect. The situation, already unsustainable, was worsening. L.W. consulted the vice-president of administration and finance of both Wise and Peoples in an attempt to find a solution. On his recommendation, the Wise brothers agreed to implement a joint inventory procurement policy whereby the two firms would divide responsibility for purchasing. Peoples would make all purchases from North American suppliers and Wise would, in turn, make all purchases from overseas suppliers. Peoples would then transfer to Wise what it had purchased for Wise, charging Wise accordingly, and vice versa. The new policy was implemented on February 1, 1994. **Before the end of the year, both Wise and Peoples declared bankruptcy. Peoples' trustee filed a petition against the Wise brothers. The trustee claimed that they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors, in breach of their duties as directors under s. 122(1) of the Canada Business Corporations Act ("CBCA"). In the alternative, the trustee claimed that the Wise brothers had in the year preceding the bankruptcy been privy to transactions in which Peoples' assets had been transferred to Wise for conspicuously less than fair market value within the meaning of s. 100 of the Bankruptcy and Insolvency Act ("BIA"). The trial judge found the Wise brothers liable on both grounds. The Court of Appeal set aside the trial judge's decision.**
Held: The appeal should be dismissed. The Wise brothers did not breach their duties under s. 122(1) of the CBCA, **nor were the impugned transactions in violation of s. 100 of the BIA.**

The fiduciary duty under s. 122(1)(a) of the CBCA requires directors and officers to act in good faith and honestly vis-à-vis the corporation. Here, the trial judge found that there was no fraud or dishonesty in the Wise brothers' attempts to solve the mounting inventory problems of Peoples and Wise. The Wise brothers considered the serious inventory management problem and implemented a joint inventory procurement policy they hoped would solve it. In the absence of evidence of a personal interest or improper purpose in the new policy, and in light of the evidence of a desire to make both Wise and Peoples "better" corporations, the directors did not breach their fiduciary duty under s. 122(1)(a). An honest and good faith attempt to redress a corporation's financial problems does not, if unsuccessful, qualify as such a breach. The fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". At all times, they owe their fiduciary obligations to the corporation, and the corporations' interests are not to be confused with the interests of the creditors or those of any other stakeholder. There is no need to read the interests of creditors into the fiduciary duty set out in s. 122(1)(a) in light of the availability under the CBCA both of the oppression remedy (s. 241(2)(c)) and of an action based on the duty of care (s. 122(1)(b)).

Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis. The standard of care is an objective one. The decisions of directors and officers must be reasonable business decisions in light of all the circumstances, including the prevailing socio-economic conditions, about which they knew or ought to have known. While courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are often involved in corporate decision-making, they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision. In this case, in adopting the joint inventory procurement policy, the directors did not breach their duty of care in respect of Peoples' creditors. The implementation of the new policy was a reasonable business decision made with a view to rectifying a serious and urgent business problem in circumstances in which no solution may have been possible. The trial judge's conclusion that the new policy led inexorably to Peoples' failure and bankruptcy was factually incorrect and constituted a palpable and overriding error. Many factors other than the new policy contributed more directly to Peoples' bankruptcy.
Section 44(2) of the CBCA as it then read (the provision has since been repealed) cannot exempt directors and officers from potential liability under s. 122(1) for any financial assistance given by subsidiaries to the parent corporation. Nor can the Wise brothers successfully invoke good faith reliance on the opinion of the vice-president of administration and finance under s. 123(4)(b) of the CBCA. As a non-professional employee, the vice-president did not belong to any of the professional groups named in s. 123(4)(b). He was not an accountant, was not subject to the regulatory overview of any professional organization and did not carry independent insurance coverage for professional negligence.
The trustee's claim under s. 100 of the BIA must fail. The relevant transactions are those spanning the period from February to December 1994 when the new procurement policy was in effect. **With regard to all the circumstances of this case, a disparity of slightly more than six percent between fair market value and the consideration received does not constitute a conspicuous difference.**

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While, in light of this conclusion, there is no need to consider whether the Wise brothers would have been "privy" to the transactions, the disagreement between the trial judge and the Court of Appeal on the interpretation of "privy" in s. 100(2) of the BIA warrants the following comments. Since the provision's remedial purpose is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person, the word "privy" should be given a broad reading to include those who benefit directly or indirectly from, and have knowledge of, a transaction occurring for less than fair market value. This rationale is particularly apt when those who benefit are the controlling minds behind the transaction.

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Applied: 373409 Alberta Ltd. (Receiver of) v. Bank of Montreal, 2002 SCC 81 (CanLII), [2002] 4 S.C.R. 312, 2002 SCC 81; approved: Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd. reflex, (1986), 59 O.R. (2d) 254; Standard Trustco Ltd. (Trustee of) v. Standard Trust Co. 1995 CanLII 3508 (ON CA), (1995), 26 O.R. (3d) 1; referred to: Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame, [1906] 2 Ch. 34; K.L.B. v. British Columbia, 2003 SCC 51 (CanLII), [2003] 2 S.C.R. 403, 2003 SCC 51; Canadian Aero Service Ltd. v. O'Malley, 1973 CanLII 23 (SCC), [1974] S.C.R. 592; 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123, aff'd reflex, (1991), 3 B.L.R. (2d) 113; Teck Corp. v. Millar (1972), 33 D.L.R. (3d) 288; Brasserie Labatt ltée v. Lanoue, [1999] Q.J. No. 1108 (QL); Regent Taxi & Transport Co. v. Congrégation des Petits Frères de Marie, 1929 CanLII 95 (SCC), [1929] S.C.R. 650, rev'd [1932] 2 D.L.R. 70; Lister v. McAnulty, 1944 CanLII 50 (SCC), [1944] S.C.R. 317; Hôpital Notre-Dame de l'Espérance v. Laurent, 1977 CanLII 8 (SCC), [1978] 1 S.C.R. 605; Dovey v. Cory, [1901] A.C. 477; In re Brazilian Rubber Plantations and Estates, Ltd., [1911] 1 Ch. 425; In re City Equitable Fire Insurance Co., [1925] 1 Ch. 407; Soper v. Canada, 1997 CanLII 6352 (FCA), [1998] 1 F.C. 124; Maple Leaf Foods Inc. v. Schneider Corp. 1998 CanLII 5121 (ON CA), (1998), 42 O.R. (3d) 177; Skalbania (Trustee of) v. Wedgewood Village Estates Ltd. 1989 CanLII 2747 (BC CA), (1989), 37 B.C.L.R. (2d) 88.

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APPEAL from a judgment of the Quebec Court of Appeal, 2003 CanLII 47928 (QC CA), [2003] R.J.Q. 796, 224 D.L.R. (4th) 509, 41 C.B.R. (4th) 225, [2003] Q.J. No. 505 (QL), setting aside a decision of the Superior Court (1998), 23 C.B.R. (4th) 200, [1998] Q.J. No. 3571 (QL). Appeal dismissed.

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Gerald F. Kandestin, Gordon Kugler and Gordon Levine, for the appellant.
Éric Lalanne and Martin Tétreault, for the respondents Lionel Wise, Ralph Wise and Harold Wise.
Ian Rose and Odette Jobin-Laberge, for the respondent Chubb Insurance Company of Canada.
The judgment of the Court was delivered by
Major and Deschamps JJ. —

I. Introduction

1 The principal question raised by this appeal is whether directors of a corporation owe a fiduciary duty to the corporation's creditors comparable to the statutory duty owed to the corporation. For the reasons that follow, we conclude that directors owe a duty of care to creditors, but that duty does not rise to a fiduciary duty. We agree with the disposition of the Quebec Court of Appeal. The appeal is therefore dismissed.

2 As a result of the demise in the mid-1990s of two major retail chains in eastern Canada, Wise Stores Inc. ("Wise") and its wholly-owned subsidiary, Peoples Department Stores Inc. ("Peoples"), the indebtedness of a number of Peoples' creditors went unsatisfied. In the wake of the failure of the two chains, Caron Bélanger Ernst & Young Inc., Peoples' trustee in bankruptcy ("trustee"), brought an action against the directors of Peoples. To address the trustee's claims, the extent of the duties imposed by s. 122(1) of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA"), upon directors with respect to creditors must be determined; we must also identify the purpose and reach of s. 100 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA").

3 In our view, it has not been established that the directors of Peoples violated either the fiduciary duty or the duty of care imposed by s. 122(1) of the CBCA. As for the trustee's submission regarding s. 100 of the BIA, we agree with the Court of Appeal that the consideration received in the impugned transactions was not "conspicuously" less than fair market value. The BIA claim fails on that basis.

II. Background

4 Wise was founded by Alex Wise in 1930 as a small clothing store on St-Hubert Street in Montreal. By 1992, through expansion effected by a mix of internal growth and acquisitions, it had become an enterprise operating at 50 locations with annual sales of approximately $100 million, and it had been listed on the Montreal Stock Exchange in 1986. The stores were, for the most part, located in urban areas in Quebec. The founder's three sons, Lionel, Ralph and Harold Wise ("Wise brothers"), were majority shareholders, officers, and directors of Wise. Together, they controlled 75 percent of the firm's equity.

5 In 1992, Peoples had been in business continuously in one form or another for 78 years. It had operated as an unincorporated division of Marks & Spencer Canada Inc. ("M & S") until 1991, when it was incorporated as a separate company. M & S itself was wholly owned by the large British firm, Marks & Spencer plc. ("M & S plc."). Peoples' 81 stores were generally located in rural areas, from Ontario to Newfoundland. Peoples had annual sales of about $160 million, but was struggling financially. Its annual losses were in the neighbourhood of $10 million.

6 Wise and Peoples competed with other chains such as Canadian Tire, Greenberg, Hart, K-Mart, M-Stores, Metropolitan Stores, Rossy, Woolco and Zellers. Retail competition in eastern Canada was intense in the early 1990s. In 1992, M-Stores went bankrupt. In 1994, Greenberg and Metropolitan Stores followed M-Stores into bankruptcy. The 1994 entry of Wal-Mart into the Canadian market, with its acquisition of over 100 Woolco stores from Woolworth Canada Inc., exerted significant additional competitive pressure on retail stores.

7 Lionel Wise, the eldest of the three brothers and Wise's executive vice-president, had expressed an interest in acquiring the ailing Peoples chain from M & S as early as 1988. Initially, M & S did not share Wise's interest for the sale, but by late 1991, M & S plc., the British parent company of M & S, had decided to divest itself of all its Canadian operations. At this point, M & S incorporated each of its three Canadian divisions to facilitate the anticipated divestiture thereof.

8 The new-found desire to sell coincided with Wise's previously expressed interest in acquiring its larger rival. Although M & S had initially hoped to sell Peoples for cash to a large firm in a solid financial condition, it was unable to do so. Consequently, negotiations got underway with representatives of Wise. A formal share purchase agreement was drawn up in early 1992 and executed in June 1992, with July 16, 1992 as its closing date.

9 Wise incorporated a company, 2798832 Canada Inc., for the purpose of acquiring all of the issued and outstanding shares of Peoples from M & S. The $27- million share acquisition proceeded as a fully leveraged buyout. The portion of the purchase price attributable to inventory was discounted by 30 percent. The discount was designed to inject equity into Peoples in the fiscal year following the sale and to make use of some of the tax losses that had accumulated in prior years.

10 The amount of the down payment due to M & S at closing, $5 million, was borrowed from the Toronto Dominion Bank ("TD Bank"). According to the terms of the share purchase agreement, the $22-million balance of

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the purchase price would be carried by M & S and would be repaid over a period of eight years. Wise guaranteed all of 2798832 Canada Inc.'s obligations pursuant to the terms of the share purchase agreement.

11 To protect its interests, M & S took the assets of Peoples as security (subject to a priority in favour of the TD Bank) and negotiated strict covenants concerning the financial management and operation of the company. Among other requirements, 2798832 Canada Inc. and Wise were obligated to maintain specific financial ratios, and Peoples was not permitted to provide financial assistance to Wise. In addition, the agreement provided that Peoples could not be amalgamated with Wise until the purchase price had been paid. This prohibition was presumably intended to induce Wise to refinance and pay the remainder of the purchase price as early as possible in order to overcome the strict conditions imposed upon it under the share purchase agreement.

12 On January 31, 1993, 2798832 Canada Inc. was amalgamated with Peoples. The new entity retained Peoples' corporate name. Since 2798832 Canada Inc. had been a wholly-owned subsidiary of Wise, upon amalgamation the new Peoples became a subsidiary directly owned and controlled by Wise. The three Wise brothers were Peoples' only directors.

13 Following the acquisition, Wise had attempted to rationalize its operations by consolidating the overlapping corporate functions of Wise and Peoples, and operating as a group. The consolidation of the administration, accounting, advertising and purchasing departments of the two corporations was completed by the fall of 1993. As a consequence of the changes, many of Wise's employees worked for both firms but were paid solely by Wise. The evidence at trial was that because of the tax losses carried-forward by Peoples, it was advantageous for the group to have more expenses incurred by Wise, which, if the group was profitable as a whole, would increase its after-tax profits. Almost from the outset, the joint operation of Wise and Peoples did not function smoothly. Instead of the expected synergies, the consolidation resulted in dissonance.

14 After the acquisition, the total number of buyers for the two companies was nearly halved. The procurement policy at that point required buyers to deal simultaneously with suppliers on behalf of both Peoples and Wise. For the buyers, this nearly doubled their administrative work. Separate invoices were required for purchases made on behalf of Wise and Peoples. These invoices had to be separately entered into the system, tracked and paid.

15 Inventory, too, was separately recorded and tracked in the system. However, the inventory of each company was handled and stored, often unsegregated, in shared warehouse facilities. The main warehouse for Peoples, on Cousens Street in Ville St-Laurent, was maintained for and used by both firms. The Cousens warehouse saw considerable activity, as it was the central distribution hub for both chains. The facility was open 18 hours a day and employed 150 people on two shifts who handled a total of approximately 30,000 cartons daily through 20 loading docks. It was abuzz with activity.

16 Before long, the parallel bookkeeping combined with the shared warehousing arrangements caused serious problems for both Wise and Peoples. The actual situation in the warehouse often did not mirror the reported state of the inventory in the system. The goods of one company were often inextricably commingled and confused with the goods of the other. As a result, the inventory records of both companies were increasingly incorrect. A physical inventory count was conducted to try to rectify the situation, to little avail. Both Wise and Peoples stores experienced numerous shipping disruptions and delays. The situation, already unsustainable, was worsening.

17 In October 1993, Lionel Wise consulted David Clément, Wise's (and, after the acquisition, Peoples') vice-president of administration and finance, in an attempt to find a solution. In January 1994, Clément recommended and the three Wise brothers agreed that they would implement a joint inventory procurement policy ("new policy") whereby the two firms would divide responsibility for purchasing. Peoples would make all purchases from North American suppliers and Wise would, in turn, make all purchases from overseas suppliers. Peoples would then transfer to Wise what it had purchased for Wise, charging Wise accordingly, and vice versa. The new policy was implemented on February 1, 1994. It was this arrangement that was later criticized by certain creditors and by the trial judge.

18 Approximately 82 percent of the total inventory of Wise and Peoples was purchased from North American suppliers, which inevitably meant that Peoples would be extending a significant trade credit to Wise. The new policy was known to the directors, but was neither formally implemented in writing nor approved by a board meeting or resolution.

19 On April 27, 1994, Lionel Wise outlined the details of the new policy at a meeting of Wise's audit committee. A partner of Coopers & Lybrand was M & S's representative on Wise's board of directors and a member of the audit committee. He attended the April 27th meeting and raised no objection to the new policy when it was introduced.

20 By June 1994, financial statements prepared to reflect the financial position of Peoples as of April 30, 1994 revealed that Wise owed more than $18 million to Peoples. Approximately $14 million of this amount resulted from a notional transfer of inventory that was cancelled following the period's end. M & S was concerned about the situation and started an investigation, as a result of which M & S insisted that the new procurement policy be rescinded.

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Wise agreed to M & S's demand but took the position that the former procurement policy could not be reinstated immediately. An agreement was executed on September 27, 1994, effective July 21, 1994, and it provided that the new policy would be abandoned as of January 31, 1995. The agreement also specified that the inventory and records of the two companies would be kept separate, and that the amount owed to Peoples by Wise would not exceed $3 million.

21 Another result of the negotiations was that M & S accepted an increase in the amount of the TD Bank's priority to $15 million and a new repayment schedule for the balance of the purchase price owed to M & S. The parties agreed to revise the schedule to provide for 37 monthly payments beginning in July 1995. Each of the Wise brothers also provided a personal guarantee of $500,000 in favour of M & S.

22 In September 1994, in light of the fragile financial condition of the companies and the competitiveness of the retail market, the TD Bank announced its intention to cease doing business with Wise and Peoples as of the end of December 1994. Following negotiations, however, the bank extended its financial support until the end of July 1995. The Wise brothers promised to extend personal guarantees in favour of the TD Bank, but this did not occur.

23 In December 1994, three days after the Wise brothers presented financial statements showing disappointing results for Peoples in its third fiscal quarter, M & S initiated bankruptcy proceedings against both Wise and Peoples. A notice of intention to make a proposal was filed on behalf of Peoples the same day. Nonetheless, Peoples later consented to the petition by M & S, and both Wise and Peoples were declared bankrupt on January 13, 1995, effective December 9, 1994. The same day, M & S released each of the Wise brothers from their personal guarantees. M & S apparently preferred to proceed with an uncontested petition in bankruptcy rather than attempting to collect on the personal guarantees.

24 The assets of Wise and Peoples were sufficient to cover in full the outstanding debt owed to the TD Bank, satisfy the entire balance of the purchase price owed to M & S, and discharge almost all the landlords' lease claims. The bulk of the unsatisfied claims were those of trade creditors.

25 Following the bankruptcy, Peoples' trustee filed a petition against the Wise brothers. In the petition, the trustee claimed that they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors, in breach of their duties as directors under s. 122(1) of the CBCA. The trustee also claimed that the Wise brothers had, in the year preceding the bankruptcy, been privy to transactions in which property had been transferred for conspicuously less than fair market value within the meaning of s. 100 of the BIA.

26 Pursuant to art. 2501 of the Civil Code of Québec, S.Q. 1991, c. 64 ("C.C.Q."), the trustee named Chubb Insurance Company of Canada ("Chubb"), which had provided directors' insurance to Wise and its subsidiaries, as a defendant in addition to the Wise brothers.

27 The trial judge, Greenberg J., relying on decisions from the United Kingdom, Australia and New Zealand, held that the fiduciary duty and the duty of care under s. 122(1) of the CBCA extend to a company's creditors when a company is insolvent or in the vicinity of insolvency. Greenberg J. found that the implementation, by the Wise brothers qua directors of Peoples, of a corporate policy that affected both companies, had occurred while the corporation was in the vicinity of insolvency and was detrimental to the interests of the creditors of Peoples. The Wise brothers were therefore found liable and the trustee was awarded $4.44 million in damages. As Chubb had provided insurance coverage for directors, it was also held liable. Greenberg J. also considered the alternative grounds under the BIA advanced by the trustee and found the Wise brothers liable for the same $4.44 million amount on that ground as well. All the parties appealed.

28 The Quebec Court of Appeal, per Pelletier J.A., with Robert C.J.Q. and Nuss J.A. concurring, allowed the appeals by Chubb and the Wise brothers: 2003 CanLII 47928 (QC CA), [2003] R.J.Q. 796, [2003] Q.J. No. 505 (QL). The Court of Appeal expressed reluctance to follow Greenberg J. in equating the interests of creditors with the best interests of the corporation when the corporation was insolvent or in the vicinity of insolvency, stating that an innovation in the law such as this is a policy matter more appropriately dealt with by Parliament than the courts. In considering the trustee's claim under s. 100 of the BIA, Pelletier J.A. held that the trial judge had committed a palpable and overriding error in concluding that the amounts owed by Wise to Peoples in respect of inventory "were neither collected nor collectible" (para. 125 QL). He found that the consideration received for the transactions had been approximately 94 percent of fair market value, and he was not convinced that this disparity could be characterized as being "conspicuously" less than fair market value. Moreover, he did not accept the broad meaning the trial judge gave to the word "privy". Pelletier J.A. declined to exercise his discretion under s. 100(2) of the BIA to make an order in favour of the trustee. In view of his conclusion that the Wise brothers were not liable, Pelletier J.A. allowed the appeal with respect to Chubb.

III. Analysis

29 At the outset, it should be acknowledged that according to art. 300 C.C.Q. and s. 8.1 of the Interpretation Act, R.S.C. 1985, c. I-21, the civil law serves as a supplementary source of law to federal legislation such as

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the CBCA. Since the CBCA does not entitle creditors to sue directors directly for breach of their duties, it is appropriate to have recourse to the C.C.Q. to determine how rights grounded in a federal statute should be addressed in Quebec, and more specifically how s. 122(1) of the CBCA can be harmonized with the principles of civil liability: see R. Crête and S. Rousseau, Droit des sociétés par actions: principes fondamentaux (2002), at p. 58.

30 This case came before our Court on the issue of whether directors owe a duty to creditors. The creditors did not bring a derivative action or an oppression remedy application under the CBCA. Instead, the trustee, representing the interests of the creditors, sued the directors for an alleged breach of the duties imposed by s. 122(1) of the CBCA. The standing of the trustee to sue was not questioned.

31 The primary role of directors is described in s. 102(1) of the CBCA:

102. (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

As for officers, s. 121 of the CBCA provides that their powers are delegated to them by the directors:

121. Subject to the articles, the by-laws or any unanimous shareholder agreement,

(a) the directors may designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in subsection 115(3);

(b) a director may be appointed to any office of the corporation; and

(c) two or more offices of the corporation may be held by the same person.

Although the shareholders are commonly said to own the corporation, in the absence of a unanimous shareholder agreement to the contrary, s. 102 of the CBCA provides that it is not the shareholders, but the directors elected by the shareholders, who are responsible for managing it. This clear demarcation between the respective roles of shareholders and directors long predates the 1975 enactment of the CBCA: see Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame, [1906] 2 Ch. 34 (C.A.); see also art. 311 C.C.Q.

32 Section 122(1) of the CBCA establishes two distinct duties to be discharged by directors and officers in managing, or supervising the management of, the corporation:

122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The first duty has been referred to in this case as the "fiduciary duty". It is better described as the "duty of loyalty". We will use the expression "statutory fiduciary duty" for purposes of clarity when referring to the duty under the CBCA. This duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the "duty of care". Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs.

33 The trial judge did not apply or consider separately the two duties imposed on directors by s. 122(1). As the Court of Appeal observed, the trial judge appears to have confused the two duties. They are, in fact, distinct and are designed to secure different ends. For that reason, they will be addressed separately in these reasons.

A. The Statutory Fiduciary Duty: Section 122(1)(a) of the CBCA

34 Considerable power over the deployment and management of financial, human, and material resources is vested in the directors and officers of corporations. For the directors of CBCA corporations, this power originates in s. 102 of the Act. For officers, this power comes from the powers delegated to them by the directors. In deciding to invest in, lend to or otherwise deal with a corporation, shareholders and creditors transfer control over their assets to the corporation, and hence to the directors and officers, in the expectation that the directors and officers will use the corporation's resources to make reasonable business decisions that are to the corporation's advantage.

35 The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K. P. McGuinness, The Law and Practice of Canadian Business Corporations (1999), at p. 715.

36 The common law concept of fiduciary duty was considered in K.L.B. v. British Columbia, 2003 SCC 51 (CanLII), [2003] 2 S.C.R. 403, 2003 SCC 51. In that case, which involved the relationship between the government and foster children, a majority of this Court agreed with McLachlin C.J. who stated, at paras. 40-41 and 49:

Fiduciary duties arise in a number of different contexts, including express trusts, relationships marked by discretionary power and trust, and the special responsibilities of the Crown in dealing with aboriginal interests. . . .

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What . . . might the content of the fiduciary duty be if it is understood . . . as a private law duty arising simply from the relationship of discretionary power and trust between the Superintendent and the foster children? In Lac Minerals Ltd. v. International Corona Resources Ltd., 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574, at pp. 646-47, La Forest J. noted that there are certain common threads running through fiduciary duties that arise from relationships marked by discretionary power and trust, such as loyalty and "the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary". However, he also noted that "[t]he obligation imposed may vary in its specific substance depending on the relationship" (p. 646). . . .

. . .

. . . concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in M. (K.) v. M. (H.), supra, at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust. . . . The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty — of putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense. [Emphasis added.]

37 The issue to be considered here is the "specific substance" of the fiduciary duty based on the relationship of directors to corporations under the CBCA.

38 It is settled law that the fiduciary duty owed by directors and officers imposes strict obligations: see Canadian Aero Service Ltd. v. O'Malley, 1973 CanLII 23 (SCC), [1974] S.C.R. 592, at pp. 609-10, per Laskin J. (as he then was), where it was decided that directors and officers may even have to account to the corporation for profits they make that do not come at the corporation's expense:

The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of Phipps v. Boardman [[1967] 2 A.C. 46], which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is Industrial Development Consultants Ltd. v. Cooley [[1972] 2 All E.R. 162], a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention. [Emphasis added.]

A compelling argument for making directors accountable for profits made as a result of their position, though not at the corporation's expense, is presented by J. Brock, "The Propriety of Profitmaking: Fiduciary Duty and Unjust Enrichment" (2000), 58 U.T. Fac. L. Rev. 185, at pp. 204-5.

39 However, it is not required that directors and officers in all cases avoid personal gain as a direct or indirect result of their honest and good faith supervision or management of the corporation. In many cases the interests of directors and officers will innocently and genuinely coincide with those of the corporation. If directors and officers are also shareholders, as is often the case, their lot will automatically improve as the corporation's financial condition improves. Another example is the compensation that directors and officers usually draw from the corporations they serve. This benefit, though paid by the corporation, does not, if reasonable, ordinarily place them in breach of their fiduciary duty. Therefore, all the circumstances may be scrutinized to determine whether the directors and officers have acted honestly and in good faith with a view to the best interests of the corporation.

40 In our opinion, the trial judge's determination that there was no fraud or dishonesty in the Wise brothers' attempts to solve the mounting inventory problems of Peoples and Wise stands in the way of a finding that they breached their fiduciary duty. Greenberg J. stated:

We hasten to add that in the present case, the Wise Brothers derived no direct personal benefit from the new domestic inventory procurement policy, albeit that, as the controlling shareholders of Wise Stores, there was an indirect benefit to

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them. Moreover, as was conceded by the other parties herein, in deciding to implement the new domestic inventory procurement policy, there was no dishonesty or fraud on their part.
((1998), 23 C.B.R. (4th) 200, at para. 183)
The Court of Appeal relied heavily on this finding by the trial judge, as do we. At para. 83 QL, Pelletier J.A. stated that:
[translation] In regard to fiduciary duty, I would like to point out that the brothers were driven solely by the wish to resolve the problem of inventory procurement affecting both the operations of Peoples Inc. and those of Wise. [This is a] motivation that is in line with the pursuit of the interests of the corporation within the meaning of paragraph 122(1)(a) C.B.C.A. and that does not expose them to any justified criticism.
41 As explained above, there is no doubt that both Peoples and Wise were struggling with a serious inventory management problem. The Wise brothers considered the problem and implemented a policy they hoped would solve it. In the absence of evidence of a personal interest or improper purpose in the new policy, and in light of the evidence of a desire to make both Wise and Peoples "better" corporations, we find that the directors did not breach their fiduciary duty under s. 122(1)(a) of the CBCA. See 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123 (Ont. Ct. (Gen. Div.)) (aff'd reflex, (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.)), in which Farley J., at p. 171, correctly observes that in resolving a conflict between majority and minority shareholders, it is safe for directors and officers to act to make the corporation a "better corporation".
42 This appeal does not relate to the non-statutory duty directors owe to shareholders. It is concerned only with the statutory duties owed under the CBCA. Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation: see E. M. Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003), 39 Can. Bus. L.J. 398, at pp. 400-1. However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation. For example, in Teck Corp. v. Millar (1972), 33 D.L.R. (3d) 288 (B.C.S.C.), Berger J. stated, at p. 314:
A classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.
I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company's shareholders in order to confer a benefit on its employees: Parke v. Daily News Ltd., [1962] Ch. 927. But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.

The case of Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd. reflex, (1986), 59 O.R. (2d) 254 (Div. Ct.), approved, at p. 271, the decision in Teck, supra. We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.
43 The various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(a) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders.
44 The interests of shareholders, those of the creditors and those of the corporation may and will be consistent with each other if the corporation is profitable and well capitalized and has strong prospects. However, this can change if the corporation starts to struggle financially. The residual rights of the shareholders will generally become worthless if a corporation is declared bankrupt. Upon bankruptcy, the directors of the corporation transfer control to a trustee, who administers the corporation's assets for the benefit of creditors.
45 Short of bankruptcy, as the corporation approaches what has been described as the "vicinity of insolvency", the residual claims of shareholders will be nearly exhausted. While shareholders might well prefer that the directors pursue high-risk alternatives with a high potential payoff to maximize the shareholders' expected residual claim, creditors in the same circumstances might prefer that the directors steer a safer course so as to maximize the value of their claims against the assets of the corporation.
46 The directors' fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". That phrase has not been defined; moreover, it is incapable of definition and has no legal meaning. What it

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is obviously intended to convey is a deterioration in the corporation's financial stability. In assessing the actions of directors it is evident that any honest and good faith attempt to redress the corporation's financial problems will, if successful, both retain value for shareholders and improve the position of creditors. If unsuccessful, it will not qualify as a breach of the statutory fiduciary duty.

47 For a discussion of the shifting interests and incentives of shareholders and creditors, see W. D. Gray, "Peoples v. Wise and Dylex: Identifying Stakeholder Interests upon or near Corporate Insolvency — Stasis or Pragmatism?" (2003), 39 Can. Bus. L.J. 242, at p. 257; E. M. Iacobucci and K. E. Davis, "Reconciling Derivative Claims and the Oppression Remedy" (2000), 12 S.C.L.R. (2d) 87, at p. 114. In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders. If the stakeholders cannot avail themselves of the statutory fiduciary duty (the duty of loyalty, supra) to sue the directors for failing to take care of their interests, they have other means at their disposal.

48 The Canadian legal landscape with respect to stakeholders is unique. Creditors are only one set of stakeholders, but their interests are protected in a number of ways. Some are specific, as in the case of amalgamation: s. 185 of the CBCA. Others cover a broad range of situations. The oppression remedy of s. 241(2)(c) of the CBCA and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction: see D. Thomson, "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000), 58 U.T. Fac. L. Rev. 31, at p. 48. One commentator describes the oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world": S. M. Beck, "Minority Shareholders' Rights in the 1980s", in Corporate Law in the 80s (1982), 311, at p. 312. While Beck was concerned with shareholder remedies, his observation applies equally to those of creditors.

49 The fact that creditors' interests increase in relevancy as a corporation's finances deteriorate is apt to be relevant to, inter alia, the exercise of discretion by a court in granting standing to a party as a "complainant" under s. 238(d) of the CBCA as a "proper person" to bring a derivative action in the name of the corporation under ss. 239 and 240 of the CBCA, or to bring an oppression remedy claim under s. 241 of the CBCA.

50 Section 241(2)(c) authorizes a court to grant a remedy if

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer . . . .

A person applying for the oppression remedy must, in the court's opinion, fall within the definition of "complainant" found in s. 238 of the CBCA:

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
(b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
(c) the Director, or
(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

Creditors, who are not security holders within the meaning of para. (a), may therefore apply for the oppression remedy under para. (d) by asking a court to exercise its discretion and grant them status as a "complainant".

51 Section 241 of the CBCA provides a possible mechanism for creditors to protect their interests from the prejudicial conduct of directors. In our view, the availability of such a broad oppression remedy undermines any perceived need to extend the fiduciary duty imposed on directors by s. 122(1)(a) of the CBCA to include creditors.

52 The Court of Appeal, at paras. 98-99 QL, referred to 373409 Alberta Ltd. (Receiver of) v. Bank of Montreal, 2002 SCC 81 (CanLII), [2002] 4 S.C.R. 312, 2002 SCC 81, as an indication by this Court that the interests of creditors do not have any bearing on the assessment of the conduct of directors. However, the receiver in that case was representing the corporation's rights and not the creditors' rights; therefore, the case has no application in this appeal. 373409 Alberta involved an action taken by the receiver on behalf of the corporation against a bank for the tort of conversion. The sole shareholder, director and officer of 373409 Alberta Ltd., who was also the sole shareholder, director and officer of another corporation, Legacy Holdings Ltd., had deposited a cheque payable to 373409 Alberta Ltd. into the account of Legacy. While it was recognized, at para. 22, that the diversion of money from 373409 Alberta Ltd. to Legacy "may very well have been wrongful vis-à-vis [373409 Alberta Ltd.]'s creditors" (none of whom were involved in the action), no fraud had been committed against the corporation itself and the bank, acting on proper authority, had not wrongfully interfered with the cheque by carrying out the deposit instructions. The statutory duties of the directors were not at issue,

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nor were they considered, and no assessment of the creditors' rights was made. With respect, Pelletier J.A.'s broad reading of 373409 Alberta was misplaced.

53 In light of the availability both of the oppression remedy and of an action based on the duty of care, which will be discussed below, stakeholders have viable remedies at their disposal. There is no need to read the interests of creditors into the duty set out in s. 122(1)(a) of the CBCA. Moreover, in the circumstances of this case, the Wise brothers did not breach the statutory fiduciary duty owed to the corporation.

B. The Statutory Duty of Care: Section 122(1)(b) of the CBCA

54 As mentioned above, the CBCA does not provide for a direct remedy for creditors against directors for breach of their duties and the C.C.Q. is used as suppletive law.

55 In Quebec, directors have been held liable to creditors in respect of either contractual or extra-contractual obligations. Contractual liability arises where the director personally guarantees a contractual obligation of the company. Liability also arises where the director personally acts in a manner that triggers his or her extra-contractual liability. See P. Martel, "Le 'voile corporatif' — l'attitude des tribunaux face à l'article 317 du Code civil du Québec" (1998), 58 R. du B. 95, at pp. 135-36; Brasserie Labatt ltée v. Lanoue, [1999] Q.J. No. 1108 (QL) (C.A.), per Forget J.A., at para. 29. It is clear that the Wise brothers cannot be held contractually liable as they did not guarantee the debts at issue here. Extra-contractual liability is the remaining possibility.

56 To determine the applicability of extra-contractual liability in this appeal, it is necessary to refer to art. 1457 C.C.Q.:

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody. [Emphasis added.]

Three elements of art. 1457 C.C.Q. are relevant to the integration of the director's duty of care into the principles of extra-contractual liability: who has the duty ("every person"), to whom is the duty owed ("another") and what breach will trigger liability ("rules of conduct"). It is clear that directors and officers come within the expression "every person". It is equally clear that the word "another" can include the creditors. The reach of art. 1457 C.C.Q. is broad and it has been given an open and inclusive meaning. See Regent Taxi & Transport Co. v. Congrégation des Petits Frères de Marie, 1929 CanLII 95 (SCC), [1929] S.C.R. 650, per Anglin C.J., at p. 655 (rev'd on other grounds, [1932] 2 D.L.R. 70 (P.C.)):

. . . to narrow the prima facie scope of art. 1053 C.C. [now art. 1457] is highly dangerous and would necessarily result in most meritorious claims being rejected; many a wrong would be without a remedy.

This liberal interpretation was also affirmed and treated as settled by this Court in Lister v. McAnulty, 1944 CanLII 50 (SCC), [1944] S.C.R. 317, and Hôpital Notre-Dame de l'Espérance v. Laurent, 1977 CanLII 8 (SCC), [1978] 1 S.C.R. 605.

57 This interpretation can be harmoniously integrated with the wording of the CBCA. Indeed, unlike the statement of the fiduciary duty in s. 122(1)(a) of the CBCA, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1)(b) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Instead, it provides that "[e]very director and officer of a corporation in exercising their powers and discharging their duties shall . . . exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Thus, the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors. This result is clearly consistent with the civil law interpretation of the word "another". Therefore, if breach of the standard of care, causation and damages are established, creditors can resort to art. 1457 to have their rights vindicated. The only issue thus remaining is the determination of the "rules of conduct" likely to trigger extracontractual liability. On this issue, art. 1457 is explicit.

58 The first paragraph of art. 1457 does not set the standard of conduct. Instead, it incorporates by reference s. 122(1)(b) of the CBCA. The statutory duty of care is a "duty to abide by [a] rul[e] of conduct which lie[s] upon [them], according to the . . . law, so as not to cause injury to another". Thus, for the purpose of determining whether the Wise brothers can be held liable, only the CBCA is relevant. It is therefore necessary to outline the requirements of the duty of care embodied in s. 122(1)(b) of the CBCA.

59 That directors must satisfy a duty of care is a long-standing principle of the common law, although the duty of care has been reinforced by statute to become more demanding. Among the earliest English cases establishing the duty of care were Dovey v. Cory, [1901] A.C. 477 (H.L.); In re Brazilian Rubber Plantations and Estates, Ltd., [1911] 1 Ch. 425; and In re City Equitable Fire Insurance Co., [1925] 1 Ch. 407 (C.A.). In substance, these cases held that the standard of care was a reasonably relaxed, subjective standard. The common law required directors to

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avoid being grossly negligent with respect to the affairs of the corporation and judged them according to their own personal skills, knowledge, abilities and capacities. See McGuinness, supra, at p. 776: "Given the history of the case law in this area, and the prevailing standards of competence displayed in commerce generally, it is quite clear that directors were not expected at common law to have any particular business skill or judgment."

60 The 1971 report entitled Proposals for a New Business Corporations Law for Canada (1971) ("Dickerson Report") culminated the work of a committee headed by R. W. V. Dickerson which had been appointed by the federal government to study the need for new federal business corporations legislation. This report preceded the enactment of the CBCA by four years and influenced the eventual structure of the CBCA.

61 The standard recommended by the Dickerson Report was objective, requiring directors and officers to meet the standard of a "reasonably prudent person" (vol. II, at. p. 74):

9.19

(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall

. . .

(b) exercise the care, diligence and skill of a reasonably prudent person.

The report described how this proposed duty of care differed from the prevailing common law duty of care (vol. I, at p. 83):

242. The formulation of the duty of care, diligence and skill owed by directors represents an attempt to upgrade the standard presently required of them. The principal change here is that whereas at present the law seems to be that a director is only required to demonstrate the degree of care, skill and diligence that could reasonably be expected from him, having regard to his knowledge and experience — Re City Equitable Fire Insurance Co., [1925] Ch. 425 — under s. 9.19(1)(b) he is required to conform to the standard of a reasonably prudent man. Recent experience has demonstrated how low the prevailing legal standard of care for directors is, and we have sought to raise it significantly. We are aware of the argument that raising the standard of conduct for directors may deter people from accepting directorships. The truth of that argument has not been demonstrated and we think it is specious. The duty of care imposed by s. 9.19(1)(b) is exactly the same as that which the common law imposes on every professional person, for example, and there is no evidence that this has dried up the supply of lawyers, accountants, architects, surgeons or anyone else. It is in any event cold comfort to a shareholder to know that there is a steady supply of marginally competent people available under present law to manage his investment. [Emphasis added.]

62 The statutory duty of care in s. 122(1)(b) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care. It is clear that s. 122(1)(b) requires more of directors and officers than the traditional common law duty of care outlined in, for example, Re City Equitable Fire Insurance, supra.

63 The standard of care embodied in s. 122(1)(b) of the CBCA was described by Robertson J.A. of the Federal Court of Appeal in Soper v. Canada, 1997 CanLII 6352 (FCA), [1998] 1 F.C. 124, at para. 41, as being "objective subjective". Although that case concerned the interpretation of a provision of the Income Tax Act, it is relevant here because the language of the provision establishing the standard of care was identical to that of s. 122(1)(b) of the CBCA. With respect, we feel that Robertson J.A.'s characterization of the standard as an "objective subjective" one could lead to confusion. We prefer to describe it as an objective standard. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the s. 122(1)(b) duty of care, as opposed to the subjective motivation of the director or officer, which is the central focus of the statutory fiduciary duty of s. 122(1)(a) of the CBCA.

64 The contextual approach dictated by s.122(1)(b) of the CBCA not only emphasizes the primary facts but also permits prevailing socio-economic conditions to be taken into consideration. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions. The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care. However, even with good corporate governance rules, directors' decisions can still be open to criticism from outsiders. Canadian courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that

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becomes available ex post facto. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the "business judgment rule", adopting the American name for the rule.

65 In Maple Leaf Foods Inc. v. Schneider Corp. 1998 CanLII 5121 (ON CA), (1998), 42 O.R. (3d) 177, Weiler J.A. stated, at p. 192:

The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction. [Emphasis added; italics in original; references omitted.]

66 In order for a plaintiff to succeed in challenging a business decision he or she has to establish that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff: W. T. Allen, J. B. Jacobs and L. E. Strine, Jr., "Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law" (2001), 26 Del. J. Corp. L. 859, at p. 892.

67 Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

68 The trustee alleges that the Wise brothers breached their duty of care under s. 122(1)(b) of the CBCA by implementing the new procurement policy to the detriment of Peoples' creditors. After considering all the evidence, we agree with the Court of Appeal that the implementation of the new policy was a reasonable business decision that was made with a view to rectifying a serious and urgent business problem in circumstances in which no solution may have been possible. The trial judge's conclusion that the new policy led inexorably to Peoples' failure and bankruptcy was factually incorrect and constituted a palpable and overriding error.

69 In fact, as noted by Pelletier J.A., there were many factors other than the new policy that contributed more directly to Peoples' bankruptcy. Peoples had lost $10 million annually while being operated by M & S. Wise, which was only marginally profitable and solvent with annual sales of $100 million (versus $160 million for Peoples), had hoped to improve the performance of its new acquisition. Given that the transaction was a fully leveraged buyout, for Wise and Peoples to succeed, Peoples' performance needed to improve dramatically. Unfortunately for both Wise and Peoples, the retail market in eastern Canada had become very competitive in the early 1990s, and this trend continued with the arrival of Wal-Mart in 1994. At paras. 152 and 154 QL, Pelletier J.A. stated:

[translation] In reality, it was that particularly unfavourable financial situation in which the two corporations found themselves that caused their downfall, and it was M. & S. that, to protect its own interests, sounded the charge in December, rightly or wrongly judging that Peoples Inc.'s situation would only worsen over time. It is crystal-clear that the bankruptcy occurred at the most propitious time for M. & S.'s interests, when inventories were high and suppliers were unpaid. In fact, M. & S. recovered the entire balance due on the selling price and almost all of the other debts it was owed.

. . .

. . . the trial judge did not take into account the fact that the brothers derived no direct benefit from the transaction impugned, that they acted in good faith and that their true intention was to find a solution to the serious inventory management problem that each of the two corporations was facing. Because of an assessment error, he also ignored the fact that Peoples Inc. received a sizable consideration for the goods it delivered to Wise. Lastly, I note that the act for which the brothers were found liable, i.e. the adoption of a new joint inventory procurement policy, is not as serious as the trial judge made it out to be and that, in opposition to his view, the act was also not the true cause of the bankruptcy of Peoples Inc. [Emphasis added.]

70 The Wise brothers treated the implementation of the new policy as a decision made in the ordinary course of business and, while no formal agreement evidenced the arrangement, a monthly record was made of the

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inventory transfers. Although this may appear to be a loose business practice, by the autumn of 1993, Wise had already consolidated several aspects of the operations of the two companies. Legally they were two separate entities. However, the financial fate of the two companies had become intertwined. In these circumstances, there was little or no economic incentive for the Wise brothers to jeopardize the interests of Peoples in favour of the interests of Wise. In fact, given the tax losses that Peoples had carried forward, the companies had every incentive to keep Peoples profitable in order to reduce their combined tax liabilities.

71 Arguably, the Wise brothers could have been more precise in pursuing a resolution to the intractable inventory management problems, having regard to all the troublesome circumstances involved at the time the new policy was implemented. But we, like the Court of Appeal, are not satisfied that the adoption of the new policy breached the duty of care under s. 122(1)(b) of the CBCA. The directors cannot be held liable for a breach of their duty of care in respect of the creditors of Peoples.

72 The Court of Appeal relied on two additional provisions of the CBCA that in its view could rescue the Wise brothers from a finding that they breached the duty of care: ss. 44(2) and 123(4).

73 Section 44 of the CBCA, which was in force at the time of the impugned transactions but has since been repealed, permitted a wholly-owned subsidiary to give financial assistance to its holding body corporate:

44. (1) Subject to subsection (2), a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise

. . .

(2) A corporation may give financial assistance by means of a loan, guarantee or otherwise

. . .

(c) to a holding body corporate if the corporation is a wholly-owned subsidiary of the holding body corporate;

74 While s. 44(2) as it then read qualified the prohibition under s. 44(1), it did not serve to supplant the duties of the directors under s. 122(1) of the CBCA. The Court of Appeal erred in concluding that s. 44(2) served as a blanket legitimization of financial assistance given by wholly-owned subsidiaries to parent corporations. In our opinion, it is incumbent upon directors and officers to exercise their powers in conformity with the duties of s. 122(1).

75 Although s. 44(2) authorized certain forms of financial assistance between corporations, this cannot exempt directors and officers from potential liability under s. 122(1) for any financial assistance given by subsidiaries to the parent corporation.

76 When faced with the serious inventory management problem, the Wise brothers sought the advice of the vice-president of finance, David Clément. The Wise brothers claimed as an additional argument that in adopting the solution proposed by Clément, they were relying in good faith on the judgment of a person whose profession lent credibility to his statement, in accordance with the defence provided for in s. 123(4)(b) (now s. 123(5)) of the CBCA. The Court of Appeal accepted the argument. We disagree.

77 The reality that directors cannot be experts in all aspects of the corporations they manage or supervise shows the relevancy of a provision such as s. 123(4)(b). At the relevant time, the text of s. 123(4) read:

123. . . .

. . .

(4) A director is not liable under section 118, 119 or 122 if he relies in good faith on

(a) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or

(b) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

78 Although Clément did have a bachelor's degree in commerce and 15 years of experience in administration and finance with Wise, this experience does not correspond to the level of professionalism required to allow the directors to rely on his advice as a bar to a suit under the duty of care. The named professional groups in s. 123(4)(b) were lawyers, accountants, engineers, and appraisers. Clément was not an accountant, was not subject to the regulatory overview of any professional organization and did not carry independent insurance coverage for professional negligence. The title of vice-president of finance should not automatically lead to a conclusion that Clément was a person "whose profession lends credibility to a statement made by him". It is noteworthy that the word "profession" is used, not "position". Clément was simply a non-professional employee of Wise. His judgment on the appropriateness of the solution to the inventory management problem must be regarded in that light. Although we might accept for the sake of argument that Clément was better equipped and positioned than the Wise brothers to devise a plan to solve the inventory

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management problems, this is not enough. Therefore, in our opinion, the Wise brothers cannot successfully invoke the defence provided by s. 123(4)(b) of the CBCA but must rely on the other defences raised.

C. The Claim Under Section 100 of the BIA

79 The trustee also claimed against the Wise brothers under s. 100 of the BIA. That section reads:

100. (1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.

(2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.

80 The provision has two principal elements. First, subs. (1) requires the transaction to have been conducted within the year preceding the date of bankruptcy. Second, subs. (2) requires that the consideration given or received by the bankrupt be "conspicuously greater or less" than the fair market value of the property concerned.

81 The word "may" is found in both ss. 100(1) and 100(2) of the BIA with respect to the jurisdiction of the court. In Standard Trustco Ltd. (Trustee of) v. Standard Trust Co. 1995 CanLII 3508 (ON CA), (1995), 26 O.R. (3d) 1, a majority of the Ontario Court of Appeal held that, even if the necessary preconditions are present, the exercise of jurisdiction under s. 100(1) to inquire into the transaction, and under s. 100(2) to grant judgment, is discretionary. Equitable principles guide the exercise of discretion. We agree.

82 Referring to s. 100(2) of the BIA, in Standard Trustco, supra, at p. 23, Weiler J.A. explained that:

When a contextual approach is adopted it is apparent that although the conditions of the section have been satisfied the court is not obliged to grant judgment. The court has a residual discretion to exercise. The contextual approach indicates that the good faith of the parties, the intention with which the transaction took place, and whether fair value was given and received in the transaction are important considerations as to whether that discretion should be exercised.

We agree with Weiler J.A. and adopt her position; however, this appeal does not turn on the discretion to ultimately impose liability. In our view, the Court of Appeal did not interfere with the trial judge's exercise of discretion in reviewing the facts and finding a palpable and overriding error.

83 Within the year preceding the date of bankruptcy, Peoples had transferred inventory to Wise for which the trustee claimed Peoples had not received fair market value in consideration. The relevant transactions involved, for the most part, transfers completed in anticipation of the busy holiday season. Given the non-arm's length relationship between Wise and its wholly-owned subsidiary Peoples, there is no question that these inventory transfers could have constituted reviewable transactions.

84 We share the view of the Court of Appeal that it is not only the final transfers that should be considered. In fairness, the inventory transactions should be considered over the entire period from February to December 1994, which was the period when the new policy was in effect.

85 In Skalbania (Trustee of) v. Wedgewood Village Estates Ltd. 1989 CanLII 2747 (BC CA), (1989), 37 B.C.L.R. (2d) 88 (C.A.), the test for determining whether the difference in consideration is "conspicuously greater or less" was held to be not whether it is conspicuous to the parties at the time of the transaction, but whether it is conspicuous to the court having regard to all the relevant factors. This is a sound approach. In that case, a difference of $1.18 million between fair market value and the consideration received by the bankrupt was seen as conspicuous, where the fair market value was $6.6 million, leaving a discrepancy of more than 17 percent. While there is no particular percentage that definitively sets the threshold for a conspicuous difference, the percentage difference is a factor.

86 As for the factors that would be relevant to this determination, the court might consider, inter alia: evidence of the margin of error in valuing the types of assets in question; any appraisals made of the assets in question and evidence of the parties' honestly held beliefs regarding the value of the assets in question; and other circumstances adduced in evidence by the parties to explain the difference between the consideration received and fair market value: see L. W. Houlden and G. B. Morawetz, Bankruptcy and Insolvency Law of Canada (3rd ed. (loose-leaf)), vol. 2, at p. 4-114.1.

87 Over the lifespan of the new policy, Peoples transferred to Wise inventory valued at $71.54 million. As of the date of bankruptcy, it had received $59.50 million in property or money from Wise. As explained earlier, the trial judge adjusted the outstanding difference down to a balance of $4.44 million after taking into account, inter alia, the

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reallocation of general and administrative expenses, and adjustments necessitated by imported inventory transferred from Wise to Peoples. Neither party disputed these figures before this Court. We agree with the Court of Appeal's observation that these findings directly conflict with the trial judge's assertion that Peoples had received no consideration for the inventory transfers on the basis that the outstanding accounts were "neither collected nor collectible" from Wise. Like Pelletier J.A., we conclude that the trial judge's finding in this regard was a palpable and overriding error, and we adopt the view of the Court of Appeal.

88 We are not satisfied that, with regard to all the circumstances of this case, a disparity of slightly more than 6 percent between fair market value and the consideration received constitutes a "conspicuous" difference within the meaning of s. 100(2) of the BIA. Accordingly, we hold that the trustee's claim under the BIA also fails.

89 In addition to permitting the court to give judgment against the other party to the transaction, s. 100(2) of the BIA also permits it to give judgment against someone who was not a party but was "privy" to the transaction. Given our finding that the consideration for the impugned transactions was not "conspicuously less" than fair market value, there is no need to consider whether the Wise brothers would have been "privy" to the transaction for the purpose of holding them liable under s. 100(2). Nonetheless, the disagreement between the trial judge and the Court of Appeal on the interpretation of "privy" in s. 100(2) of the BIA warrants the following observations.

90 The trial judge in this appeal had little difficulty finding that the Wise brothers were privy to the transaction within the meaning of s. 100(2). Pelletier J.A., however, preferred a narrow construction in finding that the Wise brothers were not privy to the transactions. He held, at para. 135 QL, that:

[translation] . . . the legislator wanted to provide for the case in which a person other than the co-contracting party of the bankrupt actually received all or part of the benefit resulting from the lack of equality between the respective considerations.

To support this direct benefit requirement, Pelletier J.A. also referred to the French version which uses the term ayant intérêt. While he conceded that the respondent brothers received an indirect benefit from the inventory transfers as shareholders of Wise, Pelletier J.A. found this too remote to be considered "privy" to the transactions (paras. 139-40 QL).

91 The primary purpose of s. 100 of the BIA is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person. It makes sense to adopt a more inclusive understanding of the word "privy" to prevent someone who might receive indirect benefits to the detriment of a bankrupt's unsatisfied creditors from frustrating the provision's remedial purpose. The word "privy" should be given a broad reading to include those who benefit directly or indirectly from and have knowledge of a transaction occurring for less than fair market value. In our opinion, this rationale is particularly apt when those who benefit are the controlling minds behind the transaction.

92 A finding that a person was "privy" to a reviewable transaction does not of course necessarily mean that the court will exercise its discretion to make a remedial order against that person. For liability to be imposed, it must be established that the transaction occurred: (a) within the past year; (b) for consideration conspicuously greater or less than fair market value; (c) with the person's knowledge; and (d) in a way that directly or indirectly benefited the person. In addition, after having considered the context and all the above factors, the judge must conclude that the case is a proper one for holding the person liable. In light of these conditions and of the discretion exercised by the judge, we find that a broad reading of "privy" is appropriate.

IV. Disposition

93 For the foregoing reasons, we would dismiss the appeal with costs to the respondents.

Appeal dismissed with costs.

Solicitors for the appellant: Kugler Kandestin, Montréal.

Solicitors for the respondents Lionel Wise, Ralph Wise and Harold Wise: de Grandpré Chait, Montréal.

Solicitors for the respondent Chubb Insurance Company of Canada: Lavery, de Billy, Montréal.

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* Iacobucci J. took no part in the judgment.

Failure to comply with duties - Sec. 198(2)

(2) A bankrupt who, without reasonable cause, fails to comply with an order of the court made under section 68 or to do any of the things required of the bankrupt under section 158 is guilty of an offence and is liable

(a) on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

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R.S., 1985, c. B-3, s. 198;
1992, c. 27, s. 71;
1997, c. 12, s. 107;
2004, c. 25, s. 90(F).

Failure to disclose fact of being undischarged - Sec. 199
199. An undischarged bankrupt who

(a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or

(b) obtains credit to a total of $1,000 or more from any person or persons without informing them that the undischarged bankrupt is an undischarged bankrupt,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both.
R.S., 1985, c. B-3, s. 199;
1992, c. 27, s. 72;
2005, c. 47, s. 111.

Bankrupt failing to keep proper books of account - Sec. 200
200. (1) Any person becoming bankrupt or making a proposal who has on any previous occasion been bankrupt or made a proposal to the person's creditors is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, if

(a) being engaged in any trade or business, at any time within the period beginning on the day that is two years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, that person has not kept and preserved proper books of account; or

(b) within the period mentioned in paragraph (a), that person conceals, destroys, mutilates, falsifies or disposes of, or is privy to the concealment, destruction, mutilation, falsification or disposition of, any book or document affecting or relating to the person's property or affairs, unless the person had no intent to conceal the state of the person's affairs.

Proper books of account defined - Sec. 200(2)
(2) For the purposes of this section, a debtor shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual and other stock-takings.
R.S., 1985, c. B-3, s. 200;
1992, c. 27, s. 73;
1997, c. 12, s. 108;
2004, c. 25, s. 91(F).

False claim, etc. - Sec. 201

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201. (1) Where a creditor, or a person claiming to be a creditor, in any proceedings under this Act, wilfully and with intent to defraud makes any false claim or any proof, declaration or statement of account that is untrue in any material particular, the creditor or person is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

Inspectors accepting unlawful fee - Sec. 201(2)
(2) Where an inspector accepts from the bankrupt or from any person, firm or corporation acting on behalf of the bankrupt or from the trustee any fee, commission or emolument other than or in addition to the regular fees provided for by this Act, the inspector is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

Unlawful transactions - Sec. 201(3)
(3) Where the bankrupt enters into any transaction with any person for the purpose of obtaining a benefit or advantage to which either of them would not be entitled, the bankrupt is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.
R.S., 1985, c. B-3, s. 201;
1992, c. 27, s. 74.

Other offences - Sec. 202
202. (1) A person who

(a) not being a licensed trustee, does any act as, or represents himself to be, a licensed trustee,

(b) being a trustee, either before providing the security required by subsection 16(1) or after providing it but at any time while the security is not in force, acts as or exercises any of the powers of trustee,

(c) having been appointed a trustee, with intent to defraud, fails to observe or to comply with any of the provisions of this Act, or fails duly to do, observe or perform any act or duty that he may be ordered to do, observe or perform by the court pursuant to this Act,

(d) having been appointed a trustee, without reasonable excuse, fails to observe or to comply with any of the provisions of this Act, or fails duly to do, observe or perform any act or duty that he may be ordered to do, observe or perform by the court pursuant to this Act,

(e) having been appointed a trustee to any estate and another trustee having been appointed in his stead, does not deliver to the substituted trustee on demand all unadministered property of the estate, together with the books, records and documents of the estate and of his administration,

(f) directly or indirectly solicits or canvasses any person to make an assignment or a proposal under this Act, or to file an application for a bankruptcy order,

(g) being a trustee, directly or indirectly, solicits proxies to vote at a meeting of creditors, or

(h) being a trustee, makes any arrangement under any circumstances with the bankrupt, or any legal counsel, auctioneer or other person employed in connection with a bankruptcy, for any gift, remuneration or pecuniary or other consideration or benefit whatever beyond the remuneration payable out of the estate, or accepts any such consideration or benefit from any such person, or makes any arrangement for giving up, or gives up, any part of the

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remuneration, either as a receiver within the meaning of subsection 243(2) or trustee, to the bankrupt or any legal counsel, auctioneer or other person employed in connection with the bankruptcy,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

Offence and punishment - Sec. 202(2)

(2) A person who fails to comply with or contravenes any provision of section 10 is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

Idem - Sec. 202(2.1)

(2.1) Every person who contravenes or fails to comply with an order made under section 204.1

(a) is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both; or

(b) is guilty of an indictable offence and is liable to a fine not exceeding ten thousand dollars, or to imprisonment for a term not exceeding three years, or to both.

Exception - Sec. 202(3)

(3) Nothing in paragraph (1)(h) shall be construed to apply to a sharing of trustee's fees among persons who together act as the trustee of the estate of a bankrupt or as joint trustee to a proposal.

Idem - Sec. 202(4)

(4) Subject to this Act, every person who contravenes or fails to comply with a provision of this Act, of the General Rules or of the regulations is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year, or to both.

Witnesses failing to attend, etc. - Sec. 202(5)

(5) Every person who fails, without valid excuse, to comply with a subpoena, request or summons issued under subsection 14.02(1.1) is guilty of an offence punishable on summary conviction and liable to a fine of not more than $1,000.

R.S., 1985, c. B-3, s. 202;
1992, c. 27, s. 75;
2004, c. 25, s. 92;
2005, c. 47, s. 112.

Punishment for removal of bankrupt's property without notice - Sec. 203

203. A person, except the trustee, who, within thirty days after delivery to the trustee of the proof of claim mentioned in section 81, or who, in case no proof has been delivered, removes or attempts to remove the property or any part thereof mentioned in that section out of the charge or possession of the bankrupt, the trustee or other custodian of the property, except with the written permission of the trustee, is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding two years or to both.

R.S., c. B-3, s. 174.

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Acting while licence suspended or cancelled - Sec. 203.1
203.1 Any trustee who exercises any of the powers or performs any of the duties of a trustee while the trustee's licence has ceased to be valid for failure to pay licence fees, after the trustee's licence has been suspended or cancelled under subsection 13.2(5) or after having been informed pursuant to subsection 14.02(4) of the suspension or cancellation of the trustee's licence is guilty of an offence and is liable on summary conviction to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding two years, or to both.
1992, c. 27, s. 76;
1997, c. 12, s. 109.

Acting contrary to conditions or limitations - Sec. 203.2
203.2 Where the Superintendent has placed conditions or limitations on the licence of a trustee and the trustee exercises any of the powers of a trustee other than the powers that the trustee is authorized to exercise, the trustee is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding two years, or to both.
1992, c. 27, s. 76.

Officers, etc., of corporations - Sec. 204
204. If a corporation commits an offence under this Act, any officer or director, or agent or mandatary, of the corporation, or any person who has or has had, directly or indirectly, control in fact of the corporation, who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.
R.S., 1985, c. B-3, s. 204;
1992, c. 27, s. 77;
2004, c. 25, s. 93(E).

Community service - Sec. 204.1
204.1 Where a person has been convicted of an offence under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, and in addition to any other punishment that may be imposed under this Act, make an order directing the person to perform community service, subject to such reasonable conditions as may be specified in the order.
1992, c. 27, s. 77.

Variation of sanctions - Sec. 204.2
204.2 (1) Subject to subsection (2), where a court has made an order under section 204.1 in respect of a person, the court may, on application by the person or the Attorney General of Canada, require the person to appear before it and, after hearing the person or the Attorney General of Canada, as the case may be, may vary the order in one or any combination of the following ways that is applicable and that, in the opinion of the court, is desirable because of a change in the circumstances of the person since the order was made:

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(a) by making changes in the order or the conditions specified therein or extending the period for which the order is to remain in force for such period, not exceeding one year, as the court considers desirable; or
(b) by reducing the period for which the order is to remain in force or relieving the person, either absolutely or partially or for such period as the court considers desirable, of compliance with any condition that is specified in the order.

Notice - Sec. 204.2(2)
(2) Before varying an order under subsection (1), the court may direct that notice be given to such persons as the court considers to be interested, and may hear any such persons.

Limitation 204.2(3)
(3) Where an application made under subsection (1) in respect of a person has been heard by the court, no other application may be made with respect to the person except with leave of the court.
1992, c. 27, s. 77.

Compensation for loss - Sec. 204.3
204.3 (1) Where a person has been convicted of an offence under this Act and any other person has suffered loss or damage because of the commission of the offence, the court may, at the time sentence is imposed, order the person who has been convicted to pay to the person who has suffered loss or damage or to the trustee of the bankrupt an amount by way of satisfaction or compensation for loss of or damage to property suffered by that person as a result of the commission of the offence.

Enforceability of order - Sec. 204.3(2)
(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the person in favour of whom the order has been made may file the order in the superior court of the province in which the trial was held and that order is enforceable against the person who has been convicted in the same manner as if it were a judgment rendered against the person who has been convicted in that court in civil proceedings.
1992, c. 27, s. 77;
1997, c. 12, s. 110.

Report on offences to be made by trustee - Sec. 205
205. (1) Whenever an official receiver or trustee has grounds to believe that an offence under this Act or under any other statute, whether of Canada or a province, has been committed with respect to any bankrupt estate in connection with which he has been acting under this Act, or that for any special reason an investigation should be had in connection with that estate, it is the duty of the official receiver or trustee to report the matter to the court, including in the report a statement of all the facts or circumstances of the case within his knowledge, the names of the witnesses who should in his opinion be examined and a statement respecting the offence or offences believed to have been committed, and to forward a copy of the report forthwith to the Superintendent.

Report by inspectors and others - Sec. 205(2)
(2) The Superintendent or a creditor, inspector or other interested person who believes on reasonable grounds that a person is guilty of an offence under this Act or under any other statute,

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whether of Canada or a province, in connection with a bankrupt, his property or his transactions, may file a report with the court of the facts on which that belief is based, or he may make such further representations supplementary to the report of the official receiver or trustee as he may deem proper.

Court may authorize criminal proceedings - Sec. 205(3)
(3) Whenever the court is satisfied, on the representation of the Superintendent or any one on his behalf, of the official receiver or trustee or of any creditor, inspector or other interested person, that there is ground to believe that any person is guilty of an offence under this Act or under any other statute, whether of Canada or a province, in connection with the bankrupt, his property or transactions, the court may authorize the trustee to initiate proceedings for the prosecution of that person for that offence.

Initiation of criminal proceedings by the trustee - Sec. 205(4)
(4) Where a trustee is authorized or directed by the creditors, the inspectors or the court to initiate proceedings against any person believed to have committed an offence, the trustee shall institute the proceedings and shall send or cause to be sent a copy of the resolution or order, duly certified as a true copy thereof, together with a copy of all reports or statements of the facts on which the order or resolution was based, to the Crown Attorney or the agent of the Crown duly authorized to represent the Crown in the prosecution of criminal offences in the district where the alleged offence was committed.
R.S., c. B-3, s. 176.

Report of offence - Sec. 206
206. (1) Where the official receiver or trustee believes on reasonable grounds that an offence under this Act or the Criminal Code relating to the property of the bankrupt was committed either before or after the date of the initial bankruptcy event by the bankrupt or any other person, the official receiver or trustee shall make a report thereon to the Deputy Attorney General or other appropriate legal officer of the province concerned or to such person as is duly designated by that legal officer for that purpose.

Copy to Superintendent - Sec. 206(2)
(2) A copy of a report made under subsection (1) shall be sent by the official receiver or trustee to the Superintendent.
R.S., 1985, c. B-3, s. 206;
1997, c. 12, s. 111;
2004, c. 25, s. 94(F).

Substance of offence charged in indictment - Sec. 207
207. In an information, complaint or indictment for an offence under this Act, it is sufficient to set out the substance of the offence charged in the words of this Act, specifying the offence or as near thereto as circumstances admit, without alleging or setting out any debt, act of bankruptcy, trading, adjudication or any proceedings in, or order, warrant or document of, any court acting under this Act.
R.S., c. B-3, s. 178.

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Time within which prosecutions to be commenced - Sec. 208
208. A prosecution by indictment under this Act shall be commenced within five years from the time of the commission of the offence and, in the case of an offence punishable on summary conviction, the complaint shall be made or the information laid within three years from the time when the subject-matter of the complaint or information arose.
R.S., c. B-3, s. 179.

PART IX

MISCELLANEOUS PROVISIONS

General Rules - Sec. 209
209. (1) The Governor in Council may make, alter or revoke, and may delegate to the judges of the courts exercising bankruptcy jurisdiction under this Act the power to make, alter or revoke the General Rules for carrying into effect the object of this Act.

(2) [Repealed, 2005, c. 47, s. 113]

(3) [Repealed, 1997, c. 12, s. 112]

To be judicially noticed - Sec. 209(4)
(4) The General Rules have effect as if enacted by this Act and shall be judicially noticed.
R.S., 1985, c. B-3, s. 209;
1997, c. 12, s. 112;
2005, c. 47, s. 113.

210. and 211. [Repealed, 1992, c. 27, s. 78]

Rights of banks, etc. - Sec. 212
212. Nothing in this Act, other than sections 69 to 69.4 and 81 and 81.1, 81.2 and Part XI, interferes with or restricts the rights and privileges conferred on banks, authorized foreign banks within the meaning of section 2 of the Bank Act and banking corporations by that Act.
R.S., 1985, c. B-3, s. 212;
1992, c. 27, s. 79;
1999, c. 28, s. 147.

Winding-up and Restructuring Act not to apply - Sec. 213
213. If an application for a bankruptcy order or an assignment has been filed under this Act in respect of a corporation, the Winding-up and Restructuring Act does not extend or apply to that corporation, despite anything contained in that Act, and any proceedings that are instituted under the Winding-up and Restructuring Act in respect of that corporation before the application or assignment is filed under this Act shall abate subject to any disposition of the costs of those proceedings to be made in the bankruptcy proceedings that the justice of the case may require.
R.S., 1985, c. B-3, s. 213;
1996, c. 6, s. 167;
2004, c. 25, s. 95.

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Fees to officers of the court - Sec. 214
214. The fees payable to officers of the court including official receivers shall be established by the General Rules, whether generally or for a particular province, and where so mentioned in the General Rules, shall belong to the Crown in right of the province.
R.S., 1985, c. B-3, s. 214;
1992, c. 27, s. 80;
1997, c. 12, s. 113.

No action against Superintendent, etc., without leave of court - Sec. 215
215. Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.
R.S., 1985, c. B-3, s. 215;
1992, c. 27, s. 80.

MacLean v. Morash, 2003 NSSC 219 (CanLII) - Suit Against Trustee for Failure to Realize All Assets

Date:	2003-11-12
Docket:	No.207118
Parallel citations:	219 NSR (2d) 83; 47 CBR (4th) 58
URL:	http://canlii.ca/t/1g0nl
Citation:	MacLean v. Morash, 2003 NSSC 219 (CanLII), <http://canlii.ca/t/1g0nl> retrieved on 2013-09-13
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IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Francis MacLean and Evelyn MacLean v. Grant Morash and Deloitte & Touche Inc., 2003 NSSC219

Date: 20031112
Docket: 207118
Registry: Sydney

Between:

Francis MacLean and Evelyn MacLean

Plaintiffs/Applicant

v.

Grant Morash and Deloitte & Touche Inc.

Defendants/Respondents

Judge: The Honourable Justice Frank Edwards
Heard: October 28, 2003, in Sydney, Nova Scotia
Written Decision: November 12, 2003
Counsel: Ralph Ripley, for the Applicant
Colin Piercey, for the Respondents

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By the Court:

[1] The Applicants apply for an Order seeking leave to bring action against Grant Morash and Deloitte & Touche Inc. pursuant to Section 215 of the ***Bankruptcy and Insolvency Act***, RSC 1985 CB-3 as amended.

[2] ***Facts:*** On May 4, 1984, the Applicant Francis MacLean (MacLean) made an Assignment in Bankruptcy.

[3] On April 30, 1984, four days before the Assignment, MacLean deposited $3,000.00 in his solicitor's trust account. He testified that he had borrowed the money from a friend, a Mr. Monahan. There is no written record of the loan from Monahan who MacLean says was a good friend. Monahan is now deceased. MacLean testified that he told his lawyer that the $3000.00 was from his sister.

[4] In his Statement of Affairs, also filed on May 4, 1984, MacLean did not disclose the existence of the $3,000.00. He did disclose that he held real estate valued at $3,000.00 as an "Heir of the Estate of Francis MacLean" (his father who died in 1969). The land in question is shown on a survey plan dated July 4, 1963. The land consists of two lots and the remainder of the parcel. Lot 1 was owned by MacLean's father; lot 2 by a Mr. MacPherson and the remaining lands jointly by MacLean Sr. and MacPherson. MacLean Sr. had three heirs. In 1984, MacLean therefore had a 1/3 interest in Lot 1 and a 1/6 interest in the remaining lands. A factual issue in this proceeding is whether MacLean ever disclosed his 1/6 interest in the remaining lands to the Trustee.

[5] In that regard, Exhibit 3, the Trustee's caveat dated May 4, 1984 is significant. The caveat is attached to a deed dated July 6, 1963, to MacLean Sr. conveying Lot 1 only. This suggests that MacLean was content to let the Trustee look at Lot 1 only. I attach little significance to MacLean's contention that he showed the Trustee the survey plan. A close examination of the plan would have revealed MacLean's 1/6 interest in the remaining lands. At the time, I am satisfied that MacLean considered his 1/6 interest to be of negligible value and therefore was content to deal with Lot 1 only.

[6] The record of the First Meeting of Creditors held on May 25, 1984 contains the following paragraph at page one:

> "THE TRUSTEE EXPLAINED that this was property of the estate of Mr. MacLean's father in which Mr. MacLean holds a 1/3 interest. The $3,000 was an offer received from Mr. MacLean's sister, who also holds a 1/3 interest in the property. The offer was being held in trust subject to a decision by the inspector of the estate."

[7] The second page of the Creditor's Meeting notes that one of the creditors asked whether the sister's $3,000.00 offer was reasonable. Mr. MacLean is recorded as saying that the property was assessed at approximately $18,000.00 and that he believed there was an appraisal done. Another creditor noted that there would probably be legal problems in trying to sell the property if the other parties holding an interest did not want to sell.

[8] By cheque dated December 21, 1984, MacLean's solicitor transferred $3,150.00 to the Trustee. The cheque appears to have been cashed by the Trustee on January 7, 1985.

[9] Exhibit 4 is a letter dated January 28, 1985, from MacLean's lawyer to the Trustee. The letter reads:

> "Re: Francis and Evelyn MacLean
> Enclosed please find a Deed which Francis spoke to me about yesterday. Would you please have it executed and returned to me for recording at your earliest convenience."

[10] Attached to the letter is a deed from the Trustee to Ann Patricia MacLean, MacLean's sister. The deed purports to convey Lot 1 only but was never executed. I have no evidence regarding whether the letter was ever sent to the Trustee. The letter and the deed were shown to MacLean in cross-examination. MacLean professed to have had no knowledge of the letter or the deed until shown them by his present lawyer a few days before this hearing. Exhibit 4 was obviously prepared at MacLean's direction. It is further evidence that MacLean did not disclose his interest in the remaining lands to the Trustee.

[11] In paragraph 9 of his August 24, 2003 affidavit, MacLean says the following about the $3,150.00 payment to the Trustee: "That payment was to maintain the interests which I had in the lands at Northside East Bay..." In other words, he now takes the position that he believed that the payment kept the real estate outside the bankruptcy. That is inconsistent with (1) the recorded 1984 offer by MacLean's sister; (2) the fact that MacLean told his lawyers in 1984 that the money was for his sister; (3) that MacLean had his lawyer prepare a deed from the Trustee to his sister and; (4) that there is no deed from the Trustee back to MacLean.

[12] From the foregoing, I have no difficulty concluding that in 1984, the $3,000.00 MacLean borrowed from Monahan thereby became MacLean's money. MacLean should have disclosed the existence of this $3,000.00 to the Trustee. Had he done so, $3,000.00 would have become part of the bankrupt estate for distribution among the creditors. MacLean would then have had no money to buy his interest in the real estate from the Trustee. In any event, I am satisfied that there was never any agreement by the Trustee to take the $3,000.00 in lieu of

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MacLean's interest in the real estate. I am also satisfied that MacLean did not disclose his 1/6 interest in the remaining lands to the Trustee.

[13] On May 17, 1985, MacLean was discharged from bankruptcy and the Trustee was also discharged.

[14] The original Trustee, Touche Ross was succeeded by Deloitte Touche Inc. Grant Morash (Morash) was a partner in both. The actual Trustee in 1984-85, Mr. Veinotte, was deceased by 1998. In September 1998, Morash received a letter from G.S. Khattar, Q.C. Mr. Khattar was attempting to resolve title problems with the remaining lands on behalf of several occupiers of those lands. Morash experienced some difficulty finding records of the 1984 MacLean bankruptcy. I am satisfied that he was eventually able to do so. I am also satisfied that Morash then correctly concluded that MacLean had not disclosed this interest in the remaining lands to the Trustee in 1984. As a result of that information, Deloitte Touche Inc. agreed to have the MacLean bankruptcy reopened and have itself reappointed as Trustee of that Estate. The sole purpose of re-opening the estate was to execute a quit claim deed regarding the remaining lands to Mr. Khattar in trust. I accept Mr. Morash's evidence as summarized in Paragraph 8 of his affidavit:

> "THAT throughout this matter, Deloitte & Touche Inc. acted as an accommodation to Khattar & Khattar to dispose of the remaining asset of the Estate of Francis T. MacLean, namely an undivided portion of land in which the discharged bankrupt Francis T. MacLean had an interest. As is the general practice, our Trustee's Deed recited in paragraph 5 to this my Affidavit contains no covenants as to title, except he standard covenant that the Trustee has done nothing to encumber the lands being conveyed."

[15] MacLean complains that he received no notice that his bankruptcy had been re-opened. In the circumstances, I cannot fault Morash for not having done so.

[16] ***Issues:***

(1) Have the MacLeans established that there is a factual basis to support the proposed claims against the Respondents pursuant to Section 215 of the *Act*?

(2) Can leave be granted pursuant to Section 215 of the *Act* given that the Respondents cannot be held liable for the proposed claims against them due to the operation of Section 41(8) of the *Act*?

The Law and Analysis

Issue #1: Is there a factual basis to support the proposed claims?

[17] Section 215 of the ***Act*** states that:

> "215 Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this ***Act***."

[18] The decision in ***Mancini (trustee of) v. Falconi,*** 1993 CarswellOnt 1861 (C.A.) Per Osborne J.A.) summarizes the fundamental principles taken from the decided cases considering Section 215 of the ***Act***:

(1) Leave to sue a trustee should not be permitted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.

(2) An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence will typically be presented by way of affidavit and must supply facts to support the claim asserted ...

(3) The court is not required to make a final assessment of the merits of the claim before granting leave ..."

[19] The court in ***Mancini*** also held that "the sufficiency of the evidence must be measured in the context of the purpose of s.186 [as it then was] which ... is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action." Furthermore, if the applicant has no chance of success in the proposed action, the court will not grant leave.

[20] **Slander of Title:** The MacLeans allege at paragraph 41 of the Statement of Claim that the Respondents slandered their title to the property described in Schedule "A" of the Deed to G.S. Khattar "in trust" (Exhibit 'E' to the Affidavit of Morash). Slander of the title requires that the following elements be proved: (1) that the defendant published words in disparagement of the plaintiff's property, (2) that such words were false, (3) that such words were published ***with actual malice***, (4) that the plaintiff sustained special damage as a result. The MacLeans have failed to establish a factual basis for the proposed claim in slander of title on these four grounds.

[21] ***Falsity:*** In his Affidavit dated August 22, 2003, Francis MacLean relies on the following recitals to the Trustee's Deed given by Morash to G.S. Khattar "in trust" (Exhibit 'E' to the Affidavit of Morash):

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> "Whereas a review of the estate file has disclosed that the Trustee in Bankruptcy did not deal with the remainder of the lands hereinafter described in Schedule "A" ***which lands had not been disclosed*** in the bankrupt's Statement of Affairs."

[22] The documents and information available to Mr. Morash for review support the fact that the original Trustee in bankruptcy, Mr. Veinotte, did not deal with certain lands which had not been disclosed in the Statement of Affairs, namely the "remaining lands" as described in the Plaintiff's Affidavit. As such, there were no false words published by the Trustee.

[23] ***Malice:*** Malice is an essential element of liability in an action for slander of title. Fridman states that "... a plaintiff will not succeed in an action for injurious falsehood unless he pleads and proves that the defendant acted maliciously, in the sense of acting for some improper purpose, with the intention of causing injury to the plaintiff, in other words, out of spite or ill-will."

[24] In ***Nicholas v. Anderson***, 1998 Carswell Ont 3815 (C.A.) (per curiam), the applicant Nicholas was an employee prosecuted by her employer's trustee in bankruptcy. The trustee had charged her with fraud in connection with the disappearance of inventory. Nicholas sought leave ***nunc pro tunc*** to bring an action against the trustee for malicious prosecution. The Supreme Court dismissed the motion and Nicholas appealed. The Court of Appeal denied the appeal and upheld the decision of the motions court judge that the applicant had failed to establish sufficient facts to support her allegation of malice: "After reviewing the evidence and all of the other evidence, Blair J. was not satisfied that Anderson's acts constituted anything other than the normal conduct of a receiver or Trustee in bankruptcy...."

[25] In the current application, the MacLeans do not allege any facts that establish, or even point to, the existence of ill-will on the part of the Respondents. Neither does the statement of claim filed by the MacLeans (Exhibit "M" of the Affidavit of Francis MacLean) allege malice on the Respondents' part. The MacLeans have failed to show that the Respondents' actions were anything other than the normal conduct of a trustee in a similar situation. The MacLeans have failed to establish a factual basis for an essential element of the proposed claim in slander of title.

[26] ***Special Damage:*** An action for slander of title also requires that the plaintiff suffer special damage resulting from the publication. In ***Cross v. Bain, Pooler & Co.***, 1937 CarswellOnt 156 (H.C.) (Per Greene J.), the plaintiff appealed from an order of the Master directing the delivery of particulars regarding allegations of special damage in the statement of claim. The Court dismissed the appeal, finding that the defendant was entitled to know the name of the intended purchaser: "... the plaintiff is not allowed to set up a claim for general damage. Where the plaintiff is confined to special damage, the defendant is entitled to know what claim he has to meet." In ***Gordon v. McGibbon*** (1875), 16 N.B.R. 49 (C.A.), the Court found that "[t]o maintain an action of that character [i.e. slander of title], the words must be followed as a natural and legal consequence by a pecuniary damage to the plaintiffs, which must be specially alleged and proved."

[27] The MacLeans do not allege or plead special damage as a result of the actions of the Respondents in their application or in their statement of claim (Exhibit "M" of the Affidavit of Francis MacLean). At paragraphs 63 and 64 of the statement of claim, the MacLeans claim general and punitive damages only. No evidence to support a claim of special damage has been advanced. Furthermore, no special damages could arise from the actions of the Respondents given that the Trustee's Deed granted to G.S. Khattar "in trust" contained no warranty of title.

[28] I am therefore satisfied that the MacLeans have failed to establish a factual basis for key elements of the proposed claim, and should therefore be denied leave to bring an action for slander of title.

[29] ***Negligence:*** At paragraph 63 of the Statement of Claim, the MacLeans allege negligence on the part of Morash and Deloitte & Touche in not properly reviewing Francis T. MacLean's bankruptcy file. Negligence "... is the breach of that duty to take care, which the law requires ... in regard to another's person or his property." Fridman states the following elements are required to establish liability in negligence:

> "... To establish such liability, it is necessary for the plaintiff to show: (i) that he was owed a duty of care by the defendant; (ii) that the defendant should have observed a particular standard of care in order to perform or fulfil that duty; (iii) that he broke his duty of care by failing to fulfil or observe the relevant standard of care; (iv) that such breach of duty caused damage or loss to the plaintiff; (v) that such damage was not too remote a consequence of the breach so as to render the defendant not liable for its occurrence.
>
> ...
>
> Before there can be liability for negligence, before there is any need to consider whether the conduct of the defendant falls short of the standards that are to be applied to his behaviour, it must be established that he was under a duty to the particular plaintiff to take care in respect of the risk involved, and that such a duty was imposed by statute or the common law."

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[30] These elements of liability were quoted with approval by Roscoe J. of the Nova Scotia Supreme Court in ***Wilson v. MacInnis*** (1992), 1992 CarswellNS 5 at para. 5.

[31] The MacLeans' application fails to present material facts in support of a key element of liability required to be proven to support a claim of negligence. The MacLeans have not presented any facts, either in the present application or in their statement of claim, in support of the damage suffered by them as a result of the alleged negligence. The existence of a Trustee's Deed respecting property to which the MacLean's claim an interest should not be viewed as sufficient support for a claim of damages. As indicated by Morash in his Affidavit sworn October 20, 2003, the Deed contained no covenants or representations as to title. A Trustee's Deed serves only to warrant that the trustee has not encumbered the property.

[32] In ***MacDulloch v. Price Waterhouse Ltd.***, 1992 CarswellNS 48 (S.C. T.D.), the executor of a bankrupt estate sued the trustee in bankruptcy for negligent mismanagement. The defendant trustee brought an application to strike out the statement of claim on the grounds that the pleading disclosed no reasonable cause of action. The Court granted the application to strike out the statement of claim because "it alleges negligent mismanagement without pleading any material facts and thus there are no facts in the statement of claim which if proved could give rise to a cause of action. A party is entitled to know the case which has to be met and this document is totally deficient in that respect."

[33] Both the MacLeans' application and the Statement of Claim fail to adequately set out the claim of negligence against the Respondents and the material facts in support of that claim. As such, the proposed claim has no hope of success and the application for leave to bring the action should therefore be denied.

Issue #2: Can leave be granted notwithstanding Section 41(8) of the Act?

[34] Section 41(8) of the ***Act*** reads as follows:

> "(8) The discharge of a trustee discharges him from all liability
>
> (a) in respect of any act done or default made by him in the administration of the property of the bankrupt, and
>
> (b) in relation to his conduct as trustee,
>
> but any discharge may be revoked by the court on proof that it was obtained by fraud or by suppression or concealment of any material fact."

[35] As outlined in the Affidavits of Morash and G. Alan Gladwin dated October 20, 2003, Morash and Deloitte & Touche were discharged on December 17, 1999. As a result, the Respondents argue that they are discharged from all liability in respect of the claims proposed in the MacLeans' Statement of Claim.

[36] A court can revoke the discharge of the trustee only upon proof that the discharge was obtained by fraud or by suppression or concealment of a material fact. In ***Alec Smith Decorating Ltd. v. Parkland School Division No. 63***, 1982 CarswellSask 63 (Q.B.), the plaintiff sought to add Touche Ross Limited, as the trustee of a bankrupt estate, as a party to a mechanics' lien action. The court found that, in view of Section 23(8) of the ***Act*** (as it then was), the trustee could not be made a party because there was no suggestion that the discharge was obtained by fraud or by suppression or concealment of a material fact.

[37] The MacLeans have made no application to have the Respondents' discharge revoked. A court cannot revoke the discharge of a trustee where no application to do so has been brought. In ***Mann v. KPMG Inc.*** 2001 CarswellSask 207 (C.A), the Saskatchewan Court of Appeal overturned a decision by the Court of Queen's Bench (in Chambers) granting leave to sue the trustee ***nunc pro tunc*** under Section 215 and revoking the trustee's discharge under Section 41(8). The Court of Appeal set aside the decision of the chambers judge for three reasons:

> "First, there was no application to that end before the court. Second, the issues touching the matter were not fully developed, for the applications were not directed toward that end. And third, the legal basis for setting aside the discharge, namely 'fraud' or 'concealment' of a material fact by the trustee, was not established. In short, we are of the view the order setting aside the discharge of KPMG was excessive."

[38] The same reasons applied by the Saskatchewan Court of Appeal are correctly applied to the current application and the discharge of the Respondents should not be revoked without a proper application for such discharge by the MacLeans and a hearing directed toward the issue. Unless the Respondents' discharge is revoked, the MacLeans have no chance of success in their proposed action.

[39] I am therefore refusing to grant leave to bring action against the Respondents pursuant to Section 215 of the ***Act***.

[40] ***Costs:*** The Respondents have been successful and are therefore entitled to their costs. This was a fairly complicated matter which required extensive briefs and consumed over three hours of court time. I am therefore

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awarding costs of $2,000.00 in total for both Respondents (rather than to each Respondent) with reasonable disbursements to be taxed. The Respondents are not entitled to costs of travel and accommodation for Counsel from Halifax to Sydney. These costs are awarded in any event payable forthwith.

Order accordingly.

J.

Society of Composers, Authors and Music Publishers of Canada v. Armitage, 2000 CanLII 16921 (ON CA) - Threshold to Commence s. 215 Action Against Trustee

Date:	2000-10-27
Docket:	C33597
Parallel citations:	50 OR (3d) 688; 20 CBR (4th) 160; 137 OAC 74
URL:	http://canlii.ca/t/1fbf3
Citation:	Society of Composers, Authors and Music Publishers of Canada v. Armitage, 2000 CanLII 16921 (ON CA), <http://canlii.ca/t/1fbf3> retrieved on 2013-08-31
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DATE: 20001027
DOCKET: C33597

COURT OF APPEAL FOR ONTARIO
CHARRON, MacPHERSON and SHARPE JJ.A.

BETWEEN:	)	
SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA	)	**Albert G. Formosa and Krista R. Chaytor, for the appellant**
Applicant (Appellant)	)	
- and -	)	**Steven L. Graff, for the respondent**
NORMAN E. ARMITAGE	)	
Respondent (Respondent)	)	
	)	**Heard: September 27, 2000**

On appeal from the decision of Madam Justice Ruth E. Mesbur dated November 2, 1999

CHARRON J.A.:

[1] This is an appeal with leave under s. 193(e) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (*"BIA"*). The Society of Composers, Authors and Music Publishers of Canada ("SOCAN") appeals from the dismissal of its application under s. 215 of the *BIA* to commence an action against Norman E. Armitage ("the trustee"), a trustee responsible for administering a court-approved bankruptcy proposal made by Coultis Broadcasting Limited ("Coultis") under the *BIA*. **This appeal turns on whether the motions court judge properly applied the threshold test for granting leave under s. 215. A subsidiary issue is raised on the appropriateness of bringing a s. 215 application for leave to commence an action rather than a s. 37 appeal to the bankruptcy court against an act or decision made by the trustee.**

A. The s. 215 leave application

1. The threshold test under s.215

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[2] Section 215 of the *BIA* provides that no action lies against a trustee with respect to any action taken pursuant to the *BIA* except with leave of the court. It is common ground between the parties that the evidence required to support an order under s. 215 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action. However, the evidence does not have to be sufficient to enable the motions judge to make a final assessment of the merits of the proposed claim. The sufficiency of the evidence must be measured in the context of the purpose of s. 215 which is to prevent the trustee from having to respond to actions which are frivolous or vexatious or which do not disclose a cause of action: see *Mancini (Bankrupt) et al. v. Falconi et al.* reflex, (1993), 61 O.A.C. 332 at 337.

2. The evidence relied upon by SOCAN

[3] SOCAN is both an ordinary and a post-proposal creditor of Coultis under the terms of the proposal. Its proposed action against the trustee is for negligence and for breach of fiduciary and other duties arising from the performance of the trustee's obligations under the terms of the proposal and the provisions of the *BIA*. SOCAN's proposed action is essentially based on an allegation that the trustee failed to receive payments for post-proposal creditors and to remit them to these creditors in breach of his duty to do so. SOCAN alleges in the affidavit evidence that certain payments were made to ordinary creditors by the debtor and by the trustee contrary to the obligation to make priority payment to post-proposal creditors.

[4] The crux of SOCAN's contention is that the trustee had an obligation *under the terms of the proposal* to receive those monies from the debtor and to make those payments to the post-proposal creditors in priority to the claims of ordinary creditors. In support of this contention, SOCAN relies mainly on the interplay of paragraphs 6 and 9 of the proposal:

> 6. THAT claims arising in respect of goods supplied, services rendered or other consideration given after the date of filing of the Notice of Intention to Make a Proposal shall be paid in full in priority to the claims of ordinary creditors.
> 9. THAT Norman Armitage, of the City of Niagara Falls, in the Province of Ontario, shall be the Trustee under this Proposal and *the moneys payable under this Proposal shall be paid to the Trustee who shall make distribution referred to in paragraphs 2 to 6 of this Proposal*. [Emphasis added.]

[5] The terms referred to in paragraph 9 provided as follows. Paragraphs 2 to 5 provided for priority payment of preferred claims, the fees and expenses of the trustee, amounts payable under the *Income Tax Act* and certain amounts payable to employees. Paragraph 6 deals with post-proposal creditors which include SOCAN. Paragraph 7 then provides for a scheme of periodic payments to the ordinary creditors, "being those persons with claims not referred to in paragraphs 2 to 6 of this Proposal". SOCAN therefore contends that it is clear from these terms that the priority payments to post-proposal creditors under paragraph 6 were included in the trustee's obligation to distribute monies pursuant to paragraph 9.

[6] SOCAN further relies on s. 60(2) of the *BIA* which provides that "[a]ll monies payable under the proposal shall be paid to the trustee and, after payment of all proper fees and expenses mentioned in subsection (1), shall be distributed by him to the creditors."

3. The trustee's position

[7] The trustee's position is that SOCAN's real quarrel is with the debtor and that the trustee had no obligation to receive monies from the debtor for payment to the post-proposal creditors or to monitor the debtor's business to ensure that post-proposal creditors were being paid in accordance with the terms of the proposal. He states that his obligations under paragraph 6 ended at the time the proposal was approved by the court and that his sole ongoing duty related to the payments made to the ordinary creditors under paragraph 7.

4. The motions court judge's decision

[8] The motions judge agreed with the trustee's position. In her reasons for decision, she stated that, if the trustee had an ongoing duty as contended by SOCAN, "then the facts as set out by SOCAN might well support a claim for negligence or other breach of that duty". She held, however, that the terms of the proposal and the provisions of s. 60(2) of the *BIA* both supported the trustee's position that his ongoing obligations extended only to the payment of monies under paragraph 7 to the ordinary creditors. She therefore concluded that "in the absence of clear duties on his part to perform the functions SOCAN suggests he should have", the facts did not disclose a reasonable cause of action and, consequently, she dismissed the application.

5. The argument on appeal

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[9] SOCAN submits that the motions court judge should have granted the application based on her finding that the affidavit evidence filed in support of the application could "well support" an action in negligence and breach of fiduciary duty. It is argued that her subsequent finding, that the trustee did not owe a duty to SOCAN as contended, was a question which could not be finally determined on this threshold application. The decision was based firstly on an interpretation of the proposal, the terms of which could reasonably support SOCAN's position, and secondly, on an interpretation of relevant provisions of the *BIA* on the scope of a trustee's personal liability, a matter that is not fully settled at law. In these circumstances, SOCAN submits that the motions court judge, in making what was in essence a final determination of the merits of the proposed action, exceeded her jurisdiction on this s. 215 application.

[10] Counsel for the trustee did not make any serious attack on the motions court judge's observation that, if the trustee had duties as contended by SOCAN, "then the facts as set out by SOCAN might well support a claim for negligence or other breach of that duty". His submissions on the sufficiency of the evidentiary foundation were essentially directed at the scope of a trustee's duties rather than on the specific factual allegations related to the breach. Counsel for the trustee made additional submissions on the quantum of damages resulting from the alleged breach in an effort to show that they would be minimal, but I did not understand his position to be that the s. 215 application should be dismissed for lack of an evidentiary foundation with respect to damages. Hence the question raised by this appeal, whether the test under s. 215 was met, really turns on the appropriateness of the motions court judge's finding on a threshold application that the trustee did not have the obligations contended by SOCAN.

6. Conclusion

[11] I agree with SOCAN's position that the motions court judge, in disposing of this leave application, made final determinations on the merits of the proposed claim and, in doing so, she exceeded her jurisdiction.On its face, the proposal supported SOCAN's position that the payments to the post-proposal creditors under paragraph 6 would form part of the monies received by the trustee and distributed by him pursuant to the direction contained in paragraph 9. There is no question that a binding contract results from the acceptance of a debtor's proposal by the creditors and its approval by the court. Counsel for the trustee submits however that the trustee is not a party to this contract. While counsel for the trustee is correct in this assertion, it does not follow that the trustee is at liberty to disregard the terms of the proposal. The trustee is bound, rather, to act so as to give effect to its terms. See, for example, *Bruncor Leasing Inc.* v. *Zutphen Bros. Construction Ltd (trustee of)* 1994 CanLII 4011 (NS CA), (1994), 26 C.B.R. (3d) 258; 116 D.L.R. (4th) 692 (N.S.C.A.). Further, it is not clear that s. 60(2) provides support solely for the trustee's position that his ongoing obligations extended only to the payment of monies under paragraph 7 to the ordinary creditors as found by the motions court judge.

[12] I therefore find that, on the motions court judge's own assessment of the sufficiency of the factual record, leave should have been granted under s. 215.

B. The failure to bring a s. 37 application

[13] Section 37 of the *BIA* provides as follows:

> 37. Appeal to court against trustee – Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[14] The trustee submits that, regardless of the sufficiency of the record, leave under s. 215 should not have been granted in this case because of SOCAN's failure to proceed under s. 37. He submits that where the allegations relate entirely to the acts of a trustee within the *BIA*, it is generally inappropriate to grant leave under s. 215 to commence an action in the regular courts. Rather, the appropriate route is to proceed under s. 37 of the *BIA* and apply for a trial in the Bankruptcy Court. He submits that leave should only be granted under s. 215 where the applicant demonstrates that the issue can be dealt with more advantageously in the ordinary courts without disadvantage to the administration of the estate. In support of his argument, counsel for the trustee relies generally on some of the case law annotated under the relevant provisions of the *BIA* in Houlden & Morawetz, *The 2000 Annotated Bankruptcy & Insolvency Act*, (Toronto: Carswell, 1999).

[15] In order to give effect to the trustee's submission on this point, this court would essentially have to find that s. 215 and s. 37 are mutually exclusive. It is not at all clear that the case law referred to by counsel would support such a finding. Furthermore, it is not clear that SOCAN's proposed claim falls entirely within the scope of a s. 37 proceeding. In particular, I note that SOCAN claims damages. Although the trustee's position appears to be otherwise on appeal, it is apparent from the record that counsel for the parties before the motions judge were in agreement that s. 215 was the appropriate procedure where the claim was one for damages. I note further that some of the allegations do not necessarily relate to "an act or a decision of the trustee" but rather to inaction on his part. It has been held that s. 37 has

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no application in such circumstances: see e.g. *Re Holley* reflex, (1986), 54 O.R. (2d) 225 (C.A.). In any event, and more importantly, it would be unfair to dispose of this appeal on this subsidiary issue when it is apparent from the record that counsel before the motions court judge were in agreement that the application turned on the sufficiency of the evidentiary foundation for the claim. For these reasons, I would not give effect to the trustee's submission on this point.

C. Disposition

[16] I would therefore allow the appeal, set aside the judgment below and substitute an order under s. 215 of the *BIA* granting SOCAN leave to commence its action against the trustee.

(signed) "Louise Charron J.A."
(signed) "I agree J. C. MacPherson J.A."
(signed) "Robert J. Sharpe J.A."

RELEASED: October 27, 2000

Claims in foreign currency - Sec. 215.1

215.1 A claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency

(a) in the case of a proposal in respect of an insolvent person and unless otherwise provided in the proposal, if a notice of intention was filed under subsection 50.4(1), as of the date the notice was filed or, if no notice was filed, as of the date the proposal was filed with the official receiver under subsection 62(1);

(b) in the case of a proposal in respect of a bankrupt and unless otherwise provided in the proposal, as of the date of the bankruptcy; or

(c) in the case of a bankruptcy, as of the date of the bankruptcy.

2005, c. 47, s. 114.

216. [Repealed, 2007, c. 36, s. 55]

PART X

ORDERLY PAYMENT OF DEBTS

Definitions - Sec. 217

217. In this Part,

"clerk"
« greffier »
"clerk" means a clerk of the court;

"court"
« tribunal »
"court" means
(a) in the Provinces of Manitoba and Alberta, the Court of Queen's Bench, and
(b) in any other province, such court as is designated by the regulations for the purposes of this Part;

"debtor"
« débiteur »

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"debtor" means an insolvent debtor, but does not include a corporation;

"registered creditor"
« créancier inscrit »
"registered creditor" means a creditor who is named in a consolidation order.
R.S., c. B-3, s. 188;
1978-79, c. 11, s. 10;
1984, c. 41, s. 2.

Application - Sec. 218
218. (1) This Part applies only to the following classes of debts:

(a) a judgment for the payment of money where the amount of the judgment does not exceed one thousand dollars;

(b) a judgment for the payment of money where the amount of the judgment is in excess of one thousand dollars if the judgment creditor consents to come under this Part;

(c) a claim or demand for or in respect of money, debt, account, covenant or otherwise, not in excess of one thousand dollars; and

(d) a claim or demand for or in respect of money, debt, account, covenant or otherwise, in excess of one thousand dollars if the creditor having the claim or demand consents to come under this Part.

Exception - Sec. 218(2)
(2) Notwithstanding subsection (1), this Part does not apply to the following classes of debts:

(a) a debt due, owing or payable

(i) to Her Majesty in right of Canada or a province,

(ii) to a municipality in Canada, or

(iii) to a school district in Canada;

(b) a debt relating to the public revenue or one that may be levied and collected in the form of taxes;

(c) a covenant in a mortgage or charge on land or in an agreement for sale of land; or

(d) a debt incurred by a trader or merchant in the ordinary course of his business.

Idem - Sec. 218(3)
(3) Notwithstanding subsection (1), this Part does not apply to the following classes of debts, unless the creditor consents to come under this Part:

(a) in the Province of Manitoba,

(i) a claim for wages that may be heard before, or a judgment therefor by, a magistrate under The Wages Recovery Act, or

(ii) a claim for a mechanic's lien or a judgment thereon under The Mechanic's Liens Act;

(b) in the Province of Alberta,

(i) a claim for wages that may be heard before, or a judgment therefor by, a magistrate under The Masters and Servants Act,

(ii) a claim for a lien or a judgment thereon under The Mechanic's Lien Act or The Mechanics Lien Act, 1960, or

(iii) a claim for a lien under The Garagemen's Lien Act; or

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(c) in any other province, any debt of a class designated by the regulations to be a class of debts to which this Part does not apply.

R.S., c. B-3, s. 189.

Application for consolidation order - Sec. 219

219. (1) A debtor who resides in a province in respect of which this Part applies may apply to the clerk of the court having jurisdiction where they reside for a consolidation order.

Supreme Court of Canada
Validity of Orderly Payment of Debts Act, 1959 (Alta.), [1960] S.C.R. 571
Date: 1960-05-16

Validity of the Orderly Payment of Debts Act, 1959 (Alta.)

1960: February 3, 4; 1960: May 16.

Present: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Constitutional law—Validity of The Orderly Payment of Debts Act, 1959 (Alta.), c. 61—Whether bankruptcy and insolvency legislation— The B.N.A. Act, 1867, s. 91(21)—The Bankruptcy Act, R.S.C. 1952, c. 14.

The Orderly Payment of Debts Act, 1959 (Alta.), c. 61, applies, with certain exceptions, to contract and judgment debts not in excess of $1,000 and, with the consent of the creditors, to judgment debts in excess of $1,000. Proceedings are instituted by the debtor applying to the clerk of the Court for a consolidation order. This application of the debtor must be supported by an affidavit setting forth, *inter alia,* particulars of his debts, of the nature and extent of his property, his and his wife's income and his dependants. The clerk settles the amount proposed to be paid by the debtor periodically or otherwise. The consolidation order, when made, becomes a judgment of the Court in favour of each creditor. After the making of the order, no process can be issued against the debtor, except as permitted by the Act or by leave of the Court.

On a reference as to the validity of the Act, the Appellate Division of the Supreme Court of Alberta held that it was *ultra vires* the Legislature of the Province. The appeal of the Attorney-General for Alberta to this Court was supported by the Attorneys-General for Ontario and Saskatchewan.

Held: The Act was *ultra vires.*

Per Kerwin C.J. and Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.: The Act was *ultra vires* as it was in pith and substance bankruptcy and insolvency legislation. The provisions of the Act could be read in no other way than showing that they referred to a debtor who was unable to pay his debts as they matured. A debtor under the Act -was one who ceased to meet his liabilities as they became due and, therefore, fell within s. 21(1) (*j*) of the *Bankruptcy Act.* The impugned legislation was not legislation for the recovery of debts.

Per Locke, Cartwright and Martland JJ.: While the Act does not declare in terms that the debtor must be insolvent in the sense that he is unable to pay his debts as they become due, it must be so construed. It is, therefore, a clear invasion of the legislative field of insolvency and is, accordingly, beyond the powers of the Legislature. Compositions and schemes of arrangement have for more than 100 years past been treated as subject-matters falling within the scope of statutes relating to bankruptcy and insolvency. The provisions of the impugned Act are in conflict with those in the legislation passed by Parliament dealing with the same matters in the *Bankruptcy Act* and the *Farmers' Creditors Arrangement Act.* The language of s. 91 of the *B.N.A. Act,* 1867, is that the exclusive legislative power of the Parliament extends to all matters in relation to, *inter alia,* bankruptcy and insolvency, and the provinces are excluded from that field. *A.G. for Ontario v. A.G. of Canada,* [1894] A.C. 189, distinguished.

Per: Cartwright and Martland JJ.: In all the decisions of the Judicial Committee or of this Court, upholding provincial legislation impugned as affecting the rights and obligations of an insolvent entity and its creditors, two conditions have been found to exist: (1) that the legislation was not in truth and substance primarily in relation to bankruptcy and insolvency but rather in relation to one or more of the matters found in s. 92; and (2) that it was not in conflict with existing valid legislation of Parliament enacted in exercise of the power contained in s. 91(21), in so far as it affected the rights and obligations of an insolvent and its creditors. Neither of these conditions. exists in this case.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division1, on a reference by the Lieutenant-Governor in Council. Appeal dismissed.

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1 (1959), 29 W.W.R. 435, 20 D.L.R. (2d) 503.

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H. J. Wilson, Q.C. and *J. W. Anderson,* for the appellant, the Attorney-General for Alberta.
L. Ingle, for the intervenant, the Attorney-General for Saskatchewan.
W. McKimm, for the intervenant, the Attorney-General for Ontario.
G. H. Steer, Q.C, counsel appointed by the Court to represent the creditors or other persons opposed to the legislation.
The judgment of Kerwin C.J. and of Taschereau, Fauteux, Abbott, Judson and Ritchie JJ. was delivered by
THE CHIEF JUSTICE:—Under the provisions of *The Constitutional Questions Act,* R.S.A. 1955, c. 55, the Lieutenant-Governor in Council of the Province of Alberta referred to the Appellate Division of the Supreme Court of the Province2 the following question for hearing and consideration:

> Is The Orderly Payment of Debts Act, being Chapter 61 of the Statutes of Alberta, 1959, *intra vires* the Legislature of Alberta, either in whole or in part, and if so, in what part or parts, and to what extent?

That Court directed that argument of the question be set down for hearing at its sittings to be held in Calgary commencing. June 1, 1959, and that a copy of that direction and of the Order-in-Council and of the Act be served upon

> (1) Canadian Bankers Association;
> (2) Credit Granter's Association of Edmonton;
> (3) Retail Merchants Association of Canada (Alberta) Inc.;

[Page 573]

> (4) Canadian Credit Men's Trust Association Ltd.;
> (5) Canadian Consumer Loan Association (Canada);
> (6) Attorney-General of Canada.

George H. Steer, Esq., Q.C., was appointed as counsel to argue the case on behalf of creditors or other persons who might be opposed to the provisions of the Act. At the hearing counsel for the Attorney General for the Province and one counsel for three credit associations appeared to uphold the Act while Mr. Steer presented argument against its validity. No one else appeared, although the others mentioned above were duly notified. Judgment was reserved and the Court consisting of the Chief Justice, H. J. Macdonald, M. M. Porter and H. G. Johnson, J.J.A., unanimously decided that the Act was wholly *ultra vires* the Legislature of the Province.
The Attorney General for Alberta appealed to this Court. In accordance with the Rules notice was duly served upon the Attorney General of Canada and by direction notice was also served upon the Attorney General for each of the other provinces. Before us counsel for the Attorney General for Ontario and for the Attorney General for Saskatchewan supported the appeal. No one else appeared except Mr. Steer On behalf of the three provinces it was submitted, as apparently it was argued in the Appellate Division, that the Act was within the legislative competence of the Province of Alberta under Heads 13, 14 and 16 of s. 92 of the *British North America Act,* 1867:

> 13 Property and Civil Rights in thet Province.
> 14 The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction and including Procedure in Civil Matters in those Courts.
> 16 Generally all Matters of a merely local or private nature in the Province.

Mr. Steer contended that the subject matter of the Act dealt with bankruptcy and insolvency and was therefore within the sole competence of the legislative authority of the Parliament of Canada under Head 21 of s. 91 of the *British North America Act.* He also contended it was *ultra vires* because it encroached upon the following heads of s. 91 of that Act:

> 15. Banking, incorporation of Banks and the issue of Paper Money.
> 18. Bills of Exchange and Promissory Notes.
> 19. Interest.

and because it gives to the clerk of a District Court the powers of a judge contrary to the provisions of s. 96 of the *British North America Act.*
I agree with the Appellate Division that the Act is *ultra vires* on the ground that in pith and substance it is bankruptcy and insolvency legislation and that it is therefore unnecessary to consider the other grounds of attack.
Section 3 of *The Orderly Payment of Debts Act* provides:

> 3. (1) This Act applies only
> (*a*) to a judgment for the payment of money where the amount of the judgment does not exceed one thousand dollars,
> (*b*) to a judgment for the payment of money in excess of one thousand dollars if the creditor consents to come under this Act, and

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2 (1959), 29 W.W.R. 435, 20 D.L.R. (2d) 503.

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(*c*) to a claim for money, demand for debt, account, covenant or otherwise, not in excess of one thousand dollars.

(2) This Act does not apply to a debt due, owing or payable to the Crown or a municipality or relating to the public revenue or one that may be levied and collected in the form of taxes or, unless the creditor consents to come under this Act,

(*a*) to a claim for wages that may be heard before, or a judgment therefor by, a magistrate under *The Masters and Servants Act,*

(*b*) to a claim for a lien or a judgment thereon under *The Mechanics Lien Act,* or

(*c*) to a claim for a lien under *The Garagemen's Lien Act.*

(3) This Act does not apply to debts incurred by a trader or merchant in the usual course of his business.

Provision is then made whereby a debtor may apply to the clerk of the District Court of the judicial district in which he resides for a consolidation order, showing by affidavit all his creditors together with the amount he owes to each one, his income from all sources and, if he is married, the amount of the income of his wife, the number of persons dependent upon him, the amount payable for board or lodging or rent or as payment on home property and whether any of his creditors' claims are secured, and if so, the nature and particulars of the security held by each. The clerk is to settle an amount proposed to be paid by the debtor into court periodically or otherwise on account of the claims of his creditors and provide for hearing objections by the latter.

After such a hearing, if necessary, a consolidation order is to be made, which order is a judgment of the Court in favour of each creditor, and provision is made for a review by the Court of any such order.

Sections 12, 13 and 14 are important and read as follows:

12. The court may, in deciding any matter brought before it, impose such terms on a debtor with respect to the custody of his property or any disposition thereof or of the proceeds thereof as it deems proper to protect the registered creditors and may give such directions for the purpose as the circumstances require.

13. Upon the making of a consolidation order no process shall be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom this Act applies

(*a*) except as permitted by this Act or the regulations, or

(*b*) except by leave of the court.

14. (1) The clerk may at any time require of, and take from, the debtor an assignment to himself as clerk of the court of any moneys due, owing or payable or to become due, owing or payable to the debtor or earned or to be earned by the debtor.

(2) Unless otherwise agreed upon the clerk shall forthwith notify the person owing or about to owe the moneys of the assignment and all moneys collected thereon shall be applied to the credit of the claims against the debtor under the consolidation order.

(3) The clerk may issue a writ of execution in respect of a consolidation order and cause it to be filed with the sheriff of a judicial district and at any land titles office.

While the Act applies only to claims or judgments which do not exceed one thousand dollars, unless in the case of a judgment for the payment of money in excess of one thousand dollars the creditor consents to come under the Act, I can read these provisions in no other way than showing that they refer to a debtor who is unable to pay his debts as they mature. Why else is authority given the Court to impose terms with respect to the custody of his property or any disposition thereof or of the proceeds thereof as it deems proper to protect the registered creditors (s. 12) ? And why else may no process be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom the Act applies, except as stated (s. 13)? Section 14 authorizing the clerk to require an assignment to him by the debtor of any monies due, owing or payable or to become due, owing or payable to the debtor, or earned or to be earned by the debtor is surely consonant only with the position of an insolvent debtor. In fact a debtor under the Act is ceasing to meet his liabilities generally as they become due and therefore falls within s. 20(1) (*j*) of the *Bankruptcy Act,* R.S.C. 1952, c. 14.

In *Attorney General for British Columbia v. Attorney General for Canada et al.*3, Lord Thankerton speaking for the Judicial Committee states at p. 402:

> In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to

3 [1937] A.C. 391, 1 D.L.R. 695, 18 C.B.R. 217, 67 C.C.C. 337.

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apply for the same administration. The justification for such proceeding by a creditor generally consists in, an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law.

This was said in an appeal affirming the decision of the majority of this Court in the *Reference as to the Validity of The Farmers' Creditors Arrangement Act of the Dominion,* as amended4.

In *Canadian Bankers' Association v. Attorney General of Saskatchewan*5, this Court held that *The Moratorium Act* of Saskatchewan was *ultra vires* as being in relation to insolvency. There the decision of the Judicial Committee in *Abitibi Power and Paper Company v. The Montreal Trust Company*6 was relied upon, but, for the reasons given by Mr. Justice Locke, it was held that it had no application. As was pointed out, the Judicial Committee in the 1943 case held that the purpose of the impugned legislation was to stay proceedings in the action brought under the mortgage granted by the Abitibi Company until the interested parties should have an opportunity of considering such plan for the re-organization of the company as might be submitted by a Royal Commission appointed for that purpose. For the same reason that decision is inapplicable here. The older decision of the Privy Council in *Attorney General for Ontario v. The Attorney General of Canada*7, dealing with *The Ontario Assignments and Preference Act,* is quite distinguishable, although in my view it is doubtful whether in view of later pronouncements of the Judicial Committee it would at this date be decided in the same sense, even in the absence of Dominion legislation upon the subject of bankruptcy and insolvency.

The Act in question is not legislation for the recovery of debts. It has no analogy to provincial bulk sales legislation because there the object is to make sure that when a person sells his stock of goods, wares, merchandise and chattels, ordinarily the subject of trade and commerce, the creditors will not be placed in any difficulty because of the disappearance of the proceeds of the sale. It is unnecessary to express any opinion as to the validity of s. 156 of *The Division Courts Act* of Ontario, R.S.O. 1950, apparently introduced for the first time in 1950 by c. 16 of the statutes of that year, which provides for a consolidation order.

The debtor under *The Orderly Payment of Debts Act* is not in the same position as the appellant in *L'Union St. Jacques de Montréal v. Bélisle*8, and the appellant can gain no comfort from *Ladore v. Bennett*9, because there it was held that the *City of Windsor (Amalgamation) Act,* 1935 and Amendment were in pith and substance Acts passed in relation to "municipal institutions in the Province" and did not encroach upon the exclusive legislative power of the Dominion Parliament in relation to bankruptcy and insolvency, interest, or private rights outside the Province. This was a decision of the Judicial Committee affirming that of the Court of Appeal for Ontario10, which latter, in the meantime, had been applied by the Court of Appeal for British Columbia in *Day v. Corporation of the City of Vancouver, McGavin and McMullen*11. The legislation in question in each of these cases was quite different from the effort by Alberta in *Board of Trustees of the Lethbridge Northern Irrigation District v. I.O.F.*12.

The appeal should be dismissed.

The judgment of Locke and Martland JJ. was delivered by

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4 [1936] S.G.R. 384, 3 D.L.R. 622, 17 C.B.R. 3.59, 66 C.C.C. 180.

5 [1956] S.C.R. 31, [1955] 5 D.L.R. 736, 35 C.B.R. 135.

6 [1943] A.C. 536, 4 D.L.R. 1, 3 W.W.R. 33.

7 [1894] A.C. 189.

8 (1874) L.R. 6 P.C. 31.

9 [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566.

10 [1938] O.R. 324, 3 D.L.R. 212.

11 (1938), 53 B.C.R. 140, 4 D.L.R. 345, 3 W.W.R. 161.

12 [1940] A.C. 513, 2 D.L.R. 273.

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LOCKE J.:—The *Orderly Payment of Debts Act* was passed by the Legislature of Alberta and appears as c. 61 of the Statutes of 1959. By s. 22 it is declared that the Act is to come into force on a date to be fixed by proclamation. We are informed that, pending the determination of this reference, it has not been proclaimed.

In my opinion of the various grounds upon which it is contended that the Act is *ultra vires* the legislature it is necessary to consider only that as to whether it infringes upon the exclusive jurisdiction of Parliament to make laws in relation to bankruptcy and insolvency under head 21 of s. 91.

While "bankruptcy" and "insolvent person" are defined in s. 2 of the *Bankruptcy Act,* R.S.C. 1952, c. 14, it is rather the meaning that these words commonly bear that is to be given to them in construing the words in s. 91. In *Parker v. Gossage*13, Parke B. said that an insolvent in the ordinary acceptation of the word is a person who cannot pay his debts. In *Reg. v. Saddlers Company*14, Willes J. adopted what had been said by Baron Parke as to the meaning assigned to the term "insolvent" and said that the words "in insolvent circumstances" had always been held to mean not merely being behind the world, if an account were taken, but insolvency to the extent of being unable to pay just debts in the ordinary course of trade and business.

In *Attorney General of British Columbia v. Attorney General of Canada*15, referring to the words in head 21, Lord Thankerton said that, in a generar sense, insolvency means inability to meet one's debts or obligations.

When the *Bankruptcy Act* was first enacted in 1919 (c. 36) "insolvent person" and "insolvent" were declared to include a person who is for any reason unable to meet his obligations as they respectively become due, or who has ceased paying his current obligations in the ordinary course of business, thus substantially adopting what had been said by Parke B. and Willes J. The meaning commonly borne by the terms employed in head 21 of s. 91 did not differ in 1867 from their present day meaning.

The statute to be considered does not refer in terms either to bankruptcy or insolvency and this, while not decisive, is a matter to be considered in determining the question as to what is its true nature.

The Act is declared by s. 3 to apply to a judgment not in excess of one thousand dollars, to a judgment in excess of that amount if the creditor consents to come under the Act and to a claim for money, demand for debt, account, covenant or otherwise, not in excess of one thousand dollars. Debts due to the Crown or to a municipality or relating to the public revenue, claims for wages that might be heard before a magistrate under the *Masters and Servants Act,* claims for a lien or a judgment thereon under the *Mechanics Lien Act,* claims for a lien under the *Garagemen's Lien Act* and debts incurred by a trader or merchant in the usual course of business are exempted from the operation of the Act.

As is the case of a proposal made by a debtor under the provisions of s. 27 of the *Bankruptcy Act* or s. 7 of the *Farmers' Creditors Arrangement Act,* R.S.C. 1952, c. 1ll, proceedings under this statute are initiated by the debtor who may apply to the clerk of the district court of the judicial district in which he resides for what is called a consolidation order. With the application the debtor is required to file an affidavit in the prescribed form setting forth, *inter alia,* particulars of the debts owing by him, of the nature and extent of his property, the amount of the income of himself and his wife and the number of persons dependent upon him.

Section 5 requires the clerk to file the affidavit and the particulars in a register and:

> upon reading the affidavit and hearing the debtor settle an amount proposed to be paid by the debtor into court, periodically or otherwise, on account of the claims of his creditors and enter particulars thereof in the register or, if so proposed, enter in the register a statement that the present circumstances of the debtor do not warrant the fixing of any amount.

The clerk is then required to give notice of the application to each of the creditors and fix a date on which he will hear objections. If no objections are received within twenty days after the notices are mailed, the clerk is required to note the fact in the register and issue a consolidation order.

By s. 7 it is provided that any creditor may within the time limited file an objection with the clerk either to the amount entered in the register as the amount owing to him or to any other creditor or to the amount "fixed to be paid into court by the debtor or the times of payment thereof or to the statement fixing no amount." Upon such objection being filed the clerk is required to notify the debtor and any other creditor whose claim is objected to.

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13 (1835) 5 L.J. Ex. 4.

14 (1863), 10 H.L.C. 404 at 425.

15 [1937] A.C. 391 at 402, 1 D.L.R. 695, 18 C.B.R. 217, 67 C.C.C. 337.

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By s. 8 the clerk is empowered to bring in and add to the register the name of any creditor of the debtor of whom he has notice and who is not disclosed in the affidavit of the debtor.

Section 9 reads:

> (1) At the time appointed for the hearing the clerk shall consider all objections filed with him in accordance with this Act and
>
> (*a*) if an objection is to the claim of a creditor and the parties are brought to agreement or if the creditor's claim is a judgment of a court and the only objection is to the amount paid thereon, he may dispose of the objection in a summary manner and determine the amount owing to the creditor.
>
> (*b*) if an objection is to the proposed terms or method of payment of the claims by the debtor or that terms of payment are not but should be fixed, he may dispose of the objection summarily and determine as the circumstances require the terms and method of payment of the claims, or that no terms be presently fixed, or
>
> (*c*) in any case he may on notice of motion refer any objection to be disposed of by the court or as the court otherwise directs.
>
> (2) The clerk shall enter in the register his decision or the decision of the court, as the case may be, and shall issue a consolidation order.

Section 10 provides that the consolidation order shall state the amount owing to each creditor, the amount to be paid into court by the debtor and the times of payment, and declares that a consolidation order is a judgment of the court in favour of each creditor for the amount stated and is an order of the court for the payment by the debtor of the amounts specified.

Section 11 provides that on notice of motion a judge of the district court may review a consolidation order made by the clerk and vary it or set it aside. Under the provisions of s. 12 the judge may impose such terms on a debtor with respect to the custody of his property or any disposition thereof as he deems proper to protect the registered creditors and give such directions for that purpose as the circumstances require.

Section 13 declares that upon the making of a consolidation order no process shall be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom the Act applies, except as permitted by the Act or the regulations, or by leave of the court.

Section 14 enables the clerk at any time to require the debtor to assign to him any moneys owing to or to become owing or to be earned by the debtor and authorizes him to issue a writ of execution "in respect of a consolidation order" and to file it with the sheriff or at any land titles office.

Section 15 permits an application to be made by a creditor whose claim is not entered in the consolidation order to have it entered in the register and provides the manner of settlement of any dispute as to its amount.

Section 16 declares that a registered creditor holding security for his claim may, at any time, elect to rely upon his security and if the security is realized any excess above the amount of the creditor's claim is to be paid to the clerk and applied in payment of other judgments against the debtor.

By s. 17 provision is made, *inter alia,* for an application by any registered creditor where a debtor defaults in complying with an order for payment or any other order or direction of the court, or where any other proceeding for the recovery of money has been brought against the debtor, or where a judgment is recovered against him for an amount in excess of one thousand dollars and the judgment creditor refuses to permit his name to be added to the register for leave to take proceedings on behalf of all of the registered creditors to enforce the consolidation order. The section further provides for an *ex parte* application to the court where a debtor is about to abscond or has absconded or, with intent to defraud his creditors, is about to remove his property from Alberta.

Section 18 provides that the debtor or any registered creditor may at any time apply *ex parte* to the clerk for a further examination of the debtor as to his financial circumstances and, after notice has been given to all parties to the consolidation order, vary the order as to the time, amount and method of payment.

Section 19 requires the clerk to distribute the moneys paid into court on account of the debts of a debtor at least once every three months *pro rata* among the registered creditors.

While, according to s. 3, the Act applies only to judgments or claims which do not exceed one thousand dollars, the total of such claims is not mentioned so that the Act can be applied irrespective of the aggregate amount of the debts. While the debtor may be required by the clerk under the provisions of s. 14 to assign any moneys due, owing, payable, or to become due or earned by the debtor, there is no express provision for the conveyance of the debtor's other assets to the clerk, though the powers of the district court judge under s. 12 would permit such an order to be made.

Persons engaged in farming in Alberta, as that expression is defined in the *Farmers' Creditors Arrangement Act,* who are entitled to make a proposal to their creditors under the terms of s. 7 of that Act are among those to whom the *Orderly Payment of Debts Act* will be applicable.

The language of s. 5 is that the clerk, upon an application being filed, after reading the affidavit required by s. 4 and hearing the debtor (apparently *ex parte)* shall "settle an amount proposed to be paid by the debtor into court periodically

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or otherwise on account of the claims of his creditors" or, "if so proposed" (presumably by the debtor) enter in the register a statement that the present circumstances of the debtor do not warrant the fixing of any amount. This language, while lacking in clarity, appears to indicate that, at least in the first instance, the clerk is to accept the debtor's estimate as to what, if anything, he can pay to his creditors and record this in the court records. Providing no objections are received within twenty days, this estimate appears to be conclusive by virtue of s. 6 and a consolidation order will issue.

Where objections are filed, they are to be dealt with under s. 9 which gives to the clerk power to settle the amount payable under any judgment if the amount is in dispute and, where the proposed scheme of payment is objected to, he may dispose of the objection summarily and decide upon the terms of the consolidation order.

This procedure may be compared with that provided for dealing with proposals which may be made to a trustee in bankruptcy by an insolvent person under the provisions of Part 111 of the *Bankruptcy Act* where the proposal is submitted to a meeting of the creditors and, if accepted by them and approved by the court having jurisdiction in bankruptcy under the terms of s. 34, becomes binding upon the parties concerned. Under the Act in question, where the proposal is objected to by a creditor whose claim does not exceed one thousand dollars, the wishes of the creditors may be disregarded by the clerk. The provisions of s. 13 which prohibit the taking of any proceedings by a registered creditor or a creditor to whom the Act applies are, after a consolidation order has been made as to these creditors, similar in their effect to the provisions of s. 40 of the *Bankruptcy Act* and s. 11 of the *Farmers' Creditors Arrangement Act* relating to bankruptcy and to proposals. While s. 4 details certain information that is to be contained in the debtor's affidavit, the form of the affidavit which may be prescribed by the Lieutenant-Governor in Council by regulation is not before us. Whether that affidavit is to contain a statement that the debtor is unable to meet his debts as they become due, or whether the clerk who is required to act by s. 5 is to do so upon the unsworn statement of the debtor that he is in insolvent circumstances, does not appear.

While the Act does not require that the debtor who applies must be insolvent in the sense that he is unable to pay his debts as they become due, it must, in my opinion, be so construed since it is quite impossible to believe that it was intended that the provisions of the Act might be resorted to by persons who were able to pay their way but do not feel inclined to do so. In my opinion, this is a clear invasion of the legislative field of insolvency and is, accordingly, beyond the powers of the legislature.

There have been bankruptcy laws in England since 1542 dealing with the estates of insolvent persons, and the terms of statutes in force in England prior to 1867 may be looked at as an aid in deciding what subject matters were generally regarded as included in these terms.

The *Bankruptcy Consolidation Act* of 1849, 12-13 Vict., c. 106, which consolidated the law relating to bankrupts, contained in ss. 201 to 223 provisions by which a trader unable to meet his engagements with his creditors might petition the court to approve a composition or scheme of arrangement for the payment of his debts and declared the manner in which such a proposal might be submitted to the creditors and, if approved, to the court for its approval.

The manner in which disputes between the official assignee and the creditors as to the carrying out of a deed of composition or arrangement were to be settled was further dealt with in 1861 in s. 136 of an *Act to amend the law relating to bankruptcy and insolvency in England,* 24-25 Vict., c. 134.

Compositions and schemes of arrangement have thus for more than 100 years past been treated as subject matters falling within the scope of the statutes relating to bankruptcy and insolvency. The provisions dealing with this subject at the present day in England are to be found in the *Bankruptcy Act* of 1914 as amended (see Williams on Bankruptcy, 17th ed., p. 92). When the *Bankruptcy Act* was enacted in Canada in 1919 it contained in s. 13 provisions whereby an insolvent debtor who wished to make a proposal to his creditors for a composition in satisfaction of his debts or an extension of time for payment thereof or a scheme of arrangement of his affairs might, either before or after the making of a receiving order against him or the making of an authorized assignment by him, require in writing an authorized trustee to convene a meeting of his creditors for the consideration of such proposal and provisions whereby the scheme, if approved, might become binding upon the parties concerned. Similar provisions for dealing with such a proposal, a term which is defined to include a proposal for a composition, an extension of time, or for a scheme of arrangement, are contained in the *Bankruptcy Act* as it is today.

These provisions are made applicable to proposals by farmers in Alberta, Manitoba and Saskatchewan by the *Farmers' Creditors Arrangement Act* above mentioned. The Act under consideration appears to be an attempt to substitute for the provisions of the *Bankruptcy Act* and the *Farmers' Creditors Arrangement Act* relating to proposals for an extension of time or a scheme of arrangement which are submitted to the interested creditors for their approval and, if approved, thereafter to the judge in bankruptcy, a scheme whereby the propriety of accepting such a proposal is to be determined by the clerk of the district court and with regard, apparently, only to the claims of those creditors the debts owing to whom are less than one thousand dollars in amount and those to whom greater amounts are owing who consent to come under the Act, leaving other creditors whose claims are greater to resort to such remedies as they may be advised to take for the

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enforcement of their claims. The provisions of the provincial Act thus conflict with those in the legislation passed by Parliament dealing with the same matters.

In *Attorney General of British Columbia v. Attorney General of Canada*16, where the *Farmers' Creditors Arrangement Act 1934* of the Parliament of Canada, as amended by the *Farmers' Creditors Arrangement Act Amendment Act 1935* was considered, Lord Thankerton said in part:

> it cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but whch assumes insolvency, is not properly within the sphere of bankruptcy legislation.

and referred to the judgment of this Court in the matter of the *Companies' Creditors Arrangement Act*17, where Sir Lyman Duff, delivering the judgment of the majority, said that the history of the law seems to show clearly that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

Some support for the validity of this legislation is sought in the judgment of the Judicial Committee in *Attorney General of Ontario v. Attorney General of Canada*18. The question in that appeal was as to whether s. 9 of c. 124, R.S.O. 1887, was within the powers of the legislature. The Act was entitled *"An Act respecting assignments and preferences by insolvent persons."* A majority of the members of the Court of Appeal who considered the question had found the section to be *ultra vires.* In an earlier case, *Clarkson v. Ontario Bank*19, Haggarty C.J.O. and Osier J.A. had held the Act as a whole to be *ultra vires* as legislation relating to bankruptcy and insolvency, while Burton and Patterson JJ.A. considered it to be *intra vires* as being in relation to property and civil rights in the province.

Prior to the passing of that statute the *Insolvency Act of 1875* (c. 16) had been repealed by Parliament by c. 1 of the Statutes of 1880 and there was no Bankruptcy or Insolvency Act of the Dominion.

The judgment allowing the appeal was delivered by Herschell L.C. The Act, the first two sections of which dealt with fraudulent preferences by insolvents or those knowing themselves to be on the eve of insolvency, permitted a debtor-solvent or otherwise—to make an assignment of his exigible assets to a sheriff for the purpose of realization and distribution *pro rata* among his creditors. Section 9 provided that such an assignment should take precedence of all judgments and all executions not completely executed by payment. There were no provisions permitting proposals for a composition or extension of time for payment of debts. It was said that the effect to be given to judgments and executions and the manner and the extent to which they might be enforced was *prima facie* within the legislative powers of the legislature and that the validity of the assignment and the application of s. 9 did not depend on whether the assignor was or was not insolvent. Such an assignment, their Lordships said, did not infringe on the exclusive legislative power of Parliament under head 21. The concluding portion of the judgment reads (pp. 200-201):

> Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

As Parliament has dealt with the matter, the concluding portion of this judgment would be fatal to the appellant's contention, even if the subject of bankruptcy and insolvency were one in relation to which the province might legislate in the absence of legislation by the Dominion. But the language of s. 91 is that the exclusive legislative power of the Parliament of Canada extends to all matters in relation to, *inter alia,* bankruptcy and insolvency, and the provinces are excluded from that field. As Lord Watson said in *Union Colliery v. Bryden*20:

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16 [1937] A.C. 391, 1 D.L.R. 695, 18 C.B.R. 217, 67 C.C.C. 337.

17 [1934] S.C.R. 659, 4 D.L.R. 75, 16 C.B.R. 1.

18 [1894] A.C. 189.

19 (1890), 15 O.A.R. 166.

20 [1899] A.C. 580 at 588, 68 L.J.P.C. 118.

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> The abstinence of the Dominion Parliament from legislating to the full limit of its power could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

Neither *Ladore v. Bennett*21 nor *Abitibi Power and Paper Co. v. Montreal Trust Co.*22*,* affect the question, in my opinion. In the former case the legislation, while it affected the rights of persons who had claims against insolvent municipalities, was found to be in pith and substance in relation to municipal institutions in the province and, as such, was *intra vires* the legislature under s. 92(8). In the latter case the purpose of the impugned legislation was to stay proceedings in an action brought under a mortgage until the interested parties should have an opportunity of considering a plan for the reorganization of the company, and the true nature of the legislation was held to be to regulate property and civil rights within the province.

I would dismiss this appeal.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J.:—I agree with the conclusion of my brother Locke, that in its true nature and character *The Orderly Payment of Debts. Act* is legislation in relation to matters coming within the class of subjects specified in head 21 of s. 91 of the *British North America Act,* and is wholly *ultra vires* of the Legislature of the Province of Alberta, and I am in substantial agreement with his reasons.

I wish, however, to add some observations as to some of the decisions relied upon by counsel who supported the appeal.

The first of these is the judgment of the Judicial Committee in *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*23. The decision of the Court of Appeal for Ontario in that case is reported in24. The question referred to the Court was:

> Had the Legislature of Ontario jurisdiction to enact the 9th section of the Eevised Statutes of Ontario, ch. 124, and entitled 'An Act respecting Assignments and Preferences by Insolvent Persons?'

The Court consisted of four judges. Hagarty C.J.O. and Burton J.A. answered in the negative; Maclennan J.A. answered in the affirmative; Osier J.A. made no answer. In the result the decision was that the section was *ultra vires* of the Legislature. On appeal to the Judicial Committee this decision was reversed and the question was answered in the affirmative.

In the earlier case of *Clarkson v. Ontario Bank*25*,* Hagarty C.J.O. had reached the conclusion that the whole Act was *ultra vires* of the Provincial Legislature; in the later case, the learned Chief Justice adhered to the opinion he had expressed in *Clarkson's* case and speaking of s. 9, to which alone the question put to the Court had reference, he said at p. 493:

> I find it impossible to separate it from the rest of the Act, or to give any opinion as to its effect, standing by itself, unless I arrived at a judgment the opposite to that expressed in 1888 to which I still fully adhere.

In the Judicial Committee, the Lord Chancellor, Lord Herschell, who gave the judgment of their Lordships, referred to certain other sections of the Act in order to explain the meaning of section 9 but did not deal with the question of the validity of those other sections or of the Act as a whole. At pp. 198 and 199, he said:

> Their Lordships proceed now to consider the nature of the enactment said to be ultra vires. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of debts are prima facie within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The Act of 1887 which abolished priority as amongst execution

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21 [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566.

22 [1943] A.C. 536, 4 D.L.R. 1, 3 W.W.R. 33.

23 [1894] A.C. 189.

24 (1893), 20 O.A.R. 489.

25 (1890), 15 O.A.R. 166.

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> creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further, and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution.
>
> But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.
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> * * *
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> Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent.

Viewing the impugned section in this way their Lordships were able to hold that, at all events in one aspect, its true subject matter fell within heads 13 and 14 of s. 92 of the *B.N.A. Act* (although in another aspect that subject matter would fall within head 21 of s. 91) and so could stand while there was no bankruptcy or insolvency legislation of the Dominion Parliament in existence in relation to the same subject matter.

In *Ladore v. Bennett*[26], their Lordships held that the impugned legislation was in its true nature and character in relation to the subject matter comprised in head 8 of s. 92, Municipal Institutions in the Province, and that the fact that the municipal institutions dealt with in the legislation had become insolvent did riot remove the subject matter from the ambit of provincial legislative power.

In *Abitibi Power & Paper Co. v. Montreal Trust Co.*[27], their Lordships regarded the subject matter of the legislation there in question as falling within heads 13 and 14 of s. 92. The Montreal Trust Co., as trustee for the bondholders, had commenced an action in the Supreme Court of. Ontario on September 8, 1932, against the Abitibi Company for the enforcement of the security of a deed of trust and bond mortgage. On September 26, 1932, the Abitibi Company was adjudicated bankrupt. On December 7, 1932, leave to continue this action was granted pursuant to s. 21 of the *Dominion Winding Up Act*. The bond-holders made no claim in the winding-up, and in their Lordships' view, once leave had been granted "the action proceeded as a provincial action, subject to the provincial law regulating the rights in such an action and subject to the sovereign power of the legislature to alter those rights in respect of property within the province". The judgment of their Lordships continues as follows at pp. 547 and 548:

> It could not be denied that the action proceeded subject to the possibility of being stayed under the ordinary rules of procedure as, for instance, for security for costs, default in pleading or discovery, or any special circumstances which the court might think demanded a stay. Middleton J.A. appreciated this position, but he expressed the opinion that the action would proceed in accordance with the orders and rules of practice that were in existence at the date of the application. The limitation to existing rules is significant. Their Lordships can see no ground for such a restriction. If the rules of procedure were subsequently altered before the action came to an end, it must proceed thereafter subject to the rules as amended. The province, therefore, could enact rules in the course of the action imposing a further ground of stay, and, if it can thus impose what may be a general moratorium, there is no reason why its sovereign power should be so limited as not to enable it to impose, if it so desired, a moratorium limited to a special class of action or suitor, or to one particular action or suitor.

I do not propose to refer in detail to the other authorities relied upon in support of the appeal but, after examining all of them, I think I am right in saying that in every decision of the Judicial Committee or of this Court in which provincial legislation, impugned on the ground that it affected the rights and obligations of an insolvent entity and its creditors and thereby trenched on the subject matter comprised in head 21 of s. 91, has been upheld it appears that in the view of the court two conditions were found to exist; (i) that the impugned legislation was not in truth and substance primarily in relation to Bankruptcy and Insolvency but rather in relation to one or more of the matters enumerated in s. 92; and (ii) that

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26 [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566.

27 [1943] A.C. 536, 4 D.L.R. 1, 3 W.W.R. 33.

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in so far as it affected the rights and obligations of an insolvent and its creditors it did not conflict with existing valid legislation of Parliament enacted in exercise of the power contained in head 21 of s. 91.
In the case at bar, as is shown in the reasons of my brother Locke, neither of these conditions exists.
I would dismiss the appeal.
Appeal dismissed.

Affidavit to be filed - Sec. 219(2)

(2) On an application pursuant to subsection (1), the debtor shall file an affidavit setting out the following:

(a) the names and addresses of the debtor's creditors and the amount the debtor owes to each creditor and, if any of them is related to the debtor, the relationship;

(b) a statement of the property the debtor owns or in which the debtor has any interest and of the value thereof;

(c) the amount of the debtor's income from all sources, naming them, and, where the debtor is married and cohabiting with the spouse, or is in a common-law partnership, the amount of the income of the debtor's spouse or common-law partner, as the case may be, from all sources, naming them;

(d) the debtor's business or occupation and, where the debtor is married and cohabiting with the spouse, or is in a common-law partnership, the business or occupation of the debtor's spouse or common-law partner, as the case may be;

(d.1) the name and address of the debtor's employer and, where the debtor is married and cohabiting with the spouse, or is in a common-law partnership, the name and address of the employer of the debtor's spouse or common-law partner, as the case may be;

(e) the number of persons dependent on the debtor, the name and relationship of each and particulars of the extent to which each is so dependent;

(f) the amount payable for board and lodging or for rent or as payment on home property, as the case may be; and

(g) whether any of the debtor's creditors' claims are secured and, if so, the nature and particulars of the security held by each creditor.

R.S., 1985, c. B-3, s. 219;
R.S., 1985, c. 31 (1st Supp.), s. 77;
2000, c. 12, s. 20;
2007, c. 36, s. 56.

Duties of clerk - Sec. 220

220. (1) The clerk shall

(a) file the affidavit referred to in subsection 219(2), giving it a number, and enter the particulars it contains in a register;

(b) on reading the affidavit and hearing the debtor,

(i) settle the amounts to be paid by the debtor into court and the times of payment thereof until all of the claims entered in the register are paid in full, and

(ii) enter in the register particulars of the amounts and times of payment so settled or, where applicable, enter in the register a statement that the present circumstances of the debtor do not warrant the immediate settling of any of those amounts or times; and

(c) fix a date for hearing any objections by creditors.

Notice to be given - Sec. 220(2)

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(2) The clerk shall give notice of an application for a consolidation order to each creditor named in the affidavit filed in connection with the application, setting out in the notice

(a) the particulars of all entries made in the register with respect to the application, and

(b) the date fixed for hearing objections by the creditors to the application or to any of the entries made in the register in respect thereof,

and the notice shall contain a statement that the creditor will, prior to the date fixed for hearing objections, be notified of any objections filed with the clerk pursuant to section 221 in connection with the application.

Idem - Sec. 220(3)

(3) The notice referred to in subsection (2) shall be served in the prescribed manner and the clerk shall enter in the register the date the notice was sent.

Register - Sec. 220(4)

(4) The register referred to in this section shall be separate from all other books and records kept by the clerk and shall be available to the public for inspection, free of charge, during the hours when the office of the clerk is open to the public.

R.S., 1985, c. B-3, s. 220;

1992, c. 1, s. 20, c. 27, s. 81.

Objection by creditor - Sec. 221

221. (1) A creditor may, within a period of thirty days after the date of the sending of the notice of an application for a consolidation order pursuant to section 220, file with the clerk an objection with respect to any of the following matters:

(a) the amount entered in the register as the amount owing to him or to any other creditor;

(b) the amounts settled by the clerk as the amounts to be paid by the debtor into court, or the fact that no such amounts have been settled; or

(c) the times of payment of any such amounts, where applicable.

Idem - Sec. 221(2)

(2) The clerk shall enter in the register a memorandum of the date of receipt of any objection filed with him.

Notice of objection - Sec. 221(3)

(3) Where an objection has been filed by a creditor, the clerk shall forthwith, in the prescribed manner, give notice of the objection and of the time and place appointed for the hearing thereof to the debtor and to each creditor named in the affidavit filed in connection with the application specifying, where applicable, the creditor whose claim has been objected to under subsection (1).

R.S., 1985, c. B-3, s. 221;

1992, c. 1, ss. 17, 20, c. 27, s. 82.

Adding additional creditors - Sec. 222

222. At the time appointed for the hearing of any objection in connection with a consolidation order, the clerk may add to the register the name of any creditor of the debtor of whom he has notice and who is not disclosed in the affidavit of the debtor.

R.S., c. B-3, s. 193.

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Hearing of objections - Sec. 223

223. (1) The clerk shall, at the time appointed for the hearing thereof, consider any objection in connection with a consolidation order that has been filed with him in accordance with this Part, and

(a) if the objection is to the claim of a creditor and the parties are brought to agreement or if the creditor's claim is a judgment of a court and the only objection is to the amount paid thereon, he may dispose of the objection in a summary manner and determine the amount owing to the creditor;

(b) if the objection is to the proposed terms or method of payment of the claims by the debtor or that terms of payment are not but should be fixed, he may dispose of the objection in a summary manner and determine, as the circumstances require, the terms and method of payment of the claims, or that no terms be presently fixed; and

(c) in any case he may on notice of motion refer any objection to be disposed of by the court or as the court otherwise directs.

Issue of order - Sec. 223(2)

(2) After the conclusion of the hearing referred to in subsection (1), the clerk shall enter in the register his decision or the decision of the court, as the case may be, and issue a consolidation order.

R.S., c. B-3, s. 194.

Issue of consolidation order - Sec. 224

224. Where no objection has been received within thirty days after the date of the sending of the notice of an application for a consolidation order pursuant to section 220, the clerk shall

(a) make an entry in the register to that effect; and

(b) issue the consolidation order.

R.S., 1985, c. B-3, s. 224;
1992, c. 1, s. 18, c. 27, s. 83.

Contents of consolidation order - Sec. 225

225. (1) A consolidation order shall state the following:

(a) the name of and the amount owing to each creditor named in the register; and

(b) the amounts to be paid into court by the debtor and the times of payment thereof or, where applicable, that the present circumstances of the debtor do not warrant the immediate settling of any such amounts or times.

Effect of order - Sec. 225(2)

(2) A consolidation order

(a) is a judgment of the court in favour of each creditor named in the register for the amount stated therein to be owing to that creditor;

(b) is an order of the court for the payment by the debtor of the amounts stated therein and at the stated times; and

(c) bears interest at the rate which by law applies to a judgment debt arising from a judgment of the court that granted the order or at such other rate as may be prescribed by regulation.

R.S., 1985, c. B-3, s. 225;
1992, c. 27, s. 84.

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Consolidation order not to be issued - Sec. 226
226. (1) A consolidation order that does not provide for the payment in full of all the debts to which it refers within a period of three years shall not be issued unless
(a) all registered creditors consent thereto in writing; or
(b) the order is approved by the court.

Deemed consent - Sec. 226(1.1)
(1.1) Where a registered creditor does not give any response to a request for consent under paragraph (1)(a) within thirty days after receiving such a request, the creditor shall be deemed to have consented to the order.

Referral to court - Sec. 226(2)
(2) Any consolidation order referred to in subsection (1) shall be referred to the court for approval or otherwise by the clerk on notice of motion to any registered creditor who has not consented thereto in writing.
R.S., 1985, c. B-3, s. 226;
1992, c. 27, s. 85.

Review of consolidation order - Sec. 227
227. (1) The court may, on application to review a consolidation order of the clerk made by notice of motion within fifteen days after the making of the order by any of the parties affected thereby, review the consolidation order and confirm or vary it or set it aside and make such disposition of the matter as the court sees fit.

Decision to be entered - Sec. 227(2)
(2) The clerk shall enter any decision made by the court under subsection (1) in the register and the decision takes effect in place of the order of the clerk.
R.S., 1985, c. B-3, s. 227;
1997, c. 12, s. 115.

Terms may be imposed on debtor - Sec. 228
228. The court may, in deciding any matter brought before it, impose such terms on a debtor with respect to the custody of his property or any disposition thereof or of the proceeds thereof as it deems proper to protect the registered creditors and may give such directions for that purpose as the circumstances require.
R.S., c. B-3, s. 199.

Process stayed by consolidation order - Sec. 229
229. On the making of a consolidation order, no process shall be issued out of any court in the province in which the debtor resides against the debtor at the instance of a creditor in respect of any debt to which this Part applies, except as permitted by this Part.
R.S., c. B-3, s. 200.

Assignments of debtor's property to clerk - Sec. 230

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230. (1) The clerk may, at any time after the making of a consolidation order, require of and take from the debtor an assignment to himself as clerk of the court of any moneys due, owing or payable or to become due, owing or payable to the debtor, or earned or to be earned by the debtor.

Notification - Sec. 230(2)
(2) Unless otherwise agreed on, the clerk shall forthwith notify the person owing or about to owe the moneys of the assignment referred to in subsection (1) and all moneys collected thereon shall be applied to the credit of the claims against the debtor under the consolidation order.

Writ of execution - Sec. 230(3)
(3) The clerk may issue a writ of execution or certificate of judgment in respect of a consolidation order and cause it to be filed in any place where the writ or certificate may bind or be a charge on land or chattels.
R.S., c. B-3, s. 201.

Adding creditors after order - Sec. 231
231. (1) Where, at any time before the payment in full of the claims against a debtor under a consolidation order, the clerk is notified of a claim to which this Part applies that is not entered in the order, he shall, subject to subsection (2) and on notice to the debtor and creditor and to each registered creditor,

(a) settle the amount owing to the creditor;
(b) where he deems it necessary to do so, vary the amounts to be paid by the debtor into court and the times of payment thereof in order to provide for the new claim; and
(c) enter the matters referred to in paragraphs (a) and (b) in the register.

Court to decide - Sec. 231(2)
(2) Where the debtor or any registered creditor disputes the claim of a creditor described in subsection (1), the clerk shall on notice of motion refer the matter to the court and the decision of the court shall be entered in the register.

Notice - Sec. 231(3)
(3) The clerk shall make such amendments to the consolidation order as may be necessary to give effect to any entries in the register made pursuant to this section, and shall give notice thereof to the registered creditors.

Creditor to share - Sec. 231(4)
(4) On the entry of a claim in the register pursuant to this section, the creditor shall share with the other creditors in any further distribution of moneys paid into court by or on behalf of the debtor.
R.S., c. B-3, s. 202.

Secured claims - Sec. 232
232. (1) A registered creditor holding security for a claim may, at any time, elect to rely on his security notwithstanding that the claim is included in a consolidation order.

Proceeds in excess - Sec. 232(2)

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(2) Where the proceeds from the disposal of the security referred to in subsection (1) are in excess of the registered creditor's claim, the excess shall be paid into court and applied in payment of other judgments against the debtor.

Exemption - Sec. 232(3)
(3) Subsection (2) does not apply where the security is in the form of chattels exempt from seizure under any law in force in the province in which the consolidation order was issued.

Reduced claim - Sec. 232(4)
(4) Where the proceeds from the disposal of the security referred to in subsection (1) are less than the registered creditor's claim, the creditor remains entitled to the balance of his claim.

Exception - Sec. 232(5)
(5) Subsection (4) does not apply in a case where, under the law in force in the province in which the consolidation order was issued, a creditor

(a) who enforces his security by repossession or repossession and sale, or

(b) who seizes and sells the security under an execution issued pursuant to a judgment obtained against the debtor in respect of the claim so secured,

is limited in his recovery of the claim to the security so repossessed or the proceeds of the sale thereof.
R.S., c. B-3, s. 203.

Enforcement of order in default of debtor - Sec. 233
233. (1) A registered creditor may apply by notice of motion to the court where

(a) a debtor defaults in complying with any order or direction of the court;

(b) any other proceeding for the recovery of money is brought against the debtor;

(c) the debtor has, after the consolidation order was made, incurred further debts totalling in excess of five hundred dollars;

(d) a judgment is recovered against the debtor larger in amount than a judgment to which this Part applies without the judgment creditor's consent, and the judgment creditor refuses to permit his name to be added to the register; or

(e) the debtor has property or funds that should be made available for the satisfaction of the consolidation order.

Ex parte application - Sec. 233(2)
(2) A registered creditor may apply ex parte to the court where a debtor

(a) is about to abscond or has absconded from the province in which the consolidation order was issued leaving personal property liable to seizure under execution; or

(b) with intent to defraud his creditors has attempted or is attempting to remove from the province in which the consolidation order was issued personal property liable to seizure under execution.

Proceedings authorized - Sec. 233(3)
(3) On the application referred to in subsection (1) or (2), the court may

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(a) authorize the registered creditor making the application to take on behalf of all the registered creditors such proceedings to enforce the consolidation order as the court deems advisable; or
(b) where it deems it advisable and on notice to all parties, make an order permitting all the registered creditors to proceed each independently of the others for the enforcement of their claims under the consolidation order.

Moneys applied to judgment - Sec. 233(4)
(4) All moneys recovered as a result of proceedings taken pursuant to paragraph (3)(a) after payment of costs incurred thereby shall be paid into the court and shall be applied to the credit of the judgments against the debtor appearing in the register.

Proceedings where continuing default - Sec. 233(5)
(5) Where a debtor defaults in making any payment into court required to be made under a consolidation order and the default continues for a period of three months, all the registered creditors are entitled to proceed forthwith, each independently of the others and without reference to the court, for the enforcement of their claims under the consolidation order, unless the court otherwise directs on being satisfied, on application by the debtor, that the circumstances giving rise to the default and to its continuation were beyond the control of the debtor.

Debtor not entitled to relief - Sec. 233(6)
(6) Where any order has been made under paragraph (3)(b) or any proceedings have been commenced under subsection (5), the debtor under the consolidation order is not, without the leave of the court, entitled to any further relief under this Part during the currency of any claim against him entered in the register.
R.S., 1985, c. B-3, s. 233;
1997, c. 12, s. 116.

Re-examination of debtor - Sec. 234
234. (1) A debtor or any registered creditor may at any time apply ex parte to the clerk for a further examination and hearing of the debtor in respect of his financial circumstances.

Idem - Sec. 234(2)
(2) The further hearing referred to in subsection (1) may only be held
(a) with the leave of the clerk; or
(b) in the event of the refusal of the clerk, with leave of the court.

Notice of hearing - Sec. 234(3)
(3) The clerk shall give all parties to the consolidation order at least thirty days notice of the time appointed for the hearing referred to in subsection (1).

Clerk may vary order, etc. - Sec. 234(4)
(4) Where after considering the evidence presented at the further hearing referred to in subsection (1) the clerk is of the opinion that
(a) the terms of payment set out in the consolidation order, or

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(b) the decision that the circumstances of the debtor do not warrant the immediate settling of any amounts or times of payment thereof,
should be changed because of a change in the circumstances of the debtor, he may
(c) vary the order with respect to the amounts to be paid by the debtor into court or the times of payment thereof, or
(d) on notice of motion refer the matter to the court for settlement.

Application of section 227 - Sec. 234(2)
(5) Section 227 applies, with such modifications as the circumstances require, to a decision of the clerk under subsection (4).
R.S., 1985, c. B-3, s. 234;
1992, c. 1, s. 19.

Disposition of moneys paid into court - Sec. 235
235. (1) Subject to subsection (3), the clerk shall distribute the moneys paid into court on account of the debts of a debtor at least once every three months.

Idem - Sec. 235(2)
(2) The clerk shall distribute the money paid under subsection (1) rateably, or as nearly so as is practicable, among the registered creditors.

Payments less than five dollars - Sec. 235(3)
(3) Except in the case of a final payment under a consolidation order, the clerk is not required to make a payment to any creditor if the amount thereof is less than five dollars.
R.S., c. B-3, s. 206.

Oaths - Sec. 236
236. (1) The clerk may for the purposes of this Part examine any person under oath and may administer oaths.

Record - Sec. 236(2)
(2) The clerk shall make a written record in summary form of all evidence given at a hearing.
R.S., c. B-3, s. 207.

If assignment or bankruptcy order made - Sec. 237
237. (1) If a debtor in respect of whom a consolidation order has been issued under this Part makes an assignment under section 49, or if a bankruptcy order is made against the debtor under section 43, or if a proposal by the debtor is approved by the court having jurisdiction in bankruptcy under sections 59 to 61, any moneys that have been paid into court as required by the consolidation order and that have not yet been distributed to the registered creditors shall, immediately after the making of the assignment or bankruptcy order or the approval of the proposal, be distributed among those creditors by the clerk in the proportions to which they are entitled under the consolidation order.

Proceedings may be taken under other Parts - Sec. 237(2)
(2) The fact that proceedings have been taken under this Part does not prevent the taking of proceedings by or against the debtor under the provisions of any other Part of this Act.

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Idem - Sec. 237(3)
(3) None of the provisions of Parts I to IX of this Act applies to proceedings under this Part.
R.S., 1985, c. B-3, s. 237;
2004, c. 25, s. 96.

Appeal - Sec. 238
238. A decision or order of the court under this Part is subject to appeal in the same manner as if it were a judgment of the court in a civil action.
R.S., c. B-3, s. 209.

Clerk to report - Sec. 239
239. (1) On the issue of any consolidation order, the clerk shall forward a copy thereof to the Superintendent.

Idem - Sec. 239(2)
(2) The clerk shall give to the Superintendent all reports that the Superintendent may require for the administration of this Part.
R.S., 1985, c. B-3, s. 239;
1992, c. 27, s. 86.

No dismissal, etc., of employees - Sec. 239.1
239.1 No employer shall dismiss, suspend, lay off or otherwise discipline a debtor by reason only that the debtor has applied for a consolidation order under this Part.
1992, c. 27, s. 87.

No discontinuance of public utilities - Sec. 239.2
239.2 (1) No public utility shall discontinue service to a debtor by reason only that the debtor
(a) is insolvent;
(b) has applied for a consolidation order under this Part; or
(c) has not paid for service rendered before the consolidation order was applied for.

Cash payments - Sec. 239.2(2)
(2) Nothing in subsection (1) shall be construed as requiring further supply of service for other than payment in cash.
1992, c. 27, s. 87.

Regulations - Sec. 240
240. The Governor in Council may make regulations
(a) prescribing the forms to be used under this Part;
(b) respecting costs, fees and levies to be paid under this Part;
(c) designating the "court" for the purpose of this Part in any province except Manitoba and Alberta;
(d) adapting this Part to the court organization or other circumstances of a particular province;

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(e) varying, in respect of any province, the classes of debts and amounts thereof to which this Part applies;
(f) changing or prescribing, in respect of any province, the classes of debts to which this Part does not apply;
(f.1) respecting the transfer of proceedings to a province other than the province in which a consolidation order was originally issued; and
(g) generally, for carrying into effect the purposes and provisions of this Part.
R.S., 1985, c. B-3, s. 240;
1992, c. 27, s. 88.

Audit of proceedings - Sec. 241
241. The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.
R.S., c. B-3, s. 212.

Application of this Part - Sec. 242
242. (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application - Sec. 242(2)
(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.
R.S., 1985, c. B-3, s. 242;
2002, c. 7, s. 85;
2007, c. 36, s. 57.

PART XI

SECURED CREDITORS AND RECEIVERS

Court may appoint receiver - Sec. 243
243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
(c) take any other action that the court considers advisable.

Restriction on appointment of receiver - Sec. 243(1.1)
(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

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(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
(b) the court considers it appropriate to appoint a receiver before then.

Definition of "receiver" - Sec. 243(2)
(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who
(a) is appointed under subsection (1); or
(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" — subsection 248(2) - Sec. 243(3)
(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed - Sec. 243(4)
(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing - Sec. 243(5)
(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements - Sec. 243(6)
(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of "disbursements" - Sec. 243(7)
(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.
1992, c. 27, s. 89;
2005, c. 47, s. 115;
2007, c. 36, s. 58.

Advance notice - Sec. 244
244. (1) A secured creditor who intends to enforce a security on all or substantially all of

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(a) the inventory,
(b) the accounts receivable, or
(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd., 1991 ABCA 351 (CanLII) - A Demanding Bank that Terminates Funding, Appoints Receiver and Lack of Notice

Date:	1991-11-25
Docket:	11907
Parallel citations:	[1992] 1 WWR 577; 83 Alta LR (2d) 289
URL:	http://canlii.ca/t/1p6k1
Citation:	Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd., 1991 ABCA 351 (CanLII), <http://canlii.ca/t/1p6k1> retrieved on 2013-08-16
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In the Court of Appeal of Alberta
Citation: Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd., 1991 ABCA 351
Date: 19911125
Docket: 11907
Registry: Calgary
Between:
The Bank of Nova Scotia
Appellant (Plaintiff)
- and -
Dunphy Leasing Enterprises Ltd.
Respondent (Defendant)
And Between:
The Bank of Nova Scotia
Appellant (Plaintiff)
(Defendant by Counterclaim)
- and -
S & D Rent-a-Car-Ltd., R.F. Sturgeon Leasing and Warehousers Ltd., Duncan Phyper, Ronald F. Sturgeon and Dunphy Leasing Enterprises Ltd.
Respondents (Defendants)
(Plaintiffs by Counterclaim)
And Between:
The Bank of Nova Scotia
Appellant (Plaintiff)
(Defendant by Counterclaim)
- and -
106315 Canada Inc., Duncan Phyper,
and Dunphy Leasing Enterprises Ltd.
Respondents (Defendants)
(Plaintiffs by Counterclaim)
And Between:
The Bank of Nova Scotia

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Appellant (Plaintiff)
(Defendant by Counterclaim)
- and -
Duncan Phyper
Respondent (Defendant)
(Plaintiff by Counterclaim)
- and -
The Canadian Bankers' Association and the Borrower's Advocate Ltd.
Interveners

The Court:
The Honourable Chief Justice Laycraft
The Honourable Mr. Justice Stratton
The Honourable Madam Justice Fraser

Reasons for Judgment of The Honourable Madam Justice Fraser

Reasons for Judgment of The Honourable Mr. Justice Stratton
Concurred in by The Honourable Chief Justice Laycraft

APPEAL FROM THE JUDGMENT OF THE HON. MR. JUSTICE P.C.G. POWER DATED 26TH DAY OF MARCH, 1990

COUNSEL:
R. K. Laing Esq., V.R. Prather and I.C. Binnie, Q.C., for the Bank of Nova Scotia
G.L. Ford Esq., for Dunphy Leasing Enterprises Ltd.
R.A. McLennan Q.C. and M.G. Crighton, for The Canadian Bankers' Association

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE FRASER

I. INTRODUCTION

[1] Few things are as important to a business' ongoing success as the relationship it enjoys with its banker. And when the banker terminates the relationship by demanding repayment of loans and threatening to appoint a receiver, the effect on a business, even a viable one, will usually be immediate and negative. And if the banker also fails to give the business a reasonable time to repay the loans before appointing a receiver, the adverse effects will generally be more pronounced.

[2] On June 8, 1982 (demand date), just over a year after The Bank of Nova Scotia (Bank) had successfully induced Dunphy Leasing Enterprises Ltd. (Dunphy) to leave its previous lender, the Bank demanded that Dunphy repay all outstanding loans. It gave Dunphy 20 hours to pay over $5,000,000.00. When Dunphy did not meet this time limit, the Bank immediately appointed a receiver for Dunphy. The receiver began to liquidate Dunphy's assets and those of two subsidiaries, S&D Rent-A-Car Ltd. (S&D)' and 106315 Canada Inc. (106), both of whom were also customers of the Bank. As often happens in receiverships, the amounts realized were insufficient to discharge the Respondents' obligations to the Bank.

[3] Following a lengthy and complex trial, the trial judge concluded that the Bank was liable for trespass and conversion with respect to each Respondent:'1990 CanLII 5931 (AB QB), (1990) 105 A.R. 161 (Q.B.). The reasons: the Bank had failed to give Dunphy reasonable notice prior to appointing a receiver; it had seized S&D's assets without authority and it had failed to give 106 reasonable notice before withdrawing 106's overdraft privileges and seizing its inventory. In addition, in a decision with far-reaching implications for the lending industry in Canada, the trial judge also concluded the Bank had improperly calculated the interest the Respondents owed on their loans. In the result, each Respondent had paid more interest than it was obliged to do. The Bank was ordered to pay Dunphy and S&D damages totalling in excess of $1.1 million. The Bank appeals these decisions and other ancillary decisions the trial judge made.

[4] The Bank, both at trial and appeal, advanced alternative defences---it denied liability; it denied causation; and it disputed the extent of the Respondents' damages. The Bank contended it had every right to proceed in the manner it did. It argued Dunphy was in default of its obligations to the Bank on the demand date and in the

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circumstances of this case, 20 hours was reasonable notice. The Bank also asserted that even if it had not given Dunphy reasonable notice before appointing a receiver and it had not given 106 reasonable notice before withdrawing its overdraft privileges, any damages the Respondents suffered were not caused by these tortious acts. The Bank's rationale for this submission was based on its contention that the Respondents were insolvent on the demand date. Thus, in the Bank's view, any losses which the Respondents suffered resulted from their insolvent status and not from the absence of reasonable notice. What the Bank's argument comes to is this: the Respondents were drowning in debt. Whether the Bank's actions caused them to drown earlier than they otherwise would have is immaterial. They would have drowned anyway.

[5] I agree with the Bank that the trial judgment must be vacated. But unlike the Bank, I do not agree that certain decisions by the trial judge should be reversed. Instead, in my view, a new trial must be ordered because of reviewable errors in the trial judgment. The reviewable errors fall into four categories: first, problems with fact findings; second, failure to address and resolve the causation issue; third, failure to explain the rationale for accepting the Respondents' valuation of damages; and fourth, failure to consider and resolve several material issues. I do wish to acknowledge, however, the difficult task which confronted the trial judge given the complexities inherent in this case. Argument on appeal alone took almost two weeks. And without question, the issues which emerged during the course of argument were far better clarified on appeal than they had been at trial.

[6] Since a new trial is to take place, it is not essential to address the manner in which the Bank was obligated to calculate interest on the Respondents' outstanding loans. But given the implications of the trial decision, I shall do so. The principles of the mathematics of finance recognize that periodic interest can be calculated using one of two methods---the nominal rate (used by the Bank to calculate interest on the Respondents' loans)---and the effective rate (which the Respondents argue should have been used). The trial judge concluded that the Bank should have used the effective rate method. Both the Bank and the intervener, the Canadian Bankers' Association, disagree. Which method of interest calculation should apply where, as here, the loan documents are silent on this issue, is a troublesome question. It is one which has bedevilled experts intent on rationalizing theories of mathematical finance with the courts' historical approach to interest issues. Not surprisingly, because of its potential impact on debtor-creditor relations generally, the interest question consumed a disproportionate portion of both trial and appeal time.

[7] The interest question raises two separate issues. First, where interest is payable on a loan, should the contract providing for payment of interest be interpreted, in the absence of any term to the contrary, so as to require that interest be calculated by the effective rate method? Second, does s.4 of the *Interest Act*, R.S.C. 1970, c. I-18, apply even though the Bank's loan documentation states an annual rate of interest? The trial judge answered both questions in the affirmative. On both issues, I am of the view that the trial judge erred.

[8] I propose to review what I understand are certain non-contentious facts (Part II, below). Then I will summarize the reasons for a new trial (Part III). Next, I will review these reasons in detail. In that context, I will endeavour to identify concerns arising out of the trial judgment, dealing with both the factual (Part IV) and legal arguments (Parts V to VII) relating thereto. Finally, I will deal with the interest issue (Part VIII).

[9] In reviewing the reasons for a new trial, I shall deal with both the issues of causation and reasonable time. I do so for several reasons. The parties are entitled to know why, in spite of a careful and detailed trial judgment, a new trial is warranted. Further, addressing certain flaws in the legal arguments advanced on appeal maximizes the likelihood of avoiding errors during what is certain to be a lengthy and costly new trial. In addition, I want to give the parties the opportunity to settle by agreement, if possible, certain unresolved facts not addressed at the first trial and to narrow the scope of the issues to be canvassed during the new trial.

[10] Finally, and most importantly, each side has argued that it should now succeed on appeal on one point thereby effectively bypassing all of its opponent's objections. This is certainly the Bank's approach on causation. It argues that even if the Bank failed to give the Respondents reasonable notice before enforcing its loan security, this court should nevertheless now reverse all the trial judge's findings on the damages issue. This is because the Bank contends that the Respondents have not proven that any damages they suffered were caused by the absence of reasonable notice as opposed to their respective financial positions. In turn, the Respondents focus on the issue of reasonable notice and argue, in effect, that damages should be presumed to flow from the absence of reasonable notice. I shall explain why I am unable to take either of these shortcuts which the opposing sides contend should lead to a reversal or 3upholding of the trial judgment. And I have chosen not to address many other issues raised by this case on the basis they are best left for the trial judge to resolve in their entirety.

II. BACKGROUND INFORMATION

[11] The origins of this case began in the heady days of 1981. With Alberta's economy then booming, the Bank decided to expand its loan portfolio in this province. In pursuit of this goal, the Bank aggressively solicited new business. One of its targets was Dunphy, controlled by Duncan Phyper (Phyper). Dunphy was in the automotive leasing

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business and Phyper had been a highly-regarded customer of the Toronto Dominion Bank (TD) for a period of over 20 years.

[12] In January, 1981, Dunphy submitted to the Bank an application for financing in which it disclosed that Dunphy's financing requirements would reach a maximum of $6.3 million by January, 1983. It is noteworthy, and this was not disputed on appeal, that Bank personnel at the Branch level were then fully aware of the relationship between Dunphy and S&D. They knew that Dunphy leased vehicles to S&D and that S&D in turn leased the vehicles on a daily rental basis. On February 11, 1981, the Bank's Head Office advised its Calgary Regional Office of its decision to extend to Dunphy a $5.0 million line of credit. By commitment letter dated March 6, 1981 and accepted by Dunphy in mid-April, 1981, the Bank and Dunphy agreed on the terms and conditions of the Bank loan. Security documentation was executed by Dunphy in the Bank's favour.

[13] Dunphy bought and then leased vehicles for terms of 2 to 4 years. Dunphy financed the vehicles it bought through the Bank line of credit in a process referred to as "discounting leases". Dunphy was required to make monthly principal and interest payments on the credit extended for each vehicle it financed. Once a vehicle's lease terminated or expired, Dunphy then had to make a "balloon payment" to the Bank, representing the balance owing on the amount financed.

[14] During the early part of a lease, the monthly payments Dunphy received from the lessee of the vehicle would not be enough to meet the monthly principal and interest payments owing to the Bank for the vehicle. However, it was anticipated that as Dunphy's lease portfolio matured and the leases reached what was described as the "crossover point", Dunphy's cash flow would then become positive. At this point, the amount of the monthly lease payments Dunphy received for the leased vehicles would be greater than the monthly payments owing to the Bank. This would occur because the interest component of the monthly payments that Dunphy made to the Bank for a vehicle would decrease with the corresponding reduction in the principal amount outstanding. And as the interest payments decreased, the "crossover point" would be reached when the monthly lease payments (which were at a fixed rate per month) exceeded the amount of interest and principal that Dunphy owed on a given vehicle. Until this occurred, the cash shortfalls that Dunphy incurred would be funded by a number of sources. One of these would be the Bank.

[15] Phyper intended to increase the volume of Dunphy's business significantly. The Bank knew this was so. During the spring, summer and fall of 1981, Dunphy flourished. Phyper, whose dedication and enthusiasm for Dunphy was unquestioned, increased Dunphy's leasing portfolio at a speed not anticipated either by him or the Bank. With this rapid expansion came an increase in Dunphy's monthly cash shortfalls and the need for increased loans by the Bank. Initially, the Bank granted such increases.

[16] By February, 1982, the Alberta economy had changed markedly and the Bank's enthusiasm for expanding its loan portfolio in Alberta had waned---along with its enthusiasm for the new credit it had extended to Dunphy less than a year earlier. The Bank decided that it wanted out of the Dunphy financing. And the Bank took steps to see that it got out. But not before it had arranged to have all security irregularities of concern to it corrected with the full cooperation of Dunphy and Phyper. Just a few days after this was accomplished, on June 8, 1982, the Bank demanded that Dunphy repay its outstanding loans.

III. REASONS FOR NEW TRIAL

[17] First, the trial judgment contains a number of seemingly contradictory fact findings. These, in turn, impact on one or more of the numerous legal issues. This is not simply a case where the parties disagree on the proper inferences to be drawn from the facts as determined by the trial judge. The problem is more fundamental---the parties cannot even agree on what fact findings were made. And it is also evident that other key fact findings were not definitively resolved or were omitted. This latter problem, in itself, constitutes a serious flaw in the judgment: ***Colautti Constr. v. Ottawa*** reflex, (1984), 9 D.L.R. (4th) 265 at 271 (Ont. C.A.). And each would justify a new trial.

[18] Second, the trial judgment does not address and resolve the causation issue: did the Bank's actions in fact cause the damages claimed by the Respondents? Instead, it appears to be premised on an assumption. That is, once it was proven that the Bank failed to give Dunphy reasonable notice before appointing a receiver, the trial judgment presumes that damages flowed therefrom, without analyzing whether Dunphy had proven a causal connection between the failure and the damages. Similarly, the judgment assumes that S&D sustained damages as a result of the Bank's failure to secure the necessary judicial approvals for the seizure of S&D's assets. It also assumes that 106 did likewise as a result of the Bank's failure to give 106 reasonable notice before withdrawing its overdraft privileges. As with Dunphy, the trial judgment gives no consideration to whether these failures in fact caused the damages claimed by each of S&D and 106. In taking this approach, the trial judgment is in error for reasons explained in detail below.

[19] Third, the trial judgment concludes that the evidence of the Respondents' expert on damages, Mr. Richard C. Jarand, should be preferred over that of the Bank's expert, Mr. Michael Bowie. But one cannot deduce from the trial judgment the basis for this conclusion. This omission would not ordinarily be fatal. A trial judge may not be obliged

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to explain the reasons for choosing one expert's evidence over another's. This is certainly so where no dispute exists between the parties concerning the primary facts upon which an expert's opinion is based. Nor is it enough that the Bank establish that the appeal court might have assessed the facts of the case or the inferences to be drawn therefrom differently than the trial judge: ***Stein v. The Ship "Kathy K"*** 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802.

[20] However, the problem in this case is that the trial judgment appears to consistently approve Bowie's general approach and analysis on the damages issue but then, without explanation, proceeds to reject Bowie's conclusions and chooses Jarand's instead. The trial judgement's failure to explain the rationale for accepting Bowie's analysis but Jarand's conclusions constitutes reviewable error: ***Nova, An Alberta Corporation v. Guelph Engineering Company et al.*** 1989 ABCA 253 (CanLII), (1989), 70 Alta. L.R. (2d) 97 (C.A.). It may also be that the trial judge missed an issue (what is meant by the orderly liquidation of assets by management), or overlooked the real significance of the experts' evidence. The judgment suggests both may have occurred. These too would warrant a new trial: ***Maryland Casualty Co. v. Roland Roy Fourrures*** 1973 CanLII 141 (SCC), [1974] S.C.R. 52 at 55 and 56; ***Harper v. R.*** 1982 CanLII 11 (SCC), [1982] 1 S.C.R. 2 at 14 and 18.

[21] Fourth, and most importantly, the trial judgment does not conclusively determine two key issues (and possibly a third depending on the answer to the first two). The first omitted issue relates to the Bank's breaches of contract, as determined by the trial judge: what effect did the Bank's breaches have on Dunphy and its subsidiaries? The trial judgment makes no attempt to resolve this issue. Was the Bank entitled to call Dunphy's loans when it did? This is the second omitted issue. And if not, then this raises the third omitted issue. What is the effect on the Bank's alternative defences of the Bank's having called Dunphy's loans when it was not entitled to do so? The trial judgment says nothing about any of these omitted issues. Nor does it address the effect the answers to these critical issues may have on the issues with which they interlock: liability, causation and damages. Overlooking significant issues itself compels a new trial: ***Harper v. R.***, ***supra.***

[22] Unlike most commercial financing arrangements, Dunphy's loans were not payable simply on demand. Instead, as the Bank conceded on appeal, its right to call Dunphy's loans was contingent upon Dunphy's then being in default of its contractual obligations to the Bank. Therefore, deciding whether the Bank was entitled to call Dunphy's loans involves consideration of a number of subsumed issues. The most Important one is what I consider to be the core question in this case: was Dunphy in default of its obligations to the Bank on the demand date? If the answer were yes, then it would be necessary to move on to the next issue---to what extent, if any, did the Bank's defaults cause or contribute to Dunphy's defaults?

[23] The trial judge's failure to conclusively determine whether Dunphy was in default of any of its obligations to the Bank on the demand date is explicable for several reasons. All relate to the manner in which the case was presented. First, much of counsel's attention focussed on what method should be used in calculating the amount of interest that Dunphy owed to the Bank. Dunphy's expert confirmed that Dunphy was not in default of its monetary obligations on the demand date assuming the Bank was obligated to use the effective rate method of interest calculation. The trial judgment accepts that the Bank was so obligated. It does not consider what the impact might have been on Dunphy's default position if, as I have concluded, the Bank was entitled to use the nominal rate method of interest calculation in determining Dunphy's interest charges.

[24] Second, the experts testifying on Dunphy's monetary defaults. Bowie and Dr. Charles Alfred Prentice, failed to factor into their respective analyses the implications of any contract breaches by the Bank, whether on Dunphy's ability to meet its monetary obligations or otherwise.

[25] Third, neither expert explained in detail how his opinion might be affected if the underlying assumptions on which his opinion was based were to change. This is exactly what happened in this case. The trial judge made a number of fact findings which differed from those which each expert assumed existed. And because of this deficiency in the experts' reports, the trial judge was deprived of any meaningful assistance in evaluating the effect which the changed assumptions might have had on the experts' opinions. Admittedly, the experts' task in these circumstances is a difficult one. Unless and until an expert knew what findings were to be made by the trial judge, the expert's attempt to provide an opinion based on the correct set of assumptions would prove highly problematic. But unfortunately, no way exists to avoid this thorny issue which will once again confront the trial judge on the new trial. However, since the onus lies on the Bank to prove that Dunphy was in default on the demand date, the problems inherent in dealing with all the permutations and combinations of the various assumptions fall largely onto the Bank's shoulders.

[26] Finally, at trial both sides proceeded on the assumption that even if the Bank had no right to call Dunphy's loans when it did, this would affect only one issue---reasonable notice. That was a mistaken assumption in my view. On appeal, the Bank maintained this position and intimated that whether Dunphy was in default on the demand date was not a watershed issue. I do not agree. As the Bank acknowledged on appeal, its ability to call Dunphy's loans was limited. These loans were not true demand loans. Dunphy first had to be in default of its obligations to the Bank in order

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for the Bank to call the loans. Therefore, in the context of this case, it is difficult to conceive of any issue that might impact more on causation and damages than the presence or absence of default. Whether the Bank was entitled to call Dunphy's loans at all on the demand date is far more important than the issue of whether the loans could be called even on reasonable notice. If the Bank had no right to call Dunphy's loans on the demand date, it would be unnecessary to even consider whether the Bank gave Dunphy reasonable notice before appointing a receiver. The Bank would have been unable to demand payment of the loans and appoint a receiver even on giving reasonable notice. What the trial judge would then have needed to consider is what effect the absence of any default by Dunphy had on the Bank's defences. The trial judgment addresses none of these questions.

[27] Given the complexity of this case, the length of trial time it required and the fact that many of the trial judge's findings and conclusions were not seriously challenged on appeal, I tried to determine the omitted issues, based on the trial judge's findings. I did so in the hope that a new trial could be avoided, at least on liability. The first step was to determine whether Dunphy was in default of its monetary obligations on the demand date. This required analyzing the extent to which the conclusions in the report (Bowie Report) of the Bank's expert, Bowie, should be altered to reflect the changes in Bowie's underlying assumptions mandated by the trial judge's findings. Unfortunately, this proved to be an impossible task.

[28] In any event, a further problem militates against limiting the scope of a new trial. The actions of a wrongdoer can give rise to liability both in contract and in tort: ***Central Trust v. Rafuse*** 1986 CanLII 29 (SCC), [1986] 2 S.C.R 147. If it should be determined that the Bank called Dunphy's loans when it had no right to do so, the Bank might be exposed to potential liability both in contract and in tort. This potential liability affects another issue: Dunphy's claim for exemplary damages. Insofar as exemplary damages are concerned, there is no need to prove causation. Exemplary damages are linked directly to liability. It is clear that Dunphy's claim for exemplary damages will continue to be vigorously asserted in the new trial. However, if the judge retrying the case were dealing only with causation and damages and not liability, the judge's ability to assess the claim for exemplary damages would be compromised. In these circumstances, there would be no factual context in which to place the exemplary damages claim.

[29] Further, and most importantly, the issues of liability, causation and damages are inextricably linked in this case. To deal with causation and damages, the trial judge must have a complete picture of the events leading up to the demand date. A snapshot view of the Respondents' financial status on the demand date would prove of little use to the trial judge in unravelling the issues of causation and damages. Without a complete understanding of the nature and extent of any breaches of contract by the Bank and their impact on each of the Respondents, a trial judge attempting to resolve these complex issues would be working in a partial vacuum. For all of these reasons, I have concluded that it would be impracticable, unworkable and unfair to restrict the scope of the new trial in any manner.

IV. FACT FINDINGS

[30] I propose to now highlight certain contradictory fact findings in the trial judgment and to identify a number of omitted fact findings which materially affect one or more legal issues. But I do not intend to exhaustively canvass all deficiencies in the primary fact findings. It is frequently unclear in the trial judgment whether a specific fact finding is being made, or whether a witness' evidence is simply being related as part of the narrative. This ambiguity may explain apparently contradictory fact findings. However, the difficulty is that one cannot always state with certainty into which category a statement falls: fact finding or narrative. This was evident during the appeal as the parties spent considerable time attempting to rationalize conflicting statements, in my view, without success.

1. AMENDMENTS TO LOAN AGREEMENT

[31] The Bank agreed to increase Dunphy's line of credit by $700,000 in July, 1981. Dunphy denied that, as a condition of the increase, it voluntarily agreed to repay the bank credit related to S&D vehicles at the increased rate of 2.75% per month. Instead, it contended that the Bank breached the loan agreement made between Dunphy and the Bank by requiring Dunphy to do so. Unfortunately, the trial judgment fails to satisfactorily resolve the question of what amendments, if any, Dunphy had agreed to as a condition of the increased line of credit. And without knowing whether the Bank was entitled to require stepped-up principal repayments on the S&D vehicles it financed, one cannot conclusively determine whether Dunphy would have been in default of its monetary obligations on the demand date.

[32] The trial judgment first indicates that Dunphy had agreed to a number of conditions in order to secure an increase in the Bank line of credit, one of which involved Dunphy's repaying the credits relating to vehicles leased to S&D at the rate of 2.75% per month. With reference to these conditions, the judgment provides:

> They were conditions agreed to by Dunphy Leasing in consideration for which the Bank agreed to the $700,000 overrun.

However, whether this statement was intended to be a fact finding is unclear because of later comments in the judgment. At one point, the trial judgment implies that a number of amendments were made to the loan agreement without Dunphy's agreement. One of the amendments mentioned is described as the Bank's decision to increase the principal repayment

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rate payable by Dunphy on loans for S&D vehicles. And then, at a later stage, as is apparent from the following excerpt, the trial judgment is ambiguous as to whether Dunphy had ever agreed to any such increase:

> It is impossible to ascertain the date on which the alleged oral agreement was made, the date on which it was to become effective or, most importantly, which of the terms of the loan agreement were amended, or how.
>
> The Bank did unilaterally amend the loan agreement and change the terms upon which it had agreed to lend to Dunphy Leasing.... There was never a written amending agreement, and the only suggestion of an oral agreement relates solely to principal repayment rate. I reject that Phyper, on behalf of Dunphy Leasing, agreed to any of the other amendments made by the Bank.

[33] Nor does the trial judgment resolve when the Bank imposed on Dunphy the requirement that the term of any leases to S&D be limited to no more than I year. If, as the trial judge found, Dunphy did not agree to this amendment, then vehicles Dunphy leased to S&D were coming off lease at dates earlier than would otherwise have been the case. The significance of the early termination of these S&D leases is that starting in May, 1982, Dunphy was obliged to begin making "balloon" payments to the Bank for the S&D vehicles coming off lease. The impact this might have had on Dunphy would be highly relevant to the issues of causation and damages. This is because Dunphy claimed the premature termination of the S&D leases exacerbated its cash flow during this period. The trial judgment gives no help on this question.

[34] Moreover, to properly evaluate how limiting the term of the S&D leases affects causation and damages, one would need other fact findings which were not made. One would need to know how many vehicles fell into this category. One would also need to know the reason why the balloon payments owing for vehicles leased to S&D began coming due in May, 1982. Did they arise because the S&D leases started terminating as a result of the Bank's insistence the leases to S&D be limited to a year in length? Or was it because Dunphy started selling the S&D vehicles as part of Phyper's decision to wind down S&D by September, 1982? Or was it a combination of the two? And even this information would be incomplete without knowing to what extent Phyper's decision to wind down S&D was itself the result of the Bank's limiting the terms of the S&D leases. These represent only a few of the obvious questions arising in these circumstances. The trial judgment answers none of these.

2. LEASE OPTION PRICE VS. BALLOON PAYMENT AMOUNT

[35] The Bank contended that the theory of Dunphy's leasing business did not conform to reality. And worse yet in the Bank's view, Dunphy failed to appreciate that the rationale underlying its business was flawed. The reason according to the Bank: contrary to Dunphy's expectations, the amounts Dunphy received when lessees' exercised their options to purchase leased vehicles were less than the balloon payments then owing to the Bank for the vehicles. Dunphy strenuously disagreed with this submission. The trial judgment proves of limited assistance in resolving this material fact issue, which impacts directly on the question of Dunphy's economic prospects and financial integrity following the demand date.

3. RESPONDENTS' FINANCIAL STATUS

[36] One of the Bank's primary grounds of appeal is Dunphy's failure to prove that the Bank's actions caused Dunphy's damages. That ground is premised on Dunphy's having been insolvent on the date that the receiver was appointed, June 9, 1982 (receivership date). The trial judgment makes no conclusive finding as to Dunphy's financial status on the critical dates. Leaving aside Dunphy's obligations vis-a-vis the Bank, all of Dunphy's financial obligations were current as of the demand date. Despite the fact that this was so, the Bank's expert, Bowie, had testified that Dunphy was insolvent on the receivership date. By his calculation, Dunphy's liabilities then exceeded its assets by approximately $540,000. The Bank took the following comments in the trial judgment to be an acceptance of the validity of Bowie's opinion:

> Bowie's evidence with respect to the insolvency of Dunphy Leasing is uncontroverted. No other witness gave evidence with respect to the issue of Dunphy Leasing's solvency.

[37] However, two pages later, the judgment makes a comment which implies it rejects Bowie's opinion. Preceding the comment is a discussion of the income Dunphy was generating because of the average "spread" Dunphy had been able to achieve between the interest rates it paid on its Bank loans and the higher interest rates payable to it by its lessees. After this discussion, the judgment states:

> Assuming loans of $5.5 Million, that spread would produce an annual gross income of $412,500, which equates to a gross monthly income of $34,000, without taking into consideration income from vehicles which were fully paid out. The existence of that monthly income is hardly consistent with Bowie's conclusion of insolvency, which approach had the effect of depriving Dunphy of the benefit of declining interest rates.

[38] The trial judgment does not attempt to rationalize these inconsistent comments. Nor am I now in a position to do so.

4. FEBRUARY 22, 1982 TELEPHONE CALL

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[39] This telephone call between the Bank's representative, Einarson, and Phyper is dealt with in three different parts of the trial judgment. The Bank argued that it was during this call that Einarson told Phyper that the Bank wanted Dunphy to take its business elsewhere. Whether the Bank did so potentially impacts on at least two issues: liability and damages. Liability is affected this way: if reasonable notice becomes a live issue on the new trial, then whether the Bank put Dunphy on notice that it should find a new lender months before it appointed a receiver will strongly influence the decision as to what constitutes reasonable notice. Deciding whether the Bank invited Dunphy to find a new lender in February will also be relevant to the question of damages, including whether this is an appropriate case for an award of exemplary damages.

[40] The trial judgment is confusing as to what transpired during the call. In what is apparently a reference to the February 22, 1982 conversation, it states:

> **Einarson did not tell Phyper that Dunphy Leasing's line of credit had been revoked, suspended, or cancelled**... Einarson did not say that the Bank would be calling Dunphy Leasing's loans, he did not demand payment from the Borrowers nor did he make demands of any type.
>
> Nothing was communicated in the February 22nd telephone conversation which would give Phyper any indication that some three and one-half months later, after having made additional loans to Dunphy Leasing, the Bank would **demand payment and appoint a receiver for Dunphy Leasing**....

[41] Comments supporting these "findings" were also made later in the judgment where the February 22 conversation is dealt with in part in this manner:

[42] This much is now clear:

> 1. No demand for payment was made.
> 2. No notice was given from which Dunphy could or should infer that a demand would be made in the **future**....
> 4. Neither the Branch nor Regional Office was aware that the end had begun: each continued to recommend further accommodation for Dunphy.

[43] However, these apparent fact findings must be contrasted with comments made much later in the judgment when it returns to the February 22 phone conversation and observes:

> On February 22, 1982, Phyper was advised that the Bank "wished to see all business including that of S&D and 106315, removed from the Bank's books as soon as possible". The evidence points to the fact that from February 22nd onward, Phyper understood the precarious position of his companies in relation to the Bank.

[44] No attempt is made to reconcile the implications of these statements with those made earlier concerning the telephone call. And again, I cannot resolve this issue at this stage.

5.106'S ACCOUNTS RECEIVABLE

[45] The Bank's attempts to collect 106's accounts receivable proved disastrous. The trial judgment finds that out of approximately $104,000 in receivables, the Bank collected nothing. At least three questions arise from these facts: first, was the Bank entitled to realize on 106's accounts receivable when it did; second, if not, did any wrongful acts by the Bank cause the losses which 106 claims; and third, what is the "true value" of the losses which 106 sustained? The second question (one of those involved in the causation issue) is not addressed at all in the trial Judgment. And no clear answers to questions 1 and 3 emerge from the trial judgment. The trial judgment begins by outlining certain "facts" relating to 106's accounts receivable:

> 3. By July 12, 1982, the Bank had given notification under its assignment of book debts; thereafter, the Bank was solely entitled to enforce and receive payment of the receivables.
> 4. The collection files were referred to the Bank's solicitors on December 1, 1982, but collection action was inexcusably delayed to such an extent that nothing appears to have been collected.
> 5. No accounting has ever been provided by the Bank.

[46] But later, the judgment makes comments concerning the many difficulties involved in the Bank's collecting 106's accounts receivable:

> 106315's receivables were very old and were of extremely low quality. This was apparent before June of 1982.106315 itself had failed to collect these accounts and most of them had already been referred to litigation.
>
> The Bank spent a good deal of money in attempting to realize some money on the receivables before realizing that they were worthless. It did not have an obligation to send good money after bad in pursuing all these cases to trial. It is not the case that the failure to realize very much money from the receivables resulted from the negligence of the Bank or of its solicitors.
>
> The accounts receivable of 106315 had been validly assigned to the Bank. Whether the Bank realized all that they were worth is an entirely different issue. The Bank was unquestionably not a converter of the receivables.

[47] The trial judgment does not attempt to reconcile these apparently contradictory fact findings. It proceeds to award damages to 106 based on the full value of the accounts receivable. The explanation for doing so appears to be

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that the Bank's failure to account for its collection of the accounts receivable entitles 106 to value the receivable at face value. In support of this approach, the trial judge refers to *Royal Bank of Canada v. First Pioneer Investments Ltd.* (1979), 27 O.R. (2d) 352 (H.C.), aff'd (1981), 39 C.B.R. (N.S.) 147 (C.A.), reversed in part on other grounds, 1984 CanLII 75 (SCC), [1984] 2 S.C.R. 125. In that case, the court recognized the duty of a privately appointed receiver-manager to ensure that a proper accounting is ultimately made to the debtor. But the case did not address the effect a creditor's failure to account may have upon the valuation of the assets of the debtor. And to suggest that it automatically follows that upon failure to account, a creditor is liable for the book value of accounts receivable is not, in my opinion, a proper statement of the law.

[48] Once the court determines that a creditor has acted unlawfully (and the causation issue has been resolved against the creditor), then the burden of satisfying the court that the accounts receivable would have realized less than their book value does fall upon the creditor: ***Provincial Bank of Canada v. Gagnon*** 1981 CanLII 195 (SCC), [1981] 2 S.C.R. 98 at 112; and ***National Bank of Canada v. Corbeil*** 1991 CanLII 117 (SCC), [1991] 1 S.C.R. 117 at 133.

[49] However, the true value of the accounts receivable represents the proper measure of damages: ***Corbeil***, *supra* at 132. And in determining the true value, in the absence of evidence to the contrary, the accounts receivable would be valued at the book value set by the debtor: ***National Bank of Canada v. Atomic Slipper Co.*** 1991 CanLII 105 (SCC), (1991), 80 D.L.R. (4th) 134 (S.C.C.). The problem in this case is that the trial judgment fails to resolve whether the apparent difficulties associated with the collection of 106's accounts receivable constitute evidence to the contrary. Certainly, the Bank's failure to account for collection of 106's accounts receivable will adversely impact on its attempts to establish that their value was not as claimed by 106. But the mere failure to account does not of itself mean that the Bank is precluded from proving through other evidence to the contrary that the book value of 106's accounts receivable did not represent their true value. Nor does the trial judgment make any attempt to assess the impact that other negative factors might have had upon the true value of the accounts receivable. And those comments that are made point to differing conclusions as to their value.

V. CAUSATION AND DAMAGES

1. BANK'S ARGUMENTS

[50] On appeal, the Bank stressed the failure of the trial judgment to deal with the causation issue. The Bank's attack here was two-pronged in effect. Firstly, it contended that Dunphy had no value on the receivership date (because it was insolvent) and therefore, Dunphy suffered no loss even if the court should determine that the receivership was improper.

[51] Secondly, the Bank submitted that even if it failed to give Dunphy reasonable notice, Dunphy cannot claim anything more than nominal damages. The reason---Dunphy is unable to establish that even with the giving of reasonable notice, it could have paid off the Bank's loans. Therefore, any losses which it suffered were not caused by the short notice but by Dunphy's precarious financial position. This submission appears to be premised on two alternative bases: either Dunphy was insolvent on the receivership date (and could never have secured the necessary financing to repay the Bank loans); or (even if solvent), Dunphy could not have secured alternative financing within a reasonable time.

[52] I consider both Bank arguments on causation to be overly expansive statements of the law and therefore invalid as stated. However, the Bank is correct that the causation issue was not addressed and resolved in the trial judgment. It should have been. To appreciate the impact which this issue might have on the resolution of this case requires an understanding of the linkage amongst the liability, causation and damages issues. In determining whether the Bank's actions caused the damages that the Respondents contend, knowing the financial status of each Respondent on the receivership date is important. But not for the reasons the Bank asserts. Nor will the solvency or insolvency of the Respondents affect the assessment of damages in the manner the Bank suggests. I shall now deal with each of the Bank's causation arguments and state why I am of the view that each is wrong in law.

2. INSOLVENCY AND ABILITY TO SUSTAIN DAMAGES

[53] The Bank contends that if Dunphy was insolvent---if it had no value----when any wrongful acts by the Bank occurred, Dunphy suffered no losses. Why? Because (in the Bank's view) the end result would have been the same with or without the Bank's wrongful acts: Dunphy would still be insolvent. The Bank effectively asserts that an insolvent debtor cannot be further damaged. I do not agree. A debtor's ability to sustain damages is not contingent on its being solvent when a wrongful act is committed.

[54] The flaw in the Bank's reasoning is the mistaken assumption that an insolvent debtor---one with no value---loses nothing as a result of a creditor's wrongful act. The Bank's position fails to recognize any distinction between degrees of insolvency. According to its theory, a deficiency of $1 is the same as a deficiency of $1,000,000. Once the debtor has drowned, what difference does it make how deep the water is? The answer is that it clearly does make a difference. Even an insolvent debtor remains obliged to discharge all its debts. Whether it has sufficient funds to do so is

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immaterial. What is important is that a debtor's ability to meet its obligations will most certainly be affected by the extent of the deficiency arising on liquidation of its assets.

[55] Further, the extent of the debtor's deficiency potentially impacts on another party---the guarantor of the debtor's obligations. The greater the deficiency, the greater the guarantor's exposure and liability. This possibility is not merely of academic interest. In this case, one of the Bank actions involves its attempts to recover more than $1 million from Phyper as guarantor of Dunphy's obligations. A guarantor has a valid and demonstrable interest in limiting the extent of a debtor's deficiency. The Saskatchewan Court of Appeal has concluded that where a guarantor has been prejudiced by reason of a creditor's tortious actions vis-a-vis a debtor, the guarantor's obligations under the guarantee should be correspondingly reduced to the extent of the prejudice: ***Bank of N.S. v. Ham*** reflex, [1986] 5 W.W.R. 249 at 258-260.

3. EFFECT OF DEBTOR'S INSOLVENCY

[56] The second prong of the Bank's attack on causation is founded on the argument that to recover any damages, Dunphy must prove that with reasonable notice it could have paid off the Bank loans. Otherwise, Dunphy cannot prove in turn that the absence of reasonable notice caused its damages. And in the Bank's view, Dunphy is unable to meet this threshold requirement. It points to Bowie's opinion that Dunphy was insolvent on the demand date to justify its assertion that Dunphy's losses resulted from its insolvency and not from any Bank actions. As stated by the Bank: "To have given additional time would have been to no avail." [Similar arguments were advanced with respect to S&D and 106.] This argument that Dunphy was bound to fail anyway and that the Bank simply put Dunphy out of its misery at an earlier date has an appealing simplicity to it. And it may very well be that in many cases in which a creditor puts a financially troubled debtor into receivership, the argument will prove successful. But as often happens when one tries to simplify complex legal issues, the apparent simplicity is misleading.

[57] When a creditor fails to provide reasonable notice to a debtor before appointing a receiver and seizing the debtor's assets, the creditor is liable in tort for trespass and conversion: ***Ronald Elwyn Lister Limited et al v. Dunlop Canada Limited*** 1982 CanLII 19 (SCC), [1982] 1 S.C.R. 726. Liability in tort arises all the more so where the creditor had no right at all to appoint a receiver, even on giving reasonable notice. Causation in tort involves two different concepts: causation-in-fact and causation-in-law. Causation-in-law generally involves determining whether the damage which a party incurred was not "too remote" a consequence of the tortfeasor's wrongful acts. See Allen M. Linden, Canadian Tort Law. 4th ed. (Toronto: Butterworths, 1988) at 305-361. In this case, causation-in-law is not in issue. If the Bank had no right to call Dunphy's loans or if the Bank failed to give Dunphy reasonable notice prior to appointing a receiver, then either way, the Bank's appointment of a receiver led to the premature seizure and liquidation of Dunphy's assets. Thus, the causation-in-law bridge would be crossed---the premature appointment of a receiver and the subsequent seizure and liquidation of Dunphy's assets would be the direct and expected result of the Bank's wrongful actions. Similar consequences would flow with respect to S&D and 106 (assuming, of course, that the Bank's liability for tortious acts vis-a-vis these parties were established).

[58] In raising the causation issue, what the Bank is really disputing is causation-in-fact: it claims that the Respondents cannot prove that the Bank's actions, even if they were wrongful, in fact caused the losses the Respondents claim. Instead, the Bank asserts that the Respondents' losses were caused by their poor financial positions. What the Bank contends is this: Dunphy cannot establish the necessary causal relation between the Bank's actions and the losses claimed by Dunphy unless Dunphy first proves that it could have paid off the Bank loans had it been given a reasonable time to do so. I do not dispute that the evidence relating to a debtor's inability to pay off its loans may persuade a court to conclude that no damages resulted from the premature seizure: ***Kavcar Investments Ltd. v. Aetna Financial Services Ltd.*** reflex, (1989), 70 O.R. (2d) 225 at 238 (C.A.). However, this conclusion does not inevitably follow. Nor does it follow that the creditor will automatically be restricted to liability for nominal damages where the debtor is unable to prove that it could have paid off its loans within a reasonable time.

[59] The fallacy in the Bank's argument to this effect is the premise on which it is based. The Bank assumes that an injured party may recover something more than nominal damages only if the creditor's tortious conduct was the sole cause of the debtor's losses. But that is not necessary. It is enough that the debtor prove that the creditor's conduct caused some of the losses either by contributing to or exacerbating the debtor's losses. While the debtor must show a causal connection between the creditor's tortious acts and the losses suffered, this can be accomplished by establishing that the tortious acts were "either 'the' cause ... or 'a' cause" of the losses sustained: Fridman, The Law of Torts in Canada, supra at 323. Liability for damages can arise either way.

[60] Thus, even if it had been proven that Dunphy was either insolvent or doomed to fail on the receivership date, that would not have ended the causation and damages analysis. Nor would the fact that Dunphy could not establish that with reasonable time it could have paid off the Bank loans. It would simply have led to other avenues to explore. First, the trial judge would have needed to consider whether the circumstances warranted an award of damages for trespass of other than a nominal amount. There is no rule of law that restricts an award of damages for trespass to a nominal amount

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only. See Street on Torts. 8th ed., M. Brazier ed. (London: Butterworths, 1988) at464; ***G.W.K. Ltd. v. Duntop*** (1926), 42 T.L.R. 376 (K.B.); and ***Pearson v. Duke*** reflex, [1931] 2 W.W.R. 442 at 444 (Sask. C.A.). Therefore, depending on the circumstances of a given case, a court may determine that an award of damages for trespass should be more than a nominal sum. As explained by A.I. Ogus in The Law of Damages (London: Butterworths, 1973) at 23:

> Damages for torts actionable *per se are* said to be "at large", that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained.

[61] Moreover, to recover damages for trespass to goods, a plaintiff is not required to prove actual damage: ***Leitch& Co. v. Leydon*** [1931] A.C. 90 at 106 (H.L.). Liability flows from the act of trespass. G.H.L. Fridman, Q.C. in The Law of Torts in Canada. Vol. 1 at 7 (Toronto: Carswell, 1989) explains this principle in this way:

> Trespass in all its forms is actionable *per se*, i.e., without the need for the plaintiff to prove he has sustained actual damage.... **[t]he absence of any requirement that damage must be shown before an action will lie is an important** hallmark of trespass as contrasted with other torts.

[62] Next, the trial judge would have needed to consider the extent to which the Bank's trespass and conversion contributed to or exacerbated Dunph's losses (or demise). This would have involved an analysis of what Dunphy's prospects would have been absent the Bank's actions. The reason for this is that where a business has been liquidated as a result of the premature appointment of a receiver, and where causation-in-fact is in issue, the starting point for determining whether causation-in-fact has been proven involves assessing what the business' prospects would have been but for the trespass and conversion. In the context of this case, this means analyzing what would have happened to Dunphy (and S&D and 106) if the Bank had not taken the steps it did.

[63] One can easily see how this assessment will be affected by a debtor's financial status on the critical date. If a debtor is then insolvent or verging on insolvency, its ability to establish that it incurred the damages which it did only because of the absence of reasonable notice will be compromised. The creditor will seek to establish, as the Bank does in this case, that the debtor's losses would have occurred anyway. Why? Different theories might be advanced. The creditor could assert that the reasonable time, had it been given, would have been so short as to be meaningless. Nothing could have been done in the interim to save the debtor or to improve its prospects. It may even be contended that the premature appointment of a receiver will have been beneficial to the debtor. Arguably, this would be the case where the debtor is in an irreversible downward spiral, with losses mounting daily and no end in sight other than insolvency or bankruptcy. In this event, the debtor may be unable to establish the causal link between the wrongful acts and the damages it alleges it suffered. This was the conclusion in ***Pax Management Ltd. v. C.I.B.C.*** 1990 CanLII 727 (BC CA), (1990), 1 C.B.R. (3d) 1 (B.C.C.A.) where the court determined that the receivership minimized the guarantors' exposure and ended the debtor's ongoing losses. Therefore, in the end result, the court's award of damages for trespass and conversion may be nominal only.

[64] And if the Bank had the right to call Dunphy's loans, this analysis would also have involved a preliminary assessment as to what would have been a reasonable time. Deciding this question first would have permitted the trial judge to then test the validity of Dunphy's assertion that the Bank's failure to give reasonable time caused, contributed to or exacerbated its tosses. Likewise, it would have permitted the court to assess the Bank's defence that giving additional time would have accomplished nothing. Comparable analyses would be required for each of S&D and 106.

[65] However, if the Bank had no right to call Dunphy's loans when it did, then what would have been a reasonable time would be irrelevant. In these circumstances, Dunphy's task in proving its losses were caused by the wrongful seizure of its assets by the receiver that the Bank appointed would have been much easier. Correspondingly, the risks the Bank faced in defending the damages that Dunphy claimed by seeking to establish Dunphy would have failed anyway and that its losses were not caused in whole or in part by the Bank's conduct would have been significantly increased. None of this critical analysis has been undertaken in the trial judgment in respect of any of the Respondents.

4. RELATIONSHIP OF BANK'S DEFAULTS TO CAUSATION AND DAMAGES

[66] Nor are the causation and damages issues as simple in this case as the Bank claims. Both are complicated by another overlapping factor: the possible impact on these issues of any breaches of contract by the Bank. The trial judgment found that the Bank had defaulted in a number of its contractual obligations to Dunphy. But as already observed, the trial judgment does not address what effect these defaults might have had on Dunphy or its subsidiaries, or on the causation and damages issues. Nor does the trial judgment consider the causation issue, as it relates to any Bank breaches of contract, from the perspective of causation in contract. And I am not in a position to resolve these complex issues at this stage.

5. REASONABLE NOTICE

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[67] The Bank stressed that even if reasonable notice had been given, Dunphy's claim for damages must fail because Dunphy cannot establish any causal connection between the Bank's failure to give reasonable notice and the losses which Dunphy incurred. [Throughout this judgment, I have used the terms "reasonable notice" and "reasonable time" interchangeably.] The trial judgment makes no finding as to what would have constituted reasonable time. What it did find is that 20 hours did not. It also found that Dunphy would have required 60 days to obtain financing. In the Bank's view, reasonable time under Canadian case law cannot be more than a few days and certainly nothing approaching the 60 days which Dunphy would have required. Therefore, Dunphy could not establish that had it been given the time, it could have paid off the loan.

[68] Depending on the fact findings made at the new trial, the issue of what constitutes reasonable time may not arise. However, given the importance attached to this issue on appeal, and given the possibility that it may become a relevant issue, I consider it appropriate to address the general proposition which the Bank advanced. I do not agree that as a matter of law, reasonable time cannot be anything more than a few days. In support of its position that this is so, the Bank relied upon the British Columbia Court of Appeal's decision in ***Whonnock Industries Limited v. National Bank of Canada*** 1987 CanLII 2644 (BC CA), (1987), 16 B.C.L.R. (2d) 320 (C.A.), leave to appeal to S.C.C. refused (1988), 22 B.C.L.R. (2d) xxx. Seaton, J.A. discussed the relatively short time limits found to constitute reasonable time at 331:

> The Canadian law demonstrated in the decisions does not contemplate more than a few days and cannot encompass anything approaching 30 days. In the decisions noted nothing approaching the seven days permitted here [by the trial judge] has been classed as unreasonable. The cases in which the requirement for reasonable notice evolved deal with notices of an hour or less. None of them holds that a notice of more than one day was inadequate and none refers to the need for a notice of more than a few days.

[69] To the extent these comments were intended to summarize cases previously decided, I agree with them. But I do not accept that this decision stands for the proposition that reasonable time cannot ever constitute 30 days or longer. In ***Lister v. Dunlop, supra***, the Supreme Court of Canada confirmed that reasonable notice is a question of fact. Under the law in Canada today, the concept of reasonable notice is not defined by or limited to any minimum or maximum length of time. Nor should it be. To judicially impose what would necessarily be arbitrary time limits in fixing these minimum or maximum periods would be a mistake. This type of compartmentalized approach to the concept of reasonable notice runs counter to the philosophy that what is reasonable cannot be determined in a vacuum. The reasonable notice concept is fact driven. It only makes sense in the context of the individual circumstances of a case. See ***Barclay Const. Corp. v. Bank of Montreal***reflex, (1989), 41 B.C.LR. (2d) 239 at 245 (C.A.).

[70] Of course, in determining whether a creditor has failed to give reasonable notice to its debtor before appointing a receiver, the insolvency of the debtor on the date of demand for repayment of loans will undoubtedly figure prominently in the court's assessment of what constitutes reasonable notice: ***Kavcar***, *supra* and ***C.I.B.C. v. Quesnel Machinery Ltd.*** (1985), 62 C.B.R. (N.S.) 91 (B.C.S.C.). What is reasonable notice may range from one extreme to the other. And there may well be circumstances in which reasonable notice may involve no time at all: ***Quesnel, supra***; ***263121 Ontario Ltd. v. Toronto Dominion Bank*** (September 27, 1984), (Ont. H.C. unreported); and ***Nobes v. Royal Bank***(*1981*), 49 N.S.R. (2d) 634 at 636 (C.A.). Equally, however, there may be cases in which the circumstances are such that reasonable time is found to be of relatively long duration.

[71] In the leading case of ***Mister Broadloom Corporation*** (***1968***) ***Ltd. v. Bank of Montreal et al*** (1979), 25 O.R. (2d) 198 at 208, Linden, J. listed the factors to be taken into account in assessing what constitutes reasonable time, including in his list "the potential ability to raise the money required in a short period". These factors which were implicitly approved by the Supreme Court in ***Lister v. Duniop, supra***, would entitle the court to explore the question of how long it would have taken Dunphy (and its subsidiaries) to arrange replacement financing: ***Kavcar, supra***, at 234-235.

[72] In the context of this case, a number of other factors would have been relevant to the Issue of reasonable time. The most important of these is whether Dunphy was in default on the demand date. Other than risk of loss to the lender, I can imagine no factor which would have more significance in assessing what constitutes reasonable time than whether a debtor is in default of any obligations to its creditor at the time of demand. If not, then the absence of default militates in favour of reasonable time being measured in weeks, rather than days.

[73] Prevailing local lending conditions may also affect the assessment of reasonable time. Commercial realities in the financial sector should not be ignored. What is a reasonable time in an urban area may not constitute a reasonable time in a rural area. And what constitutes a reasonable time in a large metropolitan area in which the head offices of many lending institutions are located may not constitute a reasonable time in another metropolitan area not similarly situated in terms of access to senior decision makers.

[74] if the creditor has given the debtor some prior indication that the creditor intends, or may be compelled, to terminate the lending relationship, this will also influence the reasonable time analysis. Oftentimes, a creditor's calling of its loans will have been preceded by discussions with the debtor focussing on the debtor's precarious position and the

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steps the creditor requires be taken. A creditor's request that a debtor take its business elsewhere prior to calling the debtor's loans will tend to shorten the period of reasonable time from what it might otherwise be absent this factor.

[75] A creditor's past conduct may also enter into the reasonable time equation. If the conduct before demand reflects the creditor's general lack of concern in terms of perception of its risk of loss, or acceptance of a status quo in which the debtor is in breach of its contractual relations, these factors would call into question the validity of the creditor's later claim that risk of loss motivated a restricted notice period. For example, a creditor might make a de facto decision to call a loan two months before it formally implemented its decision. Then, in the absence of any reason for the creditor's not placing the debtor on notice that its loan would be called and in the absence of intervening events, greater scrutiny of the creditor's stated reasons for limiting the period of reasonable time would be justified.

[76] Further, if the creditor, following demand and appointment of a receiver, permits the debtor or one of its principals to carry on in the ordinary course of business, this too will be a relevant factor tending to rebut any concerns the creditor might subsequently express about the debtor's character.

[77] Finally, another pertinent factor impacts on the assessment of reasonable time: whether the creditor's actions vis-a-vis the debtor prior to the date of demand have been characterized by an absence of good faith. I do not propose to enter into the problematic issue of whether a doctrine or duty of good faith exists as a standard of conduct in Canadian contract law since this complex issue was not fully argued on appeal. But whatever the answer to that question, I am of the view that the presence or absence of good faith by the contracting parties preceding the date of demand may properly influence a court's assessment of reasonable time. A creditor's absence of good faith in either its administration or calling of a debtor's loans would ordinarily be a highly relevant factor carrying some considerable weight in the reasonable time debate. Of course, good faith works both ways: a debtor's absence of good faith may be of equal importance in the resolution of this issue.

[78] The reasons for this conclusion are straightforward. The search for reasonable time employs the factual context in which the issue arises. And considering all the circumstances of the case necessarily includes an evaluation of the past conduct of the debtor and the creditor, and an assessment of whether either party's conduct has been characterized by an absence of good faith. In this sense therefore, the bad faith of either contracting party may be viewed as a variation on the theme that past conduct of the parties may be relevant to a reasonable time assessment.

VI. VALUATION

[79] The trial judgment did not explain why it chose Jarand's opinion over Bowie's concerning the amount of the underrealization resulting from the premature liquidation of Dunphy's assets. Bowie's opinion was that the underrealization totalled approximately $106,000, but Jarand concluded it totalled approximately $1,095,000. Each of Bowie's asset values were higher than the amounts Jarand allocated to the same assets except for two classes of assets: (1) Dunphy's investments in and advances to its subsidiaries, S&D and 106; and (2) Dunphy's main asset, its lease portfolio. It is in connection with the valuation of the lease portfolio that the tremendous discrepancy between Bowie's opinion on underrealization and Jarand's becomes evident. Each purportedly used the orderly liquidation by management approach in valuing Dunphy's lease portfolio.

[80] Bowie divided the leases into two categories for this purpose: the non-performing and the performing leases. The trial judgment refers to Bowie's valuation of both categories of leases with apparent approval. While other comments are made which arguably imply that neither valuation was fair to Dunphy, the trial judgment never definitively resolves what portion of Bowie's evidence has been accepted and what portion has been rejected. Nor does it explain why it then apparently rejects Bowie's conclusions in their entirety.

[81] Since there is to be a new trial, I do not propose to review in detail the concerns with each expert's report. However, I do consider it appropriate to make one observation. The trial judgment does not identify the principles to apply when valuing assets based on the orderly liquidation by management approach. I understand that evidence on the meaning of this concept was lacking at trial. Clearly, expert evidence as to what is meant by the orderly liquidation of assets by management is essential if one is to properly assess any damages flowing from the improper appointment of a receiver. For example, does orderly liquidation by management mean that one should value the leases on the basis of the cash flow projected to be generated over their lifetime assuming the leases would continue to their expiry date? Or should one value the leases on the basis of their being discounted to a purchaser within a reasonable time? And if so, what is the reasonable time that would be involved? These are only a few of the questions which should have been asked and answered. Undoubtedly, there are many more.

VII. OMITTED ISSUES

1. EFFECT OF BANK'S DEFAULTS

[82] Much of the trial judgment focusses on what was found to be the Bank's often contradictory, inconsistent and unilateral actions prior to the demand date---actions which the trial judge concludes constituted breaches of contract by the Bank. These actions were unrelated to what the trial judge determined to be the Bank's tortious conduct

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vis-a-vis each of the Respondents. Therefore, the trial judgment should have considered two further issues relating to the breaches. First, what impact did they have on the Respondents, including the ability of each to meet its monetary obligations to the Bank? The answer to this question is an essential component in assessing the interrelationship of the contract breaches and the issues of causation and damages. For example, would Dunphy have been a "going concern" on the receivership date had it not been for the Bank's defaults? And second, did such breaches in themselves result in any damages to the Respondents? The trial judgment avoids these issues entirely.

2. BANK'S RIGHT TO CALL LOANS

[83] The Bank stressed that Dunphy was in default of its monetary obligations to the Bank on the demand date. When pressed to substantiate this submission based on the trial findings, the Bank asserted that even if this were not so as of the demand date, Dunphy was, in any event, in default of other contractual obligations to the Bank. Dunphy denied any defaults. Alternatively, it argued that the defaults, if they existed, were caused by the Bank's breaches of contract.

[84] The trial judgment makes no definitive finding on whether Dunphy was in default of any of its obligations to the Bank on the demand date. Instead, the trial judgment says the "existence of default, if any" by Dunphy does not relieve the Bank of its obligation to give Dunphy reasonable time to pay the outstanding loans. The trial judgment concludes that the perceived existence of any default did not motivate the calling of Dunphy's loans. The judgment indicates that the Bank's decision to call the loans and appoint a receiver was "an exercise of what was then considered an unassailable Bank prerogative." This may have been so. However, I agree with the Bank that the reason for calling Dunphy's loans need not have been identified at the time of demand, as long as the Bank is able to establish after the fact that at the time of demand, an event of default existed: ***Kavcar***, *supra* and ***Pax Management Ltd. v. Canadian Imperial Bank of Commerce*** [1988] B.C.W.L.D. 2239, and supplementary reasons on September 30, 1988, [1988] B.C.W.L.D. 328, overturned on appeal on other grounds, *supra*.

[85] But I would add two limitations to this general principle. Where the "default" on which the Bank seeks to rely is premised upon the Bank's having determined that it existed before calling the loans, the decision must have been made before the loans were called. For example, the chattel mortgages in this case provide the Bank can call the loans if the Bank, in good faith, determines that Ounphy's ability to pay the loans is impaired. The Bank cannot rely upon this right after the loans have been called if no good faith decision had been made to this effect before calling Dunphy's loans.

[86] Second, where the event of "default" is one which has existed throughout the relationship of the parties and has not been the subject of adverse comment by the lender, a question arises as to whether the lender will be permitted, in all the circumstances, to rely upon the existence of the "default." This will in turn raise other issues which will need to be considered including estoppel, waiver and acquiescence.

[87] To answer the question whether Dunphy was in default of any of its contractual obligations on the demand date, the trial judgment should have first determined what these obligations were. Simply deciding that in the event of conflict as to what constitutes a "default", one security instrument prevails, such as the commitment letter, does not complete the analysis. First, the trial judgment should have determined whether broader rights of default were granted to the Bank under any of the other security documents. And if the answer were yes, the trial judgment would then have needed to evaluate whether these additional rights conflicted with or undermined the default limitations contained in the commitment letter. The trial judgment fails to address these related issues.

A. DUNPHY'S MONETARY OBLIGATIONS

[88] The Bowie Report reflects that on the demand date, Dunphy was $273, 537.40 in default. Bowie defined "default" in the same manner the term was defined in the commitment letter---30 days past due. The parties agreed that this was a proper definition of monetary default. The trial judgment should have determined the extent, if any, to which the sum of approximately $273,000 (or any portion thereof) was 30 days past due on the demand date, given the fact findings made by the trial judge which differed from those Bowie assumed to exist. But this analysis was not undertaken. And it would have required assessing at least four factors.

a. Time for Principal Payment

[89] Bowie assumed that principal payments were due and payable on the 1st day of each month. Contrary to the trial judgment's finding, the commitment letter does specify the monthly principal payments that Dunphy was to make to the Bank. However, the commitment letter is silent as to when the payments were to be made and the trial judgment does not resolve this issue. Were they due on the same date as the interest payments, the 22nd of each month, or on some other date? I shall use one example to emphasize the importance of this issue. Of the approximately $273,000 Bowie concluded was 30 days past due on the demand date, approximately $140,000 represented regular principal payments Dunphy owed for May. But if these principal payments were not owing until the date for payment of interest, the 22nd of the month, then no portion of the $140,000 would have been due until May 22, 1982. And as of the demand date, the amount would not have been 30 days past due.

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b. Due Date for Payments on Sale of Vehicles

[90] Bowie assumed Dunphy was to pay the Bank immediately on sale of a vehicle. The trial judgment found differently, deciding that payments were not due until the month following sale. When Dunphy was to pay the Bank for vehicles it sold is of critical importance in evaluating whether Dunphy was in default on the demand date. The Bowie Report indicates that of the approximately $273,000 that was thirty days past due on the demand date, approximately $48,000 related to vehicles Dunphy sold during the first six days of June, 1982. Accepting for the moment the trial judgment's finding, the payout amounts Dunphy owed to the Bank for the vehicles would not have been due until sometime in July, 1982 and would not have been 30 days past due until sometime in August.

[91] To take a further example, Exhibit 674 indicates that during the month of May, 1982, payments to the Bank for vehicles sold totalled approximately $157,000. The Bank apparently used monies in Dunphy's account to pay this amount. But if the monies for vehicles sold were not due till the month following sale, then the $157,000 would not have been owing until sometime in June, 1982 and would not have been 30 days past due until sometime in July, 1982. That in turn would mean that had the Bank not withdrawn these payments from Dunphy's account before they were due, the monies would have been available to pay all of the principal payment due for the month of May and a portion of the outstanding interest payments for April and May. Even these adjustments would be inadequate. For the trial judge to have had a complete picture of Dunphy's financial obligations vis-a-vis the Bank, the trial judge would have had to make similar adjustments for the preceding months in which Bowie made contrary assumptions to conform with the trial finding that monies were due not on sale but rather some time during the month following sale.

c. Impact of Bank's Withdrawal of Funds

[92] The trial judgment fails to consider the effect of the Bank's withdrawing monies from Dunphy's account in advance of when the monies were due. These withdrawals raise many unanswered questions. Did the withdrawals adversely affect Dunphy's cash flow? Did they result in Dunphy's incurring additional interest charges since the monies could not then be used to reduce the amount due and owing to the Bank? And if so, how much additional interest was incurred? What other effects did the premature withdrawal of monies have on Dunphy? Again, the trial judgment gives no assistance in answering these questions.

d. Other Considerations

[93] As noted earlier, the interrelationship between any of Dunphy's monetary defaults and any Bank defaults should also have been considered. It was not.

B. DUNPHY'S OTHER OBLIGATIONS

[94] On appeal, the Bank emphasized Dunphy's non-monetary defaults in its obligations to the Bank and referred to three disputed events of default not expressly dealt with in the trial judgment. These related to Dunphy's alleged breaches of its obligations under both Clause 1 (a) of the Debenture and Clause 7 of the standard chattel mortgage Dunphy granted to the Bank on the vehicles the Bank financed. In addition, the Bank asserted that it was entitled to call Dunphy's loans on the basis of the following provision in the commitment letter:

> This credit is subject to periodic review with no material adverse change occurring in the financial position of the Borrower.

The trial judgment does not resolve any of the issues raised by these submissions.

VIII. INTEREST ISSUE

[95] As noted earlier, the interest issue encompasses two distinct questions:

1. Should a contract be interpreted so as to require that any interest payable thereunder be calculated by the effective rate method of interest calculation, as opposed to the nominal rate method, unless the contract otherwise provides?
2. Does s. 4 of the *Interest Act* apply to any of the subject loan documentation?

The trial judgment concludes that the answer to both questions is yes. I do not agree.

[96] I propose to begin my analysis of these issues by outlining the relevant portions of the Bank's loan documentation (subpart 1, below). Next, I will briefly review a number of general principles, some of which clearly influenced the trial judgment (subpart 2). Then, I shall deal with the interpretation of the loan documentation as it relates to payment of interest and explain why I have concluded that the Bank was entitled to calculate interest at the stated rates in the contracts applying the nominal rate method of interest calculation (subpart 3). Finally, I shall explain why, in my view, s. 4 does not apply in this case (subpart 4).

1. RELEVANT INTEREST TERMS IN LOAN DOCUMENTATION

[97] I will set out the relevant portions of the interest provisions of each debt instrument that Dunphy executed, but will omit the chattel mortgages, which were not the subject of any argument on this point on appeal. These are the interest provisions:

1. In the Commitment Letter:

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INTEREST RATE:- Interest will be payable on the outstanding principal amount as well after as before maturity at 3/4% per annum over the Bank's prime lending rate from time to time.

CALCULATION AND PAYMENT OF INTEREST:- Interest will be payable on the 22nd day of each month as calculated on each such day on the basis of a calendar year for the actual number of days elapsed.

2. In the Promissory Notes:

... with interest at the rate set out below calculated monthly and payable monthly as well after as before demand of payment.

FLOATING RATE - at the rate per annum equal to the prime lending rate of the Bank of Nova Scotia from time to time PLUS 1% per annum (present effective rate 19 1/4% per annum).

3. In the Debenture:

... and interest at the rate of 24% per annum, calculated and payable monthly, both before and after maturity and default, and interest on overdue interest at the rate aforesaid.

The promissory notes S&D and 106 executed were in the same form as the promissory notes referred to above which Dunphy executed.

2. GENERAL PRINCIPLES

[98] The principles of the mathematics of finance recognize that when interest is payable more frequently than once a year based on a stated annual rate, either one of two methods of interest calculation may be used: the nominal rate method or the effective rate method. Interest calculated by the nominal rate method results in a higher return to the lender than does interest calculated by the effective rate method. If the Bank were restricted to the effective rate method of interest calculation, then Dunphy has been overcharged interest totalling approximately $85,000. No comparable figures are available for S&D or 106.

[99] I agree that from a borrower's perspective, a nominal annual interest rate---for example that interest will be payable at the rate of prime + 3/4% per annum---is a relatively meaningless number. By itself, it tells the borrower almost nothing. To compute the actual interest payable on a loan, a borrower would need to know other relevant information: the frequency of the period of calculation of interest; the frequency of payment of interest; whether interest is to be calculated in advance; and whether the lender has the right to compound interest (and if so, upon what basis). And even if this information were disclosed, it is open to debate whether the average borrower would have the vaguest idea how to use the information to calculate the real costs of a loan.

[100] Interest calculated and paid semi-annually rather than annually will produce a greater yield to the lender; interest calculated and paid quarterly, monthly, weekly and daily, will produce progressively increased yields. The corollary of the fact that the lender's yields will be greater is that the "costs" to the borrower will be correspondingly increased with the increase in the frequency of the calculation and payment dates. This will be the case even though all the payments are made on time and therefore, no compounding of interest is involved. Acceptance that this is so recognizes the principle that money has time value. It does. And because it does, the principles of the mathematics of finance recognize that a payment due on one date does not have the same value as a payment of an equal amount due on a later date. Money due on a certain date is treated as having a dated value. As Prentice explained in Exhibit 629, the sum of a set of dated values, due on different dates, has no meaning. The dated values have to be replaced by equivalent dated values, due on the same date. What this means is that if one were to compare a series of monthly payments of principal and interest to a single annual payment of principal and interest, the only method of interest calculation which would equalize the two is the effective rate method utilizing compounding equal to the monthly payment period.

[101] But while I agree that this may all be so, it does not assist me in resolving the issues before this court. What is in dispute here is not whether, as a matter of policy, a lender should be obligated to make full disclosure to a borrower of the "real" interest costs of a loan. Nor am I concerned with whether these obligations should apply to all customers, sophisticated borrowers or not. Nor am I empowered to consider what full disclosure should entail in order for the information to be readily understandable by the public. Subject only to the limitations in valid legislation, lenders and borrowers may contract for whatever terms for payment of interest they wish. Therefore, my inquiry is a narrow one, directed as it is to the two issues I have identified: on what terms did the parties contract for payment of interest; and does s. 4 of the *Interest Act* apply in this case? (It is the only statutory provision of any possible application in these circumstances.)

[102] At this stage, I pause to discuss another critical point, the distinction between calculation of interest and compounding of interest. In my view, the source of much of the critical comments and confusion surrounding the manner in which the courts have dealt with interest computation problems results from the failure to distinguish between calculating and compounding of interest. When a debt instrument provides for interest to be both calculated and payable monthly, no interest compounding is involved. Compounding may arise if the debtor fails to make the required interest payments. if entitled to do so, the lender can add the unpaid interest to the principal, that is "compound" the interest. It

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may be that the date for calculation of interest will also be the same date as the date for compounding of interest. But the two need not be coincidental. And in fact, a given contract may or may not make any provision for compounding of interest. If the contract so provides, interest may be added to the principal and the interest in arrears will itself bear interest at the stated rate. If the contract does not expressly provide for interest to be added to principal in this fashion, then one must look to the terms of the loan documentation and arguably to the custom or usage in the banking industry to determine if compounding of interest will be permitted: ***National Bank of Greece SA v. Pinios Shipping Co. No. 1 and another, the Maira*** [1990] 1 All ER 78 (H.L.).

[103] There is however another sense in which "compounding" of interest is said to occur and that is when the dates for payment of interest under a contract are more frequent than the dates for calculating interest thereunder. When this happens, what has come to be known as the reinvestment principle (or deemed reinvestment principle) is said to apply. This principle and the very point that its application is akin to compounding of interest (though not compounding in the mathematical sense in which this word is ordinarily used) were explained by Mary Anne Waldron in *"Sections 6 and 7 of the Canada Interest Act: Curiouser and Curiouser"* (1984) 62 Can. Bar Rev. 146 at 171:

> The re-investment principle, in its simplest form, is a reflection of the basic fact of financial planning that a dollar payable today is worth more to a lender and costs more to a borrower than a dollar payable at some future date. Anyone who appreciates the value of deferring taxes appreciates that point.
>
> An example will illustrate. Suppose that ... I borrow $1,000 at 12% per annum, **calculated annually....** If I pay $10 every month, by the end of the year I will have paid $120.... I have conferred upon my lender the opportunity of investing the interest paid **before the calculation date.... The effect is that he will earn interest on interest, just as though he had been allowed to compound it. If interest is to be paid more frequently than it is to be calculated,** then arguably the lender should charge less interest than the stipulated rate divided by the number of payment periods or, **just as in more frequent compounding,** he will receive a greater yield from the loan, with a consequent greater cost to the borrower.... **The principle is known as the re-investment principle.** [Emphasis added.]

[104] Frequently the terms "compounding" and "calculating" are used interchangeably. But understanding the distinction between the two terms that I have just outlined as well as the difference between the two uses of the term "compounding" is key to resolving these issues: first, rationalizing what might otherwise appear to be contradictory judicial authorities; and second, knowing when the reinvestment principle will be applied in a loan contract so as to require a creditor to calculate interest by the effective rate method where the contract is silent on this point.

3. INTERPRETATION OF CONTRACTS

[105] The trial judgment found that the subject contracts were capable of being construed so as to permit interest to be calculated using either the effective rate method or the nominal rate method of interest calculation. The trial judgment then determined that contracts requiring the payment of interest should be construed so as to require that interest be calculated by the effective rate method of interest calculation unless the contrary is expressly stated. This meant treating the annual interest rate stated in each contract as the effective annual interest rate. And that is precisely what the trial judgment did. With respect, I do not agree with that approach. Where interest may be calculated using either method and where a contract is silent as to which method of interest calculation should apply, to simply prefer one method of interest calculation, when the principles of the mathematics of finance recognize the possible application of two, cannot be justified. The principles of the mathematics of finance do not stipulate that one method prevails over the other. And in any event, the question is one of contractual interpretation: what did the parties intend when the subject contracts were executed?

[106] Dunphy urged that in interpreting the contracts, courts should not seek to determine the parties' intentions, but rather should interpret the contracts in a manner wholly consistent with mathematical principles of finance. Dunphy asks that 1 disregard what I determine to have been the parties' intentions. I cannot. To do so would be contrary to the basic principles of contract interpretation. Section 2 of the *Interest Act* recognizes the principle of freedom of contract and the corresponding right of contracting parties to reach any agreement they choose for calculation and payment of interest, subject only to the limitations prescribed therein. The fact that one method of interest calculation happens to be more advantageous to the lender is not, of itself, a reason for rejecting that method if it reflects what the parties have agreed to (unless the agreement is precluded by statute).

[107] Extraneous evidence of the parties' intentions would only be admissible in the event of ambiguity in the subject contracts and then only for the purpose of explaining the background of the contracts. In this case, even if it were appropriate to consider extraneous evidence of the parties' intentions, the evidence is undisputed that the Bank, on the one hand, and each of the Respondents, on the other, intended that interest would be calculated using the nominal interest rate method. However, I need not go this far, because I have concluded that the contracts are not ambiguous.

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[108] The first step in determining the parties' intentions is to look at the contracts themselves. All of the contracts expressly provide that interest is to be both calculated and payable monthly. The commitment letter refers to interest being payable monthly and it requires that interest payable will be "as calculated" on the 22nd of each month. Similarly, the promissory notes provide for interest to be "calculated monthly and payable monthly". And finally, the Debenture refers to interest being "calculated and payable monthly". Therefore, to the extent that the trial judgment proceeds on the assumption that interest was to be calculated annually (and payable monthly) under the subject contracts, it is in error. Nothing in the documentation other than the reference to a stated rate per annum could justify this conclusion. And the mere reference to a stated rate per annum does not mandate a yearly calculation of interest in the face of express contractual terms to the contrary. Nothing could be clearer, given the express terms of the contracts, than the fact that the Bank and Dunphy (and S&D and 106) contractually agreed to both monthly calculation and monthly payment of interest.

[109] Dunphy disagrees. Despite these contractual terms, it insists that the Bank was not entitled to **c**alculate and collect interest monthly. It raises a multi-faceted argument in support of its position. Dunphy starts from the principle that simple interest is payable at the end of a period. But what is the period in this case? That is the core question. Dunphy contends that the period contemplated under all the contracts is a year. In other words, argues Dunphy, interest is payable only at the end of the year and not monthly. The reason according to Dunphy is that when interest is stated at a rate per annum, as it is in all the contracts, interest is payable at the end of a year. Dunphy's argument comes to this: (1) each Respondent was required to make monthly payments of interest even though interest was not payable until the end of a year under the contracts; (2) compounding occurs whenever interest is converted into capital; and (3) therefore, the effect of the Bank's requiring Dunphy to make monthly interest payments was to compound interest monthly when it was not entitled to do so.

[110] Alternatively, Dunphy goes on to assert that the Bank, by requiring interest to be both calculated and paid monthly, contradicted the terms of the contracts. As Dunphy indicated in written argument: "By adding, 'calculated and payable monthly', the Bank converts an annual statement of rate into a contradictory monthly statement of a higher rate --- if 'calculated' means, (as the Bank contends) 'calculated by the nominal rate method'."

[111] And finally, Dunphy argues that, by calculating interest monthly using the nominal rate method, the Bank was calculating interest in advance. This argument also rests on the proposition that the Bank required interest to be payable monthly even though, in Dunphy's view, the contracts provided for interest to be payable yearly. By taking the payments early, the Bank converted interest into capital. In this sense, therefore, Dunphy argues that the Bank "compounded" interest when the contracts made no provision for it to do so. Dunphy submits that in order for the Bank to calculate interest monthly and require payment monthly using the nominal rate method of interest calculation, the Bank's loan documentation would have needed to provide that interest could be compounded monthly, not simply calculated monthly. And it did not.

[112] Numerous flaws exist in Dunphy's reasoning. The first relates to Dunphy's starting point. Dunphy confuses the concept of "payment" of simple interest with the question of when simple interest is "due". Dunphy argues that one of the principles of the mathematics of finance is that simple interest is payable at the end of the period. But the principle as expressed by R.P. Vichas in Handbook of Financial Mathematics. Formulas and Tables. (Inglewood Cliffs, N.J.: Prentice-Hall, 1979) at 48 is that "Simple interest... is due at the end of the period." That is, simple interest is to be calculated or computed at the end of the period. The period in question is the calculation period, not the payment period. And in this case, interest is to be calculated monthly, not annually.

[113] Dunphy's entire argument to the contrary rests on this submission: "The statement, 'interest at 24% per annum' means 24% payable at the end of the year." Therefore, according to Dunphy, the Bank was not entitled to calculate and collect interest monthly despite the wording to this effect in the contracts. But Dunphy's contention that 24% per annum means 24% payable at the end of the year is wrong. Although Dunphy uses the word "payable" at the end of the year, implicit in its argument is the fact that when interest is stated at a rate per annum, interest should only be calculated at the end of the year. By advancing this argument, Dunphy attempts to equate a stated rate per annum with at least two of the other material factors essential in calculating how much interest a borrower will pay: the frequency of payment of interest and the frequency of calculation of interest. None of the three are the same. I do not deny that if a contract merely provided for interest to be payable at a stated rate per annum and it made no mention of when interest payments were to be calculated or made, then a court might infer that the parties intended an annual calculation and payment of interest. Much would depend on the other factual circumstances. But in this case, no inferences need be made as to whether the Bank and the Respondents intended that interest be calculated or paid annually as opposed to monthly. All of the contracts made between the Bank and each Respondent are clear and unambiguous on their face: each expressly provides for monthly calculation and payment of interest.

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[114] Dunphy's argument is wrong for other reasons. Dunphy asserts that there is an inherent contradiction in providing for a stated rate per annum, monthly calculation and payment of interest and the application of the nominal rate method of interest calculation. Again, I disagree. I do not find this combination to be self-contradictory. How to calculate the amount of interest that a debtor owes requires knowing not only the stated nominal rate, but also the frequency of calculation, the frequency of payment, whether interest is payable in advance and whether the lender can compound unpaid interest (and if so, on what basis). There is nothing inherently contradictory about expressly stating any of these components of the interest equation in a contract. Using this information, a borrower then has the necessary information from which it can compute its borrowing costs. By focussing only on the stated rate per annum, Dunphy treats this rate as if it were intended to cover not one but three elements of the interest equation; that is, not only the rate, but also the frequency of calculation and the frequency of payment. Nothing in the contracts evidences any such intention.

[115] What Dunphy appears to be arguing is this: because the Bank secures a higher real rate of return on the outstanding loans by requiring interest to be both calculated and paid monthly, the Respondents cannot have intended that the interest rate in the contracts would be the nominal rate. instead, the parties must have intended that the stated rate would be the effective rate. But the mere fact that the Bank's real rate of return is enhanced by requiring monthly calculation and payment of interest by the Respondents cannot itself be used as justification for concluding that the parties could not have intended this result. This point was made by Estey, J. in ***Re Metropolitan Trust v. Morenish Land Developments Ltd.*** 1981 CanLII 41 (SCC), [1981] 1 S.C.R. 171 at 180:

> If, for example, the terms of the contract, given their plain meaning, have the effect of establishing a higher real rate of return on the principal sum, the result is not invalidated because of the difference between the nominal and the effective rate. This is of vital concern under the *Interest Act* but otherwise wholly dependent on the terms of the mortgage.

And if Dunphy were correct that a reference to a rate per annum meant that interest was only to be payable at the end of a year or to be calculated at the end of a year, one could never state a nominal annual interest rate and provide for it to be calculated and payable monthly unless an express stipulation to this effect were included in the contract. No principles of either law or mathematics of finance were cited in support of these propositions.

[116] Finally, and most importantly, Dunphy is in error in equating monthly calculation and payment of interest with compounding of interest. As noted, compounding occurs when a contract permits unpaid interest to be added to principal and itself bear interest at the prescribed rate. But the issue in this case is not whether the Bank could charge interest on unpaid interest. On appeal, there was no suggestion that the Bank in fact compounded interest in this fashion. As I understand, Dunphy made its interest payments when required to do so, either by using monies in its account for this purpose, or by drawing down additional monies on the Bank line of credit. Neither of these payment modes involved compounding of interest by the Bank. Nor would compounding be involved even if the Bank had removed monies from Dunphy's account and applied the monies against outstanding interest obligations. No compounding is involved when interest is applied against an outstanding interest obligation. Compounding occurs whenever unpaid interest is added to principal and thereafter bears interest at the prescribed rate.

[117] And even if the Bank had compounded interest by adding unpaid interest to principal, Dunphy would have faced two other partial hurdles. First, Dunphy contends that the contracts made no provision for interest to be added to principal and compounded in this fashion. However, this is not entirely correct. The Debenture expressly provides for interest to accrue on overdue interest at the rate stipulated therein although admittedly, the Debenture secured payment of only a portion of the outstanding loan. Second, the absence of any express reference in the contractual documentation to the Bank's right to compound unpaid interest would not necessarily preclude the Bank's compounding of interest: ***National Bank***, *supra*.

[118] The other sense in which "compounding" is said to occur is, as noted earlier, when the dates for payment of interest are more frequent than the interest calculation periods. When interest payments are made more frequently than interest is permitted to be calculated, the effect is akin to the compounding of interest (as I have discussed earlier). In this event, the "reinvestment principle" should be applied in interpreting what the parties to a loan contract intended. The rationale for a court to apply the reinvestment principle in these circumstances was discussed by Waldron in "*Sections 6 and 7 of the Canada Interest Act*: *Curiouser and Curiouser", supra*, at 171-172:

> **Where payments containing a component of interest are made more frequently than the interest is calculated,** the total amount to be paid by the borrower and the amount of his payments required to extinguish the loan in a specified time are determined by using an interest rate per payment period somewhat less than the interest per calculation period divided by the number of payment periods it contains. In other words, the borrower is being given an interest credit on the amount of interest paid before the calculation date, as if that pre-paid interest were itself bearing interest in the hands of the lender.
>
> [Emphasis added.]

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[119] Therefore, where the payment dates for interest are more frequent than the calculation dates stipulated in an agreement, a court would be entitled to conclude (in the absence of contrary contractual terms) that a stated rate per annum in a contract was intended by the parties to be an effective annual interest rate and not a nominal annual interest rate. In other words, the reinvestment principle would be properly imported into the contract. Otherwise, the lender, by receiving interest payments before interest was to be calculated, that is before it was due, would be securing a greater return than that contracted for in these circumstances. Whether one were to treat this as a case of interest being paid in adyance of the due date or as a case of the lender compounding interest when not entitled to do so given the contractual terms, the end result would be the same. The reinvestment principle will be imported into the contract and any stated rate per annum will, in the absence of express contractual terms to the contrary, be treated as an effective annual interest rate.

[120] But where the calculation and payment dates for interest are one and the same, the reinvestment principle has no application. The fact that this is so is evident from the following classic passage by H. Woodard, Canadian Mortgages (Don Mills, Ont: Collins, 1959) at 193-194:

> For example, an interest rate may be expressed as "calculated semiannually", yet the borrower may contract to pay the interest monthly. The lender, in turn, may be charging the borrower's account with interest each month. There is nothing incorrect in such procedures, provided (and it is an important proviso) that the effective annual yield to the lender is not higher than that derived from the contractual interest rate. **When Interest Is payable by the borrower more frequently than once each period of compounding as expressed in the contractual interest rate, all interest mathematics are based on the theory that the lender reinvests the interest received from time to time, at the same rate....** [Emphasis added.]

What is obvious from Woodard's comments is that they only apply where the calculation dates and the dates for payment of interest differ from one another---in other words, where the payment of interest is being made more frequently than interest is to be compounded (that is, calculated) under the debt instrument. It is in these circumstances that the reinvestment principle is operative and should properly be applied in determining what the parties to a contract intended. But these facts do not exist in this case: calculation of interest was to be made monthly and each Respondent was in turn obliged to pay interest monthly. The calculation and payment dates for interest coincided. Put in Woodard's terms, the interest payable by the Respondents was not payable more frequently than once each period of compounding (by this he means calculation) as expressed in the contractual interest rate because the contractual rate here expressly contemplated monthly calculation. Instead, the interest was payable at the same time as the monthly interest calculation.

[121] Apart from those circumstances in which the dates for payment of interest and the dates for calculation of interest differ, should the court apply the reinvestment principle in interpreting the terms of a loan contract? The answer is No. In ***Morenish***, *supra*, at 178-181, Estey J. canvassed the scope of the reinvestment principle at length and concluded that it was not a rule or principle of law:

> The argument presented to this Court revolved around the application of what is shortly referred to as "the reinvestment principle". It has long been said ... that interest at the rate of ten percent per annum calculated monthly is more than ten percent per annum calculated yearly. This is so only if one assumes the recipient of the monthly payment puts the money to work during the balance of the year and consequently accumulates interest. Such is not the case if x percent per annum is payable annually. If one does not make the assumption that the interest is reinvested during the balance of the year then ten percent per annum is the same whether paid annually or monthly. Hence the issue here really involves the application, as a quasi-rule of law, of the reinvestment principle.
>
> ...
>
> [T]he text by H. Woodard, Canadian Mortgages (1959), is quoted by ... courts where interest computation has come up for examination, but it is of little or no assistance in resolving the problems here. It must be recognized at once that the learned author's observations on expressions frequently occurring in mortgages are predicated on the proposition that: "....all interest mathematics are based on the theory that the lender reinvests the interest received from time to time, at the same rate [as specified in the mortgage]." **Aside from the fact that there is no such rule or principle of law....** the discussion of the reinvestment theory ... is directed to the circumstance arising where interest is payable more frequently than once in each compounding or computation interval. [Emphasis added.]

In this case, no "compounding" of interest is involved (in either sense in which this term may be used). Nor is this a case in which the Bank is collecting interest in advance. Both the dates for calculation of interest and the payment dates are the same. Therefore, the reinvestment principle is inapplicable.

[122] In fact, in ***Morenish***, once the court decided that the parties intended that interest was to be calculated and payable monthly despite the fact the mortgage was silent as to when calculation of interest was to occur, the reinvestment principle had no application. This very point was made by Mary Anne Waldron in a case comment *"Lynch and Utter v. Elford Estates Ltd.: Reinvestment Revisited"*(1987) 45 The Advocate 893 at 894:

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> Taken at a narrow reading, the Morenish case had nothing to say about deemed reinvestment at all. Once the court found the calculation date for the interest to be the same interval as the payments, it could not justify applying any other monthly rate than [the stated annual rate] divided by 12. The equivalent lesser rate would only apply if the two intervals were different. So the court had no need for any interest factors or for any entertaining or enlightening analogy to explain their use to the lay mind.

This is the exact situation in this case. What Waldron recognizes is that where, as here, the calculation dates and payment dates for interest are one and the same, the reinvestment principle does not apply. Therefore, since the Bank and each Respondent contractually agreed that interest was to be payable monthly and calculated monthly, the monthly rate that the Bank was entitled to charge in calculating interest was the stated annual rate divided by 12. No equivalent lesser monthly rate is warranted. In other words, the loan documentation contemplates that the interest rate stipulated therein is a nominal annual interest rate and not an effective annual interest rate.

[123] The only reason one might be driven to a different conclusion relates to the principle of the time value of money. However, I view this principle as simply a variation on the reinvestment principle. Or vice versa. I also recognize that the reinvestment principle is only an analogy. But as the Bank points out it is a useful analogy. What possible relevance would this analogy have in these circumstances? The answer: if one were to calculate what periodic monthly rate would compound to the stated annual rate in each of the contracts (which provide for interest to be calculated and payable monthly), this would involve the assumption that the Bank had reinvested the monthly interest payments it received at the same monthly interest rate prescribed in the contracts. And this is exactly what Dunphy's position is. That is, Dunphy argues that the rate stipulated in the contracts is the effective annual interest rate. Therefore, in its view, the monthly rate which the Bank was entitled to charge the Respondents is not the stated annual rate divided by 12 but rather that amount which when compounded monthly would equal the stated rate.

[124] But the contracts do not expressly provide for the application of the reinvestment principle. And ***Morenish***, *supra*, confirms that this principle is not a rule of law. And the mere fact that it would be preferable from the borrower's perspective if interest were calculated and payable annually and not monthly does not lead to the conclusion that the parties intended that the interest rate in the subject contracts was to be an effective annual interest rate as opposed to a nominal annual interest rate. The express wording of the contracts points to the contrary conclusion. It provides for the stated interest rate to be calculated and payable monthly. If one were to accept Dunphy's position, the effect would be that the monthly interest would not be the stated rate divided by 12. Instead, it would be some lesser monthly rate than this which when compounded equalled the annual stated rate. When a contract is silent as to which method of interest calculation is contemplated, the contract should be construed so as to require that interest be calculated using the nominal rate method and not the effective rate method, unless, of course, some valid reason exists for importing the reinvestment principle into the contract. No such reason exists in this case.

[125] In addition, to conclude that the Bank and Dunphy intended that the stated annual interest rate in each contract would be the effective annual interest rate would be tantamount to assuming that the stated annual rate was chosen premised on the assumption that Dunphy would default in its monthly interest obligations (assuming, of course, that unpaid interest could be compounded monthly). Nothing in the documentation justifies the conclusion that the parties intended the stated rate to be equivalent to the rate which would be in effect if Dunphy failed to pay interest when due. This construction must be rejected. This does not mean that parties cannot contract for an effective annual interest rate, calculated and payable monthly. But if this is the parties' intention, then the contract must expressly provide that this is so. Otherwise, the plain wording of the contract will be given effect and the lender will be entitled to apply the nominal rate method of interest calculation to the stated rate. Therefore, where monthly calculation and payment of interest is provided for, the lender will be entitled to divide the stated rate by 12 to determine the rate to be used in calculating the monthly interest payments. Estey, J.'s comments in ***Morenish***, *supra*, at 183-184 apply equally to this case:

> We are concerned here with an interest clause which prescribes a nominal rate of interest, that is to say a rate of interest which is unqualified by any provision requiring the lender to reinvest interest as and when paid during an interest calculation period. Interest received during a year is not, by the terms of the contract, required to be productively employed for the remainder of the year, and hence the rate is a nominal or pure rate of interest to be used in calculating the amount to be paid by the borrower.

[126] Nothing in Prentice's expert evidence leads me to a contrary conclusion. Prentice was in no position to give any evidence concerning the respective parties' intentions at the time of execution of the debt instruments. Nor did Prentice purport to give any opinion on the interpretation of s. 4. What he was asked to do was to make certain assumptions. I am satisfied from reviewing his evidence that he was asked to compare two different contracts: one providing for a single annual payment of interest to another in which interest would be payable monthly. To equalize the two, one would be required to apply the effective rate method utilizing compounding equal to the payment period since this is the only method of interest calculation which provides an annual equivalence for a series of periodic payments. But

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of course, as already observed, in this case the Bank's loan documentation does not provide for interest to be payable on an annual basis. Therefore, in this context, the concept of equivalence is irrelevant, unless, of course, s. 4 of the *Interest Act* applies to the contracts.

[127] The fact that it is entirely appropriate to apply the reinvestment principle so as to require that an interest rate in a contract be interpreted as an effective annual interest rate when interest is payable more frequently than interest is permitted to be calculated lies at the core of the reasoning in the many cases Dunphy relies upon in support of its position. These cases are all distinguishable because they represent factual situations in which the court concluded that calculation and payment dates did not coincide and the payment dates were more frequent than the calculation dates. ***Bunn et al v. Lock***reflex, (1987), 61 O.R. (2d) 772 (C.A.), ***Re Miglinn and Castleholm Construction Ltd.*** (1974), 5 O.R. (2d) 444 (C.A.) and ***Re Tilson et al. and Dougherty*** (1975), 8 O.R. (2d) 203 (Div. Ct.) all fall into this category.

[128] This distinction between calculation and payment dates also explains the Supreme Court of Canada's decision in ***Standard Reliance Mortgage Corporation v. Stubbs*** 1917 CanLII 92 (SCC), (1917) 55 S.C.R. 422. The mortgage in that case provided for monthly principal and interest payments to be made and stated that the rate of interest chargeable on the outstanding principal was "ten per cent per annum as well after as before default". The mortgage contained no reference to the dates on which calculation of interest was to take place. Anglin, J.'s decision is the one most often cited. What he concluded was that when a per annum rate is stated without further qualification, it is implied that interest is to be calculated or computed yearly and not in advance. That situation should be contrasted with the facts of this case in which the contracts expressly provide for interest to be calculated and payable monthly.

[129] Dunphy argues that Estey, J.'s comments on the reinvestment principle in ***Morenish*** *were* obiter only and that this court should prefer the obiter comments of Anglin, J. in ***Standard Reliance***, which comments, Dunphy asserts, recognize the general applicability of the reinvestment principle. But I do not agree that the two cases conflict with one another. In *Standard Reliance*, the majority of the court held that the contract required interest to be calculated annually even though monthly payments were required. However, in ***Morenish***, the court construed the contract as requiring interest to be calculated monthly with interest payments to be made monthly. Whatever criticism may be levied of the court's conclusion in ***Morenish*** that interest was to be calculated monthly even though the contract failed to state a calculation date, the fact remains that ***Morenish*** is distinguishable from ***Standard Reliance.*** In ***Standard Reliance***, interest payments were required to be made more frequently than the mortgagee was entitled to calculate interest. Therefore, the factual situation fell into the category of the exception postulated by Estey, J. in ***Morenish,*** *supra*, at 181:

> A different situation may well arise where the mortgage specifically provides for a calculation period different from the payment period. We are not here concerned with any such conflict....

[130] Viewed in this way, ***Morenish*** and ***Standard Reliance*** are reconcilable. The cases explain two different scenarios: when the reinvestment principle is imported into a contract (as it was in ***Standard Reliance***) and when it is not (as in ***Morenish***). What is required to apply the principle when a contract is silent on whether or not it is to be operative is that the contract provide for interest to be payable more frequently than it can be calculated under the contract. These circumstances do not exist in this case. The payment periods and the calculation periods for interest do not differ. Interest is not payable by the Respondents more frequently than the Bank is entitled to calculate the interest. The contracts which the Respondents executed are clear on their face. The period of calculation is stated expressly---it is to be monthly. The payment period is also stated expressly---and this too is to be monthly. The calculation and payment periods coincide. Thus, in these circumstances, the reinvestment principle has no application.

[131] Dunphy raises another argument to bolster its submission that the rate in the contracts should be construed as an effective annual interest rate. It points to the fact that the promissory notes provide that the "effective" annual rate is as stated therein. For this reason, Dunphy argues that the Bank is estopped from denying that the interest rate in each contract is an effective annual interest rate and not a nominal annual interest rate. But the evidence supports the conclusion that the "effective" rate disclosed in each note was intended to be nothing more than the total of the prime rate in effect at the time of execution of each note plus 3/4%. I do not consider this reference to represent anything more than this. The choice of words may be a poor one but this is all that it is.

[132] Therefore, for all these reasons, I have concluded that on a proper interpretation of the subject contracts, the interest rate specified in each contract is a nominal annual interest rate.

4. INTERPRETATION OF SECTION 4 OF THE INTEREST ACT

[133] The next issue to consider is whether s. 4 applies to the subject contracts. Over 100 years ago, in 1880, Parliament first enacted a portion of what is now the *Interest Act An Act relating to Interest on moneys secured by Mortgage of Real Estate*, S.C. 1880, c. 42. Then in 1897, Parliament passed s. 4 in substantially the same form it appears today: *An Act respecting Interest*, S.C. 1897, c. 8. The Revised Statutes of Canada, 1908, consolidated and revised the two former Acts. A minor amendment was made in 1917 and since then, Parliament has chosen to make no amendments to the *Interest Act*.

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[134] The trial judgment concludes that s. 4 applies to each debt instrument which the Respondents executed. Section 4 states:

> Except as to mortgages on real estate, **whenever** any **interest is,** by the terms of any written or printed contract, whether under seal or not, **made payable at a rate or percentage per** day, week, **month, or at any rate or percentage for any period less than a year, no interest exceeding** the rate or percentage of **five per cent per annum shall be** chargeable, payable or **recoverable** on any part of the principal money **unless the contract contains an express statement of the yearly rate** or percentage of interest **to which such other rate or percentage is equivalent.** [Emphasis added.]

[135] In reaching this conclusion, the trial judgment says that what triggers s. 4 is the monthly payment of interest which each Respondent was required to make to the Bank:

> The Bank contends that s. 4 of the *Interest Act* has no application in the circumstances presently under consideration because the "contracts" under consideration stipulate for interest at a rate *per annum*, even though it is payable monthly. It is the monthly payment, however, which makes the Act applicable. That payment is "interest... payable at a rate ... for a period less than a year." The period in this case is one month. The rate is a stated rate per annum. The interest is therefore payable at a rate (stated rate per annum) for a period less than a year (monthly). The section is applicable. All that is required for compliance is that interest be calculated by the effective rate method, so that the stated rate is the same as the effective rate.

[136] The Respondents wholeheartedly endorse the trial judgment submitting that the fact that interest is made payable monthly is enough to engage s. 4. This argument which the Respondents advanced at trial is accepted in its entirety by the trial judgment. The intervener, The Borrower's Advocate Ltd. (Advocate) agrees that s. 4 applies to the subject contracts because interest is made payable monthly. But unlike the Respondents and contrary to the conclusion reached by the trial judgment, the Advocate contends that the interest rate stipulated in each contract is a nominal annual interest rate. And to meet the disclosure standard in s. 4, the Advocate submits that what must be disclosed is the effective annual interest rate and not (as the contracts provide), the nominal annual interest rate. Because the contracts do not disclose the effective annual interest rate, on the Advocate's analysis, s. 4 restricts the interest that the Bank can recover to 5% per annum. The Bank and the other intervener, The Canadian Bankers' Association disagree with both the Respondents and the Advocate. They argue that s. 4 does not apply where (as in this case) the loan documentation provides that interest is payable at a stated rate per annum, regardless of whether the stated rate represents the effective or nominal annual interest rate.

[137] The first question to answer is when s. 4 applies to a written contract for the payment of interest. With respect, I disagree with the trial judgment's decision that what triggers s. 4 is the fact that a contract provides for interest to be payable monthly as opposed to being payable at a rate or percentage per month. The difficulty with this approach is that it ignores the clear and unambiguous wording of the section. By failing to give any meaning to the words "at a rate or percentage" per month, this interpretation effectively reads out these words. And in doing so, it offends one of the basic principles of statutory interpretation:

> Not only must the whole Act be read, but every provision of the Act should, if possible, be given meaning; hence, if there are rival constructions the general principle is that the construction that gives effect to the whole of the statute, or to the provisions under consideration, should be adopted in preference to one that renders part thereof meaningless. [E.A. Driedger, in Construction of Statutes. 2d ed. (Toronto: Butterworths, 1983) at 91]

If the trial judgment were correct and s. 4 were engaged simply because interest was payable monthly, no purpose would be served by referring to interest being made payable at a rate per month or at any rate for a period less than a year. These phrases would be redundant. If Parliament had intended s. 4 to apply whenever interest was to be paid periodically at intervals of less than a year, all it would have needed to stipulate was that s. 4 applied whenever interest was made payable monthly (or for some other periods of less than a year). It did not do so.

[138] Dunphy raises another argument in support of its contention that as long as a contract provided for interest to be payable monthly, that was enough to trigger the application of s. 4. It contends that the words "per month" modified both the words "payable" and the word "rate", or either of them. On this reasoning, s. 4 would be triggered as long as interest were payable "per month". But this interpretation is inconsistent with the plain words of this section and the grammatical context in which these words are used. The grammatical context clearly favours the interpretation that the words "per month" modify the words "rate or percentage" and only these words. Nothing in s. 4 indicates the contrary.

[139] Dunphy advances another argument to buttress its assertion that the contracts in this case triggered the application of s.4. It urges this court to accept the proposition that the reference to "rate" in s. 4 simply means a "standard or way of reckoning" since this is how the word is defined in The Concise Oxford Dictionary. 7th ed. (Oxford: Clarendon Press, 1987). Maybe that is so. But I fail to see how this advances Dunphy's position. In no way would this eliminate the requirement that the loan documentation include a stated monthly "rate" (or percentage or monthly "standard" or monthly

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"way of reckoning" for calculation of interest) in order for s. 4 to apply. And none of these is stipulated in any of the contracts. All of the contracts provide for interest to be payable at a stated annual rate. A stated annual rate is not a rate per month even if the interest is, by the terms of the contract, required to be calculated and paid monthly. I do not dispute that one is able to calculate what the monthly interest "rate" is from the information in the contracts. But this is done by taking the stated annual rate and dividing it by 12 (a formula which is not expressed in any of the contracts). It is not done by using any monthly rate prescribed in the contracts (whether expressed as a rate, percentage, standard or some other way of reckoning). This argument too must fail.

[140] Therefore, I have concluded that what would be required to trigger s. 4 is not the fact that interest is required to be paid monthly. Section 4 applies only if interest is made payable at a monthly rate or at any rate for any other period of less than a year. The contracts made between Dunphy and each Respondent do not make interest payable at a rate for a period of less than a year. Because this is so, that is an end of the matter: s. 4 is not engaged. This interpretation of s. 4 has been taken by many different courts. However, I readily concede that oftentimes, no detailed analysis has been undertaken of the impact that monthly interest payments may have on the possible application of s. 4. Nonetheless, those cases which have considered the scope of s. 4 have uniformly rejected the submission that s. 4 should apply where a written contract contains no provision for payment of interest at a rate for a period of less than a year.

[141] In ***IAC v. Guerrieri*** reflex, (1982), 139 D.L.R. (3d) 352 at 357, the Ontario Court of Appeal concluded that s. 4 did not apply where specified monthly payments of principal and interest were to be made but no interest rate at all was stated in the loan documentation:

> If by the terms of the contract no interest is made payable at a rate or percentage per day, week, month or for any period of less than one year, s. 4 has no application. There is in this case no specification of a rate or percentage of Interest for any period of less than one year, although there is clearly an interest component built into the monthly instalments called for by the agreements.

[142] Dunphy regards this case as the root cause of subsequent judicial misinterpretations of s. 4. It asserts that this case should be distinguished on the basis that, unlike the loan documentation the Respondents executed, no interest rate at all was prescribed in the contract under review. I agree. There is a difference. But the fact that the contract in ***IAC*** mentioned no interest rate at all while the contracts here do (although only an annual rate) is not a valid basis for distinguishing ***IAC.*** Interest was payable monthly in ***IAC*** even though the principal and interest payments were blended. If the Act had the scope Dunphy contends; if s. 4 were to apply whenever a contract provided for monthly payments of interest, then s. 4 should apply regardless of whether the principal and interest components were blended or segregated. And yet the Ontario Court of Appeal found otherwise. The rationale underlying that court's decision---that s. 4 does not apply if the contract does not make interest payable at a rate or percentage for any period of less than a year---applies equally in this case. [In addition, for other cases reaching the same conclusion, see ***Re Keating*** [1937] O.W.N. 214 at 216 (C.A.); ***Royal Bank of Canada v. Reed and Wakefield Construction Ltd.*** 1982 CanLII 696 (BC SC), [1983] 2 W.W.R. 419 at 421 (B.C.S.C.); ***Norwood Construction Ltd. v. Post 83 Co-operative Housing Assn.*** (1988), 30 C.L.R. 231 at 241 (B.C.C.A.); and ***Niagara Air Bus Inc. v. Camerman*** reflex, (1989), 69 O.R. (2d) 717 at 729 (H.C.), reversed on other grounds reflex, (1991), 3 O.R. (3d) 108 (C.A.).]

[143] Most recently, s. 4, and the trial judgment in this case, were analyzed by Craig, J. in ***Upper Yonge Ltd. et al v. Canadian Imperial Bank of Commerce*** reflex, (1990), 75 O.R. (2d) 98 (H.C.). [The reasoning in ***Upper Yonge*** has now been approved by the Ontario Court of Appeal in ***McHugh v. Forbes*** reflex, (1991), 4 O.R. (3d) 374.] After confirming that the ***IAC*** case was binding on him, Craig, J. then proceeded to explain why, in any event, s. 4 did not apply where interest was payable monthly based on a prescribed annual rate at 112:

> The point is not whether interest is payable monthly, but rather whether interest is payable at a monthly rate ("or at any rate... for any period less than a year"). In the circumstances of the instant case there is no basis upon which to order repayment of interest pursuant to s. 5.

[144] Dunphy argues that the Ontario and British Columbia cases are not good law and advances two reasons for rejecting them. First, it contends the decisions do not treat interest payable monthly as interest payable at a "rate per month". This is an accurate assessment of these decisions. But I see no flaw in this conclusion or in the reasoning underlying it. The mere fact that interest is payable monthly does not of itself attract s. 4 for the reasons canvassed above. Second, Dunphy argues that those decisions fail to demonstrate any understanding of the basics of the principles of the mathematics of finance. This criticism appears to be directed primarily at the manner in which the courts have interpreted the requirement that a lender disclose an equivalent annual rate if and when s. 4 does apply to a contract. Dunphy contends that "equivalent" in the context of s. 4 can only mean "effective annual interest rate". And, in Dunphy's view, those cases holding otherwise reflect a lack of understanding of the fundamental principles of the mathematics of finance.

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[145] However, what one must keep in mind is that the issue of what interest rate should be disclosed does not even arise if s. 4 does not apply. Deciding whether the necessary conditions exist to trigger the application of s. 4 has nothing to do with the principles of the mathematics of finance. The court's mandate is to interpret the words "payable at a rate or percentage for any period less than a year". This task involves the application of principles of statutory interpretation. Simply because interest payments are to be calculated and paid more frequently than yearly and this results in higher yields to the lender and greater costs to the borrower does not engage the section. This may appear to be an unduly simplistic approach which narrows significantly the categories of cases to which s. 4 applies. I do not deny that this is so. But it is an approach dictated in my opinion by the express and unambiguous terms of the *Act*. Given the conclusions I have reached, it is unnecessary to determine in what circumstances the disclosure standard prescribed by s. 4 mandates disclosure of the effective annual interest rate as opposed to the nominal annual interest rate. And I therefore decline to do so.

IX. CONCLUSION

[146] For the reasons explored above, I have determined that a new trial must be ordered. I recognize the great cost and difficulties that this may pose for all parties but I see no other practical solution. In all the circumstances of this case, I decline to make any award of costs. Costs of the appeal shall be in the cause. Costs of the first trial are reserved to the justice presiding at the new trial.

DATED at CALGARY, Alberta
this 25th day of NOVEMBER
A.D. 1991

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE STRATTON

[147] I concur with Madam Justice Fraser's Reasons except insofar as they address the question of what would constitute reasonable notice of intention to call a loan in the absence of the loan agreement covering that point, it is unnecessary to consider that issue at this time as, in my view, it should await a more appropriate record than the one now before us.

DATED at CALGARY, Alberta
this 25th day of NOVEMBER
A.D. 1991

Bank of Montreal v. Negin, 1996 CanLII 1548 (ON CA) - Attorn of Rents by Secured and an Issue of Notice

Date:	1996-12-02
Docket:	c20657; C20656
Parallel citations:	31 OR (3d) 321; 95 OAC 230
URL:	http://canlii.ca/t/6j5s
Citation:	Bank of Montreal v. Negin, 1996 CanLII 1548 (ON CA), <http://canlii.ca/t/6j5s> retrieved on 2013-08-18
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Court File No. C20656 and C20657

COURT OF APPEAL FOR ONTARIO
FINLAYSON, McKINLAY and CARTHY JJ.A.

B E T W E E N :	)	
	)	
BANK OF MONTREAL	)	**Fred Tayar**
	)	**for the appellants**
Plaintiff	)	
(Respondent)	)	
	)	
and	)	
	)	**Joseph Irving**

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HYMIE SIDNEY NEGIN and ALEXANDER BENJAMIN NEGIN
Defendants (Appellants) (Appellant)
for the respondent
Heard: May 1 and 2, 1996

McKINLAY J.A.:

These two appeals from summary judgments were heard together. Each involves an action on the covenant in a mortgage, and on a guarantee included in the mortgage document. In the first appeal, the appellant, Hymie Sidney Negin, is the mortgagor and his brother, Alexander Benjamin Negin, is guarantor. In the second appeal, brought by Alexander Benjamin Negin, their roles are reversed.

The three issues common to both appeals are first, that the motions judge erred in not dismissing the bank's motion for summary judgment when the respondent bank had not served an affidavit of documents prior to bringing its motion; second, that since the bank changed the locks on the properties and gave notice of the tenants to attorn rents, both within ten days after giving notice under s. 244(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, the appellants were deprived of opportunities to deal with the property and suffered loss as a result of the bank's actions; and third, that its continuation to collect rents following giving notice of sale under its power of sale constituted a "commencing" or "taking" of "further proceedings" contrary to s. 42(1) of the *Mortgages Act,* R.S.O. 1990, c. M.40. All of these issues, the appellants argue, could affect their liability as mortgagors and as guarantors, and are issues which could only be resolved at trial.

On the first issue, the motions judge stated that the only reason for the respondents' wishing to have the affidavit of documents was to buttress or substantiate their affidavits on the motion for summary judgment, and that this is not appropriate on a summary judgment motion. I do not agree with that, as a general proposition. Important evidence is often only in the possession of the party moving for summary judgment. If the responding party were denied the opportunity of reviewing relevant documents in the possession of an opposing party before examination on affidavits to be used on a motion for summary judgment, he would be deprived of information to which he is entitled under the *Rules of Civil Procedure*. In addition, it would mean that on a motion for summary judgment the responding party is not entitled to know the full evidence on which the opposing party bases its case. In this case, however, all relevant documents were before the court.

On the second issue, the facts are that the bank gave notice to the mortgagors, purportedly pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act*, stating its intention to enforce its security, and stating also that the bank was not entitled to enforce the security until after the expiry of ten days following sending of the notice. Unfortunately, the bank changed the locks on the properties involved four days prior to the expiry of the ten day notice period. It also gave notice to tenants to attorn rents one day prior to the expiry of the notice period. However, it is not clear from the evidence on the motion for summary judgment that a notice under s. 244(1) was actually required because the evidence does not show either that the mortgagors were insolvent, or that the property involved constituted "all or substantially all" of the property of the mortgagor other than inventory or accounts receivable. It seems that the bank served the notice out of an abundance of caution.

On the facts of this case, the appellants were not prevented from dealing with the property until four days prior to the end of the notice period. Only acts of the bank during that four day period could possibly have supported a defence to its action on the mortgages. However, the real property was subsequently sold by the bank under its power of sale at a fair price, resulting in no prejudice to the appellants. Given this lack of prejudice, and given the lack of evidence fitting these transactions within s. 244(1), I do not consider the second issue raised by the appellants as a genuine one for trial.

The third issue need only be stated to be rejected. Continuing to collect rents by a mortgagee in possession cannot constitute either "commencing" or "taking" of "further proceedings".

The appellants, each as guarantor of the mortgage debt of the other, take the position that the above acts of the bank have the effect of releasing them from their guarantees. On the facts, none of these acts of the bank in any way prejudiced the appellants either as mortgagee or as guarantor, and none released them as guarantor. Thus, none raise a genuine issue for trial.

Guarantee by Hymie Sidney Negin of mortgage of his brother

Hymie Sidney Negin takes the position that he is not liable on his guarantee of the mortgage given by his brother because the bank renewed that mortgage without his consent. It was renewed for a period of six months beyond its original maturity date with the rate of interest reduced from 13.5% to 5.75%.

The relevant portion of the guarantee provisions in the mortgage reads:

> AND it is hereby expressly declared that although as between the Guarantor and the Mortgagor, the Guarantor is only surety for the payment by the Mortgagor of the moneys hereby

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> guaranteed, *yet as between the Guarantor and the Mortgagee the Guarantor shall be considered as primarily liable therefor* and that no release or releases of any portion or portions of the mortgaged premises, and *no indulgence shown by the Mortgagee in respect of any default by the Mortgagor* or any successor which may arise under this mortgage, and that *no extension or extensions granted by the Mortgagee to the Mortgagor* or any successor for payment of the mortgage moneys hereby secured or for the doing, observing or performing of any covenant, agreement, matter or thing herein contained, to be done, observed or performed by the Mortgagor or any successor nor *any variation in or departure from the provisions of this mortgage* nor any other dealings between the Mortgagor or any successor and Mortgagee nor any release of the Mortgagor or any other thing whatsoever whereby the Guarantor as surety only would or might have been released shall in any way modify, alter, vary or in any way prejudice the Mortgagee or affect the liability of the Guarantor in any way under this covenant, *which [liability] shall continue and be binding on the Guarantor, and as well after as before maturity of this mortgage, until the said mortgage moneys are fully paid and satisfied*. And it is hereby further expressly declared that the Mortgagee shall not be bound to exhaust its recourse against the Mortgagor or the mortgaged premises before being entitled to payment from the Guarantor of the amount hereby guaranteed by the Guarantor. [Emphasis added.]

This case was reserved to await the reasons of the Supreme Court of Canada in *Manulife Bank of Canada v. Conlin* (released October 31, 1996). As a result of the decision in that case, the guarantor was released. The reasons of the majority raise one major issue which must be considered in deciding this appeal, that is, whether a guarantor who, by the terms of the guarantee is liable as a principal debtor, has waived his rights as principal debtor to "have notice of material changes and consent to them."

Although the words in this guarantee are different from those in the guarantee in the *Manulife* case, there can be no doubt that the guarantee makes the guarantor liable as principal debtor. When the mortgage was renewed, the renewal form provided by the bank for execution was not signed by Hymie Negin, although there was a place for the signature of the guarantor.

In the *Manulife* case, Cory J., referring to an agreement to renew the mortgage, which was not signed by the guarantor, says at p. 13 of his reasons: "It must be assumed that all these standard form agreements prepared by the bank as a lending institution were meant to mesh with and complement each other." However, he also states at p. 11: "Of course, a guarantor who, by virtue of a principal debtor clause, has a right to notice of material changes, may, by the terms of the contract, waive these rights."

The mortgage in this case had gone into default, and the renewal granted was for six months only, at a substantially reduced rate of interest. The other mortgage was also renewed, but the guarantor of that mortgage signed an extension agreement. There is no evidence that either the bank or the guarantor considered the signature of the guarantor on the renewal agreement to be necessary in this case. Had the guarantor's signature been obtained, it might have provided additional comfort to the bank. However, that does not mean that it was required and, in my view, it was not. I do not take Cory J.'s reasons as stating that one can use the line in an extension or renewal agreement marked for execution by a guarantor to assist in the interpretion of another document. In any event, I am of the view that, in this case, the guarantee provisions of the mortgage are clear and unambiguous.

In the *Manulife* case, terms involving extension of time to pay and amendment of other terms of the mortgage were dealt with in a separate clause in the mortgage, not in the guarantee provisions. In that sense, the *Manulife* case was an unusual one.

This case is much different. There are numerous words in the guarantee in this case which indicate agreement of the guarantor, whether as guarantor of as primary debtor, to be bound regardless of changes in the terms of the mortgage and regardless of whether or not the bank insists on immediate payment by the mortgagor on maturity of the mortgage. Those words have been emphasized in the portion of the guarantee quoted above. Although an argument may be made for the application of any one of the phrases emphasized, the most compelling words, in my view, are those which state that the liability of the guarantor "shall continue and be binding on the guarantor, and as well after as before default and after as before maturity of this mortgage, until the said mortgage moneys are fully paid and satisfied." There is nothing in the renewal document that indicates that there is an intended extinction of the old mortgage agreement and the execution of a new one. There is simply a change in terms, albeit important ones, *to which the guarantor, whether as guarantor or as principal debtor has agreed*. If it could be said in this case that the amended terms were not agreed to (which I do not

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consider to be so), then there is nothing to extinguish the liability of the guarantor in any event. He has covenanted to pay the full amount owing on the mortgage as well after as before default, and those moneys have not been paid.

This was not an accommodation guarantee. Each brother guaranteed a mortgage of the other. Each did so knowing that he would be liable on the mortgage of the other until all amounts owing were paid. The only effect that I can see of treating the guarantor as primary debtor in this case is that he will have the benefit of the reduced interest rate from the date of the renewal agreement rather than having to pay the higher original rate until time of payment of the full amount due under the mortgage.

I would dismiss the appeal with costs.

Court File No. C20656 and C20657
COURT OF APPEAL FOR ONTARIO
FINLAYSON, McKINLAY and CARTHY JJ.A.

B E T W E E N :
BANK OF MONTREAL

Plaintiff
(Respondent)

and
HYMIE SIDNEY NEGIN and ALEXANDER BENJAMIN NEGIN

Defendants
(Respondents)

J U D G M E N T

Released:

Period of notice - Sec. 244(2)
(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent - Sec. 244(2.1)
(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception - Sec. 244(3)
(3) This section does not apply, or ceases to apply, in respect of a secured creditor
(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem - Sec. 244(4)
(4) This section does not apply where there is a receiver in respect of the insolvent person.
1992, c. 27, s. 89;
1994, c. 26, s. 9(E).

Receiver to give notice - Sec. 245
245. (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a

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notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

(a) in the case of a bankrupt, to the trustee; or

(b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

Idem - Sec. 245(2)

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Names and addresses of creditors - Sec. 245(3)

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Receiver's statement - Sec. 246

246. (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's interim reports - Sec. 246(2)

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts - Sec. 246(3)

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

Good faith, etc. - Sec. 247

247. A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

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1992, c. 27, s. 89.

Powers of court - Sec. 248
248. (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both.

Idem - Sec. 248(2)
(2) On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.
1992, c. 27, s. 89.

Receiver may apply to court for directions - Sec. 249
249. A receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.
1992, c. 27, s. 89.

Right to apply to court - Sec. 250
250. (1) An application may be made under section 248 or 249 notwithstanding any order of a court as defined in subsection 243(1).

Where inconsistency - Sec. 250(2)
(2) Where there is any inconsistency between an order made under section 248, or a direction given under section 249, and

(a) the security agreement or court order under which the receiver acts or was appointed, or

(b) any other order of the court that appointed the receiver,

the order made under section 248 or the direction given under section 249, as the case may be, prevails to the extent of the inconsistency.
1992, c. 27, s. 89.

Protection of receivers - Sec. 251
251. No action lies against a receiver for loss or damage arising from the sending or providing by the receiver of a notice pursuant to section 245 or a statement or report pursuant to section 246, if done in good faith in compliance or intended compliance with those sections.
1992, c. 27, s. 89;

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1997, c. 12, s. 117(F).

Defence available - Sec. 252
252. In any proceeding where it is alleged that a secured creditor or a receiver contravened or failed to comply with any provision of this Part, it is a defence if the secured creditor or the receiver, as the case may be, shows that, at the time of the alleged contravention or failure to comply, he had reasonable grounds to believe that the debtor was not insolvent.
1992, c. 27, s. 89.

CRA Internal Operations Manual - Receiverships

(see below image pages)

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RECEIVERSHIPS 1

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Receiverships

Collections Manual Updates

Overview

Receivership is the result of action taken by a secured creditor against specific assets of an insolvent debtor.

Legislation

This section identifies legislation related to receiverships:

- *Bank Act* (*BA*)
- *Bankruptcy and Insolvency Act* (*BIA*)
- Canada Pension Plan (*CPP*)
- *Canadian Business Corporations Act* (*CBCA*)
- *Excise Tax Act* (*ETA*), section 266
- *Income Tax Act* (*ITA*), subsection 227(4)
- *Employment Insurance Act* (*EIA*)
- Various provincial company and security acts

Background Information

This section identifies background information related to Receivership:

- **The Purpose of Receivership**
- **Receiverships – Insolvent Persons**
- **Stages of Receiverships**
- **What is a Receiver**
- **Appointment of Receivers**
- **Receivership Options**
- **Powers of Receivers**
- **Roles and Responsibilities of Receivers**
- **Providing Tax Information to Receivers**
- **Types of Creditors**
- **Notice of Intention to Enforce Security**

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- **Deemed Trust**
- **Unpaid Suppliers Rights**

The Purpose of Receivership

The purpose of a receivership is for a secured creditor to access and sell those assets over which they hold a security agreement, to satisfy a debt.

Often the insolvent person can continue to operate, though they must do so without those assets which are subject to the security agreement.

Receiverships - Insolvent Persons

The *Bankruptcy and Insolvency Act* (*BIA*) and the applicable provincial legislations regulate Receiverships and the enforcement of security against insolvent persons.

A person in receivership must be insolvent, defined by the *BIA* as:

"a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

a) who is for any reason unable to meet his obligations as they generally become due,

b) who has ceased paying his obligations in the ordinary course of business as they generally become due, or

c) the aggregate of whose property is not, at fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due."

Stages of Receivership

Receiverships can be broken down into two different stages:

- soft (or pre) receivership
    - the secured creditor has someone in place to "watch over" the business to protect its security, the business continues to operate as usual, under the "threat" of receivership

Note: This is not a requirement, but may be used as incentive for the debtor to avoid the receivership.

- formal receivership
    - the secured creditor, or the Court, has now appointed a receiver to take possession of the secured assets

What is a Receiver

A receiver is any person or corporation that is appointed by a Court or a creditor to:

- take control of property

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- supervise liquidation proceedings
- remit the proceeds according to priorities established by common or statutory law

Under the *Excise Tax Act* (*ETA*) and the *ITA*, the term "receiver" includes a receiver-manager, receiver, monitor, liquidator, agent, committee, guardian or curator depending on the situation. Currently, it is not necessary for a receiver to be a licensed trustee.

Appointment of Receivers

There are two types of appointments:

- private appointment
- court appointment

The *BIA* applies to both types.

Related Topics:

- **Privately Appointed Receiver**
- **Court Appointed Receiver**

Privately Appointed Receiver

A secured creditor may appoint a receiver if:

- default in payment has occurred and a demand for payment/notice of default has been sent
- a notice of intention to enforce security has been sent to the debtor at least ten (10) days prior, and
- there is a perfected security agreement with a clause that allows for the appointment of a receiver

This receiver reports to, is responsible to and is compensated by the secured creditor.

Court Appointed Receiver

The court may appoint a receiver if:

- the privately appointed receiver is unable to take control of assets,
- there are competing claims against the same assets,
- the security agreement does not have a clause allowing the appointment of a receiver, or
- it is requested by a secured creditor

Any interested party may petition the court to appoint a receiver as long as they can prove they have a claim against the debtor.

The appointment of a receiver is made in accordance with:

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- section 241(3)(b) of the *Canada Business Corporations Act* (*CBCA*)
- various Provincial Securities or Corporations Acts

Receivership Options

Once the receiver has been appointed they have three options for how to handle the business:

1. Liquidation
   - the receiver will shut down the business and dispose of the assets
2. Continued Operation
   - the receiver will temporarily take over day-to-day operations of the business with the intention of resolving the secured liabilities and allowing the business to continue to operate
3. Short-term operation then liquidation
   - the receiver takes over the day-to-day operations of the business to improve the sale value of the business and/or it's assets then proceeds with liquidation

Powers of Receivers

In a Court appointed receivership:

- the Court Order sets out the receiver's duties and authorities
- the Court may direct the disposition of surplus
- the receiver reports the status of realization to the Court and requests an Order permitting distribution of the proceeds
- the receiver is discharged when the terms of the Court Order are fulfilled
- the receiver has a fiduciary responsibility to all interested parties, including the debtor.

The privately appointed receiver obtains its powers and authority from the letter of appointment. The security instrument may empower the receiver to take actions in addition to those provided in common law or statute.

In both cases the receiver may have the authority to:

- take possession of the charged property
- manage, operate and conduct the business of the tax debtor
- borrow money in order to preserve charged property to carry on the business
- sell, lease, or dispose of the charged property either as a whole or in part by way of public auction, tender or private sale
- settle or compromise any indebtedness

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- execute deeds and other instruments as an irrevocable attorney of the debtor for the carrying on of the business or for any sale
- preserve charged property including the right to make payments to prior charges or liens

Roles and Responsibilities of Receivers

Receivers have a duty to act honestly and in good faith and to deal with the property of the insolvent person in a commercially reasonable manner. However, they have no duty to operate the business, maintain its reputation or complete its contracts.

The roles and responsibilities of receivers both court and privately appointed, include:

- advising the Office of the Superintendent of Bankruptcy (OSB), and all known creditors of their appointment, no later than 10 days after becoming a receiver

Note: In the case of a bankrupt, the notice is only sent to the OSB and the trustee.

- preparing a prescribed statement of affairs containing the debtor's financial information for the OSB, the debtor or trustee and any creditor requesting a copy, including:
    - name and amount due to each creditor
    - listing of assets with book values
    - plan of action regarding assets under the receiver's control
        - preparing interim reports once every six months, for the OSB, the insolvent debtor or trustee and any creditor requesting a copy, including:
    - details of the property to be realized
    - interim statement of receipts and disbursements
    - any other information on the operation of the receivership
- preparing a Final Report and a Statement of Account, for the OSB, the insolvent debtor and any creditor requesting a copy, including:
    - details of how the proceeds were distributed
    - details of the disposition of the property not accounted for in the final statement of receipts and disbursements
    - final statement of receipts and disbursements
    - other information on the operation of the receivership
- sending all information and correspondence required under the *BIA* , the *ETA* and the *ITA*, to the attention of Revenue Collections of the tax services office in the locality of the tax debtor, including:
    - copy of the notice of receivership

Canadian Bankruptcy/Insolvency and Companies' Creditors Arrangement Law: Provisions, Precedents and Materials Compiled by Lyndon Maither, B.Comm

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- returns, remittances and payments

Note: The Receiver is responsible for any debits incurred while they were the receiver – this would be the "in receivership" accounts as well as the "post" receivership accounts.

- obtain a clearance certificate from the CRA in certain situations
- where surplus exists, the private receiver must obtain a clearance certificate from the CRA before distributing the property of the insolvent person

Receivers may be personally liable for the payment of the Departmental debt if they proceeded with the distribution of property without obtaining a clearance certificate.

Providing Tax Information to Receivers

The CRA may disclose tax information to receivers if:

- the information is reasonably regarded as necessary for the purposes of administration and/or enforcement of the *ITA* or the *ETA*
- the taxpayer in receivership to whom the tax information relates consents to the disclosure

For further details, refer to Directive RCD 95-03, **Disclosure of Tax Information to Trustee and Receivers** and Directive RCD-00-14, **Disclosure of Confidential Information to Trustees-in-Bankruptcy and Receivers**.

Types of Creditors

There are two types of creditors.

1. Secured creditors:
   - have preference over other creditors for amounts covered by their security
   - act only on security they hold
   - do not attempt to resolve the insolvency of the debtor
2. Unsecured Creditors, who fall into two sub-types:
   - Preferred:
     - have legal advantage over ordinary unsecured creditors by operation of law
     - rank behind secured creditors and ahead of ordinary unsecured creditors in legal distribution of funds
   - For example:
     - builder's liens
     - municipal taxes
     - provincial workers compensation.

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- Ordinary:
  - hold no security for the debt
  - rank last in the distribution of funds

The status of Crown claims vary depending on the work that has been completed on the account before the insolvency event occurs.

Notice of Intention to Enforce Security

Secured creditors planning to enforce their security must send a notice of their intention 10 days prior to taking action. The following are exceptions to this rule:

- the debtor consents to early enforcement
- a receiver is already appointed in respect of the insolvent person
- the debtor is bankrupt
- the secured creditor's right to realize upon its security is protected because the debtor filed a proposal which did not include that secured creditor or the secured creditor is in a class of secured creditors which voted to refuse a proposal
- the Court is satisfied that a secured creditor is likely to be materially prejudiced by the continuance of the 10 days notice or that it is equitable on other grounds that the 10 days notice be lifted

Deemed Trust

All amounts held in trust under the *ITA* Subsection 227(4) or *ETA* Subsection 222 do not form part of the estate in a receivership and remain the property of the Crown.

For further details, refer to the Deemed Trust chapter within the Collections Manual, Directive RCD 98-4, Bill C-28 Impacts on Accounts Receivable Program, RCD 98-6, Lien and Charge Registration, RCD-00-07, Regulation 2201 - Prescribed Security Interest and Communication TSDMB-2008-099, Reduction to the Prescribed Security Interest ("PSI") when making a deemed trust claim.

Related Topic:

- **Exception to Deemed Trust Priority**

Exception to Deemed Trust Priority

The only exceptions that supersede the deemed trust provisions are:

- a prescribed security interest (mortgage)
- the right of an unpaid supplier of goods to repossess those goods as provided under sections 81.1 and 81.2 of the *BIA*

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Unpaid Suppliers Rights

Section 81.1 of the *BIA* gives unpaid suppliers a statutory right of repossession of goods in the case the buyer becomes bankrupt or is in receivership. This statutory right ranks above every other claim or right, except where a buyer bought the goods later for value and in good faith, without knowing the supplier had demanded repossession of the goods.

The following conditions have to be fulfilled before a supplier repossesses the goods:

- supplier has to give the tax debtor, trustee/administrator or receiver a written demand for repossession within 30 days after the delivery of the goods
- goods have been sold for use in relation to the buyer's business
- goods cannot have been resold at arm's-length
- goods have to be identifiable as those delivered by the supplier and not fully paid
- goods have to be in the same state as they were on delivery

If these conditions are met, the suppliers have 10 days to repossess the goods after the buyer or receiver presents them with a written notice admitting that right. This ten-day period may be extended by mutual agreement.

For further details, refer to Directive, RCD 00-22, **The Rights of Unpaid Suppliers in a Bankruptcy or an Insolvency**.

Policy

This section provides policies related to Receiverships:

- **Legal Status of Receivers**
- **Stay of Proceedings**
- **Multiple Receivers**
- **Use of Requirements to Pay in a Receivership**
- **Distribution in a Receivership**
- **Clearance Certificates**
- **Liability of the Directors**
- **Receiver's Reasonable Fees and Costs**

Legal Status of Receivers

Though receivers take action for the benefit of secured creditors, there are certain actions that must be taken on behalf of the debtor such as:

- filing returns during the time of appointment and remitting appropriate amounts

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- receiving any information that is necessary to determine the debtor's liabilities and obligations

The receiver and the tax debtor are jointly and severally liable for past debts and ongoing obligations, only to the extent of the property under the receiver's control.

Note: The receiver's liability is limited to the extent of property remaining after the priority claims have been paid.

Stay of Proceedings

Unlike other Proceedings under the *BIA*, there is no automatic Stay of Proceedings in a Receivership.

A Stay of Proceedings is only applicable if specified in a court order that appoints the receiver.

The Stay is applicable all unsecured creditors, including CRA. Secured creditors are entitled to liquidate only the assets they hold as security.

A creditor, including the CRA, affected by a Stay imposed under a Receivership may apply to the court to lift the Stay.

There is no Stay of Proceedings when there is a privately appointed receiver.

For further details, refer to **Seeking Leave of the Court**.

Multiple Receivers

It is possible that there will be multiple receivers or a combination of receiver(s) and a trustee in bankruptcy.

When multiple receivers have been appointed, it is important to determine the mandate of each receiver. The receiver who is responsible for a majority of assets will use the primary account (RT0001/RP0001).

The other receivers may be required to file returns for any taxable activity/income that is a result of their actions. If this should occur, there must be a divisional account opened for each additional receiver.

Use of Enhanced Requirements to Pay in a Receivership

If the Court Order, appointing the receiver, includes a Stay of Proceedings that appears to be binding on the Crown, do not issue an ERTP. Instead, refer the matter to the Department of Justice to have the Order varied.

As there is no Stay in a privately appointed receivership the CRA is able to issue the ERTP. The use of the ERTP in Receivership is flexible and should be decided on a case-by-case basis.

Where it is unclear whether the receiver is entitled to a specific account receivable, seek the advice of the Department of Justice.

In a Receivership, accounts receivable fall into three categories:

- funds payable to the CRA
- funds shared with the Receiver

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- funds payable to the Receiver

Related Topics:

- **Funds Payable to the CRA**
- **Funds Shared with the Receiver**
- **Funds Payable to the Receiver**

Funds Payable to the CRA

If the accounts receivable were generated prior to the appointment of the receiver the CRA should enforce the Enhanced Requirement to Pay, regardless of whether it was issued before or after the appointment of a receiver. This may include situations where:

- the product was manufactured prior to the Receivership but;
- the product was delivered by the receiver, or
- the product was sold by the receiver

Funds Shared with the Receiver

The CRA may need to share ERTP funds with the receiver if the accounts receivable were partly generated by the receiver. For example:

- the existing inventory was partially manufactured or converted into a finished product and the receiver finished the work in process and delivered the goods
- the existing inventory was only partially manufactured or converted into a finished product and the receiver finished the work in process and generated the subsequent sale which resulted in the account receivable

In order to prove their entitlement to funds, the Receiver will have to provide the Collections Officer with a detailed accounting which shows that they did generate the accounts receivable.

Funds Payable to the Receiver

Accounts Receivable may be payable to the receiver if:

- the receiver purchased new inventory, manufactured or converted it into a finished product, and generated the subsequent sale which resulted in the account receivable

Again, in order to prove their entitlement to funds, the Receiver will have to provide the Collections Officer with a detailed accounting which shows that they did generate the accounts receivable.

In situations where the accounts receivable were completely generated by the receiver, the Enhanced Requirement to Pay stays in place in order to maintain the Crown's priority over other receivables, but the funds attributed to that specific receivable will be paid to the receiver.

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Receivers Reasonable Fees and Costs

A court appointed receiver may recover reasonable fees and costs in situations where:

- the CRA benefits directly from the receiver's expertise in maximizing recovery of amounts due under Enhanced Requirements to Pay or deemed trusts
- there is recovery of amounts that the CRA might not have otherwise been successful in obtaining

For further details, refer to Directive RCD-95-08, **Reasonable Fees and Costs**.

Related Topics:

- **Indicators of Reasonable Fees and Costs**
- **Indicators of Unreasonable fees and Costs**
- **Requirements of Receiver's Invoice for Fees and Costs**

Indicators of Reasonable Fees and Costs

Indicators of the reasonableness of such fees and costs are:

- the amount of time spent on the file
- the amount realized
- difficulties encountered in the realization
- urgency of the matters with which the practitioner has had to deal
- the necessary expenses incurred to fulfill the duties

Indicators of Unreasonable Fees and Costs

Fees that will not be permitted are:

- services that are illegal
- services or actions that had no positive results
- actions contrary to instructions
- regular office expenses

Requirements of Receiver's Invoice for Fees and Costs

In order to justify costs, the practitioner must keep detailed records of:

- work performed and actual time spent
- details of success vs. difficulties
- a complete accounting of amounts realized for the CRA

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- an accounting of disbursements made to obtain the funds

Procedures

This section provides procedures related to Receivership:

- **Investigating the Account**
- **Advising of Departmental Claim and Priority**
- **Opening an RT0002 or RP0002 account**
- **Seeking Leave of the Court**
- **Monitoring the Administration of the Receivership**
- **The Right of Off-Set**
- **Issuing a Clearance Certificate**

Investigating the Account

Investigation of a Receivership consists of seven (7) basic steps:

1. Identify all related accounts and taxes owing for example:
   - T1 /T2
   - payroll
   - GST/HST
   - sub ledger
   - related companies
   - shareholders and directors

Note: High priority trust exams and audits must be requested to confirm deemed trust amounts.

2. Determine the mandate and nature of the Receivership.
   - For a private receivership verify the validity of the appointment and the security agreement by reviewing the following:
     - the letter of appointment
     - the security agreement
     - the statement of affairs

3. Review the following:
   - corporate search
   - director and shareholder registries
   - certificate of incorporation

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- trade styles
- annual reports

4. Complete a books and records review to:
   - confirm status of assets and liabilities
   - identify possible asset transfers
   - locate names and addresses of accounts receivable as well as amounts owed
   - identify possible collection sources
5. Amend current collections actions to reflect the following:
   - update the collections status code
   - change the address on the account to the Receiver's if necessary
   - respect the Stay of Proceedings if applicable
6. Account for all corporate assets:
   - compare current assets with those identified in the Receiver's statement and previous collection investigations
7. Investigate alternative legal actions:
   - consider the following when investigating alternative legal actions:
     - previous account history
     - prior write offs on the account
     - aggregate amount of related debts
     - non-arm's length transactions
   - consider issuing an assessment to the directors of the corporation if any of the following situations apply:
     - there are no remaining assets in the company
     - the balance outstanding is more than **PROTECTED.**
     - investigations confirm the directors' ability to pay the assessment

Advising of Departmental Claim and Priority

Once the trust exam and/or audit have been completed and the CRA has appropriate deemed trust figures, send one of the following to the receiver:

- ELCS letter # 19715 for payroll accounts
- ELCS letter # 19686 for GST/HST accounts

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Note: It is critical to get these letters to the receiver as soon as possible. In the event that the receivership is followed by a bankruptcy, these letters will ensure the deemed trust payments are received out of the receivership.

If the CRA's trust claim is disallowed, send the appropriate documents to the Department of Justice for them to determine the extent of the claim.

All provable claims, including secured claims of the Crown, rank as unsecured unless the Crown has perfected their security.

For further details, refer to the **Security** chapter within the Collections Manual.

Opening an RT0002 or RP0002 Account

Receivers have three options for the filing and remitting of GST/HST and/or payroll:

1. They can use their own GST/HST number if:
   - they are liquidating some or all of the debtor's assets, regardless of whether or not the company will continue to operate afterwards
2. They can use the company's RT/RP 0001 number if:
   - they are liquidating assets, regardless of whether or not the company will continue to operate afterwards
   - they are operating the business in the short term with the intent to shut it down after liquidation
3. They open a divisional account if:
   - they are operating as receiver/manager and want to record the management activities separately
   - there are multiple receivers or a receiver/trustee combination

The use of the divisional account is largely at the discretion of the receiver. It is often the preference as it ensures that any ITC's are credited to the receiver's account. If the receiver decides to use the company's BN they are required to maintain the same filing requirements.

Seeking Leave of the Court

Collection actions must not be initiated or continued if a Court Ordered Receivership includes a Stay of Proceedings that appears to include the CRA. Instead:

1. Immediately forward copies of all documentation to the Department of Justice for an opinion as to what action CRA should take. Include:
   - the security agreement
   - the letter of appointment
   - the Court Order

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2. If legal action is in progress, send a letter to the third parties informing them that collection action is suspended and compliance is not required for amounts payable after the date of appointment of the Receiver until further notice.

3. Assist the Department of Justice with the preparation of the affidavit.

Once the Stay of Proceedings order is varied to expressly exclude CRA, fresh collection actions may be initiated.

Monitoring the Administration of the Receivership

Proper monitoring of the account is required to minimize any CRA losses. The Collections officer should:

- input all pertinent information in the ACSES diary
- verify that all statements are accurate by:
    - conducting field visits
    - inspecting the receiver's and/or the company's books and records
- contact the receiver for updates on the liquidation of the assets and funds available
- refer to the Receiver's interim reports to:
    - analyze the possibility of surplus funds available upon termination of the receiver's mandate
    - question the realization made on certain assets
- refer to the final report to:
    - identify if any surplus of funds are available
    - review the fees and charges of the receiver

The Right of Off-Set

The CRA does not have the right to off-set credits or refunds generated during a post-receivership period, relating to post-receivership filing periods, against liabilities incurred in a pre-receivership period. In situations where there are multiple receivers, credits or refunds cannot be off-set from one receiver's account to another's.

Issuing a Clearance Certificate

Where there will be a distribution of funds to creditors other than the appointing creditor, the receiver must obtain a clearance certificate.

Clearance certificates are issued by the Audit division.

For further details refer to the **Processing a Request for a Clearance Certificate** section of the Collections Manual.

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References

Directive RCD 95-03, **Disclosure of Tax Information to Trustee and Receivers**, issued October 27, 1995

Directive RCD-95-05, **The Use of Enhanced Garnishment in Receivership**, issued October 27, 1995

Directive RCD-95-08, **Reasonable Fees and Costs**, issued October 27, 1996

Directive RCD 98-4, **Bill C-28 Impacts on Accounts Receivable Program**, issued July 2, 1998

RCD 98-6, **Lien and Charge Registration**, issued August 28, 1998

RCD-00-07, **Regulation 2201 - Prescribed Security Interest**, issued May 26, 2000

Directive RCD-00-14, **Disclosure of Confidential Information to Trustees-in-Bankruptcy and Receivers**, issued June 1, 2000

RCD 00-22, **The Rights of Unpaid Suppliers in a Bankruptcy or an Insolvency**, issued August 25, 2000

Communication TSDMB-2008-099, **Reduction to the Prescribed Security Interest ("PSI") when making a deemed trust claim**, issued August 11, 2008

Glossary

Agent
A person authorized by another to act for or in place of that person; one entrusted with another's business.

Clearance Certificate
Document issued to the receiver confirming that the CRA's requirements have been fulfilled.

Committee
Persons appointed to manage and care for the affairs and assets of a person who is incapable of managing those affairs and assets.

Crystallize
Crystallization is the act of calling a debt. It makes a floating charge enforceable and changes the floating non-specific charge to a fixed charge on specific property. This occurs upon default, after demand for payment has occurred or when the creditor takes an action to enforce the charge.

Curator
Person appointed to manage and care for the affairs and assets of a person who is incapable of managing those affairs and assets.

Debenture
Sealed bond issued by a corporation or company in respect of a long-term loan.

Distribution in a Receivership
A distribution normally occurs when the responsible representative turns over to the shareholders, owners or creditors any residue of property after the payment of all property claims against that property.

Fixed Charge

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A fixed charge is one that grants, assigns or transfers specific identifiable property from the debtor to the security holder as security for a debt or performance of an obligation. The holders of the security instrument do not have to invoke receivership in order to enforce their rights; they foreclose on real estate (with a judgment order) or seize the asset to satisfy the debtor's liability

Guardian
Person appointed to manage and care for the affairs and assets of a person who is incapable of managing those affairs and assets.

Letter of Appointment
Letter outlining the nature of the receiver's responsibilities over the debtor's assets and under which authority he/she has been appointed. The nature of the appointment of a receiver gives the CRA ability to ensure that the various legislative requirements imposed upon the receiver in the administration of an estate are complied with.

Liquidator
Person appointed to liquidate the debtor's assets or to wind-up the affairs of a corporation.

Monitor
Person appointed by a secured creditor as a consultant to review and report the cash flow, assets and accounts payable to the secured creditor.

Property
Property includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property.

Receiver
Person appointed by a secured creditor or the court pursuant to a debenture, bond or other debt security instrument to administer and/or liquidate assets to retire a debtor's debt.

Receiver-manager
Person appointed under a debenture, bond or other debt security agreement or pursuant to a court order to manage a debtor's business according to the terms of the appointment with the purpose of either retiring the debt or operating the company to retire the debt.

Receivership
Legal or equitable proceeding in which a receiver is appointed for an insolvent corporation, partnership or individual to preserve its assets for the benefit of affected parties.

Security Instrument
A security instrument is a document (debenture, mortgage, assignment, etc.) that transfers an interest in a right or property from the debtor to the creditor.

Stay of Proceedings
The Stay requires a suspension of all collection action against the debtor or the debtor's property.

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PART XII

SECURITIES FIRM BANKRUPTCIES

INTERPRETATION

Definitions - Sec. 253
253. In this Part,

"customer"
« client »
"customer" includes

(a) a person with or for whom a securities firm deals as principal, or agent or mandatary, and who has a claim against the securities firm in respect of a security received, acquired or held by the securities firm in the ordinary course of business as a securities firm from or for a securities account of that person

(i) for safekeeping or deposit or in segregation,
(ii) with a view to sale,
(iii) to cover a completed sale,
(iv) pursuant to a purchase,
(v) to secure performance of an obligation of that person, or
(vi) for the purpose of effecting a transfer,

(b) a person who has a claim against the securities firm arising out of a sale or wrongful conversion by the securities firm of a security referred to in paragraph (a), and
(c) a person who has cash or other assets held in a securities account with the securities firm,
but does not include a person who has a claim against the securities firm for cash or securities that, by agreement or operation of law, is part of the capital of the securities firm or a claim that is subordinated to claims of creditors of the securities firm;

"customer compensation body"
« organisme d'indemnisation des clients »
"customer compensation body" means a prescribed body and includes, unless it is prescribed to be excluded from this definition, the Canadian Investor Protection Fund;

"customer name securities"
« valeur mobilière immatriculée »
"customer name securities" means securities that on the date of bankruptcy of a securities firm are held by or on behalf of the securities firm for the account of a customer and are registered or recorded in the appropriate manner in the name of the customer or are in the process of being so registered or recorded, but does not include securities registered or recorded in the appropriate manner in the name of the customer that, by endorsement or otherwise, are negotiable by the securities firm;

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"deferred customer"
« client responsable »
"deferred customer" means a customer whose misconduct, either in the customer's capacity as a customer or otherwise, caused or materially contributed to the insolvency of a securities firm;

"eligible financial contract"
"eligible financial contract"[Repealed, 2007, c. 29, s. 101]

"hold"
« détenir »
"hold", in relation to a security, includes holding it in electronic form;

"net equity"
« capitaux nets »
"net equity" means, with respect to the securities account or accounts of a customer, maintained in one capacity, the net dollar value of the account or accounts, equal to the amount that would be owed by a securities firm to the customer as a result of the liquidation by sale or purchase at the close of business of the securities firm on the date of bankruptcy of the securities firm, of all security positions of the customer in each securities account, other than customer name securities reclaimed by the customer, including any amount in respect of a securities transaction not settled on the date of bankruptcy but settled thereafter, less any indebtedness of the customer to the securities firm on the date of bankruptcy including any amount owing in respect of a securities transaction not settled on the date of bankruptcy but settled thereafter, plus any payment of indebtedness made with the consent of the trustee after the date of bankruptcy;

"open contractual commitment"
« contrat en cours »
"open contractual commitment" means an enforceable contract of a securities firm to purchase or sell a security that was not completed by payment and delivery on the date of bankruptcy;

"securities firm"
« courtier en valeurs mobilières »
"securities firm" means a person who carries on the business of buying and selling securities from, to or for a customer, whether or not as a member of an exchange, as principal, or agent or mandatary, and includes any person required to be registered to enter into securities transactions with the public, but does not include a corporate entity that is not a corporation within the meaning of section 2;

"security"
« valeur mobilière » ou « titre »

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"security" means any document, instrument or written or electronic record that is commonly known as a security, and includes, without limiting the generality of the foregoing,

(a) a document, instrument or written or electronic record evidencing a share, participation right or other right or interest in property or in an enterprise, including an equity share or stock, or a mutual fund share or unit,

(b) a document, instrument or written or electronic record evidencing indebtedness, including a note, bond, debenture, mortgage, hypothec, certificate of deposit, commercial paper or mortgage-backed instrument,

(c) a document, instrument or written or electronic record evidencing a right or interest in respect of an option, warrant or subscription, or under a commodity future, financial future, or exchange or other forward contract, or other derivative instrument, including an eligible financial contract, and

(d) such other document, instrument or written or electronic record as is prescribed.

1997, c. 12, s. 118;
2004, c. 25, s. 97(E);
2005, c. 47, s. 117;
2007, c. 29, s. 101.

GENERAL

Application of other provisions - Sec. 254
254. (1) All of the provisions of this Act apply, with such modifications as the circumstances require, in respect of claims by customers for securities and customer name securities as if customers were creditors in respect of such claims.

Application of transaction provisions - Sec. 254(2)
(2) Sections 91 to 101 apply, with such modifications as the circumstances require, in respect of transactions of a customer with or through a securities firm relating to securities.

Non-application - Sec. 254(3)
(3) This Part does not apply to proceedings under Part III.

Termination, netting or setting off or compensation - Sec. 254(4)
(4) Nothing in this Part affects the rights of a party to a contract, including an eligible financial contract, with respect to termination, netting or setting off or compensation.

Secured creditors - Sec. 254(5)
(5) The operation of this Part is subject to the rights of secured creditors.
1997, c. 12, s. 118;
2004, c. 25, s. 98(E);
2007, c. 29, s. 102.

Conflicts - Sec. 255
255. All the provisions of this Act, in so far as they are applicable, apply in respect of bankruptcies under this Part, but if a conflict arises between the application of the provisions of this Part and the other provisions of this Act, the provisions of this Part prevail.

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1997, c. 12, s. 118.

Applications re securities firm - Sec. 256
256. (1) In addition to any creditor who may file an application in accordance with sections 43 to 45, an application for a bankruptcy order against a securities firm may be filed by

(a) a securities commission established under an enactment of a province, if

(i) the securities firm has committed an act of bankruptcy referred to in section 42 or subsection (2) of this section within the six months before the filing of the application and while the securities firm was licensed or registered by the securities commission to carry on business in Canada, and

(ii) in the case in which the act of bankruptcy was that referred to in subsection (2), the suspension referred to in that subsection is in effect when the application is filed;

(b) a securities exchange recognized by a provincial securities commission, if

(i) the securities firm has committed an act of bankruptcy referred to in section 42 or subsection (2) of this section within the six months before the filing of the application and while the securities firm was a member of the securities exchange, and

(ii) in the case in which the act of bankruptcy was that referred to in subsection (2), the suspension referred to in that subsection is in effect when the application is filed;

(c) a customer compensation body, if

(i) the securities firm has committed an act of bankruptcy referred to in section 42 or subsection (2) of this section within the six months before the filing of the application and while the securities firm had customers whose securities accounts were protected, in whole or in part, by the customer compensation body, and

(ii) in the case in which the act of bankruptcy was that referred to in subsection (2), the suspension referred to in that subsection is in effect when the application is filed; and

(d) a person who, in respect of property of a securities firm, is a receiver within the meaning of subsection 243(2), a receiver-manager, a liquidator or any other person with similar functions appointed under a federal or provincial enactment relating to securities that provides for the appointment of that other person, if the securities firm has committed an act of bankruptcy referred to in section 42 within the six months before the filing of the application.

Interpretation - Sec. 256(2)
(2) For the purposes of paragraphs (1)(a) to (c),

(a) the suspension by a securities commission referred to in paragraph (1)(a) of a securities firm's registration to trade in securities, or

(b) the suspension by a securities exchange referred to in paragraph (1)(b) of a securities firm's membership in that exchange

constitutes an act of bankruptcy if the suspension is due to the failure of the firm to meet capital adequacy requirements.

Service on securities commission - Sec. 256(3)
(3) If

(a) a securities exchange files an application under paragraph (1)(b), or

(b) a customer compensation body files an application under paragraph (1)(c),

a copy of the application must be served on the securities commission, if any, having jurisdiction in the locality of the securities firm where the application was filed, before

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(c) any prescribed interval preceding the hearing of the application, or
(d) any shorter interval that may be fixed by the court and that precedes the hearing of the application.
1997, c. 12, s. 118;
2004, c. 25, s. 99;
2005, c. 47, s. 118.

Statement of customer account - Sec. 257
257. The trustee of the estate of a securities firm shall send to customers a statement of customer accounts with the firm together with the notice under subsection 102(1).
1997, c. 12, s. 118.

Deferred customers - Sec. 258
258. (1) Where the trustee is of the opinion that a customer should be treated as a deferred customer, the trustee shall apply to the court for a ruling on the matter and shall send the customer a copy of the application, together with a statement of the reasons why the customer should be so treated, and the court may, on such notice as it considers appropriate, make such order as it considers appropriate in the circumstances.

Application by customer compensation body - Sec. 258(2)
(2) Where securities accounts of customers are protected by a customer compensation body, the customer compensation body may apply to the court for a ruling as to whether a customer should be treated as a deferred customer and, in the case of such an application,
(a) the customer compensation body shall send the customer a copy of the application together with a statement setting out the reasons why the customer should be so treated; and
(b) the court may, on such notice as it considers appropriate, make such order as it considers appropriate in the circumstances.
1997, c. 12, s. 118.

Trustee powers - Sec. 259
259. The trustee may, in respect of a bankruptcy under this Part, without the permission of inspectors until inspectors are appointed and thereafter with the permission of inspectors,
(a) exercise a power of attorney in respect of and transfer any security vested in the trustee;
(b) sell securities, other than customer name securities;
(c) purchase securities;
(d) discharge any security on securities vested in the trustee;
(e) complete open contractual commitments;
(f) maintain customers' securities accounts and meet margin calls;
(g) distribute cash and securities to customers;
(h) transfer securities accounts to another securities firm, to the extent practicable, comply with customer requests regarding the disposal of open contractual commitments and the transfer of open contractual commitments to another securities firm, and enter into agreements to indemnify the other securities firm against shortages of cash or securities in transferred accounts;
(i) liquidate any securities account without notice; and
(j) sell, without tender, assets of the securities firm essential to the carrying on of its business.

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1997, c. 12, s. 118;
2004, c. 25, s. 100.

Determination of customer name securities - Sec. 260
260. The trustee shall
(a) determine which of the securities in customers' securities accounts are to be dealt with as customer name securities and those that are not to be dealt with as such; and
(b) advise customers with securities determined to be customer name securities of the determination as soon as possible thereafter.
1997, c. 12, s. 118.

DISTRIBUTION OF ESTATE

Vesting of securities, etc., in trustee - Sec. 261
261. (1) If a securities firm becomes bankrupt, the following securities and cash vest in the trustee:
(a) securities owned by the securities firm;
(b) securities and cash held by any person for the account of the securities firm; and
(c) securities and cash held by the securities firm for the account of a customer, other than customer name securities.

Establishment of a customer pool fund and a general fund - Sec. 261(2)
(2) Where a securities firm becomes bankrupt and property vests in a trustee under subsection (1) or under other provisions of this Act, the trustee shall establish
(a) a fund, in this Part called the "customer pool fund", including therein
(i) securities, including those obtained after the date of the bankruptcy, but excluding customer name securities and excluding eligible financial contracts to which the firm is a party, that are held by or for the account of the firm
(A) for a securities account of a customer,
(B) for an account of a person who has entered into an eligible financial contract with the firm and has deposited the securities with the firm to assure the performance of the person's obligations under the contract, or
(C) for the firm's own account,
(ii) cash, including cash obtained after the date of the bankruptcy, and including
(A) dividends, interest and other income in respect of securities referred to in subparagraph (i),
(B) proceeds of disposal of securities referred to in subparagraph (i), and
(C) proceeds of policies of insurance covering claims of customers to securities referred to in subparagraph (i),
that is held by or for the account of the firm
(D) for a securities account of a customer,
(E) for an account of a person who has entered into an eligible financial contract with the firm and has deposited the cash with the firm to assure the performance of the person's obligations under the contract, or
(F) for the firm's own securities account, and
(iii) any investments of the securities firm in its subsidiaries that are not referred to in subparagraph (i) or (ii); and

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(b) a fund, in this Part called the "general fund", including therein all of the remaining vested property.

1997, c. 12, s. 118;
2004, c. 25, s. 101(F);
2005, c. 47, s. 119.

Allocation and distribution of cash and securities in customer pool fund - Sec. 262

262. (1) Cash and securities in the customer pool fund shall be allocated in the following priority:

(a) for costs of administration referred to in paragraph 136(1)(b), to the extent that sufficient funds are not available in the general fund to pay such costs;

(b) to customers, other than deferred customers, in proportion to their net equity; and

(c) to the general fund.

Where property deposited with securities firm under an EFC - Sec. 262(1.1)

(1.1) Where

(a) a person has, under the terms of an eligible financial contract with the securities firm, deposited property with the firm to assure the performance of the person's obligations under the contract, and

(b) that property is included in the customer pool fund pursuant to paragraph 261(2)(a),

that person shall share in the distribution of the customer pool fund as if the person were a customer of the firm with a claim for net equity equal to the net value of the property deposited that would have been returnable to the person after deducting any amount owing by the person under the contract.

Distribution - Sec. 262(2)

(2) To the extent that securities of a particular type are available in the customer pool fund, the trustee shall distribute them to customers with claims to the securities, in proportion to their claims to the securities, up to the appropriate portion of their net equity, unless the trustee determines that, in the circumstances, it would be more appropriate to sell the securities and distribute the proceeds to the customers with claims to the securities in proportion to their claims to the securities.

Compensation in kind - Sec. 262(2.1)

(2.1) Subject to subsection (2), the trustee may satisfy all or part of a customer's claim to securities of a particular type by delivering to the customer securities of that type to which the customer was entitled at the date of bankruptcy. For greater certainty, the trustee may, for that purpose, exercise the trustee's power to purchase securities in accordance with section 259.

Allocation of property in the general fund - Sec. 262(3)

(3) Property in the general fund shall be allocated in the following priority:

(a) to preferred creditors in the order set out in subsection 136(1);

(b) rateably

(i) to customers, other than deferred customers, having claims for net equity remaining after distribution of property from the customer pool fund and property provided by a customer compensation body, where applicable, in proportion to claims for net equity remaining,

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(ii) where applicable, to a customer compensation body to the extent that it paid or compensated customers in respect of their net equity, and
(iii) to creditors in proportion to the values of their claims;
(c) rateably to creditors referred to in section 137; and
(d) to deferred customers, in proportion to their claims for net equity.
1997, c. 12, s. 118;
2005, c. 47, s. 120.

Delivery of customer name securities - Sec. 263
263. (1) Where a customer is not indebted to a securities firm, the trustee shall deliver to the customer the customer name securities that belong to the customer.

Where customer indebted to securities firm - Sec. 263(2)
(2) Where a customer to whom customer name securities belong and who is indebted to the securities firm on account of customer name securities not fully paid for, or on another account, discharges their indebtedness in full, the trustee shall deliver to that customer the customer name securities that belong to the customer.

Customer indebted to securities firm - Sec. 263(3)
(3) If a customer to whom customer name securities belong and who is indebted to the securities firm on account of customer name securities not fully paid for, or on another account, does not discharge their indebtedness in full, the trustee may, on notice to the customer, sell sufficient customer name securities to discharge the indebtedness, and those securities are then free of any right, title or interest of the customer. If the trustee so discharges the customer's indebtedness, the trustee shall deliver any remaining customer name securities to the customer.
1997, c. 12, s. 118;
2005, c. 47, s. 121.

Trustee to consult customer compensation body - Sec. 264
264. Where the accounts of customers of a securities firm are protected, in whole or in part, by a customer compensation body, the trustee shall consult the customer compensation body on the administration of the bankruptcy, and the customer compensation body may designate an inspector to act on its behalf.
1997, c. 12, s. 118.

Late claims - Sec. 265
265. A customer may prove a claim after the distribution of cash and securities in the customer pool fund and is entitled to receive cash and securities in the hands of the trustee at the time the claim is proven up to the appropriate portion of the customer's net equity before further distribution is made to other customers, but no such claim shall affect the previous distribution of the customer pool fund or the general fund.
1997, c. 12, s. 118.

ACCOUNTING OF TRUSTEE

Statement of trustee required - Sec. 266

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266. In addition to any other statement or report required to be prepared under this Act, a trustee shall prepare

(a) a statement indicating

(i) the distribution of property in the customer pool fund among customers who have proved their claims, and

(ii) the disposal of customer name securities; or

(b) such other report relating to that distribution or disposal as the court may direct.

1997, c. 12, s. 118.

PART XIII

CROSS-BORDER INSOLVENCIES

PURPOSE

Purpose - Sec. 267

267. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;

(d) the protection and the maximization of the value of debtors' property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

1997, c. 12, s. 118;
2005, c. 47, s. 122.

INTERPRETATION

Definitions - Sec. 268

268. (1) The following definitions apply in this Part.

"foreign court"
« tribunal étranger »
"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding"
« principale »
"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor has the centre of the debtor's main interests.

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"foreign non-main proceeding"
« secondaire »
"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding"
« instances étrangères »
"foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditor's collective interests generally under any law relating to bankruptcy or insolvency in which a debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.

"foreign representative"
« représentant étranger »
"foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to
(a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or
(b) act as a representative in respect of the foreign proceeding.

Centre of debtor's main interests - Sec. 268(2)
(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor's registered office and, in the case of a debtor who is an individual, the debtor's ordinary place of residence are deemed to be the centre of the debtor's main interests.
1997, c. 12, s. 118;
2004, c. 25, s. 102;
2005, c. 47, s. 122.

RECOGNITION OF FOREIGN PROCEEDING

Application for recognition of a foreign proceeding - Sec. 269
269. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application - Sec. 269(2)
(2) Subject to subsection (3), the application must be accompanied by

- **(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;**
- **(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and**
- **(c) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.**

Documents may be considered as proof - Sec. 269(3)

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(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence - Sec. 269(4)
(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation - Sec. 269(5)
(5) The court may require a translation of any document accompanying the application.
1997, c. 12, s. 118;
2005, c. 47, s. 122.

Order recognizing foreign proceeding - Sec. 270
270. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified - Sec. 270(2)
(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.
1997, c. 12, s. 118;
2005, c. 47, s. 122.

Effects of recognition of a foreign main proceeding - Sec. 271
271. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,

(a) no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;
(b) if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or otherwise dispose of any other property of the debtor in Canada; and
(c) if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.

When subsection (1) does not apply - Sec. 271(2)
(2) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor at the time the order recognizing the foreign proceeding is made.

Exceptions - Sec. 271(3)
(3) The prohibitions in paragraphs (1)(a) and (b) are subject to the exceptions specified by the court in the order recognizing the foreign proceeding that would apply in Canada had the foreign proceeding taken place in Canada under this Act.

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Application of this and other Acts - Sec. 271(4)
(4) Nothing in subsection (1) precludes the commencement or the continuation of proceedings under this Act, the Companies' Creditors Arrangement Act or the Winding-up and Restructuring Act in respect of the debtor.
1997, c. 12, s. 118;
2005, c. 47, s. 122.

Orders - Sec. 272
272. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 271(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;
(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations;
(c) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and
(d) appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,

(i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and
(ii) to take any other action that the court considers appropriate.

Restriction - Sec. 272(2)
(2) If any proceedings under this Act have been commenced in respect of the debtor at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts - Sec. 272(3)
(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the Companies' Creditors Arrangement Act or the Winding-up and Restructuring Act in respect of the debtor.
1997, c. 12, s. 118;
2005, c. 47, s. 122.

Terms and conditions of orders - Sec. 273
273. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.
1997, c. 12, s. 118;
2005, c. 47, s. 122.

Commencement or continuation of proceedings - Sec. 274

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274. If an order recognizing a foreign proceeding is made, the foreign representative may commence or continue any proceedings under sections 43, 46 to 47.1 and 49 and subsections 50(1) and 50.4(1) in respect of a debtor as if the foreign representative were a creditor of the debtor, or the debtor, as the case may be.
1997, c. 12, s. 118;
2004, c. 25, s. 103;
2005, c. 47, s. 122.

OBLIGATIONS
Cooperation — court - Sec. 275
275. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Cooperation — other authorities in Canada - Sec. 275(2)
(2) If any proceedings under this Act have been commenced in respect of a debtor and an order recognizing a foreign proceeding is made in respect of the debtor, every person who exercises any powers or performs duties and functions in any proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation - Sec. 275(3)
(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

(a) the appointment of a person to act at the direction of the court;
(b) the communication of information by any means considered appropriate by the court;
(c) the coordination of the administration and supervision of the debtor's assets and affairs;
(d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and
(e) the coordination of concurrent proceedings regarding the same debtor.

1997, c. 12, s. 118;
2005, c. 47, s. 122;
2007, c. 36, s. 59.

Obligations of foreign representative - Sec. 276
276. If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

(a) without delay, inform the court of
(i) any substantial change in the status of the recognized foreign proceeding,
(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and
(iii) any other foreign proceeding in respect of the same debtor that becomes known to the foreign representative; and
(b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

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2005, c. 47, s. 122.

MULTIPLE PROCEEDINGS

Concurrent proceedings - Sec. 277
277. If any proceedings under this Act in respect of a debtor are commenced at any time after an order recognizing the foreign proceeding is made,

(a) the court shall review any order made under section 272 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order; and

(b) if the foreign proceeding is a foreign main proceeding, the court shall make an order terminating the application of the prohibitions in paragraphs 271(1)(a) to (c) if the court determines that those prohibitions are inconsistent with any similar prohibitions imposed in the proceedings under this Act.

2005, c. 47, s. 122.

Multiple foreign proceedings - Sec. 278
278. (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor, an order recognizing a foreign main proceeding is made in respect of the debtor, the court shall review any order made under section 272 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

Multiple foreign proceedings - Sec. 278(2)
(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor, an order recognizing another foreign non-main proceeding is made in respect of the debtor, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 272 in respect of the first recognized proceeding and amend or revoke that order if it considers it appropriate.
2005, c. 47, s. 122.

MISCELLANEOUS PROVISIONS

Authorization to act as representative of proceeding under this Act - Sec. 279
279. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.
2005, c. 47, s. 122.

Foreign representative status - Sec. 280
280. An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other court order.
2005, c. 47, s. 122.

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Foreign proceeding appeals 281
281. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.
2005, c. 47, s. 122.

Presumption of insolvency - Sec. 282
282. For the purposes of this Part, if a bankruptcy, an insolvency or a reorganization or a similar order has been made in respect of a debtor in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor is insolvent and proof of the appointment of the foreign representative made by the order.
2005, c. 47, s. 122.

Credit for recovery in other jurisdictions - Sec. 283
283. (1) If a bankruptcy order, a proposal or an assignment is made in respect of a debtor under this Act, the following shall be taken into account in the distribution of dividends to the debtor's creditors in Canada as if they were a part of that distribution:

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the debtor; and

(b) the value of any property of the debtor that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if the transfer were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

Restriction - Sec. 283(2)
(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.
2005, c. 47, s. 122.

Court not prevented from applying certain rules - Sec. 284
284. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception - Sec. 284(2)
(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.
2005, c. 47, s. 122;
2007, c. 36, s. 60.

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PART XIV

REVIEW OF ACT

Review of Act - Sec. 285
285. (1) Within five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to those provisions.

Reference to parliamentary committee - Sec. 285(2)
(2) The report stands referred to the committee of the Senate, the House of Commons or both Houses of Parliament that is designated or established for that purpose, which shall

(a) as soon as possible after the laying of the report, review the report; and

(b) report to the Senate, the House of Commons or both Houses of Parliament, as the case may be, within one year after the laying of the Minister's report, or any further time authorized by the Senate, the House of Commons or both Houses of Parliament.

2005, c. 47, s. 122.

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RELATED PROVISIONS
— R.S., 1985, c. 27 (2nd Supp.), s. 11
o
Transitional: proceedings
11. Proceedings to which any of the provisions amended by the schedule apply that were commenced before the coming into force of section 10 shall be continued in accordance with those amended provisions without any further formality.
— 1990, c. 17, s. 45(1)
o
Transitional: proceedings
45. (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.
— 1992, c. 27, ss. 9(2), (3)

(2) Where, before the coming into force of this section, the Superintendent had communicated in writing to a licensee the Superintendent's intention to make a report to the Minister in respect of that licensee under section 7 of the Bankruptcy Act, as that section read immediately before the coming into force of section 6 of this Act, then
(a) the following provisions of the Bankruptcy Act continue to apply, in so far as they relate to the investigation of that licensee pursuant to section 7 of that Act:
(i) sections 7 and 8, as those sections read immediately before the coming into force of section 6 of this Act, and
(ii) subsections 14(2) and (3), as those subsections read immediately before the coming into force of this section; and
(b) to the extent that the provisions of the Bankruptcy Act referred to in paragraph (a) continue to apply, sections 14.01 to 14.03 of the Bankruptcy and Insolvency Act, as enacted by subsection (1) of this section, do not apply.
— 1992, c. 27, ss. 9(2), (3)

(3) Where
(a) by virtue of subsection (2), subsection 14(2) of the Bankruptcy Act continues to apply, and
(b) the hearing to which the licensee is entitled under subsection 14(2) had not begun at the coming into force of this section,
the Minister may delegate the Minister's powers, duties and functions under subsection 14(2) to any person other than the Superintendent, by written instrument, on such terms and conditions as are therein specified.
— 1992, c. 27, ss. 16(2), (3)

(2) Section 47 of the Bankruptcy Act, as that section read immediately before the coming into force of subsection (1), continues to apply in relation to proposals filed before the coming into force of that subsection.
— 1992, c. 27, ss. 16(2), (3)

(3) Sections 47 to 47.2 of the Bankruptcy and Insolvency Act, as enacted by subsection (1), do not apply to interim receivers appointed before the coming into force of those sections.

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— 1992, c. 27, s. 32(2)

Application
(2) Part III of the Bankruptcy Act, as that Part read immediately before the coming into force of this subsection, continues to apply in relation to proposals filed before the coming into force of this subsection.
— 1992, c. 27, s. 35(2)

(2) Section 68.1 of the Bankruptcy and Insolvency Act, as enacted by subsection (1), only applies to debtors who become bankrupt after the coming into force of that section.
— 1992, c. 27, s. 36(2)

(2) Section 69 of the Bankruptcy Act, as that section read immediately before the coming into force of this subsection, continues to apply in relation to proposals filed, or bankruptcies occurring, before the coming into force of this subsection.
— 1992, c. 27, s. 38(2)

(2) Sections 81.1 and 81.2 of the Bankruptcy and Insolvency Act, as enacted by subsection (1), apply only in relation to goods and products delivered after the coming into force of those sections.
— 1992, c. 27, s. 42(2)

(2) Section 101.2 of the Bankruptcy and Insolvency Act, as enacted by subsection (1), only applies to debtors who become bankrupt after the coming into force of that section.
— 1992, c. 27, s. 50(2)

(2) Subsection 121(1) of the Bankruptcy and Insolvency Act, as enacted by subsection (1), only applies to bankrupts who become bankrupt after the coming into force of that subsection.
— 1992, c. 27, s. 54(3)

(3) Paragraph 136(1)(d) of the Bankruptcy Act, as that paragraph read immediately before the coming into force of subsection (1) of this section, continues to apply in relation to bankruptcies occurring before the coming into force of that subsection.
— 1992, c. 27, ss. 61(2), (3)

(2) Section 168.1 of the Bankruptcy and Insolvency Act, as enacted by subsection (1), applies to an individual who became bankrupt before the coming into force of that section only in a case where no application for a discharge hearing was made under subsection 169(2) or (3) before the coming into force of section 168.1.
— 1992, c. 27, ss. 61(2), (3)

(3) Where, by virtue of subsection (2), section 168.1 of the Bankruptcy and Insolvency Act applies to an individual who became bankrupt more than seven months before the coming into force of that section, then
(a) the words "eight month period immediately following the date on which a receiving order is made against, or an assignment is made by, the individual bankrupt" in paragraph 168.1(1)(a) shall be read as "one month period immediately following the coming into force of this section";

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(b) the words "nine month period immediately following the bankruptcy" in paragraphs 168.1(1)(b), (c), (d) and (f) shall be read as "two month period immediately following the coming into force of this section";
(c) the word "nine" in subparagraphs 168.1(1)(f)(i) and (ii) shall be read as "two"; and
(d) the words "nine month period immediately following the bankruptcy" in subsection 168.1(2) shall be read as "two month period immediately following the coming into force of this section".
— 1992, c. 27, s. 89(2)

(2) Part XI of the Bankruptcy and Insolvency Act, as enacted by subsection (1), applies only in relation to persons who become receivers after the coming into force of this subsection.
— 1992, c. 27, s. 92
Review
92. After the expiration of three years after this section comes into force, this Act shall stand referred to such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established for that purpose and the committee shall, as soon as practicable thereafter, undertake a comprehensive review of the provisions and operation of this Act and shall, within one year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon.
— 1997, c. 12, s. 15(2)

Application
(2) Subsection (1) applies to bankruptcies, proposals or receiverships in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 59(2)

Application
(2) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 60(2)

Application
(2) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 61(2)

Application
(2) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 62(2)

Application
(2) Subsection (1) applies to proceedings under Part III that are commenced after that subsection comes into force.
— 1997, c. 12, s. 63(3)

Application

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(3) Subsection (1) or (2) applies to proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 64(2)

Application
(2) Subsection (1) applies to proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 65(2)

Application
(2) Subsection (1) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 73(2)

Application
(2) Subsection (1) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 74(3)

Application
(3) Subsection (1) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 78(3)

Application
(3) Subsection (2) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 82(3)

Application
(3) Subsection (1) or (2) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 84(3)

Application
(3) Subsection (1) or (2) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 87(3)

Application
(3) Subsection (1) or (2) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 89(3)

Application

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(3) Subsection (1) or (2) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 90(5)

Application
(5) Subsection (2) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 92(3)

Application
(3) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 101(2)

Application
(2) Subsection (1) applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 103(2)

Application
(2) Paragraph 173(1)(m) or (n) of the Act, as enacted by subsection (1), applies to bankruptcies in respect of which proceedings are commenced after that paragraph comes into force.
— 1997, c. 12, s. 105(4)

Application
(4) Subsection (1), (2) or (3) applies to bankruptcies or proposals in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 118(2)

Application
(2) Part XII of the Act, as enacted by subsection (1), applies to bankruptcies in respect of which proceedings are commenced after that subsection comes into force.
— 1997, c. 12, s. 119
Application
119. Sections 30 to 58 apply to proceedings commenced under the Bankruptcy and Insolvency Act after this section comes into force.
— 1998, c. 19, s. 250(2)

(2) Subsection (1) is deemed to have come into force on June 15, 1994 except that, in the application after June 14, 1994 and before June 30, 1996 of subsection 67(3) of the Act, as enacted by subsection (1), the reference to "subsections 86(2) or (2.1) of the Employment Insurance Act" shall be read as a reference to "subsections 57(2) or (3) of the Unemployment Insurance Act".
— 1998, c. 21, ss. 103(3), (4)

Application

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(3) Subsection (1) applies to debts and obligations regardless of whether they were incurred before or after this section comes into force.
— 1998, c. 21, ss. 103(3), (4)

Application
(4) Subsections (1) and (2) apply only in respect of bankruptcies and proposals in respect of which proceedings are commenced after this section comes into force.
— 1998, c. 30, s. 10
Transitional — proceedings
10. Every proceeding commenced before the coming into force of this section and in respect of which any provision amended by sections 12 to 16 applies shall be taken up and continued under and in conformity with that amended provision without any further formality.
— 2000, c. 12, s. 21
Application of amendments
Footnote *21. Sections 8 to 20 apply only to bankruptcies, proposals and receiverships in respect of which proceedings are commenced after the coming into force of this section.
Return to footnote *[Note: Section 21 in force July 31, 2000, see SI/2000-76.]
— 2000, c. 30, s. 143(2)

(2) Subsection (1) is deemed to have come into force on November 30, 1992, except that before June 30, 1996 the references in paragraph 54(2.1)(b) of the Act, as enacted by subsection (1), to the Employment Insurance Act shall be read as references to the Unemployment Insurance Act.
— 2000, c. 30, s. 144(2)

(2) Subsection (1) is deemed to have come into force on November 30, 1992, except that before June 30, 1996 the references in paragraph 60(1.1)(b) of the Act, as enacted by subsection (1), to the Employment Insurance Act shall be read as references to the Unemployment Insurance Act.
— 2000, c. 30, s. 145(3)

(3) Subsections (1) and (2) are deemed to have come into force on November 30, 1992 except that, before June 30, 1996, the references in subparagraphs 69(1)(c)(ii) and (3)(a)(ii) and (b)(ii) of the Act, as enacted by subsections (1) and (2), to the Employment Insurance Act shall be read as references to the Unemployment Insurance Act.
— 2000, c. 30, ss. 146(4), (5)

(4) Subsection (1) applies to proposals in respect of which proceedings are commenced under the Act after September 29, 1997.
— 2000, c. 30, ss. 146(4), (5)

(5) Subsections (2) and (3) are deemed to have come into force on November 30, 1992, except that before June 30, 1996 the references in subparagraphs 69.1(3)(a)(ii) and (b)(ii) of the Act, as enacted by subsection (2), to the Employment Insurance Act shall be read as references to the Unemployment Insurance Act.
— 2000, c. 30, s. 148(2)

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(2) Subsection (1) is deemed to have come into force on November 30, 1992, except that before June 30, 1996 the references in paragraph 86(3)(b) of the Act, as enacted by subsection (1), to the Employment Insurance Act shall be read as references to the Unemployment Insurance Act.

— 2001, c. 4, s. 177

Bankruptcy and Insolvency Act — "secured creditor"

177. (1) The definition "secured creditor" in subsection 2(1) of the Bankruptcy and Insolvency Act, as enacted by section 25 of this Act, applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.

Bankruptcy and Insolvency Act — par. 136(1)(e)

(2) Paragraph 136(1)(e) of the Bankruptcy and Insolvency Act, as enacted by section 31 of this Act, applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.

Bankruptcy and Insolvency Act — par. 178(1)(d)

(3) Paragraph 178(1)(d) of the Bankruptcy and Insolvency Act, as enacted by section 32 of this Act, applies only to bankruptcies in respect of which proceedings are commenced after the coming into force of that section.

— 2005, c. 47, s. 133, as amended by 2007, c. 36, s. 107

Bankruptcy and Insolvency Act

133. (1) An amendment to the Bankruptcy and Insolvency Act that is enacted by any of sections 2 to 5 and 7 to 106, subsection 107(1) and sections 108 to 123 of this Act applies only to a person who, on or after the day on which the amendment comes into force, is described in one of the following paragraphs:

(a) the person becomes bankrupt;

(b) the person files a notice of intention;

(c) the person files a proposal without having filed a notice of intention;

(d) a proposal is made in respect of the person without the person having filed a notice of intention;

(e) an interim receiver is appointed in respect of the person's property and all or part of the person's property comes into the possession or under the control of the interim receiver; or

(f) all or part of the person's property comes into the possession or under the control of a receiver.

Subsection 107(2)

(2) The amendment to the Bankruptcy and Insolvency Act that is enacted by subsection 107(2) of this Act applies only to a person who is an undischarged bankrupt on the day on which it comes into force or who becomes bankrupt on or after the day on which it comes into force.

— 2005, c. 47, s. 135

Transitional

135. The person who holds office as Superintendent of Bankruptcy immediately before the day on which subsection 5(1) of the Bankruptcy and Insolvency Act, as enacted by subsection 6(1), comes into force continues to hold office for the remainder of the person's term as though the person had been appointed under that subsection 5(1).

— 2007, c. 29, s. 117

Bankruptcy and Insolvency Act

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117. An amendment to the Bankruptcy and Insolvency Act made by any of sections 91, 92, 94 to 96 and 99 to 101 of this Act applies only to a person who, on or after the day on which the amendment comes into force, is described in one of the following paragraphs:
(a) the person becomes bankrupt;
(b) the person files a notice of intention;
(c) the person files a proposal without having filed a notice of intention; or
(d) a proposal is made in respect of the person without the person having filed a notice of intention.
— 2007, c. 36, s. 110
Bankruptcy and Insolvency Act
110. An amendment to the Bankruptcy and Insolvency Act that is enacted by any of subsections 1(1) and (5) to (7), sections 3 and 6, subsection 9(3), sections 12 and 13, subsections 14(2) and (3), 15(2) and (3), 16(2) and (3) and 17(2), sections 19 to 22, 25, 31, 34, 35, 37, 42, 44, 46 to 48 and 50, subsection 51(1), sections 55 to 57 and subsection 58(2) of this Act applies only to a person who, on or after the day on which the amendment comes into force, is described in one of the following paragraphs:
(a) the person becomes bankrupt;
(b) the person files a notice of intention;
(c) the person files a proposal without having filed a notice of intention;
(d) a proposal is made in respect of the person without the person having filed a notice of intention;
(e) an interim receiver is appointed in respect of the person's property and all or part of the person's property comes into the possession or under the control of the interim receiver; or
(f) all or part of the person's property comes into the possession or under the control of a receiver.
— 2009, c. 31, s. 66
o 66. Sections 84.1 and 84.2 of the Bankruptcy and Insolvency Act, as enacted by section 64, and section 88 of that Act, as enacted by section 65, apply to proceedings commenced under that Act on or after the day on which this Act receives royal assent.
— 2011, c. 24, s. 164
Transitional
164. The Wage Earner Protection Program Act, as amended by section 163, applies
(a) in respect of wages owing to an individual by an employer who becomes bankrupt after June 5, 2011; and
(b) in respect of wages owing to an individual by an employer any of whose property comes under the possession or control of a receiver as defined in subsection 243(2) of the Bankruptcy and Insolvency Act, after June 5, 2011.
Date modified:
2013-07

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Bankruptcy and Insolvency General Rules
C.R.C., c. 368

INTERPRETATION
1. The definitions in this section apply in these Rules.

"Act"
"Act" means the Bankruptcy and Insolvency Act. (Loi)

"business hours"
"business hours", in relation to a Division Office, means the hours during which the Division Office is open to the public from Monday to Friday, holidays excepted, as posted by that Division Office. (heures d'ouverture)

"directive"
"directive" means a directive issued by the Superintendent pursuant to subsection 5(4) of the Act. (instructions)

"Division Office"
"Division Office" means the office of the Superintendent, Department of Industry, for the bankruptcy division in which the proceedings were commenced. (bureau de division)

"judge"
"judge" means a judge of a court having jurisdiction in bankruptcy under sections 183 to 186 of the Act. (juge)

"petition"
"petition"[Repealed, SOR/2007-61, s. 1]

"registrar"
"registrar" means a person appointed or assigned as a registrar in bankruptcy under section 184 of the Act. (registraire)

"tariff"
"tariff" means the tariff of costs set out in the schedule. (tarif)

"taxing officer"
"taxing officer" means the registrar or other officer appointed or assigned under section 184 of the Act for the taxation or fixing of costs or the passing of accounts. (fonctionnaire taxateur)
SOR/92-579, s. 2;
SOR/98-240, s. 1;
SOR/2007-61, s. 1.

1.1 A stock exchange that is regulated by an Act of Parliament or of the legislature of a province is prescribed for the purposes of the definition "income trust" in section 2 of the Act.

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SOR/2009-218, s. 1.

1.2 The MFDA Investor Protection Corporation is a prescribed body for the purposes of the definition "customer compensation body" in section 253 of the Act.
SOR/2011-94, s. 1.

GENERAL
2. Documents that by the Act are to be prescribed must be in the form prescribed, with any modifications that the circumstances require and subject to any deviations permitted by section 32 of the Interpretation Act, and must be used in proceedings under the Act.
SOR/92-579, s. 3;
SOR/98-240, s. 1;
SOR/2007-61, s. 2(E).

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.
SOR/98-240, s. 1.

4. If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

5. (1) Subject to subsection (2), a notice or other document that is received by a Division Office outside of its business hours is deemed to have been received

(a) on the next business day of that Division Office, if it was received

(i) between the end of business hours and midnight, local time, on a business day, or

(ii) on a Saturday or holiday; or

(b) at the beginning of business hours of that Division Office, if it was received between midnight and the beginning of business hours, local time, on a business day.

(2) Subsection (1) does not apply to documents related to proceedings under Part III of the Act that are filed by facsimile.
SOR/78-389, s. 1;
SOR/92-579, s. 4;
SOR/98-240, s. 1;
SOR/2005-284, s. 1.

6. (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

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(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or
(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

(4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.
SOR/98-240, s. 1;
SOR/2007-61, ss. 3(E), 63(E).

7. An assignment, proposal or notice of intention that is respectively offered, lodged or filed pursuant to the Act must be offered, lodged or filed by service, personal delivery, mail, courier, facsimile or electronic transmission.
SOR/78-389, s. 1;
SOR/98-240, s. 1.

8. An interim receiver, a trustee, an administrator of a consumer proposal, an official receiver or a representative of the Superintendent is not required to be represented by a barrister or solicitor or, in the Province of Quebec, an advocate when appearing before a registrar on any court proceeding under the Act.
SOR/98-240, s. 1;
SOR/2007-61, s. 4(E).

COURT PROCEEDINGS
9. (1) All proceedings used in court must be dated and entitled in the name of the court in which they are used, together with the words "in Bankruptcy and Insolvency".

(2) Every document used in the filing of a bankruptcy application or used after the filing of an assignment must be entitled "In the Matter of the Bankruptcy of...".

(3) Every document used in the filing of a proposal before bankruptcy must be entitled "In the Matter of the Proposal of...".

(4) Every document used in the course of a receivership must be entitled "In the Matter of the Receivership of...".

(5) Unless the Chief Justice, Associate Chief Justice or Commissioner, as the case may be, referred to in section 184 of the Act otherwise directs, every document that is required to be filed in court must first be filed at the office of the registrar.

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(6) If the court deems necessary that any notice be sent to the Superintendent in any proceeding before it, a copy of that notice shall be sent to the Division Office.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E), 64.

10. If any proceedings are transferred from one court to another court under subsection 187(7) or (10) of the Act, the registrar of the former court shall send the file to the registrar of the latter court, with a copy of the order of transfer attached to it.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

MOTIONS
11. Subject to these Rules, every application to the court must be made by motion unless the court orders otherwise.
SOR/98-240, s. 1.

12. The Superintendent may intervene in any application to the court by filing a notice of intervention with the court.
SOR/98-240, s. 1.

13. Subject to any order of the court given in exigent circumstances, a party who makes a motion must, at least one day before the day set for the hearing of the motion, file with the court
(a) the original of the notice of motion, or the motion, as the case may be;
(b) every affidavit in support of the notice of motion or the motion, as the case may be; and
(c) proof of service, if any, of the documents described in paragraphs (a) and (b).
SOR/98-240, s. 1;
SOR/2005-284, s. 2.

WITNESSES AND DEPOSITIONS
14. (1) A party to any court proceedings may, with leave of the court, examine the other party or any other person and require them to produce documents.

(2) A party to any court proceedings may, with leave of the court, require the attendance of any person for examination on an affidavit that the person filed with the court.

(3) An application for leave of the court under subsection (1) or (2) may be made ex parte.
SOR/98-240, s. 1.

SEARCH, SEIZURE AND ARREST

15. A warrant issued under the Act, including a warrant of seizure and a search warrant, must be executed by the executing officer.
SOR/98-240, s. 1;
SOR/2007-61, s. 5(E).

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16. (1) A bankrupt or other person who is apprehended under section 166 of the Act shall be kept in the place of custody set out in the warrant, pending the order of the court.

(2) As soon as a bankrupt or other person has been handed over to the authority at a place of custody, the person who made the apprehension under section 166 of the Act or the arrest under section 168 of the Act shall so report to the court.

(3) After the report mentioned in subsection (2) is made, the court may make an order fixing a time and place for the examination of the bankrupt or other person by the official receiver, if section 166 of the Act applies, or by the court, if section 168 of the Act applies.

(4) As soon as a time and place are set for the examination of a bankrupt or other person by the official receiver pursuant to subsection (3), the registrar shall so notify the official receiver and the trustee.

(5) As soon as a time and place are set for the examination of a bankrupt, other than an examination referred to in subsection (4), the registrar shall so notify the trustee and the person who applied for the examination.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

17. Subject to any contrary order of the court, a person in possession or control of any property seized under the Act or these Rules shall immediately deliver it to the trustee or the interim receiver.
SOR/98-240, s. 1;
SOR/2007-61, s. 6(E).

COSTS AND TAXATION
18. All bills of costs for legal services – other than those that do not exceed $2,500 in aggregate, excluding applicable federal and provincial taxes – must be taxed by the taxing officer.
SOR/98-240, s. 1;
SOR/2009-218, s. 2.

19. A bill of costs must describe, in a fair, reasonable and detailed manner, the nature of the legal services rendered.
SOR/98-240, s. 1.

20. The bill of costs shall not be taxed unless the trustee is represented at the taxation or the bill of costs has attached to it a declaration, signed by the trustee, stating that
(a) [Repealed, SOR/2009-218, s. 3]
(b) the services have been duly authorized and duly rendered; and
(c) the charges are reasonable in the trustee's opinion.
SOR/98-240, s. 1;
SOR/2009-218, s. 3.

21. In determining the amount of costs to be allowed, the taxing officer shall determine whether
(a) the legal services have been duly rendered;

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(b) the charges are reasonable and, if applicable, are in accordance with the tariff;
(c) the legal services rendered are accounted for, and are not services that should have been rendered by the trustee; and
(d) the legal services have been authorized and approved in accordance with the Act, if the Act so requires.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

22. When a bill of costs has been taxed, the taxing officer shall make a statement to that effect on the bill and shall sign that statement, and a bill of costs so signed has the same effect as a judgment of the court and may be enforced in the same manner as a judgment.
SOR/98-240, s. 1.

23. The court may, on ex parte application by a trustee, order a barrister or solicitor or, in the Province of Quebec, an advocate to submit a bill of costs to the trustee, or to bring the bill of costs into court to be taxed, and, if the barrister, solicitor or advocate fails to comply, the court may, on ex parte application by the trustee, order that the trustee distribute the proceeds of the estate that the trustee possesses without regard to the barrister, solicitor or advocate's bill of costs.
SOR/98-240, s. 1;
SOR/2007-61, s. 7.

24. (1) The barrister or solicitor or, in the Province of Quebec, the advocate shall give to the trustee, to any other person who is liable for payment of the bill of costs and, on request, to the Division Office, a notice of the time and place of the taxation, at least 10 days before the day set for the taxation.

(2) A certified copy of the bill of costs to be presented for taxation must be attached to the notice referred to in subsection (1).
SOR/98-240, s. 1;
SOR/2007-61, s. 8.

25. (1) A decision of a taxing officer on the taxation of a bill of costs may be appealed to the court if a notice stating the grounds of appeal is given to the opposite party and the Division Office within 10 days after the day of the decision.

(2) The judge who hears the appeal may retax the bill of costs as if it were being taxed for the first time.
SOR/98-240, s. 1.

26. [Repealed, SOR/2009-218, s. 4]

FEES OF COURT OFFICERS
27. If the amount of the fees payable to a court officer is contested, the judge shall fix the amount.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

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28. Fees payable to a registrar under these Rules belong to Her Majesty in right of the province for which the registrar was appointed.
SOR/98-240, s. 1.

29. [Repealed, SOR/2005-284, s. 3]

APPEALS FROM DECISIONS OF THE REGISTRAR
30. (1) An appeal from an order or decision of the registrar must be made by motion to a judge.

(2) A notice of motion or a motion, as the case may be, must be filed at the office of the registrar and served on the other party within 10 days after the day of the order or decision appealed from, or within such further time as the judge stipulates.

(3) The notice of motion or the motion must set out the grounds of the appeal.
SOR/98-240, s. 1.

APPEAL TO COURT OF APPEAL
31. (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

32. The registrar of the court appealed from shall transmit to the court of appeal the notice of appeal and the file.
SOR/98-240, s. 1.

OFFICIAL RECEIVER
33. The official receiver may request instructions from the registrar or, if the official receiver is the registrar, from the judge, in case of doubt respecting any matter arising out of the Act, these Rules or a directive.
SOR/98-240, s. 1.

CODE OF ETHICS FOR TRUSTEES
34. Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act.
SOR/98-240, s. 1.

35. For the purposes of sections 39 to 52, "professional engagement" means any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the Act.
SOR/98-240, s. 1.

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36. Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.
SOR/98-240, s. 1.

37. Trustees shall cooperate fully with representatives of the Superintendent in all matters arising out of the Act, these Rules or a directive.
SOR/78-389, s. 2;
SOR/98-240, s. 1.

38. Trustees shall not assist, advise or encourage any person to engage in any conduct that the trustees know, or ought to know, is illegal or dishonest, in respect of the bankruptcy and insolvency process.
SOR/98-240, s. 1.

39. Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act with respect to the professional engagements of the trustees.
SOR/81-646, s. 2;
SOR/98-240, s. 1.

40. Trustees shall not disclose confidential information to the public concerning any professional engagement, unless the disclosure is
(a) required by law; or
(b) authorized by the person to whom the confidential information relates.
SOR/81-646, s. 3;
SOR/98-240, s. 1.

41. Trustees shall not use any confidential information that is gathered in a professional capacity for their personal benefit or for the benefit of a third party.
SOR/98-240, s. 1.

42. Trustees shall not purchase, directly or indirectly,
(a) property of any debtor for whom they are acting with respect to a professional engagement; or
(b) property of any estates in respect of which the Act applies, for which they are not acting, unless the property is purchased
(i) at the same time as it is offered to the public,
(ii) at the same price as it is offered to the public, and
(iii) during the normal course of business of the bankrupt or debtor.
SOR/98-240, s. 1.

43. (1) Subject to subsection (2), if trustees have a responsibility to sell property in connection with a proposal or bankruptcy, they shall not sell the property, directly or indirectly,
(a) to their employees, agents or mandataries, or persons not dealing at arms' length with the trustees;
(b) to other trustees or, knowingly, to employees of other trustees; or

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(c) to related persons of the trustees or, knowingly, to related persons of the persons referred to in paragraph (a) or (b).

(2) If trustees have a responsibility to act in accordance with subsection (1), they may sell property in connection with a proposal or bankruptcy to the persons set out in paragraph (1)(a), (b) or (c), if the property is offered for sale

(a) at the same time as it is offered to the public;

(b) at the same price as it is offered to the public; and

(c) during the normal course of business of the bankrupt or debtor.

SOR/98-240, s. 1;
SOR/2007-61, ss. 9(E), 63(E).

44. Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment.
SOR/98-240, s. 1.

45. Trustees shall not sign any document, including a letter, report, statement, representation or financial statement that they know, or reasonably ought to know, is false or misleading, and shall not associate themselves with such a document in any way, including by adding a disclaimer of responsibility after their signature.
SOR/98-240, s. 1;
SOR/2005-284, s. 4.

46. Trustees may transmit information that they have not verified, respecting the financial affairs of a bankrupt or debtor, if

(a) the information is subject to a disclaimer of responsibility or an explanation of the origin of the information; and

(b) the transmission of the information is not contrary to the Act, these Rules or any directive.

SOR/98-240, s. 1.

46.1 [Repealed, SOR/98-240, s. 1]

47. Trustees shall not engage in any business or occupation that would compromise their ability to perform any professional engagement or that would jeopardize their integrity, independence or competence.
SOR/98-240, s. 1.

48. Trustees who hold money or other property in trust shall

(a) hold the money or property in accordance with the laws, regulations and terms applicable to the trust; and

(b) administer the money or property with due care, subject to the laws, regulations and terms applicable to the trust.

SOR/98-240, s. 1.

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49. Trustees shall not, directly or indirectly, pay to a third party a commission, compensation or other benefit in order to obtain a professional engagement or accept, directly or indirectly from a third party, a commission, compensation or other benefit for referring work relating to a professional engagement.
SOR/98-240, s. 1.

50. Trustees shall not obtain, solicit or conduct any engagement that would discredit their profession or jeopardize the integrity of the bankruptcy and insolvency process.
SOR/98-240, s. 1.

51. Trustees shall not, directly or indirectly, advertise in a manner that
(a) they know, or should know, is false, misleading, materially incomplete or likely to induce error; or
(b) unfavourably reflects on the reputation or competence of another trustee or on the integrity of the bankruptcy and insolvency process.
SOR/98-240, s. 1.

52. Trustees, in the course of their professional engagements, shall apply due care to ensure that the actions carried out by their employees, agents or mandataries or any persons hired by the trustees on a contract basis are carried out in accordance with the same professional standards that those trustees themselves are required to follow in relation to that professional engagement.
SOR/98-240, s. 1;
SOR/2007-61, s. 10(E).

53. Any complaint that relates to a contravention of any of sections 36 to 52 must be sent to the Division Office in writing.
SOR/98-240, s. 1.

APPOINTMENT AND SUBSTITUTION OF TRUSTEES

54. A certificate of the official receiver, or a certified copy of it, is admissible in any proceeding under the Act as evidence of the appointment or substitution of a trustee, without proof of the authenticity of the signature or of the official character of the signatory.
SOR/98-240, s. 1;
SOR/2007-61, s. 11(E).

54.1 to 54.49 [Repealed, SOR/98-240, s. 1]

DUTIES OF TRUSTEES

55. A trustee who is appointed pursuant to subsection 41(11) of the Act shall notify the Division Office of the appointment, in writing, within 10 days after the appointment.
SOR/98-240, s. 1.

56. A former trustee who is to pass the accounts before the court in accordance with subsection 36(1) of the Act shall make an application to the court and attach to it an affidavit in prescribed form,

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and shall send a notice in prescribed form, accompanied by a copy of the statement of receipts and disbursements, specifying the time and place set for passing the accounts, to the following persons:

(a) every creditor whose claim has been proved;

(b) the registrar;

(c) the bankrupt;

(d) the substituted trustee; and

(e) a representative of the Division Office.

However, the court may order that the notice is not required to be given to the persons referred to in paragraph (a).

SOR/92-579, s. 7;
SOR/98-240, s. 1.

57. If a bankrupt who is being examined pursuant to subsection 161(1) of the Act cannot speak fluently in the official language in which the examination is being conducted, the trustee shall arrange for the services, at the examination, of an interpreter approved by the official receiver.

SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

REMUNERATION OF TRUSTEES

58. (1) Unless the court orders otherwise, the remuneration of a trustee is deemed to take into account all services performed by the trustee and by the trustee's partners and employees.

(2) In taxing the accounts of a trustee pursuant to section 152 of the Act, the taxing officer shall tax disbursements at the rates provided by the tariff.

(3) A trustee's disbursements do not include the indirect costs of the trustee's facilities or premises.

(4) The expenses incurred by a trustee for the services of an interpreter referred to in section 57 and subsection 108(2) are calculated, at the time of taxation, at a rate that the taxing officer deems reasonable.

(5) The taxing officer shall determine the disbursements for which the trustee is entitled to be repaid in accordance with this section.

SOR/98-240, s. 1;
SOR/2005-284, s. 5;
SOR/2009-218, s. 5.

58.1 (1) For the purposes of section 156.1 of the Act, the amount required to be paid under the agreement must not be more than $1,800.

(2) Subject to section 136 of the Act, money from the estate of the bankrupt shall be applied to satisfy the amount to be paid under the agreement.

(3) The trustee shall provide the Superintendent and the bankrupt with a signed copy of the agreement immediately after it is entered into.

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SOR/2009-218, s. 6.

PRESCRIBED CIRCUMSTANCES FOR OPERATION OF PARAGRAPH 67(1)(B.1) OF ACT

59. (1) A goods and services tax credit payment is not comprised in the property of the bankrupt for the purpose of paragraph 67(1)(b.1) of the Act if a dividend is available to the creditors without taking that payment into account.

(2) If, in order for a dividend to be available to the creditors, it would be necessary to take into account all or part of a goods and services tax credit payment, the portion of that payment that is not comprised in the property of the bankrupt for the purpose of paragraph 67(1)(b.1) of the Act is the portion, if any, that would have been paid as a dividend to the creditors had all of the payment been comprised in the property of the bankrupt.

(3) For greater certainty, if no dividend would be available to the creditors even if a goods and services tax credit payment were taken into account, all of that payment is comprised in the property of the bankrupt for the purpose of paragraph 67(1)(b.1) of the Act.
SOR/98-240, s. 1.

PRESCRIBED PENSION PLANS FOR OPERATION OF SUBSECTION 60(1.5) AND SECTIONS 81.5 AND 81.6 OF THE ACT

59.1 A pension plan regulated by an Act of Parliament or of the legislature of a province is prescribed for the purposes of
(a) subsection 60(1.5) of the Act; and
(b) sections 81.5 and 81.6 of the Act.
SOR/2008-223, s. 1.

PRESCRIBED PLAN FOR OPERATION OF PARAGRAPH 67(1)(B.3) OF THE ACT

59.2 A deferred profit sharing plan, as defined in subsection 147(1) of the Income Tax Act, is prescribed for the purpose of paragraph 67(1)(b.3) of the Act.
SOR/2008-223, s. 1.

TAXATION OF ACCOUNTS AND DISCHARGE OF TRUSTEE

GENERAL

60. If, pursuant to subsection 152(4) of the Act, the Superintendent gives a letter of comment to the trustee, the trustee shall, within 30 days after receiving the letter, apply to the taxing officer for a date for a taxation hearing.
SOR/92-579, s. 9;
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

61. (1) An application of a trustee for discharge must

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(a) be made in prescribed form; and

(b) be accompanied by a copy of the notice of final dividend and application for discharge of trustee, a copy of the final statement of receipts and disbursements as taxed, both in prescribed form, and a dividend sheet.

(2) At the time of discharge, the trustee must satisfy the court that

(a) the statements made in connection with the discharge are true;

(b) the final statement of receipts and disbursements is an accurate and correct statement of the administration of the estate, and has been approved by the inspectors and taxed by the court;

(c) [Repealed, SOR/2009-218, s. 7]

(d) all the property of the bankrupt for which the trustee was accountable has been sold, realized or disposed of in the manner described in the final statement of receipts and disbursements;

(e) every claim subject to a dividend was properly examined and that

(i) to the best of the trustee's knowledge, the dividend sheet presented to the court contains a true and correct list of the claims of creditors entitled to share in the estate,

(ii) all payments shown on the dividend sheet have been duly made, and

(iii) unclaimed dividends and undistributed funds have been forwarded to the Superintendent by the trustee in accordance with subsection 154(1) of the Act;

(f) the trustee has not received, does not expect to receive, and has not been promised, any remuneration or consideration other than as shown in the final statement of receipts and disbursements;

(g) the trustee has complied with subsection 170(2) of the Act; and

(h) the final statement of receipts and disbursements, the dividend sheet and the notice of application for discharge of trustee have been sent to the registrar, the Division Office, the bankrupt and every creditor whose claim has been proved.

SOR/98-240, s. 1;
SOR/2005-284, s. 6(F);
SOR/2009-218, s. 7.

SUMMARY ADMINISTRATION

62. The trustee of the estate of a bankrupt under summary administration shall apply for taxation of the trustee's accounts and for the discharge of the trustee by sending to the Division Office

(a) the trustee's final statement of receipts and disbursements, in prescribed form; and

(b) the dividend sheet, showing the dividends paid or to be paid to the creditors of the bankrupt.

(c) [Repealed, SOR/2009-218, s. 8]

SOR/98-240, s. 1;
SOR/2007-61, s. 12(E);
SOR/2009-218, s. 8.

63. The Superintendent shall examine all documents sent to the Division Office pursuant to section 62 and issue a letter of comment to the trustee, stating whether the Superintendent is requesting from the registrar the taxation of the trustee's accounts.

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SOR/98-240, s. 1.

64. (1) If the Superintendent's letter of comment states that the Superintendent is not requesting the taxation of the trustee's accounts, the trustee shall, within 30 days after receipt of the letter of comment, send to each creditor who has proved a claim a notice of taxation of the trustee's accounts and discharge of the trustee, in prescribed form, attaching

(a) a copy of the trustee's final statement of receipts and disbursements;

(b) a copy of the dividend sheet, showing the dividends paid or to be paid to the creditors of the bankrupt; and

(c) the final dividend that is owed to the creditor, if the trustee is satisfied that no creditor will object to the taxation of the trustee's accounts and the discharge of the trustee.

(2) A creditor may, within 30 days after the day on which the notice referred to in subsection (1) is sent, object to the taxation of the trustee's accounts and the discharge of the trustee by

(a) serving a notice of objection on the trustee or sending a notice of objection to the trustee by registered mail or courier;

(b) filing a copy of the notice of objection with the registrar, along with any applicable fee provided by the tariff; and

(c) sending a copy of the notice of objection to the Division Office.

SOR/81-646, s. 4;
SOR/92-579, s. 11(F);
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

64.1 to 64.6 [Repealed, SOR/98-240, s. 1]

65. (1) If a trustee receives no notice of objection within the time limit set out in subsection 64(2), the trustee shall

(a) at the expiration of that time limit, take the trustee's fee;

(b) at the expiration of that time limit, if the trustee has not already done so, send a final dividend to each creditor to whom one is owed; and

(c) within three months after the day on which the notice referred to in subsection 64(1) is sent,

(i) close the bank account used in administering the estate of the bankrupt, if that account is not a consolidated account, or, if the account is a consolidated account, ensure that all estate funds have been withdrawn from it,

(ii) remit any unclaimed dividends and undistributed funds to the Superintendent, and

(iii) send to the Division Office a certificate of compliance and deemed discharge, in prescribed form.

(2) A trustee is deemed to be discharged on meeting the requirements of paragraphs (1)(b) and (c).

(3) If a trustee receives a notice of objection within the time limit set out in subsection 64(2), the trustee shall

(a) [Repealed, SOR/2009-218, s. 9]

(b) obtain a hearing date from the registrar; and

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(c) within 30 days after the day on which the notice of objection is received, send the objecting creditor a notice of hearing, which notice must be sent at least 30 days before the date of the hearing and must be in prescribed form.

SOR/81-646, s. 4;
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E);
SOR/2009-218, s. 9.

66. (1) If the Superintendent issues a letter of comment pursuant to section 63 requesting the taxation of a trustee's accounts, the trustee shall, after obtaining a hearing date from the registrar and within 30 days after the day of receipt of the letter of comment, send to each creditor who has proved a claim and to the Division Office

(a) a notice of hearing for the taxation of the trustee's accounts and the discharge of the trustee, in prescribed form, which notice must be sent at least 30 days before the date of the hearing;

(b) a copy of the trustee's final statement of receipts and disbursements; and

(c) a copy of the dividend sheet, showing the dividends paid or to be paid to the creditors of the bankrupt.

(2) A creditor may object to the taxation of the trustee's accounts and discharge of the trustee by

(a) serving a notice of objection on the trustee or sending a notice of objection to the trustee by registered mail or courier, which notice of objection must be received by the trustee before the start of the hearing;

(b) filing a copy of the notice of objection with the registrar, along with any applicable fee provided by the tariff; and

(c) sending a copy of the notice of objection to the Division Office.

SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

67. (1) At the time of the hearing, the registrar shall consider the creditors' objections and the letter of comment issued by the Superintendent, and shall tax the trustee's accounts accordingly.

(2) If the registrar taxes a trustee's accounts as submitted, the trustee shall

(a) take the trustee's fee as taxed;

(b) send a final dividend to each creditor to whom one is owed; and

(c) within two months after the date of the taxation order,

(i) close the bank account used in administering the estate of the bankrupt, if that account is not a consolidated account, or, if the account is a consolidated account, ensure that all estate funds have been withdrawn from it,

(ii) remit any unclaimed dividends and undistributed funds to the Superintendent, and

(iii) send to the Division Office a certificate of compliance and deemed discharge, in prescribed form.

(3) A trustee is deemed to be discharged on meeting the requirements of paragraphs (2)(b) and (c).

(4) If the registrar taxes a trustee's accounts otherwise than as submitted, the trustee shall

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(a) take the trustee's fee as taxed;
(b) send a final dividend to each creditor to whom one is owed, in accordance with the taxation order; and
(c) within two months after the date of the taxation order,
(i) close the bank account used in administering the estate of the bankrupt if that account is not a consolidated account or, if the account is a consolidated account, ensure that all estate funds have been withdrawn from it,
(ii) remit any unclaimed dividends and undistributed funds to the Superintendent,
(iii) send to the Division Office and to each creditor a revised final statement of receipts and disbursements, a revised dividend sheet and a copy of the taxation order, and
(iv) send to the Division Office and to the registrar a certificate of compliance and deemed discharge, in prescribed form.

(5) A trustee is deemed to be discharged on meeting the requirements of paragraphs (4)(b) and (c).
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

BOOKS, RECORDS AND DOCUMENTS

68. (1) Unless the court orders otherwise, a trustee shall keep, for at least four years after the date of the trustee's discharge, the books, records and documents relating to the administration of that estate.

(2) Unless the court orders otherwise, the trustee shall, after being discharged, send to the latest known address of the debtor, bankrupt or officer of the bankrupt corporation, a written notice, unless there is a written waiver giving up the right to be notified, that they or their representative may, within the 30 days following the sending of the notice, take back any of the debtor's or bankrupt's books, records and documents to which subsection (1) does not apply.

(3) If no person has taken back the books, records and documents within 30 days after the sending of the notice or the giving of the waiver referred to in subsection (2), the trustee may dispose of them.

(4) Documents on which legal counsel has a lien or a right of retention shall be returned to the legal counsel on completion of the administration of the estate to which the documents relate.
SOR/98-240, s. 1;
SOR/2007-61, ss. 13, 63(E).

APPLICATION FOR BANKRUPTCY ORDER
[SOR/2007-61, s. 14]

69. No bankruptcy application filed with the registrar in the judicial district of the locality of the debtor may be served pursuant to subsection 70(1) unless the court has signed it and affixed to it the seal of the court.
SOR/98-240, s. 1;
SOR/2007-61, s. 64.

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70. (1) A notice indicating the time and place of the hearing of the bankruptcy application, together with a certified copy of the application and of the affidavit referred to in subsection 43(3) of the Act, must be served on the debtor, on the trustee named in the application and on the Division Office at least 10 days, or any shorter period that the court may order, before the hearing.

(2) After service of an application in accordance with this section, a copy of that application must immediately be filed at the office of the registrar.

(3) Subject to section 71, service on the debtor under subsection (1) must be effected by personal service.

(4) For the purposes of paragraph 256(3)(c) of the Act, the interval is 10 days.
SOR/98-240, s. 1;
SOR/2007-61, s. 15;
SOR/2009-218, s. 10.

71. (1) If the court determines that service of documents cannot, for cause, be effected by personal service as required by subsection 70(3), the court shall make an order stating the manner of service of the documents.

(2) As soon as an order is made pursuant to subsection (1), the documents shall be served together with the order.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

72. Service of a bankruptcy application must be proved by affidavit or bailiff's return of service, attached to the original application and filed with the court at least two days before the date of the hearing set out in the application.
SOR/98-240, s. 1;
SOR/2007-61, s. 16.

73. In the case of a deceased debtor, service of a bankruptcy application must be effected on the executor or administrator of the estate or the liquidator of the deceased debtor's succession.
SOR/98-240, s. 1;
SOR/2007-61, s. 16.

74. A debtor who contests a bankruptcy application shall file with the court in which the application was filed a notice setting out the contested allegations contained in the application, the grounds for contesting them and the debtor's address, and shall serve a copy of the notice on the applicant or their barrister or solicitor or, in the Province of Quebec, their advocate, at least two days before the date of the hearing set out in the application.
SOR/98-240, s. 1;
SOR/2007-61, s. 16.

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75. If a debtor who has filed a notice under section 74 does not appear at the hearing of the bankruptcy application, the court may make a bankruptcy order based on the allegations contained in the application if the court considers those allegations to be sufficient.
SOR/92-579, s. 13;
SOR/98-240, s. 1;
SOR/2007-61, s. 16.

76. If the hearing of a bankruptcy application has been stayed for the trial of an issue in dispute on a question of fact, the registrar shall, as soon as the issue has been determined, on the application of the debtor or the applicant, fix a time and place for the resumption of the hearing, and the party who makes the application shall give the other party at least two days' notice of the time and place fixed by the registrar.
SOR/98-240, s. 1;
SOR/2007-61, s. 16.

76.1 to 76.4 [Repealed, SOR/98-240, s. 1]

INTERIM RECEIVER

77. [Repealed, SOR/2009-218, s. 11]

78. If a bankruptcy application is dismissed, the court may, on application presented within 30 days after the day of the dismissal, give judgment with respect to any claim for damages, or with respect to any claim other than a claim for damages arising out of the appointment of an interim receiver, and may make any orders that the court sees fit.
SOR/98-240, s. 1;
SOR/2007-61, s. 17.

79. (1) An interim receiver shall apply to the court for taxation of accounts and discharge within two months after completion of the interim receiver's duties, after giving notice to
- **(a) the debtor, or in the case of a bankruptcy, the trustee;**
- **(b) every creditor; and**
- **(c) the Division Office.**

(2) The notice referred to in subsection (1) must
- **(a) be in prescribed form; and**
- **(b) have attached to it a copy of the interim receiver's statement of receipts and disbursements, in prescribed form and stating**
  - **(i) the number of hours spent, the tasks performed, the hourly rates and other factors for consideration in the calculation of fees, and**
  - **(ii) the expenses incurred by the interim receiver, attaching a copy of any bills of costs for legal services.**

SOR/98-240, s. 1.

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80. A person referred to in paragraph 79(1)(a) or (b) may object to the taxation of the accounts and discharge of the interim receiver by filing a notice of objection with the court within 30 days after the giving of the notice referred to in subsection 79(1).
SOR/98-240, s. 1.

81. If no objection is filed within 30 days after the giving of the notice referred to in subsection 79(1), the interim receiver's accounts are deemed to have been taxed and the interim receiver is deemed to be discharged, unless the court requires that the accounts be taxed on their own merit.
SOR/92-579, s. 15;
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

82. (1) If an objection is filed within 30 days after the giving of the notice referred to in subsection 79(1), the interim receiver shall, within 10 days after the filing of the objection, apply to the court for a date for a hearing, and shall send a notice of the date of the hearing to the objecting party.

(2) The court, at the hearing, shall tax the interim receiver's accounts on their own merit and may discharge the interim receiver, who shall send the Division Office a copy of the court order relating to the taxation and discharge.
SOR/78-389, s. 3;
SOR/92-579, s. 15;
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

82.1 [Repealed, SOR/98-240, s. 1]

BANKRUPTCY ORDERS

83. (1) The applicant shall, as soon as possible and not later than two days after a bankruptcy order is made under subsection 43(6) of the Act, serve, deliver personally or send by courier, facsimile or electronic transmission a copy of the order to the trustee appointed under subsection 43(9) of the Act.

(2) Within two days after receiving the copy of the bankruptcy order, the trustee shall serve a copy of the order on the bankrupt and send a copy to the Division Office.
SOR/98-240, s. 1;
SOR/2007-61, s. 18.

84. (1) An application to revoke a bankruptcy order or to stay proceedings may be made to the court if a notice of the application, together with copies of supporting affidavits, is served on the applicant and the trustee and is filed with the Division Office.

(2) Pending the hearing of the application mentioned in subsection (1), the court may make an interim order staying the whole or any part of the proceedings.
SOR/98-240, s. 1;
SOR/2007-61, s. 19.

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84.1 to 84.8 [Repealed, SOR/98-240, s. 1]

ASSIGNMENTS

85. An official receiver shall, on appointing a trustee pursuant to subsection 49(4) of the Act, prepare a certificate of appointment, in prescribed form, and send a copy of it to the trustee.
SOR/98-240, s. 1.

86. On receiving from a bankrupt a statement of affairs described in paragraph 158(d) of the Act, a trustee shall file a copy of it at the office of the official receiver.
SOR/98-240, s. 1.

86.1 to 86.4 [Repealed, SOR/98-240, s. 1]

87. The court may order the trustee to file with the court, before or immediately after the first meeting of the creditors, a copy of the following documents:

(a) the assignment that was filed with the official receiver;

(b) the statement of affairs that was filed with the official receiver; and

(c) the minutes of the first meeting of creditors.

SOR/92-579, s. 20;
SOR/98-240, s. 1;
SOR/2007-61, s. 20(E);
SOR/2009-218, s. 12.

87.01 to 87.18 [Repealed, SOR/98-240, s. 1]

88. (1) An application to annul an assignment may be made to the court if a notice of the application, together with copies of supporting affidavits, is served on the trustee, on the Division Office, and also on the bankrupt if the application is made by a person other than the bankrupt.

(2) Pending the hearing of the application mentioned in subsection (1), the court may make an interim order staying the whole or any part of the proceedings.
SOR/98-240, s. 1.

88.1 [Repealed, SOR/98-240, s. 1]

PROPOSALS

89. If a trustee has received a proposal made under subsection 50(1) of the Act, the trustee shall file a copy of it with the official receiver.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

90. (1) As soon as the following documents are filed with the official receiver, the trustee shall file a copy of them with the court:

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(a) the proposal;
(b) the cash-flow statement, the report on the reasonableness of the cash-flow statement and the report containing the representations by the insolvent person, required by paragraphs 50(6)(a), (b) and (c), respectively, of the Act;
(c) the material adverse change report required by subparagraph 50(10)(a)(i) of the Act;
(d) the report on the state of the insolvent person's business and financial affairs required by paragraph 50(10)(b) of the Act;
(e) the notice of intention referred to in subsection 50.4(1) of the Act;
(f) the cash-flow statement required by paragraph 50.4(2)(a) of the Act;
(g) the report on the reasonableness of the cash-flow statement, required by paragraph 50.4(2)(b) of the Act;
(h) the report containing the representations by the insolvent person required by paragraph 50.4(2)(c) of the Act;
(i) the material adverse change report required by subparagraph 50.4(7)(b)(i) of the Act; and
(j) the notice of the meeting of creditors required by paragraph 51(1)(a) of the Act.

(2) For the purposes of paragraphs 50(6)(c) and 50.4(2)(c) of the Act, the representations are as follows:

The hypothetical assumptions are reasonable and consistent with the purpose of the projection described in Note , and the probable assumptions are suitably supported and consistent with the plans of the insolvent person and provide a reasonable basis for the projection. All such assumptions are disclosed in Notes

Since the projection is based on assumptions regarding future events, actual results will vary from the information presented, and the variations may be material.

The projection has been prepared solely for the purpose described in Note , using a set of probable and hypothetical assumptions set out in Notes Consequently, readers are cautioned that it may not be appropriate for other purposes.

SOR/98-240, s. 1.

91. For the purposes of section 53 of the Act, the manner in which a creditor who has proved a claim may indicate to the trustee assent to or dissent from the proposal is by personal delivery, by mail, by facsimile or by electronic transmission.
SOR/92-579, s. 23;
SOR/98-240, s. 1.

92. When approving a proposal, the court may correct any clerical error or omission in it, if the correction does not constitute an alteration in substance.
SOR/98-240, s. 1.

93. For the purposes of section 62.1 of the Act,

(a) the time for an insolvent person to remedy a default in the performance of any provision in a proposal is 30 days after the day the default was made; and

(b) the time for a trustee to inform the creditors and the official receiver of the situation is 30 days after the expiration of the 30 day period described in paragraph (a).

SOR/98-240, s. 1.

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94. If an official receiver, under paragraph 57(b.1) or 61(2)(b.1) or subsection 63(6) of the Act, issues a certificate of assignment, the official receiver shall immediately

(a) send a copy of it to the trustee acting with respect to the proposal; and

(b) file it with the court.

SOR/98-240, s. 1;
SOR/2007-61, s. 21(E);
SOR/2009-218, s. 13.

94.1 The notice to disclaim or resiliate an agreement that is given by the debtor under subsection 65.11(1) of the Act must be served or be sent by registered mail, by courier or, if the recipient agrees, by electronic transmission.
SOR/2009-218, s. 14.

95. The notice to disclaim or resiliate a lease that is given by an insolvent person under subsection 65.2(1) of the Act must be served or be sent by registered mail, by courier or, if the recipient agrees, by electronic transmission.
SOR/98-240, s. 1;
SOR/2007-61, s. 22(E);
SOR/2009-218, s. 14.

CONSUMER PROPOSALS

96. For the purposes of paragraph 66.13(1)(b) of the Act, the information that the consumer debtor must provide the administrator is

(a) information respecting the consumer debtor's financial situation, for the purpose of preparing the consumer proposal; and

(b) an explanation of the causes of the consumer debtor's insolvency.

SOR/92-579, s. 24;
SOR/98-240, s. 1.

96.1 to 96.6 [Repealed, SOR/98-240, s. 1]

97. For the purposes of subsection 66.17(1) of the Act, the manner in which a creditor who has proved a claim may indicate to the administrator assent to or dissent from the consumer proposal is in person, by personal delivery, by agent or mandatary, by proxy, by mail, by facsimile or by electronic transmission.
SOR/98-240, s. 1;
SOR/2007-61, s. 23(E).

98. The administrator of a consumer proposal shall apply for taxation of accounts and for discharge by sending to the Division Office

(a) the administrator's final statement of receipts and disbursements, in prescribed form;

(b) a dividend sheet, showing the dividends paid or to be paid to the creditors under the consumer proposal; and

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(c) if inspectors have been appointed by the creditors, a copy of the minutes of the meeting of inspectors at which the inspectors approved or refused to approve the administrator's final statement of receipts and disbursements and the dividend sheet.

SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

99. The Superintendent shall examine all documents sent pursuant to section 98 and shall issue a letter of comment to the administrator, stating whether the Superintendent is requesting from the registrar the taxation of the administrator's accounts.
SOR/98-240, s. 1.

100. (1) If the Superintendent's letter of comment states that the Superintendent is not requesting the taxation of the administrator's accounts, the administrator shall, within 30 days after receipt of the letter of comment, send to each creditor who has proved a claim a notice of taxation of the administrator's accounts and discharge of the administrator, in prescribed form, attaching

(a) a copy of the administrator's final statement of receipts and disbursements;

(b) a copy of the dividend sheet, showing the dividends paid or to be paid to the creditors under the consumer proposal; and

(c) the final dividend that is owed to the creditor, if the administrator is satisfied that no creditor will object to the taxation of the administrator's accounts and the discharge of the administrator.

(2) A creditor may, within 30 days after the day on which the notice referred to in subsection (1) is sent, object to the taxation of the administrator's accounts and the discharge of the administrator by

(a) serving a notice of objection on the administrator or sending a notice of objection to the administrator by registered mail or courier;

(b) filing a copy of the notice of objection with the registrar, along with any applicable fee provided by the tariff; and

(c) sending a copy of the notice of objection to the Division Office.

SOR/78-389, s. 4;
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

101. (1) If the administrator receives no notice of objection within the time limit set out in subsection 100(2), the administrator shall, within three months after the day on which the notice referred to in subsection 100(1) is sent,

(a) if the administrator has not already done so, send each creditor the final dividend that is owed to them;

(b) close the bank account used in administering the consumer proposal, if that account is not a consolidated account, or, if the account is a consolidated account, ensure that all funds governed by the consumer proposal have been withdrawn from it;

(c) remit any unclaimed dividends and undistributed funds to the Superintendent; and

(d) send to the Division Office a certificate of compliance and deemed discharge, in prescribed form.

(2) The administrator is deemed to be discharged on meeting the requirements of subsection (1).

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(3) If the administrator receives a notice of objection within the time limit set out in subsection 100(2), the administrator shall

(a) [Repealed, SOR/2009-218, s. 15]

(b) obtain a hearing date from the registrar; and

(c) within 30 days after the day on which the notice of objection is received, send the objecting creditor a notice of hearing, which notice must be sent at least 30 days before the date of the hearing and must be in prescribed form.

SOR/78-389, s. 5;
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E);
SOR/2009-218, s. 15.

102. (1) If the Superintendent issues a letter of comment pursuant to section 99 requesting the taxation of an administrator's accounts, the administrator shall, after obtaining a hearing date from the registrar and within 30 days after the day of receipt of the letter of comment, send to each creditor who has proved a claim and to the Division Office

(a) a notice of hearing for the taxation of the administrator's accounts and the discharge of the administrator, in prescribed form, which notice must be sent at least 30 days before the date of the hearing;

(b) a copy of the administrator's final statement of receipts and disbursements; and

(c) a copy of the dividend sheet, showing the dividends paid or to be paid to the creditors under the consumer proposal.

(2) A creditor may object to the taxation of the administrator's accounts and discharge of the administrator by

(a) serving a notice of objection on the administrator or sending a notice of objection to the administrator by registered mail or courier, which notice of objection must be received by the administrator before the start of the hearing;

(b) filing a copy of the notice of objection with the registrar, along with any applicable fee provided by the tariff; and

(c) sending a copy of the notice of objection to the Division Office.

SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

103. (1) At the time of the hearing, the registrar shall consider the creditors' objections and the letter of comment issued by the Superintendent, and shall tax the administrator's accounts accordingly.

(2) If the registrar taxes an administrator's accounts as submitted, the administrator shall, within two months after the date of the taxation order,

(a) send each creditor the final dividend that is owed to them;

(b) close the bank account used in administering the consumer proposal, if that account is not a consolidated account, or, if the account is a consolidated account, ensure that all funds governed by the consumer proposal have been withdrawn from it;

(c) remit any unclaimed dividends and undistributed funds to the Superintendent; and

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(d) send to the Division Office a certificate of compliance and deemed discharge, in prescribed form.

(3) The administrator is deemed to be discharged on meeting the requirements of subsection (2).

(4) If the registrar taxes an administrator's accounts otherwise than as submitted, the administrator shall

(a) adjust the administrator's fee as taxed and, if that fee was reduced by the taxation, reimburse the difference to the bank account used in administering the consumer proposal; and

(b) within two months after the date of the taxation order,

(i) send each creditor the final dividend that is owed to them, in accordance with the taxation order,

(ii) close the bank account used in administering the consumer proposal, if that account is not a consolidated account, or, if the account is a consolidated account, ensure that all funds governed by the consumer proposal have been withdrawn from it,

(iii) remit any unclaimed dividends and undistributed funds to the Superintendent,

(iv) send to the Division Office and to each creditor a revised final statement of receipts and disbursements, a revised dividend sheet and a copy of the taxation order, and

(v) send to the Division Office and to the registrar a certificate of compliance and deemed discharge, in prescribed form.

(5) The administrator is deemed to be discharged on meeting the requirements of subsection (4).
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

PRESCRIBED REGULATORY BODY

103.1 A stock exchange that is regulated by an Act of Parliament or of the legislature of a province, the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada are prescribed for the purposes of section 69.6 of the Act.
SOR/2009-218, s. 16.

CONTRIBUTORIES

104. (1) In this section, "contributory" has the same meaning as in section 77 of the Act.

(2) The trustee may at any time, by written notice, demand payment from a contributory, within 30 days after the day of service or sending of the notice, of the amount that the contributory is liable to contribute under subsection 77(1) of the Act. The notice must include the relevant information on the contributory's right of dispute under subsection (4).

(3) The notice under subsection (2) must be served personally on the contributory, or sent by registered mail or courier to the contributory's latest known address or the address shown in the stock register or other books of the bankrupt corporation.

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(4) Within the 30 days after the day on which notice was served or sent, the contributory may dispute their liability, in whole or in part, in respect of the amount to be contributed, by giving the trustee a written notice of dispute setting out the disputed items and the grounds for disputing them and, after this notice is given, except with leave of the court, the contributory may not plead any other ground of dispute in any proceedings brought against the contributory by the trustee.

(5) If the amount to be contributed is not paid, or a notice of dispute is not sent, within the 30 day period referred to in subsection (4), the trustee may take ex parte proceedings for the recovery of the amount from the contributory in question.

(6) When the trustee receives a notice of dispute, the trustee may apply to the court to decide the issue and, within 10 days after making that application, shall send the contributory a notice of hearing of the application.
SOR/98-240, s. 1;
SOR/2005-284, s. 7(F);
SOR/2007-61, ss. 24(E), 63(E).

MEDIATION

105. (1) For the purposes of subsections 68(8) and 170.1(2) of the Act, the procedures governing a mediation are as set out in this section.

(2) For the purposes of this section,
- **(a) the bankrupt and the trustee are always parties to the mediation;**
- **(b) the trustee may act either personally or through a representative;**
- **(c) an opposition to discharge made by a creditor or the trustee, referred to in subsection 170.1(1) of the Act, is deemed to be a request by the creditor or the trustee, as the case may be, for mediation; and**
- **(d) a creditor who requests mediation is a party to the mediation.**

(3) For the purpose of conducting a particular mediation, the Superintendent shall designate as mediator
- **(a) an employee of a Division Office, including Division Offices other than the one for the bankruptcy division in which the proceedings were commenced; or**
- **(b) any other person with training or experience in mediation and whom the Superintendent considers qualified.**

(4) On receipt of a request for mediation from a trustee under subsection 68(6) or (7) or 170.1(1) of the Act, accompanied by the most recent income and expense statement in prescribed form completed by the bankrupt, the official receiver shall refer the matter to the mediator, who shall set the time and place for the mediation. The time set for the mediation must be within 45 days after the official receiver received the request for mediation.

(5) The mediator shall conduct the mediation with all parties physically present, unless the mediator decides to conduct the mediation by telephone conference call or by means of any other

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communication facilities that permit all persons participating in the mediation to communicate with each other.

(6) The mediation must be held at the Division Office, at any other place that is designated by the mediator, or, if the mediation is conducted otherwise than with all parties physically present, at any combination of places necessary for that purpose.

(7) The mediator shall send a copy of the notice of the mediation, in prescribed form, to the bankrupt, to the trustee and to any creditor who requested mediation, at least 15 days, or any shorter period that may be agreed to by all the parties concerned, before the date set for the mediation.

(8) If, at any time before the mediation has started, the mediator believes on reasonable grounds that the mediation cannot proceed at the time scheduled, the mediator shall reschedule it, setting a new time and place.

(9) Except when it would constitute a second adjournment, the mediator shall, subject to subsection (13), adjourn the mediation at any time during the mediation if

(a) a party requests an adjournment and the mediator believes on reasonable grounds that the mediation would benefit from further negotiations or the provision of additional information;

(b) the mediator believes on reasonable grounds that one of the parties, other than the trustee in the case of a mediation requested by a creditor under subsection 170.1(1) of the Act, cannot continue the mediation for a certain period of time;

(c) all the creditors who were informed of the mediation in accordance with subsection (7) or (11) fail to appear at the mediation and the mediator believes on reasonable grounds, with respect to at least one of those creditors, that the non-appearance is neither a delaying tactic nor intended to bring the mediation into disrepute;

(d) in the case of a mediation requested by a creditor under subsection 170.1(1) of the Act, a party, other than the trustee, who was informed of the mediation in accordance with subsection (7) or (11) fails to appear at the mediation and the mediator believes on reasonable grounds that the non-appearance is neither a delaying tactic nor intended to bring the mediation into disrepute; or

(e) in any case other than the one referred to in paragraph (d), a party, other than a creditor, who was informed of the mediation in accordance with subsection (7) or (11) fails to appear at the mediation and the mediator believes on reasonable grounds that the non-appearance is neither a delaying tactic nor intended to bring the mediation into disrepute.

(10) If a mediation is rescheduled or adjourned, the new date set must be within 10 days after the date on which the rescheduling or adjournment occurs.

(11) If a mediation is rescheduled or adjourned, the mediator shall inform the parties of the new time and place.

(12) At any time during the mediation, the mediator shall, subject to subsection (13), cancel the mediation if

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(a) there is an outstanding opposition to the discharge of the bankrupt by a creditor or the trustee on a ground referred to in paragraphs 173(1)(a) to (l) or (o) of the Act;
(b) the mediator believes on reasonable grounds that a party is abusing the rescheduling procedures;
(c) there has already been an adjournment and
(i) there is a request for adjournment under paragraph (9)(a), or
(ii) one of the circumstances referred to in paragraphs (9)(b) to (e) occurs;
(d) the mediator believes on reasonable grounds that one of the parties, other than the trustee in the case of a mediation requested by a creditor under subsection 170.1(1) of the Act, cannot continue the mediation at all;
(e) all the creditors who were informed of the mediation in accordance with subsection (7) or (11) fail to appear at the mediation and the mediator believes on reasonable grounds, with respect to all of those creditors, that the non-appearance is a delaying tactic or is intended to bring the mediation into disrepute;
(f) in the case of a mediation requested by a creditor under subsection 170.1(1) of the Act, a party, other than the trustee, who was informed of the mediation in accordance with subsection (7) or (11) fails to appear at the mediation and the mediator believes on reasonable grounds that the non-appearance is a delaying tactic or is intended to bring the mediation into disrepute; or
(g) in any case other than the one referred to in paragraph (f), a party, other than a creditor, who was informed of the mediation in accordance with subsection (7) or (11) fails to appear at the mediation and the mediator believes on reasonable grounds that the non-appearance is a delaying tactic or is intended to bring the mediation into disrepute.

(13) Despite paragraphs (9)(b) and (d) and (12)(d) and (f), the absence of one or more creditors who requested mediation, or the inability of one or more creditors who requested mediation to continue the mediation, is not a ground for adjourning or cancelling the mediation if at least one creditor who requested mediation is present at the mediation, or is able to continue the mediation, as the case may be.

(14) In the case of a mediation under section 170.1 of the Act, if all of the creditors who requested the mediation cause the cancellation of the mediation under paragraph (12)(e),
(a) the opposition to discharge on the part of each of those creditors on a ground referred to in paragraph 173(1)(m) or (n) of the Act is deemed withdrawn; and
(b) the issues submitted to mediation are deemed to have been thereby resolved for the purposes of subsection 170.1(3) of the Act.

(15) For greater certainty, if
(a) a mediation under section 68 of the Act is cancelled under any of paragraphs (12)(a) to (g), or
(b) a mediation under section 170.1 of the Act is cancelled otherwise than under paragraph (12)(e),
the issues submitted to mediation are deemed to have not been thereby resolved for the purposes of subsection 68(10) or 170.1(3), as the case may be, of the Act.

(16) If a mediation is cancelled, the mediator shall send to the Division Office and the parties a notice of the cancellation, in prescribed form, setting out the grounds for the cancellation.

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(17) No mediator or party to a mediation shall disclose to the public any confidential information concerning an issue submitted to mediation, unless the disclosure is
(a) required by law; or
(b) authorized by the person to whom the confidential information relates.

(18) If agreement is reached by all parties at the mediation, a mediation settlement agreement, in prescribed form and including all terms and conditions of the settlement reached, must be signed by the parties, and the mediator shall send copies of the agreement to the Division Office and the parties. The agreement is binding on the parties, subject to any subsequent court order.

(19) All payments made by a bankrupt under a mediation settlement agreement must be made to the trustee and deposited into the estate account.

(20) If the parties fail to reach agreement at the mediation, the mediator shall issue a notice in prescribed form to the effect that the issues submitted to mediation under subsection 68(6) or (7) or 170.1(1), as the case may be, of the Act were not resolved, and shall send that notice to the Division Office and the parties.
SOR/98-240, s. 1;
SOR/2007-61, s. 25(E);
SOR/2009-218, s. 17.

ORDER FOR PAYMENT

106. (1) A trustee who makes an application to the court under subsection 68(10) of the Act shall immediately send to the Division Office a copy of the application, and of any order of the court made under that subsection.

(2) A creditor who, pursuant to a court order made under subsection 38(1) of the Act, makes an application to the court under subsection 68(10) of the Act shall immediately send to the Division Office a copy of the application, and of any order of the court made under the latter subsection.
SOR/98-240, s. 1;
SOR/2007-61, s. 65(E).

106.1 to 106.3 [Repealed, SOR/98-240, s. 1]

PREFERENCES AND TRANSFERS AT UNDERVALUE
[SOR/2009-218, s. 18]

107. The registrar may
(a) in the Province of Quebec, if an immovable or any right relating to it is the object of litigation under sections 91 to 99 of the Act, authorize the plaintiff to apply for the registration of a notice of advance registration in the appropriate register after a copy of the demand signed by the plaintiff's advocate is filed with the court; and
(b) in any other province, if real property or any interest relating to it is the object of litigation under sections 91 to 99 of the Act, issue a certificate of lis pendens after a copy of the

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statement of claim signed by the plaintiff's barrister or solicitor is filed with the court, and, if the plaintiff is unsuccessful in whole or in part, issue a certificate of disallowance.

SOR/98-240, s. 1;
SOR/2007-61, s. 26;
SOR/2009-218, s. 19.

MEETINGS OF CREDITORS

108. (1) For the purposes of paragraph 155(d.1) of the Act, the notice of the first meeting of creditors must be sent to the persons referred to in subsection 102(1) of the Act at least 10 days before the day of the meeting.

(2) If a bankrupt cannot speak fluently in the official language in which the meeting of creditors is being conducted, the trustee shall arrange for the services of an interpreter approved by the chairperson of the meeting.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E);
SOR/2009-218, s. 20.

109. If a partnership is bankrupt, the creditors of the partnership and of each bankrupt partner shall be convened collectively for the first meeting of creditors.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

109.1 [Repealed, SOR/98-240, s. 1]

110. A bankrupt who is required by a trustee to attend a meeting of creditors other than the first meeting, and who resides more than 100 km from the place of the meeting, is entitled to be paid, out of the estate, reasonable expenses for travel, accommodation and meals.
SOR/98-240, s. 1.

CROWN'S SECURITY

111. For the purposes of subsection 87(1) of the Act, a "prescribed system of registration" referred to in that subsection is a system of registration of securities that is available to Her Majesty in right of Canada or a province and to any other creditor holding a security, and is open to the public for inspection or for the making of searches.
SOR/98-240, s. 1.

NOTICE OF DIVIDEND

112. The notice of dividend that is received by a creditor is sufficient notice of admission of the claim.
SOR/98-240, s. 1.

NOTICE OF DISALLOWANCE OR OF VALUATION

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113. The notice of disallowance or notice of valuation provided by a trustee under subsection 135(3) of the Act to a person whose claim, right to a prior rank, or security has been disallowed or on which a valuation has been made, in whole or in part, must be served, or sent by registered mail or courier.
SOR/85-325, s. 1;
SOR/87-380, s. 1;
SOR/98-240, s. 1;
SOR/2007-61, s. 27(E).

113.1 to 113.6 [Repealed, SOR/98-240, s. 1]

BANKRUPT PARTNERSHIPS

114. A partnership that is bankrupt shall submit to the trustee a statement of its partnership affairs, verified by one of the partners or by the manager in charge of the partnership affairs, and each bankrupt partner shall submit a statement of their own personal affairs.
SOR/81-646, s. 5;
SOR/98-240, s. 1.

EXAMINATIONS

115. Examinations, other than those under section 159 or 161 of the Act, shall be held before a registrar, before a person who is qualified to hold examinations for discovery, examinations of judgment debtors or examinations of debtors after judgment or before any other person that the court may, on ex parte application, order, and shall be conducted in accordance with the rules of court in civil cases.
SOR/85-167, s. 1;
SOR/85-1162, s. 1(E);
SOR/90-83, s. 1;
SOR/92-579, s. 29;
SOR/96-473, s. 1;
SOR/98-240, s. 1;
SOR/2005-284, s. 8;
SOR/2007-61, s. 28.

116. (1) An examination shall be held
(a) in the bankruptcy district or division in which the person to be examined
(i) resides,
(ii) was served with the appointment for examination, or
(iii) resided or carried on business on the day of the bankruptcy; or
(b) at any place that the court may, on ex parte application, order.

(2) The court may, on application, set the time of an examination.
SOR/92-579, s. 30;
SOR/98-240, s. 1;
SOR/2007-61, s. 29(E).

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117. The official receiver shall, before conducting an examination referred to in section 159 or 161 of the Act, send a notice of examination, in prescribed form, to the person to be examined.
SOR/92-579, s. 30;
SOR/98-240, s. 1.

DISCHARGE OF BANKRUPTS

118. Any person opposing the discharge of a bankrupt under the Act must file that opposition with the court, together with any applicable fee provided by the tariff.
SOR/92-579, s. 30;
SOR/98-240, s. 1.

119. The court may, on an application for the discharge of a bankrupt, summon the bankrupt to appear for examination.
SOR/92-579, s. 30;
SOR/98-240, s. 1;
SOR/2007-61, s. 30.

120. (1) If an order of discharge is made conditional on the bankrupt's consenting to judgment in favour of the trustee for the whole or any part of the balance of the bankrupt's debts, the judgment shall be filed in the court in the bankruptcy district or division in which the order of discharge is granted.

(2) If the bankrupt does not give the consent referred to in subsection (1) within 10 days after the date of the conditional order of discharge, the court may, on application by the trustee, revoke the conditional order of discharge or make any other order that the court considers appropriate.
SOR/92-579, s. 30;
SOR/98-240, s. 1;
SOR/2007-61, ss. 31(E), 63(E).

121. If a bankrupt applies to the court to modify the terms of an order of discharge pursuant to subsection 172(3) of the Act, the bankrupt shall send a notice of the time and place of the hearing of the application, at least 10 days before the day of the hearing, to the trustee, the Division Office and every creditor who has proved their claim, at their latest known address.
SOR/92-579, s. 30;
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

TRUSTEE REPORT

121.1 (1) For the purposes of subsection 170(1) of the Act, the circumstances in which the trustee shall prepare a report are the following:

(a) the bankrupt has surplus income;

(b) an opposition to the discharge of the bankrupt has been made;

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(c) the bankrupt has been bankrupt on a previous occasion under the laws of Canada or any prescribed jurisdiction; or
(d) a court hearing of the discharge is required.

(2) The report shall be prepared
(a) in the case of an individual who is eligible for an automatic discharge and who has never before been bankrupt under the laws of Canada or any prescribed jurisdiction,
(i) during the eighth month after the date of the bankruptcy, or
(ii) during the twentieth month after the date of the bankruptcy, if the individual is required to make payments under section 68 of the Act;
(b) in the case of an individual who is eligible for an automatic discharge and who has been bankrupt once before under the laws of Canada or any prescribed jurisdiction,
(i) during the twenty-third month after the date of the bankruptcy, or
(ii) during the thirty-fifth month after the date of the bankruptcy, if the individual is required to make payments under section 68 of the Act; and
(c) in the case of an individual who is not eligible for an automatic discharge, not less than 10 days and not more than 60 days before the date of the hearing of the application for discharge.
SOR/2009-218, s. 21.

PUBLIC RECORDS

122. (1) For the purposes of subsection 11.1(1) of the Act, the Superintendent,
(a) in keeping or causing to be kept a public record of each proposal, shall keep the files relating to it for at least 10 years after the date on which a certificate of full performance of the proposal is given pursuant to section 65.3 or 66.38 of the Act;
(b) in keeping or causing to be kept a public record of each bankruptcy of an individual, shall keep the files relating to it
(i) for at least 10 years after the date on which the trustee of the bankrupt's estate is discharged under subsection 41(2) of the Act, or is deemed to be discharged pursuant to these Rules, and
(ii) if the bankrupt has not been granted an absolute order of discharge under subsection 172(1) of the Act at the end of the period referred to in subparagraph (i), until the bankrupt has been granted that order;
(c) in keeping or causing to be kept a public record of each bankruptcy of a corporation, shall keep the files relating to it for at least 10 years after the date on which the trustee of the bankrupt's estate is discharged under subsection 41(2) of the Act;
(d) in keeping or causing to be kept a public record of each licence issued to a trustee, shall keep the files relating to it for at least 30 years after the date of expiry of the licence;
(e) in keeping or causing to be kept a public record of each appointment or designation by the Superintendent of a person to administer consumer proposals, shall keep the files relating to it for at least 30 years after the date on which the appointment or designation ceases to have effect; and
(f) in keeping or causing to be kept a public record of each notice sent to the Superintendent by a receiver pursuant to subsection 245(1) of the Act, shall keep the files relating to it for at least 10 years after the date on which the notice is received by the Superintendent.

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(2) For the purposes of subsection 11.1(2) of the Act, the Superintendent shall keep or cause to be kept any other records relating to the administration of the Act that the Superintendent deems advisable, for at least six years after the date on which they are opened.
SOR/92-579, s. 30;
SOR/98-240, s. 1;
SOR/2007-61, ss. 32(E), 63(E).

RATE OF LEVY

123. (1) Subject to subsection (2) and (3), the rate of levy payable on all payments, pursuant to section 147 of the Act, is

(a) five per cent, if the amount of payments is $1,000,000 or less;
(b) five per cent of the first $1,000,000, plus one and one-quarter per cent of the amount in excess of $1,000,000, if the amount of payments exceeds $1,000,000 but is not more than $2,000,000; or
(c) five per cent of the first $1,000,000, one and one-quarter per cent of the second $1,000,000, plus one-quarter of one per cent of the amount in excess of $2,000,000, if the amount of payments exceeds $2,000,000.

(2) The rate of levy payable in a proposal is

(a) five per cent, if the amount of payments is $1,000,000 or less;
(b) five per cent of the first $1,000,000, plus one and one-quarter per cent of the amount in excess of $1,000,000, if the amount of payments exceeds $1,000,000 but is not more than $2,000,000; or
(c) five per cent of the first $1,000,000, one and one-quarter per cent of the second $1,000,000, plus zero per cent of the amount in excess of $2,000,000, if the amount of payments exceeds $2,000,000.

(3) The rate of levy payable for an estate under summary administration is

(a) 100 per cent, if the amount of payments is $200 or less; or
(b) 100 per cent of the first $200 plus zero per cent of the amount in excess of $200, if the amount of payments exceeds $200.

(4) The rate of levy set out in subsection (3) applies to all estates under summary administration for which the final statement of receipts and disbursements has been received by the Division Office on or after the date of coming into force of that subsection.
SOR/92-579, s. 30;
SOR/98-240, s. 1;
SOR/2001-155, s. 1;
SOR/2007-61, s. 63(E).

SECURED CREDITORS AND RECEIVERS

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124. The notice of intention to enforce a security pursuant to subsection 244(1) of the Act shall be in prescribed form and shall be served, or sent by registered mail or courier, or, if agreed to by the parties, by electronic transmission.
SOR/98-240, s. 1;
SOR/2005-284, s. 9.

125. The statement required by subsection 246(1) of the Act to be prepared by a receiver after taking possession or control of property of an insolvent person or a bankrupt must contain the following information:

(a) the name of each creditor of the insolvent person or bankrupt, the amount owing to each creditor and the total amount owing to the creditors;

(b) a list of the property in the possession or under the control of the receiver, and the book value of each item; and

(c) the receiver's intended plan of action during the receivership, to the extent that such a plan has been established.

SOR/98-240, s. 1.

126. For the purposes of subsection 246(2) of the Act, interim reports relating to a receivership must be prepared by the receiver at least once every six months and must include

(a) the interim statement of receipts and disbursements, in prescribed form;

(b) the statement of all property of which the receiver has taken possession or control that has not yet been sold or realized; and

(c) information about the anticipated completion of the receivership.

SOR/98-240, s. 1.

127. The final report and statement of accounts that are required by subsection 246(3) of the Act to be prepared by a receiver immediately after completion of their duties as receiver must contain the following information:

(a) the final statement of receipts and disbursements;

(b) details of the manner of distribution of the proceeds realized from the property of which the receiver had taken possession or control; and

(c) details of the disposition of any property of which the receiver had taken possession or control and that is not accounted for in the final statement of receipts and disbursements.

SOR/98-240, s. 1;
SOR/2007-61, ss. 33(F), 65(E).

TRUSTEE'S FEES AND DISBURSEMENTS IN SUMMARY ADMINISTRATION

128. (1) The fees of the trustee for services performed in a summary administration are calculated on the total receipts remaining after deducting necessary disbursements relating directly to the realization of the property of the bankrupt, and the payments to secured creditors, according to the following percentages:

(a) 100 per cent on the first $975 or less of receipts;

(b) 35 per cent on the portion of the receipts exceeding $975 but not exceeding $2,000; and

(c) 50 per cent on the portion of the receipts exceeding $2,000.

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(2) A trustee in a summary administration may claim, in addition to the amount set out in subsection (1),

(a) the costs of counselling referred to in subsection 131(2);
(b) the fee for filing an assignment referred to in paragraph 132(a);
(c) the fee payable to the registrar under paragraph 1(a) of Part II of the schedule;
(d) the amount of applicable federal and provincial taxes for goods and services; and
(e) a lump sum of $100 in respect of administrative disbursements.

(3) A trustee in a summary administration may withdraw from the bank account used in administering the estate of the bankrupt, as an advance on the amount set out in subsection (1),

(a) $250, at the time of the mailing of the notice of bankruptcy;
(b) an additional $250, thirty days after the date of the bankruptcy; and
(c) an additional $250, four months after the date of the bankruptcy.

(4) Subsections (1) to (3) apply to bankruptcies in respect of which proceedings are commenced on or after September 30, 1997 and the accounts are taxed on or after April 30, 1998.
SOR/98-240, s. 1.

ADMINISTRATOR'S FEES AND EXPENSES IN A CONSUMER PROPOSAL

129. (1) For the purposes of paragraph 66.12(6)(b) of the Act, the fees and expenses of the administrator of a consumer proposal that must be provided for in a consumer proposal are as follows:

(a) $750, payable on filing a copy of the consumer proposal with the official receiver;
(b) $750, payable on the approval or deemed approval of the consumer proposal by the court;
(c) 20 per cent of the moneys distributed to creditors under the consumer proposal, payable on the distribution of the moneys;
(d) the costs of counselling referred to in subsection 131(1);
(e) the fee for filing a consumer proposal referred to in paragraph 132(c);
(f) the fee payable to the registrar under paragraph 3(b) of Part II of the schedule; and
(g) the amount of applicable federal and provincial taxes for goods and services.

(2) Subsection (1) applies to consumer proposals in respect of which proceedings are commenced on or after April 30, 1998.
SOR/98-240, s. 1.

APPLICATION OF SUMMARY ADMINISTRATION PROVISIONS

130. For the purposes of subsections 49(6) and (8) of the Act, the amount is $15,000.
SOR/98-240, s. 1;
SOR/2009-218, s. 22.

MISCELLANEOUS FEES

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131. (1) For the purposes of paragraph 66.12(6)(b) of the Act, the fees and expenses in respect of counselling are $85 per session if counselling is provided on an individual basis, and $25 per person per session if counselling is provided on a group basis.

(2) For the purposes of subsection 157.1(1) of the Act, the costs of counselling are $85 per session if counselling is provided on an individual basis, and $25 per person per session if counselling is provided on a group basis.
SOR/98-240, s. 1;
SOR/2007-61, s. 63(E).

132. (1) The total fee to file all documents relating to an estate with the official receiver is as follows:

(a) $75 for an estate under summary administration in respect of an individual bankrupt who has never before been bankrupt under the laws of Canada or of any jurisdiction prescribed under section 168.1 of the Act and, in the case of any other bankruptcy, $150, payable at the time of filing an assignment under subsection 49(3) of the Act or at the time of the making of a bankruptcy order under subsection 43(6) of the Act;

(b) in the case of a proposal made by an insolvent person, $150, payable at the time of filing a copy of the proposal pursuant to subsection 62(1) of the Act;

(c) in the case of a consumer proposal made by a consumer debtor, $100, payable at the time of filing a copy of the consumer proposal pursuant to paragraph 66.13(2)(d) of the Act; and

(d) if the official receiver directs, pursuant to subsection 49(8) of the Act, that subsection 49(6) of the Act ceases to apply in respect of a bankrupt, $75, payable at the time of the official receiver's direction.

(2) The fees set out in paragraphs (1)(a), (c) and (d) apply to all documents filed on or after the coming into force of those paragraphs.
SOR/98-240, s. 1;
SOR/2001-155, s. 2;
SOR/2007-61, s. 34.

133. For the purposes of subsection 11.1(1) of the Act, the fee payable for each request for information contained in the public record is $8.
SOR/98-240, s. 1.

134. (1) For the purposes of subsection 13.2(1) of the Act, the fee payable by an applicant for a licence to act as a trustee is $300.

(2) For the purposes of subsection 13.2(2) of the Act, the annual fee payable by a trustee is $850.

(3) For the purposes of paragraph 13.2(4)(a) of the Act, the penalty amount that must be paid by a trustee is $100.
SOR/98-240, s. 1;
SOR/2001-155, s. 3.

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135. For the purposes of subsection 120(5) of the Act, the fees per meeting that may be paid to an inspector, to be determined on the net receipts as calculated by subtracting the payments to secured creditors from the amount of total receipts received by the trustee, are as follows:

(a) $10, if the estate has net receipts of less than $10,000;

(b) $20, if the estate has net receipts of $10,000 or more but less than $50,000;

(c) $30, if the estate has net receipts of $50,000 or more but less than $100,000; or

(d) $40, if the estate has net receipts of $100,000 or more.

SOR/98-240, s. 1;
SOR/99-416, s. 1;
SOR/2007-61, s. 63(E).

136. For the purposes of subsection 245(1) of the Act, the fee that accompanies the notice sent to the Superintendent is $70.
SOR/98-240, s. 1.

136.1 (1) The fee payable by a creditor who applies for payment of a dividend pursuant to subsection 154(2) of the Act is $30 for each dividend applied for.

(2) The fee set out in subsection (1) applies to all applications for dividends made on or after the coming into force of that subsection.
SOR/2001-155, s. 4.

PRESCRIBED DATE

137. For the purposes of paragraphs 136(1)(h) and (j) of the Act, the prescribed date is November 30, 1992.
SOR/98-240, s. 1.

NOTICE RELATED TO FOREIGN PROCEEDING

138. For the purposes of paragraph 276(b) of the Act, the notice must contain the following information:

(a) the name and contact information of the foreign representative;

(b) the name of the debtor and the name under which the debtor carries on business in Canada, if any;

(c) the following information respecting the order, namely

(i) the name of the court that made it,

(ii) the legislative provision under which it was made, and

(iii) the date on which it was made;

(d) the country in which the foreign proceeding is filed;

(e) whether the proceeding is a foreign main or foreign non-main proceeding; and

(f) the name and contact information of legal counsel for the foreign representative.

SOR/2009-218, s. 23.

SCHEDULE(Section 1 and paragraphs 128(2)(c) and 129(1)(f))
PART I[Repealed, SOR/2010-97, s. 1]

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PART II
FEES PAYABLE TO COURT OFFICERS
FEES PAYABLE TO THE REGISTRAR

Bankruptcy
1.
The trustee shall pay the registrar, at the time of the opening of a file or at any later date determined by the registrar,
(a) for all Court services to be rendered to the trustee in a summary administration bankruptcy, a single fee of $ 50
(b) for all Court services to be rendered to the trustee in a bankruptcy other than a summary administration bankruptcy, a single fee of $150

2.
No fee shall be paid by the trustee if
(a) a summary administration bankruptcy file is caused to be opened by a person other than the trustee and a fee is paid pursuant to paragraph 4(f) for an opposition to the discharge of the bankrupt; or
(b) the debtor has become bankrupt following a bankruptcy order made under subsection 43(6) of the Act, has filed an assignment under subsection 50(4.1) of the Act or is deemed to have made an assignment under subsection 50.4(8) or (11), paragraph 57(a) or subsection 61(2) or 63(4) of the Act.

Proposal
3.
The trustee or the administrator shall pay the registrar, at the opening of a file or at any later date determined by the registrar,
(a) for all Court services to be rendered to the trustee in a general scheme proposal (Division I of Part III of the Act), a single fee of
$150

(b) for all Court services to be rendered to the administrator in a consumer proposal (Division II of Part III of the Act), a single fee of
$ 50
Bankruptcy and proposal

4.
A person other than the trustee or the administrator shall pay a fee to the registrar for the following services:

(a) an application for a bankruptcy order $150
(b) a motion for the appointment of an interim receiver $ 50
(c) a motion made under section 248 or 249 of the Act $ 50
(d) a motion for substituted service $ 10

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(e) any other motion
(i) in an ordinary bankruptcy or a proposal under Division I of Part III of the Act $ 50
(ii) in a summary bankruptcy or a proposal under Division II of Part III of the Act $ 10
(f) any written dispute or opposition $ 50
(g) taxing a receiver's accounts under subsection 248(2) of the Act $ 50
(h) taxing a bill of legal services costs for
(i) a bill of $500 or more, but not exceeding $3,000 $ 25
(ii) a bill in excess of $3,000 $ 50

Other services
5.
The fees payable for all other services, including proceedings before the Court of Appeal, name searches and the issuance of a subpoena or a certificate, shall be those in effect within each province or territory.

6.
No fee shall be charged for the filing of a document or report by the Official Receiver or the Superintendent of Bankruptcy.

FEES AND DISBURSEMENTS PAYABLE TO THE BAILIFF
7.
The fees and disbursements payable to the bailiff shall be those in effect within each province or territory.

PART III
SCALE OF TRUSTEE'S DISBURSEMENTS FOR WORK IN OTHER THAN SUMMARY ADMINISTRATION
The trustee shall, in other than summary administrations, be entitled to be paid his disbursements, and in taxing such disbursements the taxing officer may allow as disbursements the following:
1. For taking possession, verifying the bankrupt's statement of affairs, and making an inventory of his assets and a list of his liabilities:
The actual disbursements of the trustee in connection with the said work.

2. For preparing and mailing to all creditors the following documents:
(a) notice of first meeting,
(b) documents accompanying notice of first meeting,
(c) explanatory circular letter,
(d) statement of assets and liabilities,
(e) minutes of first meeting or synopsis thereof,
(f) interim report from statement,
(g) notice of application for discharge,
(h) notice of application to pass accounts,
(i) statement of receipts and disbursements,
(j) dividend sheet,

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(k) other documents necessary or desirable in the opinion of the taxing officer to inform the creditors,
the cost of printing plus postage or if it is less,
(l) on the first 100 notices and other documents, $0.07 per folio,
(m) on the next 200 notices and other documents, $0.05 per folio,
(n) on any excess over 300 notices and other documents, $0.02 per folio,
plus postage.

3. Printed proof of debt and proxy forms at cost:
If the court considers that the amount of remuneration allowed to the trustee is sufficient to compensate him adequately for all services rendered to the estate, the court may disallow the foregoing disbursements either in whole or in part.
If a court officer performs a service for which no fee is provided in this tariff, the court may allow a fee in an amount equal to the fee in this tariff for the service most nearly analogous or comparable to the services rendered, or if no fee can be found herein applicable to the particular service rendered, according to the tariff in effect in other civil matters in the court.
No disbursements are payable to trustees in respect of
(a) collection notices,
(b) notices of sale,
(c) notices under section 120,
(d) notices respecting goods in storage,
(e) notices of stay of proceedings,
(f) any other notice that is not sent to all creditors.
SOR/78-389, s. 6;
SOR/96-473, ss. 2 to 4;
SOR/98-240, s. 2;
SOR/2007-61, ss. 35 to 39, 40(F), 41, 42, 43(F), 44(F), 45, 46(F), 47(F), 48, 49(E), 50(E), 51 to 53, 54(F), 55 to 58, 59(E), 60 to 62, 63(E), 64, 66(F), 67;
SOR/2009-270, s. 1;
SOR/2010-97, s. 1.

SCHEDULE II
[Repealed, SOR/85-167, s. 3]
SCHEDULE III
[Repealed, SOR/98-240, s. 3]

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Companies' Creditors Arrangement Act
R.S.C., 1985, c. C-36
An Act to facilitate compromises and arrangements between companies and their creditors

SHORT TITLE
Short title - Sec 1
1. This Act may be cited as the Companies' Creditors Arrangement Act.
R.S., c. C-25, s. 1.

Reference re constitutional validity of the Companies Creditors Arrangement Act (Dom.), [1934] SCR 659

Date:	1934-06-06
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Supreme Court of Canada
Reference re constitutional validity of the Companies Creditors Arrangement Act (Dom.), [1934] S.C.R. 659
Date: 1934-06-06.

In the Matter of a Reference Concerning the Constitutional Validity of the Companies' Creditors Arrangement Act.

1934: March 27, 28, 29; 1934: June 6.

Present: Duff C.J. and Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

Constitutional law—The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36 (Dom.)—Constitutional validity—"Bankruptcy and Insolvency" (B.N.A. Act, s. 91 (21)).

The Companies' Creditors Arrangement Act, 1933, 23-24 Geo. V, c. 36, is *intra vires* of the Parliament of Canada. The matters dealt with come within the domain of "bankruptcy and insolvency" within the intendment of s. 91 (21) of the B.N.A. Act.

The Act discussed with regard to its aim, its features, its comparison with existing bankruptcy or insolvency legislation, and the history of bankruptcy and insolvency law.

REFERENCE to the Supreme Court of Canada for hearing and consideration pursuant to the authority of s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35) of the following question:

Is *The Companies' Creditors Arrangement Act, 1933,* 23-24 Geo. V, chapter 36, *ultra vires* of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

L. E. Beaulieu K.C. and F. P. Varcoe K.C. for the Attorney-General for Canada.

C. Lanctôt K.C. and L. St. Laurent K.C. for the Attorney-General for Quebec.

I. A. Humphries K.C. for the Attorney-General for Ontario.

The judgment of Duff C.J. and Rinfret, Crocket and Hughes JJ. was delivered by

DUFF C.J.—The history of the law seems to show clearly enough that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

Under the *Bankruptcy Act,* as it now exists, proposals for compositions and arrangements cannot be dealt with before a receiving order or assignment has been made. This, however, was not always the case. Under the *Bankruptcy Act* of 1919, a proposal for composition or arrangement could be made prior to an assignment or receiving order.

The *Winding-up Act* contains brief provisions, in sections 65 and 66, which, in substance, differ very little indeed from the legislation now before us; although this, no doubt, is subject to the important qualification, that the provisions of the *Winding-up Act* apply only in the case of a company which is in course of being wound up. Similar provisions affecting the subject matter of this legislation are to be found in Canadian legislation before and after Confederation.

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The powers conferred upon the court under the *Companies' Creditors Arrangement Act, 1933,* come into operation when a compromise or arrangement is proposed between a "company which is bankrupt or insolvent or which has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or which is deemed insolvent within the meaning of the *Winding-up Act,"* and its "unsecured creditors or any class of them." The important difference, as already observed, between the provisions of the *Companies' Creditors Arrangement Act* and those of the *Bankruptcy Act* itself in relation to compromises and arrangements is that the powers of the first named Act may be exercised notwithstanding the fact that no proceedings have been taken under the *Bankruptcy Act* or the *Winding-up Act.* The Act, however, creates powers, which can be exercised in case, and only in case, of insolvency.

Furthermore, the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation. As Lord Cave impliedly states in *Royal Bank of Canada* v. *Larue*[1], "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament."

Matters normally constituting part of a bankruptcy scheme, but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

The argument mainly pressed upon us in opposition to the validity of the legislation was that

> It does not endeavour to treat equally all contracts of debts between the debtor and his creditors but allows the interest of some of them to be sacrificed in the interest of the company and of other classes of creditors.

We think an adequate answer to this objection is put forward in the argument on behalf of the Attorney-General for the Dominion. Apart altogether from the judicial control over the proceedings, there is the circumstance that the legislation applies to insolvent companies only; and, consequently, that it is within the power of any creditor to apply for a winding-up order or a receiving order. It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interests of a single creditor or of a single class of creditors and having no relation to the benefit of the creditors as a whole. The ultimate purpose would appear to be to enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders. We think it is not unimportant to note the circumstance to which our attention was called by counsel for the Attorney-General for the Dominion that the court may order shareholders to be summoned although they are not authorized to vote.

The judgment of Lamont and Cannon JJ. was delivered by

CANNON J.—This is a reference by the Governor General in Council submitting for hearing and consideration of this Court the following question:

> Is *The Companies' Creditors Arrangement Act, 1933,* 23-24 Geo. V, chapter 36, *ultra vires* of the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

This Act is designed to apply to insolvent or bankrupt companies; and it is contended on behalf of the Dominion that Parliament could pass this legislation under section 91, par. 21, which gives it paramount jurisdiction to make laws concerning bankruptcy and insolvency. The provinces represent that in enacting it Parliament disregarded their exclusive jurisdiction under section 92, par. 13, in relation to property and civil rights in the province.

The whole argument before us was finally directed to one point: Are the proceedings contemplated by the Act, in pith and substance, *bankruptcy* or *insolvency* enactments within the fair and ordinary meaning of these words? One of the features which distinguishes this Act from the *Bankruptcy Act* now in force is that, under the latter, a composition or arrangement cannot be proceeded with before a receiving order or assignment has been made. Another difference is that under the *Bankruptcy Act* the secured creditor is dealt with on the footing that he may realize his security or value or surrender the same; it is only in respect of what he claims apart from the security that he is affected by the composition or arrangement. It was pointed out also that similar provisions giving binding effect to this approval by a certain majority of creditors are found in our legislation before and after Confederation.

The Insolvent Act of 1864, 27-28 Vict., ch. 17, sec. 9;

The Insolvent Act of 1869, Canada, 32-33 Vict., ch. 16, secs. 94 *et seq.;*

The Insolvent Act of 1875, Canada, 38 Vict., c. 16, secs. 54 *et seq.*

As far as Lower Canada is concerned, it may be of interest to note that chapter 87 of the Consolidated Statutes of Lower Canada, 1859, allowed the issue of a *capias* if the debtor "had refused to compromise or arrange with his creditors, or to make a *cession de biens,"* and provides that the debtor may be discharged if, when the affidavit for *capias* was made, he had "not refused to compromise or arrange with his creditors."

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Moreover, I find that, before and since Confederation, arrangements with the creditors have always been of the very essence of any system of bankruptcy or insolvency legislation. Civil rights and the sanctity of contracts are certainly affected by clause 5 under which a minority of creditors would be bound by the vote of a majority in number representing three-fourths in value of creditors present and voting, either in person or by proxy, if the agreement or compromise to which they agreed be sanctioned by the court. I find that this feature existed long before Confederation and was at that time generally accepted.

Pardessus, Droit Commercial, vol. 3, éd. 1843, p. 92, no. 1232, says:

> 1232. Les créanciers d'un failli ont presque toujours intérêt à faire avec lui un arrangement quelconque, plutôt que d'éprouver les lenteurs et les embarrass d'une union qui finit souvent par consumer la fortune du débiteur. Mais, comme rarement tous sont d'accord, et qu'il est naturel de présumer qu'un grand nombre prendra les arrangements les plus convenables à l'intérêt commun, on a cru devoir faire céder la volonté de la minorité à celle de la majorité; les créanciers présents ont donc été admis à décider pour les absents.
>
> Cette minorité, ces absents, doivent au moins avoir l'assurance que de mûres réflexions ont dirigé ceux dont le voeu doit devenir une loi pour eux. Tel est l'objet des règles prescrites pour la validité du concordat.

Under number 1236, classes or categories having different interests are already recognized by this author, and he adds (No. 1237):

> Le concordat est valablement consenti par la majorité des créanciers présents, pourvu que les sommes dues aux personnes qui forment cette majorité égalent les trois quarts de la totalité des créances vérifiées et affirmées, ou admises par provision, dues à des créanciers ayant droit de prendre part à la délibération du concordat.

Therefore, the very clause objected to in our Act of 1933 seems to be copied from the law of bankruptcy as it existed in France in 1843, when this work was published.

Under our system and the English *Bankruptcy Act* of 1914, bankruptcy legislation deals with the proceedings necessary for the distribution, under judicial authority, of the property of an insolvent person among his creditors. It assumes the commission of an "act of bankruptcy" followed by a petition to the court for a receiving order for the protection of the estate. The property of the debtor then vests in an official receiver. The debtor must submit a statement of affairs to the official receiver who calls a meeting of the creditors. The debtor is examined; and *if no composition or scheme of arrangement is approved,* he is adjudged bankrupt; and his property becomes divisible among his creditors and vests in a trustee.

Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation and were incorporated in our *Insolvent Act of 1864;* and such a deed of composition and discharge could be validly made either before, pending or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent. What was considered as being within the scope of the word "insolvency" when it was used in section 91 of the *B.N.A. Act* is to be found in the preamble of the 1864 Insolvency Act, which reads:

> Whereas it is expedient that provision be made for the settlement of the estates of insolvent debtors, for *giving effect to arrangements between them and their creditors,* and for the punishment of fraud.

See also: *Cushing* v. *Dupuy* (1); *Royal Bank of Canada* v. *Larue* (2).

I therefore reach the conclusion that arrangements as provided for by this Act are and have been, before and since Confederation, an essential component part of any system devised to protect the creditors of insolvents and, at the same time, help the honest debtor to rehabilitate himself and obtain a discharge.

I would, therefore, answer the question submitted to us in the negative.

The question submitted is answered in the negative.

Solicitor for the Attorney-General of Canada: W. Stuart Edwards.

Solicitor for the Attorney-General of Quebec: Charles Lanctôt.

Solicitor for the Attorney-General of Ontario: I. A. Humphries.

INTERPRETATION

Definitions - Sec 2

2. (1) In this Act,

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"aircraft objects"
"aircraft objects"[Repealed, 2012, c. 31, s. 419]

"bargaining agent"
« agent négociateur »
"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company;

"bond"
« obligation »
"bond" includes a debenture, debenture stock or other evidences of indebtedness;

"cash-flow statement"
« état de l'évolution de l'encaisse »
"cash-flow statement", in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow;

"claim"
« réclamation »
"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the Bankruptcy and Insolvency Act;

"collective agreement"
« convention collective »
"collective agreement", in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent;

"company"
« compagnie »
"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

"court"
« tribunal »
"court" means

(a) in Nova Scotia, British Columbia and Newfoundland, the Supreme Court,
(a.1) in Ontario, the Superior Court of Justice,
(b) in Quebec, the Superior Court,
(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,
(c.1) in Prince Edward Island, the Trial Division of the Supreme Court, and

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(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice;

"debtor company"
« compagnie débitrice »
"debtor company" means any company that

(a) is bankrupt or insolvent,
(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
(c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;

"director"
« administrateur »
"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called;

"eligible financial contract"
« contrat financier admissible »
"eligible financial contract" means an agreement of a prescribed kind;

"equity claim"
« réclamation relative à des capitaux propres »
"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,
(b) a return of capital,
(c) a redemption or retraction obligation,
(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

"equity interest"
« intérêt relatif à des capitaux propres »
"equity interest" means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

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(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

"financial collateral"
« garantie financière »
"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,
(b) securities, a securities account, a securities entitlement or a right to acquire securities, or
(c) a futures agreement or a futures account;

"income trust"
« fiducie de revenu »
"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or
(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

"initial application"
« demande initiale »
"initial application" means the first application made under this Act in respect of a company;

"monitor"
« contrôleur »
"monitor", in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company;

"net termination value"
« valeurs nettes dues à la date de résiliation »
"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions;

"prescribed"
Version anglaise seulement
"prescribed" means prescribed by regulation;

"secured creditor"
« créancier garanti »
"secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment,

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cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;

Sun Indalex Finance, LLC *v.* United Steelworkers, 2013 SCC 6 - Inter-play of Insufficient Assets for CCAA Approved Pensions and Secured Creditor - Deemed Trust?

Sun Indalex Finance, LLC *Appellant*
v.
United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*
- and -
George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors *Appellant*
v.
United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*
- and -
FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited *Appellant*
v.
United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville *Respondents*
- and -
United Steelworkers *Appellant*
v.
Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services *Respondents*
and
Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association *Interveners*
Indexed as: Sun Indalex Finance, LLC *v.* United Steelworkers 2013 SCC 6
File No.: 34308.
2012: June 5; 2013: February 1.
Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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Pensions — Bankruptcy and Insolvency — Priorities — Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Company entering into debtor in possession ("DIP") financing allowing it to continue to operate — CCAA court granting priority to DIP lenders — Proceeds of sale of business insufficient to pay back DIP lenders — Whether pension wind-up deficiencies subject to deemed trust — If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy — Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), 57(4), 75(1)(a), 75(1)(b) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Pensions — Trusts — Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA — Pension funds not having sufficient assets to fulfill pension promises made to plan members — Whether pension wind-up deficiencies subject to deemed trust — Whether company as plan administrator breached fiduciary duties — Whether pension plan members are entitled to constructive trust.

Civil Procedure — Costs — Appeals — Standard of review — Whether Court of Appeal erred in costs endorsement concerning one party.

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") and a constructive trust arising from Indalex's alleged breaches of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per **Deschamps** and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind-up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind-up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the

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PBA: "amount of money equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind-up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind-up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind-up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind-up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind-up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind-up and with respect to which employees make elections only after wind-up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind-up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind-up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind-up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per **Deschamps** and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This

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court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust As A Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per **Deschamps** and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

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As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

Per **LeBel** and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per **Deschamps** and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Cases Cited

By Deschamps J.

Referred to: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273; *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558.

By Cromwell J.

Referred to: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, aff'g 2008 ONCA 394, 67 C.C.P.B. 1; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Elan Corp. v. Comiskey* (1990), 41

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O.A.C. 282; *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194; *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII); *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Donkin v. Bugoy*, [1985] 2 S.C.R. 85; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303.

By LeBel J. (dissenting)

Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293; *Canson Enterprises Ltd. v. Boughton& Co.*, [1991] 3 S.C.R. 534; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

Statutes and Regulations Cited

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36.

Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 128.

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APPEALS from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 265, 104 O.R. (3d) 641, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 75 C.B.R. (5th) 19, 89 C.C.P.B. 39, 17 P.P.S.A.C. (3d) 194, [2011] O.J. No. 1621 (QL), 2011 CarswellOnt 2458, setting aside a decision of Campbell J., 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] O.J. No. 974 (QL), 2010 CarswellOnt 893. Appeals allowed, LeBel and Abella JJ. dissenting.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5th) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Benjamin Zarnett, *Frederick L. Myers, Brian F. Empey* and *Peter Kolla*, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and *George Benchetrit*, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, Ashley John Taylor and *Nicholas Peter McHaffie*, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and *Demetrios Yiokaris*, for the respondents Keith Carruthers, et al.

Hugh O'Reilly and *Amanda Darrach*, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Mark Bailey, *Leonard Marsello* and *William MacLarkey*, for the respondent/intervener the Superintendent of Financial Services.

Robert I. Thornton and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Kenneth T. Rosenberg, *Andrew K. Lokan* and *Massimo Starnino*, for the intervener the Canadian Federation of Pensioners.

Éric Vallières, *Alexandre Forest* and *Yoine Goldstein,* for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Mahmud Jamal, *Jeremy Dacks* and *Tony Devir,* for the intervener the Canadian Bankers Association.

The judgment of Deschamps and Moldaver JJ. was delivered by

DESCHAMPS J. —

[1] Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy and FTI Consulting Canada ULC.

[2] To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

I. Facts

[3] Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

[4] In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies'*

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Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

[5] At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

[6] Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

[7] From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies could draw from joint credit facilities and would guarantee each other's liabilities.

[8] Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

[9] The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

[10] The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

[11] On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

[12] On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

[13] Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

[14] The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders

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because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

[15] The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

[16] The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

[17] Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

[18] In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the PBA and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

[19] On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

[20] On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301). The Plan Members appealed the dismissal of their motions.

[21] The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641).

[22] The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

[23] The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165).

[24] The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court.

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In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

[25] The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?
2. If so, does the deemed trust supersede the DIP charge?
3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?
4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. *Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Wind-up Deficiencies?*

[26] The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

> **57.** . . .
>
> (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[27] The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

[28] The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions — the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

[29] The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

[30] It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

[31] It is readily apparent that the wind-up deemed trust provision (s. 57(4) PBA) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

> **75.** (1) Where a pension plan is wound up, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,

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(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

[32] Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

[33] The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

[34] Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

[35] In *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*. [Emphasis added; pp. 312-13.]

[36] Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

[37] The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. M.N.R.*, (1998), 41 O.R. (3d) 606 (C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

[38] The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the

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protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

[39] The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

[40] Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

[41] Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

[42] The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

[43] Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

[44] Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

[45] In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

[46] The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

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[47] The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. *Does the Deemed Trust Supersede the DIP Charge?*

[48] The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

> (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

[49] The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

> Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

[53] The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

[54] There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured

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creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

[55] With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[58] In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
> (c) there is no other alternative available to the Applicants for a going concern solution;
> (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
> (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;
> (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
> (g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order . . . ; and
> (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the

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lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7 and 8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

[61] The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

[62] The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (***Burke v. Hudson's Bay Co.***, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

[63] However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

[64] Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

[65] Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

[66] When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

[67] In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up

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to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

[68] In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

[69] Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

[70] As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

[71] First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

[72] Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

[73] In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

[74] The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the

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second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

[75] The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

[76] The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

[77] Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

[78] This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

[79] Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

[80] It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

[81] There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement

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> Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency – at its essence – is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.
>
> *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

[82] In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

[83] In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

[84] I would therefore allow the main appeals without costs in this Court, set aside the orders made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. —

I. Introduction

[85] When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[86] Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[87] The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?

B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?

C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?

D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

[88] My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

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II. Facts and Proceedings Below

A. *Overview*

[89] These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

[90] Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

[91] In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

[92] Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

[93] Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

[94] Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

[95] The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

[96] The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

[97] The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. *Indalex's CCAA Proceedings*

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

[98] As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

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[99] On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;
- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);
- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;
- He granted the DIP lenders a so-called super priority:

> THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trust, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]

- He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

[100] In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J.), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

[101] The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

> THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

[102] On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

[103] Counsel for the former executives received the motion material the night before. Counsel for USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 (Ont. S.C.J.), at para. 4. Morawetz J. wrote that any "reservation of rights" would create uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J.))

[104] On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders. [Emphasis added; para. 9.]

(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

[105] On July 20, 2009, Indalex brought two motions before Campbell J.

[106] The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

[107] The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered

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that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

[108] SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

[109] On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the wind-up deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

[110] Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

(8) The Decision of the Ontario Court of Appeal

[111] The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

[112] Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

[113] Gillese J.A. found that the super priority provided for in the DIP order did not trump the deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency* Act, R.S.C. 1985, c. B-3 ("BIA"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

[114] In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

[115] She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted: para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

[116] Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

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A. *First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?*

(1) Introduction

[117] The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

[118] The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind-up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

[119] The wind-up deficiency payments are "employer contributions" which are "not yet due" as of the date of wind-up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the wind-up".

[120] Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

[121] I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

[122] Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

[123] A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind-up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind-up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73 and 74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up deficiency: paras. 90-91.

[124] For convenience, the provision as it then stood is set out here.

> **75.** (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

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(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

[125] While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

[126] The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

[127] Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, [etc.] . . . In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": The *Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

[128] If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

[129] To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 — i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

(3) The Deemed Trust Provisions

[130] The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

[131] There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

[132] The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

[133] When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations, s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

[134] I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up . . . an employer who is required to pay contributions to the pension

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fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations."

[135] When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) The Interpretative Approach

[136] The issue we confront is one of statutory interpretation and the well-settled approach is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. Taking this approach it is clear to me that the sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

(a) *Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"*

[137] The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "are due . . . and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that have "accrued to the date of the wind up but [are] not yet due". Amounts "due" are covered by the s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

[138] In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

[139] In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

[140] Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

[141] In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D.A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306.

[142] In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed., 2010), at s. 6.5(b); see also Canadian Institute of Chartered Accountants, *CICA Handbook – Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

[143] The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated by him to be equal to sinking

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fund payments [on the bonds and debentures] which shall have accrued but shall not be due at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where . . . a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment: p. 316.

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to "due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

[144] Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37 referring to *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

[145] I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

[146] Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

[147] I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up — that is, the wind-up deficiency — are included.

[148] Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

> (2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,
>
> . . .
>
> (c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

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The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I will turn shortly.

[149] To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "accrued to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued to the date of the wind up" (s. 57(4)).

(b) *The Scheme of the Act*

[150] As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

[151] I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "due and not paid". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "not yet due".

[152] The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b). The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

[153] It is striking how closely the text of s. 75(1)(a) — which does not relate to the wind-up deficiency — tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due." Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that . . . are due . . . and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the wind-up deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

[154] I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) *Legislative History and Evolution*

[155] Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative

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history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43.

[156] Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

[157] The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that the lien and the deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency*.

[158] My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due . . . to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the wind-up deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113

[159] So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a*(1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23*a*(3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80

[160] Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

[161] It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency . . . , up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

[162] It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2

[163] The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

[164] The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

> (4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

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(a) all moneys that the employer is required to pay into the pension plan to meet,
(i) the current service cost, and
(ii) the special payments prescribed by the regulations,
that are due under the pension plan or the regulations and have not been paid into the pension plan; and
(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

[165] The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are* "in addition to the amounts that the employer is liable to pay under subsection 21(2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

[166] The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due)*.

[167] This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

[168] A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension benefit plan. These amendments will clarify the ways in which we can attain that goal.
>
> In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions. . . .
>
> Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarified the intent of Bill 214. [Emphasis added.]
>
> (*Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

[169] Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) *Pension Benefits Act, 1987*, S.O. 1987, c. 35

[170] Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983 version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s.

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21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

[171] The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued to the date of the wind up but not yet due".

[172] The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have accrued to and including the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

[173] To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) *The Purpose of the Legislation*

[174] Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at paras. 13-14.

[175] In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

[176] First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

[177] Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

[178] While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended. In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

[179] For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

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B. *Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?*

(1) Introduction

[180] The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

[181] The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

[182] In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

[183] This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?

(ii) If so, was imposition of a constructive trust an appropriate remedy?

(2) What Fiduciary Duties did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) *Legal Principles*

[184] The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1, at para. 55.

[185] However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 31. As La Forest J. put it in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574:

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship . . . [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. . . . It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. [Emphasis added; pp. 646-47.]

[186] The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.,* 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 141; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

(b) *The Legal Framework of Indalex's Dual Role as a Plan Administrator and Employer*

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[187] In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

[188] Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan." Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

[189] The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

> **22.** (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> . . .
>
> (4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[190] Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: ss. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

[191] Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

[192] The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

[193] Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

[194] This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an

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employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

(c) *Breaches of Fiduciary Duty*

[195] Against the background of these legal principles, I turn to consider the Court of Appeal's findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

(i) Conflict of Interest

[196] The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

[197] The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

[198] This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

[199] Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal — those inherent in the employer's exercise of business judgment — cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

[200] How, then, should we identify conflicts of interest in this context?

[201] In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at § 121, to explain when a conflict of interest occurs in the context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

[202] In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the CCAA Proceedings to Reduce Pension Obligations and Notice of Them

[203] The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131–32.

[204] I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

[205] First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

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> . . . the purpose of the *CCAA* . . . is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

[206] Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

[207] The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA* as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

[208] This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

[209] This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd,.Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater inc.(Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). In his initial *CCAA* order, Gascon J. put off the decision regarding the suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

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[210] Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

[211] I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

[212] I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

[213] To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one . . . does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

[214] The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

[215] I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

[216] Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

[217] Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

[218] Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re*, (2009), 75 C.C.P.B. 206 (Ont. S.C.J.). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. (Gen. Div.)), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

[219] I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

(iii) The Bankruptcy Motion

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[220] Indalex also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

[221] It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

[222] To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) Was Imposing a Constructive Trust Appropriate in This Case?

[223] The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

[224] The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85, cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54, by Sopinka J. (dissenting, but not on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

[225] As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

[226] I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

[227] I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

[228] As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for breach of fiduciary duty. The four conditions are these:

(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

[229] My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific

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property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos*, *at* para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

[230] The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 995;

> . . . for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

[231] While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters'*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. . . . [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

[232] The relevant breach in this case was the failure of Indalex to meaningfully address the conflicts of interest that arose in the course of the *CCAA* proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

[233] Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

[234] Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result. Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

[235] The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

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[236] There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust — i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's breaches of duty to the plaintiff — had been established.

[237] I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

[238] There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

[239] Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach — the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process — had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

[240] A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

[241] I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

C. *Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?*

[242] Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

D. *Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?*

(1) Introduction

[243] The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

[244] With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165, at para. 7.

[245] Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

[246] USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former

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executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) Standard of Review

[247] In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

(3) Analysis

[248] I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

[249] The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

[250] The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

[251] The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

[252] I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The factors set out in *Nolan* and other cases cited therein are best understood as highly relevant considerations guiding the exercise of judicial discretion with respect to costs.

[253] The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

[254] The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

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[255] The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation — the vast majority I would add — would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

[256] The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

[257] In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

[258] I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

IV. Disposition

[259] I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

[260] With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

[261] I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

[262] I would dismiss the USW costs appeal, but without costs.

The reasons of LeBel and Abella JJ. were delivered by

LEBEL J. —

I. Introduction

[263] The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

[264] I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

[265] Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

[266] But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

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II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

[267] Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely, this relationship works or can be twisted, perverted or abused, as was the situation in this case.

[268] The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal intended when it imposed a constructive trust.

[269] Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

[270] It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

[271] Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

[272] The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often

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balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

[273] Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:
>
> > In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction — but that is for another day. [(2009), 79 C.C.P.B. 101 (Ont. S.C.J.), at para. 10, *per* Morawetz J.]
>
> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [Factum, at paras. 54-55]

[274] I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in *CCAA* Proceedings

[275] The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

[276] I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

[277] In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in

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Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203 and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

[278] In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

[279] The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

[280] For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

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APPENDIX

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

6. The said Act is amended by adding thereto the following sections:

23*a*.—(1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

(2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.

(3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

21. . . .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

. . .

23.—(1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

. . .

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(*a*) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(*b*) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

. . .

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(*a*) the value of the assets of the plan; and

(*b*) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

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that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23.—(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

. . .

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32.—(1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58.—(1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

. . .

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

. . .

59.—(1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . .

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75.—(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

. . .

76.—(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Commission declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40 (3) (50 per cent rule) and section 75,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Pension Benefits Act, R.S.O. 1990, c. P.8

57. (1) [Trust property] Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

(2) [Money withheld] For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

(3) [Accrued contributions] An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) [Wind up] Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

. . .

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . .

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.
2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).
3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

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(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

. . .

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

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Appeals of Sun Indalex Finance, George L. Miller and FTI Consulting allowed, LEBEL *and* ABELLA JJ. *dissenting. Appeal of USW dismissed.*

Solicitors for the appellant Sun Indalex Finance, LLC: Goodmans, Toronto.

Solicitors for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors: Chaitons, Toronto.

Solicitors for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited: Stikeman Elliott, Toronto.

Solicitors for the appellant/respondent United Steelworkers: Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondents Keith Carruthers, et al.: Koskie Minsky, Toronto.

Solicitors for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership): Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the respondent/intervener the Superintendent of Financial Services: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Insolvency Institute of Canada: Thornton Grout Finnigan, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Federation of Pensioners: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Montréal.

Solicitors for the intervener the Canadian Bankers Association: Osler, Hoskin & Harcourt, Toronto.

"shareholder"
« actionnaire »
"shareholder" includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies;

"Superintendent of Bankruptcy"
« surintendant des faillites »
"Superintendent of Bankruptcy" means the Superintendent of Bankruptcy appointed under subsection 5(1) of the Bankruptcy and Insolvency Act;

"Superintendent of Financial Institutions"
« surintendant des institutions financières »
"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the Office of the Superintendent of Financial Institutions Act;

"title transfer credit support agreement"
« accord de transfert de titres pour obtention de crédit »
"title transfer credit support agreement" means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract;

"unsecured creditor"
« créancier chirographaire »
"unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be

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deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.

Meaning of "related" and "dealing at arm's length" - Sec 2
(2) For the purpose of this Act, section 4 of the Bankruptcy and Insolvency Act applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.
R.S., 1985, c. C-36, s. 2;
R.S., 1985, c. 27 (2nd Supp.), s. 10;
1990, c. 17, s. 4;
1992, c. 27, s. 90;
1993, c. 34, s. 52;
1996, c. 6, s. 167;
1997, c. 12, s. 120(E);
1998, c. 30, s. 14;
1999, c. 3, s. 22, c. 28, s. 154;
2001, c. 9, s. 575;
2002, c. 7, s. 133;
2004, c. 25, s. 193;
2005, c. 3, s. 15, c. 47, s. 124;
2007, c. 29, s. 104, c. 36, ss. 61, 105;
2012, c. 31, s. 419.

Application - Sec 3
3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Affiliated companies - Sec 3(2)
(2) For the purposes of this Act,

> **(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and**
> **(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.**

Company controlled - Sec 3(3)
(3) For the purposes of this Act, a company is controlled by a person or by two or more companies if

> **(a) securities of the company to which are attached more than fifty per cent of the votes that may be cast to elect directors of the company are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those companies; and**
> **(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the company.**

Subsidiary - Sec 3(4)
(4) For the purposes of this Act, a company is a subsidiary of another company if

> **(a) it is controlled by**

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(i) that other company,
(ii) that other company and one or more companies each of which is controlled by that other company, or
(iii) two or more companies each of which is controlled by that other company; or
(b) it is a subsidiary of a company that is a subsidiary of that other company.
R.S., 1985, c. C-36, s. 3;
1997, c. 12, s. 121;
2005, c. 47, s. 125.

PART I
COMPROMISES AND ARRANGEMENTS

Summary: Compromises and Arrangements - The Main Objective of the Act - Sections 4 to 8

Sections 4 through 5 of the CCAA detail the compromise or arrangement objective of the Act, in respect of unsecured and also secured creditors and call for a meeting of the creditors.

Section 6 then goes on to state the quorum of decision on whether the proposal by the debtor is accepted and if it is, at the discretion of the court, it is binding on them all. Note that the decision of the court to cause the outcome of acceptance on the voting is only discretionary - i.e.; if the proposal is accepted the court may still not grant its sanction.

Pursuant to s. 6(3), unless her Majesty agrees, the court will not sanction a compromise that affects the income tax, employment insurance or Canada Pension Plan obligations, or similar amounts in respect of provincial law that the debtor may have.

Subsection 6(5) allows the court to withhold sanction of the compromise unless the plan makes provision for various categories of employee costs including the $2 k as if the debtor declared bankruptcy at that time.

Subsection 6(6) deals with sanction being withheld if the company has a prescribed pension plan and has not made adequate provision for payments thereto, unless, pursuant to S. 6(7), the pension regulator has agreed to the compromise/arrangement.

Pursuant to s. 6(8) no compromise that puts payments of equity claims ahead of any non-equity claims on the debtor will allow the compromise to be sanctioned.

Section 8 effectively provides that any terms of an instrument causing the rights of any creditors to supersede the CCAA will still be subject to the CCAA.

Compromise with unsecured creditors - Sec 4
4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the

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company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
R.S., c. C-25, s. 4.

Air Canada, Re, 2004 CanLII 34416 (ON SC) - CCAA Restructuring in Support of Unsecured

Date:	2004-04-05
Docket:	03-CL-4932
Parallel citations:	2 CBR (5th) 4
URL:	http://canlii.ca/t/1h284
Citation:	Air Canada, Re, 2004 CanLII 34416 (ON SC), <http://canlii.ca/t/1h284> retrieved on 2013-08-21
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COURT FILE NO.: 03-CL-4932
DATE: 20040405

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF SECTION 191 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A" APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	*Sean F. Dunphy* and *Ashley John Taylor*, for the Applicants, Air Canada *Monique Jilesen*, for the Monitor, Ernst & Young Inc. *Kevin P. McElcheran*, for CIBC *Joseph M. Steiner*, for GTAA *Mark E. Meland*, for The Summitomo Trust & Banking Co. Ltd., and Tokyo Leasing Co., Ltd. *Gregory Azeff*, for GECAS Inc. *Harvey Chaiton*, for Dr. Ratthey and Rainer Manthey (DM Bondholders) *S.R. Rickett*, for Bayerische Landesbank *David R. Wingfield* and *Kim Mullin*, for Tudor Investment Corp. and other Senior Financial Creditors *A. Kauffman*, for Ad Hoc Committee of various Financial Creditors

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)
) **HEARD:** March 17, 2004

FARLEY J.

Re: Perpetual Subordinated Debt

[1] Canadian Imperial Bank of Commerce, Greater Toronto Airports Authority, Airbus, Cara Operations Limited and IBM Canada Limited (collectively "Trade Creditors") moved:

(A) for a declaration that the holders of Subordinated Perpetual Debt

(a) $5^{3/4}$% Subordinated Bonds 1986ff (Swiss fr 200,000,000);
(b) $6^{1/4}$% Subordinated Bonds 1986ff (Swiss fr 300,000,000);
(c) $6^{3/8}$% Interest-Adjustable Subordinated Bonds 1987ff (DM 200,000,000);
(d) Subordinated Loan Agreement (Yen 20,000,000,000); and
(e) Subordinated Loan Agreement (Yen 40,000,000,000)

(collectively "SP Debt") are not entitled to vote or receive any dividend or other distribution from Air Canada unless and until the claims of all unsecured creditors, including those whose claims are in respect of borrowed money, have been paid in full;

(B) a declaration that any entitlement of holders of [SP Debt] must be distributed not to such holders but to all unsecured creditors *pro rata* in relation to their proven claim; and

(C) such further and other relief as this Honourable Court deems just.

[2] Air Canada ("AC") moved for an order authorizing it and its subsidiary Applicants under these CCAA proceedings "to incorporate the terms of the settlement reached between certain holders of [AC's] Senior Debt and certain holders of [AC's SP Debt] in the Applicants' plan of compromise or arrangement, to be filed (the "Plan")". This settlement was described by AC as follows at item 5 of the grounds:

5. Negotiations subsequently took place and an agreement has been executed between certain holders of Senior Debt and certain holders of [SP Debt] pursuant to which:

(a) Holders of [SP Debt] shall not be included in a separate class, but rather shall be included in a general class of unsecured creditors;
(b) Notwithstanding the treatment of holders of [SP Debt] as herein proposed, each creditor holding [SP Debt] shall be entitled to vote the face value of its claim in the same manner as all other unsecured creditors;
(c) The holders of [SP Debt] shall be entitled to a distribution under the Plan which provides to them, in the aggregate, on a *pro rata* basis, twenty-six percent (26%) of the aggregate distribution which would otherwise be made to them if they were not subordinated to Senior Debt;
(d) Seventy-four percent (74%) of the aggregate distribution which would otherwise be made to the holders of [SP Debt] if they were not subordinated to Senior Debt, shall be distributed, on a *pro rata* basis, to the holders of Senior Debt, in addition to all other distributions to which they are entitled as unsecured creditors under the Plan;
(e) For certainty, a party entitled to a distribution in accordance with the foregoing shall be entitled to receive a corresponding portion of all direct or indirect benefits which may accrue to or be enjoyed by unsecured creditors pursuant to any rights offering, over-subscription mechanism or otherwise; and
(f) The mechanism described above shall allow for the distributions set forth above to occur without the necessity of the holders of Senior Debt or Air Canada enforcing the subordination covenants directly against the holders of [SP Debt].

[3] Certain investors ("DM Bondholders") who hold or represent the beneficial holders of approximately 26 million DM of the Deutsche Mark Bonds ("DM Bonds") asserted that since there was no winding-up, liquidation or dissolution of AC, then the subordination of the DM Bonds was not triggered. They relied on the fact that s. 8(2) of the terms of the DM Bonds reads as follows:

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> S. 8(2) Upon any winding-up, liquidation or dissolution of the Borrower, whether in bankruptcy, insolvency, receivership or other proceedings including special Act of Parliament or upon an assignment for the benefit of creditors or any other sequestering of the assets and liabilities of the Borrower or otherwise.

There is no reference to "reorganization" in addition to "winding-up, liquidation or dissolution" as is the case of the SF Bonds or the Yen Loan Agreements:

SF Bonds s. 7

> Upon any distribution of assets of the Company (other than such as is referred to in Section 8(2) and in respect of which the Principal Paying Agent has not exercised its rights contained in Section 8(22) or upon any dissolution, winding up, liquidation or reorganization of the Company, whether in bankruptcy, insolvency, reorganization, receivership or other proceedings or upon any assignment for the benefit of creditors of any other sequestering of the assets and liabilities of the Company or otherwise,

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Yen Loan Agreements para. 6.4.2

> Upon any distribution of assets of the Borrower (other than such as is referred to in Clause 10(h) where the surviving company assumes all the obligations of the Borrower) upon any dissolution, winding up, liquidation or reorganization of the Borrower, whether in bankruptcy, insolvency, reorganization or receivership proceedings or upon an assignment for the benefit of creditors or any other sequestering of the assets and liabilities of the Borrower or otherwise in or upon any similar or analogous proceedings or event: -

No explanation was given for the difference in language so we are left in the dark as to whether it was intentional on a negotiated basis or simply inadvertent drafting.

[4] Each of the SP Debt instruments contains subordination provisions. While all the provisions are not identical, they are substantially similar. The following are definitions from the November 14, 1989 Yen Loan Agreement:

> "Indebtedness" – the principal, premium, if any, and unpaid interest (including interest accrued after the commencement of any reorganization or bankruptcy proceedings) or any indebtedness of the Borrower for borrowed money, whether by way of loan or evidenced by a bond, debenture, note or other evidence of indebtedness and whether secured or unsecured, including indebtedness for borrowed money of others guaranteed by the Borrower;
>
> "Senior Indebtedness" – means all Indebtedness, present or future, which is not expressly subordinated to or ranking *pari passu* with the Loan whether by operation of law or otherwise, in the event of a winding-up, liquidation or dissolution, whether voluntary or involuntary, whether by operation of Law or by reason of insolvency legislation;

[5] The end result is that upon the happening of the relevant triggering event, the holders of the SP Debt have contractually agreed that they will be subordinated to Senior Indebtedness. The Trade Creditors assert that there will be **untold difficulty in determining what is "borrowed money" as this is an undefined term**. With respect, I disagree as not every term has to be defined in an agreement in order to determine its meaning and it would not appear to me to be all that difficult to draw the line if, as and when that becomes necessary.

[6] The Trade Creditors also submit that as among the unsecured debt, as the unsecured SP Debt is subordinated to Senior Indebtedness (also unsecured), then the doctrine of subordination requires that the SP Debt be subordinated to all unsecured debt – (that is, not only the Senior Indebtedness but also all unsecured debt). They rely upon what they say is **"a fundamental principle of Canadian insolvency law that, excepting only specifically enumerated preferred creditors, all** unsecured creditors are entitled to *pro rata* distribution**" and that this principle is reflected in** s. 141 of the *Bankruptcy and Insolvency Act* ("BIA"):

> S.141 Subject to this Act, all claims proved in a bankruptcy shall be paid rateably.

However, this is a CCAA insolvency proceeding not a BIA one. The jurisprudence in CCAA proceedings is that any plans of arrangement are treated as contracts amongst the parties (including the minority voting against) and that the court in a sanction hearing will review the creditor approved plan to see if it is fair, reasonable and equitable, wherein equitable does not necessarily mean equal. See *Alternative Fuel Systems Inc. v. Remington Development Corp.* 2004 ABCA 31 (CanLII), 2004 ABCA 31; *Re Sammi Atlas Inc.* 1998 CanLII 14900 (ON SC), (1998), 3 CBR (4th) 171 (Ont Gen Div).

[7] The Trade Creditors rely upon *Re Maxwell Communications Corporation PLC (No. 2)*, [1993] 1 WLR 1402 (Ch Div) where at pp. 1411-2 in approving the proposed distribution, Vinelott J. concluded that a bilateral subordination between a debtor and a creditor can be effective:

> The question is whether this underlying consideration of public policy should similarly invalidate an agreement between a debtor and a creditor postponing or subordinating the claim of the creditor to the claims of other unsecured creditors and preclude the waiver or subordination of the creditor's claim after the commencement of a bankruptcy or winding up. I do not think that it does. It seems to me plain that after the commencement of a bankruptcy or a winding up a creditor must be entitled to waive his debt just as he is entitled to decline to submit a proof.
>
> If the creditor can waive his right altogether I can see no reason why he should not waive his right to prove, save to the extent of any assets remaining after the debts of other unsecured creditors have been paid in full; ...
>
> So also, if the creditor can waive his right to prove or agree the postponement of his debt after the commencement of the bankruptcy or winding up, I can see no reason why he should not agree with the debtor that his debt will not be payable or will be postponed or subordinated in the event of a bankruptcy or winding up.
>
> (emphasis by Trade Creditors)

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However, I would caution that this quote must be taken in context; similarly for the second Vinelott J. quote. Then in reliance upon Vinelott J.'s views at p. 1416, the Trade Creditors submitted in their factum:

> 20. Accordingly, the Court gave effect to the bilateral subordination provisions as a waiver of the credit to its entitlement to receive any distribution until **all unsecured** creditor claims have been paid in full.

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> 21. In giving effect to the subordination, the Court distinguished on the facts previous decisions of the English courts that had addressed arrangements that disturbed rateable distribution among unsecured creditors. The Court, however endorsed the fundamental principle that a debtor cannot validly contract with one unsecured creditor for any advantage denied to other unsecured creditors.

Vinelott J. stated at p. 1416:

> [If] the clearance arrangements had had the effect contended for by Air France they would clearly have put a member of the clearance arrangements in a position which would have been better than the position of other unsecured creditors. The arrangements would therefore unquestionably have infringed a fundamental principle of bankruptcy law, which is reflected in but not derived from section 302 or its predecessor, that a creditor cannot validly contract with his debtor that he will enjoy some advantage in a bankruptcy or winding-up which is denied to other creditors.
>
> In my judgment I am not compelled by the decisions of the House of Lords in the *Halesowen* and *British Eagle* cases, or by the decisions of the Court of Appeal in those cases or in *Rolls Razor Ltd. v. Cox*, [1967] 1 Q.B. 552, to conclude that a contract between a company and a creditor, providing for the debt due to the creditor to be subordinated in the insolvent winding up of the company to other unsecured debt, is rendered void by the insolvency legislation.
>
> (emphasis by Trade Creditors)

[8] The Trade Creditors went on at paras. 23-24 of their factum:

> 23. However, also consistent with the decision of the English Court in *Maxwell* and cases enforcing the policy of rateable distribution among unsecured creditors which were accepted in *Maxwell*, such agreement cannot be enforced to provide an unsecured creditor (or any subset of unsecured creditors) an advantage in an insolvency proceeding which is denied to other unsecured creditors. Put simply, the [SP Debt] holders are free to waive claims if they choose, but neither they nor the debtor can direct that the resulting benefit shall be distributed preferentially to some unsecured creditors and not others.
>
> 24. Treating the holders of [SP Debt] as being subordinated to all unsecured creditors is consistent with key principles of Canadian insolvency law and with the terms of the subordination itself. **Such holders should not be entitled to receive any dividend until creditors with "borrowed money" claims are paid in full. As claims arising from "borrowed money"; in the case, are** unsecured claims, they are entitled to receive *pro rata* **distributions under Air Canada's plan of** arrangement with all other unsecured creditors and will be paid in full **only** when all other unsecured claims are paid in full.

[9] With respect, I disagree. The Trade Creditors did not bargain or pay for any benefit or advantage in respect of the SP Debt nor are they parties to any agreements in respect thereto and it is important to observe that they have not been designated as third party beneficiaries (nor have they asserted that they were). The cases cited by the Trade Creditors would not appear to me to have much if any relevance to the situation in this case. *Ex parte MacKay* (1873) 8 Ch App 643 dealt with a situation where a creditor had bargained with the debtor for additional rights upon the bankruptcy of that debtor. *British Eagle International Airlines Ltd. v. Compagnie Nationale Air France*, [1975] 1 WLR 780 (HL) involved the applicability of the laws of bankruptcy to the existence of mutual debts existing as of the date of bankruptcy. *Re Gingras Automobile Ltée*, 1962 CanLII 79 (SCC), [1962] SCR 676 deals with the legal question of paramountcy. *Hamilton and others v. Law Debenture Trustee Ltd. and others*, [2001] 2 BCLC 159 (Ch Div); *Maxwell supra*; *Re British & Commonwealth Holdings PLC (No. 3)*, [1992] 1 WLR 672 (Ch Div) each dealt with instruments that had rights on their face that were subordinated to the rights of all other creditors.

[10] Even within a bankruptcy context there is no impediment to a creditor agreeing to subordinate his claim to that of another creditor. See *Re Rico Enterprises Ltd.* 1994 CanLII 996 (BC SC), (1994), 24 CBR (3d) 309 (BCSC) where Tysoe J. observed at pp. 322-3:

> ...If one creditor subordinates its claim to the claim of another party without subordinating to other claims ranking in priority to the claim of the other party, it is my view that a distribution of the assets of the bankrupt debtor should be made as if there was no subordination except to the extent that the share of the distribution to which the subordinating creditor would otherwise be entitled should be paid to the party in whose favour the subordination was granted.
>
> It is not appropriate to simply take the subordinating creditor out of the class to which it belongs and put it in the class ranking immediately behind the holder of the subordination right. I say this

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for two reasons. First, the creditors in the same class as the subordinating creditor should not receive the benefit of a subordination agreement to which they are not a party and on which they are not entitled to rely. They would receive a windfall benefit by the removal of the subordinating creditor from their class in the event that there were insufficient monies to fully pay their class because the total indebtedness of the class would be reduced and the pro rata distribution would be increased. Second, if the parties to the subordination agreement turned their minds to it, they would inevitably agree that the subordinating creditor should receive its normal share of the distribution and give it to the party in whose favour the subordination was

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> granted. The party receiving the subordination would agree because it would be paid a portion of a distribution to a higher class of creditor that it would not otherwise receive and the subordinating creditor would agree because it would not receive the money in either event.

See also *Re Bank of Montreal v. Dynex Petroleum Ltd.* 1997 CanLII 14795 (AB QB), (1997), 145 DLR (4th) 499 (Alta QB) at p. 529 (reversed on appeal on other grounds); Roy Goode, *Legal Problems of Credit and Security*, 3rd ed. (Sweet & Maxwell: London, 2003) at p. 55. It would seem to me that a guide-lining principle should be that as discussed in A.R. Keay, *MacPherson's Law of Company Liquidation* (London; Sweet & Maxwell, 2001) at p. 717:

> However, they [the courts] would permit a liquidator to distribute according to an agreement made along the lines of the latter situation providing that to do so would not adversely affect any creditor not a party to the agreement, *i.e.*, creditors not involved in the subordination agreement would not receive less under that agreement than would have been received if distributions had been made on a *pari passu* basis.

See also J.L. Lopes, "Contractual Subordinations and Bankruptcy" (1980), 97 No. 3 *Banking Law Journal*, 204 at p. 206.

> At the conclusion of the bankruptcy proceedings, a dividend is allocated to all unsecured creditors, including the subordinated creditor, on a pro rata basis. The dividend allocated to the subordinated creditor is paid over to the senior creditor, to the extent of its claim, with the subordinated creditor retaining the remainder of the dividend if the senior creditor is paid in full.* This process neither affects the amount of claims against the debtor nor the dividend paid to unsecured creditors. (*See, e.g., *In re* Associated Gas & Elec. Co., 53 F. Supp. 107, 114 (S.D.N.Y. 1943).)

[11] It seems to me that what should be looked at with respect to the settlement is the substance and not the form, although it does seem to me that it would be better for form to follow substance. In essence, what the settlement provides for (the settlement to provide some certainty of the result and therefore avoid the uncertainty of the claim by that the SP Debt subordination provision may not be effective vis-à-vis the Senior Indebtedness and the issue of whether the SP Debt would be entitled to a separate class with the possibility of a veto being exercised by this class against a plan of reorganization, otherwise acceptable to the other creditors) is that the SP Debt would receive its rateable share of "proceeds" under the proposed plan but as a result of the agreement between the adherents to the settlement, then the SP Debt adherents would transfer 74% of their proceeds to the benefit of the Senior Indebtedness and retain 26%. It would also appear that the same result could obtain with a partial assignment of SP Debt claims or a declaration of trust in favour of the Senior Indebtedness, with the *quid pro quo* being that there be no subordination as to the remaining 26% beneficially owned by the holders of the SP Debt.

[12] There was no problem with this type of subordination arrangement in *Horne v. Chester & Fein Property Developments Pty Ltd. and Ors* (1986), 11 ACLR 485 (Vic SC) at pp. 489-90 where Southwell J. stated:

> In the speech of Viscount Dilhorne, there is a discussion of a number of authorities, of which "the weight of opinion expressed ... appears to me to be in favour of the conclusion that it is not possible to contract out of s 31". However, there, and, so far as I have seen in most other relevant cases, the term "contract out" is used in circumstances where the contract relied upon is one, the performance of which, upon later insolvency, would adversely affect other creditors who were not parties to the contract. Viscount Dilhorne referred with approval at 805 to *dicta* of Hallett J. in *Victoria Products Ltd. v. Tosh & Co. Ltd.* (1940), 165 LT 78 where His Honour said that "... an attempt to leave outside that process some particular item is one which should be regarded as against the policy of the insolvency laws ..."
>
> Repeatedly, over the years, "the policy of the insolvency laws" has formed the basis of decision. That policy, as it appears to me, was never intended to alter the rights and obligations of parties freely entering into a contract, unless the performance of the contract would, upon insolvency, adversely affect the right of strangers to the contract. Authority for that proposition is to be found in *Ex parte Holthausen*; *Re Scheibler* (1874) LR 9 Ch App 722 at 726-7 (referred to by Lord Morris in his dissenting speech in *British Eagle* at 770-1).

[13] In *Canada Deposit Insurance Corporation v. Canadian Commercial Bank* (unreported decision of Wachowich J. CQBA released December 15, 1993), the governments of Canada and Alberta waived their Crown priority on insolvency in favour of all other unsecured creditors, reducing themselves to *pari passu* ranking. But the CDIC also waived any Crown priority that it may have arising from its status as an agent of the government of Canada and it also subordinated its claim in favour of some but not all of the other unsecured creditors (including trade creditors). As put by the Bayerische Landesbank group in their factum at para. 65:

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> 65. Justice Wachowich correctly dismissed the objection made to him that the selective nature of the subordination offended the *pari passu* principle. He approved a distribution in which it was first determined what the ordinary shares of all unsecured creditors were and then the *pari passu* recovery by CDIC attributable to its claim was redirected to those creditors to whom CDIC (here, the [SP Debt] holders), the corresponding enhanced recovery went to those unsecured creditors who were intended to enjoy the benefit of the subordination covenant (here, holders of the Senior Indebtedness) and the effect on the other unsecured creditors (here, the trades) was neutral.

[14] In the end result I do not see that there is any problem with the SP Debt being selectively subordinated to the Senior Indebtedness. **This subordination to that "borrowed money" does not result in the SP Debt being subordinated to** all the unsecured debt, Senior Indebtedness and non-Senior Indebtedness alike.

[15] With respect to the right to vote, I do not see that the fact that there is a subordination takes away or detracts from the right to vote by holders of the SP Debt. See *Menegon v. Philip Services Inc.*, [1999] OJ No. 4080 (SCJ) at paras. 38, 53. At para. 21 of *Uniforêt Inc. (In the Matter or the Arrangement of)*, [2003] QJ No. 9328 (SCJ), Tingley J. stated:

> 21. For a plan of arrangement to succeed, an insolvent company must secure the approval of all classes of its creditors, even those who have subordinated their claims to all other creditors, as is the case with the debenture holders.

[16] The Trade Creditors motion is dismissed.

[17] The issue of whether the AC Applicants can incorporate the terms of the subject settlement or some equivalent thereof in a Plan to be proposed is in my view a matter for them to decide, but in general, I see no impediment to their doing so provided that they take into account all relevant factors.

[18] That leaves the issue of the position of the DM Bonds in light of the fact that s. 8(2) of their Indenture does not **refer to "reorganization" in the same way as the other issues of the SP Debt does**. Again, one must look at this provision in context. Allow me to set out the provisions of s. 8(1)(2)(5) and (7):

> 8. Subordination and Status; Listing
>
> (1) The payment of principal and interest on the Bonds and Coupons is hereby expressly subordinated, to the extent and in the manner hereinafter set forth, in right of payment to the prior payments in full of all Senior Indebtedness of the Borrower. **The term "Senior Indebtedness" shall mean all indebtedness, present or future, which is not expressly** subordinated to or ranking *pari passu* with the Bonds, whether by operation of law or otherwise, in the event of a winding-up, liquidation or dissolution, whether voluntary or involuntary, whether by operation of law or by reason of insolvency legislation. The term **"Indebtedness" shall mean the** principal, premium, if any, and unpaid interest (including interest accrued after the commencement of any reorganization or bankruptcy proceeding) on any indebtedness of the Borrower for borrowed money, whether evidence by a bond, debenture, note or other evidence of indebtedness whether secured or unsecured,

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including indebtedness for borrowed money of others guaranteed by the Borrower and including the Bonds and Coupons contemplated hereby.

(emphasis added)

(2) Upon any winding-up, liquidation or dissolution of the Borrower, whether in bankruptcy, insolvency, receivership or other proceedings including special Act of Parliament or upon an assignment for the benefit of creditors or any other sequestering of the assets and liabilities of the Borrower or otherwise,

(a) the holders of all Senior Indebtedness shall be entitled to receive payment in full of all sums on account of Senior Indebtedness (including payment of or provision for any unmatured, contingent or unliquidated Senior Indebtedness) before the holders of Bonds or Coupons are entitled to receive any payment of interest or principal; and

(b) any payment or distribution of assets of the Borrower of any kind or character, whether in cash, property or securities, to which the holder of Bonds or Coupons would be entitled except for the provisions of this § 8 shall be paid by the liquidation trustee or agent or other person making such payment or distribution, whether a trustee in bankruptcy, a receiver or liquidating trustee or otherwise, directly to the holders of Senior Indebtedness or their representative or representatives or to the trustee or trustees under any indenture under which any instrument evidencing any of such Senior Indebtedness may have been issued, rateably according to the aggregate amounts remaining unpaid on account of the principal of, premium, if any, and interest on the Senior Indebtedness, held or represented by each, to the extent necessary to make payment in full of all Senior Indebtedness remaining unpaid, after giving effect to any concurrent payment or distribution to the holders of such Senior Indebtedness; and

(c) subject to the payment in full of all due Senior Indebtedness holders of Bonds or Coupons shall be subrogated *pro rata* (based on respective amounts paid for the benefit of the holders of Senior Indebtedness) with the holder of other Indebtedness to the rights of the holders of Senior Indebtedness to receive payments or distributions of cash, property or securities of the Borrower applicable to Senior Indebtedness until the Bonds and Coupons shall be paid in full and no such payments or distributions to the holders of Bonds or Coupons of cash, property or securities otherwise distributable to the holders of Senior Indebtedness shall, as between the Borrower, its creditors other than the holders of Senior Indebtedness, and the holders of Bonds or Coupons be deemed to be a payment by the Borrower to the holders of Bonds or Coupons, or for their account. It is understood that the provisions of this § 8 are and are intended solely for the purpose of defining the relative rights of the holders of Bonds or Coupons and the holders of other *pari passu* Indebtedness, on the one hand, and the holders of Senior Indebtedness, on the other hand.

(5) No payment by the Borrower on the Bonds or Coupons (whether upon redemption or repurchase, or otherwise) shall be made if, at the due time o f such payment or immediately after giving effect thereto, (a) there shall exist a default in the payment of principal, premium, if any, sinking fund or interest with respect to any Senior Indebtedness, or (b) there shall have occurred an event of default (other than a default in the payment of principal, premium, if any, sinking fund or interest) with respect to any Senior Indebtedness, as defined therein or in the instrument under which the same is outstanding, permitting the holders thereof or any trustee under any such instrument to accelerate the maturity thereof, and such event of default shall not have been cured or waived or shall not have ceased to exist (except payments made if the Bonds are redeemed or acquired prior to the happening of such default or event of default).

(7) The Borrower undertakes vis-à-vis the Trustee for the benefit of the holders of Bonds and Coupons that until such time as the Bonds or Coupons have been completely repaid the Borrower will ensure that the Bonds rank and will rank *pari passu* with all unsecured and subordinated Indebtedness of the Borrower other than Indebtedness preferred by law.

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[19] It is not instantly obvious as to which provision "hereafter" refers to as there is no specific section reference in the same way as is specified in sections 1(2), 2(1), 3(1), 3(2), 9(3) and 10(3) of the DM Bond terms. It was posited by the Bayerische Landesbank group that "hereafter" may refer to (i) the remainder of s. 8(1); (ii) s. 8(2); (iii) the entire subsequent balance of s. 8; or (iv) the entire balance of the DM Bond terms. As the balance of s. 8(1) consists of definitions of "Senior Indebtedness" and "Indebtedness", this would speak to the "extent" of the subordination of the DM Bonds but would not address the manner in which they are subordinated.

[20] Section 8 does contain a description of how distributions are to be applied as between holders of Senior Indebtedness and holders of the DM Bonds in the event of AC being wound-up, liquidated or dissolved and there is a distribution of its assets. Thus s. 8(2) can be read as addressing the "manner" of the subordination in those particular circumstances of such a winding-up, liquidation or dissolution. However is s. 8(2) the exclusive trigger in respect of subordination? It should be kept in mind that there is no "magic words or formula" to invoke a subordination. As well, as indicated above, there are other references to specific provisions of the terms so as to direct the reader to a specific spot. It should be observed that s. 8(2) is not the only provision in the balance of s. 8 which deals with the subject of subordination as s. 8(3), (4), (5), (6) and (7) contain additional procedural or other provisions addressing in some sense the "manner" of subordination. Is there a conflict with s. 8(5) or (7) if "hereafter" refers only to s. 8(1) and (2)?

[21] Section 8(5) provides that the subordination of the DM Bonds is effective if AC fails to make any payment to any holder of the Senior Indebtedness, when due, without any reference to whether or not this default in timely payment gives rise to, or occurs in the course of, any form of insolvency proceedings. There has been a default in the payment of interest due on the Senior Indebtedness since some time prior to the CCAA filing in April, 2003. The DM Bondholders assert that this default will be cured as it is expected that the amounts due on the Senior Indebtedness will be satisfied upon implementation of a Sanctioned Plan (and in this respect I note that there is no time limit for cure to take place contained in s. 8(5)). However this presupposes that the Plan mechanism would indeed cure the default. However in the context of s. 8(5), I do not see that such compromise of the right of holders of Senior Indebtedness to be paid acts as a cure which would otherwise inactivate the form of subordination which s. 8(5) provides. Thus it would seem to me that at the present time, the failure to pay amounts due on the Senior Indebtedness has caused a default which has triggered the subordination provisions of s. 8(5). This trigger aspect is not dependent upon there being a "reorganization".

[22] Section 8(7) provides that the DM Bonds are to rank *pari passu* with all unsecured subordination Indebtedness of AC which would include the other issues of SP Debt. If the DM Bonds were not to rank equally with the rest of the SP Debt, then s. 8(7) would be rendered meaningless.

[23] It therefore seems to me that the DM Bonds are to be treated at this time as SP Debt which is to be treated in the same way as the other issues of SP Debt which are all presently subordinated to the Senior Indebtedness.

[24] Orders to issue accordingly.

J.M. Farley

Released: April 5, 2004

Anvil Range Mining Corp. (Re), 2002 CanLII 42003 (ON CA) - Example with Appeal Failing on Grounds of "fair and reasonable" arrangement with No Substantial Difference in Out-come to Unsecured Creditors

Date:	2002-07-05
Docket:	C36919
Parallel citations:	34 CBR (4th) 157
URL:	http://canlii.ca/t/1czsn
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DATE: 20020705
DOCKET: C36919

COURT OF APPEAL FOR ONTARIO

MORDEN, BORINS and FELDMAN JJ.A.

B E T W E E N :

IN THE MATTER OF ANVIL RANGE MINING CORPORATION;

AND IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED;

AND IN THE MATTER OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C-43, AS AMENDED;

AND IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED;

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF ANVIL RANGE MINING CORPORATION

Kevin R. Aalto and David Estrin for the appellants Cumberland Asset Management, Berner & Company, Global Securities Corporation, Peel Brooke Inc, Inukshuk Resources Inc., Robert N. Granger and Adrian M.S. White

George Karayannides and Kenneth Kraft for the respondent Deloitte & Touche Inc., Interim Receiver of Anvil Range Mining Corporation and Anvil Mining Properties Inc.

David Hager for the respondent Cominco Ltd.

John Porter, for the respondent Department of Indian Affairs and Northern Development

Jeremy Dacks for the respondent the Yukon Territorial Government

Derek T. Ground for the respondent Ross River Dena Council and Ross River Development Corporation

Geoffrey B. Morawetz for the respondent Yukon Energy Corporation

Heard: March 6, 2002

On appeal from orders of Justice James Farley dated March 29, 2001 and May 7, 2001.

BY THE COURT:

[1] Cumberland Asset Management, and others, appeal from orders made by Farley J. dated March 29, 2001 and May 7, 2001. In the March 29, 2001 order Farley J. sanctioned a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (C.C.A.A.) proposed by Deloitte & Touche Inc., the Interim Receiver of Anvil Range Mining Range Mining Corporation and Anvil Range Properties Inc. In his May 7, 2001 order, Farley J. ordered that the appellants pay costs relating to the sanction motion in the total amount of $28,500.

[2] The facts respecting the sanctioning of the plan are set forth in Farley J.'s reasons which are reported at 25 C.B.R. (4th) 1 and need not be repeated in detail. The following is an outline, which contains some history of this proceeding which is not included in Farley J.'s reasons.

[3] Anvil Range Mining Corporation is the owner of a lead and zinc mine, known as the Faro Mine, in the Yukon Territory. It bought this mine for about $27,000,000 in 1994 from KPMG Inc., in its capacity as Interim Receiver of the then owner, Curragh Inc.

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[4] Anvil Range began production in August 1995 after conducting a nine-month $75,000,000 pre-stripping and mill refurbishment program. It suspended mining operations in December 1996 and milling operations in the spring of 1997 because of falling metal prices. It recommenced operations in the fall of 1997 but ceased mining and milling early in 1998.

[5] In January 1998, Anvil Range applied for and received protection from its creditors under the C.C.A.A. This was the beginning of the proceeding in which the orders under appeal were, eventually, made. In March 1998, Cominco Ltd., a secured creditor of Anvil Range, moved for the appointment of an interim receiver and termination of the stay provided for in the C.C.A.A. proceeding. Deloitte & Touche Inc. was appointed Interim Receiver and the court directed it to report to the court on certain matters, including seeking advice and directions respecting a marketing plan for the mine.

[6] In response to this, the Interim Receiver filed its second report dated June 17, 1998 in which it recommended that "no funds be spent on marketing the mine for the present". This was based on several different facts, one of them being "the fact that no prospective purchasers had emerged to that date .... to express even minimal interest in the mine site despite the well publicized facts in the industry press".

[7] As part of the ongoing dispute among the parties, the Interim Receiver brought a motion before Blair J., which was heard on August 20, 1998, seeking approval to sell certain assets at the mine. Blair J. noted that the Interim Receiver had expressed the opinion on the basis of its market analysis that it was "unlikely that the Faro Mine can be reopened within the next 2-3 years and possibly as long as 5 years." He then said:

I agree that it is difficult to be very optimistic about the future prospects of the Faro Mine, including the chance of its re-opening. On the other hand, Strathcona (acknowledged by all to be expert in the field) seems to feel strongly that the best chance of recovery is if the Grum Pit at least is kept on a "standby-mode" ready to be made operative quickly when a period of good metal prices arrives. To do this the equipment in question will be necessary. To replace it would be costly and it may well be a non-starter if what is being considered is only a 3 year operation or so.

[8] Blair J. did not dismiss the request for approval to sell the equipment but adjourned it to October 29, 1998 to enable the Yukon Territorial Government to do further analysis. This was because of the importance of the mine to the fabric of the Yukon Territory.

[9] After extensive negotiations and a filing of the Yukon Territorial Government report, a funding formula was established in December 1998 whereby the Department of Indian Affairs and Northern Development ("DIAND") assumed most of the funding obligations of going forward. This funding was secured by a charge against the real property.

[10] In December 1999, the court granted leave to the Interim Receiver or the secured creditors to file a plan of arrangement. About a year of negotiations among the secured creditors followed, eventually leading to an extensive settlement conference held in Vancouver under the direction of Justice Kierans, sitting as a justice of the Supreme Court of the Yukon Territory. The conference resulted in a settlement among three groups of secured creditors: (1) the Mining Lien Act Claimants; (2) Cominco Ltd.; and (3) DIAND, the Yukon Territorial Government and the Yukon Workers' Compensation, Health and Safety Board. The settlement was to be implemented by a plan under the C.C.A.A.

[11] As will be set forth in more detail later in these reasons, the three groups of secured creditors were the only parties with a legal and economic interest in the assets of Anvil Range. The plan settled a series of complex priority disputes both within creditor classes and among creditor classes and also dealt with allocating funds in the Interim Receiver's possession.

[12] The plan divides the creditors who are affected by it (the "Affected Creditors") into three classes (the three groups mentioned above):

1. The Mining Lien Act Claimants.

2. Cominco Ltd.

3. The government creditors, DIAND, the Yukon Territorial Government, and the Yukon Workers' Compensation, Health and Safety Board.

[13] The plan provides for the class 3 creditors to acquire the mine and the mill located on it and certain other assets (the "Excluded Assets") and to assume responsibility for funding the ongoing necessary environmental, maintenance and security programs. The other two classes of Affected Creditors are to share in the proceeds of the sale of the remaining assets (the "Realization Assets").

[14] The Interim Receiver recommended approval of the plan as the best alternative for settling the outstanding priority issues in dispute and because there was no recovery possible other than to the Affected Creditors.

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[15] The class 1 creditors' secured claims against Anvil Range property, as judicially declared by judgments of the Supreme Court of the Yukon Territory, total $18,312,169. The claim of the class 2 creditor, Cominco Ltd., was judicially determined by the Superior Court of Justice (Ontario) on January 27, 1999 to be $24,353,657 with post-judgment interest accruing on this amount at 8.5% per annum.

[16] With respect to the class 3 creditors, the Yukon Territorial Government and the Yukon Workers' Compensation and Health and Safety Board claim is about $1,000,000. The claim advanced on behalf of DIAND is said to total over $60,000,000 for funding the Interim Receiver's expenses and, also, the environmental remediation costs. We shall deal with the salient details of it shortly.

[17] The Affected Creditors unanimously approved the plan which was then sanctioned by the order of Farley J. dated March 29, 2001.

[18] The appellants' appeal is substantially based on the following submissions:

1. The plan is not "fair and reasonable" in all of its circumstances as it effectively eliminates the opportunity for unsecured creditors to realize anything.

2. The plan is contrary to the purposes underlying the C.C.A.A.

3. DIAND's reclamation claim is inconsistent with the "fair and reasonable principles" of the C.C.A.A. and environmental remediation legislation.

[19] Underlying these submissions is the submission that Farley J. erred in not requiring a more complete and in-depth valuation of Anvil Range's assets be obtained by the Interim Receiver.

[20] This last submission should be dealt with first because it is fundamental to the success of the appeal. Farley J.'s findings were based on two reports, one by Strathcona Mineral Services Ltd. dated March 12, 2001 and the other by Deloitte & Touche Corporate Finance Canada, Inc. dated March 13, 2001. In preparing its report, Deloitte & Touche reviewed the Strathcona report, among other materials.

[21] In its report Strathcona noted that in the Interim Receiver's 22nd report there was an estimate of the capital expenditures that would be required to resume mining activity at the Grum deposit (which was the only accessible resource base on the Anvil property) including the purchase of mining equipment, rehabilitation of the pit walls, and modifications and repairs to the process facilities. Strathcona said:

The total is estimated at $80 to $100 million before working capital requirements and we consider this estimate to be reasonable and in the general range of what could be expected. It is clear that the capital expenditures to restart mining operations are going to exceed, perhaps by a factor of two, the cumulative gross operating margins for three years of operation that are indicated.

[22] Strathcona concluded its report as follows:

The total amount realized from the sale or disposition of the foregoing assets on a salvage basis would appear to be in the order of $10-$15 million without making any contribution towards the ongoing care and maintenance costs for the property or the reclamation requirements which we understand have become the responsibility of DIAND. There may also be some value ascribed to tax pools that remain from operating losses, capital expenditures and exploration expenditures by Anvil Range. However, presumably most of the value, if any, of those tax pools would only be applicable upon the resumption of mining operations on the property, and the Interim Receiver would be best positioned to comment on this item.

[23] Deloitte & Touche Corporate Finance Canada, Inc. concluded that the established market value of all the assets to be "in the range of $11.1 to $19.9 million (Schedule 1), as at January 31, 2001" and that, if it were asked to be more specific, "[it] would suggest the mid-point of the foregoing range, being $15.5 million." It concluded: "Based on the above, there is no value remaining for the unsecured creditors, as the amount owed to secured creditors of over $90.0 million exceeds the value of the assets of Anvil Range."

[24] The appellants submitted a letter from Watts, Griffis & McOuat, Consulting Geologists and Engineers, dated March 21, 2001 which reviewed several documents, "in particular" the Strathcona report dated March 12, 2001. In this letter, Watts, Griffis & McOuat stated "a number of questions about the methodology and logic that Strathcona is using". It did not state an opinion on the value of the Anvil Range property.

[25] On these materials, Farley J. concluded that "the secured claims are far in excess of the value of the assets" and that the value had to be determined "on a current basis" and not "on a speculative or (remote) possibility basis." He dealt with the evidence submitted by the appellant as follows:

The Watts, Griffis & McOuat letter of March 21, 2001 has been hastily prepared in an attempt to throw doubt on some of the Strathcona observations and conclusions – but not to discredit them. In fact in numerous instances [the] letter concurs with the Strathcona report. Rather the author of the letter has some questions. It must be appreciated that Strathcona/Farquharson has had significant involvement with the Anvil mining facilities over the past several years,

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whereas Watts, Griffis & McOuat has only had this rather peripheral engagement. I do not find it unusual that two experienced consultants in this mining field may have different views or approaches, nor that one may feel the need for more information than it was able to glean from reviewing the listed documents before reaching a conclusion. In the result, I think it reasonable to accept the views of Farquharson, an established and recognized expert in this field, who has had, as indicated, considerable experience with this matter over the past several years. Further, I think it inappropriate and unnecessary to further delay and incur additional costs to engage upon a further study.

> [26] In our view, Farley J. did not err in accepting the respondent's evidence as affording a reasonable basis for his findings and, further, he did not make any error in his assessment of this evidence that would justify our interfering with his conclusions: *Equity Waste Management of Canada v. Halton Hills* (*Town)* 1997 CanLII 2742 (ON CA), (1997), 35 O.R. (3d) 321 (C.A.) at 333-336.
>
> [27] It may be that the Strathcona report, as a free standing document, could have been more detailed but this is far from saying that it was not capable, particularly in the context of this proceeding, which began in 1998, of forming a reasonable basis for Farley J.'s findings. This context includes the evidence that Anvil Range bought the property in 1994 for $27,000,000, that its resources underwent depletion since then, that the cost of putting the property in a state where it could recommence operations was some $80,000,000 to $100,000,000 and, although it had been known for sometime in the industry that the property was "available", no one had expressed any interest in it.
>
> [28] We turn now to the three basic submissions of the appellant set forth in paragraph 18 of these reasons.
>
> [29] It will be helpful to deal with the third submission first, that relating to the DIAND claim. The total DIAND claim is for something over $60,000,000. **The appellants submit that by reason of the "polluter pays" principle, it is wrong that DIAND should have a secured claim against the assets of Anvil Range for environmental remediation at the expense of the unsecured creditors. There are several facets to this submission but, because of the particular facts of this case, we need not explore them. Of the total DIAND claim, some $16,000,000 relates to funds expended under court orders for the Interim Receiver and this is, undeniably, a valid secured claim. As will be apparent, it is sufficient to resolve this appeal if only this part of DIAND's claim is taken into account – and it may well not be necessary to take any part of the claim into account.**
>
> [30] We turn now to the first two of the appellant's specific submissions. **The first is that the plan is not fair and reasonable because it effectively eliminates the opportunity for unsecured creditors to realize anything.**
>
> **[31] From the accepted valuation the maximum possible total value of Anvil Range's assets is $19,900,000. After eliminating the portion of DIAND's claim for remediation costs, the secured claims total at least $60,000.000. Accordingly, even after allowing for a fair margin of error on each side of the equation (the assets side and the claims side) it can be seen that the unsecured creditors have no legal or economic interest in the assets in question.**
>
> **[32] The second submission is that the plan is contrary to the purposes of the C.C.A.A. Courts have recognized that the purpose of the C.C.A.A. is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators. See, for example, *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.* (1989), 73 C.B.R. (NS) 195 (B.C.C.A.) at 201. Farley J. recognized this but also expressed the view in paragraph 11 of his reasons that:**

The CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* reflex, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* 1995 CanLII 7380 (ON SC), (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List] at p. 104. Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.

> **[33] Further to this it may be noted that the plan in this case reflected a compromise of difficult priority issues among the secured creditors and, as stated later in Farley J.'s reasons, "the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship."**
>
> [34] It may also be noted that s. 5 of the C.C.A.A. contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors.
>
> [35] Relevant to this issue is the fact that the appellants put forward an alternative plan, which involved their receiving the corporate shell of Anvil Range together with $500,000, and other terms. This plan, however, had no viability. As Farley J. noted in his reasons for the costs disposition it was "doomed to failure given the stated opposition to same [the alternate plan] of the secureds-Cominco Lien and Claimants and DIAND".

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[36] It is not necessary to resolve this issue to decide the appeal**. If the order under appeal was not properly made under the C.C.A.A., there is no doubt that it could have been made by Farley J. in response to the alternative relief sought, which was that of approving a sale of Anvil Range's assets by the Interim Receiver on terms substantially similar to those provided for in the plan. Taking into account that the assets are insufficient to pay even half of the secured creditors claims, it is clear that the order under appeal occasioned no prejudice whatsoever to the appellants. Accordingly we do not give effect to this submission.**

[37] In the complex circumstances of the operation of the mine and given that there is no hope of the sale generating sufficient funds to satisfy the secured creditors, it cannot be said that Farley J. erred in approving the plan as being fair and reasonable.

COSTS

[38] The other appeal is from Farley J.'s order requiring the appellants to pay costs relating to the motion which he fixed in the total amount of $28,500 and allocated as follows:

$15,000 to the Interim Receiver;
$ 7,000 to Cominco;
$ 5,000 to DIAND;
$ 1,500 to Yukon Energy Corporation

[39] The appellants submit that Farley J. erred in this costs disposition because parties with an interest in a company governed by the C.C.A.A. should be free to appear in court and oppose the sanctioning of a plan on legitimate grounds without the threat of the penalty of the costs being imposed against them.

[40] The award of costs, of course, was a matter within the discretion of the judge and we are not entitled to interfere with the exercise of the discretion just because we may have exercised it differently. To succeed the appellants must show that the exercise of discretion was affected by some error in principle or by misapprehension of the facts. In this case, while we might have been inclined simply to deprive the appellant of costs relating to the motion, we cannot say that there was no principled basis for the disposition which Farley J. made. He was entitled to conclude, as he did, that there was no realistic basis supporting the appellants' opposition to the plan.

DISPOSITION

[41] In the result, the appeal is dismissed with costs payable by the appellants to the respondents who delivered factums and appeared on the hearing of the appeal. These respondents should deliver their submissions respecting the costs of the appeal, in writing, within seven days of the release of these reasons and the appellants should deliver their submissions within fourteen days of the release of the reasons.

42. "J.W. Morden J.A."
43. "Stephen Borins J.A."
44. "K. Feldman J.A."

Released: July 5, 2002

Metcalfe & Mansfield Alternative Investments II Corp., (Re) , 2008 ONCA 587 (CanLII) - Under CCAA Compromise Can Release to Non-Related Parties Occur

Date:	2008-08-18
Docket:	C48969; M36489
Parallel citations:	92 OR (3d) 513; 296 DLR (4th) 135; 47 BLR (4th) 123; 45 CBR (5th) 163; 240 OAC 245
URL:	http://canlii.ca/t/20bks
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CITATION: Metcalfe & Mansfield Alternative Investments II Corp., (Re) , 2008 ONCA 587
DATE: 20080818
DOCKET: C48969 (M36489)

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COURT OF APPEAL FOR ONTARIO
LASKIN, CRONK and BLAIR JJ.A.
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP.,
4446372 CANADA INC. AND 6932819 CANADA INC.,
TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

BETWEEN:
THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO,
Applicants (Respondents in Appeal)

and

METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP.,
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP.,
4446372 CANADA INC. AND 6932819 CANADA INC.,
TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO
Respondents (Respondents in Appeal)

and

AIR TRANSAT A.T. INC., TRANSAT TOURS CANADA INC., THE JEAN COUTU GROUP (PJC) INC., AÉROPORTS DE MONTRÉAL INC., AÉROPORTS DE MONTRÉAL CAPITAL INC., POMERLEAU ONTARIO INC., POMERLEAU INC., LABOPHARM INC.,, DOMTAR INC., DOMTAR PULP AND PAPER PRODUCTS INC., GIRO INC., VÊTEMENTS DE SPORTS R.G.R. INC., 131519 CANADA INC., AIR JAZZ LP, PETRIFOND FOUNDATION COMPANY LIMITED, PETRIFOND FOUNDATION MIDWEST LIMITED, SERVICES HYPOTHÉCAIRES LA PATRIMONIALE INC., TECSYS INC.SOCIÉTÉ GÉNÉRALE DE FINANCEMENT DU QUÉBEC, VIBROSYSTM INC., INTERQUISA CANADA L.P., REDCORP VENTURES LTD., JURA ENERGY CORPORATION, IVANHOE MINES LTD., WEBTECH WIRELESS INC., WYNN CAPITAL CORPORATION INC., HY BLOOM INC., CARDACIAN MORTGAGE SERVICES, INC., WEST ENERGY LTD., SABRE ENERTY LTD., PETROLIFERA PETROLEUM LTD., VAQUERO RESOURCES LTD. and STANDARD ENERGY INC.
Respondents (Appellants)

See Schedule "A" – Counsel for the list of counsel
Heard: June 25 and 26, 2008
On appeal from the sanction order of Justice Colin L. Campbell of the Superior Court of Justice, dated June 5, 2008, with reasons reported at [2008] O.J. No. 2265.
BLAIR J.A.:

A. INTRODUCTION

[1] In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

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[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. **They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company?** They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and – given the expedited time-table – the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Re Cineplex Odeon Corp.* 2001 CanLII 32746 (ON CA), (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Re Country Style Food Services* 2002 CanLII 41751 (ON CA), (2002), 158 O.A.C. 30, are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. FACTS

The Parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP – in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants – slightly over $1 billion – represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment – usually 30 to 90 days – typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity

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Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes – partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze – the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement – known as the Montréal Protocol – the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper – which has been frozen and therefore effectively worthless for many months – into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default

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swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

b) The Releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants – in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" – from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;

b) Sponsors – who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information – give up their existing contracts;

c) The Canadian banks provide below-cost financing for the margin funding facility and,

d) Other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

[33] On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan – 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan – 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval – a majority of creditors representing two-thirds in value of the claims – required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result

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from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" – an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing – this time involving the amended Plan (with the fraud carve-out) – was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. LAW AND ANALYSIS

[39] There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

[40] The standard of review on this first issue – whether, as a matter of law, a CCAA plan may contain third-party releases – is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;
b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
d) the releases are invalid under Quebec rules of public order; and because
e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* 1998 CanLII 14907 (ON SC), (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* 1995 CanLII

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7370 (ON SC), (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t]he history of CCAA law has been an evolution of judicial interpretation."

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools – statutory interpretation, gap-filling, discretion and inherent jurisdiction – it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally – and in the insolvency context particularly – that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell Expressvu Ltd. Partnership v. R.*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559 at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes – particularly those like the CCAA that are skeletal in nature – is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles.

[50] The remedial purpose of the CCAA – as its title affirms – is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* 1990 CanLII 529 (BC CA), (1990), 4 C.B.R. (3d) 311 at 318 (B.C.C.A.), Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act :

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

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[51] The CCAA was enacted in 1933 and was necessary – as the then Secretary of State noted in introducing the Bill on First Reading—"because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey (Trustee of)* reflex, (1990), 1 O.R. (3d) 289 (C.A.), *per* Doherty J.A. in dissent; *Re Skydome Corp.* reflex, (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.); *Re Anvil Range Mining Corp.* reflex, (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra,* at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest*. [Emphasis added.]

Application of the Principles of Interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore – as the application judge found – in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

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The Statutory Wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

a) the skeletal nature of the CCAA;

b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Re Refund of Dues under Timber Regulations*, [1935] A.C. 184 at 197 (P.C.), affirming S.C.C. [1933] S.C.R. 616. See also, *Re Guardian Assur. Co.*, [1917] 1 Ch. 431 at 448, 450; *Re T&N Ltd. and Others (No. 3)*, [2007] 1 All E.R. 851 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum* (1959) Ltd. 1976 CanLII 142 (SCC), [1978] 1 S.C.R. 230 at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* 2000 CanLII 16921 (ON CA), (2000), 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* 2004 CanLII 34416 (ON SC), (2004), 2 C.B.R. (5th) 4 at para. 6 (Ont. S.C.J.); *Olympia & York Developments Ltd. v. Royal Trust Co.* reflex, (1993), 12 O.R. (3d) 500 at 518 (Gen. Div.).

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context,

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therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan – including the provision for releases – becomes binding on all creditors (including the dissenting minority).

[64] *Re T&N Ltd. and Others, supra,* is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA – including the concepts of compromise or arrangement.[4]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence – cited earlier in these reasons – to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party*. [Emphasis added.]

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

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[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
c) The Plan cannot succeed without the releases;
d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then – as was the case in *T&N* – there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA – construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation – supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

[74] Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Re Canadian Airlines Corp.* 2000 ABQB 442 (CanLII), (2000), 265 A.R. 201, leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.* 2000 ABCA 238 (CanLII), (2000), 266 A.R. 131 (C.A.), and reflex, [2001] 293 A.R. 351 (S.C.C.). In *Re Muscle Tech Research and Development Inc.* 2006 CanLII 34344 (ON SC), (2006), 25 C.B.R (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Re Canadian Airlines*, however, the releases in those restructurings – including *Muscle Tech* – were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

[76] In *Re Canadian Airlines* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

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[77] Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Michaud v. Steinberg*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument – dealt with later in these reasons – that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

[78] Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg*, *supra*; *NBD Bank, Canada v. Dofasco Inc.*, 1999 CanLII 3826 (ON CA), (1999), 46 O.R. (3d) 514 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* 2001 BCSC 1721 (CanLII), (2001), 19 B.L.R. (3d) 286 (B.C.S.C.); and *Re Stelco Inc.* 2005 CanLII 42247 (ON CA), (2005), 78 O.R. (3d) 241 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

[80] In *Pacific Coastal Airlines*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in *Pacific Coastal* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian – at a contractual level – may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process – in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* reflex, (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of

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> compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release – as is the situation here. Thus, *NBD Bank* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

[86] The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* 2005 CanLII 41379 (ON SC), (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J.) at para. 7.

[87] This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Re Stelco Inc.*, 2006 CanLII 16526 (ON CA), (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights

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amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] – the classification case – the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... *[H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants – particularly those represented by Mr. Woods – rely heavily upon the decision of the Quebec Court of Appeal in *Michaud v. Steinberg, supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 – English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> ...
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> ...
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act – an awful mess – and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature – they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company – rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

[93] The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based,

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at least partly, on a rejection of the use of contract-law concepts in analysing the Act – an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in *Steinberg* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases – as I have concluded it does – the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent *Steinberg* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

[96] *Steinberg* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> Exception
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (*a*) relate to contractual rights of one or more creditors; or
>
> (*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> Powers of court
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> Resignation or removal of directors
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:[8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the

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company were being reorganized: see Houlden & Morawetz, vol.1, *supra,* at 2-144, E§11A; *Le Royal Penfield Inc. (Syndic de)*, 2003 CanLII 33980 (QC CS), [2003] R.J.Q. 2157 at paras. 44-46 (C.S.).

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights – including the right to bring an action – in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra,* at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, 1934 CanLII 72 (SCC), [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue* [1928] A.C. 187, "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action – normally a matter of provincial concern – or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Re Ravelston Corp. Ltd.* 2007 ONCA 268 (CanLII), (2007), 31 C.B.R. (5th) 233 (Ont. C.A.).

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[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties – including leading Canadian financial institutions – that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd.* 1998 CanLII 3836 (BC SC), (1998), 38 B.L.R. (2d) 251 at paras. 9 and 18 (B.C.S.C.). There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings – the claims here all being untested allegations of fraud – and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
c) The Plan cannot succeed without the releases;
d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they – as individual creditors – make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including

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the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

[119] The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

[120] In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. DISPOSITION

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

"Robert A. Blair J.A."
"I agree J.I. Laskin J.A."
"I agree E.A. Cronk J.A."

RELEASED: August 18, 2008

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SCHEDULE "A" – CONDUITS

Apollo Trust
Apsley Trust
Aria Trust
Aurora Trust
Comet Trust
Encore Trust
Gemini Trust
Ironstone Trust
MMAI-I Trust
Newshore Canadian Trust
Opus Trust
Planet Trust
Rocket Trust
Selkirk Funding Trust
Silverstone Trust
Slate Trust
Structured Asset Trust
Structured Investment Trust III
Symphony Trust
Whitehall Trust

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SCHEDULE "B" - APPLICANTS

ATB Financial
Caisse de dépôt et placement du Québec
Canaccord Capital Corporation
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of BC
Credit Union Central of Canada
Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank of Canada/National Bank Financial Inc.
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

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SCHEDULE "A" - COUNSEL

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee
2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.
3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)
6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
7) Mario J. Forte for Caisse de Dépôt et Placement du Québec
8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada
9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)
10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees
13) Usman Sheikh for Coventree Capital Inc.
14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
15) Neil C. Saxe for Dominion Bond Rating Service
16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

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[1] Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

[2] Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

[3] Citing Gibbs J.A. in *Chef Ready Foods, supra,* at pp.319-320.

[4] The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard)*, *supra*.

[5] See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act,* R.S.O. 1990, c. B.16, s. 182.

[6] A majority in number representing two-thirds in value of the creditors (s. 6)

[7] *Steinberg* was originally reported in French: reflex, [1993] R.J.Q. 1684 (C.A.). All paragraph references to *Steinberg* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

[8] Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

T. Eaton Co., Re, 1999 CanLII 15024 (ON SC) - Issue of 'Breaking a Contract' under a CCAA Arrangement

Date: 1999-10-24

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Docket: 99-CL-3516
Parallel citations: 14 CBR (4th) 288
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Ontario Supreme Court
T. Eaton Co., Re
Date: 1999-10-24

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as Amended
In the Matter of a Plan of Compromise or Arrangement of the T. Eaton Company Limited, Applicant

Ontario Superior Court of Justice [Commercial List] Farley J.
Heard: October 20, 1999
Judgment: October 24, 1999
Docket: 99-CL-3516

Justin R. Fogarty, for National Retail Credit Services Co.
Robert J. Arcand, for Cambridge Shopping Centre Ltd., Oxford Development Group Inc., Grosvenor International Canada Ltd., Laing Property Corp.
Edmond Lamek, for Richter & Partners Inc., the Monitor.
Jay A. Carfagnini, for Cadillac Fairview Corp. Ltd.
Patricia Jackson and Michael Rotsztain, for Sears Canada Inc.
John MacDonald, for T. Eaton Co. Ltd.

Endorsement. *Farley J.*:
[1] The National Retail Credit Services Company ("N") moved for a direction of specific performance by the T. Eaton Company Limited ("E") and Sears Canada Inc. ("S") of the Card Licence and Services Agreement dated February 13, 1998 ("Card Deal") and the Trademark Licence Agreement dated April 17, 1998 ("Trademark Licence"). E and S have entered into a Share Purchase Agreement which will form part of the foundation of E's plan of arrangement under the CCAA.
[2] N submitted that, notwithstanding E's repudiation of the Trademark Licence (as well as the Card Deal; in Amended and Restated Purchase Agreement dated February 16, 1998 and the Transition Agreement dated April 4, 1998), N be entitled to use E's trademarks and related intellectual property to collect all outstanding receivables of N owed by customers of E and generated by the customers using the E credit card. During the hearing I confirmed with counsel for E and S that there would be no impediment to N referring in any collection procedure to the name "The T. Eaton's Company Limited". It is unfortunate that this aspect had not been clarified before. With this confirmation it seems to me that N may suffer some modest inconvenience in its collection operations but no material difficulty which requires any remedy outside of a claim for damages.
[3] What then of E's repudiation of the agreements with N whereby N was to be the E private label credit card program provider. Pursuant to the Card Deal, E granted N for a 10 year term "the exclusive licence to provide all of the requirements of Cards Services of (i) [E] and its affiliates..." N paid E a significant amount of money for this grant. "Card Services" are defined as follows in s.1.1 of the Card Deal:

> "Card Services" means the services provided by Supplier to administer, operate, manage and regulate the credit granting, payment processing, and transaction authorization facilities provided under this Agreement; such services include but are not limited to the production and issuance of Cards, the distribution and receipt of applications for Cards, the review and approval or denial of applications for Cards, the granting of credit to Cardholders, the preparation and mailing of statements, the receipt and collection of payments from Cardholders, the adjudication of

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> claims, the provision of balance protection insurance, the collection, management and communication of Customer information, the maintenance and timely provision of non cash transaction records, the payment of Net Settlements to TECO, the maintenance of the Database and all cardholder related records, the authentication of Bank Card transactions by electronic or other means, the operation of the Authorization System including the authorization of Transactions, the operation and monitoring of systems and related facilities and resources for carrying out the above referenced activities, and the operation and
> administration of Cardholder Credit Balances together with such other services as may be agreed to from time to time by TECO and Supplier.

Thus N has the right to and is providing a credit type of service for the benefit of E.

[4] I note that s.7.4 of the Card Deal provides for the dispute mechanism for disputes or claims "between the parties arising out of or in relation to this Agreement". Essentially the parties N and E are to negotiate and if resolution is not forthcoming to refer the matter to a single arbitrator with the *Arbitration Act* being invoked. It seems to me that the Claims Procedure as to N's claim for damages as a result of E's repudiation essentially fulfils this provision. I note that s. 7.4(d)(vii) provides that "nothing herein will prevent a Party who gave notice under this Section 7.4(d) from applying for injunctive relief pending such arbitration proceeding." I shall deal with this motion in that light since in large respect it is a claim for a mandatory injunction.

[5] In *Re Blue Range Resource Corp.* 1999 ABQB 1038 (CanLII), (1999), 245 A.R. 154 (Alta. Q.B.); leave to appeal granted on other grounds 1999 ABCA 255 (CanLII), (1999), 12 C.B.R. (4th) 186 (Alta. C.A.), LoVecchio J. held that the debtor company could terminate (in the sense of repudiate, see infra) certain gas supply contracts under a stay order made pursuant to s.I1 of CCAA as long as that did not affect the purchaser's right to make a claim in damages against the debtor company. He stated at paras. 36-8:

> 36. The purpose of the CCAA proceedings generally and the stay in particular is to permit a company time to reorganize its affairs. This reorganization may take many forms and they need not be listed in this decision. A common denominator in all of them is frequently the variation of existing contractual relationships. Blue Range might, as any person might, breach a contract to which they are a party. They must however bear the consequences. This is essentially what has happened here.

When LoVecchio J. speaks of "the variation of existing contractual relationships", it is clear that he means that the "variation" is simply a breach of the contract and not that there is a sanctioned revision to the contract.

> 37. A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16.c or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their setoff argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that its does not affect the creditors' right to claim for damages.
>
> 38. The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathize with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route.

I agree with that analysis. See also *Re Armbro Enterprises Inc.* reflex, (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.); *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* reflex, (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce* reflex, (1992), 11 C.B.R. (3d) 161 (Ont. Gen. Div.); *Re Dylex Ltd.* 1995 CanLII 7370 (ON SC), (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) and generally as to the purpose of the CCAA, *Re Lehndorff General Partner Ltd.* reflex, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p.31.

[6] The question of fairness is one that must await the sanction hearing, provided that the plan of arrangement survives the debtor vote. In *Re Keddy Motor Inns Ltd.* reflex, (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), Freeman JA for the court stated at p. 258:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to service and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of the court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable. No amount of disclosure could compensate for such deliberately unfair treatment. Neither disclosure, nor the votes of the majority, can be used to victimize a minority creditor. On the

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other hand negotiated inequalities of treatment which might be characterized as unfair in another context may well be ameliorated when made part of the plan by disclosure and voted upon by a majority (emphasis added).

In any CCAA (and its "affiliated" legislation) situation, one has to be cognizant of the function of a balancing of the prejudices. Positions must be realistically assessed and weighed, all in the light of what the alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands. (I wish to make it clear that I am speaking generally about the approach to the CCAA and not specifically about this case as now is not the time to deal with the sanction questions).

[7] It is clear that under CCAA proceedings debtor companies are permitted to unilaterally terminate in the sense of repudiate leases and contracts without regard to the terms of those leases and contracts including any restrictions conferred therein that might ordinarily (i.e. outside CCAA proceedings) prevent the debtor company from so repudiating the agreement. To generally restrict debtor companies would constitute an insurmountable obstacle for most debtor companies attempting to effect compromises and reorganizations under the CCAA. Such a restriction would be contrary to the purposive approach to CCAA proceedings followed by the courts to this date.

[8] Is there something peculiar to the Card Deal and the other agreements which would dictate another result or amelioration in favour of N? Firstly N points to s.8.3 of the Card Deal which sets out the three provisions pursuant to which E could terminate the Card Deal (and E's obligations thereunder) before the expiration of the 10 year term. None of those provisions come into play. However, s.8.3 contemplates a termination by E *as permitted* under the Card Deal. That is not what E has done. E has repudiated the Card Deal and contrary to a permitted termination, E is to be subject to liability for such a repudiation.

[9] Secondly, N points out that pursuant to the terms of the Card Deal, E is not permitted to assign it without N's prior written consent. However, E's arrangement with S is not an assignment of the Card Deal.

[10] Thirdly, N submits that the Card Deal and other agreements grant it a licence which vests in N as licencee a right which constitutes personal property in the hands of N as licencee citing *Re Foster* reflex, (1992), 89 D.L.R. (4th) 555 (Ont. Bktcy.) at p.560 and *Sugarman v. Duca Community Credit Union Ltd.* 1998 CanLII 14665 (ON SC), (1998), 38 O.R. (3d) 429 (Ont. Gen. Div. [Commercial List]) at p.445-6. However, it should be noted that these cases are PPSA cases and under that legislation there is a very expanded view of "personal property" in which there may be a security interest. That definition does not come into play in a CCAA proceeding. See *National Trust Co. v. Bouckhuyt* reflex, (1987), 61 O.R. (2d) 640 (Ont. C.A.) and *Canadian Imperial Bank of Commerce v. Hallahan* reflex, (1990), 39 O.A.C. 24 (Ont. C.A.) for examples where similar licenses to those in *Foster* and *Sugarman* were found not to constitute "personal property" for the purposes of the PPSA or the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act*.

[11] It seems to me that where the (exclusive) licence granted to N by E is analyzed in the context of the Card Deal overall, it is not, in the traditional property sense, a licence (sometimes expressed as a licence with a grant). The Card Deal in my view does not purport to transfer, or have the effect of transferring, any type of proprietary interest to N. Rather N is permitted to provide certain services to the customers of E while others are not. In the Card Deal, N and E have expressly and it would appear exhaustively provided for the aspects as to which each holds a proprietary interest in certain assets. There is no statement in the Card Deal that the "exclusive licence" granted by E to N is in itself proprietary in nature in that it creates directly or indirectly a proprietary interest for N's benefit. Examples of proprietary claims spelled out in the Card Deal in the sense that each side merely maintains what it had and not what it is granted are as follows:

> s.6.1(c) the Confidential Information (as defined in s.6.1(a)) of each of the parties is proprietary to that party;
>
> s.6.1(g) Confidential Information in the possession of either party is to be returned on request by the other party;
>
> s.6.2 the trademarks and other intellectual property of E remain E's property, although licensed (in the sense of being permitted by E to be used by N) to N in order to facilitate the performance by N of its obligations under the Card Deal; (s.5.1 of the trademarks licence also confirms that E is the exclusive owner of the trademarks and all goodwill associated thereunder);
>
> s.6.4 the cardholder lists are and remain the property of E; N may use the lists solely for the purposes of providing Card Services under the Card Deal and for certain other specified purposes, including the sale of defined financial products to those Cardholders.

Thus contrary to N's assertion that the assets used in the credit card operations are "vested" in N, both the customer lists and trademarks (the property relevant for the provision of the credit card operations remain exclusively the property of E.

[12] Even if the grant to N of the right to provide the Card Services were construed as a traditional licence, it does not appear to me that N thereby acquires a property interest in such a right. The true nature of an (exclusive) licence is leave or permission to do such a thing, which would otherwise be unlawful (and a contract not to give leave or permission to anyone else to do the same thing. It confers no interest or property in the thing. See *Heap v. Hartley* (1899), 42 Ch. D. 461 (Eng. Ch. Div.) at pp. 468-9 per Cotton L.J.

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[13] Can N insist on specific performance of the Card Deal and other agreements, assuming for the purpose of this analysis that we ignore the clear jurisprudence discussed above in *Blue Range Resource Corp.* and the other cases which is to the effect that a debtor company in CCAA proceedings may be permitted to repudiate contracts but of course it will be subject to the damages which may arise from such repudiation, and such damages will have to be accommodated within the plan of arrangement being proposed (as may be awarded) for the creditors to vote upon? In essence, specific performance is only available where the non-repudiating party cannot be adequately compensated in damages for the breach. Here N and E have expressly agreed that a breach of the confidentiality provisions of the Card Deal would not be compensable in damages (and through negotiation, N, E and S have reached a *modus vivendi* as to the confidentiality provisions.) While N and E were free to expressly deal with other breaches of the arrangements in the same way, they did not do so; this is a strong indication of the parties' view that other breaches of the arrangements would be susceptible to compensation by way of damage claims. In fact, N has retained KPMG to prepare such an identification of damages which it now asserts is what it is entitled to. Where, as in this case, the non-repudiating party (N) cannot carry out the contract without the co-operation of the party who has refused to perform (E) and such co-operation is withheld or rendered impossible, the only remedy is a suit for damages; it is not a question of electing to accept the repudiation. See G.H.L. Fridman, *The Law of Contract* (3rd) ed., 1994; Toronto, Carswell) at p. 614 and p. 794; *Shibamoto & Co. v. Western Fish Producers Inc. (Trustee of)* reflex, (1991), 43 F.T.R. 1 (Fed. T.D.) at p. 24; affirmed (1992), 145 N.R. 91 (Fed. C.A.). See also the going dark anchor tenant in the mall cases which I have previously decided (e.g. *Chatham Centre Mall Ltd. v. New Miracle Food Mart Inc.* (1994), 40 R.P.R. (2d) 124 (Ont. Gen. Div. [Commercial List])) and *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.,* [1997] 3 All E.R. 297 (U.K. H.L.); *Centre City Capital Ltd. v. Bank of East Asia (Canada)* (December 23, 1997), Doc. RE 7243/96 (Ont. Gen. Div.) and R.J. Sharpe, *Injunctions and Specific Performance* (2nd ed, Toronto, Canada Law Book) at s.7.450 for the inappropriateness of granting a mandatory injunction where the court would in effect be required to constantly supervise the activities mandated to be performed. Since there is no assignment of the Card Deal contemplated to S or any other contractual or other relationship between S and N established, it would not seem that N can seek specific performance as against S.

[14] I note that Eatons submits that N's request for specific performance is illogical:

> If this relief were to be granted, the inevitable result would be the bankruptcy of Eaton's because the success of the Plan depends on the Sears Agreement, and in order to satisfy the conditions of the Sears Agreement, Eaton's must terminate the Card Services Agreement with NRCS. Not only would a bankruptcy result in diminished recoveries for all creditors, there would be no ongoing business to which NRCS could provide services under the Card Services Agreement.

While there may be some business practicality to the foregoing, logically, vis-à-vis E, all the S Purchase Agreement provides is some "extra" recovery to put into the plan of arrangement. Conceivably, a plan might be approved even without that additional funding. Claimants however given a choice between "more" and "less", usually prefer more. How that all works out and the relative sharings will be the subject of rough-and-tumble negotiations discussed in *Keddy Motor Inns Lid.* supra. It should also be noted that the purpose of the CCAA is not that there be a reorganization of the debtor company so that it survives no matter what; the fairness of the plan must be determined.

[15] E will have to deal with the mechanics of how to accommodate N's damages as assessed in the plan of arrangement including the restructuring contemplated thereunder. It is understood that as per LoVecchio J.'s observations in *Blue Range Resource Corp.* it is extremely unlikely in any CCAA plan that claims generally will be paid off at 100 cents on the dollar. That N may be paid off (as other creditors) in a "devalued currency" if the plan is approved does not give N any higher right to relief in this motion.

[16] N's motion is therefore dismissed.

Motion dismissed.

Compromise with secured creditors - Sec 5

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
R.S., c. C-25, s. 5.

Claims against directors — compromise - Sec 5.1

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5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception - Sec 5.1(2)
(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court - Sec 5.1(3)
(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors - Sec 5.1(4)
(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
1997, c. 12, s. 122.

Compromises to be sanctioned by court - Sec 6
6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Uti Energy Corp. v. Fracmaster Ltd., 1999 ABCA 178 (CanLII) - Ability to Reopen CCAA Approved Sale of Asset

Date:	1999-06-09
Docket:	99-18326; 99-18327; 99-18331; 99-18335
Parallel citations:	244 AR 93
URL:	http://canlii.ca/t/5s7m
Citation:	Uti Energy Corp. v. Fracmaster Ltd., 1999 ABCA 178 (CanLII), <http://canlii.ca/t/5s7m> retrieved on 2013-08-20

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Uti Energy Corp. v. Fracmaster Ltd., 1999 ABCA 178

Date: 19990609
Docket: 99-18326

99-18327
99-18331
99-18335

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MR. JUSTICE O'LEARY
THE HONOURABLE MADAM JUSTICE FRUMAN

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c.C-36 AS AMENDED
AND IN THE MATTER OF FRACMASTER LTD.
BETWEEN:

UTI ENERGY CORP.

Respondent
(Plaintiff)

- and -

FRACMASTER LTD.

Respondent
(Defendant)

APPEAL FROM THE ENTIRE ORDER OF
THE HONOURABLE MADAM JUSTICE M.S. PAPERNY
MADE MAY 17, 1999 AND ENTERED ON MAY 19, 1999

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AND BETWEEN:
ROYAL BANK OF CANADA, and
ROYAL BANK OF CANADA, as agent for ROYAL BANK OF CANADA,
CANADIAN IMPERIAL BANK OF COMMERCE, BANK OF NOVA SCOTIA,
HONG KONG BANK OF CANADA, BANQUE NATIONALE DE PARIS
(CANADA) and CREDIT SUISSE FIRST BOSTON CANADA
Respondents
(Plaintiffs)
- and -
FRACMASTER LTD.
Respondent
(Defendant)
- and -
UTI ENERGY CORP.
Appellant

APPEAL FROM THE ENTIRE ORDER OF
THE HONOURABLE MADAM JUSTICE M.S. PAPERNY
MADE MAY 21, 1999 AND ENTERED ON MAY 25, 1999

AND BETWEEN:
THE JANUS CORPORATION
Appellant
(Plaintiff)
- and -
FRACMASTER LTD.
Respondent
(Defendant)

APPEAL FROM THE ENTIRE ORDER OF
THE HONOURABLE MADAM JUSTICE M.S. PAPERNY
MADE MAY 17, 1999 AND ENTERED ON MAY 19, 1999

AND BETWEEN:
ROYAL BANK OF CANADA, and ROYAL BANK OF
CANADA, as agent for ROYAL BANK OF CANADA,
CANADIAN IMPERIAL BANK OF COMMERCE, BANK OF
NOVA SCOTIA, HONG KONG BANK OF CANADA, BANQUE
NATIONALE DE PARIS (CANADA) and CREDIT
SUISSE FIRST BOSTON CANADA
Respondents
(Plaintiffs)
- and -
FRACMASTER LTD.
Respondent
(Defendant)
- and -
UTI ENERGY CORP.
Appellant
- and -
CALFRAC LIMITED
Appellant

APPEAL FROM THE ENTIRE ORDER OF
THE HONOURABLE MADAM JUSTICE M.S. PAPERNY
MADE MAY 21, 1999 AND ENTERED ON MAY 25, 1999

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

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COUNSEL:

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E.W. Halt
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For Calfrac Limited
T.J. Mallett
A.D. Little
For BJ Services Company
B.P. O'Leary
A.Z.A. Campbell
For Arthur Andersen Inc. (The Receiver)
F.R. Dearlove
For Royal Bank et al. (The Lending Syndicate)
R. Dudelzak, Q.C.
For Global Securities Ltd.
W.E.B. Code
For BNPI
G.B. Davison
For Fracmaster (For the Corporation)
S.T. Fitzgerald
For TD Asset Finance

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MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

CONRAD, J.A. (For the Court):

[1] The decision of the Court is unanimous and will be delivered by Madam Justice Fruman.

FRUMAN, J.A. (for the Court):

[2] Fracmaster Ltd., an oil and gas services company with world-wide operations, encountered serious financial difficulties. With liabilities that greatly exceeded its assets, its inevitable insolvency gave rise to hurried attempts to restructure the company. A series of court proceedings and a court-authorized tender process, all conducted at break neck speed, resulted in a court order approving the sale of Fracmaster's assets to BJ Services Company for $80 million. That order, and the events which led up to it, are the subject of four appeals by prospective purchasers whose bids for Fracmaster were unsuccessful.

[3] We make two preliminary observations. First, this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

[4] Our second observation is that events unfolded rapidly, with short time periods and offers arriving, literally, at the last minute. Parties did not always have time to prepare and file affidavits. On occasion representations of fact were mixed with submissions of law made by counsel to the chambers judge. As a result, our record is not as complete as we might have wished. We imply no criticism. We understand Fracmaster's serious financial jeopardy, the need for haste, and the accommodation by the parties and the court to conclude matters quickly. However, the frailties of the record require that we give considerable deference to fact findings made by the chambers judge and further illustrate why leave is and should be required to appeal proceedings under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (section 13). I will refer to that statute as the "CCAA".

FACTS

[5] Fracmaster is an Alberta company. Beginning in the fall of 1998, when its financial condition was precarious, it unsuccessfully attempted to restructure its financial affairs. With the indulgence of a lending syndicate to whom Fracmaster owed $96 million, and whose debt was registered as a first charge on its assets, it subsequently filed a petition under the CCAA. On March 18, 1999, Fracmaster was granted an order imposing a stay of proceedings and appointing Arthur Andersen Inc. as the monitor. Fracmaster then conducted another sale process, in order to restructure the company, inject equity or sell its assets. The sale process was neither supervised nor controlled by the monitor. Several companies submitted offers or proposals, including UTI Energy Corp., Calfrac Limited and The Janus Corporation together with its principal, Alfred H. Balm.

[6] When the matter returned to court in May of 1999 four applications were heard:

> First, Fracmaster applied for approval of the sale of its assets to UTI. The members of the lending syndicate supported that application, in accordance with a contractual commitment they had made to UTI.
>
> Second, that same lending syndicate, as an alternative to Fracmaster's application, applied to lift the stay, appoint Arthur Andersen as receiver, direct the receiver to approve the UTI sale and permit the lending syndicate to begin to realize on its security.
>
> Third, Balm/Janus applied to continue the stay, adjourn the other applications, appoint an interim receiver and have the court direct the calling of meetings of secured creditors, unsecured creditors and shareholders, to consider the Balm/Janus plan of arrangement.
>
> Fourth, Calfrac applied for approval and acceptance of its proposal to purchase Fracmaster's assets.

[7] In reasons dated May 17, 1999, the chambers judge dismissed the Fracmaster, Balm/Janus and Calfrac applications. She appointed Arthur Andersen as the receiver/manager on certain terms and conditions, including the power to sell the assets of Fracmaster subject to court approval. She denied the lending syndicate's application to direct the receiver to sell the assets to UTI. Alive to concerns about delay, she asked the receiver to quickly report its recommendations about a sale of assets or other immediate action that the receiver considered appropriate for the benefit of all claimants, including the secured creditors (CCAA A.B. 333). The May 17 order in the CCAA proceedings is the subject of appeals by Balm/Janus and UTI.

[8] The next day, May 18, the receiver returned to court with a notice of motion seeking directions for approval of a sale process by way of sealed bids. The process was designed to respond to the principles and objectives established

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by the chambers judge for a sale of assets. As there had been no independent valuations, the proposed tender process would test the market to determine whether offers were available in excess of the amount of the lending syndicate's secured debt. The process was also designed to maximize the value to the creditors; respond to concerns about delay and the need for finality; provide a process for the benefit of all creditors; and be fundamentally fair by establishing a level playing field for all participants.

[9] The proposal was not greeted with unanimous approval by the prospective purchasers, and its terms were the subject of heated debate in court. At the conclusion of the May 18 proceedings, the chambers judge ordered a tender process. The order set out the terms and conditions of offers that would be considered, with final offers to be submitted by 2:00 p.m. on May 20, 1999, by way of sealed bids. The receiver would advise the interested parties of its recommendation by 8:00 p.m. on May 20, and make its recommendation to the court at 10:00 a.m. on May 21. The tender process established in the May 18 order has not been appealed.

[10] Offers were submitted by UTI, Calfrac and BJ Services, a company which had previously shown interest in acquiring Fracmaster, but had not participated in the CCAA company-conducted sale process. Balm/Janus did not submit an offer. The lending syndicate continued to support the UTI offer, in accordance with a contractual commitment its members had made to UTI. The receiver recommended acceptance of the BJ Services offer, for a number of reasons, including the fact that it provided the highest cash purchase price, exceeding the Calfrac offer by $13 million and the UTI offer by $19.3 million. The chambers judge, in reasons dated May 21, 1999, approved the BJ Services offer recommended by the receiver. UTI and Calfrac appeal that decision.

THE CCAA APPEALS

[11] Balm/Janus appeal the chambers judge's decision in the CCAA proceedings, declining to order a meeting of creditors and shareholders of Fracmaster to consider and implement Balm/Janus' proposed plan of arrangement. The appeal is supported by certain shareholders of Fracmaster and by Banque Nationale de Paris, a subordinated lender.

[12] The chambers judge acknowledged that the restructuring proposed by Balm/Janus was a true plan which fit within the CCAA, leaving an after-life for Fracmaster and its shareholders. However, she noted the commercial reality that there was no equity left in Fracmaster, and that the lending syndicate had the only realistic remaining financial interest (CCAA A.B. 329-330). Under the terms of the CCAA and the Balm/Janus proposal, the plan would require the approval of the lending syndicate, which had indicated that it would not support the proposal. The chambers judge found as a fact that the lending syndicate had valid commercial reasons for its refusal (CCAA A.B. 331). She decided that it would be pointless to order meetings of creditors and shareholders and dismissed the Balm/Janus application.

[13] There is no requirement under the CCAA that all proposed plans of arrangement be put to meetings of creditors and shareholders for their consideration. Sections 4 and 5 specifically employ the word "may", giving the court discretion. In exercising its discretion, the court must consider whether the proposed plan of arrangement has a reasonable chance of success: ***Bargain Harold's Discount Ltd. v. Paribas Bank of Canada*** reflex, (1992), 10 C.B.R. (3d) 23 (Ont. Gen. Div.), or instead, is doomed to failure: ***Re Inducon Development Corp.*** reflex, (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.). Here it was clear that the lending syndicate did not support the plan. They would be entitled to vote as a class at the meeting and defeat the plan. It was also clear that the Fracmaster situation was urgent, requiring rapid resolution, and that the delays that would be occasioned by calling the meetings would further jeopardize Fracmaster's financial condition and the value of its assets. The chambers judge did not err in concluding that the Balm/Janus plan was doomed to failure. We grant leave to appeal to Balm/Janus, but dismiss their appeal.

[14] We wish to make a further observation. Under the CCAA the court has no discretion to sanction a plan unless it has been approved by a vote of a 2/3 majority in value of each class of creditors (section 6). To that extent, each class of creditors has a veto. This procedure is quite different from a court-appointed receivership. In a receivership the desires of the creditors are a significant factor, but the approval by a specific majority of creditors is not a pre-condition to court sanction, and creditors do not have an absolute veto. The difference in the procedures gives rise to different tests and considerations to be applied in each type of proceeding. While in this case the lending syndicate's desires in the CCAA and receivership proceedings were consistent, the chambers judge was not required to give the same weight to their wishes in each proceeding.

[15] UTI also appeals the May 17, 1999 order denying Fracmaster's application to approve the sale of its assets to UTI under the CCAA. The chambers judge noted that the proposed sale of assets to UTI did not create any monetary return for the unsecured creditors or shareholders of Fracmaster, nor did it contemplate that they would receive any benefit. The transaction was effectively a sale of assets for the benefit of the lending syndicate, a transaction which she concluded could be accomplished in a manner that did not require the use of the CCAA (CCAA A.B. 331-332). Without deciding whether the UTI offer was commercially provident, she concluded that the sale should not be approved under the CCAA, and dismissed Fracmaster's application.

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[16] Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the best interest of the creditors generally: ***Re Lehndorff General Partner Ltd.*** reflex, (1993), 17 CBR (3d) 24 at 31 (Ont. Gen. Div.). There must be an ongoing business entity that will survive the asset sale. See, for example, ***Re Canadian Red Cross Society***, [1998] O.J. No. 3306 (Ont. Gen. Div.), online: QL (OJ); ***Re Solv-Ex Corporation and Solv-Ex Canada Limited***, (19 November, 1997), (Calgary), 9701-10022 (Alta. Q.B.). A sale of all or substantially all the assets of a company to an entirely different entity, with no continued involvement by former creditors and shareholders, does not meet this requirement. While we do not intend to limit the flexibility of the CCAA, we are concerned about its use to liquidate assets of insolvent companies which are not part of a plan or compromise among creditors and shareholders, resulting in some continuation of a company as a going concern. Generally, such liquidations are inconsistent with the intent of the CCAA and should not be carried out under its protective umbrella. The chambers judge did not err in concluding that the sale of assets to UTI would be an inappropriate use of the CCAA. We grant leave to appeal to UTI, but dismiss its appeal.

RECEIVERSHIP APPEALS

[17] Calfrac appeals the May 21 order which approved the sale of Fracmaster's assets to BJ Services. Its primary complaint is that the receiver failed to administer the sale process in strict compliance with the May 18 court ordered procedure. Calfrac's complaints about the process were considered by the chambers judge, and dealt with in her May 21 reasons (Receivership A.B. 119 to 122). She concluded that the terms of the May 18 order had to be read in light of the commercial realities of the business world and the bidding process. She viewed the variations as minor and not problematic and decided that the BJ Services offer was in substantially the same form as the offer proposed by the receiver.

[18] A review of Calfrac's offer indicates that it too was not in strict complaince with the terms of the May 18 order. This is not entirely unexpected as the order, tender process and submission of offers came about quickly, without time to contemplate all the intricacies of fine legal drafting. Amendments to the form of agreement were contemplated in paragraph 4. c of the May 18 order. The other paragraphs of section 4, setting out other terms and conditions, did not specifically mention amendments.

[19] The tender process in this case was not a distinct and final process designed to provide a complete set of bid documents to the bidders, with no possibility of negotiation or variation, as might be the case in a construction bid. See, for example, ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.***, [1999] S.C.J. No. 17 (S.C.C.), online: QL (SCJ). Time did not permit the creation of such definitive conditions. Instead the process was designed to be court supervised. The amendment provisions contained in paragraph 4. c illustrate the intent to build flexibility into the process, rather than requiring strict compliance with the order. All parties were entitled to be present and make representations at the court proceedings to approve an offer, with the court to have ultimate discretion to determine whether the principles and objectives of the sale process had been met. The chambers judge did not act unreasonably in considering the commercial realities and the nature of the variations, and in accepting the form of BJ Services offer. This ground of appeal fails.

[20] A second ground of appeal advanced by both Calfrac and UTI, is that the receiver and the chambers judge failed to properly consider the closing risks associated with the BJ Services offer. The chambers judge considered the closing risks in her reasons (Receivership A.B. 112 to 113) and accepted the receiver's conclusion that the closing risks associated with the BJ Services offer were more than the Calfrac offer, no greater than the UTI offer, and more than offset by the BJ Services purchase price.

[21] Calfrac is critical of the summary manner in which the receiver communicated its risk assessment, and the lack of detail to back up its analysis. The receiver had 6 hours in which to analyze the offers and indicate its recommendation to the parties. The expedited procedure was set out in the May 18 order which has not been appealed. With the benefit of more time, the receiver undoubtedly would have proffered a more detailed analysis. But one cannot be overly critical of the receiver's work product, given the time constraints.

[22] Both UTI and Calfrac contend that the chambers judge erred in her assessment of the closing risks. UTI suggests that she erred in concluding that the closing risks of the BJ Services offer were no greater than the UTI offer. Even if that were so, the chambers judge also concluded that the BJ Services closing risks were more than offset by the greater purchase price. If that was the case for the Calfrac offer, which involved fewer closing risks and a higher purchase price than the UTI offer, it would certainly be the case for the UTI offer, which involved greater closing risks and the lowest purchase price. We are not satisfied that the chambers judge's conclusions on risks were unreasonable. We defer to her findings and dismiss this ground of appeal.

THE LENDING SYNDICATE'S WISHES

[23] UTI's principal ground of appeal is that the chambers judge erred in acting upon the receiver's recommendation and approving the sale of Fracmaster's assets to BJ Services. UTI submits that the prevailing consideration for the

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receiver should have been the wishes and business decision of the lending syndicate, which supported the UTI offer. UTI's appeal is supported by the lending syndicate and, if the Balm/Janus appeal does not succeed, by Banque Nationale de Paris, the subordinated lender.

[24] The facts in this case are unique. After the preliminary stay and CCAA order, Fracmaster conducted a company supervised sale process, which resulted in offers or proposals from several companies, including Balm/Janus, Calfrac and UTI. The lending syndicate considered the proposals, preferred the UTI offer and contractually agreed to support it. An acknowledgment to the April 26 UTI offer, signed by the lending syndicate, stated: "The above Offer is hereby acknowledged by each of the undersigned and each of them agree to support the Offer at the CCAA Proceedings."

[25] On April 27, 1999 the lending syndicate signed a side letter which contemplated that the sale of assets might not be completed under the CCAA, but under an alternate transaction, such as the appointment of a receiver and conveyance of assets by the receiver to UTI. The letter stated: "It is agreed that the Term Lenders and the Operating Lender will use their reasonable best efforts to conclude any such alternate transaction so long as they receive the same consideration as they would have received under the Offer."

[26] Fracmaster applied for an order approving the sale of its assets to UTI under the provisions of the CCAA. Although the lending syndicate supported that application, in the same proceeding the lending syndicate applied for an alternate order appointing a receiver and directing the receiver to sell the assets to UTI. The chambers judge dismissed Fracmaster's application under the CCAA. She appointed a receiver but refused to direct the receiver to transfer the assets to UTI, concluding that this would fetter the receiver's discretion and largely defeat the purposes of its appointment (CCAA A.B. 333). Although the chambers judge noted that the receiver could have recommended a sale to UTI if it felt comfortable doing so, the receiver instead recommended a new sale process, involving sealed tenders. Both UTI and Calfrac participated in the sealed tender process, repeating their earlier offers. BJ Services, which had not made an offer in the CCAA proceedings, put in a new bid. It offered cash consideration to the lending syndicate of $80 million for Fracmaster's assets, compared to $60.7 million plus warrants offered by UTI and $66 million plus warrants offered by Calfrac. The lending syndicate, which had agreed to support the UTI offer before the BJ Services offer was made, stuck by their commitment and continued to support the UTI offer.

[27] In accordance with the May 18 order, the receiver was required to make a recommendation to the court, bearing in mind the interests of all claimants, including the secured creditors. The bid process confirmed that the lending syndicate had the only remaining financial stake in the company. The amount of its secured debt was $96 million, which exceeded the bids. The receiver was aware that the lending syndicate supported UTI's offer, and was also aware of the letter agreement. Nevertheless, the receiver concluded that the BJ Services offer was the best offer, and recommended its acceptance.

[28] The chambers judge followed that recommendation and approved the BJ Services offer. There is no suggestion that the BJ Services offer was prejudicial to the lending syndicate. The chambers judge considered the case law and concluded that although the creditors' interests were an important consideration, they were not the only consideration (Receivership A.B. 117). Accepting the principle that the creditors' views should be very seriously considered, she indicated that if she were satisfied that the receiver acted properly and providently, she would be reluctant to withhold approval of a transaction recommended by the receiver. (Receivership A.B. 118)

[29] UTI concedes that had the bid process resulted in a bid which exceeded the lending syndicate's secured claim of $96 million, parties other than the lending syndicate would have had a financial interest in the outcome, and different considerations would apply. Because none of the bids exceeded $96 million, only the lending syndicate had a financial interest in the proceeds of sale of assets. UTI submits that the lending syndicate made a bargain with UTI, and that bargain should be the paramount consideration. The thrust of UTI's argument is that its offer should be accepted so long as no one else offered more than $96 million. In effect, it would have a reserve bid.

[30] The narrow issue raised in the appeal is the weight to be given to the lending syndicate's wishes to accept the UTI offer. But this appeal raises a competing issue, the integrity of the bid process.

[31] Lenders have the ability to appoint private receivers and deal with assets without court approval. In the circumstances of this case, where Fracmaster has many offshore assets, we are told that a private receivership without court involvement would not be expedient. Once a creditor embarks upon a court appointed receivership, the creditor loses an element of control, including the power to dictate the terms of the disposition of assets. Although the lending syndicate's preferences are an important factor to be considered by the court, its preferences do not fetter the court's discretion and are not necessarily determinative.

[32] The receiver's role in a liquidation of assets is clear and well defined. Its obligation is to make a sufficient effort to obtain the highest possible sale price for the assets: ***Salima Investments Ltd. v. Bank of Montreal*** 1985 ABCA 191 (CanLII), (1985), 21 D.L.R. (4th) 473 at 476 (Alta. C.A.). In ***Royal Bank of Canada v. Soundair Corp.*** 1991 CanLII 2727

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(ON CA), (1991), 83 D.L.R. (4th) 76 at 93 (Ont. C.A.), Galligan J.A. set out the principles which govern the function of the court and the exercise of its discretion when considering an application by a receiver for court approval of a sale:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers have been obtained.
4. It should consider whether there has been unfairness in the working out of the process.

The chambers judge considered each of these principles in turn, then accepted the receiver's recommendation.

[33] Only in rare cases will the receiver's recommendation diverge from the wishes of the only stakeholder, and those cases must be carefully scrutinized by a judge who is asked to approve that recommendation. But we cannot say that the chambers judge acted unreasonably by following the recommendation of the receiver in this case, because of the unique facts and manner in which events unfolded.

[34] After the court learned of the existence of the lending syndicate's contractual commitment to support the UTI offer in a receivership, it nevertheless ordered a sealed tender process. The receiver asked for the sale process in order to determine whether offers might be made which would exceed the amount of the lending syndicate's debt. The receiver also submitted that only a sale process would satisfy the court that it had fulfilled its mandate to maximize recovery and "give everyone a fair and reasonable attempt at bidding on the assets of the company" (Receivership A.B. 56). Once the sale process was engaged, it had to be fundamentally fair, with a level playing field for all participants.

[35] The receiver contacted all parties who had previously made an offer for Fracmaster's assets or expressed an interest in making an offer. The receiver also issued a press release outlining the terms of the sale. It was therefore clearly contemplated that the bidding process would not be confined to previous bidders.

[36] Some reference to a reserve bid could have been incorporated into the May 18 order indicating, for example, that UTI's offer was to be accepted unless a bid exceeded $96 million. The order was silent. Under the order, UTI was not required to repeat its earlier offer and could have changed the consideration. In fact, it could have made no offer at all. Anyone entering the bidding process might well know, as BJ Services did, that the lending syndicate supported UTI's offer and that this could create some impediments. But they could not know that UTI's offer would have the effect of a reserve bid up to $96 million. To default to the UTI bid without prior notice to the other bidders would undermine the integrity of the independent bidding process.

[37] UTI chose to resubmit its earlier offer, but must have been mindful of the risks. Clause 6. (b) of UTI's offer specifically stated that the offer was conditional on court approval.

[38] While neither the receiver nor the court had an obligation to sweeten the lending syndicate's negotiated deal, the fact that the effect of the recommended bid was to increase the lending syndicate's cash consideration was not itself a reason to dismiss the receiver's recommendation. Once the court embarked upon a sealed tender process other interests were engaged. The chambers judge considered the interests and desires of the lending syndicate. She also considered the other factors set out in ***Soundair***, including fairness and the efficacy and integrity of the process. She balanced the competing interests, as she was required to do, and we cannot say that her conclusion was unreasonable or that she erred in principle. This ground of appeal fails.

SUMMARY

[39] We grant leave to appeal the CCAA orders to Balm/Janus and UTI. The Balm/Janus appeal, Calfrac appeal and two appeals by UTI are dismissed.

(DISCUSSION AS TO COSTS)

CONRAD, J.A. (For the Court):

[40] We have concluded that there is no reason to depart from the normal rule that costs follow the success of the appeal. Accordingly, we will order one set of costs to BJ Services to be payable in equal amounts by UTI, Calfrac and Balm/Janus. The costs are to be assessed on Column 5.

APPEAL HEARD on June 4th and 7th, 1999
MEMORANDUM FILED at Calgary, Alberta,
this 9th day of June, 1999

FRUMAN, J.A.

Air Canada (Re), 2004 CanLII 11700 (ON SC) - CCAA Objectives, in A Quagmire Circumstance

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Date: 2004-01-16
Docket: 03-CL-4932
Parallel citations: 47 CBR (4th) 169
URL: http://canlii.ca/t/1gccx
Citation: Air Canada (Re), 2004 CanLII 11700 (ON SC), <http://canlii.ca/t/1gccx> retrieved on 2013-09-10
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COURT FILE NO.: 03-CL-4932
DATE: 20040116
ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED	*Sean F. Dunphy* and *Ashley John Taylor*, for Air Canada
AND IN THE MATTER OF SECTION 191 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"	*Peter J. Osborne* and *Peter H. Griffin*, for the Monitor *Howard Gorman*, for the Ad Hoc Unsecured Creditors Committee *Aubrey Kauffman*, for the Ad Hoc Committee of Various Creditors

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APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	*Jay Swartz*, for Deutsche Bank *Mark Gelowitz*, for Trinity Time Investments *Robert Thornton* and *Gregory Azeff*, for GE Capital Aviation Services Inc. *J. Porter*, for Cerberus *Kevin McElcheran*, for CIBC *Murray Gold*, for CUPE *Ian Dick*, for AG Canada *James Tory*, for Air Canada Board *Joseph J. Bellissimo*, for the Aircraft Lessor/Lender Group *Terri Hilborn*, for Unionized Retiree Committee *William Sasso* and *Sharon Strosberg*, for Mizuho International, PLC *Jim Dube*, for Deutsche Lufthansa A.G. **HEARD:** January 16, 2004

FARLEY J.:

[1] These reasons deal with three matters which the court was asked to approve Air Canada (AC) entering into various agreements; simply put they were as follows:

(1) the Merrill Lynch (ML) indemnity;
(2) the entering into the amendments to the Trinity Agreement; and
(3) the Global Restructuring Agreements (GRA).

ML Indemnity

[2] There was no opposition to this. The court was advised that such an indemnity was customarily given and that the terms of this particular one were such as is normally given. I therefore approve AC granting such an indemnity to ML.

Trinity Amendments

[3] As I understood the submissions this morning, Mizuho a member of the Unsecured Creditors Committee (UCC) was the only interested party which spoke out against the Trinity amendments. It continues to be dissatisfied with the process by which Trinity was selected as the equity plan sponsor. I merely point out, once again, that this process was not of the Court's choosing but rather one which AC commenced on notice to the service list and as to which there were no objections before Trinity was selected on November 8, 2003 (together with the "fiduciary out" provision contained in its proposal). Aside from the court approvals envisaged by that process, the court only became involved when it was appreciated that there were some difficulties with the practical implementation of the process.

[4] I further understand that the Ad Hoc Committee of Various Creditors (CVC) withdrew its opposition yesterday along with its cross motion. The UCC (one assumes on some majority basis) supported the Trinity Amendments but indicated that, as a sounding board, it wished to continue sounding that it still had concerns about aspects of corporate governance and management incentives.

[5] I have no doubt, if adjustments in any particular area make sense between the signatories (AC and Trinity) and to the extent that any beneficiaries are involved, that such adjustments will be made for everyone's overall benefit (everyone in the sense of AC including all of its stakeholders including creditors, labour, management, pensioners, etc.) not only for

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the short term interests but the long term interests of AC emerging from these CCAA proceedings as an ongoing viable enterprise on into the future, well able to serve the public (both Canadian and foreign). A harmonious relationship with trust and respect flowing in all directions amongst the stakeholders will be to everyone's long term advantage. With respect to corporate governance though, I am able to make a more direct observation. A director, no matter who nominates that person, owes duties and obligations to the corporation, not the nominator: see *820099 Ontario Ltd. v. Harold E. Ballard Ltd.* reflex, (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.), aff'd reflex, (1991), 3 B.L.R. (2d) 113 (Div. Ct.).

[6] There was no evidence to show that the Board of AC in exercising its fiduciary duties did not properly consider on a quantitative and qualitative basis the factors (on a pro and con basis) relating to whether Cerberus had provided a Superior Proposal (as that was defined in section 9 of the Trinity Agreement approved earlier by this Court). Indeed there was no complaint from

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Cerberus in this respect. The Board's letter to me of December 22, 2003 carefully reviewed the considerations which the Board (with the assistance of Seabury and ML, together with the general oversight and views of the Monitor) gave in their deliberations with their ultimate decision that the Cerberus December 10, 2003 proposal was not a Superior Proposal with the result that the Board has selected Trinity to be the equity program sponsor in accordance with the Trinity amended deal. I approve AC executing the Trinity amended deal and implementing same, with the recognition and proviso that there may be further amendments/adjustments which may be entered into subject to the guidelines of my discussion above. I note in particular that the UCC helpfully pointed out that section 7.3 still needs to be modified, and that is being worked on. The Air Canada Pilots Association observed that there still needed to be some fine-tuning at para. 22 of its factum noting that: "These matters of the detailed implementation of the Amended Trinity Investment Agreement can all be resolved by good faith negotiations between Air Canada, Trinity and affected stakeholders, with the assistance and support of the Monitor"; I did not have the benefit of any submissions in this regard (para.22) nor was any expected to either be given or taken as the parties all appreciated that this was not to be an exercise in "nitpicking".

[7] At paragraph 71 of its 19th report, the Monitor stated:

> 71. The Monitor is of the continuing view that the Equity Solicitation Process must be completed as soon as possible. The restructuring process and many other restructuring initiatives have been delayed by approximately two months as a result of the continued uncertainty concerning the selection of the equity plan sponsor. The equity solicitation process must be concluded so that the balance of the restructuring process can be completed before the expiry on April 30, 2004 of the financing commitments from each of Trinity, GECC and DB pursuant to the Standby Agreement. The Monitor recommends that this Honourable Court approve the Company's motion seeking approval of the Amended Trinity Investment Agreement.

[8] I would therefore approve the Trinity amendments so that AC can proceed to enter into and implement the Amended Trinity Investment Agreement. I note that this approval is not intended to determine any rights which third parties may have.

GRA

[9] As with the previous approvals, I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 at 201 (B.C.C.A.). In *Re Canadian Red Cross Society* 1998 CanLII 14907 (ON SC), (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Blair J. at p. 316 adopted the principles in *Royal Bank of Canada v. Soundair Corp.* 1991 CanLII 2727 (ON CA), (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) as an appropriate guideline for determining when an agreement or transaction should be approved during a CCAA restructuring but prior to the actual plan of reorganization being in place. In *Re Sammi Atlas Inc.* 1998 CanLII 14900 (ON SC), (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are

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compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi*, equitable treatment is not necessarily equal treatment.

[10] The Monitor's 19th report at paragraphs 20-21 indicates that:

20. The GRA provides the following benefits for Air Canada:
    - The retention of a significant portion of its fleet of core aircraft, spare engines and flight simulators, which are critical to its ongoing operations;
    - The restructuring of obligations with respect to 106 of 107 Air Canada and Jazz air operating, parked and undelivered aircraft (effective immediately for 12 GECC-managed aircraft and upon exit from CCAA for the remaining 94 GECC-owned aircraft, except as indicated below), including lease rate reductions on 51 aircraft (of which 3 aircraft have been returned as of the current date), cash flow relief for 29 aircraft, termination of the Applicants' obligations with respect to 20 parked aircraft (effective immediately), the cancellation of 4 future aircraft lease commitments and the restructuring of the overall obligations with respect to 2 aircraft. Obligations with respect to the last remaining aircraft remain unaffected as it is management's view that this lease was already at market;
    - Exit financing of approximately US$585 million (the "Exit Facility") to be provided by GECC upon the Company's emergence from CCAA;
    - Aircraft financing up to a maximum of US$950 million (the "RJ Aircraft Financing") to be provided by GECC and to be used by Air Canada to finance the future purchase of approximately 43 regional jet aircraft; and
    - The surrender of any distribution on account of any deficiency claims under the CCAA Plan with respect to GECC-owned aircraft only, without in any way affecting GECC's right to vote on the Plan in respect of any deficiency claim.
21. In return for these restructuring and financing commitments, the GRA provides for the following:
    - Payment of all current aircraft rent by Air Canada to GECC, during the interim period until emergence from CCAA proceedings, at contractual lease rates for GECC-owned aircraft and at revised lease rates for GECC-managed aircraft;

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- The delivery of notes refinancing existing obligations to GECC in connection with 2 B747-400 cross-collateralized leases (the "B747 Restructuring) including one note convertible into equity of the restructured Air Canada at GECC's option;
- The delivery of stock purchase warrants (the "Warrants") for the purchase of an additional 4% of the common stock of the Company at a strike price equal to the price paid by any equity plan sponsor; and
- The cross-collateralization of all GECC and affiliate obligations (the "Interfacility Collateralization Agreement") on Air Canada's emergence from CCAA proceedings for a certain period of time.

The Monitor concluded at paragraph 70:

> 70. The Monitor notes that, if considered on their own, the lease concessions provided to Air Canada by GECC pursuant to the GRA differ substantially from those being provided by other aircraft lessors. In addition, the Monitor notes that GECC has benefitted from the cross collateralization on 22 aircraft pursuant to the CCAA Credit Facility and Interfacility Collateralization Agreement, particularly as it relates to the settlement of Air Canada's obligations to GECC under the B747 Restructuring. However, the Monitor also notes that the substantial benefits provided to Air Canada under the GRA including the availability of US $585 million of exit financing and US$950 million of regional jet aircraft financing are significant and critical to the Company's emergence from CCAA proceedings in an expedited manner. In the Monitor's view the financial benefits provided to Air Canada under the GRA outweigh the costs to the Applicants' estate arising as a result of the cross collateralization benefit provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. Accordingly, the Monitor recommends to this Honourable Court that the GRA be approved.

[11] The GRA was opposed by the UCC (again apparently on some majority basis as one of its members, Cara, was indicated as being in favour and I also understand that Lufthansa was also supportive); the UCC's position was supplemented by separate submissions by another of its members, CIBC. I agree with the position of the UCC that the concern of the court is not with respect to the past elements of the DIP financing by GE and the cross-collateralization of 22 aircraft that agreement provided for. I also note the position of the UCC that it recognizes that the GRA is a package deal which cannot be cherry picked by any stakeholder nor modified by the Court; the UCC accepts that the GRA must be either taken as a package deal or rejected. It suggested that GE, if the court rejects the GRA as advocated by the UCC, will not abandon the field but rather it will stay and negotiate terms which the UCC feels would be more appropriate. That may be true but I would observe that in my view the delay and uncertainty involved would likely be devastating for AC. Would AC be able to meet the April 30, 2004 deadline for the Trinity deal which requires that the GRA be in place? What would the effect be upon the booking public?

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[12] I note that the UCC complains that other creditors are not being given equal treatment. However, counsel for another large group of aircraft lessors and financiers indicated that they had no difficulty with the GRA. Indeed, it seems to me that GE is in a somewhat significantly different position than the other creditors given the aforesaid commitment to provide an Exit Facility and an RJ facility. Trinity and Deutsche Bank (DB) with respect to their proposed inflow of $1 billion in equity would be subordinate to GE; this new money (as opposed to sunk old money of the UCC and as well as that of the other creditors) supports the GRA. I note as well although it is "past history" that GE has compromised a significant portion of its $2 billion claim for existing commitments down to $1.4 billion, while at the same time committing to funding of large amounts for future purposes, all at a time when the airline industry generally does not have ready access to such.

[13] With respect to the two 747 LILOs (lease in, lease out), there is the concession that AC will enjoy any upside potential in an after marketing while being shielded from any further downside. GE has also provided AC with some liquidity funding assistance by deferring some of its charges to a latter period post emergence. Further it has been calculated that as to post filing arrears, there will be a true up on emergence and assuming that would be March 31, 2004, it is expected that there would be a wash as between AC and GE, with a slight "advantage" to AC if emergence were later. I pause to note here that emergence sooner rather than later is in my view in everyone's best interests – and that everyone should focus on that and give every reasonable assistance and cooperation.

[14] With respect to the snapback rights, I note that AC would be able to eliminate same by repaying the LILO notes and the Tranche Loans and AC would be legally permitted to eliminate this concern 180 days post emergence. I recognize that AC would be in a much stronger functional and psychological bargaining position to obtain replacement funding post emergence than it is now able to do while in CCAA protection proceedings. I would assume that such a project would be a financial priority for AC post emergence and that timing should not prevent AC from starting to explore that possibility in the near future (even before emergence). I also note that GE anticipates that the snapback rights would not likely come into play, given, I take it, its analysis of the present and future condition of AC and its experience and expertise in the field. I take it as a side note that GE from this observation by it will not have a quick trigger finger notwithstanding the specific elements in the definition of Events of Default; that of course may only be commercial reality – and that could of course change, but one would think that GE would have to be concerned about its ongoing business reputation and thus have to justify such action. Snapback rights only come into existence upon emergence, not on the entry into the GRA.

[15] I conclude that on balance the GRA is beneficial to AC and its stakeholders; in my view it is fair and reasonable and in the best interests of AC. It will permit AC to get on with the remaining and significant steps its needs to accomplish before it can emerge. The same goes for the Trinity deal. I therefore approve AC's entering into and implementing the GRA, subject to the same considerations as to completing the documentation and making amendments/adjustments as I discussed above in Trinity Amendments.

[16] Orders accordingly.

J. M. Farley

Released: January 16, 2004

Cinram International Inc. (Re), 2012 ONSC 3767 (CanLII) - A Typical CCAA Initial Proceeding

Date:	2012-06-26
Docket:	CV-12-9767-00CL
URL:	http://canlii.ca/t/frxvk
Citation:	Cinram International Inc. (Re), 2012 ONSC 3767 (CanLII), <http://canlii.ca/t/frxvk> retrieved on 2013-09-29
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COURT FILE NO.: CV-12-9767-00CL

DATE: 20120626

SUPERIOR COURT OF JUSTICE – ONTARIO

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(COMMERCIAL LIST)

RE: IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A", Applicants
BEFORE: MORAWETZ J.
COUNSEL: Robert J. Chadwick, Melaney Wagner and Caroline Descours, for the Applicants
Steven Golick, for Warner Electra-Atlantic Corp.
Steven Weisz, for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent
Tracy Sandler, for Twentieth Century Fox Film Corporation
David Byers, for the Proposed Monitor, FTI Consulting Inc.
HEARD &
ENDORSED: JUNE 25, 2012

REASONS: JUNE 26, 2012
ENDORSEMENT

[1] Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the Companies' Creditors Arrangement Act ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").
[2] Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.
[3] The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.
[4] Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.
[5] Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:
(i) to ensure the ongoing operations of the Cinram Group;
(ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and
(iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").
[6] Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.
[7] The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.
[8] Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

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(i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;
(ii) provides various digital media services through One K Studios, LLC; and
(iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

[9] Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

[10] The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

[11] Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

[12] Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

[13] Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

[14] Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

[15] Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

[16] The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

[17] All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

[18] As at March 31, 2012, there was approximately $233 million outstanding under the First-Lien Term Loan Facility; $19 million outstanding under the First-Lien Revolving Credit Facilities; approximately $12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately $12 million outstanding under the Second-Lien Credit Agreement.

[19] Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

[20] Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional

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funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

[21] The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

(a) the lenders demanding payment in full for money owing under the Credit Agreements;
(b) potential termination of contracts by key suppliers; and
(c) potential termination of contracts by customers.

[22] As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession ("DIP") Financing in the amount of $15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of $15 million.

[23] The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

(a) the active employment of employees in the ordinary course;
(b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;
(c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and
(d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

[24] Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

[25] The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

[26] In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

[27] Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

[28] Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

[29] Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

[30] Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

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[31] The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

[32] Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

[33] The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

[34] Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

[35] The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

[36] In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

[37] As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

[38] The Applicants have also requested that the confidential supplement – which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules – be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (CanLII), (2002) 2 S.C.R. 522, I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

[39] Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

[40] In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

(a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;

(b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;

(c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;

(d) meetings of the board of trustees and board of directors typically take place in Canada;

(e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;

(f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;

(g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;

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(h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;
(i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;
(j) new business development initiatives are centralized and managed from Toronto, Ontario; and
(k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

[41] Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

[42] The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court – in this case, the United States Bankruptcy Court for the District of Delaware – to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15.

[43] In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

MORAWETZ J.
Date: June 26, 2012

SCHEDULE "A"
ADDITIONAL APPLICANTS

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

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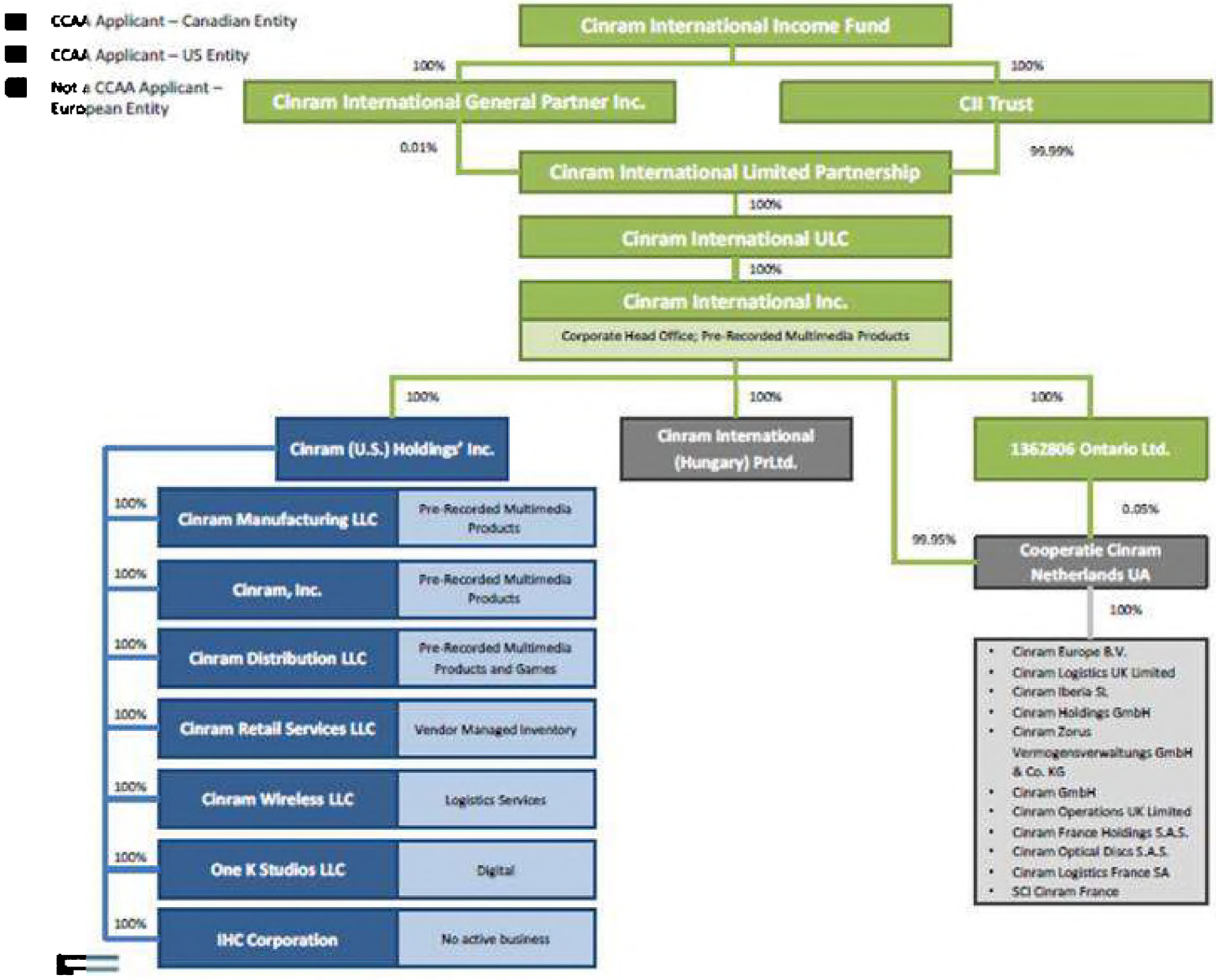
SCHEDULE "B"



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SCHEDULE "C"

A. THE APPLICANTS ARE "DEBTOR COMPANIES" TO WHICH THE CCAA APPLIES

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds $5 million.

CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies.

"debtor company" means any company that:

(a) is bankrupt or insolvent;

(b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-Up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts;

(c) has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act; or

(d) is in the course of being wound up under the Winding-Up and Restructuring Act because the company is insolvent.

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are "companies"

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Re Canwest Global Communications Corp. (2009), 59 C.B.R. (5th) 72 (Ont. Sup. Ct. J. [Commercial List]) at para. 30 [Canwest Global]; Book of Authorities of the Applicants ("Book of Authorities"), Tab 1.

Re Global Light Telecommunications Ltd. 2004 BCSC 745 (CanLII), (2004), 2 C.B.R. (5th) 210 (B.C.S.C.) at para. 17 [Global Light]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

Global Light, supra at para. 17; Book of Authorities, Tab 2.

Re Cadillac Fairview Inc. 1995 CanLII 7363 (ON SC), (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.

Elan Corporation v. Comiskey (Trustee of) reflex, (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

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50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the Bankruptcy and Insolvency Act (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

a. is for any reason unable to meet his obligations as they generally become due;

b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or

c. the aggregate of his property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 ("insolvent person").

Re Stelco Inc. 2004 CanLII 24933 (ON SC), (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J.[Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903; leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, at para. 4 [Stelco]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco, supra at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco, supra at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.

b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.

d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of $5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

a. companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person; and

b. two companies are affiliated with the same company at the same time are deemed to be affiliated with each other.

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

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57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately $252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately $12 million in letter of credit exposure) and approximately $12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed $5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. THE RELIEF IS AVAILABLE UNDER THE CCAA AND CONSISTENT WITH THE PURPOSE AND POLICY OF THE CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

Elan Corp. v. Comiskey, supra at paras. 22 and 56-60; Book of Authorities, Tab 4.

Re Lehndorff General Partners Ltd. reflex, (1993), 17 C.B.R. (3d) 24 at para. 5 (Ont. Gen. Div. [Commercial List]); Book of Authorities, Tab 6.

Re Chef Ready Foods Ltd; Chef Ready Foods Ltd. v. Hongkong Bank of Canada 1990 CanLII 529 (BC CA), (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

Re Sulphur Corporation of Canada Ltd. 2002 ABQB 682 (CanLII), (2002), 35 C.B.R. (4th) 304 (Alta Q.B.) ("Sulphur") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) The Stay of Proceedings Against Non-Applicants is Appropriate

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;

b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and

c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the status quo to enable a plan of compromise to be prepared, filed and considered by the creditors:

In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

Lehndorff General Partner Ltd., Re, supra at para. 5; Book of Authorities, Tab 6.

Canwest Global, supra at para. 27; Book of Authorities, Tab 1.

CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

Lehndorff, supra at paras. 5 and 16; Book of Authorities, Tab 6.

T. Eaton Co., Re reflex, (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

a. where it is important to the reorganization process;

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b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;
c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and
d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.
Re Woodward's Ltd. reflex, (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10.
Lehndorff, supra at para. 21; Book of Authorities, Tab 6.
Canwest Global, supra at paras. 28 and 29; Book of Authorities, Tab 1.
Re Sino-Forest Corp. 2012 ONSC 2063 (CanLII), 2012 ONSC 2063 (Commercial List) at paras. 5, 18, and 31; Book of Authorities, Tab 11.
Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.
65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.
(3) Entitlement to Make Pre-Filing Payments
66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.
67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in Re Canwest Global, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.
Canwest Global supra, at paras. 41 and 43; Book of Authorities, Tab 1.
68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:
a. whether the goods and services were integral to the business of the applicants;
b. the applicants' dependency on the uninterrupted supply of the goods or services;
c. the fact that no payments would be made without the consent of the Monitor;
d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;
e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and
f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.
Canwest Global supra, at para. 43; Book of Authorities, Tab 1.
Re Brainhunter Inc., [2009] O.J. No. 5207 (Sup. Ct. J. [Commercial List]) at para. 21 [Brainhunter]; Book of Authorities, Tab 13.
Re Priszm Income Fund (2012), 75 C.B.R. (5th) 213 (Ont. Sup. Ct. J.) at paras. 29-34; Book of Authorities, Tab 14.
69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of

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required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.
Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.
70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.
Bell Affidavit, paras. 234; Application Record, Tab 2.
71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.
Bell Affidavit, paras. 225; Application Record, Tab 2.
72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.
(4) The Charges Are Appropriate
73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.
(A) DIP Lenders' Charge
74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of $15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.
75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:
11.2(1) Interim financing - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
11.2(2) Priority – secured creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
Re Timminco Ltd. (2012), 211 A.C.W.S. (3d) 881(Ont. Sup. Ct. J. [Commercial List]) at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).
76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:
11.2(4) Factors to be considered – In deciding whether to make an order, the court is to consider, among other things,
(a) the period during which the company is expected to be subject to proceedings under this Act;
(b) how the company's business and financial affairs are to be managed during the proceedings;
(c) whether the company's management has the confidence of its major creditors;
(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
(e) the nature and value of the company's property;
(f) whether any creditor would be materially prejudiced as a result of the security or charge; and
(g) the monitor's report referred to in paragraph 23(1)(b), if any.
CCAA, Section 11.2(4).

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77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrows funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

Re Canwest Publishing Inc./Publications Canwest Inc. (2010), 63 C.B.R. (5th) 115 (Ont. Sup. Ct. J. [Commercial List]) at paras. 42-43 [Canwest Publishing]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

Re Catalyst Paper Corporation, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [Catalyst Paper]; Book of Authorities, Tab 17.

Angiotech, supra, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18

Re Fraser Papers Inc., Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;

b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;

c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedings and implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;

d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;

e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;

f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;

g. the DIP Lenders' Charge will not secure any pre-filing obligations;

h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings; and

i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent, the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

11.52(1) Court may order security or charge to cover certain costs

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate – in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

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(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, Timminco, Canwest Global and Canwest Publishing.

Canwest Global, supra; Book of Authorities, Tab 1.

Canwest Publishing, supra; Book of Authorities, Tab 16.

Re Timminco Ltd., 2012 ONSC 106 (CanLII), 2012 ONSC 106 (Commercial List) [Timminco]; Book of Authorities, Tab 20.

84. In Canwest Publishing, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in Timminco. The list of factors to consider in approving an administration charge include:

a. the size and complexity of the business being restructured;
b. the proposed role of the beneficiaries of the charge;
c. whether there is unwarranted duplication of roles;
d. whether the quantum of the proposed charge appears to be fair and reasonable;
e. the position of the secured creditors likely to be affected by the charge; and
f. the position of the Monitor.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, supra, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;
b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;
c. there is no unwarranted duplication of roles;
d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and
e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

11.51(1) Security or charge relating to director's indemnification

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) Priority

The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

11.51(3) Restriction -- indemnification insurance

The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) Negligence, misconduct or fault

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The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
CCAA, Section 11.51.
88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In Canwest Global, the Court outlined the test for granting such a charge:
I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.
Canwest Global, supra at paras 46-48; Book of Authorities, Tab 1.
Canwest Publishing, supra at paras. 56-57; Book of Authorities, Tab 16.
Timminco, supra at paras. 30-36; Book of Authorities, Tab 20.
89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD$13 million, given:
a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;
c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;
d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;
e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
f. the Monitor is in support of the proposed Directors' Charge.
Bell Affidavit, paras. 249, 250, 254-257 ; Application Record, Tab 2.
(D) KERP Charge
90. The Applicants seek a KERP Charge in an amount of CAD$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.
91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in Re Grant Forest Products Inc. considered a number of factors in determining whether to grant a KERP and a KERP charge, including:
a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
d. the employees' history with and knowledge of the debtor;
e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
h. whether the payments under the KERP are payable upon the completion of the restructuring process.
Re Grant Forest Products Inc. reflex, (2009), 57 C.B.R. (5th) 128 (Ont. Sup. Ct. J [Commercial List]) at para. 8-24 [Grant Forest]; Book of Authorities, Tab 21.
Canwest Publishing supra, at paras 59; Book of Authorities, Tab 16.
Canwest Global supra, at para. 49; Book of Authorities, Tab 1.
Re Timminco Ltd. (2012), 95 C.C.P.B. 48 (Ont. Sup. Ct. J [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

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92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.
Grant Forest, supra at para. 22-23; Book of Authorities, Tab 21.
93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD$3 million, given:
a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora Employees to remain with the Cinram Group while the company pursued its restructuring efforts;
b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;
c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;
d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;
e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;
f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.
Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.
(E) Consent Consideration Charge
94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.
95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In Sino-Forest, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.
Sino-Forest, supra, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.
96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:
a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;
b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and
c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.
Bell Affidavit, para. 176; Application Record, Tab 2.

Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can., 1989 CanLII 2672 (BC CA) - A Question of Weighted Class for Voting and the Court's Discretion on Such

Date: 1989-01-05

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Docket:	CA010238; CA010198; CA010271
Parallel citations:	[1989] 3 WWR 363; 73 CBR (NS) 195; 34 BCLR (2d) 122
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Court of Appeal
Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.
Date: 1989-01-05

F.H. Herbert and N. Kambas, for appellant Excelsior Life Insurance Company of Canada and appellant National Life Assurance Company of Canada.
A.P. Czepil, for appellant Guardian.
H.C.R. Clark and R.D. Ellis, for respondent companies.
G.W. Ghikas and C.S. Bird, for respondent Bank of Montreal.
(Vancouver Nos. CA010238; CA010198; CA010271)
January 5, 1989. Excerpt from the transcript.

[1] MCEACHERN C.J.B.C.: We are giving an oral judgment this morning because of the commercial urgency of these appeals and because counsel's helpful arguments have narrowed the issues substantially. We are indebted to counsel for their useful submissions.

[2] The petitioners (respondents on these appeals) are a number of companies (which I shall call "the companies") who have outstanding issues of secured bonds and are all engaged in real estate investment and development in Western North America and who collectively own and operate a number of office buildings and the Sandman Inn chain of hotels and motels. The appellants, Excelsior Life and National Life and Guardian Trust, are creditors of the petitioners who hold mortgages over specific properties owned by certain of the companies. They, along with eleven other lenders, are called "priority mortgagees".

[3] The companies ran into financial problems starting in 1981 and by spring of 1988, the companies owed approximately $200 million against assets of $100 million. The major creditor, the Bank of Montreal (which I shall sometimes call "the bank"), was owed approximately $117 million by the companies and the bank authorized the commencement of a receivership action. The bank holds security in all of the assets of the companies by way of trust deeds and bonds ranking second in priority to the security held by the priority mortgagees. Before decision in the receivership proceedings, the companies petitioned under the Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-36] (which I shall sometimes refer to as "C.C.A.A.") for an order directing meetings of the secured and unsecured creditors to consider a proposed compromise or arrangement plan.

[4] Mr. Justice Trainor, on 7th April 1988, granted the petition authorizing the companies to file a reorganization plan with the court, and that in the meantime, the companies would continue to carry on business and remain in possession of their undertaking, property and assets. Further, all proceedings against the companies were stayed. The original reorganization plan was filed on 25th August 1988. It provided that each priority mortgagee holding security over the property of the individual petitioners would constitute a separate class.

[5] The petitioners obtained an order to hold a creditors' meeting on 31st October 1988 and 1st November 1988. The order provided that in addition to meetings of individual classes of creditors, there should be a later general meeting of all creditors to consider the plan. In addition, the petitioners obtained an order to file and serve the amended plan seven days before the creditors' meeting along with their information circular. Other applications were brought which dealt with notices, proxies, proof of claim forms, exchange rates and directions for the calling of meetings.

[6] The amended plan was based on the following classes of creditors (descriptions of which are contained in the reasons for judgment of Trainor J. at pp. 6-7) namely:

- shareholder creditors
- A bondholders
- PUT debt claimants and C bondholders

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- priority mortgagees
- government creditors
- property tax creditors
- general creditors

[7] The amended plan also proposed consolidation of all the petitioner companies. The amended plan provided that all priority mortgagees would be grouped into one class for voting purposes. There were fifteen priority mortgagees in total, eleven of which were fully secured while the remaining four (including the appellants) faced deficiencies. The amended plan also authorized the companies to negotiate with creditors in order, if possible, to reach as much agreement as possible so that the plan would have a better chance of gaining the requisite majorities.

[8] The companies and the Bank of Montreal reached a settlement agreement on 20th October 1988, dealing with (a) the amounts owing to the bank by the companies; (b) claims by the companies and others against the bank in relation to a lender liability lawsuit; and (c) the terms of a compromise between the bank and the companies. The Bank of Montreal, according to the information circular, would only realize $32,859,005 upon liquidation. The settlement agreement between the Bank of Montreal and the companies, which is incorporated as part of the plan, provides that as of 17th January 1989, the bank is to receive the sum of $41,650,000 in either cash or in cash plus properties. A copy of this agreement was provided to creditors, along with such other documents including a notice of the meetings, the reorganization plan, and an extensive information circular.

[9] The class meetings and the general meetings of creditors were held in Vancouver on 31st October and 1st November 1988. All classes of creditors voted unanimously in favour of the plan except the priority mortgagee class. This class approved the plan by the requisite majority pursuant to the provisions of the C.C.A.A., that is, a simple majority of creditors in the class holding at least 75 per cent of the debt voting in favour of the plan. 73.3 per cent of the priority mortgagees holding 78.35 per cent of the debt voted in favour of the plan.

[10] Relax Development Corporation Ltd., a priority mortgagee facing a deficiency, voted in favour of the plan. If Relax had not voted in favour of the plan, the companies would not have obtained the requisite majority from the priority mortgagee class. Prior to the settlement with the bank, Relax struck an agreement with the companies on the value of its security amounting to about $900,000 over an appraisal value which was in dispute. Relax agreed in the settlement to vote in favour of the plan. More about that later.

[11] The appellants on these appeals voted against the plan, and raised objections that the plan improperly put all priority mortgagees into one class, and also that the plan preferred some creditors over others. They allege that the net effect of the plan on the fully secured priority mortgagees is different than that on the mortgagees facing deficiencies, in that the plan reduces the amount of debt owed to the mortgagees facing deficiencies to the market value of the subject property of their respective security, and required assignment of the deficiency for $1. They lose the right to obtain an order absolute of foreclosure pursuant to their security. On the other hand, the fully secured priority mortgagees recover the entire amount of their indebtedness.

[12] The appellants Excelsior and National are secured creditors of the petitioner, Northland Properties Ltd., one of the companies. They hold a first mortgage jointly over an office tower in Calgary adjacent to the Calgary Sandman Inn. Both buildings share common facilities. The principle amount of the debt owing to Excelsior and National as of 26th October 1988, is $15,874,533 plus interest of $311,901. The market value of the office tower as of 13th May 1988 was stated to be $11,675,000. They, therefore, face a potential deficiency of $4,512,434.

[13] Guardian Trust is a secured creditor of the petitioner, Unity Investment Company Limited, and holds a first mortgage over a small office building in Nelson, British Columbia. The amount owing to Guardian is $409,198.46 and the estimated deficiency is approximately $150,000 exclusive of transaction costs.

[14] Mr. Justice Trainor, on 12th December 1988, found that the companies had complied with the provisions of the C.C.A.A., and, therefore, the court could exercise its discretion and sanction the reorganization plan. Excelsior and National and Guardian appeal against that decision.

[15] Mr. Justice Trainor had the carriage of this matter almost from the beginning and he heard several preliminary applications. In a careful and thorough judgment, he set out the facts distinctly, reviewed the authorities and approved the plan. I do not propose to review the authorities again because they are extensively quoted in nearly every judgment on this subject. It will be sufficient to say that they include *Re Companies' Creditors Arrangement Act; A.G. of Can. v. A.G. Que.,* 1934 CanLII 72 (SCC), [1934] S.C.R. 659, [1934] 4 D.L.R. 75; *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.,* 1984 CanLII 1176 (AB QB), [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 52 C.B.R. (N.S.) 109, 53 A.R. 39 (Q.B.); *Re Associated Investors of Can. Ltd.,* 1987 CanLII 3217 (AB QB), [1988] 2 W.W.R. 211, 56 Alta. L.R. (2d) 259, 67 C.B.R. (N.S.) 237, 38 B.L.R. 148, 46 D.L.R. (4th) 669 (sub nom. *Re First Investors Corp. Ltd.)* (Q.B.); *Re Alabama, New Orleans, Texas & Pac. Junction Ry. Co.,* [1891] 1 Ch. 231 (C.A.); *Re Dairy Corp. of Can. Ltd.,* [1934] O.R. 436, [1934] 3 D.L.R. 347; *Re Wellington Bldg.*

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***Corp.,* [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626; *Br. Amer. Nickel Corp. v. O'Brien Ltd.,* [1927] A.C. 369 (P.C.); *Sovereign Life Assur. Co. v. Dodd,* [1892] 2 Q.B.D. 573 (C.A.), and others.**

[16] The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:

(1) There must be strict compliance with all statutory requirements (it was not suggested in this case that the statutory requirements had not been satisfied);

(2) All material filed and procedures carried out must be examined to determine if anything has been done which is not authorized by the C.C.A.A.;

(3) The plan must be fair and reasonable.

[17] Similarly, there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

[18] There were really four issues argued on this appeal but, as is so often the case, there is some overlapping. I shall attempt to deal with them individually.

[19] First it was alleged, principally by Mr. Czepil, that the Act does not authorize a plan whereby the creditors of other companies can vote on the question of whether the creditors of another company may compromise his claim. He called this the cross-company issue.

[20] This argument arises out of the particular facts that Mr. Czepil's client found itself in where it had a first mortgage, that is, Guardian had a first mortgage on a building owned by Unity which was the only asset of Unity, and he says the C.C.A.A. does not permit creditors of other companies to vote on the disposition of Guardian's security. I think there would be considerable merit in this submission except for the fact that the plan contemplates the consolidation of all the petitioner companies and the applications are made in this case not just under the C.C.A.A., but also under ss. 276-78 of the British Columbia Company Act, R.S.B.C. 1979, c. 59. In this respect, it is necessary to mention s. 20 of the C.C.A.A. which provides:

> 20. The provisions of this Act may be applied conjointly with the provisions of any Act of Canada or of any province, authorizing or making provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[21] During the argument of these appeals, we were treated to a review of the history of this matter in the court below. In reasons for judgment dated 5th July 1988 [now reported *Re Northland Properties Ltd.* 1988 CanLII 2924 (BC SC), (1988), 29 B.C.L.R. (2d) 257, 69 C.B.R. (N.S.) 266], Mr. Justice Trainor recited that he had been asked by some of the parties to approve a consolidation plan, but he declined to do so as the plan was not then before him in final form. It is implicit that Trainor J. thought he had authority to approve a consolidation plan and he referred to American authorities particularly, *Re Baker & Getty Fin. Services Inc.,* 78 B.R. 139 (U.S. Bankruptcy Ct., N.D. Ohio, 1987), and in *Re Snider Bros.,* 18 B.R. 320 (U.S. Bankruptcy Ct., D. Mass., 1982), and he said that he accepted the analysis of *Snider,* which proposes the test between economic prejudice of continued debtor separateness versus the economic prejudice of consolidation, and holds that consolidation is preferable if its economic prejudice is less than separateness prejudice.

[22] I think Mr. Justice Trainor was right for the reasons described in the American authorities and because to hold otherwise would be to deny much meaning to s. 20 of the C.C.A.A. and would mean that when a group of companies operated conjointly, as these companies did (all were liable on the Bank of Montreal bonds), it would be necessary to propose separate plans for each company and those plans might become fragmented seriously.

[23] I am satisfied there is jurisdiction to entertain a consolidation proposal.

[24] Secondly, it was agreed that the composition of the class of priority creditors was unfair by reason of including all priority mortgagees without regard to the fact that some of them faced a deficiency and some did not. The appellants were each in the latter difficulty and they argue that they should have been placed in a different class because the other 11 priority mortgagees were going to get paid in full whether the plan was approved or not. This argument would have more merit if the plan were only for the benefit of the undersecured priority mortgagee. But the plan was also for the benefit of the company and the other creditors who, by their votes, indicted that they thought the plan was in their best interest. The learned chambers judge considered this question carefully. At p. 25 of his reasons he said this:

> An examination of the relationship between the companies and the priority mortgagees satisfies me that they are properly in the same class. The points of similarity are:
>
> 1. The nature of the debt is the same, that is, money advanced as a loan.
>
> 2. It is a corporate loan by a sophisticated lender who is in the business and aware of the gains and risks possible.

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3. The nature of the security is that it is a first mortgage.
4. The remedies are the same - foreclosure proceedings, receivership.
5. The result of no reorganization plan would be that the lender would achieve no more than the value of the property, less the costs of carrying until disposal, plus the legal costs as well would come out of that. A possible exception would be if an order absolute left the creditor in the position of holding property for a hoped-for appreciation in value.
6. Treatment of creditors is the same. The term varied to five years, the interest rates 12 per cent or less, and the amount varied to what they would get on a receivership with no loss for costs; that is, it would be somewhat equivalent to the same treatment afforded to the Bank of Montreal under the settlement agreement.
The points of dissimilarity are that they are separate priorities and that there are deficiencies in value of security for the loan, which vary accordingly for particular priority mortgagees. Specifically with respect to Guardian and Excelsior, they are both in a deficiency position.
Now, either of the reasons for points of dissimilarity, if effect was given to them, could result in fragmentation to the extent that a plan would be a realistic impossibility. The distinction which is sought is based on property values, not on contractual rights or legal interests.

[25] I agree with that, but I wish to add that in any complicated plan under this Act, there will often be some secured creditors who appear to be oversecured, some who do not know if they are fully secured or not, and some who appear not to be fully secured. This is a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both.

[26] I adopt, with respect, the reasoning of Forsyth J. of the Court of Queen's Bench of Alberta, in a recent unreported decision in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.,* No. 8801-14453, 17th November 1988 [now reported 63 Alta. L.R. (2d) 361, 92 A.R. 81], particularly at pp. 13 and 14 [pp. 369-70]. I am unable to accede to this ground of appeal.

[27] Thirdly, I pause to mention that it was not suggested that the arrangement with the Bank of Montreal constituted a preference. It was argued, however, that the entire plan was tainted by the agreement made by the companies with Relax. Apparently, there was an appraisal showing a value of its security at $3.7 million while other evidence suggests a value of between $4.5 million to $4.6 million. The amount owing to Relax on its mortgage was $6 million.

[28] Early in the history of this matter before the plan was finalized, and before the companies struck their crucial arrangement with the Bank of Montreal, the companies and Relax agreed to a future cash payment of $500,000 and a valuation of $4 million for the Relax property which could, in total, amount to a preference of up to $900,000 to Relax and that company, in consideration of that compromise, agreed to vote for the plan.

[29] It should be mentioned that the plan, from its inception, ensured to the priority mortgagees the full market value of their security to be determined either by agreement, appraisal, or, if necessary, arbitration. Thus, the appellants do not stand to lose anything by the agreement made with Relax. It is the bank which carried the burden of that expense.

[30] There is no doubt that side deals are a dangerous game and any arrangement made with just one creditor endangers the appearance of the bona fides of a plan of this kind and any debtor who undertakes such a burden does so at considerable risk. In this case, however, it is apparent that this agreement was not made for the purpose of ensuring a favourable vote because at the time the deal was struck the companies had not reached an accommodation arrangement with the bank. I think the companies were negotiating, as businessmen do, on values for the purpose of putting a plan together.

[31] Further the arrangement with Relax was fully disclosed in the plan. This does not ensure its full absolution if it was improper, but at least it removes any coloration of an underhanded or secret deal. In fact, there were also negotiations between the companies and the appellants but nothing came of those discussions.

[32] After referring to the fact that the plan anticipated and permitted negotiations about values and other matters, the learned chambers judge said this at pp. 28 and 29 of his reasons:

> The negotiations might, on the surface, appear to have been in the nature of an excessive payment to Relax for the consideration in their agreement, which agreement, incidentally, included an undertaking to vote in favour of the plan. But the answer given by the companies is that what in effect was happening at that meeting was a negotiation as to the agreed price and that this negotiation took place earlier rather than later and that the parties in fact came to an accord with respect to the agreed price and that the settlement between them was on that basis.
> If that is so, it is something which took place in accordance with what is proposed by the reorganization plan. I have reviewed and reread a number of times the submissions by the companies and particularly by counsel on behalf of Guardian and Excelsior. I am satisfied that I should accept the explanation as to what took place, which has been advanced on behalf of the companies.

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[33] In the circumstances of this case, I would not disagree with the learned chambers judge in that connection.

[34] Lastly, it remains to be considered whether the plan is fair and reasonable. I wish to refer to three matters.

[35] First, the authorities warn us against second-guessing businessmen (see *Re Alabama,* supra, at p. 244). In this case, the companies and their advisors, the bank and its advisors, and all the creditors except the two appellants, voted for the plan. As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

[36] Secondly, I wish to mention Mr. Czepil's argument that the plan was unfair, perhaps not conceptually. but operationally by authorizing negotiations. He says this put the parties in a difficult position when it came to vote because they risked retribution if they failed to reach agreement and then voted against the plan. He complains that some benefits offered in negotiations are no longer available to his clients.

[37] With respect, negotiations between businessmen are much to be desired and I would not wish to say anything that would impede that salutory process. If negotiations lead to unfairness, then other considerations, of course, arise. But that, in my view, is not this case.

[38] Thirdly, the plan assures all the priority mortgagees the full market value of their security without liquidation expenses. That is more than they could expect to receive if there had been no plan.

[39] What they gave up is the right to take the property by order absolute or to seek a judicial sale and pursue the borrower for the deficiency. Guardian was actually offered its security but declined to accept it. The difficulty about this whole matter is the uncollectability of the deficiency having regard to the overwhelming debt owed to the bank which would practically eliminate any real chance of recovery of the deficiency.

[40] In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p. 29:

> I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
>
> Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

[41] I agree with that.

[42] I also agree with the learned chambers judge that the plan should have been approved and I would dismiss these appeals accordingly.

[43] ESSON J.A.: I agree.

[44] WALLACE J.A.: I agree.

[45] MCEACHERN J.A.: The appeals are dismissed with costs.

Appeal dismissed.

Uniforêt Inc. (Trustee of), Re, 2003 CanLII 35986 (QC CS) - CCAA Arrangement with Consideration of Quorum of Creditors

Date:	2003-05-16
Docket:	500-05-064436-015
Parallel citations:	43 CBR (4th) 254
URL:	http://canlii.ca/t/6x5l
Citation:	Uniforêt Inc. (Trustee of), Re, 2003 CanLII 35986 (QC CS), <http://canlii.ca/t/6x5l> retrieved on 2013-09-29
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JT 0971

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-05-064436-015

DATE: May 16, 2003

BY: THE HONOURABLE DANIEL H. TINGLEY, J.S.C.

IN THE MATTER OF THE ARRANGEMENT OF:

UNIFORÊT INC.
-and-
UNIFORÊT SCIERIE-PÂTE INC.
-and-
FORESTERIE PORT-CARTIER INC. (collectively, Uniforêt)
Debtors/Petitioners

-and-.
RICHTER & ASSOCIÉS
Monitor/Mis en cause (Monitor)

-and-
JOLINA CAPITAL INC. (Jolina)
Mise en cause

c.
HIGHLAND CAPITAL MANAGEMENT, L.P. (Highland)
ML CBO IV (CAYMAN) LTD.
PAMCO CAYMAN, LTD.
HIGHLAND LEGACY, LTD.
PAM CAPITAL FUNDING, L.P.
PROSPECT STREET HIGH INCOME
PORTFOLIO INC. (Prospect)
Opposing creditors

JUDGMENT
(On a Motion to Sanction a Plan of Arrangement)

THE ISSUES

[1] Uniforêt asks the Court to sanction a Second Amended Plan of Arrangement (Plan) made after proof was completed on May 6, 2003 pursuant to the Companies' Creditors Arrangement Act (Act).[1] An Amended Plan (First Plan) was approved by each of seven classes of creditors to the extent of at least 92% in number and 72% in value. Six secured creditors from a class (Class 2) of some 125 noteholders (or 4.79% of all noteholders), representing almost 28% in value of the class, oppose the sanction application, alleging amongst other things, manipulation and irregularities of the

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voting process,[2] oppression of the minority (the Opposing Creditors) of the Class 2 creditors by the majority (Jolina), unfair and confiscatory treatment of the class 2 claims and the existence of preferential payments made to so-called "unaffected creditors" prejudicial to the mass of creditors. They add that the Plan is unreasonable, unfair and confiscatory. They conclude in their written contestation that the Court should accordingly refuse to sanction it and should instead order the sale of the assets and undertakings subject to the security[3] of Class 2 claims "as a going concern" or, subsidiarily, that the Class 2 creditors be given a single class of new notes in the aggregate amount of $100 million and 90% of the equity of Uniforêt,[4] rather than the 55% that is offered as a conversion feature tied to $40 million of the new debt or B Notes.[5]

[2] Uniforêt denies any irregularities in the voting process or oppression of the Opposing Creditors by it or Jolina and relies on the Monitor's opinion that its Plan is both fair and reasonable. It adds that as all the classes of creditors have approved the Plan, in most cases overwhelmingly, the Court should sanction it. As to the request to sell the business as part of an orderly liquidation, Uniforêt stresses that such an alternative proposal (a) was considered and rejected by its management for lack of interest prior to the presentation of the First Plan, (b) comes far too late in the day and (c) poses a serious risk of prejudicing the implementation of the Plan and the expectations of the creditors who approved the First Plan in October, 2001.

THE FACTS

[3] Uniforêt first obtained protection under the Act on April 17, 2001. It filed an amended plan of arrangement (First Plan) with the Court on July 23, 2001 contemplating seven classes of creditors with potential claims aggregating in excess of $250,000,000. This Plan proposed the following arrangements:

Class	Description	Plan of Arrangement
1	The Municipalities of Port-Cartier and of l'Ascension (for Municipal taxes)	Pursuant to existing agreements
2	US Noteholders [which include the Opposing creditors and Jolina]	First US $25,000 cash with remaining balance, if any, exchanged for two new US Secured Notes: Note "A" 9% due on March 15, 2009; Note "B" convertible due on September 15, 2008; the whole for a total of $100,000,000 CDN
3	Holders of Capital Leases	Pursuant to existing agreements and contracts
4	Forestry Contractors	75% of proven claims
5	Unsecured Creditors	The lesser of $2,500 and the proven claim or a prorata share of a fund of $5,000,000
6	Canadian Debentureholders	Choice of receiving 8% of face value in cash or conversion into voting common shares of Uniforêt at a conversion rate of $6.00 per share
7	[Jolina]'s unsecured shareholder loan	Repayable on March 15, 2009 without interest

[4] The Opposing Creditors, members of Class 2 holding secured U.S. Notes in the face amount of $33.5 million U.S., applied to the Court on July 17, 2001 to modify the proposed Class 2. They asked amongst other things to be placed in a separate class from Jolina, a major shareholder of Uniforêt and the holder of more than two-thirds of the other U.S. Notes. A vote on the First Plan by Class 2 creditors was suspended pending the outcome of the Opposing Creditor's application. All of the other creditors approved the First Plan at meetings of creditors duly called and held on August 15, 2001. The Opposing Creditors' application was heard by Madame Justice Zerbisias over some 20 days. She rendered a lengthy judgment on October 23, 2002 dismissing the application and:

2) AUTHORIZED [Uniforêt] to call a meeting of creditors concerning Class 2 (U.S. Noteholders) to submit to them the amended plan (D-1) for voting purposes;

3) ORDERED [Uniforêt] and the Monitor to furnish to [the Opposing Creditors] whatever information they may possess as to the names, addresses, telephone and telecopier numbers of all beneficial owners of the U.S. notes within 5 days of this Judgment;

4) ORDERED provisional execution [...] notwithstanding appeal; [...]

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[5] Leave to appeal from this judgment was sought and refused on November 21, 2002 by Mr. Justice Nuss of the Court of Appeal who observed:

[8] The issues of fairness and reasonableness of the plan can be fully canvassed and debated at the hearing before the [Superior] Court to consider the sanctioning of the plan once the vote of all the Classes of [creditors] has taken place. Indeed, [the Opposing Creditors] acknowledge, and urged during the hearing before me, that most of the issues raised in the Motion for leave to appeal deal with the fairness and reasonableness of the plan and that the proper time for considering them will be at the hearing before the Court for the sanctioning of the plan.

[6] Four days later, the Class 2 creditors voted on the Plan. The results were as follows:

Cat.	Montant total en capital des réclamations (US$)		% en nombre		% en valeur	
	Oui	Non	Oui	Non	Oui	Non
2	87,918,000.00	33,505,000.00	95.21	4.79	72.41	27.59

[7] Uniforêt's Motion to Sanction the First Plan was first presented to the Court on December 11, 2002. The Opposing Creditors appeared to oppose its approval. Mr. Justice Lévesque was designated to manage the dossier and bring the matter on for hearing. He responded to requests for the production of additional documents and expertises and heard opposing counsel on a variety of pre-trial issues, including a request by Uniforêt to strike certain allegations of the amended, particularized contestation of the Opposing Creditors. As this request came shortly before the scheduled hearing, Mr. Justice Lévesque judiciously referred it, amongst other requests, to the trial judge.

[8] The Motion to Strike seems intended to prevent the reventilation of matters or issues already decided by Madame Justice Zerbisias in her judgment of October 23, 2002. The Court resisted the temptation to limit the debate to new issues. It informed counsel that objections to the introduction of "old" or repeat evidence would, for the most part, be taken under reserve and the legal issues arising from the Motion to Strike would if necessary be considered by this judgment. These issues were not addressed during oral argument and accordingly they will not be considered by this judgment.

[9] The Plan, as twice amended, provides in part that:

ARTICLE 2
PURPOSE AND EFFECT OF PLAN

2.1 Purpose

The purpose of this Plan is to effect a reorganization of the liabilities, business and affairs of Uniforêt in order to enable its business to continue, in the expectation that all Persons with an interest in Uniforêt will derive a greater benefit from its continued operation than would result from the immediate forced liquidation of Uniforêt's assets and business.

2.2 Joint Plan

As explained in Uniforêt's Petition for the issuance of the Initial Order pursuant to the [Act], most of the financing of Uniforêt's business is with Uniforêt Inc., while the operations and fixed assets are with Uniforêt Scierie-Pâte Inc. and Foresterie Port-Cartier Inc. who, in many instances, guaranteed the debts and obligations of Uniforêt Inc. Therefore, the related operations of Petitioners justify [...] presenting a joint Plan, the whole as permitted by the CCAA and the Initial Order. None of Uniforêt's Creditors will be prejudiced by such a joint Plan.

2.3 Persons Affected

This Plan shall become effective on the Plan Implementation Date and shall, on and after the Plan Implementation Date, bind Uniforêt and all Uniforêt's Creditors affected by the Plan.

2.4 Obligations Not affected

This Plan shall not affect any Unaffected Obligations.[6]

ARTICLE 3
CLASSIFICATION OF CREDITORS, VALUATION
OF CLAIMS AND PROCEDURAL MATTERS

3.1 Classification of Creditors

The Claims of the Creditors shall be grouped into the following Classes, and each Creditor in a designated Class shall, to the extent provided herein, be entitled to vote on the Plan as part of such Class:

Class 1 The Cities of Port-Cartier and l'Ascension (municipal taxes);
Class 2 US Noteholders;
Class 3 Holders of Capital Leases;
Class 4 Forestry Contractors;
Class 5 Unsecured Creditors;
Class 6 Canadian Debentureholders; and
Class 7 Jolina Capital Inc.'s unsecured shareholder loan.

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3.2 Creditors Meetings

Following the filing of the Plan with the Court, Uniforêt will hold the necessary Creditors Meetings to vote on the Plan, the whole in accordance with the Initial Order. [...]

3.3 Creditors Votes Required

In order that the Plan be binding on all the Creditors of Uniforêt affected by the Plan, it must first be accepted within each and every Class of Creditors as prescribed by the Plan by a majority in number of the Creditors in such Class who actually vote on the Plan (in person, by voting letter or by proxy) at the Creditors Meeting held in respect of such Class, representing two-thirds in value of the Accepted Claims for Voting Purposes of the Creditors in such Class who actually vote on the Plan (in person, by voting letter or by proxy) at such Creditors Meeting. [...]

3.4 Valuation of Claims for Voting and Distribution Purposes

Each Creditor having a Proven Claim in a Class shall be entitled to attend and to vote at the Creditors Meeting for such Class. Each Creditor of a Class who is entitled to vote shall be entitled to that number of votes at the Creditors Meeting for such Class as is equivalent to the dollar amount of its Proven Claim. In the event that the Proven Claim of a Creditor is not finally determined prior to the Creditors Meeting Date of the Creditors Meeting for any Class in accordance with this Plan and any Order of the Court, the Creditor shall be entitled to vote at the Creditors Meeting for such Class based on its Accepted Claim for Voting Purposes as determined by the Monitor, without prejudice to Uniforêt's right or the Creditor's right to require the final determination by the Court of the Creditor's Proven Claim, which Proven Claim shall apply for all purposes in connection with the Plan, including, without limitation, the Creditor's entitlement to participate in distributions under the Plan.

3.5 Participation in Different Capacities

Creditors whose Claims are affected by this Plan may be affected in more than one capacity. Each such Creditor shall be entitled to participate hereunder separately in each such capacity, unless otherwise specified. Any action taken by a Creditor in any one capacity shall not affect the Creditor in any other capacity unless the Creditor agrees to otherwise in writing.

3.6 Confirmation of Plan by the Final Order

In the event that the Plan is approved by the required majority of Creditors provided in Section 3.3, Uniforêt will seek the Final Order for the sanction and approval of the Plan. Subject only to the Final Order being granted and the satisfaction of the conditions of the Plan described in Section 5.1, the Plan will be implemented by Uniforêt and will be binding on all Uniforêt's Creditors affected by the Plan.

ARTICLE 4

THE COMPROMISE AND ARRANGEMENT

4.1 Class 1 : Treatment of the Cities of Port-Cartier and l'Ascension (municipal taxes)

Uniforêt proposes to pay to the Cities of Port-Cartier and l'Ascension the full amounts which are due to them as municipal taxes pursuant to existing agreements, or as may be agreed between them.

4.2 Class 2 : Treatment of US Noteholders

Uniforêt proposes to all US Noteholders, holding US Secured Notes totalling approximately CDN$190,000,000, as final compromise and arrangement, the following:

4.2.1 Uniforêt will pay, on the Plan Implementation Date,[7] to each US Noteholder the lesser of US$25,000 or the amount of the US Secured Note held by such US Noteholder; and

4.2.2 Uniforêt will exchange, on the Plan Implementation Date, all outstanding US Secured Notes, after payment of the amounts provided in Section 4.2.1 for two (2) new secured notes for each outstanding US Secured Note, namely (1) 9% Note "A" due March 15, 2009 and one (1) Convertible Note "B" due September 15, 2008, to be issued under an indenture providing for the issuance of 9% Notes "A" due March 15, 2009, in an aggregate principal amount of CDN$60,000,000, and Convertible Notes "B" due September 15, 2008, in an aggregate principal amount of CDN$40,000,000, both Notes "A" and "B" totalling an aggregate principal amount of CDN$100,000,000, to be issued under commercially acceptable terms and having similar secured rights on Uniforêt's assets as those held by the US Noteholders under the US Indenture, the whole, on a pro rata pari passu basis. These Notes "A" and "B" will be subject to the following terms and conditions:

9% Notes "A":

from the Plan Implementation Date, 9% Notes "A" will bear an annual interest rate of 9%, payable in arrears on a semi-annual basis, on March 15 and September 15 of each year, with the first interest payment date being on March 15, 2002, and will provide for annual principal repayment on March 15 of each year, commencing on March 15, 2003, always on a pro rata pari passu basis, equal to 50% of Available Cash Flow for fiscal years 2002 and 2003, and 75% of Available Cash Flow for subsequent fiscal years until the earlier of the maturity date, namely March 15, 2009, at which time the balance thereof will be fully repaid, or refinancing thereof;

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furthermore, at its sole discretion, Uniforêt can make, on any interest payment date, without penalty, additional principal repayments on the 9% Notes "A" and
Convertible Notes "B":
will bear no interest until September 15, 2004 and, thereafter, will bear an annual interest rate of 7.5%, payable in arrears on a semi-annual basis, on March 15 and September 15 of each year, with the first interest payment date being on March 15, 2005, and will provide for no annual principal repayment prior to September 15, 2008 and the full repayment of the principal thereof at maturity, namely on September 15, 2008;
furthermore, Convertible Notes "B" will, from the Plan Implementation Date until September 15, 2008, be convertible at any time into Class A Subordinate Voting Shares of Uniforêt Inc. (listed on The Toronto Stock Exchange under the trading symbol UNF.A) at a conversion price of $0.50 per share, such conversion right to expire at the close of business on September 15, 2008 and to be subject to a thirty (3) days prior written conversion notice to Uniforêt, which may then offer, prior to the expiry of such thirty (30) day period, to pay in cash to the noteholder, who will not be obliged to accept any such offer, an amount equal to the Market Value of the Class A Subordinate Voting Shares of Uniforêt Inc. issuable upon conversion instead of delivering shares to the noteholder;[8]
"Market Value" of the Class A Subordinate Voting Shares of Uniforêt Inc. shall mean the weighted average trading price of the Class A Subordinate Voting Shares of Uniforêt Inc. on the Toronto Stock Exchange during the twenty (20) consecutive trading days preceding the date on which the conversion notice is given to Uniforêt.
US Noteholders have no Claim for interest outstanding as of the Plan Implementation Date under US Secured Notes and are not entitled to participate in any other Class for Claims related, in any manner whatsoever, to US Secured Notes.
4.3 Class 3 : Treatment of Holders of Capital Leases
Uniforêt proposes to pay to holders of Capital Leases the full amount which is due to them pursuant to existing agreements and contracts, or as may be agreed between them.
4.4 Class 4 : Treatment of Forestry Contractors
Uniforêt proposes to pay, at the latest on the Plan Implementation Date, to each Forestry Contractor, as final compromise and arrangement of their respective Proven Claim, 75% thereof.
4.5 Class 5 : Treatment of Unsecured Creditors
Uniforêt proposes to pay to Unsecured Creditors, as final compromise and arrangement of their respective Proven Claim, on the Plan Implementation Date, in accordance with their respective election, the following
4.5.1 the lesser of $2,500 or the Unsecured Creditor's Proven Claim;
or
4.5.2 a pro rata pari passu share in the Unsecured Creditors Fund for those Unsecured Creditors with Proven Claims as of the Plan Implementation Date who will not have elected to be paid in accordance with Section 4.5.1 of this Plan.
4.6 Class 6 : Treatment of Canadian Debentureholders
Uniforêt proposes to Canadian Debentureholders, as final compromise and arrangement, in accordance with their respective election, the following: On the Plan Implementation Date,
4.6.1 payment of an amount equal to 8% of the outstanding balance of the Canadian 8% Convertible Unsecured Subordinated Debentures held; or
4.6.2 conversion of Canadian 8% Convertible Unsecured Subordinated Debentures held by a Canadian Debentureholder into Class A Subordinate Voting Shares of Uniforêt Inc. (listed on The Toronto Stock Exchange under the trading symbol UNF.A) at a conversion price of $6.00 per share, being a rate of 16.667 Class A Subordinate Voting Shares per $100 principal amount of Canadian 8% Convertible Unsecured Subordinated Debentures held by a Canadian Debentureholder, for those Canadian Debentureholders who have not elected to be paid in accordance with Section 4.6.1 of this Plan.
Canadian Debentureholders have no Claim for interest outstanding as of the Plan Implementation Date under Canadian 8% Convertible Unsecured Subordinated Debentures and are not entitled to participate in any other Class for Claims related, in any manner whatsoever, to Canadian 8% Convertible Unsecured Subordinated Debentures.
4.7 Class 7 : Treatment of Jolina Capital Inc.'s unsecured shareholder loan
Uniforêt proposes to pay Jolina Capital Inc.'s unsecured shareholder loan in the amount of $5,405,000, as final compromise and arrangement thereof, by issuing, on the Plan Implementation Date, a promissory note for the same amount, bearing no interest and providing for the full repayment thereof on March 15, 2009.
[10] Between July 23, 2001 and February 27, 2003, the Monitor produced four reports, two addressed to the creditors prior to their voting on the First Plan and two addressed to the Court in connection with the Motion to Sanction. These latter reports express the following opinions:
E) Analyse de Plan

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23. L'acceptation du Plan par toutes les catégories de créanciers permettra à Uniforêt de restructurer son endettement ainsi que de poursuivre ses activités.
24. Le Contrôleur est d'avis que les Débitrices ont agi et continuent d'agir de bonne foi, avec toute la diligence voulue dans les circonstances. Aussi, le Contrôleur n'a constaté aucun fait qui nous porterait à croire que la conduite des Débitrices est ou a été répréhensible.
25. Le Contrôleur est d'avis que le Plan proposé fut préparé de façon sérieuse et diligente par Uniforêt.
26. Le Contrôleur est d'avis que le Plan d'Uniforêt est juste et raisonnable envers les créanciers en général et envers chacune des catégories de créanciers.
27. Le Contrôleur est d'avis que le Plan tient compte de la capacité financière d'Uniforêt de respecter les termes **dudit Plan advenant son homologation par la Cour et sa mise en œuvre**.
28. Le Contrôleur, avec l'assistance d'autres conseillers professionnels et en se basant sur son expérience, a procédé à une analyse de la valeur probable des éléments d'actif d'Uniforêt dans un contexte de liquidation ordonnée.
29. Tel que déclaré dans le Premier Rapport du Contrôleur, le Contrôleur est d'avis que, dans un contexte de liquidation ordonnée, la valeur estimative des immobilisations d'Uniforêt pourrait se situer entre 60 000 000 $ et 80 000 000 $ après déduction des coûts de liquidation et des charges prioritaires (employés, droits de coupe impayés, etc.). Le montant ainsi réalisé ne serait suffisant pour assurer le remboursement intégral des sommes dues aux créanciers garantis qui totalisent 125 000 000 $ US (approximativement 200 000 000 $ CDN).
30. Tel que déclaré dans le Second Rapport du Contrôleur, le Contrôleur est d'avis que, dans un contexte de liquidation ordonnée, même en considérant la valeur aux livres en date du 30 septembre 2002, de l'encaisse, des comptes à recevoir, ainsi que des inventaires totalisant approximativement 43 000 000 $ la valeur des éléments d'actif d'Uniforêt ne s'est pas améliorée depuis juillet 2001. En fait, en tenant compte de l'état actuel du marché, des conditions de l'industrie ainsi que des facteurs externes qui sont hors du contrôle d'Uniforêt, nous sommes d'avis que les chances d'obtenir la valeur nette de réalisation estimative discutée au paragraphe 29 ont diminué.
31. Le Contrôleur est d'avis que, dans le cadre d'une liquidation forcée, la valeur estimative des immobilisations d'Unifôret serait réduite de 50%. Il semble que, dans le contexte actuel, une liquidation forcée serait plus vraisemblable.
32. Le Contrôleur est d'avis que l'acceptation du Plan est plus avantageuse pour les créanciers que la liquidation des éléments d'actif d'Uniforêt dont l'analyse se résume comme suit:

	Montant dû		Plan d'arrangement			Liquidation ordonnée (Valeur nette de réalisation estimée (a)			Liquidation ordonnée (Valeur nette de réalisation estimée (b)	
1	298 971 $		298 271 $	100%		300 000 $	100%		300 000 $	100%
2	195 337 500	(c)	100 000 000	51%		65 000 000	33%		30 000 000	15%
					(e)	16 000 000	8%	(e)	16 700 000	9%
3	5 135 924		5 135 924	100%	(d)	5 150 000	100%	(d)	5 100 000	100%
4	2 534 190	(f)	1 900 642	75%	(e)	300 000	12%	(e)	250 000	10%
5	24 849 498	(g)	5 700 000	23%	(e)	3 000 000	12%	(e)	2 500 000	10%
6	16 554 904	(h)	1 324 392	8%		néant	--%		néant	--%
7	5 405 000	(i)	1 104 858	20%	(e)	650 000	12%	(e)	550 000	10%
	250 115 987 $		115 464 087 $	46%		90 400 000 $	36%		55 400 000 $	22%

(a) Assumant une valeur de liquidation de 20 000 000 $ pour les comptes à recevoir et les stocks et une valeur nette de 70 000 000 $ pour les immobilisations.
(b) Assumant une valeur de liquidation de 20 000 000 $ pour l'encaisse, les comptes à recevoir et les stocks et une valeur nette de 35 000 000 $ pour les immobilisations.
(c) Excluant le montant du premier 38 500 $ (25 000 US) à être reçu par chaque Porteur de Billets Américains.
(d) En assumant que les créanciers de premier rang paient les soldes dus en vertu des Contrats de Location-Acquisition afin de libérer les actifs visés.
(e) Calculé en partageant la valeur estimée de liquidation des comptes clients et des stocks entre les créanciers des catégories 2 (perte excédentaire seulement), 4, 5 et 7, sur la base prorata et pari passu.
(f) 75% du montant dû.
(g) Incluant un estimé des créanciers qui choisiront de recevoir le paiement comptant de 2 500 $.
(h) Assumant que la totalité de la catégorie choisit de recevoir un paiement comptant.

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(i) Valeur actualisée du montant dû à un taux d'escompte de 18%.

33. Le Contrôleur est d'avis que l'acceptation et l'homologation du Plan est plus avantageuse pour les créanciers que la liquidation des actifs d'Uniforêt.

34. Le Contrôleur est d'avis que la continuité des opérations d'Uniforêt permettra à la majorité des créanciers d'avoir l'opportunité de poursuivre des relations avec Uniforêt qui, entre autres, vont permettre également le maintien d'emplois et d'une activité économique importante pour les municipalités de Péribonka et de Port-Cartier. De plus, certaines catégories de créanciers (catégories 2 et 3) pourront bénéficier d'un rendement continu de leurs investissements nonobstant la réduction de la valeur nominale de leur créance prévue par le Plan.

35. Le Contrôleur est d'avis qu'il est dans l'intérêt de l'ensemble des créanciers d'Uniforêt que le Plan soit homologué et approuvé par cette Cour.

[11] The Monitor relied for some of its opinions upon the expertise of CIB World Markets Inc. prepared as of February 24, 2003. The key conclusions of this expertise are:

1. The current environment for selling assets in the pulp and lumber industry is poor. There are only a limited number of buyers, but numerous mills for sale.

2- With regard to the BCTMP mill, the lack of transactions at any meaningful price over the past several years is the best indicator of [...] poor market conditions – the market has spoken for itself.

3. With regard to the sawmills, even if a temporary resolution to the on-going trade dispute with the U.S. is negotiated, the economic fundamentals underlying the Canadian industry remain troubling. Once the uncertainty associated with the trade barriers is added to the oversupply situation, it is unlikely that reasonable bids could be expected for the sawmill over at least the next 12-18 months. This problem is compounded by the volume of sawmill capacity currently being offered for sale in Quebec (or deemed "non-core") by companies other than Uniforêt.

[12] The Opposing Creditors retained Houlihan, Lokey Award & Zukin Financial Advisors Inc. (Houlihan) of New York to review the First Plan and the Monitor's report of July 23, 2001 and comment on the fairness of that plan to the Opposing Creditors. Houlihan concluded that the First Plan was "not fair and reasonable to the creditors in general or in relation to each other for [...] the following reasons:

- The Plan preserves the existing common equity ownership of [Uniforêt], and thereby allows common shareholders to maintain control [...] and to benefit from a significant de-leveraging. [...] This is unfair to secured creditors who receive less than a 100% recovery.
- The Plan provides for substantial recoveries to unsecured creditors that have claims that rank junior in priority to the secured creditors. This is unfair to secured creditors who receive less than a 100% recovery.
- The Plan provides for 100% recoveries in cash for the Class 3 secured creditors, but the Class 2 secured creditors will receive new debt securities with a face value of $100.0 million that approximates 51.2% of the Class 2 secured creditors claims of $195.5 million. This is unfair to the Class 2 Claimholders.
- The Plan provides an inadequate amount of value to the Class 2 Claimholders because the debt securities that are being offered in satisfaction of the Class 2 Claims will trade at a significant discount to face value. This is unfair to the Class 2 Claimholders.
- The Plan provides less value to the Class 2 Claimholders than they would receive in a liquidation based on the liquidation values provided in the Monitor's Report. This is unfair to the Class 2 Claimholders.
- The Plan deprives the Class 2 Claimholders of the value of the unsecured portion of their claim. This is unfair to the Class 2 Claimholders.
- The Plan is being proposed under the assumption that the Port-Cartier pulp Mill [...] on which the Class 2 Claimholders have a first lien), will not be in operation. [This] mill is a significant asset of [Uniforêt] in which over $200. million of capital expenditures have been invested since 1988. The Plan inhibits the Class 2 Claimholders from benefiting in the value that might be created in the event that the pulp mill is restarted, converted, sold or liquidated and transfers a majority of such benefits to junior creditors and common equity holders. This is unfair to the Class 2 Claimholders.
- The Plan provides for a highly leveraged capital structure that is sub-optimal from a corporate finance perspective. As a result, it is likely that both the debt and equity securities of [Uniforêt] will trade with limited liquidity and at significant discounts to their intrinsic values. This is unfair to the Class 2 Claimholders.
- The Plan consolidates all U.S. Noteholders in Class 2 for voting purposes. The purported holder of approximately 66.9% of the Class 2 Claims (Jolina Capital) is also a holder of a majority of the Class 3 Claims, certain Class 5 Claims, 100%, 100% of the Class 7 Claims and is also the largest shareholder of [Uniforêt]. [Thus], Jolina will recover a portion of the value that the Plan transfers from the Class 2 Claimholders to holders of Class 3, Class 5 and Class 7 Claims as well as the equity. Accordingly, Jolina has a different recovery profile than other Class 2 Claimholders and an economic conflict of interest with respect to voting as a Class 2 Claimholder. This is unfair to the non-Jolina Class 2 Claimholders.

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[13] This report, prepared on October 8, 2001, was filed at the hearing before Madam Justice Zerbisias together with a previous report Houlihan had submitted dated May 15, 2000. Mr. Slonecker, one of their authors, spoke to them. Madam Justice Zerbisias had this to say about those parts of the Houlihan reports that concerned her:

[72] Houlihan's first report, of May 15, 2000, assesses the value of the assets of Uniforêt at U.S. $123 to $134 million, excluding the assets of Tripap, but including the Port Cartier pulpmill whose assets are therein evaluated at U.S. $38 to 41 million. On that basis, the report and Mr. Slonecker concluded that the recovery rate relative to the face value of the notes is approximately 49 to 56%, compared to the current market trading price between 27 to 30%.

[73] Houlihan's second report, of October 8, 2001, was prepared by Houlihan at Petitioner's request as a reply to the Report of the Monitor on the Debtor's financial affairs and on the fairness of the plan. Mr. Slonecker and the report re-evaluate the assets of Uniforêt at CND $90 million. No value whatsoever is attributed to the assets of the Port Cartier pulpmill because it was not operating. Mr. Slonecker in his report, then evaluates the new securities, redeemable or convertible at a future date being provided to the Class 2 noteholders under the plan, at CDN $56.4 million, which implies a recovery rate of 51.2% of the total face value of the Class 2 claims. After discounting for the delay in payment, he concludes that this implies a real recovery rate of only 28.9%. He adds that the trading value of the Class A notes is 74% of face value, whereas the trading value of the class B notes is 31% of face value.

[74] Jolina, as a Class 2 creditor is affected by the same determinations as to its potential recovery on its U.S. notes. In addition, Houlihan and Mr. Slonecker evaluate the trading value of Jolina's new note under the plan in payment of its claim for its shareholder loan of CND $5.4 million at 18.8% of face value, i.e. worth approximately $1 million Canadian when discounted, for the delay in payment.

[75] Thus, Houlihan and Mr. Slonecker conclude on the basis of two completely different scenarios as set forth in the two reports, that the recovery rate on the U.S. notes is approximately the same: 49 to 56% on the first report and 51.2% on the second report, without attributing any value to the Port Cartier pulpmill, absent any discount for delays in payment. Similarly, the Monitor concludes that the recovery rate for Class 2 claimants is 51% under the plan, or 33% on a forced liquidation. Thus it appears that Petitioners will gain more under the plan and less on liquidation.

[14] The Opposing Creditors obtained Court permission to produce another expertise prepared by Price Waterhouse Coopers (PWC). Completed on February 7, 2003, this expertise concludes that:

141. In summary, in our view, the Plan:

(i) Does not treat secured creditors in accordance with their existing rights and priorities;

(ii) Provides significantly higher recoveries to certain unsecured creditors than is being offered to the secured US Noteholders, including the ultimate payment of 100¢ on the dollar in respect of Jolina's unsecured shareholder loan;

(iii) Requires Class 5 creditors to make an election in respect of their treatment under the Plan without being able to assess the economic impact of the alternatives available;

(iv) Provides for a recovery to Class 6 creditors, notwithstanding that such creditors have contractually subordinated themselves to all other creditors;

(v) Treats the claim of Bank of Montreal (BoM) as an Unaffected Obligation,[9] with no benefit or advantage to [Uniforêt or its] arms-length creditors, but with the significant disadvantage that $4 million that would otherwise be available for the purposes of making additional payments to Affected Creditors, funding operations or servicing debt will be paid to this unsecured creditor; and;

(vi) Contrary to established practice in CCAA restructurings, leaves substantially all of the post-restructuring equity in [Uniforêt] in the hands of the existing shareholders without any additional funding or support being provided by such shareholders, with the result that the consequences of [Uniforêt's involvency] are being suffered by the creditors, while the benefits of the compromises by creditors and a successful restructuring will accrue to the existing shareholders.

142. The Plan was approved by the Class 2 creditors only as a result of Jolina, the largest shareholder of Uniforêt, voting in favour of the Plan. Based on the Monitor's records, the Plan would not have been approved if 373[10] had been included in the CCAA filing and Jolina, as a result, had been prevented from exercising its hypothecary rights over the US Notes held by 373. Furthermore, based on our experience, we believe it is unlikely that an arm's length creditor holding the majority of the Class 2 claims would have voted in favour of the Plan.

143. The sale of the business as a going concern appears to be a commercially viable alternative to the Plan that could improve overall recoveries available to creditors by approximately $26.4 million to $42.4 million, representing an increase of approximately 31.7% to 50.6%.

144. The creditors most prejudiced by the Plan are the Class 2 creditors that would share in Notes A and Notes B, primarily Jolina and the minority US Noteholders. If the business were sold as a going concern and the proceeds distributed in the same manner as the cash payments that would be made to affected creditors under the plan, we estimate that such Class 2 creditors would recover $26.4 million to $42.4 million, more than they will recover under the Plan. These amounts would be reduced by any amount that would be needed to make a fair and reasonable distribution

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on account of the Class 7 Jolina shareholder loan. Under the Plan, Jolina retains its existing equity in Uniforêt while no equity is offered to the Minority US Noteholders. In these circumstances, the compromise being required of the Minority U.S. Noteholders is disproportionately large and cannot be considered reasonable.

145. As previously noted, the Monitor, in its July 23 Report, its October 28 Report and its December 11 Report, concluded that the Plan was fair and reasonable. Having given due consideration to the foregoing issues, the other matters discussed in this report, and all of the considerations outlined by Madam Justice Paperny in Re. Canadian Airlines,[11] we respectfully disagree with the conclusion of the Monitor and we have concluded that the Plan is not fair and reasonable.

[15] Following completion of most of the proof on May 2nd, 2003, the Court shared with the parties and their counsel its principal preoccupation concerning the fairness of the Plan in circumstances where, as here, secured creditors are asked to reduce the face amount of their notes by almost half and to accept, eventually, reduced interest on these reduced notes. The Court asked why the Plan failed to replace what was to be taken from them by equity,[12] unencumbered by a repurchase option.[13] Uniforêt responded to this enquiry on May 6, 2003 by further amending the Plan to effectively remove the repurchase option and to extend the delay during which a noteholder can exercise the conversion rights attaching to the B Notes from 2004 to 2008, coincidental with the maturity date of such notes. If exercised, the Class 2 creditors would hold 55% of the equity of Uniforêt.

[16] On the same morning, the Opposing Creditors submitted a "Re-Amended Particularized Contestation" to further amend their conclusions to ask for an "Alternate Plan" in the event a "going concern sale" cannot profitably be concluded. The Alternate Plan would differ from the Plan in that:

(a) Class 2 creditors would receive one class of New Notes in an aggregate amount of $100 million having the same repayment and interest terms as Notes A under the Plan and 90% of the equity of Uniforêt following a reorganization of its capital structure pursuant to S.191 of the Canada Business Corporations Act (CBCA),[14] and

(b) Jolina's claim as a Class 3 creditor would be disallowed and put into Class 5. The Bank of Montreal claim would also be added to Class 5 and disallowed as an "unaffected obligation".

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[17] Counsel for the Opposing Creditors remind the Court that shareholders do not have an economic stake in an insolvent company seeking relief under the CCAA.[15] They add that a plan of arrangement should offer more to creditors than would be available to them under a liquidation.[16] In assessing fairness of a plan, the Court must consider alternatives to it that are commercially available,[17] in particular a sale of the enterprise as a going concern. Moreover, they point to the inherent jurisdiction of the Court either to amend the plan for compelling reasons[18] or to order a sale of assets before a plan is presented to the creditors.[19]

[18] Counsel for Uniforêt and the Monitor acknowledged that generally, a plan of arrangement is consensual and results from negotiations leading to agreement.[20] They remind the Court that its role on a sanction hearing "is to consider whether the plan fairly balances the interests of all the stakeholders"[21] including the public interest.[22] Perfection is not required.[23] They add that there is a heavy burden upon Opposing Creditors in their quest to upset the Plan[24] and conclude that the Court should be reluctant to interfere with the business decisions of a majority of creditors "reached as a body".[25]

DISCUSSION

A. The Plan is prejudicial to the Class 2 Creditors

1. Two Fundamental Reasons

[19] The Opposing Creditors and their experts criticize the First Plan on several fronts. On the one hand they assert that the First Plan treats some unsecured creditors more favourably than the Class 2 secured creditors. They point out that Jolina will receive the entire amount of both its $5.4 million shareholder loan (Class 7) and its $3.5 million advance towards the acquisition and installation of a planer in the Peribonka sawmill (Class 3) and that the forestry contractors will realize 75% of their claims (Class 4). On the other hand, they argue that the Plan is confiscatory in that the Class 2 creditors will only receive 51% of the face amount of their old U.S. notes two years later than promised at a lower interest rate while they wait to be paid and they will not receive any meaningful equity to replace what has been taken from them, nor are they entitled to recover unpaid interest accrued on the U.S. Notes.

2. Too fair to other creditors, especially Jolina

[20] There is no doubt Jolina has been relatively well treated under both the First Plan and the Plan. Jolina is Uniforêt's White Knight.[26] It has been a shareholder and involved in the affairs of Uniforêt since 1994. It financed a new planer for the Péribonka sawmill in late 1999. It ultimately provided the funding to acquire the majority of the U.S. Notes in Uniforêt's initial attempt to rationalize its debt through a public offering for all the U.S. Notes at 30% of their principal amount in early 2000. This initiative attracted about 50% of the U.S. Notes at a cost of $33 million, or 53¢. Jolina then acquired another 16% of the U.S. Notes in the market, enough to control the outcome of the vote by the Class

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2 creditors. It helped to backstop an $11M short term or bridge loan from the Bank of Montreal to pay wages and other pressing payables. Uniforêt repaid over $6 million of this loan and shortly thereafter applied to the Court for relief under the C.C.A.A. The balance due on this loan is treated as an "unaffected obligation.[27] Accordingly, the White Knight's several claims have received generous treatment under the Plan, as well they should. After all, Jolina is Uniforêt's largest and most important creditor, quite apart from being a major shareholder. Plans of arrangement cannot hope to succeed without the approval of such a creditor. The Plan proposes, in effect, to make Jolina more or less whole, at least eventually.[28]

[21] For a plan of arrangement to succeed, an insolvent company must secure the approval of all classes of its creditors, even those who have subordinated their claims to all other creditors, as is the case with the debentureholders (Class 6). It does not necessarily follow that a plan generous to some creditors must therefore be unfair to others. A plan can be more generous to some creditors and still fair to all creditors.[29] A creditor like Jolina that has stepped into the breach on several occasions to keep Uniforêt afloat in the 4 years preceding the filing of the First Plan warrants special treatment.

[22] The Forresters' claims, although unsecured, are another special case. The Forresters had to be encouraged to bring their equipment back into the bush after the winter thaw. Without logs, the sawmills have nothing to cut. Similarly, if government permits (stumpage duties) are not paid in one year, they will not be issued in a subsequent year.[30] This explains why the cost of permits are quite properly treated in the Plan as "unaffected obligations".

3. Unfair to Class 2 Creditors

[23] The minority Class 2 creditors complain that Jolina wears too many hats in this dossier. They argue that if Jolina, like them,[31] was nothing more than a holder of U.S. Notes, it would not have voted in favour of the proposed treatment for Class 2 creditors. It did so, they add, only because of the generous treatment proposed for its unsecured claims under classes 3, 5 and 7 and the fact it was already a major shareholder. This is, of course, a purely hypothetical argument that nevertheless invites an analysis of the treatment actually accorded to the Class 2 creditors.

[24] The experts and Uniforêt agree that the "enterprise" or "going concern" values of the businesses of Uniforêt lie somewhere between $90 million (Houlihan in 2001) and $112 million (PWC in 2003).[32] There is also general agreement that Uniforêt cannot support debt in excess of $60 million from its current and projected cash flows.[33] This explains why the old U.S. Notes are to be exchanged for two classes of notes, $60 million of "A" notes and $40 million of "B" notes ($100 million in the aggregate) and why there is a conversion feature into shares attached to the "B" notes.

[25] Thus, Uniforêt proposes to give the Class 2 creditors its assessment of its entire enterprise value backed by the same security the U.S. noteholders enjoyed under their Trust Indenture.[34] If the workout over the next four to five years is successful, the holders of "B" notes will be able to share, to the extent of 55%, any future equity accruing to the shares of Uniforêt, in excess of $40 million. Mathematically, 55% of nothing is no different than 90% of nothing. However, a successful workout combined with improved economic conditions for the Canadian forestry industry – capital intensive, highly cyclical and beetle infested – may permit the "B" noteholders to recover something of what has been lost from the face amount of their old U.S. notes.

[26] The experts further agree that the orderly liquidation values of the assets of Uniforêt in a bankruptcy scenario will not realize more than $90.4 million at best.[35] Most estimates are well below this figure, including that of PWC. The one area where the experts differ is what they think might be realized, and when, if the enterprise were offered for sale "as a going concern" while under the protection of the CCAA. The Monitor and Mr. Roberts of CIB World Markets doubt such a sale would attract a price any more favourable than what is offered in the Plan anytime sooner than 18 months, if ever. Mr. Meakin of PWC thinks a carefully orchestrated sale culminating in an auction while under the umbrella of the CCAA could result in a return to the Class 2 creditors in the next 6 months of up to $42 million more than what they are to receive under the Plan. The Monitor views any such result as entirely "illusoire, irréaliste et utopique". His views are shared by Mr. Moreau, the president and chief executive officer of Uniforêt, expressed even more succinctly. Mr. Roberts observed that ever since Uniforêt applied for relief from the Court, competitors in the industry have considered it to be "for sale", yet no serious buyer has as yet surfaced. He suggests that competitors are waiting to acquire a bargain in an industry beset with overcapacity compounded by punishing countervailing duties imposed by our southern neighbours. Worse, one such competitor holds a right of first refusal affecting a key asset.

[27] Mr. Meakin's "utopian" views as to a possible outcome from a sale of the enterprise fails to account for some $19.5 million of payments due to the creditors of unaffected obligations, presupposes that (a) the payment of $6 million to the Bank of Montreal is an avoidable transaction, (b) the balance of $4 million due on its loan is a Class 5 claim and (c) omits contracts that would have to be assumed by a buyer of at least $2.3 million. This reduces a best case scenario from a sale of the business to less than a possible $10 million improvement for the Class 2 Creditors, before expenses. The Opposing Creditors' share of this theoretical sum would not exceed $2.8 million before expenses. Further, Mr. Meakin's proposal to sidestep the right of first refusal is unconvincing. This right, together with long term fiber

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procurement contracts, if not revoked, "would hamper significantly any kind of divestiture process" according to Mr. Meakin's partner, Mr. Leblanc.

[28] There are serious risks associated with any attempted sale of an insolvent enterprise over an unspecified period of time. Employees who are key to Uniforêt's business operations but not necessarily to a buyer's operations will almost certainly begin looking for safe havens. Customers will look to other sources for their wood products. Suppliers will tighten credit facilities and look for other customers. There will almost certainly be erosion on several fronts. Added to all this, it should not be forgotten that those creditors of Uniforêt who have voted in favour of the First Plan have implicitly agreed that current management and direction should remain unchanged.

[29] Given all of these factors, the Court concludes that it would be folly to attempt a sale of Uniforêt's businesses – even to test the market – almost 2 years after the First Plan was filed for so small a possible yet unlikely gain. Uniforêt has so far managed to survive under CCAA protection in weak and difficult market conditions all the while fighting this litigation. It deserves a chance to prove to its stakeholders that it can both survive and return to profitability. This is what the CCAA was designed to encourage and facilitate.

B. Who really gets hurt

[30] For those Opposing Creditors who acquired their notes for 28¢ in the dollar like Prospect, there will be no "haircut". Rather, the issue for them is the size of their gain and the yield on their investment to maturity. Only those U.S. noteholders who paid more in the after market for their U.S. Notes than they stand to receive from the Plan will suffer any loss under it. Jolina's average cost for the U.S. Notes it holds amounts to about 53¢ in the dollar. Its haircut will be modest. Accordingly it should come as no surprise to anyone that it does not insist on equity in circumstances where it will recover almost all it had to pay for its U.S. Notes. Add to this the fact it already holds 40% of the existing equity in Uniforêt. If it converts the "B" Notes it will receive under the Plan, it will increase its equity position in Uniforêt to about 63%, allowing for dilution.

[31] Highland acquired its U.S. Notes from Prospect, one of the funds it manages, at a cost of 80¢, after Uniforêt had applied for relief under the CCAA. The market at the time for the U.S. Notes was in the region of 28¢. Thus, Prospect has already realized a tidy gain on the sale of $3 million of the principal amount of the U.S. Notes it then held. It is left with $20 million of U.S. Notes. The explanation for this generous transaction – at a price more than twice the market price – leaves as many questions unanswered as were answered. Without any U.S. Notes, Highland would have no standing in these proceedings as a Class 2 creditor. The price Highland elected to pay for its U.S. Notes reflects what it hoped to achieve for all its clients in its forthcoming negotiations with Uniforêt. Highland believed that its group would control the claims of the U.S. noteholders in any Chapter 11 type proceedings and assumed that Jolina, being a shareholder of Uniforêt, would not be permitted to vote on any of its claims as Uniforêt's creditor. In this it was mistaken, as Highland's President, Mr. Dondero, readily conceded. Canadian rules do not prevent a shareholder of an insolvent company from voting on its claims as a creditor.

[32] Thus, only four of the six Opposing Creditors will sustain a real loss if the Plan is approved. Together they hold $12.5 million of U.S. Notes purchased at prices ranging from 96¢ to 66¢. Highland's loss is self inflicted. It is also Prospect's initial gain. In addition, Prospect will gain from the Plan itself, having purchased its $20 million U.S. Notes for only about 28¢. In the giant scheme of things, four holders of 10% of the $125 million U.S. Notes will sustain a legitimate loss if the Plan is approved. They will lose much more in a bankruptcy.

[33] Arguably, the question the Court might ask is whether a Plan thought by the Monitor to be both fair and reasonable – feasible and workable – and to have been approved by the required majority of all the creditors of Uniforêt should nevertheless be sacrificed to please four speculators.[36] Of course not. Their actual losses will not exceed 45¢ in the dollar[37] if the Plan succeeds, perhaps less if the conversion option is exercised. Absent bad faith, the CCAA should not be employed to permit a cranky minority creditor to frustrate a feasible and fair plan that has been blessed by an overwhelming majority of all the creditors of a debtor.[38]

C. The Equity Issue

[34] It became evident during the hearing that a serious bone of contention between the Opposing Creditors and Uniforêt centered on the unwillingness of the latter to give sufficient equity to the former. While the First Plan provided for a conversion option exercisable before September 15, 2004, it came with a very short fuse, or repurchase option.[39] By the amendments made to the Plan on May 6, 2003, the repurchase option has been dropped and the conversion of the "B" Notes may be exercised anytime before September 15, 2008. This puts a serious dent into the oppression argument advanced by the Opposing Creditors concerning the lack of an equity kicker for the Class 2 creditors.

[35] Arguably, the issue now becomes how much equity ought to have been made available to the Class 2 creditors. Jolina accepted its share of a potential 55% of the equity subject to the repurchase option. Uniforêt has removed that option and extended the conversion period by 4 years. The shareholders of Uniforêt, qua shareholders, are not involved in the Plan. Nothing was offered to them and one consequence of the Plan is that whatever interest they now

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have is going to be diluted. In all the circumstances of this case, the Court concludes that the offer of equity, while perhaps not overly generous when compared to some other recently sanctioned plans,[40] is nevertheless adequate and fair.

D. Bad Faith

[36] The good faith of the Opposing Creditors has been called into question by Madam Justice Zerbisias.[41] The Opposing Creditors assert that Uniforêt "and its allies [...] have shown bad faith of the kind which should convince any reasonable observer that the Plan is neither fair nor reasonable". They point to the treatment accorded the Bank of Montreal $11 million loan, the repayment of part of it,[42] a loan by Jolina of $1.1 million[43] repaid by Uniforêt on March 6, 2001 and Jolina's claim for the purchase of the planer (Class 3).[44]

[37] Suffice it to say that there has been aggressive behaviour displayed by all the parties in the course of this affair, at least some of the time. The Court has already commented on the transactions impugned by the Opposing Creditors.[45] Absent a bankruptcy, these claims will all be resolved eventually, just like the claims of the Opposing Creditors, either in accordance with their terms or subject to the Plan. Again, absent a bankruptcy, the impugned claims don't add any value to the Petitioners' enterprise. However, had the planer never been acquired, the Peribonka mill would not have been as profitable as it was in the 18 months preceding the CCAA filing.

[38] Aggressive behaviour is to be expected in proceedings of this kind.[46] The CCAA favours the survival of businesses and the jobs that go with them. Where, as here, it has been amply demonstrated that the creditors as a whole will fare much better under the Plan than in a liquidation, the solution is obvious. The issue in this case was to decide if a minority group of secured creditors has been materially oppressed by the behaviour of the majority. That case has not been made out. The U.S. noteholders are offered the entire enterprise value of Uniforêt in the form of reconstituted notes and they will receive annual yields on these notes for the next five years varying between some 10% and 17%.

E. The Alternate Plan

[39] While the Court may have the authority to adopt a Plan different from that sought to be sanctioned, it should only exercise that authority if it is satisfied that the proposed Plan is unfair. Moreover, the Alternate Plan proposed by the Opposing Creditors calls for a reorganization of the capital structure of Uniforêt Inc. requiring confiscation of the rights of existing shareholders without their approval being required. The Court has qualified the Plan as both fair and reasonable. The shareholders of Uniforêt have already offered control of their company to the U.S. noteholders. That is quite enough in the circumstances of this case.

[40] FOR THESE REASONS, THE COURT:

[41] MAINTAINS Petitioners' Motion to Sanction a Plan of Arrangement;

[42] DISMISSES the Opposing Creditors Re-Amended Particularized Contestation;

[43] SANCTIONS and APPROVES the Second Amended Plan of Compromise and Arrangement (Plan);

[44] PERMITS Petitioners to replace the U.S. Secured Notes, as defined in paragraph 1.1 of the Plan, by two new secured notes for each unpaid U.S. Note, a Note "A" and a Note "B" as described in paragraph 4.2 of the Plan and in virtue of two Trust Agreements previously approved by the Securities and Exchange Commissions of the United States;

[45] DECLARES that the American Trust Indenture, as defined in paragraph 1.1 of the Plan, be amended and updated by the said two Trust Agreements;

[46] DECLARES that all of the Executory Contracts, as defined in paragraph 1.1 of the Plan, save those terminated or repudiated by Petitioners before the "Plan Implementation Date", are in full force and effect as at the Plan Implementation Date, notwithstanding:

a) that Petitioners have obtained relief under the CCAA;
b) the effect on Petitioners of the completion of any one of the transactions contemplated by the Plan;
c) any compromises or arrangements effected pursuant to the Plan;
d) any default with respect to such a contract by Petitioners prior to the Plan Implementation Date; or
e) any automatic termination of any such contract or any purported termination thereof by any Person other than Petitioners

the whole in conformity with paragraph 6.7 of the Plan.

[47] DECLARES that no party to an Executory Contract, as defined in paragraph 1.1 of the Plan, shall be entitled to accelerate the obligations of Petitioners or terminate, rescind or repudiate such other party's obligations under an Executory Contract following the Plan Implementation Date on the sole ground:

a) of any event that occurred on or prior to the Plan Implementation Date which would have entitled such party to accelerate Petitioners' obligations under such Executory Contract;
b) that Petitioners have obtained relief under the CCAA;
c) of the effect on Petitioners of the completion of any of the transactions contemplated by the Plan; or
d) of any compromises or arrangements effected pursuant to the Plan.

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the whole in conformity with paragraph 6.7 of the Plan.
[48] DECLARES that the date for the implementation of the Plan will be deemed to be the date specified in a Certificate to be filed in the Court record by Petitioners and the Monitor as soon as all the conditions specified in paragraph 5.1 of the Plan have been fulfilled or satisfied.
[49] EXEMPTS Petitioners from furnishing any security;
[50] ORDERS provisional execution of this judgment notwithstanding appeal;
[51] THE WHOLE with costs against the Opposing Creditors and in favour of Petitioners, the Monitor and Jolina Capital Inc.

_____
DANIEL H. TINGLEY, J.S.C.

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Dates of hearing: March 3 to March 18, 2003
April 28 to May 9,2003

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[1] R.S.C., 1985, c.C-36, section 6 which provides that: 6. [Compromises to be sanctioned by court] Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company, and (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.
[2] Addressed in large part in the Court's judgment of October 23, 2002 rendered by Madame Justice Zerbisias dealing primarily with classification issues.
[3] Essentially all the assets and undertakings of Uniforêt's operating companies excluding receivables and inventory and specified equipment under capital leases.

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[4] Contemplating a reorganization of the capital structure of Uniforêt pursuant to the provisions of Section 191 of the Canada Business Corporations Act, R.S.C., 1985, c. C-44, as amended.
[5] Infra, paragraph [9]. See paragraph 4.2.2 of the Plan.
[6] Defined in the Plan as: a. Interim Period Debts, which shall be paid by Uniforêt in accordance with terms previously agreed upon with the respective Interim Creditors; b. Uniforêt Scierie-Pâte Inc.'s obligations towards the Municipalité Régionale de Comté de Sept-Rivières to build and maintain roads, as provided in the agreement dated April 3, 2001, and the related Hydro-Québec's claim in the amount of $5,000,000 referred to therein; c. Claims of legal, accounting and financial advisors to Uniforêt, including the Monitor and its counsel, in respect of any debt incurred or to be incurred by Uniforêt for the purposes of reorganizing Uniforêt's liabilities, business and affairs including, without limitation, pursuant to the Plan, which monies shall be paid by Uniforêt in accordance with the Initial Order; d. Claims for indemnity pursuant to the indemnities provided by Uniforêt to directors or officers of Uniforêt; e. Claims of Employee Creditors, which monies shall be paid by Uniforêt in the ordinary course of business; f. [...] g. Dues owing to the Quebec Minister of Natural Resources pursuant to the Forests Act, R.S.Q., c. F-4.1, which shall be paid by Uniforêt in accordance with terms previously agreed upon with the Quebec Minister of Natural Resources; h. Monies, if any, owing to National Bank of Canada, Bank of Montreal and La Société d'hypothèque CIBC, which shall be paid by Uniforêt in accordance with existing agreements and contracts, or as may be agreed between each of them; i. Claims for goods on consignment, which monies shall be paid by Uniforêt in accordance with terms previously agreed upon with the Creditors of such Claims; and j. Claims for warehousing contracts, which monies shall be paid by Uniforêt in accordance with terms previously agreed upon with the Creditors of such Claims.
[7] Described in the Plan as: the date on which all conditions contained in Section 5.1 of this Plan are satisfied. These conditions, save those subject to the discretion of the Court, have all been satisfied.
[8] The highlighted portions represent the changes made to the First Plan on May 6, 2003. Prior to these changes, this paragraph read: furthermore, Convertible Notes "B" will, from the Plan Implementation Date until September 15, 2004, be convertible at any time into Class A Subordinate Voting Shares of Uniforêt Inc. (listed on The Toronto Stock Exchange under the trading symbol UNF.A) at a conversion price of $0.50 per share, such conversion right to expire at the close of business of September 15, 2004 and to be subject to a thirty (30) days prior written conversion notice to Uniforêt, which may then elect, prior to the expiry of such thirty (30) day period, to pay in cash to the noteholder an amount equal to the Market Value of the Class A Subordinate Voting Shares of Uniforêt Inc. issuable upon conversion instead of delivering shares to the noteholder; effectively giving to Uniforêt a repurchase option.
[9] Supra, Note 6, paragraph (h).
[10] Infra, see paragraph [18] below. A wholly owned subsidiary of Uniforêt Inc., 3735061 Canada Inc. (373) offered to purchase all the U.S. Notes for 30% of their principal amounts. The funds to satisfy this offer were borrowed from a bank syndicate and the syndicate loans were guaranteed by Jolina. 373 defaulted under the syndicate loans. Jolina stepped into the shoes of the bank syndicate and took the U.S. Notes acquired by 373 in lieu of payment of the syndicate loan.
[11] 2000 ABQB 442 (CanLII), (2000) 20 C.B.R. (4th) 1, at page 36: Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: Royal Oak Mines Ltd., supra, para. 4., Re Cadillac Fairview Inc. (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and T. Eaton Company, supra. To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of its constituents. It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or

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prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

[12] As was done for example in Plans approved in Re Skeena Cellulose Inc., (100% of the equity offered to the secured creditors);Re Silcorp Limited, (75%); Re Pioneer Companies Inc., (57%); Re Microcell Telecommunications Inc., 500-11-019761-036; 2003-04-30 (99.9% to the creditors); Re White Rose, (94.4%); Re Royal Oak Mines Inc., 14 C.B.R. (4th) 279 (99%); Re Eagle Precision, (90.3%); Bluestar Battery, (83%); Re Algoma Steel Inc., 30 C.B.R. (4th) 1 (100%); Re McWatters Mining (2002), (75% to unsecured creditors); Re 360 Networks, (100%); Re Kmart, (50% to secured creditors). See as well Jolina's Exhibits J-28 and 29 and the Monitor's Exhibit M-1.

[13] Supra, Note 8.

[14] Supra, Note 4.

[15] Supra, Note 11, and see Re Central Capital Corp., 38 C.B.R. (3rd) 1 (Ont. C.A.), at page 37, paragraph 90 where Mr. Justice Finlayson observed that: In the case of an insolvency where the debts to creditors clearly exceed the assets of the company, the policy of federal insolvency legislation appears to be clear that shareholders do not have the right to look to the assets of the corporation until the creditors have been paid.; Re T. Eaton Co., 15 C.B.R. (4th) 311 (Ont. S.C.J.), at page 314, paragraphs 9 to 13 inclusive and Re Royal Oak Mines Inc., 14 C.B.R. (4th) 279 (Ont. S.C.J.), at page 281, paragraph 2 where Mr. Justice Farley, prior to approving a proposal contemplating the sale of a business, observed that: [...] the shareholders would have to appreciate that, when viewed as to the hierarchy of interests to receive value in a liquidation related transaction, they are at the bottom. Further in these particular circumstances there are, in relation to the available tax losses (which is in itself a conditional asset), very substantial amounts of unsecured debt standing on the shareholders' shoulders. That is, the shareholders, even assuming an ongoing operation achieving a turnaround to profitability without restructuring, would have to wait a long while before their interests saw the light of day.

[16] Supra, Note 1, at page 26, paragraph 96, where Madam Justice Paperny reminds us that: The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters: a. The composition of the unsecured vote; b. What creditors would receive on liquidation or bankruptcy as compared to the Plan; c. Alternatives available to the Plan and bankruptcy; d. Oppression; e. Unfairness to Shareholders of CAC; and f. The public interest.

[17] See Re T. Eaton Co., Supra, Note 15, at page 314, paragraphs 8 and 9.

[18] See Ontario v. Canadian Airlines Corp., 2001 ABQB 983 (CanLII), (2001) 29 C.B.R. (4th) 236 (Alb. Q.B.), at paragraph 61.

[19] See Re Canadian Red Cross Society, 5 C.B.R. (4th) 299 (Ont. S.C.J.), at page 315, paragraphs 43 and 45.

[20] See Algoma Steel Corp. v. Royal Bank, reflex, (1992) 11 C.B.R. (3d) 11 (Ont. C.A.), at page 14, paragraph 7.

[21] Supra, Note 11, at page 5, paragraph 3, where Madam Justice Paperny adds: Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

[22] Ibid, at pages 42 to 44 inclusive, paragraphs 171 to 177.

[23] Ibid, at page 44, pages 178 and 179, citing with approval the remarks of Mr. Justice Farley in Re Sammi Atlas Inc., 1998 CanLII 14900 (ON SC), (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), at page 173: A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. And see Re Quintette Coal Ltd., 1992 CanLII 670 (BC SC), (1992) 13 C.B.R. (3d) 146, at page 165, paragraph 93.

[24] See Re Central Guaranty Trustco Ltd., reflex, (1993), 21 C.B.R. (3d) 139, at page 141, where Mr. Justice Farley observed that: The Revised Plan of Arrangement had required that there be a vote on the proposed compromise re these Claims (with a majority in number representing three-quarters in value of the proven Claims). That vote was even more overwhelming as only FSTQ voted against. 92.54% by number (96.16%) by value) were in favour and 7.46% by number (3.84% by value) were opposed. This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a very heavy burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness. But see also Re Quintette Coal Ltd., ibid, at pages 168 and 169, paragraphs 108 to 116.

[25] See Re Sammi Atlas Inc., supra, Note 23, at page 174, paragraph 5.

[26] Defined in Dictionary of Finance and Investment Terms, Barron's, 1985, at p. 470 as: WHITE KNIGHT acquirer sought by the target of an unfriendly TAKEOVER to rescue it from the unwanted bidder's control. The white knight strategy is an alternative to SHARK REPELLENT tactics and is used to avert an extended or bitter fight for control.

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[27] Supra, Note 6 (h).
[28] Ignoring any discount for projected delays in payment.
[29] See Algoma Steel v. Royal Bank, Supra, Note 20, at page 9 where Mr. Justice Farley notes: What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.
[30] See Section 7 of the Forest Act, supra, Note 6 (g).
[31] That is, the proverbial "reasonable person".
[32] This is the top of a range of between $90 and $112 million.
[33] Or more accurately, its earnings before interest, taxes, depreciation and amortisation (EBITDA).
[34] Supra, Note 3.
[35] Estimated by the Monitor in paragraph 32 of his February 27, 2003 report reproduced above in paragraph [10] and based on the rosiest of assumptions.
[36] That is, investors in below investment grade securities acquired in the after market.
[37] In most cases, much less.
[38] Supra, Note 24.
[39] Supra, Note 8.
[40] Supra, Note 12.
[41] Supra, Note 2, at pages 29 and 30; paragraphs 95 and 96.
[42] Which the Opposing Creditors say is a $6 million preferential payment.
[43] Used to settle wage claims of an affiliate company for which Messrs Perron and Mercier, as directors of the affiliate, were legally liable.
[44] Jolina's security position in respect of its advances to acquire the planer is in some doubt.
[45] See paragraphs [19], [20], [22] and [23] above.
[46] See Re T. Eaton Co., Supra, Note 15, where at page 258, paragraph 6, Mr. Justice Farley observed: «The Act clearly contemplates rough-and tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get, [...]».

Court may order amendment - Sec 6(2)

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Country Style Food Services Inc. (Re), 2002 CanLII 41751 (ON CA) - Grounds to Reopen Santioned Plan

Date:	2002-04-16
Docket:	M28458
Parallel citations:	158 OAC 30
URL:	http://canlii.ca/t/1db3v
Citation:	Country Style Food Services Inc. (Re), 2002 CanLII 41751 (ON CA), <http://canlii.ca/t/1db3v> retrieved on 2013-08-21
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1. DATE: 20020416
DOCKET: M28458
COURT OF APPEAL FOR ONTARIO

IN CHAMBERS

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 C.c-36, AS AMENDED

AND IN THE MATTER OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C.c.-43, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF COUNTRY STYLE FOOD SERVICES INC., COUNTRY STYLE FOOD SEVICES HOLDINGS INC., COUNTRY STYLE REALTY LIMITED, MELODY FARMS SPECIALTY FOODS AND EQUIPMENT LIMITED, BUNS MASTER BAKERY SYSTEMS INC. and BUNS MASTER BAKERY REALTY INC.

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 C.c-36

COUNSEL: Craig R. Colraine and Mitchell D. Goldberg for Tozeng Limited, 1124019 Ontario Ltd. and 665371 Ontario Ltd. (applicants)

Joanna Board for 1304271 Ontario Limited and 995804 Ontario Inc. (supporting the applicants)

Patrick J. O'Kelly and Ashley J. Taylor for Country Style (respondent)

Frank J.C. Newbould Q.C. for the Bank of Nova Scotia (respondent)

Mahesh Uttamchandani for CAI, DIP Lender (respondent)

HEARD: April 15, 2002

FELDMAN J.A.:

[1] This is an application for leave to appeal the order of Spence J. made on March 7, 2002, whereby he sanctioned a Plan of Arrangement (the "Plan" under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 ("*CCAA*") for the respondent, Country Style Group of Corporations. The application is brought under s. 13 of the *CCAA* which provides:

s. 13 Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[2] The application was originally brought before Spence J. but as he was unable to hear it before April 16, 2002, the date scheduled for the closing of the plan transaction, he suggested that the application be brought to this court.

[3] All three applicants are Country Style franchisees. Only one, Tozeng Limited, is also a creditor that filed a proof of claim and voted in the proceeding.

[4] The applicants concede that on the record before him, Spence J. did not make any error in approving the Plan which was approved by a substantial percentage of the unsecured creditors and by the secured creditor. In fact, no one opposed the approval of the plan at the sanction hearing. The basis for this application is that immediately after the hearing approving the Plan, the applicants became aware of facts which they say vitiate the approval process in three ways:

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(1) Over a period of time, some franchisees had contributed to Country Style's national advertising fund while others had not. The applicants claim that to the extent that some franchisees thereby overcontributed, they were entitled to claim as creditors against the company for unjust enrichment in the Plan process. However, because they did not know about the overcontribution and unequal treatment until it was too late to claim in the plan process, they have been denied both the amount of their claim and the opportunity to vote for or against the Plan and to participate in the process.

(2) The company was offering improper incentives to creditors to vote for the Plan.

(3) The Monitor was in a conflict of interest.

5. The applicants rely on fresh evidence in order to assert these claims and rely on s. 134(4) of the *Courts of Justice Act* R.S.O. 1990, c.C-43, which allows a court in a proper case, to accept fresh evidence. In *R. v. Palmer*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759 at 775, the Supreme Court of Canada set out four criteria for the admission of fresh evidence on appeal, summarized as follows:

(1) by due diligence, the evidence could not have been adduced in the proceeding below;

(2) it is relevant to a decisive or potentially decisive issue;

(3) it is reasonably capable of belief;

(4) if believed, it may reasonably have affected the result.

[5] The respondents object to the admission of the fresh evidence on this application and rely heavily on the assertion that the first criterion, due diligence, has not been met in this case. They also suggest that the record discloses that Mr. English, the principal of Tozeng Limited, did know about the differential treatment of franchisees as long as one year ago.

[6] Mr. O'Kelly on behalf of Country Style, points to the fact that a creditor, Tarragon Mercantile Inc., did propose to oppose the sanction order until an out-of-court settlement was reached on the evening before the sanction motion. Tarragon filed a motion record with the court that contained affidavits outlining some of the allegations on which the applicants now rely (in particular, the alleged irregularities with the proxy solicitation process and the alleged conflict of interest of the Monitor) and raised other matters as well. I am told that Spence J. was advised on the return of the motion that Tarragon was withdrawing its opposition. The plan was thereupon sanctioned by the court. I am advised that no one opposed the order.

[7] Mr. O'Kelly's submission is that because Tarragon was in a position to find out the information necessary to bring forth some of the allegations now asserted by the applicants, the applicants could have done so as well had they exercised due diligence. In my view, on the face of it, there is merit in that submission.

[8] The one issue which is not fully detailed in the Tarragon material is the national advertising fund issue. However, the information relied on in respect of the fund is contained in an affidavit of Catherine Mauro dated March 25, 2002 and filed on this application. She is the former director of marketing and product development who was terminated by Country Style on February 4, 2002. Ms Mauro also provided one of the affidavits which is included in the Tarragon material. Again, therefore, it appears that the applicants could have discovered further information from Ms. Mauro prior to the March 7 hearing had they acted with due diligence in speaking with her.

[9] Even more significant, however, is the fact that in his affidavit filed in connection with the original material seeking court protection, Mr. Gibbons, the President of Country Style, disclosed as part of his description of the financial status of the debtor companies that one of the historical responses by management when a franchisee developed financial difficulties was "deferring or accepting reduced royalty, advertising and/or sign rental payments for a period of time" (affidavit para. 37). This information was also included in the Management proxy circular which was sent out to all creditors, of which Mr. English was one.

[10] The applicants' position is that until they talked to Catherine Mauro after the sanction hearing, they did not know that some franchisees were not paying the full 3.5% of monthly gross sales to the national advertising fund, and that the 13 corporate stores, taken over from failed franchisees, paid nothing into the fund. The applicants also take the position that the company and the monitor made it impossible for the franchisees to learn of this by failing to disclose it to the franchisees. Their evidence is that representations were made to franchisees by senior management that all franchisees paid the same percentage of their sales into the national advertising fund.

[11] However, it appears that there was disclosure of the differential treatment of franchisees in respect of the advertising fund in Mr. Gibbons' affidavit and the Management circular. Counsel also pointed out that franchisees could ask to be added to the service list for all of the documentation and that

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some were added, including Ms. Board's clients who have been represented by her here in support of the application.

[12] I conclude, based on the material currently before the court, that it cannot be said that there was non-disclosure of the differential treatment of franchisees in respect of the contribution to the national advertising fund, or that the applicants could not have discovered this evidence if they had exercised due diligence. Although it appears that the potential significance of the different contributions as a possible claim against Country Style based on unjust enrichment, may not have been considered by the applicants until after the sanction motion, a failure to appreciate the significance of information does not meet the due diligence test.

[13] Finally, the respondents point to the fact that Mr. English has deposed that in May 2000, he sought and obtained differential treatment in respect of the royalty fees he was paying and that he has been trying to retain the so-called "tiered store" status for his stores which allows them to pay lower fees. Therefore, Mr. English was aware of differentiation among franchisees in respect of some of the amounts payable to the franchiser and wanted to preserve that differentiation when it benefited him. The respondents say this shows that the new evidence should not be accepted and that furthermore, there is no merit to the suggestion that the franchisees have any claim against the debtor company based on alleged overpayments. As a result, they argue that the new evidence would not have affected the outcome of the sanction hearing had it been available at that hearing.

[14] I am satisfied that I need not deal with this part of the submission on this motion, as the due diligence criterion is not met.

[15] Even if the fresh evidence met the test for admission, which it does not on the due diligence criterion, the court must be satisfied that this is a case where leave to appeal ought to be granted. The jurisprudence in this area dictates that leave to appeal in *CCAA* proceedings should be granted sparingly: *Re Consumers Packaging Inc.* 2001 CanLII 6708 (ON CA), (2001), 27 C.B.R. (4th) 197 at 199 (Ont. C.A.); *Re Blue Range Resources Corp.* (1999), 12 C.B.R. 186 at 190 (Alta. C.A.). In order to grant leave the court must be satisfied that there are "serious and arguable grounds that are of real and significant interest to the parties": *Re Multitech Warehouse Direct Inc.* reflex, (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.). This is determined in accordance with a four-pronged test as follows:

(a) whether the point on appeal is of significance to the practice;
(b) whether the point is of significance to the action;
(c) whether the appeal is *prima facie* meritorious or frivolous;
(d) whether the appeal will unduly hinder the progress of the action.

See *Blue Range Resource Corp.*, *supra* at 190; *Cineplex Odeon Corp.* 2001 CanLII 32746 (ON CA), (2001), 24 C.B.R. (4th) 201 at 202 (Ont. C.A.)

[16] As I understand it, the main issue on appeal is the submission that the applicant franchisees and other franchisees, some of whom have filed affidavits in support, over-contributed to the national advertising fund in relation to other franchisees and the company in connection with its corporate stores. This overcontribution entitled them to make a claim against the company for unjust enrichment. However, because they did not know about this potential claim until after the sanction hearing, they did not file claims in the process; they therefore did not have the right to participate as unsecured creditors, and they did not have the right to vote for or against the Plan.

[17] Counsel for the applicants concedes that there is no evidence in the record to demonstrate that had the affected franchisees made claims and voted, the Plan would have been defeated or amended in any way.

[18] Counsel also concedes that no alternative plan has been proferred at any stage. He suggests, however, that because of the circumstances set out, the Plan cannot be considered fair and reasonable. The Monitor has made it clear in its reports that the only alternative to the Plan is bankruptcy or receivership, whereunder there would be nothing for the unsecured creditors. Counsel suggested in argument that his clients would be prepared to see the debtor company go bankrupt rather than proceed with the sanctioned Plan. There is no affidavit evidence to this effect, and I frankly find it hard to accept that franchisees with viable operations would prefer to see the corporate entity with which they are associated be liquidated in a bankruptcy or receivership.

[19] Based on the record, there is nothing to suggest that the Plan as sanctioned and approved by the court is not "fair and reasonable." If leave to appeal is granted, the progress of the action will clearly be hindered and the restructuring may not go ahead at all. If the appeal were to be successful and the

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process reopened, the applicants do not propose any alternative to the plan, so that the significance to the action appears to be procedural but not substantive.

[20] For all of these reasons, the applicants have not satisfied the test for the court to exercise its discretion to grant leave to appeal.

[21] During argument, counsel for the applicants suggested that one of the problems facing his clients is that they owe money to the debtor company, but are not able to make a claim against the company in respect of the overpayment into the advertising fund because of the orders made in the *CCAA* process. In response, counsel for Country Style took the position that s. 18.1 of the *CCAA* preserves the applicants' ability to assert a right of set-off against the company in respect of their claims against any monies which they may owe to the company. In other words, their claims against the company are not necessarily barred.

[22] As this was not an issue for resolution on this leave to appeal motion, I make no comment on (1) the effect of s. 18.1 of the *CCAA* on post- Plan claims by or against the debtor company; or (2) on the effect of the claims bar order in respect of claims by people who were not listed or served as creditors in the proceeding, or people who did not know that they had claims against the company.

[23] Finally, I note that the franchisees as a group were not considered to be people to be officially served with and included in the *CCAA* process. I was advised by a representative of the Monitor who was present in court for this appeal, that Mr. Gibbons did send a letter to all franchisees enclosing the original stay order and advising them of the Monitor's website where much of the *CCAA* material would be posted. Although the process under the Act contemplates the participation and protection of creditors, the debtor company, and possibly the shareholders, in cases where the debtor company is a franchisor, the franchisees may have an interest in the ultimate structure of the franchise operation as proposed by the Plan process. It may therefore be appropriate where a franchisor seeks *CCAA* protection, to consider whether the franchisees ought to be given notice of the proceedings and the opportunity to request the ability to participate on an appropriate basis.

CONCLUSION

[24] Leave to appeal is denied.

Signed: "K. Feldman J.A."

United Used Auto & Truck Parts Ltd. v. Aziz, 2000 BCCA 146 (CanLII) - Monitor and Debtor Legal fees as Super-priority in Restructuring

Date:	2000-02-28
Docket:	CA026591
Parallel citations:	[2000] 5 WWR 178; 16 CBR (4th) 141; 73 BCLR (3d) 236
URL:	http://canlii.ca/t/534f
Citation:	United Used Auto & Truck Parts Ltd. v. Aziz, 2000 BCCA 146 (CanLII), <http://canlii.ca/t/534f> retrieved on 2013-08-24
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Citation: ***United Used Auto & Truck Parts Ltd. v. Aziz*** 2000 BCCA 146 Date: 20000228 Docket: CA026591

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITOR ARRANGEMENT ACT*
R.S.C. 1985, C. c-36

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AND

IN THE MATTER OF THE *COMPANY ACT*, R.S.B.C. 1979, c. 59

AND:

**IN THE MATTER OF UNITED USED AUTO & TRUCK PARTS LTD.
VECW INDUSTRIES LTD., SEILER HOLDINGS LTD. and
UNITED USED AUTO PARTS (STORAGE DIV.) LTD.**

BETWEEN:
**UNITED USED AUTO & TRUCK PARTS LTD.
VECW INDUSTRIES LTD.
SEILER HOLDINGS LTD. and
UNITED USED AUTO PARTS (STORAGE DIV.) LTD.**

PETITIONERS
(RESPONDENTS)

AND:

RASHID AZIZ

RESPONDENT
(APPELLANT)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Prowse
The Honourable Mr. Justice Mackenzie

B.J. Brown	Counsel for the Appellant
S.C. Fitzpatrick	Counsel for the Respondent Century Services
C.W. Caverly	Counsel for the Respondent Ernst & Young
W.E.J. Skelly	Counsel for the Respondent United Group of Co.
R.G. Hildebrand	Counsel for the Respondent City of Surrey
B. Lewis-Hand	Counsel for the Respondent Clarica Life Insurance Co.
D.G. Nygard	Counsel for the Respondent Attorney General of Canada

Place and Date of Hearing: Vancouver, British Columbia

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January 25, 2000

Place and Date of Judgment: Vancouver, British Columbia
February 28, 2000

Written Reasons by:
The Honourable Mr. Justice Mackenzie
Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Madam Justice Prowse
Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] This appeal raises the issue of "super-priorities" under the *Companies' Creditor Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Can a court grant a priority for the fees and expenses of a court appointed monitor ahead of secured creditors without the consent of those creditors? A subsidiary issue is whether legal fees of the debtor in possession related to a proposed restructuring can be granted a similar priority. For the reasons that follow, I have concluded that equity underpins the court's *CCAA* jurisdiction and permits orders granting super-priority for the monitor's fees and expenses in appropriate circumstances as well as for the debtor's legal expenses related to a restructuring plan.

[2] Following the hearing of the appeal we advised counsel through the Registry that the appeal was dismissed and that reasons would follow. We have been advised by counsel that this is the first time the issues have come before an appellate court. We are indebted to counsel for their thorough and comprehensive submissions.

Background

[3] In brief, Mr. Justice Tysoe granted an *ex parte* order under the ***CCAA*** on 8 November 1999 staying all execution and enforcement proceedings against the debtor/petitioners. Ernst & Young Inc. was appointed monitor and its reasonable fees and disbursements were ordered to be paid in priority to secured charges. The court also ordered that the reasonable fees and disbursements of counsel for the debtors related to the plan of restructuring should be included with the monitor's fees and disbursements in the defined "administrative charge" and be granted the super-priority over the charges of the secured and other creditors. On 19 November 1999, Tysoe J. dismissed an application by the secured creditors to set aside the stay order and the priority granted for the administrative charge. Tysoe J. reduced the maximum amount of the administration charge from $500,000 to $200,000. The secured creditors have appealed the super-priority granted to the administration charge. They did not appeal the stay of proceedings.

The facts

[4] The debtor/petitioners have carried on an auto wrecking business in Surrey, British Columbia since 1963. They gradually acquired 32 parcels of land aggregating some 150 acres. The business operates on 40 acres employing about 75 people.

[5] The petitioners' financial difficulties started in 1989. Over the years since they have financed losses by mortgaging the real estate.

[6] Foreclosure actions were commenced in late 1998. The mortgagees obtained orders *nisi* and the redemption periods expired. On 28 July 1999 two of the mortgagees were granted conduct of sale. The 32 parcels have been listed at individual prices aggregating $49.6 million or an en bloc price of $32 million. Appraisals of the property range from $23 million to $48.5 million. The higher estimates are for lot-by-lot sales with no allowance for carrying costs, selling expenses, or developers' profit.

[7] The aggregate debt is $24 million.

[8] The stay order granted by Tysoe J. allowed the conduct of sale to continue but directed that the listing agents were to deal with the petitioners and the monitor rather than with the two mortgagees earlier granted conduct of sale. Tysoe J. summarized the reasons for granting a stay under the ***CCAA*** in these terms at para. 17:

> In the present case, the Petitioners have substantial land holdings and an operating business. It is their intention to reorganize their affairs in order to save the auto wrecking business. They have a legitimate concern that an en bloc sale of the lands in the foreclosure proceedings could bring an end to the operating business. In my view, it is not an act of bad faith to seek the protection of the CCAA in order to attempt to save the operating business. The arguments of the secured lenders in this regard would have been more persuasive if the only business of the Petitioners was land holdings, but the Petitioners do have an active business which must be considered.

[9] The petitioners asked for Debtor in Possession ("DIP") financing in the amount of $1.1 million. Tysoe J. refused that request but he did allow a super-priority for legal expenses reasonably incurred in connection with the effort to

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successfully restructure the petitioners' affairs. He concluded that the cash flow from the business would be insufficient to pay those expenses in the absence of DIP financing. In the result, the allowance for the petitioners' restructuring legal expenses was a limited substitute for DIP financing. The petitioners' counsel's reasonable restructuring legal fees and disbursements for the restructuring were included within the administration charge as defined in the order and subject to the cap on the amount of the administration charge.

The Companies' Creditor Arrangement Act

[10] The ***CCAA*** has been controversial since it was first enacted in 1933, in the depths of the Great Depression. It was upheld as constitutional in ***A.G. Can. v. A.G. Que.***, 1934 CanLII 72 (SCC), [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75. In an often quoted passage Duff C.J.C. summarized the purpose of the statute:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[11] Those observations were reinforced by Gibbs J.A. in ***Hongkong Bank v. Chef Ready Foods*** 1990 CanLII 529 (BC CA), (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315-16:

> The purpose of the *C.C.A.A.* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the *C.C.A.A.*, the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. ll.
>
> There is nothing in the *C.C.A.A.* which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument.

Gibbs J.A. concluded (at 320):

> In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as *Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, 1984 CanLII 1176 (AB QB), [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.); *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.); *Re Feifer and Frame Manufacturing Corp.*, [1947] Que. K.B. 348, 28 C.B.R. 124 (C.A.); *Wynden Canada Inc. v. Gaz Métropolitain Inc.* (1982), 44 C.B.R. (N.S.) 285 (Que. S.C.); and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, 72 C.B.R. (N.S.) 20, 1988 CanLII 3570 (AB QB), [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 149 (Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

[12] These comments emphasize that the ***CCAA's*** effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

The Monitor

[13] The ***CCAA*** originally contained no reference to a monitor. The term "monitor" appears to have originated in a passage from the judgment of Trainor J. in ***Re Northland Properties Ltd.*** (1988), 69 C.B.R. 266 (B.C.S.C.),as follows (at 277):

> I am satisfied that I have jurisdiction to appoint an interim receiver and spell out the responsibilities of that office such that his true role would be that of a monitor or watchdog during the interim period. The cost would be significant, but is not a factor of great weight considering the total indebtedness of the companies.

The jurisdiction relating to interim receivers is a jurisdiction in equity and Trainor J. implicitly relied upon that equitable jurisdiction to support the order.

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[14] The term "monitor" was picked up by Parliament in a 1997 amendment to the ***CCAA*** [S.C. 1997, c. 12, s. 124] and for the first time given statutory recognition. The amendment made appointment of a monitor mandatory. The material portion of the 1997 amendment is as follows:

> Court to appoint monitor
>
> 11.7(1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.
>
> Auditor may be monitor
>
> (2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.
>
> Functions of monitor
>
> (3) The monitor shall
>
> (*a*) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;
>
> (*b*) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,
>
> (i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
>
> (ii) at least seven days before any meeting of creditors under section 4 or 5, or
>
> (iii) at such other times as the court may order;
>
> (*c*) advise the creditors of the filing of the report referred to in paragraph *(b)* in any notice of a meeting of creditors referred to in section 4 or 5; and
>
> (*d*) carry out such other functions in relation to the company as the court may direct.
>
> Monitor not liable
>
> (4) Where the monitor acts in good faith and takes reasonable care in preparing the report referred to in paragraph (3)(b), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.
>
> Assistance to be provided
>
> (5) The debtor company shall
>
> (*a*) provide such assistance to the monitor as is necessary to enable the monitor to adequately carry out the monitor's functions; and
>
> (*b*) perform such duties set out in section 158 of the *Bankruptcy and Insolvency Act* as are appropriate and applicable in the circumstances.
>
> 1997, c. 12, s. 124.
>
> Non-liability in respect of certain matters
>
> 11.8(1) Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.
>
> Status of claim ranking
>
> (2) A claim referred to in subsection (1) shall not rank as costs of administration. . . .

The balance of s. 11.8 deals with liability for environmental matters that are not pertinent to this appeal.

[15] The function of the monitor is set out in some detail but the only reference to the cost of carrying out the monitor's function is the oblique reference in s. 11.8(2) that costs of statutory claims on the debtor arising before the monitor's appointment will not rank as a cost of administration. I do not think that it can be inferred that the monitor's costs of administration were otherwise overlooked by Parliament or that Parliament intended that the court have no authority to provide for those costs. The only reasonable conclusion in my opinion is that Parliament was aware of the court's general jurisdiction in equity and assumed that jurisdiction remained available except as inconsistent with the ***Act***. Indeed, by requiring the appointment of a monitor Parliament made a jurisdiction to provide for the monitor's costs of administration even more necessary.

Cases

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[16] The first attack on the jurisdiction of the court to grant a super-priority to the monitor's costs of administration came in ***Re Fairview Industries Ltd.*** reflex, (1991), 11 C.B.R. (3d) 71 (N.S.T.D.). There Glube C.J. concluded with some reluctance that the court had no authority under the ***CCAA*** to grant the monitor a super-priority in payment without the secured creditors' consent. While Glube C.J. referred to ***Northland Properties***, *supra*, in another context in the judgment, there is no reference to Trainor J.'s analogy of that between a monitor and an interim receiver and the common authority to assign a priority flowing from the court's equitable jurisdiction over interim receivers. Glube C.J. appears to have treated the issue solely as one of statutory construction without reference to any broader equitable jurisdiction.

[17] Later decisions in Ontario and British Columbia have declined to follow ***Fairview Industries.*** They have held consistently that the court does have jurisdiction to grant a super-priority for the fees and expenses of the monitor; see ***Canadian Asbestos Services Ltd. v. Bank of Montreal*** reflex, (1992), 16 C.B.R. (3d) 114 (Ont. Gen. Div.) ***Re Starcom International Optics Corp.*** 1998 CanLII 3832 (BC SC), (1998), 3 C.B.R. (4th) 177 (B.C.S.C.). In ***Canadian Asbestos*** Chadwick J. stated (at 123):

> The fruits of the monitors' efforts is for the benefit of all creditors and therefore the monitor and their legal counsel should be paid in advance and before distribution to the creditors.

[18] In ***Starcom***, *supra*, Saunders J. advanced a similar rationale at 189:

> [I]n my view the order sought is appropriate. The monitor acts on behalf of the court to provide information and monitoring for the benefit of all parties.

Neither ***Canadian Asbestos*** nor ***Starcom*** specifically referred to the source of the jurisdiction. Macdonald J. in ***Re Westar Mining Ltd.***1992 CanLII 1863 (BC SC), (1992), 14 C.B.R.(3d) 88, relied on in ***Starcom,*** referred to the jurisdiction simply as inherent jurisdiction (at 93). Macdonald J. noted that Dickson J., speaking for the Supreme Court of Canada in ***Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.***, 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475, held that inherent jurisdiction with respect to receiver-managers could not be exercised in conflict with a statute. The origins of the receivers' jurisdiction are located in the equitable jurisdiction of the Court of Chancery and while that jurisdiction cannot be exercised contrary to a statute nothing precludes its exercise to supplement a statute and effect a statutory object.

The receivers' jurisdiction

[19] The Canadian jurisprudence on priorities for receivers' fees and expenses begins with ***Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. Ltd.*** (1972), 17 C.B.R. 305 (Man. C.A.). There Dickson J.A. for the court rejected an argument that a receiver could only be paid from the debtor's remaining equity in the property. He concluded that such a restriction would frustrate the receiver's function (at 307-8):

> . . . The argument is that a receiver can only receive his remuneration and costs from property in which an equity remains. No authority was quoted in support of this proposition. There are cases to the contrary: *Strapp v. Bull, Sons & Co.*; *Shaw v. London School Board*, [1895] 2 Ch. 1: *Re Glasdir Copper Mines Ltd.*; *English Electro-Metallurgical Co. v. Glassier Copper Mines Ltd.*, [1906] 1 Ch. 365. It would seem to us that if appellant's argument is sound, one would be hard put to find anyone willing to be a receiver; he would be denied recovery of his fees and disbursements out of property under his administration if the mortgage load borne by that property exceeded the value of the property. The true worth of property under administration can rarely be determined at the time of appointment. The Court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property? The argument also appears to proceed on the assumption that when property subject to a mortgage becomes of a value less than the mortgage debt against it, it ceases to belong to the debtor. Property of a debtor, whatever the amount of the mortgage debt against it, remains the property of the debtor until all steps have been taken in law to foreclose the interest of the debtor. All of the debtor's property under administration of the court, and not merely the equity of the debtor in that property is available by order of the court to meet the fees and disbursements of a receiver.

[20] The issue of the receiver's priority was next visited by the Ontario Court of Appeal in ***Robert F. Kowal Investment Ltd. v. Deeder Electric Ltd.*** (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.). Houlden J.A. for the court relied on *Clark on Receivers*, 3rd ed., for the proposition that the receiver of a partnership has no power to subject the security of secured creditors of the partnership to liability for the receiver's disbursements. There were, however, exceptions:

1) if a receiver has been appointed with the approval of the holders of security;

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2) if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors; or

3) if a receiver has expended money for the necessary preservation or improvement of the property.

[21] Houlden J.A. stated that these three exceptions were not exhaustive. Nonetheless the ***Kowal*** statement of exceptions has been influential in subsequent cases and they were applied by this Court in ***Lochson Holdings Ltd. v. Eaton Mechanical Inc.*** (1984), 55 B.C.L.R. 54 (C.A.). But as Macdonald J. observed in ***Westar Mining***, supra at 93-94, different considerations apply under the ***CCAA.*** The court is concerned with the survival of the debtor company long enough to present a plan of reorganization. That is a broader interest than that of creditors alone. The jurisdiction must expand from the ***Kowal*** exceptions to serve that broader interest.

[22] Thus the receivers' jurisdiction and the monitors' jurisdiction are analogous to the extent that they are both rooted in equity but they diverge to the extent that the monitors' jurisdiction serves a broader statutory objective under the ***CCAA.*** In my opinion the jurisdiction under the ***CCAA*** cannot be restricted to the ***Kowal*** exceptions.

Priority for reasonable restructuring legal fees and disbursements of the debtors' counsel

[23] The legal expenses of the debtor in connection with the restructuring were wrapped up with the monitor's fees and expenses in the administration charge for the purposes of the stay order. However, I think they should be examined separately for questions of jurisdiction. As indicated above, Tysoe J. ordered the priority for the debtors' legal expenses as part of the administration charge only after he had refused to order more debtor in possession priority financing. The super-priority for the debtors' legal fees was a substitute for DIP financing and in my opinion, the jurisdictional issue turns on the power of the court to allow a super-priority for DIP financing.

[24] The subject of DIP financing has recently been examined in a trenchant paper by H.A. Zimmerman, *Financing the Debtor in Possession*, (Insolvency Institute of Canada, 19 November 1999). According to Mr. Zimmerman, the first case authorizing super-priority DIP financing under the ***CCAA*** was ***Willann Investments Ltd. v. Bank of America Canada***, [1991] O.J. No. 721 (Ont. Gen. Div.) (Q.L.). In ***Re Dylex Ltd. and Other Companies*** (23 January 1995), No. B-4/95, (Ont. Gen. Div.) super-priority DIP financing was granted for the first time over the objection of a secured creditor. According to Mr. Zimmerman the scope of super-priority DIP financing has been extended in recent, as yet unreported, cases including ***Re Skydome Corporation, Skydome Food Services and SAI Subco Inc.*** (27 November 1998), No. 98-CL-3179 (Ont. Gen. Div.) and ***Royal Oak Mines*** (14 March 1999), No. 99-CL-3278 (Ont. Gen. Div.).

[25] In ***Canadian Asbestos Services Ltd. v. Bank of Montreal***, *supra*, Chadwick J. granted super-priority for the advancement of additional funds to complete certain specific construction projects, holding that it was for the benefit of all creditors, both secure and non-secure. In ***Dylex***, *supra*, Houlden J.A. recognized a broader interest, including that of 12,000 employees, as justification for super-priority bridge financing over a secured creditor's objections. The jurisdiction to grant a super-priority for the debtors' restructuring legal expenses, whether separately or as a part of DIP financing rests on the same equitable foundation as the monitor's fees and disbursements and stands or falls on the same considerations.

Conclusions

[26] The petitioners left it very late in the day to apply for ***CCAA*** relief. The secured creditors opposed a stay of proceedings and failed. No appeal was taken from that part of the order which involved discretion of the chambers judge. Once the decision to grant relief was made, the monitor is required and I conclude that adequate security for the monitor's reasonable costs of administration necessarily follows. The question then becomes simply whether a super-priority ahead of secured creditors is necessary to provide that security in the circumstances of any particular case.

[27] The secured creditors contend that the super-priority for the monitor can only be supported if the case falls within the second ***Kowal*** exception, circumstances where the appointment is "to preserve and realize assets for the benefit of all interested parties, including secured creditors". Here it is contended that the objective is to effect a partial sale of the real estate assets for a price sufficient to pay the creditors and still leave sufficient land to permit the active business to continue. That would benefit other parties but not the secured creditors who could be paid out from an en bloc sale. The secured creditors have no interest in preserving the active business.

[28] The object of the ***CCAA*** is more than the preservation and realization of assets for the benefit of creditors, as several courts have underlined. In ***Chef Ready,*** *supra*, Gibbs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off the creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed "to monitor the business and financial affairs of the company" for the court. The appointment of a monitor is mandatory when the court grants ***CCAA*** relief.

[29] Dickson J.A. pointed out in ***Braid Builders***, *supra*, that receivers will not accept an appointment without reasonable assurance that they will be paid. That is equally true for monitors. When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the

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only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over ***CCAA*** relief. I do not think that Parliament intended that the objects of the ***Act*** could be indirectly frustrated by secured creditors.

[30] In my opinion, an equitable jurisdiction is available to support the monitor which is sufficiently flexible to be adapted to the monitor's role under the ***CCAA***. It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and ***CCAA*** orders should only be made if there is a reasonable prospect of a successful restructuring. That determination is largely a matter of judgment for the judge at first instance and appellate courts normally will be slow to interfere with an exercise of discretion.

[31] In my opinion, super-priority for DIP financing rests on the same jurisdictional foundation in equity. Priority for the reasonable restructuring fees and disbursements could have been allowed as part of DIP financing. It is immaterial that they have been allowed here as part of the administration charge.

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[32] I would dismiss the appeal for these reasons.

"The Honourable Mr. Justice Mackenzie"

I AGREE:
"The Honourable Madam Justice Rowles"
I AGREE:
"The Honourable Madam Justice Prowse"

Restriction — certain Crown claims - Sec 6(3)

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Canada (Attorney General) v. Fleet National Bank, 2005 CanLII 21 (ON CA) - Crown's Priority for ITA and GST taxes over Bank's Security

Date:	2005-01-06
Docket:	C41805
Parallel citations:	73 OR (3d) 737; 6 CBR (5th) 293; 59 DTC 5233; 193 OAC 95
URL:	http://canlii.ca/t/1jjhv
Citation:	Canada (Attorney General) v. Fleet National Bank, 2005 CanLII 21 (ON CA), <http://canlii.ca/t/1jjhv> retrieved on 2013-09-10
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DATE: 20050106
DOCKET: C41805
COURT OF APPEAL FOR ONTARIO

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LASKIN, MACPHERSON and LANG JJ.A.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36 AND THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, c. B-16

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT AMONGST THE OTTAWA SENATORS HOCKEY CLUB CORPORATION ("OSHCC"), SENATORS FINANCE CORPORATION I ("CORP I"), OTTAWA SENATORS HOCKEY CLUB 2001 LIMITED PARTNERSHIP ("OPERATING LP") AND OSHC 2001 MANAGEMENT CORPORATION ("OPERATING GP"), IN ITS OWN CAPACITY AND IN ITS CAPACITY AS GENERAL PARTNER OF THE OPERATING LP

Applicants	)	
THE ATTORNEY GENERAL OF CANADA	))	***Roger Leclaire* and *April Tate***
		for the appellant
	)	**Attorney General of Canada**
Appellant	)	
	))	***Kevin P. McElcheran***
- and -		**for the respondent**
	)	**Canadian Imperial Bank of Canada**
FLEET NATIONAL BANK AND CANADIAN IMPERIAL BANK OF COMMERCE	))))	***John A. MacDonald***
		for the respondent
		Fleet National Bank
Respondents	)	
	)	**Heard: November 25, 2004**

On appeal from the judgment of Justice James B. Chadwick of the Superior Court of Justice dated December 19, 2003.

MACPHERSON J.A.:

A. OVERVIEW

[1] This appeal arises out of a recent financial crisis experienced by the Ottawa Senators, a National Hockey League franchise. The dispute which gave rise to the litigation involves the Minister of National Revenue on one side and Canadian Imperial Bank of Commerce ("CIBC") and Fleet National Bank ("Fleet") on the other side.

[2] Specifically, the appellant, the Attorney General of Canada representing the Minister of National Revenue ("the Crown"), appeals a decision of Justice James Chadwick dated December 19, 2003, in which he held, *inter alia*, that:

(1) the Crown does not have priority over the respondent banks with respect to penalties and interest on deemed trust amounts required to be deducted from employees' wages; and

(2) the Crown does not have priority over the respondent banks with respect to the Goods and Services Tax ("GST") collected by the hockey team on behalf of the Crown but not remitted to the Receiver General.

B. FACTS

(1) The parties and the events

[3] On the ice, with players like Daniel Alfredsson, Zdeno Chara and Wade Redden, the Ottawa Senators are a skilled and successful National Hockey League team.

[4] Off the ice, the story is different. For many years, the Ottawa Senators have been mired in serious financial difficulties, which reached crisis proportions in late 2002. Two of its major secured creditors were CIBC and Fleet, which were owed $40 million and $20 million respectively.

[5] On January 9, 2003, Chadwick J. made an order declaring the Ottawa Senators Hockey Club Corporation and several related companies (collectively, the "Senators") to be debtor companies to which the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") applied.

[6] Chadwick J. appointed PricewaterhouseCoopers Inc. (the "Monitor") as monitor and ordered the Senators to prepare and file a plan of arrangement or compromise under the *CCAA*. He also imposed a stay of proceedings, including enforcement proceedings by any government against the Senators.

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[7] Initially, the Monitor explored a restructuring proposal advanced by the Bryden Group. When these negotiations foundered, the Monitor embarked on a process of selling the Senators' assets, which was authorized by paragraph 39 of the court order.

[8] On May 7, 2003, the Monitor filed its *Fourth Report to Court* (the "Report"), in which it recommended the sale of the Senators to Capital Sports& Entertainment Inc. for $100 million. Attached as Appendix A of this report was a proposed *Schedule of Interim Distribution as of Closing*, including $25.7 million to CIBC and $12.8 million to Fleet, which was about two-thirds of the amounts they were owed by the Senators.

[9] In addition, the Monitor recommended that $2 million be set aside for distribution on the "CCRA Claim", which was the potential claim of the Canada Customs and Revenue Agency on account of unremitted payroll source deductions and GST, as well as interest and penalties, all for the month of December 2002. The Monitor described this component of its proposed distribution in the Report in this fashion:

> In addition to the secured debt, the balance sheet prepared by Management as of February 28, 2003 indicates there is approximately $1.9 million owed to CCRA for amounts which may have priority to all of [the Senators'] secured and unsecured creditors.

[10] On May 9, 2003, Chadwick J. made an order under the *CCAA* and "In the Matter of a Proposed Plan of Arrangement" approving the sale of the Senators. The order provided:

> 2. THIS COURT ORDERS that the Fourth Report of the Monitor and the activities of the Monitor as set out in the Fourth Report, including the Schedule of Interim Distribution set forth in Appendix "A" to the Fourth Report, be and are hereby ratified and approved.

(2) The litigation

[11] The Crown and the banks *qua* secured creditors agreed that the Crown was entitled to receive $1,718,567.80 from the sale proceeds. This amount represented collected but unremitted payroll source deductions to which the Crown was entitled under various deemed trust provisions in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "*ITA*"), the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "*CPP*"), and the *Employment Insurance Act*, S.C. 1996, c. 23 (the "*EIA*").

[12] Unfortunately, the parties disagreed about whether the Crown's claim for interest and penalties on account of unremitted payroll source deductions under the above-noted statutes takes priority over the claims of secured creditors. The amount in dispute in this category is $196,709.14.

[13] The parties also disagreed about whether the Crown's claim for unremitted GST, interest and penalties, collected under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "*ETA*"), takes priority over the claims of secured creditors. The amount in dispute in this category is $187,470.25.

[14] The Crown brought the matter before Chadwick J. by way of a motion. The motion judge reviewed the many statutory provisions in issue and the leading case authorities and reached these conclusions:

(1) The Crown does not have priority over the banks with respect to penalties and interest on deemed trust amounts required to be deducted from employees' wages; and

(2) The Crown does not have priority over the banks with respect to unremitted GST, penalties and interest.

[15] The Crown appeals the motion judge's decision in (1) and his decision in (2) relating to unremitted GST. The Crown does not appeal the motion judge's decision in (2) relating to penalties and interest on unremitted GST.

[16] For the reasons that follow, I would dismiss the appeal with respect to (1) and allow the appeal with respect to (2).

C. Issues

[17] The issues are:

(1) Did the motion judge err in holding that the Crown does not have priority over secured creditors in *CCAA* proceedings with respect to penalties and interest on deemed trust amounts required to be deducted from employees' wages by the *ITA*, *CPP* and *ETA*?

(2) Did the motion judge err in holding that the Crown does not have priority over secured creditors in *CCAA* proceedings with respect to unremitted GST collected under the *ETA*?

D. Analysis

(1) Penalties and interest on unremitted deductions from employees' wages

[18] The motion judge delivered careful and comprehensive reasons for judgment. On this first issue, he considered the relationship between s. 227 of the *ITA* and ss. 18.3 and 18.4 of the *CCAA*. He concluded:

> In my view, section 18.3 does not provide any special priority to the Crown for interest and penalties and therefore the provisions of section 18.3(4) [*sic*, s. 18.4] would apply.

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> There does not appear to be any provisions in section 18.4 which would exempt the Crown or change their priority as such they would rank as unsecured creditors regarding the penalty and interest. The Crown may have other remedies pursuant to section 227.1(1) of the *Income Tax Act*.

[19] The Crown does not contest this analysis and conclusion. However, the Crown contends that the motion judge erred by not considering s. 18.2(1) of the *CCAA*, which provides:

> **18.2(1)** If an order contains a provision authorized by subsection 11.4(1), unless Her Majesty consents, no compromise or arrangement shall be sanctioned by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 and that are of a kind that could be subject to a demand under
>
> (*a*) subsection 224(1.2) of the *Income Tax Act*;
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts;

[20] The Crown contends that the sale of the Senators, approved by the court on May 9, 2003, was a compromise or arrangement within the meaning of s. 18.2(1) of the *CCAA* and that penalties and interest were payments that "could be subject to a demand" under s. 224(1.2) of the *ITA* and companion provisions in the *CPP* and *EIA*. Accordingly, the court could not sanction the sale without providing for payment in full of penalties and interest, in addition to the amounts actually collected from employees' wages.

[21] I do not believe that this appeal provides a proper forum to address this issue on the merits. I say this for three reasons.

[22] First, there is a real possibility that this issue was not argued before the motion judge. Two of three appeal counsel were also counsel on the motion; one thinks the argument was advanced, the other does not. I accept, absolutely, the honesty of both counsel. However, I note that the motion record filed by the Crown listed several statutory provisions on which the Crown would rely; s. 18.2 of the *CCAA* was not one of them. Moreover, the Crown factum was written almost entirely in terms of an argument grounded in s. 18.3 of the *CCAA*; there is but a single reference, in a 20 page factum, to s. 18.2. Not surprisingly, the bank's responding factum dealt exclusively with the Crown's extended argument relating to s. 18.3 of the *CCAA*.

[23] In addition, I observe that the motion judge engaged in an extensive analysis of s. 18.3 of the *CCAA* and a particularly full consideration of the GST issue. It is difficult for me to accept that he would completely ignore the argument grounded in s. 18.2 of the *CCAA* if it was squarely advanced before him.

[24] Second, we are hampered on this issue by an inadequate motion record which makes it difficult to properly consider the Crown's argument relating to s. 18.2 of the *CCAA*.

[25] The core of the Crown's argument is that a sale of the assets of a company is a compromise or arrangement that triggers the application of s. 18.2 of the *CCAA*. The words "compromise" and "arrangement" first appear in ss. 4 and 5 of the *CCAA* (they are not defined in the act). Section 5 relates to secured creditors, such as the banks in this case, and provides:

> Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[26] It can be seen that this provision ties together a compromise or an arrangement with a formal meeting of creditors. Section 6 of the *CCAA* then mandates an additional step, namely a sanctioning by the court of a compromise or arrangement if it is approved by a majority vote, representing two-thirds in value, of the creditors or class of creditors.

[27] In this appeal, the Crown asserts that a sale can be a compromise or an arrangement, and that a formal meeting of creditors to vote on it is irrelevant. The banks take the opposite position; they submit that the motion judge was not asked to approve a compromise or arrangement and therefore could ignore s. 18.2 of the *CCAA*.

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[28] I think that the record that was before the motion judge provides an inadequate foundation on which to resolve these rather bald and opposing assertions. The Crown motion record consisted of a brief seven paragraph affidavit from Brian Murphy, a research officer with the Canada Customs and Revenue Agency. There is nothing in this affidavit indicating whether the formal process for approval of a compromise or arrangement, as set out in ss. 4, 5 and 6 of the *CCAA*, was followed in this case. Without knowing whether the formal process was followed, I do not think that the motion judge, or this court, could engage in a proper analysis grounded in s. 18.2 of the *CCAA*.

[29] Third, and less significantly, I note that the Crown's claim on this issue is for $196,709.14. I observe that the court's order dated May 9, 2003 confirmed a proposed distribution to the Crown for "CCRA Claims" of $2 million. This component of the order was not appealed.

[30] On consent, the Crown has already received $1,718,567.80 pursuant to various statutory deemed trusts. In addition, my proposed disposition of the GST issue on this appeal would result in the Crown receiving an additional $187,470.25. These two amounts total $1,906,038.05. This means that there is, at most, $93,961.95 to potentially respond to the Crown's claim for $196,709.14. I confess that this is not a large factor in my mind, however, I am comforted in the knowledge that my unease about deciding a difficult legal issue without the benefit of a full record, and probably where the issue was not raised before the motion judge, appears to implicate much less money than the Crown asserts.

(2) Unremitted GST payments

[31] The second issue in this appeal arises out of a clear conflict between provisions in two federal statutes, s. 18.3(1) of the *CCAA* and s. 222(3) of the *ETA*.

[32] Section 18.3(1) of the *CCAA* provides:

> **18.3(1)** *[N]otwithstanding any provision in federal or provincial legislation* that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision [emphasis added].

[33] Section 222(1) of the *ETA* provides that every person who collects GST is deemed for all purposes to hold the amount in trust for the Crown, despite any security interest held by others. Section 222(3) provides:

> **222(3)** *Despite any other provision of this Act* (except subsection (4)), *any other enactment of Canada (except the Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests [emphasis added].

[34] The effect of s. 18.3(1) of the *CCAA* is that GST amounts that are deemed to be a trust under the *ETA* would, under the terms of the *CCAA*, only be considered as trust property if they constituted a trust at common law or in equity. The banks submit that GST amounts do not constitute trust property at common law or in equity. The Crown does not contend otherwise.

[35] Section 222(3) of the *ETA* states the opposite. It provides that if an amount is deemed under s. 222(1) to be held in trust for the Crown and is not remitted according to the *ETA*, property of the debtor in an amount of equal value is deemed to be held in trust for the Crown and does not form a part of the property of the debtor. Such property is considered to be beneficially owned by the Crown and the proceeds of the property are to be paid to the Receiver General in priority to all other security interests.

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[36] Two other features of the *ETA* and *CCAA* provisions should be noted because they relate to well-known aids for the interpretation of statutes. The *ETA* is a statute of general application; the *CCAA* is a much more specialized statute. Section 18.3 of the *CCAA* was enacted on September 30, 1997; ss. 222(1) and (3) of the *ETA* were enacted on October 20, 2000.

[37] The conflict cannot be resolved by the trumping words that are often found in statutes because both statutes contain such words: "notwithstanding any provision in federal or provisional legislation" in s. 18.3(1) of the *CCAA*, and "Despite...any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" in s. 222(3) of the *ETA*.

[38] The motion judge resolved the conflict in favour of the *CCAA*. In so doing, he declined to follow two decisions of the Alberta Court of Queen's Bench that gave precedence to the *ETA*: *Re Solid Resources Ltd.*, [2002] A. J. No. 1651, and *Re Gauntlet Energy Corporation (Companies' Creditors Arrangement Act)* 2003 ABQB 894 (CanLII), (2003), 352 A. R. 28.

[39] The motion judge carefully reviewed the words in the two provisions, various maxims of statutory construction, the policy underlying the *CCAA*, the two decisions of superior court judges in Alberta and, especially, a highly relevant decision of the Supreme Court of Canada in *City of Verdun v. Doré*, 1997 CanLII 315 (SCC), [1997] 2 S.C.R. 862.

[40] The two maxims of statutory construction considered by the motion judge were implied repeal (potential result – the later *ETA* provision impliedly repealed the earlier *CCAA* provision), and implied exception (potential result – the more specific *CCAA* provision should be removed from the ambit of the more general *ETA* provision). In the end, he opted for the latter interpretation. He concluded:

> The doctrine of implied exception has been used in the past to interpret provisions of the *Companies' Creditors Arrangement Act* and notwithstanding a decision of the Alberta Queen's Bench, I would apply the doctrine to the interpretation here. As such, the Crown will not be entitled to a super priority in relation to G.S.T. but would rank as an unsecured creditor in accordance with the provisions of section 18(4) of the *Companies' Creditors Arrangement Act*.

[41] With respect, I do not agree with the motion judge's conclusion on this issue, essentially for two reasons.

[42] First, the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, 1944 CanLII 51 (SCC), [1944] S.C.R. 226 at 239:

> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

See also: Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Carswell, 2000) at 361.

[43] The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* (the "*BIA*"). The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission.

[44] Second, and again with respect, I think that the motion judge erred in his treatment of *Doré*. *Doré*, like this appeal, involved two statutes, both of which contained 'notwithstanding any other enactment' provisions. The provision in the *Cities and Towns Act*, R.S.Q., c. C-19 (the "*CTA*"), relating to the time (15 days) within which a person seeking damages for bodily injury caused by an accident had to serve notice on a defendant municipality was both earlier and more specific than the provision in the *Civil Code of Quebec*, S.Q. 1991, c. 64 (the "*Civil Code*"), which set out a three-year notice period for actions relating to bodily injuries.

[45] After an extensive review of both statutes and the relevant principles of statutory interpretation, Gonthier J., writing for a unanimous court, concluded that the later, but more general, provision in the *Civil Code* prevailed. He stated at p. 887:

> The appellant argued in this Court that s. 585 *C.T.A.*, which states that the prior notice requirement is applicable, "any provision of law to the contrary notwithstanding", must take precedence over art. 2930 *C.C.Q.*, which is a general provision of the *Civil Code*. It based this argument on the rule of interpretation that subsequent general legislation is

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deemed not to derogate from a prior special Act ("*generalia specialibus non derogant*"). This argument cannot be accepted. The legislature has expressly given art. 2930 *C.C.Q.* precedence: "Notwithstanding any stipulation to the contrary". It has therefore specified that the subsequent general legislation derogates from the prior special Act. Accordingly, it is not necessary to rely on the "*generalia specialibus non derogant*" rule of interpretation in this case. In *The Interpretation of Legislation in Canada*, *supra*, Professor Côté stated the following on this point at pp. 299-300:

> A variety of well-known terms is used. The statute will declare that it applies "notwithstanding" provisions to the contrary.
>
> . . .
>
> Ordinary rules of interpretation hold that general statutes are set aside by subsequent general legislation, even without a "notwithstanding clause". Therefore, the only possible interpretation of "notwithstanding any inconsistent provision" is that it applies to prior special legislation, which would otherwise have precedence. By virtue of the rule of effectivity such a clause must be construed as applying to prior special legislation. [Citation omitted.]

Thus, although both provisions in issue here provide that they take precedence, the more recent, art. 2930 *C.C.Q.*, must prevail.

[46] In my view, the situation in the present appeal is identical to the one in *Doré*. Section 18.3(1) of the *CCAA* is earlier and more specific than s. 222(3) of the *ETA*. Both provisions contain 'notwithstanding any other enactment' language. Accordingly, the analysis in the passage set out above compels a decision giving precedence to s. 222(3) of the *ETA*.

[47] The motion judge chose to distinguish *Doré* on the basis that there are special features of the *Civil Code* that contributed to the analysis in *Doré*. For example, at p. 874 Gonthier J. stated that "unlike statute law in the common law, the *Civil Code* is not a law of exception, and this must be taken into account in interpreting it." This observation, and other passages in Gonthier J.'s reasoning, led the motion judge to conclude:

> One can conclude from these remarks, the court does not have to apply this method of interpretation in each case and must examine the legislation in question to determine the proper interpretation.

[48] With respect, I do not agree with this conclusion. There were two issues in *Doré*. The first related to the substantive meaning or content of the *Civil Code* provision. On this issue, Gonthier J. discussed in some detail the special nature of the *Civil Code*, including how it differed from statute law in the common law system.

[49] However, having determined the first issue, Gonthier J. turned to the second issue, resolving the conflict between the *CTA* and the *Civil Code*. On this issue, his analysis and conclusion, especially in the passage at p. 887 set out above, are succinct and clear. The 'notwithstanding any other enactment' language in a later and general statute prevails over the same language in an earlier and more specific statute. Accordingly, I agree with LoVecchio J. who said in *Gauntlet Energy* at para. 17:

> The decision in *Doré* is binding on me and the reasoning in the case dictates that the deemed trust provision of the *ETA* apply in *CCAA* proceedings, notwithstanding ss. 18(3) of the *CCAA*.

E. Disposition

[50] I would dismiss the appeal on the issue of penalties and interest relating to deductions from employees' wages under the *ITA*, *CPP* and *EIA*. I would allow the appeal on the issue of unremitted GST payments under the *ETA*.

[51] I would award costs to the appellant fixed at $5,000, inclusive of disbursements and GST.

RELEASED: January 6, 2005 ("JL")

"J. C. MacPherson J.A."
"I agree John I. Laskin J.A."
"I agree Susan E. Lang J.A."

Restriction — default of remittance to Crown - Sec 6(4)

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of

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an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc. - Sec 6(5)

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the Bankruptcy and Insolvency Act if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Air Canada, Re, 2004 CanLII 6674 (ON SC) - Wage-loss Provision Too Remote for Consideration

Date:	2004-08-09
Docket:	03-CL-004932
Parallel citations:	2 CBR (5th) 23
URL:	http://canlii.ca/t/1hnl1
Citation:	Air Canada, Re, 2004 CanLII 6674 (ON SC), <http://canlii.ca/t/1hnl1> retrieved on 2013-08-22
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COURT FILE NO.: 03-CL-004932
DATE: 20040809

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED
AND IN THE MATTER OF SECTION 191 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44 AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"
APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Sean Dunphy* and *Shana Ivall*, for Air Canada
Peter J. Osborne and *Monique Jilesen*, for Ernst & Young Inc., Monitor
Larry Steinberg, for CUPE
Hugh O'Reilly, for IAMAW
Gregory Azeff, for GECAS

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Howard A. Gorman, for the Ad Hoc Unsecured Creditors Committee
Lyle Kanee, for CAW

HEARD: August 9, 2004

ENDORSEMENT
(CUPE Appeal)

[1] CUPE appealed the decision of July 30, 2004, rendered by Geoffrey Morawetz as Claims Officer ("CO") with respect to CUPE's pay equity claim. At the end of the hearing today I dismissed the appeal and promised written reasons. These are those written reasons.

[2] At paragraphs 36 and 37 of his reasons, the CO stated:

> (36) CUPE's pay equity claim is a contingent claim in that it has not been successful on its merits as of the date of the commencement of Air Canada's CCAA proceedings. The contingency in question is the resolution of the pay equity complaint process underway before the Tribunal (and possibly the courts via appeals of the Tribunal's decision). As with any contingent claim, there are two fundamental aspects to the determination of the claim; namely, (i) as assessment of the happening of the contingency in question; and (ii) the quantification of the claim. If CUPE successfully discharges its onus of establishing that there is some basis to presuppose the happening of the contingency, a reasonable value must then be established for the claim (and it is common in practice to discount the aggregate value of the claim in a "best case" scenario by some reasonable percentage that reflects the risk that a less optimistic scenario may in fact result). For the reasons that follow, I find that CUPE has failed to provide any evidence to substantiate the happening of the contingency in question and that the quantification of CUPE's contingent claim would in any event be negligible.
>
> (37) There is, in these proceedings, a Claims Procedure Order of Farley J. dated September 18, 2003, as amended by Order of Farley J. dated July 9, 2004, which provides that all creditors (including CUPE with respect to its pay equity claim for the Relevant Period) must prove their claims in accordance with the procedures set out therein. In short, CUPE has to prove its claim now, and not at some future date, and the failure to do so results in CUPE being barred from asserting such a claim at a future date. If CUPE fails to adduce sufficient evidence to substantiate its contingent pay equity claim at the present time, it is not open to CUPE to assert that some weight ought to be given to the likelihood or possibility that it may, in the future, be able to adduce sufficient evidence so as to prove its claim in respect of the Relevant Period. That is to say, I cannot conclude that there is a 50% chance (or 40%, or 30%, etc.) that CUPE will be able to substantiate its claim in the future if it has not already done so in these proceedings and that some percentage of the value of its pay equity claim ought to be allowed at this time. CUPE cannot on the one hand admit that it has no evidence to substantiate its claim at the present time and on the other hand seek to have a claim admitted by the Monitor nonetheless on the basis that it might at some date find evidence to substantiate its claim. The merits of CUPE's contingent pay equity claim must be established in these proceedings.

He went on to observe at paragraph 39:

> (39) To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

Further at paragraph 40, the CO stated:

> (40) ... As noted by counsel to Air Canada, there are three pre-requisite elements of a human rights complaint, without which there is no claim: (i) difference in wages; (ii) within the same establishment; and (iii) the performance of work of equal value as between the groups in question. ... But, with respect to the third criterion, I agree with Air Canada that there is no evidence before me to indicate that the work performed by Flight Attendants is of equal value to the work performed by the Comparative Groups, which is the very basis of CUPE's claim. It is entirely unclear that there is any principled basis of comparison between Flight Attendants and the Comparative Groups and, in any event, no evidence before me

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> that the outcome of such comparison establishes that there is work of equal value being performed.

[3] CUPE submitted that notwithstanding my views in *Re Olympia & York Developments Ltd.*, [1994] O.J. No. 1335 (Gen. Div.), that I should follow the Alberta practice as set out by Paperny, J. in *Re Canadian Airlines Corp.*, [2001] A.J. No. 226 (Q.B.) of hearing this matter on a *de novo* basis as opposed to a true appeal. Even if I were to agree with that notwithstanding the difference in practice related to Alberta Masters, I would observe that on the basis of the record before me, I would have come up with the same conclusions as the CO save and except as to what I might describe as wholehearted acceptance of his views at paragraph 46 when he describes "the intuitive appeal of Air Canada's argument with respect to the manner in which wages are determined". It is clear from his reference later in that paragraph to "yet another reason" that this argument of Air Canada was not a determinative feature. Indeed it may well be that the CO merely intended paragraph 46 to be simply a point which could be characterized as a buttressing observation on a check of reasonability, not that there is an obligation to do so to provide a foundation for a pay equity claim. Collective bargaining is a process of give and take. Secondly I would not be of the view that as per his observation in paragraph 47 that CUPE had an obligation to lead evidence as to:

> (b) more importantly, that the wage gap cannot be explained, in full or in part, by factors other than system gender discrimination (such as consideration of the factors set out in section 11(2) of the CHRA).

While it would seem to me that CUPE was not under any positive obligation to provide such evidence (that seemingly being Air Canada's role if it wished to do so), again that observation by the CO is not in my view determinative of the wage gap question.

[4] See also my views in *Re Air Canada (Corporate Travel Management CTM Inc.)* and *Re Air Canada (Always Travel Inc.)* matters released August 3 and 5, 2004 respectively relying on the Court of Appeal decision in *Shelson* v. *Gowling Lafleur Henderson LLP,* [2004] O.J. No. 850 (C.A.) released March 9, 2004 at paragraph 20 relating to deference notwithstanding that a matter may be decided originally on a paper record.

[5] The onus is on a claimant to prove its claim. As discussed in paragraph 38 of his reasons, the CO required **that "CUPE must demonstrate that its claim is not too speculative or remote, but it need not establish that success is probable".** He went on to say at paragraph 39:

> (39) In the present case, I am satisfied for the reasons set out below that CUPE's claim has not been proven. The claim is remote and speculative as there is no evidence to substantiate that the claim has any merit. To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

It seems to me to be an unreasonable analysis of his reasoning that would allow CUPE to advance at paragraph 46 of its factum:

> (46) To require scientific certainty is to set up inappropriate roadblocks to the goal of the CHRA, namely to remedy discrimination…

The fact of the matter is that CUPE provided no evidence as to the particular case involving Air Canada (and the "merged Canadian Airlines" question) as to the third criterion.

[6] It is indeed troubling that a *Canadian Human Rights Act* / pay equity case could rattle around the Commission, the Tribunal and the courts for 14 years and for this Court to be advised that it is likely to take another decade before this matter can be adjudicated to the end under that legislation. However, that process is not the one which is required to be followed in the determination of a claim under the CCAA. Contingent unliquidated claims are determined under the CCAA claims process even in the most complicated of litigation and even though a claim may not have been actually initiated in a court or otherwise. I do not wish or intend to minimize the hurdles and hoops which may be involved in the payment equity litigation in the established "ordinary course", but I would observe that if CUPE had provided an acceptable expert report on job evaluation, even if in "simplified form" (as opposed to no evidence), then Air Canada would have had to respond to that evidence. Would that report have had to be precise (apparently to the degree envisaged by parties in pay equity disputes)? The simple answer to that is that is not necessary in a CCAA claims process.

[7] The appeal is dismissed. While that claim as agreed between Air Canada and CUPE only deals with the monetary aspect of the claim up to September 30, 2004, I would trust that with respect to the process otherwise continuing, that with respect to the determination of this as with any other human rights issue (which the Supreme Court of Canada has determined should be regarded as a quasi-constitutional right) such determination can be accomplished with cooperation in very significantly less time than a further decade. The resolution of such an important question demands nothing less.

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J.M. Farley

Released: August 9, 2004

Restriction — pension plan - Sec 6(6)

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6) - Sec 6(7)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims - Sec 6(8)

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

R.S., 1985, c. C-36, s. 6;

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1992, c. 27, s. 90;
1996, c. 6, s. 167;
1997, c. 12, s. 123;
2004, c. 25, s. 194;
2005, c. 47, s. 126, 2007, c. 36, s. 106;
2009, c. 33, s. 27;
2012, c. 16, s. 82.

Court may give directions - Sec 7
7. Where an alteration or a modification of any compromise or arrangement is proposed at any time after the court has directed a meeting or meetings to be summoned, the meeting or meetings may be adjourned on such term as to notice and otherwise as the court may direct, and those directions may be given after as well as before adjournment of any meeting or meetings, and the court may in its discretion direct that it is not necessary to adjourn any meeting or to convene any further meeting of any class of creditors or shareholders that in the opinion of the court is not adversely affected by the alteration or modification proposed, and any compromise or arrangement so altered or modified may be sanctioned by the court and have effect under section 6.
R.S., c. C-25, s. 7.

Scope of Act - Sec 8
8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.
R.S., c. C-25, s. 8.

PART II

JURISDICTION OF COURTS

Summary: Jurisdiction of Courts and Powers in Tailoring Compromises and Arrangements - Sections 9 to 18

Section 9 sets the venue for CCAA applications to be the provincial court where the debtor has his head office or chief place of business. Failing that, if the debtor resides outside of Canada, it's where any of the debtor's assets are situated.

Subsection 9(2) vests the proceedings of the CCAA petition to be with one judge, subject to appeal.

Section 10 states that the application for CCAA protection shall be commenced with a petition or originating motion in practice of that court.

Subsection 10(2) details the documents that must be presented in accompany with the application, that being:

> (*a*) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
> (*b*) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement;
> and

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(*c*) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Subsection 10(3) allows the court to order a publication ban on only the cash-flow statement of the applicant, though per its discretion may cause it to be revealed to interested parties.

Section 11 allows the court to make any order, on request of an interested party, it considers fit, unless restricted by something within the CCAA itself, but over-riding the BIA and WURA. This is the provision that gives the Act its teeth since the court's objective is to allow the debtor enough restructuring of debt and time to attend to it to survive, rather than enter into bankruptcy.

Section 11.01 states that the CCAA cannot be used to restrict demands for payment of leased or licensed assets or for demanding further money or credit.

Section 11.02 allows the judge to clamp down on any actions against the debtor that may be in the air as well as prevent any actions to put the debtor into bankruptcy through petition, however, pursuant to s. 11.02(2) said power to impose a stay may be overrode by the applicant filing against the debtor has acted in good faith with due diligence and the override would be appropriate.

Section 11.03 deals with actions against the debtor's directors and again, allows imposing a stay on actions against them but only up to until the compromise is sanctioned or fails creditor acceptance. However, this does not apply to guarantees extended by the directors. Subsection 11.03(3) deems anyone with supervisory roles to be directors if the legal directors have resigned.

Section 11.04 does not allow any order in respect of any party who has provided a guarantee in respect of the debtor or in respect of a letter of credit.

Section 11.09 allows the court to stay actions by Her Majesty in respect of income taxes, CPP or EI, or any provincial equivalent until:

- the expiry of the order,
- the refusal of a proposed compromise by the creditors or the court,
- six months following the court sanction of a compromise or an arrangement,
- the default by the company on any term of a compromise or an arrangement, or
- the performance of a compromise or an arrangement in respect of the company,

Basically. Subsection 11.09(2) prompts for the cessation of the stay imposed on Her Majesty if there is a default of these obligations for the period after the stay, while, subsection 11.09(3) provides that nothing can prevent the creation of these liabilities through the normal operation of the statutes specified (income tax, CPP, EI, or provincial equivalent).

Section 11.1(2) details that nothing can affect the actions of any regulatory body in respect of investigations of the debtor, except payments, while subs. 11.1(1) details who any such "regulatory body" can be. Subsection 11.1(3) details that the court may order that said enforcement of an action by a regulatory body may be stayed if it is against the public interest or if it would, effectively, cause the compromise to fail.

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Section 11.2 allows the court to order to change the ranking of secured creditors to allow new financing through new credit with regard to, exclusively, its cash-flow while the order cannot be used to refinance an existing charge or obligation. Pursuant to subs. 11.2(2) the court may order that this new charge rank ahead of the secured creditors. Pursuant to subs. 11.2(4) the court will consider the following issues in determining whether the order is appropriate:

- the period during which the company is expected to be subject to proceedings under this Act;
- how the company's business and financial affairs are to be managed during the proceedings;
- whether the company's management has the confidence of its major creditors;
- whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- the nature and value of the company's property;
- whether any creditor would be materially prejudiced as a result of the security or charge; and
- the monitor's report referred to in paragraph 23(1)(*b*), if any.

Section 11.3 allows the court, through parties' approval, to assign rights and obligations of the debtor to anyone the parties specify, however such does not apply to actions that commenced after the CCAA petition, an eligible financial contract, or a collective agreement. Pursuant to subs. 11.3(3) the court will consider, when assigning said rights and obligations:

- whether the monitor approved the proposed assignment;
- whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- whether it would be appropriate to assign the rights and obligations to that person.

Section 11.4 deals with orders affecting secured creditors and the provision of critical supplies for the debtor's continued operations. Subsection 2 thereof allows the court order continued supply from that supplier with regard to the existing arrangement, or, whatever is appropriate in the opinion of the court. Subsections 11.4(3)-(4) allow the court to impose a rank in respect of the critical supplier's credit on any and all of the debtor's property as well as ahead of any secured creditor's rank.

Section 11.5 allows the court, on application of an interested person, to remove a director who is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement or who is acting or is likely to act inappropriately as a director in the circumstances.

Section 11.51 allows the court to order an indemnification of any director for responsibilities in the reorganization as a charge on the assets of the debtor. This facilitiates the compromise environment whereunder a director may have onerous legal responsibilities. Subs. (2) allows the ranking to be adjusted in respect of others on the debtor's assets while subs. (3) disallows the indemnification to bbe created in the director can obtain insurance for such to begin with. Subs. (4) takes away that discretion from the court if the obligation imposed on the director comes from her own gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Section 11.52 allows the court to create charges on the assets of the debtor in respect of:

- the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

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- any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Pursuant to subs. (2) the court can order this security to rank that of secured creditors.

Section 11.6 allows the CCAA to carry-on for a proposal that was made pursuant to the Proposal provisions of the BIA but only if the proposal has not met the bankruptcy court while such application can only be made with the permission of the inspectors, however such cannot occur when the bankruptcy proposal mechanics are not attended to as described in s 50.4(6) of the BIA or the debtor has not properly acted on them.

Section 11.7 causes the court to appoint a "monitor" of the debtor's affairs, who must be a trustee within the meaning of the BIA while subs. (2) disallows the appointment of a monitor who has substantial interested connection to the debtor. Subs. (3) allows a petitioning creditor to have the court replace the monitor.

Section 11.8 allows the monitor not to have any personal liability of the debtor's affairs as a monitor when appointed. The rest of that section then details the specific conditions of exposure the monitor may or may not be exposed to in respect of her debtor.

Section 12 allows the court to fix dates for the timely mechanics of the Act, for voting and for any distributions that are made.

Section 13 allows any objecting party of a decision under the CCAA to appeal, on leave of the judge or an appeal judge.

Section 14 provides that the appeal shall be to the highest court of the province in which the judgment took place while subs. (2) effectively states that said appeal shall be commenced within 21 days of the decision appealed, with provision of security posted to court for costs of a later date of appeal.

Section 15 provides that the appeal from the highest provincial court shall be to the Supreme Ct. of Canada.

Section 16 provides that any provincial court order under the CCAA shall be recognized intra-provincially as if made in any other province.

Section 17 provides that provincial courts shall aid each other.

Jurisdiction of court to receive applications - Sec 9
9. (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

Single judge may exercise powers, subject to appeal - Sec 9(2)
(2) The powers conferred by this Act on a court may, subject to appeal as provided for in this Act, be exercised by a single judge thereof, and those powers may be exercised in chambers during term or in vacation.

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R.S., c. C-25, s. 9.

Form of applications - Sec 10
10. (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application - Sec 10(2)
(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban - Sec 10(3)
(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.
R.S., 1985, c. C-36, s. 10;
2005, c. 47, s. 127.

General power of court - Sec 11
11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
R.S., 1985, c. C-36, s. 11;
1992, c. 27, s. 90;
1996, c. 6, s. 167;
1997, c. 12, s. 124;
2005, c. 47, s. 128.

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., 1988 CanLII 3560 (AB QB) - A Typical Order and Analysis

Date:	1988-11-17
Docket:	8801-14453
Parallel citations:	92 AR 81; 72 CBR (NS) 1; 63 Alta LR (2d) 361
URL:	http://canlii.ca/t/27w7f
Citation:	Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., 1988 CanLII 3560 (AB QB), <http://canlii.ca/t/27w7f> retrieved on 2013-09-15
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Alberta Court of Queen's Bench
Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.
Date: 1988-11-17

J.J. Marshall and J.A. Legge, for Norcen Energy Resources Ltd. and Prairie Oil Royalties Co.
H.L. Kushner, for Attorney General of Alberta.
ED. Tavender, Q.C., D. Lloyd and R. Wigham, for Oakwood Petroleums Ltd.
K.N. Lambrecht, for Attorney General of Canada.
A.L. Friend, for United Energy Inc.
B.D. Newton and B. Tait, for Bank of Montreal.
B. O'Leary, for Royal Bank of Canada.
J.L. Ircandia, for HongKong Bank of Canada and Bank of America, Canada.

(Calgary No. 8801-14453)
November 17, 1988.

[1] FORSYTH J.:–

I. THE FACTS

[2] On 7th and 8th November 1988 I heard an application by Norcen Energy Resources Limited ("Norcen") regarding an order that I made on 22nd September 1988, under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 ("C.C.A.A."). It is necessary that I set out the background and the terms of that order in some detail.

[3] The order of 22nd September 1988 was granted declaring that Oakwood Petroleums Ltd. ("Oakwood") is a company to which the C.C.A.A. applies. As might be expected, Oakwood asked that a term of the order be a provision that stays proceedings by parties against it until it has had time to formulate a plan of compromise under the C.C.A.A. The exact term at issue in the order is:

> 4. AND THIS COURT FURTHER ORDERS that save and except for the matters referred to in paragraph 11 herein:
> (a) all proceedings taken or that might be taken by any of Oakwood's creditors under the *Bankruptcy Act,* R.S.C. 1970, c. B-3 and the *Winding-Up Act,* R.S.C. 1970, c. W-10, or either of them shall be stayed until further Order of this Court,
> (b) that all further proceedings in any action, suit or proceeding against Oakwood, its assets, property, and undertaking shall be restrained until further Order of this Court,
> (c) that no proceedings shall be proceeded with or commenced against Oakwood, its assets, property and undertaking except with leave of this Court with notice to Oakwood and subject to such terms as this Court may impose, and without limitation to any of the foregoing,
> i) all persons are enjoined and restrained from realizing upon or otherwise dealing with any security held by that person on the property, assets and undertaking of Oakwood until further Order of this Court, and
> ii) *all persons, having rights under the terms of any operating agreements with Oakwood are enjoined and restrained from taking proceedings to remove Oakwood as operator of such petroleum and natural gas properties and facilities, notwithstanding any provision contained in the said Agreements to the contrary, until further Order of this Court, [emphasis added]*

[4] Paragraph 11, which is referred to in para. 4, is irrelevant with respect to this application. It should be noted that Norcen was not present or represented at the C.C.A.A. application by Oakwood.

[5] The crux of the present dispute before me focuses on cl. 4(c)(ii) of the previous passage. Norcen is involved in 20 oil and gas producing properties in the Hays area of Alberta in which Oakwood also has a working interest and is the operator. The terms under which Oakwood performs as operator are contained in the standard Canadian Association of Petroleum Landmen Operating Agreement ("CAPL Agreement"). Some of the properties are covered by agreements under the 1974 CAPL Agreement form while others are dealt with under the 1981 form of the CAPL Agreement. For the purposes of this application, nothing turns on that distinction.

[6] Clause 202 of both forms of the CAPL Agreement deals with the replacement of the operator in certain situations. The two versions are substantially similar and it will suffice to set out a portion of the 1981 wording of cl. 202:

> 202 REPLACEMENT OF OPERATOR –
> (a) The Operator shall be replaced immediately and another Operator appointed pursuant to Clause 206, in any one of the following circumstances:

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(i) If the Operator becomes *bankrupt or insolvent or commits or suffers any act of bankruptcy or insolvency,* or makes any assignment for the benefit of creditors, or causes any judgement to be registered against its participating interest.

(ii) If the Operator assigns or purports or attempts to assign its general powers and responsibilities of supervision and management as Operator hereunder. emphasis added]

[7] Norcen's application in the present matter is an attempt to enforce cl. 202 of the CAPL Agreement and have itself appointed as operator of the 20 wells in the Hays area. A notice of motion dated 4th October 1988 was filed by Norcen, in which the following relief was sought:

(a) varying subparagraph 4(c)(ii) of the Order granted and entered in these proceedings the 22nd day of September, 1988 in order to permit the removal of Oakwood Petroleums Ltd. as operator of certain oil and gas properties as described in the Affidavit of Wayne Newhouse, filed herein;

(b) granting the Applicants leave to file an Originating Notice of Motion in the form attached as Exhibit "D" to the Affidavit of Wayne Newhouse, filed herein;

(c) abridging the time for service of the said Originating Notice of Motion and granting the Applicants leave to proceed with the applications set out therein before the Honourable Mr. Justice G.R. Forsyth immediately after the within applications have been heard and determined; and

(d) granting the Applicants costs of the within application.

[8] The basic effect is that leave to take appropriate steps to remove Oakwood as operator is sought and the originating notice of motion referred to above is designed to secure a declaratory order that Oakwood is not entitled to remain as operator.

[9] Oakwood is not in default on any payments due to Norcen under the operating agreement as a result of carrying on operations for approximately two years under a mixed trust fund account, nor is Oakwood indebted to its trade creditors with respect to its operatorships. I would note that there is an ongoing action between the two parties regarding Norcen's entitlement to the benefits of a settlement wherein Oakwood succeeded in arriving at a compromise of some of its debts with its trade creditors. However, the act of default relied on by Norcen for the purpose of this application is Oakwood's alleged insolvency resulting in the bringing into play of cl. 202(a)(i) of the CAPL Agreement.

II. THE ARGUMENTS

[10] The starting point of Norcen's argument is that it is urged that the mere fact that Oakwood has been found to be a company to which the C.C.A.A. applies means that it is insolvent within the meaning of the CAPL Agreement. As a result, it is argued that cl. 202 is triggered and that Oakwood either has automatically been removed as operator of the Hays properties, or in the alternative, it is now liable to be removed.

[11] From that premise, Norcen argues that, firstly, if removal has already occurred, then a "proceeding" is not required to remove Oakwood as operator and, consequently, it merely seeks declaratory relief to that effect. If the removal has not occurred automatically, Norcen further submits that the current stay in place is not of a type that falls within the ambit of the provisions of s. 11 of the C.C.A.A. Accordingly, the argument follows that I did not have the jurisdiction to include cl. 4(c)(ii) in my order of 22nd September 1988. In the further alternative, it is argued that if the C.C.A.A. purports to confer on me the jurisdiction to stay Norcen's attempts to remove Oakwood as operator, then s. 11 is unconstitutional in a division of powers sense as a federal intrusion into the provincial legislative field of property and civil rights under s. 92(13) of the Constitution Act, 1867. Of course, the arguments and their ramifications were flushed out in much greater detail than this, as will become apparent in my resolution of the issues, but I believe that I have fairly set out their basic propositions.

[12] In opposition to Norcen's application Oakwood is supported by certain of its lenders and creditors that would be involved in any proposed reorganization plan under the C.C.A.A. Submissions were made by Oakwood, the Bank of Montreal and the Royal Bank of Canada and many of Oakwood's other lenders went on the record as opposing Norcen's application. Varied attacks on the merits of the application were made.

[13] Oakwood's submissions, as well as those of the lenders supporting its position, focused on an argument suggesting that the purpose of the C.C.A.A. is to allow debtor companies to continue to carry on their business and that necessarily incidental to that purpose is the power to interfere with contractual relations, including those involving non-creditor third parties. It is argued that the federal insolvency legislative power under s. 91(21) of the Constitution Act, 1867, includes the power to interfere with contractual relations and consequently, it is submitted, no constitutional issue arises.

[14] Supporting lenders also focused on the meaning of insolvency under the CAPL Agreement, arguing that Oakwood is commercially solvent with respect to day-to-day matters and that it is only commercial insolvency which is contemplated by the agreement.

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[15] Finally, helpful submissions were made by both the Attorney General of Canada and the Attorney General of Alberta. These submissions were of assistance in delineating the constitutional issue before the court. The provincial position supported a narrow reading of s. 11 of the C.C.A.A. and, as a result, the Attorney General of Alberta supported Norcen's interpretation while federal submissions were supportive of Oakwood's construction of s. 11.

III. THE ISSUES

[16] It is necessary that I begin by dealing with preliminary issues under the CAPL Agreement to determine whether the circumstances surrounding this application are such that cl. 202 is applicable. In effect I must deal with the question of whether Oakwood is insolvent in the context of this particular application. If I arrive at the conclusion that Oakwood is insolvent, I must then consider the parties' statutory construction and constitutional arguments.

[17] In that regard, this application raises a most interesting problem that is analogous to the traditional "chicken or the egg" scenario. It must be decided whether one should approach the constitutional issue or the statutory construction issue first. In my opinion, the constitutional issue cannot be approached in a vacuum. It can be helpful to use the constitutional issue as an aid to statutory construction in borderline cases, but it must first be decided whether we are dealing with such a case. If the meaning of s. 11 of the C.C.A.A. can be determined without resort to constitutional aids to construction, that meaning must then be scrutinized for its constitutional validity. Embarking on a constitutional inquiry too early in the analysis clouds the issues and detracts from the proper construction of the statute.

[18] Section 11 of the C.C.A.A. provides as follows:

> 11. Notwithstanding anything in the *Bankruptcy Act* or in the *Winding-up Act,* whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on such notice to any other person, or without notice as it may see fit, make an order staying until such time as the court may prescribe or until further order all proceedings taken or that might be taken in respect of such company under the *Bankruptcy Act* and the *Winding-up Act* or either of them, and the court may restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit, and the court may also make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

[19] I accordingly must embark on a two-step analysis in considering the section. The first step involves a rigorous construction of s. 11. If the section has a narrow meaning as contended by Norcen, it follows that I did not have the jurisdiction to include cl. 4(c)(ii) in my order of 22nd September 1988 because s. 11 of the C.C.A.A. would then entitle me only to interfere with debtor and creditor relationships in the terms of my stay order. Norcen, as a non-creditor, would then be free to take whatever steps it feels are necessary to have Oakwood removed as operator if Oakwood is insolvent within the terms of the CAPL Agreement. Of course, it is possible that equitable relief of some sort might be available to Oak-wood in such circumstances but that issue was not argued directly before me in this application. If the section, properly construed, is to be given a wider meaning, then Norcen would be stayed in its attempts to have Oakwood removed as operator as a result of my order of 22nd September 1988. This interpretation would involve my finding that s. 11 of the C.C.A.A. is broad enough in its terms to affect the contractual rights of non-creditors. In that case, it would then be necessary to carefully consider the constitutional validity of s. 11 of the C.C.A.A. in that it would purport to affect the contractual rights of parties that are not creditors of Oakwood. That analysis constitutes the second step in the inquiry.

[20] Only if I cannot arrive at a clear meaning for s. 11 will the presumption of constitutionality enter into the picture. If that is the case, I may then turn to the so-called "presumption of constitutionality" to assist me in my interpretive task: see *Duplain v. Cameron,* 1961 CanLII 81 (SCC), [1961] S.C.R. 693 at 709, 36 W.W.R. 490, 30 D.L.R. (2d) 348 [Sask.]. I hesitate, however, to rely on that assistance too early in my interpretation of s. 11 lest it taint the proper meaning of the words of the section on their face.

[21] With that approach in mind, I now turn to consider the issues before me.

IV. Resolution Of The Issues

A. *Preliminary issues under the CAPL agreement*

[22] I begin with the broad issue of whether a default has occurred under the terms of the CAPL Agreement which might entitle Norcen to relief.

[23] In that regard, the first issue is whether Oakwood is "insolvent" within the meaning of the CAPL Agreement. I am of the opinion that it is. In *Tri-Star Resources Ltd. v. J.C. Int. Petroleum Ltd.,* 48 Alta. L.R. (2d) 355, [1987] 2 W.W.R. 141 (Q.B.), Chief Justice Moore held at p. 146:

> In my view there is no issue to be tried on the question of "insolvency". The company, by Mr. Cole's own admission as stated in his affidavit of 22nd July, was unable to meet its obligations and was insolvent. Black's Law Dictionary defines "insolvency" as an "inability to pay one's debts". Surely when the president of the company under oath states the company is unable to pay its debts there can be no further argument on the question.

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[24] In the present case, the affidavit of Douglas Nolan Blades, executive vice-president of Oakwood, dated 21st September 1988, contains numerous admissions that Oakwood is unable to pay its debts. In addition, the C.C.A.A. applies only to a "debtor company" and that term as defined in the Act amounts essentially to insolvency. It reads in part as follows:

> "debtor company" means any company that is bankrupt or insolvent or has committed an act of bankruptcy within the meaning of the *Bankruptcy Act* or is deemed insolvent within the meaning of the *Winding-up Act* ...

[25] It seems difficult to me to argue on one date that you are insolvent and that you deserve the protection of the C.C.A.A. for one purpose yet argue on another day, for another purpose, that you are not insolvent within the meaning of the CAPL agreement.

[26] The Royal Bank in its submissions argues that Oakwood is commercially solvent even though it may be legally insolvent and it further asserts that the CAPL Agreement contemplates commercial solvency in cl. 202. In my opinion, the CAPL Agreement requires that insolvency be given its normal meaning. It cannot be interpreted as relating only to the meeting of day-to-day expenses and paying the joint operators as contended by the Royal Bank. Under cl. 306 of the CAPL Agreement, one of the duties of the operator is to pay all trade debts. Under cl. 605 there is an obligation placed on the operator to distribute income from the well to parties entitled to it. Both requirements are functions and duties of the operator. Under cl. 202(*b*)(ii) the operator is liable to be removed for default on any of its duties or obligations under the CAPL Agreement. The particular situations cited and relied upon by the Royal Bank as indicia of "commercial insolvency" are specifically dealt with under these other provisions in the CAPL Agreement. The state of insolvency stands alone as a reason for removal. For that reason, I am accordingly of the view that "insolvency" in the context of the CAPL Agreement should be given its normal meaning and not the more restricted meaning urged by counsel for the Royal Bank. It follows on the facts of this case that by the bringing of its C.C.A.A. application, Oakwood has declared itself insolvent and thus cl. 202 of its operating agreement comes into play.

[27] This brings me to the second preliminary issue. That issue is whether insolvency creates an automatic ejection of Oakwood from its operatorship or whether some further action is required on Norcen's part.

[28] Norcen argues that the terms of the CAPL Agreement provide a formula for the automatic ejection of Oakwood and that they select Norcen as the operator by default and, in that regard, it relies upon cl. 206. The clause is a lengthy one but, since the issue is critical to the disposition of this application, it is essential that I set it out in full:

> 206. APPOINTMENT OF NEW OPERATOR –
>
> (a) If an Operator resigns or is to be replaced, an Operator shall be appointed by the affirmative vote of two (2) or more parties representing a majority of the participating interests, provided if there are only two (2) Joint-Operators to this Operating Procedure and the Operator that resigned or is to be replaced is one (1) of the Joint-Operators, then, notwithstanding the foregoing, *the other Joint-Operator shall have the right to become the Operator*.
>
> (b) No party shall be appointed Operator hereunder unless it has given its written consent to the appointment; provided that if the parties fail to appoint a replacing Operator or if any appointed Operator fails to carry out its duties hereunder, the party having the greatest participating interest shall act as Operator pro tern, with the right, should a similar situation re-occur after a new Operator has been appointed, to require the party having the next greatest participating interest to act as Operator pro tern and so on as occasion demands.
>
> (c) No provision of this Article shall be construed to re-appoint as next-succeeding Operator an Operator who has been replaced under Clause 202, except with the unanimous consent of the parties.
>
> (d) Except as provided in Subclause (a) of Clause 202 *(in which case the Operator shall be replaced immediately),* every replacement of Operator shall take effect at eight (8:00) o'clock a.m. on the first (1st) day of the calendar month following the expiration of any period of notice effecting a change of Operator, notwithstanding anything hereinbefore contained. [emphasis added]

[29] Norcen relies on the italicized portion of cl. 206(d) in its argument that Oakwood has already been removed as operator. In my opinion, however, that portion of the clause simply provides for a situation where a party is not forced to wait a period of time, which could be up to a month less a day, for replacement in circumstances of insolvency.

[30] I have chosen to emphasize the words in italics. In particular, I note that cl. 206(a) reads in part "shall have the right to become the Operator". It appears to be worded in the future tense suggesting that at some point following insolvency another party may become the operator if appropriate measures are taken. There is some positive election required on Norcen's part indicating that it wants to exercise its right to become the operator.

[31] Oakwood has functioned as operator for approximately two years since its difficult financial situation began. It has performed its duties and responsibilities over that entire period of time. It seems to me to be difficult to now assert that Norcen has been the operator for the last two years. It may have had a right to become the operator, but until that right is exercised, Oakwood remains in control.

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[32] In summary, Oakwood is an insolvent operator as that term is used in the CAPL Agreement. The present set of circumstances is one in which cl. 202 is applicable.

[33] The final preliminary point that I must deal with is the argument made by Norcen that their action should be permitted because insolvency under the CAPL Agreement is not curable and consequently an action to remove Oakwood as operator under the Hays agreements is inevitable in any event. In the alternative, it is suggested that if insolvency is curable, a current stay may be permanently affecting Norcen's future right to become operator in that if Oakwood becomes solvent, Norcen's right to remove it as operator will have been defeated as a result of my order.

[34] The point of whether or not insolvency is a curable state under the CAPL Agreement is not directly before me on the facts of this case at this time. I do recognize the possibility that Norcen's rights may be permanently affected by the current stay. However, the issue of curability is one that is better decided when a fact situation comes before the court in which insolvency has actually been cured. I emphasize that although I do not decide the issue here, I am cognizant of the potential for future prejudice to Norcen's rights and, accordingly, I must interpret the situation as something more than a mere suspension of its rights as contended by the Bank of Montreal.

[35] With these conclusions regarding the effect of the relevant provisions of the CAPL Agreement in mind, I now consider the statutory construction and constitutional arguments raised by the parties.

B. *The proper construction of s. 11 of the Companies' Creditors Arrangement Act*

[36] The wording of s. 11 is extraordinarily broad. It is quite capable of sustaining both meanings argued by the parties to this application. For example, the long title of the C.C.A.A. can be used to support either meaning. One can argue that "An Act to facilitate compromises and arrangements between companies and their creditors" suggests that the C.C.A.A. is only designed to affect creditors. One can equally argue that the use of the word "facilitates" means that the Act encompasses a broader scope that includes potentially affecting all parties that may threaten a compromise arrangement.

[37] I note that the debtor and creditor theme is recurrent throughout the C.C.A.A. In fact the only place that the theme is conspicuously absent is in the wording of s. 11 itself. I do not, however, regard this absence of the C.C.A.A. 's general theme from s. 11 as conclusive in any way as to the types of relations that may be interfered with in a stay under the section. The conclusion that I do draw, however, is that at least the wording of s. 11 itself is capable of sustaining the broad meaning that is argued by Oakwood and its supporters.

[38] Norcen argues that its rights are affected without it being given the same vote concerning a plan of compromise that is granted to creditors. Surely, however, third parties whose rights are affected by the compromise agreement are entitled to make submissions when the time comes for the debtor company to seek the approval of the court for its plan. In addition, it should be emphasized that the stay power under s. 11 is a discretionary one. There is much room in the terms of s. 11 to refuse a stay when third party rights will be seriously prejudiced by its terms.

[39] In construing a statute, one must always keep in mind the objects that the piece of legislation is designed to achieve. This principle is emphasized in Driedger, Construction of Statutes, 2nd ed. (1983), at p. 74:

> The comprehension of legislation is, in a sense, the reverse of the drafting process. The reader begins with the words of the Act as a whole and from a reading of these words in their setting, deduces the intention of Parliament as a whole, the legislative scheme, and the object of the Act, and then makes construction of the particular enactment harmoniously with the words, framework and object of the Act.

[40] The authorities are of some assistance in arriving at a determination of the purpose of the C.C.A.A. Illustrative are the words of Wachowich J. in *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.,* 32 Alta. L.R. (2d) 150, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109 at 114, 11 D.L.R. (4th) 576,53 A.R. 39 (Q.B.):

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[41] *Re Feifer and Frame Mfg. Corp.,* 28 C.B.R. 124, [1947] Que. K.B. 348 (C.A.), must also be considered because it involves a fact situation that can at least be analogized to the present one. The facts were that a lease of premises contained a clause permitting eviction on insolvency. The debtor tenant availed itself of the protections offered by the C.C.A.A. After the compromise proposed by the company was approved by the court, the landlord sought to rely on its eviction clause. As was illustrated during arguments on this case, that case is a difficult one from which to extract a ratio. The difficulty arises in part from the fact that four different judgments were rendered. The general holding was that the landlord was not permitted to rely on the eviction clause.

[42] I must rely on an English translation of the decision of the Quebec Court of Appeal that was included in the briefs of several of the parties that made submissions. At p. 11 of the translation, St-Germain J., in his judgment, held:

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> In effect, if, on the one hand, one must admit that recourse by a debtor to this law of arrangement constitutes in itself an act of bankruptcy, and if, on the other hand, a termination clause like that which is the subject of the present action permits a lessor to terminate his lease with a lessee, what good is it to the lessee to have recourse to this Act to make an arrangement with its non-secured creditors, if he must by that very act expose himself to the chance of his lease being terminated?

[43] It seems to me that that line of thinking is particularly relevant in the case at bar. The affidavit of Douglas Nolan Blades, dated 4th November 1988, deposes that the effect of the removal of Oakwood as operator would likely be fatal to attempts to restructure the company. A temporary stay of proceedings must apply to working partners in addition to creditors if the C.C.A.A. is to be of any protection at all.

[44] This particular application may relate to only 20 wells but the evidence is that Oakwood is the operator in approximately 800 wells when its entire undertaking is considered. It would be difficult to grant Norcen's application without granting similar orders in the future to other holders of working interests of which Oakwood is the operator with the result being a marked reduction in the probability of success for Oakwood in its efforts to negotiate an acceptable plan of compromise with its lenders.

[45] Attempts to distinguish the *Feifer* case were made on several grounds. The first is that there was a wartime ordinance in effect at the time of *Feifer* which made eviction clauses of the type considered in *Feifer* illegal. Clearly that fact materially affects the ratio of the case, but even if the passages regarding the scope of the C.C.A.A. are obiter, they are nevertheless supportive of a broad interpretation of s. 11. The second ground on which Norcen seeks to distinguish the case is on the basis that there are references in *Feifer* to the landlord as a creditor and in the present case Norcen is clearly not claiming in a capacity as a creditor. The difficulty, however, is that the purported eviction in *Feifer* took place after a binding compromise had been made. My reading of the decision is that the reference to the landlord as a "creditor" was perhaps merely a recognition of its former status. The fact is that both *Feifer* and the case at bar deal with situations under a federal statute where the company availing itself of the protections of the C.C.A.A. does not owe the party claiming contractual rights money at the time of the court hearing. It is irrelevant whether the claiming party is given the name "creditor" or some other label. The critical point is that the applicant is not owed money in either case.

[46] Norcen also relies on the decision of Chief Justice Moore in *Tri-Star Resources Ltd. v. J.C. Int. Petroleum,* supra. While that case is very helpful on the issue of insolvency, it is readily distinguishable on the stay issue. In *Tri-Star,* the operator of certain oil and gas properties filed a proposal under the Bankruptcy Act, R.S.C. 1970, c. B-3. Another party having a working interest successfully brought an application to have the operator removed summarily notwithstanding the stay provision in s. 49 of the Bankruptcy Act. The *Tri-Star* case is clearly distinguishable because of the fact that it was concerned with a proposal under the Bankruptcy Act. The stay power under s. 49 refers only to a stay against claims provable in bankruptcy while the C.C.A.A. provision, as already noted, is worded in a much broader fashion.

[47] For these reasons, I am drawn to the conclusion that s. 11 must be interpreted in the fashion suggested by Oakwood and its supporting creditors in order that the C.C.A.A. be permitted to accomplish its legislative purpose. The section grants the jurisdiction to a court to stay proceedings such as those contemplated here by Norcen. This type of action is a proceeding within the terms of s. 11.

C. *The constitutionality of a broad interpretation of s. 11*

[48] Given that I am of the opinion that the proper statutory construction of s. 11 of the C.C.A.A. is a broad one, it becomes necessary to consider whether such an interpretation is constitutionally valid under the division of powers set out in ss. 91 and 92 of the Constitution Act, 1867.

[49] Section 91(21) of the Constitution Act, 1867, grants to the Parliament of Canada legislative jurisdiction in the fields of "bankruptcy and insolvency" while s. 92(13) assigns exclusive legislative jurisdiction to the provinces in the fields of "property and civil rights". Clearly, we may be treading on marginal constitutional ground in the case at bar. If we are doing so, there is the possibility of reading the C.C.A.A. in a less offensive fashion by reading the statute down as argued by the province of Alberta and Norcen. I begin my analysis, however, on the footing that the proper statutory construction of s. 11 of the C.C.A.A. is a wide one.

[50] Given that fact, it must be asked whether interference with contractual rights such as Norcen's is constitutionally valid. Although there is no argument made that the C.C.A.A. itself is constitutionally invalid, the basic starting point must be the decision in ***Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que.,*** 1934 CanLII 72 (SCC), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75. It was held in that case that the Act was valid as relating to bankruptcy and insolvency rather than property and civil rights. At p. 664, Cannon J. held:

> Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, "bankruptcy" proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as "insolvency proceedings" with the object of preventing a declaration of bankruptcy and the sale of these assets,

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> if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation ...

[51] The C.C.A.A. is an Act designed to continue, rather than liquidate, companies. In upholding the C.C.A.A., the Supreme Court of Canada must be taken as having extended the meaning of the term "insolvency" to include dealing with insolvent companies outside of a liquidation setting. The critical part of the decision is that federal legislation pertaining to assisting in the continuing operation of companies is constitutionally valid. In effect the Supreme Court of Canada has given the term "insolvency" a broad meaning in the constitutional sense by bringing within that term an Act designed to promote the continuation of an insolvent company.

[52] Accordingly, if promoting the continuance of insolvent companies is constitutionally valid as insolvency legislation, it follows that a stay which happens to affect some non-creditors in pursuit of that end is valid. Surely a necessary part of promoting the continuance of a company is to give that company some time to stop and gather its faculties without interference from affected parties for a brief period of time. In my opinion, the distinction between creditors' contractual rights and the contractual rights of non-creditor third parties that Norcen asks me to draw is not a helpful one in these circumstances. Continuance of a company involves more than consideration of creditor claims. For that reason, I am of the opinion that s. 11 of the C.C.A.A. can validly be used to interfere with some other contractual relationships in circumstances which threaten a company's existence. I add, however, that in my judgment, such interference in the interest of fairness to all parties should be effective only for a relatively short period of time.

[53] If I am wrong in my conclusion that a wide reading of the C.C. A.A. is permissible as a valid exercise of Parliament's powers in the field of insolvency law, the wide reading can also be supported on the basis of another constitutional argument. The "necessarily incidental" or "ancillary" constitutional doctrine can be used to arrive at the same conclusion: see Hogg, Constitutional Law of Canada, 2nd ed. (1985), pp. 334-37.

[54] On either of the two tests cited by Professor Hogg for use of the ancillary doctrine, it seems that the constitutional validity of a wide reading of s. 11 of the C.C.A.A. can be upheld. Under the "rational, functional connection" test that was approved in *Multiple Access Ltd. v. McCutcheon,* 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.], there is obviously a clear connection between permitting Oakwood to remain as operator for the time being and continuance of the insolvent company. Under the more restrictive "limited to what is truly *necessary* for the effective exercise of Parliament's legislative authority" test as set out in *R. v. Thomas Fuller Const. Co. (1958) Ltd.,* 1979 CanLII 187 (SCC), [1980] 1 S.CR. 695 at 713, 12 C.P.C. 248, 106 D.L.R. (3d) 193, 30 N.R. 249 (sub nom. *Foundation Co. of Can. v. Can.*) [Fed.], a strong argument can be made that it is necessary to occasionally interfere with contractual relations in order to pursue the legislative objective of assisting companies in struggling through difficult times.

V. CONCLUSIONS

[55] I emphasize my conclusions here. I have found that a default under cl. 202 of the CAPL Agreement has taken place and as a result Norcen would normally be entitled to pursue the remedies that it is entitled to under its operating agreement. A proper interpretation of s. 11 of the Companies' Creditors Arrangement Act, however, permits that a temporary stay be imposed restraining Norcen from proceeding. I have also concluded that a wide reading of the provisions of the C.C.A.A. is constitutionally valid.

[56] I am mindful that my interpretation of s. 11 is that I still retain a discretion to not grant a stay in circumstances where it would be unfair to stop a party from pursuing its contractual rights. I am unable to grant such relief on these facts. The stay remains in force until only 30th November. During that short period of time, perhaps Oakwood can restructure itself. If it is successful in its restructuring efforts, Norcen still has its incurability argument as well as other CAPL Agreement provisions available to it should it wish to see Oakwood removed as operator. If it is unsuccessful, removal of Oakwood by Norcen may well result in any event. For the time being it is essential that the status quo be maintained in order to give effect to the purpose of the C.C.A.A. Accordingly, my order of 22nd September 1988 shall stand unamended to its present termination date of 30th November 1988, or until further order of this court.

[57] Application dismissed.

Application dismissed.

Tiger Brand Knitting Co. (Re), 2005 CanLII 9680 (ON SC) - Distinction between Court's Processes and Company's Processes and Discretional Control Thereof

Date: 2005-04-05

Docket: 04-CL-5532

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Parallel citations: 9 CBR (5th) 315
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Court File No. 04-CL-5532

Date: 20050405

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF: *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED **AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF:** TIGER BRAND KNITTING COMPANY LIMITED Applicants	*Scott A. Bomhof*, for the Monitor RSM Richter Inc. *Orestes Pasparakis*, for GMAC Commercial Finance Corporation-Canada *Sean Dewart* for the USWA *Renée B. Brosseau,* for Tiger Brand Knitting Company Limited *Steven L. Graff*, for Geetex Global Sourcing Inc. *Christopher Besant* for Joan Fisk *Fred Myers*, for the prospective purchaser *Hugh Mackenzie*, for Andrew Warnock and James Warnock *Leonard Alksnis*, for the majority of the members of the Board **Heard**: April 1, 2005

C. CAMPBELL J.:
REASONS FOR DECISION

[1] Tiger Brand Knitting Company Limited ("the Applicant") and RSM Richter Inc. ("the Monitor") seek an extension of the time within which to present an offer to the Court for the sale of the business and assets of the Applicant.

[2] The extension of up to 15 days is not opposed. Counsel on behalf of the United Steel Workers of America ("USWA") urges the Court to add a condition to the granting of any extension, namely, that the Monitor be directed not to accept a bid offer that it has received and to negotiate with another party that may make an offer.

[3] USWA seeks to add the condition with the prospect that a new offer, if it comes forward, would provide the opportunity of some or all of the 200 jobs now occupied by its members at the Applicant's facility in Cambridge.

[4] Very simply, it is urged that the broad considerations available to the Court to provide remedy under *The Companies' Creditors Arrangement Act* ("CCAA") permit the Court to take into account and balance the interests of all stakeholders, not just those of a purchaser who would provide the greatest immediate monetary recovery to a secured creditor.

Background Facts

[5] On August 30, 2004, the Applicant filed for, and obtained, protection from its creditors under the CCAA pursuant to the "Initial Order." The stay of proceedings was initially for a period of 30 days and since September 29, 2004, has been extended on a number of occasions, the last being March 15, 2005.

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[6] Tiger Brand, which is in the business of design and manufacture of casual clothing, has been subject to the impact of globalization, which has seen cheaper goods manufactured abroad displace domestic production. This, together with the rise of the Canadian dollar relative to the United States dollar, has resulted in a deterioration of financial performance.

[7] The impact will particularly felt by the employees in head office and manufacturing facilities in Cambridge, Ontario, but as well by the Company's three retail outlets.

[8] From the commencement of its involvement, the Monitor has recognized that a so-called multi-track process provided the only realistic opportunity to maximize stakeholder returns. As set out in the Monitor's First Report, these included (a) soliciting offers for the business and assets; (b) considering shareholders' restructuring plans; (c) the liquidation value of assets; and (d) assisting in identification of potential investors.

[9] Subject to comments below, none of the interested parties has taken the position that the Monitor has not reasonably or appropriately carried out its duties in accordance with Court Orders.

[10] By this Court's Order of September 13, 2004, a Sale Process was approved, as it was recognized that a sale of assets rather than a restructuring of the Company was the more likely result of the ongoing effort.

[11] The marketing process was extended and by Order of November 3, 2004, amended as set out in that Order with the explanation and rationale for it contained in the Monitor's Fifth Report to the Court dated January 11, 2005:

- The Monitor originally identified a sale transaction with Geetex which, at the time, provided the highest value to the stakeholders and had the greatest probability of closing. Importantly, the Geetex offer was premised on an asset acquisition which would likely result in Geetex carrying on an importing operation; and, as such, an orderly wind-down and termination of the Company's manufacturing and possibly other operations in Cambridge, Ontario;
- Geetex agreed that its offer would be a "stalking horse" in the amended sale process. Parties interested in purchasing the Assets for an amount greater than the Geetex stalking horse bid had to submit offers by a November 12, 2004 deadline;

[12] A deadline of November 12, 2004 was set for the receipt of offers pursuant to the Amended Sale Process, the short time period being considered necessary due to a belief by, among others, Geetex that, "if a transaction was not consummated in short order, the assets and the business of Tiger Brand generally would deteriorate significantly and rapidly in value."

[13] Apparently, both the major secured creditor GMAC and the Union were of the view that superior offers were available, the process was extended and in early January 2005, a "stay fee" was negotiated between the Monitor and Geetex, whereby Geetex kept its offer open to February 15, 2005.

[14] Geetex takes the position that there has not been until most recently an offer superior to its and that either the new offer from a new purchaser of assets should be accepted and closed, or Geetex's offer accepted and completed, or it be paid the break fee plus costs.

[15] As of the time of its Sixth Report, the Monitor had executed non-binding non-exclusive memoranda of understanding with two prospective purchasers and looked forward to one or both of the parties presenting a final form of asset purchase agreement for consideration.

[16] Since that time, the Monitor has been negotiating an agreement with one prospective purchaser, which is expected to be finalized and executed shortly. Hence the request for an extension to April 15, 2005.

[17] The affidavit material filed on behalf of USWA identifies a potential bidder, which, if successful, would provide the opportunity for preservation of some employment in Cambridge.

[18] In effect, USWA complains that the Monitor will not now consider and negotiate an offer from this bidder, which effectively eliminates the possibility of saving employment in Cambridge.

[19] The Monitor reports in its Seventh Report that efforts to identify going-concern purchasers that would preserve employment at Cambridge have been unsuccessful.

[20] The position of the Monitor, supported by the major secured creditor, Geetex and the prospective purchaser, is that to add a condition to the grant of extension would undermine and violate the process that has been followed to date.

Analysis & Law

[21] Two principles involving the Court's jurisdiction and discretion are urged, one by USWA and another by those who oppose an extension of the time to complete a plan on terms.

[22] USWA submits that the broad discretion given to the Court to take into account the interests of all stakeholders not just secured creditors, directs that in these circumstances, every reasonable consideration be given to the saving of jobs and of the Company to operate as an entity.

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[23] Mr. Dewart submits that the broad and flexible discretion given to the Court under the CCAA favours any reasonable effort to preserve the business under a restructuring as opposed to a liquidation, which is more properly achieved under the BIA.

[24] The balancing effort, it is suggested, should allow those stakeholders who wish to achieve continuance of the enterprise every reasonable opportunity to do so and in this case, the only way to do so is to require the Monitor to not accept an offer to purchase assets until it at least considers a bid from an entity that might allow continuance of at least some of the business.

[25] The Court of Appeal for Ontario rendered a decision on March 31, 2005 dealing with the issue of removal of directors in the context of a CCAA proceeding.

[26] In *Re Stelco Inc and others*, the reasons of Blair J. for the Court considered the extent to which the Court's "inherent jurisdiction" and "discretion" under the CCAA might be involved to provide the remedy sought.

[27] After adopting the observation from I.H. Jacob's "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems at p. 2, that there is a vital distinction between jurisdiction and discretion that must be observed, he went on to say at paragraph 38:

> [38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however – difficult as it may be to draw – between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose." Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. [Footnote omitted]

[28] At paragraph 39, in commenting on the discretion of a judge under s. 11 of the CCAA to, among other things, stay, restrain further proceedings or prohibit actions against the Company acting in good faith and with due diligence, Blair J.A. went on to say:

> In my view, the s. 11 discretion – in spite of its considerable breadth and flexibility – does not permit the exercise of such a power in and of itself.

[29] Paragraph 44 reads:

> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff, supra*, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. ...

[30] This leads to the principle relied on by those who oppose the extension on conditions that would favour a new offer.

[31] The principle is that process that has been put in place for receiving offers in respect of either the business as a going concern or of its assets, should be honoured. The process is integral to the administration of statutes such as the BIA and the CCAA.

[32] *Royal Bank v. Soundair Corp* 1991 CanLII 2727 (ON CA), (1991), 7 C.B.R. (3d) 1 is a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern.

[33] At paragraph 42, Galligan J.A. for the majority (himself and McKinlay J.A.) said:

> While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected.

[34] At paragraph 16, the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* reflex, (1986), 60 O.R. (2d) 87 at p. 92 was adopted and the duties of the Court summarized as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.

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4. It should consider whether there has been unfairness in the working out of the process.

[35] To my mind, those same duties of the Court are implicit in a marketing and sale process pursuant to Court Order under the CCAA.

[36] There is nothing in the material before me or in the submissions of Mr. Dewart that suggest that any of those duties have to date been breached by the Monitor in the negotiation or offer process.

[37] At this point in time, I am of the view that to allow the offering process to in effect be re-opened by enjoining the Monitor from completing a proposed transaction would amount to an unfairness in the working out of the process to the prospective purchaser, to Geetex and to GMAC the secured creditor. As well, it would interfere with the efficacy and integrity of the process and prefer the interests of one party (the USWA, albeit an important one) over others. As noted at paragraph 46 of *Soundair*

> [46] It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

[38] This is not to suggest that the interests urged by the USWA would be without remedy in appropriate circumstances.

[39] The dissent of Goodman J.A. in *Soundair* was really on the factual side, as he concluded that in his view, the conditional offer accepted by the Receiver in that case was "…an improvident one…" [at paragraph 118.]

[40] In this case, there is no accepted offer before the Court for approval. When there is, should there be another offer that would meet the test of rendering the accepted offer improvident, the Court can and perhaps should intervene.

[41] Until that occurs, I do not conclude on the facts before me, that the Monitor has acted improvidently in failing to negotiate with a party who did not bring forward an offer capable of acceptance within the process set out in the previous Order of the Court. The actions of the Monitor appear entirely appropriate.

[42] For the above reasons, the motion to extend the time within which to present an offer for sale of the business and assets of the Applicant is extended to April 15, 2005 or such earlier date as may be appropriate without the condition as sought by the USWA.

[43] If it is necessary to deal with any issue of costs, they may be spoken to at a 9:30 appointment.

C. CAMPBELL J.

Released:
Court File No. 04-CL-5532
Date: 20050405

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF: *THE COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF: TIGER BRAND KNITTING COMPANY LIMITED

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REASONS FOR DECISION

C. CAMPBELL J.

RELEASED: April 5, 2005

Companies' Creditors Arrangement Act (Re), 1998 CanLII 3832 (BC SC) - A Typical Example of Some CCAA Court Issues

Date:	1998-03-06
Docket:	A980298
Parallel citations:	3 CBR (4th) 177
URL:	http://canlii.ca/t/1f655
Citation:	The Companies' Creditors Arrangement Act (Re), 1998 CanLII 3832 (BC SC), <http://canlii.ca/t/1f655> retrieved on 2013-09-11
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Reflex Record	Related decisions, legislation cited and decisions cited

Date: 19980306
Docket: A980298
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36
AND
IN THE MATTER OF THE *COMPANY ACT*, R.S.B.C. 1996, c. 62
AND
IN THE MATTER OF STARCOM INTERNATIONAL OPTICS CORPORATION,
STARCOM SERVICE CORPORATION (B.C.)
STARCOM SERVICE CORPORATION (WASHINGTON STATE)
PETITIONERS

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE SAUNDERS (IN CHAMBERS)

Counsel for the Petitioners: H.C. Ritchie Clark, Q.C. and J.A. Dawson

Counsel for AT&T Capital Corporation: C.S. Bird and M. Verbrugge, Articled Student

Counsel for Lucent Technologies of Canada Inc.: W.C. Kaplan and J.J. Lynch

Counsel for Burlington Northern and Santa Fe Railway Company: J.R. Sandrelli

Counsel for Intelcom Group (U.S.A.), Inc.: N.E. Kornfeld

Counsel for Metronet Communication Corp.: V.L.M. Strike

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On their own behalf: Cyrus Bilimoria, John Nesbitt, Dan Robertson and Neil Callow
Place and Date of Hearing: Vancouver, B.C. February 27 and March 3, 1998

[1] On January 30, 1998 I granted an *ex parte* interim order, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, protecting the petitioners from their creditors, permitting them to file a reorganization plan on or before July 31, 1998, and appointing a monitor. The interim order required a hearing of the petition on February 27, 1998. The February 27, 1998 hearing dealt with extension of the original order granted *ex parte* as well as applications by AT&T Capital Corporation and Lucent Technologies of Canada Inc.
[2] I will be referring to the petitioners as Starcom International, Starcom B.C. and Starcom Washington.
[3] The issues that have emerged from these several applications are:

1.should the interim order protecting the petitioners be extended and confirmed?
2.should the order be amended to delete Starcom International from protection of the *Act*?
3.should the stay as it relates to Starcom International be modified and a receiver-manager appointed of its shares in Starcom B.C. and Starcom Washington with the object of replacing the current management team of Starcom B.C. and Starcom Washington?
4.in the event the stay as it relates to the shares, is not lifted, should the interim order be amended to require a reorganization plan to be presented to the court prior to July 31, 1998?
5.should the monitor's fees be paid in priority to the claims of creditors?
6.should the fees of other professional advisors be paid in priority to the claims of creditors?
7.should the petitioners be required to provide financial statements, prepare cash flow projections and keep accounts in a segregated way?
8.should the petitioners be required to disclose to AT&T all negotiations and discussions conducted in preparing their reorganization plan, and be required to permit AT&T to be present during such negotiations or discussions?
9.should the order be amended to permit a challenge to be brought to a security granted by the petitioners to Devlin Jensen, lawyers?

HISTORY
[4] The original order was made January 30, 1998. On February 13, 1998 AT&T applied to lift the stay as it affected the shares of Starcom B.C. and Starcom Washington and to appoint a receiver-manager, with the intention of replacing the petitioners' management team. The application was denied, with liberty to reapply, which AT&T has done.
[5] The general circumstances and position of the parties before me was described in my oral reasons of February 17, 1998. For completeness, I describe them again.
[6] Starcom International, a British Columbia incorporated company, is owned by shareholders who, on the information before me, invested about $4.5 million in the fibre optics enterprise. Starcom International owns 100 percent of the voting shares of Starcom B.C., a British Columbia incorporated company, and Starcom Washington, a Washington incorporated company registered extra-provincially in British Columbia. Starcom International also owns 45 percent of their non-voting shares. Another company, Intelcom Group (U.S.A.), Inc. ("ICG"), owns the other 55 percent of the non-voting shares of Starcom B.C. and Starcom Washington. ICG acquired these shares when it converted about $5.6 million debt of the petitioners to shares, as part of a refinancing that saw AT&T become the petitioners' principal creditor.
[7] Starcom B.C. and Starcom Washington, between them, own and operate a fibre optics network between Vancouver, B.C. and Seattle, Washington. The line is located on the Burlington Northern right of way. For regulatory reasons, the portion of the line in British Columbia is an asset of Starcom B.C. and that portion in the State of Washington is an asset of Starcom Washington. On the material before me, Starcom B.C. and Starcom Washington appear to be integrated in their operations and accounting functions. Concurrent creditor protection proceedings are ongoing in Washington State concerning Starcom Washington, I am instructed.
[8] Starcom B.C. and Starcom Washington have borrowed more than $40 million from AT&T. Starcom International, which has no direct debt to AT&T, has pledged its shares in the two operating companies to AT&T as part of the security package which AT&T took in exchange for the funds advanced. AT&T appeared on the application as the dominant secured creditor of the two operating companies and as holding the Starcom International pledge of the shares of the operating companies.
[9] On the information before me, the petitioners owe approximately $4.3 million to creditors other than AT&T. Of these, the largest creditor is Lucent Technologies of Canada, which appeared at the hearing. It has rendered accounts of more

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than $2.5 million, which are unpaid. The next largest creditor is Burlington Northern Railroad, which on the material, is owed more than $450,000. Another creditor is Devlin Jensen, the law firm acting for the petitioners, which is a secured creditor owed more than $240,000. In these reasons, I have, in a rough calculation, converted any sums in American dollars into Canadian dollars.

[10] The loan from AT&T has been in payment default since January 31, 1997. In the spring of 1997, AT&T and the petitioners entered into a forbearance agreement in which AT&T agreed to forebear for some time to permit the petitioners time to refinance. In late December 1997, they entered into another agreement whereby AT&T agreed to forebear collection until January 31, 1998. The petitioners have not paid AT&T and have not presented a plan acceptable to AT&T for repayment of the AT&T loan.

[11] On the *ex parte* application, the materials filed included consolidated financial statements and consolidated cash flow projections.

[12] On February 17, 1998 I asked the monitor to advise on the degree of difficulty, if any, in presenting cash-flow projections and financial statements for Starcom International on one hand and the two operating companies on the other. Since that request the financial information has been presented to the court segregated on that basis. Further, the original cash flow projections have been amended to now include enhanced revenue, which is explained by the petitioners as increases from new sales, and to include required expenditures such as Lucent Technologies' fees calculated on a monthly basis for future maintenance. Although the cash flow projections do not yet reflect charges of Burlington Northern for use of its right of way as Burlington Northern had not advised that monthly payments were required, there are sufficient revenues projected to be received to pay these additional expenses, provided the projections are accurate.

[13] The monitor has stated that in his view the assumptions on which the most recent cash flow projections are made are reasonable.

[14] In recent affidavits the petitioners have described their general plan to re-finance the company, with the objective of paying out AT&T in full. The current plan includes a combination of selling one or more indivisible rights of use ("IRU's"), attraction of fresh equity capital and completion of a new debt arrangement with a new lender.

PURPOSE OF THE LEGISLATION

[15] In deciding the many issues raised, it is useful to consider the overall purpose of the *Companies' Creditors Arrangement Act*. The purpose has been frequently described by the courts.

[16] ***Re: Alberta-Pacific Terminals Ltd.*** (8 May 1991) Vancouver A903661 (S.C.), Madam Justice Huddart described the purpose at p.7 as being:

> ... to facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue to do business ...

[17] She discussed the need to maintain the status quo, saying at p.10-11:

> ... The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the Prairie Provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

[18] In ***Hongkong Bank of Canada v. Chef Ready Foods*** 1990 CanLII 529 (BC CA), (1990), 4 C.B.R. (3d) 311 (C.A.) at 315, Mr. Justice Gibbs described the legislation in these terms:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s.11.

[19] Mr. Justice Brenner in ***Pacific National Lease Holding Corp., Re,*** (17 August 1992) Vancouver A922870 (S.C.), summed up the principles to consider in applications under the *Act*, at p.10:

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(1)The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.

(2)The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.

(3)During the stay period the Act is intended to prevent maneuvers for positioning amongst the creditors of the company.

(4)The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5)The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6)The Court has a broad discretion to apply these principles to the facts of a particular case.

1. Should the Protection of the *Act* Continue?

[20] As this hearing follows the *ex parte* order made on the initial application, any order made to continue protection will be made under s.11(4) of the *Act*. On any orders made under s.11(4), 11(6) of the *Act* places the burden of proof upon the applicants:

11.6Notwithstanding the Bankruptcy and Insolvency Act,

(a)proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part; and

(b)an application under this Act by a bankruptcy may only be made with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i)the operation of subsection 50.4(8) of the Bankruptcy and Insolvency Act, or

(ii)the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the Bankruptcy and Insolvency Act.

[21] Section 11(6), new to the *Act* in 1997, establishes three pre-conditions to an order under s.11(4):

(a)that circumstances exist that make the order appropriate;

(b)that the applicants have acted and continue to act in good faith; and,

(c)that the applicants have acted and continue to act with due diligence.

[22] Before enactment of s.11(6), the test in British Columbia for continued protection derived from ***Chef Ready Foods***, *supra*, in which Mr. Justice Gibbs spoke at p.315 of "moving the process along to a point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure". In the context of s.11(6), the question of whether the attempt is doomed to failure is one consideration in determining whether the order is appropriate. In making an assessment of appropriateness, the court must also consider whether the conditions necessary for the initial order are met.

[23] Here the conditions required for an initial order are present. The issues are whether the reorganization attempt is doomed to failure, whether there has been and is good faith and whether there has been and is due diligence.

[24] AT&T, Lucent, and to some extent Burlington Northern question the propriety of continued protection. They say, given the history and AT&T's lack of confidence, the exercise is doomed to failure, and that the petitioners have not displayed the degree of good faith and diligence required. However, even in arguing against continuation of the stay as presently framed they did not seek, as their first choice, total discontinuance of the *Act*'s protection. Rather they couched their submissions in terms of lack of confidence in the present management team and their desire to see the team replaced by, as yet, unidentified persons.

[25] Without dealing, at this point, with the application to lift the stay from Starcom International completely or in part, which I address below, I am satisfied that the petitioners have shown the court that the reorganization attempt, at this stage, is not doomed to failure. Although AT&T, the predominant creditor, has expressed its present lack of confidence in the management team, I cannot conclude that it would turn down a plan of refinancing whereby it would be paid in full. The evidence before the court explains the current efforts being made by the petitioners to refinance their debt through sale of one or more IRU's, sale of shares and fresh agreement with a new lender. On all the material before the court, I am not satisfied that this initiative is doomed to failure. Continuation of protection of the Starcom Group is appropriate,

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given the objectives of the *Act*, the current cash flow position of the company and the indications before the court that reorganization and refinancing is a realistic ambition.

[26] Questions have been raised about the good faith and diligence of the petitioners. AT&T and Lucent correctly point to deficiencies in the cash flow projections which were first presented to the court, and the adjustments to them to project increased revenue and expenditures. AT&T complains that the petitioners were not as cooperative with its agent, Ernst & Young, as it considered they should be and wonders why he was not provided a copy of the new cash flow projections before they were submitted in the monitor's report.

[27] Some of the criticisms of the cash flow projections are justified. However, on the issue of lack of cooperation, the evidence conflicts. What is clear is that the petitioners have provided the basic information requested by Ernst & Young, and with a limited staff, spent considerable time with Ernst & Young representatives. On balance, I am satisfied that the petitioners have met the onus under s.11(6)(b). The monitor has expressed his view that the assumption reflected in the latest projections are reasonable, and the projections are more positive than those originally presented. The new projections are responsive to criticisms from Ernst & Young and the monitor, and reflect and address the criticisms received. I cannot conclude that the first cash flow projections were prepared with a lack of good faith, and in my view the manner in which the criticisms have been dealt with in the ones now before the court indicate both good faith and diligence.

[28] I consider that the interim order, in general, should be extended to the date by which the reorganization plan must be presented.

2.Should the Stay be Lifted from Starcom International?

[29] AT&T has applied for an order lifting the stay from Starcom International, contending that the court should exercise its discretion to take Starcom International out of court protection because it has no active business, its only asset being shares in the operating companies.

[30] It is clear that the companies are managed as a group. The management team of the operating companies is controlled by Starcom International, which owns all the voting shares in the two operating companies. While there may be merit at some point in seeking separation of any obligations which are singular to Starcom International, to protect only the two subsidiary companies and not the parent company will fracture the status quo without apparent benefit to the reorganization effort. This application is dismissed.

3.Should the Stay Concerning Starcom International be Lifted as it Concerns the Shares?

[31] AT&T, supported by Lucent and Burlington Northern, has applied for a stay of the order concerning Starcom International to permit the shares of the operating companies to be handled by a receiver-manager, and the management team to be replaced.

[32] On February 17, 1998 I denied this application with leave to re-apply. That decision was made, in part, in recognition that many of those interested in the order were not then before the court but would be in attendance at the comeback hearing.

[33] There is little doubt that the range of creditor profiles is extreme, and that AT&T, over the past year, has displayed forbearance towards the petitioners. While this forbearance may have been prompted in part by considerations of business advantage and the possibility of success, a likely result has been that the failure of the petitioners to advance their revenues more swiftly, and to locate further investors more promptly, has diminished AT&T's confidence in the group.

[34] While the AT&T perspective and experience must be considered, the court must also consider the broader constituency protected by the *Act*, referred to in the cases referred to earlier. On balance I am satisfied that the purpose of the *Act* is best advanced by leaving the present management team in place, subject to such changes as may naturally develop. I say this for the following reasons.

1. the *Act* is designed to preserve the *status quo* and to prevent manoeuvring of creditors: see, for example, ***Re Alberta-Pacific Terminals***; ***Chef Ready Foods*** and ***Re Pacific National Lease Holding***, *supra*. To permit the proposed change in management is to significantly alter the *status quo* and place the predominant creditor in control of the petitioners, while still receiving the protection of the *Act*;
2. the present management team has embarked on discussions with potential investors and customers. A change of team at this time may waste that effort and lose the reputation and client goodwill referred to in the affidavits as accruing to the benefit of the petitioners;
3. the new, proposed team, is not described to the court. Whether any of the contemplated persons have experience in this industry, or this geographic area or with these customers, is a matter of speculation, not evidence;
4. although representing investors with amounts at stake smaller than the secured debt owing to AT&T, significant confidence in the present management team has been expressed to the court by shareholders in Starcom International and by ICG, as well as certain smaller creditors. These expressions of confidence

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> confirm the goodwill referred to in the First Marathon correspondence which is in evidence, and indicate a certain degree of competence in the operations of the company, which should not be ignored.

[35] In my view, the objects of the *Act* would not be advanced by the order sought. The *Act* intends time to be given to corporations that require reorganization, where there is a realistic prospect of success. This time is given not just to facilitate repayment of debt, which naturally is key to continued survival, but also to make use of experienced pools of knowledge and expertise within the organization, and to protect the investment in the enterprise, all this for the better good of those touched by the protected corporations. Drawn from the deep woes of the depression, protection of the *Act* is available to protect modern corporations, such as these, on the front edge of technology where the investment is high, the capacity is great and the need for time to attract business and investors is acute.

[36] For these reasons, I consider the petitioners, directed by the present management team, should have the opportunity to reorganize their finances. The application to lift the stay as it relates to the shares, is dismissed.

4. Should the Term of the Stay be Abridged?

[37] AT&T, Lucent and Burlington Northern all seek an order shortening the time within which a reorganization plan must be produced. They refer to the decision of Chief Justice Glubé in ***Fairview Industries Ltd., Re*** reflex, (1991), 11 C.B.R. (3d) 43 in which she stated, at p.56:

> A serious general concern which I have is the length of time which the courts in Nova Scotia have been giving to a company to present a plan. There is no question that 120 days is a long period of time. Until the plan is presented, the initial order may place the bank which finances a company's operating loan in a precarious position. If the position of the operating company deteriorates dramatically during that period, this could seriously affect the bank's position. Although in most cases a monitor is in place, that will not necessarily prevent serious deterioration occurring. In my opinion, shorter time periods should be considered by the courts both for the application to approve the appropriate classes of creditors and for the presentation of the formal plan of compromise or arrangement. The court should be given reasons why longer periods are necessary and I suggest that on any new applications by companies under the C.C.A.A. that the length of time granted for any of the steps be given very careful consideration. Although several recent applications in Nova Scotia contain the same times as in the present case, there are a number of cases in other provinces which have much shorter time frames, which may be more appropriate.

[38] The decision of Chief Justice Glubé was issued before the amendments to the *Act* which establish a threshold of $5 million in indebtedness, require cash flow projections and require a second hearing within 30 days.

[39] In British Columbia the standard order is for something considerably longer than the thirty or sixty days proposed to the court. In my view the concerns of Chief Justice Glubé may be met by vigilant reporting by the monitor, so that any significant deterioration in the companies' position will soon be detected and can be dealt with by fresh application. While each business will have its own financing possibilities, I consider it safe to say that generally large loans, significant equity injections, or large sales, as is required to rescue a corporation in debt for more than $5 million, will take time to develop to the point of agreement. Further, the more frequently those managing a corporation are required to return to court, the greater the distraction from their primary task of salvage. This is particularly so where the employee complement is, as here, small.

[40] In my view the original time frame of a stay until July 31, 1998, by which time a plan shall have been presented, is at least a better estimate of the time which should be provided than is any other suggestion, and is consistent with the evidence of Mr. Maasen of ICG itself in the telecommunications business, to the effect that given the industry, more time, rather than less, will be required to develop a reorganization plan.

[41] This issue of time, is, of course, a matter of the court's discretion to be exercised after peering into a foggy crystal ball.

[42] The concerns of AT&T, Lucent and Burlington Northern, however, should not be overlooked, particularly given the incomplete cash flow projections initially presented to the court. I ask the monitor to report the petitioners updated cash flow projections to the court on a bi-weekly basis, thereby to alert parties to any significant deterioration in the picture now presented.

[43] Lastly, on this issue, I note that AT&T premised its request for a short order on its concern that interest was continuing to accrue at the rate of $17,000 per day. It submitted that AT&T would experience serious prejudice by passage of time during which interest continued to accrue. Lucent referred to the deterioration of the position of unsecured creditors, as the interest was added to the amount of debt secured by AT&T's security agreement. No doubt interest will mount. However, the interest issue will not be resolved in the sense of creation of greater revenue or payment of the debt, simply by shortening the length of the stay or even by changing the management team. The best solution is development of a successful reorganization plan.

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[44] For these reasons, the original date of July 31, 1998, less than five months hence, shall remain as the end date of the order.

5. Should the Monitor's Fees be Paid in Priority?

[45] In the *ex parte* order I granted an order that the monitor's fees be paid in priority to other creditors.

[46] AT&T submitted that the court lacks jurisdiction to make this order, and in any event should decline to do so. It relies upon ***Re Fairview Industries Ltd.***, *supra*.

[47] The notion of a monitor, now found in the *Act*, was created in ***Re Northland Properties Ltd.*** (5 July 1988) Vancouver A880966 (B.C.S.C.). In that case Mr. Justice Trainor held that he had jurisdiction to appoint an interim receiver and to spell out the responsibilities such that the true role was one of monitor or watchdog. Thus, the primary purpose of the monitor is to watch from a neutral perspective, and to report to the court and the parties.

[48] This court, in previous cases which postdate ***Re Fairview Industries Ltd.***, has acted to give priority for payment of accounts. For example, in ***Westar Mining Ltd., Re*** (1992), 20 B.C.L.R. (2d) (S.C.) Mr. Justice Macdonald exercised his discretion to create a "first charge" to secure monies advanced to permit operations to continue. Considering this authority, and the genesis of the office of monitor, I conclude that this court does have jurisdiction to create a priority for fees charged by the monitor.

[49] Further, in my view the order sought is appropriate. The monitor acts on behalf of the court to provide information and monitoring for the benefit of all parties. An order protecting the fees, as first granted in the *ex parte* order, shall continue. To ensure that the true position of the petitioners is known, I request the monitor to submit accounts on at least a monthly basis, so that they may be reflected in the financial information received from time to time by the parties.

6. Should the Fees of Other Professional Advisors be Granted Priority?

[50] AT&T supported by Lucent, likewise challenged the priority initially given by the *ex parte* order to accounts of other professional advisors.

[51] In my view, for the same reasons, I am satisfied I may make the order. The question is whether I should do so.

[52] There is no material before me, as apparently there was in Westar, to the effect that the priority is required to enable operations to continue. In any case, the cash flow projections provide for monthly payment of professional fees in sizeable sums, and s.11.3 of the *Act* permits a person providing services to require immediate payment for the services.

[53] At this time, in my view, the protection of s.11.3 of the *Act* and the revenue flow shall suffice as protection for payment of these services.

[54] The terms of the order shall be amended to provide for priority only of the monitor's fees and disbursements.

7. Should Separate Financial Information be Provided for Each Petitioner

[55] AT&T, Lucent and Burlington Northern seek an order that financial information be provided for each company. Segregated information has been provided for Starcom International following the oral decision of February 17, 1998. The issue is subdivision of the accounts of the two operating companies.

[56] There may come a time when the relative assets and liabilities, and cash flow, of the two companies is significant. I do not think that time has arrived.

[57] Before such an order is made, the court should have information of the relative ease or difficulty of the task. I ask the monitor, as I did concerning Starcom International, to provide advice to the court on this matter.

8.Should the Petitioners Advise AT&T of all Negotiations and Discussions and Permit its Participation?

[58] AT&T has applied for an order that the petitioners advise it of all negotiations and discussions towards a reorganization plan, and ask to be allowed to participate. Lucent supported this application.

[59] In my view, the court should not exercise its discretion to make this order. There is little or no confidence now expressed by AT&T in the management team. While these proceedings and any progress which may be made by the petitioners may ameliorate AT&T's present sentiments, the management team has an onerous task ahead of them, and such a formalized requirement may clog the process further. I do not consider that the court should place a formal requirement on the petitioners which may have the affect of stretching their personnel even thinner, which may itself create difficulties requiring delicate handling of confidences between the petitioners and those with whom they negotiate, and which would impose an obligation on the petitioners to join in their discussions a party that has expressed its lack of confidence in them and in the plan they hope to present.

[60] Although the court encourages full communication between the parties to the extent this is practicable, this encouragement does not extend to the order sought.

[61] The application is denied.

9. May Lucent Challenge the Security Given to Devlin Jensen?

[62] It is agreed that the stay on all proceedings involving the petitioners shall be lifted to permit a court challenge to be brought to the security given to Devlin Jensen. It is so ordered.

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[63] This lifting of the stay extends only to commencement of proceedings. Any further step will await further submissions of counsel and decision of the court.

"M.E. SAUNDERS J."

Lindsay v. Transtec Canada Ltd., 1994 CanLII 1539 (BC SC) - A Case of a Contingent Creditor Not Being Taken Into Account

Date:	1994-10-07
Docket:	A903661
Parallel citations:	[1995] 2 WWR 404; 28 CBR (3d) 110; 99 BCLR (2d) 73
URL:	http://canlii.ca/t/1dn45
Citation:	Lindsay v. Transtec Canada Ltd., 1994 CanLII 1539 (BC SC), <http://canlii.ca/t/1dn45> retrieved on 2013-09-29
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Date of Release: October 7, 1994 No. A90366l

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANY ACT R.S.B.C. l979, c. 59

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT R.S.A. l98l, c. B-l5

AND IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT R.S.A. l985, c. C-36

AND IN THE MATTER OF

ALBERTA-PACIFIC TERMINALS LTD.

FRASER SURREY DOCKS

PACIFIC TERMINALS LIMITED

JOHNSTON MARINE TERMINALS LTD.

JOHNSTON INTERNATIONAL SERVICE (HONG KONG)

PETITIONERS

AND IN THE MATTER OF AN INTENDED ACTION:

BETWEEN:)

)

T. BARRIE LINDSAY)

) REASONS FOR JUDGMENT

PLAINTIFF)

)

AND:)

)

TRANSTEC CANADA LIMITED) OF THE HONOURABLE

302290 B.C. LTD. TROJAN)

EQUITIES LTD., COMPLEAT)

HOLDINGS LTD., ALBERTA-PACIFIC)

TERMINALS LTD. and TRANSTEC)

CAPITAL LTD.) MADAM JUSTICE HUDDART

)

DEFENDANTS)

G. Dickson Counsel for the Applicant

R.A. Millar Counsel for the Petitioners

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and 8808 Investments Ltd.

Heard at Vancouver: February l0, April l3, June 22, and September 7, l994

T. Barrie Lindsay asks leave to commence an action on a guarantee of his supplementary pension benefits against Alberta-Pacific Terminals Ltd ("Alberta-Pacific"). The court's permission is required because Alberta-Pacific and four related companies ("the Alberta-Pacific Group") obtained the protection of this court under the Companies' Creditors Arrangement Act (the "CCAA") in 1990. Those proceedings began with an order on November 22, 1990, staying all proceedings against the Alberta-Pacific Group, and culminated in an order on November 14, 1991, sanctioning an arrangement between those debtor companies and their creditors and continuing the stay of proceedings (at 5) as follows:

> This Court further orders that except as provided herein, the stay of proceedings in the Order of The Honourable Mr. Justice Skipp pronounced herein November 22, l990 and this Order be and is hereby confirmed and continued in accordance with the terms of the Plan as at the Closing Date;

Unfortunately, Alberta-Pacific did not invite Mr. Lindsay to participate in the meetings leading to the arrangement, although he was an ordinary creditor under the CCAA.

The Facts

When Mr. Lindsay retired from Transtec Canada Limited ("Transtec") as its Senior Vice-President on December 15, 1988, he reached an agreement with it ("the Retirement Agreement"), under which he was to receive a monthly supplemental pension in the amount of $2,100 from June 15, 1990 until his death. The pension was indexed at 4% annually commencing June 15, 1991, and it contained an acceleration provision on default. All of this Alberta-Pacific guaranteed, as did other companies formerly in what counsel called "the Johnston Group."

Transtec defaulted on its agreement when it failed to make the payment due January 15, 1993. On that day Mr. Lindsay valued the obligation at $415,601.58, the cost of providing an annuity in the amount agreed. He has demanded payment from Transtec and all other guarantors. None of them have paid. Thus, Mr. Lindsay seeks to commence an action against Alberta-Pacific.

Alberta-Pacific cannot explain why it failed to include Mr. Lindsay among those invited to attend the meetings authorized by an order made June 24, 1991. Alberta-Pacific is a holding company whose only asset is shares in Fraser-Surrey Docks Ltd. ("FSD"). FSD operates the Fraser Surrey Terminal under a licensing agreement with the Fraser River Harbour Commission. Terrence Johnston, the chief operating officer of FSD who swore in the CCAA proceedings that all creditors and claimants of all the petitioners had been given notice, says that he believed that all of the creditors of all of the petitioners were disclosed. The obligation to Mr. Lindsay appears not to have been noted in the auditor's report on the financial statements of Alberta Pacific.

The evidence persuades me that the failure to notify Mr. Lindsay was due to oversight on the part of Mr. Johnston, those advising him, and those keeping and reviewing the records of Alberta-Pacific. The oversight may be one of the results of the financial difficulties of the Alberta-Pacific Group and the demands being made on their limited staff during the re-organization process. The evidence does not support the view that Alberta-Pacific made a deliberate decision, either that contingent creditors could not be caught by the CCAA, or if they could, that they should not be included in the re-organization process. The reasons in ***Quintette Coal Ltd.*** v. ***Nippon Steel Corp.*** 1991 CanLII 303 (BC SC), (1991), 56 B.C.L.R. (2d) 80 (S.C.) affirming that contingent creditors were subject to the CCAA were released on April l2th and reported on July 29th.

It is absolutely clear that had Mr. Johnston become aware of Mr. Lindsay's claim before November 14, 1991, Mr. Lindsay would have been asked to participate in the reorganization process. His claim would have been valued for voting and participation purposes. He would have been invited to participate in the meeting of the General Creditors whose approximately 190 members were owed about $900,000. Under the arrangement members of that group received about 27% of the value of their debt. Without any discount for the contingency of payment by others, Mr. Lindsay's claim would have represented about one-third of the class. For the purposes of these reasons I will assume that Mr. Lindsay lost the opportunity to settle his claim for $80,000, and certainly no more than $100,000.

Mr. Lindsay, although aware of the CCAA proceedings and of the possibility they would affect him, took only one step before November 14 to ensure that Alberta-Pacific was aware of his claim as a creditor. After receiving legal advice, he sent a double registered letter to the Corporate Secretary of Alberta Pacific which it received on May 24, 1991. It was brief:

> Guarantee Agreement, Dated December 15, 1988, Pursuant to Retirement Agreement Between Transtec Canada Limited and T. Barrie Lindsay, Dated December 15, 1988.
>
> I understand that this company has made an application under the Company Creditors Arrangement Act and that a court order has been issued.

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As a beneficiary of this guarantee I am a creditor of this company and entitled to copies of the application, any court orders issued, and any proposals submitted pursuant to court orders.

Please arrange to forward copies of such application and court orders to me forthwith and to forward any proposals as they are submitted.

Thank you for your immediate response.

When he did not receive a reply he concluded "that my possible future claim under the Guarantee would not be included in or affected by the CCAA application." He did not contact Alberta- Pacific or anyone on its behalf during the next 6 months, although he knew all of the senior executives of the Alberta-Pacific Group because FSD had operated as a division of Transtec during his tenure as senior vice-president of that company.

Nor did he contact Alberta-Pacific or anyone on its behalf after he read a newspaper article on October 31 saying that meetings of creditors had been adjourned because a Hong Kong investor was interested in purchasing the company. He did seek the advice of his lawyers, who obtained a copy of the Plan and advised him that he was probably not included. On the same day I made an order approving the Plan he instructed his solicitors to advise Alberta-Pacific about his claim. He wanted to take advantage of the moment to negotiate a settlement with the Hong Kong purchasers. His solicitors' delay until December 20 before contacting Alberta- Pacific is unexplained. On December 17 8808 Investments Ltd ("8808") acquired the shares of Alberta-Pacific. His solicitors would have known of this closing because they acted for 8807 Investments Ltd., the unrelated company which acquired the Alberta-Pacific debt.

8808 came along as a white knight in August 1991 to make the reorganization arrangement possible. Without the investment of 8808, unsecured creditors of Alberta-Pacific would have received nothing. Coopers & Lybrand valued the assets on a liquidation basis at about $1.8 million. The secured creditors were owed over $13 million. The Fraser River Harbour Commission had reason to terminate the licence. Claims in negligence were outstanding for many more millions, although partially insured. 8808 provided $250,000 to satisfy the claims of all creditors in the category of General Creditors. Those funds were disbursed after January 4, 1992, in accordance with the terms of the arrangement on a *pro rata* basis to those General Creditors who filed Proofs of Claim.

Mr. Lindsay did not file a Proof of Claim although Russell and DuMoulin sent a copy of the Plan to his solicitors on December 31 as a result of John Fraser's conversation about Mr. Lindsay's claim with Mr. Wesik of that firm on December 20. The letter was terse. It read in its entirety:

As you are aware we are solicitors for Alberta-Pacific. Your Mr. Fraser inquired of our Mr. Wesik as to the intentions of Alberta-Pacific with respect to the guarantee granted in favour of Barrie Lindsay. We advise that we have no instructions at this time as to the position of Alberta-Pacific.

Enclosed is a copy of the Order of the Honourable Madam Justice Huddart made November 14, 1991 which Order attaches the Reorganization Plan of Alberta-Pacific as approved by the Court.

A Proof of Claim form was not enclosed.

Because Alberta-Pacific did not invite Mr. Lindsay to participate in the CCAA process and because Mr. Lindsay did not pursue his unanswered request for information before November 14, 1991, Mr. Lindsay lost the opportunity to oppose the arrangement. Because he did nothing between November 14 and December 5, the effective date of the Plan, he gave up the opportunity to re-open the arrangement. Because he did not file a Proof of Claim he gave up the opportunity to share in the fund for General Creditors. Now he wants leave to commence an action on a guarantee that may result in a judgment for twice the amount other general creditors received. This seems a high price for Alberta-Pacific to pay for a simple management error and unfair to others in Mr. Lindsay's class of creditors.

Indeed, Alberta-Pacific argues that it is unjust and inequitable that it should be burdened with the defence of such a claim and, if judgment is granted, with execution proceedings. FSD is its only source of income. Its spokesperson, Vincent Cheung, says that, although FSD has become profitable because of the arrangement and a new licensing agreement with the Fraser River Harbour Commission, the secured creditors of Alberta-Pacific still hold security well in excess of the value of the FSD shares, which are the only asset of Alberta-Pacific. He fears the action and subsequent execution proceedings would affect the security and licensing agreements.

It is difficult for Mr. Cheung and for this court to understand how Mr. Lindsay could have failed to pursue a response to his letter of May 24. He was aware of the financial and business difficulties of the Alberta-Pacific Group. He understood the importance of the CCAA proceedings and that he might be affected by them.

He explains that he formed his belief that Alberta-Pacific did not intend to include him in the Plan on the basis of the legal advice he received. In April he learned from his solicitors that it was unlikely that the CCAA included contingent creditors. However, by October 31, the decision in ***Quintette,*** *supra*, would have been known to the Bar and I had considered it in a decision in this matter. His solicitors had a copy of the Plan before November 13, perhaps before the November 5th meeting

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of creditors. They advised him that the Plan probably did not include him. His own reading of the Plan then and later confirmed that advice because it did not include the word "contingent" with regard to creditors.

While he may have concluded that the Plan would not affect his contingent claim, his letter and note of November 14 to his solicitor demonstrate his understanding that they had the potential to do so and his understanding that he was a creditor under the CCAA.

It would have been a simple matter for Mr. Lindsay to enquire from any one of the senior executives of Alberta-Pacific if he was included, and equally simple for his solicitors to enquire of Fraser Beatty or Russell & DuMoulin if they were aware of Mr. Lindsay's claim. He could have gone to the meeting of General Creditors. But he did nothing until he instructed his solicitors on November 14 to advise Alberta-Pacific of his claim. Then they did nothing until December 20, 3 days after they knew the closing had taken place. The post-script to his note to his solicitors shows his thinking precisely:

> On reflection after our telcon, I assume that the possible likely defence of Alta Pacific et al to the guarantee which is brought to their attention is to go back to Court and attempt to get an order specifically wiping out the Guarantee -- and that would be our time to defend our position? On balance, seems much better to possibly defend our position now if necessary rather than "X" months or years out - at least we know where we stand.

I must conclude that Mr. Lindsay (or his solicitors on his behalf) made considered deliberate decisions not to again notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement on December 17.

The only sensible conclusion I can reach on the basis of the evidence before me is that Mr. Lindsay preferred not to participate in the CCAA proceedings and to take his chances later based on his understanding of the CCAA and the Plan. I also accept that he would have pursued his claim more diligently if he had understood that contingent claims were included in the CCAA and that his claim was included in the Plan.

That conclusion is reinforced by the contents of a letter Mr. Mair wrote to Mr. Lindsay on January 7, 1992, after receiving the response of Russell & DuMoulin to the verbal notice given December 20. The second paragraph reads:

> I believe we agree that the Russell & DuMoulin letter accomplishes part of our purpose in having what we suspect to be the new owners of Alberta-Pacific be made aware of the existence of the guarantee. Some time in the future we may have to face the issue of whether or not the court order affects Alberta-Pacific's obligation. I will have some preliminary work done on this.

Mr. Lindsay accepts that his understanding of the CCAA was wrong. But he continues to take the position that he is not bound by the CCAA arrangement because he is not a "creditor" of Alberta-Pacific within the meaning of the Plan. If he is bound, then he seeks to be exempted from the continuing stay of proceedings because he did not receive notice of the meetings of the General Creditors and did not receive a Proof of Claim with the letter of December 31, 1991.

Is Mr. Lindsay a creditor under the plan?

His counsel concedes that the beneficiary of a guarantee by a debtor company may be subject to a plan as a creditor with a "claim" as defined in section 12 of the CCAA, or, as she put it, that a plan can capture contingent liabilities. That concession is consistent with the view Thackray J. expressed in *Quintette Coal Ltd., supra*, when he said (at 88) "'Claim' is visualized with a future prospect, i.e, 'would be a debt' and in my opinion clearly envisages giving potential creditors a role in the CCAA proceedings." However, she argues, the Alberta-Pacific plan does not do so.

I disagree. Alberta-Pacific told the court at the confirmation hearing that it intended all creditors and potential creditors to be included in the arrangements. I thought then and think now that the Plan captures creditors with contingent claims.

The relevant definitions from Article 2.01 of the plan are these:

> "Claim" means a claim for an amount alleged by a person to be owed to it by, or any obligation or cause of action against, the Companies, or any of them, as at May 30, 1991, either:
>
> (a)as set forth in a Proof of Claim which has either:
>
> (i)been admitted by the Companies for all purposes, or
>
> (ii)been determined by a Court of competent jurisdiction to be a proper obligation of the Companies, or any of them;
>
> (b)which has been determined by the Companies to be a proper obligation of the Companies, or any of them;
>
> (c)for which a valid Proof of Claim could have been filed with the Companies, but which Proof of Claim was not so filed;
>
> together with all accrued and accruing interest which is expressly declared to be payable under this Plan.
>
> "Class" means that group of persons constituting any of the following: Alberta Creditors, General Creditors, Spill Claimants, Fire Claimants, Bondholders and Related Creditors.

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"Creditor" means a person having a Claim.

"General Creditor" means a Creditor not falling within any other Class, except the Commission, a Cargo Claimant and a Related Creditor, and includes a person who is Related to the Companies and who provided goods and services to the Companies, for the fair value of those goods and services supplied.

"Proof of Claim" means a proof of claim form as distributed by the Companies, properly completed and executed by a Creditor and delivered to the Companies within the time limits set out in this Plan or the Information Circular.

Article 3.03 dealt with the General Creditors. It included these provisions:

f) In the event that a General Creditor does not file a Proof of Claim with the Companies within the time provided for above, it shall have no further claim, cause or right of action against the Companies or any of them;

g) The stay of proceedings as set out in the November 22, 1990 order in the Proceeding shall remain in full force and effect as against General Creditors after the Final Order, subject only to Article IV hereof.

Mr. Lindsay is a person who could have filed a Proof of Claim within 30 days of the acceptance by the Registrar of companies of the order sanctioning the plan for filing. I understand that the Registrar accepted the order on or about December 5.

I cannot accept that the receipt of a Proof of Claim form as approved by the court on June 24, 1991, was a pre-condition to Mr. Lindsay having a "claim" under the plan. The suggestion that the failure to deliver a Proof of Claim form to Mr. Lindsay precluded him from being included as a "creditor" under the plan and thus from sharing as a "General Creditor" requires an unduly technical interpretation of the provisions of the plan. In my view anyone reading the plan would consider that it included among those entitled to share as a General Creditor someone with a contingent claim capable of being valued as it would be on a bankruptcy.

The real issue in this application is what effect, if any, a plan can have on an unsecured creditor who is not invited to participate in the process of arriving at a compromise because of inadvertence, yet appears to fall within a class for whom provision is made in the plan. That question does not appear to have been considered by any court.

How does the plan affect Mr. Lindsay?

The final order sanctioning the Alberta-Pacific plan provided that it was "binding upon the Petitioners, the Creditors, Claimants of the Petitioners and any person having a Claim in accordance with its terms." That order also included a declaration that "all requisite notices have been given and Meetings held for the purpose of consideration of the Plan by the Creditors and Claimants of the Petitioners." The requisite notices were those authorized by the order of June 24, 1991, in the exercise of discretion given this court by section 4 of the CCAA.

The failure to adhere rigidly to such an authorizing order was considered fatal to a claim to bind an unsecured creditor in ***Quebec Steel Products (Industries) Ltd.*** v. ***James United Steel Ltd.*** (1969), 5 D.L.R. (3d) 374 (Ont. H.C.). In *obiter* (at 382) Parker J. held that "even if the plaintiff were an unsecured creditor, he would not be bound by the compromise because of the failure to give the notice required by statute." He appears to have read the requirements of the order made under section 3 (now section 4) of the CCAA as a "statutory requirement" requiring rigid adherence because there was no provision comparable to section 71(5) of the Bankruptcy Act, that creditors without notice should be bound. He did not consider the purpose of the Act to be sufficient to import such a provision. Nor did he find sufficient protection for those inadvertently excluded from the process in the right under section 13 (then section 12), of "any person dissatisfied with an order or decision made under this Act" to seek leave to appeal. There is no reference to the provisions of section 11 of the CCAA which permit the court a continuing role in the supervision of the plan under which a debtor company, which has obtained the court's protection, is allowed to continue to operate although insolvent.

Section 11 provides:

Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

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(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

Section 4 provides:

Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

I have difficulty reading that provision as a "statutory requirement". A plain reading suggests simply the conferring on the court of a discretion to direct the manner in which a meeting may be called. Presumably a court is to exercise that discretion judicially, to take account of the purpose of the CCAA, to consider the variety of interests being served by the CCAA, and to arrive at a fair direction - one that will permit the debtor company and, *inter alia,* its unsecured creditors to meet to discuss its continuation, although insolvent, in their mutual best interests, but also in the interest of the broader community the CCAA was designed to serve. It cannot be fair to those who meet and reach a compromise that those who are inadvertently omitted from the process, but whose interests bring them within a class for which provision is made in the plan, can be allowed to make a claim that could endanger the continuing existence of the debtor company. It would be even more unfair if a creditor of whose existence the company might not be aware could make such a claim.

In ***Quebec Steel*** the applicant was seeking to sue on a contract which the receiver of the debtor company had repudiated (wrongfully in the opinion of Parker J.) on March 25, 1965, before the court ordered the debtor company to give notice to all unsecured creditors as of January 17, 1965. The debtor company had not given notice of the meeting of creditors to any person having a contract with it, who might have a claim for damages for breach of contract.

It may be that the failure to give notice to an entire class of unsecured creditors merits the result Parker J. reached. However, I cannot accept that the inadvertent failure to give notice of a meeting of creditors to one unsecured creditor should be allowed to endanger the continuing existence of a debtor company when the CCAA allows fairer solutions.

It is unfortunate that the process proposed by the Alberta-Pacific Group did not provide for notice to all unknown creditors by advertisement. Such a direction is commonly given, supplementary to an order providing for notice by prepaid mail to the known creditors. The process did provide for such substitutional notice to those who were claiming in negligence. A creditor who failed to see such an advertisement would likely be considered bound by the plan as would someone who did not receive a notice mailed to it. But could not such a creditor look to sections 11 and 13 to provide a vehicle for obtaining relief if the result was inequitable in all the circumstances? If such a creditor, why not an inadvertently uninvited creditor with knowledge of the proceedings?

As Mr. Justice Thackray reminded us in ***Quintette***, the Western Canadian approach to interpretation of the CCAA is designed to arrive at an economically sensible result. In my view a strict application of the approach of Parker J. could lead to economically foolish results. The facts on this application provide an excellent example of how foolish.

The Ontario Court of Appeal is of the view that the supervising court has a broad discretion to make such exceptions to the order restraining proceedings against the debtor company as fairness demands, before and after an arrangement is sanctioned, although it also recognizes that a consensual agreement must be respected and not interfered with lightly. In ***Algoma Steel Corporation, Limited*** v. ***Royal Bank***, reflex, (1992), 11 C.B.R. (3d) 11; 8 O.R. (3d) 449; 93 D.L.R. (4th) 98, that court permitted a creditor with notice of the creditors' meetings, whose claim had been valued at $1.00, to commence proceedings against the debtor company, when its section 12 (now section l3) appeal of the valuation placed on its contingent claim failed. The court recognized that its order would affect a consensual plan that had been sanctioned by the court. It found in section 11(c) the authority to do so when the reasons were compelling and an order could be structured that would not prejudice the interests of the company or the creditors. The effect of its order was to permit a tort claimant to access the debtor company's product liability insurance policy.

In reaching that conclusion, the court (C.B.R. at l8) considered a hypothetical situation suggested to it in argument and concluded:

Suppose a visitor had become quadriplegic as a result of an injury on the premises of Algoma under circumstances in which Algoma as occupier might be liable and suppose Algoma's potential liability was insured against by an appropriate insurance policy. To restrict the injured person, a known designated unsecured creditor under the terms of the plan of arrangement, to his or her compromised claim valued, without a trial, in a summary proceeding, would, in our view, be unacceptable. The actual situation before the court is analogous.

(emphasis added)

I suggest a similar result would have been reached had the hypothetical case concerned an unknown and unascertainable tort claimant.

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The logical conclusion of the argument made for Mr. Lindsay is that any unknown or unascertainable creditor is not bound by any arrangement for the simple reason that such creditor did not receive notice. He considers that conclusion follows from the view taken of notice by Benoit J. in ***Sous-Ministre du Revenu du Québec*** v. ***Wynden Canada Inc.*** (1982), 47 C.B.R. 76 (Que. Sup.Ct.).

There, the provincial Crown, a preferred creditor whom Benoit J. found to be a secured creditor under the CCAA, was given leave to execute on a judgment it had obtained for unpaid deductions at source, and to initiate proceedings with respect to additional deductions at source which had come due subsequent to that judgment. The judgment was obtained on March 15, 1982; an order staying proceedings until May 18 was made on March 30; and an order approving an arrangement with the hypothecary creditors was approved on July 15. On that same day the judge ordered a further stay of proceedings and ordered the calling of a meeting of ordinary creditors. On July 27 the court approved an amended arrangement among the secured creditors and an arrangement among unsecured creditors and continued the stay of proceedings.

Wynden invited only the class of secured creditors constituted by its hypothecary creditors to a meeting. It sent a notice of the meeting of ordinary creditors to be held on July 23, 1982 to the Deputy Minister, who received it on July 29. Benoit J. concluded that Wynden's failure to invite the Deputy Minister to the meeting of secured creditors implied that the amounts due him would be paid when due. He held that a debtor company which wants to re-organize under the CCAA is responsible for analyzing its situation, preparing a proposal, and submitting it to those classes of creditors who have the capacity to prevent its continuing in business. Thus, when it fails to submit its proposal to a class of creditors, it is saying that it intends to meet its obligations to the members of that class. In his view, the order sanctioning the arrangement with the hypothecary creditors did not apply to the Deputy Minister because he was not such a creditor. Because he was not an ordinary creditor, the order sanctioning the arrangement among ordinary creditors did not apply to him.

In these circumstances Benoit J. said that he did not need to consider whether the Deputy Minister's vote would have prevented the approval of the proposal submitted to the ordinary creditors in deciding whether or not to grant leave to execute the judgment and commence proceedings for the additional amounts owing. He authorized the Deputy Minister to make claims for specific amounts against Wynden because neither plan applied to the Deputy Minister as a non-hypothecary secured creditor.

The ***Wynden*** case does not stand for the proposition that unknown and unascertainable creditors cannot be bound by an arrangement if they come within a class of creditors to which the plan applies. Rather, it says that the failure to make a proposal to a class of secured creditors, whether deliberate or inadvertent, necessarily implies that the arrangement does not apply to members of that class. The judge's comment, that he need not consider whether the Deputy Minister's vote could have changed the result at the meeting of ordinary creditors, undoubtedly refers to a question he might have considered had he agreed with Wynden that the Deputy Minister was an ordinary creditor who had received late notice.

Thus, he did not need to consider the issue before me: whether a creditor, a member of a class clearly contemplated by the plan, inadvertently not invited to a meeting of that class, is bound by the provision in the plan that is intended to extinguish his claim. Alberta-Pacific relies on articles 3.03(f) and (g) of the Plan, *supra*.

If Mr. Lindsay had been given proper notice of the meeting of ordinary creditors he would have been bound by the Plan and the consequence of his failure to file a Proof of Claim would have been the extinguishment of his debt. That appears to be the result of section 6 of the CCAA and the terms of the Plan. That result fits the rule by majority consensus which is the essence of the CCAA.

Section 6 of the CCAA provides that an arrangement, once sanctioned by the court, is binding on "all the creditors or the class of creditors, as the case may be" and on the company:

> Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings . . .

The section does not require that those not present be taken into account in determining either the majority in number or the three-fourths in value. It does not prevent those who fall within a "class of creditors" contemplated by the Plan, but who do not attend the meeting of that class from sharing in any benefit members of that class may obtain from the Plan. This result is not unreasonable. The known claimants will have considered the possibility of such unknown claims in deciding whether to vote to approve the Plan. The unknown claimant will be accepting a benefit under the Plan in full satisfaction of its claim. However, it is not reasonable that a plan approved at a meeting of which such an unknown claimant has not been given notice can extinguish that claimant's debt.

There is nothing in the CCAA to suggest that result. Such a result cannot be implicit in a statute that relies on consensus among creditors.

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Mr. Lindsay is bound by the stay of proceedings which protects the Plan but his claim is not extinguished by the Plan. That stay of proceedings was included in the order of November 14, 1991, in these words:

> ... No person who is a member of any class shall have any claim, right or cause of action against the companies or any of them for any claim, act or omission occurring on or before May 30, 1991 other than as provided for in the plan and any such claim, right or cause of action shall be permanently stayed, save and except as otherwise provided in the plan ....

It is evident from my earlier comments that I am of the view that the court may give Mr. Lindsay leave to commence an action even where such an action will have the effect of varying the Plan. The question is whether or not the stay should be lifted for Mr. Lindsay. It is also evident from my earlier comments that I do not think it is necessarily inequitable for a company seeking to reorganize itself under the CCAA to try to protect itself from unknown and unascertainable claims, or that every inadvertence should be allowed to defeat an arrangement which permits a company to continue to operate, while insolvent.

The question is whether the facts of this case are such that Mr. Lindsay should be exempted from the stay of proceedings that allows that continued operation, and if so, on what terms.

Should leave be granted under section 11?

The interests of Alberta-Pacific, and therefore 8808, continue to be protected by the Plan and the order staying proceedings included in the sanction order. The authority for a court to stay the commencement of proceedings "on notice to any other person or without notice as it may see fit" comes with this proviso: "except with the leave of the court and subject to such terms as the court imposes." Thus, a creditor will always be at liberty to seek leave of the court to commence an action against a debtor company in the face of a general stay of proceedings unless the debt has been satisfied by the Plan. Mr. Lindsay's debt has not been satisfied by the Plan.

Alberta-Pacific argues that any derogation from the stay of proceedings that affects the Plan must be governed by equitable principles, and that the equities that should be considered are those between the two innocent parties: 8808 and Mr. Lindsay. Mr. Lindsay says that only the position of Alberta-Pacific should be considered. In his view, the mistake of Alberta-Pacific should not be visited on him.

Counsel could not direct me to any authorities setting down the factors that should structure the exercise of my discretion. However, some can be discerned from those to which I have been directed for other purposes: the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and the debtor company; fairness to other creditors; the scheme and purpose of the CCAA; the terms of the Plan.

The first factor to be considered in this case is the actual knowledge and understanding Mr. Lindsay had of the proceedings under the CCAA. It is repugnant to the spirit of the CCAA that persons with knowledge and understanding of the proceedings can avoid the effect of an arrangement by seizing upon a lack of delivery of the notice authorized for whatever advantage they may gain over other creditors.

In ***Quebec Steel*** the decision not to notify persons who might have breach of contract claims was deliberate. The uninvited creditors had no knowledge of the CCAA proceedings. In ***Sous-Ministre*** the court was satisfied that the plan was not directed at the class of creditors to which the plaintiff belonged.

Alberta-Pacific agrees that the court may infer from a debtor company's deliberate decision not to give notice of a meeting to a creditor that such a creditor is not bound by the plan, but says that inadvertence does not permit that inference to the court or to a creditor. That may be. But a creditor cannot know the reason he was not invited to participate in an arrangement unless he has reason to believe that he is included in the Plan.

Alberta-Pacific considers that Mr. Lindsay had sufficient knowledge and understanding of the proceedings to permit him to participate in them, that he made a deliberate choice not to do so after receiving legal advice from solicitors who had considered the Plan, and that there is no unfairness in requiring him to take the consequences of that choice.

It reminds the court that neither the CCAA nor the order of June 24, 1991, says anything about the effect of a failure to give or receive notice of meetings, but that there are strong reasons for favouring the policy made explicit in the Bankruptcy Act, that those without notice are bound. Counsel for Mr. Lindsay replies that the Bankruptcy Act requires that notice of the bankruptcy be advertised and that a debtor company seeking the protection of the CCAA has the option of giving notice by advertising, if the court approves. Alberta-Pacific did not ask for such an order with regard to General Creditors.

At the root of the problem in this case is Mr. Lindsay's subjective belief that the failure to reply to his May 24 letter was deliberate, a subjective belief I consider to have been unreasonable in the circumstances I described earlier, and a belief upon which most experienced business people are unlikely to have risked reliance when information could have been obtained and he could have participated so easily. This is particularly so because Mr. Lindsay was not an ordinary trade creditor. His

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evidence about his relationship with the senior officers and directors of Alberta-Pacific is inconsistent, but it is clear that he knew them well.

But his knowledge and understanding of the proceedings is only one fact among all the facts relevant to the equities that must be balanced in reaching a decision as to how to exercise the discretion given by section 11. The economic effect on the creditor and the company must also be considered.

It was seen as fair in ***Algoma Steel*** to permit a person who had participated in the CCAA proceedings to make a further claim that would not affect the company or its creditors, but the Ontario Court of Appeal was firm that such claims would be permitted only for "compelling reasons" and only when the effect on the arrangement is "minor".

Mr. Lindsay's claim as now put forward will have a major effect on Alberta-Pacific. If his claim were restricted to the amount he would have recovered if he had filed a Proof of Claim, Alberta-Pacific would be required to pay between $80,000 and $100,000 more for the benefit it perceived in purchasing a continuing re-organized business. His claim would be subordinate to that of the secured creditors (8807) and might trigger the assertion of their rights. Unlike the situation before the court in ***Algoma Steel***, Mr. Lindsay did not participate in the proceedings and have his claim valued at $1.00; nor is there insurance available to indemnify Alberta-Pacific for whatever may be found owing to him.

Alberta-Pacific argues that modern CCAA re-organization plans contemplate the acquisition by third parties of the re-organized debtor company, frequently to the benefit of general creditors, employees, and the general community. I accept that courts should recognize this development. Tax losses are purchased. Liabilities are assumed. There is a need for certainty that all claims have been compromised.

This is an important factor in this case because it is absolutely clear that no general creditor would have received anything on a bankruptcy or liquidation by a receiver. 8808's offer, founded on the proposition that all creditors were included in the Plan, came just in time to avert such a result. An extension of the stay of proceedings had been granted only to protect those claiming in tort. All parties were aware that another extension of the stay was unlikely. In a sense 8808's offer gave value to Mr. Lindsay's contingent claim it would not otherwise have had, even as it gave value to the claims of other unsecured creditors.

In most situations this policy reason will not be as persuasive as considerations of fairness to creditors. Under the CCAA those who seek its protection have the responsibility of developing a process that gives their unknown creditors or those whom they have by inadvertence missed, an opportunity to consider a proposal that is directed at them. Notice by advertisement has been known to the insolvency bar for many years. It was used in this case with regard to the Spill Claimants.

In the circumstances of this case however this objective is of less importance. Had Mr. Lindsay been invited to participate in the process by advertisement he would have had no more information than that already in his possession. The only real difference is that he would not have been able to defend his position that he was not included in the Plan. Even Mr. Lindsay recognized on November 14 that the proposed purchasers would attempt to include him in the Plan if they became aware of his claim. Indeed, he seems to have weighed the possible consequences and opted to have his solicitors give that notice when his bargaining power was at its best, before the closing. However, what may have been in his mind at that time cannot be weighed with what happened. His solicitors waited until after the closing to tell the purchasers about this contingent claim.

Similarly, 8808 must accept the consequences and manner of its solicitors' delay in responding to the verbal information. Its solicitors could have responded that Mr. Lindsay's claim was included and enclosed a Proof of Claim. The letter of December 31 says that they have no instructions. It is somewhat surprising that instructions could not be obtained between December 20 and December 31 about a claim of such obvious importance to the Plan. At the very least one would have thought that a Proof of Claim form could have been enclosed. After all, the author of the letter was the very person who had appeared at the sanction hearing to ensure that the court understood that all unascertained claims were meant to be included. However, the letter was directed to lawyers, not to Mr. Lindsay. They would be aware that a Proof of Claim form could be obtained by simple request and they were in a position to form their own opinion as to the rights of Mr. Lindsay. Moreover, Mr. Mair's letter of January 7 is consistent with his not having drawn any conclusions from the December 31 letter.

In this case there will be no effect on other creditors who settled their claims. If Mr. Lindsay is granted leave to sue, the effect of the order will be to require Alberta-Pacific to pay from its post-arrangement revenue or to otherwise obtain additional money to satisfy Mr. Lindsay's claim and to deal with any problem that may arise with its secured creditors. This effect will be felt by the shareholders of Alberta-Pacific, the very persons who are responsible for any value Mr. Lindsay's claim may have.

The final factor to be considered is the amount of that claim. In the circumstances of this case, there is no justification for seeking the full amount of the claim. Had Mr. Lindsay's claim not been included in the Plan then leave might have been given to sue for the full amount. While I have found that Mr. Lindsay was included in the Plan, I have also concluded that he was not invited to participate in the proceedings by inadvertence, that he had full knowledge of the proceedings at the critical times,

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and that he made a deliberate decision to rely on his interpretation of the Plan at all material times. These facts indicate that I need consider only the amount he lost by failing to participate in arriving at my conclusion as to whether or not to grant leave. While that amount remains to be determined, it is unlikely to exceed $80,000 plus whatever interest may seem appropriate in all the circumstances.

The conclusion I have reached after weighing these factors is that the fair and just result in this case must be the refusal to grant leave.

Those who participate in CCAA proceedings must be assured that there are not others waiting outside them for a mistake to be made of which they can take advantage. Those who purchase the reorganized companies must be assured of whatever certainty a court can ensure in its supervision of these voluntary proceedings.

While Alberta-Pacific can be criticized in some aspects of its behaviour in these proceedings, Mr. Lindsay had every bit of knowledge he needed to make a decision about whether or not to participate in them. He chose to remain outside the proceedings until December 20, 1991, and thereafter, until it was too late. I do not think it would be fair to Alberta-Pacific or to 8808 for him to be now allowed to participate beyond this application where he had the opportunity to defend the interpretation of the Plan on which he chose to rely in making his decisions. A CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself. Whatever it may have been in past years, it is now a stage where creditors are to participate in the collective enterprise of keeping a company going for the benefit of employees, customers, and the general community, as well as the creditors. As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything.

Counsel may address the issue of costs at a mutually appropriate time.

"C.M. Ryan J."

Vancouver, B.C.
7 October, 1994

Pacific National Lease Holding Corp. v. Sun Life Trust Co., 1995 CanLII 2575 (BC CA) - Court's Jurisdiction to Assign Costs

Date:	1995-07-10
Docket:	CA017927; CA017929
Parallel citations:	[1995] 10 WWR 714; 34 CBR (3d) 4; 10 BCLR (3d) 62
URL:	http://canlii.ca/t/1ddcf
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CA017927/CA017929
Vancouver Registry
Court of Appeal for British Columbia
IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36
IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1979, c.59
BETWEEN:
IN THE MATTER OF PACIFIC NATIONAL LEASE HOLDING CORPORATION, PACIFIC NATIONAL FINANCIAL CORPORATION, PACIFIC NATIONAL LEASING CORPORATION, PACIFIC NATIONAL VEHICLE LEASING CORPORATION, SOUTHBOROUGH HOLDINGS INC.

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and PACNAT EQUITIES CORPORATION
PETITIONERS
(RESPONDENTS)

AND:

SUN LIFE TRUST COMPANY
RESPONDENT
(APPELLANT)

AND:

MUTUAL LIFE ASSURANCE COMPANY OF CANADA
RESPONDENT
(APPELLANT)

AND:

FERGUSON GIFFORD
RESPONDENT

Before: The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Hollinrake
The Honourable Madam Justice Rowles

G. Turriff Counsel for the Appellant (Sun Life)
M. Carroll Counsel for the Appellant (Mutual Life)
H.C.R. Clark and M. Palleson Counsel for the Respondent (Ferguson Gifford)

Place and Date of Hearing: Vancouver, British Columbia
June 23, 1995

Place and Date of Judgment: Vancouver, British Columbia
July 10, 1995

Written Reasons by:
The Honourable Mr. Justice Cumming

Concurred in by:
The Honourable Mr. Justice Hollinrake
The Honourable Madam Justice Rowles

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CA017927/CA017929
Vancouver Registry
Court of Appeal for British Columbia

IN THE MATTER OF PACIFIC NATIONAL LEASE HOLDING CORPORATION, PACIFIC NATIONAL FINANCIAL CORPORATION, PACIFIC NATIONAL LEASING CORPORATION, PACIFIC NATIONAL VEHICLE LEASING CORPORATION, SOUTHBOROUGH HOLDINGS INC. and PAC NAT EQUITIES CORPORATION
AND:
SUN LIFE TRUST COMPANY
AND:
MUTUAL LIFE ASSURANCE COMPANY OF CANADA
AND:
FERGUSON GIFFORD

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CUMMING:

1 This is an appeal pursuant to leave granted by a justice of this Court against an order made by Brenner J. on 4 October 1993 and confirmed the next day. The order, which was made under the ***Companies Creditors' Arrangement Act***, R.S.C. 1985, c. C-36 ("C.C.A.A.") as part of an ongoing C.C.A.A. proceeding, reads:

THIS COURT ORDERS AND DECLARES that the actual costs, including time costs, experts fees and disbursements of Ferguson Gifford in any way connected to, related to, incurred as a result of or as part of, the taxation (the "Taxation") ordered in these proceedings and set out in paragraph 16(h) of the Order of July 31, 1992 (the "Stay Order") made in this proceeding and paragraph 8 of the Order of December 17, 1992 (the "Transition Order") made in this proceeding, be and are "Restructuring Costs";

2 The principal ground of appeal advanced is that the learned judge below did not have jurisdiction to make the order he did.

FACTS

3 The PNL Group consisted of six interrelated companies that operated a leasing financing business under the financial and corporate administration of Pacific National Financial Corporation ("PNFC"), the parent company. The employees of the PNL Group, 230 as of 31 July 1992, were hired and paid by PNFC. PNFC was listed on the Toronto and Alberta Stock Exchanges. Its shares were held by a principal of the PNL Group, Arnold Jeffrey, and his family through a holding company, Southborough Holdings Ltd., and by other shareholders. As of July 1992, the PNL Group had fifteen offices across Canada and, in addition, through subsidiary companies held holdings in the United States, including the U.S. Foothill Bank.

4 Pacific National Equity Corporation ("PacNat") was a holding company, and its shares were held 90% by PNFC and 10% by the Jeffrey family. PacNat held non-financial assets of the group, such as Zippy Print Enterprises Ltd. and real estate in Vancouver and Whistler, British Columbia.

5 PNFC's financial or lease assets in Canada were held by three wholly owned subsidiaries, Pacific National Leasing Corporation ("PNLC"), Pacific National Lease Holding Corporation ("PNLHC"), and Pacific National Vehicle Leasing Corporation ("PNVLC"). Historically, PNLC was the primary generator of lease business for the group. In the normal course, PNLC purchased equipment and then entered into leases with third party lessees for such office and computer equipment. These leases were then packaged into portfolios and "sold" to third party financial institutions called "Funders", with ongoing administration of the leases, including collection of monthly lease payments remaining with PNLC.

6 Profit from the transactions was generated by the increase in the sale price PNLC charged to Funders, over and above the amount paid to the equipment vendors and by residual revenues ("residuals") paid to PNLC as a result of customers buying or releasing the equipment after the initial term. Historically, the value of residuals had been roughly 17% of the gross value of the original equipment purchase price. As of July 1992, the gross value of PNL Group's total lease portfolio was $362,000,000, yielding estimated residuals of $61,000,000. This $61,000,000 "asset" of the PNL Group was a critical component of the PNL Group's reorganization plan and the C.C.A.A. proceedings.

7 A key issue in the C.C.A.A. proceedings therefore became who had ownership of the residuals, the PNL group or the particular Funders? This tied into the general question of the nature of the relationship between the PNL Group and the Funders. Each Funder had one or more written arrangements with the PNL Group. Several Funders asserted that they owned the equipment and leases in question and that when lease revenue flowed into the PNL Group such revenue was held in trust for the benefit of the Funders. The Funders argued that they were not creditors and neither

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they nor their leases should be subject to the C.C.A.A. On the other hand, the PNL Group maintained that ownership of the equipment and lease stream revenues remained with the PNL Group (as did the rights to any residuals) and although the PNL Group was obligated as matter of contract to pay certain monies to the various Funders, a trust relationship did not exist. The PNL Group's position was that the relationship was one of debtor-creditor.

8 This "trust issue" wove its way through the C.C.A.A. proceedings. It was on the basis of the trust argument that the Funders asserted that the funds used by the PNL Group to carry on its business, including payment of Ferguson Gifford's accounts, belonged to the Funders.

9 Difficulties were experienced in the operation of the petitioners' business and insolvency loomed. Protracted efforts were made to resolve matters by way of a new investor and, when that failed, by way of a standstill agreement. When it became apparent that a standstill agreement could not be reached, PNL Group sought and obtained the ex parte stay order of 23 July 1992.

10 Ferguson Gifford were solicitors for the petitioners (the "PNL Group") in the C.C.A.A. action.

11 The original stay order did not include a concept of "restructuring costs". "Restructuring costs" first appeared in the Stay Order of 31 July 1992. It was the concept of restructuring costs which led to the provision in the Stay Order which gave "any interested party" the right to tax Ferguson Gifford's fees. This provision reflected a balancing of the competing interests of the "Funders" (of whom the appellants are two) on the one hand and the PNL Group on the other, in light of the unresolved trust issue. The provisions in the Stay Order were then carried forward, with some modification, into the Transition Order.

12 Paragraph 16(h) of the Stay Order of 31 July 1992 reads:

16.THIS COURT FURTHER ORDERS THAT:

(h) the normal costs of the Petitioners incurred in carrying on the business of the Petitioners in the ordinary course of business, to carry out and fulfill the terms of this Order (the "Restructuring Costs") including, without restriction, rent, utilities, and current wages, and the fees and disbursements of Deloitte and Touche Inc. as Monitor and Deloitte and Touche in respect of its forensic investigations, and the fees and disbursements of the solicitors acting for the Petitioners incurred in connection with the drafting, preparation and presentation of the plan of arrangement, (which said solicitor's fees and disbursements shall be paid firstly from any monies previously provided to the solicitors by the Petitioners and, which said fees and disbursements shall be subject to the taxation thereof by any interested party, but the payment of which may be made by the Petitioners prior to the taxation thereof)..." (Emphasis added.)

13 By a later order of Brenner J., pronounced 17 December 1992 in the C.C.A.A. action ("the Transition Order"), Price Waterhouse Limited was appointed receiver and manager of the PNL Group and its assets, properties and undertakings. Ferguson Gifford was ordered to "tax their accounts incurred as Restructuring Costs pursuant to the Stay Order before the Registrar of this Honourable Court" and the Funders, including the respondents, were given the right to notice of the taxation and the right to participate in it.

14 The Transition Order defined restructuring costs as follows:

"Restructuring Costs" means the normal costs of the Petitioners incurred in carrying on the business of the Petitioners in the ordinary course of business, to carry out and fulfill the terms of the Stay Order including, without restriction, rent, utilities, and current wages, and the fees and disbursements of Deloitte and Touche Inc. as Monitor and Deloitte and Touche in respect of its forensic investigations, and the fees and disbursements of the solicitors acting for the Petitioners incurred in connection with the drafting, preparation and presentation of the Plan. (Emphasis added)

15 On 11 March 1993, Ferguson Gifford obtained the first of a series of appointments for the taxation of some or some parts of various of its accounts rendered to the petitioners for professional legal services performed in connection with the drafting, preparation and presentation of the plan of arrangement. By the first appointment, headed "Pursuant to the ***Legal Profession Act***, Section 70", 9 days beginning 1 November 1993 were scheduled for the hearing of the taxation. The taxation began as scheduled on 1 November 1993, continued for 8 more days and has not been completed. Master Barber, who is presiding over the taxation, has directed that fifteen further days of hearing should be booked.

16 On 16 September 1993, Ferguson Gifford filed a notice of motion returnable 4 October 1994, before Brenner J., "... for directions with respect to the taxation of [its] accounts ... ordered by Mr. Justice Brenner in the Stay Order ... ."

17 By letter dated and delivered to counsel for the appellant on 1 October 1993, Ferguson Gifford stated its position that its costs of the taxation might be restructuring costs. In the letter Ferguson Gifford said that it intended, on the hearing of its application, "... to seek clarification of the phrase 'restructuring costs' used by [Mr. Justice Brenner in the Stay Order and Transition Order] ... including whether the costs of Ferguson Gifford incurred with respect to the taxation of its accounts can be considered 'restructuring costs'."

18 In his reasons for judgment for the order made 4 October 1993, Brenner J. said:

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Counsel for the petitioners comes before the court today seeking directions as to whether or not its costs in attending the costs taxation requested by the funders are Restructuring Costs under the terms of the Orders. The taxation is currently set for some 9 to 10 days and counsel for the petitioner advises that they are facing an estimated cost of some $60,000.00 to attend this taxation when counsel fees, together with expert witness fees, are taken into account.

In reply, Mr. Turriff for the funders, Sun Life and Mutual Life, takes the position that this taxation is like any other taxation and that counsel for the petitioners should be obliged to attend and defend its accounts on the taxation and that the normal costs procedure followed by the registrar ought to apply.

In my view, this case has to be determined in the context of the orders that were made in respect of the provision that the petitioners' normal costs incurred in carrying on its business, and the cost of carrying out and fulfilling the terms of the July 31 order, and the fees and disbursements of the solicitors acting for the petitioners incurred in connection with the drafting, preparation and presentation of the plan of arrangement, have to be considered.

All parties to this litigation participated in the drafting of the July 31, 1992 order and hence all participated in the language that was used and, in particular, the concepts which were embodied in the order. In my view, that distinguishes it from what might be termed a taxation in the more ordinary course.

Accordingly, I am of the view that it is appropriate that the costs to be incurred by the petitioners' counsel, Ferguson Gifford, be treated as restructuring costs under the terms of the order. (Emphasis added)

19 On the following day, Brenner J., in dismissing the applications of Sun Life to set aside the order and re-open the hearing, said:

The application to reconsider is dismissed. Yesterday, on motion, I was asked to interpret earlier orders made and I believe that is what I did.

20 In his reasons of 5 November 1993, granting an extension of time to Sun Life and Mutual to appeal, Brenner J. stated at 1-2:

On October 4, 1993, Ferguson Gifford, Counsel for Pacific National Leasing, applied for directions with respect to the taxation of its accounts for which provisions were made in the orders I made in this action on July 31, 1992 and December 17, 1992 (the "orders"). Following argument, I interpreted my earlier orders in the context of this case and ruled that the expenses incurred by Ferguson Gifford with respect to the taxation of the accounts were to be treated as restructuring costs as defined in those orders. (Emphasis added)

21 On 23 November 1993, counsel for the appellant Sun Life and counsel for Ferguson Gifford appeared before Brenner J. to settle the terms of the 4 October 1993 order. Brenner J. explained that his intention on 4 October 1993 "... was that Ferguson Gifford recover its actual legal fees and disbursements incurred in connection with the taxation".

22 In his reasons for judgment delivered that day, Brenner J. said:

... on motion by Messrs. Ferguson Gifford for directions with respect to the costs to be incurred by Messrs. Ferguson Gifford in connection with a taxation in this matter, I ordered that the costs of Ferguson Gifford in attending the taxation are to be restructuring costs within the definition of the July 31, 1992 order in this matter.

The issue that has arisen is whether the phrase, "costs", is to be taken as meaning costs in the legal sense or actual costs or indemnity. Subsequent to the motion on the 4th of October, counsel for the parties attended before me at which time counsel for Sun Life sought an extension of the time in which to appeal that order. After hearing Sun Life's application, I extended the time for such an appeal. On that hearing, there was a discussion between counsel and the court in which the concept embodied in my order of the 4th of October of indemnity for Ferguson Gifford was discussed.

Counsel for Sun Life on the motion today takes the position that costs is a term with a legal meaning in that it would be inappropriate for me to vary what I said on the 4th of October in the face of a matter which is currently under appeal. If I were to attempt to do that, I would concur completely with that view. However, I think it is important that I make clear what I intended on the 4th of October and my intention at that time was that Ferguson Gifford recover its actual legal fees and disbursements incurred in connection with the taxation. In those reasons I hope I explained by rationale for this deviation from what might be viewed as the normal course of events in this particular action. With the matter going to the Court of Appeal, that court will have an opportunity to consider my decision and reasons in this case and make an appropriate disposition.

However, I think it is important that I make my order clear and accordingly, would settle the order in the terms proposed by Ferguson Gifford, that is to say its actual costs that are incurred in connection with the taxation are to be considered restructuring costs and, as I say, that matter can be dealt with by the Court of Appeal.

23 On 7 March 1994, at a further hearing arranged to settle the terms of the 4 and 5 October 1993 orders, Brenner J. decided that the order to be entered should provide that the "actual costs" of Ferguson Gifford that were restructuring costs include its "time costs, experts fees and disbursements".

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24 Ferguson Gifford has been paid in full for all the work described in all the accounts that are the subject of the ordered taxation.

DISCUSSION

25 I turn now to the principal issue on this appeal, namely, whether Brenner J. had jurisdiction to make the order.

26 The jurisprudence which deals with the C.C.A.A. establishes two propositions: (a) first, this legislation is to be broadly interpreted so as to give a Supreme Court justice exercising jurisdiction a good deal of power and flexibility; and, (b) the C.C.A.A. will prevail should a conflict arise between this statute and another federal or provincial statute.

27 In *Hongkong Bank of Canada* v. *Chef Ready Foods Ltd.* 1990 CanLII 529 (BC CA), (1990), 4 C.B.R. (3d) 311 (B.C.C.A), 51 B.C.L.R. (2d) 84, the court, in deciding upon the scope of the power to stay proceedings brought by creditors pursuant to the C.C.A.A., stated at 320 [C.B.R.]:

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives ... The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s.178 security and, where the word creditor occurs, it includes a bank holding s.178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails. (Emphasis added.)

28 In ***Re Pacific National Lease Holding Corp.*** 1992 CanLII 427 (BC CA), (1992), 72 B.C.L.R. (2d) 368, this Court did not grant leave to the PNL Group to appeal a decision of Brenner J. dismissing an application to allow statutory severance payments to be made to terminated employees. It was argued that Brenner J. used the jurisdiction under the C.C.A.A. to order the appellants to breach the ***Employment Standards Act***, R.S.B.C. 1979, c.10. Macfarlane J.A. stated at 374:

This case is not so much about the rights of employees as creditors, but the right of the court under the C.C.A.A. to serve not the special interests of the directors and officers of the company but the broader constituency referred to in the ***Chef Ready Foods Ltd.***, supra. Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the C.C.A.A. must be served.

29 In addition to the provisions of the C.C.A.A. itself, courts have exercised power based on ancillary inherent jurisdiction to supplement this statute. In ***Re Westar Mining Ltd.*** 1992 CanLII 1863 (BC SC), (1992), 70 B.C.L.R. (2d) 6 (S.C.), the court created a charge over the assets of the petitioner in favour of certain suppliers. Macdonald J. stated at 12:

The issue is whether or not those suppliers who are prepared (or have been compelled, between May 14 and June 10) to extend the credit, which will hopefully keep the company operating during the period of the stay, should be secured. I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end: see *Winnipeg Supply & Fuel Co. v. Genevieve Mortgage Corp.*, reflex, [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160 (Man. C.A.), at p.657 [W.W.R.].

The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by *Halsbury's* (4th ed., vol. 37, para. 14) as:

...the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so...

Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

30 Sun Life's submission with respect to jurisdiction is based primarily on the proposition that Part 10 of the ***Legal Professions Act***, S.B.C. 1987, c.25 is a "complete code" on solicitor/client accounts such that there is no jurisdiction or court to deal with the taxation of solicitor's accounts outside of Part 10.

31 Mr. Turriff relied on the provisions of s.71 of the ***Legal Professions Act*** and particularly, s.71(11), which provides:

(11) Unless the registrar, due to special circumstances, otherwise orders,

(a)a member whose bill is reviewed shall pay the costs of the review if 1/6 or more of the total amount of the bill is subtracted from it, and

(b)the person by whom payment is to be made shall pay the costs of the review if less than 1/6 of the total amount of the bill is subtracted from it.

32 In response, Mr. Clark pointed out that it was Sun Life who sought and obtained provisions in the Stay Order and Transition Order calling for the taxation of Ferguson Gifford's accounts. Having been granted this extraordinary right, Sun Life now takes the position that Brenner J. can have no jurisdiction with respect to such matters because of the

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Legal Professions Act. It suited Sun Life's purposes to regard Brenner J.'s jurisdiction as broad enough to enable him to order a taxation of Ferguson Gifford's accounts, but now, when further directions are sought with respect to such taxation, Sun Life firmly takes the opposite view of the C.C.A.A.

33 Having ordered a review of Ferguson Gifford's accounts, Mr. Clark submitted that Brenner J. must have continuing jurisdiction over this matter.

34 Mr. Clark agreed that Master Barber, who is reviewing Ferguson Gifford's accounts, remains free to make an order as to costs. If 1/6th or more of Ferguson Gifford's accounts are taxed off, Ferguson Gifford may have to pay Sun Life the costs of the review. If less than 1/6th of the total accounts are subtracted, there may be an order that Sun Life pay Ferguson Gifford's costs. If those costs are recovered by Ferguson Gifford pursuant to the order of 4 October 1993, Ferguson Gifford will not be entitled to double recovery.

35 Mr. Turriff contends that what has been described as the inherent jurisdiction of the Supreme Court of British Columbia over lawyers' accounts no longer exists because of Part 10 of the ***Legal Professions Act***. With respect, I think this submission is beside the mark in this case.

36 Brenner J.'s jurisdiction was found pursuant to the C.C.A.A., not in the inherent jurisdiction of a superior court over lawyers' accounts. In the case at bar the "relationship" at issue was not one of lawyer/client, but rather one of an insolvent company's lawyer and the creditors of that company. Such a matter is not be dealt with by any inherent jurisdiction over the lawyer/client relationship or under the ***Legal Profession Act*** but, rather, by insolvency legislation.

37 The order under review in the case at bar does not call for one party to pay the costs of an opponent. The order deals not only with Ferguson Gifford's expenses and disbursements in carrying out the taxation, but also with Ferguson Gifford's time costs: not only the value of the time required of Ferguson Gifford personnel, including counsel, by the taxation, but also witness preparation and appearance time. As well, the order does not order Sun Life to pay such amounts, but rather declares such amounts to be restructuring costs to be dealt with as per the terms of the Stay Order and Transition Order.

38 Mr. Turriff stated that the order confirmed what he said was the pre-existing right of the Funders to "tax the petitioners' solicitors' charges" under the ***Legal Profession Act***. I am unable to accept this submission. This may have been so but was not necessarily so. This is because we were advised by counsel for Ferguson Gifford at the hearing that the Funders may not be the ones bearing the burden of these costs but rather they could fall on the ordinary creditors. Ferguson Gifford as solicitors for the petitioners, made fee arrangements with PNL Group, rendered accounts and was paid by its client. The Funders did not necessarily have a pre-existing right to tax Ferguson Gifford's accounts and, as they have been paid long since, may not, but for the provisions of the Stay Order and the Transition Order, which gave them as a third party the right to tax, have any such right. See ***Legal Profession Act***, s.71(5).

39 In addition to the above submission, the appellants asserted that inasmuch as the companies had gone into bankruptcy before Brenner J. made his final order with respect to these costs his jurisdiction under the C.C.A.A. was spent. With respect, I cannot agree. Brenner J. in making the order he did was dealing with a matter that was before him prior to the bankruptcy and I think his ongoing supervisory role left him with jurisdiction to make the order now challenged.

40 Then the appellants submit that as there is no mention of costs in the C.C.A.A. this is a matter that must be dealt with under the ***Legal Profession Act***. Again, with respect I cannot agree. I think the costs attendant on a reorganization, be they solicitor and client costs or whatever, are properly within the jurisdiction of the judge under the C.C.A.A. As I see it, these costs are part and parcel of the costs attendant on the reorganization sought under the Act and, that being so, are within the jurisdiction of the C.C.A.A. judge.

41 In my opinion, the learned judge below had jurisdiction to make the order he did and I would, accordingly, reject the main ground of appeal.

42 This Court has said that it should exercise its appeal power sparingly when asked to intervene with the exercise of discretion pursuant to the C.C.A.A. In ***Re Pacific National Lease Holding Corporation***, *supra*, Macfarlane J.A. at 375 stated:

Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its power sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A.. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

* * *

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In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A..

43 In my opinion, the order of 4 October 1993 is supportable pursuant to Brenner J.'s continuing jurisdiction over C.C.A.A. matters and his jurisdiction to interpret or to supplement his earlier orders.

44 Having reached this conclusion, I do not find it necessary to deal further with the other grounds of appeal.

45 I would dismiss the appeal.

"THE HONOURABLE MR. JUSTICE CUMMING"

I AGREE: "THE HONOURABLE MR. JUSTICE HOLLINRAKE"

I AGREE: "THE HONOURABLE MADAM JUSTICE ROWLES"

Westar Mining Ltd. (Re Bankruptcy), 1992 CanLII 1863 (BC SC) - An Example of Tailoring a Charge on the Debtor's Assets

Date:	1992-06-16
Docket:	A921164
Parallel citations:	[1992] 6 WWR 331; 14 CBR (3d) 88; 70 BCLR (2d) 6
URL:	http://canlii.ca/t/1dfjt
Citation:	Westar Mining Ltd. (Re Bankruptcy), 1992 CanLII 1863 (BC SC), <http://canlii.ca/t/1dfjt> retrieved on 2013-09-29
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Date of Release: 16 June 1992 A921164

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36

and

IN THE MATTER OF WESTAR MINING LTD.

) REASONS FOR JUDGMENT
)
) OF THE HONOURABLE
)
) MR. JUSTICE B.D. MACDONALD
)
) (IN CHAMBERS)

Alan Louie	Counsel for Her Majesty the Queen in Right of Canada
R. Richard M. Butler	Counsel for Her Majesty the Queen in Right of the Province of British Columbia
Mahnez Boelman	Counsel for B.C. Hydro & Power Authority
A.W. Carpenter	Counsel for Westar Mining Ltd.
W. Stanley Martin	Counsel for C.P. Rail
Douglas Knowles	Counsel for Bank of Montreal
Arthur L. Edgson	Counsel for several suppliers
Heber M. Suiker	Counsel for Imperial Oil Limited

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Gregory Batchellor Counsel for Finning Ltd.
Date and place of hearing: June 15, 1992
Vancouver, B.C.

On May 14, 1992, I granted an interim stay order under the CCAA in respect of Westar Mining (the Company) and fixed June 3, 1992 as the date on which submissions would commence regarding modifications thereto during the period of the stay. In response to those submissions, I made (*inter alia*) the following orders:

1. That the stay did not bind either the federal or the provincial Crown, or B.C. Hydro as an agent of the latter (June 4, 1992).
2. That despite a clause in the interim order to that effect, the court had no power to oblige the Company's suppliers of good and services to extend further credit after May 14, 1992 (June 10, 1992).
3. That as security for credit which had been extended under the interim order between May 14 and June 10, and to secure (up to a limit of $17 million) any further credit which suppliers were willing to extend (and certain other specific obligations of the Company), a charge was created upon the Company's interest in the Greenhills mine, save for "current assets" (June 10, 1992).

While that charge was described as a "first charge", the rights of the Crown in its several manifestations and of Pohang Steel Canada Limited and its parent company (Pohang) were expressly reserved for further argument. It is those rights which were the subject matter of submissions on June 15.

The charge has already been created. In doing so, I purported to exercise the inherent jurisdiction of this court. The Company would have no chance of completing a successful reorganization without the ability to continue operations through the period of the stay. It must be able to arrange for further limited credit from its suppliers if it is to continue operations. Thus, security which is sufficient, in the eyes of its suppliers, to justify the extension of some further credit is a condition precedent to any acceptable plan of reorganization.

The provincial Crown has gone a considerable way toward meeting that need. A few weeks before the Company applied for CCAA protection, the Inspector of Mines ordered reclamation security in the amount of $20.9 million in respect of the Company's other mine (Balmer) and $8 million in respect of the Greenhills mine. The province is prepared to allow those claims for reclamation security to rank in priority after the charge created by my order of June 10, 1992 in favour of the suppliers of goods and services to the Company.

POHANG

Unfortunately, the matter cannot rest there because of the position taken by Pohang. There is a joint venture agreement between Pohang and the Company in respect of the development and operation of the Greenhills mine. The terms of that agreement are the primary reason why the assets of that mine (except for "current assets" such as receivables and inventories) remain free of any mortgage.

Pohang characterizes those terms as a "negative charge" designed to ensure that the Company's 80% interest will remain available to it as security for the Company's covenant to bear 80% of the costs associated with the development and operation of the Greenhills mine, including reclamation costs. I endeavoured to protect Pohang's rights under the joint venture agreement in my order of June 10, 1992 creating the charge, by requiring any receiver-manager appointed thereunder to honour the Company's obligations in respect of operating the mine, and by guarding against the Company's majority interest being sold to a purchaser not acceptable to Pohang.

While it accepts the right of this court to create the charge, Pohang seeks a condition thereto which would protect it in the event that the 80% interest of the Company in the Greenhills mine is insufficient to cover both the $17 million charge and its share of the reclamation costs (as well as other preferred Crown claims on a bankruptcy). That event might expose Pohang to more than its proportionate share of such costs under s. 17 of the *Mines Act* S.B.C. 1989, c. 56. Pohang suggests a proviso to this effect:

> The charge [created by my order of June 10, 1992] is a first charge subject to Pohang's prior right to indemnity against the assets charged for the Company's portion of any joint liabilities to the Crown which may be claimed against Pohang.

That proviso would put the suppliers (and the charge in their favour for credit extended, voluntarily or otherwise, after May 14) some $28.9 million further back in line unless Pohang is able to negotiate a commitment from the province to limit Pohang's exposure. Time does not permit the luxury of awaiting the outcome of those negotiations. While it occurs to me that the province may have opened the door to valid arguments from Pohang (both legal and otherwise) that the province's generosity to suppliers, post-May 14, should not prejudice Pohang's position, I agree with the province that now is not the time to deal with those issues.

Whatever violence may be done to Pohang, a non-creditor, by my conclusion, it is that Pohang's rights under the joint venture agreement do not extend to prohibiting the court from accepting the province's offer. To remove almost $30 million in

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potential prior claims from ahead of the charge created on June 10, 1992 should go a long way toward comforting the Company's suppliers.

There are two further factors which support that conclusion:

(a) The interim order of May 14 obliged suppliers (in error) to extend further credit on the terms in place on April 30, 1992. Between May 14 and June 10, credit equal to more than half the value of the charge in question was extended to the Company as a consequence of that order. The court should not lightly abandon those suppliers.

(b) To the extent that a further $17 million in credit is extended to the Company, it will be represented by an approximately equal value in product. While I recognize that the benefit of that production will not be spread evenly over the May 14 pre-stay creditors, nor Pohang for that matter, the fact is that it will not be money thrown away.

PROPERTY TAXES

I accept the argument of the provincial Crown that property taxes under the *Municipal Act* and the *Taxation (Rural Area) Act* have "...priority over any claim...or encumbrance of any person except the Crown", and that it is not open to this court to grant its own charge priority over property taxes, at least in the context of CCAA proceedings. That conclusion is reinforced by s. 23(1)(b) and (c) of the *Land Title Act* R.S.B.C. 1979, c. 219 which provide that even an indefeasible title is subject to "...taxes imposed...on the land...". Thus, the suppliers must take a back seat to some $8 million in school and rural area property taxes, as well as general municipal taxes.

MINERAL TAX & MINERAL LAND TAX

I have concluded that the same priority, except with respect to mineral and mineral land taxes accruing, must be afforded to the provincial Crown's existing lien under these two acts. (See, *Roadberg v. R.* 1980 CanLII 407 (BC CA), (1981) 21 B.C.L.R. 114 (C.A.) at p. 130). The provincial Crown lien for those taxes ranks behind prior charges. Thus, the charge which I created on June 10 will rank prior to Crown liens which arise and attach thereafter under those statutes. I am advised that the liens which existed prior to June 10, 1992 total slightly in excess of $13 million.

OTHER CROWN CLAIMS

I can conveniently deal with the remaining provincial claims (for motor fuel tax - some $1.1 million, and for social service tax on purchases - some $7 thousand) at the same time as B.C. Hydro's claim as an agent of the provincial Crown for electric power supplied and the claims of the federal Crown (some $13 million, to the best of my recollection) which arise from income tax obligations of the company and employee deductions.

I note at the outset that, in light of my decision on June 4 that the CCAA stay order did not bind the Crown, it will be open to all three of those parties to sue the Company or petition it into bankruptcy (or cut off its supply of electric power) after June 19, unless the Company obtains a further stay of my order of June 4 in the context of seeking leave to appeal therefrom.

The essential argument of the Crown, in respect of those claims not supported by a statutory lien, is that this court cannot alter the priorities which will prevail when and if the Company is put into bankruptcy. Under s. 136(1)(j) of the *Bankruptcy Act*, any Crown claim is preferred.

The argument is based on this statement in *Baxter Student Housing v. College Housing Co-operative* 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at p. 480:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a Statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

But, the Company was not in bankruptcy on June 10 when the charge was created. The Crown claims which are not afforded the protection of a statutory lien are not yet preferred. The June 10 order creating the charge does not purport to alter the priorities which will apply between the claims of the Crown and the unsecured trade creditors as at May 14.

The issue is whether or not those suppliers who are prepared (or have been compelled, between May 14 and June 10) to extend the credit which will hopefully keep the Company operating during the period of the stay, should be secured. I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end. (See, *Winnipeg Supply & Fuel v. Genevieve Mortgage Corp.* reflex, [1972] 1 W.W.R. 651 (Man. C.A. at p. 657).

The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by Halsbury's (4th ed., volume 23, para. 14) as:

> ...the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so...

Proceedings under the CCAA are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

The analogy to the powers and priority which may be granted by the court to a receiver-manager is not necessary to support the exercise of this court's inherent jurisdiction to create the charge in question here. (See, *Lochson Holdings. v. Eaton Mechanical* (1984) 55 B.C.L.R. 54 (B.C.C.A.) at pp. 57/8). Indeed, different considerations apply. In the receiver-

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manager cases it is the property which is being safeguarded by the court. Under the CCAA it is the survival of the company which owns the property, for long enough to present a plan of reorganization, that is the court's concern. In my view, the three exceptions to the "general rule" discussed in *Lochson Holdings* do not exhaust the circumstances, under the CCAA, in which the court may "authorize expenses for the carrying on of the business".

Here, the view that the second exception in *Lochson Holdings* applies is open. So perhaps is the third exception, if the court were prepared to take a much broader view of "property" in the context of the CCAA. I prefer to disassociate myself with the analogy to a court appointed receiver-manager entirely and revert to what is fair and just in the particular circumstances of this case.

The essential problem here is how to enable the Company to continue operating until September 30, 1992. The court cannot compel a supplier to extend credit during that period. There is an ability under Chapter 11 proceedings in the United States to create "workout financing" but that is a concept not recognized as yet in Canada under the CCAA. The existence of unencumbered assets (except for taxes) in this situation is almost unique.

I accept the argument that the most equitable compromise is to make security over those assets, with the highest possible priority, available to those who will finance the Company's continuing operation (or who have done so against their will under the May 14, 1992 interim order). No mortgage, charge or lien need be postponed for that purpose. Admittedly, Crown claims which will be preferred if the reorganization plan fails or collapses, or if the Crown in any of its guises is free to and decides to seek a receiving order after June 19, and bankruptcy results, will be postponed to the extent of the June 10, 1992 charge. I consider that to be fair and proper in the context of this CCAA proceeding.

This court "has inherent powers in respect to any matter within its jurisdiction...and may draw [thereon] to give effect to the provisions of [a] statute". (See, *In re Loxtave Buildings of Canada* (1943) 25 C.B.R. 22 (Sask. K.B.) at p. 25).

I expressly reject the argument of the provincial Crown that the creation of the charge in question changes the status quo among creditors which existed at May 14, 1992. That charge, in my view, is the equivalent of the cash fund set aside for suppliers in *Quintette*. Here, the company does not have the cash, but it does have assets which can be substituted for such a fund against the possibility of non-payment and an unsuccessful reorganization (or a refusal of one branch of the Crown or another to allow the stay an opportunity to succeed).

Whether a reorganization plan for the Company can be successful remains to be seen. In the meantime, this court should do whatever can be done to provide such an opportunity. The importance of the Company's operations to the south-east corner of the province in particular, and to the economy of the province as a whole, justifies that approach.

June 16, 1992 "B.D. Macdonald, J."
Vancouver, B.C.

Rights of suppliers - Sec 11.01

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Smith Brothers Contracting Ltd. (Re) (Trustee of), 1998 CanLII 3844 (BC SC) - Can s. 11.3 Apply

Date:	1998-03-31
Docket:	03189
Parallel citations:	53 BCLR (3d) 264
URL:	http://canlii.ca/t/1f68z
Citation:	Smith Brothers Contracting Ltd. (Re) (Trustee of), 1998 CanLII 3844 (BC SC), <http://canlii.ca/t/1f68z> retrieved on 2013-09-29
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Record
Legislation cited (available on CanLII)
Bank Act, SC 1991, c 46 — 178
Companies' Creditors Arrangement Act, RSC 1985, c C-36 — 11; 11.3
Company Act, RSBC 1996, c 62
Interpretation Act, RSC 1985, c I-21 — 12
Decisions cited
Bronson, Re, reflex
Bronson (Trustee of), 1996 CanLII 2713 (BC SC)
Chef Ready Foods Ltd. v. Hongkong Bank of Canada, 1990 CanLII 529 (BC CA)
Elan Corp. v. Comiskey, reflex
Quintette Coal Ltd. v. Nippon Steel Corp., 1990 CanLII 430 (BC CA)

Date: 19980331
Docket: 03189
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36
AND
IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1996, c. 62
AND
IN THE MATTER OF SMITH BROTHERS CONTRACTING LTD. SMITH'S HEAVY HAULING LTD. COTTONWOOD RIVER HOLDINGS LTD. and T.R. GRADING LTD.

PETITIONERS

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE BAUMAN

Counsel for the Petitioners: Mr. Jan Christianson
Counsel for Ford Credit Canada Ltd.: Ms. B. J. Brown
Counsel for G. E. Capital Canada Equipment Financing Inc. and G. E. Capital Canada Leasing Services Inc.: Mr. J. K. Dungate
Counsel for Toronto Dominion Bank: Mr. M. J. Brecknell
Counsel for Bank of Nova Scotia: Mr. D. Marcotte
Place and Date of Hearing: Prince George, B.C.
2 February 1998

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I INTRODUCTION

[1] Ford Credit Canada Ltd. ("Ford Credit") brings this application in the context of proceedings commenced by the petitioners (collectively "Smith Brothers") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA").

[2] Ford Credit seeks leave of the court to terminate one conditional sales contract and eight "leases" held by Smith Brothers in respect of nine Ford trucks. I put "leases" in quotation marks because the characterization of these documents is at the heart of the controversy before me.

[3] The central issue involves the proper interpretation of s. 11.3(a) of the CCAA. This subsection was added to the Act as part of amendments proclaimed in force on 30 September 1997. It creates a specific exception to a s. 11 stay order. It reads:

11.3No order made under s. 11 shall have the effect of

(a)prohibiting a person from requiring immediate payment for goods, services, use of leased or licenced property or other valuable consideration provided after the order is made;

[4] By the date of hearing, Smith Brothers had voluntarily returned four of the leased vehicles to Ford Credit.

II RELIEF SOUGHT

[5] On 19 December 1997, Mr. Justice Meiklem made the initial stay order under s. 11 of the CCAA (the "Stay Order"). It was effective until 18 January 1998. It was extended to 26 January 1998 by the order of Mr. Justice R. D. Wilson on 12 January 1998. It was further extended until dismissal of the petition or further order of the court by the order of Mr. Justice Williamson made 26 January 1998.

[6] Two clauses in the Stay Order are potentially relevant on the facts before me.

[7] The first is at page 4, paragraph (i) of the Stay Order. In its essential terms this paragraph reads:

(i)All persons having agreements with the petitioner (sic) whether written or oral for the supply of goods or services to the petitioner (sic) (including, without limitation, leases of goods, . . . equipment leases, . . .) are enjoined from accelerating, terminating, determining or cancelling such agreements and that such person shall continue to supply the goods or services pursuant to the provisions of such agreements so long as the petitioner pays the prices or charges under the agreements for such goods or services incurred . . . after the Filing Date concurrently with such supply . . .

[8] I conclude that the payment proviso in this paragraph, to the extent that it covers leased property, is simply a reflection of the limitation on any stay order found in s. 11.3(a) of the CCAA.

[9] The second relevant clause is paragraph (j) on page 5 of the Stay Order. It reads in part:

(j)All persons having other agreements or other contracts with the Petitioner are restrained and enjoined from accelerating, terminating, determining or cancelling such agreements or acting upon any right or forfeiture (sic) (statutory, contractual or otherwise) without the consent of the petitioner, or leave of this court and that all such persons shall continue to perform and observe the terms, conditions and provisions contained in such agreements on their part to be performed or observed. . .

[10] The interplay between these clauses and s. 11.3(a), on the facts at bar, raises a number of possibilities. If Ford Credit can bring its agreements under s. 11.3(a), it may demand payment for the use of the vehicles after the Filing Date without leave of the court. This is so under s. 11.3(a) and it is buttressed (perhaps unnecessarily) by the payment proviso in clause (i) of the Stay Order.

[11] If, on the other hand, s. 11.3(a) is not engaged, in order to demand payment and thereafter seize the vehicles, Ford Credit would require the written consent of the petitioners or leave of the court under clause (j) of the Stay Order.

[12] I say immediately that if Ford Credit is before the court under clause (j), I am not inclined to grant leave because that would tend to undermine Smith Brothers' efforts to rearrange its affairs under the CCAA before the merits of that arrangement have been considered. It would, as well, do so in a manner tending to favour Ford Credit -- only one of many creditors.

[13] I turn to Ford Credit's Notice of Motion.

[14] It seeks leave of the court permitting it to terminate "all contracts and vehicle leases with Smith Brothers Contracting Ltd." and to seize the vehicles. It seeks this relief "pursuant to the order of Mr. Justice Meiklem granted December 19, 1997 herein".

[15] This leads to a number of observations. First, if Ford Credit can bring itself within clause (i) of the Stay Order, leave of the court to do that which it proposes is not necessary in light of the payment proviso. Further, or perhaps more properly of initial importance, s. 11.3(a) precludes anything in the Stay Order from preventing Ford Credit, if it can bring itself within the terms of the section, from demanding payment for the use of the vehicles after the Filing Date. I interject to say that I construe s. 11.3(a) to mean that if one can require immediate payment for the use of leased property after the

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Stay Order is made, impliedly one is then entitled, in the absence of payment, to retake the goods (if, of course, that remedy is reserved to the lessor).

[16] Third, it follows that by seeking leave, Ford Credit must be doing so under clause (j) of the Stay Order. This is obviously not the basis upon which Ford Credit has put its case and accordingly I will consider its application as one seeking the direction of the court on the applicability of s. 11.3(a) (and clause (i) of the Stay Order) to the arrangements covering the vehicles. To the extent that Ford Credit is unable to bring itself within s. 11.3(a), I have considered the possibility of granting leave under clause (j) but choose not to for the reasons set out above.

III THE MERITS

[17] I can deal quickly with the conditional sales agreement covering the 1993 Ford F 350 Crewcab. It is neither in form nor substance a lease of property and accordingly it comes within clause (j) of the Stay Order. Leave is not granted in respect of this vehicle.

[18] The "leases" present an issue of considerable difficulty and require a consideration of the breadth of s. 11.3(a) of the CCAA, which, I am told by counsel, is a matter of first impression. My research has suggested this as well.

[19] I will first deal with what is in the nature of a threshold issue, that is, whether s. 11.3(a) extends to a lease of property made before the stay order. I conclude that it does, in respect of payment for use of that property after the date of the stay order. If s. 11.3(a) was intended to apply only to leases entered into after the stay order, one would expect the section to read to the effect:

11.3 No order made under section 11 shall have the effect of

(a)prohibiting a person from requiring immediate payment for goods, services, leased or licensed property or other valuable consideration provided after the order is made. (underlining added)

By instead wording the section as it has, Parliament, to my mind, is saying that it is the provision of the use of leased property, not the making of the lease itself, after the stay order, which is within the purview of s. 11.3(a).

[20] This view is supported by what scant academic writing on the section there is at this time. In L.W. Houlden and G.B. Morawetz Bankruptcy and Insolvency Law of Canada, 3rd Ed. (Toronto: Carswell), the learned authors note in their commentary on s. 11.3:

(13) Suppliers of Goods and Services or Rental of Property to the Debtor after the Filing of a Plan.

If a person supplies goods and services or the debtor continues to occupy or use leased or licensed property, no stay order can be made in respect of such goods and services or leased or licensed property: s. 11.3.

[21] It is the essential submission of Smith Brothers that a "lease" for the purposes of s. 11.3(a) should be narrowly construed. It is argued that an arrangement which may partake in part of a "lease" at law should not be so construed for the purpose of s. 11.3(a) if, upon close analysis, it is more than a true lease or rental agreement. This would be the case if, for example, it is essentially a financing arrangement facilitating the eventual acquisition of the vehicle.

[22] In pursuing this submission Smith Brothers cites cases considering the lease/conditional sales contract dichotomy in the context of personal property security legislation across Canada.

[23] For the purposes of this discussion I will use Professor R.C.C. Cuming's definition of a "true lease":

. . . the term "lease" is used to refer to any transaction denominated a lease by the parties. A lease which is in substance a bailment contract is referred to as a true lease. A lease which is not a bailment, but a disguised security agreement is referred to as a security lease or security agreement. "True Leases and Security Leases Under Canadian Personal Property Security Acts" (1983) 7 Can. Bus. L.J. 251 at 256.

[24] Ford Credit responds by submitting that nothing in s. 11.3(a) requires the court to invoke a PPSA analysis in construing the phrase "leased property". There is nothing ambiguous, it is urged, about that term or about the concept of a "lease" at law. In particular, Ford Credit says that there is no reason to read down "lease" for the purposes of s. 11.3(a) of the CCAA, which, it is said, is effectively the submission of the petitioners.

[25] Obviously the phrase "leased property" requires some construction and any arrangement which purports to be a lease of property must be analyzed to ensure that it is one within the meaning of s. 11.3(a). To hold otherwise would permit creditors to so arrange the form of their contracts to avoid one of the major objectives of the CCAA, that is:

. . . to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business [per Gibbs J.A. in Hongkong Bank of Canada v. Chef Ready Foods Ltd. 1990 CanLII 529 (BC CA), (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315].

[26] In my view, one must have regard to the substance rather than simply the form of the arrangement in considering the application of s. 11.3(a).

[27] Having said what may be obvious, it is still necessary to consider whether s. 11.3(a) covers all leases or only those which might be characterized as true leases. Is a lease which is more than that -- what I will call a "Lease Plus" -- excluded from the effect of s. 11.3(a) on a proper construction thereof?

[28] The most common form of Lease Plus, and the one which is at bar, is a lease with an option to purchase.

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[29] Smith Brothers says that it has historically acquired vehicles and equipment for its logging concern through a variety of methods. These include conditional sales agreements, term loans with chattel mortgages, and lease/option agreements. Each arrangement is essentially an alternative method of acquiring vehicles and equipment, although Smith Brothers admits that it has not always exercised its options to purchase leased property.
[30] If s. 11.3(a), properly construed, elevates form over substance, then anomalies arise under the CCAA. As in the case at bar, property acquired by way of lease/option can be lost to the debtor while that acquired by term loan or conditional sales agreement would not (at least not without the leave of the court).
[31] The critical issues, then, are whether s. 11.3(a) is to be construed as covering all leases, including all forms of Lease Plus, or whether it is to be confined to "true leases" and if so, what are the criteria upon which certain forms of Lease Plus are to be excluded?
[32] Much PPSA litigation has of course concerned itself with whether a document in the form of a lease is nevertheless to be considered a financing agreement.
[33] However, it will be observed that the need and basis for segregating various types of leases is expressly dictated by the PPSA. That is, the legislation distinguishes between a true lease and one which creates a security interest, that is one which in reality secures payment or performance of an obligation.
[34] There is no express need to distinguish between forms of leases under s. 11.3(a) of the CCAA. Does a proper construction of the section imply that need?
[35] I approach the construction of s. 11.3(a) by considering the intention of Parliament and the object and scheme of the CCAA.
[36] The Court of Appeal considered the purposes of the CCAA in Chef Ready Foods Ltd., supra.
[37] Mr. Justice Gibbs made reference to S. E. Edwards, "Reorganization Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587 as explaining "very well the historic and continuing purposes of the Act" (at 318):
It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C. H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.
(Gibbs J.A. quoting Edwards)
[38] Mr. Justice Gibbs was considering whether the CCAA could operate to stay a bank's realization under a s. 178 Bank Act security. In holding that it could, Mr. Justice Gibbs noted that Canadian courts "have shown themselves partial to a standard of liberal construction which will further the policy objectives" of the CCAA (at 320). [On the purpose and object of the CCAA see also Re Repap British Columbia Inc. (9 January 1998), Vancouver A970588 (B.C.S.C.) and Re Starcom International Optics Corporation (6 March 1998), Vancouver A980298 (B.C.S.C).]
[39] Chef Ready Foods Ltd., supra was considered by the Ontario Court of Appeal in Nova Metal Products Inc. v. Comiskey (Trustee of) reflex, (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101.
[40] Finlayson J.A. (Krever J.A. concurring) said this of the purpose of the CCAA (at O.R. 297):
It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between the debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies, Elan and Nova, are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.
Doherty J.A. dissented, but his views on the purpose and objects of the CCAA reflect those of Gibbs J.A. in Chef Ready Foods Ltd., supra Mr. Justice Doherty writes (at O.R. 306-307):
The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court supervised attempt to reorganize the financial affairs of the debtor company is made. . . . The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose, Interpretation Act R.S.C. 1985, c. I-21, s. 12; Chef Ready Foods Ltd. v. HongKong Bank of Canada, supra (sic), at p. 14 of the reasons.
[41] I approach s. 11.3(a) with that spirit, that is, with the perspective that a liberal construction which furthers the policy objectives of the Act will dictate a narrow construction of the types of arrangement which are excepted from a stay order

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under s. 11.3(a). I underline, however, that any such construction must be intellectually defensible on the basis of the words which Parliament has used in the section -- I am not to redraft the section in the guise of construing it.

[42] The decision of the Court of Appeal in Quintette Coal Ltd. v. Nippon Steel Corp. 1990 CanLII 430 (BC CA), (1990), 51 B.C.L.R. (2d) 105 is also of assistance.

[43] There, certain Japanese corporate debtors of Quintette Coal Ltd. ("Quintette") sought to set off monies owing to them by Quintette against payments due Quintette for deliveries of coal. Quintette was then under CCAA protection and the issue centered on the scope of s. 11 and the jurisdiction to restrain the proposed setoff.

[44] Gibbs J.A. cited numerous decisions on s. 11 and concluded (at 113):

To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. The power is discretionary and therefore to be exercised judicially. It would be a reasonable expectation that it would be extremely unlikely that the power would be exercised where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries, whereas it would not be unlikely when the result would be to enforce payment for goods thereafter taken from or services thereafter received from the debtor company, as is the case here. In cases not involving the supply or receipt of goods or services, no doubt judicial exercise of the discretion would produce a result appropriate to the circumstances.

The order made by Mr. Justice Thackray was in accord with his understanding of the "overall intention of the Act" and consistent with the reported cases. It falls well within the "general principle" distilled from those cases. At p. 199, after considering the submissions of counsel for the Japanese companies, he said:

I must look to the overall intention of the Act, and, as has been put before me by Quintette, what is required within an order to allow Quintette the time to reorganize and make a proposal. Unless there is a sound legal principle for doing so, I must not carve out one portion of the order and give an advantage to one creditor over another. I have not acceded to the arguments of counsel for J.S.I. and consequently I cannot find the legal basis for compromising the effect of the ex parte order.

[45] It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:

. . . where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries . . .

[46] Parliament has now precluded that by adding s. 11.3(a) to the CCAA. It is instructive to note, however, that the subsection has been added against the backdrop of jurisprudence which has underlined the very broad scope of the court's jurisdiction to stay proceedings under s. 11.

[47] To repeat the relevant portion of the section:

11.3No order made under s. 11 shall have the effect of

(a)prohibiting a person from requiring immediate payment for . . . use of leased or licenced property. . . provided after the order is made;

It is noted that the remedy which is preserved for creditors is a relatively narrow one; it is the right to require immediate payment for the use of the leased property.

[48] "Payment for use" is the essential basis of a true lease covering personal property. As Professor Cuming notes (in "True Leases", supra, at 263):

Under a true lease, the lessor surrenders his possessory right in chattels to the lessee in return for an undertaking by the lessee to perform certain acts which usually involve the payment of money to the lessor. The lessee has obligations, but the transaction cannot be characterized as a security agreement because the interest of the lessor is not related to those obligations. In other words, the lessor does not remain owner merely to ensure or to induce performance of the lessee's obligations. He remains owner because a bailment contract does not involve the transfer of ownership to the bailee.

[49] In the lease/option agreements at bar, the remedy which Ford Credit invokes is found in clause 21 of the Agreements. That clause reads:

Default: If You Fail to make any payment under this Lease when it is due, or if You fail to keep any other agreement in this Lease, Dealer may terminate this Lease and take back the Vehicle. Dealer may go on your property to retake the Vehicle. Even if Dealer retakes the Vehicle, You must still pay at once the monthly payments for the rest of the lease term and any other amounts that You owe under this Lease. Dealer will subtract from the amount owed sums received from the sale of the Vehicle in excess of what Dealer would have had invested in the Vehicle at the end of the lease term. You must also pay all expenses paid by Dealer to enforce Dealer's rights under this Lease, including reasonable solicitors' fees as permitted by law, and any damages caused to Dealer because of your default. Dealer may sell the Vehicle at public or private sale with or without notice to You.

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[50] Now I should say that Ford Credit does not indicate in its Notice of Motion that it expressly invokes clause 21, but I conclude that I must analyze the case on the basis that it seeks to pursue its contractual remedies. What else can it pursue but the remedies for which it has bargained?
[51] Ford Credit may say that it is prepared, at this time, to forego the benefit of the acceleration provision in clause 21. But this overlooks the fact that clause 21, regardless of whether it is fully invoked, nevertheless assists us in characterizing what the document is as a matter of law. Further, the invocation of clause 21 is not the unilateral decision of Ford Credit. The lessee is entitled to insist on the sale of the vehicle and the benefit of any credit in his or her favour as set out in the clause.
[52] Returning to the analysis, s. 11.3(a), by referring to "payment for use", evokes, as I have said, the notion of a true lease arrangement.
[53] Clause 21 of the lease/option agreements is hardly that. Not only is the lessee dispossessed of the vehicle on default, he or she is still liable for the monthly payments for the unexpired term. The lessee in that situation is of course credited with the amount, if any, which the dealer receives on a resale of the vehicle "in excess of what Dealer would have had invested in the Vehicle at the end of the lease term".
[54] Clause 21 is not limited to "payment for use". It goes far beyond that and secures the entire term of lease payments.
[55] The presence of the acceleration provision is itself telling. Once again, I refer to Professor Cuming's article (supra, at 279):
Some American courts have recognized as an indicium of a security agreement a provision in a lease under which failure by the lessee to make one or more lease payments or to otherwise to perform his obligations under the contract permits the lessor to accelerate a payment date for all unpaid lease payments. An acceleration clause is important in an instalment debt transaction between a debtor and a creditor because it enables the creditor on default by his debtor to seek the payment of the entire debt rather than having to wait until each instalment comes due. However, while the relationship between a lessor and a defaulting lessee may be one of creditor and debtor, an acceleration clause should, at least, in some cases, be viewed as foreign to the lessor -- lessee relationship. Unlike a defaulting buyer or borrower, a lessee is generally not obligated under the rules of damages to pay a specific predetermined sum to the lessor. The lessor may well be entitled to damages for breach of contract, but there is no certainty that those damages will be assessed as the equivalent of all rental payments owing under the lease with or without deduction of an amount realized from the sale of the leased chattels by the lessor. (footnotes omitted)
[56] What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.
[57] To put the matter in a slightly different way: Ford Credit's lease does not simply require "payment for . . . use of leased or licenced property", clause 21 secures payments when the property will clearly not be used by the lessee after a default and a retaking by the lessor.
[58] Further, can one say that the leases here contemplate payments by the lessee only for the use of the vehicles? That after all is the epitome of a true lease -- that is, a contract of bailment. Once again, clause 21 assists. On a default, the lessee is liable for the lease payments for the unexpired term. However, it is contemplated that the dealer will sell the vehicle and:
. . . will subtract from the amount owed sums received from the sale of the Vehicle in excess of what Dealer would have had invested in the Vehicle at the end of the lease term.
[59] I can only conclude that by crediting the lessee in these circumstances with the excess sum defined in clause 21, the document is implicitly (and fairly) ensuring that even a defaulting lessee will enjoy whatever equity he or she has effectively built up in the vehicle.
[60] From this perspective one can say that the lessee under these leases is not simply paying for use of the vehicle. He or she is potentially acquiring, as well, equity therein.
[61] It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use and equity are not. Similarly payments for use and equity and an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.
[62] Having reached this conclusion, what are the criteria for exclusion of arrangements from the scope of s. 11.3(a)? It is here that the PPSA jurisprudence offers some useful guideposts.
[63] Re Bronson reflex, (1995), 34 C.B.R. (3d) 255 is a decision of Master Powers sitting as a Registrar in Bankruptcy. His decision was affirmed on appeal by Mr. Justice Lamperson, 1996 CanLII 2713 (BC SC), (1996), 39 C.B.R. (3d) 33 (B.C.S.C.).

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[64] Master Powers' decision offers a thorough review of the law on when a lease/option agreement will be construed as a security agreement for the purposes of the seize or sue provision in s. 67 of the PPSA S.B.C. 1989, c. 36.
[65] Master Powers quotes this extract from R.C.C. Cuming and R.J. Wood, British Columbia Personal Property Act Handbook (Toronto: Carswell, 1990):
If a transaction is one under which a party gives or recognizes that someone else has an interest in his or her property in order to secure payment or performance of an obligation, it is a security agreement. (p.31)
If the commercial realities, i.e., the substance of the transaction, point to a secured financing arrangement rather than to a bailment in the case of a lease, or an agency relationship in the case of a consignment, then the transaction is a security agreement even though it takes the form of a lease or consignment, and even though there is no provision vesting title in the lessee or consignee. Likewise the fact that a lease provides for a purchase option exercisable by the lessee does not by itself dictate (as it did under the sale of goods on conditions act) that transaction is to be regarded as a security lease. (p. 31)
The general approach is to examine carefully the relationship between the lessor and lessee in order to determine whether or not in that relationship the standard indicia of a secured credit arrangement are to be found. If the lessee is required to pay what is the equivalent of the lessor's capital investment plus a credit charge at the rate existing at the date of the agreement, there is strong evidence of a secured sale. A clause in a lease giving to the lessee the option to purchase the goods at less than their expected market value (as determined at the date of execution) indicates that the lessee has acquired an equity in the goods not unlike that which would have been acquired under an instalment purchase contract. However, the fact that at the end of a lease term roughly equivalent to the useful life of the goods the lessee can purchase the goods at their then market value does not prevent characterization of the transaction as a security agreement. Evidence that the lessee bears some of the obligations of ownership such as the requirement to repair and insure the goods provide some persuasive but not determinative indication of a security agreement. In one case, the court was prepared to look at the business activities of the lessor to determine whether or not it had a lessor's facilities and methods of operation and to take this into consideration in making the determination. (p.32-33)
[66] The learned Master also referred to a checklist prepared by Professor Cuming in September, 1991 wherein he summarized the considerations taken into account by American courts in determining whether a document is a true lease or a security agreement.
[67] These criteria are as follows:
1.Whether there was an option to purchase for a nominal sum;
2.Whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;
3.Whether the nature of the lessor's business was to act as a financing agency;
4.Whether the lessee paid a sales tax incident to acquisition of the equipment;
5.Whether the lessee paid all other taxes incident to ownership of the equipment;
6.Whether the lessee was responsible for comprehensive insurance on the equipment;
7.Whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;
8.Whether the agreement placed the entire risk of loss upon the lessee;
9.Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;
10.Whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;
11.Whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;
12.Whether the agreement required the lessee to join the lessor or permit the lessor by himself to execute a U.C.C. financing statement (this would not apply in Canada);
13.Whether there was a default provision in the lease inordinately favourable to the lessor;
14.Whether there was a provision in the lease for liquidated damages;
15.Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor;
16.Whether the aggregate rental approximated the value of purchase price of the equipment.
[68] In my opinion s. 11.3(a) does not, at a minimum, include arrangements which are closer to financing agreements than true leases as discussed in the cases on the PPSA legislation.
[69] I turn to review these lease/option agreements before me:
•they disclose a "Retail Selling Price/Lease Price of Vehicle";
•they contemplate a cash "down payment" or trade-in;
•they include an annualized lease rate, that is, I take it, something akin to a financing charge;
•they include an option to purchase exercisable by the lessee at the end of the term;

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•they require that the lessee insure the vehicle;
•they exclude warranties by Ford Credit;
•they include the default clause to which I have earlier referred;
•they require the lessee to pay all sales, use and other taxes;
•they require the lessee to pay all maintenance and operating costs.

[70] Counsel for Smith Brothers stresses the absence of warranties flowing from Ford Credit and submits that the essential function and responsibility of Ford Credit under the agreements is to provide financing.

[71] In earlier PPSA litigation, the fact that the option price reflected the approximate residual value of the vehicle at the conclusion of the term, was thought to weigh heavily against a finding that the arrangement was in essence a financing agreement.

[72] Here Ford Credit's Customer Service Representative deposes that by her estimate, Smith Brothers does not have equity in any of the leased vehicles and that each is worth significantly less than the current net payout figures.

[73] The president of the petitioner deposes that in his discussions with the manager of the initial vehicle supplier, she indicated that she was confident that they could, if permitted, sell the returned vehicles for a sum in excess of the outstanding amounts under the agreements.

[74] In an early leading case, Henry J. considered the question of the option price in Re Ontario Equipment (1976) Ltd. (1981), 33 O.R. (2d) 648 (Ont. H.C.J.), affirmed (1982), 35 O.R. (2d) 194 (Ont. C.A.).

[75] Henry J. adopted this practical distinction between a true lease and a lease by way of security (at 651):

The test in determining whether an agreement is a true lease or a conditional sale is whether the option to purchase at the end of the lease term is for a substantial sum or nominal amount . . . if the purchase price bears a resemblance to the fair market price of the property, then the rental payments were in fact designated to be in compensation for the use of the property and the option is recognized as a real one. On the other hand, where the price of the option to purchase is substantially less than the fair market value of the leased equipment, the lease will be construed as a mere cover for an agreement of conditional sale (per Croake D. J. in Re Crown Cartridge Corp., Debtor (1962) 220 F. Supp. 914).

[76] Later commentators have noted, however, that the fact that at the end of a lease term roughly equivalent to the useful life of the goods, the lessee can purchase the goods at their market value, does not prevent characterization of the transaction as a security agreement (per Cuming and Wood, quoted in Re Bronson, supra).

[77] In any event, I should stress that it is not necessary for me to reach a conclusion on whether the lease/option agreements before me on this application are security agreements for the purposes of the PPSA. It is enough that I have concluded that s. 11.3(a) does not cover all types of lease arrangement and that, in particular, those at bar are within the class of arrangement not included within the ambit of the section.

[78] Smith Brothers submitted in the alternative that if s. 11.3(a) does apply, nevertheless, if these arrangements are to be properly construed as financing agreements for the purposes of the PPSA, the court enjoys the jurisdiction under s. 63 of that Act to stay the enforcement of Ford Credit's rights on default.

[79] Counsel for Ford Credit vigorously opposes any such conclusion and submits that on a division of powers analysis, the CCAA has constitutionally occupied the field to the exclusion of the provincial legislation in these circumstances.

[80] Because of the conclusion that I have reached, it is not necessary for me to deal with this submission.

[81] In the result, the motion is dismissed. The petitioners shall have their costs against Ford Credit on Scale 3.

"BAUMAN, J."
Bauman J.

March 31, 1998
Vancouver, B.C.

Sproule v. Nortel Networks Corporation, 2009 ONCA 833 (CanLII) - Is Collective Employee Agreement a Crystallized Obligation?

Date:	2009-11-26
Docket:	C50986; C50988
URL:	http://canlii.ca/t/26t3z
Citation:	Sproule v. Nortel Networks Corporation, 2009 ONCA 833 (CanLII), <http://canlii.ca/t/26t3z> retrieved on 2013-09-29
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Reflex Record Related decisions, legislation cited and decisions cited

CITATION: Sproule v. Nortel Networks Corporation, 2009 ONCA 833
DATE: 20091126
DOCKET: C50986 and C50988
COURT OF APPEAL FOR ONTARIO
Goudge, Feldman and Blair JJ.A.
BETWEEN:

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION
C50986
Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation
Appellants
and
Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor
Respondents
C50988
AND BETWEEN:
National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915
George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation
Appellants
and
Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor
Respondents
Mark Zigler, Andrew Hatnay and Andrea McKinnon, for the appellants Nortel Networks Former Employees
Barry E. Wadsworth, for the appellant CAW-Canada
Suzanne Wood and Alan Mersky, for the respondents Nortel Networks Limited, Nortel Networks Corporation, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation
Lyndon A.J. Barnes and Adam Hirsh, for the respondents Board of Directors of Nortel Networks Corporation and Nortel Networks Limited
Benjamin Zarnett, for the monitor Ernst & Young Inc.
Gavin H. Finlayson, for the Informal Nortel Noteholder Group
Thomas McRae, for the Nortel Canadian Continuing Employees
Massimo Starnino, for the Superintendent of Financial Services
Alex MacFarlane and Jane Dietrich, for the Official Committee of Unsecured Creditors

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Heard: October 1, 2009
On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated June 18, 2009, with reasons reported at 2009 CanLII 31600 (ON SC), (2009), 55 C.B.R. (5th) 68.
Goudge and Feldman JJ.A.:

[1] On January 14, 2009, the Nortel group of companies (referred to in these reasons as "Nortel") applied for and was granted protection under the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, ("CCAA").
[2] In order to provide Nortel with breathing space to permit it to file a plan of compromise or arrangement with the court, that order provided, inter alia, a stay of all proceedings against Nortel, a suspension of all rights and remedies against Nortel, and an order that during the stay period, no person shall discontinue, repudiate, or cease to perform any contract or agreement with Nortel.
[3] The CAW-Canada ("Union") represents employees of Nortel at two sites in Ontario. The Union and Nortel are parties to a collective agreement covering both sites. On April 21, 2009, the Union and a group of former employees of Nortel ("Former Employees") each brought a motion for directions seeking certain relief from the order granted to Nortel on January 14, 2009. On June 18, 2009, Morawetz J. denied both motions.
[4] The Union and the Former Employees both appealed from that decision. Their appeals were heard one after the other on October 1, 2009. The appeal of the Former Employees was supported by a group of Canadian non-unionized employees, whose employment with Nortel continues. Nortel was supported in opposing the appeals by the board of directors of two of the Nortel companies, an informal Nortel noteholders group, and the Official Committee of Unsecured Creditors of Nortel.
[5] We will address each of the two appeals in turn.
THE UNION APPEAL
Background
[6] The collective agreement between the Union and Nortel sets out the terms and conditions of employment of the 45 employees that have continued to work for Nortel since January 14, 2009. The collective agreement also obliges Nortel to make certain periodic payments to unionized former employees who have retired or been terminated from Nortel. The three kinds of periodic payments at issue in this proceeding are monthly payments under the Retirement Allowance Plan ("RAP"), payments under the Voluntary Retirement Option ("VRO"), and termination and severance payments to unionized employees who have been terminated or who have severed their employment at Nortel.
[7] Since the January 14, 2009 order, Nortel has continued to pay the continuing employees their compensation and benefits as required by the collective agreement. However, as of that date, it ceased to make the periodic payments at issue in this case.
[8] The Union's motion requested an order directing Nortel to resume those periodic payments as required by the collective agreement. The Union's argument hinges on s. 11.3(a) of the CCAA. At the time this appeal was argued, it read as follows:[1]
11.3 No order made under section 11 shall have the effect of
(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made.
[9] The Union's argument before the motion judge was that the collective agreement is a bargain between it and Nortel that ought not to be divided into separate obligations and therefore the "compensation" for services performed under it must include all of Nortel's monetary obligations, not just those owed specifically to those who remain actively employed. The Union argued that the contested periodic payments to Former Employees must be considered part of the compensation for services provided after January 14, 2009, and therefore exempted from the order of that date by s. 11.3(a) of the CCAA.
[10] The motion judge dismissed this argument. The essence of his reasons is as follows at para. 67:
The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

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[11] The Union challenges this conclusion.

[12] In this court, neither the Union nor any other party argues that Nortel's obligation to make the contested periodic payments should be decided by arbitration under the collective agreement rather than by the court.

[13] Nor does the Union argue that any of the unionized former employees, who would receive these periodic payments, have themselves provided services to Nortel since the January 14, 2009 order.

[14] Rather, the Union reiterates the argument it made at first instance, namely that these periodic payments are protected by s. 11.3(a) of the CCAA as payment for service provided after the January 14, 2009 order was made by the Union members who have continued as employees of Nortel.

[15] In our opinion, this argument must fail.

Analysis

[16] Two preliminary points should be made. First, as the motion judge wrote at para. 47 of his reasons, the acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. The primary instrument provided by the CCAA to achieve its purpose is the power of the court to issue a broad stay of proceedings under s. 11. That power includes the power to stay the debt obligations of the company. The order of January 14, 2009 is an exercise of that power, and must be read in the context of the purpose of the legislation. Nonetheless, it is important to underline that, while that order stays those obligations, it does not eliminate them.

[17] Second, we also agree with the motion judge when he stated at para. 66:

In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed.

[18] Because of s. 11.3(a) of the CCAA, the January 14, 2009 order cannot stay Nortel's obligation to make immediate payment for the services provided to it after the date of the order.

[19] What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see Re: Mirant Canada Energy Marketing Ltd. 2004 ABQB 218 (CanLII), (2004), 36 Alta. L.R. (4th) 87 (Q.B.).

[20] Can it be said that the payment required for the services provided by the continuing employees of Nortel also extends to encompass the periodic payments to the former employees in question in this case? In our opinion, for the following reasons the answer is clearly no.

[21] The periodic payments to former employees are payments under various retirement programs, and termination and severance payments. All are products of the ongoing collective bargaining process and the collective agreements it has produced over time. As Krever J.A. wrote regarding analogous benefits in Metropolitan Police Service Board v. Ontario Municipal Employees Retirement Board et al. 1999 CanLII 3763 (ON CA), (1999), 45 O.R. (3d) 622 (C.A.) at 629, it can be assumed that the cost of these benefits was considered in the overall compensation package negotiated when they were created by predecessor collective agreements. These benefits may therefore reasonably be thought of as deferred compensation under those predecessor agreements. In other words, they are compensation deferred from past agreements but provided currently as periodic payments owing to former employees for prior services. The services for which these payments constitute "payment" under the CCAA were those provided under predecessor agreements, not the services currently being performed for Nortel.

[22] Moreover, the rights of former employees to these periodic payments remain currently enforceable even though those rights were created under predecessor collective agreements. They become a form of "vested" right, although they may only be enforceable by the Union on behalf of the former employees: see Dayco (Canada) Ltd. v. CAW-Canada, 1993 CanLII 144 (SCC), [1993] 2 S.C.R. 230 at 274. That is entirely inconsistent with the periodic payments constituting payment for current services. If current service was the source of the obligation to make these periodic payments then, if there were no current services being performed, the obligation would evaporate and the right of the former employees to receive the periodic payments would disappear. It would in no sense be a "vested" right.

[23] In summary, we can find no basis upon which the Union's position can be sustained. The periodic payments in issue cannot be characterized as part of the payment required of Nortel for the services provided to it by its continuing

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employees after January 14, 2009. Section 11.3(a) of the CCAA does not exclude these payments from the effect of the order of that date.

[24] The Union's appeal must be dismissed.

THE FORMER EMPLOYEES' APPEAL

Background

[25] The Former Employees' motion was brought by three men as representatives of former employees including pensioners and their survivors. On the motion their claim was for an order varying the Initial Order to require Nortel to pay termination pay, severance pay, vacation pay, an amount for continuation of the Nortel benefit plans during the notice period in accordance with the Employment Standards Act, 2000, S.O. 2000, c. 41 ("ESA") and any other provincial employment legislation. The representatives also sought an order varying the Initial Order to require Nortel to pay the Transitional Retirement Allowance ("TRA") and certain pension benefit payments to affected former employees. The motion judge described the motion by the former employees as "not dissimilar to the CAW motion, such that the motion of the former employees can almost be described as a "Me too motion."

[26] After he dismissed the union motion, the motion judge turned to the "me too" motion of the former employees. The former employees wanted to achieve the same result as the unionized employees. The motion judge described their argument as based on the position that Nortel could not contract out of the ESA of Ontario or another province. However, as he noted, rather than trying to contract out, it was acknowledged that the ESA applied, except that immediate payment of amounts owing as required by the ESA were stayed during the stay period under the Initial Order, so that the former employees could not enforce the acknowledged payment obligation during that time. The motion judge concluded that on the same basis as the union motion, the former employees' motion was also dismissed.

[27] For the purposes of the appeal, the former employees narrowed their claim only to statutory termination and severance claims under the ESA that were not being paid by Nortel pursuant to the Initial Order, and served a Notice of Constitutional Question. The appellant asks this court to find that judges cannot use their discretion to order a stay under the CCAA that has the effect of overriding valid provincial minimum standards legislation where there is no conflict between the statutes and the doctrine of paramountcy has not been triggered.

[28] Neither the provincial nor the federal governments responded to the notice on this appeal.

[29] Paragraphs 6 and 11 of the Initial Order (as amended) provide as follows:

6. THIS COURT ORDERS that each of the Applicants, either on its own or on behalf of another Applicant, shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages, salaries and employee benefits (including but not limited to, employee medical and similar benefit plans, relocation and tax equalization programs, the Incentive Plan (as defined in the Doolittle affidavit) and employee assistance programs), current service, special and similar pension benefit payments, vacation pay, commissions and employee and director expenses, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

11. THIS COURT ORDERS that each of the Applicants shall have the right to:

...

(b) terminate the employment of such of its employees or temporarily lay off such employees as it deems appropriate and to deal with the consequences thereof in the Plan or on further order of the Court.

...

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business. [Emphasis added.]

[30] Pursuant to these paragraphs, from the date of the Initial Order, Nortel stopped making payments to former employees as well as employees terminated following the Initial Order for certain retirement and pension allowances as well as for statutory severance and termination payments. The ESA sets out obligations to provide notice of termination of employment or payment in lieu of notice and severance pay in defined circumstances. By virtue of s. 11(5), those payments must be made on the later of seven days after the date employment ends or the employee's next pay date.

[31] As the motion judge stated, it is acknowledged by all parties on this motion that the ESA continues to apply while a company is subject to a CCAA restructuring. The issue is whether the company's provincial statutory obligations for virtually immediate payment of termination and severance can be stayed by an order made under the CCAA.

[32] Sections 11(3), dealing with the initial application, and (4), dealing with subsequent applications under the CCAA are the stay provisions of the Act. Section 11(3) provides:

11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection 1; [the Bankruptcy and Insolvency Act and the Winding Up Act]

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(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company;
(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
Analysis
[33] As earlier noted, the stay provisions of the CCAA are well recognized as the key to the successful operation of the CCAA restructuring process. As this court stated in Stelco Inc. (Re) 2005 CanLII 8671 (ON CA), (2005), 75 O.R. (3d) 5 at para. 36:
In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...
[34] Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the CCAA restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination and severance pay.[2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the CCAA that came into force on September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.
[35] As there is no specific protection from the general stay provision for ESA termination and severance payments, the question to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60 at para. 43.
[36] The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and Lebel JJ. in Canadian Western Bank v. Alberta, 2007 SCC 22 (CanLII), [2007] 2 S.C.R. 3 at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in Multiple Access Ltd. v. McCutcheon, 1982 CanLII 55 (SCC), [1982] 2 S.C.R.161:
In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

[37] However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since Multiple Access:
Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in Bank of Montreal v. Hall, 1990 CanLII 157 (SCC), [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in Mangat and in Rothmans, Benson & Hedges Inc. v. Saskatchewan, 2005 SCC 13 (CanLII), [2005] 1 S.C.R. 188, 2005 SCC 13. (para. 73)
[38] Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. Binnie and Lebel JJ. concluded by summarizing the operation of the doctrine in the following way:
To sum up, the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. (para. 75)
[39] The CCAA stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.
[40] The record before the court indicates that the motion judge made the initial order and the amended order in the context of the insolvency of a complex, multinational conglomerate as part of co-ordinated proceedings in a number of countries including the U.S. In June 2009, an Interim Funding and Settlement Agreement was negotiated which, together

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with the proceeds of certain ongoing asset sales, is providing funds necessary in the view of the court appointed Monitor, for the ongoing operations of Nortel during the next few months of the CCAA oversight operation. This funding was achieved on the basis that the stay applied to the severance and termination payments. The Monitor advises that if these payments were not subject to the stay and had to be funded, further financing would have to be found to do that and also maintain operations.

[41] In that context, the motion judge exercised his discretion to impose a stay that could extend to the severance and termination payments. He considered the financial position of Nortel, that it was not carrying "business as usual" and that it was under financial pressure. He also considered that the CCAA proceeding is at an early stage, before the claims of creditor groups, including former employees and others have been considered or classified for ultimate treatment under a plan of arrangement. He noted that employees have no statutory priority and their claims are not secured claims.

[42] While reference was made to the paramountcy doctrine by the motion judge, it was not the main focus of the argument before him. Nevertheless, he effectively concluded that it would thwart the intent of Parliament for the successful conduct of the CCAA restructuring if the initial order and the amended order could not include a stay provision that allowed Nortel to suspend the payment of statutory obligations for termination and severance under the ESA.

[43] The respondents also argued that if the stay did not apply to statutory termination and severance obligations, then the employees who received these payments would in effect be receiving a "super-priority" over other unsecured or possibly even secured creditors on the assumption that in the end there will not be enough money to pay everyone in full. We agree that this may be the effect if the stay does not apply to these payments. However, that could also be the effect if Nortel chose to make such payments, as it is entitled to do under paragraph 6 (a) of the amended initial order. Of course, in that case, any such payments would be made in consultation with appropriate parties including the Monitor, resulting in the effective grant of a consensual rather than a mandatory priority. Even in this case, the motion judge provided a "hardship" alleviation program funded up to $750,000, to allow payments to former employees in clear need. This will have the effect of granting the "super-priority" to some. This is an acceptable result in appropriate circumstances.

[44] However, this result does not in any way undermine the paramountcy analysis. That analysis is driven by the need to preserve the ability of the CCAA court to ensure, through the scope of the stay order, that Parliament's intent for the operation of the CCAA regime is not thwarted by the operation of provincial legislation. The court issuing the stay order considers all of the circumstances and can impose an order that has the effect of overriding a provincial enactment where it is necessary to do so.

[45] Morawetz J. was satisfied that such a stay was necessary in the circumstances of this case. We see no error in that conclusion on the record before him and before this court.

[46] Another issue was raised based on the facts of this restructuring as it has developed. It appears that the company will not be restructured, but instead its assets will be sold. It is necessary to continue operations in order to maintain maximum value for this process to achieve the highest prices and therefore the best outcome for all stakeholders. It is true that the basis for the very broad stay power has traditionally been expressed as a necessary aspect of the restructuring process, leading to a plan of arrangement for the newly restructured entity. However, we see no reason in the present circumstances why the same analysis cannot apply during a sale process that requires the business to be carried on as a going concern. No party has taken the position that the CCAA process is no longer available because it is not proceeding as a restructuring, nor has any party taken steps to turn the proceeding into one under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

[47] The former employee appellants have raised the constitutional question whether the doctrine of paramountcy applies to give to the CCAA judge the authority, under s. 11 of the Act, to order a stay of proceedings that has the effect of overriding s. 11(5) of the ESA, which requires almost immediate payment of termination and severance obligations. The answer to this question is yes.

[48] We note again that the question before this court was limited to the effect of the stay on the timing of required statutory payments under the ESA and does not deal with the inter-relation of the ESA and the CCAA for the purposes of the plan of arrangement and the ultimate payment of these statutory obligations.

[49] The appeal by the former employees is also dismissed.

RELEASED: November 26, 2009 ("S.T.G.")

"S.T. Goudge J.A."
"K.N. Feldman J.A."
"I agree. R.A. Blair J.A."

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[1] The analogous section to the former s. 11.3(a) is now found in s. 11.01(a) of the recently amended CCAA.
[2] The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not at issue in this motion. In Windsor Machine & Stamping Ltd. (Re) [2009] O.J. No. 3195, decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed.

De Lage Landen Financial Services Canada Inc. v. Royal Bank of Canada, 2010 ABCA 394 (CanLII) - True Lease or Financing of Issue Equipment

Date: 2010-12-14
Docket: 1003-0292-AC
URL: http://canlii.ca/t/2dw6x
Citation: De Lage Landen Financial Services Canada Inc. v. Royal Bank of Canada, 2010 ABCA 394 (CanLII), <http://canlii.ca/t/2dw6x> retrieved on 2013-08-22
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In the Court of Appeal of Alberta
Citation: De Lage Landen Financial Services Canada Inc. v. Royal Bank of Canada, 2010 ABCA 394

Date: 20101214
Docket: 1003-0292-AC
Registry: Edmonton

Between:
De Lage Landen Financial Services Canada Inc.

Applicant (Appellant)

- and -

Royal Bank of Canada and PricewaterhouseCoopers Inc., In Its Capacity As Court Appointed Receiver and Court-Appointed Transaction Facilitator

Respondents (Respondents)

Reasons for Decision of
The Honourable Mr. Justice Keith Ritter

Application for Leave to Appeal, Expedite Appeal and Stay/Direction
(Docket: Q.B.1003-05560; Bankruptcy 24-115359)

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Reasons for Decision of
The Honourable Mr. Justice Keith Ritter

[1] The applicant seeks leave to appeal pursuant to s. 13, of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) and a stay pending appeal.

[2] The applicant was a creditor of Cow Harbour Construction Ltd.'s ("CHC"), by virtue of a lease agreement ("Agreement"), which provided that CHC would rent certain equipment ("Equipment") for a term of 37 months. The Agreement did not contain a purchase option.

[3] In the spring of 2010, CHC obtained a stay of proceedings under the *CCAA* to restructure its affairs. Various court applications were heard by an assigned case management judge over the summer of 2010 and, eventually, the *CCAA* proceedings turned into a liquidation, whereby CHC would restructure by selling its assets. The sales process resulted in an offer from a purchaser, who offered to purchase a large number of CHC's assets, including the Equipment. The applicant objected to the sale of the Equipment, arguing that it could not be sold without its consent.

[4] The applicant sought a declaration that, for the purposes of s. 11.01, *CCAA*, the Agreement was a true lease, rather than a financing agreement. This characterization affects how approximately $900,000 in lease payments (currently held in trust by the Receiver's counsel) would be distributed. The applicant claims entitlement to the whole amount if the Agreement is a true lease.

[5] On August 25, 2010, the case management judge concluded that the Agreement was a security lease. He also appointed the respondent PricewaterhouseCoopers Inc. as Receiver and granted an order approving the purchase and vesting CHC's assets, including the Equipment, to the purchaser.

[6] The applicant applied to the case management judge for a stay of the August 25, 2010 order as it related to the Equipment. The application was dismissed, as it was moot (the Equipment having already been sold) and as no appeal had been taken. The applicant made a further application before the case management judge seeking leave to appeal the August 25, 2010 order as it related to the Equipment and a stay pending the appeal. Both those applications were denied: ***Royal Bank of Canada v. Cow Harbour Construction Ltd.***, 2010 ABQB 637 (CanLII), 2010 ABQB 637.

[7] The applicant seeks leave to appeal pursuant to s. 13, *CCAA*. Section 13 provides:

> 13 Except in Yukon, any person dissatisfied with an order or a decision made under this *Act* may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[8] The parties agree that the test for leave is whether there are serious and arguable grounds of real and significant interest to the parties. In order to obtain leave, the applicant must demonstrate that the following four criteria are met:

(a) the point on appeal is of significance to the practice;
(b) the point raised is of significance to the action itself;
(c) the appeal is *prima facie* meritorious or frivolous; and
(d) the appeal will not unduly hinder the progress of the action: ***Liberty Oil & Gas Ltd. (Re)***, 2003 ABCA 158 (CanLII), 2003 ABCA 158, 44 C.B.R. (4th) 96 at paras. 15-16; ***Resurgence Asset Management LLC v. Canadian Airlines Corp.***, 2000 ABCA 149 (CanLII), 2000 ABCA 149, 261 A.R. 120 at paras. 6-7. The parties disagree about whether the proposed appeal meets the test.

[9] The applicant agrees that the case management judge applied the correct test in determining that the Agreement was a financing lease rather than a true lease. However, it proposes to argue that the case management judge erred by giving equal weight to each factor within that test. It also proposes to argue that there is no case law in Alberta holding that a lease which did not include an option to purchase is anything but a true lease. In resisting the applicant's leave to appeal application, the respondents state that the four criteria have not been met. They also argue that the application was filed out of time, contrary to s. 14, *CCAA*.

[10] With respect to the argument that the application is out of time, the applicant argues that s. 14, *CCAA* only requires an appellant to apply to one of the concurrent courts as set out in s. 13, *CCAA* within the time specified. It states that if it does that and is refused, it can then make an application to the other court even though the subsequent application is outside the time limit in s. 14. I have some significant doubts about the viability of this argument as s. 14 includes a mechanism to extend time and the approach suggested by the applicant seems to render that mechanism

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meaningless. However, I prefer to deal with this application on the basis of whether leave should be granted, as this analysis leads to the conclusion urged by the respondents in any event.

[11] I conclude that factors (a) and (c) lead to my rejecting this leave application. With respect to the issue of importance to the practice, the applicant argues that this Court has never considered whether a lease agreement without a right of ultimate purchase to the lessee is a security lease. Accordingly, it says, this issue is significant to legal practice surrounding the *CCAA*. However, stating the issue in that way is re-stating it.

[12] It is clear that the parties argued before the case management judge that he should consider the factors in ***Smith Brothers Contracting Ltd. (Re)*** 1998 CanLII 3844 (BC SC), (1998), 53 B.C.L.R. (3d) 264 (S.C.), 1998 CarswellBC 678. One of the factors set out in that case is whether there is any right of acquisition. Therefore, the proposed issue is really about the weight given to a relevant factor in comparison to the weight given to other factors. This leads to the question of prospect of success on appeal.

[13] This court has stated, with respect to many contexts, that substantial deference is accorded to the weight given by trial, chambers, and case management judges, to the factors in legal tests. Any deference afforded is amplified when the judge is a case management judge whose decision is part of a series of decisions relating to an ongoing court process.

[14] That is the case here, where the applicant seeks to appeal the portion of the decision dealing with the rentals and not the direction that the Equipment be included in the sale of assets. Proceedings under *CCAA* often involve compromise. A case management judge is in the best position to assess whether a particular directive is fair in the context of the compromises made by everyone involved in the proceedings. The case management judge alluded to this in his reasons.

[15] The applicant points to a British Columbia decision which suggests *in obiter* that there should be a hierarchy in the factors used to determine if a lease is a true lease or a financing lease. In my view, this *obiter* runs contrary to current trends about how to weigh the factors in a legal test and about the deference afforded to courts of first instance in this respect. If one factor trumps the others, there is simply no point in including the others in the test.

[16] In sum, I conclude that the chances of success with respect to this appeal are minimal and that the proposed issue is not important to the practice surrounding the *CCAA*. Leave to appeal is denied.

Application heard on December 1, 2010
Reasons filed at Edmonton, Alberta
this 14th day of December, 2010

_____

Ritter J.A.

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Appearances:
S.J. Weatherill and K.R. Kawanami
for the Applicant (Appellant)
L.K. Harris
for the Respondent (Respondent) the Royal Bank of Canada
H.A. Gorman
for the Respondent (Respondent) PricewaterhouseCoopers Inc., in its capacity as Court Appointed Receiver and Court-Appointed Transaction Facilitator

Boutiques San Francisco Inc., Re, 2004 CanLII 16649 (QC CS) - 30 Day Goods under the CCAA

Date:	2004-02-10
Docket:	500-11-022070-037
Parallel citations:	[2004] RJQ 986; 5 CBR (5th) 174
URL:	http://canlii.ca/t/1ghhd
Citation:	Boutiques San Francisco Inc., Re, 2004 CanLII 16649 (QC CS), <http://canlii.ca/t/1ghhd> retrieved on 2013-09-11
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Quintette Coal Ltd. v. Nippon Steel Corp., reflex
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JG1793

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-022070-037

DATE: FEBRUARY 10, 2004

IN THE PRESENCE OF: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON

LES BOUTIQUES SAN FRANCISCO INCORPORÉES
and
LES AILES DE LA MODE INCORPORÉES
and
LES ÉDITIONS SAN FRANCISCO INCORPORÉE
Debtors
and
RICHTER & ASSOCIÉS INC.
Monitor
and
L'ORÉAL CANADA INC.
and
MAKE UP FOR EVER S.A.
Petitioners

JUDGMENT
ON MOTIONS TO LIFT THE STAY OF PROCEEDINGS OR,
SUBSIDIARILY, TO ORDER THE DEPOSIT OF MONEYS IN TRUST

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1) THE ISSUES

[1] This judgment deals with the right of unpaid suppliers to repossess their goods still in the hands of a debtor company that availed itself of the protection of the Companies' Creditors Arrangement Act [1] (CCAA).

[2] The facts giving rise to the dispute are simple and can be summarized as follows.

[3] On December 17, 2003, Les Boutiques San Francisco incorporées, Les Ailes de la Mode incorporées and Les Éditions San Francisco incorporée (BSF Group) sought and obtained some of the protections available under the CCAA. The Initial Order issued on that day provided notably for a stay of the proceedings against the BSF Group.

[4] A stay of proceedings is a standard conclusion in the initial orders made under the CCAA and section 11 (3) specifically provides for such a possibility:

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(Emphasis added)

[5] On the date of the Initial Order issued here, one supplier, L'Oréal Canada Inc., was owed $413,557.08 by the BSF Group, $360,395,32 of which represented goods delivered within the 30 days prior to December 17, 2003[2]. After the application of some credits for services rendered, the amount owed was reduced to $299,840.09 on the day of hearing of L'Oréal's motion[3].

[6] Similarly, another supplier, Make Up For Ever S.A., was also owed a sum of $67,420.97 on December 17, 2003, $30,015.58 of which represented goods delivered to the BSF Group within the 30 days preceding the date of the Initial Order[4].

[7] In early January 2004, L'Oréal and Make Up For Ever each filed a motion by which they claimed that the stay of proceedings should be lifted and declared inapplicable inasmuch as they were concerned. The reason invoked: they each want to exercise their right to revendicate the goods sold and delivered still in the possession of the BSF Group, as any sale which took place is now resolved and resiliated automatically because of the BSF Group's failure to perform its obligations, namely to pay for the goods.

[8] They rely upon article 1605 C.C.Q. which states:

"1605. A contract may be resolved or resiliated without judicial proceedings where the debtor is in default by operation of law or where he has failed to perform his obligation within the time allowed in the writing putting him in default."

(Emphasis added)

[9] Subsidiarily, if the Court does not agree to lift the stay of proceedings against them, they ask that the proceeds of the sales of their goods be kept from now on in a separate trust account by the BSF Group, in order to protect their future rights and recourses.

[10] Finally, in its own motion, L'Oréal asks that the BSF Group be ordered to either pay for the continued use of the display units ("agencements") it recently provided to them or return those immediately to L'Oréal in the absence of payment.

[11] Not surprisingly, the BSF Group vigorously contests these requests. In that contestation, it also has the support of many: the Monitor, the Bank Syndicate and the Ad Hoc Committee of Unsecured Creditors.

[12] Their position is clear and unanimous. There is no reason to treat these two suppliers any different than the other creditors of the BSF Group. To lift the stay of proceedings for these two suppliers would go against the specific objectives of the CCAA and the principles of the status quo that it should protect. Furthermore, the demands of these suppliers are not supported by any of the relevant precedents, be it from the Quebec or the Common Law provinces courts. Finally, they say that not only are the requests unjustified under the circumstances as these two suppliers, in particular, do not suffer any serious prejudice, but granting those would create an impact of such a nature as to put seriously in jeopardy the proposed arrangement of the BSF Group.

[13] On the issue of the display units, they reply that nothing is owed at this stage since this debt preceded the Initial Order and should therefore be treated in the same manner as any others.

[14] For sake of clarity and as the issues are very distinct from one another, the Court will deal, firstly, with the requests of L'Oréal and Make Up For Ever for the lift of the stay of proceedings and for the deposit of moneys in trust, and secondly, with the claim of L'Oréal pertaining to the display units.

2) The lift of the stay of proceedings and, subsidiarily, the deposit of moneys in trust

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[15] On the basis of the applicable statutes, the relevant case law and the evidence adduced, the Court is of the view that neither the lift of the stay of proceedings nor the deposit of moneys in trust should be ordered here, be it for the benefit of L'Oréal or Make Up For Ever. In reaching this conclusion, the Court relies on the following considerations:

a) The purpose and objectives of the CCAA;
b) The precedents in Quebec and Canada; and
c) The absence of a serious and distinct prejudice to the two suppliers involved.

a) The purpose and objectives of the CCAA

[16] It has been said often, and rightly so, that the CCAA is a remedial legislation. Its purpose is to allow companies in financial difficulties to reorganize themselves. As one judgment of the Quebec Superior Court recently reminded, it should be interpreted and applied as a flexible tool to assist in the restructuring of companies in financial difficulties[5].

[17] One of the main goals of the CCAA is to allow the debtor company seeking its protection to stay in business as a going concern while attempting to solve its financial difficulties. The Courts indeed recognize that the Act should be given a large and generous interpretation to favour this objective[6].

[18] As the Quebec Court of Appeal stated lately, contrary for instance to recourses under the Bankruptcy and Insolvency Act[7] (BIA), the objective of the CCAA is not to end the operation of a business and distribute its assets to its creditors, but rather to reach an arrangement between the debtor company and its creditors to allow for its survival[8].

[19] One of the key elements to achieve these objectives is maintaining a status quo for the necessary time while the debtor company attempts to gain the approval of its creditors for a proposed arrangement[9]. Like the British Columbia Court of Appeal once said[10]:

"[...] Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11."

(Emphasis added)

[20] In a judgment often cited on that subject, Mr. Justice Tysoe of the British Columbia Supreme Court summarized well what is meant by maintaining the status quo when a debtor company seeks the protection of the CCAA[11]:

"It is my view that the maintenance of the status quo is intended to attempt to accomplish the following three objectives:

1. To suspend or freeze the rights of all creditors as they existed as at the date of the stay Order (which, in British Columbia, is normally the day on which the CCAA proceedings are commenced). This objective is intended to allow the insolvent company an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor.

2. To postpone litigation in which the insolvent company is involved so that the human and monetary resources of the company can be devoted to the reorganization process. The litigation may be resolved by way of the reorganization.

3. To permit the insolvent company to take certain action that is beneficial to its continuation during the period of reorganization or its attempt to reorganize or, conversely, to restrain a non-creditor or a creditor with rights arising after the stay from exercising rights that are detrimental to the continuation of the company during the period of reorganization or its attempt to reorganize. This is the objective recognized by Quintette and Alberta-Pacific Terminals. [...]"

(Emphasis added)

[21] Therefore, as section 11 of the CCAA enacts and these precedents reiterate, in order to allow a debtor company to restructure itself and continue its operations, the stay of proceedings is a basic component of the maintenance of the status quo. Staying the proceedings means to suspend or freeze not only actual or potential litigation, but likewise any type of manoeuvres for positioning amongst creditors. This obviously includes the possibility of creditors seeking to repossess their goods in the hands of the debtor company who, to the contrary, should be allowed to continue operating as a going concern while protected under the CCAA.

[22] From that standpoint, the motions of L'Oréal and Make Up For Ever are going directly against these objectives and the key element of maintaining the status quo during the course of the restructuring under the CCAA. The lift they are seeking is directly opposed to what the Act specifically provides for at section 11 and would place both of them in a preferred position compared to that of the other unsecured creditors.

[23] Surely, maintaining the status quo involves balancing the interests of all affected parties and avoiding advantages to some over the others. Under the CCAA, the restructuring process and the general interest of all the creditors should always be preferred over the particular interests of individual ones [12].

[24] The Court does not believe that it is appropriate to set aside these objectives and principles in this case.

[25] In its Initial Amended Order of January 15, 2004, the Court has already indicated that the contemplated arrangement of the BSF Group appeared practical, workable and realistic from an economic standpoint. At this stage, it

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has very strong support within the creditors of the BSF Group and no one has suggested that there exists a better solution to the problems now faced by the BSF Group.

[26] In a situation where there exists a contemplated arrangement which is not doomed to fail but rather appears reasonable, which has the support of a vast majority of the creditors, and which is still being pursued diligently, it is the Court's opinion that the pursuit of the objectives of the CCAA should strongly be favoured, not countered.

[27] As a result, with a contemplated arrangement such as the one involved here, the solutions should be pursued and the issues resolved within the context of this arrangement, not outside of it.

[28] To that end, one must remember that the contemplated arrangement described by the BSF Group already gives consideration to the situation of suppliers such as L'Oréal and Make Up For Ever. One of its guiding principles is indeed expressed as follows by the BSF Group [13]:

"The participation of claims in the baskets could be adjusted so that the first dollars of each claim and sums due for merchandise sold and delivered within 30 days of the Initial Order, could be entitled to a greater participation in the basket than the remaining claims;"

[29] Since the proposed arrangement is not yet finalized, it is certainly too soon to comment on this potential treatment of the particular situation of the "30 days goods" suppliers. At this stage, it is sufficient to note that proper attention is being given to the situation of these suppliers who may otherwise have had other rights save for the protection afforded by the CCAA. Presently, there is no reason to believe that the arrangement that will eventually be submitted to the creditors for approval, and thereafter to the Court for sanction if fair and reasonable, will not be governed by similar considerations.

[30] Still, L'Oréal and Make Up For Ever argued that the stay of proceedings will potentially deprive them of some of their alleged rights under the Civil Code of Quebec or the BIA, particularly if the arrangement fails and a bankruptcy is declared. Even though this possibility exists, when a proposed arrangement is characterized by qualifiers such as "not doomed to failure", "apparently reasonable", "strongly supported" and "diligently pursued", the Court considers that it should assess the situation with an assumption of success, not of failure, of the process.

[31] Accordingly, even if these concerns of L'Oréal and Make Up For Ever should the arrangement fails are legitimate, they should not be the guiding criteria of the Court under the circumstances. Especially so when a proper arrangement can eventually alleviate, partially or totally, the loss of the alleged rights that the suppliers may now be denied.

[32] To minimize the consequences of their requests, L'Oréal and Make Up For Ever have also argued that their claims represent less than $370,000, while the total accounts payable of the unsecured creditors, including the suppliers, represent more than $31,000,000[14]. The impact, if any, of their motions upon the restructuring of the BSF Group would therefore be, so they say, minimal.

[33] Since no similar motions from other suppliers are presently pending, they are saying that the Court should not conclude that granting their requests will have the detrimental impact upon the restructuring process that the other parties are voicing.

[34] With respect, the Court cannot agree with this argument.

[35] Even though no other similar motions are now pending, the Court cannot simply close the eyes or look in the opposite direction and just pretend not to see the obvious. In a business such as that of the BSF Group, which is involved in the retail sale of men's, women's and children's apparels and accessories, it is clear that there are many other suppliers in a situation similar to that of L'Oréal and Make Up For Ever.

[36] It is also clear that if the requests of L'Oréal and Make Up For Ever are granted, there will be many others presented to the Court. Opening this door would create a chaotic situation that will strike at the very heart of the going concern and continued operations objectives that the CCAA aims at protecting.

[37] The Court does not need to have specific evidence from other suppliers confirming that they will proceed similarly to L'Oréal and Make Up For Ever should the motions be granted. This is self-evident and the Court cannot ignore it. This is exactly what Mr. Justice Lagacé from the Quebec Superior Court relied upon, amongst other things, in refusing to grant a similar request in the context of the restructuring of Steinberg Inc. under the CCAA[15]:

"[...] Or le tribunal ne peut ignorer que plusieurs autres créanciers pourraient réclamer le même droit que désire exercer la débitrice-requérante. [...]"

(Emphasis added)

[38] All in all, when one considers the purpose and objectives of the CCAA, there are simply no justifications for the conclusions sought by L'Oréal and Make Up For Ever in their motions.

b) The precedents in Quebec and in Canada

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[39] That said, the Court notes further that there are no precedents, be it in Quebec or elsewhere in Canada, that support the requests made here by L'Oréal and Make Up for Ever. Indeed, all the judgments that bare any kind of similarity to the situation at hand go against the granting of what is being asked.

i. The Quebec Cases

[40] To this date, the cases in Quebec have refused the claims of unpaid suppliers to repossess their goods in the context of a stay of proceedings pursuant to a reorganization or restructuring process, be it under the CCAA or the BIA.

[41] For instance, in the context of the Steinberg Inc. restructuring under the CCAA, Mr. Justice Lagacé twice refused motions to authorize an unpaid supplier to seize before judgment the merchandises sold and delivered within the 30 days prior to the Initial Order[16].

[42] In the two judgments he rendered, Mr. Justice Lagacé concluded that when faced with an arrangement that appeared serious, the individual interest of a creditor should not be preferred over the general interest of all the creditors. For Mr. Justice Lagacé, granting the requests would have most likely resulted in a number of similar motions by other suppliers and it would have basically led to the failure of the arrangement before it was even submitted to the creditors for approval. This would have been contrary to the objectives of the CCAA.

[43] It is worth noting that in these two decisions, the suppliers were relying upon article 1543 C.C.B.C. and their corresponding right to revendicate the goods sold and delivered within the prior 30 days. Since 1994, article 1741 C.C.Q. has replaced article 1543 C.C.B.C. It now states the following:

1741. Except in the case of a sale with a term, the seller of movable property may, within thirty days of delivery, consider the sale resolved and revendicate the property if the buyer, being in default, has failed to pay the price and if the property is still entire and in the same condition and has not passed into the hands of a third person who has paid the price thereof, or of a hypothecary creditor who has obtained surrender thereof.

Where the buyer is in default to pay the price and the property meets the conditions prescribed for resolution of the sale, the seizure of the property by a third person is no hindrance to the rights of the seller.

(Emphasis added)

[44] Here, L'Oréal and Make Up For Ever are not relying upon this article which is specific to the situation of an unpaid vendor of movable property in the Quebec Civil Code. As their sales were with a term, they do not meet the conditions necessary for its application. Thus, to justify their requests, they are relying upon the general provisions of obligations applicable to all contracts found at article 1605 C.C.Q.

[45] It is difficult to see why the reasoning applicable for a claim made under article 1543 C.C.B.C. (now 1741 C.C.Q.) in cases like the two Steinberg decisions would be any different inasmuch as the general provisions of article 1605 C.C.Q. are concerned. At the very least, L'Oréal and Make Up For Ever did not present any convincing argument to that end.

[46] Likewise, in the context of the BIA this time, Mr. Justice Denis has reached a conclusion similar to that of Mr. Justice Lagacé on a demand by suppliers for the repossession of goods after the filing of a notice of intention to make a proposal[17].

[47] In that matter, the suppliers were again invoking article 1543 C.C.B.C. Nonetheless, Mr. Justice Denis concluded that there was no reason not to apply the stay of proceedings to them. He emphasized that sections 81.1(4) and 50.4 of the BIA intended to temporarily deny certain rights to creditors in order to allow a company to make a proposal to solve its financial difficulties. The protection that the BIA afforded to suppliers of goods in section 81.1 was not applicable in a proposal context, hence the absence of any basis to provide them with a similar protection through article 1543 C.C.Q.

[48] The same conclusion was reached by Mr. Justice Halperin in Re Henry Birks & Sons Ltd.[18]. On a petition for an order pursuant to section 81.1(8) of the BIA, he denied the request of unpaid suppliers to exercise their remedies as unpaid vendors, as such could have well placed in jeopardy the whole reorganization process of the debtor company. He noted that section 81.1 was clear and only suspended the running of the 30 days period upon the commencement of a proposal proceeding, even though any rights as unpaid vendors in the future would often be illusory if the goods were no longer in the possession of the debtor company once a bankruptcy was finally declared[19].

[49] No Quebec courts decisions granting the requests sought by L'Oréal or Make Up For Ever could be found to support their position. The situation was no different in the Common Law provinces.

ii. The Common Law Provinces Cases

[50] In proceedings taken under the CCAA, the British Columbia Supreme Court has twice denied requests similar to those presented by L'Oréal and Make Up For Ever.

[51] In Re Agro Pacific Industries Ltd.[20], Mr. Justice Thackray denied an application by suppliers to set aside a stay of proceedings granted under the CCAA. He stated notably that ordering that the supplies made to the debtor company within 30 days of the Initial Order be traced and identified and their proceeds put in a trust account would be an

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attempt to improperly introduce into the CCAA proceedings requirements similar to those contained in section 81.1 of the BIA. In his reasons, Mr. Justice Thackray had these comments which are worth citing:

"[52] An order establishing a trust fund in favour of the applicant suppliers would create a class of secured creditors after the fact. It would turn the Court into the author of a new class of creditor. Classes of creditors should be created by the parties on a contractual basis when entering into their business relationships.

[...]

[55] Mr. Justice Tysoe in Re Woodward's also alluded to the potential that the Court cannot lose sight of legislative intention. He pointed out that the CCAA is "silent as to the creation of a trust fund to be held for the benefit of the suppliers in the event that the reorganization is not successful." Many of the challenges by the suppliers in the case at bar are legislative.

[56] The CCAA must be accepted as Parliament's approval of the continued business activities of an insolvent company, to be carried out in as normal a manner as possible while reorganizing. The Court is not allowed to suggest that the legislative intent is one designed, per se, to disadvantage the suppliers. It must, rather, be taken as giving hope that reorganization, rather than bankruptcy, will eventually benefit all interested parties."

(Emphasis added)

[52] In this judgment, Mr. Justice Thackray found no basis to justify the requests made by the suppliers under the CCAA.

[53] In Re Woodward's[21], Mr. Justice Tysoe reached a similar conclusion. In that case, applications by suppliers of goods for relief under the CCAA were also denied. Applications for leave to appeal of that decision were furthermore dismissed[22].

[54] For Mr. Justice Tysoe, in addition to the fact that section 81.1 of the BIA could not be of any use to the suppliers as the CCAA did not contain any similar provision, the creation of any trust fund was not justified as it would not serve to maintain the status quo. He wrote this on the issue[23]:

"Apart from consideration of s. 81.1 of the B. & I. Act, there is no justification for the creation of the trust fund. It would not serve to maintain the status quo. To the contrary, it would give the suppliers an advantage over other creditors of Woodward's. It would not be beneficial to the continuation of Woodward's business during the reorganization period or Woodward's attempt to reorganize. Indeed, it was the position of Woodward's on these applications that the creation of a trust fund in the amount of $30 million would make any reorganization impossible."

(Emphasis added)

[55] Finally, and similarly to what the Quebec courts did conclude, in Bruce Agra Foods Inc., Mr. Justice Farley denied a motion made by unpaid suppliers this time within the context of a notice of intention to file a proposal under the BIA. In that case, Mr. Justice Farley concluded that in a reorganization scenario, unpaid suppliers could not avail themselves of a protection similar to that of section 81.1 of the BIA. He mentioned[24]:

"2. If Parliament had intended that unpaid suppliers have direct immediate rights in a reorganization scenario as envisaged by a Notice of Intention to File a Proposal, then it would seem to me that it would have provided for same to take place in s. 81.1(b) but rather Parliament addressed the Notice of Intention situation by having a suspension during the relevant time period: see s. 81.1(4). Unfortunately for those affected, in order to promote reorganizations (which is an underlying fundamental of the BIA including the 1992 amendments which puts some teeth or perhaps "life blood" into that part of the BIA), there will be some prejudice to creditors (who may be unpaid sellers). If the rights of unpaid suppliers were to override, then there would have to be an amendment to section 69.1 (a) to that effect. [...]

[...]

6. It would seem to me that unpaid supplier rights are truly intended to protect against the unfair consequences in liquidation as seen by Parliament and are not intended to affect or disrupt reorganizations proposed pursuant to Part IV of the BIA. [...]"

(Emphasis added)

[56] Again, L'Oréal and Make Up For Ever could not refer the Court to any decision from the Common Law provinces which had granted a motion similar to theirs.

iii) L'Oréal and Make Up For Ever reply to the precedents

[57] Notwithstanding, to distinguish these decisions, L'Oréal and Make Up For Ever first argued that in the Quebec decisions in Steinberg[25] or in Shirmax[26], no claims for the deposit of moneys in a trust account similar to what is requested here were apparently made.

[58] While it is true that this issue was not specifically dealt with in these three judgments, the Court fails to see on what basis their conclusions would have been any different with respect to the deposit of moneys in a trust account.

[59] The protection given to an unpaid supplier under article 1543 C.C.B.C. (now 1741 C.C.Q.) discussed in these decisions was limited to the right to repossess its goods. If the exercise of that right was considered by the Courts as

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inappropriate in the context of proceedings under the CCAA or the BIA, it follows that, logically, the exercise of the same right «by equivalent», namely by having the proceeds of the sale of the goods deposited in a trust account, would normally trigger the same answer.

[60] Second, L'Oréal and Make Up For Ever further argued that the judgment in Shirmax[27] should be distinguished because in that case, the impact upon the restructuring would have been very significant considering the extent of the debt owed to the suppliers involved when compared to the whole debt of the company. This argument cannot be retained because it would require the Court to ignore the obvious consequences of a judgment granting the requests made, namely that it will in all likelihood trigger an avalanche of similar type of requests by the numerous suppliers of the BSF Group.

[61] Third, L'Oréal and Make Up For Ever argued that the decisions of the Common Law provinces should be distinguished and ignored as there are no recourses similar to that of article 1605 C.C.Q. in those jurisdictions.

[62] While that is true, it remains that the decisions rendered in the Common Law provinces are quite relevant and useful to the issues to be decided here.

[63] On the one hand, these judgments have correctly emphasized that the CCAA, while providing for a stay of proceedings in the context of a restructuring, has made no exceptions for the rights of suppliers as, for instance, the BIA has done in some limited circumstances, albeit not for proposals.

[64] On the other hand, in denying the requests made, these judgments have also emphasized, again rightfully, that the issues raised by the suppliers were more legislative than judicial in nature, since Parliament had decided to protect specifically the unpaid suppliers rights only in limited circumstances in the BIA.

[65] These decisions have correctly noted that in situations of reorganizations or restructurings, neither the CCAA nor the BIA contain provisions addressing these rights, except for the suspension of the running of the 30 day delay of section 81.1 in the case of a proposal under the BIA. On that issue, and as it was decided for example in Re Woodwards, the terms of the Court's Initial Order already include a similar suspension for the benefit of the suppliers.

[66] In addition, and again similarly to what this Court did here, these judgments of the other provinces have considered and given weight to the detrimental impact the granting of the motions involved would have had upon the key objectives of the protections offered by the CCAA.

[67] On the whole, even though provisions similar to article 1605 C.C.Q. do not exist in these other jurisdictions, these decisions can be relied on since their conclusions are based upon reasons that do apply in this case.

[68] As a fourth and final point, L'Oréal and Make Up For Ever argue that, notwithstanding all these precedents, in two cases decided in the context of restructurings conducted under the CCAA and the BIA, the Quebec courts have granted requests to put in a trust account the proceeds of merchandise sold pending the outcome of the reorganization process.

[69] In this respect, they refer to the Superior Court judgment of Mr. Justice Archambault in Century Industries inc. v. Les Entreprises Union Électrique ltée [28]and to the Court of Appeal decision in Gestion Max Boutin inc. v. Brasserie Molson O'Keefe[29].

[70] However, as it was indicated at the hearing, these decisions can be distinguished easily as the creditors involved had specifically retained by contract their rights of ownership in the goods at issue, which is not the case for L'Oréal or Make Up For Ever.

[71] In short, the review of these precedents in Quebec and in Canada confirms the absence of justification for the remedies sought here by these two suppliers.

c) The absence of a serious and distinct prejudice to the two suppliers involved

[72] But that is not all. In addition to the fact that the conclusions sought by L'Oréal and Make Up For Ever would be contrary to the applicable case law as well as the purpose and objectives of the CCAA, the Court is satisfied that under the circumstances, neither L'Oréal nor Make Up For Ever would suffer a prejudice sufficiently serious as to justify lifting the stay of proceedings.

[73] In summary, L'Oréal and Make Up For Ever are alleging that they are suffering a serious and distinct prejudice because the stay of proceedings will result in them losing a right to repossess goods that they have under article 1605 C.C.Q., hence their justification to lift the stay.

[74] To emphasize their prejudice, they are also asserting that an arrangement under the CCAA must give creditors something more than what they would otherwise receive in the context of a bankruptcy. Since they will end up, in all likelihood, receiving less in the context of an arrangement under the CCAA than in a bankruptcy process under the BIA, they consider that their motions should be granted.

[75] The Court disagrees with these arguments.

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[76] On the first of these arguments, in Re Canadian Airlines Corp., it was stated that under the CCAA, there are simply no statutory tests to guide a court in lifting a stay against a certain creditor. In that case, to give some indications of what could be considered to that end, Madam Justice Paperny referred to the following [30]:

"20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
3. The applicant shows necessity for payment (where the creditors financial problems are created by the order of where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period."

(Emphasis added)

[77] When one considers these situations, none apply here, except potentially the fifth one. However, even in such a situation, the only alleged prejudice suffered by L'Oréal and Make Up For Ever would be one directly caused by the mere application of the Act, namely by the stay of proceedings which the CCAA authorizes.

[78] On that specific issue, in the decision of St-Lawrence Chemical Inc. v. A.R.C. Resins Corp., Madam Justice Lemelin of the Quebec Superior Court concluded this[31]:

"Le préjudice de la requérante ne peut être que celui causé par l'application normale de la loi qui suspend les recours de tous les créanciers et fournisseurs. Le juge Trudeau qualifie même ce préjudice "de sérieux" dans l'affaire de faillite Goineau.

La requérante ne peut demander au Tribunal de mettre de côté l'application d'une loi qui dans le vœu du législateur doit favoriser la réorganisation d'entreprises en difficultés en les mettant à l'abri des procédures temporairement. Permettre aux fournisseurs de reprendre les marchandises vendues compromet les opérations de la personne insolvable. La requérante doit satisfaire le Tribunal de ce préjudice sérieux, ce qu'elle ne fait pas."

(Emphasis added)

[79] The Court agrees with these comments. Simply stated, the application of the CCAA cannot of itself constitute a sufficiently serious and distinct prejudice to justify the lift of a stay of proceedings.

[80] Consequently, even though much time was spent in argument by the attorneys for both sides on the right of an unpaid supplier to even invoke the application of article 1605 C.C.Q. in a situation similar to that of L'Oréal and Make Up For Ever, the Court considers that it is not necessary to decide this question.

[81] There are sufficient reasons here to deny the motions of L'Oréal and Make Up For Ever without having to decide whether or not an unpaid supplier who does not meet the conditions of article 1741 C.C.Q. can nevertheless invoke the benefit of the general provision of article 1605 C.C.Q. This question appears to be far from settled in the civil law doctrine or in the case law[32].

[82] In any event, on that issue of the alleged right to repossess of these suppliers, the Court notes that the resolution or resiliation of a contract without judicial proceedings as invoked by L'Oréal and Make Up For Ever only applies where the debtor, namely the BSF Group, is in default by writing or by operation of law.

[83] The BSF Group was apparently not put in default in writing by these suppliers and article 1597 C.C.Q. describes the situations where a debtor is in default by operation of law:

"1597. A debtor is in default by the sole operation of law where the performance of the obligation would have been useful only within a certain time which he allowed to expire or where he failed to perform the obligation immediately despite the urgency that he do so.

A debtor is also in default by operation of law where he has violated an obligation not to do, or where specific performance of the obligation has become impossible through his fault, and also where he has made clear to the creditor his intention not to perform the obligation or where, in the case of an obligation of successive performance, he has repeatedly refused or neglected to perform it."

(Emphasis added)

[84] Here, there is only one instance where the BSF Group would potentially be in default by operation of law towards these two suppliers: because it would have "made clear to (these) creditors (its) intention not to perform (its) obligations".

[85] However, it does not appear that this is the case yet.

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[86] When a creditor avails itself of the protection that the law offers, and as result is afforded it with a corresponding stay of proceedings, one cannot conclude that this debtor then makes it clear to its creditors that it intends not to perform its obligations. As a matter of fact, under the CCAA, the objective of this debtor is rather to propose an arrangement to these creditors for the compromise of these obligations and this may include a partial and even a total performance of these obligations in some cases.

[87] Therefore, it is far from obvious that L'Oréal and Make Up For Ever even qualify here for the application of article 1605 C.C.Q. If this were so, then their position would be even less justified under the circumstances.

[88] Concerning now the second argument that in proceedings conducted under the CCAA, L'Oréal and Make Up For Ever should not be put in a situation worst than the one they would be in under the BIA, the Court considers that if anything, it is the situation of all the creditors collectively that must be looked at.

[89] While it is true that one of the objectives of the CCAA is to provide a better solution than what a bankruptcy would offer, this is so from the standpoint of the benefit to all the creditors, not to individual ones. L'Oréal and Make Up For Ever are looking at the situation only from their own viewpoint, while in the context of proceedings under the CCAA, the prejudice and interest of the parties must in every respect be looked at collectively.

[90] Indeed, under the circumstances, the prejudice alleged by L'Oréal and Make Up For Ever, even from an individual standpoint, is far from being serious in the overall picture of the restructuring of the BSF Group.

[91] Both companies are involved in the cosmetics and perfumes business and they supply mostly, if not exclusively, Les Ailes de la Mode. In the restructuring business plan submitted to the Court[33], one of the key elements of the repositioning of the BSF Group is to focus upon what it calls its core business, notably with its banner Les Ailes de la Mode. This core business includes for one thing the cosmetics and perfumes.

[92] Therefore, these two suppliers, perhaps much more so than many others, are well within the specific business and banner upon which the BSF Group intends to focus for its restructuring. As a result, they appear to be creditors who would definitely benefit, not suffer, from a successful restructuring of the BSF Group.

[93] It is in fact striking to note this from the admissions filed in the record[34]. The sales of L'Oréal to the BSF Group totalled $3,609,000 in 2002 and $3,155,000 in 2003, for an average of $281,833 per month over these 24 months. In comparison, the sales of L'Oréal to the BSF Group for the first month immediately following the Initial Order totalled more than $335,000, namely a higher monthly average, even in the context of the restructuring process.

[94] Finally, on this issue of the prejudice, it must be remembered that, in this case, there is no evidence of bad faith in the BSF Group's behaviour towards these two suppliers. Notwithstanding what is alleged in their motions, the Court is of the view that the circumstances surrounding the discussions and exchanges of cheques in December 2003 indicate that they were carried on in good faith, in the normal course of business of the BSF Group.

[95] To sum up, be it from the angles of the lack of serious and distinct prejudice to L'Oréal and Make Up For Ever, of the applicable precedents and their reasoning, or of the purpose and objectives of the CCAA, nothing warrants the Court to lift the stay of proceedings or to order the deposit of moneys in trust in the actual situation of these two suppliers.

3) THE CLAIM OF L'ORÉAL CONCERNING THE DISPLAY UNITS

[96] Turning now to the claim of L'Oréal concerning the display units it provided to the BSF Group in November 2003, this is what the evidence indicates.

[97] Even if the written contract presented by L'Oréal in that month was never signed by the BSF Group, the exchanges of e-mails[35] that were filed in the record nevertheless suggest that the parties had agreed as follows.

[98] L'Oréal accepted to provide to the BSF Group some display units that were to be used by the BSF Group to exhibit the products and facilitate their sales. The parties were to share equally in the cost of creating, constructing and installing these display units but at all times, L'Oréal was to remain the owner. For its share, it was agreed that a first amount of $28,000 would be paid by the BSF Group within 90 days of delivery and another amount of $28,000 would be spent by them as "coop-advertising" during 2003-2004.

[99] L'Oréal considers that this is covered by section 11.3 of the CCAA which indicates in part that:

"11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other **valuable consideration provided after the order is made**; [...]"

(Emphasis added)

[100] The BSF Group replies that the agreement at issue is not per se a contract of lease but rather a sui generis agreement and that section 11.3 does not apply.

[101] Even though this agreement is not a traditional lease, it remains that it shares a lot of the characteristics that one would normally find in a contract of lease (article 1851 C.C.Q.). More specifically, we definitely have here a person, L'Oréal, who provides another, the BSF Group, with the use and enjoyment of display units for a certain period, in

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exchange for payments that are detailed in the e-mails filed. The display units are also not to be kept by the BSF Group but returned to L'Oréal after their use.

[102] This is certainly closer to a traditional lease for use than, for instance, to some sort of financing agreement[36].

[103] With respect to these display units, it is the Court's opinion that we have a situation which is quite analogous to the use of leased property provided after the initial order is made. The BSF Group continues to this day to make use of those display units for the purpose of selling the products of L'Oréal. Similarly to the use of leased premises, these are still being enjoyed and benefited from by the BSF Group in order to help the sale of the products of L'Oréal. It is a continuing benefit that the BSF Group still wants to make use of and the Court fails to see why it should be treated differently than the other situations covered by section 11.3 of the CCAA.

[104] As a result, with respect to these conclusions of the motion of L'Oréal, the Court considers that if it is indeed the intent of the BSF Group to continue to use these display units, it should abide by the terms of the obligations it agreed to. These include the payment of an amount of $28,000 within 90 days of delivery of the display units and an allowance of $28,000 as "coop-advertising" for the period 2003-2004.

[105] Since there has been no indication or evidence suggesting that the BSF Group has yet defaulted on these obligations, the Court will simply issue in this respect a declaration confirming this conclusion.

[106] FOR THESE REASONS, THE COURT:

With respect to L'Oréal Canada inc.:

[107] DISMISSES the motion for the lift of the stay of proceedings and for the deposit of moneys in trust;

[108] DECLARES that with respect to the display units provided by L'Oréal Canada Inc. to Les Ailes de la Mode pursuant to the terms of the e-mails filed as Exhibit R-10, Les Ailes de la Mode must comply with the obligations agreed upon between the parties, namely to:

- Pay an amount of $28,000 to L'Oréal Canada Inc. within 90 days following the delivery of the display units; and
- Provide for an allowance of $28,000 as «coop-advertising» for the period 2003-2004;

[109] WITH COSTS.

With respect to Make Up For Ever S.A.:

[110] DISMISSES the motion for the lift of the stay of proceedings and for the deposit of moneys in trust;

[111] WITH COSTS.

CLÉMENT GASCON, J.S.C.

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Date of hearing: January 29, 2004.

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[1] R.S.C. 1985, c. C-36
[2] See "Requête de L'Oréal Canada inc. pour faire déclarer la suspension des procédures inapplicable ou, subsidiairement, pour ordonner le dépôt en fiducie de sommes et pour exiger le paiement de sommes relatives à l'utilisation de biens" dated January 13, 2004, paragraphs 2 and 3, and Exhibits R-1 to R-4.
[3] See "Liste d'admissions" dated January 29, 2004.
[4] See "Requête de Make Up For Ever S.A. pour faire déclarer la suspension des procédures inapplicable ou, subsidiairement, pour ordonner le dépôt en fiducie de sommes" dated January 19, 2004, paragraphs 2 and 3, and Exhibit R-1.
[5] P.C.I. Chemicals Canada Inc. (Plan d'arrangement de transaction ou d'arrangement relatif à), 2002 CanLII 53210 (QC CS), [2002] R.J.Q. 1093 (C.S.).
[6] Re Olympia & York Development Ltd., [1994] O.J. No. 1335 (Ont. Ct. (Gen. Div.)); Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.).
[7] R.S.C. 1985, c. B-3.
[8] Syndicat national de l'amiante d'Asbestos inc. v. Mine Jeffrey inc., 2003 CanLII 47918 (QC CA), [2003] R.J.Q. 420, par. 30. (C.A.).
[9] Id., par. 31.
[10] Hongkong Bank of Canada v. Chef Ready Foods Ltd. 1990 CanLII 529 (BC CA), (1990), 4 C.B.R. (3d) 311, 315 (B.C. C.A.); see also Meridian Developments Inc. v. Toronto Dominion Bank (1984), 52 C.B.R. (N.S.) 109, 114 (Alta. Q.B).
[11] Re Woodward's Ltd. 1993 CanLII 881 (BC SC), (1993), 100 D.L.R. (4th), 133, 140 (B.C. S.C.).
[12] See, on these issues Re Canadian Airlines Corp. 2000 CanLII 28202 (AB QB), (2000), 19 C.B.R. (4th) 1, 11 (Alta. Q.B.); Re Woodwards reflex, (1993), 17 C.B.R. (3d) 236 (B.C. S.C.); and Quintette Coal Ltd. v. Nippon Steel Corp. reflex, (1990), 2 C.B.R. (3d) 291, 297 (B.C. S.C.).
[13] See Motion for the Extension of the Initial Order dated January 14, 2004, paragraph 17 f).
[14] First Report of the Monitor, January 14, 2004, paragraphs 19 and 20.
[15] Steinberg Inc. c. Colgate-Palmolive Canada Inc. reflex, (1992), 13 C.B.R. (3d) 139, 141 (Que. S.C.).
[16] Steinberg Inc. c. Colgate-Palmolive Canada Inc., id.; Steinberg inc. c. Gillette Canada inc., reflex, [1992] R.J.Q. 1602 (Que. S.C.).
[17] Détaillants Shirmax ltée c. 170974 Canada inc. reflex, (1994), 28 C.B.R. (3d) 177 (Que. S.C.).
[18] Re Henry Birks & Sons Ltd. reflex, (1993), 22 C.B.R. (3d) 235 (Que. S.C.).
[19] See also Re People's Department Stores Ltd. (1992) Inc., (1994), 37 C.B.R. (3d) 28 (Que. S.C.).
[20] [2000] B.C.J. No. 1069 (B.C. S.C.).
[21] Re Woodward's Ltd., supra, note 11.
[22] Re Woodwards Ltd. 1993 CanLII 305 (BC CA), (1993), 105 D.L.R. (4th) 517 (B.C. C.A.).
[23] Re Woodward's Ltd., supra, note 11, p. 141.
[24] Bruce Agra Foods Inc. v. Proposal of Everfresh Beverages Inc. 1996 CanLII 8278 (ON SC), (1996), 45 C.B.R. (3d) 169, 171-173 (Ont. S.C.J.).
[25] Supra, notes 15 and 16.
[26] Supra, note 17.
[27] Supra, note 17.
[28] C.S. Montreal, nº 500-05-005804-925, 1992-04-29, j. Archambault.
[29] J.E. 94-804 (C.A.).
[30] Supra, note 12, p. 7-8.
[31] S.C. Longueuil, nº 505-11-001681-977, 1997-05-16, J. Lemelin, AZ-97026278, p. 5.
[32] See on this issue Jean-Louis BAUDOUIN et Pierre-Gabriel JOBIN, Les obligations, 5e édition, Cowansville, Éditions Yvon Blais, 1998, p. 592-593; Pierre-Gabriel JOBIN, La vente, 2e édition, Cowansville, Éditions Yvon Blais,

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2001, p. 262-264; Denys-Claude LAMONTAGNE, Droit de la vente, Cowansville, Éditions Yvon Blais, 1995, p. 146-147; Place Fleur de Lys c. Tag's Kiosque, 1995 CanLII 5555 (QC CA), [1995] R.J.Q. 1659 (C.A.); Re Packman Packaging Supplies Inc. reflex, (1995), 42 C.B.R. (3d) 143 (C.S.); 166606 Canada inc. c. Bashtanik, J.E. 96-1556 (C.S.).

[33] Exhibit R-5 in support of the Motion for the Extension of the Initial Order dated January 14, 2004.

[34] "Liste d'admissions" dated January 29, 2004.

[35] Exhibit R-10 in support of the motion of L'Oréal.

[36] See on that issue Re Smith Brothers Contracting Ltd. (1998), 53 B.C.L.R. (3d) 265 (S.C.); Re Philip Services Corp. 1999 CanLII 15026 (ON SC), (1999), 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]); Re International Wallcoverings Ltd. reflex, (1999), 28 C.B.R. (4th) 48 (Ont. Gen. Div. [Commercial List]).

Stays, etc. — initial application - Sec 11.02

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application - Sec 11.02(2)

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Alberta-Pacific Terminals Ltd. (Re), 1991 CanLII 1293 (BC SC) - Can Action Still be Forwarded under CCAA

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IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE COMPANY ACT
R.S.B.C. l979, c.59
AND
IN THE MATTER OF THE
BUSINESS CORPORATIONS ACT,
R.S.A. l98l, c. B-l5
AND
IN THE MATTER OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. l985, c. c-36
AND

IN THE MATTER OF:)
) REASONS FOR JUDGMENT

ALBERTA-PACIFIC TERMINALS LTD.)
FRASER SURREY DOCKS LTD.)
PACIFIC TERMINALS LTD.) OF THE HONOURABLE
JOHNSTON MARINE TERMINALS)
LIMITED)
JOHNSTON INTERNATIONAL) MADAM JUSTICE HUDDART
SERVICES (HONG KONG) LTD.)
) (IN CHAMBERS)
)
PETITIONERS)

Ms. M. Copping Hollis Counsel for the Applicants,
Mr. G. Hughes Fraser River Harbour Commission
Mr. R. Holmes & Mr. G. Matei Counsel for the Petitioners
Mr. J. Dixon & Mr. A. Perry Counsel for Her Majesty the Queen
In Right of the Province of Alberta
and the Alberta Treasury Branch
Ms. S. Jermyn (Articled Student) For Rico Equipment,
an unsecured creditor
Heard at Vancouver: April l8 & l9, l99l

This application is about the right of the Fraser River Harbour Commission to be paid monies pursuant to its agreement with Fraser Surrey Docks Ltd. ("FSDL") under which FSDL operates the deep sea common user terminal of the Fraser Port, while all proceedings against FSDL and its associated companies are stayed by orders made under the Companies' Creditors Arrangement Act.

Under the terms of the Operating Agreement made January 1, 1989, FSDL is the Terminal Agent and Wharfinger for the Commission. The Commission administers the Fraser Port under the Harbour Commissions Act. The Johnston Group of companies has operated the terminal for more than 20 years, but since the 1989 agreement and related expansion, it has run into financial difficulties. The petitioners attribute these difficulties to a chemical spill in August, 1989, and consequential claims for damages; a very high debt/equity ratio and the refusal of the Alberta Treasury Branch and Government to convert their debt to equity; a fire on November 14, 1990; and finally, the Commission's threat on November 16, 1990, to terminate the Operating Agreement.

To assist FSDL with the earlier of these difficulties, the Commission had agreed on July 27, 1990, to defer payments due under the Operating Agreement for the months of June to September inclusive, the same to be paid on December 31, 1990. When FSDL defaulted on the regular payment for October due on November 15, 1990, the Commission refused a request for a further deferral, advising that it would consider termination of the Operating Agreement if payment was not made within the seven days of grace allowed under the contract.

FSDL considers that the Commission has the right to terminate the Operating Agreement only upon its insolvency. When FSDL and its related companies admitted they were insolvent and sought the protection available to them under the Companies' Creditors Arrangement Act ("the CCAA") on November 22, 1990, FSDL owed the Commission about $976,000.

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The Commission claims that Johnston Marine Terminals Limited ("JMTL") then owed it $353,000. The total debt of the petitioners to the Alberta government and the Alberta Treasury Branches ("Alberta") was $13 million, some of it secured.

The Operating Agreement is the primary asset of FSDL. Without it and the operating line of credit from the Alberta Treasury Branches the petitioners would be unable to operate the terminal.

The ex parte order Mr. Justice Skipp made on November 22, 1990, stayed all proceedings against the petitioners until May 31, 1991, specifically enjoined the Commission from taking any steps to terminate the Operating Agreement and the option to lease in favour of Pacific Terminals Ltd. ("Pacific") without further order, and ordered that contracts that might give a benefit to any petitioner "be maintained in full force and effect pending further order of this Court".

In December, the petitioners paid $28,544 to the Commission, the amount attributable to the period in November following the CCAA order.

On December 18, Mr. Justice Spencer varied the order to provide for the continued provision by the Alberta Treasury Branches of the "existing $1.25 million operating credit facility" to the petitioners or any of them. Included in that order was a provision that "interest calculated on the daily outstanding principal amount under the Facility is to be paid monthly". The order was made with the consent of the petitioners, Alberta, and the Commission. No similar provision was made with regard to the monthly payments required by the Operating Agreement.

FSDL did not make the payment due on January 15 or any subsequent payments. The payments due exceed $200,000 per month. FSDL claimed that it could not afford to make the payments, that the payments were prohibited under the order, and that, in any event, to make any payment on account of the Operating Agreement would be to favour an equity participant over general creditors.

The Commission interpreted the order and its relationship with FSDL differently. It considered that the order required payments under the Operating Agreement to be continued. The matter came before Mr. Justice Arkell who concluded on March 28:

> The present orders of the court require the Commission to continue and maintain the operating agreement for the benefit of the Petitioners, pending the reorganization plan, or further order of the court. The present court orders neither prohibit nor do they require the continuation of the monthly payments due under the operating agreement.
>
> The Commission is at liberty to apply to the court to vary the present court orders for a right of preference over other creditors and to receive continuing payments under the terms of the operating agreement. Alternatively, the Commission may apply to the Court for leave to commence an action against the Petitioners and sue for damages or ultimately for termination of the operating agreement.

Because he had reached this conclusion accepting the position of the Commission that it was a "creditor" within the meaning of the CCAA, Mr. Justice Arkell did not find it necessary to resolve the dispute as to the nature of the relationship between the petitioners and the Commission.

This application is a sequel to the application before Mr. Justice Arkell. It revisits the issue as to the nature of the relationship between the petitioners and the Commission and it asks this court to direct the payment by the petitioners of the amounts that fall due monthly under the Operating Agreement.

I find that I need consider only the second issue. The authorities cited by both counsel persuade me that the categorization of any commercial relationship will vary with the issue before the court. If and when a determination of the rights and obligations of the parties to the Operating Agreement is required, the court may be called upon to determine the nature of their relationship. If and when the court is called upon to fix the classes of creditors for the purpose of voting on a reorganization plan, the court may be required to determine whether or not the Commission is a "creditor" within the meaning of the CCAA. Until some such occasion arises I can see no reason for saying anything about their relationship.

It may be that the Commission is anxious that the court determine the nature of its relationship with FSDL, JMTL, and Alberta-Pacific Terminals Ltd, before the fixing of the classes of creditors. If so, it did not say so.

There is no doubt that the Commission is concerned at the hint in the petitioners' argument that they may be seeking the court's and the creditors' approval of a reorganization plan that will restructure their "revenue sharing arrangements" with the Commission without the approval of the Commission. A question about the judicial nature of the relationship might arise if the petitioners successfully exclude the Commission from voting as a creditor, then seek to have it bound by any reorganization plan. From the information available to me on this application and from my understanding of the purpose and scheme of the CCAA, I consider such an idea so far-fetched as not to require further comment.

It may be that the Commission considers the nature of the relationship material to the issue as to whether or not it should be paid the monies that have fallen due since November 30 or that will fall due before May 31 or any later termination of the stay. I do not find it to be so because I have not had recourse to the arguments put forward by the petitioners based on joint

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venture, debt or equity contribution, or equitable subordination, in reaching the conclusion that I should not order the petitioners or any of them to pay monies pursuant to the Operating Agreement pending the termination of the stay orders.

I have come to that conclusion having regard to the purpose and scheme of the CCAA, the terms of the Operating Agreement, and the financial circumstances of the petitioners as revealed in the Monitor's Report.

The purpose of the CCAA is to facilitate a compromise between an insolvent corporate debtor and its creditors so that the company is able to continue in business, said Mr. Justice Gibbs in ***Chef Ready Foods Ltd.*** v. ***Hongkong Bank of Canada*** (1990), 51 B.C.L.R. 84 at page 88. No creditor is exempted. But neither is anyone who is not a creditor included within its ambit.

At page 90 of the ***Chef Ready*** case, Mr. Justice Gibbs said of the effect of the CCAA on the property interest acquired by a bank under s. 178 security:

> But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the bank under ss. 178 and 179? It does not detract from the bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not breach the "complete code". All that it does is postpone the exercise of the right to seize and sell. And here the bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise.

From a similar perspective it can be said that all that the orders pursuant to the CCAA do with regard to the Commission's rights under the Operating Agreement is to postpone the exercise of the right to terminate the agreement on insolvency or to sue for payments not made as they fall due. The Commission had already allowed a four month postponement. So the petitioners argue. However, the Commission seeks neither to sue nor to terminate the agreement. It does not wish to prevent FSDL from carrying on business. It recognizes the purpose of the stay of proceedings.

Rather, it says that the orders requiring it to continue to provide its land and facilities without current recompense and without any guarantee of future recompense make it unique among the creditors of the petitioners, unlike the Alberta Treasury Branches, who are to continue the line of credit facility, but who are to receive current interest on the credit advanced under it, and unlike those creditors who are paid for current supply of goods and services. In effect, it says that the monthly payments should be made in the ordinary course of business for the continued use of the land and facilities because if they are not, the Commission's position is eroding relative to other creditors. Its debt is growing each month, not only by accrual of interest, but by an additional $200,000, on average. It is providing the land and facilities from the use of which income is being derived without any compensation from that income. Thus it seeks an order for payment of the monies as they accrue due to "preserve the status quo."

The petitioners say that to accede to the Commission's request to be paid would be to give it a preference over general creditors to which it is not entitled given the terms of the Operating Agreement and particularly the way in which the payments are structured. The Commission disagrees, saying that the Operating Agreement is valid, and enforceable, there being neither an agreement nor an order suspending or prohibiting payments under it and that to require current payments to be made would not be to prefer one creditor over another with regard to debt accumulated before the stay orders.

In ***Chef Ready,*** *supra,* Mr. Justice Gibbs described the court's function on applications such as these at pages 88 and 89 in these words:

> When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

The status quo is not always easy to find. It is difficult to freeze any on-going business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the Prairie Provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

Obviously the Commission is one of the most important of those interests because it holds and administers the public's interest in the land and facilities.

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When I have regard to all of the materials put before me by the Commission, I find no proof of hardship or even of need. For example, I see no suggestion that the Commission is incurring expenses related to the Fraser Surrey Dock that it must pay from other sources of revenue. Its only concern is that its position not be eroded relative to the position of other creditors. If the reorganization is successful it is unlikely the Commission will suffer any loss in the value of its position to which it has not agreed. If the reorganization turns out not to be possible, the Commission's loss because of the stay may be substantial. Or it may not be. The owner of land and facilities is not in the same position as a creditor owed a fixed sum of money, easily valued.

When I have regard to the Monitor's Cash Flow statements I do not find the money to make the payments sought. The original *ex parte* order and the subsequent consent order left to management of the petitioners a considerable area of discretion in the application of its current cash flow. Given the terms of the Operating Agreement, the history of the relationship between the Commission and the petitioners, the nature of the terminal operation, the nature of the line of credit facility, and those cash flow statements, I have decided that it is inappropriate for the court to intervene in management's exercise of that discretion without some reason, perhaps evidence of hardship to the Commission or of erosion of its property value.

I have reached that conclusion despite some considerable reservations about the way in which management has exercised that discretion as revealed in the Monitor's Reports. Those Reports suggest that payments have been made to other creditors from the petitioners' cash flows contrary to this court's orders. I do not consider that I should discuss this matter further in these reasons. I advised counsel at the hearing of this application that such matters should be considered on another occasion on notice to all interested parties. On this hearing only one unsecured creditor appeared. That creditor did not suggest that it had reason to remain after ascertaining the nature of the application and that its presentation would require the disclosure of information contained in the Monitor's Reports, sealed by order of Mr. Justice Spencer. It may be that unsecured creditors will wish to request further information if they receive notice of an application authorizing other payments.

"J. Huddart, J."
Vancouver, B.C.
May 8, 1991

Burden of proof on application - Sec 11.02(3)
(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction - Sec 11.02(4)
(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section. 2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

Stays — directors - Sec 11.03
11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception - Sec 11.03(2)
(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

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Persons deemed to be directors - Sec 11.03(3)
(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.
2005, c. 47, s. 128.

Persons obligated under letter of credit or guarantee - Sec 11.04
11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.
2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association - Sec 11.06
11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the Canadian Payments Act or the by-laws or rules of that Association.
2005, c. 47, s. 128, 2007, c. 36, s. 64.

11.07 [Repealed, 2012, c. 31, s. 420]

Restriction — certain powers, duties and functions - Sec 11.08
11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;
(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the Canada Deposit Insurance Corporation Act; or
(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the Winding-up and Restructuring Act.

2005, c. 47, s. 128.

Stay — Her Majesty - Sec 11.09
11.09 (1) An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the Income Tax Act or any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than
(i) the expiry of the order,

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(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or
(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the Income Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

When order ceases to be in effect - Sec 11.09(2)

(2) The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a

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contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Operation of similar legislation - Sec 11.09(3)

(3) An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the Income Tax Act,

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the Income Tax Act in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the Canada Pension Plan in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 128;
2009, c. 33, s. 28.

Meaning of "regulatory body" - Sec 11.1

11.1 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature

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of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02 - Sec 11.1(2)
(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception- Sec 11.1(3)
(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

> **(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and**
> **(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.**

Declaration — enforcement of a payment - Sec 11.1(4)
(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.
1997, c. 12, s. 124;
2001, c. 9, s. 576;
2005, c. 47, s. 128;
2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing - Sec 11.2
11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors - Sec 11.2(2)
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders - Sec 11.2(3)

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(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered - Sec 11.2(4)
(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;
(b) how the company's business and financial affairs are to be managed during the proceedings;
(c) whether the company's management has the confidence of its major creditors;
(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
(e) the nature and value of the company's property;
(f) whether any creditor would be materially prejudiced as a result of the security or charge; and
(g) the monitor's report referred to in paragraph 23(1)(b), if any.

1997, c. 12, s. 124;
2005, c. 47, s. 128;
2007, c. 36, s. 65.

Algoma Steel Inc. (Re), 2001 CanLII 5433 (ON CA) - Open CCAA Arrangement when Class of Creditors Not Aware of Approved Arrangement

Date:	2001-05-25
Docket:	m27359
Parallel citations:	25 CBR (4th) 194; 147 OAC 291
URL:	http://canlii.ca/t/1cxhg
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DATE: 20010525

DOCKET: M27359

COURT OF APPEAL FOR ONTARIO

RE: **IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 AND THE BUSINESS CORPORATIONS ACT, R.S.O. 1990, c. B.16**

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT WITH RESPECT TO ALGOMA STEEL INC.

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ALGOMA STEEL INC. (Applicant/Responding Party)

BEFORE: **OSBORNE A.C.J.O., DOHERTY AND MACPHERSON JJ.A.**

COUNSEL: **John B. Laskin and David Outerbridge**
for the moving party First Mortgage Noteholders

Michael Barrack, Geoff Hall and Sarit Batner
for the responding party Algoma Steel Inc.

John T. Porter, Alan Merskey and Mario Forte
for the DIP Lenders

Ken Rosenberg, Lily Harmer and Marcus Knapp
for the United Steelworkers of America

James H. Grout
for the Monitor

Andrew Hatnay
for the Superintendent of Financial Services

Michael Weinczok
for the Directors of Algoma Steel Inc.

HEARD: **May 18, 2001**

On appeal from the order of Justice James M. Farley dated April 23, 2001.

E N D O R S E M E N T

[1] The First Mortgage Noteholders ("the Noteholders") seek leave to appeal, pursuant to s. 13 of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("the *CCAA*"), from the order of Farley J. dated April 23, 2001. The Noteholders are a consortium of about a dozen companies and groups which holds first mortgage notes totalling about $550 million issued by the respondent Algoma Steel Inc. ("Algoma").

[2] Farley J.'s order was an initial order made pursuant to s. 11(3) of the *CCAA*, on a motion by Algoma. It was made without notice to the Noteholders. The essence of Farley J.'s order was an authorization to Algoma to obtain additional financing ("the DIP Financing") from its existing bank lenders during the 30 day stay period permitted by s. 11(3) of the *CCAA*. The purpose of the order was to respond, on an urgent and interim basis, to a serious negative cash flow crisis at Algoma. Indeed, without short-term financial assistance designed to serve as a base for restructuring Algoma's current indebtedness, Algoma might well have had to cease operations. The order also gave priorities (which the parties call superpriorities) to the DIP Financing charge and to certain Administration and Directors Charges over the Noteholders' existing security.

[3] In his endorsement, Farley J. said, *inter alia*:

> Algoma qualifies as a corporation with the threshold debt re seeking relief under the CCAA.
>
> . . . . .
>
> The noteholders who are owed in excess of $1/2 billion were not represented today for the very simple reason that none of them were served. The reason for that as I understand it is that there is no set up at the present time of a Creditor's Committee or any equivalent. *I note that there is a comeback clause and I would particularly emphasize that if it is felt appropriate and needed, this clause should be used on a timely basis.*

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> Order to issue as per my fiat.
>
> [Emphasis added.]

[4] The comeback clause in the underlined passage is reflected in paragraph 48 of Farley J.'s order:

> 48.THIS COURT ORDERS that any interested person may apply to this court to vary or rescind this order or seek other relief upon seven (7) days' notice to the Applicant, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

[5] Once the Noteholders became aware of Farley J.'s order, they decided to challenge it. They did so in two ways: by seeking leave to appeal to this court and by initiating a motion to vary before Farley J. The former proceeded before this court, on a preliminary basis, on May 15 and, on the merits, on May 18. The latter was scheduled to be heard by Farley J. on May 23.

[6] The Noteholders seek leave to appeal Farley J.'s order on three bases, which they frame as Proposed Questions for this court:

> **(1)Did the motions judge exceed his jurisdiction in making the initial order by altering existing priorities of and between secured creditors through the granting of superpriorities without the consent of the First Mortgage Noteholders?**
>
> **(2)Did the motions judge exceed his jurisdiction or otherwise err in law by granting these superpriorities without any notice to the First Mortgage Noteholders or to the trustee under the trust indenture?**
>
> **(3)Did the motions judge err in law by failing: (a) to treat the First Mortgage Noteholders in an equitable and even-handed manner relative to the Bank Lenders; and (b) to give due regard to the prejudice suffered by the First Mortgage Noteholders as a result of the initial order?**

[7] In our view, the motion for leave to appeal is premature. Initial orders, made on a without notice basis, are specifically authorized by s. 11(1) of the *CCAA*. Proceedings under the *CCAA* are often urgent, complex and dynamic. The Algoma proceedings fit that description. Farley J. was faced with complex facts and a difficult decision potentially implicating the closure of one of the largest companies in Ontario. Moreover, he had to make his decision in a very timely fashion. In these circumstances, he recognized that his initial order might not be acceptable to all interested parties, including some of Algoma's creditors. That is why he included a comeback clause in his order and specifically invited parties to resort to it in his endorsement.

[8] The fact that the *CCAA* provides that an appeal of an initial order is only available with leave indicates that appeals in *CCAA* proceedings should be limited. An appeal court should be cautious about intervening in the *CCAA* process, especially at an early stage. On this point, we are attracted to the reasoning of MacFarlane J.A. (in chambers) in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. 265 at 272 (B.C.C.A.):

> [T]here may be an arguable case for the petitioners to present to a panel of this court on discrete questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. . . .
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.
>
> . . . In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellant proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

[9] Like MacFarlane J.A., we do not say that leave to appeal should never be granted in the midst of *CCAA* proceedings. However, it is premature to grant such leave at this juncture in the Algoma proceedings. Farley J.'s order was only an initial order brought on an urgent basis to deal with seemingly desperate circumstances. Moreover, the order specifically opened the proceedings to all interested parties and invited dissatisfied parties to bring their concerns to the

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court on a timely basis. The Noteholders availed themselves of this opportunity by initiating a motion to vary which was scheduled to be heard on the very day the initial order expired. In our view, this is precisely how a dynamic *CCAA* proceedings should unfold. Accordingly, it would be unwise to interrupt this normal and desirable process by granting leave to appeal at this juncture. The issues that the Noteholders want to raise can be considered by Farley J., importantly in the context of the entire proceedings with which he is familiar. Moreover, if at a later point in time this court grants leave to appeal, it will then have the benefit of the considered reasons of the motions judge flowing from a complete record and from full argument by all interested parties.

[10] For these reasons, the motion for leave to appeal is dismissed, without prejudice to the right of the Noteholders, or any other interested party, to make a similar motion at a later juncture in the proceedings, and to do so on an expedited basis. Only the United Steelworkers of America requested their costs of the motion. They are entitled to their costs which we would fix at $1000.

"C. A. A. Osborne A.C.J.O."
" D. Doherty J.A."
"J. C. MacPherson J.A."

Assignment of agreements - Sec 11.3
11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions - Sec 11.3(2)
(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;
(b) an eligible financial contract; or
(c) a collective agreement.

Factors to be considered - Sec 11.3(3)
(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;
(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction - Sec 11.3(4)
(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order - Sec 11.3(5)
(5) The applicant is to send a copy of the order to every party to the agreement.
1997, c. 12, s. 124;
2005, c. 47, s. 128;
2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

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Critical supplier - Sec 11.4

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Montreal Trust Co. of Canada Ltd. v. Smoky River Coal Ltd., 2001 ABCA 209 (CanLII) - Charge for Continued Supply

Date:	2001-08-02
Docket:	00-18924; 00-18944; 00-18947; 00-18950; 00-18957; 00-18958; 00-18975
Parallel citations:	299 AR 125; 205 DLR (4th) 94; [2001] 10 WWR 204; 28 CBR (4th) 127; 95 Alta LR (3d) 1
URL:	http://canlii.ca/t/51bx
Citation:	Montreal Trust Co. of Canada Ltd. v. Smoky River Coal Ltd., 2001 ABCA 209 (CanLII), <http://canlii.ca/t/51bx> retrieved on 2013-09-15
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Montreal Trust Company of Canada Ltd. v. Smoky River Coal Limited, 2001 ABCA 209

Date: 20010802
Docket:00-18924, 00-18944, 00-18947,
00-18950, 00-18957, 00-18958, 00-18975

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MADAM JUSTICE FRUMAN
THE HONOURABLE MR. JUSTICE WITTMANN

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF SMOKY RIVER COAL LIMITED
ALLSTATE INSURANCE COMPANY, ALLSTATE LIFE INSURANCE COMPANY, SECURITY LIFE OF DENVER INSURANCE COMPANY, INDIANA INSURANCE COMPANY, PEERLESS INSURANCE COMPANY, PACIFIC LIFE INSURANCE COMPANY, AH (MICHIGAN) LIFE INSURANCE COMPANY, NORTHERN LIFE INSURANCE COMPANY, RELIASTAR LIFE INSURANCE COMPANY, MODERN WOODMEN OF AMERICA, PHOENIX HOME LIFE MUTUAL INSURANCE COMPANY, AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK and PHOENIX AMERICAN LIFE INSURANCE COMPANY

PETITIONERS

BETWEEN:
MONTREAL TRUST COMPANY OF CANADA LTD.

PLAINTIFF

- and -

SMOKY RIVER COAL LIMITED,
COPTON EXCOL LTD. and 378419 ALBERTA LTD.

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DEFENDANTS

BETWEEN:
CANADIAN NATIONAL RAILWAY COMPANY,
MUNICIPAL DISTRICT OF GREENVIEW NO. 16,
FINNING (CANADA) - A DIVISION OF FINNING INTERNATIONAL INC., CONECO EQUIPMENT INC., ATCO ELECTRIC LTD. and
RO-DAR CONTRACTING LTD.

APPELLANTS
(Not named parties to the Queen's Bench Action)

MONTREAL TRUST COMPANY OF CANADA
RESPONDENT (PLAINTIFF)
- and -
PRICEWATERHOUSECOOPERS INC. in its capacity as Interim Receiver of
SMOKY RIVER COAL LIMITED,
HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented by the
DEPARTMENT OF RESOURCE DEVELOPMENT,
NON-UNION EMPLOYEES OF SMOKY RIVER COAL LIMITED and
UNITED STEELWORKERS OF AMERICA LOCAL 7621

RESPONDENTS
(Not named parties to the Queen's Bench Action

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE LOVECCHIO
DATED JULY 31, 2000

REASONS FOR JUDGMENT RESERVED

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For the Respondents

REASONS FOR JUDGMENT RESERVED

THE COURT:
[1] The central issue in this appeal is determining which creditors of Smoky River Coal Ltd. are entitled to participate in a post-petition trade creditors' charge.
FACTS
[2] The facts are set out in detail in the decision of LoVecchio, J.: ***Re Smoky River Coal Limited***, [2000] A.J. No. 925 (Q.B.), online: Q.L. (A.J.). They are briefly recapped here.
[3] Until very recently, Smoky River operated a coal mine located in Grande Cache, Alberta. It had been experiencing financial difficulties since 1998. Effective July 31, 1998, Smoky River obtained the protection of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA") pursuant to an order of Cairns, J. dated August 10, 1998. This order stayed all proceedings against Smoky River and provided for the creation of charges.

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[4] On August 17, 1998, Prowse, J. issued an order creating an express charge and priority over Smoky River's assets in favour of what were termed in the order "post-petition trade creditors" ("PPTC Charge"). Paragraphs 2(c) and (d) of the August 17, 1998 order state (AB 32):

> (c) obligations incurred by Smoky to trade creditors after the date of filing of the Petition ("Post-Petition Trade Creditors") shall be paid in accordance with their terms of credit;
>
> (d) Post-Petition Trade Creditors shall be entitled to the benefit of and are hereby granted a charge ("Post-Petition Trade Creditors' Charge") against, and security interest in, the Property, as security for indebtedness incurred to them [...].

[1] The purpose of the PPTC Charge was to encourage the regular trade creditors of Smoky River to continue to provide essential goods and services to Smoky River during its reorganization period. The order did not define the term "post-petition trade creditor", but called for a special hearing as soon as possible to delineate post-petition trade creditors' entitlement to, and priority in, the PPTC Charge. That hearing was never held.

[5] LoVecchio, J. was appointed the CCAA judge. On June 16, 1999, he capped the amount of the PPTC Charge at $7 million.

[6] On March 17, 2000, the CCAA judge lifted the CCAA stay of proceedings, allowing the Petitioners, the holders of $75 million of secured notes, to accelerate their claims, make a demand for payment, and deliver a notice to Smoky River pursuant to s. 244 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3. The order further stipulated that Smoky River should only operate and make expenditures as required in the ordinary course of business, or to preserve the status quo.

[7] On March 22, 2000, the Petitioners applied to issue a Statement of Claim, and appoint a Receiver/Manager over Smoky River and its subsidiary corporations. They also proposed a "wind-down" of the mining operations, given the large number of employees involved. A plan for the "ramping down" of activities was created to ensure a smooth transition into receivership.

[8] On March 25, 2000, Smoky submitted an "orderly Shutdown Plan" to the Monitor. On March 29, 2000, the CCAA judge limited the payments that could be made by Smoky River. Notwithstanding the provisions of the *Employment Standards Code,* S.A. 1996, c. E-10.3, Smoky River was ordered to pay only outstanding wage claims of employees. The order specified that "the rights of any employee shall not otherwise be prejudiced by this order, nor shall this order be used as a basis for an argument to alter the legal entitlement of employees" (AB 158).

[9] On March 31, 2000, the Petitioners were granted leave to commence proceedings under the *Bankruptcy and Insolvency Act* and the CCAA proceedings were stayed. By a second order on the same date, PricewaterhouseCoopers was appointed the interim receiver of Smoky River. The obligations established throughout the CCAA proceedings were preserved by the following provisions (AB 49):

> 7. The Receiver may without further order of the Court and on notice to the Noteholders make payments:
>
> (a) to employees of Smoky River Coal Limited up to the extent of their statutory priority; [...]
>
> (e) to creditors entitled to the benefit of the CCAA post-petition trade creditors' charge;
>
> provided that the priority of such payments is in accordance with the priorities set out in previous orders of the Court relating to The CCAA proceedings of the Defendant Smoky River Coal Limited, and shall make no other distribution to the Plaintiff or other creditors of any class without first having obtained the leave of this Court.
>
> 19. The Receiver shall be bound by all the charges, priorities and obligations created or approved by this Court in The CCAA proceedings, and the Receiver is directed to:
>
> (a) determine which creditors are entitled to the benefit of the post-petition trade creditors' charge; and
>
> (b) determine what other charges, priorities and obligations need to be maintained;
>
> and if necessary seek the direction of this Court within 45 days hereof. [...]

[10] On May 9, 2000, the Receiver was authorized to send out notices to all creditors claiming refuge under the PPTC Charge, informing them whether or not their claims had been accepted. Creditors were provided with a mechanism for court review of the Receiver's decisions.

[11] On July 4 and 5, 2000, the CCAA judge heard the applications of several creditors, including all the parties to this appeal, appealing the Receiver's determination of their entitlement, or lack of entitlement, to the PPTC Charge.

THE CCAA JUDGE'S DECISION

[12] In his decision of July 31, 2000, *supra*, the CCAA judge set out two requirements for eligibility for the PPTC Charge. The first criteria was that the debt in question was incurred by Smoky River during the CCAA period, between July 31, 1998 and March 31, 2000.

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[13] The second criteria for eligibility was that the debt in question was incurred in connection with the daily operating activities of Smoky River, as opposed to debts that arose from the cessation or termination of services. As stated by the CCAA judge (*supra,* at para. 40):

> The main purpose of the Charge was to encourage the creditors who supply Smoky with goods and services to continue to deal with Smoky during the reorganization period. The critical characteristic of the service provided by the creditors must have been that it was essential to keeping 'the lights of the company on'. Thus, the costs or expenses incurred must be essential to the continued day to day operations of the mine. Penalties or obligations associated with a breach are not expenses associated with continued operations.

We are in substantial agreement with the two eligibility criteria delimited by the CCAA judge.

[14] After setting out these requirements, the CCAA judge applied them to the applications of the various creditors. His decisions are discussed below, in the analysis of the individual appeals.

CREATING CCAA CHARGES

[15] CCAA orders become the roadmap for the proceedings and the litigation which may follow. Orders must therefore be drafted with clarity and precision. The purpose of the CCAA must be kept at the forefront in both drafting and interpreting a CCAA order. The CCAA is remedial legislation. As was stated in ***Re Lehndorff General Partner Ltd.*** reflex, (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div):

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan *[sic]* of compromise or arrangement to be prepared, filed and considered by their creditors and the court.

[16] It is particularly important that the terms and scope of any charge created by an order be clearly defined. Creditors need to know from the outset whether or not they are entitled to benefit in any charge or other priority created by the order. Those extending credit, be it trade credit or otherwise, should not be forced to participate in litigation after the CCAA proceeding to discover whether or not they hold some form of security or are entitled to a super-priority. Similarly, secured creditors of a troubled company need to know from the outset the effect the CCAA process will have on their security. They should not be forced to wait until the end of the proceedings to discover that their security has been whittled away due to a broad judicial interpretation of qualification for super-priority status. A precise CCAA order will ensure commercial practicality by allowing all creditors of the debtor company to properly adjust the terms of their credit.

[17] Terms for which there is no common and easily discernable meaning, such as "post-petition trade creditor", should be defined with as much precision as possible. In this case, the term was not defined in the original order, but was to be delineated in a special hearing to be "scheduled as soon as counsel can secure a special chambers date" to determine "whether or not and on what terms, including priority, if any, Post-Petition Trade Creditors shall be entitled to the benefit of and granted a charge against, and security interest in, the Property, as security for indebtedness incurred to them from and after the date of the Special Hearing" (AB 33-34). The parties charged with scheduling that hearing were Smoky River, the monitor, the Petitioners, the Canadian Imperial Bank of Commerce and Canadian National Railway Company. Their failure to convene the hearing has led to costly litigation and the appeals before us.

[18] Parties in a CCAA proceeding, with the supervision of a CCAA judge, may define a post-petition trade creditors' charge as they see fit. Because they failed to do so in this case, the court must attempt to balance the interests of the parties. Most secured creditors are already protected, as they obtained an order capping the PPTC Charge at $7 million. Creditors who extended credit to Smoky River under the PPTC Charge have no similar protection. However, they are taken to understand the purpose of the CCAA and to expect that the PPTC Charge would be interpreted to accord with the commercial reality that the insolvent business would operate in its ordinary course. Therefore, while we accept the CCAA judge's requirement that to qualify, a debt must have been incurred in connection with the daily operating activities of Smoky River, in the circumstances of this case, we interpret that requirement on commercially reasonable terms.

THE APPEALS

[19] The appeals have been consolidated. The CCAA judge's decisions, grounds of appeal and our conclusions are as follows:

Appeal of Coneco Equipment Inc.

[20] Coneco Equipment Inc. leased heavy equipment to Smoky River during the CCAA period. The CCAA judge decided that Coneco was a post-petition trade creditor, entitled to the benefit of the PPTC Charge for the rental fee.

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Coneco appeals, asking for a declaration that it is also entitled to participate in the PPTC Charge for the cost of repairs to the equipment.

[21] Coneco argues that the provisions of the August 17, 1998 order creating the PPTC Charge must be interpreted in a commercially reasonable manner -- in the manner that an unsecured creditor or business person being asked to provide credit would interpret them. It contends that it was commercially reasonable to assume that repair costs to the equipment leased to Smoky River were part of the terms of credit, and would be included in the PPTC Charge. Conoco bases its argument on the lease agreements, which provided that Smoky River would pay the repair costs.

[22] The application of commercially reasonable terms to Conoco's claim for repairs involves applying a legal test to a particular set of facts. We review on a standard of correctness.

[23] Coneco was clearly a post-petition trade creditor. The covenant to repair the equipment was just as much a term of the lease and a term of credit as Smoky River's obligation to pay rent. The repair costs were not a damage claim, but a clear contractual obligation that arose during the CCAA period. It is not commercially reasonable that Coneco would lease valuable equipment to Smoky River unless Smoky River maintained it in good operating condition. Had there been no obligation to maintain the equipment, the rental rate would have been considerably higher. This interpretation is consistent with commercial reasonableness.

[24] The order states that post-petition trade creditors will be paid in accordance with their terms of credit and will have the benefit of the PPTC Charge. The repair costs were part of Coneco's terms of credit and Coneco is entitled to the benefit of the PPTC Charge. Coneco's appeal is allowed.

Appeal of Finning (Canada)

[25] Finning (Canada) also leased heavy equipment to Smoky River during the CCAA period. The CCAA judge decided that Finning was a post-petition trade creditor, and was entitled to the benefit of the PPTC Charge for rental only. Finning appeals, asking for a declaration that it is also entitled to participate in the PPTC Charge for the costs of the maintenance, repairs, servicing and required change-outs of the leased equipment.

[26] Finning relies on the terms and conditions of its leases with Smoky River, which contained a clear obligation to maintain the equipment in good repair and operating condition. In addition, contemporaneous with the execution of the leases, Finning and Smoky River established a maintenance schedule for the equipment. The schedule outlined the number of operating hours the equipment could be used before maintenance, repairs and change-outs were required, and set out the fees Smoky River agreed to pay Finning for the change-outs.

[27] Finning's appeal is similar to Coneco's, and the same analysis and standard of review apply. The cost of maintenance, repairs, servicing and required change-outs to the equipment were part of Finning's terms of credit and it is entitled to the benefit of the PPTC Charge. Finning's appeal is allowed.

Appeal of the Municipal District of Greenview No. 16

[28] The CCAA judge ruled that property taxes owed to the Municipal District of Greenview No. 16 were not a "traded commodity" and were not entitled to the benefit of the PPTC Charge.

[29] Greenview appeals, asking for a declaration that it is a post-petition trade creditor entitled to participate in the PPTC Charge for all of its 1999 property tax claim and for the pro-rated portion of its 2000 tax claim for the time period in which Smoky River continued to operate under the protection of the CCAA.

[30] Greenview argues that it provided Smoky River with services which were a benefit to Smoky River. It submits that taxes were a necessary obligation incurred by Smoky River in connection with its daily operating activities during the CCAA period, and Greenview is therefore entitled to the benefit of the PPTC Charge.

[31] Trade is defined in *Black's Law Dictionary*, 6th ed., as "the act or the business of buying and selling for money." In fact, Greenview was not selling its services to Smoky River for money. Counsel for Greenview conceded in oral argument that Greenview did not deny and could not have denied Smoky River the services it provided, although Smoky River did not pay its property taxes. Property taxes are not the purchase price for the services provided by Greenview; instead they are the means of generating the revenue to provide those services.

[32] Greenview was not engaged in the act of trading and cannot be a trade creditor. While nothing prevents a government that exchanges goods or services for money from being a trade creditor, in this case the nature of the property tax is determinative.

[33] Greenview was not entitled to the benefit of the PPTC Charge. Its appeal is dismissed.

Appeal of CNR re: Royalty Payments to the Alberta Department of Resource Development

[34] The CCAA judge decided that resource royalties on coal leases payable to the Alberta Department of Resource Development were entitled to the benefit of the PPTC Charge. CNR appeals this decision. It argues that ADRD is not a trade creditor, and that because the royalties in issue are in the nature of a tax, they are not properly considered trade debt.

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[35] Smoky River was required to pay monthly royalties to the ADRD to keep its most fundamental asset, its coal leases, in good standing. Because Smoky River needed its coal leases to continue its coal mine operations, the ADRD provided goods to Smoky River that were essential to "keeping the lights on" during the CCAA period. The royalty payments were not a tax but an exchange of money for goods, which could properly be characterized as a trade debt. The CCAA judge did not err in deciding that the ADRD was entitled to participate in the PPTC Charge. CNR's appeal is dismissed.

Appeal of CNR re: Vacation Pay

[36] The CCAA judge made the receiving order retroactive to April 1, 2000. With the agreement of counsel, he also held that the employees were entitled to the benefit of the PPTC Charge for their vacation pay.

[37] CNR appeals these decisions. It argues that the employment relationship is not one which would give rise to a "trade debt". Employees, therefore are not "trade creditors", and as such cannot participate in the PPTC Charge.

[38] CNR also argues that because the time and date of bankruptcy is established by s. 2.1(a) of the *Bankruptcy and Insolvency Act*, the CCAA judge did not have the discretion to make that date retroactive. As the date of the receiving order was July 31, 2000, this also was the date of bankruptcy. Accordingly, vacation pay would have been paid before the bankruptcy, would have been given super-priority status under s.109(3) of the *Employment Standards Code*, and should not have been included in the PPTC Charge. CNR argues that including vacation pay in the PPTC Charge diluted the payments to *bona fide* trade creditors.

[39] Because the decision to include vacation pay in the PPTC Charge was based on a concession by counsel for all the parties that Smoky River's employees were PPTC creditors for wages and vacation pay accrued during the CCAA period, we will not interfere. However, we offer no opinion whether employees should be characterized as trade creditors or whether wages and vacation pay should be characterized as trade debts. It is also unnecessary for us to decide and we express no opinion whether the CCAA judge erred in making the receiving order retroactive to April 1, 2000. CNR's appeal is dismissed.

Appeal of CNR re: Severance Pay

[40] Severance payments calculated under the *Employment Standards Code* were paid to all Smoky River employees whose employment was terminated before March 29, 2000. Severance payments were suspended under the March 29, 2000 order. However, the order indicated that employees' rights were not affected and that the order could not be used to alter their legal entitlement. The CCAA judge decided that severance obligations for employees terminated between March 29 and March 31, 2000 were entitled to benefit from the PPTC Charge.

[41] CNR appeals this decision. It argues that employees were not trade creditors and that severance pay was not an obligation that was incurred in connection with the daily operating activities of Smoky River, but rather arose from the cessation or termination of services.

[42] In a complex case such as this, a great deal of deference must be given to the CCAA judge. The CCAA judge dealt with more than 100 applications, attempting to balance the rights and equities of many parties. The lack of precision in the initial order of August 17, 1998, and the failure to hold the special hearing to define the scope of the PPTC Charge made this task even more complex.

[43] ***Alberta* v. *Bank of Canada*** 1991 ABCA 215 (CanLII), (1991), 84 D.L.R. (4th) 335 at 337 (C.A.) sets forth the proper standard of review to be taken by an appellate court in these circumstances:

> [The chambers judge] has heard numerous applications and has made many orders and directions with respect to these proceedings. He, better than anyone, has gained insight into the problems relating to this matter and how to attempt to resolve them. At times, no doubt, resolutions to these problems require some innovation. Suffice it to say that we will not lightly interfere with the enormous task undertaken by this chambers judge. We would do so only if clear error is shown.

[44] This court also commented on the appropriate standard in ***Luscar Ltd. et al.* v. *Smoky River Coal Ltd.*** 1999 ABCA 179 (CanLII), (1999), 175 D.L.R. (4th) 703 at 724 (Alta. C.A.):

> The fact that an appeal lies only with leave of an appellate court (s. 13, CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

[45] The CCAA judge, in permitting the severance pay to be included in the PPTC Charge, clarified his March 29, 2000 order which expressly stated that it was not meant to alter the legal entitlements of employees. The CCAA judge interpreted his earlier order to mean that employees were to be treated equally: those terminated after March 29 were not to be denied the severance pay that employees terminated before March 29 had received. By deciding that the March 29, 2000 order did not create two classes of employees, the CCAA judge attempted to balance the equities.

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[46] Based on the unusual circumstances of this case and the standard of review, we dismiss CNR's appeal. In doing so we do not suggest that employees are properly considered trade creditors, or that severance pay is properly included in a PPTC Charge. We offer no opinion on either of these issues.

SUMMARY

[47] The appeals of Coneco and Finning are allowed. The appeals of the Municipal District of Greenview No. 16 and CNR are dismissed. The judgment of the CCAA judge will be varied in accordance with these reasons.

APPEAL HEARD on June 13 & 14, 2001
MEMORANDUM FILED at Calgary, Alberta,
this 2nd day of August, 2001

PICARD J.A.

FRUMAN J.A.

WITTMANN J.A.

Chef Ready Foods Ltd. v. Hongkong Bank of Canada, 1990 CanLII 529 (BC CA) - CCA Ranks over Bank Act s 178 Charge on Accounts Receivable

Date:	1990-10-29
Docket:	CA12944
Parallel citations:	[1991] 2 WWR 136; 4 CBR (3d) 311; 51 BCLR (2d) 84
URL:	http://canlii.ca/t/1d7ws
Citation:	Chef Ready Foods Ltd. v. Hongkong Bank of Canada, 1990 CanLII 529 (BC CA), <http://canlii.ca/t/1d7ws> retrieved on 2013-08-12
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COURT OF APPEAL FOR BRITISH COLUMBIA
NO. CA12944
VANCOUVER REGISTRY
IN THE MATTER OF THE COMPANY ACT)
R.S.B.C. 1979, c. 59)
)
AND)
)
IN THE MATTER OF THE COMPANIES') REASONS FOR JUDGMENT
CREDITORS ARRANGEMENT ACT, R.S.C.)
1985 c. C-36)
)
AND)
)
IN THE MATTER OF:)
)
CHEF READY FOODS LTD. AND)
ISTONIO FOODS LTD.)
) OF THE HONOURABLE
BETWEEN:)

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)
CHEF READY FOODS LTD.)
)
RESPONDENT)
(PETITIONER))
) MR. JUSTICE GIBBS
AND:)
)
HONGKONG BANK OF CANADA)
)
APPELLANT)
(RESPONDENT))

Before: The Honourable Mr. Justice Carrothers
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Gibbs
Counsel for the Appellant: D. I. Knowles and
H. M. Ferris
Counsel for the Respondent: R. H. Sahrmann and
L. D. Goldberg
Date and Place Heard: October 12, 1990
Vancouver, British Columbia
Date and Place Handed Down: October 29, 1990
Vancouver, British Columbia

The sole issue on this appeal is whether a stay order made by a Chambers judge under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, Chap. C-36 is a bar to realization by the Hongkong Bank of Canada (the "Bank") on security granted to it under s. 178 of the Bank Act, R.S.C. 1985, Chap. B-1.

The facts relevant to resolution of the issue are not in dispute. The respondent Chef Ready Foods Ltd. ("Chef Ready") is in the business of manufacturing and wholesaling fresh and frozen pizza products. The appellant Bank provided credit and other banking services to Chef Ready. As part of the security for its indebtedness Chef Ready executed the appropriate documentation and filed the appropriate notices under s. 178 of the Bank Act. Accordingly the Bank holds what is commonly referred to as "section 178 security".

Chef Ready encountered financial difficulties. On August 22, 1990, following upon some fruitless negotiations, the Bank, through its solicitors, demanded payment from Chef Ready. The debt then stood at $365,318.69 with interest accruing thereafter at $150.443 per day. Chef Ready did not pay.

On August 27, 1990 the Bank commenced proceedings upon debenture security which it held and upon guarantees by the principals of Chef Ready. Also on August 27, 1990, the Bank appointed an agent under a general assignment of book debts which it held, with instructions to the agent to realize upon the accounts. In the meantime, on August 23, 1990, so as to qualify under the Companies' Creditors Arrangement Act (the "C.C.A.A."), Chef Ready had granted a trust deed to a trustee and issued an unsecured $50 bond. On August 28, 1990, the day after the Bank commenced its debenture and guarantee proceedings, Chef Ready filed a petition seeking various forms of relief under the C.C.A.A. On the same day Chef Ready filed an application, ex parte, as they were entitled to do under the C.C.A.A., for an order to be issued that day granting the relief claimed in the petition.

The application was heard in Chambers in the afternoon of August 28, 1990 and the following day. The Bank learned "on the grapevine" of the application and appeared on the hearing and was given standing to make submissions. It also filed affidavit evidence which appears to have been taken into account by the Chambers judge. The affidavit evidence had appended to it, inter alia, the s. 178 security documentation. On August 30, 1990 the Chambers judge granted the order and delivered oral reasons at the end of which he said:

"I therefore conclude that the Companies' Creditors Arrangement Act is an overriding statute which gives the court power to stay all proceedings including the right of the bank to collect the accounts receivable."

The reasons refer specifically to the accounts receivable because the Bank was then poised ready to take possession of those accounts and collect the amounts owing. Its right to do so arose under the general assignment of book debts and under clause 4 of the s. 178 security instrument:

" 4. If the Customer shall sell the property or any part thereof, the proceeds of any such sale, including cash, bills, notes, evidence of title, and securities, and the indebtedness of any purchaser in connection with such sales shall be the property of the Bank to be forthwith paid or transferred to the Bank, and until so paid or

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transferred to be held by the Customer on behalf of and in trust for the Bank. Execution by the Customer and acceptance by the Bank of an assignment of book debts shall be deemed to be in furtherance of this declaration and not an acknowledgement by the Bank of any right or title on the part of the Customer to such book debts."

The formal order made by the Chambers judge contains a paragraph which stays realization upon or otherwise dealing with any securing on "the undertaking, property and assets" of Chef Ready:

" THIS COURT FURTHER ORDERS THAT all proceedings taken or that might be taken by any of the Petitioners' creditors or any other person, firm or corporation under the Bankruptcy Act (Canada) or the Winding-Up Act (Canada) shall be stayed until further Order of this Court upon 2 days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until the further Order of this Court upon 2 days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of this Court upon 2 days notice to the Petitioners and subject to such terms as this Court may impose and that the right of any person, firm or corporation to realize upon or otherwise deal with any property, right or security held by that person, firm or corporation on the undertaking, property and assets of the Petitioners be and the same is postponed;"

(Emphasis added.)

The jurisdiction in the court to make such a stay order is found in s. 11 of the C.C.A.A.:

" 11. Notwithstanding anything in the Bankruptcy Act or the Winding-Up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-Up Act or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes."

The question of whether a step, not involving any court or litigation process, taken to realize upon the accounts receivable is a "suit, action or other proceeding...against the company" is not before the court on this appeal. The Bank does not put its case forward on that footing. Its contention is more general in nature. It is that s. 178 security is beyond the reach of the C.C.A.A.; put another way, that whatever the scope of the C.C.A.A. it does not go so far as to impede or qualify, or give jurisdiction to make orders which will impede or qualify, the rights of realization of a holder of s. 178 security. Consistent with that position, by way of relief on the appeal the Bank asks only that the stay order be varied to free up the s. 178 security:

"NATURE OF ORDER SOUGHT

An order that the appeal of the Appellant be allowed and an order be made the Order of the Judge in the Court below be set aside insofar as it restrains the Appellant from exercising its rights under its section 178 security..."

The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. ll.

There is nothing in the C.C.A.A. which exempts any creditors of a debtor company from its provisions. The all-encompassing scope of the Act qua creditors is even underscored by s. 8 which negates any contracting out provisions in a security instrument. And Chef Ready emphasizes the obvious, that if it had been intended that s. 178 security or the holders of s. 178 security be exempt from the C.C.A.A. it would have been a simple matter to say so. But that does not dispose of the issue. There is the Bank Act to consider.

There is nothing in the Loans and Security division of the Bank Act either, where s. 178 is found, which specifically excludes direct or indirect impact by the C.C.A.A. Nonetheless the Bank's position, in essence, is that there is a notional cordon sanitaire around s. 178 and other sections associated with it such that neither the C.C.A.A. or orders made under it can penetrate. In support of its position the Bank relies heavily upon the recent unanimous judgment of the Supreme Court of

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Canada in Bank of Montreal v. Hall, 1990 CanLII 157 (SCC), [1990] 1 S.C.R. 121, and to a lesser degree upon an earlier unanimous Supreme Court of Canada judgment in Flintoft v. Royal Bank of Canada 1964 CanLII 89 (SCC), (1964), S.C.R. 631.

The principal issue in Hall was whether ss. 19 to 36 of the Saskatchewan Limitation of Civil Rights Act applied to a security taken under ss. 178 and 179 of the Bank Act. The court held that it was beyond the competence of the Saskatchewan Legislature "to superadd conditions governing realization over and above those found within the confines of the Bank Act" (p. 154). In the course of arriving at its decision the court considered the property interest acquired by a bank under s. 178 security, the legislative history leading up to the present ss. 178 and 179, the purposes intended to be achieved by the legislation, and the rights of a bank holding s. 178 security. All of those considerations have application to the issue here, and the judgment merits reading in full to appreciate the relevance of all of its parts. However , a few extracts will serve to illustrate the Bank's reliance:

"...a bank taking security under section 178 effectively acquires legal title to the borrower's interest in the present and after-acquired property assigned to it by the borrower" (p. 134)

"...the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers" (p.139)

"...These sections of the Bank Act have become an integral part of bank lending activities and are a means of providing support in many fields of endeavour to an extent which otherwise would not be practical from the standpoint of prudent banking" (p. 139)

"The bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights" (p. 143)

"...the rights, duties and obligations of creditor and debtor are to be determined solely by reference to the Bank Act..." (p. 143)

"The essence of that regime [ss. 178 and 179], it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, and immediate right to seize and sell those goods..." (p. 152)

"...it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the Bank Act itself" (p. 154)

"...Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest" (p. 155).

It is the insular theme which runs through these propositions that the Bank seizes upon to support its claim for immunity. But, it must be asked, in what respect does the preservation of the status quo qua creditors under the C.C.A.A. for a temporary period infringe upon the rights of the Bank under ss. 178 and 179? It does not detract from the Bank's title; it does not distort the mechanics of realization of the security in the sense of the steps to be taken; it does not prevent immediate crystallization of the right to seize and sell; it does not breach the "complete code". All that it does is postpone the exercise of the right to seize and sell. And here the Bank had already allowed at least five days to expire between the accrual of the right and the taking of a step to exercise. It follows from this analysis that there is no apparent bar in the Bank Act to the application of the C.C.A.A. to s. 178 security and the Bank's rights in respect of it.

Having regard to the broad public policy objectives of the C.C.A.A. there is good reason why s. 178 security should not be excluded from its provisions. The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the Bankruptcy Act and the Winding-Up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business. These excerpts from an article by Stanley E. Edwards at p.587 of 1947 Vol. 25 of the Canadian Bar Review, entitled "Reorganizations Under The Companies' Creditors Arrangement Act", explain very well the historic and continuing purposes of the Act:

" It is important in applying the C.C.A.A. to keep in mind its purpose and several fundamental principles which may serve to accomplish that purpose. Its object, as one Ontario judge has stated in a number of cases, is to keep a company going despite insolvency. Hon. C. H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation, through reorganization, to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found

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who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often a sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders." (p. 592)

" There are a number of conditions and tendencies in this country which underline the importance of this statute. There has been over the last few years a rapid and continuous growth of industry, primarily manufacturing. The tendency here, as in other expanding private enterprise countries, is for the average size of corporations to increase faster than the number of them, and for much of the new wealth to be concentrated in the hands of existing companies or their successors. The results of permitting dissolutions of companies without giving the parties an adequate opportunity to reorganize them would therefore likely be more serious in the future than they have been in the past.

Because of the country's relatively small population, however, Canadian industry is and will probably continue to be very much dependent on world markets and consequently vulnerable to world depressions. If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims and their opportunity to share in the fruits of the future activities of the corporations. While we hope that this dismal prospect will not materialize, it is nevertheless a possibility which must be recognized. But whether it does or not, the growing importance of large companies in Canada will make it important that adequate provision be made for reorganization of insolvent corporations." (p. 590)

It is apparent from these excerpts and from the wording of the statute that, in contrast with ss. 178 and 179 of the Bank Act which are preoccupied with the competing rights and duties of the borrower and the lender, the C.C.A.A. serves the interests of a broad constituency of investors, creditors and employees. If a bank's rights in respect of s. 178 security are accorded an unique status which renders those rights immune from the provisions of the C.C.A.A. the protection afforded that constituency for any company which has granted s. 178 security will be largely illusory. It will be illusory because almost inevitably the realization by the bank on its security will destroy the company as a going concern. Here, for example, if the Bank signifies and collects the accounts receivable Chef Ready will be deprived of working capital. Collapse and liquidation must necessarily follow. The lesson will be that where s. 178 security is present a single creditor can frustrate the public policy objectives of the C.C.A.A. There will be two classes of debtor companies: those for whom there are prospects for recovery under the C.C.A.A.; and those for whom the C.C.A.A. may be irrelevant dependant upon the whim of the s. 178 security holder. Given the economic circumstances which prevailed when the C.C.A.A. was enacted it is difficult to imagine that the legislators of the day intended that result to follow.

In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives. See such cases as Meridian Developments Inc. v. T.D. Bank (1984), 52 C.B.R. 109 (Alta.Q.B.); Northland Properties Limited v. Excelsior Life Insurance Company 1989 CanLII 2672 (BC CA), (1989), 34 B.C.L.R. (2d) 122 (B.C.C.A.); Re Feifer and Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Que.C.A.); Wynden Canada Inc. v. Gaz Metropolitaine (1982), 44 C.B.R. 285 (Que.S.C.); and Norcen Energy Resources v. Oakwood Petroleums (1988) 72 C.B.R. 2 (Alta.Q.B.). The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A.

The trend which emerges from this sampling will be given effect here by holding that where the word security occurs in the C.A.A.A. it includes s. 178 security and where the word creditor occurs it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes therefore, the broad scope of the C.C.A.A. prevails.

For these reasons the disposition by the Chambers judge of the application made by Chef Ready will be upheld. It follows that the appeal is dismissed.

"The Honourable Mr. Justice Gibbs"

I AGREE: The Honourable Mr. Justice Carrothers

I AGREE: The Honourable Mr. Justice Cumming

Obligation to supply - Sec 11.4(2)

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

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Nortel Networks Corporation (Re), 2009 CanLII 31600 (ON SC) - Employees as Class and Special Issues as Continuing Supply

Date: 2009-06-18
Docket: 09-CL-7950
Parallel citations: 55 CBR (5th) 68
URL: http://canlii.ca/t/24200
Citation: Nortel Networks Corporation (Re), 2009 CanLII 31600 (ON SC), <http://canlii.ca/t/24200> retrieved on 2013-09-15
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COURT FILE NO.: 09-CL-7950
DATE: 20090618
SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)
RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION
Applicants
APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
BEFORE: MORAWETZ J.
COUNSEL: Barry Wadsworth for the CAW and George Borosh et al
Susan Philpott and Mark Zigler for the Nortel Networks Former Employees
Lyndon Barnes and Adam Hirsh for the Nortel Networks Board of Directors
Alan Mersky and Mario Forte for Nortel Networks et al
Gavin H. Finlayson for the Informal Nortel Noteholders Group
Leanne Williams for Flextronics Inc.
Joseph Pasquariello and Chris Armstrong for Ernst & Young Inc., Monitor
Janice Payne for Recently Severed Canadian Nortel Employees ("RSCNE")
Gail Misra for the CEP Union
J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services
Henry Juroviesky for the Nortel Terminated Canadian Employees Steering Committee
Alex MacFarlane for the Official Unsecured Creditors Committee
M. Starnino for the Superintendent of Financial Services
HEARD: April 21, 2009
E N D O R S E M E N T

[1] The process by which claims of employees, both unionized and non-unionized, have been addressed in restructurings initiated under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "CCAA") has been the subject of debate for a number of years. There is uncertainty and strong divergent views have been expressed. Notwithstanding that employee claims are ultimately addressed in many CCAA proceedings, there are few reported decisions which address a number of the issues being raised in these two motions. This lack of jurisprudence may reflect that the issues, for the most part, have been resolved through negotiation, as opposed to being determined by the court in the CCAA process – which includes motions for directions, the classification of creditors' claims, the holding and conduct of creditors' meetings and motions to sanction a plan of compromise or arrangement.

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[2] In this case, both unionized and non-unionized employee groups have brought motions for directions. This endorsement addresses both motions.

Union Motion

[3] The first motion is brought by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 (the "Union") and by George Borosh on his own behalf and on behalf of all retirees of the Applicants who were formerly represented by the Union.

[4] The Union requests an order directing the Applicants (also referred to as "Nortel") to recommence certain periodic and lump sum payments which the Applicants, or any of them, are obligated to make pursuant to the CAW collective agreement (the "Collective Agreement"). The Union also seeks an order requiring the Applicants to pay to those entitled persons the payments which should have been made to them under the Collective Agreement since January 14, 2009, the date of the CCAA filing and the date of the Initial Order.

[5] The Union seeks continued payment of certain of these benefits including:

(a) retirement allowance payments ("RAP");
(b) voluntary retirement options ("VRO"); and
(c) termination and severance payments.

[6] The amounts claimed by the Union are contractual entitlements under the Collective Agreement, which the Union submits are payable only after an individual's employment with the Applicants has ceased.

[7] There are approximately 101 former Union members with claims to RAP. The current value of these RAP is approximately $2.3 million. There are approximately 180 former unionized retirees who claim similar benefits under other collective agreements.

[8] There are approximately 7 persons who may assert claims to VRO as of the date of the Initial Order. These claims amount to approximately $202,000.

[9] There are also approximately 600 persons who may claim termination and severance pay amounts. Five of those persons are former union members.

Former Employee Motion

[10] The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are required to be paid to affected Former Employees in accordance with the *Employment Standards Act*, *2000* S.O. 2000 c.41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including the Transitional Retirement Allowance ("TRA") and any pension benefit payments Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately $18 million.

[11] The TRA and the RAP are both unregistered benefits that run concurrently with other pension entitlements and operate as time-limited supplements.

[12] In many respects, the motion of the Former Employees is not dissimilar to the CAW motion, such that the motion of the Former Employees can almost be described as a "Me too motion".

Background

[13] On January 14, 2009, the Applicants were granted protection under the CCAA, pursuant to the Initial Order.

[14] Upon commencement of the CCAA proceedings, the Applicants ceased making payments of amounts that constituted or would constitute unsecured claims against the Applicants. Included were payments for termination and severance, as well as amounts under various retirement and retirement transitioning programs.

[15] The Initial Order provides:

(a) that Nortel is entitled but not required to pay, among other things, outstanding and future wages, salaries, vacation pay, employee benefits and pension plan payments;
(b) that Nortel is entitled to terminate the employment of or lay off any of its employees and deal with the consequences under a future plan of arrangement;

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(c) that Nortel is entitled to vacate, abandon or quit the whole but not part of any lease agreement and repudiate agreements relating to leased properties (paragraph 11);
(d) for a stay of proceedings against Nortel;
(e) for a suspension of rights and remedies vis-à-vis Nortel;
(f) that during the stay period no person shall discontinue, repudiate, cease to perform any contract, agreement held by the company (paragraph 16);
(g) that those having agreements with Nortel for the supply of goods and/or services are restrained from, among other things, discontinuing, altering or terminating the supply of such goods or services. The proviso is that the goods or services supplied are to be paid for by Nortel in accordance with the normal payment practices.

Position of Union

[16] The position of the CAW is that the Applicants' obligations to make the payments is to the CAW pursuant to the Collective Agreement. The obligation is not to the individual beneficiaries.

[17] The Union also submits that the difference between the moving parties is that RAP, VRO and other payments are made pursuant to the Collective Agreement as between the Union and the Applicants and not as an outstanding debt payable to former employees.

[18] The Union further submits that the Applicants are obligated to maintain the full measure of compensation under the Collective Agreement in exchange for the provision of services provided by the Union's members subsequent to the issuance of the Initial Order. As such, the failure to abide by the terms of the Collective Agreement, the Union submits, runs directly contrary to Section 11.3 of the CCAA as compensation paid to employees under a collective agreement can reasonably be interpreted as being payment for services within the meaning of this section.

[19] Section 11.3 of the CCAA provides:

> No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
> (b) requiring the further advance of money or credit.

[20] In order to fit within Section 11.3, services have to be provided after the date of the Initial Order.

[21] The Union submits that persons owed severance pay are post-petition trade creditors in a bankruptcy, albeit in relation to specific circumstances. Thus, by analogy, persons owed severance pay are post-petition trade creditors in a CCAA proceeding. The Union relies on *Smokey River Coal Ltd. (Re)* 2001 ABCA 209 (CanLII), 2001 ABCA 209 to support its proposition.

[22] The Union further submits that when interpreting "compensation" for services performed under the Collective Agreement, it must include all of the monetary aspects of the Collective Agreement and not those specifically made to those actively employed on any particular given day.

[23] The Union takes the position that Section 11.3 of the CCAA specifically contemplates that a supplier is entitled to payment for post-filing goods and services provided, and would undoubtedly refuse to continue supply in the event of receiving only partial payment. However, the Union contends that it does not have the ability to cease providing services due to the *Labour Relations Act, 1995*, S.O. 1995, c. 1. As such, the only alternative open to the Union is to seek an order to recommence the payments halted by the Initial Order.

[24] The Union contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement it will abide by. By failing to abide by the terms of the Collective Agreement, the Union contends that the Applicants have acted as if the contract has been amended to the extent that it is no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

[25] The Union submits that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of the contract between parties and as the court cannot amend the terms of the Collective Agreement, the employer should not be allowed to act as though it had done so.

[26] The Union submits that no other supplier of services would countenance, and the court does not have the jurisdiction to authorize, the recipient party to a contract unilaterally determining which provisions of the agreement it will or will not abide by while the contract is in operation.

[27] The Union concludes that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and the court should direct the recommencement and repayment of those benefits that arise out of the Collective Agreement and which were suspended subsequently to the filing of the CCAA application on January 14, 2009.

Position of the Former Employees

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[28] Counsel to the Former Employees submits that the court has the discretion pursuant to Section 11 of the CCAA to order Nortel to recommence periodic and lump-sum payments to Former Employees in accordance with Nortel's statutory and contractual obligations. Further, the RAP payments which the Union seeks to enforce are not meaningfully different from those RAP benefits payable to other unionized retirees who belong to other unions nor from the TRA payable to non-unionized former employees. Accordingly, counsel submits that it would be inequitable to restore payments to one group of retirees and not others. Hence, the reference to the "Me too motion".

[29] Counsel further submits that all employers and employees are bound by the minimum standards in the ESA and other applicable provincial employment legislation. Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.

[30] Counsel submits that each province has minimum standards employment legislation and regulations which govern employment relationships at the provincial level and that provincial laws such as the ESA continue to apply during CCAA proceedings.

[31] Further, the Supreme Court of Canada has held that provincial laws in federally-regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered: See *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60.

[32] In this case, counsel further submits that there is no conflict between the provisions of the ESA and the CCAA and that paramountcy is not triggered and it follows that the ESA and other applicable employment legislation continues to apply during the Applicants' CCAA proceedings. As a result counsel submits that the Applicants are required to make payment to Former Employees for monies owing pursuant to the minimum employment standards as outlined in the ESA and other applicable provincial legislation.

Position of the Applicants

[33] Counsel to the Applicants sets out the central purpose of the CCAA as being: "to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business". (*Pacific National Lease Holding Corp. (Re)*, (1992) B.C.J. No. 3070, aff'd by 1992, 15 C.B.R. (3d) 265), and that the stay is the primary procedural instrument used to achieve the purpose of the CCAA:

> ...if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the court under Section 11 (*Pacific National Lease Holding Corp. (Re), supra*).

[34] The Applicants go on to submit that the powers vested in the court under Section 11 to achieve these goals of the CCAA include:

(a) the ability to stay past debts; and

(b) the ability to require the continuance of present obligations to the debtor.

[35] The corresponding protection extended to persons doing business with the debtor is that such persons (including employees) are not required to extend credit to the debtor corporation in the course of the CCAA proceedings. The protection afforded by Section 11.3 extends only to services provided after the Initial Order. Post-filing payments are only made for the purpose of ensuring the continued supply of services and that obligations in connection with past services are stayed. (See *Mirant Canada Energy Marketing Ltd. (Re)* (2004), A.J. No. 331).

[36] Furthermore, counsel to the Applicants submits that contractual obligations respecting post employment are obligations in respect of past services and are accordingly stayed.

[37] Counsel to the Applicants also relies on the following statement from *Mirant, supra*, at paragraph 28:

> Thus, for me to find the decision of the Court of Appeal in Smokey River Coal analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only is his salary which he has been paid falls within that definition.

[38] Counsel to the Applicants states that post-employment benefits have been consistently stayed under the CCAA and that post-employment benefits are properly regarded as pre-filing debts, which receive the same treatment as other unsecured creditors. The Applicants rely on *Syndicat nationale de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.* (2003) Q.J. No. 264 (C.A.) ("*Jeffrey Mine*") for the proposition that "the fact that these benefits are provided for in the collective agreement changes nothing".

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[39] Counsel to the Applicants submits that the Union seeks an order directing the Applicants to make payment of various post-employment benefits to former Nortel employees and that the Former Employees claim entitlement to similar treatment for all post-employment benefits, under the Collective Agreement or otherwise.

[40] The Applicants take the position the Union's continuing collective representation role does not clothe unpaid benefits with any higher status, relying on the following from *Jeffrey Mine* at paras. 57 – 58:

> Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.
>
> The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

[41] In addition, the Applicants point to the following statement of the Quebec Court of Appeal in *Syndicat des employées et employés de CFAP-TV (TQS-Quebec), section locale 3946 du Syndicat canadien de la function publique c. TQS inc.*, 2008 QCCA 1429 (CanLII), 2008 QCCA 1429 at paras. 26-27:

> [Unofficial translation] Employees' rights are defined by the collective agreement that governs them and by certain legislative provisions. However, the resulting claims are just as much [at] risk as those of other creditors, in this case suppliers whose livelihood is also threatened by the financial precariousness of their debtor.
>
> The arguments of counsel for the Applicants are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

[42] Collectively, RAP payment and TRA payments entail obligations of over $22 million. Counsel to the Applicants submits that there is no basis in principle to treat them differently. They are all stayed and there is no basis to treat any of these two unsecured obligations differently. The Applicants are attempting to restructure for the final benefit of all stakeholders and counsel submits that its collective resources must be used for such purposes.

Report of the Monitor

[43] In its Seventh Report, the Monitor notes that at the time of the Initial Order, the Applicants employed approximately 6,000 employees and had approximately 11,700 retirees or their survivors receiving pension and/or benefits from retirement plans sponsored by the Applicants.

[44] The Monitor goes on to report that the Applicants have continued to honour substantially all of the obligations to active employees. The Applicants have continued to make current service and special funding payments to their registered pension plans. All the health and welfare benefits for both active employees and retirees have been continued to be paid since the commencement of the CCAA proceedings.

[45] The Monitor further reports that at the filing date, payments to former employees for termination and severance as well as the provisions of the health and dental benefits ceased. In addition, non-registered and unfunded retirement plan payments ceased.

[46] More importantly, the Monitor reports that, as noted in previous Monitor's Reports, the Applicants' financial position is under pressure.

Discussion and Analysis

[47] The acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. (See *Pacific National Lease Holding Corp. (Re),* (1992) B.C.J. No. 3070, aff'd by 1992 CanLII 427 (BC CA), (1992), 15 C.B.R. (3d) 265, at para. 18 citing *Chef Ready Foods Ltd.* v. *Hongkong Bank of Canada* 1990 CanLII 529 (BC CA), (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315). The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.

[48] The powers vested in the court under Section 11 of the CCAA to achieve these goals include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. (*Woodwards Limited (Re)*, reflex, (1993), 17 C.B.R. (3d) 236 (S.C.).

[49] The Applicants acknowledged that they were insolvent in affidavit material filed on the Initial Hearing. This position was accepted and is referenced in my endorsement of January 14, 2009. The Applicants are in the process of restructuring but no plan of compromise or arrangement has yet to be put forward.

[50] The Monitor has reported that the Applicants are under financial pressure. Previous reports filed by the Monitor have provided considerable detail as to how the Applicants carry on operations and have provided specific information as to the interdependent relationship between Nortel entities in Canada, the United States, Europe, the Middle East and Asia.

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[51] In my view, in considering the impact of these motions, it is both necessary and appropriate to take into account the overall financial position of the Applicants. There are several reasons for doing so:

(a) The Applicants are not in a position to honour their obligations to all creditors.

(b) The Applicants are in default of contractual obligations to a number of creditors, including with respect to significant bond issues. The obligations owed to bondholders are unsecured.

(c) The Applicants are in default of certain obligations under the Collective Agreements.

(d) The Applicants are in default of certain obligations owed to the Former Employees.

[52] It is also necessary to take into account that these motions have been brought prior to any determination of any creditor classifications. No claims procedure has been proposed. No meeting of creditors has been called and no plan of arrangement has been presented to the creditors for their consideration.

[53] There is no doubt that the views of the Union and the Former Employees differ from that of the Applicants. The Union insists that the Applicants honour the Collective Agreement. The Former Employees want treatment that is consistent with that being provided to the Union. The record also establishes that the financial predicament faced by retirees and Former Employees is, in many cases, serious. The record references examples where individuals are largely dependent upon the employee benefits that, until recently, they were receiving.

[54] However, the Applicants contend that since all of the employee obligations are unsecured it is improper to prefer retirees and the Former Employees over the other unsecured creditors of the Applicants and furthermore, the financial pressure facing the Applicants precludes them from paying all of these outstanding obligations.

[55] Counsel to the Union contends that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and further that the court does not have the jurisdiction to authorize a party, in this case the Applicants, to unilaterally determine which provisions of the Collective Agreement they will abide by while the contract is in operation. Counsel further contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement they will abide by and that by failing to abide by the terms of the Collective Agreement, the Applicants acted as if the Collective Agreement between themselves and the Union has been amended to the extent that the Applicants are no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

[56] The Union specifically contends that the court has no jurisdiction to alter the terms of the Collective Agreement.

[57] In addressing these points, it is necessary to keep in mind that these CCAA proceedings are at a relatively early stage. It also must be kept in mind that the economic circumstances at Nortel are such that it cannot be considered to be carrying on "business as usual". As a result of the Applicants' insolvency, difficult choices will have to be made. These choices have to be made by all stakeholders.

[58] The Applicants have breached the Collective Agreement and, as a consequence, the Union has certain claims.

[59] However, the Applicants have also breached contractual agreements they have with Former Employees and other parties. These parties will also have claims as against the Applicants.

[60] An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.

[61] In addition, there is nothing on the record which addresses the issue of how the claims of various parties will be treated in any plan of arrangement, nor is there any indication as to how the creditors will be classified. These issues are not before the court at this time.

[62] What is before the court is whether the Applicants should be directed to recommence certain periodic and lump sum payments that they are obligated to make under the Collective Agreement as well as similar or equivalent payments to Former Employees.

[63] It is necessary to consider the meaning of Section 11.3 and, in particular, whether the Section should be interpreted in the manner suggested by the Union.

[64] Counsel to the Union submits that the ordinary meaning of "services" in section 11.3 includes work performed by employees subject to a collective agreement. Further, even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation, and relevant legal norms. Counsel submits that the courts must consider the entire context. As a result, when interpreting "compensation" for services performed under a collective agreement, counsel to the Union submits it must include all of the monetary aspects of the agreement and not those made specifically to those actively employed on any particular given day.

[65] No cases were cited in support of this interpretation.

[66] I am unable to agree with the Union's argument. In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 483-485.) Section 11.3 applies to services provided after the date of the Initial Order. The

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ordinary meaning of "services" must be considered in the context of the phrase "services,...provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

[67] The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[68] The interpretation urged by counsel to the Union with respect to this section is not warranted. In my view, section 11.3 does not require the Applicants to make payment, at this time, of the outstanding obligations under the Collective Agreement.

[69] The Union also raised the issue as to whether the court has the jurisdiction to order a stay of the outstanding obligations under Section 11 of the CCAA.

[70] The Union takes the position that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of a contract between parties. The Union relies on *Bilodeau et al v. McLean*, [1924] 3 D.L.R. 410 (Man. C.A.); *Desener v. Myles,* [1963] S. J. No. 31 (Q.B.); *Hiesinger v. Bonice* [1984] A. J. No. 281; *Werchola v. KC5 Amusement Holdings Ltd.* 2002 SKQB 339 (CanLII), 2002 SKQB 339 to support its position.

[71] The Union extends this argument and submits that as the court cannot amend the terms of a collective agreement, the employer should not be allowed to act as though it had been.

[72] As a general rule, counsel to the Union submits, there is in place a comprehensive regime for the regulation of labour relations with specialized labour-relations tribunals having exclusive jurisdiction to deal with legal and factual matters arising under labour legislation and no court should restrain any tribunal from proceeding to deal with such matters.

[73] However, as is clear from the context, these cases referenced at [70] are dealing with the ordinary situation in which there is no issue of insolvency. In this case, we are dealing with a group of companies which are insolvent and which have been accorded the protection of the CCAA. In my view, this insolvency context is an important distinguishing factor. The insolvency context requires that the stay provisions provided in the CCAA and the Initial Order must be given meaningful interpretation.

[74] There is authority for the proposition that, when exercising their authority under insolvency legislation, the courts may make, at the initial stage of a CCAA proceeding, orders regarding matters, but for the insolvent condition of the employer, would be dealt with pursuant to provincial labour legislation, and in most circumstances, by labour tribunals. In *Re: Pacific National Lease Holding Corp*. 1992 CanLII 427 (BC CA), (1992) 15 C.B.R. (3d) 265 (B.C.C.A.), the issue involved the question whether a CCAA debtor company had to make statutory severance payments as was mandatory under the provincial employment standards legislation. MacFarlane J.A. stated at pp. 271-2:

> It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.
>
> ...
>
> This case is not so much about the rights of employees as creditors, but the right of the court under the CCAA to serve not only the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd., supra*. Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

[75] The *Jeffrey Mine* decision is also relevant. In my view, the *Jeffrey Mine* case does not appear to support the argument that the Collective Agreement is to be treated as being completely unaffected by CCAA proceedings. It seems

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to me that it is contemplated that rights under a collective agreement may be suspended during the CCAA proceedings. At paragraphs 60 – 62, the court said under the heading Recapitulation (in translation):

> The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements). Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.
>
> Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).
>
> Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

[76] The issue of severance pay benefits was also referenced in *Communications, Energy, Paperworks, Local 721G v. Printwest Communications Ltd.* 2005 SKQB 331 (CanLII), 2005 SKQB 331 at paras. 11 and 15. The application of the Union was rejected:

> ...The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.
>
> ...
>
> If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise – and thereby be paid in full – such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

[77] At the commencement of an insolvency process, the situation is oftentimes fluid. An insolvent debtor is faced with many uncertainties. The statute is aimed at facilitating a plan of compromise or arrangement. This may require adjustments to the operations in a number of areas, one of which may be a downsizing of operations which may involve a reduction in the workforce. These adjustments may be painful but at the same time may be unavoidable. The alternative could very well be a bankruptcy which would leave former employees, both unionized and non-unionized, in the position of having unsecured claims against a bankrupt debtor. Depending on the status of secured claims, these unsecured claims may, subject to benefits arising from the recently enacted *Wage Earner Protection Program Act*, be worth next to nothing.

[78] In the days ahead, the Applicants, former employees, both unionized and non-unionized may very well have arguments to make on issues involving claims processes (including the ability of the Applicants to compromise claims), classification, meeting of creditors and plan sanction. Nothing in this endorsement is intended to restrict the rights of any party to raise these issues.

[79] The reorganization process under the CCAA can be both long and painful. Ultimately, however, for a plan to be sanctioned by the court, the application must meet the following three tests:

(i) there has to be strict compliance with all statutory requirements and adherence to previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA;

(iii) the plan is fair and reasonable. *Re: Sammi Atlas Inc.* 1998 CanLII 14900 (ON SC), (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.)

[80] At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

[81] It follows that the motion of the Union is dismissed.

[82] The Applicants also raised the issue that the Union consistently requested the right to bargain on behalf of retirees who were once part of the Union and that the concession had not been granted. Consequently, the retirees' substantive rights are not part of the bargain between the unionized employees and the employer. Counsel to the Applicants

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submitted that the union may collectively alter the existing rights of any employee but it cannot negatively do so with respect to retirees' rights.

[83] The Union countered that the rights gained by a member of the bargaining unit vest upon retirement, despite the fact that a collective agreement expires, and are enforceable through the grievance procedure.

[84] Both parties cited *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)* 1993 CanLII 144 (SCC), [1993] 2 S.C.R. 230 in support of their respective positions.

[85] In view of the fact that this motion has been dismissed for other reasons, it is not necessary for me to determine this specific issue arising out of the *Dayco* decision.

[86] The motion of the Former Employees was characterized, as noted above, as a "Me too motion". It was based on the premise that, if the Union's motion was successful, it would only be equitable if the Former Employees also received benefits. The Former Employees do not have the benefit of any enhanced argument based on the Collective Agreement. Rather, the argument of the Former Employees is based on the position that the Applicants cannot contract out of the ESA or any other provincial equivalent. In my view, this is not a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. In my view, the analysis is not dissimilar from the Collective Agreement scenario. There is an acknowledgment of the applicability of the ESA, but during the stay period, the Former Employees cannot enforce the payment obligation. In the result, it follows that the motion of the Former Employees is also dismissed.

[87] However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

[88] In recognition of the circumstances that face certain retirees and Former Employees, the Monitor is directed to review the current financial circumstances of the Applicants and report back as to whether it is feasible to establish a process by which certain creditors, upon demonstrating hardship, could qualify for an unspecified partial distribution in advance of a general distribution to creditors. I would ask that the Monitor consider and report back to this court on this issue within 30 days.

[89] This decision may very well have an incidental effect on the Collective Agreement and the provisions of the ESA, but it is one which arises from the stay. It does not, in my view, result from a repudiation of the Collective Agreement or a contracting out of the ESA. The stay which is being recognized is, in my view, necessary in the circumstances. To hold otherwise, would have the effect of frustrating the objectives of the CCAA to the detriment of all stakeholders.

MORAWETZ J.

DATE: June 18, 2009

Security or charge in favour of critical supplier - Sec 11.4(3)

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority - Sec 11.4(4)

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

1997, c. 12, s. 124;
2000, c. 30, s. 156;
2001, c. 34, s. 33(E);
2005, c. 47, s. 128;
2007, c. 36, s. 65.

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Removal of directors - Sec 11.5
11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy - Sec 11.5(2)
(2) The court may, by order, fill any vacancy created under subsection (1).
1997, c. 12, s. 124;
2005, c. 47, s. 128.

Security or charge relating to director's indemnification - Sec 11.51
11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority - Sec 11.51(2)
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance - Sec 11.51(3)
(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault - Sec 11.51(4)
(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
2005, c. 47, s. 128;
2007, c. 36, s. 66.

Court may order security or charge to cover certain costs - Sec 11.52
11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

> **(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;**
> **(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and**

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(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority - Sec 11.52(2)
(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
2005, c. 47, s. 128;
2007, c. 36, s. 66.

Bankruptcy and Insolvency Act matters - Sec 11.6
11.6 Notwithstanding the Bankruptcy and Insolvency Act,

(a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the Bankruptcy and Insolvency Act, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the Bankruptcy and Insolvency Act.

1997, c. 12, s. 124.

Court to appoint monitor - Sec 11.7
11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act.

Restrictions on who may be monitor - Sec 11.7(2)
(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(b) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the Civil Code of Quebec that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor - Sec 11.7(3)

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(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act, to monitor the business and financial affairs of the company.
1997, c. 12, s. 124;
2005, c. 47, s. 129.

No personal liability in respect of matters before appointment - Sec 11.8
11.8 (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

> **(a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and**
> **(b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.**

Status of liability - Sec 11.8(2)
(2) A liability referred to in subsection (1) shall not rank as costs of administration.

Liability of other successor employers - Sec 11.8(2.1)
(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Liability in respect of environmental matters - Sec 11.8(3)
(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

> **(a) before the monitor's appointment; or**
> **(b) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.**

Reports, etc., still required - Sec 11.8(4)
(4) Nothing in subsection (3) exempts a monitor from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders - Sec 11.8(5)
(5) Notwithstanding anything in any federal or provincial law but subject to subsection (3), where an order is made which has the effect of requiring a monitor to remedy any environmental condition or environmental damage affecting property involved in a proceeding under this Act, the monitor is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

> **(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed or during the period of the stay referred to in paragraph (b), the monitor**
> > **(i) complies with the order, or**

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(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a) or within ten days after the order is made or within ten days after the appointment of the monitor, if the order is in effect when the monitor is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the monitor to contest the order, or

(ii) the court having jurisdiction under this Act for the purposes of assessing the economic viability of complying with the order; or

(c) if the monitor had, before the order was made, abandoned or renounced any interest in any real property affected by the condition or damage.

Stay may be granted - Sec 11.8(6)

(6) The court may grant a stay of the order referred to in subsection (5) on such notice and for such period as the court deems necessary for the purpose of enabling the monitor to assess the economic viability of complying with the order.

Costs for remedying not costs of administration - Sec 11.8(7)

(7) Where the monitor has abandoned or renounced any interest in real property affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims - Sec 11.8(8)

(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remedying any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge

(a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and

(b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs - Sec 11.8(9)

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

1997, c. 12, s. 124;

2007, c. 36, s. 67.

Fixing deadlines - Sec 12

12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

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R.S., 1985, c. C-36, s. 12;
1992, c. 27, s. 90;
1996, c. 6, s. 167;
2004, c. 25, s. 195;
2005, c. 47, s. 130;
2007, c. 36, s. 68.

Leave to appeal - Sec 13
13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
R.S., 1985, c. C-36, s. 13;
2002, c. 7, s. 134.

Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149 (CanLII) - Issues to Consider in Appealing CCAA Order

Date:	2000-05-29
Docket:	00-18816
Parallel citations:	261 AR 120; 19 CBR (4th) 33; 80 Alta LR (3d) 213
URL:	http://canlii.ca/t/5rvf
Citation:	Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149 (CanLII), <http://canlii.ca/t/5rvf> retrieved on 2013-08-24
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Reflex Record	Related decisions, legislation cited and decisions cited

Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149

Date: 20000529
Docket: 00-18816

IN THE COURT OF APPEAL OF ALBERTA

THE HONOURABLE MR. JUSTICE WITTMANN IN CHAMBERS

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED;
AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT (ALBERTA) S.A. 1981, c.B-15., AS AMENDED, Section 185
AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION and CANADIAN AIRLINES INTERNATIONAL LTD.
BETWEEN:

RESURGENCE ASSET MANAGEMENT LLC

Applicant

- and -

CANADIAN AIRLINES CORPORATION
and CANADIAN AIRLINES INTERNATIONAL LTD.

Respondents

[Note: An erratum was filed on June 5, 2000; the corrections have been made to the text and the erratum is appended to this judgment.]

APPLICATION FOR LEAVE TO APPEAL THE ORDER
OF THE HONOURABLE MADAM JUSTICE M. S. PAPERNY

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DATED THE 12th DAY OF MAY, 2000

MEMORANDUM OF DECISION

COUNSEL:
D. Haigh, Q.C.
D. Nishimura
For the Applicant
A. L.Friend, Q.C.
H. M. Kay
For the Respondents
S. Dunphy (for Air Canada)
A. J. McConnell (for Bank of Nova Scotia Trust Company of New York, Montreal Trust Co. of Canada)
P. T. McCarthy, Q.C.(for Price Waterhouse Coopers)

MEMORANDUM OF DECISION OF THE
HONOURABLE MR. JUSTICE WITTMANN

INTRODUCTION

[1] This is an application for leave to appeal the decision of Paperny, J. made on May 12, 2000, pursuant to the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, as amended (***CCAA***). The applicant, Resurgence Asset Management LLC (Resurgence), is an unsecured creditor by virtue of its holding 58.2 per cent of U.S. $100,000,000.00 unsecured notes issued by Canadian Airlines Corporation (CAC)

[2] CAC and Canadian Airlines International Ltd. (CAIL) (collectively Canadian) commenced proceedings under the ***CCAA*** on March 24, 2000.

[3] A proposed Plan of Compromise and Arrangement (the Plan) has been filed in this matter regarding CAC and CAIL, pursuant to the CCAA.

[4] The decision of Paperny, J. May 12, 2000 (the Decision) ordered, among other things, that the classification of creditors not be fragmented to exclude Air Canada as a separate class from Resurgence in terms of the unsecured creditors; that Air Canada should be entitled to vote on the Plan pursuant to s. 6 of the ***CCAA*** at the creditors' meeting to be held May 26, 2000; that there be no separation of unsecured creditors of CAC from unsecured creditors of CAIL for voting purposes; and that votes in respect of claims assigned to Air Canada, be recorded and tabulated separately, for the purpose of consideration in the application for court approval of the Plan (the Fairness Hearing).

LEAVE TO APPEAL UNDER THE *CCAA*

[5] The section of the ***CCAA*** governing appeals to this Court is as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[6] The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse District* reflex, (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.); *Luscar Ltd. v. Smoky River Coal Ltd.*, [1999] A.J. No. 185 at para. 22 (C.A.); *Re Blue Range Resource Corporation*, [1999] A.J. No. 975; *Re Blue Range Resource Corporation*, [2000] A.J. No. 4;*Re Blue Range Resource Corporation*, [2000] A.J. No. 31.

[7] Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) at 396 (B.C.C.A.), and were adopted in *Med Finance Company S.A. v. Bank of Montreal* reflex, (1993), 22 C.B.R. (3d) 279 (B.C.C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p.397:

> **(1) whether the point on appeal is of significance to the practice;**
> **(2) whether the point raised is of significance to the action itself;**

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(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

FACTS

[8] On or about October 19, 1999, Air Canada announced its intention to make a bid for CAC and to proceed to complete a merger subject to a restructuring of Canadian's debt. On or about November 5, 1999, following a ruling by the Quebec Superior Court, a competing offer by Airline Industry Revitalization Co. Inc. was withdrawn and Air Canada indicated that it would proceed with its offer for CAC.

[9] On or about November 11, 1999, Air Canada caused the incorporation of 853350 Alberta Ltd. (853350), for the sole purpose of acquiring the majority of the shares of CAC. At the time of incorporation, Air Canada held 10 per cent of the shares of 853350. Paul Farrar, among others, holds the remaining 90 per cent of the shares of 853350.

[10] On or about November 11, 1999, Air Canada, through 853350, offered to purchase the outstanding shares of CAC at a price of $2.00 per share for a total of $92,000,000.00 for all of the issued and outstanding voting and non-voting shares of CAC.

[11] On or about January 4, 2000, Air Canada and 853350 acquired 82 per cent of CAC's outstanding common shares for approximately $75,000,000.00 plus the preferred shares of CAIL for a purchase price of $59,000,000.00. Air Canada then replaced the Board of Directors of CAC with its own nominees.

[12] Substantially all of the aircraft making up the fleet of Canadian are held by Air Canada through lease arrangements with various lessors or other aircraft financial agencies. These arrangements were the result of negotiations with lessors, jointly conducted by Air Canada and Canadian.

[13] In general, these arrangements include the following:

(i) the leases have been renegotiated to reflect contemporary fair market value (or below) based on two independent desk top valuations; and

(ii) the present value of the difference between the financial terms under the previous lease arrangements and the renegotiated fair market value terms was characterized as "unsecured deficiency," reflected in a Promissory Note payable to the lessor from Canadian and assigned by the lessor to Air Canada.

[14] In the result, Air Canada has acquired or is in the process of acquiring all but eight of the deficiency claims of aircraft lessors or financiers listed in Schedule "B" to the Plan in the total amount of $253,506.944.00. Air Canada intends to vote those claims as an unsecured creditor under the Plan.

[15] The executory contracts claims listed in Schedule "B" to the Plan total $110,677,000.00, of which $108,907,000.00 is the claim of Loyalty Management Group Canada Inc. (Loyalty), an entity with a long term contract with Canadian to purchase air miles. The claim is subject to an agreement of settlement between Loyalty, Canadian and Air Canada. Air Canada was assigned the Loyalty unsecured claim.

[16] In the Plan, all unsecured creditors of both CAC and CAI are grouped in the same class for voting purposes.

[17] Pursuant to the Plan, unsecured creditors will receive a payment of $0.12 on the dollar for each $1.00 of their claim unless the total amount of unsecured claims exceeds $800 million, in which case, they will receive less. Air Canada will fund this Pro Rata Cash Amount. As a result of the assignments of the deficiency amounts in favour of Air Canada, if the Plan is approved, Air Canada will notionally be paying a substantial proportion of the Pro Rata Cash Amount to itself.

[18] The Plan further contemplates Air Canada becoming the 100 per cent owner of Canadian through 853350.

[19] On April 7, 2000, an Order was granted by Paperny, J., directing that the Plan be filed by the Petitioners; establishing a claims dispute process; authorizing the calling of meetings for affected creditors to vote on the Plan to be held on May 26, 2000; authorizing the Petitioners to make application for an Order sanctioning the Plan on June 5, 2000; and providing other directions.

[20] The April 7, 2000 Order established three classes of creditors: (a) the holders of Canadian Airlines Corporation 10 per cent Senior Secured Notes due 2005 (the Secured Noteholders); (b) the secured creditors of the Petitioners affected by the Plan (the Affected Secured Creditors); and (c) the unsecured creditors affected by the Plan (the Affected Unsecured Creditors).

[21] On April 25, 2000, the Petitioners filed and served the Plan, in accordance with the Order of April 7, 2000. By Notice of Motion dated April 27, 2000, Resurgence brought an application, among other things, seeking "directions as to the classification and voting rights of the creditors . . . (and) the quantum of the 'deficiency claims' assigned to Air Canada." Resurgence sought to have Air Canada excluded from voting as an unsecured creditor unless segregated into a separate class. Resurgence also sought to have the holders of the unsecured notes vote as a separate class.

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[22] The result of the April 27, 2000 motion by Resurgence is the Decision.

THE DECISION

[23] In the Decision, the supervising chambers judge referred to her order of April 14, 2000, wherein she approved transactions involving the re-negotiation of the aircraft leases. She referred to "about $200,000,000.00 worth of concessions for CAIL" as "concessions or deficiency claims" which were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved of the method of quantifying the claims and Paperny, J. approved the transactions, reserving the issue of classification and voting to her May 12 Decision.

[24] The Plan provides for one class of unsecured creditor. The unsecured class is composed of a number of types of unsecured claims including executory contracts (e.g. Air Canada from Loyalty) unsecured notes (e.g. Resurgence), aircraft leases (e.g. Air Canada from lessors), litigation claims, real estate leases and the deficiencies, if any, of the senior secured noteholders.

[25] In seeking to have Air Canada vote the promissory notes in a separate class Resurgence argued several factors before Paperny, J., as set out at pp. 4-5 of the Decision as follows:

> 1. The Air Canada appointed board caused Canadian to enter into these ***CCAA*** proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

[26] She then recited the argument made by Air Canada and Canadian to the effect that the legal rights associated with Air Canada's unsecured claims are the same as those associated with the other affected unsecured claimants, and that the matters raised by Resurgence relating to classification are really matters of fairness more appropriately dealt with in a Fairness Hearing scheduled to be held June 5, 2000.

[27] After observing that the ***CCAA*** offers no guidance with respect to the classification of claims, beyond identifying secured and unsecured categories and the possibility of classes within each category, and that the process has developed in case law, Paperny, J. embarked on a detailed analysis and consideration of the case law in this area including ***Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); ***Sovereign Life Assurance Co. v. Dodd***, [1892] 2 Q.B. 573 (C.A.); ***Re Fairview Industries Ltd.*** reflex, (1991), 11 C.B.R. (3d) 71 (N.S.S.C.T.D.); ***Re Northland Properties*** (1989), 73 C.B.R. (N.S.) 195; ***Savage v. Amoco Acquisition Corp.*** (1988), 68 C.B.R. 154 (Alta. C.A.); ***Re Woodward's Ltd.*** 1993 CanLII 870 (BC SC), (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); ***Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*** reflex, (1991), 86 D.L.R. (4th) 621 at 626 (Ont. Gen. Div.); ***Re NsC Diesel Power Inc.*** (1990), 79 C.B.R. (N.S.) 1 (N.S.S.C.T.D.); ***Re Wellington Bldg. Corp.***, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.). Paperny, J. also referred to an oft-cited article "Reorganization under the Companies Creditors Arrangement Act" by S. E. Edwards (1947), 25 Can. Bar Rev. 587. She concluded her legal analysis at pp.12-13 by setting forth the principles she found to be applicable in assessing commonality of interest as an appropriate test for the classification of creditors:

> 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
> 2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
> 3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the ***CCAA***, namely to facilitate reorganizations if at all possible;
> 4. In placing a broad and purposive interpretation on the ***CCAA***, the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.
> 5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

THE STANDARD OF REVIEW AND LEAVE APPLICATIONS

[28] The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the ***CCAA***. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in ***UTI Energy Corp. v. Fracmaster Ltd.*** 1999 ABCA 178 (CanLII), (2000), 244 A.R. 93 where she stated for the Court at p.95:

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> . . . . this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

In another recent ***CCAA*** case from this Court, ***Re Smoky River Coal Ltd.*** (1999) 237 A.R. 326, Hunt, J.A., speaking for the unanimous Court, extensively reviewed the history and purpose of the ***CCAA***, and observed at p.341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 ***CCAA***) suggests that Parliament, mindful that ***CCAA*** cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

[29] The standard of review of this Court, in reviewing the ***CCAA*** decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

STATUTORY PROVISIONS

[30] The ***CCAA*** includes provisions defining secured creditor, unsecured creditor, refers to classes of them, and provides for court approval of a plan of compromise or arrangement in the following sections:

> 2. INTERPRETATION
>
> . . .
>
> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;
>
> . . .
>
> "Unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.
>
> COMPROMISES AND ARRANGEMENTS
>
> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such a manner as the court directs.
>
> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the courts directs.
>
> . . .
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> > (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

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> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the ***Bankruptcy and Insolvency Act*** or is in the course of being wound up under the ***Winding-up and Restructuring Act***, on the trustee in bankruptcy or liquidator and contributories of the company.

CLASSES OF CREDITORS

[31] It is apparent from a review of the foregoing sections that division into classes of creditors within the unsecured and secured categories may, in any given case, materially affect the outcome of the vote referenced in section 6. Compliance with section 6 triggers the ability of the court to approve or sanction the Plan and to bind the parties referenced in s. 6(a) and 6(b) of the ***CCAA***. In argument before me, it was conceded by the applicant that Resurgence would not have the ability to ensure approval of the Plan by casting its vote if Air Canada were to be excised from the unsecured creditor category into a separate class. Conversely, counsel for Resurgence candidly admitted that Resurgence would effectively have a veto of the Plan if Air Canada were segregated into a separate class of unsecured creditor.

APPLICATION OF THE CRITERIA FOR LEAVE TO APPEAL

[32] The four elements of the general criterion are set out in paragraph [7]. The first and second elements are satisfied in this case. The points raised on appeal are of significance to the action. If Resurgence succeeds, it obtains a veto. If it does not succeed, and it votes as a member of the unsecured creditors class with Air Canada, Air Canada can control the vote of the unsecured creditors.

[33] In terms of the points on appeal being of significance to the practice, it may be that an appellate court's views in this province on the classification of unsecured creditors issue is desirable, there being no appellate authority from this Court on this issue. Although I have doubt as to the significance of this element of the general criterion in the context of the facts of this case, I am prepared for the purposes of this application to treat this element as having being satisfied.

[34] The third element is whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous. In my view, the proper interpretation of this element is not a mutually exclusive application of an appeal being either meritorious or frivolous. Rather, the appeal must be *prima facie* meritorious; if it is not *prima facie* meritorious, this element is not satisfied.

[35] I find that the appeal on the points raised from the Decision is not *prima facie* meritorious. In the plain ordinary meaning of the words of this element, on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

[36] I have carefully reviewed all of the cases referred to by the supervising chambers judge and the principles she derived from them. In my view, she made no error in law.

[37] In the exercise of her discretion, she decided neither to allow the applicant's motion to excise Air Canada from the unsecured creditors class nor to prohibit Air Canada from voting. She also declined, on the facts established before her, to separate creditors of CAC from creditors of CAIL for voting purposes. She did, however, order that Air Canada's vote be recorded and tabulated and indicated that this will be considered at the Fairness Hearing.

[38] It was strenuously argued before me by the applicant, that deferring classification and voting issues to the Fairness Hearing was an error of law or principle in and of itself.

[39] The argument was put in terms that if, on a proper classification of unsecured creditors, Air Canada was removed from the unsecured class, and Resurgence vetoed the Plan, the matter of a Fairness Hearing would never arise. While that may be true, it does not follow that there is any error in law in what the supervising judge did. She concluded that the separate tabulation of the votes will allow the voice of the unsecured creditors to be heard, while, at the same time, permit, rather than rule out the possibility, that the Plan might proceed. This approach is consistent with the purpose of the ***CCAA*** as articulated in many of the authorities in this country.

[40] The supervising chambers judge also refused to exclude Air Canada from voting on the basis that the legal rights attached to the notes held by Air Canada were valid. Resurgence argued that because Air Canada had other interests in the outcome of the Plan, it should be excluded from voting as an unsegregated secured creditor. Paperny, J. held that this was an issue of fairness, as was the fact that Air Canada was really voting on its own reorganization. She did not err in principle. She expressly acknowledged the authorities that, on different facts, either allowed different classes or excluded a vote. See, for example, ***Re Woodward's Ltd.*** 1993 CanLII 870 (BC SC), (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 166 (B.C.S.C.); ***Re NsC Diesel Power Inc.*** (1990), 79 C.B.R. (N.S.) 1 (N.S.S.C.T.D.).

[41] The fourth element of the general criterion is whether the appeal will unduly hinder the progress of the action. In other words, will the delay involved in prosecuting, hearing and deciding the appeal be of such length so as to unduly

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impede the ultimate resolution of the matter by a vote or court sanction? The approach of the supervising judge to the issues raised by the applicant is that its concerns will be seriously addressed at the Fairness Hearing scheduled for June 5, 2000, pursuant to s.6 of the ***CCAA***, provided the creditors vote to adopt the Plan.

[42] This element has at its root the purpose of the ***CCAA***; the role of the supervising judge; the need for a timely and orderly resolution of the matter; and the effect on the interests of all parties pending a decision on appeal. The comments of McFarlane, J.A. in ***Re Pacific National Lease Holding Corp.*** 1992 CanLII 427 (BC CA), (1992) 15 C.B.R. (3d) 265 (B.C.C.A.) are particularly apt where he stated as follows at p.272:

> Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.
>
> Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

[43] In that case, it appears that McFarlane, J.A. was satisfied that the first three elements of the criteria had been met, i.e. that there "may be an arguable case for the petitioners to present to a panel of this court on discrete [sic] questions of law".

[44] It was argued before me that an appeal would give rise to an uncertainly of process and a lack of confidence in it; that the creditors, or some of them, may be inclined to withdraw support for the Plan that would otherwise be forthcoming, but for the delay. None of the parties tendered affidavit evidence on this issue.

[45] Nowhere in any of the authorities has the issue of onus in meeting the elements the general criterion been prominent. I am of the view that the onus is on the applicant. That onus would include the applicant producing at least some evidence on the fourth element to shift the onus to the respondents, even though it involves proving a negative, i.e. that there will not be any material adverse impact as the result of the delay occasioned by an appeal. That evidence is lacking in this case. It is lacking on both sides but the respondents do not have an initial onus in this regard. Therefore, I find that the fourth element has not been established by the applicant.

[46] The last step in a proper analysis in the context of a leave application is to ascribe appropriate weight to each of the elements of the general criterion and decide over all whether the test has been met. In most cases, the last two elements will be more important, and ought to be ascribed more weight than the first two elements. The last two elements here have not been met while the first two arguably have. In the result, I am satisfied that the applicant has not met the threshold for leave to appeal on the basis of the authorities, and I am therefore denying the application.

CONCLUSION

[47] The application for leave to appeal the Decision is dismissed on the basis that there is no *prima facie* meritorious case and that the granting of leave would likely unduly hinder the progress of the action.

APPLICATION HEARD on May 18, 2000
MEMORANDUM FILED at Calgary, Alberta
this 29th day of May, 2000

WITTMANN J.A.

ERRATUM OF THE MEMORANDUM OF DECISION

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In the Style of Cause, in the lines "Application for Leave to Appeal . . . Dated the 18th day of May, 2000" the date has been changed to read "Dated the 12th day of May, 2000".

Big Bear Exploration Ltd. v. Price Waterhouse Coopers Inc., 2000 ABCA 3 (CanLII) - A Leave to Appeal and Criteria

Date:	2000-01-06
Docket:	99-18610
Parallel citations:	250 AR 172; 15 CBR (4th) 160
URL:	http://canlii.ca/t/5rz5
Citation:	Big Bear Exploration Ltd. v. Price Waterhouse Coopers Inc., 2000 ABCA 3 (CanLII), <http://canlii.ca/t/5rz5> retrieved on 2013-09-10
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Reflex Record	Related decisions, legislation cited and decisions cited

Big Bear Exploration Ltd. v. Price Waterhouse Coopers Inc., 2000 ABCA 3

Date: 20000106
Docket: 99-18610

IN THE COURT OF APPEAL OF ALBERTA

THE HONOURABLE MR. JUSTICE WITTMANN
IN CHAMBERS

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, as amended
AND IN THE MATTER OF BLUE RANGE RESOURCES CORPORATION
BETWEEN:

BIG BEAR EXPLORATION LTD.

Appellant

- and -

PRICE WATERHOUSE COOPERS INC., in its capacity as Monitor,
ENRON CANADA CORP., and THE CREDITORS' COMMITTEE

Respondents

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF
THE HONOURABLE MR. JUSTICE S. J. LoVECCHIO MADE DECEMBER 17, 1999

MEMORANDUM OF DECISION

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COUNSEL:
R. J. Wilkins, Q.C. and G. A. Befus
For Big Bear Exploration Ltd., the appellant
K. M. Horner,
For Price Waterhouse Coopers Inc.
A. Robert Anderson and K. A. Wilkes
For Enron Canada Corp.
H. A. Gorman
For The Creditors' Committee, the respondents

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MEMORANDUM OF DECISION OF THE
HONOURABLE MR. JUSTICE WITTMANN

Introduction

[1] On March 2nd, 1999, Blue Range Resources Corporation (Blue Range) obtained an order from the Court staying proceedings against it, invoking the ***Companies' Creditors Arrangement Act*** R.S.C. 1985 c.C-36 as amended (CCAA). With one exception made known on this application to the Court, the supervising judge throughout has been LoVecchio, J. and he has made numerous orders culminating in an order for interim distribution pronounced December 17, 1999 (the Decision). Big Bear Exploration Ltd. (Big Bear) applies for leave to appeal the Decision, and a stay of the Decision.

Background Facts

[2] On May 5, 1999, Big Bear filed a Notice of Claim in the amount of $151,317,298.00. Big Bear alleged that this is an unsecured claim (Big Bear claim).

[3] The Big Bear claim was disputed by the Monitor, Price Waterhouse Coopers Inc. and Big Bear was directed by the Monitor in a Notice of Dispute to file and serve a Notice of Motion for the determination of the Big Bear claim.

[4] Also on May 5, 1999, Big Bear filed a Notice of Motion and an affidavit in support for an order lifting the stay of proceedings under the March 2, 1999 order, and allowing Big Bear to file a statement of claim, a draft of which was attached to the affidavit, which application was dismissed by LoVecchio, J. on May 11, 1999. **The statement of claim as drafted claimed, amongst other things, damages against Blue Range in the sum of $151,317,298.00 based on alleged false and misleading statements made by Blue Range which induced Big Bear to purchase the shares of Blue Range.**

[5] On May 31, 1999, pursuant to the direction given in the Notice of Dispute by the Monitor, Big Bear filed a Notice of Motion for a declaration that the unsecured claim of Big Bear was a meritorious claim against Blue Range, and an order directing the expeditious trial and determination of the issues raised by Big Bear.

[6] At the direction of Chief Justice Moore, Romaine, J. was directed to hear and determine issues arising out of the disputed Big Bear claim. Romaine, J. made an order October 28, 1999 stating as follows:

> **1. At the preliminary applications to be heard on November 8 and 9, 1999 (the "Preliminary Applications"), one of the issues to be determined shall be:**
>
> **With respect to the alleged loss or damage of $147,687,298 allegedly suffered by Big Bear from the exchange of Big Bear and Blue Range Resource Corporation ("Blue Range") shares (the "Alleged Share Exchange Loss"), without considering the principle of equitable subordination, is Big Bear:**
>
> **(a) an unsecured creditor of Blue Range which ranks equally with the unsecured creditors of Blue Range, or**
>
> **(b) is it a shareholder of Blue Range which ranks after the unsecured creditors of Blue Range?**
>
> **2. Another issue to be determined at the Preliminary Applications shall be:**
>
> **Assuming (without admitting) misrepresentations by Blue Range and reliance on it by Big Bear, is the Alleged Share Exchange Loss a loss or damage incurred by Big Bear and, accordingly, is Big Bear a proper party to advance the claim for such loss?**
>
> 3. The following is the only other issue which shall be determined at the Preliminary Applications:
>
> Whether Big Bear is entitled to make or advance by way of argument in these proceedings the claims represented by the heads of damage specified in the draft Statement of Claim set out at Exhibit "F" to the Affidavit of A. Jeffrey Tonken dated June 25, 1999?

[7] The preliminary applications were heard by Romaine, J. November 8 and 9, 1999 and judgment was and remains reserved.

[8] The sixth interim report of the Monitor dated December 14, 1999 had attached to it as Appendix D a schedule outlining a potential estimated second interim distribution to the Class B claimants as of December 9, 1999. Paragraph 26

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of that report stated that the largest unresolved claim was Big Bear's unsecured Class B claim of approximately $151 Million and that the 25 cent estimated dividend assumed a value of $30 Million for this claim and the 50 cent estimated dividend assumed the claim would be disallowed or be subordinated in full to the claims of Class B claimants. It also stated that the Monitor sought the advice and direction of the Court regarding the amount which would be appropriate for an interim distribution.

[9] That issue came before LoVecchio, J. on December 17, 1999 together with a motion by Big Bear requesting that the Monitor withhold from distribution a reserve on account of the Big Bear unsecured claim until such time as a final determination of that claim had been made by the Court. Big Bear argued that s. 12(2) of the CCAA mandated that the claim of any unsecured creditor "shall be determined", and that the Big Bear claim had not yet been determined.

[10] The Decision of LoVecchio, J. pronounced December 17, 1999 ordered an interim distribution with a reserve for the Big Bear claim of $3,070,000.00.

[11] The motion for leave to appeal the Decision and for a stay of the Decision was filed December 20th, 1999 returnable December 21st, 1999, and requested that this Court abridge the time for notice of the motion. The abridgement of time was not objected to by any of the respondents and time was ordered abridged. Written briefs were filed by the Creditors' Committee and by Big Bear.

[12] No formal order of LoVecchio, J. dated December 17, 1999 was before this Court on the hearing of the application nor were the reasons for judgment made available on December 21st. The matter was adjourned until December 22nd, 1999 pending receipt of a transcript of the proceedings in chambers December 17th, 1999 which was provided to the Court on the afternoon of December 21st.

[13] This matter was argued December 22nd, 1999, and I ordered an interim stay of the Decision pending this decision.

Leave under the CCAA

[14] No one before me disputed the criteria for leave to appeal a decision of the supervising judge pursuant to s. 13 of the CCAA. The criteria that has been applied by this Court is found in *Re Multitech Warehouse Direct* reflex, (1995), 32 Alta. L.R. (3d) 62 at 64 (C.A.); *Luscar Ltd. v. Smoky River Coal Ltd.* [1999] A.J. No. 185 at para. 22 (C.A.); *Re Blue Range Resource Corp.* [1999] A.J. No. 975 at para. 2, 3, 4 (C.A.).

[15] Madam Justice Fruman in deciding leave applications arising out of other orders granted by LoVecchio, J. in *Re Blue Range Resources Corp*, [*supra*] referred to *Re Pacific National Lease Holding Corp.* 1992 CanLII 427 (BC CA), (1992) 15 C.B.R. (3d) 265 at 272 (B.C.C.A.), as well as *Med Finance Co. S.A. v. Bank of Montreal* reflex, (1993), 22 C.B.R. (3d) 279 at 282 (B.C.C.A.). The latter case sets forth factors to be considered in granting leave to appeal an issue under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, as amended. The factors are:

> **(a) whether the point on appeal is of significance to the practice;**
> **(b) whether the point raised is of significance to the action itself;**
> **(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and**
> **(d) whether the appeal will unduly hinder the progress of the action.**

[16] The general test articulated in *Multitech* of "serious and arguable grounds that are of real and significant interest to the parties" encompasses the four criteria set forth above.

The Argument

(a) Big Bear

[17] The essence of Big Bear's argument is that s. 12 of the CCAA mandates that its claim shall be determined by the Court, that it took steps to have it determined in May of 1999, and through no fault of its own, judgment is now reserved on issues pertaining to the Big Bear claim. Further, Big Bear submits that LoVecchio, J. has made a pre-determination of the value of the claim prior to any hearing or summary determination of it, and that this is a point of significance to the practice. Big Bear further argues that the point raised is of significance to the action of itself as LoVecchio, J. set aside an amount of $3,070,000.00 as a reserve for the Big Bear claim, and that Big Bear will forever be unable to share with other creditors on a pro-rated basis should it be determined by a court to have a claim of more than this sum. Big Bear further argues that the appeal will not hinder the progress of the action because a plan of arrangement is already in place.

[18] With respect to a stay of the Decision, Big Bear relies on ***Re Associated Investors of Canada Ltd.; Deloitte Haskins and Sells v. Coopers & Lybrand Inc.*** reflex, (1996) 37 Alta. L.R. (3d) 64 (C.A.) for a three-part test that:

> (1) the Court must be satisfied on a preliminary assessment there is a serious issue to be tried;
> (2) that if the stay is not granted the applicant would suffer irreparable harm not capable of recompense in damages; and
> (3) that the balance of convenience favours a stay.

Big Bear submits that, at the very least, a stay should be granted pending the decision of Romaine, J.

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(b) The Creditors' Committee

[19] The Creditors' Committee, supported by Enron Canada Corp. (the largest single creditor) argued strenuously that the Decision was based on the cross-examination on affidavit of James W. Surbey, the Senior Vice President Corporate Development of Big Bear, which occurred on the evening of Thursday December 16th, 1999 and on the Rule 266 examination of Kyle Kitigawa. Transcripts and exhibits relating to both examinations were before LoVecchio, J. for the purpose of reserving for the Big Bear claim on December 17, 1999. The gist of this argument is that the reserve in the amount of $3,070,000.00 for the Big Bear claim was correct, if not generous in light of the evidence that Big Bear entered into an Arrangement Agreement with Avid Oil and Gas Limited (Avid) dated November 26, 1999 and issued a press release to its shareholders that the Agreement provided that Avid would acquire all of the issued and outstanding common shares of Big Bear based on one common share of Avid for every 15 common shares of Big Bear, subject to some adjustments. Some of the evidence on the cross-examination and examination referred to above was in essence that Big Bear placed no value on its claim against Blue Range with respect to the valuation of the Big Bear assets which, in turn, impacted on the value of the Big Bear shares for the purpose of the Arrangement Agreement valuation. It is clear that LoVecchio, J. accepted that evidence for the purpose of the valuation and reserve for the Big Bear claim.

Issues

(1) Should leave to appeal the Decision be granted?

(2) Should a stay of the Decision be granted?

Leave to Appeal

[20] Should leave to appeal the Decision be granted? Returning to the criteria outlined above, there must be serious and arguable grounds that are of real and significant interest to the parties. Subsumed in this general criteria are the four elements in ***Med Finance Company S.A. v. Bank of Montreal*** [***supra***].

[21] Big Bear's counsel indicated in argument that Big Bear was simply not ready to have a hearing on the valuation of the Big Bear claim on December 17, 1999 and that there was no intention to proceed on that basis. This position is difficult to reconcile with the cross-examination and examination referred to above, the thrust of which was to demonstrate that Big Bear placed little or no value on its claim against Blue Range and, secondly, with the motion of Big Bear requesting a reserve amount be withheld from distribution on account of the Big Bear unsecured claim and, alternatively, providing directions for the valuation of the Big Bear unsecured claims. Presumably, in order for LoVecchio, J. to provide for a reserve amount, he at least had to consider the value of the claim. It is apparent from the transcript of the proceedings on December 17, 1999 that LoVecchio, J. accepted the proposition that Big Bear's officers and directors put little, if any, value on the Big Bear claim. Illustrative is the following excerpt (at pp.153-154):

> THE COURT: Right.
>
> And I'm going to keep the designation of 6,930,000 in respect of the others, which means the differential, 3,070,000 is for the Big Bear, and I want to state on the record, I see that as several million dollars more than the directors and officers of Big Bear have valued it at for the purposes of the Anvil [***sic***] transaction under which they have a fiduciary responsibility.
>
> MS. HORNER: Okay, sir, again, just so that I follow you, in the conservative column across from the Big Bear claim, so at the second column on Appendix D, instead of 30 million, I'm to insert 3,070,000.
>
> THE COURT: Right.
>
> As I say, I want it on the record that I have reviewed the financial information associated with the public statements of the company - - that is, Big Bear - - in relation to the share exchange ratio, the valuation of the company, and in my view, this values that claim at several million dollars higher than the directors and officers appear to have valued it for the purposes of the share exchange ratio, and the directors and officers, of course, are under a fiduciary responsibility to their shareholders to ensure a proper valuation of the company.

[22] In the context of setting a reserve for the Big Bear claim, the learned chambers judge was entitled to accept the evidence before him. The evidence before him which he chose to accept was that the Big Bear officers and directors valued the Big Bear claim against Blue Range for the purposes of the Avid share exchange at a negligible value. As was pointed out in argument before LoVecchio, J., Big Bear did not lead any convincing evidence to the contrary. Leave to appeal the decision of the LoVecchio, J., fixing the Big Bear reserve at $3,070,000.00, is therefore denied.

Stay of the Decision

[23] Should a stay of the Decision be granted? Although at first blush it might seem that the denial of leave to appeal renders the stay issue moot, I am of the contrary view. Big Bear argued before me that, even if leave to appeal was not granted, there should be stay of the Decision, until the decision of Romaine, J. is made.

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[24] The learned chambers judge was asked to stay the Decision. He did not expressly decide the issue but rather stated: ". . . you should go and talk to the Court of Appeal about a stay." [Transcript of the December 17, 1999 proceedings at p.155].

[25] This case is unusual. Rule 508 of the ***Alberta Rules of Court*** states as follows:

> 508. An appeal does not operate as a stay of enforcement or of proceedings under the decision appealed from except so far as a judge of the Court of Queen's Bench or the Court of Appeal may order and no intermediate act or proceeding is invalidated except so far as the court appealed from may direct.

[26] If leave to appeal is denied, one might question the authority of this Court to grant a stay of the learned chambers judge's decision pending the decision of Romaine, J.

[27] If authority need be cited for the proposition that this Court has such a power, I refer to the provisions of the ***Judicature Act***, R.S.A. 1980 c. J-1 as amended, s.3, 4 and 5, and the inherent jurisdiction of this Court.

[28] This Court has the power to regulate process and proceedings. It may stay an action unless and until some condition or term which it has imposed has been complied with.

[29] The criteria for granting a stay in these circumstances are set forth in the judgment of Russell, J.A. in ***Deloitte Haskins and Sells v. Coopers & Lybrand Inc.*** reflex, (1996) 37 Alta. L.R. (3d) 64 (C.A.). She said at p.67:

> In considering a stay application the court must be satisfied on a preliminary assessment that there is a serious issue to be tried, that if the stay is not granted the applicant would suffer harm irreparable in damages, and that the balance of convenience favours the stay.

[30] Applying these tests, it must be conceded that there is a serious issue to be tried in terms of those issues that are extant before Romaine, J. Those issues were not re-argued before me and, indeed, ought not to have been. In terms of regulation of the process of the Court, the Court of Queen's Bench has chosen to direct issues as to the entitlement and quantification of the Big Bear claim for a preliminary determination by Romaine, J. Presumably, her decision involves a serious issue. For example, it may be that she will rule that there is no entitlement in Big Bear which would permit it to rank as an unsecured creditor of Blue Range or that it is not a proper party to advance a claim against Blue Range. If Romaine, J.'s decision on the first two issues is in favour of Big Bear, the third issue becomes all the more prominent: that is, whether Big Bear is entitled to make or advance by way of argument the claims represented by the heads of damage specified in the draft statement of claim it put forward including a claim for damages against Blue Range in the sum of $151,317,298.00.

[31] It is clear that LoVecchio, J. was aware of the issues before Romaine, J. and was aware she had reserved her decision involving those issues on November 8th, 1999. [Transcript of the proceedings December 17th, 1999, pp. 94 to 98].

[32] Therefore, I find in the context of the criteria for a stay application that there is a serious issue that has been heard and remains undecided.

[33] The remaining criteria, namely, whether the applicant will suffer irreparable harm if the stay is not granted or which of the parties would suffer the greater harm from the granting or refusal of the stay (i.e. balance of convenience or inconvenience) also resolve themselves in favour of the applicant.

[34] It is clear from the evidence presented and the argument before me that if the distribution were to be made on the basis of the $3,070,000.00 reserve for the Big Bear claim, that Big Bear would be irreparably prejudiced by the preliminary distribution proposed in the event the Big Bear claim was later to be determined as valid and larger. The last criteria, the balance of convenience or inconvenience also tends to favour the applicant. If no distribution is made pending a decision of Romaine, J., the unsecured creditors as a class have been prejudiced only to the extent that there is some delay in receiving their money. While that may be an inconvenience, it is not the kind of prejudice that leads to irretrievable loss as is the case if Big Bear should later obtain a favourable decision from Romaine, J., and in the meantime the distribution has been made.

[35] Therefore, exercising the inherent jurisdiction of this Court, I grant Big Bear's application for a stay of the Decision ordering an interim distribution, pending the decision of Romaine, J.

Summary and Conclusion

[36] The application for leave to appeal the Decision is refused;

[37] The application for a stay of the Decision pending the decision of Romaine, J. reserved November 8, 1999, is granted.

APPLICATION HEARD on December 22, 1999
MEMORANDUM FILED at Calgary, Alberta
this 6th day of January, 2000

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WITTMANN, J.A.

Duke Energy Marketing Limited Partnership v. Blue Range Resource Corporation, 1999 ABCA 255 (CanLII) - Threshold to Appeal CCAA Sanction

Date: 1999-08-24
Docket: 99- 18395; 99-18397; 99-18410; 99-18411; 99-18418; 99-18424
Parallel citations: 244 AR 103; 12 CBR (4th) 186
URL: http://canlii.ca/t/5s59
Citation: Duke Energy Marketing Limited Partnership v. Blue Range Resource Corporation, 1999 ABCA 255 (CanLII), <http://canlii.ca/t/5s59> retrieved on 2013-08-20
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Duke Energy Marketing Limited Partnership v. Blue Range Resource Corporation, 1999 ABCA 255

Date: 19990824
Docket: 99- 18395
99-18397
99-18410
99-18411
99-18418
99-18424

IN THE COURT OF APPEAL OF ALBERTA

MEMORANDUM OF DECISION OF THE
HONOURABLE MADAM JUSTICE FRUMAN

IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, as amended
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BLUE RANGE RESOURCE CORPORATION
BETWEEN:
APPEAL # 99-18395

DUKE ENERGY MARKETING LIMITED PARTNERSHIP

Appellant

- and -

BLUE RANGE RESOURCE CORPORATION and HUMBLE PETROLEUM MARKETING LTD.

Respondents

APPEAL FROM THE ORDER OF

THE HONOURABLE MR. JUSTICE S.J. LoVECCHIO DATED JUNE 18, 1999.
AND BETWEEN:
APPEAL # 99-18397

ENGAGE ENERGY CANADA, L.P.

Appellant
(Applicant)

- and -

BLUE RANGE RESOURCE CORPORATION

Respondent

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APPEAL FROM THE ORDER OF
THE HONOURABLE MR. JUSTICE S.J. LoVECCHIO DATED JUNE 18, 1999.
AND BETWEEN:
APPEAL # 99-18410

ENRON CAPITAL& TRADE RESOURCES CANADA CORP.

Appellant
(Applicant)

- and -

BLUE RANGE RESOURCE CORPORATION, HUMBLE PETROLEUM MARKETING LTD., PRICEWATERHOUSECOOPERS INC., in its capacity as Monitor, ROYAL BANK OF CANADA, NATIONAL BANK OF CANADA, and FIRST NATIONAL BANK OF CHICAGO
Respondents
(Respondents)
APPEAL FROM THE ORDER OF
THE HONOURABLE MR. S.J. JUSTICE LoVECCHIO

DATED JUNE 30, 1999 AND FILED JULY 8, 1999
AND BETWEEN:
APPEAL #99-18411

DUKE ENERGY MARKETING LIMITED PARTNERSHIP

Appellant

- and -

BLUE RANGE RESOURCE CORPORATION and HUMBLE PETROLEUM MARKETING LTD.
Respondents
APPEAL FROM THE ORDER OF
THE HONOURABLE MR. JUSTICE S.J. LoVECCHIO DATED JUNE 30, 1999.
AND BETWEEN:
APPEAL #99-18418

ENGAGE ENERGY CANADA, L.P.

Appellant
(Applicant)

- and -

BLUE RANGE RESOURCE CORPORATION and HUMBLE PETROLEUM MARKETING LTD., PRICEWATERHOUSECOOPERS INC., in its capacity as Monitor, ROYAL BANK OF CANADA, NATIONAL BANK OF CANADA, and FIRST NATIONAL BANK OF CHICAGO
Respondents
APPEAL FROM THE ORDER OF
THE HONOURABLE MR. JUSTICE S.J. LoVECCHIO DATED JUNE 30, 1999.

AND BETWEEN:
APPEAL # 99-18424

BIG BEAR EXPLORATION LTD.

Appellant
(Respondent)

- and -

ENRON CAPITAL & TRADE RESOURCES CANADA CORP.
Respondent
(Applicant)
APPEAL FROM THE ORDER OF
THE HONOURABLE MR. JUSTICE L.D. WILKINS DATED JULY 16, 1999.
COUNSEL:
L.B. Robinson - Engage Energy Canada, L.P.
J.L. Ircandia - Blue Range Resource Corporation et al

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M. Marion
A.R. Anderson - Enron Capital Trade Resources Canada Corp.
B. Urrell
H.A. Gorman - Duke Energy Marketing Limited Partnership
R. J. Wilkins - Big Bear Exploration Ltd.

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MEMORANDUM OF DECISION OF THE
HONOURABLE MADAM JUSTICE FRUMAN

FRUMAN, J.A.:

[1] Blue Range Resource Corporation, a company which produces and sells natural gas, experienced serious financial problems. On March 2, 1999, it successfully petitioned the court for an order staying proceedings against it under s. 11 of *The Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. A series of further applications were heard, resulting in numerous orders adversely affecting companies which had contractual arrangements with Blue Range, and its subsidiary, Humble Petroleum Marketing Ltd. Six of those orders are the subject of applications for leave to appeal under s. 13 of the CCAA.

Leave Under the CCAA

[2] Section 13 provides that any person dissatisfied with an order or decision made under the CCAA may appeal from it, with leave from either the judge appealed from, or the Court of Appeal. The section does not clarify the grounds upon which leave may be granted. The test that has been adopted in Alberta requires the applicant to show "serious and arguable grounds that are of real and significant interest to the parties": *Re Multitech Warehouse Direct* reflex, (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.); *Luscar Ltd. v. Smoky River Coal Ltd.*, [1999] A.J. No. 185 at para. 22 (C.A.).

[3] An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in CCAA proceedings. A judge exercising a supervisory function under the CCAA has an ongoing management process, much like a trial judge making orders in the course of a trial: *Re Pacific National Lease Holding Corp*. 1992 CanLII 427 (BC CA), (1992), 15 C.B.R. (3d) 265 at 272 (B.C.C.A.).

[4]* In *Med Finance Co. S.A. v. Bank of Montreal* reflex, (1993), 22 C.B.R. (3d) 279 at 282 (B.C.C.A.), Hinds J. summarized the matters to be considered in granting leave to appeal an issue under the *Bankruptcy Act:

(a) whether the point on appeal is of significance to the practice*;*
(b) whether the point raised is of significance to the action itself;
(c) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
(d) whether the appeal will unduly hinder the progress of the action.

[5] The parties agree, as do I, that these four elements are subsumed in the more general wording of the *Multitech* test. In particular, the importance to the practice or to the industry should be considered. While many matters involving competing claims on money will be significant to the parties, they may have little precedential value. This element is entirely consistent with the requirement that an appellate court exercise its powers sparingly.

[6] In this case, unlike *Multitech* and *Smoky River,* a plan of arrangement is already in place and an appeal would not unduly hinder the progress of restructuring Blue Range's affairs. It is therefore unnecessary to consider any potential delay caused by granting leave.

[7] The leave applications relate to orders granted by LoVecchio J. on June 18 and June 30, 1999, and by Wilkins J. on July 16, 1999.

June 18, 1999 Order - CA Appeal Nos. 18395 and 18397

Variation Order

[8] The original CCAA stay order permitted termination of various contracts. Engage Energy Canada, L.P. and Duke Energy Marketing Limited Partnership applied for a variation of the initial stay order to provide that Blue Range should only be permitted to terminate its gas marketing contracts with them if Blue Range was incapable of performing them, or termination was essential to the success of the restructuring. LoVecchio J. dismissed the application. Although he recognized that the applicants would potentially suffer substantial losses as a result of the termination of the contracts, he found that an order authorizing the termination was appropriate in the circumstances, especially since it did not affect the creditors' rights to claim for damages.

[9] Engage and Duke seek leave to appeal. No legal principles are in issue, nor is there any suggestion that the chambers judge lacked jurisdiction to make the initial order or to refuse a variation. A chambers judge has a broad discretion under the CCAA. It is clear from his reasons that LoVecchio J. was aware of the circumstances, understood the competing issues and attempted to balance the interests of all the parties. He is owed considerable deference. Engage and Duke allege no errors, other than their disagreement with the exercise of his discretion. They have not made out serious and arguable grounds, and their application for leave to appeal is denied.

Set-Off

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[10] At the time of the CCAA stay order, Engage and Duke had received but not yet paid for natural gas deliveries made by Blue Range in February and March of 1999. As a result of the termination of their gas purchase contracts with Blue Range, they would have to buy natural gas at higher prices, resulting in damages. Engage and Duke sought orders permitting them to set-off anticipated damages they would incur, against the payments owed by them to Blue Range for natural gas deliveries. LoVecchio J. dismissed their application, based on his finding that the future damages were sufficiently independent from the obligation to pay for gas already delivered that equitable set-off was not appropriate.

[11] Engage and Duke seek leave to appeal. Section 18.1 of the CCAA provides that the law of set-off applies to all claims made against a debtor company. Although the section is a recent addition to the statute, at the hearing counsel relied upon the same authorities and did not disagree on the principles upon which determinations of set-off are made. They disagreed considerably on the application of those principles to the facts of this case, however. The point in issue has significance to the parties, as well as to the practice. It requires a determination whether amounts owing to a debtor company under a contract at the time of a CCAA stay, are sufficiently connected to damages suffered from the termination of that contract as a direct result of the CCAA proceedings, to warrant equitable set-off. The point must be considered in the context of the legislation which now specifically authorizes set-off in s. 18.1. The issue raises serious and arguable grounds. Leave to appeal is granted.

June 30, 1999 Order - CA Appeal Nos. 18410; 18411 and 18418

[12] Duke, Engage and Enron Capital & Trade Resources Canada Corp. have applied for leave to appeal the June 30, 1999 decision of LoVecchio J. Although their application is unopposed, I nevertheless have an obligation to ensure that the tests for granting leave are met.

[13] The chambers judge was asked to decide whether contracts providing for delivery of natural gas were "eligible financial contracts" as defined in s. 11.1(1) of the CCAA. He received the evidence of U.S. and Canadian experts, and heard extensive argument and
submissions. He concluded, based on the sources cited by counsel, that almost any contract could fit within the definition, but went on to decide that the contracts being considered were "physical" rather than "financial" contracts, and not captured by the language of the section. The effect of his decision is to restrict "forward commodity contract" in subsection 11.1(1)(h) to derivative contracts.

[14] Section 11.1 of the CCAA was enacted in 1997. The June 30 decision is the first to deal with the interpretation of "eligible financial contract" and the first to consider financing vehicles that provide for delivery of product. Its meaning has a real and significant interest to the parties, as well as a significant impact upon the oil and gas industry generally, as it affects available financing instruments. The issue raises serious and arguable grounds. Leave to appeal is granted.

July 16, 1999 Order - CA Appeal No. 18424

[15] Big Bear Exploration Ltd. acquired control of Blue Range on December 12, 1998. The two companies were kept separate, with Big Bear assuming Blue Range's management obligations. On March 1, 1999 a management agreement was committed to writing. Big Bear also paid liabilities to third parties in respect of Blue Range's assets and operations. Meanwhile, on January 12, 1999 the two companies executed a loan agreement. Advances made by Big Bear to Blue Range under the loan were secured under a General Security Agreement signed at the same time.

[16] Enron and the Blue Range Creditors' Committee applied to the court for an order that amounts owed to Big Bear for management fees and third party liabilities, totalling more than $1.1 million, were not secured under the terms of the General Security Agreement. Wilkins J. granted the order, finding that the General Security Agreement had to be read with the Loan Agreement, whose terms were not broad enough to cover the management fees.

[17] Big Bear seeks leave to appeal. There were no facts in dispute before the chambers judge. Big Bear complains about the brevity of the reasons, alleges errors in contractual interpretation and disagrees with the chamber's judges conclusion, arguing that the General Security Agreement should be interpreted without reference to the Loan Agreement. In essence, the point raises an issue of priority among creditors resulting from the interpretation of a particular and unique financial instrument. It has no possible precedential value and does not raise serious and arguable grounds. Leave to appeal is dismissed.

Summary

[18] **C.A. Appeal Nos. 18395 and 18397** -- Leave to appeal the portion of the June 18, 1999 order dealing with variation of contracts is dismissed. Leave to appeal the portion dealing with set-off is granted.

[19] **C.A. Appeal Nos. 18410; 18411 and 18418** -- Leave to appeal the June 30, 1999 order is granted.

[20] **C.A. Appeal No. 18424** – Leave to appeal the July 16, 1999 order is dismissed.

APPLICATION HEARD on August 18, 1999
MEMORANDUM FILED at Calgary, Alberta

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this 24th day of August, 1999

FRUMAN, J.A.

A Plan of Compromise or Arrangement of Cow Harbour Construction Ltd., 2010 ABQB 637 (CanLII) - CCAA Consideration of True Lease and Nature of s 13 Appeal?

Date: 2010-10-05
Docket: 1003 11241; 1003 05560
URL: http://canlii.ca/t/2cwmq
Citation: a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd., 2010 ABQB 637 (CanLII), <http://canlii.ca/t/2cwmq> retrieved on 2013-09-10
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Court of Queen's Bench of Alberta
Citation: Royal Bank of Canada v. Cow Harbour Construction Ltd., 2010 ABQB 637

Date: 20101005
Docket: 1003 11241, 1003 05560
Registry: Edmonton

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Between:
Royal Bank of Canada

Plaintiff

- and -

Cow Harbour Construction Ltd. and 1134252 Alberta Ltd.

Defendants

And Between:

Docket: 1003 05560
BKCY Action No: 24-115359

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended
In the Matter of Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
And in the Matter of a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.

Memorandum of Decision
of the
Honourable Mr. Justice K.D. Yamauchi

I. Background

[1] On April 7, 2010, Cow Harbour Construction Ltd. ("Cow Harbour") applied for a stay of proceedings against it under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). This Court granted that order (the "Initial Order") in *CCAA* action 1003 05560 (the "CCAA Action"). This Court extended the stay of proceedings from time to time by a number of subsequent orders. It should be noted that this Court did not want to extend the stay for a lengthy period at any given time. Accordingly, this Court required the parties to this action, of which there are many, to appear before it often and regularly, so that Cow Harbour and the various professionals involved in this matter could provide this Court with regular updates on the status and progress of the restructuring.

[2] It became clear as this matter progressed that Cow Harbour was not going to be able to restructure it affairs through a refinancing, a compromise or an equity restructuring. Rather, this matter evolved into a liquidation. This Court approved a process that would permit Cow Harbour to restructure by way of a sale of its assets. The process involved inviting potential purchasers to present proposals to purchase Cow Harbour's assets and undertaking. The intent behind this process was to effect a sale of Cow Harbour as a going concern. This process resulted in this Court being presented with three proposals to purchase certain of Cow Harbour's assets.

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[3] Aecon Group Inc. ("Aecon") presented a letter of intent to purchase a significant portion of Cow Harbour's assets (the "Original Aecon Proposal"). The Original Aecon Proposal was subject to a number of terms and conditions. This Court appointed PricewaterhouseCoopers Inc. ("PWC") to act as a transaction facilitator to assist the various parties' in their negotiations. As the transaction facilitator, PWC successfully negotiated a higher purchase price with Aecon. Aecon eventually presented a Letter of Intent to Purchase (the "LOI").

[4] On August 5, 2010, this Court endorsed PWC's acceptance of the LOI, with a view that the parties would return to this Court to seek this Court's approval of an asset purchase agreement and vesting order.

[5] One of Cow Harbour's assets that Aecon wanted to purchase was a Hitachi EX5500, serial number FF018NQ001008 (the "Equipment"). The Equipment was in Cow Harbour's possession as a result of an agreement dated April 1, 2009, between De Lage Landen Financial Services Canada Inc. ("DLL") and Cow Harbour (the "Agreement"). In the Agreement, DLL agreed to lease the Equipment to Cow Harbour for a 37-month term. The Agreement contained no option in which Cow Harbour could purchase the Equipment at the end of the term of the Agreement or otherwise.

[6] After this Court granted the Initial Order, on May 14, 2010, DLL filed a notice of motion, returnable May 21, 2010. In it, DLL sought a declaration that, for the purposes of *CCAA* s.11.01, the Agreement was a true lease, and not a financing lease.

[7] On May 21, 2010, this Court directed that Cow Harbour make certain payments to McLennan Ross LLP, counsel for the monitor this Court appointed pursuant to the Initial Order. Those payments represented all monthly payments from April 1, 2010, that Cow Harbour would have paid to lessors under leases for which there was a dispute as whether they were true leases or financing leases, or which the monitor's counsel had not been able to categorize as either (the "Disputed Lease Funds"). This Court directed McLennan Ross LLP to hold the Disputed Lease Funds, pending resolution of disputes pertaining to the categorization of the disputed leases.

[8] The Agreement was one of the disputed leases. Accordingly, included in the Disputed Lease Funds was approximately $900,000 representing payments that Cow Harbour should have been making to DLL under the Agreement.

[9] As part of the sale process, PWC prepared a proposed allocation of Aecon's purchase price, indicating the portion of the overall purchase price that Aecon allocated among Cow Harbour's assets. This Court received that allocation and placed it under seal. It was of the view that the creditors need not know how much of Aecon's purchase price was going to be allocated to the claims of other creditors.

[10] DLL did not agree that the Equipment could be sold to Aecon without DLL's consent. At no time did DLL provide its consent to a sale of the Equipment to Aecon or anyone else.

[11] The parties returned to court on August 25, 2010, at which time this Court heard a number of applications, including the following:

(a) DLL's application in the CCAA Action for an order declaring that DLL's interest in the Equipment is that of owner and lessor under a true lease. This application was made by way of a notice of motion in the CCAA Action only and was originally returnable May 21, 2010. It had previously been adjourned;

(b) DLL's application for an adjournment of the pending applications for an approval of the sale of Cow Harbour's assets to Aecon and a vesting order;

(c) RBC's application to appoint a PWC as receiver in action number 1003 11241 (the "Receivership Action"); and

(d) PWC's application for approval of the asset purchase agreement among Aecon, PWC, in its capacity as receiver of Cow Harbour and PWC, in its capacity as transaction facilitator (the "Asset Purchase Agreement") and a vesting order, vesting title of Cow Harbour's assets which formed the subject-matter of the Asset Purchase Agreement into Aecon's name (the "Vesting Order").

[12] Counsel made their submissions on the DLL application during the morning of August 25, 2010. This Court took a recess of about 3 hours to consider the positions of the respective parties. This Court rendered its judgment, with oral reasons, that the Agreement constituted a financing lease and not a true lease. This Court then granted RBC's application for a receivership order, and granted an order approving the Asset Purchase Agreement and the Vesting Order. The Vesting Order included the Equipment. This Court granted those orders sequentially, in the sense that:

(a) first, it dealt with DLL's applications in the CCAA Action;

(b) second, it dealt with the receivership application; and

(c) third, it dealt with the applications to approve the Asset Purchase Agreement and the Vesting Order.

The second and third orders were dependent on the Court's determination of the nature of the Agreement.

[13] Once this Court granted these orders, the transaction contemplated by the Asset Purchase Agreement closed on August 26, 2010.

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[14] On August 31, 2010, DLL served all parties to these proceedings with a notice of motion returnable September 3, 2010, for an order staying the provisions of the August 25, 2010 orders, as they related to the Equipment, in the Receivership Action and the CCAA Action. On September 2, 2010, DLL filed a Civil Notice of Appeal relating to issues in the Receivership Action and (notwithstanding the absence of leave to appeal) in the CCAA Action. On September 3, 2010, the parties argued the stay application. This Court denied the application on the basis that the issue was moot and further, that DLL had not met the test for a stay pending its appeal. This Court said:

> There was no appeal, there was no seeking of stay of the effect of my orders and this matter has closed. The issue is now moot., Transcript of Proceedings, September 3, 2010, p. 24, ll. 3-6.

II. Nature of the Applications

[15] DLL brings two applications, being:

1. **An application pursuant to *CCAA* s. 13, for leave to appeal this Court's August 25, 2010 order, which declared that the Agreement was a financing lease and not a true lease (the "Leave Application"); and**
2. **An application seeking an order in the nature of a stay pending appeal, holding back the Disputed Lease Funds insofar as they relate to funds payable under the Agreement and an order holding back from distribution a portion of the sale proceeds resulting from the Asset Purchase Agreement, equivalent to the net book value of the Equipment (the "Stay Application").**

[16] The Royal Bank of Canada ("RBC") and PWC, the court-appointed receiver, oppose these applications.

III. Leave Application

[17] DLL seeks leave to appeal pursuant to *CCAA* s.13, which provides:

> 13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[18] DLL has the right to seek leave from this Court or from the Court of Appeal or from a judge of the Court of Appeal. The legislation provides for this. If an applicant for leave is not successful at one level, does that preclude the applicant from making a further application to the "next level"? There can be no doubt that if a judge of the court of appeal refuses the applicant's leave to appeal, a judge of the lower court, even the judge who made the original order, could not overturn the court of appeal's decision. The converse, however, was not so clear. In ***Westar Mining Ltd. (Re)***, 1993 CarswellBC 529, 17 C.B.R. (3d) 202 at para. 7 (C.A.), the majority held that "an application for leave to appeal may be commenced in any one of three ways, and that once that choice is made a party does not have any further right to pursue an application for leave to appeal." McEachern C.J.B.C., at para. 45, dissented and analyzed the issue as follows:

> Section 13 of the C.C.A.A. provides for an appeal with leave, and further provides that leave may be obtained from the judge who made the order, from this court, or from a judge of this court. I do not find any support in the language of s. 13 for my colleagues' conclusion that these are exclusive alternatives, so that the refusal of leave at any level precludes an application at another level. Maxwell on *Interpretation of Statutes*, 12th ed. (1969), pp. 232-233, suggests that in some cases "and" and "or" may be substituted for each other. While it is true that the C.C.A.A. must prevail, I see no conflict between it and the *Court of Appeal Act*, or with the practice which is followed in this province to obtain leave from the Court.

[19] The Supreme Court of Canada allowed the appeal "for the reasons given by McEachern C.J.B.C.", ***Westar Mining Ltd. (Re)***, 1993 CarswellBC 553, 1993 CanLII 97 (SCC), [1993] 2 S.C.R. 448. Thus, if DLL is unsuccessful in its application for leave before this Court, there is nothing preventing it from making a further leave application to "the court or a judge of the court to which the appeal lies."

[20] Is this matter properly before this Court? In ***General Publishing Co. (Re)***, 2002 CarswellOnt 2215, 34 C.B.R. (4th) 183 at para. 4 (Sup. Ct. Jus.), Justice Ground said, "the usual and preferred route to appeal an order under the CCAA is to bring the motion for leave before a judge of the Court of Appeal." In fact, in that case, Justice Ground was not prepared to hear the application, "as it would undoubtedly result in a non-productive, additional step in trying to resolve this issue." This Court agrees with the concern Justice Ground expressed for the reasons that follow.

[21] Before moving on to consider those reasons, it is worthwhile noting how the Alberta Court of Appeal has dealt with this "concurrent" jurisdiction in another context. In ***R. v. Harness***, 2005 CarswellAlta 963, 200 C.C.C. (3d) 431 (C.A.), the court was considering the effect of the *Criminal Code*, R.S.C. 1985, c. C-46, s. 678(2), which provides:

> 678(2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

[22] The ***Harness*** court at para. 23, explained how it would deal with this "concurrent jurisdiction" when it said:

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> 23 Based on the rules of statutory interpretation and the case authorities, it is clear that s. 678(2) provides concurrent jurisdiction to hear applications to extend time, rather than a right of review or right to appeal the decision of a single judge to a full panel of the court. Both a single judge and the court have jurisdiction to grant a time extension, though often the rules of practice established by the court limit the applicant's right to choose which one will hear the application. Once a decision on an application to extend has been made, whether by a single judge or by a full panel of the court, there is no right of appeal within the court. However, a panel or a judge can consider the application afresh when the interests of justice so require, particularly when circumstances or conditions have changed since the last application. No such change is alleged here, nor does Harness suggest that there are new facts that might affect the outcome of his application. [emphasis added]

[23] The *CCAA* permits DLL to apply to this Court to seek leave to appeal this Court's earlier decisions. Accordingly, despite the approach that the ***General Publishing*** court took in similar circumstances, this Court will consider this application. Whether the Alberta Court of Appeal will apply reasonaing similar to that which it applied in ***Harness*** is not a question that this Court needs to answer.

[24] For DLL to obtain leave to appeal under the *CCAA*, it must meet the test set out by the Alberta Court of Appeal in ***Fairmont Resort Properties Ltd. (Re)***, 2009 ABCA 360 (CanLII), 2009 ABCA 360 at para. 10, where the court said:

> The test for leave involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; (4) whether the appeal will unduly hinder the progress of the action.

[25] Before this Court considers the factors involved in the "test for leave," it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be granted. In ***Canadian Airlines Corp. (Re)***, 2000 ABCA 149 (CanLII), 2000 ABCA 149 at paras. 28-29, the court held that:

> 28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* 1999 ABCA 178 (CanLII), (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:
>
> > .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

[26] In ***Smoky River Coal Ltd. (Re)*** (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the *CCAA*'s history and purpose, and observed at p. 341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.
>
> The standard of review of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

[27] It appears that this is the reason why the ***General Publishers*** court and this Court has difficulty in analyzing its own decisions. It is awkward, if not difficult, for a court to consider whether it has made a palpable and overriding error in its exercise of discretion or in findings of fact. These are the foundations on which it built its original decision and it undermines this Court's original decision if it were to second guess itself.

[28] Nonetheless, Parliament has given this task to the "judge appealed from" so this Court will undertake that task.

[29] ***Fairmont Resort*** provides us with the "test for leave." The test is but one test, in which "there must be serious and arguable grounds that are of real and significant interest to the parties." To determine whether DLL has met its onus, we must consider the four factors that ***Fairmont Resort*** outlines. The question then becomes whether DLL must satisfy all the factors. In other words, if it fails on one (or more), does fail to meet the test? The answer to this question lies in the

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decision of O'Brien J.A. in ***Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)***, 2005 CarswellAlta 1527, 15 C.B.R. (5th) 235 (C.A.). In that case, Justice O'Brien went through and applied the four factors to the facts with which he was dealing. The applicant in that case had met some of the factors, but not others. Justice O'Brien at para. 15, made his decision not to grant leave after "weighing all the factors." In other words, success or failure to prove one or more of the factors does not guarantee that the applicant has met the "test for leave." The court must weigh all the factors.

Whether the point on appeal is of significance to the practice

[30] DLL argues that the distinction between true leases and financing leases is one of significance to the practice. RBC argues, on the other hand, that the issue is of no significance to the practice. The finding that DLL's Equipment was the subject of a financing lease rather than a true lease is a factual finding that is specific only to that particular lease and does not have any impact on the practice in general.

[31] DLL argues that this Court erred in holding that an agreement without a purchase option or any other contractual mechanism of transferring ownership from the purported lessor to the purported lessee, can be characterized as a financing lease. RBC argues that there is no single overriding factor in determining whether a particular lease is a true lease or a financing lease.

[32] When characterizing leases pursuant to *CCAA* s.11.01, the court must have regard to the substance, rather than simply the form of the arrangement, ***Smith Brothers Contracting Ltd. (Re)***, 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264 (S.C.). In fact, when making its decision, this Court considered the non-exhaustive list of criteria that the ***Smith Brothers*** court suggested that courts look to when determining whether a document is a true lease or a financing lease. This Court outlined those criteria in its oral reasons, Transcript of Proceedings, August 25, 2010, pp. 57-59, and concluded that:

> [T]here is not one factor that is the *sine qua non* for determining whether a document is a true lease or a financing lease. One must look at the whole document to get a flavour of the [parties'] intentions, Transcript of Proceedings, August 25, 2010, p. 59, ll. 11-13.

[33] This Court concluded that "When one examines the De Lage Landen Financial Services Canada document as a whole, it is clear that it is a security lease and not a true lease," Transcript of Proceedings, August 25, 2010, p. 59, ll. 23-24.

[34] DLL argues that the characterization of a lease without a purchase option or any other mechanism of transferring ownership from the purported lessor to the purported lessee is a novel proposition in law and is an unresolved issue that is of significance to the practice, ***Kenroc Building Materials Co. Ltd. v. Kerr Interior Systems Ltd.***, 2008 ABCA 291 (CanLII), 2008 ABCA 291 at para. 9 . If that were the sole basis on which this Court rendered its decision, it might indeed be novel. However, this Court was guided by the broader principle of examining the whole document, which is an approach that is already well-established in the case law. Thus, there is nothing novel about this approach and this Court's finding that the Agreement was a financing lease, rather than a true lease, has no broad significance to the practice.

[35] Furthermore, in ***Philip Services Corp. (Re)***, 1999 CarswellOnt 4495, 15 C.B.R. (4th) 107 at para. 4 (Sup. Ct. Jus.), Justice Farley determined that a lease which "does not specifically indicate that there is an option to buy the (hardware) assets at the end of the lease" could indeed be characterized as a capital or financing lease, having regard to the criteria set out in ***Smith Brothers***. Notwithstanding the absence of an option to purchase in the agreement, Justice Farley undertook the same analysis set out in ***Smith Brothers*** to determine the nature of the lease. He said, at para. 3:

> That involves a functional analysis of the relationship based on substance as opposed to form. Unfortunately there are no tags or labels which may be read with ease and "certainty" ("certainty" in the same way that a laboratory is able to conduct a DNA test and give probabilities or odds). Rather the task involves the weighing of the various materials involved. It is not a simple analysis of determining between black and white but rather the shade of grey where all factors are weighed and the balance as to whether the scales would tip towards a true lease relationship or alternatively against being a true lease relationship.

[36] DLL pointed out that the parties in ***Philip Services*** had a course of conduct that resulted in the lessee purchasing leased assets from the lessor, although Justice Farley, at para. 1, described the course of conduct between the parties as "rather informal, flexible and sloppy." The fact that Justice Farley took care to point out that the leases themselves did not contain an option to buy assets at the end of the lease term indicates that this factor was in his mind when he balanced the various ***Smith Brothers*** factors. Depending on the circumstances of each case, the presence or absence of an option to purchase may or may not loom large in the court's analysis. In the case with which this Court was dealing, this "tag" or "label" was but one factor it considered.

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[37] Thus, this Court finds that the issue is of no importance to the practise.

Whether the point on appeal is of significance to the action itself

[38] This Court acknowledges that the point on any potential appeal has significance to DLL. Otherwise why would this matter have come before this Court? That, however, is not the nature of this factor. This factor requires this Court to look at the action as a whole.

[39] RBC argues that the appeal is of no significance to the action because the appeal is moot and, as such, it would be impossible to "unscramble the egg" even if DLL were successful, ***Minister of National Revenue v. Temple City Housing Inc.***, 2008 ABCA 1 (CanLII), 2008 ABCA 1 at para. 14. Indeed, DLL acknowledges this fact. However, DLL goes on to argue that while the CCAA Action has been concluded, there still remains the issue of the Disputed Lease Funds. DLL claims entitlement to approximately $900,000, representing the monthly lease payments to which it would be entitled if classified as a true lessor under *CCAA* s.11.01. DLL's claim to these funds rests on it being categorized as a true lessor. Additionally, the allocation of restructuring costs against DLL in these proceedings is dependent on whether DLL is classified as a true lessor.

[40] It is important, at this stage, to explain the process that resulted in the Vesting Order. This Court appointed PWC to facilitate negotiations with the various parties and finalization of the transaction. From August 5, 2010, when this Court endorsed PWC's acceptance of the LOI, to August 25, 2010, when this Court approved the Agreement of Purchase and Sale and granted the Vesting Order, Aecon and PWC negotiated the allocation of the purchase price among the various creditors. At the beginning of the process, there was not overwhelming support from the general body of creditors for the Aecon transaction. However, through persistent and effective negotiations, PWC secured the support of holders of 92.8 percent of the debt that Cow Harbour owed to its creditors, representing a majority in number of 90.625 percent. As well, Aecon committed to running Cow Harbour's business and employing almost all of Cow Harbour's employees, except for certain management personnel.

[41] Because of the circumstances involving certain of Cow Harbour's management, Cow Harbour would not put Aecon's transaction before the creditors as a plan of arrangement. Besides, it would have been impossible to meet the time requirements set forth in the *CCAA* to allow a plan of arrangement to be considered and approved. Cow Harbour's financial situation was deteriorating with each day. It had to meet payroll and other expenses and it did not have the financial wherewithal to meet those expenses. Aecon advised this Court that for it to facilitate the survival of Cow Harbour's business, this Court had to approve the transaction and allow a closing before the end of August, 2010. Like the parties in ***General Publishing***, the parties in this case had a sword of Damocles hanging over their heads, as the failure of this Court to approve this transaction would surely have resulted in Aecon withdrawing its offer or, if it did not, Cow Harbour's continued financial difficulties would have resulted in its demise, whether or not it was in the Aecon's hands.

[42] Given the support that the creditors showed, and the fact that Cow Harbour's business would continue to operate, this Court felt it was in the best interests of the stakeholders to approve the sale and grant the Vesting Order. To do otherwise might have resulted in a piecemeal liquidation of Cow Harbour's assets and a closing-down of its business. In other words, although this transaction was consummated under the Receivership Action, this Court considered the public policy reasons underlying *CCAA* proceedings, when it approved the Aecon transaction and granted the Vesting Order.

[43] The Aecon transaction was carefully negotiated and each of the creditors sacrificed part of their respective claims. No creditor obtained everything it was seeking. Aecon advised this Court on August 25, 2010, that it would not consummate the transaction if it did not receive an order vesting all of the assets it was purchasing into its name, free and clear of all charges, liens and encumbrances. If this Court were to give one creditor, even a creditor that was owed a trifling amount, preferential treatment, the other creditors would not have supported the Aecon transaction.

[44] An appeal of this matter might be of significance to DLL specifically. However, this Court's characterization of the Agreement is of no significance to this action generally.

Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous

[45] RBC argues that DLL has not demonstrated that it has a *prima facie* meritorious case. On September 3, 2010, DLL sought a stay of the various orders this Court granted on August 25, 2010. This Court held that because there was no appeal pending and that DLL did not seek a stay of the effect of the various orders this Court granted on that date after they were granted or at least before the Aecon transaction closed, this Court denied DLL's application on the ground of mootness. In other words, even if the Court of Appeal were to overturn this Court's August 25, 2010 decisions, DLL could not succeed in its claim to have the Equipment returned to it. The Equipment was part of a larger transaction.

[46] Does this, of itself, mean that the proposed appeal lacks merit or is otherwise frivolous? The simple answer is no. Allowing the appeal may not provide DLL with a remedy, but that does not make the proposed appeal frivolous or one that lacks merit. Rather, we must analyze the strength of the appeal on the basis of the standard of review that would

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govern the appeal, ***Liberty Oil & Gas Ltd. (Companies' Creditors Arrangement Act)***, 2003 ABCA 158 (CanLII), 2003 ABCA 158 at para. 20; ***Resurgence Asset Management LLC v. Canadian Airlines Corporation***, 2000 ABCA149 at paras. 28-29 .

[47] As stated earlier in these reasons, it is difficult for this Court to find that it made an overriding and palpable error in its consideration of the issues the parties placed before it. Surely, this is the same awkwardness that Justice Ground faced in ***General Publishing***. This Court gave its oral reasons for why it held the Agreement to be a financing lease rather than a true lease. Even taking an objective view of this with the benefit of hindsight, this Court would come to the same conclusion today.

[48] This Court acknowledges that it is not necessary for DLL to show that it is guaranteed to win an appeal. It only needs to show that it has an arguable case, ***Kenroc Building Materials Co. Ltd. v. Kerr Interior Systems Ltd.***, 2008 ABCA 291 (CanLII), 2008 ABCA 291 at para. 11. Given this Court's various findings, it is difficult to see that DLL has an arguable case, in these circumstances. On these bases, this Court finds that any proposed appeal is not on its face meritorious.

Whether the appeal will unduly hinder the progress of the action

[49] RBC and PWC argue that an appeal would unduly hinder the CCAA Action and the Receivership Action and create tremendous uncertainty concerning the various transition orders this Court granted in the CCAA Action. It should be noted at this stage that as part of the transition, this Court ordered that Disputed Lease Funds would be transferred from the monitor's counsel to the receiver's counsel, under the same terms as the May 21, 2010 order.

[50] DLL, on the other hand argues that an appeal would not unduly hinder the progress of this action. The CCAA Action has been completed. The assets have been sold to Aecon. The hearing at which the other parties with disputed leases will have their agreements categorized has not yet been scheduled. DLL's application for a stay against Aecon has been denied, so there is no issue as to uncertainty surrounding Aecon's use of the Equipment. Accordingly, DLL argues that the progress of neither action would be unduly hindered by an appeal.

[51] This Court finds that any appeal would unduly hinder the progress of the actions. Pursuant to the transition orders this Court granted on August 25, 2010, this Court must deal with many issues, including those concerning the remuneration of the chief restructuring advisor, the distribution of the Disputed Lease Funds, and who will be paying the administrative expenses. DLL is correct that Aecon's use of the Equipment is not an issue. However, the creditors seek a distribution of their respective share of the $180 million purchase price. This cannot happen if there is a pending appeal that could have an effect on the allocation. Thus, the progress of this action would be unduly hindered by the appeal to the prejudice of the creditors who supported the Aecon transaction.

[52] More importantly, the transaction that PWC and Aecon negotiated with all the creditors rests on a fine balance. The uncertainty surrounding the finality of these issues unduly hinders the progress of these actions. A more thorough discussion of this fine balance will be undertaken when this Court discusses the Stay Application.

[53] As a result of the foregoing, this Court dismisses DLL's application for leave to appeal. This result deals sufficiently with the Stay Application. However, as a courtesy to DLL, this Court will comment briefly on it.

IV. Stay Application

[54] Earlier, this Court referred to DLL's application for a stay of this Court's orders approving the Aecon Asset Purchase Agreement and the Vesting Order. On September 3, 2010, the parties argued the stay application. This Court denied the application on the basis that the issue was moot and further, that DLL had not met the test for a stay. DLL argues that the application now before this Court differs from the one it argued on September 3, 2010, as it is not challenging the sale and Vesting Order. Rather, it is seeking to have this Court hold back monies representing DLL's alleged share of the Disputed Lease Funds and the net book value of the Equipment.

[55] For DLL to obtain a stay of a stay of proceedings it must satisfy a tripartite test set out in ***RJR McDonald Inc. v. Canada (A.G.)***, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, being:

(a) Is there a serious question to be argued on appeal?
(b) Will DLL suffer irreparable harm if this Court does not grant a stay?
(c) Does the balance of convenience weigh in favour of a stay?

[56] Unlike the factors that make up the "test for leave," the tripartite test does not require or permit courts to weigh these factors. The applicant must satisfy all three elements before a court will grant the stay. In other words, if the applicant does not establish one of the elements, its application will fail. Because of this, this Court will focus on the third element of the tripartite test; the balance of convenience.

[57] On August 25, 2010, the Court heard Aecon's submissions that the Equipment is critical to the work that Aecon will be undertaking under contracts with Syncrude. For its negotiations to be successful, Aecon would have to

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satisfy Syncrude that it could fulfill the requirements under the Syncrude contracts. For this to occur, Aecon required the Equipment. Without the Equipment, Aecon would not have proceeded with the transaction.

[58] As well, this Court heard submissions that outlined many details regarding the negotiations and work of Aecon, PWC and numerous creditors which led to the Asset Purchase Agreement. The negotiations were undertaken by these parties in good faith, which required significant compromise by the creditors, including RBC, Cow Harbour's largest creditor. PWC struck a balance among numerous interests.

[59] Creditors representing 90.625 percent of all creditors negotiated in good faith and compromised their claims. Granting a stay in these circumstances would undermine the processes that Aecon, PWC, and the other creditors undertook in good faith. Holding back the net book value of the Equipment seriously upsets the fine balance that resulted from these negotiations. The creditors did not agree to compromise their claims so they could recover "something." They compromised their claims so they could receive a definite amount, as negotiated. Their receiving something less than that negotiated amount will result in this Court sanctioning an "unscrambling of the egg" and undermines the process that this Court approved and monitored. It should be noted also that DLL will be receiving an allocation of the purchase price representing a substantial portion of its claim.

[60] DLL argues that this Court's finding that it holds a financing lease prejudices its right to argue that it should obtain a portion of the Disputed Lease Funds. That may be so, but it chose to have this Court deal with the nature of the Agreement in a summary fashion. Given this Court's finding that the Agreement is a financing lease, in the end, this argument carries little weight. However, this Court has dealt with that issue and it is not now open to DLL to attempt to re-argue it.

[61] As a result, the balance of convenience favours this Court dening the stay.

V. Conclusion

[62] For the foregoing reasons this Court dismisses DLL's application pursuant to *CCAA* s. 13, for leave to appeal this Court's August 25, 2010 order, which declared that the Agreement was a financing lease and not a true lease. As well, it dismisses DLL's application seeking an order in the nature of a stay pending appeal, holding back the Disputed Lease Funds insofar as they relate to funds payable under the Agreement and an order holding back from distribution a portion of the sale proceeds resulting from the Asset Purchase Agreement, equivalent to the net book value of the Equipment.

Heard on the 22rd day of September, 2010.

Dated at Edmonton, Alberta this 5td day of October, 2010.

K.D. Yamauchi
J.C.Q.B.A.

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Big Sky Farms Inc. (Re), 2010 SKQB 255 (CanLII) - Review of Failure of Claims Officer

Date:	2010-07-20
Docket:	Q.B.G. No. 1461/2009
URL:	http://canlii.ca/t/2bt10
Citation:	Big Sky Farms inc. (Re), 2010 SKQB 255 (CanLII), <http://canlii.ca/t/2bt10> retrieved on 2013-09-11
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QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2010 SKQB 255**

Date: **2010 07 20**
Docket: Q.B.G. No. 1461/2009
Judicial Centre: Saskatoon

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED (the "*CCAA*")
AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE
CREDITORS OF BIG SKY FARMS INC., DRYCAST SYSTEMS INC. and
BIG SKY MANAGEMENT CONSULTING CORP.

Counsel:

Kevin C. Mellor	for the appellant, Alberts Construction Ltd.
Jeffrey M. Lee and Naheed Bardai	for the respondent, Big Sky Farms Inc.

JUDGMENT — GABRIELSON J.
July 20, 2010

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Introduction

[1] This is an appeal by Alberts Construction Ltd. ("Alberts") from a March 15, 2010, decision of Nicholas J. Stooshinoff (the "Claims Officer"), wherein the Claims Officer dismissed the claim of Alberts against Big Sky Farms Inc. ("Big Sky").

Background

[2] Alberts is a Saskatchewan construction company. Its principals are Mervin Alberts, as president, and Merlin Alberts as director. For several years, Alberts built pig barns and related facilities for Big Sky at various locations throughout Saskatchewan.

[3] Big Sky is a producer, feeder and marketer of hogs from multiple locations throughout Saskatchewan and Manitoba. In November 2009, Big Sky applied for court protection under the *Companies' Creditors Arrangement Act* (Canada), R.S.C. 1985, c. C-36 ("*CCAA*"), in order to restructure its business and financial affairs. Drycast Systems Inc. ("Drycast") is a wholly owned subsidiary of Big Sky. Big Sky Management Consulting Corp. ("BSMCC") is an inactive company which was incorporated to facilitate management of third party hog production operations. **Both Drycast and BSMCC are guarantors of the principal secured obligations owed by Big Sky to its senior secured lenders and, as a result, were parties to the *CCAA* application by Big Sky.**

[4] In December 2009, Big Sky presented a plan of compromise and arrangement (the "Plan") under the *CCAA* to its creditors and the Court. As part of the plan, a claims process (the "Claims Process") was proposed. The Claims Process was approved by the Court pursuant to an order dated December 9, 2009 (the "Claims Process Order"). As part of the Claims Process, creditors of Big Sky submit a claim to a monitor (the "Monitor"), who could either accept or disallow the claim. If the claim was accepted by the Monitor, the claimant would be paid a portion of its claim as set out in the Plan. If the claim was not accepted by the Monitor and the claimant disagreed with this disposition, the claim would be referred to the Claims Officer, who would then determine the validity of the disputed claim. The Claims Process also provided for an appeal to the Court from the Claims Officer's determination.

[5] During the course of the Claims Process, a claim (the "Claim") was submitted to the Monitor by Alberts alleging that Big Sky was indebted to Alberts in the amount of $2,373,790.60 for work done for Big Sky relating to the construction of facilities and roadways at three separate sites, being the Pelly breeder barn ("Pelly One"), the Pelly nursery barn ("Pelly Two") and the Porcupine Plain facility ("Porcupine"). The Claim by Alberts was disallowed by the Monitor on the basis that the records of Big Sky indicated that Alberts had been paid in full for the work and, alternatively, that the Claim would be statute barred by the expiration of the limitation period.

[6] Alberts filed a dispute note from the denial of the Claim by the Monitor and sought to have the matter determined by the Claims Officer. A summary trial was held before the Claims Officer on February 12, 2010. Affidavit evidence was submitted by both Big Sky and Alberts. Counsel were allowed to cross-examine the opposing affiants at the hearing. In a decision dated March 15, 2010, the Claims Officer held that Alberts had failed to prove the Claim on a balance of probabilities and, further, that even if the allegations had been proven, the Claim would be statute barred except for the sum of $68,899.66.

Issues

[7] Although the notice of motion filed by Alberts in this appeal lists 20 grounds of appeal, the parties agree that this list could be reduced to four main issues to be determined by the Court:

1. Did the Claims Officer err in finding that Alberts had failed to prove the Claim on a balance of probabilities?
2. Did the Claims Officer err in finding that Exhibits "E" and "F" to the affidavit of Casey Smit were contracts by which the parties intended to govern their relationship?
3. Did the Claims Officer err in finding that Alberts had sufficient information to prepare its invoices in a timely fashion?
4. Did the Claims Officer err in determining that the majority of the Claim was barred by the expiry of the limitation period?

Further issues to be addressed were the Court's jurisdiction and the standard of review that the Court should follow.

Analysis

1. Jurisdiction and standard of review.

[8] The parties agree that Alberts had a right to appeal the Claims Officer's decision by virtue of paragraph 12(c) of the Claims Process Order and paragraph 24 of the Claims Process set out in Schedule "A" to the Claims Process Order. The parties also agree that the standard of review to be followed by this court is that of an appellate court. The standard of review by an appellant court was outlined by the Supreme Court of Canada in the case of *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, 2002 SCC 33. In that case, the Court held that deference should be given to a

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decision of a trial judge with respect to factual findings unless those factual findings constitute a palpable and overriding error. The Court also held that the standard of review on a pure question of law is one of correctness, where the appellate court was free to replace the opinion of the trial judge with its own.

[9] This standard of appellate review has also been applied by courts in Ontario when hearing appeals from claims officers' decisions in *CCAA* proceedings. See *Re 1587930 Ontario Inc.* 2006 CanLII 34422 (ON SC), (2006), 25 C.B.R. (5th) 264 (Ont. S.C.J.); and *Triton Tubular Components Corp. v. Steelcase Inc.* 2005 CanLII 33299 (ON SC), (2005), 14 C.B.R. (5th) 264 (Ont. S.C.J.).

[10] In this case, the Claims Officer's decision was made after an adversarial proceeding in which each party tendered evidence by affidavit, which evidence was then subject to cross-examination of the affiant. Following written submissions by the parties, the Claims Officer wrote a detailed decision outlining his findings of fact and conclusions of law. These findings and conclusions should therefore be subjected to the standard of review as set out above: correctness as to questions of law and deference as to findings of fact, except where such findings of fact would amount to a palpable and overriding error.

2. Did the Claims Officer err in finding that Alberts had failed to prove the Claim on a balance of probabilities?

[11] Alberts' position is that the evidence submitted by Big Sky through the affidavit of Casey Smit ("Mr. Smit"), wherein he deposed that Big Sky had paid for all the work done by Alberts and that, accordingly, no money was owing, was based upon hearsay and should not have been accepted by the Claims Officer. Further, Alberts position is that the Claims Officer should have drawn a negative inference against Big Sky when it failed to call a witness, Dean Possberg ("Mr. Possberg"), who Alberts says would have given direct evidence as to the issues involved in the Claim. Alberts also submits that the Claims Officer made a palpable and overriding error when he determined that Alberts had not proven the Claim on a balance of probabilities.

[12] Counsel for Big Sky submitted that the Claims Officer had ample support in the evidence to make the findings and inferences of fact, which he did, and that no palpable or overriding error was made.

[13] The Claims Officer made the following findings in reference to the inability of Alberts to prove the Claim on a balance of probabilities:

> 17. While it may be that Alberts did perform work and provided services to Big Sky for which it has not been paid, on the documentation and evidence produced by both sides I am unable to find on a balance of probabilities if that is the case and if so what that work was, when it was performed and when it was invoiced, and finally, if it was paid for in part or at all.
>
> ...
>
> 36. Whether or not Alberts has been overpaid or is still owed money cannot be determined on the evidence before me. Big Sky submits that its account ledger indicates that Alberts has been paid in full for all work requested and approved. It indicates that the last payment to Alberts was July 16, 2007 (paragraph 24 of the affidavit of Casey Smit). On the evidence before me I can only conclude that Alberts has failed to prove on a balance of probabilities that it is owed a debt in the amounts alleged or at all.

[14] In the case of *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, 2008 SCC 53, the Supreme Court of Canada referred to the standard of proof in a civil case. At paragraph 40, the Court stated:

> 40 Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. ...
>
> ...
>
> 46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[15] The Claims Officer was therefore correct in his finding that Alberts had to prove the Claim on a balance of probabilities and that if the evidence before him did not meet this standard of proof, he must dismiss the Claim.

[16] In respect to the issue of hearsay, while the affidavit of Mr. Smit, the CEO of Big Sky, does refer to discussions he had had with Mr. Possberg, the Claims Officer's decision was not based upon such evidence but, rather, the lack of evidence provided by Alberts in proof of the Claim. Big Sky's position was that all monies owing to Alberts for work performed had been paid. This position was not based solely on the information provided by Mr. Possberg to Mr.

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Smit but also on the ledger which Big Sky kept regarding Alberts, which ledger was marked as Schedule "K" to the affidavit of Mr. Smit. This ledger showed a zero balance owing to Alberts. That ledger was the one referred to by the Claims Officer in paragraph 36 of his decision. Accordingly, it cannot be said that hearsay evidence led the Claims Officer to make a palpable and overriding error.

[17] In respect to Alberts' position that an adverse inference should have been drawn by virtue of the failure by Big Sky to call Mr. Possberg, an adverse inference should be drawn only after a *prima facie* case has been established by the party bearing the burden of proof. *Dwyer v. Mark II Innovations Ltd.* 2006 CanLII 9406 (ON CA), (2006), 208 O.A.C. 305 (Ont. C.A.).

[18] The classic Saskatchewan case concerning situations in which an adverse inference may be drawn from a party's failure to adduce relevant evidence is *Murray v. Saskatoon*, [1952] 2 D.L.R. 499 (Sask. C.A.). The Court in that case stated at paragraphs 20 and 21:

20 The subject is dealt with at length by the learned author in *Wigmore on Evidence*, 3rd ed., vol. II, pp. 162 *et seq.* On p. 162 it is stated in part:–"The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."

21 The party affected by the inference may, of course, explain it away by showing circumstances which prevent the production of the witness; but where the failure to produce the witness is not explained, the inference may be drawn that the unproduced evidence would be contrary to the party's case or at least would not support it. In the pages in *Wigmore on Evidence* following the above quotation many authorities are referred to which indicates that in the Courts of the United States the rule is of wide application.

[19] In the circumstances of this case, Big Sky provided evidence to explain why it did not call Mr. Possberg. At paragraph 13 of his affidavit, Mr. Smit deposes that Mr. Possberg is no longer employed by Big Sky. At Q. 567 of the cross-examination of Mr. Smit, he confirms that Mr. Possberg stopped working for Big Sky in August 2009. As such, Big Sky has provided an explanation as to why Mr. Smit is the affiant, as he is the CEO of Big Sky. There is no property in a witness: *Harmony Shopping Co. S.A. v. Davis*, [1979] 3 All E.R. 177 at 180-81, and *S.M. v. Canada (Attorney General)*, 2005 SKQB 351 (CanLII), 2005 SKQB 351, 271 Sask. R. 123. If Alberts felt that the evidence of Mr. Possberg could establish its claim, Alberts has the ability to subpoena Mr. Possberg to obtain his evidence.

[20] The finding by the Claims Officer in paragraphs 12 and 36 that Alberts has failed to prove on a balance of probabilities that it is owed a debt by Big Sky or the amount thereof are findings of fact for which deference should be given. I find that there is evidence to support the Claims Officer's findings of fact in this regard. While there may have been evidence as to inconsistencies in Big Sky's documentation as referred to by counsel for Alberts in this appeal that does not assist Alberts in proving its own claim. The finding of fact by the Claims Officer that Alberts did not prove its claim on a balance of probabilities cannot be said to amount to a palpable or overriding error.

3. Did the Claims Officer err in finding that Exhibits "E" and "F" to the affidavit of Casey Smit were contracts which the parties intended to govern their relationship?

[21] Exhibits "E" and "F" to the affidavit of Casey Smit are documents "H" and "I" in the index of documents filed with the Court at the hearing of this appeal. Alberts submits that at paragraph 11 of his decision, the Claims Officer found that Exhibits "E" and "F" were contracts between the parties and that this finding of fact constituted a palpable and overriding error. Big Sky submits that the two documents reflect an understanding between the parties and that the Claims Officer properly made use of them in coming to the conclusions he did concerning the relationship. In any event, Big Sky submits that even if they were found by the Claims Officer to be contracts, such finding would not be a palpable and overriding error.

[22] In his decision, the Claims Officer recognized that Exhibits "E" and "F" were incomplete documents. His conclusion was that, although incomplete, they were contractual documents "intended by both parties to govern their relationship for the construction of Pelly Barn #1 and Pelly Barn #2". There is evidence to support such a finding found in paragraphs 11 to 13 of Mr. Smit's affidavit. The Claims Officer found that each side was equally at fault for failing to properly document their contractual relationship and, in my opinion, the evidence supports such a conclusion. The Claims Officer was entitled to use the said documents for the limited purpose that he did. Accordingly, I find the Claims Officer has not committed a palpable and overriding error in referring to these documents as contractual documents.

4. Did the Claims Officer err in finding that Alberts had sufficient information to prepare its invoices in a timely fashion?

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[23] Alberts' position is that the Claims Officer made an error of fact in paragraph 30 of his decision when he made the following determination in the last sentence of that paragraph:

30. ... I find that Alberts did in fact have sufficient information to prepare its invoices and at the very least could have entered into an arrangement for determining any short fall [*sic*] it may have claimed.

[24] The Claims Officer concluded that the dirt quantity listing report dated December 7, 2006, and provided to Alberts on January 10, 2007, (document "E" in the index of documents) was sufficient to allow Alberts to submit its invoice at that time.

[25] Once again, it is clear from his decision that the Claims Officer was aware of the position of Alberts that it could not submit an accurate invoice without additional information from Big Sky in the form of final dirt work quantities. At paragraph 30, the Claims Officer dealt with this submission and made a finding of fact that this position was not accepted for the reasons given. Deference must be given to these findings of fact. The Claims Officer's findings of fact in this regard cannot be said to amount to a palpable or overriding error.

5. Did the Claims Officer err in determining that the majority of the Alberts claim was barred by the expiry of the limitation period?

[26] While the principle reason given by the Monitor for rejecting Alberts' proofs of claim in respect to monies owing by Big Sky was that Alberts had already been paid for any goods and services provided to Big Sky, the Monitor also gave an alternative reason for disallowing the claim. In the Monitor's notice of January 20, 2010, the Monitor stated:

... Furthermore, if any claim exists, it would be barred by the expiry of the limitation period for making such a claim.

[27] The Claims Officer dealt with this alternative reason and concluded that the Monitor had been correct in his decision that the vast majority of the claim was time barred. Although the Claims Officer found that invoices for work done in 2004 totalling $68,899.66 would not have been time barred when *The Limitations Act*, S.S. 2004, c. L-16.1, was amended in 2005, the Claims Officer found Alberts had failed to establish on a balance of probabilities that the claim for 2004 work had been proven. In this appeal, counsel for Alberts raised three submissions concerning the findings by the Claims Officer that the majority of Alberts' claims were time barred:

(a) there is no limitation period in respect to *CCAA* claims;
(b) the Alberts claim was not time barred because Alberts did not discover its claim until the spring of 2009; and
(c) the Alberts claim was not time barred because Big Sky had concealed information from Alberts necessary to submit a claim.

Each of these submissions will be dealt with separately.

(a) Does The Limitations Act *apply to CCAA claims?*

[28] Alberts' position is that the *CCAA* does not provide for any limitation period within that Act. Further, counsel for Alberts submitted that Alberts' claim is not subject to the limitation periods in *The Limitations Act* because Alberts' claim is not commenced by statement of claim or originating notice as referred to in s. 3(1) of that Act. Counsel for Alberts submits that the application before the Claims Officer is in the nature of an appeal from the disallowance of Alberts' claim by the Monitor and that s. 3(2)(a) of *The Limitations Act* clearly exempts appeals. Alberts refers to ss. 2 and 3 of *The Limitations Act* which provide:

Interpretation

2 In this Act:

(a) **"claim"** means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;

(b) "claimant" means a person who has a claim;

...

Application of Act

3(1) Subject to subsections (2) to (5), this Act applies to claims pursued in court proceedings that:

(a) are commenced by statement of claim; or

(b) are commenced by originating notice and are not proceedings in the nature of an application.

(2) This Act does not apply to court proceedings that are:

(a) proceedings in the nature of an appeal;

...

[29] It is the position of Big Sky that *The Limitations Act* does not specifically include or exclude *CCAA* proceedings. Counsel for Big Sky submits, however, that case law has established that a debt barred by a statute of limitations is not provable within the meaning of the *CCAA* and accordingly the Act applies to claims such as that brought by Alberts.

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[30] Whether *The Limitations Act* applies to a notice of claim filed pursuant to the *CCAA* is a matter of statutory interpretation. Accordingly, the standard of review is one of correctness.

[31] When considering whether *The Limitations Act* applies to CCAA proceedings, the starting point is to consider the purpose of a statute of limitations. In the case of *M.(K.) v. M.(H.)*, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6, La Forest J. dealt with the purposes of limitation statutes. He stated at pages 29-31:

... In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the *Limitations Act*, I believe it is helpful to first examine its underlying rationales. There are three, and they may be described as the certainty, evidentiary, and diligence rationales ....

Statutes of limitations have long been said to be statutes of repose; see *Doe on the demise of Count Duroure v. Jones* (1791), 4 T.R. 301, 100 E.R. 1031, and *A'Court v. Cross* (1825), 3 Bing. 329, 130 E.R. 540. The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. ...

The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim; see *Dundee Harbour Trustees v. Dougall* (1852), 1 Macq. 317 (H.L.), and *Deaville v. Boegeman* reflex, (1984), 48 O.R. (2d) 725 (C.A.). ...

Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. ...

[32] The above noted rationales were referred to and adopted by the Saskatchewan Court of Appeal in the case of *Josvanger v. Folk*, 2005 SKCA 138 (CanLII), 2005 SKCA 138, 275 Sask. R. 101.

[33] Beginning at paragraph 45 of his decision, it is clear that the Claims Officer was aware of and considered the purposes of limitation periods as referred to above. The issue before me is whether he was correct in his determination that *The Limitations Act* applies in the circumstances of this case.

[34] Although the *CCAA* does not have an express purpose clause, it is titled "an Act to facilitate compromises and arrangements between companies and their creditors". This title can be taken to suggest that its purpose was to assist insolvent companies in achieving arrangements with creditors so that the company could find a way to continue operations and avoid bankruptcy. The connection between the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), as amended, can also be seen throughout the *CCAA*.

[35] Some sections of the *CCAA* make specific reference to the *BIA*. Section 2 of the *CCAA* defines the term "claim" and provides:

> **Definitions**
> **2.** (1) In this Act,
> ...
> "claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;
> ...

[36] Section 2 of the *BIA* provides:

> **Definitions**
> **2.** In this Act,
> ...
> "claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;
> ...

[37] Section 121(1) of the *BIA* defines what is a "claim provable". It provides:

> **Claims provable**
> **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[38] Numerous cases have held that limitation periods apply to claims under the *BIA*. Most of these cases refer to the case of *Reference re the Debt Adjustment Act, 1937 (Alb.)*, [1943] 2 D.L.R. 1 (P.C.), in which the Privy Council said at page 11:

... In England it has always been held that, subject to the statutory exception as to debts payable at some certain future time, the petitioning creditors' debt and the debts provable must be debts recoverable by legal process. For

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example, a debt barred by the *Statute of Limitations* is not a debt on which a bankruptcy petition can he presented, nor is it one provable in bankruptcy.... The Dominion Act is very similar to the English *Bankruptcy Acts* so far as those matters are concerned, and there appears to be no reason for thinking that a similar principle would not be applied in Canada to the words "debt due." ... [Emphasis added.]

[39] In the case of *Re Hamar* (1921), 63 D.L.R. 241 (Sask. K.B.), MacDonald J. stated at page 241:

A debt barred by the statutes of limitation [is] not provable. *Ex parte Dewdney; Ex parte Seaman* (1808), 15 Ves. Jun. 479, 33 E.R. 836; *Ex parte Roffey* (1815), 2 Rose 245; 2 Hals. P. 202, para. 325.

[40] Other cases have also held that a provable claim in bankruptcy proceedings must be one recoverable by legal process and therefore not one for which the limitation period has already run. *Farm Credit Corp. v. Holowach (Trustee of)* 1988 ABCA 216 (CanLII), (1988), 51 D.L.R. (4th) 501 (Alta. C.A.); and *Re Morton* (1922), 66 D.L.R. 378 (Sask. K.B.).

[41] As s. 2 of the *CCAA* requires that the claim be "provable" within the meaning of the *BIA*, following the above authorities, I am satisfied that the Claims Officer was correct in his determination that *The Limitations Act* would apply to claims brought under the *CCAA*. At paragraph 3 of his decision, the Claims Officer made a finding of fact that the invoices forming the Claim refer to work done prior to August 13, 2007, and that the limitation period had expired by August 13, 2009, prior to the *CCAA* application. My review of the invoices confirms this finding of fact and, accordingly, his conclusion that the Claim was time barred is not a palpable or overriding error.

(b) Was the Alberts claim not time barred because Alberts did not discover its claim until the spring of 2009?

[42] Sections 5, 6 and 18 of *The Limitations Act* are relevant to this issue. They provide:

> **Basic limitation period**
>
> **5** Unless otherwise provided in this Act, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.
>
> **Discovery of claim**
>
> **6**(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;
>
> (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
>
> (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.
>
> (2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.
>
> ...
>
> **Burden of proof**
>
> **18** If, in a proceeding, a limitation period is raised against a claimant, the claimant has the burden of proving that:
>
> (a) the limitation period has not expired; or
>
> (b) there is no limitation period that applies to the claim.

[43] It is the position of Alberts that it did not discover its claim until the spring of 2009 when Mr. Possberg, who was at that time employed by Big Sky, advised Alberts that Big Sky would not pay them any more money for work done by Alberts at the Pelly and Porcupine locations. Alberts also suggests that it did not receive the final dirt quantity numbers as prepared by the engineering technologists and submitted to Big Sky, and that, without these quantities, it has been unable to prepare and submit invoices to Big Sky. Alberts suggests that s. 6(1)(b), (c) and (d) are applicable in the circumstances of this case.

[44] The parties agree that s. 6 of *The Limitations Act* is merely a codification of the existing case law, which was set out by the Supreme Court of Canada in the cases of *Kamloops (City) v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2, and *Central Trustco v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147. In discussing this codification, in the case of *Placzek v. Green*, 2009 ONCA 83 (CanLII), 2009 ONCA 83, 307 D.L.R. (4th) 441, the Ontario Court of Appeal stated at paragraph 52:

> 52 Whether under the former limitations regime or under the new Act, in the context of limitations law, "discovered" refers to discovering the material facts on which a cause of

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> action or claim is based for the purpose of triggering the limitation period: see *Kamloops (City of) v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147, at p. 224; and see s. 5 of the new Act.

[45] The Claims Officer made findings of fact that Alberts was aware of the work it had done and could have pursued a claim but chose not to do so. At paragraphs 49-51 of his decision, the Claims Officer refers to evidence on which he based this determination. Alberts' position that the limitation period would not commence until they were told by Mr. Possberg in the spring of 2009 that they would not be paid any more money, even if accepted as factual, would not be the date for discovery of the claim as required by the Act but, rather, only discovery of the non-payment of its claim. To take the submission of counsel for Alberts to its logical conclusion, if Alberts had not heard from Big Sky for 20 years, it could still claim the limitation period did not start to run. To say that no money is owed is not an acknowledgment of a debt but, rather, an affirmation that there is no debt. I have reviewed the evidence referred to by the Claims Officer at paragraphs 49 to 51 of his decision and, in my opinion, the Claims Officer did not make a palpable and overriding error in this regard and deference must be given to his determination.

(c) Was the Alberts claim not time barred because Big Sky concealed information from Alberts necessary to submit a claim?

[46] Section 17 of *The Limitations Act* provides that the limitation periods established by the Act will not apply if there has been a wilful concealment by the party against whom the claim is made. Section 17 provides:

> **Concealment**
>
> **17** The limitation periods established by this Act or any other Act or regulation are suspended during any time in which the person against whom the claim is made:
>
> (a) wilfully conceals from the claimant the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made; or
>
> (b) wilfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

[47] The position of Alberts is that Big Sky received a report from the engineering technologist as to the final dirt quantities moved by Alberts but failed to provide this report to Alberts such that Alberts was not in a position to invoice Big Sky for the work that had been done. This same submission was also made to the Claims Officer, who dealt with it in paragraphs 52-57 of his decision. The Claims Officer specifically found that Big Sky had faxed a copy of the report to Alberts in a fax dated January 10, 2007. The fax, which is Document "E" in the index of documents, states in part: "Attached are the final excavation quantities for Site 1 and Site 2 @ Pelly."

[48] While counsel for Alberts submitted that these were not the final dirt quantity reports regarding Pelly and that there were no dirt quantity reports for Porcupine Plain, there was no evidence tendered before the Claims Officer that there had been any "wilful concealment" of the dirt reports. The Claims Officer concluded that both sides bear responsibility for poor record-keeping, but also found that sloppy record-keeping is not wilful concealment. At question 892 of the cross-examination of Mr. Smit, Mr. Smit indicated on behalf of Big Sky that he could not locate any other final quantity report. There was no evidence before the Claims Officer that there is any other final dirt report other than that contained in the January 10, 2007, fax. The onus of proving that Big Sky wilfully concealed such information is upon Alberts, and I conclude, as did the Claims Officer, that Alberts has not met this onus.

[49] In any event, the limitation period found in s. 5 of *The Limitations Act* commences on the day on which the claim is discovered, not when the claimant discovered the precise amount of the claim. The concept of discoverability, which was initially applicable only to actions in tort, has now been codified and incorporated into ss. 5 and 6 of *The Limitations Act*. See *Pusch v. Freshair Enterprises Ltd.*, 2007 SKCA 60 (CanLII), 2007 SKCA 60, [2007] 11 W.W.R. 1, and *Stomp Pork Farm Ltd. v. Lombard General Insurance Co. of Canada*, 2008 SKQB 405 (CanLII), 2008 SKQB 405, [2009] 4 W.W.R. 483 at paras. 34-35. The presumptions found in s. 6(2) are applicable in the circumstances of this case. The Claims Officer determined as a fact that Alberts knew it had a claim and could have pursued it but, as a result of the choice by Mervin Alberts, the president of the company, Alberts chose not to initiate proceedings. There was ample evidence on which the Claims Officer could have made such a determination and, accordingly, I find that he made no palpable or overriding error in his determination that s. 17 of the Act did not apply to this case.

Conclusion

[50] For the above noted reasons, the appeal is dismissed with costs to the respondent, Big Sky.

J.

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N.G. Gabrielson

Lexxor Energy Inc. v. Richter, Allan & Taylor Inc., 2003 ABCA 158 (CanLII) - Test for Appeal of Order

Date: 2003-05-14
Docket: 0301-0038-AC
Parallel citations: 44 CBR (4th) 96
URL: http://canlii.ca/t/59z9
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Liberty Oil& Gas Ltd. (Companies Creditors Arrangement Act), 2003 ABCA 158

Date: 20030514
Docket: 0301-0038-AC

IN THE COURT OF APPEAL OF ALBERTA

MEMORANDUM OF DECISION OF THE
HONOURABLE MR. JUSTICE WITTMANN

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF LIBERTY OIL & GAS LTD.

BETWEEN:

LEXXOR ENERGY INC. and LIBERTY OIL & GAS LTD.

Appellants

- and -

RICHTER, ALLAN & TAYLOR INC.
MONITOR OF LIBERTY OIL & GAS LTD.

Respondents

APPLICATION FOR LEAVE TO APPEAL THE DECISION
OF THE HONOURABLE MR. JUSTICE D. G. HART DATED JANUARY 24, 2003

COUNSEL:

G. Brian Davison
For the Various Unsecured Creditors

Larry B. Robinson
For the appellants, Lexxor Energy Inc. and Liberty Oil & Gas Ltd.

Geoffrey D. Baker
For Rick Martin

Frank R. Dearlove
For the respondents, Richter, Allan & Taylor Inc., Monitor of Liberty Oil & Gas Ltd.

Peter S. Jull, Q.C.
For Various Unsecured Creditors

MEMORANDUM OF DECISION OF THE
HONOURABLE MR. JUSTICE WITTMANN

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INTRODUCTION

[1] Lexxor Energy Inc. ("Lexxor") acquired Liberty Oil & Gas Ltd. ("Liberty") after Liberty's plan of arrangement ("the Plan") pursuant to the *Companies Creditors' Arrangement Act* ("*CCAA*") R.S.C. 1985 c. C-36 was accepted by its creditors. The transaction closed July 23, 2002.

[2] Hart, J. at all material times was the supervising judge pursuant to the ***CCAA*** and Richter, Allan & Taylor Inc. acted as the court-appointed Monitor. The business of Liberty included the production of oil and gas. As is customary in the industry, payment for the previous month's production was not received until the following month. In the case of Liberty, on or about the 25th of each month. A dispute arose between the unsecured creditors and Lexxor as to the amounts available attributable to the post-petition interval between February 25, 2002, the petition date, and July 23, 2002 ("the ***CCAA*** Period").

[3] At the core of the dispute was whether revenue accruing during the *CCAA* Period was available to pay excluded claims, a defined term under the Plan. Lexxor took the position before Hart, J. that the matching principle of accounting was inapplicable, that the Plan indicated that only cash received during the *CCAA* Period would be used to pay excluded claims and that therefore the cash proceeds ("the basket") were available to pay any unsecured creditor deficiency arising. The impact on the unsecured creditors if Lexxor's position were adopted is significant. It markedly decreases their recovery.

FACTS

[4] The relevant provisions of the Plan voted upon by the unsecured creditors and affirmed by court order dated June 29, 2002 are as follows:

> 2.1 Purpose
> . . . Liberty's Unsecured Creditors are to be paid their first $1,500.00 of Proven Claims in cash and receive their ***pro rata*** share of a pool of cash and Lexxor Shares estimated to enable them to recover $0.75 per dollar of Proven Claim. . . .
> 2.2 Claims Not affected - Excluded Claims
> This Plan does not compromise the following Claims and rights that arise in the following capacities (the "Excluded Claims"):
>
> . . .
> (b) All Claims arising or accruing for either or both of the provision of goods and performance of services to Liberty from and after the date of the Initial Order;
> . . .
> 4.1 Overview
> . . . it is expected that this Plan will enable Liberty to go forward as a viable business entity. It is expected that this Plan will result in:
> (a) repayment of 100% of all Excluded Claims from the Cash Proceeds with the exception of the National Bank Debt which will be dealt with . . .
> (b) a distribution to Unsecured Creditors of approximately $0.75 per dollar, consisting of the balance of Cash Proceeds and Lexxor Shares;
> . . .
> 4.2 Details of the Plan
> . . .
> (d) Payment of Excluded Claims and Distributions to Secured Creditors, and Unsecured Creditors:
> (i) *Excluded Claims*: If Excluded Claims which are to be repaid in accordance with the provisions of the Plan have not been paid by the Plan Implementation Date, then Liberty shall pay such Excluded Claims from the Cash Proceeds as soon as practicable following the Plan Implementation Date . . .
> (ii) *Cash Distributions to Unsecured Creditors*: The Monitor shall distribute the portion of Cash Proceeds due to Unsecured Creditors with Proven Claim after payment of or allowance for all Excluded Claims . . .
> "**Cash Proceeds**"means a cash payment of $6,811,425.00 which will be available to Liberty and the Monitor which will permit Liberty or the Monitor, as applicable, to make the payments to Creditors contemplated by this Plan.

THE MONITOR'S FIFTH REPORT TO THE COURT

[5] In that part of the Fifth Report of the Monitor to the Court dealing with "Lexxor's Interpretation of the Plan", the Monitor stated at p.2:

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> At the closing date of July 23, 2002, the Liberty had $1,362,484 in liabilities relating to post-petition trade creditors that had not yet been paid by Liberty. These creditors are to be satisfied in full as the amounts owed to them arose subsequent to the Initial Order [FEB. 25, 2002]. Lexxor is of the view that the $1,362,484 is to be paid from the Cash Proceeds as Lexxor acquired no debt. Interpreting the Plan in this fashion has the effect of reducing the cash recovery to Liberty's unsecured creditors from 45 cents on the dollar to 27.5 cents on the dollar.

[6] He continued at pp.2-3:

> . . . The Plan, however, does not address revenues earned by Liberty during the post-petition period. Those revenues which Lexxor believes they are entitled to, are required to pay Liberty's post-petition creditors.
>
> When Liberty's Plan was advanced to creditors to vote upon, unsecured creditors expected a recovery of 75 cents on the dollar, 45 cents in cash, and 35 cents in Lexxor shares. Paying post-petition trade creditors from the Cash Proceeds advanced by Lexxor was not contemplated. It is the Monitor's view that if the Plan is interpreted in this way the resulting removal of $1,362,484 from funds available to unsecured creditors may have significantly affected their vote on the Plan. Moreover, there were alternatives available other than Lexxor's proposal which both Liberty and the unsecured creditors may have considered differently if those parties were aware that the cash component of their recovery would only be 27.5 cents not 45 cents as a result of post-petition trade creditors sharing in the cash proceeds.
>
> As well, given Lexxor's interpretation of the Plan, it appears that the quantum of post-petition trade creditors left in Liberty is arbitrary based on the closing date. If Lexxor had acquired Liberty on July 26, 2002, not July 23, 2002, the revenues for June 2002 production would have been received by Liberty and would have been used to pay a portion of Liberty's post-petition trade creditors. Consequently, the date of closing has a substantial impact on the recovery to Liberty's unsecured creditors. The gross revenues received by Liberty for June and July 2002 total approximately $1.55 million net of royalties. It seems consistent to the Monitor that these funds should be available to satisfy Liberty's post-petition trade creditor debt, not the Cash Proceeds.

[7] There were other issues put forward by Lexxor that are not subject to this leave application but which were dealt with by Hart, J. on January 24, 2003.

MONITOR'S SIXTH REPORT TO THE COURT

[8] This report was part of the material before Hart, J. on January 24, 2003. It is dated January 21, 2003. It is short. It repeats the issue as set out in the Monitor's Fifth Report in terms of the position of Lexxor and the payment of post-petition trade creditors. It also indicates that the Monitor had requested a summary of receipts and disbursements for the period February 25 to February 28, 2003 from Lexxor but that that information had not been provided. It goes on to reference Exhibit 1 which the Monitor at p.3 stated :

> . . . reflects Liberty's receipts for July and August, 2002 as well as the disbursements made by Liberty in July 2002, the majority of which were made after the July 23, 2002 closing date. Based on the information available to the Monitor, it appears that during the ***CCAA*** Period Liberty had positive cash flow. Consequently, if the revenues and expenses (receipts and disbursements) were matched, it appears that the post-petition trade creditors would have been paid in full and the unsecured creditors of Liberty would receive a greater percentage of the Cash Proceeds.
>
> Lexxor's interpretation of the Plan may be contrary to a fundamental accounting concept. The concept is known as matching whereby expenses that are linked to a revenue generating activity are matched with the revenues in the period the revenue is recognized. Liberty would have prepared its statements on an accrual basis and therefore would have recognized or recorded the revenue in the period it occurred as well as when the expenses were incurred. Lexxor's interpretation would only reflect Liberty's expenses and not its revenues. The treatment of revenues in Liberty's Plan is not addressed and it is the Monitor's view that in the absence of clear language fundamental accounting principles should be applied.

THE DECISION OF THE SUPERVISING CHAMBERS JUDGE - JANUARY 24, 2003

[9] The transcript of the reasons includes the following:

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> . . . looking at the plan as a whole and considering the process as a whole and included in that, of course, are the monitor's ongoing reports reporting on positive cashflow, that data coming from the operating company, looking at the various clauses in the plan itself, I am satisfied that the matching principle, as set out by the monitor in its reports, most notable the sixth report, and as contained in the briefs of - at least as contended for - in the briefs of Mr. Davison and Mr. Jull, is the proper principle and that the plan should be and was intended to be interpreted accordingly.
> There is no clear language to rebut a proper application of generally accepted accounting principles and it is clear that the unsecured creditors, at least, were given very strong representations that they could expect, on the basis of ongoing operations between the petition date and the closing date, that they could expect something in the order of $.75 on the dollar. There were other expenses that were not contemplated at the time that drives that figure down. But implicit in that representation I am satisfied was the notion that the matching principle would be applied between those dates and that earnings would be taken into account.
> Now that is the advice and direction that I give to the monitor.

[10] The application for leave to appeal to this Court was filed February 10, 2003. During the period from January 24, 2003 to March 3, 2003, the parties could not agree on the form of order to be taken out pursuant to Hart, J. reasons. On March 3, 2003, another hearing before Hart, J. was held to settle the minutes of his January 24, 2003 order.

THE DECISION OF THE SUPERVISING JUDGE ON MARCH 3, 2003

[11] At this hearing, counsel for Lexxor and Liberty shifted gears, perhaps in an attempt to grasp too much of a good thing. Two alternate forms of order were put forward to Hart, J. on March 3, 2003. So far as this leave application is concerned, the relevant clauses are, as put forward by Lexxor:

> 2. The Court approves and adopts the matching principle as set out by the Monitor in its Reports, most notably the Sixth Report, and, in particular:
>
> (a) the application of the matching principle is to be applied in accordance with generally accepted accounting principles for the period between February 25, 2002 and July 23, 2002.

[12] The second form of order put forward by the remainder of the parties, including the Monitor and the unsecured creditors, stated:

> 2. The Court approves and adopts the concept of "matching" as applied in the Monitor's Sixth Report, and, in particular, Exhibit "1" to that Report.

[13] At the hearing before Hart, J., Lexxor's counsel repeatedly advocated that the words "generally accepted accounting principles" be used in the form of the order because Hart, J. had mentioned that terminology in his decision on January 24, 2003 and wanted to make sure it applied to the entire ***CCAA*** period. Extensive argument occurred before Hart, J. as to the difference in impact on the unsecured creditors if Lexxor's version of the order were adopted or if the remainder, i.e. the majority of the parties' version were adopted. Hart, J. stated at p.42-43 of his March 3, 2003 decision as follows:

> The purpose of this hearing today on - this aspect of the hearing at least is to fix the terms of the order that I granted on January 24th on the monitor's application.
> I have heard all counsel who have spoken on this settlement of terms hearing and I am satisfied that the version that - as between the two versions of the order, the one that accords with the actual order that I granted on the 24th is the order acceptable to the majority of the parties.
> I was at pains in January to make it clear that the matching principle that I wanted to see applied and which formed a basis for the rationale of the order I gave at that time was the matching principle as discussed by the monitor in his sixth report. And that was clear then, it remains clear and, in my belief, the order sponsored by the monitor and the majority of the parties reflects that position. I am not satisfied that the order proposed by Mr. Robinson on behalf of his client [Lexxor] does that.
> Indeed, in my view, his order distorts the matching principle and could well result in a clawback or a diversion of funds from the unsecured creditor or the estate back to Lexxor contrary to the spirit and intent of my order of January the 24th and, indeed, as I see it, contrary to the proper meaning of the plan of arrangement itself.
> So I order and direct that the form of order to be used in the circumstances is the form of order agreed to by the majority of the parties.

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THE TEST FOR LEAVE TO APPEAL

[14] Leave to appeal is available under the *CCAA* by virtue of s. 13. Sections 13 and 14(1) state as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> 14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

[15] The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties: *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149 (CanLII), (2000), 261 A.R. 120, 2000 ABCA 149 ("*Resurgence #1*") at para 6; *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 62 (CanLII), 1999 ABCA 62 at para. 22; *Resurgence Asset Management LLC v. Canadian Airlines Corporation* 2000 ABCA 238 (CanLII), (2000) 266 A.R. 131, 2000 ABCA 238 ("*Resurgence #2*") at para. 19; *Re Multitech Warehouse Direct* (1995) A.J. No. 663 at para. 3; 32 Alta. L.R. (3d) 62 at 63 (C.A.).

[16] The four factors subsumed in an assessment whether the criterion is present are:

(1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action: *Resurgence #1* at para. 7; *Resurgence #2* at para. 19.

[17] The first factor may be influenced by whether there is appellate authority on the question proposed to be considered on appeal: *Resurgence #1* at para. 33. It is also interpreted broadly to include not only in the insolvency practice but the industry involving the claimant: *Re Blue Range Resource Corp.* 2001 ABCA 86 (CanLII), (2001) 281 A.R. 172 at para. 1. It was argued by the unsecured creditors that the point on appeal had no significance to the insolvency practice because it involved an interpretation of the terms of a specific plan of arrangement. Therefore, it was not a point of significance in the sense used. Perhaps. But the timing of payment for oil and gas production in relation to the *CCAA* period may be of significance to the practice.

[18] The second factor - whether the point raised is of significance to the action itself - is conceded. In argument before me, Lexxor asserted that the proper application of the matching principle would result in a clawback of over a million dollars but Lexxor proposed to cap the clawback at a million dollars in any event of the result. The unsecured creditors indicated that the broader import of the matching principle as put forward by Lexxor would indeed have that result. So it is of significance to the parties.

[19] The third factor involves a consideration as to whether there appears to be an error in principle of law or a palpable and overriding error of fact or that the exercise of discretion by a supervising *CCAA* judge has been exercised improperly, such as by taking into consideration irrelevant factors or failing to consider relevant factors: *Resurgence #1* at para. 41-42. Lexxor's counsel argued strenuously that the alleged misstatement of the matching principle was an error of law, subject to the standard of review of correctness. The other parties submitted that there was no error of law or principle, that the interpretation of the Plan and the adoption of the Monitor's proposal was at most an error of mixed law and fact or the exercise of discretion by the supervising judge. I agree.

[20] The standard of review that would govern the appeal is to be considered: *Resurgence #2* at para. 42; *Resurgence #1* at para. 28-29. Ancillary to these considerations are indications that a supervising chambers judge under the *CCAA* should be accorded considerable deference. Their decisions will be interfered with only in the event of unreasonable acts, errors in principle or manifest errors: *UTI Energy Corp. v. Fracmaster Ltd.* 1999 ABCA 178 (CanLII), (1999) 244 A.R. 93 at para. 3. It has also been stated that an appellate court scrutinizing leave applications under the *CCAA* should exercise its powers sparingly, that a supervising *CCAA* judge has an ongoing management process similar to that of a judge making orders during a trial: *Duke Energy Marketing Limited Partnership v. Blue Range Resource Corporation*, 1999 ABCA 255 (CanLII), 1999 ABCA 255 at para. 3; *Luscar Ltd* at para. 62. Finally, the four factors are to be assessed in the context of determining whether the criterion has been met by ascribing appropriate weight to each of the elements of the general criterion: *Resurgence #1* at para. 46.

APPLICATION IN THIS CASE

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[21] Central to the issue proposed for appeal is the impact of the application of the matching principle either as propounded by Lexxor or as propounded by the Monitor. The issue is not whether the matching principle is to be applied in accordance with generally accepted accounting principles. It is whether Hart, J. erred in law in approving the Monitor's proposed application of the matching principle in his Sixth Report. In my view, he did not. No details were articulated as to what the error complained of was. Only that the words "generally accepted accounting principles" were absent from the formal order actually settled on when they were, in fact, included in the reasons. It is clear from the quotation from the Monitor's Sixth Report what Hart, J. had in mind. He said what he had in mind when he settled the minutes of the order. He, in effect, approved the Monitor's version of the matching principle, i.e. the recognition of revenue during the ***CCAA*** period and its availability to satisfy excluded claims. Neither the Monitor nor Hart, J. intended to extend "the matching principle" beyond revenue recognition. In other words, there was no intent to derive a new accounting from February 25 to July 23 on a full accrual basis according to the version put forward by Lexxor.

[22] Whether the appeal would unduly hinder the progress of the action was not strenuously argued. Apparently, an interim distribution can be made and there must be some delay because there is another contingent claim brought by one Martin which remains outstanding and which will delay a final distribution in any event. I am prepared to proceed on the basis that this factor would not and does not influence the decision to grant leave.

CONCLUSION

[23] What is fatal to the applicant's position here is the absence of any demonstrable or, with respect, arguable error in the decision of the supervising chambers judge. He did not pronounce on the matching principle as if he were writing a chapter of the ***Canadian Institute of Chartered Accountants*** (***"CICA") Handbook*** in setting out generally accepted accounting principles. What he did do was adopt the Monitor's interpretation of fundamental accounting concepts for the purposes of revenue recognition during the ***CCAA*** period. Recognition in terms of revenue is a specialized term pursuant to the ***CICA Handbook*** at **1000**.41 where it is indicated that "recognition is the process of including an item in the financial statements of an entity". It has a particular application to revenue in terms of the timing of it: See s. **3400 revenue** .06, .07 of the ***CICA Handbook***.

[24] Generally accepted accounting principles are defined at paragraph **1000** .59, .60, .61 of the ***CICA Handbook*** including departure and applicability. That terminology would not be helpful in a general sense to the resolution of the dispute between the parties here. The particular application of a fundamental accounting concept in terms of revenue recognition and measurement, as recommended in detail by the Monitor, is what is relevant, and that is what Hart, J. ordered.

[25] The application for leave to appeal is denied.

APPLICATION HEARD on April 23, 2003
FILED at Calgary, Alberta
this 14th day of May, 2003

WITTMANN, J.A.

Court of appeal - Sec 14

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice - Sec 14(2)

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.
R.S., 1985, c. C-36, s. 14;
2002, c. 7, s. 135.

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Appeals - Sec 15
15. (1) An appeal lies to the Supreme Court of Canada on leave therefor being granted by that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

Jurisdiction of Supreme Court of Canada - Sec 15(2)
(2) The Supreme Court of Canada shall have jurisdiction to hear and to decide according to its ordinary procedure any appeal under subsection (1) and to award costs.

Westar Mining Ltd. (Re), [1993] 1 S.C.R. 890 - Leave to Appeal to Highest Court

United Mine Workers of America International Union and United Mine Workers of America, Local 7292 *Applicants*
v.
Larry Bell, Robert Chase and Peter Dolezal *Respondents*
and
Greenhills Workers' Association *Respondent*
and
Three Hundred Non-Union Employees *Respondents*
and between
Larry Bell, Robert Chase and Peter Dolezal *Applicants*
v.
United Mine Workers of America International Union and United Mine Workers of America, Local 7292 *Respondents*
and
Greenhills Workers' Association *Respondents*
and
Three Hundred Non-Union Employees *Respondents*
Indexed as: Westar Mining Ltd. (Re)
File No.: 23395.
1993: March 1; 1993: March 18.
Present: Sopinka, Cory, McLachlin, Iacobucci and Major JJ.
Applications for leave to appeal and motion to quash the applications for leave to appeal

Appeal -- Leave to appeal -- Supreme Court of Canada -- Court of Appeal refusing leave to appeal on matters arising under Companies' Creditors Arrangement Act -- Whether leave to appeal to Supreme Court of Canada may be granted -- Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s. 15.

Cases Cited

Applied: *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460.

Statutes and Regulations Cited

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s. 15.

MOTION to quash applications for leave to appeal to the Supreme Court of Canada from a refusal of the British Columbia Court of Appeal (1993), 38 A.C.W.S. (3d) 7 to grant leave to appeal from an order of the British Columbia Supreme Court (1992), 35 A.C.W.S. (3d) 148. Motion dismissed and applications for leave to appeal granted.

Jack M. Giles, *Q.C.*, for Bell et al.

Gwen K. Randall, *Q.C.*, for United Mine Workers of America International Union et al.

Frank G. Potts, for Greenhills Workers' Association.

//*Sopinka J.*//

The judgment of the Court was delivered by

SOPINKA J. -- The respondent Greenhills Workers' Association moved to quash the applications for leave to appeal brought by the applicants on the ground that this Court had no jurisdiction to grant leave to appeal from the refusal of a

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provincial appellate court to grant leave to appeal to that court on a matter arising under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, C-36 ("*CCAA*"). We are all of the view that this Court does have jurisdiction.

Section 15(1) *CCAA* provides that an appeal from a provincial court of highest resort lies to this Court upon leave being granted by this Court and s. 15(2) further states that this Court has "jurisdiction to hear and to decide according to its ordinary procedure any appeal under subsection (1)". In the absence of any restrictions placed by the *CCAA* upon the jurisdiction of this Court to grant leave to appeal, the reasoning in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, applies such that this Court has a discretion to grant leave to appeal from a decision of a provincial appellate court refusing leave to appeal to that court and to hear the appeal on the merits.

The motion to quash the applications for leave to appeal is dismissed and the applications for leave to appeal are granted.

Judgment accordingly.

Solicitors for Bell et al.: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for United Mine Workers of America International Union et al.: McCarthy Tétrault, Calgary.

Solicitors for Greenhills Workers' Association: Lindsay Kenney, Vancouver.

Stay of proceedings - Sec 15(3)

(3) No appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless and to the extent ordered by that Court.

Security for costs - Sec 15(4)

(4) The appellant in an appeal under subsection (1) shall not be required to provide any security for costs, but, unless he provides security for costs in an amount to be fixed by the Supreme Court of Canada, he shall not be awarded costs in the event of his success on the appeal.

Winnipeg Motor Express Inc. et al, 2009 MBQB 204 (CanLII) - Allocation of Costs on CCAA Restructuring

Date:	2009-06-19
Docket:	CI 08-01-56696
Parallel citations:	56 CBR (5th) 265; 243 Man R (2d) 31
URL:	http://canlii.ca/t/251b1
Citation:	Winnipeg Motor Express Inc. et al, 2009 MBQB 204 (CanLII), <http://canlii.ca/t/251b1> retrieved on 2013-09-10
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Date: 20090619
Docket: CI 08-01-56696
(Winnipeg Centre)
Indexed as: Winnipeg Motor Express Inc. et al.
Cited as: 2009 MBQB 204
COURT OF QUEEN'S BENCH OF MANITOBA

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IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD. and 5273634 MANITOBA LTD. ("the applicants")	Counsel: DAVID R. M. JACKSON for Ernst & Young Inc. (the "monitor") G. BRUCE TAYLOR and JENNIFER J. BURNELL for Winnipeg Motor Express ("WME") HARVEY G. CHAITON for Heller Financial Canada Holding Company ("Heller") and GE Canada Leasing Services Company ("GE") DONALD G. DOUGLAS for Paccar Financial Services Ltd. ("Paccar") DOUGLAS G. WARD, Q.C. for Alterinvest Fund L.P. (BDC) ROBERT A. DEWAR, Q.C. for Ramwinn Diesel, Inc. ("Ramwinn") WILLIAM G. HAIGHT for Key Equipment Finance Canada Ltd. E. PETER AUVINEN for CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton Trailers Canada Corp. ("Stoughton") DONALD R. KNIGHT, Q.C. for Maxim Transportation Services Inc. ("Maxim") Oral Reasons for Judgment Delivered: June 19, 2009

SUCHE J.

[1] The issue before me today is the appropriate distribution of the DIP loan and administrative charges (collectively referred to as the "Court Ordered Charges") incurred since May 15, 2008, when I granted a stay of proceedings pursuant to s. 11 of the *CCAA*. The DIP loan represents working capital advanced to WME by Heller during the restructuring period; the administrative charges consist of the monitor's fees, its legal fees, WME's legal fees, and director's charges. The amount of these fees is not in issue and both have been paid by Heller out of receivables collected from WME's operations and sale of assets. Thus, the effect of this order will be to require other parties to reimburse Heller for some portion of the $1.8525 million in issue.

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[2] The monitor, in its twelfth report dated February 12, 2009, recommends that the Court Ordered Charges be allocated among the secured creditors based on pro rata recovery, using actual or estimated recovery. Total recovery for any creditor includes its direct recovery plus allocated sale proceeds, plus any lease payments recovered, less direct costs, which includes expenditures for such things as repairs or reconditioning.

[3] In the result, certain secured creditors will be excluded, namely:

(i) Daimler Chrysler Financial Services, as I ruled its equipment was not subject to the stay, or the Court Ordered Charges;

(ii) three secured creditors, Richard Sobey, Frontier Capital Partners, and Shaw Satellite Services, whose security is subordinate to BDC, which itself only recovered a minimal amount of WME's outstanding indebtedness.

[4] In addition, several office or non-fleet equipment lessors have been excluded on the basis of administrative efficiency because of the very small amount of their respective recoveries.

[5] In making its recommendations, the monitor indicates it relied on the following principles:

(i) all secured creditors should contribute to the cost of restructuring;

(ii) a strict accounting on a cost benefit basis is impractical and not necessary or desirable for allocation purposes;

(iii) security arrangements and priorities should not be readjusted as part of this process;

(iv) the proportion each creditor should be allocated need not be equal; and

(v) the allocation should be equitable, rather than equal.

[6] The monitor also recommends that no DIP charge should be allocated to any equipment parked and available for pickup at the date of filing, or for units that have not yet been returned to a lessor/lender.

THE PARTIES AND THEIR POSITIONS

Heller

[7] Heller provided a demand operating loan to WME margined against 85% of eligible accounts receivable. At the time of the stay, this loan was at $5,643,297, which was secured by accounts receivable of $5,868,630. During the restructuring, Heller continued to allow the operating loan to revolve. It advanced approximately $8,750,000 (Cdn.) and $2,800,000 (U.S.) under the operating loan to pay WME's ongoing business expenses. The pay down of the loan was as a result of a combination of the sale of assets and collection of receivables. In the end, Heller is projected to suffer a loss of approximately $55,000. It makes the point that it would likely have avoided this had its collateral not been used to make lease payments of approximately $394,000 to financing lessors.

[8] Heller supports the monitor's recommendation.

GE

[9] GE leased 44 tractors and 204 trailers to WME under financing leases. Despite my order of July 3, 2008 requiring WME to pay equipment lessors as of August 1, 2008, GE did not seek payment under any of its leases. Ultimately, GE's equipment was included in the purchase by Newco, although as part of that transaction, GE wrote off approximately $250,000 in principal and unpaid interest and renegotiated its leases at an interest rate of 9.25%.

[10] In calculating GE's net recovery, the monitor used the average between the liquidation value of its equipment and the present value of the leases assumed, discounted at the rate of 9.25%. It was argued by several creditors that this discount is commercially unreasonable, and seriously understates the value of GE's recovery.

[11] GE supports the monitor's proposed allocation.

Paccar

[12] as at the date of filing, Paccar leased 83 tractors and 19 trailers to WME, pursuant to financing leases. As a result of my order of July 3, 2008, Paccar received $279,855 in lease payments between August 1 and the date on which its equipment was returned. Although Newco was amenable to including Paccar's equipment in its purchase, Paccar was not agreeable to this. Accordingly, all its equipment (save one or two units which could not be recovered) was returned.

[13] Paccar disputes the monitor's proposed allocation, arguing that GE and Heller have received the lion's share of the benefit from these proceedings and have suffered virtually no loss. It further maintains that it has been unduly prejudiced, as have all equipment lessors, by virtue of the fact that its security has been used to the benefit of WME (and the other secured creditors, particularly Heller) during the restructuring. In contrast, Paccar's security has suffered significant deterioration.

[14] Paccar maintains that the appropriate methodology would be to recognize the net losses suffered. It points out that its loss from its dealings with WME is approximately $2.7 million, compared to Heller's loss of $55,000, on virtually the same level of debt owed. It maintains that GE should be considered to have effected 100% recovery, given that Newco has assumed the leases for its equipment.

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[15] It also maintains that the benefit of an orderly return by WME was not all that significant, given that Paccar is in the business of supplying transport equipment, and is experienced in recovering vehicles in such situations.

CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton

[16] These four equipment lessors collectively had 115 trailers under lease to WME at the time of filing. Stoughton maintains that its lease is not a financing lease.

[17] Collectively they argue that the monitor's methodology is not appropriate as it does not adequately reflect the relative benefit derived from the proceedings by different secured creditors. They, too, argue that Heller and GE have essentially been paid in full, which stands in contrast to their situation, each of them having incurred substantial losses. They also did not have the opportunity to have their equipment included in the Newco purchase.

[18] These creditors ask that I allocate specific expenses to the secured creditors who they say benefitted from various expenses, which they did not.

[19] When considering the issue of recovery, they say the only benefit they received from the restructuring was the orderly return of equipment. However, they maintain that several of their units should not be included in the calculation as these were recovered through their efforts, with no help from WME. They also argue that they were well equipped to pick up all units and would have happily done so.

Ramwinn

[20] Ramwinn provided mechanical services to WME. At the time of the stay, it had some vehicles in its possession and, thus, possessory lienholder rights. It also had lien claims against a significant number of other vehicles. An arrangement was made among the various equipment lessors to whom equipment was to be returned, to pay Ramwinn for the work performed in order to secure release of the equipment. Ramwinn was also granted leave to commence certain actions where the limitation dates were approaching during the restructuring period. It also recovered $4,738.12 out of the proceeds of sale of WME's redundant assets.

[21] Ramwinn argues that the money it received from the equipment lessors should not be included in its net recovery, as it was recovered from third parties, not WME. It also points out that Ramwinn's garagekeeper security was of a different kind than the other secured creditors and gave it priority ahead of all other creditors. Thus, to include its recovery in the allocation, effectively amounts to altering the security arrangements between WME and its creditors, which is something that should not be done.

[22] Finally, Ramwinn has a claim against WME in the amount of $18,679 for an account incurred subsequent to the stay. The monitor disputes liability on the part of WME and asserts the account payable by Newco. This dispute has yet to be resolved. Ramwinn seeks payment of this account, or, at least an order requiring that this amount ought to be set aside by Heller pending the determination of the matter.

Maxim

[23] Maxim provided 15 trailers to WME under a lease which it maintains is an operating lease. It was paid its lease payments of $5,985 per month during the restructuring period, and its leases have been assumed by Newco. It says its registration in the Personal Property Registry is for purposes of giving notice that WME is in possession of its equipment, and is not a registration of a security interest.

BDC

[24] BDC was owed approximately $2.5 million plus interest as at the date of the stay. It holds security over all of WME's assets. In general terms, it was subordinate only to Heller on accounts receivable but had a first charge on all other assets. It recovered $78,998.79 plus interest from the redundant asset sale and will recover $260,000 plus interest from the proceeds of the sale to Newco. BDC supports the monitor's methodology and its recommendation, although it argues that the application was premature given that there may be statutory creditors such as Worker's Compensation who might be entitled to be paid their claims in priority to the secured creditors who are being asked to contribute to the Court Ordered Charges. Since the date of the hearing, I have made an order of bankruptcy against WME.

[25] I turn, then, to the legal issues raised on this motion.

TRUE VERSUS FINANCING LEASES

[26] Both Stoughton and Maxim claim to be "true" lessors. The significance of this issue is twofold; s. 11.3(a) of the ***CCAA*** provides that an owner of property is entitled to require payment for its use during the restructuring. In addition, of course, the recommendation of the monitor is that only the secured lenders be included in the allocation of the Court Ordered Charges.

[27] Section 11.3(a) was added to the ***CCAA*** in 1997, apparently to clarify, or address, the point made by the British Columbia Court of Appeal in ***Quintette Coal Ltd. v. Nippon Steel Corp.*** 1990 CanLII 430 (BC CA), (1990), 51 B.C.L.R. (2d) 105, [1990] B.C.J. No. 2497 (QL), namely, that a stay under s. 11, presumably would never be used to enforce the continuous supply of goods or services without payment for current deliveries. The amendment, of course, makes good

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sense and also brings the ***CCAA*** into line with the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, as amended (the "***BIA***"), which has a similar provision concerning proposals.

[28] The leading authority on the proper interpretation of s. 11.3(a) is ***Smith Brothers Contracting Ltd., Re*** 1998 CanLII 3844 (BC SC), (1998), 53 B.C.L.R. (3d) 264, [1998] B.C.J. No. 728 (QL) (B.C.S.C.). There, Bauman J. relied on jurisprudence arising out of personal property security legislation as a starting point in the determination of the circumstances which would bring a party within s. 11.3(a). The distinction between a true lease – that is, a contract of bailment also known as an operating lease – and a financing, or capital lease, is critical, in a variety of situations. Where a supplier of equipment retains ownership solely for the purposes of enforcing the obligations of the debtor/lessee until payment in full has been made, a security interest is created, and ownership is lost.

[29] It is worth observing that the precise legal nature of an agreement in these situations has considerable commercial significance, and seems to have generated something of an ongoing legal struggle. Purveyors of equipment, ever concerned with the legitimate business goal of minimizing risk, try to appear as owners engaging in acts of bailment, thus minimizing the risk of the failure of a debtor/lessee's business, while at the same time passing off the risks of the equipment; that is, loss, damage and defects.

[30] At the same time, it is also true that the world of commercial arrangements is increasingly diverse, complex and focused on cost recovery, so it is very difficult to generalize about how any particular type of relationship will be structured.

[31] All of this is to say that, with the benefit of sophisticated legal advice and astute business judgment, the true nature of arrangements involving the supply of equipment can be very difficult to peg.

[32] In ***Smith Brothers***, Bauman J. concluded that s. 11.3(a) should be narrowly construed, given that it is an exception to a s. 11 stay, which in turn is of a remedial nature, and to be interpreted broadly and in a manner which supports the objectives of the ***CCAA***. He says:

> 56 What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.

[33] And further, at para. 61:

> 61 It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use *and* equity are not. Similarly payments for use *and* equity *and* an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

[34] ***Smith Brothers*** has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it cannot seek the benefits of ownership. Similarly, the narrow construction of s. 11.3 limiting it to payments for use of equipment only, is consistent with the idea that a supplier could not be expected to continue to provide its product without payment. All this being so, the result has some unintended consequences, which I address later on in these reasons.

[35] I turn, then, to the two creditors in this case, Maxim and Stoughton. I have no hesitation in concluding that the agreement between Maxim and WME is a "true" lease. The essential bargain is payment for use of Maxim's property.

[36] I say this because a review of Maxim's obligations reveal that it undertakes all the risks associated with ownership of the equipment – it is responsible for providing all parts and supplies, carrying out maintenance and repairs, providing road service for vehicles which suffer mechanical breakdown, supplies substitute vehicles to WME if there has been mechanical failure, and provides and pays for all licencing and taxes. The option to purchase is truly an option, and the purchase price is determined by a formula, which seeks to determine the true market value of the vehicle at the time the option is exercised.

[37] It was argued that the "Elective Termination" provision, which allows Maxim to require WME to purchase the equipment in accordance with the Option if a default has not been cured within seven days, changes the nature of the arrangement. I disagree. While on its face it may be an unusual remedy and probably has more bark than bite, it seems that Maxim is letting WME know that it may take tardiness very seriously.

[38] The Maxim agreement does not, in my view, create a security interest. In this regard, I prefer the analysis on ***Western Express Air Lines Inc., Re***, 2005 BCSC 53 (CanLII), 2005 BCSC 53, (2005), 10 C.B.R. (5th) 154, over that in ***Paccar of Canada Ltd. v. Peterbilt of Ontario Inc.***, 2005 CanLII 43684 (ON SC), (2005), 18 C.B.R. (5th) 125 (Ont. Superior Court of Justice).

[39] The agreement between Stoughton and WME is a different matter. When Stoughton's agreement is viewed as a whole, I conclude that it is either a financing lease or sufficiently akin to one to fall outside the scope of s. 11.3(a). In

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particular, the agreement provides that WME bears the entire risk of loss from any cause and is required to make payments to Stoughton regardless of loss, or any claim against the manufacturer of the equipment. The warranties by the manufacturers are excluded. All registration, licence fees and taxes are paid by WME, as is any and all maintenance and repair costs.

[40] The lease also requires that the vehicle be returned to Stoughton in a condition that would require significant expenditure. This, combined with an option to purchase the vehicle for a stated amount, which appears to be the difference between the initial value of the equipment less payments made over the term of the lease, suggest to me that the parties intended that WME purchase the vehicle, and ownership was retained solely for the purpose of enforcing WME's obligation.

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THE LAW

[41] I turn, then, to the question of principles of allocation of Court Ordered Charges under the ***CCAA***. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in ***Hunters Trailer & Marine Ltd., Re***, 2001 ABQB 1094 (CanLII), 2001 ABQB 1094, (2001), 305 A.R. 175. While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the ***CCAA*** make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

[42] In ***Re Hickman Equipment (1985) Ltd. (In Receivership)***, 2004 NLSCTD 164 (CanLII), 2004 NLSCTD 164, at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:

(1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;

(2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;

(3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;

(4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;

(5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

[43] I also agree with the decision in ***Sulphur Corp. of Canada Ltd. (Re)***, 2002 ABQB 682 (CanLII), 2002 ABQB 682, (2002), 5 Alta. L.R. (4th) 251, where LoVecchio J. concluded that the court has jurisdiction to grant a charge for debtor in possession financing which ranks in priority to provincial statutory liens, in that case a builder's lien.

ANALYSIS AND DECISION

[44] I begin with the observation that the s. 11 stay in this case has accomplished exactly what the ***CCAA*** intends that it do – it allowed a company in desperate financial circumstances the opportunity to restructure so that part of its business which was viable could carry on.

[45] Having said that, good news under the ***CCAA*** is a relative thing. Substantial financial carnage occurred along the way, not just to the secured creditors, almost all of whom have recovered at least something, but more so to a long list of unsecured creditors as well as the investors. The overriding theme of the individual submissions before me was that each of the parties would have been in a much better position had they been able to simply realize on their security. That may or may not have been so, but of course the point of the ***CCAA*** is that the collective good and the benefit to all stakeholders governs.

[46] The starting point, then, on this motion is the recommendation of the monitor to allocate the Court Ordered Charges among the secured creditors on the basis of a pro rata share using total recovery. This method, in effect, amounts to requiring the secured creditors to pay a fee to collect its outstanding receivables. This certainly is not a novel concept in debt collection.

[47] In my view, the methodology proposed by the monitor on its face is fair. It has an objective basis and is being applied uniformly. Utilizing an "outstanding indebtedness approach", which has been applied in other cases, would not be better as it ends up favouring Heller substantially at the expense of most of the secured creditors.

[48] I agree with the view expressed in ***Hunjan International Inc., Re*** 2006 CanLII 63716 (ON SC), (2006), 21 C.B.R. (5th) 276 (Ont. Superior Court of Justice), that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.

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[49] So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted, and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.

[50] As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.

[51] My conclusion is that all the secured creditors who the monitor suggests should participate in the allocation received real and meaningful benefit as a result of these proceedings. Heller's success in collecting receivables was increased and made less costly than had the company been placed in receivership. The equipment lessors' effort, cost, delay, and risk in recovering their equipment from various locations across North America was considerably reduced by virtue of WME's organized return of equipment to its yard or other agreed upon locations. Ramwinn's effort, cost and delay in having its accounts paid was substantially less than had it been required to engage in collecting from the equipment lessors, institute court proceedings, and potentially undergo the process of realizing on equipment in its possession. Those creditors, including Heller, BDC and Ramwinn, who shared in the proceeds from the sale of redundant assets or the purchase by Newco, also received real and meaningful benefit from the efforts of WME and the monitor in conducting the sale and the purchase by Newco would not have happened without the restructuring.

[52] Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to objectives of the ***CCAA***.

[53] I am also of the view that the relative loss – the issue raised by Paccar – results more from the nature of the security and the specific business decisions made by the parties. Heller, and Ramwinn, for example, experienced very small relative losses; BDC's and Alterinvest's loss was considerable. The difference in their respective security is substantial. To make adjustments as Paccar requests would, in my view, amount to readjusting priorities among creditors.

[54] At the same time, I do not accept Ramwinn's argument that requiring it to pay the allocation recommended by the monitor is also a violation of this principle. The allocation proposed is not at all disproportionate, in my view, to the benefit accrued to Ramwinn.

[55] I also conclude that there is no basis on which I can or should direct that the funds be held to pay for the outstanding claim Ramwinn advances against WME.

[56] As to equipment obtained directly by lessors, I am of the view that regardless of how lessors recovered equipment, any equipment recovered post stay should be included in the allocation as suggested by the monitor. Self-help is not to be condoned, and a potential benefit not realized due to a creditor's actions, should not be discounted in this analysis, as to do so falls into a detailed cost benefit analysis.

[57] There is one adjustment, however, that I do feel is in order. A discount rate of 9.25% on the present value of GE's leases was used by the monitor. I am not persuaded that this is justifiable. I accept what I take to be the monitor's secondary position of 6% as being reasonable.

EQUIPMENT LEASES

[58] Much attention was paid during these proceedings to the situation of equipment lessors who hold financing leases. Paccar, in particular, but also others, advocated forcefully that they were unduly prejudiced by the stay. They maintain that not only are they not being paid while their assets are being used to the benefit of the other stakeholders, but their underlying security is being rapidly and substantially deteriorated in the process. This, they say, violates one of the fundamental objectives of preventing one creditor from obtaining an advantage over other creditors during the stay period.

[59] It strikes me that the fact that true lessors are entitled to be paid further aggravates this problem in circumstances such as WME's where it has a variety of arrangements with equipment suppliers, including some true leases. It is clearly in a debtor company's economic interests to use financed rather than leased equipment during restructuring. This is what seems to have occurred here (although I make no criticism of WME for doing so).

[60] It is difficult to know how this situation can be remedied, given that the whole point of the ***CCAA*** is to relieve a company of ongoing financial burden to allow it the opportunity to restructure. In this case, for example, WME would not have succeeded had been obliged to pay for its equipment during the entirety of the restructuring.

[61] On the particular facts of this case, this issue became somewhat easier to address given the nature of WME's business. Equipment to a transportation company is akin to raw goods to a manufacturer, and I was of the opinion that if WME was going to be viable, at a certain point it would have to demonstrate it could pay for the essential means of

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production. Otherwise, there would be no purpose to continue the stay. Accordingly, I ordered that financing leases would be paid as of August 1, 2008.

[62] I say all this not to justify or revisit the basis for my earlier decision, but to get to the point that in considering what is equitable, undue prejudice is a reason to adjust what would otherwise be a uniform approach. I am satisfied that equipment lessors in a business operation such as WME's do suffer undue prejudice. In this case, however, the equipment lessors were paid as of August 1. Being financing leases, those payments were not just for use, but included some amount on account of equity. I conclude, then, that the undue prejudice suffered has been recognized, albeit not totally, perfectly or precisely, but, in my view, in an amount sufficient amount to justify the uniform application of the methodology proposed by the monitor.

[63] The last issue is one that perhaps is more controversial. Maxim, the only true lessor, has, in my view, derived the same benefit as the financing lessors from these proceedings. Its trailers were part of WME's network which stretched across North America. As a result of WME's continued operations, its equipment was gathered in and ultimately it was able to assign its leases to Newco without any interruption. While s. 11.3(a) specifically allows for payments for use of equipment despite the stay, I do not see that there is any statutory prohibition against requiring a contribution to the Court Ordered Charges against such a party. Taking a broad and purposive approach to the ***CCAA***, which I am obliged at law to do in determining an equitable distribution of the costs of the restructuring, I conclude that Maxim should share in these charges on some basis.

[64] I do this, recognizing that the only authority on point that was provided to me, ***Western Express Air Lines***, came to a different conclusion. However, I note that there, Brenner C.J.S.C. specifically found that:

> 20 ... If costs are to be allocated in the basis of the benefit to be derived from a successful restructuring, then the lessors should arguably pay nothing. As ordinary creditors for the outstanding lease payments they will likely receive nothing. ...
>
> . . .
>
> 22 Accordingly under the general equitable principles of the *CCAA* I see no basis for requiring the aircraft lessors to bear a portion of the Existing Charges.

[65] Here, I have found the situation to be otherwise. There was a real and meaningful benefit to Maxim.

[66] However, just as GE's assumed lease was discounted for the risk of non-performance by Newco, so, too, should Maxim's. Subject to hearing further submissions on the matter, the amount of Maxim's total recovery should be discounted by the same discount rate, namely, 6%.

CONCLUSION

[67] At the outset of the hearing before me, several disputes remained which concerned the value of various creditors' total recovery.

[68] I understand that through a combination of information provided during the hearing and the findings I have made this afternoon, these have all been resolved.

[69] I trust that these reasons will allow the monitor to calculate the precise allocation among the parties. However, I recognize that it may be that some aspect of my reasons require either clarification or some addition. Should that be the case, I invite the parties to let me know.

_____ J.

Decision final - Sec 15(5)

(5) The decision of the Supreme Court of Canada on any appeal under subsection (1) is final and conclusive.

R.S., c. C-25, s. 15;

R.S., c. 44(1st Supp.), s. 10.

Order of court of one province - Sec 16

16. Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it.

R.S., c. C-25, s. 16.

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Courts shall aid each other on request - Sec 17
17. All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.
R.S., c. C-25, s. 17.

18. [Repealed, 2005, c. 47, s. 131]

18.1 [Repealed, 2005, c. 47, s. 131]

18.2 [Repealed, 2005, c. 47, s. 131]

18.3 [Repealed, 2005, c. 47, s. 131]

18.4 [Repealed, 2005, c. 47, s. 131]

18.5 [Repealed, 2005, c. 47, s. 131]

18.6 [Repealed, 2005, c. 47, s. 131]

Loewen Group Inc., Re, 2001 CanLII 28285 (ON SC) - Need for Directors' Resolution on CCAA Disposal/Restructuring - NOW REPEALED THUS AGAIN RELEVANT

Date:	2001-12-13
Docket:	99-CL-3384
Parallel citations:	22 BLR (3d) 134; 32 CBR (4th) 54
URL:	http://canlii.ca/t/1wbzj
Citation:	Loewen Group Inc., Re, 2001 CanLII 28285 (ON SC), <http://canlii.ca/t/1wbzj> retrieved on 2013-09-15
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Ontario Supreme Court
Loewen Group Inc., Re
Date: 2001-12-13
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended ("CCAA")
In the Matter of the Ontario Business Corporations Act, R.S.O. 1990, c. B-16, As Amended ("OBCA")
In the Matter of the Loewen Group Inc. and the Other Companies Listed on Schedule "A"
Ontario Superior Court of Justice [Commercial List] Farley J.
Heard: December 7, 2001
Judgment: December 13, 2001
Docket: 99-CL-3384
Derrick Tay, Orestes Pasparakis, for Applicants

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Geoffrey Morawetz, for KPMG Inc., Monitor
Alec Zimmerman, for Trust Company of the Bank of Montreal, Indenture Trustee
Harry Fogul, for HSBC Bank USA, Noteholder Trustee
Sheryl Seigel, for Unsecured Creditors Committee
Alex Ilchenko, for Secured Creditors/Bank Syndicate
David Ward, for Wachovia

***Farley J.*:**

[1] On Dec. 7, 2001, I heard the motion of The Loewen Group Inc. ("Loewen") and the other Companies listed in Schedule "A" requesting an order pursuant to s. 18.6(2) of the *Companies' Creditors Arrangement Act* ("CCAA") and s. 182 of the Ontario *Business Corporations Act* ("OBCA"). That relief, *inter alia* of recognizing the US plan of arrangement and granting a vesting order pursuant thereto, was granted that day. I noted that I was in agreement with the general thrust of the factum of the moving parties. It was observed that there did not seem to be any reported case to date dealing with the non-applicability of s. 126 of the British Columbia *Company Act.* RSBC 1996, c.62 ("BC Company Act") or its equivalence under the corporations legislation in the other jurisdictions in Canada, given that this subject case dealt with a reorganization pursuant to the insolvency law. Perhaps this analysis will be of some assistance in filling that vacuum.

[2] I agreed with the assertion of the moving parties that s. 126 of the BC Company Act was not applicable in these circumstances so as to require a special resolution of the shareholders (members). Loewen was incorporated under the BC Company Act. S. 126 provides as follows:

> 126(1) The directors must not sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company unless they have the approval of the members given by a special resolution.
>
> (2) If the approval required by subsection (1) has not been obtained, the court, subject to subsection (3), on application by any member, director or creditor of a company, may do one or more of the following:
>
> > (a) enjoin a proposed sale, lease or other disposition of the whole, or substantially the whole, of the undertaking of the company;
> >
> > (b) set aside a sale, lease or other disposition;
> >
> > (c) make any further order the court considers appropriate.
>
> (3) A sale, lease or other disposition of the whole, or substantially the whole, of the undertaking of a company to a person with whom the directors are dealing for valuable consideration and in good faith, is valid, despite the failure of the directors to comply with subsection (1).
>
> (4) Despite approval by the members of a sale, lease or other disposition of the whole, or substantially the whole, of the undertaking of the company, the directors may abandon the proposed transaction without further action by the members.
>
> (5) If a company proposes to sell, lease or otherwise dispose of the whole, or substantially the whole, of its undertaking, any member of the company may, until 2 days before the meeting at which approval is sought, give a notice of dissent to the company in respect of the member's shares and, in that event, section 207 applies [i.e., appraisal rights].
>
> (6) This section does not apply to disposition of the whole, or substantially the whole, of the undertaking of the company by mortgage.

[3] In my view s. 126 contemplates a voluntary disposal of the assets and undertaking of a corporation by the directors and not a transfer of property pursuant to a vesting order issued pursuant to the CCAA (or other federal bankruptcy and insolvency legislation), in this case pursuant to s. 18.6(2) of the CCAA. An arrangement between a bankrupt or insolvent corporation and its directors, including the disposal of the corporation's property to implement the arrangement, falls within the exclusive jurisdiction of the federal Parliament. Provincial legislation which would otherwise apply to the sale of the corporation's property has no application in such circumstances. See *Montreal Trust Co. v. Abitibi Power & Paper Co.,* [1938] O.R. 589 (Ont. C.A.), at pp. 601-2.

[4] I note that s. 126 is directed against conduct by the directors of the corporation, not the fundamental capacity of the provincial corporate entity. In this regard, see s. 126(3) which provides that despite the failure of the directors to comply with s. 126(1), the disposition is valid if effected for valuable consideration and in good faith. Given the nature of these insolvency proceedings, the conditions of s. 126(3) would be met, even if s. 126 were applicable.

[5] I further note that if concurrent bankruptcy or insolvency proceedings are not pending, then pursuant to s. 252 of the BC Company Act, a transfer of the corporation's property could be ordered by a court pursuant to that provincial creditor arrangement without resort to s. 126. See also s. 254 regarding a provincial shareholder arrangement.

[6] In receiverships the directors' powers of management are curtailed or eliminated. See *Nova Metal Products Inc. v. Comiskey (Trustee of)* reflex, (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.); *Australian Industrial Development Corp. v. Co-operative Farmers & Graziers Direct Meat Supply Ltd.* [[1978] V.R. 633 (Australia Vic. Sup. Ct.)] 1978 VIC

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LEXIS 91 at p.32, citing *Whinney v. Moss Steam Ship Co.,* [1912] A.C. 254 (U.K. H.L.) at p. 263. See also s. 98 of the BC Company Act which provides:

> 98. If a receiver manager is appointed, the powers of the directors and officers of the corporation cease with respect to that part of the undertaking of the company unless they have the approval of the members given by a special resolution.

It seems to me that the Court's power and authority to grant a vesting order under the CCAA is analogous to the inherent process of a court in a receivership. The court's inherent powers to make orders in a CCAA proceeding have been analogized to those in receiverships for the purpose of recognizing the court's jurisdiction to grant super priorities for certain debtor expenses and debtor in possession (DIP) financing. These quasi-receivership powers permit the court to override the usual ordering of priorities accorded to secured creditors under provincial legislation. See *United Used Auto & Truck Pans Ltd., Re,* [2000] B.C.J. No. 409 (B.C. C.A.) at para. 22 where the British Columbia Court of Appeal held that the court's inherent jurisdiction in a CCAA proceeding is even broader than its inherent jurisdiction in a receivership.

If a conflict arises between the CCAA and a provincial statute, then under the doctrine of paramountcy, the CCAA provision prevails and the conflicting provisions of the provincial statute are rendered inoperative. See *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* 1995 CanLII 2575 (BC CA), (1995), 34 C.B.R. (3d) 4 (B.C. C.A.) at pp.11-2. Thus even if s. 126 of the BC Company Act were to be interpreted as applying (which I have found it does not), then in this case the

Loewen shareholders would have an opportunity to veto a key component of the US Plan which is being recognized by this Court pursuant to s. 18.6(2) of the CCAA. Thus there would be an irreconcilable conflict between those provisions of the provincial statute and the CCAA.

[8] Under U.S. bankruptcy law, shareholders having no economic interest to protect have no right to vote on a plan of reorganization. Consistent with that appropriate economic and legal principle, courts in Ontario and Alberta have held that where shareholders similarly have no economic interest to protect, it would defeat the policy objectives of the CCAA to give those shareholders a right to veto a plan of arrangement. In the subject case the shareholders of Loewen have no economic interest. Loewen has in fact to its credit consistently advised in press releases that it considered its shares to be valueless, notwithstanding that these shares continued to trade for somewhat more than nominal value during a considerable portion of the CCAA and U.S. Chapter 11 Bankruptcy Code proceedings.

[9] Most recently Paperny J. (then on the trial bench) stated in *Canadian Airlines Corp., Re* 2000 ABQB 442 (CanLII), (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.) at p. 22:

> The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.
>
> The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decision of *Re Royal Oak Mines Inc.* 1999 CanLII 15023 (ON SC), (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) and *T. Eaton Co.* [(1999), 15 C.B.R. (4th) 311 (Ont. S.C.J.)], *supra* in which Farley J. of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.
>
> Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.
>
> In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

[10] A single judge of the Alberta Court of Appeal denied leave to appeal from Paperny J.'s judgment and in doing so noted that her acceptance of the Monitor's report that the shares had no value was a proper exercise of her discretion and could not be said to be unreasonable; subsequently leave applications were denied by a full panel of the Alberta Court of Appeal and by the Supreme Court of Canada on procedural grounds: *Canadian Airlines Corp., Re* 2000 ABCA 238 (CanLII), (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]) (single judge); *Canadian Airlines Corp., Re,* 2001 ABCA 9 (CanLII), 2001 ABCA 9 (Alta. C.A.) (full panel); *Canadian Airlines Corp., Re,* [2001] S.C.C.A. No. 60 (S.C.C.). See also my views in this regard in *Cadillac Fairview Inc., Re,* [1995] O.J. No. 707 (Ont. Gen. Div. [Commercial List]) at paras. 7-8 and

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in *Royal Oak Mines Inc., Re,* [1999] O.J. No. 4848 (Ont. S.C.J. [Commercial List]) at paras. 2-4. In the latter case I observed:

> It is not proposed that the Royal Oak shareholders actually vote on the transaction set out in the Northgate term sheet—whereby the unsecured creditors and the shareholders would participate in the ongoing but restructured fortunes of Royal Oak but to a relatively quite limited small degree. Of course, if the transaction were to remain an approved asset sale, then neither the unsecured creditors nor the shareholders would receive anything. One might also observe that the shareholders would have to appreciate that, when viewed as to the hierarchy of interests to receive value in a liquidation or liquidation related transaction, they are at the bottom. Further in these particular circumstances there are, in relation to the available tax losses (which is in itself a conditional asset), very substantial amounts of unsecured debt standing on the shareholders' shoulders. That is, the shareholders, even assuming an ongoing operation achieving a turnaround to profitability without restructuring, would have to wait a long while before their interests saw the light of day.
>
> I see no reason then why the proposal would not utilize the provisions of s. 186 of the OBCA since this "reorganization" provision contemplates *inter alia* "an order made under the *Bankruptcy Act* (Canada) [now BIA] approving a proposal". It is curious to note that s. 186(1) OBCA does not incorporate as does s. 191 CBCA that the Court order could also include "(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors"—which language would appear to encompass the CCAA. The CBCA language was introduced by S.C. 1974-75. While this was subsequent to the introduction, of the OBCA in 1970, it was not until the overhaul of the OBCA by S.O. 1982 that what is now s. 186 (then s. 185) was introduced.
>
> In any event it is also desirable to keep in mind the question of whether the shareholders have a true interest to be protected (and voting)—i.e. an interest which given the existing financial fortunes of the corporation could be said to have some reasonable prospect of economic value. In that regard see
>
> my views in [*Cadillac Fairview*].... In any event the shareholders will be notified by notice to their last known address that they may participate, if they wish, at the sanction hearing (assuming the structural plan is approved by the requisite majority of the creditors).

[11] The conflict between, on the one hand, the recognition of the U.S. Confirmation Order and the U.S. Plan pursuant to s. 18.6(2) of the CCAA and, on the other hand, the shareholders voting rights mandated by s. 126 of the BC Company Act may be resolved by applying the constitutional doctrines of dual aspect and paramountcy. The disposition of all of Loewen's property in an insolvency restructuring has a dual aspect. Both s. 18.6 of the CCAA and s. 126 of the BC Company Act are constitutionally valid enactments: s. 18.6 of the CCAA falls within the scope of the federal legislative power over bankruptcy and insolvency and s. 126 of the BC Company Act falls under the scope of provincial legislative powers over the incorporation of provincial companies and property and civil rights. See *Olympia & York Developments Ltd., Re* reflex, (1993), 102 D.L.R. (4th) 149 (Ont. Gen. Div.); *Multiple Access Ltd. v. McCutcheon,* 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161 (S.C.C.).

[12] In *Olympia & York Developments Ltd.,* Blair J. confirmed the dual aspect doctrine in the case of provincial shareholder arrangements in approving a shareholder arrangement with a solvent corporation (incorporated pursuant to the OBCA) which was part of a larger CCAA arrangement involving insolvent affiliates. The shareholder arrangement involved share transfers, reorganizations, corporate amalgamations, share cancellations and an exchange of shares; it was held that the shareholders would derive intrinsic benefit from such an arrangement. Blair J. held that while the CCAA authorizes creditor arrangements, there is no federal legislation authorizing arrangements between provincially incorporated corporations and their shareholders and the provincial shareholder arrangement provisions fill this gap while operating harmoniously under CCAA creditor arrangements. *Olympia & York Developments Ltd.* was an example of the practice which has developed of combining a plan of arrangement under the CCAA with a shareholder arrangement or other procedure under provincial corporate legislation. See Houlden & Morawetz, *The 2002 Annotated Bankruptcy and Insolvency Act* (Carswell, Toronto) at para. N-24, p. 1206; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Associated Investors of Canada Ltd., Re* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.), partially reversed on other point (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.).

[13] The doctrine of paramountcy has been applied where the exercise of a court's discretion under the CCAA conflicted with the mandatory provisions of provincial legislation. In *Smoky River Coal Ltd., Re,* [1999] A.J. No. 676 (Alta. C.A.), the Alberta Court of Appeal held as follows:

(a) The CCAA gave the Court discretion to establish a dispute resolution procedure, even though the parties had agreed to arbitrate their disputes.

(b) The Court acknowledged that in other cases, courts had sent specific issues to a provincial forum for resolution. However, in each of those cases the courts had determined that resolution in the other forum would promote the objectives of the CCAA. In this case, the CCAA judge had found that the objectives of the CCAA would be frustrated by a

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transfer of the dispute to provincial arbitration. The Court held that while a judge has the discretion under the CCAA to permit issues to be determined in another forum, he is under no obligation to do so.
(c) The Court confirmed that the CCAA authorized it to affect permanently the rights of third parties if their actions would potentially prejudice the success of the plan.
(d) Even if the provincial arbitration act required arbitration of the dispute in the circumstances, there would then be a conflict between the CCAA and the provincial act and the CCAA must prevail.
[14] It seems to me that the reasoning in *Smoky River Coal Ltd., Re* is applicable in the subject case before me since:
(a) The U.S. Plan is a U.S. bankruptcy reorganization which can be recognized and implemented in Canada pursuant to s. 18.6(2) of the CCAA. It contains no proposal to restructure Loewen's share capital. Confirming the U.S. Plan falls squarely within the jurisdiction of the U.S. Court, and recognizing and effecting the U.S. Court proceedings in Canada falls squarely within the jurisdiction of this Court pursuant to s. 18.6(2) of the CCAA.
(b) In confirming the U.S. Plan under which shareholders received no value and on which they did not vote, the U.S. Court confirmed that Loewen's shareholders have no economic interest to protect. This determination is consistent with recent developments in Canadian law, discussed above, and so there are strong policy reasons for the Ontario Court to recognize and give effect to it.
(c) In such circumstances, a requirement for shareholder approval would defeat the purpose of Loewen's bankruptcy reorganization because it would give shareholders, who have no economic interest to protect, a right to veto and potentially extract an economic benefit. This would give rise to irreconcilable conflict between s. 18.6(2) of the CCAA and s. 126 of the BC Company Act. Under the constitutional doctrine of paramountcy, s. 18.6(2) of the CCAA prevails.
Motion granted.

PART III
GENERAL CLAIMS

Summary: General Provisions that Tailor the Application of the CCAA - Sections 19 to 43

Section 19 details that the CCAA can only apply to compromises or arrangements in respect of certain debts or liabilities that are basically present or future as owed by the debtor applicant. Subsection (2) details that the CCAA cannot be used to seek court sanction of a compromise in respect of certain other liabilities, unless the "creditor" agrees to the compromise, being:

- any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
- any award of damages by a court in civil proceedings in respect of
    - bodily harm intentionally inflicted, or sexual assault, or
    - wrongful death resulting from an act referred to in subparagraph (i);
- any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
- any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or
- any debt for interest owed in relation to an amount referred to in anything above.

Section 20 determines the amount of the claims that is used to calculate for voting purposes. It basically provides that the amount, for unsecured creditors, will be that that satisfies the proof of claim provisions in either the WURA or BIA or that amount proven in court. In the case of secured creditors said amount is basically that amount otherwise proven subject to the WURA or BIA or, in court. Subject to subs. (2) the debtor may allow a claim into a class for voting purposes subject to future litigation to have it assessed.

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Section 21 prompts for the law of set-off to apply to all claims for purposes of the Act whereby anything owing to the debtor will be taken into account in establishing the amount of the claim for voting purposes.

Pursuant to section 22 the debtor may divide its creditors into classes after applying to the court for guidance on the issue. Subsection 22(2) provides that the classes shall be based on similarity of commonality of interest taking into account:

- the nature of the debts, liabilities or obligations giving rise to their claims;
- the nature and rank of any security in respect of their claims;
- the remedies available to the creditors in the absence of the compromise or arrangement
- being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
- any further criteria, consistent with those set out in the paragraphs above, that are prescribed.

Subsection (3) provides that a creditor related to the debtor can vote against but not for a compromise.

Section 22.1 provides that creditors with equity claims cannot be amalgamated with other classes of creditors and cannot vote on a proposal.

Section 23 provides the duties and activities of the monitor once appointed. Basically they shall cause to be published in a court-approved newspaper a notice of compromise and advising to creditors with claims of $1,000 or more same, review the debtor's cash-flow statement and file an appraisal off it with the court, and make other appraisals and filings as the subsection provides. This is the actual activity that allows the court to have foundation that the various parties, including itself, interests are being attended to. The list of activity and duties is rather extensive so you should study it below. Subsection (2) provides that as long as the monitor has carried on these functions in good faith and with reasonable care he is immune from action if loss, to any party, results.

Section 24 allows the monitor open access to any financial records the debtor may have to allow her to assess the situation.

Section 25 requires the Monitor to act honestly within the Code of Ethics prescribed to trustees described in the BIA.

Section 26 requires the Superintendent of Bankruptcy (SB) to maintain appropriate information related to any proceedings under the CCAA and provide such to any that ask upon payment of appropriate fee.

Section 27 allows the SB to intervene as a party to have a monitor's activity or appointment regulated by the court.

Sections 28 through 31 deal with the powers of the SB in regulating the discipline of monitors by allowing investigation, delegation of investigation, and if need be, suspension on licence.

Sections 32 allows the debtor to disclaim or resiliate any agreement the debtor has with any party provided the monitor is in agreement while pursuant to subs. (2) the other party may apply to court to refuse the disclaimer/resiliation. Pursuant to subs. (3), if the monitor does not agree with the disclaimer the debtor

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company can apply for a court consideration of such and pursuant to subsection (4) the court will consider the following issues in granting it:

- whether the monitor approved the proposed disclaimer or resiliation;
- whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Section 33 deals with collective bargains that the debtor company has entered into and that per the statute they are to remain in force. Additional subsections in section 33 deal with whether the debtor can open a collective agreement to facilitate better recovery.

Section 34 attends to instances where the debtor may have agreements regarding security or suffer payments of forfeitures accelerated as a result of the petition under the CCAA. In such a case they are not allowed. Subs. (2) through the remaining section operate to disallow refusal to continue utilities and leases etc.

Section 35 provide that the debtor is to supply whatever assistance is necessary to the monitor to allow her to carry out her duties. Subs. (2) provides that, effectively, this includes, making reference to the BIA bankrupt duties:

- make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;
- (*a.1*) in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;
- deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;
- at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;
- within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;
- make or give all the assistance within his power to the trustee in making an inventory of his assets;
- make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

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- make disclosure to the trustee of all property disposed of by gift or settlement without adequate valuable consideration within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;
- attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;
- when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;
- submit to such other examinations under oath with respect to his property or affairs as required;
- aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;
- execute any powers of attorney, transfers, deeds and instruments or acts that may be required;
- examine the correctness of all proofs of claims filed, if required by the trustee;
- in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;
- (*n.1*) inform the trustee of any material change in the bankrupt's financial situation;
- generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or
- made on the occasion of any special application by the trustee, or any creditor or person interested; and
- until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.

Section 36 restrictions the debtor's ability to dispose of any property outside the normal business of the debtor while the section also allows the court to order any disposition even without approval of the shareholders. Subs. (2) provides that the debtor is required to advise any affected secured creditor of said disposition while subs. (3) allows the court to consider, among other things, in granting the authorization to dispose of a property:

- whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- whether the monitor approved the process leading to the proposed sale or disposition;
- whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- the extent to which the creditors were consulted;
- the effects of the proposed sale or disposition on the creditors and other interested parties; and
- whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

The rest of the subsections in the section deal with dispositions to related parties of debtor.

Section 36.1 attends to undervalue transfers or preferences exactly similar to the BIA. See the material on that Act's provisions for more information.

Pursuant to section 37 deemed trusts to Her Majesty or any province for income tax, Canada Pension Plan or Employment Insurance are continued, though not in respect of other deemed trusts not mentioned in the section.

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Section 38 deals with workers compensation claims making them unsecured claims for purposes of the CCAA.

Section 39 requires that any right Her Majesty or a province has as a secured creditor must be registered as at the date that the CCAA proceedings commence to be recognized as secured while subs. (2) places limitations on those amounts.

Section 40 makes the CCAA binding on Her Majesty as well as any province.

Section 41 prompt for the inapplicability of the compromise provisions in the Winding Up and Restructuring Act contained in the latter's s. 65 and 66.

Section 42 allows for the amalgamation and combined application of the CCAA provisions with any provincial laws that may exist regarding similar objectives.

Section 43 converts all foreign currency claims to their value in Canadian as at the date of initial CCAA application, for purposes of voting and compromise, unless specified to the contrary in the proposed compromise.

Claims that may be dealt with by a compromise or arrangement - Sec 19
19. (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Alternative Fuel Systems Inc. v. Remington Development Corp., 2004 ABCA 31 (CanLII) - Does Provincial Landlord Claim Rank in CCAA

Date:	2004-01-29
Docket:	0301-0270-AC
Parallel citations:	346 AR 28; 236 DLR (4th) 155; [2004] 5 WWR 475; 47 CBR (4th) 1; 24 Alta LR (4th) 1
URL:	http://canlii.ca/t/1g9sd
Citation:	Alternative Fuel Systems Inc. v. Remington Development Corp., 2004 ABCA 31 (CanLII), <http://canlii.ca/t/1g9sd> retrieved on 2013-08-31
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In the Court of Appeal of Alberta

Citation: Alternative Fuel Systems Inc. v. Remington Development Corp., 2004 ABCA 31

Date: 20040129
Docket: #0301-0270-AC
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended
And in the Matter of Alternative Fuels Inc.

Between:

Remington Development Corporation

Respondent
(Applicant)

- and -

Alternative Fuel Systems Inc.

Appellant
(Respondent)

The Court:

The Honourable Madam Justice McFadyen
The Honourable Madam Justice Paperny
The Honourable Mr. Justice Clark

Reasons for Judgment Reserved

Appeal from the Order of
The Honourable Mr. Justice S. J. LoVecchio
Dated the 2nd day of September, 2003
Filed on the 17th day of September, 2003
2003 ABQB 745 (CanLII), (2003 ABQB 745, Docket: 0301-05678)

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Reasons for Judgment of The Honourable Madam Justice Paperny
Concurred in by The Honourable Madam Justice McFadyen
Concurred in by The Honourable Mr. Justice Clark

Introduction

[1] This appeal raises a pure question of law: Does the *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5 (LRBA) apply to the determination of a landlord's claim when the debtor tenant has received protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA).

Facts

[2] The respondent, Remington Development Corporation (Remington) is agent for the landlord of the appellant, Alternative Fuel Systems Inc. (AFS). Remington had two agreements with AFS to lease commercial space in Calgary from August 1, 2000 to January 31, 2016. Finding itself in financial difficulty, AFS petitioned and on April 9, 2003 received the order that it was a company to which the CCAA applies and could file a plan of compromise or arrangement under the CCAA. As part of its restructuring, AFS surrendered the leased premises to Remington in May 2003.

[3] Both Remington and AFS sought a valuation of the landlord's claim and a determination whether, as an unsecured creditor, the claim should form part of the unsecured creditor class in the CCAA. Before the chambers judge, AFS calculated Remington's claim under the LRBA was approximately $96,000 without considering offsets for prepaid rent and other items. On a full accounting, the sum could be further reduced to $15,000. A non-discounted mitigated claim for the unexpired term of the leases would be about $4.2 million, although, as a result of mitigation the largest portion of Remington's claim has now been reduced to $1.1 million while the smaller portion currently remains at $400,000.

[4] The chambers judge held that the LRBA does not automatically apply to limit or quantify the landlord's claim in CCAA proceedings.

Appellant's position

[5] The thrust of the appellant's submission, broadly stated, is that under the CCAA the amount of a landlord's claim in Alberta is the same amount as would be calculated in a bankruptcy. More specifically, the appellant submits that an unbreakable thread connects the CCAA to the LRBA. The thread begins with the plain meaning of s. 12(1) of the CCAA which refers to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA) to define claims under the CCAA. The thread continues to s. 12(2) of the CCAA which provides for a determination of the amount represented by a claim in three different ways. In this appeal, the applicable sub-clause, s. 12(2)(a)(iii) provides that amount is that which might be proven under the BIA. A third link is s. 136 of the BIA which sets a priority for payment to a bankrupt's creditors and specifically, s. 136(f), which includes a landlord for priority payment, but limits the amount which may be claimed by a landlord. The next connection, says the appellant, is s. 146 of the BIA which further provides that in addition to ss. 136 and 73(4) of the BIA, rights of landlords are determined according to the law of the province in which leased premises are situated. In Alberta, that law includes the LRBA which further limits a landlord's rights in bankruptcy. Through this series of statutory provisions, it submits Parliament has provided that the landlord's rights under the CCAA are identical to those under the BIA and thus, under the LRBA.

Relevant legislation

[6] The relevant provision in the CCAA is s. 12 which provides:

> 12. (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.
>
> Determination of amount of claim
>
> (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of an unsecured claim shall be the amount
>
> (i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,
>
> (ii) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the

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company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

Admission of claims

(3) Notwithstanding subsection (2), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

[7] The following provisions in the BIA are also relevant:

Scheme of Distribution

Priority of claims

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(f) the landlord for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

...

Application of provincial law to landlords' rights

146. Subject to priority of ranking as provided by section 136 and subject to subsection 73(4), the rights of landlords shall be determined according to the laws of the province in which the leased premises are situated.

[8] The provisions in the LRBA which the appellant submits are relevant are:

Assignment of property

1 A lessee against or by whom a receiving order or assignment is made under the *Bankruptcy and Insolvency Act* (Canada) is deemed to have made an assignment of all the lessee's property for the general benefit of the lessee's creditors before the date of the receiving order or assignment.

Payment of rent after assignment

2 As soon as the receiving order or assignment is made

(a) the landlord of the lessee is not afterwards entitled to distrain or realize the rent by distress, and

(b) the trustee in whom the property of the lessee vests under the *Bankruptcy and Insolvency Act* (Canada) shall pay to the landlord in priority to all other debts

(i) an amount not exceeding in value the distrainable assets of the lessee and not exceeding 3 months' rent accrued due before the date of the receiving order or assignment, and

(ii) the costs of distress, if any.

Surplus rent

3 The lessee is a debtor to the landlord

(a) for all surplus rent in excess of the 3 months' rent accrued due at the date of the receiving order or assignment, and

(b) for any accelerated rent to which the landlord may be entitled under the lease but not exceeding an amount equal to 3 months' rent.

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When landlord unable to claim from lessee

4 Subject to section 3, the landlord has no right to claim as a debt any money due to the landlord from the lessee for any portion of the unexpired term of the lessee's lease.

Analysis

[9] As a pure question of law, the standard of review is correctness. I agree with the Chambers Judge that the LRBA does not apply to limit or quantify the landlord's claim in CCAA proceedings.

[10] I arrive at this conclusion on the basis, first, that the condition precedent set out in the LRBA for its application (and mirrored in its correlative, Part II of the BIA, which deals with Receiving Orders and Assignments) is not satisfied when the debtor is not the subject of a receiving order or an assignment, nor does the LRBA fit within the scheme and intent of the CCAA. Second, the interpretation of s. 12 of the CCAA does not direct the importation of all the provisions of the BIA into the CCAA when determining the amount of the claim. Third and most significantly, the objects of the BIA and CCAA are distinct and each must be interpreted with their respective purposes in mind.

The condition precedent for application of the LRBA

[11] That provincial legislation can deal with a landlord's rights upon the bankruptcy of a tenant if it does not conflict with the BIA (***Principal Plaza Leasehold Ltd. v. Principal Group Ltd.*** (1996), 188 A.R. 187 (Q.B.)) is not in dispute. There is no question that the LRBA properly operates within a bankruptcy context, when the debtor is the subject of either a receiving order or an assignment.

[12] In such a case, s. 136(1)(f) of the BIA confers on the landlord a preferred claim for arrears of rent for a specified period and provincial legislation is called into operation pursuant to s. 146. Consequently the LRBA's provisions are invoked.

[13] The appellant seeks to invoke these provisions when a debtor is not the subject of a receiving order or an assignment, but rather, proposes a plan of arrangement under the CCAA. In my view, the LRBA's provisions are not invoked in such circumstances.

[14] The LRBA sets out the conditions under which the provisions of the Act operate. The triggering condition is that a receiving order or assignment under the BIA be made against or by the lessee. Section 1 describes the effect of a receiving order or assignment into bankruptcy. Section 2 operates "as soon as the receiving order or assignment is made", making it clear that the pre-condition is the receiving order or assignment.

[15] The entire LRBA should be read as relying upon the operation and effect of a receiving order or assignment under the BIA. Sections 3 and 4 of the LRBA, which limit the landlord's debt, must be interpreted as requiring the condition precedent of a receiving order or assignment. Nothing in the wording of the LRBA suggests it applies in the absence of a receiving order or assignment into bankruptcy, and no receiving order or assignment is made while a company attempts to restructure under the CCAA.

Section 12 of the CCAA

[16] The specific sub-clause at issue in this appeal is s. 12(2)(a)(iii), which appears under the heading "Determination of amount of claim". Omitting the irrelevant sub-clauses, it states:

> For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows: (a) the amount of an unsecured claim shall be the amount...(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor.

[17] It is the appellant's position that this sub-clause must be interpreted as mandating the importation of the BIA and LRBA to expressly calculate the amount provable. I reject that interpretation for the three reasons set out below.

Use of the Word "Might" Conveying Discretion

[18] The first basis for my disagreement stems from Parliament's use of the words "might be made" (in sub-clause iii) which *per se* confers flexibility. This is underscored and reinforced when contrasted with the imperative "has been made" specified in the other two sub-clauses, (i) and (ii). In my view, "might" should be understood as meaning "could", i.e., the claim may be capable of being proven under the BIA.

[19] This interpretation is consistent with a long line of unassailable authorities. In ***Algoma Steel Corp. v. Royal Bank of Canada*** reflex, (1992), 11 C.B.R. (3d) 11 (Ont. Gen. Div.), Farley J. held that the word "shall" in s. 12(2) which then stated that "the amount represented by a claim...shall be defined as follows..." should be interpreted as "may" when one appreciates that the debtor companies and all affected stakeholders are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

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[20] Ten years later, the following statement by Houlden and Morawetz in ***2003 Annotated Bankruptcy and Insolvency Act*** (Toronto: Carswell, 2002) at 1100 is analogous to the issue before us. Citing ***In re Parisian Cleaners and Laundry Ltd. v. Blondin*** (1938), 20 C.B.R. 452 (Que. C.A.), they stated: "The purpose of s. 12(2) [of the CCAA] is to provide a means of determining the amount of a claim, not to incorporate the provisions of the Bankruptcy and Insolvency Act as to what constitutes a preferred or unsecured claim.". (Emphasis added) The same proposition is also supported by ***Québec (Sous-ministre du revenu) v. Wynden Canada Inc.*** (1983), 47 C.B.R. (N.S.) 76 (Que. S.C.), and ***Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*** (1969), 5 D.L.R. (3d) 374 (Ont. H.C.).

[21] In my view, the words "might be made under the BIA" should be understood to mean "could be made". In other words, the claim may be, but must not necessarily be, capable of being proven under the BIA.

Use of the Word "Determined" Conveying "Methodology"

[22] My second disagreement stems from my broader interpretation of the word "determined" as used in the opening sentence of s. 12(2). The interpretation urged upon us by the appellant is that "determined" should be interpreted as meaning "calculated". However, reference to the BIA indicates that use of the term has two meanings: it can mean either a "methodology" or a "calculation", i.e., a formula for calculating a specific amount.

[23] That "determination" is used to mean "methodology" is illustrated by the following example. Section s. 121(1) broadly defines "claims provable" and the subsequent sub-sections add more specificity. Section 121(2) states that the "determination" of whether contingent and unliquidated claims are provable claims and their valuation is in made accordance with s. 135. The term "determination" in s. 121(2) clearly refers to a methodology, since s. 135 does not provide a formula for calculation of the amount, but rather a methodology at s. 135(1.1):

> Claims provable
>
> 121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> Contingent and unliquidated claims
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> Determination of provable claims
>
> 135(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[24] When Parliament directed that the claims of unsecured creditors are those that might be proven under the BIA, it did not refer to the quantification or calculation of the amount provable in bankruptcy. In my view, it was intended to define who is included in the scheme of the CCAA, so as to override conflicting common law definitions.

The Dilemma of Which Section of the BIA To Invoke to Calculate Quantum

[25] This interpretation is supported by my third area of disagreement with the appellant. Were one to adopt the appellant's interpretation of sub-clause (iii), i.e., that the *amount* of the claim must be *calculated* in accordance with the methodology for calculating such claims under the BIA/LRBA, the issue then raised is: should one apply the method set out in s. 65.2 or that in s. 136, both of which apply to landlords? Each method yields substantially different results.

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[26] As a preface, and at the risk of stating the obvious, the BIA governs two types of debtors. Part III, titled "Proposals", is similar to the scheme and object of the CCAA, and is intended to govern those debtors who, with the support their creditors, have a reasonable hope of returning to financial viability. In contrast, Part II, titled "Receiving Orders and Assignments" and its companion section, Part V ("Administration of Estates") govern situations where the debtor has no hope of returning to financial viability, but rather, its assets are vested in a trustee for distribution among the debtors' creditors. These two discrete objects of the BIA are essential to the analysis that follows.

[27] For landlords, the direction in s. 12(1)(a)(iii) of the CCAA cannot be read as requiring the valuation of the amount of the claim as set out in the BIA because the BIA itself provides two different methods and amounts that may be applicable to landlords' claims.

[28] The first is s. 65.2 (in Part III, Proposals), which makes provisions for disclaiming commercial leases. If the disclaimer of the lease is in accordance with the requirements of the section, s. 65.2(4) sets out the amount the landlord may claim as follows:

> Effects of disclaimer
>
> (4) Where a lease is disclaimed under subsection (1),
>
> (a) the landlord has no claim for accelerated rent;
>
> (b) the proposal must indicate whether the landlord may file a proof of claim for the actual losses resulting from the disclaimer, or for an amount equal to the lesser of
>
> (i) the aggregate of
>
> (A) the rent provided for in the lease for the first year of the lease following the date on which the disclaimer becomes effective, and
>
> (B) fifteen percent of the rent for the remainder of the term of the lease after that year, and
>
> (ii) three year's rent; and
>
> (c) the landlord may file a proof of claim as indicated in the proposal.

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[29] Section 65.2 limits a landlord's claim under a proposal and provides for a larger amount than when the debtor is the subject of a receiving order or assignment. This accords with authorities which suggest that proposals must offer creditors some better advantage than a bankruptcy: ***Re Pateman*** reflex, (1991), 5 C.B.R. (3d) 115 (Man. Q.B.), ***Re Sumner Co.*** (1984) Limited (1987), 64 C.B.R. 219, ***In Re Allen Theatres Ltd.*** (1922), 3 C.B.R. 145 (Ont. S.C.).

[30] Section 136 (in Part V) provides a scheme for the distribution of the assets of a bankrupt who is the subject of a receiving order or an assignment under Part II. Landlords are specifically provided for at s. 136(1)(f) as follows:

> Priority of claims
> 136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
> ...
> (f) the landlord for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

[31] This is the section that the appellant urges upon us as being part of the unbreakable thread. In my view, nothing in the wording of s. 136 assists it's position. On the contrary, the limitation on the amount a landlord may claim in s. 136(f) appears under the heading "priority of claim". As appellant's counsel explained, there is a trade off, the amount which the landlord receives is reduced from the full amount which could be claimed under a lease and in return, the landlord receives a priority position when the proceeds of the bankrupt's property is paid out. Section 136 requires payment of the enumerated claims in full in the order specified before any other unsecured creditor receives payment.

[32] However, there is no scheme for priority payment of claims set out in the CCAA. Thus, the effect on the landlord, were this interpretation accepted, is to compromise the claim not once, but twice, without the benefit of any priority, as noted by the Chambers Judge.

[33] If s. 65.2 were to be applied, it assumes that the proposal provisions, Part III of the BIA, applies to CCAA and not Parts II and V, the bankruptcy provisions. Section 146 of the BIA which allows for the application of provincial law is also included in Part V and its provisions are in reference to s. 136 which sets out distribution in bankruptcy proceedings, not proposals.

[34] If s. 12(2)(a)(iii) of the CCAA requires calculation of an amount in accordance with the BIA, as submitted by the appellant, it would have to stipulate which of ss. 65.2 or 136 is applicable. It does not, providing further support that the BIA does not direct the calculation of the amount of a landlord's claim in a CCAA proceeding or that the CCAA requires s. 136 of the BIA be applied.

[35] During oral argument, the appellant sought to distinguish cases involving Ontario's provincial legislation which is not as restrictive as the Alberta LRBA. But the provincial legislation setting out the rights of landlords in bankruptcy proceedings is irrelevant if ss. 136 and 146 of the BIA do not apply to the CCAA.

[36] There are numerous cases dealing with landlords' claims that have treated the CCAA as an autonomous statute and did not look to s. 12 as directing the use of BIA provisions to determine the amount of the claim. ***Re Woodward's Limited*** 1993 CanLII 870 (BC SC), (1993), 20 C.B.R. (3d) 74 (B.C.S.C.), is an example of the purposive approach taken by courts under the CCAA in dealing with creditors.

[37] Decisions in ***Re Agnew Group Inc.*** unreported February 4, 1994 (Ont. Gen. Div.), ***Sklar-Peppler Furniture Corporation v. Bank of Nova Scotia*** reflex, (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.), ***Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce*** reflex, (1992), 90 D.L.R. (4th) 285 (Ont. Gen. Div.), and ***Ambro Enterprises Inc. (Re)*** reflex, (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.), all treated landlord's claims very differently than the BIA and took a broad approach to the classification and quantification of landlords' claims to facilitate the object and purpose of the CCAA.

[38] The appellant was unable to cite any authority to compel us to a different conclusion. The appellant submits that the Court's decision in ***Luscar Ltd. v. Smoky River Coal Ltd.*** 1999 ABCA 179 (CanLII), (1999), 175 D.L.R. (4th) 703, determined that s. 12(2) provides that an amount of a claim must be that amount as provided for under the BIA. I disagree. The issue in ***Smoky River*** (*supra*) was whether a CCAA judge had the discretion to establish a procedure for resolving a dispute between parties who had agreed by contract to arbitrate their disputes. This required that the dispute fall within the jurisdiction of the CCAA. In other words, the plaintiffs in the dispute had to be considered "creditors" for the purpose of the CCAA. The court's focus was on s. 12(1) of the CCAA, not s. 12(2). This Court looked to the similar wording between the BIA and CCAA referring to "debt provable in bankruptcy" and "claim provable in bankruptcy" to conclude that the plaintiffs, who had a contingent and unliquidated claim, were creditors. Valuation of the amount was not

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an issue since the claim was contingent and unliquidated. The issue was solely one of the court's discretion to establish a process to resolve the amount of the claim.

[39] The wording in s. 12(2)(a)(iii) is intended to be and must be general. That sub-clause captures all the unsecured claims of a company not subject to a receiving order or assignment or winding up. These unsecured claims include landlords as creditors, but also capture a host of unliquidated and contingent claims, the latter of which would not be defined as creditors at common law. Thus, the phrase "proof of which might be made under the Bankruptcy and Insolvency Act" directs that the various methods within the BIA to determine claims are to be employed to cover the wide range of potential claims. This clause is intended to define who is included in the scheme of the CCAA and override conflicting common law definitions.

[40] Moreover, amendments to both the BIA and CCAA in 1997 and 1998 were intended to harmonize the two pieces of legislation. Changes were made to the BIA to enhance the rights given to landlords, but no change in either legislation amended or introduced provisions to apply the BIA to landlords in CCAA proceedings.

[41] More recently, in November 2003, the Standing Senate Committee on Banking, Trade and Commerce released "Debtors and Creditors Sharing the Burden: A Review of the BIA and the CCAA", a report calling for substantial reform of the federal insolvency statutes (the "Report"). Twenty-two of the Committee's recommendations apply specifically to commercial insolvencies.

[42] A very broad range of stakeholders provided input on virtually all elements of the two *Acts*. The Committee concluded that [p. 173]: "We believe that the need for flexibility is paramount with the CCAA....". As a consequence, they recommend that the BIA and the CCAA continue to operate as separate statutes.

[43] The Report also considered the existence of contracts, including leases, and how these should be dealt with under the legislation. The Joint Task Force on Business Insolvency Law Reform was of the view that the ability set out in the BIA to disclaim executory contracts including real property leases should apply to all bankruptcy and insolvency proceedings. The Committee's final recommendation was that:

> The BIA and the CCAA be amended to permit disclaimer of executory contracts in existence in the date of commencement of proceedings under the Acts. This disclaimer should apply to all contracts, provided that a number of conditions are met. In particular: the debtor should be obliged to establish inability or serious hardship in restructuring the enterprise without the disclaimer; the co-contracting party should be permitted to file a claim in damages in the restructuring [and other conditions specific to collective agreements].
>
> [Emphasis added]

[44] The Report recognized that the CCAA treats landlords differently than the BIA and harmonization in respect of this difference was recommended. Significantly, no such recommendations were made with respect to implementing a consistent approach for the valuation of a landlord's claim.

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Purposes of the BIA and CCAA

[45] Assuming the words are capable of bearing the interpretation urged upon us by the appellant, statutory interpretation requires that s. 12 be read in the context of the scheme, the object, and the intention of Parliament in passing the CCAA and where the CCAA refers to the BIA, regard must also be given to the scheme, object and intention of that Act.

[46] The proper approach to statutory interpretation requires that words be read contextually to give effect to the purpose and intent of the legislation. As the Supreme Court of Canada recently stated in ***Harvard College v. Canada (Commissioner of Patents)***, 2002 SCC 76 (CanLII), **[2002] 4 S.C.R. 45 at para. 154**, "This Court has on many occasions expressed the view that statutory interpretation cannot be based on the wording of the legislation alone (***Rizzo& Rizzo Shoes Ltd. (Re)***, 1998 CanLII 837 (SCC), **[1998] 1 S.C.R. 27)**". When interpreting specific provisions, a court must pay sufficient attention to the scheme of an act, its objects or the intention of the legislature.

[47] The BIA is a comprehensive legislative scheme largely designed to facilitate the orderly liquidation of the estate of a bankrupt. The purposes of the Act include conducting the liquidation in a manner that maximizes recovery for the general benefit of the creditors, treating similarly situated creditors fairly and in accordance with the Act. The Act sets out priorities and a detailed process, making the BIA a logical choice when the only possible outcome is dissolution. It provides a high degree of certainty for all creditors.

[48] The CCAA is a very brief piece of legislation with a purpose described in ***Elan Corp. v. Comiskey*** reflex, (1990), 1 O.R. (3d) 289 (C.A.) as follows:

> The legislation is remedial in the purest sense in that it provides a means whereby devastating, social and economic effects of bankruptcy or creditor–initiated detriments of ongoing business operations can be avoided while court-supervised attempt to reorganize the financial affairs of the debtor is made.

[49] The very brevity of the Act and the fact that it is silent on details permits a wide and liberal construction to enable the Act to serve its remedial purpose: ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada***, 1990 CanLII 529 (BC CA), [1991] 2 W.W.R. 136 (B.C.C.A.).

[50] The role of the CCAA is unique. It affords the debtor company an opportunity to restructure its affairs in a manner that will permit it to continue as a going concern without intervention by creditors which might hamper or prevent the restructuring process. Its ultimate goal is to avoid bankruptcy, thereby maximizing creditor compensation, reducing the inevitable loss of employment precipitated by bankruptcy and, if successful, offering the prospect of shareholder equity. The debtor remains in possession and control of the company under the supervision of a court appointed monitor. See for example, ***Re Canadian Airlines Corp.***, 2000 ABQB 442 (CanLII), [2000] 10 W.W.R. 269, 2000 ABQB 442, leave denied, 2000 ABCA 238 (CanLII), [2000] 10 W.W.R. 314, 2000 ABCA 238, leave denied [2001] S.C.C.A. No. 60; ***Re Lehndorff General Partner Ltd.*** reflex, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); ***Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada***, 1989 CanLII 2672 (BC CA), [1989] 3 W.W.R. 363 (B.C.C.A.).

[51] The decision to seek protection under the CCAA is that of the debtor. There are numerous considerations in choosing the CCAA as opposed to utilizing the proposal provisions of the BIA, however, one significant factor is the high degree of flexibility the CCAA offers in terms of plan fundamentals and process. The BIA is highly rule driven with clearly defined standards and processes for developing a proposal. Thus, the debtor company under CCAA has far broader latitude within which to propose a plan capable of winning creditor support.

[52] A company which invokes the CCAA process retains a great deal of control over it. Under the CCAA claims process, the company, not the monitor, initially accepts or rejects claims. Section 12(2)**(a)(iii) states**, "**if the amount so** provable is not admitted by the company, the amount shall be determined by the court on summary application by the **company or by the creditor**".

[53] Section 12(2)(a)(iii) permits different treatment of different claims. The company can admit a claim, or refer it to a court to determine by summary application or trial. In recent cases, recognizing the need for expedited valuation of claims to facilitate the process, the courts have begun appointing a claims officer to make this determination.

[54] Rehabilitation of a company under the CCAA is furthered by a climate that allows for commercial realities and variables to be considered and negotiated among and by the affected parties. The debtor company, through the operation of the stay, is given the breathing room to explore alternatives and to structure a proposed plan that will find favour with creditors, sufficient to support the restructuring.

[55] To maximize flexibility, it is unwise and unnecessary to incorporate, by oblique reference, portions of the BIA or the LRBA that may not assist the process. What the CCAA requires is that the end result, the plan of arrangement, be fair and reasonable. Only when those conditions are met, will a plan of arrangement be approved by a court. What constitutes fairness is largely determined by the circumstances of each case. An important measure of fairness is the degree to which creditors approve it. Creditor support can create an inference that assenting creditors see the plan as viable and

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commercially reasonable given other available alternatives. The courts generally accept the view that the creditors are in a better position to determine whether the plan is in their own best interests.

The implications of incorporating all BIA provisions into the CCAA

[56] If the appellant's interpretation of s. 12 of the CCAA is accepted, such an interpretation would not be limited to claims by landlords but would include all other unsecured creditors who fall within the provisions of the BIA. At minimum, tax claimants, employees claims, and workers compensation indebtedness as provided in s. 136 of the BIA would apply to the CCAA, thereby increasing the rigidity and reducing the options for compromise.

[57] Under the BIA, the claims receiving priority after secured creditors are enumerated in s. 136 and have ten categories, each ranking behind the other. All must be paid in full before unsecured creditors recover anything. If the appellant is correct, arguably, those claims must be quantified under the BIA but without priority and subject to possible further compromise.

[58] Two other examples illustrate the uncertainty and difficulty that would arise if the appellant's submission was adopted. First, federal excise tax legislation gives Canada Customs and Revenue Agency (CCRA) a deemed trust for amounts due to it for GST and prohibits any legislation other than the BIA from overriding the deemed trust. There is no deemed trust in a bankruptcy, but cases including this proceeding have held a deemed trust exists in a CCAA restructuring. If the appellant is correct, then excise tax claims must be treated the same in CCAA and a deemed trust would be overridden.

[59] A second example that would import complex and unsettled issues in bankruptcy law is a severance claim. These claims raise thorny issues such as whether the bankruptcy itself triggers termination of employment without cause and thereby gives rise to a provable claim, whether legislation which continues a collective agreement gives rise to a severance claim, and whether a bankruptcy triggered by a creditor and not the bankrupt is to be distinguished. Under the CCAA, employees' claims for severance avoid those issues by treating employees as claimants and capable of being compromised under the CCAA. In ***Re Woodward's Ltd.***, a British Columbia case, the court recognized the claims of employees who were terminated and included them in the class of general creditors maintaining that once the amount of the claim had been agreed upon or determined by a court, the employees had the same rights as any other unsecured creditor.

The inconsistency of the BIA and LRBA with the objectives of the CCAA

[60] Automatically applying the LRBA when protection is sought under the CCAA results in the immediate compromise of a landlord's claim prior to the formulation of a plan. Its effect could be to isolate the landlord's claim, treating it differently and potentially unfairly by automatically compromising it without consideration of the plan as a whole. There is no compelling reason for such an *a priori* blanket regime for landlords in a CCAA proceeding that is intended to preserve the status quo pending the approval of a plan.

[61] There is no reported decision of a court applying s. 136 of the BIA, the LRBA or other provincial legislation equivalent to the LRBA. Instead, case law shows those provisions are not applied and courts have agreed with Farley J., who stated in ***Re Lehndorff General Partner Ltd.*** at para. 11, "Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see ***Sklar-Peppler Furniture Corporation*** reflex, (1992), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318."

[62] Landlords' claims have been a source of difficulty under the CCAA and have spawned considerable academic comment on the problems and potential ways to resolve them. The chambers judge and the respondent have noted many including the following: Moffat, "Treatment of Landlords in Commercial Re-organizations" (1997) 10 Comm. Insol. R. 14; Rotsztain and Kraft, "Landlords and Leases in Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act Reorganizations" [1994] ICR 2005; Marantz, "Retail Revival: The Eaton's Restructuring" (1998), 10 Comm. Insol. R. 37; Birkness, "*Re Woodward's Limited* – The Contextual Commonality of Interest Approach to Classification of Creditors" (1993) 20 C.B.R. (3d) 91; Kulidjian, Sheldon and Peck, "Potential Creditors Under the Companies' Creditors Arrangement Act" (1996) 13 National I. R. 4; Marantz, "Dealing with Proposals: Acting for the Creditor in CCAA and the New Bankruptcy Act Proposals" (Ontario: Canadian Bar Association C.L.E., 1993); Hayes, "Landlords' Rights on Bankruptcy and in Restructuring Proceedings" in *The Failing Smaller Business: Essential Debtor - Creditor Practice* (Law Society of Upper Canada, 1994); and Johnston and Campbell, "Using the CCAA to 'Cram Down' Landlords: *Sklar-Pepplar Furniture Corporation v. Bank of Nova Scotia* and its Aftermath" (1992) 1 Nat. Real Property L. Rev. (2d) 181.

[63] Much of the comment accords with those of Moffat, "Treatment of Landlords in Commercial Re-organizations", where the author states at 16:

> Unlike the proposal provisions of Part II of the BIA, the CCAA does not make any special provision for the valuation or classification of landlord claims under a plan. This does not give the debtor the power to

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> compromise a landlord's claim in any way it chooses; the courts have placed limits on the method by which landlord claims may be valued and classified under a plan. A landlord which objects to its treatment under a plan may pursue a number of remedies, including seeking amendment of the plan prior to the meeting of creditors held to vote upon the plan, voting against the plan at the creditors' meeting, and opposing court approval of the plan at the sanction hearing.

[64] Courts have approved a variety of solutions to quantifying landlord's claims without reliance on the BIA or provincial legislation. In ***Sklar-Peppler Furniture Corporation v. Bank of Nova Scotia***, the court classified the landlords among the general class of unsecured creditors for both outstanding rent and any contingent claim for damages arising from repudiation of the lease. The court permitted the termination of certain leases upon the plan's approval and limited damages to three months arrears of rent, three months' rent after a protection order and share pro rata with other ordinary creditors for the balance of their claims. Borins J. stated at 318:

> [R]ecognition must be given to the legislative intent to facilitate corporate re-organization and that in the modern world of large and complex business enterprises the excessive fragmentation of classes could be counter-productive to the fulfilment of this intent....In my view, in placing a broad and purposive interpretation upon the provisions of the CCAA the court should take care to resist approaches which would potentially fragment creditors and thereby jeopardize potentially viable plans of arrangement, such as the plan advance in this application.

[65] In ***Grafton Fraser*** and in ***Re Agnew Group Inc.***, the landlords were granted claims based on the present value of the unexpired terms of the abandoned leases. In ***Agnew***, with the exception of one landlord with a particularly long term lease, landlords received a maximum of six months' rent.

[66] Rotsztain and Kraft in "Landlords and Leases in BIA and CCAA Reorganizations" commenting on ***Agnew*** and ***Grafton-Fraser*** note at 5-31 that, "A claim based on the present value of the unexpired term of the lease is something which landlords generally look upon more favourably than a straight payment of a few months' rent." The authors explain that this is because this approach recognizes the significant long term impact termination can have on landlords and allows the factoring in of tenant inducements which are generally built into rental payments over the entire lease.

[67] On this appeal, the appellant suggests incorporating the LRBA serves a useful purpose because without the LRBA limitations, the landlord's claim is so potentially large that it makes a restructuring impossible, and requires too much time to mitigate and thus to quantify the landlord's claim.

[68] Speaking generally, I disagree that the magnitude or quantification issues arising from a landlord's claim make restructuring impossible. Treatment of a landlord's claim under a plan may produce the same result as that under the LRBA and such plan might be approved by both the landlord and the court. Similarly, treatment under the plan could be less than or more than the amount provided for under the LRBA. But these are issues for negotiation and ultimately, court approval.

[69] In the absence of legislation, the unique and distinct purpose of the CCAA has been and must remain the focus for judicial interpretation and discretion. Where there is neither statutory direction nor demonstrated need, it is undesirable to import statutory provisions that may have a negative affect on the flexibility afforded by the CCAA and thus become an impediment to its creative use. Adopting the LRBA as determinative of a landlord's claim under the CCAA is an example of narrowing the benefit of a broad statute in favour of a certainty. As a general proposition and without considering the merits of that position in a particular plan, such an approach is to be discouraged.

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Relief
[70] For these reasons, the appeal is dismissed.
Appeal heard on December 2, 2003
Reasons filed at Calgary, Alberta
this 29th day of January, 2004

_____ Paperny J.A.

I concur: _____

McFadyen J.A.

I concur: _____

Clark J.

Appearances:
B. P. O'Leary, Q.C.
C. Murray
for the Appellant
L. B. Robinson
for the Respondent
R. J. Gilborn, Q.C.
for the Monitor

Big Bear Exploration Ltd. v. Price Waterhouse Coopers Inc., 2000 ABCA 3 (CanLII) - A Leave to Appeal and Criteria

Date:	2000-01-06
Docket:	99-18610
Parallel citations:	250 AR 172; 15 CBR (4th) 160
URL:	http://canlii.ca/t/5rz5
Citation:	Big Bear Exploration Ltd. v. Price Waterhouse Coopers Inc., 2000 ABCA 3 (CanLII), <http://canlii.ca/t/5rz5> retrieved on 2013-09-10
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Big Bear Exploration Ltd. v. Price Waterhouse Coopers Inc., 2000 ABCA 3

Date: 20000106
Docket: 99-18610

IN THE COURT OF APPEAL OF ALBERTA

THE HONOURABLE MR. JUSTICE WITTMANN
IN CHAMBERS

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, as amended
AND IN THE MATTER OF BLUE RANGE RESOURCES CORPORATION
BETWEEN:

BIG BEAR EXPLORATION LTD.

Appellant

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- and -

PRICE WATERHOUSE COOPERS INC., in its capacity as Monitor,
ENRON CANADA CORP., and THE CREDITORS' COMMITTEE

Respondents

APPLICATION FOR LEAVE TO APPEAL THE ORDER OF
THE HONOURABLE MR. JUSTICE S. J. LoVECCHIO MADE DECEMBER 17, 1999

MEMORANDUM OF DECISION

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COUNSEL:
R. J. Wilkins, Q.C. and G. A. Befus
For Big Bear Exploration Ltd., the appellant
K. M. Horner,
For Price Waterhouse Coopers Inc.
A. Robert Anderson and K. A. Wilkes
For Enron Canada Corp.
H. A. Gorman
For The Creditors' Committee, the respondents

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MEMORANDUM OF DECISION OF THE
HONOURABLE MR. JUSTICE WITTMANN

Introduction

[1] On March 2nd, 1999, Blue Range Resources Corporation (Blue Range) obtained an order from the Court staying proceedings against it, invoking the ***Companies' Creditors Arrangement Act*** R.S.C. 1985 c.C-36 as amended (CCAA). With one exception made known on this application to the Court, the supervising judge throughout has been LoVecchio, J. and he has made numerous orders culminating in an order for interim distribution pronounced December 17, 1999 (the Decision). Big Bear Exploration Ltd. (Big Bear) applies for leave to appeal the Decision, and a stay of the Decision.

Background Facts

[2] On May 5, 1999, Big Bear filed a Notice of Claim in the amount of $151,317,298.00. Big Bear alleged that this is an unsecured claim (Big Bear claim).

[3] The Big Bear claim was disputed by the Monitor, Price Waterhouse Coopers Inc. and Big Bear was directed by the Monitor in a Notice of Dispute to file and serve a Notice of Motion for the determination of the Big Bear claim.

[4] Also on May 5, 1999, Big Bear filed a Notice of Motion and an affidavit in support for an order lifting the stay of proceedings under the March 2, 1999 order, and allowing Big Bear to file a statement of claim, a draft of which was attached to the affidavit, which application was dismissed by LoVecchio, J. on May 11, 1999. **The statement of claim as drafted claimed, amongst other things, damages against Blue Range in the sum of $151,317,298.00 based on alleged false and misleading statements made by Blue Range which induced Big Bear to purchase the shares of Blue Range.**

[5] On May 31, 1999, pursuant to the direction given in the Notice of Dispute by the Monitor, Big Bear filed a Notice of Motion for a declaration that the unsecured claim of Big Bear was a meritorious claim against Blue Range, and an order directing the expeditious trial and determination of the issues raised by Big Bear.

[6] At the direction of Chief Justice Moore, Romaine, J. was directed to hear and determine issues arising out of the disputed Big Bear claim. Romaine, J. made an order October 28, 1999 stating as follows:

> **1. At the preliminary applications to be heard on November 8 and 9, 1999 (the "Preliminary Applications"), one of the issues to be determined shall be:**
>
> **With respect to the alleged loss or damage of $147,687,298 allegedly suffered by Big Bear from the exchange of Big Bear and Blue Range Resource Corporation ("Blue Range") shares (the "Alleged Share Exchange Loss"), without considering the principle of equitable subordination, is Big Bear:**
>
> **(a) an unsecured creditor of Blue Range which ranks equally with the unsecured creditors of Blue Range, or**
>
> **(b) is it a shareholder of Blue Range which ranks after the unsecured creditors of Blue Range?**
>
> **2. Another issue to be determined at the Preliminary Applications shall be:**
>
> **Assuming (without admitting) misrepresentations by Blue Range and reliance on it by Big Bear, is the Alleged Share Exchange Loss a loss or damage incurred by Big Bear and, accordingly, is Big Bear a proper party to advance the claim for such loss?**
>
> 3. The following is the only other issue which shall be determined at the Preliminary Applications:
>
> Whether Big Bear is entitled to make or advance by way of argument in these proceedings the claims represented by the heads of damage specified in the draft Statement of Claim set out at Exhibit "F" to the Affidavit of A. Jeffrey Tonken dated June 25, 1999?

[7] The preliminary applications were heard by Romaine, J. November 8 and 9, 1999 and judgment was and remains reserved.

[8] The sixth interim report of the Monitor dated December 14, 1999 had attached to it as Appendix D a schedule outlining a potential estimated second interim distribution to the Class B claimants as of December 9, 1999. Paragraph 26

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of that report stated that the largest unresolved claim was Big Bear's unsecured Class B claim of approximately $151 Million and that the 25 cent estimated dividend assumed a value of $30 Million for this claim and the 50 cent estimated dividend assumed the claim would be disallowed or be subordinated in full to the claims of Class B claimants. It also stated that the Monitor sought the advice and direction of the Court regarding the amount which would be appropriate for an interim distribution.

[9] That issue came before LoVecchio, J. on December 17, 1999 together with a motion by Big Bear requesting that the Monitor withhold from distribution a reserve on account of the Big Bear unsecured claim until such time as a final determination of that claim had been made by the Court. Big Bear argued that s. 12(2) of the CCAA mandated that the claim of any unsecured creditor "shall be determined", and that the Big Bear claim had not yet been determined.

[10] The Decision of LoVecchio, J. pronounced December 17, 1999 ordered an interim distribution with a reserve for the Big Bear claim of $3,070,000.00.

[11] The motion for leave to appeal the Decision and for a stay of the Decision was filed December 20th, 1999 returnable December 21st, 1999, and requested that this Court abridge the time for notice of the motion. The abridgement of time was not objected to by any of the respondents and time was ordered abridged. Written briefs were filed by the Creditors' Committee and by Big Bear.

[12] No formal order of LoVecchio, J. dated December 17, 1999 was before this Court on the hearing of the application nor were the reasons for judgment made available on December 21st. The matter was adjourned until December 22nd, 1999 pending receipt of a transcript of the proceedings in chambers December 17th, 1999 which was provided to the Court on the afternoon of December 21st.

[13] This matter was argued December 22nd, 1999, and I ordered an interim stay of the Decision pending this decision.

Leave under the CCAA

[14] No one before me disputed the criteria for leave to appeal a decision of the supervising judge pursuant to s. 13 of the CCAA. The criteria that has been applied by this Court is found in *Re Multitech Warehouse Direct* reflex, (1995), 32 Alta. L.R. (3d) 62 at 64 (C.A.); *Luscar Ltd. v. Smoky River Coal Ltd.* [1999] A.J. No. 185 at para. 22 (C.A.); *Re Blue Range Resource Corp.* [1999] A.J. No. 975 at para. 2, 3, 4 (C.A.).

[15] Madam Justice Fruman in deciding leave applications arising out of other orders granted by LoVecchio, J. in *Re Blue Range Resources Corp*, [*supra*] referred to *Re Pacific National Lease Holding Corp.* 1992 CanLII 427 (BC CA), (1992) 15 C.B.R. (3d) 265 at 272 (B.C.C.A.), as well as *Med Finance Co. S.A. v. Bank of Montreal* reflex, (1993), 22 C.B.R. (3d) 279 at 282 (B.C.C.A.). The latter case sets forth factors to be considered in granting leave to appeal an issue under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, as amended. The factors are:

> **(a) whether the point on appeal is of significance to the practice;**
> **(b) whether the point raised is of significance to the action itself;**
> **(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and**
> **(d) whether the appeal will unduly hinder the progress of the action.**

[16] The general test articulated in *Multitech* of "serious and arguable grounds that are of real and significant interest to the parties" encompasses the four criteria set forth above.

The Argument

(a) Big Bear

[17] The essence of Big Bear's argument is that s. 12 of the CCAA mandates that its claim shall be determined by the Court, that it took steps to have it determined in May of 1999, and through no fault of its own, judgment is now reserved on issues pertaining to the Big Bear claim. Further, Big Bear submits that LoVecchio, J. has made a pre-determination of the value of the claim prior to any hearing or summary determination of it, and that this is a point of significance to the practice. Big Bear further argues that the point raised is of significance to the action of itself as LoVecchio, J. set aside an amount of $3,070,000.00 as a reserve for the Big Bear claim, and that Big Bear will forever be unable to share with other creditors on a pro-rated basis should it be determined by a court to have a claim of more than this sum. Big Bear further argues that the appeal will not hinder the progress of the action because a plan of arrangement is already in place.

[18] With respect to a stay of the Decision, Big Bear relies on ***Re Associated Investors of Canada Ltd.; Deloitte Haskins and Sells v. Coopers & Lybrand Inc.*** reflex, (1996) 37 Alta. L.R. (3d) 64 (C.A.) for a three-part test that:

> (1) the Court must be satisfied on a preliminary assessment there is a serious issue to be tried;
> (2) that if the stay is not granted the applicant would suffer irreparable harm not capable of recompense in damages; and
> (3) that the balance of convenience favours a stay.

Big Bear submits that, at the very least, a stay should be granted pending the decision of Romaine, J.

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(b) The Creditors' Committee

[19] The Creditors' Committee, supported by Enron Canada Corp. (the largest single creditor) argued strenuously that the Decision was based on the cross-examination on affidavit of James W. Surbey, the Senior Vice President Corporate Development of Big Bear, which occurred on the evening of Thursday December 16th, 1999 and on the Rule 266 examination of Kyle Kitigawa. Transcripts and exhibits relating to both examinations were before LoVecchio, J. for the purpose of reserving for the Big Bear claim on December 17, 1999. The gist of this argument is that the reserve in the amount of $3,070,000.00 for the Big Bear claim was correct, if not generous in light of the evidence that Big Bear entered into an Arrangement Agreement with Avid Oil and Gas Limited (Avid) dated November 26, 1999 and issued a press release to its shareholders that the Agreement provided that Avid would acquire all of the issued and outstanding common shares of Big Bear based on one common share of Avid for every 15 common shares of Big Bear, subject to some adjustments. Some of the evidence on the cross-examination and examination referred to above was in essence that Big Bear placed no value on its claim against Blue Range with respect to the valuation of the Big Bear assets which, in turn, impacted on the value of the Big Bear shares for the purpose of the Arrangement Agreement valuation. It is clear that LoVecchio, J. accepted that evidence for the purpose of the valuation and reserve for the Big Bear claim.

Issues

(1) Should leave to appeal the Decision be granted?

(2) Should a stay of the Decision be granted?

Leave to Appeal

[20] Should leave to appeal the Decision be granted? Returning to the criteria outlined above, there must be serious and arguable grounds that are of real and significant interest to the parties. Subsumed in this general criteria are the four elements in ***Med Finance Company S.A. v. Bank of Montreal*** [***supra***].

[21] Big Bear's counsel indicated in argument that Big Bear was simply not ready to have a hearing on the valuation of the Big Bear claim on December 17, 1999 and that there was no intention to proceed on that basis. This position is difficult to reconcile with the cross-examination and examination referred to above, the thrust of which was to demonstrate that Big Bear placed little or no value on its claim against Blue Range and, secondly, with the motion of Big Bear requesting a reserve amount be withheld from distribution on account of the Big Bear unsecured claim and, alternatively, providing directions for the valuation of the Big Bear unsecured claims. Presumably, in order for LoVecchio, J. to provide for a reserve amount, he at least had to consider the value of the claim. It is apparent from the transcript of the proceedings on December 17, 1999 that LoVecchio, J. accepted the proposition that Big Bear's officers and directors put little, if any, value on the Big Bear claim. Illustrative is the following excerpt (at pp.153-154):

> THE COURT: Right.
>
> And I'm going to keep the designation of 6,930,000 in respect of the others, which means the differential, 3,070,000 is for the Big Bear, and I want to state on the record, I see that as several million dollars more than the directors and officers of Big Bear have valued it at for the purposes of the Anvil [***sic***] transaction under which they have a fiduciary responsibility.
>
> MS. HORNER: Okay, sir, again, just so that I follow you, in the conservative column across from the Big Bear claim, so at the second column on Appendix D, instead of 30 million, I'm to insert 3,070,000.
>
> THE COURT: Right.
>
> As I say, I want it on the record that I have reviewed the financial information associated with the public statements of the company - - that is, Big Bear - - in relation to the share exchange ratio, the valuation of the company, and in my view, this values that claim at several million dollars higher than the directors and officers appear to have valued it for the purposes of the share exchange ratio, and the directors and officers, of course, are under a fiduciary responsibility to their shareholders to ensure a proper valuation of the company.

[22] In the context of setting a reserve for the Big Bear claim, the learned chambers judge was entitled to accept the evidence before him. The evidence before him which he chose to accept was that the Big Bear officers and directors valued the Big Bear claim against Blue Range for the purposes of the Avid share exchange at a negligible value. As was pointed out in argument before LoVecchio, J., Big Bear did not lead any convincing evidence to the contrary. Leave to appeal the decision of the LoVecchio, J., fixing the Big Bear reserve at $3,070,000.00, is therefore denied.

Stay of the Decision

[23] Should a stay of the Decision be granted? Although at first blush it might seem that the denial of leave to appeal renders the stay issue moot, I am of the contrary view. Big Bear argued before me that, even if leave to appeal was not granted, there should be stay of the Decision, until the decision of Romaine, J. is made.

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[24] The learned chambers judge was asked to stay the Decision. He did not expressly decide the issue but rather stated: ". . . you should go and talk to the Court of Appeal about a stay." [Transcript of the December 17, 1999 proceedings at p.155].

[25] This case is unusual. Rule 508 of the ***Alberta Rules of Court*** states as follows:

> 508. An appeal does not operate as a stay of enforcement or of proceedings under the decision appealed from except so far as a judge of the Court of Queen's Bench or the Court of Appeal may order and no intermediate act or proceeding is invalidated except so far as the court appealed from may direct.

[26] If leave to appeal is denied, one might question the authority of this Court to grant a stay of the learned chambers judge's decision pending the decision of Romaine, J.

[27] If authority need be cited for the proposition that this Court has such a power, I refer to the provisions of the ***Judicature Act***, R.S.A. 1980 c. J-1 as amended, s.3, 4 and 5, and the inherent jurisdiction of this Court.

[28] This Court has the power to regulate process and proceedings. It may stay an action unless and until some condition or term which it has imposed has been complied with.

[29] The criteria for granting a stay in these circumstances are set forth in the judgment of Russell, J.A. in ***Deloitte Haskins and Sells v. Coopers & Lybrand Inc.*** reflex, (1996) 37 Alta. L.R. (3d) 64 (C.A.). She said at p.67:

> In considering a stay application the court must be satisfied on a preliminary assessment that there is a serious issue to be tried, that if the stay is not granted the applicant would suffer harm irreparable in damages, and that the balance of convenience favours the stay.

[30] Applying these tests, it must be conceded that there is a serious issue to be tried in terms of those issues that are extant before Romaine, J. Those issues were not re-argued before me and, indeed, ought not to have been. In terms of regulation of the process of the Court, the Court of Queen's Bench has chosen to direct issues as to the entitlement and quantification of the Big Bear claim for a preliminary determination by Romaine, J. Presumably, her decision involves a serious issue. For example, it may be that she will rule that there is no entitlement in Big Bear which would permit it to rank as an unsecured creditor of Blue Range or that it is not a proper party to advance a claim against Blue Range. If Romaine, J.'s decision on the first two issues is in favour of Big Bear, the third issue becomes all the more prominent: that is, whether Big Bear is entitled to make or advance by way of argument the claims represented by the heads of damage specified in the draft statement of claim it put forward including a claim for damages against Blue Range in the sum of $151,317,298.00.

[31] It is clear that LoVecchio, J. was aware of the issues before Romaine, J. and was aware she had reserved her decision involving those issues on November 8th, 1999. [Transcript of the proceedings December 17th, 1999, pp. 94 to 98].

[32] Therefore, I find in the context of the criteria for a stay application that there is a serious issue that has been heard and remains undecided.

[33] The remaining criteria, namely, whether the applicant will suffer irreparable harm if the stay is not granted or which of the parties would suffer the greater harm from the granting or refusal of the stay (i.e. balance of convenience or inconvenience) also resolve themselves in favour of the applicant.

[34] It is clear from the evidence presented and the argument before me that if the distribution were to be made on the basis of the $3,070,000.00 reserve for the Big Bear claim, that Big Bear would be irreparably prejudiced by the preliminary distribution proposed in the event the Big Bear claim was later to be determined as valid and larger. The last criteria, the balance of convenience or inconvenience also tends to favour the applicant. If no distribution is made pending a decision of Romaine, J., the unsecured creditors as a class have been prejudiced only to the extent that there is some delay in receiving their money. While that may be an inconvenience, it is not the kind of prejudice that leads to irretrievable loss as is the case if Big Bear should later obtain a favourable decision from Romaine, J., and in the meantime the distribution has been made.

[35] Therefore, exercising the inherent jurisdiction of this Court, I grant Big Bear's application for a stay of the Decision ordering an interim distribution, pending the decision of Romaine, J.

Summary and Conclusion

[36] The application for leave to appeal the Decision is refused;

[37] The application for a stay of the Decision pending the decision of Romaine, J. reserved November 8, 1999, is granted.

APPLICATION HEARD on December 22, 1999
MEMORANDUM FILED at Calgary, Alberta
this 6th day of January, 2000

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WITTMANN, J.A.

Royal Bank of Canada v. Central Capital Corp., 1996 CanLII 1521 (ON CA) - Example of Disallowance of Claim in CCAA due to Nature of "Debt"

Date: 1996-02-07
Docket: c21477; C21479
Parallel citations: 27 OR (3d) 494; 132 DLR (4th) 223; 26 BLR (2d) 88; 38 CBR (3d) 1; 88 OAC 161
URL: http://canlii.ca/t/6j8z
Citation: Royal Bank of Canada v. Central Capital Corp., 1996 CanLII 1521 (ON CA), <http://canlii.ca/t/6j8z> retrieved on 2013-08-18
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Legislation cited (available on CanLII)
Assignments and Preferences Act, RSO 1990, c A.33
Bankruptcy and Insolvency Act, RSC 1985, c B-3 — 2; 121; 121(1)
Canada Business Corporations Act, RSC 1985, c C-44 — 25(3); 34; 34(2); 35; 35(3); 36; 36(1); 36(2); 39; 40; 40(1); 40(3); 42; 173; 191; 191(7)
Companies' Creditors Arrangement Act, RSC 1985, c C-36 — 12(1); 20
Fraudulent Conveyances Act, RSO 1990, c F.29
Winding-up and Restructuring Act, RSC 1985, c W-11
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Nelson v. Rentown Enterprises Inc., 1994 ABCA 47 (CanLII)
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The Queen v. Imperial General Properties Ltd., 1985 CanLII 7 (SCC)
Vachon v. Canada Employment and Immigration Commission, 1985 CanLII 12 (SCC)

C21479 C21477

COURT OF APPEAL FOR ONTARIO

FINLAYSON, WEILER and LASKIN JJ.A.

IN THE MATTER OF Central Capital Corporation;

AND IN THE MATTER OF THE Companies' Creditors Arrangement Act, R.S.C. 1985, c. 36, as amended

AND IN THE MATTER OF AN APPEAL FROM THE DISALLOWANCE OF THE CLAIMS OF JAMES W. McCUTCHEON, CENTRAL GUARANTEE TRUST COMPANY, AS TRUSTEE FOR THE REGISTERED RETIREMENT SAVINGS PLAN OF JAMES W. McCUTCHEON AND CONSOLIDATED S.Y.H. CORPORATION BY PEAT MARWICK THORNE INC. ADMINISTRATOR OF CERTAIN ASSETS OF CENTRAL CAPITAL CORPORATION

B E T W E E N :)

)

ROYAL BANK OF CANADA, BANCA COMMERCIALE) Bryan Finlay, Q.C.
ITALIANA OF CANADA, CREDIT LYONNAIS) and John M. Buhlman
CANADA, DAI-ICHI KANGYO BANK (CANADA),) for James W.
PRUDENTIAL ASSURANCE COMPANY LIMITED,) McCutcheon and
PRUDENTIAL GLOBAL FUNDING, INC., SANWA) Central Guaranty BANK CANADA, THE BANK OF TOKYO
CANADA,) Trust

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THE TORONTO-DOMINION BANK, WESTDEUTSCHE LANDESBANK GIROZENTRALE, BACOB SAVINGS BANK s.c., BANCA NAZIONALE DEL LAVORO OF CANADA, BANCO DI ROMA (LONDON), COMMERZBANK INTERNATIONAL S.A.,) CREDIT COMMERCIAL DE FRANCE, CREDIT COMMUNAL DE BELGIQUE S.A., CREDIT SUISSE (LUXEMBOURG) S.A., DG BANK LUXEMBOURG S.A.) KREDIETBANK NV (BELGIUM), NIPPON TRUST BANK LIMITED, OLFRN INVESTMENT (PANAMA) INC., PAUL REVERE LIFE INSURANCE, RBC FINANCE B.V., SCOR REINSURANCE COMPANY OF CANADA, SOCIETE GENERALE, THE BANK OF TOKYO, LTD., THE CHIBA BANK LTD., THE	)	James H. Grout and Anne Sonnen for Consolidated S.Y.H. Corporation Terence J. O'Sullivan and Paul G. Macdonald for the Unsecured Creditors of Central Capital Corporation
DAI-ICHI KANGYO BANK, LTD. (ATLANTA), THE HOKURIKU BANK LTD., THE JOROKU BANK LTD., THE KYOWA SAITAMA BANK (CHICAGO), LAURENTIAN BANK OF CANADA, LAURENTIAN GROUP CORPORATION AND IMPERIAL LIFE ASSURANCE COMPANY OF CANADA, THE LONG-TERM CREDIT BANK OF JAPAN, LTD., THE MARITIME LIFE ASSURANCE COMPANY, THE MITSUBISHI TRUST AND BANKING CORPORATION, THE SANWA BANK, LIMITED (LONDON), THE SHOKO CHUKIN BANK (NEW YORK) and THE TOHO BANK, LTD.	)	Neil C. Saxe for Peat Marwick Thorne Inc. Heard: August 17, 1995
Applicants	)	
- and -	)	
CENTRAL CAPITAL CORPORATION	)	
Respondent	)	

FINLAYSON J.A. (dissenting):

The appellant James W. McCutcheon and Central Guarantee Trust Company as Trustee for the Registered Retirement Savings Plan of James W. McCutcheon (hereinafter sometimes referred to collectively as "McCutcheon") and the appellant Consolidated S.Y.H. Corporation ("SYH") appeal from the order of The Honourable Madam Justice Feldman of the Ontario Court (General Division) dated January 9, 1995 [reported as Central Capital Corp. 1995 CanLII 7415 (ON SC), (1995), 29 C.B.R. (3d) 33]. Feldman J. dismissed appeals from decisions dated January 20, 1993 and February 16, 1993 of the respondent Peat Marwick Thorne Inc., in its capacity as Interim Receiver, Manager and Administrator ("Administrator") of certain assets of Central Capital Corporation ("Central Capital**"). The Administrator disallowed Proofs of Claim submitted by the appellants with respect to a Plan of Arrangement under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA").** Leave to appeal the order of Feldman J. was granted on March 17, 1995 by The Honourable Mr. Justice Houlden.

Overview of the proceedings

These appeals arise out of the insolvency of Central Capital which in and prior to December 1991 defaulted under its obligations to various unsecured lenders, note holders and subordinated debt holders. In early December of 1991, Central Capital advised its creditors that, pending implementation of new financial arrangements, it had decided to discontinue payment of all interest and principal due under outstanding loans, with the exception of indebtedness due

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under secured notes issued to The Royal Trust Company. In an Agreed Statement of Facts, which was prepared by the parties for the purposes of appeals from the disallowances of the Administrator, it was agreed that at all material times since in or prior to December 1991, Central Capital was insolvent. It had a total unsecured debt of $1,577,359,000 and, among other things:

(a) it was unable to pay its liabilities as they became due; and
(b) the realizable value of its assets was less than the aggregate of its liabilities.

By Notice of Application issued June 12, 1992, thirty-nine of the creditors commenced an application pursuant to the CCAA for an order declaring the following: that Central Capital was a debtor company to which the CCAA applied; that Peat Marwick Thorne Inc. be appointed Administrator of the property, assets and undertaking of Central Capital; that a stay of proceedings against Central Capital, except with leave of the court, be granted and; that the applicants be authorized and permitted to file a plan of compromise or arrangement under the CCAA.

By order of Houlden J. made June 15, 1992, Central Capital was declared to be a company to which the CCAA applied and all proceedings against Central Capital were stayed. By further order of Houlden J. made July 9, 1992, it was provided, among other things, that:

(a) Peat Marwick Thorne Inc. was appointed Administrator, Interim Receiver and Manager of such of the undertaking, property and assets of Central Capital as necessary for the purpose of effecting the transaction described in the order pursuant to which specified significant assets of Central Capital would be transferred to a newly incorporated company called Canadian Insurance Group Limited ("CIGL");
(b) the Administrator was authorized to enter into and carry out a Subscription and Escrow Agreement with creditors of Central Capital pursuant to which creditors of Central Capital would be entitled to elect to exchange a portion of the indebtedness owing to them by Central Capital for shares and debentures to be issued by CIGL;
(c) the Administrator was authorized and directed to supervise the calling for claims of creditors of Central Capital who elected to exchange a portion of the indebtedness from Central Capital for shares and debentures to be issued by CIGL as aforesaid; and
(d) Central Capital was authorized and permitted to file with the court a formal plan of compromise or arrangement with Central Capital's secured and unsecured creditors and shareholders in accordance with the CCAA and the Canada Business Corporations Act, R.S.C. 1985, c. C-44 (the "CBCA") which would provide for the restructuring and reorganization of the debt and equity of Central Capital in the manner set out in the said order.

According to the Agreed Statement of Facts, the order of Houlden J. was made without prejudice to the rights of the appellants to assert claims as creditors in the CIGL transaction. Pursuant to the terms of the July 9, 1992 order, all claims of creditors of Central Capital who wished to participate in CIGL were required to be submitted to the Administrator by September 8, 1992, or such other date fixed by the court. The Administrator received claims from various persons who wished to participate, including the claims submitted by the appellants herein.

The Administrator disallowed the claims of McCutcheon and SYH by Notices of Disallowance dated January 20, 1993 and February 16, 1993 in which various reasons were cited as to why the appellants did not qualify as creditors**. The effect of this disallowance was that McCutcheon and SYH could participate only as shareholders in the plan of compromise and arrangement under the CCAA to be put forward by Central Capital.** In dismissing the appeals from this disallowance, Feldman J. found that the appellants were not creditors because they did not have a claim provable under the Bankruptcy Act (Canada), R.S.C. 1985, c. B-3 ("Bankruptcy Act").

Issue

The Agreed Statements of Facts sets out the issue in the appeal in the following language:

Do the appellants, or any of them, have claims provable against CCC [Central Capital] within the meaning of the Bankruptcy Act (Canada), as amended as of the date of the Restated Subscription and Escrow Agreement? If the appellants, or any of them, have provable claims, then the proof of claim of any appellant that has a claim provable is to be allowed as filed and the appeal from the disallowance allowed, and the appellants, or any of them, whose claim is allowed, are to participate in the Plan of Arrangement of Central Capital as a senior creditor.

The determination of this issue was deferred by Houlden J.'s order of October 27th, 1992. He ordered therein that preferred shareholders who had filed claims against Central Capital as creditors were not permitted to vote at the meeting of creditors called to consider the Plan of Arrangement "...but such is without prejudice to the rights of those claimants to prosecute their claims as filed". The last paragraph in the order ended:

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For greater certainty, the validity of any claim filed by a preferred shareholder shall not be affected by the terms of this paragraph.

Overview of the restructuring of Central Capital

The order of Houlden J. of July 9, 1992 directed the restructuring of Central Capital under the aegis of the court. The order, and others that would follow, contemplated that the restructuring would take place in two stages. The first stage involved the transfer to the Administrator of certain major assets of Central Capital to a company to be incorporated called Central Insurance Group Limited (CIGL). This company is frequently referred to in the documentation and the reasons of Feldman J. as "Newco". CIGL was then to be owned by those Central Capital creditors who chose to participate in the reorganization by accepting a reduction in their debts due from Central Capital and exchanging this reduced indebtedness for debentures in CIGL. Subscription for debentures by this means additionally entitled the creditors to subscribe for shares in CIGL. Our understanding from counsel is that the assets transferred to CIGL included the assets acquired by Central Capital from the appellants in purchase agreements described later in these reasons.

The court approved a Subscription and Escrow Agreement setting out this arrangement. In order to participate, the creditors were required to file with the Administrator a Proof of Claim in the prescribed form along with other documents confirming the creditor's intention to reduce its claim against Central Capital and to subscribe for debentures and shares of CIGL. Claims were to be based on Central Capital's indebtedness to creditors as of June 15, 1992, the date of the court-ordered stay of proceedings. This transaction was completed on October 1, 1992 and resulted in CIGL being owned by the creditors of Central Capital in exchange for a reduction in Central Capital's unsecured debt in the amount of $603,000,000.

The second stage of the restructuring involved a Plan of Arrangement under the CCAA. That plan as put forward by Central Capital recognized four classes of creditors, only one of which, namely that of "Senior Creditors", could apply to the appellants. The Plan of Arrangement, as amended, provided that Central Capital would issue to Senior Creditors pro rata on the basis of their senior claims a class of secured promissory notes in the aggregate principal amount of $20,000,000 of secured debt, which were to be known as first secured notes. A similar arrangement was made for the issuance of $1,000,000 of second secured promissory notes to subordinated creditors. Senior and subordinated creditors included any creditor whose claim had been allowed under the CIGL claims procedure in the first stage, to the extent of that creditor's reduced claim.

The Plan of Arrangement also called for the creation of a new class of shares in Central Capital to be called the Central New Common Shares. Central Capital would issue to the above Senior and Subordinated Creditors ninety percent of the new share capital of Central Capital in extinguishment of the balance of their debt. The Central Capital shareholders of all classes would have their existing shares converted into the remaining ten percent of the Central New Common Shares. All of the existing preferred and common shares would be cancelled upon implementation of the plan.

The amended Plan of Arrangement was ultimately voted on and approved by all four classes of creditors of Central Capital. On December 18, 1992, Houlden J. sanctioned this plan of arrangement under the CCAA. He authorized and directed Central Capital to apply for Articles of Reorganization pursuant to s.191 of the CBCA, so as to authorize the creation of the Central New Common Shares for implementation of the amended Plan of Arrangement. He also lifted the stays of proceedings affecting Central Capital and its ability to carry on business as of January 1, 1993.

The effect of the amended Plan of Arrangement after approval was that all remaining debts and obligations owed by Central Capital to its creditors on or before June 15, 1992 were extinguished and all outstanding and unissued shares of any kind in Central Capital were cancelled and replaced by Central New Common Shares. Central Capital was then free to carry on business. It was no longer insolvent.

Facts as they relate to the claim of McCutcheon

By a Share Purchase Agreement dated June 15, 1987 between Central Capital and Gormley Investments Limited ("Gormley") and Heathley Investments Limited ("Heathley"), Central Capital agreed to purchase all Class "B" Voting Shares of Canadian General Securities Limited ("CGS") that were owned by Gormley and Heathley. James W. McCutcheon and his brother, who were the sole shareholders of Gormley, represented to Central Capital that CGS owned substantially all of the shares of Canadian Insurance Sales Limited, which in turn owned substantially all of the shares in a number of operating insurance, credit and trust companies. The consideration for the purchase of the CGS shares was $575 per share. The vendors were to be paid $400 per share in cash on closing and were to receive seven Series B Senior Preferred Shares of Central Capital. These shares contained a retraction clause entitling the holder to retract each preferred share on July 1, 1992 for $25. Failing issuance of the shares by Central Capital, the vendors were to receive an

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additional $175 for each CGS share. The Share Purchase Agreement and later the Articles of Central Capital further provided that the holders of Series B Senior Preferred Shares were entitled to receive dividends as and when declared by the directors of Central Capital out of monies of the corporation properly applicable to the payment of dividends and in the amount of $1.90625 per share per annum (being 7 5/8% per annum on the stated capital of $25 per share) payable in equal quarterly payments. No dividends were in fact declared.

The Certificate of Amendment for Central Capital dated July 30, 1987, and the Articles of Amendment setting out the provisions attaching to the Series B Senior Preferred Shares contain all the terms and conditions governing the said shares. I am setting out below a description of those that are relevant to this appeal.

Pursuant to Article 4.1 of the Senior Series B Provisions, each holder of Series B Senior Preferred Shares was entitled, subject to and upon compliance with the provisions of Article 4, to require Central Capital to redeem all or any part of the Series B Senior Preferred Shares registered in the name of that holder on July 1, 1992 at a price equal to $25 per share, plus all accrued and unpaid dividends thereon, calculated to but excluding the Retraction Date.

Article 4.2 of the Senior Series B Provisions sets out the procedure for retraction of the shares. Article 4.3 of the Senior Series B Provisions provides that if the redemption by Central Capital of all of the Series B Senior Preferred Shares required to be redeemed on the Retraction Date would be contrary to applicable law or the rights, privileges, restrictions and conditions attaching to any shares of Central Capital ranking prior to Series B Senior Preferred Shares, then Central Capital shall redeem only the maximum number of Series B Senior Preferred Shares which it determined was permissible to redeem at that time. Article 4.3 provides the mechanism for a pro rata redemption from each holder of the tendered Series B Senior Preferred Shares and redemption of the tendered Series B Senior Preferred Shares by Central Capital at further dates.

Article 4.4(a) provides that subject to Section 4.4(b), the election of any holder to require Central Capital to redeem any Series B Senior Preferred Shares shall be irrevocable upon receipt by the transfer agent of the Certificates for the shares to be redeemed and the signification of election of the holder of the Series B Senior Preferred Shares.

Article 4.4(b) of the Senior Series B Provisions provides that if the retraction price is not paid by Central Capital, Central Capital shall forthwith notify each holder of the Series B Senior Preferred Shares who has not received payment for his deposited shares of the holder's right to require Central Capital to return all (but not less than all) of the holder's deposited Share Certificates and the holder's rights under Article 4.3 outlined above.

Article 4.5 of the Senior Series B Provisions provides that the inability of Central Capital to effect a redemption shall not affect or limit the obligation of Central Capital to pay any dividends accrued or accruing on the Series B Senior Preferred Shares from time to time not redeemed and remaining outstanding.

Article 7 of the Series Senior B Provisions provides that in the event of the liquidation, dissolution or winding-up of Central Capital, whether voluntary or involuntary, or any other distribution of assets of Central Capital among its shareholders for the purposes of winding up its affairs, the holders of the Series B Senior Preferred Shares shall be entitled to receive, from the assets of Cental Capital, $25 per Series B Senior Preferred Shares, plus all accrued and unpaid dividends thereon, to be paid prior to payment to junior ranking shareholders. Upon payment of such amounts, the holders of the Series B Senior Preferred Shares shall not be entitled to share in any further distribution of assets of Central Capital.

A Notice of Retraction Privilege was sent by Central Capital to the holders of Series B Senior Preferred Shares with a cover letter dated April 23, 1992. The letter stated, among other things, that Central Capital would not redeem any shares because the redemption of such shares would be contrary to applicable law in the context of Central Capital's then current financial situation. McCutcheon and Central Guaranty Trust deposited for redemption 406,800 and 26,000 Series B Senior Preferred Shares, respectively, in accordance with the Senior Series B Provisions and the Notice of Retraction Privilege. The shares were deposited on May 28, 1992, with Montreal Trust Company of Canada, pursuant to the Notice of Retraction Privilege. The shares were properly tendered for redemption in the manner and within the time required by Central Capital's Articles of Amendment.

Central Capital did not pay the redemption price on July 1, 1992 and on July 20, 1992 it notified each holder of Series B Senior Preferred Shares of its right to require Central Capital to return all of the holder's deposited Share Certificates as required by Article 4.4(b) of the Senior Series B Provisions. McCutcheon and Central Guaranty Trust did not exercise that right.

Pursuant to the terms of Houlden J.'s order of July 9, 1992 directing the restructuring of Central Capital, McCutcheon submitted to the Administrator, as a creditor of Central Capital, Proofs of Claim dated September 3, 1992 and September 4, 1992, respectively. McCutcheon claimed the amount of $10,913,593.69 in respect of his Series B Senior

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Preferred Shares tendered for redemption. Central Guaranty Trust claimed the amount of $697,526.68 in respect of its tendered 26,000 Series B Senior Preferred Shares. McCutcheon also executed and submitted the Restated Subscription and Escrow Agreement and other documents electing to participate in CIGL. These claims were completed and submitted in the prescribed form and within the time required by Houlden J.'s order.

As was previously noted, these claims were disallowed by the Administrator. The substance of the Administrator's reasons for disallowance was that the ability of Central Capital to redeem these preference shares is restricted by the provisions of the CBCA and it would be contrary to applicable law to redeem the shares in the context of Central Capital's financial position. The relevant provision of the CBCA provides:

36.(1) Redemption of shares. Notwithstanding subsection 34(2) or 35(3), but subject to (2) and to its articles, a corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding the redemption price thereof stated in the articles or calculated according to a formula stated in the articles.

(2) Limitation. A corporation shall not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that

(a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would after the payment be less than the aggregate of

(i) its liabilities, and

(ii) the amount that would be required to pay the holders of shares that have a right to be paid, on a redemption or in a liquidation, rateably with or prior to the holders of the shares to be purchased or redeemed.

Evidently, the Administrator equated redemption by the corporation with the right of retraction by the preferred shareholder. It agreed with Central Capital's position that once it became insolvent in December of 1991, Central Capital no longer had the ability to redeem the shares tendered for retraction and thus McCutcheon was restricted to exercising what rights it might have as a shareholder.

Facts as they relate to the claim of SYH

Pursuant to an Agreement of Purchase and Sale made as of June 30, 1989, as amended, Scottish & York Holdings Limited (the predecessor to SYH) sold to Central Capital the shares of Central Canada Insurance Services Limited, Eaton Insurance Company, Scottish & York Insurance Co. Limited and Victoria Insurance Company of Canada (collectively the "Insurance Companies"), except for certain preference shares held by the directors of those corporations. In consideration of this transfer, Central Capital issued to Scottish & York Holdings Limited 60,116,000 Series A Junior Preferred Shares and 9,618,560 Series B Junior Preferred Shares.

The Articles of Central Capital provided that it would pay on each dividend payment date prior to the fifth anniversary of this issue, as and when declared by the directors out of the assets of the corporation properly applicable to the payment of dividends, a dividend of $.08 for each outstanding Series A Junior Preferred Share. The dividend was payable quarterly by the issuance of .02 Series B Junior Preferred Shares for every outstanding Series A Junior Preferred Share. No dividends were in fact declared.

The Articles also provided that Central Capital was obligated to retract the Series A Junior Preferred Shares and Series B Junior Preferred Shares, at the option of the holders of those shares, on the fifth anniversary of their issuance. The retraction price was $1.00 per share plus all accrued and unpaid dividends. Payment of the retraction price of these shares by Central Capital was subject to the provisions of the CBCA, which governs the affairs of Central Capital. For the purposes of this appeal, I believe that we can treat the balance of the provisions relating to these preferred shares as being the same as those governing the McCutcheon Series B Senior Preferred Shares.

Given that the operative date for proving claims against Central Capital was June 15, 1992, the retraction date governing the preferred shares of SYH was some two years removed. Notwithstanding, on September 8, 1992 SYH executed and delivered to the Administrator a Proof of Claim, a Counterpart of the Restated Subscription and Escrow Agreement, an initial Share Subscription and an Instrument of Claims Reduction Form, all in the prescribed form and within the time required. The claim was that SYH was holding or entitled to hold the following shares of Central Capital:

(a) 60,116,000 Junior Preferred Series A shares;

(b) 9,618,560 Junior Preferred Series B shares;

(c) 4,611,095 Junior Preferred Series B shares accrued to June 15th, 1992 but not yet issued to SYH;

for a total of 74,345,655 shares, each having a retraction value of $1.00. However, because of some adjustments in favour of Central Capital to the purchase price of the shares sold by SYH to Central Capital under the June 30, 1989 Agreement of Purchase and Sale, the net claim as of June 15, 1992 was reduced from $74,345,655 to $72,388,836.

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By Notice of Disallowance dated January 20, 1993, the Administrator disallowed the claim by SYH to subscribe for debentures and common shares to be issued by CIGL. The reasons for the disallowance are similar to those provided for disallowing the claims of McCutcheon. The Administrator found that SYH's right to require Central Capital to retract the Series A and B Junior Preferred Shares only arose on the expiry of the fifth anniversary of their issuance and that Central Capital was precluded from retracting those shares by virtue of its insolvency and the provisions of the CBCA. Hence SYH, like McCutcheon, was limited to exercising what other rights it might have as a shareholder.

Analysis

Although the factual groundwork is necessary for putting in perspective the sole issue before the court, the final question confronting us is a narrow one. Did the retraction clauses in the appellants' shares create a debt owed by Central Canada as of June 15, 1992 within the meaning of the Bankruptcy Act? I think that they did.

It is agreed that the operative section of the Bankruptcy Act is s.121(1). It reads as follows:

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

There was no bankruptcy in this case and thus the relevant date was agreed to be June 15, 1992. The obligations of Central Capital to the appellants were incurred before that date, and so the only question becomes whether the obligations created a debt between the appellants and Central Capital.

What then is a debt? All the parties turn to Black's Law Dictionary, quoting different editions. The following is from the Sixth Edition (1990), at p. 403:

Debt. A sum of money due by certain and express agreement. A specified sum of money owing to one person from another, including not only the obligation of debtor to pay but right of creditor to receive and enforce payment....

A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future.

The above is consistent with what is defined as a debt by Jowitt's Dictionary of English Law, 2nd ed. (1977), at p.562:

A debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor). Hence "debt" is properly opposed to unliquidated damages; to liability, when used in the sense of an inchoate or contingent debt; and to certain obligations not enforceable by ordinary process. "Debt" denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment.

And finally, The Shorter Oxford Dictionary, 3rd ed. (1973), at p. 497:

Debt 1. That which is owed or due; anything (as money, goods or service) which one person is under obligation to pay or render to another. 2. A liability to pay or render something; the being under such liability.

I have no difficulty in finding that the claims of the appellants in the case under appeal fall within all of the above definitions. As will be discussed herein, concern was expressed in this case over whether or not the appellants as creditors were entitled to "receive and enforce payment" on the "debt" because of the insolvency of Central Capital on June 15, 1992. I will deal with the specific arguments relating to the effect of insolvency on this particular indebtedness in due course, but for the moment I am content to observe that the above definitions contemplate only that the creditor's right to recover is the reciprocal of the debtor's obligation to pay. For every debtor there must be a creditor. There may be cases where it is difficult to identify the person who in law may receive and enforce payment, but this is not such a one.

With great respect to the judge of first instance and to the submissions of counsel for the unsecured creditors, I believe that the fundamental error that has been made in these proceedings arises from the conception that the preferred shares in question can either be debt instruments or equity participation instruments, but they cannot have the attributes of both.

Feldman J. had this to say at p. 48 of her judgment:

Although the right of retraction at the option of the preferred shareholder may be less common than the usual right of the company to redeem at its option, that right is one of the incidents or provisions attaching to the preferred shares, but does not change the nature of those shares from equity to debt. The parties have characterized the transaction as a share transaction. The court would require strong evidence that they did not intend that characterization in order to hold that they rather intended a loan.

In my view, this case turns on whether the right of retraction itself creates a debt on the date the company becomes obligated to redeem even if it cannot actually redeem by payment on that date, or a contingent future debt on the same analysis, not on whether the preferred shares themselves with the right of retraction are actually debt documents.

Because the preferred shares remain in place as shares until the actual redemption, the appellants are not creditors and have no claim provable under the Bankruptcy Act (Canada), and the appeals are therefore dismissed.

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As I read these reasons, the learned judge is in effect stating that these instruments are preferred shares in the corporation because the parties have so described them. In the first place, I do not think that describing the documents as preferred shares is conclusive as to what instrument the parties thought they were creating. In the second place, it is not what the parties call the documents that is determinative of their identity, but rather it is what the facts require the court to call them. The character of the instrument is revealed by the language creating it and the circumstances of its creation. Although these instruments may "remain in place as shares" until they are actually redeemed, they also contain a specific promise to pay at a specified date. This is the language of debt. I cannot accept the proposition that a corporate share certificate cannot create a corporate debt in addition to the certificate holder's rights as a shareholder.

The rules relating to the competing rights of shareholders and creditors of an insolvent corporation have become so regulated by governmental action that one can readily lose sight of the common law basis for making a distinction. To understand the difference in treatment, we must re-examine what a share of a corporation represents. Initially, a share is issued by the corporation to raise share capital. The price of the share is money or the promise of money. Accordingly, an individual share is one of a number of separate but integral parts of the authorized capital of a corporation. Even though it is the shareholders who contribute to the capital of the corporation, the capital remains the property of the corporation. The shareholders, however, as owners of the shares of capital, effectively control the corporation. They have the responsibility of managing its affairs through their control over the board of directors and in popular terminology are considered to be the owners of the corporation. However, the corporation is a separate entity in law, and if in the course of carrying out its business it incurs debts to third parties, those debts are those of the corporation. A corporation is an intangible and its capital therefore represents its substance to third parties having business dealings with the corporation. A preferred share is simply a share of a class of issued shares which contains a preference over other classes of shares, whether preferred or common: see Sutherland, Fraser and Stewart on Company Law of Canada, 6th ed. (1993), at pp.157 and 195 for further discussion.
The rights of shareholders are conveniently summarized by R.M.Bryden in his chapter, "The Law of Dividends", contained in Ziegel ed., Studies in Canadian Company Law (1967), at p.270:

The purchaser of a share in a business corporation acquires three basic rights: he is entitled to vote at shareholders' meetings; he is entitled to share in the profits of the company when these are declared as dividends in respect of the shares of the class of which his share forms a part; and he is entitled, upon the winding-up of the corporation, to participate in the distribution of the assets of the company that remain after creditors are paid. A fourth right which should be noted is the right to transfer ownership in his share, whereby the owner for the time being may realize upon the increase in value of the company's assets, or its favourable prospects, by selling his share at a price reflecting the buyer's estimation of the value of the rights he will acquire. Unless the shareholder chooses to sell his share, he can realize a return upon his investment only through receipt of dividends or by the return of his capital upon an authorized reduction of capital or winding up.
Shareholders are variously characterized as entrepreneurs, investors or risk- takers and as such they have the opportunities of benefitting from the successes of the corporation and suffering from its failures. While the corporation is an operating entity, the shareholders receive their rewards, if there are any, through the payment of dividends declared from time to time by the board of directors. While the source of these dividends is not restricted to surplus funds, the result of the payment of the dividend must not result in a return of capital to the shareholders. The classic justification for this rule was stated by Sir George Jessel, Master of the Rolls in Flitcroft's Case (1882), 21 Ch. D. 519 at 533-4:
The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor . . . gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders....

Creditors, on the other hand, do not have an ownership or equity interest in the corporation. They are third parties who have loaned money or otherwise advanced credit to the corporation. They look to the company for payment in accordance with the terms of the contract creating the indebtedness. They are also restricted in their recovery to the amounts stipulated in the terms of indebtedness. They are entitled to payment regardless of the financial circumstances of the debtor corporation and accordingly are not restricted to receiving payment of the debt from surplus. They can be paid out of assets or through the creation of further indebtedness. It is immaterial how the corporation records this indebtedness in its internal books. In some circumstances the indebtedness could properly reflect the acquisition of property from a creditor as a capital asset. This does not, however, convert the creditor into an investor. The vendor of the property remains a creditor and retains priority over shareholders in the event of a bankruptcy or insolvency.

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In my view, the reasons under appeal do not reflect a sensitivity to the circumstances which gave rise to the issuance of the preference shares. The shares were not issued by Central Capital to the general public in order to raise capital and do not represent an investment by the public in the capital of the corporation. They were issued to specific persons as payment for the acquisition of specified assets. While the corporation was authorized by its Articles of Incorporation to issue preferred shares generally, the shares issued to the appellants were structured to meet the requirements of the appellants as vendors of the controlling interest in the operating companies that Central Capital was acquiring. In my view, these preference shares are the equivalent of vendor shares in that the appellants received them in exchange for the transfer of assets to Central Capital.

In the case of McCutcheon, the retraction provision in the preferred shares represented only partial payment of an agreed value for the assets, but in the case of SYH, they represented the full value. In both cases, the agreed value as reflected in the retraction price was guaranteed by Central Capital to be retractable at a fixed price at a predetermined date. By postponing the obligation to pay the purchase price in this way, Central Capital was using the retraction provisions of the preference shares as a vehicle for the financing of its expanding asset base. The appellants, for their part, deferred the realization of the purchase price of their assets to the agreed dates and thereby extended credit to the corporation. In return for extending credit for some or all of the selling price, the appellants agreed to receive dividends calculated in advance but payable as and when declared by the board of directors.

Thus, in looking at the substance of the transaction that led to the issuance of the preference shares, it appears to me that the retraction clauses were promises by Central Capital to pay fixed amounts on definite dates to the appellants. They evidenced a debt to the appellants. The fact that the appellants as holders of the preference shares had rights as shareholders in the corporation up to the time when the retraction clauses were exercisable did not affect their right to enforce payment of the retraction price when it became due.

The validity of an analysis directed to the substance of the transaction is supported by Canada Deposit Insurance Corporation v. Canadian Commercial Bank, 1992 CanLII 49 (SCC), [1992] 3 S.C.R. 558, a judgment of the Supreme Court of Canada delivered by Iacobucci J. The case involved a number of corporations constituting a support group which entered into an arrangement to provide emergency financial assistance to Canadian Commercial Bank ("CCB"). On the ultimate failure of the bank, the issue arose as to whether the monies advanced to CCB under this support arrangement were in the nature of a loan or in the nature of a capital investment. I find instructive to our situation Iacobucci J.'s observation at pp.590-1:

As I see it, the fact that the transaction contains both debt and equity features does not, in itself, pose an insurmountable obstacle to characterizing the advance of $255 million. Instead of trying to pigeonhole the entire agreement between the Participants and CCB in one of two categories, I see nothing wrong in recognizing the arrangement for what it is, namely, one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a debtor-creditor relationship. Financial and capital markets have been most creative in the variety of investments and securities that have been fashioned to meet the needs and interests of those who participate in those markets. It is not because an agreement has certain equity features that a court must either ignore these features as if they did not exist or characterize the transaction on the whole as an investment. There is an alternative. It is permissible, and often required, or desirable, for debt and equity to co-exist in a given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing a characterization issue. Again, it is not because there are equity features that it is necessarily an investment in capital. This is particularly true when, as here, the equity features are nothing more than supplementary to and not definitive of the essence of the transaction. When a court is searching for the substance of a particular transaction, it should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement. [Emphasis in original.]

I have no difficulty in finding that the appellants' preferred shares with their retraction clauses are of "a hybrid nature, combining elements of both debt and equity". As to the equity component, the appellants are shareholders prior to exercising their retraction rights in that they have the right to vote in certain circumstances and have a right to receive dividends when and if they are declared by the board of directors. The debt component is more significant however. The shares were not issued to investors, but to vendors of property. The vendors were entitled to receive a fixed sum at a specified time in payment therefor. Pending payment, the vendors were entitled to receive dividends which were the equivalent of interest on the unpaid balance.

I can think of no reason why the holders of these preferred shares should not be treated as both shareholders and creditors. It does not concern me that these appellants act as shareholders before their retraction rights are exercisable.

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Nor do I see any hardship to other creditors of Central Capital arising from the ability of these appellants to claim as creditors in the restructuring of the company given that the appellants are unpaid with respect to substantial assets sold to the corporation and now transferred on the restructuring to GIGL.

Much was made in argument of the fact that the retraction amounts could not be paid on the retraction dates. In the case of McCutcheon, the corporation was insolvent and subject to court administration on the due date of July 1, 1992. In the case of SYH, the retraction date did not arrive before the reorganization was complete.

The narrow issue of the effect of insolvency on a debt has been dealt with by the British Columbia Court of Appeal in Re East Chilliwack Agricultural Co-Operative (1989), 74 C.B.R. (N.S.) 1. In this case, the appellants were one-time members of three co-operative associations. The rules of the co-operatives permitted a member to withdraw upon written notice to the board of directors to that effect. The member was entitled to elect to have his shares redeemed either in equal instalments over five years or in one payment with interest at the end of five years. In April of 1987, the superintendent of co-operatives, under the authority of the Cooperative Association Act, R.S.B.C. 1979, c.66, suspended the co-operatives' right to redeem their shares until their financial situation was no longer impaired. The three co-operatives subsequently went bankrupt and a two-fold issue came before the bankruptcy court: (1) whether those members whose notices of withdrawal had been accepted by the board of directors but who had not yet received the value of the shares were entitled to rank as unsecured creditors, and (2) whether those who had delivered notices that had not been accepted were to be treated as unsecured creditors. The court of first instance found that the members were shareholders and answered both questions in the negative. That judge was reversed on appeal with the majority of the court deciding that the answer to both questions was yes. Hutcheon J.A. for the majority stated at p.13:
I shall use Mr. Neels [a co-operative member] as my example. According to R. 3.06 he ceased to be a shareholder in May 1983. In May 1984 the Agricultural Co-operative owed him the first of five payments, or $686.40. I know of no principle of law that would support the proposition that Neels could not sue for that amount if the Agricultural Co-operative failed to pay in May 1984. Of course, the superintendent of co-operatives has power under s.15(2) to suspend payments if, in his opinion, the financial position of the co-operative was impaired. Subject to that power, the position of Neels and the Agricultural Co-operative would be that of ordinary creditor and debtor. In my opinion, the order made by the judge cannot be sustained on the first ground.
From this case, I extract the proposition that the fact of an insolvency, whether declared or not, does not change the nature of the relationship between debtor and creditor. It continues notwithstanding the inability of the debtor to pay or the creditor to collect.

It appears to me, with deference, that the issue of the effect of Central Capital's insolvency on the character of the retraction payments is something of a red herring. The contest in this appeal is between those who are conceded to be unsecured creditors and those whose claim to such status is contested. In both cases, any right to payment was suspended by Central Capital's announcement in December of 1991 that it was insolvent and that it had suspended all payments of principal and interest to unsecured creditors. This course of action was not freely chosen but was required by law. Any payments to creditors after the date of insolvency would be voidable at the instance of creditors on the basis that they were fraudulent preferences. In addition to ss.95 and 96 of the Bankruptcy Act dealing with fraudulent preferences generally, there is provincial legislation in the form of the Fraudulent Conveyances Act, R.S.O. 1990, c. F-29 and the Assignments and Preferences Act, R.S.O. 1990, c. A-33 that would be applicable. Counsel for the unsecured creditors maintains that the right to redeem shares, including preference shares was postponed by s.36(2) of the CBCA, supra. I am not certain that s.36(2) applies to the retraction provisions of the appellants' preference shares as opposed to the redemption privileges of Central Capital, but in my opinion the point is irrelevant to this appeal. Once Cental Capital acknowledged its insolvency, it could neither redeem its shares nor honour its retraction obligations. The whole purpose for the creditors applying to the court for a stay of Central Capital's obligations, including those of the acknowledged unsecured creditors, was to arrange for a scheme of payments to all creditors that could not be subject to attack as preferences. There is no suggestion on the evidence before us that the claims of unsecured creditors accepted by the Administrator were claims that had crystallized prior to the insolvency of Central Capital. Nor is it suggested that any creditors were rejected because some or all of their claims were not payable until after the date of the insolvency. The fact of insolvency, by itself, does not provide a rational basis for distinguishing the claims of the appellants from those of other unsecured creditors.

Much also was made of the provision in the Articles authorizing the shares in question, which states that if the obligation to redeem "would be contrary to applicable law", then Central Capital "shall redeem only the maximum number of [shares]

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it is then permitted to redeem". Counsel for the unsecured creditors submits that the reference to "applicable law" is to s.36 of the CBCA. The reference certainly embraces the CBCA, but it is not restricted by its terms to that statute. For example, "applicable law" would also capture s.101 of the Bankruptcy Act, which provides for penalties against directors and shareholders where insolvent companies redeem shares or pay dividends.
There was no evidence led as to why this provision was placed in the Articles and the share certificates. It appears to be a standard clause in all the preference shares issued by the corporation and not just those that were adapted to the appellants' situations where specific retraction clauses were drafted to satisfy the particular asset acquisitions. For my part, I have difficulty in understanding how a consideration of this provision assists the process of determining the underlying character of the retraction obligations. The statement is so self-evident that it is almost banal. I can only assume that the statement was included in the share provisions of a corporation marketing its securities world-wide so as to inform purchasers that legal restrictions in this jurisdiction apply to the company's right to redeem shares.

In summary then regarding the insolvency argument, these various statutes prohibit payments of any kind to shareholders by an insolvent company. As I understand it, counsel does not question that when a dividend has been lawfully declared by a corporation, it is a debt of the corporation and each shareholder is entitled to sue the corporation for his proportion: see Fraser and Stewart, supra, at p.220 for a list of authorities. However, once a company is insolvent it cannot make payments to shareholders or creditors so long as it continues to be insolvent. On the other hand, nowhere in the CBCA or elsewhere will we find authority for the proposition that once a corporation is insolvent, it is no longer obliged to pay its debts. The obligation is postponed until the insolvency is corrected or the corporation makes an accommodation with its creditors and obtains a release with or without the assistance of the various statues dealing with insolvency.

The existence of provisions prohibiting payment to shareholders and creditors on insolvency does not in anyway assist the determination of whether the retraction obligations at issue in this appeal constitute a debt or a return of capital at the time they are payable. Speaking of the obligation to honour the retraction in terms of the corporation redeeming its shares also introduces the wrong emphasis. The corporation is not redeeming the shares at its option as contemplated by most redemptions. It is being forced to redeem them because of a prior contractual obligation for which the preferred shareholder gave good consideration. It is for this reason that I question whether s.36 of the CBCA is the appropriate reference point. This is not the type of payment which concerned Jessel M.R in Flitcroft's Case, supra.
At the risk of oversimplifying this case, it appears to me that many of the arguments made against the appellants' claims to be creditors of Central Capital are impermissible in the context of the Agreed Statement of Facts. The issue in appeal is frozen in time by the stipulation that the court is to determine if these retraction clauses created a debt within the meaning of the Bankruptcy Act on June 15, 1992. The arguments against the appellants' claims also ignore that debts under s.121(1) of the Bankruptcy Act need not be payable at the date of the bankruptcy (or June 15, 1992 in our scenario). They need only come beneath the broad umbrella of "debts and liabilities, present and future, to which [Central Capital] is subject" on June 15, 1992. The fact that the debts could not be paid after June 15, 1992, does not mean that they were not provable claims pursuant to s.121 of the Bankruptcy Act. Moreover, assuming the retraction clauses created a debt payable on a future date, neither the order of Houlden J. nor the restrictions in the Articles creating the shares themselves purported to extinguish that debt.

There is nothing in either the Articles of Central Capital or in the law that excuses the obligation to pay the retraction amounts. Rather, discharge of the obligation is simply postponed until the cessation of the disabling event of insolvency. Article 4.3 of the Senior Series B Provisions provides the mechanism for future redemption of tendered shares that are not redeemed because such redemption would be contrary to law. Article 4.5 provides that the inability to effect a redemption does not affect the obligation to pay dividends accrued or accruing on the unredeemed shares.
So far as SYH is concerned, the retraction price was not payable until the fifth anniversary of the June 1989 sale of assets. Therefore, no issue of the effect of insolvency arose in 1992. The orders of Houlden J. of June 15 and July 9, 1992 changed the rules of the game. If this appellant is a creditor, it does not have to wait until the retraction date. It can claim as a creditor now. It did and the claim was disallowed. However, if this court holds that the claim should have been allowed, then in accordance with the narrow issue put to us, SYH is entitled to be accepted as a full creditor in the entire reorganization of Central Capital.

An additional factor raised by counsel during argument was that Article 7, supra, provides that in the event of the liquidation, dissolution or winding-up of Central Capital, whether voluntary or involuntary, or any other distribution of assets among its shareholders for the purpose of winding up its affairs, the holders of these preferred shares are entitled to recover "from the assets of Central Capital" the retraction price plus all accrued and unpaid dividends thereon. Such

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amount is to be paid prior to payment to junior ranking shareholders. The Article further provides that "[u]pon payment of such amounts, the holders of [the preferred shares] shall not be entitled to share in any further distribution of assets of [Central Capital]". Because it is trite law that shareholders are entitled to recover from assets only after all ordinary creditors have been paid in full, counsel for the unsecured creditors submits that the fact that the clause contemplates priorities between shareholders on a winding up or a liquidation of assets is clear evidence that they were shareholders only.

I have two responses to this submission. The first is the obvious, that we are not dealing with this contemplated event. We are dealing with a reorganization in which the parties have put a single question to the court: are the appellants creditors? Consideration of issues of priority or the valuation of claims have been taken away by the narrow scope of the agreed question. If the answer to the question posed is yes, then in accordance with the Agreed Statement of Facts, the appellants are entitled to have their claims as creditors allowed under the Subscription and Escrow Agreement and to participate in the Amended Plan of Arrangement as Senior Creditors. If the answer is no, they are to be treated as the Administrator has treated them: they are not creditors at all and are restricted to receiving Central New Common Shares under the Amended Plan of Arrangement.

My second response is that counsel for the unsecured creditors misses the significance of the clause. He assumes that there will be a deficiency in all circumstances leading up to a liquidation, dissolution or winding up that will necessitate a pro rata distribution, first to creditors and then to shareholders of all classes. However, the clause does not say that those with retraction rights are not creditors. It says that the retraction amounts are to be paid out of assets, not suplus. Once the retraction amounts have been paid in full, the appellants are not entitled to share in any further distribution. This contemplates a surplus after all creditors, including the appellants, have been paid in full. Accordingly, far from classifying the appellants as shareholders, the clause provides that they are not entitled to be treated as shareholders under a winding up or liquidation but only as creditors.

Finally, with respect to SYH's claims, it was submitted that these claims were so contingent as to be virtually non-existent. The claims anticipate a retraction date that as of June 15, 1992 was some two years into the future. Upon approval of the Amended Plan of Arrangement on December 18, 1992, the shares of SYH were cancelled and replaced by a new issue of shares, the Central New Common Shares. Counsel relied upon the finding of Feldman J. that there was then no discernable basis upon which the retraction could occur. Once again, with respect, this conclusion misses the point. Following the final order of Houlden J. approving the Amended Plan of Arrangement, all the shares and all the debts of Central Capital disappeared. There was thereafter no discernable basis upon which any event contemplated by any debt or share instruments could occur. We are only concerned with the status of shareholders and creditors as of June 15, 1992.

Based on the reasons set out above, I have concluded that the retraction amounts do fall within the definition of debts and liabilities, present or future, to which Central Capital was subject on June 15, 1992. This does not apply to undeclared dividends however, because until a dividend is declared no action on behalf of a shareholder lies to enforce its payment: see Fairhall v. Butler, 1928 CanLII 11 (SCC), [1928] S.C.R. 369 at 374. If undeclared dividends have been claimed by any of the appellants they should be disallowed. In all other respects the claims should be allowed.

Accordingly, I would allow the appeals, set aside the order of Feldman J. and order that the appellants have provable claims that are to be allowed by the Administrator. The record does not disclose what order if any Feldman J. made as to costs. Certainly the appellants are entitled to their costs of this appeal. If the parties are unable to agree with respect to any other disposition of costs, I would suggest that they submit their positions to the court in writing.

LASKIN J.A. (CONCURRING):

I have read the reasons of my colleagues Justice Finlayson and Justice Weiler. Like Justice Weiler, I would affirm the decision of the motions judge, Feldman J., and dismiss these appeals. I prefer, however, to state my own reasons for upholding the position of the unsecured creditors of Central Capital Corporation.

The Issue

The application was argued before Madam Justice Feldman on an agreed statement of facts. My colleagues have summarized the relevant facts and important provisions of the documents. Each appellant holds preferred shares of Central Capital and each appellant's shares contain a right of retraction — a right to require Central Capital to redeem the shares on a fixed date and for a fixed price. The retraction date for the appellants James McCutcheon and Central Guarantee Trust Company (collectively McCutcheon) was July 1, 1992, and before that date McCutcheon exercised his right of retraction and tendered his shares for redemption. The retraction date for the appellant S.Y.H. Corporation was September 1994 and although it could not tender its shares for redemption, it did file a proof of claim with the

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Administrator of Central Capital. The Administrator disallowed each appellant's claim and Feldman J. dismissed appeals from the Administrator's decisions.

The issue on these appeals is whether McCutcheon and S.Y.H. Corporation "have claims provable against Central Capital Corporation within the meaning of the Bankruptcy Act (Canada) as amended as of the date of the Restated Subscription and Escrow Agreement." Under the Bankruptcy Act, R.S.C. 1985, c.B-3, s.2, a claim provable "includes any claim or liability provable in proceedings under this Act by a creditor" and a creditor "means a person having a claim, preferred, secured or unsecured, provable as a claim under this Act." Section 121(1) of the Bankruptcy Act further defines claims provable as follows:

121.(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

The date of the Restated Subscription and Escrow Agreement is May 1992.[1] By then, and indeed since December 1991, Central Capital had been insolvent and therefore was prohibited by s.36(2) of the Canada Business Corporations Act, R.S.C. 1985, c.C-44 from making any payment to redeem the appellants' shares.

On June 15, 1992, Houlden J. provided that Central Capital could be reorganized under the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36 and he stayed proceedings against it. Houlden J.'s order of July 9, 1992, which approved the restructuring of Central Capital, was made without prejudice to the right of the appellants to assert claims as creditors. Thus the question for this court is whether the appellants' retraction rights created debts of Central Capital in May, 1992. In other words were McCutcheon and S.Y.H. Corporation creditors of Central Capital in May, 1992? If they were creditors, then like the other unsecured creditors of Central Capital, they can elect to take shares in the newly incorporated company, Canadian Insurance Group Limited; if they were not creditors, then they remain shareholders of Central Capital under the restructuring plan.

This is a question of characterization. I will address the question first, by considering the "substance" of the relationship between each appellant and the company; and second by considering s.36(2) of the Canada Business Corporations Act, supra. In brief I conclude:

(1) Although the relationship between each appellant and the company has characteristics of debt and equity, in substance both McCutcheon and S.Y.H. Corporation are shareholders, not creditors of Central Capital. Neither the existence of their retraction rights nor the exercise of those rights converts them into creditors;

(2) Finding that the appellants were creditors of Central Capital would defeat the purpose of s.36(2) of the statute.

I The Relationship Between the Appellants and Central Capital

Preferred shares have been called "compromise securities" and even "financial mongrels": Grover and Ross, Materials and Corporate Finance (1975), at p.49. Invariably the conditions attaching to preferred shares contain attributes of equity and, at least in an economic sense, attributes of debt. Over the years financiers and corporate lawyers have blurred the distinction between equity and debt by endowing preferred shareholders with rights analogous to the rights of creditors. One example is the right of redemption — the right of the corporation to compel preferred shareholders to sell their shares back to the corporation. Another example, and it is the case before us, is the right of retraction — the right of shareholders to compel the corporation to buy back their shares on a specific date for a specific price.

I acknowledge, therefore, that redeemable or retractable preferred shares are somewhat different from conventional equity capital. What makes the appeals before us difficult is that although the appellants appear to hold equity, their right of retraction appears to be a basic characteristic of a debtor-creditor relationship. See Grover and Ross, supra, at pp.47-49; Buckley, Gillen and Yalden, Corporations: Principles and Policies, 3rd ed. (1995), at pp.938-940.

If the certificate or instrument contains features of both equity and debt — in other words if it is hybrid in character — then the Court must determine the "substance" of the relationship between the holder of the certificate and the company. This is the lesson of Justice Iacobucci's judgment in Canada Deposit Insurance Corporation v. Canadian Commercial Bank, 1992 CanLII 49 (SCC), [1992] 3 S.C.R. 558. In that case the Supreme Court of Canada had to determine whether the financial assistance given by several lending institutions to try to rescue the Canadian Commercial Bank was "in the nature of a loan" or "in the nature of a capital investment." Justice Iacobucci discussed his approach to the problem at pp.590-591 of his judgment:

As I see it, the fact that the transaction contains both debt and equity features does not, in itself, pose an insurmountable obstacle to characterizing the advance of $255 million. Instead of trying to pigeonhole the entire agreement between the

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Participants and CCB in one of two categories, I see nothing wrong in recognizing the arrangement for what it is, namely, one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a debtor-creditor relationship. Financial and capital markets have been most creative in the variety of investments and securities that have been fashioned to meet the needs and interests of those who participate in those markets. It is not because an agreement has certain equity features that a court must either ignore these features as if they did not exist or characterize the transaction on the whole as an investment. There is an alternative. It is permissible, and often required, or desirable, for debt and equity to co-exist in a given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing a characterization issue. Again, it is not because there are equity features that it is necessarily an investment in capital. This is particularly true when, as here, the equity features are nothing more than supplementary to and not definitive of the essence of the transaction. When a court is searching for the substance of a particular transaction, it should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

In determining the substance of the relationship, as in any other case of contract interpretation, the court looks to what the parties intended. In CDIC v. CCB, supra, Iacobucci J. put this proposition as follows at p.588:

As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.

In these appeals what the parties intended is reflected mainly in the share purchase agreements and the conditions attaching to the appellants' shares, but also in the articles of incorporation and in the way Central Capital recorded the appellants' shares in its financial statements. These documents indicate that in substance the appellants are shareholders of Central Capital, not creditors. I rely on the following considerations to support my conclusion:

(i) Both appellants agreed to take preferred shares instead of some other instrument — for example, a bond or debenture — that would obviously have made them creditors. The appellant McCutcheon sold shares of one corporation (Canadian General Securities Limited) for cash and for shares of another corporation (Central Capital). Neither the share purchase agreements nor the share conditions support McCutcheon's contention that in taking preferred shares he was extending credit to Central Capital by deferring payment of the purchase price. He made an investment in the capital of Central Capital, no doubt because of the attractive dividend rate, the income tax advantages of preferred shares and "sweeteners" such as conversion privileges. Unlike Finlayson J.A., I place little weight on what he termed "the unique nature of the transaction". McCutcheon transferred assets to acquire his preferred shares rather than acquiring them with cash. But he nonetheless decided to invest in Central Capital and to take the risk and the profits (through dividends) of his investment.

Similarly, S.Y.H. Corporation exchanged its equity investment in four insurance companies for an equity investment in Central Capital. It too chose equity not debt. None of the contractual documents indicates that the appellants' retraction rights were intended to trigger an obligation on the part of Central Capital to repay a loan. Moreover, as Weiler J.A. points out, neither the share purchase agreements nor the share conditions provides for interest if Central Capital fails to honour its retraction obligations.

(ii) The senior preferred shares and junior preferred shares that the appellants own were part of the authorized capital of Central Capital before the appellants acquired them.

(iii) The appellants' shares were recorded in the financial statements of Central Capital as "capital stock," along with the company's issued and outstanding common shares, class "A" shares and warrants. The amount Central Capital might be obligated to pay the appellants if they exercised their retraction rights was not recorded as debt (even contingent debt) in the company's financial statements.

(iv) Both appellants had the right to receive dividends on their shares and McCutcheon had the right to vote his shares for the election of directors of Central Capital if dividends remained unpaid for a specified time. These rights — to receive dividends and to vote — are well recognized rights of shareholders. And these rights continue, even after the retraction dates, until the appellants' shares are redeemed.

(v) The preferred share conditions provide that on a liquidation, dissolution or winding up, the holders rank with other shareholders and therefore, implicitly, behind creditors. The appellant McCutcheon, who holds senior preferred shares, would rank behind creditors but ahead of the holders of subordinate classes of shares; the appellant S.Y.H. Corporation,

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which holds junior preferred shares, would rank behind senior preferred shareholders but ahead of common shareholders.

These provisions in the preferred share conditions also state that on payment of the amount owing to them the appellants "shall not be entitled to share in any further distribution of assets of the corporation." Finlayson J.A. interprets this to mean that the appellants "are not entitled to be treated as shareholders under a winding up or liquidation but only as creditors." I disagree. These are typical preferred share provisions, which limit the recovery of the holders but do not treat them as creditors: Sutherland et al., Fraser & Stewart Company Law of Canada, 6th ed. (1993), at p.198. At least on a liquidation, dissolution or winding up, the preferred share conditions evidence that the appellants would be treated not as creditors but as shareholders. In CDIC v. CCB, supra, Iacobucci J. placed considerable weight on a provision in the Participation Agreement stating that each participant "shall rank pari passu with the rights of the depositors." No such provision exists in this case. Indeed the share conditions I have referred to state the opposite.
Of course, Central Capital was reorganized, not liquidated, dissolved or wound up and the preferred share conditions are silent about what occurs on a reorganization. Still these conditions shed light on what the parties intended on the reorganization. Section 12(1) of the Companies' Creditors Arrangement Act, supra, defines claim as "any indebtedness, liability or obligation of any kind that, if unsecured would be a debt provable in bankruptcy within the meaning of the Bankruptcy Act." The question the court has been asked to answer is the same question that would arise on a liquidation. It is illogical to conclude that the appellants could claim only as shareholders on a liquidation and yet can claim as creditors on the reorganization. Whether Central Capital's financial difficulties led to a liquidation or a reorganization, the issue is the same and the analysis and the result should also be the same.

The appellants argue, however, that they are shareholders only until they exercise their retraction rights but once they exercise these rights they become creditors. I do not agree with this argument. The share conditions provide that even after exercising their retraction rights, the appellants continue to be entitled to dividends and to vote until their shares are redeemed. In other words, they continue to enjoy the rights of shareholders. Moreover, if when the appellants exercised their retraction rights the company were insolvent and were to be subsequently liquidated (or dissolved or wound up), the appellants would rank as shareholders on the liquidation. And as I have indicated above the result should be no different on the reorganization.
It seems to me that these appellants must be either shareholders or creditors. Except for declared dividends, they cannot be both. Once they are characterized as shareholders, their rights of retraction do not create a debtor-creditor relationship. These rights enable them to call for the repayment of their capital on a specific date (and at an agreed upon price) provided the company is solvent. Ordinarily shareholders have to recoup their investment by selling their shares to third parties. If they have retraction rights, however, they can compel the company (if solvent) to repay their investment at a given time for a given price. But the right of retraction provides for the return of capital not for the repayment of a loan. Certainly the Canada Business Corporations Act treats a redemption of shares as a return of capital because s.39 of the statute requires a company on a redemption to deduct from its stated capital account an amount equal to the value of the shares redeemed. The shares redeemed are then either cancelled or returned to the status of authorized but unissued shares.

Putting it differently, a preferred shareholder exercising a right of retraction on the terms that exist here must rank behind the company's creditors. Grover and Ross make this point more generally in their Materials and Corporate Finance, supra, at pp.48-49:
On the other hand, the company cannot issue "secured" preferred shares in the sense that shares cannot have a right to a return of capital which is equal or superior to the rights of creditors. Preferred shareholders are risk-takers who are required to invest capital in the business and who can look only to what is left after creditors are fully provided for. Thus, in the absence of statutory authorization, the claims of shareholders cannot be secured by a lien on the corporate assets. They rank behind creditors but before common shareholders (if specified) on a voluntary or involuntary dissolution of the company.
Admittedly there is little authority in Canada on the issue confronting this court. Some of the cases that the respondent relies on — for example, Re Patricia Appliance Shops Ltd., [1923] 3 D.L.R. 1160 (Ont. S.C.), Laronge Realty Ltd. v. Golconda Investments Ltd. (1986), 63 C.B.R. 74 (B.C.C.A.) and even Re Meade, [1951] 2 All E.R. 168 — are of limited assistance because the shareholders in those cases did not have retraction rights.

Perhaps the closest case — and the appellants rely heavily on it — is the judgment of the British Columbia Court of Appeal in Re East Chilliwack Agricultural Co-operative (1989), 74 C.B.R. (N.S.) 1. In that case a majority of the court

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(Craig J.A. dissenting) held that a withdrawing member of a co-operative association who elected to have his shares redeemed in instalments over a five-year period should be treated on the subsequent bankruptcy of the association as an ordinary creditor rather than as a shareholder. I decline to apply East Chilliwack for three reasons. First, because the case was decided in 1989, the British Columbia Court of Appeal did not have the benefit of the Supreme Court of Canada's reasons in CDIC v. CCB, supra. In East Chilliwack Hutcheon J.A., writing for the majority did not focus on what the parties intended when the member contracted with the co-operative. Instead he only considered the relationship between the member and the co-operative after the member had withdrawn. I do not think his approach is consistent with Justice Iacobucci's judgment in CDIC v. CCB, supra.

Second, there are important factual differences between East Chilliwack and the appeals before us. Justice Weiler has referred to these factual differences in her reasons. The most important of these differences are the following: in East Chilliwack the rules of the association provided that a member had to withdraw from the association to trigger the right of redemption, whereas the appellants' share conditions provide that they continue to be shareholders of Central Capital until their shares are redeemed; in East Chilliwack the member elected to withdraw and redeem his shares when the association was solvent whereas when the appellant McCutcheon exercised his right of retraction Central Capital was insolvent; and in East Chilliwack Hutcheon J.A. expressly stated that he was not considering the effect of the superintendent's power to suspend payments if the financial position of the co-operative was impaired, whereas the effect of the statutory prohibition against Central Capital making payment, found in s.36(2) of the Canada Business Corporations Act, is in issue in these appeals.

Third, the decision in East Chilliwack is at odds with most of the American case law and I favour the American approach. When a company repurchases shares by instalment and bankruptcy intervenes, the prevailing American position is that the shareholder's claim is deferred to the claims of ordinary creditors. The decision of the Fifth Circuit Court of Appeals in Robinson v. Wangemann 75 F.2d 756 (1935) is frequently cited. The facts of that case are virtually identical to the facts in East Chilliwack. A company had agreed to repurchase a stockholder's stock by instalments. Although the company was solvent when the agreement was made it went bankrupt before the repurchase was completed. The stockholder sought to prove as an ordinary creditor for the unpaid purchase price. Foster, Circuit Judge, writing for a unanimous court rejected the stockholder's claim at p.757:

A transaction by which a corporation acquires its own stock from a stockholder for a sum of money is not really a sale. The corporation does not acquire anything of value equivalent to the depletion of its assets, if the stock is held in the treasury, as in this case. It is simply a method of distributing a proportion of the assets to the stockholder. The assets of a corporation are the common pledge of its creditors, and stockholders are not entitled to receive any part of them unless creditors are paid in full. When such a transaction is had, regardless of the good faith of the parties, it is essential to its validity that there be sufficient surplus to retire the stock, without prejudice to creditors, at the time payment is made out of assets.

At the heart of Robinson v. Wangemann is the finding that the selling stockholder is not a creditor in the sense of a person who loans money to a corporation, and therefore is not entitled to parity with the general creditors. The principle in Robinson v. Wangemann seeks to protect creditors by refusing to permit selling stockholders, who were risk investors, to withdraw their capital on the same terms as general creditors in the event of insolvency. Section 40(3) of the Canada Business Corporations Act — a section to which I shall return when considering s.36(2) of the same statute — codifies the principle in Robinson v. Wangemann for share repurchases, though not for share redemptions. See also Blumberg, The Law of Corporate Groups (1989), at pp.205-210 and see contra Wolff v. Heidritter Lumber Co. 163 A. 140 N.J.Ch. (1932).

Quite apart from the instalment purchase price cases, American courts have often grappled with the question whether preferred stockholders can claim as creditors of the corporation. Although there are cases going both ways, most appear to come to the same conclusion as I do. The American cases are collected in Bjor and Solheim, Fletcher Cyclopedia Of the Law of Private Corporations (1995), revised vol. 11 and in Bjor and Reinholtz, Fletcher Cyclopedia Of the Law of Private Corporations (1990), revised vol. 15A. In volume 11 the authors of the text indicate — as did the Supreme Court of Canada in CDIC v. CCB — that "[w]hether or not the holder of a particular instrument or certificate is to be regarded as a shareholder or a creditor is a question of interpretation, and depends on the terms of the contract as evidenced by the instrument, the articles of incorporation, and the statutes of the state. The nature of the transaction is to be determined by the real substance and effect of the contract rather than by the name given to the obligations or its form ..." (at p.566).

And in volume 15A the authors state at pp.290 and 292 that even the arrival of a fixed redemption date does not change a preferred stockholder into a creditor:

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Holders of preferred stock of a corporation, in the absence of express provision to the contrary, are stockholders and not creditors of the corporation, except for dividends declared. They have no lien upon, and are not entitled to, any of the assets of the corporation when it becomes insolvent, until all debts are paid. Furthermore, there is authority that the status of a preferred stockholder is not changed to that of creditor, even though a dividend is guaranteed. Indeed it is beyond the power of a corporation to issue a class of stock, the holders of which are entitled to preference over general creditors.

...

Even where preferred stock has a fixed redemption date, arrival of that date does not change the status of a preferred stockholder to that of a creditor. (pp.290, 292)

I agree with these statements. I therefore conclude first that the appellants, in substance, were shareholders of Central Capital not creditors; and second that neither the existence nor the exercise of their retraction rights turned them into creditors.

II Provable Claims and Section 36(2) of the Canada Business Corporations Act

In May 1992 Central Capital was insolvent. It was unable to pay its liabilities as they became due and the realizable value of its assets was less than the aggregate of its liabilities. Because it was insolvent it was prohibited by s.36(2) of the Canada Business Corporations Act from redeeming the appellants' shares. Section 36(2) of the statute provides:

36. (2) A corporation shall not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that

(a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would after the payment be less than the aggregate of

(i) its liabilities, and

(ii) the amount that would be required to pay the holders of shares that have a right to be paid, on a redemption or in a liquidation, rateably with or prior to the holders of the shares to be purchased or redeemed.

As well, the appellants' share conditions provide that they are not permitted to redeem their shares if to do so would be "contrary to applicable law," in this case s.36(2) of the statute.

To hold that the appellants have provable claims would defeat the purpose of s.36(2) of the Canada Business Corporations Act. At common law a company could not repurchase its own shares on the open market or in the language of Trevor v. Whitworth (1887), 12 A.C. 409, a company could not "traffick in its own shares." The obvious reason was to prevent companies from using their assets to destroy the claims of their creditors. Modern corporate statutes, such as the Canada Business Corporations Act, modified the rule in Trevor v. Whitworth to permit repurchases provided the company's creditors would not be prejudiced. Thus the legislation insisted that the company could not repurchase its own shares unless it satisfied stated solvency tests. And so, s.34(2) of the Canada Business Corporations Act provides:

34. (2) A corporation shall not make any payment to purchase or otherwise acquire shares issued by it if there are reasonable grounds for believing that

(a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes.

In Nelson v. Rentown Enterprises Inc. 1992 CanLII 6183 (AB QB), (1993), 96 D.L.R. (4th) 586 aff'd 1994 ABCA 47 (CanLII), (1994), 109 D.L.R. (4th) 608 (Alta. C.A.), Hunt J. of the Alberta Queen's Bench wrote at p.589:

The policy behind the s.34(2) limitation upon a corporation's power to purchase its own shares seems obvious. It is intended to ensure that one or more shareholders in a corporation do not recoup their investments to the detriment of creditors and other shareholders. It has been observed that:

Corporate power to purchase its own stock has been frequently abused. Done by corporations conducting faltering businesses, it has been employed to create preferences to the detriment of creditors and of the other stockholders.

(Mountain State Steel Foundries, Inc. v. C.I.R., supra, at p. 741 [284 F.2d 737 (1960)].)

Modern business statues permit these share purchases to take place provided that the position of creditors and other shareholders is protected, by virtue of the application of the s.34(2) tests.

Redemptions of preferred shares, unlike repurchases, were always permitted at common law as long as they were not made in contemplation of bankruptcy. But the solvency test in s.36(2) of the Canada Business Corporations Act has the same purpose as the solvency test in s.34(2): to prevent redemptions if they would allow the company to prejudice the

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claims of creditors. See Buckley et al., Corporations: Principles and Policies, supra, at pp.968-71. To hold that the appellants' retraction rights gave rise to provable claims in the face of s.36(2), thereby allowing the appellants to rank equally with the unsecured creditors, would undermine the purpose of the section. If a claim in a bankruptcy or reorganization proceeding is unenforceable under the statute, the claim is not entitled to recognition on a parity with the claims of unsecured creditors: See Blumberg, supra, at pp.205-6; and Farm Credit Corporation v. Holowach (Trustee of) (1988), 68 C.B.R. (N.S.) 255 (Alta. C.A.).

I draw comfort in this conclusion from s.40 of the Canada Business Corporations Act. Section 40(1) provides that a contract with a corporation for the purchase of its shares is specifically enforceable against the corporation "except to the extent that the corporation cannot perform the contract without thereby being in breach of s.34 ..." Section 40(3) then states:

40.(3) Until the corporation has fully performed a contract referred to in subsection (1), the other party retains the status of a claimant entitled to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors but in priority to the shareholders.

In other words, the section recognizes that if a company contracts to repurchase its shares but is prohibited from doing so because it is insolvent, the vendor of the shares is not a creditor and on a liquidation ranks subordinate to the rights of creditors. The shareholder cannot be repaid at the expense of the company's creditors. Although s.40 does not expressly apply to s.36, I think that the rationale for s.40(3) applies to redemptions as well as to repurchases. Whether a repurchase or a redemption, the shareholder is not a creditor and is subordinate to the rights of creditors. More simply the shareholder does not have a provable claim.

The appellants rely on The Custodian v. Blucher, [1927] 3 D.L.R. 40, (S.C.C.) but in my view this case does not assist them. In Blucher dividends were declared on stock but payment of the dividends was suspended during World War I. The Supreme Court of Canada held at p.43 that "[t]he right of recovery was in suspense during the war, but the debt nevertheless existed." In that case, however, the dividend was declared before the suspension of payment took place. Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared it is a debt on which each shareholder can sue the corporation.

Holding that the appellants do not have provable claims accords with sound corporate policy. On the insolvency of a company the claims of creditors have always ranked ahead of the claims of shareholders for the return of their capital. Case law and statute law protect creditors by preventing companies from using their funds to prejudice creditors' chances of repayment. Creditors rely on these protections in making loans to companies. Permitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection.

I would dismiss these appeals. I would not make any cost order. I am grateful to all counsel for their assistance on this interesting and difficult problem.

WEILER J.A.:

I have had the benefit of reading the reasons of Finlayson J.A. and for the reasons which follow I respectfully disagree with his conclusion that the appellants are entitled to prove a claim pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA").

Section 12(1) of the CCAA requires that persons wishing to participate in a reorganization have claims which would be provable in bankruptcy. Section 121(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, states that "[a]ll debts and liabilities, present or future ... shall be deemed to be claims provable in proceedings under this Act."

In order to decide whether the obligation of Central Capital to redeem the preferred shares of the appellants is a claim provable in bankruptcy, it is necessary to characterize the true nature of the transaction. The court must look to the surrounding circumstances to determine whether the true nature of the relationship is that of a shareholder who has equity in the company or whether it is that of a creditor owed a debt or liability by the company: Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 1992 CanLII 49 (SCC), [1992] 3 S.C.R. 558. In this case, the decision is not an easy one. Where, as here, the agreements between the parties are reflected in the articles of the corporation, it is necessary to examine them carefully to characterize the true relationship. It is not disputed that if the true nature of the relationship is that of a shareholder-equity relationship after the retraction date and at the time of the reorganization, then the appellants do not have a claim provable in bankruptcy. Consequently, they will not have a claim under the CCAA.

As I see it, three main questions need to be addressed:

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(1) Was Feldman J. correct in characterizing the relationship between Central Capital and the companies owned by James McCutcheon ("McCutcheon"), and between Central Capital and Scottish and York Holdings Limited (the predecessor to S.Y.H., hereinafter referred to as "SYH"), as a shareholder relationship?
(2) Did the nature of the relationship change after the retraction date for redeeming the shares of McCutcheon or, in the case of SYH, at the time of the reorganization?
(3) If the nature of the relationship is not a shareholder-equity relationship, are the appellants entitled to prove a claim under the CCAA.?
In addition, the appellants raise the question of whether they have a right to prove a claim for dividends, which have accrued but have not yet been declared payable. The price to be paid by Central Capital to McCutcheon on the retraction date, July 1, 1992, was $25 per share plus all accrued and unpaid dividends thereon. The dividends are therefore part of the retraction price. Similar provisions apply to SYH.

The reasons of Finlayson J.A. contain a comprehensive statement of the background to the litigation and I will therefore only refer to the facts in a summary fashion.
James McCutcheon and his brother sold their shares in Central Guarantee Trust Company to Central Capital Corporation ("Central Capital"), a trust company, for $575 a share. They received $400 per share in cash. The balance of $175 owing on each share was paid through the issue of seven preferred shares in Central Capital, with each share having a par value of $25. Following this transaction, McCutcheon purchased his brother's shares. These preferred shares, known as Senior Series B Preferred Shares, were to be listed on the Toronto Stock Exchange. These shares carried with them a retraction privilege. The shareholder had the right to have his shares redeemed by Central Capital on July 1, 1992, for $25 a share, provided that such redemption would not be "contrary to law in the context of the Corporation's current financial position." McCutcheon chose not to sell his shares.

Scottish & York Holdings Limited (the predecessor to SYH) sold its shares in certain insurance companies which it owned to Central Capital. Central Capital paid for these shares by the issue of Series A Junior Preferred Shares. These shares were not listed on a stock exchange. SYH had the right to have its shares redeemed by Central Capital on or after September 1994 at a price of $1 per share, subject to the provisions of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 (the "CBCA").
It should be noted that the right of retraction was not unique to these two classes of shareholders. Even common shareholders had the right to have their shares retracted under certain circumstances.

By December 1991, Central Capital was unable to pay its liabilities as they became due and its total liabilities greatly exceeded the value of its assets. As a result, the various banks and subordinated debtholders, collectively referred to as the lenders, had a choice to make. Inasmuch as the definition of a corporation in s. 2 of the Bankruptcy and Insolvency Act precludes a creditor from bringing a petition against a trust company, they could either wind up Central Capital under the Winding Up Act, R.S.C. 1985, c. W-11, or they could try to restructure Central Capital under the CCAA. In a winding up or liquidation, the trustee would sell the company's assets, either piecemeal or as a going concern, to third parties. The proceeds from the sale would then be distributed to those who proved a claim according to set priority rules. In a reorganization, existing fixed amounts owed to Central Capital's creditors would be traded for new claims and ownership interests in the reorganized corporation which would remain a going concern. The lenders chose to reorganize.
Two transactions were involved. In the Consolidated Insurance Group Limited transaction, or "CIGL transaction", Central Capital transferred some of its significant assets to a newly incorporated company, CIGL. Thirty-nine creditors of Central Capital then elected to exchange a portion of Central Capital's debt owing to them for equity in this newly incorporated company. In the second transaction, common shares were issued for the remaining assets of Central Capital. The creditors of Central Capital were given 90 per cent of the common shares of the reorganized company. The balance of 10 per cent was allocated to the shareholders of Central Capital. All of the preferred, common and subordinate voting shares in Central Capital were then converted into these "new" common shares. The reorganization was subsequently approved by the creditors and sanctioned by the Court as required by the Act, but this approval was given without prejudice to any claims that McCutcheon and SYH might have.

McCutcheon's position was that the right to have his shares retracted accrued before the reorganization, and that his exercise of this right of retraction in May 1992 constituted a present debt or liability entitling him to rank as a creditor in the CIGL transaction and in the reorganized Central Capital. SYH's position was that the right to have its shares retracted in 1994 created a future debt or liability and thus a provable claim. The administrator of Central Capital disallowed both claims. McCutcheon and SYH appealed the administrator's decision to Feldman J. In dismissing their appeals, she held

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that the appellants were shareholders and that the right of retraction attaching to the shares did not change the nature of the shares from equity into debt.

1. Was Feldman J. correct in characterizing the agreement between Central Capital and the companies owned by McCutcheon, and between Central Capital and SYH, as creating a shareholder relationship between the parties?

Feldman J. analyzed the transaction and came to the conclusion that it was an equity transaction.

Finlayson J.A. is of the opinion that the nature of this transaction is different and that Feldman J. erred in not showing sensitivity to the fact that she was dealing with the sale of a business by its owners. He is of the opinion that the shares issued by Central Capital are the equivalent to "vendor shares" in that the appellants received them in exchange for the transfer of assets to Central Capital. He does not see the transaction as being either a contribution to capital by McCutcheon and SYH or as a return of capital. Although the transaction has debt and equity features, Finlayson J.A. is of the opinion that the true nature of the transaction is that of a debt owing by Central Capital to McCutcheon and SYH for the shares in their companies.

My analysis of the transaction is that when McCutcheon sold his shares in Central Guaranty and took back preferred shares in Central Capital as part payment, he transferred part of his capital investment from a smaller entity to a larger entity. Similarly, SYH transferred its investment in the shares of the insurance companies for shares in the larger entity of Central Capital. Both appellants could look to a larger asset base than before to generate a return on their capital. Until the retraction date, McCutcheon chose to take the risk of continuing his investment in Central Capital, which offered the prospect of a stable, yet relatively high, annual return through the receipt of 7-5/8 per cent dividends. Because the shares traded on the Toronto Stock Exchange, he would have had the option of realizing upon his investment by selling his shares for what they would bring on the open market, but he did not do so. In the case of SYH, although these shares were not required to be publicly listed, the corporation's articles did not restrict their transfer. The corporation's articles indicate that these shares had some preference over other shares with respect to the right to receive dividends and in the distribution of assets after creditors are paid on a liquidation. As preferred shareholders, McCutcheon and SYH did not have a voice in company affairs unless the company failed to pay the dividends it had promised to pay. This is quite typical: see Welling, Corporate Law in Canada, 2nd ed. (1991) at p. 604; Ziegel et al, Cases and Materials on Partnership and Canadian Business Corporations, 2nd ed. (1989) at p. 1198. Risk taking, profit sharing, transferability of investment, and the right to participate in a share of the assets on a liquidation after the creditors have been paid are the hallmarks of a shareholder: see R.M. Bryden "The Law of Dividends" contained in Ziegel ed., Studies in Canadian Company Law (1967) at p. 270. In my opinion, Feldman J. was correct that the true nature of the relationship between the parties initially was that of an equity transaction.

2. Did the nature of the relationship change after the retraction date for McCutcheon's shares and did the reorganization trigger a right of redemption respecting SYH's shares?

Ordinarily, shareholders cannot realize on their investment in a company except by transferring their shares. The retraction privilege attaching to the shares gives the preferred shareholders the option of realizing on their investment other than by transferring their shares to a third party.

Feldman J. found that McCutcheon continued to be a shareholder after the retraction date and that he remained a shareholder at the time of the reorganization. She found SYH's claim to be too remote inasmuch as the retraction date had not yet arrived at the time of the reorganization.

The appellants argue that Feldman J. erred in this conclusion. They submit that although McCutcheon and SYH may have been shareholders initially, this relationship changed. Upon McCutcheon's exercise of his right to have the corporation pay him the retraction price of his shares, he ceased to be a shareholder. When Central Capital failed to pay him, he became a creditor of the corporation. In the case of SYH, it is submitted that when the lenders opted to reorganize the company, they, in effect, triggered the obligation to redeem SYH's shares.

a) Nature of the transaction's relationship to the Capital Structure of the Corporation

Section 25(3) of the CBCA states that shares shall not be issued until the consideration for the shares is fully paid either in cash or with property having a fair market value equivalent to the shares issued. Therefore, by issuing preferred

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shares with a fixed par value, Central Capital paid McCutcheon for his shares of Central Guaranty and paid SYH for the shares of the insurance companies that Central Capital received. Central Capital could not issue preferred shares except as full payment for the shares it received. The preferred shares were part of the capital of Central Capital and the preferred shares were always shown as shareholders' equity on Central Capital's books. The capital of the corporation is representative of the assets available to pay creditors. If, on the date for redemption of McCutcheon's shares, or on the date of reorganization in the case of SYH, the shares are redeemed, the amount paid must be deducted from the stated capital of the corporation: s. 39 CBCA. Consequently, the total assets that Central Capital will have available to pay the lenders and other creditors outside the corporation will be reduced. A reduction of capital by the redemption of redeemable shares is permitted under the CBCA but only where the requirements of s. 36 are met.

b) Section 36 of the CBCA
Section 36 of the CBCA makes the ability of a corporation to redeem its redeemable shares subject to (1) its articles and (2) a solvency requirement. For ease of reference s. 36 is reproduced below.

36. (1) Notwithstanding subsection 34(2) or 35(3) [both of which deal with a corporation's acquisition of its own shares in other circumstances], but subject to subsection (2) and to its articles, a corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding the redemption price thereof stated in the articles or calculated according to a formula stated in the articles.
(2) A corporation shall not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that
(a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
(b) the realizable value of the corporation's assets would after the payment be less than the aggregate of
(i) its liabilities, and
(ii) the amount that would be required to pay the holders of shares that have a right to be paid, on a redemption or in a liquidation, rateable with or prior to the holders of shares that have a right to be paid, on a redemption or in a liquidation, rateable with or prior to the holders of the shares to be purchased or redeemed.
[Emphasis added.]

There is no dispute that Central Capital was unable to redeem McCutcheon's shares on the retraction date. Nor could it redeem SYH's shares on the date of the reorganization. The appellants agree that the effect of s. 36 renders the agreement between themselves and Central Capital unenforceable. It is the position of the appellants, however, that s. 36 does not extinguish a debt or liability which they say has been created. The appellants rely on the decision in Re East Chilliwack Agricultural Co-operative (1989), 74 C.B.R. (N.S.) 1 (B.C.C.A.) in support of their position that a debt or liability is created notwithstanding the solvency requirements of s. 36 respecting payment. The appellants' submission does not take into consideration the major differences between the decision in East Chilliwack and the present situation relating to the timing, effect of the solvency requirements and the provisions in the articles governing the relationship of the parties.
1) In East Chilliwack, farmers who owned shares in an agricultural co-operative gave notice to the co-op of their intention to have their shares redeemed. After the notices had been given, the superintendent of co-operatives suspended the right of the co-op to redeem its shares. Here, the request to redeem the shares by McCutcheon and the retraction date occurred after Central Capital had sent out a notice that it would not be able to redeem the shares due to its financial position. SYH had no right to demand that its shares be retracted until the retraction date, which was some two years after the date of Central Capital's insolvency.

As in the instant case, the issue in East Chilliwack was whether the farmers were entitled to rank with the creditors of the co-op. Hutcheon J.A., with Toy J. A. concurring, held that they were entitled to be treated as creditors.
At the outset of his reasons, Hutcheon J.A. noted, at p. 11, that the effect of the superintendent's suspension on the farmers' rights was not argued on appeal and that the court had been asked to determine the status of the farmers without regard to the suspension.

Here, the effect of Central Capital's inability to redeem its shares due to insolvency is very much in issue and cannot be ignored. Although the articles provide for the redemption of all of the shares held by McCutcheon and SYH on or after the retraction date, the articles also state that Central Capital will only redeem so many of its shares as would not be "contrary to law." Pursuant to s. 36(1) of the CBCA, a corporation may purchase or redeem redeemable shares, but the corporation is prohibited from doing so if the corporation is unable to pay its liabilities as they become due or if the assets of the

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corporation are less than the total of its liabilities and the amount required for the redemption. Because Central Capital could not comply with the solvency requirements, redemption would be "contrary to law."

2) In East Chilliwack, supra, at p. 13, the rules of the co-op provided that upon the giving of a notice of redemption, the farmer giving it ceased to be a shareholder. Central Capital's articles do not state that a request for redemption of the holder's shares terminates his status as a shareholder. McCutcheon continued to have the right to receive dividends pursuant to Article 4.5 while his shares were not redeemed. In effect, so long as Central Capital was unable to redeem the shares but had profits, McCutcheon continued to be entitled to a share of the profits through the declaration of dividends. If the dividends remained unpaid for eight consecutive quarters then, pursuant to Article 8, McCutcheon had the right to receive notice of, and to attend, each meeting of shareholders at which directors were to be elected and was entitled to vote for the election of two directors. The articles relating to the preferred shares held by SYH contain a similar provision. The result of insolvency as envisaged by the articles was that McCutcheon and SYH would continue as shareholders.

3) In East Chilliwack, supra, Hutcheon J.A. held, at p. 13, that, subject to the power of the superintendent of co-operatives, the farmer's position would be that of an ordinary creditor.

Here, the terms attaching to McCutcheon's shares do not give him that right. Instead, he is given the right to continue to receive dividends so long as the company cannot pay him. The articles relating to the shares held by SYH contain a similar provision. In addition, Article 4.3(b), respecting the retraction of the shares, indicates that if the directors have acted in good faith in making a determination that the number of shares the corporation is permitted to redeem is zero, then the corporation is not liable in the event this determination proves inaccurate. This would hardly be the position vis à vis an ordinary creditor.

4) Article 8 and a similar provision in the articles relating to the shares held by SYH provide that upon a sale of all or a substantial part of the company's undertaking, the preferred shareholders have a right to receive notice of and to be present at the meeting called to consider this sale. The farmers in East Chilliwack do not appear to have had any similar right.

5) Article 7 provides that in the event of a liquidation, dissolution or winding-up of the Corporation the preferred shareholders have a right to receive $25 per Series B Senior Preferred Share before the corporation pays any money or distributes assets to shareholders in any class subordinate or junior to the Series B Senior Preferred Shares. Similarly, SYH, as the holder of Series A and B Junior Preferred shares has the right, upon the dissolution or winding up of the corporation, to receive a sum equivalent to the redemption amount for each series junior preferred share. This right is subject to the rights of shares ranking in priority to the shares of these series, but is ahead of the rights of the holders of common shares.

Nothing in the articles concerning the retraction date affects the right of McCucheon and SYH to participate in Central Capital's liquidation. The participation of the farmer in East Chilliwack ceased once he had given notice to redeem. Article 4.4 of Central Capital provides that once the shares have been tendered for retraction this election is irrevocable on the part of the holder. In the event that payment of the retraction price was not made, however, the holder had the right to have all deposited share certificates returned. Central Capital offered to return McCutcheon's shares to him, but he refused. Because McCutcheon retained all the rights and privileges of a preferred shareholder after the retraction date, the fact that he refused to take back his share certificates cannot alter the true nature of the relationship. The refusal was merely evidence of a dispute concerning what the relationship was. SYH also retained its full status as a shareholder until the date of the reorganization. This was not the situation in East Chilliwack.

By way of summary, on the date of the reorganization McCutcheon and SYH had not ceased to be preferred shareholders of Central Capital. The rights attaching to their retractable preferred shares entitled them to continue to share in the profits of the company when these were declared as dividends, to vote at shareholders meetings to elect directors so long as dividends remained unpaid for a specified period of time, and, on a winding up of the company, to participate in the distribution of assets that remained after the creditors were paid according to the ranking of the series of their shares. The company's obligation to redeem its shares was not absolute. Instead, the articles provided for what was realistically a "best efforts" buy-back based on solvency and continuation as a shareholder to the extent a buy-back could not take place. In East Chilliwack, because the farmer ceased to be a shareholder, the articles do not appear to make any provision for continued participation or for the postponement of payment depending on the solvency of the co-op.

c) Evidence of a debtor-creditor relationship is lacking in the articles.

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Looked at another way, after the retraction date and at the time of the reorganization, the common features of a debtor-creditor relationship are not in evidence in Central Capital's articles. The agreements between the parties contain no express provision that the redemption of the shares is in repayment of a loan. The corporation was not obliged to create any fund or debt instrument to ensure that it could redeem the shares on the retraction date. There is no indemnity in the event that the money is not repaid on the retraction date. There is no provision for the payment of any interest after the retraction date in the event that the money is not repaid on the retraction date. There is no provision that after the retraction date and in the event of insolvency, the appellants would have the right to have the company wound up. (See R. v. Imperial General Properties Ltd., 1985 CanLII 7 (SCC), [1985] 2 S.C.R. 288 for a case where the articles of the company contained this right.) There is no provision that upon a winding up or insolvency the parties are entitled to rank pari passu with the creditors as was the case in Canada Deposit Insurance Corp. v. Canadian Commercial Bank, supra.

d) The effect of the reorganization

Finlayson J.A. is of the view that it is immaterial that the articles provide, in the event of the liquidation, dissolution or winding-up of the company, that the appellants are only entitled to rank after the creditors but ahead of the junior ranking shareholders. In his view, this provision is irrelevant because we are not dealing with a liquidation but with a reorganization. He finds it significant that, like debtors, the preferred shareholders are not entitled to participate in any surplus once they have been paid. I am of the view that this provision in the articles is significant. It represents a clear indication that the holders of the retractable shares were not to be dealt with on the same footing as ordinary creditors even after the retraction date. Instead, they were to be dealt with as shareholders, albeit an elevated class. Under the CBCA all shares carry equal rights. Words used in the articles to differentiate a class of shares are nothing more than authorized deviations from this statutory position of equality: Welling, supra, at p.683.

The appellants submit that a winding-up or liquidation is not the same as a reorganization. This is true. Both, however, are methods of dealing with insolvency. Both are methods for secured creditors to enforce their claims by seizing the assets in which they hold security interests. If the value of the corporation as a going concern exceeds the liquidation value of the assets, it is in the interest of all the debt holders that the corporation be preserved as a going concern. The purpose of both a liquidation and a reorganization is to permit the rehabilitation of the insolvent person unfettered by debt: Vachon v. Canada Employment and Immigration Commission, 1985 CanLII 12 (SCC), [1985] 2 S.C.R. 417. By virtue of s. 20 of the CCAA, arrangements under the Act mesh with the reorganization provisions of the CBCA so as to affect the company's relations with its shareholders. Shareholders have no right to dissent to a reorganization: s. 191(7), CBCA. On a reorganization, among other things, the articles may be amended to alter or remove rights and privileges attaching to a class of shares and to create new classes of shares: s. 173, CBCA. These statutory provisions provide a clear indication that, on a reorganization, the interests of all shareholders, including shareholders with a right of redemption, are subordinated to the interests of the creditors. Where the debts exceed the assets of the company, a sound commercial result militates in favour of resolving this problem in a manner that allows creditors to obtain repayment of their debt in the manner which is most advantageous to them.

The similarities between a liquidation and a reorganization, together with the express statement in the articles of Central Capital with respect to what is to happen on a winding-up, dictate that the interests of the holders of retractable shares, McCutcheon and SYH, are subordinated to the creditors and they are not entitled to claim under the CCAA equally with the creditors. This position is also consistent with the provisions of the Bankruptcy and Insolvency Act and the Winding-Up Act. In the case of an insolvency where the debts to creditors clearly exceed the assets of the company, the policy of federal insolvency legislation appears to be clear that shareholders do not have the right to look to the assets of the corporation until the creditors have been paid.

Dividends

Although dividends were payable on the shares of McCutchon and SYH, no dividends were in fact declared. The appellants contend that the dividends, which have accrued but which were not declared, are a debt or liability because they were stipulated to be part of the retraction price.

Article 7 of Central Capital respecting McCutcheon's shares states that in the event of a liquidation, dissolution or winding up of the corporation, the shareholders are entitled to receive not only the $25 per Series B preferred share, but "all accrued and unpaid dividends thereon, whether or not declared ... before any amount is paid by the Corporation or any assets of the Corporation are distributed to the holders of any shares...ranking as to capital junior to the Series B Senior preferred Shares."

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It is trite law that a dividend may only be declared if a company is solvent. For corporations governed by the CBCA, it appears that the common law tests for solvency have all been subsumed or overruled: R. v. McClurg, 1990 CanLII 28 (SCC), [1991] 2 W.W.R. 244 at 259, 260 (S.C.C.).
Section 42 of the CBCA provides:
A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that
(a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

Section 42 prevents the corporation from declaring or paying a dividend when it does not meet certain solvency requirements. There was no declaration of a dividend in the present case. Any obligation to pay a dividend as part of the retraction price cannot therefore be enforced when the company is insolvent. Dividends which have accrued but which are unpaid are not considered to be a debt because, on reading the articles as a whole, the provision for payment is not one which is made independant of the ability to pay: see Welling, supra, at p. 689, citing International Power Co. Ltd. v. McMaster University and Montreal Trust Co., 1946 CanLII 34 (SCC), [1946] S.C.R. 178 where it was held there was no guarantee of payment and hence the accrued but unpaid dividends were not a debt. Instead, accrued but unpaid dividends are considered to be akin to a return of capital. Making these accrued dividends part of the retraction price does not alter this.
By way of analogy to the treatment of dividends, it could be said that until the company has declared it will redeem the shares which are tendered to it the obligation to redeem them is not a debt or liability. The promise to pay in the articles of Central Capital is not made independent of any ability to pay.
In the event that I am wrong in my conclusion that the true nature of the relationship is one of equity, I shall now consider the position in the event that a debt has been created.
3. If the nature of the relationship is not an equity relationship
are the appellants entitled to be claimants under the CCAA.?

The parties agree that the effect of s. 36 renders the agreement to redeem their preferred shares unenforceable. It is the position of the appellants, however, that s. 36 does not extinguish Central Capital's obligation to repay them. Their position is that Central Capital's obligation to repay them is a contingent liability and therefore gives them a claim provable in bankruptcy, bringing them under s. 12(1) of the CCAA.
The Meaning of Debt
Debt is defined in a very broad manner in Black's Law Dictionary, 6th ed. (1990) at p. 403. It is the position of the appellants that this definition of "debt" is broad enough to include McCutcheon's right to have Central Capital redeem his shares. In the case of SYH, it is submitted that the right to redemption constitutes a future liability. It is the appellants' position that Feldman J. erred in holding that to have a provable claim, McCutcheon and Central Capital must be able to obtain a judgment against Central Capital for the retraction price and be entitled to seek payment on the judgment. Finlayson J.A. agrees with the appellant's position.
Debt is defined in Black's Law Dictionary, supra, as:

A sum of money due by certain and express agreement. A specified sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment.
A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future. In a still more general sense, that which is due from one person to another, whether money, goods, or services. In a broad sense, any duty to respond to another in money, labour, or service; it may be even a moral or honorary obligation, unenforceable by legal action. Also, sometimes an aggregate of separate debts, or the total sum of the existing claims against person or company. Thus we speak of the "national debt", the "bonded debt" of a corporation, etc.
It will be readily apparent that in Black's the term "debt" is defined in two distinct ways. In order to constitute a debt as defined in the first paragraph, the obligation must be enforceable. In the second paragraph debt is defined more broadly as any duty or obligation even if unenforceable by legal action. Feldman J. considered the first portion of the definition in her reasons. If the first portion of the definition applies, no debt is created because the obligation is not enforeceable under the CBCA. The appellants rely on the second portion of the definition. They also rely on the definition of of the word "liability" in Black's which is also defined very broadly.

In one sense, support for the position of the appellants is found in s. 40 of the CBCA. Section 40 states that a contract with a corporation providing for the purchase of shares of the corporation is specifically enforceable against the

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corporation except to the extent that the corporation cannot perform the contract without being in breach of ss. 34 or 35. Section 34 contains the solvency requirements concerning the redemption by a company of its own shares other than those carrying a right of redemption. Section 35 deals with shares which have been issued to settle or compromise a debt. In s. 2, "liability" is defined as including "a debt of a corporation arising under section 40 ...."

Section 40 does not include any reference to the obligation of a company to repurchase redeemable shares under s. 36. As a result s. 36 is not incorporated by reference into the definition of liability. While it might be suggested that this is a legislative oversight, the omission is also consistent with the position that only the articles of the corporation govern the relationships between the company and the holders of the retractable shares under s. 36. I have already stated my opinion that the articles of Central Capital do not make the obligation to redeem the shares a debt or, for that matter, a liability. Moreover, even if a provision like s. 40 is implied with respect to redeemable preferred shares, it would also be necessary to imply a provision like s. 40(3) which states that in the event of liquidation where the company has not performed its contract to redeem, the other party is entitled to be ranked subordinate to the rights of creditors but in priority to the shareholders. This is a clear expression of legislative intention that on insolvency the claim of those entitled to have their shares redeemed should not be placed on the same footing with the claims of creditors but should rank subordinate to them: see Nelson v. Rentown Enterprises Inc., 1994 ABCA 47 (CanLII), [1994] 4 W.W.R. 579 (Alta. C.A.), adopting the reasons of Hunt J. at 96 D.L.R. (4th) 586 (Alta. Q.B.). Policy reasons would again militate in favour of the result being the same on a reorganization.

Claims in Bankruptcy

Even if the broader definitions of a debt or liability in Black's are adopted, the appellants still do not have a claim provable in bankruptcy.

Persuasive authority already exists to the effect that in order to be a provable claim within the meaning of s. 121 of the Bankruptcy and Insolvency Act the claim must be one recoverable by legal process: Farm Credit Corporation v. Holowach (Trustee of), 1988 ABCA 216 (CanLII), [1988] 5 W.W.R. 87 at 90 (Alta. C.A.), leave to appeal to the Supreme Court of Canada dismissed at [1989] 4 W.W.R. lxx.

In Holowach, the seven members of the court were dealing with a situation in which some persons borrowed money from a mortgagee and mortgaged certain lands as security for repayment of the loan. The mortgagors then made an assignment in bankruptcy. The mortgagee filed a proof of claim for the full amount of the deficiency, that is, the amount of the indebtedness less the value of the land which the mortgagee was permitted to purchase. The Alberta Law of Property Act, R.S.A. 1980, c.L-8 precluded deficiency claims against individuals in foreclosure actions, although the effect of the legislation was not to extinguish or satisfy the debt. The mortgagee argued that it had a claim provable in bankruptcy under s. 95(1), now s. 121(1), of the Bankruptcy and Insolvency Act. The court rejected this argument, holding that a provable claim must be one recoverable by legal process. In coming to its conclusion, the court relied on Ref. re Debt Adjustment Act, 1937, [1943] 1 All E.R. 240, (P.C.) and a number of decisions at the trial level which are collected at p. 91 of the decision.

Here, the contract to repurchase the shares, while perfectly valid, is without effect to the extent that there is a conflict between the corporation's promise to redeem the shares and its statutory obligation under s. 36 of the CBCA not to reduce its capital where it is insolvent. As was the case in the Holowach decision, this statutory overlay renders Central Capital's promise to redeem the appellants' preferred shares unenforceable. Although there is a right to receive payment, the effect of the solvency provision of the CBCA means that there is no right to enforce payment. Inasmuch as there is no right to enforce payment, the promise is not one which can be proved as a claim.

It could be suggested that the decision in Holowach can be distinguished from the instant case on the basis that in Holowach the claim is made unenforceable forever by statute whereas under the CCAA the claim is unenforceable only so long as the corporation does not meet the solvency requirements of s. 36 of the CBCA. I do not believe this is a valid distinction for three reasons. First, the relevant date for determining any contingent liability is not the future but the past, namely, September 8, 1992, the date by which proofs of claim had to be submitted. On that date, Central Capital was insolvent. Second, it is only because the lenders were willing to convert their debt obligations into equity in the reorganization that Central Capital is now solvent. Central Capital is not the same company and its liabilities are not the same. The redeemable shares no longer exist. Third, in order to be profitable, the assets of a company must be managed. Any value in the assets after the insolvency of the company is, in this case, due to the new management and not to the preferred shareholders extending credit to the company by having their claim for redemption postponed.

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Even if Central Capital's obligation to redeem the shares of the appellants created a debt or liability, the appellants do not have a claim provable within the meaning of s. 121 of the Bankruptcy and Insolvency Act.

CONCLUSION

I would dismiss the appeal. For the reasons I have given, the retraction amounts do not constitute a debt or liability within the meaning of s. 121 of the Bankruptcy and Insolvency Act. Even if I am wrong in my conclusion and a debt or liability is created, it is not a claim within the meaning of the CCAA. This is a case of first impression. For these reasons, I would not award any costs of this appeal.

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[1] There is a discrepancy in the materials before this court on the relevant date for establishing a claim provable against Central Capital: S.Y.H. Corporation used May, 1992, the date of the Restated Subscription and Escrow Agreement whereas McCutcheon and the unsecured creditors of Central Capital Corporation used June 15, 1992, the date of the court-ordered stay of proceedings against Central Capital. I have used the May 1992 date but nothing turns on the use of this date as opposed to the June 15, 1992 date.

Quintette Coal Ltd. (Re) (Trustee of), 1991 CanLII 303 (BC SC) - Class Divisions Based on Loan Guarantees

Date:	1991-04-12
Docket:	A901507
Parallel citations:	7 CBR (3d) 165; 56 BCLR (2d) 80
URL:	http://canlii.ca/t/1csg5
Citation:	Quintette Coal Ltd. (Re) (Trustee of), 1991 CanLII 303 (BC SC), <http://canlii.ca/t/1csg5> retrieved on 2013-09-15
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Date Released: April 12, 1991

NO. A901507
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT R.S.C. 1985, C.C.36

AND:

IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1979, C. 59

AND:

IN THE MATTER OF QUINTETTE COAL LIMITED

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE THACKRAY

Counsel for the Crown: M. Beck
Counsel for C.I.B.C. and Bank of Montreal: A.P. Shandro
Counsel for Shell Oil and other creditors: A. Edgson
Counsel for the Japanese Steel Industry: A.J. Adair
Counsel for Charbonnages de France International and Charbonnages de France: W. McAllister, Q.C.

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and B. Lewis-Hand

Counsel for Quintette Coal Limited: D.F. Tysoe

THE COURT: (ORAL) This is an application by the banks (lenders) for an order allowing them to make demand upon Charbonnages de France international and Charbonnages de France (CdFI and CdF) for the amount of their guarantees to Quintette. Quintette does not oppose the application provided that it can be assured that in the voting on any reorganization plan under the Companies' Creditors Arrangement Act (CCAA) CdFI does not have a special class. **That is, that CdFI is part of the class to which the lenders belong. CdFI take the position that they should, because of certain terms in the guarantee, be in a separate class.**

The guarantees are in the vicinity of ten million dollars while the indebtedness of Quintette to the banks exceeds six hundred million dollars. The Japanese Steel industry (JSI) also have a claim against Quintette exceeding thirty-five million dollars, and there are other major trade creditors. The only opposition to this motion is from CdFI and CdF, to whom I will refer as CdFI.

The court approval for Quintette to proceed with a reorganization plan under CCAA was given on June 13, 1990. It provided that Quintette would file within six months of the order a formal plan of compromise between itself and its creditors. Such a plan has been filed but it is being renegotiated with the hopes that a mutually acceptable plan can be devised. Consequently no application has yet been made to set the classes of creditors nor to hold a vote upon the plari pursuant to the terms of the CCAA. A further complication is that Quintette is in the throes of a management change, and until the new management is in place it would be premature to conclude the proceedings. However, it appears that progress is being made on all fronts and that within the near future finalization of the reorganization is possible.

CdFI asked for an adjournment of this application but this was refused. I also considered reserving judgment on the motion in order to prepare tailored reasons. However, I see time as a significant factor, and for the same reasons that I rejected the application to adjourn, I feel compelled to deliver these reasons without any delay. I would not want any delay by the court to prejudice any party or the plan in general. Nothing should be done that will make a successful reorganization less likely.

By way of preamble I will note that I am inclined to a broad view of proceedings under the CCAA. As I mentioned during submissions the court is involved in the process of trying to arrive at an economically sensible decision and that the strict lines that are often drawn in court proceedings are somewhat blurred. The paramount interest of all parties and the court must be to successfully conclude a reorganization wherein Quintette survives and wherein the various creditors lose as little as possible and retain the potential benefit of continuing to be suppliers and lenders to Quintette and thereby somewhat mitigate their losses.

In using the word "creditors" it is difficult not to so visualize CdFI. You will see, as my reasons go along, that on a common sense approach it would be a narrow and unrealistic approach to do otherwise. if CdFI was before the court as the applicant, setting forth its position as guarantor and asking for some role in these proceedings, it is difficult to visualize denying it status that allowed them to participate. Why then should it change if the shoe is on the other foot? It should not unless there is binding legal precedent against such participation. CdFI has put forth legal precedents and consequently I have approached this matter by trying to analyze the legal impediments and if they are not a bar then I will resort to the general philosophy which I have set forth.

The application by the lenders asks (a) that part of my order of June 13, 1990 that said:

"And this Court further orders that all creditors of the Petitioner be enjoined from making demand for payment upon the Petitioner or upon any guarantor of an obligation of the Petitioner until further order of this court";

Be amended to read:

"And this Court further orders that all creditors of the Petitioner be enjoined from making demand for payment upon the Petitioner save for the purpose of making a demand upon any guarantor of an obligation of the petitioner";

(b) A declaration that, for the purpose of voting on a Reorganization Plan as defined in the CCAA Order, Charbonnages de France international S.A. ("CdFI") be a member of the same class of creditors as the lenders but with no right to vote on any reorganization plan unless and to the extent that CdFI has, prior to any such vote, discharged its obligations to the lenders pursuant to the guarantee dated December 15, 1982 of the debts of the Petitioner granted by CdFI to the lenders (the "CdFI Guarantee");

(c) in the alternative, a declaration that, for the purpose of voting on any such Reorganization Plan, CdFI be a member of the same class of creditors as the lenders provided that, prior to any such voting, CdFI has discharged in full its obligation to the lenders pursuant to the CdFI guarantee; and

(d) A declaration that nothing in the CCAA order or any other order made in these proceedings including, without restriction, any order to be made herein approving any Reorganization Plan and nothing in any such Reorganization Plan, shall impair, alter or otherwise affect the rights of the lenders against CdFI and Charbonnages de France ("CdFI") and in particular, but without limitation, no such order or Reorganization Plan shall directly or indirectly reduce or diminish or have the effect of

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reducing or diminishing the amounts of the "obligations" as defined in the CdFI guarantee and in the guarantee dated January 4, 1983 of the debts of CdFI granted by CdF;

Subparagraph (d) of the Notice of Motion was not argued before me and is thereby adjourned.

On January 11, 1991 an application was made by the lenders to amend that order to allow them to make a demand on CdFI. At that time I ruled that a demand could be made on Quintette, but on the urging of counsel for Quintette I added that no demand could be made on CdFI until the Reorganization Plan had been voted upon. I put a time limit upon that and consequently ordered that the demand could not be made upon CdFI until either the Reorganization Plan had been voted upon, or April 12, 1991, whichever was earlier.

No party to these proceedings suggests that any trade creditor, that any lender, that the Japanese steel industry nor Quintette have proceeded in any way other than in an honest and straightforward manner to arrive at a reorganization. But I must observe that the protection that was given to CdFI in the earlier order was at the behest of Quintette and that it was based solely on their fear that CdFI would form a separate class for voting purposes. Counsel for CdFI offered to seek instructions softening their position and possibly answer this worry of Quintette. However, counsel for both Quintette and the lenders said that adjourning to obtain their clients' instructions would not resolve the matter as they were sure that the instructions sought would not result in a change of position by the lenders or Quintette. Indeed they quite forcefully put forth the position that an adjournment was simply one more step by CdFI to gain an advantage through the Companies' Creditors Arrangement Act proceedings. CdFI is seen as wanting to escape their obligations under the guarantees by taking advantage of the proceedings herein. Whether this is so is not for me to decide. While I view this procedure as one wherein the Court is a partner in the process of attempting to arrive at a solution, the role of the Court is somewhat uncomfortable in that when the crunch comes it is the Court that must make a decision that will be unpopular with at least one of the parties. The position of CdFI was that if I make any order of variation it will result in an appeal and that this in itself will cause delays and add to the chances of a compromise not being successful. This is a chance that I will have to take and I view this CdFI position as more of a threat than a constructive approach.

The lenders' first position is that CdFI is now a creditor of Quintette. This is based upon the proposition that a claim of a guarantor in a bankruptcy is a contingent claim that as such is provable in bankruptcy and that a link exists between bankruptcy legislation and the Companies' Credit Arrangement Act which extends this principle to proceedings within the Act.

I was referred to McGuinness in the Law of Guarantee, 1986. It is stated under "Principles in Bankruptcy" that:

"A surety is a creditor of the principle within the meaning of the Bankruptcy Act even prior to payment and even though his claim at that time is only contingent as he has not been called upon to pay."

The lenders referred me to Ex parte Read (1981) 1 QB 71. The reasons of Mr. Justice Vaughan Williams are contained at page 72 and I have taken them into account. Within those reasons he said:

"In my judgment, when once I arrive at that reason I must come to the conclusion that the word 'creditor' in Section 48 must mean a person who would be entitled to prove and to share in that distribution."

Paraphrasing further, Mr. Justice Vaughan Williams said that he thought that the word creditor means a person who at the date of payment would have had to come in and prove and rank with other creditors in a bankruptcy and:

"A surety would be such a person."

I will note two other cases supporting that general proposition: in Re Blackpool Motor Car Company Limited (1901), 1 Chancery 77, and Cuchuran vs. Dubitz (1945) 3 Western Weekly Reports 541. A case that received more attention in the hearing was in Re Froment vs. Alberta Department of Agriculture (1925) 3 DLR 377. There is at page 384 a paragraph which was particularly relied upon which commences by referring to the Bankruptcy Act of Canada. After making reference to the appropriate section in the legislation and referring back to historical bankruptcy acts, Mr. Justice Tweedie said:

"It is now established, notwithstanding the doubts expressed in In re Parrott (1891) 8 Morr. 49 that the contingent liability of a surety who has not been called upon to pay, or who has not in fact paid, forms a debt provable in bankruptcy of a principal debtor."

Finally on this point the lenders referred to Re Film House Limited (1974) 19 Canadian Bankruptcy Reports 231. That decision from the Supreme Court of Ontario referred to in Re Froment and Mr. Justice Holding in giving oral reasons said that:

"If the surety had paid off the bank, it would be entitled to receive the security in the possession of the principal creditor. And if this happened, there is no doubt that in voting the claim Section 90 would apply, and the surety would have to give credit for the security received from the principal creditor. The fact that it has not paid off the claim, when it is permitted to vote the claim by reason of the principal creditors election not to vote it, should not in my opinion affect the situation."

Counsel for the lender then linked these decisions to the Companies' Creditors Arrangement Act by way of Section 12.1. That section reads as follows:

"For the purposes of this act 'claim' means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy Act."

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The lenders say that if CdFI has a claim provable in bankruptcy then this makes the link and it has a claim under the CCAA.

Counsel for the lenders conceded that the major legal impediment to their position is by way of the finding of the Ontario High Court in Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd. (1969) 5 DLR (3rd) 374. The headnote reads as follows:

"Plaintiff, which had contracted with defendant for the sale of certain goods to be manufactured by defendant, was awaiting performance when defendant was placed into receivership by its secured creditors. The receiver having informed plaintiffs that defendant would not be performing the contract, plaintiff obtained alternative goods elsewhere at higher cost and brought this action for damages. Defendant pleaded the order of the Court confirming the compromise of defendant's obligations under the Companies' Creditors Arrangement Act, R.S.C. 1952, c. 54, which had not been appealed or collaterally attacked by plaintiff. Defendant's receiver admitted not having given notice of the meeting of creditors to plaintiff or any other persons having contracts with the defendant.

Held, plaintiff was not bound by the compromise, it appearing either that it was not a 'creditor' of defendant at the time the arrangement was made (being unaware that the defendant was going to repudiate its contract and thus having at best only a potential claim for unliquidated damages) or, in the alternative, that plaintiff was a creditor of a wholly distinct class which was not bound by the compromise because not given notice of it. Unlike the related (but distinct) federal statutes governing insolvency, the Companies' Creditors Arrangement Act does not contain an extended definition of the term 'creditor' which must therefore be construed in its common law sense as excluding persons with mere claims for unliquidated damages. A provision in the company's compromise, for the resolution of disputed unliquidated claims could hardly affect plaintiff's position when it was not given notice of the arrangement proceedings."

The lenders relied upon the following passages from the Reasons of Mr. Justice Parker:

"The first issue that I must decide is whether the plaintiff was an unsecured creditor as of January 17, 1965, under the Companies' Creditors Arrangement Act. The interpretation section of that Act [s. 2(g) (since repealed 1952-53, c. 3. s. 5)] provides:

(g) 'unsecured creditor' means any creditor of a company who is not a secured creditor, whether resident or domiciled within or without Canada.

No one claims that the plaintiff is a secured creditor.

Counsel for the plaintiff submitted that since no extended definition is given by the Companies' Creditors Arrangement Act to the word 'creditor', the common law definition should govern. Other statutes do give extended meanings to this word. For example, under the Bankruptcy Act, s. 2(h) provides:

(h) 'creditor' means a person having a claim, preferred, secured or unsecured, provable as a claim under this Act; (The italics are mine.) Under this Act you disregard the normal creditor-debtor relationship and look to what constitutes a provable claim. What is a provable claim is set out in s. 83(1) of the Bankruptcy Act:

83(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

So a contract not breached at the date of bankruptcy but repudiated before the discharge in which there is a possible claim for unliquidated damages would be a claim provable under the Bankruptcy Act and such a claimant would be a creditor under that Act.

The Winding-up Act has somewhat similar provisions and also contains an extended definition of 'creditor'. Section 2(3) reads:

(e) 'creditor' includes all persons having any claim against the company present or future, certain, ascertained, or contingent, for liquidated or unliquidated damages; and in all proceedings for determining the persons who are to be deemed creditors it includes any person making such claim."

The lenders noted that at the time of the judgment what is now Section 12 of the CCAA was included in Section 11. They say that this makes a significant difference, because Section 11 as it then was is concerned only with the "amount" of the claim. This is an important distinction. Mr. Justice Parker said:

"Once a creditor establishes his status under s. 3 of the Companies' Creditors Arrangement Act and the compromise is sanctioned by the Court under s. 5, then (my underlining) s. 11 applies to determine this amount."

He then quoted s. 11 and went on:

"This section clearly refers to amount. In the present case we are not concerned with the amount . . . ."

Section 11 as it then was commenced by stating that "the amount . . . shall be determined as follows" and then set forth what is now s. 12(1). Section 12(1) defines "claim" as any

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"obligation of any kind that, if unsecured, would be a debt provable in bankruptcy with the meaning of the Bankruptcy Act."

CdFI submitted that they are not a creditor. They based their argument upon the Quebec Steel case, in particular the remarks of Mr. Justice Parker commencing at page 377:

"The Farmers' Creditors Arrangement Act, R.S.C. 1952, c. 111, also defines who may be creditors under that Act, s. 2(e):

(e) 'creditor' includes a secured creditor and any person to whom a farmer owes any debt and includes the Crown, as well in right of any province as in right of Canada;

Section 2(2) provides:

2(2) Unless it is otherwise provided, expressions contained in this Act have the same meaning as in the Bankruptcy Act, and this Act shall be read and construed as one with the Bankruptcy Act, but shall have full force and effect notwithstanding anything contained in the Bankruptcy Act, and the provisions of the Bankruptcy Act and Bankruptcy Rules, except as in this Act or in the regulations otherwise provided, apply mutatis mutandis in the case of proceedings hereunder including meetings of creditors.

No such extended definition is contained in the Companies' Creditors Arrangement Act. Since Parliament carefully set forth the meaning it intended in the Bankruptcy Act, the Winding-up Act and the Farmers' Creditors Arrangement Act, it is difficult to presume that any such extended meaning was intended in the Companies' Creditors Arrangement Act. Had Parliament intended to give such an extended meaning to the word 'creditor' in the Companies' Creditors Arrangement Act it could have said so. No case was submitted to me where the Courts have given the word 'creditor' a wider meaning except where the meaning was extended by statute."

CdFI conceded that I am not bound by that decision, but said that it is persuasive authority. I am not convinced that if Mr. Justice Parker had the present placement (that is in Section 12 instead of Section 11) in front of him that he would come to the same decision. He preferred to resort to a common law definition of "claim" because he found that the definition in the CCAA was restricted to that section concerned with amount. The legislation has been amended and we must assume with purpose. The concepts of claim and amount are no longer tethered together. "Claim" is visualized with a future prospect i.e. "would be a debt" and in my opinion clearly envisages giving potential creditors a role in the CCAA proceedings. CdFI do not want a role and if that is their ultimate choice so be it. But as a matter of law it exists.

Furthermore Parker, J. had a situation wherein "The plaintiff did not know of the plan of compromise or the holding of a meeting to approve it. The defendant, having admitted the breach, now submits that the plaintiff was an unsecured creditor as of January 17th and, therefore, is bound by the compromise." This is a most significant factual difference to the case at bar wherein CdFI are informed, have received a benefit under the original order, have appeared, and want the continued protection with no offsetting obligations.

I must also consider that in the Northland Properties Limited cases and in the Court of Appeal of British Columbia in this case and in Chef Ready Foods Ltd. vs. Hongkong Bank of Canada, the courts have commented upon the purpose of the CCAA. It may be that this Court is taking a liberal approach to interpretation in favour of trying to arrive at an economically sensible result. That appears to be the approach of the courts in Western Canada which after all is the area responsible for the promulgation of the legislation in the first place.

In the case at bar an appeal was taken from my judgment dismissing an application by the Japanese steel industry for an order setting aside part of my order made on June 13, 1990. The appeal reasons were delivered by Mr. Justice Gibbs. They reinforce, in my mind, the considerations governing our approach to the Act. In the result I am convinced that it is illogical to consider CdFI anything other than a creditor for the purposes of the CCAA proceedings.

Quintette argued that it is unnecessary to make a determination whether or not CdFI is a creditor. They said this matter could be left open as long as there is a ruling that CdFI will be a member of the lender class if it becomes a creditor. I accept this submission and my ruling with respect to class is not dependent upon my decision that CdFI is now a creditor for the purposes of the CCAA.

The lenders and Quintette asked for an order that CdFI is in the same class as the lenders for the purposes of voting upon the plan pursuant to the provisions of the CCAA. CdFI said that they are not a creditor and therefore the Court has no jurisdiction to make any orders that affect CdFI. I am still struggling with the logic of that argument. Surely if this is correct then there was no jurisdiction in the Court to make that part of the June 13, 1991 order that protects CdFI from demands. Yet CdFI argued strenuously to protect that provision. I believe that the Court has jurisdiction to make orders that affect parties such as CdFI. Further, CdFI conceded that there is jurisdiction to define the class into which creditors fall and that if I find CdFI to be a creditor then the jurisdiction exists for its classification. It said that it is now premature to do this, but I reject that contention.

Quintette's position regarding the lenders is founded upon the classification of CdFI being the same as that of the lenders. The Japanese steel industry and the other major creditors take the same position. After months of negotiation all of these parties have concluded that, this would be a positive step toward arriving at an acceptable plan.

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Furthermore, it is obvious that if no demand is made upon CdFI then CdFI is not going to pay upon the guarantees. It follows that the lenders will prove the full amount of the indebtedness and CdFI will not be able to vote because of the principle of double proof. Therefore, as pointed out by Quintette, the issue of the class into which CdFI falls will not be determined. If a demand is made upon CdFI then it should be known into what class it will fall. If I do not determine the classification then I would be most reluctant to vary the order as requested. I do not think that the court should be so handicapped particularly in that it can as easily be determined now as later.

Quintette referred me to Savage v. Amoco Acquisition Company Ltd. (1988) 68 Canadian Bankruptcy Reports 154. It noted that this is not a decision made under the CCAA, but rather under the Business Corporation Act, and that it does not involve creditors, but it involves shareholders. But they nevertheless referred me to those portions of the Reasons of Mr. Justice Rerans as they appear commencing at page 195:

"It is then said for the preferred shareholders that they should be classed separately, or at least Class A and B preferred shareholders should be classed separately. The learned Queen's Bench judge directed a common meeting of all shareholders as a class but that the votes of preferred shares be recorded separately. He expressed concern that, otherwise, a very small group - the preferred shares represent less than two per cent of the holdings - would have a 'virtual veto'. Mr. Sternberg now assures us that his clients would not ask that the tail wag the dog in this way, as he says. He nevertheless wants us to direct that the preferred shareholders are a separate class. Mr. O'Connor supports the order on the ground that the recognition of the preferred shareholders as a separate class predetermines the issue to be decided at the approval hearing, that being whether in these circumstances their shares have value and should be granted a preference. He concedes, however, that a meeting could be held without necessarily declaring the shares to be a distinct class. Both counsel argue the psychological effect of these choices on the shareholders and on the public. We think that, at this stage, the least misleading alternative is not to disturb the order made. We note that, if, as Mr. Sternberg says, the preferred shareholders have things to discuss 'alone', they are quite capable of holding their own meeting. We think it was not an error to refuse to direct such a meeting not to refuse to create a separate class at the preliminary stage. We reject this ground of appeal."

In that passage it will be noted that the comment is, made by counsel that his client "would not ask that the tail wag the dog." What is being suggested here is that a $10 million guarantor should be put into a separate class thereby giving it significant power and possibly veto power over she proceedings. CdFI as a $10 million tail wants to be allowed to wag the $600 million dog.

I was also referred by counsel for Quintette to Norcen Energy Resources Limited v. Oakwood Petroleum Ltd. This is a judgment of the Alberta Queen's Bench at (1988) 72 Canadian Bankruptcy Reports page 20. That is a significant judgment in my mind on the question of classification and I will quote at length from that case and the following quotations commence at page 24:

"The very narrow issue which I must address concerns the propriety of classifying all the secured creditors of the company into one group. Counsel for Oakwood and Sceptre have attempted to justify their classifications by reference to the 'commonality of interests test' described in Sovereign Life Assur. Co. v. Dodd, [1892] 2 Q.B. 573 (C.A.). That test received the approval of the Alberta Court of Appeal in Savage v. Amoco Acquisition Co. 1988 ABCA 148 (CanLII), (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 87 A.R. 321, where Kerans J.A., on behalf of the court stated [pp. 264-65]:

We agree that the basic rule for the creation of groups for the consideration of fundamental corporate changes was expressed by Lord Esher in Sovereign Life Assur. Co. v. Dodd, [supra] when he said, speaking about creditors:

'. . . if we find a different state of facts existing among different creditors which may differently affect their minds and their judgments, they must be divided into different classes.'

In the case of Sovereign Life Assur. Co. Bowen, L.J. went on to state at p. 583 that the class:

'. . . must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'

To put the issue in another light, what I must decide is whether the holding of distinct security by each creditor necessitates a separate class of creditor for each, or whether notwithstanding this factor that they each share, nevertheless this factor does not override the grouping into one class of creditors. In my opinion, this decision cannot be made without considering the underlying purpose of the CCAA.

In Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., Calgary No. 8801- 14453, 17th November 1988 [now reported ante, p. 1, 63 Alta. L.R. (2d) 361], after canvassing the few authorities on point, I concluded that the purpose of the CCAA is to allow debtor companies to continue to carry on their business and that necessarily incidental to that purpose is the power to interfere with contractual relations. In referring to the case authority

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Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., 1934 CanLII 72 (SCC), [1934] SCR 659, 16 CBR 1, [1934] 4 DLR 75, I stated at pp. 24 and 25 [p.15]:

It was held in that case that the Act was valid as relating to bankruptcy and insolvency rather than property and civil rights. At p. 664, Cannon J. held;

'Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, 'bankruptcy' proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as 'insolvency proceedings' with the object of preventing a declaration of bankruptcy and the sale of these assets. If the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part, provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation . . .'

I went on to note:

The CCAA is an Act designed to continue, rather than liquidate companies . . . The critical part of the decision is that federal legislation pertaining to assisting in the continuing operation of companies is constitutionally valid. In effect the Supreme Court of Canada has given the term 'insolvency' a broad meaning in the constitutional sense by bringing within that term an Act designed to promote the continuation of an insolvent company. [emphasis added]

In this regard, I would make extensive reference to the article by Mr. Robertson, Q.C., where, in discussing the classification of creditors under the CCAA and after stating the proposition referred to by counsel for the Hongkong Bank and Bank of America, he states at p. 16 in his article:

An initial, almost instinctive, response that differences in claims and property subject to security automatically means segregation into different classes does not necessarily make economic or legal sense in the context of an act such as the CCAA.

And later at pp. 19 and 20, in commenting on the article by Mr. Edwards, he states:

However, if the trend of Edwards' suggestions that secured creditors can only be classed together when they held security of the same priority, that perhaps classes should be subdivided into further groups according to whether or not a member of the class also holds some other security or form of interest in the debtor company, the multiplicity of discrete classes or subclasses classes might be so compounded as to defeat the object of the act. As Edwards himself says, the subdivision of voting groups and the counting of angels on the heads of pins must top somewhere and some forms of differences must surely be disregarded.

In summarizing his discussion, he states on pp. 20-21:

From the foregoing one can perceive at least two potentially conflicting approaches to the issue of classification. On the one hand there is the concept that members of a class ought to have the same 'interest' in the company, out to be only creditors entitled to look to the same 'source' or 'fund' for payment, and ought to encompass all of the creditors who do have such an identity of legal rights. On the other hand, there is recognition that the legislative intent is to facilitate reorganization, that excessive fragmentation of classes may be counter-productive and that some degree of difference between claims should no preclude creditors being put in the same class.

It is fundamental to any imposed plan or reorganization that strict legal rights are going to be altered and that such alteration may be imposed against the will of at least some creditors. When one considers the complexity and magnitude of contemporary large business organizations, and the potential consequences of their failure it may be that the courts will be compelled to focus less on whether there is any identity of legal rights and rather focus on whether or not those constituting the class are persons, to use Lord Esher's phrase, 'whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest' . . .

If the plan of reorganization is such that the creditors' particular priorities and securities are preserved, especially in the event of ultimate failure, it may be that the courts will, for example, in an apt case decide that creditors who have basically made the same kinds of loans against the same kind of security, even though on different terms and against different particular secured assets, do have a sufficient similarity of interest to warrant being put into one class and being made subject to the will of the required majority of that class. [emphasis added]

These comments may be reduced to two cogent points. First, it is clear that the CCAA grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the

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> 'identity of interest' proposition as a starting point in the classification of creditors necessarily results in a 'multiplicity of discrete classes' which would make any reorganization difficult, if not impossible to achieve.
>
> In the result, given that this planned reorganization arises under the CCAA, I must reject the arguments put forth by the Hongkong Bank and the Bank of America, that since they hold separate security over different assets, they must therefore be classified as a separate class creditors."

I was also referred to Re Northland Properties Limited, the trial decision of Mr. Justice Trainor of this court at (1988) 72 Canadian Bankruptcy Reports 175 and the appeal decision at (1989) 73 Canadian Bankruptcy Reports 195. They have an impact on my thinking and I refer specifically to the Reasons of Chief Justice McEachern at pages 203 and 204. I also note that the Chief Justice adopted the words of Mr. Justice Forsyth in Norcen.

Quintette submitted that it is improper to create a separate class if no conflict of interest arises by having a specific party in a certain class. They said this applies to CdFI and that they simply fall into the shoes of the lenders possibly by subrogation and they should rank no better. In presenting this submission counsel for Quintette set forth some background as to the guarantees and I find it worthwhile to summarize that brief digest as given to me. It was stated that CdFI guaranteed the Tranche B debt of approximately $10 million U.S. and that other guarantors had satisfied their guarantees and that the Tranche A debt is for the balance to the lender of approximately $600 million U.S.

The CdFI guarantee is contained in a contract, but the lenders were not satisfied with the strength of CdFI, therefore, the lenders requested that CdF "guarantee the guarantee".

Counsel for Quintette said that normally if CdFI paid they would be subrogated to the rights of the lenders, but for CdF there is a separate subrogation contract, because whereas if the guarantor made payment there would be automatic subrogation, but if the guarantor of a guarantor pays there may be an argument as to this principle.

Mr. Tysoe noted that both contracts of guarantee have provisions that give rise to CdFI's claim for a separate class. If CdFI makes payment then they are not entitled to claim indemnity from Quintette until the lenders are paid the balance of the indebtedness, that is, the Tranche A debt. He referred to this as a "deferral" of the subrogation rights. He said that if there was no deferral and if CdFI was entitled to share equitably with the others than clearly they would be in the same class, consequently the Reorganization Plan as it is at this time specifically takes away the deferral provisions.

The lenders' submission is that:

> "At every stage of the process, including the classification of creditors, it must be borne in mind that the primary purpose of the CCAA is to facilitate reorganization."

The lenders then quoted from Norcen. The lenders further stated:

> "A tiny minority should not, if possible, be given a veto over a reorganization plan."

They then referred to Norcen and as well to the words of Mr. Justice Forsyth in Amoco and to the words of Mr. Justice Gibbs in the Quintette appeal to which I earlier referred.

The lenders further stated that:

> "To the extent possible, creditors should be bound by their pre CCAA arrangement as long as the CCAA proceedings cause no additional prejudice. Due to its subrogated rights, CdFI enjoy 'identity of interest" with the lenders. For CdFI to be in the same class as the lenders is not oppressive: It is precisely what CdFI bargained for.
>
> If CdFI were to form a separate class the 'minority veto test' would not be met. There would be a tyranny of the minority. The court should be vigilant in the exercise of its supervisory jurisdiction to ensure that such a situation does not arise."

CdFI submitted that they were clearly entitled to be a separate class, but their only foundation for this was the deferral aspect of the guarantees. I accept the submission of the lenders and the major creditors of Quintette and JSI and hold that CdFI shall at this time be part of the lender class.

The reasons for the protection clause in the earlier order have now been removed, it was there only because of the concern of Quintette as to the class to which a demand might place CdFI. A determination of the class into which CdFI falls has now been met. There is no objection to the variation from anyone other than CdFI who say that I had no jurisdiction to make the order in the first place. If I did have the jurisdiction to make it, then I have jurisdiction to vary it and I do and I vary it in accordance with the Part (a) of the application.

With respect to the class I make the variation in accord with Part (b) of the application.

(SUBMISSIONS BY COUNSEL)

Mr. Edgson and Ms. Adair have made a point on behalf of their clients with respect to potential prejudice to their clients. JSI drafted a paragraph which did not appear to meet with opposition. The position on that will have to be worked out and in that Mr. McAllister is not here it will be adjourned to come back before me as soon as possible, provided it cannot be resolved by consent.

"THACKRAY, J."

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Exception - Sec 19(2)

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

R.S., 1985, c. C-36, s. 19;
1996, c. 6, s. 167;
2005, c. 47, s. 131;
2007, c. 36, s. 69.

Determination of amount of claims - Sec 20

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, to be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

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Admission of claims - Sec 20(2)
(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.
R.S., 1985, c. C-36, s. 20;
2005, c. 47, s. 131;
2007, c. 36, s. 70.

Law of set-off or compensation to apply - Sec 21
21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.
1997, c. 12, s. 126;
2005, c. 47, s. 131.

Algoma Steel Inc. v. Union Gas Ltd., 2003 CanLII 30833 (ON CA) - Example of Law of Set-off, Legal and Equitable

Date:	2003-01-17
Docket:	C37904
Parallel citations:	63 OR (3d) 78; 39 CBR (4th) 5; 168 OAC 89
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COURT OF APPEAL FOR ONTARIO

WEILER, ROSENBERG and FELDMAN JJ.A.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 and THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, c. B-16

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT WITH RESPECT TO ALGOMA STEEL INC.

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

B E T W E E N:)
)

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ALGOMA STEEL INC.	)	James P. Dube
	)	for the appellant
Applicant	)	
(Respondent in Appeal)	)	
- and -	)	
UNION GAS LIMITED	)	Geoffrey R. Hall
	)	for the respondent
Respondent	)	
(Appellant in Appeal)	)	**HEARD: September 10, 2002**

On appeal from the order of Justice James M. Farley of the Superior Court of Justice dated December 10, 2001.

ROSENBERG J.A.:

[1] This appeal from an Order of Farley J. concerns the application of legal and equitable set-off in the context of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. On April 23, 2001, the respondent Algoma Steel Inc. obtained an initial order under the *CCAA*. At that time, Algoma was indebted to the appellant Union Gas Limited under two contracts (the 2000 contracts) for gas services in March and April of 2001 amounting to just under $2 million. At the same time, Algoma was entitled to a rebate from Union of approximately $2.2 million plus interest as a result of an overpayment for gas services in 1999. Union sought to set off amounts owed to it by Algoma against the 1999 rebate. The motions judge held that Union had not established a claim for legal set-off. He held that Union had made out a claim for an equitable set-off but only in relation to one of the contracts in the amount of $461,244. Because of various orders made in the *CCAA* proceedings this means that Union must pay the entire amount of the 1999 rebate less the $461,244 and is not entitled to payment of $1,265,934 owed to it under the 2000 contract. Union submits that the motions judge erred in refusing to allow legal set-off and, in the alternative, erred in limiting the scope of equitable set-off.

[2] In my view, the motions judge did not err with respect to legal set-off but did err with respect to equitable set-off. Accordingly, I would allow the appeal with costs.

THE FACTS

The relationship between Algoma and Union

[3] The facts are based entirely upon affidavits filed by two employees of Union. Algoma filed no affidavits and did not cross-examine the Union employees. I begin with a summary of the facts that lead to Algoma's entitlement to the $2.2 million rebate. In 1999, Algoma obtained gas on a buy/sell arrangement under which Algoma bought natural gas from a resource supplier (presumably in Western Canada) and sold the gas to Union. Union arranged for the transportation of the gas on its own account and then sold the gas back to Algoma in Ontario when it was needed. In 1999, the relationship between Union and Algoma was governed by a contract commencing November 1, 1998 and terminating on October 31, 1999. This contract was subject to automatic renewal for successive one-year periods.[1]

[4] Under the 1998 contract, Algoma was required to pay for the gas services in accordance with Union's rate schedule as approved by the Ontario Energy Board. These rates are based on many factors including projected costs of gas. If those projections are found to be either too high or too low following the end of a calendar year, Algoma may have either overpaid or underpaid Union. To track actual costs with projected costs, Union established deferral accounts for the various classes of customers. Algoma is in a Rate 100 class. As it happened, in 1999, Algoma and the other Rate 100 customers overpaid and were entitled to a rebate. However, Union could not repay its customers without approval from the Board. Union therefore made an application to the Board in which it proposed to pay the rebates to the customers. The total rebate for the Rate 100 class is just under $4 million. According to the affidavit of the Union employee, Algoma's share of the rebate "approximates $2.2 million". Algoma is also entitled to interest on the rebate accruing from January 1, 2000 at a rate set by the Board.

[5] In its July 21, 2001 decision, the Board approved Union's proposal. But instead of authorizing immediate payment, the Board directed Union to bring forward the balances in all of the year 2000 deferral accounts for review. In a

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further decision dated October 16, 2001, the Board directed Union to continue to hold the balances in the deferral accounts until the 2001 and 2002 rates are implemented and 2000 and 2001 deferral balances are disposed of. According to the Union employee's affidavit, this will not affect Algoma's rebate because it is not entitled to share in the 2000 and 2001 deferral accounts. By the time of the hearing before the motions judge, the Board had not yet indicated when Union could pay the rebate to its customers, including Algoma.

[6] I will now deal with the contracts that governed the Union/Algoma relationship when the *CCAA* orders were made. In 2000, Algoma changed its relationship with Union so that it no longer had a buy-sell arrangement. In October 2000, the parties entered into two new contracts. These contracts may conveniently be referred to as the 2000 gas services contract and the assignment agreement. Both contracts covered almost the same period; from November 1, 2000 to October 31, 2001 for the 2000 gas services contract and November 1, 2000 to November 1, 2001 for the assignment agreement. As a result of the new arrangement, Algoma no longer sold the gas to Union and repurchased it from Union in Ontario. Rather, Union assigned its right to access gas transportation capacity directly from TransCanada Pipelines Limited ("TCPL") through Union's contract with TCPL. Algoma thus paid TCPL directly. Importantly, however, if Algoma failed to pay TCPL for use of gas transportation capacity being accessed by it, Union was required to pay TCPL. Algoma was then required to indemnify Union.

[7] Under the 2000 gas services contract, Union continued to transport the gas from Union's metering station at the TCPL pipeline to the Algoma plant. That contract included this term:

> This agreement is contingent upon the TCPL Assignment Agreement which is attached as Schedule D and forms an integral part of this arrangement. In the event either of these agreements terminate, the other agreement shall also terminate, unless agreed to otherwise by the parties.

[8] As of the April 23, 2001 *CCAA* order, Algoma owed Union $461,244 under the 2000 gas services contract. Further, because Algoma failed to pay TCPL for gas transportation services obtained by Algoma under the assignment agreement, Union was obliged to indemnify TCPL in the amount of $1,265,934. It is these two amounts that Union seeks to set off against the 1999 rebate. As indicated, the motions judge only allowed Union to set off the former amount.

The *CCAA* Proceedings

[9] On April 23, 2001, Algoma obtained an initial order under the *CCAA*. As part of that order, the right of any claimant to assert, enforce or exercise any right of set-off or consolidation of accounts was stayed during the stay period. On November 9, 2001, while the stay period was still in force, Algoma obtained an order to authorize meetings of its creditors to consider its Plan of Arrangement, to establish a process for proving claims and for the subsequent barring of those claims in return for participating in the Plan. Under this order, an unsecured creditor that had not filed a proof of claim was deemed to have filed one in the amount as valued by Algoma. The creditor was then barred from making or enforcing any such deemed claim after December 12, 2001. Union did not file a proof of claim since it took the view that there was no net balance due from Algoma to Union once the 1999 rebate was factored in. Algoma denied that Union was entitled to a set-off and deemed Union's claim to be in the amounts of $461,244 and $1,265,934.

[10] As a result, on November 27, 2001, Union moved before Farley J. for a declaration that its rights of set-off referable to its dealings with Algoma up to April 23, 2001 were not affected by the *CCAA* proceedings. In this way, it sought to prevent its claims from being deemed to have been the subject of a proof of claim and then deemed to have been barred after December 12, 2001. Union relied upon s. 18.1 of the *CCAA*, which preserves rights of set-off. I will set out that section in full below.

THE REASONS OF THE MOTIONS JUDGE

[11] The motions judge noted that a condition for application of legal set-off is that the obligations must be debts, in the sense that they are liquidated amounts. After reviewing the Board rulings and various letters by Union to Algoma, the motions judge concluded that the 1999 rebate was not a liquidated amount. He noted that in the Union employee's affidavit the rebate "approximates $2.2 million". Further communications between Union and its Rate 100 customers suggested that there might not even be a rebate, depending on the decision of the Board. He therefore held that legal set-off had not been made out.

[12] As to equitable set-off, the motions judge held that the 2000 gas services contract was in substance a continuation of the 1998 contract. He concluded that there was a "close connection sufficient to ground equitable set-off as to the gas supply portion of the October 15, 2000 Agreement vis-à-vis any rebate which is authorized by the Board, but not any monies owing by Algoma to Union as a result of the November 1, 2000 Transportation Agreement." He therefore limited the equitable set-off as indicated above.

ANALYSIS

General Principles

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[13] Algoma does not dispute that the law of set-off applies notwithstanding the *CCAA* proceedings. Section 18.1 of the Act makes this clear:

> The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[14] Algoma does, however, submit that set-off claims should be carefully scrutinized where *CCAA* proceedings are underway because the effect is to give preference to certain creditors. As Rowles J.A. said in *Cam-Net Communications v. Vancouver Telephone Co.* 1999 BCCA 751 (CanLII), (1999), 71 B.C.L.R. (3d) 226 (C.A.) at 235:

> Using, or rather misusing, the law of set-off is one example of how persons with a claim against the company in reorganization might attempt to escape the CCAA compromise. A party claiming set-off ... realizes its claim on a dollar-for-dollar basis while other creditors, who participated in the CCAA proceedings, have their claims reduced substantially. For this reason, the legislative intent animating the CCAA reorganization regime requires that courts remain vigilant to claims of set-off in the reorganization context.

[15] I accept this principle, but I do not see it as a concern in this case. Union operates within a highly regulated regime and the disposition of the rebate is subject to scrutiny by a specialized tribunal. The amounts owing by Algoma to Union are not in doubt.

[16] There was some dispute between the parties about the standard of review by this court of the decision of the motions judge. Counsel for Union seemed to suggest that because there is no right of appeal in *CCAA* proceedings and appeals are relatively rare, it was open to this court to review the decision of the motions judge on a standard of correctness even where that decision turned on findings of fact and inferences to be drawn from those facts. In my view, the usual standard of review in appeal proceedings applies and this court is required to give deference to the findings of the motions judge even where, as here, the decision is based on a paper record. The fact that there is no right of appeal and the appeal is only with leave under s. 13 of the Act only reinforces that conclusion. Decisions in the *CCAA* context must often be made quickly. They are, as in this case, usually made by a judge with considerable expertise in the area who has been managing the *CCAA* proceedings and is intimately familiar with the context and the issues at stake.

[17] This court and the Supreme Court of Canada have variously described the standard of appellate review. In *Equity Waste Management of Canada v. Halton Hills (Town)* 1997 CanLII 2742 (ON CA), (1997), 35 O.R. (3d) 321 (C.A.) at 336, Laskin J.A. wrote as follows:

> Therefore, although the entire record before a trial judge or a motion judge consists of documentary or written evidence, as it does in this case, the judge's factual findings are entitled to deference on appeal. What standard of deference applies in such a case? It is not easy to articulate a standard less deferential than "manifest error" but falling short of "correctness". I suggest that it may simply be a matter of weight or emphasis, or that, plausibly, a uniform standard of appellate review should be applied to a trial judge's findings of fact, whether the evidence is entirely oral, entirely documentary or, more typically, a combination of the two.
>
> What is important for this appeal is the kind of error that justifies intervention by an appellate court. An error of law obviously justifies intervention. An appellate court may interfere with a finding of fact if the trial judge or motion judge disregarded, misapprehended, or failed to appreciate relevant evidence, made a finding not reasonably supported by the evidence, or drew an unreasonable inference from the evidence.

[18] More recently the Supreme Court in *Housen v. Nikolaisen* 2002 SCC 33 (CanLII), (2002), 211 D.L.R. (4th) 577, discussed at some length the standard of appellate review where the appellate court is called upon to review inferences from facts. The court concluded that the standard is one of considerable deference. Iacobucci and Major JJ. described the standard at para. 23 as follows:

> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. *If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.* The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems

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> from a difference of opinion over the weight to be assigned to the underlying facts [emphasis added].

[19] On the other hand, where the issue concerns application of a legal standard to a set of facts the question is one of mixed fact and law and a somewhat less deferential standard may be appropriate, although not the standard of correctness required for questions of law. This was described as follows at para. 28:

> However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: Southam, supra, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in Southam, supra, at para. 37:
>
> > ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. *In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact.* See R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future [emphasis added].

[20] It seems to me that this appeal concerns both inferences from facts and a question of mixed fact and law. The motions judge's decision about the application of legal set-off turned exclusively on the inferences to be drawn from the undisputed facts in the affidavits. His decision that Union had not shown the rebate as a debt was fact specific. Although Union argues that the motions judge overlooked important facts and misapprehended certain facts, I am not persuaded that the motions judge made any palpable or overriding error. To the contrary, I am satisfied that his decision is supported by the evidence.

[21] The decision about equitable set-off is somewhat different since it involves application of a legal standard to a set of facts. As such, it is a question of mixed law and fact. While the assessment by the motions judge is entitled to deference, I am nevertheless of the view that the motions judge erred in his application of the test for equitable set-off to these particular facts.

Legal Set-Off

[22] Section 111 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides the statutory framework for legal set-off. Subsections (1) and (2) provide:

> (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.
>
> (2) Mutual debts may be set off against each other even if they are of a different nature.

[23] The only question on the application of legal set-off in this case was whether the rebate was a debt for the purpose of s. 111. Union accepts that debt means a liquidated sum and argues that the rebate is a liquidated sum because the amount is ascertainable and, save for interest, can neither increase nor decrease. Union submits that the amount is ascertainable and fixed because the Board has accepted its proposal for calculating the amount of the rebate. It also relies on the affidavit evidence that Algoma's share of the rebate for Rate 100 customers will be unaffected by the adjustments for the years 2000 and 2001 deferral accounts.

[24] The motions judge, however, was not prepared to draw that inference from the affidavit evidence. He relied upon the fact that Union only provided an estimate of the rebate and his reading of the Board decisions that did not explicitly state that Algoma or any of the other customers would receive a rebate. He also relied upon Union's own communications to its Rate 100 customers that suggested the amount of the rebate was not fixed. In his submissions, counsel for Algoma pointed out a number of facts upon which the decision by the motions judge could rest and that could

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support the inferences drawn. Counsel pointed out that to overturn the decision of the motions judge, this court would have to be satisfied of the following:

> (1) That it was appropriate to sever off the interest part of the rebate, since the rate had not yet been set by the Board.
>
> (2) That no significance should be attached to the use of the term "approximate" in the Union employee's description of the amount of the rebate.
>
> (3) That no significance should be attached to the fact that Union had not provided an exact figure for the amount of the rebate.
>
> (4) That the communications by Union to Algoma and its other customers concerning the uncertainty of the amount of the rebate had no significance.
>
> (5) That there is no significance to the fact that the Board continues to prevent Union from releasing the rebate to Algoma; put another way, that the Board has no good reason for holding up disposition of the rebate.
>
> (6) That the amounts of the rebates cannot change as a result of events in 2002.

[25] I am not prepared to say that the motions judge's decision disclosed a palpable and overriding error. Since his decision is supported by the evidence, the evidence supplied by Union itself, this aspect of the appeal must be dismissed.

Equitable Set-Off

[26] Equitable set-off is available where there is a claim for a sum whether liquidated or unliquidated. In *Telford v. Holt* 1987 CanLII 18 (SCC), (1987), 41 D.L.R. (4th) 385 (S.C.C.) at 398-99, Wilson J., speaking for the court, approved a statement of the applicable principles for equitable set-off found in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* 1985 CanLII 144 (BC CA), (1985), 20 D.L.R. (4th) 689 (B.C.C.A.) at 696-97. Those principles can be summarized as follows:

> 1. The party relying on a set-off must show some equitable ground for being protected against the adversary's demands.
>
> 2. The equitable ground must go to the very root of the plaintiff's claim.
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract.
>
> 5. Unliquidated claims are on the same footing as liquidated claims.

[27] In one way or another the first three principles, but particularly the third, are in issue in this case. Put shortly, is the 1999 rebate from the 1998 gas services contract so clearly connected with the amounts owing under the 2000 assignment agreement that it would be manifestly unjust to enforce payment of the rebate without taking into account the amounts owing under the assignment agreement? The motions judge recognized that the assignment agreement was integral to the 2000 gas services agreement, but he refused equitable set-off for the amounts owing under the assignment agreement because it was not the same type of contract as the supply of gas by Union. In my view, this was not a sufficient reason to refuse equitable set-off given the interrelationship between the two 2000 agreements.

[28] Kelly R. Palmer in *The Law of Set-Off in Canada* (1993) traces the evolution of the doctrine of equitable set-off from a very strict test in which the "claim raised in set-off had to impeach the title of the plaintiff's claim" [at p. 89] to a somewhat more flexible approach based upon fairness. The leading cases describing, in some fashion, the more modern test are *Coba Industries*; *Telford* and *Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066 (C.A.) [affirmed on other grounds at [1979] A.C. 757 (H.L.)].

[29] It seems to me that a very helpful test is set out in a passage from the reasons of Lord Denning in *Federal Commerce* at p. 1078 and which was quoted with apparent approval by Wilson J. in *Telford* at p. 400:

> *We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties?* ... This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. *It is only cross-claims that arise out of the same transaction or are closely connected with it.* And it is only cross-claims which go directly to impeach the plaintiff's demands, *that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim* [emphasis added].

[30] In my view, there is such a close connection between the 2000 gas services contract and the 2000 assignment agreement, that the amounts owing on them cannot be severed for the purposes of equitable set-off. The assignment

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agreement is attached as a schedule to the 2000 gas services contract and in the event either of the agreements terminates, the other terminates, unless otherwise agreed to by the parties. The parties agreed in the 2000 gas services contract that it was "contingent upon" the assignment agreement and that the latter formed an integral part of the latter. Accepting the correctness of the motion judge's determination that the 1998 and 2000 gas services contracts exhibit a sufficient degree of connection to justify equitable set-off, it seems to me that it would be manifestly unjust to allow Algoma to insist on payment of the rebate arising under the former without allowing Union to set-off all the amounts owing under the 2000 arrangement.

[31] The relationship between the parties under the 2000 contracts is different than the relationship under the 1998 contract but they are in a sense nothing more than a successor arrangement to accomplish what had been done under the 1998 contract. Admittedly, under the 2000 assignment agreement, the underlying relationship was between TCPL and Union. Union only became entitled to collect from Algoma because Algoma failed to pay the charges that TCPL was entitled to collect from Union. Under the agreement, Algoma agreed to indemnify Union in those circumstances. However, there is a close connection between the 1998 contract and both of the 2000 contracts because they all, in one way or another, facilitate the supply of gas to Algoma.

[32] A helpful example is *Coba Industries*, which was approved by Wilson J. in *Telford.* Palmer describes the facts of *Coba Industries* at p. 133 of his text:

> Hp entered a sale and leaseback of property with the defendant, in the course of which Hp obtained a second mortgage over the property and granted a lease to the defendant. The lease payments were calculated to be sufficient to cover the mortgage payments. Hp assigned the mortgage to the plaintiff who notified the assignment to the defendant. When Hp fell into arrears on the lease, the defendant ceased making mortgage payments. The plaintiff sued for foreclosure, and was met with a claim for set-off.

[33] Macfarlane J.A., writing for the court in *Coba Industries*, found several facts that established the close connection necessary for equitable set-off. He wrote at p. 700:

> I think this evidence demonstrates that, from the outset, it was at the heart of any liability on the part of [the defendant] that [Hp] provide and assure payments under the leases sufficient to satisfy payments from time to time under both mortgages.

[34] The 1998 contract and 2000 agreements exhibit this kind of connection. Given that the motions judge found that it would be manifestly unjust not to permit Union to set off the amounts owing on the 2000 gas services contract, I conclude that it would be manifestly unjust to allow Algoma to enforce payment of the 2000 rebate without taking into account its liability to Union under the assignment agreement, which formed an integral part of the arrangement between the parties.

DISPOSITION

[35] Accordingly, I would allow the appeal with costs on a partial indemnity basis. In accordance with the written submissions of the parties, costs are fixed at $33,111.29.

Signed: "M. Rosenberg J.A."

"I agree K.M. Weiler J.A."

"I agree K. Feldman J.A."

RELEASED: "KMW" JANUARY 17, 2003

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[1] Although not stated explicitly in the affidavits, it appears that the contract did renew for a further year.

Blue Range Resource Corp. (Re), 1999 ABQB 1038 (CanLII) - Set-off for Damages of Termination of Creditor-Debtor Contract

Date: 1999-06-18

Docket: 9901-04070

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Re Blue Range Resource Corporation, 1999 ABQB 1038

Date: 19990618
Action No. 9901-04070

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BLUE RANGE RESOURCE CORPORATION

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE S.J. LoVECCHIO

INTRODUCTION

[1] This decision relates to the applications for advice and directions brought by three gas marketing companies regarding their dealings with Blue Range Resource Corporation. Blue Range is subject to an Order dated March 2, 1999, under the *Companies' Creditors Arrangements Act*[1].

BACKGROUND

[2] Blue Range is a producer of natural gas. It holds leases for natural gas producing properties and over the years entered into a number of long term natural gas supply agreements with various gas marketing companies. Among these companies are Engage Energy Canada, L.P., Duke Energy Marketing Limited Partnership and CanWest Gas Supply Inc.

[3] On March 2, 1999, Blue Range petitioned the Court and was granted an order staying proceedings against it pursuant to section 11 of the CCAA. PricewaterhouseCoopers was named the Monitor for Blue Range under the Order. Certain provisions of that Order are germane to this application. They are:

> **3. b.** all Persons having arrangements or agreements, written or oral, with Blue Range for the supply of goods and/or services by or to Blue Range...are hereby restrained from accelerating, terminating, suspending, modifying or cancelling any such agreements, arrangements or supply of goods and services, and are also hereby restrained from exercising any right of distress, recission, set-off or consolidation of accounts in relation to any indebtedness or obligation in favour of Blue Range...without the prior written consent of Blue Range ...or leave of this Honourable Court.
>
> **c**. notwithstanding subparagraph 3(b) hereof, this Order shall not prohibit any party to an "eligible financial contract" (as defined in section 11.1(1) of the CCAA), which contract was entered into before the date of this Order, from terminating, amending or claiming an accelerated payment under such eligible financial contract and setting off the obligations between Blue Range and such other party in accordance with its provisions, provided that if the "net termination value" (as defined in section 11.1(1) of the CCAA) determined in accordance with the eligible financial contract is owed by Blue Range to another party to the eligible financial contract, the other party shall be deemed to be a creditor of Blue Range with a claim in respect of that net termination value;
>
> **16.** Blue Range shall have the right to:
>
> **a.** ...

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> **d.** proceed with an orderly liquidation of such of its Property as Blue Range deems appropriate... provided that any sale of any real or personal property outside the ordinary course of business... shall require... the approval of the Court;
> **e.** terminate such of its arrangements or agreements of any nature whatsoever, including without limitation contracts for the purchase or sale of commodities, marketing agreements, transportation agreements, and service agreements, whether oral or written, as Blue Range deems appropriate and to make provision for any consequences thereof in the Plan (as hereinafter defined),
>
> all of the foregoing to permit Blue Range to proceed with an orderly restructuring of its business, property and affairs (the "Restructuring").
>
> **17.** In order to facilitate the Restructuring, Blue Range shall be permitted to carry on its business in the manner and to the extent determined by it, to dispose of any or all of its inventory and other assets, all subject to paragraph 16(d) hereof, wherever situate, and, for greater certainty, Blue Range shall have the right to realize upon its assets in such manner as Blue Range deems suitable or desirable for the purpose of maximizing the proceeds and recovery therefrom.

[4] As part of a restructuring plan, Blue Range may sell certain of its petroleum leases the lands and reserves under which were "dedicated" to the supply of natural gas under the aforementioned long term natural gas supply agreements.

[5] Some of the agreements provide for the sale of natural gas at prices below today's spot prices for natural gas. As such, the leases might command a higher price if they were sold after the existing contractual supply obligations had been terminated and Blue Range called for bids for the leases based on that assumption.

[6] After supplying natural gas in accordance with the terms of the existing contractual supply obligations for both February and March, on March 31, 1999, Blue Range terminated some of its natural gas supply contracts as permitted by paragraph 16.e of the Order including those with Engage, Duke and CanWest.

[7] While the precise terms of the various contracts may differ slightly, it is generally the case that the payment for a month's supply of natural gas becomes payable on the 25th day of the following month. Thus the payment for the February supply of natural gas was due on March 25th and the payment for the March supply of natural gas was due on April 25th.

[8] At the time of the hearing, Duke and Engage had not paid Blue Range for February or March. Duke has, however, reserving its right to argue set-off, paid the amount owing for its February delivery to the Monitor. Engage, while permitted to pay on the same basis, did not. No indication was given at the hearing how Duke or Engage would deal with the payment for March deliveries. The principles of this decision would however be applicable to that payment as well.

[9] Payment to the Monitor on this basis had been authorized by the Court pursuant to an order dated March 25th, 1999. The purpose for permitting this mode of payment was twofold. It was to prevent Blue Range from arguing that the creditor was in default for non-payment of natural gas which had been delivered thereby giving termination rights due to that fact and, at the same time, to protect the funds paid by the creditor while the issue of set-off was being decided by the Court.

[10] All of the companies may suffer substantial losses as a result of the termination of the existing natural gas supply contracts as, prior to the termination of the agreements, they had the right to purchase natural gas below the current spot market price for natural gas and that natural gas will have to be replaced by purchases of natural gas at prices that at present are higher.

THE APPLICATIONS

[11] The different companies have made a number of applications with respect to the March 2nd Order. These applications were all made before Blue Range terminated the agreements.

[12] Engage and CanWest have each applied for a declaration that, if any of the leases which are dedicated to their respective supply contracts are sold, the terminations of the contracts are to be declared ineffective with the corresponding result that the leases will remain subject to the pricing provisions and the "dedication" contained in the agreements.

[13] In the alternative, Engage and CanWest, joined by Duke, seek a variation of the stay order such that Blue Range would be able to terminate the contracts only on certain conditions. The conditions sought being that Blue Range could only terminate if it was incapable of performing them or that termination is essential to the success of the restructuring.

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[14] Duke and Engage have also each applied for an order permitting them to set-off the damages that they anticipate suffering, as a result of Blue Range terminating the supply contracts, against the payments due to Blue Range for the February and March deliveries of natural gas.

[15] Lastly, Engage and Duke seek to have their respective agreements declared "eligible financial contracts" as defined in the CCAA. This last issue, however, has been adjourned with the agreement of all of the interested parties. This decision is predicated on the assumption that the contracts in question will not be considered "eligible financial contracts".

ISSUES

[16] The relief sought by the various applicants gives rise to three main issues.

(1) Should the "dedication" of the natural gas reserves contained in the pre-existing natural gas supply contracts be found to be an interest running with the land thereby giving rise to an encumbrance on the leases which Blue Range listed for sale?

(2) Have CanWest, Engage and Duke satisfied the Court that it is appropriate to vary the Order such that Blue Range should only be permitted to terminate the contracts if Blue Range is found to be incapable of performing them or that termination is essential to the success of the restructuring?

(3) Should Engage and/or Duke be entitled to set-off their anticipated damages for non-delivery against the payments that they owe for the natural gas deliveries of February and March?

DECISION - ISSUE (1)

[17] For the reasons which follow, the "dedication" of the natural gas reserves contained in the pre-existing natural gas supply contracts does not, in the circumstances of this case, constitute an interest running with the land thereby giving rise to an encumbrance on the leases which Blue Range listed for sale.

DISCUSSION

[18] Counsel for CanWest conceded in argument that the natural gas supply contracts in question do not contain the type of words which would normally be associated with either the creation of a security interest or the creation of an interest in land with the result that the entire foundation for their argument is based on the legal interpretation to be given to the word "dedicate" in the contracts. Counsel also candidly agreed that there are at present no authorities in support of the legal position they postulate.

[19] The word "dedicate" appears in a slightly different way in the various agreements filed in these proceedings. CanWest provided the various relevant provisions in Exhibit A to the Affidavit of Janet Vellutini.

In certain of the contracts, the following appears:

> "Seller herein agrees to dedicate Seller's share of the Remaining Recoverable Reserves to Buyer and Buyer herein agrees to accept such reserve dedication from Seller".

In seven of the nine contracts, the following appears:

> "3. The Assignee [Blue Range] covenants and agrees with CanWest that it now owns and possesses a right, title, interest and estate in the lands and leases formerly owned by the Assignor and dedicated to the Contract(s) as set out in the attached Schedule "A"."

In one of the contracts, the following appears:

> "Seller shall dedicate sufficient lands and gas reserves in the Silver area attached hereto as Schedule "A", ..."

[20] The ordinary meaning of the word dedicate, according to the Canadian Oxford Dictionary (1998, Oxford University Press, Toronto) includes:

b. commit, contribute, or set apart resources etc. for a particular cause or effort.

This word does not connote a transfer or assignment of an interest. Use of a word which connotes these elements would be more indicative of an intention to create an interest in land. In my view, the word "dedicate" alone, without more, should not be seen as creating anything other than a contractual covenant in favour of the other party to the contract.

[21] This word connotes to me only an intention by Blue Range to give an assurance of its ability to perform. By dedicating or setting apart reserves, Blue Range provides comfort to CanWest and the others that it has sufficient reserves so that it will be in a position to perform several years into the future.

[22] The necessity for and the value of a covenant of this nature would depend on the particular circumstances. If CanWest were dealing with a company that had very significant volumes of proven and probable reserves and the contracted volumes of CanWest were very small relative to those reserves, then the necessity for such a covenant might be diminished. On the other hand, if CanWest were dealing with a producer whose volumes of proven and probable

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reserves were not as significant and the contracted volumes represented a significant portion of those reserves then the value of or comfort gained by such a covenant might be increased.

[23] I make this observation as, in my view, there is nothing in our law which would prevent the parties if they so desired from using words which would manifest an intention to create an encumbrance in appropriate circumstances thereby giving more than mere comfort from the assurance.

[24] This situation is not unlike that in **Scurry-Rainbow Oil Ltd. et al. v. Galloway Estate**[2] in which Hunt J., as she then was, decided that certain royalty interests could amount to interests in land but that it depended on the specific language used. The case was appealed[3] and the Court described her analysis at page 69 as follows:

> ...Firstly, having concluded that the retention of the right of reversion in a give P.& N.G. lease could amount to an interest in land, she held that she then had to look at each of the subject leases to see if in fact that had been done;
>
> ...We find no reversible error in the learned trial judge's analysis...

[25] Moreover, according to Paragraph 15 of the Affidavit of Janet Vellutini of CanWest, eight of the nine CanWest contracts contain a restriction on assignment identical or similar to the following provision.

> Each party undertakes to the other party that it shall not assign this Agreement or any of its rights hereunder without the consent in writing of such other party, which consent shall not be withheld, if the proposed assignee undertakes in form satisfactory to such other party that each of its rights acquired by such assignment is subject to the rights, title and interest of such other party herein set forth.

Paragraph 16 of that same Affidavit says that six of the contracts contain a specific restriction on Blue Range disposing of its interest in the petroleum and natural gas leases covered by the Contracts identical or similar to the following provision:

> Seller's undertaking to sell Raw Gas (as set forth in Article VI hereof) is subject to the following reservations:
>
> > e. the right to dispose of Said Lands, or any part thereof, provided that such disposition is made subject to this agreement...

Only one of the nine contracts does not have such a provision. It apparently provides that Blue Range "can assign with consent if all lands [are] acquired"[4]. CanWest argues that these provisions are consistent with an intention to create an interest in land.

[26] In my view, these provisions do not assist their argument. Really, the contrary is true. If the word dedicate were found to constitute a legal encumbrance running with the land, there would be no need to have such covenants restricting assignment without consent or requiring a purchaser to honour the covenant. The later requirement, which is contractual in nature, indicates to me that the parties understood such a purchaser would not be so bound without specifically agreeing to be bound.

[27] As I said, I would not view the use of the word "dedicate" alone as manifesting such an intention but I see no reason why such an interest could not be created in appropriate circumstances by the use of appropriate language.

[28] Counsel referred me to the case of **Bank of Montreal v. Dynex Petroleum Ltd.**[5], where Rooke J. decided that royalty and net profit interest holders, whose rights were granted by a petroleum lessee, did not have interests in land. At page 70 he concluded that:

> ...the requirement for an interest in land, as held by a number of authorities and jurists in this jurisdiction and the Supreme Court of Canada, is, in simple language, that, as a matter of law, *a lessee of an oil and gas lease (which is a profit a prendre), which is in itself an interest in land, obtained from a lessor (whether the Crown or freehold), cannot in law pass on an interest in land to a third party.*[emphasis added]

[29] Applying that logic to this situation, the interest which the applicants want me to conclude that the parties intended to create could not have been created. As I have decided that, regardless of the principles in the above passage, the language of the instrument was insufficient to establish an intention to create an interest in land, I need not consider the application of the **Dynex** case to this case. That argument will be left for another day.

DECISION - ISSUE (2)

[30] For the reasons which follow, CanWest, Engage and Duke have not satisfied the Court that it is appropriate to vary the Order such that Blue Range should only be permitted to terminate the contracts if Blue Range is found to be incapable of performing them or that termination is essential to the success of the restructuring.

DISCUSSION

[31] CanWest and Engage have applied in the alternative, and they are joined in this argument by Duke, for an order either deleting entirely or amending accordingly clause 16.e of the March 2nd Order such that Blue Range would be

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prevented from terminating any of the applicable contracts without satisfying the Court that certain conditions have been satisfied.

[32] In view of my decision on the first issue, this second issue must be addressed in the context of the contracts being ordinary contractual arrangements between the marketing companies and Blue Range.

[33] The Applicants submit that it is unfair for Blue Range to be permitted to terminate its contracts pursuant to the March 2nd Order, when Blue Range has the natural gas to deliver and is capable of performing the contracts. The only rationale for allowing Blue Range to terminate the contracts, they say, is because they are below market and, as a result, Blue Range could increase its cash flow by selling natural gas under new contracts at today's higher rates.

[34] CanWest also submits that section 11 of the CCAA does not allow the Court to permit a debtor company to terminate contracts as part of a stay order.

[35] On the other hand, Blue Range's position, and it is shared by the Banks, is that the termination of the contracts should not be prevented as it is crucial to the reorganization of Blue Range.

[36] The purpose of the CCAA proceedings generally and the stay in particular is to permit a company time to reorganize its affairs. This reorganization may take many forms and they need not be listed in this decision. A common denominator in all of them is frequently the variation of existing contractual relationships. Blue Range might, as any person might, breach a contract to which they are a party. They must however bear the consequences. This is essentially what has happened here.

[37] A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16 .e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.

[38] The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathise with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route.

[39] As I said, one of the objectives of the CCAA is to provide relief to a beleaguered company from its obligations to individual creditors and to allow the detrimental repercussions of that relief to be dealt with as equitably as possible under a court approved plan.

[40] I will now turn briefly to CanWest's suggestion that the Court has no jurisdiction to countenance the termination by a debtor of its contracts. This is not the first time that such a provision has been included in a section 11 stay order.

[41] In **Re Dylex Limited**[6] Farley J. upheld an order which authorised the debtor to break a number of retail leases in shopping malls under which it was the tenant. Farley J. considered the equities of the situation and had regard to the relative commercial stamina of the parties before saying at p.110:

> I am therefore of the view that in weighing the balancing of interests in a CCAA context, the nod should continue to be given to Dylex which is in a precarious position as opposed to Cambridge which is in a sound financial condition...
>
> It is clear that s.11 of the CCAA gives the power to the court to sanction a plan which includes the termination of leases as part of a debtor's plan of arrangement... In the interim between the filing and the approval of a plan, the court has the inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan.

[42] The termination of these contracts by Blue Range, as an adjunct to the disposition of the leases on favourable economic terms, is necessary to the company's survival program and I am satisfied that the Court has the necessary jurisdiction to permit termination. As to the broad discretion of the Courts under section 11 of the CCAA, reference should also be made to the discussion under Issue (3).

[43] I will now consider the set-off arguments.

DECISION - ISSUE (3)

[44] For the reasons which follow, Engage and/or Duke are not entitled to set-off their anticipated damages for non-delivery against the payments that they owe for the natural gas deliveries of February and March.

DISCUSSION

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[45] Engage and Duke seek to vary the March 2nd Order to allow them to set-off the payments that they owe for February and March, 1999, against anticipated damages arising from Blue Range's future non-performance.

[46] Factually the cases of the two companies vary slightly because Duke paid the amounts owing into court on the understanding that it would preserve its right to argue set-off and Engage did not.

[47] Further, the Duke contracts provided for the setting-off of anticipated damages from supply replacement against delivery payments upon receiving notice of the anticipated supply failures. The relevant clause of that contract is 6.1(g) which reads:

> (g) Any Alternate Gas Supply Damages payable hereunder shall be paid by Seller to Buyer on the 25th day of each month following the month in which they were incurred. The amount of Alternate Gas Supply Damages properly payable by Seller to Buyer hereunder may be offset by Buyer against amounts payable by Buyer hereunder as contemplated in Section 11.3....

[48] Additionally, the Engage contracts provided for a period of delay after non-payment for supply before the expiration of which Blue Range could not terminate the agreements for non-payment.

[49] Section 18.1 of the CCAA provides that the law of set-off applies to claims by and against the debtor company. It reads:

> **18.1.** The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[50] This section was added in 1997 by *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*[7]. It is clear from the wording of this passage that it neither prohibits nor requires the setting-off of obligations by a Court but merely states that the law of set-off, with its usual implications, applies to debtor companies. It is necessary then, to look to the principles of set-off in general.

[51] **Quintette Coal Limited v. Nippon Steel Corporation**[8] is one of the most helpful cases dealing with set-off in a CCAA context. In that case, the debtor company owned a coal mine which sold coal to a Japanese steel conglomerate. The conglomerate was the sole purchaser of the coal generated by the mine which would otherwise not have been an economic facility. Following a demand for payment of a debt to the conglomerate, the debtor company received CCAA protection with a stay order that, amongst other things, specifically prevented the Japanese conglomerate from exercising rights of set-off.

[52] The conglomerate was owed approximately $46 million as a result of favourable decision on a retroactive pricing arbitration and sought to set-off this amount against payments for coal deliveries, some already received and some yet to be received.

[53] On an application to vary the specific prohibition and thus allow set-off, Thackray J. of the British Columbia Supreme Court stated:

> Nor do I accept the proposition that the order forces an overpayment by J.S.I. for future coal deliveries. They are obliged to pay, and Quintette is obliged to accept, a price set pursuant to the arbitration award or any variation thereof pursuant to any appeal of that award [the damages owed by the debtor co]. The award has created a debt owed by Quintette to J.S.I. and I see that as completely distinguishable from the debts incurred by J.S.I. for future coal deliveries.
>
> Mr. G. Muench, in his short but able presentation, said that he could not see why J.S.I. should be treated any differently than any other creditor of Quintette. In spite of the able arguments of Mr. McAlpine, neither can I.[9]

The reasoning underlying this decision also emerges from the following passage:

> Unless there is a sound legal principle for doing so, I must not carve out one portion of the order and give an advantage to one creditor over another[10].

[54] The British Columbia Court of Appeal[11] affirmed the decision of Thackray J. One of the issues on the appeal was whether the power to stay set-off rights was granted to a Court by section 11 of the CCAA. The Court held that it was and relied upon the wide discretion conferred upon the Courts to achieve the CCAA's purpose of holding creditors at bay to assist a debtor company in surviving as a going concern.

[55] Counsel for Duke and Engage argued that section 18.1 came into being after the **Quintette** decision and that it therefore brings the continued usefulness of the decision into question. While I am inclined to agree with Thackray J. in the B.C.S.C. decision that allowing set-off runs contrary to the purpose of the CCAA by unfairly subordinating the rights of other creditors, I do not, in view of section 18.1, consider that reason as a ground for this decision.

[56] Parliament has specifically mandated that, notwithstanding the well known purpose of the Act as a whole, namely to share amongst all of the creditors the asset shortfall, the general law of set-off is to apply to debts owed or claimed by the debtor company.

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[57] That this is the appropriate way to approach the problem is supported by the analysis of the Ontario Court of Appeal in **Re Citibank Canada and Confederation Life Insurance Company in Liquidation et al.**[12]. In that case, a company sought to set-off against amounts owed by it to a debtor company in liquidation under the *Winding Up Act*[13] part of the debtor's liability to it arising from the termination of certain swap agreements.

[58] While the *Winding Up Act* provided for set-off, it is clear that the Court had the same reservations as are expressed here about effectively granting priority to one creditor over the other creditors.

The Court stated:

> "Citibank seeks a set-off to have the moneys owing to it paid in full and, in the process, reduce its indebtedness. Citibank would thereby gain a distinct advantage over the other creditors who must stand behind the policy holders and wait to recover pari passu in accordance with the priorities established under the Act. There would be little, if any recovery for the other creditors.
>
> Section 73 of the Winding Up Act preserves the right of set-off on a winding up. It provides as follows:
>
> > 73. The law of set-off, as administered by the Courts, whether of law or equity, applies to all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company, in the same manner and to the same extent as if the business of the company was not being wound up under this Act.
>
> A right of set-off can arise by agreement, at law or in equity...There is no question of an agreement to set-off in this case. Further, Citibank concedes on this appeal that it cannot meet the test for equitable set-off...Therefore, the question is whether there can be set-off at law"[14].

[59] The Court of Appeal held that there could be no legal set-off as the claims were not sufficiently certain to be liquidated claims. What is important to note is that, notwithstanding the same policy concerns as to priority, where the legislation had mandated the applicability of the law of set-off, the Court proceeded to consider whether the claim for set-off should be allowed in the circumstances of the case.

[60] Blair J. who heard the application in first instance[15] also discussed the effect of set-off on priorities. After quoting section 73 of the *Winding Up Act*, Blair J. said at paragraph 29:

> "This provision - along with a similar (although not identical) provision in section 97(3) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as amended - preserves the law of set -off as administered by the courts, in such insolvency situations. In this fashion set-off becomes the policy mechanism whereby the competing "equities" emerging from the dilemma outlined at the beginning of these reasons are balanced.
>
> In insolvency situations, set-off provides a creditor with an advantage which other creditors, ranking pari passu except for the set-off, do not have. It puts the advantaged creditor in what is tantamount to a secured position, something which was not a part of the bargain with the insolvent company in the first place. On the other hand, there is an inherent unfairness where a debtor/creditor is required to pay the liquidator everything that is legitimately owed to the insolvent company but is only able to collect a fraction of what is equally legitimately owing by the insolvent company, if anything".

[61] The Court concluded that the legislature had resolved this issue in favour of the application of the general law of set-off and proceeded to apply the law. With the advent of section 18.1 of the CCAA, the same answer holds in this case and I am bound to consider the question of set-off without reference to the policy concern of potentially creating priorities between various creditors.

[62] Counsel on all sides rely upon the same authorities and there appears not to be any disagreement as to the principles upon which determinations of set-off are made. It is not contended that legal set-off is available in this case as the claims to be set-off are unliquidated.

[63] Conversely, "equitable set-off is available where there is a claim for a money sum whether liquidated or unliquidated"[16]. With respect to equitable set-off, Counsel refer to the Supreme Court of Canada's application of the law of equitable set-off as found in **Telford v. Holt**[17]. In that case, two parties exchanged two parcels of land and granted each other mortgages with the difference to be set-off and netted-out. However, before closing, one party assigned its mortgage to a third party who subsequently foreclosed on the property and sought to enforce the entire amount of the mortgage.

[64] The Supreme Court found that equitable, but not legal, set-off applied to the claim. I note that that case and the authorities discussed therein are concerned primarily with the application of equitable set-off to situations in which one of the two parties to a contract (usually a mortgage) has assigned its rights under that contract to a third party.

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[65] Counsel for both the Banks and for Duke refer to five enumerated principles found at page 398 of that case as standing for the state of the law of equitable set-off.

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: **Rawson et al. v. Samuel** (1841), Cr. & Ph. 161, 41 E.R. 451.
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [**Br. Anzani (Felixstowe) Ltd. v. Int'l Marine Mgmt (U.K.) Ltd.**, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063]
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim: [**Federal Commerce & Navigation Ltd. v. Molena Alpha Inc.**, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: **Bankes v. Jarvis**, [1903] 1 K.B. 549 (Div.Ct.); **Br. Anzani**.
> 5. Unliquidated claims are on the same footing as liquidated claims: [**Nfld. V. Nfld. Ry. Co.** (1888), 13 App.Cas. 199 (P.C.)].

[66] I should point out that those principles appeared in the Court's discussion of prior cases as part of a quote from the British Columbia Court of Appeal's decision in **Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.**[18].

[67] Nevertheless, both counsel contend that it is a correct statement of the law to be applied to the issues at hand and I concur. The Court decided that the debts should be set-off since they arose out of the same contract or closely interrelated contracts such that it would be unfair to enforce only one side of the land exchange agreement[19].

[68] It is clear that the overriding concern for a court faced with an application for equitable set-off is fairness whether it be formulated as "manifestly unfair[20]", "unfair[21]", "unjust and unreasonable[22]", "unconscionable[23]" or as any of the other descriptions that have been invoked in support of the doctrine's application.

[69] Counsel for Duke favours the formulation found in **British Anzani (Felixstowe) Ltd. v. Int's marine Management (U.K.) Ltd.**[24] in which Forbes J. stated at p.1076 that:

> "It would in my view be manifestly unjust to allow the landlord to recover his rent without taking into account the damages which it is alleged the tenant has suffered through failure by the landlord to perform his part of the agreement".

Spry, *The Principles of Equitable Remedies* fifth ed. (1997, Carswell, Agincourt) at p. 173 introduces the topic of equitable set-off with the following words at page 173:

> ...To decide that there is an equitable set-off is to decide that, on grounds that are set out hereunder, it would be unjust to order the specific enforcement of a particular obligation without lessening or reducing it by reference to a related obligation of the plaintiff to the defendant or making specific enforcement conditional on performance of that related obligation.

[70] A passage from the fourth edition is quoted by the Alberta Court of Appeal in **420093 B.C.Ltd. v. Bank of Montreal**[25].

[71] The case was predominantly concerned with the operation of the doctrine of res judicata and the Court decided that if the claims could have been raised as matters of equitable set-off, the claims were res judicata. The Court, did, however, at page 500 make the following comments by way of *obiter dicta*:

> The nature of equitable set-off is explained in I.C.G. Spry, *The Principles of Equitable Remedies,* 4th ed. (Toronto: Carswell, 1990). After observing that it is not sufficient to assert an unrelated cross-claim or even to plead a claim which arises out of the same transaction as the plaintiff's claim, the author states at p. 174:
>
> > What must be established is a relationship between the respective claims of the parties which is such that the claim of the defendant has been brought about by, or has been contributed to by, or is otherwise closely bound up with, the rights that are relied on by the plaintiff and which is also such that it would be unconscionable that he should proceed without permitting a set-off. Thus if conduct of the plaintiff is such as to induce the defendant to incur an obligation in favour of the plaintiff, and the conduct itself is fraudulent, negligent or otherwise wrongful so as to give a cause of action to the defendant, the plaintiff is not ordinarily permitted to proceed until he has made good the material claims of the defendant.
> >
> > In other cases also it will, where appropriate, be held that an equitable set off lies, provided that it appears that the claim of the defendant does in truth impeach that of the plaintiff, for the application of the principles that are here in question should not be

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> arbitrarily restricted. Thus the better view is that this category of equitable set-offs extends to cases where a relevant claim is, not for a sum of money, but for the possession of property or some other non-pecuniary item.

In **Bank of Boston Connecticut v. European Grain and Shipping Ltd.** [1989] 2 W.L.R. 440, the House of Lords held at p.452 that the test is to determine whether the cross-claim in question is one "flowing out of and being inseparably connected with the transaction", that is, the transaction giving rise to the plaintiff's claim. *Spry says that this apparently new and more generous test is merely an instance of the traditional one which requires the defendant's claim to be "so closely connected with his [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross claim": (p.176).* [emphasis added]

[72] Therefore, I conclude that the question to be asked is whether the anticipated damages are so closely connected to the payments for February and March natural gas that it would be manifestly unjust or unfair to require Duke and Engage to pay Blue Range for the natural gas without permitting Duke and Engage to set-off their claims for unliquidated damages.

[73] The obligation to pay for the gas delivered in February and March arose upon its delivery. At the point in time of each of the deliveries, there were no damages. Thus, Engage and Duke had a contractual obligation to pay for the natural gas at a point in time when they had suffered no damages albeit there was trouble on the horizon.

[74] The anticipated damages for the higher cost of replacement natural gas only arise later and the cause of them is the prospective termination of the contract with the resulting failure of the delivery of natural gas from April onwards. They do not arise from a problem with the February and March deliveries.

[75] Fundamentally, Engage and Duke contracted to buy natural gas from Blue Range. They contracted to pay for it on a month to month basis. They were delivered natural gas. They accepted the natural gas delivered and have sold or otherwise utilized the natural gas received.

[76] Now, when payment is due they do not want to pay for it. The reason they give is that Blue Range's suspension of future deliveries will make them incur future damages. In my view, the future damages from the non-deliveries are sufficiently independent that it is not manifestly unjust to require Engage and Duke to pay for the natural gas that they have received.

[77] Counsel for Duke, in argument, cited the Duke contract which provided for the setting-off of replacement cost damages against delivery payments. There was, however, notwithstanding this clause, no serious attempt to argue contractual set-off. This, I presume, is because the provision allowed for damages *for a given month* to be set-off only against payments *for the same month.*

[78] If anything, this provision serves to reinforce the view that damages for future non-deliveries are not so closely connected to past deliveries that fairness demands their being set-off against payments for previous deliveries.

[79] While Counsel for Engage and Duke have endeavoured valiantly to distinguish the **Quintette** case, they have not succeeded on one part of the decision. It is to be remembered that the purchasing company wanted to set off *past* debts of the insolvent company (from the retroactive price review) against their *future* obligation to pay the insolvent company for ongoing coal deliveries. This was the exact inverse of the situation at bar where the companies wish to set off *future* damages owed them against their *past* payment obligations.

[80] In my view, while the chronology is reversed, the principle is the same. The situation in that case led the Supreme Court to say, at p.296:

> The award has created a debt owed by Quintette to J.S.I. and I see that as completely distinguishable from the debts incurred by J.S.I. for future coal deliveries.

[81] This observation is not affected by the change in the CCAA provisions to allow set-off. The legislature has spoken. In this case, the principles of set-off are to be applied. The issue for the Court is whether through the application of those principles a set-off should be permitted in the circumstances of this case.

[82] The anticipated damages arise after the completion of the deliveries. They arise after the stay order. They become an unsecured claim just like the claim of any other unsecured creditor of Blue Range and lack the necessary relatedness to the deliveries and the consequent unfairness to take them out of this category.

[83] Quite to the contrary, the applicants should share with the other unsecured creditors the burden of the reorganization and to hold otherwise would be potentially unfair to the other creditors.

[84] In any event, although this was not argued before me with much emphasis (other than indirectly at paragraph 4.c. of the Blue Range Brief), as regards the March deliveries (which for all but one day occurred after the order was issued), it seems to me that it ought to have been well known to both Engage and Duke that trade taking place with a debtor company in CCAA protection after the implementation of a stay order is generally conducted on a cash basis.

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[85] Indeed paragraph 34 of the March 2nd Order stipulates that post-petition creditors supplying goods or services to Blue Range after the order are entitled to be paid in accordance with their terms of credit. It further provides that, where the supply spans time before and after the order, they are a post-petition creditor only for the portion of the supply made after the order. In short, trade is to be conducted on a cash basis.

[86] Since Blue Range is not purely a consumer of goods and supplies it is implicit in this paragraph of the order that sales *by* Blue Range will be conducted on the same cash basis as sales *to* Blue Range. This would require Engage and Duke to pay their post-order delivery debts as they became due, notwithstanding any potential damage claims.

CONCLUSION

[87] The applications made by CanWest, Engage and Duke are denied.

COSTS

[88] While Blue Range has been put to the expense of contesting these applications, Blue Range will benefit significantly from the result in that it will be entitled to receive significant payments for the February and March deliveries. On the other hand, Duke and Engage have raised significant issues of more general import and will potentially suffer significant costs in finding replacement natural gas. This being so, it is not my intention to award any costs in these applications to any of the parties who appeared and made representations.

DATED at Calgary, Alberta this 18th day of June, 1999.

_____

J.C. Q.B.A.

APPEARANCES:

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C.J. Shaw, Q.C.
For CanWest Gas Supply Inc.

R.C. Dixon
For Credit Lyonnais Canada

H.A. Gorman
For Duke Energy Marketing Limited Partnership

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[1] R.S.C. 1985, c. C-36.
[2] (1993) 138 A.R. 321 (Q.B.).
[3] This decision is reported at 1994 ABCA 313 (CanLII), (1994) 157 A.R. 65 (C.A.).
[4] Page 2 to Exhibit B of the Vellutini Affidavit.
[5] 1995 CanLII 9262 (AB QB), (1995) 39 Alta. L.R. (3d) 66.
[6] 1995 CanLII 7370 (ON SC), (1995) 31 C.B.R. (3d) 106 (Ont.Ct.Just. Gen.Div).
[7] S.C. 1997 c. 12, s.125.
[8] reflex, (1990), 2 C.B.R. (3d) 291 (B.C.S.C.) and 51 B.C.L.R. (2d) 104, 2 C.B.R. (3d) 303 (C.A.).
[9] Ibid at page 296.
[10] Ibid at page 297.
[11] This decision is reported at 1990 CanLII 430 (BC CA), (1990) 2 C.B.R. (3d) 303.
[12] 1998 CanLII 955 (ON CA), [1998] O.J. No. 114, 37 O.R. (3d) 226, (C.A.).
[13] R.S.C. 1985, c.W-11.
[14] At page 2 of the Quicklaw text.
[15] [1996] O.J. No. 3409, (Ont. Ct. Justice, Gen).

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[16] **Telford v. Holt** infra, at p.394.
[17] 1987 CanLII 18 (SCC), (1987) 41 D.L.R. (4th) 385 at 398.
[18] 1985 CanLII 144 (BC CA), (1985), 20 D.L.R. (4th) 689 at 696-7, [1985] 6 W.W.R. 14 at 22.
[19] P. 401.
[20] **B. Anzani.**
[21] **Telford v. Holt**.
[22] Spry, *The Principles of Equitable Remedies,* 2nd ed. (1980) at p. 168.
[23] Ibid. at p. 170-1.
[24] [1979] 2 All E.R. 1063 (Q.B.D.).
[25] (1995) 128 D.L.R. (4th) 488 (C.A.).

British Columbia v. Canadian Airlines Corp., 2001 ABQB 146 (CanLII) - Legal and Equitable Set-off re Tax Liabilities

Date:	2001-02-21
Docket:	0001-05071
Parallel citations:	294 AR 253; [2001] 7 WWR 383; 14 BLR (3d) 258; 92 Alta LR (3d) 140
URL:	http://canlii.ca/t/5mfq
Citation:	British Columbia v. Canadian Airlines Corp., 2001 ABQB 146 (CanLII), <http://canlii.ca/t/5mfq> retrieved on 2013-08-21
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Canadian Airlines Corp., 2001 ABQB 146

Date: 20010221
Action No.0001-05071

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF

BETWEEN:
IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C.C.-36, AS AMENDED

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT (ALBERTA), S.A. 1981, C.B.-15, AS AMENDED, SECTION 185

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD.

[Note: An Erratum has been filed on February 28, 2001 the correction has been made to the text and the Erratum is appended to this Judgment.]

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE M.S. PAPERNY

APPEARANCES:
Larry Robinson
for the B.C. Government
Chris Simard
for Canadian Airlines Corporation and Canadian Airlines International Ltd.

INTRODUCTION

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[1] On March 24, 2000, the initial order in these proceedings was made by Moore C.J., providing for, *inter alia*, a stay of proceedings under the ***Companies' Creditors Arrangement Act*** ("CCAA").

[2] On June 2, 2000, Her Majesty the Queen in Right of the Province of British Columbia ("B.C. Government") filed a Voting/Distribution Dispute Notice with Canadian Airlines Corporation and Canadian Airlines International Ltd. (collectively, "Canadian"), claiming tax liabilities owed to it by Canadian. Canadian rejected that notice as it was presented past the Claims Bar Date of May 5, 2000 established under the amended plan of arrangement ("Plan"). By my order dated June 28, 2000, the B.C. Government received an extension to June 30, 2000 to file the notice.

[3] On June 29, 2000 the B.C. Government filed a Voting/Distribution Dispute Notice ("Dispute Notice") with Canadian in the amount of $1,859,777.53.

[4] The Dispute Notice also identified tax refunds owing to Canadian by the B.C. Government. The amount of the refunds owing at June 29, 2000 was $1,732,268.47.

[5] The B.C. Government asserted a right to set-off any refunds owed to Canadian against the tax liabilities owed by Canadian pursuant to section 18.1 of the CCAA, which states:

> The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[6] The Alberta Court of Appeal recently considered this section in ***Blue Range Resource Corp. (Re)***, 2000 ABCA 200 (CanLII), 2000 ABCA 200 and confirmed that notwithstanding the application of the section may have the result of preferring one creditor over others, Parliament, by enacting s. 18.1, made the decision that the general law of set-off is to apply in CCAA proceedings.

[7] Canadian denied the entitlement to set-off and the matter was brought before the Claims Officer appointed in these proceedings. The Claims Officer determined that only a portion of Canadian's tax liabilities were capable of being set-off against tax refunds owing to it by the B.C. Government. The B.C. Government appeals from this decision.

II. BACKGROUND FACTS

[8] The Dispute Notice claims the following tax liabilities owed to the B.C. Government by Canadian:

a. $1,673,299.42 under the ***Social Services Tax Act*** , R.S.B.C., 1996, c.431 (tax relating to the sale of consumables, capital additions, liquor and uniform), including penalties and interest; and

b. $187,478.11 under the ***Motor Fuel Tax Act***, R.S.B.C. 1996, c. 317(tax relating to unauthorized use of coloured fuel) including interest.

[9] The Dispute Notice also identified tax refunds owing to Canadian. At March 24, 2000, the refunds totalled $645,320.92. As noted, as at June 29, 2000, the date of the Dispute Notice, the refunds totalled $1,732,268.47. The refunds all arise under the ***Motor Fuel Tax Act*** and represent a rebate of a three-cent/litre tax embedded in the purchase price of jet fuel, payable on the basis that the fuel was used on international flights.

[10] The B.C. Government claimed that it is entitled to set-off the ***Motor Fuel Tax Act*** refunds against both the ***Motor Fuel Tax Act*** and the ***Social Services Tax Act*** liabilities, based on legal, equitable or statutory set-off. It argued that the Claims Officer's decision was wrong and that the court is entitled to substitute its discretion for his as this is a *de novo* application.

[11] Canadian asserted that the Claims Officer's decision is to be afforded a high degree of deference. It went on to argue that the B.C. Government's rights to set-off are restricted to those contained in the very specific provisions of the ***Social Services Tax Act***, the ***Motor Fuel Tax Act*** and the ***Motor Fuel Tax Act Regulation*** and that the B.C. Government is not entitled to set-off under those provisions. Alternatively, Canadian argued that if legal and equitable set-off are available, the B.C. Government failed to meet the respective tests.

III. ISSUES

1. What is the standard of review of the decision of the Claims Officer?
2. Is the B.C. Government entitled to legal set-off?
3. Is the B.C. Government entitled to equitable set-off?
4. Is the B.C. Government entitled to statutory set-off?
5. If set-off is available, what tax liabilities in which period of time are subject to be set-off against what refunds?

IV. ANALYSIS

1. Standard of Review

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[12] The B.C. Government relies on two decisions to support its argument that this hearing is *de novo*: ***Westminer Canada Holdings Ltd.* v. *Coughlan*** reflex, (1990), 73 D.L.R. (4th) 584 (Ont. C.A.) and ***Olympia and York Developments Ltd. (Re)***, [1994] O.J. No. 1335 (Gen. Div.) online: QL (OJ).

[13] ***Westminer***, *supra* is not a CCAA case. It simply applies ***Stoicevski* v. *Casement*** (1983), 43 O.R. (2d) 436, in which the Ontario Court of Appeal held that while ordinarily interlocutory orders made by the exercise of judicial discretion will not be interfered with unless they are clearly wrong, if the interlocutory order relates to a "vital" issue, the appellate court can substitute its own discretion for that of the court below. In ***Olympia and York Developments Ltd.*** *supra*, which was a CCAA case, Farley J. also applied ***Stoicevski***. He described the decision of the claims officer in determining the quantum of a claim which could have ultimately defeated the plan in question, as "knife edge vital". He also commented on the short time available to the claims officer to make the determination as strengthening his decision to substitute his own discretion for that of the claims officer.

[14] The law in Alberta relating to appeals of interlocutory orders differs from the law in Ontario, at least *vis-`a-vis* appeals from a Master. In Alberta, such appeals are *de novo*: ***Wright* v. *Disposal Services Ltd. and Marsh*** 1977 CanLII 619 (AB QB), (1978), 4 Alta. L.R.(2d) 173 (Q.B.) at. 177-78. The court in that case found that the discretionary jurisdiction possessed by a superior court trial judge by virtue of his federal appointment cannot be fettered in any way by a previous decision of a Master, who is appointed by the provincial Crown.

[15] An appointment by a Queen's Bench justice of a claims officer to handle disputes in the CCAA claims process and thereby save time and expense, cannot include a grant of the sort of deference that is impeded by the Constitution when it comes to decisions of Masters of this court, as described in ***Wright***, *supra*. Canadian argued that if the appeal is *de novo*, then what is the point of having a claims officer? On that logic, one might also question the utility of Masters. Just as Masters fulfill a critical role in the Court of Queen's Bench, so do claims officers in CCAA proceedings. It does not follow from this, however, that the appeal from the claims officer will be a true appeal and not *de novo*. Unlike a specialized tribunal with unique knowledge to which the court may defer, the Claims Officer in these proceedings was appointed for the purpose of expediting a process which by necessity must be summary. This summary nature is not to operate so as to fetter the court's discretion.

[16] While Canadian's counsel did argue that the decision of the Claims Officer ought to be afforded significant deference, he acknowledged that Canadian's filing of a further affidavit in addition to that before the Claims Officer weakened its position that the appeal before me was not *de novo*.

[17] In my view, the ruling of the Claims Officer certainly deserves the court's respect. However, the court is free to substitute its own discretion.

[18] I now turn to the three bases upon which the B.C. Government claims an entitlement to set-off.

2. Legal set-off

[19] The test for legal set-off has been variously described by courts across the country. In its simplest form, legal set-off requires "the fulfilment of two conditions. The first is that both obligations must be debts. The second is that both debts must be mutual cross-obligations": ***Telford* v. *Holt*** 1987 CanLII 18 (SCC), (1987), 41 D.L.R. (4th) 385 (S.C.C.) at 393 , adopting ***Canadian Imperial Bank of Commerce* v. *Tuckerr Industries Inc***. 1983 CanLII 302 (BC CA), (1983), 149 D.L.R. (3d) 172 at p. 174 (B.C.C.A.) . However, as stated by K. Palmer in ***The Law of Set-Off in Canada*** (Aurora: Canada Law Book, 1993) at 21, each of these elements has its own problems and parts. Mr. Palmer goes on to provide a neat summary of the various expressions of the test that reflects these:

> 1. The cross claims must be enforceable in debt, which entails setting up a claim which is liquidated, enforceable and mature.
> 2. The mutual claims for any rights to set-off must have accrued to the original creditor and debtor prior to any assignment to the existing plaintiff or defendant. (p. 21)

I will consider each of these elements in turn.

a. enforceable in debt

[20] Canadian has objected to a small portion of one assessment relating to the taxation of Canadian's use of aircraft fluids in the amount of $133, 938.34 and to its liability for any penalties on all of the assessments. As a result, Canadian argued that the validity and quantum of the tax liabilities have been placed into question and therefore are not liquidated. This dispute will be adjudicated by consent under the normal statutory and legislative processes in place in British Columbia and until that is completed, Canadian argued, it cannot be said that there is a specified sum that is payable by Canadian to the B.C. Government. Canadian essentially suggested that due to its objection to the claim by the B.C. Government, the tax liabilities are not liquidated until a court confirms the liabilities are "debts" and rules on the amount for which Canadian is liable to pay.

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[21] I cannot agree that the tax liabilities are not "debts". There are many definitions of debt contained in Canadian jurisprudence and academic commentary, such as:

> ..."mutual debts" mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading": ***Telford* v. *Holt***, *supra* at p. 393-394, citing ***Royal Trust* v. *Holden*** (1915), 22 D.L.R. 660 (Ont. C.A.) at 662-663;
>
> "a sum payable in respect of a liquidated money demand, recoverable by action": ***Diewold* v. *Diewold***, [1941] 1 D.L.R. 561(S.C.C.) at 564;
>
> "in substance there is a liquidated demand in money": ***National Bank fur Deutschland* v. *Blucher***, 1927 CanLII 69 (SCC), [1927] S.C.R. 420 at 426;
>
> "What is a debt but merely a duty, an obligation to pay?": ***Love* v. *Bell Piano (Furniture) Co.*** (1909), 10 W.L.R. 657 at 659 (Alta. T.D.);
>
> "the word "debt" is not today a term of art with a clear, never-changing denotation. Instead of trying to define a core meaning, it would seem better to agree with the editors of the *Corpus Juris Secundum* that "[the word] takes shades of meaning from the occasion of its use, and color from accompanying use, and it is used in different statutes and constitutions in senses varying from a very restricted to a very general one". One can say that the most common use of the word "debt" is to describe an obligation to pay a sum certain or a sum readily reducible to a certainty... but to this writer the essence of the term is that, if there is an obligation to pay a certain or ascertainable sum, the courts should tend not to concern themselves with the precise nature of the cause of action": C.R.B. Dunlop, ***Creditor-Debtor Law in Canada***, 2nd ed. (Toronto: Carswell, 1995) at 16.

[22] The amounts contained in the Dispute Notice are plain; it is clear that a liquidated sum has been claimed as owing by the B.C. Government. On any of these definitions, the B.C. Government's claim is in debt as distinct from damages or a property claim, both of which are excluded from legal set-off under this first requirement.

[23] The governing legislation similarly makes it plain that the assessments issued by the B.C. Government represent obligations that must be paid notwithstanding any appeals. Section 115 of the ***Social Services Tax Act*** provides for the issuing of an assessment for tax that is payable and s.120 provides that any liability for payment under the Act, including an assessment, is not delayed by virtue of the appeal process. Sections 43 and 52 of the ***Motor Fuel Tax Act*** are similarly phrased. In other words, simply because Canadian disagrees that it is liable for a portion of the assessments and has embarked on an appeal process, it is still required to pay the amounts set out in the assessments. Section 120(2) of the ***Social Services Tax Act*** and s. 52(2) of the ***Motor Fuel Tax Act*** provide a remedy to the taxpayer who succeeds on appeal after being made to pay what the government has said is owing under the statute; a refund will be made of the excess amount of tax paid plus any interest or penalties imposed. The obligation to pay is not removed or suspended until the appeal process has been exhausted.

[24] As noted, Canadian does not object to the entirety of the tax liabilities. It has consented to have its *liability for payment* of the disputed portion adjudicated in British Columbia according to the procedure set out in the governing legislation. Simply because Canadian has taken the position that it is not liable to pay a portion of the tax liabilities, however, does not change the nature of the B.C. Government's claim. It is still a debt that according to the relevant legislation is payable now despite Canadian's objection. It cannot be right that simply by challenging an assessment, an insolvent taxpayer can erect an effectively permanent roadblock to the government's right to set-off. While there are many examples in the case law of legal set-off failing because the debt in question had not matured or was subject to an unfulfilled condition precedent at the material time, Canadian provided no authority suggesting that a challenged debt under a statutory regime such as that contained in the ***Social Services Tax Act*** and ***Motor Fuel Tax Act*** is not a liquidated debt for the purposes of legal set-off . Even if such authority had been provided, however, it would have been entirely appropriate in the circumstances of this case to carve out the disputed portion of the tax liabilities and leave the unchallenged balance available for set-off.

[25] Canadian next argued that the B.C. Government did not issue an assessment for the tax liability under the ***Motor Fuel Tax Act*** and seemed to suggest that this prevented the liability under that statute from being liquidated. While the amount claimed under the ***Motor Fuel Tax Act*** is as specific and plain as the amount claimed under the ***Social Services Tax Act***, s. 43 of the ***Motor Fuel Tax Act*** appears to require an assessment. Without it, a question is raised about the enforceability of the tax liabilities under the ***Motor Fuel Tax Act***. Counsel for the B.C. Government did not respond to Canadian's argument in this regard and I am not satisfied that the claim for tax liabilities under the ***Motor Fuel Tax Act*** meets the first requirement of legal set-off.

[26] Counsel agreed that the refunds arose from an embedded tax contained in the price of fuel purchased by Canadian. There is no issue between the parties that the refunds represented a liquidated debt.

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[27] I find that the tax liabilities under the ***Social Services Tax Act*** and the refunds under the ***Motor Fuel Tax Act*** satisfy the first requirement of legal set-off.

b. mutuality

[28] Canadian conceded that the cross - obligations in issue existed between the same parties - Canadian and the B.C. Government.

[29] However, Canadian suggested that the distinct statutory regimes and factual bases under which the bulk of the tax liabilities and the entirety of the refunds arose prevented the obligations from being "in the same right", a necessary element of mutuality based on the following expression of this second requirement of legal set-off contained in ***Citibank Canada*** **v.** ***Confederation Life Insurance Co.*** 1996 CanLII 8269 (ON SC), (1996), 42 C.B.R. (3d) 288 (Ont. Gen. Div.) at p. 298, aff'd (1998), O.R.(3d) 226 (C.A.):

> For set-off at law to occur, the following circumstances must arise:
>
> 1. The obligations existing between the two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and
>
> 2. Both debts must be mutual cross-obligations, i.e. cross-claims between the same parties *and in the same right.* (emphasis added)

[30] As the discussion later in these reasons illustrates, there is indeed a close connection between the cross-obligations. However, with respect, Canadian's interpretation of "in the same right" is incorrect. To accept it would be to import a connection requirement into legal set-off. It is important to remember that the connection requirement appears to have developed as a basis upon which it would be fair to allow set-off in the absence of liquidated claims and/or existing mutuality between the parties. K. Palmer states at p. 21 of ***The Law of Set-Off in Canada***, *supra*, as follows:

> There is no requirement in legal set-off that the debts be connected in any manner. This is probably the most important difference remaining between equitable and legal set-off which allows a claim in legal set-off to have any effect.

[31] The Alberta Court of Appeal recognized this in ***Aboussafy*** **v.** ***Abacus Cities Ltd.*** (1981), 39 C.B.R. (N.S.) 1 at 10:

> There was no set-off at common law. It was introduced into the law of England by statute...and made to apply only as between liquidated claims, *although these claims may be unrelated*. This is what he [sic] might call legal set-off. (emphasis added)

[32] I accept the explanation of "in the same right"contained at pp. 46-47 of ***The Law of Set-off in Canada***, as follows:

> Whether debts exist in the same right refers to whether the debtor and creditor are liable solely to each other or to each other jointly with third parties. Again, this is simply a question of mutuality: if a debt is held jointly, rather than jointly and severally, it is not immediately clear how responsibility for the debt may be fairly divided when a set-off is claimed by a debtor who has not dealt with all the joint parties. What burden or benefit must the joint debtholders bear or receive due to the actions of one of their group? The presence of any such uncertainty generally will disallow set-off for the debts not being in the same right.

[33] Accordingly, I find that the second requirement of legal set-off is also met in this case and that Canadian is entitled at law to set off the refunds against the ***Social Services Tax Act*** liabilities.

3. Equitable set-off

[34] If I am incorrect that legal set-off is available, I find that the B.C. Government would be entitled to exercise equitable set-off in any case.

[35] The parties agreed with the principles of equitable set-off expressed in ***Coba Industries Ltd.*** **v.** ***Millie's Holdings (Canada) Ltd.*** 1985 CanLII 144 (BC CA), (1985), 20 D.L.R. (4th) 689 (B.C.C.A.), approved in ***Telford*** **v.** ***Holt***, *supra* at pp. 398-399:

> 1. The party relying on set-off must show some equitable ground for being protected against his adversary's demands: *Rawson et al. v. Samuel* (1841)., Cr. & Ph. 161, 41 E.R. 451.
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int'l Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim:[*Federal Commerce & Navigation Ltd. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*

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5. Unliquidated claims are on the same footing as liquidated claims: [*Nfld v. Nfld. Ry. Co.* (1888), 13 App. Cas. 199 (P.C.)].

[36] Just as was the case before the Alberta Court of Appeal in ***Blue Range***, *supra*, the only contentious aspect of the assertion of equitable set-off in this case is the "close connection" between the cross-obligations. As stated in ***Blue Range***, that is the "important point for invoking equitable set-off" (para. 19).

[37] Canadian emphasized that the bulk of the tax liabilities and all of the refunds respectively arose under distinct statutory taxation regimes governing different types of taxes and embodying different policy motives. Canadian noted that the refunds represent payments due to Canadian by way of a rebate of an embedded tax on *jet fuel*, pursuant to the ***Motor Fuel Tax Act*** and ***Motor Fuel Tax Regulation***, while the majority of the tax liabilities represent an assessed underpayment by Canadian with respect to previous purchases of *goods or services*, such as liquor and uniforms, pursuant to the ***Social Services Tax Act.*** Canadian therefore argued that the cross-obligations were not sufficiently connected**.** The Claims Officer was persuaded by this argument and found that "while the two pieces of legislation do not establish complete codes of the rights as between the parties, it is clear that the two statutes establish different regimes for the payment of tax".

[38] I do not find those arguments persuasive. To the extent that the ***Social Services Tax Act*** and the ***Motor Fuel Tax Act*** create distinct taxation regimes, I would expect no less as otherwise management of the various taxes they address would become impossible. Canadian also emphasized that distinct branches of the B.C. Government administered the ***Social Services Tax Act*** and the ***Motor Fuel Tax Act*** liabilities in support of its argument that there was an insufficient connection to support equitable set-off. Canadian conceded, however, in the context of its submissions on the application of legal set-off, that government departments are not separately incorporated and therefore are not distinct legal entities. An action taken against a particular department of the government is still considered an action against the Crown (see for example, ***Glaxo Canada* v. *Canada*** reflex, (1987), 11 F.T.R. 121 (T.D.), citing ***Perepelytz* v. *Department of Highways for Ontario*** (1958), 12 D.L.R. (2d) 81 (S.C.C.)) and therefore it is reasonable to treat the Crown as one entity for the purposes of set-off.

[39] In short, the taxes may arise under separate acts and be administered separately by different departments, but these are artificial bases on which to sever the fundamental connection of the taxpayer-tax collector relationship in this case that is also reflected in the connection between the cross-obligations themselves. The obligation owed by Canadian is for tax and the obligation owed by the B.C. Government is for refunds of tax and these cross-obligations arise out of the same relationship between these two parties. As well, the funds flow in and out of the same source - the coffers of the B.C. Government as taxing authority - and in effect, Canadian is seeking to make a withdrawal from that fund without paying in full what it owes to that fund.

[40] A similar approach was taken by the Saskatchewan Court of Queen's Bench in ***National Bank of Canada* v. *Saskatchewan Property Management Corp***. reflex, [1993], 7 W.W.R. 636. In that case, the bankrupt GeoData owed Education and Health tax to the Saskatchewan government but was also owed money by the Saskatchewan Property Management Corp., a Crown agency entirely funded with tax revenues. The court held at page 640:

> Through various taxation statutes, including *The Education and Health Tax Act*, R.S.S. 1978, c.E-3, as amended, the Crown is able to generate revenue. Revenue that is used by various provincial departments of government and by Crown corporations. The basis of S.P.M.C.'s funding is tax revenue. GeoData's liability is more than a simple liability for the payment of a debt. It is a liability for the payment of taxes. In the particular circumstances I consider the connection between the claims to be close enough to warrant the application of equitable set-off.
>
> It is not fair to allow National (GeoData's assignee) to obtain payment, from funds generated by tax revenue, of a GeoData receivable, without ensuring that GeoData's tax liability is paid.

[41] The relationship between the parties and the cross-obligations in this case is more direct than that in ***National Bank.*** In that case there was no mutuality but the court found the requisite connection in the fact that the money that the Crown agency was using to pay the debtor was generated by tax revenue. Here, we are dealing solely with the B.C. Government and the same relationship - that of taxpayer-tax collector - is the basis of both cross-obligations.

[42] Canadian also argued that section 11(3) of the ***Crown Proceedings Act*** , R.S.B.C. 1996, c.89, which prohibits taxpayers from raising set-off against taxes owing, destroys any connection that otherwise might exist between taxes and refunds. The flaw in that argument is that it is not the *taxpayer* seeking to set-off, but the tax collector, in the CCAA context. Just because the ***Crown Proceedings Act*** precludes set-off by the taxpayer does not similarly preclude the B.C. Government from setting-off refunds owing to Canadian.

[43] In ***Cam-Net Communications* v. *Vancouver Telephone Co.***, 1999 BCCA 751 (CanLII), 1999 BCCA 751 the British Columbia Court of Appeal recognized equitable set-off in the CCAA context and found that it would be unjust to separate the cross-claims in issue there.

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[44] Similarly, I find in this case that it would be manifestly unfair for a taxpayer not to pay taxes under one statute, while collecting a refund of tax under another statute, each involving the same tax collector.

[45] For these reasons, I find that the B.C. Government would be entitled in equity to set-off the refunds against the tax liabilities.

4. Statutory Set-off

[46] The B.C. Government submitted that if the court found that legal and equitable set-off were not available, then s. 38 of the ***Financial Administration Act***, R.S.B.C. 1996, c. 138 creates an additional, statutory right of set-off. Section 38 provides that:

> **38** The Treasury Board may, by directive, authorize the Comptroller General to retain money by way of set-off, out of any money due or payable to a person by the government or out of a trust fund, if
>
> (a) that person owes money to the government,
>
> (b) an overpayment has been made by the government to that person, or
>
> (c) an advance made to that person under section 36 has not been repaid or accounted for.

[47] This section on its face appears to describe a broad right of set-off. Arguably the directive does not create the right, but the authority of the Comptroller General to set-off funds. However, in either case, the invoking of this section on August 5, 2000, well after the Effective Date of the Plan and the compromise of claims was effected, is inappropriate. The directive cannot be utilized retrospectively to effectively negate (in the absence of set-off on other grounds) the terms of the sanctioning order insofar as the B.C. Government is concerned.

[48] It is also necessary in the context of statutory set-off to consider the impact of the ***Social Services Tax Act***, ***Motor Fuel Tax Act*** and the ***Motor Fuel Tax Act Regulation*** on the B.C. Government's general rights of set-off.

[49] Canadian's primary argument in this application was that since the provisions in this legislation are so specific and detailed in their delineation of when set-off may occur, that the B.C. Government is limited to asserting set-off only in those delineated situations. In other words, Canadian argued that the machinery in the legislation replaces the ordinary law of set-off.

[50] Canadian relied on the following passage from ***Re White Motor Corporation of Canada Ltd.*** (1981, Ont. S.C.) to support its argument in this regard:

> Moreover, if it should occur that the minister reassesses the debtor's tax for the 1979 tax year and an overpayment is determined, the minister has by s. 164(2) of the Income Tax Act a discretion to apply the overpayment against other liability of the debtor under that Act. The statute therefore gives him this specific right in settling the accounting between the Crown and the taxpayer. As a matter of law between them the ordinary law of set-off is not available *to the taxpayer* but is replaced by the machinery in s. 164 of the Income Tax Act. In my opinion this is not set aside by the Bankruptcy Act. (emphasis added)

[51] However appealing this statement may be in suggesting that the B.C. Government is stuck with the regime it set up regarding set-off, a careful review shows that the court in ***Re White*** was limiting the *taxpayer* to the statutory machinery; the court did not say the *Crown* was similarly limited. K. Palmer, in ***The Law of Set-off in Canada*** comments on this difference at p. 255:

> For those who consider themselves students of Canadian governments (or just those who are affected by their actions) it should come as no great surprise that the government powers with respect to taxation and set-off are rather one-sided. The right to set-off is widely available to the Crown and wholly unavailable to the taxpayer. The thrust of the statutory powers granted in this area are similar to those described above in the *Financial Administration Act,* where a broad power of set-off is granted....
>
> Amounts owing for taxation can therefore be withheld by the Crown from any payment due from the Crown to the taxpayer.
>
> The situation, unfortunately, does not work in the reverse. A taxpayer cannot withhold from taxes due an amount which the Crown owes to the taxpayer. This was considered in *R. v. Lamothe*, where the defendant as an employer failed to remit deductions from wages for income tax, claiming that he had set these off against a tax refund owed to him personally. The set-off was not allowed by the court, which noted that the *Income Tax Act* created a statutory duty to pay taxes, against which set-off was not available as a defence:
>
> > That duty is not qualified in any way, and the mere fact that the Receiver-General may owe the person paying money does not, it seems to me quite apart from any question of set-off, afford a defence to an information alleging a failure to observe an obligation imposed by statute.
>
> The same conclusion was reached in *Re White Motor Corp. of Canada Ltd.*, which noted that this statutory duty replaced the ordinary rules of set-off which would otherwise apply *to the Crown*. (emphasis added)

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[52] While *White* does not stand for the proposition suggested by Canadian, it is appropriate to review the legislation in question and determine whether it modifies the legal and equitable rights of set-off and if so, to the extent that the B.C. Government is not able to access those general rights.

[53] The ***Social Services Tax Act*** does speak very specifically to credits and refunds in cases of particular scenarios (for example, it provides for a refund of tax involved in the sale of a horse), but counsel did not refer the court to any provision that addresses the situation at bar. Similarly, counsel did not rely on any section of the ***Motor Fuel Tax Act*** that would apply to the particular set-off being claimed by the B.C. Government. The statutes provide variously for refunds, credits and applications of payments from taxpayers, using a mixture of imperative and permissive language. It might be argued that the legislation modifies to some extent the B.C. Government's existing rights of legal and equitable set-off in particular scenarios, but it does not follow in this context that the failure to refer to a particular scenario in the legislation means that there are absolutely no set-off rights with respect to that scenario. Quite simply, because these circumstances are not included in the statutes, the set-off rights have not been modified by the statutes.

[54] Canadian argued that there is no provision in either the ***Social Services Tax Act*** or the ***Motor Fuel Tax Act*** authorizing the B.C. Government to set-off refunds owing to taxpayers under other enactments as against liabilities arising thereunder and that therefore such a set-off is not permitted. I disagree that statutory permission is required.

[55] The B.C. Government conceded that the refunds in question fall under sections 4.2 (3) and 4.3 (4) of the ***Motor Fuel Tax Act Regulation***. These subsections respectively provide that where tax is paid on jet fuel, the director:

> "*shall*, on application, refund from the consolidated revenue fund to the person who paid the tax a refund of 3[CENTS] for every litre of fuel for which tax was paid under section 7(1)(a) o f the Act."(s. 4.2 (3))
>
> "*shall*, on application, provide from the consolidated revenue fund to the person who paid the tax a refund calculated in accordance with the following formula...". (s.4.3 (4))

[56] Canadian did apply for the refunds on a monthly basis from February - June, 2000, the very months for which the B.C. Government is arguing it is entitled to set-off the refunds.

[57] The word "shall" in the ***Motor Fuel Tax Act Regulation*** is to be construed as imperative: ***Interpretation Act*** R.S.B.C. 1996, c. 238, s. 29. The plain meaning of these provisions is therefore that the B.C. Government is obliged to provide a refund to the taxpayer. While the provisions do not expressly rule out setting-off the refunds, I cannot consider them in a vacuum. As referenced above, the ***Motor Fuel Tax Act,*** the statute under which the ***Motor Fuel Tax Act Regulation*** was enacted, contains both imperative and permissive language in its treatment of the provision of refunds. However, counsel did not refer the court to any provision of the ***Motor Fuel Tax Act*** which addressed the application or crediting of refunds by the B.C. Government; its ability to set-off is not expressly addressed. Were this not the case, I might have been more inclined to find that the absence of references to set-off in the ***Motor Fuel Tax Act Regulation*** reflected the deliberate intention on the part of the B.C. legislature to exclude any ability of the B.C. Government to use refunds to set-off tax liability. However, simple use of the imperative "shall" instead of "may" in this context does not rule out the possibility of set-off. Further, allowing the exercise of set-off in these circumstances does not violate either the letter or the spirit of the ***Motor Fuel Tax Act Regulation***. The set-off *recognize*s the refund rather than disregarding it.

[58] In addition, interpreting the ***Motor Fuel Tax Act Regulation*** in the way Canadian suggests would entirely remove the B.C. Government's common law right of legal set-off as well as its equitable right in this regard. I am unable to read the statutory language as disclosing an intention by Parliament to effect such a fundamental change in the B.C. Government's legal rights when the presumption, at least *vis-`a-vis* the common law, is that legislation is not meant to interfere with common law rights, nor, generally, to change the common law. In ***Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.***, 1956 CanLII 2 (SCC), [1956] S.C.R. 610 at 614, Fauteux J. held that:

> ...a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed.

[59] More recently this principle was affirmed by the Supreme Court of Canada in ***R. v. T.***, 1992 CanLII 88 (SCC), [1992] 1 S.C.R. 749 at 763-764, where L'Heureux-Dube J. adopted the following statement in P.B. Maxwell, ***Maxwell on the Interpretation of Statutes***, 12th ed. (London: Sweet & Maxwell, 1969) at page 116:

> It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question.

[60] L'Heureux-Dube J. went on to find that while it was open to Parliament, subject to constitutional restraints, to change the law as it likes, the legislation that makes the alterations must be drafted such that its intention is "in no way in doubt" (p. 764).

[61] In my view, the wording contained in the ***Motor Fuel Tax Act Regulation*** does not expressly or impliedly rule out the B.C. Government raising a set-off in response to an application for a refund, as it has here.

[62] Canadian also asserted that the ***Motor Fuel Tax Act Regulation*** creates an absolute and immutable right to payment without set-off. It referred to the discussion in ***R. v. Lamothe*** (1957), 119 C.C.C. 330 (Ont. H.C.) of the statutory

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duty of a taxpayer to pay taxes (p. 336) and suggested that the mandatory language of the refund provisions in the ***Motor Fuel Tax Act Regulation*** created a similar *duty* to pay refunds which replaces the ordinary rules of set-off available to the B.C. Government. I note that the legislation in ***R. v. Lamothe*** went beyond a direction to pay the taxes and created an offence for failure to do so. Obviously there is no associated offence with respect to failure of the B.C. Government to provide a refund to a taxpayer. Canadian was not able to provide any authority supporting the creation of such a duty and without more, on my interpretation of the legislation, I am not prepared in these particular circumstances to elevate the obligation of the B.C. Government to provide a refund to the level of a duty which prohibits set-off. As noted above, the set-off rights of government relating to unpaid taxes are frequently one-sided and while various taxing statutes expressly remove the *taxpayer's* right to set-off, such provisions do not exist here with respect to the B.C. Government's ability to set-off tax liabilities against the refunds in question.

5. Timing of Set-Off

[63] Canadian asserted that if set-off applied in this case, the B.C. Government should be restricted to setting off the tax liabilities against the refunds of tax that were in existence at the time the initial stay order was granted. It argued that the March 24, 2000 order restricted set-off to cross-obligations in existence as at that date.

[64] The distinction Canadian seeks to make between pre- and post- petition refunds cannot be maintained in this particular case, for two reasons: first, all of the refunds arose before the Effective Date under the Plan, and second, the connection between the obligations is such that the issuance of the initial order on March 24, 2000 is insufficient to sever it.

[65] The Plan approved by the requisite number of creditors and sanctioned by this court on June 27, 2000 contemplated that all amounts due and owing *up to and including* the Effective Date of July 5, 2000 would be included in the Plan, as reflected in the Plan definitions of "Tax"/"Taxes" and "Tax Claims" and the releases contained in s. 6.2 of the Plan, as follows:

> **"Tax" or "Taxes"** shall mean any and all federal, provincial, municipal, local and foreign taxes, assessments, reassessments and other governmental charges, duties, impositions and liabilities...
>
> **"Tax Claims"**means any and all claims for Taxes by any federal, provincial, territorial, municipal, local or foreign authority, agency or government...in respect of any taxation year or period ending *on or before the Effective Date* including, without limitation, any Taxes arising out of or attributable to any transaction to be completed in accordance with this Plan and, in the case where a current taxation year does not end on the Effective Date, any Taxes due in respect of or attributable to that portion of the period commencing at the beginning of such current taxation year *up to and including the Effective Date*;(emphasis added)
>
> **6.2(1)** *As of the Effective Date*, the Applicants will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities (other than the rights of the Applicants to enforce the Plan and the contracts, instruments, releases and other agreements and documents delivered thereunder) whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, forseen or unforseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place *on or prior to the Effective Date* in any way relating to the Applicants or the Subsidiaries, the parties released pursuant to this Section 6.2(1), the CCAA Proceedings or the Plan, and that could have been asserted by or on behalf of the Applicants against former directors, officers and employees of the Applicants in each case, as of the Date of Filing or that have become officers and/or directors thereafter but prior to the Effective Date (other than for indebtedness owed by any such directors, officers, or employees to any of the Applicants) and the Applicants' agents and professionals (including, for greater certainty, the Monitor). (emphasis added)
>
> **6.2(2)** *As of the Effective Date*, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities (other than the rights to enforce the Applicants' obligations under the Plan and the securities, contracts, instruments, releases and other agreements and documents delivered thereunder), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, forseen or unforseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place *on or prior to the Effective Date* ...(emphasis added)

[66] But for set-off, the tax liabilities owing to the B.C. Government up to and including the Effective Date would be compromised at that date. All of the refunds had arisen prior to that time. Clearly the Effective Date was pinpointed by Canadian as the settlement date for its liabilities. The result that the B.C. Government can ultimately set-off tax liabilities

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against all of the refunds is therefore not inconsistent with the Plan nor with the prospective nature of paragraph 5(e) of Moore C.J.'s March 24, 2000 order in these proceedings:

> Until the Stay Termination Date or further order of this Court and subject to other provisions of this Order:...Subject to Section 18.1 of the CCAA, no person shall exercise any right of set-off with respect to any accounts of the petitioners, or any combination of accounts in relation to *amounts due or accruing due* in respect of or arising from any indebtedness or obligation of the petitioners...(emphasis added).

[67] The Alberta Court of Appeal in ***Blue Range***, *supra* was faced with a decision of a chambers judge that was based in part upon the distinction between pre-petition and post-petition obligations. The court did not approve of this distinction in that case and expressly found that the "connection" between the pre- and post- petition obligations was sufficient to support equitable set-off, regardless of the fact that one of the obligations arose after the stay instituted by the initial CCAA order. The Court of Appeal stated at paragraph 19 that "[the fact that the damages owed to Duke and Engage arise after the stay order is not relevant when the obligations arise out of the same contracts".

[68] In this case, the cross- obligations do not arise contractually, but from a single tax payer- tax collector relationship. As described earlier in these reasons, this relationship between the B.C. Government and Canadian that is reflected in the taxes and refunds of taxes owed supports the close connection that is a hallmark of equitable set-off. To disregard this relationship would be to disregard the law of set-off which Parliament has legislated is to continue to apply in the CCAA context.

[69] While the distinction between pre- and post- petition claims may have significance in determining whether a close connection exists in certain circumstances, it is not significant here given the terms of the Plan and the close connection that exists between the cross-claims in issue.

[70] Although ***Blue Range*** suggests that it is inappropriate to consider prejudice to other creditors in prohibiting set-off, the court did not go so far as to say that a court in determining a close connection is prohibited from considering whether the intention of the CCAA will be entirely defeated. Allowing set-off in this case will not have such an effect, insofar as the refund which will be applied against Canadian's tax liabilities does not form any part of the fund established by Air Canada to pay dividends to creditors. Further, there is also no evidence before me, nor was any submission made by counsel that would suggest that allowing the set-off in this case would defeat the intention of the CCAA to permit debtor companies to continue in business for the currency of the proceedings and afterward, where possible.

[71] In this case I have found that the cross-obligations in question are capable of legal or alternatively equitable set-off. The wording of the Plan, the March 24, 2000 order and s. 18.1 of the CCAA support this result.

V. CONCLUSION

[72] The B.C. Government is entitled to set-off the refunds owing to Canadian against ***Social Services Tax Act*** liabilities owed by Canadian, as those amounts stand as at July 5, 2000, the Effective Date under the Plan. Canadian has challenged its liability to pay a portion of the tax liabilities and has consented to have that issue resolved by the B.C. court. To the extent that Canadian is successful to any degree in that regard, further accounting may have to take place. If there is any disagreement between the parties at that point, they may see me.

HEARD on the 11th day of December, 2000.

DATED at Calgary, Alberta this 21st day of February, 2001.

_____

J.C.Q.B.A.

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An errata has been issued for the above judgment as follows:

ERRATA OF THE MEMORANDUM OF DECISION OF
THE HONOURABLE MADAM JUSTICE PAPERNY

The first line of paragraph 17 has been revised to read: **"In my view, the ruling of the Claims Officer certainly deserves the court's respect."** and on the last page of the above judgment, the following sentence has also been revised to read:
DATED at Calgary, Alberta this 21st day of February, 2001.
Please replace these pages in your copy of the judgment.

CLASSES OF CREDITORS

Company may establish classes - Sec 22
22. (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors - Sec 22(2)
(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account
(a) the nature of the debts, liabilities or obligations giving rise to their claims;
(b) the nature and rank of any security in respect of their claims;
(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Woodward's Ltd., 1993 CanLII 870 (BC SC) - "Class" of Creditor Defined Through Multiple Cases

Date:	1993-04-20
Docket:	A924791
Parallel citations:	20 CBR (3d) 74; 84 BCLR (2d) 206
URL:	http://canlii.ca/t/1dhrf
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Date of Release: April 20, 1993
No. A924791
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36

- AND -

IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1979, c. 59

IN THE MATTER OF WOODWARD'S LIMITED, WOODWARD STORES LIMITED AND ABERCROMBIE & FITCH CO. (CANADA) LTD.	)	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE TYSOE (IN CHAMBERS)

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Susan M. Eyre
D. Geoffrey Cowper

Counsel for Hans Andriessen and certain other terminated employees: Paul J. Pearlman

Counsel for R. Longine and certain other terminated employees: James E. Howell

Counsel for Royal Trust Corporation of Canada: Vincent Morgan

Counsel for National Bank Leasing: Digby R. Leigh

Counsel for North American Trust Company: Douglas B. Hyndman

Counsel for Triple Five Corporation Limited: B.A.R. Smith, Q.C. (Alta.)

Counsel for Bucci Investment Corporation and Prospero International Realty Inc.: William E.J. Skelly

Counsel for Cambridge Shopping Centres Limited: Douglas I. Knowles
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Counsel for Laing Properties: Robert P. Sloman

Counsel for Oakridge Centre Holdings Inc. and others: Gordon K. Mitchell
L.M. Candido

Counsel for General Electric Capital Canada Inc.: Alan H. Brown

Counsel for Zellers Inc.: James P. Taylor, Q.C.
Scott A. Turner
Michael Harquail (Ont.)

Date and place of hearing: April 13, 14 and 15, 1993
Vancouver, B.C.

INTRODUCTION

The Petitioners ("Woodward's") apply for an order approving the classes of creditors designated in their plan of arrangement under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 (the "***CCAA***") filed on April 7, 1993 (the "Reorganization Plan"). Woodward's proposes to hold meetings of these classes of creditors during the first part of May 1993 for the purpose of voting on the Reorganization Plan.

The classes of creditors designated by the Reorganization Plan are Secured Creditors, Noteholders, Landlords and General Creditors. Each of these terms is defined in the Reorganization Plan. There is no issue as to the appropriateness of classes of secured creditors, noteholders, landlords and general creditors. The question is whether or not there should be additional classes.

The definitions in the Reorganization Plan of the classes of creditors are as follows:

"Secured Creditors" means the Secured Trustee as holder of the Secured Notes;

"Noteholders" means the A & F Debentureholders, the Stores Debentureholders, the 9% Noteholders and the 10% Noteholders;

"Landlord" means any landlord, head lessor, sublessor or owner of premises which has entered into any Lease with any member of the Woodward's Group and includes any mortgagee or successor in title of such premises who has taken possession of such premises or is collecting rent in respect of such premises as well as any party who has taken an assignment of rents or assignment of lease in respect of such premises, whether as security or otherwise; provided, however, that if more than one person would otherwise come within this definition of Landlord in respect of any particular Lease, the rights and claims of all such persons in respect of such Lease will be dealt with collectively under this Plan and each reference herein to such Landlord shall be construed as a collective reference to all such persons;

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"General Creditors" means all persons with unsecured claims for any Indebtedness against Woodward's Group as at the General Creditor Meeting Date, including the Pre-Filing Trade Creditors, Employee Creditors, the Landlords and the Equipment Financiers but, for the Landlords and the Equipment Financiers, only to the extent of their claims to be dealt with in the General Creditor class as provided herein, and specifically excluding Post-Filing Trade Creditors, the Noteholders and the holders of the Unaffected Obligations.

The additional classes that have been proposed are as follows:

(a) employees of Woodward's that have been terminated since the commencement of these proceedings on December 11, 1992 (these employees made a formal application for separate classification);

(b) Royal Trust Corporation of Canada which holds a debenture creating a fixed charge against certain equipment purchased by Woodward's with the financing provided by Royal Trust;

(c) equipment financiers (which could include Royal Trust);

(d) creditors of Woodward Stores Limited (the "Operating Company") that hold the guarantee or joint covenant of its holding company, Woodward's Limited (the "Holding Company");

(e) one of more classes of landlords whose leases are being repudiated.

There is the potential that two parties having agreements to lease with Woodward's will want to make submissions that they should be in a separate or different class. These parties were only served with the Petition in this proceeding recently and it was agreed that my ruling would not affect their ability to make submissions at a subsequent time. It was also agreed that General Electric Capital Canada Inc. would not be bound by my ruling and could make submissions that it should be in a separate or different class or that it should be considered to be a holder of an Unaffected Obligation.

I will return to the positions of the various parties but I think it will be useful to first review the authorities setting forth the general principles applicable to the issue of creditor classification.

GENERAL PRINCIPLES

The starting point of the case authorities is the decision of the English Court of Appeal in *Sovereign Life Assurance Company v. Dodd*, [1892] 2 Q.B. 573 where Lord Esher said the following at pp. 579-80 in relation to the meeting of creditors to consider a plan of arrangement under the Joint Stock Companies Arrangement Act:

The Act says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes - classes which the Act of Parliament recognizes, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

Bowen L.J. made the following comments at p. 583:

The word "class" is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class or classes to be called. It seems plain that we must give such a meaning to the term "class" as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

There has been some jurisprudence over the years regarding creditor classification but, like the jurisprudence on other issues under the CCAA, it has intensified over the past five to ten years. One of the earlier cases of the present wave of jurisprudence dealing with creditor classification is *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. 20 (A.Q.B.). In that case Forsyth J. rejected the argument that different secured creditors should be placed in separate classes because they held separate security over different assets or because the relative values of their security were different. The Court rejected the "identity of interest" approach which involves each class only containing creditors with identical interests. Instead, the Court followed the approach which I will call the "non-fragmentation" approach. This approach avoids the creation of a multiplicity of classes by

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including creditors with different legal rights in the same class as long as their legal rights are not so dissimilar that it is not possible for them to vote with a common interest. This is essentially the approach that was suggested by Bowen L.J. in the passage from the *Sovereign Life* quoted above (although his words have been incorrectly attributed to Lord Esher in at least one case authority and one article).

The approach taken in the *Oakwood Petroleums* case has been specifically adopted by the B.C. Court of Appeal in *Northland Properties Limited v. Excelsior Life Insurance Company of Canada* (1989), 73 C.B.R. 195. In the lower court decision in that case the Court considered the similarities and dissimilarities of various mortgagees holding mortgages against different properties and concluded that they should be in the same class. Dealing with the points of dissimilarity, Trainor J. said as follows at p. 192 of 73 C.B.R.:

> **The points of dissimilarity are that they are separate properties and that there are deficiencies in value of security for the loan, which vary accordingly for particular priority mortgagees. Specifically with respect to Guardian and Excelsior, they are both in a deficiency position.**
>
> **Now, either of the reasons for points of dissimilarity, if effect was given to them, could result in fragmentation to the extent that a plan would be a realistic impossibility. The distinction which is sought is based on property values, not on contractual rights or legal interests.**

After the Court of Appeal in *Northland Properties* quoted the above passage, it said the following (at p. 203):

> **I agree with that, but I wish to add that in any complicated plan under this Act, there will often be some secured creditors who appear to be oversecured, some who do not know if they are fully secured or not, and some who appear not to be fully secured. This is a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both.**

As the B.C. Court of Appeal has specifically adopted the reasoning in *Oakwood Petroleums*, the approach which I have called the "non-fragmentation" approach is the one to be followed in British Columbia. As will be seen shortly, the "non-fragmentation" approach has also been preferred over the "identity of interest" approach by the Ontario courts.

There have been two recent cases that are particularly relevant because they deal with employees, landlords and equipment lessors in circumstances that are similar to the situation at hand. The first of these cases is *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* reflex, (1991), 8 C.B.R. (3d) 312 (O.C.J.) where one of the proposed classes consisted of all creditors other than two secured creditors, including holders of unsecured debentures, terminated employees, landlords whose leases had been repudiated and equipment lessors whose leases were to be repudiated (although the report does not specifically say it, I assume that the proposed class also included the general trade creditors). The Court rejected the argument of one of the landlords that there should be a separate class of creditors consisting of the landlords and the equipment lessors. Borins J. utilized the "non-fragmentation" approach as illustrated by the following passage on pp. 317-8:

> **In my view, an important principle to consider in approaching ss. 4 and 5 of the C.C.A.A. is that followed in *Re Wellington Building Corp.*, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (S.C.), in which it was emphasized that the object of ss. 4 and 5 is not confiscation but is to enable compromises to be made for the common benefit of the creditors as creditors, of for the common benefit of some class of creditors as such. To this I would add that recognition must be given to the legislative intent to facilitate corporate re-organization and that in the modern world of large and complicated business enterprises the excessive fragmentation of classes could be counter-productive to the fulfilment of this intent. In this regard, to approach the classification of creditors on the basis of identity of interest, as suggested by counsel for H & R Properties, would in some instances result in the multiplicity of classes, which would make any re-organization difficult, if not impossible, to achieve. In my view, in placing a broad and purposive interpretation upon the provisions of the C.C.A.A. the court should take care to resist approaches which would potentially fragment creditors and thereby jeopardize potentially viable plans of arrangement, such as the plan advanced in this application.**

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The other recent decision is *Re Grafton-Fraser Inc. and Canadian Imperial Bank of Commerce* reflex, (1992), 90 D.L.R. (4th) 285 (Ont. Gen. Div.). In that case Houlden J.A. approved the classification of creditors into secured creditors, landlords and unsecured creditors. It appears from the report that the plan contemplated that some leases would be repudiated and there would be rent reductions in respect of certain of the continuing premises. I am told that the final plan of Grafton-Fraser Inc. did not include the landlords with continuing leases at reduced rental rates in the same class as the landlords whose leases were repudiated, but the decision of Houlden J.A. appears to be predicated on the fact that the two types of landlords would be in the same class. It had been argued that the landlords should be in the same class as the unsecured creditors. Houlden J.A. felt that it was appropriate to have the landlords in a separate class for two reasons; namely, there would be great difficulty in ascertaining the amounts of the claims of the landlords and the plan enjoined the landlords from exercising their contractual and statutory remedies.

Before I apply the general principles outlined above to the circumstances of this case, I wish to add some comments regarding the classification of creditors. The case authorities focus on the differences in the legal rights of the creditors in determining whether their interests are sufficiently similar or dissimilar to warrant creditors being placed in the same class or separate classes. I agree that it is the legal rights of the creditors that must be considered and that other external matters that could influence the interests of a creditor are not to be taken in account. However, it is my view that the legal rights should not be considered in isolation and that they must be considered within the context of the provisions of the reorganization plan. It would be appropriate to segregate two sets of creditors with similar legal interests into separate classes if the plan treats them differently. Conversely, it may be appropriate to include two sets of creditors with different legal rights in the same class if the plan treats them in a fashion that gives them a commonality of interest despite their different legal rights. In addition, when the Court is assessing whether there is a sufficient commonality of interest to include two sets of creditors in the same class, it is necessary in my view to examine their legal rights within the context of the potential failure of the reorganization plan. The treatment of the two sets of creditors under the plan should be compared to the rights they would have in the event of the failure of the plan (i.e., bankruptcy or other liquidation).

TERMINATED EMPLOYEES

The first set of creditors that submitted that it should be in a separate class is the group of former employees of Woodward's who were terminated after December 11, 1992, the date of commencement of these ***CCAA*** proceedings. These former employees all have claims against Woodward's for damages as a result of Woodward's failure to give them reasonable notice of termination. The Reorganization Plan includes the terminated employees in the class of General Creditors which also includes the trade suppliers and other unsecured claims of the Operating Company. The Reorganization Plan proposes that the General Creditors receive 37% of the principal amounts of their proven claims.

The two counsel acting for former employees on this application submitted that their clients should comprise a separate class of creditors for several reasons. They say that the terminated employees are largely middle-aged, long service employees with limited education who have little prospect of finding alternate employment. They point to the fact that the courts recognize the difference between a contract of employment and an ordinary commercial contract. They further make reference to the fact that the trade suppliers will be selling merchandise to the reorganized company and that they will have a potentially continuing relationship which may influence the manner in which they vote on the plan. Finally, they say that the trade suppliers have the ability to "write off" their losses and that they will receive different income tax treatment in respect of their losses than the terminated employees.

In arguing that the terminated employees should form their own class, counsel relied on the article ***Reorganizations under the Companies' Creditors Arrangement Act*** (1947) 25 Can. Bar Rev. 587 by Stanley E. Edwards. This article has been relied upon extensively by the courts in interpreting the ***CCAA***. However, the article has not been followed with respect to the classification of creditors. Mr. Edwards proposes the "identity of interest" approach which was not been adopted by the Alberta, British Columbia and Ontario courts. The preferred approach is the "non-fragmentation" approach.

The legal rights of the terminated employees are the same as the legal rights of the trade suppliers. They are both creditors with unsecured claims against the Operating Company (the secured and preferred amounts payable to employees under provincial legislation and the ***Bankruptcy and Insolvency Act*** have already been paid to the terminated employees). In a bankruptcy or other liquidation they would both receive the same pro rata amount of their claims. They are to receive the same pro rata amount of their claims under the Reorganization Plan.

The fact that there is a recognized difference between contracts of employment and ordinary commercial contracts is not relevant because the contracts of employment of the terminated employees have come to an end. The terminated employees have claims for damages against Woodward's for wrongful dismissal. Once the amount of damages for an employee has been agreed upon or determined by the Court, the difference between the two types of contracts becomes historical and the

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employee has the same rights as any other unsecured creditor. The differences between the two types of contracts may result in the employees receiving higher amounts of damages but the differences do not warrant the terminated employees being entitled to a higher distribution than the other unsecured creditors.

I am satisfied that there is a sufficient commonality of interest between the terminated employees and the other members of the General Creditors class that they should be included in the same class.

EQUIPMENT FINANCIERS AND ROYAL TRUST CORPORATION OF CANADA

It is convenient to deal with the submissions of the equipment lessors and Royal Trust at the same time because if Royal Trust is not put in a class of its own, its alternate position was that it should be included in a class with the equipment lessors.

The term "Equipment Financiers" is defined in the Reorganization Plan. In brief, the term means any person who has provided financing for the acquisition or installation of office equipment or trade fixtures and who has retained a security interest by way of a lease or a security instrument. Woodward's has notified or will be notifying certain equipment financiers that it no longer requires their equipment. These equipment financiers will then have a claim against Woodward's for damages resulting from the repudiation of their contractual arrangements. It is these equipment financiers who wish to be in a separate class. The Reorganization Plan proposes that the terminated equipment financiers be treated as General Creditors and that they receive 37% of the amounts of their claims. The amount of each claim would presumably be the discounted value of future payments owing by Woodward's to the equipment financier less the present value of the equipment.

Most of the equipment financiers are parties that bought the equipment and are leasing it to Woodward's on a normal type of term lease. The equipment financiers who are lessors include National Bank Leasing, North American Trust Company and Royal Bank Leasing. Royal Trust also falls within the definition of "Equipment Financier" but it is not a lessor. It financed the acquisition by Woodward's of certain equipment by way of a traditional financing arrangement. It loaned money to Woodward's on a term basis and it took security in the form of a debenture creating a fixed charge against the equipment that it financed.

In other contexts under the ***CCAA*** the treatment of equipment leases in relation to the treatment of security documents causes me considerable doubts. Should equipment leases be treated the same as security instruments in all or some cases? Does it make a difference whether the lease is classified as an operating lease or a capital lease? Should the extent of depreciation of the subject asset be taken into account? Fortunately these questions can be left for another time because they do not need to be resolved in order to deal with the classification issue.

Lessors and debentureholders do have different legal rights but the question to be answered is whether the different rights result in a lack of commonality of interest. In a bankruptcy a lessor is entitled to retake possession of the leased goods upon default and, if the lease is worded properly, the lessor is entitled to prove as an unsecured creditor for its damages. In the case of a debentureholder in a bankruptcy situation, the debentureholder has the right to cause the charged assets to be sold and it is entitled to prove as an unsecured creditor for the deficiency on its loan. In most cases the damages of the lessor and the deficiency on the debentureholder's loan will be equivalent; namely, the difference between the present value of the monies that are owed and the value of the leased goods or the charged assets. Hence, the rights of an equipment lessor and the rights of a debentureholder with a fixed charge on financed equipment in a bankruptcy situation are roughly the same. The equipment lessors and Royal Trust are being treated the same under the Reorganization Plan. Therefore, there is a sufficient commonality of interest for Royal Trust to be included in the same class as the equipment lessors.

Some submissions were made with respect to the priority between Royal Trust and The R-M Trust Company which is the sole Secured Creditor under the Reorganization Plan. I do not accept the contention that Royal Trust has priority over The R-M Trust Company on any of Woodward's assets other than the ones that are covered by the fixed charge in favour of Royal Trust.

The question then becomes whether the equipment financiers (including Royal Trust) belong in a separate class or in the class of General Creditors. This is an example of why the legal rights of the parties must be examined within the context of the Reorganization Plan. In isolation the rights of the equipment financiers and the rights of unsecured creditors are very different. But the treatment of the two groups in the Reorganization Plan could affect their interests.

If the Reorganization Plan provided that Woodward's was to retain the financed equipment and the equipment financiers were to be paid the same proportion of their indebtedness as the unsecured creditors, the equipment financiers would be entitled to be included in a different class from the unsecured creditors. They would be losing their proprietary or security rights in the equipment and they would be receiving the same pro rata distribution as unsecured creditors who do not have same rights. However, that is not what the Reorganization Plan is proposing.

The Reorganization Plan does not affect any of the proprietary or security rights of the equipment financiers. Woodward's is allowing the equipment financiers to fully exercise those rights outside of the Reorganization Plan. All the Reorganization Plan is purporting to affect are the claims of the equipment financiers for damages or the deficiencies on loans. These claims are unsecured claims and there is no reason why they should be treated any differently than the claims

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of unsecured creditors. There is a sufficient commonality of interest between the unsecured creditors and the equipment financiers with respect to their unsecured claims for damages or the deficiencies on loans. It is appropriate to include the equipment financiers in the class of General Creditors with respect to these claims.

This classification of the equipment financiers is consistent with the decision in ***Sklar-Peppler***, *supra*, where the Ontario Court of Justice approved the grouping of equipment lessors in the same class as the unsecured creditors.

HOLDERS OF GUARANTEES OR JOINT COVENANTS

The class of General Creditors is comprised of creditors of the Operating Company. However, at least two of these creditors hold a guarantee or joint covenant of the Holding Company. National Bank Leasing holds a guarantee from the Holding Company and the debenture held by Royal Trust is a joint debenture from the Operating Company and the Holding Company. For ease of reference I will refer to a creditor holding a guarantee or joint covenant of the Holding Company as the holder of a guarantee and such reference shall also include the holder of a joint covenant.

The Holding Company does not own any tangible assets. Other than the shares in the Operating Company, the only asset owned by the Holding Company is an inter-company account owed to it by the Operating Company. This inter-company account means that upon the bankruptcy or other liquidation of the Operating Company, the Holding Company would be an unsecured creditor entitled to share on a pro rata basis in distributions to the unsecured creditors of the Operating Company. If the Holding Company was also to be liquidated, the money received on account of the inter-company receivable would be distributed to the creditors of the Holding Company, including creditors of the Operating Company with guarantees from the Holding Company and other unsecured creditors if sufficient monies were available to fully satisfy the secured and preferred creditors of the Holding Company. The result is that unsecured creditors of the Operating Company with guarantees from the Holding Company may receive more money than the other unsecured creditors of the Operating Company in the event of bankruptcies or other liquidations of the two companies.

On April 16, 1993 the Monitor appointed in these proceedings issued a report confirming that upon a liquidation of the two companies, the unsecured creditors of the Holding Company would receive a distribution. The Monitor estimates a liquidatation distribution for the unsecured creditors of the Holding Company to be in the range from 2% to 12%.

The distinction between the interests of the unsecured creditors of the Operating Company and the interests of the unsecured creditors of the Holding Company is recognized in the classification of the creditors in the Reorganization Plan. The unsecured creditors of the Holding Company are included in the class of Noteholders which is a different class from the General Creditors, the class that includes the unsecured creditors of the Operating Company. It is proposed in the Reorganization Plan that the Noteholders receive 32% of their indebtedness.

The Reorganization Plan ignores the fact that the holders of guarantees are unsecured creditors of both companies. It proposes that they receive the same 37% proportion of their indebtedness as the other General Creditors and their status as creditors of the Holding Company is not reflected.

In view of the fact that the holders of guarantees do have different legal rights from the other members of the class of General Creditors, it is necessary to decide whether the rights are so dissimilar that they cannot vote on the Reorganization Plan with a common interest. It was submitted by counsel for Woodward's that there is a common interest because the holders of guarantees will still receive more under the Reorganization Plan than they will be paid upon a liquidation of the two companies. I do not think that this is sufficient to create a commonality of interest with the other members in the class of General Creditors who have lesser legal rights. To the contrary, I believe that this is an example of what Bowen L.J. had in mind in the ***Sovereign Life*** case, *supra*, when he used the term "confiscation". By being a minority in the class of General Creditors, the holders of guarantees can have their guarantees confiscated by a vote of the requisite majority of the class who do not have the same rights. The holders of guarantees could be forced to accept the same proportionate amount as the other members of the class and to receive no value in respect of legal rights that they uniquely enjoy and that would have value in a liquidation of the two companies.

The passage from ***Sklar-Peppler*** quoted above made reference to the decision in ***Re Wellington Building Corp.***, *supra*. In that case the Court was asked to approve a scheme of arrangement under the ***CCAA*** that had one class of secured creditors which included bondholders, lienholders, third mortgagee and fourth mortgagees. The Court refused to approve the scheme on the basis that there should have been more than one class of secured creditors. Kingstone J. said the following at p. 54 of 16 C.B.R.:

... it was necessary under the Act that they should vote in classes and that three-fourths of the value of each class should be obtained in support of the scheme before the Court could or should approve of it. Particularly is this the case where the holders of the senior securities' (in this case the bondholders') rights are seriously affected by the proposal as they are deprived of the arrears of interest on their bonds if the proposal is carried through. It was never the intention under the Act, I am convinced, to deprive creditors in the position of the bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the

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company which would permit the holders of junior securities to put through a scheme inimicable to this class and amounting to confiscation of the vested interest of the bondholders.

In ***Re 229531 B.C. Ltd.*** (1989), 72 C.B.R. 310 (B.C.S.C.) the Court refused to approve a plan of arrangement under the ***CCAA*** for numerous reasons. One of the reasons was that a guarantee held by one creditor was to be released as a result of the reorganization plan and the creditor was to receive the same proportionate distribution as all of the other unsecured creditors. In other words, the guarantee was being confiscated by the vote of other creditors who did not enjoy the same rights as the creditor which held the guarantee.

If it was clear that no monies would be available to unsecured creditors upon a liquidation of the Holding Company, the legal rights of the holders of the guarantees would have no practical value and there would then be no objection to their inclusion in the class of General Creditors. There is also a point where the prospects of the unsecured creditors of the Holding Company receiving any monies upon its liquidation would be so uncertain that the commonality of interest between the holders of the guarantees and the other members of the class of General Creditors would not be affected. However, I am not satisfied in this case that such prospects are so uncertain that the holders of guarantees should be forced to be in the same class as the other unsecured creditors of the Operating Company. In making this statement, I note that the unsecured creditors of the Holding Company are to receive 32% of their indebtedness under the Reorganization Plan.

I should stress that it is important in my view that there is only one difference between the rights of the holders of the guarantees and the rights of the other members of the class of General Creditors. It is clear that the one additional right enjoyed by the holders of the guarantees is not being given any value under the Reorganization Plan. The result could be different if the other members of the class of General Creditors had additional rights that were not enjoyed by the holders of the guarantees. There could be a trade-off between the rights that were not commonly shared and the groups could have a sufficient commonality of interest to be included in the same class. Here, there is no potential trade-off between the two groups and the one additional right of the holders of the guarantees is being confiscated without compensation.

Counsel for Woodward's suggested that the issue of the guarantees be left to the fairness hearing (i.e., the hearing to consider the sanctioning of the Reorganization Plan). As I believe that the holders of guarantees have a sufficiently different legal right to warrant a separate classification, it follows that I would consider the Reorganization Plan to be unfair to them if they are included in the class of General Creditors. I should not order meetings for the creditors to vote on the Reorganization Plan when I know that those meetings would be fruitless because I would refuse to approve the outcome of the meetings.

LANDLORDS

Counsel for Triple Five Corporation Limited submitted that there should be two classes of landlords, one class consisting of landlords with anchor tenants whose leases are being repudiated and the other class consisting of the remaining landlords. Counsel for Bucci Investment Corporation and Prospero International Realty Inc. submitted that there should be three classes of landlords, one class consisting of landlords with anchor tenants whose leases are being repudiated, a second class consisting of landlords without anchor tenants whose leases are being repudiated and the third class consisting of the remaining landlords.

Counsel for Triple Five Corporation Limited put forward three reasons in support of his position. A fourth reason was also put forward initially but it was withdrawn and reserved for the fairness hearing. The three reasons are as follows:

(a)a repudiation of a lease by an anchor tenant will cause the landlord to be in breach of other contractual obligations and the consequences of such a repudiation go beyond the liquidated damages that result from the repudiation of a lease by a tenant other than an anchor tenant;

(b)there is no precedent for the selective repudiation of leases under the ***CCAA*** and Woodward's has chosen not utilize the proposal provisions of the ***Bankruptcy and Insolvency Act*** that now has a procedure for the repudiation of leases;

(c)Zellers Inc. (and its parent, The Hudson's Bay Company) is a stranger to the relationship between Woodward's and its creditors and its involvement in Woodward's reorganization (by way of a merger with the reorganized company) requires a higher degree of fairness.

In my view, none of these reasons is a valid justification for the creation of a separate class of landlords:

(a)the additional consequences of a repudiation by an anchor tenant flow from external considerations and the different consequences to different landlords does not result from different legal rights existing between the landlords and Woodward's. As was held in ***Northland Properties***, *supra*, separate creditor classification must be based on a difference in legal interests or rights;

(b)***Sklar-Peppler***, *supra*, and ***Grafton-Fraser***, *supra*, are both examples of reorganizations involving repudiations of leases. The fact that the ***Bankruptcy and Insolvency Act*** now specifically provides for the repudiation of

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leases does not mean that a reorganization involving lease repudiation cannot be attempted under the ***CCAA*** and it certainly does not mean that there should be separate classes of landlords;

(c)the aspect of fairness is a matter to be considered on the application for the Court to sanction the Reorganization Plan. The application is commonly called the fairness hearing. There is nothing in the involvement of Zellers Inc. that requires the creation of separate classes for landlords.

Counsel for Bucci and Prospero did not put forward any independent grounds for the creation of separate landlord classes. His point was that if there was justification for the creation of a separate class for landlords with anchor tenants whose leases were being repudiated, there was equal justification for the creation of a separate class for the other landlords whose leases were being repudiated.

There was one point that bothered me about the grouping of all the landlords into a single class. In addition to including landlords whose leases were being repudiated, the class includes landlords who are having their leases partially repudiated by the unilateral reduction in the amount of leased space and landlords who are having the rent under their leases unilaterally reduced. Both of these two groups of landlords would be having a continuing relationship with Woodward's. Unlike the trade suppliers, the continuing relationship between these landlords and Woodward's is based on legal rights. I was concerned that the continuing legal relationship between these landlords and Woodward's may give them a different interest from interests of the landlords whose leases are being wholly repudiated. For example, the continuing landlords may be more willing to vote in favour of the Reorganization Plan because they will be able to recoup some of their losses from the profits generated out of the continuing relationship with Woodward's. The answer to my concern is that the rent under all of the continuing leases is to be adjusted to market rent. The landlords whose leases are being repudiated will also be leasing their premises to new tenants at market rent. Accordingly, the landlords with continuing leases will not have any advantage over the other landlords and there will be sufficient commonality of interest to include all of the landlords in one class.

During submissions I queried whether the landlords should be included in the class of General Creditors. At first blush a landlord whose lease is being repudiated is in the same position as the other unsecured creditors of the Operating Company. The reason why it is appropriate for the Landlords to be in a different class is that they receive different treatment under the Reorganization Plan. The General Creditors are to be paid 37% of their claims while the Landlords are to paid an amount equal to six months' rent. One reason for the different treatment is the fact that it is very difficult to properly quantify the claims of the Landlords and the efforts of the Landlords to mitigate their damages will not be known prior to the implementation of the Reorganization Plan. This rationale was accepted in ***Grafton-Fraser***, *supra*, where the Court approved a separate classification for the landlords. Another justification for the different treatment is the fact that the ***Bankruptcy and Insolvency Act*** provides that landlords whose leases are repudiated are entitled to compensation equal to six months' rent.

In the ***Grafton-Fraser*** case, *supra*, the Court approved a landlord class which, at least at the time of the decision, appeared to include both landlords with repudiated leases and landlords with continuing leases at reduced rental rates.

It is my view that there is sufficient commonality of interest among the landlords for all of them to be included in a single class. I am reinforced in my decision by the positions of the other landlords represented by counsel at the hearing. Mr. Kuhn, Mr. Knowles and Mr. Mitchell, who each represent landlords in each of the three proposed landlord classes, all supported the single class for the landlords and that position in itself demonstrates that the landlords do have a commonality of interest.

CONCLUSION

I approve the classes of creditors designated in the Reorganization Plan with the exception that the class of General Creditors should not include creditors of the Operating Company who hold guarantees or joint covenants from the Holding Company. I dismiss the application of the terminated employees for separate classification and I reject the other submissions for separate classifications.

April 20, 1993 " D. Tysoe, J. "
Vancouver, B.C.

West Bay SonShip Yachts Ltd. (Re), 2009 BCCA 31 (CanLII) - Pre-Filing Claim of Wrongful Employment Termination Captured in CCAA Order or Not?

Date:	2009-01-30
Docket:	CA035080
Parallel citations:	306 DLR (4th) 294; [2009] 4 WWR 415; 71 CCEL (3d) 45; 49 CBR (5th) 159; 89 BCLR (4th) 82
URL:	http://canlii.ca/t/2294q

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Citation: West Bay SonShip Yachts Ltd. (Re), 2009 BCCA 31 (CanLII), <http://canlii.ca/t/2294q> retrieved on 2013-08-22
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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***West Bay SonShip Yachts Ltd. (Re),***
2009 BCCA 31

Date: 20090130

Docket: CA035080

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36
and
IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57

Between:
West Bay SonShip Yachts Ltd.
Respondent
(Petitioner)
And
Gerald Esau
Appellant
(Respondent)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman

S. Kent	Counsel for the Appellant
R.A. Millar	Counsel for the Respondent
Place and Date of Hearing: October 8, 2008	Vancouver, British Columbia
Place and Date of Judgment: January 30, 2009	Vancouver, British Columbia

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Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Groberman

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Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The appellant, Gerald Esau, appeals from the order of a Supreme Court chambers judge made May 3, 2007, in the course of proceedings involving the respondent, West Bay SonShip Yachts Ltd., under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Mr. Esau claims, among other grounds of appeal, that the chambers judge erred in ruling that he was a creditor subject to the terms of the Plan of Arrangement (the "Plan").

[2] For the reasons that follow, I would dismiss the appeal.

Background

Facts

[3] On December 16, 2005, West Bay filed for protection under the *CCAA*. Mr. Esau had been an employee of West Bay since 1991. On January 17, 2006, he received notice that his employment in the position of Vice President, Production, would be terminated, effective June 6, 2006. Mr. Esau sued West Bay for damages for wrongful dismissal, but did not file a Proof of Claim in the *CCAA* restructuring. West Bay sought a declaration that Mr. Esau's claim was compromised by the Plan, and an order that the wrongful dismissal action be stayed.

The CCAA Proceedings

[4] In the initial order in the *CCAA* proceedings, made on December 16, 2005 (the "Filing Date"), the court imposed a stay of proceedings against West Bay, including any proceeding pursuant to labour or employment standards legislation (s. 2(c)). The initial order provided for West Bay to continue to pay obligations incurred by it after the Filing Date, including wages and "other monies owing to or in respect of its employees", but expressly prohibited the payment of "any amounts that are due on account of severance pay arising at law or under Statute" (s. 5). The order permitted West Bay to downsize its operations and terminate its employees. The financial consequences of downsizing were to be dealt with in the Plan to be filed (s. 6):

> 5. THIS COURT FURTHER ORDERS that all obligations incurred by the Petitioner after the Filing Date, including without limitation, all obligations to persons who advance or supply goods or services to the Petitioner after the Filing Date (including those under purchase orders outstanding at the Filing Date but excluding any interest on the Petitioner's existing obligations incurred prior to the Filing Date) shall be paid or otherwise satisfied by the Petitioner and, without limiting the generality of the foregoing, that the Petitioner shall pay all wages, source deductions, benefits (including long and short term disability payments), expenses, omissions, vacation pay, and other monies owing to or in respect of its employees (including any independent contractor providing employment related services to the Petitioner) irrespective of whether such obligations arose or were earned before or after the Filing Date but not including any amounts that are due on account of severance pay arising at law or under Statute (hereinafter collectively referred to as "Wages").
>
> 6. THIS COURT FURTHER ORDERS that, subject to the terms of this Order, the Petitioner shall remain in possession of its undertaking, property and assets, wherever situate (collectively, the "Assets") with full power and authority to relocate to British Columbia those Assets currently situated within other jurisdictions including, without limitation, the State of California, the State of Florida and the State of Washington and shall continue to carry on its business in the ordinary course, provided that:
>
> ...
>
> (b) it shall have the right without further Order of this Court, but subject to the consent of the Monitor, to proceed with an orderly disposition of such of its Assets outside of the ordinary course of its business as it deems appropriate in order to facilitate the downsizing of its business and operations ("Downsizing"), including:
>
> (i) terminating the employment of such of its employees or temporarily laying off such of its employees, as it deems appropriate;
>
> ...
>
> all without interference of any kind from third parties, including its landlords and notwithstanding the provisions of any lease, mortgage other instrument or law affecting or limiting the rights of the Petitioner to move or liquidate Assets from leased premises, and may take any Downsizing steps at any time after the Filing Date irrespective of whether or not payments have been made subsequent to the Filing Date under any lease or mortgage, provided that the financial obligations, if any, of the Petitioner to creditors affected by such Downsizing shall be provided for and dealt with in the Plan of Arrangement to be filed by the Petitioner.
>
> [Emphasis added]

[5] By final order in the *CCAA* proceedings, pronounced June 23, 2006, the court approved West Bay's Plan. All claims falling within the definition of "Claim" in Article 1.1 of the Plan were compromised as against West Bay and others:

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> **"Claim"** means a claim for an amount alleged by a person to be owed to it by the Company, or a claim in relation to any obligation, enforceable right, duty or liability, contingent, accrued, vested or otherwise, (including any claim whether contingent or accrued on behalf of Her Majesty the Queen in right of the Dominion of Canada or any Province or any municipality) against the Company which was in existence in whole or in part as of the Filing Date, including any claim in relation to any liability, loss or damage arising from any such claim after the Filing Date, or any cause of action against the Company or its assets and property calculated either as at the Filing Date, or, in the case of claims under executory contracts arising subsequent to the Filing Date as a result of the termination of such contracts in accordance with an order of the Court made prior to the date of the Meeting, as at the date of such termination, either:
>
> (a) as set forth in a Proof of Claim which has either:
>
> (i) been admitted by the Company pursuant to the Plan for all purposes; or
>
> (ii) been determined by a Court of competent jurisdiction to be a proper obligation of either or both of the Company; or
>
> (b) for which a valid Proof of Claim could have been filed with the Company, but which Proof of Claim was not so filed prior to the Claims Bar Date;
>
> provided that a Claim shall not include the amount due or accruing due to a Post Filing Creditor in respect of Post Filing Creditor Claims, nor shall the Claim include interest for the period subsequent to the Filing Date. [Emphasis added]

The Reasons of the Chambers Judge

[6] The chambers judge held that Mr. Esau's claim for damages for wrongful dismissal was a "contingent liability" at the Filing Date, and, as such, fell within the definition of "Claim" in the Plan. She relied on two superior court decisions, *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* 1996 CanLII 3025 (BC SC), (1996), 21 B.C.L.R. (3d) 91 (S.C.), and *Rizzo and Rizzo Shoes Ltd. (Re)* reflex, (1991), 6 O.R. (3d) 441 (Gen. Div.), aff'd. (on other grounds), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, in concluding that the claim for damages for breach of Mr. Esau's employment contract accrued from the outset of his employment, and was therefore a liability of West Bay at the Filing Date.

[7] The chambers judge ordered that Mr. Esau's claim was a "pre-filing claim" and was compromised by the Plan. She permanently stayed the action, and refused to grant Mr. Esau an extension of time to file a Proof of Claim.

[8] Her reasons may be found at *West Bay SonShip Yachts Ltd. (Re)*, 2007 BCSC 1553 (CanLII), 2007 BCSC 1553, 37 C.B.R. (5th) 253.

Issues on Appeal

[9] On appeal, the parties joined issue on two alternative interpretations of the definition of "Claim" in the Plan, under which Mr. Esau's claim for damages for wrongful dismissal may be considered to be a "pre-filing claim": if it was a contingent liability at the Filing Date, or it was a claim under an executory contract.

[10] Thus, there are two issues in this appeal:

1. **Is a wrongful dismissal claim a contingent liability prior to the termination of employment?**
2. **Is an employment contract an executory contract?**

Analysis

Contingent Liability

[11] Mr. Esau takes the position that his claim for damages for breach of his employment contract did not accrue throughout his employment, but only arose when he was terminated. Thus, he argues, West Bay had no liability, contingent or otherwise, until the termination of his employment, which occurred after West Bay filed for protection under the *CCAA*. Thus, he says, his claim for damages is not compromised by the Plan.

[12] West Bay argues that while Mr. Esau's right to bring an action for damages for wrongful dismissal may not have crystallized until notice of termination was given, West Bay's obligation to pay severance was in existence "in whole or in part" as of the filing date. Thus, Mr. Esau's claim for damages for wrongful dismissal is a pre-filing claim and is compromised by the Plan.

[13] Both *Eland Distributors* and *Rizzo and Rizzo Shoes*, relied on by the chambers judge and West Bay, dealt with severance under employment standards legislation. The present case, however, involves a common law claim for damages for wrongful dismissal. As explored in three recent decisions of the British Columbia Employment Standards Tribunal, citing the decision of the Supreme Court of Canada in *Barrette v. Crabtree Estate*, 1993 CanLII 127 (SCC), [1993] 1 S.C.R. 1027, this distinction is significant.

[14] In *Sitter (Re)*, [2000] B.C.E.S.T.D. No. 515 at paras. 11 and 14, the adjudicator drew the following distinction between statutory and common law claims:

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> Compensation for length of service payable under section 63 of the [*Employment Standards*] *Act* is a form of deferred contingent compensation that is intended "to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment ends" (see *Re Rizzo & Rizzo Shoes Ltd.* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27). Consistent with it being a service-based benefit, the amount of compensation for length of service payable by an employer increases in lockstep with an employee's tenure. However, "an amount payable in lieu of [contractual] notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice" (see *Barrette v. Crabtree Estate*, 1993 CanLII 127 (SCC), [1993] 1 S.C.R. 1027).
>
> ...
>
> "Wages", as defined in section 1 of the Act, includes monies payable as compensation for length of service. Since compensation for length of service represents compensation for "years of service" (see *Rizzo*, supra.) it is, in fact, deferred compensation that is paid for "work" (see definition, section 1). On the other hand, damages for breach of a contractual notice provision are not paid for "work" but, rather, are paid (subject to mitigation) for "non-performance of a contractual obligation to give sufficient notice" (*Barrette*, supra.). An employee's right to sue for damages for breach of contract, even though the proper amount of compensation for length of service has been paid to the employee, is preserved by section 118 of the Act.
>
> [Emphasis added]

[15] This view was affirmed in *Rupert Title Search Ltd. (Re)*, [2003] B.C.E.S.T.D. No. 70 at paras. 25 and 32, and in *Taylor (Re)*, [2003] B.C.E.S.T.D. No. 82 at para. 11. In *Rupert Title Search*, the Tribunal described the statutory liability of an employer as "an 'earned' benefit to the employee that accumulates as the length of service of the employee increases", and distinguished this "length of service compensation" from common law damages for wrongful dismissal.

[16] *Sitter*, *Rupert Title Search*, and *Taylor* were recently approved by this Court in *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220 (CanLII), 2007 BCCA 220, 66 B.C.L.R. (4th) 373 at paras. 5-7. Madam Justice Huddart, for the Court, held that the Tribunal's understanding of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, and the distinction between statutory compensation payments and reasonable notice under an employment contract "merits respect". Common law claims for damages for wrongful dismissal are distinguishable from statutory claims for severance under employment standards legislation in terms of how they arise and are calculated.

[17] It is not necessary for the purpose of this appeal to determine whether a statutory claim for severance is properly characterized as a contingent liability prior to termination of employment. For present purposes, it is sufficient to conclude that *Eland Distributors* and *Rizzo and Rizzo Shoes* do not assist in the analysis of Mr. Esau's claim.

[18] The first step in determining whether Mr. Esau's claim for damages for breach of his employment contract represents a contingent liability is to consider the meaning of that term. This was recently discussed by the Supreme Court of Canada in *Canada v. McLarty*, 2008 SCC 26 (CanLII), 2008 SCC 26, [2008] 2 S.C.R. 79 at paras. 17–18, where Rothstein J. for the majority referred to the "well-accepted test for a contingent liability" as that described by Lord Guest in *Winter v. Inland Revenue Commissioners*, [1963] A.C. 235 at 262 (H.L.):

> I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.

[19] Similarly, *Black's Law Dictionary*, 8th ed. 2004, defines contingent liability as a "liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event."

[20] For financial reporting purposes, threatened and pending litigation are considered to be contingent liabilities of a company: *Institute of Chartered Accountants Handbook*, looseleaf (Toronto: Canadian Institute of Chartered Accountants, 1981) at s. 3290; Errol C. Soriano, *Understanding Financial Analysis in Litigation* (Scarborough: Carswell, 2004) at 64-65; *Levy-Russell Ltd. v. Shieldings Inc.* 2004 CanLII 66297 (ON SC), (2004), 48 B.L.R. (3d) 28 at para. 126 (Ont. S.C.J. [Commercial List]). That is, threatened or pending litigation is characterized as a contingent liability. Actual liability will arise only when there is a judgment against the company.

[21] The question that arises in this case is whether the existence of a contractual obligation, and the corresponding potential for a claim for damages for its breach, is a contingent liability of the party who may commit the breach. I conclude that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where there is no present cause of action. That is, until there is a breach of contract, there is no legal basis for any claim or any corresponding liability.

[22] This conclusion finds support in the following definition of "liability" from *Royal Trust Co. v. H.A. Roberts Group Ltd.*, 1995 CanLII 6094 (SK QB), [1995] 4 W.W.R. 305 at para. 119 (Sask. Q.B.):

> These statutory provisions [s. 125(1) and (3) of *The Land Titles Act*] envisage three kinds of obligations that can be secured by a registrable mortgage: a debt, a loan, or a liability that is future or contingent. No

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> case was cited to me that clarifies what is meant by these terms used in s. 125. The term "liability" is a broad term and is most often used to describe an unliquidated or unspecified legal obligation which arises due to negligence, breach of contract, etc. The term "debt" is a narrower term and means a specific kind of obligation for a liquidated or certain sum incurred pursuant to an agreement. The term "loan" is even narrower and means a specific type of debt. [emphasis added]

[23] Further support can be found in the American case of *Grant-Howard Associates v. General Housewares*, 472 N.E.2d 1 at 3-4 (N.Y. 1984), approved in *Climatrol Industries Inc. v. Fedders Corp.*, 501 N.E.2d 292 at 294-295 (Ill.App. 1 Dist. 1986), in the context of a product liability claim:

> An uninjured party simply is not a "contingent liability" in the usual sense of that term (see, e.g., Black's Law Dictionary [5th ed.], p. 291 ["A potential liability; e.g. pending lawsuit"]). There is no liability or claim before injury occurs. Granted that "contingency" invokes uncertain events, the uncertainty should be restricted to the success of asserting an existing claim, rather than expanding it to include the altogether unpredictable event that an injury will occur. [emphasis added]

[24] I conclude that the liability to pay damages if an employment contract is breached for failing to give reasonable notice of termination is not a contingent liability within the ordinary meaning of that term. Until the termination of employment without adequate notice, there is no injury. The possibility of a breach of contract is not sufficient to give rise to a contingent liability.

[25] Therefore, Mr. Esau's wrongful dismissal claim did not accrue from the outset of his employment and it did not represent a contingent liability of West Bay at the Filing Date. Consequently, Mr. Esau's claim is not a pre-filing claim on this basis.

Executory Contract

[26] West Bay argues in the alternative that Mr. Esau's contract of employment was an executory contract. As a result, it maintains that his claim for damages for its termination after the Filing Date and before the date of the meeting of General Creditors to approve the Plan on June 12, 2006 (the "Meeting"), was a "Claim" within the meaning of, and compromised by, the Plan. It says that the characterization of an employment contract as an executory contract is consistent with the legal definition of executory contracts and the purpose of the *CCAA*.

[27] Mr. Esau submits that when his employment contract was terminated it was not an executory contract because the only remaining performance to be tendered was the payment of money. He cites in support of his argument *re U.S. Metalsource Corp.*, 163 B.R. 260 at 269 (Bankr. W.D. Pa. 1993), in which it was held that where the only obligation of the debtor was the obligation to pay severance pay to terminated employees, "[t]his type of contractual duty to pay a debt is insufficient to create an executory contract."

[28] If the contract was an executory contract at the Filing Date, however, a claim arising subsequent to that date as a result of termination of the contract is a "Claim" as of the date of termination. That is, if Mr. Esau's contract of employment was an executory contract at the Filing Date, his claim for damages for wrongful dismissal, arising as a result of his termination subsequent to that date and before the Meeting, became a "Claim" as of the date of termination.

[29] Thus, the question is whether a contract of employment such as Mr. Esau's, under which he promised to render services in return for West Bay's promise to pay him, was an executory contract at the Filing Date.

[30] The Alberta Court of Appeal recently considered the meaning of "executory contract" in *Kary Investment Corp. v. Tremblay*, 2005 ABCA 273 (CanLII), 2005 ABCA 273 at para. 19, 371 A.R. 339:

> A contract is said to be executory if anything remains to be done under it by any party, and executed when it has been wholly performed by all parties: *Halsbury's Laws of England*, 4th ed. reissue, vol. 9(1) (London: Butterworths, 1998) at 341, para. 606; *S. W. Mackay & Associates Ltd. v. Park Lane Ventures Ltd.* 1997 CanLII 2051 (BC SC), (1997), 32 B.C.L.R. (3d) 338 at para. 8 (S.C.).
> [Emphasis added]

[31] In "*A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals – Joint Task Force on Business Insolvency Law Reform – March 15, 2002*", the authors cited the following meanings for "executory contract":

> What is an executory contract? Neither the CCAA nor the BIA use the expression, but the United States Bankruptcy Code does in s. 365 ("Code, s. 365"). In general contract law, "executory contract" means a contract under which one or both parties still have obligations to perform. However, in U.S. bankruptcy law the expression is normally given a narrower meaning. According to the most widely accepted definition in the United States, an executory contract for the purposes of Code s. 365 is:

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> a contract under which both the obligations of the bankrupt ["A"] under the contract and the other party to the contract ["B"] are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

(Countryman, "Executory Contracts in Bankruptcy" (1974) 57 *Minnesota Law Review* 439 (Part 1), at 460).

[32] The authors included an employment contract as an executory contract in this sense. See also: *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, a Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003, at 131, and Janis Sarra, *Rescue!: The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2007) at 177-178, where employment contracts were characterized as executory contracts in the context of the discussion of insolvency laws. Professor Sarra noted (at 178-179) that damage claims resulting from termination or repudiation of executory contracts after the initial order are unsecured claims for damages.

[33] None of these sources discussed the application of the U.S. definition of executory contract for bankruptcy purposes to an employment contract. It is not clear to me, because of the nature of the employment relationship, that that definition will generally apply. As a matter of contract law, if the employee fails to provide the promised services, or the employer fails to pay for services rendered, subject to any other terms of the contract, that would ordinarily be a material breach excusing the performance of the other party. Whether that conclusion would ordinarily apply to an employment contract is, however, a question I do not need to decide for the purposes of this case. The ordinary legal definition of executory contract covers these circumstances.

[34] An ongoing employment contract, under which an employee has promised to render services in return for the employer's promise to pay for those services, is an executory contract as there are obligations on both parties that are yet to be completed. Thus, Mr. Esau's employment contract was, at the Filing Date, an executory contract.

[35] Accordingly, Mr. Esau's claim against West Bay for damages for wrongful dismissal fell within the definition of "Claim" in the Plan.

[36] That Mr. Esau's rights arising on termination of his employment contract were compromised under the Plan is consistent with the purpose of the *CCAA*, as recently considered by this Court in *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344 (CanLII), 2003 BCCA 344, (sub nom. *Skeena Cellulose Inc. (Re)*) 13 B.C.L.R. (4th) 236 at para. 34:

> ...[C]ourts appear to have given full effect to the "broad public policy objectives" of the [CCAA], which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:
>
> > Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.
> >
> > Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent company in exchange for new securities of lower nominal amount and later maturity date.
> >
> > [Emphasis added]

[37] The Plan permitted West Bay to rationalize its business affairs with a view to a reorganization that would make it viable in the future. The stated purpose of the Plan was to allow West Bay to "settle payment of its liabilities arising both

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before and after the Filing Date and to compromise the indebtedness owed to Creditors of the Company on a fair and equitable basis" (Plan, s. 2.1). It needed to retain its employees in order to complete existing orders for the construction of yachts, and to use the sale proceeds from the yachts to fund payments to its creditors on a compromised basis, on the basis that all of its creditors would "derive a greater benefit from the Plan than would result from the bankruptcy of the Company and so as to allow the Company to continue in business in the future". West Bay's tangible assets were sold to a related company to provide cash to further fund payments to creditors. It was intended that the company would remain in business using a revised production financing model, using private capital raised after the effective date of the Plan.

[38] In *Skeena*, the issue addressed by the Court was whether the termination of replaceable forest contracts, which could have "disastrous consequences for many individuals, local governments and communities", supplanted the intent and purpose of the *CCAA* to stave off a bankruptcy. The Court upheld the trial judge's decision that terminated employees were not to be placed in a better position than other creditors (at para. 22), and noted that "[i]n the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights" (at para. 37). In considering whether the arrangement under the *CCAA*, as a whole, was "fair, reasonable and equitable", the Court noted that "equity" is not necessarily "equality" and that the courts looks to all of the creditors to see if rights are compromised in an attempt to balance interests (at para. 59). The Court concluded (at para. 60):

> As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask "Why me?" However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

Mr. Esau's Claim

[39] Mr. Esau's claim was thus subject to the terms of the Plan, which required creditors to file a "Proof of Claim" in accordance with the procedure and before the times set out in the relevant court orders. Mr. Esau did not file a Proof of Claim at any time. He did not receive a "Proof of Claim Package", as did other creditors, providing notice to file a Proof of Claim. However, West Bay published the notice to creditors, as ordered by the court, in the Vancouver Sun, and on its website. Mr. Esau was advised, through his counsel, that he was not entitled to bring an action against the company because of the stay of proceedings, that his claim as a creditor was compromised in the Plan, and that he could apply for an extension of time to file a Proof of Claim.

[40] In West Bay's application that is the subject of this appeal, it sought an order extending the time for Mr. Esau to file a Proof of Claim. It was only during the hearing of West Bay's application that Mr. Esau took the position that the time should be extended.

[41] The chambers judge denied the application for the extension of time, after considering the factors enumerated in *Blue Range Resources Corp. (Re)*, 2000 ABCA 285 (CanLII), 2000 ABCA 285, 271 A.R. 138 at para. 26:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[42] She concluded that the delay was significant, and was not caused by inadvertence. She further concluded that permitting the claim would result in prejudice that could not reasonably be alleviated (at paras. 32-36).

[43] The chambers judge's decision to deny an extension of time to file a Proof of Claim was discretionary, reviewable by this Court only if it was clearly wrong or has worked a substantial injustice: see *Meuller v. Coronation Insurance* (1995), 12 B.C.L.R. (3d) 90 (C.A.).

[44] Mr. Esau has not shown that the chambers judge's decision was clearly wrong, and she was in the best position, as the judge supervising the *CCAA* proceedings, to weigh the relative prejudice to all parties if his claim was allowed to be litigated while all other matters involving West Bay's creditors had been finalized.

[45] I see no basis to interfere with the chambers judge's decision not to extend the time to file the Proof of Claim.

Conclusion

[46] Mr. Esau's claim for damages for wrongful dismissal was a claim under an executory contract, and as such was stayed and compromised by the *CCAA* proceedings. There is no basis to interfere with the chambers judge's decision not to extend the time to file a Proof of Claim, nor to consider Mr. Esau's claim for misrepresentation.

[47] It follows that I would dismiss the appeal.

"The Honourable Madam Justice Levine"

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I AGREE:
"The Honourable Madam Justice Rowles"
I AGREE:
"The Honourable Mr. Justice Groberman"

Related creditors - Sec 22(3)
(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.
1997, c. 12, s. 126;
2005, c. 47, s. 131;
2007, c. 36, s. 71.

Class — creditors having equity claims - Sec 22.1
22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.
2005, c. 47, s. 131;
2007, c. 36, s. 71.

Blue Range Resource Corp. (Re), 2000 ABQB 4 (CanLII) - Is Claimant Shareholder or Creditor?

Date:	2000-01-10
Docket:	9901-04070
Parallel citations:	259 AR 30; [2000] 4 WWR 738; 15 CBR (4th) 169; 76 Alta LR (3d) 338
URL:	http://canlii.ca/t/5nm5
Citation:	Blue Range Resource Corp. (Re), 2000 ABQB 4 (CanLII), <http://canlii.ca/t/5nm5> retrieved on 2013-08-22
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Reflex Record	Related decisions, legislation cited and decisions cited

Re Blue Range Resource Corporation, 2000 ABQB 4

Date: 20000110
Action No. 9901-04070

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED
AND IN THE MATTER OF BLUE RANGE RESOURCE CORPORATION

APPEARANCES:
R.J. (Bob) Wilkins/Gary Befus of Walsh Wilkins
for Big Bear Exploration Ltd.
A. Robert Anderson/Bryan Duguid of Blake Cassels & Graydon
for Enron Trade & Capital Resources Canada Corp.
Glen H. Poelman of Macleod Dixon
for the Creditors' Committee
Virginia A. Engel of Peacock Linder & Halt
for MRF 1998 II Limited Partnership

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REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B.E. ROMAINE

INTRODUCTION

[1] This is an application for determination of three preliminary issues relating to a claim made by Big Bear Exploration Ltd. against Blue Range Resource Corporation, a company to which the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, applies. Big Bear is the sole shareholder of Blue Range, and submits that its claim should rank equally with claims of unsecured creditors. The preliminary issues relate to the ranking of Big Bear's claim, the scope of its entitlement to pursue its claim and whether Big Bear is the proper party to advance the major portion of the claim.

[2] The Applicants are the Creditors' Committee of Blue Range and Enron Canada Corp., a major creditor. Big Bear is the Respondent, together with the MRF 1998 II Limited Partnership, whose partners are in a similar situation to Big Bear.

FACTS

[3] Between October 27, 1998 and February 2, 1999, Big Bear took the following steps:

(a) it purchased shares of Blue Range for cash through The Toronto Stock Exchange on October 27 and 29, 1998;

(b) it undertook a hostile takeover bid on November 13, 1998, by which it sought to acquire all of the issued and outstanding Blue Range shares;

(c) it paid for the Blue Range shares sought through the takeover bid by way of a share exchange: Blue Range shareholders accepting Big Bear's offer received 11 Big Bear shares for each Blue Range share;

(d) it issued Big Bear shares from treasury to provide the shares used in the share exchange.

[4] The takeover bid was accepted by Blue Range shareholders and on December 12, 1998, Big Bear acquired control of Blue Range. It is now the sole shareholder of Blue Range.

[5] Big Bear says that its decision to undertake the takeover was made in reliance upon information publicly disclosed by Blue Range regarding its financial situation. It says that after the takeover, it discovered that the information disclosed by Blue Range was misleading, and in fact the Blue Range shares were essentially worthless.

[6] Big Bear as the sole shareholder of Blue Range entered into a Unanimous Shareholders' Agreement pursuant to which Big Bear replaced and took on all the rights, duties and obligations of the Blue Range directors. Using its authority under the Unanimous Shareholders' Agreement, Big Bear caused Blue Range to apply for protection under the CCAA. An order stipulating that Blue Range is a company to which the CCAA applies was granted on March 2, 1999.

[7] On April 6, 1999, LoVecchio, J. issued an order which provides, in part, that:

(a) all claims of any nature must be proved by filing with the Monitor a Notice of Claim with supporting documentation, and

(b) claims not received by the Monitor by May 7, 1999, or not proved in accordance with the prescribed procedures, are forever barred and extinguished.

[8] Big Bear submitted a Notice of Claim to the Monitor dated May 5, 1999 in the amount of $151,317,298 as an unsecured claim. It also filed a Notice of Motion on May 5, 1999, seeking an order lifting the stay of proceedings granted by the March 2, 1999 order for the purpose of filing a statement of claim against Blue Range. Big Bear's application for leave to file its statement of claim was denied by LoVecchio, J. on May 11, 1999.

[9] On May 21, 1999, the Monitor issued a Notice of Dispute disputing in full the Big Bear claim. Big Bear filed a Notice of Motion on May 31, 1999 for:

(a) a declaration that the unsecured claim of Big Bear is a meritorious claim against Blue Range; and

(b) an order directing the expeditious trial and determination of the issues raised by the unsecured claim of Big Bear.

[10] On October 4, 1999, LoVecchio, J. directed that there be a determination of two issues in respect of the Big Bear unsecured claim by way of a preliminary application. On October 28, 1999, I defined the two issues and added a third one.

[11] Big Bear's Notice of Claim sets out the nature and amount of its claim against Blue Range. The amount is particularized by the schedule attached to the Notice of Claim, which identifies the claim as being comprised of the following components:

(a) the price of shares acquired for cash on October 27 and 29, 1998 ($724,454.91);

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(b) the value of shares acquired by means of the share exchange of Big Bear treasury shares for Blue Range shares held by Blue Range shareholders ($147,687,298); and

(c) "transaction costs," being costs incurred by Big Bear for consultants, professional advisers, filings, financial services, and like matters incidental to the share purchases generally, and the takeover bid in particular ($3,729,498).

ISSUE #1

[12] With respect to the alleged share exchange loss, without considering the principle of equitable subordination, is Big Bear:

(a) an unsecured creditor of Blue Range that ranks equally with the unsecured creditors of Blue Range; or

(b) a shareholder of Blue Range that ranks after the unsecured creditors of Blue Range.

[13] At the hearing, this question was expanded to include reference to the transaction costs and cash share purchase damage claims in addition to the alleged share exchange loss.

Summary of Decision

[14] The nature of the Big Bear claim against Blue Range for an alleged share exchange loss, transaction costs and cash share purchase damages is in substance a claim by a shareholder for a return of what it invested *qua* shareholder. The claim therefore ranks after the claims of unsecured creditors of Blue Range.

Analysis

[15] The position of the Applicants is that the share exchange itself was clearly an investment in capital, and that the claim for the share exchange loss derives solely from and is inextricably intertwined with Big Bear's interest as a shareholder of Blue Range. The Applicants submit that there are therefore good policy reasons why the claim should rank after the claims of unsecured creditors of Blue Range, and that basic corporate principles, fairness and American case law support these policy reasons. Big Bear submits that its claim is a tort claim, allowable under the CCAA, and that there is no good reason to rank the claim other than equally with unsecured creditors. Big Bear submits that the American cases cited are inappropriate to a Canadian CCAA proceeding, as they are inconsistent with Canadian law.

[16] There is no Canadian law that deals directly with the issue of whether a shareholder allegedly induced by fraud to purchase shares of a debtor corporation is able to assert its claim in such a way as to achieve parity with other unsecured creditors in a CCAA proceeding. It is therefore necessary to start with basic principles governing priority disputes.

[17] It is clear that in common law shareholders are not entitled to share in the assets of an insolvent corporation until after all the ordinary creditors have been paid in full: *Re: Central Capital Corp.* 1996 CanLII 1521 (ON CA), (1996), 132 D.L.R. (4th) 223 (Ont. C.A.) at page 245; *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* 1992 CanLII 49 (SCC), (1992), 97 D.L.R. (4th) 385 (S.C.C.) at pages 402 and 408. In that sense, Big Bear acquired not only rights but restrictions under corporate law when it acquired the Blue Range shares.

[18] There is no doubt that Big Bear has exercised its rights as a shareholder of Blue Range. Pursuant to the Unanimous Shareholders' Agreement, it authorized Blue Range to file an application under the CCAA "to attempt to preserve the equity value of [Blue Range] for the benefit of the sole shareholder of [Blue Range]" (Bourchier November 1, 1999 affidavit). It now attempts to recover its alleged share exchange loss through the claims approval process and rank with unsecured creditors on its claim. The issue is whether this is a collateral attempt to obtain a return on an investment in equity through equal status with ordinary creditors that could not be accomplished through its status as a shareholder.

[19] In *Canada Deposit Insurance* (supra), the Supreme Court of Canada considered whether emergency financial assistance provided to the Canadian Commercial Bank by a group of lending institutions and government was properly categorized as a loan or as an equity investment for the purpose of determining whether the group was entitled to rank *pari passu* with unsecured creditors in an insolvency. The court found that, although the arrangement was hybrid in nature, combining elements of both debt and equity, it was in substance a loan and not a capital investment. It is noteworthy that the equity component of the arrangement was incidental, and in fact had never come into effect, and that the agreements between the parties clearly supported the characterization of the arrangement as a loan.

[20] *Central Capital* (*supra*) deals with the issue of whether the holders of retractable preferred shares should be treated as creditors rather than shareholders under the CCAA because of the retraction feature of the shares. Weiler, J.A. commented at page 247 of the decision that it is necessary to characterize the true nature of a transaction in order to decide whether a claim is a claim provable in either bankruptcy or under the CCAA. She stated that a court must look to the surrounding circumstances to determine "whether the true nature of the relationship is that of a shareholder who has equity in the company or whether it is that of a creditor owed a debt or liability."

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[21] The court in *Central Capital* found that the true nature of the relationship between the preferred shareholders and the debtor company was that of shareholders. In doing so, it considered the statutory provision that prevents a corporation from redeeming its shares while insolvent, the articles of the corporation, and policy considerations. In relation to the latter factor, the court commented that in an insolvency where debts will exceed assets, the policy of federal insolvency legislation precludes shareholders from looking to the assets until the creditors have been paid (*supra*, page 257).

[22] In this case, the true nature of Big Bear's claim is more difficult to characterize. There may well be scenarios where the fact that a party with a claim in tort or debt is a shareholder is coincidental and incidental, such as where a shareholder is also a regular trade creditor of a corporation, or slips and falls outside the corporate office and thus has a claim in negligence against the corporation. In the current situation, however, the very core of the claim is the acquisition of Blue Range shares by Big Bear and whether the consideration paid for such shares was based on misrepresentation. Big Bear had no cause of action until it acquired shares of Blue Range, which it did through share purchases for cash prior to becoming a majority shareholder, as it suffered no damage until it acquired such shares. This tort claim derives from Big Bear's status as a shareholder, and not from a tort unrelated to that status. The claim for misrepresentation therefore is hybrid in nature and combines elements of both a claim in tort and a claim as shareholder. It must be determined what character it has in substance.

[23] It is true that Big Bear does not claim recission. Therefore, this is not a claim for return of capital in the direct sense. What is being claimed, however, is an award of damages measured as the difference between the "true" value of Blue Range shares and their "misrepresented" value - in other words, money back from what Big Bear "paid" by way of consideration. Although the matter is complicated by reason that the consideration paid for Blue Range shares by Big Bear was Big Bear treasury shares, the Notice of Claim filed by Big Bear quantifies the loss by assigning a value to the treasury shares. A tort award to Big Bear could only represent a return of what Big Bear invested in equity of Blue Range. It is that kind of return that is limited by the basic common law principal that shareholders rank after creditors in respect of any return on their equity investment. Whether payment of the tort liability by Blue Range would affect Blue Range's stated capital account is irrelevant, since the shares were not acquired from Blue Range but from its shareholders.

[24] In considering the question of the characterization of this claim, it is noteworthy that Mr. Tonken in his March 2, 1999 affidavit in support of Blue Range's application to apply the CCAA did not include the Big Bear claim in his list of estimated outstanding debt, accounts payable and other liabilities. The affidavit does, however, set out details of the alleged mispresentations.

[25] I find that the alleged share exchange loss derives from and is inextricably intertwined with Big Bear's shareholder interest in Blue Range. The nature of the claim is in substance a claim by a shareholder for a return of what it invested *qua* shareholder, rather than an ordinary tort claim.

[26] Given the true nature of the claim, where should it rank relative to the claims of unsecured creditors?

[27] The CCAA does not provide a statutory scheme for distribution, as it is based on the premise that a Plan of Arrangement will provide a classification of claims which will be presented to creditors for approval. The Plan of Arrangement presented by CNRL in the Blue Range situation has been approved by creditors and sanctioned by the Court. Section 3.1 of the Plan states that claims shall be grouped into two classes: one for Class A Claimants and one for Class B Claimants, which are described as claimants that are "unsecured creditors" within the meaning of the CCAA, but do not include " a Person with a Claim which, pursuant to Applicable Law, is subordinate to claims of trade creditors of any Blue Range Entities." The defined term "Claims" includes indebtedness, liability or obligation of any kind. Applicable Law includes orders of this Court.

[28] Although there are no binding authorities directly on point on the issue of ranking, the Applicants submit that there are a number of policy reasons for finding that the Big Bear claim should rank subordinate to the claims of unsecured creditors.

[29] The first policy reason is based on the fundamental corporate principle that claims of shareholders should rank below those of creditors on an insolvency. Even though this claim is a tort claim on its face, it is in substance a claim by a shareholder for a return of what it paid for shares by way of damages. The Articles of Blue Range state that a holder of Class A Voting Common Shares is entitled to receive the "remaining property of the corporation upon dissolution in equal rank with the holders of all other common shares of the Corporation". As pointed out by Laskin, J. in *Central Capital (supra* at page 274):

> Holding that the appellants do not have provable claims accords with sound corporate policy. On the insolvency of a company the claims of creditors have always ranked ahead of the claims of shareholders for the return of their capital. Case law and statute law protect creditors by preventing companies from

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> using their funds to prejudice creditors' chances of repayment. Creditors rely on these protections in making loans to companies.

[30] Although what is envisaged here is not that Blue Range will pay out funds to retract shares, the result is the same: Blue Range would be paying out funds to the benefit of its sole shareholder to the prejudice of third-party creditors.

[31] It should be noted that this is not a case, as in the recent restructuring of Eatons under the CCAA, where a payment to the shareholders was clearly set out in the Plan of Arrangement and approved by the creditors and the court.

[32] As counsel for Engage Energy, one of the trade creditors, stated on May 11, 1999 during Big Bear's application for an order lifting the stay order under the CCAA and allowing Big Bear to file a statement of claim:

> We've gone along in this process with a general understanding in our mind as to what the creditor pool is, and as recently as middle of April, long after the evidence will show that Big Bear was identifying in its own mind the existence of this claim, public statements were continuing to be made, setting out the creditor pool, which did not include this claim. And this makes a significant difference in how people react to supporting an ongoing plan...

[33] Another policy reason which supports subordinating the Big Bear claim is a recognition that creditors conduct business with corporations on the assumption that they will be given priority over shareholders in the event of an insolvency. This assumption was referred to by Laskin, J. in *Central Capital (supra)*, in legal textbooks (Hadden, Forbes and Simmonds, Canadian Business Organizations Law Toronto: Butterworths, 1984 at 310, 311), and has been explicitly recognized in American case law. The court in *In the Matter of Stirling Homex Corporation*, 579 F. 2d 206 (1978) U.S.C.A. 2nd Cir. at page 211 referred to this assumption as follows:

> Defrauded stockholder claimants in the purchase of stock are presumed to have been bargaining for equity type profits and assumed equity type risks. Conventional creditors are presumed to have dealt with the corporation with the reasonable expectation that they would have a senior position against its assets, to that of alleged stockholder claims based on fraud.

[34] The identification of risk-taking assumed by shareholders and creditors is not only relevant in a general sense, but can be illustrated by the behaviour of Big Bear in this particular case. In the evidence put before me, Big Bear's president described how, in the course of Big Bear's hostile takeover of Blue Range, it sought access to Blue Range's books and records for information, but had its requests denied. Nevertheless, Big Bear decided to pursue the takeover in the absence of information it knew would have been prudent to obtain. Should the creditors be required to share the result of that type of risk-taking with Big Bear? The creditors are already suffering the results of misrepresentation, if it occurred, in the inability of Blue Range to make full payment on its trade obligations.

[35] The Applicants submit that a decision to allow Big Bear to stand *pari passu* with ordinary creditors would create a fundamental change in the assumptions upon which business is carried on between corporations and creditors, requiring creditors to re-evaluate the need to obtain secured status. It was this concern, in part, that led the court in *Stirling Homex* to find that it was fair and equitable that conventional creditors should take precedence over defrauded shareholder claims (*supra* at page 208).

[36] The Applicants also submit that the reasoning underlying the *Central Capital* case (where the court found that retraction rights in shares do not create a debt that can stand equally with the debt of shareholders) and the cases where shareholders have attempted to rescind their shareholdings after a corporation has been found insolvent is analogous to the Big Bear situation, and the same result should ensue.

[37] It is clear that, both in Canada and in the United Kingdom, once a company is insolvent, shareholders are not allowed to rescind their shares on the basis of misrepresentation: *McAskill v. The Northwestern Trust Company*, 1926 CanLII 57 (SCC), [1926] S.C.R. 412 at 419; *Milne v. Durham Hosiery Mills Ltd.,* [1925] 3 D.L.R. 725 (Ont. S.C.A.D.); *Trusts and Guarantee Co. v. Smith* (1923), 54 O.L.R. 144 (Ont. S.C.A.D.); *Re: National Stadium Ltd.* (1924), 55 O.L.R. 199 (Ont. S.C.); *Oaks v. Turquend* [1861-73] All E.R. Rep. 738 (H.L.) at page 743-744.

[38] The court in *McAskill (supra* at page 419) in obiter dicta refers to a claim of recission for fraud, and comments that the right to rescind in such a case may be lost due to a change of circumstances making it unjust to exercise the right. Duff, J. then refers to the long settled principle that a shareholder who has the right to rescind his shares on the ground of misrepresentation will lose that right if he fails to exercise it before the commencement of winding-up proceedings, and comments:

> The basis of this is that the winding-up order creates an entirely new situation, by altering the relations, not only between the creditors and the shareholders, but also among the shareholders *inter se*.

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[39] This is an explicit recognition that in an insolvency, a corporation may not be able to satisfy the claims of all creditors, thus changing the entire complexion of the corporation, and rights that a shareholder may have been entitled to prior to an insolvency can be lost or limited.

[40] In the Blue Range situation, Big Bear has actively embraced its shareholder status despite the allegations of misrepresentation, putting Blue Range under the CCAA in an attempt to preserve its equity value and, in the result, holding Blue Range's creditors at bay. Through the provision of management services, Big Bear has participated in adjudicating on the validity of creditor claims, and has then used that same CCAA claim approval process to attempt to prove its claim for misrepresentation. It may well be inequitable to allow Big Bear to exercise all of the rights it had arising from its status as shareholder before CCAA proceedings had commenced without recognition of Blue Range's profound change of status once the stay order was granted. Certainly, given the weight of authority, Big Bear would not likely have been entitled to rescind its purchase of shares on the basis of misrepresentation, had the Blue Range shares been issued from treasury.

[41] Finally, the Applicants submit that it is appropriate to take guidance from certain American cases which are directly on point on this issue.

[42] The question I was asked to address expressly excludes consideration of the principle of "equitable subordination". The Applicants submit that the principle of equitable subordination that is excluded for the purpose of this application is the statutory principle codified in the U.S. Bankruptcy Code in 1978 (Bankruptcy Code, Rules and Forms (1999 Ed.) West Group, Subchapter 1, Section 510 (b)). This statutory provision requires notice and a full hearing, and relates to the ability of a court to subordinate an allowed claim to another claim using the principles of equitable subordination set out and defined in case law. The Applicants submit, however, that I should look to three American cases that preceded this statutory codification and that dealt with subordination of claims by defrauded shareholders to the claims of ordinary unsecured creditors on an equitable basis.

[43] The first of these cases is *Stirling Homex (supra)*. The issue dealt with by the United States Court of Appeals, Second Circuit, is directly on point: whether claims filed by allegedly defrauded shareholders of a debtor corporation should be subordinated to claims filed by ordinary unsecured creditors for the purposes of formulating a reorganization plan. The court referred to the decision of *Pepper v. Litton* (308 U.S. 295 at page 305, 60 S.Ct. 238, 84 L. Ed. 281 (1939)) where the Supreme Court commented that the mere fact that a shareholder has a claim against the bankrupt company does not mean it must be accorded *pari passu* status with other creditors, and that the subordination of that claim may be necessitated by principles of equity. Elaborating on this, the court in *Stirling Homex* (*supra* at page 213) stated that where the debtor corporation is insolvent, the equities favour the general creditors rather than the allegedly defrauded shareholders, since in this case, the real party against which the shareholders are seeking relief is the general creditors whose percentage of realization will be reduced if relief is given to the shareholders. The court quotes a comment made by an earlier Court of Appeals (*Newton National Bank v. Newbegin*, 74 F. 135, 140 (8th Cir. 1896):

> When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of creditor, is very strong, and all attempts of that kind should be viewed with suspicion.

[44] Although the court in *Stirling Homex* refers to its responsibility under US bankruptcy law to ensure that a plan of reorganization is "fair and equitable" and to the "absolute priority" rule of classification under US bankruptcy principles, it is clear that the basis for its decision is the general rule of equity, a "sense of simple fairness" (*supra*, page 215). Despite the differences that may exist between Canadian and American insolvency law in this area, this case is persuasive for its reasoning based on equitable principles.

[45] If Big Bear's claim is allowed to rank equally with unsecured creditors, this will open the door in many insolvency scenarios for aggrieved shareholders to claim misrepresentation or fraud. There may be many situations where it could be argued that there should have been better disclosure of the corporation's declining fortunes, for who would deliberately have invested in a corporation that has become insolvent. Although the recognition that this may greatly complicate the process of adjudicating claims under the CCAA is not of itself sufficient to subordinate Big Bear's claim, it is a factor that may be taken into account.

[46] The Applicants also cite the case of *In re U.S. Financial Incorporated* 648 F. 2d 515 (1980)(U.S.C.A. 9th Cir.). This case is less useful, as it was decided primarily on the basis of the absolute priority rule, but while the case was not decided on equitable grounds, the court commented that support for its decision was found in the recognition of the importance of recognizing differences in expectations between creditors and shareholders when classifying claims (*supra* at page 524). The court also stated that although both creditors and shareholders had been victimized by fraud, it was

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equitable to impose the risks of insolvency and illegality on the shareholders whose investment, by its very nature, was a risky one.

[47] The final case cited to me on this issue is *In re THC Financial* 679 F. 2d 784 (1982) (U.S.C.A. 9th Cir.), where again the court concluded that claims of defrauded shareholders must be subordinated to the claims of the general creditors. The court commented that the claimant shareholders had bargained for equity-type profits and equity-type risks in purchasing their shares, and one such risk was the risk of fraud. As pointed out previously, Big Bear had an appreciation of the risks of proceeding with its takeover bid without access to the books and records of Blue Range and took the deliberate risk of proceeding in any event.

[48] In *THC Financial*, the claimants argued that since they had a number of possible causes of action in addition to their claim of fraud, they should not subordinated merely because they were shareholders. The court found, however, that their claim was essentially that of defrauded shareholders and not as victims of an independent tort. All of the claimants' theories of recovery were based on the same operative facts - the fraudulent scheme.

[49] Big Bear submits that ascribing some legal impediment to a shareholder pursuing a remedy in tort against a company in which it holds shares violates the principle set out in *Salomon v. Salomon and Company, Limited* [1897] A.C. 22 (H.L.) that corporations are separate and distinct entities from their shareholders. In my view, this is not in issue. What is being sought here is not to limit a tort action by a shareholder against a corporation but to subordinate claims made *qua* shareholder to claims made by creditors in an insolvency situation. That shareholder rights with respect to claims against a corporation are not unlimited has already been established by the cases on rescission and recognized by statutory limitations on redemption and retraction. In this case, the issue is not the right to assert the claim, but the right to rank with creditors in the distribution of the proceeds of a pool of assets that will be insufficient to cover all claims. No piercing of the corporate veil is being suggested or would result.

[50] Counsel for Big Bear cautions against the adoption of principles set out in the American cases on the basis that some decisions on equitable subordination require inequitable conduct by the claimant as a precondition to subordinating a claim, referring to a three-part test set out in a number of cases. This discussion of the inequitable conduct precondition takes place in the broader context of equitable subordination for any cause as it is codified under Section 510 of the US Bankruptcy Code. In any event, it appears that more recent American cases do not restrict the use of equitable subordination to cases of claimant misconduct, citing, specifically, that stock redemption claims have been subordinated in a number of cases even when there is no inequitable conduct by the shareholder. "Stock redemption" is the term used for cases involving fraud or misrepresentation: *U.S. v. First Truck Lines, Inc.* (1996) 517 U.S. 535; *SPC Plastics Corporation et al v. Griffiths et al* (1998) 6th Circuit Case No. 88-21236. Some of the American cases draw a distinction between cases where misconduct is generally required before subordination will be imposed and cases where "the claim itself is of a status susceptible to subordination, such as...a claim for damages arising from the purchase ... of a security of the debtor": *U.S. v. First Truck Lines, Inc. (supra,* at paragraph 542).

[51] The issue of whether equitable subordination as codified in Section 510 of the U.S. Bankruptcy Code should form part of the law in Canada has been raised in several cases but left undecided. Big Bear submits that these cases establish that if equitable subordination is to be part of Canadian law, it should be on the basis of the U.S. three-part test which includes the condition of inequitable conduct. Again, I cannot accept this submission. It is true that Iacobucci, J. in *Canada Deposit Insurance Corp.*, while he expressly refrains from deciding whether a comparable doctrine should exist in Canada, refers to the three-part test and states that he does not view the facts of the *Canada Deposit Insurance Corp.* case as giving rise to inequitable conduct. It should be noted, however, that that case did not involve a claim by a shareholder at all, since the lenders had never received the securities that were an option under the agreements, and that the relationship had at this point in the case been characterized as a debtor/creditor relationship.

[52] At any rate, this case, together with *Olympia and York Developments Ltd. v. Royal Trust Co.* [1993] O.J. No. 181 (Ont. G.D.) and *Unisource Canada Inc. v. HongKong Bank of Canada* [1998] O.J. No. 5586 (Ont. H.C.) all refer to the doctrine of equitable subordination codified in the U.S. Bankruptcy Code which is not in issue here. The latter two cases appear to have accepted the erroneous proposition that inequitable misconduct is required in all cases under the American doctrine.

[53] Big Bear also submits that the equitable principles that exist in U.S. law which have led the courts to ignore separate corporate personality in the case of subsidiary corporations are related to equitable principles used to subordinate shareholder claims. The basis for this submission appears to be a reference by the British Columbia Court of Appeal in *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd. et al* (1989) 43 B.L.R. 68 (1989) to the *Pepper v. Litton* case (*supra*) and the so-called "Deep Rock doctrine" under American law. I do not see a link between the comments made in *Pepper v. Litton* and referred to in *B.C. Preeco* on an entirely different issue and comments concerning the court's equitable jurisdiction in the case of claims by shareholders against insolvent corporations.

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[54] I acknowledge that caution must be used in following the approach taken in American cases to ensure that the principles underlying such approach do not arise from differences between U.S. and Canadian law. However, I find that the comments made by the American courts in these cases relating to the policy reasons for subordinating defrauded shareholder claims to those of ordinary creditors are persuasive, as they are rooted in principles of equity that are very similar to the equitable principles used by Canadian courts.

[55] American cases are particularly useful in the areas of commercial and insolvency law given that the larger economy in the United States generates a wider variety of issues that are adjudicated by the courts. There is precedent for the use of such cases: Laskin, J. in *Central Capital Corp.* (*supra*) used the analysis set out in American case law on whether preferred shareholders can claim as creditors in an insolvency to help him reach his conclusion.

[56] The three American cases decided on this direct issue before the 1978 statutory codification of the law of equitable subordination are not based on a doctrine of American law that is inconsistent with or foreign to Canadian common law. It is not necessary to adopt the U.S. absolute priority rule to follow the approach they espouse, which is based on equitable principles of fairness and policy. There is no principled reason to disregard the approach set out in these cases, which have application to Canadian business and economy, and I have found them useful in considering this issue.

[57] Based on my characterization of the claim, the equitable principles and considerations set out in the American cases, the general expectations of creditors and shareholders with respect to priority and assumption of risk, and the basic equitable principle that claims of defrauded shareholders should rank after the claims of ordinary creditors in a situation where there are inadequate assets to satisfy all claims, I find that Big Bear must rank after the unsecured creditors of Blue Range in respect to the alleged share exchange loss, the claim for transaction costs and the claim for cash share purchase damages.

ISSUE #2

[58] Assuming (without admitting) misrepresentation by Blue Range and reliance on it by Big Bear, is the alleged share exchange loss a loss or damage incurred by Big Bear and, accordingly, is Big Bear a proper party to advance the claim for such a loss?

Summary of Decision

[59] As the alleged share exchange loss is not a loss incurred by Big Bear, Big Bear is not the proper party to advance this claim.

Analysis

[60] The Applicants submit that negligence is only actionable if a plaintiff can prove that it suffered damages, as the purpose of awarding damages in tort is to compensate for actual loss. This is a significant difference between damages in tort and damages in contract. In order for a plaintiff to have a cause of action in negligent misrepresentation, it must satisfy the court as to the usual elements of duty of care and breach thereof, and it must establish that it has sustained damages from that breach.

[61] The Applicants argue that Big Bear did not suffer any damages arising from the share exchange. The Big Bear shares used in the share exchange came from treasury: Big Bear did not use any corporate funds or corporate assets to purchase the Blue Range shares. As the shares used in the exchange did not exist prior to the transaction, Big Bear was essentially in the same financial position pre-issuance as it was post-issuance in terms of its assets and liabilities. The nature and composition of Big Bear's assets did not change as the treasury shares were created and issued for the sole purpose of the share exchange. Therefore, Big Bear did not sustain a loss in the amount of the value of the shares. The Applicants submit that the only potential loss is that of the pre-takeover shareholders of Big Bear, as the value of their shares may have been diluted as a result of the share exchange. However, even if there was such a loss, Big Bear is not the proper party to pursue such an action. Just as shareholders may not bring an action for a loss which properly belongs to the corporation, a corporation may not bring an action for a loss directly incurred by its shareholders.

[62] Big Bear claims that it is entitled to recover the value of the Big Bear shares that were issued in furtherance of the share exchange. It says that it can prove all the elements of negligent misrepresentation: there was a special relationship; material misrepresentations were made to Big Bear; those representations were made negligently; Big Bear relied on those representations; and Big Bear suffered damage.

[63] It submits that damages for negligent misrepresentation are calculated as the difference between the represented value of the shares less their sale value. Big Bear contends that it matters not that the consideration for the Blue Range shares was Big Bear shares issued from treasury. As long as the consideration is adequate consideration for legal purposes, its form does not affect the measure of damages awarded by the courts for negligent misrepresentation.

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Big Bear says that it bargained for a company with a certain value, and, in doing so, it gave up its own shares worth that value. Therefore, Big Bear submits that it clearly incurred a loss.

[64] Big Bear submits that it is the proper party to pursue this head of damages. While the corporation has met the test for negligent misrepresentation, the shareholders likely could not, as the representations in questions were not made to them. In any event, Big Bear indicates that it does not claim for any damages caused by dilution of the shares. It also notes that a claim for dilution would not be the same as the face value of the shares issued in the share exchange, which is the amount claimed in the Notice of Claim.

[65] **Big Bear's claim is in tort, not contract. This is an important distinction, as the issue at hand concerns the** measure of damages. The measure of damages is not necessarily the same in contract as it is in tort.

[66] It is a first principle of tort law that a person is entitled to be put in the position, insofar as possible, that he or she was before the tort occurred. While the courts were historically loath to award damages for pure economic loss, this position was softened in ***Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.)** where the court confirmed that damages could be recovered in this type of case. When assessing damages for negligent misrepresentation resulting in pure economic loss, the goal is to put the party who relied on the misrepresentation in the position which it would have been in had the misrepresentation not occurred. While the parties to this application appear to agree on this principle, it is the application thereof with which they disagree.

[67] The proper measure of damages in cases of misrepresentation is discussed in **S.M. Waddams, *The Law of Damages* (Toronto: Canada Law Book Inc., Looseleaf, Dec. 1998)**, where the author states:

> The English and Canadian cases have consistently held that the proper measure [with respect to fraudulent misrepresentation] is the tortious measure, that is the amount of money required to put the plaintiff in the position that would have been occupied not if the statement had been true but if the statement had not been made. The point was made clearly in *McConnel v. Wright* , [1903] 1 Ch. 546 (C.A.):
>
> > It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect come in, but it is an action of tort - it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. (at 5-19, 5-20)
>
> ...
>
> Since the decision of the House of Lords in 1963 in *Hedley Byrne Ltd.* v. *Heller & Partners Ltd.,* [1964] A.C. 465 (H.L.) it has been established that an action lies for negligent misrepresentation causing economic loss. It naturally follows from acceptance of out-of pocket loss rather than the contractual measure as the basic measure of damages for fraud, that the same basic measure applies to negligent misrepresentation. (at 5-28).

[68] Big Bear claims to be entitled to the difference between the actual value and the exchange value of the shares. The flaw in this assertion is that it focuses on what Big Bear bargained for as opposed to what it actually received, which is akin to a contractual measure of damages. Big Bear clearly states that it is not maintaining an action in contract, only in tort. Damages in tort are limited to the losses which a plaintiff *actually incurs* as a result of the misrepresentation. Thus, Big Bear is not entitled to recover what it expected to receive as a result of the transaction; it is entitled to be compensated only for that which it actually lost. In other words, what did Big Bear have before the loss which it did not have afterwards? To determine what losses Big Bear actually sustained, its position after the share exchange must be compared with its position prior to the share exchange.

[69] The situation at hand is unique. Due to a negligent misrepresentation, Big Bear was induced to give up something which, although it had value, was of substantially no cost to the corporation, and in fact did not even exist but for the misrepresentation. Big Bear created shares which had a value for the purpose of the share exchange, in that Blue Range shareholders were willing to accept them in exchange for Blue Range shares. However, outside of transaction costs, those shares had no actual cost to Big Bear, as compared to the obvious costs associated with a payment by way of cash or tangible assets. Big Bear cannot say that after the share exchange, it had lost approximately $150 million dollars, because the shares essentially did not exist prior to the transaction, and the cost of creating those shares is not equivalent to their face value. Big Bear retains the ability to issue a limitless number of shares from treasury in the future; any loss in this regard would not be equivalent to the actual value of the shares. Therefore, all that is required to return Big Bear to its pre-misrepresentation position is compensation for the actual costs associated with issuing the shares.

[70] That Big Bear has not incurred a loss in the face value of the exchanged shares is demonstrated by comparing the existing facts with hypothetical situations in which such a loss may be found. Had Big Bear been required to pay for

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the shares used in the exchange, for instance, by purchasing shares from existing Big Bear shareholders, there would have been a clear loss of funds evidenced in the Big Bear financial statements. Big Bear's financial position prior to the exchange would have been significantly better than its position afterwards. However, no such difference results from the mere exchange of newly-issued shares. If there had been evidence that Big Bear was or could be compelled to redeem or retract the new shares at the value assigned to them at the time of the share exchange, Big Bear may have a loss in the amount of the exchange value of the shares. However, there is no evidence of such a redemption or retraction feature attaching to these shares.

[71] In sum, Big Bear's position prior to the share exchange is that the Big Bear shares issued as part of the exchange did not exist. As a result of the alleged misrepresentation, Big Bear issued shares from treasury. These shares would not have been issued but for the misrepresentation. All that is required to put Big Bear back into the position it was in prior to the negligent misrepresentation is compensation for the cost of issuing the shares, which is not the same as the exchange value of those shares. Although this is somewhat of an anomalous situation, it is consistent with the accepted tort principle that, except in cases warranting punitive damages, damages in tort are awarded to compensate for actual loss. A party may not recover in tort for a loss of something it never had. Indeed, if Big Bear was awarded damages for the share exchange equal to what it has claimed, it would be in a better position financially than it was prior to the exchange. To the extent that shareholders would indirectly benefit, they would not only be Big Bear's pre-exchange shareholders, who may have suffered a dilution loss, but a new group of shareholders, including former Blue Range shareholders who participated in the exchange.

[72] Big Bear submits that it incurred other losses as a result of the misrepresentation. Transaction costs incurred in the share exchange may be properly characterized as damages in tort, as those costs would not have been incurred but for the negligent misrepresentation. The same is true for the Big Bear claim for cash expended to purchase Blue Range shares prior to the share exchange. However, as I have indicated in my decision on Issue #1, Big Bear's claim for transaction costs and for cash share purchase damages ranks after the claims of other unsecured creditors. There may also be losses such as loss of ability to raise equity. There was no evidence of this before me in this application, and I have addressed Big Bear's ability to advance a claim for this type of loss in the decision relating to Issue #3.

[73] Finally, there may also be a loss in the form of dilution of the value of the Big Bear shares. However, as Big Bear admits in its submissions, no such claim is made by the corporation, and any loss relating to a diluted share value would not be the same amount as the exchange value of the shares.

[74] In the result, I find that Big Bear is not the proper party to pursue a claim for the alleged share exchange loss.

ISSUE #3

Is Big Bear entitled to make or advance by way of argument in these proceedings the claims represented by the heads of damage specified in the draft Statement of Claim set out at Exhibit "F" to the affidavit of A. Jeffrey Tonken dated June 25, 1999?

[75] In addition to claims for damages for negligent misrepresentation, the claims that are set out in the draft Statement of Claim are claims for remedies for oppressive and unfairly prejudicial conduct and claims for loss of opportunity to pursue valuable investments and endeavours and loss of ability to raise equity.

Summary of Decision

[76] Given the orders made by LoVecchio, J. on April 6, 1999 and May 11, 1999, Big Bear is not entitled to advance the claims represented by the heads of damage specified in the draft Statement of Claim other than as set out in its Notice of Claim.

Analysis

[77] Big Bear submits that it is clear that, in an appropriate case, a complex liability issue that arises in the context of CCAA proceedings may be determined by a trial, including provision for production and discovery: *Algoma Steel Corp. v. Royal Bank of Canada* [1992] O.J. No. 889 (Ont. C.A.). Big Bear also submits that the court has the jurisdiction to overlook technical complaints about the contents of a Notice of Claim. The CCAA does not prescribe a claim form, nor set the rules for completion and contexts of a claim form, and it is common ground that in this case, the form used for the "Notice of Claim" was not approved by any order of the court. At any rate, Big Bear submits that it is not seeking to amend its claim to add new claims or to claim additional amounts.

[78] It makes that assertion apparently on the basis that the major parties concerned with CCAA proceedings in the Blue Range matter were aware of the nature of Big Bear's additional claims by reason of the draft Statement of Claim attached to Mr. Tonken's May 5, 1999 affidavit, although that affidavit was filed in support of an application to lift the stay imposed under the CCAA, an application which was dismissed by LoVecchio, J. on May 11, 1999.

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[79] Big Bear characterizes the issue as whether it must prove the exact amount claimed in its Notice of Claim or otherwise have its claim barred forever. It submits that the bare contents of the Notice of Claim cannot be construed as a fixed election barring a determination and assessment of an unliquidated claim for tort damages, and that it would be inequitable to deny Big Bear a hearing on the substance of its claim based on a perceived technical deficiency in the contents of the Notice of Claim.

[80] In summary, Big Bear asks that the court direct an expedited trial for the hearing of its claim as outlined in the draft Statement of Claim.

[81] The Applicants submit that, by attempting now to make claims other than the claims set out in the Notice of Claim, Big Bear is attempting to indirectly and collaterally attack the orders of LoVecchio, J. dated April 6, 1999 and May 11, 1999, specifically:

a) by adding claims for alleged heads of damage other than those specified in the Notice of Claim contrary to the claims bar order of April 6, 1999; and

b) by attempting to include portions of the draft Statement of Claim relating to other alleged heads of damage in the Notice of Claim contrary to the May 11, 1999 order dismissing leave to file the draft Statement of Claim.

[82] While it is true that a court has jurisdiction to overlook technical irregularities in a Notice of Claim, the issue is not whether the court should overlook technical non-compliance with, or ambiguity in, a form, but whether it is appropriate to do so in this case where previous orders have been made relating to these issues. Here, Big Bear chose to pursue its claims through two different routes. It filed a Notice of Claim alleging damages for a share exchange loss, transaction costs and the cost of shares purchased before the takeover bid, all damage claims that can reasonably be identified as being related to an action for negligent misrepresentation. At about the same time, it brought an application to lift the stay granted under the CCAA and file a Statement of Claim that alleged other causes of action. That application was dismissed, and the order dismissing it was never appealed. This is not a situation as in *Re Cohen* reflex, (1956) 19 W.W.R. 14 (Alta. C.A.) where a claim made on one basis was later sought to be made on a different basis, nor an issue of Big Bear lacking the necessary information to make its claim, although quantification of damage may have been difficult to determine. Given the previous application by Big Bear, this is a collateral or indirect attack on the effectiveness of LoVecchio, J.'s orders, and should not be allowed: *Wilson v. The Queen* (1983) 4 D.L.R. (4th) at 599). The effect of the two orders made by LoVecchio, J. is to prevent Big Bear from advancing its claim other than as identified in its Notice of Claim, which cannot reasonably be interpreted to extend beyond the claims for damages for negligent misrepresentation.

[83] It is true that the Notice of Claim form is not designed for unliquidated tort claims. I do not accept, however, that it was not possible for Big Bear to include claims under other heads of damages in the claim process by, for example, attaching the draft Statement of Claim to the Notice of Claim, or by incorporating such claims by way of schedule or appendix, as was done with respect to the claims for damages for negligent misrepresentation.

[84] I note that LoVecchio, J. issued a judgment after this application was heard relating to claims for relief from the impact of the claims procedure established by the court by a number of creditors who filed late or wished to amend their claims after the claims bar date of May 7, 1999 had passed. Although LoVecchio, J. allowed these claims, and found that it was appropriate in the circumstances to grant flexibility with respect to the applications before him, he noted that total amount of the applications made to him would be less than 1.4 million dollars, and the impact of allowing the applications was minimal to the remaining creditors. The applications before him do not appear to involve issues which had been the subject of previous court orders, as in the current situation, nor would they have the same implication to creditors as would Big Bear's claim. The decision of LoVecchio, J. in the circumstances of the applications before him is distinguishable from this issue.

DATED at Calgary, Alberta this 10th day of January, 2000.

J.C.Q.B.A.

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, [1992] 3 SCR 558 - Capital Injection or Loan for Winding Up Purposes

Date: 1992-11-19

Docket: 22084

Parallel citations: 1992 CanLII 49 (SCC); 97 DLR (4th) 385; 7 BLR (2d) 113; 16 CBR (3d) 154; 5 Alta LR (3d) 193

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Canada Deposit Insurance Corp. *v.* Canadian Commercial Bank, [1992] 3 S.C.R. 558

In the Matter of The *Winding-up Act*, R.S.C. 1970, c. W-10, as amended;
and
In the Matter of the Winding-up of Canadian Commercial Bank
between
Price Waterhouse Limited, Liquidator of Canadian Commercial Bank *Appellant*
v.
Her Majesty The Queen in right of Alberta, Royal Bank of Canada, Bank of Montreal, Toronto-Dominion Bank, Bank of Nova Scotia, Canadian Imperial Bank of Commerce and National Bank of Canada *Respondents*

Indexed as: Canada Deposit Insurance Corp. *v.* Canadian Commercial Bank

File No.: 22084.

1992: April 2; 1992: November 19.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Stevenson* and Iacobucci JJ.

on appeal from the court of appeal for alberta

Banks and banking operations -- Winding-up -- Bank facing solvency crisis -- Support group providing emergency financial assistance -- Whether money advanced was in nature of a loan or of a capital investment -- Whether participants rank pari passu with other unsecured creditors on winding-up.

Banks and banking operations -- Winding-up -- Postponement of claims -- Doctrine of equitable subordination -- Bank facing solvency crisis -- Support group providing emergency financial assistance -- Money advanced being in nature of a loan -- Whether loan comes within postponement provision in Partnerships Act -- If not, whether claim should nonetheless be postponed under doctrine of equitable subordination -- Partnerships Act, R.S.O. 1990, c. P.5, ss. 3(3)(d), 4.

In early 1985 Canadian Commercial Bank ("CCB") faced a solvency crisis owing to a sharp deterioration in its loan portfolio. A support group consisting of the governments of Canada and of Alberta, the Canadian Deposit Insurance Corp. and six major Canadian banks (the "participants") entered into an arrangement to provide the emergency financial assistance requested. They essentially agreed to purchase from CCB an undivided interest by way of participation in a portion (the "syndicated portion") of a portfolio of assets it held, the participation interest of each being proportionate to its own financial contribution. The parties also agreed that the participants would receive from CCB on a proportionate basis the money recovered on the syndicated portion of the portfolio assets as well as 50 percent of CCB's pre-tax income, or alternatively 100 percent of CCB's pre-tax income plus interest at the prime rate, until such time as the money advanced had been repaid. CCB undertook to indemnify each participant against any loss experienced under the support program up to the amount paid by them to CCB. It was agreed that, in the event of the insolvency or winding-up of CCB, any amount remaining unpaid "shall constitute indebtedness of CCB to the members of the Support Group". Finally, the parties agreed that each participant would receive from CCB, on a proportionate basis, warrants to purchase common shares of CCB, although the exercise of this option was contingent on shareholder, regulatory and legislative approval. The warrants were to expire 10 years after the date on which CCB had repaid the full amount advanced. Despite this financial assistance, CCB's financial status continued to deteriorate and the Court of Queen's Bench ordered that it be wound up. On an application by the liquidator for advice on the validity and ranking of the participants' claims, the chambers judge considered the injection of funds by the participants to have been a capital investment. He held that they were entitled to repayment of sums recovered on the syndicated portion of the portfolio assets but otherwise not entitled to recovery of their advances until after all ordinary creditors were paid in full. The Court of Appeal reversed the latter part of this judgment. It characterized the advance as a loan and concluded that the participants were entitled to rank *pari passu* with CCB's other unsecured creditors for all monies advanced and not repaid from the syndicated portion of the portfolio assets. This appeal is to determine (1) whether the Court of Appeal was correct in characterizing the advance by the participants to CCB as a loan; if so, (2) whether the loan comes

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within the postponement provision found in s. 4 of the Ontario *Partnerships Act*; and (3) if the *Partnerships Act* does not apply, whether the respondents' claim for the money loaned under the participation agreement should nonetheless be postponed to the claims of CCB's other unsecured creditors based on the doctrine of equitable subordination.

Held: The appeal should be dismissed.

Both the wording of the agreements and the surrounding circumstances clearly support the Court of Appeal's conclusion that the $255 million advance was in substance a loan and not a capital investment. Although the transaction did have an equity component (the warrants), this aspect alone does not in the circumstances of this case transform the essential nature of the advance from a loan to an investment. Nor does the fact that CCB's pre-tax income was the main source for repayment affect this characterization as the amount to be repaid from this source was limited to the sum advanced to CCB. Thus, the respondents are creditors of CCB and, as such, are entitled to rank *pari passu* with the other unsecured creditors of CCB in the distribution of CCB's assets.

The Court of Appeal properly declined to postpone the respondents' claims for the moneys not repaid until the claims of the other ordinary creditors of CCB were satisfied. The postponement provision in s. 4 of the Ontario *Partnerships Act* applies only where "money has been advanced by way of loan upon such a contract as is mentioned in section 3". Section 3(3)(a) makes no reference to a "contract" and is thus beyond the scope of s. 4. Section 3(3)(d) applies where "the lender is to receive . . . a share of the profits arising from carrying on the business". Any fixed debt to be repaid out of profits does not in itself constitute a "share of the profits" within the meaning of this provision. A lender does not share in profits unless he or she is entitled to be paid amounts referable to profits other than in repayment of the principal amount of the loan. Here the participants had a fixed debt which would be repaid in part by the moneys received from the syndicated portion of the portfolio assets and in part by CCB's pre-tax income. With the exception of the contingent interest at prime rate, under no circumstance were the payments from the pre-tax income to be applied to anything but the repayment of the loan. Once the loan was fully repaid, all payments from CCB's pre-tax income were to stop. Accordingly, the participants were not to receive a "share of the profits" of CCB within the meaning of s. 3(3)(d) by virtue of the repayment scheme for the advance. The contemplated granting of warrants under the highly contingent circumstances of this case does not alter this conclusion.

The principles of equitable subordination have no application to the facts of this case. Assuming that Canadian courts have the power in insolvency matters to subordinate otherwise valid claims to those of other creditors on equitable grounds relating to the conduct of these creditors *inter se*, the exercise of such a power is not justified in the present case. The reasons and limited evidence advanced before this Court disclose neither inequitable conduct on the part of the participants nor injury to the ordinary creditors of CCB as a result of the alleged misconduct.

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APPEAL from a judgment of the Alberta Court of Appeal 1990 ABCA 139 (CanLII), (1990), 107 A.R. 199, 74 Alta. L.R. (2d) 69, 69 D.L.R. (4th) 1, allowing the respondents' appeal from a judgment of the Court of Queen's Bench 1987 CanLII 3216 (AB QB), (1987), 83 A.R. 122, 56 Alta. L.R. (2d) 244, 46 D.L.R. (4th) 518, 67 C.B.R. (N.S.) 136. Appeal dismissed.

Charles P. Russell, for the Liquidator.

Earl A. Cherniak, *Q.C.*, and *Robert J. Morris*, for the general body of creditors of the estate of Canadian Commercial Bank.

James Rout, *Q.C.*, for the respondent Her Majesty the Queen in right of Alberta.

Colin L. Campbell, *Q.C.*, for the respondents Royal Bank of Canada, Bank of Montreal, Toronto-Dominion Bank, Bank of Nova Scotia, Canadian Imperial Bank of Commerce and National Bank of Canada.

//Iacobucci J.//

The judgment of the Court was delivered by

IACOBUCCI J. -- In September of 1985, the Canadian public witnessed what fortunately has been an infrequent occurrence in Canadian banking. Early that month, a chartered bank known as the Canadian Commercial Bank ("CCB") became insolvent and was ordered to be wound up pursuant to the provisions of the *Winding-up Act*, R.S.C., 1985, c. W-11 (formerly R.S.C. 1970, c. W-10). This appeal concerns the characterization of the unique and complex financial arrangement entered into by the Governments of Canada and of Alberta, six major Canadian financial institutions, the Canadian Deposit Insurance Corporation ("CDIC") and CCB in the spring of 1985 in an attempt to prevent its winding-up. The main issue is whether, in substance, the $255 million advanced to CCB under this arrangement was in the nature of a loan, in which case the "lenders" thereof would rank *pari passu* with the other unsecured creditors of CCB, or whether it was in the nature of a capital investment in the business of CCB, in which case such unsecured creditors would have priority over the "investors". If the former characterization is adopted, as I believe it should be, subsidiary issues concerning the postponement of claims under s. 4 of the *Partnerships Act*, R.S.O. 1990, c. P.5, and the doctrine of equitable subordination are also raised.

I. Facts

Although they are relatively uncomplicated, the facts of this case are rather extensive and warrant a full review. CCB was a chartered bank involved primarily in commercial lending. In early 1985, CCB faced a solvency crisis owing to a sharp deterioration in its loan portfolio. Many of its outstanding loans had become non-performing. On March 14, 1985, CCB's Chief Executive Officer reported this crisis to the Office of the Inspector General of Banks and announced the inability of CCB to continue in operation without outside assistance. At the request of the Governor of the Bank of Canada, a government and banking industry funded support initiative was undertaken to assist CCB and to avoid the loss of public confidence in Canada's banking system.

On March 24, 1985, a support group comprising Her Majesty in right of Canada ("Canada"), Her Majesty in right of Alberta ("Alberta"), CDIC and what I shall sometimes refer to as the "Bank Group", consisting of the Royal Bank of Canada, the Bank of Montreal, the Toronto-Dominion Bank, the Bank of Nova Scotia, the Canadian Imperial Bank of Commerce, and the National Bank of Canada, entered into a Memorandum of Intent to provide the "emergency financial assistance" requested by CCB "on certain terms".

In essence, Canada, Alberta, CDIC and the Bank Group, collectively referred to as the "Participants", agreed to purchase from CCB, at a total price of $255 million, an undivided interest by way of participation in a portfolio of assets held by CCB consisting of loans and related security having a nominal value, on the books of CCB, of over $500 million ("Portfolio Assets"). The participation interest of each Participant was proportional to its own financial contribution and was to be evidenced by Participation Certificates issued by CCB. The parties also agreed in principle that the Participants would receive from CCB on a proportionate basis, and until such a time as the Participants received the amount they paid for their Participation Certificates, a portion of the money received on account of each Portfolio Asset as well as 50 percent of CCB's pre-tax income, or alternatively 100 percent of CCB's pre-tax income plus interest. In other words, it was agreed that the $255 million advanced by the Participants would be repaid by CCB. After repayment, the payments from the Portfolio Assets and from CCB's pre-tax income would cease.

Under the Memorandum of Intent, CCB undertook to indemnify each Participant against any loss experienced under the support program up to the amount paid by them to CCB. It was agreed that in the event of the insolvency or winding-up of CCB, any amount remaining unpaid "shall constitute indebtedness of CCB to the members of the Support Group". Finally, the parties agreed in principle that each Participant would receive from CCB, on a proportionate basis, transferable rights or warrants to purchase common shares of CCB at a price of $0.25 per share. The warrants were to expire 10 years after the day that CCB had repaid the full amount advanced for the Participation Certificates.

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On March 25, 1985, the Department of Finance issued a press release announcing a joint agreement involving "an infusion of capital with repayment provisions . . . designed to provide the Canadian Commercial Bank with sufficient funds to ensure solvency following a recent and sharp deterioration in its U.S. loan portfolio". The agreement was described as resulting in the "purchase by the support group of a package of nonperforming loans", leaving CCB "in a strong position of solvency in order to support its deposit base". After setting out the general terms of the support program, the Minister of State (Finance) said she had "full confidence" that this program "involving Canada's largest chartered banks and the two Governments will permit the Canadian Commercial Bank to continue its active and important role in the growing economy of Western Canada". The Minister concluded that the support program represented "a strong collective vote of confidence in the health of the economy of Western Canada".

In order to carry out the letter and spirit of the Memorandum of Intent, the Participants and CCB were to execute, among other documents, a "Participation Agreement" (also referred to as "P.A."), an "Equity Agreement" (also referred to as "E.A.") and an "Amending and Subordination Agreement". These agreements, which incorporate and refine the general principles agreed to earlier in the Memorandum of Intent, were ultimately entered into as of April 29, 1985. The Participation Agreement and the Equity Agreement formed the core of the support program. There are no relevant inconsistencies between these documents and the Memorandum of Intent. I will, however, review in closer detail the former documents as their provisions are of crucial importance to the resolution of the issues raised by this appeal.

Section 2 of the Participation Agreement provided for the Participants to purchase from CCB, at a total price of $255 million, an undivided interest by way of participation in 255,000,000 units in the Portfolio Assets of CCB. Each Participant's interest was proportional to its financial contribution. For example, CDIC advanced $75 million and received a participation interest in 75,000,000 units. The total participation in the Portfolio Assets was divided into 529,798,627 units, with the portion of 255,000,000 units purchased by the Participants commonly referred to as the "Syndicated Portion". CCB retained beneficially an undivided participation interest in the remaining 274,798,627 units which comprised the aggregate of the "CCB Portion" of the Portfolio Assets.

Under s. 5 of the Participation Agreement, CCB warranted that the CCB Portion for each Portfolio Asset represented its "best estimate of the amount likely to be recovered from or with respect to that Portfolio Asset". Thus, as found by the learned chambers judge, the Participants purchased, in essence, a portfolio of bad loans or that portion of a loan not likely to be recovered.

CCB was appointed and authorized to act as agent to administer the Portfolio Assets (P.A. s. 6(a)). Pursuant to s. 9 of the Participation Agreement, all money received by CCB on account of each Portfolio Asset, whether principal, interest or otherwise, was first to be retained by CCB until the CCB Portion of that Portfolio Asset was completely recovered; then to be paid to the Participants (except CDIC) proportionately to reduce or retire their respective advances; then to be paid to CDIC to reduce or retire its proportionate share; and finally to be retained by CCB. Each Participant was entitled to receive these proceeds up until such time as it received an amount which, when taken together with all amounts received by that Participant from CCB's pre-tax income pursuant to s. 10, was equal to the price paid by that Participant for its Participation Certificate.

In addition to proceeds from CCB's Portfolio Assets, the Participants were entitled to receive proportionately from CCB, on a quarterly basis, an amount equal to 50 percent of CCB's pre-tax income (P.A. s. 10). CCB's "pre-tax income" was defined in s. 10 of the Participation Agreement as CCB's "net income . . . before making any allowance for the payments to be made pursuant to this section, accrued interest on any presently existing bank debenture of CCB or any provision for income taxes payable to Canada, the United States of America and any political division of either". Again, CCB's obligation to make such payments would terminate after each Participant received an amount pursuant to ss. 9 and 10 equal to the price paid by such Participant for its Participation Certificate (P.A. s. 10).

Under s. 11 of the Participation Agreement, if CCB failed by October 31, 1985, to obtain the shareholder and regulatory approval necessary for it to increase its authorized capital to the extent required for it to perform the Equity Agreement, as discussed below, then s. 10 of the Participation Agreement would be deemed to have been amended and would be construed as requiring CCB to pay to the Participants 100 percent of CCB's pre-tax income. This obligation would continue until such time as the total amount received by each Participant from the Portfolio Assets and CCB's pre-tax income satisfied the amount paid by that Participant for its Participation Certificate, together with interest at prime rate. It should be noted that this was the only circumstance under which CCB was to pay interest to the Participants.

Section 8 of the Participation Agreement provided that CCB indemnified each Participant against any loss suffered by it by reason of the amounts realized from the Portfolio Assets and from 50 percent of CCB's pre-tax income failing to equal the price paid by that Participant for its Participation Certificate. This indemnity was to be paid only by payments of the amount and source described in ss. 10 and 11, with one important exception: "if CCB becomes insolvent or is wound up, any amount remaining unpaid and required to be paid in order to indemnify that Participant completely in accordance with the foregoing indemnity, shall constitute indebtedness of CCB, to which the provisions of section 13 shall apply."

The relevant parts of s. 13 of the Participation Agreement read as follows:

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13. Priorities on Insolvency

(a) Notwithstanding the provisions of section 277 of the Bank Act [which otherwise gives Canada and a province a first and second charge respectively on the assets of an insolvent bank] or any other rule of law, each of the Participants agrees that, in the case of the insolvency or winding-up of CCB:

(i) neither Canada, CDIC nor Alberta shall, in connection with any money owing to it under this agreement, claim any charge on the assets of CCB;

(ii) the right of each of the Participants other than CDIC to money owing to it under this agreement shall rank pari passu with the right of the depositors of CCB to payment in full of the deposit liabilities of CCB;

(iii) the right of CDIC to money owing to it by CCB, under this agreement but not by reason of the subrogation of CDIC to the claims of depositors of CCB (if any) shall be subordinate in right of payment to the prior payment in full of all money owing to the other Participants under this agreement and to the depositors of CCB, but shall rank in priority to any outstanding bank debentures of CCB.

Each of Canada, CDIC and Alberta acknowledges that it has waived, as set out above, any priority to which it would otherwise be entitled. Each Participant agrees that this section 13 is intended to benefit the depositors of CCB, and to enure to the benefit of the successors of CCB and any curator, liquidator or receiver that may be appointed to supervise or to wind up the business of CCB. [Emphasis added.]

Moreover, s. 13 provided that each Participant would rank *pari passu* with each other except CDIC and that each would, as necessary, redistribute payments received by it in order to achieve this ranking.

Pursuant to s. 12 of the Participation Agreement, CCB could not, without the consent of the Participants, declare or pay any dividend or reduce its issued capital until such time as CCB paid to each Participant its purchase price, and any additional amount (interest at prime rate) payable under s. 11. Moreover, the Participants required as a condition to their purchase, *inter alia*: (1) the execution of an Amending and Subordination Agreement; (2) the execution of the Equity Agreement; and (3) the opinion of the Inspector General of Banks that CCB would be solvent following the purchase (P.A. ss. 14 and 16). Finally, the parties expressly declared that the Participants were not partners or joint venturers with each other (P.A. s. 18(j)) and that the law governing the agreement would be the law applicable in the Province of Ontario (P.A. s. 18(d)).

The Equity Agreement gave the Participants warrants providing for the right to subscribe to a total of 24,062,517 common shares of CCB at a price of $0.25 per share, on a basis proportionate to each Participant's participation interest (E.A. ss. 2, 3, 5 and 6). At the date of the agreement, CCB had an authorized capital of 10,000,000 common shares with a par value of $10 each, of which 6,529,768 were issued and outstanding (E.A. s. 4). If all outstanding employee stock options to purchase common shares were exercised and all issued convertible preferred shares were converted into common shares, the issued capital of CCB would consist of a total of 8,020,839 common shares (E.A. s. 4). Thus, if the warrants were fully exercised, the Participants would own 75 percent of CCB's common shares.

Shareholder and regulatory approval were required to increase CCB's authorized capital from its current level of 10,000,000 common shares to the 32,100,000 required in order to give full effect to the Equity Agreement. Pursuant to s. 15 thereof, CCB had to first obtain shareholder approval no later than October 31, 1985, and next had to apply to the Minister of Finance pursuant to the *Bank Act*, R.S.C., 1985, c. B-1 (formerly S.C. 1980-81-82-83, c. 40) for the necessary change in its authorized capital. If such an application was not made by October 31, 1985, the provisions of s. 11 of the Participation Agreement (100 percent pre-tax income plus interest) were triggered. In s. 8 of the Memorandum of Intent, Canada had agreed that "an application for such alteration in capital when made shall be approved for purposes of the Bank Act".

The limited authorized capital of CCB was not the only obstacle to the issuance of common shares to the Participants. Under present law, the chartered banks which were Participants could not legally exercise their right to subscribe to common shares of CCB. This was recognized by the parties in paragraph (d) of the preamble to the Equity Agreement as well as in s. 10 of the agreement. Under s. 8 of the Equity Agreement, the warrants were made fully assignable and it was the declared intention of the Participants, as recorded in the preamble, "that unless the present law is materially changed, they shall assign such rights".

The Participants' right to purchase these shares was to continue for a period of 10 years after the date on which each Participant had been repaid the full amount it had advanced under the terms of the Participation Agreement (E.A. ss. 1 and 12). Again, this agreement would be governed by and construed in accordance with the law applicable in the Province of Ontario (E.A. s. 19).

Finally, under the Amending and Subordination Agreement, the holders of all outstanding subordinated debentures issued by CCB pursuant to s. 132 of the *Bank Act* (i.e. Canada, British Columbia, Alberta and the Workers' Compensation Board of British Columbia) agreed to postpone the repayment of the amounts represented by their debentures until such time as CCB had paid to each Participant an amount equal to the price paid by that Participant for its Participation Certificate.

To summarize, the Participants were to receive in return for the $255 million advanced under the support program, proportionally to their own financial contribution and up to that amount: (1) payments from the Portfolio Assets; (2) (a) 50

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percent of CCB's pre-tax income and warrants to buy up to 75 percent of CCB's common shares, or (b) 100 percent of CCB's pre-tax income, with interest on the amount contributed; and (3) an indemnity for any losses caused. Under these agreements, the Participants could receive a return which was greater than their contribution only in two ways, namely by exercising or assigning their warrants up to 10 years after full repayment (however, this option was contingent on shareholder, regulatory and legislative approval) or, if these warrants could not be granted, by receiving interest on the amount advanced at the prime rate.

CCB was advised by the Office of the Inspector General of Banks, by a letter dated April 24, 1985, as to the appropriate accounting treatment to be applied to these transactions. Following these guidelines, CCB wrote down its loan assets by $255 million, charged the write-down to tax-allowable appropriations for contingencies and credited the $255 million received from the Participants to tax-paid appropriations for contingencies. CCB was not specifically directed by the Inspector General of Banks to record its indemnity towards the Participants as a liability, nor did CCB do so. By effectively "selling" that portion of its loan portfolio not likely to be recovered and by not recording its indemnity obligation under the Participation Agreement to repay the $255 million as a liability, CCB was able to restore a position of solvency on its books, thereby allowing it to remain in business, which was, after all, the *raison d'être* of the support program.

Despite this financial assistance, CCB's financial status continued to deteriorate. For reasons beyond the scope of this appeal, the support program was unsuccessful in ensuring CCB's long-term solvency. By an Order made September 3, 1985, on a petition by CDIC, Wachowich J. of the Alberta Court of Queen's Bench ordered CCB to be wound up pursuant to the *Winding-up Act*, R.S.C. 1970, c. W-10. At that point, none of the Participants had exercised or assigned (or even been granted) any of their warrants under the Equity Agreement as the preliminary conditions of shareholder and regulatory approval for the authorization and issuance of additional common shares had not been fulfilled. Price Waterhouse Limited was appointed, and remains, the sole Liquidator of CCB ("Liquidator").

As of August 18, 1987, the Liquidator had recovered approximately $112 million on account from CCB's Portfolio Assets, of which $5 million was attributable to the portion thereof beneficially owned by the Participants (namely, the Syndicated Portion). The Liquidator brought an application before Wachowich J. for advice and direction as to the interpretation of the support agreements. In particular, the Liquidator sought to determine the validity and ranking of the claims of the Participants pursuant to the Participation Agreement.

In a judgment rendered on December 7, 1987, Wachowich J. held the Participants to be entitled to the repayment of sums recovered by the Liquidator on the Syndicated Portion of the Portfolio Assets (the $5 million), but otherwise not entitled to recover their advances until after all ordinary creditors, including unsecured creditors, were paid in full. Wachowich J. interpreted the injection of funds by the Participants to have been a capital investment. The Participants, apart from Canada and CDIC, the respondents in this appeal, successfully appealed the latter part of this judgment. The Alberta Court of Appeal disagreed with Wachowich J., preferring to characterize the advance of $255 million as a loan. The Court of Appeal concluded that the Participants were entitled to rank *pari passu* with CCB's unsecured creditors for all monies advanced to CCB pursuant to the Participation Agreement and not repaid by monies recovered from the Syndicated Portion of the Portfolio Assets.

On an application by the Liquidator, Wachowich J. directed the Liquidator to present an application to this Court for leave to appeal from the Court of Appeal's decision. Wachowich J. further ordered that Lerner & Associates be appointed as Legal Representative ("Legal Representative") of CCB's general body of creditors, other than the Participants, for purposes of the application for leave to appeal and further on the appeal. Leave to appeal to this Court was granted on March 14, 1991, [1991] 1 S.C.R. vi. The Liquidator, as an officer of the Court and as the representative of all the creditors of CCB, takes no position in this appeal. The Bank Group and Alberta, the respondents before this Court, made separate written and oral submissions.

II. Judgments in the Courts Below

A. *Alberta Court of Queen's Bench* (1987), 83 A.R. 122

On the initial application, the Participants took the position that they were entitled under the terms of the support agreements: (1) to receive their proportionate shares of the moneys received by the Liquidator or CCB on account of the Portfolio Assets; and (2) to rank *pari passu* with all the other unsecured creditors of CCB for any amounts not recovered from the Portfolio Assets and still owing to them pursuant to the Participation Agreement. Wachowich J. agreed with the first proposition but rejected the second.

According to Wachowich J., the Participants' first submission involved a consideration of the validity of the Participation Agreement. The learned chambers judge confessed it was a "difficult task" to determine the position of the Participants with respect to CCB's estate given the "extraordinary nature of the agreement" involved (at p. 126). He noted there were no precedents dealing with similar commercial agreements. In his view, the Participation Agreement in question was not prohibited by ss. 173 and 174 of the *Bank Act*. While the agreement did not relate to business in which a bank would normally or commonly engage, he noted that "given the unique circumstances and the stated purpose of the Participation

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Agreement as a whole, one can hardly regard this as an invalid transaction" (at p. 127). He found it was a valid contractual document binding on all parties and held that the Participants were entitled to receive their proportionate share from moneys recovered by the Liquidator from the Portfolio Assets, in the manner provided for in s. 9 of the Participation Agreement (i.e. to the extent such recoveries exceed the CCB Portion).

Next, Wachowich J. turned to a consideration of the ranking of the Participants with the general body of creditors of CCB for any amounts not recovered from the Syndicated Portion of the Portfolio Assets, and still owing pursuant to the Participation Agreement. He noted that the Participants would have "valid claims" under the terms of the Participation Agreement for such amounts (at p. 128). However, whether they could rank *pari passu* with other unsecured creditors depended on the interpretation of the agreement taken as a whole and a determination of the "real basis upon which the $255 million was paid to CCB" (at p. 128).

In Wachowich J.'s view, the essence of the Participation Agreement was not the creation of a mere purchase and sale of assets with an added indemnity as to the value of those assets. Rather, the transaction reflected an investment of capital into CCB (at p. 129):

> The agreement, as evidenced by all the surrounding circumstances, was really to effect an infusion of capital into C.C.B. whereby the Participants would be risking their monies in hope that the C.C.B. would continue as a viable and profitable business. If this in fact had occurred, the Support Group Participants stood to gain a healthy return on their investments.

The learned chambers judge found support for his characterization in the following: (1) the portion of the Portfolio Assets purchased by the Participants was of little value; (2) s. 2 of the Participation Agreement masked the true nature of the transaction, that is, the investment of working capital into CCB; (3) the indemnity provision and repayment structure set up by the agreement were directly connected to the profits and income of CCB; (4) the repayment of the purchase price was to come not only from the Portfolio Assets, but mainly from CCB's pre-tax income; (5) if CCB's business was successful, the Participants would benefit not only in recovering their purchase price, but as well by purchasing common shares in CCB under the Equity Agreement; (6) "[w]hile the transaction may not be a typical investment situation, where for example there is an outright purchase of shares, it is difficult to ignore the investment features of the agreement" (p. 130); (7) while the accounting treatment had to be looked at with caution, the fact there was no liability to the Participants recorded on the balance sheet of CCB, as created by the indemnity provisions of the agreement, supported the conclusion that the transaction was an investment; (8) the cases of *Laronge Realty Ltd. v. Golconda Investments Ltd.* 1986 CanLII 756 (BC CA), (1986), 7 B.C.L.R. (2d) 90 (C.A.) ("*Laronge Realty*"), *In re Dickie Estate* (1924), 5 C.B.R. 214 (N.S.S.C.), and *In re Meade*, [1951] 1 Ch. D. 774, "stand for the general proposition that advances of monies will be classed as capital investments where the monies were used in the business and the business was carried on for the joint benefit of the parties involved" (at p. 131); and (9) the Participants here did have a stake in the continued profitability of CCB in that (a) the repayment of the money advanced would come from the income of CCB and (b) their warrants allowed them to "continue to share in the profits of C.C.B." (at p. 131).

Thus, according to Wachowich J., the Participants could not rank *pari passu* with the ordinary creditors of CCB, including unsecured creditors, for the amounts not recovered from the Portfolio Assets. In so doing, he applied the principle that "if a person contributes capital to a business, even though that person is not a partner in the business and may have received no share of the profits, they cannot prove their claim in bankruptcy in competition with the creditors of the business" (at p. 131): *Halsbury's Laws of England* (3rd ed.), vol. 2, at p. 495; *Laronge Realty*, *supra*; and *In re Beale* (1876), 4 Ch.D. 246.

In concluding, Wachowich J. held the provisions of the Participation Agreement which attempt to rank the Participants *pari passu* and to create a debt on insolvency are ineffective to alter the "existing legal nature of their relationship" with CCB. These provisions would be void as they are an attempt to alter insolvency laws through a private agreement: *British Eagle International Airlines Ltd. v. Compagnie Nationale Air France*, [1975] 2 All E.R. 390 (H.L.).

B. *Alberta Court of Appeal* 1990 ABCA 139 (CanLII), (1990), 107 A.R. 199

The respondents (the Participants apart from Canada and CDIC) appealed from Wachowich J.'s conclusion with respect to their ranking on insolvency, whereas the then Legal Representative cross-appealed from the conclusion that the Participants could receive funds from the Syndicated Portion of the Portfolio Assets. Harradence J.A. (writing for the Court of Appeal) began by stating that the learned chambers judge had erred in law in his interpretation of the decisions in *Laronge Realty, supra*, *In re Dickie Estate*, *supra*, and *In re Meade*, *supra* (at p. 207):

> I have examined closely the cases relied upon as well as others to which I have been referred and the inescapable conclusion to be reached is that the proposition as stated [by Wachowich J.] can only be correct where one implies into the term "monies were used in the business" a necessary condition that the investor has not expressly stipulated a requirement for the repayment of monies advanced. A failure to imply this term into the proposition results in a misstatement of the appropriate test and, further, is inconsistent with the decision of the Supreme Court of Canada in **Sukloff v. Rushforth** (1964), 45 D.L.R. (2d) 510 (S.C.C.).

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Harradence J.A. reviewed the cases cited by Wachowich J. and noted that, unlike the case at bar, none of them involved transactions where provisions for the repayment of the money advanced had been included by the parties. Turning specifically to *Sukloff v. A. H. Rushforth & Co.*, 1964 CanLII 11 (SCC), [1964] S.C.R. 459 ("*Sukloff v. Rushforth*"), Harradence J.A. said that while it was "difficult to glean" from that case the exact reason for concluding that the transaction under consideration therein was a loan rather than a capital investment, "the only reasonable conclusion to be reached is that the provision for repayment was determinative of the nature of the transaction" (at p. 209). He concluded his review of the jurisprudence by stating (at p. 210): "where, as in this case, the evidence indicated that monies advanced to a business are to be repaid, and particularly when the terms of repayment are specified, the transaction is classified as a loan".

Harradence J.A. next turned to the interpretation of the Participation Agreement. He noted at the outset the rule prohibiting extrinsic evidence from contradicting express contractual terms. He reviewed a number of factors favouring interpreting the agreement as a loan, namely: (1) there is nothing in the express terms of the agreement which supports a conclusion that the money was advanced as an investment; (2) there are express provisions pointing to the opposite conclusion, including provisions for repayment and for an indemnity that full repayment will be made; (3) pursuant to the Participation Agreement, upon insolvency or winding-up, any amount remaining unpaid was to constitute indebtedness and, in such circumstances, the Participants were to rank *pari passu* with other creditors; and (4) the intention of the Participants was consistent with a "loan" characterization. He did not find it necessary to determine whether the accounting treatment was consistent with an investment, holding that such a factor is not determinative of the legal relationship of the parties.

Harradence J.A. found that repayment of the money advanced was intended and was coupled with express repayment provisions. Thus, relying on *Sukloff v. Rushforth*, *supra*, and the other cases cited, he concluded that the $255 million advanced was not to be characterized as an investment in capital but rather as a "loan coupled with a purchase agreement to CCB" (at p. 211).

The observation made by the learned chambers judge that the business of CCB was carried on for the "joint benefit" of CCB and the Participants, because (1) repayment was to come from the income of CCB and (2) the warrants, if exercised, would allow the Participants to continue to share in the profits of CCB, was next addressed. With respect to the first factor, Harradence J.A. held that Wachowich J. erred in considering the source of the funds for repayment in concluding that the Participants would be sharing in CCB's profits. His comments warrant citation (at p. 211):

> It is important to recognize that while repayment was to be made from pre-tax income of C.C.B., there was no direct link between the success of the C.C.B. and the overall quantum of the amount due to or payable to the Support Group Participants. I have been referred to no authority which supports the proposition that a repayment, the instalments of which are referable to the quantum of the income of the debtor, is a situation of "joint benefit". Since the sums to be received by the Participants were limited to repayment of monies advanced, with a contingent right to interest, the source of the repayment monies is not relevant and, with respect, the learned Chambers Judge erred in concluding the Participants were "sharing in profits" in this respect.

As for the second factor, Harradence J.A. summarily rejected it as an indicium of investment and "joint benefit" mainly because of the contingent nature of the warrants in question, as recognized by both the Participation Agreement and the Equity Agreement. He added (at p. 212): "Had shares actually been issued or even approval obtained, or if there was an obligation to purchase or if a purchase had been made, then the `joint benefit' argument might have some merit and it would have been necessary to fully address this issue."

Finally, Harradence J.A. considered whether repayment to the respondents was nevertheless postponed pursuant to what are now s. 139 of the *Bankruptcy Act*, R.S.C., 1985, c. B-3, and s. 4 of the *Partnerships Act*, R.S.O. 1990, c. P.5. In his view, the application of these provisions was precluded by his earlier conclusion that the Participants were not to receive a rate of interest varying with the profits of CCB or a share in the profits of CCB.

Thus, the appeal was allowed and it was ordered that the respondents were entitled to rank *pari passu* with the ordinary creditors of CCB for all monies advanced to CCB pursuant to the Participation Agreement and not repaid by monies recovered from the Portfolio Assets. In view of this result, the cross-appeal brought by the then Legal Representative, alleging an inconsistency in Wachowich J.'s conclusions, was dismissed.

III. Issues

There are many ways of characterizing the issues raised by this appeal. As I see it, the three main questions which need to be addressed are:

(1) Was the Court of Appeal correct in characterizing the advance of $255 million by the Participants to CCB as a loan, as opposed to an investment in capital, thereby creating a debtor-creditor relationship between the parties?

(2) If the true legal nature of this transaction is indeed a loan, does this loan come within the postponement provision found in s. 4 of the *Partnerships Act*, R.S.O. 1990, c. P.5?

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(3) If the *Partnerships Act* does not apply, should the respondents' claim for the money loaned under the Participation Agreement nonetheless be postponed to the claims of the general body of CCB unsecured creditors, other than the Participants, based on the United States doctrine of equitable subordination?

The Legal Representative raises a subsidiary issue concerning the portion of the moneys recovered attributable to the Syndicated Portion of the Portfolio Assets:

(4) Was the Court of Appeal correct in upholding the conclusion of the learned chambers judge that the Participants are entitled to receive from the Liquidator, pursuant to the Participation Agreement, the sums recovered on the Syndicated Portion of the Portfolio Assets?

For the reasons that follow, it is my view that the first and fourth questions should be answered in the affirmative while the second and third should be answered in the negative. In summary, the words chosen by the parties in their agreements clearly support the Court of Appeal's conclusion that the assistance program involved, in substance, a loan of $255 million and not a capital investment. The surrounding circumstances provide additional support for, rather than detract from, this conclusion. Although the transaction did have an equity component (the warrants), this aspect alone does not, in the circumstances of this case, transform the essential nature of the advance from a loan to an investment. Put another way, while it is true that this transaction does have "investment features", these features were incidental to the debt features of the arrangement and do not alter the substance of the debtor-creditor relationship that was created by the parties with respect to the $255 million advanced by the Participants to CCB. Moreover, the fact that CCB's pre-tax income was the main source for repayment does not affect this characterization as the amount to be repaid from this source was limited to the sum advanced to CCB, plus a contingent interest at prime rate. Thus, the respondents are creditors of CCB and, as such, are entitled to what may be called a "*prima facie*" *pari passu* ranking with the other unsecured creditors of CCB in the distribution of CCB's assets.

In the circumstances of this case, this *prima facie* ranking is not altered by the principles of law and equity relied upon by the Legal Representative. Indeed, the loan in question does not fall within the ambit of the Ontario *Partnerships Act* (ss. 3(3)(d), 4) as the Participants were to receive neither a "rate of interest varying with the profits" of CCB nor a "share of the profits arising from carrying on the business" of CCB. In my view, the principles of equitable subordination have no application to the facts of this case. Finally, in light of these conclusions, the Legal Representative's subsidiary issue concerning the moneys recovered on the Syndicated Portion of the Portfolio Assets must also fail. Accordingly, I would dismiss the appeal.

IV. Relevant Statutory Provisions

Winding-up Act, R.S.C., 1985, c. W-11:

Distribution of Assets

93. The property of the company shall be applied in satisfaction of its debts and liabilities, and the charges, costs and expenses incurred in winding-up its affairs.

94. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, are payable out of the assets of the company, in priority to all other claims.

95. The court shall distribute among the persons entitled thereto any surplus that remains after the satisfaction of the debts and liabilities of the company and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation of the company, any property or assets remaining after the satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company.

Partnerships Act, R.S.O. 1990, c. P.5:

3. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

. . .

3. The receipt by a person of a share of the profits of a business is proof, in the absence of evidence to the contrary, that the person is a partner in the business, but the receipt of such a share or payment, contingent on or varying with the profits of a business, does not of itself make him or her a partner in the business, and in particular,

(a)the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him or her a partner in the business or liable as such;

. . .

(d)the advance of money by way of loan to a person engaged or about to engage in a business on a contract with that person that the lender is to receive a rate of interest varying with the profits, or is to receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such, provided that the contract is in writing and signed by or on behalf of all parties thereto;

. . .

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> **4.** In the event of a person to whom money has been advanced by way of loan upon such a contract as is mentioned in section 3, or of a buyer of the goodwill in consideration of a share of the profits of the business, becoming insolvent or entering into an arrangement to pay his or her creditors less than 100 cents on the dollar or dying in insolvent circumstances, the lender of the loan is not entitled to recover anything in respect of the loan, and the seller of the goodwill is not entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer, for valuable consideration in money or money's worth, are satisfied.

V. Analysis

A. *Characterization of the $255 Million Advanced: Capital Investment or Loan*?

The first and foremost issue in this appeal concerns the determination of the true nature of the transaction in question between the Participants and CCB. Was the $255 million advanced by the Participants in the nature of a loan, as found by the Court of Appeal, or in the nature of an investment of capital, as found by the learned chambers judge? If the Court of Appeal was correct in describing the transaction as a loan, it follows that the Participants are creditors of CCB and as such, pursuant to both the Participation Agreement and ss. 93 to 95 of the *Winding-up Act*, they would be entitled, subject to the statutory (s. 4 of the *Partnerships Act*) and equity ("equitable subordination") principles raised by the Legal Representative, to rank *pari passu* with the other ordinary creditors of CCB in the distribution of CCB's assets. If, however, Wachowich J.'s characterization is to be preferred, then, relying on an old common law principle, it is argued the Participants would not be creditors entitled to an equal ranking with CCB's true creditors: *In re Beale, supra*; *In re Meade, supra*; *Laronge Realty*, *supra*; and *Halsbury's Laws of England* (4th ed.), vol. 3(2), at p. 315. Under this approach, it is said the Participants would have an equitable right to share in the distribution of the assets of CCB, but only at such time as the ordinary creditors have been paid in full.

The principal argument raised by the Legal Representative in favour of finding the transaction to have been that of a capital infusion is the potential for unlimited returns and control over CCB by reason of the warrants granted to the Participants under the Equity Agreement. Other indicia of capital investment are also suggested. First, CCB's accounts did not show their obligation to the Participants as a liability. It is submitted that, if the financial statements could have led creditors, including depositors, to believe that there was adequate capitalization, this should be taken into consideration in determining the rights of the ordinary creditors and the respondents. Second, it is argued that the Court of Appeal's interpretation of ss. 8 and 13 of the Participation Agreement fails to recognize that the rights of differing classes of people who provide funds for the use of a business crystallize prior to insolvency, and cannot be altered by an agreement. It is argued that the Court of Appeal erred in assuming that the characterization by the Participants and CCB of their rights and obligations *inter se* should be determinative of the relative priority of the claims of the Participants and the ordinary creditors of CCB. According to the Legal Representative, "[s]ection 13 should be disregarded by the Courts, as being a self-serving attempt by the Participants to enhance their position for distribution purposes in the event of insolvency." Finally, the Legal Representative argues that the Court of Appeal erred in its interpretation of *Sukloff v. Rushforth*, *supra*, which, according to him, stands for the proposition that, if someone has an interest in a business, in the sense that his or her potential for return is unlimited except by the enterprise's actual ability to generate profits, that person may not rank as a creditor if the business becomes insolvent. The key, according to the Legal Representative, is the right or potential to an unlimited return, not the right to repayment.

The respondent Alberta, on the other hand, submits that the advance was a loan and offers the following arguments: (1) the agreement for the advance contained no express provision that the advance was an investment in capital but did contain express provisions to the contrary, including provisions for repayment and an indemnity for that repayment; (2) the parties intended the advance to be repayable; (3) CCB was contingently liable to pay interest; (4) in its financial statements CCB accounted for the advance as being a debt by disclosing the outstanding balance of the advance at the opening, repayments during, and the obligation for the outstanding balance at the closing of each reporting period; (5) Mr. Justice Estey considered the advance to be a loan in the *Report of the Inquiry into the Collapse of the CCB and Northland Bank* (1986) ("*Estey Report*"), at pp. 115, 118 and 125; (6) the Participants could not and did not invest in CCB's equity capital; (7) the decision of this Court in *Sukloff v. Rushforth*, *supra*, as correctly demonstrated by the Court of Appeal, supports the conclusion that the advance to CCB was a loan; and (8) according to *Sukloff v. Rushforth*, *supra*, and other decisions, an advance of money which is to be repaid, without more, is a loan and not an investment in equity capital or the supply of capital for the business of the recipient for the joint benefit of the advancer of money and the recipient, even if it is described as an investment of capital or if the person advancing the money is to share the profits or to receive shares of the recipient or if the advance is repayable when funds are available or out of profits. Alberta also takes issue with the Legal Representative's characterization of s. 13 of the Participation Agreement. It submits that this is a common provision in loans and, rather than enhance the Participants' ranking on insolvency, has the effect of reducing the otherwise priority ranking of Canada, Alberta and CDIC.

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For their part, the Bank Group note that the agreements in question represent a unique response to a unique situation, and thus, cannot be perceived as a normal investment in a business. For the reasons given therein, they commend the Court of Appeal's characterization of the advances as a loan in the form of a purchase of doubtful assets. Specifically, they submit that Harradence J.A. was correct in finding that, because of the contingent nature of the warrants, the support agreements did not provide a right to share in profits or for a rate of interest that varied with profits. They characterize the Equity Agreement as a mere "sweetener". The Bank Group submits that the cases, including *Sukloff v. Rushforth*, *supra*, do not support the conclusion that a contingent right to profits in circumstances like the case at bar can represent an interest in the business. With respect to the accounting issue, they argue that they should be considered on a basis different from the other Participants because they were prohibited from controlling or attempting to control CCB. Indeed, they had no control over how CCB showed its obligations to them in its financial statements. Further, such a factor should not determine the nature of the legal relationship between the parties to the agreement.

For my part, I agree in essence with the position advanced by Alberta and the Bank Group. Briefly put, the words chosen by the parties in their agreements strongly support the Court of Appeal's conclusion that the financial assistance program involved, in substance, a loan of $255 million rather than a capital investment and there is nothing in the surrounding circumstances which distracts from this characterization. On the contrary, the surrounding circumstances offer additional support for the Court of Appeal's conclusion. As noted by Wachowich J. and the Legal Representative, the transaction did indeed have an equity component (the warrants) and did involve a repayment scheme linked to the profits of CCB. However, for reasons which I shall elaborate, these aspects are insufficient to justify the conclusion reached by Wachowich J. Similarly, the other indicia of capital investment put forward by the Legal Representative, such as the accounting treatment given to the advance, do not affect the substance of this transaction.

As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.

In the case at bar, it should be noted that the circumstances surrounding the financial arrangements between CCB and the Participants, and the agreements themselves, are somewhat unique. At the heart of this matter is the attempted rescue of a Canadian chartered bank. Recourse to emergency measures in order to preserve the solvency of a bank is, fortunately, relatively rare in our country. I say this not because financial support programs are harmful (quite the contrary), but because the events surrounding the CCB rescue in the mid-1980's infrequently arise. Part of the result, however, is that the task of ascertaining the intention of the Participants and of CCB with respect to the advance of $255 million is not particularly simple. Indeed, the learned chambers judge described the Participation Agreement as a "unique document based on a unique set of facts" as well as an "extraordinary transaction", and he found it "most difficult" to characterize (at pp. 132 and 126). Similarly, Harradence J.A. said that "[t]he unique situation of C.C.B. and the Participants resulted in novel and complex documentation, the interpretation and characterization of which is a challenging and difficult task" (at p. 206).

It is evident from reviewing the agreements in question that characteristics associated with both debt and equity financing are present. The most obvious examples are, on the one hand, ss. 8 and 13 of the Participation Agreement pertaining to CCB's indemnity towards the Participants and their ranking in the event of a winding-up and, on the other hand, the provisions of the Equity Agreement concerning the warrants granted by CCB to the Participants. Such a duality is apparently quite common in loan participation agreements. Indeed, in an article entitled "Characterization of Loan Participation Agreements" (1988), 14 *Can. Bus. L.J.* 336, Professor Ziegel uses the heterogeneity in some loan participations to explain, in part, the divergence of judicial and academic opinion in the United States on the proper characterization of a participation agreement (at p. 337):

> This issue [the characterization of the participation agreement] has provoked a large body of case law and textbook and periodical literature, most of it American, and the conclusions are not always the same. At one time or another one or more of the following descriptions have been applied to a participation agreement: a simple debtor-creditor relationship, with or without the benefit of a security; an agency agreement; a partnership or joint venture; a trust; and, finally, a sale or assignment of an undivided interest in the loan.
>
> It is easy to see why there should be this divergence of opinion. As with any agreement, the parties are free to verbalize it as they see fit and ambiguous or neutral language may reflect their unwillingness to answer hard questions, perhaps in the hope that the need to do so may never arise. Frequently, the several parts of a participation agreement lend themselves to different characterizations and the agreement is really a composite of cumulative legal elements. Finally, there is a significant overlap between such flexible concepts as a secured loan or trust and the sale or assignment of an undivided share of a loan, and the language of the agreement may be consistent with more than one of them. Faced with such ambiguity, the job of the adjudicator, when a dispute

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arises, is to find the characterization that best seems to fit the parties' intentions as derived from the total agreement and all the surrounding circumstances.

As I see it, the fact that the transaction contains both debt and equity features does not, in itself, pose an insurmountable obstacle to characterizing the advance of $255 million. Instead of trying to pigeonhole the entire agreement between the Participants and CCB in one of two categories, I see nothing wrong in recognizing the arrangement for what it is, namely, one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a debtor-creditor relationship. Financial and capital markets have been most creative in the variety of investments and securities that have been fashioned to meet the needs and interests of those who participate in those markets. It is not because an agreement has certain equity features that a court must either ignore these features as if they did not exist or characterize the transaction on the whole as an investment. There is an alternative. It is permissible, and often required, or desirable, for debt and equity to co-exist in a given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing a characterization issue. Again, it is not because there are equity features that it is necessarily an investment in capital. This is particularly true when, as here, the equity features are nothing more than supplementary to and not definitive of the essence of the transaction. When a court is searching for the substance of a particular transaction, it should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

The weight to be given to one aspect of the support agreements over another in assessing the true intention of the parties underlies the difference in opinion between the learned chambers judge and the Court of Appeal's characterization of the transaction. Wachowich J. emphasized both the fact that the recovery by the Participants of their contribution was dependent upon the income generated by CCB and the Participants' potential to share in the future success of CCB by the warrants, even after having been repaid, as evidencing that the essence of the transaction was that of a capital investment. The Court of Appeal, however, largely dismissed the relevance of the Equity Agreement because of its contingent nature and emphasized instead that the Participants were only entitled to receive from CCB the amount advanced to it and that the parties had included specific provisions in the Participation Agreement referring to debt; all of which amounted to a very strong indicium of a loan.

In the circumstances of this case, it is my view that the learned chambers judge and the Legal Representative give far too much weight to the equity features associated with the Equity Agreement in characterizing the overall nature of the advance of $255 million. It is true the Participants received warrants to purchase common shares of CCB through the Equity Agreement. It is also true, at least in theory, that by fully exercising their warrants the Participants would own 75 percent of the common shares issued by CCB. However, it is evident on the face of the record that this possibility was not only a mere hypothesis, but it was unlikely to occur. As noted by the respondents and the Court of Appeal, shareholder and regulatory approval was required to permit an increase in CCB's authorized capital and, unless the warrants were assigned, an amendment to the *Bank Act* was necessary before the Participants who are chartered banks could fully exercise their rights to purchase shares. It is not without significance that none of the Participants ever exercised any of their warrants nor did they assign them. In these circumstances, I agree with the Court of Appeal that the true effectiveness of the Equity Agreement was highly contingent and that the learned chambers judge erred in not considering the warrants for what they really were, namely so-called "sweeteners" or "kickers" with respect to the advance of $255 million which were simply additional features to the underlying loan arrangement between the parties. Undoubtedly, the warrants are an equity feature of the transaction supporting a conclusion that the advance was an investment. However, in the facts of this case, only minimal weight should be given to this factor in the overall characterization of the agreement. Alone, the highly contingent warrants are surely insufficient to tip the scales when faced with the strong indicia of debt present here as identified by the Court of Appeal.

Wachowich J. also erred in concluding that the Participants would be "sharing in the profits" of CCB under the support agreements. The Participation Agreement simply referred to CCB's profits (i.e. pre-tax income) as one of the sources for repayment. The other source for repayment, the moneys recovered on the Syndicated Portion of the Portfolio Assets, was not linked with CCB's profits. While full repayment from the Portfolio Assets alone was unlikely, the fact remains that the amount of money to be paid to the Participants from both sources was fixed at the amount advanced by each for their Participation Certificate. Regardless of where the repayments were coming from, they remained mere repayments for moneys advanced. Of course, the Participants would benefit from the success of CCB's business; however, this benefit would be capped by the amount of the advance. I shall examine in greater detail the "sharing in profits" argument of the Legal Representative when I deal with s. 4 of the *Partnerships Act*. For now, it is sufficient to state that, in the circumstances of this case, the source from which CCB was to repay the advance made does not carry any weight in favour of a finding that said advance was an investment in capital rather than what it appears to be on the face of the agreements, namely a loan of $255 million coupled with an equity "sweetener" or "kicker".

Another error committed by the learned chambers judge relates to his reliance on the decisions of *Laronge Realty*, *supra*, and *In re Meade*, *supra*. The latter case together with *In re Beale*, *supra*, are said to have established the common law

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principle applied in *Laronge Realty* and upon which Wachowich J. relied in order to deny ranking the Participants *pari passu* with CCB's unsecured creditors other than the Participants. This principle is stated as follows in *Halsbury's Laws of England* (4th ed.), vol. 3(2) (at p. 315):

> If a person advances money to another, not by way of loan but as a contribution to the capital of a business carried on for their joint benefit, the person who has made the advance, even though he is not a partner in the business and has received no share of the profits as such, is debarred from proving in the bankruptcy of the recipient of the money in competition with the creditors of the business.

Briefly, I agree with Harradence J.A.'s conclusion that none of the agreements at issue in the cases relied upon by Wachowich J. contained express provisions for the repayment of the money advanced and that such a factor was crucial to the conclusions reached therein. I also agree that the express repayment scheme set out in the Participation Agreement clearly distinguishes the case at bar from those in which the common law rule relied upon by Wachowich J. has been applied.

This rule was referred to, but not applied, by this Court in *Sukloff v. Rushforth*, *supra*, a case upon which the Legal Representative strongly relies. There, Ritchie J. declined to apply the common law rule since he found that the money advanced by Mr. Sukloff was more in the nature of a loan, thereby creating a debtor-creditor relationship between the parties. Indeed, just after citing the above excerpt, Ritchie J. stated (at p. 467): "As I have indicated, I do not construe Mr. Sukloff's role as that of one who was supplying capital for a business carried on for the joint benefit of himself and the two limited companies." Earlier, he had specifically agreed with the trial judge's finding that Mr. Sukloff's relationship with the companies in question "was confined to that of a lender or financier who had a right to share in the profits, if any, of the undertakings of these companies" (at pp. 465-66) (emphasis added). This "share in the profits" aspect was later used by Ritchie J. in order to postpone part of the money advanced by Mr. Sukloff (the unsecured $10,000 upon which the Legal Representative asks this Court to focus) under what was then s. 98 (now s. 139) of the *Bankruptcy Act*, a provision similar to s. 4 of the *Partnerships Act*. However, this aspect had no effect whatsoever on the characterization of the true nature of the transaction involved and on the application of the common law rule set out in *In re Beale*, *supra*, and *In re Meade*, *supra*, and applied in *Laronge Realty*, *supra*. As found on the evidence, the advances in *Sukloff v. Rushforth*, *supra*, amounted to a loan.

As observed by Harradence J.A. in the case at bar, it is somewhat difficult to discern what specific evidence Ritchie J. was referring to when he agreed with the finding of the trial judge in *Sukloff v. Rushforth*, *supra*. However, I would note, as did Harradence J.A., that the agreements involved therein contained express repayment provisions similar to those contained in the Participation Agreement. It is not unreasonable to suggest that these provisions played an important role in the characterization of the advances as a loan. In any event, what is most important for our purposes is the fact that none of the moneys advanced by Mr. Sukloff was "postponed" under the common law principle advanced by Wachowich J. and the Legal Representative. The only part which was indeed postponed (the $10,000), was done so under the *Bankruptcy Act* and not following *In re Meade*, *supra*. I will explain in the context of my analysis of s. 4 of the *Partnerships Act* why, contrary to *Sukloff v. Rushforth*, *supra*, such statutory postponement has no application to the facts of this case (namely, because there is no profit sharing in the case at bar, simply a repayment out of profits). Suffice it here to say that, contrary to the Legal Representative's submissions, *Sukloff v. Rushforth, supra,* has no bearing on the characterization issue facing this Court.

Similarly, contrary to the Legal Representative's submissions, the accounting treatment is not by itself of great weight in the characterization of the advance. I agree with the learned chambers judge that this "evidence" should be "looked at with caution" (at p. 130). I say this for the following interrelated reasons. First, CCB was following the express directives given by the Office of the Inspector General of Banks, who is not a party to any of the agreements, in using the accounting methods it did. Second, as noted by the Bank Group, the accounting methods used by CCB were beyond the control of many of the Participants. Third, the Legal Representative is really asking us to look at the conduct of one party, after an arrangement has been signed, in order to discern the common intention of all contracting parties at the time of signing. This type of unilateral and after the fact "evidence" is clearly of little relevance and reliability with respect to the issues before this Court. Fourth, as previously noted, the accounting treatment used and the success of the support program were closely linked and it is unwise to draw inferences on the legal relationship of the parties therefrom. For all these reasons, I would not place much weight on the accounting treatment used by CCB in determining the true nature of the advance of $255 million. In so concluding, I do not wish to say that there may not be other cases where the accounting treatment could be helpful in determining the nature of a given transaction.

Finally, I cannot agree with Wachowich J. about the relevance to the characterization issue of the fact that the portion of the Portfolio Assets purchased by the Participants was of little value. Even assuming that courts are entitled to weigh the value of the consideration given for a particular promise when characterizing an agreement, there was more to the support agreements than the mere purchase of participations in bad loans. Regardless of the true value of the Syndicated Portion, the Participants were to be repaid the entire $255 million they had advanced to purchase their Participation Certificates. The source of this repayment was also the profits of CCB and the parties agreed that any amount remaining unpaid upon insolvency would be considered an indebtedness by CCB towards the Participants.

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On the other hand, the factors noted by the Court of Appeal of Alberta and the respondents as providing indicia of the "loan" nature of the advance of $255 million are clearly relevant to the characterization issue and they strongly support such a conclusion. I have already referred to these factors in summarizing the reasons of Harradence J.A. and the submissions made by Alberta and the Bank Group. To repeat the most important ones: (1) there is nothing in the express terms of the agreements which supports a conclusion that the money was advanced as an investment; and (2) there are express provisions supporting a characterization of the advance as a loan, including provisions for repayment (P.A. ss. 9-11), for an indemnity should full repayment not be made from the sources contemplated (P.A. s. 8), and for equal ranking with the ordinary creditors of CCB (P.A. s. 13).

It is interesting to note that my conclusion that the $255 million advance was a loan also accords with the views of Mr. Justice Estey in his report. The relevant passages are found at pp. 115, 118 and 125 of the *Estey Report*:

> The $255M reduced the bank's debt to the Bank of Canada, but itself became an obligation to be retired by collections on the Support Package loans or on liquidation, out of the assets of the bankrupt bank. The receipt of the $255M therefore is irrelevant to the presence or absence of solvency. Whatever state the bank was in at that time remained unaffected by the receipt of the Support Package moneys. The Inspector General, therefore, was in error in finding the bank to be solvent upon receipt of the $255M. It should be borne in mind that the $255M, by the terms of the interim and final agreements, remains an obligation in debt of the CCB.
>
> . . .
>
> The Support Package should have classified these moneys as an unrecoverable purchase price, as a capital grant of some nature or as a subordinated loan, repayable out of earnings only. What CCB needed at this time of crisis was a loan without recourse in the nature of a capital grant repayable only from future profits and not a loan which would retain that characteristic and revive when the bank ran into further difficulties.
>
> . . .
>
> The object of this Support Program therefore was to replace lost income and thereby protect and renew capital. The banks could not in law contribute equity capital, and the government agencies likewise were not in a position, either legally or practically, to do so. Resort was had to what amounted to a long-term loan repayable out of the prospects of collections from bad debts and future earnings. The money infused, therefore, could not be treated as capital, but only serve to reduce liquidity advances.

Contrary to the Legal Representative's submissions, s. 13 of the Participation Agreement is not an attempt to enhance the ranking of the Participants upon CCB's insolvency. As evidenced by the passages from this clause which I earlier emphasized, the main purpose and effect of s. 13 is to reduce, rather than enhance, the ranking of certain of the Participants (Canada and Alberta) upon insolvency as the parties agreed to do away with s. 277 of the *Bank Act*. As for the other Participants, there is nothing in s. 13 other than a confirmation that the ordinary principles of common law and of ss. 93 to 95 of the *Winding-up Act* apply upon insolvency, namely the Participants, as unsecured creditors of CCB, are entitled to rank *pari passu* with the other ordinary creditors of CCB.

For all the foregoing reasons, I find that the Court of Appeal did not err in characterizing the advance of $255 million to CCB as being, in substance, a loan rather than an investment of capital. While indicia supporting both conclusions are present, the overall balance clearly tilts in favour of the characterization put forward by the respondents. Accordingly, I would dismiss this first ground of appeal.

B. *Postponement Under Section 4 of the Partnerships Act*

In the alternative, the Legal Representative submits that, even if the advance of $255 million was properly characterized as a loan, the Court of Appeal erred in declining to postpone, under existing statutory and common law principles, the respondents' claims for the moneys not repaid until the claims of the other ordinary creditors of CCB were satisfied. Relying on ss. 3(3)(d) and 4 of the *Partnerships Act*, he argues that, where a lender advances money to a business borrower under a contract providing that the lender shall "participate in the profits of that business", and the borrower subsequently becomes insolvent, the lender is not entitled to recover anything in respect of the loan until the claims of all other creditors of the borrower have been satisfied. It is submitted that the support agreements in question are contracts of such a nature because the Participants contracted to be repaid their advances out of CCB's pre-tax income (either 50 percent or 100 percent plus interest, depending on whether the Equity Agreement could be carried out), and because of the potential for profits inherent in the warrants granted to the Participants under the Equity Agreement.

As noted earlier, the Alberta Court of Appeal rejected a similar argument on the grounds that, notwithstanding the source for repayment and the warrants, the Participants were not to receive under the agreements a "rate of interest varying with the profits" or a "share of profits" (at p. 212). In other words, the loan in question was not one to which s. 4 of the *Partnerships Act* applied. The respondents before this Court adopt a similar position on this issue.

Alberta argues, persuasively in my view, that a lender does not receive a "share of the profits" within the meaning of ss. 3(3)(d) and 4 of the Ontario *Partnerships Act* unless he or she is entitled to be paid amounts referable to profits other

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than in repayment of the principal amount of the loan. It is submitted that a lender does not share in profits merely by having a contingent right to acquire or possibly even by having the right to acquire or by owning shares of the borrower. In the case at bar, Alberta submits that all amounts which the Participants were entitled to be paid were to be applied only in repayment of the principal amount due and hence they were not entitled to and did not share in CCB's profits. As for the Bank Group, it is submitted that in the case of the insolvency of a bank, the *Winding-up Act* and not the *Partnerships Act* or the *Bankruptcy Act* determines the priority of claims. Moreover, they argue that the transaction at hand is not one to which the *Partnerships Act* applies because the Participation Agreement referred to profits only as a means of determining the source of the Participants' right to repayment, and because any alleged "share of the profits" would stop when the sum advanced was repaid.

I have already found that the Court of Appeal was correct in characterizing the advance of $255 million under the support program as a loan. In order to determine the applicability of s. 4 of the *Partnerships Act* to the facts of this case, a provision which may apply regardless of whether a partnership exists, the general question to be answered is whether this loan was made "upon such a contract as is mentioned in section 3" of the Act. If so, then, subject to any constitutional arguments not made herein, the respondents would not be entitled to recover anything in respect of the loan until the claims of the other ordinary creditors of CCB are satisfied.

The only provisions in s. 3 of the *Partnerships Act* which make specific reference to a "contract" are ss. 3(3)(b) and (d). Section 3(3)(b) is clearly irrelevant to this appeal. Thus, at least at first glance, the contracts in the case at bar must fall within the ambit of s. 3(3)(d) of the *Partnerships Act* in order to trigger the application of s. 4. The specific question then becomes whether or not the support agreements provided that the Participants were to receive a "rate of interest varying with the profits" of CCB, or a "share of the profits arising from carrying on the business" of CCB. While the Legal Representative originally structured his s. 4 argument exclusively around the wording in s. 3(3)(d) of the *Partnerships Act*, he expanded this argument during oral submissions to include s. 3(3)(a). He submitted that, even if the transaction does not fall within the ambit of the former subsection, it clearly falls within the latter. Accordingly, another specific question to be considered is whether s. 4 of the *Partnerships Act* can be triggered by "the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business" which does not involve a contract of the sort described in s. 3(3)(d). I will deal with both of these questions in turn.

Sections 3(3)(d) and 4 of the *Partnerships Act* originate from the now repealed 1865 *Act to Amend the Law of Partnership* (U.K.), 28 & 29 Vict., c. 86 ("*Bovill's Act*"). The intent of what is now s. 3 of the *Partnerships Act* was evidently to mitigate the harshness of the old common law rule, which was that any person who shared in the profits of the partnership was deemed to be a partner, and so liable for any debts of the partnership on insolvency: *Grace v. Smith* (1775), 2 Wm. Bl. 997, 96 E.R. 587 (at p. 588 *per* De Grey C.J.: "[e]very man who has a share of the profits of a trade ought also to bear his share of the loss"); and *Waugh v. Carver* (1793), 2 Hy. Bl. 235, 126 E.R. 525.

The old common law rule was first modified by the decision in *Cox v. Hickman* (1860), 8 H.L.C. 268, 11 E.R. 431, which in some respects was very similar on the facts to the present case. The company of Smith and Son fell into financial difficulties and was unable to pay its creditors. The Smiths entered into an arrangement with five of its creditors assigning the company to them (as trustees for all of the creditors), for a term of 21 years. During that period, the trustees were to carry on the business of the company "and to pay the net income, after answering all expenses; which net income was always to be deemed the property of the two Smiths, among [all] the creditors of the Smiths" (at p. 432 E.R.). In other words, the creditors "were to be paid their debts out of the profits of their debtors' business" (*Lindley on the Law of Partnership* (15th ed. 1984), at p. 104). The most significant fact for our purposes is that the repayment was to be only to the extent of the debts; when all the debts had been paid, the trustees were to hold the estate in trust for the Smiths. Financial troubles continued under the new management, and the company once again became unable to pay its debts.

Since at that time the law was thought to be that a person who shared in the profits was liable as a partner, the question in *Cox v. Hickman*, *supra*, was not, as here, whether those creditors who were being paid out of profits were to be ranked equally with subsequent creditors, but whether the former group were to be themselves liable as partners to subsequent creditors. In deciding that they were not so liable, the House of Lords is considered to have established, amongst other things, that receipt of a share of the profits is not conclusive proof of a partnership as was previously thought (*Lindley on the Law of Partnership*, *supra*, at p. 104).

However, it is interesting to note one excerpt of the opinion of Wightman J. (one of the judges who came to advise the House of Lords in *Cox v. Hickman*) who, instead of modifying the old common rule, would simply have not applied it to the facts of the case (at p. 443 E.R.):

> It is said that a person who shares in net profits is a partner; that may be so in some cases, but not in all; and it may be material to consider in what sense the words, "sharing in the profits" are used. In the present case, I greatly doubt whether the creditor, who merely obtains payment of a debt incurred in the business by being paid the exact amount of his debt, and no more, out of the profits of the business, can be said to share the profits. If in the present case, the property of the Smiths had been assigned to the trustees to carry on the business, and

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> divide the net profits, not amongst those creditors who signed the deed, but amongst all the creditors, until their debts were paid, would a creditor, by receiving from time to time a rateable proportion out of the net profits, become a partner? I should think not.

In my view, the undesirability of the result foreseen by Wightman J. is equally compelling in the context of ss. 3(3)(d) and 4 of the *Partnerships Act*.

Historically, s. 3(3)(d) of the *Partnerships Act* appears to refer to loans similar to those involved in *Sukloff v. Rushforth*, *supra*, namely loans in which the creditor advances money to the debtor on the terms that it shall be repaid with interest, and in addition the creditor is to receive a share of the profits over and above any payments on principal until the amount is paid off, as opposed to loans such as those in the present case where the share of the profits is used solely to repay the principal. In other words, s. 3(3)(d) applied to loans which had no cap or limit on the amount to be paid to the creditor from the profits of the debtor's business or which had a cap unrelated to the principal owing on the debt.

It is not entirely clear in *Sukloff v. Rushforth*, *supra*, whether the lender actually received any of the profits of the company via the arrangement for 50 percent of the profits. However, in many older cases it is clear that the lender did receive interest and the stated share of the profits for a period, and then claimed for the entire amount of the principal on bankruptcy of the debtor. In these cases ss. 2(3)(d) and 3 of the *Partnership Act, 1890* (U.K.), 53 & 54 Vict., c. 39 (similar to ss. 3(3)(d) and 4 of the *Partnerships Act*) were applied to subordinate the claims: see *Ex parte Taylor; In re Grason* (1879), 12 Ch.D. 366; *In re Stone* (1886), 33 Ch.D. 541; *Re Hildesheim*, [1893] 2 Q.B. 357; *In re Mason; Ex parte Bing*, [1899] 1 Q.B. 810; and *In re Fort; Ex parte Schofield*, [1897] 2 Q.B. 495. These sections of the *Partnership Act, 1890* essentially repeated *Bovill's Act* so it seems reasonable that this was the specific situation envisaged by the *Act*.

Contrary to the oral submission of the Legal Representative, *In re Young; Ex parte Jones*, [1896] 2 Q.B. 484, is not inconsistent with the distinction I am drawing. There, Mr. Jones lent money to Mr. Young which was to be used to pay the expenses of Mr. Young's business. The terms of the agreement provided that, in return for the use of this sum, Jones was to be paid a fixed weekly sum out of the profits of the business. When Young became insolvent, Jones claimed for the entire amount of principal, without making allowance for the amounts received by virtue of the weekly payments. In other words, the weekly sum received by Jones out of profits was not for the purpose of repaying the principal sum on the debt. Thus, *In re Young* is clearly distinguishable from the facts of this case and should not be seen as foreclosing the interpretation of s. 3(3)(d) that I am advancing.

In addition, s. 3(3)(a) of the *Partnerships Act* provides strong support for the distinction between profits as the source of repayment, and a share in the profits, with any repayment of a fixed debt falling into the former category. Indeed, it provides that:

> (a)the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him or her a partner in the business or liable as such;

This seems to preclude any reading of s. 3(3)(d) which would catch debts which are to be repaid "out of profits". In this respect, it is interesting to note that the authors of *Lindley on the Law of Partnership* are of the view that the equivalent of s. 3(3)(a), not s. 3(3)(d), applies to cases such as *Cox v. Hickman*, *supra*, where, as we have seen, an arrangement similar to the one at bar was involved (at p. 108).

For the foregoing reasons, I would conclude that any fixed debt to be repaid out of profits does not in itself constitute a "share of the profits" within the meaning of s. 3(3)(d) of the *Partnerships Act*. As argued by Alberta, a lender does not receive a "share of the profits" under this provision unless he or she is entitled to be paid amounts referable to profits other than in repayment of the principal amount of the loan.

Having said this, the question of whether the support agreements provided that the Participants were to receive a "rate of interest varying with the profits" of CCB, or a "share of the profits arising from carrying on the business" of CCB, as to trigger s. 4 of the *Partnerships Act*, may be readily answered. Clearly, the Participants were not to receive in return for the advance of $255 million a rate of interest varying with CCB's profits. The rate of interest to be paid was fixed according to the prime rate and was contingent on whether or not the Equity Agreement could be carried out. As for CCB's profits, they merely represented the source from which the Participants were to be repaid their advance. In this respect, I entirely agree with the following excerpt taken from the reasons of Harradence J.A. in the case at bar (at p. 211):

> It is important to recognize that while repayment was to be made from pre-tax income of CCB, there was no direct link between the success of the CCB and the overall quantum of the amount due to or payable to the Support Group Participants. I have been referred to no authority which supports the proposition that a repayment, the instalments of which are referable to the quantum of the income of the debtor, is a situation of "joint benefit". Since the sums to be received by the Participants were limited to repayment of monies advanced, with a contingent right to interest, the source of the repayment monies is not relevant and, with respect, the learned Chambers Judge erred in concluding the Participants were "sharing the profits" in this respect.

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The Participants had a fixed debt which would be repaid in part by the moneys received from the Syndicated Portion of the Portfolio Assets and in part by CCB's pre-tax income. With the exception of the contingent interest at prime rate, under no circumstance were the payments from the pre-tax income to be applied to anything but the repayment of the loan. All amounts that the Participants were entitled to be paid were to be applied only in repayment of the principal amount of the loan. Once the loan was fully repaid, all payments from CCB's pre-tax income were to stop. Accordingly, I find that the Participants were not to receive a "share of the profits" of CCB within the meaning of s. 3(3)(d) of the *Partnerships Act* by virtue of the repayment scheme for the $255 million advance. I also do not accept that the contemplated granting of warrants under the highly contingent circumstances of this case alters this conclusion.

The question then is whether s. 4 of the *Partnerships Act* can be triggered by an arrangement falling under s. 3(3)(a). Indeed, as previously noted, the Legal Representative takes the alternative position that, even if s. 3(3)(d) does not apply, the transaction in this case is surely one contemplating "the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business". While one cannot seriously dispute this proposition, the fact remains that s. 4 cannot apply unless "money has been advanced by way of loan upon such a contract as is mentioned in section 3". The first point to note is that s. 3(3)(a) of the *Partnerships Act* makes no reference whatsoever to a "contract" and thus appears to be beyond the realm of s. 4. Clearly, the legislature could have chosen a more general term than "contract" in s. 4 had it wished this postponement provision to apply to every transaction described in s. 3. The same could also be said about the absence of the word "loan" in s. 3(3)(a). It is not without significance that we were not presented with any jurisprudence in which a person who had a fixed debt to be paid out of profits (i.e., who would fall under s. 3(3)(a) and not s. 3(3)(d)) was subordinated under the Act.

Further, if the policy on which s. 4 of the *Partnerships Act* is based is that a person who reaps the rewards of profits must share some risk, then this would not apply to a creditor with a fixed debt, notwithstanding that the fund or source of repayment is profits, because his or her total return will not vary with the profitability of the company.

From the above, I conclude that s. 4 of the *Partnerships Act* cannot be triggered by what is described in s. 3(3)(a) as "the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business", which does not involve a contract of the sort described in s. 3(3)(d). The present case may very well fall within s. 3(3)(a) of the *Act*. However, that section only deals with a guideline for determining whether or not a partnership has been created, an issue which is not raised in this appeal. Contrary to s. 3(3)(d) of the *Partnerships Act*, s. 3(3)(a) does not have the added function of triggering the postponement provision of the Act. As the Participants were not to receive a "rate of interest varying with the profits" of CCB or a "share of the profits arising from carrying on the business" of CCB, their claims for the return of the moneys advanced cannot be postponed under s. 4.

Accordingly, I would dismiss this ground of appeal. The Court of Appeal did not err in declining to postpone the respondents' claims under s. 4 of the *Partnerships Act*.

C. *Equitable Subordination*

In the further alternative, the Legal Representative submits that even if the transaction in question is a loan and the *Partnerships Act* does not apply, the Participants' claims should be subordinated on equitable grounds based on the United States doctrine of "equitable subordination".

More specifically, it is argued that the equitable jurisdiction of superior courts gives them authority in insolvency matters to subordinate claims that, while valid as against the insolvent's estate, arise from or are connected with conduct prejudicial to the interests of other creditors. While the Legal Representative does not assert that the conduct of the Participants was fraudulent or worthy of censure, he argues that the Participants acted to the detriment of the ordinary creditors of CCB in ways (which I shall outline below) that should invoke this equitable jurisdiction. Both the Bank Group and Alberta challenge the proposition that equitable subordination is available under Canadian law in insolvency matters. In addition, the respondents argue that the facts of this case do not call for the application of equitable principles.

This issue does not appear to have been raised before Wachowich J. or the Court of Appeal and consequently this Court does not have the benefit of any findings of fact as to the actual or potential prejudice suffered by CCB's depositors and other creditors as a result of the conduct of the Participants. In this respect, the evidence presented to this Court by the Legal Representative is limited to certain excerpts of the *Estey Report*, incorporated by reference in the affidavit of Mr. Allan Taylor of the Royal Bank of Canada (C.O.A. at pp. 236-41). The excerpts in question are those found at pp. 114-21 of the *Estey Report* under the heading "Flaws in the Support Program".

This Court also does not have the benefit of the insight of the courts below as to whether or not, in the first place, the doctrine of equitable subordination should become part of Canadian insolvency law. As I see the matter, however, it is not necessary in the circumstances of this case to answer the question of whether a comparable equitable doctrine should exist in Canadian law and I expressly refrain from doing so. Assuming, for the sake of argument only, that Canadian courts have the power in insolvency matters to subordinate otherwise valid claims to those of other creditors on equitable grounds relating to the conduct of these creditors *inter se*, this Court has been presented with insufficient grounds to justify the exercise of such a

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power in the case at bar. Briefly put, the reasons and limited evidence advanced by the Legal Representative before this Court disclose neither inequitable conduct on the part of the Participants nor injury to the ordinary creditors of CCB as a result of the alleged misconduct.

As I understand it, in the United States there are three requirements for a successful claim of equitable subordination: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute. See *In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977), at p. 700; *In re Multiponics Inc.*, 622 F.2d 709 (5th Cir. 1980); A. DeNatale and P. B. Abram, "The Doctrine of Equitable Subordination as Applied to Nonmanagement Creditors" (1985), 40 *Bus. Law.* 417, at p. 423; and L. J. Crozier, "Equitable Subordination of Claims in Canadian Bankruptcy Law" (1992), 7 C.B.R. (3d) 40, at pp. 41-42. Even if this Court were to accept that a comparable doctrine to equitable subordination should exist in Canadian law, I do not view the facts of this case as giving rise to the "inequitable conduct" and ensuing "detriment" necessary to trigger its application.

In this regard, the actions cited by the Legal Representative as being detrimental to the ordinary creditors of CCB, thereby giving rise to equitable subordination, come down to two elements: (1) the press release of March 25, 1985, issued by the Department of Finance announcing to the general public that the support program would leave CCB "in a strong position of solvency" and that sufficient funds were being advanced "to ensure solvency"; and (2) the flaws in the support program outlined in the *Estey Report* and described by the Legal Representative as (a) the inadequacy of the support program to ensure CCB's solvency, (b) the accounting treatment disguised the fact that the Participation Agreement required the entire amount advanced to be repaid, (c) the accounting treatment used by the Bank Group gave rise to tax benefits not available to ordinary depositors, (d) the Participation Agreement allegedly obliged CCB to apply all amounts received on the Syndicated Portion of the Portfolio Assets to the Participants, (e) the warrants would have the effect of prohibiting CCB from raising funds in the equity market since they would enable the Participants to acquire 75 percent of the common shares of CCB up to 10 years after the advances had been paid in full, and (f) after making their advances and receiving their Participation Certificates, the Bank Group ceased dealing with CCB in the normal manner.

At the outset, I note that many of the actions relied on by the Legal Representative cannot be attributable to the Participants. For example, the press release was not issued by the respondents and the accounting treatment given by CCB to the advance of $255 million simply followed the instructions given by the Office of the Inspector General of Banks. Thus, even if some inequitable connotation could be given to these actions, they would not represent misconduct on the part of the respondents to whom the ordinary creditors of CCB are now attempting to rank in priority.

Another difficulty with the Legal Representative's submission, however, is that I fail to see anything remotely inequitable in the conduct complained of. With respect to the press release, the evidence does not show that the Participants were necessarily of a different opinion from that set out in the press release. Certainly, they advanced the funds on the condition that the Inspector General of Banks provide them with an opinion letter confirming the solvency of CCB on the infusion of the proposed funds. As for the flaws in the support program, there is nothing to show that the Participants' plans were other than well intentioned. As stated at the beginning of these reasons, it is beyond the scope of this appeal to engage in a detailed review of the reasons which led to the failure of the support program. Suffice it to say that the assertions of the Legal Representative in substance do not show wrongdoing or unfairness on the part of the Participants, but merely show that the support program did not work and, perhaps with hindsight, offer some explanations as to why.

In any event, it does not appear to have been suggested at any time in the courts below nor was any evidence led to suggest that any creditor of CCB was misled by any of the above actions or that the press release, accounting treatment or any flaw in the support program operated to cause any creditor to act to its detriment. Thus, even if this Court were to find that the Participants acted in an inequitable manner in their dealings with CCB and its depositors and other creditors, we do not have a shred of evidence upon which to conclude that the improper conduct resulted in actual harm to the ordinary creditors of CCB now before this Court. One can only speculate that depositors and other creditors relied on the press release or accounting treatment and thereby suffered damages. We have been offered no United States decision in which mere speculation of harm to other creditors has been found sufficient to meet the second requirement of the doctrine of equitable subordination. Of course, the ordinary creditors of CCB who appear before this Court have, to a varying extent, suffered from the winding-up of CCB, just as any creditor (including the Participants) suffer following an insolvency or bankruptcy. The Legal Representative has not shown, however, that these ordinary creditors have suffered identifiable prejudice attributable specifically to the alleged misconduct of the Participants.

Accordingly, I would reject this alternative ground of appeal. Even if equitable subordination is available under Canadian law, a question which I leave open for another day, the facts of this case do not call for an intervention with the *pari passu* ranking of the respondents in the name of equity.

D. *The $5 Million Attributable to the Syndicated Portion of the Portfolio Assets*

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The last matter to be addressed pertains to the moneys recovered from the Portfolio Assets and attributable to the Syndicated Portion thereof. In his oral submissions, the Legal Representative argued that the learned chambers judge erred in allowing the Participants to recover funds from the Syndicated Portion of the Portfolio Assets. A similar submission was made in the Alberta Court of Appeal but was summarily rejected (at p. 212). As I understand it, the argument is one of inconsistency between the treatment given, on the one hand, to the respondents' claim for their portion of the moneys recovered from the Portfolio Assets and, on the other hand, to the respondents' claim for all moneys advanced to CCB pursuant to the Participation Agreement and not repaid by moneys recovered from the Portfolio Assets. According to the Legal Representative, these two claims stem from the same financial arrangement and cannot be given different legal effects. It is argued that, if the advance of $255 million is really an investment of capital, as found by Wachowich J., then it is wrong to rank the respondents behind the ordinary creditors of CCB only with respect to the claim for what is not repaid by moneys recovered from the Portfolio Assets. Similarly, if the transaction is really a loan but the loan is one to which s. 4 of the *Partnerships Act* applies, then both claims ought to be postponed.

This submission has already been answered by my conclusion that the advance of $255 million to CCB was substantially in the nature of a loan and that the *Partnerships Act* does not apply to postpone the loan.

VI. Disposition

For the foregoing reasons, I would dismiss the appeal with costs here and in the courts below. As found by the learned chambers judge and upheld by the Court of Appeal, the Participants are entitled to their proportionate share of the moneys recovered from the Portfolio Assets of CCB in the manner set out in the Participation Agreement, that is, to the extent such recoveries exceed the CCB Portion of each of the Portfolio Assets. Moreover, as found by the Court of Appeal, the respondents are entitled to rank *pari passu* with the ordinary creditors of CCB for all moneys advanced pursuant to the Participation Agreement and not repaid by moneys recovered from the Portfolio Assets.

Appeal dismissed with costs.

Solicitors for the Liquidator: Cruickshank, Karvellas, Layton & Connauton, Edmonton.

Solicitors for the general body of creditors of the estate of Canadian Commercial Bank: Lerner & Associates, Toronto.

Solicitor for the respondent Her Majesty The Queen in right of Alberta: The Attorney General for Alberta, Edmonton.

Solicitors for the respondents Royal Bank of Canada, Bank of Montreal, Toronto-Dominion Bank, Bank of Nova Scotia, Canadian Imperial Bank of Commerce and National Bank of Canada: McCarthy Tétrault, Toronto.

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* Stevenson J. took no part in the judgment.

MONITORS

Duties and functions - Sec 23

23. (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

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(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;
(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;
(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —
(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,
(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and
(iii) at any other time that the court may order;
(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;
(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);
(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;
(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;
(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;
(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the Bankruptcy and Insolvency Act, so advise the court without delay after coming to that opinion;
(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;
(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and
(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable
(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.
2005, c. 47, s. 131;
2007, c. 36, s. 72.

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Right of access - Sec 24
24. For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.
2005, c. 47, s. 131.

Obligation to act honestly and in good faith - Sec 25
25. In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the Bankruptcy and Insolvency Act.
2005, c. 47, s. 131.

Pine Valley Mining Corporation (Re), 2008 BCSC 356 (CanLII) - Inter-co Capital Investment or Debt? Function of Monitor.

Date:	2008-03-14
Docket:	S066791
Parallel citations:	41 CBR (5th) 43
URL:	http://canlii.ca/t/1w7rq
Citation:	Pine Valley Mining Corporation (Re), 2008 BCSC 356 (CanLII), <http://canlii.ca/t/1w7rq> retrieved on 2013-09-15
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IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: ***Pine Valley Mining Corporation (Re),***
2008 BCSC 356

Date: 20080314

Docket: S066791
Registry: Vancouver
In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, as amended
And
In the Matter of the *Business Corporations Act*,
R.S.B.C. 2002, c. 57, as amended

In the Matter of Pine Valley Mining Corporation,
Falls Mountain Coal Inc., Pine Valley Coal Inc., and
Globaltex Gold Mining Corporation
Petitioners

Before: The Honourable Madam Justice Garson
Oral Reasons for Judgment
March 14, 2008

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Counsel for Pine Valley Mining Corporation:	J. R. Sandrelli O. Jones
Counsel for Tercon Mining PV Ltd.:	B.G. McLean C. Armstrong
Counsel for the Monitor:	W. Kaplan, Q.C.
Counsel for Petro-Canada:	D.A. Garner
Counsel for CN Rail:	R.D. Watson
Place of Hearing:	Vancouver, B.C.

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[1] This is an application for directions respecting the process for the determination of the amount of Pine Valley Mining Corporation's ("PVM") claim against Falls Mountain Coal Inc. ("FMC") within a proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985 c. C-36, as amended, (the "CCAA Proceeding"), in which both PVM and FMC are related parties and petitioners.

[2] FMC is a wholly-owned subsidiary of PVM. PVM claims that FMC owes PVM $37,692,218. The other major creditors of FMC dispute that amount largely on the basis that the advances made to FMC are properly characterized as capital investment in FMC, not debt, and therefore PVM should rank behind the other unsecured creditors in the distribution of FMC assets. The Monitor appointed by this Court in the CCAA Proceeding has reviewed the accounts of PVM and FMC and determined that $27,070,166 is properly owed to PVM by FMC as debt.

[3] On this application the Court is asked to determine two issues:

1. Who bears the onus of proof of the amount and character of PVM's claim?
2. Should the trial be a summary trial or a conventional trial with *viva voce* witnesses, or some combination of those two procedures?

[4] The relevant factual background to the matter may be stated as follows:

- FMC is the wholly-owned subsidiary of PVM.
- FMC operated the Willow Creek Coal Mine.
- On October 20, 2006, PVM and FMC petitioned this Court for a general stay of proceedings under the ***CCAA***. The order they sought was granted, and extended from time to time since the initial order.
- The Petition did not disclose an inter-company debt as between the two petitioners. All financial reporting was done on a consolidated basis. When the Monitor requested unconsolidated financial statements for each of the petitioners the inter-company debt was revealed. In recounting this history I make no adverse finding of fact on this point. That is a matter for the trial judge.
- On January 19, 2007, PVM filed a claim with the Monitor stating that FMC was indebted to PVM in the amount of $41,658,441.
- On March 16, 2007, the Monitor issued its Fourth Report to the Court. That report contained a detailed review of the transactions underlying the PVM claim. As already noted, as a result of his investigations the Monitor "[proposed] to allow a revised PVM Claim against FMC in the amount of $27,070,166".
- Some of the creditors objected to the claim, including the revised claim, and agreed that the counsel for the largest creditor, Tercon, would have standing to defend the PVM claim and to raise all defences available to FMC and to creditors of FMC. The other main creditors have maintained - if I may describe it thus - an active watching brief.

[5] A ten-day trial has been reserved for May of this year. The parties have reached an impasse on the two issues mentioned above. Mr. Sandrelli, counsel for PVM, says that "deference is owed to the Monitor's ... conclusions ... in [his] Fourth Report, such that the onus to challenge the Monitor's findings lies on the party appealing the Monitor's findings; and if deference is owed to the Monitor's findings, what standard of review applies to those findings".

[6] I understood Mr. Sandrelli to use the term "appeal" in a loose sense. He acknowledged that this is not an appeal because Tercon did not participate in the original decision making process of the Monitor. He said in submissions that the process is more akin to a review on a correctness standard of review. He concluded his submissions by contending that Tercon should bear the onus of displacing the finding of the Monitor that PVM is owed $27 Million by FMC, and that PVM bears the onus of displacing the Monitor's finding that PVM is not entitled to the additional approximate $11 million it claims.

[7] Mr. McLean, counsel for Tercon, contends that "the burden of proof lies upon the party who substantially asserts the affirmative of the issue": *Phipson on Evidence*,14th ed. He says that PVM seeks to prove that it is a creditor of FMC and it must carry the burden of proof of that whole claim.

[8] Mr. Sandrelli argues that in the special context of a ***CCAA*** proceeding the Monitor, who is appointed by the court, should be accorded deference and that the review of his decision is akin to a review of a ***CCAA*** claims officer's decision in a ***CCAA*** proceeding. He relies for this proposition on dicta in ***Olympia & York Developments Ltd. (Re)*** reflex, (1993), 17 C.B.R. (3d) 1; ***Air Canada (Re.)*** 2004 CanLII 6674 (ON SC), (2004), 2 C.B.R. (5th) 23; ***Canadian Airlines (Re)***, 2001 ABQB 146 (CanLII), 2001 ABQB 146; ***Matte v. Roux***, 2007 BCSC 902 (CanLII), 2007 BCSC 902; ***Triton Tubular Components Corp v. Steelcase Inc.***, [2005] O.J. No. 3926 (S.C.J.) (QL); and ***Muscletech Research & Development Inc.*** 2006 CanLII 34344 (ON SC), (2006), 25 C.B.R. (5th) 231.

[9] In ***Olympia & York***, the decision under review was that made by a claims officer. The claims officer is akin to a judicial officer. The proceeding before him is an adversarial one and naturally he should be granted some deference. That decision is distinguishable on the grounds that the court appointed Monitor in this proceeding, while undoubtedly an impartial agent of the court, reviews the claim but is in no way engaged to conduct a hearing or any type of adversarial or

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quasi-judicial type proceeding. Similarly, ***Air Canada*** involved an appeal from a decision of a claims officer appointed in the ***CCAA*** proceeding in which the claims officer had dismissed a contingent claim. The appeal was dismissed. The ***Air Canada*** case is distinguishable for the same reasons as the ***Olympia & York*** case. In ***Canadian Airlines***, the decision under review was also that of a claims officer appointed to determine disputed claims within a ***CCAA*** proceeding. Paperny J., as she then was, held that the review was a trial *de novo*, but that was because the law in Alberta differed from Ontario. The ***Matte*** case involved the standard of review of a master's decision and for the same reasons, I find it unhelpful and distinguishable. ***Triton*** also involved the review of a claims officer's decision. The court determined that the standard of review was correctness but, for the same reasons as above, the case is distinguishable. The ***Muscletech*** case is similarly distinguishable.

[10] In none of the cases cited above was the decision under review one of a monitor, not engaged in an adversarial process.

[11] Paragraph 17 of the Claims Procedure Order pronounced December 8, 2006, provides:

> Where a Creditor delivers a Dispute Notice in accordance with the terms of this Order, such dispute shall be resolved as directed by this Court or as the Creditor in question, the Petitioners and Monitor may agree.

[12] Section 12(2) of the ***CCAA*** provides in part as follows:

> For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of the unsecured claim shall be the amount
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor;

[13] I conclude from the ***CCAA*** and the Claims Procedure Order that the function of the Monitor, that is relevant to this application, is to determine the validity and amount of a claim on the basis of the evidence submitted. The Monitor's process in doing so is in no way akin to an adversarial process. Although his findings and opinion should be respectfully considered, he is not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant. Counsel have not called my attention to any authority for either of the following propositions, either that the CCAA claim process alters substantive law that would otherwise apply to the determination of such a claim, or that a monitor appointed on the terms here is entitled to the deference accorded a quasi-judicial officer like a court appointed claims officer. It follows that PVM has the burden of proving its claim. PVM shall file a statement of claim. Tercon, with standing to defend on behalf of FMC, shall file a statement of defence.

[14] I turn next to the procedural questions.

[15] The Monitor has spent a good deal of time investigating the PVM claim. His report documents the numerous transactions that are at issue, and provides a very useful framework for the court. There is much in the report that may be of use to the parties at the hearing of this matter. In exercising my jurisdiction to give directions for a summary determination of this matter I order that either party is at liberty to use the Monitor's report or part of the report at the trial of this matter, as an expert report, provided the necessary notice is given to the other. The Monitor may be required to be cross-examined on the report.

[16] The second issue I have been asked to determine is the question of the format of this trial. Section 12 of the ***CCAA*** requires a summary trial. I recognize that in some cases, courts have held that that does not preclude a conventional trial. (See ***Algoma Steel Corporation v. Royal Bank of Canada*** reflex, (1992), 8 O.R. (3d) 449 (C.A.). I do not understand Mr. McLean to object in principle to an order that this matter be determined in a summary way but, rather, I think he reserves his right to object to the suitability of such a procedure depending on how the evidence unfolds. It is my view that s.12 of the ***CCAA*** informs any decision the court must make as to the format of a trial and that trial must surely be as the section dictates, a summary trial, unless to do otherwise would be unjust, or there is some other compelling reason against a summary trial. I am not persuaded that this claim cannot be tried summarily on the date reserved in May of this year. The parties have one week to work out an agreement as to a time line for the necessary steps to prepare for that trial, including the exchange of pleadings, disclosure of documents as requested by Tercon, agreed facts, delivery of affidavits, expert reports (including notice of reliance on all or part of the Monitor's reports), delivery and responses to notices to admit, examination for discovery if consented to, and delivery of written arguments. I acknowledge that many of these steps are underway.

[17] Mr. Sandrelli says he will now have to marshall all the evidence to prove his claim from ground zero as opposed to simply relying in the first instance on the Monitor's report. As I have said, he may rely on all or part of the Monitor's report. I am not persuaded yet that he cannot marshall his evidence in the time remaining before the May trial date. I will hear submissions on the trial schedule if, by March 21, 2008, the parties have been unable to reach

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agreement on it. The parties may contact the registry to arrange such a hearing prior to ordinary court hours. Either party has leave to apply to cross-examine the deponent of an affidavit out of court or in court. Either party has leave to apply to convert this summary trial to a conventional trial but I expect the parties to make their best efforts to manage this generally as a summary trial.

[18] The parties have each proposed somewhat differing forms of order, concerning various procedural matters relevant to the conduct and hearing of the inter-company claim. Also Mr. Watson, for CN, objects to the following clause proposed by PVC:

> No other creditor, claimant or counsel therefore shall be entitled to participate by having representation in the proceedings concerning the determination of the Issues and in relation to the claim of PVM against FMC without leave of the Court, which application for leave,if any, shall be made on 4 days' notice to PVM and Tercon by no later than March 31, 2008.

[19] Mr. Watson, counsel for CN, one of the creditors, contends that his client should be exempted from the limitation imposed on all other creditors contemplated by this last mentioned clause in the draft order. I agree with Mr. Sandrelli that it is necessary for the orderly conduct of the resolution of the claim that PVM and Tercon have some certainty as to what counsel are involved. On the other hand, CN and Petro-Canada have maintained what I earlier described as an active watching brief on the progress of the inter-company claim resolution. They should have the ability to continue to do so. Their submissions have generally been helpful and consequently I see no prejudice in permitting them to continue in that role, at least until shortly before the hearing. I will leave it to counsel to work out a date by which those two creditors will be barred from seeking leave to participate. I have in mind something like two weeks before the hearing but if counsel cannot agree they may make further submissions on this point.

[20] I will leave it to the parties to work out the balance of the terms of the order. They have leave to speak to the matter if those terms cannot be agreed upon.

"N. GARSON, J."

POWERS, DUTIES AND FUNCTIONS OF SUPERINTENDENT OF BANKRUPTCY

Public records - Sec 26

26. (1) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, a public record of prescribed information relating to proceedings under this Act. On request, and on payment of the prescribed fee, the Superintendent of Bankruptcy must provide, or cause to be provided, any information contained in that public record.

Other records - Sec 26(2)

(2) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, any other records relating to the administration of this Act that he or she considers appropriate.

Agreement to provide compilation - Sec 26(3)

(3) The Superintendent of Bankruptcy may enter into an agreement to provide a compilation of all or part of the information that is contained in the public record.
2005, c. 47, s. 131;
2007, c. 36, s. 73.

Applications to court and right to intervene - Sec 27

27. The Superintendent of Bankruptcy may apply to the court to review the appointment or conduct of a monitor and may intervene, as though he or she were a party, in any matter or proceeding in court relating to the appointment or conduct of a monitor.
2005, c. 47, s. 131.

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Complaints - Sec 28
28. The Superintendent of Bankruptcy must receive and keep a record of all complaints regarding the conduct of monitors.
2005, c. 47, s. 131.

Investigations - Sec 29
29. (1) The Superintendent of Bankruptcy may make, or cause to be made, any inquiry or investigation regarding the conduct of monitors that he or she considers appropriate.

Rights - Sec 29(2)
(2) For the purpose of the inquiry or investigation, the Superintendent of Bankruptcy or any person whom he or she appoints for the purpose

(a) shall have access to and the right to examine and make copies of the books, records, data, documents or papers — including those in electronic form — in the possession or under the control of a monitor under this Act; and

(b) may, with the leave of the court granted on an ex parte application, examine the books, records, data, documents or papers — including those in electronic form — relating to any compromise or arrangement in respect of which this Act applies that are in the possession or under the control of any other person designated in the order granting the leave, and for that purpose may under a warrant from the court enter and search any premises.

Staff - Sec 29(3)
(3) The Superintendent of Bankruptcy may engage the services of persons having technical or specialized knowledge, and persons to provide administrative services, to assist the Superintendent of Bankruptcy in conducting an inquiry or investigation, and may establish the terms and conditions of their engagement. The remuneration and expenses of those persons, when certified by the Superintendent of Bankruptcy, are payable out of the appropriation for the office of the Superintendent.
2005, c. 47, s. 131;
2007, c. 36, s. 74.

Powers in relation to licence - Sec 30
30. (1) If, after making or causing to be made an inquiry or investigation into the conduct of a monitor, it appears to the Superintendent of Bankruptcy that the monitor has not fully complied with this Act and its regulations or that it is in the public interest to do so, the Superintendent of Bankruptcy may

(a) cancel or suspend the monitor's licence as a trustee under the Bankruptcy and Insolvency Act; or

(b) place any condition or limitation on the licence that he or she considers appropriate.

Notice to trustee - Sec 30(2)
(2) Before deciding whether to exercise any of the powers referred to in subsection (1), the Superintendent of Bankruptcy shall send the monitor written notice of the powers that the Superintendent may exercise and the reasons why they may be exercised and afford the monitor a reasonable opportunity for a hearing.

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Summons - Sec 30(3)
(3) The Superintendent of Bankruptcy may, for the purpose of the hearing, issue a summons requiring the person named in it

(a) to appear at the time and place mentioned in it;

(b) to testify to all matters within their knowledge relative to the subject matter of the inquiry or investigation into the conduct of the monitor; and

(c) to bring and produce any books, records, data, documents or papers — including those in electronic form — in their possession or under their control relative to the subject matter of the inquiry or investigation.

Effect throughout Canada - Sec 30(4)
(4) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (3).

Fees and allowances - Sec 30(5)
(5) Any person summoned under subsection (3) is entitled to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

Procedure at hearing - Sec 30(6)
(6) At the hearing, the Superintendent of Bankruptcy

(a) has the power to administer oaths;

(b) is not bound by any legal or technical rules of evidence in conducting the hearing;

(c) shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit; and

(d) shall cause a summary of any oral evidence to be made in writing.

Record - Sec 30(7)
(7) The notice referred to in subsection (2) and, if applicable, the summary of oral evidence referred to in paragraph (6)(d), together with any documentary evidence that the Superintendent of Bankruptcy receives in evidence, form the record of the hearing, and that record and the hearing are public unless the Superintendent of Bankruptcy is satisfied that personal or other matters that may be disclosed are of such a nature that the desirability of avoiding public disclosure of those matters, in the interest of a third party or in the public interest, outweighs the desirability of the access by the public to information about those matters.

Decision - Sec 30(8)
(8) The decision of the Superintendent of Bankruptcy after the hearing, together with the reasons for the decision, must be given in writing to the monitor not later than three months after the conclusion of the hearing, and is public.

Review by Federal Court - Sec 30(9)
(9) A decision of the Superintendent of Bankruptcy given under subsection (8) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside under the Federal Courts Act.
2005, c. 47, s. 131;
2007, c. 36, s. 75.

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Delegation - Sec 31
31. (1) The Superintendent of Bankruptcy may, in writing, authorize any person to exercise or perform, subject to any terms and conditions that he or she may specify in the authorization, any of the powers, duties or functions of the Superintendent of Bankruptcy under sections 29 and 30.

Notification to monitor - Sec 31(2)
(2) If the Superintendent of Bankruptcy delegates in accordance with subsection (1), the Superintendent or the delegate must give notice of the delegation in the prescribed manner to any monitor who may be affected by the delegation.
2005, c. 47, s. 131.

AGREEMENTS

Disclaimer or resiliation of agreements - Sec 32
32. (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation - Sec 32(2)
(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation - Sec 32(3)
(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered - Sec 32(4)
(4) In deciding whether to make the order, the court is to consider, among other things,

- **(a) whether the monitor approved the proposed disclaimer or resiliation;**
- **(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and**
- **(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.**

Date of disclaimer or resiliation - Sec 32(5)
(5) An agreement is disclaimed or resiliated

- **(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);**
- **(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or**

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(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property - Sec 32(6)
(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation - Sec 32(7)
(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation - Sec 32(8)
(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions - Sec 32(9)
(9) This section does not apply in respect of
(a) an eligible financial contract;
(b) a collective agreement;
(c) a financing agreement if the company is the borrower; or
(d) a lease of real property or of an immovable if the company is the lessor.
2005, c. 47, s. 131;
2007, c. 29, s. 108, c. 36, ss. 76, 112.

Collective agreements - Sec 33
33. (1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Application for authorization to serve notice to bargain - Sec 33(2)
(2) A debtor company that is a party to a collective agreement and that is unable to reach a voluntary agreement with the bargaining agent to revise any of the provisions of the collective agreement may, on giving five days notice to the bargaining agent, apply to the court for an order authorizing the company to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Conditions for issuance of order - Sec 33(3)
(3) The court may issue the order only if it is satisfied that
(a) a viable compromise or arrangement could not be made in respect of the company, taking into account the terms of the collective agreement;

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(b) the company has made good faith efforts to renegotiate the provisions of the collective agreement; and
(c) a failure to issue the order is likely to result in irreparable damage to the company.

No delay on vote - Sec 33(4)
(4) The vote of the creditors in respect of a compromise or an arrangement may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent has not expired.

Claims arising from termination or amendment - Sec 33(5)
(5) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the company, the bargaining agent that is a party to the agreement is deemed to have a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

Order to disclose information - Sec 33(6)
(6) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the company's business or financial affairs and that is relevant to the collective bargaining between the company and the bargaining agent. The court may make the order only after the company has been authorized to serve a notice to bargain under subsection (2).

Parties - Sec 33(7)
(7) For the purpose of this section, the parties to a collective agreement are the debtor company and the bargaining agent that are bound by the collective agreement.

Unrevised collective agreements remain in force - Sec 33(8)
(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.
2005, c. 47, s. 131.

Certain rights limited - Sec 34
34. (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease - Sec 34(2)
(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

Public utilities - Sec 34(3)

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(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid for services rendered or goods provided before the commencement of those proceedings.

Certain acts not prevented - Sec 34(4)
(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;
(b) requiring the further advance of money or credit; or
(c) [Repealed, 2012, c. 31, s. 421]

Provisions of section override agreement - Sec 34(5)
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Powers of court - Sec 34(6)
(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Eligible financial contracts - Sec 34(7)
(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or
(b) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the Canadian Payments Act and the by-laws and rules of that Association.

Permitted actions - Sec 34(8)
(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and
(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and
(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction - Sec 34(9)
(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values - Sec 34(10)

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(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority- Sec 34(11)
(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.
2005, c. 47, s. 131;
2007, c. 29, s. 109, c. 36, ss. 77, 112;
2012, c. 31, s. 421.

OBLIGATIONS AND PROHIBITIONS

Obligation to provide assistance - Sec 35
35. (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the Bankruptcy and Insolvency Act - Sec 35(2)
(2) A debtor company shall perform the duties set out in section 158 of the Bankruptcy and Insolvency Act that are appropriate and applicable in the circumstances.
2005, c. 47, s. 131.

Restriction on disposition of business assets - Sec 36
36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors - Sec 36(2)
(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered - Sec 36(3)
(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- **(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;**
- **(b) whether the monitor approved the process leading to the proposed sale or disposition;**
- **(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;**
- **(d) the extent to which the creditors were consulted;**
- **(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and**
- **(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.**

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Additional factors — related persons - Sec 36(4)
(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons - Sec 36(5)
(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;
(b) a person who has or has had, directly or indirectly, control in fact of the company; and
(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear - Sec 36(6)
(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers - Sec 36(7)
(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.
2005, c. 47, s. 131;
2007, c. 36, s. 78.

PREFERENCES AND TRANSFERS AT UNDERVALUE

Application of sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act - Sec 36.1
36.1 (1) Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation - Sec 36.1(2)
(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
(b) to "trustee" is to be read as a reference to "monitor"; and
(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

2005, c. 47, s. 131;

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2007, c. 36, s. 78.

HER MAJESTY

Deemed trusts - Sec 37
37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Exceptions - Sec 37(2)
(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.
2005, c. 47, s. 131.

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 SCR 379 - Deemed Trust of GST Monies Not Recognized for CCAA Purposes

Date:	2010-12-16
Docket:	33239
Parallel citations:	2010 SCC 60 (CanLII)
URL:	http://canlii.ca/t/2dz21
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SUPREME COURT OF CANADA

Citation: Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379

Date: 20101216
Docket: 33239

Between:
Century Services Inc.
Appellant
and
Attorney General of Canada on behalf of
Her Majesty The Queen in Right of Canada
Respondent
Coram: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Reasons for Judgment: (paras. 1 to 89)	Deschamps J. (McLachlin C.J. and Binnie, LeBel, Charron, Rothstein and Cromwell JJ. concurring)
Concurring Reasons: (paras. 90 to 113)	Fish J.
	Abella J.
Dissenting Reasons: (paras. 114 to 136)	

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379

Century Services Inc. Appellant

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada Respondent

Indexed as: Century Services Inc. v. Canada (Attorney General)
2010 SCC 60
File No.: 33239.
2010: May 11; 2010: December 16.
Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for british columbia

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

The debtor company commenced proceedings under the Companies' Creditors Arrangement Act ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the Excise Tax Act ("ETA") created a deemed trust over unremitted GST, which operated

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despite any other enactment of Canada except the Bankruptcy and Insolvency Act ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the ETA to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the CCAA to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA can be resolved through an interpretation that properly recognizes the history of the CCAA, its function amidst the body of insolvency legislation enacted by Parliament and the principles for interpreting the CCAA that have been recognized in the jurisprudence. The history of the CCAA distinguishes it from the BIA because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the CCAA offers more flexibility and greater judicial discretion than the rules-based mechanism under the BIA, making the former more responsive to complex reorganizations. **Because the CCAA is silent on what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the CCAA and the BIA, and one of its important features has been a cutback in Crown priorities. Accordingly, the CCAA and the BIA both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.**

When faced with the apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA, courts have been inclined to follow Ottawa Senators Hockey Club Corp. (Re) and resolve the conflict in favour of the ETA. Ottawa Senators should not be followed. Rather, the CCAA provides the rule. Section 222(3) of the ETA evinces no explicit intention of Parliament to repeal CCAA s. 18.3. **Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the CCAA or the BIA**. The internal logic of the CCAA appears to subject a GST deemed trust to the waiver by Parliament of its priority. **A strange asymmetry would result if differing treatments of GST deemed trusts under the CCAA and the BIA were found to exist, as this would encourage statute shopping, undermine the CCAA's remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the ETA does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the CCAA in the circumstances of this case. In any event, recent amendments to the CCAA in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the CCAA. The conflict between the ETA and the CCAA is more apparent than real.**

The exercise of judicial discretion has allowed the CCAA to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, CCAA courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a CCAA proceeding, courts should first interpret the provisions of the CCAA before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the CCAA is capable of supporting. The general language of the CCAA should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers

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judge's order staying the Crown's GST claim was in furtherance of the CCAA's objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the CCAA to the BIA, meeting the objective of a single proceeding that is common to both statutes. The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of BIA proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the BIA scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the CCAA is sufficient to construct a bridge to liquidation under the BIA. Hence, the chambers judge's order was authorized.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the CCAA established above, because the Crown's deemed trust priority over GST claims would be lost under the CCAA and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the ETA notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a CCAA or BIA provision explicitly confirming its effective operation. The Income Tax Act, the Canada Pension Plan and the Employment Insurance Act all contain deemed trust provisions that are strikingly similar to that in s. 222 of the ETA but they are all also confirmed in s. 37 of the CCAA and in s. 67(3) of the BIA in clear and unmistakeable terms. The same is not true of the deemed trust created under the ETA. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the BIA or the CCAA, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Per Abella J. (dissenting): Section 222(3) of the ETA gives priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the BIA from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the BIA. This is borne out by the fact that following the enactment of s. 222(3), amendments to the CCAA were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the CCAA consistent with those in the BIA. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the CCAA.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the BIA. Section 18.3(1) of the CCAA is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the Interpretation Act, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the ETA has no effect on the interpretive queue, and s. 222(3) of the ETA remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the ETA takes precedence over s. 18.3(1) during CCAA proceedings. While s. 11 gives a court discretion to make orders notwithstanding the BIA and the Winding-up Act, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the BIA and the Winding-up Act. That includes the ETA. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the ETA. Neither s. 18.3(1) nor s. 11 of the CCAA gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the CCAA proceedings.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205 (CanLII), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805 (CanLII), 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, Owen J. James and Matthew J. G. Curtis, for the appellant.

Gordon Bourgard, David Jacyk and Michael J. Lema, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

[1] Deschamps J. — For the first time this Court is called upon to directly interpret the provisions of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). In that respect, two questions are raised. The first requires reconciliation of provisions of the CCAA and the Excise Tax Act, R.S.C. 1985, c. E-15 ("ETA"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the CCAA and not the ETA that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the CCAA in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The ETA creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The ETA provides that the deemed trust operates despite any other enactment of Canada except the BIA. However, the CCAA also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the CCAA. Accordingly, under the CCAA the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced CCAA proceedings the leading line of jurisprudence held that the ETA took precedence over the CCAA such that the Crown enjoyed priority for GST claims under the CCAA, even though it would have lost that same priority under the BIA. The CCAA underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C.

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2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

[4] On April 29, 2008, Brenner C.J.S.C., in the context of the CCAA proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the status quo while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the BIA. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the BIA 2008 BCSC 1805 (CanLII), (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal 2009 BCCA 205 (CanLII), (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the ETA to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in Ottawa Senators Hockey Club Corp. (Re) 2005 CanLII 21 (ON CA), (2005), 73 O.R. (3d) 737 (C.A.), which found that the ETA deemed trust for GST established Crown priority over secured creditors under the CCAA.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the ETA displace s. 18.3(1) of the CCAA and give priority to the Crown's ETA deemed trust during CCAA proceedings as held in Ottawa Senators?

(2) Did the court exceed its CCAA authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the ETA provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the Bankruptcy and Insolvency Act)" (s. 222(3)), while the CCAA stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the CCAA, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the CCAA, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, Bankruptcy and Insolvency Law (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to

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obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the BIA. The BIA offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the BIA itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The BIA is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the BIA contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the CCAA is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the BIA, the CCAA contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting CCAA proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the CCAA proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the BIA or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the BIA and the CCAA is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the CCAA — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the BIA may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the CCAA in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, Creditor Rights and the Public Interest: Restructuring Insolvent Corporations (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The CCAA was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (Reference re Companies' Creditors Arrangement Act, 1934 CanLII 72 (SCC), [1934] S.C.R. 659, at pp. 660-61; Sarra, Creditor Rights, at pp. 12-13).

[17] Parliament understood when adopting the CCAA that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, Creditor Rights, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the CCAA's remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (ibid., at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The CCAA fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The manner in which courts have used CCAA jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

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[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the Bankruptcy and Insolvency Act of 1992 (S.C. 1992, c. 27) (see Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the CCAA, the House of Commons committee studying the BIA's predecessor bill, C-22, seemed to accept expert testimony that the BIA's new reorganization scheme would shortly supplant the CCAA, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the CCAA enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the BIA. The "flexibility of the CCAA [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2002), at p. 41). Over the past three decades, resurrection of the CCAA has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., Annual Review of Insolvency Law 2005 (2006), 481, at p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in Bankruptcy and Insolvency Law:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the CCAA and the BIA allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the CCAA and the BIA relates to priorities. Because the CCAA is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the BIA in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny, 2009 SCC 49 (CanLII), 2009 SCC 49, [2009] 3 S.C.R. 286; Deputy Minister of Revenue v. Rainville, 1979 CanLII 2 (SCC), [1980] 1 S.C.R. 35; Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency).

[24] With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47; Gauntlet Energy Corp., Re, 2003 ABQB 894 (CanLII), 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the CCAA and BIA, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

[26] The Court of Appeal proceeded on the basis that the ETA precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so

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doing, it adopted the reasoning in a line of cases culminating in Ottawa Senators, which held that an ETA deemed trust remains enforceable during CCAA reorganization despite language in the CCAA that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in Ottawa Senators and argues that the later in time provision of the ETA creating the GST deemed trust trumps the provision of the CCAA purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., Komunik Corp. (Arrangement relatif à), 2009 QCCS 6332 (CanLII), 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII), 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the CCAA to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether Ottawa Senators was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in Ottawa Senators.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the CCAA was binding at all upon the Crown. Amendments to the CCAA in 1997 confirmed that it did indeed bind the Crown (see CCAA, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 Am. Bankr. L.J. 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, Priority of Crown Claims in Insolvency (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The ETA states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the ETA. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) ("ITA"), ss. 86(2) and (2.1) of the Employment Insurance Act, S.C. 1996, c. 23, and ss. 23(3) and (4) of the Canada Pension Plan, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[33] In Royal Bank of Canada v. Sparrow Electric Corp., 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the ITA and security interests taken under both the Bank Act, S.C. 1991, c. 46, and the Alberta Personal Property Security Act, S.A. 1988, c. P-4.05 ("PPSA"). As then worded, an ITA deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. Sparrow Electric held that the ITA deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the ITA deemed trust had no property on which to attach when it subsequently arose. Later, in First Vancouver Finance v. M.N.R., 2002 SCC 49 (CanLII), 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the ITA by deeming it to operate from the moment the deductions were not paid to the Crown as required by the ITA, and by granting the Crown priority over all security interests (paras. 27-29) (the "Sparrow Electric amendment").

[34] The amended text of s. 227(4.1) of the ITA and concordant source deductions deemed trusts in the Canada Pension Plan and the Employment Insurance Act state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the BIA. The ETA deemed trust at issue in this case is similarly worded, but it excepts the BIA in its entirety. The provision reads as follows:

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. . .

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(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed . . . .

[35] The Crown submits that the Sparrow Electric amendment, added by Parliament to the ETA in 2000, was intended to preserve the Crown's priority over collected GST under the CCAA while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the BIA. This is because the ETA provides that the GST deemed trust is effective "despite" any other enactment except the BIA.

[36] The language used in the ETA for the GST deemed trust creates an apparent conflict with the CCAA, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the CCAA (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the CCAA (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the BIA, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; BIA, s. 67(2)). It is noteworthy that in both the CCAA and the BIA, the exceptions concern source deductions (CCAA, s. 18.3(2); BIA, s. 67(3)). The relevant provision of the CCAA reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

[39] Meanwhile, in both s. 18.4(1) of the CCAA and s. 86(1) of the BIA, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (CCAA, s. 18.4(3); BIA, s. 86(3)). The CCAA provision reads as follows:

18.4 . . .

. . .

(3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the Income Tax Act,

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution . . . .

Therefore, not only does the CCAA provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the CCAA first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the CCAA, is overridden by the one in the ETA enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the BIA. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

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[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the ETA, thereby maintaining GST deemed trusts under the CCAA. Ottawa Senators, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the ETA should take precedence over the CCAA (see also Solid Resources Ltd., Re reflex, (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); Gauntlet).

[42] The Ontario Court of Appeal in Ottawa Senators rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the BIA in ETA s. 222(3), but not the CCAA, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The BIA and the CCAA are closely related federal statutes. I cannot conceive that Parliament would specifically identify the BIA as an exception, but accidentally fail to consider the CCAA as a possible second exception. In my view, the omission of the CCAA from s. 222(3) of the ETA was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the ETA and the CCAA to that before this Court in Doré v. Verdun (City), 1997 CanLII 315 (SCC), [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered Doré binding (para. 49). In Doré, a limitations provision in the more general and recently enacted Civil Code of Québec, S.Q. 1991, c. 64 ("C.C.Q."), was held to have repealed a more specific provision of the earlier Quebec Cities and Towns Act, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the ETA, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the CCAA (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in Ottawa Senators can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000 with the Sparrow Electric amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the CCAA (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the CCAA. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the CCAA and s. 67(3) of the BIA expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The CCAA and BIA are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the CCAA or the BIA. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

[46] The internal logic of the CCAA also militates against upholding the ETA deemed trust for GST. The CCAA imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the ETA (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the CCAA, it would be inconsistent to afford a better protection to the ETA deemed trust absent explicit language in the CCAA. Thus, the logic of the CCAA appears to subject the ETA deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the ETA priority over the CCAA urged by the Crown is adopted here: the Crown would retain priority over GST claims during CCAA proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (Gauntlet, at para. 21). If creditors' claims were better protected by liquidation under the BIA, creditors' incentives would lie overwhelmingly with avoiding proceedings under the CCAA and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the CCAA can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

[48] Arguably, the effect of Ottawa Senators is mitigated if restructuring is attempted under the BIA instead of the CCAA, but it is not cured. If Ottawa Senators were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the CCAA or the BIA. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive CCAA regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the ETA was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the CCAA to the same or a higher level than source deductions claims. Indeed, the

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summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the BIA. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the BIA in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the BIA itself (and the CCAA) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the BIA or the CCAA.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the ETA as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the CCAA alongside the BIA in s. 222(3) of the ETA, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the ETA, the GST deemed trust could be seen as remaining effective in the CCAA, while ceasing to have any effect under the BIA, thus creating an apparent conflict with the wording of the CCAA. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the CCAA in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the ETA evinces no explicit intention of Parliament to repeal CCAA s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted ETA s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of ETA s. 222(3) that the GST deemed trust was intended to be effective under the CCAA.

[52] I am not persuaded that the reasoning in Doré requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in Doré concerned the impact of the adoption of the C.C.Q. on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 C.C.Q. had repealed by implication a limitation provision in the Cities and Towns Act, he did so on the basis of more than a textual analysis. The conclusion in Doré was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in Doré are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, Doré cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the CCAA. Indeed, as indicated above, the recent amendments to the CCAA in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the CCAA depends on ETA s. 222(3) having impliedly repealed CCAA s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the CCAA stating that, subject to exceptions for source deductions, deemed trusts do not survive the CCAA proceedings and thus the CCAA is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the CCAA.

[54] I do not agree with my colleague Abella J. that s. 44(f) of the Interpretation Act, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the CCAA underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the BIA and the CCAA as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by CCAA s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in CCAA proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that ETA s. 222(3) was not intended to narrow the scope of the CCAA's override provision. Viewed in its entire context, the conflict between the ETA and the CCAA is more apparent than real. I would therefore not follow the reasoning in Ottawa Senators and affirm that CCAA s. 18.3 remained effective.

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[56] My conclusion is reinforced by the purpose of the CCAA as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a CCAA reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the CCAA helps in understanding how the CCAA grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

[57] Courts frequently observe that "[t]he CCAA is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (Metcalfe & Mansfield Alternative Investments II Corp. (Re), 2008 ONCA 587 (CanLII), 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (Dylex Ltd., Re 1995 CanLII 7370 (ON SC), (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, per Farley J.).

[58] CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the CCAA's purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(Elan Corp. v. Comiskey reflex, (1990), 41 O.A.C. 282, at para. 57, per Doherty J.A., dissenting)

[60] Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the status quo while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., Chef Ready Foods Ltd. v. Hongkong Bank of Can. 1990 CanLII 529 (BC CA), (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; Pacific National Lease Holding Corp., Re (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., Canadian Airlines Corp., Re, 2000 ABQB 442 (CanLII), 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, per Paperny J. (as she then was); Air Canada, Re 2003 CanLII 64269 (ON SC), (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; Air Canada, Re, 2003 CanLII 49366 (ON SC), 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, per Farley J.; Sarra, Creditor Rights, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re 2000 CanLII 22488 (ON SC), (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, per Blair J. (as he then was); Sarra, Creditor Rights, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA. Without exhaustively cataloguing the various measures taken under the authority of the CCAA, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

[62] Perhaps the most creative use of CCAA authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., Skydome Corp., Re reflex, (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146 (CanLII), 2000 BCCA 146, 135 B.C.A.C. 96, aff'g 1999 CanLII 5374 (BC SC), (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, Rescue! The Companies' Creditors Arrangement Act (2007), at pp. 93-115). The CCAA has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the CCAA's supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

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[63] Judicial innovation during CCAA proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during CCAA proceedings? (2) What are the limits of this authority?

[64] The first question concerns the boundary between a court's statutory authority under the CCAA and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during CCAA proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself (see, e.g., Skeena Cellulose Inc., Re, 2003 BCCA 344 (CanLII), 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, per Newbury J.A.; Stelco Inc. (Re) 2005 CanLII 8671 (ON CA), (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, per Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., Annual Review of Insolvency Law 2007 (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the CCAA will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the CCAA and the recent history of the legislation, I accept that in most instances the issuance of an order during CCAA proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the CCAA empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the matter, . . . subject to this Act, [to] make an order under this section" (CCAA, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the CCAA. Thus, in s. 11 of the CCAA as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of CCAA authority developed by the jurisprudence.

[69] The CCAA also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (CCAA, ss. 11(3), (4) and (6)).

[70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see Chef Ready, at p. 88; Philip's Manufacturing Ltd., Re 1992 CanLII 2174 (BC CA), (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court.

[72] The preceding discussion assists in determining whether the court had authority under the CCAA to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the CCAA to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the CCAA and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe

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J.A. correctly held that the mandatory language of the ETA gave the court no option but to permit enforcement of the GST deemed trust when lifting the CCAA stay to permit the debtor to make an assignment under the BIA. Whether the ETA has a mandatory effect in the context of a CCAA proceeding has already been discussed. I will now address the question of whether the order was authorized by the CCAA.

[74] It is beyond dispute that the CCAA imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[75] The question remains whether the order advanced the underlying purpose of the CCAA. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the CCAA was accordingly spent. I disagree.

[76] There is no doubt that had reorganization been commenced under the BIA instead of the CCAA, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the BIA the deemed trust for GST ceases to have effect. Thus, after reorganization under the CCAA failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the BIA. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the CCAA and the BIA proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the CCAA. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the CCAA's objectives to the extent that it allowed a bridge between the CCAA and BIA proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the CCAA. That section provides that the CCAA "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the BIA. Section 20 clearly indicates the intention of Parliament for the CCAA to operate in tandem with other insolvency legislation, such as the BIA.

[77] The CCAA creates conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the CCAA and the BIA as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the BIA and the CCAA, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (Ivaco Inc. (Re) 2006 CanLII 34551 (ON CA), (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the CCAA and the BIA. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the CCAA context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (CCAA, s. 11.4). Thus, if CCAA reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the CCAA and the BIA for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the BIA must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the BIA where a proposal is rejected by creditors. The CCAA is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the BIA. The court must do so in a manner that does not subvert the scheme of distribution under the BIA. Transition to

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liquidation requires partially lifting the CCAA stay to commence proceedings under the BIA. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the BIA.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the CCAA to lift the stay to allow entry into liquidation.

3.4 Express Trust

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., Waters' Law of Trusts in Canada (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of CCAA s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the CCAA and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with Ottawa Senators, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the BIA was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the CCAA restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [CCAA proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the CCAA to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the CCAA nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the CCAA.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

Fish J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account 2008 BCSC 1805 (CanLII), (2008 BCSC 1805, [2008] G.S.T.C. 221).

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[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the CCAA and the Excise Tax Act, R.S.C. 1985, c. E-15 ("ETA").

[93] In upholding deemed trusts created by the ETA notwithstanding insolvency proceedings, Ottawa Senators Hockey Club Corp. (Re) 2005 CanLII 21 (ON CA), (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the CCAA and s. 222 of the ETA as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision creating the trust; and second, a CCAA or Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA") provision confirming — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the ETA.

[98] The first is the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) ("ITA"), where s. 227(4) creates a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly confirmed in s. 18.3 of the CCAA:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act . . . .

[101] The operation of the ITA deemed trust is also confirmed in s. 67 of the BIA:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act . . . .

[102] Thus, Parliament has first created and then confirmed the continued operation of the Crown's ITA deemed trust under both the CCAA and the BIA regimes.

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[103] The second federal statute for which this scheme holds true is the Canada Pension Plan, R.S.C. 1985, c. C-8 ("CPP"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the Employment Insurance Act, S.C. 1996, c. 23 ("EIA"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the ITA, the CPP and the EIA is confirmed in s. 18.3(2) of the CCAA and in s. 67(3) of the BIA. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the ETA. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not confirm the trust — or expressly provide for its continued operation — in either the BIA or the CCAA. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant ETA provisions is identical in substance to that of the ITA, CPP, and EIA provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the CCAA provides for the continuation of this deemed trust after the CCAA is brought into play.

[108] In short, Parliament has imposed two explicit conditions, or "building blocks", for survival under the CCAA of deemed trusts created by the ITA, CPP, and EIA. Had Parliament intended to likewise preserve under the CCAA deemed trusts created by the ETA, it would have included in the CCAA the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the BIA as an exception when enacting the current version of s. 222(3) of the ETA without considering the CCAA as a possible second exception" 2009 BCCA 205 (CanLII), (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). All of the deemed trust provisions excerpted above make explicit reference to the BIA. Section 222 of the ETA does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the BIA at all in the ETA.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the BIA so as to exclude it from its ambit — rather than to include it, as do the ITA, the CPP, and the EIA.

[111] Conversely, I note that none of these statutes mentions the CCAA expressly. Their specific reference to the BIA has no bearing on their interaction with the CCAA. Again, it is the confirmatory provisions in the insolvency statutes that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during CCAA proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the CCAA. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

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[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] Abella J. (dissenting) — The central issue in this appeal is whether s. 222 of the Excise Tax Act, R.S.C. 1985, c. E-15 ("ETA"), and specifically s. 222(3), gives priority during Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the CCAA is circumscribed accordingly.

[115] Section 11[1] of the CCAA stated:

11. (1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the ETA at issue in this case, states:

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[116] Century Services argued that the CCAA's general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the ETA were, accordingly, inapplicable during CCAA proceedings. Section 18.3(1) states:

18.3 (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[117] As MacPherson J.A. correctly observed in Ottawa Senators Hockey Club Corp. (Re) 2005 CanLII 21 (ON CA), (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the ETA is in "clear conflict" with s. 18.3(1) of the CCAA (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the ETA, has unambiguous language stating that it operates notwithstanding any law except the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada except the BIA, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in Ottawa Senators:

The legislative intent of s. 222(3) of the ETA is clear. If there is a conflict with "any other enactment of Canada (except the Bankruptcy and Insolvency Act)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the Bankruptcy and Insolvency Act . . . . The BIA and the CCAA are closely related federal statutes. I cannot conceive that Parliament would specifically identify the BIA as an exception, but accidentally fail to consider the CCAA as a possible second exception. In my view, the omission of the CCAA from s. 222(3) of the ETA was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the CCAA from the operation of the ETA is a reflection of a clear legislative intention, is borne out by how the CCAA was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the ETA came into force, amendments were also introduced to the CCAA. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative status quo, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the CCAA consistent with those in the BIA. In 2002, for example, when Industry Canada conducted a review of the BIA and

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the CCAA, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the BIA be extended to the CCAA (Joint Task Force on Business Insolvency Law Reform, Report (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 Report on the Commercial Provisions of Bill C-55; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the BIA remains the only exempted statute under s. 222(3) of the ETA. Even after the 2005 decision in Ottawa Senators which confirmed that the ETA took precedence over the CCAA, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in Tele-Mobile Co. v. Ontario, 2008 SCC 12 (CanLII), 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the CCAA.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the CCAA and ETA described above. As Mr. Justice MacPherson observed at para. 43 of Ottawa Senators, it is inconceivable that Parliament would specifically identify the BIA as an exception when enacting the current version of s. 222(3) of the ETA without considering the CCAA as a possible second exception. I also make the observation that the 1992 set of amendments to the BIA enabled proposals to be binding on secured creditors and, while there is more flexibility under the CCAA, it is possible for an insolvent company to attempt to restructure under the auspices of the BIA. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (generalia specialibus non derogant).

[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, Sullivan on the Construction of Statutes (5th ed. 2008), at pp. 346-47; Pierre-André Côté, The Interpretation of Legislation in Canada (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the generalia specialibus non derogant principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (Doré v. Verdun (City), 1997 CanLII 315 (SCC), [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in Ottawa Senators, at para. 42:

. . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (generalia specialibus

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non derogant). As expressed by Hudson J. in Canada v. Williams, 1944 CanLII 51 (SCC), [1944] S.C.R. 226, . . . at p. 239 . . . :

The maxim generalia specialibus non derogant is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, Interprétation des lois (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the ETA was enacted in 2000 and s. 18.3(1) of the CCAA was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the ETA, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (generalia specialibus non derogant). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the BIA. Section 18.3(1) of the CCAA is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the CCAA was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the Interpretation Act, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see Attorney General of Canada v. Public Service Staff Relations Board, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the Interpretation Act defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current CCAA is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(f) of the Interpretation Act simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [sic] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [sic] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(Debates of the Senate, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the ETA remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the ETA takes precedence over s. 18.3(1) during CCAA proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the CCAA.

[134] While s. 11 gives a court discretion to make orders notwithstanding the BIA and the Winding-up Act, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the BIA and the Winding-up Act. That includes the ETA. The chambers judge in this case was, therefore, required to respect the priority regime set

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out in s. 222(3) of the ETA. Neither s. 18.3(1) nor s. 11 of the CCAA gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the CCAA proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the Income Tax Act or any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the Income Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

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(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if
(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or
(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or
(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under
(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.
(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of
(a) subsections 224(1.2) and (1.3) of the Income Tax Act,
(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or
(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,
and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the Income Tax Act in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the Canada Pension Plan in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.
18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

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(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the Income Tax Act,

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the Income Tax Act in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the Canada Pension Plan in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
(3) [Burden of proof on application] The court shall not make the order unless
(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.
. . .
11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that
(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the Income Tax Act or any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than
(i) the expiry of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or
(v) the performance of a compromise or an arrangement in respect of the company; and
(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the Income Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,
for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.
(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if
(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

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(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under
(i) subsection 224(1.2) of the Income Tax Act,
(ii) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.
(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of
(a) subsections 224(1.2) and (1.3) of the Income Tax Act,
(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or
(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or
(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,
and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the Income Tax Act in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the Canada Pension Plan in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.
37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if
(a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or
(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,
and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)
222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the Bankruptcy and Insolvency Act), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.
. . .
(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)
67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise
(a) property held by the bankrupt in trust for any other person,
(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or
(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),
but it shall comprise
(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.
(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.
(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where
(a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or
(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan,
and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the Income Tax Act in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the Canada Pension Plan in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, Abella J. dissenting.

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

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[1] Section 11 was amended, effective September 18, 2009, and now states:

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[2] The amendments did not come into force until September 18, 2009.

Status of Crown claims - Sec 38

38. (1) In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 39 called a "workers' compensation body", rank as unsecured claims.

Exceptions - Sec 38(2)

(2) Subsection (1) does not apply

(a) in respect of claims that are secured by a security or charge of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

(i) pursuant to any law, or

(ii) pursuant to provisions of federal or provincial legislation if those provisions do not have as their sole or principal purpose the establishment of a means of securing claims of Her Majesty or a workers' compensation body; and

(b) to the extent provided in subsection 39(2), to claims that are secured by a security referred to in subsection 39(1), if the security is registered in accordance with subsection 39(1).

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Operation of similar legislation - Sec 38(3)
(3) Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the Income Tax Act,

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts if the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and, for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the Income Tax Act in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the Canada Pension Plan in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.
2005, c. 47, s. 131;
2009, c. 33, s. 29.

Statutory Crown securities - Sec 39
39. (1) In relation to proceedings under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if, before the day on which proceedings commence, the security is registered under a system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

Effect of security - Sec 39(2)
(2) A security referred to in subsection (1) that is registered in accordance with that subsection

(a) is subordinate to securities in respect of which all steps necessary to setting them up against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.
2005, c. 47, s. 131;
2007, c. 36, s. 79.

Act binding on Her Majesty - Sec 40
40. This Act is binding on Her Majesty in right of Canada or a province.

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2005, c. 47, s. 131.

MISCELLANEOUS

Certain sections of Winding-up and Restructuring Act do not apply - Sec 41
41. Sections 65 and 66 of the Winding-up and Restructuring Act do not apply to any compromise or arrangement to which this Act applies.
2005, c. 47, s. 131.

Act to be applied conjointly with other Acts - Sec 42
42. The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.
2005, c. 47, s. 131.

Alternative Fuel Systems Inc. v. Remington Development Corp., 2004 ABCA 31 (CanLII) - Can CCAA Make Provision for Provincial Landlord Law?

Date:	2004-01-29
Docket:	0301-0270-AC
Parallel citations:	346 AR 28; 236 DLR (4th) 155; [2004] 5 WWR 475; 47 CBR (4th) 1; 24 Alta LR (4th) 1
URL:	http://canlii.ca/t/1g9sd
Citation:	Alternative Fuel Systems Inc. v. Remington Development Corp., 2004 ABCA 31 (CanLII), <http://canlii.ca/t/1g9sd> retrieved on 2013-08-18
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In the Court of Appeal of Alberta

Citation: Alternative Fuel Systems Inc. v. Remington Development Corp., 2004 ABCA 31

Date: 20040129
Docket: #0301-0270-AC
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended
And in the Matter of Alternative Fuels Inc.

Between:
Remington Development Corporation

Respondent
(Applicant)

- and -

Alternative Fuel Systems Inc.

Appellant
(Respondent)

The Court:

The Honourable Madam Justice McFadyen

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The Honourable Madam Justice Paperny
The Honourable Mr. Justice Clark

Reasons for Judgment Reserved
Appeal from the Order of
The Honourable Mr. Justice S. J. LoVecchio
Dated the 2nd day of September, 2003
Filed on the 17th day of September, 2003
2003 ABQB 745 (CanLII), (2003 ABQB 745, Docket: 0301-05678)

Reasons for Judgment of The Honourable Madam Justice Paperny
Concurred in by The Honourable Madam Justice McFadyen
Concurred in by The Honourable Mr. Justice Clark

Introduction

[1] This appeal raises a pure question of law: Does the *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5 (LRBA) apply to the determination of a landlord's claim when the debtor tenant has received protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA).

Facts

[2] The respondent, Remington Development Corporation (Remington) is agent for the landlord of the appellant, Alternative Fuel Systems Inc. (AFS). Remington had two agreements with AFS to lease commercial space in Calgary from August 1, 2000 to January 31, 2016. Finding itself in financial difficulty, AFS petitioned and on April 9, 2003 received the order that it was a company to which the CCAA applies and could file a plan of compromise or arrangement under the CCAA. As part of its restructuring, AFS surrendered the leased premises to Remington in May 2003.

[3] Both Remington and AFS sought a valuation of the landlord's claim and a determination whether, as an unsecured creditor, the claim should form part of the unsecured creditor class in the CCAA. Before the chambers judge, AFS calculated Remington's claim under the LRBA was approximately $96,000 without considering offsets for prepaid rent and other items. On a full accounting, the sum could be further reduced to $15,000. A non-discounted mitigated claim for the unexpired term of the leases would be about $4.2 million, although, as a result of mitigation the largest portion of Remington's claim has now been reduced to $1.1 million while the smaller portion currently remains at $400,000.

[4] The chambers judge held that the LRBA does not automatically apply to limit or quantify the landlord's claim in CCAA proceedings.

Appellant's position

[5] The thrust of the appellant's submission, broadly stated, is that under the CCAA the amount of a landlord's claim in Alberta is the same amount as would be calculated in a bankruptcy. More specifically, the appellant submits that an unbreakable thread connects the CCAA to the LRBA. The thread begins with the plain meaning of s. 12(1) of the CCAA which refers to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA) to define claims under the CCAA. The thread continues to s. 12(2) of the CCAA which provides for a determination of the amount represented by a claim in three different ways. In this appeal, the applicable sub-clause, s. 12(2)(a)(iii) provides that amount is that which might be proven under the BIA. A third link is s. 136 of the BIA which sets a priority for payment to a bankrupt's creditors and specifically, s. 136(f), which includes a landlord for priority payment, but limits the amount which may be claimed by a landlord. The next connection, says the appellant, is s. 146 of the BIA which further provides that in addition to ss. 136 and 73(4) of the BIA, rights of landlords are determined according to the law of the province in which leased premises are situated. In Alberta, that law includes the LRBA which further limits a landlord's rights in bankruptcy. Through this series of statutory provisions, it submits Parliament has provided that the landlord's rights under the CCAA are identical to those under the BIA and thus, under the LRBA.

Relevant legislation

[6] The relevant provision in the CCAA is s. 12 which provides:

> 12. (1) For the purposes of this Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.
>
> Determination of amount of claim

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(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

Admission of claims

(3) Notwithstanding subsection (2), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

[7] The following provisions in the BIA are also relevant:

Scheme of Distribution

Priority of claims

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(f) the landlord for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

...

Application of provincial law to landlords' rights

146. Subject to priority of ranking as provided by section 136 and subject to subsection 73(4), the rights of landlords shall be determined according to the laws of the province in which the leased premises are situated.

[8] The provisions in the LRBA which the appellant submits are relevant are:

Assignment of property

1 A lessee against or by whom a receiving order or assignment is made under the *Bankruptcy and Insolvency Act* (Canada) is deemed to have made an assignment of all the lessee's property for the general benefit of the lessee's creditors before the date of the receiving order or assignment.

Payment of rent after assignment

2 As soon as the receiving order or assignment is made

(a) the landlord of the lessee is not afterwards entitled to distrain or realize the rent by distress, and

(b) the trustee in whom the property of the lessee vests under the *Bankruptcy and Insolvency Act* (Canada) shall pay to the landlord in priority to all other debts

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(i) an amount not exceeding in value the distrainable assets of the lessee and not exceeding 3 months' rent accrued due before the date of the receiving order or assignment, and

(ii) the costs of distress, if any.

Surplus rent

3 The lessee is a debtor to the landlord

(a) for all surplus rent in excess of the 3 months' rent accrued due at the date of the receiving order or assignment, and

(b) for any accelerated rent to which the landlord may be entitled under the lease but not exceeding an amount equal to 3 months' rent.

When landlord unable to claim from lessee

4 Subject to section 3, the landlord has no right to claim as a debt any money due to the landlord from the lessee for any portion of the unexpired term of the lessee's lease.

Analysis

[9] As a pure question of law, the standard of review is correctness. I agree with the Chambers Judge that the LRBA does not apply to limit or quantify the landlord's claim in CCAA proceedings.

[10] I arrive at this conclusion on the basis, first, that the condition precedent set out in the LRBA for its application (and mirrored in its correlative, Part II of the BIA, which deals with Receiving Orders and Assignments) is not satisfied when the debtor is not the subject of a receiving order or an assignment, nor does the LRBA fit within the scheme and intent of the CCAA. Second, the interpretation of s. 12 of the CCAA does not direct the importation of all the provisions of the BIA into the CCAA when determining the amount of the claim. Third and most significantly, the objects of the BIA and CCAA are distinct and each must be interpreted with their respective purposes in mind.

The condition precedent for application of the LRBA

[11] That provincial legislation can deal with a landlord's rights upon the bankruptcy of a tenant if it does not conflict with the BIA (***Principal Plaza Leasehold Ltd. v. Principal Group Ltd.*** (1996), 188 A.R. 187 (Q.B.)) is not in dispute. There is no question that the LRBA properly operates within a bankruptcy context, when the debtor is the subject of either a receiving order or an assignment.

[12] In such a case, s. 136(1)(f) of the BIA confers on the landlord a preferred claim for arrears of rent for a specified period and provincial legislation is called into operation pursuant to s. 146. Consequently the LRBA's provisions are invoked.

[13] The appellant seeks to invoke these provisions when a debtor is not the subject of a receiving order or an assignment, but rather, proposes a plan of arrangement under the CCAA. In my view, the LRBA's provisions are not invoked in such circumstances.

[14] The LRBA sets out the conditions under which the provisions of the Act operate. The triggering condition is that a receiving order or assignment under the BIA be made against or by the lessee. Section 1 describes the effect of a receiving order or assignment into bankruptcy. Section 2 operates "as soon as the receiving order or assignment is made", making it clear that the pre-condition is the receiving order or assignment.

[15] The entire LRBA should be read as relying upon the operation and effect of a receiving order or assignment under the BIA. Sections 3 and 4 of the LRBA, which limit the landlord's debt, must be interpreted as requiring the condition precedent of a receiving order or assignment. Nothing in the wording of the LRBA suggests it applies in the absence of a receiving order or assignment into bankruptcy, and no receiving order or assignment is made while a company attempts to restructure under the CCAA.

Section 12 of the CCAA

[16] The specific sub-clause at issue in this appeal is s. 12(2)(a)(iii), which appears under the heading "Determination of amount of claim". Omitting the irrelevant sub-clauses, it states:

> For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows: (a) the amount of an unsecured claim shall be the amount...(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor.

[17] It is the appellant's position that this sub-clause must be interpreted as mandating the importation of the BIA and LRBA to expressly calculate the amount provable. I reject that interpretation for the three reasons set out below.

Use of the Word "Might" Conveying Discretion

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[18] The first basis for my disagreement stems from Parliament's use of the words "might be made" (in sub-clause iii) which *per se* confers flexibility. This is underscored and reinforced when contrasted with the imperative "has been made" specified in the other two sub-clauses, (i) and (ii). In my view, "might" should be understood as meaning "could", i.e., the claim may be capable of being proven under the BIA.

[19] This interpretation is consistent with a long line of unassailable authorities. In ***Algoma Steel Corp. v. Royal Bank of Canada*** reflex, (1992), 11 C.B.R. (3d) 11 (Ont. Gen. Div.), Farley J. held that the word "shall" in s. 12(2) which then stated that "the amount represented by a claim...shall be defined as follows..." should be interpreted as "may" when one appreciates that the debtor companies and all affected stakeholders are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

[20] Ten years later, the following statement by Houlden and Morawetz in ***2003 Annotated Bankruptcy and Insolvency Act*** (Toronto: Carswell, 2002) at 1100 is analogous to the issue before us. Citing ***In re Parisian Cleaners and Laundry Ltd. v. Blondin*** (1938), 20 C.B.R. 452 (Que. C.A.), they stated: "The purpose of s. 12(2) [of the CCAA] is to provide a means of determining the amount of a claim, not to incorporate the provisions of the Bankruptcy and Insolvency Act as to what constitutes a preferred or unsecured claim.". (Emphasis added) The same proposition is also supported by ***Québec (Sous-ministre du revenu) v. Wynden Canada Inc.*** (1983), 47 C.B.R. (N.S.) 76 (Que. S.C.), and ***Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.*** (1969), 5 D.L.R. (3d) 374 (Ont. H.C.).

[21] In my view, the words "might be made under the BIA" should be understood to mean "could be made". In other words, the claim may be, but must not necessarily be, capable of being proven under the BIA.

Use of the Word "Determined" Conveying "Methodology"

[22] My second disagreement stems from my broader interpretation of the word "determined" as used in the opening sentence of s. 12(2). The interpretation urged upon us by the appellant is that "determined" should be interpreted as meaning "calculated". However, reference to the BIA indicates that use of the term has two meanings: it can mean either a "methodology" or a "calculation", i.e., a formula for calculating a specific amount.

[23] That "determination" is used to mean "methodology" is illustrated by the following example. Section s. 121(1) broadly defines "claims provable" and the subsequent sub-sections add more specificity. Section 121(2) states that the "determination" of whether contingent and unliquidated claims are provable claims and their valuation is in made accordance with s. 135. The term "determination" in s. 121(2) clearly refers to a methodology, since s. 135 does not provide a formula for calculation of the amount, but rather a methodology at s. 135(1.1):

> Claims provable
> 121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
> Contingent and unliquidated claims
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
> Determination of provable claims
> 135(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[24] When Parliament directed that the claims of unsecured creditors are those that might be proven under the BIA, it did not refer to the quantification or calculation of the amount provable in bankruptcy. In my view, it was intended to define who is included in the scheme of the CCAA, so as to override conflicting common law definitions.

The Dilemma of Which Section of the BIA To Invoke to Calculate Quantum

[25] This interpretation is supported by my third area of disagreement with the appellant. Were one to adopt the appellant's interpretation of sub-clause (iii), i.e., that the *amount* of the claim must be *calculated* in accordance with the methodology for calculating such claims under the BIA/LRBA, the issue then raised is: should one apply the method set out in s. 65.2 or that in s. 136, both of which apply to landlords? Each method yields substantially different results.

[26] As a preface, and at the risk of stating the obvious, the BIA governs two types of debtors. Part III, titled "Proposals", is similar to the scheme and object of the CCAA, and is intended to govern those debtors who, with the support their creditors, have a reasonable hope of returning to financial viability. In contrast, Part II, titled "Receiving Orders and Assignments" and its companion section, Part V ("Administration of Estates") govern situations where the

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debtor has no hope of returning to financial viability, but rather, its assets are vested in a trustee for distribution among the debtors' creditors. These two discrete objects of the BIA are essential to the analysis that follows.

[27] For landlords, the direction in s. 12(1)(a)(iii) of the CCAA cannot be read as requiring the valuation of the amount of the claim as set out in the BIA because the BIA itself provides two different methods and amounts that may be applicable to landlords' claims.

[28] The first is s. 65.2 (in Part III, Proposals), which makes provisions for disclaiming commercial leases. If the disclaimer of the lease is in accordance with the requirements of the section, s. 65.2(4) sets out the amount the landlord may claim as follows:

> Effects of disclaimer
> (4) Where a lease is disclaimed under subsection (1),
> (a) the landlord has no claim for accelerated rent;
> (b) the proposal must indicate whether the landlord may file a proof of claim for the actual losses resulting from the disclaimer, or for an amount equal to the lesser of
> (i) the aggregate of
> (A) the rent provided for in the lease for the first year of the lease following the date on which the disclaimer becomes effective, and
> (B) fifteen percent of the rent for the remainder of the term of the lease after that year, and
> (ii) three year's rent; and
> (c) the landlord may file a proof of claim as indicated in the proposal.

[29] Section 65.2 limits a landlord's claim under a proposal and provides for a larger amount than when the debtor is the subject of a receiving order or assignment. This accords with authorities which suggest that proposals must offer creditors some better advantage than a bankruptcy: ***Re Pateman*** reflex, (1991), 5 C.B.R. (3d) 115 (Man. Q.B.), ***Re Sumner Co.*** (1984) Limited (1987), 64 C.B.R. 219, ***In Re Allen Theatres Ltd.*** (1922), 3 C.B.R. 145 (Ont. S.C.).

[30] Section 136 (in Part V) provides a scheme for the distribution of the assets of a bankrupt who is the subject of a receiving order or an assignment under Part II. Landlords are specifically provided for at s. 136(1)(f) as follows:

> Priority of claims
> 136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
> ...
> (f) the landlord for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

[31] This is the section that the appellant urges upon us as being part of the unbreakable thread. In my view, nothing in the wording of s. 136 assists it's position. On the contrary, the limitation on the amount a landlord may claim in s. 136(f) appears under the heading "priority of claim". As appellant's counsel explained, there is a trade off, the amount which the landlord receives is reduced from the full amount which could be claimed under a lease and in return, the landlord receives a priority position when the proceeds of the bankrupt's property is paid out. Section 136 requires payment of the enumerated claims in full in the order specified before any other unsecured creditor receives payment.

[32] However, there is no scheme for priority payment of claims set out in the CCAA. Thus, the effect on the landlord, were this interpretation accepted, is to compromise the claim not once, but twice, without the benefit of any priority, as noted by the Chambers Judge.

[33] If s. 65.2 were to be applied, it assumes that the proposal provisions, Part III of the BIA, applies to CCAA and not Parts II and V, the bankruptcy provisions. Section 146 of the BIA which allows for the application of provincial law is also included in Part V and its provisions are in reference to s. 136 which sets out distribution in bankruptcy proceedings, not proposals.

[34] If s. 12(2)(a)(iii) of the CCAA requires calculation of an amount in accordance with the BIA, as submitted by the appellant, it would have to stipulate which of ss. 65.2 or 136 is applicable. It does not, providing further support that the BIA does not direct the calculation of the amount of a landlord's claim in a CCAA proceeding or that the CCAA requires s. 136 of the BIA be applied.

[35] During oral argument, the appellant sought to distinguish cases involving Ontario's provincial legislation which is not as restrictive as the Alberta LRBA. But the provincial legislation setting out the rights of landlords in bankruptcy proceedings is irrelevant if ss. 136 and 146 of the BIA do not apply to the CCAA.

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[36] There are numerous cases dealing with landlords' claims that have treated the CCAA as an autonomous statute and did not look to s. 12 as directing the use of BIA provisions to determine the amount of the claim. ***Re Woodward's Limited*** 1993 CanLII 870 (BC SC), (1993), 20 C.B.R. (3d) 74 (B.C.S.C.), is an example of the purposive approach taken by courts under the CCAA in dealing with creditors.

[37] Decisions in ***Re Agnew Group Inc.*** unreported February 4, 1994 (Ont. Gen. Div.), ***Sklar-Peppler Furniture Corporation v. Bank of Nova Scotia*** reflex, (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.), ***Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce*** reflex, (1992), 90 D.L.R. (4th) 285 (Ont. Gen. Div.), and ***Ambro Enterprises Inc. (Re)*** reflex, (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.), all treated landlord's claims very differently than the BIA and took a broad approach to the classification and quantification of landlords' claims to facilitate the object and purpose of the CCAA.

[38] The appellant was unable to cite any authority to compel us to a different conclusion. The appellant submits that the Court's decision in ***Luscar Ltd. v. Smoky River Coal Ltd.*** 1999 ABCA 179 (CanLII), (1999), 175 D.L.R. (4th) 703, determined that s. 12(2) provides that an amount of a claim must be that amount as provided for under the BIA. I disagree. The issue in ***Smoky River*** (*supra*) was whether a CCAA judge had the discretion to establish a procedure for resolving a dispute between parties who had agreed by contract to arbitrate their disputes. This required that the dispute fall within the jurisdiction of the CCAA. In other words, the plaintiffs in the dispute had to be considered "creditors" for the purpose of the CCAA. The court's focus was on s. 12(1) of the CCAA, not s. 12(2). This Court looked to the similar wording between the BIA and CCAA referring to "debt provable in bankruptcy" and "claim provable in bankruptcy" to conclude that the plaintiffs, who had a contingent and unliquidated claim, were creditors. Valuation of the amount was not an issue since the claim was contingent and unliquidated. The issue was solely one of the court's discretion to establish a process to resolve the amount of the claim.

[39] The wording in s. 12(2)(a)(iii) is intended to be and must be general. That sub-clause captures all the unsecured claims of a company not subject to a receiving order or assignment or winding up. These unsecured claims include landlords as creditors, but also capture a host of unliquidated and contingent claims, the latter of which would not be defined as creditors at common law. Thus, the phrase "proof of which might be made under the Bankruptcy and Insolvency Act" directs that the various methods within the BIA to determine claims are to be employed to cover the wide range of potential claims. This clause is intended to define who is included in the scheme of the CCAA and override conflicting common law definitions.

[40] Moreover, amendments to both the BIA and CCAA in 1997 and 1998 were intended to harmonize the two pieces of legislation. Changes were made to the BIA to enhance the rights given to landlords, but no change in either legislation amended or introduced provisions to apply the BIA to landlords in CCAA proceedings.

[41] More recently, in November 2003, the Standing Senate Committee on Banking, Trade and Commerce released "Debtors and Creditors Sharing the Burden: A Review of the BIA and the CCAA", a report calling for substantial reform of the federal insolvency statutes (the "Report"). Twenty-two of the Committee's recommendations apply specifically to commercial insolvencies.

[42] A very broad range of stakeholders provided input on virtually all elements of the two *Acts*. The Committee concluded that [p. 173]: "We believe that the need for flexibility is paramount with the CCAA....". As a consequence, they recommend that the BIA and the CCAA continue to operate as separate statutes.

[43] The Report also considered the existence of contracts, including leases, and how these should be dealt with under the legislation. The Joint Task Force on Business Insolvency Law Reform was of the view that the ability set out in the BIA to disclaim executory contracts including real property leases should apply to all bankruptcy and insolvency proceedings. The Committee's final recommendation was that:

> The BIA and the CCAA be amended to permit disclaimer of executory contracts in existence in the date of commencement of proceedings under the Acts. This disclaimer should apply to all contracts, provided that a number of conditions are met. In particular: the debtor should be obliged to establish inability or serious hardship in restructuring the enterprise without the disclaimer; the co-contracting party should be permitted to file a claim in damages in the restructuring [and other conditions specific to collective agreements].
>
> [Emphasis added]

[44] The Report recognized that the CCAA treats landlords differently than the BIA and harmonization in respect of this difference was recommended. Significantly, no such recommendations were made with respect to implementing a consistent approach for the valuation of a landlord's claim.

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Purposes of the BIA and CCAA

[45] Assuming the words are capable of bearing the interpretation urged upon us by the appellant, statutory interpretation requires that s. 12 be read in the context of the scheme, the object, and the intention of Parliament in passing the CCAA and where the CCAA refers to the BIA, regard must also be given to the scheme, object and intention of that Act.

[46] The proper approach to statutory interpretation requires that words be read contextually to give effect to the purpose and intent of the legislation. As the Supreme Court of Canada recently stated in ***Harvard College v. Canada (Commissioner of Patents)***, 2002 SCC 76 (CanLII), [2002] 4 S.C.R. 45 at para. 154, "This Court has on many occasions expressed the view that statutory interpretation cannot be based on the wording of the legislation alone (***Rizzo& Rizzo Shoes Ltd. (Re)***, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27)". When interpreting specific provisions, a court must pay sufficient attention to the scheme of an act, its objects or the intention of the legislature.

[47] The BIA is a comprehensive legislative scheme largely designed to facilitate the orderly liquidation of the estate of a bankrupt. The purposes of the Act include conducting the liquidation in a manner that maximizes recovery for the general benefit of the creditors, treating similarly situated creditors fairly and in accordance with the Act. The Act sets out priorities and a detailed process, making the BIA a logical choice when the only possible outcome is dissolution. It provides a high degree of certainty for all creditors.

[48] The CCAA is a very brief piece of legislation with a purpose described in ***Elan Corp. v. Comiskey*** reflex, (1990), 1 O.R. (3d) 289 (C.A.) as follows:

> The legislation is remedial in the purest sense in that it provides a means whereby devastating, social and economic effects of bankruptcy or creditor–initiated detriments of ongoing business operations can be avoided while court-supervised attempt to reorganize the financial affairs of the debtor is made.

[49] The very brevity of the Act and the fact that it is silent on details permits a wide and liberal construction to enable the Act to serve its remedial purpose: ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada***, 1990 CanLII 529 (BC CA), [1991] 2 W.W.R. 136 (B.C.C.A.).

[50] The role of the CCAA is unique. It affords the debtor company an opportunity to restructure its affairs in a manner that will permit it to continue as a going concern without intervention by creditors which might hamper or prevent the restructuring process. Its ultimate goal is to avoid bankruptcy, thereby maximizing creditor compensation, reducing the inevitable loss of employment precipitated by bankruptcy and, if successful, offering the prospect of shareholder equity. The debtor remains in possession and control of the company under the supervision of a court appointed monitor. See for example, ***Re Canadian Airlines Corp.***, 2000 ABQB 442 (CanLII), [2000] 10 W.W.R. 269, 2000 ABQB 442, leave denied, 2000 ABCA 238 (CanLII), [2000] 10 W.W.R. 314, 2000 ABCA 238, leave denied [2001] S.C.C.A. No. 60; ***Re Lehndorff General Partner Ltd.*** reflex, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.); ***Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada***, 1989 CanLII 2672 (BC CA), [1989] 3 W.W.R. 363 (B.C.C.A.).

[51] The decision to seek protection under the CCAA is that of the debtor. There are numerous considerations in choosing the CCAA as opposed to utilizing the proposal provisions of the BIA, however, one significant factor is the high degree of flexibility the CCAA offers in terms of plan fundamentals and process. The BIA is highly rule driven with clearly defined standards and processes for developing a proposal. Thus, the debtor company under CCAA has far broader latitude within which to propose a plan capable of winning creditor support.

[52] A company which invokes the CCAA process retains a great deal of control over it. Under the CCAA claims process, the company, not the monitor, initially accepts or rejects claims. Section 12(2)(a)(iii) states, "if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor".

[53] Section 12(2)(a)(iii) permits different treatment of different claims. The company can admit a claim, or refer it to a court to determine by summary application or trial. In recent cases, recognizing the need for expedited valuation of claims to facilitate the process, the courts have begun appointing a claims officer to make this determination.

[54] Rehabilitation of a company under the CCAA is furthered by a climate that allows for commercial realities and variables to be considered and negotiated among and by the affected parties. The debtor company, through the operation of the stay, is given the breathing room to explore alternatives and to structure a proposed plan that will find favour with creditors, sufficient to support the restructuring.

[55] To maximize flexibility, it is unwise and unnecessary to incorporate, by oblique reference, portions of the BIA or the LRBA that may not assist the process. What the CCAA requires is that the end result, the plan of arrangement, be fair and reasonable. Only when those conditions are met, will a plan of arrangement be approved by a court. What constitutes fairness is largely determined by the circumstances of each case. An important measure of fairness is the degree to which creditors approve it. Creditor support can create an inference that assenting creditors see the plan as viable and

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commercially reasonable given other available alternatives. The courts generally accept the view that the creditors are in a better position to determine whether the plan is in their own best interests.

The implications of incorporating all BIA provisions into the CCAA

[56] If the appellant's interpretation of s. 12 of the CCAA is accepted, such an interpretation would not be limited to claims by landlords but would include all other unsecured creditors who fall within the provisions of the BIA. At minimum, tax claimants, employees claims, and workers compensation indebtedness as provided in s. 136 of the BIA would apply to the CCAA, thereby increasing the rigidity and reducing the options for compromise.

[57] Under the BIA, the claims receiving priority after secured creditors are enumerated in s. 136 and have ten categories, each ranking behind the other. All must be paid in full before unsecured creditors recover anything. If the appellant is correct, arguably, those claims must be quantified under the BIA but without priority and subject to possible further compromise.

[58] Two other examples illustrate the uncertainty and difficulty that would arise if the appellant's submission was adopted. First, federal excise tax legislation gives Canada Customs and Revenue Agency (CCRA) a deemed trust for amounts due to it for GST and prohibits any legislation other than the BIA from overriding the deemed trust. There is no deemed trust in a bankruptcy, but cases including this proceeding have held a deemed trust exists in a CCAA restructuring. If the appellant is correct, then excise tax claims must be treated the same in CCAA and a deemed trust would be overridden.

[59] A second example that would import complex and unsettled issues in bankruptcy law is a severance claim. These claims raise thorny issues such as whether the bankruptcy itself triggers termination of employment without cause and thereby gives rise to a provable claim, whether legislation which continues a collective agreement gives rise to a severance claim, and whether a bankruptcy triggered by a creditor and not the bankrupt is to be distinguished. Under the CCAA, employees' claims for severance avoid those issues by treating employees as claimants and capable of being compromised under the CCAA. In ***Re Woodward's Ltd.***, a British Columbia case, the court recognized the claims of employees who were terminated and included them in the class of general creditors maintaining that once the amount of the claim had been agreed upon or determined by a court, the employees had the same rights as any other unsecured creditor.

The inconsistency of the BIA and LRBA with the objectives of the CCAA

[60] Automatically applying the LRBA when protection is sought under the CCAA results in the immediate compromise of a landlord's claim prior to the formulation of a plan. Its effect could be to isolate the landlord's claim, treating it differently and potentially unfairly by automatically compromising it without consideration of the plan as a whole. There is no compelling reason for such an *a priori* blanket regime for landlords in a CCAA proceeding that is intended to preserve the status quo pending the approval of a plan.

[61] There is no reported decision of a court applying s. 136 of the BIA, the LRBA or other provincial legislation equivalent to the LRBA. Instead, case law shows those provisions are not applied and courts have agreed with Farley J., who stated in ***Re Lehndorff General Partner Ltd.*** at para. 11, "Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see ***Sklar-Peppler Furniture Corporation*** reflex, (1992), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318."

[62] Landlords' claims have been a source of difficulty under the CCAA and have spawned considerable academic comment on the problems and potential ways to resolve them. The chambers judge and the respondent have noted many including the following: Moffat, "Treatment of Landlords in Commercial Re-organizations" (1997) 10 Comm. Insol. R. 14; Rotsztain and Kraft, "Landlords and Leases in Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act Reorganizations" [1994] ICR 2005; Marantz, "Retail Revival: The Eaton's Restructuring" (1998), 10 Comm. Insol. R. 37; Birkness, "*Re Woodward's Limited* – The Contextual Commonality of Interest Approach to Classification of Creditors" (1993) 20 C.B.R. (3d) 91; Kulidjian, Sheldon and Peck, "Potential Creditors Under the Companies' Creditors Arrangement Act" (1996) 13 National I. R. 4; Marantz, "Dealing with Proposals: Acting for the Creditor in CCAA and the New Bankruptcy Act Proposals" (Ontario: Canadian Bar Association C.L.E., 1993); Hayes, "Landlords' Rights on Bankruptcy and in Restructuring Proceedings" in *The Failing Smaller Business: Essential Debtor - Creditor Practice* (Law Society of Upper Canada, 1994); and Johnston and Campbell, "Using the CCAA to 'Cram Down' Landlords: *Sklar-Pepplar Furniture Corporation v. Bank of Nova Scotia* and its Aftermath" (1992) 1 Nat. Real Property L. Rev. (2d) 181.

[63] Much of the comment accords with those of Moffat, "Treatment of Landlords in Commercial Re-organizations", where the author states at 16:

> Unlike the proposal provisions of Part II of the BIA, the CCAA does not make any special provision for the valuation or classification of landlord claims under a plan. This does not give the debtor the power to compromise a landlord's claim in any way it chooses; the courts have placed limits on the method by which landlord claims may be valued and classified under a plan. A landlord which objects to its treatment

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> under a plan may pursue a number of remedies, including seeking amendment of the plan prior to the meeting of creditors held to vote upon the plan, voting against the plan at the creditors' meeting, and opposing court approval of the plan at the sanction hearing.

[64] Courts have approved a variety of solutions to quantifying landlord's claims without reliance on the BIA or provincial legislation. In ***Sklar-Peppler Furniture Corporation v. Bank of Nova Scotia***, the court classified the landlords among the general class of unsecured creditors for both outstanding rent and any contingent claim for damages arising from repudiation of the lease. The court permitted the termination of certain leases upon the plan's approval and limited damages to three months arrears of rent, three months' rent after a protection order and share pro rata with other ordinary creditors for the balance of their claims. Borins J. stated at 318:

> [R]ecognition must be given to the legislative intent to facilitate corporate re-organization and that in the modern world of large and complex business enterprises the excessive fragmentation of classes could be counter-productive to the fulfilment of this intent....In my view, in placing a broad and purposive interpretation upon the provisions of the CCAA the court should take care to resist approaches which would potentially fragment creditors and thereby jeopardize potentially viable plans of arrangement, such as the plan advance in this application.

[65] In ***Grafton Fraser*** and in ***Re Agnew Group Inc.***, the landlords were granted claims based on the present value of the unexpired terms of the abandoned leases. In ***Agnew***, with the exception of one landlord with a particularly long term lease, landlords received a maximum of six months' rent.

[66] Rotsztain and Kraft in "Landlords and Leases in BIA and CCAA Reorganizations" commenting on ***Agnew*** and ***Grafton-Fraser*** note at 5-31 that, "A claim based on the present value of the unexpired term of the lease is something which landlords generally look upon more favourably than a straight payment of a few months' rent." The authors explain that this is because this approach recognizes the significant long term impact termination can have on landlords and allows the factoring in of tenant inducements which are generally built into rental payments over the entire lease.

[67] On this appeal, the appellant suggests incorporating the LRBA serves a useful purpose because without the LRBA limitations, the landlord's claim is so potentially large that it makes a restructuring impossible, and requires too much time to mitigate and thus to quantify the landlord's claim.

[68] Speaking generally, I disagree that the magnitude or quantification issues arising from a landlord's claim make restructuring impossible. Treatment of a landlord's claim under a plan may produce the same result as that under the LRBA and such plan might be approved by both the landlord and the court. Similarly, treatment under the plan could be less than or more than the amount provided for under the LRBA. But these are issues for negotiation and ultimately, court approval.

[69] In the absence of legislation, the unique and distinct purpose of the CCAA has been and must remain the focus for judicial interpretation and discretion. Where there is neither statutory direction nor demonstrated need, it is undesirable to import statutory provisions that may have a negative affect on the flexibility afforded by the CCAA and thus become an impediment to its creative use. Adopting the LRBA as determinative of a landlord's claim under the CCAA is an example of narrowing the benefit of a broad statute in favour of a certainty. As a general proposition and without considering the merits of that position in a particular plan, such an approach is to be discouraged.

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Relief
[70] For these reasons, the appeal is dismissed.

Appeal heard on December 2, 2003
Reasons filed at Calgary, Alberta
this 29th day of January, 2004

_____
Paperny J.A.

I concur: _____
McFadyen J.A.

I concur: _____
Clark J.

Appearances:
B. P. O'Leary, Q.C.
C. Murray
for the Appellant
L. B. Robinson
for the Respondent
R. J. Gilborn, Q.C.
for the Monitor

Claims in foreign currency - Sec 43
43. If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the initial application in respect of the company unless otherwise provided in the proposed compromise or arrangement.
2005, c. 47, s. 131.

PART IV

CROSS-BORDER INSOLVENCIES

PURPOSE

Purpose - Sec 44
44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
(b) greater legal certainty for trade and investment;
(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
(d) the protection and the maximization of the value of debtor company's property; and
(e) the rescue of financially troubled businesses to protect investment and preserve employment.

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2005, c. 47, s. 131.

INTERPRETATION

Definitions - Sec 45
45. (1) The following definitions apply in this Part.

"foreign court"
« tribunal étranger »
"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding"
« principale »
"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.

"foreign non-main proceeding"
« secondaire »
"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding"
« instance étrangère »
"foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

"foreign representative"
« représentant étranger »
"foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

> **(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or**
> **(b) act as a representative in respect of the foreign proceeding.**

Centre of debtor company's main interests - Sec 45(2)
(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.
2005, c. 47, s. 131.

RECOGNITION OF FOREIGN PROCEEDING

Application for recognition of a foreign proceeding - Sec 46

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46. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application - Sec 46(2)
(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof - Sec 46(3)
(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence - Sec 46(4)
(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation - Sec 46(5)
(5) The court may require a translation of any document accompanying the application.
2005, c. 47, s. 131.

Order recognizing foreign proceeding - Sec 47
47. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Babcock & Wilcox Canada Ltd., Re, 2000 CanLII 22482 (ON SC) - Interplay of US Bankruptcy Proceedings with Cdn. CCAA

Date:	2000-02-25
Docket:	00-CL-3667
Parallel citations:	5 BLR (3d) 75; 18 CBR (4th) 157
URL:	http://canlii.ca/t/1w3sn
Citation:	Babcock & Wilcox Canada Ltd., Re, 2000 CanLII 22482 (ON SC), <http://canlii.ca/t/1w3sn> retrieved on 2013-08-16
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Ontario Supreme Court

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Babcock & Wilcox Canada Ltd.,
Date: 2000-02-25
In the Matter of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
In the Matter of Babcock & Wilcox Canada Ltd.

Ontario Superior Court of Justice [Commercial List] Farley J.
Heard: February 25, 2000
Judgment: February 25, 2000
Docket: 00-CL-3667
Derrick Toy, for Babcock & Wilcox Canada Ltd.
Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

***Farley J.*:**
[1] I have had the opportunity to reflect on this matter which involves an aspect of the recent amendments to the insolvency legislation of Canada, which amendments have not yet been otherwise dealt with as to their substance. **The applicant, Babcock & Wilcox Canada Ltd. ("BW Canada"), a solvent company, has applied for an interim order under s. 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA"):**

> **(a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;**
> **(b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;**
> **(c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;**
> **(d) that BW Canada be authorized to guarantee the obligations of its parent to the DIP Lender (debtor in possession lender) and grant security therefor in favour of the DIP Lender; and**
> **(e) and for other ancillary relief.**

[2] In Chapter 11 proceedings under the U.S. Bankruptcy Code, the U.S. Bankruptcy Court in New Orleans issued a temporary restraining order on February 22, 2000 wherein it was noted that BW Canada may be subject to actions in Canada similar to the U.S. asbestos claims. U.S. Bankruptcy Court Judge Brown's temporary restraining order was directed against certain named U.S. resident plaintiffs in the asbestos litigation:

> ...and towards all plaintiffs and potential plaintiffs in Other Derivative Actions, that they are hereby restrained further prosecuting Pending Actions or further prosecuting or commencing Other Derivative Actions against Non-Debtor Affiliates, until the Court decides whether to grant the Debtors' request for a preliminary injunction.

Judge Brown further requested the aid and assistance of the Canadian courts in carrying out the U.S. Bankruptcy Court's orders. The "Non-Debtor Affiliates" would include BW Canada.
[3] Under the 1994 amendments to the U.S. Bankruptcy Code, the concept of the establishment of a trust sufficient to meet the court determined liability for a mass torts situations was introduced. I am advised that after many years of successfully resolving the overwhelming majority of claims against it on an individual basis by settlement on terms BWUS considered reasonable, BWUS has determined, as a result of a spike in claims with escalating demands when it was expecting a decrease in claims, that it is appropriate to resort to the mass tort trust concept. Hence its application earlier this week to Judge Brown with a view to eventually working out a global process, including incorporating any Canadian claims. This would be done in conjunction with its joint pool of insurance which covers both BWUS and BW Canada. Chapter 11 proceedings do not require an applicant thereunder to be insolvent; thus BWUS was able to make an application with a view towards the 1994 amendments (including s. 524(g)). This subsection would permit the U.S. Bankruptcy Court on confirmation of a plan of reorganization under Chapter 11 with a view towards rehabilitation in the sense of avoiding insolvency in a mass torts situation to:

> ...enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claims or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust.

[4] In 1997, ss. 267-275 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended ("BIA") and s. 18.6 of the CCAA were enacted to address the rising number of international insolvencies ("1997 Amendments"). The 1997 Amendments were introduced after a lengthy consultation process with the insolvency profession and others. Previous to the 1997 Amendments, Canadian courts essentially would rely on the

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evolving common law principles of comity which permitted the Canadian court to recognize and enforce in Canada the judicial acts of other jurisdictions.

[5] La Forest J in *Morguard Investments Ltd. v. De Savoye* 1990 CanLII 29 (SCC), (1990), 76 D.L.R. (4th) 256 (S.C.C.), at p. 269 described the principle of comity as:

> **"Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws…**

[6] In *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]), at pp. 302-3 I noted the following:

> **Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* reflex, (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye,* 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:**
>
> > **The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra.* The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:**
> >
> > > **Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem,* such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the slate where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (emphasis added in original)**
> >
> > ***Morguard Investments* was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. <u>However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process</u>. (my emphasis added)**

Certainly the substantive and procedural aspects of the U.S. Bankruptcy Code including its 1994 amendments are not so different and do not radically diverge from our system.

[7] After reviewing La Forest J.'s definition of comity, I went on to observe at p. 316:

> As was discussed by J.G. Castel, *Canadian Conflicts of Laws,* 3rd ed. (Toronto: Butterworths, 1994) at p. 270, there is a presumption of validity attaching to a foreign judgment unless and until it is established to be invalid. It would seem that the same type of evidence would be required to impeach a foreign judgment as a domestic one: fraud practiced on the court or tribunal: see *Sun Alliance Insurance Co. v. Thompson* (1981), 56 N.S.R. (2d) 619, 117 A.P.R. 619 (T.D.), Sopinka, supra, at p. 992.

La Forest J. went on to observe in *Morguard* at pp. 269-70:

> In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.

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. . .

> Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

See also *Hunt v. T & N plc* 1993 CanLII 43 (SCC), (1993), 109 D.L.R. (4th) 16 (S.C.C.), at p. 39.

[8] While *Morguard* was an interprovincial case, there is no doubt that the principles in that case are equally applicable to international matters in the view of MacPherson J. and myself in *Arrowmaster* reflex, (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.), and *ATL* respectively. Indeed the analysis by La Forest J. was on an international plane. **As a country whose well-being is so heavily founded on international trade and investment, Canada of necessity is very conscious of the desirability of invoking comity in appropriate cases.**

[9] In the context of cross-border insolvencies, Canadian and U.S. Courts have made efforts to complement, coordinate and where appropriate accommodate the proceedings of the other. Examples of this would include *Olympia& York Developments Ltd., Ever fresh Beverages Inc.* and *Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119 (B.C. S.C.). Other examples involve the situation where a multi-jurisdictional proceeding is specifically connected to one jurisdiction with that jurisdiction's court being allowed to exercise principal control over the insolvency process: see *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta. Q.B.), at pp. 5-7 [[1998] A.J. No. 817]; *Microbiz Corp. v. Classic Software Systems Inc.* 1996 CanLII 8276 (ON SC), (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.), at p. 4; *Tradewell Inc. v. American Sensors Electronics, Inc.,* 1997 WL 423075 (S.D.N.Y. 1997).

[10] In *Roberts,* Forsythe J. at pp. 5-7 noted that steps within the proceedings themselves are also subject to the dictates of comity in recognizing and enforcing a U.S. Bankruptcy Court stay in the *Dow Corning* litigation [*Taylor v. Dow Corning Australia Pty. Ltd.* (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.)] as to a debtor in Canada so as to promote greater efficiency, certainty and consistency in connection with the debtor's restructuring efforts. Foreign claimants were provided for in the U.S. corporation's plan. Forsyth J. stated:

> Comity and cooperation are increasingly important in the bankruptcy context. *As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination there would be multiple proceedings, inconsistent judgments and general uncertainty.*
>
> *…I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court.* Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding… (emphasis added)

[11] The CCAA as remedial legislation should be given a liberal interpretation to facilitate its objectives. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* 1990 CanLII 529 (BC CA), (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* reflex, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

[12] David Tobin, the Director General, Corporate Governance Branch, Department of Industry in testifying before the Standing Committee on Industry regarding Bill C-5, An Act to amend the BIA, the CCAA and the Income Tax Act, stated at 1600:

> Provisions in Bill C-5 attempt to actually codify, which has always been the practice in Canada. They include the Court recognition of foreign representatives; Court authority to make orders to facilitate and coordinate international insolvencies; provisions that would make it clear that foreign representatives are allowed to commence proceedings in Canada, as per Canadian rules – however, they clarify that foreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada; and Canadian creditors and assets are protected by the bankruptcy and insolvency rules.

The philosophy of the practice in international matters relating to the CCAA is set forth in *Olympia & York Developments Ltd. v. Royal Trust Co.* reflex, (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.), at p. 167 where Blair J. stated:

> The Olympia & York re-organization involves proceedings in three different jurisdictions: Canada, the United States and the United Kingdom. Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts – sometimes substantive, sometimes procedural – between the jurisdictions. The Courts of the various jurisdictions should seek to cooperate amongst themselves, in my view, in facilitating the trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of

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> jurisprudence. The interests of international cooperation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.

Blair J. then proceeded to invoke inherent jurisdiction to implement the Protocol between the U.S. Bankruptcy Court and the Ontario Court. See also my endorsement of December 20, 1995, in *Everfresh Beverages Inc.* where I observed: "I would think that this Protocol demonstrates the 'essence of comity' between the Courts of Canada and the United States of America." *Everfresh* was an example of the effective and efficient use of the Cross-Border Insolvency Concordat, adopted by the Council of the International Bar Association on May 31, 1996 (after being adopted by its Section on Business Law Council on September 17, 1995), which Concordat deals with, inter alia, principal administration of a debtor's reorganization and ancillary jurisdiction. See also the UNCITRAL Model Law on Cross-Border Insolvency.

[13] Thus it seems to me that this application by BW Canada should be reviewed in light of (i) the doctrine of comity as analyzed in *Morguard, Arrowmaster* and *ATL, supra,* in regard to its international aspects; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the 1997 Amendments.

"Foreign proceeding" is defined in s. 18.6(1) as:

> In this section,
>
> "foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;...

Certainly a U.S. Chapter 11 proceeding would fit this definition subject to the question of "debtor". It is important to note that the definition of "foreign proceeding" in s. 18.6 of the CCAA contains no specific requirement that the debtor be insolvent. In contrast, the BIA defines a "debtor" in the context of a foreign proceeding (Part XIII of the BIA) as follows:

> s. 267 In this Part,
>
> "debtor" means an *insolvent person* who has property in Canada, a *bankrupt* who has property in Canada or a *person who has the status of a bankrupt* under foreign law in a foreign proceeding and has property in Canada;... (emphasis added)

I think it a fair observation that the BIA is a rather defined code which goes into extensive detail. This should be contrasted with the CCAA which is a very short general statute which has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation circumstances. A general categorization (which of course is never completely accurate) is that the BIA may be seen as being used for more run of the mill cases whereas the CCAA may be seen as facilitating the more unique or complicated cases. Certainly the CCAA provides the flexibility to deal with the thornier questions. Thus I do not think it unusual that the draftees of the 1997 Amendments would have it in their minds that the provisions of the CCAA dealing with foreign proceedings should continue to reflect this broader and more flexible approach in keeping with the general provisions of the CCAA, in contrast with the corresponding provisions under the BIA. In particular, it would appear to me to be a reasonably plain reading interpretation of s. 18.6 that recourse may be had to s. 18.6 of the CCAA in the case of a solvent debtor. Thus I would conclude that the aspect of insolvency is not a condition precedent vis-a-vis the "debtor" in the foreign proceedings (here the Chapter 11 proceedings) for the proceedings in Louisiana to be a foreign proceeding under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as a "foreign proceeding" for the purposes of s. 18.6 of the CCAA.

[14] It appears to me that my conclusion above is reinforced by an analysis of s. 18.6(2) which deals with concurrent filings by a debtor under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction. This is not the situation here, but it would be applicable in the *Loewen* case. That subsection deals with the coordination of proceedings as to a "debtor company" initiated pursuant to the CCAA and the foreign legislation.

> s. 18.6(2). The court may, in respect of a *debtor company,* make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of proceedings under the Act with any foreign proceeding. (emphasis added)

[15] The definition of "debtor company" is found in the general definition section of the CCAA, namely s. 2 and that definition incorporates the concept of insolvency. Section 18.6(2) refers to a "debtor company" since only a "debtor company" can file under the CCAA to propose a compromise with its unsecured or secured creditors: ss. 3, 4 and 5 CCAA. See also s. 18.6(8) which deals with currency concessions "[w]here a compromise or arrangement is proposed in respect of a debtor company...". I note that "debtor company" is not otherwise referred to in s. 18.6; however "debtor" is referred to in both definitions under s. 18.6(1).

[16] However, s. 18.6(4) provides a basis pursuant to which a company such as BW Canada, a solvent corporation, may seek judicial assistance and protection in connection with a foreign proceeding. Unlike s. 18.6(2), s. 18.6(4) does not contemplate a full filing under the CCAA. Rather s. 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding.

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> s. 18.6(4) Nothing in this section prevents the court, on the application of a foreign representative or *any other interested persons,* from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act. (emphasis added)

BW Canada would fit within "any interested person" to bring the subject application to apply the principles of comity and cooperation. It would not appear to me that the relief requested is of a nature contrary to the provisions of the CCAA.

[17] Additionally there is s. 18.6(3) whereby once it has been established that there is a foreign proceeding within the meaning of s. 18.6(1) (as I have concluded there is), then this court is given broad powers and wide latitude, all of which is consistent with the general judicial analysis of the CCAA overall, to make any order it thinks appropriate in the circumstances.

> s. 18.6(3) An order of the court under this Section may be made on such terms and conditions as the court considers appropriate in the circumstances.

This subsection reinforces the view expressed previously that the 1997 Amendments contemplated that it would be inappropriate to pigeonhole or otherwise constrain the interpretation of s. 18.6 since it would be not only impracticable but also impossible to contemplate the myriad of circumstances arising under a wide variety of foreign legislation which deal generally and essentially with bankruptcy and insolvency but not exclusively so. Thus, the Court was entrusted to exercise its discretion, but of course in a judicial manner.

[18] Even aside from that, I note that the Courts of this country have utilized inherent jurisdiction to fill in any gaps in the legislation and to promote the objectives of the CCAA. Where there is a gap which requires bridging, then the question to be considered is what will be the most practical common sense approach to establishing the connection between the parts of the legislation so as to reach a just and reasonable solution. See *Westar Mining Ltd., Re* 1992 CanLII 1863 (BC SC), (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), at pp. 93-4; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* 1995 CanLII 2575 (BC CA), (1995), 34 C.B.R. (3d) 4 (B.C. C.A.), at p. 2; *Lehndorff General Partner Ltd.* at p. 30.

[19] The Chapter 11 proceedings are intended to resolve the mass asbestos related tort claims which seriously threaten the long term viability of BWUS and its subsidiaries including BW Canada. BW Canada is a significant participant in the overall Babcock & Wilcox international organization. From the record before me it appears reasonably clear that there is an interdependence between BWUS and BW Canada as to facilities and services. In addition there is the fundamental element of financial and business stability. This interdependence has been increased by the financial assistance given by the BW Canada guarantee of BWUS' obligations.

[20] To date the overwhelming thrust of the asbestos related litigation has been focussed in the U.S. In contradistinction BW Canada has not in essence been involved in asbestos litigation to date. The 1994 amendments to the U.S. Bankruptcy Code have provided a specific regime which is designed to deal with the mass tort claims (which number in the hundreds of thousands of claims in the U.S.) which appear to be endemic in the U.S. litigation arena involving asbestos related claims as well as other types of mass torts. This Court's assistance however is being sought to stay asbestos related claims against BW Canada with a view to this stay facilitating an environment in which a global solution may be worked out within the context of the Chapter 11 proceedings trust.

[21] In my view, s. 18.6(3) and (4) permit BW Canada to apply to this Court for such a stay and other appropriate relief. Relying upon the existing law on the recognition of foreign insolvency orders and proceedings, the principles and practicalities discussed and illustrated in the Cross-Border Insolvency Concordat and the UNCITRAL Model Law on Cross-Border Insolvencies and inherent jurisdiction, all as discussed above, I would think that the following may be of assistance in advancing guidelines as to how s. 18.6 should be applied. I do not intend the factors listed below to be exclusive or exhaustive but merely an initial attempt to provide guidance:

> (a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.
>
> (b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.
>
> (c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.
>
> (d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

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(e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:

(i) the location of the debtor's principal operations, undertaking and assets;

(ii) the location of the debtor's stakeholders;

(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;

(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;

(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

(g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

[22] Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the "comeback" clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS' obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an "Information Officer" who will give quarterly reports to this Court. Notices are to be published in the Globe & Mail (National Edition) and the National Post. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate "comeback" clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

[23] I am satisfied that it is appropriate in these circumstances to grant an order in the form of the revised draft (a copy of which is attached to these reasons for the easy reference of others who may be interested in this area of s. 18.6 of the CCAA).

[24] Order to issue accordingly.

Application granted.

Appendix

Court File No. 00-CL-3667
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
THE HONOURABLE MR. JUSTICE FARLEY — FRIDAY, THE 25TH DAY OF FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

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INITIAL ORDER

THIS MOTION made by the Applicant Babcock & Wilcox Canada Ltd. for an Order substantially in the form attached to the Application Record herein was heard this day, at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the Affidavit of Victor J. Manica sworn February 23, 2000 (the "Manica Affidavit"), and on notice to the counsel appearing, and upon being advised that no other person who might be interested in these proceedings was served with the Notice of Application herein.

SERVICE

1. *THIS COURT ORDERS* that the time for service of the Notice of Application and the Affidavit in support of this Application be and it is hereby abridged such that the Application is properly returnable today, and, further, that any requirement for service of the Notice of Application and of the Application Record upon any interested party, other than the parties herein mentioned, is hereby dispensed with.

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

3. *THIS COURT ORDERS AND DECLARES* that the Applicant is a company which is entitled to relief pursuant to s. 18.6 of the CCAA.

PROTECTION FROM ASBESTOS PROCEEDINGS

4. *THIS COURT ORDERS* that until and including May 1, 2000, or such later date as the Court may order (the "Stay Period"), no suit, action, enforcement process, extra-judicial proceeding or other proceeding relating to, arising out of or in any way connected to damages or loss suffered, directly or indirectly, from asbestos, asbestos contamination or asbestos related diseases ("Asbestos Proceedings") against or in respect of the Applicant, its directors or any properly of the Applicant, wheresoever located, and whether held by the Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise shall be commenced, and any Asbestos Proceedings against or in respect of the Applicant, its directors or the Applicant's Property already commenced be and are hereby stayed and suspended.

5. *THIS COURT ORDERS* that during the Stay Period, the right of any person, firm, corporation, governmental authority or other entity to assert, enforce or exercise any right, option or remedy arising by law, by virtue of any agreement or by any other means, as a result of the making or filing of these proceedings, the U.S. Proceedings or any allegation made in these proceedings or the U.S. Proceedings be and is hereby restrained.

DIP FINANCING

6. *THIS COURT ORDERS* that the Applicant is hereby authorized and empowered to guarantee the obligations of its parent, The Babcock & Wilcox Company, to Citibank, N.A., as Administrative Agent, the Lenders, the Swing Loan Lender, and Issuing Banks (as those terms are defined in the Post-Petition Credit Agreement (the "Credit Agreement")) dated as of February 22, 2000 (collectively, the "DIP Lender"), and to grant security (the "DIP Lender's Security") for such guarantee substantially on the terms and conditions set forth in the Credit Agreement.

7. *THIS COURT ORDERS* that the obligations of the Applicant pursuant to the Credit Agreement, the DIP Lender's Security and all the documents delivered pursuant thereto constitute legal, valid and binding obligations of the Applicant enforceable against it in accordance with the terms thereof, and the payments made and security granted by the Applicant pursuant to such documents do not constitute fraudulent preferences, or other challengeable or reviewable transactions under any applicable law.

8. *THIS COURT ORDERS* that the DIP Lender's Security shall be deemed to be valid and effective notwithstanding any negative covenants, prohibitions or other similar provisions with respect to incurring debt or the creation of liens or security contained in any existing agreement between the Applicant and any lender and that, notwithstanding any provision to the contrary in such agreements,

(a) the execution, delivery, perfection or registration of the DIP Lender's Security shall not create or be deemed to constitute a breach by the Applicant of any agreement to which it is a party, and

(b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any agreement caused by or resulting from the Applicant entering into the Credit Agreement, the DIP Lender's Security or other document delivered pursuant thereto.

REPORT AND EXTENSION OF STAY

9. As part of any application by the Applicant for an extension of the Stay Period:

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(a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");
(b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and
(c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as an result of or relating in any way to the appointment of the Information Officer or the fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

10. *THIS COURT ORDERS* that the Applicant shall, within fifteen (15) business days of the date of entry of this Order, publish a notice of this Order in substantially the form attached as Schedule "A" hereto on two separate days in the Globe & Mail (National Edition) and the National Post.

11. *THIS COURT ORDERS* that the Applicant be at liberty to serve this Order, any other orders in these proceedings, all other proceedings, notices and documents by prepaid ordinary mail, courier, personal delivery or electronic transmission to any interested party at their addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

MISCELLANEOUS

12. *THIS COURT ORDERS* that notwithstanding anything else contained herein, the Applicant may, by written consent of its counsel of record herein, agree to waive any of the protections provided to it herein.

13. *THIS COURT ORDERS* that the Applicant may, from time to time, apply to this Court for directions in the discharge of its powers and duties hereunder or in respect of the proper execution of this Order.

14. *THIS COURT ORDERS* that, notwithstanding any other provision of this Order, any interested person may apply to this Court to vary or rescind this order or seek other relief upon 10 days' notice to the Applicant and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule "A"

NOTICE

RE: IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made February 25, 2000. The corporate parent of Babcock & Wilcox Canada Ltd. and certain other affiliated corporations in the United States have filed for protection in the United States under Chapter 11 of the Bankruptcy Code to seek, as the result of recent, sharp increases in the cost of settling asbestos claims which have seriously threatened the Babcock & Wilcox Enterprise's long term health, protection from mass asbestos claims to which they are or may become subject. Babcock & Wilcox Canada Ltd. itself has not filed under Chapter 11 but has sought and obtained an interim order under Section 18.6 of the CCAA affording it a stay against asbestos claims in Canada. Further application may be made to the Court by Babcock & Wilcox Canada Ltd. to ensure fair and equal access for Canadians with asbestos claims against Babcock & Wilcox Canada Ltd. to the process established in the United States. Representations may also be made by parties who would prefer to pursue their remedies in Canada.

Persons who wish to be a party to the Canadian proceedings or to receive a copy of the order or any further information should contact counsel for Babcock & Wilcox Canada Ltd., Derrick C. Tay at Meighen Demers (Telephone (416) 340-6032 and Fax (416) 977-5239).

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DATED this day of, 2000 at Toronto, Canada

Court File No. 00-CL-3

IN THE MATTER OF S. 18.6 of THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. AND IN THE MATTER
BABCOCK & WILCOX CANADA LTD.
1985,
c
C-36, AS AMENDED

SUPERIOR COURT OF JUSTICE COMMERCIAL LIST
PROCEEDINGS COMMENCED AT TORONTO

INITIAL ORDER

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Nature of foreign proceeding to be specified - Sec 47(2)
(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.
2005, c. 47, s. 131.

Order relating to recognition of a foreign main proceeding - Sec 48
48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

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(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order - Sec 48(2)
(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply - Sec 48(3)
(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts - Sec 48(4)
(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.
2005, c. 47, s. 131.

Other orders - Sec 49
49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Restriction - Sec 49(2)
(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts - Sec 49(3)

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(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.
2005, c. 47, s. 131.

Terms and conditions of orders - Sec 50
50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.
2005, c. 47, s. 131.

Commencement or continuation of proceedings - Sec 51
51. If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.
2005, c. 47, s. 131.

OBLIGATIONS

Cooperation — court - Sec 52
52. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Cooperation — other authorities in Canada - Sec 52(2)
(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Forms of cooperation - Sec 52(3)
(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

- **(a) the appointment of a person to act at the direction of the court;**
- **(b) the communication of information by any means considered appropriate by the court;**
- **(c) the coordination of the administration and supervision of the debtor company's assets and affairs;**
- **(d) the approval or implementation by courts of agreements concerning the coordination of proceedings; and**
- **(e) the coordination of concurrent proceedings regarding the same debtor company.**

2005, c. 47, s. 131;
2007, c. 36, s. 80.

Obligations of foreign representative - Sec 53
53. If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

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(a) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

(b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

2005, c. 47, s. 131.

MULTIPLE PROCEEDINGS

Concurrent proceedings - 54

54. If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

2005, c. 47, s. 131.

Multiple foreign proceedings - Sec 55

55. (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

Multiple foreign proceedings - Sec 55(2)

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

2005, c. 47, s. 131.

MISCELLANEOUS PROVISIONS

Authorization to act as representative of proceeding under this Act - Sec 56

56. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

2005, c. 47, s. 131.

Foreign representative status - Sec 57

57. An application by a foreign representative for any order under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the

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costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.
2005, c. 47, s. 131.

Foreign proceeding appeal - Sec 58
58. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.
2005, c. 47, s. 131.

Presumption of insolvency - Sec 59
59. For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.
2005, c. 47, s. 131.

Credit for recovery in other jurisdictions - Sec 60
60. (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and

(b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

Restriction - Sec 60(2)
(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.
2005, c. 47, s. 131.

Court not prevented from applying certain rules - Sec 61
61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception - Sec 61(2)
(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

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2005, c. 47, s. 131;
2007, c. 36, s. 81.

PART V
ADMINISTRATION

Regulations - Sec 62
62. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including regulations

(a) specifying documents for the purpose of paragraph 23(1)(f); and

(b) prescribing anything that by this Act is to be prescribed.

2005, c. 47, s. 131;
2007, c. 36, s. 82.

Review of Act - Sec 63
63. (1) Within five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to those provisions.

Reference to parliamentary committee - Sec 63(2)
(2) The report stands referred to the committee of the Senate, the House of Commons or both Houses of Parliament that is designated or established for that purpose, which shall

(a) as soon as possible after the laying of the report, review the report; and

(b) report to the Senate, the House of Commons or both Houses of Parliament, as the case may be, within one year after the laying of the report of the Minister, or any further time authorized by the Senate, the House of Commons or both Houses of Parliament.

2005, c. 47, s. 131.

Companies' Creditors Arrangement Act
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RELATED PROVISIONS
— R.S., 1985, c. 27 (2nd Supp.), s. 11
Transitional: proceedings
11. Proceedings to which any of the provisions amended by the schedule apply that were commenced before the coming into force of section 10 shall be continued in accordance with those amended provisions without any further formality.
— 1990, c. 17, s. 45(1)
Transitional: proceedings
45. (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.
— 1997, c. 12, s. 127
Application
127. Section 120, 121, 122, 123, 124, 125 or 126 applies to proceedings commenced under the Companies' Creditors Arrangement Act after that section comes into force.
— 1998, c. 30, s. 10
Transitional — proceedings
10. Every proceeding commenced before the coming into force of this section and in respect of which any provision amended by sections 12 to 16 applies shall be taken up and continued under and in conformity with that amended provision without any further formality.
— 2000, c. 30, s. 156(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.
— 2000, c. 30, s. 157(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.
— 2000, c. 30, s. 158(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.
— 2001, c. 34, s. 33(2)

(2) Subsection (1) applies to proceedings commenced under the Act after September 29, 1997.
— 2005, c. 47, s. 134, as amended by 2007, c. 36, s. 107
Companies' Creditors Arrangement Act
134. An amendment to the Companies' Creditors Arrangement Act that is enacted by any of sections 124 to 131 of this Act applies only to a debtor company in respect of whom proceedings commence under that Act on or after the day on which the amendment comes into force.
— 2007, c. 29, s. 119
Companies' Creditors Arrangement Act

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119. An amendment to the Companies' Creditors Arrangement Act made by section 104 or 106 of this Act applies only to a debtor company in respect of which proceedings under that Act are commenced on or after the day on which the amendment comes into force.
— 2007, c. 36, s. 111
Companies' Creditors Arrangement Act
111. The amendment to the Companies' Creditors Arrangement Act that is enacted by section 67 of this Act applies only to a debtor company in respect of whom proceedings commence under that Act on or after the day on which the amendment comes into force.
Date modified:
2013-07

CRA Internal Operations Manual - CCAA

(see following page images)

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COMPANIES' CREDITORS ARRANGEMENT ACT 1

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Companies' Creditors Arrangement Act

Collections Manual Updates

Overview

The *Companies' Creditors Arrangement Act* (*CCAA*) outlines the proceedings used by corporations to restructure their debts as an alternative to filing a Division I proposal under the *Bankruptcy and Insolvency Act*.

Legislation

This section identifies legislation which may impact on the *Companies' Creditors Arrangement Act* and the restructuring of a corporate debtor's affairs.

- *Bankruptcy and Insolvency Act* (*BIA*)
- *Companies' Creditors Arrangement Act* (*CCAA*)
- *Excise Tax Act* (*ETA*)
- *Income Tax Act* (*ITA*)
- *Winding Up and Restructuring Act*

Background Information

- **History of the *Companies' Creditors Arrangement Act* (*CCAA*)**
- **Purpose of the *CCAA***
- **Criteria to use the *CCAA***
- **Initial Application**
- **Initial Order**
- **Stay of Proceedings**
- **The Plan of Arrangement**
- **The Meeting of Creditors**
- **Voting on the Plan of Arrangement**
- **When a Plan is Approved**
- **When a Plan is Rejected**
- **Court Approval**

History of the *CCAA*

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Originally enacted in 1993, the *CCAA* offers corporations a viable alternative to bankruptcy or receivership through a voluntary attempt to restructure their debt load and arrange equitable and orderly payments to creditors.

The last amendment to the *CCAA* (Bill C-5) on September 30, 1997, made the Act binding on the Crown.

Purpose of the *CCAA*

The *CCAA* is a remedial process which provides an insolvent company with an opportunity to address financial difficulties that may otherwise result in bankruptcy or receivership. This process is an attractive option to debtors offering more flexible options than the *Bankruptcy and Insolvency Act*, while still providing the same creditor protection.

Benefits of *CCAA* include:

- protecting the interest of creditors and permitting an orderly distribution of the debtor company's affairs
- maintaining the status quo while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement
- permitting equal treatment of creditors of the same class
- preserving the insolvent company as a viable operation
- protecting an insolvent company from proceedings by creditors which would prevent it from carrying out the terms of a compromise or arrangement
- promoting a structured environment for the negotiation of compromises between a debtor company and its creditors
- permitting an insolvent company to remain in business

For further details, refer to Directive ARD-03-09, **The Relationship between Bankruptcy and Insolvency Events**.

Criteria to use the *CCAA*

The *CCAA* is only available to a company or affiliated companies with total liabilities in excess of $5 million.

The company or affiliated companies must:

- be incorporated under an Act of Parliament or the legislature of a province
- be incorporated or affiliated having assets or doing business in Canada
- be either bankrupt or insolvent
- have an outstanding issue of secured or unsecured bonds issued under a trust deed (the reorganization plan must include a compromise or arrangement with the holders of the bond)

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Note: As affiliated companies are included in this legislation, it is important to check the entire Order to identify any and all affiliated companies.

The companies may not be:

- a bank
- a loan company
- an insurance company
- a railway company

For further details, refer to Directive ARD-01-02, ***The Companies' Creditors Arrangement Act***.

Initial Application

When a debtor company decides to undertake a *CCAA* proceeding, it files an "initial application" with the Court. The Court receives and reviews the application and determines if the company:

- is eligible to proceed under the *CCAA*, and
- is viable

At that point the court will issue the Initial Order.

Initial Order

The Initial Order outlines the criteria for continuing in the *CCAA* process. It may include the following:

- terms, if any, of a Stay of Proceedings
- permission and deadline for the company to file the Plan of Arrangement
- appointment and duties of a monitor
- requirements for the service of documents
- any other such terms as the court sees fit

Stay of Proceedings

Unlike the *BIA*, the *CCAA* does not provide for an automatic Stay of Proceedings against all creditors. It is at the discretion of the Court to decide whether a Stay applies as well as the scope of the Stay. Details regarding the Stay are outlined in the Initial Order.

A Stay under a *CCAA* may require certain conditions to be followed, including the following:

- creditors are not permitted to start or continue any legal actions
- the CRA is not permitted to issue Enhanced Requirements to Pay
- no actions may be taken against the directors

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- landlords may not terminate leases
- utilities may not discontinue services
- suppliers must continue to honour contracts
- limited rights of set-off

Note: The Stay from an Initial Order can not extend beyond thirty (30) days.

For further details refer to: **Enhanced Requirement to Pay under the *Companies' Creditors Arrangement Act*** and Directive RCD-00-22, **The Rights of Unpaid Suppliers in a Bankruptcy or an Insolvency**.

Related Topics:

- **Lifting the Stay of Proceedings**
- **When the Stay Ceases**

Lifting the Stay of Proceedings

Since the terms of the Stay are outlined in the Initial Order of the Court, any party taking collection action may be held in contempt of court. However, any creditor, including the CRA, may apply to the court to have the Stay varied or lifted under certain circumstances. Some of those circumstances are:

- a creditor with the voting power to defeat the arrangement intends to do so
- the debtor is not acting in good faith
- the company intends to liquidate rather than restructure

For further details refer to: **Obtaining Leave of the Court**.

When the Stay Ceases

The Stay automatically ceases when:

- the timeline, as stated in the Initial Order, has expired
- the arrangement is voted down by creditors
- there is a default in the arrangement
- the arrangement has been completed

For payroll debts, the Stay automatically ceases if:

- the company defaults on payment of any amount that becomes due to after the order and could be subject to a demand under s. 224(1.2) of the *ITA*, or
- any other creditor is, or becomes entitled to realize a security on any property that could be claimed by the CRA under s. 224(1.2) of the *ITA*

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The Plan of Arrangement

The Plan of Arrangement is prepared by the debtor company with the assistance of the monitor and, if applicable, the restructuring officer. A completed plan includes the following:

- a description of the arrangement as it affects the creditors, shareholders, and any debenture holders
- last audited financial statements
- value of the tax debtor's assets when the plan was filed
- list of the company's secured creditors
- types of security held
- projected cash flow
- a description of the proposed changes to the existing outstanding shares or to the share capital of the company, where applicable
- a description of the outstanding court actions

Where an Initial Order provides for a stay of proceedings that prevents the Agency's from exercising its rights under section 224(1.2) of the ITA, or section of the CPP or EI Act that refer to section 224(1.2) of the ITA, or similar provincial legislation, an Arrangement requires that the amounts subject to these sections be paid in full within 6 months of court approval, unless otherwise authorized by the Crown.

The Meeting of Creditors

Once the Plan of Arrangement has been prepared and submitted to the Court, the Court sets a date for the creditors to meet and vote on the plan.

Voting on the Plan of Arrangement

In order to vote on the Plan of Arrangement, a creditor must:

- have filed an accepted Proof of Claim
- be present at the creditor's meeting either in person or by proxy

For further details refer to Communication TSDMB-2007-022, **Amendments/Corrections to the Delegations Legislative and Policy Matrices**.

When a Plan is approved

A Plan of Arrangement is not just a description of the monetary repayments that the debtor company must pay to creditors; rather it is a detailed business plan for the restructuring of the company. For a Plan to be approved by creditors, or a class of creditors, there must be:

- acceptance by a majority in numbers with 2/3 in dollar value of proven claims

If any class of creditors rejects the Plan, the Plan may still be approved by the court, however it will not be binding on that class of creditors rejecting it and that class may commence or continue

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legal action against the debtor company once the plan becomes operative or fully performed if the stay remains in effect.

When a Plan is Rejected

When a Plan of Arrangement has been rejected, there are two issues to consider:

- the applicant is not automatically bankrupt
- the Stay of Proceedings against the applicant is lifted

At this point, the debtor company will have to file a voluntary assignment into bankruptcy.

Court Approval
Once the Plan is approved by creditors, it is presented to the Court for approval and authorization. The Court ensures that the plan is fair and reasonable to all creditors, that compliance with all statutory requirements, including the provision for payment of the entire source deductions claim within 6 months, is achieved, and nothing has been done outside the scope of the Act.

Policy
This section provides policies related to *CCAA*.

- Impact on the Crown
- Effect of Court Order
- Effect on Collection Action
- Impact on Director's Liability
- Impact on Set-off

Impact on the Crown

Where applicable, the provisions of the *CCAA* are binding on the CRA.

Effect of Court Order

Once the Agency becomes aware of a court order, it must obey the court order, unless the CRA is successful in getting the Court Order changed

Refer to the procedures Obtaining Leave of the Court for further detail.

Effect on Collection Action

When a corporate debtor is under the protection of the *Companies' Creditors Arrangement Act* (*CCAA*) do not:

- disobey or ignore a court order
- initiate or continue collection actions regardless of whether the Crown or the CRA are specifically named in the order
- vote in favour of the plan, unless directed to do so by the delegated authority

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If a Collection Officer becomes aware of a court order and continues to pursue collection, the individual could be found to be in contempt of court.

For further details refer to Communication TSDMB-2007-022, **Amendments/Corrections to the Delegations Legislative and Policy Matrices**.

Impact on Director's Liability

Directors are not liable for trust funds unless the CRA has demonstrated it has met one of the following three preconditions:

a) the return of an unsatisfied certificate for the amount of the corporation's liability which was registered in the Federal Court

b) proved a claim against the corporation within six months following the date of dissolution or liquidation proceedings began

c) proved a claim against the corporation within six months following the date of bankruptcy

A *CCAA* filing could disrupt the events of b) and c) (above) since the Agency is prevented from assessing the directors if more than two years have passed since the person last ceased to be a director of the corporation. As a result, for a director to be held liable, it may be necessary to invoke a) (above). Before this can be done, consult the Department of Justice to see if leave of the court must be sought.

If the *CCAA* proceeding becomes a liquidation, precondition b) would apply.

The Proof of Claim must be filed as soon as possible. If the Agency files a Proof of Claim with the monitor in a *CCAA* proceeding, it has proven a claim.

If the Agency waits for the actual plan of arrangement to be filed, six months could easily have passed.

Refer to: **Department of Justice Opinions** for further detail.

For additional details, refer to the procedure, **Proving a Director's Liability Claim Under the *Companies' Creditors Arrangement Act***.

Impact on Set-Off

The Court Order may state that creditors are not entitled to receive funds as a result of the issuance of a Statutory Set-off or use the right of offset to recover amounts owing to the debtor. In such a case, contact the Department of Justice who may petition the courts to have the Order varied.

A 1997 amendment to the *CCAA* (section 18.1) allows the law of set off to apply. This allows the CRA to set off amounts payable to a tax debtor against the tax debtor's indebtedness to it. These provisions contain the requirement of mutuality, that being the Crown and the debtor owe each other in the same time period.

Related Topics:

- **Where a Debt is Established**
- **Where No Debt is Established**

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Where a Debt is Established

Hold credit amounts if the two following conditions exist:

- the CRA has an established debt
- a Notice of Assessment is issued prior to the *CCAA* coming into effect

A credit is held, but will not be set-off or offset against agency debts as this may appear contrary to the court order. The credit amounts are held and distributed once the restructuring plan is implemented or upon the approval of senior management of a Tax Services Office (TSO).

Where No Debt is Established

Credit amounts are not withheld if there is no debt on any related account, provided all related accounts are filed up to date.

Changes to the *Income Tax Act* and *Excise Tax Act*, effective April 1, 2007, permit the CRA to withhold credits or refunds until such time as all required returns are filed.

For further details refer to Communication TSDMB-2007-038, **Amendments to different Acts in the 2006 Budget**.

Procedures

This section provides procedures for those accounts where the debtor corporation seeks protection under the *Companies' Creditors Arrangement Act*.

- **Actioning Accounts under *CCAA***
- **Department of Justice Opinions**
- **Preparing the Memorandum for Headquarters**
- **Obtaining Leave of the Court**

Actioning Accounts under *CCAA*

When an account is under the *CCAA* the Collections Officer must complete specific steps to ensure the proper procedures are actioned. There are two phases of actioning an account.

Related Topics:

- **Preparation**
- **Working the File**

Preparation

Upon notification of *CCAA* filing

1. Immediately contact and advise the Department of Justice

For further details, refer to: **Department of Justice Opinions**.

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2. Advise Headquarters

For further details, refer to: Preparing the Memorandum for Headquarters.

3. Request Trust Exam and Audit

   - ensure outstanding audits are given priority
   - ensure outstanding objections and appeals are resolved on a priority basis

Working the File

When advised of an account under the *CCAA*, the Agency will need to follow these steps:

- suspend but do not withdraw current legal actions including garnishments issued under the *Excise Tax Act* section 317 (3) or the *Income Tax Act* subsection 224 (1.2)
- do not initiate further collection actions
- file a Proof of Claim

  Note: As no template exists on ELCS, contact Field Support for assistance.
- follow up with Audit and Trust Exam and ensure all filings are current
- review File in detail
- centralize related accounts from all TSOs (preferably in Headquarters)
- liaise with affected federal and provincial departments and agencies to ensure government claims are put in a separate class from other creditors
- identify the affiliated companies
  Note: Keep local management fully apprised on the status of companies filing under the *CCAA*.
- research information on directors including names at the time the debt was incurred and dates when these directors resigned.

Department of Justice Opinions

It is imperative that the Department of Justice review the Initial Order as they represent and act for the Agency in all legal aspects of the *CCAA* proceedings including:

- challenging the Court's Initial Order
- defeating requests for directors' reduced claims
- putting the Crown's claim in a separate class
- varying a Stay to effect set-off or to allow the issuance of Enhanced Requirements to Pay pursuant to subsection 317(3) of the ETA

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The referral memorandum must be signed by the responsible Assistant Director, Revenue Collections and should include the following information:

- debtor profile
- account history (collections and compliance)
- collection actions outstanding
- amount of debt outstanding
- a copy of the court order and other applicable documentation

Preparing the Memorandum for Headquarters

The referral memorandum must be signed by the responsible Assistant Director, Revenue Collections and includes details such as:

- identity of debtor including all affiliated companies
- account history (collections and compliance)
- amount of debt outstanding
- collection actions outstanding
- other Federal Government debt
- a copy of the Initial Order and other applicable documentation
- a detailed plan of action with justification for the proposed actions as per DOJ recommendations

Address the memorandum to:

Headquarters
Accounts Receivable Division
Field Support Section

Obtaining Leave of the Court

When a Court Order imposes a Stay of Proceedings, the Collection Officer should forward a memorandum, including all relevant information, to the Department of Justice requesting an opinion as to whether the CRA should:

- seek leave of the court to vary the order
- initiate or continue with regular collection actions

Once Department of Justice determines that the CRA should move forward to obtain leave of the court, the Collection Officer must:

- obtain approval from Headquarters to proceed with obtaining the variance
- assist the Department of Justice in the preparation of an affidavit if leave of the court is sought

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Statistical Reporting

While relatively few filings occur under *CCAA*, they often represent substantial risk, and involve significant balances owing to the Agency. These factors, along with potential legislative impacts surrounding this sensitive area, point to the need for statistical tracking. Taxpayer Services and Debt Management Branch is developing processes to capture statistical information as it relates to insolvency workloads.

Submission of statistical information for all current and future filings must occur in two stages, initial and final.

Related Topics:

- Initial Stage
- Final Stage

Initial Stage

After receiving notification of a *CCAA* filing, complete an initial review and submit a summary to:

Accounts Receivable Division
Insolvency and International Section
Headquarters

Include in the submission

- debtor profile
- account history (collections and compliance)
- collection actions outstanding
- amount of debt outstanding
- a copy of the court order and other applicable documentation

The submission should highlight GST/HST deemed trust amounts owing to the Agency.

Final Stage

Upon final disposition of the file, record in the ACSES diary a breakdown of all amounts recovered including deemed trust amounts. The Insolvency and International Section will review and follow up on these accounts.

Statistical Checklist

The information for continuous tracking must be submitted on a statistical reporting checklist, which is broken into two parts:

Part I-*CCAA* filing information - requires basic information relating to the *CCAA* filing details.

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Part II- Account Information - requires information relating to all accounts involved, including all related accounts, subsidiary and related companies that are indebted or are about to become indebted to the Agency.

In keeping with the CRA's **Electronic Networks Policy Guidelines**, and **Policy on the Management of Protected Client Information**, send all submissions via use of WINZIP 9, providing that all WINZIP 9 policies and procedures are adhered to. Alternatively, transmission by secure fax or inter-office mail, to the following, may also be utilized.

Insolvency and International Section
Accounts Receivable Division, TSDMB
10th Floor, Tower "C"
25 McArthur Road
Vanier, On
K1A 0L5
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For further details refer to Communication TSDMB-2005-002, **WinZip: How to Exchange Information Securely**.

References

Directive ARD-03-09, **The Relationship between Bankruptcy and Insolvency Events**, issued September 24, 2003

Directive ARD-01-02, **The Companies Creditors Arrangement Act**, revised January 11, 2002

Directive RCD-00-22, **The Rights of Unpaid Suppliers in a Bankruptcy or an Insolvency**, issued August 25, 2000

Communication TSDMB-2007-022, **Amendments/Corrections to the Delegations Legislative and Policy Matrices**, issued March 30,2007

Communication TSDMB-2007-038, **Amendments to different Acts in the 2006 Budget**, issued June 1, 2007

TSDMB-2005-002, **WinZip: How to Exchange Information Securely**, issued June 10, 2005

GLOSSARY

Claims Bar Date

The Claims Bar Date is the deadline, set by the court, for creditors to prove their claims against the company. Failure to file a claim by the deadline may result in the creditor being excluded from voting and receiving a dividend.

Companies' Creditors Arrangement Act

Under the CCAA statute, a company owing at least $5 million, can seek a compromise of its debts by filing a plan of arrangement.

Debtor company

A debtor company refers to any company that is bankrupt or insolvent or has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-Up Act or has made an assignment under the Bankruptcy and

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Insolvency Act or against which a receiving order has been made or is in the course of being wound up under the Winding-Up Act because the company is insolvent.

Division I proposals

A Division I proposal is a reorganization proposal made under the Bankruptcy and Insolvency Act.

Off-set

The internal netting of a credit against a debit balance by the system.

Sanction

To assent, concur, confirm, reprimand or ratify.

Statutory Set-off

A document requiring another government department or agency to remit to the CRA monies owing to the tax debtor.

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Fraudulent Conveyances Act (Ontario)

R.S.O. 1990, CHAPTER F.29

Definitions - Sec 1

1. In this Act,

"conveyance" includes gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property by writing or otherwise; ("cession")

"personal property" includes goods, chattels, effects, bills, bonds, notes and securities, and shares, dividends, premiums and bonuses in a bank, company or corporation, and any interest therein; ("biens meubles")

"real property" includes lands, tenements, hereditaments and any estate or interest therein. ("biens immeubles") R.S.O. 1990, c. F.29, s. 1.

Where conveyances void as against creditors - Sec 2

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. R.S.O. 1990, c. F.29, s. 2.

Abakhan & Associates Inc. v. Braydon Investments Ltd., 2009 BCCA 521 (CanLII) - No Need for Dishonest Intent to Defraud Creditors

Date:	2009-11-24
Docket:	CA036607
URL:	http://canlii.ca/t/26s3n
Citation:	Abakhan & Associates Inc. v. Braydon Investments Ltd., 2009 BCCA 521 (CanLII), <http://canlii.ca/t/26s3n> retrieved on 2013-08-22
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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Abakhan & Associates Inc. v. Braydon Investments Ltd.,*** 2009 BCCA 521

Date: 20091124

Docket: CA036607

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Between:
Abakhan & Associates Inc., the trustee of the estate of Botham Holdings Ltd., a bankrupt
Respondent
(Plaintiff)
And
Braydon Investments Ltd.
Appellant
(Defendant)

Corrected Judgment: The text of the judgment was corrected at para 39, page 11 on February 2, 2010.

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Groberman
On appeal from: Supreme Court of British Columbia, November 14, 2008
(*Abakhan & Associates Inc. v. Braydon Investments Ltd.*, S077051)
Counsel for the Appellant: G.K. Macintosh, Q.C., S. Hern

Counsel for the Respondent: R.A. Millar, L. Sulek

Place and Date of Hearing: Vancouver, British Columbia
September 24, 2009
Place and Date of Judgment: Vancouver, British Columbia
November 24, 2009

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Groberman
Reasons for Judgment of the Honourable Chief Justice Finch:
I. Introduction
[1] Braydon Investments Ltd. ("Braydon") appeals from the order of the Supreme Court of British Columbia pronounced 14 November 2008, holding the transfer of assets from Botham Holdings Ltd. ("BHL") to Braydon, pursuant to an agreement made 31 October 2005, to be void and of no effect as against the plaintiff Abakhan, the trustee in bankruptcy of BHL.
[2] Following a trial on affidavit evidence under Rule 18A, the learned summary trial judge held that one purpose of the asset transfer was to put BHL's assets out of reach of its creditors, and the transfer was therefore a fraudulent conveyance within the meaning of the *Fraudulent Conveyance Act*, 1996, R.S.B.C. c.163. The trial judge held this to be so, despite the fact that BHL's and Braydon's principal, William Botham, had no dishonest intent, or *mala fides*, and acted on professional advice to effect legitimate business purposes.
[3] I respectfully agree with the conclusion of the learned summary trial judge, and would dismiss the defendant's appeal.
II. Facts
[4] The background leading to the asset transfer of 31 October 2005 was described by the learned trial judge this way:
[3] Mr. William Botham was the directing mind of BHL. That company had been incorporated many years earlier and had accumulated substantial worth such that its equity in real property was worth approximately $20 million at the time of the Transaction. The shareholders in BHL were Mr. Botham and the Botham Grandchildren's Trust (the "Family Trust"), although that changed after the Transaction to include Braydon.
[4] Mr. Botham was also the directing mind of Braydon. Braydon was incorporated on October 25, 2005. The shareholders of Braydon were Mr. Botham and the Family Trust.

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[5] In 2004, BHL sold a substantial real estate asset at a profit. BHL therefore paid a large amount of capital gains tax.

[6] In 2005, Mr. Botham was looking for an opportunity to invest the funds realized by BHL's sale of its real estate asset. He had discussions with a friend, Jordan Welsh, who had had many years' experience in the car leasing business. He encouraged Mr. Botham to invest in a new business, involving the selling and leasing of motor vehicles.

[7] Mr. Welsh proposed that they form a new business called "JW Auto Group" and acquire a portfolio of leased vehicles from a failed business, Totem Ford.

[8] The proposed investment would have the tax benefit of generating capital cost allowance claims. This would enable BHL to obtain refunds of capital gains tax which it had previously paid.

[9] However, BHL could only claim this tax benefit if it became a general partner in the new business, and only if the new business were its major source of revenue.

[10] As a general partner of JW Auto Group, however, BHL would be responsible for any debts incurred by the partnership. But BHL had substantial assets which far exceeded what Mr. Botham wished to invest in the new venture.

[5] William Botham was advised that he could both protect BHL's assets from creditors' claims, and qualify for the tax benefits of capital cost allowance claims by transferring BHL's assets to a new corporation, Braydon, and using BHL to invest as a general partner in JW Auto.

[6] The mechanisms for achieving these ends were complicated, and are reviewed in the trial judge's reasons at paras. 17-27. An intermediary company, Silverspoon Developments Limited (SSDL) was used in the transaction. The trial judge said the transaction was summarized by BHL and William Botham's solicitor as follows:

1. Bill Botham and a family trust sold to Braydon preferred shares of Botham Holdings Ltd., having a redemption value, in total, of $18,700,000. The redemption values track the fair market value of the real estate owned by BHL. Thus, at this step in the reorganization, Braydon owned preferred shares of BHL, having a redemption value of approximately $18,700,000.

2. BHL sold its real estate to Braydon for consideration which included assumption of debt owing to third parties of approximately $4,300,000, and a promissory note of approximately $12,100,000, plus preferred shares having a redemption value of approximately $6,900,000; at this point, BHL had virtually no debt, had a promissory note in the amount of $12,160,000 from Braydon and preferred shares having an aggregate redemption value of $6,900,000.

3. The preferred shares of Braydon owned by BHL were redeemed for a promissory note of approximately $6,900,000.

4. The preferred shares of BHL owned by Braydon were then redeemed and a promissory note for approximately $18,000,000 was issued by BHL in favour of Braydon, representing the redemption proceeds.

5. The promissory notes were then cancelled off against each other.

6. In the end result, Braydon owed approximately $350,000 to BHL as the promissory notes differed by that amount; Braydon and Silverspoon used their rights of offset to cancel that note against the amounts to Silverspoon owing by BHL as a partner of JW Auto Group.

[7] The effect of the transaction was described as follows:

On October 31, 2005, two months after the Partnership [JW Auto] had been formed and commenced operations, BHL and Braydon completed the BHL-Braydon Transaction. While the BHL-Braydon Transaction is complicated in its structure, and required a substantial number of transitional documents, its effect was to transfer all of BHL's assets to Braydon, without triggering capital gains tax on the disposition, and leaving BHL with effectively no assets except for BHL's interest in the Partnership, which...had a nominal or negative value.

[8] The trial judge recorded:

[30] At the time of the transaction, October 31, 2005, BHL did have several creditors. Its indebtedness to AIG exceeded $4 million. It owed SSDL $5.2 million. It was the guarantor of indebtedness to the Bank of Montreal of $2.1 million.

[31] Ultimately, BHL's investment in JW Auto Group was a failure. Within seven months, as of May 31, 2006, the partnership had operating losses of more than $5 million. By May 2007, both the partnership and BHL were assigned into bankruptcy. Creditors' claims currently exceed $20 million.

[9] William Botham admitted on his examination for discovery at Q. 333 that:

Q. ... The purpose and intent and effect of the transaction was to make sure that the assets of BHL were removed from BHL so that creditors of JW Auto couldn't have access to them to satisfy their claim?

A. That's what I understood.

[10] However, the plaintiff conceded that William Botham had no "dishonest intent" or any intent to "defraud" creditors. And in addition to his wish to protect his and his family's assets, William Botham also testified that the asset

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transfer was done in order to take advantage of the tax free rollover available under s. 85 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1.

[11] The trial judge concluded that the asset transfer was a fraudulent conveyance. He said:

[77] Based on the foregoing, I find that BHL did engage in a fraudulent conveyance, despite Mr. Botham's lack of dishonest intent. A transaction which is the result of an honest intent to defeat one's creditors is precisely one of the situations caught by the *Fraudulent Conveyance Act*.

[78] I have also considered the defendant's argument that the plaintiff's position, if accepted, would place judge-made restrictions on a taxpayer's right to avail him or herself of s. 85 tax-free rollovers under the *Income Tax Act* and on the right of a corporation to redeem shares under ss. 77 and 79 of the *Business Corporations Act*.

[79] I disagree. These statutory provisions do not provide a license to engage in transactions which are counter to the *Fraudulent Conveyance Act*. ...

[12] The judge held that the defendant had no defence under s. 2 of the *Act*:

[80] There are three parts to this defence. It requires that the disposition be made (1) for good consideration, (2) in good faith, and (3) to a person who had no notice or knowledge of the fraud. The defence does not apply in the case at bar. I find that there was no good consideration which passed from Braydon to BHL for the assets. At the end of the Transaction, BHL was left with virtually no assets while Braydon had obtained $19 million in assets. The Transaction was clearly not in good faith based on the direct evidence of Mr. Botham's intent with regards to BHL's assets. Finally, given that Mr. Botham was the directing mind of both Braydon and BHL, it cannot be said that the transferee had no notice or knowledge of the fraud.

[13] He accordingly concluded that the transaction was void and of no effect.

III.

[14] The issue on this appeal is whether the learned summary trial judge erred in setting aside the 31 October 2005 transaction as a fraudulent conveyance. More precisely, the question may be framed as whether a transfer of property made with a view to protecting assets from creditors, present or future, if made honestly, without moral blameworthiness, and for other legitimate business purposes, is prohibited by the *Fraudulent Conveyance Act*.

IV. The Parties' Positions

A. The Appellant Braydon

[15] Braydon says the learned trial judge erred both in fact and law in holding the transfer of assets from BHL to Braydon to be a fraudulent conveyance.

[16] The appellant says the legal error was in interpreting s. 1 of the *Fraudulent Conveyance Act* as requiring only an intent in the transferor to put assets out of the reach of creditors. The appellant says that a fraudulent or dishonest intent must be proven. The appellant points to the language of s. 1 in the *Act* which renders void a disposition made to "delay, hinder or defraud" creditors "by collusion, guile, malice or fraud".

[17] The appellant says the section has been interpreted, correctly, to mean that there must be "*mala fides*" in the intent of the transaction: See *Westinghouse Canada Limited v. Caldwell* (1979), 31 C.B.R. (N.S.) 276 (B.C.S.C.) at p. 282; *First Royal Enterprises Ltd. v. Armadillo's Restaurant Ltd.* 1995 CanLII 605 (BC CA), (1995), 15 B.C.L.R. (3d) 254 (C.A.) at paras. 23, 35 and 36; and *Mandryk v. Merko* (1971), 19 D.L.R. (3d) 238 (Man. C.A.) at pp. 241-242. Here the appellant says the trial judge erred in holding that an "honest intent to defeat ones creditors" was, as a matter of law, an intent sufficient to meet the requirements of s. 1.

[18] The appellant also says the trial judge erred in fact in finding that the plaintiff had proven the intent proscribed by s. 1. The appellant says that on the whole of the evidence William Botham's intent was an honest and prudent one, to take advantage of the tax benefits provided by the "rollover" plan devised by his professional advisors. The appellant says that by focusing on William Botham's answers on his examinations for discovery to questions 395 and 396 where he agreed that the "whole motivation" behind the transfer was to "ensure that creditors wouldn't get the assets of the estate", the trial judge ignored or failed to give effect to the whole of the evidence which showed Mr. Botham's "innocent and reasonable intentions in engaging in the rollover".

[19] As expressed in the appellant's factum: "... the plan was to empty an old company of its assets unrelated to auto leasing, and use the old company for the partnership rather than incorporate a new one, because using the old company allowed for a tax benefit".

[20] The appellant says that if a new company controlled by Mr. Botham had been incorporated and used as the general partner there would be no question of a fraudulent conveyance. They say that is so because, first, there would have been no conveyance and, secondly, there could be nothing fraudulent in engaging in a partnership by way of a private, limited liability company. By extension, this argument appears to be that effecting the same intention by way of a conveyance cannot, therefore, be considered fraudulent. The appellant contends that what was done in this case is no

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different and no more "fraudulent" than what has routinely been done by persons seeking to limit personal liability by incorporation. (citing C.R.B. Dunlop, *Creditor-Debtor Law in Canada,* looseleaf, Toronto (Carswell, 1995, 2nd ed.) at 592.

[21] The appellant distinguishes the facts of this case from others where a fraudulent intent has been found because at the time of the asset transfer no creditor had an outstanding demand against BHL that it could not satisfy. Neither BHL nor JW Auto were under any financial pressure from which a fraudulent intent could be inferred. The appellant says the transfer of assets in the rollover was not "voluntary" but was rather for "valuable" consideration, and that while the "nature" of BHL's assets changed as a result of the transfer, its net financial position did not.

[22] The appellant submits that no creditors of JW Auto relied on the asset holdings of BHL in deciding to advance credit to JW Auto and that no creditors of BHL were prejudiced by the asset transfer. The appellant further contends that its asset transfer to Braydon following redemption of Braydon's preferred shares was a *bona fide* payment to a creditor.

[23] The appellant therefore contends that, in any event, its conduct falls within the defence to an allegation of a fraudulent conveyance afforded by s. 2 of the *Act*, in that the transfer was for good consideration, made in good faith, and made to a person (William Botham was the directing mind of Braydon as well as BHL) who had no notice or knowledge of any collusion or fraud.

B. The Respondent's Position

[24] On the question of how to construe s. 1 of the *Fraudulent Conveyance Act*, counsel for the respondent says the words "collusion, guile, malice or fraud" add little or nothing to the meaning of the section. The respondent says the only intent necessary to contravene the section is the intent to put assets out of the reach of one's creditors. If there is an intent to delay or hinder a creditor's rights, the transfer is void as against the creditor. The respondent says that even if the transferor has other legitimate intentions, so long as one intent is to put assets out of a creditor's reach, that is sufficient to void the disposition. So the respondent says despite the fact that BHL (through William Botham) intended to obtain a tax advantage from the deal, the transfer is nonetheless a contravention of s. 1 if its intent and effect is to defeat creditors' claims.

[25] The respondent says the meaning attributed by the trial judge to the words of s. 1 is consistent with a long line of cases, both in British Columbia and elsewhere. Counsel says there was no legal error in the judge's interpretation of s. 1.

[26] As to whether the appellant had an intention prohibited by s. 1, the respondent says that is a question of fact on which this Court should defer to the judge's findings unless the appellant establishes a palpable and overriding error. Here the respondent says there was ample evidence, including the admissions of William Botham himself, on which the proscribed intent could be found.

[27] The effect of the transfer was to place all of BHL's real estate assets in the hands of Braydon. BHL was left with the preferred shares it acquired as consideration for the real estate transfer. And in addition, BHL was left with the debts it owed previously to CFI, Shamrock and the Bank of Montreal, as well as its indebtedness to SSDL as a result of the transaction. BHL also became liable, as a general partner, to all of JW Auto's creditors.

[28] The respondent says it is no answer for the appellant to say that no creditor was pressing for payment at the time of the transfer, and that it is wrong to say that no creditor was prejudiced by the transfer. The fact is that the real assets were put out of reach of BHL's creditors, and that they were prejudiced because it was far more difficult to execute against the preferred shares than it would have been to execute against the real estate.

[29] The respondent concedes that it would have been perfectly lawful for BHL to limit its liability by incorporating a new company to invest in JW Auto. But, the respondent points out, that is what BHL explicitly decided not to do because of its desire to obtain both limited liability and tax advantages.

[30] The respondent says that the defence available to transferors under s. 2 of the *Fraudulent Conveyance Act* is not available to the appellant on the facts of this case. To say, as the appellant suggests, that the transfer to Braydon was payment to an existing creditor, has no air of reality. Braydon was created for the sole purpose of receiving BHL's assets. The consideration for the transfer, even if "good consideration", was by no means of the same nature or quality as the assets Braydon received. In the result, Braydon ultimately paid nothing and BHL was left with nothing of value.

[31] In any event, the respondent says the transfer could not be said to be in good faith because the controlling mind of both BHL and Braydon was William Botham, and his intent to defeat BHL's creditors must also be attributed to Braydon. And for the same reason, Braydon is fixed with notice of BHL's improper intent (see *Chan v. Stanwood*).

[32] The respondent says that neither legitimate business goals, nor tax or estate planning advantages can excuse a fraudulent conveyance. That is especially so here where the only "estate planning" achieved by the transaction was to protect BHL's assets from its creditors.

V. The Provisions of the Statute

[33] The *Fraudulent Conveyance Act*, R.S.B.C. 1996, c.163, provides, in full:

Fraudulent conveyance to avoid debt or duty of others

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1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies
(a) a disposition of property, by writing or otherwise,
(b) a bond,
(c) a proceeding, or
(d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

Application of Act

2 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[Emphasis added.]

VI. Analysis

[34] The defendant points to the words in s. 1, "... by collusion, guile, malice or fraud ..." as showing a clear legislative requirement for a morally blameworthy intent, or *mala fides*, on the part of the transferor in order to constitute the conduct proscribed by the *Act*.

[35] Here, the plaintiff conceded and the trial judge found that William Botham had no "dishonest intent". The question, then, is whether the mere intent to delay or hinder creditors is sufficient or whether *mala fides* must be established under s. 1 of the *Act*.

A. Legislative History

[36] It is generally acknowledged that the fraudulent conveyance statutes enacted in British Columbia have their roots in the *Statute of Elizabeth*, 1571 (13 Eliz. 1), c.5. In a feasibility study written for the Uniform Law Conference of Canada, Civil Law Section (August, 2004), Professor C.R.B. Dunlop wrote:

[6] English law on fraudulent conveyances dates back to the Middle Ages, but the first comprehensive attempt at prohibition may be the *Fraudulent Conveyance Act, 1571,* usually referred to as the Statute of Elizabeth. The Statute sought to avoid "feigned, covinous and fraudulent" transfers of land and personalty entered into with the intent to "delay, hinder or defraud creditors and others" of their just and lawful claims. S. 2 provided that such conveyances should be "clearly and utterly void, frustrate and of no effect" as against "creditors and others" whose claims might be delayed by such conveyances. S. 6 contained the important proviso that the Act did not extend to a conveyance for "good consideration" entered into bona fide and without notice of the fraud. The Statute of Elizabeth on its face created a criminal offence, but the courts quickly saw its potential as the foundation for a civil action to avoid fraudulent conveyances of exigible property by debtors. Since 1571, the courts have been active in creating a large and complex body of law which purports to interpret the Statute but which in reality constructs a new right in "creditors and others" to challenge and avoid fraudulent conveyances.

[37] The *Statute of Elizabeth* was, in Dunlop's view, "... intended primarily to create a crime, not a civil cause of action" (at para. 36).

[38] The first *Fraudulent Conveyance Act* in British Columbia was enacted in 1897 (R.S.B.C. 1897, c. 86). It adopted the language of the *Statute of Elizabeth,* including the words "contrived of malice, fraud, covin, collusion or guile". The original B.C. statute also included, in s. 3, the penal provision of the *Statute of Elizabeth*, imposing penalties and forfeitures for the fraud, including imprisonment.

[39] The penal provision remained in the British Columbia statute through successive amendments and re-enactments until it was formally repealed by the Legislature in 1987 (*Miscellaneous Statute Amendment (No.2) Act,* S.B.C. 1987, c. 43).

[40] The penal provision of the 1960 *Act* was contained in s. 3, which concluded with the words:

... and also, being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprize.

[41] In 1965, the constitutionality of this legislation was challenged. In *Allison & Burnham Concrete Ltd. v. Mountain View Construction Ltd. et al*, 54 D.L.R. (2d) 67 (B.C.S.C.); [1965] B.C.J. No. 157, Mr. Justice Ruttan said:

14 Section 3 then imposes penalties and forfeitures for the fraud and concludes with these words: "... and also, being thereof lawfully convicted, shall suffer imprisonment for one-half year without bail or mainprize."

15 There is no doubt that the portion just quoted from s. 3 of the Act is beyond the jurisdiction of a Provincial Legislature. It refers to a criminal process resulting in a term of imprisonment and as such is entirely within the jurisdiction of the Federal Government in criminal law. In *R. v. Smith* (1852), 6 Cox C.C. 31 at p. 37, Maule, J., had this to say about the identical words as they appear in the English statute:

It surely could never be contended that the meaning of the statute is, that when such a court has given judgment for the damages, it should proceed to award to the defendant the punishment of imprisonment for half a year. The humanity of

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our law has established a clear distinction between civil and criminal proceedings, and this act of Parliament cannot be supposed to sanction so anomalous a course as that. It is obvious that by some means or another, imprisonment is to be awarded after a proper conviction before a recognised tribunal. How then can that be done, otherwise than by indictment?

16 This section, of course, would never be invoked in criminal prosecutions for the same subject-matter is covered in the *Criminal Code* of Canada. But I do not agree with counsel for the defendant that because the statute has ventured to legislate in part in the field of criminal law the whole statute is therefore "in pith and substance" to be deemed a criminal one and therefore *ultra vires in toto*. Mr. Vogel cites the Alberta decision of *Connors v. Egli*, reflex, [1924] 2 D.L.R. 59, 20 A.L.R. 205, [1924] 1 W.W.R. 1050, where it was held by the Alberta Court of Appeal that s. 3 of the statute is criminal law and the ground having been occupied by the *Criminal Code* of Canada, is not now in force in the Province of Alberta.

[42] Ruttan J. concluded that while the imprisonment portion of s. 3 was "clearly within the scope of criminal law and invalid in a provincial statute, the remainder of s. 3 is clearly a matter of civil suit and therefore *intra vires* the Provincial Legislature." (at para. 18, citations omitted).

[43] Despite this declaration of invalidity, the British Columbia statute retained a penal provision in the 1979 revision. Section 3 of the *Fraudulent Conveyance Act*, R.S.B.C. 1979, c.142 provided:

A fraudulent disposition under this Act is an offence punishable on conviction by 6 months imprisonment.

[44] Finally, in 1987 the Provincial Legislature repealed ss. 2 and 3 of the *Fraudulent Conveyance Act*, R.S.B.C. 1987, c.43.

[45] The repeal of ss. 2 and 3 of the *Act* left remaining s. 1 and what had been s. 4. They now appear as ss. 1 and 2 of the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c.163, quoted in full above at para. 34.

[46] As is evident, the words in s. 1 "... by collusion, guile, malice or fraud ..." remain in the *Act* to the present time.

B. Case Law

[47] The appellant relies heavily on two British Columbia decisions as support for its submission that a dishonest or quasi-criminal intent in the transferor is required before a conveyance may be set aside under s. 1.

[48] In *Westinghouse Canada Limited v. Caldwell*, *Hickman* (1979), 31 C.B.R. (N.S.) 276 (B.C.S.C); [1979] B.C.J. No. 604, Taylor J., applying the provisions of the 1960 version of the *Act* said at p. 282:

> ... A careful reading of the legislation as a whole discloses an intention to visit with criminal as well as civil consequences transfers of property which have been contrived so as to "delay, hinder or defraud" creditors and "other persons". It not only declares such conveyances void as against persons thereby "disturbed, hindered, delayed or defrauded" but condemns the parties responsible for such transactions to six months imprisonment and also to substantial monetary penalties. Thus the conduct at which the statute is aimed is conduct deserving of criminal sanction. It deals, albeit somewhat more broadly, with the offence now described in s. 350 of the Criminal Code, R.S.C. 1970, c. C-34, which carries a maximum sentence of two years' imprisonment.
>
> Insofar as it forms a valid part of the law of British Columbia, the Fraudulent Conveyances Act may be regarded as providing a civil remedy to those persons who have been the victims of conduct of a criminal, or at least quasi-criminal, character designed to defeat creditors. There must, it seems, be mala fides in the intent of the transaction.

[Emphasis added.]

[49] The underlined paragraph was quoted, with apparent approval, by this Court in *First Royal Enterprises Ltd. v. Armadillo's Restaurant Ltd.* 1995 CanLII 605 (BC CA), (1995), 15 B.C.L.R. (3d) 254 (C.A.) at para. 23.

[50] I would make the following observations about these two judgments. In *Westinghouse*, the learned judge concluded that the *Act* was aimed at providing a remedy for victims of conduct that was criminal or quasi-criminal in nature and that "*mala fides* in the intent" was, therefore, a necessary element. This conclusion is clearly based on the presence of the penal provision which formed part of the 1960 statute that he was applying.

[51] It does not appear that the decision of Mr. Justice Ruttan in *Allison & Burnham Concrete Ltd.* was drawn to the attention of the Court in *Westinghouse*. If the learned judge there had had his mind directed to the earlier judgment, and to Ruttan J.'s declaration that the imprisonment portion of s. 3 was *ultra vires* the province, he could not have relied on it to support his reasoning.

[52] Similarly, in *First Royal Enterprises*, the Court was apparently not made aware of the judgment in *Allison & Burnham Concrete Ltd.* The Court there was applying the 1979 version of the *Fraudulent Conveyance Act* which retained the imprisonment provision in s. 3. There is no indication in the judgment that the imprisonment portion of s. 3 had been declared *ultra vires* in 1965.

[53] I am therefore of the view that neither *Westinghouse* nor *First Royal Enterprises* can be considered as sound authority for the proposition that a dishonest intent, or *mala fides*, is necessary to the application of s. 1 of the *Act*. In any event, with the repeal of s. 3 in 1987, such authority would no longer be applicable to the modern *Act*.

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[54] Counsel for the appellant referred to *Havel v. Galemar Holdings Ltd. and Fabbro* (1981), 36 O.R. (2d) 348 (H.C.J.), but I do not read that case as authority for the proposition that anything more than an intent to defeat creditors is required in order to render a transfer void under the equivalent Ontario statute.

[55] Counsel for the appellant also relied extensively on *Mandryk v. Merko* (1971), 19 D.L.R. (3d) 238 (Man. C.A.). As I understand the judgment in *Mandryk*, the Court held that the intent required to render a transfer void was the intent to defeat creditors; that such an intent could be inferred from evidence of the transaction and other circumstances; that the direct evidence of the transferor must be considered; and that any inference or "presumption" to be drawn from the effect of the transfer was not conclusive.

[56] I do not read *Mandryk* as holding that a subjectively dishonest or fraudulent state of mind in the transferor is required to render the transfer void. In simple terms, the action in *Mandryk* failed because the plaintiff failed to prove, as a matter of fact, the transferor's intent to delay, defeat or hinder his creditors.

[57] In considering what meaning, if any, is to be given to the words "by collusion, guile, malice or fraud" in s. 1, it is instructive to consider the substantial body of authority holding it unnecessary to establish *mala fides* on the part of the transferor to commit fraud. The focus in the case law has been on the provision of a civil remedy for creditors disadvantaged by the conduct of their debtors.

[58] In *Freeman v. Pope* (1870), L.R. 5 Ch App 538, Lord Hatherley stated at pg. 540 that the principle on which the *Fraudulent Conveyance Act* is based is "that persons must be just before they are generous, and that debts must be paid before gifts can be made". As a result, if the necessary effect of a conveyance was to defeat, hinder or delay the creditors, that necessary effect was to be considered as showing an intention to do so. Such intention was sufficient to establish a fraudulent conveyance.

[59] *Freeman* was applied in *Mackay v. Douglas* (1872) L.R. 14 E.Q. 106, where Vice-Chancellor Malins said at p. 120:

... It is not at all necessary to shew that a man had any fraudulent intent in making a settlement as the law is now settled. ... The statute speaks of cases where the creditors "are, shall, or might be in any wise disturbed, hindered, delayed, or defrauded," and it is not necessary to shew an intention to do that, because if the settlement must have that effect the Court presumes the intention and will attribute it to the settlor. ... So I dare say that Mr. *Douglas* had no fraudulent intention, according to his view, in making the settlement, and that he thought it a prudent thing to protect his wife and children. But in doing that he has, within the meaning of this statute, committed a fraudulent act, because, going into trade, he was taking away the only property which would be available for his creditors.

[60] In this Province, there are several cases articulating the intent required by s. 1 to render a disposition void. In *Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.* 1995 CanLII 740 (BC SC), (1995), 34 C.B.R. (3d) 241, 1995 CanLII 740 (B.C.S.C.), Madam Justice Baker said:

25 In essence, a fraudulent conveyance is a transfer of an interest in property which is made with the intention, and which has the effect, of hindering or impairing the right of a creditor or other person to satisfy a claim against the transferor. It is not necessary for the person seeking relief to show that the transferor was insolvent at the time the transfer was made, and the applicant need not establish that he or she was a creditor, or an unsecured creditor, at the time the transfer was made: *Re Skinner* (1960), 27 D.L.R. (2d) 74 (B.C.S.C.).

26 All that the applicant must show is that the transferor, in making the gift or transfer, did so with intent to delay, hinder or defraud creditors or others: *Canadian Imperial Bank of Commerce v. Ash* (1964), 47 D.L.R. (2d) 620 (B.C.S.C.); *Canadian Imperial Bank of Commerce v. Boukalis* 1987 CanLII 2694 (BC CA), (1987), 11 B.C.L.R. (2d) 190 (C.A.).

[61] In *Jaston & Co. v. McCarthy* 1996 CanLII 2982 (BC SC), (1996), 41 C.B.R. (3d) 212, 1996 CanLII 2982 (B.C.S.C.), Mr. Justice K. Smith said much the same thing:

85 The plaintiffs' case on this claim is made out on the testimony of Mr. and Mrs. McCarthy. Each testified that their intention was to distance the shares in McCarthy Realty (72) Ltd. and Dev-Gro Holdings Ltd. from potential claims by clients of Mr. McCarthy's notary practice. That intention resulted, they say, from advice they received at a notaries' convention to shelter their assets from such claims because of a reduction in the limit of third party liability insurance available to notaries. Thus, the transfer of these shares was not *bona fide* but was made for the purpose of avoiding future claims of creditors.

86 It is sufficient to fix the defendants with liability if they foresaw potential creditors who might be defeated by the conveyance: *Newlands Sawmills Ltd. v. Bateman*, 31 B.C.R. 351, reflex, [1922] 3 W.W.R. 649, 70 D.L.R. 165 (C.A.), appl'd *Canadian Imperial Bank of Commerce v. Boukalis* 1987 CanLII 2694 (BC CA), (1987), 11 B.C.L.R. (2d) 190 (C.A.), at p. 196; *Bank of Montreal v. Kelliher* (1980), 36 C.B.R.) (N.S.) 205 (B.C.S.C.) at p. 210. On their own evidence they foresaw such creditors here.

[Emphasis added.]

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[62] In *Sykes (Re)* 1998 CanLII 4597 (BC CA), (1998), 156 D.L.R. (4th) 105, 48 B.C.L.R. (3d) 169 (C.A.), McEachern C.J.B.C. cited the remarks of Mr. Justice Gonthier in *Royal Bank of Canada v. North American Life Assurance Co.*, 1996 CanLII 219 (SCC), [1996] 1 S.C.R. 325 at 365, as follows:

However, the other provincial statutes all refer to some sort of "conveyance" or "disposition "of "property" with the "intent to defeat" creditors' claims. All the provincial fraud provisions are clearly remedial in nature, and *their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors*. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects as required by provincial statutory interpretation legislation ... I agree with the following observation by Professor Dunlop in Creditor-Debtor Law in Canada (2nd ed. 1995), at p. 598, that the purpose of fraudulent conveyance legislation:

... is to strike down all conveyances of property made with the intention of delaying, hindering or defrauding creditors and others except for conveyances made for good consideration and bona fide to persons not having notice of such fraud. The legislation is couched in very general terms and should be interpreted liberally. [Emphasis added by Gonthier J.]

[Italic emphasis added by this Court.]

[63] In *Chan v. Stanwood*, 2002 BCCA 474 (CanLII), 2002 BCCA 474, 6 B.C.L.R. (4th) 273, Madam Justice Newbury, giving the judgment of this Court, noted the differences in the intent required between cases where consideration for a transfer was inadequate or nominal, and those where "valuable" consideration had passed. She said:

20 The Commission's report also stated, however, that the significance of consideration lies both in its relation to the *intention* behind the transaction and in relation to its effect. Where the consideration is inadequate or nominal, a creditor need only show that the *Transferor* intended to delay, hinder or defraud the creditor of his remedies. Where on the other hand valuable consideration has passed, the creditor must also show that the *transferee* actively participated in the fraud. As stated by this court in *Meeker Cedar Products Ltd. v. Edge* (1968), 68 D.L.R. (2d) 294 (B.C.C.A.) (aff'd at (1968), 1 D.L.R. (3d) 240 (S.C.C.)):

... it is clear as a matter of interpretation of the statute as a whole and upon authority that where a sale is made for good and valuable consideration the transaction will not be void by reason of the purchaser's having notice of knowledge of the vendor's intent to delay, hinder or defraud creditors and others unless it be proved that the purchase was actually privy to the fraud, *i.e.*, a party to carrying out the fraudulent intention and purpose. [at 299; emphasis added.]

21 Where valuable consideration has passed, then, the focus is not on the sufficiency of that consideration but on the intentions of both parties to the transaction. The trial judge rightly stated at para. 36 of her Reasons that in this case, the intention of the holding companies must be taken to have been the intention of the Stanwoods. Further, she found it was clear on the evidence that the Stanwoods had intended to delay and defeat their creditors by exchanging their exigible assets for shares which were "not effectively exigible".

22 I agree with these conclusions. ... Although exigible in theory, the various restrictions and obstacles placed in the way of any 'unfriendly' holder meant that in fact they were not worth executing against. The exchange of exigible assets for the Preferred shares delayed, hindered or defrauded the Chans – and did so by design. This "design" or "purpose" constitutes the "fraudulent intent" required by the *Act* ...

[64] Most recently, in *Royal Bank of Canada v. Clarke*, 2009 BCSC 481 (CanLII), 2009 BCSC 481, Madam Justice Griffin said:

[21] I am bound by the authorities that have clearly held that it is unnecessary to show any dishonest intention, other than the intention to move the property out of reach of potential creditors, for the *Act* to apply: *Jaston & Co. v. McCarthy* 1996 CanLII 2982 (BC SC), (1996), 41 C.B.R. (3d) 212 (B.C.S.C.) as cited in *Abakhan* at para. 75.

[65] In my respectful opinion, a review of the case law amply demonstrates that a dishonest intent, or *mala fides*, is not necessary to avoid a transaction under s. 1 of the *Act*.

C. Principles of Statutory Interpretation

[66] The guiding principle of statutory interpretation is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), 2002 SCC 42 at para. 26.

[67] Mr. Justice Gonthier in *Royal Bank of Canada v. North American Life Assurance Co.* (*supra*) said that the fraud provisions in provincial statutes "are clearly remedial in nature". The cases reviewed above support the remedial purpose of the legislation. They have essentially ignored the words "by collusion, guile, malice or fraud".

[68] In Springman, M.A. et al, *Fraudulent Conveyances And Preferences,* looseleaf, Toronto (Carswell, 2009), the learned author comments on the inclusion of the words "by collusion, guile, malice or fraud" in s. 1 of the B.C. Statute. The learned author says:

Furthermore, the addition of the concepts of "collusion, guile, malice or fraud," arguably as a way of adding some flesh to the earlier description of the transferor's intent, is also interesting. But would the addition of these concepts mean

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that a disposition, etc. with the intent "to delay, hinder or defraud," but somehow not animated by "collusion, guile, malice or fraud", would be immune from impeachment under the Act? And if the response is that, in the very nature of things, the transferor could never have the intent "to delay, hinder or defraud" without "collusion, guile, malice or fraud" being involved, then what is the value of the latter words? Perhaps there are simply too many words used to describe the legislators' more simple purpose here. At the very least, s.1 would seem to leave itself open to a host of possible arid arguments. [Footnote 23 at 1-13 to 1-14]

[69] In the period when dispositions under the *Act* attracted penal consequences, it was at least arguable that a dishonest intention in the transferor was a necessary element of the prohibited transaction.

[70] However, for many years, and certainly since the repeal of the penal provisions in 1987, the purpose and scheme of the B.C. *Fraudulent Conveyance Act* has been to provide a civil remedy to creditors. Its purpose is to protect creditors where property dispositions by debtors "... were effected for the purpose of defeating the legitimate claims of creditors" per *Sykes* (*supra*). As a result, the words "by collusion, guile, malice or fraud" no longer perform a meaningful function in the text.

[71] Thus, as stated in *Sullivan on the Construction of* Statutes, 5th ed. (Markham: LexisNexis, 2008) at pp. 178-179, in circumstances where:

... courts encounter words in a legislative text for which no satisfactory interpretation can be offered ... courts may strike out the offending language if the text makes sense without it. ... In effect, the court must conclude that the words to be struck perform no meaningful function in the text, contrary to the presumption against tautology; their presence is simply a mistake.

[72] The *Act* not only makes sense after removal of these words, but accords with the modern purpose and scheme of the *Act*. Therefore, the words "by collusion, guile, malice or fraud" should be struck.

[73] The only intent now necessary to avoid a transaction under the modern version of the *Act* is the intent to "put one's assets out of the reach of one's creditors" (per *RBC v. Clarke*). No further dishonest or morally blameworthy intent is required.

D. Proof of Intent

[74] Intent is a state of mind and a question of fact.

[75] For example, in *Mackay v. Douglas* (*supra*), Malins, V.C. said (at p. 120) that where a disposition had the effect of hindering or delaying or defeating creditors, "the Court presumes the intention and will attribute it to the settlor". That was held to be sufficient proof of the intent even though Mr. Douglas apparently gave evidence and "had no fraudulent intention". Mr. Douglas thought he had made a settlement of property as "a prudent thing to protect his wife and children" (p. 120). Despite this, it was held to be a fraudulent conveyance.

[76] In *Ocean Construction* (*supra*), Baker J. said this about proof of fraudulent intent:

27 Fraudulent intent is essentially a matter of fact to be proved in the circumstances of each particular case. Proof that the transferor intended to defeat or delay its creditors usually involves drawing inferences from the circumstances surrounding the transaction. Where some consideration has flowed from the transferee to the transferor, the court may consider the adequacy of the consideration in relation to the issue of intent, since a transfer at an undervalue raises suspicions about motive. Inadequate consideration may be considered to be a badge of fraud.

[77] In that case, the controlling mind of the defendant company, Mr. Lee, gave evidence as to the debtor's solvency, which the court did not accept (para. 37). The transfer was held to be void based on the inference drawn from the transfer itself and other circumstances (para. 39) despite Mr. Lee's evidence to the contrary.

[78] In *Jaston v. MCarthy* (*supra*) the defendants testified that their intention to protect assets was based on advice concerning potential risks arising from reduced insurance coverage (para. 85). The Supreme Court of British Columbia held that the defendants contravened the prohibition in s. 1 because they foresaw that potential creditors might be defeated by the impugned conveyance.

[79] In *Chan v. Stanwood* (*supra*) the intent to delay or defeat creditors was inferred at trial from evidence that "exigible assets" were exchanged "for shares" which were "not effectively exigible". The defendants' intent to put assets beyond the reach of their creditors was inferred from the effect of the transaction, and despite the fact that the defendants acted on professional advice.

[80] In many of the cases cited there is no direct evidence of the grantor's intent. Intent could only be proven by drawing an inference from the grantor's conduct, the effect of the transfer or other circumstances. However, in some cases where the grantor has given evidence, there may be direct evidence of his intent and the question of proof then turns on the weight or credit given to the direct evidence, viewed in light of the other circumstances and the inferences to be drawn.

VII. Application of the Law to the Facts of This Case

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[81] Having established that the intent to delay or hinder creditors is sufficient under s. 1 of the *Act,* it is now necessary to assess the trial judge's finding that the disposition in this case was a fraudulent conveyance.

[82] The trial judge found that on the whole of the evidence, Mr. Botham had the requisite intent to delay and hinder creditors. He stated:

[65] Proof of intent to defeat or delay creditors typically requires drawing inferences from the circumstances surrounding the transaction. However, it is not necessary in this case to draw an inference at all. Here, there is direct evidence of the intent of Mr. Botham and his solicitors. Mr. Botham's answers on examination for discovery and in his affidavit make his intent patently clear:

395. Q. Okay. Well here's my suggestion. This BHL - Braydon transaction had nothing to do with estate planning unless you would say that the protection of your assets from claims of creditors is part of estate planning?

A. That I could agree with.

396. Q. All right. And the whole motivation behind the BHL - Braydon transaction again was to ensure that creditors wouldn't get assets of the estate?

A. Yes.

[66] The letter from Owen Bird dated October 31, 2005 describes the objectives and purpose of the Transaction as follows:

1. Move the real property of BHL to a new company ("Newco") to ensure that BHL's real property and other assets are not exposed to its new leasing venture; and

2. Limit the activities and gross revenue of BHL to its interest in the JW Auto Group partnership.

[emphasis added]

[67] In his affidavit sworn October 3, 2007 in Action No. S076370, Mr. Botham stated:

...I did not want to cause BHL to go into the partnership with the nine properties at risk of execution by creditors of the partnership.

[68] In the same affidavit Mr. Botham deposed that it was not his "objective...to deprive creditors of any remedies against BHL... ." However, this statement is inconsistent with all of the evidence in this case and cannot be accepted.

[69] For these reasons, it is not necessary to attempt to draw an inference. Mr. Botham's evidence, taken as a whole, is conclusive as to his intent to defeat BHL's creditors and must result in the finding that the Transaction was a fraudulent conveyance.

[83] As a result, the trial judge concluded:

[77] Based on the foregoing, I find that BHL did engage in a fraudulent conveyance, despite Mr. Botham's lack of dishonest intent. A transaction which is the result of an honest intent to defeat one's creditors is precisely one of the situations caught by the *Fraudulent Conveyance Act*.

[84] Counsel for the appellant argues that the judge made a palpable and overriding error in relying on Mr. Botham's evidence on examination for discovery. He argues that those answers suggest that Mr. Botham and BHL had only one intention, namely to protect the assets from creditors' claims. He argues that there was other evidence of Mr. Botham's legitimate business purposes, namely to gain the benefit of the s. 85 tax rollover. Counsel for the appellant placed much emphasis on the facts that the appellant was pursuing a prudent and legitimate business strategy in attempting to take advantage of the capital cost allowance claims available under s. 85 of the *Income Tax Act,* and in attempting to limit his liability when investing in the new venture, JW Auto.

[85] Such arguments do not establish a palpable and overriding error. As this Court put it in *Chan v. Stanwood,* "the question in every case is whether it was carried out 'to delay, hinder or defraud creditors and others of their just and lawful remedies'." While Botham may have been pursuing other business objectives, such as trying to obtain tax advantages, it is nevertheless clear that he had the intent to put BHL's assets beyond the reach of JW Auto's creditors. This is what the trial judge found, stating:

BHL entered into the partnership with Mr. Welsh at a time when BHL had substantial assets. As a partner, BHL was responsible for all debts incurred by the partnership. BHL then acted to shelter its assets from the claims of present and future creditors of the partnership. BHL did this by transferring its assets to Braydon, a related company, for little to no consideration. (para. 81).

[86] This is a clear finding of fact that is supported by the evidence. The trial judge's findings cannot be characterized as palpable and overriding errors.

[87] There is also no dispute that the *effect* of the transfer was to delay and hinder the creditors of BHL, both present and future. Section 1 captures transfers intended to defeat the rights of creditors and "others," which includes future creditors: *Canadian Imperial Bank of Commerce v. Bukalis* 1987 CanLII 2694 (BC CA), (1987), 34 D.L.R. (4th) 481, 11 B.C.L.R. (2d) 190 (C.A.) at 484. As a general partner of JW Auto, BHL was, as the trial judge found, "responsible for all debts incurred by the partnership." Therefore, by transferring its assets to Braydon, BHL was not only hindering its

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creditors, but was hindering the present and future creditors of JW Auto. As the trial judge found, at para. 81, creditors' claims currently exceed $20 million.

[88] The appellant also argues that it is legitimate to limit the assets which one puts at risk in a business venture, otherwise corporations would be illegal. However, the trial judge correctly found, at para. 81 of his reasons, that while BHL could have limited its liability by incorporating a new corporation, it made the explicit choice not to do so. It would have been legitimate for BHL to limit its liability in the new venture by incorporating a new corporation to act as the general partner in JW Auto. However, Botham and BHL wanted to achieve two objectives, one being to limit liability and the other being to obtain the tax advantages under s. 85 of the *ITA*. By incorporating a new corporation, it was possible to limit liability, but it would not have been possible to obtain the tax advantages. Therefore, Botham and BHL made the choice to try to achieve both the limited liability and tax advantages by transferring the assets of BHL out of the company and into Braydon. As the appellant states in its factum, "...the plan was to empty an old company of its assets unrelated to auto leasing, and use the old company for the partnership rather than incorporate a new one, because using the old company allowed for a tax benefit." However, in doing this and in choosing not to incorporate a new company, BHL engaged in a fraudulent conveyance.

[89] Finally, the trial judge cannot be said to have made a palpable and overriding error in his factual findings relating to the defence in s. 2. The trial judge stated:

[80] There are three parts to this defence. It requires that the disposition be made (1) for good consideration, (2) in good faith, and (3) to a person who had no notice or knowledge of the fraud. The defence does not apply in the case at bar. I find that there was no good consideration which passed from Braydon to BHL for the assets. At the end of the Transaction, BHL was left with virtually no assets while Braydon had obtained $19 million in assets. The Transaction was clearly not in good faith based on the direct evidence of Mr. Botham's intent with regards to BHL's assets. Finally, given that Mr. Botham was the directing mind of both Braydon and BHL, it cannot be said that the transferee had no notice or knowledge of the fraud.

[90] In my view, there was evidence on which the judge could properly find that none of the elements in s. 2 had been established. While the parties disagree on appeal as to whether or not there was good consideration, it does not affect the disposition because Braydon cannot establish the other two elements under s. 2. As the trial judge stated, because Botham controlled both BHL and Braydon, his knowledge and intent to delay and hinder BHL's creditors must be imputed to both corporations.

[91] I would dismiss the appeal.

"The Honourable Chief Justice Finch"
I agree:
"The Honourable Mr. Justice Lowry"
I agree:

"The Honourable Mr. Justice Groberman"

Bank of Montreal v. Chu, 1994 CanLII 7246 (ON SC) - Timing of Intent to Defraud Creditors: Date of Initial Steps or Concluding Step?

Date:	1994-02-28
Parallel citations:	17 OR (3d) 691
URL:	http://canlii.ca/t/1vsnf
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Ontario Supreme Court
Bank of Montreal v. Chu
Date: 1994-02-28

Bank of Montreal
and
Chu et al.

Ontario Court (General Division), Wilson J. February 28, 1994
Mark Hartman, for plaintiff.
Kirk M. Baert, for defendants.

[1] WILSON J.:—In this action, a motion for default judgment was granted by the Honourable Mr. Justice Wright on April 13, 1993 (the conveyance judgment). Affidavit material was filed by the plaintiff in support of its request for default judgment. The matrimonial home, municipally known as 22 Patrick Boulevard, North York (the home) was acquired in 1988 by the defendants as joint tenants. The deed dated May 2, 1989, and registered December 9, 1991, transferred the joint tenancy interest of Eva M. Chu (Eva) to her husband Jim Chung-Len Chu (Jim) (the transfer). The conveyance judgment set aside the transfer as fraudulent contrary to the provisions of the *Fraudulent Conveyances Act,* R.S.O. 1990, c. F.29 (the Act). In this motion, Eva seeks to set aside the conveyance judgment pursuant to rule 19.08(1) of the Rules of Civil Procedure. This motion raises the following issues:

1. What is the test for determining whether the defendant has raised a defence on the merits for the purpose of setting aside a default judgment?

2. Does the evidence of Eva's circumstances in 1989 or in 1991 lead to an inference of fraudulent intent?

3. In a fraudulent conveyance action, is the appropriate time frame for considering the intent of Eva and Jim the time the deed was executed in 1989, or the time the deed was registered in 1991? It is acknowledged that there was a significant deterioration in Eva's financial situation between 1989 and 1991 and different inferences may fairly be drawn from the circumstances at the two time frames.

The facts

[2] Many of the facts are not in dispute. I will begin with the uncontested facts and will then consider the contested facts.

[3] In May of 1988, Eva arranged for a $50,000 bank loan for her business (the loan). On May 22, 1988, a personal financial statement was prepared with the representative of the bank. The personal financial statement indicates equity of $260,000 for the old house and a $20,000 deposit on the new house. When the personal financial statement was prepared, Eva had signed the agreement of purchase and sale for the acquisition of the home as a joint tenant with Jim. She intended to, and did, in fact, take title to the home as a joint tenant. The former matrimonial home was registered in Jim's name alone. The bank states that they relied upon the information in the personal financial statement, particularly on her interest in the home, in lending funds to Eva. In spite of requests, Eva did not provide updated financial disclosure. In January 1992, Eva defaulted on the loan.

[4] On October 6, 1992, the bank obtained default judgment against Eva in the amount of $51,967.04 as a consequence of her default on the loan. As well, the bank obtained judgment on October 6, 1992, against Jim in the amount of $15,820.66 pursuant to his written guarantee of Eva's loan. These judgments are not being disputed.

[5] The transfer is dated May 2, 1989, but was registered on December 9, 1991. It is to be noted that the land transfer tax affidavit appears on its face to have been initially dated 1989, later changed to 1991 and subsequently changed to May 2, 1989. The affidavit is commissioned by a lawyer who was not acting for the defendants in May of 1989. The reasonable inference may be drawn that the affidavit of land transfer tax was backdated from 1991 to May 2, 1989. There is, however, no evidence to dispute the defendants' evidence that the transfer was executed May 2, 1989.

[6] The transfer was prepared by Mr. Frank Seto who was a solicitor with McMillan Binch. Mr. Seto's file was produced as an exhibit in this motion. It is evident from the file that Eva's intention in retaining Seto was to attempt to limit her personal liability by incorporating a limited company to conduct her business. As the landlord and the franchisor refused to permit the substitution of the limited company for Eva's sole proprietorship without personal guarantees, Eva decided not to proceed with the transfer of the assets of the business to a limited company.

[7] As part of the plan to limit personal liability, the transfer was prepared and signed. However, Mr. Seto left the country soon after May 2, 1989, and the transfer was not registered. Eva became aware that the transfer was not registered in 1991 when she retained a new solicitor, Mr. Chong. The transfer was registered shortly thereafter, on December 9, 1991. Mr. Chong apparently backdated the commissioning signature of the affidavit of land transfer tax.

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[8] The applicant has explained the delay, and the circumstances leading to the default. Eva states that the effect of the transfer did not render her insolvent and unable to pay creditors. She states further by way of defence that there was no fraudulent intent in the transfer. The transfer was made to give effect to the Chinese tradition that the male in a marriage hold property, and to recognize and protect $100,000 advanced in 1988 by Jim's parents to him for the acquisition of the home.

Issue 1: Appropriate test to establish a defence on the merits

[9] This motion is to set aside the default judgment of Justice Wright granted April 13, 1993, pursuant to rule 19.05 of the Rules of Civil Procedure. Affidavit material was filed in support of that request for judgment. The judge was satisfied that the conveyance was fraudulent. This is not a motion to set aside a default judgment of the Registrar pursuant to rule 19.04, supported only by a requisition for default judgment. Rule 19.05(1), (2) and (3) is reproduced below:

19.05(1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed.

(2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages, a divorce or a declaration of the invalidity of a marriage.

(3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action or order that the action proceed to trial and that oral evidence be presented.

[10] This default judgment may be set aside pursuant to rule 19.08(2):

19.08(2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just.

[11] In deciding whether discretion will be exercised to set aside default judgment, a court will consider three factors. They are: whether the motion was made as soon as possible, whether the circumstances giving rise to the default are adequately explained, and a consideration of the defence on the merits: *James Sturino Realty Ltd. v. Andrew Michaels Group Ltd.* reflex, (1988), 64 O.R. (2d) 410, 28 O.A.C. 354 (Div. Ct.).

[12] Of importance in this motion is the last factor. What is intended by "the defence on the merits", or a "triable issue" referred to in the case law?

[13] In assessing the defence on the merits, the relationship between the test used under rule 19.08 and the test used in a motion for judgment under Rule 20 of the Rules of Civil Procedure has not yet been explored. It is useful to consider the possible relationship between the tests utilized under the two rules.

[14] The root decision reflecting a changed approach to motions for summary judgment is the often-quoted *Pizza Pizza Ltd. v. Gillespie* 1990 CanLII 4023 (ON SC), (1990), 75 O.R. (2d) 225, 33 C.P.R. (3d) 515 (Gen. Div.). In that case, Henry J., at pp. 237-38, emphasized the need for a genuine issue for trial and the requirement of taking a good, hard look at the merits of the defence.

[15] Some of the cases decided pursuant to rule 19.08 indicate that the court should take a close look at the merits of the defence. The principles developed and routinely applied under Rule 20 motions are implicitly applied in assessing the merits of the defence in a motion to set aside a default judgment under rule 19.08: see *Mantia v. Honour Oak Investments Ltd.* reflex, (1985), 50 O.R. (2d) 788 at p. 790, 3 C.P.C. (2d) 28 (H.C.J.), and *Allfur Trading Ltd. v. Polizos* (1991), 7 C.P.C. (3d) 39 (Master) at p. 41.

[16] In this motion, affidavit material was filed by Eva explaining from her perspective the absence of delay, a reason for the default, and her defence on the merits. I find that the explanations concerning delay and the reason for the default are adequate. In connection with the defence on the merits, the evidence before the court is similar to the kind one would find in a motion for summary judgment. Cross-examinations have taken place upon the affidavits.

[17] I support and adopt the principles enunciated in *Emblematic Jewellery Products of Canada Inc. v. Marchant,* unreported (December 1, 1992), O.J. No. 2766, where Hockin J., quoting from *Dealers Supply (Agriculture) Ltd. v. Tweed Farm & Garden Supplies Ltd.* (1987), 22 C.P.C. (2d) 257 (Ont. Dist. Ct.) [at p. 263], states at p. 5:

There is, I believe, good authority for the proposition that, in determining whether or not these requirements have been met, the Judge ought to lean in favour of an affirmative answer simply because prima facie no one should suffer judgment against him except after a full hearing and after a careful determination on the merits. At the same time I think the cases make it clear as well that the satisfaction of these requirements does not automatically dictate success to the applicant. There is still the broad obligation to look at all the circumstances and to be satisfied that no injustice is done to the innocent party—the respondent to the motion—in any order that is finally made.

[18] The principle of a right to a full hearing must be balanced with the emerging belief that if there is no genuine issue for trial, all litigants should be spared the cost and disruption of litigation. I echo the words of Morden A.C.J.O., in *Irving Ungerman Ltd. v. Galanis* reflex, (1991), 4 O.R. (3d) 545 at pp. 550-51, 83 D.L.R. (4th) 734 (C.A.):

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A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense.

[19] Consistent with the policy of balancing the applicant's right to a trial with the respondent's rights to a speedy resolution is one in which the defence itself is examined. In order to give full and fair consideration to the issue of whether the application has a defence on the merits, the principles applicable in a motion for summary judgment should be considered in assessing whether a default judgment ought to be set aside. Does the defence on the merits raise a genuine issue for trial? Does the defence have an air of reality about it in light of the evidence brought forward in the motion? Are there real credibility issues relating to important facts? These tests are enunciated in *Irving Ungerman Ltd. v. Galanis, supra,* at pp. 549-52, and *Pizza Pizza Ltd. v. Gillespie supra,* at p. 238.

[20] Applying these principles encourages a consistent approach in the application of the Rules of Civil Procedure. As well, the rights of an applicant to a trial and the rights of a respondent to a prompt resolution are balanced. The appropriateness of this approach is emphasized in this case where a judge has granted judgment after considering affidavit material in support of the motion. The judgment ought not to be aside unless the defence suggested raises a genuine issue for trial, having about it an air of reality in the context of all of the evidence. If there are credibility issues relating to important facts in issue, the matter ought to be determined in the context of a trial, rather than a motion.

Issue 2: The Fraudulent Conveyances Act and relevant findings of fact

[21] Sections 2 to 4 of the Fraudulent Conveyances Act provide as follows:

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereinafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to him notice or knowledge of the intent set forth in that section.

4. Section 2 applies to every conveyance executed with the intent set forth in that section notwithstanding that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.

[22] A fraudulent conveyance as defined in s. 2 of the Act is a conveyance of real property made with the intent to defeat creditors. Eva's financial situation in May 1989 and December 1991 is obviously relevant to the issue of a fraudulent conveyance. For reasons to be outlined, I find that the inferences that may be drawn in 1989 differ from those in 1991. I outline first the principles that apply.

[23] Regardless of a party's actual intention, fraudulent intent may be inferred from the facts and circumstances at the time of a transfer. If a debtor gives away substantially all assets and has no means by which creditors can be satisfied, the intention to defraud creditors may be implied: *Perry v. Perry* (1923), 53 O.L.R. 502, [1924] 1 D.L.R. 665 (H.C.J.), reversed 54 O.L.R. 613, [1924] 4 D.L.R. 1177 (C.A.). If the effect of a conveyance is to make the transferor insolvent then the conveyance is void regardless of the intent of the transferor: *Sun Life Assurance Co. of Canada v. Elliott* 1900 CanLII 32 (SCC), (1900), 31 S.C.R. 91.

[24] I conclude that if the evidence on the motion supports the inference of fraudulent intent, or if the conveyance results in Eva being insolvent, then the judgment of Wright J. ought not be set aside. If the evidence does not clearly show that the inference of fraudulent intent must be drawn, and if issues of credibility are involved, then the judgment ought to be set aside on terms, and a trial permitted.

[25] I turn now to the evidence of Eva's financial situation in 1989 and 1991.

[26] In May 1989, Eva was working in her business known as Koya, Japan in the North York City Centre. There is evidence of some financial difficulty in May 1989, including arrears in royalty payments, potential arrears in lease and capital payments, and funds owing to the landlord. There is, therefore, evidence that Eva was financially vulnerable in 1989 when the transfer was signed. However, there is no evidence before me of Eva's assets in 1989, assuming the transfer is effective from that date.

[27] I cannot then conclude from the evidence before me that Eva was unable to pay her creditors in May 1989. Further details of her finances, including her assets and debts, would be required prior to the adverse inference being drawn that the 1989 transfer is a fraudulent conveyance.

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[28] The defendant further and alternatively seeks to rely on s. 3 of the Fraudulent Conveyances Act as saving the transfer in question. Section 3 provides that s. 2 will not apply in the case of a transfer for good consideration to a bona fide third party without notice of the fraudulent intent at the time of the transfer.

[29] The defendant states that the husband's parents advanced the sum of $100,000 in 1988. Eva states that the transfer to Jim in May 1989 was made to recognize this advance, as well as to reflect the Chinese tradition that the male in a marriage hold the property. The purpose of the $100,000 was either to acquire the home or, alternatively, to conduct renovations on the home. Eva states that this was valuable consideration flowing through

[30] Jim's parents to him and that the property was to be registered in Jim's name to protect the parents' funds.

[31] Although the evidence is uncontradicted that a $100,000 advance was made in 1988, the deed executing the transfer between Eva and Jim was signed in 1989, almost one year later. Generally, past consideration is no consideration: see Eastwood v. Kenyon (1840), 11 Ad. & El. 438, 113 E.R. 482. A line of cases developed at common law to modify this strict principle where a just result required it. The case of Bank of Nova Scotia v. Gaudreau reflex, (1984), 48 O.R. (2d) 478 at p. 504, 27 B.L.R. 101 (H.C.J.), submitted by counsel for Eva reflects a group of cases that state that a prior debt was consideration for a subsequent promise, if the promise is incorporated in a bill of exchange, such as a promissory note. This rule is codified by the Bills of Exchange Act, R.S.C. 1985, c. B-4, s. 52. No promissory note or other bill of exchange exists in this case to permit the conclusion that the $100,000 is consideration for a subsequent promise to transfer the home.

[32] As well, the alleged consideration falls far short of adequate consideration for a 50 per cent interest in the home. Moreover, it is very difficult for Jim to argue that he was a bona fide third party without notice of his spouse's intent. Courts will closely scrutinize transfers between husband and wife, particularly when both spouses continue to enjoy the benefit, use and enjoyment of the asset after the date of the conveyance in question. Section 3 was intended to protect arm's length bona fide purchasers for value. I conclude that s. 3 does not apply.

[33] Nor am I persuaded by Eva's assertion that title was taken in Jim's name to reflect the Chinese tradition that the male in a marriage hold property. Eva was a licensed real estate agent at the time of the acquisition of the home. On several occasions, including when the loan application and financial disclosure was made, documents were signed expressing the intention to take title as joint tenants. The Chinese tradition explanation is transparent and lacks an air of reality. It is not accepted in light of the consistent and contradictory trail of documents.

[34] Although I do not accept Eva's arguments about the $100,000 payment, consideration and Chinese tradition, it is not clear on the evidence before me as to her financial situation if the transfer was effective from May 2, 1989. She states that even after the transfer, she had adequate assets at the time to pay her creditors. Therefore, I conclude that the first ground of a defence advanced by Eva raises a triable issue requiring further inquiry.

[35] The situation in December 1991 is different. By this time, Eva's financial situation had deteriorated significantly. It is clear from the evidence that the effect of the transfer rendered Eva insolvent and unable to satisfy her creditors. Her debts significantly exceeded her assets. In January 1992, perhaps relying on the transfer registered in December 1991, Eva defaulted on her loan payments. I infer the obvious. The effect of the transfer in 1991 rendered Eva insolvent. Regardless of the intention of Eva and Jim, in accordance with Sun Life Assurance Co. v. Elliott, supra, the transaction is a fraudulent conveyance. Alternatively, fraudulent intention may be inferred since Eva, by registering the transfer, gave away substantially all her assets. She had insufficient remaining assets at that time to satisfy creditors: Perry v. Perry, supra.

[36] I reiterate my comments on Eva's defence of consideration and a s. 3 exemption, and the defence concerning Chinese tradition. These two assertions do not meet the test of raising a good defence on the merits.

[37] I conclude that if the intent of the transfer is to be established in December 1991, the inference may clearly be drawn that the transfer is a fraudulent conveyance and ought to be set aside. The judgment of Wright J. should therefore not be set aside.

[38] I have reached a different conclusion for the purpose of this motion in connection with Eva's unestablished financial situation in May 1989.I now turn to the issue of whether the intent of the transfer ought to be assessed at the date the transfer was signed, or at the date the transfer was registered.

Issue 3: Is intent of a conveyance determined at the date of execution or at the date of registration?

[39] After reviewing the relevant statutory provisions and the case law, I conclude that a deed is effective between the parties at the time of its execution, notwithstanding that it is not effective against subsequent purchasers or encumbrancers in the registry system. I review first the relevant statutory provisions followed by the case law.

[40] Section 2 of the Fraudulent Conveyances Act provides that every conveyance made with intent to defeat creditors is void. The transfer was signed May 2, 1989, but not registered, apparently due to an oversight by a solicitor. It

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was registered December 9, 1991, as instrument No. C74977-9 in the land registry office for the Land Titles Division of Metropolitan Toronto. Sections 78(4) and 86(2) of the Land Titles Act, R.S.O. 1990, c. L.5, provide as follows:

78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

...

86(2) The transfer shall be completed by the land registrar entering on the register the transferee as owner of the land transferred, and the transferor shall be deemed to remain owner of the land until the registration of the transfer has been completed in accordance with this Act.

[41] At first blush, looking only at the statutory provisions, it appears that the intention of a conveyance is to be determined at the point of registration. However, a review of the case law under both the registry and land titles systems confirms that intention and validity of an instrument as between the parties is determined on the date of execution rather than registration.

[42] In *Stonehouse v. British Columbia (Attorney General),* 1961 CanLII 48 (SCC), [1962] S.C.R. 103, 31 D.L.R. (2d) 118, Ritchie J. found that an executed but unregistered instrument is operative between the parties. In that case, it had the effect of severing the joint tenancy. Similarly, the Ontario Court of Appeal in *Hooper v. Hooper,* [1953] O.R. 753, [1953] 4 D.L.R. 443, found that a deed was effective between the parties in equity at the date of execution and before registration in the land titles system. Pickup C.J.O. states, at pp. 758-59:

While the system may be said to be a system for registration of title, not of deeds, execution and delivery of the instrument of transfer in the prescribed form, particularly when accompanied by the affidavits requisite for registration, confers a title in equity until registration, and I think that such title is good for all purposes except as against some other title which may obtain priority by being recorded in the land titles office.

[43] The case in the British Columbia Supreme Court, *Re Skinner* (1960), 27 D.L.R. (2d) 74, deals with the issue of when intent is established for the purposes of the *Fraudulent Preferences Act,* R.S.B.C. 1960, c. 156. Wilson J. states [at p. 76]:

There is no proof that the intention of the debtor when he instructed his lawyer in March, 1959 to arrange to convey the property to his wife was a guilty or fraudulent one. Through delay on the part of his solicitor, no fault of his, the instruction was not carried out until a few days after he had signed the guarantee on which he has been found liable.

[44] Although the court found at p. 77 that the presumption of fraud applied, the date on which intention was inferred was the date of execution of the deed, rather than the date of registration:

... it must not be forgotten that, since he occupied the home with his wife, he could derive benefit from having the property execution-proof.

Therefore I think that his earlier honest decision is irrelevant; the things that matter are the things that were, or should have been, in his mind at the date the deed was signed (not, as suggested by counsel, the date of registration, because registration was a matter over which he had no control). Those things, as I have already said were such as to raise a presumption of fraud and that presumption has not been rebutted.

[45] I concur with the approach taken by Wilson J. in *Re Skinner* and apply the principles enunciated in *Hooper* and *Stonehouse.* The date on which fraudulent intent is to be assessed is the date the transfer was executed. The fact that the transfer was not registered in a timely way through a solicitor's inadvertence is not within the control of the applicant. The respondent bank should not benefit gratuitously as a result of a solicitor's error.

Conclusion

[46] For reasons given, the intention of Eva and Jim is to be determined at the date the transfer was signed on May 2, 1989. Based upon the evidence before me, I find that the defendant has met the onus of raising a genuine issue for trial and that the judgment of Wright J. ought to be set aside. In the interim, I grant the bank's request for a certificate of pending litigation on the home. If, between now and the time of trial, the property is sold, the total amount in dispute shall be paid into court to the credit of this action.

[47] It is acknowledged that the costs of this motion for both the applicant and respondent shall be borne by the Law Society of Upper Canada on behalf of Mr. Seto and Mr. Chong. If the parties are unable to agree on the amount of costs of this motion, written submissions may be made to me within 30 days of the release of these reasons.

[48] This is a case-managed matter. The cross-examinations conducted to date shall stand in lieu of discovery; any further discoveries to be completed by March 30, 1994; the pre-trial conference to be scheduled no later than May 30, 1994, at which time a trial date will be set.

ENDORSEMENT—APRIL 13, 1994

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[49] I have carefully reviewed the extensive submissions made by counsel for the parties and by Mr. Caplan for Weir and Foulds on behalf of Mr. David Chong and the Law Society of Upper Canada.
[50] After reviewing the written submissions, I asked Mr. Caplan whether he wished an opportunity to argue the matter. He declined.
[51] I note that the defendants served notice on their former solicitor, Mr. Chong, that the defendants were going to seek an order under rule 57.07(1)(*c*) of the Rules of Civil Procedure that he be personally responsible to pay any costs of the defendants for bringing this motion, and the costs incurred by the plaintiff in bringing its motion for default judgment and resisting the defendants' motion.
[52] The letter of Mr. Caplan dated January 17, 1994 was filed before me in the motion. I had understood that the Law Society was acknowledging responsibility for payment of the legal costs associated with the motion of both the defendants and the plaintiff. I have been corrected by the submissions of Mr. Caplan and make this order based on the principles outlined in s. 131(1) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, and rule 57.07(1) of the Rules of Civil Procedure.
[53] It appears to me abundantly clear that Mr. Chong, through his conduct, has caused the costs to be incurred for this motion, including the problems of delay and negligence. As well, it appears that Mr. Chong has gone well beyond mere negligence by apparently backdating his signature commissioning the signatures in the deed in question.
[54] It appears to me clear that Mr. Chong should be responsible for the defendants' reasonable costs as well as the plaintiff's reasonable costs in defending the motion and their costs in bringing their motion for default judgment. I have reviewed the submissions concerning the quantum of costs. Although costs should be reasonable, I do not think that this motion warrants costs on a solicitor-client basis.
[55] Although the motion was not argued over a lengthy period of time, there were extensive submissions, factums and two sets of examinations. I am aware of the significant solicitor-client costs incurred by each side based on the submissions before me. I find that an appropriate amount for costs is the amount of $7,500 plus G.S.T. payable by Mr. Chong personally to each of the defendants and the plaintiff.
Motion granted.

Chan v. Stanwood, 2002 BCCA 474 (CanLII) - A Question of Fair Value on a FCA Application in an "Estate Planning" [Creditor Shielding] Scenario

Date:	2002-08-27
Docket:	CA028373; CA028390; CA029768
Parallel citations:	216 DLR (4th) 625; 6 BCLR (4th) 273
URL:	http://canlii.ca/t/5jsg
Citation:	Chan v. Stanwood, 2002 BCCA 474 (CanLII), <http://canlii.ca/t/5jsg> retrieved on 2013-08-22
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Citation:	Chan v. Stanwood 2002 BCCA 474	Date: 20020827 Docket:	CA028373 CA028390 CA029768

COURT OF APPEAL FOR BRITISH COLUMBIA

CA028373
CA029768
BETWEEN:

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LAWRENCE T.F. CHAN and MARGARET P.N. CHAN

APPELLANTS
(PLAINTIFFS)

AND:

**GREGORY MARK STANWOOD, SHARON GAIL STANWOOD,
566942 B.C. LTD., GEORGE EDWARD DAVIS,
G&G STANWOOD CONSULTING INC.**

RESPONDENTS
(DEFENDANTS)

- and-

CA028390
BETWEEN:
**GREGORY MARK STANWOOD, SHARON GAIL STANWOOD,
566942 B.C. LTD., GEORGE EDWARD DAVIS,
G&G STANWOOD CONSULTING INC.**
APPELLANTS
(DEFENDANTS)
AND:
LAWRENCE T.F. CHAN and MARGARET P.N. CHAN

RESPONDENTS
(PLAINTIFFS)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Mackenzie

B.G. McLean	Counsel for Lawrence T.F. Chan and Margaret P.N. Chan
R.J. Sewell, Q.C.	Counsel for Mr. and Mrs. G.M. Stanwood, 566942 B.C. Ltd., and G&G Stanwood Consulting Inc.
R.G. Ward and D.M. Towill	Counsel for George Edward Davis
Place and Date of Hearing: June 7, 2002	Vancouver, British Columbia
Place and Date of Judgment: August 27, 2002	Vancouver, British Columbia

Written Reasons by:
The Honourable Madam Justice Newbury

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Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Mackenzie

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Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] In the summer of 1998, the defendants Mr. and Mrs. Stanwood were facing the prospect of bankruptcy. The plaintiffs Mr. and Mrs. Chan had just obtained a judgment against them in the amount of $264,242 plus interest, and other creditors, including the law firm that had represented the Stanwoods in the Chans' litigation, were owed additional sums. The Stanwoods' assets — the family home, three strata lots, two vehicles, and interests in a limited partnership — would for the most part be easily exigible by the Chans, who were pressing for immediate payment of their judgment.

[2] The Stanwoods, who were particularly anxious to continue living with their children in their family home, consulted the defendant Mr. Davis, a solicitor, in July 1998. He provided them with a paper he had written entitled "The Family Holding Company as an Estate Planning and Asset Protection Vehicle for the Living". In it, Mr. Davis advocated the use of a "family holding company to organize ones' [sic] assets in such a way so as to make the use of them available only to the person or persons who created them in the first place while at the same time placing those same assets out of the reach of those strangers who covet them (Like banks and the Queen!)". He described a modification of the usual estate freeze which he described as "the way to keep the creditor from realizing and seizing debtors' assets". The paper continued:

> We are not talking about planning what you want to happen to your assets after you are dead. We are talking about planning what you want to do with your assets while you are alive, working and when you retire. We are talking about keeping those assets in a place where they are available only to you and your family and not available [to] those who do not have your interests at heart. We are talking about changing the nature of your assets without changing your net worth. Finally we are talking about all of the above without losing absolute control over all the assets you worked so hard to accumulate over your lifetime. [Emphasis added.]

[3] The paper described the steps involved in carrying out such a 'freeze': the client would cause a private company to be incorporated, obtain an expert valuation of his or her assets, and then transfer them to the company. It would pay fair market value for the assets by issuing Preferred shares to the client having a value "exactly equal to the value of the assets" transferred to the company. Once this was done, Mr. Davis's paper stated, a creditor could not obtain the client's former assets because the client would no longer own them. He continued:

> What [the creditor] is entitled to get though is the preferred shares you got from the [family holding company]. (There is a way to make it hard for the creditor to collect on the shares but you will have to ask me in person ... this way we know if you have actually read this.) The effect of all this is that you have limited your exposure to your creditors to the value of the assets you have at the time that you make the transfer. From then on, rather than working for yourself and making a bigger pot of assets available to your creditors, you go to work for [the family holding company] and guide it to expanding the asset base you sold it.

The paper emphasized that although a debtor could not intentionally diminish his or her net worth to the prejudice of creditors, unsecured creditors could not insist that assets be preserved in any particular form.

[4] Apparently relying on Mr. Davis's advice, the Stanwoods decided to proceed with the transfer of their assets as described in his paper. In August, they became the shareholders of two private British Columbia companies, the corporate defendants in this action. I will refer in these Reasons to the share structure and ownership of only one of them, 566942 B.C. Ltd., since the majority of the assets were transferred to that company. A similar scheme was used for G&G Stanwood Consulting Inc. ("G&G").

[5] The numbered company had authorized capital consisting of Class A and B voting (non-equity) shares, Class C equity shares (these were non-voting but a shareholder of three years' standing could elect to add a voting right), and three classes of Preferred shares. Unusually, a special resolution of the company required the approval of 85 percent of the voting shares. The Class A and Class B shareholders were each entitled as a class to appoint one of two directors. One director was always either Mr. or Mrs. Stanwood and the second was a person "friendly" to them. (At the time of the transfers, the friendly person was Mr. Corney, Mrs. Stanwood's brother. Later, he was replaced by Mr. Davis.) The directors were entitled under the Articles to refuse to register any transfer of shares in their "absolute discretion", and all shares were subject to a pre-emptive right.

[6] The Preferred shares were non-voting and carried a 10 percent preferential dividend on their redemption amount ($1,000 per share in the case of First Preferreds, and $1 per share in the case of the Second and Third Preferreds), which dividend was cumulative during the first five years of issue of such shares. Any redemption required the unanimous consent of the directors. The shares were retractable (i.e., redeemable at the option of the holder) only after the holder had held the shares for five years.

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[7] Following the transfers by the Stanwoods of their assets to the companies and following other allotments, the issued share capital of the numbered company was as follows:

	Class A Voting	**Class B Voting**	**Class C Non-Voting**	**Second Preferred**	**Third Preferred**
Mr. Stanwood	40			153,803	
Mrs. Stanwood	40				133,803
Mr. Corney		20	10		
Gregory Stanwood (son)			495		
Michelle Stanwood (daughter)			495		
Total	80	20	1,000	153,803	133,803

[8] As Mr. Davis deposed, the transactions ensured "the accommodation of the Stanwood children [in the family home] ... for five years, at least." Mr. and Mrs. Stanwood remained in effective control of the transferred assets through their *de facto* control of the boards of directors of the companies and indeed continued to use those assets as before, although they paid what is said to have been a fair market rent in return. Any creditor who sought to execute against their shares in the companies would encounter major obstacles: the pre-emptive right on share transfers; the right of the directors to refuse to register a transfer of shares; the requirement for 85 percent approval of a special resolution; the five-year waiting period attached to dividends on the Preferred shares and to rights of retraction of those shares; and the ability of the Class C shareholders to elect to make their shares voting shares – a means by which members of the Stanwood family could defeat any attempt by a creditor to elect a board of directors through control of the Class A and B shares.

[9] The Stanwoods' control was reinforced later in 1998, when they subscribed for additional Second and Third Preferred shares and received options to acquire the balance (999,000) of the Class C shares at $.001 per share. As well, certain creditors who were "friendly" to the Stanwoods, including Mr. Corney, advanced further funds to the companies which were used to pay legal fees and other miscellaneous debts. In return, these creditors received promissory notes secured by the hypothecation of some of the Preferred shares held by the Stanwoods. (Mr. Davis acted as escrow agent.) Obviously, these steps had the effect of reducing the number of Preferred shares that could be executed against by unsecured creditors such as the Chans. The trial judge noted at para. 22 of her Reasons that there was no evidence that any of these creditors (other than the Chans) "were pressing for repayment or had the intention to do so."

[10] On learning of the transactions, the Chans made no attempt to execute against the Stanwoods' Preferred shares in the holding companies. They also declined offers of payment over time with security in the interim. Instead, they commenced proceedings under the ***Fraudulent Conveyance Act***, R.S.B.C. 1996, c. 163 (the "***Act***"). They alleged that the intention and effect of the freeze had been "to delay, hinder and defraud the Plaintiffs of their lawful remedy for the collection of [the Chans'] Judgment and delay, hinder and defraud other creditors contrary to the *Act*." As well, they joined Mr. Davis as a defendant, alleging that he had breached a "duty of care" and fiduciary duty (which claims are not being pursued in this court), committed an "intentional tort", and "wrongfully advised and induced" the Stanwoods to carry out the transfers. The Chans sought, *inter alia*, a declaration that the transfers were fraudulent within the meaning of the ***Act*** and therefore of no force or effect; injunctive relief to restrain the holding companies from disposing of, encumbering or dealing with the assets; and damages, including punitive damages. Last, they sought special costs — which prayer is the subject of a separate appeal to which I will return in due course.

THE CASE AGAINST THE STANWOODS

The Trial Judgment

[11] The action was heard by summary trial under R. 18A after the parties agreed the matter was appropriate to be heard summarily. Affidavit evidence, as well as transcripts of the defendants' examinations for discovery were adduced. Mr. Davis deposed that in advising the Stanwoods, he had "specifically rejected any options which in [his] opinion transgressed creditors' rights legislation such as the *Fraudulent Preferences Act* or the *Fraudulent Conveyances Act* both of which were specifically discussed with the Stanwoods." Further, he said, he told his clients that "provided the net value of their assets remained equal, the creditors would not be delayed or hindered." At the same time, he stated in discovery that an exception had been made in this case to the usual practice of keeping one's principal residence in one's own name since "that asset was exposed to [the

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Stanwoods'] creditors." His counsel instructed him not to answer the question of whether he knew his clients' property "would not be available for the Chans to execute against" following the transfer to the numbered company.

[12] For their part, the Stanwoods maintained that their intention had not been to hinder or delay their creditors. Mr. Stanwood deposed:

> 8. The intent of the plan, which we ultimately selected, was to freeze our estate at that point in time. In other words, the entire value of our estate could be converted to exigible shares reflecting the actual cash value of our entire estate. These shares, in turn, could be rateably apportioned to each of our creditors in accordance with the amounts owing. In addition, we could provide certain unsecured creditors with the equity preference shares as security for further advances of much needed cash. At all material times, we were well advised that our assets, in the form of preference shares, could be seized by creditors to satisfy debts, and that they provided a ready means of making the value of assets available to creditors.

and Mrs. Stanwood deposed to similar effect:

> **14. At all material times, we were well advised that our assets in the form of preference shares, could be seized by creditors to satisfy debts, and that they provided a ready means of making the value of assets available to creditors. We acted in the belief that we were permitted to preserve our assets in any form chosen as our unsecured creditors do not have a right to dictate the form upon which the value of our assets was maintained.**

Like Mr. Davis's evidence, then, their evidence focused on the form of their property and appeared to assume that the shares they received were exigible by creditors. They described Mr. Davis's plan simply as an "estate planning tool" and said it was "coincidental" that it had had the effect of delaying or hindering the Chans.

[13] Another important item of evidence was an opinion prepared for the Stanwoods by a business valuator, Mr. McMann. After describing the transactions in his letter of opinion, he wrote regarding the numbered company:

> In summary, immediately after the transfer of assets to the [numbered] Company the vendors held shares issued for the net equity so transferred. They held voting shares to elect one of two directors although at the time of the sale of assets to the Company they were both directors. They held an option which when exercised would increase their equity position.
>
> They could demand redemption of their Preferred shares five years hence at $1.00 per share plus $0.50 in dividends if the Preferred share dividend had not been paid in the five year period.
>
> **While I have not been engaged to specifically provide opinions on either asset or share values, it is my opinion that the data and circumstances described herein are sufficient to conclude that:**
>
> **a) Consideration received [sic] was valuable.**
>
> **b) Was worth more than a nominal value.**
>
> **c) In the circumstances was a fair and reasonable value.**

[14] Although this portion of Mr. McMann's letter is rather oblique, it appears from his transmittal letter that the "Consideration received" to which he was referring was the consideration received by the Stanwoods in return for their assets — i.e., the Preferred shares. As the trial judge noted at para. 35 of her Reasons, Mr. McMann did not express an opinion as to the fair market value of the shares. (Nor did he comment on the value of the assets, but instead assumed the correctness of the values given to him by his clients. It was not argued in this court or in the court below, however, that these values were incorrect.)

[15] The trial judge naturally began her Reasons by describing the transactions. She then recited the operative provisions of the ***Act***, which I reproduce below for convenience:

> 1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies
>
> (a) a disposition of property, by writing or otherwise,
>
> (b) a bond,
>
> (c) a proceeding, or
>
> (d) an order
>
> is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.
>
> 2 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

She correctly noted that the fraudulent intent required by the ***Act*** is "essentially a matter of fact to be proved in the circumstances of each particular case", citing ***Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp.***

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1995 CanLII 740 (BC SC), (1995) 34 C.B.R. (3d) 241 (B.C.S.C.) and ***First Royal Enterprises Ltd. v. Armadillo's Restaurant Ltd.*** 1995 CanLII 605 (BC CA), (1995) 15 B.C.L.R. (3d) 254, a decision of this court.

[16] The trial judge considered the defendants' argument, based on Mr. McMann's opinion, that the companies had given consideration which was "valuable, was worth more than a nominal value and was a fair and reasonable relative value at the time of sale"; but she also emphasized that he had not valued the shares received by the Stanwoods in return for their assets. In her analysis:

> **I have difficulty understanding what Mr. McMann means by a fair and reasonable relative value. To give an opinion as to relative value, one is presumably drawing a comparison. Even it were to be assumed that the assets have the value which was ascribed to them by the Stanwoods, a comparison could not be drawn without valuing the preferred shares. Nor is an opinion that consideration has more than a nominal value of particular assistance. That is a conclusion for the court to draw or not, based on evidence. As Mr. McMann did not value the shares, I do not take his opinion to mean that their value was not much below the value of the assets. If he is using the word "nominal" to mean not real or virtually nothing, his opinion is not helpful. The assets which were transferred had a value in excess of $300,000.**
>
> **As a final comment on Mr. McMann's opinion and report, he did not express an opinion as to fair market value which is defined as the highest price available in an open and unrestricted market between informed, prudent parties acting at arms' length and under no compulsion to act, expressed in terms of money or monies' worth. The Stanwoods and the holding company are obviously not at arms' length. Relying on common sense, the conclusion must be that the value of the preferred shares to the Stanwoods far exceeds their fair market value given their ownership of voting shares, their entitlement to elect director[s] and their option to acquire shares. [paras. 34-5; emphasis added.]**

[17] The trial judge accepted that even though valuable consideration had passed between the Stanwoods and the companies, the plaintiffs could succeed if they were able to prove the Stanwoods had intended to delay or hinder their creditors. This was made clear in *Gresham v. Gresham* 1993 CanLII 1421 (BC CA), (1993) 18 C.B.R. (3d) 201 at 203-4, where this court cited *Re Johnson; Golden v. Gillam* (1881) 20 Ch. D. 389 (aff'd (1882) 51 L.J. Ch. 503 (C.A.)) for the proposition that a plaintiff may "undertake to impeach for *mala fides* a deed which has been executed for valuable consideration", although such an undertaking is likely to be one of "great difficulty."

[18] The trial judge then stated her findings regarding the Stanwoods' intentions in carrying out the transfers, and the effect of the transfers *vis à vis* their creditors:

> The Stanwoods went to Mr. Davis within weeks of the Chan judgment, which was in excess of $325,000. They correctly believed that unlike their other creditors, the Chans wanted to be paid. The assets of the Stanwoods were clearly at risk and what was of the greatest concern to them was that they would lose their family home. It was not merely the residence of their children but their most valuable asset with equity of approximately $200,000. As Mr. Davis expressed it, bankruptcy would not have met his client's objectives. As the Stanwoods deposed, they did not want to lose their home. The scheme proposed by Mr. Davis had the advantages described in his letter and paper, which have been referred to extensively, and in his affidavit. The assets would remain available to the Stanwoods and not to those, like the Chans, who in Mr. Davis's words did not have the interests of the Stanwoods at heart. The assets have remained available to them. I do not understand how Mr. Davis or the Stanwoods can dispute that the preferred shares are unattractive to creditors. That was Mr. Davis's view. The exchange of assets for shares is the reason why the assets of the Stanwoods have remained available to them.
>
> The argument of the plaintiffs is that they were delayed and hindered as the transferred assets were no longer available for execution. Although the preferred shares in the corporate defendants are exigible, they are not effectively exigible as by virtue of their special rights and restrictions, they are not redeemable for five years. Further, almost two-thirds of the shares were encumbered as part of this scheme and are now held in escrow by Mr. Davis. Moreover, the corporate defendants and their assets are controlled by the Stanwoods. If seized and sold, the remaining preferred shares would yield little recovery.
>
> I agree with these submissions. In my view, the plaintiffs have established the necessary intention and are entitled to declarations that the transfers of the real property, motor vehicles, shares and equipment are void and of no effect as against them. [paras. 38-40; emphasis added.]

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On Appeal

[19] In this court, Mr. Sewell argued on behalf of the Stanwoods that the trial judge erred in two main respects — in finding the conveyance of the assets to be fraudulent notwithstanding the fact that the companies gave "valuable consideration" for the assets; and in finding fraudulent intent on the part of the Stanwoods notwithstanding that the transfers were not a "sham". On the first issue, counsel cited the following passage from the ***Report of the Law Reform Commission of British Columbia on Fraudulent Conveyances and Preferences***, issued in 1988:

> **The test of inadequacy of consideration has been expressed in a number of different ways. It has been said that the inadequacy must be "so palpable that it must be taken to have been a fraudulent contrivance." Other cases have referred to "gross inadequacy," but temper that test by refusing in cases of sales between relatives to call consideration grossly inadequate if it is supplemented by considerations of "natural love and affection," even though such "meritorious consideration" will not bring a conveyance within section 4 [now s. 2] of the *Fraudulent Conveyance Act* on its own.**
>
> **Whatever formula is used to distinguish "good" consideration from "inadequate" consideration, the policy is clear. To bring a transaction within section 4 [now s. 2], it is unnecessary to show that there exists a one-to-one correspondence between the market value of the property transferred and the consideration supplied. To do so would constitute too great a restraint on the transferability of property. The question is, therefore, one of degree, in which the subjective position of grantor and grantee cannot be entirely overlooked. [at 21; emphasis added.]**

[20] The Commission's report also stated, however, that the significance of consideration lies both in its relation to the intention behind the transaction and in relation to its effect. Where the consideration is inadequate or nominal, a creditor need only show that the transferor intended to delay, hinder or defraud the creditor of his remedies. Where on the other hand valuable consideration has passed, the creditor must also show that the transferee actively participated in the fraud. As stated by this court in ***Meeker Cedar Products Ltd. v. Edge*** (1968) 68 D.L.R. (2d) 294 (aff'd at (1968) 1 D.L.R. (3d) 240 (S.C.C.)):

> . . . it is clear as a matter of interpretation of the statute as a whole and upon authority that where a sale is made for good and valuable consideration the transaction will not be void by reason of the purchaser's having notice or knowledge of the vendor's intent to delay, hinder or defraud creditors and others unless it be proved that the purchaser was actually privy to the fraud, *i.e.*, a party to carrying out the fraudulent intention and purpose. [at 299; emphasis added.]

[21] Where valuable consideration has passed, then, the focus is not on the sufficiency of that consideration but on the intentions of both parties to the transaction. The trial judge rightly stated at para. 36 of her Reasons that in this case, the intention of the holding companies must be taken to have been the intention of the Stanwoods. Further, she found it was clear on the evidence that the Stanwoods had intended to delay and defeat their creditors by exchanging their exigible assets for shares which were "not effectively exigible".

[22] I agree with these conclusions. The ***Fraudulent Conveyance Act***, like its sister statute, the ***Fraudulent Preference Act***, must be applied in a manner consistent with modern commerce and common sense. Even if one assumes that the Preferred shares of the companies had substantial value, it simply could not be said on any realistic view that all the defendants did was exchange one form of asset for another and that the effect on creditors was neutral or negligible. The whole purpose of the transaction, as acknowledged by the defendants in discovery, was to permit the Stanwoods to continue to enjoy the use of their family home (and, one may add, their other assets) for at least five years. To do this, the assets had to be put beyond the reach of the Chans. This was done by designing specific rights and restrictions attached to the shares of the companies and by issuing the shares in such numbers and classes as to retain control even if 'unfriendly' persons succeeded in executing against the shares. Although exigible in theory, the various restrictions and obstacles placed in the way of any 'unfriendly' holder meant that in fact they were not worth executing against. The exchange of exigible assets for the Preferred shares delayed, hindered or defrauded the Chans — and did so by design. This "design" or "purpose" constitutes the "fraudulent intent" required by the ***Act***: see Law Reform Commission Report, *supra*, at 16.

[23] As his second ground of appeal, Mr. Sewell submitted that in order to attract the operation of the ***Act***, the transfer must be shown to have been a "sham" — i.e., one not intended to operate as it appears. (See ***Snook v. London and West Riding Investments Ltd.*** [1967] 2 Q.B. 786 at 802.) In this regard, he relied on a comment of the English Court of Appeal in ***Glegg v. Bromley*** [1912] 3 K.B. 474. At 485 of that case, Fletcher Moulton L.J. stated:

> The covenous assignments referred to in the 13 Elizabeth are mock assignments whereby in some form or other the assignor reserves some benefit to himself, but an out and out assignment by way of charge

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> to secure an actual existing creditor is not within the class of assignments which are affected by that statute, . . . [Emphasis added.]

In the same case, Vaughan Williams L.J. noted ***Alton v. Harrison*** (1869) L.R. 4 Ch. 622, and stated:

> First there is *Alton v. Harrison*, where Giffard L.J. says: "If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect." Again, "If the deed is bona fide — that is, if it is not a mere cloak for retaining a benefit to the grantor — it is a good deed under the statute of Elizabeth." Compare per Parker J. in *Wigan v. English and Scottish Law Life Assurance Association* [[1909] 1 Ch. 297]. [At 479, emphasis added.]

Building on these observations, Mr. Sewell submitted that in order to constitute a fraudulent conveyance, the transfer in question must have been designed to allow the debtor to remain the apparent "owner" of the asset and entitled to the full benefit and enjoyment of the asset. That did not occur here, since the transfers were fully documented, and the Stanwoods have been paying the companies rent for the use of them. The companies and their directors may deal with the assets only in a manner consistent with the companies' best interests.

[24] I do not find the "sham" argument persuasive. First, it is apparent the Court in ***Glegg v. Bromley*** was not purporting to provide a comprehensive definition of fraudulent conveyances — these may be as varied as the imagination of a creative debtor allows. Many actions under the ***Act*** have succeeded without proof of a sham. Further, as Mr. McLean submitted, the facts of ***Glegg v. Bromley*** were quite different from the facts of this case. In ***Glegg***, the debtor's husband, who was already a substantial creditor of his wife, advanced funds to her for legal fees and sought more security for the advance. She granted an assignment to him shortly before being adjudged liable in a lawsuit brought against her. The question was whether the assignment was *bona fide*. The Court held that it was good consideration in the form of the further advance having been shown. In the words of Parker J.:

> I think that where a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security, and I cannot think that this inference is rebutted by the fact that the reason why he asks for the further security is his desire to obtain a benefit for himself at the expense of another creditor who may shortly be in a position to take the subject-matter of the proposed security in execution. The Court below appears to have adopted the Master's finding that the mortgage was a valid and operative assignment at any rate as against the mortgagor, a finding which involved the existence of consideration, but at the same time they held that as against the respondent the mortgage was void under 13 Eliz. c. 5 on the ground that it was a voluntary assignment. If the assignment was operative at all, it can only have been on the ground that it was not voluntary, but that there was good consideration for it. [at 491-2]

In the case at bar, in contrast, the transferees of the property were shelf companies; they were not existing creditors; and they did not advance any funds to the Stanwoods. The companies were the Stanwoods' creatures — their intentions were the Stanwoods' intentions.

[25] Further, as noted by the Law Reform Commission in its Report, *supra*, the references in some cases to "sham" transactions as offending the ***Act*** seem simply to mean that to be saved by what is now s. 2, the transaction must be carried out in "good faith" or without notice of collusion or fraud on the part of the transferee. The Commission stated:

> The term "good faith" only has meaning if it is used to characterize the intent of the parties with respect to the passing of property under the disposition. When a debtor transfers his property away, he may wish only to present the appearance of a transfer. His true intent may be to reserve some interest to himself, by way of a secret instrument, oral agreement, or understanding with the transferee. In such a case the conveyance is not made in good faith, since it is a sham. . . .
>
> This interpretation of the words "good faith" probably lies at the root of a number of cases in which courts have held that a conveyance is barred by the *Fraudulent Conveyance Act* if the grantor intended to retain some interest in the property transferred. [at 23-4]

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[26] Thus although no sham transaction can be said to have been carried out in "good faith", a transaction need not be a sham to contravene the ***Act***. Again returning to the wording of the statute, the question in every case is whether it was carried out "to delay, hinder or defraud creditors and others of their just and lawful remedies" — not whether the transfer was intended to have real effect or not.

[27] Accordingly, I see no error in the trial judge's conclusions that the transfers offended the ***Act***. I would dismiss the Stanwoods' appeal from the order of the court below declaring the transfers void and of no force and effect insofar as they affected the rights of the Chans.

THE ACTION AGAINST MR. DAVIS

The Trial Judgment

[28] The second part of the trial judge's Reasons dealt with the action as against Mr. Davis. The portions of the plaintiffs' Statement of Claim relevant to Mr. Davis were as follows:

> 20. Davis, with the knowledge and intention that the Transfers would delay, hinder and defraud the Plaintiffs of their lawful remedy for the collection of the Judgment, and delay, hinder and defraud other creditors, contrary to the *Act*, wrongfully advised and induced the Stanwoods to the effect the Transfers.
>
> 21. Davis had a legal obligation or duty or a fiduciary duty to the Plaintiffs in respect of the Transfers, which Transfers were contrary to the *Act*, which he knew or is deemed to have known.
>
> 22. Davis, in his state of knowledge, had a legal obligation or duty or fiduciary duty to the Plaintiffs which he breached:
>
> (a) to refrain from counselling and advising the Stanwoods to effect the Transfers; and
>
> (b) to refrain from effecting the Transfers on behalf of the Stanwoods.
>
> 22.1 By reason of his conduct, Davis made himself a party to the torts committed by the other Defendants herein. Further or in the alternative, Davis induced the torts committed by the other Defendants herein.
>
> . . .
>
> 23.1 Liability arises for the Defendants in intentional tort and, or alternatively, in negligence. Further or in the alternative as against the Defendant Davis, liability arises for breach of fiduciary duty. [Emphasis added.]

Obviously, the pleading did not "name" a tort in the usual way. The Chans' allegations were elaborated upon in their written argument in the court below:

> In designing the scheme, counselling and inducing the other defendants to carry out the scheme in his state of knowledge, and effecting the scheme on behalf of the other defendants, Davis committed a tort against the Chans. He participated in the fraud, and in fact was the principal party responsible for carrying out the scheme. Davis cannot escape liability by asserting that he was the Stanwoods' solicitor and as such owed no duty of care *qua* solicitor to the Chans. His duty of care to the Chans stands on a different footing: it is required as a matter of public policy. [Emphasis added.]

(As earlier mentioned, neither breach of fiduciary duty nor negligence was pressed on appeal.)

[29] We were told that the trial judge repeatedly questioned the Chans' counsel about the cause of action alleged against Mr. Davis. Counsel responded that they were not required to attach a name to the tort being relied upon or to identify a known cause of action, but that they could rely on the phrase "intentional tort" or "participation in a fraudulent conveyance". We were also told that counsel for the Chans stated in the court below that his clients were not alleging fraud on Mr. Davis's part — apparently drawing a distinction between "fraud" and "participation in" or "counselling" a fraudulent conveyance.

[30] In the following passages, the trial judge decided both the substantive and the procedural issues of the case brought against Mr. Davis by the plaintiffs:

> Leaving aside for the moment any difficulty with the pleadings, the fundamental assertion is that an intentional tort was committed by all defendants. Mr. Davis has deposed that he held the opinion that this was not a fraudulent conveyance. I obviously do not agree with his opinion, but I cannot conclude that it was not honestly held. As this matter proceeded under Rule 18A, I have not even had the benefit of listening to Mr. Davis or of cross examination. I do not understand how Mr. Davis could be liable for an intentional tort when he was of the view that the transactions did not offend any legislation.
>
> . . .
>
> If the plaintiffs are truly alleging participation in a fraud or a conspiracy to defraud, there must be a specific plea. I cannot agree that the plaintiffs are not required to attach a name to the tort they allege, as was submitted by Mr. Postman on behalf of the Chans. In that regard, I note the comments of

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> Nordheimer J. in ***J.G. Young & Son Ltd. v. Tec Park Ltd.***, [*infra*], a decision relied upon by Mr. Postman. [paras. 47 and 49; emphasis added.]

[31] In ***J.G. Young & Son Ltd. v. Tec Park Ltd.*** [1999] O.J. No. 4066 (Ont. Sup. Ct.), the pleadings had referred to four causes of action — conspiracy, fraud, intentional interference with contractual relations, and breach of the ***Fraudulent Conveyances Act*** of Ontario. Nordheimer J. ruled that none of the defendants would be able to tell from the Statement of Claim which category of wrong was alleged against them. Further, he said, it was not sufficient to "merely plead the facts required for a claim under the ***Fraudulent Conveyances Act*** and then simply add a claim for damages for fraud to the prayer for relief." (para. 13) In the case at bar, the trial judge noted, the prayer for relief did not even claim damages for fraud or for conspiracy to defraud. For the reasons quoted above, she dismissed the Chans' claim against Mr. Davis.

On Appeal

[32] On appeal, the Chans argue that the trial judge erred both on the substantive level, in concluding that Mr. Davis held the opinion his clients' transactions would not offend the ***Act***, and on the procedural level, in requiring that the "tort" alleged against Mr. Davis be identified. On the substantive level, I am of the view, with all due respect to the trial judge, that Mr. Davis's statement concerning his opinion runs counter to the weight of all the other evidence, including his own. He could not reasonably have believed that the Preferred shares received by the Stanwoods for their assets were of equal value, in any market, to those assets or that the effect of the transaction was neutral from anyone's viewpoint — the creditors' or his clients'. Mr. Davis himself wrote the paper relied on by the Stanwoods which described how to keep "assets in a place where they are available only to you and your family and not available [to] those who do not have your interests at heart", as well as how to "make it hard for the creditor to collect on the shares"; and he stated in discovery that the purpose of the plan was to ensure that the Stanwood children would be accommodated in the family home "for five years at least." This must, in my view, be taken as tantamount to an admission that the transactions he was counselling would delay and hinder the Stanwoods' creditors at a time when his clients were insolvent, and that that was the purpose of the transactions.

[33] On the assumption, then, that Mr. Davis, at least, knew what he was doing, can he as a lawyer who has counselled clients to commit what turns out to be an illegal act, be found liable for the consequences of that act? This is obviously an important and far-reaching question. Mr. Ward, counsel for Mr. Davis, argued that the imposition of any liability on a lawyer for advice given to a client would interfere with the lawyer's duty to advise his or her client as appropriate and to consider and act only in the client's best interest. He noted that courts have been careful to restrict the circumstances in which lawyers have been found to owe duties of care to persons dealing with, or adverse in interest to, their clients. (In this regard, see the judgment of this court in ***Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.*** 1989 CanLII 242 (BC CA), (1989) 64 D.L.R. (4th) 167, a case decided prior to the opening up of liability in negligence for pure economic loss), at 169-170.)

[34] But it cannot be suggested that a lawyer may hide behind his or her profession to commit illegal acts. The ***Handbook of Professional Conduct*** issued by the Law Society of British Columbia states at Rule 1(1) of Chapter 1 that a lawyer should not aid, counsel or assist any person to act in any way contrary to the law, and at Rule 6 of Chapter 4 that "A lawyer shall not knowingly assist a client to make, receive or participate in a fraudulent conveyance, preference or settlement."

[35] So I return to the procedural question of whether the plaintiffs' pleadings were sufficient to disclose a cause of action. In arguing that they were, counsel for the Chans relies on the principle, recently affirmed by this court in ***Alford v. Canada (Attorney General)*** [1998] B.C.J. No. 2965, that the ***Rules of Court*** do not require a pleader to identify or "name" the cause of action being advanced as long as the material facts on which the pleader relies, together with the relief sought, are set out in the Statement of Claim. (Cf. ***Homalco Indian Band v. British Columbia*** (1998) 25 C.P.C. (4th) 107 (B.C.S.C.).) But the question is not merely one of sufficiency of pleadings. Rather, it is whether having gone through the trial disavowing an allegation of fraud, the Chans may now change their position and allege it for the first time in this court. In my view, the moral stain attached to fraud, coupled with the potential effect of such a finding on the reputation of any professional person, require that if such an allegation is made, it be made clearly, and at trial. Thus I agree with Mr. Ward's submission that the Chans should not be permitted to make such a "clarification" at this late stage. No motion to amend the Statement of Claim was advanced, and I doubt such a motion would have succeeded in the present circumstances.

[36] Setting aside the tort of fraud, then, the next question is whether an allegation that Mr. Davis "wrongfully advised and induced the Stanwoods to effect the Transfers" can give rise to any other actionable wrong. I have considered whether the tort of conspiracy, which consists of an "agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means" (see L.N. Klar, ***Tort Law*** (2nd ed., 1996) at 514) was described in the plaintiffs' pleadings. Whilst an argument might be made to this effect, it was not made by counsel here or below, and it would have been a tortuous one

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if it had been made. Again, given the unusual nature of this tort, it would be inappropriate to set out down this winding road at this late stage without proper foundations being laid or argument being made.

[37] The remaining question is whether advising another to carry out a breach of the ***Fraudulent Conveyance Act*** constitutes a civil wrong (other than fraud or conspiracy) in the same way as "counselling" a crime is itself a crime. (See ***Criminal Code***, s. 22; V. Gordon Rose, ***Parties to an Offence*** (1982) at 122-4.) Counsel did not bring to our attention any authority for the proposition that "counselling" or "inducing" a breach of the ***Fraudulent Conveyance Act*** is a "tort" as that term is generally understood, and I have located none. It is true that in ***Centre Star Mining Co. v. Rossland Miners Union*** (1905) 11 B.C.R. 194 (B.C.S.C.), Chief Justice Hunter suggested that it was a "common law offence" to breach the ***Act*** and for a lawyer to counsel such an offence, but he cited no authority. In fact there is authority that even effecting a fraudulent conveyance may not be a "tort". ***Halsbury's*** (4th ed., v. 31, §868) notes ***Upton v. Basset*** (1595) 78 E.R. 685, where it was said that "[a]t the common law, there was not any fraud remedied, which should defeat an after purchase, but that only which was committed to defraud a former interest." More recently, the question was canvassed by the Manitoba Court of Queen's Bench in ***Suncorp Realty Inc. v. PLN Investments Inc.*** reflex, [1986] 1 W.W.R. 619. There, Jewers J. referred to ***Anchor Elevator Co. v. Heney*** (1908) 18 Man. R. 96, where the Manitoba Court of Appeal held that a preference prohibited by the Manitoba ***Assignments Act*** did not give rise to a claim in tort, and therefore could not be the subject of an order granting service *ex juris*. In ***Suncorp***, the Court concluded that in a fraudulent conveyance action:

> There is no claim for damages. The whole idea of the proceeding is to simply avoid the transaction as against the creditors so they can have access to the property in question to satisfy their claims.
>
> Because of the absence of a possible claim for unliquidated damages — or any damages at all — I would not be prepared to classify a fraudulent conveyance as a tort. [at 631; emphasis added.]

[38] Mr. McLean referred us to cases in which courts have awarded damages to plaintiffs in fraudulent conveyance actions where the assets are no longer available: see, e.g. ***Sale v. Roper Construction Ltd.*** [1989] B.C.J. No. 2017 (B.C.Co.Ct.) and ***Gooseaire Humidification Ltd. v. Knowles Brothers Ltd.*** (1979) 27 N.B.R. (2d) 541 (N.B.Q.B.). However, the damage remedy in those cases was simply a substitute for the reconveyance of the property; a new "tort" was not thereby created, in my view. In the case at bar, no damages were proven in the summary trial. Instead the ***Act*** served its purpose — the setting aside of the transfers of assets vis à vis the plaintiffs.

[39] In the result, I conclude that in the absence of a pleading of fraud or conspiracy, the trial judge did not err in dismissing the action against Mr. Davis on the evidence before her. I would dismiss the plaintiffs' appeal against the dismissal of their action against Mr. Davis.

COSTS

[40] Following the issuance of her Reasons in the main action, the trial judge gave the parties an opportunity to make submissions in writing regarding costs. The plaintiffs sought special costs as against the Stanwoods and the holding companies, relying on various cases in which special costs were awarded in successful fraudulent conveyance actions. However, the trial judge found — reluctantly — that because Mr. Davis had advised the Stanwoods that the transactions did not contravene any law, an order of special costs against them was not appropriate.

[41] On appeal, the plaintiffs submit that the conduct of the Stanwoods and their companies was sufficiently "reprehensible" to warrant an award of special costs, consistent with the judgment of this court in ***Stiles v. British Columbia (W.C.B.)*** 1989 CanLII 235 (BC CA), (1989) 38 B.C.L.R. (2d) 307. Further, they say special costs have been consistently awarded in other cases involving fraudulent conveyances on the basis that the proceedings were necessitated by the defendants' fraudulent intentions. (See ***Tracy Estate v. Wobick*** [1999] B.C.J. No. 2530 (B.C.S.C.); ***L.K.B. v. G.J.T.*** [1997] B.C.J. No. 348 (B.C.S.C.); and ***Rohani v. Rohani*** [1999] B.C.J. No. 2059 (B.C.S.C.) at para. 27; aff'd at [2002] B.C.J. No. 809.)

[42] I do not read any of those cases, however, to mean that a trial judge does not have a discretion to decline to make an award of special costs in a case involving fraud. The trial judge in this case properly stated the applicable law and it does not appear she acted on any misapprehension of principle in reaching the conclusion she did. I see no basis for interfering with her award of costs at Scale 3 against the Stanwoods and the corporate defendants.

[43] In connection with the costs of the appeal in the action against him, Mr. Davis seeks special costs in his favour. I am not of a mind to make such an order, given the fact that he must have known that the transfers carried out on his advice were prohibited. Mr. Davis should bear his own costs of the appeal.

[44] We are indebted to all counsel for their helpful submissions.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Mackenzie"

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FL Receivables Trust 2002-A v. Cobrand Foods Ltd., 2007 ONCA 425 (CanLII) - A Review of Shifting Onuses on Attempted Indication of Badges of Fraud

Date: 2007-06-12
Docket: C43408; C42354
Parallel citations: 85 OR (3d) 561
URL: http://canlii.ca/t/1rrrw
Citation: FL Receivables Trust 2002-A v. Cobrand Foods Ltd., 2007 ONCA 425 (CanLII), <http://canlii.ca/t/1rrrw> retrieved on 2013-08-22
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CITATION: FL Receivables Trust 2002-A v. Cobrand Foods Ltd., 2007 ONCA 425
DATE: 20070612
DOCKET: C43408 & C42354
COURT OF APPEAL FOR ONTARIO
LASKIN, BORINS and FELDMAN JJ.A.
BETWEEN:
PRUDENTIAL SECURITIES CREDIT CORP., LLC in its capacity as Administrator of FL RECEIVABLES TRUST 2002-A on its own behalf and on the behalf of all creditors of Robert Laba
Plaintiff (Respondent in C43408 and Appellant in C42354)
and
COBRAND FOODS LTD., ROBERT LABA, BARRY O. TELFORD, CHARLES XAVIER and ANGELA LABA
Defendants (Robert Laba, Appellant in C43408 and Respondent in C42354
and Angela Laba, Respondent)
Martin Sclisizzi for the appellant/respondent Robert Laba
Brett Harrison for the respondent/appellant Prudential Securities Credit Corp., LLC
Myron W. Shulgan, Q.C. for the respondent Angela Laba
Heard: December 13, 2006
On appeal from the judgment of Justice Herman J.W. Siegel of the Superior Court of Justice dated March 29, 2005.
LASKIN J.A.:

A. OVERVIEW

[1] The plaintiff, Prudential Securities Credit Corp., LLC, claimed against Robert Laba on a guarantee, and against Robert Laba and his wife, Angela Laba, on the ground that Robert's transfer of his interest in two properties to Angela were fraudulent conveyances and thus void under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29. The action was tried by a judge alone.

[2] At the end of Prudential's case, both Robert Laba and Angela Laba brought motions for a non-suit and elected to call no evidence. The trial judge dismissed Robert Laba's motion and granted Angela Laba's motion, with reasons to follow. Later, and without hearing further submissions, he delivered reasons granting Prudential judgment against Robert Laba on his guarantee in the amount of its claim (US $639,348.32 and Can $600.00, together with prejudgment interest of US $139,189.45), and dismissing Prudential's claim against Angela Laba.

[3] Both Robert Laba and Prudential have appealed. On his appeal, Robert Laba makes a single submission: the trial judge failed to give him an opportunity to make closing argument. Robert Laba submits that this failure amounted to a miscarriage of justice and must be remedied by a new trial.

[4] On its appeal, Prudential submits that in dismissing its action against Angela Laba, the trial judge made three errors. First, he applied the wrong legal test on a non-suit motion. Second, he applied the wrong test for establishing a fraudulent conveyance. And third, he failed to properly assess the evidence in support of Prudential's claim.

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B. BACKGROUND FACTS

[5] In 1996, Robert Laba became the chief financial officer and a 50 per cent shareholder in T.B. Extreme Foods Limited. Over the next three years, T.B. Extreme acquired twenty-six Taco Bell franchises. In 1999, the defendant, Cobrand Foods Ltd. was incorporated to acquire additional Taco Bell franchises. Robert Laba became the chief financial officer and a director of Cobrand. He was sued on a written guarantee that he gave in connection with a loan from Captec Financial Group Inc. to Cobrand. Prudential is Captec's assignee.

[6] Captec was in the business of making loans to franchised restaurant operators for the purchase of restaurant equipment. In November 1999, Captec agreed to finance Cobrand's purchase of equipment for a Taco Bell / Pizza Hut restaurant in Toronto. In April 2000, Captec advanced the loan in the amount of US $523,680.00, and Cobrand gave Captec a promissory note and security over the equipment. Robert Laba guaranteed payment of Cobrand's debts and liabilities in respect of the Captec loan.

[7] In March 2001, Cobrand defaulted on the loan. In February 2002, Prudential began this action. It obtained a default judgment against Cobrand, and proceeded to trial against Robert and Angela Laba.

C. ANALYSIS

I. Robert Laba's Appeal

1) Did the trial judge's failure to give Robert Laba an opportunity to make closing argument amount to a miscarriage of justice?

[8] The non-suit motions were argued over two and a half days in late July 2004. The trial judge reserved his decision on the motions. Before adjourning court, however, he advised counsel that if the non-suit motions were unsuccessful they should be ready to re-attend for closing argument. On July 30, 2004, the trial judge issued a brief endorsement. He dismissed Robert Laba's non-suit motion and granted Angela Laba's motion, and said, "Written reasons with respect to both motions will follow."

[9] The trial judge apparently forgot about reconvening for final argument. Instead, on March 29, 2005, he delivered written reasons in which he not only explained his decision on the non-suit motions, but also went farther, granting judgment against Robert Laba and dismissing the action against Angela Laba.

[10] In finding Robert Laba liable on his guarantee, the trial judge said at para. 35 of his reasons:

[35] For the foregoing reasons, I am satisfied that the plaintiff has raised a *prima facie* case. Accordingly, the motion for non-suit must be dismissed. In fact, as set out above, I am satisfied that the plaintiff has established well beyond a balance of probabilities that Robert Laba is liable on the Guarantee.

[11] Robert Laba submits that the right to make closing argument is a substantive right, essential to a fair trial. As he was deprived of this right, albeit inadvertently, he was denied the opportunity to fully present his case. He points out that though he presented argument on the non-suit motion, a plaintiff's burden to defeat a non-suit differs from and is less onerous than its burden to obtain judgment on its claim. Thus, Robert Laba contends that the result of being denied the right to make closing argument amounts to a miscarriage of justice, which can be remedied only by an order for a new trial.

[12] Before addressing Robert Laba's submission, I want to say a few words about non-suit motions in civil non-jury trials. The term "non-suit" refers to a motion brought by the defendant at the close of the plaintiff's evidence to dismiss the action on the ground that the plaintiff has failed to make out a case for the defendant to answer. Neither the *Courts of Justice Act*, R.S.O. 1990, c. C.43, nor the *Rules of Civil Procedure* specifically provides for non-suit motions, but judges continue to have a recognized jurisdiction to entertain these motions.

[13] Still, I question whether in this province a non-suit motion in a civil non-jury trial has much value. In Ontario, when a defendant moves for a non-suit, the defendant must elect whether to call evidence. See *Ontario v. Ontario Public Service Employees Union (OPSEU)* reflex, (1990), 37 O.A.C. 218 at para. 40 (Div. Ct.). If the defendant elects to call evidence, the judge reserves on the motion until the end of the case. If the defendant elects to call no evidence – as Robert Laba elected in this case – then the judge rules on the motion immediately after it has been made.

[14] A non-suit motion adds to the time and expense of a trial. And because of the election requirement, it has little practical value. Perhaps a defendant bringing the motion sees a tactical advantage in being able to argue first. To succeed on the motion, however, the defendant must show that the plaintiff has put forward no case to answer, in most lawsuits an onerous task. Why not simply take on the less onerous task of showing that the plaintiff's claim should fail? It is small wonder that most commentators consider that in civil judge alone trials, non-suit motions gain little and are becoming obsolete. See *Phipson on Evidence*, 16th ed. (London: Sweet & Maxwell, 2005) at 274, and John Sopinka, Donald B. Houston& Melanie Sopinka, *The Trial of an Action*, 2d ed. (Toronto: Butterworths Canada, 1999) at 151-52.

[15] In this case, I agree with Robert Laba on three points. First, as my discussion above signals, Prudential's burden on the non-suit motion differed from and was less onerous than its burden to obtain judgment on its claim. To defeat the non-suit motion, Prudential had to satisfy the trial judge that it had put forward a *prima facie* case – that it had

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put forward evidence, which, if believed, would allow the trial judge to decide in its favour. To obtain judgment, Prudential, of course, had to establish its claim on a balance of probabilities.

[16] Second, I agree with Robert Laba that the opportunity to make closing argument is a substantive right. And third, I agree that though he did so inadvertently and not deliberately, the trial judge erred in depriving Robert Laba of that opportunity. Because of this error, Robert Laba asks for a new trial.

[17] Not every error by a trial judge entitles an aggrieved party to a new trial. Section 134(6) of the *Courts of Justice Act* stipulates that this court should order a new trial only where "some substantial wrong or miscarriage of justice has occurred." This stringent standard reflects the underlying policy that new trials ordinarily are contrary to the public interest. New trials cause increased costs or wasted costs as well as delay in resolving disputes, and are therefore to be avoided unless plainly required by the interests of justice. See *Arland and Arland v. Taylor*, [1955] O.R. 131 (C.A.).

[18] Thus, the narrow question on this appeal is whether the trial judge's failure to give Robert Laba an opportunity to make a closing argument caused a miscarriage of justice. I would answer that question, no.

[19] There are decisions of this court standing for the proposition that a litigant has a substantive right to present closing argument, and where that right is denied, we should order a new trial. The main case, followed many times, is *Felker v. Felker*, [1946] O.W.N. 368 (Ont. C.A.). In that case, this court held that the defendant was deprived of her substantive right to have her case fully presented because the trial judge gave judgment without giving her an opportunity to present argument. The court ordered a new trial.

[20] In the appeal before us, I come to a different conclusion. In doing so, I do not intend in any way to depart from *Felker* and its progeny. But, as is invariably the case, context matters. Here, the context includes three important considerations.

[21] First, Robert Laba cannot say that he had no opportunity to present argument after all the evidence was in. To the contrary, he fully argued over the course of two and a half days all the defences to the guarantee available to him. Although he did so on his non-suit motion instead of in final argument, he nonetheless had an opportunity to fully present his side of the case. It seems to me that is all *Felker* requires. Indeed, the trial judge's reasons show that even on the non-suit motion, Robert Laba argued Prudential had not established its claim against him on a balance of probabilities. At para. 25 of his reasons, the trial judge set out Robert Laba's principal argument: "The principal argument of the defendant is that the plaintiff has failed to prove, on a balance of probabilities, that the Guarantee relates to the Loan."

[22] Second, and critically important, Robert Laba has not shown that if he had been given an opportunity to make closing argument, the result would have been different. On appeal, his trial counsel filed an affidavit stating that he expected to have the opportunity to make closing submissions. But, his affidavit is silent on any new arguments that he might have presented.

[23] In his factum on appeal, Robert Laba raised but one defence: his guarantee was meant to be an "interim measure", to end once the landlord of the restaurant premises agreed – as it eventually did – to subordinate its interest in Cobrand's equipment to that of Captec. This defence was not even pressed at trial, and was quickly and correctly disposed of by the trial judge at para. 13 of his reasons:

[13] While Robert Laba has pleaded that he understood the Guarantee to be effective only until the landlord waiver issue was finalized to the satisfaction of Captec, this was not seriously argued at trial and there is no evidence to support this position.

[24] Third, when the trial judge released his reasons granting judgment, Robert Laba did not write to him or go back to him to complain that he had been prejudiced in any way by being deprived of the opportunity to make closing argument.

[25] In the light of these considerations, I am not persuaded that a miscarriage of justice has occurred. Had Robert Laba been given the opportunity to present a closing argument, I am not satisfied that the result would have been different. I would dismiss his appeal.

II. Prudential's Appeal

1) Did the trial judge apply the wrong test on Angela Laba's non-suit motion?

[26] In October 2000, Robert Laba transferred his interest in two properties to his wife, Angela. In its action, Prudential alleged that the transfers were void because they were made with intent to defeat its claim as creditor, contrary to s. 2 of the *Fraudulent Conveyances Act*. Section 2 states:

Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

[27] At the end of Prudential's case, Angela Laba moved for a non-suit, which the trial judge granted. Prudential submits that by doing so the trial judge applied the wrong test. The factual background of this submission is briefly as follows.

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[28] As I have said, Robert Laba was a 50 per cent shareholder in T.B. Extreme. T.B. Extreme's lender was the Royal Bank of Canada ("RBC"). In May 1998, Robert Laba gave RBC a personal guarantee of T.B. Extreme's indebtedness limited to $1 million. By 1999, T.B. Extreme was in financial difficulty. In April 2000, Robert Laba gave Captec his personal guarantee of Cobrand's indebtedness.

[29] At the time he gave these two guarantees, Robert Laba had an interest in two properties. He held a 50 per cent interest in the matrimonial home at 4 Lyon Court in Leamington, Ontario. Angela Laba held the other 50 per cent. He also held a 50 per cent interest in the property at 39 Erie Street South in Leamington. His father held the other 50 per cent.

[30] In the summer of 2000, because of T.B. Extreme's financial difficulties, RBC asked for additional security and threatened to put in a monitor. In July 2000, the Labas entered into a transfer agreement in which Angela consented to a $500,000 mortgage in favour of RBC on a property at 10 Hillview Crescent in Leamington owned by her numbered company, 1220812 Ontario Inc. ("122"). In return, Robert Laba agreed to transfer his interest in 4 Lyon Court and 39 Erie Street South to Angela. Robert transferred his interest in the properties in October 2000. The trial judge found that when Robert Laba gave his guarantee to Captec, his interest in the two properties was worth approximately $562,000.

[31] In February 2001, T.B. Extreme was assigned into bankruptcy. RBC claimed against Robert Laba on his guarantee and against 122 to enforce the mortgage. 122 defended the action, contending that the mortgage was invalid.

[32] In resisting Angela's non-suit motion, Prudential put forward what it claimed were numerous "badges of fraud" associated with the transfers. The trial judge itemized these badges at para. 61 of his reasons:

[61] The plaintiff says Robert Laba conveyed the property "with intent to defeat, hinder, delay or defraud his creditors and others". It says the following "badges of fraud" raise an evidentiary burden on Robert Laba which he has not discharged:

1. the conveyance represented substantially all of his remaining assets at the time;
2. Robert Laba continued in possession and used the Properties after the transfers;
3. the transfers were made at a time when RBC was putting in place a monitor over TB Extreme whose debts Robert Laba had guaranteed;
4. the deeds refer to nominal consideration which the plaintiff says is untrue if the true consideration was the granting of a mortgage by 122 if called upon in the future;
5. unusual haste to make the transfers in October, 2000;
6. retention by Robert Laba of some benefits in 4 Lyon, reflected in his receipt of funds from a later mortgage on 4 Lyon in 2002;
7. the close relationship between the parties as husband and wife; and
8. an alleged lack of good consideration.

[33] The trial judge nonetheless granted Angela Laba's motion. He concluded, at para. 71, that the "badges of fraud do not, on a balance of probabilities, evidence fraud when considered against the background of the purpose of the Transfer Agreement." According to the trial judge, at para. 69, "it is at least as likely that the Transfer Agreement and the transfers of the Properties were entered into by Robert Laba with a view to having 122 grant the RBC Mortgage in favour of RBC, one of his two creditors, rather than with an intent to defeat, hinder, delay or defraud his creditors."

[34] Prudential submits that the trial judge applied the wrong test on the non-suit motion. It argues that the trial judge should not have weighed the competing inferences available from the evidence to determine whether fraud had been established on a balance of probabilities. Instead, he should simply have determined whether Prudential's evidence, assuming it was believed, made out a *prima facie* case, a case for Angela Laba to answer. I agree with this submission.

[35] On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences. This court discussed this latter principle in *Hall et al. v. Pemberton* (1974), 5 O.R. (2d) 438 at 438-9, quoting *Parfitt v. Lawless* (1872), 41 L.J.P. & M. 68 at 71-72:

I conceive, therefore, that in judging whether there is in any case evidence for a jury the Judge must weigh the evidence given, must assign what he conceives to be the most favourable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.

...

From every fact that is proved, legitimate and reasonable inferences may of course be drawn, and all that is fairly deducible from the evidence is as much proved, for the purpose of a *prima facie* case, as if it had been proved directly. I

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conceive, therefore, that in discussing whether there is in any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

[36] In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion. See John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths Canada, 1999) at 139.

[37] In granting Angela Laba's motion, the trial judge went beyond his limited mandate and failed to apply either of the two principles set out above. Ordinarily, where an appellate court reverses a decision to grant a non-suit in a judge alone trial, a new trial is ordered. Prudential, however, does not want a new trial. Instead, it wants this court to decide whether the trial judge erred in concluding that it had not established that the transfers were fraudulent conveyances. Furthermore, although Prudential does request, in the alternative, that the case be sent back for a new trial, in my view, that remedy is not warranted as the trial judge's reasons provide a sufficient basis for this court to determine the merits of Prudential's action.

2) Did the trial judge apply the wrong test for establishing a fraudulent conveyance claim?

[38] Prudential submits that by putting the onus on it to establish fraud on a balance of probabilities, the trial judge applied the wrong test. Prudential argues that the trial judge should have engaged in a two-step analysis. First, he should have concluded that the "badges of fraud", on which Prudential relied, gave rise to an inference of fraud and that that inference then put a "burden of explanation" on Angela Laba to show that her husband did not act with an intent to defeat his creditors. See *Rinaldo v. Rosenfeld (Trustee of)*, [2001] O.J. No. 4189 (C.A.). Second, as neither Robert nor Angela Laba put forward any evidence to meet their burden, the trial judge should have found that Prudential was entitled to a judgment against Angela Laba and declared the transfers void. I do not accept Prudential's submission.

[39] The crucial question in any fraudulent conveyance action is whether the plaintiff has proved the fraudulent intent of the debtor. While the legal burden to prove fraudulent intent remains on the plaintiff throughout the trial, the plaintiff can raise an inference of fraud sufficient to put a "burden of explanation" on the defendant debtor. The plaintiff typically raises an inference of fraud by putting forward "badges of fraud." These "badges of fraud" vary from case to case. They are no more than typical and suspicious facts that may allow the court to make a finding of fraud absent an explanation from the debtor. See C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Toronto: Thomson Canada, 1995) at 613-15.

[40] The court, however, is not compelled to draw this inference of fraudulent intent from badges of fraud pleaded by the plaintiff. See *Koop v. Smith* 1915 CanLII 26 (SCC), (1915), 51 S.C.R. 554 at 558-59. The court may dismiss a fraudulent conveyance action because it has decided that the surrounding circumstances taken as a whole explain away the plaintiff's evidence. It seems to me that is what the trial judge did in this case.

[41] It is clear from his reasons that the trial judge was well aware that it was within his discretion to draw an inference of fraudulent intent from Prudential's alleged badges of fraud. Unfortunately, the trial judge's reasons are not entirely clear on whether he drew this inference. One or two paragraphs in his judgment suggest that he did. On balance, however, on my reading of his reasons, it appears that the trial judge decided not to draw an inference of fraudulent intent and thus not to place the "burden of explanation" on Angela Laba. Instead, he decided Prudential's claim on the basis it had the burden of proof to establish a fraudulent conveyance on a balance of probabilities and did not have the benefit of an inference of fraudulent intent. He looked at all the circumstances surrounding the badges of fraud and drew inferences that explained away Prudential's evidence. He therefore concluded that Prudential had not made out its case.

[42] For example, at para. 69 of his reasons, in a passage I have already quoted, he said, "it is at least as likely" that the transfers were made to facilitate the RBC mortgage rather than to defeat his creditors. Implicitly, he concluded Prudential did not establish a fraudulent intent on a balance of probabilities. Also, at para. 71, he found, "the facts which the plaintiff submits represents badges of fraud do not, on a balance of probabilities, evidence fraud." Again, he determined that Prudential failed to meet its burden. And, more importantly, in several paragraphs, which I discuss below, the trial judge rejected a number of the badges of fraud alleged by Prudential. In my view, these passages demonstrate, as in *Rinaldo*, *supra*, that the trial judge concluded, in the circumstances before him, that Prudential had not met the threshold necessary to put the burden of explanation on Angela Laba. In my view, it was open to him to do so.

[43] In the next section of these reasons, I discuss the inferences that the trial judge did draw. On this ground of appeal, it is sufficient to say that the trial judge did not and was entitled not to draw the permissive inference of fraudulent intent. I am therefore not persuaded that he applied the wrong test for establishing a fraudulent conveyance.

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3) Did the trial judge fail to properly assess Prudential's evidence?

[44] Even accepting that it had the burden throughout to establish that the transfers were fraudulent on a balance of probabilities, Prudential contends that in finding against it the trial judge failed to properly assess the evidence. Central to this contention is Prudential's submission that, as the entire fraudulent conveyance case against Angela Laba was based on a written record, the principle of appellate deference to a trial judge's fact-finding and inference-drawing does not apply.

[45] The principle of deference means that an appellate court may substitute its own view of the evidence and draw its own inferences only if the trial judge committed a palpable and overriding error or made findings of fact or drew inferences that are unreasonable or unsupported by the evidence. See *H.L. v. Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401 at para. 4. However, because the relevant evidence in this case is written, Prudential submits that this court may make its own findings of fact and draw its own inferences without giving any deference to the trial judge.

[46] That submission has been overtaken by recent decisions of the Supreme Court of Canada and this court. See *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, *Schwartz v. Canada*, 1996 CanLII 217 (SCC), [1996] 1 S.C.R. 254, *Equity Waste Management of Canada v. Halton Hills (Town)* 1997 CanLII 2742 (ON CA), (1997), 35 O.R. (3d) 321 (C.A.), *Gottardo Properties (Dome) Inc. v. Toronto (City)* 1998 CanLII 6184 (ON CA), (1998), 162 D.L.R. (4th) 574 (Ont. C.A.), and *Waxman v. Waxman* 2004 CanLII 39040 (ON CA), (2004), 44 B.L.R. (3d) 165 (Ont. C.A.). The principle of appellate deference to a trial judge's fact-finding and inference-drawing applies even when the entire trial record is in writing. That is so because the principle of deference is grounded in more than a trial judge's ability to see and hear the witnesses. Deference recognizes that even on a written record, the trial judge "lives through" the trial while a court of appeal reviews the record only through the lens of appellate review. Deference also preserves the integrity of the trial process, maintains the confidence of litigants in that process, reduces the number and length of appeals and therefore, the cost of litigation, and appropriately presumes that trial judges are just as competent as appellate judges to resolve disputes justly.

[47] The principle of deference, therefore, applies to the trial judge's finding that Prudential failed to establish that the transfers were fraudulent. That finding was based on inferences the trial judge drew from the factual record. In drawing those inferences, the trial judge rejected as evidence of fraudulent intent a number of the badges of fraud put forward by Prudential.

[48] For example, at para. 66 of his reasons, the trial judge refused to infer that Robert Laba selected 10 Hillview Crescent to defeat his creditors. Instead, he inferred that RBC selected the security on 10 Hillview Crescent for reasons that do not impeach the transfers. At para. 73, the trial judge also drew the inference that Angela Laba would not have consented to the RBC mortgage if she had not received consideration roughly equal in value to the equity in 10 Hillview Crescent.

[49] And, faced with a choice of whether the transfers showed an intent to defeat creditors or an attempt to meet the demands of T.B. Extreme's lender, at para. 69, the trial judge drew the inference that the latter was at least as likely as the former. Prudential contends that favouring one creditor over another amounted to a fraudulent conveyance under s. 2 of the *Fraudulent Conveyances Act*. Although this court has held that this statute may apply to conveyances made for the benefit of other creditors, the trial judge correctly concluded that s. 2 requires a fraudulent intent on the part of the debtor regardless of whether one creditor is "favoured" over another. See *Optical Recording Laboratories Inc. v. Digital Recording Corp.* reflex, (1990), 1 O.R. (3d) 131 at 139 (C.A.). He refused to find that intent in this case.

[50] Finally, at para. 72, the trial judge refused to draw an inference of fraud either from the mere fact that Robert and Angela Laba were husband and wife or from the fact that she later permitted him to take some of the mortgage proceeds on the matrimonial home at 4 Lyon Court for his personal use.

[51] Thus, the only question on this branch of the appeal is whether the inferences drawn by the trial judge on which he based his ultimate finding are supported by the evidence or, I might add, by the absence of evidence put forward by Prudential. See *H.L.*, *supra*, at para. 74. In my view, they are.

[52] When the transfers took place, neither Robert Laba nor Cobrand was insolvent. Neither was in breach of any obligation to Captec. The transfers themselves gave RBC access to about the same amount of security as it would have had access to if Robert Laba had not conveyed the two properties to his wife. Prudential led no evidence to show or suggest that Angela Laba would have consented to the mortgage on 10 Hillview Crescent even if she had received nothing in return. And, Prudential led no evidence to show that Robert and Angela Laba chose 10 Hillview Crescent with a view to defeating his creditors.

[53] The trial judge found that the badges of fraud put forward by Prudential did not establish a fraudulent intent on a balance of probabilities. In the light of the record before him, I do not think that the trial judge committed a palpable and overriding error in so finding. I would dismiss Prudential's appeal.

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D. CONCLUSION

[54] I would dismiss both Robert Laba's appeal and Prudential's appeal. Although the trial judge erred by not giving Robert Laba an opportunity to make a closing argument, in the context of this case, I do not think that this error caused a miscarriage of justice.

[55] The trial judge also erred by going beyond his limited mandate on Angela Laba's non-suit motion. However, in dismissing the action against her, he applied the correct legal test and drew inferences that are reasonably supported by the record.

[56] Prudential is entitled to the costs of Robert Laba's appeal, which I would fix in the amount of $6,000, inclusive of disbursements and GST. Angela Laba is entitled to the costs of Prudential's appeal. I would also fix those costs in the amount of $6,000, inclusive of disbursements and GST, but I would then deduct $1,000 for Angela Laba's abandoned cross-appeal on costs. Angela Laba is therefore entitled to $5,000 in costs.

RELEASED: JUN 12, 2007
J.L.

"John Laskin J.A."
"I agree S. Borins J.A."
"I agree K. Feldman J.A."

Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp., 1995 CanLII 740 (BC SC) - An Evaluation of a FCA Application on Transfers Between Related Parties

Date:	1995-08-17
Docket:	A950759
Parallel citations:	34 CBR (3d) 241
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DATE OF RELEASE: August 17, 1995 No. A950759

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)
) REASONS FOR JUDGMENT
OCEAN CONSTRUCTION SUPPLIES)
LIMITED)
)
PETITIONER) OF THE HONOURABLE
)
AND:)
)
CREATIVE PROSPERITY CAPITAL CORP.,) MADAM JUSTICE BAKER
LEADERS CONSTRUCTION CORP., and)
PACIFIC TRADE CENTRE INC.)
)
RESPONDENTS) (IN CHAMBERS)

Counsel for the petitioner: J. Cam McKechnie
Counsel for the respondents: Stephen G. Wright
Counsel for Suhwa Kan (Appearing April 7, 1995): Valmon J. LeBlanc
Place and date of hearing: Vancouver, B.C.
April 7, 1995 and
May 12, 1995

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1 Creative Prosperity Capital Corp. ("Creative") owns two pieces of land at 375 Terminal Avenue in Vancouver legally described as Lot G, Block G, District Lot 2037, Plan 21789, and Lot H, Block G, District Lot 2037, Plan 22525 ("the lands").

2 On August 12, 1994, Creative granted a mortgage over Lot H to the respondent Pacific Trade Centre Inc. ("Pacific") in the amount of $1,000,000 and also gave Pacific an assignment of rents. The mortgage and assignment of rents were registered on the title to Lot H on August 12, 1994 under numbers BH300573 and BH300574, respectively.

3 The petitioner Ocean Construction Supplies Limited ("Ocean"), and Suhwa Kan, who has entered an appearance in this proceeding, are judgment creditors of Creative. They allege the mortgage and assignment of rents are void by operation of section 1 of the Fraudulent Conveyance Act, R.S.B.C. 1979, c. 142 or section 3 of the Fraudulent Preference Act, R.S.B.C. 1979, c. 143.

4 All counsel agreed that the Petition should be heard and disposed of on the affidavit evidence filed. No party considered it necessary to have a trial of the issues.

FACTS

5 Ocean obtained judgment against Creative and Leaders Construction Corp. ("Leaders") for $274,377.89 on October 5, 1994 and registered the judgment on the title to Lot G on October 20, 1994, and on the title to Lot H on October 31, 1994.

6 Suhwa Kan obtained judgment against Creative for $326,531.50 on December 7, 1994 and registered the judgment against the titles to Lots G and H on December 12, 1994.

7 Creative was incorporated in August 1979 under the Company Act of British Columbia. It has an interest in an affiliated company called Vancouver Trade Mart Inc. (VTM) which operates an industrial commercial building on Terminal Avenue in Vancouver known as the Vancouver Trade Mart.

8 Creative, Pacific, VTM, and Leaders are all members of the Creative Group of companies owned and controlled by businessman H. George Lee. Mr. Lee is the President and a director of Creative, Pacific and VTM. He is the only director and the President and Secretary of Leaders.

9 Lots G and H are adjacent to property on which VTM operates the Vancouver Trade Mart. In 1991, Creative acquired Lots G and H and commenced construction of a commercial project called the Vancouver Trade Mart Phase II. Ocean contracted in October 1991 to supply concrete for the construction of the project. Construction was suspended in August 1992, when Creative was unable to obtain financing to continue the project. By that time, Ocean was owed over $250,000 for concrete it had supplied to the project.

10 Mr. Lee concedes that after Creative suspended construction on the lands in August 1992, it had no source of income. Creative's financial statements for the year ended December 31, 1993, prepared sometime after May 11, 1994, present a bleak picture of Creative's financial situation in 1992, 1993 and early 1994. The statements reveal that Creative had net losses of $603,255 in 1992 and $731,634 in 1993. At the end of 1992, Creative had liabilities of $9,562,366 exceeding its assets of $8,234,246 by $1,328,120. By the end of 1993, Creative's deficit picture had worsened, with liabilities exceeding assets by $2,084,226.

11 As of May 11, 1994, construction of the Vancouver Trade Mart Phase II was still suspended, and no contracts had been tendered for the completion of the development. Creative had been unable to arrange new construction financing or long term financing, and was engaged in disputes with contractors and suppliers. The company had been unable to redeem preferred shares due for redemption in 1992 and 1993, and had been unable to repay promissory notes due on September 17, 1993.

12 Creative's investment in Vancouver Trade Mart Inc. was also in jeopardy. VTM had been unable to redeem its shares, resulting in litigation, and had defaulted on a promissory note due after December 31, 1992, casting doubt on Creative's ability to recover its investment in VTM.

13 The notes to Creative's 1993 financial statements indicate that Creative hoped to raise the funds necessary to complete the development by attracting foreign immigrant investors. In an attempt to facilitate this, Pacific had been incorporated and had received approval as a privately administered investment syndicate under the Immigration Investment Program, established by Employment and Immigration Canada. Creative hoped that Pacific would be able to raise $10,000,000 to complete the project, but the notes to the financial statements describe Creative's future as "uncertain".

14 There is other evidence of Creative's dismal financial circumstances. The B.C. Assessment authority assessed the value of Lot H in 1994 at $1,779,000, but Mr. Lee says the assessment was appealed and the assessed value was reduced to $1,500,000. There are two other mortgages on the title to Lot H, registered prior to the mortgage to Pacific. Aetna Trust Company is owed $1,050,000 on its first mortgage and Carpe Investments Corporation is owed $253,000 on a second mortgage.

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15 The assessed value of Lot G is not disclosed in the material. The title reveals that there is a mortgage to Edelweiss Credit Union on the title. $720,000 is owed to Edelweiss.

16 There are also several claims of builder's lien, certificates of pending litigation, and judgments filed against the title to Lot G. The first certificate of lis pendens was registered April 1, 1993; the first claim of builder's lien was registered July 30, 1993 and the first judgment was registered July 28, 1994, by Harris Steel Ltd. In an affidavit sworn April 7, 1995, Mr. Lee deposed that creditors other than Ocean and Mr. Kan have judgments against Creative totalling $1,034,000. Harris Steel Ltd. has obtained an order to offer the Creative lands for sale to satisfy its judgment.

17 Mr. Lee concedes that when Creative granted the $1,000,000 mortgage and the assignment of rents to Pacific on August 12, 1994, Pacific did not advance any money to Creative. In fact, Pacific never advanced or loaned any money to Creative. Mr. Lee says he caused Creative to grant the mortgage to Pacific to secure loans he personally made to Creative between September 199l and February 1995. He says that by the time the mortgage and assignment of rents were executed in August 12, 1994, Creative owed Mr. Lee in excess of $2,000,000.

18 Mr. Lee says that in September 1991 he loaned $1,800,000 to Creative, to be used, in part, to purchase Lots G and H. The loan was unsecured. Mr. Lee did produce a cancelled cheque for $1,641,697.62, dated July 31, 1991, drawn on an account in the name of Vancouver Trade Mart Inc. Mr. Lee says that this amount was deducted from his shareholder's loan to VTM.

19 Mr. Lee says that after August 1992 when construction was suspended, he personally made the payments due under the mortgages on Creative's lands, totalling about $12,000 per month. He considered these payments to be unsecured shareholder loans to Creative. Creative's 1993 year-end financial statements do contain a note indicating that Creative's mortgages were all current as of May 11, 1994.

20 Mr. Lee has produced photocopies of the front only of numerous cheques made payable to Creative. According to these cheques, Mr. Lee advanced $775,000 to Creative during 1992. Mr. Lee advanced $80,500 to Creative in 1993 - $80,000 in March and April, and a further $500 on September 15.

21 Mr. Lee advanced $128,050 to Creative in 1994 prior to August 12, the date on which Creative granted the mortgage to Pacific, and approximately $160,000 more by the end of 1994. In 1995, Mr. Lee advanced approximately $28,000 to Creative; the last advance was made on February 28, 1995. Mr. Lee stopped loaning money to Creative in February 1995 because his funds were exhausted.

22 Mr. Lee says that sometime in 1993 he decided he would make no further unsecured loans to Creative. He says he told the company's accountant this and advised the accountant he intended to take mortgage security from Creative. There is a reference in the notes to the December 31, 1993 year-end financial statements of Creative as follows:

6. Due to a Shareholder

The shareholder has personally borrowed funds and made advances to the Company. These amounts are unsecured, bear interest at the shareholder's borrowing cost plus 3% and have no fixed terms of repayment. Up to this point the shareholder has waived in part the interest incurred. The company paid $93,911 (1992 - $11,220) in interest charges to Mr. George H. Lee. It is the intention of the shareholder to register a charge against the Company's assets to secure this amount.

(underlining added)

23 Mr. Lee says that sometime in 1994 a resolution of the directors of Creative was passed, authorizing the granting of a mortgage to him. This resolution is not in evidence. Mr. Lee decided in August 1994 to put the mortgage and assignment of rents in the name of Pacific. He says this was done to give Pacific assets which would enable it to pursue funding for an attempt to purchase the Vancouver Trade Mart building at 333 Terminal Avenue. A mortgage and assignment of rents was executed by Creative in favour of Pacific on August 12, 1994, and registered against the title to Lot H on the same day.

THE FRAUDULENT CONVEYANCE ACT

24 The Fraudulent Conveyance Act consists of two sections. The relevant portions follow:

1. A disposition of property, by writing or otherwise, ... at any time made, to delay, hinder or defraud creditors and others of their just and lawful remedies, shall be void and of no effect as against a person.....whose rights and obligations by collusion, guile, malice or fraudulent devices and practices are or might be, in any way, disturbed, hindered, delayed or defrauded, notwithstanding a pretence or other matter to the contrary.

4. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person not having, at the time of the transfer to him, any notice or knowledge of collusion or fraud.

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25 **In essence, a fraudulent conveyance is a transfer of an interest in property which is made with the intention, and which has the effect, of hindering or impairing the right of a creditor or other person to satisfy a claim against the transferor. It is not necessary for the person seeking relief to show that the transferor was insolvent at the time the transfer was made, and the applicant need not establish that he or she was a creditor, or an unsecured creditor, at the time the transfer was made. Re Skinner (1960), 27 D.L.R. (2d) 74 (B.C.S.C.).**

26 **All that the applicant must show is that the transferor, in making the gift or transfer, did so with intent to delay, hinder or defraud creditors or others. Canadian Imperial Bank of Commerce v. Ash, (1964), 47 D.L.R. (2d) 620 (B.C.S.C.); C.I.B.C. v. Boukalis, 1987 CanLII 2694 (BC CA), (1987) 11 B.C.L.R. (2d) 190 (C.A.).**

27 **Fraudulent intent is essentially a matter of fact to be proved in the circumstances of each particular case. Proof that the transferor intended to defeat or delay its creditors usually involves drawing inferences from the circumstances surrounding the transaction. Where some consideration has flowed from the transferee to the transferor, the court may consider the adequacy of the consideration in relation to the issue of intent, since a transfer at an undervalue raises suspicions about motive. Inadequate consideration may be considered to be a badge of fraud.**

28 **Where a transaction renders the transferor insolvent, the circumstances may also be considered suspicious. Freeman v. Pope (1870), L.R. 5 Ch. App. 538. If a transferor with debts makes a transfer the effect of which is to render him unable to meet his then existing liabilities, that circumstance furnishes very strong evidence of an intent to defraud his creditors. Manryk v. Merko (1971), 19 D.L.R. (3d) 238, (Man. C.A.). This case is also authority for the proposition that where parties to a transaction are related to each other, and the circumstances are suspicious, the burden of explanation falls on the related parties. In such a case the testimony of the related parties must be scrutinized with care and suspicion, and a judge may reject the evidence absent corroboration. As Justice Duff said in Koop v. Smith, 1915 CanLII 26 (SCC), (1915) 51 S.C.R. 55, 8 W.W.R. 1203, 25 D.L.R. 355, at page 1204:**

> **....it is very seldom that such evidence can safely be acted upon as in itself sufficient.**

Later on the same page, Justice Duff said:

> **...I think the true rule is that suspicious circumstances, coupled with relationship, make a case of res ipsa loquitur which the tribunal of fact may and will generally treat as a sufficient prima facie case, but that it is not strictly in law bound to do so; and that the question of the necessity for corroboration is strictly a question of fact.**

THE FRAUDULENT PREFERENCE ACT

29 The sections of the Fraudulent Preference Act relied upon by the parties are reproduced below:

3. Subject to section 6, a disposition of property by a person at a time when he is in insolvent circumstances, is unable to pay his debts in full, or knows that he is on the eve of insolvency, is void as against an injured creditor, if made

(a) with intent to defeat, hinder, delay or prejudice creditors, or some of them; and
(b) to or for a creditor with intent to give the creditor preference over other creditors or some of them.

6. (4) .....Nothing in this section invalidates a security given to a creditor for an existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the belief in good faith that the advance will enable the debtor to continue his business and to pay his debts in full.

30 In order to attack a transaction or conveyance under the Fraudulent Preference Act, the applicant must have had the status of creditor at the time the allegedly preferential transaction took place. As well, the applicant must establish that the preferential transfer or conveyance was to, or for, another creditor of the transferor. Re Skinner, cited above, approved in C.I.B.C. v. Boukalis, also cited above.

31 The applicant must also establish that at the time of the preferential transfer the transferor was insolvent, on the eve of insolvency or unable to pay its debts in full.

ANALYSIS AND CONCLUSION

32 Pacific did not advance any money to Creative, before or after the August 12, 1994 mortgage was granted. Looked at in this light, Pacific is not a creditor, and the mortgage to Pacific cannot be attacked under the Fraudulent Preference Act.

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33 **However, the transaction is void under the provisions of the Fraudulent Conveyance Act. The evidence establishes beyond any doubt that when Creative granted the mortgage to Pacific, Creative was insolvent, whatever definition of insolvency is applied. Creative's liabilities exceeded its assets; it was not carrying on the business for which it had been incorporated or any other business; and it was not paying its debts as they came due.**

34 **The granting of the mortgage to Pacific did reduce Creative's ability to satisfy the legitimate claims of its creditors, including Mr. Kan and Ocean, and has hindered and delayed them in the pursuit of their just and lawful remedies.**

35 **Did Creative intend to delay, hinder or defraud creditors and others, within the meaning of section 1 of the Fraudulent Conveyance Act, when it granted the mortgage to Pacific? There are suspicious circumstances surrounding the transaction from which the court may infer an intent to defraud Creative's creditors. Pacific and Creative are related companies, part of the group of companies owned or controlled by Mr. Lee. Mr. Lee refers to Pacific in one of his affidavits as "my company". From Creative's financial statements, it appears that Mr. Lee is the only holder of common shares in Creative since the notes to the statements refer to him as "the shareholder".**

36 **There can be no doubt that Mr. Lee knew that Creative was insolvent in August 1994, and that knowledge is attributed to Pacific, since Mr. Lee is the President and a director of both companies.**

37 **Mr. Lee did not depose that Creative was or believed itself to be solvent in 1993 or 1994. He did depose, in his affidavit sworn April 7, 1995, that Creative is presently able to pay all of its creditors and is not insolvent, but that assertion is simply not true. Creative has not paid its debts, and it has no present ability to do so.**

38 Presumably Mr. Lee's assertion of solvency is based on a belief that if Creative is able to sell Lots G and H, all its creditors can be paid, but there is no proof, such as appraisal evidence, offered in support of that assertion, and the fact that the liabilities of the company already exceeded its assets by more than $2,000,000 by the end of 1993 strongly suggests the contrary.

39 **All of these circumstances justify the inference that the mortgage to Pacific was granted with the intent to delay, hinder or defraud Ocean, Kan and others of their remedies against Creative.**

40 The respondents say, however, that the mortgage and assignment of rents were lawfully granted to Pacific for good consideration and in good faith, because there was an agreement between Mr. Lee and Creative that he would be given security for loans he had already made to Creative, in return for his promise to continue to advance money to the company. Mr. Lee says that this agreement was made sometime in 1993; that he did continue to advance money to Creative in 1994; and that he continued to advance money to Creative after the mortgage and assignment of rents were executed on August 12, 1994.

41 There are problems with Mr. Lee's assertion that the granting of the mortgage and assignment of rents to Pacific was to secure Creative's debt to him. There is no evidence that the debt owed to Mr. Lee by Creative was ever assigned to Pacific. Mr. Lee did not claim to have assigned the debt. In his affidavit he said only that he decided in August 1994 to have the mortgage and assignment of rents granted to Pacific, instead of himself.

42 If the mortgage and assignment of rents to Pacific were made to secure a debt owed to Mr Lee, the applicants may rely on the Fraudulent Preference Act, as well as the Fraudulent Conveyance Act, because the former Act applies to dispositions of property made to or for a creditor, if the evidence establishes that when Creative gave the mortgage and assignment of rents to Pacific, it did so to delay, hinder or defraud creditors of their just and lawful remedies, and with intent to defeat, hinder, delay or prejudice Creative's creditors, by preferring Mr. Lee over those other creditors.

43 I have already stated my conclusion that Creative was in insolvent circumstances and unable to pay its debts in full on August 12, 1994 when the mortgage and assignment of rents to Pacific were executed and registered on Creative's lands. In response to this, Mr. Lee says that when the security was granted to Pacific, Creative was carrying out its obligations under an agreement made between Mr. Lee and Creative earlier, in 1993.

44 This assertion does not assist Pacific because Creative was also insolvent in 1993, and an agreement to grant security to a creditor in 1993 is also a disposition of property which may be attacked as a fraudulent preference. As well, if there was an agreement in 1993 to grant security to someone, it was not to Pacific. Mr. Lee deposed in his affidavit that the decision to name Pacific as the mortgagee was not made until August 1994.

45 Mr. Lee has failed to establish that Creative agreed in 1993 that it would grant a mortgage and assignment of rents to anyone. He has not said that Creative agreed to give a mortgage in 1994; he only deposed that he advised Creative's accountant of his intention to obtain mortgage security from Creative. Mr. Lee is not the only director of Creative. I have already noted that no directors' resolution of Creative has been put in evidence, but Mr. Lee deposed, in any event, that the directors' resolution was not passed until 1994. The financial statements do not prove

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an agreement by Creative to grant mortgage security. They simply state that Mr. Lee intends to register "a charge" against the Company's assets to secure amounts due to him.

46 Have the applicants established that Creative intended to prefer Mr. Lee, and to defeat, hinder, delay or prejudice other creditors? Creative and Mr. Lee must have known that Creative was insolvent in 1993 and on August 12, 1994. This was not an arms' length transaction between creditor and debtor such as that in Ex parte Wilkinson, In re Berry, (1882) 22 Ch.D. 788, relied upon by the respondents, where the court concluded that a supplier of cotton to an insolvent business was unaware, when it obtained security for an existing debt, that the debtor was insolvent.

47 The respondent relies on section 6(4) of the Fraudulent Preference Act. It is clear that the $1,000,000 debt secured by the mortgage in August 1994 was existing debt. Mr. Lee had advanced $1.6 million dollars to Creative through VTM in 1991 and he has deposed that by the time Creative granted the mortgage and assignment of rents to Pacific, he was owed over $2,000,000. It is true that Mr. Lee made further advances to Creative after August 12, 1994. However, I find that those advances were not made in the belief in good faith that the advances would enable Creative to continue its business and pay its debts in full.

48 Mr. Lee has not offered any evidence that he did believe that the advances would enable Creative to continue its business and pay its debts in full. He has not suggested that he or Creative had any realistic plan to extricate Creative from its ongoing financial problems, let alone enable it to pay its debts in full. In fact, all that Mr. Lee has claimed is that he advanced funds to Creative to keep the first and second mortgages in good standing.

49 Mr. Lee deposed that if Creative's mortgages were not kept current, Creative would almost certainly have been foreclosed and unable to continue its business. But keeping the mortgages current did not enable Creative to continue its business of constructing and operating the Vancouver Trade Mart Phase II development.

And Mr. Lee had a direct personal interest in seeing that the mortgage payments were made - he had personally guaranteed the mortgages to Carpe and Edelweiss. If Creative did not pay the mortgages payments due to Carpe and Edelweiss, he would have been required to do so personally. And if the first mortgagee, Aetna, started foreclosure proceedings, Carpe and Edelweiss might well have called upon Mr. Lee to honour his personal guarantees.

50 From the evidence it may also be inferred that Mr. Lee knew, when he caused Creative to grant the mortgage and assignment of rents to Pacific, that he would be unable to advance sufficient funds to allow Creative to continue its business, and to pay its debts in full. Creative needed $10,000,000 to complete the construction. And Mr. Lee did not have that kind of money left. The total of sums claimed against Mr. Lee personally in actions commenced in 1992, 1993 and in the months prior to August 12, 1994, is in excess of $3,500,000, according to the records of the Vancouver Registry of the Supreme Court of British Columbia. Mr. Lee borrowed against a life insurance policy to advance monies to Creative in early October 1994, and he was unable to make any further advances to Creative after February 1995.

51 The inescapable inference is that Mr. Lee knew when he decided to obtain security from Creative for the existing debt, and when he caused Creative to grant the mortgage and assignment of rents to Pacific, that he was doing nothing more than delaying the inevitable financial collapse of Creative while significantly improving his own position as a creditor, to the prejudice of other creditors.

52 Ocean and Mr. Kan have been injured by the granting of the mortgage to Pacific. Instead of sharing pro rata with Mr. Lee the assets of Creative available to unsecured creditors, Mr. Lee acquired a priority for himself by the mortgage and assignment of rents.

53 Mr. Kan and Ocean have established that if Pacific is not a creditor of Creative, the mortgage and assignment of rents to Pacific are void by operation of section 1 of the Fraudulent Conveyance Act, and are not saved by section 4 of that Act. And if the mortgage was granted to Pacific for Mr. Lee, the applicants have established that the mortgage and assignment of rents are void by operation of section 3 of the Fraudulent Preference Act, and are not saved by section 6 of that Act. In either circumstance, the mortgage and assignment of rents are void as against the lien and charge created by the registration in the land title office of the judgments of Ocean and Kan. There shall be a declaration to that effect.

54 Counsel for Ocean originally sought an order that Lot H be sold to pay Ocean's judgment, but adjourned that application on May 12, 1995. Ocean is at liberty to renew the application, and to seek further directions if required. I am not seized of any further applications.

55 Ocean and Kan are entitled to their costs against the respondents, to be taxed on Scale 3.

"W.G. Baker, J."

Vancouver, B.C.
August 17, 1995

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Stone v. Stone, 2001 CanLII 24110 (ON CA) - Does the *Fraudulent Conveyances Act* apply in the context of the *Family Law Act*, and if so, in what way?

Date:	2001-08-10
Docket:	C32856
Parallel citations:	55 OR (3d) 491; 203 DLR (4th) 257; 18 RFL (5th) 365; 156 OAC 345
URL:	http://canlii.ca/t/1fg38
Citation:	Stone v. Stone, 2001 CanLII 24110 (ON CA), <http://canlii.ca/t/1fg38> retrieved on 2013-08-22
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DATE: 20010810

DOCKET: C32856

COURT OF APPEAL FOR ONTARIO
CATZMAN, FELDMAN and SHARPE JJ.A.

BETWEEN:	
SARAH STONE **Plaintiff** **(Respondent, Appellant by Cross-Appeal)**	**Barry Fick for the respondent (appellant by cross-appeal)**
- and -	
IAN ARNOLD STONE, MAXINE ORDOWER, THE CANADA TRUST COMPANY, Estate trustee of the Estate of Harry Stone, PEBBLE INVESTMENTS, HIJ HOLDINGS, STONER INVESTMENTS, GERALD S. MARCUS , in trust PARAMOUNT , PAINTING & DECORATING (SUDBURY) LIMITED, PARAMOUNT PAINTING & DECORATING (LONDON) LIMITED, 452099 ONTARIO LTD. c.o.b. as THE ANTIQUARIAN DALE SPORTS ACTIVITIES LTD. EAST PARK GOLF GARDENS LIMITED, 843535 ONTARIO LIMITED and 458804 ONTARIO INC. **Defendants** **(Appellants, Respondents by Cross-Appeal)**	**Harvey Strosberg, Q.C. and David Robins for the appellants (respondents by cross-appeal)** **Heard: July 16, 2001**

On appeal from the judgment of Justice Hockin dated August 25, 1999.

FELDMAN J.A.:

[1] The issue in this case is whether a husband who learns that he is terminally ill, is entitled to dispose of his property by *inter vivos* gifts to his grown children in order to frustrate the equalization of his net family

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property by his wife upon his death. The trial judge held that he could not, and set aside the *inter vivos* conveyances to the children. They appealed. For the reasons which follow, I would dismiss the appeal.

FACTS

[2] The marriage of Mr. and Mrs. Stone was the second for each of them following the deaths of their respective spouses, and they each had children from their first marriages. They lived a very comfortable life together over 24 years of marriage, which included a nice home, a condominium in Florida, and travel, until Mr. Stone's death in 1995.

[3] Mr. Stone had a business and several real estate investment holdings. His son, Ian Stone, managed all of the businesses. Mr. Stone had an estate plan, the purpose and goal of which were that ultimately all of his assets would belong to his two children, Ian Stone and Maxine Ordower. Although during his marriage to Mrs. Stone, Mr. Stone had transferred some properties and shares to his children, he maintained control over the assets through a voting trust and through the retention of the last $1.9 million. He did not want any of his assets to go to Mrs. Stone's children, and to that end, nothing was held by Mrs. Stone in her own name. Mr. Stone was aware that Mrs. Stone's assets would consist of approximately $116,000 in cash at the date of his death. The matrimonial home was held in Mr. Stone's name. The condominium in Florida had been once in both names, but when Mrs. Stone was diagnosed with breast cancer, she agreed to transfer her interest to him in April 1994, although once her health improved, the deed was not registered.

[4] In March 1995, Mr. and Mrs. Stone returned to London early from Florida as Mr. Stone was quite ill. He went straight to hospital where he was diagnosed with lung cancer and told that he only had weeks or months to live and that he should get his affairs in order. Mr. Stone then told his doctor that his children would be receiving everything from him before his will, and that is exactly the plan that he proceeded to implement. In that conversation Mr. Stone also told the doctor that he expected that some day there would be litigation over what he did.

[5] Before this time, Mr. Stone had made a will dated June 18, 1991 wherein he left life estates in the matrimonial home and the Florida condominium to Mrs. Stone, a specific gift of $25,000 to a stepson and the residue to be split between Mrs. Stone and his two children, Ian Stone and Maxine Ordower. The children were named executors and were given the specific power to settle any dispute with Mrs. Stone in the event that she elected to take an equalization payment under the *Family Law Act*, R.S.O. 1990, c. F-3 rather than her legacy under the will.

[6] Through his grandson, an articling student, Mr. Stone retained a new lawyer, Mr. Fischer, who did not have any conflict with Mrs. Stone, to assist him in carrying out his intentions with respect to his property.

[7] Mr. Fischer attended on Mr. Stone in the hospital on March 30, 1995. At that time, Mr. Stone indicated that he was unsure whether he or Mrs. Stone would die first. On this issue, the trial judge found that by this time Mrs. Stone's condition had improved after a mastectomy and therapy, that her death was not imminent, and that to everyone's knowledge, she was almost certainly going to survive Mr. Stone. However, Mr. Stone's suggestion to Mr. Fischer was to leave his wife a life estate in the matrimonial home, along with a life interest in the income on $125,000 from which, together with her own funds, she would support herself and keep up the home. Mr. Fischer advised that the figure was too low and suggested $175,000. He also explained that under the *Family Law Act*, Mrs. Stone could elect an equalization payment rather than take under the will [1] . Mr. Stone responded that "I'm going to do what I'm going to do". They also discussed the concept of using the Florida condominium as a "bargaining chip".

[8] Mr. Stone was discharged from hospital by the end of March, and on April 3 he attended on Mr. Fischer at his office. A will was prepared and signed leaving Mrs. Stone $250,000 together with a life tenancy in the matrimonial home "if it was owned by me at my death." Mrs. Stone was to pay all taxes, insurance and maintenance on the home. After the will was signed, Ian Stone and Maxine Ordower joined their father in the lawyer's office where they discussed the immediate transfer of all of Mr. Stone's business assets to them. The paperwork for the transfers was completed on April 10. On the same date, Mr. Stone signed a deed conveying the Florida condominium to his two children. On April 26, Ian Stone instructed Mr. Fischer to prepare a transfer of the matrimonial home from Mr. Stone to Ian Stone and Maxine Ordower. This was executed by Mr. Stone on May 4, 1995 and registered on May 15, 1995 without compliance with s. 21 of the *Family Law Act*. [2] The registration was noted as "subject to spousal".

[9] Over this time, there was some discussion with Mrs. Stone about what was going to be left to her. First Mr. Stone told her he would leave her $100,000 plus a one-quarter interest in his antique shop, and a life interest in the matrimonial home. Mrs. Stone told him that was inadequate. He later told her she would receive $250,000. He was told that this was also inadequate. Mrs. Stone was never told that the matrimonial home or the Florida condominium would be conveyed to Ian Stone and Maxine Ordower, nor that the business assets had been conveyed to them by *inter vivos* transfer.

[10] Mr. Stone died on July 21, 1995, leaving virtually nothing in his estate. Mrs. Stone elected under s. 6 of the *Family Law Act* not to take her legacy under Mr. Stone's will but instead to take her entitlement to equalization under s. 5 of the Act. She also proceeded with a successful motion for an order setting aside the transfer of the matrimonial home.

[11] The action for equalization was brought under s. 7 of the *Family Law Act*. [3] For the purpose of determining the value of Mr. Stone's net family property at the day before his death and Mrs. Stone's entitlement to an effective order for

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the amount she was entitled to receive, Mrs. Stone claimed that the *inter vivos* transfers to Ian Stone and Maxine Ordower since March, 1995 were made with intent to defeat her entitlement to the equalization payment and were therefore void as against her under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F-29.

[12] The trial judge held that the *Fraudulent Conveyances Act* could be applied in conjunction with the *Family Law Act* and that the *inter vivos* transfers by Mr. Stone to his children were void as against Mrs. Stone. He ordered that those assets therefore be returned to the estate, and that an equalization payment of $851,937.74 be made to Mrs. Stone. He also ordered costs in her favour on a solicitor and client basis. He reduced the prejudgment interest rate to 2.5%, instead of 5%, in light of the fact that Mrs. Stone was being paid support to the time of trial and she occupied the matrimonial home.

[13] The appellants appeal from the judgment and award of costs. The respondent cross-appeals on *inter alia*, the prejudgment interest rate and the failure of the trial judge to award punitive damages.

ISSUES

[14] On the main appeal, Mr. Strosberg posed three issues for the court:

(1) Did the trial judge err in concluding that the *Family Law Act* creates a debtor/creditor relationship between spouses as a running account which becomes settled on the date of separation or the date before death?

(2) Did the trial judge err in failing to apply ss. 5(6) of the *Family Law Act*? (an unequal division based on unconscionability)

(3) Does the *Fraudulent Conveyances Act* apply in the context of the *Family Law Act*, and if so, in what way?

[15] In his argument, Mr. Strosberg made the following submission with respect to the issues and the operation of the two Acts: Spouses do not have a debtor/creditor relationship on an ongoing basis during co-habitation based on a running account between them. If they did, no spouse would be able to transfer his or her own property during co-habitation free of the claims of the other. During co-habitation, unless an order has been made under s. 5(3), one spouse is not the creditor of the other. Until there is a debtor/creditor relationship, there can be no order under the *Fraudulent Conveyances Act* to set aside any conveyance as void against a spouse.

[16] The appellants submit that improvident or fraudulent transfers are intended to be taken into account under ss. 5(6)(d) of the *Family Law Act*. Under that section, the court may order an "unequal" equalization amount if it would be unconscionable to merely equalize, having regard to a spouse's intentional or reckless depletion of his or her net family property. The court must weigh all of the circumstances surrounding the transfers in order to determine whether it would be unconscionable to make an equal division between Mr. and Mrs. Stone. In this case, one such factor is the legitimate objective of Mr. Stone to see his children and not Mrs. Stone's children end up with his assets and businesses.

[17] If the trial judge concluded that an unequal division was appropriate and ordered an equalization amount that was more than the estate had available to pay, based on the fact that Mrs. Stone would then have become a judgment creditor of the estate, she could at that time seek to set aside the conveyances.

[18] The essence of the appellants' submission is that the *Family Law Act* is a self-contained code intended to regulate financial relations between spouses and that there is no room for the *Fraudulent Conveyances Act* to operate on the rights of the spouses in respect of each other's property, i.e., the right to a one-half interest in the difference between their net family property amounts that arises on separation. [4]

[19] The appellants therefore say that the trial judge erred in applying the *Fraudulent Conveyances Act* to bring back into his net family property calculation, the assets Mr. Stone transferred to his children; and the trial judge further erred in failing to deal with the issue of those transfers under s. 5(6) of the *Family Law Act* as a factor in determining whether there should be an unequal division of the difference between the net family property amounts of the two spouses.

ANALYSIS

[20] In spite of the able argument of Mr. Strosberg, I am unable to accept this analysis.

[21] The relevant section of the *Fraudulent Conveyances Act* is s. 2, which provides:

s. 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Section 5 is the relevant section of the *Family Law Act*. It provides:

5. (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

(2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.

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(3) When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation.

. . . .

(6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

. . . .

(d) a spouse's intentional or reckless depletion of his or her net family property;

. . . .

(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

[22] The first issue to be determined is whether, and if so, when is a spouse a "creditor or other" of the other spouse in respect of the right to an interest in the net family property of the other spouse, within the meaning of s. 2 of the *Fraudulent Conveyances Act*.

The Fraudulent Conveyances Act

[23] Longstanding case law decided under the *Fraudulent Conveyances Act* has addressed the issue of who is a "creditor or other" for the purpose of s. 2. In *Hopkinson v. Westerman* (1919), 45 O.L.R. 208 (C.A.) at 211, the court held that "others" extended to persons who, though not judgment creditors, had pending actions in which they were sure to recover damages. In that case, the person who transferred the land was a defendant in a tort action. In *Bell v. Williamson and Moulton*, [1945] O.R. 844 (C.A.) the court similarly held that the claimant need not be a judgment creditor at the time of the conveyance, but a person may fall within the words "or others" even if the person has, at the time of the impugned transaction, only a claim for unliquidated damages in contract or in tort. Robertson C.J.O. stated at p. 848:

I do not doubt for a moment that a transaction may be null and void within s. 2 of *The Fraudulent Conveyances Act*, although the plaintiff who brings the action attacking it may, at the time of the transaction, and even when action is brought attacking it, have had nothing more than a claim for unliquidated damages in contract or in tort. The effect of the words "or others" following the word "creditors" is to give to such persons a right of action to have a transaction set aside as null and void as against them, if made with the required intent. . . .

[24] This interpretation of the phrase "creditors or others" has been applied many times including in the family law context: See for example: *Shephard v. Shephard* (1925), 56 O.L.R. 556 (C.A.); *Ferguson v. Lastewka*, [1946] O.R. 577 (H.C.J.); *Oliver v. McLaughlin* (1893), 24 O.R. 41 (Q.B.); *Murdoch v. Murdoch* (1976), 26 R.F.L. 1 (Alta. S.C.); *Chan v. Chan*, [1993] B.C.J. No. 442 (B.C.S.C.); and *Lepore v. Lepore,* [1998] O.J. No. 733 (Dist. Ct.), aff'd by Ontario Court of Appeal (October 22, 1990).

[25] Therefore, in order for a spouse to qualify as a person who is intended to be protected from conveyances of property made with intent to defeat her interest, she must have had an existing claim against her husband at the time of the impugned conveyances, that is a right which she could have asserted in an action.

The Family Law Act

[26] The nature of the property regime established as between spouses under the *Family Law Act* was clearly described by Cory J. in *Rawluk v. Rawluk*, 1990 CanLII 152 (SCC), [1990] 1 S.C.R. 70 and by Galligan J.A. in *Berdette v. Berdette* reflex, (1991), 3 O.R. (3d) 513 (C.A.). Spouses each own their separate property throughout the marriage. However, upon the happening of one of the five triggering events, there is a valuation date. If at that date the net family property of one spouse is less than that of the other, then the spouse with the lesser net family property is "entitled to one-half the difference between them": (s. 5(1)). The five events are outlined in s. 4(1): (1) the date of separation with no reasonable prospect of resuming co-habitation; (2) the date of divorce; (3) the date of declaration of nullity; (4) the date one of the spouses commences an application under s. 5(3) for improvident depletion of net family property, if the application is granted; and (5) the date before the death of the spouse with the greater net family property.

[27] In this case, Mr. and Mrs. Stone were not separated at the time Mr. Stone transferred his assets to his children. However, Mr. Stone knew his death was imminent. He also knew that the value of his wife's assets was significantly less than the value of his. He had been specifically advised that on his death his wife could elect not to take under his will but instead, to take an equalization payment based on the difference between their respective net family properties. Furthermore, Mr. Stone anticipated litigation over his will and transfers and Mrs. Stone specifically told him that she would contest a legacy that was not sufficient for her, such as the amount he told her he was leaving her.

[28] Mrs. Stone did not initiate an application under s. 5(3) of the Act which provides:

5. (3) When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family

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properties divided as if the spouses were separated and there was no reasonable prospect that they would resume cohabitation.

[29] Mrs. Stone did not have an opportunity to initiate an application because the transfers were kept secret from her. She had no knowledge of the transfer of any of the assets including the business assets, the matrimonial home and the Florida condominium. The secret was such that she was permitted to believe she still had an ownership interest in the Florida condominium. She even continued to pay the associated expenses until she learned some months later that the property had been transferred.

[30] Because Mr. Stone's death was known by all to be imminent, Mrs. Stone's claim to a right to equalization was also imminent and would have been triggered by his death. One of the effects of s. 5(3) of the Act is to provide a remedy to a spouse in those circumstances where the other spouse seeks to divest himself or herself of his or her property in anticipation of death and in order to defeat the spouse's claim to equalization. Had Mrs. Stone exercised that remedy by commencing an application, she would have been a "creditor or other" of Mr. Stone within the meaning of s. 2 of the *Fraudulent Conveyances Act* on the date she commenced the application.

[31] The trial judge made the following finding on the issue:

. . . It is clear to me that Mrs. Stone may well have resorted to this provision and was at least entitled to the chance but of course Mr. Stone kept the full extent and nature of his dealings a secret from her. . . .(*Stone v. Stone* 1999 CanLII 15094 (ON SC), (1999), 46 O.R. (3d) 31 at 59 (S.C.J.))

[32] That finding is fully supported by the evidence including Mrs. Stone's stated intention to contest the will and, of course, by this litigation. I agree with the trial judge that Mr. Stone and his children could not, by deliberate non-disclosure, deprive Mrs. Stone of her ability to establish the legal status of "creditor or other". Because she had the right to apply for equalization at the time of the transfers, but was deprived of her ability to exercise that right by the actions of Mr. Stone and his children, the parties to the transfers, she was a "creditor or other" within the meaning of the *Fraudulent Conveyances Act*.

[33] The trial judge also based his conclusion that Mrs. Stone was a "creditor" of Mr. Stone at the time of the transfers on the following statement of law:

...the [Family Law] Act creates a creditor-debtor relationship which takes the form of an open or running account which becomes a settled account on separation or death.

With respect to the trial judge, I do not agree that that statement is an accurate reflection of the law. To characterize spouses as being in a constant debtor-creditor relationship would require clear legislative expression. There is nothing in the Act which suggests such a relationship. To the contrary, the provision of the five alternative triggering events for the valuation date and the right to equalization only on one of those dates indicates that the debtor-creditor relationship arises only on the valuation date.

[34] Having said that, it is unnecessary in this case to decide how far the concept of "creditor or other" may extend in the family law context, apart from s. 5(3) of the *Family Law Act*.

[35] In this case, for the reasons set out, I find that Mrs. Stone was a "creditor or other" of Mr. Stone at the time of his *inter vivos* transfers and therefore entitled to set those transfers aside under s. 2 of the *Fraudulent Conveyances Act*.

Section 5(6) of the Family Law Act

[36] The second branch of the appellants' argument is that the trial judge erred by applying the *Fraudulent Conveyances Act* in conjunction with the equalization procedure under the *Family Law Act*. The appellant submits that the *Family Law Act* is a code unto itself and to the extent that it contains anti-avoidance provisions, [5] the legislature intended only those provisions to apply to the family law context. Therefore, the trial judge should have first determined the equalization amount based on the net family property of each spouse on the day before Mr. Stone's death (i.e. without setting aside the *inter vivos* transfers) and then considered whether Mr. Stone's conduct in transferring his assets to his children to avoid the equalization process was unconscionable and warranted an unequal division. In that regard, ss. 5(6)(d) and (h) are set out again:

5. (6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

. . . .

(d) a spouse's intentional or reckless depletion of his or her net family property;

. . . .

(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

[37] The appellants submit further that in assessing the issue of unconscionability, the court would also consider the long-standing estate plan of Mr. Stone and the legitimacy of wanting to see his assets end up in the hands of his children, as well as all of the other circumstances.

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[38] Counsel suggested that only after judgment was awarded, could the *Fraudulent Conveyances Act* be used to set aside any transfer, if necessary to give effect to the judgment.

[39] I cannot accept this argument for the following reasons:

First, this court in *Berdette, supra,* clearly set out the correct method for determining net family property and the application of s. 5(6). The first step is to establish the net family property of each spouse under s. 4 of the Act by determining and valuing the property each owned on the valuation date. The next step is to apply s. 5(1) and determine whether one spouse's net family property is greater than the other's, and what the equalization payment would be. Then the court decides whether it would be unconscionable to equalize the net family property. If so, the court will order a payment of more or less than one half the difference. Otherwise the court will order equalization by payment of one half. Galligan J. A. clearly rejected the approach suggested by counsel in the following conclusion:

In the above-quoted extract from *Rawluk*, Cory J. held that the third step [application of s. 5(6)] is to be kept distinct from the determination of ownership of property. Ownership of property is determined in the first step. It is therefore my opinion that the considerations set out in subparagraphs (a) through (h) of s. 5(6) are irrelevant to determining the net family properties of each spouse. This opinion, I think, is additionally supported by reference to the structure of Part I. The provisions of s. 5 are all founded upon the concept of net family property, and assume that net family property has been established. There is nothing in s. 4 which incorporates consideration of elements of s. 5(6) into the determination of which spouse owned what property on valuation day. Moreover, my reading of the judgments in *Rawluk v. Rawluk* at trial (reflex, (1986), 55 O.R. (2d) 704, 3 R.F.L. (3d) 113 (H.C.J.)) and in this court (reflex, (1987), 61 O.R. (2d) 637, 10 R.F.L. (3d) 113)) is that it was assumed that the provisions of s. 5(6) had no bearing upon the ownership issues essential to the determination of the net family properties under s. 4(1). (p. 526)

[40] Second, in this case, had the fraudulent conveyances not been set aside as of the valuation date in order to calculate the net family property of Mr. Stone, then without those assets Mrs. Stone's net family property would have been greater than Mr. Stone's. There would therefore have been no basis for Mrs. Stone to claim entitlement to equalization under s. 5(1), and therefore no opportunity for the court to consider the unconscionability provisions. The same conclusion was reached by Galligan J.A. in *Berdette, supra* where, without the finding sought by the wife of a constructive trust of gifts made by her to her husband during the marriage, the wife could not have applied for equalization, as her net family property was equal to his.

[41] Third, as discussed above, it is not necessary to be a judgment creditor in order to qualify as a "creditor or other" under s. 2 of the *Fraudulent Conveyances Act*. Therefore there is no need to wait until an equalization payment has been ordered before applying the Act. In any event, the timing of such an order, being well after the date of the impugned transfers, would not relate back to the date of the transfers and therefore would not provide a basis for setting them aside.

[42] Fourth, section 5(6) of the *Family Law Act* only empowers the court to order an unequal division of the difference in value of net family property. It is not a provision which can be used to set aside previous dispositions of property to third parties. Consequently, any order must be based on the net family property amounts of the spouses as determined under s. 4. The order cannot reflect the value of any property which is not part of that net family property value. As a result, although the reckless depletion of assets by one spouse can be used by the court as a factor in assessing unconscionable conduct and making an unequal distribution, the section will only be useful if the spouse who made the transfers of property has sufficient property left on the valuation date to make an order for an unequal sharing an effective remedy for the wronged spouse.

[43] Finally, In *Rawluk v. Rawluk*, 1990 CanLII 152 (SCC), [1990] 1 S.C.R. 70, Cory J. made the following statement regarding how ownership of property is to be determined under the *Family Law Act*:

The *Family Law Act, 1986* does not constitute an exclusive code for determining the ownership of matrimonial property. The legislators must have been aware of the existence and effect of the constructive trust remedy in matrimonial cases when the Act was proposed. Yet neither by direct reference nor by necessary implication does the Act prohibit the use of the constructive trust remedy. . . . (p. 97)

[44] I am satisfied that as with the constructive trust, the *Family Law Act* does not exclude other applicable statutory or common law remedies which deal with the ownership of property at law and in equity, including the *Fraudulent Conveyances Act*. It is true that the legislature has not proceeded, as suggested by the 1993 Ontario Law Reform Commission Report on Family Law [6] , to extend and codify within the *Family Law Act* itself, what will constitute a fraudulent disposal of property by a spouse during cohabitation, made in order to defeat the potential interests of the other spouse, and which can therefore be set aside. However, where on the facts, the *Fraudulent Conveyances Act* can apply, there is nothing in the *Family Law Act* which ousts the operation of the *Fraudulent Conveyances Act* as part of the process to determine the net family property of each spouse as of the applicable valuation date.

[45] For the above reasons, the trial judge did not err by applying the *Fraudulent Conveyances Act* or in his conclusion that s.5(6) of the *Family Law Act* had no application in this case as a remedy for Mrs. Stone.

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OTHER ISSUES

[46] The appellants raised three other issues on appeal. First, the appellants challenged the trial judge's ruling regarding the late introduction of new appraisal evidence of the value of certain lands. I agree with the respondent that there is no basis to interfere with the trial judge's exercise of discretion in respect of this ruling. The new appraisal was obtained by the appellants after the respondent had closed her case and committed to values for all of the properties. It was sought to be introduced by Canada Trust on behalf of the estate and not by the appellants, and after Canada Trust had also closed its case. The trial judge was entitled to find that admitting the new appraisal at that point in the trial and thereby allowing Canada Trust to re-open its case with a different position would have created prejudice and unfairness to the respondent.

[47] Second, the appellants say that the trial judge erred by failing to have Mrs. Stone properly account for monies she received as interim support and for the benefit she received by occupying the matrimonial home pending trial. I see no basis to interfere with the trial judge's treatment of these amounts. These matters were reflected in a reduced rate for prejudgment interest.

[48] Finally, the appellants also appeal from the award of solicitor and client costs. Again, I would not interfere with the view of the trial judge that because of the fraudulent conveyances and the intention of the appellants to defeat Mrs. Stone's legitimate interests, the costs award on that scale was justified.

THE CROSS-APPEAL

[49] The cross-appeal involves queries with respect to the valuation treatment of certain assets, an appeal from the denial of a punitive damages award and an appeal from the rate of prejudgment interest. These matters were not pursued in oral argument but left with the court on the basis of the factum alone.

[50] I am not satisfied that the trial judge made a reversible error on any of the issues raised on the cross-appeal. The valuation findings were made by the trial judge based on hearing and weighing all of the relevant evidence. The cross-appellant has not pointed to any misapprehension of the evidence which would warrant the interference of this court.

[51] The trial judge declined to award punitive damages. This was within his prerogative. He expressed his opprobrium of the appellants' conduct by the award of solicitor and client costs.

[52] There is also no basis to interfere with the award of prejudgment interest. The trial judge exercised his discretion and as noted, did take into account other benefits received by Mrs. Stone pending trial as an off-set for some of the prejudgment interest.

CONCLUSION

[53] In the result, I would dismiss the appeal and cross-appeal, both with costs.

RELEASED: "MAC" AUGUST 10, 2001

Signed: "K. Feldman J.A."
"I agree M.A. Catzman J.A."
"I agree Robert J. Sharpe J.A."

---

[1] Section 6(1) of the *Family Law Act* provides:

6(1) When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.

[2] Section 21(1) of the *Family Law Act* provides:

[4] The right to equalization arises on the valuation date which is defined in s. 4(1) of the *Family Law Act* as the earliest of five triggering events:

"valuation date" means the earliest of the following dates:

1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
2. The date a divorce is granted
3. The date the marriage is declared a nullity.
4. The date one of the spouses commences an application based on subsection 5(3) (improvident depletion) that is subsequently granted.
5. The date before the date on which one of the spouses dies leaving the other spouse surviving

[5] For example, s. 21(2):

(2) If a spouse disposes of or encumbers an interest in a matrimonial home in contravention of subsection (1), the transaction may be set aside on an application under section 23, unless the person holding the interest or encumbrance

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at the time of the application acquired it for value, in good faith and without notice, at the time of acquiring it or making an agreement to acquire it, that the property was a matrimonial home.

[6] Ontario, *Report on Family Property Law* (Ontario: Ontario Law Reform Commission, 1993).

Rohani v. Rohani, 2004 BCCA 605 (CanLII) - An Example of FCA Application on Shareholder's Corporate Assets Upon Corporate Veil Being Pierced

Date:	2004-12-02
Docket:	CA031278; CA031277
Parallel citations:	247 DLR (4th) 17; 8 RFL (6th) 179; 34 BCLR (4th) 62
URL:	http://canlii.ca/t/1jcgn
Citation:	Rohani v. Rohani, 2004 BCCA 605 (CanLII), <http://canlii.ca/t/1jcgn> retrieved on 2013-08-22
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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Rohani v. Rohani,***
2004 BCCA 605

Date: 20041202

Docket: CA031278; CA031277
Docket: CA031278
Between:
Shideh Rohani
Respondent
(Petitioner)
And
Atollah Rohani, a.k.a. Ata Rohani
Respondents
(Appellants)
And
John C. Fiddes
(Respondent)
- and -
Docket: CA031277
Between:
Shideh Rohani
Respondent
(Plaintiff)
And
Atollah Rohani, a.k.a. Ata Rohani, Myfam Holdings Ltd. 451300 B.C. Ltd., Maryam Rohani, Yasse Eghdami, a.k.a. Yass Eghdami, Eagle West (Canada) Enterprises Ltd. and Majid Rohani
Appellants
(Defendants)

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Before:	The Honourable Madam Justice Prowse The Honourable Mr. Justice Mackenzie The Honourable Mr. Justice Smith
D.J. Barker	Counsel for the Appellant, A. Rohani
H.R. Anderson	Counsel for the Appellants
D.W. Roberts, Q.C. and W. Baker	Counsel for the Respondent S. Rohani
Place and Date of Hearing: November 10, 2004	Vancouver, British Columbia
Place and Date of Judgment: December 2, 2004	Vancouver, British Columbia

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Madam Justice Prowse
The Honourable Mr. Justice Smith

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Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] **This is an appeal from the orders of Lander J. directing that Myfam Holdings Ltd. ("Myfam") and 451300 B.C. Ltd. ("451300") be added as parties to the divorce action between the respondent Shideh Rohani ("the wife") and Ata Rohani ("the husband"), that Myfam and 451300 be restrained from disposing of assets or issuing dividends until a compensation order in favour of the wife against the husband has been satisfied, and directing that Myfam and 451300 provide security for payment in the form of mortgages of their assets. The appellants contend that the orders offend basic principles of separate corporate identity laid down by *Salomon v. Salomon*, [1897] A.C.22 (H.L.).**

The Litigation History

[2] These proceedings have a lengthy and complex history which must be set out in some detail to frame the limited issues raised on this appeal.

[3] The husband and wife were married in November 1987; they separated finally in November 1992. It was a second marriage for both of them and they had no children together. The husband had four adult children from his first marriage, three of whom are now parties to these proceedings. The wife's children from her first marriage are not involved in the litigation. The husband died after the trial of the actions but his estate has continued to be represented.

[4] **The wife initially petitioned for divorce in 1990 and revived those proceedings in 1995 after the parties' final separation. In 1997 she commenced a separate action under the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 and the *Family Relations Act*, R.S.B.C. 1996, c. 128, against the husband, three of his children, Myfam, 451300, and Eagle West Canada Enterprises Ltd., alleging that the husband had fraudulently transferred or conveyed assets to the other defendants in order to defeat her claims to family assets.** These actions were tried together before the late Mr. Justice Lysyk over 36 days between November 1997 and July 1998. Reasons for judgment were delivered in August 1998. In the fraudulent conveyance action Lysyk J. set aside the transfer of an 11/20 interest in a townhouse on Folkestone Way, West Vancouver ("the Folkestone Way property") by Myfam to the husband's daughter, the defendant Maryam Rohani. He also set aside the transfer of 25 shares in 451300 from Myfam to another daughter, the defendant Yasse Egdami. 451300 was otherwise a wholly owned subsidiary of Myfam and it owned property on Clyde Avenue in West Vancouver ("the Clyde Avenue property").

[5] In the divorce action Lysyk J. concluded that the Class A shares of Myfam were a family asset but the evidence of the value of the shares was inadequate to effect a division. The parties came back before him in February 1999. They agreed that the value of Myfam was $1,078,891 consisting of shareholder loans of $133,333 and attributed value to the Class A and Class B common shares of $945,518. Lysyk J. concluded that only nominal value should be attributed to the Class B shares held by the husband's children, and the value of Myfam's equity was properly attributable to the Class A shares held by the husband. After making a deduction for the equal division of proceeds of sale of the matrimonial home (not otherwise relevant to these reasons) Lysyk J. valued Myfam at $790,000 and he ordered that the wife be paid $230,000 compensation in lieu of her share of family assets, an amount which reflected a 30 percent interest in Myfam. The parties returned to Lysyk J. again in June 1999 on the wife's application for an order against Myfam securing her compensation order and costs. In supplementary reasons dated 13 September 1999, Lysyk J. ordered that Myfam be restrained from disposing of its assets or issuing dividends until the wife's compensation order was satisfied and that Myfam provide security for payment in the form of mortgages attached to the order. He gave the wife special costs against the husband in both actions.

[6] The husband and the other defendants appealed in both actions. The husband died before the appeal was heard but counsel continued to be retained on behalf of his estate. The orders of Lysyk J. were upheld with the exception of grounds five and six, directed to the compensation order, which were remitted back to the trial court. As this remit frames the issues before us I set out the reasons of Rowles J.A. for the Court on those grounds in their entirety:

> **XIII. Did the trial judge err in piercing the corporate veil of Myfam and did he err in ordering Myfam to provide security for the compensation order in favour of the wife?**
>
> [88] Grounds five and six may conveniently be considered together.
>
> [89] Subsection 66(2)(c) of the *F.R.A.* provides that the court may "order a spouse to pay compensation to the other spouse...", and subsection 66(2)(f) provides that the court may "order that a spouse give security for the performance of an obligation imposed by order under this section...."
>
> [90] The appellants argue that the trial judge erred when ordering Myfam to provide security for the payment of the compensation order when Myfam was not a party to the action in the divorce and the F.R.A. action in which the compensation order was made and when Myfam was not and could not be a "spouse".
>
> [91] The appellants also argue on a number of grounds that the trial judge was in error when he pierced the corporate veil for the purpose of ordering security.

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> [92] I do not propose to consider the arguments made by appellants' counsel on the difficult questions raised in grounds five and six because the orders made by the trial judge requiring security to be provided by Myfam for the payment of compensation were made without all of the persons whose interests might be affected by that order having been given notice or an opportunity to be heard.
>
> [93] I would set aside the orders in both actions requiring Myfam to post security for payment of the compensation ordered as well as the order directed to Myfam that no dividends be issued until the compensation ordered is paid. I would remit the question of payment of the compensation ordered and the issue of security for payment to the trial court.

[7] The remit was heard by Lander J. in August 2003. Myfam is solvent but the husband filed for bankruptcy before his death. We were informed by counsel that the estate has been discharged from bankruptcy but the trustee continues to hold the Class A shares of Myfam. The trustee has been given notice of proceedings since the bankruptcy but he has not appeared. We must therefore assume that he claims no interest in Myfam's Class A shares.

[8] Lander J. ordered that Myfam be joined in the divorce action and he confirmed the order for security against Myfam. He said:

> [28] I have considered the submissions made on behalf of Myfam, Yasse Eghdami, Eagle West (Canada) Enterprises Ltd., Majid Rohani and Maryam Rohani. **I find that counsel's submission in paragraph 11 of** his court brief wherein it is stated that this is not a case for [*sic*] the corporate veil should be pierced. That argument has no merit in that Mr. Justice Lysyk found that that was so and the Court of Appeal has agreed with that determination.

The Business and Corporate Background

[9] The business and corporate history of the husband is related in detail in the reasons of Lysyk J. It is necessary to summarize it briefly for the purpose of these reasons. The husband was a successful developer in Iran before the revolution. Together with his brother Aziz and another business associate, the husband incorporated a B.C. company in 1974 which became Sigma **Investments Ltd. ("Sigma").** Each of the three was issued one third of the Class A shares of Sigma and the children of each were given Class B shares. Sigma constructed an office building at 747 Fort Street, Victoria in 1978. The husband contributed $2 million to the cost through funds from Iran and his associate contributed the balance of about $1 million. The husband took back a $2 million mortgage for his contribution and assigned one-half of it to his four children. The other half was assigned to the children of Aziz. The assignment was described as a gift, but the **husband continued to use the mortgage as security for his business dealings, apparently with his children's passive** acquiescence. Sigma sold the Fort Street building for $9,750,000 in December 1990 and Myfam was incorporated as part of an ***Income Tax Act***, R.S.C. 1985, c. 1 (5th Supp.), s. 85 **"rollover".** The husband exchanged his Class A shares of Sigma for Class A voting shares of Myfam and the children exchanged their Class B shares of Sigma for Class B non-voting shares of Myfam. The other two principals of Sigma followed a similar course with separate companies. The husband made all the business decisions for Myfam although his two daughters joined him as directors in 1991 and remain directors.

[10] 451300 was incorporated in 1993 and acquired the Clyde Avenue property. Initially Myfam held a 60 percent interest in 451300 and the remaining 40 percent was held by a company controlled by a business associate of the husband. Myfam purchased the other 40 percent interest in 1996 and 451300 became a wholly owned subsidiary of Myfam. The husband later arranged a transfer of 25 shares of 451300 from Myfam to his daughter, Yasse Egdami. Lysyk J. set aside this transfer as a fraudulent conveyance and consequently Myfam continues to own all of the shares of 451300.

[11] Myfam also held the Folkestone Way property, a condominium occupied by the husband after he moved out of the matrimonial home in late 1992. Initially Myfam had a majority interest in the Folkestone Way property and the husband held a minority interest directly. According to his solicitor, he held the minority interest for the purpose of obtaining a property tax homeowner grant. That interest was later transferred to Myfam. In January 1996, Myfam transferred an 11/20th interest in the Folkestone Way property to Maryam Rohani. Lysyk J. set aside that transfer to his daughter as a fraudulent conveyance.

[12] The status of Myfam following the findings of Lysyk J. which are not now in issue may be summarized as follows. Myfam is a holding company without active business operations. It owns the Folkestone Way property and, through its wholly owned subsidiary 451300, it owns the Clyde Avenue property. It has no other significant assets or liabilities, apart from a shareholders' loan discussed below. All of the Class A shares of Myfam were held by the husband. He exercised complete control of Myfam's affairs, without consultation with other directors or shareholders. He funded substantial gifts to the wife from Myfam during the marriage and also used its funds and assets for living expenses before and after the separation. He had routinely used other companies in a similar manner and he treated interests nominally transferred to the children as his own for the purpose of arranging bank financing for his projects.

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[13] Lysyk J. found that the Class A shares of Myfam were a family asset and virtually all of Myfam's equity should be allocated to those shares for valuation purposes. As 451300 is a wholly owned subsidiary of Myfam it can be treated as indistinguishable from Myfam. The valuation of Myfam and the wife's share of the equity, quantified in the amount of the compensation order, are no longer in issue. It is the security interest in the assets of Myfam that remains controversial. This Court left that issue open on the remit, in part because all of the persons whose interests could be affected had not been given the opportunity to be heard. That opportunity was provided in the hearing before Lander J.

Analysis

[14] The problem that faced Lysyk J. was how to effect payment of the compensation order in circumstances where the husband had no exigible assets apart from Myfam and he controlled Myfam. His prior history provided ample reason for the trial judge to conclude that the husband would frustrate payment by any available means. He had attempted to move assets out of Myfam through fraudulent conveyances to avoid the wife's claims, acts which justified the order in the fraudulent conveyance action restraining Myfam from disposing of its assets or issuing dividends before the compensation order was satisfied.

[15] The controversial part of his order was the charge directly on the assets of Myfam. Lysyk J. recognized in making that order he was piercing Myfam's corporate veil. The appellants contend that his order, confirmed by Lander J., failed to satisfy the conditions for piercing the corporate veil outlined by this Court in *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Limited* 1989 CanLII 230 (BC CA), (1987), 37 B.C.L.R. (2d) 258 (C.A.).

[16] Lysyk J. referred to Myfam as the *alter ego* of the husband. He said:

> **[8] As to piercing the corporate veil, I concluded on the evidence that the Husband routinely drew funds from Myfam to finance his own living expenses and those of the Wife: see the 1998 Reasons, para. 188. He treated Myfam as his alter ego and at all material times he made the decisions that guided its corporate affairs.**

[17] The wife contends this finding is one of fact and it is determinative of the corporate veil issue. Lander J. appears to have concluded that the issue was no longer open. With some reluctance, the appellants accepted that the *alter ego* designation of Myfam is not open to review on this appeal but they submit that it is merely descriptive of the facts summarized in the context of the reference, namely that the husband used Myfam's funds for his own and the wife's living expenses and he made Myfam's corporate decisions. They contend that those facts are insufficient to pierce the corporate veil and the reference to *alter ego* cannot foreclose the issue.

[18] In my respectful view, Lander J. misconstrued the terms of the remit set by this Court. He relied on certain passages from the reasons of Rowles J.A. that were directed to the issues of whether the Class A shares of Myfam were family assets and the valuation of those shares. Those matters are no longer in dispute. However, the determination that the shares are family assets does not decide the corporate veil issue. As I read the reasons related to the remit quoted above, that issue was sent back for re-argument. I agree with the appellants' position that the reference to *alter ego* in its context was simply a label applied to the facts as found: the issue is whether those facts could support piercing Myfam's corporate veil. I therefore turn to that issue.

[19] The Supreme Court of Canada considered the basic implications of separate corporate existence in *Kosmopoulos v. Constitution Insurance Co. of Canada*, 1987 CanLII 75 (SCC), [1987] 1 S.C.R. 2. The case involved a fire loss insurance claim by a company and its sole shareholder. The company held the assets damaged in the fire but the policy was issued in the shareholder's name. While the Court allowed the claim on an alternative basis, the majority declined to lift the corporate veil between the company and the shareholder. Wilson J., writing for five of the six member Court observed (at paras. 12 and 13):

> **[12] As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979) at p. 112. I have no [page11] doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co. v. Southern Missionary College*, *supra*, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.**
>
> **[13] There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice": Gower, supra, at p. 138. Mr. Kosmopoulos was advised by a competent solicitor to incorporate**

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> **his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to "blow hot and cold" at the same time.**

[20] Applying this reasoning to the circumstances here, the use of Myfam as a corporate vehicle pre-dates the separation and it had legitimate business, succession, and tax planning objectives. It was a genuine incorporation. While the wife had no direct interest in Myfam she benefited from its existence during the marriage to the extent that it presumably provided a tax shelter for assets and income and was used by the husband to fund family living expenses and gifts to the wife. The use for family purposes was central to the conclusion that the Class A shares were family assets. While the husband's use of company funds may have been questionable by others, the wife was not defrauded or prejudiced on that account. To paraphrase Wilson J., the wife, having received the benefits of incorporation, should not be allowed to escape the burden of its existence by looking directly to its assets as if they were personal assets of the husband. Serious and far reaching implications could result from piercing the separate corporate existence of a company created and operated for legitimate business and tax planning purposes simply on the ground of irregular use of corporate funds for personal expenses of its principals.

[21] The majority judgment of this Court in ***Evetts v. Evetts***, [1996] B.C.J. No. 2614, is consistent with this view. That was a family law case involving apportionment of the interest in a closely held corporation. Lambert J.A., for the majority, stated (at para. 17):

> I think that the application of s-s. 45(3)(a) [now s. 58(3)(a) of the *Family Relations Act*] may present different problems where the corporation in question is widely held than it does where the corporation is closely held. In a case where all the shares of the corporation are held by one of the spouses, I think that the application of s-s. 45(3)(a) is comparatively straightforward. The corporation is regarded as eliminated and the assets are considered to have been directly held by the spouse. It seems to me that all accumulations and payments must be treated as they would have been treated if the assets had been directly held by that spouse. The corporate veil is retained to the extent that the court, after looking through the corporate veil to the underlying assets for the purpose of characterization and division of family assets, must accomplish any such division through a reapportionment of the shares in the corporation, rather than of the underlying assets.

[Underlining added.]

[22] Newbury J.A. dissented from the conclusion that the shares of Mr. Evetts' corporation were family assets but her reasons did not address the point at issue here. In the present case, unlike ***Evetts***, the husband owned only the voting Class A shares, but Lysyk J. followed a similar approach to valuation of those shares. He made the compensation order as a substitute for the wife's apportioned interest in the Class A shares. It is the shares that are apportioned, not the underlying assets. The substitution of a compensation order for the shares does not eliminate that distinction.

[23] In ***B.G. Preeco***, Seaton J.A. considered the limited circumstances where the corporate veil can be pierced for "fraud or improper conduct", the relevant heading in Gower's *Modern Company Law*, 4th ed. He stated (at p. 268):

> The cases in which the corporate veil is pierced on the ground of "fraud or improper conduct" deal with instances where a corporation is used to effect a purpose or commit an act which the shareholder could not effect or commit.

[24] In this case, the husband's fraud was not moving assets into Myfam to escape the wife's claims: it was moving assets out of Myfam. This pattern reinforces the conclusion that Myfam was not created to avoid the wife's claims, nor did it acquire its assets for that purpose. Myfam's asset holdings are consistent with the husband's long-term practice of using corporate vehicles to hold real property and to use company funds for personal and family living expenses. Using the company as a "piggy-bank" may create difficulties for him (and now his estate) elsewhere, but it does not support the conclusion that Myfam was a sham intended to avoid the wife's claims. On the authorities to which we have been referred I do not think the facts meet the standard required to pierce Myfam's corporate veil. Accordingly, I do not think that the order granting security directly in the assets of Myfam can be supported.

[25] The question is then whether the wife is to be left without any means of payment from Myfam. Section 66(1) of the ***Family Relations Act*** authorizes the court "to make orders which are necessary, reasonable or ancillary" to a determination and disposition of family assets. The compensation order here is intended to be a substitute for the wife's interest in the equity of Myfam. It is a hollow order if payment cannot be effected. Myfam is the only available source of payment. The simplest expedient would be to cause Myfam to declare and pay a dividend sufficient to pay the compensation order and have it paid to the wife in satisfaction of the order. There are two complicating factors. The first is the wife's entitlement to costs of the protracted litigation which now substantially exceed the net amount of the order. The other complication is the intervening bankruptcy of the husband which we are told has placed the Class A shares in

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the hands of his bankruptcy trustee, notwithstanding the husband's later discharge from bankruptcy. Even without these complications, the likelihood of the husband voluntarily adopting that course of action was remote.

[26] In my view, the wife was entitled to ancillary remedies necessary to effect payment of her compensation order, consistent with the continued separate legal existence of Myfam. Causing the winding up of Myfam is not an option because most of the distribution on a winding up would go to the Class B shareholders and be inconsistent with the valuation of the Class A shares. In my view, the wife should be granted a constructive trust of the Class A shares of Myfam, allowing her to effect payment of a dividend sufficient to pay the compensation order, including interest and special costs, and to cause Myfam to sell assets for that purpose if necessary. The unaudited financial statements of Myfam used by the experts for the purposes of valuation indicate that there are already "advances to shareholders", and that the amount of those advances at the date of valuation, $133,333, was later increased to $843,903. These advances apparently represent dividends declared and unpaid on the husband's Class A shares, and as such they could be the first source for payment. Declaration of a further dividend on the Class A shares under the constructive trust should be required only to the extent that obligations to the wife under the compensation order exceed that amount. The trust would extend to the dividend declared and paid on all the Class A shares for that purpose. The declaration and payment of the dividend would be limited by Myfam's legal capacity to pay the dividend in the event that the amount of the compensation order exceeds Myfam's dividend paying capacity.

[27] The appellants have contested joining Myfam as a party in the divorce action, contending specifically that Myfam cannot be a "spouse", required for authority to make an order under s. 66(2)(c) and (e) of the ***Family Relations Act***. The constructive trust of the shares is directed to the husband's interest in the shares and does not extend to Myfam's assets directly. The injunction restraining dividends or asset dispositions by Myfam can be maintained in the divorce action under s. 66(1) which authorizes the court to "make orders which are necessary, reasonable or ancillary to give effect to [a property] determination." Joining Myfam for the limited purpose of preserving the status quo in Myfam until the wife can take the steps required under the constructive trust of the shares is reasonably ancillary to the trust and does not depend on any spousal status. I am satisfied that Myfam was properly joined in the divorce action for that purpose.

[28] In the result, I would allow the appeal, set aside the order for security in the assets of Myfam, and order a constructive trust of the Class A shares of Myfam on the terms outlined above. The trust should extend to include the interest on the compensation and costs awarded. As the trust is in substitution for the asset security originally ordered by Lysyk J., this order should take effect as of the date of that order, 13 September 1999, pursuant to s. 9(1)(a) of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77. The injunction restraining dividends and asset dispositions by Myfam should be continued until payment except as modified to give effect to the constructive trust.

[29] As success on this appeal may be considered to be divided, there should be no costs of the appeal to any party.

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The costs awarded by Lander J. in the proceeding before him and by Lysyk J. and this Court on the earlier appeal are not varied.
"The Honourable Mr. Justice Mackenzie"
I AGREE:
"The Honourable Madam Justice Prowse"
I AGREE:
"The Honourable Mr. Justice Smith"

Where s. 2 does not apply - Sec 3

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section. R.S.O. 1990, c. F.29, s. 3.

Where s. 2 applies - Sec 4

4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser. R.S.O. 1990, c. F.29, s. 4.

When fraudulent conveyances declared void as against purchasers - Sec 5

5. Every conveyance of real property heretofore or hereafter made with intent to defraud and deceive the purchaser shall be deemed to be void only as against that person and the person's assigns and all persons lawfully claiming under that person or the person's assigns who have purchased or hereafter purchase for money or other good consideration the same real property or a part thereof. R.S.O. 1990, c. F.29, s. 5.

Where s. 5 does not apply - Sec 6

6. Section 5 does not apply to and shall not be construed to impeach, defeat or make void a conveyance of real property made in good faith and for good consideration. R.S.O. 1990, c. F.29, s. 6.

Conveyances made revocable - Sec 7(1)

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7. (1) If a person makes a conveyance of real property with a clause, provision, article, or condition of revocation, determination or alteration at that person's will or pleasure, and after such conveyance bargains, sells, demises, grants, conveys or charges such real property or a part thereof to a person for money or other good consideration paid or given, such first conveyance not being revoked, made void or altered according to the power and authority so reserved or expressed therein, then such first conveyance as touching the real property so after bargained, sold, conveyed, demised or charged is void against the bargainees, vendees, lessees, grantees, their heirs, successors, and their assigns and against every person lawfully claiming under them. R.S.O. 1990, c. F.29, s. 7 (1).

Saving as to mortgages - Sec 7(2)

(2) No lawful mortgage made in good faith, and without fraud or covin, and upon good consideration shall be impeached or impaired by force of this Act, but it has the like force and effect as if this Act had not been passed. R.S.O. 1990, c. F.29, s. 7 (2).

Validity of voluntary conveyance, etc., executed in good faith and duly registered - Sec 8(1)

8. (1) Nothing in section 5, 6 or 7 extends to a conveyance that is executed in good faith and duly registered in the proper land registry office before the execution of the conveyance to, and before the creation of any binding contract for the conveyance to a subsequent purchaser from the same grantor of the same real property or a part thereof, nor is such a conveyance merely by reason of the absence of a valuable consideration void as against such purchaser or the heirs, executors, administrators or assigns of the purchaser or any person claiming by, from or under any of them. R.S.O. 1990, c. F.29, s. 8 (1).

Effect of subs. (1) - Sec 8(2)

(2) Nothing in subsection (1) has the effect of making valid an instrument that is for any reason, other than or in addition to the absence of a valuable consideration, void under section 5, 6 or 7 or otherwise, nor has the effect of making valid an instrument as against a purchaser who had before the 28th day of February, 1868, entered into a binding contract for or received a conveyance upon such purchase. R.S.O. 1990, c. F.29, s. 8 (2).

C.I.B.C. v. Boukalis, 1987 CanLII 2694 (BC CA) - Whether Secured Creditor can Bring Action under FCA

Date:	1987-01-30
Docket:	CA006136
Parallel citations:	[1987] 3 WWR 505; 65 CBR (NS) 66; 11 BCLR (2d) 190
URL:	http://canlii.ca/t/2124z
Citation:	C.I.B.C. v. Boukalis, 1987 CanLII 2694 (BC CA), <http://canlii.ca/t/2124z> retrieved on

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Court of Appeal
C.I.B.C. v. Boukalis
Date: 1987-01-30

S.R. Schachter and A.C. Whitcombe, for appellant.

J.W. Elwick and J.A. Adelaar, for respondents.

(Vancouver No. CA006136)

January 30, 1987. The judgment of the court was delivered by

[1] SEATON J.A.:— At issue in this appeal is whether one who is not an unsecured creditor at the time of a conveyance has status to challenge the conveyance under the Fraudulent Conveyance Act, R.S.B.C. 1979, c. 142.

[2] In the action the Canadian Imperial Bank of Commerce seeks to set aside a second mortgage granted on 29th June 1983 by the defendant Vasilios Boukalis, to his brother, the defendant John Boukalis, for the sum of $550,000. On 29th June 1983 Vasilios Boukalis was indebted to the bank but the indebtedness was secured and the bank has not shown that the security was inadequate at that time. At the time of trial, the security had proved to be inadequate and the bank had several outstanding judgments against Vasilios Boukalis.

[3] In his reasons [[1986] B.C.W.L.D. 2896], the trial judge first posed this issue:

> To succeed in its action to set aside the second mortgage as a fraudulent conveyance, the plaintiff must show that it was granted with intent to delay, hinder or defraud the plaintiff as a creditor of just and lawful remedies.

After carefully reviewing the evidence, the trial judge said:

> Vasilios granted the second mortgage, impugned by these proceedings, at a time when the business of Alpine Carpets Ltd. was failing, when real estate values were falling and when his Granville Street residence, supposed to be built for $125,000, had swallowed up almost $600,000. I am quite satisfied that the mortgage figure of $550,000 was chosen to exhaust the apparent equity. So Vasilios' intent to hinder or delay the plaintiff is shown. I also find that John Boukalis had that intent in accepting the mortgage because I do not accept his evidence that Vasilios owed him that amount of money, but rather something less, and because as brothers their close relationship demands an explanation which, on John Boukalis' part, is unsatisfactory.

The trial judge concluded that that was not enough:

> **There is, however, a hurdle of law which the bank is unable to overcome in this case. It is that a creditor who was fully secured at the time of an impugned transaction is not permitted to take the benefit of the Fraudulent Conveyance Act. Much argument, supported by numerous authorities, was devoted to this problem by both counsel.**

The trial judge concluded that the bank had not shown that it was unsecured on 29th June 1983 and, therefore, he dismissed the action.

[4] Counsel for the bank conceded that there are decisions of the Supreme Court of British Columbia that support the conclusion reached by the trial judge and that there are decisions of this court that seemed to support that result. He therefore sought and was granted a court composed of five justices of appeal to consider the question.

[5] In the first line of authority that impelled the trial judge to say that the bank could not succeed unless it was unsecured on 29th June 1983 there is confusion between two statutory provisions; in the second line of authority there is confusion between two steps in one proceeding.

[6] Cases in the first group treat fraudulent conveyance questions the same as fraudulent preference questions. *Royal Bank of Can. v. Dunsmuir* (1978), 5 R.P.R. 74, 85 D.L.R. (3d) 549 at 553 (B.C.S.C.), is an example of this:

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> The significant date for establishing the status of the secured or unsecured creditor is the date when the transaction took place, *i.e.,* the conveyance from husband to wife. I follow here with respect the judgment of my brother Anderson in *Re Ehattesaht Co-operative Enterprises Ass'n and Vancouver Equipment Corp. Ltd.* 1977 CanLII 353 (BC SC), (1977), 3 B.C.L.R. 117 at p. 120, where he says:
>
> "In my view a 'secured creditor' cannot bring proceedings under the Act unless at the date the preference was given there were moneys owing for which there was no security."
>
> Anderson, J., was there dealing with an application under the *Fraudulent Preferences Act,* but I agree with counsel for the defendant that the principle is the same whether the application be launched under the *Fraudulent Conveyances Act* or the *Fraudulent Preferences Act.*

[7] The language used in the two Acts is different. The Fraudulent Preference Act, R.S.B.C. 1979, c. 143, s. 3, provides:

> 3. Subject to section 6, a disposition of property by a person at a time when he is in insolvent circumstances, is unable to pay his debts in full, or knows that he is on the eve of insolvency, is void as against an injured creditor, if made
>
> (*a*) with intent to defeat, hinder, delay or prejudice *creditors or some of them;* and
>
> (*b*) to or for a creditor with intent to give the creditor preference over *other creditors or some of them.* [emphasis added]

Section 1 of the Fraudulent Conveyance Act is not the same:

> 1. A disposition of property, by writing or otherwise, and a bond, proceeding and order, at any time made, to delay, hinder or defraud *creditors and others* of their just and lawful remedies, shall be void and of no effect as against *a person,* his personal representative and assignee *whose rights* and obligations by collusion, guile, malice or fraudulent devices and practices *are or might be,* in any way, disturbed, hindered, delayed or defrauded, notwithstanding a pretence or other matter to the contrary. [emphasis added]

[8] The different language indicates that there is a different group to be protected, and that is consistent with the fact that the Acts have different purposes.

[9] This part of the Fraudulent Preference Act deals with preferences in favour of certain creditors. A plaintiff cannot be a prejudiced creditor if he was not a creditor at the time the preference was given. The thrust of these sections is to ban the preference of one creditor over another or others. Thus, the Act refers to "creditors or some of them".

[10] The Fraudulent Conveyance Act has a different thrust. It is designed to ban the disposing of property to hinder or delay creditors and those who might become creditors. Thus, the Act refers to "creditors and others".

[11] The two Acts have similarities, but they have differences and those differences should be respected. In *Re Skinner* (1960), 27 D.L.R. (2d) 74 (B.C.S.C.), Wilson J. (as he then was) dealt with an application under s. 7 of the Fraudulent Preferences Act, R.S.B.C. 1960, c. 156, the predecessor to the present s. 9. He distinguished between a fraudulent preference and a fraudulent conveyance (at p. 78):

> This is not an attempt by one creditor to set aside a preferential transfer to another creditor. It is a bid by a judgment creditor to set aside a conveyance as being, in the words of s. 7 "made to defeat, hinder, delay, prejudice, or defraud creditors".
>
> I can see that in the preference cases it is only logical that if one creditor is to attack a payment to another as preferential when made then he, the attacking creditor, must also have had the status of creditor at that time. If he had not, there could be no preference, because the debt to the attacking creditor did not exist at the time. Therefore it could not be said that another creditor was preferred over him.

[12] I would adopt that reasoning and reject the reasoning in the first line of authority.

[13] The second line of authority adopts language without respect for the context in which it is found.

[14] The trial judge found on the evidence that there was the necessary intention to hinder or delay. In many cases, that finding cannot be made except by drawing an inference from the circumstances. The inference of fraud is drawn because of the existence of creditors at the time of the conveyance. If the existing creditors are well secured, one is unlikely to infer that the conveyance was made in order to defeat them. Of course, the time for considering intent is the time of the conveyance. The cases, therefore, which are concerned with whether or not the creditors were secured at that

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time, are not deciding whether or not the plaintiff has status to bring the proceedings, but are deciding whether or not the impugned conveyance was made with the intent to hinder or delay. Some cases have employed language that appears to support the view that creditors to have standing must be creditors at the time of the conveyance. The context surrounding that language shows, however, that it was used in relation to intent.

[15] Vice-Chancellor Blake detected this problem in *Reid v. Kennedy* (1874), 21 Gr. 86 (at pp. 90-91):

> Looking at the Statute alone, apart from the authorities, I should have thought its effect to be, that where an intention to defraud creditors or other persons was shewn at the time of the execution of the deed, then it mattered not whether the creditor attacking the deed existed at the time of its execution or not. In its inception the deed was fraudulent, it remained so, unless cured by some subsequent act, and was liable to be impeached by a subsequent creditor, whose potential equity has not been lost by some matter *ex post facto. Totten v. Douglas* [18 Gr. 341], is an instance of such an equity being lost. There is some inconsistency in the decided cases, but from them I think the opinion I have formed as above expressed is correct
>
> In many of the cases fraud can only be inferred from the effect of the conveyance; the rule adopted being that a grantor must be taken to have intended the natural result of his act. Where there were no creditors at the time of the impeached conveyance, or all those then in existence have been satisfied, it has been frequently argued that the inference of fraud which might be otherwise drawn has been rebutted by the absence of these debts. If the grantor be insolvent at the time of the impeached conveyance, it is clear it is fraudulent and void. But why is this so? Because as there are creditors, and the effect of the instrument must be to defeat or delay, it is therefore concluded mat with this intention the grantor executed it In other words, direct evidence of the fraudulent intent is wanting; but this may be, and is inferred, and therefore the transaction can be impeached. But here, that which in the cases referred to is inferred, is proved. The admission made by the parties shew the object they had in view was covinous, collusive, and guileful, and the result that should flow from this must be to find such conveyance "Void, frustrate, and of none effect," as against a person whose action is thereby hindered, delayed, or defrauded. The words in the Act are "creditors and others," and, proving that the conveyance was tainted with fraud once, I do not think it loses this stain, but remains a conveyance with this infirmity which prevents it being set up as against a creditor whose debt arises yean after the instrument was executed. The words "and others" extend the operation of the Act if the word creditors confined it to those existing when the deed was made.

The Vice-Chancellor reviewed a number of decisions that fully justified the statement he had made.

[16] Those who would revitalize the argument rejected by Vice-Chancellor Blake rely on this sentence from the judgment of Sedgewick J. in *Sun Life Assur. Co. of Can. v. Elliott* 1900 CanLII 32 (SCC), (1900), 31 S.C.R. 91 [B.C.] (at pp. 95-96):

> If, however, he is a *secured* creditor, if he has sufficient of the assets of the debtor in his hands to fully cover the indebtedness, then undoubtedly the statute was not intended for him, but for the general and unsecured creditors.

The language is found in a discussion about whether or not to infer *intent*. The sentence is preceded by a quotation from *Freeman v. Pope* (1870), 5 Ch. App. 538, dealing with the inference of intention in the absence of direct proof of intention. It is followed by a reference to *Crombie v. Young* (1894), 26 O.R. 194 (C.A.), and this statement (at p. 96):

> In that case it was shewn that at the time of the impeached transaction, a donation from a husband to his wife, the settlor was perfectly solvent after the conveyance, still possessing other lands and a large interest in the mortgaged property, far in excess of the mortgage. And it was held, whether rightly or wrongly, that under these circumstances, *any intent to hinder or delay could not be imputed to him.* As already shown the facts here are the reverse of those in *Crombie v. Young.* At the time of the impeached conveyances (and all *evidence of intent* except at that particular time is irrelevant), the mortgaged lands were probably wholly insufficient to pay the mortgage debt, and the voluntary conveyances themselves forever precluded the settlor from having any means of making up the shortage. [emphasis added]

[17] Interpreting the language of Sedgewick J. as barring a creditor who was secured at the date of the conveyance is inconsistent with the remainder of the language used in the judgment and inconsistent with the conclusion reached by the court.

[18] The *Crombie* judgment referred to by Sedgewick J. dealt entirely with intent. MacMahon J. set out why he was considering the adequacy of the security (at p. 200):

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> One of the tests to apply in this case in considering whether the settlements though voluntary, are fraudulent and void, is whether *at the time of the settlements* in favour of the wife the property mortgaged was insufficient to pay and satisfy the mortgage debt....

He concluded that there was no intention to defraud.

[19] Rose J. said (at p. 208):

> I do not, on the evidence, find it at all safe to infer that there was any intention to defraud these mortgagees when the impeached transfers were made. My mind turns the other way.

[20] This second line of authority does not support the conclusion of the trial judge.

[21] The conclusion is also inconsistent with the interpretation of the Act found in other cases. The suggestion that a creditor secured at the time of the conveyance is forever barred from claiming under the Act is inconsistent with the cases that say that a subsequent creditor, a person not a creditor at the time of the conveyance, may claim under it. No reason has been offered why an unsecured creditor who was a secured creditor at the time of the transaction has no status, whereas an unsecured creditor who was not a creditor at all at the time of the transaction has status.

[22] A conveyance can be set aside even if there were no creditors when it was made. The judgment of Macdonald C.J.A. in *Newlands Sawmills Ltd. v. Bateman,* 31 B.C.R. 351 at 354, reflex, [1922] 3 W.W.R. 649, 70 D.L.R. 165 (C.A.), concisely sets out the facts and the decision of this court:

> This action was brought to set aside a conveyance by James Edward Bateman to his wife, Minnie Bateman, of a farm, being the principal item of the assets of the grantor, on the ground that the same was made to defeat the plaintiff, which subsequently became the creditor of Bateman.
>
> Just previous to the date of the conveyance Bateman had entered into a contract with the plaintiff to cut and boom logs. The contract was rather an extensive one, considering the financial position of the defendant Bateman, and was, in my opinion, a hazardous one within the meaning of that term as used in cases of this kind. It is to be noted that the contract calls for the commencement of logging operations on the 10th of May, 1920, and that the conveyance in question in this action was made on the 22nd of May of the same year.
>
> The submission of counsel for the defendants was that as Bateman had no creditors at the time he entered into the contract he was entitled to make a voluntary conveyance to his wile of the property in question. The authorities to which we were referred do not sustain this contention. It is a question to be decided upon the proper inference to be drawn from the facts and circumstances of the particular case as to whether there was an intention to defeat creditors or not, and if there was the intention to defeat creditors, then it does not matter whether it was to defeat present or future creditors.

[23] I conclude that it was not an essential step in the action for the bank to prove that it was an unsecured creditor at the time of the conveyance.

[24] The trial judge felt bound by the decision of this court in *Bank of N.S. v. Scott* 1985 CanLII 243 (BC CA), (1985), 67 B.C.L.R. 145. The only issue argued there was whether or not the bank was a secured creditor. This court concluded that it was, The issue now before the court was not raised. The *Scott* case is not authority for the proposition that a creditor secured at the time of the conveyance cannot have recourse to the Fraudulent Conveyance Act. To the extent that it may imply that that is so, and to the extent that other cases such as *Royal Bank of Can. v. Dunsmuir,* supra, and *Delbreuck & Co. v. Muenzenberg* 1984 CanLII 881 (BC SC), (1984), 54 B.C.L.R. 264, 44 C.P.C. 36 (S.C.), so hold, they should be considered overruled.

[25] I would allow the appeal.

Appeal allowed.

Parliament Review: Fresh Start: A Review of Canada's Insolvency Laws (See below)

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Industry Canada Industrie Canada

Fresh Start: A Review of Canada's Insolvency Laws

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Fresh Start: A Review of Canada's Insolvency Laws

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The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* require that the Minister of Industry report to Parliament on the provisions and operation of both Acts in 2014. I am pleased to table this report in fulfillment of that responsibility.

The Government of Canada launched a public consultation in May 2014, with the release of a Discussion Paper seeking input on key aspects of Canada's insolvency regime and its administration. The public consultations built on previous research and analysis of economic and insolvency trends by departmental officials, as well as contributions from stakeholders. The results of the review activities are captured in this report.

Insolvency laws are important marketplace framework legislation that have an impact on Canada's competitiveness. An efficient, well-functioning insolvency regime is vital to Canada's continued economic prosperity. Stakeholders told us that Canada's insolvency laws have responded well to the needs of Canadian consumers and businesses, particularly during the recent recession. At the same time, Canada's insolvency laws must evolve to meet the needs of the economy and changes in the global marketplace. Our government is committed to ensuring that Canadian insolvency legislation maintains its status among the most modern regimes in the world.

In tabling this report, I would like to thank the many Canadians who participated in the review. The extensive public feedback in response to the Discussion Paper, including input from insolvency experts, academics, and other stakeholder groups, will inform our work as the review continues in the coming parliamentary session.

The Honourable James Moore
Minister of Industry

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Introduction

In 2008, the world experienced one of the deepest economic downturns since the Great Depression. Canada was not spared as we experienced a recession that was felt across Canada, a record number of personal insolvencies and the failure or restructuring of numerous businesses.

Canada's post-2008 performance led G7 countries with the highest level of job creation and one of the best growth rates coming out of the recession. Canada experienced a positive macroeconomic environment, including a low federal government debt-to-gross domestic product ratio, the lowest overall tax rate on new business investment among G7 countries, a sound approach to regulation of financial institutions and a stable, low inflation environment. These factors were reinforced by the Economic Action Plan, which responded to the global crisis by reducing taxes, investing in infrastructure, enhancing skills training, supporting sectoral and regional adjustment and facilitating business lending. Despite lingering turmoil in certain countries, Canada is projected to continue its stable growth as domestic firms reinvest to enhance their competitiveness.

Even in a growing economy, Canadians will face challenges: one of the highest consumer debt-to-income ratios in the G20 and changing demographic trends that are increasingly imposing financial burdens on the "sandwich" generation will test consumers' resilience; and globalization will present new business opportunities but also greater challenges from international competitors.

In this context, Canada's insolvency environment continues to evolve: relationship lending, which was once predominant, is declining; new players, including private equity and distressed debt traders, are presenting unique challenges to corporate restructuring efforts; financial market innovations, such as credit and other derivatives, are shifting parties' interests and incentives; and the growth in cross-border insolvency proceedings is increasing the complexity of cases and bringing new competing interests for scarce resources.

What remains constant is that there will be individuals and businesses who, for various reasons, find themselves overwhelmed by debt. For them, and for the benefit of the economy, an effective insolvency regime is necessary to ensure an

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efficient process to settle debts and, where appropriate, provide individuals with a fresh start and businesses with an opportunity for financial rehabilitation.

Canada's insolvency laws are well-regarded internationally and are frequently cited as a model in international insolvency panels, such as the United Nations Commission on International Trade Law (UNCITRAL). While these laws proved robust during the 2008 downturn, it is critical to ensure that they remain responsive to new challenges in the constantly evolving domestic and global economic landscapes. To that end, the *Bankruptcy and Insolvency Act*[1] (BIA) and the *Companies' Creditors Arrangement Act*[2] (CCAA) include a statutory provision that requires their periodic review. This report is a step in the review process.

Canada's Insolvency Framework

Canada's insolvency regime is composed primarily of two Acts, the BIA and the CCAA. The BIA provides the legislative framework to address personal and corporate insolvency. In a bankruptcy, a trustee liquidates the bankrupt's assets and distributes the proceeds in a fair and orderly way among the creditors. Alternatively, the BIA provides procedures for insolvent consumers and businesses to avoid bankruptcy by negotiating an agreement with their creditors to reorganize their financial affairs. This is referred to as a "proposal". The CCAA provides the legislative framework for insolvent companies with more than $5 million in debt to reorganize under court supervision. It enables the insolvent company to seek a court order staying its creditors from taking action against it while it negotiates an arrangement to reorganize its financial affairs. A monitor is appointed by the Court to watch over the restructuring and provide information to the Court and creditors. While corporate restructurings can occur under either Act, the CCAA's court-driven process provides greater flexibility for judges to deal with the specific issues in the cases before them.

> "Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs." [3]

The Superintendent of Bankruptcy (the Superintendent) is part of the administrative framework, overseeing the functioning of the insolvency regime and

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ensuring its integrity. The Superintendent has statutory responsibility to supervise the administration of all estates and matters under the BIA, and regulates the trustees who administer consumer and commercial bankruptcies and proposals. The Superintendent also has certain functions under the CCAA, including maintaining a public record of CCAA proceedings and investigating complaints regarding the conduct of monitors. In fulfilling his mandate, the Superintendent sets standards and provides guidance to stakeholders regarding expected conduct through directives, notices, position papers and compliance programs.

I. History

The BIA has its roots in the *Bankruptcy Act* of 1919, which was substantially reformed in 1949. The BIA was further amended in 1992, 1997 and 2008-2009. The CCAA came into force in 1933 but only became a commonly used restructuring statute in the 1980's. It was amended in 1997 and 2009.

The 1992 reforms focussed on maximizing creditor value through reorganization and rehabilitation, improving the equitable distribution to suppliers and employees and improving the administration of the BIA. The 1997 reforms encouraged consumer debtor responsibility, and improved the reorganization provisions and the administration of the Acts, including the introduction of specialized provisions related to securities firms and international insolvencies.

The most recent legislative reforms, which came into force in 2009, had four main objectives: to encourage the restructuring of viable, but financially troubled, companies; to better protect workers' claims for unpaid wages and vacation pay; to make the bankruptcy system fairer and reduce abuse; and, to improve the administration of the system. Best practices that developed under the CCAA were codified in order to enhance certainty in restructuring proceedings. Unpaid wages of up to $2,000 per employee and unremitted pension contribution claims were prioritized ahead of secured creditors and collective agreements were protected. Debtors who had high income-tax debt were denied an automatic discharge from bankruptcy and those with surplus income were required to pay more into their estate and remain in bankruptcy for a longer period of time.

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II. Economic Implications

Insolvency legislation is a key component of Canada's marketplace framework legislation that governs commercial relationships for both consumers and businesses. Certain and reliable rules provide security for investors and lenders that, in turn, influences the cost and availability of credit in the Canadian marketplace.[5] This can help attract higher levels of domestic and foreign investment while the fresh start provided by bankruptcy offers a safety net that promotes entrepreneurship.[6] Efficient bankruptcy and insolvency processes help to ensure that debtors' assets can be returned to productive use quickly, improving Canada's overall economic performance.[7] Equitable treatment of stakeholders and transparent processes also help to protect the integrity of the insolvency regime.

"Capital and credit, in their myriad of forms, are the lifeblood of modern commerce." [4]

Although broad economic considerations are important, it is essential to not lose sight of the individuals and businesses affected by these events and who must be dealt with equitably.

III. Objectives of Insolvency Policy

In a dynamic, market-based economy, insolvency is a fact of life. From time to time, individuals and businesses will encounter financial difficulty, as a result of choices made, economic downturns or personal misfortune beyond their control.

"Despite the proven wisdom of the policies underpinning the insolvency legislation, it is understandable that few appreciate the 'haircuts' or even outright losses that bankruptcies trigger." [8]

Countries have traditionally taken different approaches to the social and legal consequences of excessive debt. Canada adopted a "fresh start" policy for consumers, which relieves honest but unfortunate debtors of excessive debts. In recent years, there has been movement internationally towards the fresh start approach, which reduces costs for creditors and the negative social consequences for individuals faced with unmanageable debts.

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Within the commercial insolvency sphere, Canada has encouraged the financial rehabilitation of viable, but financially distressed, businesses as that typically increases recoveries for creditors, maintains supplier relationships and protects jobs. Other countries are moving in a similar direction.

The objectives underlying the BIA and CCAA include minimizing the impact of a debtor's insolvency on all stakeholders by pursuing an equitable distribution of the debtor's assets and, where possible, by rehabilitation of the debtor. This is achieved by legislation that:

- provides certainty to promote economic stability and growth;
- maximizes the value of assets;
- strikes a balance between liquidation and reorganization;
- ensures equitable treatment of similarly situated creditors;
- provides for timely, efficient and impartial resolution of insolvency;
- preserves the insolvency estate to allow equitable distribution to creditors;
- ensures transparent and predictable insolvency laws that contain incentives for gathering and dispensing information; and
- recognizes existing creditor rights and establishes clear rules for ranking of priority claims. [9]

Insolvency Trends

I. Consumer

The Canadian consumer insolvency rate (the number of consumer insolvencies per 1,000 residents aged 18 years or older) has trended higher over the past few decades. This may be due to greater comfort with, and easier access to, consumer credit and reduced stigma related to bankruptcy. While the period of 2002-2007 saw a relatively stable consumer insolvency rate, the 2008 downturn pushed it to a new peak in 2009. Since that time, the rate has trended back towards pre-recession levels.

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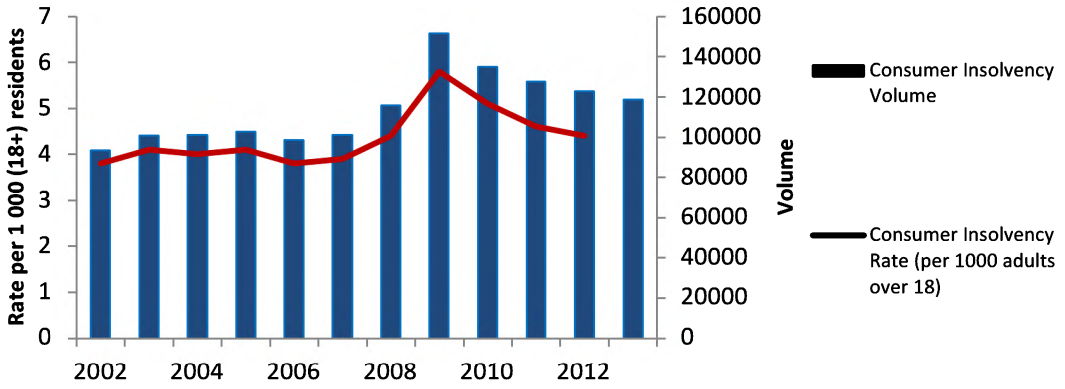
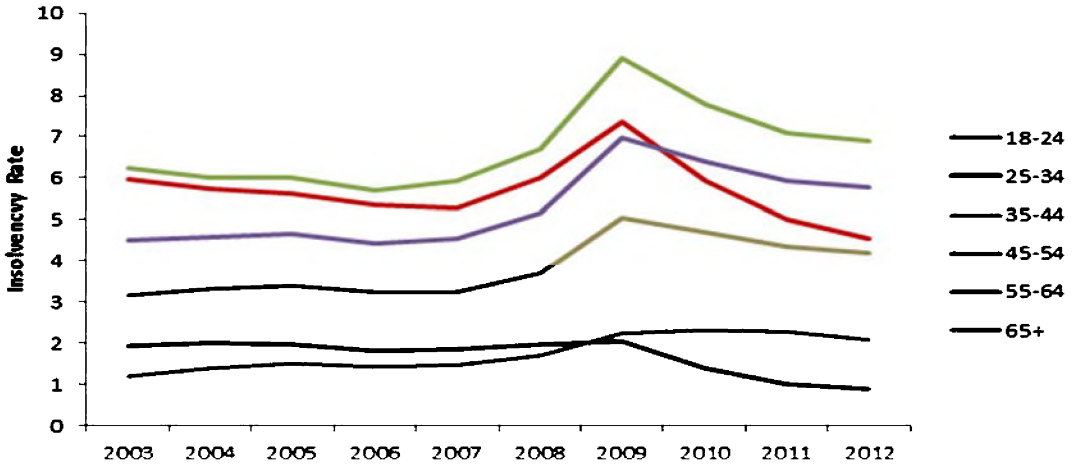
Consumer Insolvency Rate and Volume



Source: Office of Superintendent of Bankruptcy

The rate of insolvencies is not evenly distributed among Canadians when viewed by age. Those aged 35-54 are at the highest risk of insolvency. Since 2008 two potentially significant trends have appeared. The consumer insolvency rates for Canadians older than 35 are higher than prior to the recession and insolvency rates for Canadians younger than 35 are lower. This could be indicative of delayed transition to financial autonomy by offspring placing greater financial burdens on parents. It is too early to determine whether the trend is an anomaly or indicative of a longer-term change.

Consumer Insolvency Rate by Age Cohort



Source: Office of Superintendent of Bankruptcy

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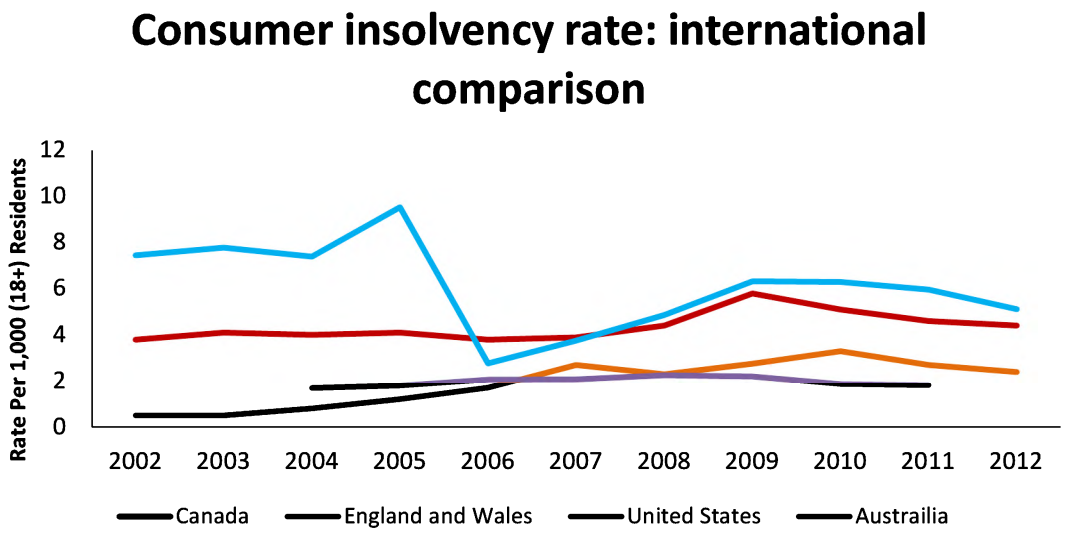
Internationally, it can be difficult to compare consumer insolvency rates because countries have taken different approaches to the social and legal consequences of excessive debt. Different levels of social stigma related to insolvency may also impact consumer insolvency rates. That being said, Canada's consumer insolvency rate appears high compared to some other developed countries.



Sources: Statistics Canada, OECD, American Bankruptcy Institute, United Kingdom Office of National Statistics, Australian Bureau of Statistics, with Industry Canada calculations.

This could be a sign that Canada's insolvency regime is readily accessible, providing Canadians overwhelmed by debt with the fresh start they need. Alternatively, it could be a sign that Canadians are not managing their use of credit appropriately. Furthermore, because Canadians have the highest debt-to-income ratio among G7 countries, consumers are more susceptible to economic shocks, such as job loss or other negative life events.

II. Business

In contrast to the consumer insolvency trends, the business insolvency rate (the number of business insolvencies per 1,000 businesses operating in Canada) has fallen nearly 70 percent since 2002.

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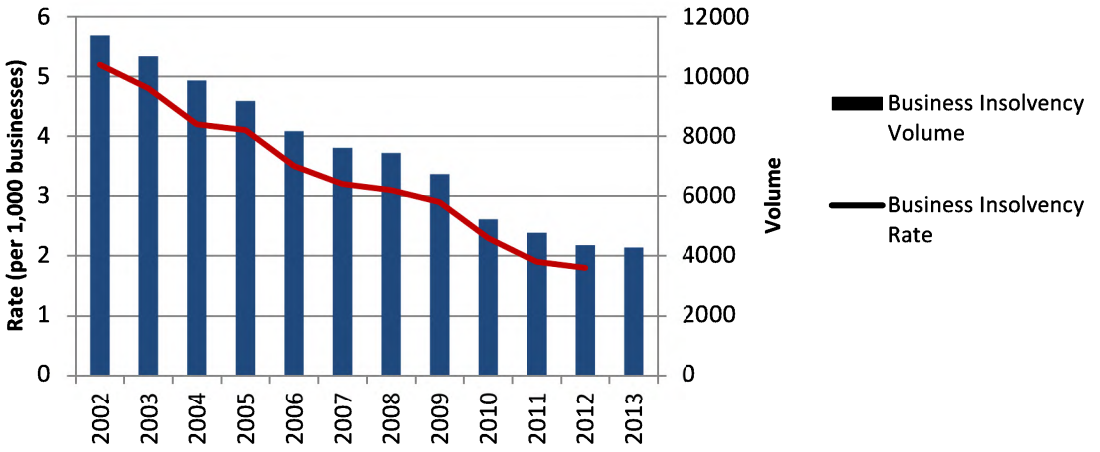
Business Insolvency Rate and Volume



Source: Office of Superintendent of Bankruptcy

It is unclear why the business insolvency rate continues to trend downwards. It may be related to the relatively low cost of credit during the past decade, although other countries experienced low credit cost yet saw their business insolvency rates climb. It could also be attributed to closer monitoring by lenders, resulting in remedial actions before businesses reach the tipping point into insolvency. Finally, the cost of formal insolvency proceedings may have encouraged more private workouts or business closures.

Of note, unlike other periods of economic downturn, the 2008 recession did not result in an increase in the business insolvency volume. This is consistent with anecdotal evidence that suggests lenders were hesitant to trigger defaults post-2008 as there was a very limited market for distressed assets.

Internationally, Canada has a lower per capita business insolvency rate (the number of business insolvencies per 100,000 individuals) than comparable countries. The 2008 downturn resulted in spikes in business insolvencies in both the United States and United Kingdom whereas Canada maintained its downward trend. Australia's business insolvency rate continued to climb throughout the period.

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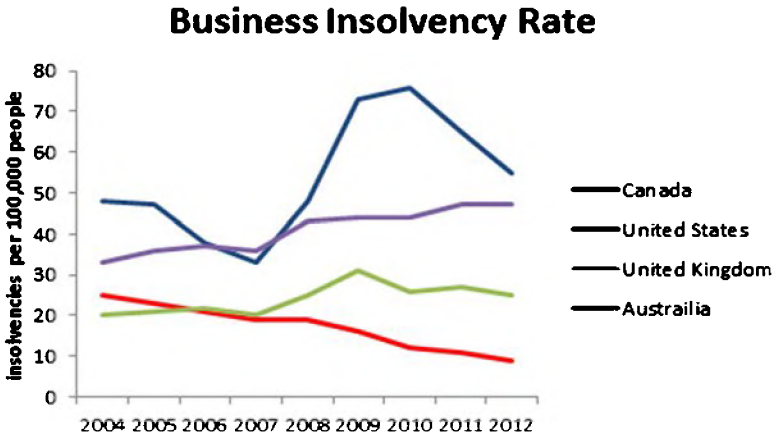

Sources: Trading Economics; OECD; Industry Canada calculations.

Review Process

The 2009 reforms to both the BIA and CCAA require the Minister of Industry to lay before Parliament a report on the provisions and operation of the Acts.[10] Industry Canada has monitored the Canadian insolvency marketplace to identify emerging trends and issues. In early 2013, a systematic environmental scan was initiated in order to gain a comprehensive understanding of how Canada's insolvency laws are functioning. The review included an examination of academic research and expert commentary, of insolvency proceedings and judicial decisions, and of domestic and international economic and insolvency trends. It was complemented by a broad outreach effort to an array of key stakeholders, including insolvency practitioners and academics, industry associations and employee and retiree groups, among others.

In May 2014, Industry Canada launched an on-line public consultation based on a wide-ranging discussion paper (the Discussion Paper) in order to obtain the views of Canadians. More than 70 individuals and organizations made submissions on a variety of issues. Interested stakeholders were also given the opportunity to meet with Industry Canada officials to share their views in person or by teleconference. Annex A provides a list of written submissions received by the Department. The Discussion Paper and submissions may be found at:

http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00870.html

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This report fulfills the Minister of Industry's statutory obligation. Pursuant to the BIA and CCAA, this report is to be referred to a Parliamentary committee designated to review it and report back to Parliament within one year or such further time authorized by Parliament.

What Canadians Said

Overall, most stakeholders are generally satisfied that the BIA and CCAA achieve their objectives in an efficient manner. That being said, Industry Canada received submissions regarding a large number of issues that could be addressed to improve the functionality of Canada's insolvency regime. Below are descriptions of several key issues that generated significant stakeholder commentary. The list is not intended to be exhaustive nor is it intended to exclude other issues. Industry Canada intends to continue to examine all matters raised in the public consultations.

I. Consumer Issues

Registered Disability Savings Plans – When an individual becomes bankrupt, the trustee gathers together the bankrupt's assets for distribution to the bankrupt's creditors. The BIA, however, provides that the bankrupt is entitled to keep certain property that is exempt under provincial law and the BIA (e.g. personal belongings, work tools, pension entitlements and funds held in registered retirement savings plans).

Stakeholders expressed a strong preference to see an exemption added to the BIA for registered disability savings plans, which are intended to provide for the financial needs of severely disabled individuals when those who care for them are no longer able to provide support.

Licence Denial Regimes – Provinces are responsible for issuing licences or permitting Canadians to engage in certain activities, such as driving. Some provinces have linked the ability to obtain or renew a licence to the payment of debts owed to the province or other specified entities. While this is within the province's authority in normal circumstances, it creates a conflict with the bankruptcy regime if the provincial legislation permits a creditor to demand

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payment outside the insolvency process, instead of inside the process like all the other unsecured creditors.

There was stakeholder consensus that licence denial regimes – to the extent they purport to apply to debts released in bankruptcy – violate the fresh start principle and could have a significant, negative impact on the bankrupt and other creditors. As a result, stakeholders suggested that such regimes should not apply to debts released in bankruptcy.

Family Law and Equalization – Family law and insolvency proceedings often intersect. In recognition of the social importance of family-related obligations, the BIA provides that spousal and child support orders are not releasable in bankruptcy. In a recent case before the Supreme Court of Canada, [11] a spousal claim for an equalization payment against property that was exempt from seizure under provincial law as against other creditors – but not as against a claim for equalization – was defeated. The Court suggested that as a matter of fairness insolvency law should ensure that such claims are protected in the future.

Stakeholders agreed with the Court's assessment that the BIA should expressly protect equalization claims against exempt property held by the bankrupt.

Reaffirmation Agreements – Through bankruptcy proceedings, an individual can have most of his or her debts released. In some cases, however, the bankrupt may wish to "reaffirm" (i.e. reinstate) a debt obligation for specific reasons. For example, anecdotal evidence suggests that car loans are often reaffirmed in order to permit the bankrupt to continue to use a vehicle that is required for work, especially in rural areas. Currently, a bankrupt may reaffirm a debt either through a written contract or by conduct (e.g. by making a payment on the debt following discharge from bankruptcy).

Stakeholders expressed concern that reaffirmation defeats the fresh start principle. There was also concern that bankrupts might not realize the consequences of reaffirmation by conduct. As a result, the majority of stakeholders were supportive of limitations in the BIA on reaffirmation by conduct.

There was no consensus regarding other consumer issues that were identified in the Discussion Paper, including responsible lending, consumer deposits, implementation of a federal exemption list and discharge of student loans.

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II. Commercial Issues

Intellectual Property – The knowledge-based economy continues to expand in importance in addition to the manufacturing-based, bricks-and-mortar economy. Stakeholders told us that it is crucial that Canada's insolvency laws respond as effectively to financial distress involving intangible and intellectual property as they do to "hard" assets, such as real estate, equipment and inventory.

On this topic there was substantial consensus that Canada's insolvency laws require significant modernization. It was recognized that amendments implemented in 2009 were a positive first step but that they were not broad enough to address all of the shortfalls. There remain aspects related to intellectual property for which there were calls for change, including modernizing the language related to the existing provisions on copyright and patents and ensuring that all types of intellectual property are recognized and properly treated.

Priorities – Bankruptcy is often described as a "zero-sum game" because there are finite and insufficient assets available to satisfy the bankrupt's debts and liabilities. Changing the ranking according to which creditors are entitled to be paid would impact all creditors. This could, in turn, affect the cost and availability of credit for Canadians. As noted by the Standing Senate Committee on Banking, Trade and Commerce, "…the availability of credit at reasonable cost has implications for the levels of domestic and foreign investment, entrepreneurship and innovations, and personal investment and consumption."[12]

In response to the Discussion Paper, there were calls from employee groups, pensioners, fresh produce sellers, small businesses and tax authorities seeking priority payment on the basis that they experience different vulnerabilities and, therefore, are in need of special protection. It was conveyed that there is a need to consider the unique risks and challenges in different sectors of the economy. On the other hand, lenders and insolvency practitioners suggested caution in considering these types of requests due to the potential impacts on credit cost and availability, particularly for financing of inventory that is related to farming. Some stakeholders recommended that options outside of insolvency should be considered in order to offer more secure protection for socially important claims and to protect the integrity of insolvency proceedings.

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Streamlined Proceedings – Insolvency proceedings, particularly corporate restructurings, can be complex, requiring significant time, effort and expertise. As a result, one of the key issues for insolvency law is to put in place efficient processes that permit a quick resolution, while ensuring fairness through necessary checks and balances.

In the CCAA context, most stakeholders supported streamlining measures, such as reducing the need for court approval of interim actions. Better disclosure of professional fees was also raised although there was no consensus on concrete actions that should be taken.

Stakeholders also suggested that the cost of restructuring under existing mechanisms is often too high for small and medium-sized businesses. This would suggest a more streamlined proceeding may be warranted, especially given the importance of small business entrepreneurs in driving the economy.

Cross-border Insolvencies – Globalization continues to transform the world's economy and create new markets and opportunities for Canadian workers and businesses. At the same time, as business becomes more international, the number of cross-border insolvencies has also increased.

Some stakeholders suggested that reforms may be necessary to ensure Canada's insolvency laws keep pace with globalization trends. They pointed to work being undertaken by UNCITRAL's insolvency working group, in which Canada is an active participant. Others, however, cautioned that any potential reforms should take into account the conditions necessary to promote investment in Canada and to protect the legitimate interests of Canadian firms in global markets.

Financial Contracts – Innovation in the financial markets has resulted in continual evolution of products that assist business and investors in managing risks, including credit risk. It is in the intersection of these financial instruments and insolvency law that stakeholders are seeing emerging issues that may require policy responses to ensure that the balance in insolvency proceedings is maintained.

Most stakeholders indicated support for measured disclosure requirements, which would provide greater transparency for other creditors and the courts. There was no consensus regarding possible changes to rebalance the competing interests between those who use these financial products and other insolvency stakeholders.

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III. Administrative Issues

Accessibility – The insolvency regime provides Canadians with unmanageable debts a potential for a fresh start. The administration of files is carried out by private sector trustees. This means that the cost of accessing the insolvency system is based, to a certain extent, on market forces. Existing measures, such as the Bankruptcy Assistance Program and agreements to pay trustee fees post-discharge under the BIA, are intended to ensure access to bankruptcy.

Some stakeholders have suggested that there may still be accessibility issues as the cost of a simple bankruptcy, estimated to be as high as $1,500, may be too high for low and no-income individuals. They suggested that new options could be developed to ensure better access to the insolvency regime.

Legislative Structures – Currently, Canada's insolvency regime is implemented by a number of different laws under the mandate of different Ministers: the BIA, CCAA and the *Canada Business Corporations Act* fall under the responsibility of the Minister of Industry; the *Winding-up and Restructuring Act*, which can be used by certain corporations and financial institutions, falls under the shared responsibility of the Ministers of Industry and Finance; the *Canada Transportation Act*, under the Minister of Transport, can be used to resolve the insolvency of certain railway companies; and, the *Farm Debt Mediation Act*, under the Minister of Agriculture and Agri-Food, is available to insolvent Canadian farmers.

While there was little consensus as to concrete action, many stakeholders expressed support for rationalization of the current legislative structure.

Modernization – The BIA was last comprehensively reformed in 1949, with significant amendments being made on several occasions since 1992. Some stakeholders suggested that a comprehensive review of the BIA may be warranted in order to remove outdated concepts and provisions. Other stakeholders suggested that the role and powers of the Superintendent could be enhanced.

Stakeholders also raised a number of issues that are tangential to insolvency law policy, including taxation issues, the operation of the Wage Earner Protection Program, and regulation of pensions. These matters could impact on the

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effectiveness and efficiency of the insolvency regime and could be considered in the context of the review.

Conclusion

The 2008 economic downturn led many developed economies into a deep recession. Canada's experience was better than most as a result of positive actions taken to address the downturn yet, still, a significant number of Canadians suffered personal insolvency and major firms failed. The BIA and CCAA were up to the challenge and played their part by providing individuals with the needed fresh start and offering viable but financially troubled firms the opportunity to restructure.

That being said, stakeholders have been clear in expressing the need for the BIA and CCAA to be reviewed and updated periodically due to the evolving insolvency environment. As key marketplace framework legislation, the BIA and CCAA play an important role in Canada's economic performance. They also affect the lives and livelihoods of hundreds of thousands of Canadians every year. It is imperative that legislation of this significance is reviewed and updated to ensure it continues to meet its objectives.

This report and the review that supported it is one important step towards that goal. A parliamentary committee review and report stage will occur next. During this time, Industry Canada will continue to reach out to stakeholders, including academics and insolvency experts, and conduct further study and analysis. Decisions regarding any potential reforms will be made following the parliamentary committee report stage.

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Endnotes

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
2. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
3. *Century Services Inc.* v. *Canada (Attorney-General)*, 210 SCC 60 (CanLii), [2010] 3 S.C.R. 379 at paragraph 18.
4. The World Bank, *Principles for Effective Insolvency and Creditor Rights Systems* (Revised), 2005.
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6. Armour, John and Cumming, Doug, *Bankruptcy Law and Entrepreneurship*, ECGI Working Paper Series in Law (2008).
7. Succurro, Marianna, *Bankruptcy Systems and Economic Performance Across Countries: Empirical Evidence*, Working Paper, Department of Economics and Statistics, University of Calabria, (2008).
8. *Schreyer* v. *Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605 at paragraph 19.
9. R. J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law Book, 2009) at page 4 (referring to the UNCITRAL Legislative Guide on Insolvency Law at page 14).
10. BIA section 285; CCAA section 63.
11. *Schreyer* v. *Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605.
12. Debtors and Creditors Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*, Report of the Standing Senate Committee on Banking, Trade and Commerce; November 2003.

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ANNEX A – STAKEHOLDER SUBMISSIONS

Air Canada Pionairs
American Frozen Food Institute, Virginia
Anne Clark-Stewart
Assuris, Ontario
Barb Sabathil
Benoit Mario Papillon, Université du Québec Trois-Rivières
BC Produce Marketing Association
Bruce Leonard, Esq., Ontario
Canadian Association of Insolvency and Restructuring Professionals
Canadian Bankers Association
The Canadian Bar Association
Canadian Bond Investors Association
Canadian Federation of Agriculture
Canadian Federation of Independent Business
Canadian Federation of Pensioners
Canadian Institute of Actuaries
Canadian Life and Health Insurance Association Inc.
Carol Martin
Cavendish Farms, New Brunswick
Consumers Council of Canada
Credit Union Central of Canada
Dennis A. Fege
Doug Querns
EarthFresh Foods, Ontario
Edward Song
Fresh Produce Alliance, Ontario
Fresh Produce Association of the Americas, Arizona
Frozen Potato Products Institute, Virginia
Gail Clark
Government of Alberta
Healthy Trends Produce LLC, Arizona
Holland Marsh Growers' Association, Ontario
Hoyes Michalos and Associates Inc., Ontario
Hugh C. Stewart
Iain Ramsay, Kent Law School, United Kingdom
Insolvency Institute of Canada
Insurance Corporation of British Columbia
International Insolvency Institute
International Swaps and Derivatives Association, Inc., New York
IPR Fresh, Arizona
James Callon (former Superintendent of Bankruptcy), Ontario
Jean-Daniel Breton, CPA, CA, FCIRP, Québec

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Jerry Hockin
Kaliroy Premium Greenhouse Tomatoes, Arizona
Ken Rowan & Associates Inc., Ontario
L&M Companies, Inc., Ontario
Laurie Gescheke
Leo Wynberg, CA, CIRP
Marion Evans
Melinda Long
Nishaben Patel
The Ontario Produce Marketing Association
The Oppenheimer Group, British Columbia
Paddon & Yorke Inc., Ontario
Planned Lifetime Advocacy Network, British Columbia
Prince Edward Island Potato Board
Roderick J. Wood, University of Saskatchewan and
F.R. (Dick) Matthews, Q.C., University of Alberta
Rumanek & Company Ltd.
Sam Babe, J.D., M.B.A., Ontario
Sandia Distributors Inc., Arizona
SCRG, a Sears Canada retirees association, Ontario
Sheila Maxwell
TMX Group Limited
Unifor, Ontario
United States Department of Agriculture
United States Fresh Fruit and Vegetable Trade Associations
WaudWare Incorporated, Ontario

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